

Legal construct of usufruct in roman private law

Construção jurídica do usufruto no direito privado romano

*Aleksandr Biryukov(1); Galina Zakharova(2); Marina Melnichuk(3); Victoria Savina(4);
Alyona Shevchenko(5)*

1 North-Caucasus Federal University, Stavropol, Russia.

E-mail: abiryukov75@yandex.ru | ORCID: <https://orcid.org/0000-0001-9892-5404>

2 North-Caucasus Federal University, Stavropol, Russia.

E-mail: galinazakharova64@mail.ru | ORCID: <https://orcid.org/0000-0002-2316-6279>

3 North-Caucasus Federal University, Stavropol, Russia.

E-mail: melsi76@mail.ru | ORCID: <https://orcid.org/0000-0003-0423-4720>

4 North-Caucasus Federal University, Stavropol, Russia. Plekhanov Russian University of economics, Moscow, Russia.

E-mail: savin-viktoriya@yandex.ru | ORCID: <https://orcid.org/0000-0002-8385-9421>

5 North-Caucasus Federal University, Stavropol, Russia.

E-mail: sshevchenko@internet.ru | ORCID: <https://orcid.org/0000-0002-6581-6938>

Revista Brasileira de Direito, Passo Fundo, vol. 19, n. 1, e4923, janeiro-abril, 2023 - ISSN 2238-0604

[Received/Recebido: november 28, 2023; Accepted/Aceito: november 29, 2023;

Publicado/Published: january 24, 2024]

DOI: <https://doi.org/10.18256/2238-0604.2023.v19i1.4923>

Como citar este artigo / How to cite item: [clique aqui/click here!](#)

Abstract

The institution of rights to other people's property (limited proprietary rights) is familiar to the civilized systems of many states. It is manifested both in the codifications of countries in the continental law family and in statute and precedent law in countries of Anglo-Saxon law. One of the most popular rights in this category (along with superficies and emphyteusis) is limited use of other people's real estate (servitude), pledge, and usufruct. By analyzing the sources of Roman private law (the Digest, the Institutes of Gaius), the study examines the classical usufruct model and its impact on the establishment of contemporary legislation on proprietary rights. It is concluded that the primary features of usufruct, among which are fixed-term (lifetime) limited use of another's movable or immovable property with the possibility of its natural and civil benefits being extracted by a certain person responsible for preserving the economic purpose of the object, were formed in classical Roman law and later reflected in the civil legislation of European countries, Asian countries, Latin America, and others.

Keywords: Roman Law; Usufruct; Property Law; Limited Property Rights; Real Property; Real Estate.

Resumo

A instituição de direitos à propriedade de outras pessoas (direitos de propriedade limitados) é familiar aos sistemas civilizados de muitos estados. Manifesta-se tanto nas codificações dos países da família do direito continental como nos estatutos e no direito precedente dos países de direito anglo-saxão. Um dos direitos mais populares nesta categoria (junto com superfícies e enfiteuse) é o uso limitado de bens imóveis de outras pessoas (servidão), penhor e usufruto. Ao analisar as fontes do direito privado romano (o Digest, as Institutas de Caio), o estudo examina o modelo clássico de usufruto e seu impacto no estabelecimento da legislação contemporânea sobre direitos de propriedade. Conclui-se que as principais características do usufruto, entre as quais estão o uso limitado por prazo determinado (vitalício) de bens móveis ou imóveis alheios, com possibilidade de seus benefícios naturais e civis serem extraídos por determinada pessoa responsável pela preservação da finalidade econômica do objeto, foram formados no direito romano clássico e posteriormente refletidos na legislação civil de países europeus, asiáticos, latino-americanos e outros.

Palavras-chaves: Direito Romano; Usufruto; Direito de Propriedade; Direitos de Propriedade Limitados; Bens Imóveis; Imóveis.

1 Introduction

The impetus for the emergence and development of the modern construction of limited property rights was the reception of Roman private law, which touched Western European countries and influenced the formation of the civil law of France, Italy, Germany, and several other states. As applied to property rights, this return to the roots resulted in the replacement of feudal property rights institutions with the property rights of non-owners known to classical Roman jurisprudence.

A special place among these property rights is held by usufruct (*usufructus*). As a limited property right, usufruct, which can also be referred to as tenure, was enshrined in the civil legislation of many countries, for example, the civil codes of France (Code Civil) Art. 578-624 [2], Germany (*Bürgerliches Gesetzbuch*) Art. 1030-1088 [1], Italy (Codice civile) Art. 978-1020 [3], Spain (*Código civil Español*) Art. 467-522 [4], and more. Specialists emphasize continuity in the definition of usufruct in modern legal systems [15].

Initially, usufruct was a result of the reception of Roman law. Later, throughout the formation of Western European civil law, it transformed from personal servitude, *servitutes personarum*, into an independent property law institution, as it remains in most civil codes and statutes in force today.

For many states, especially those that were not affected by the reception of Roman law at some point, the issue of limited property rights, including usufruct, remains one of the most pressing from the point of the lawmaking process. As of now, provisions on usufruct are included in the recent legislation of several Asian countries, e.g., China, Japan, Philippines, etc. In Russia, usufruct is not presented as a denominated institution. However, there has been a years-long discussion of draft amendments to Part 1 of the Civil Code, including the introduction of a separate chapter on usufruct or usufruct of possession in the section on property rights.

In this light, there is a particular research interest in the study of the ancient Roman construct of usufruct and its characteristic features that have affected the emergence of modern legislative provisions on usufruct.

The goal of the present study is to conduct a historical legal analysis of the doctrinal and legislative model of usufruct in Roman law.

Methods. The primary research method employed to study the Ancient Roman construct of usufruct is the historical method. It allowed us to investigate the extant sources of Roman private law, which preserved information about the views of Roman jurists of different periods on usufruct and other limited property rights.

The study also utilized the universal dialectical method to analyze various (opposing) scientific conceptions substantiating the legal nature and essence of usufruct. In addition, the research process included the techniques of formal logic and

systemic analysis, which provided for a critical consideration of the sources of Roman private law and the relationship between the socioeconomic processes that unfolded in Ancient Rome and the development of the legal model of usufruct.

2 Research Fundamentals

In Ancient Roman classification, usufruct was attributed to the so-called private servitude [27]. The predominant viewpoint in scientific literature is that private servitude (to which usufruct is attributed by the tradition) appeared much later than rural and urban servitude, in the late classical period [8, 17, 20, 23].

Some legal scientists believe that the construct of personal servitude was known already under Cicero, yet the concept of private servitude appeared much later, in post-classical times, possibly under emperor Justinian [7]. The argument in favor of this is the relatively rare mention of the term “private servitude” in the Digest. Usufruct is referred to as personal servitude in only six cases. Thus, some researchers question the authenticity of the relevant text of such fragments, believing that alien textual insertions might have been added to them [9]. V.A. Savelev believes that classical Roman law did not consider usufruct a servitude and became one only owing to the Byzantine jurists of the Justinian era [24].

Whatever the case may be since there are few extant original Roman sources without subsequent revisions and overlays, conclusions on the independent legal nature of usufruct or its interpretation as a subtype of servitude can only be very conventional.

The tradition has brought to our knowledge four personal easements: *usufructus*, *usus*, *habitatio*, and *operae servorum vel animalium*. Fragments of the Digest and the Institutes of Gaius allow singling out characteristic features of this type of property right and its differences from rural and urban servitude, namely:

- ◆ belonging to a specific person rather than established in favor of the dominant estate;
- ◆ predominant occurrence by will or by virtue of marital relations;
- ◆ temporary nature, usually limited to the lifespan of the entitled person;
- ◆ divisibility, which is not characteristic of predial servitudes.

Specialists consider usufruct historically the most ancient private servitude. According to a periodization proposed by Russian civilist L.B. Dorn, first, before the Laws of the Twelve Tables, servitudes *praediorum rusticorum* appeared. Next, after Rome was burned by the Gauls (390 BC) and rebuilt, urban servitude emerged, and only with the development of the doctrine of legates did usufruct and later other personal servitudes come into existence [14].

Professor E.A. Sukhanov notes on this issue that “Economic needs led to the development of institutes first, and later usufruct with its known varieties (*usus* and

habitatio); to the same group of property rights researchers typically assign superficies and emphyteusis, which appeared much later, as well as the right of lien (in the form of pignus and hypotheca)” [26].

However, there are other opinions in legal science literature, suggesting that the initial private servitude was not usufruct but usus (use). For instance, 19th-century German pandectist G. Puchta argues: “The ordinary doctrine of servitudes proceeds from a misconception of the reciprocal relations between these four kinds of servitude <...> usufructus is typically considered the proper right, while usus is seen as a deviation from it. In fact, the relationship between them is the opposite. Servitus usus is a true private servitude, and in and of itself the only one” [22].

The concept of usufruct was proposed by the prominent Roman lawyer Julius Paulus (D.7.1.1). “Usufructus est ius alienis rebus utendi fruendi, salva rerum substantia” – “Usufruct is the right to use and enjoy the property of others, at the same time preserving intact the substance of the same” [13]. This definition contains all the parameters of usufruct that shed light on its distinctive characteristics.

Thus, a usufruct grants the usufructuary the use of the fruits of another’s property – utendo et fruendo. In the Pandects, a prominent German specialist in Roman law G. Dernburg describes as the fruits “income – natural or civil – that is legally extracted from the subordinate object. Natural income is intended for personal consumption, and civil income – for sale” [12].

L.B. Dorn indicates that “The expression ‘use’ (usus) covers the totality of extremely diverse actions that may considerably affect the economic status of the object. The question of the material use of the object and the ways of extracting factual benefits from it is not for the lawyer to resolve. It is only when the usufructuary wishes to bring the object into a new legal position and, in order to do so, wants to subject it to some legal action, that this action becomes a subject for consideration by jurisprudence” [14].

In modern doctrine, the use ius utendi is the extraction of useful properties of the object, the possibility of exploiting the object and obtaining from it fruits and incomes [16, 25]. Yet because usufruct implies the use of another person’s belonging, this right must have its limits. The issue of the limits of use is closely associated with the categories of things subjected to usufruct.

What are the types of things that became the objects of usufruct in Roman law? First and foremost, it is real property. Real estate subjected to usufruct was distinguished into two categories – praedia urbana (urban land plots with residential and industrial, handicraft buildings) and praedia rustica (agricultural land).

The Digest establishes the possibility of usufruct over land plots and their parts (D.7.1.9.1), quarries, sites with chalk deposits (D.7.1.9.2), mines (D.7.1.9.2), gardens and plant nurseries (D.7.1.9.6), forest plots (D.7.1.10.), houses (D.7.1.15.6), etc. Usufruct was applicable not only to land but also to the buildings, draught animals, and slaves on it.

What are the limits of the use of another's real property? General instructions on the limits of the use of the thing can be found in the Digest. First, the use must be exercised *salva rei substantia*, i.e., with preservation of the integrity (substance) of the thing. When using an object under usufruct, the person must preserve its economic purpose. For instance, one cannot cut down fruit-bearing trees or forests not intended for this, demolish or rebuild houses, turn a meadow into arable land or a vineyard into a field, etc. In turn, if the land plot had no predominant type of use initially, the usufructuary could discover new ways to utilize it.

The usufructuary's use of buildings and structures also had several restrictions (*domus, aedes*). First, the purpose of the structure could not be changed. If it was a residential house, one could not open a shop or craft workshop in it. A shop or workshop could be opened only if they once existed in that house. "Where the usufruct of a bath is bequeathed, and the testator changed it into a lodging, or a shop, or made a residence out of it, it must be held that the usufruct is extinguished" (D.7.4.12) [13]. Likewise, it is forbidden to turn a private bathhouse into a public one, etc.

Second, in addition to restrictions on the purposes of buildings, there were restrictions on changes – prohibition to rebuild the building, add floors, change the location of the building's interior rooms, doors, underground passages, etc.

Aside from the preservation of the thing's substance and its use according to the intended purpose, the sources mention a third rule. As indicated by Ulpian, the usufructuary had to use the thing burdened *boni viri arbitrato*, "as a good man", and *diligens paterfamilias*, "as a good family father", i.e., as prescribed by the custom, even if the ways of use were not established with the servitude (D.7.1.9.2). The same rule is found on other fragments of the Digest.

In contemporary European legislation, real property remains the main object of usufruct. Moreover, same as in Roman law, real property can have different purposes – residential building, agricultural land, garden, forest plot, plot with subsoil deposits. Under today's legislation, the economic exploitation of such plots can be allowed with special permits from the state, as prescribed, for example, in Art. 598 of the Civil Code of France.

In Ancient Rome, usufruct could be created over movable property as well. The sources mention usufruct both over things that bring fruits (a herd of domestic animals) and other things. Especially notable are the mentions of usufruct over ships, ancient gold and silver coins, cups, pictures, and statues in the Digest.

As Ulpian states, the use of a ship burdened by usufruct is left to the discretion of the usufructuary, "as a ship is constructed for the purpose of navigation" (D.7.1.12.1). This means that the usufructuary equipped the ship, hired the crew, and decided on the weather conditions appropriate to sail (proceeding from the risk of a shipwreck) but could only use the ship in accordance with its purpose.

Ancient coins, pictures, statues, and household utensils (*vasa*) were used as home decorations, as suggested by the commentary of Pomponius (D.7.1.28.). It can thus be assumed that Roman civil law already had a notion and recognized the value of antiquities.

Usufruct could be created even over clothes. Ulpian comments, “When the usufruct of clothing is bequeathed, Pomponius holds that although the heir may have stipulated that the clothing should be returned when the usufruct comes to an end; nevertheless, the promisor is not liable if he delivers the clothing which was worn out without malicious intent” (D.7.9.9.3.).

Roman law understood stipulation (from Latin *Stipulatio* – formally requested pledge) as an oral contract concluded through the utterance of certain words, a kind of verbal formula. *Stipulatio autem est verborum conceptio, quibus is qui interrogatur, daturum facturumve se, quod interrogatus est, responderit* (D. 45. 1. 5. 1). “*Verbis obligatio fit ex interrogatione et responsione, uelut dari spondes? Spondeo, dabis? Dabo, promittis? Promitto, fidepromittis?, fidepromitto, fideiubes? Fideiubeo, facies? Faciam*”. “Do you solemnly promise conveyance? I solemnly promise conveyance. Will you convey? I will convey. Do you promise? I promise. Do you promise on your honor? I promise on my honor. Do you guarantee on your honor? I guarantee on my honor. Will you do? I will do” (Gaius 3.92.) [11].

As believed by G. Dernburg, the fragment above refers not to regular clothes that quickly deteriorate when worn and lose their initial properties but to theatrical costumes that can last for a long time. For other clothing, in the absence of a separate agreement, a quasi-usufructus is established [12].

Romanists define quasi-usufructus as usufruct over consumed things that grants the person in possession ownership of the things consumed enjoys their fruits and at the end of the use must return an equal amount of identical things [9]. Ulpian writes: *Senatus censuit, ut omnium rerum, quas in cuiusque patrimonio esse constaret, usus fructus legari possit: quo senatus consulto inductum videtur, ut earum rerum, quae usu tolluntur vel minuuntur, possit usus fructus legari*. “The Senate decreed that “the usufruct of all property which it is established could belong to the patrimony of any individual, can be bequeathed; and, as the result of this Decree of the Senate, it is held that the usufruct of those things which are destroyed or diminished by use can be bequeathed” (D.7.5.1.).

This fragment of the Digest mentions *senatus consultum* of unknown date, presumably early in the reign of Augustus, which authorized usufruct in respect of things consumed. Ulpian, Gaius, and Paulus include in this category money (D.7.5.2.1.), wine, oil, grain (D.7.5.7.), other consumable things, and even debt claims (D.7.5.3.).

Contemporary European civil codifications (France, Spain, Italy, etc.), like Roman law, provide for usufruct over movable property, although the predominant

object of usufruct remains real property. In countries that were not affected by the reception of Roman law at some point, such as Russia, the possibility of usufruct over movable property is typically rejected in the civil law doctrine. Professor E.A. Sukhanov even argues that “usufructs are impossible and meaningless as applied to movable objects” [26].

Among the possible objects of Ancient Roma usufruct were also slaves. Roman jurisprudence recognized slaves not as subjects but as objects of rights, essentially equating them with things. In the Institutes, Gaius notes that slaves, on a par with bulls, horses, and mules, belong to *res mancipi* (things of special value for farming). “*Mancipi sunt servi, boves, equi, muli, asini et fundi, item aedes in Italico solo servitutes praediorum urbanorum nec mancipi sunt*” (Gaius 2. 14 b). Famous Russian civilist S.A. Muromtsev once suggested that *res mancipi* belonged to a group of objects “of a purely agricultural nature” [19].

On the possibility of usufruct over a slave, same as over livestock, Gaius states: “*Sed cum ususfructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in prouinciis per in iure cessionem constitui posset*” (Gaius 2. 32).

In addition to the use of the thing, usufruct allows extracting all its fruits. “*Usufructu legato omnis fructus rei ad fructuarium pertinet*” – “Where a usufruct is bequeathed as a legacy, the entire profits of the property belong to the usufructuary” (D.7.1.7.1). As previously indicated, the usufructuary possesses both the natural fruits of the thing and the so-called “civil fruits”, *fructus civiles* – profit from the use of the thing.

Natural fruits are marked by the following parameters. First, fruit is a derivative of the thing, and the thing has to be fruit-bearing. Second, fruits need to be detachable from the thing either naturally (e.g., fruit falling from trees) or by human action (e.g., shearing sheep). The fruit-bearing thing must retain its integrity. Therefore, a part of the thing cannot be its fruit. Third, the fate of fruits does not depend on the legal fate of the thing that produced it.

What things could bring natural fruits to the usufructuary? The analysis of sources allows us to distinguish the following groups: land plots on which consumable trees (construction and firewood) and consumable agricultural plants (e.g., cereals, legumes, plants for fodder) grow; mineral resources; fruit-bearing plants (fruit trees, shrubs), as well as animals.

As described by Ulpian, “Moreover, where the usufruct of land has been bequeathed, whatever is derived from the land and whatever can be collected therefrom, is included in the profits which belong to the legatee” (D.7.1.9.). This fragment of the Digest essentially points to any inanimate fruits that a land plot can produce.

First, among such fruits is timber intended for cutting firewood, as well as for construction purposes – *silva caedua*. This category of plots was intended for

harvesting timber for economic purposes, as construction material, firewood, etc. The use of forests as natural fruits had its own peculiarities. They were associated with the limited amount of forest to be cut, as well as with the choice of forest material. Timber is a material difficult to obtain without violating the *salva rei substantia* rule (preserving the integrity of the thing or its substance). Uncontrolled cutting could lead to the disappearance of the forest plantation, which was unacceptable.

The fragments of information in literary sources allow us to conclude that the usufructuary could cut down as many trees as the forestry rules of the time allowed. Pomponius comments on this: “*Ex silva caedua pedamenta et ramos ex arbore usufructuarium sumpturum, ex non caedua in vineam sumpturum, dum ne fundum deteriolem faciat*” (D.7.1.10.). “The usufructuary can take stakes for props from a thicket, and limbs from trees, and from a wood which is not a thicket he can take what he requires for his vineyard; provided he does not make the land any the less valuable”.

It is not accidental that the Digest describes logging in such detail. It appears that the emergence of usufruct coincided with the development of viticulture. Varro, in his famous treatise, describes the arrangement of Roman vineyards as follows: “It depends, said I, upon the kind of vine, for there are many. Some keep to the ground and need no supports, as in Spain; others are trained up — the so-called ‘yoked vines’, to which class Italian vines mostly belong. <...> two terms are used, viz., *pedanienta* (props) and *iuga* (espaliers); the uprights which support the vine are called *pedamenta*, the supports which are placed cross-wise have the name of *iuga* (yokes). Hence, too, the term ‘yoked vines’” [10]. Thus, vineyard maintenance required a large amount of support material. Varro further notes: “If the material needed for this training grows on one’s property, the cost is not formidable; if much can be had from a neighboring estate, it is but trifling” [10].

The timber obtained from windthrow was not considered fruit, so the usufructuary could harvest fallen trees only for the needs of his own household. The rest belonged to the owner of the plot. “Where trees are uprooted or overthrown by the force of the wind, Labeo says that the usufructuary can recover them for his own use, and that of his household, but he must not use the timber for firewood, if he has any other available for that purpose; and I think that this opinion is correct” (D.7.1.12.).

This conclusion is inspired by Pomponius’ commentary: “Where trees are thrown down by the wind and the owner does not remove them, and the usufruct is rendered more inconvenient, thereby, or a roadway is obstructed; suit can be brought by the usufructuary against him in a proper action” (D.7.1.19.1). If trees died for other reasons, the usufructuary could also make them his property by planting new ones (D.7.1.18.).

Second, forests could be used not only for economic purposes but as *silva non caedua* (D.7.1.10.) – forests that could not be cut down. This category of forest plots was intended not for timber harvesting, but for other purposes, e.g., for parks, hunting grounds, beekeeping, etc.

The usufructuary could, however, use the trees grown in special nurseries. Ulpian: “I am of the opinion that the yield of a nursery also belongs to the usufructuary, so that he also has the right to sell and to plant; but he is obliged to have the bed always prepared and to renew it for the purpose of replanting the same, as a kind of implement to be employed for the benefit of the land; so that, when the usufruct is terminated it may be restored to the owner” (D.7.1.9.6.).

In addition to trees, the category of natural fruits also includes various agricultural crops, as well as grass used for animal feed. Rules for the extraction of such fruits can be found in individual fragments of the Digest. Paulus states: “If a usufructuary has harvested a crop and then dies, Labeo says that the crop which is lying on the ground belongs to his heir, but that the grain still attached to the soil belongs to the owner of the land; for the crop is considered to be gathered when the heads of grain or stems of grass are cut” (D.7.4.13.).

The category of natural fruits of the usufruct can also include minerals, metals, and other natural resources obtained through subsoil development.

The fruits not yet separated were considered to belong to the owner until the moment of their ripening and harvest by the usufructuary or separation from the fruit-bearing thing (as in the case of animal offspring). This, however, is inapplicable to marble, chalk, gold, silver, and other subsoil resources mentioned in the Digest.

There are, however, opposite views on this matter. V.A. Krasnokutskii asserts that “the classics differed in their opinions regarding subsoil resources, but most of them regarded the products of the earth’s bowels as fruits. Justinian’s law took the same point of view and attributed to fruits the products of stone quarries, which was in the spirit of the interest in monumental construction that swept that era” [23].

It seems that in Ancient Rome, the minerals and other resources extracted from the subsoil for the usufructuary were, in fact, considered the fruit of the land plot [5]. First and foremost, such fruit is of a natural origin that is not related to human activity.

However, the useful properties of minerals, just like any other fruit, cannot come into existence without the involvement of humans, specifically, labor. Just as it is impossible to extract the useful properties of a grain crop without processing it with a combine harvester or at least a sickle, so it is impossible to use Italian white marble without cutting it from the world-famous Carrara deposits discovered under Augustus with the help of special devices.

The next group of things that deliver natural fruits to the usufructuary are fruit-bearing trees and shrubs. Under the classification adopted in Roman law, fruit trees and shrubs are typical examples of the so-called primary and secondary things and the transformation of fruits from *fructus pendentes* (fruits attached to the thing) to *fructus separati* (fruits separated from the thing).

The Digest has a general requirement for the emergence of the usufructuary’s rights to the fruits separated from plants. The fruits must be collected (*perceptio*) by

the usufructuary (D.7.4.13.4). The fruits not yet separated belong to the owner of the trees. This, however, does not assume that the fruits must be ripe. The usufructuary may also harvest unripe fruits if their cultivation is a regular source of income, e.g., for them to ripen already in transit.

Finally, the things capable of producing natural fruits included animals. The sources mention two types of animals: draught animals (bulls, horses) and domestic animals intended to produce livestock products. The literature describes cases of use of not only livestock but also circus animals, as well as animals on display in menageries [14]. Usufruct could be established both over individual farm animals and the whole herd.

If usufruct was created over a herd, the usufructuary obtained milk, wool, manure, and litter from animals. Yet at the same time, he had to make up for the number of animals in the herd in case of their deaths since he had to return the herd to the owner with the exact number of animals he had received. Furthermore, the usufructuary was obliged to replace draught livestock that had fallen into disrepair (e.g., sick, crippled).

Next, we should consider the so-called civil fruits, *fructus civiles*, or the profit that the thing under servitude could bring the usufructuary. Several fragments of the Digest give examples of extracting income from the things encumbered by usufruct by concluding transactions. For example, Ulpian points to the possibility of renting out things, to the fact that the usufructuary owns all the income generated using real property (D.7.1.1.), to the right to sell trees from nurseries (D.7.1.9.6), etc.

As far as we can tell, the usufructuary could obtain monetary income by selling any natural fruits. It was possible to sell both the harvest of olives, grapes, or wheat and the stone, ore, or sand extracted from the quarries of the land under usufruct.

Some legal scholars believe that income from the use of the thing was divided between the usufructuary and the owner in proportion to the duration of the usufruct [12]. However, this view is heavily criticized. Arguments against this version have been put forward by L. Dorn, the leading one being the absence of direct contractual relations between the tenant and the owner of the thing burdened by usufruct [14]. Modern science also rejects the possibility of income being divided between the owner and the usufructuary is also negated in modern science since this refers to the so-called *nuda proprietas* – bare ownership [23].

Usufruct in Roman law also assumed some responsibilities of the usufructuary. Their content can be summarized as follows. First, the usufructuary was obliged to maintain the property as a caring owner. He had to maintain the thing under usufruct in proper condition, namely: carry out current repairs of buildings and structures, cultivate land plots in time in accordance with their purpose, replenish gardens, nurseries, and vineyards with seedlings, repair equipment, feed livestock in time, maintain the herd, etc.

Second, the usufructuary was obliged to bear all public taxes and duties, as well as those imposed as a result of transactions, for example, to allow limited use of the plot by virtue of real servitudes.

Third, the usufructuary was required to guarantee the use of property according to its purpose, as well as the return of the thing upon termination of the usufruct. This special type of stipulation was titled *cautio usufructuaria*. Ulpian notes on the matter: “Where the usufruct of anything is bequeathed, it seemed to the Praetor to be perfectly just that the legatee should give security with reference to two things; one, that will use the property as a good citizen should, and the other, that when the usufruct ceases to belong to him, he will restore what remains of it” (D.7.9.1).

Cautio usufructuaria was not limited to a simple promise to restitute the thing. Sources indicate that such cases required security through *satisfatio* – surety. The usufructuary was required to find reliable guarantors. Could usufruct be provided without *satisfatio*? The considered sources do not provide a clear answer, as they retain only references to suretyship. It is suggested in the literature that, in the absence of guarantors, collateral could be provided in the form of a pledge and, in extreme cases, by means of a *jurata promissio* – an oath [12, 18].

In individual cases, Roman law did make some exemptions from *cautio usufructuaria*. First, security was not demanded from a father with a legal usufruct over his children’s property. Second, a husband was freed from *cautio usufructuaria* under a usufruct granted as a dowry.

Third, *cautio* was not required from a spouse entering a second marriage when obtaining usufruct over *lucra nuptialia*. In this case, usufruct was established over the property acquired during the first marriage. The use was retained throughout the life of the usufructuary, and then the property was passed to children from the first marriage.

Fourth, security was not needed for a usufruct that provided for the acquisition of ownership of the thing with time. Finally, exempted from security were *fiscus* and *civitates*, as well as a donor when lifetime use of the gifted thing was retained.

Grounds for the termination of usufruct differed from the grounds for the termination of rural and urban servitudes. Usufruct was terminated by the death of the authorized person, as well as in the event of them losing their legal capacity *capitis deminutio* (*maxima* and *media*). The second reason is a significant change of the thing burdened by usufruct or its destruction. As noted above, the chief condition for the existence of usufruct is adherence to the principle of *salva rei substantia*.

Ulpian states: “It is established that a usufruct is terminated by a change of the property to which it belongs; for example, if a bequest was made to me of the usufruct in a house, and the house has been demolished, or burned, the usufruct is unquestionably extinguished” (D. 7.4.5.2). If the usufructuary “changes it [usufruct of a bath] into a lodging, or a shop, or makes a residence out of it, it must be held that the

usufruct is extinguished” (D.7.4.12.). Usufruct is also lost if a building is placed on an empty plot (D.7.4.5.3), if a field is flooded (D. 7.4.10.2.), etc.

The third ground is the event of the usufructuary acquiring property rights to the burdened things. According to Venonius, “If the usufructuary should obtain the property, the usufruct ceases to belong to him on account of the merger of the same” (D.7.9.4.). In other words, the termination of usufruct on these grounds relates to the usufructuary and the proprietor being the same person.

The fourth ground is the expiration of the term for which the usufruct was established if such rights were not granted for life.

3 Conclusion

Over its centuries-long history, usufruct has retained the features inherent in this real-law construction that were conceptually substantiated in Ancient Roman jurisprudence. Usufruct is the right to limited use of an immovable or movable thing belonging to another person, with the possibility of extracting not only the useful properties of such a thing but also the fruits and income that it can bring.

A modern usufruct may involve not only the burdening of a thing but also allow for burdening property rights, as provided, for example, in the German Civil Code. The most crucial prerequisite of the classical usufruct that is reflected in modern civil law is the preservation of the purpose, economic essence, or substance of the thing that is put into the use of another. Any changes to such things, other than natural wear and tear, not agreed upon with the titleholder, are not permitted.

In European civil law, usufruct has retained one more critical characteristic – attachment to a specific person, the usufructuary. Thus, in Roman law, usufruct belonged to private servitudes, since the burden of a thing was established in favor of a specific person rather than the predominant property, as in classical land servitude. However, in contrast to Antiquity, in modern law, usufruct can be established not only in favor of individuals but also in favor of a legal entity, although for a limited time – no more than 30 years.

Finally, the traditional features retained by modern usufruct from the time of Ancient Rome are only the primary ways of its emergence and extinguishment – the law under which usufruct arises in favor of the surviving spouse, the legatee, as well as the agreement between the owner of the thing and the user, the usufructuary. Termination of the usufruct occurs in case of death of the usufructuary, expiration of the term for which the usufruct is established, coincidence of the usufructuary and the owner in one person, and expiration of the term of the right.

References

ABDRASHITOV, Vagil; GILMULLIN, Ainur Razifovich. *Digesty Iustiniana. Izbrannye fragmenty v perevode i s primechaniiami I.S. Pereterskogo*. The Digest of Justinian. Selected fragments, Selected fragments in translation and with remarks by I.S. Pereterskii. Moscow: Nauka, 1984.

ALEMANHA. *Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002, das zuletzt durch Artikel 4 des Gesetzes vom 25. Oktober 2023*. Alemanha, 2023. Available in: <http://www.gesetze-im-internet.de/bgb/BJNR001950896.html>. Access in: 01 ago. 2023.

BABAITSSEV, Elena Anatolyevna. Transformatsiia gosudarstvennoi sobstvennosti na poleznye iskopaemye v chastnuiu sobstvennost. Transformation of public ownership of minerals into private ownership. *Sovremennoe Pravo*, n. 10, p. 8-12, 2009.

BARTOSZEK, Mariola. *Rimskoe pravo: Poniatiia, terminy, opredeleniia*. Roman law: concept, terms, definitions. Moscow: Iuridicheskaiia literatura, 1989.

BERGER, Adolf. *Encyclopedic dictionary of Roman law*. Philadelphia: American Philosophical Society, 1991.

BOGOLEPOV, Nikolay Pavlovich. *Posobie k leksiim po istorii rimskogo prava*. Manual for lectures on the history of Roman law. Moscow: Universitetskaia tipografiia, 1890.

BUCKLAND, William Warwick. *A Textbook of Roman law from Augustus to Justinian*. Cambridge: Cambridge University press, 1963.

DORN, L. Ob uzufukte po rimskomu pravu. On the usufruct on Roman law. *Printing House of the Imperial Academy of Sciences*, St. Petersburg, 1871.

EMELKINA, Irina Aleksandrovna. *Sotsialnoe naznachenie ogranichennogo veshchnogo prava polzovaniia chuzhim nedvizhimym imushchestvom*. The social purpose of the limited proprietary right to use others' real property. In collection: *Grazhdanskoe pravo sotsialnogo gosudarstva: sbornik statei, posviashchennyi 90-letiiu so dnia rozhdeniia professora A.L. Makovskogo (1930 – 2020)*. A.G. Arkhipova, A.V. Asoskov, V.V. Bezbakh et al.; chief eds. V.V. Vitrianskii, E.A. Sukhanov. Moscow: Statut, 2020. p. 74-93.

ESPANHA. *Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil*. Espanha: Real Decreto, 1889. Available in: <https://www.conceptosjuridicos.com/codigo-civil/>. Access in: 01 ago. 2023.

FRANÇA. *Code Civil*. Titre III: De l'usufruit, de l'usage et de l'habitation (Articles 578 à 636) Version à la date. França: République Française, 1804. Available in: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000006117905/#LEGISCTA000006117905. Access in: 01 ago. 2023.

GAIUS. *Institutsii*. Text and translation by F. Dydynskii. Warsaw: K. Kovalevsky printing house, 1891.

ITÁLIA. *Regio Decreto 16 marzo 1942, n. 262*. Approvazione del testo del Codice civile.

Itália, 1942. Available in: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1942-03-16;262>. Access in: 01 ago. 2023.

KOMMENTARII k Grazhdanskomu kodeksu Rossiiskoi Federatsii (uchebno-prakticheskii). Chasti pervaiia, vtoraiia, tretia, chetvertaia (postateinyi). Commentary to the Civil Code of the Russian Federation (educational and practical). Parts 1, 2, 3, 4 (by article). S.S. Alekseev, A.S. Vasilev, V.V. Golofaev et al.; ed. S.A. Stepanova. ed. 2, revised and supplemented. Moscow: Prospekt; Ekaterinburg: Institut chastnogo prava, 2009.

KOPTSEV, Alezandr. *Servituty v rimskom prave i sovremennom rossiiskom zakonodatelstve*. Servitudes in Roman law and contemporary Russian legislation. *Notarius*, n. 2, 2006. p. 21-25.

KRANS. *Traite' des droits d' usufruit, de usage ed d' habitation etc.* en droit Romain. Liege et Paris. 1869.

KRASNOKUTSKII, V.A. et al. *Rimskoe chastnoe pravo*: Uchebnik. Roman private law: Textbook. Ed. I.B. Novitskii, I.S. Pereterskii. Moscow: Volters Kluver, 2010.

MUROMTSEV, Sergey. *Grazhdanskoe pravo Drevnego Rima*. Civil Law of Ancient Rome. Moscow: Tipografiia Mamontova, 1883.

PANDEKTY, Dernburg. *Veshchnoe parvo*. St. Petersburg: 1912.

PEVNITSKII S.G.; CHEFRANOVA E.A. *Mnogokvartirnye doma: problemy i resheniia*. Apartment buildings: problems and solutions. Moscow: Statut, 2006.

Pravo sobstvennosti: aktualnye problem. Proprietary rights: topical problems. Chief eds. V.N. Litovkin, E.A. Sukhanov, V.V. Chubarov; Institute of Legislation and Comparative Law. Moscow: Statut, 2008.

PUCHTA, Georg Friedrich. *Kurs rimskogo grazhdanskogo prava*. Course of Roman Civil Law. Ed. O.N. Plevako. Moscow: "Sovremennye izvestiia" Printing House, 1874.

SAVELEV, V. A. Servituty i uzufukt v rimskom klassicheskom prave. Servitudes and usufruct in Roman classical law. *Journal of Russian Law*, n.11, p. 92-102, 2011.

SHCHENNIKOVA, Larissa; MIGACHEVA, A. Uzufuktnoe pravo: istoki, sravnitelno-pravo-voi analiz i perspektivy razvitiia v Rossii. Usufruct law: origins, comparative legal analysis and prospects of development in Russia. Perm University Herald. *Juridical Sciences*, n.2, p. 321-345, 2021.

SKLOVSKII, Konstantin. *Sobstvennost v grazhdanskom prave*. Property in civil law. ed. 4. Moscow: Statut, 2008.

SUKHANOV, Evgueny. Nedvizhimost v sisteme obektov grazhdanskikh prav. Real estate in the system of civil rights objects. *Journal of Russian Law*, n.1, p 16-22, 2021.

VARRO, Marcus Terentius. *O selskom khoziaistve*. On Farming. Moscow: Leningrad, Publishing house of the Academy of Sciences of the USSR, 1964.