Iuris civilis notae ad vestem seu textile pertinentes: Notes on Dress in Roman Property Law

Iuris civilis notae ad vestem seu textile pertinentes: Notas sobre Vestimenta en el Derecho de Propriedad Romano

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Abstract

Roman law considered clothing as a *res*, as something that could be the object of legal relations, specifically as a *res corporalis*, a *res quae usu consumatur*, a *res nec mancipi* and a *res mobilis.* These characteristics of *vestis* as a *res* were of great practical importance and to a large extent determined the legal regime applicable to the personal property of this type of goods, specifically in regard to possession, right of usufruct and modes of acquiring ownership, as *usucapio*, *occupatio*, *specificatio* and some cases of *accessio* affecting movables goods: *textura* and *tinctura.*

Keywords: *vestis*; *mobilia pretiosa*; *usufructus vestimentorum.*

Resumen

En Derecho romano fue considerada la vestimenta como una *res*, como un objeto susceptible de relaciones jurídicas, en concreto, como una *res corporalis*, una *res quae usu consumatur*, una *res nec mancipi* y una *res mobilis.* Estas características de la *vestis* como *res* fueron de una gran importancia práctica y en gran medida determinaron el régimen jurídico aplicable a la propiedad de esta clase de bienes, en particular respecto a la posesión, el derecho de usufructo y los modos de adquirir la propiedad, tales como la *usucapio*, la *occupatio*, la *specificatio* y algunos casos de *accessio* relativos a bienes muebles: la *textura* y la *tinctura*.

Palabras clave: *vestis*; *mobilia pretiosa*; *usufructus vestimentorum.*

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Roman law considered clothing –*vestis* or *vestimentum*– as a *res*, as something that could be the object of legal relations. The word *res* is much used in Roman Law. Its primary meaning was a physical object, a thing. Later, it came to have a much wider meaning: it was any asset that had economic and juridical value. This broadening of the meaning of *res* was reflected in the distinction between corporeal and incorporeal things, which can be found in various passages in Gaius' Institutes (2nd century AD) that were included almost literally in the Institutes and also the Digest of the emperor Justinian I. In them the jurist states that "corporeal things are tangible, as land, a slave, clothing, gold, silver, and innumerable others. Incorporeal things are intangible; such as those which have an existence simply in law as inheritance, usufruct or obligation".[1] So clothing, *vestis*, is a *res corporalis*, a material entity which is the object of legal relations: property, enjoyment, transmission.

In addition to being classified as a *res corporalis*, *vestis* can also be classified according to other dichotomies applied to a *res* by Roman jurists. *Vestis* belongs to the group of things the normal use of which consists in full or partial consumption (*res quae usu consumuntur*);[2] to the group of things that are not mancipable (*res nec mancipi*), as opposed to those that are –things taken by the hand and so alienable– (*res mancipi*), a dichotomy of remote origin, but extremely important in archaic and classical Roman law;[3] and to the group of movable things (*res mobiles*), as opposed to those that are immovable (*res immobiles*).

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1 G. 2, 12-13: *12. Quaedam praeterea res corporales sunt, quaedam incorporales. 13. Corporales hae sunt, quae tangi possunt, uelut fundus, homo, uestis, aurum, argentum et denique aliae res innumerabiles*; See also I. 1, 2, pr.-2; GAI. 2 *inst*. D. 1, 8, 1, 1; and EG. 2, 1, 2 and 5. See about this dichotomy: PUGLIESE, G., *Res corporales, res incorporales e il problema del diritto soggettivo*, Milano, Giuffrè, 1951; ZAMORANI, P., "Gaio e la distinzione tra «res corporales» e «res incorporales»", in *Labeo. Rassegna di Diritto Romano*, Naples, Jovene, 1974, 20, pp. 362 ff.; BONA, F., "Il coordinamento delle distinzioni «res corporales-res incorporales» e «res mancipi-res nec mancipi» nella sistematica gaiana", in AA.VV., *Prospettive sistematiche nel diritto romano*, Turin, Giappichelli, 1976, pp. 409 ff. (= *Lectio sua. Studi editi e inediti di diritto romano*, 2, Pavia, CEDAM, 2003, p. 1091 ff.); BALDESSARELLI, F., "A proposito della rilevanza giuridica della distinzione tra res corporales e res incorporales nel diritto romano clasico", in *Revue Internationale des Droits de l'Antiquité*, Paris, Éditions de Boccard, 1990, 37, pp. 87 ff.; BURDESE, A., "Considerazioni sulle res corporales e incorporales quali elementi del patrimonio (in margine al pensiero di Gaetano Scherillo)", in BALESTRI FUMAGALLI, M. *et al*. (ed.), *Gaetano Scherillo (Atti Convegno-Milano 1992)*, Bologna, Cisalpino, 1994, pp. 23 ff. (= *Miscellanea romanistica*, Madrid, Fundación Seminario de Derecho Romano "Ursicino Álvarez", 1994, pp. 177 ff.); and DAJCZAK, W., "La divisione gaiana in *res corporales* e *incorporales* nel manoscritto del *Digestum Vetus* dagli Archivi della Biblioteca di Körnik (BK 824)", in *Seminarios Complutenses de Derecho Romano: Revista Complutense de Derecho Romano y tradición romanística*, Madrid, Fundación Seminario de Derecho Romano "Ursicino Álvarez", 2015, 28 (En memoria de José María Coma Fort), pp. 327 ff.

2 I. 2, 4, 2: *Constituitur autem usus fructus non tantum in fundo et aedibus, verum etiam in servis et iumentis ceterisque rebus, exceptis his quae ipso usu consumuntur: nam eae neque naturali ratione neque civili recipiunt usum fructum. quo numero sunt vinum, oleum, frumentum, vestimenta.*

3 On the dichotomy *res mancipi* and *res nec mancipi* see GALLO, F., "Studi sulla distinzione fra «res mancipi» e «res nec mancipi». Con una «nota di lettura» di Ferdinando Zucotti", in *Rivista di Diritto Romano*, Milan, LED, 2004, 4, pp. 1-40.

These characteristics of *vestis* as a *res* were not a matter of the Roman jurists' simply wanting to establish a taxonomy, but were of great practical importance and to a large extent determined the legal regime applicable to this type of goods: everything to do with the modes of acquiring ownership of a *vestis* and the real rights with which it can be encumbered; possessory protection; intestate inheritance and testamentary provisions regarding *vestis*; contracts, obligations and guarantees concerning, or in some way related to, *vestis*; and private offences representing an attack on this kind of goods. In what follows I shall deal with clothing as the object of property law and only incidentally with matters to do with clothing in the law of obligations and contracts, and in the law of descent and distribution, especially legacies, a subject on which there is a strikingly large body of discussion of specific cases. Nor shall I deal with the restrictions on ownership of *vestes*, sumptuary law or other issues of public law.

The term *vestis*, or its derivative *vestimentum*, is the one usually employed in a generic sense in Roman legal texts. It is the legal term used to refer to the material entity that is the subject of this article. In the Digest, Callistratus (2nd-3rd century AD) gives a hermeneutic rule concerning the use of this word in legal contexts: "*vestis* should be construed as meaning both male clothing (*vestis virilis*) and female clothing (*vestis muliebris*), and also stage clothing (*vestis scaenica*), including that which is used in tragedy or in playing the zither".[4] It follows from this rule that a garment's aesthetic connotations in regard to the user's sex, status or rank, the use or purpose to be given to it, or any other social, cultural or economic connotations are not taken into account by law when the generic term *vestis* is employed in legal rules, declarations, deeds or dealings. So, if, for example, in his will Titus names Caius as legatee of his *vestes*, these should be understood as being all the clothes that belonged to Titus; not only the male clothes, but also the female clothes, if, for any reason, he had any of the latter among his property, those of everyday use as well as those of formal or recreational use, those of linen as well as those of wool or silk, and *purpureae vestes* as well as those of lesser value.

For the case in which the term *vestis* or *vestimentum* is not employed isolated in legal rules, declarations, deeds or dealings, Pomponius (2nd century AD) offers us an interesting passage contained in the Digest about *vestimenta virilia*,[5] in which he resolves an

4 CALL. 4 *de cognit*. D. 50, 16, 127: *"Vestis" appellatione tam virilis quam muliebris et scaenica, etiamsi tragica aut citharoedica sit, continetur.*

5 POMPON. 4 *ad Q. Muc*. D. 34, 2, 33: *Inter vestem virilem et vestimenta virilia nihil interest: sed difficultatem facit mens legantis, si et ipse solitus fuerit uti quadam veste, quae etiam mulieribus conveniens est. itaque ante omnia dicendum est eam legatam esse, de qua senserit testator, non quae re vera aut muliebris aut*

interpretative problem raised with a legacy. He advises that the intention of the testator bequeathing a legacy, the *mens legantis*, must prevail over the typical meanings of the *verba* employed in bequeathing it. Thus, the legacy of *vestimenta virilia* would include the clothes intended by the testator, independently of whether they were conventionally female. Faced with the dilemma between *voluntas* and *verba*, the jurist opted, then, for the former and cited in support of his interpretation the authority of the republican jurist Quintus Mucius Scaevola, who proposed with a certain "mischief" the same solution in a hypothesis involving the opposite circumstance: that of a senator of his acquaintance who habitually wore female dinner dress. So, in the hypothesis that the said senator left in his will a legacy of *vestimenta muliebria*, the female clothes that he put on to dine would not have been included in it. However, that should not lead to the conclusion that the jurists advocated relativity and subjectivity in the meaning of things and that *voluntas* must always prevail over *verba*, but that in both cases the situations were exceptional and anomalous, and it was possible to know the testator's intention. Had it not been that type of situation, or even if it had but somehow not proved possible to reconstruct the will of the testator, the legacy would have included male and female clothes respectively, in accordance with the typical meaning of *vestimenta virilia* and *muliebria*.[6] This passage also suggests, as rightly stated,[7] "the idea that even people of higher rank could indulge in this kind of behaviour, namely, wearing female clothing, which they used as if it were men's: *qua ipse quasi virili utebatur*, without incurring any legal consequences, at least when this occurred privately".

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virilis sit. nam et quintus titius ait scire se quendam senatorem muliebribus cenatoriis uti solitum, qui si legaret muliebrem vestem, non videretur de ea sensisse, qua ipse quasi virili utebatur. On this passage see MASCHI, C. A., *Studi sull'interpretazioni dei legati. Verba e voluntas*, Milan, Vita e Pensiero, 1938, p. 34 f.; GANDOLFI, G., *Lezioni sull'interpretazione dei negozi giuridici. Corso di esegesi delle fonti del diritto romano*, Milan, La Goliardica, 1962, pp. 3-6, and *Studi sull'interpretazione degli atti negoziali in diritto romano*, Milan, Giuffrè, 1966, pp. 87-89; ASTOLFI, R., *Studi sull'oggetto dei legati in diritto romano*, 2, Padua, CEDAM, 1969, pp. 251-255, and "Abiti maschili e femminili", in *Labeo*, *Rassegna di Diritto Romano*, Naples, Jovene, 1971, 17, pp. 33-39; GUARINO, A. "Sul legato di vesti", in *Labeo*, *Rassegna di Diritto Romano*, Naples, Jovene, 1970, 16, pp. 58-60; JOHN, U., *Die Auslegung des Legats von Sachgesamtheiten im römischen Recht bis Labeo*, Karlsruhe, Müller, 1970, pp. 102-104; SOFO, C., «Senatores boni viri», in *Index*. *Quaderni camerti di studi romanistici*, Naples, Jovene, 1970, 1, pp. 396 f.; WATSON, A., *The Law of Succession in the Later Roman Republic*, Oxford, Clarendon Press, 1971, p. 88; WIELING, H. J., *Testamentsauslegung im römischen Recht*, Munich, C. H. Beck, 1972, pp. 46 f. and 102 f.; and DALLA, D., *"Ubi Venus mutatur". Omosessualità e diritto nel mondo romano*, Milan, Giuffrè, 1987, pp. 21-23; and specially K. TUORI, "Dig. (34), 2, 33: The return of the cross-dressing senator", in *Arctos. Acta Philologica Fennica*, University of Helsinki, 2009, 43, pp. 191-200.

6 See also my contribution "On the Economic and Social Category of Garments in the *Responsa* of the Roman Jurists", in ORTIZ, J., ALFARO, C., TURELL, L. and MARTÍNEZ, M. J. (eds.) *Purpureae Vestes, V, Textiles, Basketry and Dyes in the Ancient Mediterranean World,* University of Valencia, 2016, p. 152.

7 RAGGI, A., "Cross-dressing in Rome between norm and practice", in CAMPANILE, D., CARLÀ-UHINK, F. and FACELLA, M., TransAntiquity, Cross-Dressing and Transgender Dynamics in the Ancient World, London-New York, Routledge, 2017, p. 65.

Similarly, when a constitution of Valentinian I, Valens and Gratian in 369 included *vestes* among the goods that were to be confiscated from a person sentenced to proscription, these had to be understood as all the *vestes* belonging to the person so sentenced without exception; and the term *vestis* had likewise be understood generically as referring to every kind of clothing, without distinction, in the expression *item vestis*,[8] with which the jurist Pomponius, in completing a list of goods drawn up by Marcellus (2nd century AD), supposedly excluded clothing from the goods that war captives recovered by the right of *postliminium*, ie, when they returned to Roman territory and regained their freedom and all their former rights. The reason for this strange exclusion is not given in the Digest and this laconic statement, which constitutes the whole of the passage, is probably just a fragment of a much longer original passage by Pomponius.

Moreover, *vestis* ended up being included in the legal concept of *victus* –"nourishment", "victuals"–, hence food, drink, the care of the body, and everything necessary to human life is embraced in the term "maintenance" and Labeo (1st century BC-1st century AD) said that maintenance also includes clothing.[9] In this regard attention should be drawn to the existence of differing opinions among Roman jurists concerning bedclothes, blankets and bedspreads. This can be seen in two passages in the Digest. Whereas, in the opinion of Labeo, quoted by Ulpian,[10] bedclothes (*stratus*, περίστρωμα), understood as comprising all the clothes put on, and that can be used to cover, a bed (*stragula vestis*), should be excluded from the concept of *vestis* as "nourishment" (*victus*), another jurist, Aulus Ofilius (1st century AD), cited by Gaius, had previously included both clothes (*vestimenta*) and bedclothes (*stramenta*) in *victus*, "as nobody can live without them".[11] This was no idle matter, as the extent of the maintenance to

8 POMPON. 37 *ad Q. Muc*. D. 49, 15, 3.

9 VLP. 58 *ed*. D. 50, 16, 43: *Verbo "victus" continentur, quae esui potuique cultuique corporis quaeque ad vivendum homini necessaria sunt. Vestem quoque victus habere vicem Labeo ait.* See also VLP. 1 *de omn. trib*. D. 27, 2, 3, 2. On VLP. 58 *ed*. D. 50, 16, 43 and the meaning of *victus* and *alimenta* in the roman jurisprudence see WYCISK, F., "«Alimenta» et «victus» dans le droit romain classique", in *Revue historique de droit français et étranger, Paris, Sirey, 1972,* 50, 2, pp. 205-228; ALBURQUERQUE SACRISTÁN, J. M., "Aproximación a la perspectiva jurisprudencial sobre el contenido de la prestación de alimentos derivada de una relación de parentesco", in *Anuario da Facultade de Dereito da Universidade da Coruña*, University of La Coruña, 2005, 9, pp. 21 ff.; and *La prestación de alimentos en Derecho romano y su proyección en el derecho actual*, Madrid, Dykinson, 2010; specially SACCOCCIO, A., "Victus e alimenta nelle fonti giuridiche romane: Storia di un'evoluzione dogmatico-concettual", in *Roma e America. Diritto romano comune*, Modena, Enrico Mucchi, 2012, 33, pp. 139-153; and CENTOLA, D. A., "Alcune osservazioni sull'origine del diritto agli alimenti nell'àmbito familiare", in *Teoria e storia del diritto privato*, University of Salerno, 2013, 6, p. 12.

10 VLP. 58 *ed*. D. 50, 16, 45: *In "stratu" omne vestimentum contineri quod iniciatur Labeo ait: neque enim dubium est, quin stragula vestis sit omne pallium,* περίστρωμα*. In victu ergo vestem accipiemus non stragulam, in stratu omnem stragulam vestem.*

11 GAI. 2 *ad leg. XII tab*. D. 50, 16, 234, 2: *Verbum "vivere" quidam putant ad cibum pertinere: sed Ofilius ad Atticum ait his verbis et vestimenta et stramenta contineri, sine his enim vivere neminem posse.*

be provided by whoever had a duty to do so in virtue of a blood tie, an agreement, a legacy or other testamentary provision depended on the scope given to the term *victus*. This was especially important from the end of the second century AD onwards, when the emperors Marcus Aurelius and Antoninus Pius made the obligation to provide maintenance between parents and children, and between patrons and freedmen, a legal and not just a moral duty, and specific measures were laid down to legally enforce fulfilment. Subsequently, a constitution of Constantine I and Licinius in 315 established, in order to stop the alarming growth of the infanticide, to avoid that poor parents be driven to the parricide, the provision of nourishment for infants, expressly including clothing, to be charged to public funds at the request of the parents if they were destitute.[12]

Vestis also bears a certain relationship to the legal concept of fruit (*fructus*). Fruits belonged to the owner, but in the case of a right of usufruct, the usufructuary's most important benefit was the right to take and own the fruits of the property subject to the usufruct. This means that civil fruits –the revenue the owner, possessor or usufructuary of clothes might have obtained from hiring out *vestes*–[13] were considered fruits, something the judge had to take into account when a legal claim was made for *vestes* and he sentenced the defendant to payment of the fruits obtained with them.

The fact that *vestis* was a *res nec mancipi* means that it was one of the goods regarded as less valuable, less essential to the household in early Roman society. The most important means of production of a peasant economy, such as the Roman, belonged to the class of *res mancipi*. Moreover, the economic and legal status of the *vestis* did not vary, however luxurious the garment in question or even if it was dyed with the most expensive purple. This does not mean that the degree of sumptuousness of the garment was always and in every case completely irrelevant from the legal viewpoint, as shall be seen later on in regard to the *mobilia pretiosa*. *Res mancipi* included exclusively buildings and land on Italian soil, rustic servitudes attaching to such land, slaves and farm animals of draft and burden, such as oxen, horses, mules or asses. The distinction between *res mancipi* and *res nec mancipi* was the most

12 CT. 11, 27, 1: *(…) Officiumque tuum haec cura perstringat, ut, si quis parens adferat subolem, quam pro paupertate educare non possit, nec in alimentis nec in veste impertienda tardetur, cum educatio nascentis infantiae moras ferre non possit (…).* On this constitution and his matter see BIANCHINI, M. G., "Provvidenze costantiniane a favore di genitore indigente: per una lettura di CTh. 11. 27. 1-2", in *Annali della Facoltà di Giurisprudenza di Genova*, Genoa, De Ferrari, 1984, 20, pp. 30 ff.; and CORBO, C., *«Paupertas». La legislazione tardoantica (IV-V sec.)*, Naples, Satura, 2006, pp. 11-22 and 66-79.

13 GAI. 6 *ad leg. XII tab*. D. 22, 1, 19 pr.: *Videamus, an in rebus petitis in fructus quoque condemnatur possessor. Quid enim si argentum aut vestimentum aliam omnibus ve similem rem, quid praeterea si usum fructum aut nudam proprietatem, cum alienus usus fructus sit, petierit? (…) Praeterea Gallus Aelius putat, si vestimenta aut scyphus petita sint, in fructu haec numeranda esse, quod locata ea re mercedis nomine capi potuerit.*

important in Roman law. It dated from Rome's earliest period and survived until it was abolished definitely by Justinian. It had a fundamental meaning in the conveyance of property. As Gaius states, "there is an important difference between things mancipable and things not mancipable. Complete ownership in things not mancipable is transferred by merely informal delivery of possession (*traditio*), if they are corporeal and capable of delivery. Thus when possession of clothes or gold or silver is delivered on account of a sale or gift or any other cause, the property passes at once, if the person who conveys is owner of them".[14] On the other hand, mancipable things became alienable by means of the extremely formal procedure by bronze and balance, called mancipation (*mancipatio*), or through a special conveyance by surrender before a magistrate (*in iure cessio*).

As already noted, *vestes* were considered consumable things –*res quae usu consumuntur*–, which entails that a usufruct, ie "the right of using and taking the fruits of property not one's own, without impairing the substance of that property"[15], could not be established in regard to them. "A usufruct may be created not only in land or buildings, but also in slaves, cattle, and other objects generally, except such as are actually consumed by being used, of which a genuine usufruct is impossible by both natural and civil law. Among them are wine, oil, grain, clothing, and perhaps we may also say coined money; for a sum of money is in a sense extinguished by changing hands, as it constantly does in simply being used. For convenience sake, however, a decree of the senate under Tiberius stated that a usufruct could be created in such things, provided that due security be given to the heir. Thus if a usufruct of money be given by legacy, that money, on being delivered to the legatee, becomes his property, though he has to give security to the heir that he will repay an equivalent sum on his dying or undergoing a loss of status. And all things of this class, when delivered to the legatee, become his property, though they are first appraised, and the legatee then gives security (*cautio*) that if he dies or undergoes a loss of status he will pay the value which was put upon them. Thus in point of fact the senate did not introduce a usufruct of such things, for that was beyond its power, but established a right analogous to usufruct, *quasi usufructus*, by requiring security".[16] Therefore, what can be created on *vestis* is a *quasi*

14 GAI. 2, 18-20: *18. Magna autem differentia est inter mancipi res et nec mancipi. 19. Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem. 20. Itaque si tibi uestem uel aurum uel argentum tradidero siue ex uenditionis causa siue ex donationis siue quauis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim.*

15 I. 2, 4, pr.: *Usus fructus est ius alienis rebus utendi fruendi salva rerum substantia.*

16 I. 2, 4, 2: *Constituitur autem usus fructus non tantum in fundo et aedibus, verum etiam in servis et iumentis ceterisque rebus, exceptis his quae ipso usu consumuntur: nam eae neque naturali ratione neque civili recipiunt usum fructum. quo numero sunt vinum, oleum, frumentum, vestimenta. quibus proxima est pecunia numerata: namque in ipso usu adsidua permutatione quodammodo extinguitur. sed utilitatis causa*

ususfructus, a term that was coined in Justinian law, an exceptional form of a usufruct of things which are consumed in use. In practice this meant that when the usufruct of *vestes* was extinguished, the usufructuary was bound to return not the same *vestes* that were delivered to him, but the same quantity of *vestes* of the same quality. That decree of the senate also provided for the possibility of creating a *quasi ususfructus* on wool and purple.[17]

However, alongside this *ususfructus vestimentorum*, which was a usufruct of quantity, provision was made for an ordinary usufruct of *vestes*, in which case the usufructuary was bound to use the clothes carefully and in accordance with their specific purpose, as he had to return the same *vestes* as he had received, normally to the heir of the person who created the usufruct. This type of usufruct would be employed in the case of *vestes* of singular value or characteristics, such as a funeral suit or a stage costume or a theatre curtain, and the jurists allowed the usufructuary to even hire out such *vestes* to a third party, provided they were to be used for their specific purpose; in the case of *vestis scaenica*, for example, only for use on the stage.[18] In the opinion of some jurists, such as Pomponius, the usufructuary could be held liable for any serious deterioration of the *vestis* only if he had acted fraudulently, even if he had promised to return the *vestis* to the heir. This solution, with more benign consequences for the usufructuary, is the one included in the Digest.[19]

Clothing is obviously a member of the class of *res mobiles*, things that can be moved from one place to another. This important *divisio rerum* was established as early as the law of the Twelve Tables (5th century BC), a distinction being made between *fundi*, lands, and *ceterae res*, anything else, essentially for the purpose of the *usucapio* of goods.[20] But before dealing with the implications of a *vestis* being a movable thing in regard to various institutions

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senatus censuit, posse etiam earum rerum usum fructum constitui, ut tamen eo nomine heredi utiliter caveatur (…) ergo senatus non fecit quidem earum rerum usum fructum (nec enim poterat), sed per cautionem quasi usum fructum constituit.

17 VLP. 18 *Sab*. D. 7, 5, 11: *Si lanae alicui legatus sit usus fructus vel odorum vel aromatum, nullus videtur usus fructus in istis iure constitutus, sed ad senatus consultum erit descendendum, quod de cautione eorum loquitur.* SCAEV. 15 *dig*. D. 33, 2, 32, 2: *Uxori usum fructum domuum et omnium rerum, quae in his domibus erant, excepto argento legaverat, item usum fructum fundorum et salinarum: quaesitum est, an lanae cuiusque coloris mercis causa paratae, item purpurae, quae in domibus erat, usus fructus ei deberetur. Respondit excepto argento et his, quae mercis causa comparata sunt, ceterorum omnium usum fructum legatariam habere.*

18 VLP. 18 *Sab*. D. 7, 1, 15, 4-5: *4. Et si vestimentorum usus fructus legatus sit non sic, ut quantitatis usus fructus legetur, dicendum est ita uti eum debere, ne abutatur: nec tamen locaturum, quia vir bonus ita non uteretur. 5. Proinde etsi scaenicae vestis usus fructus legetur vel aulaei vel alterius apparatus, alibi quam in scaena non utetur, sed an et locare possit, videndum est: et puto locaturum, et licet testator commodare, non locare fuerit solitus, tamen ipsum fructuarium locaturum tam scaenicam quam funebrem vestem.*

19 VLP. 51 *ed*. D. 7, 9, 9, 3: *Si vestis usus fructus legatus sit, scripsit Pomponius, quamquam heres stipulatus sit finito usu fructu vestem reddi, attamen non obligari promissorem, si eam sine dolo malo adtritam reddiderit.*

20 L. XII TAB. 6, 3 (CIC. *top*. 4, 23): *Usus auctoritas fundi biennium est, – ceterarum rerum omnium – annuus est usus.*

of private law, it will be useful to refer to the concept of *mobilia pretiosa* –precious movable goods–. This concept is first found in a passage by Ulpian, through which we learn that the praetorian edict listed *vestis serica* –a silk dress– among the *res pretiosiores* for the purpose of obliging the seller of this class of goods to promise the buyer compensation amounting to twice the sale price (*stipulatio duplae*) in the event of the item belonging to someone other than the seller or the loss of such goods through eviction (*evictio*).[21]

The category of *mobilia pretiosa* reappears in a constitution of the emperor Constantine in 326[22] which mentions as such *vestes* together with other goods such as gold, silver and pearls. The constitution prohibits tutors and guardians from selling that class of goods belonging to their wards, as it considers this to be potentially prejudicial to the wards' assets. The reason for this prohibition was most likely the fact that abuse by guardians of the assets of wards under the age of puberty was common and the *oratio* of Septimius Severus dating from 195 which was in force at that time proved ineffective to curb this. The constitution also prohibited the sale of other assets of minors coming under the traditional category of *res mancipi*: urban slaves, houses, baths and granaries. In broadening the scope of the ban to encompass the sale of many other assets belonging to wards, it repealed the old *oratio* of Septimius Severus, which only prohibited guardians from selling wards' landed property and rural slaves unless the transaction was authorised in each case by the praetor. The concept of *mobilia pretiosa*, used in law and of which *vestes* constitute a class, is consistent with a socioeconomic model different from the one based on land ownership, farming and hereditary transmission of wealth to which the traditional distinction between *res mancipi* and *res nec mancipi* corresponded and with which Septimius Severus's *oratio* was still imbued, to judge by the nature of the wards' goods it sought to keep safe from being plundered by guardians. By extending the prohibition to transactions involving *mobilia pretiosa* and other goods, Constantine's constitution was better suited than Septimius Severus's to an economy based primarily on commercial relations and the exchange value of things in the market. Proof of this is that the constitution did not prohibit the free sale by

21 VLP. *ed*. 32. D. 21, 2, 37, 1: *Quod autem diximus duplam promitti oportere, sic erit accipiendum, ut non ex omni re id accipiamus, sed de his rebus, quae pretiosiores essent, si margarita forte aut ornamenta pretiosa vel vestis serica vel quid aliud non contemptibile veneat. Per edictum autem curulium etiam de servo cavere venditor iubetur.*

22 C. 5, 37, 22, pr.: *Lex, quae tutores curatoresque necessitate adstrinxit, ut aurum argentum gemmas vestes ceteraque mobilia pretiosa, urbana etiam mancipia, domos balnea horrea atque omnia intra civitates venderent omniaque ad nummos redigerent praeter praedia et mancipia rustica, multum minorum utilitati adversa est.* See also CT. 3, 30, 3.

guardians of minors' *vestes detritae*,[23] "worn-out clothes". The devaluation of such *vestes* due to deterioration certainly made them lose their status as *mobilia pretiosa*, which for the legislator must have meant that the alienation of such goods ceased to be potentially prejudicial to the indemnity of the wards' assets, and so such acts did not need to be subject to any control by the public authorities.

A *vestimentum scissum* –a torn garment– is different from *vestes detritae*. The former was no longer considered by the praetorian edict as a devalued *res*, but as a *res* that was missing (*abest*), that no longer existed as such (*res amissa*), since the value of a *vestis* is not in the material, but in how it is made up (*non in substantia sed in arte*), which means that whoever returned a *vestimentum* in such a state to its owner would be held liable.[24] It follows from this that the praetorian edict conforms to Platonic and also Peripatetic metaphysics which accords greater importance to the form of things than to their matter or substance: *forma dat esse rei*: "form gives the essence of things",[25] a concept that will again be encountered in the Proculian thesis about who should be considered the owner in the case of *specificatio.*

The fact that a *vestis* has the property of being moveable has various consequences, especially in regard to two inter-related institutions: possession and *usucapio.* Possession is regarded essentially as physical control of a thing and is protected by possessory interdicts, whereas ownership is the ultimate right, the full title to property, and is protected by actions. Therefore possession is a form of presumptive ownership and the man in possession is not always the owner. This would be the case of a thief, for example. Possessory interdicts are the standard remedies in disputes about possession. They are not judicial trials, but provisory remedies issued by the praetors at the request of a claimant and addressed to another person upon whom a certain attitude is imposed. To acquire, retain or recover possession of a *vestis* the claimant had to request the appropriate interdict for movable things. To recover a *vestis* taken by force the appropriate interdict was *utrubi*. Through it the praetor ordered the restoration of the *vestis* to the one who had been evicted by force, providing that his possession had not been acquired from the other party by force, stealth or permission. The party who had possessed the *vestis* for longer during the year preceding the issuance of the

23 C. 5, 72, 4: *Et sine interpositione decreti tutores vel curatores quarumcumque personarum vestes detritas et supervacua animalia vendere permittimus.* See also CT. 3, 30, 3.

24 PAVL. 7 *ed*. D. 50, 16, 14 pr.: *Labeo et Sabinus existimant, si vestimentum scissum reddatur vel res corrupta reddita sit, veluti Scyphi collisi aut tabula rasa pictura, videri rem "abesse", quoniam earum rerum pretium non in substantia, sed in arte sit positum. Item si dominus rem, quae furto sibi aberat, ignorans emerit, recte dicitur res abesse, etiamsi postea id ita esse scierit, quia videtur res ei abesse, cui pretium abest.*

25 That conclusion, worded in scholastic terms, is drawn mainly from the eighth book of Metaphysics of Aristotle.

interdict would succeed in retaining or regaining possession of a *vestis* providing that his possession had not been obtained by force (*vi*), secretly (*clam*) or at the owner's request (*precario*).

In addition to the expeditious recourse to a possessory edict, the owner of the *vestes*, or anyone who believed he was the owner, could bring a proper court case to claim ownership (*reivindicare*) in order to recover the *vestes*, or their economic value, from the person who possessed them illicitly. The plaintiff had to prove the acquisition of the *vestes* under the rules of civil law from its previous quiritary owner and, in accordance with the praetorian edict, had to inform the magistrate, when requesting the action for the protection of the ownership of *vestes*, of the number and colour of the *vestes* he was claiming, but was under no obligation to say whether they were new or used.[26]

Usucapio is a mode of acquiring ownership through possession for a prescribed period of time.[27] This possession has to be continuous and uninterrupted for the required period and the result of a transaction or cause constituting grounds for lawful acquisition, and the possessor must have acted in good faith when he begins to possess the item in question. For the mere possessor of a *vestis* to become its owner through *usucapio*, he must be a citizen, the *vestis* must not have been stolen and he must possess it for a year under the conditions set out, as this had been the prescribed period, since the law of the Twelve Tables, for *usucapio* of moveable things, whereas that for immoveable things was two years. Another mode of acquiring ownership different from *usucapio* was *occupatio*, occupation: taking possession of ownerless things that were susceptible to private ownership. In so far as they were *res nec mancipi*, *vestes* could be acquired by occupation. There follow some examples showing how ownership of a *vestis* might be acquired by usucaption and occupation.

Let us suppose that Titius finds a toga in the street or some other public place. If the toga had been abandoned deliberately by its owner, Titius would automatically acquire ownership of it through occupation (*occupatio*), because the first taker of ownerless property becomes its owner. If, however, the toga had been a *res mancipi*, Titius would not have acquired ownership by merely taking possession of it, but would have had to acquire it through usucaption after having possessed it for a year. Now let us suppose that the toga had been lost or someone who was taking it somewhere had accidentally dropped it. Titius cannot

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26 PAVL. 6 *ed*. D. 6, 1, 6: *(...) Et si vestimenta nostra esse vel dari oportere nobis petamus, utrum numerum eorum dicere debebimus an et colorem? Et magis est ut utrumque: nam illud inhumanum est cogi nos dicere, trita sint an nova (...)*

27 MOD. 5 *pan*. D. 41, 3, 3: *Usucapio est adiectio dominii per continuationem possessionis temporis lege definiti.*

acquire ownership of the toga through occupation, as it was lost, not abandoned, nor can he usucapt it, for the same reason. He would be a mere possessor. Let us imagine that Titius wants to do a good deal and sells the toga, which is not his, to Caius and that Caius buys it in good faith, ie without being aware that the seller of the toga is not its owner. Naturally Caius thinks he is the owner of the toga as he has received it from Titius having paid the agreed price for it. However, Caius is not the owner, but a mere possessor, of the toga, as that was the status of the assigning seller. Nevertheless, since Caius is a Roman citizen and has acted in good faith civil law provides him with a remedy if he also fulfils some other conditions: he will be able to become the owner of the toga if he possesses it continuously and uninterruptedly for a year, provided its real owner does not reclaim it in court from him as the possessor before that year of possession is up or expires during the corresponding trial. Once this period has expired, a claim for the toga by its former owner would fail and Caius would have consolidated his ownership of the toga. Caius could have acquired ownership of the toga through usucaption without having realised it, believing that the toga was his from the time he bought it.

Specificatio (mediaeval word)[28] and *accessio* are two other ways of acquiring ownership[29] of *vestes* upon which Roman jurists expressly stated their opinion. The properties of a *vestis* as a *res* that have already been described are also decisive in these two cases. *Specificatio* was a mode of acquiring ownership by the creation of a new thing (*nova species*) out of someone else's raw materials; for example, if someone has made a garment with another person's wool. Juristically *specificatio* becomes important if the maker of the new thing from another's material made it without the latter's authorisation, even in bad faith (mala fides).[30] The issue as to who is the owner of the new thing –the owner of the material or the maker– was discussed at length by the jurists. Gaius recorded the discussion of this point among the jurists of the Proculian and Sabinian schools. Here is what he says: "when someone makes something for himself out of another's materials, Nerva and Proculus are of the opinion

[28] Roman jurists used descriptions such as *cum ex aliena materia species aliqua facta sit ab aliquo* (GAI. 2 *cott.* D. 41, 1, 7, 7 = GAI. 2, 1, 17-31) or *cum quis ex aliena materia speciem aliquam suo nomine fecerit* (I. 2, 1, 25).

[29] Recently it has been defended, by PLISECKA, A., "*Accessio* and *specificatio* reconsidered", in *Legal History Review*, Leiden, Brill, 2006, 74, 1-2, pp. 45-60, that "contrary to the dominant opinion of contemporary Roman law studies, *accessio* and *specificatio* were not considered in ancient Roman law as independent modes of acquisition of ownership". According to this author, actually "they became regarded as such only in the 12th Century. In ancient Roman law, what later came to be called *accessio* caused only an extension of the ownership of the principal thing to include also the accessory without, however, giving rise to a new ownership".

[30] Cfr. KRAFT, C., "*Bona fides* als Voraussetzung für den Eigentumserwerb dürch *specificatio*", in *Legal History Review*, Leiden, Brill, 2006, 74, 3-4, pp. 289-318.

that the maker owns that thing because what has just been made previously belonged to no one. Sabinus and Cassius, on the other hand, take the view that natural reason requires that the owner of the materials should be the owner of what is made from them, since a thing cannot exist without that of which it is made. […] There is, however, the intermediate view of those who correctly hold that if the thing can be returned to its original components, the better view is that propounded by Sabinus and Cassius, but that if it cannot be so reconstituted, Nerva and Proculus are sounder."[31] This intermediate view, that the new thing belonged to the maker if it was not reducible to its original form, was also the solution adopted by Justinian and, like the Proculian view, basically follows the Platonic principle *forma dat esse rei* as opposed to the Sabinians' Stoic materialism. "For example, a vessel when cast, can easily be reduced to its rude materials of brass, silver, or gold; but wine, oil, or wheat, cannot be reconverted into grapes, olives, or ears of corn; nor can mead be resolved into wine and honey".[32]

Gaius does not provide any examples of *specificatio* regarding clothing and there may not have been a single solution in such cases. Let us imagine the following case: Titius has made a tunic out of Marcus's wool. According to the intermediate view, supported by Gaius and accepted by Justinian, which is based on the criterion of whether or not the form is reversible, two hypotheses must be distinguished depending on whether Marcus's wool had been transformed into yarn when Titius used it to make the tunic. If it had been, Marcus would be the owner of the tunic, as the tunic can be transformed back into yarn. But if it hadn't been, Titius would be the tunic's owner, as the tunic could hardly be turned into a shapeless mass of unspun wool again. It is to this hypothesis that the jurist Paulus (2nd-3rd century AD) refers in arguing that the wool does not survive when a garment is made from it; rather, what exists is a woollen object,[33] so the dress would belong to the maker. At all events, when the maker acquired ownership of the *nova species* by means of *specificatio* he had to

31 GAI. 2 *cott*. D. 41, 1, 7, 7: *Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit (…) Est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et Sabinus et Cassius senserunt, si non possit reverti, verius esse, quod Nervae et Proculo placuit (…).* See also GAI. 2, 79 and I. 2, 1, 25.

32 GAI. 2 *cott*. D. 41, 1, 7, 7: *(…) Ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest: ac ne mulsum quidem ad mel et vinum vel emplastrum aut collyria ad medicamenta reverti possunt (…)*

33 PAVL. 14 *Sab*. D. 41, 1, 26 pr.: *Sed si meis tabulis navem fecisses, tuam navem esse, quia cupressus non maneret, sicuti nec lana vestimento facto, sed cupresseum aut laneum corpus fieret. Proculus indicat hoc iure nos uti, quod servio et Labeoni placuisset: in quibus propria qualitas exspectaretur, si quid additum erit toto cedit, ut statuae pes aut manus, Scypho fundus aut ansa, lecto fulcrum, navi tabula, aedificio cementum: tota enim eius sunt, cuius ante fuerant.*

compensate the owner of the material, as that acquisition was obviously not free and the owner of the material could take legal action to claim its value in the event of a so-called action *ad exhibendum*,[34] or action due to theft, as happens in the case of *accessio*.[35]

Accessio is the attachment of immovable or movable things belonging to different owners by natural forces or artificially so that they form an organic unity, a whole. The thing that is incorporated is the accession, which is added to the principal. But there is *accessio* only when the attached thing is not readily separable without damage to the property. In the case of *accessio* of a movable thing, the general rule was that the owner of the principal became the owner of the whole, irrespective of the good faith of the parties or the identity of the person who did the attaching. The two issues in this kind of *accessio* were: deciding which thing was the principal thing and which the accessory; and whether compensation was payable to the owner of the accession. Roman law recognised many cases of *accessio* affecting movables, including *textura* and surely also *tinctura*, which are of interest here.

Textura exists in the case of the inseparable weaving of costly thread or purple owned by one party into a garment belonging to another. The owner of a piece of cloth acquires ownership of whatever has been woven into it. The cloth is the principal thing and the thread the accession. The *Institutes* of Justinian specifically allow for *accessio* in regard to purple and a garment: "if [...] any one has woven purple belonging to another into his own vestment, the purple, although the more valuable, attaches to the vestment as an accession, and its former owner has an *actio* of theft and a *condictio* against the person who stole it from him, whether it was he or someone else who made the vestment. For although things which have perished cannot be reclaimed by *vindicatio*, yet this gives ground for a *condictio* against the thief, and against many other possessors".[36]

As for *tinctura* –tincture or dyeing–, if someone dyes another person's fabric by applying a product to it, the owner of the original material becomes the owner of the coloured material. "Labeo says that if you dye my wool purple, it will still be mine, because there is no difference between wool after it has been dyed, and where it has fallen into mud or filth, and

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34 PAVL. 26 *ed*. D. 10, 4, 12, 3: *Si quis ex uvis meis mustum fecerit vel ex olivis oleum vel ex lana vestimenta, cum sciret haec aliena esse, utriusque nomine ad exhibendum actione tenebitur, quia quod ex re nostra fit nostrum esse verius est.*

35 VLP. 24 *ed*. D. 10, 4, 7, 2: *Idem et si armario vel navi tabulam meam vel ansam scypho iunxeris vel emblemata phialae, vel purpuram vestimento intexeris, aut bracchium statuae coadunaveris.*

36 I. 2, 1, 26: *Si tamen alienam purpuram quis intexuit suo vestimento, licet pretiosior est purpura, accessionis vice cedit vestimento: et qui dominus fuit purpurae, adversus eum qui subripuit habet furti actionem et condictionem, sive ipse est qui vestimentum fecit, sive alius. nam extinctae res licet vindicari non possint, condici tamen a furibus et a quibusdam aliis possessoribus possunt.*

has lost its former colour for this reason."[37] As can be seen, the principal thing is not necessarily the most valuable thing, as in the case of *tinctura* and *textura*, the greater value of the purple does not confer ownership of the *res nova* on the owner of the thread or the dye; rather, the embellished item remains the property of the owner of the garment or fabric.



[37] PAVL. 14 *Sab*. D. 41, 1, 26, 2: *Si meam lanam infeceris, purpuram nihilo minus meam esse Labeo ait, quia nihil interest inter purpuram et eam lanam, quae in lutum aut caenum cecidisset atque ita pristinum colorem perdidisset.*