RES IN COMMERCIO AND RES EXTRA COMMERCIUM: REFLECTIONS OF ROMANS JURISTS AND CATEGORIES OF MODERN LAW

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Abstract

This research relates to the category of res in commercio and res extra commercium. It is a division accepted in the manual, but the subject of debate in the literature, which more recently tend to deny its very existence. The workings of the classical jurists instead confirms the presence, already in the age of the Principato, of a distinction within the res, in which emerges with a solid foundation the category of res quarum commercium non est: it is a stable category in the statements of iuris periti, but on which appears the incessant work of interpretation face, not to assert its existence, but to expand the goods on and expand analogy vests the legal effects of the new understanding in it.

Keywords: res, commercium, patrimonium, res divini iuris, res publicae.

RES IN COMMERCIO VE RES EXTRA COMMERCIUM: ROMA HUKUKÇULARININ YANSIMALARI VE MODERN HUKUK KATEGORİLERİ

Özet

Bu çalışmanın konusunu *res in commercio* (alışverişe-ticari işlemlere elverişli mallar) ve *res extra commecium* (alışverişe –ticari işlemlere elverişli olmayan mallar) ayrımı oluşturmaktadır. Bu ayrım uygulamada kabul edilmiş, öğretide ise son dönemde ağırlıklı olarak

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varlığının reddedilmesi yönünde ilerleyen bir tartışmanın konusu olmuştur. Buna karşılık, klasik hukukçuların çalışmaları, *res* (mallar) bakımından yapılan bu ayrımın daha *Principatus* döneminde bulunduğunu doğrulamaktadır ki; *res quarum commercium non est* (ticari işlemlerin dışında kalan mallar) kategorisi buradan ortaya çıkar. Bu, *iuris periti'* nin (hukuk âlimlerinin) ifadelerinde yer bulan bir kategoridir; ancak sürekli yorumlarda varlığını belirmek için değil, kapsamındaki malları genişletmek ve aralarındaki benzerliğin yetkilendirdiği yeni anlayışın hukuki etkilerini artırmak için belirir.

Anahtar Kelimeler: *res* (eşya), *commercium* (alışveriş-ticari işlemler), *patrimonium* (malvarlığı), *res divini iuris* (tanrısal-dinsel hukuka tabi mallar), *res publicae* (kamu malları).

1. *Introduction. Open issues and research setting.*

In a recent study Mario Genovese[1] deals with the question of the distinction between *res in commercio* and *res res extra commercium* taking its cue from the words of Giovanni Nicosia, which in its institutional manual[2] says that 'non ricorre nelle fonti la distinzione, che pure viene tradizionalmente ripetuta, tra c.d. *res in commercio* e c.d. *res extra commercium*. I giuristi romani in riferimento a particolari limitazioni stabilite per certe persone relativamente alla possibilità di acquistare o di alienare certe cose dissero che queste persone *commercium non habebant* di tali *res*, adoperando quindi l'espressione *commercium non habere* (*alicuius rei*) in un senso del tutto diverso, riferito alla particolare situazione soggettiva in cui venivano a trovarsi certe persone relativamente a taluni beni'. The illustrious romanista concludes by saying that 'i giustinianei talora (cfr. I. 2.20.4, nonché D. 18.1.6 pr., testo profondamene rimaneggiato) adoperarono l'espressione *res cuius non est*

[1] M. GENOVESE, Res e relative qualifiche in rapporto al commercium, in Studi per Giovanni Nicosia 4, (Milano 2007) 87 ss.

[2] G. NICOSIA, Institutiones. Profili di diritto romano (Catania 1999) 113. See also ID., Passi scelti dalla Istituzioni di Gaio e di Giustiniano. Con traduzione a fronte e commento (Catania 1990) 91 s.

commercium, in senso non relativo, bensì assoluto (con palese travisamento della terminologia e dell'impostazione dei classici), in riferimento a *res divini iuris* e *publicae*'.

The position of Nicosia, then, betrays a clear distrust of the possibility of ascribing to the Roman jurists accomplished classification between *res commercium quarum est* and *res quarum commercium non est*, that distinction is usually synthesized in the binomial *res in commercio*/*res extra commercium*. The reason for this negative position you would track in the absence of such a breakdown in the *Institutiones* of Gaius, together with the absence of express explication of it in other sources[3].

The distinction of which we are concerned is substantially followed in most of the institutional manuals[4], as well as in the treatises on the

[3] Adds G. NICOSIA, Passi scelti cit., 91: 'Anche nelle altre fonti una tale distinzione non è mai esplicitamente posta; tutt'al più essa può forse considerarsi implicita in qualche testo in cui si fa riferimento alle res quarum commercium non est, restando in ogni caso escluso che essa abbia assunto, nel pensiero e nella sistematica dei giuristi romani, portata classificatoria'.

[4] Cfr. CH. MAYNZ, Cours de droit romain, 1^4 (Bruxelles 1876) 436; P. HUVELIN, Cours élémentaire de droit romain, publ. P. R. Monier (Paris 1927) 413 s.; H. SIBER, Römisches Recht in Grundzügen für die Vorlesung, II (Berlin 1928) 61; S. PEROZZI, Istituzioni di diritto romano 1 (Roma 1928, rist. Milano 2002) 591 ss.; E. BETTI, Diritto romano, 1 (Padova 1935) 692 s.; ID., Istituzioni di diritto romano, 1 (Padova 1942) 356; G. LA PIRA, Istituzioni di diritto romano (Firenze 1939) 196 s.; G. LONGO, Manuale elementare di diritto romano (Torino 1939) 163; S. DI MARZO, Istituzioni di diritto romano (Milano 1946) 200; ID., Manuale elementare di diritto romano (Torino 1954) 114; R. MONIER, Manuel élémentaire de droit romain, 1^6 (Paris 1947, rist. Aalen 1970) 343; E. SEIDI, Römisches Privatrecht (Köln-Berlin-Bonn-München 1963) 55; E. VOLTERRA, Istituzioni di diritto romano (Roma 1961) 273; M. KASER, Das römische Privatrecht, 1^2 (München 1971) 377; A. CARCATERRA, Lezioni istituzionali di diritto romano (Bari 1972) 148 s.; P. FUENTESECA, Derecho privado romano (Madrid 1978) 100 s.; M. J. GARCIA GARRIDO, Derecho privado romano[2] (Madrid 1982) 55; P. JÖRS – W. KUNKEL – L. WENGER, Römisches Recth[1] (Berlin-Heidelberg-New York-London-Paris-Tokyo 1987) 83; F. PASTORI, Gli istituti romanistici come storia e vita del diritto[2] (Milano 1988) 261; M. TALAMANCA, Istituzioni di diritto romano (Milano 1990) 380; G. PUGLIESE, Istituzioni di diritto romano[3] (Torino 1991) 427; J. MIQUEL, Derecho privado romano (Madrid 1992) 84; A. BURDESE, Manuale di diritto privato romano[4] (Torino 1993) 169 s.; M. MARRONE, Istituzioni di diritto romano[2] (Palermo 1994) 291; S. CASTAN PEREZ-GÒMEZ, Regimen juridico de las concesiones administrativas en el derecho romano (Madrid 1996) 27 s.; A.

subject of the *res*[5] and doctrine which also dealt with the theme of *commercium*[6].

As it is easy to note the passing literature that has dealt with our theme, the opposition *res in commercio*/*res extra commercium*, often placed in relation to the opposition, sometimes considered identifiable[7],

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EX D'ORS, Derecho privado romano[9] (Pamplona 1997) 131 e nt. 3; H. HAUSMANINGER-W. SELB, Römisches Privatrecht[8] (Wien-Köln-Weimar 1997) 180; P. APATHY-G. KLINGENBERG-H. STIEGLER, Einführung in das römische Recht[2] (Wien-Köln-Weimar 1998) 75; TH. MAYER MALY, Römisches Recht[2] (Wien-New York 1999) 53; G. FRANCIOSI, Corso di istituzioni di diritto romano[3] (Torino 2001) 470 e nt. 51; A. GUARINO, Diritto privato romano[12] (Napoli 2001) 323; C. SANFILIPPO, Istituzioni di diritto romano[10] (curr. A. CORBINO – A. METRO) (Soveria Mannelli 2002) 71; G. SCHERILLO-F. GNOLI, Diritto romano. Lezioni istituzionali (Milano 2003) 136 ss.; A. D. MANFREDINI, Istituzioni di diritto romano[3] (Torino 2003) 113; P. VOCI, Istituzioni di diritto romano[6] (Milano 2004) 111; D. DALLA – R. LAMBERTINI, Istituzioni di diritto romano[3] (Torino 2006) 219 s.; A. CORBINO, Diritto privato romano. Contesti fondamenti discipline[2] (Padova 2012) 377 s.; adde M.G. ZOZ, Riflessioni in tema di res publicae (Torino 1999) 19 e nt. 39.

[5] See P. BONFANTE, Corso di diritto romano, 2.1. La proprietà (Roma 1926) 3 ss.; V. SCIALOJA, Teoria della proprietà nel diritto romano, 1 (Roma 1933) 11 ss.; G. GROSSO, Le cose (corso di diritto romano) (Torino 1941) 3 ss.; G. SCHERILLO, Lezioni di diritto romano. Le cose. 1. Concetto di cosa – cose extra patrimonium (Milano 1945) 1 ss.; G. ASTUTI, s.v. cosa (storia), in ED. 11 (Milano 1962) 3 ss.; Y. THOMAS, Res, chose et patrimoine (Note sur le rapport sujet-objet en droit romain), in Arch. Phil. Droit 25 (1980) 413 ss.; M. BRETONE, I fondamenti del diritto romano. Le cose e la natura (Bari-Roma 1998) 43 ss.

[6] See TH. MOMMSEN, Römisches Staatsrecht 3 (Leipzig 1888) 628 ss.; R. LEONHARD, Commercium, in PWEW. 4.1 (Stuttgart 1900) 768 s.; G. HUMBERT, Commercium, in DS. 1.2 (Paris 1918) 1407 s.; P. HUVELIN, Études d'histoire du droit commercial romain (Paris 1929) 8 ss.; G. SAUTEI, La notion romain de "commercium" à l'époque ancienne, in Varia. Études de droit romain I (Paris 1952) 4 ss.; M. KASER, Von Begriff des "commercium" in Studi in onore di V. Arangio-Ruiz 2 (Napoli 1953) 131 ss.; G. SCIACCA, Commercium, in NNDI. 3 (Torino 1959) 621 s.; E. POLAY, Die Zeichen der Wechsehwirkungen zwischen dem römischen Reichsrecht und dem Peregrinenrecht im Urkundenmaterial der siebenbürgischen Wachstafeln, in ZSS. 79 (1962) 59 ss.; A. GUARINO, "Commercium" e "ius commercii", in Le origini Quiritarie. Raccolta di scritti romanistici (Napoli 1980) 266 ss.; L. CAPOGROSSI COLOGNESI, "Ius commercii", "conubium", "civitas sine suffragio". Le origini del diritto internazionale privato e la romanizzazione delle comunità latino-campane, in Le strade del potere (cur. A. CORBINO) (Catania 1994) 19 ss. e ntt. 34-36; P. CERAMI – A. DI PORTO – A. PETRUCCI, Diritto commerciale romano (Torino 2004) 15 e nt. 20.

[7] See in the sense of assimilation say, even just a trend, the two major classifications, V. ARANGIO-RUIZ, Istituzioni cit., 169, where the scholar says: 'Ma a capo della

res in nostro patrimonio/res extra nostrum patrimonium[8], is in substance considered attributable to the already classic jurisprudence, but often understood with reference to sources in the field, without which there has been a particular effort to track down the foundations for a reconstruction of the complex relationship between the *res* and *commercium*.

As already observed a century ago Bonfante[9], with the distinction *res in commercio* e *res extra commercium* 'si indica il lato dinamico della suscettibilità o insuscettibilità di rapporti giuridici, con la seconda [*res in patrimonio* e *res extra patrimonium*] l'aspetto per così dire statico'. More strenuous advocacy, it is recognized[10] as the *res in commercio* indicate things capable of being the subject of private legal relations, especially relations of exchange, where the *res extra commercium* (also called *res quarum commercium not est*) would be devoid of such suitability.

Generally, the distinction in question is deemed to have the value of real classification by the vast majority of the doctrine[11], which tends to be reserved to it autonomous space in the larger partitions on the subject of 'things', freeing it from nearby classification of *res in nostro patrimonio* and *res extra nostrum patrimonium* which, as noted, alludes to the current situation of the thing, i.e. whether or not the subject of a heritage of a

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trattazione de rebus è collocata, nel manuale gaiano, un'altra distinzione: essa si esprime in vario modo, parlando ora di res in patrimonio ed extra patrimonium, ora di res in commercio ed extra commercium'. See also G. SCHERILLO, Le cose cit., 29 ss.: 'Normalmente la distinzione [tra res in patrimonio ed extra patrimonium] si interpreta nel senso che il criterio posto a base sia la concreta attitudine delle cose a far parte di un patrimonio, e per solito la si ritiene equivalente ad altra distinzione che, quantunque mai espressamente formulata, affiora qua e là nelle fonti, quella cioè fra res in commercio e res extra commercium'. But see G. G. ARCHI, La "summa divisio rerum" in Gaio e in Giustiniano, in SDHI. 3 (1937) 10: he denies the possibility of identifying the two classifications, stating that in the sources do not ever would track a systematic equivalence between the two distinctions, saying 'l'una non ha nulla che fare con l'altra'.

[8] See M. GENOVESE, Res in nostro patrimonio vel extra nostrum patrimonium. Valenza giuridico-istituzionale della partizione, in Fides Humanitas Ius. Studi in onore di L. Labruna, 4 (Napoli 2007) 2133 ss.

[9] Corso di diritto romano cit., 10.

[10] From M. TALAMANCA, Istituzioni cit., 380.

[11] See nt. 4.

subject[12], anodyne understood in the context of it the problem of marketability or less of the same good[13].

Thus, as noted, today is likely the doctrine[14] to understand in two divisions as so many classifications, one having separate and autonomous space than the other: the existence, therefore, of the classification between *res in commercio* and *res extra commercium*, is considered well-founded, as established is considered the meaning of fitness to be the subject of private legal relations, distinct from the present and actual property right which envelops the *res in (nostro) patrimonio*. With the effect that to be excluded from the notion of *res in commercio* and to be among the *res quarum commercium not est* lays the *res divini iuris* and, between the *res humani iuris*, *res publicae*[15].

[12] Recently we looked at the difference in argument from a different valuation point by A. CORBINO (Diritto privato romano[2] cit., 377): Corbino has in fact seen as the res quarum commercium not est indicate 'le res delle quali i Romani dicevano che non vi è possibilità di trattarle come "merx", come cosa oggetto di relazioni economiche'. From such a definition inevitably disengages the other classification, one that looks to res in nostro patrimonio as 'cose che formano oggetto attuale di ricchezza privata', to which specularly oppose those that, although not in the act of any (res nullius in bonis) 'e sulle quali non è perciò vantabile alcuna pretesa privata, ma che siano suscettibili di essere ricondotte ad un patrimonio privato con un valido atto di apprensione' (ibid.).

[13] In this sense, G. SCHERILLO (Le cose cit., 30) called for a reflection on the fact that the adjective nostrum, reported in Gai. 2.1, would indicate that the distinction would not look to the attitude or not of the thing to be part of a private property, but simply the concrete belonging to the heritage of that good of someone. This would seem to be confirmed in Gai. 2.9: Quod autem divini iuris est, id nullius in bonis est: id vero, quod humani iuris est, plerumque alicuius in bonis est; potest autem et nullius in bonis esse: nam res hereditariae, antequam aliquis heres existat, nullius in bonis sunt.

[14] See M. TALAMANCA, Istituzioni cit., 380: '…la dottrina procede ad una duplice classificazione: la prima fra res in patrimonio ed extra patrimonium, la seconda fra res in commercio ed extra commercium, sottolineando come, nonostante coincidenze più o meno ampie, l'ambito di queste due classificazioni non sia identico'.

[15] In doctrine there is also those who say that it is preferable to consider the distinction between res in commercio and res res quarum commercium not est, compared to the first distinction adopted by Gaius in the second commentary. See V. ARANGIO-Ruiz, Istituzioni cit., 169: 'E pertanto questa seconda terminologia è assai più precisa, potendo benissimo essere attualmente senza padrone cose suscettibili. Gaio, che usa la prima terminologia, la contempera un po' a stento (come si vede dal confronto tra i § 1 e 2 del libro II) con un diverso ordine d'idee cui si atteneva il vecchio manuale ch'egli elaborava'; also A. GUARINO, Diritto privato romano[12] cit., 323 nt. 19.9: 'A nostro

The framework described so far, as we have often observed that tends to maintain the character of classification of the distinction in question[16], while the dating doctrine doubts about the existence of the distinction in question, or its scope classificatory[17], although more recently seen resurface doubts about the possibility exists to believe such a distinction, or about the character of classification adopted by classical jurists, on the assumption of his alleged character interpolatory.

In particular, Carlo Busacca has made broad examination concerning the classifications of things in the *Institutiones* of Gaius, coming to the conclusion that the distinction in question would not have character classification[18], not being able to single out the sources regarding a clear scope of a general nature: corollary would be that according to which the classification in question would arise in middle age[19].

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avviso non vi furono mai criteri generali di classificazione. La distinzione più usuale fu quella tra res in commercio ed extra commercium, ma Gaio le preferì quella fra res in patrimonio e res extra patrimonium'.

[16] But there are doubts even in the doctrine inclined to admit the distinction between res in commercio and res res extra commercium: see M. TALAMANCA, Istituzioni cit., 380. Talamanca observes that the Roman sources, in spite of the classifications presented in the literature, they offer a less accurate, adding that in the sources lack the classification in question, in fact limiting the sources, in different contexts, to say that for certain things missing commercium; while Gaius presents only one classification between res in patrimonio and extra patrimonium, however, the only jurist to offer me, without which clearly describes the scope.

[17] See P. F. GIRARD, Manuel élémentaire de droit romain (Paris 1929) 260 ss.; V. SCIALOJA, Teoria cit., 123 ss.; S. DI MARZO Istituzioni cit., 172; P. BUCKLAND, A text book of Roman law from Augustus to Justinian (Cambridge 1950) 182 ss.; C. FERRINI, Manuale di Pandette[4] (Milano 1953) 200 ss.

[18] C. BUSACCA, Studi sulla classificazione cit., 26: 'L'esame di questi testi ci porta alla conclusione che la distinzione tra res in commercio ed extra commercium pur se può considerarsi implicita nelle fonti (nelle quali si fa talora riferimento ad uno dei due termini di essa, generalmente alle res quarum commercium non est) non assume portata classificatoria né per il diritto classico né per quello giustinianeo; nelle fonti infatti il riferimento alle res quarum commercium non est serve solo in ipotesi particolari per motivare concrete soluzioni, quali la nullità di una vendita o di un legato avente ad oggetto tali cose'.

[19] See C. BUSACCA, Studi sulla classificazione cit., 27 nt. 73. Busacca notes that the distinction had great importance in the school of Basel of the sixteenth century, as it

More recently Mario Genovese, in the footsteps of the thought of Nicosia, was received to exclude the existence of our classification in classical times, believing Genovese that it is the result of a rearrangement of matter, formed in the post-classical era[20].

Starting point, in the thesis of the Genovese, is that according to which, in the sources of our knowledge, is completely lacking documentation of a conflict between the *res in commercio* and *res extra commercium*: it, in fact, even Gaius makes no mention. Similarly, we find no express testimony of the expression *'res extra commercium'* or only *'extra commercium'* nor that *'res in commercio'*: the only, as we shall see, that can find some confirmation in the sources is that of '*res quarum commercium non est*'. Doubts, however, says Genovese, it would have on the genuineness of little evidence of that category[21].

In those circumstances, I think it's appropriate to do a review of the sources on the subject, in order to groped to understand what the thinking of the classical jurists, that if, in spite of the lack of expressed formulations about, they were using the category of *res in commercio*, so also implicitly creating a classification as delimiting and exclude things excluded from the traffic law[22].

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would take the index of the works of Alciato Basel edition of 1582. In fact, reporting the opinion of Alciato in relation to D. 45.1.83.5, the author of the index summarizes the thought of Alciato with the phrase 'rerum extra commercium nulla stipulatio', therefore using expression (res extra commercium) not used by Alciato. Just puts account to observe that there is no reason that this expression was already present in the works of classical jurists, to us, however, not received.

[20] M. GENOVESE, Res e relative qualifiche cit., 87 ss.

[21] M. GENOVESE, Res e relative qualifiche cit., 108 ss.

[22] Note, however, that the category of on-traded goods, than merely descriptive of res extra patrimonium, had followed in most legislation: in fact, the Italian Civil Code, in addition to providing in Articles. 822 ss. a discipline of state property, heritage and heritage available unavailable bearing undercurrent classifications shooting even from the opposition res in commercio/res extra commercium, expressly speaks of 'possesso di cose fuori commercio' (art. 1145 cc) defining them as assets of which is not allowed to buy the property; as well, art. 2810, states that are the subject of mortgage 'i beni immobili che sono in commercio'. There are those who noted that the res quarum commercium not est, just as excluded from the possibility of setting up rights on them,

2. The hypothesis of sale and non-marketability of the asset in legal relationship.

The sources of our knowledge, in which we find mention of *commercium* in semantic relationship with the noun *res*, not a particularly broad catalog: they all belong to the Digest and can be divided roughly into two groups, within which distinguish a first set of fragments which evoke a not merchantability relativity of good, which is determined or personal conditions of the subject, or by limitations on specific *negotia*, so that the good in itself is not merchantability ever, drawing strength exclusion good trade limited and contingent factors[23].

These fragments that there adversely aid in the survey that we want to lead[24], taking into account that in them the not merchantability is not linked to the nature of the good, but to factors external to it[25].

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would not constitute assets in the legal sense: see. M. MARRONE, (Istituzioni[2] cit., 291 nt. 6) which says 'in sostanza, le res extra commercium non erano res dal punto di vista del diritto privato'.

[23] V. D. 30.40 (Ulp. 2 fideicomm.): Sed si res aliena, cuius commercium legatarius non habet, ei cui ius possidendi non est per fideicommissum relinquatur, puto aestimationem deberi; 31.49.2-3 (Paul. 5 ad leg. Iul. Pap.): Labeo refert agrum, cuius commercium non habes, legari tibi posse trebatium respondisse, quod merito priscus fulcinius falsum esse aiebat. Sed Proculus ait, si quis heredem suum eum fundum, cuius commercium is heres non habeat, dare iusserat ei, qui eius commercium habeat, putat heredem obligatum esse, quod verius est, vel in ipsam rem, si haec in bonis testatoris fuerit, vel si non est, in eius aestimationem; 41.1.62 (Paul. 5 manual.): Quaedam, quae non possunt sola alienari, per universitatem transeunt, ut fundus dotalis, ad heredem, et res, cuius aliquis commercium non habet: nam etsi legari ei non possit, tamen heres institutus dominus eius efficitur; 45.1.34 (Ulp. 48 ad Sab.): Multum interest, utrum ego stipuler rem, cuius commercium habere non possum, an quis promittat: si stipuler rem, cuius commercium non habeo, inutilem esse stipulationem placet: si quis promittat, cuius non commercium habet, ipsi nocere, non mihi; I. 3.19.2: Idem iuris est, si rem sacram aut religiosam, quam humani iuris esse credebat, vel publicam, quae usibus populi perpetuo eita sit, ut forum vel theatrum, vel liberum hominem, quem servum esse credebat, vel rem cuius commercium non habuit, vel rem suam, dari quis stipuletur. nec in pendenti erit stipulatio ob id quod publica res in privatum deduci et ex libero servus fieri potest et commercium adipisci stipulator potest et res stipulatoris esse desinere potest: sed protinus inutilis est.

[24] Mention of commercium see in C. BUSACCA, Studi sulla classificazione cit., 17 nt. 37.

[25] See G. HUMBERT, Commercium cit., 1407 s.; P. BONFANTE, Corso, 2.1 cit., 11; SCIALOJA, Teoria cit, 124 s.; E. BETTI, Diritto Romano, 1 cit., 692 ss.; S. DI MARZO, Istituzioni cit., 201; Manuale cit., 114; M. KASER, Von Begriff des commercium cit., 164

It should, instead, focus on those sources - which we saw all extraneous both to the *Institutiones* of Gaius[26], both the *Institutiones* of Justinian, which do not relate this distinction - in which shows an absolute meaning[27] of not merchantability of the *res*, such from whatever the specificity of the store or by the personal conditions of the subject[28], so that the not merchantability assumes an objective value and absolute.

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s.; ID., Das röm. Privatrecht 1[2] cit, 337 e nt. 12; B. BIONDI, Istituzioni di diritto romano[4] (Milano 1965) 154; C. BUSACCA, Studi sulla classificazione cit., 18 nt. 44; A. BURDESE, Manuale di diritto privato cit., 170; M. MARRONE, Istituzioni cit., 291 nt. 6.

[26] Gaius not mention never noun commercium: see P. P. ZANZUCCHI, Il vocabolario delle Istituzioni di Gaio (rist. Torino 1961) 18.

[27] M. BRETONE (I fondamenti cit., 142), after having pointed out that 'non c'è una perfetta corrispondenza fra le res in nostro patrimonio e quelle extra nostrum patrimonium, da un lato, le res in commercio e quelle extra commercium dall'altro', observes: 'Una cosa in commercio è normalmente in nostro patrimonio, ma non sempre; e una cosa extra commercium è anche in nostro patrimonio, ma non sempre; e una cosa extra commercium è anche extra nostrum patrimonium; ma non lo è, se la "incommerciabilità" a cui si pensa è relativa a certi atti o persone'. Then Bretone highlights how the not marketability can present with a character not absolute, but relative, thus determining the result according to which if something extra commercium normally will never be in someone's heritage, it is true that where the not marketability present as relative, that is relative only to certain object or certain acts, there is no reason that this thing can be subject to certain private legal relations and therefore not present as extra patrimonium, well able, in spite of his (relative) not marketability, back in the richness of a subject.

[28] V. 18.1.6 pr. (Pomp. 9 ad Sab.): Sed Celsus filius ait hominem liberum scientem te emere non posse nec cuiuscumque rei si scias alienationem esse: ut sacra et religiosa loca aut quorum commercium non sit, ut publica, quae non in pecunia populi, sed in publico usu habeatur, ut est campus Martius; 18.1.34.1 (Paul. 33 ad ed.): Omnium rerum, quas quis habere vel possidere vel persequi potest, venditio recte fit: quas vero natura vel gentium ius vel mores civitatis commercio exuerunt, earum nulla venditio est; 20.3.1.2 (Marcianus l. S. ad form. hypoth.): Eam rem, quam quis emere non potest, quia commercium eius non est, iure pignoris accipere non potest, ut divus Pius Claudio Saturnino rescripsit. Quid ergo, si praedium quis litigiosum pignori acceperit, an exceptione summovendus sit? et octavenus putabat etiam in pignoribus locum habere exceptionem: quod ait Scaevola libro tertio variarum quaestionum procedere, ut in rebus mobilibus exceptio locum habeat; 30.39.10 (Ulp. 21 ad Sab.): Sed et ea praedia Caesaris, quae in formam patrimonii redacta sub procuratore patrimonii sunt, si legentur, nec aestimatio eorum debet praestari, quoniam commercium eorum nisi iussu principis non sit, cum distrahi non soleant; I. 2.20.4: Non solum autem testatoris vel heredis res, sed et aliena legari potest: ita ut heres cogatur redimere eam et praestare vel, si non potest redimere, aestimationem eius dare. Sed si talis res sit, cuius non est commercium, nec

The lack of literary sources about it[29] necessarily leads to focus on those references, not many, in which it seems to emerge, in a non-expressed classification of goods concerning the qualification of things as excluded from *commercium* for some intrinsic conditions of them.

The speech can be started by

18.1.6 pr. (Pomp. 9 *ad Sab*.): *Sed Celsus filius ait hominem liberum scientem te emere non posse nec cuiuscumque rei si scias alienationem esse: ut sacra et religiosa loca aut quorum commercium non sit, ut publica, quae non in pecunia populi, sed in publico usu habeatur, ut est campus Martius.*

In the fragment of Pomponius jurist shows the opinion of Celsus about not merchantability of free man, as well as anything of which you are aware inalienability[30]: then the response about the impossibility of the sale of a free man is enlarged to inalienability of the *res divini iuris*, specifically of *res religiosae* and *res sacrae* as of *res publicae*, specifying however the jurist as should stand[31] between *res in pecunia populi*, not

aestimatio eius debetur, sicuti si campum Martium vel basilicam vel templa vel quae publico usui destinata sunt, legaverit: nam nullius momenti legatum est.

[29] Except Cic. Verr. 2.3.93: Diocles est Panhormitanus, Phimes cognomine, homo inlustris ac nobilis. Arabat is agrum conductum in Segestano; nam commercium in eo agro nemini est; conductum habebat HS sex milibus. See M. KASER, Von Begriff cit., 361 nt. 93; A. WATSON, The Law of Property in the later Roman Republic (Oxford 1968) 13 s.; M. GENOVESE, Condizioni delle civitates della Sicilia ed assetti amministrativo-contributivi della altre province nella prospettazione ciceroniana delle Verrine, in Iura 44 (1993) 1 ss.; ID., Res e relative qualifiche cit., 142 ss.

[30] See also D. 18.1.4 (Ulp. 28 ad Sab.): Et si liberi hominis et loci sacri et religiosi, qui haberi non potest, emptio intellegitur, si ab ignorante emitur.

[31] About distinction between res in pecunia populi and res in publico usu see P. BONFANTE, Corso di diritto romano, cit., 63 ss., 70 ss.; G. GROSSO, Le cose cit., 118 ss.; ID., Problemi sistematici del diritto romano. Cose – contratti (Torino 1970) 33 ss.; G. SCHERILLO, Le cose cit., 97 ss.; G. ASTUTI, s.v. cosa cit., 5; G. PUGLIESE, Res publicae in usu populi e in patrimonio populi nel Corso di Gaetano Scherillo sulle cose, in Gaetano Scherillo. Atti del Convegno (Milano 1994) 153 ss.; E. Lo CASCIO, Patrimonium, ratio privata, res privata, in ID., Il princeps e il suo impero. Studi di storia amministrativa e finanziaria romana (Bari 2000) 108 ss.

affected by the ban, and *res in usu publico*, for which instead applies the inability to sell, linked to their not merchantability[32].

The fragment is generally considered interpolated[33], both in point of form, both in point of substance: in particular, however, to be questioned is the engraved central *nec cuiuscumque rei si scias alienationem*, observing[34] as it exhibits a rehash it would be done by compilers in order to standardize the regulation of the sale of the free man with the one

[32] See G. SCHERILLO (Le cose cit., 96): 'Le cose incluse nel primo gruppo, perché da esse il populus trae direttamente una utilità, hanno il carattere di beni del populus, ne costituiscono il patrimonio e sono perciò suscettibili di rapporti giuridici patrimoniali, ancorché secondo già si è avvertito, non sempre di rapporti patrimoniali privati. Le cose incluse nel secondo gruppo sono invece, normalmente e in linea di principio, insuscettibili di rapporti giuridici patrimoniali'.

[33] See E. ALBERTARIO, In tema di responsabilità in contrahendo, già in AG. 96 (1926), ora in Studi di diritto romano. 3. Obbligazioni (Milano 1936) 370; ID., Corso di diritto romano. Le obbligazioni (Milano 1945) 131 s.; G. LONGO, Le res extra commercium e l'azione di danni nei contratti di vendita nulli, in Studi in onore di P. Bonfante 3 (Milano 1930) 367 ss.; B. BIONDI, La vendita di cose fuori di commercio, in Studi in onore di S. Riccobono 4 (Milano 1936) 11 ss.; P. VOCI, L'errore nel diritto romano (Milano 1937) 148 ss.; ID., Le obbligazioni romane (corso di Pandette). Il contenuto dell'obligatio 1 (Milano 1969) 151 s.; G. LOMBARDI, Ricerche cit., 148 nt. 2; M. KASER, Von Begriff des commercium cit., 162; V. ARANGIO-RUIZ, La compravendita in diritto romano[2] (Napoli 1954) 131 ss.; A. VALENTE, Note sulla culpa in contrahendo, in Ann. Macerata 22 (1958) 317 s.; G. GROSSO, Obbligazioni. Contenuto e requisiti della prestazione. Obbligazioni alternative e generiche[3] (Torino 1966) 55 s.; R. ORESTANO, Il problema delle persone giuridiche in diritto romano 1 (Torino 1968) 330 s.; F. PETERS, Zur dogmatischen Einordnung der anfänglichen, objektiven, Unmöglichkeit beim Kauf, in Festschrift für M. Kaser (München 1976) 292; R. EVANS JONES – G. MACCORMACK, The Sale of res extra commercium in Roman Law, in ZSS. 112 (1995) 330 ss.; CASTÁN PÉREZ-GÓMEZ, Regimen juridico de las concesiones administrativas cit., 64; E. LO CASCIO, Patrimonium cit., 108 nt. 31; R. ASTOLFI, I libri tres iuris civilis di Sabino (Padova 2001) 12 ss.; E. STOLFI, Studi sui libri ad edictum di Pomponio 2 (Milano 2001) 180 e nt. 184; A. RODEGHIERO, Sul sinallagama genetico nell'emptio venditio classica (Padova 2004) 134; A. TRISCIUOGLIO, Sinallagma genetico e vendita delle res extra commercium, in La compravendita e l'interdipendenza delle obbligazioni nel diritto romano 1 (cur. L. Garofalo) (Padova 2007) 288; S. A. CRISTALDI, Il contenuto dell'obbligazione del venditore nel pensiero dei giuristi dell'età imperiale (Milano 2007) soprattutto 45 ss.; M. GENOVESE, Res e relative qualifiche cit., 110 ss.

[34] See C. BUSACCA, Studi sulla classificazione cit., 20 s.

concerning the *res divini iuris*[35]: in fact, the classical jurists would separate the sale of the free man, effective *insciente emptore*, with those of the *loca sacra et religiosa*, ineffective in any case[36], whereas the compilers would intervene to standardize the legal framework of such sales, stating the effectiveness however, in the event that the buyer was unaware and then without *dolus*.

However, it can be seen as the interpolated character of the fragment in question not unanimous in doctrine: in fact, more recently, there is who[37] said that the character *insiticio* not concern the reference to the *res divini iuris*, but only the one concerning *res publicae*, despite the distinction between *res in patrimonio populi* and *res in publico*. And there is also authoritative doctrine[38] which more recently has *usu* excluded the character *compilatorio* of fragment, ascribing its classicism already reached the equalization of the sale of the *res quarum commercium non est* in the workings of the jurists of the classical period.

[35] I. 3.23.5: Loca sacra vel religiosa, item publica, veluti forum, basilicam, frustra quis sciens emit, quas tamen si pro privatis vel profanis, deceptus a venditore, emerit, habebit actionem ex empto, quod non habere ei liceat ut consequatur quod sua interest deceptum eum non esse. Idem iuris est, si hominem liberum pro servo emerit.

[36] See Index Interpolationum ad h. l.; adde C. FERRINI, Sulle fonti delle Istituzioni di Giustiniano, in BIDR. 13 (1901) 179, ora in Opere, 2 (Milano 1929) 392; G. LONGO, Le res extra commercium e l'azione di danni nei contratti di vendita nulli, in Studi in onore di P. Bonfante cit., 372 ss. ID., Casi d'impossibilità della prestazione nel diritto giustinianeo, in Ann. Macerata 10 (1934) 21; B. BIONDI, La vendita di cose fuori di commercio cit., 6 ss.; V. ARANGIO-RUIZ, La compravendita in diritto romano[2] cit., 131 ss.; L. REGGI, Liber homo bona fide serviens (Milano 1958) 248 ss.; G. GROSSO, Obbligazioni cit. 57; R. ORESTANO, Il problema delle persone giuridiche cit., 301; J. A. C. THOMAS, The Sale of Res Extra Commercium, in Current Legal Problems 29 (1976) 139 s.; C. BUSACCA, Studi sulla classificazione cit., 21; Y. BEN DROR, The Perennial Ambiguity of Culpa in Contrahendo, in American Jornal of Legal History 27 (1983) 161 s.; M. GENOVESE, Res e relative qualifiche cit., 112 s.

[37] P. STEIN, Fault in the Formation of Contract in Roman Law and Scots Law (Edinburg – London 1958) 75 ss.; F. CUENA BOY, Estudios sobre la imposibilidad de la prestaciòn. La imposibilidad juridica (Valladolid 1992) 60 ss.; ID., La prestaciòn y sus requisitos, in Derecho romano de obligationes. Homenaje al Pr. J. L. Murga Gener (Madrid 1994) 106 s.

[38] M. TALAMANCA, s.v. Vendita (diritto romano) in ED. 46 (Milano 1993) 336.

I believe, therefore, that there is no strong evidence to affirm the presence of interpolations in the fragment in question, in this supported by doctrine in this sense that detects the lack of evidence of fines in the formal step, which also invite to exclude has been substantial alteration of the content of the fragment pomponianus.

According to other doctrine[39], however, while considering himself immune to the substance of the piece in question, there is still the figure according to which, however *insiticia* is precisely the term which refers to *res quarum commercium non est* and more specifically '*loca quorum commercium not sit*': just the nature of this interpolated paraphrase might suggest exclude character classification of such distinction, alien environments classics as witnessed by the silence of Gaius, was coined in the post-classical environments.

In particular, some says [40] that the fragment betray just a contradiction: in fact, the fragment make a distribution in which the *res divini iuris* are opposed, or if we want juxtaposed, to the *res quarum commercium not est*, the list of which includes instead, and exclusively, the *res publicae*, among which is mentioned on the Campus Martius, distinguishing properly the fragment between *res in publico usu* and *res populi in patrimonio* or *pecunia populi*, the latter not subject to the regime of exclusion from legal traffic. By doing so, highlights yet this doctrine, is manifested not only the non-classification of that distinction, but especially if it calls into question the content, given that remain outside the category of *res extra commercium* precisely those that constitute the modern doctrine considers it main part, i.e. the *res divini iuris*[41].

Now, apart from the doubts that authoritative doctrine[42] moves to the supposed interpolation of the fragment in which content would be the

[39] C. BUSACCA, Studi sulla classificazione cit., 21; see also M. GENOVESE, Res e relative qualifiche cit., 112 s.
[40] C. BUSACCA, Studi sulla classificazione cit., 21
[41] M. GENOVESE, Res e relative qualifiche cit., 113.
[42] See B. BIONDI, La vendita di cose fuori di commercio cit., 51 ss.; R. ORESTANO, Il problema delle persone giuridiche cit., 301.

reference to *res quarum commercium non est*, doubts that tend to highlight the genuineness of the express reference to *res extra commercium*, with significant use of terminology that, far from creating a contrast explicit, aims to shape a category of goods objectively excluded from the sale and then the traffic law (*res quarum commercium not est*), i said that it's possible can move other considerations, considering how these doubts seem to highlight the probable authenticity of the reference contained in the fragment.

In fact, if we start from the aforementioned given the substantial character of genuine reference to assets excluded from the market, one can hypothesize that Pomponius, compared with coeval gaiano silence on the market and the category of *res extra commercium*, in a context of *ius controversum* has expressly adopted the terminology of *res quarum commercium non est*, referring to a theory that appears foreign to the diarchy of assets placed in *incipit* of the second commentary by Gaius, who looked again, as evidenced by the subsequent clear distinction, the current destination of the goods and not to its legal regime of circulation.

The use pomponianus, which in a sense 'breaking its banks' adopting this regime, in itself denotes the presence of a strong jurisprudential workings[43], also witnessed by the omission of Gaio; workings inside of which is not yet definitively settled the perimeter of the category of *res extra commerciu*m, much to distinguish even the *res sacrae* and *religiosae* respect to the class of things excluded from *commercium*, integrated only by *res publicae in publico usu*.

But in itself, the exclusion of the *res divini iuris* from the category of *res extra commercium* can find no other explanation, as we shall see below, especially in light of the testimony offered to us by I. 2.20.4; neither appears *in re ipsa* testimony of an intervention interpolatory,

[43] M. TALAMANCA, Istituzioni cit., 380: 'Le res divini iuris, inidonee ad essere oggetto di rapporti giuridici privati, rientrerebbero tutte nelle res extra commercium: alle volte, i giuristi romani, però, le contrappongono a quelle extra commercium (quorum commercium non est, come dice Pomponio in D. 18.1.6 pr.)'.

having indeed keep in mind that if the compilers had intervened on the fragment in order to create a unitary category of *res extra commercium*, in order to established classification of newly minted, they would not certainly forgot to harmonize the thought of Pomponio, suitably manipulating the content by retracting also *loca sacra et religiosa* among those not liable to the sale and then marked by the *stigma* of not marketability, as appears to induce the fragment in highlighting the inability to *emptio-venditio*, which alone actually refers Pomponio, while generically then add the exclusion of certain goods from *commercium*[44].

A substantial common thread seems to tie the fragment just seen another of Paul:

> **D. 18.1.34.1 (Paul. 33 *ad ed*.):** *Omnium rerum, quas quis habere vel possidere vel persequi potest, venditio recte fit: quas vero natura vel gentium ius vel mores civitatis commercio exuerunt, earum nulla venditio est*.

The fragment, given particular depth by the doctrine[45], also focuses on the case of a purchase, even having the aim to establish a general

[44] Moreover, Ulpian in defining the commercium refers to sell and buy. See Ulp. Reg. 19.5: Commercium est emendi vendendique invicem ius.

[45] Glossa ad h.l.; U. DONELLO, Opera omnia, 1 (Lucca 1762) 681; G. CUIACIO, Opera omnia, 7 (Napoli 1758) 692; B. BIONDI, La vendita di cose fuori commercio, in Studi in onore di S. Riccobono 4 (Palermo 1936) 20, 52; C. A. MASCHI, La concezione naturalista del diritto negli istituti giuridici romani (Milano 1937) 163 ss.; M. KASER, Mores maiorum und Gewohnheitsrecht, in ZSS. 59 (1939) 92 ss.; ID., Von Begriff des "commercium" cit., 163 ss.; G. BRANCA, Le cose extra patrimonium humani iuris, in Ann. Trieste 12 (1941) 230; G. LOMBARDI, Ricerche in tema di ius gentium (Milano 1946) 52 ss.; ID., Sul concetto di ius gentium (Roma 1947) 229; R. REGGI, Liber homo bona fide serviens cit., 258 s.; TH. MAYER MALY, Necessitas costituit ius, in Studi in onore di G. Grosso 1 (Torino 1968) 184; P. VOCI, Le obbligazioni romane (Milano 1969) 151 ss.; J. L. MURGA, Una actio in factum de Ulpiano para la venta de sepulcros, in RIDA. 21 (1974) 301; U. ROBBE, La successio e la distinzione fra successio in ius e successio in locum 1 (Milano 1965) 171 s.; S. CASTAN PEREZ-GÒMEZ, Regimen juridico de las concesiones administrativas cit., 59, 63; C. BUSACCA, Studi sulla classificazione cit., 21 ss.; C. A. CANNATA, Corso di istituzioni di diritto romano 2.1 (Torino 2003) 217; C. CASCIONE, Consensus. Problemi di origine, tutela processuale, prospettive sistematiche (Napoli 2003) 353 nt. 9; A. RODEGHIERO, D. 18.1.34.3: vendita di "res furtiva" e principio di buona fede, in (cur. L. GAROFALO) Il ruolo della buona fede

principle concerning precisely to trade: Paolo says, making a clear dichotomy, that while it is valid and effective (*recte fit*) the sale of things that anyone can '*habere vel possidere vel persequi*', vice versa is invalid that sell of things that '*natura vel gentium vel mores*' excluded from *commercium*.

The fragment is suspected of manipulative intervention, especially in so far as relates a tripartite division of the causes exclusionary *commercium* and therefore the validity of the sale: in particular, it is assumed that the non-classicism[46] of reference that appears unusual about the origin of the inability to sell, in which once again takes the form of exclusion from *commercium*; singular, at least at the classics, it also appears the use of the verb *exuere* while dubious appears finally to identify the things identified on the basis of that tripartite division.

However, to the contrary it was stated[47] that there are no strong reasons in support of the interpolation, it is not conclusive of the fact, however, surpassed by some to be seen, which would be difficult to identify the goods excluded on the basis of the tripartite remembered, not being this sure sign of corruption of the text; in other respects, in itself a reference to the 'classi' of causes of exclusion may well be seen in key classificatory, which seeks to identify the origins of the prohibition of marketability of a good.

In such a perspective can be taken to the conclusions of those who[48], while considering the inclusion of spurious reference to the *ius*

oggettiva nell'esperienza giuridica storica e contemporanea. Atti del convegno internazionale di studi in onore di Alberto Burdese (Padova 2003) 239; ID., Sul sinallagama genetico cit., 56; P. VOCI, Istituzioni cit., 442 nt. 4; L. D'AMATI, La compravendita delle 'res in potestate hostium', in La compravendita e l'interdipendenza cit., 381; S. A. CRISTALDI, Il contenuto dell'obbligazione del venditore cit., 136 s.; M. GENOVESE, Res e relative qualifiche cit., 109 s.

[46] M. KASER, Mores maiorum cit., 92 ss.; ID., Von Begriff des "commercium" cit., 163 ss.; 229; R. REGGI, Liber homo cit., 259.

[47] From G. LOMBARDI, Ricerche cit. 53 and C. BUSACCA, Studi sulla classificazione cit., 22 s.

[48] G. LOMBARDI, Ricerche cit. 53; then C. BUSACCA, Studi sulla classificazione cit., 23.

gentium, argues about the classicism of the *natura* and *mores*, emerging as the first refers to an exclusion of the goods by their nature, then to their inherent characteristics, where the *mores* would address a intervene with regulations aimed at excluding that good from traffic legal.

More recently, indeed, the doubts on the fragment have been recalled and emphasized[49], excluding classical character stating 'severe censure sul fronte interpolazionistico', so that the value of the fragment would be undone by his own hand be attributed to Justinian, intervention testified that it would be the inconsistency between the hypothesis of validity of the sale and that of its nullity; and the fact that the exclusion from *commercium*, according to the wording of the text, it would be limited exclusively to the sale and not to the other *negotia*[50].

However, one can argue that the central part of the fragment refers precisely to the causes that may exclude a good from *commercium* and then make the sale anything, where it is in breach of the ban; conversely, the beginning of the piece does not pose a conflict, but rather establishes what is the physiology of the sale negotiation where, as a rule, the good itself is marketable. Ultimately the fragment shows the rule, with respect to which the closed highlights the exception determined by not marketability of the object of the sale.

[49] See M. GENOVESE, Res e relative qualifiche cit., 109 s.

[50] M. GENOVESE, Res e relative qualifiche cit., 110: 'In presenza dei già gravi dubbi sulla classicità della definizione escludente il sorgere delle obbligazioni da compravendita qualora essa verta su res che natura, ius o mores civitatis abbiano posto fuori dal commercium, ci sentiamo di aggiungere, da un lato, che ad accentuarli concorre la disomogeneità tra detta perifrasi e quella che, per contrapposto, individua le res per le quali una vendita recte fit (in quanto le si possa habere, possidere e giudizialmente persequi); dall'altro, che la frase "quas vero natura vel gentium ius vel mores civitatis commercio exuerunt", quasi sicuramente giustinianea, mostra come per gli stessi bizantini considerare una res per ragioni varie estromessa dal commercium importasse un oggettivato impedimento della stessa ad essere comprata e venduta ma, stando al tenore del testo, senza implicare ulteriori, necessitate, preclusioni di portata generalizzante in campo negoziale'.

The piece, therefore, refers exclusively to the sale [51], called specifically by the use of the noun *venditio* in two places: the use of the three verbs recalls the possibility of subjective legal situations exerted on it by the seller[52], but in itself not affect the validity of the sale, which is explicitly excluded from not marketability of good.

If therefore no contradiction can can infer from the alleged inconsistency between the two parts of the fragment, also can not to be possible understand as the limitation to the hypothesis of the sale, enunciated in piece, can denote an intervention interpolatory[53]. While it is true that at the not marketability is limited by the hypothesis of the *emptio-venditio* Paolo, we need to understand whether this is a sign that facilitates the perimeter of *res extra commercium*, or whether that choice is dictated by other reasons.

It may be pointed that this limitation has emerged already in the fragment of Pomponius previously analyzed: should however also considered that in both fragments jurists were concerned *ex professo* to trade, so the limitation to it, far from giving guidance on the classification of *res*, could only be justified by reasons of the conference with a speech conducted, so that no argument could be drawn with regard to the subject of our research, since the failure indications of general prohibitions in the field of negotiations would indeed motivated by logic discursive.

3. *The concept of* res extra commercium *and expansion of its scope*.

Undoubtedly, until now the flow emerged about the content of the category of *res extra commercium* appears limited to things excluded from trade: it is necessary however to test this conclusion in part by examining other fragments.

[51] See S. A. CRISTALDI, Il contenuto dell'obbligazione del venditore cit., 136 s.

[52] See P. VOCI, Le obbligazioni romane cit., 151 e nt. 38: 'con habere Paolo si riferisce al diritto di proprietà; con possidere al possesso (per es., di fondi provinciali; o di cosa di cui il venditore non sia proprietario); con persequi ai crediti'.

[53] M. GENOVESE, Res e relative qualifiche cit., 110 nt. 44.

Seems to provide an initial response to our question a fragment of Marcianus:

> **20.3.1.2 (Marcianus *l. s. ad form. hypoth*.):** *Eam rem, quam quis emere non potest, quia commercium eius non est, iure pignoris accipere non potest, ut divus Pius Claudio Saturnino rescripsit. Quid ergo, si praedium quis litigiosum pignori acceperit, an exceptione summovendus sit? et Octavenus putabat etiam in pignoribus locum habere exceptionem: quod ait Scaevola libro tertio variarum quaestionum procedere, ut in rebus mobilibus exceptio locum habeat*.

The text[54] contains a reference to a rescript of Antoninus Pius directed to that Claudio Saturnino, which stated that the good not marketable (*commercium eius non est*) - and for that reason is not amenable to sale - can not be for the same reason given in pledge. This general principle stated in the first part of the fragment.

In what follows, Marcianus inserts a reflection that apparently seems unhooked from rescript initial: fact states that in the event of a pledge of *praedia litigiosa* was granted by the magistrate the *exceptio litigiosi*[55] the holder agreed in claims by those who, aware of the dispute

[54] See G. SCHERILLO, Le cose cit., 30; G. BESELER, Beiträge zur Kritik des römischen Rechtsquellen, in ZSS. 66 (1948) 350; M. KASER, Vom Begriff des "commercium" cit., 165; G. NICOSIA, L'acquisto del possesso mediante i potestati subiecti (Milano 1960) 152 nt. 24; F. DE MARINI AVONZO, I limiti alla disponibilità della "res litigiosa" nel diritto romano (Milano 1967) 227 ss., 267 ss.; H. WAGNER, Vorassetzungen, Vorstufen und Anfänge der römischen Generalverpfändung (Marburg 1968) 115; C. BUSACCA, Studi sulla classificazione cit., 23 ss.; M. GENOVESE, Res e relative qualifiche cit., 130 ss.

[55] Gai. 4.117a: In his quoque actionibus, quae non in personam sunt, exceptiones locum habent. Velut si metu me coegeris aut dolo induxeris, ut tibi rem aliquam mancipio dem, tua est; sin eam rem a me petas, datur mihi exceptio, per quam, si metus causa te fecisse Vel dolo malo arguero, repelleris. Item si fundum litigiosum sciens a non possidente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omni modo summoveris; D. 44.6.1.1 (Ulp. 76 ad ed.): Si inter primum et secundum sit lis contestata et ego a tertio emero, qui nullam controversiam patiebatur, videamus, an exceptioni locus sit. Et putem subveniendum mihi, quia is, qui mihi vendidit, nullam litem habuit et quod fieri potest, ut duo in necem eius litem inter se iungant, qui cum ipso litigare non

pending on real estate, he bought that good. In this sense, is called the opinion of Octavenus, which admitted the fact experienceability of *exceptio* by holders agreed, where were likely experienced the *actio Serviana*: this principle was later extended by Scaevola to the case of movable property[56].

The pass itself appears to have a trend a bit strange: after treating the hypothesis of *res extra commercium*, Marcianus would then be passed to investigate and deepen an aspect of a procedural nature, inherent enforceability of *exceptio*, in the presence of pledge concerning a *res litigiosa*.

But proceed with order: the part that most interested us here is the first, where it is stated a principle that appears to possess a general nature, intended to say that the thing whose marketability is prohibited, i.e. *res quarum commercium non est*, is therefore excluded from the possibility to trade: the question, however, is subjected to the imperial chancery, on the extension of this not marketability, itself limited to the sale, also to the different legal relationship of pledge[57].

The finding that the matter be referred, as we are told by Marcianus, to the attention of the emperor, leads to the assumption that

poterant. si tamen cum procuratore tutore curatoreve alicuius iudicium acceptum sit, consequens erit dicere, quasi cum ipso litigetur, ita eum ad exceptionem pertinere.

[56] Believe genuine mention of res mobiles F. DE MARINI AVONZO, I limiti alla disponibilità cit., 272 nt. 18; see also H. KIEFNER, Ut lite pendente nil innovetur. Zum Verbot der Verfügung über res und actiones litigiosae in römischen Recht und im gemeinen Techt des 19. Jarhundertes, in Gedächtnisschrift für W. Kunkel (Frankfurt a. Main 1984) 127 nt. 31. In the past it had been originally supported the thesis that the fragment was referring to the res nec mancipi instead to res mobiles: così H. SIBER, Die Passivlegitimation bei der Reivindicatio (Leipzig 1970) 102 s.; E. BETTI, D. 42.1.63. Trattato dei limiti soggettivi della cosa giudicata in diritto romano (Macerata 1922) 329 nt. 1; F. MESSINA-VITRANO, La disciplina romana dei negozi giuridici invalidi. 2. La compra dall'attore dell'obbietto litigioso fatta scientemente (Messina 1924) 6; S. Di MARZO, Istituzioni cit., 373 nt. 2.

[57] F. DE MARINI AVONZO, I limiti alla disponibilità cit., 268 s.: 'Il fondamento della regola è evidente: poiché il creditore insoddisfatto può acquistare o almeno trasmettere, la proprietà della cosa pignorata, l'oppignoramento si presenta come una potenziale causa di acquisto e in certi casi può essere opportuno assoggettare alla stessa regolamentazione restrittiva stabilita per gli acquisti in senso stretto'.

there was indeed a doubt about the possibility of extending by analogy, in relation to one thing *extra commercium*, the prohibition negotiating tied itself to trade, to cover the case of the constitution of the pledge. So, Marcianus refers the opinion imperial positive to the extension, while not referring the case submitted to Antoninus Pius and solved through *rescriptum*[58].

Now, place the doubt is resolved in a positive way, but, as I said, impossible for us to reconstruct the case[59]: but the notation is fundamental - that is not understood whether to belong to the imperial rescript or to Marcianus, although the character of notational theory seems to allude to a language case law - that is introduced by the causal *quia*, which aimed at introducing a causal proposition of objective type, seems to allude to a kind of correspondence between the *res extra commercium* and the ban of *emere*[60].

In other words, the causal indication proves invaluable: the lawyer makes, with an effort to systematize general, an explicit link between *res quarum commercium not est* and not marketability, i.e. a prohibition of alienation, which already surfaced, but in a still implied deduction, in the fragments of Pomponius and Paulus previously analyzed.

The interpretation of fragment is not, however, unique in the literature: in fact, there are those who have speculated that the piece in

[58] On rescripta see M. TALAMANCA, 'Rescripta', 'epistulae', 'decreta', in AA.VV., Lineamenti di storia del diritto romano[2] (Milano 1989) 417 ss.; nonché N. PALAZZOLO, Potere imperiale ed organi giurisdizionali nel II sec. d.C. L'efficacia processuale dei rescritti imperiali da Adriano ai Severi (Milano 1974) 1 ss.; ID., Le costituzioni casistiche: epistulae e rescripta, in AA.VV., Le fonti di produzione del diritto romano (Catania 2002) 110 ss. Maggiori ragguagli in D. NORR, Zur Resckriptenpraxis in der boben Prinzipatszeit, in ZSS, 89 (1981) 1 ss.; J. P. CORIAT, Le prince législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du Principat (Roma 1997) 608 ss.; F. ARCARIA, Referre ad principem. Contributo allo studio delle epistulae imperiali in età classica (Milano 2000) 3 ss.; M. U. SPERANDIO, 'Codex Gregorianus'. Origini e vicende (Napoli 2005) 72 ss.

[59] See F. DE MARINI AVONZO, I limiti alla disponibilità cit., 269 nt. 6.

[60] On value of grammar of quia see A. TRAINA – T. BERTOTTI, Sintassi normativa della lingua latina[3] (Bologna 2003) 424 ss.; A. TRAINA – G. BERNARDI PERINI, Propedeutica al latino universitario[6] (Bologna 1998) 222 ss.

question falls between those that do not foresee a general case of not marketability, but relate to a 'cosa che, pur essendo in astratto suscettibile di negozi giuridici patrimoniali, non lo è in concreto, o per l'esistenza di un divieto di alienazione, o per la mancanza della capacità o facoltà di disporre'[61].

This approach, however, also followed more recently[62], has been subject to review by Mario Genovese[63], who renewed the exegesis of the passage is concluded that the fragment should be amended in the following wording: *'quia commercium <ei> [eius] non est' or 'quia commercium <ei> eius non est* '. This is because, if indeed it is assumed that the passage refers to a limitation of the relative character, for any people or property or personal categories, suspicion would be the use of a formulation of a general nature as that used by Marcianus, where we talk about something that does not have *commercium*, instead of using the module '*aliquis alicui rei commercium not habere*', just the restrictions on marketability of its character.

I think the point of the question is right here: the wording does not believe that authorizes a reference to a specific asset (*ea res*) and to a certain person (*quam quis emere non potest*): in fact, regardless of the expression *'ea res'*, that need to specify the object covered by the question imperial and being necessary that the not marketability be on a particular asset, that in itself as a category of legal goods, actually using *'quis'* does not need to specify a certain subject, but just to indicate the indeterminacy of the subject under consideration, so that the not marketability embraces that category of goods regardless of the person involved in the legal

[61] G. SCHERILLO, Le cose cit., 30.

[62] M. KASER, Vom Begriff des "commercium" cit., 164 e nt. 107: 'Von den Stellen die nur einer bestimmten Person das commercium an sachen, die als solche im Rechtsverkehr stehen, absprechen, beruft sich nur eine ausdrücklich auf den Kauf: sie sagt, weil diese Person sie nicht kaufen könne sie sie auch nicht als Pfand erhalten'.

[63] M. GENOVESE, Res e relative qualifiche cit., 132 ss.

relationship: specifically, *quis* indicates just one person or thing whose existence is hypothetical (with formula one, someone, if any)[64].

So, the first part of the fragment, from the observations above reported, it does not seem to consider a relative form of not marketability, but a form which we have already experienced in prior fragments and which denotes a form of not marketability in absolute form, as paid to potential buyers, just not predetermined since each is prevented from buying that good (*quis emere non potest*), so get to say, not that *commercium not habere*, symptomatic of relativity, but *commercium non esse*, peculiar of character absolute[65].

At this point it imposes a question: what function covers the following example of the case highlighted by Marcianus and what connection has with the general principle stated by the jurist in the first part on the basis of the imperial rescript?

We must start from some considerations to better understand the case of *praedia litigiosa*: in fact, a measure[66] of Augustus[67] forbade any act of purchase of the fund object of litigation by the litigant not *possessor*, with the sanction of nullity of the purchase and monetary penalty charged to the subject purchaser[68]. The case of the purchase of the

[64] See A. TRAINA – T. BERTOTTI, Sintassi normativa cit., 185.

[65] But M. GENOVESE, Res e relative qualifiche cit., 138: 'Se è quantomeno verosimile, come da noi supposto, che Marciano partisse da un principio normativo affermato dall'imperatore in dipendenza di un caso concreto rispetto a cui si potesse rilevare che a taluno non spettasse commercium di un certa cosa'.

[66] See F. GALLO, "Princeps" e "ius praetorium", in Rivista di diritto romano 1 (2001) http://www .ledonline.it/rivistadirittoromano, 6 ss.

[67] Fragm. de iure fisci 8: Qui contra edictum divi Augusti rem litigiosam a non possidente comparavit, praeterquam quod emptio nullius momenti est, poenam quinquaginta sestertiorum fisco repraesentare compellitur. Res autem litigiosa videtur de qua lis apud suum iudicem delata est. Sed hoc in provincialibus fundis prava usurpatione optinuit.

[68] See F. DE MARINI AVONZO, I limiti alla disponibilità cit., 173 ss. e passim; adde H. P. BENÖIR, Arglist und Kenntnis der Hilfspersonen beim Absclhuß Schuldrechtlicher Geschäfte, in ZSS. 87 (1970) 163; G. PROVERA, La vindicatio caducorum: contributo allo studio del processo fiscale romano (Torino 1964) 149 s.; R. QUADRATO, Sulle tracce dell'annullabilità. Quasi nullus nella giurisprudenza romana (Napoli 1983) 92 ss.; T.

res litigiosa is undergoing an expansion, however, in post-classical age, as to be extended from the bottom quarrelsome, originally planned, to any property in dispute, if it is the same to sanction the purchase of the litigious matter by the fact that the purchase is made by the plaintiff or defendant[69].

The hypothesis considered in the second part of the fragment would seem detached from the general principle expressed in the beginning[70], since it would be aimed at highlighting a ban on selling or buying[71] having relative character because it refers to certain goods and/or certain persons, who as that would not allow you to indent the *praedia litigiosa* between *res quarum commercium not est*.

I think it's possible, however, another way of interpretation: in fact, developing a note of Bonfante, who ascribing the fragment in question to the the assumptions of *res extra commercium* in an absolute sense, noted that 'la designazione (di *res quarum commercium non* est contenuta nella prima parte) abbraccia anche i divieti di alienazione'[72], then it's possible assume that Marcianus, after explaining the general principle regarding *res extra commercium*, is passed to an exemplification citing the case of the funds subject of dispute, for which, similarly to all other *res extra commercium*, the impossibility of sale was extended to cover the case of a pledge. And the exclusion of the pledge of the goods in issue can be explained as the first jurisprudential perspective implicitly fall between

SPAGNUOLO VIGORITA, Exsecranda pernicies. Delatori e fisco nell'età di Costantino (Napoli 1984) 177; H. KIEFNER, Ut lite pendente nil innovetur cit., 119 ss.

[69] CTh 4.5.1 e C. 8.36(37).2.

[70] C. BUSACCA, Studi sulla classificazione cit., 24: 'Poiché non si può ritenere, come risulta dal seguito del testo, che il caso concreto sottoposto all'imperatore fosse quello del fondo litigioso, l'espressione res cuius commercium non est, di cui parla il rescritto, va interpretata nel senso di cosa non suscettibile di rapporti giuridici privati'.

[71] See F. MESSINA VITRANO, La disciplina romana dei negozi giuridici invalidi cit., 8 ss.; G. PROVERA, La vindicatio caducorum cit., 148 nt. 61; F. DE MARINI AVONZO, I limiti alla disponibilità cit., 230 nt. 170, 250 ss.; M. KASER, Von Begriff des "commercium" cit., 164; Das röm. Privatrecht, 1^2 cit., 377 nt. 12, 406; R. QUADRATO, Sulle tracce dell'annullabilità cit., 92 s.; M. TALAMANCA, s.v. Vendita cit., 342.

[72] P. BONFANTE, Corso 2.1 cit., 11.

res excluded from *commercium*, and therefore the prohibition of sales leads, according to the rescript of Antoninus Pius, the not marketability also related to the pledge.

The fragment, therefore, offers a glimpse of res *quarum commercium non est* which category very 'fluid', the result of interpretation of the lawyers, who work on a concept still with uncertain boundaries. However, the proposed interpretation may serve to bring coherence to the discourse of Marcianus, creating an element of connection between the two parts of the fragment, in a key explanatory of *res extra commercium* intended to encompass not only the *res publicae* or *res divini iuris*, but other hypotheses of not marketability of categories of goods than the general indeterminate subjects.

4. *The legacy concerning* the res quarum commercium not est.

The classification returns in

D. 30.39.10 (Ulp. 21 *ad Sab*.): *Sed et ea praedia Caesaris, quae in formam patrimonii redacta sub procuratore patrimonii sunt, si legentur, nec aestimatio eorum debet praestari, quoniam commercium eorum nisi iussu principis non sit, cum distrahi non soleant*.

The passage relates to the particular discipline of imperial funds, forming part of the assets of the emperor and placed under the administration of a *procurator*[73]: in it Ulpian says that in the assumption

[73] On fiscus see U. COLI, Fisco: diritto romano, in NNDI. 7 (Torino 1961) 380 ss.; then O. KARLOWA, Römische Rechtgeschichte, 1 (Leipzig 1885) 505; T. MOMMSEN, Römisches Staatsrecht[3] 3 cit., 998 ss.; O. HIRSCHFELD, Die kaiserliche Verwaltungsbeamten bis auf Diocletian[2] (Berlin 1905, rist. 1975) 1 ss.; B. ELIACHEVITCH, La personnalité juridique en droit privé romain (Paris 1942) 33 ss.; H. NESSELHAUF, Patrimonium und res privata des römischen Kaisers, in Historia Augusta Colloquium, Bonn 1963 (Bonn 1964) 84 ss.; R. ORESTANO, Il problema delle persone giuridiche cit., 241 s.; A. MASI, Ricerche sulla res privata del princeps (Milano 1971) 3 ss.; P. CERAMI, 'Contrahere cum fisco', in AUPA. 34 (Napoli 1975) 897 ss.; T. SPAGNUOLO VIGORITA, Bona caduca e giurisdizione procuratoria agli inizia del terzo secolo d.C., in Labeo 24 (1978) 131 ss.; G. BOULVERT, L'autonomie du droit fiscal: le cas des ventes, in ANRW. 2.14 (Berlin-New York 1982) 817 ss.; P. A. BRUNT, The Fiscus and its Development, in Roman Imperial Themes (Oxford 1990, rist. 1998) 134 s.; F. PERGAMI, Rilievi sulla appartenenza dei fundi rei

that they are the subject of legacy *praedia Caesaris quae in formam patrimonii redacta sub procuratore patrimonii sunt* on the heir does not rest even a duty to pay the *aestimatio* since, Ulpian says, these assets are subtracted from commercium, unless there is *iussum* imperial, because of such property is normally excluded *distractio.*

The fragment was not particularly object of suspicion of interpolation[74], indeed manifesting in doctrine positive assessment about its authenticity[75], while feeding on strong doubts on *nisi iussu principis*, while there are doubts about the genuineness of the reference of Ulpian expression '*quoniam eorum commercium not sit*'.

The fragment, indeed, invests the problem of legacy concerning the *praedia Caesaris quae in formam patrimonii redacta sub procuratore patrimonii sunt* and in particular the relationship that would create between such property and *res extra commercium*: in fact, if Scherillo resorted again once the concept of *res extra commercium* in a relative sense[76], the Bonfante ascribed no doubt, as noted in the fragment analyzed previously, to things excluded from trade in an absolute sense, that at present are part of the heritage of anybody[77].

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publicae alla res privata principis nella legislazione tardo imperiale, in Gaetano Scherillo. Atti Convegno Milano cit., 129 ss.; M. ALPERS, Das nachrepublikanische Finanzsyste. Fiscus und Fisci in der früen Kaiserzeit (Berlin-New York 1995) 1 ss.; E. LO CASCIO, Patrimonium cit., 97 ss., spec. 109 s.

[74] See G. BESELER, Einzelne Stellen, in ZSS. 47 (1927) 372; F. KNIEP, Societas publicorum 1 (Jena 1896) 188; O. GRADENWITZ, Ulpien l. 39 § 7-10 D. 30, in ZSS. 26 (1905) 480; P. BONFANTE, Corso 2.1 cit., 68; M. KASER, Vom Begriff des "commercium" cit., 162 nt. 100; C. A. CANNATA, "Possessio" "possessor" "possidere" nelle fonti giuridiche del basso impero romano (Milano 1962) 149 nt. 10; C. BUSACCA, Studi sulla classificazione cit., 25.

[75] See F. G. SAVAGNONE, Le terre del fisco nello impero romano (Palermo 1900) 40 s.; F. VASSALLI, Concetto e natura del fisco, in Studi Senesi 25 (1908) 92 nt. 1; U. COLI, s.v. Fisco cit., 384 nt. 5; P. DE FRANCISCI, Nuovi appunti intorno al principato, in BIDR. 69 (1966) 78 s.; A. MASI, Ricerche sulla 'res privata' del princeps (Milano 1971) 33 ss.; P. CERAMI, 'Contrahere cum fisco', cit., 361 ss.; F. De MARTINO, Storia della costituzione romana 4.2 (Napoli 1975) 361 ss.; G. BOULVERT, L'autonomie du droit fiscal cit., 836 ss.; E. LO CASCIO, Patrimonium cit., 110 s.

[76] G. SCHERILLO, Le cose cit., 30.

[77] P. BONFANTE, Corso 2.1 cit., 11.

In view, however, of an orientation inclined to exclude the assets subject of the fragment by *res quarum commercium non est*[78], other doctrinal positions manifest together with genuineness of the passage, the belief that the funds imperial object of fragment are unmarketable goods[79].

I believe, however, that if you accept the thesis of the original traceability to Ulpian expression '*quoniam eorum commercium not sit*', necessarily has to find an explanation for the connection that the jurist has among *praedia Caesaris* and not marketability: under this angle of view, i think that Ulpian, in a context of *ius controversum* who works on the category 'magmatica' of *res extra commercium*, has completed an evaluation regarding legacy on a good imperial, referring to the conceptual category of the good out of the trade, however operating assimilation than other goods, as different in legal status, but potentially related to the category *in fieri* of *res extra commercium.*

So it would seem to address what Ulpian says just before § 10:

D. 30.39.8 (Ulp. 21 *ad Sab*.): *Si vero Sallustianos hortos, qui sunt Augusti, vel fundum Albanum, qui principalibus usibus deservit, legaverit quis, furiosi est talia legata testamento adscribere.* 9. *Item campum Martium aut forum romanum vel aedem sacram legari non posse constat.*

If, as we highlighted just before, in § 10 Ulpian explores *patrimonium Caesaris*, excluding marketability[80], in hindsight the speech of the jurist is started before: in fact Ulpian, after noting that it's possible a legacy of good of others[81], having the heir procure the asset to the

[78] See C. FERRINI, Teoria generale dei legati e dei fedecommessi (Modena 1889, rist. 1976) 232 nt. 2; B. BIONDI, Successione testamentaria. Donazioni (Milano 1943) 422 s.; G. GROSSO, I legati nel diritto romano[2] (Torino 1962) 242 nt. 6; F. De MARTINO, Storia della costituzione romana 4.2 cit., 916 nt. 86; E. LO CASCIO, Patrimonium cit., 110.

[79] P. BONFANTE, Corso 2.1 cit., 11; M. KASER, Vom Begriff des "commercium" cit., 162; P. CERAMI, 'Contrahere cum fisco' cit., 362.

[80] M. KASER, Vom Begriff des "commercium" cit., 162: 'Wohl aber stellt D. 30.39.10 das patrimonium Caesaris unter die Sachen ausser commercium',

[81] D. 30.39.7 (Ulp. 21 ad sab.): Constat etiam res alienas legari posse, utique si parari possint, etiamsi difficilis earum paratio sit.

legatee, although this seems complicated, having to pay the otherwise *aestimatio*[82], the general rule is to follow the exceptional cases where it'snot possible a legacy because of its features.

And therein lies the core of the whole reasoning Ulpian: i do not think it's random use of the verb *parare* alluding precisely the time of purchase, because with it the jurist wants to highlight that the legacy of what someone else has validity only when allowing heir, in *legato per damnationem*, to *redimere* the good, except in case of impossibility that allows to the heir pay the *aestimatio* in favor of the legatee. But the case becomes legally divergent profiles, because to be the object of the legacy is not just a good of others, but a good that is subtracted from the *commercium*.

The hypothesis, therefore, that marks Ulpian in §§ 8-10 represent cases of legacy that have as object in the broadest sense a thing of others, which, however, has some peculiarities under which is subtracted from the merchantability, with the result that legally '*legari non posse constat*': so we have the impossibility of legacy of the *horta Sallustiana*, the *fundus Albanus*, but also the Campus Martius, the Roman Forum and the *aedes sacrae*. All examples of *res in usu publico*, such as the Campus Martius or Roman forum, or *res sacrae*, which are combined assets, such as the gardens of Sallust and the *fondo Albano*, for the person of the *princeps*, and as such also subtracted to *commercium* and therefore not liable to be the subject of legacy[83].

At this point, Ulpian, after noting hypothesis of goods undoubtedly out of the *commercium*, then *res quarum commercium not est*, finally examines hypothesis-limit, such as those of the assets of *patrimonium fisci*, for which concludes that, since they do not are normally separated or divided (*'cum distrahi not soleant*'), they constitute goods out of *commercium* and therefore can not be the subject of legacy, unless special

[82] Gai. 2.202: Eoque genere legati etiam aliena res legari potest, ita ut heres rem redimere et praestare aut aestimationem eius dare debeat.
[83] See P. CERAMI, 'Contrahere cum fisco' cit., 362.

iussus principis[84]: whether the exclusion from the legal circuit is certain and established in the cases of § 8 -9, resulting legal impossibility of its related, more nuanced appears Ulpian's statement in relation to the hypothesis contained in § 10, where the same legal consequence, namely the inability to be the subject of legacy, with the corollary of exclusion *redemptio* and *aestimatio*, is surrounded of particular measures, probably because hypothesis that still gave rise to jurisprudential debate and on which rested not certainties.

What has previously been detected would appear to be confirmed in

I. 2.20.4: *Non solum autem testatoris vel heredis res, sed et aliena legari potest: ita ut heres cogatur redimere eam et praestare vel, si non potest redimere, aestimationem eius dare. Sed si talis res sit, cuius non est commercium, nec aestimatio eius debetur, sicuti si campum Martium vel basilicam vel templa vel quae publico usui destinata sunt, legaverit: nam nullius momenti legatum est*.

The text[85] deals of good out of *commercium*: the exemplification and the legal consequences seem to trace almost verbatim what was stated by Ulpian. In fact, the issue is once again that of the legacy good of others[86], which we already know from other sources[87] discipline: as

[84] See F. De MARTINO, Storia della costituzione romana 4.2 cit., 916 nt. 86; S. CASTAN PEREZ-GÒMEZ, Regimen juridico de las concesiones administrativas cit., 64; E. LO CASCIO, Patrimonium cit., 109 ss.

[85] See C. FERRINI, Sulle fonti delle "istituzioni" di Giustiniano cit., 160 ss.; A. EHRHARDT, Litis aestimatio im römischen Formularprozess (München 1934) 25 ss.; M. KASER, Quanti ea res est. Studien zu Methode der Litisästimation im klassischen römischen Recht (München 1935) 88 nt. 15; ID., Vom Begriff des "commercium" cit., 162; E. LEVY, Beweislast im klassichen Recht, in Iura, 3 (1952) 161; B. BIONDI, Successione testamentaria e donazioni (Milano 1955) 423; U. ZILLETTI, La dottrina dell'errore nella storia del diritto romano (Milano 1961) 156 ss.; G. GROSSO, I legati cit., 251 ss.; S. CASTAN PEREZ-GÒMEZ, Regimen juridico de las concesiones administrativas cit., 68; C. BUSACCA, Studi sulla classificazione cit., 25 ss.; M. GENOVESE, Res e relative qualifiche cit., 114 ss.

[86] See P. VOCI, s.v. Legato (diritto romano), in ED. 22 (Milano 1973) 715 e nt. 80; then, C. FERRINI, Teoria generale dei legati e dei fedecommessi cit., 288 ss.; B. BIONDI, Successione testamentaria cit., 243 ss.; G. GROSSO, I legati cit., 244; P. VOCI, Diritto

already reported by Gai. 2.202, which takes over the wording, the legacy that has as its object a good not of the testator or of the heir obliges it to redeem the good, that is to buy it for *praestare* to the legatee: where the *redemptio* was impossible, was the heir *aestimatio* held to the legatee.

If this is the general principle, the institutional passage deepens the discussion with reference to that good '*cuius non est commercium*': in this case, exemplified with reference to the cases of the Campus Martius, basilicas and temples, and of those things '*quae publico usui destinata sunt*', the *Institutiones* contend that the legacy is void ('*nullius moments*'), not being the heir to *redempio* neither obliged nor the *aestimatio*.

The feeling that emerges from institutional passage is to ascribe a desire to reach classificatory category of *res quarum commercium non* est: category already widely present in case law and that by means of the hypothesis of legacy of good of others by compilers risen to classification general, which incorporates various classes of goods, some, like the *res divini iuris*, still kept out by Pomponio in D. 18.1.6 pr.

5. *Conclusions: the* res extra commercium *as open category includes acts excluded from the sale*.

The fragment analysis conducted up to now has shown that the classical jurists widely say of res excluded from *commercium*, frequently using the expressions of *res quarum* or *eorum commercium not est*[88] or *res cuius commercium non est*[89]or *commercium eius non est*[90], all expressions, we detected, whose authenticity is difficult to doubt, why is a conservative approach adopted in this regard.

The expressions mentioned, often in different contexts thematically, however, are all used by lawyers in negative, indicating significantly those assets excluded from *commercium*. From a content point of view, the

ereditario romano[2]. 2. Successione ab intestato. Successione testamentaria (Milano 1963) 252.

[87] Gai. 2.202 e 262; D. 30.71.3; 32.14.2; 32.30.6; 35.2.61.

[88] D. 18.1.6 pr.; 30.39.10

[89] I. 2.20.4.

[90] D. 20.3.1.2.

category outlined in a negative, is configured not as *numerus clausus*, but as a container of goods in time, in the game of *ius controversum*, are gradually subsumed in it.

So, if in Pomponius still *res sacrae* appear excluded from *res extra commercium*, Ulpian later seems inclined to encompass them, mentioning the *aedes sacrae*, listing in the *Institutiones* of Justinian expand to contain the basilicas and temples. No doubt, however, the inclusion of the *res in publico usu*, even if the speech of Ulpian in D. 30.39.10 seems to reveal the uncertainty about the fate of the goods components *patrimonium principis*, distinguished itself from *ratio privata*.

Uncertainty about the boundaries of *res quarum commercium non est*, it juxtaposes a heterogeneity of reflections jurisprudential also functionally category: the common thread, however, is the exclusion from the buy and sale, as suggested already Ulp. Reg. 19.5[91] in reference to meaning of *commercium*[92], and as is shown by the fact that two important examples, such as those offered to us by D. 18.1.6 pr. and D. 18.1.34.1 consequence of selling, the not marketability of the object of which entailed the nullity of the same.

In this regard, the very discussion in D. 20.3.1.2 extent also to the pledge, as well as to the sale, as a consequence of not marketability, on the basis of the rescript of Antoninus Pius, endorse the idea that from a legal category of *res quarum commercium not est* had settled, functionally, which ousted set of goods, on pain of nullity, by the use of those formal acts, in principle probably the *gesta aes et libram*, presenting a buy and a sell, that would supplement the most important acts of exchange, in line with the meaning of *commercium*[93].

[91] Commercium est emendi vendendique invicem ius.

[92] See A. CORBINO, Diritto privato romano[2] cit., 287: 'Il ius commercii comportava la facoltà di compiere attività di scambio delle "merci" (delle cose aventi cioè rilievo economico) con le stesse forme e gli stessi effetti giuridici (trasferimento e acquisto della loro "proprietà") che si avevano quando quelle attività intervenivano tra Romani'.

[93] See G. HUMBERT, Commercium cit., 1406: 'Le commercium ou jus commercii peut être envisagé en droit romain par rapport aux personnes ou aux choses. Sous le premier point

The exclusion from the traffic law of *res quarum commercium non est* have consequences: the discourse conducted by Ulpian in D. 30.39.7-10 highlights how jurists suddenly sense the potential expansive category, with effects that went far beyond the simple ban of sell. If, in fact, the pledge, could also indirectly lead to the purchase of the property or the proceeds of the asset seized by the pledgee, is to be included among the effects of not marketability, same analogical reasoning leads to exclude the possibility of applying the discipline of legacy of good of others to *res extra commercium*, on the basis of the reasoning by which the legacy of good of others the heir is obliged to *'parare'*, i.e. to purchase the property, activities we have detected be prohibited for *res extra commercium*: with the result exceptional as to be excluded also the duty to pay the *aestimatio*, probably ruling out that such property by their nature are subject to evaluation.

The workings of the classical jurists, ranging from Pomponius to Paulus in Ulpian in Marcianus, confirms the presence, already in the age of the Principato, of distinction within the *res*, in which stands firm foundation with the category of *res quarum commercium not est*: it is, for the reasons set out above, a category stable in the statements of *iuris periti*, but on which appears the incessant work of interpretation face, not to assert its existence, but to expand the goods on and expand the analogy mesh of the legal effects of the new understanding in it.

Likely, this is *interpretatio* to stand in close relationship with the concept of *commercium*[94] that, taking origin from the exchange of *merx*[95], indicates, as has often been pointed out, the act of buying and selling[96]:

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de vue c'est le droit de participer à un contrat ou à une manière d'acquérir la propriété admise par le droit civil romaine'.

[94] Isid. or. 5.25.35: Commercium dictum a mercibus, quo nomine res venales appellamus.

[95] See E. FORCELLINI, Lexicon totius latinitatis 3 (Patavii 1805) s.v. merx: res ipsa, quae emitur, venditurve.

[96] Cic. Verr. 6.59: Commercium alicuius rei habere dicitur is, qui eam vel alienare, vel acquirere potest; C. 4.40.3 (Imperatores Arcadius, Honorius): Quia nonnunquam in diversis litoribus distrahi publici canonis frumenta dicuntur, vendentes et ementes sciant capitali poenae se esse subdendos et in fraudem publicam commercia contracta damnari;

the renewed consideration of the case law on meaning of *commercium* serves to create a circularity with respect to the scope of our figure, with the effect of influencing the same scope of it, where the legal act tent to realize a type of ownership.

> **In I. 2.20.4** it's possible see a now crystallized characterization of the figure of *res quarum commercium non est* emerges, regardless of legacy, with greater clarity: the step Justinian seems to tend to stabilize a figure, whose character classification of goods in categories has already emerged gradually in the thinking of the classical jurists, but whose 'mobili frontiere' have characterized the debate in the jurisprudence of the Principato, with the effect that its vagueness in terms of content might help to explain the absence in the *Institutiones* of Gaius.

C. 4.42.2.1 (Imperator Leo): Barbarae autem gentis eunuchos extra loca nostro imperio subiecta factos cunctis negotiatoribus vel quibuscumque aliis emendi in commerciis et vendendi ubi voluerint tribuimus facultatem; C. 4.63.3 (Imperatores Honorius, Theodosius): Nobiliores natalibus et honorum luce conspicuos et patrimonio ditiores perniciosum urbibus mercimonium exercere prohibemus, ut inter plebeium et negotiatorem facilius sit emendi vendendique commercium.