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ABOUT LEGAL NOTIONS: CESSION, NOVATION, SUBROGATION AND ASSIGNATION

Abstract

This paper deals with the legal notions of cession, novation, subrogation and assignation in comparative perspective and especially with regard to their understanding and treatment in Roman law. At the outset the paper presents some general legal problems connected with the legal definition of the abovementioned legal terms in order to clarify their exact legal meaning.

The Paper especially deals with the definitions of ***cessio*** and ***novatio*** in the Roman legal system according to Gaius and Justinian and with the notion of the doctrine of ***res judicata***.

In conclusion the author proposes further analysis and reconsideration of the domestic regulation of the mentioned legal institutes and avoidance of duplication in domestic laws and regulations with acceptance of different legal solutions from different legal systems which are not consistent with the basic legal structure of the domestic legal system.

Keywords: Cession, novation, subrogation, assignment, res judicata, surety, insurance, transfer of debt, transfer of claims, change of parties in obligations

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This paper makes an attempt at reconsideration of a number of notions in domestic civil and commercial (obligations) law, which appear to me insufficiently conceptualized in the exiting legal solutions. In this context we could at least consider their different regulation. Basically this relates to legal notions of subrogation and assignation and their place in the domestic legal system. But in order to be able to comprehend these notions at all, we must first start from what seems to be their relevant legal basis: legal institutes of cession and novation, as well as the known court proceedings principle– res judicata.

To better understand cession and novation, we will revert to their sources in the Institutes of Gaius and Justinian. I consider that both works were a reflection of Ancient Egyptian law (adapted to the local needs), whereas the legal system described in them largely depended on the time period in which either Rome or Macedonia (Byzantine) occupied Egypt.

Cessio, as a legal institute, was defined by Gaius as the way of transfer of things carried out before the magistrate (state official, mainly praetor or president of province) in the form of "legal suit" (legis actio).[2] In his Institutes things are divided into res mancipi (roughly "things that may be touched with a hand and may be held in possession") and res nec mancipi (roughly "things that may not be touch with a hand").[3] At his time res nec mancipi were transferred by traditio (according to natural law: if it was a corporeal thing and could be delivered), while res mancipi were transferred by mancipation and in jure cessio. Apart from rural servitudes, all other incorporal things (for example, usufruct, right to use, urban servitude, inheritance etc..) were created or transferred before a magistrate in *in jure cession* proceedings (if they related to things in Italy) or by contract (pact or stipulatio, if they related to things in provinces).

Although Gaius refers to property or real rights and obligations as ***"incorporeal things" ("obviously incapable of transfer by delivery of possession - traditio"),***[4] one must note that the procedure for creation or ***transfer of right in jure cession relates only to property or real rights, but not to obligations.*** According to Gaius: "38. Obligations, in whatever way contracted, are incapable of transfer by either method. For if I wish to transfer to you my claim against a third

[2]Gai, Institvtiones or Institutes of Roman Law by Gaius, with a translation and commentary by the late Edward Poste, M.A. Oxford, Clarendon Press, 1904, paragraph 24 p. 134.
[3]Accoding to Gaius res mancipi are all immovables in Italy, domestic animals (i.e. tame animals or animals which may be tamed) and rustic servitudes over immovables in Italy. According to him, res nec mancipi are urban servitudes, wild beasts, land in provinces, in state (stipendiary) or imperial (tributary estates) ownership and all incorporeal things (except rustic servitudes).
[4]Gai, ibid, paragraph 28, page 140.

person, none of the modes whereby corporeal things are transferred is effective: but it is necessary that at my order the debtor should bind himself to you by stipulation: whereupon my debtor is discharged of his debt to me and becomes liable to you; which transformation is called novation of an obligation. 39. In default of such novation he cannot sue in his own name, but must sue in my name as my cognitor or procurator. "[5]

Gaius also writes that novation is one of the methods for extinguishing of obligations[6], and gives an example of something today known as take-over of debt. One may conclude from the Gaius' work that ***in jure cession procedure was designed for incorporeal property or real rights***, whereas any change in case of ***obligations was made with the help of novatio***. In the first case, it was necessary to have the presence of praetor or another magistrate who carried out transfer of the property right with a decision as in court proceedings (and recorded it in his notebook - album), while the relationship in case of *inter partes* obligations required each and every change in the given obligation to be carried out by novation, i.e. replacement of old with new obligation (irrespective of the fact whether a change implies replacement of parties or more substantive alteration of the agreed obligation).

Nearly identical situation may be seen in the Institutes of Justinian, but in a slightly different form. The Institutes of Justinian abolish the division of things into *res mancipi* and *res nec mancipi*, and thereby the modalities of their transfer changed. The basic method of transfer for all ***corporeal things is traditio***, while all ***incorporeal things are transferred either by pact (agreement) or stipulation***. Justinian also retains the difference in transfer between property rights and obligations. Although in his case, the transfer of real rights is carried out by pact or stipulation (agreement or contract), he continues to use the term cession for such transfers, what is particularly apparent for security rights and transfer of right of disposal (*abusus*) in case of bankruptcy or insolvency (*cessio bonorum*). The same as Gaius, he explicitly states that transfer and cancellation of obligations in carried out by ***novatio***. As previously obligations are here considered legal tie *inter partes* and since obligations are defined as "tie of law, which binds us, according to the rules of our civil law, to render something", and ***each change of parties in an obligation*** or of ***agreed contents of obligations*** is treated by Justinian also as ***novatio***. At that it is completely unimportant whether it refers to the alteration of debtor or creditor or the substantial change of the agreement.

[5]Gai, ibid, paragraphs 38 and 39, page 143.
[6]Gai, ibid, paragraph 176-179, page 391.

In essence, the old contract is annulled and a new one is created and that operation is called novation.[7] To avoid problems occurring in practice due to difference of opinions, in particular caused by the subsequent insertion of various conditions in agreements and contracts, the Institutes add that: "In consequence, our constitution was published, in which it was clearly decided that novation shall only take place when the contracting parties have expressly declared that their object in making the new contract is to extinguish the old one; otherwise the former obligation will remain binding, while the second is added to it, so that each contract will give rise to an obligation still in force, according to the provisions of our constitution……"[8]

Throughout the texts of the Institutes of Gaius and of Justinian, it is quite obvious that obligations are changed only by novation what implies an utterly new contract, ***i.e. obligation that annuls the previous one.*** This is the case irrespective of the fact whether it is about the change of parties or substantial alteration of the agreed obligation. Obligations are treated as a personal tie (*inter partes*) and any change was considered novation.

As distinct from obligations, ***property rights (as incorporeal things) were transferred only by contract, but the text only uses the word cessio.***

This situation changed in the late Byzantine empire when following a discovery of mechanical printing machines the circle of individuals around ***patriarch Joseph II of Constantinople (Georgius Gemistus Pletho)***, made a key turning point in the classification of things and ***included only material or corporeal thing in things or res.*** Their transfer is regulated by tradition or registration. However, much more interesting is development in the area of "incorporeal things". ***Incorporeal things are now not treated as a "thing"(res), but as right (real or obligation).*** Novation, i.e. conclusion of a new contract abolishing old obligation and creating a new one, is kept for obligation rights and their alteration. But this time the notion of cession is expanded to the transfer of real rights and to the transfer of obligations, the cession not being understood as a court complaint procedure or proceedings before a magistrate ***(state official in this case eparch, as a successor to the position of praetor), but as a contract.*** When it comes to transfer a real right, no matter by which contract that right is transferred, the very act of transfer of that right is called *cessio*. For example, all real rights are transferred by a pact or stipulation

[7] Thomas Collett Sandars, Institutes of Justinian, Callaghan & Company, Chicago, 1876,,Book III, Title XXIX, paragraph 3, page 474.
[8]Ibid,, Book III, Title XXIX, paragraph 3, page 476.

(ownership, servitude, right to use, security rights, right to inheritance, co-ownership etc.), but the transfer of *titulus* (right) itself contained in the contract is called *cessio* (transfer).

In contrast to real rights, in case of obligations there appeared a need a third party to step into the shoes of his predecessor without a new contract being concluded (i.e. without novation) and that is why apart from novation, cession was allowed for obligations, i.e. transfer of a right (obligation) ensuing from the existing contract which remains in force. In the case of cession of obligations, nothing is changed in the contract except for the parties in the *inter partes* relation, what does not have to be the case for novation (because the negotiating power of parties may have changed in the meantime).

In this manner, cession became the method for transfer of real and obligation rights that does not lead to annulment of the existing relationship but to the change of parties to that relationship (similar to real rights transfer). Neither Gaius nor Justinian made a difference between "ceding of claims", "debt takeover" or "accession to debt". For them it is all the same whether the contract is changed or a party to the obligation is replaced by a third party. It is all novation for them. Later on with the changes made by Pletho, all this is novation or cession depending on whether the existing obligations remain in force (cession) or are replaced by new ones (novation). Today's distinction between "ceding of debts", "debt takeover" etc. is a result of feudal relict reflected in the modern civil and obligation codifications and is in my opinion utterly unnecessary.

According to the Justinian's Institutes: "Every obligation is dissolved by the payment of the thing due, or of something else given in its place with the consent of the creditor. And it makes no difference whether it is the debtor himself who pays, or someone else for him; for the debtor is freed from the obligation, if payment is made by a third person, and that either with or without the knowledge of the debtor, or even against his will. If the debtor pays, all those who have become surety for him are thereby freed, just as if a surety pays, not only he himself is freed, but the principal is freed also."[9]

In view of that fact that sureties are considered persons acting under a ***mandate*** (given by their principal – debtor) ***following a debt payment,*** surety may sue his principal (debtor) with the suit for mandates contract (*actio mandati*). Justinian also states that: "4. The exceptions given for the protection of the debtor are also for the most part given in behalf of his fidejusores, and rightly

[9]Ibid, BookIII, Title XXIX, p.471.

so; for what is demanded from them is really demanded from the debtor, because by the *actio mandati* he will be forced to repay them what they have paid for him."[10]

One further mater that must be taken into account is that according to both Gaius and Justinian ***filing a suit is a personal thing and consequently it is impossible to have "transfer of right to sue"or "cession of right to sue"*** for a simple reason that the right to sue is not treated as a real right. According to Justinian, "An action is nothing else than the right of suing before a judge for that which is due to us".[11] He adds that earlier it was forbidden to sue on someone else's behalf, and all plaintiffs had to do it personally. But since there were practical problems and situations which realistically required another person to appear in trial instead of a plaintiff, it became a regular practice a plaintiff to appoint a procurator. As stated in the Institutes "1. A procurator is appointed without any particular form of words, nor is the presence of the adverse party required; indeed, it is generally done without his knowledge. For any one is considered to be your procurator who is employed to bring or to defend an action for you"[12]

One may see from the above that Roman law allowed only for a situation in which a procurator or a cognitor acts ***"on behalf of a party to the dispute"***. Neither Gaius nor Justinian recognizes something like "cession or transfer of the right to sue".

Subrogation and assignation

A more interesting legal institute present in today's legal systems is the so-called ***subrogation.*** The notion of subrogation is utterly different in different legal systems (the same as definitions of notions of "cession" and "novation"), and I will start from the domestic understanding of this notion. In our Law on Obligations, subrogation is placed in Chapter "Fulfillment or dissolution" (of obligations) and as a special type of "dissolution by subrogation", and is defined as "(1) In case of fulfillment of somebody else's obligation, every fulfiller may agree with the creditor, before or during fulfillment, the fulfilled claim to be transferred on him with all or with some of the secondary rights"[13]. "Transfer of rights of creditor to guarantor"

[10]Ibid, Book IV, Title XIV, paragraph 4, p. 569.
[11]Ibid, Book IV,Title VI (Actiones), p. 507.
[12] Ibid, Book IV,Title X, paragraph1, p. 553.
[13]Law on Obligations, Off. Gazz no 18/01, 4/02, 5/03, 84/08, 81/09, 161/09 and Decisions of the Counstitutional Court U no. 121/01, no 67/02, article 288 paragraph 1.

(Article 1042) and "transfer of rights of an insured person in relations to to tortfeasor to the insurer**"** (Article 995)[14] are listed as specific cases of subrogation.

In essence, subrogation is a new age invention resulting from an unfortunate understanding of Gaius and Justinian and their comprehension of the institute "*res judicata*" and of a number of other notions of that time. The Institutes of Gaius, right after the clarification of novation as another way of annulment of the previously existing obligation and creation of a new one, list another way of annulment of obligations which could today be provisionally called "judicial novation". Gaius states that when a legal action is taken in court in respect of an obligation, then following the plaintiff's action, the previously existing obligation is annulled and a respective court judgment becomes a new obligation for the parties to the court proceedings. That new obligation is contained in the judgment and results from it. The previous obligation ceased to exist and following a judgment delivery, parties are obliged to fulfill the court judgment. Because of the importance of understanding this issue, this paragraph by Gaius is given bellow in its entirety:

"The extinction of an obligation is also effected by joinder of issue (litis contestatio) at least of a statutable action (judicium legitimum, 4 § 104). Then the original obligation is dissolved, and a new obligation is imposed on the defendant, by joinder of issue. But if he is condemned, the obligation arising from the joinder of issue is discharged, and a new obligation arises from the judgment. Hence the saying of the old jurists, that, before action brought, a debtor is bound to pay his debt; after joinder of issue he is bound by the condemnation of the formula; after condemnation passed, he is bound to satisfy the judgment".[15]

Gaius does not name this *novatio*, but only notes that if action is brought in respect of a certain obligation, that obligation is annulled and following a relevant judgment, the prior obligation is not fulfilled but a court decision is. A court judgment becomes an obligation for the parties.

Depending on whether a new action may be brought on the same issue, Gaius differentiates between situations in which the court ***ex officio (ipso jure)*** takes care of the principle *res judicata* and will not allow new court proceedings for the same issue between the same parties and situations in which the party himself must make an exception for ***res judicata*** (i.e. the court does

[14] For theoretical explication of subrogation and the difference between it and cession and other above-mentioned institutes, see the textbook "Obligations Law ", Professor Gale Galev, Ph.D., Professor Jadranka Dabovic-Anastasovska, CEPPE, Skopje, 2009, pages 199-225, 323-328.

[15]Gaius, Ibid. paragraph 180, p.392.

not take this principle into consideration *ex officio*). The latter situation appears if a previous decision was not made in a legal action before court, but was made by a praetor in provinces or when one of the parties was a foreigner (peregrine, a person who is not a Roman citizen). In both situations the principle res judicata applies, but a basic difference is whether a court applies it *ex officio* or a party himself must make an exception for that.[16]

In the Justinian's Institutes there is only one paragraph in which a party may make *res judicata* exception. In a special chapter "Exceptions" (in civil proceedings) the Justinian's Institutes state the following: "Again, if an action real or personal has been brought against you, the obligation still subsists, and, in strict law, an action might still be brought against you for the same object, but you are protected by the exception rei judicatae".[17] We may conclude that this paragraph may be interpreted in two ways: (1) that in this system, the court does not *ex officio* apply the principle *res judicata;* or (2) that as long as a judgment has not been made in the first proceedings for the same matter, the obligation exists and if the second action is brought for the same obligation, the defendant may stop it by calling for exception *res judicata*. Especially because at the time of Justinian there was already two instance procedure and appeal procedure and the origins of notion of finality of judgments. The basic distinction in this case (if we presume that the option 2 is more likely) would be that Gaius wrote that obligation was annulled the moment an action was brought, while Justinian's position was that it happened when the judgment was made. Although he does not go into details of exceptions, there are indications that some are taken care of *ex officio*, while for some a party to the proceedings had to declare it in the proceedings.

[16]Gaius, ibid, paragraph 181,p. 393 and paragraph 106 p. 535. I am not going to present the whole system in detail but in short Gaius makes a distinction between legal actions presented in court and honorary actions presented before a praetor in provinces. After one party has lodged a legal action and the other party appears in court, the old obligation is annulled and a new obligation consists of a pleading (suit request) or motions (formulation of guilt) and later of a judgment text. In case of legal actions, the court will not allow ex officio (ipso jure) the initiation of another proceedings for the same matter, because the principle of res judicata starts to be applied at the moment the defendant appeared in court (litis contestatio). In contrast to this situation, if an action is not lodged in court (i.e.is not a legal action) but before a praetor, the effect of res judicata exists since the moment the defendant appeared in court, but the court do not apply it ipso jure. If another action for the same matter is lodged at the same time, the parties themselves have to declare exception (exceptio) for res judicata: that there is a judgment for that matter or that there is an ongoing proceedings before another court. This is due to the fact that by lodging action before a praetor, obligations with is a subject of a dispute is not annulled, but continues to exist. This theoretically means that several proceedings may be initiated for the same matter, if parties did not declare exception res judicata. This was further complicated by the fact whether the action related to legal or factual issue. For that, see Gaius, paragraphs 104-109, pp. 535-536.

[17]Justinian, ibid.,BookIV, Title XIII, paragraph 5, p. 564.

However a fact remains that while proceedings is under way the disputed obligation is considered valid and is not extinct automatically (although any other proceedings may block it with exception *res judicata*). Furthermore, for the purpose of understanding the way in which civil proceedings were conducted at that time, it is relevant to know provisions on deposition of securities (as a guarantee that no other action will be taken in respect of the same dispute) or placing the defendant's property in mortgage, in the course of the proceedings.

A large number of authors who researched origins of subrogation note that it first appeared in France and England (common law countries) but all claims in respect of its origination in Roman law are utterly wrongful.

Exploring the origin of subrogation in England, Buckland concludes that it was in a way taken over from France but researching the French sources of its origin notes that the French reference to the Roman roots of subrogation are completely erroneous.[18] In France at the time of adoption of the Civil Code subrogation is defined as "fiction of law by which the creditor is regarded as ceding his rights and privileges to one from whom he receives his money" (Pothier) or as "juridical fiction by reason of which a debtor extinguished by payment by a third party, or by a debtor with money provided by a third party, is regarded as still existing for the benefit of the third party, to the extent of his payment" (J. Flach).[19] However Roman law does not recognize the notion of "ceding claims or debt". In Roman law, obligations are strictly personal relations and any change is called "novation" i.e. new contract. Cession of claims or debt (i.e. cession of obligations) is a late Byzantine invention and is not rooted either in Gaius' or Justinian's work.

If it comes to a guarantee, the above example makes it obvious that a gaurantor had *actio mandati* against the main debtor because he was considered a mandator of his principal (debtor). If it comes to the replacement of a creditor, Roman law knows only about novation, while at the time of Pletho, cession is also applied (when there is no new obligation but a person who takes over "steps into the shoes of his predecessor in the same legal relation").

Many authors (most likely prompted by a misunderstanding of Savigny) find the second basis of subrogation in "Roman law" in a Roman institute or doctrine cession actionum (transfer of right to sue) which actually did not exist at that time. As we have already seen, actions at that

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[18] W.W. Buckland, M.A., Equity in Roman Law, University of London Press, London, 1911, pp.47-55.
[19] See Pothier, Treaties on Obligations, considered in a moral and legal view, Newbern, N.C., Martin & Ogden, 1802.

time were considered strictly personal matter and one can find nothing resembling of "transfer of right to sue" either Gaius' or Justinian's work.

Moreover, the damages itself (injuria) was treated the same way as today: as obligations, i.e. as strictly personal legal relations between the tortfeasor and the victim of tort caused by a harmful act. A harmful act having been carried out, there appears an obligation to compensate damages (similar to the obligation to deliver a thing or to pay a sales price, but here obligation is not a result of a contract but of a harmful act). Accordingly all other rules relevant to obligations applied to damage as well. What would then be the difference between cession and subrogation if today the American literature defines subrogation as "replacement of one person (party) with another".

Here we arrive to the question why subrogation or what is called in some legal systems "legal cession" was invented. In his review of historical development of subrogation doctrine, Marasinghe indirectly links it to the development of insurance industry.[20] But even if this is a correct assumption, after detailed consideration of the issue, I see no reason for its necessity. It is true that in some systems "cession" meant transfer of a complete claim (not of its part) and there appeared problems in court proceedings as to who should be a party in relation to the tortfeasor. But it may be corrected much easier than by inventing a whole legal institute.[21]

Common law systems resorted to the doctrine of unjust enrichment, which was further complicated with the so-called equity right of the insurer and legal right of the insured. However, if all this may have some sense in common law systems, there are genuinely no need for that in civil law systems (and even less in those considering only material things as res).

If one makes a comparative review of the existing systems today, one may conclude that in one way or another all of them are inconsistent in relation to the transfer of debts and claims, viewed from the perspective of classification of things, division of rights to real rights and obligations etc. (i.e. from the perspective of what was important to Roman lawyers to whom systematization of law based on reason and logical principles was an ultimate ideal and objective). In some US federal states whose legal systems bear traces of common law and civil law countries,

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[20]M.L. Marasinghe, An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine I, Valparaiso University Law Review, Vol. 10, Number 1, 1975, pp. 45-65.

[21]For example see Jennifer A. Bueler, Understanding the Difference between the Right to Subrogation and Assignment of an Insurance Claim – Keisker v. Farmer, Missouri Law Review, Vol. 68, Issue 4, University of Missouri School of Law, 2003.

a difference is even made among assignment, cession and subrogation (what is basically the same), but they invented totally different rules for the three matters that differ slightly. In their literature, the term assignment usually implies cession, but it all depends which is the federal state we are talking about, who is the author and what he understood of all of that.[22]

The situation is not different in civil law countries. To take the example of the domestic Law on Obligations which contains separate provisions on cession and subrogation, and even for some sort of assignation (when they wanted to meet desires of certain banks in the country).[23]

It is quite apparent that the European legal systems, before adoption of big codifications, were "suffering from greatness" and tried to revert to Gaius and treated cession as the method of transfer of *res*, in line with their classification of things in "corporal" and "incorporeal". However it is still obvious that they got entangled in this problem and did not develop consequent solutions or were "lost in practice" (what we may witness today). It is obvious that they wanted to restore cession as a method of transfer, but the time for that was over.

Against this background and for the purpose of simplifying legal solutions in the system, I consider that we should engage in theoretical clarification of these legal institutes which duplicate in one way or another. In my opinion, the existence of cession (as understood by late Byzantine lawyers) and novation is quite sufficient for resolution of all practical problems which were additionally complicated by uncritical insertion of legal institutes from other legal systems (which may have a different classification basis or conceptualization in the domestic legal system).

References:

[22]For doctrine of res judicata in entire this context see: Albrecht Zeuner and Harald Koch, Effects of Judgments (Res judicata), IECL, Installment 41, Brill, 2012. For this doctrine in the domestic law see: Arsen Janevski and Tatjana Zoroska Kamilovska, Civil Procedure Law, Justinianus Primus, 2012 (second edition), pp. 455-459.

[23]See Law on Obligations: cession (art. 424ss.), novation (art. 337ss.), subrogation (art 288ss.) and assignation (art. 1059ss.). One may also note that the domestic law does not appear to be familiar with the concept of paper of value (security) and speaks about cession for the transfer of some of them similarly to the common law systems (which do not have a concept of Wertpapier).

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