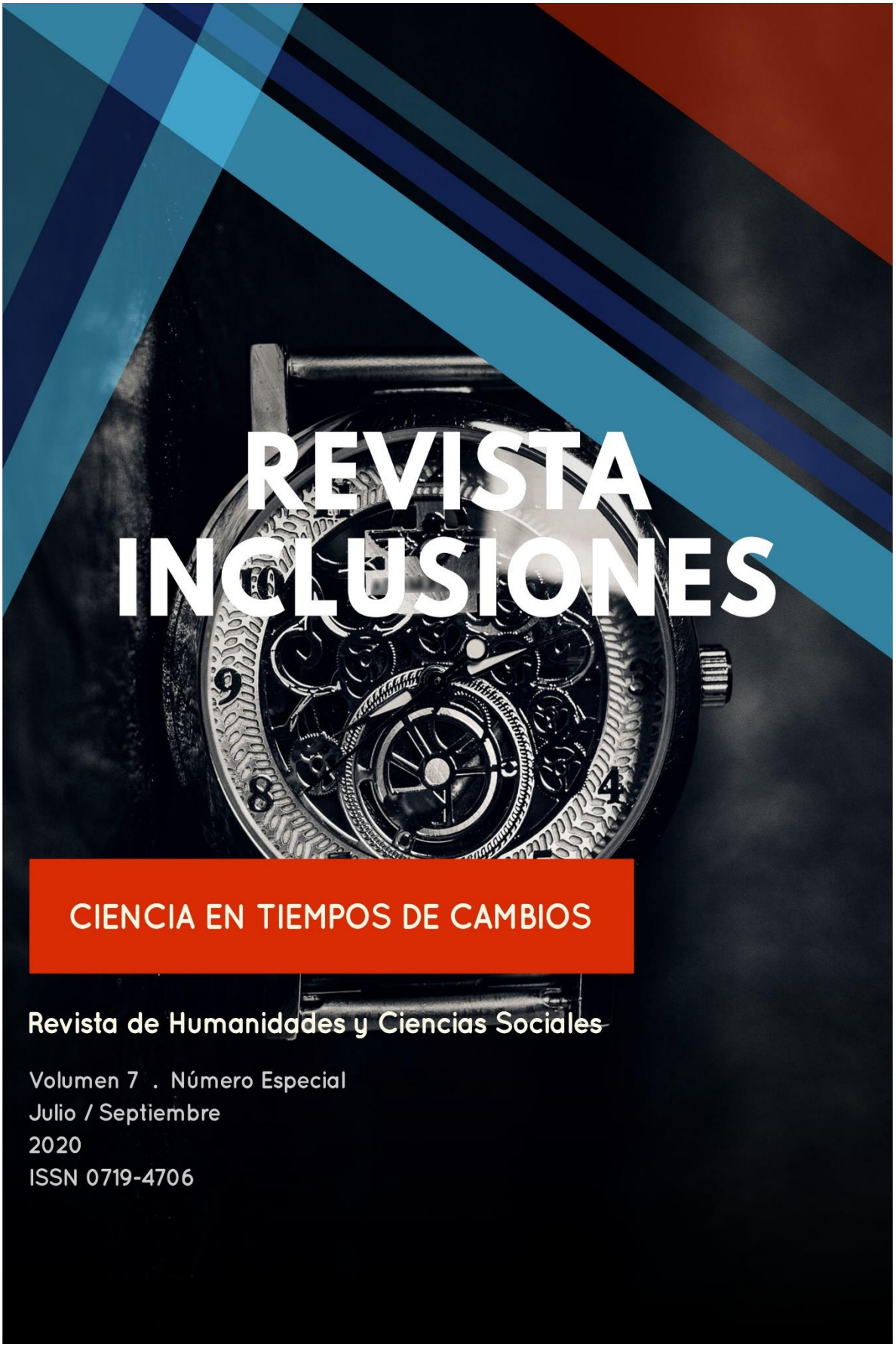

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THE EMERGENCE AND FIRST STAGES OF THE DEVELOPMENT OF COMMON OWNERSHIP

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Abstract

The study discusses the emergence of relations of common ownership and the first steps of the civil law institution, which originates from the law of Ancient Rome. The connection of communal ownership, joint possession, common ownership, as well as communities based on property (juridical person, partnership and others), and their influence on similar modern institutions is shown. The purpose of the study is to find out how joint possession grew into communal ownership right and then into personal right and common ownership right. What is the role of these processes in the emergence of legal institutions based on the property community? Is there a connection between the modern institute of common ownership and communal ownership right and the Roman institute of common ownership? Are ancient institutions valuable at present?

Keywords

Ownership – Ownership right – Joint possession – Juridical person – Partnership

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Introduction

Ownership right is the central institution of private law and, due to this, it has been studied in sufficient detail. One of the types of ownership is the common ownership right. It would be logical to assume that it has been studied just as carefully, but upon close examination, it turns out that this is not true. Many questions remain controversial and unclear. The answers to them can be given by a study of the history of the institution of common ownership. Roman law provides the most detailed information about this, since, first, it is extremely well developed and, second, it most accurately reflects the life processes characteristic of the vast majority of social entities that world history knows.

Knowledge of Roman law and its institutions, including ownership right, is mainly derived from educational literature (D. D. Grimm, S. A. Muromtsev, C. Ando, P. Plessis, K. Tuori and others). References to Roman law are available in monographs on ownership right (E. A. Sukhanov, U. B. Filatova and others). At the same time, there are no studies specifically devoted to common ownership, precisely from the point of view of its appearance and development.

Methods

Using the historical research method, we established a chronological sequence of events that led to the emergence of common ownership. With the help of the comparative research method, the general and distinctive features of the modern institution of common ownership with its predecessors in Roman law were revealed. The method of classification and systematization was used to describe institutions arising from the joint possession of things.

Results

The emergence of communal ownership and possession

The works of the most authoritative experts in the field of law of Ancient Rome start with a description of the times when Roman tribes began to occupy certain lands and considered them their own, protecting and separating them from the lands of other communities and clans. In particular, I. A. Pokrovskii wrote that a settled way of life led community members and clans to the idea that the lands they occupied belonged to them. The neighboring lands, on which other communities and clans settled, were no longer common, but alien. Thus, a feeling of belonging to the community and the clan of completely defined territories arose, which became the right of communal and clan ownership of land.

Similar processes occurred in smaller units of the community – families. They also strived to separate their land possession, but such possession was still far from ownership. According to Pokrovskii, the law of Ancient Rome for a long time considered the family not as the full owner of the land it occupied, but as an entity whose ownership was delegated: “the original ‘Quirite ownership’ (*dominium ex jure Quiritium*) meant only the right to the famous ‘draw’ in the communal land, on some ‘quota’ of it, that the word *fundus* meant more of the ‘allotment’ than the real area of the land”[1]. Therefore, we see the emergence of what is now called a share in the ownership right. It is interesting to note that the share from the moment of its appearance was of ideal nature.

[1] I. A. Pokrovskii, Istoriia rimskogo prava (Petrograd: Letnii Sad, 1917).

The protection of communal ownership and possession

Possession of public land must be protected and Roman jurists developed possession interdicts for this. Most likely, the very first type of possession that was protected by such interdict was *posessio agri publici*. That is, possession protection, which is now associated with ownership right, is older than this right and originated from the protection of their possession by a participant in communal ownership. A similar conclusion was made by N. P. Bogolepov, who also found a connection between the authority of possession and the possession of public land[2].

Initially, we suggested that the term *agri publici* could mean public land in the sense that it is owned by the state and then our conclusion about the origin of the possessor's protection could be called into question. However, S. A. Muromtsev managed to find that the term *ager publicus* meant land belonging precisely to the community, which after the fall of the communal system passed into the possession of individual families, giving rise to private possession[3]. The conclusion that modern ownership right has come out of *posessio agri publici* is also confirmed in modern foreign literature[4]. Under such circumstances, there is no doubt that possession protection is not just older than the right of personal ownership. It is also genetically related to common (communal) ownership.

Another interesting rule, which dates back to the times of communal ownership of land, is the presence of witnesses when transactions were made. Bogolepov[5] suggests that in ancient times, witnesses were recruited from among the residents of the community and should have been agreeing with a deal. The later requirement of publicity when making such transactions was an evolving rule on the presence of witnesses (community members).

The transfer of communal ownership to family ownership and the consolidation of personal ownership

At the next stage in the development of the relations under study, the land became the property of a family and each member was considered a co-owner: "all family members are like co-owners of this land even during the life of *paterfamilias* ("*quodammodo domini*" – Gaius)"[6]. In this regard, the inheritance mechanism is quite surprising. Today, it is believed that inheritance is one of the forms of universal succession, when one person loses their rights and another takes them. Among the ancient Romans, if we are talking about the stage when the family was recognized as the property owner, the decease of the head of the family meant the transfer of actual control to another family member, but not the transfer of the right. In particular, Bogolepov emphasizes that the death of the householder did not entail a division of property, as it was and remained in common possession and use[7]. Pokrovskii similarly describes inheritance: "inheritance *sui heredes*, from the point of view of the old law, is not even inheritance, but simply the entry into autonomous management of property that, even during the life of *paterfamilias*, belonged to them as family common ownership"[8].

[2] N. P. Bogolepov, Uchebnik istorii rimskogo prava. Posobie k lektsiiam (Moscow: 1895).
[3] S. A. Muromtsev, Grazhdanskoe pravo Drevnego Rima (Moscow: 1883).
[4] C. Ando; P.J du Plessis y K. Tuori, The Oxford Handbook of Roman Law and Society (Oxford: Oxford University Press, 2016).
[5] N. P. Bogolepov, Uchebnik istorii rimskogo…
[6] I. A. Pokrovskii, Istoriia rimskogo prava (Petrograd: Letnii Sad, 1917).
[7] N. P. Bogolepov, Uchebnik istorii rimskogo prava…
[8] I. A. Pokrovskii, Istoriia rimskogo prava…

Pokrovskii connects the final consolidation of private ownership with the strengthening of the role of *paterfamilias*, who assumed the role of the sole owner, which happened by the time of the Law of the Twelve Tables.

From the foregoing, a general conclusion follows that historically public ownership preceded personal ownership. I. B. Novitskii writes: "The individual ownership of an individual citizen was historically preceded by the public ownership of the tribe, clan association, family"[9]. The point of view that personal ownership grew out of common ownership of real estate, primarily land, is very widespread. It is disproved by T. Mommsen who believes that slaves and cattle were the first to be appropriated while the land was for a long time communally owned. In support of this statement, Mommsen cites the ancient name of the property – "possession of cattle" (*pecunia*) or "possession of slaves and cattle" (*familia pecuniaque*)[10]. A. Berger understands the term *familia pecuniaque* similarly and translates it as all property in general[11]. Something similar can be found in the works of Novitskii. He believes that the oldest ownership – the ownership of a family – was extended to the means and products of production[12]. Clarification of Novitskii and Mommsen is informative, but not essential. For this study, it is sufficient to conclude that the sole ownership arose from the possession of part of the common property.

The transition from personal to common ownership

The final formation of personal ownership does not mean that the Romans abandoned all joint possession of things and property community. At that time, a very interesting phenomenon occurred: having gotten rid of communal ownership (at least ceasing to consider it as the main one), the Romans began to add private ownership into common one. That is, if previously private ownership was considered as a derivative of communal ownership, now common ownership, as a rule, was formed by adding up the private ownership of two or more persons. Roman law was familiar with the common ownership and property community formed by accidentally falling into it, as, for example, during inheritance (*consortium*). It was also based on the will of the participants; otherwise a division would have been made. Perhaps, the only incident of the formation of common ownership, besides the will of the participants, was "accidental community" (*communio incidens*), for example, when combining patrimonial things of different persons. The addition of private ownership to the common was so common that Roman jurists even developed a broader concept of "common possession", from which juridical person, partnership agreements and others originated. It should be clarified that the Romans distinguished property community and common ownership. The first concept was broader and included the second one. In addition to common ownership, the common superficies and emphyteusis could be attributed to the property community. That is, not only ownership right was divisible, but also other real rights[13].

Like nowadays, in ancient Rome, the law did not always keep pace with facts and economic realities. That is to carry out economic activity, the Romans began to unite their efforts, capital and property, forming collectives that, however, were not recognized as the subject of law and were not protected. Therefore, Muromtsev noted that things that were not

[9] I. B. Novitskii, Rimskoe parvo (Moscow: Yurait, 2002).
[10] T. Mommsen, Istoriia Rima (Rostov-on-Don: 1997).
[11] A. Berger, Encyclopedic Dictionary of Roman Law (Ltd.: The Lawbook Exchange, 2002).
[12] I. B. Novitskii, Rimskoe parvo…
[13] D. D. Grimm, Lektsii po dogme rimskogo prava. Posobiie dlia slushatelei (Riga: 1924).

in private possession were not recognized as being in civil circulation and, therefore, were not protected by civil law means[14]. In this regard, jurists developed the concept of a juridical person: "A juridical person contained a legal recognition of common possession as a form separate from personal possession, but with equal rights"[15].

Initially, the property did not belong to the community and was the common ownership of the participants[16]. Pokrovskii agreed that the property of the corporation was considered the property of individual members (according to the rules of partnership, *societas*) and he made an important addition that the share determined the degree of participation. The ownership right during the creation of a juridical person could be given to the treasurer[17]. To give stability to relations with corporations, rules were gradually introduced leading to the separation of property. Therefore, the law came to the fact that a juridical person was recognized as the owner of the property.

Partnerships became another form of joint possession. The feature of this form is that it was based on a contract. As D. D. Grimm accurately observed, "a partnership is a contractual property community"[18]. The agreement governs all relations associated with the partnership. There is no formation of a new "person". Property invested in a common cause becomes common ownership (*condominium*) or goes into general use[19]. By their agreement, the parties could determine the share of each in the common property, as well as establish the procedure for its use[20]. Such associations that did not have a legal personality had a different degree of community and were created for joint management based on hereditary property (*consortium*), conducting business (*societas unius negotiationis*), single transactions (*societas unius rei*), etc.[21].

If during communal ownership (clan, family ownership) inheritance led to the replacement of the person managing such ownership, now inheritance consisted of the transfer of the right. This may entail the transfer of one thing to several persons. Thus, for the first time, common ownership appeared by virtue of the law – *communio*. It is noteworthy that the law provided for the presence of shares of participants. Subsequently, according to E. A. Sukhanov[22], this form, along with the contractual community of partners, developed into a *condominium*, which, in turn, became a common shared ownership, known to modern law and order. This assumption is very logical, since the "corporate" community was evolving into the ownership of a juridical person.

General rules governing Roman law relations of common ownership

Having developed the concept of common ownership (*condominium*), Roman jurists started developing rules that would most generally regulate the relations connected with it. They are described in more detail by Novitskii[23] and Grimm[24]. They point out that it was the

[14] S. A. Muromtsev, Grazhdanskoe pravo Drevnego Rima (Moscow: 1883).
[15] S. A. Muromtsev, Grazhdanskoe pravo Drevnego Rima…
[16] I. B. Novitskii, Rimskoe parvo…
[17] I. A. Pokrovskii, Istoriia rimskogo prava…
[18] D. D. Grimm, Lektsii po dogme rimskogo prava. Posobiie dlia slushatelei (Riga: 1924).
[19] S. A. Muromtsev, Grazhdanskoe pravo Drevnego Rima (Moscow: 1883).
[20] E. A. Sukhanov, Veshnoe pravo: nauchno-poznavatelnyi ocherk (Moscow: Statut, 2017).
[21] I. A. Pokrovskii, Istoriia rimskogo prava…
[22] E. A. Sukhanov, Veshnoe pravo: nauchno-poznavatelnyi…
[23] I. B. Novitskii, Rimskoe parvo…
[24] D. D. Grimm, Lektsii po dogme rimskogo prava…

Romans who developed the concept of share in the right, believing that the accomplice does not own a part of the thing, but a certain share in the right to all property. There were other opinions among Roman jurists that were described by W. W. Buckland and A. D. McNair, for example, that there is a single possession shared by all[25]. Still, Roman jurists settled on a concept that involved the division of right, but not possession. This state of affairs is associated with a special understanding of possession: "Several persons cannot simultaneously own the same thing so that each of them is considered the owner of the whole thing (*compossessio plurium in solidum esse non potest*). But several individuals can own an inseparably common thing so that everyone is considered the owner of the ideal part of the thing (the so-called *compossessio plurium pro partibus indivisis*)"[26]. Hence, there is the rule that if one of the participants dropped out, the share of participation of the rest increased proportionally. The Romans also concluded that the commonality of right implied a commonality in deciding on the implementation of the right. Therefore, all acts aimed at common things were agreed upon by the accomplices. Moreover, according to D. V. Dozhdev[27], the size of the participation did not matter. Therefore, one of the co-owners could paralyze any decision. At the same time, each of the partners was entitled to dispose of their ideal share, for example, leaving it as a pledge. One of the co-owners who took emergency measures to ensure the safety of the common property could claim compensation from others. Each of them could unilaterally demand the division of a thing (the allocation of its share), for which they resorted to *actio commuoi dividundo*. If the division was not possible, the judge could award the thing to one, obliging them to pay compensation to their associates. The decision in the case was legal in nature, that is, it gave rise to a new law – the right to personal ownership. Simultaneously with the decision on the division (separation), the judge could establish a servitude so that the new owner could freely use their thing. The division of a thing, especially land, cannot be infinite, so that excessively small sections were not formed: "It was left to the customs and common sense of the population to put a limit on the excessive fragmentation of land ownership"[28]. Another achievement of Roman jurists was the creation of the "neighbor law". They believed that real estate, due to its natural properties, involved joint possession by neighbors, hence the whole range of rights – the neighborhood rights[29]. To protect their rights from attacks by third parties, the co-owner could resort to *rei vindicatio* or *actio negatoria*[30]*.*

Achievements of medieval law

The next stage in the development of legal thought is associated with the fall of the Western Roman Empire in 476, as well as a new round of the study of Roman law by Western European jurists. This period lasted a long time, until the end of the 19th – beginning of the 20th centuries, when the "new" Roman law acted in Europe. For developing views on common ownership, this time provides little new information, even though under the influence of the work of European jurists, primarily glossators and commentators, Roman law was significantly revised or rather interpreted.

[25] W. W. Buckland y A. D. McNair, Roman Law and Common Law: A Comparison in Outline (CUP Archive, 1965).
[26] D. D. Grimm, Lektsii po dogme rimskogo prava…
[27] D. V. Dozhdev, Rimskoe chastnoe parvo...
[28] T. Mommsen, Istoriia Rima (Rostov-on-Don: 1997).
[29] S. A. Muromtsev, Grazhdanskoe pravo Drevnego Rima (Moscow: 1883).
[30] D. V. Dozhdev, Rimskoe chastnoe parvo...

The same goes for common ownership relations. In the works of H. Dernburg[31], K. F. Chilarzh[32] and other authors, we find sections devoted to common ownership, but they are not a breakthrough in the field under study. The merit of medieval jurisprudence can only be attributed to the development of such a variety as "aggregate ownership" (*Gesammteigenthum*)[33], as well as the formation of the preferential right to purchase[34]. Significant progress was made in the issue of regulation of relations of common ownership of spouses.

The relationship between Roman and modern Russian law in the regulation of relations of common ownership

The foundation, which was laid down by Roman law, turned out to be so strong that many of its parts are used to this day – modern common ownership right is based on it. Nowadays, law considers the relationship of common shared ownership through the prism of the concept of share in the right. For example, according to the point 2 of article 244 of the Civil Code of the Russian Federation, property may be in common ownership with the determination of each share in the right of ownership (shared ownership) or without the determination of such shares (joint ownership). There is still a rule on the joint exercise of rights (articles 246 and 247 of the Civil Code of the Russian Federation), on the unconditional right to demand the allocation of a share (point 2 of article 252 of the Civil Code of the Russian Federation), etc. In the event of the impossibility of division, compensation is still paid today (paragraph 2, point 3, point 4 of article 252 of the Civil Code of the Russian Federation). Now, like in Ancient Rome, the limits of the division of things are established, but if earlier they applied only to land, today, they apply to residential premises. The "neighbor law" remained with the understanding that the specifics of real estate is the inability to possess it in isolation from other persons. Unfortunately, some of the achievements were undeservedly forgotten. For example, in modern literature, there is a discussion regarding the nature of a court decision on division. It is proposed to consider it as transformative or awarding[35]. However, even the Romans considered such a decision to be legal, and this position seems to us the most balanced. We consider useful the experience of Roman jurists who, when dividing common property, simultaneously imposed a servitude. Nowadays, courts do not do this. Unfortunately, the modern practice has refused to use *rei vindicatio* in case of violation of the rights of one of the co-owners in favor of the claim "on the restoration of the right to share". Some of the provisions of Roman law, the modern legislator has not adopted, for example, that one of the participants could block any decision regarding a common thing. In modern law, the will of one or more owners can be overcome (point 1, article 247 of the Civil Code of the Russian Federation).

Conclusion and recommendations

The most ancient form of joint possession of property among the Romans was the communal ownership right, and its object – land and means of production. Smaller social units – families – possessed land only by virtue of involvement in the community, and then

[31] H. Dernburg, Pandekty: Veshnoe pravo (St. Petersburg: 1905).
[32] K. F. Chilarzh, Uchebnik institutsii rimskogo prava (Moscow: 1906).
[33] H. Dernburg, Pandekty: Veshnoe pravo (St. Petersburg: 1905).
[34] U. B. Filatova, Pravo preimushchestvennoi pokupki v evropeiskikh pravoporiadkakh: istoriia i sovremennost. Pravovye voprosy nedvizhimosti (Moscow: 2012).
[35] E. A. Krasheninnikov, "Zashita okhraniaemykh zakonom interesov putem preobrazovaniia prav I obiazannostei", Vestnik ekonimicheskogo pravosudiia Rossiiskoi Federatsii num 2 (2013): 6-9.

the right of family ownership to the means of production appeared. Possession of public land developed into the ownership of it. Now, every member of the family was considered a co-owner. At the next stage, personal ownership was formed and, along with this, joint possession of things remained. Moreover, legal institutions based on a property community were developed: “juridical person”, “partnership”, etc. The Romans derived the concept of “common ownership” and determined the rules by which it should exist. They were the first to introduce the term “share” to relations of common ownership. The modern law of common shared ownership partially preserved the experience of Roman law and partially introduced new provisions. Today, like many years ago, the right to common ownership is considered through the prism of the concept of share in the right. The rules on the joint exercise of powers, the unconditionalness of the right to allot a share, and if this is impossible, the right to monetary compensation, the limits of the division of things and others, have been preserved. At the same time, the teachings have been undeservedly forgotten, but the exercises should be in demand: on the law-forming role of the decision on the division of common ownership, on the use of servitude in the section of general things and others.

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