врахування особистісного підходу при визначенні розміру відшкодування моральної шкоди.

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PROBLEMATIC RELATIONSHIP TERMS «GROUNDS» AND «METHODS» OF ACQUIRING PROPRIETARY RIGHTS

Relevance of the chosen topic due to improper functioning of the right of ownership, caused by identification by jurists at the beginning of the nineteenth and today the concepts «grounds» and «methods» of ownership.

At different periods of time russian and ukrainian scientists have made researches on this issue, such as: Spasibo I., Romanovich S., Shershenevich H., Meyer, D., Khvostov V. and others.

In view of the above, the purpose of this article is to clarify the genesis of the terms «ground» and «method», consideration of common and distinguishing features between the grounds and methods of acquiring proprietary rights in the aspect of the importance of distinguishing between theoretical and practical points of view; determining proposals for legislation.

Based on the rules of lexicology the word «ground» and «method» is not identical. Thus, the legislator has allocated different rules, which are used, respectively, the terms «grounds» (eg Art. 328 of the Civil Code of Ukraine (CC)) and «methods» (part 2, Art. 16 Civil Code of Ukraine) [1].

An example of the widespread identification of the concepts «method» and «ground» is in understanding methods of property rights – legal grounds on which a particular person becomes the owner of a property [2, 229], or legal facts with which the law associates emergence of property rights, which are called methods and grounds simultaneously [3, 253].

Striking example of mixing methods and grounds is the emergence of property rights under the contract. So as examples of the original method of acquiring property rights are called contracts of sale, gift, while they actually have grounds of acquiring property rights [4, 341].

Roman law under titulus acquirendi (rights acquisition ground) understood the legal facts, which binds only the emergence of obligations and modus acquirendi

(acquisition method) is the following legal facts, which is associated with acquiring property rights [5, 140].

The separation of grounds and methods acquiring property rights is important for the conclusion of contracts on acquisition of property ownership, in inheritance, reorganization of legal entities. All of them are acquisition of property rights to property, which is associated with a corresponding termination of the right to the same property in another person. Of course, in this case it is important to establish the time of transfer of ownership, and exactly in this aspect is important distinction the conclusion of the contract and compliance requirements of the form of the contract and its registration.

Also, there are numerous cases where ownership arises first time, for example, if things did not exist before, but physically it appeared due to its creation by person. Maybe something else: when the thing existed, but it did not belong on the property right to person or if the owner is unknown.

In this case traditionally it comes to original and derived methods of acquiring property rights [6, 303], although expresses another opinion – the division into original and derivative acquiring property rights grounds [7, 121]. Given the above considerations, it seems more true to expose the separation of original and derived right acquisition, as the latter is a broader category, not only from a legal point of view, but it is contains a methods and grounds simultaneously.

Therefore the godsend will be the initial a right acquisition, the ground of which is fact of detection of another's lost thing and method – next taking possession in conjunction with the decision to leave it, provided by the abiding the requirements of the law on the acquisition of property rights to the found thing.

In the XIX-early XX century. law did not operated the term «ground of right acquisition», using the term «method». The modern right, by contrast, do not use the term «method of right acquisition» and refers only to the grounds. Essentially something that belongs to the grounds of acquiring proprietary rights does not defined as such (eg sales contract, etc.)., and vice versa - now something that relates to the method of acquiring property rights (such as state registration) are not recognized.

So the ground of acquiring ownership rights must be a legal fact which gives rise to legal obligations relationships (eg sales contract, etc.)., and the method of the acquisition of ownership – a legal fact, which binds emergence of property rights (transfer of property, the state registration of the transaction, etc.).

Separately existing, grounds and methods can not lead to the acquisition of property. So for right acquisition there should be a set of these legal facts. For example, consider the procedure for acquisition the right under the contract of sale. In itself signing the contract (ground of right acquisition) does not lead to the emergence of property of the buyer, because for this purpose law put forward additional requirements. They relate to: (a) transfer of property (part 1, Art. 334 Civil Code of Ukraine) – as a general rule; (b) notarization if the property is alienated for contracts which are subject this certification (part 3 Art. 334 Civil Code of Ukraine); (c) the entry into force of the court decision on the recognition of contract without notarized valid (part 3 Art. 334 Civil Code of Ukraine); (d) state registration if an agreement on the disposal of property subject to registration

(p. 4 of Art. 334 Civil Code of Ukraine). All these facts are just the methods of right acquisition.

Significant for problem is transformation the list of «methods» of acquisition property rights, which are marked in the scientific literature directly related to the law. For example, D. I. Meyer pointed to such methods of acquiring property rights: (1) «by means of ownership» which refers tradition, antiquity, war trophy and finding; (2) regardless of the ownership – use, increment, blending [8, 122].

G. F. Shershenevich determines such methods of acquisition of ownership that offered contemporary legislation: 1) «gifts and gratuitous» – donation, separation, gift, covenant 2) heritage, 3) «mutual» methods – mine and buying 4) agreements and obligations [9, 299].

Most modern textbooks on civil law make such a system of «methods» of right acquisition (although, according to the Civil Code, the latter is precisely the grounds of acquisition of property): manufacturing or creating new things, recycling, finding, usucaption, recognition of ownership of unauthorized construction, contract, inheritance and others [10, 438].

As we see, in many respects list of «methods» of acquiring ownership rights coincides past and present, and most important in the community (approach) on the right acquisition is the last division to original (acquisito originaria) and derivatives (acquisito derivativa).

But we can talk about the grounds and methods not only to derivative but also concerning the original ownership. Thus, for the acquisition of property for public gifts of nature (wild berries, mushrooms, fish, wild animals, etc.) to the subsequent appropriation of the object, it is necessary first of all identify the object (ground of acquisition of property), then take possession on it (the method). If you find berries or mushrooms, you should collect them; if there is a wild animal – shoot or effectively capture it and so on. Taking possession as a method in any case is an action (active action), while identifying things being ground, can be passive – for example, a person accidentally find thing or treasure.

Thus, we can conclude that the grounds and methods in their totality constitute the formula of right acquisition in which they undergo specific interaction and complementarity. They are related to legal connection and the existence of one without the other can occur in theory and in practice, but obviously not lead to the desired result – acquisition of property rights. This raises the need to review legislation to clearly notation those legal facts, thought will occur ownership of a person, ie at the level of legislation to determine the content of such basic concepts as «ground» and «method» which directly used in the Civil Code of Ukraine, but not explained by legislator clearly.

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РОЗШИРЕННЯ ПРАВ КОРИСТВУВАЧА У ДОГОВОРІ КОМЕРЦІЙНОЇ КОНЦЕСІЇ

На сьогоднішній день договір комерційної концесії міцно увійшов у наше життя. Сфера застосування охоплює різноманітні види бізнесу. Наприклад, серед відомих в Україні це, Макдональдс, Старбаск, 1С, тощо.

За договором комерційної концесії одна сторона (правоволоділець) зобов'язується надати другій стороні (користувачеві) за плату виключне право користування відповідно до її вимог комплексом належних цій стороні прав з метою виготовлення та (або) продажу певного виду товару та (або) надання послуг. Укладення цього договору дозволяє отримати відповідне право на використання об'єктів інтелектуальної власності для планомірної та вигідної реалізації товару. Для правоволодільця це можливість створення та розширення виробничої, торгової чи збутової мережі для просування своїх товарів чи послуг, розширення ринку збуту, здійснення реклами своєї продукції, у короткі строки створення розгалуженої системи бізнесу. А для користувача – це вигідна можливість використати в підприємницькій діяльності комплекс виключних прав правоволодільця задля прибутку при цьому значно скоротити витрати при створенні свого бізнесу з нуля. Таким чином, в укладенні договору комерційної концесії зацікавлені обидві сторони.

У ст. 1124 передбачено, що у користувача, який належним чином виконував свої обов'язки, є право на укладення договору комерційної концесії на новий строк. Але доволі часто можна побачити, що даний договір після його закінчення не буває продовжений, а укладається з іншою особою на тих же умовах. Через це користувач не може далі використовувати торгівельну марку, виготовляти продукт, чи надавати послуги та втрачає усі свої права стосовно подальшої підприємницької діяльності. Подібні дії негативно позначається, як на користувачеві, якому завдаються не тільки збитки, а і відображається на розвитку бізнесу в Україні. Вважаючи, що це є правовою проблемою у сучасному українському цивільному законодавстві, слід