

Roman Law

The 'why' and 'how' of an anachronism



Justinian and the Corpus Iuris (530 CE)

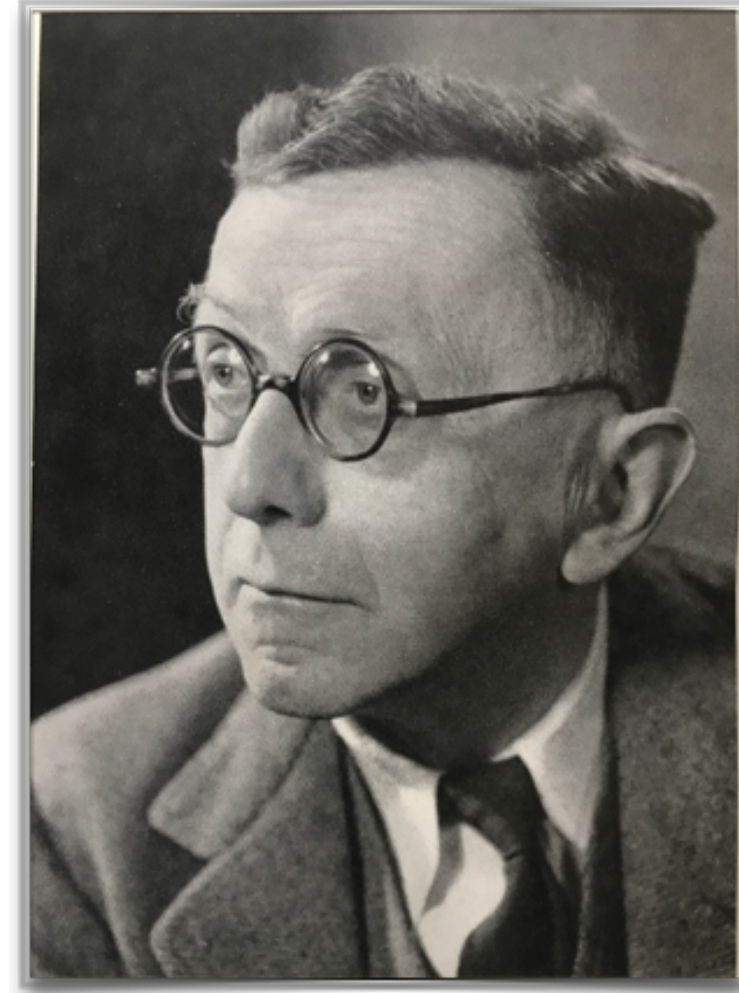
- The Digest and the classical jurisprudence (1st-3rd cent. CE)
- The Codex and the imperial rescripts (2nd-6th cent. CE)
- The Institutions and the teaching of the law in the East





The evolution of Roman law

- Law and Legislation. The Law of the Twelve Tables (ca. 450 BCE). Isonomia
- Fritz Schulz (1879-1957): «Das Volk des Rechts ist nicht das Volk der Gesetze» (Prinzipien des römischen Rechts, 1934, 4)



Shaping forces:

a. Interpretation of the legal experts:

- The birth of the legal science. Sextus Aelius Petus Catus, Tripertita (ca. 200 BCE).
- The jurisprudential activity: responsa; quaestiones. Legal literature & casuism

b. Jurisdictional activity of the Roman magistrates.

- The Roman iuris dictio
- Ius honorarium
- The praetorian Edict





An Example: The 'Accessory' Nature of Real Securities

- Pledge & Hypothec
- 'Real' Securities (vs. 'personal' securities)
- Real 'Securities': coercive / satisfactive function
- From function to structure: 'accessory' nature (Akzessorietät)



The security & the secured debt

1. You hypothecate your house with me, having agreed that I will give you a loan of 100.000 in a week's time. I die, the loan is not given, but my heirs decide to enforce the security.
2. You give me a ring as security for a loan of 10.000. I die, and in my will, in sign of friendship, I release you from the debt. Can you claim back the ring from my heirs?



The German 'Bürgerliches Gesetzbuch'

- BGB §1252: Das Pfandrecht erlischt mit der Forderung, für die es besteht.
- BGB §1252: The pledge is extinguished together with the claim to which it relates.

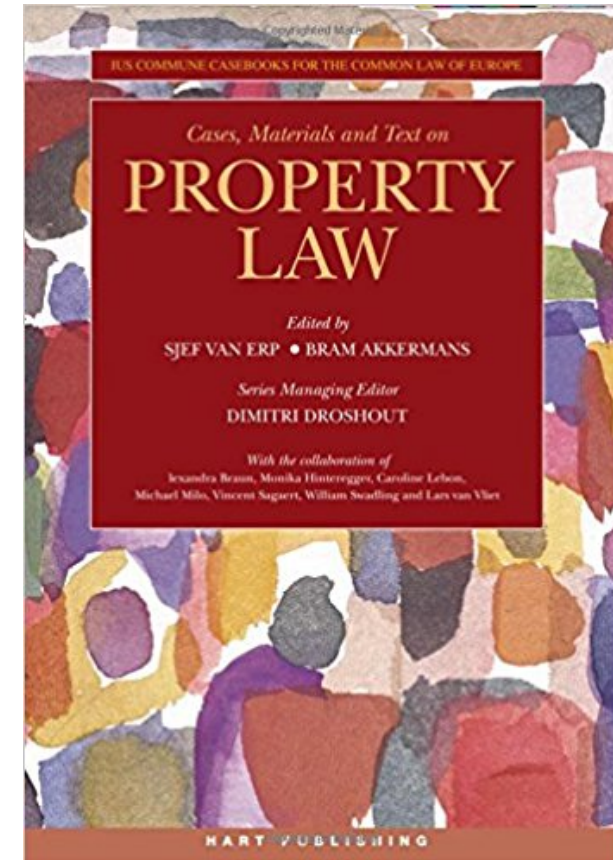


The French 'Code Civil'

- Art. 2488: Les privilèges et hypothèques s'éteignent : 1° Par l'extinction de l'obligation principale sous réserve du cas prévu à l'article 2422
- Art. 2422: L'hypothèque constituée à des fins professionnelles par une personne physique ou morale peut être ultérieurement affectée à la garantie de créances professionnelles autres que celles mentionnées dans l'acte constitutif pourvu que celui-ci le prévoie expressément...
- Art. 2488: Privileges and hypothecs are extinguished: 1° By extinction of the principal obligation, except for the case provided for in Article 2422
- Art. 2422: A hypothec given for professional purposes by a natural or legal person may be subsequently allocated to secure professional debts other than those mentioned in the constitutive instrument, provided that the latter lays so down expressly ...

The ‘Common Law of Europe’

- [431] Common Features of Security Rights: Accessory Nature of the Security Interest
- [433 s.] “... the accessory nature of the security right is subject to exceptions. ... recent international legal devices distanced themselves from this principle of accessory”



Ius Commune Casebooks for the Common Law of Europe



Swiss Law

- “The right on the pledge is accessory to the obligation. This means the following: Only when and inasmuch, qualitatively and quantitatively, the secured obligation effectively exists, exists also the right on the pledge”.

H. M. Riemer, Die beschränkten dinglichen Rechte, 2 ed., Stämpfli, Bern, 2000



OR 114 I

Geht eine Forderung infolge ihrer Erfüllung oder auf andere Weise unter, so erlöschen alle ihre Nebenrechte, wie namentlich die Bürgschaften und Pfandrechte.

Where a claim ceases to exist by virtue of being satisfied or in some other manner, all accessory rights such as guarantees and charges are likewise extinguished.



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Ulpian, 2nd book of Rules (D. 46,3,43)

In omnibus speciebus liberationum etiam **accessiones** liberantur, puta adpromissores hypothecae pignora

In all cases where persons are released from liability, the **accessories** are also released, for instance sureties, and property hypothecated or pledged

The Afterlife of Roman Law

- The 11th century. The legend of Amalfi
- Irnerius & Bologna. The 'glossators'. Accursius' magna glossa
- Bartolus. The Commentarists
- Ius commune europaeum
- The modern codifications





The rules of the game

Let X be judge. If it appears that the plaintiff had given the defendant the object at stake as security for a debt, and the debt has been paid, or other satisfaction accepted by the defendant, or the defendant is to blame for its not having been paid, let the judge condemn the defendant to pay to the plaintiff as much as the matter will be worth; otherwise, let him be absolved

- What can this text be?
- What does it allow us to infer about ancient Roman civil trials?
- The judge, appointed for the specific case, and bound to these instructions
- The judge decides about the facts, the appointing magistrate about the law



N.C.P.I.--Civil 815.20
General Civil Volume
Page 1

VOIDABLE MARRIAGE (ANNULMENT)--ISSUE OF MARRIAGE OF PERSON
UNDER 16.¹

NOTE WELL: Give this instruction only where the
alleged underage person was under 16 at the time of the
marriage. If the alleged underage person was between 16 and
18, use N.C.P.I.--Civil 815.23.

NOTE WELL: If one of the parties to the marriage has
died, also give N.C.P.I.--Civil 815.30.²

The (state number) issue reads:

"[Was] [Were] (name person(s) claimed to have been underage)
less than 16 years old at the time of [his] [their] marriage [to

(name other person)] [to each other] on (state date of marriage
ceremony)?"

On this issue the burden of proof is on the plaintiff. This
means that the plaintiff must prove, by the greater weight of the
evidence, that at the time of the marriage [he] [(name other
person)] [both he and (name other person)] were under the age of
16.

Finally, as to this (state number) issue on which the
plaintiff has the burden of proof, if you find by the greater
weight of the evidence that at the time he and [(name other
person)] were married [he] [(name other person)] [both he and
(name other person)] [was] [were] under the age of 16, then it
would be your duty to answer this issue "Yes" in favor of the
plaintiff.

If, on the other hand, you fail to so find, it would be your
duty to answer this issue "No" in favor of the defendant.



The formula of the *actio pignoratitia*

Let X be judge. If it appears that the plaintiff had given the defendant the object at stake as security for a debt, and the debt has been paid, or other satisfaction accepted by the defendant, or the defendant is to blame for its not having been paid, let the judge condemn the defendant to pay to the plaintiff as much as the matter will be worth; otherwise, let him be absolved

- What needs to be proved for the defendant to be condemned?
 1. The constitution of the pledge
 2. The existence of the secured debt
 3. That the defendant:
 - a. was paid (*solutio*)
 - b. or otherwise satisfied (*satisfactio*)
 - c. or has unlawfully rejected payment (*mora creditoris*)
- Accessory nature?

A case

I buy from you a racing horse, for which I pay, in cash, a hundred thousand. The horse is to be delivered to me in one week. I require some security, and you give me a ring as a pledge.

The horse dies before delivery from a sudden disease, despite your diligence in trying to avoid this sad result.

1. Can I sue you for breach of contract?

- Roman law: the principle of good faith
- Swiss law, OR 119 I: Soweit durch Umstände, die der Schuldner nicht zu verantworten hat, seine Leistung unmöglich geworden ist, gilt die Forderung als erloschen - An obligation is deemed extinguished when its performance is made impossible by circumstances not attributable to the debtor.



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2. Can I claim back the hundred thousand?

- Roman law: *periculum emptoris*
- Swiss law, OR 185 I: Sofern nicht besondere Verhältnisse oder Verabredungen eine Ausnahme begründen, gehen Nutzen und Gefahr der Sache mit dem Abschlusse des Vertrages auf den Erwerber über. The benefit and risk of the object pass to the buyer on conclusion of the contract, except where otherwise agreed or dictated by special circumstance.



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3. Can I keep the ring?

- Swiss law, OR 114 I: Geht eine Forderung infolge ihrer Erfüllung oder auf andere Weise unter, so erlöschen alle ihre Nebenrechte, wie namentlich die Bürgschaften und Pfandrechte. - Where a claim ceases to exist by virtue of being satisfied or in some other manner, all accessory rights such as guarantees and charges are likewise extinguished.



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3. Can I keep the ring under Roman law?

- Let X be judge. If it appears that the plaintiff had given the defendant the object at stake as security for a debt, and the debt has been paid, or other satisfaction accepted by the defendant, or the defendant is to blame for its not having been paid, let the judge condemn the defendant to pay to the plaintiff as much as the matter will be worth; otherwise, let him be absolved



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3. Where does the difference lie?

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3. Where lies the difference?

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In other manner?

- Agreement (OR 115)
 - Novation (OR 116-117)
 - Merger (OR 118)
 - Set-off (OR 120-126)
 - Prescription (OR 127-142)
- Any alternative to the
,accessority'-principle?
 - ,Satisfaction'-principle



In Roman law?

Let X be judge. If it appears that the plaintiff had given the defendant the object at stake as security for a debt, and **the debt has been paid, or other satisfaction accepted by the defendant**, or the defendant is to blame for its not having been paid, let the judge condemn the defendant to pay to the plaintiff as much as the matter will be worth; otherwise, let him be absolved

- Any alternative to the ‚accessory‘-principle?
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- Any alternative to the ‚accessory‘-principle?
- ‚Satisfaction‘-principle

Roman Law?

- Roman law as precedent
- The s.c. 'propedeutic' function: language, categories, typification, method.
- Rechtsdogmatik and its romanistic roots
- Roman law as a tool for a critical study of the law

