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The Reception of Roman Law in Swiss Law:
Back to The Future!

I. Introduction

The influence of Roman law on European countries with a civil law tradition is well known. After the rediscovery of Justinian's *Corpus iuris civilis* around 1100, Roman law became the common basis of legal studies in European universities. Along with Canon law, Roman law became the common law of educated people of Western Europe (*ius commune*). Through centuries Roman legal literature penetrated legal practice and the judiciary in different ways. The *ius commune* has thus influenced more or less directly the evolution of law in all Western European countries¹.

The codifiers of the 19th and 20th centuries did not consult Roman law sources but rather canon law sources (that are very much influenced by Roman law), customs and statutes, laws and case law of their time². Nevertheless they did base their codification work on the *usus modernus*³ doctrine, the books of the famous

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- 1 See HELMUT COING, *Von Bologna bis Brüssel. Europäische Gemeinsamkeiten in Vergangenheit, Gegenwart und Zukunft*, Köln, 1989, pp. 2ff; JULIUS G. LAUTNER, *Zur Bedeutung des römischen Rechts für die europäische Rechtskultur und zu seiner Stellung im Rechtsunterricht*, Zürich, 1976, pp. 17ff; RAOUL C. VAN CAENEGEM, *Introduction historique au droit privé*, Bruxelles, 1988, pp. 52ff and ROBERT FEENSTRA, « Le droit romain et l'Europe », in *Revue internationale des droits de l'Antiquité*, supplement to volume XLI, 1994, pp. 15ff. The degree of « Romanisation » varies from one country to another. In certain countries like Italy and in the south of France Roman law as it was rediscovered in the 12th century progressively replaces archaic customs. Elsewhere as in northern France customs maintained their position and are even promulgated in statutes. Roman law however still has an important role to play as suppletive law and remains the basis of legal thinking. The influence of Roman law was even more fundamental in the German Empire where around 1500 medieval customs were abandoned and Roman law was received (*recipere, die Rezeption*) as national law (VAN CAENEGEM, Introduction, pp. 4f and 75ff).
- 2 See FRITZ STURM, « Droit romain et identité européenne », in *Revue internationale des droits de l'Antiquité*, supplement to volume XLI, 1994, p. 148.
- 3 The *Usus Modernus Pandectarum* (the new application of the Digest), that continued the *mos italicus*, a tradition of interpreting Roman texts, is generally associated with Germany although it existed in most occidental European countries from the 16th century. The *Usus Modernus* had a last period of popularity in the German

jurisconsults of the Natural Law School⁴ as well as on the manuals of the Pandectists⁵. Therefore it is really Roman law that gave civil law countries their fundamental notions of private law and proceedings law.

Swiss private law is a remarkable illustration of this indirect influence of Roman law. Although Swiss law unlike other national European systems has not incorporated Roman law as such⁶ there has been a gradual "Romanisation". During the 13th and 14th centuries there were Swiss scholars in Bologna. A century later a law faculty was founded in Basle (1459). Finally, the fruitful research of Jacques GODEFROY in Geneva, the vigour of the *ius commune* in the territories that are now the Italian speaking part of Switzerland and the slow penetration of Romanistic principles in city laws during the modern era have contributed to the great influence of Roman law in our country⁷.

However it is above all during the 19th century, under the strong influence of the German Pandectist movement that Roman law became an efficient legal science in Switzerland. The famous Swiss Professors BACHOFEN and KELLER were students of SAVIGNY. Furthermore numerous eminent German Pandectists taught in Swiss Universities⁸.

legal science of the 19th century (see VAN CAENEGEM, Introduction, p. 76 and FEENSTRA, *Le droit romain*, pp. 20f).

4 The Natural Law School defends the idea of a universal and immutable legal order common to all countries. Among the principal author of this movement, who « recherchent, par une étude rationnelle et critique de la nature humaine, les principes fondamentaux, évidents et axiomatiques, à partir desquels » it is possible to deduce all the other rules, we find Hugo Grotius, Samuel Pufendorf, Christian Thomassius, Christian Wolff; Jean Domat and Robert Joseph Pothier (see VAN CAENEGEM, Introduction, pp. 129ff, quotation, p. 130. See also LAUTNER, *Zur Bedeutung*, pp. 46ff).

5 The Pandectists is the name given to the 19th century German lawyers who following the Historical School movement have built a systematic private law science based on the *Digestae* (in Greek, *Pandectae*) of Emperor Justinian. The denomination « Pandectist » science comes from the most frequent title given to their scientific manuel which is « Pandektenrecht » (see FEENSTRA, *Le droit romain*, p. 26). On the same theme, see also LAUTNER, *Zur Bedeutung*, pp. 49ff.

6 See, for example, KONRAD ZWEIGERT and HEINZ KÖTZ, *Einführung in die Rechtsvergleichung*, Tübingen, 1996, p. 166.

7 See PIO CARONI, « La romanistica svizzera ottocentesca fra (irregolarità) e conferme », in *Index* 23 (1995), p. 84 and LAUTNER, *Zur Bedeutung*, pp. 38ff. On the vast work of GODEFROY, see BRUNO SCHMIDLIN and ALFRED DUFOUR (éd.), *Jacques Godefroy (1587-1652) et l'Humanisme juridique à Genève*, Basel and Frankfurt am Main, 1991.

8 For example, Regelsberger, Dernburg and Exner in Zürich; Jhering, Windscheid, Fitting, Leist, Stintzing and Rabel in Basel; Baron and Lotmar in Bern (see CARONI, *La romanistica*, p. 86 and LAUTNER, *Zur Bedeutung*, pp. 161f).

More generally and disregarding the ways in which Roman law penetrated Swiss law it is undeniable that the influence of the Romanistic tradition is very strong in our legal system. A great number of rules and fundamental concepts of the 1907 Swiss Civil Code and of the 1911 Swiss Code of Obligations as well as the 1889 Swiss Federal Law on debt collection and bankruptcy and the Federal and Cantonal laws on proceeding have their origin in Roman law⁹.

Studying and knowing Roman law is the only way to understand how these fundamental notions were created and how they managed to resist the test of time from the classical law period of Roman law to the present day. But one must determine what the real meaning of these notions was in Roman law. Indeed Roman law rules were not codified like our modern private law but emerged through case law. The originality and the genius of the Roman legal mind resided in its ability to establish clear legal principles whilst reserving a fair number of exceptions and adaptations. Therefore we must beware of simplistic comparisons between Roman law and modern law.

It is in that context that we will examine two legal institutions, the «fiducie» and the contract of sale warranty for defects. The interest of these two subjects is multiple: first they were well known by Roman lawyers ; second their rules are unsatisfactory in modern Swiss law; third it has been wrongly assumed that these rules are a modern transposition of Roman law and fourth with the help of a correct analysis Roman sources contain ideas that would enable courts and law reforms to improve those rules.

II. Two examples of incorrect transposition of Roman law in Swiss law

1. The Swiss fiducie¹⁰

In Swiss law, the *fiducie* was created by case law. Its existence was recognised by the Federal Tribunal from 1893 for the *fiducie-sûreté*¹¹ and from 1905 for the *fiducie-gestion*¹².

9 See HANSJÖRG PETER, « La place de l'histoire du droit dans l'enseignement et la formation du comparatiste », in *Rapports suisses présentés au XV^{ème} Congrès international de droit comparé*, Zürich, 1998, pp. 341ff and HANSJÖRG PETER, « Vestiges romains dans l'exécution forcée », in *Revue de droit suisse* 115 I (1996), pp. 445ff.

10 On this subject, see the doctoral thesis of JEAN-PHILIPPE DUNAND: *Le transfert fiduciaire: « donner pour reprendre »*. *Mancipio dare ut remancipetur. Analyse historique et comparatiste de la fiducie-gestion*, Basel and Frankfurt am Main, (to be published 2000).

A *fiducie* is a combination of legal transactions relating both to the law of obligations (it is a contract) and to the law of property (it is a disposition of property).

The creator undertakes, by agreeing to a contract (the *convention de fiducie*), to transfer the full legal title to certain things or rights (the fiduciary property), while the fiduciary undertakes to keep and manage them, and possibly even to transfer them, in accordance with the objects and clauses of the agreement, and to restore the fiduciary property (either the original property or some other property acquired through reinvestment of the proceeds from sale of the original property) on expiry of the agreement. Fiduciary management can generally be terminated by either party. A *fiducie-sûreté* does not end until the debt that is secured by the fiduciary property has been repaid.

At the same time, or subsequently, the creator will implement the agreement by transferring (*acte de disposition* or *acte translatif de droits*) the fiduciary property – i.e. the movable or immovable property, personal rights, paper securities, rights of intellectual or industrial property, etc., named in the agreement – to the fiduciary, so that the latter acquires a full legal title to them.

According to the prevailing view in Swiss law, the *fiducie* is a legal transaction whose structure is determined by three of the cardinal rules of civil law: a clear distinction between rights *in rem* and rights *in personam*; the principle that rights *in rem* are subject to a *numerus clausus*; and the principle of the unity of patrimony (*unité du patrimoine*).

Remodelled from time to time by case law, sometimes completed by regulation in specific fields (fiduciary operations by banks, investment funds), the rules governing the *fiducie*, and in particular the *fiducie-gestion*, are being increasingly criticised by legal authors. Unpracticable solutions, incoherences, lack of protection for fiduciary assets, lack of independence of the fiduciary towards the creator, distortion of the rules of competition in favour of banks and incompatibility with the Hague Convention on trust are the main criticism made against the *fiducie* rules. In our opinion a historical and a comparative analysis can give precious information in order to reform the Swiss *fiducie*.

11 ATF 19 344, 347, *Triefus c. Drexler*. A *fiducie-sûreté* (or *fiducia cum creditore*) is used to create a security interest over an asset for the benefit of the fiduciary (*le fiduciaire, der Treuhänder*), to which he acquires full legal title to be restored to the creator (*le fiduciant, der Treugeber*) only after the latter's debt has been paid in full.

12 ATF 31 II 105, *Grüiring-Dutoit c. Kappeler*. A *fiducie* is set up for purposes of management (*fiducie-gestion* or *fiducia cum amico*) when the creator transfers to the fiduciary the property of some assets to perform management tasks which principally serve the interests of the creator or occasionally some other beneficiary.

According to a widespread but debatable opinion, the structure of the *fiducie* in Swiss law is merely a modernisation of the structure of the ancient Roman *fiducia*. In this view, the *fiducia* comprises two distinct acts: a disposal, using the formalistic procedure of *mancipatio*, whereby the creator transfers to the fiduciary the ownership of the fiduciary property; and a distinct agreement, the *pactum fiduciae*, whereby the fiduciary undertakes to restore this property to the creator under certain conditions. The only hold which the creator has over the fiduciary is a claim to restitution; the fiduciary has sole title to the fiduciary property, which becomes part of his personal patrimony. Modern *fiducie* would be the mere revival of Roman *fiducie*.

In his doctoral thesis, one of the two authors of the present article tried to demonstrate that this conception is misleading¹³. But here we shall only mention the principal results of this research. First, a brief presentation of available Roman law sources is necessary. Sometimes fragmentary, sources on the *fiducia* have unequal value and result from the works of lawyers as well as non-lawyers. Still, some of them give us precise and reliable information on numerous aspects of the *fiducie*¹⁴.

There are express references to the *fiducia* in the work of CICERO (106-43 B.C.), in the *Institutes* of GAIUS (2nd century A.D.), as well as in the *Sententiae receptae* attributed to the jurist PAULUS (3rd century A.D.). Furthermore we have access to a few inscriptions. A waxed tablet of Herculaneum's triptych that dates back to the 1st century A.D. mentions the *fiducia* (the *Tabula Herculaneensis* n. 65), a few waxed tablets from Pompei dating from the 1st century A.D. (the *Tabulae Pompeianae* 19, 21 and 22), a triptych of Pompei from 61 A.D. (frequently called *mancipatio pompeiana*), an inscription marked on a bronze tablet of the 1st or 2nd century A.D. (commonly called *Formula Baetica*), as well as a latin papyrus of the 3rd century A.D. concerning the emancipation of young women in Egypt (commonly called *emancipatio puellae*). There are also a few texts relating to the *fiducia* in important private collections such as the *fragmenta Vaticana* (4th century A.D.) or the *collatio legum Mosaicarum et Romanarum* (end of the 4th century or beginning of the 5th century A.D.). The *fiducia* is also mentioned in the texts of BOETHIUS (about 480-524 A.D.)¹⁵ and of ISIDORUS OF SEVILLA (560-636 A.D.)¹⁶.

13 See DUNAND, *Le transfert fiduciaire*.

14 For a detailed index of sources, see GJISBERT NOORDRAVEN, *De Fiducia in het Romeinse recht*, Arnhem, 1988, pp. 475ff and also, PAUL OERTMANN, *Die Fiducia im römischen Privatrecht*, Berlin, 1890, pp. 5 to 51.

15 See *In Ciceronis Topica*, 4.10.41.

16 See *Originum sive Etymologiarum libri*, 5.23.

Finally, in his reconstitution of the perpetual Edict of the praetor, the German lawyer LENEL demonstrated at the end of the 19th century through a systematic study of Justinianian interpolations that numerous fragments of classical works contained in *Digest*, although they deal with *pignus* (pledge), in particular in Book 13.7, *de pignoratitia actione* (of the pledge's action), were originally written on the *fiducia* (*cum creditore*)¹⁷. This discovery has prompted new critical studies that establish very convincingly that in certain other fragments of the *Digest* the compilers had substituted to the *fiducia* not only the *pignus* (for the *fiducia cum creditore*), but also the deposit and the gratuitous loan (for the *fiducia cum amico*), the mandate (for the *fiducia manumissionis causa*) or even the sale. Most historical and legal authors now recognise that JUSTINIAN's lawyers have systematically erased all reference to the *fiducia* because this institution had become redundant. These lawyers replaced the *fiducia* with the contracts that were used to achieve the same goals.

The *fiducia* probably appeared in archaic law at a time when the fundamental principles of private law were not yet clearly defined. Many sources show that the initial transfer of the fiduciary assets from the creator to the fiduciary is made through a specific mancipation act called « *fiduciae causa* »¹⁸ or « *fid(e)i fiduciae causa* »¹⁹. The form and the ritual of this act signals clearly the fiduciary character of the operation and the duty to retransfer the assets is created at the same time. The *fiducia* is in fact a single act of *mancipio dare ut remancipetur* (i.e. a legal power is transferred through *mancipatio* with a view to restitution at a later time): in other words, a temporary transfer of the legal title to an asset, with an ultimate aim in view. This mutual dependency in fiduciary relations between *mancipatio* (transfer) and *remancipatio* (retrocession) appears clearly from GAIUS in cases of *emancipatio* (« *mancipio dedit ut sibi remanciparetur* »)²⁰ and where persons are given in *mancipium* (« *mancipio dedit ut sibi remancipetur* »)²¹, but also in the papyrus concerning the *emancipatio puellae* (« *fiducia contracta (ut) sibi remanciparetur* »). This interdependence is also mentioned by BOETHIUS in a famous extract of his *In Ciceronis Topica* (4.10.41):

17 See in particular the fragments of book X of GAIUS' commentary *ad edictum provinciale*, of book XXXI of PAULUS' commentary *ad edictum*, of book XXX of ULPIANUS' commentary *ad edictum* and of the book XIII of IULIANUS' *Digestorum libri XC* (see OTTO LENEL, « *Quellenforschungen in den Edictcommentaren* », in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, volume III (1882), pp. 104 to 120 and 177 to 180).

18 See, for example, GAIUS, *Institutes*, 2.59.

19 See, for example, the *Formula Baetica*.

20 *Institutes*, 1.172.

21 *Institutes*, 1.140.

Fiduciam accepit cuicumque res aliqua mancipatur, ut eam mancipanti remancipet. Velut si quis tempus dubium timens amico potentiori fundum mancipet, ut ei, cum tempus quos suspectum est praeterit, reddat. Haec mancipatio fiduciaria nominatur idcirco, quod restituendi fides interponitur.

(A fiduciary is a person to whom some property is transferred so that he may transfer it back again to the person who originally transferred to him, as for example, if someone who fears difficult times transfers a farm to a more powerful friend so that the friend might return the farm to him when the critical time has passed. This is called transfer of property to a fiduciary, because trust in the restoration of the property is established).

The duty of restitution of the fiduciary assets is inherent in the *fiducia* and there is no need to spell it out in an attached agreement. When the parties add a *pactum fiduciae* to the *mancipatio*, a practice which is only attested by two sources²², their objective is only to define the modalities of the retrocession. In the *fiducia cum amico* such an agreement will never be made because the fiduciant will fix unilaterally the time at which restitution will have to be made. In the *fiducia cum creditore* the pact can have the function of fixing the time at which the debt covered by the fiduciary transaction must be reimbursed as well as determining the consequences of a non-payment at that time.

The Roman *fiducie* must not be analysed like a contract. It is a legal act created by a specific ritual without real exchange of consent. The integration in pre-classical law of the good faith principle has the effect of transforming the *fiducia* (at first the *fiducia* was only actionable during the formal acts (*mancipatio* – *remancipatio*)) into a *negotium* (juridical transaction), a legal relationship actionable from its creation to its end (*mancipatio* – the duration of relations – *remancipatio*). The main duty of the fiduciary is to protect the fiduciary assets against any aggression, physical or legal, and to allow its retransfer to the creator at all times. The creator does not precisely have a claim to restitution, but he could sue the fiduciary through an *actio in personam* if the latter has not (according to the celebrated clause of the *actio fiduciae* quoted in several of Cicero's works) acted honestly and without deceit, as one would expect in dealings among good men (« *ut inter bonos bene agere oportet [et sine fraudatione]* »)²³. By condemning the fiduciary the judge does not rely on the non-execution of a debt, of a *dare* or of a *facere*, but the fact that the fiduciary has not conducted himself like an honest man.

It is undeniable that the *mancipatio* transfers formal title to the fiduciary property to the fiduciary. A thorough study of that matter (which concerns essentially sources on the *fiducia cum creditore*) shows nevertheless that the creator

22 Namely the *mancipatio pompeiana* and the *Formula Baetica*.

23 For example, in *De officiis*, 3.15.61 and 3.17.70.

retains a certain power of disposal (on a formal level) as well as a substantial title (on a material level) on the assets.

Vis-à-vis third parties the fiduciary exercises the title of ownership, or to put it another way, « acts as the owner ». Therefore he can dispose of the fiduciary assets²⁴ and he enjoys fully the different rights necessary to protect these assets (*rei vindicatio* (property claim)²⁵, the right to bring the *actio furti* and the *condictio furtiva* (criminal actions)²⁶). The creator maintains however a large legal power over the fiduciary assets (right to sell²⁷ and to leave the fiduciary assets²⁸, the right to bring a criminal action against the seller²⁹, etc. ...) so long as the legal act performed is compatible with the declared aim of the fiduciary transaction itself (*fiducia cum creditore* ou *fiducia cum amico*) and also brings benefits to the fiduciary.

Furthermore the fiduciary assets are considered as part of the creator's patrimony: it is as if the value of the fiduciary assets was only deposited with the fiduciary. So when the fiduciary sells the fiduciary assets the amount of the price paid by the buyer that exceeds the guaranteed debt (the *superfluum*) belongs to the creator³⁰. The creator will also become entitled to the profits generated by the fiduciary assets³¹ and be burdened by the risks. According to a fragment of MARCELLUS which many legal authors consider as dealing with the *fiducia* the creator can even sell the fiduciary assets to the fiduciary himself (despite the fact that the fiduciary is already the formal owner of the assets) probably at a price equivalent to the value of the assets minus the debt of the creator³².

GAIUS (*Institutes*, 2. 59 and 2.60) has left us precious information about the *usureceptio*. This is a specific way in which the creator can regain his formal title on the fiduciary assets after an uninterrupted possession of one year (even for land). There is neither a need for a good transfer title (*iustus titulus*) nor for any good faith (*bona fides*) on the part of the possessor (creator) contrary to the requirements of the ordinary usucapion:

24 See, for example, PAPINIANUS, D. 33.10.9.2 (legacy of the fiduciary assets).

25 See *Fragmenta Vaticana* 94 (= PAULUS, D. 24.3.49.1) and PAULUS, *Sententiae receptae*, 5.26.4.

26 See ULPIANUS, D. 13.7.22pr.

27 See PAULUS, *Sententiae receptae*, 2.13.3 and POMPONIUS, D. 13.7.6.

28 See GAIUS, *Institutes*, 2.220.

29 See ULPIANUS, D. 47.2.14.5-7.

30 See PAULUS, *Sententiae receptae*, 2.13.1.

31 See PAULUS, *Sententiae receptae*, 2.13.2.

32 See MARCELLUS, D. 13.7.34.

2.59

Adhuc etiam ex aliis causis sciens quisque rem alienam usucapit, nam qui rem alicui fiduciae causa mancipio dederit uel in iure cessio cesserit, si eandem ipse possederit, potest usucapere, anno scilicet, et soli si sit. Quae species usucapionis dicitur usureceptio, quia id quod aliquando habuimus recipimus per usucapionem.

(There are further cases in which a man knowingly acquires the property of another by usucapion. For if a man acquires possession of what he has mancipated or surrendered *in iure* to another by way of *fiducia*, he can regain ownership of it by usucapion, and that in one year, even if it be land. This kind of usucapion is called *usureceptio*, because by the usucapion one recovers what one had previously owned).

2.60

Sed cum fiducia contrahitur aut cum creditore pignoris iure, aut cum amico, quos tutius nostrae res apud eum essent, si quidem cum amico contracta sit fiducia, sane omni modo competit usureceptio; si uero cum creditore, soluta quidem pecunia omni modo competit, nondum uero soluta ita demum competit si neque conduxerit eam rem a creditore debitor neque precario rogauerit ut eam rem possidere liceret; quo casu lucrativa usucapio competit.

(Now *fiducia* is contracted either with one's creditor by way of security or with a friend for the safer keeping of one's property in his hands. If it is contracted with a friend, *usureceptio* is allowed unconditionally, but if with a creditor, is allowed unconditionally if the debt has been paid, but if the debt has not yet been paid, then only if the debtor has neither hired the thing from the creditor nor obtained his licence to possess it; in that case lucrative usucapion is admitted).

Concerning the *fiducia cum amico* the creator can use the *usureceptio* without any restriction. In fact he can take possession of the fiduciary assets at any time and in any circumstances (« omni modo ») even against the will of the fiduciary. For the *fiducia cum creditore* the availability conditions of the *usureceptio* remain controversial amongst scholars. However it is generally said that one must favour the creator's position in that matter. The mere existence of the *usureceptio* demonstrates that the fiduciary property is not an ordinary property and that the creator does not have a simple usual personal right.

According to yet other sources Roman lawyers considered the creator as the real possessor (for the purpose of calculating the length of the uninterrupted possession in the usucapion)³³ and even sometime the real *dominus* (master) of the fiduciary assets³⁴.

Finally the creator and the fiduciary have shared powers over the fiduciary assets. There is an evident interdependence between the rights of the fiduciary and

33 See IULIANUS, D. 41.2.36.

34 See PAULUS, D. 9.4.22 pr.1 and 2.

those of the creator. Both must exercise these rights in such a way that they are profitable to both parties. The right of ownership appears under its two aspects: the fiduciary has the formal right of ownership, the physical power over the assets, the temporary legal control and the creator has the substantial ownership, the economic control.

Hence the theoretical concept of the *fiducie* in Swiss law does not derive directly from Roman sources, but from an erroneous interpretation of those sources by a number of German Pandectists in the latter half of the nineteenth century. Admittedly, they were correct in emphasising that an institution such as the *fiducia* could contribute usefully to modern German law. Indeed, the influence of the Roman sources was decisive, because they proved that the concept of the *fiducia* was a historical and practical reality and could be used to support the creation of a modern equivalent. One aim of the research was to provide a juridical foundation for certain legal transactions – such as the provision of security by means of transfer or assignment – which otherwise might be considered fictitious and therefore ineffective.

Many scholars wrote on the Roman sources, but the most favourable attention was accorded to the theory of the fiduciary transaction (*fiduziarisches Geschäft*) as adduced by the Pandectist Ferdinand REGELSBERGER, and from which stemmed the *Vollrechtstheorie*. Indeed that theory was in conformity with the great principles of the German Civil Code then in course of development. REGELSBERGER's theory was expressly adopted by the Federal Tribunal in the fundamental decision of 1905 on the *fiducie* in Swiss law (the *Grüning-Dutoit* decision) and is still today in favour with most Swiss legal authors.

One of the keys to an analysis of the modern *fiducie* is to recognise the distinction between the formal title (use of ownership, *propriété-exercice*) that belongs to the fiduciary and the material title (value of ownership, *propriété-valeur*) that belongs to the creator. Furthermore if one studies comparative law this shows that is only the recognition that fiduciary property constitutes a separate patrimony (*patrimoine séparé, Sondervermögen*), distinct from general patrimony of the fiduciary and set aside for the purposes determined by the fiduciary agreement, that can adequately protect the interests of the creator without jeopardising third parties' rights³⁵. And we have seen that similar solutions to this one (that can certainly be a basis for a law reform of the *fiducie* rules in Switzerland)

35 See in Luxemburg, the « règlement grand-ducal du 19 juillet 1983 relatif aux contrats fiduciaires des établissements de crédit », in France, the « projet de loi instituant la fiducie adopté en Conseil des Ministres le 19 février 1992 » and in Lebanon, the law of the 6th of June 1996 « relative au développement du marché financier et des contrats fiduciaires ».

had already been considered, without having been formally set out, by the Roman lawyers.

On the international level there is not at the present time any harmonisation project on the rules governing the *fiducie*. It is the *fiducie*'s rival, the trust, that has had the favours of international attention. First and foremost the *Hague Convention on the law applicable to trusts and on their recognition*, that came into force in January 1992 for the accessing countries, unifies on an international level the conflict of law rules applying to trust. And second a group of experts from European countries have recently laid down the *Principles of European Trust Law*. These Principles are divided into eight articles that are aimed at making easier the mutual understanding between the trust and the *fiducie* but also to promote the trust in Europe³⁶. It is again the concept of *separate patrimony* that emerges from these two new international instruments.

2. The warranty of quality in the contract of sale

The rules on warranty for defects in the Swiss Code of obligations also have their origin in Roman law³⁷. But Roman warranty rules have developed enormously through the centuries. At the end of the so-called classical period (2nd and 3rd centuries A.D.) the seller's duties were to:

« ... take care of the thing till delivery, to deliver it, to answer for eviction, to answer for latent defects. In the final state of the law all four were enforceable by *actio empti*, all being capable of being regarded as imposed by *bona fides* and so inherent in the relation of buyer and seller. But the warranties against eviction and latent defects had grown up otherwise than as deductions from *bona fides*, and this is reflected in the texts even of the *Corpus Iuris*. In continental law they still bear the special name of *Garantie* or *Gewähr*»

36 Edited by HAYTON/KORTMANN/VERHAGEN, The Hague, 1999, pp. 21ss.

37 It is primarily through the Pandectists that the Swiss Code of Obligations has incorporated Roman law rules. See BRUNO HUWILER, « Wiener Kaufrecht, Der schweizerische Aussenhandel unter dem UN-übereinkommen über den internationalen Warenkauf » in *Berner Tage für die Juristische Praxis* 1990, Bern, 1991, pp. 266ff.; JULIUS LAUTNER, « Grundsätze des Gewährleistungsrecht », in *Festgabe für Fritz Fleiner*, Zürich, 1937, pp. 9ff, pp. 22ff; ALFRED MEILI, *Die Entstehung des Schweizerischen Kaufrechts*, Zürich, 1976, n. 328ff; *Feuille Fédérale*, 1905, Volume II, pp. 19 and 20; WILHELM KLEMP, *Die Grundlagen der Sachmängelhaftung des Verkäufers im Vernunftrecht und Usus Modernus*, Stuttgart, 1967, pp. 35, 55 and 56. Concerning the warranty against defects rules, the Pandectist movement had based itself on the rules of the Digest. See BERNHARD WINDSCHEID, *Lehrbuch des Pandektenrechts*, Frankfurt-am-Main, 1900, volume 2, n. 393; HEINRICH DERNBURG, *Pandekten*, volume 2, Berlin, 1886, n. 100, p. 264.

leistung, which, like «warranty», connotes responsibility for the existence of a state of facts rather than a promise of performance»³⁸.

The remains of the evolution of warranties have survived in the Digest because of Justinian's traditionalism. Although the jurisdiction of the Ediles had long been abolished, Justinian maintained its rules in his codification³⁹. But he also introduced the classical law rules on sale alongside, hence creating a co-existence of two different sets of rules to solve the same legal problem⁴⁰. The Swiss Code of Obligations rules on warranty in sales, like other continental codes' rules on the same matter, have inherited this dual system⁴¹.

The evolution of the Roman warranty for defects in sale contracts has been very important. Initially, Roman law did not offer any protection to the buyer of a faulty object⁴². This legal situation was not very satisfactory; therefore probably since a very early time, the buyer asked the seller to give him a warranty against defects through a *stipulatio*⁴³. The simple and strict character of the *stipulatio* was well adapted to the warranty situation. Whatever the involvement of the

38 ZULUETA, *The Roman Law of Sale : introduction and select texts*, Oxford, 1945, p. 35.

39 The *Corpus Iuris Civilis* is not a codification in the modern sense. It does not reflect the state of the law under Justinian but consists of a compilation of edited writings of jurists. Those writings date from the late Republic to the mid-third century and some of them do not even represent the law of the time of their author but a collection of opinions. See OLIVIA ROBINSON, DAVID FERGUS and WILLIAM GORDON, *European Legal History*, London, 1994, p. 3.

40 This has resulted in the seller's liability for non-conformity being materialised by the aedilician actions as well as by the *actio empti ad redhibendum* or the *actio empti quanti minoris*. See PETER STEIN, « Medieval Discussions of the Buyer's Actions for Physical Defects » in DAVID DAUBE, ed., *Studies in the Roman Law of Sale*, Oxford, 1959, pp. 102ff, 104.

Furthermore, these competitive rules are contained in different parts of the Digest which seems to suggest their difference. The Book 19 of the Digest deals with the *actio empti* and Book 21 contains the rules on the aedilician actions. See, for instance, REINHARD ZIMMERMANN, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford, 1996, p. 322.

41 HEINRICH HONSELL, *Schweizerisches Obligationenrecht, Besonderer Teil*, Bern, 1997, p. 59 and ERNST RABEL, «The Nature of Warranty of Quality» (1950) 24 *Tulane Law Review* 273.

42 However, the *mancipatio* which was a form of property transfer did offer limited protection to the buyer of land. See MAX KASER, *Das römische Privatrecht*, vol. 1, München, 1975, p. 557; RAYMOND MONIER, *Manuel élémentaire de droit romain*, vol. II, Paris, 1947, p. 158 and RAYMOND MONIER, *La garantie contre les vices cachés dans la vente romaine*, Paris, 1930, p. 8.

43 See KASER, *Das römische*, p. 558, HEINRICH HONSELL/THEO MAYER-MALY/WALTER SELB, *Römisches Recht*, München, 1987, p. 316.

seller in the appearance of the defect, he was to guarantee the delivery of a sound object. This practice became very widespread⁴⁴.

Despite this there were still some areas where this system was not satisfactory. This was the case in particular in public markets. There, slave dealers, who were mostly foreigners, had a reputation of dishonesty. An intervention by the State apparently seemed necessary to protect weak Roman citizens who had been foolish enough to buy « faulty » slaves⁴⁵. This intervention took the form of an Edict. At first, this Edict was only the political program of the praetor, an elected magistrate who had local administrative functions. In the course of time the political manifesto became more important as it acquired some normative effect for civil law matters: it gave citizens actions to defend their rights⁴⁶. Although the praetor could give actions he did not create or modify the civil law strictly speaking. He built his rules on the civil law foundations and granted actions to protect rights.

The most important fragment on the aedilician warranty in sales is the following:

Aiunt aediles: qui mancipia vendunt, certiores faciant emptores, quid morbi vitiiue cuique sit, quis fugitivus errove sit noxave solutus non sit: eademque omnia, cum ea mancipia venibunt, palam recte pronuntianto. Quod si mancipium adversus ea venisset sive adversus quod dictum promissumve fuerit cum veniret fuisset, quod eius praestari oportere dicitur: emptori omnibusque ad quos ea res pertinet (in sex mensibus, quibus primum de ea re experiundi potestas fuerit⁴⁷), iudicium dabimus, ut id mancipium redhibeatur, si quid autem post venditionem traditionemque deterius emptoris opera familiae procuratorisve eius factum erit, sive quid ex eo post venditionem natum adquisitum fuerit, et si quid aliud in venditione ei accesserit, sive quid ex ea re fructus pervenerit ad emptorem, ut ea omnia restituat, item, si quas accessiones ipse praestiterit, ut recipiat. Item si quod mancipium capitale fraudem admiserit, mortis consciscendae sibi causa quid fecerit, inve harenam depugnandi causa ad bestias intromissus fuerit, ea omnia in venditione pronuntianto: ex his enim causis iudicium dabimus, Hoc amplius si quis adversus ea sciens dolo malo vendidisse dicitur, iudicium dabimus⁴⁸.

44 See for instance M. TERENCE VARRO, *Ex libro secundo Rerum Rusticarum*, 2, 2, 5 in ZULUETA, *The Roman Law*, pp. 62 and 63.

45 See D. 21, 1, 1, 2.

46 WALTER SELB, « La fonction originale de l'édit du préteur: caractère politique ou acte normatif? », in *IURA* (1985) 36 115.

47 The words in brackets are not found in the fragment but should be read into it according to OTTO LENEL, *Essai de Reconstitution de l'Edit Perpétuel*, Paris, 1901 (French translation) p. 304.

48 Digeste 21, 1, 1.

(The aediles say: Sellers of slaves⁴⁹ are to inform buyers of any disease or defect in any slave and whether any slave is a runaway, a vagabond, or not free from noxal liability; all these matter they must declare with proper publicity when the slaves shall be sold. But if a slave was sold in contravention of the foregoing or in contravention of what was stated or promised when he was being sold, in respect of which a legal claim shall be made, we will grant to the buyer and to all whom the matter concerns an action for redhibition of the slave (within six months from when it shall first have been possible to bring an action on that account). The buyer must, however, make good to the seller all the following: any deterioration of the slave which has occurred since the sale and delivery and has been caused by himself or his household or his *procurator*, also anything born from or acquired through the slave since the sale, also any other thing that went with the slave as an accessory on the sale and any profits that have come to the buyer therefrom. Furthermore, the seller may reserve any accessories provided by himself. Furthermore, sellers must declare at the time of sale all the following: any capital offence committed by the slave or any attempt at suicide on his part or the fact that he has been sent into the arena to fight with wild beasts. For on all these grounds we will grant an action. Moreover we will grant an action if it be alleged that a slave has been sold with conscious dishonesty against our rules)⁵⁰.

This text shows that the warranty for defects in the Edict was a punctual law protecting buyers from damage caused by the existence of certain defects. Indeed, only buyers of slaves (and later cattle) on public markets could benefit from the aedilician rules. In addition, and this is confirmed by other fragments⁵¹, the seller was responsible for the damage caused by the defect even if he had not been at fault.

Although the Edict on warranty was not part of the civil law, it constituted a rather detailed and complete body of rules. It applied to cases where the seller had acted in bad faith⁵² or when he made false affirmations about the qualities of the object of the sale⁵³. Despite the fact the Edict only mentions *the actio redhibitoria*, the buyer could also claim compensation through the *actio quanti minoris*⁵⁴.

49 Initially made for sales of slaves the Edict was extended to sales of cattle. D. 21, 1, 38.

50 Translation in ZULUETA, *The Roman Law*, pp. 139 and 140.

51 For instance Paul. D. 21, 1, 2.

52 See the end of the extract of the Edict.

53 Ulp. D. 21, 1, 17, 20.

54 The question of determining whether the *actio quanti minoris* was an invention of Justinian's compilers or a real classical Roman law action has been hotly debated. However the general view is now that this action did exist in classical Roman law. See Ulp. D. 21, 1, 31, 16; Ulp. D. 21, 1, 38, 13; Paul. D. 21, 1, 43, 6; Ulp. D. 21, 2, 32, 1. See also ANTHONY MAURICE HONORÉ, « The History of the Aedilician Actions from Roman to Roman-Dutch Law » in *Studies in the Roman Law of Sale*, Oxford, 1959, pp. 132ff, p. 153, note 8 and finally Pomp. D. 21, 1, 48, 1 and 2.

Swiss legal authors frequently refer to this Edict in order to explain the origins of warranty rules in the Code of Obligations. However the Edict did not have the monopoly of the quality warranty rules. From the first century B.C. the civil law was developing its own rules on the seller's warranty duty, probably under the influence of the Edict⁵⁵. This became possible thanks to the creation of the legal principle of good faith in consensual contracts to which sale belonged. Only progressively did that principle include the warranty duty in the « natural » obligations deriving from the sale contract. At first, under civil law, the seller could only be made responsible if he had breached a promise of quality⁵⁶. But with the growing importance of the *bona fides* principle in consensual contracts, the seller's responsibility grew. He then had to pay damages to the buyer if he had refrained from informing him about defects he knew about when making the contract⁵⁷. With time good faith simply meant that the seller was responsible for the quality of the object sold⁵⁸. And at the end of the classical period of Roman law, the seller was responsible for all the non-conformities of the sale's object, even if he didn't know about them⁵⁹. The remedy was the of course the *actio empti*.

The following text by Julian shows this evolution of Roman law:

Julianus libro quinto decimo inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto; ait enim, qui pecus morbosum aut tignum vitiosum vendidit, differentiam facit in condemnatione ex empto; ait enim, qui pecus ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus, si id emptorem decepti, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morborum pecori perierunt quod interfuit idonea venisse erit praestandum.

55 HONSELL/MAYER-MALY/SELB, *Römisches Recht*, pp. 318 and 319, ALLAN ROGERSON, « Implied Warranty against Latent Defects in Roman and English Law » in D. Daube, ed., *Studies in the Roman Law of Sale*, Oxford, 1959, pp. 112ff, pp. 117 to 119; ZIMMERMANN, *The Law*, p. 321; AUGUST BECHMANN, *Der Kauf nach gemeinem Recht*, volume III, 2, Aalen, 1965 (reedition of Erlangen 1876), pp. 174ff.

56 See Pomp. D. 19, 1, 6, 4.

57 See Cicero, *Ex libro De Officiis tertio*, C. 16, 65 and the translation in ZULUETA, *The Roman Law*, p. 63.

58 See D. 19, 1, 6, 4; D. 19, 1, 13; ZIMMERMANN, *The Law*, p. 320, KASER, *Das römische*, p. 558; HONSELL/MAYER-MALY/SELB, *Römisches Recht*, p. 319 and ROGERSON, *Implied Warranty*, pp. 118 et 119.

59 Nearly all legal scholars specialised in Roman law recognise this evolution of the warranty. See ZIMMERMANN, *The Law*, p. 320; ULRICH VON LUEBTOW, « Zur Frage der Sachmängelhaftung im römischen Recht » in *Studi in onore di Ugo Enrico Paoli*, Firenze, 1956, pp. 492ff and HONSELL/MAYER-MALY/SELB, *Römisches Recht*, p. 319.

(In the matter of damages in the action *ex empto* Julian, book 15, distinguishes between one who has sold with knowledge and one who has sold in ignorance. For, he says, the unwitting seller of a diseased herd or of unsound timber will have to make good in the action *ex empto* only the amount by which the price would have been reduced had the buyer known the truth, whereas, if the seller knew, but was silent and so deceived the buyer, he will have to make good to the buyer all losses that have fallen on him in consequence of the purchase: thus, if a house has collapsed owing to the unsound timber, he must make good the value of the house, or, if the buyer's beasts have perished through being infected by the diseased herd, the damage sustained)⁶⁰.

This text shows how the aedilician rules and actions found their place in the contract of sale. The *bona fides* principle makes the seller responsible for the conformity of the object sold because the buyer has paid a price for an object free of defects. Therefore he is compensated for the difference between the price the buyer paid and the price he would have paid if he had known about defect⁶¹. This form of compensation, which is an award of damages given with the *actio empti*, comes to the same result as the aedilician actions. If the buyer would not have paid anything for the faulty object, there is a redhibition. If he would have paid a lesser price, then there is a price reduction⁶².

Compared with the Edict rules, the civil law rules are wider in their application as they govern all sales not just slaves and cattle on public markets. The other main difference between these two sets of rules lies in the amount of compensation they give to the buyer. Aedilician actions mainly compensate the buyer for the absence or diminution in value of the seller's performance whereas the *actio empti* covered all expenses and losses due to the seller's breach⁶³. These two differences had the effect that the *actio empti* could absorb totally the aedilician remedies. Unfortunately, as I have already mentioned, the Digest did not take into account this phenomenon. For this reason, like other continental laws, Swiss law has retained the rules of the Edict rather than those of the classical period civil law.

60 Ulp. D. 19, 1, 13, in ZULUETA, *The Roman Law*, p. 124.

61 See also this extract: Ulp. D. 19, 1, 13, 1:

... *si vero ignorans vendiderit, circa fugitivum quidem tenetur, quanti minoris empturus esset, si eum esse fugitivum scisset, ...*

(. the unconscious [as to the fault of the slave] seller will be liable in the case of the runaway [slave] in the amount by which the price would have been reduced had the buyer known the slave to be a runaway ...) (Translation from ZULUETA, *The Roman Law*, p. 124)

62 HUWILER, *Wiener Kaufrecht*, pp. 255 to 257, contends that this reasoning is a consequence of the synallagma principle present at the time. However for ALLAN WATSON, « The Notion of Equivalence » in *Legal Origins and Legal Change*, London, 1991, pp. 239 and 240, the synallagma only emerged in the Middle Ages.

63 HONORÉ, *The History*, p. 144.

In the Swiss Code of Obligations warranty rules⁶⁴ find themselves separated and different from the rest of the sales rules. The main problem is that instead of being an extension of the sale rules on breach of contract, warranty rules contain many special rules and also special remedies. The remedies of redhibition, reduction of price and replacement are only found in the warranty rules⁶⁵. Furthermore, incidental and consequential damages can be awarded alongside termination of the contract without the seller being at fault⁶⁶. This is contrary to ordinary sale and contract rules. And yet, most authors and the courts consider breach of warranty to be a form of contract breach. So the differences between warranty rules and sale rules are more confusing than useful.

The modern trend is precisely to acknowledge the similarity between breach of warranty and breach of contract and to assimilate the two as much as possible. The Vienna Convention on the international sale of goods that was made in 1980 (CISG) is an example of how warranty rules can be harmonised with general sale rules. Due to its common law influence however, it is not as good a model for Swiss warranty rules as the civil law of the classical period of Roman law.

The best example of this is the award of damages following a breach of warranty. Under the CISG the buyer can claim full compensation for breach of contract and for breach of warranty even if the seller is not at fault⁶⁷. As in common law countries, damages arise out of a mere breach of contract whereas in the Romanistic tradition there must also be a fault on the part of the breaching party. Julian's solution in the above mentioned extract is well adapted to Swiss law: if the seller is innocent of the breach, the contract is rebalanced by reducing the obligations of the parties. If the seller is at fault he is responsible for all the damage caused by the breach.

III. Conclusion

The two subjects we have presented in this article show that a modern analysis of Roman law sources is interesting from four points of view:

1. Although modern Swiss law belongs to the Romanistic tradition, its rules are not necessarily derived from Roman classical law.

a) The rules governing the *fiducie* in Swiss law have been taken from the German *theory of the fiduciary transaction (fiduziarisches Rechtsgeschäft)*. This

64 Articles 197 to 210.

65 Articles 205 and 206 of the Code of Obligations (CO).

66 Article 208 CO.

67 Article 74ff CISG.

theory is the result of a wrong interpretation of Roman sources which was made by eminent Pandectists in the second half of the 19th century.

b) The modern warranty of quality was taken from a contradictory body of rules made by Emperor Justinian's lawyers in the Digest.

2. This misinterpretation of Roman law sources has resulted in unsatisfactory solutions both for the *fiducie* and for the warranty rules.

a) Although the courts and also the legislator (by example in fiduciary operations by banks) have sometimes tried to diminish the prejudicial consequences of the theory of the fiduciary transaction, this theory is still inadequate with the aim looked by the creator and the fiduciary. As a result the rules governing the *fiducie* are dissimilar, incomplete and incoherent.

b) Warranty rules give rise to controversial interpretations as courts cannot decide whether to liken them to general contract rules or not.

3. Significantly, a more faithful interpretation of Roman law sources would have resulted in clearer and more adapted rules.

a) The main problem concerning the *fiducie* is to find means of protecting adequately the fiduciary assets. The Roman lawyers have shown in a very pragmatic way that it is possible to take into account all the relevant interests. The fiduciary has the use of the *formal ownership* and the creator has the *substantial ownership*.

b) As to warranty rules we saw that at the end of the classical period of Roman law, these rules found their place within sale rules which prevented all problems of interpretation.

4. Roman law still has an important part to play in a world that tries to harmonise national private laws.

a) The Hague Convention on trusts and the *Principles of European Trust Law* underline the problem of what the position of the civil law *fiducie* should now be in view of the growing importance of the common law trust. Roman law, in its protection of the interests of both the creator (value of ownership) and the fiduciary (use of ownership), could be a link between the *fiducie* and the trust. In that respect Switzerland can consider accessing the Hague Convention without being hindered by dogmatic considerations.

b) The Vienna Convention has managed to integrate to a great extent warranty rules in the sale but this seems to have been done partly at the expense of fundamental principles of Swiss and Roman law.

As STEIN says: « Roman law can still serve its traditional function of offering a supermarket in which can be found ideas, concepts and arguments relevant to almost any new situation. Roman lawyers should therefore seize this moment to

press the relationship between Roman law and modern law »⁶⁸. We have tried to show in this brief article that Roman law must not be seen as a purely historical branch but as an essential means of understanding more clearly and even of reforming our modern rules. Roman law must be taken into account by lawyers and in particular by comparatists⁶⁹.

Heirs to the principles and rules created by the Roman lawyers countries that follow the civil law tradition form a large legal community. The laws derived from the *ius commune* are the basis of the European legal unity and should enable these common roots to play an important part in the harmonisation and the unification of private European law⁷⁰. It has the necessary richness to become a means of counterbalancing the strength and unity of Common law if it is correctly analysed and used.

68 See PETER STEIN, « The future of Roman law in a Britain that is part of Europe », in *Revue internationale des droits de l'antiquité*, supplement to volume XLI, 1994, p. 180.

69 See PETER, *La place de l'histoire*, p. 342. As says STURM: « On se rend aujourd'hui de plus en plus compte que faire du droit comparé signifie procéder à une analyse horizontale et verticale. Il ne suffit pas d'inventorier les différences et d'exposer les contrastes des législations actuelles. Il est aussi nécessaire de les expliquer. Et cela suppose nécessairement qu'on examine leur histoire et leur évolution » (see STURM, *Droit romain*, p. 157). On the relationship between legal history and comparative law, see also EUGEN BUCHER « Recht – Geschichtlichkeit – Europa », in *Vers un droit privé européen commun? – Skizzen zum gemeineuropäischen Privatrecht*, Basel, 1994, pp. 26ff; CARLO AUGUSTO CANNATA, « Usus hodiernus pandectarum, common law, diritto romano olandese e diritto comune europeo », in *Studia et Documenta Historiae et Iuris* LVII (1991), pp. 383ff; HANS HANISCH, « Rechtsvergleichung – aber wie? », in *Vers un droit privé européen commun? – Skizzen zum gemeineuropäischen Privatrecht*, Basel, 1994, pp. 125ff; HEINZ KÖTZ, « Was erwartet die Rechtsvergleichung von der Rechtsgeschichte? », in *Juristen Zeitung* 1992, pp. 20ff and GIOVANNI PUGLIESE, « Il significato dell'insegnamento del diritto romano oggi », in *Scritti giuridici scelti*, volume III, Napoli, 1985, pp. 407ff.

70 See FRANCESCO PAOLO CASAVOLA, « Diritto romano tra passato e futuro », in *Il diritto romano nella formazione del giurista, oggi*, Milano, 1989, pp. 117ff; ROLF KNÜTEL, « Römisches Recht und Europa », in *Revue internationale des droits de l'Antiquité*, supplement to volume XLI, 1994, pp. 185ff; BRUNO SCHMIDLIN, « Gibt es ein gemeineuropäisches System des Privatrechts? », in *Vers un droit privé européen commun? – Skizzen zum gemeineuropäischen Privatrecht*, Basel, 1994, pp. 33ff and REINHARD ZIMMERMANN, « Das römisch-kanonische *ius commune* als Grundlage europäischer Rechtseinheit », in *Juristen Zeitung* 1992, pp. 8ff.