Fundamental Concepts of the Roman Law

(This is the fourth of a series of articles being written by Professor Radin on Roman Law.)

X

THAT the Roman partnership despite its varying forms was far from being as fully developed functionally as that of England and America, must be apparent. An even more characteristic form of modem commercial associations is the corporation, and of the Roman corporation we may say that it contained almost all the elements to be met with in modern corporations, but that the Romans found little occasion to use them.

Whether corporate personality is a fiction or a reality has been largely discussed in the nineteenth century. Gierke's splendid Genossenschaftsrecht furnished the impetus to a renewed examination of the question. But fiction or not, and whatever it turns out to be, corporate personality in form and substance was a thoroughly Roman concept.¹

There is an orthodox theory on the history of Roman corporations which was established by Mommsen and which is likely to be perpetuated in treatises and manuals, on the cumulative authority of Mommsen himself and of the authors of the treatises. A concise form is to be found in Mitteis' Römisches Privatrecht (1909).² It may be formulated as follows: The power of forming corporations freely—the liberté d'associer—existed in Rome from time immemorial. Once formed, these corporations were entities. The individual members had obligations toward them and claims upon them. The corporation acted through its duly elected officers, control of whom was vested in the corporators. The latter met at

¹Cf. Maitland's Sidgwick lecture (1903) (3 Maitland, Collected Papers, p. 304, especially the bibliography, pp. 319-320) and his Trust and Corporation, ibid., pp. 320-403. The leading foreign authorities are Michoud, Théorie de las Personnalité Morale, 2 vols., 1906-1909, and besides the work of Gierke already mentioned, Hölder, Natürliche und Juristische Personen, Zitelman, Begriff und Wesen d. jur. Personen (1873). Nearly every standard manual of French or German law discusses the question in some detail.

regular intervals and acted in a formally determined way. By a statute of Augustus, this right of corporate activity was made dependent upon a formal state license in which both senate and princeps coöperated. From that time on, only such corporations as were duly licensed possessed the powers and privileges enumerated. All other persons who assumed to exercise corporate functions were guilty of an offense and succeeded only in creating the joint obligations of partners, in the Roman sense of the word.  

But within the strictly limited sphere of licensed corporations, the enlargement of corporate powers went on, chiefly in the capacity to receive bequests and in specific immunities from various types of taxes and other governmental exactions. The final form of such corporations as the firemen and the scavengers of Rome, the firemen of Baetica, the musicians of Puteoli, was not notably different from that of the Pacific Gas and Electric Company or the Erie Railroad. To be sure, none of the thousand questions relating to stocks and to stockholder's responsibility, to ultra vires acts, to holding companies and reorganizations, arose. The corporations mentioned were not organized for business purposes but were distinctly of a public character, in whole or in part, performing services which in most modern communities are the functions of the state. We may say, therefore, that the technical word for a Roman corporation, *collegium, corpus*, meant a public corporation. Membership in it was designated by a term similar to that referring to other political privileges, *collegium habere*, as compared with *tribum habere, ordinem habere*, etc.

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3 In a Columbia dissertation (1909), The Legislation of the Greeks and Romans on Corporations, pp. 91-97, I advanced arguments for the belief that Mommsen's construction was without real foundation, that there was no law of Augustus on corporations, that the passage in Suetonius (Aug. § 32) on which he principally relies, refers to the *Lex Julia de vi* and that the inscription of the *symphoniaci* (C. I. L. VI, 4416) which he combines with the Suetonius passage, refers to some other law,—perhaps, as I am now inclined to suppose, Caesar's, *Lex Julia Municipalis*, or an amendment of it.

On a reexamination of the question, it seems to me that these criticisms of Mommsen's position are still valid. If the conclusions set forth are to be accepted, there never was any restriction or modification at Rome of the right of association *ad exemplar rei publicae*, except the general police and criminal statutes against riot and treason. The licensed corporations would then be those on whom a specific public privilege, involving the use of public property had been conferred. This privilege was in the nature of a franchise and was strictly limited.

4 C. I. L. VI, 1872; 29691.
5 C. I. L. II, 1167.
6 C. I. L. X, 1642, 1643, 1647.
7 Ulpian, Dig. 50, 2, 2.  1. C. I. L. XIV, 196, n. 2112, v. 11.  C. I. L. III, 2, 924, v. 20.  Cicero, Phil. VI, 12.
That which gave the impulse to the creation and rapid growth of the modern corporation was the possibility of combining relatively small sums in a joint venture of considerable magnitude and of limiting the risk to the amount so invested. That could not be done by way of partnership in Anglo-American law because of the partners' unlimited liability. Again, the proper execution of a joint venture involving the cooperation of many men was impossible because of the practically unlimited powers of any partner to act for the group. But in Rome it will be seen both difficulties were non-existent. There was no general liability or general agency of individual co-operators and a company of merchant adventurers might have sailed forth to colonize Thule without creating a new legal unit or demanding legal concepts elsewhere unknown.

The best indication of that fact is the striking instance of the societas publiconorum, the partnership for the purpose of farming out the taxes, or for operating mines and quarries. In this case the amount of money which the purchaser of the revenue needed was as a rule beyond the available fluid capital of any one man. It was usual, consequently, for a number—perhaps a large number of persons—to combine for that purpose although generally the contract was let out to one of them. But an equal control of all partners was obviously impossible. Management had to be intrusted to a selected manager. The shares were transmissible and inheritable and those who dealt with the company thought of their claims as limited by the common treasury—the arca—of the societas. Except for the limited duration of such organizations, there is little that would be needed to convert this into a recognizable American corporation, amenable to Blue-Sky laws and subject to corporation and stock transfer taxes.

The modern civil law of the European continent derived its corporation practice from the model of these special types of partnerships. The very name of the continental institution most resembling our corporation—société anonyme, sociedad anonima, società anonima—indicates it, and societas in the modern codes generally includes both our partnership and our corporation. But there is no doubt that the quasi-public collegia and corpora, consciously imitating state and municipal organization, maintained an unbroken line of descendants in a variety of organizations and when modern conditions gave a new impulse to mercantile association, the partnership scheme of the Roman law was rapidly developed into a real corporation in civil law countries because of
the familiarity and persistence of the corporate idea in its public form. The assimilation of the two types had the unfortunate effect of making both depend on governmental licenses, duly applied for and formally issued, but in the nineteenth century this was abrogated for mercantile associations and the Roman freedom of organization reestablished.\(^8\)

One function of modern corporations—the creation of endowments for beneficent ends, neither the Roman quasi-public collegium nor the societas, even on the analogy of a societas publicanorum, could quite fulfil. It is with this type of entity that modern civilians have peculiar difficulty and in connection with which they have largely discussed the theory of corporations. The English law created the trust which fully covered such situations before corporations came into any real importance. The later Roman law developed a type of foundation known as pia causa in which certain funds are definitely and permanently designated to effect certain purposes. This seems to have been a Hellenistic conception and was capable of indefinite development.\(^9\)

In mandate and societas the transactions were not merely bonae fidei, not merely, that is, acts implying good faith between the participants, but involved an obvious relation of trust and confidence, even of fraternity. In both cases a participant could sue for performance of a promise not merely because of a tangible loss sustained in reliance upon it, but because of reasonable expectations defeated by its non-performance. But reasonable expectation has a much greater importance apart from any relation of trust and confidence. It is the foundation of any developed economic system.

Such systems are pretty generally based on property and demand a transferability of property interests. These property interests are concerned—and in Roman law almost exclusively concerned—with concrete movable things, with human beings, free or slave, and with land. Some man has certain privileges in respect to these types of things and persons; he may utilize or exploit them to a greater or

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\(^8\) Compare particularly the French law of July 1, 1901. In other countries this freedom had been established earlier.

\(^9\) Funds in the possession of temple treasuries were frequently earmarked for a particular purpose so that the temple was compelled to borrow small sums for ordinary expenses in spite of the presence of large amounts of money in its treasury. Cf. Tarn, A Social Question of the Third Century (Hellenistic Age, pp. 109-111).
less degree; he may prevent the utilization or exploitation of them by anyone else. Any society organized on property must provide not merely for the possibility of the transfer of these privileges—but must facilitate such a transfer. But even this is not enough in large communities in which a credit system grows up. Essentially a credit system is the discounting of future transfers and in order to maintain it the defeat of reasonable expectation of such transfers must be, as far as possible, prevented.

The group of obligations surrounding transactions like sale and letting demanded recognition as a group as soon as the transaction itself became important as a complex unit. The various elements in a sale, the bargaining, the surrender of possession, the assurance of good quality, the protection against collusive claims, the incidence of accidental loss, the payment of the purchase price, could all be isolated and could become the objects of obligatory stipulations and throughout the whole of Roman law, for greater security and certainty, that was done. But when Rome became one of the world's great markets, and its legal system attempted even partially to control the operation of the other great markets of the world, and perhaps when those chiefly concerned in the mercantile development of Rome, were Greeks, Syrians and Egyptians, trained in expeditious methods and particularly unfamiliar with the stipulation form, this form could not remain the vehicle of so widespread and common an economic function.

In the absence of a concrete thing like the specific reply to a specific question, or like the transfer of a res from A to B, a point had to be found at which one could be assured that some or all the obligations had come into existence which in ordinary commerce are included in a sale. That point was the agreement as to the price. This is by no means the first stage of the transaction. The specification of the res has preceded it. The two parties come to the sale in the words of an interesting constitution of Diocletian (293 A. D., C. J. 4, 44, 8) post multas contentiones, after considerable give and take on both sides. We can easily see that "agreement" as so understood is by no means an abstract "meeting of the minds" but is almost as specific as the reply in a stipulation. One person has proffered a price and the other has indicated his assent. When that is done, and not until it is, the two participators in the transaction are identified as buyer and seller and either side can

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10 C. J. 4, 44, 3. This is the constitution to be discussed later in connection with lesion.
discount in advance the advantages which he reasonably expects to derive from the engagement.

From the buyer's point of view the chief of these advantages is the expectation of being in physical control of the thing and of exploiting it for his own benefit. As far as it is in the vendor's power to do so, a Roman court will compel him to see that the buyer is put and kept in such control. This generally involves an active effort on the vendor's part. He must bring the movable where the buyer can get it. He must facilitate the buyer's entrance into the land, if it is land, and under no circumstances must any obstacle to the buyer's acquisition of control be traceable to the act or omission of the vendor.

On the seller's part, what he desires is obviously the securing of the purchase price. The obligation of delivery—detailed in the preceding paragraph—and the tender of the price are mutual conditions. But either act may be deferred if buyer or seller has satisfied himself that it is reasonably sure of being performed later.

Once both acts are accomplished, we are apt to think of the transaction as closed. But it is apparent that there are certain risks inherent in the sale which are unequally distributed. These risks press very heavily on the buyer. Even a fairly careful examination of the res leaves a large margin of uncertainty as to its fitness for his needs. Further there is the danger that he may be evicted by a title paramount to that of his vendor. The vendor runs no such risk. The quality and authenticity of a price paid in metallic money is determined with relative ease. Eviction under paramount title is impossible.

The obligations of the vendor, accordingly, survived the acts which were the immediate objectives of the sale. He was made to warrant the quality of the article sold and to compensate the purchaser or to restore the price and take back the article if the thing was not as the purchaser might reasonably expect it to be. The evil and cynical rule of 

caveat emptor

was abrogated in practice and in law at Rome some time before the Christian era, nor need we ascribe the implied warranties that negative 

caveat emptor

to any loftier source than the common sense of merchants. The law in this respect was administered with a reasonable regard to business convenience and, precisely as in the common law, can be really understood only in connection with the hundreds of cases cited in the Digest.

The implied warranties dealt with freedom from those defects
which were of frequent or ordinary occurrence in various classes of commodities. The existence of special qualities could of course be part of the bargain and at a very early time without stipulation and without any other device for creating an obligation, a statement in regard to a thing, warranted that the quality existed and was actionable, if false.\textsuperscript{11} If we remember that in Chandelor v. Lopus\textsuperscript{11a} in the early part of the seventeenth century and for at least a hundred years thereafter, the use of the hieratic words “I warrant” was essential at common law in order to bind the seller, we may estimate by that fact the degree of commercial development which Rome had attained in the first pre-Christian century.\textsuperscript{12}

The Roman courts, however, showed an indulgence to commercial weaknesses similar to that exhibited by our own courts. There was a difference between “puffing” and words that import a warranty.\textsuperscript{13} The test of course was the impression produced on a reasonable auditor, and we may be sure it was not always easy to distinguish what was said or promised, \textit{sic ut praestentur}, “so that it was to be made good,” from what was meant as a mere vaunt, \textit{sic ut iactentur}.

The other obligation of the seller that survived delivery and payment, was the duty to keep the buyer in free enjoyment of the res. Whether there had once been a warranty of “title” we cannot be sure. Certainly there was none throughout the entire period of Roman law as we know it. But if the buyer was actually ousted by paramount title the seller must pay a penalty of double the price or under certain circumstances give compensation. This is not quite so effective a protection as warranting title, but in most cases it has the same practical result and gives slightly less occasion for certain types of fraud.

A question that plays a large part in the discussion of the common law of sales is the determination of the moment at which “title” passes. The matter has often been treated as a question of metaphysics rather than as an issue presented by certain real and quite common situations. Considered realistically, what we wish to determine is which of the two parties bears the risk of loss in case of accidental destruction and under what circumstances a second purchaser from the buyer will be protected against the original vendor. These are two very different questions and our rules for

\textsuperscript{11} Dig. 21, 1, 17, 20.
\textsuperscript{12} 1 Williston on Sales (2d ed.) p. 368 seq., § 195.
\textsuperscript{13} Cf. Dig. 21, 1, 19 and Williston, op. cit., § 202 seq.
determining the passing of title, as codified in Sales Acts and in authoritative textbooks, do not sufficiently distinguish them. That results in the creation of "security titles" which are not real titles but have some of the effects of them, as well as in similar devices.\textsuperscript{14}

The incidence of accidental loss was regulated in Rome by a simple rule. It fell on the buyer the moment the obligations of the sale were created, without reference to delivery. To be sure, this, like all other matters, could be changed by agreement. Whatever may have been the origin of the rule, it was one easy to adjust oneself to, especially since the vendor in possession was held to a high degree of diligence in respect of the thing sold.

On the second question, the Roman law did not permit an unpaid vendor to have his cake and eat it. If he distrusted the buyer's good faith or solvency he need not deliver the article until payment was made, or he could protect himself by some form of personal or real security. But he could not—even by special provision—dispense with such security and still get the benefit of it. It may be doubted whether the devices by which modern business men do this very thing owe their origin to anything else than a rather low commercial morality and the facility of bankruptcy. A Roman vendor who wished to retain the measure of control over the thing involved in a security title could not effect it by a sale, although there were other transactions by which he might get a result somewhat like it.\textsuperscript{15}

The question of title, however, might have another application in the special case of "future" goods. A very old English case allowed the sale of goods of which one had "potential" possession\textsuperscript{16} and Pomponius declared a sale of future crops and young of animals valid, so that when the object of the sale comes into existence, the effects of the sale immediately apply to it.\textsuperscript{17} In Grantham v. Hawley (1616)\textsuperscript{18} the effect was that the vendee of the future crop took them from a subsequent grantee of the land. The effect of the Sales of Goods Act and the Uniform Sales Act in doing away with present sales of potential goods would compel the opposite decision.\textsuperscript{19}

\textsuperscript{14} Williston, op. cit., § 286a seq.
\textsuperscript{15} A present grant of a usufruct with the understanding that a sale will be made later, or a contract of \textit{locatio} with such an understanding will secure an approximate result. But special stipulations would have to be made to cover the risk and otherwise safeguard the vendor.
\textsuperscript{16} Y. B. 21 Hen. VI, 43. 1 Williston on Sales (2d ed.) p. 256.
\textsuperscript{17} Dig. 18, 1, 8, pr.
\textsuperscript{18} Hob. 132.
\textsuperscript{19} Uniform Sales Act, § 8, Sales of Goods Act, § 5.
At Roman law, when the future goods come into existence, the only effect would be that the risk of their accidental destruction is on the vendee. That of course must have been the case in the English and American law before recent codification, and there is no very good reason why the vendee should not bear this risk. The objections to the doctrine of potential existence related to the fraud which by it could so easily be practised on innocent purchasers of the principal res. No such difficulty existed at Roman law, and the modern law operating with an unanalyzed term like "title" in order to cure one defect made a change in the risk which was neither necessary nor contemplated.

Similarly "title" has been a fruitful source of confusion in those cases in which at the common law it "passes" while possession was retained by the vendor. The conclusion that subsequent purchasers or creditors were to be postponed to the first vendee to whom the title had passed seemed inevitable, although it was preposterously unjust. Almost every jurisdiction remedied the matter by special statute allowing title to pass to the first vendee, and then to leave the first vendee and pass to the second vendee, while the former retained his remedy against the vendor. At Roman law this result was a matter of course without the vertiginous darting of "title" from one owner to another.

Yet the matter of transferring title as such is much discussed by modern Romanists and a passage of the Institutes in which that question is raised has been made the text for a deal of speculation. The statement is undoubtedly true that the Roman law is quite different from the common law in this respect. The contract of sale of a deliverable chattel is not at Roman law, in the absence of special agreement, a conveyance of it. To convey it, delivery, traditio, is required. Those who go further and say that even traditio did not pass title, unless the price was paid, or security given for the price or credit extended, forget that this leaves the group of situations in which traditio is not followed by title, very small indeed. It is hard to imagine what the rule would then cover except the case in which the buyer got possession of the article under the pretext of paying cash and then absconded. Such situations are readily dealt with under the ordinary categories of furtum or dolus.

20 See the very full discussion of the statutes of the several states in 1 Williston on Sales (2d ed.) pp. 828-972.
If, therefore, the transfer of title has a meaning in Roman law, it must be sought for elsewhere. Most of the Mediterranean communities were on a timocratic foundation. Their public duties and privileges were determined on the basis of their property. The institution of the census at Rome, the system of liturgies in the East, had this implication. It might be of extreme importance, therefore, in these communities whether at a given moment a citizen did or did not own a certain amount of property. We may conjecture that the question of passing title was primarily concerned with these matters, since transfer or retention of title obviously did not fulfill the functions that it does in the Common Law of Sales.

A curious and late development was the principle of lesion (laesio enormis) introduced, according to our texts, by Diocletian (293 A.D.). This provided that if the vendor had received less than half the value of the thing, he might rescind the sale unless the buyer was willing to pay the difference. It is quite generally believed that the provision is interpolated and that the institution is a creation of Justinian. The evidence for this is somewhat stronger than that which is offered for other alleged interpolations, but it is far from conclusive even here. At any rate it is a late and ill-advised principle. Except for articles that have a market value, the determination of a iustum pretium is peculiarly difficult if not impossible, and it is precisely in things which have no market value that there is most occasion for a complaint on the score of lesion. Further there is no very good ground for confining lesion to a suit by the vendor.

However, in spite of its imperfections, lesion became the means of testing the validity of contracts generally by their fairness, a principle embodied in the German Civil Code, section 138, and the Swiss Code of Obligations, section 21. Such a test is no more

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22 The institution of antidosis at Athens enabled a man on whom a burdensome liturgy had been imposed to offer to exchange his property with another citizen and then perform it. In that case, what was and what was not a man's property must have been a matter of anxious examination. Cf. the Demosthenic oration against Phaeacippus, passim. Lipsius, Das Att. Recht, p. 590.

23 The position of the sentence is suspicious. It comes at the end of a constitution which would lead one to expect a wholly different conclusion. The doctrine is not referred to in the Theodosian Code which is later than Diocletian. These circumstances are the strongest elements in the case against the authenticity of the rule. I am unable to attach much weight to the vigorous—often violent—argumentation of Solazzi, L'origine Storica della Rescissione per Lesione Enorme, Boll. Inst. del Dir. Rom. XXX, pp. 51-87.

24 This is the Chikanenverbot, much discussed in foreign legal studies.
difficult to apply in law than in equity where it has long been established in our system. As the Romans applied it, it was a clumsy and inadequate way of reaching this result. In modern courts, it invests judges with a discretion not very likely to be abused, but sufficient to act as a deterrent to the grosser forms of economic exploitation.

It need hardly be pointed out that the transaction of sale is a flexible one, particularly dependent on local custom. As it is bona fide, neither side can claim what a reasonable man ought not to expect, but a reasonable man at Rome as in England was held to know that market transactions are in part at least competitive contests of wits. Something of the ferocity of the competition was removed by the methods indicated, but in both systems, the safest and most certain methods of securing any advantages or avoiding any dangers in a sale, was to make the terms of the contract, as fully as was feasible, explicit terms of the bargain. Over-prudent merchants might insist on stipulations, but this soon became unnecessary.

That the rules of sales covered such diverse things as sales of land and sales of merchandise, had an advantage in such a society as the Roman, in which population was inclined to be settled. If population had been as shifting as it is in America, sales of land would both have become much more frequent and have demanded greater security for the buyer than possession of the vendor at the time of the sale, even assisted by a short prescriptive period. Hellenistic Egypt had a system of land registration that might easily have spread through the Roman world.

XII

A contract of much less importance than sale was that of letting and hiring, locatio-conductio. This was more limited than the corresponding contract in our law or in modern continental law, because of the peculiar Roman doctrine of possession. Its essence lay in transferring to B by A the right of exploiting a res to a limited extent and the thing transferred by a natural extension came to include the labor-power of a free man. The fact that in the last case the laborer was the locator and the employer the conductor is a logical refinement of little importance.

25 The Roman distinction between possession which gave an interest in the res and detention which did not, will be examined later. The hirer at Roman law did not have possession.
It was recognized by the Romans that this was a species of sale\textsuperscript{26} and a great deal of what has been said about sale will apply here. The obligation arose when the price was agreed upon and the price must be in money. The hirer could claim compensation for anything short of accidental destruction or overwhelming force, by which he was deprived of enjoyment, and if the res was so lost or destroyed, he owed no rent. The lessor, on the other hand, could demand reasonable care on the hirer's part, which included in practice a guaranty against loss by theft, in case of movables.\textsuperscript{27}

In the case of lease of land two provisions that seem very strange to us were derived from local conditions. These were the rule that the lessor could terminate the lease if he needed the property for his own habitation and that an agricultural tenant was relieved from rent if his crops had been destroyed by a bad season. This latter relief was in the nature of a suspension of claim, and in subsequent good harvests arrears might be claimed. Conditions like these are usually generalized from common experience and become implied terms of contracts only because people are familiar with them. They could always be modified or avoided by special stipulations.

In a slave-holding society, labor contracts can have only a minor importance. They were not wholly insignificant. Free labor played a real part in the general economy. Obviously, however, we need look for nothing like the development of modern labor law with its engrossing social and political implications. Even the first of the great modern codes, the French Civil Code of 1804, seems to contemplate no problem that could not be settled in the frame of the Roman contract of \textit{locatio-conductio, operarum}.

That other modern example of the \textit{locatio-conductio}, the contract of transportation, would scarcely have seemed to the Romans a matter of first-rate moment. It was essentially a type of \textit{locatio conductio operis}, i.e., the \textit{conductor} undertook to get a job done, the job being the bringing of certain articles to a specified place. The largest contracts of this sort were probably made with the government in connection with the \textit{anwna}, the public food supply of the city of Rome.

Yet, even here, Romans would have found much of our modern

\textsuperscript{26} Just. Inst. III, 24, pr.

\textsuperscript{27} This is not quite certain, but likely to have been the case in most instances. Cf. Buckland, A Text Book in Roman Law, pp. 555 seq., and the work of Lasignani there cited, \textit{Responsabilita per Custodia}. 
law of carriers intelligible, because of their familiarity with a system of transportation comparable on a small scale with our own. Maritime commerce was one of the great industries of the Eastern Mediterranean and had been so for millenia before Justinian. Bottomry bonds, marine insurance, responsibility of carriers, were present not merely in germ but in a fairly developed form. These things, to be sure, the Roman system took over as it found them, and just as the common law did in the case of the law merchant, the Roman law observed the wise policy of letting immemorial customs alone. A very special rule, for example, the Rhodian law of jettison, *lex Rhodia de iactu*, forms a title by itself in the Digest (14, 2) and has survived almost unchanged into our system.

It may be noticed that this contract of *locatio-conductio*, of plainly minor importance at Rome, was none the less the most completely "consensual" of all the "consensual" contracts. In mandate and partnership the revocable nature of the agreement before anything was done qualified the obligation created by consent very materially. Even unseasonable renunciation must in most cases have resulted only in nominal damage. Again in sales, while agreement as to price established the obligation, a certain transfer was at once effected. Risk of loss was at once transferred to the vendee. We might almost say that a new *interesse* in the res had been created and vested in the vendee. But in *locatio* no change in the relation of the parties in respect of a *res* was effected. The only thing that was created by the agreement was an enforceable obligation on the conductor and the locator to carry out the promises explicitly or implicitly contained in the agreement.

At the common law contracts that were not under seal when they were enforced at all, are said to require an element that is called "consideration." Just what consideration is has been found extremely difficult to define with precision, although in a great many concrete instances, it is easy enough to say that the contract is invalid because without consideration. It may be doubted whether the concept will prove of much value or vitality in the future development of Anglo-American law. But it is undoubtedly an element of the law as it is now, that is, there are agreements which, though the terms are mutually satisfactory to the parties concerned, are not enforceable in a court.
It has often been supposed that a Roman term, the *causa*, very much resembled our consideration. At any rate, an element called *causa* was assumed to be an essential element of a civil law contract and was credited to the Roman system on which the civil law was founded. This element appears in all the modern codes derived from the French, but not in the more recent codifications of the civil law system, the German, the Swiss and the Brazilian codes.

The term was subjected to a severe and destructive criticism by M. Planiol, a criticism which has not been successfully met, although most French, Italian and Spanish manuals still enumerate *causa* as one of the constituents of obligatory contracts. In the Roman law it certainly played no part at all. It is at best the hypostasis of a phrase—the process that Dean Pound prefers to call reification.

There were certain situations which both at Roman and at common law are called quasi-contractual. Just as some obligations created in an externally recognized way, would not be enforced because it was inequitable to do so, so there were situations in which although no obligation could be said to be present, a litigant would be treated in equity as though he had an obligatory claim. The "innominate" contracts of which the "real" contracts are particular examples were based upon the inequity of allowing a man to strip himself without compensation. We can readily see, therefore, that when he asked not for compensation, but simply to be restored to his former position, his demand *a fortiori* could scarcely be resisted.

The Roman system had long known a procedure which was called *restitutio in integrum*. If property had been transferred by force or fraud, if a minor had made an improvident transaction in which his inexperience had been taken advantage of, the praetor would put the injured person as far as possible in the position in which he was, before the act took place. This was not a regular action but an extraordinary remedy upon application and special inquiry. Such an idea can obviously be extended and without consciously following the model of the *restitutio*, the idea was extended to a number of cases in which property had been transferred to a transferee who had no legal claim to get it. A common example is that of a mutual mistake sufficient to have prevented

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28 *Tr. El. de Droit Civil* (8th ed.) pp. 343-349.
enforcement of a claim if it had been sued upon. Or else we might have a valid obligation when made which by change of circumstances becomes invalid. In either case any one who has performed when he legally need not have done so, may come into court and ask neither for penalty, nor compensation, nor for pressure to have his legitimate expectation realized, but simply to be put back into the status quo.

A case cited in the Digest will illustrate. A has given clothes to a fuller to be washed. The clothes are lost by theft. A sues the fuller and recovers the damages in an action *ex locato*. Later A finds his clothes. Can he also keep the money he got from the fuller? Plainly not. We may say that there was a mutual mistake as to the basis of the payment, but after all the fuller paid because he had to. There was no mistake that judgment had gone against him. Ulpian finally suggests that the fuller has really paid *sine causa*, without any good reason, as it turned out, for the payment.

Just as such payments are *sine causa*, there are others in which a good reason had been expected but, as a matter of fact, did not arise: *causa non secuta est*. It is expressly stated that the suit *causa non secuta* is put in the same category as though it were *sine causa*. One example is concerned with master and slave. A, a supposed slave, gives B, his master, money in order to be emancipated. It becomes known that B, unknown to himself or to A, had been a free man at all times. He can of course get his money back. But how shall the situation be classified? It is not really different from the illustration given before and it may be described in either way, as a claim for money given *sine causa*, or *causa non secuta*.

There were many similar situations. A gives B money not to commit a crime or to induce B to return an object lent for safekeeping. There is nothing dishonorable in A's desiring the crime not to be committed, or in wishing the property returned. There is something dishonorable in B's requiring payment to do what he

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30 Dig. 12, 7, 2.
31 The full phrase *causa data, causa non secuta* occurs only in the rubrics. In the text *causa secuta* is common, but *re data* takes the place of the first phrase, often accompanied by *re non secuta*. As a matter of fact *dare causam* in this sense is meaningless, although *causa sequitur* is perfectly intelligible. When the rubrics were put into the manuscripts *causa* already had its Low-Latin meaning of "thing"—a meaning already foreshadowed in many classical passages. In the Romance languages this use of *causa* has completely displaced *res*. Cf. Fr. *chose*, It. *cosa*, Sp. *cosa*.
32 Dig. 12, 7, 1.
33 Dig. 12, 4, 3, 5.
34 Dig. 12, 5, 2.
ought to do. Money under such circumstances can be recovered because given *ob turpem causam*, "because of a dishonorable situation," since the word *causa* has its larger connotation in this phrase. The same thing applies when money is paid under a stipulation extorted by fraud, or when a promisor has failed to do what he has promised unless he receives additional pay. It was morally disgraceful to take this money and it could be got back.\(^{35}\)

If we compare these cases with that of the fuller, we shall see that the only real difference is the character of the act at the moment of acceptance. In the fuller's case, the payment is not only proper at the time but could have been legally compelled. In the others, payment was highly improper. But in all cases, it might be said that there was no sufficient legal reason for the payment of the money, whether that fact was or was not known by the recipient.

The terms *sine causa*, *ob iniustam causam*, *ob turpem causam*, *causa non secuta*, are merely phrases of description. They do not qualify the suit at law, but the situation which gives a basis for the suit. The suit itself is in every case a general action, the *condictio*, which lies whenever money or property is in the hands of a man who *ex aequo et bono* ought not to have it as against another.\(^{36}\) The varieties of such situations are as numerous as the dolose devices of men can suggest. When they were collected for examination into the various titles of Code and Digest, they formed an incongruous and miscellaneous assemblage. And in so collecting them, the compilers or the later revisers of the manuscripts affixed the rubrics we know, *condictio sine causa* and the like. Such rubrics were of course mere memoranda of the contents of a title, but inevitably later commentators took them for the names of specific actions and it is from these rubrics that the descriptive term *causa* was hypostatised into a distinct entity to the prejudice of legal discussion and the comprehension of the Roman contract.

The largest number of cases in which suit is instituted to recover something paid *sine causa*, "without adequate legal reason," are grouped in the Digest under the rubric, *de condictione indebiti* (12, 6) "Suit for recovery of payments made which were not due." Many of the cases are obviously the same as those discussed in the title "sine causa." Most of them are instances of mistake or ignorance. It is in this title that the famous phrase occurs which by

\(^{35}\) Dig. 12, 5, 9, 1.

\(^{36}\) *Aequum et bonum* is expressly asserted to be the foundation of the action. Papinian, Dig. 12, 6, 66.
Mansfield's decision of Moses v. Macfarlan,\(^{37}\) has become the foundation of our claim based on unjust enrichment. *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem,* "It is in accordance with natural equity that no one become richer by reason of some one else's loss."\(^ {38}\)

Literally construed, this is of course nothing better than a moral ideal, but it was meant with the qualifications derived from its application. Its essence lay in the requirement that if B has obtained A's property in such a way that well-defined moral sanctions would require him to return it, he can be made legally to do so. If no such sanction exists, the mere fact that B could not have sued A for the property is not a basis for the *condictio.* So if B owes A money to be paid December 1, and in ignorance of that fact pays it on November 1, he cannot recover it.\(^ {39}\) Again, if A sues B and loses although his claim is well founded, B may be convinced of that fact and pay in spite of his success in the courts. B will then not be able to recover.\(^ {40}\) Or if B having a good defense prefers to pay rather than run the risks of litigation, he cannot recover.\(^ {41}\)

The moral sanctions mentioned must be those which the institutions of the community support. Suppose a minor—less than fourteen years of age—makes a stipulation for a perfectly valid and fair return, and pays under it, the minor can none the less recover his money.\(^ {42}\) And money paid by mistake to him cannot be recovered.\(^ {43}\) These violations of what seems *aequum et bonum,* are due to the fact that the public policy which governed such transactions was felt to be superior to the prejudice sustained by any particular person.

XIV

Certain matters that loom very large in the minds of lawyers at the present time and especially in our system, seem to have been lightly treated by Roman courts. There is certainly nothing strange in that fact. The questions that occupy our legal interests are very different from those that seemed important less than a century ago. English and American textbooks and decisions had vastly more to do a few generations past with estates, with settlements,


\(^{38}\) Dig. 12, 6, 14.

\(^{39}\) Dig. 12, 6, 10.

\(^{40}\) Dig. 12, 6, 28.

\(^{41}\) Dig. 12, 6, 24.

\(^{42}\) Dig. 12, 6, 41.

\(^{43}\) Just. Inst. III, 14, 1.
with trespasses and waste than they do now. We shall consequently find little matter for comment in the fact that a very large number of the most important modern questions in agency, corporations, carriers, labor and the like were apparently not considered at all in Roman law and that our sources afford us little aid in determining how they would be treated if we were required to apply a Pandekt-enrecht to our present conditions.

Bankruptcy procedure may illustrate. The Romans had a well worked out system which we might call one of bankruptcy. There was a suit at law for acts done in fraud of creditors, a special interdict and a claim for restitutio in integrum. A curator was appointed who was obviously equivalent to an assignee for the benefit of creditors or a trustee in bankruptcy. One of the two principal purposes of bankruptcy statutes was consequently well enough provided for. But the other one, the humane purpose of discharging an unfortunate debtor, seems not to have been considered either as desirable or as a proper inference from the provisions for the prevention of fraud on creditors.44

It may be noticed that the term used here was in fraudem and that the expression in the praetor’s edict was fraudandi causa, not dolo malo. The fraud on creditors which makes a conveyance invalid in our law was apparently taken from these sources, and the use of the term “fraud” to cover both such cases and wilful wrong has caused confusion. We have been compelled to invent a category like “legal fraud” to account for it. The case cited in the Digest from Julian presents the problem so often discussed in our cases, of a conveyance by a debtor which leaves him without property when no positive evidence can be offered of fraudulent intention, consilium fraudandi. Julian decides, as our courts do, that a man who makes such a conveyance must be assumed to have this intention, and that even if the grantee can be shown to have no knowledge of such a purpose.

Discharge of a bankrupt is a privilege for which a statute would be necessary, as has been found to be the case in all communities that permit it. Whether this dangerous privilege, so frequently and so grossly abused, could be surrounded with greater safeguards

44 The older rule seemed to discharge the bankrupt who had given up his property, Dig. 42, 3, 4, 1. But the first sentence of this fragment indicates that another rule was adopted by which the debtor could be sued on the old debt and recovery had to the extent of his power. This is as far as the feeling of humanum would go in the bankrupt’s favor, Just. Inst. 4, 6, 40, and the 135th Novel of Justinian.
46 Dig. 42, 8, 17, 1.
than we have succeeded in putting about it, may well be doubted. Perhaps we should have to come to the same conclusions as those which apparently animated the framers of our bankruptcy statutes, that the net result is the distribution of the risks of a mercantile enterprise over the mercantile community as a whole and that the advantage of this result outweighs the dangers inherent in it.

What would the Roman law have done with insurance? Bottomry loans, the fenus nauticum, was a familiar concept. Men lent money to merchants engaged in foreign trade on the special condition that if the ship was lost the loan was discharged. For this extraordinary risk the ordinary usury laws had no application. Such a loan, in theory, was possible with almost any condition attached. Scaevola makes a general institution of it, condicione quamvis poenali. Speculation, consequently, was perfectly legitimate and one of Scaevola's illustrations is the lending of money to a fisherman to be repaid with interest only out of the catch. Yet there are very few detailed instances given except in connection with maritime loans, and the examples of Scaevola have the air of supposititious cases.

But this is not an insurance contract. Scaevola restricts his permitted contracts to those that fall short of gambling—si modo in aleae speciem non cadat, although Pomponius admits that the sale of a future catch of fish like the sale of an expectancy in general is a sort of gambling, quasi alea. Now despite earnest efforts to prove the contrary, insurance contracts are a sort of gambling, and although the validity of gambling contracts as such at Rome is somewhat doubtful, it is easy to see how by an interchange of stipulations with appropriate conditions every form of our insurance contracts except that of life insurance could be provided for. Yet apparently, though risks of theft, of accidental destruction, are described in all Latin literature as very common, this type of protection was not utilized.

As to life insurance indeed, the forms developed by Roman law would oppose an extraordinary resistance. One could not stipulate for a beneficiary and a stipulation for one's estate—which was feasible in practice although accomplished by indirection—coupled with a testamentary bequest to the beneficiary was far from

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46 It forms the rubric of two titles, Dig. 22, 2 and Just. Code, 4, 33.
47 Dig. 22, 2, 5, pr. The reading has been questioned but it seems sound.
48 The common conditions, si navis venit, si navis non venit, Dig. 45, 1, 63 and 45, 1, 141, 7, probably had nothing to do with insurance cases, but they could easily have embodied an insurance contract.
adequate. A statute could of course have cured the difficulties, but
the need for insurance was rendered less imperative by the existence
of a restriction on testament, by the dotal system which provided for
the wife and by an elaborate system of compulsory guardianship of
orphans and incompetents.

But doubtless the largest apparent gap in the Roman law is
the absence of any category that would cover negotiable instruments.
To be sure the origin and growth of this idea can be traced with
relative certainty and it is as much a naturalized foreigner in our
system as it was in the civil law system. It is likely enough that
the Romans would have attempted to stretch the mandate to cover
it just as later civilians did, when it was attempted to embody this
mercantile transaction into their law. A can give B a mandate to
collect a claim of A's against C and he can do so for B's sole benefit.
But even if B is a mandatary in rem suam, the rules of agency apply.
The mandate is extinguished by A's death.

The Romans had a type of agency or intervention called negoti-
tiorum gestio by which a volunteer might act without warrant from
the principal whose interests he is serving and hold the principal
liable for obligations he has assumed on his behalf. That seemed
a sufficient basis to which to refer indorsement, but the idea of an
indorsement is really a very different thing.

However, even the earliest medieval writers knew that in the
bill of exchange something new had been invented. The new word
cambium which they devised for it, indicates that and the explana-
tion that cambium was a commutatio pecuniae absentis cum praes-
ten
dolo facit qui petit quod redditurus est, (Digest 44, 4, 8, pr.) "It
is fraud to make a claim for what you are under an obligation to
return."

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(To be continued)

Raphael de Turri, Tractatus de Cambiis, Disp. 1, qu. 3, n. 2.