DAVID JOHNSTON

THE ROMAN LAW OF TRUSTS

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Jacket illustration : detail of Justinian from sixth-century mosaic, Ravenna, Italy. Photo: Sonia Halliday

For
John Crook

Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas.

Cicero, *de officiis* 1.23

Nulla paene res adeo pro utilitate humani generis invenitur quae non callidis hominum consiliis ad fraudem malitiamque convertitur.

Nov. Theod. XXII. 2 pr. (AD 443)

Preface

If the law of legacies and trusts was the favourite law of the Roman jurists, it has some claim now to be considered the least favourite law of Romanists. Reasons are not far to seek: the sources are extensive and complex; they appear to have contributed little to modern law and to have little to contribute to its study. For the historian this tradition of neglect is bewildering: since the mechanisms and laws of succession govern the transmission of wealth, they affect quite crucially the formation, structure, and continuance of the property-owning classes in society. Historians too, however, (with greater justification) have been deterred by the technicality of the Roman law of succession.

Against this background, it is a matter of taste whether a study of the law of trusts should be hailed as timely or derided as anachronistic. In any event, to study the law of trusts may seem a curious way to combat long-standing neglect, for the history of the law of trusts is not so much the history of the rules of succession as the history of a system which subverted those rules. For over five centuries the civil law of succession and the law of trusts coexisted uneasily, but when reform came it was the law of trusts which prevailed. The history of trusts can be viewed, then, as the history of a system from its inception to maturity in five centuries. It can be used as a case study in the evolution of law.

This book is concerned with the question why the law of trusts developed as it did; why it was able to gain at the expense of the civil law; what advantages it offered testators of different classes and periods. The argument is not, therefore, structured as an exposition of legal doctrine. On the other hand it is quite clear that answers to these questions depend on a detailed analysis of legal rules and their development, and consequently on examining the main texts in the *Digest* which are concerned with trusts. This is particularly so in the case of Chapter VI: since its subject is interpretation, it is wholly dependent on close analysis of legal texts. The texts have been quoted, sometimes at length (but with translations) since they alone allow a satisfactory reconstruction of the law.

I have attempted to write so that the argument should be comprehensible not just to Roman lawyers, but also to other legal historians and (perhaps less so) to Roman historians. This reflects two convictions, one legal and one historical. First, that there are remarkable similarities between the history of the Roman law of trusts and the early history of English uses and trusts. The parallels are distinct; but whether we should speak of influences is a question this book cannot attempt to answer. Second, that the history of the institutions of Roman law is an important, even a vital, ingredient in any attempt to write Roman social history. These convictions may sound comfortingly general, but none the less a warning may be in order: those who are easily depressed by legal technicalities ought at all costs to avoid Chapter VI, and also sections in other chapters headed 'principles' or 'definition'.

Little has been written in this area of Roman law. The notes therefore refer largely to primary sources. The bibliography at the end lists only works on trusts, Roman or other, and other works cited on several occasions in the notes.

Most of this book has been written in the course of 1987. Its inspiration, in a sense, goes back much further, to my Ph.D. thesis completed in 1985. Although the book does not contain very much that was in the thesis (Chapter IV reproduces those arguments which seemed worth retaining, and others are reproduced in the earlier articles cited), I am none the less very grateful to Peter Stein for supervising my early work in this area and to the examiners of my thesis, Peter Birks and Peter Garnsey, who provided valuable criticism.

The whole text has been read and improvements suggested by John Crook, Bruce Frier, Tony Honoré, and Peter Stein. I am very grateful to all of them for agreeing with such enthusiasm to what was no doubt a trying and tedious task and for performing it so generously. I have also benefited from discussions with Michael Crawford and Keith Hopkins. I have been able to try out various arguments on audiences variously legal and historical in Cambridge, London, Ann Arbor, and Chicago. Ulrich Manthe has been kind enough to allow me to use the manuscript of his recent book long before publication; and Edward Champlin has allowed me to see parts of his forthcoming book on Roman wills. John Vallance has provided a good deal

of general encouragement. Richard Hart has shown unfailing editorial patience. I thank them all.

Almost the whole of this book has been written during my time at Christ's College, Cambridge as a research fellow. The remainder was written in autumn 1987 while holding a visiting fellowship at the University of Michigan Law School. Two very different institutions, certainly; but equally liberal in their support of research.

I am glad to be able to dedicate this book to John Crook, who first introduced me to Roman law, little expecting these consequences. He has saved me from many errors and much legalistic excess, and would gladly have saved me from more.

D.E.L.J.

Christ's College, Cambridge
February 1988

Abbreviations

AE	*L'Année épigraphique*
ANRW	*Aufstieg und Niedergang der römischen Welt*, ed. H. Temporini (Berlin, from 1972)
BIDR	*Bullettino dell'istituto di diritto romano*
C.	*Codex Iustinianus* (*Corpus iuris civilis*, vol. 2), ed. P. Krueger
CIL	*Corpus inscriptionum latinarum*
CQ	*Classical Quarterly*
CR	*Classical Review*
C. Th.	*Codex Theodosianus*, ed. Th. Mommsen and P. Meyer
D.	*Digesta Iustiniani* (*Corpus iuris civilis*, vol. 1), ed. Th. Mommsen and P. Krueger
FIRA	*Fontes iuris romani anteiustiniani*[2], ed. S. Riccobono *et al.* (Florence, 1941–3)
G.	*Gai institutionum commentarii* (ed. B. Kübler)
GA	*Gai fragmenta Augustodunensia* (*FIRA* II 205 ff.)
GE	*Gai institutionum epitome* (*FIRA* II 229 ff.)
Heumann–Seckel	H. Heumann and E. Seckel, *Handlexikon zu den Quellen des römischen Rechts*[9] (Jena, 1907)
I.	*Institutiones* (*Corpus iuris civilis*, vol. 1), ed. P. Krueger
ILS	*Inscriptiones latinae selectae*, ed. H. Dessau (Berlin, 1892–1916)
IP	*Interpretatio* to *PS*, ed. M. Kaser and F. Schwarz (Cologne, 1954)
IT	*Interpretatio* to C. Th.
JRS	*Journal of Roman Studies*
Kaser *RP*	M. Kaser, *Das römische Privatrecht*[2] I (1971), II (1975) (Munich)
Kaser *RZ*	M. Kaser, *Das römische Zivilprozessrecht*

	(Munich, 1966)
Lenel *EP*	O. Lenel, *Das Edictum Perpetuum*[3] (Leipzig, 1927)
Lenel *Pal.*	O. Lenel, *Palingenesia iuris civilis* (Leipzig, 1889)
LQR	*Law Quarterly Review*
NRH	*Nouvelle revue historique de droit français et étranger*
PCPS	*Proceedings of the Cambridge Philological Society*
PS	*Pauli sententiae* (*FIRA* II 317 ff.)
RE	*Paulys Realencyclopädie der classischen Altertumswissenschaft*, ed. G. Wissowa *et al.* (Stuttgart)
RHD	*Revue historique de droit français et étranger*[4] (from 1922; previously *NRH*)
RIDA	*Revue internationale des droits de l'antiquité*
SDHI	*Studia et documenta historiae et iuris*
SZ	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Romanistische Abteilung)
TR	*Tijdschrift voor rechtsgeschiedenis*
UE	*Ulpiani epitome* (or *tituli ex corpore Ulpiani*) (*FIRA* II 259 ff.)
Voci *DER*	P. Voci, *Diritto ereditario romano*[2] I (1967), II (1963) (Milan)
ZPE	*Zeitschrift für Papyrologie und Epigraphik*

Contents

I

Theory, Practice, and History: Rudiments

1. INTRODUCTION

Trusts did not exist in Roman law; nor do they exist in the civil systems which derive from it. They are rightly regarded as one of the hallmarks of legal systems of the common-law family. Since this is the case, a book on the Roman law of trusts might well be expected to be short.

'Trust', however, is the ideal word in English, even in legal English, to translate the Latin *fideicommissum* which is the subject of this book. The two legal institutions have much in common: both developed in independent jurisdictions, the trust in equity, outside the common law; the *fideicommissum* outside the Roman formulary system, in a new official procedure. They have a common fiduciary nature: property is entrusted to one person for the benefit of another. More detailed similarities will emerge in the course of the following chapters. They are sufficiently impressive to justify the use of the term 'trust' as the English equivalent of *fideicommissum*. Even if we deny (as we might well) the direct influence of the *fideicommissum* on the growth of the trust in the English equitable jurisdiction, parallels are remarkable; and the translation 'trust' serves as a reminder that even if the two institutions, trust and *fideicommissum*, are diverse in origin they are none the less related in function.

Fideicommissa are among the most versatile institutions of Roman law and of the early civilian systems which derive from it. They are also among the most neglected. Originally conceived as a kind of informal bequest, the *fideicommissum* in Roman law went through various transformations in the six centuries between Cicero and Justinian. Those transformations have scarcely been studied. More attention has been lavished on the *fideicommissa* of early modern times. They correspond somewhat to the strict settlements and entails of the common law, devices by which

landed estates were preserved inalienable and undivided in noble hands. Yet a great gulf divides these *fideicommissa* from more humble beginnings and more various functions. This observation is not new. But no attempt has been made to outline the various uses to which trusts were put in Roman law or to highlight their gradually changing character.

This book concentrates on the functions and the internal structure of the trust in Roman law. It attempts to evaluate its significance by selecting what seem the most crucial areas in which it altered the face of the Roman law of succession, whether by introducing a new remedy, by leading to new standards of interpretation, or by filling gaps in the existing legal order. It is convenient to refer to that existing legal order as the 'civil law', in contrast to the law of trusts. What is intended is a contrast between the new unorthodox procedure and content of the law of trusts, and the old accepted scheme of Roman private law, including not just the *ius civile* which had been developed for the citizens of Rome of an earlier period, but also the elaborations of that scheme by the praetor (*ius honorarium*). 'What could you do with a trust which you could not do with the institutions of the civil law?' is the central question of this book.

The answer to the (unrhetorical) question just asked presupposes at least a minimal acquaintance with the civil law of succession. An outline is supplied immediately, and details provided in the course of later chapters.[1] The remaining sections of this chapter give a sketch of the law of trusts: their historical background; the sources of law they drew on; the principles on which their validity was based.

Roman law, from its earliest days and its earliest rules incorporated in the XII Tables, had been bound to the principle of universal succession. A testator's only necessary act in making a will was to appoint an heir; and this is what Gaius means when he speaks of the institution of an heir as the *caput et fundamentum* of a will.[2] The heir did not simply acquire the

[1] For full accounts of the law of succession, see H. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*[3] (Cambridge, 1972) 242 ff.; Voci (1982c); von Woess (1911) (for historical sketches); W. W. Buckland, *A Textbook of Roman Law*[3] (Cambridge, 1963) 282 ff.; Kaser *RP* I 668 ff.; Voci *DER* (for legal details).

[2] G. 2.229.

property of the deceased: he succeeded him as a person, and so was entitled to benefit from and was bound by (almost) all obligations in favour of or against the deceased. He was heir, moreover, for good: *semel heres semper heres.*

Freedom and formality are a paradoxical pair, but they are the two words which best characterize the Roman civil law of succession. Roman law from the XII Tables onwards was notable for the freedom it allowed the testator: *uti legassit suae rei, ita ius esto* are the words Gaius quotes from them,[3] and this was the way the law for long remained. A testator was free to dispose of his property as he wished; the concept of legitim or *Pflichtteilsrecht* lay in the future.

This is not to say the law of succession was unregulated. On the contrary. Civil law provided that formal requirements must be met. No will was valid if it was not duly made and witnessed, if it did not begin with the institution of an heir in prescribed form; no legacy was valid if it did not follow the institution and itself satisfy the time-honoured wordings.[4] Depending on the words used, the legacy was classified as one of four different types, and the actions available to claim it were determined accordingly.

Nor was this all. The civil law protected the expectations of children, particularly male children, with various provisions. Male children, if not instituted heirs, had to be disinherited by name. Female children need not be mentioned by name, but had to be covered at least by a general clause of disherison. These requirements do not in any way inhibit freedom of testation. They demand only that proper forms be followed. Their rationale is plain: it is desirable that a testator should make his intentions quite clear, and in the case of heirs in his family this rightly takes on a sense of urgency.

Only with the evolution of the *querela inofficiosi testamenti* did Roman law arrive towards the end of the Republic at the principle that the descendants (or ascendants) of a testator actually had a legitimate expectation of acquiring a share of his estate,

[3] G. 2.224; the words probably related to the original pre-mancipatory will and might be translated something like 'as he declared with respect to his own property, so let the law be'. Other versions of the words are found in *auctor ad Herennium* 1.23; Cicero, *de inventione* 2.148.

[4] For exceptions to these principles, see ch. VI sect. 3.

by virtue of the law itself rather than the testator's own fancy. The *querela* lay to any descendant or ascendant who could show that he had received less than a quarter of the share of the estate he would have received had the testator died intestate; and that the testator had had no good reason for cutting him out. Yet even here it is clear how cautiously Roman law advanced towards a concept of legitim, for a quarter of the prospective intestate share is not really very much. Take the case of a testator with three children. Each has a prospective intestate share of one-third of the estate; to bar the *querela* each must be left at least a quarter of that, that is one-twelfth. The consequence is that the testator's hands are tied only in respect of a quarter of his entire estate, and he is free to give away the remaining three-quarters as he pleases.

The whole civil law of succession depended, then, on formality. Yet it did not remain vast, monolithic, and immutable. Long before the introduction of trusts there was change in the air. Its origin was in the praetor's edict. Inspired by the advice of jurists (and rarely himself a jurist), the praetor promulgated each year an edict listing the causes of action which his jurisdiction would support. To start with, this was no more than an adjective outgrowth on the substantive infrastructure of the *ius civile*. Yet that soon changed: by denying claims he thought unjust (although legitimate at *ius civile*), by admitting claims he thought equitable (although overlooked by the *ius civile*), the praetor presided over the formation of a new body of law, in which some quite radical departures from tradition were made. In no field was this more evident than in the law of succession. Here the praetor introduced wholly new entitlements: the claims of cognates and spouses were no longer left aside, as hitherto they had been; and he was prepared too to grant unprecedented actions, sometimes even contrary to the tenor of the will where equity seemed to demand this.[5]

The praetor has often been compared to the Chancellor of English equity: both presided in courts outside the traditional private-law jurisdiction; and both were prepared to intervene on behalf of equity and against tradition. In Rome the process

[5] Pap. 2 *def.* D. 1.1.7.1 is the *locus classicus*; the most recent full discussion is M. Kaser, '*Ius honorarium* und *ius civile*' *SZ* 101 (1984) 1–114.

continued, although it gradually lost momentum, until the final codification of the edict under Hadrian. It is important to stress this progressive aspect of Roman law, and to bear in mind that the 'received' private law was by no means wholly ossified, even though there was room still for much radical innovation and much relaxation of stern formalism. For this the law of trusts was to be responsible.

From the practical point of view, too, the civil law was by no means outmoded and inept. Careful drafting and good legal advice would secure most goals; the plurality of legal institutions offered a choice of methods, one or other of which would suit most testators. This is most notable in the case of legacies, which were of great importance. Roman society was one in which the wide dispersion of property on death was common; in this way a society in which during a lifetime much was achieved by friendship and patronage finally paid its obligations. Heirs could sometimes justly complain of the exhaustion of an estate by excessive legacies; statutes followed, the last of which (the *lex Falcidia* of 40 BC) required that the heirs should retain at least a quarter of the net estate.

Of four types of legacy, two predominated: the legacy *per vindicationem*, which offered the legatee the inestimable benefit of an action *in rem*, since it made him owner the moment the inheritance was accepted by a heir; and the legacy *per damnationem*, which gave only an action *in personam*, but which was hedged about with fewer restrictions than applied to its rival. Useful too was the *donatio mortis causa*, a gift made during his lifetime and recoverable by a donor in the event that his death did not then ensue. Who could say that it was a testamentary disposition, however closely its effects might approximate to one? The gift managed in this way to bypass various restrictions on testamentary dispositions, although the process of closing this loophole proceeded, never far behind. With such devices, and prompted by keen juristic imagination, the civil law remained a living system of inheritance. Carefully handled, it had great potential.

Care was needed, because there were strict formal requirements, the natural bulwark of ancient and venerable legal systems. Their traditional rationale was not in doubt, but the effects of neglecting them could be disastrous for a testator's strategy of succession. While this might be tiresome, it had the advantage

of making it unequivocally clear whether there was a valid institution of an heir and whether the legacies were valid in one form or another. If the wrong words were used for a legacy, it was void. If the institution of the heir or the disherisons were formally deficient, the will was void and intestacy ensued. In the interests of proof, set form has much to be said for it: if a testator has employed the set form, his intention need not even be considered; and if he has not, then this may be regarded as evidence that he did not have the requisite intention. Perhaps it was a stark regime, but it was a clear one; and if the right words were used, most things could be done.

Trusts were entirely different from the traditional institutions of the civil law: this theme, these words will recur throughout the book. Yet there are different sorts of differences, and one sort is the concern of Chapters II to V. This group of chapters takes its shape from Gaius, who in his *Institutes* remarks that 'there is a big difference between things left by trust and those bequeathed directly'.[6] He supplies a list of differences. Three of them are particularly interesting. First, legacies could be left only to certain people, who must in the first place be Roman citizens, and in the second not members of certain groups subject to disadvantages in the law of succession. Trusts could be left to anyone. It is to this that Gaius attributes their probable origin. Second, legacies could be made only in a valid will. Trusts could be charged even on an intestate heir, so offered a way of regulating the devolution of specific pieces of property even in the absence of a valid will. Third, legacies could be charged only on an heir. Trusts could be charged on any beneficiary under the will, a legatee or even another trust beneficiary. By this means perpetuities might arise.

The significance of these differences, it might be thought, can hardly be exaggerated. The first at a stroke increases the range of possible beneficiaries; the second alters the nature of intestate succession entirely; the third expands the temporal power of a settlor beyond his natural lifespan. Previous discussions of the trust in Roman law have generally concentrated their attention on two of these points, the possibility of setting up trusts in favour of people disqualified at civil law, and the potential for

[6] G. 2.268.