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"Traditio" In The Civil Law

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COMMENTS

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Traditio in the Roman Law

Roman law recognized two different modes of acquiring property — original and derivative. An original acquisition was one which applied to things which had never been owned or to things which had been abandoned, *res nullius*. A derivative acquisition arose when a person entered into the right of property which had pre-existed in another. The derivative modes of conveyance fell into two groups which can be distinguished from each other by their origin. One group grew out of the civil law while the other developed from the Jus Gentium.[1]

Traditio (delivery) is regarded as a means of conveyance of the Jus Gentium,[2] but it did have a place, a restricted one, in the oldest Roman law. The oldest civil method of conveyance was *in jure cessio*. This was a formal mode of conveyance which could be applied to all kinds of property. It consisted of a fictitious real action or vindication in which the parties appeared in public before a magistrate of the Roman people. The plaintiff, alienee, would make a claim upon the defendant, alienor; and the alienor admitted the claim. The magistrate would then declare that the

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1. Originally the only Roman law was the civil law, or the law which applied to all Romans but only to Romans. As Rome expanded, a need was felt for a law which could be applied to the unprivileged alien residents of the expanding Empire. These conquered people, it was felt, were outside the pale of the civil law, but the Romans felt that some law should apply to them. The solution the Romans developed was a secondary or subsidiary civil law which they applied to all aliens. This law came to be known as the Jus Gentium or the law of the world. At first these two bodies of law, the civil law and the Jus Gentium, were completely separate, but as both developed they began to merge. An example of this is traditio. At first this method of conveyancing was applied to aliens alone. Later certain elements of traditio were introduced into the civil law; and, by the time of Justinian, it had so merged into the civil law that he codified the principle and just mentions the fact that it came from the Jus Gentium. Some authors look upon the Jus Gentium in much the same light as they look upon English equity. As Roman civil law principles become solidified, the courts would often look to and adopt rules of the Jus Gentium which were often less rigid. By this process the two systems became, to a great extent, merged; and, by the time Justinian codified the law, the distinction was only useful in determining the origin of the rules which were expressed in the code.

2. INSTITUTES 2.1.40.

property belonged to the alienee, and thus the transfer was completed.[3]

To relieve the magistrate and the parties from this formal process a new mode of conveyance, *mancipation*,[4] was introduced. Mancipation did not require the aid of a public official, but it was confined to property that could be classed as *res mancipi*.[5] By the time of Gaius[6] *mancipatio* was the preferred of these two methods of conveyance because it could be accomplished in private without the aid of a magistrate.[7] The introduction of mancipation rendered mancipable things the more easily alienable since they could be alienated in private or by surrender in court while non-mancipable things could only be conveyed by *in jure cessio*.

Traditio was introduced at a time when mancipation and *in jure cessio* were already established methods of conveyance. *Traditio* was a means of conveyancing by simple delivery of possession; however, when first developed it was available only for the transfer of *res nec mancipi*.[8] At this time only one kind of ownership, *dominium ex jure Quiritium*, was recognized in Roman law.[9] If a Roman citizen acquired property properly trans-

3. GAIUS 2.24.

4. Not much is known about the actual procedure used to convey title by mancipation; however, Gaius did give the following description: "Mancipation is a fictitious sale, a process peculiar to Roman citizens. It is effected thus: —

"There are brought together not less than five witnesses. Roman citizens above the age of puberty and another person similarly qualified, who is to hold a bronze balance, and is called the libripens. Then the person who is acquiring by mancipation, taking hold of the thing to be transferred uses the following form of words: — 'This man (the sale of a slave was usually taken as a typical example) I declare to be mine by quiritary right, and be he bought to me with this bronze and bronze balance': then he strikes the balance with a piece of bronze and gives it to the transferor by way of price." GAIUS 1.119.

5. The term *res mancipi* included land and houses in Italy and in certain privileged districts outside of Italy, rustic servitudes over such land, slaves, and beasts of draft and burden. GAIUS 2.14a; ULP. XIX, 1. A distinction was made between mancipable movables and immovables. Movable *res mancipi* could only be transferred in the presence of the parties; immovables *res mancipi* did not need to be in the presence of the parties. See ULP. XIX, 4.5.

6. It has not been determined exactly when Gaius lived, but his commentaries were written some time during the second century A.D.

7. Gaius said, "Why should a result that can be accomplished in private with the assistance of our friends be prosecuted with greater trouble in the court of the praetor or president of the province?" GAIUS 2.25.

8. See note 5 *supra*. *Res nec mancipi* includes all property which is not included in the term *res mancipi*. During this period non-mancipable things were more easily transferrable. The term mancipable, which had before denoted an enlargement of the power of alienation, then denoted a restriction; mancipable things were things alienable either by surrender in court or by what was by then considered the cumbrous process of mancipation. GAIUS 2.17;2.20. Non-mancipable things could at this time be transferred by surrender in court or by the very simple process of delivery.

9. GAIUS 2.40. Since our concern is with Roman law we may assume the

ferred by mancipation, *in jure cessio*, or tradition,[10] his ownership was *dominium ex jure Quiritium*, and he could assert his title against anyone by an action of vindication.[11] After the introduction of *traditio*, however, ownership parted into two different kinds, namely, *ex jure Quiritium* and *bonitary dominion*.[12] The transfer of a mancipable thing by delivery did not give the transferee title *ex jure Quiritium*. The effect of such a delivery was to make the mancipable thing the transferee's *in bonis*; the title *ex jure Quiritium* remained in the transferor until a period of prescription had run in the transferee's favor.[13] This period having elapsed, the mancipable thing was his by absolute right, that is, the transferee would then hold *in bonis* and *ex jure Quiritium* just as if the *res mancipi* had been transferred by mancipation or by *jure in cessio*.[14]

At this point in the development of the law all things could be conveyed by delivery, but if a mancipable thing were so conveyed the defective title of the transferee had to be cured by prescription. After this period of prescription had elapsed, the transferee was entitled to all the remedies provided by Roman law for owners *ex jure Quiritium*.[15] Until the prescriptive period had run, however, the transferor held *ex jure Quiritium* and under the civil law could assert a claim to the property to which the transferee had no defense.[16] Under such conditions the praetor came to the transferee's aid by giving him the *exceptio res venditae et traditae*[17] which in effect denied the transferor's

parties to the transaction to be Roman citizens and the subject of the transaction to admit to Roman ownership. These rules did not apply to aliens, for dominium was an institution of strict civil law, and so it was not opened to aliens; nor did they apply to provincial lands, for they in theory belonged to the Emperor or the Roman people as a whole. GAIUS 2.7. See also note 1 *supra*.

10. If the property to be transferred were a *res mancipi*, the transfer had to be by mancipation or *in jure cessio* in order for the transferee to take title *ex jure Quiritium*; if the property were a *res nec mancipi* the transfer by tradition or surrender in court would give the transferee title by *ex jure Quiritium*. GAIUS 2.40.

11. GAIUS 4.41, 51.

12. GAIUS 2.40. Ownership *ex jure Quiritium* was the only ownership recognized by the civil law. *Bonitary dominion* was a type of ownership recognized by the praetorian law. See note 17 *infra*.

13. GAIUS 2.41. This period of prescription was termed *usucapio* in the Roman law.

14. GAIUS 2.41.

15. GAIUS 4.36.

16. GAIUS 2.41.

17. The praetor had complete control over the procedure in his court. This is said to be one aspect of the imperium or residuary sovereignty vested in the higher magistrates of the Roman people. Since the administration of justice was placed in his hands it was within his competence to give or refuse an action. When the praetor allowed this exception, which they usually did as a matter

civil right to assert his claim.[18] According to the Jus Civile, the transferee was in the same position with regard to adverse claims of third parties. He was not the owner; therefore, he could not assert ownership against adverse claims.[19] Again the praetor came to the alienee's aid, this time by the *Actio Publiciana*[20] which allowed a party to recover property as owner before his ownership had been perfected by the lapse of time required according to the rules of prescription. Gaius stated that he could not claim the thing *ex jure Quiritium* in his *intentio*;[21] but by a fiction he was held to have acquired the thing by *usucapio*, and he could thus put forward his *intentio* as quasi-owner *ex jure Quiritium*.[22] By the time of Gaius[23] the complete alienation of almost all things was possible by delivery, and in the case of *res mancipi* the alienee acquired, for nearly all purposes, all the rights of ownership. The only effective limitation imposed upon him was that he could not re-convey to another by *mancipatio* or *in jure cessio*, for these were civil means of conveyancing and, until prescription had run, he was not owner Jus Civile.[24]

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of course, he did not repeal the civil law but did check its effect. This praetorian law is very much like English equity.

18. DIGEST 21.3;44.4.4.31a;21.3.3.

19. GAIUS 4.36.

20. When a praetor entered into office he issued an edict in which he stated the rules of procedure by which he intended to be governed during his term of office. He would adopt, in the main, the edict of his predecessor only modifying or enlarging it as seemed desirable. It is said that the *Actio Publiciana* was first put forth in the edict of the *Praetor Publicius* from whence it got its name. The edicts of the praetors were a source of praetorian law until Hadrian consolidated the edicts in 130 A.D. He gave the edicts permanent form, and from that time they ceased to be a source of praetorian law.

21. All petitions had to follow a certain formula which was composed of, among other things, an *intentio* and *condemnatio*. The *intentio* is the part of the formula in which the plaintiff embodies his claim; the *condemnatio* is the part of the formula by which the judge receives authority to condemn or absolve the defendant. A typical example of this formula is given by GAIUS 4.41, 51. ". . . if it appears that the Cornelian estate, now in question, belongs to Aulus Agerius by Quiritary title, and the said land shall not to your satisfaction be restored to Aulus Agerius, at what sum soever the amount shall be assessed, in so much money, judge, condemn Numerius Negidius to Aulus Agerius: if it does not appear, absolve."

22. GAIUS 4.36.

23. See note 6 *supra*.

24. GAIUS 4.37. Since *traditio* could not accomplish almost all the purposes of mancipation, it might be asked why the cumbrous form of *mancipatio* survived. There were two reasons for its continued existence. In order for delivery to be effective as a means of conveyance, the property had to be in the presence of the parties. This was not required to mancipate movables. See note 5 *supra*. Thus it was frequently more convenient to transfer immovables by mancipation. In the case of slaves a different reason for the continued use of *mancipatio* existed. If the master had title to the slave *ex jure Quiritium* he could free the slave by manumission, and such a freed slave would become a Roman citizen. If the master had only *bonitary dominion*, however, he could not free him in such

Such was the law in the time of Gaius.[25] All corporeal things, movable or immovable, could be acquired by simple delivery; *res mancipi* could be so acquired, but until prescription had elapsed, the title was not perfected. Between the time of Gaius and Justinian, *mancipatio* and *in jure cessio* fell into disuse.[26] This trend was furthered by Justinian's legislation which made tradition more readily available. He abolished the distinction between *res mancipi* and *res nec mancipi* and provided that all kinds of property could be transferred, in full ownership, by delivery.[27] This made the distinction between *bonitary* ownership and *dominion ex jure Quiritium* unnecessary and consequently Justinian passed legislation making all ownership *ex jure Quiritium*.[28]

In Justinian's time, as was the case before his legislation, simple delivery was not enough to transfer title. There were essential conditions which had to be met before title vested in the transferee. In the opinion of the Roman jurists (a view which Justinian adopted), only corporeal things were susceptible of possession and delivery; incorporeal things admitted to neither possession nor to delivery.[29] Thus it was that only a corporeal thing, movable or immovable, could be transferred by delivery. The second essential condition for transferring ownership by delivery was that both transferee and transferor must be competent to give and acquire ownership by way of tradition. In general, this meant that the parties must have capacity to enter into the types of agreement upon which the transaction was founded and that the transferor was the owner of the *res*.[30]

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a way as to make the slave a Roman citizen. Such a freed slave was said to be a Latin, which denoted a status just below citizenship. This status implied the *jus commercii* (the right of making civil law contracts) but not the *jus conubii* (the right of contracting a civil law marriage). GAIUS 1.17, 33-35.

25. See note 6 *supra*.

26. In the later period of the Empire slavery became uneconomical; thus, one of the reasons for the continued use of mancipation was not as important. The only other reason for its continued use was to transfer immovables which were not in the presence of the parties. See note 24 *supra*. After the introduction of fictitious delivery, a point covered later in this article, this reason for the continued use of mancipation was no longer important.

27. INSTITUTES 2.1.40.

28. CODE 7.25.1. Justinian also provided that provincial land might be alienated by delivery. INSTITUTES 2.1.40. This, combined with the Constitutio Antorniniana of A.D. 212, which extended Roman citizenship to the whole Roman world, made the distinction between alien and Roman, provincial and Roman land no longer necessary. See note 9 *supra*. For all practical purposes *traditio* was then universal.

29. DIGEST 41.1.43,1; INSTITUTES 2.1.40.

30. DIGEST 41.1.20. The transferor could not give more than he had and hence the transferee took the *res* subject to any burdens attached to it. There

Besides requiring that the *res* be susceptible of delivery and that the parties be capable of conveying ownership, Roman law required that the transferor intend to convey ownership and the transferee to receive it. It was not necessary, however, to have what is known in Anglo-American law as consideration or a *quid pro quo*. An intention to convey and receive ownership was all that was required in this regard, and this intent was inferred from the fact that the parties had come to an agreement.[31] The essential element here was the intent to transfer ownership. If the requisite intent (to transfer ownership) existed in the minds of the parties, it made no difference why they so intended. Thus, if the parties mistakenly thought there was an obligation to deliver when in fact there was not, the property would nevertheless pass.[32] Similarly if one party believed the transaction was a sale while the other thought it a gift, title would pass, since both parties contemplated a transfer of ownership.[33] The case, however, would be different if only one party contemplated a transfer of title; if the transferor intended a gift while the transferee intended a loan for use, title would not pass.[34]

In addition to the requirement that the *res* had to be a corporeal, there had to be some transfer of possession.[35] In essence this requirement meant that the transferor must place the transferee in a position in which he could deal with the *res* to the exclusion of others. This might be accomplished by an actual transfer of physical possession, in which case the transfer was said to be a real tradition. In addition, four types of fictitious tradition, in which there was no actual physical transfer, were

were, however, a few cases in which non-owners could make a transfer. Within narrow limits Roman law recognized some principles of agency and in these cases the agent could transfer title by delivery. INSTITUTES 2.1.42, 43. Then too, a tutor in some circumstances could alienate the property of his ward. DIGEST 27.9.1; CODE 5.37.22. On the other hand, there were a few instances in which an owner was not competent to alienate, for example, a husband, though technically owner, could not alienate dotal immovables, and since gifts between husband and wife were prohibited, delivery by way of gift between spouses was ineffectual to convey property. DIGEST 24.1.19, 1.

31. INSTITUTES 2.1.40. The essential thing was the intent — *animus transferendi et acquirendi dominii*. The *causa* was only important as evidence of the intent. See BUCKLAND, TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN (2d ed. 1932).

32. DIGEST 41.1.33. In such a case the transferor's action to recover the property was a *condictio indebiti*, a personal action based upon the transferee's quasi-contractual liability. GAIUS 3.91; INSTITUTES 3.27. See also DIGEST 22.6.9; 22.6.10; 22.6.65.

33. DIGEST 41.1.36; 12.1.8.

34. *Ibid.*

35. INSTITUTES 2.1.40; 2.1.41.

available. Thus, delivery could be effected by placing the *res* in view of the transferee and declaring that he might take possession. This was called *traditio longa manu.*[36] Delivery *traditio longa manu* could also be accomplished by placing the object to be transferred in the house of the transferee. In this case it was not necessary that the owner of the house, or for that matter anyone on his behalf, actually see the object at the time of delivery. If the transferee was already in possession of the property at the time the transferor expressed his intention to convey ownership, the tradition was complete without the necessity of a transfer and retransfer. Such a transfer was known as *traditio brevi manu.*[37] If the transferor wished to transfer ownership of the property and yet retain its use he might do so by *traditio consitutum possessorium.*[38] In such a situation the transfer of ownership was accomplished without a physical transfer of possession; the transferee became owner, and the transferor remained in possession. The fourth type of fictitious tradition, symbolical, was based on delivery to the transferee of some object symbolic of ownership and control of the property transferred.[39] Thus, if the keys to a warehouse were given to the transferee, this act constituted sufficient delivery to make the transferee owner of the contents of the building or owner of the building and contents, depending on the intention of the parties.[40]

The rules discussed above were true in general for all types of agreements which had as their purpose the transfer of ownership. However, there were some special rules pertaining to sales. Under the law of the XII Tables, the agreement to buy and sell and the physical transfer of the *res* were not enough to pass title. According to the construction put upon sale by the Roman law, the seller was understood not to *intend* to part with his property until he had received his money or unless he

36. DIGEST 46.3.79; 41.2.1.

37. DIGEST 12.1.9. For example, *A* might be in possession of *B*'s goods by way of deposit. Later, if *B* wanted to make a gift of the goods to *A*, he could so express his intention. If *A* had the necessary intent, the intent to accept the liberality, he, *A*, would become owner without a transfer and retransfer.

38. DIGEST 6.1.77; 41.2.18.

39. INSTITUTES 2.1.45.

40. Akin to this method of symbolical tradition is the process of putting marks on the *res*, as upon logs of wood. If, however, the purpose of giving the keys or marking the logs was not to transfer ownership but was for some other purpose, such as to allow inspection of the building or to identify the logs, ownership would not pass because the necessary intention on the part of the presumed transferor would be lacking.

had received some other satisfaction such as a personal or real security for the debt.[41] If, before receiving the price or accepting something in lieu of it, he delivered the object, he was understood to have done so without the intention of transferring ownership. If the vendor sold the goods relying on the credit of the vendee, however, title would pass. In such a case the seller was regarded as parting with ownership in confidence that the buyer would pay the price.[42] Another oddity about the law of sale was that though title did not pass until sometime after the agreement to sell, once title did pass, it was given a retroactive effect. The buyer was then considered as having owned the property from the date of sale, *i.e.*, the point of time at which there was consent as to the thing and price.[43]

Such was *traditio* in the civil law at the time of Justinian. Simple delivery of a corporeal coupled with the intent to convey was all that was needed to transfer title between parties having the requisite capacity. In the case of sale, the only exception, the law established that the parties did not intend to convey ownership until the price was paid. A written document was not sufficient or necessary to transfer ownership, though such documents were commonly made as a record of the facts.[44] The question now arises, does this Roman principle of *traditio* exist in civilian systems today?

Traditio in Selected Civil Law Systems

It would be beyond the scope of this article to consider the part that *traditio* has played in all civil law systems, but it is interesting to note its effect on a few chosen systems.[45] As could be expected, the Roman-Dutch law followed the Roman precedent.[46]

41. INSTITUTES 2.1.41.

42. *Ibid.* According to Justinian, the XII Tables provided that if the vendor sold the goods relying on the credit of the vendee, the title would pass. Controversy still exists as to the origin of this rule. Justinian attributed it to the XII Tables; some modern writers think that Justinian himself was the source of the rule. Regardless of its origin, if the goods were sold on credit, the seller was regarded as parting with the ownership in confidence that the buyer would pay him. The intention to part with ownership in the case of sale was held not to attach to the fact of agreement, but to the fact of payment or something in lieu thereof; and hence, sale did not impute the intention to transfer ownership unless coupled with payment. In all other cases the transfer of ownership coincided with the delivery of possession providing there was the proper intent.

43. CODE 4.48.1; DIGEST 18.6.8.

44. CODE 3.32.27.

45. In order to keep the article within bounds, compliance with essential elements, such as capacity of the parties, consent, and subject matter will be assumed.

46. The Roman-Dutch law is used to mean the system which obtained in the

Corporeal movables could be transferred by delivery provided the other requisites for a transfer were present,[47] and any of the fictitious methods previously mentioned were sufficient to constitute a delivery.[48] With respect to immovables, however, delivery was not sufficient. In many parts of Holland it early became the practice to convey land before the courts of the district in which the land was situated. This practice was made general and obligatory by a Placaat of Charles V of May 10, 1529, which provided that immovables could not be alienated or encumbered except in the presence of a judge for the place where the property was situated. A later Political Ordinance of April 1, 1580, required registration in a land-book. Both of these enactments provided that the transactions would be null and void unless their conditions were complied with. It was held, however, by the courts of Holland that the transactions were valid and binding as between the parties even though not registered; nevertheless, in order to affect third parties, the transaction had to be passed before the court and registered.[49] The courts never resolved the question as to whether title to the property passed as between the parties if this transaction were not registered. There seems to be conflict between some writers as to the exact effect of non-registration on the passing of title as between the parties; however, Voet said that as between the parties property passes.[50] If this be true, as between the parties the law was the same as the earlier Roman law if in fact there had been an actual or fictitious putting into possession.

South Africa, at one time a Dutch colony, was considerably influenced by the Roman-Dutch precedents. Corporeal movables can be transferred by delivery in the same way as this might be accomplished under the Roman and Roman-Dutch law. South Africa, however, has extended the methods of fictitious delivery by allowing a transfer by attornment.[51] Delivery can take place

province of Holland from the middle of the fifteenth to the early years of the nineteenth century when Napoleon imposed his code on this province. This system derived from two sources, Germanic Custom and Roman law.

47. The transferor must be the owner of the *res* or at least be authorized to transfer it. VAN LEEUWEN 2.7.5; VOET 41.1.35. The transferor and transferee had to have the proper intention. LEE, INTRODUCTION TO ROMAN-DUTCH LAW 138-39 (5th ed. 1953). The parties had to be legally competent, and the *res* had to be capable of delivery — a corporeal thing. VOET 41.1.34.

48. LEE, INTRODUCTION TO ROMAN-DUTCH LAW 136, 137 (5th ed. 1953).

49. *Id.* at 139, 140.

50. VOET 41.1.42.

51. Garavelli and Figli v. Gollach and Gomperts (Pty.), Ltd., 1 So. Afr. L.R. 816 (1959); Ambassador Factors Corp. v. K. Koppe & Co., 1 So. Afr. L.R. 312 (1949); Standard Bank of South Africa, Ltd. v. Efroiken and Newman, So.

upon an agreement between the transferor, the transferee, and a third party then holding the property that henceforth the third party's possession shall be on behalf of the transferee rather than the transferor.[52] With respect to the sale of movables South Africa follows the Roman and Roman-Dutch rule that title does not pass until the price has been paid or security or credit given.[53]

Thus far consideration has been given to transfer in general with no distinction having been made between corporeal movables and immovables. As indicated previously the Roman law made no distinction, but in the Roman-Dutch law it was otherwise. It is not necessary to trace the numerous registration statutes which have been in force in South Africa; it is sufficient to mention that in South Africa today a department called the Deeds Registry exists, and this department exercises the functions which were previously vested in the courts of Holland.[54]

Thus in South Africa delivery is not the requisite element for passing title to corporeal immovables; the requisite is rather registration. It has been heretofore noted that the enactments in Holland provided that the transactions were invalid, but the courts held that they were valid as between the parties; in addition, Voet said that as between the parties, property passed without registration.[55] The South African Court has declared that without registration the transaction is valid as between the parties, but it has repudiated the utterance of Voet and held that, even as between the parties, title does not pass.[56] Therefore, in South Africa in order to convey corporeal immovables there need not be a delivery but rather registration.

Since the reception of Roman legal concepts came later in Scotland than in other Western European countries, the principle of *traditio* has not had as great a role there as in some other civilian systems. The law of Scotland concerning the transmission of title varies according to the type of property

Afr. L.R. 171 (1924); Goldinger's Trustee v. Whitelaw and Son, So. Afr. L.R. 66 (1917); Groenewald v. Van Der Merwe, So. Afr. L.R. 233 (1917); Marcus v. Stamper and Zoutendyk, So. Afr. L.R. 58 (1910).

52. Hearn and Co. (Pty.), Ltd. v. Bleiman, 3 So. Afr. L.R. 617 (1950).

53. Grosvenor Motors (Potchefstroom), Ltd. v. Douglas, 3 So. Afr. L.R. 420; 73 S.A.L.J. 365 (1956).

54. Deed Registries Act, Acts 1937, No. 47.

55. VOET 41.1.42.

56. Breytenbach v. Van Wijk, So. Afr. L.R. 541 (1923).

concerned. With respect to corporeal movables, the common law of Scotland is Roman in character. Here again, the owner of corporeal movables may convey them by delivery provided he intends to do so.[57] The rule *traditionibus non nudis pactis transferuntur rerum dominia* applies to all forms of contracts for the conveyance of movables, with the exception of the contract of sale.[58] In regard to the contract of sale, Scotland has adopted, by statute, the common law of England.[59] As in the Roman law, disregarding the statutory exception of the contract of sale, there is no need for the contract to be in writing, but this is often done in order to prove the intent to transfer and to have a record of the facts.[60] The land law of Scotland as regards tenure and conveyancing is feudal law modified by successive enactments.[61] Roman principles have had little if any effect on the methods of transferring title to immovable property due to the fact that the feudal system was established in Scotland before she received Roman law principles.

Under French law title passes, as between the parties, upon the completion of the agreement to transfer without the necessity of delivery. This is true with respect to transfers of immovables as well as movables. Thus, this modern system has dropped one of the Roman elements, delivery, at least as between the parties. This French modification of the Roman *traditio* grew out of the practice of French notaries of inserting in conveyancing contracts clauses which purported to convey rights *in rem* at the moment the agreement was reached. Under such agreements no further act of delivery was necessary to transfer title to the rights. Later provision for immediate transfer upon an agreement to that effect was incorporated in the Civil Code.[62]

With respect to the rights of third parties the French draw a distinction between conveyances of movables and immovables. Under the doctrine of *la possession vaut titre* (possession equals title)[63] the second of two purchasers of the same movable is protected if he receives delivery in good faith. Delivery for the

57. ERSKINE 2.1.18.; BELL, PRINCIPLES § 1458 (1829).
58. See note 57 *supra*. See also 1 SMITH, THE BRITISH COMMONWEALTH 935 (1955).
59. Sale of Goods Act, 1893, 56 & 57 Vict. c. 71.
60. 1 SMITH, THE BRITISH COMMONWEALTH 935 (1955).
61. *Id.* at 917. See also BELL, PRINCIPLES § 675 (1829).
62. AMOS, INTRODUCTION TO FRENCH LAW 101-03 (1932).
63. FRENCH CIVIL CODE art. 2279.

purposes of this doctrine is not always required to be actual delivery, constructive delivery sufficing where actual delivery is not possible.[64] Under the law as it now stands, title to immovable property, as far as third persons are concerned, is controlled by priority of registration.[65] This principle would seem to apply regardless of the good or bad faith of a second purchaser or mortgagee. Thus the French law has departed from the principle that delivery is necessary to convey title, but, in order to guarantee security of transactions, requires receipt in good faith where movables are involved or prior registration in the case of immovables where the transferee seeks to assert his right against a subsequent transferee.[66]

Transfer of Title in Louisiana

It is a basic principle under the Louisiana Civil Code that property is transferred upon an agreement between the parties to that effect.[67] However, the Code, statute law, and jurisprudence have established certain modifications to this general theme. Movables may be transferred as between the parties by a mere agreement to that effect.[68] But a transfer of movables has effect against third parties acquiring rights in good faith from the transferor only if there has been prior delivery to the transferee.[69] Thus in a contest between two good faith transferees the one who has received delivery prevails.[70] Similarly, the creditors of the transferor have superior rights to the transferee to whom the movable has not been delivered.[71] Delivery may be actual or constructive, depending upon the nature of

64. *Id.* art. 1606; 5 AUBRY ET RAU, DROIT CIVIL FRANÇAIS no 354 (5th ed. 1893); BAUDRY-LACANTINERIE, PRECIS DE DROIT CIVIL no 512 (3d ed. 1889); 14 LAURENT, PRINCIPES no 167 (5th ed. 1893).

65. There were systems of land registration in France before the Revolution. It is to be noted, however, that the Code does not provide for the registration of all interest in immovable property. It was not until 1855 that registration of deeds as a general principle was recognized on French statute books.

66. See AMOS, INTRODUCTION TO FRENCH LAW 103-06 (1932).

67. LA. CIVIL CODE arts. 1909, 1920, 1921, 1922 (1870).

68. *Ibid.;* Nicolopulco v. His Creditors, 37 La. Ann. 472 (Orl. Cir. 1885); Nanson & Co. v. Matthews, 24 La. Ann. 90 (Orl. Cir. 1872); Note, 30 TUL. L. REV. 155 (1955).

69. LA. CIVIL CODE art. 1922 (1870); Nicolopulco v. His Creditors, 37 La. Ann. 472 (Orl. Cir. 1885); Nanson & Co. v. Matthews, 24 La. Ann. 90 (Orl. Cir. 1872); Note, 30 TUL. L. REV. 155 (1955).

70. See note 69 *supra.*

71. LA. CIVIL CODE art. 1923 (1870).

the property.[72] In these regards, Louisiana reaches the same results as the French.[73]

The problem of the effect of delivery upon the extent to which the rights of a transferee depend upon the rights of his transferor is an interesting one. According to the doctrine of *la possession vaut titre* the transferor who acquires a movable by fraud, not amounting to theft, may transfer a completely valid title to a good faith transferee if he delivers the property.[74] This doctrine, however, is not expressed[75] in the Louisiana Civil Code of 1870, and when it has been urged upon the courts it has been rejected.[76] In place of this French doctrine the Louisiana courts have adopted the bona fide purchaser doctrine of the common law when dealing with goods that a transferor obtained by fraud.[77] This doctrine is predicated on title. Where a transferee acquires title by fraud he acquires a voidable title, the transferor retaining an equitable interest. Under the doctrine, if the transferee should re-transfer the title, the second transferee's legal rights will cut off the equitable rights of the original transferor.[78]

72. *Id.* art. 2247; Meeker, Knox & Co. v. F. W. Vredenburgh & Co., 15 La. Ann. 438 (1860); Rice & Hathaway v. Kendall, Yoe & Co., 10 La. Ann. 15 (1855). *But see* Brooklyn Cooperage Co. v. Cora Planting & Mfg. Co., 137 La. 807, 69 So. 195 (1915).

73. The theory of *la possession vaut titre* is not to be found in the Louisiana Civil Code of 1870, but it is reflected in Articles 1922, 1923, and 2456 of that Code. When the theory has been urged upon the courts it has been rejected. Holton v. Hubbard, 49 La. Ann. 715, 22 So. 338 (1897); Holloway v. Ingersoll Co., 133 So. 819 (La. App. 2d Cir. 1931); Note, 23 TUL. L. REV. 422 (1948). When applying Articles 1922 and 2456 of the Louisiana Civil Code of 1870 the courts come to the same conclusion that would be reached if the doctrine of *la possession vaut titre* were applied. Nicolopulco v. His Creditors, 37 La. Ann. 472 (1885); Nanson & Co. v. Matthews, 24 La. Ann. 90 (1872); Note, 30 TUL. L. REV. 155 (1955).

74. For a full discussion of this point see Comment, 6 TUL. L. REV. 589 (1932); Note, 23 TUL. L. REV. 422 (1949). As the doctrine of *la possession vaut titre* is applied here, two essential conditions must be met; namely, the second transferee must be in good faith and he must receive delivery.

75. See note 73 *supra.*

76. See note 73 *supra.*

77. Stamm-Scheele Mfg. Co. v. Fontenot, 171 La. 614, 131 So. 728 (1930); State v. Hackley, Mume & Joyce, 124 La. 854, 50 So. 772 (1909); Blanchard v. Castille, 19 La. 362 (1841); Thomas v. Mead, 8 Mart.(N.S.) 341 (La. 1829).

78. The common law rule is based on equity in that the legal rights of the third party may cut off the equity of the original transferor. Kibler v. Yakima Finance Corp., 144 Wash. 604, 258 Pac. 490 (1927); 3 Pomeroy, EQUITY JURISPRUDENCE 3, § 735 (Symon's 5th ed. 1941). The doctrine only applies to a bona fide purchaser who receives delivery. City Nat. Bank v. Nelson, 218 Ala. 90, 117 So. 681 (1928); Tillman v. Heller, 78 Tex. 597, 14 S.W. 700 (1890). The purchaser must be bona fide and have no notice of the defect in title. McFadden v. Evans-Snider-Bull Co., 185 U.S. 505 (1902); Means v. Bank of Randall, 146 U.S. 355 (1892). The doctrine does not apply when a third party has been entrusted with the goods in an agency relationship. Baehr v. Clard, 83 Iowa 313,

The law of Louisiana also differs from that of France with respect to stolen and lost goods. Under the French law the owner has three years from the day that the goods were stolen or lost to bring a revendicatory action against their possessor.[79] If the possessor purchased the property in what an Anglo-American lawyer could call market overt,[80] the owner must reimburse the possessor what it cost him.[81] After this three-year period has elapsed, however, the original owner has no action to recover the goods that had been stolen or lost.[82] In Louisiana if a bona fide purchaser purchased stolen or lost goods at a public auction or from one in the habit of selling such things and has possessed the thing for three years or more he can demand the return of the purchase price before returning the goods to the owner.[83] After ten years of possession by

49 N.W. 840 (1891); Green v. Wachs, 254 N.Y. 437, 173 N.E. 575 (1930); Know v. Eden Musse American Co., 148 N.Y. 441, 42 N.E. 988 (1896). If a person obtains property by misrepresenting himself as an agent of another, he obtains no title and a third party can protect himself only by showing negligence on the part of the original seller. Peters Box & Lumber Co. v. Lesh, 119 Ind. 98, 20 N.E. 291 (1889); Alexander v. Swackhamer, 105 Ind. 81, 4 N.E. 433 (1886); Russel Willis, Inc. v. Page, 213 S.C. 156, 48 S.E.2d 627 (1948); Petty v. Borg, 106 Utah 524, 150 P.2d 776 (1944). For a discussion of the distinction made between misrepresentation made *inter praesentes* and *inter absentes*, see Note, 23 TUL. L. REV. 421-22 (1948). The doctrine does not apply when the goods have been stolen. Voss v. Chamberlain, 139 Iowa 569, 117 N.W. 269 (1908); Harvey E. Mack Co. v. Ryan, 80 Mont. 524, 261 Pac. 293 (1927). The doctrine of market overt has not been accepted in the United States. Commercial Credit Co. v. Parker, 101 Fla. 928, 132 So. 640 (1931); Thomas v. Prairie Home Co-Operative Co., 121 Neb. 603, 237 N.W. 673 (1931). This doctrine of the common law was early received in Louisiana. See note 77 *supra*. The Louisiana law has also accepted the exceptions of the common law when a party breaches a trust. Moore v. Lambeth, 5 La. Ann. 66 (1850); Campbell v. Nichols, 11 Rob. 16 (La. 1845); Russle v. Favier, 18 La. 585 (1841). If a person misrepresents himself as the agent of another, the Louisiana courts have allowed the seller to recover the property from a third party. Freeport & Tampico Fuel Oil Corp. v. Lange, 157 La. 217, 102 So. 313 (1924). However, there is dicta to the effect that if the seller were negligent, the bona fide purchaser would prevail. Lynn v. Lafitte, 177 So. 83, 84 (La. App. 2d Cir. 1937); Holloway v. Ingersoll Co., 133 So. 819, 821 (La. App. 2d Cir. 1931); Russell v. Kunemann, 19 La. Ann. 517 (1867). For a more detailed treatment of the doctrine and its adoption in Louisiana, see Note, 23 TUL. L. REV. 420 (1948).

79. FRENCH CIVIL CODE art. 2279; 14 Huc, COMMENTAIRE DE CODE CIVIL no 522 (1902).

80. An open or public market. In London every shop in which goods are exposed publicly to sale is market overt, but only for things which the owner professes to trade in. BLACK, LAW DICTIONARY (4th ed. 1951). This doctrine has not been adopted in the United States. Commercial Credit Co. v. Parker, 101 Fla. 928, 132 So. 640 (1931); Thomas v. Prairie Home Co-Operative Co., 121 Neb. 603, 237 N.W. 673 (1931).

81. FRENCH CIVIL CODE arts. 2279, 2280. The French Civil Code does not use the term market overt, but "bought it at a fair or at a market or at a public sale, or from a tradesman selling similar goods." *Id.* art. 2280. This seems to have the same connotation as market overt.

82. See note 78 *supra*.

83. Articles 3506 and 3507 are different from their French counterparts, Articles 2279 and 2280 of the French Civil Code; therefore, the Louisiana courts

the purchaser, however, the original owner cannot demand the return of the goods in Louisiana.[84]

Like the case of movables, it is a basic principle under the Louisiana Civil Code that immovable property is transferred upon an agreement between the parties to that effect; but, as is the case with most modern legal systems, Louisiana handles its contracts translative of title to immovables differently from those involving movables.[85] All transfers of immovables must be in writing,[86] with the exception that such a transfer is binding on the parties if, after actual delivery, the transferor confesses the transfer under oath.[87] No specific form or language is required for the contract, and the courts have been very liberal and have held as sufficient any writing which complies with the substantive law.[88]

In order to establish security of transactions where transfers of immovables are involved, Louisiana has developed a system of registry for such transfers. The Code provides that contracts,

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have come to different conclusions when applying the articles in the Louisiana Civil Code of 1870. The Louisiana courts have interpreted Articles 3506 and 3507 of the Louisiana Civil Code of 1870 in *pari materia* and have read the three-year prescriptive period into the latter article. Security Sales Co. v. Blackwell, 167 La. 667, 120 So. 45 (1929). The prescriptive period starts with possession in Louisiana under the provisions of Articles 3506 and 3507 of the Louisiana Code of 1870. The possessor must be a bona fide purchaser under the provisions of these articles; however, even the bona fide purchaser is not entitled to be reimbursed for the purhase price until he has possessed for three years. Security Sales Co. v. Blackwell, 167 La. 667, 120 So. 45, 120 So. 250 (1928). After three years of possession, the bona fide possessor may demand the return of the purchase price if he bought the goods at a public auction or from one in the habit of selling such goods. Security Sales Co. v. Blackwell, 167 La. 667, 120 So. 45, 120 So. 250 (1928); Port Finance Co., Inc. v. Ber, 45 So.2d 404 (La. App. Orl. Cir. 1950).

84. LA. CIVIL CODE art. 3509 (1870).

85. *Id.* arts. 1909 and 1920 make no distinction between the obligation to deliver movables and immovables except that in the case of immovables the *agreement* must be clothed with the formalities required by law, these formalities being a writing and, in order to affect third parties, registration.

86. *Id.* art. 2275. Under the Spanish law, when it prevailed in Louisiana, such a writing was not required. Gonzales v. Sanchez, 4 Mart.(N.S.) 657 (La. 1826). The rule was changed by La. Civil Code of 1808, 3.6.241.

87. If the transferor denies the contract, his testimony is controlling and it cannot be contradicted in any way. Sherman v. Nehlig, 154 La. 25, 97 So. 270 (1923); Bubenstine v. Flies, 146 La. 727, 84 So. 33 (1920); Wright-Blodgett Co. v. Elms, 106 La. 150, 30 So. 311 (1901); Haughery v. Lee, 17 La. Ann. 1 (1865); Knox v. Thompson, 12 La. Ann. 114 (1857); Stocks v. Furguson, 10 La. Ann. 132 (1855); Marionneaux v. Edwards, 4 La. Ann. 103 (1849); Bauduc v. Conrey, 10 Rob. 466 (La. 1845).

88. A mere receipt containing the amount paid, name of the purchaser, description of the land, and signature of the seller has been held sufficient to constitute the writing which is required by the Code for a *sale*. Buise v. Mason, 156 La. 201, 100 So. 297 (1924). See also Hitchcock v. Harris, 1 La. 311 (1830); Richards v. Nolan, 3 Mart.(N.S.) 336 (La. 1825).

sales, or judgments affecting immovable property are utterly null and void, except as between the parties, if they are not recorded.[89] Recordation is effective as to third persons from the time the act is deposited in the recorder's office.[90] Third parties take any rights to immovables free from unrecorded claims. This is true even though the third party may have known of the unrecorded claims to the property; knowledge is not equivalent to registry.[91] There appears to be an exception to this rule, however, where the third party fraudulently prevents the prior purchaser from recording his deed.[92]

Despite the above rules a person acquiring rights in immovables is not always safe in relying on the public records because some rights in immovables are not created by such "sales, contracts and judgments" as must be recorded. Rights created by acquisitive prescription are acquired through the operation of law and will not appear on the records until acknowledged by a court judgment. For this reason the transferee must investigate the possibility of prescriptive rights in order to be sure of the title. The question of which, if any, of the rights created by virtue of Louisiana's community property and forced heirship laws must be recorded in order to affect third parties has proved troublesome. It appears settled that a marriage contract is not such a contract affecting immovables as must be recorded. If the records show that a woman is single when in fact she is married and dealing with community property, a transferee will not be protected by the public record.[93] Similarly, even though the records show that a man was single when he purchased the immovable, his transferee's rights will be defeated by those of his children who inherited the interest of their mother who died before the sale.[94]

89. LA. CIVIL CODE art. 2266 (1870). Lack of registration will not affect the rights of the transferor and transferee. *Id.* arts. 2266, 2442.

90. *Id.* art. 2264. This provision has been literally interpreted so that the third party is charged with notice from the time the act is deposited even though there will be a delay before the act is entered into the conveyance book. Schneidau v. New Orleans Land Co., 132 La. 264, 61 So. 225 (1913).

91. McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909).

92. Howard v. Coyle, 163 La. 257, 111 So. 697 (1927). Richardson Oil Co. v. Herndon, 157 La. 211, 102 So. 310 (1924) established what could be called another exception to the rule of McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909); however, the *Richardson* case has been overruled by LA. CODE OF CIVIL PROCEDURE art. 3751 (1960).

93. Succession of James, 147 La. 944, 86 So. 403 (1920). The husband alone is the head and master of the community during its existence. LA. CIVIL CODE art. 2404 (1870).

94. This would appear to be the result under the cases of Succession of James, 147 La. 944, 86 So. 403 (1920) and Long v. Chailan, 187 La. 507, 175 So. 42

During the community's existence the husband has authority to deal with its property.[95] If the community is terminated by some type of judgment, this authority terminates, but the judgment must be recorded in order to affect third parties.[96] On the other hand, where the community terminates by virtue of the death of one of the spouses, no recordation of this fact is necessary.[97] Rights of heirship need never be recorded, though they may be defeated in some cases by the failure to make other recordations that are necessary. It has been held that a divorced wife's rights were inferior to those of a third party purchaser where he relied on the public records, the judgment of divorce not having been recorded.[98] From this it would seem to follow that the wife's heirs' rights are also inferior to those of the third party purchaser where a judgment of divorce is not recorded. If the wife had died during the existence of the community, however, the claim of her heirs would not be barred.[99]

Conclusions

From the foregoing it can be seen that the idea of a transfer of title upon delivery still finds a place in modern civil systems. When dealing with movables, some of these systems follow the Roman law which ruled the dealings of the Roman people in the sixth century A.D. These systems still hold that title to movables can be transferred by a simple transfer of possession. Some civil systems now provide that title will pass upon agreement, but even these systems require a delivery of movables before the transferee is given any great degree of protection from claims of third parties. When dealing with immovables, however, the role of *traditio* has been greatly reduced in all civil systems due to the need for greater security of transactions in modern business type societies.

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(1947). The public records should show whether the recorded owner is married or single. LA. R.S. 35:11, 44:135 (1950). If the statement as to the marital status of the owner is false, the third party is not protected under the rule of *Succession of James* and *Long v. Chailan* above.

95. LA. CIVIL CODE art. 2404 (1870).
96. Humphreys v. Royal, 215 La. 567, 41 So.2d 220 (1949).
97. Long v. Chailan, 187 La. 507, 175 So. 42 (1937).
98. LA. CIVIL CODE art. 2404 (1870).
99. Humphreys v. Royal, 215 La. 567, 41 So.2d 220 (1949).