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The Roman Law of Trusts

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Among other criticisms, two in particular may be mentioned. First, Morgan says little about Madison's opposition to the doctrines of nullification and secession (pp. 197-201), and even less about Madison's views of slavery and the racial problem in general. But Madison's writings on these matters are important for his interpretation of the nature of the union (cf. Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge, 1989), Chapters 4-8). Second, the presentation of Morgan's argument is marred by numerous typographical errors. The book would have benefited greatly from another round of thorough editing.

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David Johnston, *The Roman Law of Trusts*. Oxford: Clarendon Press, 1988. xiv, 306 pp. \$64.00.

David Johnston's book on the Roman law of "trusts" is an excellent history of the substantive law of *fideicommissa* from their origin in republican Rome until the time of Justinian. Although this book was not written for beginners, it is full of insights that will expand the horizons of anyone interested in the comparative study of trusts and decedents' estates. The seasoned Romanist cannot be failed to be impressed by the meticulous reasoning of this work, whether all of Johnston's conclusions are accepted or not. The author's general philosophy of analysis is an extreme reluctance to treat a text as having been interpolated by Justinian's commissioners. This, of course, makes life difficult for the author, but it forces him and us to try to understand difficult texts and to solve difficult problems without resort to intellectual legerdemain. It would be much easier to declare an enigmatic passage to have been interpolated and then to speculate on what the original text might have been.

This book begins with an argument that the Roman device of the *fideicommissum* was sufficiently similar to the English trust so that the Latin word can be translated as trust. Although there are similarities, there are also fundamental differences between them. Inasmuch as the English trust was not borrowed from or modelled upon the *fideicommissum* and particularly since modern legal systems of Europe do not provide for trusts, this translation could easily mislead. It would have been better, in this reviewer's opinion, had the author been as cautious here as he was in the area of interpolations.

Chapter II of this book describes the origin of *fideicommissa* in republican Rome and their legal enforcement in court as first decreed by Augustus. Chapter III is an excellent explanation of the use of *fideicommissa* and especially the use of secret *fideicommissa*. Secret *fideicommissa* were sometimes used in order to evade legal limitations on the ability of various classes of persons, e.g. foreigners, unmarried persons, and childless couples, to receive a legacy or take by intestacy. Such *fideicommissa*, however, were not allowed if discovered; they were clearly against stated public policy, and when they were discovered, they were confiscated. Some flexibility developed in the practice of these confiscations in that, if the beneficiary acknowledged the *fideicommissum* in his favor, he could keep one-half of the benefit, but this was kept as an informer not as a beneficiary.

The Romans did not use *fideicommissa* for family settlements. Their social needs and desires were different from English ones, and although the Roman law could have accommodated family settlements, ancient Roman "family strategy was carried out by other means." The Romans had too few heirs, as a general rule, rather than too many. Thus, there was an emphasis on adoption, even of adults. (The Anglo-American law did not allow adoption until the nineteenth century, even though in eighteenth-century England, nephews and sons-in-law were frequently required to change their surnames in order to receive a legacy.)

Perpetuities were not possible in Roman law because *incertae personae* could not be beneficiaries of a legacy or of a *fideicommissum*. Justinian limited restraints on alienations to four generations regardless of what could have been fit within the classical Roman legal system. It is to be noted that a perpetuity was apparently attempted during the reign of Justinian and it was dealt with in Novel 159.

In Chapter V, the author gives a lucid account of the uses of *fideicommissa* in situations of intestacy. This discussion demonstrates the flexibility of these devices and explains their popularity. This chapter also points out fundamental differences between *fideicommissa* and trusts. Although the former were independent of wills, a "trustee" could only be a person who benefited upon the death of the "settlor," *i.e.* an heir at law or a legatee, to use the modern terms. The *fideicommissum* was thus strictly limited to succession of property at death; the Roman law never allowed for anything like an *inter vivos* trust.

The author's discussion of the technicalities of creating *fideicommissa* is a very interesting picture of the development of the law over a long period of time. Also, it is interesting to note that the method that Augustus gave for enforcing *fideicommissa*, the *cognitio* procedure, became in later times the method for proceeding in all civil actions.

The book concludes with a discussion of the fusion of *fideicommissa* and legacies. Johnston shows convincingly that Ulpian's statement in *Digest* 30.1, that they are equivalent, does not accurately represent Ulpian's opinion but rather the state of the law at the time of Justinian. The author also argues that almost all of the other sources of confusion before the changes made by Justinian came from a work by Q. Cervidius Scaevola that was published posthumously in the epi-classical period by a person who was poorly versed in the law. There was no fusion of legacy and *fideicommissum* before Justinian. As the author says on page 269: "The linguistic phenomena we see in the texts reflect not classical fusion of law but post-classical confusion of language." Justinian merged the law of these two legal devices by ordering that the deficiencies of one were to be supplied from the other.

It is at this point that Johnston lays down his pen, and indeed it is a traditional terminus, the death of Justinian in 565. But what of *fideicommissa* and legacies in medieval Europe? Accursius in the *glossa ordinaria* to *Digest* 30.1, notes that they are not the same ("*immo in multis differunt*") and give examples. Perhaps Accursius was in error; perhaps the inclusion in the *Digest* of all the old classical texts and their enactment by Justinian actually prevented the fusion of the two, which was attempted by the emperor in his other legislation. Maybe the medieval law of *fideicommissa* could be another volume for Johnston to undertake.

The subject matter of this work is difficult, complex, and abstruse, and the author has done an admirable job in making it accessible to the reader. The book is very well organized, and the careful explanations of the organization were much appreciated. The author, throughout the book, is telling us what we have read and what is coming next. All terms are carefully defined and explained, and most of the Latin texts have been translated into English by the author. This reviewer did not

errors in translation on pages 47, 49, 51, and 66 where *ei qui capere non potest* is mistranslated as "a person without testamentary capacity." Testamentary capacity means only the ability to make a will, but not the ability to take under a will. An infant, for example, can benefit under a will though he cannot make a will. This error, however, did not affect the author's explanations.

This book on the Roman law of *fideicommissa* is a brilliant study. The balancing of competing theories is exemplary, and the clarity of exposition is impressive. This book should be in every library of Roman law studies, and we should be grateful for Dr. Johnston's defiance of the imperial ban on commentaries on the *Digest*.

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