

ROMAN INFLUENCE ON SWEDISH CASE  
LAW IN THE 17TH CENTURY

BY

STIG JÄGERSKIÖLD

*Professor of Public Law,  
University of Uppsala*



The purpose of this paper is to demonstrate Roman influence, within the field of commercial law, on the 17th-century decisions of the Svea Hovrätt, which was then the leading Swedish court of law. If such influence can be established it will be interesting for two reasons: first, Roman influence has previously been doubted or denied; secondly, new light would be shed on the important Swedish codification of 1734.

Some background information must be given by way of introduction.

The Swedish judicial organization at the beginning of the 17th century may be described as a three-instance system. There were local courts, there were provincial courts (in the towns and cities: city courts), and there was a final appeal to the King in Council. These appeals had become so numerous and were such a burden on the Council that in 1614 the King created a new court to take care of the appellate business of the Council. This was the Svea Hovrätt. It was located in Stockholm and was meant to be the highest tribunal in the land. It is true that additional appellate courts on the same level were later set up in other parts of the realm, and that in time the King—who had never quite given up his prerogative of being the ultimate dispenser of justice—resumed his right to hear appeals in the last instance, whereupon the Swedish system in fact became a four-instance one.<sup>1</sup> In spite of this, the Svea Hovrätt was undoubtedly the leading Swedish court of law in the 17th century.

The law that the Svea Hovrätt had to apply had as its nucleus two medieval codifications, the General Urban Code, governing towns and cities, and the General Rural Code, which was the law of the rest of the country. Both codes had been issued in the middle of the 14th century. It is natural that, in a country whose

<sup>1</sup> Much later the Council again found the appellate business too much of a burden. In 1789 the work was therefore transferred, this time finally, to a separate court, Högsta Domstolen (the Supreme Court).

economy was rapidly expanding and which was on the threshold of becoming, for a short time, one of Europe's great powers, they would be felt to be inadequate. Work was accordingly started in the 17th century on a new code, and this ultimately resulted in the Code of 1734.

Two questions arise in connection with the facts just given. The first is, what did the courts, and especially the Svea Hovrätt, do when they found the two Codes, enacted three hundred years previously, deficient or obsolete? The second problem concerns the Commercial Title of the 1734 Code: what were the sources of this Title, the only one that is almost lacking in *travaux préparatoires*? The answer to both questions lies, to a great extent, in Roman law. The Svea Hovrätt largely solved its problems by receiving Roman law, and this Roman-inspired case law was the law which was later codified in the Commercial Title of the 1734 Code.

Hitherto the actual situation during the 17th century has not been fully appreciated. While it has been obvious to everyone that the legal text writers of 17th-century Sweden were greatly influenced by Roman law, there has nevertheless been a general belief that the influence went no further and that the courts continued to apply indigenous rules, or evolved new ones of their own invention. One reason for this belief, which fitted in well with attitudes of national self-importance and chauvinism in the 19th and early 20th centuries, was that the judgments of the Svea Hovrätt in the 17th century did not by their form betray any Roman influence; the Court was instructed to use only Swedish terminology in its judgments, and this rule was carefully observed.

As regards the historical evidence, there exists, apart from the recorded judgments, and filed pleadings, etc., a special series of records, namely verbatim minutes of the conferences held by the judges before they decided a case. The series was discontinued after a time, and this may explain why it has been overlooked by many scholars—they may have failed to grasp the value of a series which no longer has any counterpart. Be that as it may, the series continued throughout the 17th century and is a goldmine of information. Usually seven or eight judges took part in the hearing of each case; one of them was always appointed to make a particularly close study of the case and then, in a speech to his colleagues, to sum up the facts, discuss the legal issues, and suggest a solution. The judge entrusted with this task will here be referred to as the "judge in charge". He at least, and often other judges

as well, made speeches or pronouncements, all of which were taken down and recorded in the minutes. Normally both the conferences and the minutes were kept secret, even from the parties, and the judges felt free to use Latin and to make copious references to Swedish and foreign literature. It is here that the Roman influence is laid bare.

One further point should be stressed before embarking on the survey of the Roman influence. It is this: the word "Roman" is taken in a wide sense, so as to include certain later developments, principally Romano-German law but also Roman-Dutch law, which had some influence in 17th-century Sweden. However, the Svea Hovrätt often based its decisions directly on the Justinian legislation as it appears in the *Corpus Juris Civilis*, particularly when neither the indigenous Swedish law nor the Romano-German law offered any ready-made solution. The contribution of the *Corpus Juris* in such cases was, of course, normally of a more general nature; it could suggest a solution by some analogy or general maxim to be found in the *Corpus Juris*. For the purposes of the present paper it has, for the most part, been considered best not to make too nice a distinction between Justinian, Romano-German and Roman-Dutch law, and so the term "Roman law" is used so as to embrace them all.

Sanctity of contracts and freedom of contracting are the two basic principles which are constantly met with in the 17th-century minutes of the Svea Hovrätt. From them a multitude of detailed rules were derived. Expressed in Latin (partly of a later origin than the *Corpus Juris Civilis*) these principles were readily quoted in the deliberations of the judges: "*Pacta sunt servanda*",<sup>2</sup> "*Quod semel placuit postea displicere nequit*",<sup>3</sup> and "*Hominis provisio tollit provisionem legis*".

The judges generally found the basis for the sanctity of contracts principle in the meeting of minds entered into by the parties. "*Contractus perficitur consensu*",<sup>4</sup> it was said in 1682; while the maxim "*Voluntas probata servanda est*" had been resorted to as early as 1625. Thus, the efficacy of a contract did not, as in Justinian law, primarily depend on its being referable to a recognized type of contract, but on the existence of *consensus*. It is true that references to *pacta vestita*, *pacta nuda* and *naturales*

<sup>2</sup> Cf. D. 2.14.7.7, C. 2.3.12.

<sup>3</sup> Cf. D. 2.14.1; Liber sextus, Regula juris 21.

<sup>4</sup> Cf. D. 45.1.137.1.

*obligationes*—concepts which were closely associated with the system of types of contracts—are encountered in the judges' discussions. But the idea that sanctity should be accorded to all contracts prevailed. In an important case in 1691 a judge of the Svea Hovrätt maintained quite generally that contracts must be performed. When giving his reasons for the decision in the case he said, in the Latin-interlarded jargon beloved of the judges: "It is *notorium* that *contractus* are *stricti juris* and have *vis* and force of *rescriptum principis* and of *res judicata* which . . ., once honestly and properly concluded, can no more be altered than they can be displaced or abrogated. Here is a *contractus* in which each party has to do his *facienda* and both are obliged thereto unless it [the contract] is dissolved *mutuo consensu*."

Thus contractual obligations had inexorably to be performed unless they were void on any of the recognized grounds of invalidity (which will be treated below). A corresponding rule was applied to a bond to pay a sum of money or to perform some other obligation. The bond had to be met according to its tenor, even if this did not in fact express the original transaction. A plea, for instance, that the obligor had not fully received the sum stated to have been advanced by way of loan would accordingly have to be dismissed. There are several cases to this effect. The court of first instance had the following to say in a judgment of 1665: "Notwithstanding J.L.'s assertion that he, being in a foreign place (Amsterdam) and in order to avoid ignominy and to preserve his good name, was forced to sign this bond although he did not owe the sum stated, nevertheless, inasmuch as the said bond is written in such strict terms and in it J.L. expressly waives all that might assist him against the said obligation . . ., this Court is not competent to alter the said bond." The Court, however, stated as an additional ground that J.L. had commenced repayment by instalments. The court of second instance took into account only the wording of the bond although "the Court well enough realizes that, no doubt from rashness and by accident, J.L. had suffered harm . . . by his . . . bond." In 1666 the Svea Hovrätt, the court of third instance, approved the judgments of the courts below. In another case a promissory note, which had been issued in blank and which was later alleged to have been filled in with an excessive amount, was considered binding. For this decision reference was made to Romano-German rules derived from "the great Carpzov".

Given the notion that the sanctity of contracts was due to the

meeting of two or more minds, it was natural to consider an offer as not binding. "No *contractus* that is *in fieri* can obligate", it was said in the Svea Hovrätt in 1665. The rule is consistent with Justinian law as handed down.

Obviously the view of contracts as inexorably binding sometimes came into conflict with considerations of justice as appearing from the proven facts of the case. In other words, great tension might arise between the principle of sanctity of contracts and the justice of a particular case where the contract could not be set aside on any of the few recognized grounds of invalidity. Guidance was then sought in certain general provisions of the *Corpus Juris*. The rule against unjust enrichment was often quoted: "*Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiores.*"<sup>5</sup> The maxim "*Nemo praesumitur jactare suum*" was regarded as a general principle of interpretation. Finally, reference was made to *aequitas*. A typical example of such conflicts and of the means of overcoming them is provided by a case of 1638. A person had given another a bond and so, in principle, he was bound to pay the whole sum promised although this exceeded the debt. The Svea Hovrätt on the facts found this absurd and sought an escape in the maxim "*Simplicitati et non calliditati subveniendum*".

Important expedients for bringing about modifications were also found in adaptations of the Roman-law concepts of *bona fides* and *contractus bonae fidei* as opposed to contracts *stricti juris*. Certain kinds of contracts, such as the contract of suretyship, were normally assigned to the category of *strictum jus*, while others, e.g. contracts of hire, leases and, often, contracts of sale, were regarded as *bonae fidei*, thus admitting of a more benevolent interpretation. Another means of reaching a fair decision, which, however, was seldom employed, was the doctrine of the *causa*. The requirement of a *causa*, a *quid pro quo*, for every contract or promise originated in the old Roman law. This principle might well have provided a method of avoiding unreasonable consequences of the sanctity-of-contracts rule. But the doctrine of the *causa* played a relatively minor part in the Justinian law and the same happened in Sweden, although it comes into view occasionally. Thus in 1655 it was pleaded in the Svea Hovrätt that a party should be excused payment because he had not derived any benefit from the contract in question. In some cases concerning

<sup>5</sup> D. 50.17.206.

dowries and settlements doctrines of *causa* were employed. “*Dos* requires a *causa*, out of which she should issue” it was said in the Court in 1663.

Closely related to the doctrine of the *causa* was the *exceptio non numeratae pecuniae*. This was a plea that there had never been a payment that could justify the claim for repayment or other performance. The onus of proof was on the party now demanding performance. The *exceptio* turns up in the Svea Hovrätt in the latter part of the 17th century. In the case of *Lützow v. Count Oxenstierna* (1673) it was alleged that a promissory note had been issued in blank and that it had subsequently been filled in in a such a way as not to correspond to the original claim. The judge in charge made reference to the *jus civile*, but on this occasion there was no need to determine whether the defence was available in Sweden, since he could point to the fact that the time limits for making the exception laid down in C. 4.30.14 had not in any event been observed. This was enough to dispose of the plea. Subsequently, the *exceptio non numeratae pecuniae* was accepted as a valid defence in a great many lawsuits and the rule admitting it was received into Swedish law. In the course of the 18th century, however, it disappeared again and was replaced by other rules.

In view of the great importance attributed to the sanctity of contracts, it is obvious that there was but little scope for rules declaring contracts void or permitting rescission. Among the grounds of invalidity the first ones to attract notice deal with circumstances that obviously prevent a true intention from being formed or finding expression, as e.g. force (*vis*), fear (*metus*), fraud (*dolus*) and mistake (*error*). In addition, a contract might be void as being contrary to law or good morals (*contra bonos mores*). To some extent the same circumstances were recognized in the old law of Sweden as elements vitiating a contract, but forensic argumentation in the 17th century was based primarily on Roman law.

Fraud was treated in a practical fashion by the old Swedish Codes. In 1630, however, a judge in charge had this to say about fraud in relation to contracts of sale: “*Propter dolum autem intervenientem emptionis et venditionis contractus annihilari atque vitiari solet.*” And in 1673 it was said quite generally that all “*pacta et conventiones* [should] be *fraude ac circumventionem vacua*”. The vitiating effect of fraud was often based on Justinian provisions.

Duress as a ground of invalidity had a long tradition in the indigenous Swedish law. The provisions of the *Corpus Juris* on *vis* and *metus*, which were quoted in this connection, hardly added anything new to the Swedish law. On the other hand, in opposition to the alleged materiality of duress reference was made to the Justinian proposition as to consent: "*Injuriam accipere non videtur qui semel voluit.*"<sup>6</sup> This was quoted in the Svea Hovrätt as early as 1625. It seems, however, that no detailed doctrine on consent was worked out at this time.

The effect of mistake was much discussed. The proposition "*nulla enim voluntas errantis est*" was quoted from D. 39.3.20. On the basis of certain "Willenstheorien" (subjective theories of contract, i.e. theories that, in point of principle, apply a subjective test of intention in regard to the formation of the contract) this proposition was narrowed down so that only mistakes causing an inappropriate expression of the will were taken into account. Apart from this, a few definite types of mistake were considered material in accordance with the Justinian doctrine of error. In 1688 reference was, for instance, made to *error levis circa personam*. There was, however, no relief for imprudently signing a document having more far-reaching consequences than was realized; on this point an opinion was expressed in the Svea Hovrätt which clearly draws on D. 22.6.9.5: "*nec stultis solere succurri, sed errantibus.*" Nor was relief given where a party had expressed the same intention repeatedly. He then lost his right to plead mistake. The principle was taken from Romano-German writings and quoted as: "the general rule pronouncing *geminationes sive repetitiones actus vel promissionis . . . omnem dolum et errorem excludere.*"

Miscalculation—*error calculi*—held a unique position among the different types of mistake. According to Justinian law—C. 2.5.1—such errors were to be rectified: the "true justice" was aimed at in these cases. The same principle was at an early stage accepted in the case law of the Svea Hovrätt. One judge relied on it as early as 1648 and even in the previous year the Court had rectified an erroneous invoice in accordance with the maxim "miscalculation is no true payment"—a phrase which was the result of the translation into the vernacular of a rule of Romano-German origin.

The scope of this rule was much discussed. In the case of *Singelman v. Korbmaker* in 1672 it was made clear that *error*

<sup>6</sup> Cf. D. 39.3.9.1.

*calculi* was confined to miscalculation in the sense of mistakes in addition, etc. A more far-reaching principle against unjust enrichment could be based on other passages from the Digest; these were often quoted, like the above-mentioned D. 50.17.206: "*Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiores.*" Certain grounds could, however, be adduced against a wholesale recognition of the "true justice" of the case and the rectification of every *error calculi*, in particular that it should be possible to regard *bona fide* payments, receipts and settled accounts as definite transactions, not liable to be set aside. The clash of opinions on this point continued into the 18th century and was particularly evident in the long-drawn-out lawsuit between "Ständernas bank" (the Bank of the Estates of the Realm, the national bank of Sweden) and the Baroness Anna Berendes. In that case, however, the tendency to rectify an *error calculi* ultimately prevailed.

The Bank claimed a sum of money from the Baroness in order finally to extinguish a debt allegedly due from her. It was true that a previous payment had been regarded by the parties as a final settlement, but an examination of the accounts of the Bank had disclosed an error to the latter's disadvantage, due to a miscalculation. Accordingly, it was pleaded on behalf of the Bank, the Baroness still owed a certain sum. But she denied any further liability and referred to the Bank's previous declarations, on which she considered herself entitled to rely.

The case came up for consideration in the Svea Hovrätt in June 1714. The problems involved were defined and elucidated by the judge in charge. "The *quaestio juris*", he said, "is whether a debtor, after the lapse of several years, may be approached with a claim for some newly discovered balance previously concealed by reason of a miscalculation . . ., and when the debtor, on the basis of the creditor's own calculation, had been fully discharged from liability." On the one hand it would be unjust for a debtor to make a profit on the creditor's miscalculation. But on the other hand, it would also be inequitable to hold a debtor still liable "when he had been fully discharged *bona fide* and without any pressure having been put on the creditor . . .". Settled accounts should not be set aside unless *dolus* be proved on the part of the debtor, the judge continued. An account signed by the creditor ought to be as reliable and conclusive as a final judgment—this is an instance of the parallel often drawn at that time between the sanctity of contracts and *res judicata*. "For otherwise",

the judge went on, "the necessary result would be continued uncertainty for the rest of the debtor's life and even a man's children and those who succeeded to his property could be disquieted *in perpetuum*, a state of affairs which cannot be tolerated because of the general security of ownership to his property which is accorded every man *in societate civili*. . . . And *in jure* there is the further provision, *Quod quis ex sua culpa damnum sentit, non intelligitur damnum sentire*."<sup>7</sup> The judge added that this was an occasion for applying "the well-known *axioma juris, quod res, quae ab initio fuit vitiosa, tractu temporis robur sumat*".

From these starting points the judge came to the conclusion that the claim of the Bank should fail. However, he also considered the special problem whether the Bank's character of a public authority warranted a different appraisal. It was a widespread opinion at the time that the Crown and public institutions should enjoy special protection for the sake of the *salus publica*. But it could be maintained, on the other hand, that the officials of the Bank were "prudent and mature men, well trained and versed in the art of reckoning". It should therefore be possible to rely on the correctness of their calculations, and indeed this was essential for the credit of the Bank.

Regarding the Bank's claim for payment in spite of the receipt previously issued in error, the judge accordingly stressed that statements of the kind in question, particularly if emanating from the authorities, ought to be trustworthy. Against the idea of aiming at the "true justice" in every situation, the judge set the need for security and reliability, and here his reasoning puts one in mind of the arguments which had previously been advanced in support of the rules as to limitation of actions. Putting it in another way, the rule against unjust enrichment was contrasted with the rule of paying regard to good faith.

The other members of the Court, however, were reluctant to make up their minds on the difficult legal problem involved. The case stood adjourned for several years. When it was taken up again in October, 1717, with a different judge in charge, the majority of the Court, as already indicated, preferred the arguments in favour of the Bank.

Another type of mistake that attracted much attention was mistake of law, *error juris*. The old criminal law of Sweden accepted both mistake of fact and mistake of law as valid defences.

<sup>7</sup> D. 50.17.203.

In the course of the 17th century a sharp distinction was introduced between *error facti* and *error juris*, on the pattern of Roman law and contemporary legal theory, including writings on canon law. A rule became recognized to the effect that *error juris* generally—there were exceptions—could not be pleaded in defence to a criminal charge but that it was available in other cases within narrow limits. Thus, in a case concerning the distribution of an estate, which was heard in the Svea Hovrätt in 1673, the judge in charge quoted both the Digest and Romano-German legal writings in order to prove that *error juris* should be taken into account.

Drunkenness could free a party from liability in contract. It could also relieve a person from criminal responsibility or be pleaded in mitigation. These results were supported by arguments based on Roman law.

There was no doubt that the fact that an agreement was contrary to good morals could be pleaded in order to avoid the obligations resulting from it. Whether the principle extended to wagering contracts was, however, the subject of much discussion in the Svea Hovrätt, a discussion that was based on certain passages in the *Corpus Juris*. The majority of the Court came to the conclusion that a wager was a void contract. The Court took up the same attitude with regard to agreements concerning future inheritances, and this was clearly in accordance with scholarly conceptions concerning Roman law.

The decision to declare wagering contracts void was taken in a case of 1656 where the Court's Vice-President, Baron Gustaf Rosenhane, famous in Swedish belles-lettres but also a distinguished lawyer, in a long and eloquent speech propounded every conceivable reason for accepting wagering contracts as valid. He considered his own opinion to be in agreement with Roman law. But he failed to move his colleagues and became the only dissident.

The case concerned the validity of an agreement whereby A promised B (a bachelor) a sum of money if B married before the end of the year. If B failed to do so, B would instead pay A an equal sum. Rosenhane could not find this agreement to be *contra bonos mores*. In his analysis there was a distinction between wagering and gambling; only the latter, like fornication, fraud, etc., was contrary to good morals. He stressed—and this is an application of the theory of sources of law prevalent at the time—that wagers were accepted by the so-called *jus gentium*, a fictional body of law consisting of the rules which might be regarded as the dominant ones for any legal situation in the civilized systems

of law. Considering the position of Sweden at the time, it would be most undesirable to adopt principles which were at variance with this law of the nations, the Vice-President said. "What a species of law or *novus mos* to introduce, prohibiting what has not been forbidden in Sweden, nor anywhere else in the world! We are to administer justice among *cives*, not *subditi*. Nor are we *censores morum*. . . . We are now making a code of morals in a *florentissimum amplum imperium* and in a *civitas regia*, where *confluxus gentium* takes place *ex omnibus partibus mundi*, of people who censure all that happens here *publice*, particularly if it is done by a royal court of law, like this one. These people want no *coacti mores* nor *juri gentium contrarii* and *nusquam usitati*." And even if the Court decided to declare wagers *contra bonos mores* it would be an ineffective prohibition. In this connection he also quoted the reasons given by the Emperor Tiberius for rejecting legislation against luxury and extravagance: "*Vitia adulta et praevalida sunt potius omittenda*."

Rosenhane further pointed to the principle of sanctity of contracts. A wager was, after all, an agreement, and in the present case it had actually been concluded in writing and under seal in the presence of a witness. Such an agreement ought not to be rescinded. There was no question of the agreement being disreputable, "a *stipulatio ex turpi causa*, like one in *latrocinio* or *homicidio, divortio, stupro*". On the contrary, the aim had been to further the contracting of a marriage, "an *obligatio ad promovendum conjugium*, something which everyone ought to promote . . .". The biblical agreement of Rachel and Leah was more open to criticism; it was "more of a *frivolum pactum* what is said in *sacra illa historia* about Rachel suggesting to her sister Leah: *dormiat tecum maritus hac nocte pro liliis filii tui*. And this pact was kept and meets with approval."

The Vice-President also stressed that ordinary contracts might involve great risks: a man could "send out a ship, and if it returns with a rich cargo, he will have made a fortune; but if it never returns, *imputet vel fortunae vel sibi credenti fortunae*. Should navigation, which is more hazardous than anything else, therefore be forbidden?" Rosenhane finally made a comparison with the casting of lots (*sortes*), a procedure which even had certain applications in legal contexts. And "*sortes* were also used by the Romans and were *licitae*". But Rosenhane's eloquence was of no avail. As we have seen, the majority of the Court classified wagers as void contracts, and so they still remain.

The resistance against allowing mistake and other subjective circumstances to nullify contracts was in some cases evaded by attaching importance to objective factors. One instance of this was the doctrine of *laesio enormis*, according to which a contract which entailed great prejudice to one party could be set aside. The prejudice in the typical case consisted in the price falling below half the value of the subject of the contract. The technical terms used were *laesio ultra dimidium* or *laesio enormis*.

These rules had their origins in the Justinian law.<sup>8</sup> Largely through the instrumentality of courts in the then Swedish provinces east of the Baltic, they were accepted into the case law of the Svea Hovrätt and have played an important role in that Court. The limits of the doctrine, however, were uncertain. Was it confined to sales, or could it be applied to other contracts, e.g. to a compromise of a dispute (*transactio*)? The Court's deliberations on this question followed closely the lines of the Romano-German theoretical discussion.

Not far removed from the rules on *error* are the principles governing *condictio indebiti*. Both as developed in legal writing and in their case-law application, they, too, were derived from the *Corpus Juris*. These rules, of course, concern claims for the return of money paid where none was owed, and they were accepted by the Svea Hovrätt in a fair number of cases. But there were also instances where a payment, although made in error, was considered irrecoverable. The Latin dictum "*quod multa recte solvuntur quae non legitime exiguntur*" was used in this connection and it was even said that "no debt can be made *irritum* after it has been paid" (1691).

The principle of freedom of contracting was carefully guarded. There were, of course, spheres where it could not be upheld, and then reference was often made to the well-known rule of the Digest: "*Jus publicum privatorum pactis mutari non potest.*"<sup>9</sup> But outside this sphere the principle was "*Hominis provisio tollit legem*" or, in the vernacular, "bargain breaks law". The latter principle achieved great importance in many branches of the law, e.g. with regard to sale, hire, leases of land, suretyship and pledges. But where was the line to be drawn? As regards a contractual stipulation for a gift between spouses, for instance, some members of the Svea Hovrätt considered such a contract valid,

<sup>8</sup> C. 4.44.2 and 8.

<sup>9</sup> D. 2.14.38.

but one judge maintained that “our law does not recognize any *pura donatio inter maritum et uxorem* and no *privatorum conventiones* can override the law”, and this opinion prevailed (*The Crown v. Adlercrona*; the case is given further attention below).

A central problem in Swedish law in the latter part of the 17th century was the extent of the implied warranty of title where land was sold. This problem will be treated in greater detail below, but it may be stated here that the main questions were whether the vendor could contract out of liability for title and, in particular, what the legal position was with regard to the warranty where land was taken over by the Crown in the course of the process, bordering on confiscation, which was known as the *reduktion*—the Reduction or reappropriation of former Crown property, particularly in the 1680's.<sup>1</sup>

The principle of freedom of contracting was hard to reconcile with various requirements as to form. In medieval Swedish law legal transactions required the observance of particular formalities in a considerable number of instances, e.g. in sales and pledging. As a consequence of the increased freedom of contracting many of these requirements vanished during the 17th century—although they reappeared to a limited extent in the codification of 1734.

There was a lack of rules in medieval Swedish law concerning unilateral dispositions such as gifts and promises. In Roman law a distinction was made between remunerative gifts and other gifts, and this distinction was adopted by Swedish law. So was revocation of gifts for ingratitude (*propter ingratitudinem*), for failure to fulfil the conditions of a gift and on account of the donor's poverty. Another rule concerning gifts that was taken from Roman law—but only after considerable discussion—was the prohibition of gifts between spouses. When this question came to the fore the reaction against the influence of foreign law had already set in—this was a feature of the “Caroline absolutism” under Charles XI and Charles XII (from 1680 onwards). Nevertheless the opinion prevailed that Swedish law on this point

<sup>1</sup> The Reduction was aimed at recovering Crown property which had been granted to subjects by previous sovereigns, especially Queen Christina. The grants had generally been made as compensation, though sometimes on an excessive scale, for services to the realm, but there were instances of downright squandering of public assets.

should not differ from the "*jus civile* and the law of all other nations".

There were sharp differences of opinion in *The Crown v. Adlercrona* (1689), the case which may be regarded as having decided the question. One judge, who was in favour of allowing gifts between spouses, said that "the law permits and even enjoins a man to give his wife dowry in *pretium virginitatis*. Should it not be even more legitimate to augment the dowry by means of some gift for the sake of a happy married life?" But these reasons did not convince the majority of the Court; instead, the foreign laws exercised great influence. The Court's Vice-President said in his summing-up: "If eventually I want to benefit my wife, it must be done *mortis causa per testamentum*."

The great 18th-century scholar David Nehrman (also called Ehrenstråle, the name he assumed on his elevation to the nobility) noted that the Roman rule had been accepted in Sweden. In his opinion it was based on Stoic philosophy.

Consistently with the reluctance to admit grounds of invalidity as regards contracts there was an unwillingness to recognize the extinction of a right by reason of the mere lapse of time. "*Tempus non est legitimus modus tollendi*." It is true that even the Swedish law of the Middle Ages possessed in the institution of (acquisitive) prescription—sometimes based on enjoyment from time immemorial, sometimes requiring three years' user—a means of protecting a person who acquired real property, but there were no rules of prescription concerning movables. When a strong need for such rules became apparent, a twenty years' period of prescription was introduced. This, however, met with opposition, and so a principle of vigilance, based on certain Justinian passages, took its place. For a time the last-mentioned, quite flexible rule was followed, and there was consequently an equitable appraisal of each case on its merits. But the Court soon returned to the firm twenty-year period. The requirements of just cause and good faith in the Swedish law of prescription corresponded with Justinian principles.

With regard to extinctive prescription (limitation of actions) attempts were made in one set of circumstances to fix the starting point for the lapse of time in accordance with the leading opinion as to the contents of Roman law. It was accordingly maintained that, where no date for performance was fixed, time was to run from the day on which performance was demanded. A different opinion prevailed, however, viz. that time should run from the

date of the creation of the debt. Though possibly deviating from the *Corpus Juris*, this rule may, however, be said to accord with Justinian tradition in that it is fully compatible with the principle of vigilance. The rules exempting the Treasury from prescription were in exact conformity with the *Corpus Juris*. "*Praescriptio non currit in fiscum*."

The binding effect of a bare promise was a question surrounded by just as much obscurity as were the problems connected with gifts. There was a tradition of a moral and religious kind, voiced particularly by Grotius, to the effect that a promise was legally binding. But the general view was the opposite one. In the Svea Hovrätt different opinions were expressed on this point in a case of 1697 concerning the liability of a father for the debts of his deceased son. In a letter addressed to the son's widow the father had promised to pay the debts on certain conditions. He subsequently refused to carry out his promise because, in his opinion, the conditions had not been fulfilled. The majority of the Court considered that he was not bound by the promise. One member, however, thought that he was, and that promises could bind; and, as the promise in this case was given neither "*per errorem, dolum, metum*" nor "*concussionem*", the father-in-law was bound. The judge, referring to the fact that the father-in-law's letter was written in French, remarked sarcastically: "What was promised as a compliment in French will have to be honestly performed in Swedish." But in this conclusion the Court, as already indicated, did not concur.

Among the particular types of contract that of sale was the most important. Already in the early part of the 17th century rules on this topic were borrowed from Roman law, even when they differed from the Swedish law of the Middle Ages, more particularly the Sales Title of each of the old Codes. The Roman *emptio-venditio* was taken as a pattern for the Swedish decisions. The medieval requirements as to form were abandoned. As early as 1630 a judge defined a sale on Roman lines. It was said in one case that the contract of sale "*presupposes contractus venditionis, qui solo consensu perficitur*"—and it was also claimed that consent "*contractui huic formam constituit essentialem*". Reference was made to I. 3.23 pr. and to D. 18.1.35 pr. But there were also other points of view. In a case of 1675 the judge in charge maintained that a valid contract of sale necessitated not only an agreed price but also the payment of earnest (*arrha*) or the making of a

document. It was impossible, he said, to acknowledge "*venditionem esse perfectam, nisi sit instrumento aut scripto perfecta, aut arrhae nomine aliquid detur*." This may be regarded as a combination of Justinian's legislation and medieval Swedish law. A case of 1662 went even further in requiring "*res vendita, pretium, arrha, traditio*"—delivery was essential for a complete sale. *Traditio ficta* could, however, be accepted in certain cases. As *arrha*, not only coins but also other valuable objects could be accepted; this corresponded with Justinian law. But whatever the views and solutions as to details, it is clear that the old indigenous law of sale was largely disregarded and that rules of Justinian or Romano-German origin were adopted instead.

Conditions in contracts of sale were permissible to a great extent in accordance with the Roman doctrine of freedom of contracting which had been accepted by the courts. In the Swedish case law, as well as in theoretical works, Latin terms are met with, like the *pactum de retroemendo* (under which the buyer could compel a repurchase) and *pactum protimiseos* (giving a right of pre-emption). In a case of 1690 a judge remarks that "such *pacta contractibus adjecta*, like this *pactum retrovenditionis sive relutionis*, are very much in use". A line was, however, drawn so as to exclude conditions which denied the purchaser real ownership, "*verum et plenum dominium*". Such contracts had to be classified as mortgages.

With regard to the transfer of property the Roman rule of transfer by *traditio* (and not by the consensual contract) was received. As explained by the Svea Hovrätt in a decision of October 26, 1686, *traditio* (possession) ought to take place before *actio empti et venditi* was permitted. However, according to the Justinian law D. 19.1, *periculum* was transferred to the buyer by the contract. Thus the Svea Hovrätt had laid down as early as 1648 that *periculum rei ad emptorem spectat*. In case of late delivery Roman law was applied to the rights of the buyer.

The rules of Roman law were also the starting point for the discussions of the Svea Hovrätt judges on the legal consequences of defects in the goods delivered. "*Defectus rei vel materiae, de qua contractus fuit initus*, is one of the instances where *contractus jure civili infirmatur*", said the judge in charge in a case of 1682. But a marked unwillingness to allow a concluded contract to be set aside asserted itself in this field, too. *Defectus particularis* only led to an adjustment of the contract. The Justinian rules as to the buyer's duty to examine the goods and

to notify the seller of his complaint were followed, and so were the Justinian time limits for bringing an action in respect of defects.

The protection of a party in case of the other's insolvency created problems that could be solved with the guidance of the Roman law. Delivery was the decisive factor in this connection, and reference was made to Mevius in support of the view adopted as current law.

Among the seller's obligations was also his liability for title, the implied warranty against eviction. A duty of this nature was already recognized by the medieval Codes and is to be found in the Land Law Title of each Code as regards realty, and in the Sales Title in respect of personal property. These rules were reminiscent of those of the Justinian legislation. It was rather on the basis of the latter, however, that the extended liability for eviction was built up in the Swedish law of the 17th century. "Responsibility for eviction is *de natura contractus emptionis venditionis*", it was successfully claimed by a party in the Svea Hovrätt in 1682. But an exception was made in cases where the purchaser was deprived of the property on the strength of principles referable to public law: "*Factum principis habetur pro casu fortuitu.*" This exception, however, had one important limitation: it did not apply where the purchaser was ousted by the Crown in the course of the Reduction referred to above. Then the purchaser could demand compensation from the seller. (But the seller could not, in his turn, sue the Crown that had once given him the property by way of grant—for then the Reduction would have been futile.)

The field of operation of the implied warranty of title illustrates how the divisions of the law of obligations embodied in the Roman law were adopted in Sweden. The warranty was implied in contracts of sale, pledging, etc., but not in the case of a gift, "*transactio*" (compromise of a dispute) or "*cessio juris*" (assignment of a right or claim, e.g. a right of inheritance). Consistently with the principle of freedom of contracting, it was considered possible to exclude the warranty by agreement. But such exception clauses were to be interpreted strictly.

There is a marked difference between the Justinian law and other systems with regard to the right of the true owner to recover property from another person in possession. The main principle of the *Corpus Juris* may be rendered as *omnia mea vindico*, cf. D. 50.17.54. This severe principle was, however, modified by the

rules of acquisitive prescription (three years for movables) and the fact that a bona fide possessor was to a certain extent free from liability for damage to the property vindicated.

In Swedish law the right of recovery was limited, apart from rules of prescription, by the principle of *Hand wahre Hand*: if the true owner had voluntarily relinquished possession (e.g. through a loan), then a bona fide recipient of the property could require the true owner to proceed against the first transferee (i.e. the borrower, in the example given). Thus, provided the owner had not lost possession by theft or robbery, he must first sue the immediate transferee, the man "in whom he had placed his confidence"; and the holder who took in good faith was immune from action. However, influence from the *Corpus Juris* in the direction of an increased right of recovery asserted itself in the course of the 16th and 17th centuries, and is also apparent in the decisions of the Svea Hovrätt. "Wrongfully gotten is equal to ungotten" was the vernacular phrase for it. As far as stolen property was concerned, the right to recover it even from a bona fide possessor had always been accepted, but now the conception of theft (= *furtum*) was widened so as to include a wide range of unlawful transactions. But in due course the right of recovery was again narrowed down, first by an increased use of the principle of *Hand wahre Hand*, and later by the 1734 legislation.

A loan of money at this time began to be called *mutuum*, and a loan of chattels *commodatum*. The Swedish law of the Middle Ages had hardly any rules on pecuniary loans; with regard to interest, the courts early took into account the prohibitions of canon law in this respect—but means of evasion were devised. Loans of chattels were treated in the old Codes, where a few provisions of the Sales Titles paid attention to the subject. This difference in treatment made it all the easier for the Swedish judges to accept the Roman-law distinction between *mutuum* and *commodatum*. These conceptions are encountered both in the works of scholars—like Johannes Loccenius and Claes Rålamb—and in the minutes of the Svea Hovrätt.

The old hostility towards the charging of interest was reflected in the early decisions of the Svea Hovrätt. In several cases in the middle of the 17th century the Court, on grounds of equity, refused to order interest to be paid, relying on the old adage that "Usury comes last in priority". Generally, however, interest had to be paid. This was done on grounds suggested by the Justinian

law: there should either be an express contractual undertaking, or else some specific legal provision. The chief instance of the latter in Roman law was that, so far as *bonae fidei* contracts were concerned, interest could be awarded for delay, *mora*, see D. 22.1.32.2. In the main the Court followed these lines, and it was said on one occasion: "*De jure civili usurae* [will be awarded] *non modo ex stipulato sed ex mora debentis*." In the case of a money loan, adherence to the rules of the *Corpus Juris* resulted in no interest being awarded where none had been stipulated: no obligation to pay interest was implied by law, and even in the case of *mora* interest must be refused since *mutuum* was a contract *stricti juris* and not *bonae fidei*. Attempts were made by parties, however, to justify interest in these cases, too: it would, they said, amount to compensation for the advantage of having had the use of the money. The old terms *lucrum cessans* and *damnum emergens* were brought out in this connection. Among legal writers Claes Rålamb and David Nehrman-Ehrenstråle expressed similar opinions.

As regards the date from which interest should be calculated, the *Corpus Juris* was followed in an important group of cases: *tempus motae litis* was accepted, on the strength, *inter alia*, of D. 22.1.34 and 35. But in one respect the Court declined to follow the *Corpus Juris*. Where goods had been sold on credit, interest was not, in spite of D. 19.1.13.20, ordered from the date of delivery. The reason given was that merchants used anyway to recoup themselves by charging increased prices if credit was given.

After a period of liberty as regards the rate of interest—apart from the courts' inherent power to modify exorbitant rates on grounds of equity—it was considered necessary to introduce maximum rates by legislation. This was done by the Royal Proclamation of November 14, 1666, concerning interest. The maxima were 6 and 8 per cent and in fact corresponded with rates laid down by the Justinian legislation.

The charging of compound interest was at first permitted by the courts in accordance with the principle of freedom of contracting—and this was also the attitude of legal scholars. Later, however, note was taken of the prohibition of compound interest which could be found in many systems of law, including the *Corpus Juris*. And it was especially in the latter that guidance was sought when, in 1677, there was a departure from the previous practice: "*Usurae usurarum nullo jure permittentur*." This

form of interest was regarded as conflicting with “*aequitas naturalis* and *humanitas*” (1681). An important exception was, however, soon recognized—after a forensic discussion based on arguments derived from Justinian’s legislation. If interest due but unpaid was added to the principal each year (instead of forming a separate capital) the procedure was considered unassailable. This was a victory of latter-day customs of foreign countries over the principles of Roman law.

Justinian law was resorted to for rules on *pactum antichreseos*, i.e. an agreement that the fruits of the pledged property were to be kept as remuneration for a loan in lieu of interest. Yet another Justinian principle in the field of interest law not only was received but also played an important political role in connection with the Reduction in the reign of Charles XI. This was the principle of *alterum tantum*—that the total interest yielded by a loan might not exceed the amount of the principal. The rule is encountered in D. 12.6.26.1 and other passages. By way of the provinces east of the Baltic this rule found its way into the case law of the Svea Hovrätt in the middle of the 17th century, and it was often applied.<sup>2</sup> It was only towards the end of the century that sceptical voices were heard: the principle, it was said, put a premium on evasion. The rule can still be found in court records of the early 18th century, but afterwards appears to have fallen into disuse.

It has often been said that a reception of the Justinian law of hypothecs offered few advantages. The Germanic rules were considered superior. The formalities for constituting a pledge and the requirements as to particularization of the subject matter of the hypothec were the chief differences. As far as the Swedish legal development is concerned, the influence of the *Corpus Juris* meant in the first place that the requirements of form in the medieval law were disregarded. Differences of opinion as to the validity of these formalities continued in the Svea Hovrätt for a long time, but in the latter part of the 17th century the view

<sup>2</sup> In the course of the Reduction the Crown made use of the principle of *alterum tantum* in the following way. Some of the Crown property formerly conveyed to subjects had been granted by way of mortgage as security for loans to the Crown. The grantee generally was to keep the yield of the property as remuneration for the loan (antichresis). It was now maintained by the Crown that, in so far as the aggregate yield through the years exceeded the amount of the loan, it must be regarded as a repayment, in whole or in part, of the loan. On this reasoning, the loan had often been repaid, the property was in fact redeemed and so could be claimed back by the Crown.

prevailed that a pledge might be constituted privately, without the need for previous valuation before a court of law as the old Codes prescribed. Some other rules concerning pledges were also borrowed from Justinian law, such as, e.g., the pledgee's duty of care. This was in accordance with the *onus vigilandi* which was such an important element in Roman law. A notable feature in connection with this development is the adoption by the law of Sweden of a number of tacit hypothecs. Many claims were given special protection under the pretence that they were coupled with a hypothec. Examples are the ward's claim for compensation where the guardian had embezzled the ward's property, the Crown's claim as against a tax collector, the landlord's claim for rent, and the claim of a shipowner against a shipper for freight. It was also considered that a *tacita hypotheca* arose in favour of a person who had procured a judgment or a permit to issue execution against his debtor. In time these rules were replaced by others giving the creditor a right of priority in the debtor's property.

Another loan from Justinian law was the general hypothec, two instances of which have already been given (the tacit hypothecs of the Crown and of the ward were general in nature). For a time such hypothecs were even entitled to priority over special hypothecs. Later, however, special hypothecs were required to be registered and were given priority over the general ones, which—in this form—disappeared. The distinction between the hypothecation of real and of personal property, which was first made in the course of the 17th century, also had a background in Justinian law. A system of registration was created for the hypothecs of realty. From the general tenet that the vigilant should be given precedence, there were devolved rules giving priority to the creditor who took the trouble to register his mortgage in the local lawcourt. The system of rules was worked out in detail on the basis of the Justinian principle *prior tempore, potior jure* (C. 8.17(18).3(4)). Public registration was in keeping with the respect which acts of publicity were beginning to command at this time. It was now the general view that publicity would be in the interests of the credit market. The arguments for the opposite solution—e.g. consideration for the wishes of borrowers to keep their financial position secret—were not found strong enough. A factor which evidently contributed to the development was the need for certainty, a need that became very apparent in the course of the Reduction. A means of proving the actual time of hypoth-

ecation was absolutely necessary, and public registration fulfilled this requirement.

If the reception of the Justinian law of hypothecs involved a replacement of the old indigenous rules, the adoption of Roman rules on suretyship, on the other hand, amounted rather to a closing of gaps in the Swedish legal system. The provisions of the medieval law mainly concerned bail in court proceedings. Under the influence of the growing authority of the *Corpus Juris* the Svea Hovrätt, in the middle of the 17th century, accepted the principle that a creditor must in the first place demand payment of the principal debtor before he could proceed against a surety (*beneficium excussionis seu ordinis*). This rule was first advocated in the Svea Hovrätt in 1645 and was then accepted, but had previously been recommended by as many as three writers (Johan Skytte, quoting Gail, the famous Roman-law scholar; Benedictus Crusius, himself a judge of the Svea Hovrätt; and Johannes Loccenius). The rule was to some extent counterbalanced by the principle that the creditor could make an immediate claim against the surety where the debtor's insolvency was obvious. The institution of the strict guarantee, where the surety can always be approached in the first instance, was soon also received into Swedish law, but it only arose where the surety by express agreement renounced his *beneficium excussionis*. His right to forgo this *beneficium* was denied by certain Continental writers but was supported by Mevius and some Swedish theorists (Crusius, Loccenius). It was accepted in a court decision as early as 1651.

The *beneficium divisionis*, i.e. the principle that, where there were several sureties, one of them could require the creditor to divide his claim *pro rata* between the (solvent) sureties (several liability), was also borrowed from Justinian law; previously joint liability had, as a rule, been the basis of Swedish court decisions. The Justinian rule secured a footing in scholarly works (Loccenius and Mikael Wexionius, later ennobled as Gyldenstolpe). The courts at first considered that this *beneficium* required an express agreement, but soon the *beneficium* was accepted as the main rule and a special agreement was necessary in order to establish joint liability. Certain arrangements (*beneficium cedendarum actionum*) to enable the surety to claim indemnity from the principal debtor or contribution from co-sureties were also of Justinian origin. The absence of formal requirements for the

creation of suretyship corresponded with the strong general tendency to enforce contracts without paying regard to formalities.

Just as the rules on money loans were suggested by the Justinian *mutuum*, so, too, *commodatum* was used as a model for the loan of personal chattels. Such loans were, in principle, gratuitous, and the borrower was only liable for *culpa*—his liability was not strict as it was in old Swedish law. The Roman rules concerning *depositum* were also to influence the indigenous law as to deposits. In Justinian law *depositum*, like *commodatum*, was gratuitous, but expenses could be claimed from the depositor, and this principle was accepted by the Svea Hovrätt and also in theoretical works. Eventually the rule was taken over from Romano-German law that remuneration could be charged for a deposit. *Depositum* should be for the benefit of the depositor and not for the *depositarius*—that was the main principle in Justinian law, and this was relied on in a case in the Svea Hovrätt in 1675. There was, however, one institution known to Justinian law, according to which the *depositarius* was entitled to use the subject matter of the deposit and had to return an equal quantity of the same kind. This was the *depositum irregulare*, the chief instance being the “deposit” of money with a banker, and was in actual fact a kind of loan. It is referred to in the minutes of the Svea Hovrätt and was accepted as a basis of reasoning in at least one of the 17th-century decisions of the Court.

The law of hire and house-letting received scanty attention in the medieval codifications (chiefly in Chapter 14 of the Building and Settlement Title of the General Urban Code). Justinian law, on the other hand, was amply furnished with rules in this field, the law of *locatio-conductio*, and important features thereof were received into the Swedish legal system in the course of the 17th century. The position was similar with regard to the law of leasehold land. The relationship between landlord and tenant was now subjected to general rules, taken from Roman law, as to liability for negligence. One result was a modification of the strict liability the old law imposed on a tenant in the event of the premises being damaged by fire. Other rules taken over from Justinian law concerned the termination of the tenancy and implied renewal of the contract where the tenant, with the landlord's consent, remained in possession after the expiration of the term (*relocatio tacita*). The rule was received that “sale breaks hire”, a principle

which, however, had already been quite generally accepted in Europe and had even obtained a certain foothold in Sweden. Nevertheless, in the remarkable case of *Lovisin v. Wilkens* opinions still differed on this point. Lovisin, the purchaser of a house, successfully quoted, *inter alia*, D. 19.2.33, while the other party to the action stressed without avail the sanctity of the tenancy agreement which he had concluded with the vendor of the house. Actuated by the sanctity of contracts principle, the courts did, however, later accept the rule that the parties to a tenancy agreement had power, by introducing a clause to that effect, to make the tenancy stable in spite of any future sale of the premises.

In view of the vigorous expansion of the Swedish economy in the course of the 17th century the need was felt for a more detailed and complete law of associations than that known to the medieval codifications. The rules of this character were mainly to be found in one short chapter of the Land Law Title of the General Rural Code. It gave very little guidance, though it did impose formalities. The *societas* of the *Corpus Juris* was in reality a contract aiming at mere cooperation. This association was not a juristic person and the liability of a partner was unlimited. A partner had not, in principle, authority to bind the other partners. When a partner died the association came to an end.

After Justinian the law of associations developed into a more serviceable instrument in commercial life. This development was mainly due to an increased freedom of contracting in this field. The tendency was towards an acceptance of rules based on the principles, first, that a partner had implied authority to bind his co-partners and, secondly, that a partnership was a separate corporate entity.

The development of the Swedish law in this field was long dependent on the rules of Justinian law, a fact which, to some extent, retarded the adoption of more advanced norms. As regards the creation of a partnership it was considered that the rules of the old Swedish law had fallen "*in desuetudinem*", and so a partnership agreement could be made informally. The partners were free in the choice of the objects of the association. There was no joint liability in the absence of an express agreement to that effect. In the latter part of the 17th century the Justinian rule was received that the partners could select a "*praepositus institor*" with authority to make contracts on behalf of all the partners. Another loan from Justinian law was the rule that the

death of a partner dissolved the partnership. Towards the end of the century, however, attempts were made to evade this principle, mainly with the aid of a more or less fictitious agreement between the partners. The prohibition in the *Corpus Juris* of a *societas leonina*—an agreement that one partner should share only in losses—was regarded as applicable in Sweden, too. On the theoretical level, difficulties were encountered in formulating the legal distinction between the commercial concept of partnership and the partnership of husband and wife; the difference was found to lie in the fact that it was less easy to contract out of the latter association.

At an early stage of the existence of the Svea Hovrätt the judges found that the indigenous law had no workable rules on bankruptcy. They had to turn for guidance to the *Corpus Juris* and to the legal writing based thereon. As regards the right to make *cessio bonorum*, Continental writers were followed only where there were mitigating circumstances. Prodigals and slothful debtors were sent to prison, “the debtors’ tower”, primarily on the pattern of Saxon law. According to the opinion that finally prevailed in the courts, bankruptcy did not lead to the discharge of the bankrupt from future liability. This solution was in accordance with Justinian law,<sup>3</sup> and was supported by some judicial decisions and writings in Continental Europe, but at the same time the opposite view could also be backed up with foreign authorities. In the end a compromise was reached, whereby reference was made to the principle of freedom of contracting: if a composition with the creditors could be made, then the debtor was discharged for the future. Safeguards for the debtor’s minimum of subsistence could be based on the Roman rule of *ne egeat*.<sup>4</sup> Procedural rules, the public summons calling on unknown creditors to come forward with their claims, etc., were framed in close adherence to Romano-German law. The rule that a majority of creditors, by acceding to an arrangement, might bind the minority could be supported by reference to certain principles of Justinian law. The law as to fraudulent preferences and avoidance of recent transactions with the bankrupt, the administration in bankruptcy of insolvent estates (after the submission of an inventory) and the legal position of the wife of the bankrupt—all these matters were regulated through the reception of Roman rules.

<sup>3</sup> I. 4.6.40; D. 42.3.4 pr., 6, 7.

<sup>4</sup> D. 50.17.173 pr.

The development of an order of priority between different types of claims was closely associated with the growth of a law of bankruptcy. While the old Swedish law, which was still quoted in the middle of the 17th century, prescribed a proportionate distribution, the creditors ranking *pari passu*, Justinian law and the Romano-German law based thereon abounded with heads of preferred claims; their priority was generally put down to their nature of *tacitae hypothecae*. To a large extent these rubrics were incorporated in Swedish law, in the form of a system modelled on the orders of priority of the Saxon and the Lübeck systems of law.

The first thing shown by the documentary material from the Svea Hovrätt which has been made use of in this article is the fact that the Swedish judges adopted the terminology of Roman law and employed its system. The judges of the Svea Hovrätt, from an early date in its existence, frequently clothed their utterances in Latin. Thus, terms associated with possession were taken from Roman law, such as, e.g., *traditio brevi manu* and *traditio longa manu*. A contract was called *pactum* or *conventio*, a compromise *transactio*, the assignment of a claim *cessio juris*, payment was referred to as *solutio*, set-off as *compensatio*, and a duty was *obligatio*. Ownership became *dominium plenum*, delay *mora*, a heritable tenancy of land *emphyteusis*, the cognates' right of pre-emption *jus retractus*, and a vendor's liability for title was treated under the heading of *evictio*. Many more examples have already been given. As regards systematics, the division, suggested by Roman law, of contracts into *pacta nuda* and *pacta vestita* is worth noting.

However important, generally speaking, a Roman-law phraseology of the kind indicated above may have been, it does not follow that any extensive reception of Roman rules took place. It was quite possible for many rules of the old Swedish law to be fitted into a Roman conceptual system without necessarily undergoing for that reason any substantive changes. Not infrequently the same result was, in fact, reached as would follow from the old law, but with the use of Roman terms, conceptions and lines of thought: a Roman garb merely served to conceal indigenous Swedish rules. A typical example of this was the habit of quoting the Digest as a ground for declaring a transaction void on account of fraud or duress.

A closer scrutiny of the material will, however, reveal a more

profound influence than that indicated by the mould of Roman law. The latter was not always quoted as a mere guide of general import. Its rules often provoked substantive changes in the law of Sweden. It should first of all be emphasized that important principles concerning the sources of law were borrowed from the *Corpus Juris*. Although these principles were not always in harmony with one another, they were, on the other hand, capable of growth in different directions. Support for the development of custom and precedents as sources of law was thus found in authoritative passages in the *Corpus Juris*. The idea of a *jus gentium* was another feature of the theory of sources of law in the Justinian codification. This was received; and the general opinion was that the Swedish legal system, like that of any other civilized country, ought to follow the "Law of All Nations", the *jus gentium*, as described in the Institutes. And this in turn greatly facilitated the further reception of Roman, including Romano-German, law. It was only towards the end of the 17th century, in step with the extension of the absolute monarchy, that an increased respect for statutes and indigenous law grew up, a fact which gradually diminished the prospects of a continued large-scale reception of Continental law.

A fact of great importance was the acceptance of certain general principles of law, normally taken from the seventeenth Title of the fiftieth Book of the Digest. Many of these survived in Sweden, even when it was no longer expedient to quote the *Corpus Juris Civilis* directly, in the form of "Judges' Rules", i.e. certain general rules of long standing for the guidance of the judges in the performance of their office, and traditionally forming part of Swedish law. The tenet "No one can give another a better title than he has himself" (cf. D. 50.17.54 and 120) may be mentioned as an example. But the 17th century also saw the adoption of a long series of somewhat more specific rules. Thus the judges relied on the Roman prohibition of unjust enrichment, the Roman rule of liability for negligence (*culpa*), and Roman principles stressing *bona fides*, *aequitas* and *vigilantia*. Other Roman principles were quoted to justify the sanctity of contracts and the freedom of contracting.

It was no doubt important, too, that rules of interpretation—both of statutes and of contracts—were taken over from Justinian law and the Continental law based thereon. Thus the distinction made by the judges between contracts *stricti juris* and contracts *bonae fidei* (the latter admitted of a greater freedom of

interpretation) originated in the classical Roman law. The same is true of the distinction between *jus publicum* and *jus privatum*—the two were differently construed. A few rules of interpretation of a more specialized import were also taken from the *Corpus Juris* (e.g. D. 50.17.172 as to ambiguous contracts of sale), while others were gathered from the writings of scholars who were building their systems on Roman foundations, and in particular the works of Hugo Grotius.

The main result, however, of an investigation of decided cases is that a far-reaching reception of specific rules and institutes of Roman private law took place in Sweden in the 17th century. To demonstrate this has been the purpose of the survey above. As far as the *Corpus Juris* itself is concerned, its influence on Swedish law has not been uniform. This is due in the first place to the fact that the Justinian codification is no unitary legal system, but a collection of quotations from legal writings and statutory texts of many centuries. Even if they have been tampered with to some extent with a view to achieving increased uniformity and usefulness, essential inconsistencies nevertheless remain between different rules of the *Corpus Juris*. It is possible, for instance, to quote the codification in support of a strong principality but also in favour of constitutionality; similarly, reference may be made to rules of the *Corpus Juris* in order to justify informality but also to urge requirements of form and especially the giving of particular weight to acts of publicity. The primacy of usage may be based on the Digest, but so also may that of statutory law. It would be easy to multiply these examples.

On top of this comes the fact that in every reception of Justinian rules the latter have been transformed in different respects so as to fit in with the law of the receiving country or in order to achieve certain ends of legal policy. Often the solution was found in giving a general principle an application it had never had in the Roman empire or its successors. Thus the basic views on contract law and on the sanctity of contracts underwent changes—the system of types of contract lost in importance and *consensus*, the meeting of minds, became the decisive factor.

A further development of rules taken from the *Corpus Juris* has often taken place in Swedish case law, as in that of other countries. Fresh circumstances have required more diversified or even altered norms. The warranty of title was, for instance, to some extent given a new meaning and it became possible to exclude it by agreement. The rules concerning interest were

modified and compound interest was eventually permitted to a certain degree. The principle of *alterum tantum*, which was observed for a long period, has disappeared from Swedish law, like the practice of giving relief on the ground of *laesio enormis*. The law of mortgages underwent a notable development, partly on account of the Reduction; compulsory registration prevailed in the end. In the codification of 1734 a clear and important departure was made in one noteworthy particular from the dominating opinion inspired by Roman law, namely with regard to requirements of form, particularly in connection with the sale of land, mortgaging, partnership agreements and deposit. These rules were not, however, wholly uninfluenced by views previously expressed by judges and scholars. An increased regard for the evidential and other advantages of formalities had decisive effect.

The extensive dependence on the *Corpus Juris* is associated with the fact that for a long period it was regarded as a legitimate source of law, at any rate of a supplementary character. As I have already stressed, this view gained support from the theory of sources of the *Corpus Juris* itself. It was permissible to apply Roman law wherever Swedish law had no conflicting rule—and this was very often the case. In 1650 Queen Christina stated in the Council of the Realm that it was lawful, in the absence of an indigenous rule, to “look to the *jus romanum*”.<sup>5</sup> A few years later the President of the Svea Hovrätt, Baron Johan Gyllenstierna, who was also a Councillor of the Realm, expressed the same opinion in a criminal case—where, incidentally, the accused was a former favourite of Queen Christina, Anton von Steinberg. As late as 1670 a well-known lawyer said in a landlord-and-tenant case in which he was a party that Roman law was in force in Sweden in so far as it was equitable and not in conflict with our own laws.

In actual fact, if not formally, Roman law has, however, often done duty as the law in force, in the process overruling indigenous provisions. Swedish law was simply said to correspond with Roman law, even though this was not true. In order to attain what was often regarded as the ultimate end—the adaptation of our law to a general European system built on Roman foundations—fiction was employed. Thus Gustaf Rosenhane endeavoured to show that Roman and Swedish law coincided with regard to

<sup>5</sup> SRP (Minutes of the Council of the Swedish Realm) 14, p. 190. Cf. Jägerskiöld, “The Origins of International Law”, *Legal Essays, a Tribute to Frede Castberg*, Oslo 1963, pp. 241 ff.

the validity of wagers. Another judge, as we have seen, made the Justinian rules on *error calculi* agree with Swedish law. The Roman grounds for revocation of gifts were said to be indigenous Swedish law. It was also claimed that the *beneficium excussionis* and the *beneficium divisionis* were part of Swedish law. The rule that "sale breaks hire" was said to be in harmony with Swedish tradition, as were also the Roman rules on the liability of partners.

It is natural, against this background, that the judges should be found simply applying Roman rules, with the result that it is now impossible in any particular case to explain the application by reference to the need for a rule (a reception of necessity), the respect for Roman law (an authoritative reception) or considerations of legal policy. All these motives had their influence on the development. It is occasionally possible to discern the reasons behind a particular instance of reception, but in most cases the application of a Roman rule must simply be acknowledged. This is so, for example, with regard to several grounds of invalidity in the law of contracts, like the *laesio enormis*, *error*, and drunkenness. The same is true of the rules concerning the place of delivery, *novatio*, set-off (*compensatio*), and revocation of gifts, the prerequisites of a valid sale, the legal effects of *depositum* and the rules as to implied renewal of tenancies (*tacita relocatio*).

One fact is evident, however: the development of the law, including the reception, was often due to the influence of works of legal scholars. It was not only the authority of the Justinian codification, but also scientific expositions of Roman law and scholarly analyses of legal problems, that affected the courts. The truth was that judges of the Svea Hovrätt quite often cited Swedish and foreign scholars in support of their arguments. Some examples have been given above, and a few more will now be given.<sup>6</sup>

The judges sometimes referred to scholarly opinion in general, using such phrases as "*schola philosophorum*", "*juris consulti uno ore*", "the unanimous opinion of the doctors" or what "the *juris-consulti* sustain". Of the indigenous authorities J. Loccenius was not infrequently quoted, e.g. concerning gifts, deposits, partner-

<sup>6</sup> The litigating parties themselves, on the contrary, quoted scholarly authorities on rather few occasions. This applies to Sweden proper, where it was due to an express statutory prohibition. Parties in lawsuits in the provinces east of the Baltic, however, made copious references to such authorities, even in the courts of first instance.

ships, fraudulent preferences in connection with bankruptcy, enforcement of bills of exchange and the order of priority of claims. Claes Rålamb was relied on regarding questions of currency depreciation, partnerships and fraudulent preferences. Claudius Kloot was cited on a question of partnership. Grotius, Mevius and Pufendorf—the works of all three being counted as almost part of Swedish legal literature—were referred to on multitudinous occasions, e.g. with regard to mistake of law, suretyship, bankruptcy, priority of debts and interpretation of contracts and of statutes. The theory<sup>7</sup> that the Swedish case law of the period was not in any great degree influenced by the works of foreign scholars is hardly tenable: among Continental writers referred to in the minutes of the Svea Hovrätt are Berlichius and Brunnemannus on priority (the latter was also cited concerning suretyship), Gail and Carpzov on *laesio enormis*, Damhouders on bankruptcy, Baldus and Faber, Gail, Scaliger, Mynsinger and Everhardus on suretyship, Schneidevinus and Carpzov concerning a tenancy agreement, Menochius, Carpzov and Zoedig on partnership, and Carpzov regarding a document which had been executed in blank. As I have shown elsewhere,<sup>8</sup> the works of foreign scholars mentioned in the minutes of the Svea Hovrätt were also abundantly represented in the private libraries of several of the judges of that Court.

It is often possible to ascertain with certainty that the information on the current state of the law given by contemporary legal scholars in fact corresponded with the case law. The doubts which have so often been expressed as to the reliability in this respect of Loccenius, Rålamb and Kloot have been unjustified. Delivery, for instance, was really given the significance attributed to it by the scholars; their accounts of the law of landlord and tenant, suretyship, offers (which were considered as not binding), contracts generally, interest, partnerships, limitation, bankruptcy and agency reproduce the case law faithfully. There are also examples of academic controversies having counterparts in the discussions of the judges, e.g. as to the binding force of a promise and the legal consequences of a wager.

<sup>7</sup> See, e.g., Fehr, *Om fordringspreskription*, Uppsala 1913, pp. 30 ff.; Karlgren, "Utan det vises, att det honom till nytta använt är", *Minnesskrift ägnad 1734 års lag*, vol. 2, Stockholm 1934, pp. 636 f., note 2; Nial, "Penningskuld och penningvärde", *ibid.*, p. 704.

<sup>8</sup> Jägerskiöld, "Juristbibliotek från stormaktstiden", *Sv.J.T.* 1963, pp. 33 ff.; same author, *Utländsk juridisk litteratur i svenska juristbibliotek från tiden före år 1734*, Uppsala 1966.

It is evident that the scholarly influence, like the dependence on Roman law, was furthered by the fact that certain judges serving in the Svea Hovrätt had had an academic career. This was so already at an early stage in the Court's existence: thus a surprising number of references to the *Corpus Juris* are to be found in the speeches of one of the first of the academic judges, Benedictus Crusius. He had been promoted in 1630 to a judgeship in the Svea Hovrätt from a chair in the Faculty of Law at Uppsala—the Faculty was then a recent creation. His scholarly works show that he was well acquainted with Roman law. Corresponding observations can be made with respect to subsequent Svea Hovrätt judges with an academic past, like Ericus Olai, Erik Lovisin, Lars Wadensten, Håkan Fägerstierna and many others.<sup>9</sup>

The case law of the Svea Hovrätt in the field corresponding to the Commercial Title of the 1734 Code provides ample background material for the understanding of that Title. The information that can be gathered from these decisions, and especially from the recorded discussions at the conferences held by judges before delivering judgment, is particularly welcome since (as I have already pointed out) the Commercial Title is very scantily furnished with *travaux préparatoires*. The latter seldom disclose anything of the deliberations of the Law Reform Commission (*lagkommissionen*), which was the body responsible for the preparation of the Code. The argumentation, where there were differences of opinion, can be followed in only a few instances. We have no means of ascertaining the exchange and development of ideas within the Commission on other points.

It is clear, however, that the system of rules which was codified in the Commercial Title of the Code of 1734, to a great extent originated in the case law of the previous century and particularly of the "Caroline" epoch, i.e. the period of the three kings named Charles (1654 and onwards). It is in fact possible in a great number of instances to trace the rules of the Code back to particular lawsuits, the vast majority of which were tried in the Svea Hovrätt. This circumstance is natural in view of the standing of the Court and its close association with the Council of the Realm, i.e. the government. Indeed, the composition of the Law Reform

<sup>9</sup> Cf. Jägerskiöld, *Studier rörande receptionen av främmande rätt i Sverige under den yngre landslagens tid*, Stockholm 1963, pp. 35 ff.; the same author, "Hovrätten under den karolinska tiden och till 1734 års lag (1654–1734)", *Svea Hovrätt—Studier till 350-årsminnet*, Stockholm 1964, p. 184.

Commission reflects the importance of the Svea Hovrätt: a great number of the members of the Commission were also judges of that Court.

The deliberations of the judges of the Svea Hovrätt and the Court's decisions evidently rest on a far-reaching reception of Roman law. This is consequently also true of the provisions of the Commercial Title of the 1734 Code, as the Title is, by and large, a codification of the case law. This important connection does not, however, emerge clearly from the text of the Title. One reason is that the Title is too brief to allow *all* the multifarious case law developed in the course of the previous century to be transformed into statutory provisions. Important fields of private law, e.g. the general part of the law of contract, remained uncodified. Further, the members of the Law Reform Commission strove to clothe the text in as national a costume as possible, while the deliberations in the Svea Hovrätt, on the other hand, were conducted in the idiom of the Roman-law literature. The great dependence on the *Corpus Juris Civilis* and on the scholarly writings based thereon, a dependence apparent from the speeches of the judges and the rest of the documentary material, is rather carefully concealed in the codification. A scrutiny of the actual solutions adopted does, however, reveal the connection: the Code of 1734 must be seen against the background of the case law, and that means Roman law. The Swedish development, not unnaturally, turns out to be part of the general European evolution. Like the latter, our legal civilization is founded on the Roman heritage.

