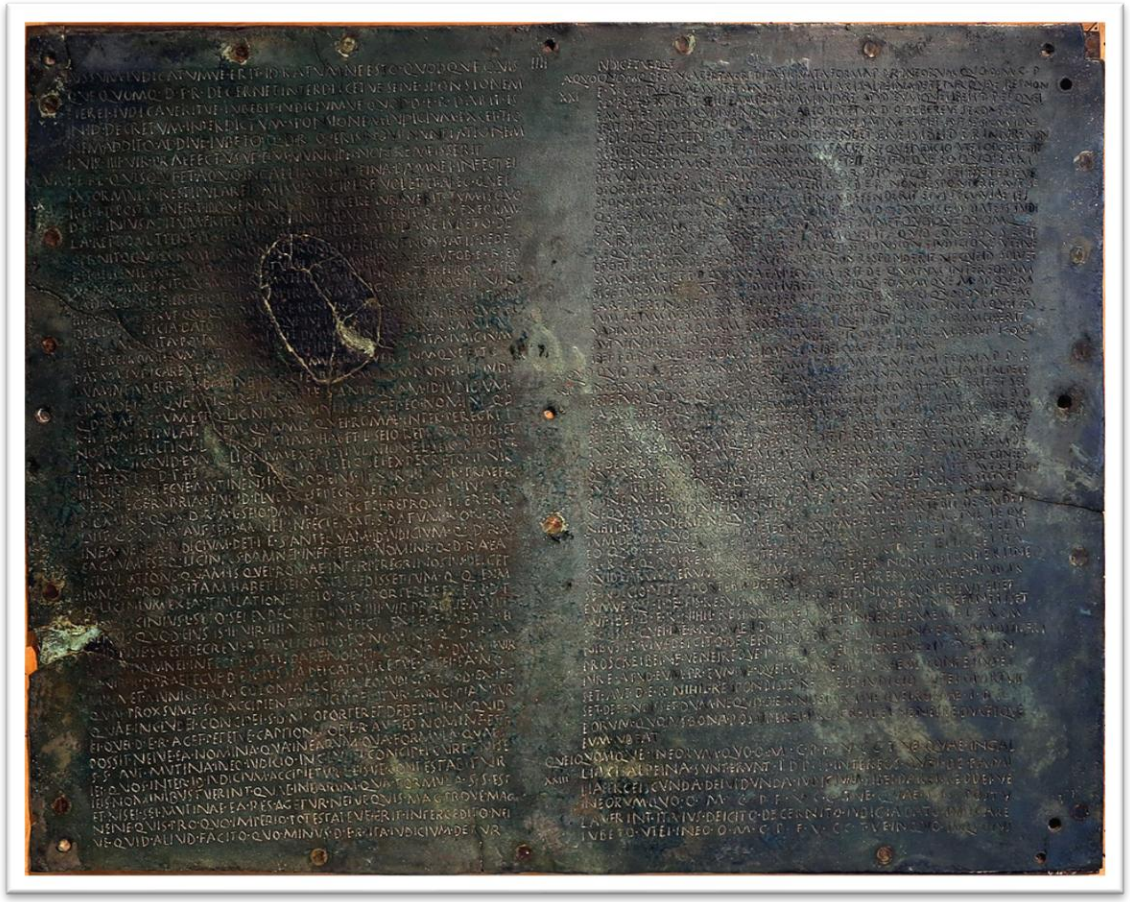
Introduction to Swiss Law

Roman Law

Dr. Adrian Häusler

5 December 2025



***Lex de Gallia cisalpina*, Veleia fragment I (ca. 42 BCE)**

Sale and Transfer of Ownership

Article 1583 Code civil

[La vente] est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, **dès qu'on est convenu de la chose et du prix**, quoique la chose n'ait pas encore été livrée ni le prix payé.

[The sale] is complete between the parties, and ownership is acquired as of right by the buyer with respect to the seller, **as soon as the thing and the price have been agreed upon**, although the thing has not yet been delivered or the price paid.

Sale and Transfer of Ownership

Article 1376 Codice civile

Nei contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata, la costituzione o il trasferimento di un diritto reale ovvero il trasferimento di un altro diritto, **la proprietà o il diritto si trasmettono e si acquistano per effetto del consenso delle parti legittimamente manifestato**.

In contracts having as object the transfer of ownership of a definite thing, the creation or transfer of a right in rem or the transfer of another right, **ownership or the right is transmitted and acquired by the consent of the parties legitimately given**.

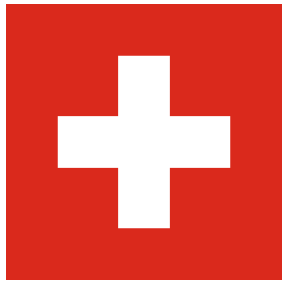
Sale and Transfer of Ownership

§ 425 ABGB

Der bloße Titel gibt noch kein Eigenthum. Das Eigenthum und alle dingliche Rechte überhaupt können, außer den in dem Gesetze bestimmten Fällen, nur **durch die rechtliche Übergabe und Übernahme erworben werden**.

The mere title does not give ownership. Except in the cases specified in the law, ownership and all rights in rem in general can only be acquired **through legal transfer and acquisition**.

Sale and Transfer of Ownership



Art. 714 ZGB

Zur Übertragung des Fahrniseigentums bedarf es **des Überganges des Besitzes** auf den Erwerber.

The transfer of movable ownership requires the **transfer of possession** to the purchaser.

+

Federal case-law: transfer of ownership requires a "**just cause**" (*iusta causa*)

Sale and Transfer of Ownership

Section 929 BGB

Zur Übertragung des Eigentums an einer beweglichen Sache ist erforderlich, **dass der Eigentümer die Sache dem Erwerber übergibt und beide darüber einig sind, dass das Eigentum übergehen soll**. Ist der Erwerber im Besitz der Sache, so genügt die Einigung über den Übergang des Eigentums.

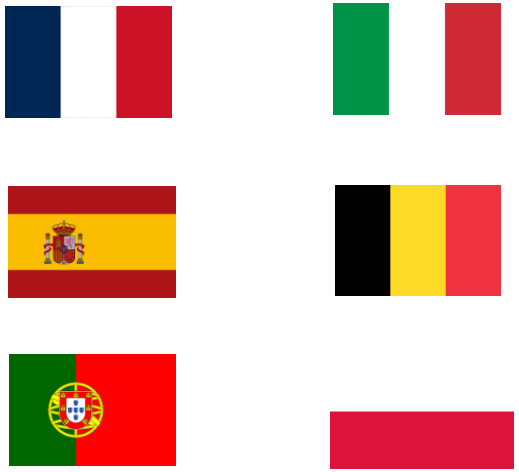
For the transfer of the ownership of a movable thing, it is necessary **that the owner delivers the thing to the acquirer and both agree that ownership is to pass**. If the acquirer is in possession of the thing, agreement on the transfer of the ownership suffices.

Sale and Transfer of Ownership

- Different solutions with common roots:

Consensual principle

Consent grants ownership



Causal principle

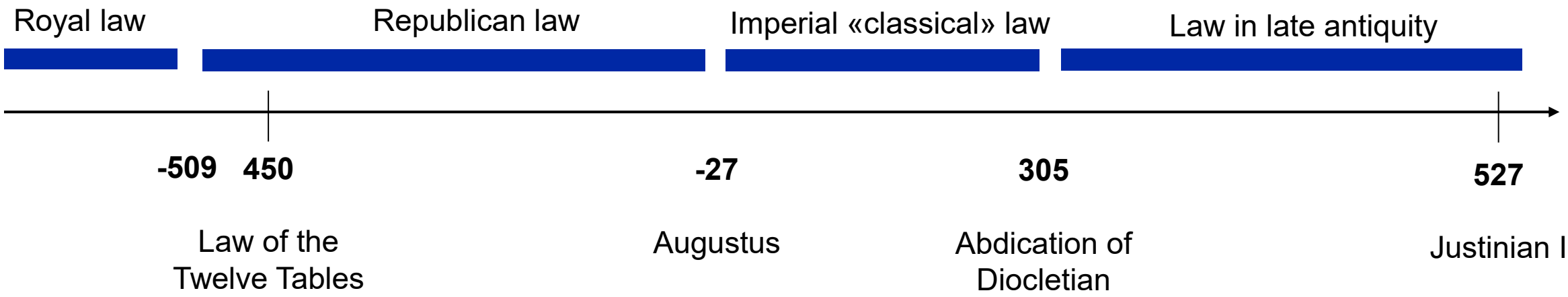
Transfer grants ownership, if just cause

Abstraction principle

Transfer grants ownership

What is Roman Law?

- Law of the «Romans»?



What is Roman Law?

- The main sources of law
  - Civil law
    - Statutes and plebiscites
    - Interpretation of the jurists
      - Legal advice, teaching, writing
    - Senatusconsults
    - Imperial constitutions
      - Edicts, decrees, rescripts, instructions
  - Honorary law
    - Edicts and decrees

Sale of bread, fresco, home of Julia Felix, Pompeii

What is Roman Law?

Gaius, 2nd book, *On common things*, D. 41.1.9.3

Property which becomes ours by **delivery** is acquired by us under the Law of Nations; for nothing is so conformable to natural equity as that the wish of an owner, who intends to transfer his property to another, should be complied with.

Paul, 31st book, *On the edict*, D. 41.1.31.pr.

The mere delivery of an article does not transfer its ownership, for this takes place only where a sale or some other **just cause** precedes delivery.

Gai. 2 rer. cott. D. 41.1.9.3

Hae quoque res, quae **traditione** nostrae fiunt, iure gentium nobis adquiruntur: nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi.

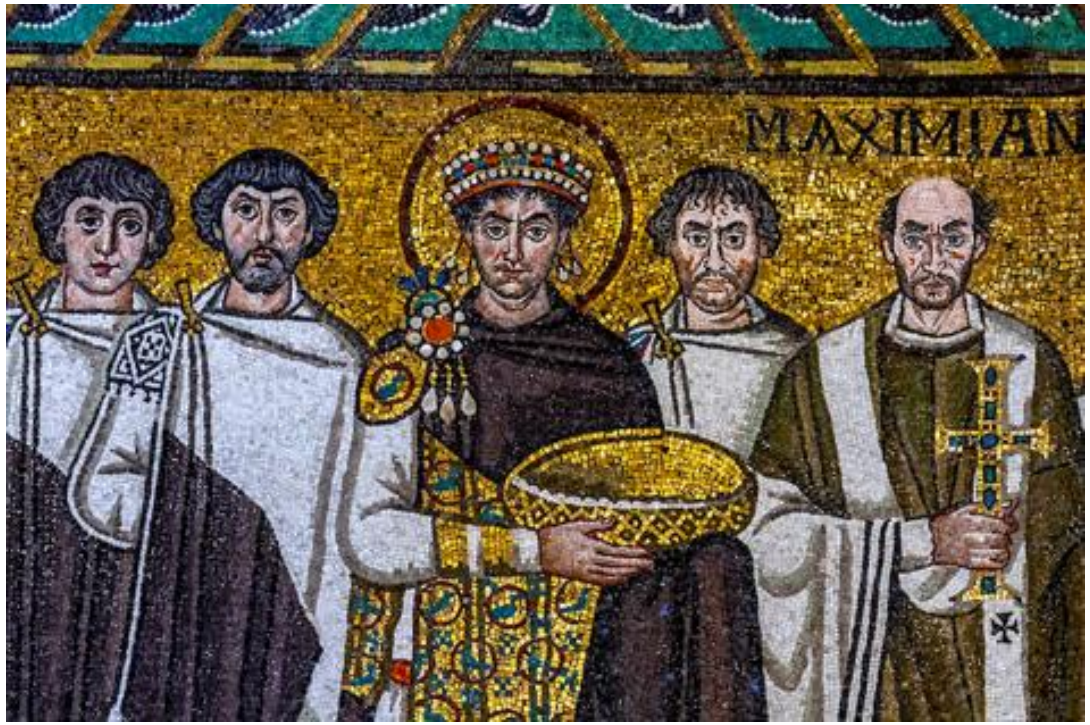
Paul. 31 ad ed. D. 41.1.31.pr.

Numquam nuda traditio transfert dominium, sed ita, si venditio aut aliqua **iusta causa** praecesserit, propter quam traditio sequeretur.

→ Direct sources of the causal principle

The Justinian “Corpus Iuris Civilis”

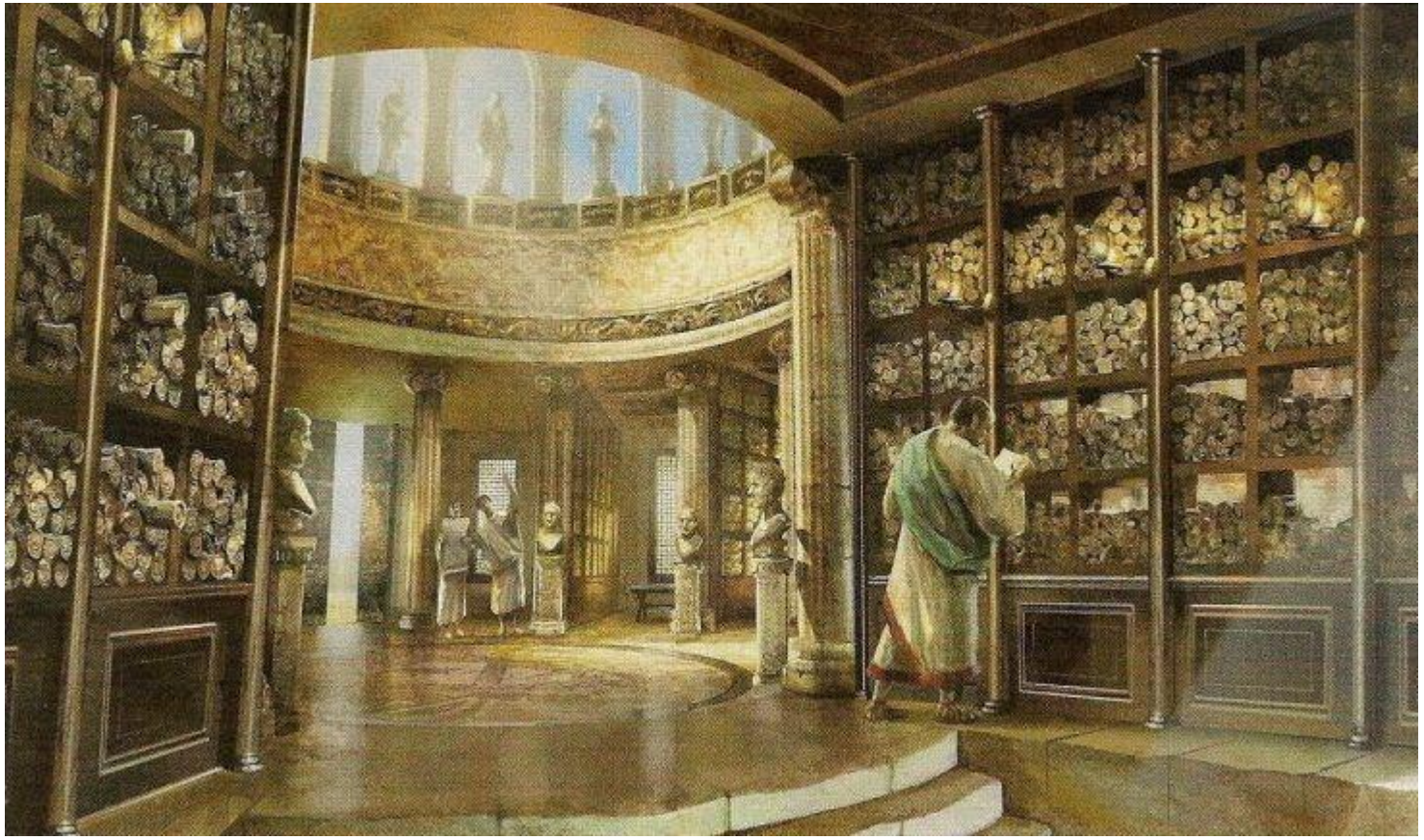
- In the 4-6th century
  - Western Empire: rise of Germanic kingdoms
  - Eastern Empire: Roman, “Byzantine” Empire
  - Justinian I (482–565)
  - Tribonian (†542)



Mosaic depicting Emperor Justinian and his dignitaries in the Basilica San Vitale of Ravenna

The Justinian “Corpus Iuris Civilis”

- The *Digest* (or *Pandects*): an extraordinary performance
  - 50 books
  - 432 titles
  - 9’000 “fragments”
- The *Institutions*
- The *Code*
- The *Novels*



Modern depiction of the Library of Alexandria

The Justinian "Corpus Iuris Civilis"

- *Institutions* of Justinian (6th century):

Justinian's *Institutions* 2.1.40
Things are likewise obtained by us by natural law through **delivery**.

Justinian's *Institutions* 2.1.41
Thus, if anything is delivered by way of gift or dowry, or **for any other cause**, it is unquestionably transferred.

Inst. Iust. 2.1.40
Per **traditionem** quoque iure naturali res nobis adquiruntur […]

Inst. Iust. 2.1.41
Sed si quidem ex causa donationis aut dotis aut **qualibet alia ex causa**, sine dubio transferuntur.

Law in Helvetian Territories until the 12th century?

- Scarce sources
- Primacy of Germanic law
- Roman law in legislation of the Germanic kingdoms
  - “Edict of Theodoric”, “Roman law of the Burgunds”, “Roman law of the Wisigoths” in the 6th century
  - “Rhetic Roman Statute“ (*lex Romana Raetica* or *Curiensis*) in Grisons in the 8th century

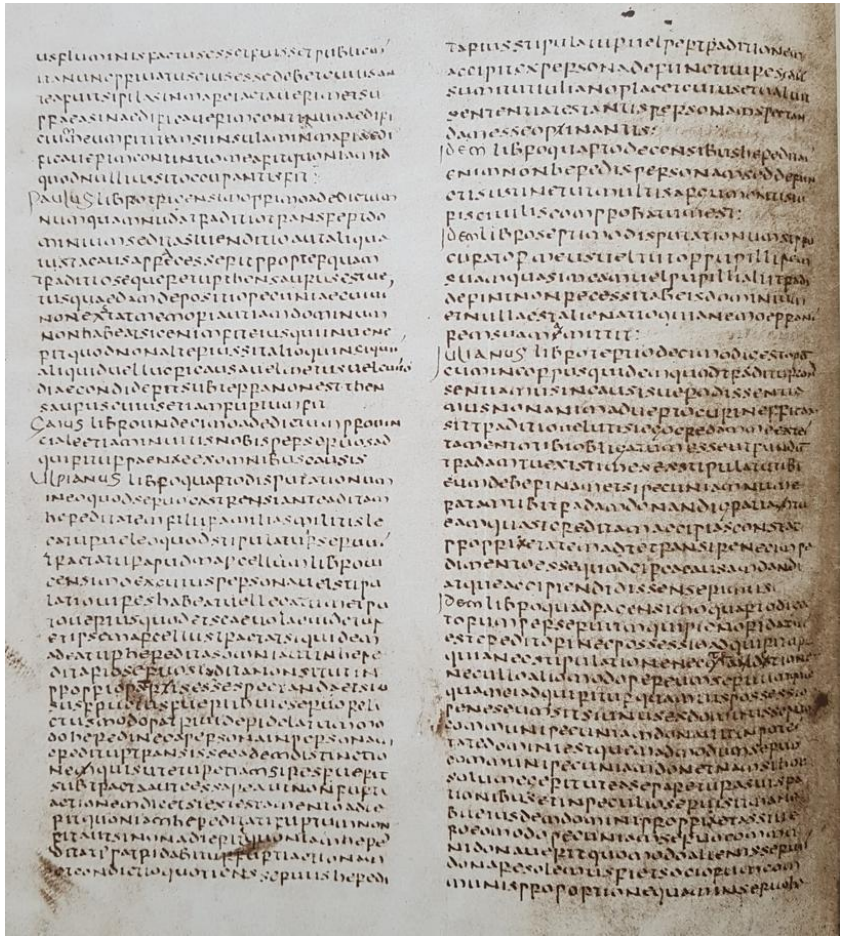
Law in Helvetian Territories until the 12th century?

The “Reception” of Roman law

- “Reception” as a continental European phenomenon between the 11th and 19th centuries
- Rediscovery, study, interpretation, application and adaptation of sources of Roman law
- And Switzerland?
  - Roman law students in Northern Italy
  - Roman law scholars in Switzerland
  - Resurgence of Roman law in the Swiss codifications of the 19th century

Swiss Students in Northern Italy

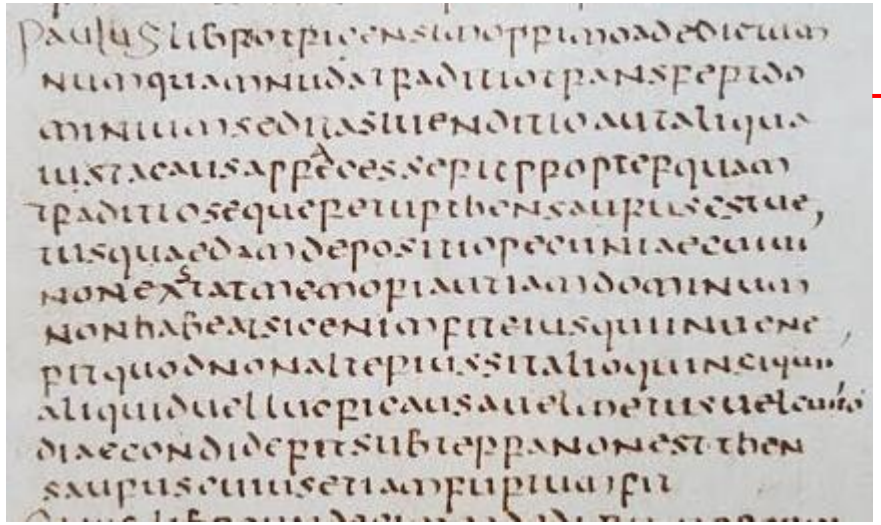
- Rediscovery of the *littera Florentina* in Amalfi in the 11th century
- First universities in Northern Italy
- First jurists in Bologna (Pepo, Irnerius or Werner, Bulgarus, Azo)
- “Glossator” school
  - *Corpus iuris civilis* commented as a “holy text”
  - Culmination with Accursius’ *Glossa ordinaria* (1250)
- “Postglossator” school
- Roman law as “common law” (*ius commune*) in continental Europe

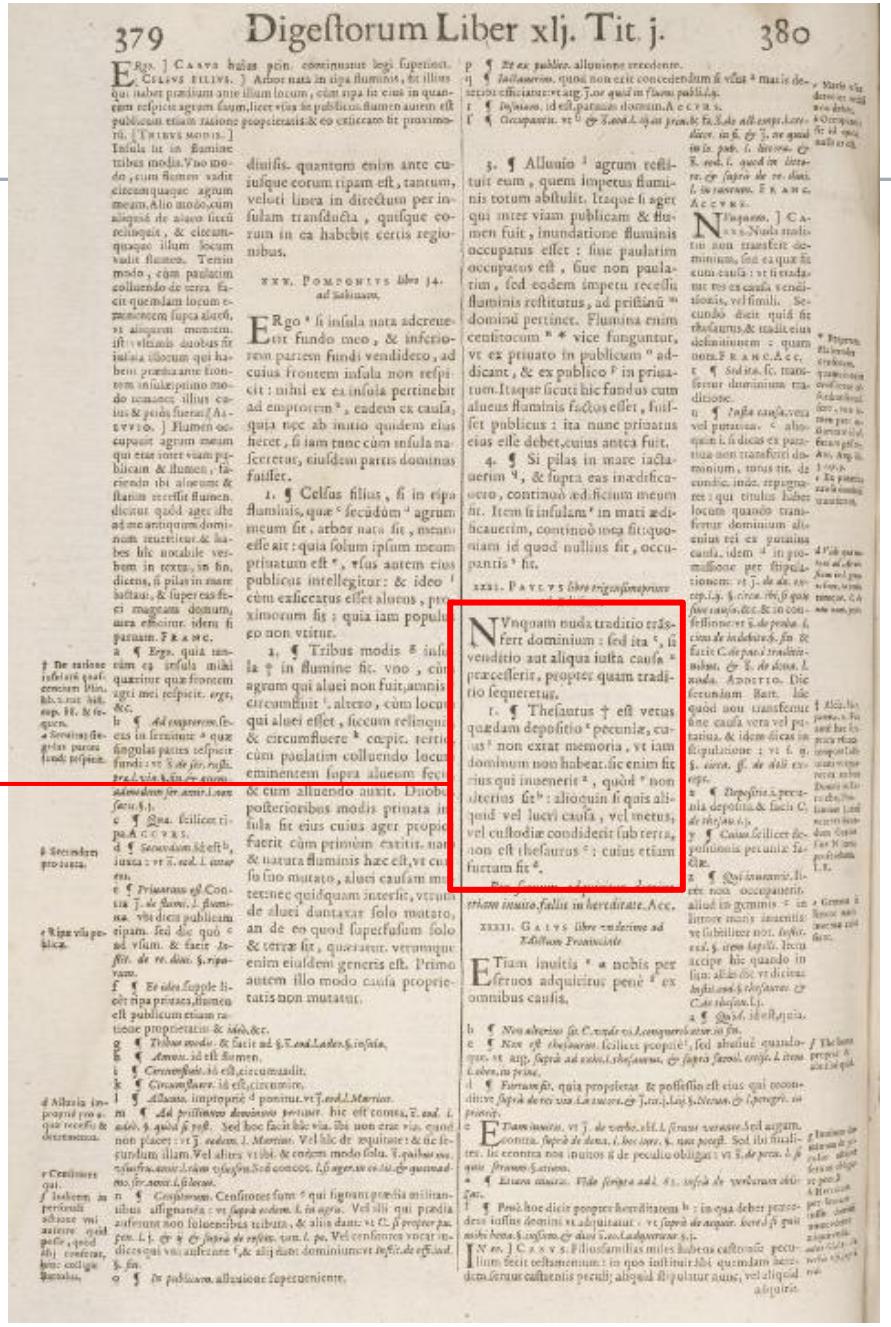


Littera florentina, folio 254v

Swiss Students in Northern Italy

- A typical example of scholastic innovation: *Glossa ordinaria* to Paul, 31st book, *On the edict,* D. 41.1.31.pr.





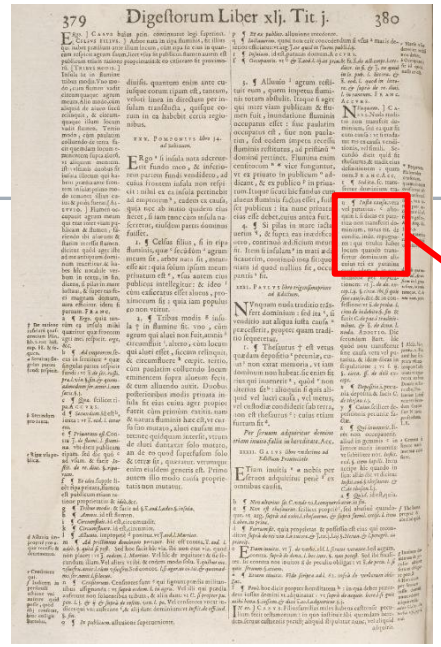
379 Digestorum Liber xlj. Tit. j. 380

Swiss Students in Northern Italy

- *Glossa ordinaria* to Paul, 31st book, *On the edict,* D. 41.1.31.pr.

  Just cause. True or putative: Otherwise, if you say that a putative cause does not pass ownership, the whole title on the unjust enrichment (*condictio indebiti*) would contradict your opinion, which title applies where the ownership of some thing is transferred **upon a putative cause**.

→ **Nucleus of the German abstraction principle**


379 Digestorum Liber xlj. Tit. j. 380

Iusta causa. Vera vel putativa: alioquin, si dicas ex putativa causa non transferri dominium, totus titulus de condictione indebiti repugnaret, qui titulus habet locum quando transfertur dominium alicuius rei **ex putativa causa**.

Swiss Students in Northern Italy

- At least 310 Swiss students between 1265 and 1330
- Divided in three linguistic "*nationes*" (associations)
- Use of Roman law in Helvetian homeland
  - Legal advice
  - Notarial activity (contractual waivers, last will)
  - Arbitration
  - Ecclesiastical courts
- Notable influence of Roman law in practice until the 15th century

Laurentius de Voltolina, 14th century

Roman Law Scholars in Switzerland

- Rise of «legal humanism» in French universities (Bourges, Orléans, Avignon, Montpellier, Paris) in the 15th century
  - Improvement of the text (philology)
  - Source in its historical context
  - Roman law still «common law»
- Religious persecutions and confessional wars
- Swiss cities as haven land for the protestant elite, especially Basel and Geneva

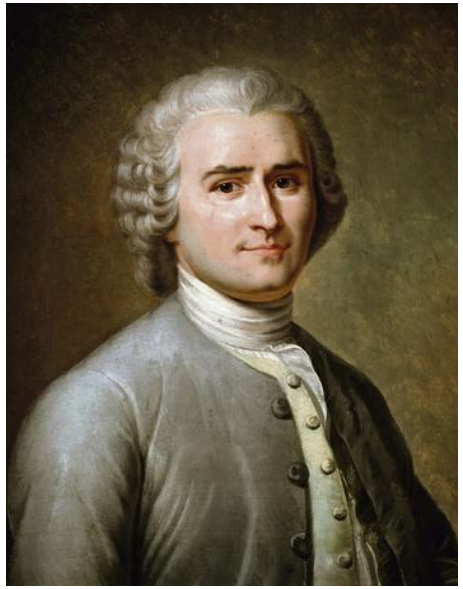
Roman Law Scholars in Switzerland

- Basel
  - University founded in 1460
  - Teaching and legal advice
  - Two important figures:
    - Claude Chansonette (1400-1549)
    - Bonifacius Amerbach (1495-1562)

Hans Holbein the Younger, Portrait of Bonifacius Amerbach, 1519

Roman Law Scholars in Switzerland

- Geneva
  - University founded in 1559
  - International recognition in legal education
- Scholars in Geneva
  - François Hotman (1524-1590)
  - Denys Godefroy (the “Elder”, 1549-1622)
  - Jacques Godefroy (1587-1652)
  - Jean Cramer (1701-1773)
  - Jean-Jacques Rousseau (1712-1778)



Roman Law Scholars in Switzerland

- Hugo Grotius (1583-1645)

The Rights of War and Peace, Book II, 8.25

The last way of acquiring a property by the law of nations is a formal delivery, but we have said above that **that a delivery is not by the law of nature required in the transfer of ownership**, what the jurisconsults admit in certain cases, as in the donation of a thing of which one retains the enjoyment […].

The Rights of War and Peace, Book II, 12.15.1

As to buying and selling, we must observe that the bargain and sale is good, **from the very moment of the contract**; and though the thing be not actually delivered, **yet the ownership may be transferred**, and this is the easiest way of dealing.

→ **Nucleus of the French consensual principle**

Michiel Jansz, Hugo De Groot, 1631

Was Roman Law Applied in Switzerland?

- A judge in Frauenfeld (Thurgau) around 1646: “We Confederates ask nothing of Bartolus and Baldus and the other doctors; we have our own customs and rights. Out, Doctor, out!”

- Charles d’Apples in 1778: “There is no private law given in Switzerland, which is common to all villages, but each village is governed by its written or unwritten laws, and the Roman and canonical law in Switzerland is not either that subsidiary authority which they enjoy in Germany, but if the written laws and morals fail, the judges judge according to what is just and good.”

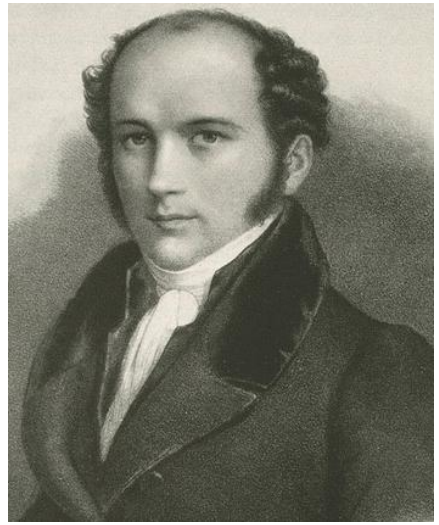
Was Roman Law Applied in Switzerland?

- Switzerland as a fragmented territory (politically, socially, lingustically, economically)
- «Infiltration» of Roman law, especially in 12th and 15th centuries
  - No subsidiary law, but rather an utilitarian tool
- Testimonies of hostility towards Roman law until the 19th century
  - "Germanic continuity" until the 19th century (deep-rooted Swiss "exceptionalism")
  - Political reasons: signal to the hegemonic Holy Roman Empire applying Roman law at the *Reichskammergericht*
  - Exceptions such as Geneva, Ticino

Cantonal and Federal Codifications

- Romanistic codifications as inspiration sources for Swiss cantonal codes
- Influence of the *French Code civil* (1804) in French-speaking cantons
  - Vaud (1817), Geneva, Fribourg, Neuchâtel, Valais, Jura
- Influence of the Austrian *Allgemeines bürgerliches Gesetzbuch* (ABGB) of 1812 on the Bernese Civil Code (1826/1831)
  - Lucerne, Solothurn, Aargau

Cantonal and Federal Codifications



- Zurich
  - Friedrich Ludwig Keller (1799-1860)
    - Yearned for an objective legal science
    - Romanistic approach
  - Johann Caspar Bluntschli (1808-1881)
    - *Privatgesetzbuch für den Kanton Zürich* (1853-1856)
    - Germanistic approach, but romanistic method
    - Influenced the codes of Glarus and Grisons as well as the code draft of Basel

Cantonal and Federal Codifications

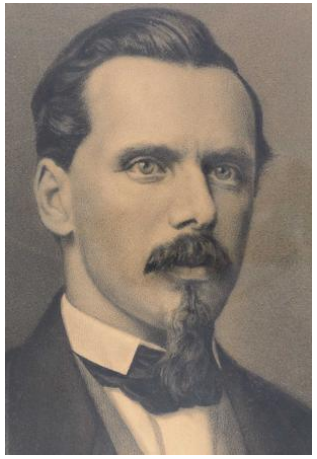
- Roman law tradition in the Zurich *Privatrechtliches Gesetzbuch*

§ 646 *Privatrechtliches Gesetzbuch*

Das Eigenthum an einer beweglichen Sache wird von dem Eigenthümer auf seinen Nachfolger übertragen **durch die Uebergabe des Besitzes in Folge eines auf Übergang des Eigenthums gerichteten Rechtsgeschäftes**, z. B. Kauf, Tausch, Schenkung.

The ownership of a moveable thing is transferred from the owner to his successor **through the transfer of possession as a result of a legal transaction aimed at the transfer of ownership**, e.g. purchase, exchange, donation.

Cantonal and Federal Codifications



- *Federal Code of Obligations*
  - Walther Munzinger (1830-1873)
  - Romanistic approach
  - Strong influence of the romanistic *Dredner Entwurf* (1866)
  - Munzinger's draft (1871), final version (1881), entry in force (1883), reform (1911)

- *Federal Civil Code*
  - Eugen Huber (1849-1923)
  - Strong germanistic approach, romanistic method
  - Mixture of germanistic and romanistic traditions

Cantonal and Federal Codifications

- Finding a middle-ground: the unexpected article 185 para. 1 CO

Art. 185 Abs. 1 OR

Sofern nicht besondere Verhältnisse oder Verabredungen eine Ausnahme begründen, gehen Nutzen und Gefahr der Sache mit dem Abschlusse des Vertrages auf den Erwerber über.

The benefit and risk of the object pass to the buyer on conclusion of the contract, except where otherwise agreed or dictated by special circumstance.

→ **Risks do not pass with the transfer of ownership**

Cantonal and Federal Codifications

- Finding a middle-ground: the unexpected article 185 para. 1 CO

BGE 128/2002 III 370

Both the case law and the doctrine […] advocate a restrictive application of the rule and an extensive interpretation of the exceptions to it. [...] However, the law must be respected. If a restrictive application is permissible, care must of course be taken to ensure that the exceptions do not replace the general rule. [...]; the exceptions were intended to cover cases where the temporal separation between the act of obligation and the act of disposal was not in the interest of the buyer, **but only or predominantly in the interest of the seller**. [...] the alternative obligation with the seller's right of option (art. 72 CO) […].

→ **Exceptions to article 185 para. 1 CO**

Roman Law in the Third Millenium?

- Teaching and “historical awareness”
- Participation to legal life
- Research in legal history

Thank you for your attention!