THE CONCEPTION OF SERVITUDES IN ROMAN LAW.

Few things have brought more confusion into the study of Roman Law than the habit of reading into the texts our modern ideas. Modern writers have denied that the slave was for the Romans a person, though countless texts make it clear that he was. The explanation is that modern writers mean something other than what the Romans meant by the word 'person.' When we ask whose property the Fiscus was, the plain answer is 'Caesar's,' and so say the texts. But Mitteis tells us that to hold this is to be the dupe of words: it is an 'Anstaltsperson.' It is not quite clear whether he means that the dominium is in the administrators or that it is an independent Stiftung, the fund owning itself. The latter view is not very satisfactory for those whose legal systems do not recognize this conception. The other view is not in itself impossible, for the later Romans seem to have regarded certain charitable funds as vested in their administrators. But this is an inference from the language of the texts. They say, e.g., 'si quidem testator significaverit per quem desiderat redemptionem fieri captivorum, is qui specialiter designatus est legati seu fideicommissi habeat exigendi licentiam et pro sua conscientia votum adimpleat testatoris.' But this is not the language used about the Fiscus. It everywhere appears as the financial representative of the Head of the State, Caesar. It administers his property. If treasure is found in land of Caesar, the finder's half goes to the Fiscus. If Caesar is instituted heres the property goes to the Fiscus. The price of property sold by the procurator Caesaris is due to the Fiscus. The objection to this kind of doctrine is that to explain an institution in a way in which the Romans did not explain it does not help to an understanding of the working of the law as an historical fact. To utilize modern ideas in expounding the 'gemeines Recht' is reasonable, like the appeal of modern Pandectists, in their 'Allgemeiner Teil' to Kant or

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1 E.g., P. 5. 12. 9; Fr. de iure fisci, passim; D. 49. 14. 30 etc.
2 Mitteis, Röm. Privatr. 1. 350.
3 C. 1. 3. 28. 1; see also h. t. 48. 2; Duff, Cambridge Legal Essays, 83 et seq.
4 D. 49. 14. 3. 10.
5 See P. Sent. 5. 12. 8, 9.
6 C. 3. 26. 4.
Hegel, but to use these ideas in explaining the Roman Law 'up to the time of Diocletian,' is it not to be the victim of an idea?

A question in which this modernizing tendency has caused some confusion is that of the effect on a praedial servitude of abandonment of either of the praedia concerned. It has been said, indeed, that this is not a very practical question, since if one praedium is abandoned, the owner of the other will 'occupy' it and the question will not arise. But, apart from the fact that some one else, e.g., the owner on the other side, may occupy it first, there is the further point that, at least in later law, such a seizure may not have always been advisable. From Diocletian onwards, tributum affected Italic as well as provincial lands, and there was, later on, legislation making persons acquiring land liable for arrears of tribute, applying indeed in terms only to cases of transfer, but possibly of wider application. It is clear that agri deserti were not uncommon and, as they might lie unoccupied for a considerable time, the question what happened to a servitude imposed on or attaching to them must have been of some practical importance. Into the history of the discussion in modern books it is not necessary to go. All possible views are held. An account of them may be found in Windscheid, Pandekten, and Fadda, Studi e Questioni. The latter holds, as it seems rightly, that the servitude was in no way affected by the abandonment of either praedium or of both. But his discussion, like all the others, seems to start from two presuppositions, i.e., that a servitude is a fraction of ownership and therefore in some way depends on ownership, and that a right must have an owner. In general, therefore, those who maintain the continuance of the servitude have contrived more or less ingenious ways of circumventing the effects of these principles, though Windscheid adopts, without explanation, the view that the servitude can continue 'subjectlos,' but seems really to be adopting the view of Ihering. For him—and Fadda follows him—land lying abandoned, not withdrawn from commerce, is

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7 Fadda, Studi e Questioni, 1, 212.
8 If we hold, with Bonfante (Corzo, 2, 2, 192, 273), that occupatio was not applicable to agri deserti, the point at once becomes very practical.
9 Marquardt, Staatsverw. 2, 217.
10 C. Th. 11, 3, 1=C. 4, 47, 2. See, however, C. Th. 13, 11, 16=C. 11, 58, 7, a century later.
11 C. 11, 59.
12 § 215, n. 3.
13 § 211 et seq.
14 Articoli reuniti, 2, 229 et seq. cited Fadda; French version, Etudes Complémentaires, viii, p. 382.
still property, though there is at the moment no owner of it, and
this potential property is enough to maintain the servitude. For
some, c.g., Bianchi,16 a servitude over a res nullius is nonsense,
but as it is difficult on the evidence to deny that the right went
on, in practice it is to be conceived not as a servitude but another
sort of right very like it—an extension of ownership. It is
impossible not to agree with Fadda that it is simpler to say that
the servitude goes on, notwithstanding any logical difficulties
which may exist.17 For it seems impossible to understand
D. 8. 5. 6. 2 as meaning anything but that the servitude
continues though the servient praedium is abandoned. After
discussing the liability of the servient owner to keep the wall in
repair, where there is a servitude oneris ferendi, it continues:

Labeo autem hanc servitutem non hominem debere sed rem,
denique licere domino rem derelinquere scribit.

The question arises whether the survival where the servient tenen-
ment is abandoned cannot be explained without any ingenuities,
by considering how in fact the Romans looked at the institution.
In the first place, it cannot be denied that a servitude may be
conveniently described as a fraction of ownership: every right
included in a servitude is in fact one of the innumerable rights
included in ownership.18 And it is equally reasonable to treat
it as a burden on ownership. This is hardly the Roman point of
view. Nowhere in the titles on praedial servitudes are they
spoken of as burdens on ownership. They are burdens on the
land, and Elvers in his fundamental work observes that it is
necessary to treat the conception of servitude as quite distinct
from that of ownership.19 It is true that he shows this by refer-
ence to the usufruct which could exist in a servus sine domino,
and usufruct was not a servitude in earlier law. But the
principle stated is correct. Although servitudes may be thought
of as fractions of ownership or as qualities of the fundus, a con-
ception found in the sources,20 and these notions have led to
divergent views on the point with which we are concerned,21 these
rights have another character. They are iura, independent
bodies of right which exist without reference to any other right.
All that is necessary for them is that the fundi be capable of

16 Servitu legali, 1. 111, cited Fadda, cit., 211.
18 As to the inadmissibility of this conception as an explanation of the facts,
see Scialoja, Proprietà, 1. 298 et seq.
19 Servitutenlehre, 29.
20 D. 50. 16. 86.
21 Thus for Fadda they are qualities and continue though the praeda cease to
have an owner. For Bianchi they depend on ownership and cease, as servitudes,
if either praedium ceases to have an owner.
private rights, not necessarily *dominium* in private hands—that is immaterial. Thus Gaius tells us \(^{22}\) that servitudes are created in provincial lands by pact and stipulation. His language is not that which he uses in relation to *res religiosa*.\(^{23}\) The servitude is not *pro servitute*: it is an actual servitude. It is true that there is *dominium* here, in the State, but the fact remains that the right is fully created between two parties who have not *dominium* of either *praedium* concerned. What the present writer has sought elsewhere \(^{24}\) to show of usufruct is true, *mutatis mutandis*, of praedial servitudes. They are alike *tura* standing on their own basis.\(^{25}\) The fundamental difference between them is that usufruct has, in its original conception, no relation to physical things, but only to a person, while servitudes have their primary relation to *fundī* and, one may almost say, no relation to a person: servitutem non hominem debere sed rem. The slave *sub usufructu manumissus* remains a slave *sine domino*, not by reason of any peculiarity \(^{26}\) in slaves, but by reason of the above-stated principle. The same would be true of any other usufruct; no one will contend that if A has a usufruct and B the *nuda proprietas*, and B abandons his right, A's usufruct is immediately extinguished for ever. For this must be the result: whethier he or another 'occupies' the *res* there has been an interval of time, and this whether A knows of B's act or not. But the holder of a usufruct or a servitude remains the holder of it whether the property subject to it is abandoned or not, just as the owner of land would remain owner even though he and the Emperor were the only people left alive. The contrary view brings in the notion of *obligatio*, which as Fadda observes \(^{27}\) is wholly out of place. A servitude is a vindicable right: it is as effective against outsiders as against the owner of the servient land. There does not seem to be much significance in the fact to which Fadda attaches importance that it is primarily enforceable against him.\(^{28}\) He is prominent as the person best able effectively to dispute the enjoyment of the right, but he is no more bound than other people: servitutem non hominem debere sed rem.

But there is another way of arriving at the result reached

\(^{22}\) G. 2. 31. We have no right to assume inexact language.
\(^{23}\) G. 2. 7.
\(^{24}\) L. Q. R., 1927, 326 et seq.
\(^{25}\) The name *ius* in *re aliena*, which is unroman, rests on this misconception. Bonfante (*Corso*, 2. 2. 190), says: 'Avremmo, forse, dei *tura* in *re aliena* gravanti su cose nullius? Questi si è indotti a sostener.' The assumptions usually but unjustifiably made could not be more explicitly stated.
\(^{26}\) As is held by, e.g., Brugi, *cit. Fadda, op. cit.*, 225.
\(^{27}\) *Op. cit.*, 216.
in what seems to be the only text, \( ^{29} \) \textit{i.e.}, perdurance of the servitude. The principles in this matter, whatever they are, had their origin in early times in connexion with the primitive rights of way and water. These rights were \textit{res mancipi}\(^{30} \) and could be pledged.\(^{31} \) They were in fact thought of as physical things, independent of the ownership of the \textit{praedia}. The way was a defined, perhaps paved,\(^{32} \) track. The waterway was a defined channel, probably with some kind of \textit{caementa}, were it only pressed clay. It was for this reason, their physical nature, that they were subject to usucapion till the \textit{lex Scribonia}.\(^{23} \) The abandonment of the \textit{praedium serviens} makes no difference to them. They are still there and still belong to the owner of the \textit{praedium dominans}. There is nothing surprising in the persistence of this rule even when the class of servitudes has widened and the conception of them has become less material.

The case of abandonment of the \textit{praedium dominans} appears to present more difficulty. The practical question is: If A abandons a \textit{praedium} to which a servitude over another is attached and B occupies the abandoned \textit{praedium} before the term of prescription by non-user is over, has he the servitude? The \textit{prima facie} logical answer is: No. For though it is easy to conceive a right existing in its holder though there is no person specially bound to observe it, it is not so easy to suppose a right to which no one is entitled. The late owner cannot be entitled as he held the right only in virtue of his ownership of the \textit{praedium} and this he no longer owns. It is not possible to take the simple way of saying that the Romans regarded the right as belonging to the \textit{praedium}, for though there are many expressions which suggest this point of view -(\textit{ius fundi, praedium dominans}) and many texts which express it,\(^{34} \) there are many texts which speak of the right as belonging to the owner of the \textit{praedium dominans}.\(^{35} \) The Romans could not have taken the view that the right was owned by the land: this was inconsistent with the form of a \textit{vindicatio servitutis} and involves the ultra-modern conception of an independent Stiftung. Nor is it sufficient to say that, though it was a \textit{ius}, it was also a quality or attribute of the land, which, having been created, could not be destroyed except in certain definite

\(^{29} \) D. 8. 5. 6. 2.
\(^{30} \) G. 2. 17.
\(^{31} \) D. 20. 1. 12. As stated, the rule applies only to the primitive rights of way and water.
\(^{32} \) Cf. D. 8. 1. 10.
\(^{33} \) D. 41. 3. 4. 28.
\(^{34} \) \textit{E.g.}, D. 8. 2. 2; h. t. 6; h. t. 9 etc.
\(^{35} \) \textit{E.g.}, D. 8. 1. 8; 8. 2. 24; h. t. 40; 8. 3. 21, etc.
ways. For that is to beg the question. No doubt it is a quality of the land, but the problem to solve is whether it is one for this purpose, whether, having to decide between the solution suggested by this fact and the opposite solution suggested by the fact that there is no one to whom it can attach, the Romans adopted the former, and considered the servitude as still subsisting. So far as I have seen none of the writers who accept this view offers any other evidence to weigh down the balance. No doubt their adoption of this simple but unsatisfactory solution is more or less disguised. All the commentators who take this view seem to rest the survival on the grounds assigned by Ihering. Though the ownership is destroyed so far as the owner is concerned, it has merely become subjectless. Property still exists in a potential state. The servitude is a quality of the land and the appearance of the new owner brings it to life again. What this adds to the simple proposition that it is a quality of the land may be a very good reason for 'gemeines Recht' or modern law generally, but it is impossible to believe that, if the Romans of the age in which these rules were being formulated had considered the question of the reasons, they would have answered it in this subtle way. There is, indeed, another way of putting the matter. It is said that in abandoning the land the owner has abandoned only his own right: he cannot be thought of as abandoning a right which attached to the land, which therefore remains. But this does not help. He at any rate retains nothing in the land, and, if the servitude remains, it is because it is a quality of the land. It is true that Windscheid says that the will of the abandoning owner was directed to giving up his ownership, but not to the giving up of the servitude. As a mere question of fact, this seems not to be true. He abandoned this in precisely the same sense as that in which he abandoned any other quality of the land, and, if the servitude survives, it must be just because it is a quality of the land and we are back at the simple solution that it survives because it is a quality of the land.

For Czyhlarz the servitude is extinct: the dereliction is a dereliction of everything, involving the destruction of the right. To this Fadda replies that it is an abandonment, not of the servitus as a quality of the field, but of his relation to it. This is a restatement of the subtle point made by Ihering and generally

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For ref. to the literature, Fadda, op. cit. 219.
Fadda, op. cit. 219 et seq.; Ihering, cit.
Pand. § 215, n. 3.
Eigentumsvererisarten, 126 et seq.
followed: the right has a potential 'subjectlos' existence. He makes the further objection that the dereliction cannot cover this, partly because it is a quality of the land, but also because it is a right bearing in the first instance on a third party and can be abandoned only by some act in relation to him.\footnote{Loc. cit.} This is not very convincing. It is practically reverting to the notion of obligation, which Fadda elsewhere expressly abjures\footnote{Op. cit., p. 216.}; and it is impossible to hold that anything is left in the *derelinquens*, even potentially. It is true that for Fadda and for Ihering it is not a question of abandoning his own right, but of destroying by abandonment a quality of the land—-we may almost say a right of the *praedium*. But since the author with Ihering expressly repudiates\footnote{Op. cit., p. 219.} the notion of a right vested in the *praedium* itself, this is only in a disguised form the proposition that the Romans allowed the inherence in the *praedium* to override the difficulty that the right has no subject. Nothing is really added: it is simply a statement that the Romans solved the difficulty in this way.

But in fact Czyhlarz’s opposite view carries us no further. He seems to be right in refusing to accept Ihering’s contention that abandonment is only abandonment of the owner’s relation to the property, not of the ownership itself.\footnote{Op. cit., p. 216.} But it is not easy to see that anything follows from his own argument. The fact that ownership has ceased to exist does not prevent it from arising again if the land is ‘occupied,’ and it is not shown that the same could not happen to the servitude. The only practical point would be that it is a new servitude, though similar to the old, but that is also true of the ownership. In fact the contention amounts to no more than that the Romans answered the question, which principle was to prevail, in the opposite way to that maintained by the other writers, who hold that the servitude went on.

The difficulty cannot be solved in this case as it could in the other by recognizing that the servitude is an independent *ius*, a fraction of ownership indeed, but also something else, a right which can exist without ownership, for if it is a *ius* there remains the difficulty that we can find no ‘subject’ for it. But here, too, the difficulty disappears if we go back to early times and consider what these servitudes were. In early law they were physical things, obvious to the eye. If a man abandoned his property he did not erase these existing things, tear up the
channels, plough up the paths. The land lay open to occupation with these visible 'rights' attached to it. Here the probabilities are reversed. In later law when the servitude is a *merum ius* it needs, as we have seen, some ingenuity to show why the servitude should survive, or how it could survive, while in the earlier conditions it would need some power of analysis to show that it could not. No such analysis was in the least probable, and if, in these beginnings, the servitude survived the abandonment, it is not likely that the rule would be affected by the gradual evolution which produced the institution, less materially conceived, which we find in the texts.

What is the effect where both *praedia* are abandoned, a hypothesis not so unpractical as it looks, since, if one farm is abandoned for sterility, its neighbour is likely to be of the same character and to have the same fate? If, owing for instance to a rise in the price of foodstuffs, one or both be re-occupied by other persons, does the servitude still exist? Logically, accepting the conception of servitudes which we find in the texts, it would seem that it must have disappeared. For there are no longer two *praedia*; there is only a tract of land which, at an earlier stage in its history, was two *praedia*. But here, too, if the foregoing account is correct, the waterway, the footpath, would still remain for the benefit of any subsequent 'occupans,' at any rate till it had been lost by nonuse. It may be, indeed, that till the end of the republic, or not much earlier, the notion of nonuse would not have been applicable. It is true that in the texts the nonuse by which these ancient servitudes were lost is differentiated from the *usucapio libertatis* applicable to urban servitudes, by the rule that adverse possession was not an essential in the former case. But the time of nonuse is the same as that for *usucapio* and till nearly the end of the republic, when the *lex Scribonia* was enacted, such rights were usucapible. We read in Pauli, *Sententiae*: viam iter actum aquaeductum qui biennio usus non est amissus videtur: nec enim ea usucapi possunt quae non utendo amittuntur. Here something seems to have dropped out in the first clause: it can be construed, but is not likely to have been written in the present form. And in the second clause the 'enim' is odd: the fact, if it be a fact, that what is lost by nonuse cannot be usucapied is not a reason for a rule that *iter*, etc. are lost by nonuse, and it has been

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45 P. Sent. 1. 17. 1.
46 D. 41. 3. 4. 29. See Rotondi, *Leges Publicae Populi Romani*, 414.
47 Seckel-Kuebler, *ad text.*
suggested to replace ‘enim’ by ‘tamen.’ 48 It seems not unlikely that there is a good deal of history behind this cryptic statement. It may well be that the familiar distinction between loss by non-use and by usucaption is a creation of the early empire. If it be true that what is lost by nonuse cannot be usucapied, it must follow that before the lex Scribonia, when these rights were usucapible, they would not be lost by nonuse. But the whole story of the lex Scribonia and its effects is hopelessly obscure.

We are told in a well-known group of texts that, if land is sold, a water right attached to it passes without mention, and, with it, the pipes through which the water runs, even though off the premises, and, further, that if the right has been lost by non-use, the pipes nevertheless pass ‘quasi pars aedium.’ 49 This expresses the developed view of servitudes: it would not have occurred to Ulpian’s mid-republican predecessors to separate the water right from the pipes. For them the pipes embodied the right and so long as they remained and were not used by the ‘servient owner’ for any other purpose the right would have remained unaffected.

The foregoing view as to the original conception of servitudes may throw light on a text 50 which has caused some difficulty. We are told that a right of way or water could be pledged, that the creditor, if a neighbour, could use the right and if he was not paid could sell it to some neighbour. As this text assumes the servitude existing in the hands of the creditor and to sell it to another person is to shift it from one praedium to another, it is not surprising that Paul tells us that it is allowed only propter utilitatem contrahentium, nor is it surprising that modern writers have maintained that it is due to Justinian and that Paul said exactly the opposite. 51 (The supposition that he is given a right to create a servitude for the third person, which would create little difficulty, 52 though it is widely held that this is the right interpretation, seems to be excluded by the language of the text.) But it is difficult to see why Justinian should have introduced it, since the utilitas contrahentium cannot have been very great, or why if he introduced it he should have not only excluded urban servitudes, but have dealt only with the ancient rights of way and water, or why Paul in discussing the point should have dealt only with these, unless they had some special

48 Krueger, ad text.
49 18. 1. 47—49.
50 90. 1. 12.
51 Perozzi, Ist. 1. 487; Albertario, Il pegno della superficie, 4.
52 Girard, Man. (7), 819; Joers, Röm. Recht. 115; Windscheid, Lehrbuch, § 227, n. 10.
character and there was some ancient tradition on the matter. On this hypothesis we must not think in terms of _pignus_ but of _fiducia_. The debtor mancipates to his creditor the right to have a water-channel of some sort across his land, on the terms that he is to release it if the debt is paid. The channel is thought of as something belonging to the creditor. If the debt is not paid he may realize its value in the best way he can so as to get payment. A later analysis would require for such realization a surrender of the old servitude and the creation of a new one in favour of the buyer, for a servitude cannot be shifted to another _praedium_. But the analysis which sees in a servitude a burden on _praedium_ A in favour of _praedium_ B is not primitive. They were the same servitude. For the imperial jurists this would be quite impossible; if they admitted it at all, it could only be as an anomaly, _propter utilitatem contrahentium_. And the better view seems to be that Paul did reluctantly admit this ancient doctrine, but only on this ground.

W. W. Buckland.