

Foundations of the South African Law

Only study guide for **FLS102W**



DEPARTMENT OF JURISPRUDENCE

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Preface

Welcome to Foundations of the South African Law, a first-level module in the Department of Jurisprudence. We hope that you will find this course interesting and instructive.

The study guide is written in such a way that you will be actively involved as you study the course material. We hope that you will find it interesting and that you will master the course material with ease.

I Aim of this module

The aim of this module is to give you an overview of the Roman law foundations of the South African law of things, law of contract and law of delict. Naturally you will wonder whether the Roman law foundations of these subjects could really be of any importance to a law student of the twenty-first century. And, if so, why? In the course Introduction to Law (ILW1036) you learned that the five principal authoritative sources of South African law are the following:

- legislation/statutes/acts of Parliament
- case law
- common law
- customs
- indigenous African law

Ancient Roman law makes up an important part of common law since it was received in the Netherlands just after the Middle Ages (in other words, accepted as part of Dutch law). Some parts of our law have been far more heavily influenced by Roman law than others. The three subjects on which we will concentrate in this module, namely the law of things, the law of contract and the law of delict, have been chosen for the very reason that they are still strongly influenced by Roman law today. We'll draw your attention to these influences later on, for example when we learn about prescription and servitudes in the law of things or the *lex Aquilia* in the law of delict.

You will find the study of numerous principles and legal institutions in Roman law very valuable in understanding the same legal principles and institutions in South African law. Furthermore, your study of Roman law will make you realise afresh how the political, social, economic and technological conditions in a country stimulate and influence the development of a legal system.

Students who have successfully completed this module will have a good

understanding of the historical development of the law of things, the law of contract and the law of delict, as well as the extent to which Roman law today is still directly and indirectly relevant and important in South African private law.

Outcomes

The aim of this module is to show you, as a law student and prospective lawyer, where the South African law of things, law of contract and law of delict come from. By describing the Roman law origin and historical development of these subjects to you, we'll be helping you to extend your insight into and perspectives on contemporary law of things, law of contract and law of delict. We shall also equip you with the necessary skills and knowledge to enable you to analyse and solve problems that might crop up in your career in relation to the three above topics.

2 Importance and relevance of Roman law for South African law students

As we have already said, a large part of our modern South African private law, and especially the law of things, the law of contract and the law of delict, is based on Roman legal principles and actions. There is another reason why Roman law is still of great importance to us today.

The expansion of Rome into a global empire has meant that many countries (eg Gaul, Germany, Spain, Carthage, Britain, Greece, Egypt, Assyria and Asia) became part of the Roman empire. Each of these countries had their own population. And each nation had its own culture, language and legal system. These conquered nations gradually (over the course of centuries) became part of the Roman empire. Some of these countries were considerably more civilised and developed than the Romans. Some of the conquered countries were ruled by Roman governors and officials, some had their own kings, who had sworn an oath of allegiance to the Roman empire, and some had other forms of government. In certain countries the national language, culture and legal system survived. Problems cropped up when these people came to Rome for trading purposes, be it as slaves or visitors. Their legal systems were not applicable in Rome and the original Roman legal system, the *ius civile* or civil law, was only applicable to Roman citizens. The peoples conquered by Rome did not automatically become Roman citizens; they were simply Roman subjects. This meant that they were without any form of legal protection when they were in Rome. It was necessary to make some arrangements in order to extend the protection of the law to these people (*peregrini* = everyone who had come from another country and was not a Roman citizen). The solution found was to create a new post, namely that of *praetor peregrinus*. This official dealt with all cases involving either two strangers (*peregrini*) or a stranger and a Roman citizen. The law he applied was called the *ius gentium* (law of all nations). This legal system was developed by taking the well-known *ius civile* rules and adapting them in order to make the system more just and equitable, and also less formal and rigid. In this process the *praetor peregrinus* often



- 1. South Africa
- 2. South America
- 3. Louisiana (USA)
- 4. Scotland
- 5. Europe
- 6. Turkey
- 7. South Korea
- 8. Sri-Lanka

made use of the legal rules of other nations, especially in cases where their legal rules were more developed, such as in commercial matters. When the Roman citizens began to realise that they were being put at a disadvantage by their own *ius civile* because it was so strict and rigid, they began asking for the rules of the *ius gentium* to be incorporated into the *ius civile* as well. This adapted and extended *ius civile* came to be called the *ius honorarium*. In time the three systems converged and came to be applied to all the inhabitants of the Roman empire.

If we apply this factual situation to the South African situation, it is clear that we can learn a great deal from Rome. We also have a nation made up of various peoples, each with its own language, culture, legal system, civilisation etc. While the plurality of our legal system is recognised in the present Constitution, a great deal of work still lies ahead. The same problems occur in the European Union (where Roman law, which forms the basis of most European legal systems, is also used to create a new *ius commune*) and in the African Union. In both these unions the ultimate aim is to create a common legal system. If the example set by Rome is followed, in other words if relevant, equitable, just and workable legal rules are taken from the various legal systems and incorporated into the existing system, a legal system will be developed that is just and equitable, as well as relevant for all population groups. This would be to the advantage of the South African legal system.

3 General background

We hope that as you work through the study material you will realise that the law is a “living institution”. The legal rules that are made do not stand for ever. The law changes all the time. Changes are necessitated by a large number of factors. Consider for a moment all the changes in political, economic, sociological, technological, medical, religious and moral circumstances. All of this has an influence on the law, because the law develops along with society in order to meet society’s needs.

As you work through the study guide you will often come across concepts like “republican period” or “classical period”. These refer to specific periods in Roman history and Roman legal history. Historically, the history of Rome can be divided into three periods:

- the monarchy (753 BC¹–510/509 BC)
- the republican period (510 BC–27 BC)
- the imperial period (27 BC–AD)² (this period can be subdivided into the principate (27 BC–AD 284) and the dominate (AD 284–AD 565))

Even after the fall of the Roman empire, Roman law remained in existence. It was incorporated into the legal systems of European countries, from which it was transplanted to South Africa. As a result of various factors, it also had a

¹ BC = Before Christ.

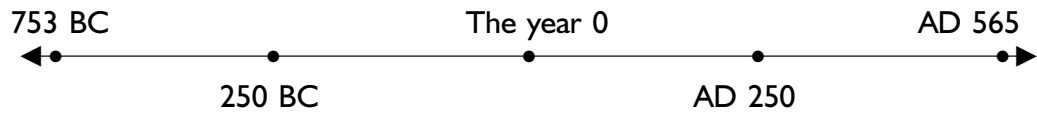
² AD = *Anno Domini* (in the year of Our Lord) = After Christ.

major influence in other countries and on other continents (eg South America, the state of Louisiana in the USA, Scotland, Turkey, Korea and Japan).

Besides historical periods, we can also distinguish periods in the history of jurisprudence. It is important that you should take note of these, because we'll often refer to the law as it was in the classical period or mention changes introduced by Justinian. The four periods in Roman legal history were the following:

- **Early Roman law (753–250 BC).** The *ius civile* was the only recognised legal system. It was only applicable to Roman citizens and was characterised by inflexibility and formalism.
- **The preclassical period (250–27 BC)** With the expansion of the Roman empire it became necessary to make provision for people who happened to be within the boundaries of the Roman empire, but were not Roman citizens. A new official, the *praetor peregrinus*, was appointed and he introduced a new legal system, namely the *ius gentium*. This was applicable to disputes between foreigners and to disputes between Roman citizens and foreigners. This legal system was noted for its equity and flexibility and a lack of formalism.
- **The classical period (27 BC–AD 284).** During this period the jurists built on foundations laid by the *praetor* and the jurists of the preclassical period. In AD 212 Emperor Caracalla promulgated the *constitutio Antoniniana*, which theoretically extended citizenship to all the inhabitants of the Roman empire. This removed any need for different legal systems for citizens and non-citizens and the differences between the various systems therefore gradually disappeared. Roman law was refined and developed to such an extent that it surpassed the legal systems of other ancient civilisations and today still has a formative influence on jurists.
- **The postclassical period (AD 284–565).** During this period attempts were made to simplify the law and the influence of vulgar law was conspicuous. The concept “vulgar law” refers to the law as applied during the postclassical period when the Roman empire and legal system were deteriorating and declining. The people who had to apply the law did not all have a good knowledge of Latin (Greek became more and more frequently used in the Roman empire) and there was a widespread shortage of written legal sources. The law became increasingly simplified and superficial, finer distinctions disappeared and more and more local law was introduced into all the provinces of the Roman empire. Towards the end of the postclassical period there was a renewed interest in classical law. This ultimately led to the codification by Emperor Justinian (*Corpus Iures Civilis*), which was proclaimed in AD 529 and ensured the survival of Roman law.

Many of you have probably never seen these abbreviations. BC stands for Before Christ and AD stands for After Christ. It is important to know how to read these dates. We therefore provide the following timelines:



Early Roman law	Pre-classical period	Classical period	Post-classical period
753 BC → 250 BC	250 BC → 27 BC	27 BC → AD 284	AD 284 → AD 565

Timeline: History of Rome

Monarchy: 753–510 BC

753 BC: Foundation of Rome

519 BC: Expulsion of the Tarquin kings

Republic: 510/509 BC–27 BC

510/509 BC: Beginning of the Republican period

451/450 BC: Compilation of the *Twelve Tables*

287 BC: *Lex Hortensia*

27 BC: Augustus regularises his constitutional position

Principate: 27 BC–AD 284

27 BC: Princeps Augustus

AD 161: *Institutes* of Gaius

AD 212: *Constitutio Antoniniana*

AD 284: End of the Principate

Dominate: AD 284–AD 565

AD 284: Beginning of Diocletian's reign

AD 395: Division of the Roman empire

AD 476: End of the Western Roman empire

AD 527: Beginning of the reign of Justinian

AD 533: *Corpus Iuris Civilis*

AD 565: Death of Justinian and end of the Dominate

Timeline: Roman legal history

Early Roman law: 753 BC–250 BC

Pre-classical period: 250 BC–27 BC

Classical period: 27 BC–AD 284

Post-classical period: AD 284–AD 565

4 How to approach the study material

All the study material you have to study for this module is contained in this study guide. There is no prescribed textbook for this module, so you will have

to rely solely on the study guide. This naturally implies that the study guide is very important and you need to study it very carefully.

At the beginning of each section there is a brief introduction. This is followed by a discussion of the study material for the particular section. You have to do the activities dispersed throughout the guide to ensure that you understand the work. We provide feedback on all the activities so that you can make certain that you understand the work well.

At the end of each section there are a number of self-evaluation questions that will test your knowledge of the work and help you to assess whether you have in fact mastered it. The answers to these questions are contained in the relevant chapter and are easy to find. Do not start a new chapter until you have done the activities and questions for the previous one. It is important to make certain that you are able to answer all the questions. This will require a lot of self-discipline because the answers (feedback) to the activities are provided. Use the feedback only to check your answers.

5 Activities and self-evaluation questions

Activity

After having studied certain sections, you have to do something, for instance reformulate a definition, answer questions, etc. An activity also includes the feedback we give to help you understand the work. Please do the activities. We have created them with the specific intention, first, of enabling you to see whether you know and understand the work that has been dealt with.

They secondly also serve as a small-scale experience of doing an assignment or examination question.

Self-evaluation questions

These are questions which are placed at the end of each study unit and which you must answer. The questions cover the work dealt with in that study unit, and you are expected to check your answers yourself, by referring to the study material.

6 Terminology

You will soon see that in addition to the legal terminology you have encountered in other modules, a number of Latin words and expressions occur in the study guide (eg *bona fides*, *mora*, *mancipatio*, etc). Relax: we're not going to test your knowledge of Latin as such! But, as you will realise in the course of your legal studies, there are certain Latin words and expressions that form part of South African legal terminology. This means that when you read

court cases or textbooks, you will encounter these Latin words and expressions and you need to know what they mean.

Some of these words/expressions are easy to translate (eg *traditio* = delivery, and *bona fides* = good faith), but others are not (eg *mancipatio*). In some textbooks and court cases you will find that the authors/judges use the Latin terminology and in others they use the translations. It is therefore important that you should be able to recognise the Latin words/expressions and know what they mean. These are ultimately part of your professional vocabulary (legal vocabulary) and one day when you are a qualified lawyer you will be expected to speak, write and understand the “language” of your profession. Wherever possible we’ll supply translations (English and Afrikaans) of the Latin words/expressions.

7 Good luck!

Best of luck! We hope that you will enjoy this course and that it will be of value to you in your further studies and your working environment.

PART A

The Roman law of things

CHAPTER I

The Roman law of things

GENERAL INTRODUCTION

This chapter is a general introduction to the Roman law of things. Important basic concepts (such as “thing”) are explained. You will also learn about the different kinds of things known to the Roman jurists. It is important that you not only understand but remember these basic concepts and kinds of things, because we refer to them over and over again throughout this study guide.

I What is “the law of things”?

The law of things comprises the system of legal principles or legal rules that regulate the relationship between a legal subject and a particular kind of legal object, namely a thing. The relationship between the legal subject and the thing could take various forms. When a person has physical control of a thing, such as holding a book or occupying a house, then, depending on the circumstances, he could exercise this control in the capacity of either possessor or owner. It is also possible to use a thing belonging to another person as a usufructuary or to have a pledge over that thing. (We shall return to the concepts “usufructuary” and “pledge”.) The function of the law of things is therefore to harmonise the great variety of individual rights in respect of things. The content of these rights and the interchange between things and real rights are regulated in three ways:

- Ownership of various legal subjects are harmonised by defining the content and limits of ownership of each legal subject with regard to those of the others.
- The law of things also strives to bring about harmony in cases where different people have different real rights in respect of the same thing (for example in the case of usufruct, where the usufructuary has usufruct of a thing of which another person is the owner, or a case where a lessor has the right to use a thing which is the property of another person).
- The law of things also regulates the exchange of and dealings with things and real rights (for example how ownership is passed from one person to another, or what the rights of a lessor are in respect of the leased thing).

In the Introduction to Law module (ILW1036) you were introduced to the concepts “real right” and “personal right”. It is very important that you should be able to distinguish between these two kinds of rights. **Basically one could say that a real right is a right in respect of a thing which was enforced under Roman law by a real action and that this right could be enforced**

against any person who encroached on a person's right to a thing. A classic example is the theft of a chariot belonging to Quintus. The owner could then go and demand the return of the chariot from any person in possession of it and not only from the thief. **A personal right, on the other hand, is a right that can only be enforced against a specific person (by means of a personal action).** A good example would be where Susanna has agreed with Tertius that he will repair the roof of her house: Tertius, and no-one else, can be compelled (by means of a personal action) to repair the roof. In other words, Susanna has a personal right against Tertius and Tertius alone.

In conclusion it is interesting and very important for your purposes, to know that even today Roman law is probably still the principal source of the South African law of things. Over the years numerous changes have naturally been made to Roman law by legislation, the judiciary and the constitution, but the basic structure is still the same: Ownership is still ownership, possession is still possession, a servitude is still a servitude, a pledge is still a pledge and prescription still prescription! It is self-evident that knowledge and understanding of the Roman law of things will be a very useful guide when you have to study the South African law of things at a later stage.

2 The classification of things

2.1 What is a thing (*res*)?

The word "thing" (*res* in both the singular and the plural in Latin) had multiple meanings in Roman law. In the narrow sense of the word it meant "thing" or corporeal object. In the broad sense of the word it meant something/a thing that made up part of one's patrimony or estate. In the language of jurists it had other meanings as well, such as an interest, an achievement, a matter, a lawsuit. When we speak of "thing" in the remainder of this study guide, however, the term will be used to refer to a "thing" in the narrow sense of the word. We shall now discuss the various kinds of things that the Romans distinguished.

2.2 Things in the estate (*res in nostro patrimonio*) or things in commerce which could be acquired in ownership (*res in commercio*) and things outside the estate (*res extra nostrum patrimonium*) or things outside commerce which could not be acquired in ownership (*res extra commercium*)

The most important distinction is that between things in the estate, in other words things which are in the commercial world, and those outside the estate, which are therefore not within the commercial world. Things within the commercial world were important in the law of things because these were the things that one could possess, of which one could obtain ownership and in respect of which one could establish a limited real right (such as a pledge or servitude).

Things that were outside the estate were beyond human control (ie private individuals could not obtain ownership over these things) and are therefore of

no significance in the law of things. Such things were either (1) things subject to divine law (*res nullius divini iuris*) or (2) things that belonged to everyone (*res nullius humani iuris*) or (3) things that belonged to the state or to a community (*res communes omnium*). Some examples of things that were subject to divine law were temples, altars, religious objects, tombs, cemeteries and in conclusion city walls and gates, which were dedicated to the gods. Some examples of things that belonged to everyone are the air, the sea and the beach. Examples of things that belonged to the state were public roads, bridges, state mines and industries and land in the provinces. Things that belonged to the community included things that belonged to a city for the use and enjoyment of all its inhabitants, such as theatres, parks and sports stadia.

We shall now briefly discuss the various kinds of things that were within the commercial world.

2.2.1 Corporeal things (*res corporales*) and incorporeal things (*res incorporales*)

The first distinction made by the jurist Gaius¹ (*Institutes* 2.12) was between corporeal and incorporeal things. Corporeal things are things that can be touched or observed by means of the senses (eg land, a garment, a book). Incorporeal things are things that cannot be touched or observed by means of the senses. Therefore these are things that exist for juristic purposes and that can be regarded as abstract things. Examples of incorporeal things are an inheritance, usufruct or a servitude. When the Romans spoke of an incorporeal thing they meant the capacity or the right that formed part of the person's assets. In other words, we are dealing with a right to an inheritance (even if that inheritance consists of corporeal things) or the right to usufruct (even if that includes the right to occupy a house), or the right to exercise a servitude (which in practice usually gives the owner of the dominant tenement the right to do something in respect of the servient tenement).

It is important to remember that only corporeal things were susceptible to ownership and possession. The result was that certain legal institutions, such as delivery and prescription, were only applicable in the case of corporeal things. (See 3.2.3 and 3.3.2.)

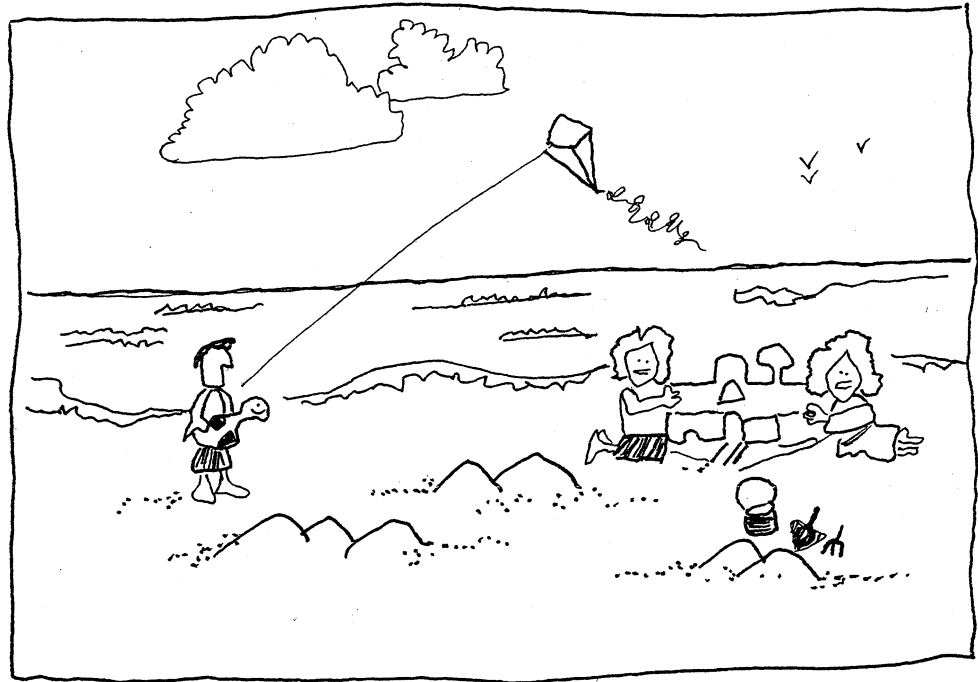
2.2.2 Replaceable things (*res fungibiles*) and non-replaceable things (*res non fungibiles*)

Res fungibiles are things that can be replaced or generic things (that is things of the same kind or genus). These are things that can be weighed, measured or counted (such as grain, olive oil, money). Such things all have the same characteristics or qualities and the one can just as well replace the other. In our study of the law of obligations, when we deal with the contract of loan for consumption, you will see that only fungibles can be the subject of such

¹ Gaius was the most famous jurist of the classical period, and lived during the 2nd century AD. Around AD 160 he wrote a legal textbook for students, the *Institutiones* or *Institutes*. This is an important book for all students of Roman law. First, it has been preserved almost in its entirety and is consequently a very important source of classical law. Secondly, the simple style in which it is written has made it a popular textbook in the postclassical period. Thirdly, this work by Gaius contains the only known classification of Roman law. Consequently it had a major influence on the history of jurisprudence in later years when the Roman legal system became so important.

contracts. *Res non fungibiles*, by their nature, cannot be replaced by other things with similar qualities. Here we are usually speaking of specific things. For example, when you have two horses, one of which is a racehorse and the other is not, the one cannot be replaced by the other.

Things: In this sketch you can see, *inter alia*, a number of things: The air, the sea and the beach (things that belonged to everyone) and a kite, a bucket, a spade and a fork (corporeal things).



It is important to note that whether or not things are replaceable often depends on the intentions of the parties concerned. Things that may appear to be interchangeable at first glance, such as two coins or two oil jars, may be irreplaceable in certain circumstances. This would be the case if one coin proved to be a valuable collector's item and the other an ordinary coin in commercial circulation. Or if one oil jar had been made and decorated by a famous artist and the other one had been mass produced.

2.2.3 Single and joint or composite things

Things like a book, an ox or a beam are regarded as single things. However, a thing may be made up of multiple components, such as a ship or a house, which are made up of multiple constituents combined in such a way as to form a unit. In some cases a thing which is made up of separate things, such as a flock of sheep or a herd of cattle, is seen as a unit. It is also possible, however, that these separate things will retain their individuality even when they are incorporated into the joint thing. Prescription, for example, is applied to the individual animals in a herd and not to the herd as a whole and in the case of accrual a distinction is made between those parts that accrue and those that do not accrue.

2.2.4 Divisible and indivisible things

A thing is considered to be divisible if the nature and the quality and the economic value of the separate parts are not affected by the division. For example, a bag of maize or a jar of olive oil can be divided without the inherent value being diminished. An indivisible thing (such as a bull or a painting or a coat) cannot be divided. This distinction is relevant in the case of co-ownership. Only divisible things can be physically divided between the former co-owners. In the case of an indivisible thing (such as a house) one person would obtain ownership in respect of the thing and he would have to pay out the former co-owners for their share. This would also be applicable in the case of a pledge or the establishment of servitudes and partnerships.

2.2.5 Consumable things (*res consumptibiles*) and non-consumable things (*res non consumptibiles*)

Consumables (such as sugar or flour) are consumed by normal use whereas non-consumables (such as a hammer or an axe) are not consumed by use. This is an important distinction in the case of usufruct (see 1.3.3(a)), since this capacity cannot normally apply in respect of consumables. It is one of the requirements for usufruct that the nature of the thing may not be affected.

2.2.6 Movable things (*res mobiles*) and immovable things (*res immobiles*)

Immovable things were land and everything permanently attached to it (for example buildings, trees and plants). Movable things were all things that were not immovable. In Roman law this distinction was important in various instances: The periods of prescription differed for movables and immovables, movables and immovables were protected by different interdicts and only movables could be stolen.

2.2.7 Fruits

In law the term “fruits” refers to the economic benefits that flow from the normal use of a thing. The “fruits” become separate things when they are separated from the principal thing. *Fructus naturales* are distinguished from *fructus civiles*. The former were fruits produced in nature, such as fruits of an orchard, crops or young animals, wool or milk. The latter were fruits that were obtained only after the establishment of a contractual relationship, such as rent from a house or interest from an investment.

2.2.8 *Res Mancipi* and *res nec Mancipi*

We now come to the most important distinction between different kinds of things (in the view of the Romans at any rate), namely that between *res Mancipi* and *res nec Mancipi*.

The distinction between *res Mancipi* and *res nec Mancipi* existed long before the promulgation of the Twelve Tables in 450 BC. During the late Republican period the *praetor* began giving legal protection to persons who had acquired *res Mancipi* by an informal method of delivery (*traditio*) and the distinction

between *res Mancipi* and *res nec Mancipi* became blurred. It nevertheless survived until *Mancipatio* (a formal method of transfer of ownership) fell into disuse in the postclassical period. This distinction was ultimately formally abolished in AD 531 by Justinian.

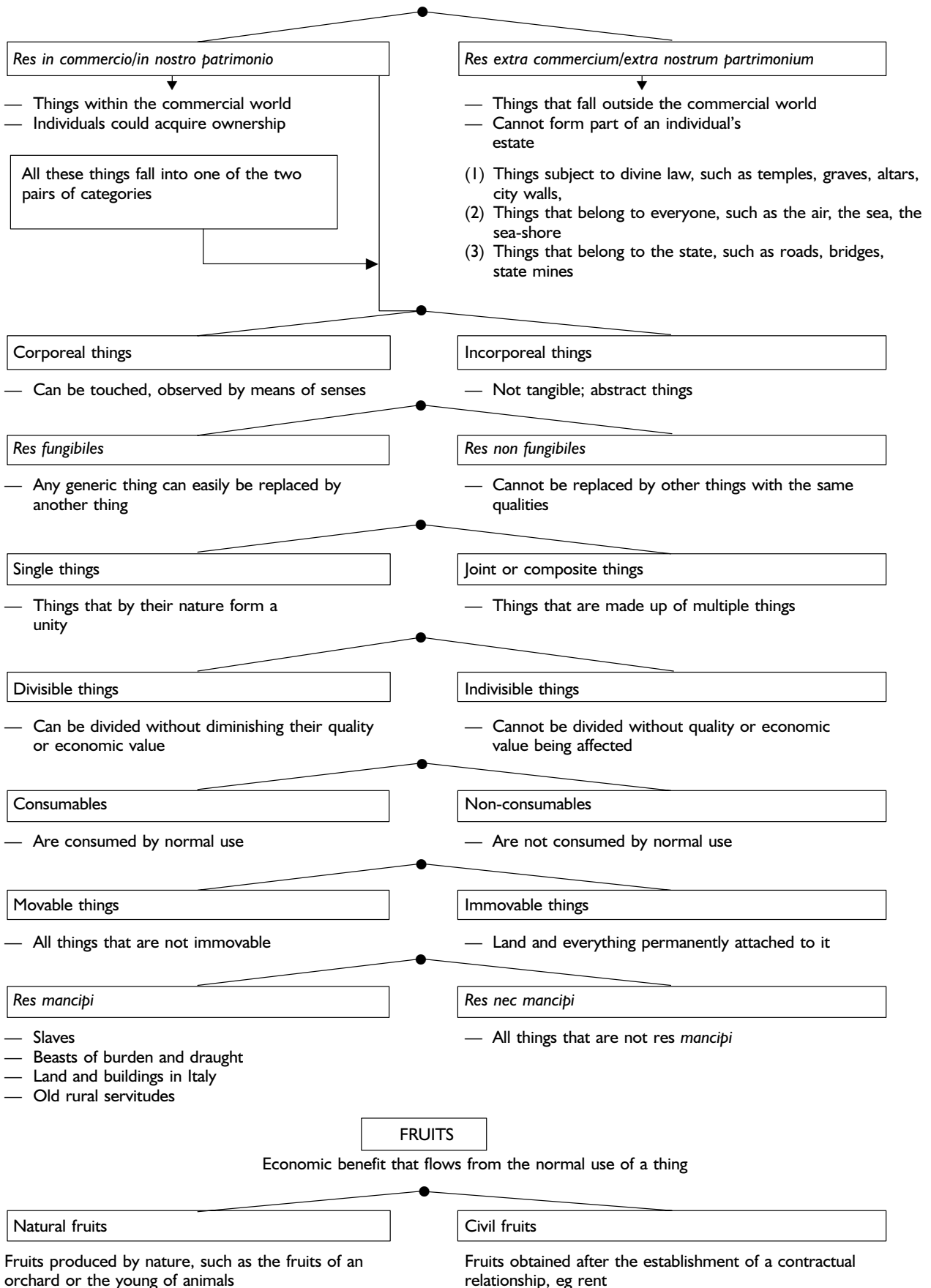
The importance of this distinction lay in the fact that full Roman ownership (*dominium*) of *res Mancipi* could only be transferred by the formal *Mancipatio* or *in iure cessio* modes of conveyance, whereas *res nec Mancipi* could be transferred by means of *traditio* (delivery) or by means of *in iure cessio*. The formal modes of conveyance of ownership could only be used by Roman citizens and the publicity attached to these modes of conveyance protected Roman citizens against the unauthorised alienation of their property.

The following things were regarded as *res Mancipi*: Land (and buildings) in Italy, certain rural praedial servitudes (such as *iter*, *actus*, *via en aquaeductus*) over such land, slaves and beasts of draught and burden (such as oxen, horses, mules and donkeys). It is not entirely clear why these things were classified as *res Mancipi*, but one reason that suggests itself is that during the early Roman period these were regarded as things of some economic importance. It is interesting to note that these things were associated with agriculture: After all Rome was initially a small agricultural settlement. All other things, irrespective of their economic value, were regarded as *res nec Mancipi*.

Study the following diagram carefully. It gives you an overview of the classification of things at a glance.

DIAGRAM I

Classification of things



Activity

Study Diagram 1 on page 8 thoroughly. You will have noticed that it is just a summary of what has been said in this chapter about the classification of things. See whether you can expand on the information provided under the various headings by adding more relevant information and try to explain, in your own words, what it means. Remember: This diagram will be very useful when you prepare for the examination since it will serve as a summary of the content of the chapter.

Feedback

Due to the nature of this activity it is not possible to give feedback. Remember however: The more complete and correct your own diagram is the better you will understand it and the more benefit you will reap from it in the rest of the guide where you will find many references to various kinds of things and their characteristics.

Self-evaluation questions

You should try to answer these questions on your own after you have studied the work in this chapter. If you have any difficulty with the questions, go back to the relevant section(s) and try again. All the information is contained in the chapter.

- 1 What is a thing? (2)
 - 2 What is a real right? What is a personal right? Name two differences between these rights. (You will find this question or variation thereof in almost every examination paper. It is of extreme importance that you answer the question correctly and that you understand it well. You will already have come across it in the Introduction to Law module. And you will find it again and again as your studies progress. These are difficult concepts, but they constitute cornerstones of our legal science.) (4)
-

In conclusion:

In this chapter you have learned what the important legal concepts “real right” and “personal right” mean and how to distinguish between them. You have also studied the classification of things and become aware that in Roman law it was important (for various reasons) to distinguish between the different kinds of things.

CHAPTER 2

Possession

GENERAL INTRODUCTION

In this chapter you will encounter the concept “possession”. Once we have explained it you will know that it has a specific meaning in law (that it is a technical term in law). It is a very important term in the context of the law of things (and in other legal fields that you will learn about later, such as criminal law). You will discover that there are various kinds of possession and that there is a specific way in which possession must be acquired, can be protected and is lost.

I The concept “possession”

In everyday language the word “possession” is used somewhat loosely. A layman might easily say that he possesses a house or a car or a book and then he really means that he is the owner of that thing, in other words that he has right of ownership in respect of that thing. For a jurist, “possession” has a specific technical meaning. The Latin word for possession is *possessio*. *Possessio*, which is derived from the verb *possidere*, means to possess or occupy. It therefore signifies the physical and factual control a person has over a corporeal thing. In practice the owner of a thing often has possession of his own thing (eg where the owner of a house occupies the house himself), but it is also possible that a person who is not the owner of a thing has control over it (eg the lessee of a house). It may be that a person is unlawfully in possession of a thing (eg a thief). Possession is therefore purely a physical fact. But this does not mean that the law and possession have nothing to do with one another.

On the contrary, without possession it was impossible, for example, to acquire ownership of a thing by means of prescription or some of the original forms of acquiring ownership (such as appropriation). Possession is also very important in determining who the plaintiff and the defendant are in any dispute involving ownership. Furthermore possession, as a factual given, is protected by the law and it also plays an important role in respect of limited real rights (as you will see when we deal with pledge (4.2.3) and servitude (4.1)) In other words, possession is a very important aspect of the law of things.

2 Different kinds of possession

2.1 Introduction

In Roman law we usually distinguish three kinds of possession, namely

possessio civilis (prescriptive possession), *possessio ad interdicta* (possession protected by interdicts) and *possessio naturalis* (natural possession).

2.2 *Possessio civilis* (possession leading to ownership by means of prescription)¹

Possessio civilis was protected physical control that could lead to full ownership (*dominium*) by means of prescription. This form of possession was obtained by means of a lawful ground (*iusta causa*). Examples of such lawful grounds include a contract of purchase and sale, a donation, a dowry and a legacy. A person who had obtained ownership of a thing in good faith (*bona fide*) on the strength of a lawful ground could obtain ownership of the thing under the *ius civile*. The possessor of the thing should really have obtained ownership of the thing immediately, but because of a formal defect of some kind this did not happen. In the first place it was possible that the person who should have transferred (or did transfer) ownership of the thing was not the owner. In terms of the *nemo plus iuris* rule he was therefore not permitted to transfer ownership. In the second place it was possible that ownership was not transferred by the correct method. For example, where the thing should have been delivered by means of *mancipatio* and it was transferred to the new “owner” by mere delivery. In both these cases the recipient would eventually become the owner of the thing upon expiry of the prescribed period of prescription. During the period of prescription the possession of the prospective acquirer of ownership (remember: This person had the intention of acquiring ownership of the thing) was protected by the possessory interdicts of the *praetor*.

2.3 *Possessio ad interdicta* (possession protected by interdicts)

The second group of protected possessors consisted mainly of a number of possessors who all possessed the thing with the intention of owning it (*animus domini*, that is the intention of possessing the thing permanently to the exclusion of all other persons). Persons who were entitled to possessory protection by means of interdicts could, if their possession of a thing were threatened or if they were deprived of possession of a thing, apply to the *praetor* for an interdict by means of which their factual position as possessors could be maintained or restored.

This group of persons included, first, the owner of a thing. The second group that received protection were persons with *possessio civilis*. These were people who obtained a thing from a person who was not the owner or who obtained a thing by means of an incorrect method of delivery and who possessed the thing in good faith. Thirdly, this group included possessors in bad faith (*mala fide* possessors), such as thieves or robbers. Bear in mind, however, that this protection was not applied against the true owner of the thing. The *mala fide* possessor was only protected against third parties.

¹ See 3.3.2 for more information about prescription.

In addition to these possessors, who all possessed the thing with the intention of becoming the owner, there were a number of other possessors who were also protected by interdicts. This group of persons, who had factual control over a thing without the intention of possessing it as the owner, included the following persons:

- The pledgee
- The long-term lease holder, that is a person with a real right to have or to acquire a building or something similar in or on top of another person's immovable thing.
- The *precario tenens*. When a person has received a thing in terms of an agreement (*precarium*) for use on condition that permission to use the thing may be revoked at any time by the grantor, he (the *precario tenens*) was protected against third parties but not against the grantor.
- The *sequester*. A *sequester* was a person to whom the possession of a disputed thing was entrusted, pending the outcome of the dispute. When the dispute was resolved, the *sequester* had to deliver the thing to the victorious party.

We do not know on what grounds the *praetor* granted protection to these persons, all of whom lacked the *animus domini*. They all possessed the things knowing that they would have to surrender possession at some time. Their positions were no different from those of a lessee, a borrower or a depositary. The latter three groups enjoyed no possessory protection, despite the fact that they must have been entitled to protection.

2.4 *Possessio naturalis* (natural possession)

The possession of persons who had physical control of a thing but who were not entitled to possessory interdicts was known as *possessio naturalis* (natural possession) or *detentio* (physical control). In these cases there was no question of possession in the legal sense; there was only physical control over the thing.

A person who exercised this form of control did so in terms of some form of agreement between himself and the person from whom he obtained factual control over the thing. Examples of such possessors were: The lessee in terms of a contract of lease, the borrower in terms of a contract of *commodatum* and the depositary in terms of a contract of *depositum*. In all these cases the possessor had to turn to the other contracting party (usually the owner of the thing) for possessory protection. If the person from whom he obtained possession had been a protected possessor, the latter would have been entitled to the possessory interdict. It has been said that the natural possessor or *detentor* exercised factual control on behalf of another person and therefore did not have the *animus domini*. If the possessor or *detentor* were to be deprived of possession, the person entitled to possession was the person on whose behalf he was in possession of the thing. The lessee was a natural possessor or *detentor* and the lessor was entitled to a possessory interdict if the former was deprived of his possession, because the lessor was held to possess by way of the lessee.

DIAGRAM 2

Different kinds of possession

<i>Possessio civilis</i>	<i>Possessio ad interdicta</i>	<i>Possessio naturalis</i>
<ul style="list-style-type: none"> — Protected possession — Could lead to <i>dominium</i> through prescription <ul style="list-style-type: none"> ● Possessor purely by prescription ● Bonitary owner (see 3.2.2) 	<ul style="list-style-type: none"> — Protected possession <ul style="list-style-type: none"> (a) Possessors who possessed the thing with the <i>animus domini</i>: <ul style="list-style-type: none"> (i) owner (ii) <i>mala fide</i> possessor (iii) <i>bona fide</i> possessor who could not obtain ownership through prescription (b) Possessors who lacked the <i>animus domini</i>: <ul style="list-style-type: none"> (i) pledgee (ii) long-term lease holder (iii) <i>precario tenens</i> (iv) <i>sequester</i> 	<ul style="list-style-type: none"> — Unprotected possession — Exercises control in terms of an agreement with the party from whom he obtained control of the thing — Examples <ul style="list-style-type: none"> ● lessee ● borrower ● <i>detentor</i>

Study this diagram carefully. It will give you an overview at a glance of the different kinds of possession.

Activity

- (a) In 45 BC Brutus sold a black horse, which he had stolen from Julius, to Gaius for 20 *denarii*. Ownership of the horse was transferred to Gaius by way of *mancipatio*. Does Gaius immediately obtain ownership of the horse? If not can he obtain ownership later on? Substantiate your answer.
- (b) Brutus hires Julius's house in Rome while Julius is spending some time on his farm. Gaius interferes with Brutus's possession of the house and eventually deprives him of his possession of the house by force. Does Brutus have any remedy?
- (c) In 18 BC Brutus buys a house from Julius. The house is transferred to Brutus by Julius, who was not the owner of the house, by means of *mancipatio*. Six months later Gaius, the true owner of the house, comes and deprives Brutus of possession of the house by force. Advise Brutus.

Feedback

- (a) Gaius would not obtain ownership of the horse. Although there was a legally valid cause (contract of purchase and sale) and the correct form of transfer of ownership (as required in 45 BC) was followed (*mancipatio*, since a horse was a *res mancipi*), ownership was not transferred from Brutus to Gaius. Although Gaius did buy the horse in good faith, it was a stolen thing and Brutus, the seller, was not the owner of the thing. Brutus was therefore not entitled to transfer ownership, because he did not have ownership and no-one can transfer more rights than he has himself. Since there was a stigma attached to the thing (it was a stolen thing), the thing

was not susceptible to prescription which could lead to acquisition of ownership.

- (b) In Roman law possession was protected by interdicts and not by actions. These interdicts were granted upon demand by the *praetor*, as an interim remedy. The question is now: Is Brutus, as the lessee, entitled to an interdict? As you have already learned, there were three kinds of possessors and two of them were entitled to interdicts, namely those with prescriptive possession (*possessio civilis*) and those with *possessio ad interdicta*. The third group were those with natural possession (*possessio naturalis*). These people were not entitled to possessory interdicts. The lessee only had natural possession and could therefore not approach the *praetor* for protection. It was the person on whose behalf he possessed, in other words the lessor, who was entitled to the interdict and who had to seek the protection of the *praetor* on behalf of the lessee.
- (c) Brutus could apply to the *praetor* for the *interdictum uti possidetis*. This interdict would be granted to him, even against the non-possessory owner of the house. The interdict prohibits the use of force against the possessor and in this way the *praetor* makes it possible for Brutus to recover possession of the house. The true owner, Gaius, has no defence against the interdict. Once Brutus's possession has been restored, Gaius can attempt to get his thing back through an action for the restoration of ownership.

3 Acquisition of possession

How is possession acquired? The jurist Paulus unambiguously states the following:

Possession is acquired *corpore* (physically) and *animo* (with intent); not only by intent or only by physical control (see *Digesta* 41.2.3 pr-1).¹

In other words, possession was obtained when a person established physical control over a thing with the intention of controlling it. Paulus was signifying by this definition that both the objective and outwardly perceptible action (the acquisition of physical control over the thing) and the subjective and outwardly imperceptible element (consisting of the intention to possess) were necessary for the establishment of possession.

The requirement of physical control was usually met when one person delivered a movable thing to another. In the case of things that belonged to no-one (*res nullius*), it was sufficient merely to take possession of them. When a large quantity of the particular kind of thing had to be delivered, such as a stack of wood, a pile of bricks or a herd of cattle, possession was established by posting a guard or marking the objects. The possession of things stored in

¹ In your study of the module FLS101V you will already have learned about Justinian's codification of the law, which was known as the *Corpus Iuris Civilis*. This code consists of four parts, namely the *Codex* (imperial constitutions), the *Digesta* (the opinions of the jurists), the *Institutiones* (students' textbook) and the *Novellae* (new legislation promulgated by Justinian). The codification of the first three parts was completed in AD 529 and the *Novellae* were added later.

cellars or warehouses (eg wine or olive oil or grain) was passed by handing over the key to the building. In the case of immovable things it was sufficient to point out the boundaries of the property, enter the property or hand over the keys to the gate.

The other element we mentioned above was the requirement of intent (*animus*). This indicated the presence of a legally valid intention to possess the thing (*animus possidendi*). There was no formal requirement, such as the making of an affidavit, for this element, but it was deduced from the circumstances surrounding the physical control over the thing. Note that possession could not be obtained by intent alone, but that it could be retained by intent alone. The classic example is the case of winter and summer pastures, which are physically controlled only for part of the year. Although the element of physical control did not exist for part of the year, possession continued theoretically.

4 Protection of possession

4.1 Introduction

Possessory protection increasingly became the responsibility of the *praetor*. A person whose possession had been interfered with or who had been deprived of possession appealed to the *praetor* for help. The *praetor* could then issue an interdict to maintain the possession of the person in question or to restore possession to him. This was a speedy procedure whereby a person was ordered to do something (eg to restore the possessor's possession) or prohibited from doing something (eg to stop disturbing a person's possession). Possession was therefore protected by means of interdicts and not by means of actions. It is interesting to note that this procedure has survived up to the present day and is used in much the same way.

When granting an interdict the *praetor* did not enquire whether the possessor's possession was lawful or not. The only question was whether the possessor's possession had been interfered with. Once the possessor's possessory position had been restored (by means of an interdict prohibiting further interference with possession or ordering the restitution of possession), the legal position of the possessor would be decided by means of the ordinary legal procedures. The use of an interdict was therefore not an indication of whether or not a person's possession was lawful. On the contrary, it only related to the factual position. Society is not served by self-help and by restoring the factual situation immediately the *praetor* forestalled this. On the one hand his function was to prevent disturbance of the public order and the peace and on the other to protect the personal interest of the plaintiff in not having his possession disturbed.

For the sake of convenience we divide the possessory interdicts into those aimed at maintaining or protecting possession and those aimed at restoring possession that had been lost. The first group were known as prohibitory interdicts and the last group as restitutory or mandatory interdicts. However, the same interdict could be either prohibitory or restitutory, depending on

circumstances, and this is something you should remember when classifying interdicts. We shall now briefly discuss the most important possessory interdicts.

4.2 *Interdictum uti possidetis*

This was an interdict applicable to immovable things. It protected the possessor who was in possession of the thing at the time when the interdict was requested. First, it protected the possessor whose possession had been disturbed. But it went further than this. It also protected the possessor who had lost his possession. The possessor of the immovable thing could apply successfully to the *praetor* for this interdict if he had been disturbed in his possession or deprived of his possession by force, secretly or as a result of a specific agreement (a holder *precario* held a movable or immovable thing for his use or enjoyment subject to revocation at any time by the grantor, ie, he held it on sufferance (*vi aut clam aut precario*)).

The following example makes this clearer:

Petrus bought a farm in good faith (*bona fide*) from Brutus (who was not the owner of the land). The farm was transferred to Petrus by means of *mancipatio*. As a result of the operation of the *nemo plus iuris* rule (in terms of which no-one can transfer more rights than he himself has) Petrus did not become the owner of the farm. He was merely a *possessor civilis*. If the true owner of the farm, Servus, tried to drive Petrus off the farm or deprive him of the farm by force, secretly or by demanding its return (*vi aut clam aut precario*), Petrus could apply to the *praetor* for an interdict, in this case the *interdictum uti possidetis*, in order to protect his possession. This interdict prohibited the use of force against the possessor who last possessed the thing *nec vi nec clam nec precario* (not by force, not secretly or on sufferance) towards the other party. The *praetor* therefore only allowed the person whose possession had been disturbed or who had been deprived of possession by the opposing party by force, secretly or by demanding its return to regain such possession. Since Petrus did not obtain the farm in any such way in this case, the *praetor* forbade Servus to interfere with Petrus's possession. Furthermore, Servus was not given the opportunity to defend himself by showing that he was the true owner of the farm.

This illustrates the function of the interdict as a preliminary procedure in the institution of an action to protect ownership. If the opposing party ignored the *praetor*'s order, he was initially punished with a fine and later with the restitution of the thing or its monetary value. This example clearly illustrates the fact that the possessor enjoyed extremely strong protection and that he was even protected against the non-possessory owner.

4.3 *Interdictum utrubi*

This interdict applied to movables. It was an order that was applicable both to the person who requested it and to the person against whom it was requested.

In this case the person protected was not necessarily the person who was in possession at the time when the interdict was applied for. The person who had been in possession of the thing for the longest period during the past year was regarded as the possessor and was protected. He was only protected, however, if he had not gained possession of the thing by force, secretly or on sufferance. The first question was therefore: Who was in possession of the thing for the longest period during the past year? Such person was placed in possession, irrespective of whether he had been in possession at the time when the interdict was instituted. The person who had been in possession of the thing for the shortest period could, however, gain possession of the thing if the other party had deprived him of possession by force, secretly or on sufferance.

Note that this was the position at the time of Gaius (AD 162, that is during the classical period). Justinian (AD 550, that is during the post-classical period) introduced changes that resulted in the requirements of the *interdictum utrubi* being made the same as those of the *interdictum uti possidetis*. The result was that the person who was in possession of the thing at the time when the interdict was requested was maintained in possession. Possession could, however, be granted to the other person if the current possessor had deprived the other person of possession by force, secretly or on sufferance.

4.4 The *interdictum unde vi* and the *interdictum unde vi armata*

These interdicts were available in cases where immovable things had been lost in a violent manner. In the case of the *interdictum unde vi*, during the classical period, the person against whom the interdict was directed could have raised the defence that the person who was driven from the property had possessed by force, secretly or on sufferance against him. This defence was not available in the case of the *interdictum unde vi armata*. This interdict related to immovable property of which possession had been taken away by force and in particular by armed force.

Justinian combined these two interdicts. The resulting *interdictum unde vi* did not distinguish between armed force and any other kind of force. It was applicable to immovable property and was available to any person who had been deprived of possession by force. His possession could be restored by means of this interdict.

Activity

Answer the following questions:

- (a) Which were the most important reasons that led to the institution of possessory protection?
 - (b) By whom and how was possession protected?
 - (c) Who could claim protection?
-

Feedback

- (a) There were several important reasons that gave rise to possessory protection. First, the *praetor* made official protection possible in order to prevent self-help. (You will remember that the grounds for granting an interdict were not whether or not the possessor's possession was lawful: The purpose was simply to restore possession, after which the possessor's legal position could be determined by means of an ordinary legal procedure.) Secondly, the personal interest of certain possessors who were lawfully in possession were protected.
- (b) Possession was protected by the *praetor*. In Roman law possession was protected by interdicts.
- (c) All prescriptive possessors (*possessores civiles*) and possessors who were entitled to interdicts (*possessores ad interdicta*) were entitled to protection by means of interdicts. Possessors who were not entitled to possessory protection (such as lessees) had to request someone else (in the case of a lessee the lessor of the thing who had leased it to him and on whose behalf he possessed it) to restore his possession.

5 Loss of possession

The general rule was that loss of possession, like the acquisition of possession, took place when a person lost physical control of a thing with the intention of losing such control, in other words *corpore et animo* (physically and with intent).

The jurist Paul (*Digesta* 41.2.8) said:

Just as no possession can be acquired except physically and with intent, so none is lost unless both elements are departed from.

The Roman jurists' pragmatic approach to law meant that here, too, exceptions to the rule were accepted. It was therefore accepted that possession could sometimes be lost *corpore* and sometimes *animo*. For example, possession was lost when the thing was stolen, when it was removed by force or simply lost. In none of these cases did the possessor have the intention of relinquishing his possession. Similarly, possession could be lost when the possessor retained control over the thing, but no longer had the necessary will to possess the thing.

Self-evaluation questions

After studying this section you should be able to answer the following questions. Try to answer the questions independently, as you did in the previous chapter. If you have any problems, go back to the relevant parts of the chapter and supplement or correct your answers if necessary. All the information is to be found in the chapter.

- (1) Why was it necessary to protect possession? (2)

- (2) Discuss the different kinds of possessors in Roman law and indicate which of them were entitled to possessory protection. (9)
 - (3) Name and discuss the different possessory interdicts. (6)
 - (4) Discuss the acquisition of possession. (4)
-

In conclusion:

In this chapter you learned what was meant under the important legal concept “possession”. Thereafter the different kinds of possession known to the Romans were discussed. Finally the acquisition and protection of possession were explained and discussed.

CHAPTER 3

Ownership

GENERAL INTRODUCTION

In this chapter we explain what ownership is and introduce you to the different kinds of ownership that were recognised in Roman law. We include a brief discussion of indigenous property rights, which you should find very interesting. This is followed by a fairly extensive discussion of the ways in which ownership could be acquired.

I Introductory remarks on ownership

I.1 What is ownership?

Ownership is probably the most important right one can have had over a thing. But what is the true nature of ownership? Theoretically speaking, ownership is the fullest possible right one could have over a corporeal thing. Logically, only the owner could have ownership over the thing. If other persons also have rights over that specific thing (limited real rights), such as the holders of servitudes or pledges, they necessarily have limited entitlements to the thing. Ownership is limited by the limited real rights other people may have over a thing, but the owner's entitlements are always more comprehensive than those of other persons with limited real rights.

It is also important to note that ownership is not a static concept. The extent and content of a person's ownership of a thing change when social conditions change. The content of ownership is determined by legal and sociological factors that include historical, economic, religious and philosophical considerations.

Ownership has been protected from early on in human history. The historical era, which commenced around 6 000 years ago and for which we have written records to refer to, has yielded early evidence of the protection of ownership. Our own Constitution provides in section 25 for the protection of ownership as a fundamental right:

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

I.2 Restrictions on ownership

The most general restrictions on ownership were (1) the existence of personal rights against the owner whereby his ownership was restricted and

(2) restricted real rights over the thing that he owned (to be dealt with later on).

In Roman law, from the earliest times, society imposed restrictions on ownership on moral or religious grounds. Provision was made for such restrictions in the Twelve Tables. Public interest was the deciding factor.

The Twelve Tables imposed restrictions on the use of an owner's thing in the interests of his neighbours. These restrictions imposed by the law were intended to prevent a person from exercising his ownership in a manner detrimental to his neighbours. For example, it was possible for a property owner to require his neighbour to remove the overhanging branches from a tree. Or he could require that the free flow of water or silt from his neighbour's land to his be reduced to a reasonable quantity in order to prevent damage to his land. These principles still apply in South African law today. The following important Appeal Court case serves as an example:

REGAL V AFRICAN SUPERSLATE (PTY) LTD 1963 (1) SA 102 (A)

In this case Mr R alleged that in developing some slate quarries, the previous owner of A's land, which bordered on his (Mr R's land), had left behind slate waste where it could be carried downstream by flood water from the Elands River. Mr R further alleged that this slate waste ended up in the river bed on his land and that Mr A had failed to take the necessary steps to prevent any further slate from being carried onto his (Mr R's) land by flood waters. With reference to *Holland v Scott* 1882 2 EDC 307 at 312, 317 and 331, the court decided that in all respects South African law concurs with English law on this point, since the English rulings, like ours, are based on the following principles of Roman law:

Prohibetur ne quis faciat in suo nocere possit alieni = a person is prevented from doing something with his own thing which might prejudice another, and

Sic utere tuo ut alienum non laedas = use your own (property) in such a manner that you do not damage the property of another

1.3 Co-ownership

It goes without saying that ownership is also restricted by co-ownership (joint ownership). In the case of co-ownership the right of each co-owner to the use and enjoyment of the specific thing is restricted by the equal rights of the other owner(s). Although the Romans knew more than one form of co-ownership, all that is important for your purposes is to take note of the *communio pro indiviso*, or *condominium*, since this form of co-ownership still exists in South African law today. This came into being when partners voluntarily entered into a joint undertaking. The entitlements of the joint owners were determined by the contract and different owners did not necessarily have equal shares in the joint property. Furthermore, they did not each possess a specific part or parts of the property. Each owner had an individual share in the property as a whole which entitled him to its use and enjoyment. Each joint owner had the right to alienate his undivided share in the property. Even today division of joint ownership can still be claimed by means of the *actio communi dividundo*.

2 Kinds of ownership

2.1 Civil ownership (*dominium ex iure Quiritium* = Quiritary ownership)

Originally the Romans only knew one type of ownership, namely civil ownership or *dominium ex iure Quiritium*. This form of ownership was only available to Roman citizens (*Quirites*) and it could only be acquired in terms of the *ius civile*. Furthermore, it could only be exercised over corporeal things *in commercio*, in other words, that were part of the commercial world (susceptible of private ownership) and without any defect (ownership could not, for example, be established over stolen goods).

Civil ownership or *dominium* could be established over *res Mancipi* as well as *res nec Mancipi*. (Do you still remember what these very important concepts mean? If not, go back to chapter 1 and make sure that you understand them.) Ownership of *res Mancipi* had to be transferred by a formal mode of transfer, whereas ownership of *res nec Mancipi* could be transferred in an informal manner. We return presently to the various ways in which ownership could be transferred and discuss them in detail. All that you need to remember at present is that up to a late stage of Roman legal history the distinction between *res Mancipi* and *res nec Mancipi* was maintained and that the former had to be transferred by a formal mode of transfer (*Mancipatio* or *in iure cessio*) whereas the latter could be informally (by means of delivery) transferred. If a specific thing was not transferred in the correct manner, civil ownership was not transferred. The practical implications of this emerge from the following set of facts:

Brutus sold and delivered an ox to Julius. They had been good friends for years and decided not to make use of the formal methods of transfer (*Mancipatio* or *in iure cessio*) since they knew each other well and foresaw no problems with the transaction. Shortly after delivering the ox, Brutus died. Gaius, his heir, was aware that Brutus had been the owner of the ox and heard by chance that the ox had not been transferred by one of the formal methods. He immediately concluded that he must be the owner of the ox (as Brutus's heir) because the formal method of transfer had not been followed. He claimed the ox from Julius. Because the ox had not been delivered in the correct way, Julius had in fact not become the civil owner and he had no defence against Gaius. He consequently had to return the ox to the true owner, Gaius.

This situation was clearly unsatisfactory. Brutus and Julius had acted in good faith and the intention was that Julius should become the owner. The *praetor* therefore decided to intervene and offer protection to people in Julius's position. We shall discuss this in greater detail in 3.3.2.

Activity

Brutus, a Roman citizen, is the owner of a big farm near Rome. Marble is discovered on the farm and he decides to start exploiting it commercially. This results in large-scale excavations and the Arno River, which runs across his farm and was formerly

used by his neighbour (Julius) to irrigate his lands, dams up as a result of the silt and waste. Could Julius expect Brutus to cease his activities or arrange for the normal flow of the river to be restored?

Feedback

Yes, in terms of the law of nuisance Julius could expect Brutus to use his land in a way that is not detrimental to Julius and Brutus would therefore have to organise the activities on his farm in such a way that Brutus was not adversely affected.

2.2 Praetorian or bonitary ownership

As we said in the previous paragraph, civil ownership (*dominium*) over *res mancipi* could only be transferred by means of one of the two formal modes of transferring ownership, namely *mancipatio* or *in iure cessio*. By the end of the Republican period (which extended from 510 BC to 27 BC), the Romans were increasingly ignoring this legal principle and numerous things that were classified as *res mancipi* were simply transferred by means of delivery (*traditio*). The above example clearly showed that, irrespective of the good intentions of the parties, civil ownership (*dominium*) was not transferred from one party to the other in such a case. In practice this had unfair consequences and towards the end of the Republican period the *praetor* decided to assist the (intended) transferee.

The *praetor* could not make laws, however, and neither could he change the provisions of the *ius civile* (the legal system that was applicable to Roman citizens and in terms of which transfer of ownership of *res mancipi* was supposed to take place by means of formal modes of transfer). He accommodated the transferee in another way, namely by giving him full legal protection (in 2.2 we explain how legal protection worked) and in this way effectively recognising a new form of ownership. This new form of ownership was called “praetorian” or “bonitary” ownership (derived from the Latin word “*bona*”: Meaning “goods”). This came about in cases where Roman citizens transferred things by methods of transfer that were not prescribed by the *ius civile*. You should note that a person who had in good faith obtained a thing from a non-owner while under the impression that he had become owner thereby was also regarded as a bonitary owner (see 3.3.2 *usucapio*).

As you will have realised by now, the transferee of the thing did not immediately obtain civil ownership (*dominium*) of it. He had to have possessed it for a prescribed period (which varied depending on whether the thing was a movable or an immovable thing and also depending on the period during which the transaction took place, since requirements were different in the preclassical and the classical periods, for example). The transferee was able to obtain civil ownership by means of acquisitive prescription. It is important to note that praetorian ownership was only a temporary measure. The reason for this is that prescription began to run as soon as the transferee obtained the thing in an informal manner and when the term of prescription expired he obtained full Roman ownership (*dominium*).

The transferee's position was insecure for the duration of the prescription period because the transferor (or his heir, as we saw above) still had civil ownership of the thing and could claim it at any time by having recourse to the *rei vindicatio* (that was the action by means of which ownership was protected). If the thing were to fall into the hands of a third person during this period, the transferee had no (legal) remedy by which to get it back.

To solve this unsatisfactory situation the *praetor* intervened and gave the transferee a defence (*exceptio*) against the owner's *rei vindicatio* as well as the *actio Publiciana*, an action by means of which the transferee could claim the thing if it fell into the hands of third parties. The *actio Publiciana* was a real action for the recovery of a thing of which possession had been lost before the person who was claiming the thing could acquire ownership by means of prescription. In other words, if a person who was in the process of obtaining ownership of a thing by means of prescription lost possession of the thing, he could recover it from the possessor by means of this action. This action was based on a fiction provided by the *praetor* that the period for prescription had already expired and that ownership had therefore already been established by prescription.

The result of these praetorian protective measures was that the transferee (that is the praetorian or bonitary owner) was the owner of the thing for all practical purposes during the period of prescription. If the civil owner reclaimed the thing, the recipient could raise the *exceptio rei venditae ac traditae* (that is the defence that the thing had been sold and delivered to him) against the civil owner. By means of the *actio Publiciana* the recipient could claim the thing from anyone, even the true owner if he had acquired from a non-owner. At the conclusion of the period of prescription he obtained civil ownership (*dominium ex iure Quiritium*).

In conclusion, please note that the *constitutio Antoniniana* (a constitution in which Emperor Caracalla decreed in AD 212 that virtually all the inhabitants of the Roman empire should receive citizenship) and the abolition of the distinction between *res Mancipi* and *res nec Mancipi* by Justinian resulted in the survival of only one form of ownership (*dominium*).

2.3 Ownership of foreigners (*peregrini*)

Foreigners (*peregrini*) or persons who were not Roman citizens usually did not have the right to participate in Roman commerce (that is they didn't have the *ius commercii*) and consequently could not obtain ownership of a thing. They were permitted to use the informal method of transferring ownership (*traditio* = delivery). This method was derived from the *ius gentium* (the law which was applicable to transactions between foreigners or to transactions between a foreigner and a Roman citizen). They obtained a different kind of ownership, however (not *dominium*), and therefore they could not enforce their ownership by means of the *rei vindicatio*. However, the *praetor* also intervened here in the interests of justice. By adjusting the wording of the *formula* (he instructed the judge to proceed on the assumption that the foreigner in question was a Roman citizen), he succeeded in affording foreigners effective legal protection as well.

A similar situation existed with regard to provincial land. Because this land belonged to the Roman people (*populus*) or to the emperor, an individual could not acquire ownership of it. Individuals could, however, acquire a right over part of the land in certain circumstances, which for all practical purposes amounted to ownership. This could be transferred by certain methods (those derived from the *ius gentium*) and the land could even be encumbered by a servitude. This form of ownership was protected by means of an action modelled on the *rei vindicatio*.

In South African law there is only one form of ownership and — as in Roman law — it is not absolute.

In *Gien v Gien* 1979 (2) SA 1113 (T) at 1120C ownership is defined as follows:

Eiendomsreg is die mees volledige reg wat 'n persoon ten opsigte van 'n saak kan hê. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat by wil. Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas. Daardie beperkings kan óf uit die objektiewe reg voortvloei óf dit kan bestaan in beperkings wat deur die regte van ander persone daarop geplaas word. Geen eienaar het dus altyd 'n onbeperkte bevoegdheid om na vrye welbehae en goeiddunke sy eiendomsbevoegdhede ten aansien van sy eiendom uit te oefen nie.

Activity

In 138 BC Brutus sold twelve horses and three donkeys to Julius. They were transferred to Julius by means of delivery (*traditio*).

- (a) Did Julius obtain ownership of the horses and donkeys?
 - (b) Would it have made a difference if the transaction had taken place in AD 540?
 - (c) Would it have made a difference if Julius had not been a Roman citizen?
 - (d) Would it have made a difference if Julius had not been a Roman citizen and the transaction had taken place in AD 248?
-

Feedback

- (a) Julius obtained bonitary ownership of the things. Horses and donkeys were *res Mancipi* and had to be delivered by means of either *Mancipatio* or *in iure cessio* in order for civil ownership (*dominium*) to be transferred.
- (b) It would have made a difference. Justinian officially abolished the distinction between *res Mancipi* and *res nec Mancipi* (which had long disappeared in practice) and there was only one kind of ownership, namely civil ownership. Julius would therefore have acquired civil ownership (*dominium*).
- (c) It would certainly have made a difference. Foreigners (that is *peregrini*, people who were inhabitants of the empire or who were simply there by

chance) could not obtain Roman ownership, but obtained a different form of ownership that enjoyed the protection of the *praetor*.

- (d) If the transaction had taken place in AD 248, Julius would have obtained bonitary ownership, since Caracalla conferred citizenship on all inhabitants of the Roman empire in AD 212 by means of the *Constitutio Antoniniana*. He would therefore have obtained the same kind of ownership as Julius in (a).

2.4 Indigenous property rights

2.4.1 Introduction

As mentioned above, section 25 of the Constitution guarantees the individual's property rights. For a proper understanding of ownership, it is necessary to try to establish the meaning of the concept "property" in indigenous law.

2.4.2 The importance of the social relationship

Land, cattle and personal property are the most important categories of property in indigenous law. The individual's rights in respect of each of these categories are determined by his social status and position in the group.

It is easiest to explain the categories of property in the context of the indigenous marriage and the family.

In simple terms, the following categories of property can be distinguished in the context of indigenous marriage and the family:

- family property
- household property
- personal property

2.4.3 Family property

The marital law of the indigenous peoples provides for polygamous or polygynous marriages. This means that every man can have more than one legal wife. Each wife in a polygamous household has a specific rank or status in relation to the other wives. A particular wife, together with her children, forms a separate unit that we could term a household.

The husband is traditionally the head of the family and the control and administration of the family property is his responsibility. Family property includes all property of and earnings by the head of the family (eg things inherited by him or which he has received as gifts; income obtained from work or through the provision of professional services or goods received as dowry [*lobolo*] in relation to the head of the family's granddaughters).

Family property must be used by the head of the family for the benefit of the whole family. Each member of the family, depending on his or her status within the group, is therefore entitled to share in the property. If the head of the family abuses his position, his powers can be taken away from him and transferred to another male relative.

2.4.4 Household property

Gifts received by a woman, goods earned by her or by members of the household, *lobolo* given in respect of a daughter and household things such as furniture and utensils, are examples of household property. Household property may also include the right to use specific agricultural land or to use a residence.

In the case of household property, the interests of the household as a whole are paramount. The property must be used to the advantage of the woman of that house and her children. No individual rights to property exist in the Western sense in respect of household property.

The head of the house (who is usually also the head of the family) must administer and control the household property in accordance with the principle that household property must be used to the advantage of the house. Household property must not be transferred from one household to another without a valid reason.

When the household property is insufficient, the family property must be used for the maintenance of the wife and children of that particular household.

2.4.5 Personal property

Goods which are only of use and value to a specific individual and not to the group as a whole can be described as personal property. The individual concerned has the exclusive right to use such property. Personal property is sometimes destroyed upon the death of the individual — this illustrates the personal nature of the property and the slight value that it has for the group as a whole.

There is a similarity between the powers an individual acquired over personal property and the Western viewpoint on personal property. Personal property appears to come closest to what the Roman jurists called *dominium*. There is no doubt, however, that personal property cannot be equated with *dominium*, because the existence of personal property still has to be seen in terms of the group.

2.4.6 Summary

The fact that indigenous rights to property are seen as social relations (and not as individual rights) implies that the rights have no meaning outside the context of the indigenous marriage and the family. Laws were passed during the apartheid era which brought about an enforced separation of racial groups into different areas. In terms of this legislation male family members who went to work in the cities could not be accompanied by their wives and children. As a result indigenous communities were disrupted and torn apart. There were implications for indigenous law, such as the practice that developed in some areas that the woman, as head of the family, could control the property.

It appears that nowadays, as a result of a variety of factors (urbanisation, dearth of tribal leadership, scarcity of land, poverty), indigenous rights to land are in crisis. The concept of individual ownership of movable as well as immovable goods is generally known among blacks. The result is that the question is often asked whether indigenous law or the general law of the land should apply. The

answer to this question is not yet clear and the finding of a suitable solution is going to require creativity and ingenuity. In the search for such a solution due consideration will have to be given to the foundations of South African law. A system in which provision is made for the recognition of individual ownership, subject to limitations in the interests of the group, as circumstances dictate, should theoretically be possible.

You will have to agree that it is almost impossible to understand or explain the indigenous concept of ownership on the basis of the Roman origin of South African law. The principal questions that should be put with regard to property are the following: Who controls it and who may use it? Regarding indigenous law, the answers to these questions must be sought in the broader family relationship and the marital relationship. In the case of the Roman law concept of property, on the other hand, the answers to these questions will depend on who the owner of the thing is.

It is also impossible to equate the position in early Roman law (which recognised only the powers of the *paterfamilias* [the head of the family under Roman law] over his wife, children, slaves and livestock) with the position in indigenous law. In the first place the Romans did not recognise polygamy. Secondly, the powers of the *paterfamilias* were absolute and were not limited by the requirement that he had to administer his property for the benefit of his *familia* (the family in Roman law). Thirdly, there was no possibility that an individual member of the *familia* could become the owner of certain things. A category such as the indigenous household property would therefore not have been possible in early Roman law.

For the vast majority of the South African population land is the most important category of things and property. It should be clear to you from the above discussion that it is inconceivable in terms of indigenous law for an individual to have ownership of land in the Western sense of the word.

If we take a closer look at the indigenous rights to land, it is possible to discern similarities to the traditional Western view of ownership. Despite these similarities, however, it is clear that the indigenous rights to land have a distinctive character and if they are to be characterised as ownership, this should not be confused with the Roman concept of ownership (*dominium*).

Although, strictly speaking, none of the indigenous rights to property fall within the concept of property as it was understood in Roman law (or the Western concept of property), it can be accepted that indigenous property rights fall within the scope of section 25 of the Constitution and consequently will be protected as fundamental rights.

3 The acquisition of ownership

3.1 Introduction

There were various ways in which ownership could be acquired under Roman law. The Romans distinguished between the modes of transfer of ownership derived from the *ius civile* and those derived from the *ius gentium*. Another

classification distinguished between original and derivative modes of transfer of ownership.

The Roman distinction between modes of transfer of ownership derived from the *ius civile* as distinct from those derived from the *ius gentium* will not be followed in our discussion, although in our discussion of any method of acquiring ownership we indicate whether it was derived from the *ius civile* or the *ius gentium*. The forms derived from the *ius civile* were the true Roman forms, grounded in Roman law. They were only applicable to Roman citizens and a few other inhabitants of the empire who had been granted the right to participate in trade (*ius commercii*). The modes derived from the *ius gentium* were accessible to both Roman citizens and foreigners (*peregrini*).

Because the distinction between original and derivative modes of acquiring ownership is still followed in modern law, we give preference to this classification. Original modes of acquisition of ownership applied when a person acquired ownership of a thing independently and without the assistance of any other person. In the small number of cases where there was a predecessor, he had rendered no assistance in the acquisition of ownership. The most important ways in which ownership could thus be acquired originally were prescription (*usucapio*), appropriation (*occupatio*), discovery of a treasure (*thesaurus*), acquisition of fruits (*acquisitio fructuum*), accession (*accessio*), mixing of non-fluids (*commixtio*) and fluids (*confusio*) and creation of a thing (*specificatio*). Derivative modes of acquisition of ownership are those modes where ownership passed from one person to another with the cooperation of the predecessor in title. Here *mancipatio*, *in iure cessio* and delivery (*traditio*) were available to the parties.

With the exception of delivery (*traditio*), which was derived from the *ius gentium*, all the derivative modes of acquisition of ownership fell under the *ius civile*. The original modes of acquisition of ownership were, with one exception, namely prescription (*usucapio*), all derived from the *ius gentium*. The original modes of acquisition of ownership derived from the *ius gentium* were all available to both Roman citizens and foreigners. The two derivative modes of acquiring ownership which were derived from the *ius civile* were not available to foreigners, however, but only to Roman citizens.

Before we discuss the different modes of transferring ownership in detail, we need to begin by examining a very important legal principle, namely that no-one can transfer more rights to another than he himself has.

This rule was formulated as follows by the great Roman jurist Ulpian (*Digesta* 50.17.54):

Nemo plus iuris ad alium transferre potest quam ipse haberet (no-one can transfer more rights to another than he himself has).

For the purposes of transfer of ownership this meant that ownership can only be transferred if the person who transferred it was himself the owner of the thing. This rule applied to all the derivative modes of transfer of ownership. When we come to the section on prescription (an original method of acquisition of ownership) you will see that a person who received a thing in good faith (*bona*

fide) from a non-owner could eventually acquire ownership through prescription if he had complied with all the requirements for prescription.

3.2 Derivative methods of acquisition of ownership

3.2.1 *Mancipatio*

Mancipatio was a formal juristic act that formed part of the *ius civile* and consequently was only available to Roman citizens. This meant that only a Roman citizen could serve as a buyer, a seller or a witness. It was used to acquire absolute rights in respect of children *in potestate* (under the authority of another person), as well as *res Mancipi* (that is land in Italy, slaves, beasts of draught and burden and certain old rural servitudes). The effect of *mancipatio* was that ownership of the things concerned passed if the things had been alienated by the owner. Where children under authority of their fathers were concerned, the acquirer obtained a power over the child, which was similar to that over slaves, and this was called *mancipium*. Regarding the use of *mancipatio* as a form of transfer of ownership, it is important to note the following:

Mancipatio was an ancient institution that had long been in existence when the law of the Twelve Tables was promulgated (450 BC). It dates back to a period when coined money was not yet in use and payment was made by paying over a specific amount of copper or bronze. This explains the important part played in the transaction by the person holding the scale and the scale on which the metal was weighed.

The procedure was very formal. Both parties, the person holding the scale and the thing had to be present in front of five witnesses. The witnesses had to be Roman citizens over the age of puberty. The transferee (buyer) had to hold the thing and formally declare that the thing belonged to him and that he had bought it with the copper or bronze with which he touched the scales. The copper or bronze was then handed over to the transferor (seller).

Mancipatio was therefore originally a formal cash sale as well as a mode of transferring ownership (*dominium*). Coined money was only used from the fourth century BC and it expanded the application of *mancipatio*. The symbolism of the scales was retained, but it was simply touched with a coin and it was no longer necessary to weigh off and hand over the exact amount of money. *Mancipatio* was also used to transfer ownership in the case of a sale on credit, or for any other reason. *Mancipatio* was furthermore used to bring about other legal consequences, such as the constitution of servitudes, the emancipation and adoption of children, the creation of marital power over a wife and the execution of a will.

Ownership of *res Mancipi* was transferred by the *mancipatio* procedure provided the transferor (owner), the transferee (new owner) and the witnesses were all Roman citizens (or had formally received the right to participate in Roman commerce). Further, only persons under paternal authority and *res Mancipi* could be transferred by means of this legal procedure. The distinction between *res Mancipi* and *res nec Mancipi* applied from early on and remained important from the preclassical period until deep into the postclassical period.

As we said previously, *mancipatio* was initially a cash sale and the transfer of

ownership was effected simultaneously with the payment of the sum of money in cash. Once this symbolic sale had become the rule, it came to be used in this form for the transfer of ownership. The reason (*causa*) for the transfer of ownership by means of *mancipatio* could have taken a number of forms. Examples included a cash sale, a donation, the provision of a dowry, agreements arising from real security, the performance of obligations arising from a verbal contract, a legacy, et cetera. Note that *mancipatio* may be regarded as an abstract mode of transfer of ownership. The reason for this statement is that if the underlying agreement (eg the contract of purchase and sale, the donation or the testamentary disposition) were to prove invalid, ownership would nevertheless pass to the recipient. The formal act as such brought about the legal consequences and the invalidity of the reason or *causa* did not affect the transfer of ownership. *Mancipatio* was therefore abstract, as we said above — in other words, it was not dependent on a valid cause or reason for the transfer.

It is also important that you should remember that the *mancipatio* procedure simply gave effect to the intention of the parties to create a real right. *Mancipatio* was therefore not a contract or agreement. The procedure usually consisted of the following two steps:

-
1. Agreement (eg a contract of purchase and sale)
+
 2. *Mancipatio*
= Establishment of a real right
-

During the classical period (ie 27 BC–AD 284) the informal mode of transferring ownership (delivery = *traditio*) gradually supplanted the formal *mancipatio* in practice. Long before Justinian removed it from the classical sources and formally abolished it, *mancipatio* had fallen into disuse.

3.2.2 *In iure cessio*

In iure cessio (cession before the *praetor*) was already in existence at the time of the Twelve Tables.¹ Like *mancipatio*, it was a formal act that formed part of the *ius civile* and could only be used by Roman citizens. All kinds of things, that is *res Mancipi* and *res nec Mancipi*, as well as incorporeal things, could be transferred in this way.

Both parties and the thing to be transferred (or a symbol thereof) had to appear before the *praetor*. The transferee took hold of the thing and formally declared that he was the owner. The transferor did not contest this and the *praetor* then awarded the thing to the transferee.

Ownership was transferred in this way, but it was also used to effect the cession or extinction of certain rights. *In iure cessio* could, like *mancipatio*,

¹ The first codification of Roman law was the Twelve Tables. The Twelve Tables were compiled at the request of the people who desired to have a knowledge of the law. It was adopted in 450 BC by the popular assembly and then promulgated as law. The tables (which were made of wood or bronze) were placed on the marketplace in Rome for everyone to read.

have any reason or cause and was independent of the validity of such cause. Therefore it was also an abstract mode of transfer of ownership. It is important to remember that civil ownership only passed in the case of *in iure cessio* if the person who was transferring or delivering the thing was the owner. The *nemo plus iuris* rule was therefore also applicable here.

You should bear in mind that the formal act (*in iure cessio*), like *mancipatio*, followed a preexisting agreement or cause. Therefore we can also speak of two steps.

-
- | | |
|---|-----------------------------------|
| 1 | Agreement (eg a contract of sale) |
| | + |
| 2 | <i>In iure cessio</i> |
| | = |
| | Establishment of a real right |
-

This form of transfer of ownership fell into disuse at the end of the classical period and was formally abolished by Justinian.

Mancipatio and *in iure cessio* are considered to be abstract modes of transfer of ownership. This means that even if the underlying reason (*causa*) (eg the contract of sale) was invalid, ownership could still pass if the parties complied with the necessary formalities.

3.2.3 *Traditio ex iusta causa* (delivery on a lawful ground)

Within the context of the acquisition of ownership, delivery (or *traditio*) indicated the transfer of ownership over a thing through delivery of the thing by the owner (the transferor) to another person (the transferee). Although this transaction in essence consisted of the transfer of possession, it should be clear to you that ownership did not pass every time one person handed over a thing to another. For example, Brutus could have handed over his chariot to Julius to take part in a race on his behalf or Gaius could have handed his house over to Caesar, who had rented it. In both cases all that passed was possession, not ownership. In order to transfer ownership the transferor (owner) must have intended to transfer ownership of the thing to the recipient and the recipient must have had the intention of receiving ownership. This principle is still applicable in South African law today:

Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein 1980 (3) SA 917 (A)

In this case Jansen JA expressed himself as follows on the transfer of movables:

See Codex 2.3.20:

Traditionibus et usucapionibus dominia rerum, non nudis pactis transferentur. Ownership cannot be transferred by agreement alone: Delivery must also take place. The opposite is also true: Delivery alone is not sufficient. It must be accompanied by an agreement between the transferor and transferee that ownership will be transferred.

As in the case of *mancipatio* and *in iure cessio* there were two steps involved in delivery (*traditio*):

-
- | | |
|---|---|
| 1 | A valid reason/cause (<i>iusta causa</i>) |
| | + |
| 2 | Delivery (<i>traditio</i>) |
| | = |
| | Establishment of a real right (ownership) |
-

It was also important to note that delivery, unlike *mancipatio* and *in iure cessio*, was a causal mode of transfer of ownership. This means that ownership only passed if there was a valid reason for the transfer. The difference between the abstract and the causal methods of transfer of ownership can be explained as follows: Brutus hands over (delivers) a silver cup to Julius. This does not necessarily mean that Brutus has transferred ownership to Julius. Brutus could have handed it over with the intention of lending it to Julius or so that Julius could repair it or so that Julius could give it to Gaius or so that Julius could melt it down and turn it into a plate. In the case of *mancipatio* and *in iure cessio* the intention of the parties was clearly apparent from the formal acts prescribed and compliance with these acts necessarily caused ownership to pass from one person to another. In the case of delivery, however, the intention of the parties was not apparent from their acts. Ownership therefore did not pass unless there was a valid reason for the transfer.

Traditio (or delivery) was an informal mode of transfer of ownership that was derived from the *ius gentium* (the Roman legal system developed by the *praetor peregrinus* and applicable to all persons in the Roman empire, irrespective of whether they were citizens or not). It dated from the period of the early *ius civile* (the Roman legal system that was only applicable to Roman citizens). By the time of Justinian it was the only mode of transferring ownership, since both *mancipatio* and *in iure cessio* had long since fallen into disuse by that time.

The eminent Roman jurist Paul expressed himself as follows on this matter. See *Digesta* 41.1.31 *pr*:

Bare delivery of itself never transfers ownership, but only when there is a prior sale or other ground on account of which the delivery follows.

What was a valid reason for transfer? For the purposes of transfer of ownership one could say that it meant a transaction on the basis of which ownership would normally pass. The following transactions were considered to be sufficient for the transfer of ownership:

- A contract of sale
- A donation
- The constitution of a dowry

- The fulfilment of a valid obligation that has the transfer of ownership as its object, namely a contract of *mutuum* (see 6.1.1)

Traditio could be used in various cases. It was used firstly to transfer ownership of *res nec Mancipi* (between Roman citizens, between foreigners and lastly also between Romans and foreigners). Secondly it could be used for the transfer of provincial land. Thirdly, it was the means by which foreigners obtained ownership. And fourthly, from the late Republican period it could be used for the acquisition of bonitary ownership over *res Mancipi*. In the case of *res nec Mancipi* delivery resulted in the immediate transfer of ownership (*dominium*). In the case of *res Mancipi*, as you know by now, delivery led only to the acquisition of bonitary ownership, which could eventually lead to civil ownership after a period of prescription. After Justinian had abolished the distinction between *res Mancipi* and *res nec Mancipi*, *traditio* resulted in the transfer of civil ownership (*dominium*) in all cases.

Traditio (delivery or handing over) could take various forms. It is obvious that a bag of wheat and a farm could not be delivered in the same way. The Romans recognised the following forms of *traditio*:

(a) *Simple delivery or delivery from the one hand to the other (traditio de manu in manum)*

This was the simplest form of *traditio* and it referred to the physical handing over of the thing from one person to another. For example, if A bought a loaf of bread from B and B handed the loaf to him over the counter, this was known as simple delivery.

(b) *Delivery with the long hand (traditio longa manu)*

This form of delivery took place when the thing that had to be delivered or transferred was simply pointed out, with the proviso that it was within sight of the parties and that the person acquiring it could immediately establish control over it. This was the logical method when the thing could not easily be handled. It was considered sufficient, for example, to point out the boundaries of a piece of land, or to point to a ship or a herd of cattle.

The following case from South African case law serves as an example:

Groenewald v Van der Merwe 1917 AD 233

In this case, which concerned the delivery of a threshing machine, Chief Justice Innes expressed the following opinion:

But physical prehension is not essential if the subject-matter is placed in presence of the would-be possessor in such circumstances that he and he alone can deal with it at pleasure. In that way the physical element is sufficiently supplied; and if the mind of the transferee contemplates and desires so to deal with it, the transfer of possession — that is the delivery — is in law complete.

See also the text to which Innes CJ referred (Paul *Digesta* 41.2.1.21):

For he says that there is no need for actual physical contact in order that possession may be taken; but that it can be done by sight and intent is demonstrated in the case of those things

which, because of their great weight, cannot be moved, columns, for instance; for they are regarded as delivered, if the parties agree on their transfer in the presence of the thing ...

(c) Delivery with the short hand (traditio brevi manu)

There were also cases where delivery was even simpler and it was not even necessary to physically hand the thing over to the transferee or to point it out. This was the case where the transferee was already physically in control of the thing. If, for example, the lessee of a house were to buy the house from the owner, it was not necessary for him to hand the house back to the former owner before the house was formally delivered to him. As a result of the fact that the lessee (the new owner) already had control over the thing, an agreement between the parties was considered sufficient for the lessee, to obtain control as the owner. (Note: in modern South African law transfer of a house takes place by means of registration.)

(d) Constitutum possessorium (delivery with the intention to possess forthwith on behalf of the transferee)

Let us use an example to explain this form of delivery. Brutus buys a house from Julius. When the house is sold to Brutus, ownership passes to him. But they immediately conclude a deed of lease in terms of which the original owner, Julius, leases the house from the new owner, Brutus. Instead of the house being delivered to Brutus first (when he buys it) and then returned to Julius (when he hires it), Julius retains uninterrupted control of the house. The mere intention of the parties allows possession of the house to pass. As in the case of delivery with the short hand, the parties need not hand the thing back and forth.

(e) Symbolic delivery (traditio symbolica)

In the latter years of the Roman empire recognition was also given to several forms of delivery that can best be described as symbolic. In these cases true control of the thing was not transferred but the transfer of possession took place through a symbolic act. We owe our knowledge of an important example of these symbolic forms of delivery to the increasing importance of writing in the latter years of the Roman empire. It became increasingly common to record any legal act that had been performed in writing as evidence. Suppose, for example, that Brutus donates a thing to Julius. A document is drawn up as evidence and handed to Julius. The delivery of this document gradually replaced the delivery of the thing as a means of transfer of ownership. The document was used by Julius as proof of ownership, which means that ownership passed by delivery of the document. The thing itself was not necessarily delivered and possession might even have remained with Brutus. Julius could therefore have obtained ownership of the thing without having had possession. Although this was regarded as a form of delivery, it was not delivery in the strict sense of the word because possession did not necessarily pass. The document simply served as a symbol of the thing, which is why we speak of symbolic delivery.

Another example:

Things which could not physically be handed over due to their nature or size, were handed over symbolically in the sense that a token or symbol was given. This indicated that transfer of physical control had taken place. A good example would be transfer of the keys to a warehouse.

Emperor Justinian (who ruled from AD 527 to 565) laid down specific rules for cases where *traditio* did not take place on the basis of a contract of sale. It was determined that, apart from the delivery of the thing bought, the purchase sum had to have been paid as well or credit had to have been granted or security for payment provided. In other words, unless one of these three requirements was met, ownership of the thing was not transferred when the thing was delivered.

We pointed out above that delivery (*traditio*) was a causal method of transfer of ownership. The transfer of ownership was therefore dependent on the existence of a valid reason or cause. But suppose there had been a misunderstanding and the transferor thought that the delivery had taken place in terms of a contract of sale, whereas the transferee thought that he had received the thing as a gift? The jurists of the classical period could not reach agreement on this problem. Justinian solved the problem by deciding that provided both parties intended ownership of the thing to be transferred, a putative *causa* of this kind was sufficient. In the above example ownership would have passed if the thing had been delivered.

Today, in South African law, ownership is transferred if one person has delivered the thing to another, provided both parties had the serious intention to pass ownership from one person to the other. The fact that the reason or cause that gave rise to such delivery was invalid does not prevent the transfer of ownership.

Activity

Which form of delivery is applicable in the following examples?

- (a) Brutus buys a flock of sheep from Julius. The sheep cannot be taken to Brutus's farm immediately and Brutus therefore leaves a shepherd with the flock to see to the sheep.
 - (b) Brutus leases a house from Julius. Two years later Julius puts the house on the market and Brutus buys it.
 - (c) Brutus sells his house to Julius, but the parties agree that Brutus will lease the house from Julius for a period of six months.
 - (d) Brutus buys a farm from Julius. The details of the transaction are put in writing and the document is delivered to Brutus.
-

Feedback

- (a) Delivery with the long hand
- (b) Delivery with the short hand

- (c) *Constitutum possessorium*
- (d) Symbolic delivery

3.3 Original methods of acquiring ownership

3.3.1 Introduction

In the previous section the derivative methods of acquiring ownership were discussed, in other words those cases where the cooperation and presence of the predecessor in title were necessary in order for ownership to pass. It was, however, also possible for ownership of a thing to be acquired without the cooperation of and independently of another person. It is possible that there was no previous owner or if there was that he did not cooperate in the process of acquisition. This is known as original acquisition of ownership. The Romans recognised a number of such original methods of acquiring ownership and they are all recognised in more or less identical forms in South African law.

3.3.2 Prescription (*usucapio*)

(a) Introduction

This form of acquisition of ownership dates back to the Twelve Tables. It was laid down in the Twelve Tables that if a person had enjoyed uninterrupted possession of a piece of land for a period of two years pursuant to a *mancipatio* act or had enjoyed uninterrupted possession of any other thing for at least one year, he became the owner. This applied only in respect of *res Mancipi*, however, and only to Roman citizens. Ownership of stolen property could not be acquired in this way either.

In the classical period these rules were extended and it was possible for ownership of a thing (*res Mancipi* and *res nec Mancipi*) which had been transferred in any way from a non-owner to another person to pass to the acquirer under certain circumstances. Furthermore a person to whom a *res Mancipi* had been transferred by means of *traditio* (delivery) instead of *mancipatio* or *in iure cessio* could also obtain civil ownership (*dominium*) of the thing in this way.

Prescription or *usucapio* therefore ensured that the possessor of a thing who was not the owner but who had factually possessed the thing for a certain period of time could ultimately become its lawful owner. In other words, prescription made it possible for a person to possess a thing that had belonged to another person and to become its owner upon expiry of a prescribed period. At the end of the period of prescription the ownership of the previous owner was terminated and vested in the new owner. Accordingly, prescription ensured that the legal situation was brought into harmony with the factual situation. In law this is known as acquisitive prescription.

There were various reasons why a legal institution like prescription was required.

- The **first** need it had to meet was legal certainty. The Roman jurist Gaius expressed this as follows (*Digesta* 41.3.1):

Usucapio was introduced for the public weal, to wit, that the ownership of certain things should not be for a long period, possibly permanently, uncertain, granted that the period of time prescribed should suffice for owners to inquire after their property.

In practice it was important to know who the owner of a thing was (cf p 31 with reference to the *nemo plus iuris* rule). A person who was not the owner could not transfer ownership and this had serious consequences for the prospective purchaser who could not obtain ownership immediately. It also had far-reaching implications in the case of an application for protection of possession or ownership. Prescription, that is acquisitive prescription, as an original method of acquiring ownership, therefore fulfilled the important legal function of ensuring legal certainty. This legal institution made it possible to determine with certainty, upon expiry of a particular prescribed period, who the owner of a thing was. In other words uncertainty did not prevail for an indeterminate period.

- In the **second** place prescription considerably lessened the burden that rested on the plaintiff to prove his ownership. A plaintiff who claimed to be the owner of the thing had only to prove that he (or one of his predecessors in title) had fulfilled all the requirements for prescription. If it had not been for *usucapio*, the plaintiff would have had to prove the ownership of his predecessor in title, which he would only have been able to do if in turn he had been able to prove the ownership of his predecessor, etc.
- In the **third** place, in classical and preclassical Roman law, prescription transformed bonitary ownership into civil ownership (*dominium*) (see above).

In a small and unsophisticated society like that of Rome at the time of the early *ius civile*, the periods specified in the Twelve Tables (one year for movables and two years for immovable things) were sufficient to give the owner the opportunity to claim his thing or assert his ownership. As the borders of the Empire expanded and the population grew, it was realised that the mere expiry of a relatively short period of time as the only requirement for the acquisition of ownership was not realistic. A number of further requirements were developed which had to be fulfilled before ownership could be acquired by means of prescription. We shall now discuss these important requirements in greater detail.

(b) *Requirements for prescription*

(i) **The thing had to be capable of ownership (*res habilis*)**

Only things which were capable of civil ownership could be acquired by *usucapio*. Things that were outside commerce (eg cemeteries or temples) could consequently not be acquired by means of prescription. Furthermore, under the *lex Atinia* stolen goods could not be acquired

by prescription, and the *lex Iulia* and *lex Plautia* applied a similar exception to things taken by force.

(ii) **There had to be a cause that the law normally recognised as sufficient for the transfer of ownership (*iusta causa*, or *iustus titulus usucapionis* = a valid reason or legal ground for prescription)**

A number of such causes (*causae*) were recognised: Purchase and sale (*pro emptore*), where the thing had been received as performance in terms of an obligation (*pro soluto*), where a thing had been abandoned by a person who was not its owner (*pro derelicto*), where a thing had been received as a gift (*pro donato*), where a thing had been received as an inheritance (*pro herede*), where a thing had been received as part of a dowry (*pro dote*), where a thing had been received as a legacy (*pro legato*) and cases that could not be classified under any of the above but were considered to be unique or one of its kind (*sui generis*). The latter category also included cases where a putative title was in question (that is cases where the title was not valid objectively speaking, but the acquirer had really believed that it was a legally valid title). During the classical period it was only in exceptional cases that the jurists allowed a putative *causa*. It is uncertain whether Justinian recognised a putative *causa* or not. The texts are contradictory:

Justinian *Institutes* 2.6.11:

A mistake over a false cause will not give rise to usucapion, as when a person possesses a thing, thinking that he has bought it, when he has not, or that it has been given him as a gift when that is not so.

Compare the following:

Digesta 41.4.2.15:

If I should buy something from a *pupillus* without his tutor's *auctoritas*, believing him to be over puberty, we hold usucapion to run so that here belief prevails over fact ...
and:

Digesta 41.4.2.16:

If I buy something from a lunatic whom I think to be sane, it is settled that on grounds of convenience, I will usucapt it, although the sale is void ...

(iii) **Good faith (*bona fides*)**

The recipient must have taken the thing into his possession in good faith (*bona fide*). There must have been a reasonable belief on the possessor's part that he had obtained ownership of the thing at the time when possession was transferred to him. In other words, he should have believed that he received the thing from the owner or from a person who had the capacity to transfer it on behalf of the owner (eg a guardian or a curator).

See the following text of Modestinus from the *Digesta* (50.16.109):

“A purchaser in good faith” seems to be someone who did not know that the thing belonged

to someone else or thought that the seller had the right to sell, for instance, a procurator or tutor.

Good faith or *bona fides* was required only at the time when the thing was acquired. If the possessor became aware at a later stage during the period of prescription that he was not really the owner of the thing, this had no influence on the course of the period of prescription. This legal principle runs as follows: Supervening bad faith does no harm (*mala fides superveniens non nocet*).

This implies that good faith was a purely subjective element. In other words, it was merely an indication of the recipient's subjective belief that he had not infringed on the rights of another person. The assumption was that good faith existed if the thing had been obtained on the grounds of a *iusta causa*. Good faith and a *iusta causa* usually went hand in hand and the one was not likely to be present without the other. Unless the contrary was proved, good faith was presumed to have existed in the presence of a *iusta causa* (valid reason).

The application of the good faith rule in respect of prescription may be illustrated with reference to the following example. Suppose Brutus buys a thing from Julius in good faith, but Julius is not the owner of the thing. Two months after the thing has been delivered to him, he hears that Julius was not the owner. He thereafter loses possession of the thing. He had not acquired ownership of the thing through prescription since the prescription period had not yet expired. If he were to regain possession of the thing, his lack of good faith (because now he knows that Julius is not the owner) would prevent him from trying to obtain ownership of the thing through prescription (that is he would not be able to usucapt).

See the following text of Paul from the *Digesta* (41.3.15.2) on this matter:

If a possessor in good faith should learn, before completing usucapion, that the thing belongs to a third party and then, having lost possession, subsequently regain it, he cannot usucapt because the commencement of his second possession is flawed.

(iv) **Possession (*possessio*)**

Possession or physical control of the thing of which ownership is being obtained by means of prescription is very important. Revise the relevant sections on the acquisition and loss of possession in the previous chapter (cf 2.3 and 2.5) before you read further.

It is very important to note that possession during the period of prescription had to have been uninterrupted. Loss of possession during the period of prescription was known as *usurpatio*, which meant a break or interruption in possession. *Usurpatio* could take two forms. The first was *usurpatio naturalis* or natural interruption, which occurred when possession was physically lost. If the possessor voluntarily relinquished possession of the thing to another, that is where he transferred it to another person, prescription came to an end. The new possessor had to

start complying with the requirements for possession anew. During the reigns of Septimius Severus and Caracalla (at the beginning of the third century AD) certain changes were made to this rule. First, an heir was allowed to complete the period of prescription begun by the testator by possessing the thing for the remaining part of the term only. Secondly, a buyer who had bought a thing in good faith from a person who was in the process of acquiring ownership by means of prescription only had to complete the remaining part of the prescribed term of prescription to acquire ownership of the thing. The periods of the two possessors were added (*accessio possessionum* = combining periods of holding of predecessors in title). The second form of *usurpatio* was *usurpatio civilis* or civil interruption, where possession was lost as a result of the successful institution of an action (especially the *rei vindicatio*, about which more later in 3.4.2) against the possessor.

(v) **Period of prescription (*tempus*)**

The period of prescription was originally brief. In terms of the Twelve Tables it was only necessary to possess movables for one year and immovables (land) for two years. In the imperial period and also during the Republic, when the community and the Roman territory were still small, there was probably quite enough time for owners to find and trace their property. But even during the classical period, when Rome had a population of one million people spread over a vast area, these brief periods of prescription still applied, apparently without causing any problems.

Several changes were introduced during the Justinian period, however. As a starting point he accepted the five requirements laid down during the classical period. Subsequently, however, he extended the period of prescription for movables to three years. In the case of immovables he extended the period to ten years of uninterrupted possession of the thing where the original owner resided in the same Roman province and to twenty years where the possessor and the owner resided in different provinces. The requirement for longer periods of prescription was partly alleviated since Justinian generally allowed later possessors to add the periods of prescription of their predecessors in title to their own.

(c) *Concluding remarks*

We should like to remind you that prescription was a legal institution derived from the *ius civile*. It was therefore only applicable to Roman citizens and foreigners who had been granted the right to enter into commercial transactions with Roman citizens in terms of Roman law. Furthermore, it was only applicable to things within commerce that could be acquired in ownership (*res in commercio*).

Consequently in the postclassical period (AD 284–565) another form of prescription developed that was applied in cases where the original form of prescription was not used, namely in respect of provincial land and things in the possession of foreigners. This was called “prescription over a long period” or *longi temporis praescriptio*. The requirements were more or less the same as

for the ordinary form of prescription. Uninterrupted possession for a period of ten years (where the parties lived in the same province) or twenty years (where the parties did not live in the same province) was required, however. This form of prescription was really a form of extinctive prescription. In other words at the end of the term of prescription the possessor acquired only a defence which protected him against the claim of the original owner.

In South African law prescription is still recognised today as a method of acquiring ownership. In *Pienaar v Rabie* 1983 (3) SA 126 (A) the court stated that the aim of prescription is not to punish a negligent owner but to ensure legal certainty. The purpose of prescription, and therefore also the need that gave rise to this legal institution in the first place, remains — almost 2 500 years after the promulgation of the Twelve Tables — legal certainty!

3.3.3 Appropriation (*occupatio*)

The next original mode of acquiring ownership that we will discuss is *occupatio* or appropriation. This form of acquisition of ownership was derived from the *ius gentium*. The first person who took possession of a *res nullius*, that is a thing that was owned by no-one, with the intention of becoming the owner became the owner of the thing by taking possession.

Gaius (*Institutiones* 2.66) offered the following explanation:

But it is not only those things that become ours by delivery that we acquire under natural law, but also those which we acquire by occupation (by being the first takers), because they were previously no one's property, for example everything captured on land, in the sea or in the air.

It is possible to distinguish between two kinds of *res nullius*:

- Things which were never before owned by anyone. Examples of these are wild animals, bees, fish, newly formed islands in the sea and things (eg shells) found on the beach.
- Abandoned things, in other words things that the owner had thrown away or discarded with the intention of relinquishing his ownership (*res derelictae*). Things that were simply lost (*res deperditae*), in other words things that the owner simply did not know where to find at that particular time, were not regarded as *res nullius*.

In *Reck v Mills* 1990 (1) SA 751 (A) Mills approached the court for an interdict against the defendants in respect of control over parts of a shipwreck, to which both Mills and the defendants laid claim. With reference to *Institutes* 2.1.47, the court decided that ownership of the thing is lost when an owner gives up or abandons his thing with the intention of no longer being the owner thereof. The thing then becomes a *res derelicta* (an abandoned thing) without an owner (*res nullius*). The person who then, by means of *occupatio*, acquires physical control over the thing with the intention of becoming its owner becomes both possessor and owner of the thing by means of appropriation or *occupatio*.

With reference to the acquisition of ownership, you should note that the Roman jurists laid down strict requirements. The thing must have been taken into factual control, in other words the person who had the intention of becoming its owner must have had factual control of it.

We shall briefly discuss a few examples.

- Things which had belonged to the enemy could also have been acquired by means of *occupatio*. This only applied to things that had belonged to the enemy and been appropriated by a Roman on Roman territory in times of war and things that had belonged to citizens of states with whom Rome did not have a treaty of friendship. Note, however, that things taken as booty in a military action were not capable of *occupatio*. Such booty was usually sold or given away to the troops by the victorious general.
- We said above that things that washed up on the beach, such as shells and pearls, were capable of *occupatio*. This did not apply to wreckage and flotsam and jetsam that had washed up on the beach. Therefore, if goods had fallen off a ship without any intention on the part of the owner(s) to discard them or if goods had been thrown overboard in an attempt to make the ship lighter, such goods were not *res nullius* and could not be appropriated if they washed up on the beach.
- Since the capture of wild animals was an important example of *occupatio*, we conclude by discussing this.

Gaius (*Digesta* 41.1.1.1) commented as follows:

So all animals taken on land, sea or in the air, that is wild beasts, birds and fish, become the property of those who take them ...

As a rule one could say that animals of this nature were considered to have been appropriated when a person had established factual control over such animals. Possession was therefore not acquired before there was certainty as to whether the person had indeed established lasting or effective control over the animals. It was not sufficient, for example, for a hunter to have wounded an animal; he would have had to track and finally capture or kill the animal before he could acquire ownership. Once effective control had been established, ownership was retained as long as the person who had appropriated the animal retained control over it. As soon as a wild animal escaped, ownership was lost and the animal became *res nullius* again. Partially tame animals like doves and bees remained the property of the person who had appropriated them with the intention of acquiring ownership of them as long as they (the animals) had the *animus revertendi* or the intention of going back to their owner (in other words going back to the cages and nests he had built for them).

Let us take a look at what Gaius had to say in *Institutes* 2.68:

But as regards such animals as habitually haunt some place, for instance pigeons and bees, or deer haunting a wood, there is a traditional rule that they cease to be ours and belong to

the first taker, if they have ceased to have the disposition to return. They are considered to have ceased to have this disposition when they have abandoned the habit of returning.

See also the following:

Institutes 2.1.13: The question has been asked, whether, if you have wounded a beast, so that it could easily be taken, it immediately becomes your property. Some have thought that it does become yours at once, and that it continues to be yours while you continue to pursue it, but that if you cease to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm the latter opinion, because many accidents may happen to prevent your capturing it.

Gaius *Digesta* 41.1.5: Now an animal is considered to recover its natural liberty when either it has escaped from sight or, though still in sight, its pursuit is difficult. It has been asked whether a wild beast, which has been so wounded that it can be captured, at once becomes the property of the wounder. Trebatius held that it becomes his property at once, and is considered his so long as he keeps up its pursuit, but that, if he gives up its pursuit, it ceases to be his, and once more becomes the property of the first taker.

In South African law today stricter requirements regarding possession (control) are laid down for the acquisition of ownership, for example by means of *occupatio* than for the retention of ownership. In *Underwater Construction Co (Pty) Ltd v Bell* (1968 (4) SA 190 (C) 192) the ruling was that “[o]wnership, once acquired, cannot be lost by a failure to remain in physical possession”. As long as it appears from the circumstances that control (and the intention) remain, ownership is retained.

In the case of wild animals, before the Game Theft Act 105 of 1991 came into operation, factual continuous control was required. In terms of the provisions of this Act it is quite sufficient if the owner of the game has acquired his ownership by means of adequate fencing. His ownership of the animals would continue, even if they escaped or were removed without his permission.

3.3.4 Treasure-trove (*thesauri inventio*)

A treasure was something that had lain hidden for so long that it was impossible to trace the owner. The treasure must have been hidden: A thing that had fallen out of someone’s pocket along the roadside or that had been mislaid or an abandoned thing, did not constitute a treasure.

Originally, and in accordance with the principles that applied in the case of a *res nullius*, the finder became the owner of the treasure. Over time it became apparent that this rule caused problems in practice. Emperor Hadrian (AD 117–138) ruled that a person who found a treasure on his own property became the owner of the treasure. If the person accidentally found the treasure on another person’s property, he became the owner of half the treasure and the owner of the property got the other half.

In South African law the same rules still apply today.

3.3.5 The acquisition of fruits (*acquisitio fructuum*)

The acquisition of ownership of fruits took place by means of separation (*separatio*) from the fruit-bearing thing. While the fruits had not yet separated, they formed part of the principal thing. It was only on separation that they began to exist independently and were capable of ownership. Here we are thinking specifically of natural fruits (*fructus naturales*), that is fruits produced by nature, such as the fruits of trees, crops, the young of animals, wool and milk. This is also an original means of acquiring ownership, derived from the *ius gentium*.

The general rule was that the owner of the fruit-bearing thing (principal thing) was the owner of the fruits. A holder of land in quitrent tenure (long-term leaseholder of land) and possessor in good faith who had acquired the thing in terms of a valid cause (*bona fide possessor ex iusta causa*) also became owners of the fruit through separation (*fructus separati*). An ordinary tenant of land or an usufructuary did not automatically acquire ownership of fruits upon separation; they first had to take the fruits into their possession (gather them = *fructus percepti*).

In the case of civil fruits (*fructus civiles*), such as rent from a house or farm, ownership of the “fruits” (eg rent) passed upon delivery. The principles that applied in the case of natural fruits therefore did not apply here.

3.3.6 Accession or joining of things (*accessio*)

The question of accession arose when two things belonging to different owners were indivisibly attached to one another so that the owner of one of the things also became the owner of the composite thing.

Because ownership related to physically independent and autonomous things, ownership of two things which belonged to separate people was necessarily affected if the things were attached in such a way that a new, composite thing was formed. Therefore, the law had to formulate rules to establish who the owner of the new composite thing was and whether the two owners would own it jointly as co-owners.

Before *accessio* could occur, two requirements had to be met:

- The thing that was acquired by means of *accessio* (the accessory thing) had to be joined to the other thing (the principal thing) in such a way that it lost its identity.
- The accessory thing had to be connected inseparably with the principal thing. A button sewn onto a coat, for example, became part of the coat, but because it could easily be removed again, there was no *accessio*.

In cases where it was possible to separate the things, ownership of the accessory thing was merely “suspended” and then restored as soon as the accessory thing was again separated from the principal thing. In order to effect the separation, the Roman jurists sometimes made a personal action, known as

the *actio ad exhibendum* (action to bring the thing forward, to show it), available. This action could force the owner of the composite thing to separate the accessory thing from the principal thing. After separation the owner of the accessory thing could claim it back by means of the ordinary proprietary action (the *rei vindicatio*).

If separation was impossible (for financial or technological reasons), the owner of the accessory thing lost his ownership. He was then usually entitled to claim compensation from the owner of the new composite thing.

The Roman jurists also distinguished between the joining together of movables to movables, movables to immovables and immovables to immovables.

(a) Joining of movables to movables

Where a movable thing was joined to another movable thing, the owner of the principal thing became the owner of the new composite thing. In practice it was often difficult to establish which was the principal thing and which the accessory thing. The monetary value of the respective things was not always decisive.

It would appear that the test was the identity of the composite thing. It was necessary to establish whether the composite thing would lose its identity if the accessory thing were removed. In other words, which of the two things gave its identity to the composite thing? If a golden handle were attached to a bronze kettle, for example, the owner of the kettle would acquire ownership of the handle as well. Similarly, a diamond formed part of a ring and dye part of the wool. When one person wrote on parchment belonging to another, the owner of the parchment became the owner of the book or poem, even if the writer had written in gold.

(b) Joining of movables to immovables

Where movables (for example building materials) were joined with land, the owner of the land became the owner of the movables (building materials). This principle is clearly expressed in the rule that the building structure becomes part of the land (*superficies solo cedit* = the building structure accedes to the land). Although separation of the building structure from the land would have been possible in most cases, the law of the Twelve Tables prohibited this — in many cases it would have resulted in the building having to be pulled down. If the owner of the land had to pull down the building, however, the owner of the building materials could reclaim them from the owner of the land.

Things planted or sowed on another person's land became the property of the owner of the land once the plants took root. In this case, however, the ownership of the previous owner of the plants or seedlings did not revive if the plant or tree were separated from the ground later on.

(c) Joining of immovables to immovables

This form of *accessio* could take place in a variety of ways:

- Gradual, imperceptible accretion (*alluvio*). This took place when soil

from one person's property was imperceptibly deposited on the land of another person through the action of a river.

- Perceptible accretion (*avulsio*). This occurred when a sudden torrent bore away part of the land belonging to one person and added it to the land of another. As soon as trees and plants growing in the part which had become detached took root in the land against which the detached part had come to rest, they became the property of the owner of the latter piece of land.
- When an island arose in a public river (*insula nata in flumine*), it belonged to the respective riparian owners according to an imaginary line drawn through the middle of the river.

Finally, it should be remembered that the intention with which the joining together took place, in other words whether it was done in good or bad faith, did not as a rule affect the acquisition of ownership of the composite thing. Except where an immovable thing was joined to another immovable thing (always the result of natural phenomena), there was always the possibility that the owner of the principal thing would have to compensate the owner of the accessory thing for the loss of his property. If we accept that the parties acted in good faith, we could state as a general rule that the person who has lost his ownership of a thing would be entitled to compensation.

3.3.7 Mixing (*commixtio*) and blending (*confusio*)

This could really have been discussed as part of the previous section (*accessio*). The main reason for discussing it separately is that the principles that applied in the case of *accessio* were only applicable where a main thing and an accessory thing were joined. In the cases that we shall now discuss, one thing was not subordinate to another.

When solids (for example grain or two flocks of sheep) belonging to different owners became mixed (*commixtio*), *accessio* did not take place. If this "mixing" took place with the permission of the different owners, they became the co-owners of the joint thing. If it took place without their permission, each owner retained ownership of his separate portion. If it were not possible to physically identify the things belonging to the different owners (eg grain), each owner would be able to claim his *pro rata* share by means of the *rei vindicatio*. If identification was possible (eg where sheep had been branded), each owner would be able to claim his things (sheep) by means of the *actio ad exhibendum*, followed by the *rei vindicatio*.

In the case of the mixing of fluids (*confusio*) like wine, honey or molten metal, which belonged to different owners, the substances were inseparably blended. Since there was no question of one thing being subordinate to the other, the two owners acquired joint ownership of the mixture. Whether they did so by agreement or by accident made no difference. The owners could claim their respective shares (*pro rata* shares of the mixture) by means of the *actio communi dividundo* (action for the division of joint property).

In *Ex Parte Terminus Campania Naviera SA & Grinrod Marine (Pty) Ltd: In re The Arete (L)* 1986 (2) SA 446 (C) the lessee poured his own oil into the bunkers of the lessor's ship, with the unavoidable consequence that his own oil became mixed with that of the lessor. The lessor claimed to have acquired ownership of all the oil, but the court rejected his claim. The court ruled that when the lessee added his oil to that of the lessor in the ship all the oil became the joint property of the lessee and the lessor as a result of *confusio* (blending).

3.3.8 The creation of a new thing from existing material (*specificatio*)

Specificatio occurred when someone, without authorisation, created a new thing (*nova species*) from, without authorisation, material belonging partially or entirely to someone else. Some examples of *specificatio* are the making of wine from grapes, a garment from wool or a vase from gold or silver.

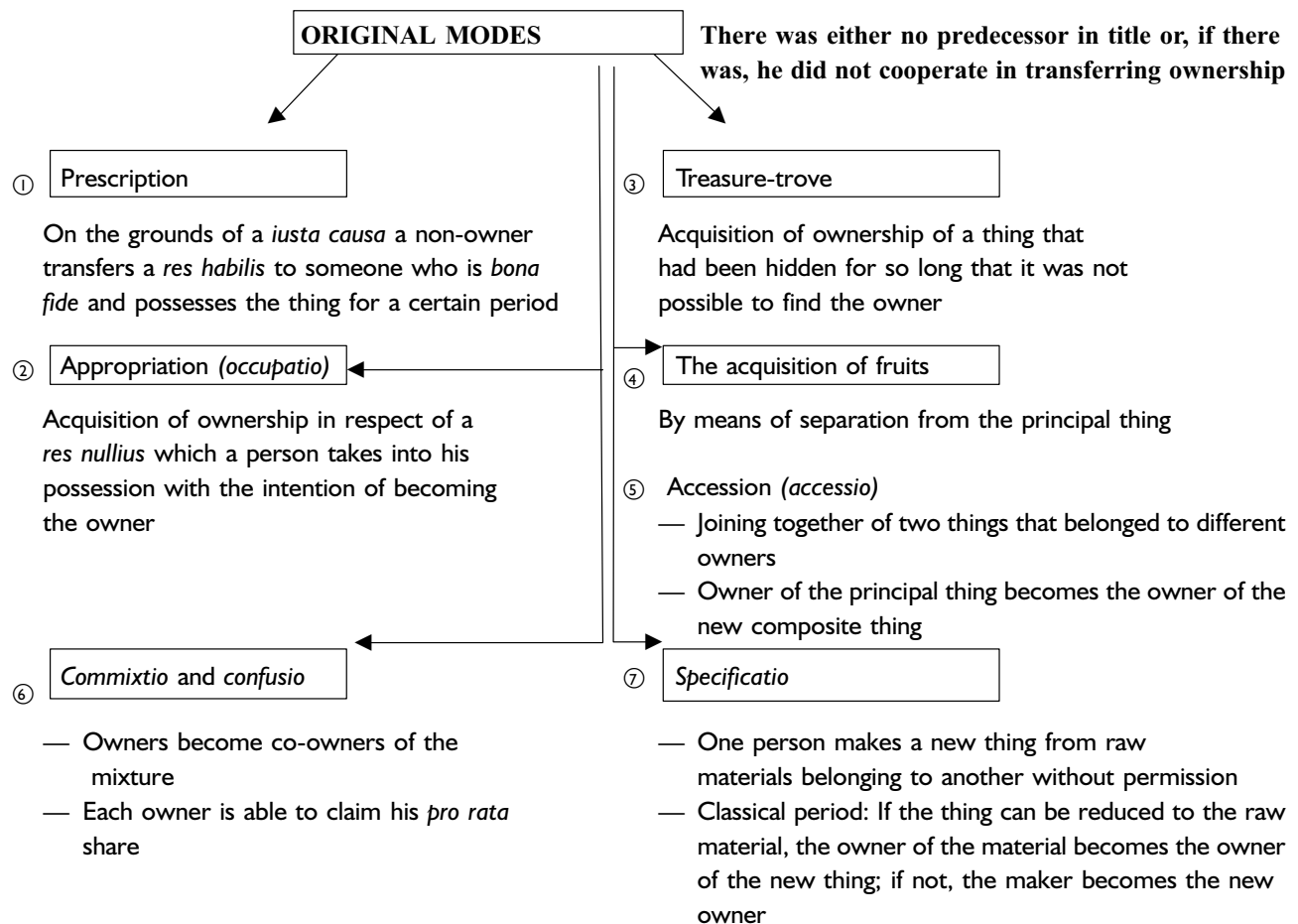
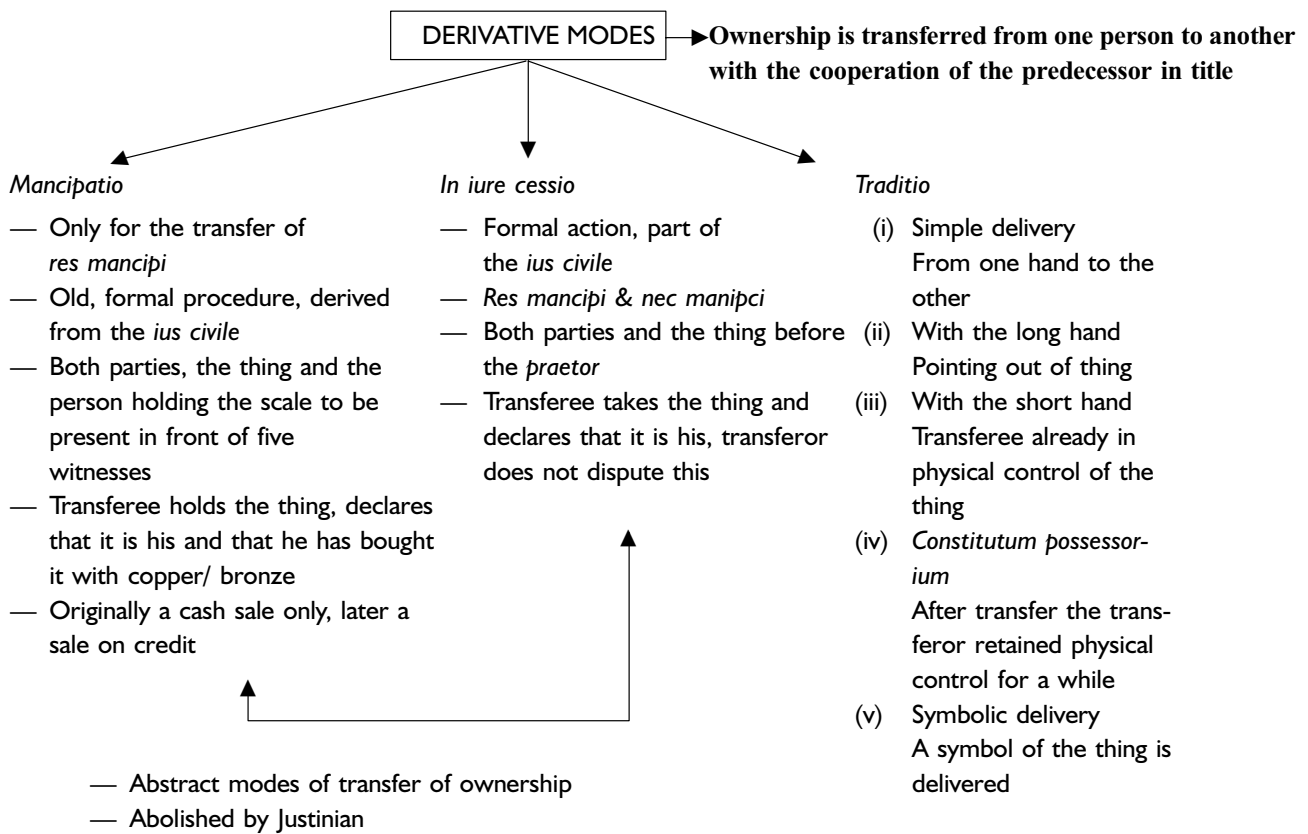
If a person created a new thing partly from his own material and partly from that of another person (eg a garment from both his own wool and that of another or oil partly from his own olives and partly from olives belonging to another person), he always became the owner of the completed thing. After all, he had not only partly used his own material, but also supplied the labour. However, where all the material belonged to another person, there was dissension among the Roman jurists as to who would own the thing. The Sabiniani (the more modern school of jurists) were of the opinion that the owner of the material also became the owner of the thing. The Proculians (who represented the more conservative school of jurists), held the contrary view, namely that the maker of the new thing should be regarded as the owner. By the classical period there was a group of jurists who opted for a "golden" mean. Their view was that the owner of the material also became the owner of the new thing if the new thing could be reduced to its original condition. If this could not be done, the maker of the new thing became its owner. Justinian supported this viewpoint. According to him, a person who made wine from grapes or oil from olives or meal from grain, became its owner. However, the owner of a piece of gold or silver that another person had melted down to make a vase became the owner of the vase.

The party who had suffered a loss could obtain compensation by means of an *actio utilis*. The owner of the new thing could also be forced to pay compensation if the former owner of the material used to make the new thing raised an *exceptio doli* against the new owner's *rei vindicatio* if he (the former owner of the material) was in possession of the thing. In conclusion, if the material had been stolen the owner could use the *actio furti* (penal action for theft) and *condictio furtiva* (suit for the recovery of stolen property) against the thief.

Study this diagram carefully. It will give you an overview at a glance of all the original and derivative modes of acquisition of ownership.

DIAGRAM 3

The modes of acquiring ownership



Activity

- (a) In AD 63 Brutus bought three slaves from Julius in Rome by means of *mancipatio*. These slaves had been specially trained as gladiators to perform in the Colosseum. It appeared, however, that Julius had stolen these slaves from Gaius the true owner, who lived near Naples. Did Brutus obtain ownership of the slaves by means of *mancipatio*? Could he obtain ownership of the slaves by means of prescription?
 - (b) Brutus, the owner of three draught oxen, decides while returning to Rome from Ostia to abandon the animals since they have contracted foot-and-mouth disease and become too weak to work. Julius walks past three days later and sees the oxen wandering around. He decides to take them for himself. Could Julius obtain ownership of the oxen by means of prescription? If not, could he obtain ownership of them by any other means? If so, name the relevant method of acquisition.
 - (c) In AD 212 Brutus buys a farm in Italy from Julius, the guardian of the nine-year-old boy Paulus. He is under the impression that Julius is the owner of the land and is only informed by a neighbour three months later that Paulus is the true owner. Could he become the owner of the land by means of prescription?
 - (d) During a terrible storm, Brutus, the captain of the ship *Medea*, throws 287 jars of olive oil overboard with the aim of reducing the ship's weight in an attempt to save it from sinking. The undamaged jars of oil wash up on the beach at Puteoli and Julius, the owner of a well-known beach restaurant, takes them into his possession with the intention of becoming their owner. Could he in fact become the owner by means of *occupatio*?
 - (e) Brutus, a celebrated winemaker, decides to make another batch of his popular blended wine and, as usual, uses his own cabernet grapes and the merlot grapes from Julius's vineyard, which is adjacent. Who is the owner of the wine made from these grapes?
-

Feedback

- (a) Brutus could not obtain ownership of the slaves by means of *mancipatio* since Julius was not the owner of the slaves. Julius could not transfer more rights than he had himself. Brutus could not acquire ownership of the slaves through prescription either. Under Roman law a stolen thing was not susceptible to ownership since a taint attached to it. The slaves were therefore not *res habiles*. This meant that they were not susceptible to the acquisition of ownership.
- (b) Julius could not have acquired ownership of the oxen by means of prescription. (Refer to the requirements for prescription that we discussed above. There was no cause there that was normally considered sufficient in law for the transfer of ownership.) He could have acquired ownership of the oxen by means of *occupatio* (appropriation). After all, the oxen had been abandoned by their owner (Brutus) and had therefore become *res derelictae* or *res nullii*, which could be appropriated by a person with the intention of becoming the owner.
- (c) Yes, he could, because he bought the land in good faith. At the time when he took possession of the land he was under the impression that Julius was the owner and his subsequent discovery that this was not actually the case did not detract from his initial good faith.
- (d) No, the jars were not regarded as abandoned things and Julius could

therefore not become their owner. Brutus did not have the intention of relinquishing his ownership.

- (e) In the case of the making of a new thing from existing materials (such as wine from grapes), the person who had made the new thing from material belonging partly to himself and partly to another person became the owner of the thing. In this case Brutus was the owner of the wine and Julius would only have been able to claim compensation for the loss he had suffered.

4 The protection of ownership

4.1 Introduction

There were various remedies available to a Roman owner if his ownership had been infringed. The specific remedy used depended on the nature of the infringement.

If a thing belonging to a person had been stolen (that is in the case of theft), he could claim his thing by means of the *rei vindicatio* (an action *in rem*) from whoever was in control of the thing. He could also institute an *actio furti* (a personal action for twice the value of the thing) in order to punish the thief. In cases where the thing could not be recovered, he could claim damages from the thief with the *condictio furtiva* (a personal action).

If a person's property was damaged, the owner could also claim damages from the wrongdoer with the *actio legis Aquiliae* (a personal action). We shall discuss this important action, which is still in use in South African law today, in detail in the section on the law of delict.

There were several other remedies available to the owner, such as the possessory interdicts (which we discussed in 2.4), and the *actio negatoria*, which was used where someone exercised a servitude to which he was not entitled over the owner's things (to be discussed in 4.1).

4.2 The *rei vindicatio*

The *rei vindicatio* was the most important remedy available to the Roman law (Quiritary) owner. Foreigners and bonitary owners did not have the right to institute this action. The owner could use this action to claim the thing (or its value) from whoever was in control of the thing.

The owner had to prove his ownership of the thing in order to succeed with this real action which was derived from the *ius civile*. The owner could not succeed with his burden of proof merely by demonstrating, for example, that he had bought the thing from the previous owner or received it as a gift. In terms of the *nemo plus iuris* rule (namely that no-one can transfer more rights than he himself had) he would have had to prove that the seller or donor, as well as the person from whom the seller or donor had acquired it, was in fact the owner of the thing. What this amounted to in practice was that the owner had to show that he (or a predecessor in title) had complied with all the requirements for prescription or that he had acquired the thing by another original means of acquisition of ownership.

If, therefore, the owner could prove ownership, he could recover the thing from

the person who was in control of it. It made no difference whether the possessor had acted in good faith (*bona fide*) or in bad faith (*mala fide*). The defendant had to be in factual control of the thing. Justinian was later to permit the institution of actions against persons who were not in factual control of the thing (*ficti possessores* = fictitious possessors). This term applied first to people who had disposed of the thing fraudulently in order to escape the institution of the *rei vindicatio* against them. Secondly, it applied to people who defended the action knowing that they were not in possession (that is in order to enable another person to acquire ownership of the thing by means of prescription).

The defendant could naturally avoid a conviction at any time by simply giving the thing back to the plaintiff.

You should note that the defendant could not be compelled to give the thing back. If the plaintiff succeeded in proving that he was the owner of the thing, the defendant could nevertheless refuse to return it, in which case the defendant could be condemned to pay the value of the thing to the plaintiff. In such cases the defendant remained in possession of the thing.

Finally, note that the plaintiff could use the *rei vindicatio* to claim not only the thing, but also the fruits produced by the thing or that which would have been produced if the plaintiff had been in possession of the thing at the time of institution of the action (*litis contestatio*).

The *rei vindicatio* still exists today and is probably the most important action to protect ownership in South African law.

Read the following statement by Jansen JA (from *Chetty v Naidoo* 1974 (3) SA 12 (A)):

It is inherent in the nature of ownership that possession of the *res* (thing) should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (eg, a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the Defendant is holding the *res* — the onus being on the Defendant to allege and establish any right to continue to hold against the owner.

4.3 Praetorian protection of ownership

Persons who were in possession of a thing on lawful grounds (*iustae causae*) (plural) and who were in the process of acquiring ownership of the thing by means of prescription (*usucapio*), initially enjoyed no legal protection during the period of prescription. Then the *praetor* intervened and granted these possessors legal relief.

The nature of the legal relief granted depended on the type of possessor. There were two different types:

- A person who received a *res mancipi* in an informal manner by means of delivery (*traditio*)
- A person who received a thing from someone who was not the owner

In the first case the praetorian protection was effective against all persons, in other words against the Roman law owner as well (*dominus ex iure Quiritium*). In the second place it was effective against third parties excluding the owner.

Two remedies were available to the possessors referred to above. First, the *praetor* offered them legal relief by means of a real action, the *actio Publiciana*, and secondly they had a defence in the form of the *exceptio rei venditae ac traditae* (the defence that the thing had been sold and delivered).

The *actio Publiciana* was a real action from the last century BC that the *praetor* afforded certain possessors. In principle it afforded such possessors the same protection as the *rei vindicatio* afforded Roman law owners. By means of this action the possessor could reclaim the thing from any person who was in possession of it.

If the possessor had instituted the action against the Roman law owner in good faith, the latter could raise the defence that he was the true owner of the thing (*exceptio iusti domini*). Against this defence of the true owner the possessor or transferee could object that the thing had been sold and transferred to him by the true owner (*replicatio rei venditae et traditae*). This implies that a person who had acquired a thing from a non-owner would not be able to raise this defence against the true owner's *exceptio iusti domini*.

As we said above, a person who acquired a *res Mancipi* in an informal manner by means of delivery (*traditio*) did not receive Roman law ownership of the thing. If the true owner were to sue the transferee for the thing, the latter would have had no defence against the true owner. Therefore the *praetor* intervened again and granted the transferee a defence against the true owner's *rei vindicatio*. This was known as the defence that the thing had been sold and delivered to him (*exceptio rei venditae ac traditae*).

4.4 The *actio ad exhibendum*

In cases involving a real action (*ius in rem*), the defendant was not obliged to participate in the institution of action (*litis contestatio*). For example, by denying that he possessed the thing the defendant could have obstructed the institution of the *rei vindicatio* (or any other real action).

To solve this problem, the plaintiff was afforded a personal action (the *actio ad exhibendum*) with which he could force the person in possession of the thing to appear before the *praetor*. If he did produce the thing he could avoid the *condemnatio* (that is either being condemned or absolved by the judge) and this made the institution of a real action possible. If the defendant produced the thing but still refused to participate in the institution of the action, the plaintiff was summarily placed in possession of the thing without having to prove his ownership.

Make a thorough study of the following diagram. It will give you an overview at a glance of all the ways in which ownership was protected under Roman law.

DIAGRAM 4

Protection of ownership

(1) <i>Rei vindicatio</i>	(2) Praetorian protection	(3) <i>Actio ad exhibendum</i>	(4) <i>Actio negatoria</i>
<ul style="list-style-type: none"> — Real action — Only available to Roman citizens — Derived from the <i>ius civile</i> — Owner had to prove his ownership in order to succeed with the action — Owner could use this action to claim his thing from any person in possession of it — The owner could also use the <i>rei vindicatio</i> to claim the fruits the thing produced while it was in possession of the defendant 	<ul style="list-style-type: none"> — The <i>praetor</i> protected the possession of two categories of persons: <ul style="list-style-type: none"> (a) Any person who had received a <i>res Mancipi</i> in an informal manner (b) Any person who had received a thing <i>bona fide</i> from a non-owner — Two possible remedies: <ul style="list-style-type: none"> (i) <i>Actio Publiciana</i> (ii) <i>Exceptio rei venditae ac traditae</i> <p>NB: Remember that the possessor in category (b) could not protect his possession against the true owner of the thing.</p>	<ul style="list-style-type: none"> — Personal action — Often instituted before the <i>rei vindicatio</i> — Its object was to force the possessor of the thing to bring the thing before the court 	<ul style="list-style-type: none"> — Owner of land could deny the existence of a servitude over his land

4.5 The *actio negatoria*

The owner of a piece of land could deny the existence of a servitude over his property by means of this action. The action was only available against a person who laid claim to the servitude in good faith. If a person exercised a servitude in bad faith it was possible to proceed against him with the aid of the *actio iniuriarum* (action for affront).

Activity

- (a) Brutus buys two oxen from Julius at an auction by means of *mancipatio*. Three days later Gaius realises that his oxen have disappeared and upon enquiry he finds that Julius had stolen his oxen and sold them to the *bona fide* Brutus. Which remedies are available to Gaius?
- (b) Brutus is in the process of obtaining ownership of a valuable slave by means of prescription. The slave was transferred to him in an informal manner by means of delivery by Julius, the owner. Gaius his neighbour, steals the slave one night with the intention of selling him to Caesar. Does Brutus have any remedy and can he get his slave back?

Feedback

- (a) Gaius could have reclaimed his oxen from Brutus with the aid of the *rei vindicatio*. This was the most important remedy available to a Roman law owner and he could reclaim a thing from whoever was in possession of it, irrespective of whether the person had acted in good faith or in bad faith. Note that he could only have claimed the thing if he could prove that he was indeed the owner. Further, it is important to remember that Brutus had the choice of returning the oxen or paying the monetary value to Gaius. Brutus could also have recovered damages from Julius, the thief, with the *condictio furtiva* (see 8.3.1.3).
- (b) The *praetor* afforded protection during the period of prescription to persons who had obtained possession of a thing on a lawful ground and were in the process of acquiring ownership of the thing by means of prescription. Brutus could have reclaimed the slave Gaius from with the aid of the *actio Publiciana*: The slave was a *res Mancipi* that had been transferred in an informal manner and the praetorian protection therefore applied against all persons. Brutus could have used this action to reclaim the thing from whoever was in possession of it.

Self-evaluation questions

After studying the work in this chapter, try to answer these questions on your own. If you experience any difficulties, go back to the relevant section(s) and try again. All the information is contained in this chapter.

- 1 Distinguish between Roman law (civil or Quiritary) and bonitary ownership and briefly discuss the nature and characteristics of each. (10)

- 2 Briefly discuss *mancipatio* and *in iure cessio*. (10)
 - 3 Discuss the two steps involved in delivery (*traditio*). You should fully deal with the concept of a valid reason (*iusta causa*) (5) and then name and explain the five forms of delivery treated in the study guide. (10)
 - 4 Name the requirements that had to be fulfilled before ownership could be acquired by means of prescription during the classical period. (5)
 - 5 Why was there a need for this form of acquisition of ownership under Roman law? (3)
 - 6 Name and briefly discuss the various original modes (except for prescription) by means of which ownership could be acquired under Roman law. (12)
 - 7 Name and briefly discuss the most important remedy available to the Roman law (civil) owner. (5)
-

In conclusion:

After having studied this chapter you should be aware that the Romans distinguished between different kinds of ownership and what the characteristics of each kind were. You will also be expected to have a thorough knowledge of the various original and derivative methods of acquisition of ownership. The application of the important *nemo plus iuris* rule was discussed and we trust that you fully understand it. The difference between the causal and abstract methods of acquiring ownership is discussed and the chapter concludes with a discussion of the various ways in which the Romans protected ownership.

CHAPTER 4

Limited real rights

GENERAL INTRODUCTION

Ownership is a real right that a person had over his own thing (*a ius in re propria*). A *ius in re aliena*, in contrast, was a real right that a person could have in respect of a thing whose ownership vested in another person. Ownership, as you will remember, was unlimited in principle, although it could be limited by the provisions of the law and by the rights of others in respect of the property in question. The other real rights were all limited in the sense that they accorded the person who was entitled to them only certain specific entitlements. The limited real rights we shall be discussing can be divided into two categories:

- Real rights of enjoyment (servitudes, quitrent and *superficies*)
- Real rights of security (*fiducia*, pledge and hypothec)

Limited real rights are also protected by real actions and therefore enforceable against all third parties encroaching upon a person's limited real rights.

I Servitudes

I.1 Introduction

We distinguish between two kinds of servitudes, namely personal servitudes and praedial or real servitudes. A personal servitude was a **real right** that a person exercised for his own benefit over a thing belonging to another (*ius in re aliena*). A praedial servitude was a **real right** a person exercised to the benefit of land of which he was the owner. It is very important to remember that both personal and praedial servitudes were limited **real** rights. In the case of personal servitudes the benefit (of the thing belonging to another person) accrued to the servitude holder in his personal capacity. In the case of a praedial servitude the benefit accrued to a specific piece of land, irrespective of who it belonged to (in other words, it did not matter who the owner was). Because both personal and praedial servitudes were (limited) real rights, they were enforced by means of real actions.

See *Digesta* 8.1.1:

Servitudes attach either to persons, as in the case of use and usufruct, or to things, as in the case of rustic and urban praedial servitudes.

Servitudes were therefore real rights over other people's things. The person who exercised the right was able to maintain the right, not only against the owner of the thing but against all other persons as well. Therefore if someone interfered with the exercise of his right, he could take measures of his own accord to protect his rights and did not have to approach the owner of the thing for protection.

1.2 Praedial servitudes

1.2.1 General remarks on praedial servitudes

Praedial servitudes were real rights exercised by the owner of an immovable thing in respect of the immovable thing of another. These rights did not accrue to the owner in his personal capacity but in his capacity as owner of the dominant tenement (a piece of land). The "dominant tenement" (*praedium dominans*) was the immovable thing for the benefit of which a right of some kind was exercised over the "servient tenement" (*praedium serviens*). The servient tenement can therefore be said to have "served" the dominant tenement. Remember that the owner of the dominant tenement enjoyed the benefit as owner of the tenement and not in his personal capacity. There might be a change of ownership of the dominant and servient tenements, but it was always the person who was the owner of the dominant tenement who was able to exercise the powers attached to the servitude. This naturally means that the owner of the servient tenement always had to allow the exercise of the entitlements (rights) in respect of the servient tenement. A person who became the owner of such a tenement (because he had inherited it or bought it) therefore obtained an "encumbered" thing with a servitude on it.

1.2.2 Types of praedial servitudes

According to the function they fulfilled, and not the location of the dominant or servient tenements, praedial servitudes were divided into rural (*servitutes praediorum rusticorum*) and urban (*servitutes praediorum urbanorum*) servitudes.

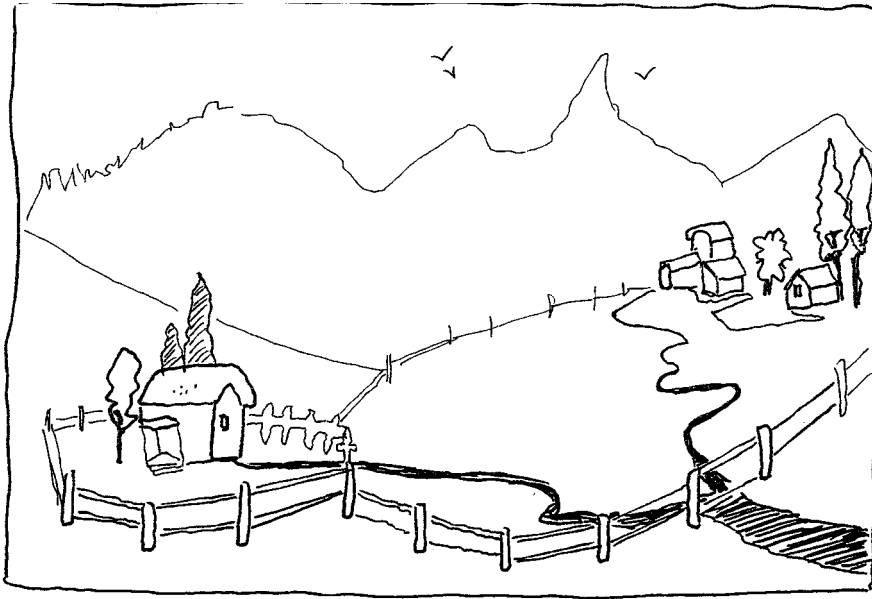
Owing to the agrarian character of early Roman society, the oldest servitudes belonged to the category of *servitutes praediorum rusticorum*. The old rural servitudes were initially classified by the Romans as *res Mancipi*. Urban servitudes, which were of a later origin, were regarded as *res nec Mancipi*.

The four oldest rural servitudes were *iter*, *actus*, *via* and *aquaeductus*. Compare the following text:

Institutiones 2.3 *pr*:

The rights of rustic land are these: the rights of way, *iter*, *actus* and *via*, and the right to bring water through (*aquaeductus*). *Iter* entitles a man to walk and go on foot but not to drive animals or to go in a vehicle. *Actus* is the right to drive animals or take a vehicle. Hence, a person who has *iter* does not have *actus* but one who has *actus* also has *iter* for he can exercise his right even without animals. *Via* is a general right of passage, including in itself both *iter* and *actus*. *Aquaeductus* is the right of bringing water through another's land.

Servitude: In this sketch you can clearly see that the owner of the property to the left must have had a servitude over the tenement of the other owner in order to gain access to his tenement.



As we said above, urban servitudes were *res nec mancipi*. They concerned mainly buildings. Servitudes in respect of buildings were always regarded as urban servitudes, even if the buildings were located in rural areas.

The most important urban servitudes included the right to allow rainwater to drip from one's eaves onto one's neighbour's roof or the right to receive rainwater from one's neighbour's roof (*servitus stillicidii avertendi* or *servitus stillicidii recipiendi*), the right to discharge water streaming from a neighbour's eaves onto your roof or land (*servitus fluminis recipiendi*), the right to insert beams into a neighbour's wall (*servitus tigni immitendi*), the right to support a building on the dominant tenement on a construction on the servient tenement (*servitus oneris ferendi*), a servitude not to build higher (*servitus altius non tollendi*) and the right to prevent a neighbour from erecting a structure that would block off the light of the dominant tenement (*servitus ne luminibus officiatur*).

Servitudes can further be divided into those that obliged the owner of the servient tenement to do something and those that obliged him to suffer or permit something to be done (positive and negative servitudes). Rural servitudes usually gave the owner of the dominant tenement the right to do something on the servient tenement and were therefore positive. Urban servitudes could be positive or negative: The restraining servitude on the erection of a higher building was negative and the servitude that gave someone the right to insert beams into a neighbour's wall was positive.

1.2.3 Requirements for (and characteristics of) praedial servitudes

The number of rural servitudes recognised was not restricted. In other words it was possible to create new servitudes provided they complied with the following requirements and had the following characteristics:

(a) *Praedio utilitas (the servitude had to benefit the dominant tenement)*

This means that the servitude had to benefit the dominant tenement. Any owner of the dominant tenement therefore had to benefit from the servitude, not only a specific owner. In other words the essence of a praedial servitude was that the servient tenement had to serve the dominant tenement in one way or another. This requirement implied that there were always two tenements and that they were adjacent or at least located close enough to each other for the function of the servitude to be fulfilled.

In *Erlax Properties (Pty) Ltd v Registrar of Deeds* (1992 (1) SA 879 (A)) Joubert JA explained with reference to, *inter alia*, Digesta 8.1.15 that it is an essential characteristic of a real servitude that it must be of economic benefit and use to the dominant tenement: “Whenever a servitude is found not to be for the benefit of an individual or an estate, then it is of no effect ...”

(b) *Causa perpetua (perpetual benefit)*

In principle the servitude must be of perpetual application. It could therefore not be made subject to a resolutive condition or term. For example, a person would not be able to establish a servitude to draw water from his neighbour’s spring if the spring was not perennial.

(c) *Civiliter modo (a reasonable manner)*

A servitude had to be exercised in a reasonable manner (*civiliter modo*) in order to encumber the servient tenement as little as possible. The owner of the dominant tenement had to exercise his right in a manner that would not cause the owner of the servient tenement unnecessary inconvenience.

It is important to remember that in respect of praedial servitudes South African law has retained almost all the principles of Roman law.

In *Brink v Van Niekerk* 1986 (3) SA 428 (T) Van Zyl J expressed himself as follows on the principle of *civiliter modo*: “The *civiliter modo* principle has been part of the common law from Roman times, as appears from *Digest* 8.1.9, 8.1.15 *pr.* and 8.5.8.6:

Celsus *Digesta* 8.1.9:

Suppose a man is granted or bequeathed a *via* without reservation over another’s estate. He may walk and drive across it without restriction, that is to say, across any part of the estate he chooses, so long as he does so in a reasonable manner; ...

(d) *Ius in re aliena (right in respect of another’s thing)*

A servitude was a right in respect of another person’s thing (*ius in re aliena*). This implied that no-one could exercise a servitude over his own thing (*nulla res sua servit*). If the owner of one of the two tenements (dominant and servient tenements) also acquired ownership of the other tenement, the

servitude lapsed. The servitude did not automatically revive if ownership of one of the tenements was transferred to another person. In that case the servitude would have to be established anew.

(e) *Servitus non in eo consistit ut aliquid faciat quis sed ut patiatur vel non faciat* (a servitude does not consist in doing something, but in allowing something or refraining from doing something)

A servitude did not imply that the owner of the servient tenement had to do something, but rather that he had to endure something or refrain from a particular action (*servitus non in eo consistit ut aliquid faciat quis sed ut patiatur vel non faciat*). In other words the owner of the servient tenement could not be expected to do something.

The Roman jurists did permit two exceptions to this rule, however. In the case of a right to support a building on the dominant tenement on the wall of a building that had been erected on the adjacent (servient) tenement and in the case of a right to insert a beam into an adjacent building, the owner of the servient tenement was obliged to maintain the supporting structure. The Romans probably considered it unreasonable to expect the owner of the dominant tenement to maintain his neighbour's building.

(f) *Servitus servitutis esse non potest* (there could be no servitude over another servitude)

A servitude could not be established over another servitude (*servitus servitutis esse non potest*). The owner of the dominant tenement could therefore not grant a third party a servitude over land over which his own servitude extended (= the servient tenement). This meant that where A had the right of way over B's land, he could not grant C *iter* (a footpath).

(g) *A servitude was indivisible*

If the servient tenement was subdivided, the servitude was retained and extended across all the portions.

Activity

Brutus and Julius are neighbours. Julius's spring dried up during a protracted drought, but Brutus's spring ran from time to time. Brutus and Julius agreed that Julius could draw water from Brutus's spring if there was a sufficient supply for both of them and that Brutus would keep the pipes clean with that end in view. Would you say that a servitude had been established in favour of the dominant tenement (Julius's tenement) over Brutus's tenement (the servient tenement)?

Feedback

No, no servitude was established. First, a servitude cannot be established merely by an agreement. Secondly, the servitude had to benefit the dominant tenement

and not a specific owner (Julius). Thirdly, the principle was that a servitude had to exist in perpetuity and could therefore not be established over a spring that was not perennial. In conclusion, no duty could be imposed on the owner of the servient tenement (Brutus) to perform a specific task. He was merely obliged to endure or permit something.

1.3 Personal servitudes

1.3.1 General remarks on personal servitudes

In the previous section we discussed praedial servitudes. You know by now that a praedial servitude attached to a particular piece of land. The servitude remained in existence irrespective of who the owners of the dominant and servient tenements were. A personal servitude, in contrast, attached to the person of the holder of the servitude. Personal servitudes therefore vested in a specific person. The holder of the right did not necessarily have to be a landowner. His personal servitude could apply to a movable or an immovable thing. It is called a “personal” servitude because it accrued to the holder of the right in his personal capacity **and not because it was a personal right**. Like a praedial servitude, it was a **real right** that was protected by a real action.

One of the most important differences between a personal and a praedial servitude was therefore that a personal servitude accrued to a specific person. Since a personal servitude was indissolubly attached to a specific person, the servitude ceased to exist upon the death of the holder of the servitude. A personal servitude did not, like a praedial servitude, survive in perpetuity in principle. Although it usually terminated upon the death of the holder of the servitude, it could well have been extinguished earlier if the servitude had been granted for less than a lifetime. The duration of a personal servitude was therefore limited.

Although both praedial and personal servitudes were recognised in early Roman law, Justinian was the first to embody the right to use and enjoy another person’s thing in the concept “servitude”.

The holder of a personal servitude could not transfer his real right to another person. Neither could the servitude be inherited. The holder of the servitude could, however, allow someone else to exercise the entitlements (such as those of use and enjoyment) conferred on him by this right. The third party did not acquire a real right but merely a personal right which he could enforce against the holder of the real right (the holder of the personal servitude).

1.3.2 Characteristics of and requirements for personal servitudes

Although praedial and personal servitudes differed considerably, there were nevertheless marked similarities between them. Both comprised rights of enjoyment to another’s thing, they were created and extinguished in much the same way, and some of the characteristics of and requirements for praedial servitudes were applicable to personal servitudes. Like praedial servitudes, personal servitudes did not require a person to do anything, but merely to endure or permit something. Furthermore, a personal servitude over a person’s own thing

was impossible and it was impossible to have one personal servitude over another. Lastly, a personal servitude was indivisible and had to be exercised in a reasonable manner.

1.3.3 Types of personal servitudes

(a) *Usufruct (ususfructus)*

Usufruct was undoubtedly the oldest personal servitude. It was the right to use and enjoy another person's thing without altering its character.

The jurist Paulus defined it as follows (*Digesta* 7.1.1):

Usufruct is the right to use and enjoy the things of another without impairing their substance.

Usufruct probably originated as a means of providing for the maintenance of a wife married *sine manu* (in other words, who was not subject to her husband's authority). The husband could therefore leave his property to his children, while at the same time ensuring that his surviving spouse would have the benefit and enjoyment of that property. The person who inherited the property obtained mere ownership (*nuda proprietas*), while the usufructuary obtained the limited real right to use the thing (*ius utendi*) and to take the fruits for herself (*ius fruendi*). The fact that the purpose of usufruct was to provide support or make provision for a person explains why it adhered so strictly to the beneficiary and could not be transferred, bequeathed or ceded to another person.

The object of usufruct was a thing (*res*) eg, a farm or a flock of sheep. This right existed in respect of both immovable and movable things (even a sum of money). The content of the right was therefore the use of the thing and the fruits it yielded. Fruits could be either natural fruits (such as wheat or lambs) or civil fruits (such as rental or quitrent). A person who had usufruct over a farm therefore had the right to farm on it and to use and enjoy its fruits. The usufructuary was also allowed to let the farm and live on the rental.

The thing in respect of which the usufruct existed had to be maintained and its nature was not allowed to be altered. The Roman jurists also held that usufruct had to be exercised *salva rerum substantia* (keeping the substance of the things intact). This requirement had a number of consequences.

- First, the usufructuary was not permitted to alter the nature of the thing. In other words, he would not be able to convert a wine farm into a crop farm or a dwelling house into a shop.
- Secondly, the usufructuary had to maintain the property in the condition in which he received it. For example, stock numbers had to be kept at the same level and buildings had to be properly maintained.
- Thirdly, the usufructuary had to use the thing in a reasonable manner (*civilliter modo*). This means that he had to preserve the thing in the condition in which he received it. He had to display the diligence of a

diligent head of a household (*diligens paterfamilias*). In other words, he could be held responsible for any damage, however slight, caused to the property through his negligence.

The usufructuary was entitled to both civil fruits (eg interest) and natural fruits (eg apples). He acquired ownership of the natural fruits at gathering. Since the usufructuary had the right to use the thing he naturally had it in his possession. However, he was only a holder (*detentor*) and not a *possessor* of the property (cf 2.2 above). The position of usufructuaries improved gradually and during the classical period his possession was protected by means of a special interdict (*interdictum quem usumfructum*). Justinian eventually granted usufructuaries the general possessory interdicts.

(b) *Quasi-usufruct (quasi ususfructus)*

The rule that the things had to be returned in the same condition at the end of the period of usufruct (*salva rerum substantia*) originally meant that consumables (such as money) could not be the object of a usufruct. Because the usufruct of an inheritance containing consumables (especially money) was often bequeathed, at the beginning of the 1st century BC a resolution of the senate (*senatus consultum*) was promulgated in terms of which the usufruct of money became possible. The money became the property of the usufructuary and he had to give security that the same amount of money would be returned at the termination of the usufruct. The same principle was later applied to other consumable things (cf 1.2.2.2 above). This type of usufruct was called quasi-usufruct by the jurists (*quasi ususfructus*), since it did not in fact imply a restricted real right over the thing belonging to another, but was only a form of credit provision. Gaius provides the following explanation in the *Institutiones*:

Institutiones 7.5.7

If a usufruct of wine, olive oil or grain is left by way of legacy, the ownership thereof ought to be transferred to the legatee, and he should be required to furnish a *cautio* (guarantee) to the effect that whensoever he dies or undergoes a change of civil status, goods of the same quality will be returned; alternatively, the goods should be valued and security given for the payment of a sum of money certain. This latter method is the more convenient. We may take it as read that the same rule applies to all other fungibles.

The Roman law principles relating to usufruct and quasi-usufruct were incorporated into Roman-Dutch law and subsequently into South African law. The distinction between these two forms of usufruct is still recognised and applied in South African law.

(c) *Use (usus)*

Usus was the real right to use someone else's thing without taking the fruits. The usufructuary only had the right to use the thing. This restriction was gradually relaxed, however, and by the classical period the user was permitted to take as much of the fruits as he and his family required for their personal and daily use.

(d) *Right of free occupation (habitatio)*

This was the right to occupy another person's house. Although this amounted to the same thing as use or usufruct, Justinian regarded it as a servitude in its own right. In this case the holder of the right was permitted to cede his entitlements of use and enjoyment to another party. He therefore had the right to let the house to someone else.

(e) *Services of slaves or beasts of burden (operae servorum vel animalium)*

This was the real right to make use of the services of another person's slaves or beasts of burden. These rights could also be leased to a third party by the holder of the right.

Activity

Brutus bequeaths his farm to his son, Julius, and establishes usufruct over the farm in favour of his wife, Gaia. Gaia decides to let the farm to Caesar for a period of five years. What rights to the farm did Gaia acquire on the grounds of the usufruct? Was she entitled to let the farm to Caesar? Would Caesar have had any remedy if Julius had refused to allow him to exercise his rights as lessee?

Feedback

Gaia was entitled (1) to use the farm for the purpose for which it was intended and (2) to enjoy the fruits or yield of the farming operations (3) on condition that the nature of the farm remained unchanged. She was also entitled to let the farm, but she could not make the lessee a usufructuary. Caesar obtained no real right, but merely a personal right against Gaia that he could use to try to enforce his rights.

1.4 The constitution of servitudes

Servitudes were real rights and had to be constituted in particular ways. Personal and praedial servitudes were generally constituted in the same way.

1.4.1 *Mancipatio*

Only those servitudes that were recognised as *res mancipi*, in other words the old rural servitudes, had to be constituted by means of *mancipatio*. As we have already said, this method became obsolete in the postclassical period and was eventually abolished by Justinian.

1.4.2 *In iure cessio*

Any servitude could be created by means of *in iure cessio*. This method was so cumbersome, however, that it also fell into disuse in the postclassical period.

1.4.3 Reservation of a servitude (*deductio servitutis*)

When the owner of two adjacent tenements had transferred ownership of one to another party by means of *mancipatio* or *in iure cessio*, he could reserve a servitude in favour of his remaining property by means of formal declarations at the time of the transaction. In Justinian's time this reservation of a servitude could even take place if the alienation had been effected by means of delivery (*traditio*).

1.4.4 Legacy

A testator could bequeath ownership of his property to one person and at the same time bequeath a servitude over the property to another person as a legacy. Although rural servitudes could also be constituted in this way, the method was mainly reserved for usufruct (*ususfructus*).

1.4.5 Adjudication (*adiudicatio*)

In actions concerning the division of property the judge often awarded ownership to one person and a servitude over the property to another.

1.4.6 Pacts and stipulations (*pactiones et stipulationes*)

Servitudes over provincial land were originally constituted by means of *pactiones et stipulationes*, that is by means of an informal agreement (*pactio*) between the parties, which was later confirmed by means of a formal verbal contract (*stipulatio*). This contract was entered into by the owner of the servient tenement and subsequently neither he nor his heirs could impede the exercise of the servitude. Although this method of creating a servitude originally only gave rise to personal obligations, in due course the *praetor* granted an *actio in rem* (real action). Justinian extended its operation to all categories of land. In his time it became the most important way of constituting servitudes.

1.4.7 Quasi delivery (*quasi traditio*)

This was a development of postclassical law. In principle delivery (*traditio*) could not be used to create servitudes because this form of transfer required the transfer of possession of a corporeal thing. Servitudes were incorporeal things and could therefore not be delivered in this way. In practice the following happened: Where Brutus and Julius had agreed that Brutus should grant Julius a servitude and Brutus had indeed endured Julius's exercise of the entitlement granted to him, a form of quasi possession of the servitude was said to have been transferred. Although this quasi possession did not initially carry an *actio in rem*, during the reign of Justinian it was sufficient to constitute a real right.

1.4.8 Prescription (*usucapio*)

The acquisition of servitudes by means of prescription was abolished by the *lex Scribonia* (1st century BC). Towards the end of the classical period (around AD 284), however, in response to practical needs, the *praetor* made it possible to acquire a servitude over provincial land by means of *longi temporis*

praescriptio, that is a very long period of prescription. Justinian extended this means of acquisition to all categories of land. Consequently a person who had exercised such entitlement (conferred by certain kinds of servitudes) for ten years *inter praesentes* (in other words where the parties lived in the same province) and twenty years *inter absentes* (in other words where the parties lived in different provinces) could establish a limited real right to that land.

1.5 Protection of servitudes

Servitudes were real rights and were therefore protected by real actions. They could be protected by the following actions:

1.5.1 *Vindicatio servitutis*

According to the *ius civile* the holder of the servitude could protect his real right by means of this action. The purpose of this action was to obtain recognition of the servitude from the person who was repudiating it and further to obtain an assurance that he would not continue infringing the real right. In the case of usufruct (*ususfructus*), a similar action, known as the *vindicatio ususfructus*, protected the usufructuary's rights. Justinian replaced these actions with the *actio confessoria*, which could be used by all holders of servitudes. This action was directed against anyone who infringed the servitude holder's right to exercise the servitude.

1.5.2 *Actio negatoria*

This action was available to the owner of land over which another person unlawfully claimed to have a servitude (see 3.4.5 above).

1.5.3 Special interdicts

In classical law some servitude holders were protected by special interdicts. Justinian later granted all servitude holders the same protection.

1.6 Termination of servitudes

Although in principle servitudes were supposed to exist in perpetuity, in practice recognition was given to a number of ways in which they could be terminated.

First, servitudes were terminated if one or both of the properties were destroyed or if they became the property of one person. Secondly, the owner of the dominant tenement could relinquish the servitude. This was originally done by means of *in iure cessio*, but later it was done informally. Thirdly, rural servitudes also lapsed through disuse (*non usus*). The periods of disuse were originally only two years, but Justinian extended the periods to ten or twenty years (depending on whether the parties were resident in the same or different provinces).

Study the following diagram carefully. It will provide a summary at a glance of this section on servitudes.

DIAGRAM 5

Servitudes

	PRAEDIAL SERVITUDES	PERSONAL SERVITUDES
Definition	Limited real right that the owner of an immovable thing exercises over the immovable thing of another.	A personal servitude was a limited real right, attaching to the person of the holder, to another's thing. It gave the holder both the use of the thing and the fruits of the thing.
Categories	<ul style="list-style-type: none"> — rural praedial servitudes — urban praedial servitudes 	<ul style="list-style-type: none"> — usufruct — quasi-usufruct — <i>operae servorum vel animalium</i> — use — right of free occupation — right to services of animals and slaves
Requirements	<p>(1) <i>praedio utilitas</i> The servitude had to be to the benefit of the dominant tenement.</p> <p>(2) <i>causa perpetua</i> It had to be possible in principle to exercise the servitude in perpetuity.</p> <p>(3) <i>civiliter modo</i> The servitude had to be exercised in a reasonable manner.</p> <p>(4) <i>ius in re aliena</i> Nobody could have a servitude over his own property.</p> <p>(5) A servitude could not impose a positive obligation on the owner of the servient tenement.</p> <p>(6) A servitude could not exist over a servitude.</p> <p>(7) A servitude was indivisible.</p>	<p>(1) Could exist for no longer than the lifetime of the holder.</p> <p>(2) <i>civiliter modo</i> Usufruct had to be exercised in the least cumbersome manner.</p> <p>(3) <i>ius in re aliena</i> No person could have an usufruct over his own thing.</p> <p>(4) Usufruct did not impose a positive obligation on the owner of the thing.</p> <p>(5) Usufruct was indivisible.</p> <p>(6) A usufruct could not exist over another personal servitude.</p>

Self-evaluation questions

Try to answer the questions on your own after studying the work in this chapter. If you have any difficulty in doing so, go back to the relevant section(s) and try again. All the information is to be found in the chapter.

- (1) Distinguish briefly between praedial and personal servitudes. (4)
 - (2) Distinguish briefly between rural and urban servitudes. (6)
 - (3) Name and briefly discuss the requirements that must be fulfilled before a right can be classified as a servitude. (14)
 - (4) Discuss usufruct fully as the most important example of a personal servitude. (10)
 - (5) Briefly discuss the most important ways in which praedial and personal servitudes could be terminated in Roman law. (3)
 - (6) Briefly discuss the various remedies that were available to persons who held praedial and personal servitudes. (3)
-

2 Real security

2.1 Introduction

In this section we shall learn about the Roman law origin of real security. Even today it remains a recognised and very important legal institution.

What does one do if one wants to buy a house or a new car, enrol at a university or go on an overseas trip but does not have enough cash available to pay for these things in a single payment? In other words, what does one do if one is broke and needs money, for any reason whatever? The answer is simple: The money would have to be borrowed. Most people need loans at various stages of their lives. Few people can pay cash for a house, a car, furniture or tertiary studies. In such cases they are obliged to approach a financial institution of some kind (eg a bank) to obtain a loan.

But, the desire to borrow money is just one side of the transaction. It has to be paid back! And in most cases the lender (creditor) would not lend or advance the money without some form of security for its repayment. There are two ways in which the lender will be able to ensure that he will recover the debt:

- By insisting that a third person should be held responsible for the debt along with the borrower (debtor). We usually say that someone (the third person) “stands surety” for another person (the borrower). This is known as “personal security” and it grants a personal right to the lender against the surety.
- By granting a real right over property belonging to the borrower (debtor). The lender (creditor) then acquires a limited real right over the property. If the borrower is unable to repay the debt, in other words cannot pay the money back, the lender can sell the property and use the proceeds of the sale to discharge the debt. This is known as “real security” and the lender

enjoys greater security than when the debt is secured by a personal security.

Both personal and real security have their origin in Roman law. In this section we briefly discuss the basic principles of Roman real security. The basic principles of personal security will be discussed later under the heading “Suretyship” in the section of the law of contracts (cf 5.2).

Interestingly enough, the Romans gave preference to personal security, which is contrary to the modern practice. The fact that Roman society regarded it as a moral obligation of friends to stand surety for one another, together with the threat of exceptionally severe penalties against the debtor should he fail to pay, were the probable reasons. Further, because of the lack of publicity as a result of inadequate means of communication, it was difficult for a creditor to determine whether the thing he had been offered as security had already been used as security or not.

Real security, as we said above, came into existence when the creditor obtained a limited real right over a thing belonging to the debtor. If the debtor was unable to pay the debt, the creditor was entitled to sell the thing and recover the debt from the proceeds. The debtor received any excess.

It is very important to remember that the existence of a debt was a requirement for the creation and existence of a real (and personal) security right. A real security right was therefore indissolubly attached to the existence of a debt to be secured; in other words the real security right was accessory to the debt. Real security is therefore terminated through a operation of the law (*ipso iure*) when the debt is discharged.

These important principles, which are still applicable in South African law, come directly from Roman law. It is therefore important that we should study and understand the Roman law foundations of real security.

In the course of Roman legal development there were three forms of real security, namely (1) *fiducia cum creditore contracta* (contract with a creditor based on trust), (2) *pignus* (pledge) and (3) *hypotheca* (hypothec). We shall now discuss these three forms of real security in greater detail.

2.2 *Fiducia*

Fiducia was derived from the *ius civile* and was the oldest form of real security in Rome. It was also the most important form of real security in Roman law during the Republican and classical periods.

The term *fiducia* points to a specific consequence which a debtor and a creditor envisaged when securing an existing debt. *Fiducia* was not an independent contract. Neither was it a form of *traditio* or delivery. Rather, it points to the underlying agreement between the debtor and the creditor when ownership in a thing was transferred (by means of *mancipatio* or *in iure cessio*) as security by the debtor to the creditor. It was also part of this agreement (which was known as a *pactum fiduciae*) that the creditor (the person who had received the thing) was trusted to restore ownership of the thing to the debtor (the person who had

transferred the thing) once certain conditions had been satisfied. These conditions usually involved the repayment of the debt to the creditor by the debtor. After discharge of the debt the creditor was supposed to transfer ownership of the thing to the debtor. In other words, the thing served as security for the duration of the debt and this was the strongest form of security available to creditors.

Fiducia therefore came into being when ownership of the thing that had to serve as security was transferred to the creditor by means of *mancipatio* or *in iure cessio* as security for the discharge of the debt. Before transfer of ownership took place or during the transaction, the parties concluded an agreement in terms of which the creditor would reconvey ownership of the thing once the debt had been discharged.

Originally, this agreement (the *pactum fiduciae*) was not enforceable and the debtor consequently had to rely on the trustworthiness of the creditor. Early on the *praetor* therefore granted a personal action (the *actio fiduciae*) to the debtor by means of which the debtor could enforce the *pactum fiduciae* against the creditor. The particulars of the agreement were specified in the *pactum fiduciae*. The most important provision naturally related to the circumstances under which the creditor could sell the thing. If the thing was sold, the debtor could claim any excess by means of the *actio fiduciae*.

In conclusion, it is important to note that the creditor could not profit from the thing. The fruits of the thing (eg crops on a farm or rental from a house) had to be put towards interest on the debt and then towards the repayment of the capital sum. Payment of the debt did not automatically terminate the creditor's ownership of the thing, in other words the debtor did not automatically recover ownership of the thing. He had to recover ownership by means of *remancipatio* or prescription (*usucapio*).

Initially only *res mancipi* could be used for *fiducia*. Later on all corporeal things could be used for this purpose. *Fiducia* disappeared during the postclassical period and Justinian had all references to it removed from the sources.

2.3 Pledge (*pignus*)

Fiducia gave the creditor complete protection. It did, however, have a few serious disadvantages:

- The debtor lost both ownership and possession of the thing.
- The thing could only be delivered as security to one person at a time.
- The procedures that had to be followed were fairly cumbersome.

During the Republican period the custom therefore arose of transferring a thing as security without going through the formalities attached to *fiducia*. This meant that ownership of the thing pledged was not transferred to the creditor. Since the requirements of *fiducia* were not met, the holder of the thing (the creditor) had no legal protection. In other words, if the creditor lost possession

of the thing he had to depend on the debtor to reclaim it and then return it to him (the creditor). The creditor had no real right in respect of the thing.

The position changed, however, when the *praetor* began protecting the creditor's possession by means of a possessory interdict. A new form of real security, namely pledge or *pignus*, then developed in terms of which the debtor retained ownership of the thing but possession was transferred to the creditor. Both movable and immovable things could serve as security.

A pledge came into existence when the debtor (pledgor) delivered a corporeal thing to the creditor (pledgee) as security for the discharge of a debt. The delivery of the thing followed on an agreement between the parties that the thing would be handed back to the pledgor by the pledgee when the debt had been discharged. The contract of pledge was therefore established by (1) the agreement and (2) delivery of the pledged object.

The pledging of a thing by agreement required that (1) at the moment of pledging the pledgor had to have ownership over the thing or be the bonitary owner of the thing; (2) the parties had concluded an informal agreement of pledge and (3) a debt existed which could be secured by the right of pledge.

The pledgor could avail himself of a personal action, namely the *actio pigneraticia*, against the pledgee by means of which he could demand that the thing be restored to him after the debt had been discharged. Originally the pledgee was only entitled to keep the thing until the debt had been discharged. Later on it became a tacit provision of the contract that the pledgee could sell the thing if the pledgor did not fulfil his obligation to discharge the debt.

It was also possible for the parties to agree that, if the debt were not discharged, the creditor could keep the thing. Such an agreement could have unfair consequences, because the pledged object was often worth more than the amount of the debt that it served to secure. An agreement of this kind (known as a *lex commissoria*) was therefore forbidden in the postclassical period. During Justinian's time the creditor (pledgee) was only entitled to sell the pledged object and satisfy his claim from the proceeds. The pledgor could claim the excess by means of the *actio pigneraticia*.

Incidentally, it is important to note that the pledgee was not entitled to use and enjoy the pledged object unless the parties had expressly so agreed. The pledgee was therefore only afforded security that the secured debt would be discharged.

The pledgor was protected by the possessory interdicts and also by the *actio Serviana* or the *actio quasi Serviana*. He could avail himself of this real action to reclaim the pledged object from whoever was in possession of it.

2.4 Hypothec (*hypotheca*)

Hypothec as a legal institution originated in a practice that gradually developed with regard to the leasing of land. The landowner or lessor desired security for the payment of the rent; the lessee, on the other hand, possessed certain movables such as livestock, slaves and agricultural implements. He needed

these to work the land, however, and he had to exploit the land in order to find the money to pay the rent. He was therefore unable to hand over these movables to the landlord (lessor) as security.

The landlord and tenant therefore agreed that the tenant's *invecta et illata* (the movables that he had brought onto the leased farm) and the fruits from the leased farm (eg a crop or livestock) would serve as security for the payment of the rental. The *praetor* made this agreement enforceable by granting the landowner (lessor) an interdict known as the *interdictum Salvianum*. By means of this interdict the landowner could obtain possession of the *invecta et illata* (movables brought onto the leased land) once the rent fell due but was not paid. The interdict could, however, only be used against the tenant.

Consequently the *praetor* granted a real action, the *actio Serviana*, to the landowner. This gave the lessor a real right over the *invecta et illata*. With this action the lessor (landlord) could obtain possession of the *invecta et illata* from whoever was in possession of it.

This tacit hypothec of the landowner was extended to other situations as well. Any creditor and debtor could by agreement create a security over any thing. It was not a requirement that the thing should have been delivered to the creditor. If the debtor had omitted to pay his debt, the creditor could claim the thing from the debtor by availing himself of the *interdictum Salvianum*. With the aid of the *actio quasi Serviana*, which was later known as the *actio hypothecaria*, he could claim the thing from any third party who was in possession of it or from the debtor himself.

After he had obtained possession of the thing, the creditor was in the same position as a pledgee and the rules governing pledge then applied. Hypothecation was a form of pledge without possession. Note that with a hypothec the creditor acquired neither ownership nor possession of the thing. The debtor retained both ownership and possession of the thing that served as security for the discharge of the debt. Naturally this also means that a hypothec, like pledge, implied the existence of a debt that was secured by the thing and that the hypothec was terminated by the discharge of the debt.

Hypothec had a number of very important advantages:

- Virtually anything could be used: Movables (eg a table) and immovables (eg a farm); corporeal things (eg a plough) and incorporeal things (eg a claim); existing things (eg a wagon) as well as futures (eg a crop in the field); single objects (eg a book) and composite objects (eg a farm together with all improvements).
- The fact that the debtor retained both ownership and possession of the thing meant that he did not lose use and enjoyment of the thing.
- Further, because he retained possession of the thing, the debtor could offer it to more than one creditor as security.

Hypothecs were usually created by informal agreements. There was no publicity (as a result of the poor communication media at the time and also because registration was unknown in Roman law) and the creditors would

therefore be unaware that the thing had already been offered as security on more than one occasion. To protect the creditors' interests, the debtor was obliged to inform each successive creditor of the number and value of the debts for which the thing had already been offered as security. As far as the payment of creditors was concerned, the rule was that the first creditor had the strongest right. In Latin this is known as the *prior tempore, potior iure* rule (earlier in time, stronger in the right). The creditor whose hypothec was established first therefore had the right to be the first to satisfy his claim from the proceeds of the sale of the hypothecated thing. The second creditor in the sequence was the next to satisfy his claim, etc. Naturally this means that the creditors whose hypothecs were secured by the thing at a later stage might receive no compensation or only partial compensation if the total of the secured debts exceeded the value of the thing. Certain hypothecs were privileged, which put them at the top of the list when it came to repayment of the debt. Some examples were the hypothec of the imperial fisc in respect of back taxes, the hypothec of a wife for her dowry over her husband's whole estate and the hypothec of a ward over the estate of his guardian.

Study diagram 6 carefully. It will give you an overview at a glance of the various forms of real security.

DIAGRAM 6

Real security

FIDUCIA	PLEDGE	HYPOTHEC
<ul style="list-style-type: none"> ● Transfers ownership of the thing to the creditor 	<ul style="list-style-type: none"> ● Only transfers possession of the thing to the creditor 	<ul style="list-style-type: none"> ● Debtor retains both ownership and possession of the thing
<ul style="list-style-type: none"> ● Nevertheless the creditor may not use the thing 	<ul style="list-style-type: none"> ● Unless the agreement stipulates otherwise, the creditor may not use the pledged thing 	<ul style="list-style-type: none"> ● Debtor uses the thing to earn an income and discharge his debt
<ul style="list-style-type: none"> ● Originally only <i>res mancipi</i> ● Later all corporeal things 	<ul style="list-style-type: none"> ● Any corporeal (usually movable) thing 	<ul style="list-style-type: none"> ● Almost anything: Movable, immovable, corporeal, incorporeal
<ul style="list-style-type: none"> ● Most beneficial to the creditor 		<ul style="list-style-type: none"> ● Most beneficial to the debtor

Activity

Brutus is a money lender. Advise him on the best form of real security in each of the following cases. Briefly explain what each involves and indicate how he would recover his money in the different cases.

- (a) Julius wants to borrow 1 000 to open a market stall. The only asset he has is a gold ring.
 - (b) Gaius wants to borrow 70 000 to buy a farm. His only assets are his livestock, his slaves and his agricultural implements.
-

Feedback

- (a) First, *fiducia* could be used. Julius could transfer ownership of the ring to Brutus. Once Julius had repaid the 1 000, Brutus would be obliged to transfer ownership of the ring to him. Secondly, Julius could have pledged the ring. This would mean that Brutus would possess the ring for the duration of the debt. As soon as the 1 000 had been repaid, the ring would have to be returned to Julius. In both cases Brutus could sell the ring if Julius did not discharge the debt. The surplus of the proceeds would have to be paid to Julius.
- (b) In this case a hypothec would be the obvious form of security. Gaius wants to buy a farm with the money he has borrowed and then the livestock, slaves and agricultural implements would be needed for his farming operations. *Fiducia* and pledging would therefore be impractical, because that would mean that he lost possession of the things he would need. Brutus should create a hypothec over the *invecta et illata* and if Gaius failed to perform he could attach the livestock, slaves and agricultural implements in order to sell them and discharge the debt from the proceeds.

Self-evaluation questions

Try to answer the questions on your own after studying the work in this chapter. If you encounter any difficulties, go back to the relevant section(s) and try again. All the information is contained in the chapter.

- 1 Briefly discuss the most important differences between *fiducia* and pledge (*pignus*). (4)
 - 2 Discuss three important advantages of a hypothec over a pledge. (6)
-

In conclusion:

After having studied this last chapter of the Roman law of property, you should know what a servitude is. You will also be expected to distinguish real and personal servitudes. It is furthermore important that you must be able to discuss the requirements for and characteristics of servitudes and the ways in which they were protected. Finally, after having studied the section on real security, you should have a thorough knowledge of *fiducia*, pledge and hypothec.

PART B

The Roman law of obligations

CHAPTER I

General principles of the law of obligations

GENERAL INTRODUCTION

The importance of the Roman law of obligations is evident from the fact that it forms the basis of the law of obligations of a number of modern legal systems. As you will know by now, the law of obligations differs from the law of things in that the law of obligations has a personal character. To throw further light on this, we should like to remind you of the difference between a real right and a personal right.

Unlike the law of things, where a **right to a thing** is at issue, the law of obligations is characterised by a **right to claim a specific performance from a specific person**. This right is a **personal right** which can be enforced with the aid of a **personal action** (*actio in personam*).

- For example: If Quintus owes Darius money, Darius cannot recover the money from Tertius or if Quintus has undertaken to repair Darius's roof, Darius cannot demand that Tertius repairs his roof.

In the case of a real action (*actio in rem*) any person who infringes a particular real right can be called to account.

- For example: Darius's ownership of his horse is enforceable against everyone and not only against a specific person. It would make no sense to say that Darius could only protect or enforce his ownership against Tertius! In other words we are saying that his right is protected by law.

Paul *Digesta* 44.7.3 *pr.*

The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do, or perform something for us.

The above passage from Paul emphasises the personal nature of the law of obligations. You will note that we refer throughout to quotations (placed in frames) from some of the Roman jurists as found in the *Digesta* (part of the *Corpus Iuris Civilis*, to which you were introduced in the general introduction to this module) and in the *Institutes* of Gaius, a Roman jurist who lived during the second century AD. You are not expected to study these passages for examination purposes. The aim is merely to show you the origin of a particular legal principle.

To return to the *Digesta*: The complete *Digesta* consists of fifty "books"

containing a total of 150 000 lines. The term “book” is not entirely accurate since it refers to something different from the traditional sense of “book” as we know it. You probably know that printing was not discovered until 1450! The books of the *Digesta* consist of chapters dealing with particular legal topics. In each chapter there are fragments (*leges*) taken from the works of a particular author, with his name at the top. Long fragments are divided into paragraphs. The first paragraph of such a fragment is abbreviated as “*pr.*” (which stands for *principium*). *Dig* 16.2.1.3 would therefore refer to book 16 of the *Digesta*, chapter 2 and the fourth paragraph of the first fragment. Since the first paragraph is recorded as “*pr.*”, the second paragraph is referred to as the first paragraph.

You will also find references in frames to relevant modern court decisions or even to interesting facts that shed light on a certain section in the guide. You must note such references for study purposes. It is therefore **only** the quotations from the old jurists that need not be studied for examination purposes.

I What is an obligation?

An obligation can be defined as a legal bond (an invisible bond created by law) between two or more parties, one of which, the creditor, had a personal right against the other party (parties), the debtor (debtors), to enforce a particular performance, while the debtor is under an obligation to the creditor to perform. The legal bond between the debtor and the creditor can be compared to a chain.

2 Sources of obligations

Obligations did not come into existence just as such. They owed their origin to certain legal acts or factual events that were acknowledged by law as sources of obligations.

The jurist Gaius¹ wrote in his manual *Institutiones* (III 88) that the sources of obligations were contracts and delicts.

It is easy to see that a contract would give rise to an obligation. For those of you who have not been introduced to delicts elsewhere in your studies, it may not be so obvious why a delict would give rise to an obligation.

You should keep in mind that in Roman law delicts were regarded as private matters. Delicts were unlawful acts against an individual, his possessions or his family. In Part C you will learn more about the Roman law of delicts. For the purposes of this introductory section all you need to know is that a delict (an unlawful act that results in damages) gives rise to a duty to compensate the victim, which in turn gives rise to an obligation between the offender and the victim. This obligation arises despite the fact that the parties have not agreed and may not have any desire to become bound to each other!

¹ To refresh your memory: Gaius, who lived in the second century after Christ, was one of the most celebrated jurists of his time and wrote the *Institutiones*, a manual for law students that came into use around AD 160.

Justinian² considered that obligations arise from the following four sources:

- Contracts
- Delicts
- Quasi-contracts
- Quasi-delicts

We shall discuss these four grounds in greater detail.

2.1 Contracts

Justinian adopted the following fourfold classification of contracts, which was acknowledged by Gaius:

- Contracts that came about through a mere agreement (*contractus consensu*)
- Contracts that came about as a result of the uttering of certain formal words (*contractus verbis*)
- Contracts that came about after delivery of a thing (*contractus re*)
- Contracts that came about as a result of writing (*contractus litteris*).

These contracts were very important and will be dealt with in greater detail in the course of our discussion of the law of obligations. At this stage you only need to take note of the fourfold classification of contracts and how it came into being and to be able to give examples of each.

We should like to point out that the Roman concept of a contract differed considerably from the contemporary idea of what a contract involves. In contemporary law an agreement is often regarded as being synonymous with a contract, but this was not the case in Roman law. Not every agreement between two people gave rise to an obligatory contract under Roman law. To create an *enforceable* contract, an additional element had to be present. This element was the *causa contractus*. We can explain this with reference to the above fourfold classification of contracts. Real contracts (*contractus re*) were created by agreement, **followed by** the delivery of a thing. In this case the subsequent delivery of the thing was the *causa contractus*. Examples of the *contractus re* were loan for consumption (*mutuum*), loan for use (*commodatum*), deposit (*depositum*) and pledge (*pignus*). (These contracts will be studied in more detail later.)

Obligatio



In Roman law delicts were regarded as private matters

² Justinian, who became emperor of the Eastern Roman Empire in AD 527, was responsible for the codification of Roman law. This codification later became known as the *Corpus Iuris Civilis*.

agreement + delivery of a thing = *contractus re*

Verbal contracts (*contractus verbis*), on the other hand, came about as a result of agreement, followed by the use of certain formal words. *Stipulatio* was an example of a verbal contract.

agreement + formal words = *contractus verbis*

The *causa contractus* for written contracts (*contractus litteris*) was the requirement of a written document or a written entry. The written contract owed its existence to the fact that the creditor had made an entry in a ledger. It was customary for the *paterfamilias* to keep a record of his business transactions first in a daily record book and then in a ledger. If the debtor agreed with this entry, a *contractus litteris* came into being.

agreement + writing = *contractus litteris*

In consensual agreements (*contractus consensu*) agreement was in itself sufficient and no additional element was required. Examples of consensual contracts were the contract of purchase and sale (*emptio et venditio*); the contract of letting and hiring (*locatio et conductio*); mandate (*mandatum*) and the contract of partnership (*societas*). These contracts are all discussed in more detail below.

agreement = *contractus consensu*

The latter type of contract is an exception to the rule that requires an additional element to be present.

It is also important to note that Roman law recognised only a **limited number of contracts**. Each of the above contracts had its own name and action (s) with the aid of which performance in terms of the contract could be enforced. If an agreement between two or more parties could not be classified into one of the existing categories of contracts, then logically it could not be enforced as one of the existing contracts. You will naturally be able to deduce that a **closed system** of this kind must have hampered commerce. The *praetor* did intervene later on and under certain circumstances held a party to an agreement, despite the fact that no contract existed between the parties. It is interesting to note that over time jurists built on the exceptions created by the *praetor* and that eventually this led to the position where a mere agreement could give rise to a contract. This is the position in South African law as well.

In *Conradie v Rossouw* 1919 AD 279 at 320 Appeal Judge Solomon formulated the principle that is still accepted as the basis for the existence of a contract today:

An agreement between two or more persons entered into seriously and deliberately is enforceable by action.

2.2 Quasi-contracts

This category relates to situations that were not strictly speaking of a contractual nature, but had certain similarities with contracts. Some examples were the unauthorised administration of another's affairs (*negotiorum gestio*) (the conduct of someone else's affairs or interests without his knowledge or consent); joint ownership and wrongful enrichment. These will be briefly discussed later on in this chapter on the law of obligations. In these cases an obligation came about without agreement.

- For example: If Stichus repairs the roof of Antonius's house in Antonius's absence after the roof has been damaged by the wind, an obligation would arise between the two parties. This situation is an example of *negotiorum gestio*.

While we are considering contracts and quasi-contracts, you should note that contracts and quasi-contracts are also classified into **unilateral** and **bilateral** (or **reciprocal**) contracts. A unilateral contract (like a quasi-contract) merely creates one obligation.

Study Diagram 7 on the next page carefully: It provides you with a summary of the different kinds of contracts.

DIAGRAM 7

Contracts

UNILATERAL CONTRACTS	RECIPROCAL CONTRACTS	IMPERFECTLY RECIPROCAL CONTRACTS
<p>— Give rise to only one obligation</p> <p>— One party has a duty to perform (debtor)</p> <p>— The other party has a right to the performance (creditor)</p> <p>Example: <i>stipulatio</i></p> <ul style="list-style-type: none"> ● A says to B: “B, do you promise to pay me 10 000?” ● B says: “I promise.” <p>A = creditor</p> <p>B = debtor</p>	<p>— Give rise to two obligations</p> <p>— Both parties have a right to performance and a duty to perform</p> <p>— Both parties are the debtor and the creditor</p> <p>— One party’s right is the other party’s duty and vice versa</p> <p>Example: Contract of purchase and sale</p> <p>A sells a car to B for 10 000</p> <p>Obligation 1</p> <p>A has a right to 10 000 (creditor) and B has an obligation to pay it (debtor)</p> <p>Obligation 2</p> <p>B has a right to the car (creditor) and A has a duty to deliver it to him (debtor)</p>	<p>— Unilateral in principle</p> <p>— The debtor may have a counterclaim if he suffers damages</p> <p>Example: Contract of loan for use</p> <p>A lends B a bicycle</p> <p>In principle:</p> <p>A = creditor</p> <p>B = debtor</p> <p>But: If A has deliberately tampered with the brakes and B falls and is injured, B has a counterclaim against A.</p>

- An example of a unilateral contract is the *stipulatio*, where only one party promises the other party that he will perform. For example: Antionius: “Do you promise to transfer ownership of the horse Incitatus to me?” Stichus: “I promise.”

Bilateral or reciprocal contracts give rise to two obligations, which means that duties are imposed on both contracting parties. An example of a bilateral contract is the contract of purchase and sale.

Later on in your study of the law of obligations you will come across the concept “**imperfectly bilateral contract**”. In principle, this type of contract gives rise to only one obligation, but there is the possibility of a counterclaim. The contract of loan for use is a good example of an imperfectly bilateral contract based on good faith, because the borrower always incurred certain obligations in terms of the contract, whereas the lender only incurred an obligation in exceptional circumstances. If I lent Bertus a broken wagon and his goods were damaged while he was using the wagon, my action was contrary to the requirements of good faith and Bertus could therefore claim damages from me for the damaged goods. We advise you to study the diagram above, which illustrates the differences between unilateral, reciprocal and imperfectly reciprocal contracts.

2.3 Delict

A delict creates an obligation between the victim and the perpetrator if the perpetrator’s unlawful act caused the victim damage. One could therefore see the perpetrator as the debtor in the obligation, who has to compensate the victim (creditor) for the damage he has caused. We shall discuss the Roman delicts in greater detail later on.

2.4 Quasi-delict

Quasi-delicts were a category that were not pure delicts but could result in certain obligations. An example of quasi-delicts was the liability of innkeepers for damage done to guests’ property. For the purposes of this course you need only take note of quasi-delicts as a category that could give rise to obligations.

Justinian’s fourfold classification had an enormous influence on the subsequent development of the law. It was incorporated into French law, for example. South African writers have, however, preferred the threefold classification of Gaius (above).

As the jurists developed a deeper understanding of obligations, they tried to shed further light on the concept by means of further classifications.

3 Classification of obligations

The Roman jurists created the following classifications of obligations:

3.1 Civil obligations (*obligationes civiles*)

These obligations were the only kind of obligation that could be enforced by means of a personal action and were derived from the *ius civile*. Most obligations fell into this category. Civil obligations were therefore enforceable.

3.2 Natural obligations (*obligationes naturales*)

Natural obligations were ordinary obligations which, although valid, could not be enforced by means of an action, usually because an action was refused or, if an action was available, it could not be executed. The difference between a civil and a natural obligation was therefore that civil obligations were enforceable, whereas natural obligations were not enforceable. An example of a natural obligation was one incurred by slaves or by minors (under Roman law the age of majority was 12 years in the case of a girl and 14 years in the case of a boy). If a minor concluded a contract without the consent of his or her guardian, the contract was legally valid in all respects, but was not enforceable, because the minor could not be compelled to perform towards the third party.

3.3 *Obligationes stricti iuris*

Jurists distinguished between obligations that originated in early law (ie the *ius civile*) and obligations based on good faith (*bona fides*). An obligation that originated from the provisions of early law necessarily gave rise to an action based on early law and the judge's decision was intended to enforce an action derived from early law. The judge had to confine himself to provisions contained in the *formula*. The jurists contrasted these obligations with obligations based on good faith or equity (*obligationes bonae fidei*).

3.4 *Obligationes bonae fidei*

Obligations based on good faith gave rise to actions in which good faith or equity was the criterion and the judge's decision would be in accordance with the requirements of good faith. Unlike obligations derived from the strict and formal *ius civile* (*obligationes stricti iuris*), *obligationes bonae fidei* were enforceable by means of actions based on good faith. There was therefore considerably more flexibility in the judicial process, because judges had to develop and give content to the concept of good faith.

4 Termination of obligations

You have already seen how obligations were created. There were naturally also

particular ways in which obligations were extinguished or terminated. The various ways in which obligations could be terminated are explained below.

4.1 Performance

An obligation was naturally terminated when performance or fulfilment took place, in other words when the debtor rendered the required performance.

4.2 Release

Release is an agreement between the creditor and the debtor in terms of which the debtor does not have to render the performance owed.

4.3 Compensation

Compensation is best explained by means of an example:

- David owes Paul a sum of R100. Paul in turn owes David a sum of R150. Strictly speaking this means that David has to pay R100 to Paul, after which Paul has to pay R150 to David. The simplest, therefore, is for Paul to pay David only R50. Both obligations are therefore wiped out by compensation.

In the case of compensation there were three requirements:

- Both performances had to be claimable.
- The performances had to be of a similar nature (ie money, cattle, or the like).
- The two debts had to have been owed by the same parties to whom compensation was applied.

4.4 Merger

Merger can also be illustrated by means of an example:

- Suppose Bertus owes Brutus the sum of R100. Bertus dies, leaving his entire estate to Brutus in his will. The obligation is logically terminated, since Brutus can't collect the sum of R100 from himself to pay over to himself!

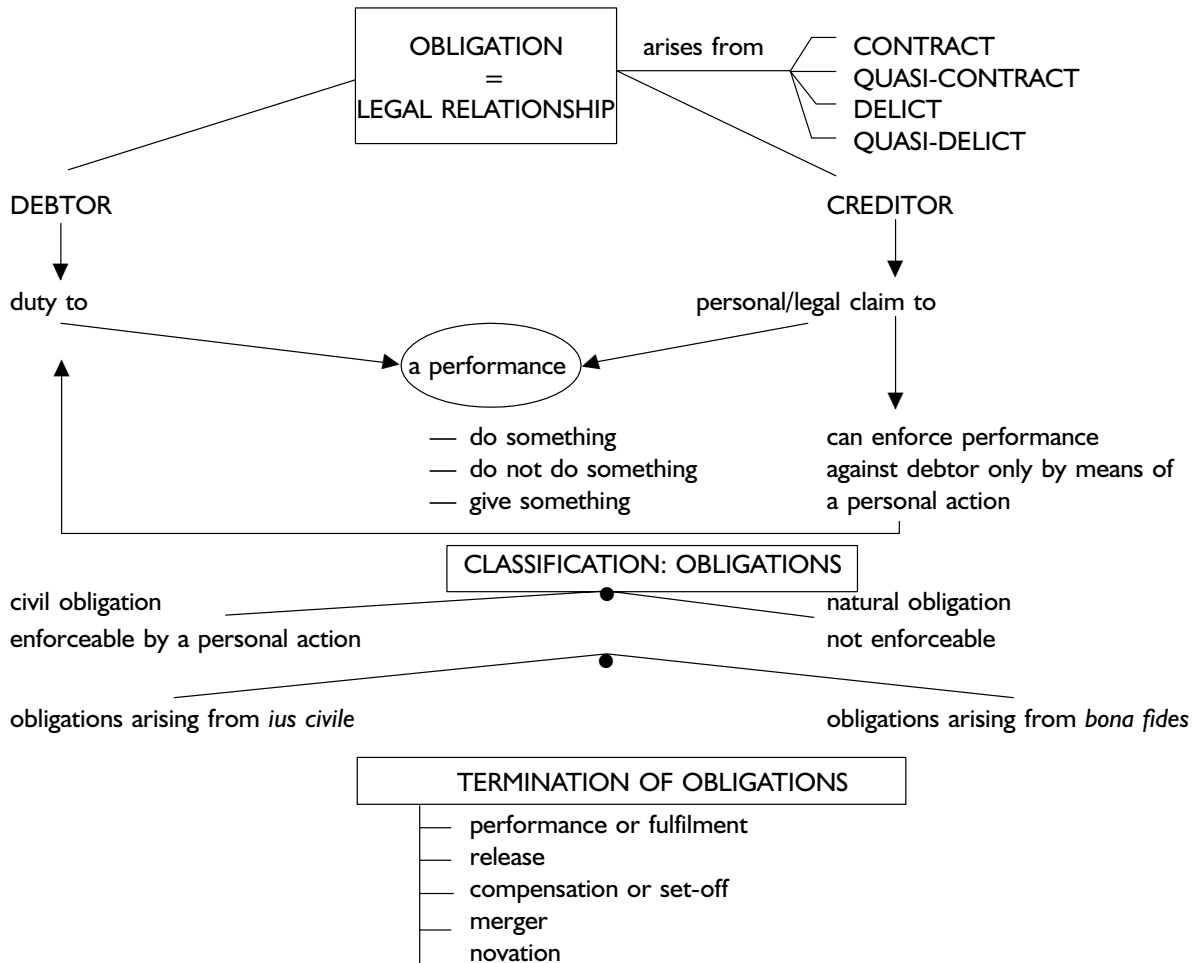
4.5 Novation

Novation takes place when the original obligation is extinguished by the creation of a new obligation in the place of the original one. In Roman law novation was originally effected by means of *stipulatio*, a verbal contract. Any existing obligation could be transformed by means of *stipulatio* into a new or different obligation, and one of the parties to the existing obligation could even be replaced by a different party by means of novation.

Before you try to answer the self-evaluation questions below, we suggest that you revise the following schematic classification of the origins of obligations, the classification of obligations and the way obligations are terminated. If you do not understand the schematic classification, we suggest that you reread the contents of this section. This schematic classification serves as a summary of the above discussion.

DIAGRAM 8

The obligation



Self-evaluation questions

After studying the general principles of the law of obligations, you should be able to answer the following questions in writing:

- 1 What is an obligation? (2)
 - 2 What is the difference between a personal and a real action? (2)
 - 3 Briefly explain the various sources of obligations. (4)
 - 4 Name the Roman jurists' classifications of obligations. (4)
 - 5 Give examples of Justinian's fourfold classification of contracts. (4)
 - 6 In which ways could obligations be terminated? (5)
-

These self-evaluation questions are based on the contents of this chapter. All the answers to these questions are contained in the above material. If you cannot answer any of these questions, we suggest that you revise the particular section thoroughly.

Feedback

- 1 The explanation of what an obligation is, appears in the first paragraph, "What is an obligation?"
- 2 The difference is stated at the beginning of the general introduction to this chapter.
- 3 Both contracts and delicts and quasi-contracts and quasi-delicts were regarded as sources of obligations.
- 4 You must refer to both Justinian's and Gaius' classifications.
- 5 Examples appear in the discussion above.
- 6 The five ways are discussed in detail above.

CHAPTER 2

The Roman law of contracts

GENERAL INTRODUCTION

We said in previous chapters that the Roman jurists never worked out and applied a system of general legal principles in respect of contracts. Specific contracts were simply classified according to the way in which they came into existence. It was only later that Roman law writers identified certain characteristics that were common to all contracts. Therefore, when you study the general principles of contracts, bear in mind that these principles were in fact characteristic of most contracts in Roman law. We shall deal with general principles as a background to our discussion of individual contracts.

I Contents of Roman contracts

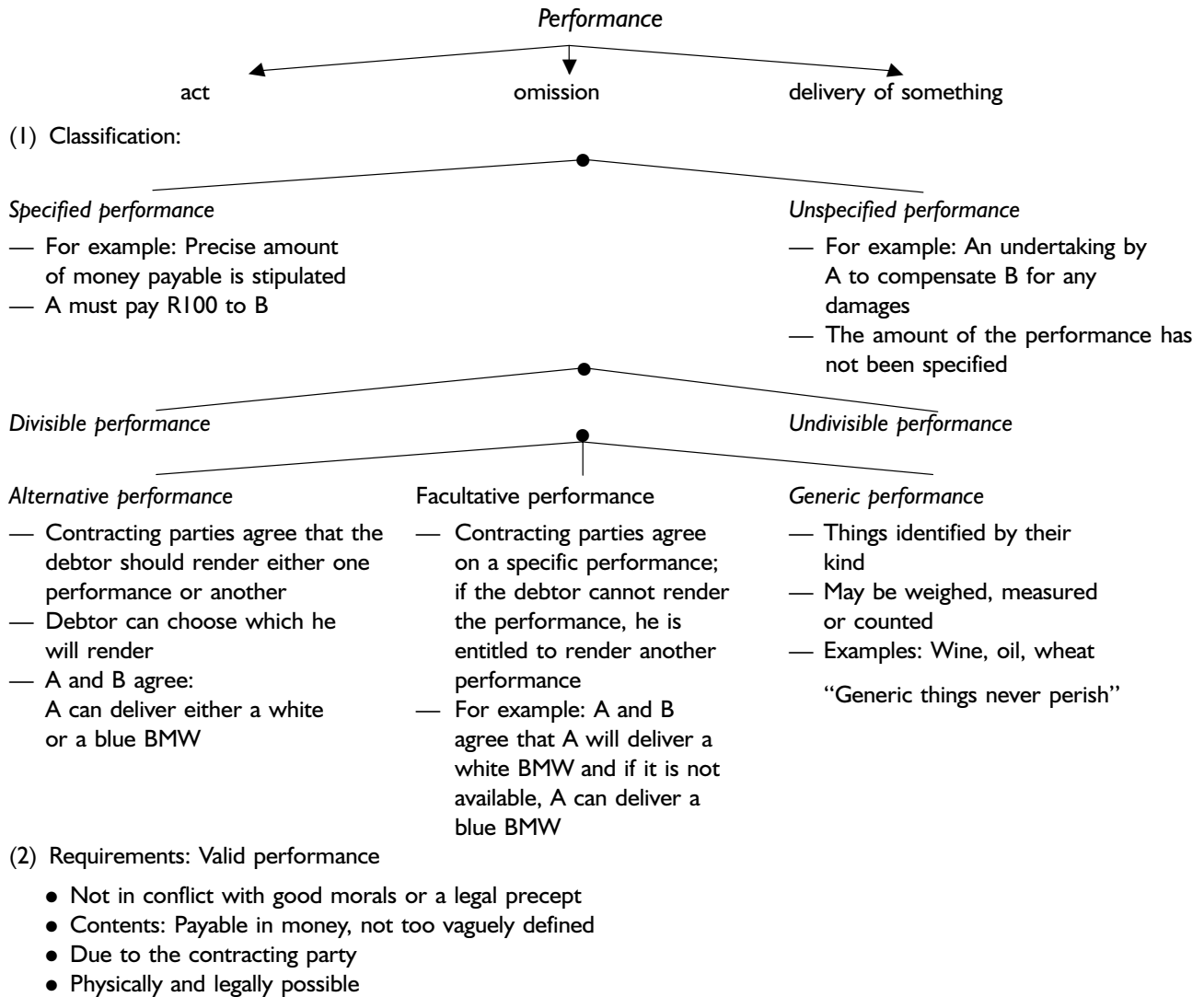
When we speak of the contents of contracts, we are referring specifically to the performance required to fulfil the terms of the contract. Any act or omission could constitute performance in terms of a contract. This performance could be **specified** (*certum*) or **unspecified** (*incertum*) and either **divisible** or **indivisible**.

- An example of a specific performance is where a sum of money is exactly stipulated, such as R100. An example of an unspecified performance would be where Petrus undertakes to compensate a neighbour for any damages he may suffer as a result of Petrus's building extensions.

A performance could also take the form of an **alternative** obligation, as agreed between the parties. A **facultative obligation** was another form of performance. Performance was facultative in cases where performance was due but the debtor was entitled to render another kind of performance instead of the original one. Lastly, a performance could be generic. Let us look at an example of a **generic** performance:

- If Antonius is obliged to deliver 10 litres of wine to Stichus, we are dealing with a generic performance. The Romans believed that generic things were not perishable and even if Antonius's winery burned down, his obligation to deliver 10 litres of wine to Stichus would continue to exist.

DIAGRAM 9



We advise you to take a careful look at diagram 9 above, which reflects the classification of performance and the requirements for valid performance. We should like to encourage you to draw up similar diagrams on your own to illustrate the contents of obligations. Such diagrams will help you to gain a better understanding of the material and will serve as summaries.

There were a certain number of **requirements for valid performance**:

- It should not be in conflict with good morals or a legal precept.
- The content of the performance had to be determinable in monetary terms and could not be vague or imprecise.
- The performance had to be due to the other contracting party (the Romans did not recognise the principle of agency).
- The performance had to be physically and legally *possible*. An example of physical impossibility would be if Stichus sold Julius a house that had already burned down and performance would have been legally impossible if a thing that fell outside the sphere of legal commerce (*extra commercium*) was sold.

It is self-evident that within certain limits (see above) the parties to a contract

could agree on anything. The provisions of a contract are often referred to as the “contract terms”. A condition in a contract is a specific kind of contractual term which determines that an obligation will be created or terminated on the occurrence of an uncertain future event. We distinguish between **suspensive** and **resolutive conditions**. A suspensive condition suspends the effect of the legal act until the condition has been fulfilled.

- For example: Antonius sells his house to Bertus for 100 000. It is stipulated in the contract of purchase and sale that the contract is subject to the approval of a loan. In this case the approval of the loan is the suspensive condition and the obligation is only created if the condition is fulfilled, in other words when the loan is granted.

A resolutive condition works the other way round: It discharges the effect of a legal act **as soon as** the condition is fulfilled. Therefore if a contract is subject to a resolutive condition, the obligation arises immediately and it is terminated upon the fulfilment of the condition.

- For example: Julius undertakes to lend Sextus his wagon for as long as Sextus, who has a broken leg, is in plaster. When the plaster is removed Sextus has to return Julius’s wagon to him. The removal of the plaster is the resolutive condition which terminates the agreement between Sextus and Julius.

It was also possible to link a legal act and consequently a contract to a **time clause**. Unlike a condition, a time clause related to a certain future event. Therefore, if a legal act was made dependent on a **suspensive term**, the obligation would have come into operation immediately, but performance would have taken place only at the end of a predetermined period. If a legal act was made dependent on a resolutive term, the legal act would have come into operation but would have ceased to exist at the conclusion of the term.

The diagram below on contractual clauses clearly illustrates the difference between a suspensive and a resolutive condition, as well as between a suspensive and a resolutive time clause. If the diagram is not clear to you, we suggest that you thoroughly revise the above section.

DIAGRAM 10

Contractual clauses

(1) **CONDITION:** An uncertain future event to which a contract is made subject.

SUSPENSIVE CONDITION**RESOLUTIVE CONDITION**

— The contract is only concluded when the condition is fulfilled.

Example: A and B conclude a contract of purchase and sale in terms of which A sells his house to B if B obtains a loan from C.

- Uncertain future event:
The obtaining of the loan
- Contract is included: When B obtains the loan
- If a condition is not fulfilled: Contract is not concluded.

— Contract is concluded immediately and is extinguished when the condition is fulfilled.

— Example: A and B conclude a contract of letting and hiring in terms of which A hires B's house until B is able to sell the house.

- Uncertain future event:
The sale of the house
- Contract is concluded immediately, but is extinguished when the house is sold.
- If the condition is not fulfilled, the contract remains in force.

(2) **TERM:** A certain future event to which a contract is made subject.

SUSPENSIVE TERM**RESOLUTIVE TERM**

— The contract is concluded immediately.
— Enforceability is suspended until the term has been complied with.
— For example: A promises to give B R1 000 on 1 October.
Thus:
B can claim his money on 1 October.

— The contract is concluded immediately, but is extinguished when the term is fulfilled.
— Example: A and B agree that A may borrow B's car until 31 October.
— Thus:
On 31 October A must return the car.

2 Agreement (*consensus*)

Consensus (*consensus ad idem*, literally “agreement on the same thing”) was a requirement for the creation of all contracts in Roman law. In the absence of agreement or where it was impossible to ascertain the intention of the parties, no contract came into being.

The chief factors that could exclude or influence agreement between the parties were fraud (*dolus*), duress (*metus*) and mistake (*error*). These factors or defects in the will, as they were known, will be explained next. Before we look at these defects in the will it is important to distinguish between **void** and **voidable** contracts. Contracts that were **void** *ab initio* (from the start) had no legal effect. In such a case there was no contract and no rights or duties were conferred on the parties. In Roman law mistake (*error*) sometimes resulted in no valid contract being created. We shall illustrate this below with reference to examples. **Voidable** contracts, on the other hand, were contracts that contained a defect, such as **fraud** or **duress**, which meant that the contract had been valid and binding *prima facie* (at first sight, initially), but that the injured party was entitled to have the contract declared void.

Factors that could exclude or influence consensus between contracting parties were:

2.1 Fraud (*dolus*)

Fraud includes any fraudulent or misleading conduct or misrepresentation that was intended to persuade the other party to conclude the contract. Fraud results in the contract being voidable. If a person is persuaded as a result of fraud to conclude a contract in terms of *stipulatio*, which was derived from the old *ius civile*, the debtor had to perform as long as the prescribed formalities (formal words) were complied with. The judge had no discretion, because the good faith clause was not part of the formulation of the action. This situation had very inequitable consequences. In 66 BC the *praetor* introduced the *exceptio doli*. This defence was afforded to a party who had been induced by fraudulent means to enter into a *stipulatio*. The victim of the fraud was then entitled to raise the *exceptio doli* as a defence against an action arising from the contract. This meant that such a contract was not automatically void, but was voidable. In contracts based on good faith, the *exceptio doli* was unnecessary, because parties were obliged to act in accordance with the dictates of good faith. A contract based on good faith was not void but voidable and the victim of the fraud could institute an action for damages against the offender on the basis of the contract. As you will see when we discuss mistake (*error*), the difference between fraud and mistake lies in the fact that fraud relates to deliberate misrepresentation, whereas mistake relates to a *bona fide* mistake or guess.

- If Antonius sold his horse to Cassius, under the false and fraudulent representation that the horse was five years old, whereas the horse was in fact fifteen years old, and Cassius bought the horse after he had been given this impression (although he specifically wanted a young horse), the contract would be voidable on the grounds of fraud (*dolus*).

2.2 Duress (*metus*)

Duress or intimidation becomes a factor when it is the means of persuading a party to conclude a contract. In such cases the duress should have been unlawful and of such a nature that a reasonable person would fear for the immediate safety of his person, property or close family members. Should a party through duress have concluded a contract, such contract would have been voidable.

The legal development regarding duress ran more or less the same way as that of fraud. Initially the victim of a contract concluded under the old *ius civile* because of intimidation had no remedy if the formal requirements had been met. Once again the *praetor* stepped in and the *exceptio metus causa* was granted to the victim. The victim could use this as an exception against the other party's claim.

In the case of contracts based on good faith concluded because of intimidation, the *exceptio* was unnecessary, because the parties were obliged to act in accordance with the dictates of good faith. The contract was always voidable on request of the victim.

Digesta 4.2.1: Ulpian:

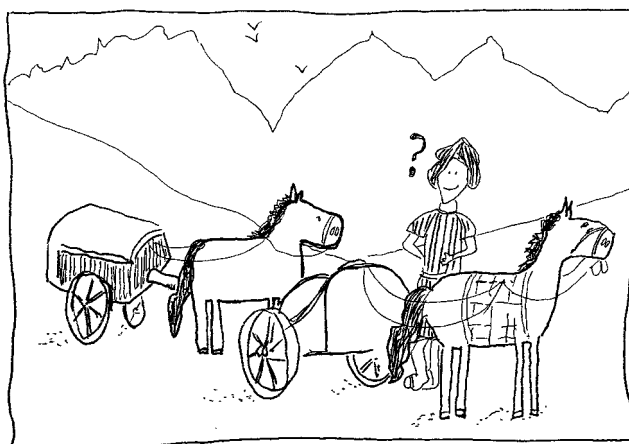
The *praetor* says: “Where an act is done through fear I will not uphold it.”

The above quotation is an example of the quotations to which we referred in the Introduction and which do not have to be studied for examination purposes. The aim of these quotations is to show you where the legal principles are to be found. You may be interested to know that the Roman jurist, Ulpian, who was quoted above, was one of the five great jurists (the other four were Gaius, Papinian, Paul and Modestinus), all of whom played a major part in the history of Roman law.

2.3 Mistake (*error*)

Mistake refers to a *bona fide* mistake made by one or both of the contracting parties in the conclusion of a contract and that was not due to fraud on the part of either contracting party. Mistake is therefore nothing other than an erroneous impression of the true facts. The various kinds of mistake or error had different legal consequences, as illustrated below. The following types of mistake are recognised in Roman law:

Error



Mistake regarding the object of the legal act:
Chariot or carriage?

2.3.1 Mistake in regard to the nature of the legal act (*error in negotio*)

In this case no valid contract came into existence and the contract was void *ab initio*.

- Example: Antonius and Stichus concluded a contract. Antonius was under the impression that he was selling his house to Stichus, whereas Stichus thought that he was concluding a contract of letting and hiring with Antonius.

2.3.2 Mistake in respect of the object of the contract (*error in corpore*)

No valid contract came into existence and the contract was void *ab initio*.

- Julius and Darius concluded a contract in terms of which Julius sold his chariot to Darius. Darius was under the impression, however, that Julius was selling him his carriage.

Digesta 18.1.9 *pr.*: Ulpian:

If I thought that I was purchasing the Cornelian Field, and you thought that you were selling me the Simpronian Field, for the reason that we disagree as to the object of the transaction, the sale will be null and void.

It is important to emphasise that the above types of mistake, which were material, resulted in no valid contract coming into existence.

2.3.3 Mistake regarding the name of the object of the contract (*error in nomine*)

Since both contracting parties had the same object in mind, the contract remains valid.

- Aulus sells his slave whose name is Seius to Pamphilus. Pamphilus is under the impression, however, that Aulus's slave is called Meius. This mistake is therefore irrelevant, since both the buyer and the seller had the same slave in mind. The contract remains valid.

2.3.4 Mistake with regard to the identity of the other contracting party (*error in persona*)

An error as to the identity of the other contracting party (eg that he was Mr Smith and not Mr Smit) usually had no influence in principle on the validity of the contract. It would be different, however, if the contract had been entered into with regard to a certain person, as where a specific person was contracted.

2.3.5 Mistake as to the nature or quality of the object of the contract (*error in substantia*)

It is not very clear whether a contract containing mistakes as regards the nature or quality of the object of the contract was valid. It would appear that this form of mistake was not material during the classical Roman period, but that the position changed in later law. The contract would have been **void** if the object of the contract differed **in essence**, from what had been agreed to.

- Aulus sells a silver vase to Balbus, under the impression that it is made of solid silver, but upon closer examination it turns out to be a bronze vase that had been silver plated. It could be argued that this is an essential difference, with the result that the contract is void.
-

Digesta 18.1.41.1: Julian:

You sold me a table plated with silver, with the understanding that it was solid, neither of us being aware that it was not. The sale is void, and the money paid on account of it can be recovered.

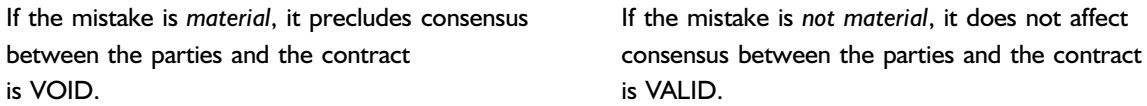
Before you attempt the next activity, we suggest that you refresh your memory by studying Diagram 11.

DIAGRAM 11

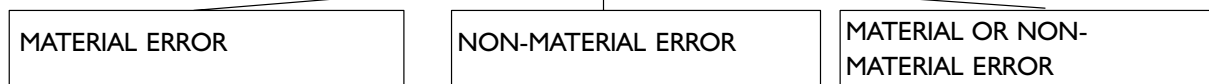
Defects in agreement

(1) MISTAKE

- (a) Definition: A *bona fide* mistake made by one or both parties to the contract
- (b) Effect of mistake on a contract



- (c) Classification of the different kinds of error



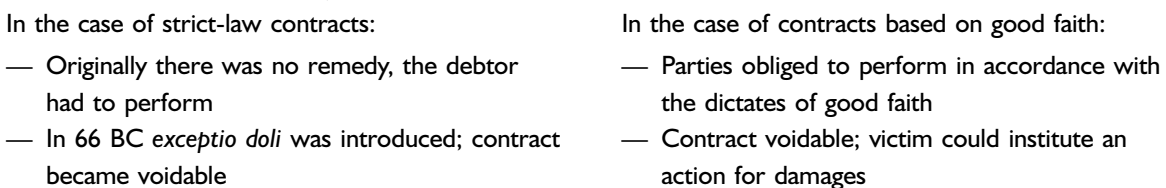
- (i) *Error in negotio*
Mistake regarding the *nature* of the contract
- (ii) *Error in corpore*
Mistake regarding the *object* of the contract

- (i) *Error in nomine*
Mistake regarding the *name* of the object of the contract

- (i) *Error in persona*
Mistake regarding the identity of the other contracting party
 - (a) if *identity is material*, effect of the error: Contract void
 - (b) if *identity is unimportant*, the mistake is non-material and the contract is valid
- (ii) *Error in substantia*
Mistake in respect of the *nature or the quality of the object* of the contract; material if it relates to the essence of the performance

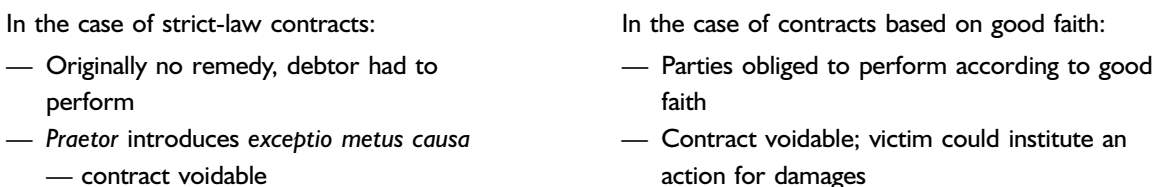
(2) FRAUD/MISREPRESENTATION

- (a) Definition: One party deliberately misleads the other contracting party and the contract is concluded as a result of misrepresentation
- (b) Effect of fraud on contract



(3) DURESS

- (a) Definition: One party to the contract is persuaded by means of unlawful intimidation or duress to conclude a contract with the other contracting party. The intimidation must be of such a nature that a reasonable person would immediately fear for his person, property or closest family members.
- (b) Effect on contract



Work through the discussion of the factors that could influence or preclude consensus and then test your understanding by doing the following activity:

Activity

Briefly discuss whether there was consensus between the parties in the following cases and the effect on the validity of the contract that was concluded.

- (a) Baldus is Cassius's employer. They agree that Cassius will rent Baldus's holiday home from him for a period of five years. Baldus makes it quite clear to Cassius that he (Baldus) will ensure that Cassius's service contract is not renewed the following year if he refuses to conclude the contract of letting and hiring with him. (3)
 - (b) Antonius and Stichus conclude an agreement in terms of which Stichus buys a stand from Antonius. Antonius points the boundaries of the stand out to Stichus. When Stichus starts taking measurements for the villa he wants to build on the stand, it appears that a portion of the stand actually belongs to Antonius's neighbour. (3)
 - (c) Aulus enters into an agreement with Furius, a goldsmith, that Furius will make Aulus's wife a pair of earrings out of gold. Furius fraudulently makes the earrings out of an inferior metal and plates them with a thin coating of gold. (3)
-

Feedback

- (a) If Cassius were to conclude the contract with Baldus under duress or for fear that his service contract would not be renewed, the contract would be voidable as a result of duress (*metus*). Cassius therefore has the option of withdrawing from the contract without incurring any obligation or liability.
- (b) If there was a *bona fide* mistake regarding the boundaries of the stand, we are dealing with *error in corpore* (mistake regarding the object of the contract) and no valid contract was created between Antonius and Stichus.
- (c) While at first sight these facts appear to suggest *error in substantia* (mistake regarding the quality or nature of the object of the contract), the key to the answer lies in the word "fraudulently". The contract between Aulus and Furius is voidable as a result of fraud (*dolus*). Aulus could therefore have the contract declared void.

2.4 Contractual liability

When persons conclude a contract they intend to render performance in accordance with the provisions of the contract. In practice the debtor may malperform, either by not fulfilling his obligations in terms of the contract at all or by rendering an inadequate performance. In these cases the law lays down certain standards or norms that are used to determine whether the debtor would have to pay compensation to the other contracting party. In Roman law these standards differed according to the **nature of the contract** and the **subjective interests** of the parties to the contract.

In contracts based on good faith (*bona fides*) the basis of the parties' commitment to the contract was, of course, *bona fides*, and it was therefore self-evident that the parties had to perform in accordance with the dictates of good faith. A party who committed fraud (*dolus*) would therefore have contravened the dictates of good faith. In practice the result was that the party who had malperformed in a fraudulent manner could have been held liable for the payment of compensation to the other party.

Malperformance was also possible where there was no fraud on the part of the debtor. In almost all cases the debtor was expected to ensure that performance took place. The degree of care the debtor was expected to display depended on the type of contract. In most cases the contracting parties were expected to act with the utmost care or diligence. In legal terms it was said that they had to display the care of a *bonus et diligens paterfamilias*.¹

The following **degrees of negligence** were distinguished:

If a party omitted to display the care of a *bonus et diligens paterfamilias*, he acted negligently or, to use the technical term, he was guilty of ***culpa levis in abstracto***. This means that the highest form of care was required from the contracting party. He was held liable even in the case of the slightest negligence. A party to a contract who derived a benefit from the transaction thus had to display the care of a *diligens paterfamilias*. Examples: Both parties to a contract of letting and hiring, contract of mandate or a contract of purchase and sale. Contracts of letting and hiring and contracts of purchase and sale are discussed in greater detail in subsequent chapters.

Culpa levis in concreto indicated that a contracting party was expected to display the same degree of diligence or care as he would have applied to his own affairs. This diligence was applicable to contracts where the one contracting party may have had to see to his own interests as well as those of the other contracting party over a long period. It would have been unreasonable under these circumstances to expect the contracting party to exercise a higher degree of care with regard to the other party's things, than with regard to his own. Consequently he was only expected to care for the other party's things in the same way as his own. Persons liable for *culpa levis in concreto* were, for example, partners in terms of a partnership contract. Partnership contracts are also dealt with in detail in a subsequent study unit.

Digesta 17.2.72: Gaius:

One partner is liable to another on the ground of negligence ... it is sufficient for him to employ the same diligence in the partnership affairs as he is accustomed to do in his own; because where anyone takes a partner who displays very little diligence he has only himself to blame.

Culpa lata referred to gross negligence. For all practical purposes gross

¹ The *diligens* or *bonus paterfamilias*, which can be translated as the careful head of a family, corresponds to the mythical "reasonable man" which is used as the criterion in modern South African law.

negligence was virtually the same as *dolus* (malice). The depositary in a contract of deposit was responsible for *culpa lata*, for example.

Study the following activity carefully after you have studied the section on *culpa* under contractual liability and try to answer the question on it.

Activity

Balbus borrows Antonius's slave, Pamphilus, for a few days to help him copy a few documents. Balbus asks Pamphilus to repair his roof. Pamphilus is not used to this kind of work. He loses his balance, falls off Balbus's roof and suffers serious head injuries. Discuss Balbus's possible liability for Pamphilus's injuries. (5)

Feedback

The contract between Balbus and Antonius is a contract of loan for use, which is a contract based on good faith (*bona fides*). Balbus should have displayed the care of a *diligens et bonus paterfamilias*. However, since he used the slave Pamphilus for a purpose other than the one he agreed upon with Antonius, he acted negligently and was therefore liable for *culpa levis in abstracto* towards Antonius for the injuries suffered by Pamphilus.

2.4.1 *Mora*

Another form of breach of contract occurred when the performance was possible and due, but the debtor failed to perform due to his fault. Here we speak of *mora debitoris* (failure by the debtor to render performance as a result of his own fault). If the debtor's failure to perform was not his own fault or if it was reasonable that he was under the impression that performance was not due, there was **no** question of *mora debitoris*. *Mora debitoris* came to an end as soon as the debtor tendered performance or when the obligation was terminated in one of the recognised ways (see above).

The **consequences** of *mora debitoris* were that the obligation remained in force and the debtor was liable for performance, even if performance became impossible after he was in *mora* through no fault of his own.

Digesta 22.1.32. *pr.*, 2: Marcianus:

Mora is understood to apply ... where the party, after having been notified at the proper place, does not make payment ... In *bona fide* contracts, interest becomes due through default.

If there are no time clauses or conditions in a contract regarding the time when performance should take place, performance can be demanded immediately after the contract has been concluded or within a reasonable period, depending

on the nature of the obligation and the accompanying circumstances. We shall now discuss the different forms of *mora* at greater length.

If the parties agreed that the debtor should perform on a particular day, he would automatically be in *mora* if he did not perform on that particular day. This form of *mora* was known as *mora ex re*.

- For example: Julius asks Stichus: “Do you promise to transfer ownership of your slave Sextus to me on 1 January?” Stichus answers: “I promise”. Stichus neglects to hand over the slave in question on 1 January and on 2 January he is therefore in *mora ex re*.

If no exact date had been determined for performance, the creditor first had to give the debtor **notice** to perform. It is self-evident that without such notice the debtor could not be aware of the fact that the creditor desired performance and there could be no question of fault on the part of the debtor if he failed to perform. If the debtor received a notice from the creditor requiring him to perform on a certain day and he neglected to perform on the appointed day, he would fall into *mora*. This form of *mora* was known as *mora ex persona*.

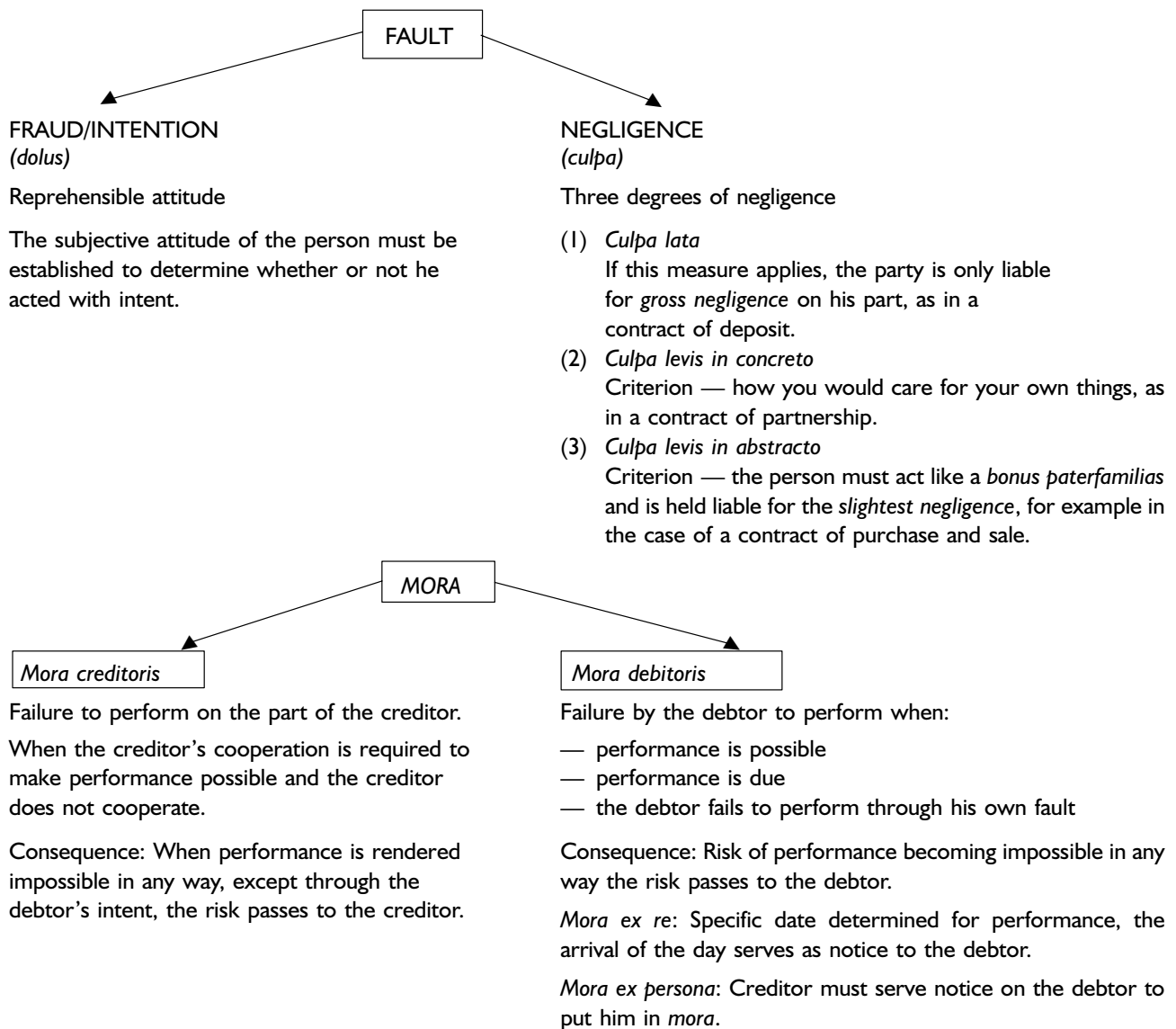
- Example: Stichus and Antonius conclude a contract in terms of which Antonius may borrow Stichus’s slave for one week. No date for performance is fixed. Antonius informs Stichus that he should deliver the slave to him on or before 30 December. Stichus neglects to deliver the slave on 30 December and has therefore fallen into *mora ex persona* on 31 December.

Another form of *mora* was *mora creditoris* and this occurred when the **creditor** made tendering of the performance by the debtor impossible or refused or neglected to accept the performance when it was duly tendered at the right time and in the right place. Unlike in the case of *mora debitoris*, the creditor fell into *mora creditoris* even in cases where there was no fault on his side, as for example if he was ill or was prevented by circumstances beyond his control from accepting the performance. *Mora creditoris* was terminated if the creditor indicated his willingness to accept the performance or cooperated in enabling the performance to be accepted. This form of *mora* is self-explanatory and requires no example to illustrate it.

The **consequences** of *mora creditoris* were that it improved the debtor’s position. If the debtor was liable for *culpa* (negligence) before the inception of *mora creditoris*, he could now only be held liable if the thing was destroyed as a result of *dolus* (fraud) on his part. The debtor would also have been entitled to a claim for the damages he suffered as a result of the *mora creditoris*.

We suggest that, before you try the activity below, you refresh your memory by studying the following diagram. This diagram gives you a schematic overview of contractual liability. Note the distinction between *mora debitoris* and *mora creditoris*.

DIAGRAM 12

Contractual liability**A**ctivity

Seius asks Antonius: "Do you promise to transfer ownership of your horse, Sextus, to me on or before 1 May?" Antonius immediately answers: "I promise". Antonius does not perform on the given date, however, but goes to Seius's house one day later. On the way to Seius's house Sextus is killed by lightning.

Answer the following questions on the facts given above:

- (a) Explain what kind of *mora* is applicable here and say when it came into operation. (2)
- (b) Antonius contends that the death of the horse was caused by an act of God (*vis major*) and not by any fault of his. Can Seius hold Antonius liable for the death of the horse Sextus? Explain briefly. (3)
- (c) If Seius had refused to receive the horse on 1 May, what would the legal position have been? (2)

Feedback

- (a) Antonius was in *mora ex re* on 2 May. An agreed date had been set for performance and he failed to perform on that date.
- (b) The consequence of Antonius's *mora* was that as debtor he remained liable for performance, even if that performance had become impossible through no fault of his own. Seius could hold Antonius liable for the payment of an amount equivalent to the value of the horse, Sextus.
- (c) If Seius refuses to receive the horse on 1 May when performance is tendered by the debtor as agreed, he has fallen into *mora creditoris*. Antonius becomes entitled to claim compensation for damages suffered by him as a result of Seius's *mora*, such as the cost of stabling and feeding the horse, which he had necessarily to incur.

2.5 Impossibility and supervening impossibility of performance

Digesta 50.17.185:

There is no obligation to do anything which is impossible.

Impossibility and supervening impossibility of performance must now be considered. The Latin maxim for this is: *Impossibilium nulla obligatio* (If it is impossible to perform, there is no contract).

The term “**impossibility of performance**” is used in a case where it was impossible to perform **at the moment** the contract was concluded. In other words, this is a case of initial impossibility of performance. The consequences of initial impossibility of performance varied depending on the fact whether it was a strict law contract or whether it was a contract based on good faith. In the case of a strict law contract initial impossibility (in accordance with the Latin maxim) resulted in the contract being void. In the case of contracts based on good faith, however, the question to be asked was whether the debtor knew that performance was impossible. If he was aware of the fact that it was impossible, he acted fraudulently and would be held liable. If he did not know that performance was impossible, the maxim applied and no contract came into being.

Supervening impossibility of performance indicates those cases in which performance only became impossible **after** the contract had been concluded. In order to determine what the effect of impossibility in these cases is, one should enquire about the cause of the supervening impossibility. If it was caused by an act of God (*vis maior*) or chance (*casus fortuitus*), the maxim applied and no contract was concluded. If the supervening impossibility was caused by the fault of the debtor (if he had malice or if he had acted negligently), the debtor will be held liable in terms of the contract.

Vis maior or an act of God refers to an irresistible force. This concept was not confined to natural forces, but included human acts as well. Some examples of *vis maior* are earthquakes, lightning, floods, tempests, incursions by enemies, riots and robbery.

Casus fortuitus referred to inevitable accidents. In Roman law the most important forms of *casus fortuitus* were theft, death and disease. These incidents were less serious than *vis major*, but shared an element of unforeseeability with *vis major*.

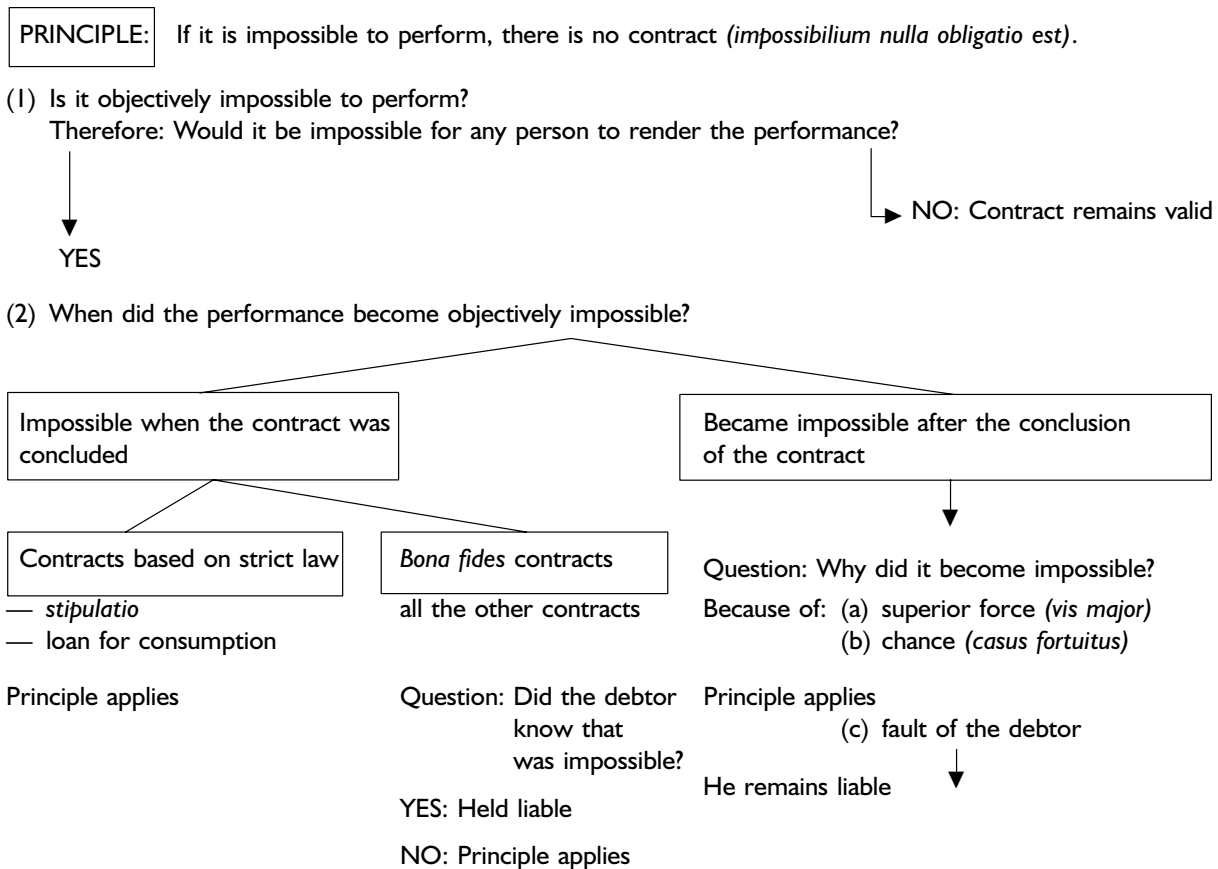
Let us examine an example illustrating the concept of supervening impossibility of performance:

- Brutus and Baldus conclude a contract in terms of which Brutus may borrow Baldus's slave, Stichus, to cultivate his (Brutus's) wheatfield. War breaks out, however, and news is received that a hostile force has encamped virtually next to Brutus's land. In this case the consequence of the supervening of *vis major* (the hostile incursion) is that Baldus need no longer deliver his slave to Brutus to cultivate Brutus's wheatfield.

Revise the following schematic representation of the impossibility or supervening impossibility of performance before you attempt the activity below.

DIAGRAM 13

Impossibility/supervening impossibility of performance



Activity

Briefly discuss the legal consequences of the following situations:

- (a) Cassius and Darius conclude a contract in terms of which Cassius buys a villa on Darius's land. Upon closer inspection it appears, however, that the villa burned down some time previously. (3)
 - (b) Bertus and Antonius agree that Bertus may borrow Antonius's wagon for a week. Shortly after the contract has been concluded, when Antonius wants to deliver the wagon to Bertus, Antonius's wagon is stolen. (4)
-

Feedback

- (a) In this case performance was impossible *ab initio*, since the villa did not exist at the time when the contract was concluded. Therefore no valid contract came into existence.
- (b) These facts are an example of where performance became impossible after the contract had been concluded. Under the *impossibilium* rule the risk of supervening impossibility of performance devolves on the creditor, unless the supervening impossibility of performance is the result of *vis major* or *casus fortuitus*. The theft of the wagon is an example of supervening impossibility of performance as a result of *casus fortuitus* and consequently Antonius is released from his obligation under the contract.

2.6 Unilateral, bilateral and imperfectly bilateral contracts

We now need to have a look at unilateral, bilateral and imperfectly bilateral contracts.

Only **one** obligation followed from a **unilateral** contract. This means that one of the contracting parties (the debtor) was under an obligation to perform, while the other party (the creditor) was entitled to a performance. An example of such a unilateral contract was a loan of consumption.

An **imperfectly bilateral** contract was, in principle, unilateral. This means that in principle it gave rise to only one obligation. However, in exceptional circumstances (for example when the debtor suffered damages as result of the creditor's fault or gross negligence), the debtor would also have a claim. An example of an imperfectly bilateral contract is a loan for use.

A **bilateral** contract gave rise to two obligations. Both contracting parties enjoyed rights and had obligations. Both parties to the contract were creditor as well as debtor. The fact that it was "bilateral" meant that one party's right was the other's obligation. A good example was the contract of sale. The most important duty of the buyer was to pay the purchase price and the seller was entitled to receive it. On the other hand it is the seller's most important obligation to deliver the object of sale, while the buyer is entitled to receive the object of sale.

In the following discussion of the different kinds of contract we shall indicate whether each contract is unilateral, imperfectly bilateral or bilateral.

Self-evaluation questions

After studying the general characteristics of Roman contracts, you should be able to answer the following questions in writing:

- 1 What were the legal requirements for valid performance in Roman law? (5)
- 2 What is the difference between a suspensive and a resolutive condition? (2)
- 3 What is the difference between void and voidable contracts? (2)
- 4 Name the factors that preclude or influence consensus between contracting parties. (3)
- 5 Briefly discuss the various forms of *culpa* in contractual liability. (6)
- 6 Name the various forms of *mora* and the legal consequences of each. (4)
- 7 Briefly discuss the supervening impossibility of performance and its consequences. (6)

We remind you that the answers to the self-evaluation questions are contained in this chapter. If you are unable to answer these questions, we suggest that you study this chapter carefully again. The concepts dealt with in this chapter are very important. You will come across these principles again and again in the course of your further legal training.

Feedback

- 1 The five requirements are discussed under contents of Roman law contracts above.
- 2 The difference is illustrated by means of an example in the text above.
- 3 The answer relates to the validity or not of the contract — see discussion above.
- 4 You need to refer to fraud, duress and mistake.
- 5 You should explain the three forms each in one sentence.
- 6 There are two main forms, each with separate legal consequences. See discussion above.
- 7 Supervening impossibility of performance refers to the situation where performance becomes impossible after the conclusion of the contract. See discussion above for the relevant consequences.

CHAPTER 3

Consensual contracts (Part I)

GENERAL INTRODUCTION

Contractus consensu, as we explained in chapter 1, were created solely by agreement between the parties and were one of the exceptions to the rule that a contract had to contain an additional element, known as the *causa contractus*, before it was enforceable. The four consensual contracts were purchase and sale, letting and hiring, partnership and mandate.

The development of the consensual contracts was necessitated by the large-scale development and expansion of the Roman economy during the period of the Republic.¹ In 241 BC the *praetor peregrinus*² recognised consensual contracts of sale between foreigners (*peregrini*) and from 200 BC onwards consensual contracts of sale between Roman citizens were also recognised.

The contract of purchase and sale, probably the most important Roman contract, will be studied more closely in the following section.

I Contract of purchase and sale (*emptio venditio*)

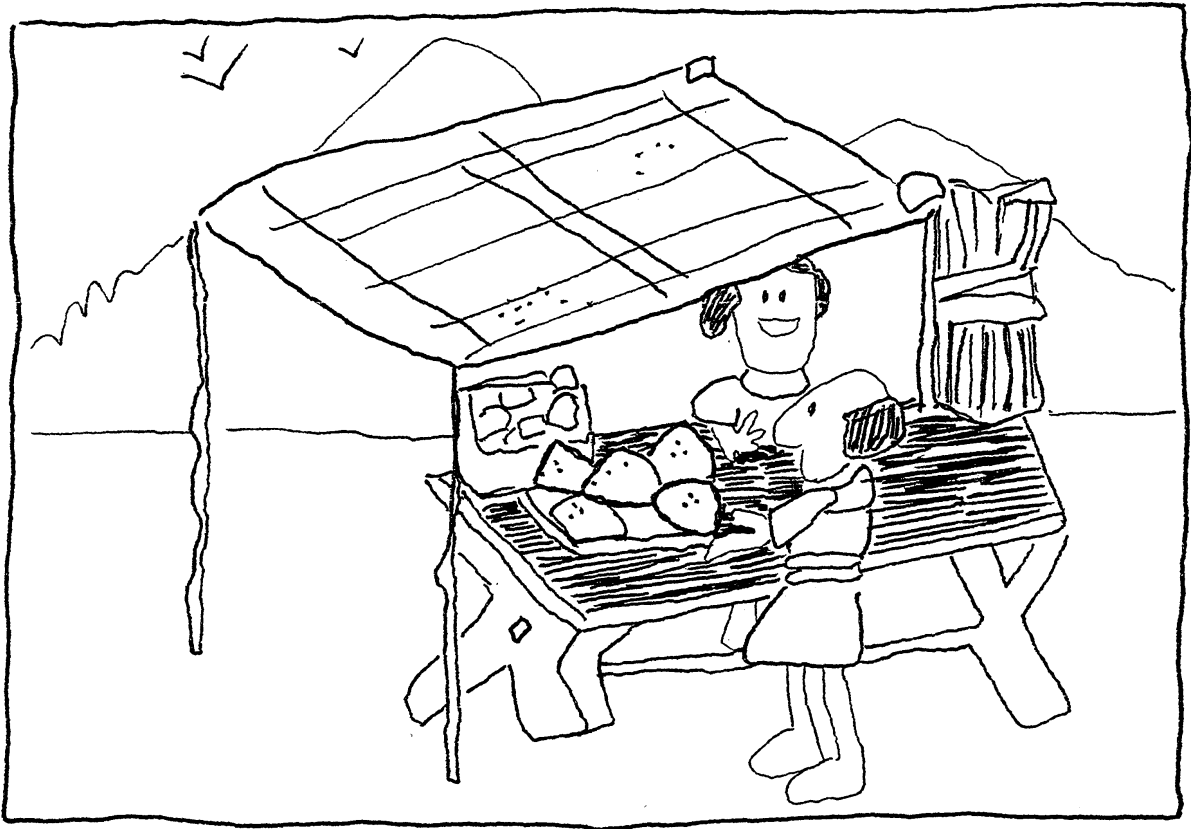
The only requirement for the conclusion of a contract of purchase and sale is consensus between the seller and the purchaser regarding the three material elements of the contract of purchase and sale, namely:

- (1) an agreement between the purchaser and the seller regarding the nature of the contract
- (2) the object of sale, which had to comply with certain requirements
- (3) the purchase price, which had to comply with certain requirements

A contract of sale could therefore be defined as an agreement according to which one party, the seller (*venditor*), agreed to deliver vacant possession of the object sold to the other party, the purchaser (*emptor*), who in turn undertook to pay the purchase price.

¹ “The Republic” refers to the period from 509–27 BC in Roman history during which governance was in the hands of two officials, known as consuls. During this period the Roman empire expanded through the subjection of many peoples to Roman dominion and Rome became a centre of international trade.

² The office of *praetor peregrinus* was created in 242 BC as a result of the expansion of the Roman economy during the Republican period. The *praetor peregrinus* was entrusted with dispensing justice in Rome in cases in which the parties were non-Romans (foreigners or *peregrini*) or cases involving Romans and foreigners.



A contract of sale is an agreement between a seller and a purchaser

2 Elements of the contract of sale

The contract of sale is a reciprocal contract based on *bona fides*.

The three elements (*essentialia*) of the contract of sale will now be briefly discussed.

2.1 Agreement (*consensus*)

As explained above, a contract of sale only came into existence when there was agreement between the buyer and the seller regarding the purchase and sale, the object of sale and the purchase price. This agreement was demonstrated in various ways, such as a handshake or the exchange of rings. It was not necessary for the parties to have come to this agreement in each other's presence and it was possible to conclude the contract by letter or through the agency of messengers.

Digesta 18.1.1.2:

Sale is a contract of the law of nations and so is concluded by simple agreement; it can thus be contracted by parties not present together, through messengers, or by correspondence.

It became customary for the buyer to hand the seller a sum of money or some other item of value, known as *arrha*, as a symbol of his good faith and his

serious intentions. This custom did not have its origin in Roman law but was based on Greek and Egyptian precedents. It is important to note that the *arrha* was not regarded as a requirement for the conclusion of a contract in Roman law, unlike the position in Greek law. It would appear that the Romans followed the Greek example by accepting that if the purchaser did not fulfil the agreement, he would have to repay twice the *arrha*, in other words the *arrha* together with an equivalent amount, to the purchaser.

It became customary to put the contract in writing in cases where land and other valuable objects were sold. In AD 529 Justinian ruled that a contract would only become binding once it had been put in writing.

In modern law it is a requirement for the validity of certain contracts that they are put in writing. The best-known example is a contract for the alienation of immovable property.

2.2 Object of sale

Digesta 18.1.34.1:

There can be a valid sale of anything one may have, possess, or sue for; but there can be no sale of anything which is excluded from *commercium* by natural law, the law of nations, or the observances of the state.

Only things that were susceptible of private ownership (*res in commercio*) could be the subject of a contract of sale. *Res extra commercium* (things outside commerce) such as a temple, a grave or a free person could not be sold and if a contract were to be entered into, it would be void.

Other things that could not be sold were

- things that already belonged to the buyer
- things that did not exist at the time of conclusion of the contract of sale
- things on which a prohibition of sale had been imposed by law, such as the sale of dowry items consisting of immovable property in certain cases

In the case of things that did not exist at the time when the contract was concluded, it is necessary to distinguish between things that had already ceased to exist before the contract was concluded and things that would come into being after the conclusion of the contract. As we saw above, any contract where the object had ceased to exist before the agreement was concluded was void. This rule also applied in a situation where only a portion of the object sold had ceased to exist.

- If Antonius sold Sextus two horses for the price of one and one of the horses was already dead at the time when the contract was concluded, then no sale would take place.

Digesta 18.1.44:

Even though there is agreement on the thing, if the thing ceases to exist before the sale, the contract is void.

The sale of **future things** was possible.

- Example: Brutus agrees with Augustus that he will purchase “next year’s wine crop from Augustus’s vineyard”.

With the sale of future things the Roman jurists distinguished between the **purchase of an object hoped for** (*emptio rei speratae*) and the **purchase of a hope** (*emptio spei*). They were both valid contracts under Roman law, but the legal consequences were different if the thing did not materialise. Let us illustrate this difference with reference to examples:

- An example of the purchase of a hope (*emptio spei*) would be if Aulus agreed with Ulpus that he would buy all the birds Ulpus caught in his trap in a period of two days for five coins. If Ulpus caught nothing in his trap in these two days, Aulus was nevertheless responsible for paying the five coins. This sale was therefore a risk, because if nothing materialised, the purchaser still had to perform. This contract was therefore to the advantage of the seller.
- An example of the purchase of a future thing or an object hoped for (*emptio rei speratae*) would be if Aulus agreed with Stichus that he would buy Stichus’s lucerne crop for the following year from certain fields at five silver pieces per bag of lucerne. This contract was to the buyer’s advantage, because if no lucerne were harvested, no obligations would arise. Therefore, if Stichus harvested no lucerne the following year, Aulus owed him nothing.

It was not always easy to distinguish between the two categories of purchases of future things. In cases where the distinction was not very clear, the intention of the parties was important, as was the way in which they agreed on the price. The purchase of a future thing differs from the purchase of an expectation in this respect that at the time when the agreement was concluded there was a reasonable expectation that the object of the sale would materialise. In the last example there was a good chance that something would materialise, even if it was only a poor lucerne crop. If the price was fixed proportionally in respect of the expected future thing, for example five coins per bag of lucerne, there was a good chance that the subject of the contract was something hoped for (*emptio rei speratae*). However, if Aulus had agreed with Stichus to buy the **entire crop** for ten silver pieces, the contract would have been construed as an *emptio spei* (purchase of a hope).

The object sold had to be **specific** (*certum*). This meant that a sale by kind, where the contract only referred to the kind of object sold and not to a specific object, was not permissible.

- Examples of contracts that were inadmissible would include those for the sale of “the best firewood” or “five litres of red wine”.

There were two exceptions to the rule that the object sold had to be specific. These exceptions were the **alternative sale** and the **semi-specific** sale.

- With the alternative sale the object sold consisted of two alternatives, for example “my horse Beauty or my horse Duke”. With the semi-specific sale the object of sale was not precisely identified, but there was an indication of where it came from and what distinguished it from an inadmissible sale by kind. An example of a semi-specific sale was where the object sold was described as “ten young colts *from my stable*”.

It was not a requirement that the object of sale should be the seller’s own property. A seller could sell the property of another person (*res aliena*) and this would still give rise to a legally valid contract. It was therefore **not** a requirement in terms of the contract of sale that the seller should transfer ownership of the object sold to the purchaser. (As you will see when we discuss the obligations of the seller below, he was only required to give the purchaser free and undisturbed possession of the thing sold and a guarantee against eviction. At this stage you need not be concerned if you do not understand what “eviction” means here — we explain the concept below under the duties of the seller.)

The following is a brief summary of the requirements that an object of a sale had to meet:

- It had to be in commerce (*in commercio*) or susceptible of private ownership.
- It had to be possible at the time the contract was concluded.
- It had to be specific (*certum*).

2.3 Purchase price

Digesta 18.1.2.1:

There is no sale without a price.

Just as there were certain requirements with which the object sold had to comply, there were also requirements concerning the purchase price. You should remember that for the conclusion of a contract of sale there had to be agreement on the price.

2.3.1 Requirements regarding the purchase price

(a) *No price no sale*

The first requirement was that for a valid sale to take place there had to be a

price. The principle *nulla emptio sine pretio* (no price no sale) means that a contract of sale could not be created unless a price was specified. Determination of the price by one party unilaterally was not permitted.

- If it was agreed between Aulus and Preuius that Preuius would pay Aulus “as much as Balbus will decide” for Aulus’s black stallion and Balbus could not decide on an amount, no purchase price was determined and the contract was therefore void.

(b) Money required

The second requirement was that the price had to be in money, in other words it had to be a sum of money that could be physically counted or weighed on a scale.

This requirement that the price had to be in money gave rise to a celebrated debate between the Proculians and the Sabiniani. These were two schools of jurists that appeared on the scene during the first century BC and that followed different approaches to the law. The Proculians (called after Proculus) were conservative in their approach and supported the Republic, while the Sabiniani were more liberal and ranged themselves behind the imperial monarchy. The Sabiniani believed that because barter had preceded the use of money, it was the original form of sale and therefore no price consisting of money was required. The Proculians, on the other hand, believed that a sale consisted not of the exchange of two things, but of the exchange of money for a thing. Their opinion prevailed in the end. Justinian supported the requirement that there had to be a price consisting of money.

(c) The price had to be specific (certum)

A third requirement was that the price had to be specific (*certum*). Like the object of sale referred to above, the price had to be specific and if a price was not agreed on, the contract was void. A price was still specific if it was *ascertainable but unknown*. Let us examine the following example:

- A price given as “a reasonable price” is not specific and the contract of sale would be void. An example of a price that is certain but not known, would be if Aulus agreed to pay Stichus the same price per bag of wheat “as he paid last year”. Although this amount is unknown, it can easily be ascertained.

Digesta 18.1.7.1: Ulpian:

A purchase made in the following terms: “I will buy this of you at the same price you paid for it, or I will give the amount which I have in my chest”, is valid. For the price is not uncertain, as the amount paid at the sale can readily be ascertained.

(d) The price had to be genuine (verum)

A fourth requirement was that the price had to be genuine (*verum*). This means that the parties must have intended that it should be paid; the price determined could not be a sham. If the price was merely a sham, the contract was regarded as a donation.

- If A sold his farm to B for one cent, the intention was clearly to make a donation and not to create a contract of sale.

(e) The price had to be just (iustum)

A fifth requirement that was introduced during the postclassical period was that the price had to be just and reasonable (*iustum*).

3 Stages in the contract of sale and the passing of risk

It is possible to distinguish various stages in respect of certain contracts of sale. You saw above that a contract of sale was concluded when there was agreement between the parties to purchase and sell and agreement on the object of sale and the price. An important consequence of this moment of consensus was that it created certain obligations for the purchaser and the seller.

If a contract was made subject to a suspensive condition (see chapter 2 above for the discussion of a suspensive condition), an element of uncertainty was introduced which had particular legal consequences. This differs from the situation where one buys a pair of shoes in a shoe shop, pays for it and takes it home immediately. In the latter case consensus between the purchaser and the seller regarding the transaction, the object of sale and the price, payment of the price and delivery of the object of sale all take place virtually simultaneously. However, if a contract contains a suspensive condition, these stages in the conclusion of the contract do not occur simultaneously and they may therefore be distinguished from one another. This has particular implications if the object sold were to be destroyed after the conclusion of the contract, but before delivery of the object of sale.

Suppose A concludes a contract with B, a motor vehicle dealer, for the purchase of a motor car and this contract is made subject to the suspensive condition that A will buy the motor car if his application for a loan for the purchase of the motor car is approved by his bank. If the motor car stands on the showroom floor at B's premise while A is waiting for approval from the bank and B's business burns down during this period, who bears the risk for the destruction of the motor car (object of the sale) if the purchase price has not been paid and the motor car has not yet been delivered?

The answer to the above question will depend on whether the contract is *perfecta*. Exactly what does it mean if we say that a contract is *perfecta*?

A contract is regarded as *perfecta* as soon as **everything has been completed apart from the payment of the purchase price and the delivery of the**

object of sale or, to put it differently, if there is agreement on the *essentialia* and there is no suspensive condition.

Digesta 18.6.8 *pr*: Paul:

If the quality and quantity of the property to be sold are determined, as well as the price of the same, and it is sold without any condition, the transaction is complete (*perfecta*).

A contract is therefore *imperfecta* (the opposite of *perfecta*) if

- the object of sale in a semi-specific sale (see above) has not yet been adequately identified
- the price had not yet been clearly determined
- the sale has been made subject to a suspensive condition

Let's explain this with reference to a few examples:

- If Stichus sells his wagon to Aulus for as much money as Cassius decides and Cassius is unable to decide on a price, the contract is *imperfecta*.
- If Baldus agrees with Brutus that he will buy ten bags of wheat from Brutus's only field, we are dealing with a semi-specific sale, since the object sold has not yet been adequately identified. This type of contract would therefore be *imperfecta*, while the ten bags of wheat had not yet been harvested and bagged. Remember that a semi-specific object of sale is one of the exceptions to the rule that the object of sale has to be *specific* if a valid contract is to be created. Until a semi-specific object of sale has been physically identified, the contract of sale remains *imperfecta*.

NOTE: A contract that is *imperfecta* is not necessarily an invalid contract. The *perfecta/imperfecta* status of a contract relates only to the risk rule and not to its validity.

- If Caelius buys a villa from Aulus, subject to a loan that he has to obtain from moneylenders, there is a suspensive condition and the contract will be *imperfecta*.

Now that you are able to distinguish between a contract that has become *perfecta* and one that is still *imperfecta*, we can proceed to discuss the risk rule.

The risk rule determines that the risk for the destruction of or damage to the object of the sale passed from the seller to the purchaser **as soon as the contract was *perfecta***. If the contract was still *imperfecta*, as in the above examples, the risk of the destruction of the object sold was borne by the seller and he had to suffer the loss or damage. It is important to note that the risk rule was applicable when the damage or loss to the object sold was caused by *vis maior* (an act of God) or *casus fortuitus* (chance). We suggest that you go back to chapter 2 above and revise the section on *vis maior* and *casus fortuitus*. In other words, if a contract was *perfecta*, the risk passed from the seller to the

purchaser and the purchaser became liable for the payment of the purchase price, even if the object sold had been destroyed through no fault of the seller.

- If Aulus bought ten bags of lucerne from Stichus, from Stichus's only field, and a great flood caused the lucerne crop to be lost, the contract was still *imperfecta* and the seller, Stichus, had to bear the risk of the loss.
- If Aulus bought a stallion from Stichus, for as much money as Caelius decided and the stallion was stolen **after** Caelius had already set the price, the contract was *perfecta* and Stichus would have been able to claim the purchase price from Aulus.

If, however, the seller was responsible for the destruction of or damage to the object sold, the risk rule was not applicable and the seller was liable to pay compensation to the purchaser. You should remember that the risk rule was an exception to the normal position, which was that the seller had to bear the loss (*res perit domino*).

In modern South African law the position is also that the risk of the destruction of or damage to the object sold as a result of *vis major* or chance passes to the purchaser once the contract becomes *perfecta*. This is a clear illustration of the operation of the Roman law rule in the modern context.

It is self-evident that when the risk passes to the purchaser after the contract has become *perfecta*, the purchaser should also be entitled to any fruits or accrual of the thing that may have arisen after the conclusion of the contract. A foal born after a contract of sale for the purchase of a mare has been concluded and has become *perfecta* would therefore belong to the purchaser.

Activity

Pamphilus and Julius conclude a contract of sale in terms of which Pamphilus buys ten cattle at a price of ten gold coins per animal from Julius's stud. A serious stock disease then breaks out, making it necessary for Julius to have all his cattle put down. Who bears the risk for the death of the cattle? (3)

Feedback

The sale mentioned above is a semi-specific sale, which means that the contract was not yet *perfecta*. It will only become *perfecta* once the ten cattle have been identified. Since the contract is still *imperfecta*, this means that the risk still rests with the seller, Julius. Julius will therefore still have to bear the loss of the death of the cattle and cannot expect Pamphilus to pay the purchase price. (The position would have been different, however, if the specific ten cattle had already been selected and identified. In the latter case the contract would have been *perfecta* and the risk would have passed to the purchaser,

Pamphilus, in which case Julius would have been able to claim the payment of the purchase price.)

4 Duties of the contracting parties

We mentioned above that both the seller and the purchaser acquire certain duties as soon as the contract of sale becomes *perfecta*. These duties are very important and will be discussed in more detail in the following section.

4.1 Duties of the seller

4.1.1 The duty to care for the property before delivery

The seller had a duty to look after the object of the sale after the contract became *perfecta* and up to the time of delivery. When we discussed the principles of the Roman law of contract in the preceding chapters we mentioned that the seller was expected to display the same degree of care as a *bonus paterfamilias*. The seller was liable for *culpa levis in abstracto* and had to display the care of a reasonable man in looking after the object of the sale. If the seller failed to perform his duty of care, he was liable for any damage caused by his intent (*dolus*) or negligence (*culpa levis in abstracto*). The purchaser could recover damage caused by *culpa* with the aid of an action known as the *actio empti*.

4.1.2 Delivery of vacant possession to the purchaser

Delivery consisted of the transfer of possession. The seller had to deliver the object of the sale to the purchaser immediately after the conclusion of the contract or at a later date, as agreed. Delivery could take place in any of the different ways in which possession could be transferred. The transfer of possession was discussed in the section that dealt with the law of things and need not be repeated here. The seller also had to deliver to the purchaser all the fruits or accrual that the object sold had produced after the contract became *perfecta*. As we mentioned above, the seller was not required to transfer ownership of the thing sold to the purchaser: He merely had to transfer free and undisturbed possession of the object of sale (*vacuam possessionem tradere*). This means that the purchaser had to be placed in effective and exclusive control of the object of sale. If the purchaser was willing to pay, but the seller had not delivered the thing or had not delivered the thing timeously or properly, the purchaser could raise an *actio empti* against the seller to claim damages suffered as a result of the nondelivery or improper delivery.

Digesta 19.1.3: Pomponius:

The delivery of possession which should be made by the seller is of such a nature that if anyone can legally deprive the purchaser of it, possession will not be understood to have been delivered.

4.1.3 Guarantee against eviction

One of the duties of the seller was to give the purchaser a guarantee that nobody with a better title (such as an usufructuary or the owner of the thing) could evict (claim by means of a legal action) the thing or a portion of it. A guarantee against eviction did not mean that eviction would **not** take place, since nothing could prevent a true owner from instituting a *rei vindicatio* for the return of his thing. If this were to happen, the purchaser could institute an action (*actio empti*) for damages against the seller for the damage he had suffered as a result of eviction.

If the seller was the owner of the object sold, however, ownership would pass to the purchaser when the object sold was delivered to the purchaser. If the seller was not the owner of the object sold, he would not be able to pass ownership of the thing to the purchaser in view of the well-known rule that no-one can transfer more rights to another than he himself has (*nemo plus iuris ad alium transferre potest quam ipse habet* or, in brief, the *nemo plus iuris* rule).

4.1.4 Guarantee against latent defects

A latent defect was a hidden defect in the object sold that diminished or affected its value or utility. The term “hidden” implies that neither the seller nor the buyer could reasonably have been expected to have been aware of the defect at the time when the contract was concluded. Since the contract of sale was a *negotium bonae fidei*, the seller could be prosecuted with the aid of the *actio empti* if he were to sell a thing in contravention of the requirements of good faith in the knowledge that there was a latent defect in the thing. But what was the position when the seller himself was not aware of the presence of a latent defect in the thing sold?

Initially the purchaser had no remedy in the case of latent defects and he had to bear the loss arising from the latent defect himself. As in the case of eviction, however, the seller could guarantee the presence or absence of certain qualities in the object sold by means of *stipulationes*. If it subsequently transpired that these guarantees were false, the seller could have been held responsible for the buyer’s loss on the grounds of these *stipulationes*. One can assume that in practice the sellers were unwilling to disclose defects of which they were aware or to guarantee that there were no latent defects that they did not know about. For this reason the *aediles curules*³ stepped in and decreed in their edicts that when **slaves or draught animals** were sold on the market in Rome the seller had to disclose any physical or character defects of the object of sale which impacted negatively on the use of the thing. If it later transpired that the object sold had latent defects that had not been declared by the seller, the seller could be held responsible through one of the aedilician actions. In the case of the sale of slaves and draught animals it later became irrelevant whether or not the seller was aware of the latent defects: In both cases he was held liable if any

³ The office of the *aediles curules* was instituted in Rome in 367 BC. The most important functions of these officers were to protect the safety of the inhabitants and their duties included supervising public markets, public buildings and streets. As custodians of the public order they therefore acted as a kind of police force. Their control of the markets served an important purpose and they settled any trade disputes that arose at those markets. The edicts they published regarding the transactions that took place at the markets played an important part in the development of the law concerning contracts of purchase and sale.

latent defects were found. The seller was presumed to have provided a tacit guarantee that there were no latent defects present in the object sold.

The *aediles curules* made two actions available to the buyer:

- The *actio redhibitoria*, which had to be instituted within six months after the latent defect became known, enabled the purchaser to claim repayment of the purchase price and to return the object of the sale to the seller
or
- The *actio quanti minoris*, which enabled the purchaser to claim a reduction in the purchase price within twelve months after he became aware of the latent defect

During Justinian's reign it was decreed, by analogy with the aedilician actions, that in all cases and not just where slaves and draught animals were being sold, the seller was held to have given a tacit guarantee against latent defects, no matter where the sale took place. In addition to the above two aedilician actions, the purchaser was also entitled to use the *actio empti* to claim return of the purchase price or a reduction in the purchase price in the case of latent defects.

Digesta 21.1.1.1: Ulpian:

The *aediles* say: Those who sell slaves should notify the purchasers if they have any diseases or defects, if they have the habit of running away, or wandering, or have not been released from liability for damage which they have committed. All of these things must be publicly stated at the time that the slaves are sold. If a slave should be sold in violation of this provision, we will grant an action to compel the seller to take back the said slave.

4.1.5 Conduct in accordance with good faith

The consensual contract of sale in developed Roman law was a contract governed by the principles of good faith. The seller was obliged to act in accordance with the encompassing demands of good faith. An example of an act contrary to good faith would be if Stichus sold Brutus a horse that he (Stichus) knew to belong to Aulus. If Brutus could prove that he had suffered a loss, he could sue Stichus with the *actio empti* for damages.

In modern South African law the seller's obligation to care for the object of sale like a *bonus paterfamilias* still applies and if he neglects to do this, the purchaser can hold him liable for damages. The seller is still obliged to guarantee that no-one with a stronger right to the thing will partly or wholly deprive the purchaser of the use and enjoyment of the object of sale. The seller's warranty against latent defects still exists in modern South African law in a slightly modified form.

Activity

During the reign of Justinian, Cassius and Brutus concluded a contract of purchase and sale in terms of which Cassius sold Brutus two agricultural implements and three draught animals. After paying the purchase price and delivering the implements and draught animals, Brutus discovered that the draught animals were suffering from a lung disease that would cut short their life and render them unfit for work. To make matters worse, Stichus turned up at Brutus's house and reclaimed the implements that Cassius had sold to Brutus, saying that they were his (Stichus's) property. Stichus then claimed his implements from Brutus with the *rei vindicatio*.

- (a) Was a valid contract of sale concluded between Cassius and Brutus? (2)
 - (b) What remedies were available to Brutus regarding the sick draught animals? (4)
 - (c) What remedies were available to Brutus regarding the implements? (4)
-

Feedback

- (a) The contract between Cassius and Brutus was valid. There was agreement between the two of them on the transaction, the price and the object of sale.
- (b) The lung disease could be regarded as a latent defect. In Justinian's time it was accepted that the seller provided a tacit guarantee against latent defects in the thing sold. Brutus could have availed himself of the *actio redhibitoria* to return the draught animals to Cassius and reclaim the purchase price. Alternatively he could have claimed the repayment of the purchase price by Cassius with the *actio empti*, together with damages for the loss he might have suffered as a result of the draught animals' lung disease (if it was an infectious disease and had spread to his other livestock).
- (c) As we explained above, it was not a requirement that the seller should pass ownership of the thing sold to the buyer. While the seller had to guarantee the buyer against eviction, this did not prevent eviction from taking place. As the owner Stichus had a stronger title to the implements and he could claim them with the *rei vindicatio*. If this were to happen, Brutus could claim compensation from Cassius with the *actio empti* for any loss he had suffered as a result of the eviction.

4.2 The duties of the purchaser

After the contract of purchase and sale has become *perfecta* the purchaser had the following obligations:

4.2.1 Payment of the purchase price

The purchaser had to pay the purchase price at the agreed time, or if no time was decided on, upon delivery of the object of the sale. It is important to note that the purchaser could not enforce any of the duties of the seller with the *actio empti* before he had paid the purchase price.

4.2.2 Acceptance of delivery of the object of sale

The purchaser had to take delivery of the object sold at an agreed time and place. Unless otherwise agreed between the buyer and the seller, the buyer had to take delivery immediately or within a reasonable time. The buyer was entitled to refuse to take delivery if the seller had not fulfilled his duties. The seller could force the buyer with the *actio venditi* to take delivery of the object sold.

4.2.3 Reimbursement of expenses

The buyer had to reimburse the seller for necessary costs incurred in respect of the thing sold from the time the contract was concluded to the time the thing was delivered.

- If Aulus had to incur medical costs for the horse he had sold to Stichus, after concluding the contract but before delivering the horse to Stichus, he could recover these costs from Stichus upon delivery of the horse.

4.2.4 Conduct in accordance with good faith

The contract of purchase and sale was a contract based on *bona fides*, as we explained at the beginning of this chapter.

The above duties of the purchaser have been confirmed in modern South African law. The diagram below will serve to refresh your memory regarding contract of purchase and sale before you attempt the self-evaluation questions.

DIAGRAM 14

The contract of purchase and sale

Comes into being once agreement has been reached on the three *essentialia*, namely:

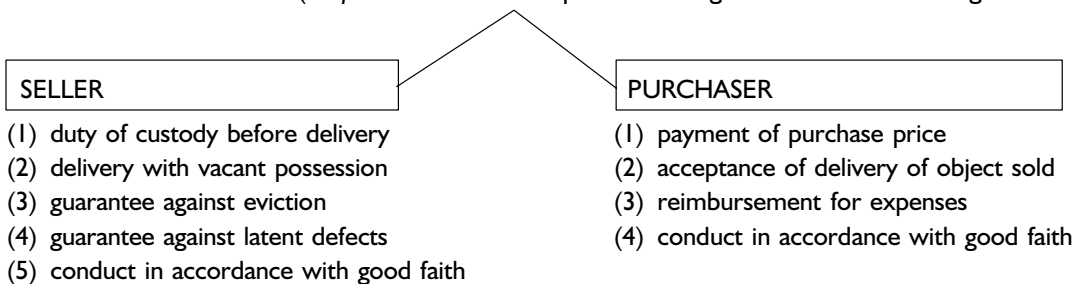
<p>(1) The nature of the contract: To purchase and to sell</p>	<p>(2) The object of the sale:</p> <ul style="list-style-type: none"> — susceptible of private ownership — possible at the time when the contract was concluded — specific (<i>certum</i>) — seller could sell a thing that was the property of another person — purchaser could not buy his own thing 	<p>(3) The price:</p> <ul style="list-style-type: none"> — no price, no sale — price had to be money — price had to be certain (<i>certum</i>) — price had to be a true price — price had to be just
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Once there was agreement on the above and in the absence of any suspensive condition, the contract was *PERFECTA*.

Then

- the *risk* of damage/destruction of the thing sold passed to the purchaser.
- the purchaser was entitled to all *fruits* of the thing.

RELIEF OF THE PARTIES (*reciprocal contract*: The purchaser's rights are the seller's obligations and vice versa)



Self evaluation questions

After studying chapter 3 you should be able to answer the following questions in writing:

- 1 Name the four Roman consensual contracts. (4)
- 2 Give the requirement for the conclusion of the Roman contract of purchase and sale. (1)
- 3 Briefly discuss the requirements for the object of the sale. (3)
- 4 Briefly discuss the requirements in respect of the price. (4)
- 5 Briefly distinguish between the purchase of an object hoped for (*emptio rei speratae*) and the purchase of a hope (*emptio spei*), with reference to two examples. (6)
- 6 Discuss the risk rule with reference to an example. (6)
- 7 Briefly discuss the duties of the seller. (5)
- 8 Briefly discuss the duties of the purchaser. (3)

The answers to the above self-evaluation questions are to be found in the chapter. If you have any difficulty in answering these questions, we advise you to go back to the chapter and study it thoroughly.

Feedback

- 1 The four contracts are the contract of sale, letting and hiring, partnership and mandate.
- 2 The requirement is consensus.
- 3 The three requirements for the object of sale are discussed above.
- 4 The four requirements in respect of the price are discussed above.
- 5 The discussion above refers to an example illustrating the difference.
- 6 The risk rule is illustrated by means of an example above.
- 7 The duties of the seller are very important — see discussion above.
- 8 The duties of the buyer are also important — see discussion above.

CHAPTER 4

Consensual contracts (Part II)

GENERAL INTRODUCTION

In this chapter we shall be studying the remaining three consensual contracts, namely letting and hiring (*locatio conductio*), partnership (*societas*) and mandate (*mandatum*). If the outcomes given below appear to you to be a lot of work, we should like to reassure you. The section that follows deals chiefly with the various forms of letting and hiring, the partnership contract and mandate. The different outcomes therefore cover more than one aspect of the same phenomenon. You are advised to refresh your memory by rapidly going over the general introduction to chapter 3 (Consensual Contracts, part I).

I Contract of letting and hiring (*locatio conductio*)

Letting and hiring was a consensual contract in terms of which one party, the lessor (*locator*), hired out a thing, his service or a piece of work to another person (*conductor*). There were various forms of contracts of letting and hiring. In the case of the hiring of a **thing or service** the lessee undertook to pay the lessor a sum of money. With the hiring of **services** the lessee, who performs the service, is entitled to payment by the employer (*conductor*). Over time a distinction was drawn between

- the hiring of a thing (*locatio conductio rei*)
- a contract of service (*locatio conductio operarum*)
- a contract for undertaking a piece of work (*locatio conductio operis*)

An important characteristic of letting and hiring was that it was not gratuitous. The parties had to agree on a **price**. This price had to be set in monetary terms.

The contract of hiring (*locatio*) and letting (*conductio*) came into being when the lessor (*locator*) and the lessee (*conductor*) agreed to hire and let a specific thing for a fixed sum of money. Let's take a closer look at the three forms of letting and hiring.

I.1 Letting and hiring of a thing (*locatio conductio rei*)

The contract of letting and hiring (contract of lease) was a contract in terms of which the lessor (*locator*) undertook to allow the lessee (*conductor*) to use and enjoy a specific thing in return for paying a fixed amount of money. The contract of letting and hiring was a reciprocal contract, since both parties acquired rights and duties.

The contract of letting and hiring was concluded when there was agreement (*consensus*) between the lessor and the lessee on the lease transaction, the thing leased and the rent. This was also one of the contracts based on good faith.

As regards the thing leased, you should note that any movable or immovable thing could be the subject of a contract of letting and hiring. Because the thing had to be returned at the end of the period of lease, consumables (*res consumptibiles*) could **not** be the subject of *locatio conductio*. The object leased did not have to be the property of the lessor.

Rent had to be paid in the form of a predetermined sum of money.

1.1.1 Duties of the lessor

The lessor had the following duties:

(a) *The object leased and all its accessories had to be delivered to the lessee*

The lessor had to put the object leased and its accessories at the disposal of the lessee and ensure that the lessee had undisturbed use and enjoyment of the object leased for the entire period of the lease. Undisturbed use and enjoyment of the object leased meant that the lessor could not interfere with the thing during the term of the lease.

(b) *Guarantee against eviction*

The lessor had to give the lessee a guarantee against eviction. Eviction takes place when a third party with a stronger title to the thing leased causes the lessee to lose his possession of the leased object. In the case of eviction the lessee could claim damages from the lessor with the *actio conducti*.

Digesta 19.2.25.1: Gaius:

Where a man has leased anyone a tract of land to be cultivated, or a house to be occupied, and he sells the land or the house, he must see that the purchaser permits the tenant to enjoy the land or occupy the house.

(c) *Ensure that the object leased remains in good condition*

The lessor had an obligation to ensure that the object leased remained in good condition for the term of the lease. Any reasonable expenses incurred by the lessee in order to maintain the hired property could be reclaimed from the lessor. The lessor was normally responsible for paying municipal rates and taxes.

(d) *Risk rule*

If the property was damaged or destroyed by an act of God (*vis maior*) through no fault of the lessor's, the lessor bore the risk. He was not entitled to claim any rental for the remainder of the contract and had to return prepaid rental to the lessee. The lessor's duty of care with regard to the hired thing was that he had to exercise the care and skill of a reasonable person and he was responsible for *culpa levis in abstracto*.

(e) *Acceptance of object of lease after period of lease had expired*

After expiry of the lease, the lessor had to receive the thing back and reimburse the lessee for any necessary costs that the latter had incurred for the maintenance of the thing.

- If Cassius unknowingly leased leaking wine barrels to Stichus, Cassius would be liable to Stichus for damages for any loss of wine if Cassius had not displayed the care and skill of a reasonable man.

1.1.2 Duties of the lessee

The lessee had the following duties:

(a) *Accept delivery and pay rent*

The lessee had to accept delivery of the hired property and pay the rent to the lessor (either in instalments or in a lump sum)

(b) *Take reasonable care of the leased property*

The lessee had to take proper care of the hired property, as would a reasonable man. If the hired property were to be damaged or destroyed as a result of his *dolus* or *culpa (levis in abstracto)*, the lessor could hold him liable for damages by invoking the *actio locati*. If the hired property were damaged or destroyed without fault on the part of the lessee, the lessor bore the risk and the lessee was absolved from his duty to pay the rent to the lessor.

- For example: If the house Cassius was hiring from Stichus was destroyed by an earthquake, Stichus could not claim the rent from Cassius.

(c) *He had to return the leased object to the lessor*

Upon expiry of the lease the lessee had to return the hired thing to the lessor in more or less the same condition in which it was delivered, allowing for normal wear and tear.

Virtually all the Roman law principles and rules regarding the letting and hiring of things still exist in modern South African law.

Read the following set of facts carefully and try to answer the questions set on them. We only expect you to apply the knowledge you have gained from the above section to the facts. If you do not understand the feedback on the problem, we suggest that you revise the above section thoroughly.

Activity

Balbus and Aulus agree that Aulus will hire one of Balbus's chariots for a period of six months at a rental of 20 silver pieces per month. One night one of the wheels of the chariot is stolen by a thief. Discuss the legal position. (4)

What would the position have been if one of the wheels had been lost as a result of a defect in the chariot's axle? (2)

Or if a wheel had come off while Aulus was driving the chariot recklessly? (2)

Total: 8

Feedback

The contract between Balbus and Aulus was one of letting and hiring of a thing (*locatio conductio rei*). If the hired property (the chariot) was damaged without any fault on Aulus's part, Balbus as the lessor would have to bear the risk and he would not be able to claim the rent from Aulus before he had repaired the chariot. The lessor's duty of care in leased property meant that he was responsible for *culpa levis in abstracto*.

If the wheel of the chariot had been lost as a result of a defect in the chariot's wheel, the risk had to be borne by Balbus and he would also not have been entitled to claim rent from Aulus. If Balbus as the lessor should reasonably have known that there could have been a defect in the chariot's axle and Aulus suffered damage as a result of the loss of the wheel (eg suffered an injury), Balbus would have been liable to Aulus for the medical expenses the latter had to incur as a result of the injury, since it could be said that he had not displayed the care of a reasonable person.

The situation would be different if the wheel had been lost as a result of Aulus's reckless handling of the chariot. The lessee was responsible for *culpa levis in abstracto* and should have exercised reasonable care in utilising the leased property. He would therefore have been liable to Balbus for the replacement of the wheel and for any other costs accruing to Balbus or to a third party.

1.2 Letting and hiring of services (*locatio conductio operarum*)

In terms of a contract of service the employee (*locator*) placed his services at the disposal of the employer (*conductor*) in return for a fixed daily, weekly, monthly or annual wage. The contract was concluded once there was agreement on the kind of service to be rendered and the remuneration. Note that although it may seem strange, the employee or labourer was the *lessor* in this case and the employer was the *lessee*. The contract of service was a reciprocal contract that created rights and duties for both parties.

The Roman contract of service (*locatio conductio operarum*) differs from the modern service contract in that only services that were usually performed by slaves, mostly manual labour or unskilled labour, fell under it. (Services rendered by free persons who had received special training, such as medical doctors, architects, professors, jurists and philosophers, were usually retained through a contract of mandate and these people were paid an *honorarium*. They considered it beneath them to receive money for their labours in the same way as unfree persons!) In terms of *locatio conductio operarum* the Roman

labourer was in a far worse position than his modern counterpart: There was no question of sick leave, a medical fund or pension benefits. Labour legislation in modern South African law makes provision for extensive protection of the rights of labourers and the prevention of discrimination in the workplace.

1.2.1 Duties of the employer (*conductor*)

The duties of the employer (*conductor*) under the Roman contract of service were the following:

(a) *Pay the agreed wage*

The employer had to pay the wages agreed upon. The employer had the *actio conducti* to force the employee to meet his obligations or else to claim damages if he had suffered a loss as a result of the employee's failure to do the work he had contracted to do.

(b) *Exercise the care and diligence of a reasonable man*

The employer had to display the care and diligence of a reasonable person (*bonus paterfamilias*) and was responsible for *culpa levis in abstracto*. This entailed, among other things, that the employer had to ensure a safe workplace and working environment.

1.2.2 Duties of the employee (*locator*)

The duties of the employee (*locator*) were as follows:

(a) *Perform the work agreed upon*

The employee had to perform the work he and the employer had agreed upon. The employee had the *actio locati* at his disposal by which to force the employer to carry out his part of the contract or to claim damages as a result of the employer's noncompliance. If the employee was unable to work on account of illness, he was not entitled to any pay.

(b) *Exercise the care of a reasonable person*

The employee had to exercise the care of a reasonable person and was therefore also liable for *culpa levis in abstracto*.

Digesta 19.2.9.5: Ulpian:

Where a party [lets his services], he must be responsible for negligence, and whatever fault he commits through want of skill is negligence.

1.3 Letting and hiring of a piece of work (*locatio conductio operis*)

The undertaking of work was a contract in terms of which the lessor (*locator*) hired a piece of work from an independent contractor (*conductor*). The person who commissioned the work, that is the person for whom the work was done, was the lessor and the person who undertook and did the work was the lessee. This is different from the letting and hiring of services above, as we will point

out in more detail below. (But remember that if the contract stipulated that the employee should make something out of material belonging to him, a **contract of sale** was created. If Balbus agreed with Aulus, for example, that Aulus should make him a ring from gold belonging to Aulus, a contract of sale was created between them and it was not a case of *locatio conductio operis*.) The undertaking of work was a reciprocal contract that created rights and duties for both parties.

- Examples of the undertaking of work included the repair of chariots, the repair of clothing, the building of a house, copying a manuscript and painting a portrait. In cases where it is difficult to distinguish between the undertaking of work and a contract of service one would look at the **degree of supervision** and the expertise required. If Brutus hired Aulus to chop wood under his (Brutus's) supervision, this was a service contract (*locatio conductio operarum*), but if Aulus used his own tools and worked without supervision, this was the undertaking of work (*locatio conductio operis*).

1.3.1 Difference between letting and hiring of a piece of work (*locatio conductio operis*) and a service contract (*locatio conductio operarum*)

The undertaking of work (*locatio conductio operis*) differs in a few respects from the service contract (*locatio conductio operarum*). These differences are briefly the following:

- Unlike in the case of the service contract, where the employee was the lessor (who hired his service to the lessee), with the undertaking of work, the commissioner of the work (the person who contracts the work out) is the lessor. In the service contract the employer is the lessee, but with the undertaking of work, the person who has to do the work is the lessee.
- With the service contract the employee worked under the supervision of the employer, but the person who undertook a piece of work used his own discretion in completing the job.
- With a service contract the employee in Roman times was usually not skilled and used his employer's equipment. The people who undertook piece work were usually more skilled and were contractors or tradesmen who used their own equipment.
- An employee was usually appointed for a specific period and received a weekly or monthly wage. The contractor worked until the job he was appointed for was completed and usually received a lump sum as payment upon completion of the work.

1.3.2 The duties of the lessor (*locator*)

The **lessor** had the following **duties**:

(a) *Remunerate the contractor for his service*

The lessor had to remunerate the contractor for his services when the work was completed.

(b) *Display the care of a **bonus paterfamilias***

The lessor had to display the care of a *bonus paterfamilias* and was therefore also responsible for *culpa levis in abstracto*.

1.3.3 The duties of the contractor (*conductor*)

The **contractor** (or lessee) had the following duties:

(a) *Complete the work within the agreed period*

The contractor had to complete the work within the agreed period (or within a reasonable time if a period was not determined).

(b) *Display the care of a **bonus paterfamilias***

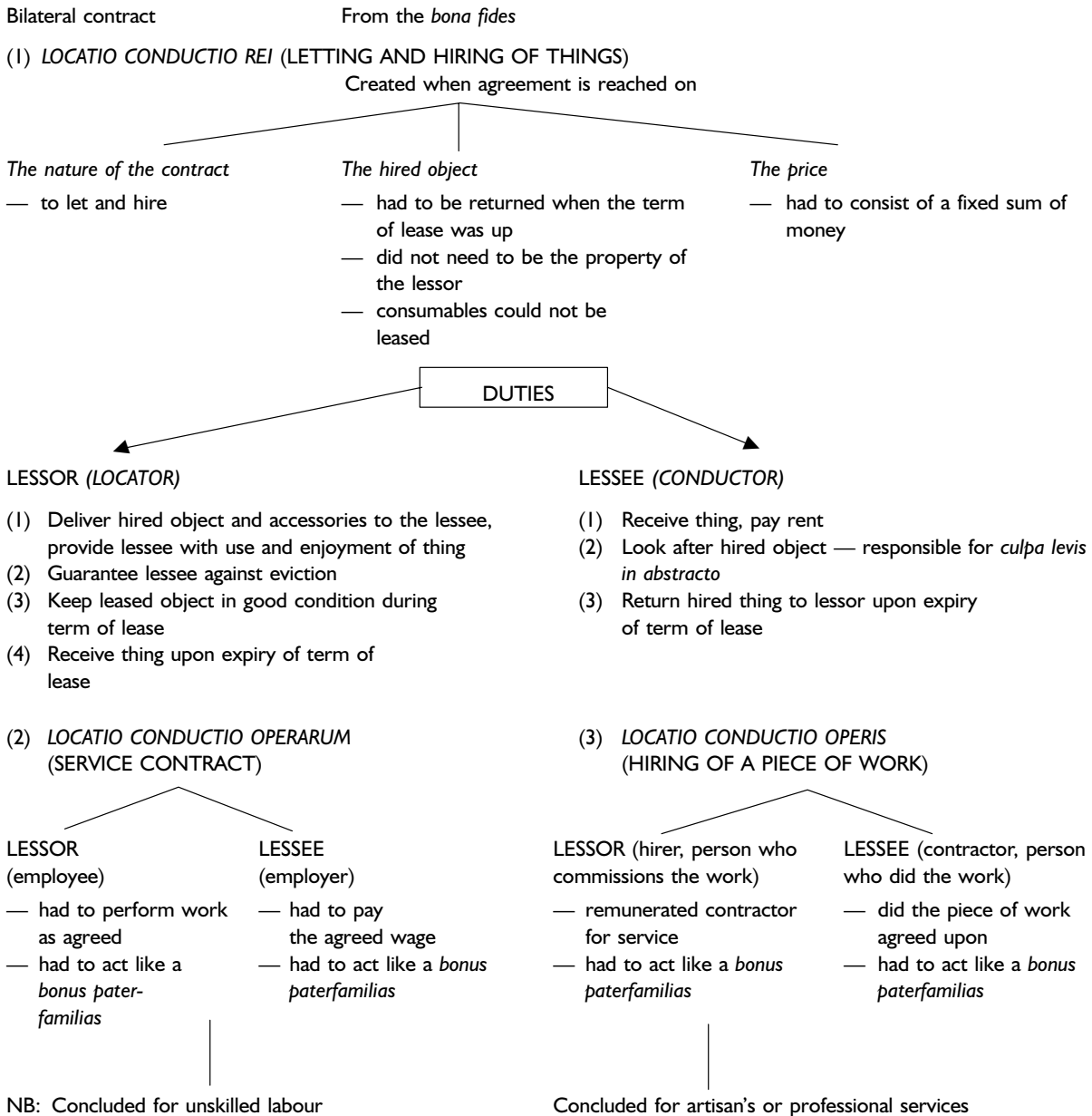
The contractor had to display the care of a *bonus paterfamilias* and was liable for *culpa levis in abstracto*. Inexperience or a lack of expertise was regarded as negligence (*culpa*). A contractor who undertook to build a house, but did not have sufficient skill, was liable for *culpa levis in abstracto* for any loss the lessor suffered as a result. If the contractor was unable to complete a task as a result of a defect in the soil (for example, if a house built on sandy soil collapsed) that was outside the control of the contractor, the lessor had to bear the risk. If the collapse of the house was the result of the building methods used by the contractor and was therefore within his control, the contractor had to bear the risk. If the completion of the work was rendered impossible by *vis maior*, the risk devolved on the lessor.

In modern South African law the contracts of independent contractors (people who undertake piece work) are subject to more or less the same basic principles.

Take a good look at the following synoptic diagram showing the various forms of letting and hiring. You need to be able to distinguish clearly between *locatio conductio operarum* and *locatio conductio operis*. These terms look very similar and we have found in the past that students often confuse them.

DIAGRAM 15

Letting and hiring



Activity

Identify the type of contract of letting and hiring concluded in each of the examples below:

- (a) Marcus agreed with Aulus that Aulus would copy a manuscript for him at a weekly wage. Marcus undertook to provide the ink and pens and insisted that Aulus should work under his supervision every day. (2)
- (b) Brutus agreed with Stichus, a goldsmith, that Stichus would make his wife a gold ring for the price of 70 coins and that he (Brutus) would give Stichus the gold for this. Would the position have been different if Stichus had used his own gold to make the ring? (2)
- (c) Paulus concluded a contract with Cassius, a freed slave, under which Cassius would build houses for Paulus for a fixed weekly wage, with Cassius working

under Paulus's supervision and control. What would the position have been if Cassius had used his own tools which he had hired from Marcus and they agreed that he would build only one house for Paulus? (3)

Feedback

- (a) The contract of letting and hiring created between Marcus and Aulus was for the letting and hiring of services or a service contract (*locatio conductio operarum*). The key to the answer lies in the fact that Marcus (the employer) supplied the equipment (pens and ink) and that Aulus (the employee) had to work under his supervision. If Aulus had used his own equipment and worked at his own pace without any supervision, the contract would have been one of hiring of a piece of work (*locatio conductio operis*).
- (b) A contract for the hiring of a piece of work (*locatio conductio operis*) was created between Brutus and Stichus. In this situation Brutus was the lessor or commissioner of the work (*locator*) and Stichus was the independent contractor or lessee (*conductor*). If Stichus had used his own gold to make the ring, a contract of sale would have been created between them.
- (c) The contract between Paulus and Cassius was a service contract (*locatio conductio operarum*). If Paulus and Cassius had agreed that Cassius would use his own equipment and would build only one house for Paulus, then the contract would be one for the hiring of a piece of work (*locatio conductio operis*). The contract created between Marcus and Cassius for the letting and hiring of building tools was one for the letting and hiring of a thing (*locatio conductio rei*).

2 Partnership (*societas*)

A partnership was a contract in terms of which two or more persons undertook to join in a common venture for their mutual economic benefit.

- Stichus, Cassius and Brutus agree to build a boat that they want to use to go deep sea fishing, to sell the fish and share the profits. Stichus supplies the building materials to build the boat; Cassius is responsible for building the boat and Brutus undertakes to put to sea in the boat every day. All the profit they make from selling their catch on the open market will be divided among the three of them in equal shares.

A partnership contract was a bilateral contract that differed from a contract of purchase and sale in that the rights and duties of the respective partners were identical and could only be enforced by means of a single action, known as the *actio pro socio*. (You will remember that in the case of purchase and sale there were two sets of rights and duties — for the buyer and seller respectively — that could be enforced by means of various actions.) The partnership contract originated from the *ius gentium* and was therefore based on *bona fides*. The relationship between partners was equated with that between brothers. Each partner had to act in accordance with the dictates of good faith (*bona fides*).

A partnership was **not** a juristic person. As a result a partnership could not litigate, conclude contracts or perform any legal act *in its own name*. Further, the partnership could not own property, which meant that the assets brought into a partnership remained the property of the individual partners or were owned by the respective partners in co-ownership. Since Roman law did not recognise the concept of representation, no-one could enter into a legal act on behalf of the partnership or represent the partnership. Consequently the other partners did not share in any contractual relations between a partner and third parties that such partner had contracted with. When a partner contracted with third parties, two separate legal relationships could be identified. The first relationship was that between the partner and his co-partners in terms of which the partner undertook certain partnership activities. The second relationship came into being between the partner and any third party with whom the partner had contracted. If a partner made a profit in terms of such a contract, the partner could be forced to share the profit with his co-partners under the first contract. Similarly, if a partner suffered a loss in terms of a contract with a third party, he could ask his co-partners to share in that loss. The partners' duty to indemnify one another is illustrated in the following text:

Digesta 17.2.52.4: Ulpian:

Some men established a cloak-making business. One of them set out to purchase goods but fell upon robbers and lost his money. His slaves were wounded and he also lost some items that were his own. Julian says that the loss is shared and that therefore the other partner ought to submit in an action on partnership to half the loss, both in money and in the other items of property which he would not have taken with him if he had not set out to make purchases on their joint behalf. Indeed, Julian quite rightly supports the view that the other partner should also acknowledge responsibility for a proportion of such medical expenses as were incurred.

Certain **essential characteristics were laid down as conditions for the creation of a partnership**. There naturally had to be agreement between the partners about the conclusion of the contract of partnership, their common venture and what contribution each of the partners should make. Let's take a closer look at each of these characteristics (note that the information in bold type relates to the **duties of partners**).

2.1 Essential requirements for the establishment of a contract of partnership

2.1.1 Common purpose

The partners' common venture had to be physically possible and lawful and could not be immoral or contrary to the good faith. The partners were not permitted, for example, to pursue a goal that was against the law, such as illegal gold mining with a view to splitting the profits.

2.1.2 Intention to form a partnership

There had to be an intention to form a partnership (*affectio societatis*). A partnership between persons could not come into being spontaneously.

2.1.3 Contributions by each partner

Each partner had to contribute to the common venture, whether in the form of goods, capital, labour or expertise. It was the duty of each partner to contribute the promised capital, assets or expertise and help to manage the partnership. Note that it was **not** a requirement that the contributions should be of equal value or that they should be proportional to a partner's share in the profits.

Digesta 17.2.5.1: Ulpian:

A valid partnership can be formed by parties who have not the same means; since frequently one who is less wealthy, makes up by his labour what he lacks in poverty.

2.1.4 Mutual economic benefit

The mutual benefit pursued had to be of an economic, that is monetary, nature.

2.1.5 Mutual agreement on the division of profits and losses

The partners had to agree among themselves on the division of the partnership's profits and losses. Each partner had a duty to account for the profits received and the losses suffered in the course of partnership business. Initially profits and losses were divided equally among the partners, but later on a division of profits and losses based on the principles of equity (*aequitas*) and brotherhood (*fraternitas*) was accepted. If no agreement was reached regarding the division of profits and losses, the profits and losses were equally shared.

2.1.6 Furtherance of the interests of the partnership

Partners had to display the same degree of care for the interests of the partnership as they would for their own interests. If a partner suffered any loss as a result of the *dolus* or *culpa levis in concreto* (note: not *in abstracto*) of a co-partner, damages could be claimed with the aid of the *actio pro socio*. In Justinian's time the *actio pro socio* could also be used to claim contributions, profits, losses and expenses of individual partners during the existence of the partnership.

- An agreement in terms of which a partner would share only in the losses and not in the profits was invalid. That kind of agreement was known as a *societas leonina*, called after the fable by Aesop in which the lion refused to allow the sheep, the goat and the cow, who had taken part in a hunt, to share in the spoils of the hunt!

Depending on the form taken by the common venture, the following **types of partnership** were distinguished:

2.2 Types of partnership

2.2.1 A partnership in all assets (*societas omnium bonorum*)

The partners pooled all their assets and became co-owners of the common property. Everything they subsequently acquired also belonged to them jointly.

2.2.2 A partnership for a single transaction (*societas unius rei*)

The partners joined forces for a single venture, such as a joint property.

2.2.3 A partnership to operate a single business (*societas unius negotiationis*)

The partners' aim was to operate one or more business enterprises, for example to transport slaves or goods.

2.2.4 A general business partnership (*societas quae ex quaestu veniunt*)

This type of partnership was created when the partners joined forces to conduct all their business transactions.

2.3 Termination of partnerships

A partnership could be terminated through unilateral termination by one of the partners, by passage of time if the partnership had been set up for a particular period, by the death of one of the partners, by the destruction of the partnership asset and by the achievement of the purpose of the contract of partnership.

The following diagram provides a neat summary of the contents of the chapter on the contract of partnership.

DIAGRAM 16

The contract of partnership

A contract in terms of which two or more persons agree to pursue a common purpose. The purpose had to be to the benefit of all the partners and each partner had to contribute something.

- BILATERAL CONTRACT
 - BASED ON *BONA FIDES*
 - DUTIES:
 - The parties had the same duties towards each other.
 - They could enforce these on each other by the *actio pro socio*.
- Each partner had to *bring in* as agreed.
 - Each partner had to *act in good faith*.
 - *Liability*: Each partner had to take as much care of the affairs of the partnership as he would of his own affairs; the criterion was *culpa levis in concreto*.

REQUIREMENTS FOR THE ESTABLISHMENT OF A PARTNERSHIP

- (1) The *common purpose* had to
 - be physically possible
 - be lawful
- (2) An *intention* to form a partnership
- (3) The benefit pursued had to be an economic one
- (4) Agreement on sharing profits and losses.
If not, equal shares

VARIOUS TYPES OF PARTNERSHIPS

- (1) Partnership in *all assets*
- (2) Partnership to exploit a *single venture*
- (3) Partnership to operate a *business*
- (4) *General partnership*

In *Bester v Van Niekerk* 1960 (2) SA 779 (A) the Appeal Court confirmed that a partnership had to show three essential characteristics corresponding to those described above, namely that each partner had to make a contribution, that the partnership had to be to the joint benefit of the partners (which is the requirement that partners had to share in the profits) and that the aim of a partnership had to be to make a profit.

Activity

Flavius and Aulus are two partners who jointly operate a fishing boat, sharing the profit from their catches equally. Flavius advanced the money to build the boat and Aulus undertook to do the fishing every day. What are Aulus and Flavius's duties towards each other as partners? (4)

Feedback

The duties of the partners Flavius and Aulus are, briefly, that they each had to contribute to the joint venture (in the form of either capital or labour), that they had to conclude a contract regarding the division of profits and losses and also be accountable to the partnership for such profits and losses and, lastly, that

their duty of care towards the partnership had to be the same as their care for their own affairs. In other words they were liable for *culpa levis in concreto* and could claim damages from each other with the *actio pro socio*.

3 Mandate (*mandatum*)

In terms of a contract of mandate the mandatee (*mandatarius*, later known as the *procurator*) undertakes to perform a service gratuitously for another, the mandator (*mandator*). Mandate had its origin in the Roman custom which imposed a moral duty on friends to perform certain services for each other.

- The best known example in Roman law was the action of erecting a tombstone on behalf of a friend. In time other actions also fell into the category of mandate, such as transporting people or acting as a person's general manager.

A contract of mandate originated in the *ius gentium* and, like the real contracts which are discussed below — loan for use, deposit and pledge —, it resulted in an imperfectly bilateral contract. This means that the mandatee always incurred obligations whereas the mandator only incurred obligations in certain cases.

The essential requirement for the creation of a contract of mandate was consensus regarding the **nature** of the contract, the **action** to be performed and also the fact that it would be performed **gratuitously**. Regarding these requirements, you should note the following:

- The task or action agreed upon should be performed gratuitously. This requirement should be qualified, however: The parties could also decide that the mandatee should receive an *honorarium* out of gratitude for his services, which was permissible. However, if a price was agreed upon for the task to be performed, a contract of hire was created.
- The tasks performed could take the form of any activity that was possible, lawful and clearly defined.
- A mandate could involve a specific act or the general management of the affairs of the mandator. Further, the instruction could be carried out in the interests of the mandator, a third party or partly in the interests of the mandatee. If the instruction was solely in the interests of the mandatee, however, it was seen as free advice and not as a mandate.

The mandatee in a contract of mandate was not an agent or representative of the mandator. Consequently the mandator was not a party to any contractual relationships that may have been established between the mandatee and third parties while the mandatee was executing his task. If the mandatee did contract with third parties in the execution of his task, two separate legal relationships were created: The first between the mandatee and the mandator, in terms of which the mandatee would carry out his instruction; the second between the mandatee and any third person with whom the mandatee had to contract in order to execute his instructions.

3.1 Duties of the mandatee

The contract of mandate was an imperfectly bilateral contract and the following **duties** were created for the **mandatee**:

- The mandatee was not obliged to accept the mandate. However, if he did accept it, he either had to carry it out or renounce it timeously so that the mandator could carry it out himself or instruct someone else to do so.
- The mandatee had to keep within the limits of the mandate. The jurists known as the Sabinians (discussed previously) took a different line from the Proculians regarding this requirement and held that the mandatee could not recover any of his expenses if he did exceed the limits of his mandate.

Example:

If Cassius asked Brutus to buy a villa for two hundred gold pieces and Brutus bought a villa for two hundred and fifty gold pieces, the Sabinians held that Brutus could not recover any of his expenses from Cassius. The Proculians felt that this position was highly inequitable and were of the opinion that Brutus could still recover two hundred gold pieces from Cassius.

- The mandatee was not allowed to benefit from the transaction. He therefore had to render a strict account and hand over any benefit he may have received to the mandator. The mandatee had the *actio mandati contraria* at his disposal by which he could recover essential costs or damages for which the mandator was responsible.
- The mandatee had to perform the mandate like a *diligens paterfamilias*. He was therefore responsible for *culpa levis in abstracto*. The mandatee was originally only liable in the case of *dolus*. The stricter liability that arose towards the end of the classical period was probably due to the custom of paying the mandatee an *honorarium*.

The contract of mandate came to an end when the mandate had been performed, either party had renounced the contract or one of the parties had died.

3.2 The position of the mandator

Although the contract of mandate created duties **for the mandatee only**, the **mandator** nevertheless undertook to do the following:

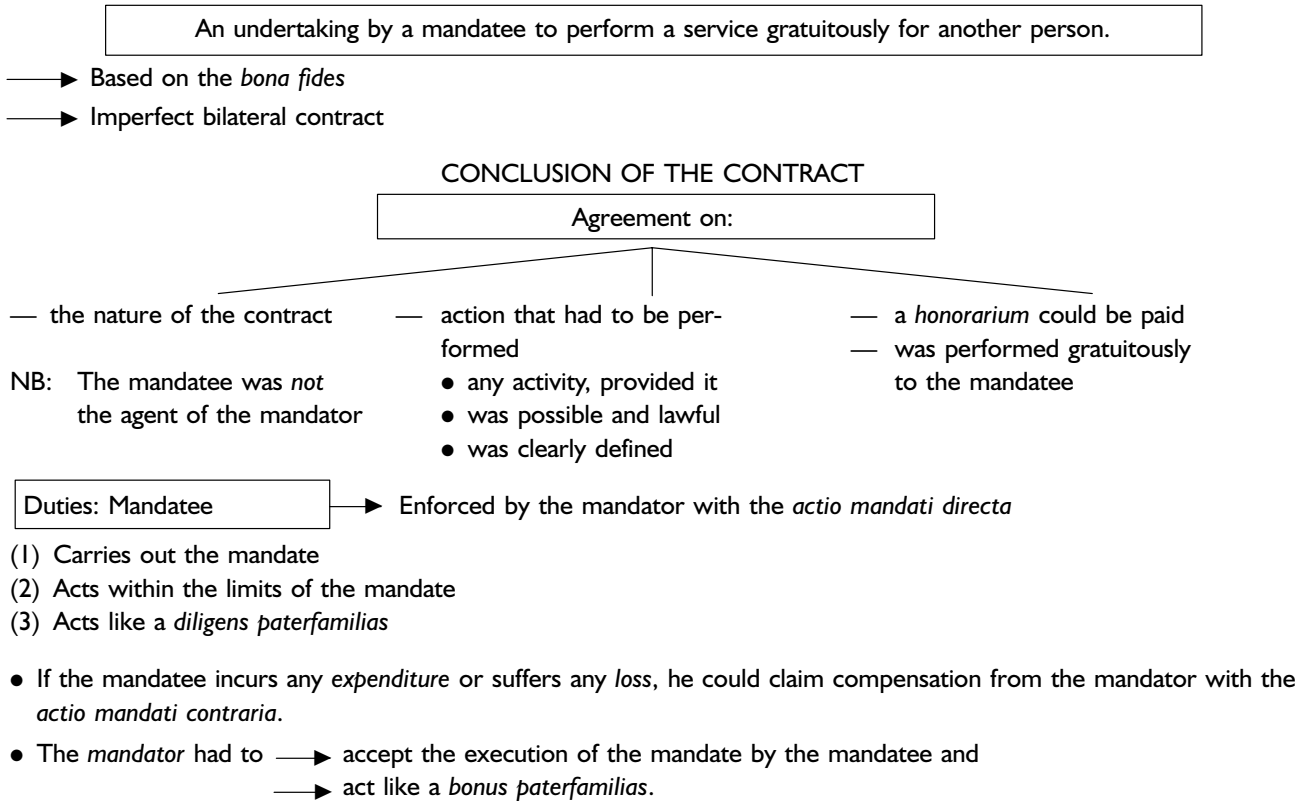
- The mandator had to accept the execution of the mandate by the mandatee. This meant that he became liable for all expenses and losses incurred by the mandatee in the execution of his task.
- The mandator had to exercise the care of a *bonus paterfamilias* with regard to the task he had imposed on the mandatee. He was therefore liable for *culpa levis in abstracto*.
- The mandator had the *actio mandati directa* at his disposal for the

execution of the mandate and the recovery of damages for which the mandatee was liable.

Make a thorough study of the following diagram which illustrates the contract of mandate. Add your own notes to the diagram if you wish.

DIAGRAM 17

Mandate



Activity

Aulus asks his friend Stichus to buy him a villa by the sea. Stichus concludes a contract of sale with Julius for the sale of Julius's seaside villa. What are the legal implications? What would the position be if Stichus had liked the villa so much that he had refused to hand it over to Aulus? (5)

Feedback

A contract of mandate was concluded between Aulus and Stichus, in terms of which Aulus was the mandator and Stichus the mandatee. Only Stichus and not Aulus, was a party to the contract of sale with Julius and Stichus was liable for the payment of the purchase price for the villa to Julius. Julius had to give Stichus the free and undisturbed possession of the villa and not Aulus. If Stichus were to decide to retain the villa himself and not to hand it over to Aulus, Aulus could invoke the *actio mandati directa* against Stichus to claim the villa. Stichus, on the other hand, was entitled to invoke the *actio mandati*

contraria to recover from Aulus any costs he had necessarily incurred as a result of the mandate.

In modern law it is acceptable to remunerate a mandatee for his services, unlike in Roman times, when the service was performed gratuitously or it later became customary to pay an *honorarium* to the mandatee in gratitude. In Roman law the mandatee did not act as a representative of the mandator, but the modern position has changed to such an extent that the mandatee has become the direct representative of the mandator. You can clearly deduce from the above discussion on consensual contracts that the four consensual contracts that we have dealt with all still play an extremely important role in modern South African law. Although these contracts have developed considerably since Roman times, their essential characteristics are still very similar to those found in Roman times.

After studying the above material on consensual contracts, you should be able to answer the following questions verbally and in writing:

Self-evaluation questions

- 1 Briefly distinguish between the various forms of letting and hiring (*locatio conductio*). (9)
 - 2 What were the duties of the lessor and the lessee in the hiring and letting of a thing (*locatio conductio rei*)? (7)
 - 3 What were the duties of the employer and the employee in the contract of service (*locatio conductio operarum*)? (4)
 - 4 What was the difference between the contract of service (*locatio conductio operarum*) and the contract for the hiring of a piece of work (*locatio conductio operis*)? (6)
 - 5 Briefly discuss the duties of the commissioner (lessor) and the contractor (lessee) in the hiring of a piece of work (*locatio conductio operis*). (4)
 - 6 Give a brief definition of a partnership (*societas*). (3)
 - 7 What were the essential requirements for the creation of a contract of partnership? (6)
 - 8 Distinguish between four possible types of partnership. (4)
 - 9 How did a contract of mandate arise (*mandatum*)? (2)
 - 10 What are the essential requirements for the creation of a contract of mandate? (6)
 - 11 Briefly discuss the duties of the mandator and the mandatee in the contract of mandate. (7)
-

Feedback

- 1 Your answer should refer to the differences between letting and hiring of a thing, letting and hiring of services and letting and hiring of a piece of work.
- 2 The answer is clearly indicated in the discussion above.

-
- 3 See this chapter for the relevant duties.
 - 4 See the introduction to the contract of service and contract for undertaking of a piece of work above for the distinction.
 - 5 The duties are clearly defined above.
 - 6 See introduction to the discussion on partnerships above.
 - 7 The six requirements are discussed in detail above.
 - 8 Explain each type in one sentence.
 - 9 See introduction to the discussion on mandate above.
 - 10 You need to refer in detail to the consensus requirement as discussed above.
 - 11 The duties are clearly defined above.

We shall now proceed to study verbal and written contracts. If you had any difficulty in answering the self-evaluation questions, we advise you to study this chapter thoroughly again. All the answers to the above questions are contained in the sections they refer to. You will often find that a concept or principle that may have seemed obscure at first will suddenly become clear when you revise it.

CHAPTER 5

Verbal and written contracts

GENERAL INTRODUCTION

We have already explained to you that contracts recognised by Roman law were classified into four categories on the basis of their *causae*. These categories were *contractus re*, *contractus verbis*, *contractus litteris* and *contractus consensu*. We have discussed consensual contracts in some detail. In this chapter we make a brief study of one of the contracts that qualified as a *contractus verbis* (verbal contract). We shall also take a brief look at written contracts (*contractus litteris*). Although Justinian does mention the *contractus litteris* as one of the four categories of his fourfold classification of contracts, these contracts were not of much importance in Roman law. By Justinian's time the *contractus litteris* had already been wholly replaced by the written *stipulatio*, which is the first contract that we discuss in this chapter.

In the case of a *contractus verbis* the contract came into existence once the parties had uttered certain formal words. This meant that the preceding agreement and the formalities (uttering of formal words) were equally important. The following diagram serves as an illustration:

agreement + uttering of formal words = *contractus verbis*

Written contracts came into existence once the parties had formally expressed their agreement in writing. The following diagram illustrates this:

agreement + written record of agreement = *contractus litteris*

One of the oldest forms of *contractus verbis* was *sponsio*, a contract with sacred and magical connotations. In time *sponsio* was replaced by *stipulatio*. Both *sponsio* and *stipulatio* were derived from the *ius civile* and were therefore a *negotium stricti iuris*. Since *stipulatio* was the most important *contractus verbis*, we shall confine our discussion of *contractus verbis* to *stipulatio*. One of the most important contracts concluded by means of *stipulatio* was the contract of suretyship. Since suretyship still plays a very important part in modern legal practice, we shall examine a few aspects of suretyship in detail.

We suggest that you make yourself a schematic representation (or diagram) of the learning content dealt with below.

I Origin, creation and requirements of *stipulatio*

Digesta 45.1.5.1:

A *stipulation* is a verbal expression in which the man who is asked replies that he will give or do what he has been asked.

The origins of *stipulatio* can be traced back to the solemn oath (*sponsio*) by which a family member undertook to become a “hostage” on behalf of a debtor. This oath was probably taken before the Roman gods in the temple. In time this oath fell into disuse and was supplanted by the contract of *stipulatio*.

In classical Roman law *stipulatio* was a formal contract that was strictly enforced (*negotium stricti iuris*). It consisted of a formal promise that was formally made in answer to a formal question and which gave rise to an obligation on the part of the person who made the promise. The contract was first created when the parties pronounced the formal words required for its conclusion. The formal words or formalities consisted of a question and an answer in which the same verb had to be used. The answer had to follow immediately after the question. Initially the verb *spondere* (to promise) was used, but later on other words could also be used. It is important to note that no witnesses or additional formalities (such as in the case of *mancipatio*) were required.

- Stichus says: “Seius, do you promise (*spondesne*) to give me 500 gold pieces?” Seius answers immediately: “I promise (*spondeo*).”

In time it became customary for the parties to put the agreement that had been reached in the form of *stipulatio* in writing (in the classical period the writing merely served an evidentiary function, since the emphasis was still on the formal words). In Justinian’s time the original *stipulatio* was replaced by a written contract. Since any lawful performance could be contained in a *stipulatio*, there was a broad field of application.

I.1 Requirements for *stipulatio*

Let us briefly sum up the requirements:

- The *stipulatio* was concluded by the **pronouncement of formal words**. As a result deaf and dumb persons could not conclude a *stipulatio*.
- **Both parties** to the *stipulatio* **had to be present** when the formal words were uttered and the *stipulatio* was concluded.
- The **answer had to follow the question without interruption**. In other words it had to form a continuous transaction.
- The question and answer had to contain **the same verb** (such as “promise”) and the answer could not introduce any fresh terms or conditions.

The *stipulatio* was evidence of the value the Romans attached to

trustworthiness (*fides*). The concise nature and accurate wording of the *stipulatio*, together with the presence of both contracting parties, largely eliminated misunderstandings. It is therefore hardly surprising that *stipulatio* was the most popular contract in Roman commercial life.

Stipulation was a **unilateral contract**. The result of this was that only one party had an obligation, while the other party had a corresponding (personal) right. The creditor had a personal right to claim the performance from the person who had promised it (the debtor). If the performance was directed to a **definite** thing (such as a slave), the action was known as a *condictio*. Where the performance was **indefinite** (for example, where Sextus promised Servius to compensate Servius for damages he had suffered as a result of an accident), the action was known as the *actio ex stipulatu*. We mentioned above that *stipulatio* originated in the *ius civile*. Consequently the *condictio* and the *actio ex stipulatu* were based on early law. This means that the creditor could only claim whatever had been promised.

2 The contract of suretyship

The role of stipulation in Roman commerce was especially important in cases where it was used to guarantee that a principal obligation would be fulfilled. Suretyship was incurred by means of a *stipulatio*. In terms of the contract of *stipulatio* the surety bound himself to the debtor's creditor to fulfil the obligation if the debtor was not able to fulfil it.

It is important to refresh your memory regarding the concepts “**real security**” and “**personal security**”. In the case of real security a certain thing was reserved for a creditor to ensure that a debt would be paid. The other form of security was personal security, as exemplified by suretyship. Here the surety bound himself contractually to the creditor of the principal debtor as security for the payment of the latter's debt.

In the case of a contract of suretyship there were two obligations, namely the obligation between the creditor and the principal debtor, known as the primary obligation, and then the obligation between the creditor and the surety, which arose as a result of *stipulatio* between the latter two, and was known as an accessory obligation.

In Roman law there were four types of suretyship, namely *sponsio*, *fideipromissio*, *fideiussio* and mandate-suretyship. For the purposes of this chapter we shall merely be looking at *fideiussio*.

2.1 *Fideiussio*

Fideiussio was created by a subsidiary *stipulatio*. The purpose of the latter had to be to secure a principal obligation. The following is an example of *fideiussio*:

First, the **creation of the principal debt**:

Servius: “Claudius, do you promise to give me ten silver coins?”

Claudius: “I promise.”

Secondly, the **creation of the subsidiary obligation (suretyship)**:

Servius: “Brutus, do you promise to give me what Claudius owes me?”

Brutus: “I agree that the debt should be supported by my trustworthiness.”

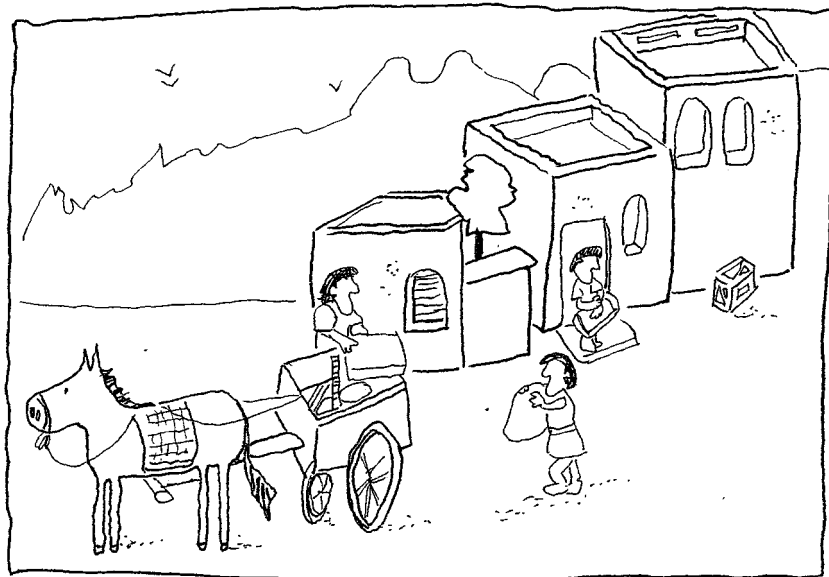
Interestingly enough, the liability of the surety in Roman law was not initially of a subsidiary nature. Subsidiary means that the principal debtor first had to be “shaken until his teeth rattled” before the money could be claimed from the surety. The position initially was that both the principal debtor and the surety were jointly and severally (*in solidum*) liable. The principal debtor could therefore claim payment of the debt from each one separately and could also choose which person to claim payment from. If he chose the surety, the surety had no choice but to pay up. Furthermore, he was not entitled to institute the action that was available to the creditor against the principal debtor. The surety had to be satisfied with instituting the action based on mandate. The drawbacks attached to this situation are obvious. The creditor could institute his claim against the surety even if the principal debtor was solvent and able to pay his debt himself. It was therefore necessary to introduce measures to improve the position of sureties.

2.1.1 Measures to improve the position of the surety

The position of sureties was improved by the introduction of the following measures:

(a) *Benefit of excussion (beneficium excussionis)*

If a surety was sued for the payment of the principal debt, he could claim that the creditor first proceed against the debtor (for the principal debt). The surety’s liability was therefore subsidiary to that of the principal debtor.



Excussion: The surety could ask that the creditor first proceed against the debtor for the principal debt.

(b) Benefit of division of debt (beneficium divisionis)

If there were several sureties and one of them was sued for the payment of the principal debt, the surety could demand a division of liability among all the solvent sureties. Each solvent surety could therefore be sued only for a particular portion of the debt. This concession was originally introduced by Hadrian (AD 117–138).

(c) Benefit of cession of actions (beneficium cedendarum actionum)

The creditor who was suing the surety for the payment of the principal debt was obliged to first cede the action or other remedy he had against the debtor. The surety could then, after paying the debt, proceed to sue the principal debtor.

The following aspects are important with *fideiussio*:

- *Fideiussio* could be used to secure any existing obligation, irrespective of whether it arose from a contract, a delict or any other ground.
- It was a requirement that the principal debt had to be valid.
- If the principal debt were to lapse (take another look at the ways in which obligations could be extinguished, as set out above), the suretyship would also lapse.
- Defences available to the principal debtor regarding the enforceability of the principal debt (for example that the principal debt had been contracted fraudulently) were also available to the surety.
- The surety could not be held liable for an amount that exceeded the principal debt.

It is interesting to note that the Roman senate prohibited women (between 41 and AD 65) from standing surety for their husbands in terms of a suretyship. If a woman stood surety for a person other than her husband, she could rely on a defence based on the *Senatus Consultum Velleianum* that enabled her to escape liability under the suretyship. If you concluded that this measure was introduced to discourage women from taking part in Roman commercial life, you were wrong. Its chief aim was to protect women, who were considered to be inherently weak and lacking in business sense!

Suretyship still plays an important part in commerce today. The modern contract of suretyship is derived directly from Roman law. The three privileges described above are still available to a surety today. The enactment by the Senate prohibiting women from acting as sureties was applied until 1971, when it was abolished by section 1 of the Suretyship Amendment Act 57 of 1971. Although the contract of suretyship still retained many of its Roman law roots, one very important amendment was introduced. In terms of section 6 of the General Laws Amendment Act 50 of 1956, a contract of suretyship was only valid if it was put in writing and signed. The reason for this amendment was clearly spelled out in *Fouramel (Pty) Ltd v Madison* 1977 (1) SA 333 (A) in the words of Miller JA: “However many objects the Legislature may have had in mind in enacting sec. 6 of Act 50 of 1956, one of them was surely to achieve certainty as to the true terms

agreed upon and thus avoid or minimize the possibility of perjury or fraud and unnecessary litigation.”

3 Invalid stipulations

As you were informed in the above sections, stipulations could be used to create almost any obligation, no matter what the content. You may have wondered what stipulations were considered invalid. Briefly, invalid stipulations were the following:

- if no performance was possible
- if the stipulation only came into force after the death of one of the contracting parties
- if it was incurred on behalf of a third party
- if the stipulation was immoral.

After studying this chapter, we suggest you attempt the following activities based on it:

Activity

- (a) Briefly discuss whether the following stipulation was valid during the classical Roman period:

Servius: “Tertius, do you promise to give me 50 silver pieces?” Tertius didn’t answer, but rode off on his horse and returned to Servius’s house as the sun was setting. He produced glasses, poured two glasses of wine, handed one to Servius and nodded his consent. (3)

- (b) Read the following set of facts carefully and then answer the questions based on it:

Agricola sold the farm called “Cornelia” to Brutus. The purchase price amounted to 300 gold pieces. Brutus was not able to pay the purchase price immediately and Crassus made himself available to act as a surety for Brutus.

- (i) What did Crassus have to do in order to be liable as a surety? (1)
- (ii) Could Crassus accept responsibility as a sponsor for only 250 gold pieces or did he have to be liable for 300? Could he have accepted responsibility for 400 gold pieces? (1)
- (iii) Brutus neglected to pay the purchase price on the agreed date. Could Agricola summarily and immediately hold Crassus liable for the payment of the purchase price? (1)
- (iv) Crassus acted as surety without being asked to do so by Brutus. Would it nevertheless have been possible for him, after paying the debt to Agricola, to recover the amount from Brutus? (2)
- (v) Apart from Crassus, Secundus, Tertius and Quartus also stood surety for the principal debt. Was Agricola entitled to claim the full amount from Crassus? (3)

Feedback

- (a) The stipulation was not valid. If you revise the requirements for a valid stipulation, it is clear that Tertius should have answered Servius's question immediately and used the same verb and formal words as Servius. The fact that he returned later and merely nodded assent, was not sufficient to create a valid stipulation.
- (b)
 - (i) Crassus should have agreed formally and by *stipulatio* to accept liability as a surety.
 - (ii) As a surety Crassus was liable for the full debt of 300 gold pieces (he was therefore liable *in solidum*).
 - (iii) As mentioned above, the surety was originally jointly and severally liable for the whole debt and the debtor could therefore choose whether he wanted to claim the debt from the debtor or the surety. Justinian changed this situation, however, so that from then onwards the creditor was obliged to claim the debt from the principal debtor first, after which he could sue the surety.
 - (iv) The fact that Crassus voluntarily undertook to stand surety for the debt meant that he could only sue Brutus on the grounds of unauthorised agency (*negotiorum gestio*). Unauthorised agency was a quasi-contract, a form which we shall be studying in greater detail below.
 - (v) Under a resolution by the Emperor Hadrian, each surety had the privilege of division (*beneficium divisionis*) in terms of which he, when accepting liability, could claim his right to division. This meant that he could claim that the debt should be proportionally divided among all the sureties who were solvent at the date of the joining of issue. The whole amount could therefore not be claimed from Crassus.

4 Contracts constituted by writing (*contractus litteris*)

It is clear from the above section on stipulations that, in view of the importance of stipulation in Roman law, written documents and other written transactions did not play such an important part in Roman commercial life. Illiteracy, together with the emphasis the Romans placed on verbal undertakings, were chiefly responsible for this.

The earliest contract constituted by the use of writing was derived from the practice by the *paterfamilias* of keeping book of his business transactions. He normally recorded these in a day-book and then transferred them to a ledger. If the debtor agreed with the entry, a *contractus litteris* was created.

- For example: If Brutus lent Balbus 50 silver pieces, Brutus made a note of the fact that on that day he had lent Balbus 50 silver pieces. Balbus as the debtor had to agree with the entry and this gave rise to a *contractus litteris*.

Very little is known about contracts of this kind and we are not certain what form the debtor's consent to the entry had to take. It is assumed that the presence of both parties was not required when the entry of the debt was made.

Although Justinian names the *contractus litteris* as one of his four categories of his four-fold classification of contracts, these contracts were not really of much importance in Roman law. By the reign of Justinian the *contractus litteris* had been replaced in its entirety by the written *stipulatio*.

Since contracts of this kind were of little importance in Roman law and we have discussed them very sketchily with you, you will not be expected to do any activities based on this material.

Self-evaluation questions

Test your knowledge of this chapter by answering the following questions in writing:

- 1 Explain how verbal and written contracts came into being. (4)
- 2 Briefly discuss the formal requirements that *stipulatio* had to comply with in classical law. (4)
- 3 Name the remedies available with *stipulatio*. (2)
- 4 Write a brief note on the origins and nature of *fideiussio* as a type of Roman suretyship. (4)
- 5 Name the three measures aimed at improving the position of the surety. (3)
- 6 Give an example of how a *contractus litteris* (contract constituted by writing) came into being. (1)

We remind you that the answers to the above self-evaluation questions can be found in the relevant parts of this chapter.

Feedback

- 1 Verbal and written contracts are discussed above.
- 2 See discussion above.
- 3 See discussion above.
- 4 See discussion on *fideiussio* as type of suretyship.
- 5 The three measures are discussed above.
- 6 See discussion above for an example.

CHAPTER 6

Real contracts

GENERAL INTRODUCTION

The last of the four classes of contracts in the Roman law of contracts is the *contractus re* or real contracts. Real contracts consist of four contracts that we'll study in more detail below. These contracts are *mutuum* (loan for consumption), *commodatum* (loan for use), *depositum* (deposit) and *pignus* (pledge). The word “real” is derived from the Latin word *res* which, as you know, means “thing”. These contracts therefore owe their name to the fact that they only came into existence when the thing, which was the subject of the contract, was **delivered** by one of the parties to the other.

I Introduction to real contracts

The basic requirements for the creation of the four real contracts in classical Roman law was an agreement between the parties, followed by delivery of the object of the contract to the recipient. After delivery of the object, the recipient was obliged to return the same object or (in the case of loan for consumption) a similar object. The real contracts therefore developed out of the gratuitous service the Romans did for each other. It is important to remember that consensus between the parties is not sufficient for the establishment of contracts of this kind. An additional element was required: The *causa* for contracts of this kind was the handing over of the object.

The first two real contracts, *mutuum* (loan for consumption) and *commodatum* (loan for use) were to the advantage of the recipient. These contracts will be discussed next.

I.1 Loan for consumption (*mutuum*)

1.1.1 Creation

Loan for consumption was the oldest of the four kinds of *contractus re* and was derived from the *ius civile*. The parties agreed that one party (the lender) would lend the other person (the borrower) a thing or things to consume and that the latter (the borrower) would later return a similar thing or things to the lender. The obligation came about after the parties had reached *consensus* on the loan and the object handed over. Since the borrower was allowed to *consume* the thing, it follows logically that ownership did pass to the borrower with delivery. The lender therefore had to have been the owner of the consumable thing or things before delivery. As a matter of interest, we mention the

following: The predecessor of loan for consumption, known as *nexum*, was a formal money-lending transaction in which a debtor formally bound himself as hostage to a creditor to ensure that a debt would be repaid. If the debtor defaulted, the creditor was entitled to seize the debtor, keep him as a slave, sell or even kill him! When *nexum* fell into disuse, *mutuum* became the standard money-lending contract of the Republic.

1.1.2 Object of loan for consumption (*mutuum*)

The contract of *mutuum* was concluded in respect of fungibles (*res fungibiles*) which also had to be consumables (*res consumptibiles*). The object of *mutuum* could therefore be money or other consumables such as wine, oil, material, gold, silver, wheat or barley, to name a few examples.

Digesta 12.1.2.2:

This kind of lending happens in relation to those things which are dealt in by weight, number or measure.

1.1.3 Nature of the contract of *mutuum*

Loan for consumption was a **unilateral contract**. A unilateral contract gave rise to a single duty and a corresponding personal right. The borrower (debtor) was obliged to restore a thing of the same quality and quantity as the thing he received. Since the object of this contract was a consumable thing, the debtor could not avail himself of the defence that performance had become impossible. The lender (creditor) had a corresponding personal right to claim the thing from the borrower (debtor). It is important to note that the lender incurred no contractual obligation. Since the borrower became the owner of the thing lent to him, the risk of the destruction of the thing passed to him. A contract of *mutuum* could be seen as a gratuitous loan, usually between friends. The contract of *mutuum* as a *negotium stricti iuris* was derived from the *ius civile*.

1.1.4 Rights of the lender

Since loan for consumption was a unilateral contract, it created an obligation for the borrower only. The lender had a personal right in the form of a personal action, a *condictio*, to claim from the lender a thing of the same quality and quantity as the one he made available as a loan. The lender transferred ownership of the thing to the borrower and therefore the lender had to own the thing himself at the time he made the loan. (To refresh your memory: You will remember that in terms of the *nemo plus iuris* rule a person could not transfer more rights than he had himself; consequently only the owner of a thing could transfer ownership of the thing to someone else.)

1.1.5 Duties of the borrower

The borrower was under an obligation to restore to the lender a thing of the same quality and quantity as the thing he borrowed.

1.1.6 Actions

The lender could enforce his personal right by recourse to a personal action derived from the *ius civile*, namely the *condictio*. This action could be used to claim a particular thing, a sum of money or a generic thing. Interest could not be claimed, since the contract of consumption (*mutuum*) was a gratuitous loan between friends and not a business loan. If the parties wanted to negotiate interest, it had to be specified in a supplementary stipulation contract (see previous study unit).

1.2 Loan for use (*commodatum*)

1.2.1 Origin

Loan for use (*commodatum*) was derived from the *ius gentium* and in terms of this contract the parties agreed that one party (the lender) would lend the other (the borrower) a thing gratuitously for his use and the borrower would later return the same thing to the lender. Mere consensus between the parties was not sufficient to create a contract. The contract was only created when the thing was delivered to the borrower. The purpose of *commodatum* was the loan of the thing for **use** (and not, as with *mutuum*, for **consumption**). The logical consequence of this is that the contract was only possible in respect of movables that were not consumables or fungibles. Since the borrower was only going to use the thing and then return it to the lender upon expiry of the loan, it was not necessary for ownership to pass to the borrower upon delivery. The lender therefore did not pass ownership, but only detention (*possessio naturalis*) to the borrower. Instead of ownership only physical control of the thing was transferred to the borrower. Please note this important distinction between loan for consumption and loan for use.

1.2.2 Object of the loan for use (*commodatum*)

Any movable or immovable corporeal thing, like a slave or a plot of ground, could be given as a loan for use. In practice movable, non-consumable things were mainly given.

1.2.3 The nature of the loan for use (*commodatum*)

Commodatum was an **imperfectly bilateral** contract. In other words, the contract gave rise to only one principal obligation, namely the obligation of the borrower to return the thing. The borrower could demand that the lender compensate him for any damage he might have suffered as a result of a defective thing which the lender had knowingly lent to him. It is important that the thing should have been lent gratuitously, since otherwise a contract of hire would have been created. In contrast to *mutuum*, which was a *negotium stricti*

iuris, commodatum was a *negotium bonae fidei*, which meant that the duties of the parties were determined by *bona fides*. In accordance with the requirements of good faith, the lender was not only entitled to the return of his thing, but also to any fruits produced by the thing during the period of loan (eg lambs born of sheep that had been lent).

1.2.4 Duties of the lender

As we mentioned above, the contract of *commodatum* was an imperfectly bilateral contract and the lender therefore only incurred obligations in the following special circumstances:

- He had to reimburse the borrower if the latter had incurred extraordinary expenses in order to maintain the borrowed thing, such as medical expenses for the care of a slave or a horse.
- Since the lender derived little benefit from the contract, his duty of care was low. He could only be held liable for *dolus*, as when he knew that the object of the loan had a defect and he did not inform the borrower. An example that springs to mind is a leaking wine vat that could possibly result in a loss for the borrower.

1.2.5 Duties of the borrower

- The borrower had to return the object of the loan (with its fruits and accessories) to the lender at an agreed time or within a reasonable time.
- The borrower had to use the thing for the purpose for which it was lent.

For example: If Antonius lent Savarius an ox for ploughing his fields and Savarius harnessed the ox to pull a vegetable cart back and forth to town, he was guilty of theft of the use of the ox. If the thing was damaged or destroyed while being used for a purpose other than the purpose agreed upon, the borrower was responsible for all damage, even if the damage or destruction was caused by *vis maior* (an act of God). If Savarius was using the ox in a manner other than the agreed manner and the ox was struck dead by lightning, he would have had to compensate Antonius in full for the loss of the ox.

- The duty of care imposed on the borrower was *culpa levis in abstracto*. The reason is that the borrower benefited most from the contract and consequently he had a stricter duty of care than the deposittee (see **deposit** below), for example. The borrower was therefore responsible for any damage to the thing, apart from damage caused by an act of God (*vis maior*) or chance (*casus*). Note that a distinction was drawn in respect of the legal consequences of damage between cases where the object of the loan was used for an unauthorised purpose (see above) and where it was used as agreed between the parties.

1.2.6 Actions

The lender could institute the direct action on loan (*actio commodati directa*) to enforce the borrower to meet his obligations. The borrower could institute a

contrary action through the *actio commodati contraria*. This action forced the lender to meet his obligations. The relationship between the lender and the borrower was based on good faith and the actions of both parties were therefore based on good faith.

Digesta 13.6.18.3:

Again, someone who knowingly lends defective containers must, if wine or oil poured in is spoiled or spilled, be condemned on that account.

1.3 Deposit (*depositum*)

1.3.1 Origin

Deposit originated from the *ius honorarium* in terms of which the parties agreed that one party (the depositor) would give a movable object to another (the depositee) for safekeeping and the latter would take care of the deposited thing gratuitously and return it to the depositor upon demand. A contract of deposit or safekeeping was concluded when an agreement was reached, **followed** by the handing over of the thing for safekeeping. The depositee was merely the *detentor* of the thing and ownership did not have to be transferred as in loan for consumption.

1.3.2 Object of deposit (*depositum*)

The object of deposit was a movable, corporeal thing. Money could be the object of a special kind of deposit known as *depositum irregulare*. Land (an immovable object) could also be the object of deposit in the case of a special type of deposit where the land was given into the custody of an arbiter. It is important, however, for the purposes of this course that you note that the object was usually a movable, corporeal object.

1.3.3 Nature of the obligations created

Like a loan for use, deposit was an **imperfectly bilateral** contract. The depositee always had obligations, whereas the depositor only incurred obligations in certain cases. The first duty of the depositee was to return the thing to the depositor at the end of the period of safekeeping. Like the loan for use, deposit was also performed gratuitously. In the event of payment, the contract would logically have been one of undertaking a piece of work (*locatio conductio operis*). It is important to note that the purpose of deposit was the safekeeping of someone else's thing. If the depositee used the thing, he was guilty of theft. Unlike loan for consumption (*mutuum*), which was a *negotium stricti iuris*, deposit was a *negotium bonae fidei*. The duties of the parties were therefore determined by the *bona fides*. Let us take a closer look at the duties of the depositee and the depositor.

1.3.4 Duties of the depositor

As in the case of the lender in loan for use (see above), the depositor only incurred obligations in special circumstances. The depositor was obliged to do the following:

- The depositor had to reimburse the depositee for all expenses incurred by the latter for the maintenance of the thing. If the depositee suffered any damage as a result of his safekeeping of the thing, the depositor could be held liable for compensating the depositee.
- If the depositee suffered damage as a result of a defect in the thing in his care, the depositor could be held liable for damages. Since he benefited from the deposit, he was liable for *culpa levis in abstracto*.

1.3.5 Duties of the depositee

Two of the duties of the depositee were exactly the same as those of the borrower for use. The duty of care of the depositee was, however, different from that of the borrower for use, since the depositee did not benefit from the contract.

The duties of the depositee were to do the following:

- The depositee had to safeguard the thing left in his care and eventually return it to the depositor, together with all its fruits and accessories.
- He had to look after the thing gratuitously, but his duty of care was slight since he derived no benefit from the contract. He was liable for *dolus* and *culpa lata* (gross negligence). This meant that he was responsible for paying damages to the depositor if he deliberately damaged the thing or conspired with someone else to steal the thing.
- The depositee was not allowed to use the thing and if he did so, could be held liable for theft of the use of the thing (*furtum usus*).

1.3.6 Actions

The depositor had recourse to the direct action on deposit (*actio depositi directa*) if the depositee was unwilling to return the thing or if he wanted to claim damages for any damage to or loss of the thing for which the depositee was responsible. The depositee could institute the contrary action, the *actio depositi contraria*, for reimbursement of any expenses (maintenance) he had had to incur in maintaining the thing and for any damage that he had suffered as a result of the depositor's deliberate or careless delivery of a defective thing.

1.4 Pledge (*pignus*)

1.4.1 Origin

Pledge (*pignus*) was a real contract derived from the *ius honorarium* whereby the parties agreed that one party (the pledgor) would give the other party (the

pledgee) a thing to serve as security for a debt and that the latter (the pledgor) should return the same thing as soon as the secured obligation had been discharged. The contract was therefore created by an agreement between the pledgor and the pledgee, **followed** by the delivery of the pledged thing. Note that ownership of the pledged thing remained with the pledgor, while the pledgee merely acquired possession of the pledged thing.

In the section on the law of things you were introduced to pledge as a **real security right** available to a creditor to secure a debt. You probably realised in the course of your study of real security that the pledge had to be handed to the pledgor pursuant to an agreement between the parties. It was this preexisting agreement **together with** the subsequent delivery of the pledge that gave rise to the contract of pledge that we are discussing now.

1.4.2 Object of pledge (*pignus*)

The object of pledge could have been any movable or immovable corporeal thing since the purpose of the pledge was that the thing should be held as security and not be consumed.

1.4.3 Nature of the pledge agreement

Like loan for use and deposit, the contract of pledge was an imperfectly bilateral contract. The pledgee always acquired duties, but the pledgor only acquired a duty in special circumstances. The pledgee had one principal duty, which was to return the thing. Unlike loan for consumption, which was a *negotium stricti iuris*, pledge was a *negotium bonae fidei*. The duties of the parties were therefore regulated by the *bona fides*. These duties will be discussed next.

1.4.4 Duties of the pledgee

The first two duties of the pledgee corresponded to those of the borrower (*commodatum*) and the deposittee (*depositum*). The third duty related to a duty of care.

The pledgee was obliged to do the following:

- He had to return the pledged object, together with its fruits and accessories, to the pledgor. If the pledgor defaulted on his debt, the pledgee was entitled to sell the pledged object on public auction. Any surplus, after the discharge of the debt for which the pledged thing had served as security, had to be paid over to the pledgor.
- The pledgee was not entitled to use the pledged object, unless otherwise agreed between the parties. If the pledgee did use the pledged object, he was guilty of theft of use (*furtum usus*).
- The duty of care of the pledgee was *culpa levis in abstracto* since he benefited from the contract (he received security). He had to display the care of a reasonable person with regard to the object.

1.4.5 Duties of the pledgor

The duties of the pledgor, which correspond to those of the lender and the depositor, were the following:

- The pledgor had to reimburse the pledgee for all necessary expenses incurred for maintaining the pledged object.
- The pledgor was liable for damages caused by a defect in the pledged object of which he was aware.
- The pledgor also benefited from the contract (in that he was able to obtain credit) and was therefore liable for *culpa levis in abstracto*. He consequently had to show the care of a *diligens paterfamilias*.

1.4.6 Actions

The pledgor could avail himself of the direct action on pledge (*actio pignoratitia directa*) to claim back the pledged object after he had redeemed the secured debt. Damages could be claimed by the same action for any damage caused to the object by the pledgee's negligence. The pledgee could institute a contrary action on pledge (the *actio pignoratitia contraria*) by means of which he could claim reimbursement for his expenses and for any damages he had suffered on account of defects in the pledged object.

The contracts of loan for consumption, loan for use, deposit and pledge still exist in South African law. The principles the Roman jurists developed in respect of these contracts largely correspond to the principles applicable to their modern counterparts. The only major difference is the fact that nowadays all these contracts come into existence as soon as the parties have reached *consensus*. Delivery is not a prerequisite any more.

Once you have made a thorough study of the principles applicable to the above four real contracts, we advise you to attempt the following activity. It is in your own interest to find the answers for yourself, without consulting the feedback.

Activity

Read the following facts carefully and then answer the questions based on them.

Antonius lends Servius a donkey to move his household belongings, along with a basket of bread and a small barrel of wine.

- (a) Identify the real contracts applicable to the above set of facts. (4)
- (b) What would the legal position be if
 - (i) Servius forgot to give the donkey food and water and the animal died as a result? (2)
 - (ii) the donkey was very nervous and started at a mouse, causing the wine barrel to break and the wine to leak onto Servius's clothes? (2)
- (c) What would the legal position be if Servius used the donkey for donkey races? (1)

- (d) What would the legal position have been if the donkey had eaten up two of the loaves before Servius and his family could eat it? (2)
-

Feedback

- (a) The loan of the donkey is an example of loan for use (*commodatum*); the loan of the bread is loan for consumption (*mutuum*); the loan of the wine is an example of both loan for use in respect of the wine barrel and loan for consumption in respect of the wine.
- (b) (i) The duty of care that rested on Servius as the lender in loan for use was *culpa levis in abstracto*. If the donkey died as a result of his negligence, the lender (Antonius) could hold him (Servius) liable for the loss of the donkey.
- (ii) If the donkey was of a very nervous temperament, the borrower (Servius) could hold the lender (Antonius) responsible for *dolus*. Therefore, if Antonius was aware of the defect (nervousness) in the thing (donkey), he could be held liable for the resulting loss (the damage to Servius's clothing and the broken wine jar).
- (c) If the lender (Servius) used the object of the loan for any purpose other than that agreed upon, he could be held liable for theft of the use of the thing (*furtum usus*). (We refer you to the duties of the borrower under loan for use.)
- (d) The contract of loan for consumption in respect of the bread implied an obligation on Servius to return two similar loaves to Antonius within a reasonable period. If Servius defaulted on this duty, Antonius could claim the loaves from Servius with the *condictio*.

Activity

Read the following facts carefully and answer the questions based on them:

Brutus and Tertius agree that Tertius will leave the slave, Titus, in the care of Brutus at no charge while Tertius is away on holiday outside the boundaries of Rome and that Brutus will return the slave to Tertius after a month when Tertius returns to Rome.

- (a) What type of real contract has been established here? (1)
- (b) If Tertius had owed Brutus a sum of money and had given the slave to Brutus to secure the loan, what type of real contract would have been applicable? (1)
- (c) What would the legal consequences have been if Brutus
- (i) under the first type of real contract (question (a)), had used the slave Titus to repair his roof? (2)
- (ii) under the second type of real contract (question (b)), had forced the slave to work in his inn? (2)
-

Feedback

- (a) The real contract applicable here is deposit (*depositum*). If you answered incorrectly, we advise you to study the section on deposit again.
- (b) This is a contract of pledge (*pignus*).
- (c) (i) As you will see from the duties of the depositee above, the pledgee may not use the thing and if he does use it, as Brutus used the slave to repair his roof, he committed theft of the use of the thing (*furtum usus*).
- (ii) With pledge the requirements are the same as in (i) above. Brutus as the pledgee may not use the pledged object unless he and Tertius had otherwise agreed. He was therefore also guilty of theft of the use of the thing (*furtum usus*) as in the situation above.

Self-evaluation questions

After studying the chapter on real contracts, we suggest that you test your knowledge by answering the following self-evaluation questions:

- 1 Briefly explain how *contractus re* were created in general by naming the four real contracts. (4)
- 2 What were the objects concerned in the four different real contracts? (4)
- 3 What were the legal consequences for the respective parties in each of the real contracts? (4)
- 4 What were the remedies at the disposal of each of the parties to the four real contracts? (8)

Feedback

- 1 See discussion above for the answer.
- 2 See discussion above.
- 3 See discussion above under “duties” and “actions”.
- 4 See discussion above under “actions”.

Refer to the diagrams supplied in the other chapters on the law of obligations and try to draw up your own diagram for the real contracts. The purpose of the diagrams in your study material, as we said above, is to help you to understand the material better and we should like to encourage you to use this method throughout.

CHAPTER 7

Quasi-contract

GENERAL INTRODUCTION

Quasi-contract was one of the four categories in Justinian's classification of the sources of obligations. The most important examples of quasi-contracts were unauthorised administration of another's affairs (*negotiorum gestio*), guardianship (*tutela*) and curatorship (*cura*), co-ownership (*communio*) and the various instances of unjust enrichment (*condictiones*).

You should note that the obligations involved in quasi-contracts did not arise as a result of contracts, but that these situations were broadly analogous to established contractual situations.

We are only going to look at unauthorised administration (*negotiorum gestio*) as an example of a quasi-contract.

I Unauthorised administration (*negotiorum gestio*)

I.1 Origin

Unauthorised administration is the administration of the affairs and interests of another, without his consent.

- For example: In Balbus's absence his roof is blown off by a tornado. His neighbour, Antonius, leaps into the breach and mends the roof, in the process spending a lot of money on the purchase of building materials to mend Balbus's roof.

Here there is no question of consensus between the parties and no contract was concluded between Balbus and Antonius. The law, however, treated this kind of obligation as *if* a contract had been concluded. The *gestor*, Antonius, would therefore have been allowed to recover his expenses. The following are the requirements imposed by law before anyone can be compensated for *negotiorum gestio*:

I.2 Requirements

- The *gestor* had to have acted without the consent of the owner (*dominus*). In other words there should have been no agreement between the parties.

- The *gestor* must have acted reasonable or, to put it differently, his service must have been reasonable.

For example: Neighbourly assistance that was unreasonable and entirely uncalled for did not qualify under certain circumstances, as when Balbus painted Antonius's house without his permission while Antonius was away for the week-end.

- The act must have been beneficial to the principal. If the *gestor* thought he was acting in the interests of the principal, but objectively seen this was not the case, no quasi-contract of unauthorised administration was created. If the actions of the *gestor* were reasonable, even if the end result was not successful (as when Balbus's roof blew off again after Antonius had mended it), the expenses incurred could still be recovered.
- Unauthorised administration depended on the *gestor* expecting to be reimbursed for his expenses. He should not have performed them merely out of altruism.
- A *gestor* could not act in contravention of an express prohibition of the *dominus*.

1.3 Nature of unauthorised administration

Unauthorised administration was an imperfectly bilateral quasi-contract, since the *gestor* always acquired rights and duties and the *dominus* only did so in exceptional cases. The *gestor* had to show the care of a *bonus paterfamilias*. If he acted in an emergency he was only liable for *dolus*. The owner (*dominus*) had to accept the acts done in his best interests and reimburse the *gestor* for all expenses reasonably incurred by the latter.

1.4 Actions

The owner could institute the *actio negotiorum gestorum* to enforce the *gestor's* duties. The *gestor* could avail himself of the contrary claim (*actio negotiorum gestorum contraria*) in order to enforce the *dominus's* duties.

Activity

Without Gaius's knowledge and consent Antonius decides to restore and repair Gaius's chariot, which has been stored in a shed for many years. Gaius is amazed, but feels indignant when Antonius claims the cost of the materials and labour from him. Briefly discuss the legal position. (3)

Feedback

We refer to the section above which deals with the requirements for unauthorised administration. One could reason that Antonius's actions,

although theoretically to Gaius's advantage, were unreasonable (and unnecessary at the time). Unauthorised administration therefore did not arise. If Gaius had been dependent on the chariot and Antonius had repaired it in his absence, the picture would have been entirely different.

Self-evaluation questions

The fact that we did not discuss quasi-contracts in depth does not mean that this section is not important. You must be able to answer the following questions in writing:

- 1 Name a few examples of quasi-contracts in Roman law. (5)
 - 2 What are the requirements for unauthorised administration? (5)
 - 3 What actions were available to the *gestor* and the owner (*dominus*) in unauthorised administration? (2)
-

Feedback

- 1 The five examples are referred to in the introduction.
- 2 The five requirements are discussed above.
- 3 The actions for both appear in the discussion above.

This chapter brings us to the end of our study of the Roman law of obligations. As you will probably agree, this is a very exciting area of law and a thorough knowledge of the Roman law of obligations will be of inestimable value to anyone interested in specialising in modern law of contracts.

PART C

The Roman law of delict

CHAPTER 8

The Roman law of delict

GENERAL INTRODUCTION

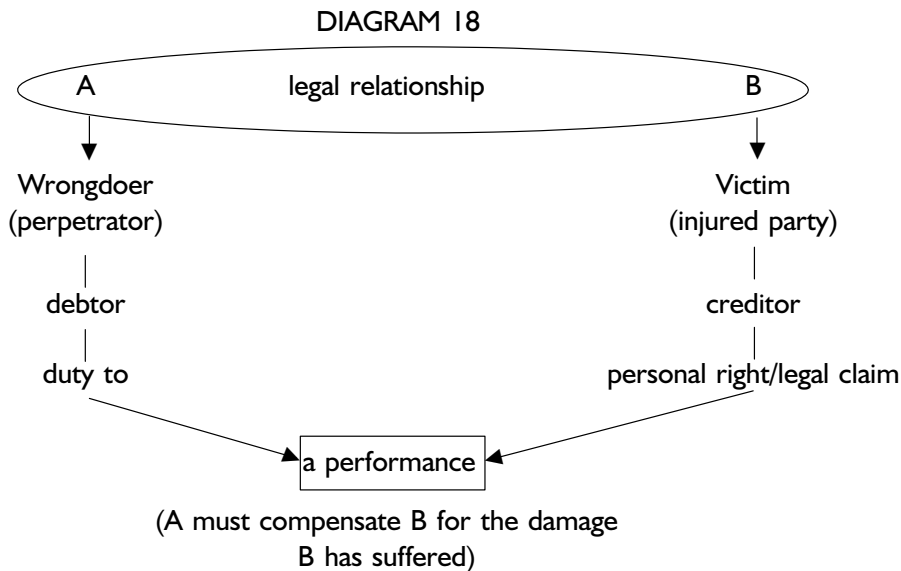
In this chapter you will be introduced to the concept “delict”. The law of delict and the law of contract both form part of the law of obligations. We begin by explaining to you what a delict is and why it creates an obligation. You will then be introduced to the various Roman delicts and the remedies available to the injured party.

I Introductory remarks

I.1 What is a delict?

A delict may be described as an **unlawful culpable act** which causes **damage** and creates an obligation.

It is important that you should understand that a delict, like a contract, creates an obligation and that you should be able to explain the reasons for this. You already know that an obligation is a legal tie between a debtor and a creditor. In the case of a delict the victim (the injured party) is the creditor and the wrongdoer (the party that caused the damage or injury) is the debtor. Because an obligation arises from a delict, the victim/creditor has a personal right to recover damages from the wrongdoer/debtor. To illustrate this, let's take the example of a familiar delict in modern society: A traffic accident. Suppose A omits to stop at a red traffic light and collides with B. The legal position of the parties would be as follows: B would be the creditor, because he suffered damage, which he can recover from the other party to the obligation, A, the debtor. If it were not for the fact that the delict created an obligation, B would not have had a foot to stand on in law to force A to compensate him for his damage.



1.2 The distinction between a crime and a delict

This is something you may well have asked yourself: Didn't A in the example in 1.1 commit a crime by ignoring the red traffic light? The answer is yes. A was guilty of both a crime and a delict. He contravened a traffic rule, which is a criminal offence and one for which the state can prosecute and punish him, but he also caused damage to B's vehicle, for which B could claim compensation with a delictual action. The contravention of a regulation constitutes a crime and the wrongful negligent damage to B's vehicle a delict.

Roman law differed materially from modern South African law in the way it distinguishes between a crime and a delict. As you noted above, the state would prosecute A and punish him for the crime he committed, but B would be able to institute a civil claim against A to recover damages on the basis of the delict A committed against him.

The Romans only classified offences in which the state had a direct interest as crimes. High treason and murder were examples of Roman crimes. They classified other cases where one person injured or prejudiced another as *delicta privata* or "private delicts". In such cases the injured party recovered damages or satisfaction from the perpetrator, as well as an additional amount to "punish" the wrongdoer for his actions. The Romans were of the opinion that it was the injured party that had suffered the damage and that he should therefore have the benefit of an additional monetary penalty. In Roman law the example above would have given rise to a delict but not a crime.

1.3 The different categories of actions based on delict

The Romans classified the actions that could be instituted on the basis of delict into three categories:

1.3.1 Recovery action or *actio rei persecutoria*

An action of this kind enabled the injured party to recover his thing or the

value of the thing or compensation from the perpetrator. Examples of such actions are the *rei vindicatio* and the *condictio furtiva*.

1.3.2 Penalty action or *actio poenalis*

An action belonging to this category allowed the injured party to recover a fine from the perpetrator as a “punishment” for the perpetration of the delict. An example would be the *actio furti*.

1.3.3 Mixed action or *actio mixta*

A mixed action was used to claim both compensation and a fine. In this case a single action was instituted to serve the purpose of the actions in both 1.3.1 and 1.3.2. An example of an action of this kind was the *actio vi bonorum raptorum*.

Here an action for compensation was instituted at the same time as a penal action. If the specific delict made a mixed action available to the injured party, however, only one action was instituted.

2 Elements of a delict

It is important to understand that **five** elements had to be present before one can speak of a delict. In the absence of one of these elements, no delict had been committed. The position is the same in modern South African law. We proceed to discuss the delictual elements from the perspective of Roman law.

2.1 An act

Naturally there had to be an act by the perpetrator, because a delict is an unlawful **act** that is committed by someone and that causes damage or injury. Originally the Romans only regarded a direct positive action as an act for the purposes of delict. During the classical period the *praetor* extended the law so that indirect causation of damage also complied with the requirements for the act. In Justinian’s time an omission was also regarded as an act in certain circumstances.

2.2 Wrongfulness

Before a certain action could create a delict, that action had to be wrongful. Wrongfulness literally meant “**contrary to the law**”. The law forbade theft, therefore the appropriation of a thing belonging to another would constitute a delict provided the other delictual elements were also present.

2.3 Fault (*mens rea*)

“Fault” referred to the blameworthy attitude of the perpetrator. Fault could take one of two forms, namely **intent** or **negligence**.

In order to establish whether a person acted **deliberately**, it was necessary to

establish his subjective frame of mind while committing the act. The establishment of negligence on the part of a person requires an objective test, however. In Roman law there were three degrees of negligence, namely *culpa levis in abstracto*, *culpa levis in concreto* and *culpa lata*. (Refer back to the law of contracts for a full discussion of negligence.) In the first place a person was considered **negligent** if he did not display the degree of care of a diligent *bonus paterfamilias*. This yardstick for negligence gave rise to the modern test of the reasonable person. Here it is asked whether a reasonable person in the same circumstances as the perpetrator would have foreseen and prevented the damage. If the answer to both questions is yes, then the perpetrator was negligent.

The development of the element of *mens rea* in Roman law was especially important in wrongful damage to property (see 3.3 below).

2.4 Damage

In order to create a delict, the unlawful act would need to have caused someone damage or an injury.

2.5 Causality

There had to be a causal connection between the action of the perpetrator and the damage suffered by the victim. This means that the damage had to have been the result of the perpetrator's act.

Activity

A visits the home of his friend B. A does not know that an expensive vase had been placed under one of the coffee tables and kicks it over by accident. The vase breaks. Has A committed the delict of damage to property?

Feedback

No, A could not be held liable for damage to property. A acted neither deliberately nor negligently, so the element of guilt is absent. Since all five of the elements are not present, there can be no question of a delict.

3 The specific Roman delicts

3.1 Theft (*furtum*)

3.1.1 Definition

The Roman concept of theft was far wider than the modern South African concept. Gaius (the well-known jurist from the classical period of Roman law)

defined theft as the **use of a thing contrary to the wish of the owner**. The Roman jurist Paulus probably provided the best definition of theft, namely: **Theft is the fraudulent interference with a thing, whether with the thing itself or the use or possession of it, for the purpose of gain**. It should be added that the thief should have had the intention of permanently depriving the victim of his thing.

In addition to the ordinary form of theft, namely the unlawful appropriation of a movable thing belonging to someone else, the Romans recognised another two forms of theft. Firstly, there was **unlawful appropriation of use**, where one person used a thing unlawfully. Examples of this are where a pledgee used a pledged object without the consent of the pledgor or where a lessee used a hired object for a purpose other than the one for which he had hired it. Secondly, there was **appropriation of possession**, where a person was unlawfully in possession of a thing. The best example of this is where the owner took back his thing while it was subject to a contract of hire and the lessee was therefore lawfully in possession of the hired object at that time.

We shall now discuss the elements of a delict as applicable to theft.

3.1.2 The elements of a delict as applicable to theft

- Action
The use of a thing contrary to the wish of the owner or the unlawful use or possession of a thing.
- Unlawfulness
The appropriation, use or occupation of the thing **without the consent** of the owner or person entitled to use the thing introduces the element of unlawfulness.
- Fault
The perpetrator must have had the *animus furandi*, that is the intention of stealing. Deliberate intent is a requirement. A person cannot negligently commit theft.
- Damage or loss
The person who is the owner of the thing that has been removed naturally suffers a loss.
- Causality
Logically, the damage suffered by the victim is the result of the action of theft of the perpetrator.

3.1.3 Remedies for the victim

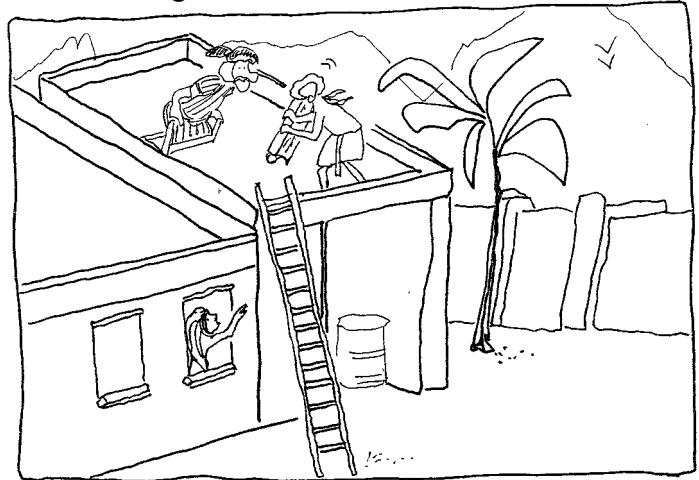
- Action for recovery of the thing
If the thing was still in the possession of the thief, the owner could institute the *rei vindicatio* against him. If the thing was no longer in the possession of the thief or had been destroyed, the victim could institute the *condictio furtiva* against the thief to claim damages.

- Penal action

Depending on whether or not the thief was caught red-handed, the *actio furti manifesti* or the *actio furti nec manifesti* could be instituted against him.

If the thief was caught in the act, the *actio furti manifesti* was raised against him whereby four times the value of the thing was claimed as a penalty. What qualified as “caught in the act”? If the thief was caught while he was engaged in stealing or caught on the premises where the theft was committed with the thing in his possession or caught on the way to his destination with the thing in his possession, this qualified as “caught in the act”.

Sketch of thief caught in the act



If the thief was not caught in the act, the *actio furti nec manifesti* for double the value of the stolen thing was instituted against him.

- Note that for theft there was no mixed action by means of which damages as well as a fine could be recovered. In the case of theft the victim would therefore institute both an action for recovery and a penal action.

Activity

- Brutus, Julius and Gaius decide to break into Marcus's house. While they are busy in Marcus's house, they hear the front door opening. Brutus and Julius jump through the window. Marcus catches Gaius in the house with the stolen money. Marcus runs out of the house and catches Julius just outside the gate with a painting. Brutus has made a swift getaway with a ring he had stolen. What remedies are available to Marcus and what can he claim by means of these remedies?
- Brutus and Julius are sitting next to each other in a bar. Brutus has had too much to drink and puts Julius's purse in his pocket thinking that it is his own purse. Would Julius succeed with a charge of theft against Brutus?

Feedback

- First, it is important to remember that there was no mixed action for theft. Marcus would therefore have to institute both an action for recovery and a penal action. He would have to raise the *rei vindicatio* against each of the perpetrators to recover his property. If the perpetrators had already disposed of the property, Marcus would have to raise the *condictio furtiva* against each of them and claim the value of the stolen property. Then

Marcus would raise the *actio furti manifesti* against Julius and Gaius and claim four times the value of the stolen thing from each of them, since they were caught red-handed. Marcus would raise the *actio furti nec manifesti* against Brutus for twice the value of the stolen property, since Brutus was not caught in the act.

- (b) No, Julius would not succeed. The required form of guilt in the case of theft is intent. For Brutus to have been guilty of theft he would have had to have the *animus furandi*. Even if Brutus had been negligent, that would not have been sufficient.

3.2 Robbery (*rapina*)

3.2.1 Definition

Robbery is theft with violence.

3.2.2 Development of this delict in Roman law

Initially robbery was simply regarded as theft. The problem is that robbers were not usually caught red-handed and therefore the *actio furti nec manifesti* was usually raised against them. Robbery is a more serious delict than theft and robbers should be more severely punished than thieves.

3.2.3 Elements of this delict as applied to robbery

- Act
In robbery the act is the unlawful appropriation of a thing belonging to another, accompanied by the use of violence.
- Unlawfulness
The appropriation of another person's thing without the consent of that person and the use of violence against the owner of the thing are prohibited by law.
- Fault
The required form of guilt for robbery is intent.
- Damage
The victim undoubtedly suffers damage because he has been deprived of his thing and has possibly been injured in the accompanying violence.
- Causality
The damage suffered by the victim is the consequence of the robber's deeds.

3.2.4 Remedies for the victim

During the Republican period the *praetor* instituted a separate action for robbery, namely the *actio vi bonorum raptorum*. This was a penal action by

means of which four times the value of the stolen thing was claimed as a fine. In addition, the victim instituted an action for recovery, the *rei vindicatio* or the *condictio furtiva* (see discussion under theft).

In Justinian's time the nature of this action changed to a mixed action. Therefore the only action instituted was this action for four times the value of the stolen thing. Three times the value served as a fine and once the value as compensation for damages.

3.3 Damage to property (*damnum iniuria datum*)

3.3.1 Development of this delict in Roman law

In the early days the specific cases of *damnum iniuria datum* together with the fine payable were listed individually in the Twelve Tables. One example was the burning down of another person's vineyards. However, if a person suffered damage that was not mentioned in the Twelve Tables, he had no remedy. It therefore became necessary to institute a general delict of wrongful damage to property on the basis of which a victim could claim for any damage that was wrongfully done to his property.

In 287 BC the *lex Aquilia* was promulgated with the intention of creating a uniform delict of wrongful damage to property. The wording of this statute included the following (you need to know this very well!):

Chapter 1

Anyone who wrongfully slew (that is, to kill by beating) the slave or *pecus* (four-footed grazing animal) belonging to another had to pay to the injured party the highest value of that slave or *pecus* during the past year.

Chapter 3

Any person who wrongfully burned, broke or fractured a thing belonging to another person (other than a thing mentioned in chapter 1), had to pay the injured party the highest value that the thing had during the past 30 days.

It is clear that the *lex Aquilia* had severe limitations. Only two kinds of things are mentioned in chapter 1, namely slaves and four-footed grazing animals. The only injurious action mentioned in chapter 1 is slaying. Further, chapter 1 makes no provision for wrongful wounding of the slaves or grazing animals. Chapter 3 is also very narrow in the sense that only three injurious acts are mentioned. It is apparent from this that the *lex Aquilia* did not initially succeed in its purpose of creating a uniform delict to cover wrongful damage to property.

3.3.2 Elements of a delict as applied to the early *lex Aquilia*

- Act

Originally only a direct, positive act qualified as an act for the purposes of

damnum iniuria datum. This means that the perpetrator had to have caused the damage by an act which he physically carried out himself.

- Unlawfulness
In terms of chapters 1 and 3 the damage or injury caused had to be unlawful.
- Fault
Initially fault played no part. It was irrelevant whether the perpetrator acted deliberately or negligently or possibly was not at fault at all.
- Damage
Only damage suffered as described in chapters 1 and 3 could be claimed. The “other thing” referred to in chapter 3 was confined to a corporeal thing.
- Causation
The damage had to have been the result of an act by the perpetrator.

3.3.3 Extension of the *lex Aquilia*

The *lex Aquilia* underwent a long development. It was developed by the *praetor*, the jurists and also by Justinian. This development mainly took the form of the interpretation of terms.

The meaning of the word “*pecus*” in chapter 1 was extended to include pigs, camels and elephants. “Slay” (to kill by beating) was interpreted as to cause death by any direct, positive act. In chapter 3 the meaning of the verb *rumpere* was extended to include *corrumpere*, which means damage in any manner. The wrongful wounding of slaves or four-footed grazing animals was also made punishable under chapter 3. Similarly, the killing of things other than those included in chapter 1 was made punishable under chapter 3.

3.3.4 Elements of a delict as applied to the developed *lex Aquilia*

- Act
An indirect act was recognised by the *praetor* as an act for the purposes of damage to property. Therefore if Brutus knocked Julius’s slave down with his carriage, Julius had a claim under the *lex Aquilia*. Justinian even regarded an omission as an act. Therefore if Brutus left Julius’s gate open and Julius’s horses got out, Brutus might be held liable for this omission under the *lex Aquilia*.
- Unlawfulness
Over time grounds of justification developed. If the wrongdoer was able to prove a ground of justification, this excluded unlawfulness. An example would be where Brutus killed Julius’s slave out of self-defence because the slave was attacking Brutus with a knife. Although killing another person’s slave was forbidden by law, Brutus did not act unlawfully here, since he was defending his life.

- Fault

A wrongdoer might have damaged a thing belonging to another person either deliberately or negligently. As you already know, the establishment of intent involves a subjective test. The degree of negligence that operated here was *culpa levis in abstracto*. If the perpetrator caused damage in circumstances where he had not acted like a *diligens paterfamilias*, he would be liable for damage to property.

- Damage

After the extension of the delict of *damnum iniuria datum* it also became possible to claim for damage to a free person's body.

“The highest value” in chapters 1 and 3 was interpreted as full damage. Full damage could be made up of two categories, namely consequential damage and loss of profit. **Consequential damage** or *damnum emergens* was the damage that followed naturally from the perpetrator's actions. **Loss of profit** or *lucrum cessans* was the loss of income that the victim suffered as a result of the damage or destruction of his thing.

Let's illustrate these forms of damage with reference to an example: Brutus is the owner of slave Julius, who is an extremely gifted painter. Each month Brutus sells Julius's paintings and earns 300 silver pieces in this way. Gaius does not like Brutus and kills his slave, Julius. The value of the slave is the consequential damage and the income that Brutus was making from Julius's paintings is the loss of profit.

- Causality

The content of this element remained the same, namely that the damage had to be the result of the perpetrator's action.

3.3.5 *The actio legis Aquiliae*

The *actio legis Aquiliae* was the action that could be instituted on the grounds of the delict of *damnum iniuria datum*, created by the *lex Aquilia*.

The *actio legis Aquiliae* was a mixed action. The fact that the “highest value” over the past year (chapter 1) or 30 days (chapter 3) could be claimed, which might be more than the actual damage, was seen as the penalty element.

Originally the *actio legis Aquiliae* was only available to the owner. In its extended form it could also be instituted by pledgees, borrowers, lessees and usufructuaries. As mentioned above, damages could be claimed with the *actio legis Aquiliae* in its extended form.

Activity

- In 250 BC, Brutus kicks Julius's slave to death. Would Julius have a claim against Brutus in terms of the *lex Aquilia*?
- Brutus takes a load of vegetables to the market. At the forum he visits a bar and drinks too much red wine. He's slightly tipsy when he climbs onto his horse-drawn cart and starts the trip home. He's not in very good control of the cart.

The cart rolls backwards down a slope and knocks Julius's slave down. The slave dies on the scene. Would Julius have a claim against Brutus under the original *lex Aquilia*? Would your answer have been different if Julius had claimed under the extended *lex Aquilia*?

Feedback

- (a) No. Julius would only have had a claim under chapter 1 of the *lex Aquilia* if the slave had been beaten to death. Originally there was strict adherence to the letter of the law.
- (b) Under the original *lex Aquilia* Julius would not have had a claim. In terms of chapter 1 "beat to death" was the only action that was punishable. Initially only a direct positive act was recognised as an act for the purposes of damage to property.

Under the extended *lex Aquilia* Julius would have had a claim. "Beat to death" in chapter 1 was interpreted as kill in any manner. An indirect act, like the act in question here, also qualified as an act for the purposes of the *lex Aquilia*.

3.4 Insulting behaviour (*iniuria*)

3.4.1 Development of the delict

In the early days the Twelve Tables listed specific categories of insulting behaviour along with the penalties provided in each case. These penalties were actually paid in order to "buy off" possible vengeance — thus in order to avoid the proverbial "eye-for-an-eye" situation! One example would be where one person broke another person's leg (*os fractum*) and the perpetrator had to pay the injured party 300 coins.

By the praetorian period, however, the penalties prescribed in the Twelve Tables had devalued so much that they were no longer a deterrent. The *praetor* then created the *actio iniuriarum*, by means of which the injured person could claim satisfaction from the perpetrator on the grounds of any insulting behaviour (see below).

3.4.2 What qualified as infringement of the person (*iniuria*)?

The Romans recognised three forms of *iniuria*, namely physical attacks on the body, attacks on a person's dignity and damaging a person's reputation.

- Physical attacks on the body (*corpus*)
Any unlawful physical attack on a free person's body constituted infringement of the person (*injuria*). Assault or the threat of physical violence falls into this category.
- Attack on a person's dignity (*dignitas*)
An example of this would be if one person plucked another's toga off in public.

- Damaging a person's reputation (*fama*)

The application of this category is self-evident. If an example is needed, think of the case where one person spreads false rumours about another, to the detriment of the latter's good name. The Romans considered it a typical case of an attack on a person's *fama* if a virgin was subjected to pregnancy tests.

3.4.3 Elements of the delict as applicable to *iniuria*

- Act

Any act that infringed the physical integrity, the dignity or the reputation of the victim qualified as an act for the purposes of *iniuria*. Attacks on a person's dignity or reputation could be committed directly (eg insulting a person in public) or indirectly (eg insulting a man's wife).

- Unlawfulness

Iniuria was unlawful.

- Fault

Intent was a requirement for the commission of *iniuria*. The perpetrator had to have had the *animus iniuriandi*.

- Damage

The damage suffered here was hurt feelings.

- Causality

The damage had to have been caused by the act.

3.4.4 The *actio iniuriarum*

It is not really possible to place a monetary value on hurt feelings and the injured party therefore claimed satisfaction with the *actio iniuriarum* and not damages. Satisfaction can be described as "comfort (*solace*) money" (*solatium*), which was intended to soothe the feelings of the injured party.

Please note: There was a certain amount of overlap in the ambit of the *lex Aquilia* and the *actio iniuriarum*. A possible example would be where Brutus assaults Julius and also tears his toga. Julius could institute the *actio legis Aquiliae* against Brutus for damage to the toga and the *actio iniuriarum* for *iniuria*.

Activity

Brutus and Julius are two business partners. They become involved in a dispute, however. Brutus shouts loudly in the middle of the forum that Julius has committed fraud. After that Julius's friends want nothing more to do with him. Does Julius have a remedy against Brutus?

Feedback

Brutus has committed *iniuria* against Julius by deliberately making remarks that damaged or besmirched his good name (*fama*). Julius could institute the *actio iniuriarum* against Brutus to claim satisfaction to soothe his hurt feelings.

4 Quasi-delict

As you already know, according to Justinian obligations could arise from four sources, namely, contracts, quasi-contracts, delicts and quasi-delicts. You have already studied the first three. All that remains is to mention a few points relating to quasi-delicts.

Throughout history scholars of Roman law have been surprised at Justinian's decision to single out four delicts and categorise them as quasi-delicts. There is no difference between the delicts and the quasi-delicts. They are both unlawful acts that cause damage. Justinian's reason for grouping four delicts together under the heading of quasi-delicts may possibly have had to do with systematics. He may have been of the opinion that, since there were quasi-contracts, there should be quasi-delicts as well! The true reason still evades us.

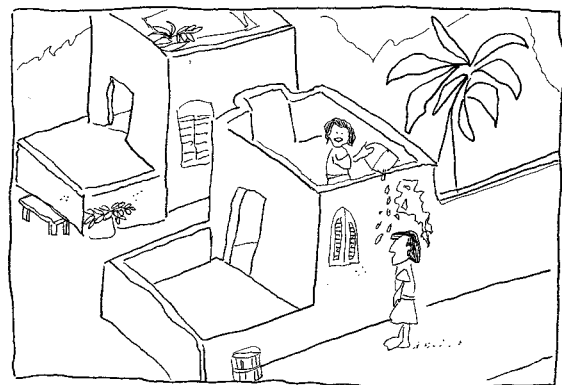
The four quasi-delicts were the following:

(1) *ludex qui litem suam fecit* Delict

or where a judge acted in a partial manner and therefore gave a verdict that unfairly prejudiced one party. (Remember, in Roman times there was no such thing as review.)

(2) *Res effusae vel deiectae*.

Where anything was poured or thrown from a building onto a public street and it hit anyone or caused damage, the injured party could recover his damages from the occupier of the building.



This is an example of *res effusae vel deiectae*

(3) *Res positae vel suspensae*. If a thing was placed on a window sill or suspended from a building (eg shop signs) and it fell on someone or caused damage, the injured party could recover his damage from the person who had placed the thing there.

(4) *Nautae, caupones et stabularii*. Shippers, innkeepers or stable-keepers were held liable if one of their employees caused someone else damage.

5 Noxal liability/damage caused by animals

For your purposes it is sufficient to note the fact that delictual liability without fault was possible. If an animal caused someone damage or loss, an action for damages could be raised against the owner.

Self-evaluation questions

After studying the work in this chapter, try to answer these questions on your own. If you experience any difficulties, go back to the relevant section(s) and try again. All the information is contained in this chapter.

- 1 Discuss the delictual elements that had to be present before an action based on theft, unlawful damage to property, robbery and *iniuria* could be raised. (5 marks per delict)
 - 2 What is the distinction between *furtum* and *rapina*? (2)
 - 3 Was it possible to steal the property of another through negligence? Similarly, was it possible to commit the delict *iniuria* in a negligent manner? (2)
 - 4 The original scope of the *delict damnum iniuria datum* was very limited. Discuss this statement as well as the development and extension of this delict.¹ (10)
 - 5 Name and discuss the three categories of *iniuria* recognised by the Romans. (6)
-

Please study Diagram 19 carefully: It will provide you with a complete summary of the Roman delicts.

¹ Tip: Look at the content of the elements of the delict and the development that took place with regard to the elements of this delict.

DIAGRAM 19

Overview of Roman delicts

	Theft/<i>furtum</i>	Robbery/<i>rapina</i>	Unlawful damage to property/ <i>damnum iniuria datum</i>		Insult to the personality/ <i>iniuria</i>
1 Definition	Intentional and unlawful handling of a thing belonging to another person or the use or possession of such a thing.	Theft accompanied by violence	The culpable, unlawful damage or destruction of a thing belonging to another person		Action attacking another person's physical integrity, dignity or reputation
2 Elements of the delict					
(a) Act	— Appropriation of another person's thing — Unlawful use or unlawful possession of a thing	Unlawful appropriation of the thing belonging to another, accompanied by the use of violence	Original <i>Lex Aquilia</i> Only direct, positive acts qualified	Extended <i>Lex Aquilia</i> — Indirect action or — even an omission	Any action attacking another person's — body — dignity — good name
(b) Unlawfulness	<i>Without</i> the consent of the owner/possessor	The taking of the thing and the violence are prohibited by law	The damaging of another person's thing is unlawful	Grounds of justification developed	Assault or injuring another person's feelings — unlawful
(c) Fault	Intent is required <i>animus furandi</i>	Intent is a requirement	Fault not a requirement	Intent or negligence required	Intent is required — <i>animus iniuriandi</i>
(d) Damage	The person who is deprived of the thing suffers damage	Victim is deprived of the thing, possible injuries as a result of the violence	"Highest value" as stipulated in chapters 1 and 3 could be claimed	Full damages could be claimed — consequential damage and — loss of profit	— Injured feelings of victim — Satisfaction claimed
(e) Causality	Damage = consequence of the act of theft	Damage — the consequence of the robbery	The damage is the result of an act of damaging property		Injured feelings as a result of the perpetrator's actions
3 Remedy	<i>Actio furti manifesti/nec manifesti</i>	<i>Actio vi bonorum raptorum</i>	<i>Actio legis Aquiliae</i>		<i>Actio iniuriarum</i>

GLOSSARIUM

LYS VAN LATYNSE TERME /LIST OF LATIN TERMS

- a fortiori* (des te meer; des te sterker // with stronger reason; more conclusively)
- a contrario* (by wyse van teenstelling; daarteenoor // as a contrast; on the other hand)
- a quo* (waarvandaan // from which)
- ab initio* (van die begin of // from the beginning)
- accessio* (natrekking; bysaak; aanwas // accession; increase; addition; accessory (thing))
- actio* (aksie; eis; hofsaak; regsgeding; (regs)vordering // action; claim; lawsuit)
- actio doli* (aksie weens bedrog // action upon (resulting from) fraud)
- actio in rem* (saaklike aksie // real action)
- actio in personam* (persoonlike aksie // personal action)
- actio iniuriarum* (aksie weens belediging // action resulting from insult)
- actio negotiorum gestorum* (aksie uit hoofde van saakwaarneming // action resulting from the (unauthorised) management of the affairs of another)
- actio pro socio* (aksie uit vennootskap // action upon partnership)
- actio Publiciana* (aksie beskikbaar aan nie-eienaars wat besit op 'n wettige manier verkry het om besit van die sack te behou // action available to a non-owner who obtained possession legally, to keep possession of the thing)
- actio quanti minoris* (aksie ter vermindering van die koopprys // action for reduction of the purchase price)
- actio redhibitoria* (eis vir die teruggawe van die koopprys in ruil vir die goedere // claim for the return of the purchase price in return for the goods)
- actio utilis* (billikheidsaksie; aangepaste, analoë of gewysigde aksie // equitable action; a modified, adapted, adjusted or analogous action)
- actio ad exhibendum* (aksie vir die vertoning van sake (eiendom) // action for the production of property)
- aediles curules* (amptenare wat moes omsien na die openbare orde op strate en markpleine // officials who kept public order in the streets and the markets)
- animo domini* (met die bedoeling om eienaar te wees // with the intention of being owner)
- animus iniuriandi* (bedoeling om te benadeel; wil om te krenk // intention to wronging, harming, injuring, offending someone)
- beneficium competentiae* (voorreg van vermoënsperke (vir behoud van leeftog) // benefit of competency (to ensure subsistence))
- beneficium cedendarum actionum* (voorreg van sessie van aksies // benefit of cession of actions)
- beneficium excussionis* (voorreg van (eerste) uitwinning // benefit of prior excussion)
- bona fide possessor* (besitter te goeder trou // possessor in good faith)
- bonus // diligens paterfamilias* (oppassende, sorgsame man; sorgvuldige huisvader of gesinshoof; redelike man // reasonable man, prudent, diligent, careful, circumspect head of a family)
- cives* (Romeinse burgers // Roman citizens)

- civiliter modo* (op 'n beskaafde/redelike wyse // in a civil/reasonable way)
- cognitio extraordinaria* (regsprosedure tydens die Prinsipaat deur keiserlike amptenare behartig // legal procedure during the Principate controlled by the emperor's officials)
- compos mentis* (by sy volle verstand // in one's right mind)
- condictio indebiti* (terugvordering van onverskuldigde betaling // suit for return of a sum not owing but paid)
- consensus ad idem* (wilsooreenstemming; konsensus // agreement to the same thing; unanimity)
- constitutum possessorium* (lewing deur die vorming van die bedoeling om voortaan namens die oordragontvanger te besit // transfer of possession where A with the intention of transferring his ownership in a thing to B declares that he will henceforth hold the thing for B)
- contra bonos mores* (teen(strydig) met die goeie sedes // immoral; against good morals; in breach of the moral law)
- contra naturam sui generis* (teen (of strydig) met sy eie aard // against the nature of its kind)
- contractus litteris* (kontrak wat voltooi word deur die opskrifstelling daarvan // contract which is completed by the writing down thereof)
- contrectatio* (aanraking, hantering; onttrekkingshandeling (by diefstal); toe-eiening; verwydering // handling; illegal appropriation; removal)
- corpus* ('n persoon se liggaam // a person's body)
- curator ad litem* (kurator vir hofverrigtinge // curator for the conduct of a suit)
- curator bonis* (kurator van goedere // curator of property)
- curia adversari vult* (afgekort as *cur adv vult*) (uitspraak word voorbehou; die hof wil beraadslaag // the court wishes to consider its verdict, reverses judgment)
- damnum emergens* (gelede skade (skade gely) // loss arising; damage actually suffered)
- damnum iniuria datum* (skade uit onregmatige daad; onregmatige vermoënsbenadeling // unlawful damage; damage (resulting) from delict; damage wrongfully caused)
- de iure* (regtens; na die reg geoordeel // of right, by right and just title; in law)
- de lege ferenda* (aangaande die wenslike reg // concerning the law as (ideally) it should be)
- de manu in manum* (van die een hand na die ander // from the one hand to the other)
- de minimis non curat lex* (die reg bemoei hom nie met, steur hom nie aan beuselagtighede nie, slaan geen ag op nietighede nie // the law does not regard (concern itself with) trifles)
- de facto* (feitelik; na die feitelike toestand gereken // in fact, in deed, as a matter of fact (not of law))
- de novo* (opnuut; van nuuts af // afresh; anew)
- detentio* (houerskap, detensie // detention of a thing)
- dictum et promissum* (uitdruklike waarborg // express warranty)
- dies venit* (dag van opeisbaarheid van die skuld // day on which the debt becomes claimable (falls due))
- dolus* (bedrog // fraud)
- donatio* (skenking; donasie // gift)
- edictum* (edik // edict)

- error in corpore* (dwaling tov die saak (se identiteit) // error as regards (the identity of) the thing)
- error in substantia* (dwaling tav 'n wesentlike (essensiële) eienskap van die koopsaak; grondfout // error concerning a vital (material; essential) quality of the thing sold; fundamental error)
- ex abundantia cautela* (vir die wis en die onwis; uit oormaat van voorsorg; van oorversigtigheid // out of (from) abundant caution; to make assurance double sure)
- ex mero motu* (spontaan; uit eie beweging // spontaneously; of (his) own free will; voluntarily; of (his) own accord)
- ex parte* (as enigste belanghebbende; eensydig // as the sole interested party; by (or from) one party only)
- ex post facto* (uit wat daarna gebeur het; van agterna beskou (besien) // in the light of subsequent events; acting (judging) retrospectively; arising from a subsequent event; by hindsight)
- ex lege* (van regsweë; deur regswerking // by force (operation) of law; as a matter of law; according to law)
- ex facie* (blykens, soos dit voorkom (uit 'n dokument) // evidently (as would appear from the document)
- exceptio non adimpleti contractus* (verweer van nie nagekome (nie vervulde) kontrak; verweer dat die eiser ook in gebreke is (en dus syner syds geen nakoming kan vorder nie) // exception of unfulfilled contract; exception on the ground that the plaintiff, too, is in default (and therefore cannot demand performance)
- exceptio rei venditae ac traditae* (verweer dat die saak verkoop en gelewer is // defence that the thing had been sold and delivered)
- facta probanda* (feite wat bewys moet word om die skuldoorsaak te staaf // facts to be proved to establish the cause of action)
- facta probantia* (feite wat die *facta probanda* bewys // facts proving the *facta probanda*)
- functus officio* (nie meer diensdoende nie; nie meer in funksie nie // no longer in office (officiating); having discharged his office)
- genus* (soort // genus)
- imperitia culpa adnumeratur* (onbedrewenheid word as nalatigheid gereken (dis die plig van die ambagsman om sy vak met bedrewenheid te beoefen) // want of skill is reckoned as a fault (an artisan is required to ply his trade with skill))
- in casu* (in hierdie geval; in die onderhawige geval // in the present case; in the case in question)
- in iure cessio* (geregtelike oordrag; transport // transfer (of property))
- in limine* (vooraf; in die aanvangstadium (van die verhoor) // initially; at the very outset (of the hearing))
- in loco parentis* (in die plek van 'n ouer // in the place (in lieu, instead) of a parent)
- in re* (in die saak van // in the matter of)
- in solidum* (vir die geheel; vir die volle skuld; solidêre (= gesamentlike en afsonderlike) aanspreeklikheid // joint and several (liability))
- in toto* (in sy geheel // wholly, completely)
- in transitu* (onderweg // in transit, on the way, en route)
- in utero* ((voor)geboorte) in die moederlyf // unborn child; in the womb)

- infra* (hieronder // below)
- iniuria* (belediging; krenking; persoonlikheidskending (-inbreuk of -krenking)
// injury to personal dignity)
- inter alia* (onder meer // among other things)
- interim* (tussentyds // between times)
- intra vires* (binne magtiging; binne die bevoegdheid (van) // within the powers
(or competence) of)
- ipsissima verba* (die presiese woorde // the identical (the very) words)
- ipso facto* (deur die blote felt; vanself(sprekend) // by the mere fact; by the very
fact)
- ipso iure* (van regsweë; deur regswerking; vanself; uit hoofde van
ontwyfelbare reg // by the law as such; by (the mere) operation of law;
by unquestioned right)
- ius civile* ((1) privaatreë, burgerlike reg (2) die Romeinse reg // (1) civil law,
private law (2) Roman law)
- ius gentium* (volkereë (Romeinsregtelik) // law of nations (concept of Roman
law))
- ius in rem* (saaklike reg // real right)
- iusta causa* (redelike oorsaak, geoorloofde oorsaak // just cause, lawful
ground)
- legis actio* (statutêre prosedure; gedingvoering kragtens 'n wet (= Twaalf
Tafels) // statutory procedure; litigation in accordance with the provisions
of a statute (= Twelve Tables)
- lex commissoria* (ontbindende voorwaarde // resolutive condition)
- lis pendens* (elders hangende saak // suit pending elsewhere)
- litis contestatio* (ingedingtreëding; formulering van die geding; sluiting van
pleitstukke // joining issues (in a suit); close of pleadings)
- locatio conductio* (huur en verhuur; huurkontrak // contract of letting and
hiring)
- locus standi in iudicio* (bevoegdheid as gedingvoerder (met voldoende belang
in die geding om as party erken te word) // a right of appearance (in court
as a party); standing in court)
- lucrum cessans* (gederfde wins; verbeurde wins // ceasing gain; gain lost
(forfeited, forgone)
- mala fide possessor* (besitter te kwader trou // possessor in bad faith)
- mancipatio* (formele regshandeling waardeur eiendomsreg verkry is // formal
juristic act which served to acquire ownership)
- mens rea* (laakbare gesindheid; verwytbare geestesgesteldheid; misdadige
opset; skuld (in wyere sin) // guilty mind; wrongful intent; criminal
purpose or intention)
- mutuum* (verbruikleen; teen van vervangbare sake // loan for consumption;
loan of fungibles)
- negotiorum gestio* (saakwaarneming; vriendelike, welwillende bemoeëing //
gratuitous intervention; spontaneous agency (without a mandate))
- nemo plus iuris ad alium transferre potest quam ipse habet* (niemand kan meer
regte aan 'n ander oordra as wat by self het nie // no one can transfer more
rights to another than he himself has)
- non iure* (onregmatig // element of wrongfulness)
- obiter dictum* (terloopse opmerking // remark in passing)
- obligatio* (verbintenis // obligation)

- pactum* (ooreenkoms; beding // agreement; pact; convention; compact)
- pactum displicentiae* (beding van terugtrede // cancellation clause (or agreement))
- paterfamilias* (huisvader; gesinshoof // father (head) of the family)
- per se* (op sigself; sonder meer // by himself (itself); on its own)
- peregrinus* (vreemdeling; gedingvoerder van buite die regsgebied // foreigner; litigant not residing within the jurisdiction of the court)
- pignus* ((1) pand; pandobjek (2) pandkontrak // (1) pledge (delivered to creditor) (2) contract of pledge)
- poena* ((1) straf (2) boete; boetebeding; dwangsom // (1) punishment (2) penalty or penalty clause)
- postea* (daarna // thereafter)
- praedium dominans* (heersende erf (ten gunste waarvan die serwituut gevestig is) // dominant tenement or land (in whose favour a servitude has been established))
- praedium serviens* (dienende erf (met serwituut betas) // servient tenement or estate (charged with the servitude))
- prima facie* (op die oog af; op die eerste gesig; volgens die uiterlike // at first sight; on the fact of it, at first blush)
- quaere* (onseker // query; doubtful; problematical)
- quasi* (asof // as if; almost)
- ratio decidendi a* (grond vir 'n beslissing; oorweging wat ten grondslag aan 'n beslissing lê; deurslaggewende oorweging by 'n beslissing // ground for decision; decisive (underlying) ground for the court's ruling)
- rei vindicatio* (saakopvolging; opeising van eiendom (of: van die eie goed) in regte // vindicatory action (recovery of property by the owner from any person in possession of it))
- res ipsa loquitur* (dit spreek vanself; dis vanselfsprekend // the matter speaks for itself; it stands to reason)
- res iudicata* (die saak is afgehandel; eindvonnis // a matter adjudged; matter settled by judgment)
- res in patrimonio // extra patrimonium // extra commercium* (sack binne/buite die handel // inside/outside commerce)
- res corporalis // incorporalis* (liggaamlike/onliggaamlike saak // corporeal/incorporeal thing)
- res habiles* (saak vir eiendom vatbaar // thing susceptible of ownership; capable of being held in ownership)
- res nullius* (niemandsgoed; saak wat aan niemand behoort nie // ownerless thing; property of nobody)
- restitutio in integrum* (herstel in die vorige toestand // act of rescission; return to the previous legal position)
- salva rerum substantia* (met behoud van die wese van die sake // without impairment of the essential qualities of the things)
- servitus oneris ferendi* (serwituut van 'n muurstut, van muurbeswaring // servitude for the support of a burden (ie of a house))
- servitus tigni immitendi* (serwituut van inbalking // servitude of letting in a beam; right of inserting beams in a neighbour's walls)
- sine* (sonder // without)
- societas* (vennootskap // partnership)
- specificatio* (saakvorming; gedaantegewing; skepping van 'n saak ('n vorm

- van eiendomsverkryging) // specification; creation of a thing (ie fashioning materials into a new product, resulting in the acquisition of ownership by the “fashioner”))
- spes* (verwagting; hoop // hope; expectation)
- stante matrimonio* (tydens die (voortbestaan van die) huwelik; staande die huwelik // while the marriage continues)
- stare decisis* (gewysdes (gegewe beslissings) navolg // abide by, adhere to, decided cases)
- stipulatio* (stipulasie; mondelinge kontrak (met vraag en antwoord; Romeinse reg) // verbal contract (by means of question and answer; in Roman law))
- stuprum* (ontug (geslagsverkeer met ’n ongetroude vrou) // unchastity; fornication; illicit intercourse (with an unmarried woman))
- sub iudice* (nog hangende // still undecided (under consideration))
- sui generis* (eiesoortig; eie in sy soort // the only one of its kind; peculiar)
- sui iuris* (handelingsbevoeg // having legal or contractual capacity)
- superficies solo cedit* (die opstal word deel van die grond (en dus die eiendom van die grondeenaar) // buildings (erected in terms of such a lease) form part of the land (and hence become the property of the landowner)
- supra* (hierbo // above)
- uberrima fides* (die hoogste goeie trou // the most abundant good faith; absolute and perfect candour)
- ultra vires* (buite (sy) bevoegdheid; buitemagtig // beyond the scope of (his) powers)
- usucapio* (verkryging deur verjaring (deur langdurige besit); verkrygende verjaring (’n wyse van eiendomsverkryging) // usucapion; prescription (a mode of acquisition of property by mere possession))
- vice versa* (omgekeerd // the other way round)
- vinculum iuris* (regsband (verbintenis) // bond of law (obligation))
- vis* ((1) dwang, geweld (2) hewigheid, krag, mag (3) gelding, werking (4) inhoud // (1) compulsion, duress, force (2) power, violence, strength (3) legal effect, force, validity (4) purport; tenor)
- vis major* (oormag // greater, superior, irresistible force; act of God)
- vitium* (gebrek; tekortkoming; mankement // defect; flaw; imperfection)
- viva voce* (mondeling // oral)