

PROPERTY CASES

STUDY UNIT 2 (REAL RIGHTS distinguished from LIMITED REAL RIGHTS distinguished from CREDITORS RIGHTS)

EX PARTE GELDENHUYS (SG pg 37-38)

→ Study guide pg 37-38
where you will find the case in the study guide

Facts

In a mutual will a farm is bequeathed subject to two conditions, viz. :

- (a) When the eldest child of the testators comes of age, the farm must be divided by means of drawing of lots.
- (b) The child who obtains the portion comprising the homestead must pay a specified amount of money to the other children.

The Registrar of Deeds refuses to register the abovementioned conditions on the basis that they do not constitute real rights in land.

Legal Question

What criteria (tests) must be applied to determine whether a condition constitutes a mere creditor's right (personal right) or a real right?

Ratio decidendi

The test was formulated as follows [At 164]: "One has to look not so much to the right, but to the correlative obligation. **If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable;** if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right, or right *in personam*, and it cannot as a rule be registered".

Finding

Applied to the facts of the case, **the first condition** curtails the normal entitlement of co-owners to partition the property when and how they like. This places a burden on the ownership and therefore constitutes a real right that can be registered. **The second condition** is more difficult because it contains an obligation to pay a sum of money. The court held that an obligation to pay money does not normally impose a real right unless it takes the form of a duly constituted hypothec. This condition constitutes a creditor's right (personal right), which, in principle cannot be registered. However, because of the close connection between both conditions, the court decided that the two should be registered as a whole even though the second condition creates a creditor's right (personal right).

STUDY UNIT 3 (DEFINITION AND LIMITATION OF OWNERSHIP)

1 GIEN v GIEN

X and Y are seriously affected by the baboons that destroy their meliies. X installs an apparatus to chase away the baboons, on the boundary with his neighbour. The apparatus makes loud noises at regular intervals during the day and the night. The neighbour writes to X and Y to complain about the noise during the night, but X ignores the letter and refuses to speak to his neighbour on the telephone. X and his neighbour are not on speaking terms because his neighbour seriously insulted him a few years ago.

This case is important because of :

- (a) **The definition of ownership (inherent nature)** (pg 43 SG), the court **defined ownership** with reference to its inherent **nature** as the **most comprehensive real right** a person can have to **a thing**. The point of departure is that a person can do on his/her thing as that persons **pleases**. This apparent freedom is **restricted**, however, by the **law** and the **rights of others**. Consequently, no owner ever has the unlimited right to exercise his/her entitlements in absolute freedom in his/her own discretion.
- (b) **Limitation on ownership through neighbour law (the law of nuisance)** (SG pg 49) – the respondent was prohibited by means of an interdict from using an apparatus which, by means of a cracking noise, was intended to scare away monkeys and baboons from his garden, because of the nuisance which the cracking sound caused for the neighbour.
- (c) **Remedies for nuisance** (SGpg 50)
 - Nuisance in the narrow sense (only infringement of personality) – **interdict**
 - Nuisance in the wide sense (actual damage) – **damages** (delict).

2 MALHERBE v CERES MUNICIPALITY (pg 50-51)

Facts

The appellant approached the court for an interdict ordering the respondent to prevent acorns and leaves of oak trees growing alongside the street from falling onto his property. The appellant averred that the oak trees constituted a nuisance because the falling oak leaves blocked the gutters of his building, causing rainwater to damage the walls of the building.

Legal Question

Whether or not the falling leaves, acorns or protruding branches of trees growing alongside the street constituted a nuisance?

Ratio decidendi

General : The law expects a degree of tolerance between neighbours in exercising their entitlements of ownership.

Regarding leaves from trees in the street (pg 51) : The planting of oak trees alongside the streets of towns and cities is considered compatible with the nature and normal use of streets in the Western Province. If their leaves are blown by the wind onto neighbouring premises, then the owners of those premises must endure them as a natural result of the normal use of the street.

Regarding leaves from overhanging branches : The appellant cannot complain about falling leaves and acorns from hanging branches if he allows such branches to protrude onto his property. However, if he chooses to allow the branches to protrude, he cannot expect his neighbour to clear the leaves from his property. If the appellant wishes to prevent leaves and acorns from falling onto his property, he must request the respondent to remove them. If the respondent refuses to remove the branches, the appellant may either remove them himself or compel the owner to do so by means of an interdict.

Finding

Appellant is not entitled to the interdict. The falling leaves did not cause any obvious damage to the appellant's building. The damage complained about could have been avoided by annually spending a small amount of money on the cleaning of the gutters. It would be reasonable to expect from the appellant to exercise a degree of tolerance in this regard.

With regard to the overhanging branches, the appellant did not prove that he had requested the respondent to remove the branches, nor that the respondent refused to remove the branches or claimed that he had a right to let the branches protrude onto the appellant's land.

Remedies

Either an interdict or if damage can be proved, a delictual claim for damages.

STUDY UNIT 4 (ORIGINAL ACQUISITION OF OWNERSHIP)

1. OCCUPATIO / APPROPRIATION

R v MAFAHLA (SG pg 61)

S and his friends go for a hunting weekend. S mortally wounds a kudu. The kudu manages to escape into thick bushes. S gives up the search when it becomes dark. On his way home from a party, Z, one of the farm labourers, stumbles upon the wounded kudu. He fetches his friends and they slaughter the animal and take the meat to their respective homes. Z is accused of the theft of the kudu.

The importance of this case :

- (a) **It concerns occupatio (appropriation of wild game)** : Appropriation is the unilateral taking of physical control of a thing which does not belong to anyone (*res nullius*, for example, a *res derelicta*), but which is within the sphere of law (*res in commercio*) with the intention of becoming its owner.

- (b) **The elements of appropriation are :**

- **Control** . Physical control is essential for the acquisition of ownership by means of appropriation (*occupatio*). The acquirer must obtain physical control with the necessary intention (that is, the intention of becoming the owner).

One should note that the control need not be lawful. If, for example, a person has no right to hunt, either because he has no licence to shoot certain animals or where certain wild animals are protected by legislation, he commits a crime if he shoots such animals, but he nevertheless becomes the owner of the dead animals by means of appropriation (*S v Frost*; *S v Noah* 1974 (3) SA 466 (C)).

Where wild animals are wounded and actual physical control is not taken, appropriation (*occupatio*) does not take place. Therefore, if one person wounds a wild animal, but another person catches it or discovers the carcass, the latter obtains ownership.

- **Thing which does not belong to anyone** : *Res nullius* are things that belong to no one. All creatures that are wild by nature (animals, birds, fish and insects) either in their natural state (before someone has taken control of them) or when they have reverted to their former wild state (after having been controlled by a person) are regarded as *res nullius*. An exception occurs in the case of tamed animals which are wild by nature, but are owned. These remain the property of the owner until they lose the habit of returning, when, once again, they become *res nullius*, and capable of being acquired by appropriation

- **Note** : Domestic animals or wild animals regulated by the Game Theft Act 105 of 19991 are not *res nullius* and cannot be acquired in ownership by appropriation.

RECK v MILLS (SG pg 62)

Facts

Mills was attempting to remove a large condenser from the *Antipolis*, a shipwreck, abandoned by its owners. He tied a rope with a buoy to a large condenser in the engine room weighing about 63 tones, together with its attached pipes and contents. Reck and Hartmann started to cut sections of the condenser loose to remove and sell them. Mills wished to stop them with a spoliation remedy and had to prove that he was in undisturbed physical control of the thing.

Essence

The acquiring of ownership through appropriation of a *res derelictae* by control and the intention of becoming owner (see pg 61 – 62).

Legal Question

To determine whether the first respondent was entitled to the spoliation remedy (mandament van spolie) or alternatively to an interdict. The trial court granted the spoliation order. Reck appealed against this decision.

Ratio decidendi

- (i) According to common law, ownership of a thing is terminated by means of *derelictio* when the owner abandons his property with the intention of no longer being the owner.
- (ii) The spoliation remedy (mandament van spolie) is based on the principle that the person who has been unlawfully deprived of his/her control must be reinstated in his/her original state of control before the merits of the case can be investigated. To succeed with this remedy Mills (*spoliatus*) must prove that he had free and undisturbed control and that, against his wish, he was unlawfully deprived of such control by the spoliator. There must be clear proof of control in a physical sense.
- (iii) To succeed with an interdict Mills had to show (a) that he had a clear right to the condenser, (b) that he had suffered damage or that he was threatened by irretrievable damage and (c) that he had no other effective (appropriate) remedy at his disposal.

Application of finding on relevant facts

It was common cause between the parties that the shipwreck was a *res derelicta* and therefore a *res nullius*. The case had to be decided on the requirements for spoliation. Even if the court accepted the evidence that Mills had tied a buoy with a rope to the condenser he failed to prove that he had exercised the required control over the condenser to justify the spoliation order.

The court also refused to grant a final interdict because Mills failed to show that he had a clear right to the condenser or that he had been prejudiced by the activities of

Reck and Hartmann or that their conduct had threatened to cause him harm or that there was no other appropriate remedy available to him.

The appeal against the decision of the trial court was upheld.

2. ACCESSION OF MOVABLES TO IMMOVABLES (Building)

MAC DONALD LTD v RADIN NO etc (SG pg 66 and 67)

Facts

S, the lessee of a section of Waterford, decides to build a dairy and stables on this farm which belongs to X and Y. S buys all the equipment to build the dairy from the cooperative, K. The cooperative reserves ownership of the equipment until the final instalment has been paid. A team of experts working for K installs the dairy under the supervision of S. They build the stables from bricks, on a concrete floor. They also install all the pipes and tanks for the proper functioning of the dairy. Two years after S has started the dairy and before the cooperative has been paid in full, S becomes insolvent and the trustee of his insolvent estate argues that all the structures and equipment are moveable assets which form part of the insolvent estate. X and Y claim that as co-owners of the land, they became owners of the structures by means of accession, and the cooperative claims that it remained the owner.

Judgement

The three standards applied by the courts to determine whether a movable thing is attached to an immovable thing by means of accession in such a fashion that it subsequently becomes part of the immovable thing, with the result that the right of ownership thereof thereafter vests in the owner of the immovable thing, will now briefly be discussed under the following headings :

- (i) nature and purpose of the attached thing
- (ii) manner and degree of attachment
- (iii) intention of the person annexing it (or the intention with which the attachment was effected or the intention of the owner of the movable).

If the first two criteria are not decisive, the third one is the determining factor. In the *MacDonald* case, the third criterion was described as the intention of the "person annexing it" and also as "the intention with which it was annexed".

The judge, however, subsequently stated that one can only look at the intention of the owner of the movable. In this particular case and in the question the owner of the movables was also the annexor, although he acted under the supervision of the non-owner (holder of the land in terms of an instalment sale).

STANDARD VACUUM REFINING CO v DURBAN CITY COUNCIL (SG pg 67)

Facts

Standard-Vacuum Refining Company operated an oil refinery on its land situated within the municipal area of Durban City Council. The latter, when assessing the appellant's land for rating purposes, took into account the value of certain steel tanks which were part of the refiner. These tanks were used for storing unfinished and finished products. The valuers regarded the steel tanks as buildings on the land and therefore part of the immovable property. Standard-Vacuum Refining Company objected to the valuation and argued that the tanks were not buildings and therefore not part of the land. They regarded the tanks as movable things.

Legal Question

Whether the tanks on the Standard-Vacuum's land were attached to the land in such a way as to render them immovable.

Ratio decidendi

The judge held as follows : "Indeed as I understand the above quoted authorities, it would appear that in each case the object of the enquiry is to enquire whether the movable has been attached to the land or other immovable with the intention that it should remain permanently attached thereto. **In order to ascertain whether such is the intention regard must be had to the following physical features, viz. the nature of the movable, the method and degree of its attachment to the land or other immovable, and whether it can be readily removed without injury to itself or to the land or immovable to which it is attached.** If the nature of the movable is such that it is readily capable of acceding to the land or other immovable and is so securely attached thereto that separation must, of necessity, involve substantial injury, either to the movable or to the land or immovable to which it is attached, then it must be inferred that the movable was attached with the intention of permanency, and for that reason it must be held to have become and be immovable. **If, however, an examination of the physical features produces an equivocal result in the sense that from an examination of such features, no inference can be drawn that the attachment was made with an intention of permanency or otherwise, the intention of the annexor may be decisive.**"

The intention of the annexor has to be judged at the time of the attachment. It is not necessary in order to prove an intention to attach permanently, to show that the person attaching intended the attachment to continue into all eternity.

(Distinguish between a subjective and objective intention).

Application of finding to relevant facts

By examining their physical features, the court found that the tanks never enjoyed an independent existence apart from the land. There was nothing in the nature of the tanks that rendered them unadaptable to acceding to the land which they did by sheer weight and method of construction. **Even in the absence of evidence as to the actual intention of the annexor, the above features would be sufficient to justify an inference that the intention was to attach the tanks permanently (objective intention).** This inference, drawn from the physical features, was, however, also confirmed by the subjective intention of the company as expressed by its representative (subjective intention).

THEATRE INVESTMENTS (PTY) LIMITED v BUTCHER BROTHERS (SG pg 68)

Facts

The original lessors owned certain immovable property situate at the corner of Smith Street and Albany Grove in Durban. A building (comprising a theatre, restaurant and other accommodation), which is known as "The Playhouse", stands upon this property. In terms of a notarial lease agreement entered into on 6 December 1926, this property was leased to African Theatres Ltd. The original lessors formed the company Butcher Brothers (Pty) Ltd and transferred the immovable property to it.

The original lessee duly erected the theatre and other buildings upon the immovable property, and such buildings were named "The Playhouse". The buildings were solidly constructed and were elaborately finished and ornamented in a manner designed to give the appearance of an early English theatre.

The buildings were large, comprising a theatre with 1 762 seats on two levels, a foyer, gallery, restaurant and other accommodation. The theatre building was equipped with all that was necessary for its use as a theatre or cinema and used for the said purposes ever since. Among the equipment installed in the building when it was erected were theatre seats, fitted carpets, lighting and cinema projection equipment, and air-conditioning equipment with the necessary ancillary fittings and ducting. The lease was terminated and the lessee claimed that the theatre seats, fitted carpets, lighting and cinema projection equipment, as well as the air-conditioning equipment with the necessary ancillary fittings and ducting remained movable and that, as the owner, it was entitled to remove them from the theatre.

Legal Question

To determine whether Butcher Brothers acquired ownership of the equipment through attachment to the land.

Ratio decidendi

The court stated that a generally accepted test to be applied to determine whether a movable, which is capable of acceding to an immovable and which has been annexed thereto, becomes part of that immovable is **to enquire whether the annexor of such a movable did so with the intention that it should remain permanently annexed thereto. Evidence as to the annexor's intention can be sought from numerous sources, inter alia, the annexor's own evidence as to his intention (subjective intention), the nature of the movable and of the immovable, the manner of annexation and the cause for and circumstances giving rise to such annexation (objective intention).** The annexor's intention is not to be treated as conclusive evidence thereof but, should such evidence have been given, it must be weighed together with the inferences derivable from the other sources of evidence above-mentioned in order to determine what, in the view of the court, was in fact the annexor's intention. In cases where no evidence is forthcoming from the annexor, a court will be constrained to determine the issue upon such inferences as may legitimately be drawn from the sources mentioned above.

Application of finding to relevant facts

In applying the above criteria, the court came to the conclusion that, having regard to the intended duration of the original contract as well as to the period of its possible extension, to the fact that the building was erected for the purpose of conducting a

theatre in it and that the seats, the emergency lighting and dimmer-board constitute equipment essential to the effectuation of such a purpose, then it is difficult to avoid the conclusion that such items of equipment when they were attached to the building were intended to remain there indefinitely.

KONSTANZ PROPERTIES v Wm SPILHAUS en KIE (SC pg 68)

Facts

Wm Spilhaus sold a number of loose components of an irrigation system to Pumps for Africa with the explicit reservation of ownership, until the purchase price was paid in full. Before the purchase price was paid, Pumps for Africa installed the irrigation system on the farm of Konstanz Properties. The latter paid Pumps for Africa, but, in turn, it failed to pay Wm Spilhaus. Konstanz Properties claimed the pumps and the connections in the pumphouse. They rely on their ownership of the pumps and connections.

Judgement

- (a) The court applied the three requirements as set out in the *McDonald* case.
- (b) The court held that the subjective intention of the owner of the movables was decisive.

VAN WEZEL v VAN WEZEL'S TRUSTEE (SG pg 66, 69)

Facts

S leases a portion of X and Y's farm for 30 years with an option to renew the lease for a further 30 years. He builds houses for his farm manager and workers on the farm. When S leased the farm, a dairy had already been erected on it. Next to the dairy he erected a house, a windmill and a stand. From the windmill a pipe ran to the tank which stood upon a masonry structure from which pipes led to the house and the tank. S also erected a cowshed and fence. This was done to facilitate the smooth operation of the dairy business. After 10 years of successful operation S was declared insolvent and a trustee appointed.

Judgement

- (a) A clear distinction must be drawn between a situation where the attachment of the movables had been made by **owner** of the land, and where it has been made by a **non-owner** (a possessor or holder of the land or lessee).
- (b) In this type of situation, the lessee, S, has a right to remove improvements (other than necessary improvements) which can be dismantled without damage to the property (as long as these improvements are removed before the termination of the lease).

STUDY UNIT 5 (DERIVATIVE ACQUISITION OF OWNERSHIP)

(A) THE KEY ELEMENTS WHICH DEFINE DERIVATIVE ACQUISITION OF OWNERSHIP

1. **THE THING MUST BE A *RES IN COMMERCIO***
2. **PARTIES MUST HAVE THE CAPACITY TO TRANSFER OWNERSHIP**
3. **THE TRANSFEROR MUST BE THE OWNER OR SO AUTHORISED BY THE OWNER.**
See *Absa Bank Ltd v Jordashe Auto CC* (pg 93).
4. **THE PARTIES MUST HAVE THE INTENTION TO PASS AND RECEIVE OWNERSHIP.**
See *Absa Bank Ltd v Jordashe Auto CC* (pg 93).
See *Commissioner of Customs and Excise v Randles Brothers* (pg 93)
See *Air-Kel (Edms) h/a Merkel Motors v Bodenstein* (pg 94)
5. **THERE MUST BE A LEGAL GROUND (*IUSTA CAUSA*) FOR TRANSFER OF OWNERSHIP.**
See *Commissioner of Customs and Excise v Randles Brothers* (pg 94) which accepted the ABSTRACT SYSTEM of transfer.
6. **CASH OR CREDIT**
In the case of a credit transaction, the parties may also agree that ownership will not be transferred until the purchase price has been paid in full. Delivery is then subject to a suspensive condition and ownership is only transferred once the conditions of payment are met. Credit agreements subject to the provisions of the *Credit Agreements Act 75 of 1980* also fall in this category and ownership is not transferred until the last instalment has been paid by the credit buyer to the credit seller. See in this regard *Info Plus v Scheelke 1998 (A)* (pg 95).
7. **METHOD OF TRANSFER (PUBLICITY AGREEMENT)**
See *Absa Bank t/a Bankin v Jordashe Auto* (pg 95)
See *Info Plus v Scheelke* (pg 95).

B. DELIVERY OF MOVABLES

1. **ACTUAL DELIVERY (*TRADITIO VERA*)**
See *Groenewald v Van der Merwe* (pg 96)
2. **CONSTRUCTIVE DELIVERY (*TRADITIO FICTA*)**
 - 2.1 **Delivery with the Long Hand (Physical control passed to transferee)(*traditio longae manu*)**
GROENEWALD v VAN DER MERWE

Facts

In March 1974 D signed a document declaring that he had sold a threshing machine to Van der Merwe for £180 the receipt of which sum he acknowledged. Van der

Merwe, after inspecting the machine, left it with D upon the understanding that D should keep it until it was reclaimed and should retain any earnings for himself.

In August 1915, D, being still in possession of the machine, sold it to Groenewald and again received payment, the parties signing a document which contemplated an immediate delivery of the machine. Groenewald then went with D to the latter's farm where Groenewald, after inspecting the machine, stated that it was now his threshing machine. Groenewald further wrote to one W, who was in charge of the machine, asking him to thresh for him on the same terms as he had done for D.

Thereafter Van der Merwe removed the machine from D's farm and Groenewald threatened to sue him unless D signed a promissory note "as security" for the redelivery of the machine. D signed a note which was never paid and Groenewald, who had meanwhile attempted to obtain a charge over certain mealie crops belonging to D, sued Van der Merwe for the recovery of the machine and payment of damages.

Judgement

The following requirements define this type of delivery:

- The intention of the parties to effect delivery in this process must be clear. Especially in the case of things which can be delivered physically, the intention of the parties to effect delivery in this way must be clear.
- The thing must be pointed out by the transferor to the transferee in the presence of the thing.
- The transferee must be enabled to exercise physical control of the thing. (See also *Eskom v Rollomatic Engineering* (pg 97)).
- The thing must be identified clearly and separated (see also *Eskom v Rollomatic Engineering*).

ESKOM v ROLLOMATIC ENGINEERING (pg 97)

Facts

A mining company had erected certain steel towers according to the specifications of the appellant. The towers had been fixed to the land by means of sunken concrete blocks. The respondent bought the towers from the mining company and it was agreed that it could remove them at a later stage. Before the respondent could remove the towers, the appellant became owner of the land on which the towers were erected.

Legal Question

Whether or not ownership of the steel towers was transferred by the mining company to the respondent by means of delivery with the long hand (*traditio longa manu*)

Ratio decidendi

The important qualification for delivery with the long hand is that the pointing out of the object must place the transferee in a position to exercise physical control of the thing in such a way that he or she alone can deal with it as he or she pleases. In this way both the physical element and the intention to transfer and accept ownership constituting delivery with the long hand have to be complied with.

Finding

Since the respondent could not prove that he had physical control of the towers after they had been pointed out to him, delivery with the long hand did not take place.

2.2 DELIVERY WITH THE SHORT HAND (TRANSFEREE ALREADY IN PHYSICAL CONTROL) (TRADITIO BREVI MANU)

See *Info Plus v Scheelke* (pg 97)

2.3 CONSTITUTUM POSSESSORIUM (TRANSFEROR EXERCISES PHYSICAL CONTROL ON BEHALF OF TRANSFEREE)

The main problem with this kind of transfer is that it allows for ordinary fraud or fraud in the form of a simulated contract.

Example (Ordinary fraud)

Absa Bank Ltd t/a Bankfin v Jordashe Auto CC (pg 97).

Facts

Jordashe supplied R Motors with motor vehicles to be sold by R Motors. Jordashe retained ownership of the vehicles until the last instalment had been paid by R Motors with the explicit agreement that R Motors was not permitted to transfer ownership of the vehicles without Jordashe's consent. On inspection of the premises where the vehicles were displayed, Jordashe's representative established that the vehicles were registered in the name of R Motors. These registrations were effected by means of false documents. Unbeknown to Jordashe, in the meantime R Motors had also entered into a floor plan agreement with Absa in terms of which it sold and delivered (by means of *constitutum possessorium*) certain vehicles to Absa. As owner of the vehicles in question, Jordashe wishes to attach them.

Example (Fraud in the form of a simulated contract)

Parties sometimes conclude a simulated agreement without the intention of transferring ownership, for instance in the case of certain money lending transactions (granting of credit). If the creditor wishes to establish real security in respect of movables of the debtor for repayment of the loan, this can be done by means of pledge. A pledge in respect of a movable thing can only be established by means of the transfer of the physical control of the thing to the pledgee (creditor). However, if an owner of a movable thing must transfer the thing to the creditor as security for the loan, the thing is removed from the pledgor's control and, in the circumstances where the pledgor wants to use the thing, this makes a pledge unpractical. To avoid this requirement, the parties often conclude a simulated contract of sale which stipulates that the owner "sells" the thing to the creditor for the same amount as that loaned to him. The thing is then released to the "seller" by the creditor and ownership of the thing reverts to the "seller" as soon as the loan is paid back in full. All these transactions imply that the "seller" never loses physical control of the thing and the parties allege that delivery took place by way of *constitutum possessorium*. However, if the parties never had the intention of transferring ownership, but used the transaction merely to avoid complying with the requirements for pledge, ownership will not be transferred by means of *constitutum possessorium* (see *Vasco Dr. Cleaners v Tolverose* (pg 98)).

VASCO DRY CLEANERS v TWYXCROSS (pg 98)

Facts

During 1967 Z sold his dry cleaning business called Vasco Dry Cleaners to X. It was a term of the contract of sale that, in respect of the dry cleaning machinery included in the sale, the passing of ownership would be suspended until the purchase price had been paid in full. At the end of June 1972 the balance still due to Z was R4 650,00. X was in financial difficulties and, in order to avoid the repossession of the machinery by Z, he sought and obtained financial assistance from Twycross, his brother-in-law. X and Twycross accordingly entered into a written agreement on 28 June 1972 in terms of which Twycross was to pay the balance still due to Z. It was agreed that on such payment to Z, ownership of the machinery would pass to Twycross, who agreed to sell the machinery to X for a purchase price of R4 700,00, payable on or before 30 June 1973. It was further agreed between X and Twycross that ownership of the machinery would not pass to X until the purchase price had been paid in full to Twycross. They agreed that if the purchase price was not paid, Twycross would be entitled to obtain the return and repossession of the machinery.

In November 1972, X sold the business, including the machinery, to a new owner. In the deed of sale X warranted that it was the owner of the machinery. The new owner of Vasco Dry Cleaners was not aware of the contract between Twycross and X. X failed to pay Twycross the sum of R4 700,00. Twycross wishes to claim the machinery from the new owner.

Judgement

- This is a typical example of how *constitutum possessotium* can be used to commit fraud.
- The court will look behind the simulated contract of sale of ownership to the true intention of the parties which was to enter into a contract of pledge.

2.4 ATTORNMENT (PHYSICAL CONTROL IN THE HANDS OF A THIRD PARTY)

AIR-KEL (EDMS) v BODENSTEIN (pg 98)

Facts

S had an agreement with K, the cooperative, in terms of which he traded his old truck in as part payment for a harvester that he bought from K. The truck was with a panel beater who had to fix the damage to the truck caused by an accident. S and K completed change of ownership documents for the truck and K informed the panel beater that he (K) was the new owner of the truck.

The panel beater never declared a willingness to control the truck on behalf of the new owner. Z, a creditor of S, obtained an execution order against S. When the sheriff tried to attach the truck while it was still with the panel beater, the latter told the sheriff that K had informed him that K was the new owner of the truck. Z disputes this.

Judgement

Both the transferor and the transferee of ownership must instruct the person in physical control of the thing (3rd party) to hold the property on behalf of the transferee and not the transferor.

The court decided that, because of the fact that the person in physical control of the thing had not received any notification from the transferor, but only received an order from the transferee to hold on his (the transferee's) behalf, the requirements of delivery by attornment had not been met.

The requirements of attornment are (pg 98) .

- (a) A tripartite agreement between the transferor, the transferee and the third party holder in terms of which the holder will continue to hold for the transferee and no longer for the transferor. All three parties therefore consent to the transfer of ownership.
- (b) The holder should exercise physical control at the moment of transfer from the transferor to the transferee (*Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein*).

The person in physical control must have been in control or had the right to exercise control at the time when the transferor and transferee had the intention to transfer ownership – *Barclays Western Bank Ltd v Ernst* 1985 (A).

BARCLAYS WESTERN BANK v ERNST

Facts

S leased a car from a car dealer. The dealer had a discount agreement with a bank. In terms of the discount agreement, the bank undertook to take a cession of the rights contained in the lease agreement and of the ownership when the dealer presented the bank with the discount agreement. On 21 May 2002 the dealer handed the car to S, who immediately sold it and delivered it to Z. The relevant lease agreement with S was submitted to the bank on 26 May 2002. The bank then paid the discounting price to the dealer and claimed the car from Z. The bank claimed that it became the owner of the car by means of attornment.

The controller need not be in control of the thing when he is informed that he must control on behalf of the transferee, as long as he was in control at the time when the change of intention regarding the transfer of ownership from transferor to transferee took place.

CALEDON EN SUID-WESTELIKE DISTRIKTE EKSEKUTEURSKAMER v WENTZEL 1972 (A) (pg 98, 99).

Facts

A and B concluded a discounting agreement in terms of which B would sell vehicles on credit to third parties and then cede the credit agreements to A and transfer ownership of the vehicles to A along with cession of the contracts. B sold a vehicle to C on credit transferred physical control of the vehicle to C, ceded the credit agreement to A and received the full purchase price from A in terms of the discounting agreement. A then informed C that ownership of the vehicle had passed to A and that C exercised physical control on behalf of A and not B. Before this notification reached C however, C had already sold and delivered the vehicle to D and D to E. The court finds that ownership had been transferred by attornment to A since C had already agreed in the credit agreement that after cession of the contract he would exercise physical control on behalf of A and not B. At the time of cession of the contract C had

still been in physical control of the vehicle, but when A's notice reached B, he was no longer in physical control.

Judgement

- In this case, the law relating to attornment was altered and a method of transfer of ownership analogous to attornment was recognised. By this method the third party holder makes a prior declaration of intention, to the effect that he/she will hold the thing on behalf of a future transferee to whom the owner may transfer ownership. This declaration can take place at a stage when transfer to the transferee has not yet taken place and may, possibly, never take place. When transfer eventually takes place (by means of cession and notice to the transferee), the third party holder may even no longer be in control of the thing.

The Appellate Division held in the *Caledon* case that ownership nevertheless had passed to the transferee (*Caledon*) in these circumstances, since the holder had undertaken at an early stage to hold on behalf of the transferee when transfer of ownership (by cession) took place from the owner to the transferee. The holder's knowledge of the date of cession (of the rights in terms of the contract of sale) is not juridically relevant for the transfer of ownership. What is relevant is the third party holder's earlier declaration of will to hold on behalf of a future transferee (cessionary of the claims in terms of the discounting agreement).

- The effect of the decision is that the Appellate Division has acknowledged a new form of delivery in addition to the acknowledged forms. It held that a holder's mere declaration of will to hold in future on behalf of a new transferee causes ownership to pass on the date on which the transferor cedes his rights to the acquirer and notifies the third party holder of the cession.

STUDY UNIT 5 (PROTECTION OF OWNERSHIP)

1 THE REI VINDICATIO (authority *Chetty v Naidoo*)

The elements of a *rei vindicatio* are :

- The *rei vindicatio* can be **defined** as a real action with which an owner can claim his/her thing from whoever is in control of it without the owner's permission or consent. It may be instituted in regard to movable or immovable things. In the latter situation, the remedy takes the form of an eviction order. (See *Chetty v Naidoo*, pg 109). The owner must prove he/she is the owner.
- The thing must still exist and must be identifiable.
- The thing may be recovered from any party who is in control of it. (See *Chetty v Naidoo* pg 110). However, if the 3rd party has a legal right (ie lease, HP or other contractual right) to the thing, then the owner cannot vindicate it. Therefore the *rei vindicatio* may be instituted against any party who is in control of the thing when the action is instituted. However, where a defendant can show that he/she has a right to the thing, the statement in *Chetty v Naidoo* (1974 (3) SA 13 (A) 20C) is pertinent:
 "[I]t 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)".

2. RESTRICTIONS ON THE APPLICATION OF THE REI VINDICATIO (pg. 110)

- Sale in execution
- Statutory limitation on eviction
- Estoppel

QUENTY'S MOTORS v STANDARD CREDIT CORP

Facts

The claimant Q, a car dealer from Pretoria, provided L, a second-hand car dealer doing business in Durban, with two motor cars for sale on the explicit condition that ownership would not be transferred until the full purchase price had been paid to Q. L needed a credit facility and approached S for credit. S was prepared to provide credit to L on condition that L furnished real security to S. L concluded an agreement with the defendant, S, in terms of which the vehicles were sold to S and immediately resold it to L in terms of a so-called floor plan agreement. At no time did either L or S intend that the vehicles should be removed from the physical control of L at his business premises. L further agreed that the re-sold vehicles would be held by him on behalf of S until the full purchase price had been paid to S by L. L disappeared and subsequently his estate was sequestrated without the purchase price being paid to S. S had the vehicles removed from L's business premises.

Judgement (SG pg 111).

The elements of estoppel are :

- Representation
- Fault
- Detriment
- Causal element.

3. **INTERDICT**
SETLOGELO v SETLOGELO (pg 112)

Facts

X and Y are owners of Waterford. S, their son, leases a portion of the farm for grazing purposes. X starts to plough on a section of their farm to which S is entitled in terms of the lease contract. S requests X to stop the ploughing on that portion of the farm. X refuses.

Judgement

The decision is important for its authoritative formulation of the requirements for an interdict :

- (a) A clear right
- (b) Injury actually committed or reasonably apprehended
- (c) The absence of similar protection by any other ordinary remedy.

It illustrates the fact that the lawful occupation of land constitutes a clear right for purposes of this remedy and that ownership is not required.
 (See *Gien v Gien*; *Malherbe v Ceres Municipality*).

4 **CONDICTIO FURTIUA** (pg 112)
(CLIFFORD v FARINHA)

Facts

The plaintiff, C, leased a car from a bank and was responsible for any damage to it, as well as the purchase price if it were stolen. In his absence, the defendant F has "borrowed" and used the car with C's knowledge or permission, and while F was using it, the car was stolen. F was not negligent.

Judgement

A number of options were considered in the decision :

- (a) C cannot claim the car from F with the *rei vindicatio*, as C was not the owner and F was not in control of the car.
- (b) C cannot institute the *actio ad exhibendum* against F, since F did not transfer control of the car voluntarily, neither did she have fault (intent or negligence) with regard to the theft.
- (c) C cannot claim damages from F with the *actio legis Aquiliae*, because F had no fault with regard to the theft.
- (d) The court did not consider the *spoliation remedy*, but in all probability C would not have succeeded with it, even though he could prove all the

required elements. F could probably succeed with the defence of impossibility, since she was in no position to restore control of the car.

- (e) The case was decided on the basis of the *condictio furtiva*, with which an owner can recover the monetary value of his property from a thief who is unable to return the property. In this case it was decided that the lessee C could also use the *condictio* against F.
- (f) **The possessory action was not considered**, but C could probably have such an action against F, to recover the value of the property. C could prove that F has committed spoliation, and could also prove that he had a stronger right to control the thing. F's right to control the thing is much weaker, and F was also responsible for the unlawful removal of the thing from C's control. C can also prove all the requirements for delictual damage.

SUMMARY OF CLIFFORD v FARINHA

Facts

In terms of the lease agreement entered into between the plaintiff and a bank, the plaintiff accepted full risk for loss or damage to the rented car. While the plaintiff was on vacation, the defendant, without the plaintiff's permission, drove the car to a shopping centre. When she returned from her shopping, the car was stolen. The plaintiff instituted an action against the defendant for recovery of damages.

Legal Question

Whether or not the applicant can succeed with the *condictio furtiva*.

Ratio decidendi

The basis of the defendant's liability is that she, having wrongfully and intentionally withdrawn possession of the vehicle from the plaintiff and appropriated such possession and use to herself, incurred *the risk* of the vehicle being lost through a cause not attributable to her fault. There is direct authority for the basis of liability. Voet, dealing with the *condictio furtiva*, states:

"Moreover the action for the recover of stolen property is a personal action. Not merely was it brought to meet the personal case of wrongdoing, but rather was it granted and did it arise from and depend upon the actual infamous wrongdoing of theft. On the side of the plaintiff it is an action for the recovery of property. On the side of the defendant, it is penal, insofar as judgement is given against the person sued in this action though nothing has reached his hands out of the property stolen or it has perished by accident. It seems that he who originally handled the property against the will of the owner is always in default in regard to the restoration of a thing which he ought never to have removed" [At 321]

The rule *fur semper in mora* and the liability of the thief for accidental loss or damage, applied not only to the thief who appropriate the *res* itself, but also to the person who – such as the present defendant – merely wrongfully withdraws a thing from the possession of another and uses it while intending to restore possession after the use thereof. When regard is had to the ratio for the rule *fur semper in mora* as indicated above, there is no reason to exclude a person in the position of the defendant from the operation of the rule.

Voef expressly states that the *condictio furtiva* applies in such circumstances :

“Whether the theft wreaked was one of proprietorship or one of use or possession ... makes no difference to the possibility of this action being available” [At 322]

It must therefore ... be concluded that the *condictio furtiva* is, in our law, a remedy not restricted to owners only ... [At 324].

Finding

Damages as a result of loss of damage were awarded against the defendant. The decision indicates that this remedy is not limited to the owner, but can also be instituted by someone who is not the owner, but who has a positive or negative interest in the property or its value, such as a lessee who bears the risk for its loss.

STUDY UNIT 7 (CO-OWNERSHIP)

ERASMUS v AFRIKANDER PROPRIETARY MINES (SG pg 124)

Facts

Erasmus (the applicant) is the holder, under a deed of cession of mineral rights, of an undivided 1/520th share in the mineral rights in respect of the farm "Brakfontein". He applied for an interdict restricting Afrikander Proprietary Mines (the respondent) from exercising his mining rights. The respondent, which is a wholly owned subsidiary of the General Mining and Finance Company, is the registered holder of an undivided 519/520th share of the coal rights on "Brakfontein". The respondent is also the registered holder of all the coal rights on the adjoining farm "Haverklip" on which its Delmas Colliery is established.

The application was precipitated by a letter, dated 15 April 1975, from the respondent's attorneys to the applicant. In this letter applicant was approached for a division of his undivided share in terms of a notarial agreement in view of the fact that he had refused permission to the respondent to continue with its mining operations on "Brakfontein".

The applicant's attitude in this matter is that as long as he is the holder of an undivided 1/520th share in the mineral rights, which include the coal rights on "Brakfontein", the respondent is not entitled to take any steps whatever for the exploitation of the coal rights on the farm, unless it has authority from the applicant to do so. The applicant also contended that he would suffer irreparable prejudice should the respondent commence its mining operations on Brakfontein, because the respondent would then be mining and removing coal from property in respect of which the applicant is the holder of an undivided share in the mineral rights. The respondent, so it was contended, would thereby, in effect, be depleting the applicant's mineral rights in the property.

Judgement

- (a) Use of property as co-owner : Every co-owner is entitled to **reasonable use** consistent with their undivided share of the property.
- (b) In the event of any dispute about the conduct of a co-owner and the manner in which he has made use of the joint property, **the court would have to consider whether the conduct complained of constitutes an unreasonable user, inconsistent with the user to which the property was destined and to the detriment of the rights of the other co-owner, and, unless a co-owner's use of the property can be so described, interdict proceedings against him will not succeed.**

PRETORIUS v NEFDT AND GLAS (SG pg 124, 125)

Facts

Pretorius is the usufructuary of an undivided half of the farm, "Leeuwkloof" and also acts as the guardian of a minor son who owns a one-eighth undivided share in the farm, subject to her usufruct. Glas is the registered owner of the other undivided half of the farm. Apparently, with the consent of the other interested parties certain

children of Pretorius and Glas quarried and burned lime in kilns which they had erected upon the farm, not far from the boundary of an adjoining property, "Kalkheuvel". They had made a road leading from this spot to the market or, at any rate, improved an existing track so as to make it suitable for transport. Nefdt, a son-in-law of Glas's, having required rights to lime on the adjoining farm of "Kalkheuvel", began transporting his lime, with the consent of Glas, through the farm, "Leeuwkloof", along the road used by those quarrying lime upon "Leeuwkloof". Pretorius objected to this. Negotiations aimed at giving Nefdt a right of passage began, but they fell through. It is alleged that a contract was then concluded between Glas and Nefdt, by which Glas undertook to transport the lime to the market on behalf of Nefdt, and for that purpose used the road across "Leeuwkloof".

Judgement

- (a) Every free co-owner can use the thing in proportion to this/her undivided share in the ownership, provided that the **use is reasonable**. A free co-owner cannot use the thing as though he/she were its sole owner
- (b) A co-owner can use an interdict to prohibit another co-owner from making unreasonable use of the property. All the requirements for an interdict must be proved.
- (c) Remedies for unreasonable use : (1) Damage or division of profit; (2) interdict; (3) subdivision.

STUDY UNIT 8 (POSSESSION AND HOLDERSHIP)

NIENABER v STUCKEY (SG pg. 130, 131)

Facts

In September S applies for the spoliation remedy against X and Y, who have locked the gate that gives him access to their farm, thereby effectively debarring S from access to his farming implements. S had left these on the farm after having harvested the crop in July. Since July neither he nor his labourers have set foot on the land. X and Y argue that he has not been in control of the implements since July and that he is therefore not entitled to succeed with his application.

Judgement

- (a) **The physical element of control is determined by** (pg. 130)
- Physical control is a factual condition. A controller must have actual control.
 - Sometimes it is not possible to have direct physical control over a thing, in which case indirect control is possible.
 - The requirements for physical control are applied **more strictly where the acquisition** of physical control is concerned than in the case of the **continued existence** or retention of control. Before a buyer can establish physical control over the thing he/she bought, he/she will need to gain direct physical control of the thing. He/she can, however then retain control over the thing by means of indirect control, for example, simply by locking it in his/her cupboard.
 - Physical control need not be exercised personally, but may be exercised by a person on behalf of another person.
 - Physical control need not be continuous. A farmer retains physical control over those parts of his farm that he seldom visits, and a person who leaves her car, locked, in a parking area while she does her shopping still has physical control over it. An important criterion in this regard is whether the controller is able to regain physical control at any time.
 - Physical control need not be comprehensive
 - The degree of physical control is greater for movables than for immovable things.
- (b) **The mental element of control** (pg. 131, 132)
- The intention to control as owner; or as *bona fide* possessor, or as *mala fide* possessor.
 - The intention to control for one's own benefit, while recognising the ownership right of someone else.

SCHOLT v FAIFER

Facts

S builds a dairy for Z. Z refuses to pay S the agreed amount on the due date. In December S locks the partially completed building to establish a builder's lien over the

property. At the beginning of February the following year, Z takes control of the building. S applies to the court for restoration of his control

Judgement

Note this judgement contains all the elements mentioned in the *Nienaber* case.

S v BRICK (sg P 134)

Facts

S opens his mail and finds pornographic material in it. He decides to take it to the police the next day on his way to work. In the meantime, he hides it high up in a cupboard in his bedroom so that his wife and children will not see it. That night the police raid his house and discover the pornographic material. S is charged with the "possession" of pornographic material in terms of the *Indecent or Obscene Photographic Matter Act 37* of 1967 which prohibits such possession. S argues that he did not possess the material, as he did not intend keeping it.

Legal Question

What is the meaning of the term "possession" in the statute?

Ratio decidendi

The precise meaning to be assigned to the word "possession" occurring in a penal statute is often a matter of considerable difficulty. The difficulty may sometimes be lessened if the word is used in association with "custody". In the ultimate analysis, however, the decision vitally depends upon the intention of the Legislature as reflected in the context of the particular statutory enactment concerned.

In terms of the statute, the offence is committed by any person who "has in his possession" any indecent or obscene photographic matter. Having regard to the obvious objective of the Act, the court held that witting physical detention, custody or control of such matter is penalised. Once it is shown that the holder was aware of the existence of such photographic matter in his detention, custody or control, it is not essential for a conviction under the Act that the State should prove that the holder intended to exercise control over the photographic matter in question for his own purpose or benefit.

Application of finding to the relevant facts

The accused was found guilty but the fact that he intended to turn the material over to the police was regarded as a mitigating circumstance entitling him to a lesser fine.

STUDY UNIT 9 (PROTECTION OF POSSESSION AND HOLDERSHIP)

NINO BONINO v DE LANGE (SG pg 142)

Facts

Z leases a billiard room in Newtown from S. In terms of the lease agreement, Z is not allowed to serve alcohol on the premises or stay open after 12 at night. S and Z insert a term in the agreement entitling S to take control of the premises if Z contravenes any of the terms of the lease. Z serves alcohol to his friends and holds rowdy parties until sunrise. The neighbours complain to S. S removes the locks from the building and fits new locks. He locks all entrances to the premises and effectively debar Z from using or entering the premises. Z applies for a spoliation order.

Judgement

- (a) **This is regarded as the classic and most important decision regarding the *spoliation remedy*, and it contains the most important points to note with regard to this remedy :**
- A remedy exists and is granted as a matter of legal policy, based upon the principle that no-one is allowed to take the law into her own hands or to act as judge in her own case;
 - Because of the policy underlying the remedy it is applied summarily, regardless of the merits of the parties' claims to the thing in question;
 - Spoliation need not be accompanied by violence, fraud or stealth to qualify for this purpose;
 - The fact that the applicant's own control of the property was illegal or unlawful is of no concern since the court does not investigate the merits of the parties' claims to the property;
 - An agreement purporting to allow a party to a contract to commit acts of spoliation is against public policy and therefore void.
- (b) ***Yeko v Qana* :** Contains a similar judgement to *Nino Bonino* and sets out the requirements for a spoliation remedy which are :
- Proof that the applicant was in **peaceful and undisturbed control** of the property
 - Proof that the respondent took or destroyed that control by means of **unlawful self-help** or spoliation.

ZULU v MINISTER OF WORKS, KWA-ZULU

Facts

The applicant was a senior prince in the royal Zulu family and lived in a private house near the royal residence. When the royal residence was built, the applicant installed a water pipe to provide water from the royal house to his own house. This was done at his own cost but in consultation with the relevant authorities. He was allowed to draw water free of charge from this pipe as long as surplus water was available but when the water supply became insufficient, the water supply to the pipe was terminated by the authorities without notice. Initially the supply was cut off by closing a stopcock but when the applicant opened the stopcock, the authorities severed the pipe. Applicant applied for a spoliation remedy to have the water supply restored.

Judgement (quasi-control)

- (a) The corporeal element of control often causes confusion with regard to cases where so-called *quasi* control of incorporeals (or rights) is concerned.
- (b) The facts are typical of cases where so-called *quasi* control of a right is concerned : the control in question is the kind of control usually associated with the exercise of a right such as a servitude. Because of the fact that rights are not investigated in a spoliation case, the question arises what form the control should take in these cases.
- (c) In the *Zulu* case, the matter was initially approached correctly : The court stated that the applicant must prove the existence of control by proof of acts which, if they were conducted lawfully, would constitute the exercise of a right of servitude. The question is not whether there was such a right, but simply whether there is proof of the acts usually associated with such a right. **In this case, it means that the applicant did not have to prove a right to use the water, but simply that he, in fact, used the water from the pipeline.** However, in its application of this principle, the court is not quite consistent, and eventually it seems that the application was denied because the applicant did not have the right to use the water. If the principle was applied correctly, the fact that the water was actually used should have been decisive.

RIKHOTSO v NORTHCLIFF CERAMICS (PTY) LTD (SG pg 143)

Facts

A number of dwellings were erected on land belonging to Northcliff Ceramics (respondent) without the latter's consent. The unauthorised dwellings were demolished by the respondent and the materials with which certain of the dwellings had been constructed were burnt. Rikhotso (applicant) applied for a spoliation order on behalf of the occupants who had been dispossessed of their dwellings by the respondent.

JUDGEMENT (THE DEFENCE OF IMPOSSIBILITY)

- (a) The court decided that the defence of impossibility must succeed when squatters' huts were completely destroyed by fire, and that replacement cannot be effected by the spoliation remedy in such a case. However, in *Ierse Trogg CC v Sulra Trading CC 1997 (C)*, it was confirmed that the rebuilding of a wall that had been demolished could form part of a spoliation order, even though some replacement materials might be required.
- (b) The court emphasised the inherent nature of the spoliation remedy, that is, the fact that it is aimed at restoration, and refused such an order. The court argued that if the materials were destroyed, restoration is impossible and the spoliation remedy is not the applicable one. In such circumstances a delictual claim for damages is the appropriate remedy.

IERSE TROGG CC v SULRA TRADING CC (SG 143)

Facts

Applicant (Ierse Trogg CC) brought an urgent application against both respondents (Sulra Trading CC as purchaser of the property [first respondent] and the demolition corporation [second respondent] for a spoliation order. What applicant wanted was the restoration of a structure comprising a storeroom on first respondent's property in Fish Hoek. Applicant alleged that it was in possession (control) of this room which it had used as a storeroom until 08:30 am on 18 April 1997.

The background to this matter is that first respondent had launched ejectment proceedings against applicant on 2 April 1997.

The ejectment proceedings, which have been opposed by applicant, are pending in the Simonstown Magistrate's Court. On 18 April 1997 at 08:30 am, applicant noticed that employees of second respondent had commenced knocking holes into the external walls of the storeroom. Attorneys on both sides were immediately engaged. Not much later, applicant noticed that the workmen were completing demolition of the external walls of the storeroom. Applicant points out that he is unable to secure any of his property in the room in its present state.

Judgement

- (a) It was held that restoration may be ordered where it can be effected with materials of a similar nature to the materials which had been destroyed.
 - (b) The court held that a spoliation order can be granted where the property has not been entirely destroyed. The court may grant an order for the rebuilding of a wall and a degree of substitution of the building materials-
-

STUDY UNIT 10 (LIMITED REAL RIGHTS SERVITUDE)

WILLOUGHBY'S CONSOLIDATED CO LTD v COPTHALL STORES LTD

Facts

S transferred an exclusive right to trade on a certain piece of land to Z. Z transferred this right to his son, Zz. The right was not registered in favour of Z. S sold his farm to X. X argues that Zz is not entitled to trade on that piece of land, but Zz insists that he acquired that right from his father, Z.

Judgement

(a) The decision set out the basic characteristics of a personal servitude :

- **A personal servitude (once properly constituted) is a real right, but it serves a specific person and is therefore not capable of being transferred to another.** The decision therefore proceeds on the basis that, even if the right in question were a real right, it could not have been acquired by the defendant since it would have been a personal servitude, and incapable of being sold or transferred to someone else.
 - The main point of importance is that even personal servitudes (once properly constituted) constitute real rights and not personal rights.
- (b) Significant differences exist between personal and land (praedial) servitudes. A land servitude lasts indefinitely, while a personal servitude (which is not transferable) is granted for a specific period, usually a person's lifetime (or 100 years)(SG pg 155);
- (c) A land servitude must enhance the use and enjoyment (utilitas) of the dominant servitude (SG pg 156).
- (d) **The decision sets out the main principles governing the enforcement of servitudes, both praedial and personal .**
- A servitude may be acquired by **agreement**;
 - Such an agreement is **binding** upon the parties, but it does not constitute a servitude (which is a real right) yet,
 - For the vesting of a real right to **land registration** is required;
 - The question whether a specific servitude is real or personal in nature depends upon the **intention** of the parties creating it, determined from the terms of the contract in the light of the relevant circumstances.
- (e) Remedies : If someone claims servitude rights over a property, the property owner may apply to court for a declaratory order, together with a mandatory or prohibitory interdict (SG pg 163).

DE KOCK v HÄNEL (SG 157)

Facts

S (the applicant) applies for a declaratory order to the effect that a servitude of right of way recorded in the title deeds of a property owned by X and Y (first and second respondents) did not confer any rights of servitude over his property. The servitude was created in 1963 and both the dominant and the servient tenements were subsequently subdivided. Q and R (the third and fourth respondents) were together with X and Y (the first and second respondents) owners of subdivisions of the original dominant tenement. S (the applicant) contended in the first place that the wording of the servitude was ambiguous and that recourse to the surrounding circumstances was

therefore required to interpret it; in the second place, that the effect of the subdivision had been to place an excessive burden on the servient tenements; and lastly, that the *utilitas* of the servitude had ceased to exist as far as X and Y (the first and second respondents) were concerned. The latter argument was based on the fact that the servitude was granted to afford access to another road, a purpose for which it was no longer used.

Judgement

- (a) A praedial (land) servitude burdens the **whole** of the servient tenement.
- (b) If the dominant tenement is subdivided, a servitude remains vested in each subdivision of the original dominant tenement, **provided the burden on the servient tenement is not increased**. Mere subdivision does not entail an increasing burden on the servient tenements.
- (c) The same principle applies to the subdivision of the servient tenement, except where the servitude is demarcated and applies to a particular part of the tenement only (ie such as a right of way). Those subdivisions which are not crossed by the right of way are exempt from the servitude in the case of subdivision.

VAN RENSBURG v COETZEE (SG pg 158)

Facts

Z allows S to use a road over his farm to the national road to which S had no direct access. After some months, Z informs S that he can no longer use the road. S approaches a neighbour who allows S to use the road over his farm. After a while, he also informs S that he can no longer use the road. S approaches the court and applies for a way of necessity over Z's farm.

Judgement (way of necessity)

The following **guidelines** were laid down by the court for a successful application for a way of necessity :

- The particulars of claim must allege the particular necessity, as well as the reason why the way of necessity must cross the defendant's land (for example, that the defendant's land is situated between the applicant's land and the nearest public road).
- The width of the road claimed must be stated as well as the grounds upon which that claim is founded.
- A particular route should be indicated for the court's consideration as the most suitable.
- A particular amount as compensation should be offered for the court's consideration.
- This judgement confirmed in *Sanders NO v Edwards NO*.

GRANT v STONESTREET (SG pg 162)Facts

S has entered into an agreement with Q and R in terms of which they have given him the right to use the road over their farm to "Waterford". This agreement is in writing, but not registered. Q and R sell the farm and the new owner, who knows about the servitude agreement, refuses to allow S to use the road.

Judgement (Doctrine of knowledge)

- (a) Doctrine of knowledge means that where a successor-in-title has knowledge of the agreement (ie which contractually created the servitude) between the previous owner and the servitude holder, then the successor-in-title is bound by that agreement.
- (b) The court decided :
 - The unregistered servitudal agreement is enforceable only between the contracting parties.
 - Because the successor in title to the contracting owner of farm B had no knowledge of the agreement, it is not enforceable against him. If he had had knowledge, it would have been enforceable against him in terms of the doctrine of knowledge.
 - The next successor in title of farm B did have knowledge of the agreement and, consequently, it is enforceable against him because of the doctrine of knowledge. The agreement was not terminated because of the previous owner of B's lack of knowledge of the agreement.
 - The doctrine of knowledge will only be applicable if the contracting parties intended to bind their successors in title.
- (c) See also *Wahloo Sand Bpk v Trustees, Hambly Parker Trust*.

BRINK v VAN NIEKERK AND ANOTHERFacts

S has a registered right of way over Q and R's farm. S allows Z, his neighbour, to use this road to access the main road. Q and R request Z orally and in writing not to use the road. They indicate to him that the servitude is available to S only. Z ignores their requests and persists in using the road. Q and R also ask S to revoke his permission to Z. S and Z refuse to cooperate.

Judgement

- (a) The servitude holder must exercise the right of servitude in a reasonable manner (*civiliter modo*).
- (b) It has been pointed out by commentators that the general requirement that the holder of a servitude must exercise that servitude reasonably (*civiliter modo*) implies that the servitude holder should not place a greater burden upon the servient tenement and its owner than is reasonably necessary, and it seems clear that the granting of permission to owners of other farms to use the right of way does bring about a greater burden upon the servient tenement. The fact is that the servitude grants a restricted limited right to the holder of the servitude either in her personal capacity (personal servitude) or in her capacity as owner of the servient tenement (real servitude) with the result that she does not have the right of the

entitlement to permit others or owners of other farms to use that right of way – in doing so, she automatically exceeds the limits of her limited real right and thereby places a more onerous burden upon the servient tenement and its owner.

STUDY UNIT 11 (REAL SECURITY)

THIENHAUS v METJE AND ZIEGLER (SG pg 174)

Facts

S registers a mortgage bond over his farm in favour of Z, to cover a debt owed to Z by the S company. Due to a slip of the pen by the conveyancing attorney, the debtor was described on the mortgage bond as "S" and not "S Company". S becomes insolvent and the trustee argues that the mortgage is invalid and that Z is only a concurrent creditor.

Judgement (Principal debt)

- (a) All real security rights are accessory in nature and dependant on the existence of a principal debt.
- (b) A real security right ceases to exist only if the principal debt is extinguished. Where the principal debt is discharged, then the security right is extinguished by operation of law.

OSRY v HIRSCH, LOUBSER (SG pg 176)

Facts

S hands ostrich feathers to Z to sell on his behalf. Z is unable to sell all the feathers. Z advances a large sum of money to S and agrees that he will try to sell the feathers, if necessary at a public auction. The feathers will serve as a pledge object for repayment of the money advanced to S. Z sells the feathers at a public auction and buys them at a very low price. S argues that this sale is invalid since it was executed in terms of an invalid summary execution clause.

Judgement (Pledge)

Summary execution (execution with out a court order – *parate executie*)

The pledgor and pledgee may agree that, in case of default payment, the pledgee may sell the thing without an execution order from the court. Such a clause is valid and, should such a sale take place, the pledgee must sell the thing at a public auction to the highest bidder (*Contract Forwarding (Pty) Ltd v Cherterfin (Pty) Ltd*).

MAPENDUKA v ASHINGTON (SCR pg 176)

Facts

S buys 152 bags of mealies from K, the cooperative on credit. As security for repayment of the debt, he leaves € oxen, a cow, and a horse with K as a pledge. The parties agree in writing that K may keep the pledge animals if S does not repay the debt on the due date. S fails to pay, and K regards the animals as his property. If

terms of the written agreement between himself and S. Two years later, S tenders R8000 as payment of the outstanding debt. He also claims his animals back, or R12000 as damages in lieu of the animals.

Judgement (Pledge)

- (a) The clause that the pledgee may keep the thing if the pledgor should fail to pay his/her debt is invalid (a *pactum commissorium* is invalid).
- (b) A clause that the pledgee may buy the thing at a specific price is restricted to the situation where the agreement was made after the debt had become due or, where the agreement preceded the due date only if the pledgor at the time of non-payment was prepared to part with ownership of the thing at the agreed price.

6 ASSIGNMENTS FOR 1999

ASSIGNMENT 01

QUESTION 1

find in summary of cases

Study the following court decisions and, in not more than 250 words each, give brief summaries of the facts, the legal problem, the reason for the decision and the decision of the court

- (a) *Ex parte Geldenhuys* 1926 OPD 155 (5)
 - (b) *Malherbe v Ceres Municipality* 1951 4 SA 510 (A) (5)
 - (c) *Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 2 SA 669 (A)(5)
 - (d) *Eskom v Rollomatic Engineering (Edms) Bpk* 1992 2 SA 725 (A) (5)
 - (e) *Clifford v Farinha* 1988 4 SA 315 (W) (5)
- [25]

QUESTION 2

reference to study guide

- (a) Define
 - thing p920 (5)
 - ownership p942-43 (Gien v Gien) (5)
 - delivery with the long hand p96 (Groenewald v Van der Merwe) (4)
 - (b) State the requirements for a successful claim for acquisition by means of occupation (3)
 - (c) Name the type of right which is relevant in a share block scheme p225 (1)
 - (d) Name two statutes dealing with issues related to security of land tenure p215 p218 (2)
 - (e) Give one examples for each of the following
 - divisible thing
 - consumable thing
 - non-fungible thing
 - immovable thing
 - negotiable thing p27 (5)
- [25]

QUESTION 3

- (a) Briefly distinguish between
 - rights and an entitlements p20-21 (3)
 - free co-ownership and bound common ownership p123 (co-ownership) (4)
 - original and derivative methods of acquisition of ownership p63 (introduction) (4)
- (b) Briefly explain the different tests which are applied in order to determine whether a specific right is a real or a creditor's right p37-38 (ex parte Geldenhuys) (5)
- (c) Name and briefly discuss two statutory limitations on ownership
 - p41 example 6 (2)

- (d) Briefly explain the consequences of the causal and abstract systems of transfer of ownership (5)
[25]

QUESTION 4

(NUISANCE) pg 49-51 see URM + malice

- (a) X and Y are seriously affected by the baboons that destroy their mealies. X installs an apparatus to chase away the baboons on the boundary with his neighbour. The apparatus makes loud noises at regular intervals during the day and the night. The neighbour writes to X and Y to complain about the noise during the night, but X ignores this and refuses to speak to his neighbour on the telephone. X and his neighbour are not on speaking terms because his neighbour seriously insulted him a few years ago. The neighbour approaches you for legal advice. Advise him fully with reference to authority. (8)
e pg 49-51
- (b) S sows mealies on the land he leases from his parents (X and Y). Before he can reap the crops, the term of his lease expires and his parents do not renew the lease. X and Y reap the mealies and sell them. S claims the proceeds. Will he be successful? Substantiate your answer fully. (5)
pg 65
(planting & sowing)
- (c) X and Y purchase their farm implements in terms of a credit agreement, from the cooperative, K. K reserves ownership until X and Y have paid the final instalment. X and Y pay a fairly high rate of interest to the cooperative and Q, X's father-in-law undertakes to pay the full amount to the cooperative. X and Y can then repay the money in instalments to him. The cooperative transfers ownership to Q. Which form of transfer of ownership is applicable here? Indicate how it operates. (8)
pg 98
Attornment
- (d) Q is the owner of a car. T, a thief, steals the car. Z borrows the car, drives through a red traffic light and causes an accident. The car is seriously damaged, but will be able to be repaired at a high cost. Advise Q fully as to his legal position. (4)

TOTAL

See pg 109-12

- remedies of an owner
- vindictio
- reductio in integrum
- delictual claim for damages
- f. (liberatio tanna)
- r. (Chetty's Hardship)

[25]

[100]

ASSIGNMENT 02

QUESTION 1

Study the following court decisions and give brief summaries of the facts, the legal issue, the reason for the decision and the finding of the court in not more than 250 words each.

- (a) *Setlogelo v Setlogelo* 1914 AD 221 (5)
- (b) *Grant v Stonestreet* 1968 4 SA 1 (A) (5)
- (c) *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 4 SA 10 (A) (5)
- (d) *Van Rensburg v Coetzee* 1979 4 SA 655 (A) (5)
- (e) *Nino Bonino v De Lange* 1906 TS 120 (5)
- [25]**

QUESTION 2

- (a) Define
- (i) control (3)
- (ii) possession (2)
- (iii) praedial servitude (5)
- (b) Name
- (i) the forms of real security rights (4)
- (ii) the three main aspects of land reform as indicated in the Reconstruction and Development Programme (3)
- (c) Give three examples of personal servitudes (3)
- (d) Mention the circumstances under which the movables of third parties will be subject to the lessor's tacit hypothec. (4)
- (e) Is a personal servitude a real right? (1)
- [25]**

QUESTION 3

- (a) Name the different methods of termination of possession and holdership (7)
- (b) How is the criterion of reasonableness applied in the case of servitudes? (4)
- (c) How is a right of mortgage terminated? (7)
- (d) How does the **Constitution of the Republic of South Africa** 108 of 1996 accommodate customary law? (5)
- (e) What makes mineral rights unique? (2)
- [25]**

QUESTION 4

- (a) S leases 100 morgen from his parent X and Y for grazing purposes. The contract of lease is invalid and S is unaware of this until his attorney informs him of it. He nevertheless continues as if the contract of lease is valid. S does not inform X and Y.
- (i) What is the position of S with regard to the land before he became aware of the invalid contract of lease and why is that so?

Handwritten answer: S is in a position of a possessor in good faith.

(ii) What is the position of S with regard to land after he became aware of the invalid contract of lease and why is this so? (3)

(b) The farm of S is close to the urban area of Newtown. S has little time for the farm and he wants to start limiting his farming operations. He obtains permission to subdivide the farm. S sells another portion of his farm to a developer Z who wishes to develop the land as a township. After obtaining permission to develop the land as a township Z lays out the township as Newtown Extension 1 in terms of the provincial township establishment legislation. Newtown Extension 1 comprises 30 erven of 500 square metres each. Against the title deeds of each of the erven in Newtown Extension 1 conditions of title are inserted into all the title deeds which provide the following:

- (1) "Only a single residential dwelling house shall be erected on the erf"
- (2) "No dairy farming is permitted on the erf"
- (3) "The dwellings erected shall be built of brick with tiled roofs"
- (4) "The erf shall not be used for business purposes"

One of the residents in the new township decides to open a restaurant in her house

- (i) Do the neighbours have any remedies? Substantiate your answer (2)
- (ii) What are the duties of the relevant local authority in a case like this? (2)
- (iii) She wishes to open a restaurant legally. Indicate what procedure she must follow (2)

(c) Y takes a tractor, which he purchased on credit from K, the cooperative, to a garage for repairs. Y gives orders to the garage to replace the steering mechanism because it is broken. Furthermore, he requests the garage to install a canopy over the driver's seat which will keep out the sun and he asks that the tractor be painted light pink because he is bored with the green tractor. Y stops paying the instalments to K and he refuses to pay the garage for the repairs. K claims the tractor from the garage with the *rei vindicatio*. Discuss the position of the garage fully. Mens pg 190-191 (10)

(d) After S has successfully prevented the local authority from digging trenches on his farm and through the dam wall, the local authority expropriates a part of S's farm so that it can continue the sewerage works. The local authority refuses to pay compensation. State which part of this example indicates a private-law relationship and which part indicates a public-law relationship. (2)

(e) B and C live in the city and work for S. The farm "Highlands" was taken from their parents in 1923 in terms of racially-based legislation and against compensation. They wish to claim the return of the farm. Indicate which section in the property clause provides the basis for the restitution of land rights. (1)

[25]

TOTAL

[110]

ASSIGNMENT 03

QUESTION 1**Define**

- | | | |
|-----|---------------------------------|-----|
| (a) | principal thing | (3) |
| (b) | free co-ownership | (3) |
| (c) | <i>constitutum possessorium</i> | (4) |
| (d) | planting and sowing | (4) |
| (e) | owner's intention in possession | (2) |
| (f) | personal servitude | (4) |

[20]**QUESTION 2**

- | | | |
|-----|--|-----|
| (a) | Name the characteristics of a thing. | (5) |
| (b) | Name the forms which a housing development scheme for retired persons can take | (4) |
| (c) | Indicate the purpose of the Restitution of Land Rights Act 22 of 1994 | (2) |
| (d) | State the purpose of neighbour law. | (2) |
| (e) | Mention the methods of termination of ownership | (3) |
| (f) | How is the requirement of reasonableness applied in servitudes? | (4) |

[20]**QUESTION 3**

- | | | |
|-----|--|-----|
| (a) | Distinguish between | |
| | (i) singular and composite things | (2) |
| | (ii) causal and abstract systems of transfer of ownership | (2) |
| | (iii) unlawful holders in bad faith and unlawful possessors in bad faith | (5) |
| (b) | Briefly name the requirements for a way of necessity as set out in <i>Van Rensburg v Coetzee</i> 1979 4 SA 655 (A). | (7) |
| (c) | Name the circumstances in which the goods of third parties are subject to the tacit hypothec of a lessor as set out in <i>Bloemfontein Municipality v Jacksons Ltd</i> 1929 AD 266 | (4) |

[20]**QUESTION 4**

- | | | |
|----------|---|-----|
| 37-38 | (a) What is the purpose of the "subtraction from the <i>dominium</i> " test and in which decision was this test formulated? <i>ex parte Geldenhuys</i> | (2) |
| 12-115 | (b) Q is the owner of a car. T, a thief, steals the car. T gives the car to his son, T1, to use. Against whom can Q institute the <i>condictio furtiva</i> ? What are the requirements for the remedy and what can Q claim? | (5) |
| 30 | (c) Briefly discuss how both direct and indirect control can be exercised over a thing with reference to a relevant example | (4) |
| 176 (77) | (d) Indicate whether the following terms in a security agreement are enforceable or not | |
| | (i) "The pledgee may keep the pledged object if the pledgor does not repay the principal debt in full within six months" | |
| | (ii) "The pledgee may sell the pledged object without recourse to the court if the pledgor does not repay the principal debt in full within six months" | |

- 9183 (iii) "The mortgagee may sell the farm without recourse to the court if the mortgagor does not repay the principal debt in full within six months" (3)
- 12 (e) How was a right of retention formulated in *Buzzard Electrical v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 4 SA 19 (T)? (3)
- (f) What is the relevance of section 39 of the **Constitution of the Republic of South Africa** 108 of 1996? (3)

[20]

QUESTION 5

- (a) S builds a house made of corrugated iron for the herdsman. He bolts the corrugated iron to a cement foundation on the farm of his parents (X and Y). After the term of the contract of lease has expired S wants to remove the house. X and Y warn him that he cannot do that because this would amount to theft. X and Y argue that they became owners of the corrugated iron house by accession. S removes the house. Can X and Y claim the return of the building material? Substantiate fully. (5)

- (b) X and Y are co-owners of Waterval. They purchase certain farm implements from K, the cooperative, in terms of a credit agreement. K reserves ownership of the implements. The implements consist of a tractor, a plough, a harvester, spades, picks and shovels. T steals the plough and gives it to his son, Tt, to use.

(i) Can X and Y make use of the *actio ad exhibendum*?

(ii) Against whom can it be instituted?

(iii) What are the requirements for a successful reliance on this remedy? (5)

- (c) S has entered into an agreement with Q and R in terms of which they grant him the right to use the road over their farm. This agreement is in writing but not registered. Q and R sell their farm and the new owner refuses to let S use the road. Discuss the position of S with reference to relevant case law. (4)

- (d) Your client X, asks for legal advice. She owns a valuable piece of undeveloped beachfront property outside Cape Town. X inherited the property from her father, who bought the property two years ago with the intention of developing it as an upmarket holiday resort. However, when X started making enquiries about the possibilities of development, she discovered that a new conservation ordinance, promulgated just six months ago (just months after the **Constitution of the Republic of South Africa** 108 of 1996 came into operation), places an absolute prohibition on development or any building in the relevant area. Property consultants told X that her property is now practically worthless and that nobody would buy it from her at any cost. What is her legal position? Explain briefly. (5)

[20]

TOTAL

[100]

4

ASSIGNMENT 02: FIRST SEMESTER
(DUE DATE: 15 APRIL 2000)

ANSWER ALL QUESTIONS

QUESTION 1

Define:

- (a) Law of Property (5)
 - (b) Principal thing (3)
 - (c) Ownership (5)
 - (d) Control (3)
 - (e) Lawful control (2)
 - (f) Unlawful control (2)
- [20]**

QUESTION 2

- (a) Name the requirements for
 - (i) An interdict (3)
 - (ii) Creation of a praedial (real) servitude (6)
- (b) Mention the main forms of security (2)
- (c) Mention the categories of expenses or improvements which can be effected to a thing (3)
- (d) Why are mineral rights unique? (2)
- (e) Indicate the three main categories of land reform programmes (3)
 - (i) To which category does the *Development Facilitation Act 67* of 1995 belong? (1)

[20]

QUESTION 3

- (a) Distinguish between a right and an entitlement. (3)
- (b) Mention the remedies of co-owners. (3)
- (c) Briefly explain what each of the following acts regulate:
- (i) *Upgrading of Land Tenure Rights Act* 112 of 1991 (1)
 - (ii) *Land Reform (Labour Tenants) Act* 3 of 1996 (1)
 - (iii) *Extension of Security of Tenure Act* 62 of 1997 (1)
- (d) Distinguish between:
- (i) original and derivative forms of acquisition of ownership (5)
 - (ii) *bona fide* and *mala fide* control (2)
 - (iii) control and possession (2)
 - (iv) main groups of servitudes (2)
- [20]

QUESTION 4

- (a) S builds a house made of corrugated iron for his herdsman. He bolts the corrugated iron onto a cement slab on the farm of his parents (X and Y). After the term of the contract of lease has expired S wants to remove the house. X warns him that he cannot do that because this would amount to theft. X and Y argue that they became owners of the corrugated iron house by accession. S removes the house. X and Y claim the return of the building material with the *rei vindicatio*. Will they succeed with their claim? Substantiate your answer. (10)
- (b) Q is the owner of a car. T, a thief, steals the car.
- (i) T gives the car to his son, Tt, to use. Can Q institute the *condictio furtiva* against Tt? Substantiate your answer. (5)
 - (ii) Because T is afraid of being caught by the police, he sets fire to the car and it is completely destroyed. Can Q institute the *actio ad exhibendum* against T and what can he claim? (5)
- [20]

pg 66-68
pg 115
pg 113

QUESTION 5

(a) X and Y are co-owners of the farm "Waterval" They purchase certain farm implements from K, the cooperative in terms of a credit agreement K reserves ownership of the farm implements. The farm implements consist of a plough, a harvester, a tractor, spades, rakes and picks. T steals the plough. The harvester is left with the farm workers on the north-eastern corner of the farm where it is required in autumn when the wheat is harvested. Z, a neighbour borrows the tractor for a month to plough her own fields. When she has finished she lends her rented trailer to X and Y in return for the loan of the tractor.

Indicate with which intention does the following persons exercise control:

- (i) X and Y with regard to the farm implements (lawful holders) (1)
- (ii) X and Y with regard to the trailer (lawful holders) (1)
- (iii) T with regard to the plough (malicious unlawful possession) (1)
- (iv) the farm workers with regard to the harvester (lawful holders) (1)
- (v) Z with regard to the tractor (lawful holder) (1)

pg 131
-133

(b) X and Y are co-owners of the farm and of their car, but the farm implements were purchased from the cooperative K, in terms of a credit agreement. The cooperative reserved ownership of the farm implements. X and Y owe L, the Land Bank, R100 000-00 and, to secure this debt the Land Bank holds a mortgage over the farm. X's mother, M has a right of habitation over the old homestead where she lives at present. S has a right of way and drives over his grandparents' farm, "Pulang", every day to check his cattle on Waterval. H, a mining company, has mining rights over Waterval, Pulang and Highlands

pg 149

Indicate the nature and type of right involved in each of the following situations

- (i) K in relation to the farm implements (owner) until X-Y pay off the credit agreement (2)
- (ii) L in relation to X and Y's farm Limited real right (of mortgage) (2) security right
- (iii) M in relation to the old homestead Limited real right of personal servitude (2) (habitation)
- (iv) S in relation to his grandparents' (Q and R) farm, "Pulang" limited (2) real right of passage
- (v) H in relation to the Waterval, Pulang and Highlands limited real right in the form of mineral rights (2) servitude

(c) B and C live in the city and work for S. The farm "Highlands" was taken from their parents in 1923 in terms of racially-based legislation and against compensation. Indicate which factors will be taken into consideration in determining the amount of compensation payable in terms of the property clause in the **Constitution of the Republic of South Africa 108 of 1996** (5)

pg 207-210
Sec 25 of the

[20]

TOTAL: 100 MARKS

(in white)
- Depreciation clause
- expropriation clause

ASSIGNMENT 01: SECOND SEMESTER
(DUE DATE: 12 AUGUST 2000)

QUESTION

Give a brief summary of the following cases under the following headings:

- Facts
- Legal question
- Finding
- Application of finding on relevant facts

- (1) *Ex parte Geldenhuys* 1926 OPD 155
- (2) *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A)
- (3) *Reck v Mills* 1990 (1) SA 751 (A)
- (4) *Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A)
- (5) *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (3) SA 682 (A)
- (6) *Eskom v Rollomatic Engineering (Edms) Bpk* 1992 (2) SA 725 (A)
- (7) *Chetty v Naidoo* 1974 (3) SA 13 (A)
- (8) *Brink v Van Niekerk* 1986 (3) SA 428 (T)
- (9) *Hassam v Shaboodien* 1966 (2) SA 720 (C)
- (10) *Grant v Stonestreet* 1968 (4) SA 1 (A)

[100]

(YOUR DISCUSSION OF EACH CASE MAY NOT EXCEED 250 WORDS)

ASSIGNMENT 02: SECOND SEMESTER
(DUE DATE: 15 SEPTEMBER 2000)

ANSWER ALL QUESTIONS

QUESTION 1

Define:

- (a) Property (2)
- (b) Appropriation (5)
- (c) Delivery (5)
- (d) Notarial bond as contemplated in the *Security by means of Movable Property Act 57* of 1993 (5)
- (e) Leasehold (3)
- [20]**

QUESTION 2

- (a) Distinguish between:
- (i) principal things
- (ii) accessory things
- (iii) auxiliary things (6)
- (b) The law and the rights of other persons place limitations on ownership. Mention the different categories of limitations in each of these groups and give examples of each category. (8)
- (c) Give six examples of rights which would qualify as "property" in terms of the **Constitution of the Republic of South Africa 108** of 1996. (6)
- [20]**

QUESTION 3

- (a) Name the requirements for each of the following remedies.
- (i) *rei vindicatio* (3)
- (ii) *condictio furtiva* (5)
- (iii) *mandament van spolie* (2)
- (b) Name the defences allowed against the spoliation remedy (*mandament van spolie*) (6)
- (c) What is the content of the *actio negatoria*? (1)
- (d) Mention the remedies which are available in the case of non-compliance with restrictive conditions (3)
- [20]**

QUESTION 4

(see building)

- 950
pg 190
pg 210
pg 38
- (a) Q accidentally sinks a borehole on X's farm and erects a windmill there, thinking that the windmill was on his side of the boundary. How would you describe Q's legal position in relation to the windmill? Substantiate your answer. (5)
- (b) Briefly explain the operation of the tacit hypothec of a credit grantor in the case of insolvency. (6)
- (c) Name the factors which influence the amount of compensation payable in terms of section 25 of the **Constitution of the Republic of South Africa** 108 of 1996. (5)
- (d) Indicate the difference between ownership and limited real rights with reference to examples. (4)
- [20]

QUESTION 5

- 196-97
strong with
the long
hand
istum
- (a) A windmill stands on the farm of X and Y, which they no longer use. S purchases the windmill from them. His father takes him to the windmill and shows it to him. He says "Here is the windmill. You must come and dismantle it and take it away." S undertakes to do this as soon as he has the time. S becomes insolvent and the curator of the insolvent estate claims that the windmill is part of the insolvent estate. X and Y deny this and argue that the windmill is still part of their land. Will they be successful with their argument? Substantiate your answer fully. (12)
- (b) X is involved in an accident. The car is insured with Santam. X takes the car to Z for repairs. After the repairs have been completed and paid for by Santam, Santam realises that the premiums had never been paid by X. Santam cancels the insurance contract and collects the car from Z. Santam refuses to give the car to X. X claims the car with the *revindicatio* from Santam. Will X be successful? Substantiate your answer fully with reference to authority. (8)

TOTAL: 100 MARKS

Singh v Santam Insurance

[20]

(Henc) pg 192
See also case summary for Singh case

We really do hope that you will enjoy working through this module and we wish you success with your studies! Remember that we are here to help you master the module - do not hesitate to contact us if you have any questions or problems.

Prof. Susan Scott
Prof. Jeannie van Wyk
Mr PD Brink

ASSIGNMENT 02: FIRST SEMESTER
(DUE DATE: 15 APRIL 2002)

ANSWER ALL QUESTIONS

QUESTION 1

Briefly describe:

- | | |
|-----------------------------|-------------|
| (a) Remedy | (6) |
| (b) Nuisance in wider sense | (5) |
| (c) Shareblock scheme | (5) |
| (d) Judicial pledge | (4) |
| | [20] |

QUESTION 2

Briefly compare:

- | | |
|--|-------------|
| (a) Consumable and non-consumable things | (5) |
| (b) Forfeiture and confiscation | (5) |
| (c) Lawful and unlawful control | (4) |
| (d) Pledge and notarial bond | (6) |
| | [20] |

QUESTION 3

- (a) Name the remedies provided in terms of the *Restitution of Land Rights Act 22 of 1994*. (3)
- (b) What are the different methods of termination of possession and holdership? (6)
- (c) Q and R bequeath their farm to Y on condition that the farm must be excluded from the joint estate of X and Y.
 Can this condition be registered against the title deed of the property and what is the effect of such a condition? (3)
- (d) Q and R have an agreement with S in terms of which they undertake to register a servitude over their farm in favour of 'Highlands'.

- pg 162
103
- (i) Before the servitude can be registered, S dies and his wife now wishes to use the road. Briefly advise her. (2)
- (ii) After the servitude has been registered, S dies and his wife now wishes to use the road. Briefly advise her. (2)
- (iii) Before the servitude can be registered, S sells the farm and the new owner now wishes to use the road. Briefly advise him. (2)
- (iv) After the servitude is registered, S sells the farm and the new owner now wishes to use the road. Briefly advise him. (2)
- [20]

QUESTION 4

- pg 10
pg 125
- (a) Briefly distinguish between deprivation and expropriation in terms of section 25 of the *Constitution of the Republic of South Africa* 108 of 1996. (6)
- (b) Discuss **two** of the remedies available to the co-owner. (8)
- (c) When will the *huur gaat voor koop* rule apply? (6)
- [20]

QUESTION 5

- pg 119-121
- (a) X and Y are seriously affected by the baboons that destroy their mealies. X installs an apparatus to chase away the baboons on the boundary with his neighbour. The apparatus makes loud noises at regular intervals during the day and the night. The neighbour writes a letter to X and Y to complain about the noise during the night, but X ignores it and refuses to speak to his neighbour on the telephone. The neighbour approaches you for legal advice. Advise the neighbour fully with reference to authority. (10)
- (b) Q is the owner of a car. T, a thief, steals the car.
- (i) T changes the engine and registration numbers and sells the car to Z. Can Q claim the car from Z. If so, what must she prove to be successful with her claim? (4)
- (ii) Because T is afraid of being caught by the police, he sets fire to the car and destroys it. Can Q institute the *actio ad exhibendum* against T (substantiate your answer) and what can she claim? (4)
- pg 119-112

- (c) B and C live in town, but work for S who is the owner of the farm 'Highlands'. The farm 'Highlands' had been taken away from B and C's parents in 1923 in terms of racially based legislation. B and C now approach the Land Claims Court to ask that the farm be returned to them. Which statute is applicable in this case and why can they rely on it? (2)

[20]

TOTAL: 100 marks

ASSIGNMENT 01: SECOND SEMESTER

(DUE DATE: 15 AUGUST 2002)

Give a brief summary of the following prescribed cases under the following headings:

Facts
 Legal question
Ratio decidendi
 Finding

(100)

(YOUR DISCUSSION OF EACH CASE MAY NOT EXCEED 250 WORDS.)

- (1) *Ex parte Geldenhuys* 1926 OPD 155
- (2) *Gien v Gien* 1979 (2) SA 1113 (T)
- (3) *Reck v Mills* 1990 (1) SA 751 (A)
- (4) *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (3) SA 682 (A)
- (5) *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (Wp) Bpk* 1996 (3) SA 273 (A)
- (6) *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 (3) SA 188 (A)
- (7) *Chetty v Naidoo* 1974 (3) SA 13 (A)
- (8) *Setlogelo v Setlogelo* 1914 AD 221
- (9) *Hassam v Shaboodien* 1966 (2) SA 720 (C)
- (10) *Singh v Santam Insurance Ltd* 1997 (1) SA 291 (A)

ASSIGNMENT 02: SECOND SEMESTER

(DUE DATE: 13 SEPTEMBER 2002) AND 2003

ANSWER ALL QUESTIONS**QUESTION 1****Define:**

- | | |
|----------------------|-------------|
| (a) property | (5) |
| (b) attornment | (5) |
| (c) accession | (5) |
| (d) control | (3) |
| (e) improvement lien | (2) |
| | [20] |

QUESTION 2**Mention the**

- | | |
|--|-------------|
| (a) different types of schemes that can be implemented to establish a housing development scheme for retired persons and indicate the nature of the right that can be acquired in terms of each. | (5) |
| (b) different methods of termination of possession and holdership. | (6) |
| (c) four categories of real security rights. | (4) |
| (d) factors which in terms of section 25 of the <i>Constitution of the Republic of South Africa</i> 108 of 1996 will influence the amount of compensation payable in case of expropriation. | (5) |
| | [20] |

QUESTION 3**Distinguish between:**

- | | |
|--|-------------|
| (a) singular and composite thing | (5) |
| (b) original and derivative method of acquisition of ownership | (5) |
| (c) registered long-term lease and unregistered long-term lease with regard to the <i>inurendat voor koop</i> rule | (5) |
| (d) debtor-creditor lien and enrichment lien | (5) |
| | [20] |

QUESTION 4

- pg 125
- pg 113
- pg 132
- 2901 an
10 may 14
pg 113
- pg 209-
210
- (a) Briefly discuss the steps that can be taken if co-owners cannot reach an agreement on the subdivision of the common property. (5)
- (b) Q is the owner of a car. T, a thief, steals the car. Because T is afraid of being caught by the police, he sets fire to the car and destroys it. Can Q institute the *actio ad exhibendum* against T? What requirements must Q meet and what can he claim? (4)
- (c) Define lawful holder. (2)
- (d) S, the son of X and Y, leases a portion of his parents' farm. When his father's farm implements are stolen he lends some of his equipment to his father, X, to use. Father and son have an argument. In his anger X breaks his son's equipment. Indicate which remedy is available to S and what the requirements for success are. (4)
- (e) After S has successfully prevented the local authority from digging trenches on his farm and through the dam wall, the local authority, because it is angry at having lost the court case against S, expropriates a part of S's farm and pays no compensation. Indicate whether this is in accordance with the property clause of the *Constitution of the Republic of South Africa* 108 of 1996. (5)

[20]**QUESTION 5**

- pg 53
- (a) X and Y entered into a contract of lease with S. In terms of the contract S can use the farm of X and Y for grazing purposes. X and Y decide to utilise the whole farm themselves by starting a nursery. They chase all S's livestock back to his farm and close off the gate to their farm. They forbid S from using their farm any longer for grazing purposes. Fully discuss the limitations on ownership applicable here. (5)
- (b) M has a right of habitation over a homestead on X and Y's farm. X and Y decide that M is too old to stay in the homestead. She refuses to go to a retirement village. They decide to get an eviction order against her and ask you to apply for the order. Explain with reference to the nature of the rights involved here whether X and Y will succeed. (5)

09/90
191

(c) Y takes a tractor, which he purchased on credit from K, the cooperative, to a garage for repairs. Y gives orders to the garage to replace the steering mechanism because it is broken. Furthermore, he requests the garage to install a canopy over the driver's seat which will keep out the sun and he asks that the tractor be painted light pink because he is bored with the green tractor. Y stops paying the instalments to K, fails to pay the garage for repairs and disappears. K claims the tractor from the garage with the *rei vindicatio*. Discuss the legal position of the garage fully.

(10)

[20]

TOTAL: [100]

We really do hope that you will enjoy working through this module and we wish you success with your studies! Remember that we are here to help you master the module - do not hesitate to contact us if you have any questions or problems.

MR PD BRINK
MS MM MOKOTONG

ASSIGNMENT 02: SECOND SEMESTER

(DUE DATE: 13 SEPTEMBER 2003) AND 2004

ANSWER ALL QUESTIONS**QUESTION 1****Define:**

- (a) Judicial pledge (5)
 (b) *Condictio furtiva* (4)
 (c) Remedy (6)
 (d) Appropriation (5)
[20]

QUESTION 2**Name:**

- (a) The different categories of mortgages (7)
 (b) The categories of the land reform and indicate which legislation supports each category (5)
 (c) The general characteristics of servitudes (5)
 (d) The elements of delivery (3)
[20]

QUESTION 3**Distinguish between:**

- (a) Deprivation and expropriation in terms of the *Constitution* (5)
 (b) Property and a thing (5)
 (c) Suspension and interruption of prescription (4)
 (d) *Res derelictae* and *res perditae* (6)
[20]

QUESTION 4

- (a) Briefly discuss the purpose and requirements of the *mandament van spolie*. (8)
 (b) Control of corporeal things is an element of ownership, possession and holdership. Explain briefly, what control is. (4)
 (c) Briefly discuss the following quotation from *Gien v Gien* 1979 (2) SA 1113 (T) at 1120C
 "Ownership is the most complete real right a person can have with regard to a thing" (8)
[20]

QUESTION 5

- PM174
- (a) P sells his car to Z, but Z cannot pay the purchase price to P immediately. Q (Z's father) — concludes a contract of suretyship with P in terms of which Q undertakes to pay the amount due to P if Z should fail to do so. A few days later Z, due to his negligence, is involved in a collision with E. Z undertakes to pay the costs for the repairs to E's car, but cannot do so immediately. As security for payment of the costs for repairs, Z offers his motorcycle to E as a pledge. Against this background answer the following questions:
- (i) What are the different types of security applicable here? (2)
- (ii) What is the nature of the right in each case? (2)
- (iii) Indicate what the position would be where Z agrees to pledge the motorcycle but does not deliver it to E. Refer to case law. (3)
- (b) C has a right of habitation over a homestead on A and B's farm. A and B decide that C is too old to stay in the homestead. C refuses to go to a retirement village. Explain, with reference to the nature of the rights involved here, whether C has a right to refuse. (5)
- (c) S builds a house made of corrugated iron for his herdsman. He bolts the corrugated iron onto a cement slab on the farm of his parents (X and Y). After the term of the contract of lease has expired S wants to remove the house. X warns him that he cannot do that because this would amount to theft. X and Y argue that they became owners of the corrugated iron house by accession. S removes the house. X and Y claim the return of the building material with *rei vindicatio*. Will they succeed? Substantiate your answer. (8)
- [20]
- TOTAL MARKS:** [100]

We really do hope that you will enjoy working through this module and we wish you success with your studies! Remember that we are here to help you master the module - do not hesitate to contact us if you have any questions or problems.

PROFESSOR JEANNIE VAN WYK
PROFESSOR SUSAN SCOTT
MR PD BRINK
MS IM NEL

applicant was before the spoliation took place. This cannot be achieved if restoration is no longer possible.

Finding:

The court emphasised the inherent nature of the spoliation remedy, that is, the fact that it is aimed at restoration, and refused such an order. The court argued that if the materials were destroyed, restoration is impossible and the spoliation remedy is not the applicable one. In such circumstances a delictual claim for damages is the appropriate remedy.

MEMORANDUM FOR ASSIGNMENT 02

QUESTION 1

Define:

- (a) ownership (5)

Ownership is the most complete real right (1) a person can have with regard to a thing. (1) The point of departure is that a person, as far as an immovable is concerned, can do on and with his/her property as he/she pleases. (1) This apparent freedom is restricted/limited (1) by the law (½) and the rights of others. (½)

(Study guide p 43 par 1.3)

- (b) servitude (7)

A servitude can be defined as a limited real right (1) to another person's thing. (1) It confers specific entitlements of use and enjoyment (1) on the holder who enjoys these entitlements in his or her personal capacity (1) (in the case of a personal servitude) (1) or as owner of a particular piece of land (1) (in the case of a land (praedial/real) servitude). (1)

(Study guide p 154 par 2)

- (c) *kustingbrief* (5)

A *kustingbrief* can be defined as a special mortgage (1) over an immovable thing to secure (1) a principal debt that has been incurred in respect of the purchase of that thing where the deed of hypothecation (1) is registered simultaneously (1) with the deed of transfer (1) of the particular thing.

(Study guide p 183 par 4.3.3)

- (d) lawful holder (3)

A lawful holder can be defined as a person who physically controls (1) the thing with the owner's permission, or of another legal person, (1) in order to derive some limited real property.

(Study guide p 77 par 2.2.2)

QUESTION 2

Name the:

- (a) characteristics of a thing (5)
- Corporeality (1)
 - External to humans (1)
 - Independence (1)
 - Subject to human control (1)
 - Useful and valuable to humans (1)
- (Study guide p 25-27 par 1.1)*
- (b) requirements for the *condictio furtiva* (6)
- Proof of ownership (1) or of retention of a lawful interest (1) in the thing from the date of the theft (½) until the date of the institution of the action. (½)
 - Theft (1) or removal of the thing with deceitful intent. (1)
 - If the action is not instituted against the thief or deceitful remover, that the defendant is the heir (1) of the former
- (Study guide p 113 par 3.1.2)*
- (c) forms of real security (4)
- Pledge (1)
 - Mortgage (1)
 - Security by means of claims (1)
 - Security granted by operation of law or tacit hypothecs (1)
- (Study guide Study unit 11)*
- (d) factors which in terms of section 25 of the *Constitution of the Republic of South Africa 108 of 1996* will influence the amount of compensation payable in the case of expropriation (5)
- Current use of the property (1)
 - History of the acquisition and use of the property (1)
 - Market value of the property (1)
 - Extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property (1)
 - Purpose of the expropriation (1)
- (Section 25(3)(a)-(e) of the Constitution of the Republic of South Africa 108 of 1996, Study guide p210 par 2.4)*

[20]

QUESTION 3

Distinguish between:

- (a) free and bound co-ownership with reference to the definition of co-ownership (7)
- CO-OWNERSHIP EXISTS WHEN two or more persons own the same thing for the same purpose

undivided shares. (1) In *free co-ownership* the co-ownership is the only relationship (1) between the co-owners. In the case of *bound co-ownership* there is an underlying legal relationship (1) between the co-owners which determines the basis of their co-ownership. (1)
(Study guide p 123 par 2)

- (b) suspension and interruption (4)

In the case of *interruption* the period of prescription ($\frac{1}{2}$) which has already run is terminated (1) and the period of prescription must begin to run anew (de novo), (1) while *suspension* is the temporary suspension ($\frac{1}{2}$) of the period of prescription. The period which has already run does not lapse, but the course is suspended and recommence (1) at a later date.
(Study guide p 76 & 78 par 9.4)

- (c) possession in good faith and possession in bad faith (4)

Possession in good faith is when a person who is not recognised as the owner (1) of the thing, because he/she does not comply with the requirements for establishing ownership, controls the thing with the intention of an owner, on the incorrect assumption (1) that he/she is in fact the owner. *Possession in bad faith* on the other hand is when a person who is aware (1) of the fact that he/she is not legally recognised as the owner of a thing, since he/she does not conform to the requirements for ownership, controls the thing with the intention of an owner. The difference between the two is that in the case of *possession in good faith* the possessor doesn't know that he/she is not the owner, and in the case of *possession in bad faith* the possessor knows that he/she is not the owner, but pretends to be. (1)
(Study guide 132 par 1.2.1)

- (d) personal and land (real/praedial) servitudes (2)

Land servitudes are created in favour of a piece of land, (1) while *personal servitudes* benefit someone in his/her personal capacity. (1)

or

Land servitudes last indefinitely. (1) in principle, while *personal servitudes* can be granted only for a specific period, (1) or for the holder's lifetime, or, if not granted for a specific period, in the case of legal persons for 100 years.

or

Land servitudes can be established over immovable things, (1) only: *personal servitudes* may be established over movables and immovables. (1)

or

Land servitudes are alienated (1) together with the land. *Personal servitudes* are inseparably attached to the holder's person and are in no way transferable. (1)
(Study guide p 155-163 par 4&5)

- (e) various types of liens (3)

Two categories of liens can be distinguished, namely *debtor-creditor liens* (½) and *enrichment liens*. (½) Enrichment liens can be divided into *salvage liens* (½) and *improvement liens* (½) A *debtor-creditor lien* is not a limited real right and can may be enforced only against the debtor and his/her successors who have knowledge of the existence of the lien. (½) An *enrichment lien* is a limited real right which comes into existence by operation of law. (½)

or

Only the amount agreed upon (½) in terms of the contract may be claimed with a *debtor-creditor lien*. (½) Only necessary or essential expenses (½) may be claimed with a *salvage lien* (½) and only useful expenses (½) may be claimed with an *improvement lien*. (½)

(Study guide p 190-191 par 3)

[20]

QUESTION 4

- (a) How is the *subtraction from the dominium*-test formulated in *Ex parte Geldenhuys* (1926 OPD 155)? (5)

“One has to look not so much to the right, but to the correlative obligation. (1) If that obligation is a burden upon the land, a subtraction from the *dominium*, (1) the corresponding right is real and registrable; (1) if it is not such an obligation, but merely an obligation binding on some person or other, (1) the corresponding right is a personal right, (1) or right in *personam*, and it cannot as a rule be registered.”

(Study guide 37 par 4)

- (b) Explain the difference between delivery with the short hand and *constitutum possessorium* with reference to both the general principles pertaining to delivery and examples. (6)

Delivery with the short hand (traditio brevi manu) - is where the transferee is already in physical control (1) of the thing by virtue of some other legal relationship. (1) Example: X donates his lawnmower to Y who borrowed the lawnmower and who still exercises control over the lawnmower at time of the donation. (1)

Constitutum possessorium is where the transferor retains physical control over the thing in which he/she agreed to transfer ownership to the transferee. (1) Only the intention towards the thing undergoes a change. Example X, after conclusion of the sale of a dress to Y, retains the dress on behalf of Y to effect certain alterations. (1)

(Study guide p 96-97 par 4.2)

- (c) Briefly discuss the accessory principle in the law of real security. (3)

All real security rights are accessory in nature (1) This means that the security rights cannot exist if there is no principal debt. (1) When the principal debt is discharged, the security right is extinguished by operation of law (*ipso iure*). (1)

(Study guide p 174 par 1)

(d) Explain the difference between the three categories of land reform. (6)

Restitution of land rights (1) - is aimed at returning specific pieces of land (½) taken away from specific people during the apartheid era. (½)

Land tenure reform (1) - involves legislation and other measures to improve the quality and security of existing land rights. (½) It applies to people who do have access to land or housing, but whose tenure is based on weak or insecure property. (½)

Redistribution of land (1) - is aimed at rectifying the unequal distribution (½) of land and making land or access to land to people who had no land or insufficient land. (½)
(Study guide p 215-221 par 2-4) [20]

QUESTION 5

(a) S decides to build a dairy and stables on *Waterval*. He buys all the building material and equipment from the cooperative. The cooperative reserves ownership of the material and equipment until the last instalment has been paid. S builds the dairy and the stables with bricks and a cement floor. S installs all the pipes and tanks for the milk. Two years after he has started the dairy, but before the cooperative has been fully paid, S becomes insolvent. The trustee of his insolvent estate argues that all the structures and equipment are movable assets which form part of S's estate. X and Y claim that, as co-owners of *Waterval*, they became owners of the structures and attachments through accession. The cooperative alleges that it remained the owner of the building materials and equipment.
Advise:

(i) X and Y (5)

X and Y can only claim ownership of the material if the material had become part of the land through accession. To determine whether accession has taken place, it must be established whether the nature and purpose (1) of the materials and the manner and degree of their attachment (1) were such as to justify the conclusion that they were permanently attached to the land. (Refer to any one of the following cases: *MacDonald Ltd v Radin NO and the Potchefstroom Dairies and Industries Co Ltd* or *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (Wp) Bpk.*) (1) If these factors are not conclusive one must look at the intention (1) with which the movables were attached to the land. In both the above cases it was held that one must look at the intention of the owner of the movable things. (1) Accordingly the attachments remained movable. (1)

(ii) the trustee (2)

Since the attachments remained movable, the cooperative remained owner. However, since S was insolvent, (1) the *Insolvency Act* automatically converted his ownership into a tacit hypothec (1)

or

The trustee cannot claim the movables since S was neither owner of the farm (1), nor owner of the movables. (1)

ii) the cooperative (3)

Since the attachments remained movable, the cooperative remained owner thereof. (1) If there was no insolvency entitling the trustee to ownership, the cooperative could have claimed the movables.

(1) Furthermore, in *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (Wp) Bpk* the court upheld the defence of estoppel against the owner of the movables. (1)

(Study guide p 65-69 par 3.4)

B and C, farm workers of S, occupy and cultivate a portion of Highlands. S has an argument with the farm workers and they refuse to work. S removes their furniture and clothing from the houses. S breaks down their houses. Thereafter S burns all their furniture and clothing, as well as the materials with which the houses were built. B and C want restoration of their possessions as soon as possible.

i) Advise B and C on the most appropriate remedy and what the requirements for successful reliance on this remedy are. (3)

The most appropriate remedy would be the spoliation remedy (*mandament van spolie*). (1) B and C must prove that they had peaceful and undisturbed control of the property (1) and that their control was disturbed or destroyed unlawfully by S. (1)

ii) S avers that B and C were never in control of the houses because, at the relevant time, they were living elsewhere on the farm where they were harvesting their crops. Will S succeed with this defence? Substantiate your answer. (2)

S will not succeed with his defence. (1) because mere temporary absence does not destroy control. B and C must prove that they had effective control. (1) (*Scholz v Faifer* 1910 TS 243)

iii) S raises the defence that it is impossible to restore the furniture, the clothing and the building materials, since they had been destroyed. Will S succeed with this defence? Substantiate your answer. (5)

The defence of impossibility is a valid defence to the spoliation remedy (*mandament van spolie*). (1) because a court cannot force a respondent to do something that is impossible. (1) This defence can therefore be raised when the property has been destroyed. (1) Where assembly and repairs are possible the court can order restoration. (1) Where a certain degree of replacement is required the court may order restoration with materials of similar nature. (1)

(Study guide p 141-143 par 2.3) [20]

TOTAL MARKS : [100]

QUESTION 1

Define:

- (a) Judicial pledge (5)

A real security right (1) that arises officially, that is by the attachment in terms of a court order (½) of the judgment debtor's movable or immovable things (½), on execution of the attachment order by the sheriff.(1) The attachment of movables by the sheriff has the same effect as a pledge (1) and the attachment of immovables by the sheriff has the same effect as a special mortgage of immovables.(1)

(Study Guide p192)

- (b) *Condictio furtiva* (4)

An action which can be instituted by the owner (1) or a person with a lawful interest (½) in claiming the thing (½) or its highest value since the theft (½) from the thief (1) or the person who removed the thing with deceitful intent.(½)

(Study Guide p112)

- (c) Remedy (6)

A legal process (1) with its own purpose.(1) for which certain requirements (1) are set and which protects.(½) maintains (1) or restores (½) a particular relationship (½) in a specific way.(1)

(Study Guide p21)

- (d) Appropriation (5)

Appropriation or occupation (*occupatio*) is defined as the unilateral taking (1) of physical control (1) of a thing which does not belong to anyone (*res nullius*, for example, a *res derelicta*), (1) but which is within the sphere of law (*res in commercio*) (1) with the intention of becoming its owner. (1)

(Study Guide p61) [20]

QUESTION 2

Name the:

- (a) different categories of mortgages (7)

- (i) Notarial bond
 - (ii) Special mortgage over immovable things
 - (iii) *Kustingbrief*
 - (iv) Covering bond
 - (v) Participation bond
 - (vi) Tacit hypothecs
 - (vii) Liens
 - (viii) Judicial pledge
- ((1) mark each for any 7 named)

(Study Guide p180-192)

- (b) the categories of land reform and indicate which legislation supports each category (5)

- (i) Restitution of land rights (1/2) - *Restitution of Land Rights Act* 22 of 1994 (1/2)
- (ii) Land tenure reform (1/2) - *Upgrading of Land Tenure Rights Act* 112 of 1991; (1/2) *Communal Property Associations Act* 28 of 1996; (1/2) *Land Reform (Labour Tenants) Act* 3 of 1996; (1/2) *Extension of Security of Tenure Act* 62 of 1997; (1/2) *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (1/2)
- (iii) Redistribution of land (1/2) - *Development Facilitation Act* 67 of 1995; (1/2) *Land Reform (Labour Tenants) Act* 3 of 1996; (1/2) *Housing Act* 107 of 1997 (1/2) (6 possible marks)

(Study Guide p215-222)

- (c) the general characteristics of servitudes (5)

- (i) The holder of a servitude acquires a limited real right in the property of another person.
- (ii) The holder of a servitude cannot expect an owner to perform a positive duty.
- (iii) No person may acquire a servitude over his/her own thing. (1)
- (iv) The holder of a servitude may not transfer the servitude to another person. (1)
- (v) The holder of a servitude must exercise the entitlement reasonably. (1)

(Study Guide p154-163)

- (d) the elements of delivery (3)
- (i) physical element (1) (*corpus*) (½)
 - (ii) mental element (1) (*animus*) (½)

(Study Guide p96)

[20]

QUESTION 3

Distinguish between:

- (a) deprivation and expropriation in terms of the *Constitution* (5)
- (i) Compensation is not usually paid for deprivations, (½) whereas it is paid for expropriations. (½)
 - (ii) A deprivation involves the exercise of the State's regulatory powers in respect of property (½) and an expropriation occurs where property is taken away by the State. (½) In the case of a deprivation the property remains in the hands of the owner, (½) but in the case of an expropriation the ownership of the property vests in the State. (½) The State may either keep the property or transfer it to someone else. (1)
 - (iii) Another distinction is that section 25(2) of the *Constitution* provides that expropriations should be for a public purpose or in the public interest. (½) Section 25(1) does not contain a similar provision regarding deprivations. (½)

(Study Guide p210)

- (b) property and a thing (5)

Property is everything that can form part of a person's estate (½) including corporeal things (½) and incorporeal things (½) and rights. (½)

A thing is a legal object which is an independent part (½) of the corporeal world (½) which is external to humans, (½) subject to human control (½) and is useful (½) and valuable to humans. (½)

(Study Guide p21 and p25)

- (c) Suspension and interruption of prescription (4)

In the case of suspension the period of prescription which has already run does not lapse, (1) but the course is suspended and can recommence at a later date. (1)

In the case of interruption, the period of prescription which has already run is terminated, (1) and the period of prescription must begin to run anew (*ae nouo*). (1)

(Study Guide p76 & 78)

- (d) *Res derelictae* and *res deperditae* (6)

Res derelictae are things which a former owner has abandoned (1) with the intention of ceasing to be owner thereof.(1) Such things are then *res nullius* and may become the property of any person taking control of them.(1) A *res deperditae* is a thing which have been lost by an owner.(1) It is not a *res nullius*, but remains the property of the owner(1) as long as it is his/her intention to retain ownership.(1)

(Study Guide p62) [20]

QUESTION 4

- (a) Briefly discuss the purpose and requirements of the *mandament van spolie*. (8)

This remedy is aimed at the protection of the legal order, in a unique way. Its purpose is to prevent self-help which may result in a breach of the peace,(1) by summarily undoing the consequences of such self-help (1) (in so far as it has disturbed the existing relationships of control), without any reference to the lawfulness (1) or otherwise of the pre-existing control which is to be restored.(1) In other words, the court does not investigate the merits of the application. (1)

The requirements for a successful reliance on this remedy are the following:

- (i) The applicant (*spoliatus*: the person whose control has been disturbed) must have enjoyed peaceful (1/2) and undisturbed (1/2) control (1) of the thing.
- (ii) The respondent (*spoliator*: the person who disturbed the control of the *spoliatus*) must have disturbed the applicant's control in an unlawful manner.(1)

(Study Guide p141-142)

- (b) Control of corporeal things is an element of ownership, possession and holdership. Explain briefly what control is. (4)

Control consists of a physical or corporeal element (1) i.e the way in which the thing is actually held or controlled (1) and a mental element (1) i.e the intention with which a thing is held or controlled.(1)

(Study Guide p61 and p131)

- (c) Briefly discuss the following quotation from *Gien v Gien* 1979 (2) SA 1115 (F) at p. 1200: "Ownership is the most complete real right a person can have with regard to a thing" (8)

The point of departure is that a person can do with his/her thing as he/she pleases.(1) This apparent freedom is restricted, however, by the law (1) and the rights of others.(1) Ownership is restricted by the (objective) law through statutory limitations (1) and neighbour law. (1) Ownership is also restricted by the (subjective) rights of other people through limited real rights(1) and personal rights (creditor's rights).(1) Consequently, no owner ever has the unlimited right to exercise his/her entitlement in absolute freedom in an unfettered discretion.

(Study Guide p43) [20]

QUESTION 5

(a) P sells his car to Z, but Z cannot pay the purchase price to P immediately. Q (Z's father) concludes a contract of suretyship with P in terms of which Q undertakes to pay the amount due to P if Z should fail to do so. A few days later Z, due to his negligence, is involved in a collision with E. Z undertakes to pay the costs of the repairs to E's car, but cannot do so immediately. As security for the payment of the costs of repairs, Z offers his motorcycle to E as a pledge. Against this background answer the following questions:

(i) What are the different types of security applicable here? (2)

Real security (pledge) (1) and personal security (suretyship).(1)

(Study Guide p173)

(ii) What is the nature of the right in each case? (2)

Limited real right (pledge) (1) and personal/creditor's right (suretyship).(1)

(Study Guide p173)

(iii) Indicate what the position would be where Z agrees to pledge the motorcycle but does not deliver it to E. Refer to case law. (3)

A pledge can only come into operation when the property is delivered as security by the pledgor to the pledgee.(1) In *Quenty's Motors (Pty) Ltd v Standard Credit Corporation* (1) a pledge was represented as a simulated contract of sale to avoid having to effect delivery of the object.(1/2) The court held that this was unenforceable.(1/2)

(Study Guide p175; *Quenty's Motors (Pty) Ltd v Standard Credit Corporation* 1994 (3) SA 188 (A))

(b) C has a right of habitation over a homestead on A and B's farm. A and B decide that C is too old to stay in the homestead. C refuses to go to a retirement village. Explain, with reference to the nature of the rights involved here, whether C has a right to refuse. (5)

Dwelling is a personal servitude conferring a limited real right (1) on the holder to occupy another's house.(1) with retention of the character of the thing.(1) C's right limits the rights of A and B as owners of the farm.(1) Therefore C does have the right to refuse.(1)

(Study Guide p161-162)

(c) S builds a house of corrugated iron for his herdsmen. He bolts the corrugated iron onto a cement slab on the farm of his parents (X and Y). After the term of the contract of lease has expired S wants to remove the house. X warns him that he cannot do that because it would amount to theft. X and Y argue that they became owners of the corrugated iron house by accession. S removes the house. X and Y claim return of the building material, with the *fructus* *in rem*. Will they succeed? Substantiate your answer.

The requirements for the *rei vindicatio* are that X and Y must prove that

- (i) they are the owners; (1)
- (ii) the building materials exist and are identifiable; (1)
- (iii) the defendant (S) was in control of the materials when the action was instituted.(1)

X and Y could only have become owners of the building material by means of building (*inaedificatio*). To determine whether the building material became attached to the land the following three factors must be taken into account:

- (i) nature and purpose of the attached thing; (1)
- (ii) manner and degree of attachment; (1)
- (iii) intention with which the attachment was made. (1)

A number of court decisions have concentrated on the application of these three criteria eg *MacDonald Ltd v Radn and the Potchefstroom Dairies Industries Co Ltd* (1915 AD 454); *Standard-Vacuum Refining Co v Durban City Council* (1961 (2) SA 669 (A)); *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* (1978 (3) SA 682 (A)); *Melcorp SA v Joint Municipal Pension Fund (Tvl)* (1980 (2) SA 214 (W)); *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (Wp) Bpk* (1996 (3) SA 273 (A)). The varying interpretations of intention are relevant.(1) In *Konstanz* the subjective intention of the owner of the movables are decisive. The outcome of a decision could go either way depending on the application of the three criteria.(1)

(8)

(Study Guide p66-68 & 109)

[20]

TOTAL : 100

COMMENTARY ON ASSIGNMENT 01

2005

QUESTION 1

Indicate the **INCORRECT** statement

The owner of a car can:

- 1 pledge the car and thereby vest a real security right over it in favour of the pledgee. (**Correct.** *Study Guide p 44 par 1.4*)
- 2 claim it back from anyone who is controlling it unlawfully. (**Correct.** *Study Guide p 44 par 1.4*)
- 3 do anything he/she likes with it. (**Incorrect.** Although ownership is the most comprehensive real right a person can have over a thing and that the point of departure is that a person can do with his/her thing as he/she pleases, this apparent freedom is restricted by the law and by the rights of others. No owner, therefore, has the unlimited right to exercise his/her entitlements in absolute freedom in his/her own discretion. *Study Guide p 45 par 1.3*)
- 4 sell it. (**Correct.** *Study Guide p 44 par 1.4*)

The correct answer to the question is 3.

QUESTION 2

X and Y are the owners of a farm with a homestead on it. M has a right of habitation over the homestead on X and Y's farm. X and Y decide that they want to make use of the homestead. X and Y want to evict M.

Indicate the **CORRECT** statement:

X and Y can evict M, because they are the owners of the farm. (**Incorrect.** M's right of habitation is a personal servitude (limited real right) which limits X and Y's ownership. *Study Guide p 52 par 3.1*)

X and Y cannot evict M, because M has a personal servitude over the homestead. (**Correct.** X and Y's ownership is limited by M's personal servitude of habitation until M dies or until M abandons her right. *Study Guide p 52 par 3.1*)

A personal servitude can only be created over immovable things. (**Incorrect.** It can also be created over movable things such as a flock of sheep. *Study Guide p 52 par 3.1*)

- 4 X and Y would be able to evict M if M leases the homestead to her friend. (**Incorrect.** The holder of a personal servitude of habitation may let the house to someone else. *Study Guide* p 162 par 5.2.3)

The correct answer to the question is 2.

QUESTION 3

Which **one** of the following statements regarding original methods of acquisition of ownership is **INCORRECT**?

- 1 Judge of Appeal Wessels stated in *Van Wazei v Van Wazei's Trustees* (1924 AD 409) that structures built into the soil by a lessee becomes part of the soil and therefore the property of the owner of the leased premises. (**Correct**)
- 2 It was stated in *Macdonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* (1915 AD 454) that the nature of the particular article, the degree and manner of annexation and the intention of the person annexing it have to be considered to determine, whether an article, originally movable, has become immovable through accession. (**Correct**)
- 3 *Specificatio* can be defined as an original method of acquiring ownership in terms of which ownership is acquired by the authorised production of a completely new thing, using a thing belonging to another. (**Incorrect** - unauthorised production. *Study Guide* p 71 par 5.1)
- 4 Judge of Appeal Nienaber in *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (Wp) Bpk* (1996 (3) SA 273 (A)) held that in order to determine whether a movable thing has become attached to land through accession, the intention of the owner of the movable things, is decisive. (**Correct**)

The correct answer to the question is 3.

QUESTION 4

Which **one** of the following statements regarding prescription is **CORRECT**?

- 1 Interruption temporarily suspends the period of prescription. (**Incorrect.** Suspension temporarily suspends the period of prescription. *Study Guide* p 78)
- 2 X has possessed Y's farm openly as if he were the owner for 25 years. Y realises this and serves summons on X. The course of prescription is permanently interrupted. (**Incorrect.** The mere service of process does not permanently interrupt the course of prescription. Interruption occurs only if the person who lays claim to ownership succeeds in carrying his or her claim to final judgement. *Study Guide* p 77)

Prescription is an original method of acquiring ownership in terms of which a person who controls (possesses) a thing of another openly and as if he/she were the owner for an uninterrupted period of thirty years becomes the owner. (**Correct.** *Study Guide* p 72 par 6.2)

- 4 Section 2 of the *Prescription Act* 68 of 1969 provides that the running of prescription shall not be interrupted by the involuntary loss of possession. Possession can be regained by instituting the *rei vindicatio*. (**Incorrect.** Possession must be regained by a spoliation order. The *rei vindicatio* can only be instituted by an owner. *Study Guide* p 77)

The correct answer to the question is 3.

QUESTION 5

Which **one** of the following statements based on the decision of the Supreme Court of Appeal in *Info Plus v Scheelke* (1998 (3) SA 114 (SCA)) is **INCORRECT**?

- 1 Transfer of ownership of a corporeal movable thing requires transfer of control of the property by the owner to the transferee as well as a real agreement between them. (**Correct.** Decision 189E)
- 2 When a thing, that is purchased under an instalment sale agreement, with the intention of both parties that ownership shall pass on payment of the last instalment, is delivered, no further real agreement on or after delivery is required for ownership to be transferred. (**Correct.** Decision 190I)
- 3 The purchaser under the instalment sale agreement (*Info Plus*) should have been in possession of the purchased thing when the final payment was made. (**Incorrect.** This was the court *a quo*'s view. Decision 191I)
- 4 *Info Plus* should succeed in its claim of the car with the *rei vindicatio*. (**Correct.** Decision 195D)

The correct answer to the question is 3.

QUESTION 6

Which one of the following statements based on the decision of *Vasco Dry Cleaners v Twycross* (1979 (1) SA 603 (A)) is **INCORRECT**?

- 1 In the case of *constitutum possessorium* a transferor retains physical control of the thing to be transferred. (**Correct.** Decision 610A)
- 2 *Constitutum possessorium* does not constitute delivery for purposes of creating a valid pledge. (**Correct.** Decision 612A)
- 3 Only actual delivery is a sufficient method of delivery to constitute a valid pledge. (**Incorrect.** *Traditio brevi manu* [subject to clear evidence that the transaction is *bona fide*] could also be a sufficient method according to the court. Decision 611E-612A)
- 4 The real object underlying the transaction between Air Capricorn (X in example 9 p 91 of the *Study Guide*) and Twycross was not a sale agreement, but rather a pledge agreement. (**Correct.** This was referred to as a simulated transaction. The true intention of the parties has to be considered. Decision 616G-II)

The correct answer to the question is 3.

QUESTION 7

In which **court decision** was the *subtraction from the dominium* test, which is used to determine whether a specific right is a real right or a personal (creditor's) right, formulated?

- 1 *Kegal v African Superstate* (1963 (1) SA 102 (A)) (**Incorrect**. This decision concerned nuisance in neighbour law. *Study Guide Study Unit 3*)
- 2 *Gien v Gien* (1979 (2) SA 1113 (T)) (**Incorrect**. This decision concerned nuisance in neighbour law. *Study Guide Study Unit 3*)
- 3 *Ex parte Geidenhuys* (1926 OPD 155) (**Correct** *Study Guide Study Unit 2*)
- 4 *Cape Explosive Works Ltd v Denel (Pty) Ltd* (2001 (3) SA 569 (SCA)) (**Incorrect**. The Supreme Court of Appeal confirmed the test in this decision *Study Guide p 38 par 4*)

The correct answer to the question is 3.

QUESTION 8

Which remedy was **NOT** considered in the decision of *Clifford v Farinha* (1988(4) SA 315 (WLD))?

- 1 The *rei vindicatio*
- 2 The interdict
- 3 The *aquilian* action
- 4 The *condictio furtiva*

The correct answer to the question is 2.

QUESTION 9

Which **statement(s)**, mentioned below, regarding the protection of ownership is/are **INCORRECT**?

- 1 D and E
- 2 B and C
- 3 A and D
- 4 A, D and F

Statements:

- A The *rei vindicatio* is available to the owner of a thing and can be used to claim a movable or immovable thing, or the highest value of that thing. (**Incorrect**. The *rei vindicatio* can only be used to claim a thing *Study Guide p 109 par 2.1*)
- B The *condictio furtiva* can be used to claim a stolen thing or a thing which was removed with deceitful intent or the highest value of that thing since the theft or removal. (**Correct** *Study Guide p 112 par 5.1*)

- C The requirements for a successful reliance on an interdict were set out in *Setlogelo v Setlogelo* (1914 AD 221). (**Correct.** *Study Guide p 112 par 2.2.2*)
- D The *condictio furtiva* and the *rei vindicatio* can be instituted simultaneously. (**Incorrect.** These remedies can only be instituted in the alternative. *Study Guide p 112 par 3.1.1*)
- E Estoppel is a defence against the *rei vindicatio*. (**Correct.** *Study Guide p 111 par 2.1.3.3*)
- F The decision of the Appellate Division in *Quentz's Motors (Pty) Ltd v Standard Credit Corporation Ltd* (1994 (3) SA 188 (AD)) is authority for the strong protection which ownership enjoys and indicates how the defence of estoppel must be applied. (**Correct.** Decision 198H)

The correct answer to the question is 3.

QUESTION 10

Which of the following do not fit as examples of how ownership can be extinguished by the operation of law?

- 1 insolvency
- 2 destruction of thing
- 3 acquisitive prescription
- 4 attachment and sale in execution

The correct answer to the question is 2. (*Study Guide p 119 par 4.3*)

COMMENTARY ON ASSIGNMENT 02

QUESTION 1

Define:

- (a) property law (5)

Property law (the law of things) can be defined as a branch of private law (1) which consists of a number of legal rules (2) that determine the nature, content, establishment, protection, transfer and termination (3) of various real relationships (4) between a legal subject and a thing (5) as well as the rights and duties (6) ensuing from these relationships.

(*Study Guide p 19*)

- (b) remedy (5)

A remedy can be defined as a legal process (1) with its own purpose (2) for which certain requirements (3) are set and which protects (4) maintains (5) or restores (6) a particular relationship (7) in a specific way (8). (*Study Guide p 21*)

(c) *res nullius* (2)

Res nullius are things that are susceptible to ownership (1) but that belong to no-one (1) at a particular stage.

(Study Guide p 28)

(d) prescription (8)

Prescription can be defined as an original method (1) of acquiring ownership (1) in terms of which a person who controls (possesses) (1) a thing (1) openly (1) and as if he/she were the owner (1) for an uninterrupted period (1) of thirty years (1) becomes its owner.

(Study Guide p 74) [20]

QUESTION 2

(a) Name the requirements for a successful reliance on the:

(i) *rei vindicatio* (refer to a relevant court decision) (4)

For a successful reliance on the *rei vindicatio* the plaintiff must prove on a balance of probabilities, that:

- ▶ he/she is the owner (1)
- ▶ the thing exists and is identifiable (1)
- ▶ the defendant is in control (1)
- ▶ A relevant court decision is: *Chetty v Naidoo*, *Clifford v Farinha*, *Quenty's Motors v Standard Credit Corporation*, *Konstanz Properties Pty Ltd v Wm Spilhaus en Kie MacDonald Ltd v Rudin* and *The Potchefstroom Dairies and Industries Co Ltd*, *Singh v Santam Insurance*, *Eskom v Rollomatic Engineering (Edms) Bpk* (1)

(Study Guide p 109)

(ii) interdict (refer to a relevant court decision) (4)

- ▶ a clear right (1)
- ▶ injury (1) actually committed or reasonable apprehended and
- ▶ the absence of similar protection (1) by any other remedy
- ▶ A relevant court decision is: *Setlogelo v Setlogelo*, *Reek v Mills*, *Regai v African Superstate*, *Gien v Gien*, *Malnerbe v Ceres Municipality*, *Theatre Investment v Butcher Brothers*, *Brink v Van Nickerk* (1)

(Study Guide p 112)

(b) Mention four ways in which a co-owner can encumber his/her undivided share in the common property (4)

- 1 In case of movables it is possible to pledge the share (1)
- 2 In case of immovables to encumber the share with a mortgage (1)
- 3 The share can be encumbered with a personal servitude such as usufruct (1)
- 4 The share can be leased or bequeathed (1)

(Study Guide p 124)

- (c) Briefly discuss the requirements for and effect of a notarial bond in terms of section 1(1) of the *Security by Means of Movable Property Act* 57 of 1993. (5)

Requirements:

- The corporeal (1) movable things (1) of the mortgagor has to be described in the mortgage bond in such a way that it is readily recognisable. (1)

Effect:

- A notarial bond in terms of this section of the *Security by Means of Movable Property Act* 57 of 1993 provides the creditor (mortgagee) on registration (½) with a limited real right (a pledge) (1) over the defined movable property of the debtor without the property being delivered to the creditor. (½)

(Study Guide p 182)

- (d) Name the categories of land reform and give one example of a statute applicable under each category. (3)

- 1 Restitution of land rights: (½) the *Restitution of Land Rights Act* 22 of 1994 (½)
- 2 Land tenure reform: (½) the *Upgrading of Land Tenure Rights Act* 112 of 1991 **or** the *Communal Property Associations Act* 28 of 1996 **or** the *Land Reform (Labour Tenants) Act* 3 of 1996 **or** the *Extension of Security of Tenure Act* 62 of 1997 **or** the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (½)
- 3 Redistribution of land: (½) the *Development Facilitation Act* 67 of 1995 **or** the *Land Reform (Labour Tenants) Act* 3 of 1996 (½) **or** the *Housing Act* 107 of 1997.

(Study Guide p 215-222)

[20]

QUESTION 3

(a) Distinguish between:

- (i) deprivation and expropriation with reference to section 25 of the *Constitution of the Republic of South Africa* 108 of 1996 (5)

The first distinction between deprivations and expropriations is that compensation is not usually paid for deprivations, whereas it is paid for expropriations. (1)

A further distinction between deprivations and expropriations is that a deprivation involves the exercise of the State's regulatory (1) powers in respect of property and an expropriation occurs where property is taken away (1) by the State. In the case of a deprivation the property remains in the hands of the owner, but in the case of an expropriation the ownership of the property vests in the State. (1) The State may either keep the property or transfer it to someone else.

Another distinction is that section 25(2) of the Constitution provides that expropriations should be for a public purpose or in the public interest. Section 25(1) does not contain a similar provision regarding deprivations. (1)

(Study Guide p 210)

- (ii) accession and manufacture. (10)

Accession is an original method of acquiring ownership which takes place when an accessory thing

becomes merged (1) with a principal thing, (1) with the result that the two things form one entity, (1) The accessory thing loses its independence (1) and becomes part of the principal thing. The owner of the principal thing is the owner of the composite thing, (1)

Manufacture (specificatio) is an original method of acquiring ownership in terms of which ownership is acquired by the unauthorised production (1) of a completely new thing (1) using a thing belonging to another, (1)

In manufacture a new thing (1) is created by the person who will acquire ownership, (1) In the case of *manufacture* one is dealing with a composite thing, which is not the case with accession, (1)

(Study guide p 62 & 71)

(b) Briefly discuss *constitutum possessorium* as a method of delivery to establish a pledge. (5)

Constitutum possessorium is a form of delivery where the transferor (pledgor) retains physical control (1) over the thing and exercises physical control on the transferee's (pledgee's) behalf, (1) This method of transfer is not acceptable to the courts as a means of constituting a pledge, because it provides ample opportunity for fraud, (1) There is a mere change in the intention of the transferor and the transferee, (1) In order to establish a limited real security right of pledge, actual physical delivery (1) of the pledge object to the pledgee is required. Refer to *Vasco Dry Cleaners v Twyeross* (1979 (1) SA 603 (A)) or *ABSA Bank Ltd v/a Bankfin v Jordasho Auto CC* (2003 (1) SA 401 (SCA)), (1)

(Study Guide p 175-176)

[20]

QUESTION 4

(a) Analyse the nature of ownership with reference to two court decisions on neighbour-law limitations on ownership. (10)

Ownership entails the relationship between a legal subject and a thing (1) and the relationship between legal subjects regarding the thing, (1) Ownership is a real right (1) which gives the owner the most complete and absolute entitlements to a thing, (1) These entitlements are however limited by the (objective) law (1) and the (subjective) rights of others (1) (limited real rights and creditors rights), (1) For this reason no owner has the right to exercise his entitlements of ownership in absolute freedom and in his own unfettered discretion, (1)

In the case of neighbour law the exercise of an owner's entitlements is limited by the interests of neighbours, (1) The harmonization of neighbours' conflicting ownership rights can be achieved by restricting ownership (1) The test is always one of reasonableness, (1) On the one hand a landowner must exercise his/her entitlements reasonably and on the other hand the neighbouring owner or user is expected to tolerate this use within reasonable bounds, (1)

Gien v Gien (1979 (2) SA 1113 (T))

Facts

G was seriously affected by baboons that destroyed his mealies. G installed an apparatus to chase away the baboon, on the boundary with his neighbour (his brother). The apparatus made loud noises at regular intervals during the day and the night. The neighbour wrote to G to complain about the noise during the night, but G ignored it and refused to speak to his neighbour on the telephone. The neighbour instituted an interdict and requested the court to make an order to stop G from using the apparatus. G's defence was that he is the owner of the property and as such he can do of his property as he pleases.

Legal question

What is the nature and scope of ownership. (1)

Ratio decidendi

The court defined ownership as the most comprehensive real right (1) a person can have to his/her thing. In principle, it entitles the owner to do as he/she pleases (1) with his/her property. This freedom is restricted, (1) however, by the law (1) and the rights of others. (1) In this case neighbour law determines that an owner should exercise his/her ownership rights reasonably. (1)

Neighbour law deals with the limitations placed on owners in the exercise of their entitlements as owners in the interests of neighbours. A balancing of interests must be made and the criterion with which neighbour relationships is judged is that of reasonableness. Neighbours are expected to behave reasonably towards one another. An **owner** must therefore exercise (1) his/her entitlements as owner reasonably and the **neighbour** must endure (1) such exercise in a reasonable way. A certain degree of tolerance is expected of neighbours in the exercise of their entitlements as owners. (1)

Application of finding on relevant facts

The court granted the interdict. It indicated that G could have taken alternative steps to curb his problem. He could have moved the apparatus further away from the boundary. It was not necessary to set the apparatus at such high volume. All the people and animals on the neighbour's farm were adversely affected by the noise. (1)

and

Malherbe v Ceres Municipality (1951 (4) SA 510 (A))

Facts

The appellant, Malherbe approached the court for an interdict ordering the respondent, Ceres Municipality, to prevent acorns and leaves of oak trees growing alongside the streets of Ceres, from falling onto his property. The appellant averred that the oak trees constituted a nuisance on his property in that the falling oak leaves blocked the gutters of his building thereby causing rainwater to damage the walls of the building. (1)

Legal question

To determine whether falling leaves and acorns and protruding branches of trees growing alongside streets constitute a nuisance. (1)

Ratio decidendi*General*

The law expects a degree of tolerance (1) between neighbours in the exercise of their entitlements of ownership.

Regarding leaves from trees in the street

The planting of oak trees alongside the streets of towns and cities is considered to be compatible with the natural and normal use (1) of streets in the Western Province. Oak trees are benign as well as ornamental and shade giving. If their leaves are blown onto neighbouring premises by the wind then the owners of those premises must endure (1) them as a natural result of the normal use of the street by the respondent.

Regarding leaves from overhanging branches

The appellant cannot complain about falling leaves and acorns from overhanging branches, if he allows such branches to protrude onto his property. If he chooses to allow the branches of trees to protrude onto his property, he cannot expect his neighbour to clear the leaves from his property. (1) If the appellant wishes to prevent leaves and acorns from overhanging branches from falling onto his property, he must

request (1) the respondent to remove them. If the respondent refuses (1) to remove the branches, the appellant may either remove them himself (1) or he may apply for an interdict (1) either ordering the respondent to remove the overhanging branches or forbidding him to let the branches protrude onto the appellant's land.

Application of finding on relevant facts

The application for an interdict failed. (1) The falling leaves did not cause any obvious damage to the appellant's building. The damage complained about could have been avoided by the appellant by annually spending a small amount of money on cleaning the gutters. (1) It is reasonable to expect the appellant to exercise a degree of tolerance in this regard.

With regard to the overhanging branches the appellant failed because he did not prove that he had requested the respondent to remove the branches, or that the respondent refused to remove the branches or claimed that it had a right to let the branches protrude onto the appellant's land. (1)

(Study Guide p 42-50 & 53-54)

[Marks are in excess of 10.]

- (b) Discuss the criterion of reasonableness in the exercise of servitudes. Briefly refer to *Brink v Van Niekerk* (1986 (3) SA 428 (T)) in this regard. (10)

The rights of a servitude holder enjoy precedence over those of the owner, in so far as the exercise of the servitude is concerned. (1) The servitude holder is entitled to perform all the acts that are necessary for the due exercise of the servitude. (1) The exercise of the servitude should take place in a civilised manner (*civilter modo*) (1) with the least possible inconvenience to the owner (1) The owner of the servient tenement is entitled to exercise his/her rights as owner as long as these do not conflict with the servitude holder's rights. (1) The criterion of reasonableness entails that a servitude holder must exercise the entitlements within reasonable bounds. On the other hand the owner must tolerate the exercise of these entitlements within reasonable bounds.

In *Brink v Van Niekerk* the owner of the dominant tenement who was entitled to a servitude of right of way over the servient tenement granted his neighbour, who also happened to be the lessee of a part of the dominant tenement, permission to use the servitude road over the servient tenement in order to enable the neighbour to reach the neighbour's own land. (1) The owner of the servient tenement applied to court first, to forbid the owner of the dominant tenement to allow the neighbour or any other person to use the servitude road over the servient tenement to reach the neighbour's land and, second, to forbid the neighbour to use the road to reach his own land. (1)

The court, however, found that no evidence was produced to show that the use of the servitude road was inconsiderate or unreasonable, or that the use caused any damage or inconvenience. (1) It could therefore not be held that the holder of the servitude did not act *civilter modo* in the exercise of his servitude. (1) The court further held that, as a lessee of part of the dominant tenement, the neighbour's presence on the dominant tenement was lawful. Therefore, it was irrelevant whether the neighbour used the servitude road over the servient tenement, with the consent of the dominant owner, to reach the dominant tenement or to reach his (the neighbour's) own land. (1) The mere permission to use the road does not mean that the servitude holder did not act *civilter modo*. Additional evidence was needed to prove this. (1)

(Study Guide p 163 & Brink v Van Niekerk (1986 (3) SA 428 (T))

[Marks are in excess of 10.]

[20]

QUESTION 5

- (a) Z rents a billiard room in Newtown from S. In terms of the lease agreement Z is not allowed to serve alcohol on the premises or keep it open after twelve at night. S and Z insert a term in the agreement entitling S to take control of the premises if Z contravenes any of the terms of the lease. Z serves alcohol to his friends and holds rowdy parties until sunrise. The neighbours complain to S. S removes the locks from the building and fits new ones. He locks all entrances to the premises and effectively debar Z from using or entering the premises. Z applies for a spoliation order. Briefly indicate the nature of this remedy, the requirements for the remedy and Z's chances of success. You must refer to the relevant court decision. (5)

The spoliation remedy is aimed at the protection of the legal order in a unique way. The purpose of the remedy is to prevent self-help which may result in a breach of the peace, (1) by summarily undoing the consequences of such self-help without reference to the lawfulness or otherwise of the pre-existing control which is to be restored. (1) In other words, the court does not investigate the merits of the application.

The requirements for a successful reliance on this remedy are the following:

- ▶ The applicant must have enjoyed peaceful and undisturbed control (1) of the thing
- ▶ The respondent must have disturbed the applicant's control in an unlawful manner. (1)

Z will be successful because it is clear that S resorted to unlawful self-help. S cannot rely on the clause in the lease agreement entitling him to take control of the premises, since such a clause would entitle S to take the law into his own hands which is against public policy and not permitted. (1) See *Nino Bonino v De Lange* (1906 TS 120). (1)

(Study Guide p 141-142 & *Nino Bonino v De Lange* (1906 TS 120))

- (b) Apart from the spoliation remedy and the interdict, mention one other remedy that can be used to protect possession and holdership. Indicate the aim of this remedy, against whom it can be instituted and the requirements for a successful reliance on it. (5)

There are three remedies that are applicable here. You need only discuss one of them.

Remedy: *Condictio furtiva* (1)
 Aim: To claim a stolen thing (½) or its highest value since the theft. (½)
 Against: The thief (½) or the thief's heirs (½) or the person who removed the thing with deceitful intent. (½)
 Requirements: To succeed with this remedy the applicant must prove:
 ▶ a lawful interest (½) from date of theft to date of institution of the action (½)
 ▶ theft (½) or removal with deceitful intent (½)
 ▶ if the action is not instituted against the thief or deceitful remover, that the defendant is the heir of the former (½)

or

Remedy: Declaratory order (1)
 Aim: To authoritatively determine and circumscribe the respective rights of each party with regard to the thing. (1)
 Against: Another possessor/holder (1)

