



Tutorial Letter 201/1/2012

Property Law

PVL3701

Semester 1

Department of Private Law

This tutorial letter contains important information about your module.

Bar code



EXAMINATION INFORMATION

**COMMENTARY ON ASSIGNMENT 01 FIRST SEMESTER 2012
COMMENTARY ON ASSIGNMENT 02 FIRST SEMESTER 2012
COMMENTARY ON ASSIGNMENT 03 FIRST SEMESTER 2012**

Dear Student

This tutorial letter contains commentary on **Assignment 01, 02 and 03** for the first semester.

Information regarding the examination:

- ✓ **This is the last tutorial letter that you will receive this semester.**
- ✓ **The examination paper will consist of two sections. Section 1 (20 marks out of 100 marks) of your examination paper will consist of multiple choice questions. Examples of multiple choice questions can be found in your compulsory assignment 01. The questions in Section 2 (80 marks out of 100 marks) of the examination paper will be similar to the questions asked in your Study Guide and in assignments 02 and 03.**
- ✓ **Assignment 03 was a previous examination paper.**
- ✓ **Make sure that you study ALL the work contained in the Study Guide, as well as the cases listed in tutorial letter 101/3/2012 (page 8-9).**
- ✓ **Please take note of Part II in your Study Guide that deals with writing skills, especially page 15 and further.**
- ✓ **Take note of the mark allocation in tutorial letter 101/3/2012 (page 12). This will be very helpful in your preparation for the examination.**

We trust that this tutorial letter will assist you in your studies.

Please contact us if you have any queries or experience problems with this module.

Yours sincerely

PROF INA KNOBEL knobeim@unisa.ac.za **012 429-8491 / 084 965 1742**

MS MITZI WIESE wiesem@unisa.ac.za **012 429-8466**

COMMENTARY ON ASSIGNMENT 01

These questions are based on the Study Units 1-8.

ANSWER THE QUESTIONS BY CHOOSING ANSWER (1), (2), (3) OR (4) AND BY INDICATING YOUR CHOICES ON THE MARK-READING SHEET

Each question counts 1 (one) mark.

1 Which option is the odd one out?

- (1) chair
- (2) freedom
- (3) patent
- (4) performance

Answer: (2)

Comments:

- (1) A chair is a movable thing and forms part of the estate of a person.
- (2) Freedom is a constitutional right and does not form part of a person's estate.
- (3) A patent is an immaterial property right and forms part of a person's estate.
- (4) A performance is a personal right or a creditor's right and forms part of a person's estate. (Study Guide p 41-49)

2 Which one of the following real relationships is always lawful?

- (1) *bona fide* possession
- (2) ownership
- (3) holdership
- (4) *mala fide* possession

Answer: (2)

Comments:

- (1) Possession is always unlawful, thus a mere real relationship. A *bona fide* possessor thinks he/she is the owner but is not.
 - (2) Ownership is always lawful, thus a real right.
 - (3) Holdership can be lawful or unlawful. A holder never has the intention of an owner, but the intention to derive a benefit. A lawful holder has a real right for example a pledgee or usufructuary. An unlawful holder has a mere real relationship, it can be *bona fide* for example a lessee who thinks the lease agreement is valid but it isn't, or it can be *mala fide*, for example a lessee who knows the lease agreement has expired but stays on.
 - (4) Possession is always unlawful. A *mala fide* possessor knows he is not the owner but holds a thing as if he is the owner, for example a thief.
(Study Guide p 35 and 197)
- 3 Which option is not a feature or characteristic of real rights?
- (1) The rule *prior in tempore potior in jure* applies to real rights.
 - (2) Real rights grant preference in the case of insolvency.
 - (3) Real rights are unenforceable against *bona fide* third parties.
 - (4) The object of a real right is a thing.

Answer: (3)**Comments:**

- (1) In the case of insolvency, a real right enjoys preference over other rights. The *prior in tempore potior in jure* rule means that "first in law is stronger in right" and is applied in the case of two or more competing real rights, therefore this option is a feature of real rights.
- (2) As mentioned above real rights enjoy preference over other rights upon insolvency. This option is therefore a feature of real rights.
- (3) Real rights are absolute in principle and therefore enforceable against the whole world. A person who has a real right over a thing can vindicate it (subject to certain exceptions) from whomever is in control of it.
- (4) The object of a real right is a corporeal thing.
(Study Guide p 58-59)

4 In which case did the court formulate the following test:

"If the obligation is a burden upon the land, a subtraction from the dominium, the corresponding right is real and registrable."

- (1) *Lorentz v Melle* (1978 (3) SA 1044 (T))
- (2) *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* (1915 AD 454)
- (3) *Theatre Investments (Pty) Ltd v Butcher Brothers (Ltd)* (1978 (3) SA 682 (A))
- (4) *Ex parte Geldenhuys* (1926 OPD 155)

Answer: (4)

Comments:

- (1) In *Lorentz v Melle* (1978 (3) SA 1044 (T)) the court amongst other things drew a distinction between a real right and a personal right. This case is not a prescribed case.
- (2) In *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* (1915 AD 454) the court applied three criteria 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.
- (3) *Theatre Investments (Pty) Ltd v Butcher Brothers (Ltd)* (1978 (3) SA 682 (A)) concerned the question whether a movable became part of an immovable by means of accession.
- (4) This is the correct option. In *Ex parte Geldenhuys* (1926 OPD 155) a test called the "subtraction from the *dominium* test" was formulated.

The test was formulated as follows:

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 (ownership), 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 is a personal right, or right *in personam*, and it cannot as a rule be registered (164)

(Study Guide p 60-64)

5 Which option does not reflect a recognised subdivision of the law of neighbours?

- (1) lateral support
- (2) planting of trees
- (3) interference with the natural flow of water
- (4) nuisance

Answer: (2)

Comments:

- (1) Lateral support is subdivision of neighbour law and means that every owner of a piece of land is entitled to support from his/her neighbour's land. Excavations must be made with that in mind.
- (2) Planting of trees is not *per se* a subdivision of neighbour law. The encroachment of the branches and roots of a tree is a subdivision of neighbour law.
- (3) Interference with the natural flow of water is a subdivision of neighbour law. Every owner of land has to receive the natural flow from water adjoining land. An upper owner may not interfere with the natural flow of the water in a manner that would be to the disadvantage of the lower owner.
- (4) Nuisance as a subdivision of neighbour law, essentially entails the balancing of the interests of neighbours. The criterion by which the balancing of interests takes place is that of reasonableness. An owner must exercise his/her entitlements as owner reasonably and the neighbour should endure such exercise in a reasonable manner.

(Study guide p 75-78)

6 Give an example of vindication as an entitlement of ownership.

- (1) X can register a bond over his property
- (2) X can burn his book.
- (3) X can claim his motor from Y.
- (4) X can donate his bike to Y.

Answer: (3)

Comments:

- (1) To register a bond over property is an example of the entitlement to burden property by granting a limited real right over your thing to someone else.
- (2) An owner is entitled to destroy his/her property. To burn a book is an example of the entitlement to destroy property.
- (3) An owner is entitled to claim his/her thing from anyone who is unlawfully in control of it. To do this the owner uses the *rei vindicatio* – this remedy is the real action with which the thing is claimed by the owner. This entitlement is therefore called the entitlement to vindicate.
- (4) An owner is entitled to alienate his/her thing. X can alienate his bike by donating or selling it to Y.

(Study Guide p 69-70)

- 7 Which option is not a requirement or characteristic of manufacture (*specificatio*) as an original mode of acquisition of ownership?
- (1) A new thing must be created.
 - (2) The new thing should be produced using material which belongs to someone else.
 - (3) The owner of the material does not lose his ownership.
 - (4) The production of the new thing must not be authorised by the owner of the material.

Answer: (3)

Comments:

- (1) For *specificatio* to take place a completely new thing has to be manufactured, for example wine from grapes.
- (2) For *specificatio* to take place the manufacturer should have used a thing belonging to another.
- (3) If *specificatio* takes place the owner of the material loses his/her ownership. *Specificatio* is an original method of acquisition of ownership which means that the owner of the thing, in this case of the material, does not cooperate, but still loses his/her ownership.
- (4) If the production of the new thing is authorised, *specificatio* does not take place. The production of a new thing must be unauthorised. It is important to note that if the manufacturer was *bona fide* under the impression that the material belonged to him/her or if he/she knew that they belonged to someone else, the owner of the material can institute an enrichment action for the value of the material or a claim for damages.

(Study Guide p 114 -115)

- 8 In which case did the court formulate the following criteria in order to establish whether a movable has become permanently attached to an immovable: the nature and the purpose of the attached thing, the manner and degree of attachment and the intention of the person annexing it?
- (1) *Standard-Vacuum Refining Co v Durban City Council* (1961 (2) SA 669 (A))
 - (2) *Konstanz Properties (Pty) Ltd v WM Spilhaus en Kie (Wp) Bpk* (1996 (3) SA 273 (A))
 - (3) *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* (1915 AD 454)
 - (4) *Theatre Investments (Pty) Ltd v Butcher Brothers (Ltd)* (1978 (3) SA 682 (A))

Answer: (3)

Comments:

- (1) In *Standard-Vacuum Refining Co v Durban City Council* (1961 (2) SA 669 (A)) Van Winsen AJA distinguished between an objective intention and a subjective intention.
- (2) In *Konstanz Properties (Pty) Ltd v WM Spilhaus en Kie (WP) Bpk* (1996 (3) SA 273 (A)) the court applied the three requirements as set out in the *MacDonald* case. Nienaber JA held that the third requirement was decisive, although he expressed unease about the correctness of the approach. He held that in the specific circumstances of the case and the subjective intention of the owner of the movables attached thereto was decisive. The ownership of the attached components therefore did not pass to the landowner by means of accession. The court stated that there was a possibility that in other circumstances the subjective intention of the owner may not prevail.
- (3) In *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* (1915 AD 454) the court applied three criteria 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, namely:
 - (i) the nature and purpose of the attached thing
 - (ii) the manner and degree of attachment; and
 - (iii) the Intention of the person annexing it or the intention of the owner of the movable
- (4) In *Theatre Investments (Pty) Ltd v Butcher Brothers (Ltd)* (1978 (3) SA 682 (A) 688) Van Winsen AJA remarked (at 688) that all the direct and inferential evidence as to the intention would have to be considered together and that in the light of that evidence it would have to be decided on a balance of probabilities whether the annexor intended a permanent attachment.
(Study Guide p 104-106)

9 Which option is the odd one out?

- (1) symbolic delivery
- (2) delivery with the short hand
- (3) *constitutum possessorium*
- (4) appropriation

Answer (4)**Comments:**

- (1) Symbolic delivery is a derivative method of acquiring ownership.
- (2) Delivery with the short hand is also a derivative method of acquiring ownership.
- (3) *Constitutum possessorium* is also a derivative method of acquiring ownership.
- (4) Appropriation is an original method of acquiring ownership.
(Study Guide p 91-92, 132, 137-141)

10. Indicate the **correct** option.

In *Nino Bonino v De Lange* (1906 TS 120) the court considered the validity of a clause contained in a lease agreement in terms of which the lessor was entitled under certain circumstances to effectively debar the lessee to have access to the premises.

- (1) The court decided that a clause in a lease agreement that allowed the parties to the agreement to take the law into their own hands was valid.
- (2) The court held that parties in certain circumstances should be allowed to be the judge of whether a breach of the contract had taken place.
- (3) Innes CJ stated that only a court of law, and not the parties to the agreement, could decide whether a breach of contract had been committed.
- (4) Innes CJ stated that the lessee's application for the spoliation remedy should fail, because the lessor's actions were authorised by the lease agreement.

Answer: (3)

Comments:

- (1) In *Nino Bonino v De Lange* the court decided that a clause in a lease entitling the lessor to take the law into his/her hands was invalid.
- (2) In *Nino Bonino v De Lange* the court held that under no circumstances the parties can be allowed to decide if there was a breach of contract, because this would mean that the lessor acted as the judge in his/her own case.
- (3) In *Nino Bonino v De Lange* Innes CJ stated that only a court, and not the parties to the agreement, could determine if a breach of contract occurred.
- (4) In *Nino Bonino v De Lange* the court held that the lessee must succeed with his application for a spoliation order seeing that his control was unlawfully disturbed. The clause in the contract entitling the lessor to deny the lessee access to the leased premises under certain circumstance allowed the lessor to be the judge in his/her own case and was invalid.

(*Nino Bonino v De Lange* 1906 TS 120)

TOTAL: [10]

COMMENTARY ON ASSIGNMENT 02

QUESTION

ASSIGNMENT 02: FIRST SEMESTER

Summarise the following case and analyse the approach to building in the judgment:

MacDonald Ltd v Radin NO and the Potchefstroom Dairies and Industries Co Ltd (1915 AD 454)

Summarise the judgment accordingly:

Facts	(1 mark)
Legal question	(1 mark)
<i>Ratio decidendi</i>	(6 marks)
Judgement	(2 marks)

TOTAL: [10]

Suggested summary:

Facts:

Potchefstroom Dairies and Industries Co Ltd, the defendant (hereinafter “Potchefstroom Dairies”) sold a piece of land on which there was a building which was used for a dairy to J. The purchase price was payable in instalments and J could only get transfer of the land after a certain part of the purchase price had been paid. J bought certain refrigerating equipment in terms of an instalment sale agreement from M (the plaintiff). This agreement provided that M would remain the owner of the equipment until the last instalment was paid. M would have been able to remove the equipment if J did not comply with his duties. The equipment weighed 12,5 tons. The plaintiff installed the equipment on the land which J bought from the defendant. Certain parts of the equipment were fastened with bolts into a concrete floor. It was clear that the equipment could be loosened and removed without causing any damage. (1)

Legal question:

Did the equipment attach permanently? (1)

Ratio decidendi:

In *Olivier v Haarhof* (TS 1906 497) it was held that each case should be considered on its own facts and that the criteria which should be considered were the nature of the movable thing, the degree and manner of its annexation and the intention of the person annexing the thing. The nature of the thing must be such that it is possible to attach it. There should be some kind of attachment. It could be the mere weight of the thing or the physical connection and there should be an intention that the thing attach permanently. Chief Justice Innes argued that the first two factors were important, but that the intention criterion was most important, and in many instances the determinable factor. The question of whether permanent attachment had taken place was often answered by only considering the nature of the movable thing. If the movable were incorporated with the land in such a way, or were attached in a way which would cause severe damage to either the attached thing or the immovable thing (land) the intention of permanency was clear. The situation became more complicated if the attached thing's identity was preserved and if the thing could be removed easily. In such instances the intention with which the thing was attached should be considered. This intention was according to Chief Justice Innes the intention of the owner of the movable thing. (6)

Judgement:

The court decided that the equipment did not become permanently attached. M did not have the intention to attach the equipment permanently and J's intention could not have the effect of ending M's ownership over the equipment. The situation would have been different if J was also the owner of the equipment. (2)

Please take note: This is only a suggested summary of this case. It was also possible to be awarded other marks for your assignment and the markers had a look at the entire court case. You could also have been awarded mark if you referred to the judgments of Juta AJA, Maasdorp AJA, Solomon JA and Wessels AJA.

COMMENTARY ON ASSIGNMENT 03

QUESTION 1

Define:

(a) ownership (7)

ANSWER:

Ownership is the most comprehensive (1) real right (1) a person can have with regard to a thing (1). In principle, a person can act upon and with his thing as he/she pleases.(1) This apparent freedom is restricted (1) however, by the law (1) and the rights of others. (1)

(Study Guide p 67)

(b) expropriation as a form of acquisition of ownership (5)

ANSWER:

Expropriation can be defined as an original method (1) of acquiring ownership in terms of which the state (1) acquires ownership (1) of a movable (½) or immovable (½) thing without the consent of the owner (1) against payment of compensation. (1)

(Maximum 5 marks)

(Study Guide p 118)

(c) possession (in its broad sense) (3)

ANSWER:

Possession in the broad sense can be described as a real relationship between a legal subject and a thing, (1) characterised by two elements:

- (i) a physical element (*corpus*) (1)
- (ii) a mental element (*animus*) (1)

(Study Guide p 187 and 197)

(d) co-ownership

(5)

ANSWER:

Co-ownership can be defined as the situation where two or more persons (1) own the same thing (1) at the same time (1) in undivided shares. (1) Two forms of co-ownership can be distinguished, namely free co-ownership (½) and bound co-ownership. (½)

(Study Guide p 176)

[20]

QUESTION 2

Name:

(a) the sources of the current law of things in order of priority

(6)

ANSWER:

- (i) the Constitution of the Republic of South Africa, 1996 (1)
- (ii) statutory law (1)
- (iii) case law (1)
- (iv) common law (Roman-Dutch law) (1)/indigenous (customary) law (1)

(1 mark per source – one additional mark if order is correct.)

(Study Guide p 37-38)

(b) the requirements for the application of the *actio ad exhibendum*

(3)

ANSWER:

- (i) alienation or destruction (1) of the thing,
- (ii) *mala fide* intention (1) (with knowledge) of the person who alienated or destroyed the thing, and
- (iii) loss (1) incurred by the owner of the thing

(Study Guide p 165-166 and 170)

(c) three ways in which a servitude is terminated

(3)

ANSWER:

Any three from the following list:

- (i) upon the expiry of the period (1) for which it was established, or the fulfillment of a resolutive condition and, specifically in the case of a personal servitude, by the death of the holder or, where the holder is a legal person, after 100 years, if no time period was fixed
- (ii) by agreement (1)

- (iii) by prescription (1)
- (iv) by expropriation (1)
- (v) by renunciation (abandonment) (1)
- (vi) by merger (1)
- (vii) by the impossibility of exercising the right as a consequence of a permanent change in the condition of the dominant or servient tenement (eg, in the case of a servitude to draw water, where the well has completely dried up) (1)

(Maximum 3 marks)

(Study Guide p 246)

(d) the <u>persons</u> in whose favour prescription is suspended	(4)
------------------------------------------------------------------	-----

NOT FOR EXAMINATION PURPOSES

ANSWER:

- (i) minors (1)
- (ii) insane persons (1)
- (iii) married women with retention of the husband's marital power (1) although the marital power was completely abolished in section 29 of the General Law Fourth Amendment Act 132 of 1993, this should not be interpreted to the detriment of women against whom prescription was running during the period when they were still subject to the marital power of their husbands) (1)
- (iv) persons absent from the country because of war, or those who are employed by the state (1)
- (v) *fideicommissaries* - in the case where a *fiduciarius* has alienated *fideicommissary* goods without the power to alienate, until such time as the *fideicommissary* goods are distributed. (1)

(Maximum 4 marks)

(Study Guide p 123)

(e) the <u>requirements</u> for the <i>condictio furtiva</i>	(4)
--------------------------------------------------------------	-----

ANSWER:

- (i) ownership (1) or retention of lawful interest (1) from date of theft to date of institution of the action
- (ii) theft (½) or removal of the thing with deceitful intent (½)

- (iii) if the action is not instituted against the thief or deceitful remover, that the defendant is the heir of the former (1)

(Study Guide p 164 and 169)

[20]

QUESTION 3

Distinguish between:

(a) land/praedial and personal servitudes

(8)

ANSWER:

- 1) Land servitudes are created in favour of a piece of land, (1) while personal servitudes benefit someone in his/her personal capacity. (1)
- 2) 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 (*Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* (1913 AD 267 282)).
- 3) Land servitudes can be established over immovable (1) things only; personal servitudes may be established over movables (eg, over money or a flock of sheep or a herd of cattle) and immovables (1) (land).
- 4) Land servitudes are alienated together with the land. (1) Personal servitudes are inseparably attached to the holder's person and are in no way transferable. (1)

(Study Guide p 235)

(b) lawful and unlawful holders

(2)

ANSWER:

A lawful holder can be defined as a person who physically controls the thing with the owner's permission or on another legal basis, (1) in order to derive some benefit from it.

An unlawful holder can be defined as a person who does not regard or conduct him/herself as the owner, and who recognises and respects the owner's ownership to the thing, but who physically controls it for the sake of the benefit he/she derives from it, without the owner's permission or other legal ground for his/her control. (1)

(Study Guide p 194-195 and 197)

(c) original and derivative methods of acquisition of ownership

(6)

ANSWER:

Original methods of acquiring ownership are used when there is no co-operation from a predecessor in title (1); in other words, where there is no transfer of ownership. (1) This form of acquisition is also not limited to things belonging to no-one (res nullius): (1) in cases of accession, prescription and expropriation the thing is actually owned by another.

Derivative methods of acquiring ownership occur with the co-operation of a predecessor in title. (1) The right which the transferee obtains is derived from the former owner. This implies that the predecessor in title should himself/herself have been the owner (1) and entitled to transfer ownership. This principle is expressed in the maxim: no-one can transfer more rights to another person than he has himself (*nemo plus iuris in alium transferre potest quam ipse haberet*). (1) Furthermore, the right is transferred to the new owner with the advantages and the disadvantages attached to that right. (1)

(Maximum 6 marks)

(Study Guide p 90)

(d) real and personal rights under the following headings:

(Half marks will be awarded)

- (i) object
- (ii) absoluteness
- (iii) preference
- (iv) publicity

(4)

ANSWER:

(i) Object

The object of a real right is a corporeal thing (½); whereas the object of a personal right is performance. (½)

(ii) Absoluteness

Real rights are absolute in principle: (½) the holder of the right can vindicate his/her thing (subject to certain exceptions) from whomever is in control of the thing; while personal rights are relative in principle: (½) the holder can enforce his/her right only against the person who is obliged to perform in terms of an obligation (contract or delict).

(iii) Preference

In the case of insolvency, a real right enjoys preference over other rights. (½) Moreover, the maxim, first in time is stronger in law (*prior in tempore est potior in jure*) is applied in the case of two or more competing real rights. Apart from a few exceptions, this principle does not apply to personal rights. (½)

(iv) Publicity

The establishment of real rights requires some form of publicity. (½) The reason for this lies in the nature of real rights. Since these rights have to be respected by the world at large, it is imperative that there should be some form of publicity informing outsiders of the existence, transfer or extinction of the real right. The establishment of personal rights does not require publicity. (½)

(Study Guide p 58-59)

[20]

QUESTION 4

(a) T steals Q's car. T takes the car to Highway Motors, which undertakes to:

- (i) install a new crank shaft
- (ii) install a device to improve petrol consumption
- (iii) replace the upholstery with leather upholstery

In terms of their agreement, T would pay R 600-00, R 200-00 and R 300-00 to Highway Motors for the above services respectively. On passing the garage, Q sees her car and institutes the *rei vindicatio* against Z, the owner of Highway Motors. Z, who was *bona fide* all the time, and who was under the impression that T was the owner of the car, relies upon his lien and alleges that he is entitled to keep the car until the full R1 100-00 has been paid for his services.

Discuss Z's legal position.

(15)

ANSWER:

See Study Guide page 21-22 for the answer.

(b) S decides to develop a part of his farm Highlands as a residential township, but his attorney informs him that it is not possible. It appears that a regional development plan in terms of a physical planning scheme provides that the area is to be utilised for agricultural purposes only.

S approaches you for legal advice. Fully advise S on his legal position.

(5)

ANSWER:

Although S has the most comprehensive real right to Highlands and, in principle, he can do as he pleases, (1) his ownership is nevertheless restricted. (1) We are dealing here with a limitation on ownership in terms of the law (1) and, more specifically, in terms of statutory measure. (1) Therefore, S will not be able to develop a township on Highlands. (1)
(Study Guide p 74-75.

[20]

QUESTION 5

- (a) Employees from the local authority, without notice and without proper authority, start to break up the dam on S's farm and dig trenches across his land. This is all part of an extensive sewerage system which also crosses S's farm. While working on the farm, they use some of the farm implements which S bought from the cooperative on credit, with reservation of ownership. Their use of these implements renders them useless. Discuss the remedy available to S with reference to the requirements for that remedy and to case law. (10)

ANSWER:

S can rely on the Aquilian action. (1) The Aquilian action is a delictual remedy (1) (originating from an obligation created in terms of a delict) by means of which the owner of a thing (1) may recover damages (1) from someone who has culpably and unlawfully damaged it. (1) In principle, it is clearly the owner of the thing whose estate is impaired by damage to the thing (which forms part of the estate). The owner is therefore, in principle, the only one who may use the delictual remedy. (1) However, there are cases in which another person may suffer patrimonial loss as a result of damage to a thing of which he/she is not the owner, (1) and the question then arises whether such a person should also be protected by the delictual remedy.

This question becomes relevant in cases in which a non-owner has an interest in the particular thing, to the extent that damage to the thing will impair his/her estate as well. Someone who buys a car on credit with reservation of ownership, for example, and who is therefore a lawful holder, may have paid a large part of the price when the car is damaged by a third person. The owner-seller may decide not to sue for damages, since the car has almost been paid for in full. The buyer's predicament is that, although he/she is not the owner, he/she is prejudiced directly by the damage to the car. In a case such as this it may be necessary to put the delictual remedy at the buyer's disposal, in spite of the fact that he/she is not the owner, since his/her estate is directly affected by the damage. (1)

In principle (bearing in mind the requirements for the delictual remedy), one may only recover damages on the basis of the Aquilian action for unlawful infringement of a patrimonial interest, that is, if the plaintiff has a lawful claim to the thing or to its control. This implies that the delictual action is available only to those who can prove a lawful patrimonial interest in the thing. (1)

On the basis of this argument, but with consideration for the fact that modern law recognises that other persons besides the owner may have a patrimonial interest in the thing or in control of the thing, the delictual remedy has been conferred on the following non-owners (*Smit v Saipem* (1) (1974 (4) SA 918 (A)); *Refrigerated Transport Edms (Bpk) v Mainline Carriers* (1) (1983 (3) SA 121 (A))):

- (i) bona fide possessors (1)
- (ii) lawful holders (1) (eg, buyers in terms of a deed of sale where the risk has passed to the buyer, but ownership has not been passed (*Smit v Saipem* (1974 (4) SA 919 (A)))

(Maximum 10 marks. Marks were also awarded for the requirements of the Aquilian action.)

(Study Guide p 214-216)

(b) D, E, F and G work on *Pulang*, a farm belonging to Q and R. D and E live on the farm and have the right to use a portion of the farm for cropping or grazing purposes in exchange for the work they perform for Q and R. F and G work on the farm, are paid a monthly wage and reside there. Because of continual crop failures Q and R are forced to reduce their farming activities. As a result they must evict some of the workers on the farm.

Indicate which statutes the parties could possibly invoke in support of their claims and briefly explain why these statutes could be applicable. (10)

ANSWER:

See Study Guide page 325 for the answer.

[20]

TOTAL MARKS: [100]