Notes for FLS1502 – Foundations of South African Law

Glossary:

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Ius civile</em></td>
<td>Original Roman law or civil law</td>
</tr>
<tr>
<td><em>Peregrini</em></td>
<td>Everyone who had come from another country &amp; was not a Roman citizen</td>
</tr>
<tr>
<td><em>Praetor peregrinus</em></td>
<td>Official who dealt with all cases involving peregrine which may involve Roman citizens</td>
</tr>
<tr>
<td><em>Ius gentium</em></td>
<td>The law of all nations. The law the <em>praetor peregrinus</em> applied by taking the <em>ius civile</em> and adapting it in order to make the system more just and equitable &amp; less formal and rigid, often utilizing the rules of other nations (such as with commercial matters)</td>
</tr>
<tr>
<td><em>Ius honorarium</em></td>
<td>The rules of <em>ius gentium</em> was later incorporated into the rules of <em>ius civile</em> therefore the new system of <em>ius honorarium</em></td>
</tr>
<tr>
<td><em>Res</em></td>
<td>Thing</td>
</tr>
<tr>
<td><em>Res in nostro patrimonio</em></td>
<td>Things in the estate</td>
</tr>
<tr>
<td><em>Res extra nostrum patrimonium</em></td>
<td>Things outside the estate</td>
</tr>
<tr>
<td><em>Res in commercio</em></td>
<td>Things in commerce which could be acquired in ownership</td>
</tr>
<tr>
<td><em>Res extra commercium</em></td>
<td>Things outside commerce which could not be acquired in ownership</td>
</tr>
<tr>
<td><em>Animus Domini</em></td>
<td>Possession with the intention of owning it to the exclusion of all others</td>
</tr>
<tr>
<td><em>Sequester</em></td>
<td>A person to whom the possession of a disputed thing was entrusted, pending outcome of the dispute</td>
</tr>
<tr>
<td><em>Inter</em></td>
<td>Entitles a man to walk through a person’s land. A man with <em>via</em> cannot have <em>actus</em></td>
</tr>
<tr>
<td><em>Actus</em></td>
<td>The right to drive animals or take a vehicle through another’s land. Also has <em>inter</em></td>
</tr>
<tr>
<td><em>Via</em></td>
<td>General right of passage, including both <em>inter</em> and <em>actus</em></td>
</tr>
<tr>
<td><em>Aqueductus</em></td>
<td>The right to bring water through another’s land</td>
</tr>
</tbody>
</table>

The history of Rome divided into:

- The monarchy (753 BC – 510/509 BC)
- The republican period (510 BC – 27 BC)
- The imperial period (27 BC – AD)
  - Principate (27 BC – AD 284)
  - Dominate (AD 284 – AD 565)
Periods of Roman legal history:

- **Early Roman Law (753-250 BC)**
  The *ius civile* is only recognized legal system applicable only to Roman citizens and was inflexible and formal

- **Preclassical period (250-27 BC)**
  Introduction of the *ius gentium* legal system applicable to matters concerning foreigners and was noted for its equality, flexibility and lack of formalism

- **Classical period (27BC – AD 284)**
  In AD 212 Emperor Caracalla promulgated the *constitutio Antoniniana*, which theoretically extends citizenship to all inhabitants of the Roman Empire. This removed any need for different legal systems for citizens and non-citizens and the differences between the various systems gradually disappeared

- **Postclassical period (AD 284-565)**
  Due to lawmen not having a sound knowledge of Latin and Greek and a widespread shortage of written legal sources, the law became increasingly simplified and superficial with more local laws introduced. There was a renewed interest in classical law which led to the codification by Emperor Justinian (*Corpus Iuris Civilis*).

### The Roman Law of Things Part A

**Definition:** The system of legal principles / rules that regulate the relationship between a legal subject and a particular kind of legal object, namely a thing.

**Function:** To harmonize the great variety of individual rights in respect of things, regulated in three ways:

- Defining the content and limits of ownership
- Harmonising the cases where different people have different real rights in respect of the same thing
- Regulating the exchange of and dealings with things and real rights

<table>
<thead>
<tr>
<th><strong>Res in nostro patrimonio</strong></th>
<th>Things in the estate</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Res extra nostrum patrimonium</strong></td>
<td>Things outside the estate – of no significance to the law of things as these are things beyond human control and ownership could not be had. Such things were either:</td>
</tr>
<tr>
<td>1. Things subject to divine law (<em>res nullius divini iuris</em>),</td>
<td></td>
</tr>
<tr>
<td>2. Things that belonged to the state or community (<em>res communes omnium</em>), or</td>
<td></td>
</tr>
<tr>
<td>3. Things that belonged to everyone (<em>res nullius humani iuris</em>)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Res in commercio</strong></th>
<th>Things in commerce which could be acquired in ownership</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Res extra commercium</strong></td>
<td>Things outside commerce which could not be acquired in ownership</td>
</tr>
</tbody>
</table>

Various things in the commercial world:

1. **Corporeal things:** Things that can be touched or observed by means of the senses (land, books, etc). Only corporeal things were susceptible to ownership and possession
Incorporeal things: things that cannot be touched or observed by means of the sense, abstract things (inheritance, usufruct, servitude)

2. **Replaceable** things *(res fungibles)*: things that can be replaced or generic things (of the same kind). These are things that can be weighed, measured or counted that have the same characteristics or qualities and the one can be replaced by the other.

**Non-replaceable** things *(res non fungibles)*: specific things that cannot be replaced by other things with similar qualities

3. Things that may be regarded as **single things** but may be made up of multiple components which are made up of multiple constituents combined in such a way as to form a **unit** but they may retain their individuality even when they are incorporated into a **joint** thing

4. **Divisible** things: things that can be divided if the separated parts do not affect the nature, quality and economic value of the thing (bag of maize, jar of olive oil)

**Indivisible** things: cannot be divided without affecting the nature, quality or economic value of the thing (bull, painting, house)

5. **Consumables** *(res consumptibles)*: consumed by normal use, sugar or flour

**Non-consumables** *(res consumptibiles)*: not consumed by use, hammer or axe.

6. **Moveable things** *(res mobiles)*

**Immoveable things** *(re immobiles)* such as land

7. **Fruits** the economic benefits that flow from the normal use of a thing
   - *Fructus naturales* were fruits produced by nature (crops, animals, wool, milk)
   - *Fructus civiles* fruits that were obtained only after the establishment of a contractual relationship (rent, interest)

### *Res mancipi*

Full Roman ownership *(dominium)* of *res mancipi* could be transferred by the formal *mancipatio* or *in iure cessio* modes of conveyance. Could only be used by Roman citizens

Examples of things considered as *res mancipi*: land and buildings in Italy, certain rural praedial servitudes over such land, slaves and beasts of burden. Things with important economic value.

### *Res nec mancipi*

Could be transferred by means of delivery *(traditio)* or by means of *in iure cession*

Could be used by everyone (not just Roman citizens)
Classification of things

Res in commercio/in nostro patrimonio

- Things within the commercial world
- Individuals could acquire ownership

All these things fall into one of the two pairs of categories

Res extra commercium extra nostrum patrimonium

- Things that fall outside the commercial world
- Cannot form part of an individual's estate

(1) Things subject to divine law, such as temples, graves, altars, city walls,
(2) Things that belong to everyone, such as the air, the sea, sea-shore
(3) Things that belong to the state, such as roads, bridges, state mines

Corporal things

- Can be touched, observed by means of senses

Res fungibles

- Any generic thing can easily be replaced by another thing

Single things

- Things that by their nature form a unity

Divisible things

- Can be divided without diminishing their quality or economic value

Consumables

- Are consumed by normal use

Movable things

- All things that are not immovable

Res mancipi

- Slaves
- Beasts of burden and draught
- Land and buildings in Italy
- Old rural servitudes

Incorporeal things

- Not tangible; abstract things

Res non fungibles

- Cannot be replaced by other things with the same qualities

Joint or composite things

- Things that are made up of multiple things

Indivisible things

- Cannot be divided without quality or economic value being affected

Non-consumables

- Are not consumed by normal use

Immovable things

- Land and everything permanently attached to it

Res nec mancipi

- All things that are not res mancipi

FRUITS

Economic benefit that flows from the normal use of a thing

Natural fruits

Fruits produced by nature, such as the fruits of an orchard or the young of animals

Civil fruits

Fruits obtained after the establishment of a contractual relationship, eg rent
### Possession

<table>
<thead>
<tr>
<th><strong>3 KINDS OF POSSESSION</strong></th>
<th><strong>Possessio civilis</strong></th>
<th><strong>Possessio ad interdicta</strong></th>
<th><strong>Possession naturalis</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Protected physical control</strong></td>
<td>Protected physical control that could lead to full ownership (dominium) through prescription, obtained by means of a lawful ground (iusta causa), for example a contract of purchase</td>
<td>Protected possession by means of an interdict (a) Possessors who possessed the thing with the animus domini: I. Owner II. Mala fide possessor (thief, robber) II. Bona fide possessor who could not obtain ownership through prescription (b) Possessors who lacked the animus domini: I. Pledgee II. Long-term lease holder III. Precario tenens IV. Sequester</td>
<td>Has physical control of a thing, but is not entitled to possession in a legal sense Unprotected possession Examples: - Lessee - Borrower - Detentor Natural possessor</td>
</tr>
<tr>
<td><strong>A person who obtained ownership of a thing in good faith (bona fide) on the strength of a lawful ground could obtain ownership under ius civile</strong></td>
<td>A person who obtained ownership of a thing in good faith (bona fide) on the strength of a lawful ground could obtain ownership under ius civile</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Examples:

INSERT Q&A from page 13 & 14 here

1. **How Is Possession Acquired**

Possession was obtained when a person established physical control over the thing with the intention of controlling it.

<table>
<thead>
<tr>
<th>The requirement of physical control was delivery:</th>
<th>Intent (animus):</th>
</tr>
</thead>
<tbody>
<tr>
<td>- In the case of things that belonged to no-one (res nullius), it was sufficient to merely take possession</td>
<td>- Indicated the presence of a legally valid intention to possess the thing</td>
</tr>
<tr>
<td>- When a large quantity of a thing had to be delivered possession was established by posting a guard or marking the objects</td>
<td>- No formal requirement (such as an affidavit) but it was deduced from the circumstances surrounding the physical control over the thin</td>
</tr>
<tr>
<td>- The possession of things stored in warehouses or cellars was passed by handing over the key to the building</td>
<td>- Possession could not be obtained by intent alone, but could be retained by intent alone</td>
</tr>
<tr>
<td>- In the case of immovable things, it was sufficient to point out the boundaries of the property, enter the property or hand over the keys to the gate.</td>
<td></td>
</tr>
</tbody>
</table>
2. Protection of Possession

A person whose possession has been interfered with or who had been deprived of possession appeals to the praetor to issue an interdict to maintain possession or restore possession.

The issuing of an interdict was solely based on whether the possession was interfered with, not whether the possession was lawful or not.

Once the possessor’s position was restored the legal position of the possessor could be decided by means of available legal procedures.

The function of the praetor was thus:

a. To prevent disturbance of the public order and the peace,
b. To protect the personal interest of the plaintiff in not having his possession disturbed

Two main kinds of possessory interdicts:

<table>
<thead>
<tr>
<th>Prohibitory interdicts</th>
<th>Restitutory Interdicts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aimed at maintaining / protecting possession</td>
<td>Aimed at restoring possession that had been lost</td>
</tr>
</tbody>
</table>

Subdivided into:

<table>
<thead>
<tr>
<th>Interdictum uti possidetis</th>
<th>Interdictum utrubi</th>
<th>Interdictum unde vi / unde vi armata</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicable to immovable things</td>
<td>Applied to movable things</td>
<td>Applicable where immovable things had been lost in a violent manner.</td>
</tr>
<tr>
<td>Protected the possessor of the thing at the time interdict is requested</td>
<td>Applied to both the requester of the interdict and the person against whom it was requested. Protected the person who had possession for the longest period during the past year, provided possession was not gained by force, secretly or on sufferance.</td>
<td>Classical Period: Interdictum unde vi: the person against whom the interdict was directed defended that possession was obtained by force, secretly or on sufferance.</td>
</tr>
<tr>
<td>The possessor of the immovable thing could apply for an interdict if:</td>
<td>Note, this was the position at the time of Gaius (AD 162 – classical period). Justinian (AD550 – postclassical period) introduced changes that resulted in the requirements to be the same as (possessor at time of interdict maintained possession unless obtained by force, secrecy or sufferance).</td>
<td>Interdict issued if immovable property had been taken by force – in particular armed force.</td>
</tr>
<tr>
<td>a. He had been disturbed in his possession or</td>
<td></td>
<td>Postclassical period: Justinian combined these two interdicts into Interdictum unde vi, which did not distinguish between different kinds of force.</td>
</tr>
<tr>
<td>b. Deprived of his possession by force, secretly or as a result of a specific agreement (eg sufferance)</td>
<td></td>
<td>Applicable to immovable property and available to any person deprived of possession by force.</td>
</tr>
<tr>
<td>Here the interdict is a preliminary procedure in the institution of an action to protect ownership. Possessor enjoyed extremely strong protection, even against the non-possessorial owner</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
3. Loss of Possession

Corpore et animo: physical loss of control of a thing with intent – same as with acquisition of possession.

It was accepted that possession could be lost corpore (physically) – example stolen, removed by force, lost and sometimes animo (with intent) – when a possessor retained control over a thing but no longer had the will to possess it.

Ownership

Definition: Ownership is the fullest possible right one could have over a corporeal thing. Ownership may be limited by the limited real rights other people may have over a thing, but the owner’s entitlements are always more comprehensive that those with limited real rights. It is not static and is determined by legal and sociological factors that include historical, economic, religious and philosophical considerations.

Restrictions on ownership:

1. The existence of personal rights against the owner whereby his ownership was restricted
2. Restricted real rights over the thing that he owned

The Twelve Tables imposed restrictions on the use of an owner’s thing, intended to prevent a person from exercising ownership to the detriment of his neighbours.

A recent court judgement proves its relevancy today:

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

Types of ownership

1. Civil Ownership (*dominium ex iure Quiritium*)
   - only available to Roman citizens,
   - could only be acquired into the *ius civile* ,
   - could only be exercised over corporeal things *in commercio* (part of the commercial world),
   - without any defect (eg not stolen)
   - civil ownership could be established over *res mancipi* awa *res nec mancipi*
   - if the thing was not transferred in the correct manner, civil ownership was not transferred

2. Praetorian or bonitary ownership

By the end of the Republican period Romans were increasingly ignoring the legal principle set out in 1. and more frequently opted to transfer ownership by means of delivery (*traditio*), therefore civil ownership was not being properly transferred.

To accommodate this the *praetor* gave the transferee full legal protection and effectively recognising a new form of ownership, referred to as “praetorian” of “bonitary” ownership.

To obtain full civil ownership he had to have possessed it for a prescribed period.

In other words, praetorian ownership was only a temporary measure: prescription began to run as soon as the transferee obtained the thing in an informal manner, when the term of prescription expired he obtained full Roman ownership – this is termed acquisitive prescription.

The transferee’s position was insecure during the prescription period because the transferor still had civil ownership and could claim it any time. Also, if the thing were to fall into the hands of a 3rd person during the period, the transferee had no legal remedy to get it back.

Two remedies available to the transferee, extended by the praetor:

a) If the civil owner reclaimed the thing, the transferee could raise the *exeptio rei venditae ac traditae* (that the thing had been sold and delivered to him and he was the owner for all practical purposes during the period of prescription.)
b) By means of *actio Publicaina* the recipient could claim the thing from anyone, even the true owner, if he had acquired it from a non-owner. This action was based on the fiction that the period of prescription had expired and that ownership therefore had already been established by prescription.

3. **Ownership of Foreigners**

During the classical period foreigners (*peregrini*) usually did not have the right to participate in Roman commerce. They were permitted to use the informal method of transferring ownership (delivery) but could not enforce their ownership by means of *rei vindicatio*.

The praetor intervened by adjusting the wording to reflect the foreigner as a Roman citizen.

4. **Indigenous property rights**

a. Family property: husband is head of the family with the responsibility of controlling and administering family property to the benefit of the whole family. Example is all property and earnings of the head of the family

b. Household property: A particular wife, together with her children, forms a unit household. The interests of the household is paramount and the property must be used to the advantage of the woman and children of that house. Example is gifts received by a woman, goods earned by her or members of the household.

c. Personal property: goods which are only of use and value to a specific individual and he/she has exclusive right to use such property

**The acquisition of ownership**

There are various ways in which ownership could be acquired under Roman law:

1. Modes of transfer of ownership derived from the *ius civili* and those derived from the *ius gentium*
2. Original and derivative modes of transfer of ownership (still followed in law today)

*Nemo plus iurus ad alium transferre potest quam ipse haberet* (no one can transfer more rights than he himself has to another)
The modes of acquiring ownership

**DERIVATIVE MODES**

Ownership is transferred from one person to another with the cooperation of the predecessor in title.

- **Mancipatio**
  - Only for the transfer of res mancipi
  - Formally, formal procedure, derived from the ius civile
  - Both parties, the thing and the person holding the thing to be present in front of five witnesses
  - Transferee holds the thing, declares that it is his and that he has bought it with copper/bronze
  - Originally a cash sale only, later a sale on credit
  - Abstract modes of transfer of ownership
  - Abolished by Justinian

- **In iure cessio**
  - Formal action, part of the ius civile
  - Res mancipi & nec mancipi
  - Both parties and the thing before the praetor
  - Transferee takes the thing and declares that it is his, transferor does not dispute this

- **Traditio**
  1. Simple delivery
     - From one hand to the other
  2. With the long hand
     - Pointing out of thing
  3. With the short hand
     - Transferee already in physical control of the thing
  4. Constitutum possessorium
     - After transfer the transferee retained physical control for a while
  5. Symbolic delivery
     - A symbol of the thing is delivered

**ORIGINAL MODES**

- **Prescription**
  - On the grounds of a iusta causa a non-owner transfers a res habilit to someone who is bona fide and possesses the thing for a certain period

- **Appropriation (occupatio)**
  - Acquisition of ownership in respect of a res nullius which a person takes into his possession with the intention of becoming the owner

- **Commixtia and confusio**
  - Owners become co-owners of the mixture
  - Each owner is able to claim his pro rata share

- **Treasure-trove**
  - Acquisition of ownership of a thing that had been hidden for so long that it was not possible to find the owner

- **The acquisition of fruits**
  - By means of separation from the principal thing

- **Accession (accessio)**
  - Joining together of two things that belonged to different owners
  - Owner of the principal thing becomes the owner of the new composite thing

- **Specificatio**
  - One person makes a new thing from raw materials belonging to another without permission
  - Classical period: If the thing can be reduced to the raw material, the owner of the material becomes the owner of the new thing; if not, the maker becomes the new owner

There was either no predecessor in title or, if there was, he did not cooperate in transferring ownership.
The protection of ownership

Various remedies available to a Roman owner if his ownership has been infringed:

1. Rei vindication
   - Real action only available to Roman citizens
   - Owner had to prove his ownership as lawful according to the *nemo plus iurus* rules to succeed in the action
   - Derived from the *ius civile*
   - Owner could use this action to claim the thing from any person in possession of it
   - Owner could also use the *rei vindication* to claim the fruits produced while it was in possession of the defendant.
   Note: Justinian later permitted the institution of actions against persons who were fictitious possessors:
      - Applied to people who had disposed of the thing fraudulently in order to escape the institution of the *rei vindication* against them
      - Applied to people who defended the action knowing they were not in possession
   Remedies:
      - Could hand back the thing to the plaintiff at any time
      - Should the plaintiff be successful in the action, the defendant could still refuse to hand over the thing. Defendant could then be condemned to pay the value of the thing and remain in possession of the thing

2. Praetorian Protection
   - Preator interdict
   - Persons in possession of a thing on lawful grounds and who were in the process of obtaining ownership through prescription were provided legal relief by the praetor based on 2 categories of people:
      - Any person who had received a *res mancipi* in an informal manner (delivery)
      - Any person who had received a thing *bona fide* from a non-owner. However, the possessor could still not protect his possession against the true owner of the thing
   - Two possible remedies: 1) Action Publiciana (real action where the possessor could reclaim the thing) 2) Exceptio rei venditae ac traditae (the defence that the thing had been sold and Delivered

3. The actio ad exhibendum
   - Personal action
   - Often instituted before *rei vindicatio* by which the person in possession of the thing must appear before the praetor:
      - If he could produce the thing he could avoid being condemned by the judge, which made the institution of a real action possible
      - If he produced the thing but still refused to participate in the action, the plaintiff was summarily placed in possession of the thing without having to prove his ownership

4. The action negatoria
   Owner could deny the existence of a servitude over his land

Limited Real Rights

*Ius in re propria:* Ownership is a real right that a person has over his own thing

*Ius in re aliena:* A real right that a person could have in respect of a thing whose ownership vested in another person
Limited real rights: limited ownership by the provisions of the law and by the rights of others in respect of the property in question. The other real rights were all limited in the sense that they accorded the person who was entitled to them only certain specific entitlements.

Two categories of limited real rights:
1. Real rights of enjoyment (servitudes, quitrent, and superficies)
2. Real Rights of security (fiducia, pledge and hypothec)

**SERVITUDES (Real rights over other people’s things)**

<table>
<thead>
<tr>
<th>Categories or Types</th>
<th>Definition</th>
<th>Requirements</th>
</tr>
</thead>
</table>
| **Praedial Servitudes** | **Limited real right that the owner of an immovable thing exercises over the immovable thing of another. Serv tenement served the dominant tenement** | (1) *Prædio utilitas*: The serv had 2b 2 the benefit of the dominant tenant  
(2) *Causa perpetua*: It had 2b possible in principle 2 exercise the serv in perpetuity (eternity)  
(3) *Civiliter modo*: The serv had 2b exercised in a reasonable manner  
(4) *Ius in re aliena*: Noone could have a servitude over his own property  
(5) A serv could not impose a +ve obligation on the owner of the servient tenement (dwelling)  
(6) A serv could not exist over a serv  
(7) A serv was indivisible |
| **Rural** praedial servitudes: | Originally under *res mancipi*  
*Inter, Actus Via & Aquaductus* |  
- Urban praedial servitudes: | Under *res nec mancipi*  
They concerned mainly buildings, even if located in rural areas |
| **Requirements** | | (1) *Praedio utilitas*: The serv had 2b 2 the benefit of the dominant tenant  
(2) *Causa perpetua*: It had 2b possible in principle 2 exercise the serv in perpetuity (eternity)  
(3) *Civiliter modo*: The serv had 2b exercised in a reasonable manner  
(4) *Ius in re aliena*: Noone could have a servitude over his own property  
(5) A serv could not impose a +ve obligation on the owner of the servient tenement (dwelling)  
(6) A serv could not exist over a serv  
(7) A serv was indivisible |

**Personal Servitudes**

<table>
<thead>
<tr>
<th>Categories or Types</th>
<th>Definition</th>
<th>Requirements</th>
</tr>
</thead>
</table>
| **Usufruct** (the right to use & enjoy the things of another without impairing / altering it) | Right existed for moveable & immovable things for use and fruits. The usufructuary could not alter the nature of the thing, had to maintain its condition and use it in a reasonable manner. **Quasi-usufruct**: A form of credit provision where money / consumables were given as security  
**Use**: Originally the real right to use some1 else's thing without taking fruits, but later changed to include fruits as sustenance  
**Habitatio**: The right to occupy another’s house  
**Operae servorum vel animalium**: The real right to make use of the services of another’s slaves of beasts of burden and these rights can also be leased to a 3rd party by the holder of the right | (1) Could exist 4 no longer than the lifetime of the holder  
(2) Usufruct had to be exercised in the least cumbersome manner  
(3) No person could have an usufruct over his own thing  
(4) Usufruct did not impose a +ve obligation on the owner of the thing  
(5) Usufruct was indivisible  
(6) Usufruct could not exist over another personal servitude |
The constitution of servitudes (Personal & Praedial servitudes constituted in the same way)

1. Mancipatio: Only serv recognized as res mancipi (i.e. old rural) had 2b constituted by means of mancipatio. This method became obsolete in post classical period
2. In iure cession: Any srv could be created in this manner, very cumbersome and no longer used post classical
3. Deduction servitutis: Reservation of the serv
4. Legacy: Mainly reserved for usufruct. A testator could leave/bestow ownership of his property to 1 person and leave/bestow a servitude over the property to another as a legacy
5. Adjudication: In actions concerning division of property a judge could award ownership to 1 person and a serv over the property to another
6. Pacts & Stipulation: informal agreement → formal verbal agreement. Very important way in Justinian time
7. Quasi-delivery: development of postclassical law that was sufficient to constitute a real right
8. Prescription: Preator made it possible (2ward end of classical period) to acquire serv over provincial land by means of a very long period of prescription – later extended to all classifications of land

Protection of servitudes (serv were real rights therefore, protected by real actions)

1. Vindication servitutis: Action directed at anyone who infringed the serv holder’s right to exercise the serv
2. Actio negatoria: action available to owner of the land over which another person unlawfully claimed 2 have a serv
3. Special interdicts: classical law → some serv holders were protected by special interdicts post classical law → all serv holders protected

Termination of servitudes (although in principle they had to exist perpetually, in practice it could b terminated)

1. Terminated if one or both of the properties were destroyed or became the property of 1 person
2. Owner of dominant tenement could relinquish serv
3. Rural serv lapsed through disuse (2years at first, then 10-20 years)

Real Security

It is a limited real right so it is a right in the property of another, but for a SPECIFIC REASON: TO SECURE A DEBT

Securing a debt: a thing (moveable or immovable) is encumbered or burdened by the creditor’s right to claim such property if the debt is not paid.

Types of Real Security:

<table>
<thead>
<tr>
<th>FIDUCIA</th>
<th>PLEDGE</th>
<th>HYPOTHEC</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Fiducia is the oldest form of real security and this form never existed in SA law. In fact it fell out of use after the Roman classical period</td>
<td>-Beneficial to both parties</td>
<td>- Used when immovable property was used to secure a debt, or when the debtor had nothing of value to provide to secure the debt, as he needed to use his property to earn a living (If a dairy farmer makes use of pledge and hands his cows over to secure the debt he cannot make money by selling the milk, so he cannot repay the debt). So the creditor can claim the property once the debt has not been repaid in time.</td>
</tr>
<tr>
<td>-Transfers ownership of the thing to the creditor</td>
<td>-Only transfers possession of the thing to the creditor</td>
<td></td>
</tr>
<tr>
<td>-Creditor may NOT use the thing</td>
<td>-Any corporeal thing</td>
<td></td>
</tr>
<tr>
<td>-Originally only res mancipi but later all corporeal things</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-Most beneficial to the creditor</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The same example as pledge, but we say that A and B used *fiducia* instead of pledge as the method of securing the debt. Once A has repaid the debt, B is supposed to transfer ownership of the watch BACK TO A. *Fiducia is obviously more beneficial to the creditor*, as he is the owner and possessor of the watch until the debt is repaid.

A is broke and wants to borrow R500 from B. B is afraid that A won’t repay him. They agree that A will give his watch IN PLEDGE to B to secure the debt. So A hands the watch to B and B hands the R500 to A. If they agreed that repayment should take place on Friday 10 May and A does not/ cannot repay the money, B may sell A’s watch. If B gets R600 for the watch he may keep R500, but must return the residual R100 to A. This is important – B may not make money out of the transaction at A’s expense. A (the debtor) remains owner of the watch, but loses his possession of the watch and B (the creditor) has the watch in his possession, so he can sell it if he does not get his money back.

The hypothec is the last example of a real security. In this instance A (the debtor) REMAINS IN POSSESSION of the watch. He also DOES NOT transfer ownership of the watch to B. *So the hypothec is the most beneficial type of real security for the debtor*: he gets to borrow money, secure his debt, but also remain the owner of the property and he keeps possession of it.

---

**Fiducia** and hypothec works on the same principles as Pledge (property is provided to secure the repayment of a debt) but different rules regarding the transfer of possession (and ownership) in the property applies.

<table>
<thead>
<tr>
<th></th>
<th>Fiducia</th>
<th>Pledge</th>
<th>Hypothec</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is it?</td>
<td>Transfers ownership to creditor</td>
<td>Transfer of possession to creditor with possessory interdict</td>
<td><strong>Debtor retains ownership</strong> <strong>and possession</strong></td>
</tr>
<tr>
<td>Advantage</td>
<td>Creditor could not profit from the sale of the thing or the fruits of the thing (had to go towards repayment of debt or excess paid to debtor)</td>
<td>Creditor could not profit from the sale of the thing or the fruits of the thing (unless agreed upon)</td>
<td>Anything could be used: moveable or immovable, (in)corporeal things, existing or future things, single of composite things. Debtor did not lose enjoyment of the thing and could still make profit of it</td>
</tr>
<tr>
<td>Disadvantage</td>
<td>Thing served as security for duration of the debt Therefore debtor lost ownership for duration of debt Gave creditors complete protection</td>
<td>If the debt was not paid according to agreement, creditor could retain the thing (only during classical period) or sell it with excess going back to debtor</td>
<td>As the debtor could offer the same thing to more than one creditor as security, the interests of the creditors were not protected</td>
</tr>
<tr>
<td>NOTE</td>
<td>Fiducia disappeared during post classical period</td>
<td>Contract established through 1. The agreement and 2. Delivery of pledged object</td>
<td>Usually used to secure payment of rent for leased land</td>
</tr>
</tbody>
</table>
The Roman Law of Obligations  Part B

General Principles of the law of obligations

The law of obligations is characterised by a right to claim a specific performance from a specific person

This is a personal right which can be enforced with the aid of a personal action

Definition of obligation: a legal bond between 2 or more parties, one of which had a personal right (creditor) against the other party (debtor) to enforce a particular performance, while the debtor is under obligation to the creditor to perform

Creditor has personal right to performance

Debtor has obligation to perform

Sources of obligations

1. Contracts: in roman law not every agreement gave rise to an obligatory contract. To create an enforceable contract, the element of causa contractus had to be present:

The 4 types of contracts recognized by Roman law:

<table>
<thead>
<tr>
<th>Type of Contract</th>
<th>Description</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement + delivery of a thing = contractus re</td>
<td>Real contracts created by agreement followed by delivery of a thing</td>
<td>loan for consumption, loan for use, deposit and pledge</td>
</tr>
<tr>
<td>Agreement + formal words = contractus verbis</td>
<td>Agreement followed by the use of certain formal words</td>
<td>Stipulatio where only one party promises the other party that he will perform</td>
</tr>
<tr>
<td>Agreement + writing = contractus litteris</td>
<td>Agreement followed by a written document or written entry into a ledger</td>
<td></td>
</tr>
<tr>
<td>Agreement = contractus consensu</td>
<td>A consensual agreement (no further requirements)</td>
<td>contracts of purchase and sale, letting &amp; hiring, mandate &amp; the contract of partnership</td>
</tr>
</tbody>
</table>

Later on, if an agreement did not fall into any of the above 4 categories, the praetor could intervene and hold the parties to an agreement, despite that no contract existed. Eventually this led to the position where a mere agreement could give rise to a contract = relevant today! Example:

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

An agreement between 2 or more persons entered into seriously and deliberately is enforceable by action
2. **Quasi-contracts**: related to situations that were not of a contractual nature but had certain similarities with contracts. Examples: unauthorised administration of another’s affairs without his knowledge or consent / joint ownership / wrongful enrichment.

*In these cases an obligation came about without agreement*

### CONTRACTS & QUASI CONTRACTS

Further classified as:

<table>
<thead>
<tr>
<th>Unilateral contract</th>
<th>Reciprocal Contracts</th>
<th>Imperfectly Reciprocal Contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gives rise to only 1 obligation</td>
<td>Gives rise to 2 obligations</td>
<td>Unilateral in principle</td>
</tr>
<tr>
<td>One party has a duty to perform (debtor) and the other party has a right to performance (creditor)</td>
<td>Both parties have a right to performance &amp; a duty to perform</td>
<td>The debtor may have a counter claim if he suffers damages</td>
</tr>
<tr>
<td>Example: Stipilatio</td>
<td>Example: Contract of purchase</td>
<td>Example Contract of loan for use</td>
</tr>
</tbody>
</table>

3. **Delict**: creates an obligation between a victim and perpetrator if the perp’s unlawful act caused the victim damage

*Perp = debtor in the obligation*

*Victim= creditor to receive compensation for damage caused*

4. **Quasi-delict**: not a pure delict but could result in obligations. Example is the liability of innkeepers for damage done to guest’s property

### Classification of obligations

1. **Civil obligations = obligationes civiles**
   Enforceable by means of personal action & derived from *ius civilis*

2. **Natural obligations = obligations naturales**
   Ordinary valid obligations but could not be enforced through action (because the action was refused or could not be executed) for example a minor that completed a contract without consent (although contract is legal it could not be enforced)

3. **Obligations stricti iuris**
   Obligations derived from the *ius civilis* gave rise to an action based on early law & was enforceable through action based on early law. The judge had to confine himself to provisions of the *formula* and the jurists contrasted these obligations with obligations based on good faith or equity

4. **Obligations bonae fidei**
   Obligations based on good faith gave rise to action in which good faith or equity was the criterion and the judge’s decision would be in accordance with the requirements of good faith. These obligations were enforceable through actions based on good faith
Terminations of obligations

1. Performance: obligation terminated when performance completed
2. Release: agreement between creditor & debtor absolving debtor from further performance
3. Compensation: 3 requirements
   a. Both performances had to be claimable
   b. Performances had 2b of similar nature
   c. The two debts had to have been owed by the same parties to whom compensation was applied
4. Merger: when an obligation is logically terminated (R100 – estate in will)
5. Novation: when the original obligation is extinguished by the creation of a new obligation

The Roman Law of Contracts

Contents of contracts refer to the **performance required to fulfil the terms of the contract**.

INCLUDE DIAGRAM ON P90
INSERT DIAGRAM 10 ON P92
INSERT DIAGRAM 11 P 96
INSERT DIAGRAM 12 P101
INSERT DIAGRAM 13 P 103
Consensual contracts (*contractus consensu*)

The development of the consensual contracts was necessitated by the large-scale development & expansion of the Roman economy during the period of the REPUBLIC.

In 241 BC the *praetor peregrinus* recognised consensual contracts of sale between foreigners & from 22 BC onwards consensual contracts of sale between Roman citizens were also recognized.

INSERT DIAGRAM 14 P 120
Verbal and Written Contracts

Agreement + uttering of formal words = *contractus verbis*

The contract came into existence once the parties have uttered certain words, the preceeding agreement and formalities were equally important.

Agreement + written record of agreement = *contractus litteris*

One of the oldest forms this contract was *sponsio*, a contract with sacred and magical connotations. In time *sponsio* was replaced with *stipulation*. Both these terms were derived from the *ius civilis* and were therefore a *negotium stricti iuris*. One of the most important contracts concluded by means of *stipulatio* was the contract of suretyship.

A stipulation is a verbal expression in which the man who is asked replies that he will give or do what he has been asked.

**STIPULATIO**

In classical Roman law it was a formal contract strictly enforced.

It consisted of a formal promise made in answer to a formal question which then gave rise to an obligation on the part of the person who made the promise.

In Justinian’s time the verbal agreement was replaced by a written contract.

**Requirements for stipulatio:**

1. Concluded by pronouncement of formal words
2. Both parties had to be present
3. The A had to follow the Q without interruption
4. Q&A had to contain the same verb

- Deaf/dumb could not conclude this contract
- Stipulation was a unilateral contract
- therefore only one obligation
- the other party had a corresponding personal right
- the creditor could only claim what was promised

- If the performance was directed to a **definite** thing (slave) the action was known as *condictio*
- If the performance was **indefinite** (compensation for possible damages) the action was known as *actio ex stipulatu*

The contract of suretyship was used to guarantee fulfilment of a principle obligation.

The surety bound himself contractually to the creditor of the principle debtor as security for the payment with two obligations:

a) The obligation btw the C and the principle D = primary obligation
b) The obligation btw the C and the surety = accessory obligation.
In Roman Law there are 4 types of suretyship:
- Sponsio
- Fideipromissio
- Fideiussio
- Mandate-suretyship

Fideiussio
- created by a subsidiary stipulato with the purpose of the latter to secure a principal obligation

EXAMPLE:
1. The creation of the principal debt (C, do you promise to give me... / I promise)
2. The creation of the subsidiary obligation or surety ship (do you promise to give me what C owes me / I promise)

Important aspects:
- Could be used to secure any existing obligation, irrespective of whether it arose from a contract, a delict or any other grounds
- It was a requirement that the principal debt had to be valid
- If the principal debt were to lapse, the suretyship would also lapse
- Defences available to the principal D regarding the enforceability of the principal debt was also avail to the surety
- The surety could not be held liable for an amount that exceeded the principal debt

Measures to improve the position of the surety:

a) Benefit of excussion (beneficium excussionis): If a surety was sued for the payment he could claim that the C first proceed against the D for the principal debt – therefore liability was first placed on the PD

b) Benefit of division of debt (beneficium divisionis): A surety could demand a division of liability for payment of a principal debt among solvent sureties (if there are multiple) – therefore could only be sued for a portion of the pd

c) Benefit of cession of actions (beneficium cedendarum actionum): Creditor to cede action ot find an alternative before suing the surety – surety could then, after paying the debt, proceed to sue the PD

Invalid stipulations:
- If no performance was possible
- If the stipulation only came into force after the death of one of the contracting parties
- If it was incurred o.b.o. a 3rd party
- If the stipulation was immoral
Regarding your question about the encumbered thing and the revival, these two statements actually have nothing to do with one another:

A property/land which has a servituded over it (a servient tenement) is an **encumbered** thing, because the right of another person (the servitude holder) affects how the owner of the property may deal with his property: If a right of way is applicable over A's farm, he may not build a house in the road his neighbour is supposed to use - his property is thus encumbered by the right of another and he does not have all the rights an owner usually has, as his rights may be restricted by the servitude.

Regarding **revival**: (I will explain this via an example)

Farm A is next to farm B and a servitude exists over farm B for the benefit of A in terms of which the owner of farm A (lets call him Allan) has a right of way over farm B. This means that Allan can drive over (lets call him) Barry's farm (B) to get to his (A).

Praedial servitudes are attached to the land, not the person. So if Allan sells his farm to Claude, Claude will also be allowed to drive over farm B, because Claude bought the dominant tenement (farm A). The same applies if Barry sells the servient tenement (farm B) to Daniel. Daniel must allow any owner of farm A to drive over his farm, because a praedial servitude exists perpetually (potentially forever).

**BUT** remember: Let's say Allan and Barry are still the owners. If Allan buys farm B and becomes the owner of both the dominant and the servient tenements, THE SERVITUDE WILL CEASE TO EXIST/ FALL AWAY, because you cannot have a servitude over your own property. If Allan later divides the property up again and sells farm B to Eric, a brand new servitude must be created/registered. THE SERVITUDE WILL NOT **REVIVE** AUTOMATICALLY!!! This means that once it has ceased to exist and Eric can now not reach his farm, a BRAND NEW servitude will have to be constituted.