

## 3.2 Derivative methods of acquisition of ownership

### 3.2.1 *Mancipatio*

*Mancipatio*, a formal juristic act of the *ius civile*, was only available to Roman citizens. Only a Roman citizen could serve as a buyer, seller or witness. Used to obtain absolute rights over children *in potestate* (under the authority of another person), as well as *res nec Mancipi* (land in Italy, slaves, beasts of draught and burden and certain rural servitudes). Therefore ownership of things passed if alienated by the owner. Where children under authority of their fathers were concerned, the buyer received a power over the child, similar to slaves, and this was called *mancipium*.

*Mancipatio* was in existence long before the law of the Twelve Tables (450 BC), but was initially a formal cash sale and a mode to transfer ownership (*dominium*). *Mancipatio* was also used to transfer ownership in the case of a sale on credit or any other reason, and to bring about other legal consequences, such as servitudes, emancipation and adoption of children, the creation of marital power over a wife and the execution of a will.

Ownership of *res Mancipi* was transferred by the *mancipatio* procedure, if the transferor, transferee and the witness were all Roman citizens (or had the right to participate in Roman commerce). Only persons under paternal authority and *res Mancipi* could be transferred through *mancipatio*.

The reason (*causa*) for the transfer of ownership through *mancipatio* include a cash sale, a donation, a dowry, agreements arising from real security, performance of obligations arising from a verbal contract, a legacy, etc.

*Mancipatio* is considered an abstract mode of transfer of ownership. If the underlying agreement were proven invalid, ownership would still pass. The formal act brought about legal concerns and the invalidity of the reason did not affect the transfer of ownership. *Mancipatio* was therefore not dependent on a valid cause for the transfer.

The *mancipatio* procedure gave effect to the intention of the parties to create a real right. *Mancipatio* was therefore not a contract or agreement:  
An agreement (contract of purchase and sale) + *mancipatio* = ownership.

During the classical period (27 BC – AD 284) before it was abolished *mancipatio* fell into disuse.

### 3.2.2 *In iure cessio*

*In iure cessio*, which existed at the time of the Twelve Tables, was a formal act that formed part of the *ius civile* and only used by Roman citizens. All things, *res Mancipi* and *res nec Mancipi*, as well as incorporeal things, could be transferred this way. It was also used to effect the cession or extinction of certain rights.

Both parties and the object to be transferred had to appear before the *praetor*. The transferee took control of the object and formally declared he was the owner. The transferor did not contest this and the *praetor* then awarded the object to the transferee.

*In iure cessio* could have any cause and was independent of the validity of such cause. Civil ownership only passed in the case of *in iure cessio* if the person transferring or delivering the object was the owner. The *nemo plus iure* rule was also applicable here. Agreement (a contract of sale) + *in iure cessio* = ownership.

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

*Mancipatio* and *in iure cessio* are considered abstract modes of transfer of ownership that even if the *causa* was invalid, ownership could still pass if the parties complied with the necessary formalities.

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

*Traditio* meant the transfer of ownership over an object through delivery of the object by the owner to another. Although this transaction consisted of the transfer of possession, ownership did not pass every time one handed over an object to another. Eg. Brutus could hand over his chariot to Julius to take part in a race in his place or Gaius could hand his house to Caesar to rent it. In both cases possession passed, not ownership. To transfer ownership the owner must intend to do so and the recipient must intend to receive same.

In *Air-Kel (Edms) Bpk v Bodenstein* it was ruled that ownership cannot be transferred by agreement alone: delivery must take place. Delivery alone is insufficient; it must be accompanied by an agreement between the parties that ownership will be transferred. (*iusta causa + traditio* = ownership)

Delivery was a causal mode of transfer of ownership: ownership passed if there was a valid reason for the transfer. Eg. Brutus delivers a silver cup to Julius.

Roman Jurist Paul said that bare delivery itself never transfers ownership, but only when there is a prior sale or other ground on account of which the delivery follows.

What was a valid reason for transfer?

- A contract of sale
- A donation
- The constitution of a dowry
- The fulfilment of a valid obligation that has transfer of ownership as its object, such a contract of *mutuum*.

*Traditio* could be used in various cases:

To transfer ownership of *res nec Mancipi*

For the transfer of land

A means for foreigners to obtain ownership

After the late Republican period, for the acquisition of bonitary ownership over *res Mancipi*.

With *res nec Mancipi* delivery resulted in the immediate transfer of ownership (*dominium*). With *res Mancipi* delivery lead only to the acquisition of bonitary ownership which could lead to civil ownership after a period of prescription.

After Justinian abolished the difference between *res Mancipi* and *res nec Mancipi*, *traditio* led to the transfer of civil ownership (*dominium*) in all cases. *Traditio* could take various forms:

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

Simplest form of *traditio* and the physical handing over of the thing from one person to another. Eg. A buys a loaf of bread from B and B hands the loaf to him over the counter.

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

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

In *Groenewald v Van der Merwe*, which concerned the delivery of a threshing machine, it was ruled that physical apprehension is not essential if the subject matter is placed in the presence of the would-be-possessor in such a way that he alone can deal with it at his pleasure. This way the physical element is sufficiently supplied, and if the mind of the transferee contemplates and desires so to deal with it, the transfer of possession is in law complete. Referring to Paul he says that there is no need for actual physical contact for possession to be taken; but that it can be done by sight and intent is demonstrated by those things which, because of their great weight cannot be moved, columns, for instance for they are regarded as delivered, if the parties agree on their transfer in the presence of the thing.

b) **Delivery with the short hand (*traditio brevi manu*)**

Where the transferee was already physically in control of the thing. Eg, if the lessee of a house were to buy the house from the owner, it was not necessary for him to hand the house back to the former owner before formal delivery to him. Because the lessee already had control of the thing, an agreement between the parties was considered enough for the lessee to obtain control as owner.

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

Eg. Brutus buys a house from Julius. When the house is sold to Brutus, ownership passes to him. But they immediately conclude a deed of lease in terms of which Julius leases the house from Brutus. Instead of the house being delivered to Brutus and then returned to Julius, Julius retains uninterrupted control of the house. The mere intention of the parties allows possession of the house to pass. Therefore, the parties need not hand the thing back and forth.

d) **Symbolic delivery (*traditio symbolica*)**

True control of the thing was not transferred but the transfer of possession took place symbolically. Eg. Brutus donates something to Julius. A document is drawn up as evidence and handed to Julius. The delivery of the document eventually replaced delivery of the thing as a means of transfer of ownership. The document was used by Julius as proof of ownership, which means that ownership passed by delivery of the document. The thing itself was not necessarily delivered and possession could even have remained with Brutus. Julius could therefore obtain ownership of the thing without having had possession. Although a form of delivery, it was not strictly so, as possession did not necessarily pass. The document was a symbol of the thing; therefore, symbolic delivery.

Things that could not be handed over due to their nature or size were handed over symbolically in that a token or symbol was given, eg. The transfer of keys to a warehouse.

Emperor Justinian (AD 527 to 565) laid down specific rules: Apart from the delivery of the thing bought, the purchase sum must be paid as well or credit granted or security for payment provided. Unless one of these requirements was met, ownership of the thing was not transferred when the thing was delivered.

Transfer of ownership was therefore dependent on the existence of a valid reason. If there was a misunderstanding and the transferor thought that delivery had been in terms of a contract of sale, whereas the transferee thought he received a gift, then Justinian ruled that if both parties intended ownership of the thing to be transferred, a putative *causa* was sufficient. Therefore, ownership would pass through delivery.

- \*\*\* In SA law, ownership is transferred if one delivers the thing to another, provided both parties had the serious intention to pass ownership from one to the other. Even an invalid reason for such delivery does not prevent transfer of ownership.

### Activity

Which form of delivery is applicable in the following examples?

- a) Brutus buys a flock of sheep from Julius. The sheep cannot be taken to Brutus' farm immediately and Brutus therefore leaves a shepherd with the flock to see to the sheep.

Delivery with the long hand.

- b) Brutus leases a house to Julius. Two years later Julius puts the house on the market and Brutus buys it.

Delivery with the short hand.

- c) Brutus sells his house to Julius, but the parties agree that Brutus will lease the house from Julius for a period of six months.

*Constitutum possessorium*

- d) Brutus buys a farm from Julius. The details of the transaction are put in writing and the document is delivered to Brutus.

Symbolic delivery

## 3.3 Original methods of acquiring ownership

### 3.3.1 Introduction

Ownership of a thing could also be acquired without the cooperation of and independently of another person. It is possible that there was no previous owner or if there was that he did not cooperate in the process of acquisition. This is known as original acquisition of ownership.

### 3.3.2 Prescription (*usucapio*)

#### a) Introduction

It was laid down in the twelve tables that if a person enjoyed uninterrupted possession of a piece of land for two years pursuant to a *mancipatio* act or enjoyed uninterrupted possession of any other thing for at least a year, he became the owner; however only in respect of *res nec mancipi* and only to Roman citizens, and not ownership of stolen property either.

In the classical period the rules were extended to include *res mancipi* and *res nec mancipi* transferred in any way from a non-owner to another to pass to the acquirer under certain circumstances. A person to whom a *res mancipi* had been transferred through *tradition* rather than *mancipatio* or *in iure cession* could also obtain civil ownership (*dominium*) in this way.

*Usucapio* ensured that the possessor who was not the owner but who factually possessed the thing for a certain period of time could ultimately become its lawful owner upon expiry of a prescribed period and ownership of the previous owner was terminated and vested in the new owner. Prescription ensured the legal situation was brought into harmony with the factual situation – acquisitive prescription.

There were various reasons why prescription was required:

It had to meet legal certainty. It was important to know who the owner of the thing was. A non-owner could not transfer ownership, and this had serious consequences for the prospective purchaser who could not obtain ownership immediately. It had far-reaching implications for protection of possession or ownership. Acquisitive prescription fulfilled the important legal function of ensuring legal certainty, which made it possible to determine with certainty, upon expiry of a prescription period, who the owner was.

Secondly, prescription lessened the burden that rested on the plaintiff to prove his ownership. A plaintiff had only to prove that he fulfilled all the requirements for prescription.

Thirdly, in classical and pre-classical Roman law, prescription transformed bonitary ownership into civil ownership (*dominium*). The periods specified in the twelve Tables (one year for movables and two years for immovables) were sufficient to give the owner the opportunity to claim his thing or assert his ownership.

#### b) Requirements for prescription

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

Only then could it be acquired by *usucapio*. Things outside commerce (cemeteries or temples) could not be acquired by prescription. Under the *lex Atinia* stolen goods could not be acquired by prescription, and the *lex Iulia* and *lex Plautia* applied a similar exception to things taken by force.

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

Purchase and sale (*pro emptore*) where the thing had been received as performance in terms of an obligation (*pro solute*), where a thing had been abandoned by someone who was not the owner (*pro derelicto*), where a thing is received as inheritance (*pro donato*), where a thing is received as part of a dowry (*pro dote*), where a thing is received as a legacy (*pro legato*) and cases not classified under the above but included cases where a putative title was in question (where the title was not valid,

but the acquirer believed it was a legally valid title). In the classical period only in exceptional cases was a putative *causa* allowed.

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

The recipient had to have taken the thing in his possession in good faith (*bona fide*). The owner must have believed that he had obtained ownership of the thing at the time when possession was transferred to him. He had to believe that he received the thing from the owner or a person who had the capacity to transfer it on behalf of the owner.

*Bona fide* was required only when the thing was acquired. If the possessor became aware later during the period of prescription that he was not really the owner of the thing, it did not influence the period of prescription. Supervening bad faith does no harm (*mala fides superveniens non nocet*).

The assumption was that good faith existed if the thing had been obtained on the grounds of a *iusta causa*. Unless the contrary was proved, good faith was presumed to exist in the presence of a *iusta causa*.

Eg. Suppose Brutus buys a thing from Julius in good faith, but Julius is not the owner of the thing. Two months after the thing was delivered to him, he hears that Julius was not the owner. He thereafter loses possession of the thing. He had not acquired ownership of the thing through prescription since the prescription period had not yet expired. If he were to regain possession of the thing, his lack of good faith would prevent him from trying to obtain ownership of the thing through prescription (he would not be able to usucapt.)

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

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

Possession of the thing of which ownership is being obtained through prescription is very important. Possession during the period of prescription had to have been uninterrupted. Loss of possession during the period of prescription was known as *usurpatio*, which meant a break or interruption in possession, and could take two forms.

Firstly, *usurpatio naturalis* which occurred when possession was physically lost. If the possessor voluntarily relinquished possession, prescription came to an end. The new possessor had to start complying with the requirements for possession anew.

During the reign of Septimius Severus and Caracalla (3rd century AD) certain changes were made to this rule. First, an heir could complete the period of prescription begun by the testator by possessing the thing for the remaining part of the term. Secondly, a buyer who bought a thing in good faith, who would have acquired ownership through prescription only had to complete the remaining part of the prescribed term to acquire ownership. The periods of the two possessors were added (*accessio possessionum* = combining periods of holding of predecessors in title.)

Secondly, *usurpatio civilis*, where possession was lost after successful institution of an action against the possessor (*rei vindicato*).

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

According to the Twelve Tables, one had only to possess movables for one year and immovables for two years. It applied during the imperial period, the Republic, and even during the classical period.

Several changes were introduced during the Justinian period. He accepted five requirements laid down during the classical period.

Subsequently, he extended the period of prescription for movables to three years and immovables to ten years of uninterrupted possession where the original owner resided in the same Roman province and to twenty years where the possessor and the owner resided in different provinces. Longer periods of prescription was partly alleviated to allow later possessors to add the period of prescription of their predecessors in title to their own.

### c) Concluding remarks

Prescription was a legal institution derived from the *ius civile*, only applicable to Roman citizens and foreigners granted the right to enter into commercial transactions with Roman citizens, and only applicable to things within commerce that could be acquired in ownership (*res in commercio*).

In the postclassical period (AD284-565) another form of prescription developed, regarding provincial land and things in possession of foreigners, namely prescription over a long period (*longi temporis praescriptio*). However, uninterrupted possession for 10 years (for parties living in the same province) or twenty years (for parties not living in the same province) was required. This was a form of extinctive prescription.

At the end of the term of prescription, the possessor only acquired a defence which protected him against a claim of the original owner.

Prescription is still recognized today as a method of acquiring ownership.

In *Pienaar v Rabie* the court stated that the aim of prescription is not to punish a negligent owner but to ensure the purpose of prescription and therefore the need that gave rise to this legal institution in the first place, remains legal certainty.

### 3.3.3 Appropriation (*occupatio*)

*Occupatio* or appropriation was derived from the *ius gentium*. The first person who took possession of a *res nullius*, a thing owned by no-one, with the intention of becoming the owner became the owner of the thing by taking possession. Occupation (by being the first takers) of, for example, everything captured on land, in the sea or in the air.

There were two kinds of *res nullius*:

- Things never owned by anyone, for example wild animals, bees, fish, newly formed islands in the sea and things (shells) found on the beach.
- Abandoned things (things thrown away or discarded in order to relinquish ownership (*res derelictae*). Things simply lost (*res deperditae*) were not regarded as *res nullius*.

In *Reck v Mills*, Mills approached the court for an interdict against the defendants for control over parts of a shipwreck, to which both Mills and the defendants laid claim. The court ruled that ownership was lost when an owner gives up or abandons his thing with the intention of no longer being the owner thereof. The thing then becomes a *res derelicta* without an owner (*res nullius*). The person who then, through *occupatio*, acquires possession with the intention of becoming its

owner becomes both possessor and owner through appropriation or *occupatio*. Mills, however never took possession and therefore lost the case.

The Roman jurists laid down strict requirements for the acquisition of ownership. The thing had to be taken into factual control; the person who had the intention of becoming its owner had to have factual control of it. For example:

- Things belonging to the enemy could also be acquired through *occupatio*. This only applied to things appropriated by a Roman on Roman territory in times of war and things that belonged to citizens of states with whom Rome did not have a treaty of friendship. However, things taken as booty were not capable of *occupatio*, but was sold or given away to the troops by the victorious general.
- Things that washed up on the beach, eg. shells and pearls, were capable of *occupatio*, but not wreckage and flotsam and jetsam that washed up on the beach. If goods fell of a ship without being discarded or thrown aboard to lighten the ship, such goods were not *res nullius* and could not be appropriated if washed up on the beach.
- Wild animals captured were considered to have been appropriated when a person had established factual control over such animals. A hunter had to track and finally capture or kill the animal before acquiring ownership. Once effective control was established, ownership was retained as long as the person retained control over it. Once the wild animal escaped, ownership was lost and the animal became *res nullius* again. Partially tamed animals like doves and bees remained the property of the person who appropriated them as long as they had *animus revertendi* (the intention of returning to their owner). They are considered to have ceased to have this disposition once they abandon the habit of returning.

In South African law stricter requirements are laid down for the acquisition of ownership, e.g. through *occupation* than for the retention of ownership. In *Underwater Construction Co (Pty) Ltd v Bell* the ruling was that ownership once acquired, cannot be lost through failure to remain in physical possession. As long as it appears from the circumstances that control (and the intention) remain, ownership is retained.

In the case of wild animals, factual continuous control was required. In terms of the Game Theft Act it is quite sufficient if the owner has acquired his ownership through adequate fencing. His ownership would continue, even if they escaped or removed without his permission.

### 3.3.4 Treasure-trove (*thesauri inventio*)

A treasure is something that lay hidden for so long that it was impossible to trace the owner. Originally, the finder became the owner of the treasure. Emperor Hadrian (AD117 – 138) ruled that a person who found a treasure on his own property became the owner of the treasure. If the person accidentally found a treasure on someone else's property, he became the owner of half the treasure and the owner of the property got the other half. In South African law this rule still apply.

### 3.3.5 The acquisition of fruits (*acquisition fructuum*)

The acquisition of ownership of fruits took place through separation (*separation*) from the fruit-bearing thing. While not yet separated, they formed part of the principal thing. Only on separation did they exist independently and capable of ownership, such as the fruits of trees, crops, the young of animals, wool and milk.

The owner of the fruit-bearing thing was the owner of the fruit. A holder of land in quitrent tenure and possessor in good faith who acquired the thing in terms of a valid cause (*bona fide possessor ex*

*iusta causa*) also became owners of the fruit through separation (*fructus separati*). An ordinary tenant of an usufructuary did not automatically acquire ownership of fruits upon separation; they had to take the fruits in their possession first (*fructus percepti*).

Ownership of civil fruits (*fructus civiles*) such as rent passed upon delivery. The principles that applied to natural fruits did not apply here.

### 3.3.6 Accession or joining of things (*accessio*)

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

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

- The thing acquired through *accessio* had to be joined to the principle thing to lose its identity.
- The accessory thing had to be connected inseparably with the principle thing. A button sewn to a coat became part of the coat, but because it can be easily removed again, there was no *accessio*.

Where it was possible to separate things, ownership was merely suspended and then restored as soon as it was separated from the principle thing. To force separation, Roman jurists sometimes made a personal action available; the *actio ad exhibendum* (action to bring the thing forward, to show it). After separation the owner of the accessory thing could claim it back through the ordinary proprietary action (the *rei vindicatio*). If separation was impossible, the owner of the accessory thing lost his ownership, and entitled to claim compensation from the owner of the new composite thing.

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

#### a) Joining movables to movables

Where a movable thing was joined to another movable thing, the owners of the principal thing became the owner of the new composite thing. The test was the identity of the composite thing. It was necessary to establish whether the composite thing would lose its identity if the accessory thing was removed. E.g. if a golden handle was attached to a bronze kettle, the owner of the kettle acquired ownership of the handle as well. A diamond formed part of a ring and dye part of the wool. When a person wrote on parchment belonging to another, the owner of the parchment became the owner of the book or poem, even if written in gold.

#### b) Joining of movables to immovables

Where movables (building materials) were joined with land, the owner of the land became the owner of the movables (building materials). *Superficies solo cedit* = the building structure accedes to the land. Although separation of the building structure is possible, the law of the Twelve Tables prohibited this. If the owner of the land should pull down the building, the owner of the building materials could reclaim them from the owner of the land.

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

### c) Joining of immovables to immovables

This form of *accessio* could take place in different ways:

- Gradual, imperceptible accretion (*alluvio*), when soil from someone's property was imperceptibly deposited on the land of another through the action of the river.
- Perceptible accretion (*avulsion*), when a sudden torrent bore away part of the land belonging to someone and added it to the land of another. As soon as trees and plants growing in the part which had become detached took root in the land against which the detached part came to rest, they became the property of the owner of the latter piece of land.
- When an island arose in a public river (*insula nata in flumine*), it belonged to the respective riparian owners according to an imaginary line in the middle of the river.

The intention with which the joining together took place, in good or bad faith, did not as a rule effect the acquisition of ownership of the composite thing. Except where the immovable thing was joined to another immovable thing (natural phenomena), there was always the possibility that the owner of the principal thing would have to compensate the owner of the accessory for the loss of his property. If the parties acted in good faith, as a general rule, the person who lost his ownership of a thing would be entitled to compensation.

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

*Accessio* were only applicable where a main thing and an accessory were joined. When solids (grain or two flocks of sheep) belonging to different owners became mixed (*commixtio*), *accessio* did not take place. If it took place with the owners' permission, they became the co-owners of the joint thing. If it were not possible to physically identify the things belonging to different owners (grain) each owner could claim his *pro rata* share through the *rei vindicatio*.

When mixing fluids (*confusio*) (wine, honey or molten metal), that belonged to different owners, the substances were inseparably blended, and the owners acquired joint ownership of the mixture. Whether by agreement or accident made no difference. The owners could claim their respective shares (*pro rata*) of the mixture through the *actio communi dividundo* (action for the division of joint property).

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

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

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

If a person created a new thing partly from his own material and partly from that of another, he always became the owner of the completed thing. After all, he partly used his own material and supplied the labour. However, where all the material belonged to another, there was dissension as to who would own the thing.

The Sabiniani suggested that the owner of the material also became the owner of the thing. The Proculians held that the maker of the new thing should be the owner. Another group opted for a “golden” mean; that the owner of the material also became the owner of the new thing if the new thing could be reduced to its original condition. If not, the maker of the new thing became its owner. Justinian supported this view and suggested that a person who made wine from grapes or oil from olives or meal from grain, became its owner. However, the owner of a piece of gold or silver, melted down by another to make a vase, became the owner of the vase.

The party who suffered a loss could obtain compensation through an *action utilis*. The owner of the new thing could also be forced to pay compensation if the former owner of the material raised an *exception doli* against the new owner’s *rei vindication* if he was in possession of the thing. If the material was stolen the owner could use the *action furti* (penal action for theft) and *condictio furtiva* (suit for the recovery of stolen property) against the thief.

### Activity

- a) In AD 63 Brutus bought three slaves from Julius in Rome through *mancipatio*. These slaves had been specially trained as gladiators to perform in the Colosseum. It appeared, however, that Julius had stolen these slaves from Gaius the true owner, who lived near Naples. Did Brutus obtain ownership of the slaves through *mancipatio*? Could he obtain ownership of the slaves through prescription?

Brutus could not obtain ownership of the slaves by means of *mancipatio* since Julius was not the owner of the slaves. Julius could not transfer more rights than he had himself. Brutus could not acquire ownership of the slaves through prescription either. Under Roman law a stolen thing was not susceptible to ownership since a taint was attached to it. The slaves were therefore not *res habiles*. This meant that they were not susceptible to the acquisition of ownership.

- b) Brutus, the owner of three draught oxen, decided while returning to Rome from Ostia to abandon the animals since they have contracted foot-and-mouth disease and become too weak to work. Julius walks past three days later and sees the oxen wandering around. He decides to take them for himself. Could Julius obtain ownership of the oxen through prescription? If not, could he obtain ownership of them by any other means? If so, name the relevant method of acquisition.

Julius could not have acquired ownership of the oxen by means of prescription. He could have acquired ownership of the oxen by means of *occupation* (appropriation). After all, the oxen had been abandoned by their owner (Brutus) and had therefore become *res derelictae* or *res nulli*, which could be appropriated by a person with the intention of becoming the owner.

- c) In AD 212 Brutus buys a farm in Italy from Julius, the guardian of the nine-year-old boy Paulus. He is under the impression that Julius is the owner of the land and is only informed by a neighbour three months later that Paulus is the true owner. Could he become the owner of the land through prescription?

Yes, he could, because he bought the land in good faith. At the time when he took possession of the land he was under the impression that Julius was the owner and his subsequent discovery that this was not actually the case did not detract from his initial good faith.

- d) During a terrible storm, Brutus, the captain of the ship Medea, throws 287 jars of olive oil overboard with the aim of reducing the ship's weight in an attempt to save it from sinking. The undamaged jars of oil wash up on the beach at Puteoli and Julius, the owner of a well-known beach restaurant, takes them into his possession with the intention of becoming their owner. Could he in fact become the owner through *occupatio*?

No, the jars were not regarded as abandoned things and Julius could therefore not become their owner. Brutus did not have the intention of relinquishing his ownership.

- e) Brutus, a celebrated winemaker, decides to make another batch of his popular blended wine, and, as usual, uses his own cabernet grapes and the merlot grapes from Julius' vineyard, which is adjacent. Who is the owner of the wine made from these grapes?

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

## 4. The protection of ownership

### 4.1 Introduction

Various remedies were available to a Roman owner if his ownership had been infringed, depending on the nature of the infringement. If in case of theft, he could claim his thing through the *rei vindicatio* (an action in *rem*) as well as an *actio furti* (a personal action for twice the value of the thing) in order to punish the thief. Where the thing could not be recovered, he could claim damages from the thief with the *condictio furtive* (a personal action). If damaged, he could claim damages from the wrongdoer with the *actio legis Aquillae* (a personal action). Other remedies were available, the possessory interdicts and the *actio negatoria*, where a servitude was exercised to which one was not entitled.

### 4.2 The *rei vindicatio*

The most important remedy available to the Roman law (Quiritary) owner. Foreigners and bonitary owners had no right to institute this action. The owner could use this action to claim the thing from whoever was in control of the thing.

The owner had to prove his ownership to succeed with this real action, but not by demonstrating that he had bought the thing from the previous owner or received it as a gift. In terms of the *nemo plus iuris* rule he had to prove that the seller or donor, as well as the person from whom the seller or donor had acquired it, was in fact the owner of the thing. The owner had to show that he (or a predecessor) had complied with all the requirements for prescription or that he had acquired it by another original means of acquisition.

If ownership is proven, he could recover the thing, regardless of whether the possessor had acted in good faith or in bad faith. The defendant had to be in factual control of the thing. Justinian later permitted actions against persons not in factual control (*ficti possessors* = fictitious possessors) when disposed of the thing fraudently to escape *rei vindication* or to those who defended the action knowing they were not in possession. The defendant could avoid a conviction by simply giving the thing back to the plaintiff.

If the plaintiff succeeded in proving that he was the owner of the thing, the defendant could still refuse to return it, and then the defendant could be condemned to pay the value of the thing to the plaintiff.

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

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

### 4.3 Praetorian protection of ownership

Person in possession of a thing on lawful grounds (*iustae causae*) and in the process of acquiring ownership of the thing through prescription (*usucapio*), initially enjoyed no legal protection during the period of prescription. The *praetor* then intervened and granted them legal relief, depending on the type of possessor.

- A person who received a *res mancipi* through *tradition*.
- A person who received a thing from a non-owner.

Praetorian protection was effective against all persons and third parties, excluding the owner. Two remedies were available:

A legal brief through a real action, the *actio Publiciana*, a defence in the form of the *exceptio rei venditae ac traditae* (defence that the thing had been sold and delivered). The *actio Publiciana* in principle afforded possessors the same protection as the *rei vindicatio* afforded to Roman law owners, and could reclaim the thing from any person.

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

### 4.4 The *actio ad exhibendum*

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

To solve this problem, the plaintiff was afforded a personal action (*actio ad exhibendum*) whereby he could force the person in possession of the thing to appear before the *praetor*. If he produced the thing he could avoid the *condemnatio* (being condemned or absolved by the judge) which made a real action possible. If after producing the thing, he still refuses to participate, the plaintiff was summarily placed in possession of the thing without having to prove ownership.

#### 4.5 The *actio negatoria*

The owner of a piece of land could deny the existence of a servitude over his property through this action, which was only available against someone who claimed the servitude in good faith. If a person exercised a servitude in bad faith one could proceed against him with the aid of the *actio iniuriarum* (action for affront).

#### Activity

- a) Brutus buys two oxen from Julius at an auction through *mancipatio*. Three days later Gaius realises that his oxen have disappeared and upon enquiry he finds that Julius had stolen his oxen and sold them to the *bona fide* Brutus. Which remedies are available to Gaius?

Gaius could have reclaimed his oxen from Brutus with the aid of the *rei vindicatio*. This was the most important remedy available to a Roman law owner and he could reclaim a thing from whoever was in possession of it, irrespective of whether the person had acted in good faith or bad faith, if he can prove that he was indeed the owner. Furthermore, Brutus had the choice of returning the oxen or paying the monetary value to Gaius. Brutus could also have recovered damages from Julius, the thief, with the *condictio furtiva*.

- b) Brutus is in the process of obtaining ownership of a valuable slave by means of prescription. The slave was transferred to him in an informal manner by means of delivery by Julius, the owner. Gaius his neighbour, steals the slave one night with the intention of selling him to Caesar. Does Brutus have any remedy and can he get his slave back?

The *praetor* afforded protection during the period of prescription to a person who had obtained possession on a lawful ground and were in the process of acquiring ownership of the thing through prescription. Brutus could have reclaimed the slave from Gaius with the aid of the *actio Publiciana*, because the slave was a *res Mancipi* transferred in an informal manner and the praetorian protection applied against all persons. Brutus could have used this action to reclaim the thing from whomever was in possession thereof.

#### Self-evaluation questions

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

Civil ownership or *dominium ex iure Quiritium* was only available to Roman citizens (*Quirites*) and could only be acquired through *ius civile*. It was only exercised over corporeal things *in commercio* (susceptible of private ownership) and without any defect (stolen goods). Civil ownership could be established over *res Mancipi* and *res nec Mancipi*.

Civil ownership over *res Mancipi* could only be transferred through *mancipatio* or *in iure cessio*. By the end of the Republic this legal principle was ignored and things classified as *res Mancipi* were simply transferred through delivery (*traditio*). In practice this was unfair and at the end of the Republic the *praetor* assisted the transferee by giving him full legal protection and so recognised a new form of ownership, namely praetorian or bonitary ownership where Roman citizens transferred things by methods not prescribed by the *ius civile*. A person who in good faith obtained a thing from a non-owner was also a bonitary owner.

Praetorian ownership was only temporary, however, he had to have possessed it for a prescribed period, after which he obtained full Roman ownership (*dominium*). During the prescription period the transferor could claim it at any time through the *rei vindicatio*. If the thing fell into the hands of a third party during this time, the transferee had no recourse to get it back.

Therefore to solve this problem, the *praetor* intervened and gave the transferee a defence (*exceptio*) against the owner's *rei vindication* and the *actio Publiciana* (for recovery if a possession was lost before prescription expired.) Thus, the transferee was the owner for all practical purposes during the prescription period.

If the civil owner reclaimed the thing, the recipient could raise the *exceptio rei venditae ac traditae* (the thing was sold and delivered to him) against the civil owner. Through the *actio Publiciana* the recipient could claim the thing from anyone, even the true owner. Once the prescription period expired he obtained civil ownership (*dominium ex iure Quiritium*).

The *constitutio Antoniana* and the abolition of the distinction between *res Mancipi* and *res nec Mancipi* by Justinian resulted in the survival of only *dominium*.

## 2. Briefly discuss *mancipatio* and *in iure cessio*. (10)

*Mancipatio*, an institution long before the Twelve Tables and a formal juristic act of the *ius civile* was only available to Roman citizens and used to acquire absolute rights in respect of children *in potestate* and *res Mancipi* (land in Italy, slaves, beasts of draught and burden and old rural servitudes.) The effect was that ownership of the things passed if the things were alienated by the owner. Where children were concerned, acquirer obtained a power over the child similar to slaves and was called *mancipium*.

*Mancipatio* was also used to bring about the constitution of servitudes, emancipation and adoption of children, the creation of marital power over a wife and the execution of a will. The reason for the transfer of ownership through *mancipatio* included a cash sale, donation, dowry, agreements arising from real security, performance of obligations, a legacy, etc. *Mancipatio* was not dependent on a valid cause for the transfer. During the classical period *mancipatio* fell into disuse.

*In iure cessio* (cession before the *praetor*) was a formal act of the *ius civile* and only used by Roman citizens. All things, *res Mancipi* and *res nec Mancipi*, and incorporeal things were transferred this way. Both parties and the thing to be transferred had to appear before the *praetor*. The transferee took hold of the thing and formally declared he was the owner. The transferor did not contest this and the *praetor* awarded the thing to the transferee. It was also used to affect cession or extinction of certain rights. It could have any reason or cause and was independent of the validity of such cause, but ownership could only pass if the transferor was the owner. This form of transfer fell into disuse at the end of the classical period and was abolished by Justinian.

*Mancipatio* and *in iure cessio* were abstract modes of transfer of ownership where even if the underlying reason was invalid, ownership would still pass if the parties complied with the necessary formalities.

## 3. Discuss the two steps involved in delivery (*traditio*). You should fully deal with the concept of a valid reason (*iusta causa*) (5) and then name and explain the five forms of delivery treated in the study guide. (10)

There were two steps involved in delivery:

1. A valid reason (*iusta causa*)
- +
2. Delivery (*traditio*)
- =
- Establishment of a real right (ownership)

Delivery (*traditio*) indicated transfer of ownership over a thing through delivery of the thing by the transferor to the transferee. In the case of delivery, the intention of the parties was not apparent from their acts. Ownership did not pass unless there was a valid reason for the transfer.

A valid reason for transfer was a transaction on the basis on which ownership would pass, such as a contract of sale, a donation, the constitution of a dowry or the fulfilment of a valid obligation that has transfer of ownership as its object, such as a contract of *mutuum*.

Transfer of ownership was dependent on a valid reason or cause. If there was a misunderstanding and the transferor thought delivery took place through a contract of sale, whereas the transferee thought he received a gift, Justinian ruled that provided both parties intended ownership of the thing be transferred, a putative *causa* was sufficient. Ownership would therefore pass if the thing was delivered.

In South Africa, ownership is transferred if one person delivered a thing to another, provided both parties intended ownership to pass from one to another. Whether the reason or cause that gave rise to such delivery was invalid does not prevent transfer of ownership.

*Traditio* took various forms:

Simple delivery or delivery from one hand to another (*traditio de manu in manum*), e.g. A bought a loaf of bread from B and B handed the loaf to him over the counter.

Delivery with the long hand (*traditio longa manu*) took place when the thing to be delivered or transferred was pointed out with the proviso that it was within sight of the parties and the person acquiring it could immediately establish control over it, especially when the thing could not be easily handled. E.g. to point out the boundaries of a piece of land or to point to a ship or herd of cattle.

Delivery with the short hand (*traditio brevi manu*) where the transferee was physically in control of the thing, e.g. the lessee of the house were to buy the house from the owner, he did not have to hand back the house to the former owner before it was formally delivered to him. The lessee already had control over the thing so an agreement was sufficient to obtain control as the owner.

*Constitutum possessorium* (delivery with the intention to possess forthwith on behalf of the transferee), e.g. Brutus buys a house from Julius. When the house is sold to Brutus, ownership passes to him. But they immediately conclude a lease agreement whereby the original owner, Julius leases the house from the new owner, Brutus. Instead of delivering the house to Brutus and then return it to Julius, Julius retains uninterrupted control of the house. The parties do not have to hand the thing back and forth; a mere intention of the parties allows possession of the house to pass.

Symbolic delivery (*traditio symbolica*), e.g. Brutus donates a thing to Julius. A document is drawn up as evidence and handed to Julius. This document was the proof of ownership, which means ownership passed by delivery of the document. The document therefore served as a symbol of the thing. Also thing which could not be handed over due to their size were handed over symbolically such as the transfer of a key to a warehouse.

#### 4. Name the requirements that had to be fulfilled before ownership could be acquired by means of prescription during the classical period. (5)

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

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

Good faith (*bona fides*)

Possession (*possessio*)

Period of prescription (*tempus*)

5. Why was there a need for this form of acquisition of ownership under Roman law? (3)

It had to meet legal certainty. It was important to know who the owner of a thing was. A non-owner could not transfer ownership. It had far-reaching implications for protection of possession or ownership. Prescription made it possible to determine with certainty, upon expiry of a prescribed period who the owner of a thing was.

Prescription lessened the burden that rested on the plaintiff to prove his ownership. A plaintiff only had to prove that he fulfilled all the requirements for prescription.

In classical and preclassical Roman law, prescription transformed bonitary ownership into civil ownership (*dominium*).

6. Name and briefly discuss the various original modes (except for prescription) by means of which ownership could be acquired under Roman law. (12)

Appropriation (*occupatio*) – The first person who took possession of a *res nullius*, a thing owned by no-one, with the intention of becoming the owner, became the owner of the thing by taking possession.

Treasure-trove (*thesauri inventio*) – A treasure was something hidden for so long that it impossible to find the owner. Therefore the find became the owner. A person who found a treasure on his own property became the owner thereof. A person who found a treasure on someone else's property became the owner of half the treasure and the owner of the property got the other half.

The acquisition of fruits (*acquisitio fructuum*) – This took place through separation (*separatio*) from the fruit-bearing thing. While not yet separated they are part of the principal thing. Once separated they exist independently and were capable of ownership, such as fruits of trees, crops, the young of animals, wool and milk.

Accession or joining of things (*accessio*) – When two things belong to different owners and were indivisibly attached to one another so that the owner of one of the things also became the owner of the joint thing. The Roman jurists also distinguished between the joining of movables to movables, movables to immovables and immovables to immovables.

Mixing (*commixio*) and blending (*confusio*) – When solids (grain or two flocks of sheep) belonging to different owners became mixed (*commixtio*), *accessio* did not take place. If the mixing took place with the permission of the owners they became co-owners of the joint thing. If not, each retained ownership of his separate portion. Mixing of fluids (*confusio*) like honey, wine or molten metal, which belonged to different owners, were inseparably blended and the owners acquired joint ownership of the mixture.

The creation of a new thing from existing material (*specificatio*) – when someone, without authorisation, created a new thing from, without authorisation, material belonging to another, e.g. wine from grape, a garment from wool or a vase from gold or silver. If a person created a new thing partly from his own material and partly from that of another, he became the owner of the completed thing, e.g. wine from grapes, oil from olives, or meal from grain. However, the owner of a piece of gold or silver melted down by another to make a vase became the owner of the vase.

## 7. Name and briefly discuss the most important remedy available to the Roman law (civil) owner. (5)

The *rei vindicatio* was the most important remedy available to the Roman (Quiritary) owner. The owner could use this action to claim the thing from whoever was in control thereof. The owner, however, had to prove his ownership to succeed with this action by demonstrating that he had bought the thing or received it as a gift from the previous owner. He had to prove that the seller or donor was the owner of the thing. He had to show that he complied with all requirements for prescription or acquired it by another original means of acquisition of ownership.

If ownership was proven, he could recover the thing regardless of whether the possessor had acted in good faith or in bad faith. The defendant had to be in factual control of the thing. Justinian permitted actions against person not in factual control of the thing, firstly if the thing was disposed of fraudently to escape the *rei vindicatio* and secondly to those who defended the action knowing they were not in possession. To avoid a conviction, the defendant could give the thing back to the plaintiff.

If the plaintiff succeeded in proving that he was the owner, the defendant could still refuse to return it and could be condemned to pay the value of the thing. The plaintiff could use the *rei vindicatio* to claim not only the thing but also the fruits produced by the thing or possible fruits had the plaintiff been in possession of the thing during the institution of the action (*litis contestatio*).

## Chapter 4

### Limited real rights

#### General introduction

Ownership is a real right that a person had over his own thing (*ius in re propria*). A *ius in re aliena* was a real right that a person could have in respect of thing whose ownership vested in another person. Ownership was unlimited in principle, although limited by provisions of the law and the rights of others in respect of the property in question. Other real rights were all limited in that they accorded only certain specific entitlements and can be divided into two categories: Real rights of enjoyments (servitude, quitrent and *superfices*) and real rights of security (*fiducia*, pledge and hypothec). Limited real rights are also protected by real actions and therefore enforceable against third parties encroaching upon a person's limited real rights.

#### 1. Servitudes

##### 1.1 Introduction

There are two kinds of servitudes, personal servitudes and praedial or real servitudes. A personal servitude is a real right that can be exercised for one's own benefit over a thing belonging to another (*ius in re aliena*). A praedial servitude is a real right one exercise to benefit one's own land. Both servitudes were limited real rights and enforced through real actions. The benefit of the personal servitude accrued to the servitude holder. The benefit of a praedial servitude accrued to a specific piece of land, regardless of whom it belongs to.

## 1.2 Praedial servitudes

### 1.2.1 General remarks on praedial servitudes

Praedial servitudes were real rights exercised by the owner of an immovable thing in respect of the immovable thing of another. These rights accrued to the owner in his capacity as owner of the dominant tenement.

### 1.2.2 Types of praedial servitude

Praedial servitudes were divided into rural (*servitudes praediorum rusticorum*) and urban (*servitudes praediorum urbanorum*) servitudes. The oldest servitudes belonged to the category of *servitudes praediorum rusticorum* and classified as *res Mancipi*. Urban servitudes were *res nec Mancipi*.

The four oldest rural servitudes were the rights of way, *iter*, *actus*, *via* and *aquaeductus*. Urban servitudes concerned mainly buildings even if located in rural areas.

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

Servitudes are also positive and negative. Rural servitudes gave the owner of the dominant tenement the right to do something on the servient tenement and were positive. Urban servitudes are positive and negative. The restraining servitude on the erection of a higher building was negative and the servitude that gave someone the right to insert beams into a neighbour's wall was positive.

### 1.2.3 Requirements for (and characteristics of) praedial servitudes

Servitudes had to comply with the following requirements:

- a) *Praedio utilitas* (the servitude must benefit the dominant tenement)
- b) *Causa perpetua* (perpetual benefit) and not made subject to a resolutive condition or term.
- c) *Civiliter modo* (a reasonable manner) in order to encumber the servient tenement as little as possible and not cause the owner of the servient tenement unnecessary inconvenience.
- d) *Ius in re aliena* (right in respect of another's thing) and could not exercise a servitude over his own thing (*nulla res sua servit*).
- e) *Servitus non in eo consistit ut aliquid faciat quis sed ut patiat vel non faciat* (a servitude does not consist in doing something, but in allowing something or refraining from doing something). The owner had to endure something or refrain from a particular action. There were two exceptions: a right to support a building on the dominant tenement on the wall of a building that had been erected on the adjacent tenement and a right to insert a beam into an adjacent building.
- f) *Servitus servitutis esse non potest* (there could be no servitude over another servitude) The owner cannot grant a third party a servitude over land over which his own servitude extended. If A had the right of way over B's land, he could not grant C *iter* (a footpath).

g) A servitude was indivisible.

### Activity

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

### Feedback

No, a servitude was not established. A servitude cannot be established by a mere agreement. The servitude had to benefit the dominant tenement and not a specific owner (Julius). The principle was that a servitude had to exist in perpetuity and could not be established over a spring that was not perennial. No duty could be imposed on the owner of the servient tenement (Brutus) to perform a specific task. He was merely obliged to endure or permit something.

## 1.3 Personal servitudes

### 1.3.1 General remarks on personal servitudes

A personal servitude is vested to a specific person and ceased to exist upon the death of the holder or earlier if granted for less than a lifetime. The duration was therefore limited. The holder of the right need not be a landowner and cannot transfer his right to another person. His personal servitude could apply to a movable or immovable thing, and it accrued to the holder of the right in his personal capacity and not because it was a personal right. It is a real right protected by a real action.

### 1.3.2 Characteristics of and requirements for personal servitudes

Praedial and personal servitudes differ considerably, but also had similarities. Both comprised rights of enjoyment to another's thing, created and extinguished in the same way and some characteristics and requirements for praedial servitudes also applied to personal servitudes. Personal servitudes also did not require a person to do something, but to endure or permit something. A personal servitude over a person's own thing or one over another was impossible. It was indivisible and had to be exercised in a reasonable manner.

### 1.3.3 Types of personal servitudes

#### a) Usufruct (*usufructus*)

The oldest personal servitude and a right to use and enjoy another's thing without altering its character. It was a way of providing maintenance of a wife married *sine manu*. The husband left his property to his children but ensured that his surviving spouse have the benefit and enjoyment of the property. The heirs obtained ownership (*nuda proprietas*) while the usufructuary received the limited real right to use the thing (*ius utendi*) and take the fruits for herself (*ius fruendi*).

The purpose of a usufruct is to provide support or make provision for a person and adheres strictly to the beneficiary and cannot be transferred, bequeathed or ceded to another.

The object of a usufruct was a thing (*res*), eg, a farm or flock of sheep and existed in respect of immovable and movable things (also money). The content was the use of the thing and the fruits it yielded, natural (wheat or lambs) or civil (rental or quitrent).

A usufruct must be exercised *salva rerum substantia* (keeping the substance of the things intact), which had certain consequences:

The nature of the thing could not be altered, eg. he could not convert a wine farm into a crop farm or a house into a shop. The property must be maintained in the condition received, e.g. stock numbers must be kept at the same level and buildings properly maintained. The thing had to be used in a reasonable manner (*civiliter modo*), therefore preserved in the same condition. *Diligens paterfamilias* must be observed, i.e. he was liable for any damage caused to the property through negligence.

Usufructuary was entitled to civil fruits (interest) and natural fruits (apples) and acquired ownership of natural fruits at gathering. Since he had the right to use the thing he had it in his possession, but was only a holder and not a possessor of the property.

During the classical period the possession of usufructuaries was protected through a special interdict (*interdictum quem usufructum*). Justinian also granted them general possessory interdicts.

b) Quasi-usufruct (*quasi usufructus*)

Because the usufruct of an inheritance containing money was often bequeathed, the Senate passed a resolution (1<sup>st</sup> century BC) allowing a usufruct of money. The money became the property of the usufructuary who gave security that the same amount would be returned after termination of the usufruct. This type of usufruct was known as a quasi usufruct as it was a mere credit provision and not a real right over a thing belonging to another.

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

c) Use (*usus*)

*Usus* was the real right to use another's thing without taking fruits. The usufructuary only had the right to use the thing, which was later relaxed. By the classical period, the user was allowed to take of the fruits what was required for his household's personal and daily use.

d) Right of free occupation (*habitatio*)

The right to occupy another's house. Although the same as use or usufruct, Justinian regarded it as a servitude in its own right. The holder of the right was allowed to cede his entitlements of use and enjoyment to another: he could let the house to another.

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

The right to use the services of another's slaves or beasts of burden, and could be leased to a third party by the holder of the right.

### Activity

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

## Feedback

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

### 1.4 The constitution of servitudes

Servitudes were real rights and were constituted in specific ways. Personal and praedial servitudes were constituted in the same way.

#### 1.4.1 *Mancipatio*

Only servitudes recognised as *res mancipi* (rural servitudes) were constituted through *mancipatio*.

#### 1.4.2 *In iure cessio*

Any servitude could be created through *in iure cessio*, however it was so cumbersome that it fell into disuse in the postclassical period.

#### 1.4.3 Reservation of a servitude (*deduction servitutis*)

If the owner of two adjacent tenements transferred ownership of one to another party through *mancipatio* or *in iure cessio*, he could reserve a servitude in favour of his remaining property through formal declarations at transfer. It could even take place if alienated through delivery (*traditio*).

#### 1.4.4 Legacy

A testator could bequeath ownership of his property to someone and simultaneously bequeath a servitude over the property to another as a legacy. This method was mainly reserved for usufruct (*usufructus*).

#### 1.4.5 Adjudication (*adiudicatio*)

Regarding the division of property the judge would award ownership to someone and a servitude over the property to another.

#### 1.4.6 Pacts and stipulations (*pactiones et stipulationes*)

Servitudes over provincial land were constituted through *pactiones et stipulationes*, an informal agreement (pactio) between the parties later confirmed through a formal verbal contract (*stipulatio*). Although this method initially only gave rise to personal obligations, the *praetor* later also granted an *actio in rem* (real action). This method was later extended by Justinian to all land and became the most important way to constitute servitudes.

#### 1.4.7 Quasi delivery (*quasi traditio*)

A development of postclassical law. Servitudes were incorporeal things and could not be transferred through delivery (*traditio*). Where Brutus and Julius had agreed that Brutus should grant Julius a servitude and Brutus endured Julius' exercise of the entitlement granted to him, a form of quasi possession of the servitude was said to have been transferred. Although this *possessio* initially did not carry an *actio in rem*, it was allowed by Justinian to constitute a real right.

### 1.4.8 Prescription (*usucapio*)

Acquisition of servitudes through prescription were abolished by the *lex Scribonia* (1st Century BC). Around AD 284 the *praetor* allowed that servitudes over provincial land could be acquired through *longi temporis praescriptio*. Justinian extended this method to all categories of land. Therefore, someone who exercised such entitlement for 10 years *inter praesentes* and 20 years *inter absentes* could establish a real right to that land.

## 1.5 Protection of servitudes

Servitudes were real rights and protected by the following real actions:

### 1.5.1 *Vindicatio servitutis*

To obtain recognition of the servitude from the person repudiating it and to obtain an insurance that he would not continue to infringe on the real right. For usufruct, the *vindicatio ususfructus* protected the usufructuary's rights. Justinian replaced these actions with the *actio confessoria* for use by all holders of servitudes, against anyone who infringe the holder's right to exercise the servitude.

1.5.2 *Actio negatoria*, an action available to the owner of the land over which another person unlawfully claimed to have a servitude.

1.5.3 Special interdicts protected some servitude holders. Justinian later granted all holders the same protection.

## 1.6 Termination of servitudes

Servitudes were supposed to exist in perpetuity, but it was permitted to have them terminated.

- (a) If one or both properties were destroyed or became the property of one person.
- (b) The owner of the dominant tenement could relinquish the servitude through the *in iure cessio*, and later informally.
- (c) Rural servitudes lapsed through disuse (*non usus*). Periods of disuse were two years, but was extended by Justinian to 10 or 20 years

## Self-evaluation questions

### 1. Distinguish briefly between praedial and personal servitudes. (4)

There are two kinds of servitudes, personal servitudes and praedial or real servitudes. A personal servitude is a real right that can be exercised for one's own benefit over a thing belonging to another (*ius in re aliena*). A praedial servitude is a real right one exercise to benefit one's own land. Both servitudes were limited real rights and enforced through real actions. The benefit of the personal servitude accrued to the servitude holder. The benefit of a praedial servitude accrued to a specific piece of land, regardless of whom it belongs to.

### 2. Distinguish briefly between rural and urban servitudes. (6)

Praedial servitudes were divided into rural (*servitudes praediorum rusticorum*) and urban (*servitudes praediorum urbanorum*) servitudes. The oldest servitudes belonged to the category of *servitudes praediorum rusticorum* and classified as *res mancipi*. Urban servitudes were *res nec mancipi*.

The four oldest rural servitudes were the rights of way, *iter*, *actus*, *via* and *aquaeductus*. Urban servitudes concerned mainly buildings even if located in rural areas.

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

Servitudes are also positive and negative. Rural servitudes gave the owner of the dominant tenement the right to do something on the servient tenement and were positive. Urban servitudes are positive and negative. The restraining servitude on the erection of a higher building was negative and the servitude that gave someone the right to insert beams into a neighbour's wall was positive.

3. Name and briefly discuss the requirements that must be fulfilled before a right can be classified as a servitude. (4)

Servitudes had to comply with the following requirements:

- a) *Praedio utilitas* (the servitude must benefit the dominant tenement)
- b) *Causa perpetua* (perpetual benefit) and not made subject to a resolutive condition or term.
- c) *Civiliter modo* (a reasonable manner) in order to encumber the servient tenement as little as possible and not cause the owner of the servient tenement unnecessary inconvenience.
- d) *Ius in re aliena* (right in respect of another's thing) and could not exercise a servitude over his own thing (*nulla res sua servit*).
- e) *Servitus non in eo consistit ut aliquid faciat quis sed ut patiatur vel non faciat* (a servitude does not consist in doing something, but in allowing something or refraining from doing something). The owner had to endure something or refrain from a particular action. There were two exceptions: a right to support a building on the dominant tenement on the wall of a building that had been erected on the adjacent tenement and a right to insert a beam into an adjacent building.
- f) *Servitus servitutis esse non potest* (there could be no servitude over another servitude) The owner cannot grant a third party a servitude over land over which his own servitude extended. If A had the right of way over B's land, he could not grant C *iter* (a footpath).
- g) A servitude was indivisible.

4. Discuss usufruct fully as the most important example of a personal servitude. (10)

The oldest personal servitude and a right to use and enjoy another's thing without altering its character. It was a way of providing maintenance of a wife married *sine manu*. The husband left his property to his children but ensured that his surviving spouse have the benefit and enjoyment of the property. The heirs obtained ownership (*nuda proprietas*) while the usufructuary received the limited real right to use the thing (*ius utendi*) and take the fruits for herself (*ius fruendi*).

The purpose of a usufruct is to provide support or make provision for a person and adheres strictly to the beneficiary and cannot be transferred, bequeathed or ceded to another.

The object of a usufruct was a thing (*res*), eg, a farm or flock of sheep and existed in respect of immovable and movable things (also money). The content was the use of the thing and the fruits it yielded, natural (wheat or lambs) or civil (rental or quitrent).

A usufruct must be exercised *salva rerum substantia* (keeping the substance of the things intact), which had certain consequences:

The nature of the thing could not be altered, eg. he could not convert a wine farm into a crop farm or a house into a shop. The property must be maintained in the condition received, e.g. stock numbers must be kept at the same level and buildings properly maintained. The thing had to be used in a reasonable manner (*civilter modo*), therefore preserved in the same condition. *Diligens paterfamilias* must be observed, i.e. he was liable for any damage caused to the property through negligence.

Usufructuary was entitled to civil fruits (interest) and natural fruits (apples) and acquired ownership of natural fruits at gathering. Since he had the right to use the thing he had it in his possession, but was only a holder and not a possessor of the property.

During the classical period the possession of usufructuaries was protected through a special interdict (*interdictum quem usufructum*). Justinian also granted them general possessory interdicts.

5. **Briefly discuss the most important ways in which praedial and personal servitudes could be terminated by Roman law. (3)**

- (a) If one or both properties were destroyed or became the property of one person.
- (b) The owner of the dominant tenement could relinquish the servitude initially through the *in iure cessio*, and later informally.
- (c) Rural servitudes lapsed through disuse (*non usus*). Periods of disuse were two years, but was extended by Justinian to 10 or 20 years.

6. **Briefly discuss the various remedies that were available to person who held praedial and personal servitudes. (3)**

*Vindicatio servitutis*; an action to obtain recognition of the servitude from the person repudiating it and to obtain an insurance that he would not continue to infringe on the real right. For usufruct, the *vindicatio ususfructus* protected the usufructuary's rights. Justinian replaced these actions with the *actio confessoria* for use by all holders of servitudes, against anyone who infringe the holder's right to exercise the servitude.

*Actio negatoria*, available to the owner of the land over which another person unlawfully claimed to have a servitude.

Special interdicts protected some servitude holders. Justinian later granted all holders the same protection.

## 2. Real security

### 2.1 Introduction

A lender (creditor) needs security for repayment of an advance. To ensure that he will recover the debt, a lender may:

- Insist that a third person be held responsible for the debt along with the debtor. The third party then stands surety for the debtor. This is called personal security and grants a personal right to the lender against the surety.
- Grant a real right over the property belonging to the debtor. The creditor acquires a limited real right over the property. If the debtor is unable to repay the debt, the creditor can sell the property and use the proceeds of the sale to discharge the debt. The debtor received the balance. This is called real security and the creditor enjoys greater security than with a personal security.

Real security is terminated through the law (*ipso iure*) when the debt is discharged. In Roman law there were 3 forms of real security, namely *fiducia cum creditore contracta* (contract with a creditor based on trust), *pignus* (pledge) and *hypotheca* (hypothec).

## 2.2 Fiducia

*Fiducia* was derived from *ius civile* and the oldest and most important form of real security in Roman law. *Fiducia* is a specific consequence which a debtor and creditor envisaged when securing an existing debt. It is not an independent contract, nor a form of *tradition*. It is a underlying agreement between the debtor and creditor when ownership was transferred as security by the debtor to the creditor. The creditor was also trusted to restore ownership of the thing to the debtor once certain conditions were satisfied (*pactum fiduciae*), which involved the repayment of the debt to the creditor. After discharge, the creditor had to transfer ownership of the thing to the debtor.

*Fiducia* existed when ownership of the thing that served as security was transferred to the creditor through *mancipatio* or *in iure cession* as security for the discharge of the debt. The *pactum fiduciae* was initially not enforceable and the praetor later had to grant a personal action (*actio fiduciae*) to the debtor through which the debtor could enforce the agreement against the creditor. The most important provision related to the circumstances under which the creditor could sell the thing and the debtor could claim any excess.

The creditor could not profit from the thing. The fruits had to be used towards the interest on the debt and repayment of the capital sum. Payment of the debt did not automatically terminate the creditor's ownership. He had to recover ownership through *remancipatio* or prescription. Initially only *res Mancipi* could be used for *fiducia*, however this later included all corporeal things. *Fiducia* disappeared during the classical period and Justinian had all references removed.

*Fiducia* had disadvantages:

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

## 2.3 Pledge (*pignus*)

During the Republican period the custom arose to transfer a thing as security without the formalities attached to *fiducia*. Ownership pledged was not transferred to the creditor. Therefore, the creditor had no legal protection. If the creditor lost possession he had to rely on the debtor to reclaim it and return it to him. The creditor had no real right in respect thereof.

Therefore, the praetor protected the creditor through possessory interdicts and a new form of real security developed, a pledge whereby the debtor retained ownership but possession was transferred to the creditor. Both movables and immovables could serve as security.

A pledge existed when the debtor (pledgor) delivered a corporeal thing to the creditor as security for the discharge of a debt. Delivery relied on an agreement between the parties that the thing would be returned to the pledgor when the debt is discharged. The contract was therefore established by the agreement and delivery of the pledged object.

Pledging of the thing by agreement meant that at the moment of pledging the pledgor had to have ownership of the thing or be the bonitary owner, the parties had concluded an informal agreement of pledge and a debt existed that could be secured by the right of pledge.

The pledgor could use a personal action, the *actio pignoratitia* against the pledgee through which he could demand that the thing be restored to him upon discharge of the debt. Initially, the pledgee could only keep the thing until the debt was discharged, however, later it became a tacit provision of the contract to sell the thing if the pledgor did not fulfill his obligation to discharge the debt. The creditor could even keep the thing, if the debt was not discharged, although this was unfair as the object could be worth more than the debt it served to secure. Such an agreement (*lex commissoria*) was forbidden in postclassical Rome, and Justinian ruled that the pledgee could only sell the object and satisfy his claim from the proceeds and the pledgor could claim the excess through the *actio pignoratitia*.

The pledgee was also not entitled to use and enjoy the object unless expressly so agreed. He was therefore only afforded security that the secured debt would be discharged. The pledgor was protected by the possessory interdicts, as well as the *actio Serviana* or the *actio quasi Serviana* and could reclaim the object from whomever was in possession of it in terms of this real action.

## 2.4 Hypothec (*hypotheca*)

Hypothec developed in respect of lease of land. The lessor desired security for the payment of rent; the lessee possess certain movables such as livestock, slaves and agricultural equipment, which he needed for the land. The lessee was therefore unable to hand over these movables as security. An agreement was entered into that the tenant's *invecta et illata* (movables) and the fruits (crop or livestock) served as security for payment of the rent. This agreement was made enforceable through an interdict called the *interdictum Salvianum*. Through this interdict the landowner obtained possession of the *invecta et illata* when the rent was due but not paid.

Hypothecation was a form of pledge without possession, as the creditor acquired neither ownership nor possession. The debtor retained ownership and possession of the thing that served as security for the discharge of the debt. A hypothec implied that a debt existed that was secured by a thing and the hypothec was terminated by the discharge of debt.

The advantages of a hypothec:

- Anything could be used: movables and immovables; corporeal and incorporeal thing; existing and future things; single and composite objects.
- The debtor retained ownership and possession and therefore did not lose the use and enjoyment of the thing.
- The debtor could offer the thing to more than one creditor as security.

Hypothec were created by informal agreements and not publicized, therefore creditors were unaware if the thing had been offered as security before, however the debtor was obliged to inform each successive creditor of the number and value of debts for which the thing was offered as security and the first creditor had the strongest right (*prior tempore, potior iure*). He had the first right to settle the claim from the proceeds of the sale of the hypothecated thing. However, some hypothecs were privileged and were placed at the top of the list for repayment, eg. back taxes, a wife's dowry and a ward over the estate of his guardian.

## Activity

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

- a) Julius wants to borrow 1000 to open a market stall. The only asset he has is a gold ring.

First, *fiducia* could be used. Julius could transfer ownership of the ring to Brutus. Once Julius had repaid the 1000, Brutus would be obliged to transfer ownership of the ring to him. Secondly, Julius could have pledged the ring. This would mean that Brutus would possess the ring for the duration of the debt. As soon as the 1000 had been repaid, the ring would have to be returned to Julius. In both cases Brutus could sell the ring, if Julius did not discharge the debt. The surplus of the proceeds would have to be paid to Julius.

- b) Gaius wants to borrow 70 000 to buy a farm. His only assets are his livestock, his slaves and his agricultural implements.

In this case a hypothec would be the obvious form of security. Gaius wants to buy a farm with the money he has borrowed and then the livestock, slaves and agricultural implements would be needed for his farming operations. *Fiducia* and pledging would therefore be impractical, because that would mean that he lost possession of the things he would need. Brutus should create a hypothec over the *invecta et illata* and if Gaius failed to perform he could attach the livestock, slaves and agricultural implements in order to sell them and discharge the debt from the proceeds.

### Self-evaluation questions

- 1) Briefly discuss the most important differences between *fiducia* and pledge (*pignus*). (4)

- 2) Discuss three important advantages of a hypothec over a pledge. (6)

Anything could be used: movables (table) and immovables (farm); corporeal (plough) and incorporeal things (a claim); existing (wagon) and future things (crop in the field); single (book) and composite objects (a farm with improvements).

The debtor retained ownership and possession and therefore did not lose the use and enjoyment of the thing.

The debtor could offer the thing to more than one creditor as security, because he retained possession.

## Part B

### The Roman law of obligations

#### Chapter 1

#### General principles of the law of obligations

##### General introduction

The law of obligations is characterized by a right to claim a specific performance from a specific person. This right is a personal right enforceable through a personal action (*actio in personam*). Eg. If Quintus owes Darius money, Darius cannot recover the money from Tertius or if Quintus has undertaken to repair Darius' roof, Darius cannot demand that Tertius repairs his roof.

In the case of a real action (*actio in rem*) any person infringing a particular real right can be accountable. Eg. Darius' ownership of his horse is enforceable against everyone not only against a specific person. It

would not make sense if Darius could only protect or enforce his ownership against Tertius. His right is therefore protected by law.

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

## 1. What is an obligation?

An obligation is defined as a legal bond between two or more parties, one of which, the creditor, had a personal right against the other, the debtor, to enforce a particular performance, while the debtor is under an obligation to the creditor to perform.

## 2. Sources of obligations

A contract gives rise to an obligation. Delicts were unlawful acts against an individual, his possession or his family. A delict gives rise to a duty to compensate the victim, which in turn gives rise to an obligation between the offender and the victim, regardless of whether the parties have agreed or desired to become bound to each other. Gaius classified the sources of obligations as contracts and delicts. Justinian considered that obligations arise from the following four sources:

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

### 2.1 Contracts

Contracts were classified as:

- Contracts that formed through a mere agreement (*contractus consensus*)
- Contracts that formed as a result of certain formal words (*contractus verbis*)
- Contracts that formed after delivery of a thing (*contractus re*)
- Contracts that formed as a result of writing (*contractus litteris*)

To create an enforceable contract, the *causa contractus* had to be present. Real contracts (*contractus re*) were created by agreement, followed by delivery. The subsequent delivery was the *causa contractus*. Examples are: loan for consumption (*mutuum*), loan for use (*commodatum*), deposit (*depositum*) and pledge (*pignus*).

Agreement + delivery of a thing = *contractus re*

Verbal contracts (*contractus verbis*) formed through an agreement followed by the use of certain formal words. Eg. *stipulatio*

Agreement + formal words = *contractus verbis*

The *causa contractus* for written contracts (*contractus litteris*) was the requirement of a written document or entry. The written contract owed its existence to the fact that the creditor had made an entry in a ledger. If the debtor agreed with this entry, a *contractus litteris* was concluded.

Agreement = writing = *contractus litteris*

In consensual agreements (*contractus consensus*) agreement was sufficient and no additional element was required. Eg. contract of purchase and sale (*emptio et venditio*), contract of letting and hiring (*location et conduction*), mandate (*mandatum*) and contract of partnership (*societas*).

Agreement = *contractus consensus*

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

## 2.2 Quasi-contracts

Eg. unauthorized administration of another's affairs (*negotiorum gestio*), joint ownership and wrongful enrichment. In these cases an obligation were formed without agreement. A quasi-contract is a unilateral contract that merely creates one obligation.

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

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

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

An imperfectly bilateral contract give rise to only one obligation, but there is a possibility of a counterclaim, eg. a contract of loan for use based on good faith, because the borrower always incurred certain obligations in terms of the contract, whereas the lender only incurred an obligation in exceptional circumstances. If I lent Brutus a broken wagon and his goods were damaged while using the wagon, my action was contrary to the requirements of good faith and Brutus could claim damages from me for the damaged goods.

## 2.3 Delict

A delict creates an obligation between the victim and the perpetrator (debtor) if his unlawful act caused the victim damage. The debtor must compensate the victim for damages caused.

## 2.4 Quasi-delict

Quasi-delicts are not pure delicts but could result in certain obligations. Eg. Quasi-delict was the liability of innkeepers for damage done to guests' property.

## 3. Classification of obligations

3.1 Civil obligations (*obligationes civiles*) – were enforceable through a person action and derived from the *ius civile*.

## 3.2 Natural obligations (*obligations naturales*)

Ordinary obligations, although valid, could not be enforced through an action because an action was refused or not executed. Eg. If a minor concluded a contract without the consent of his guardian, the contract was legally valid in all respects, but not enforceable, because the minor could not be compelled to perform towards the third party.

### 3.3 *Obligationes stricti iuris*

Obligations derived from the *ius civile* gave rise to an action based on early law and was enforceable through action based on early law. The judge had to confine himself to provisions contained in the *formula*.

### 3.4 *Obligationes 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.

## 4. Termination of obligations

There were particular ways in which obligations could be extinguished or terminated:

### 4.1 Performance

An obligation was terminated when performance or fulfillment took place.

### 4.2 Release

Release is an agreement between the creditor and the debtor whereby the debtor does not have to render the performance owed.

### 4.3 Compensation

There were three requirements:

- Both performances had to be claimable
- The performances had to be similar (money, cattle, etc.)
- The two debts had to be owed by the same parties to whom compensation applied.

Eg. David owes Paul a sum of R100. Paul in turn owes David a sum of R150. This means that David has to pay R100 to Paul, after which Paul has to pay R 150 to David. Therefore Paul must only pay David R50. Both obligations are therefore wiped out by compensation.

### 4.4 Merger

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

### 4.5 Novation

When the original obligation is extinguished by the creation of a new obligation in the place of the original one. Novation was usually effected by *stipulatio*, a verbal contract. Any existing obligation could be transformed this way into a new or different obligation, and one of the parties of the existing obligation could even be replaced by another through novation.

## Self-evaluation questions

### 1. What is an obligation? (2)

An obligation is defined as a legal bond between two or more parties, one of which, the creditor, had a personal right against the other, the debtor, to enforce a particular performance, while the debtor is under an obligation to the creditor to perform.

### 2. What is the difference between a personal and a real action? (2)

A personal right is enforceable through a personal action (*actio in personam*). Eg. If Quintus owes Darius money, Darius cannot recover the money from Tertius or if Quintus has undertaken to repair Darius' roof, Darius cannot demand that Tertius repairs his roof.

In the case of a real action (*actio in rem*) any person infringing a particular real right can be accountable. Eg. Darius' ownership of his horse is enforceable against everyone not only against a specific person. It would not make sense if Darius could only protect or enforce his ownership against Tertius. His right is therefore protected by law.

### 3. Briefly explain the various sources of obligations. (4)

Contracts were classified as contracts that formed through a mere agreement (*contractus consensus*); as a result of certain formal words (*contractus verbis*); after delivery of a thing (*contractus re*) and as a result of writing (*contractus litteris*)

To create an enforceable contract, the *causa contractus* had to be present. Real contracts (*contractus re*) were created by agreement, followed by delivery. The subsequent delivery was the *causa contractus*. Examples are: loan for consumption (*mutuum*), loan for use (*commodatum*), deposit (*depositum*) and pledge (*pignus*).

Quasi-contracts - Eg. unauthorized administration of another's affairs (*negotiorum gestio*), joint ownership and wrongful enrichment. In these cases an obligation were formed without agreement. A quasi-contract is a unilateral contract that merely creates one obligation.

Delict - A delict creates an obligation between the victim and the perpetrator (debtor) if his unlawful act caused the victim damage. The debtor must compensate the victim for damages caused.

Quasi-delict - These are not pure delicts but could result in certain obligations.

### 4. Name the Roman jurists' classification of obligations. (4)

Gaius classified the sources of obligations as contracts and delicts. Justinian considered that obligations arise from contracts, delicts, quasi-contracts and quasi-delicts.

### 5. Give examples of Justinian's fourfold classification of contracts. (4)

In consensual agreements (*contractus consensus*) agreement was sufficient and no additional element was required. Eg. contract of purchase and sale (*emptio et venditio*), contract of letting and hiring (*location et conduction*), mandate (*mandatum*) and contract of partnership (*societas*).

Quasi-contracts - Eg. unauthorized administration of another's affairs (*negotiorum gestio*), joint ownership and wrongful enrichment. In these cases an obligation were formed without agreement. A quasi-contract is a unilateral contract that merely creates one obligation.

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

Delict – the perpetrator is the debtor in the obligation that has to compensate the victim for the damage caused.

Quasi-delict was the liability of innkeepers for damage done to guests' property.

## 6. In which ways could obligation be terminated? (5)

Performance - An obligation was terminated when performance or fulfillment took place.

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

Release - an agreement between the creditor and the debtor whereby the debtor does not have to render the performance owed.

Compensation - Eg. David owes Paul a sum of R100. Paul in turn owes David a sum of R150. This means that David has to pay R100 to Paul, after which Paul has to pay R 150 to David. Therefore Paul must only pay David R50. Both obligations are therefore wiped out by compensation.

Novation - When the original obligation is extinguished by the creation of a new obligation in the place of the original one. Novation was usually effected by *stipulatio*, a verbal contract. Any existing obligation could be transformed this way into a new or different obligation, and one of the parties of the existing obligation could even be replaced by another through novation.

## Chapter 2

### The Roman law of contracts

#### General Introduction

#### 1. Contents of Roman contracts

Any act or omission could constitute performance in terms of a contract. The performance could be specified (*certum*) or unspecified (*incertum*) and either divisible or indivisible.

Eg Specific performance is where a sum of money is exactly stipulated, such as R100. Unspecified performance would be where Petrus undertakes to compensate a neighbour for any damages suffered as a result of Petrus' building extensions.

Performance could also be an alternative obligation, as agreed between the parties. A facultative obligation was another form of performance, where performance was due but the debtor was entitled to render another kind of performance instead of the original one.

A performance could also be generic where Antonius is obliged to deliver 10 litres of wine to Stichus. If Antonius' winery burned down his obligation to deliver would still exist.

### Requirements for valid performance:

- It may not be in conflict with good morals or a legal concept;
- The content of the performance must be determinable in monetary terms and not vague or imprecise;
- The performance has to be due to the other party; and
- The performance has to be physically and legally possible.

An example of physical impossibility: If Stichus sold Julius a house already burned down and performance would be legally impossible if a thing that fell outside the sphere of legal commerce was sold.

The provision of a contract are referred to as contract terms. A condition in a contract is a specific kind of contractual term which determines that an obligation will be created or terminated upon the occurrence of an uncertain future event.

There are suspensive and resolutive conditions. A suspensive condition suspends the effect of the legal act until the condition is fulfilled:

Eg. Antonius sells his house to Brutus for 100 000. It is stipulated in the contract of purchase and sale that the contract is subject to the approval of a loan. The approval of the loan is the suspensive condition and the obligation is only created if the condition is fulfilled, or the loan is granted.

A resolutive condition discharges the effect of a legal act as soon as the condition is fulfilled. Therefore if a contract is subject to a resolutive condition, the obligation arises immediately and is terminated upon fulfillment of the condition.

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

It was also possible to link a contract to a time clause. A time clause relates to a certain future event. If a legal act was dependent on a suspensive term, the contract is concluded immediately, but only enforced after the term has ended. If a legal act was dependent on a resolutive term, the contract is concluded immediately but extinguished when the term is fulfilled.

## 2. Agreement (*consensus*)

Consensus (*consensus ad idem*) was a requirement for the creation of all contracts in Roman law. In the absence of agreement, no contract was concluded. Contracts could also be void and voidable.

Contracts that were void *ab initio* (from the start) had no legal effect. Then there was no contract and no rights or duties were conferred on the parties. Mistake (*error*) sometimes resulted in no valid contracts being created. Voidable contracts were contracts that contained a defect, such as fraud or duress, which meant the contract is valid and binding *prima facie* but the injured party was entitled to have it declared void.

Factors that could excluded or influenced agreement between parties were fraud (*dolus*), duress (*metus*) and mistake (*error*).

## 2.1 Fraud (*dolus*)

Fraud includes any fraudulent act or misleading conduct or misrepresentation that was deliberately intended to persuade the other party to conclude the contract. Fraud results in the contract being voidable.

If Antonius sold his horse to Cassius, under the false and fraudulent representation that the horse was five years old, while the horse was in fact 15 years old, and Cassius bought the horse after he had been given this impression (although he specifically wanted a young horse), the contract would be voidable on the grounds of fraud (*dolus*).

## 2.2 Duress (*metus*)

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

## 2.3 Mistake (*error*)

Mistake refers to a *bona fide* mistake made by one or both parties in the conclusion of the contract and that was not due to fraud on the part of either party. Mistake is therefore an erroneous impression of true facts. The various kinds of mistake or error had different legal consequences:

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

No valid contract exists and the contract is void *ab initio*.

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

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

No valid contract exists and the contract is void *ab initio*.

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

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

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

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

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

An error as to the identity of the other contracting party usually had not influence in principle on the validity of the contract. It would be different if, however, the contract had been entered into with regard to a certain person, as where a specific person was contracted.

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

The contract would have been void if the object of the contract differed in essence, from what had been agreed to.

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

#### Activity

- a) Baldus is Cassius' employer. They agree that Cassius will rent Baldus' holiday home from him for a period of five years. Baldus make it quite clear to Cassius that he will ensure that Cassius' service contract is not renewed the following year if he refuses to conclude the contract of letting and hiring with him. (3)

If Cassius were to conclude the contract with Baldus under duress or for fear that his service contract would not be renewed, the contract would be voidable as a result of duress (*metus*). Cassius therefore has the option of withdrawing from the contract without incurring any obligation or liability.

- b) Antonius and Stichus conclude an agreement in terms of which Stichus buys a stand from Antonius. Antonius points the boundaries of the stand out to Stichus. When Stichus starts taking measurements for the villa he wants to build on the stand, it appears that a portion of the stand actually belongs to Antonius' neighbour. (3)

If there was a *bona fide* mistake regarding the boundaries of the stand, we are dealing with *error in corpore* (mistake regarding the object of the contract) and no valid contract was created between Antonius and Stichus.

- c) Aulus enters into an agreement with Furius, a goldsmith, that Furius will make Aulus' wife a pair of earrings out of gold. Furius fraudulently makes the earrings out of an inferior metal and plates them with a thin coating of gold. (3)

While at first sight these facts appear to suggest *error in substantia* (mistake regarding the quality or nature of the object of the contract) the key lies in the word "fraudulently". The contract between Aulus and Furius is voidable as a result of fraud (*dolus*). Aulus could therefore have the contract declared void.

### 2.4 Contractual liability

When person conclude a contract, they intend to render performance in accordance with the provisions of the contract. The debtor may malperform, either by not fulfilling his obligations in terms of the contract or by rendering an inadequate performance. The debtor is expected to ensure that performance takes place, the degree of which depended on the contract. In most cases the contracting parties were expected to display the care of a *bonus et diligens paterfamilias*.

If a party omitted to display the care of a *bonus et diligens paterfamilias*, he acted negligently and was guilty of *culpa levis in abstracto*. He was held liable even in the slightest negligence, even if he was a party to contract who derived a benefit from the transaction. Eg. Both parties to a contract of letting and hiring, contract of mandate or a contract of purchase and sale.

*Culpa levis in concreto* indicated that a contracting party was expected to display the same degree of diligence as he would apply to his own affairs, especially where one party had to see to his own interests as well as those of the other party over a long period. Persons liable for *culpa levis in concreto* are partners in terms of a partnership contract.

*Culpa lata* referred to gross negligence. It was the same as malice (*dolus*). The depositary in a contract of deposit is responsible for *culpa lata*.

## Activity

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

## Feedback

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

### 2.4.1 Mora

Another form of breach of contract occurred when the performance was possible and due, but the debtor failed to perform due to his fault – *mora debitoris*. If the debtor's failure to perform was not his own fault or if it was reasonable that he was under the impression that performance was not due, there was no *mora debitoris*. *Mora debitoris* ended as soon as the debtor tendered performance or when the obligation is terminated.

The consequences of *mora debitoris* are that obligation remains in force and the debtor is liable for performance, even if performance becomes impossible after being *in mora* through no fault of his own.

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

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

If no date is specified for performance, a notice must first be served on the debtor to perform. If the debtor received the notice from the creditor to perform on a certain date and he neglected to do so, he falls into *mora ex persona*.

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

When the creditor's cooperation is needed to make performance possible and neglects or refuse to do so, then the creditor would be in *mora creditoris*. This applies even if he was prevented by circumstances from accepting performance. *Mora creditoris* is terminated if the creditor indicates

his willingness to accept performance. The debtor is also entitled to claim for damages suffered as a result of the *mora creditoris*.

### Activity

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

Answer the following questions on the facts given above:

- a) Explain what kind of *mora* is applicable here and say when it came into operation. (2)

Antonius was in *mora ex re* on 2 May. An agreed date had been set for performance and he failed to perform on that date.

- b) Antonius contends that the death of the horse was caused by an act of God (*vis major*) and not by any fault of his. Can Seius hold Antonius liable for the death of the horse Sextus? Explain briefly. (3)

The consequence of Antonius’ *mora* was that as debtor he remained liable for performance, even if that performance had become impossible through no fault of his own. Seius could hold Antonius liable for the payment of an amount equivalent to the value of the horse, Sextus.

- c) If Seius had refused to receive the horse on 1 May, what would the legal position have been? (2)

If Seius refuses to receive the horse on 1 May when performance is tendered by the debtor as agreed, he has fallen into *mora creditoris*. Antonius becomes entitled to claim compensation for damages suffered by him as a result of Seius’ *mora*, such as the cost of stabling and feeding the horse, which he had necessarily incurred.

### 2.5 Impossibility and supervening impossibility of performance

*Impossibilium nulla obligatio* (if it is impossible to perform, there is no contract). The term impossibility of performance means that it was impossible to perform at the moment the contract was concluded. The consequence of initial impossibility of performance varied depending on whether it was a strict law contract or one based on good faith. A strict law contract resulted in the contract being void. And contracts based on good faith, it depends on whether the debtor knew if performance was impossible. If he knew then he acted fraudulently and is liable. If he did not know that performance was impossible then the maxim applied and there is no contract.

Supervening impossibility of performance refer to cases where performance only became possible after the contract was concluded. If it was caused by an act of God (*vis major*) or chance (*casus fortuitus*) the maxim applied and no contract was concluded. If caused by the fault of the debtor (with malice or negligence), the debtor is liable in terms of the contract.

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

*Casus fortuitous* refers to inevitable accidents, such as theft, death and disease. They are less serious than *vis maior*, but share the element of unforeseeability with *vis maior*.

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

### Activity

Briefly discuss the legal consequences of the following situations:

- a) Cassius and Darius conclude a contract in terms of which Cassius buys a villa on Darius' land. Upon closer inspection it appears, however, that the villa burned down some time previously. (3)

Performance was impossible *ab initio*, since the villa did not exist at the time when the contract was concluded. Therefore no valid contract came into existence.

- b) Bertus and Antonius agree that Bertus may borrow Antonius' wagon for a week. Shortly after the contract has been concluded, when Antonius wants to deliver the wagon to Bertus, Antonius' wagon is stolen.

These facts are an example of where performance became impossible after the contract had been concluded. Under the *impossibilium* rule the risk of supervening impossibility of performance devolves on the creditor, unless the supervening impossibility of performance is the result of *vis major* or *casus fortuitous*. The theft of the wagon is an example of supervening impossibility of performance as a result of *casus fortuitous* and consequently Antonius is released from his obligation under the contract.

## 2.6 Unilateral, bilateral and imperfectly bilateral contracts

Only one obligation followed from a unilateral contract: One of the parties (debtor) was under an obligation to perform, while the other party (creditor) was entitled to performance. Eg. a loan of consumption.

An imperfectly bilateral contract was unilateral: In principle it gave rise to only one obligation. In exceptional circumstances (where the debtor suffered damages due to the creditor's negligence) the debtor could also claim. Eg. a loan for use.

A bilateral contract gave rise to two obligations. Both parties enjoyed rights and had obligations. Both parties were creditor and debtor. One party's right was the other's obligation. Eg. a contract of sale. The most important duty of the buyer was to pay the purchase price and the seller was entitled to receive it. The seller's most important duty was to deliver the object of sale, while the buyer was entitled to receive it.

### Self-evaluation questions

1. What were the legal requirements for valid performance in Roman law? (5)

It may not be in conflict with good morals or a legal concept;  
 The content of the performance must be determinable in monetary terms and not vague or imprecise;  
 The performance has to be due to the other party; and  
 The performance has to be physically and legally possible.

2. What is the difference between a suspensive and a resolutive condition? (2)

A suspensive condition suspends the effect of the legal act until the condition is fulfilled:

Eg. Antonius sells his house to Brutus for 100 000. It is stipulated in the contract of purchase and sale that the contract is subject to the approval of a loan. The approval of the loan is the suspensive condition and the obligation is only created if the condition is fulfilled, or the loan is granted.

A resolutive condition discharges the effect of a legal act as soon as the condition is fulfilled. Therefore if a contract is subject to a resolutive condition, the obligation arises immediately and is terminated upon fulfillment of the condition.

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

3. What is the difference between void and voidable contracts? (2)

Contracts that were void *ab initio* (from the start) had no legal effect. Then there was no contract and no rights or duties were conferred on the parties. Mistake (*error*) sometimes resulted in no valid contracts being created. Voidable contracts were contracts that contained a defect, such as fraud or duress, which meant the contract is valid and binding *prima facie* but the injured party was entitled to have it declared void.

4. Name the factors that preclude or influence consensus between contracting parties. (3)

Factors that could be excluded or influenced agreement between parties were fraud (*dolus*), duress (*metus*) and mistake (*error*).

Fraud includes any fraudulent act or misleading conduct or misrepresentation that was deliberately intended to persuade the other party to conclude the contract. Fraud results in the contract being voidable.

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

Mistake refers to a *bona fide* mistake made by one or both parties in the conclusion of the contract and that was not due to fraud on the part of either party. Mistake is therefore an erroneous impression of true facts.

5. Briefly discuss the various forms of *culpa* in contractual liability. (6)

If a party omitted to display the care of a *bonus et diligens paterfamilias*, he acted negligently and was guilty of *culpa levis in abstracto*. Eg. Both parties to a contract of letting and hiring, contract of mandate or a contract of purchase and sale.

*Culpa levis in concreto* indicated that a contracting party was expected to display the same degree of diligence as he would apply to his own affairs, especially where one party had to see to his own interests as well as those of the other party over a long period. Persons liable for *culpa levis in concreto* are partners in terms of a partnership contract.

*Culpa lata* referred to gross negligence. It was the same as malice (*dolus*). The depositary in a contract of deposit is responsible for *culpa lata*.

6. Name the various forms of *mora* and the legal consequences of each. (4)

Another form of breach of contract occurred when the performance was possible and due, but the debtor failed to perform due to his fault – *mora debitoris*. If the debtor's failure to perform was not his own fault or if it was reasonable that he was under the impression that performance was not due, there was no *mora debitoris*. *Mora debitoris* ended as soon as the debtor tendered performance or when the obligation is terminated.

The consequences of *mora debitoris* are that obligation remains in force and the debtor is liable for performance, even if performance becomes impossible after being *in mora* through no fault of his own.

When the creditor's cooperation is needed to make performance possible and neglects or refuse to do so, then the creditor would be in *mora creditoris*. This applies even if he was prevented by circumstances from accepting performance. *Mora creditoris* is terminated if the creditor indicates his willingness to accept performance. The debtor is also entitled to claim for damages suffered as a result of the *mora creditoris*.

7. Briefly discuss the supervening impossibility of performance and its consequences. (6)

Supervening impossibility of performance refer to cases where performance only became possible after the contract was concluded. If it was caused by an act of God (*vis major*) or chance (*casus fortuitus*) the maxim applied and no contract was concluded. If caused by the fault of the debtor (with malice or negligence), the debtor is liable in terms of the contract.

## Chapter 3

### Consensual contracts (Part 1)

#### General introduction

*Contractus consensu* were created by agreement between the parties and were one of the exceptions to the rule that the contract had to contain an additional element, *causa contractus*, before it was enforceable. The four consensual contracts were purchase and sale, letting and hiring, partnership and mandate. Purchase and sale was the most important Roman contract.

#### 1. Contract of purchase and sale (*emptio venditio*)

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

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

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

## 2. Elements of the contract of sale

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

### 2.1 Agreement (*consensus*)

A contract of sale came into existence when there was agreement between the buyer and the seller regarding the purchase and sale, the object of sale and the purchase price. This agreement was demonstrated in various ways through a handshake or the exchange of rings, but not necessarily in each other's presence or even by letter or through messengers.

In AD 529 Justinian ruled that a contract would only be binding once it's put in writing. In modern law it's a requirement for the validity of certain contracts to be in writing, such as a contract for the alienation of immovable property.

### 2.2 Object of sale

Only things susceptible of private ownership (*res in commercio*) could be the subject of a contract of sale. *Res extra commercium* such as temples, graves or free persons could not be sold and such a contract would be void.

Other things that could not be sold were:

- Things that belonged to the buyer
- Things that did not exist when the contract of sale was concluded
- Things on which a prohibition of sale was imposed by law, such as the sale of dowry items consisting of immovable property in certain cases.

It had to be possible at the time the contract was concluded. A contract where the object ceased to exist before the agreement was concluded is void:

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

The sale of future things was possible:

Brutus agrees with Augustus that he will purchase next year's wine crop from Augustus' vineyard.

With the sale of future things the jurists distinguished between the purchase of an object hoped for (*emptio rei speratae*) and the purchase of a hope (*emptio spei*). They were both valid contracts, but the legal consequences were different if the thing did not realize.

Eg. If Aulus agreed with Ulpus that he would buy all the birds Ulpus caught in his trap in a period of two days for five coins. If Ulpus caught nothing in his trap in these two days, Aulus was nevertheless responsible for paying the five coins. This sale was therefore a risk, because if nothing materialized, the purchaser still had to perform. This contract was therefore to the advantage of the seller.

If Aulus agreed with Stichus that he would buy Stichus' lucerne crop for the following year from certain fields at five silver pieces per bag of lucerne. This contract was to the buyer's advantage, because if no lucerne were harvested, no obligations would arise. Therefore, if Stichus harvested no lucerne the following year, Aulus owed him nothing.

The object sold had to be specific (*certum*). A sale by kind, where the contract only referred to the kind of object sold and not a specific object, was not allowed. Eg the sale of the best firewood or five litres of red wine.

There were two exceptions to the rule that the object sold had to be specific, alternative sale and semi-specific sale. With the alternative sale the object sold consisted of two alternatives, the horse Beauty or the horse Duke. With the semi-specific sale the object of sale was not precisely identified, but there was an indication of where it came from and what distinguished it from an inadmissible sale by kind. Eg. 10 young colts from my stable.

It was not a requirement that the object of sale should be the seller's own property. He could sell the property of another (*res aliena*) and it would still be a valid contract. The seller did not have to transfer ownership of the object sold to the purchaser. He only had to give the purchaser free and undisturbed possession of the thing sold and a guarantee against eviction.

## 2.3 Purchase price

There is no sale without a price.

### 2.3.1 Requirements regarding the purchase price

- a) No price no sale. The principle *nulla emptio sine pretio* means that a contract of sale could not be created unless a price was specified.

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

- b) Money required. The price had to be a sum of money that could be physically counted or weighed on a scale.
- c) The price had to be specific (*certum*). If a price was not agreed on, the contract was void. A price was still specific if it was ascertainable but unknown.

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

- d) The price had to be genuine (*verum*). The part had to intend that it should be paid; the price determined could not be a sham. If the price was a sham, the contract was regarded as a donation.

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

- e) The price had to be just and reasonable (*iustum*).

## 4. Stages in the contract of sale and the passing of risk

If a contract was made subject to a suspensive condition, an element of uncertainty was introduced which had particular legal consequences.

Suppose A concludes a contract with B, a motor vehicle dealer, for the purchase of a motor car and this contract is made subject to the suspensive condition that A will buy the motor car if his application for a loan for the purchase of the motor car is approved by his bank. If the motor car

stands on the showroom floor at B's premise while A is waiting for approval from the bank and B's business burns down during this period, who bears the risk for the destruction of the motor car (object of sale) if the purchase price has not been paid and the motor car has not yet been delivered?

It depends on whether the contract is *perfecta*.

A contract is *perfecta* when everything has been completed apart from the payment of the purchase price and the delivery of the object of sale, or if there is agreement on the *essentialia* and there is no suspensive condition.

A contract is *imperfecta* if

The object of sale in a semi-specific sale has not yet been adequately identified  
 The price had not yet been clearly determined  
 The sale has been made subject to a suspensive condition.

If Stichus sells his wagon to Aulus for as much money as Cassius decided and Cassius is unable to decide on a price, the contract is *imperfecta*.

If Baldus agrees with Brutus that he will buy 10 bags of wheat from Brutus' own field, it is a semi-specific sale, since the object sold has not yet been adequately identified. This contract is *imperfecta*, while the 10 bags of wheat had not yet been harvested and bagged. Until a semi-specific object of sale has not been physically identified, the contract of sale remains *imperfecta*.

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

The risk rule determines that the risk for the destruction of or damage to the object of sale passed from the seller to the purchaser as soon as the contract was *perfecta*. If the contract was still *imperfecta*, the risk of the destruction of the object sold is borne by the seller and he has to suffer the loss or damage. The risk rule is applicable when the damage or loss to the object sold was caused by *vis maior* or *casus fortuitous*. If a contract was *perfecta*, the risk passed from the seller to the buyer and the buyer is liable for the payment of the purchase price, even if the object sold is destroyed through no fault of the seller.

If Aulus bought 10 bags of lucerne from Stichus, from Stichus' only field, and a great flood caused the lucerne crop to be lost, the contract was still *imperfecta* and the seller, Stichus had to bear the risk of the loss.

If Aulus bought a stallion from Stichus, for a much money as Caelius decided and the stallion was stolen after Caelius had already set the price, the contract was *perfecta* and Stichus could claim the purchase price from Aulus.

If the seller was responsible for the destruction of or damage to the object sold, the risk rule does not apply and the seller was liable to pay compensation to the purchaser. When the risk passes to the purchaser after the contract was *perfecta*, the purchaser would also be entitled to any fruits or accrual of the thing that arisen after the conclusion of the contract. A foal born after a contract of sale for the purchase of a mare has been concluded and has become *perfecta* would still belong to the purchaser.

Activity on Page 114

Feedback on Page 115

#### 4. Duties of the contracting parties

## 4.1 Duties of the seller

### 4.1.1 The duty to care for the property before delivery.

The seller was liable for *culpa levis in abstracto* and had to display the care of a reasonable man in looking after the object of sale. If he failed in his duty of care, he was liable for any damages caused by his intent (*dolus*) or negligence (*culpa levis in abstracto*). The purchaser could recover damage caused by *culpa* through the *action empti*.

### 4.1.2 Delivery of vacant possession to the purchaser.

Delivery consists of transfer of possession. The seller must deliver the object of sale to the purchaser immediately after conclusion of the contract or later, as agreed. The seller also had to deliver to the purchaser all fruits or accruals that the object sold produced since the contract became *perfecta*. He had to transfer free and undisturbed possession of the object of sale (*vacuam possessionem tradere*) – the purchaser had to be placed in effective and exclusive control of the object of sale.

### 4.1.3 Guarantee against eviction that nobody with a better title could evict the thing or portion of it. A guarantee against eviction did not mean that eviction would not take place. The purchaser could institute an action (*action empti*) for damages against the seller for damages he had suffered due to eviction.

### 4.1.4 Guarantee against latent defects. A latent defect was a hidden defect in the object sold that diminished its value or utility. Neither the seller nor the buyer could have been expected to be aware of the defect when the contract was concluded. Since the contract was a *negotium bonae fidei*, the seller could be punished through the *action empti* if he sell a thing in contravention of the rules of good faith if he knew of the latent defect.

The *aediles curules* decreed that when slaves or draught animals were sold on the market the seller must disclose any physical or character defects of the object of sale which impacted negatively on the thing's use. If it later transpired that the object sold had latent defects that was not been declared by the seller, the seller is liable through one of the aedilician actions.

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

The *actio redhibitoria*, to be instituted within 6 months after the latent defect became known, to claim repayment of the purchase price and to return the object to the seller.

The *actio quanti minoris* that enabled the purchaser to claim a reduction in the purchase price within 12 months after the defect became known.

### 4.1.5 Conduct in accordance with good faith because the consensual contract of sale was governed by the principles of good faith. Eg. an act contrary to good faith would be if Stichus sold Brutus a horse that he knew belonged to Aulus. If Brutus proved that he suffered a loss, he could sue Stichus with the *actio empti* for damages.

See activity on P118

See feedback on P118

## 4.2 The duties of the purchaser

The purchaser had to following obligations:

- 4.2.1 Payment of the purchase price at the agreed time or upon delivery of the object of sale. The purchaser could not enforce any duties of the seller with the *actio empti* before he paid the purchase price.
- 4.2.2 Acceptance of delivery of the object of sale at an agreed time and place. The buyer was entitled to refuse to take delivery if the seller did not fulfil his duties, however the seller could force him to take delivery through the *actio venditi*.
- 4.2.3 Reimbursement of expenses for necessary costs incurred for the thing sold from the time the contract was concluded until the thing was delivered.

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

- 4.2.4 Conduct in accordance to good faith, because the contract of purchase and sale was based on *bona fides*.

### Self evaluation questions

1. Name the four Roman consensual contracts. (4)

Contract of sale, letting and hiring, partnership and mandate.

2. Give the requirement for the conclusion of the Roman contract of purchase and sale. (1)

Consensus

3. Briefly discuss the requirements for the object of the sale. (3)

Only things susceptible of private ownership (*res in commercio*) could be the subject of a contract of sale.

It had to be possible at the time the contract was concluded. A contract where the object ceased to exist before the agreement was concluded is void:

The object sold had to be specific (*certum*). A sale by kind, where the contract only referred to the kind of object sold and not a specific object, was not allowed. Eg the sale of the best firewood or five litres of red wine.

4. Briefly discuss the requirements in respect of price. (4)

No price no sale. The principle *nulla emptio sine pretio* means that a contract of sale could not be created unless a price was specified.

Money required. The price had to be a sum of money that could be physically counted or weighed on a scale.

The price had to be specific (*certum*). If a price was not agreed on, the contract was void. A price was still specific if it was ascertainable but unknown.

The price had to be genuine (*verum*). The party had to intend that it should be paid; the price determined could not be a sham. If the price was a sham, the contract was regarded as a donation. The price had to be just and reasonable (*iustum*).

5. Briefly distinguish between the purchase of an object hoped for (*emptio rei speratae*) and the purchase of a hope (*emptio spei*), with reference to two examples. (6)

With the sale of future things the jurists distinguished between the purchase of an object hoped for (*emptio rei speratae*) and the purchase of a hope (*emptio spei*). They were both valid contracts, but the legal consequences were different if the thing did not realize.

Eg. If Aulus agreed with Ulpus that he would buy all the birds Ulpus caught in his trap in a period of two days for five coins. If Ulpus caught nothing in his trap in these two days, Aulus was nevertheless responsible for paying the five coins. This sale was therefore a risk, because if nothing materialized, the purchaser still had to perform. This contract was therefore to the advantage of the seller.

If Aulus agreed with Stichus that he would buy Stichus' lucerne crop for the following year from certain fields at five silver pieces per bag of lucerne. This contract was to the buyer's advantage, because if no lucerne were harvested, no obligations would arise. Therefore, if Stichus harvested no lucerne the following year, Aulus owed him nothing.

#### 6. Discuss the risk rule with reference to an example. (6)

The risk rule determines that the risk for the destruction of or damage to the object of sale passed from the seller to the purchaser as soon as the contract was *perfecta*. If the contract was still *imperfecta*, the risk of the destruction of the object sold is borne by the seller and he has to suffer the loss or damage. The risk rule is applicable when the damage or loss to the object sold was caused by *vis maior* or *casus fortuitus*. If a contract was *perfecta*, the risk passed from the seller to the buyer and the buyer is liable for the payment of the purchase price, even if the object sold is destroyed through no fault of the seller.

If Aulus bought 10 bags of lucerne from Stichus, from Stichus' only field, and a great flood caused the lucerne crop to be lost, the contract was still *imperfecta* and the seller, Stichus had to bear the risk of the loss.

#### 7. Briefly discuss the duties of the seller. (5)

The duty to care for the property before delivery.

The seller was liable for *culpa levis in abstracto* and had to display the care of a reasonable man in looking after the object of sale. If he failed in his duty of care, he was liable for any damages caused by his intent (*dolus*) or negligence (*culpa levis in abstracto*). The purchaser could recover damage caused by *culpa* through the *actio empti*.

Delivery of vacant possession to the purchaser.

Delivery consists of transfer of possession. The seller must deliver the object of sale to the purchaser immediately after conclusion of the contract or later, as agreed. The seller also had to deliver to the purchaser all fruits or accruals that the object sold produced since the contract became *perfecta*. He had to transfer free and undisturbed possession of the object of sale (*vacuam possessionem tradere*) – the purchaser had to be placed in effective and exclusive control of the object of sale.

Guarantee against eviction that nobody with a better title could evict the thing or portion of it. A guarantee against eviction did not mean that eviction would not take place. The purchaser could institute an action (*actio empti*) for damages against the seller for damages he had suffered due to eviction.

Guarantee against latent defects. A latent defect was a hidden defect in the object sold that diminished its value or utility. Neither the seller nor the buyer could have been expected to be aware of the defect when the contract was concluded. Since the contract was a *negotium bonae fidei*, the

seller could be punished through the *actio empti* if he sell a thing in contravention of the rules of good faith if he knew of the latent defect.

The *aediles curules* decreed that when slaves or draught animals were sold on the market the seller must disclose any physical or character defects of the object of sale which impacted negatively on the thing's use. If it later transpired that the object sold had latent defects that was not been declared by the seller, the seller is liable through one of hthe aedilician actions.

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

The *actio redhibitoria*, to be instituted within 6 months after the latent defect became known, to claim repayment of the purchase price and to return the object to the seller.

The *actio quanti minoris* that enabled the purchaser to claim a reduction in the purchase price within 12 months after the defect became known.

Conduct in accordance with good faith because the consensual contract of sale was governed by the principles of good faith. Eg. an act contrary to good faith would be if Stichus sold Brutus a horse that he knew belonged to Aulus. If Brutus proved that he suffered a loss, he could sue Stichus with the *actio empti* for damages.

8. Briefly discuss the duties of the purchaser. (3)

Payment of the purchase price at the agreed time or upon delivery of the object of sale. The purchaser could not enforce any duties of the seller with the *actio empti* before he paid the purchase price.

Acceptance of delivery of the object of sale at an agreed time and place. The buyer was entitled to refuse to take delivery if the seller did not fulfil his duties, however the seller could force him to take delivery through the *actio venditi*.

Reimbursement of expenses for necessary costs incurred for the thing sold from the time the contract was concluded until the thing was delivered.

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

Conduct in accordance to good faith, because the contract of purchase and sale was based on *bona fides*.

## Chapter 4

### Consensual contracts (Part II)

#### General introduction

#### 1. Contract of letting and hiring (*locatio conductio*)

Letting and hiring was a consensual contract for which a party, the lessor (*locator*), hired out a thing, his service or a piece of work to another (*conductor*). When hiring of a thing or service the lessee undertook to pay the lessor a sum of money. With the hiring of services, the lessee, who performs the service, is entitled to payment by the employer (*conductor*).

The hiring of thing (*locatio conductio rei*)

A contract of service (*locatio conductio operarum*)

A contract for undertaking piece work (*locatio conductio operis*)

A characteristic of letting and hiring was that it is not gratuitous. The parties had to agree on a price in monetary terms. The contract of hiring (*locatio*) and letting (*conductio*) came into being when the lessor (*locator*) and the lessor (*conductor*) agreed to hire and let a specific thing for a fixed sum of money.

#### 1.1 Letting and hiring of a thing (*locatio conductio rei*)

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

It was concluded when there was agreement (*consensus*) between the lessor and the lessee on the lease transaction, the thing leased and the rent. A contract based on good faith. Rent had to be paid in the form of a predetermined sum of money.

##### 1.1.1 Duties of the lessor

- a) The object leased and all its accessories had to be delivered to the lessee. The lessor had to ensure that the lessee had undisturbed use and enjoyment of the object leased for the entire lease period. The lessor could not interfere with the thing during the term of lease.
- b) Guarantee against eviction. Eviction takes place when a third party with a stronger title to the thing leased causes the lessee to lose his possession of the leased object. The lessee could claim damages from the lessor with the *actio conducti*.
- c) Ensure that the object leased remains in good condition. Any reasonable expenses incurred by the lessee to maintain the hired property could be reclaimed from the lessor. The lessor was responsible to pay rates and taxes.
- d) Risk rule. If the property was damaged or destroyed by an act of God (*vis maior*) through no fault of the lessor's, he bore the risk. He could not claim any rental for the remainder of the contract and had to return prepaid rental to the lessee. The lessor's duty of care was that he had to exercise the care and skill of a reasonable person and he was responsible for *culpa levis in abstracto*.
- e) Acceptance of object of lease after lease period has expired by the lessor and reimburse the lessee for any necessary costs the latter incurred for maintenance.

If Cassius unknowingly leased leaking wine barrels to Stichus, Cassius would be liable to Stichus for damages for any loss of wine if Cassius had not displayed the care and skill of a reasonable man.

### 1.1.2 Duties of the lessee

- a) Accept delivery and pay rent (either in instalments or in a lump sum)
- b) Take reasonable care of the leased property as would a reasonable man. If the hired property were damaged or destroyed due to *dolus* or *culpa (levis in abstracto)*, the lessor could hold him liable for damages by invoking *actio locati*. If the hired property was damaged or destroyed without fault on the part of the lessee, the lessor bore the risk and the lessee was absolved from the duty to pay rent.

If the house Cassius hired from Stichus was destroyed by an earthquake, Stichus could not claim rent from Cassius.

- c) He had to return the leased object to the lessor upon expiry of the lease in more or less the same condition as delivered allowing normal wear and tear.

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## 1.2 Letting and hiring of services (*locatio conductio operarum*)

The employee place his services at the disposal of the employer for a fixed daily, weekly, monthly or annual wage. The contract was concluded once there was agreement on the kind of service to be rendered and the remuneration. The contract of service was a reciprocal contract that created rights and duties for both parties. Only services that were usually performed by slaves, mostly manual labour or unskilled labour, fell under it.

### 1.2.1 Duties of the employer (*conductor*)

- a) Pay the agreed wage. The employer had the *actio conducti* to force the employee to meet his obligations or else to claim damages if he suffered a loss due to the employee's failure to do the work contracted to do.
- b) Exercise the care and diligence of a reasonable man (*bonus paterfamilias*) and responsible for *culpa levis in abstracto*. The employer had to ensure a safe workplace and working environment.

### 1.2.2 Duties of the employee

- a) Perform the work agreed upon. The employee had the *actio locati* to force the employer to carry out his part of the contract or to claim damages due to the employer's noncompliance. If the employee was unable to work due to illness he would not receive any pay.
- b) Exercise the care of a reasonable man and also liable for *culpa levis in abstracto*.

## 1.3 Letting and hiring of a piece of work (*locatio conductio operis*)

### 1.3.1 Difference between letting and hiring of a piece of work (*locatio conductio operis*) and a service contract (*locatio conductio operarum*)

Unlike with a service contract, where the employee was the lessor with the undertaking of work, the commissioner of the work is the lessor. In the service contract the employer is the lessee, but with the undertaking of work, the person who has to do the work is the lessee.

With the service contract the employee work under the supervision of the employer, but the person who undertook a piece of work used his discretion to complete the job.

With a service contract the employee was not skilled and used his employer's equipment. The people who undertook piece work were more skilled and were contractors or tradesmen who used their own equipment.

An employee was appointed for a specific period and received a weekly or monthly wage. The contractor worked until the job he was appointed for was completed and received a lump sum as payment upon completion of the work.

### 1.3.2 The duties of the lessor (*locator*)

- a) Remunerate the contractor for his service when the work was completed.
- b) Display the care of a *bonus paterfamilias* and also responsible for *culpa levis in abstracto*.

### 1.3.3 The duties of the contractor (*conductor*)

- a) Complete the work within the agreed period or within a reasonable time if a period was not determined.
- b) Display the care of a *bonus paterfamilias* and was liable for *culpa levis in abstracto*. Inexperience or a lack of expertise was regarded as negligence (*culpa*). A contractor who undertook to build a house, but did not have sufficient skill, was liable for *culpa levis in abstracto* for any loss the lessor suffered as a result. If the contractor was unable to complete the task due to a defect, the lessor bore the risk. If the collapse of the house was the result of the building methods used by the contractor, the contractor bore the risk. If the completion of the work was rendered impossible by *vis maior*, the risk devolved on the lessor.

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## 2. Partnership (*societas*)

A partnership was a contract through which two or more person undertook to join in a common venture for their mutual economic benefit.

Stichus, Cassius and Brutus agree to build a boat that they want to use to go deep sea fishing, to sell the fish and share the profits. Stichus supplies the building materials to build the boat; Cassius is responsible for building the boat and Brutus undertakes to put to sea in the boat every day. All the profit they make from selling their catch on the open market will be divided among the three of them in equal shares.

A partnership contract is a bilateral contract in that the rights and duties of the respective partners were identical and could only be enforced through a single action, the *action pro socio*. The partnership contract originated from the *ius gentium* and was based on *bona fides*. Each partner had to act in accordance with the dictates of good faith

A partnership was not a juristic person which could not conclude contracts or perform any legal act in its own name and could not own property. Assets remained the property of the individual partners. Partners did not share in any contractual relations between a partner and third parties. When a partner contracted with third parties, two separate legal relationships could be identified, that between the partner and his co-partners by which the partner undertook certain partnership activities and between the partner and any third party. If a partner made a profit in terms of such a contract, the partner could be forced to share the profit with his co-partners. If a partner suffered a loss in terms of a contract with a third party, he could ask his co-partners to share in that loss.

Essential characteristics were laid down as conditions for the creation of a partnership by agreement between the partners about the conclusion of the contract of partnership, their common venture and what contributions each of the partners should make.

## 2.1 Essential requirements for the establishment of a contract of partnership

Common purpose. A common venture had to be physically possible and lawful and not be immoral or contrary to good faith. There partners were not permitted to pursue illegal gold mining to split the profits.

Intention to form of partnership (*affection societatis*). A partnership between persons could not come into being spontaneously.

Contributions by each partner whether in the form of goods, capital, labour or expertise. It was the duty of each partner to contribute the promised contributions and help manage the partnership.

Mutual economic benefit, that is monetary nature

Mutual agreement on the division of profits and loss. Each partner had a duty to account for the profits received and the losses suffered in the course of the partnership's business. Profits and losses were equally divided based on the principles of equity (*aequitas*) or brotherhood (*fraternitas*). If no agreement was reached, the profits and losses were equally shared.

Furtherance of the interest of the partnership as they would their own interests. If a partner suffered any loss due to *dolus* or *culpa levis in concreto* of a co-partner, damages could be claimed through the *action pro socio* to claim contributions, profits, losses and expenses of individual partners during the existence of the partnership.

An agreement through which a partner would share only in the losses and not in the profits was invalid. That kind of agreement was known as *societas leonina*

## 2.2 Types of partnership

### 2.2.1 A partnership in all assets (*societas omnium bonorum*)

The partners pool all their assets and become co-owners of the common property. Everything they subsequently acquire belong to them jointly.

### 2.2.2 A partnership for a single transaction (*societas unius rei*) such as joint property

### 2.2.3 A partnership to operate a single business (*societas unius negotiationis*)

The aim is to operate one or more business enterprises, eg. to transport slaves or goods

### 2.2.4 A general business partnership (*societas quae ex quaestu veniunt*) when the partners joined forces to conduct all their business transactions.

## 2.3 Termination of partnership

A partnership was terminated through unilateral termination by one of the partners, by passage of time if the partnership was set up for a particular period, by the death of a partner, by the destruction of the partnership asset and by the achievement of the purpose of the contract of partnership.

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### 3. Mandate (*mandatum*)

Through a mandate the mandatee (*mandatarius* or *procurator*) undertakes to perform a service gratuitously for another, the mandator, eg. the action of erecting a tombstone on behalf of a friend.

A contract of mandate originated in the *ius gentium* and resulted in an imperfectly bilateral contract. The mandatee always incurred obligations whereas the mandatory only incurred obligations in certain cases.

The essential requirement for the creation of a contract of mandate was consensus regarding the nature of the contract, the action to be performed and the fact that it would be performed gratuitously.

- The task or action agreed upon should be performed gratuitously: The parties could decide that the mandatee should receive an honorarium out of gratitude for his services. If a price was agreed upon for the task to be performed, a contract of hire was created.
- The tasks performed could take the form of any activity that was possible, lawful and clearly defined.
- A mandate could involve a specific act or the general management of the affairs of the mandator. Further instruction could be carried out in the interests of the mandatory, a third party or partly in the interests of the mandatee. If the instruction was solely in the interests of the mandatee, it was seen as free advice and not a mandate.

The mandator was not a party to any contractual relationship established between the mandatee and third parties while the mandatee was executing his task. If the mandatee did contract with third parties in the execution of his task, two separate legal relationships were created, between the mandatee and the mandator to carry out his instruction and between the mandatee and any third person to execute his instructions.

#### 3.1 Duties of the mandatee

The mandatee was not obliged to accept the mandate. If he did, he either had to carry it out or renounce it timeously so the mandator could do it himself or instruct someone else.

The mandatee had to keep within the limits of the mandate.

The mandatee was not allowed to benefit from the transaction. He had to render a strict account and hand over any benefit received to the mandator. The mandatee had the *actio mandati contraria* to recover essential costs or damages for which the mandator was responsible.

The mandatee had to perform the mandate like a *diligens paterfamilias* and was responsible for *culpa levis in abstracto*.

The contract of mandate terminated when the mandate was performed, either party renounced the contract or one of the partners died.

#### 3.2 The position of the mandator

The mandator had to accept the execution of the mandate by the mandatee: he was liable for all expenses and losses incurred by the mandatee in the execution of his task.

The mandator had to exercise the care of a *bonus paterfamilias* with regard to the task imposed on the mandatee and was liable for *culpa levis in abstracto*.

The mandator had the *actio mandati directa* at his disposal for the execution of the mandate and the recovery of damages for which the mandatee was liable.

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## Chapter 5

### Verbal and written contracts

#### General introduction

Contracts were classified into four categories on the basis of their *causae*. These were *contractus re*, *contractus verbis*, *contractus litteris* and *contractus consensu*. *Contractus verbis* came into existence once the parties had uttered certain formal words. The preceding agreement and the formalities were equally important. Written contracts came into existence once the parties had formally expressed their agreement in writing.

The oldest form of *contractus verbis* was *sponsio*, a contract with sacred and magical connotations. *Sponsio* was replaced by *stipulatio*. Both *sponsio* and *stipulatio* were derived from the *ius civile* and were *negotium stricti iuris*. The most important contracts concluded through *stipulatio* was a contract of suretyship.

#### 1. Origins, creation and requirements of *stipulatio*

The origins of *stipulatio* is traced to a solemn oath (*sponsio*) by which a family member undertook to become a hostage for a debtor.

*Stipulatio* was a formal contract that was strictly enforced (*negotium stricti iuris*). It consisted of a formal promise that was formally made in reply to a formal question that gave rise to an obligation on the part of the person who made the promise. The contract was first created when the parties pronounced the formal words required for its conclusion. The formal words or formalities consisted of a question and a reply in which the same verb had to be used. Initially the verb *spondere* (to promise) was used and no witnesses or additional formalities were required.

Eg. Stichus says: “Seius, do you promise (*spondesne*) to give me 500 gold pieces?” Seius answers immediately: “I promise (*spondeo*).”

Later it became customary for the parties to put the agreement reached through *stipulatio* in writing.

#### 1.1 Requirements for *stipulatio*

The *stipulatio* was concluded by the pronouncement of formal words.

Both parties to the *stipulatio* had to be present when the formal words were uttered and the *stipulatio* was concluded.

The answer had to follow the question without interruption – a continuous transaction.

The question and answer had to contain the same verb. The answer could not introduce any fresh terms or conditions.

## 2. The contract of suretyship

Suretyship was incurred through a *stipulatio*. The surety bound himself to the debtor's creditor to fulfil the obligation if the debtor was unable to.

In the case of real security a certain thing was reserved for a creditor to ensure the debt would be paid. Personal security, as exemplified by suretyship occurred when the surety bound himself contractually to the creditor of the principal debtor as security for payment of the latter's debt.

There were two obligations, namely the obligation between the creditor and the principal debtor, known as the primary obligation and the obligation between the creditor and the surety, known as an accessory obligation.

There were four types of suretyship, namely *spensio*, *fideipromissio*, *fideiussio* and mandate-suretyship.

### 2.1 *Fideiussio*

*Fideiussio* was created by a subsidiary *stipulatio*. The purpose was to secure a principal obligation. First the creation of a principal debt, then the creation of the subsidiary obligation (suretyship)

Servius: "Claudius, do you promise to give me 10 silver coins?"

Claudius: "I promise."

Servius: "Brutus, do you promise to give me what Claudius owes me?"

Brutus: "I agree that the debt should be supported by my trustworthiness."

#### 2.1.1 Measures to improve the position of the surety

##### a) Benefit of excussion (*beneficium excussionis*)

If a surety was sued for the payment of the principal debt, he could claim that the creditor first proceed against the debtor for the principal debt. The surety's liability was subsidiary to that of the principal debtor.

##### b) Benefit of division of debt (*beneficium divisionis*)

If there were several sureties and one was sued for the payment of the principal debt, he could demand a division of liability among all solvent sureties. Each solvent surety could therefore be sued only for a particular portion of the debt.

##### c) Benefit of cession of actions (*beneficium cedendarum actionum*)

The creditor who sues the surety for payment of the principal debt was obliged to first cede the action or other remedy he had against the debtor. The surety could then proceed to sue the principal debtor.

*Fideiussio* could be used to secure any existing obligation, irrespective of whether it arose from a contract, a delict or any other ground.

The principal debt had to be valid

If the principal debt lapse, the suretyship also lapse.

Defences available to the principal debtor regarding the enforceability of the principal debt were also available to the surety.

The surety could not be held liable for an amount that exceeded the principal debt.

If a woman stood surety for a person other than her husband, she could rely on a *Senatus Consultum Velleianum*.

### 3. 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 on behalf of a third party

If the stipulation was immoral.

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### 4. Contracts constituted by writing (*contractus litteris*)

Written documents and other written transactions did not play an important part in Roman commercial life. Illiteracy, together with the emphasis the Romans placed on verbal undertakings, were responsible for this. The earliest contract was derived from the practice by the *paterfamilias* to keep book of his business transactions. If the debtor agreed with the entry, a *contractus litteris* was created. These contracts were not of much importance in Roman law. By Justinian's time the *contractus litteris* were replaced entirely by the written *stipulatio*.

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## Chapter 6

### Real contracts

#### General introduction

*Contractus re* or Real contracts consists of four contracts: *mutuum* (loan for consumption), *commodatum* (loan for use), *depositum* (deposit) and *pignus* (pledge). These contracts owe their name to the fact that they only came into existence when the thing was delivered by one party to another.

#### 1. Introduction to real contracts

The basic requirements were an agreement between the parties, followed by delivery of the object of the contract to the recipient. After delivery of the object, the recipient was obliged to return the same object or in the case of loan for consumption a similar object. Consensus between the parties is not sufficient for the establishment of real contracts. An additional element is required: The *causa*, being the handing of the object. Of the real contracts, *mutuum* (loan for consumption) and *commodatum* (loan for use) were to the advantage of the recipient.

## 1.1 Loan for consumption (*mutuum*)

### 1.1.1 Creation

Loan for consumption was the oldest of the four kinds of *contractus re* and derived from the *ius civile*. The parties agreed that the lender would lend the borrower a thing or things to consume and that the borrower would later return a similar thing or things to the lender. The obligation came about after the parties reached *consensus* on the loan and the object handed over.

### 1.1.2 Object of loan for consumption (*mutuum*)

The contract of *mutuum* was concluded in respect of fungible (*res fungibiles*) which also had to be consumables (*res consumptibles*). The object of *mutuum* could be money or other consumables such as wine, oil, material, gold, silver, etc.

### 1.1.3 Nature of the contract of *mutuum*

Loan for consumption was a unilateral contract which gave rise to a single duty and a corresponding personal right. The borrower (debtor) was obliged to restore a thing of the same quality and quantity as the thing received. Since the object of this contract was a consumable, the debtor could not avail himself of the defence that performance became impossible. The lender (creditor) had a corresponding personal right to claim the thing from the borrower (debtor). The lender incurred no contractual obligation. Since the borrower became the owner of the thing lent to him, the risk of destruction also passed to him. The contract of *mutuum* as a *negotium stricti iuris* was derived from the *ius civile*.

### 1.1.4 Rights of the lender

Since loan for consumption was a unilateral contract, it created an obligation for the borrower only. The lender had a personal right through a personal action, a *condictio*, to claim from the lender a thing of the same quality and quantity as the one made available for loan. The lender transferred ownership of the thing to the borrower and therefore the lender had to own the thing himself when he made the loan.

### 1.1.5 Duties of the borrower

The borrower was under an obligation to restore to the lender a thing of the same quality and quantity as the thing borrowed.

### 1.1.6 Actions

The lender could enforce his personal right by recourse to a personal action derived from the *ius civile*, the *condictio* to claim a particular thing, a sum of money or a generic thing. If the parties wanted to negotiate interest, it had to be specified in a supplementary stipulation contract.

## 1.2 Loan for use (*consumption*)

### 1.2.1 Origin

In terms of loan for use (*consumption*) the parties agreed that one party (the lender) would lend the other (the borrower) a thing gratuitously for his use and the borrower would later return the same thing to the lender. The contract was created when the thing was delivered to the borrower. The purpose of *commodatum* was the loan of the thing for use, consequently the contract was only possible in respect of movables that were not consumables or fungibles. It was not necessary for

ownership to pass to the borrower upon delivery, only detention (*possessio naturalis*) (physical control) passed to the borrower.

### 1.2.2 Object of the loan for use (*commodatum*)

Any movable or immovable corporeal thing, such as a slave or a plot of ground, could be given as a loan for use. In practice, movable, non-consumable things were mostly given.

### 1.2.3 The nature of the loan for use (*commodatum*)

*Commodatum* was an imperfectly bilateral contract, only the borrower was obliged to return the thing. The borrower could demand the lender compensate him for any damage he may have suffered due to a defective thing which the lender knowingly lent him. *Commodatum* was a *negotium onae fidei*, the duties of the parties were determined by *bona fides*. The lender was not only entitled to return the thing, but also any fruits produced by the thing during the loan period (eg. lambs born of sheep that was lent).

### 1.2.4 Duties of the lender

Reimburse the borrower if the latter incurred extraordinary expenses to maintain the borrowed thing, eg. medical expenses for the care of a slave or horse.

His duty of care was low. He could only be held liable for *dolus* when he knew that the object of loan had a defect and did not inform the borrower, eg. a leaking wine vat.

### 1.2.5 Duties of the borrower

The borrower had to return the object of loan (with its fruits and accessories) to the lender at the agreed time or within a reasonable time.

The borrower had to use the thing for the purpose for which it was lent.

If Antonius lent Savarius an ox for ploughing his fields and Savarius harnessed the ox to pull a vegetable cart back and forth to town, he was guilty of theft of the use of the ox. If the thing was damaged or destroyed while being used for a purpose other than the purpose agreed upon, the borrower was responsible for all damage, even if caused by *vis maior* (an act of God). If Savarius was using the ox in a matter other than the agreed manner and the ox was struck dead by lightning, he had to compensate Antonius in full for the loss of the ox.

The duty of care imposed on the borrower was *culpa levis in abstracto* as the borrower benefited most from the contract and had a stricter duty of care. He was responsible for any damage to the thing apart from damage caused by an act of God (*vis maior*) or chance (*casus*).

### 1.2.6 Actions

The lender could institute the direct action on loan (action *commodati directa*) to enforce the borrower to meet his obligations. The borrower could institute a contrary action through the action *commodati contraria*. This action forced the lender to meet his obligations. The relationship was based on good faith and the action of both parties were therefore based on good faith.

## 1.3 Deposit (*depositum*)

### 1.3.1 Origin

Deposit originated from the *ius honorarium* in terms of which the parties agreed that one party (the depositor) would give a movable object to another (the depositary) for safekeeping and the latter

would take care of the thing gratuitously and return it to the depositor upon demand. A contract of deposit or safekeeping was concluded when an agreement was reached, followed by the handing over of the thing for safekeeping. The depositee was merely the *detentor* of the thing and ownership did not have to be transferred.

### 1.3.2 Object of deposit (*depositum*)

The object of deposit was a movable, corporeal thing. Money could be the object of a special kind of deposit known as *depositum irregulare*, also land where land was given into the custody of an arbiter.

### 1.3.3 Nature of the obligations created

Deposit was an imperfectly bilateral contract. The depositee had obligations, whereas the depositor only incurred obligations in certain cases. The duty of the depositee was to return the thing to the depositor at the end of the period of safekeeping. The purpose of deposit was the safekeeping of someone else's thing. If the depositee used the thing, he was guilty of theft. Deposit was a *negotium bonae fidei*. The duties of the parties were therefore determined by the *bona fides*.

### 1.3.4 Duties of the depositor

The depositor only incurred obligations in special circumstances. He was obliged to:

Reimburse the depositee for all expenses incurred for the maintenance of the thing. If the depositee suffered any damage due to his safekeeping of the thing, the depositor could be held liable for compensating the depositee.

If the depositee suffered damage due to a defect in the thing in his care, the depositor could be held liable for damages. Since he benefitted from the deposit, he was liable for *culpa levis in abstracto*.

### 1.3.5 Duties of the depositee

To safeguard the thing left in his care and eventually return it to the depositor, together with all fruits and accessories.

To look after the thing gratuitously, but his duty of care was slight since he derived no benefit from the contract. He was liable for *dolus* and *culpa lata* (gross negligence), i.e. responsible for paying damages to the depositor if he deliberately damaged the thing or conspired with someone to steal the thing.

Not to use the thing, and if he did, he was held liable for theft of the use of the thing (*furtum usus*)

### 1.3.6 Actions

The depositor had the recourse to *actio directa* if the depositor was unwilling to return the thing or to claim damages for any damage to or loss of the thing for which the depositor was responsible. The depositor could institute the contrary action, the *actio depositi contraria*, for reimbursement of any expenses (maintenance) and for any damage suffered due to the depositor's deliberate or careless delivery of a defective thing.

## 1.4 Pledge (*pignus*)

### 1.4.1 Origin

Pledge (*pignus*) was a real contract derived from the *ius honorarium* whereby the parties agreed that one party (pledgor) would give the other (pledgee) a thing to serve as security for a debt and the latter would return the same thing after the secured obligation had been discharged. The contract was therefore created by an agreement between the pledgor and the pledgee, followed by the delivery of the pledged thing. Ownership of the pledged thing remained with the pledgor, while the pledgee merely acquired possession.

### 1.4.2 Object of the pledge (*pignus*)

Any movable or immovable corporeal thing since the purpose of the pledge was that the thing should be held as security and not be consumed.

### 1.4.3 Nature of the pledge agreement

The contract of pledge was an imperfectly bilateral contract. The pledgee always acquired duties, but the pledgor only acquired a duty in special circumstances. The pledgee had one principal duty to return the thing. Pledge was a *negotium bonae fidei*; regulated by the *bona fides*.

### 1.4.4 Duties of the pledgee

To return the pledged object, together with its fruits and accessories to the pledgor. If the pledgor defaulted on his debt, the pledgee was entitled to sell the pledged object on public auction. Any surplus, after the discharge of the debt for which the thing served as security, had to be paid over to the pledgor.

Not to use the pledged object, unless otherwise agreed. If the pledgee did use the pledged object, he was guilty of theft of use (*furtum usus*).

The duty of care of the pledgee was *culpa levis in abstracto* since he benefited from the contract (he received security). He had to display the care of a reasonable person with regard to the object.

#### 1.4.5 Duties of the pledgor

To reimburse the pledgee for all necessary expenses incurred for maintaining the pledged object.

To pay for damages caused by a defect in the pledged object of which he was aware.

As he benefited from the contract, he was liable for *culpa levis in abstracto* and to show the care of a *diligens paterfamilias*.

#### 1.4.6 Actions

The pledgee could avail himself on *actio pignoratitia directa* to claim back the pledged object after he redeemed the secured debt, as well as for any damages. The pledgee could institute a contrary action (*actio pignoratitia contraria*) and reimbursement for his expenses and for any damages suffered on account of defects in the pledged object.

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Chapter 7

Quasi-contract

General introduction

The most important quasi-contracts were unauthorised administration of another's affairs (*negotiorum gestio*), guardianship (*tutela*) and curatorship (*cura*), co-ownership (*communio*) and unjust enrichment (*condictiones*).

1. Unauthorised administration (*negotiorum gestio*)

## 1.1 Origin

Unauthorised administration is the administration of the affairs and interest of another, without his consent. Eg. In Balbus' absence his roof is blown off by a tornado. His neighbour, Antonius, leaps into the breach and mends the roof, in the process spending a lot of money on the purchase of building materials to mend Balbus' roof.

There is no consensus between the parties and no contract was concluded. The law, however, treated this kind of obligation as if a contract was concluded. The *gestor* would be allowed to recover his expenses.

## 1.2 Requirements

The *gestor* had to act without consent of the owner (*dominus*); no agreement between the parties.

The *gestor* had to act reasonable. Eg. Neighbourly assistance that was unreasonable and entirely uncalled for did not qualify under certain circumstances like when Balbus painted Antonius' house without his permission while Antonius was away for the weekend.

The act must be beneficial to the principal. If the *gestor* though he acted in the interest of the principal but objectively it was not the case, no quasi-contract of unauthorised administration was created. If the action of the *gestor* was reasonable, even if not successful, the expenses incurred could still be recovered.

Unauthorised administration depended on the *gestor* expecting to be reimbursed for his expenses.

A *gestor* could not act in contravention of an express prohibition of the *dominus*.

## 1.3 Nature of unauthorised administration

Unauthorised administration was an imperfectly bilateral quasi-contract as the *gestor* always required rights and duties and the *dominus* only so in exceptional cases. The *gestor* had to show the care of a *bonus paterfamilias*. If he acted in emergency he was only liable for *dolus*. The owner (*dominus*) had to accept the acts done in his best interests and reimburse the *gestor* for all expenses reasonably incurred by the latter.

## 1.4 Actions

The owner could institute the *actio negotiorum gestorum* to enforce the *gestor's* duties. The *gestor* could avail himself of the *actio negotiorum gestorum contraria* to enforce the *dominus's* duties.

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Feedback on P160

## Part C

The Roman law of delict

Chapter 8

The Roman law of delict

General introduction

The law of delict and the law of contract both form part of the law of obligations.

### 1. Introductory remarks

#### 1.1 What is a delict?

A delict is an unlawful culpable act which causes damage and creates an obligation. In the case of a delict the victim is the creditor and the wrongdoer is the debtor. An obligation arises from a delict, the victim/creditor has a personal right to recover damages from the wrongdoer/debtor. Eg. Suppose A omits to stop at a red traffic light and collides with B. Legally, B would be the creditor, because he suffered damage, which he can recover from the other party to the obligation, A, the debtor. If delict did not create an obligation, B would not have had a foot to stand on in law to force A to compensate him for his damage.

#### 1.2 The distinction between a crime and a delict

A contravened a traffic rule, which is a criminal offence and one for which the state can prosecute and punish him, but he also caused damage to B's vehicle, for which B could claim compensation with a delictual action. The contravention of a regulation constitutes a crime and wrongful negligent damage to B's vehicle a delict.

### 1.3 The different categories of actions based on delict

- 1.3.1 Recovery action or *actio rei persecutoria* to enable the injured party to recover his thing or the value of the thing or compensation from the perpetrator. Eg the *rei vindication* and the *condictio furtiva*.
- 1.3.2 Penalty action or *actio poenalis* which allowed the injured party to recover a fine from the perpetrator as a punishment for the perpetration of the delict, eg. *actio furti*.
- 1.3.3 Mixed action of *actio mixta* to claim both compensation and a fine, e.g. the *actio vi bonorum raptorum*. An action for compensation was instituted at the same time as a penal action. For the specific delict made a mixed action available to the injured party, only one action was instituted.

## 2. Elements of a delict

- 2.1 There had to be an act by the perpetrator, because a delict is an unlawful act that is committed by someone and that causes damage or injury.
- 2.2 The action had to be wrongful; i.e. contrary to the law. The appropriation of a thing belonging to another would constitute a delict provided the other delictual elements were also present.
- 2.3 Fault (*mens rea*) is the blameworthy attitude of the perpetrator. Fault could either be intent or negligence. To establish whether a person acted deliberately, one had to establish his subjective frame of mind while committing the act. The establishment of negligence on the part of a person requires an objective test, the *culpa levis in abstractione*, *culpa levis in concreto* and *culpa lata*. A person was considered negligent if he did not display the degree of care of a diligent *bonus paterfamilias*.
- 2.4 To create a delict, the unlawful act would need to have caused someone damage or an injury.
- 2.5 The connection between the action of the perpetrator and the damage suffered by the victim; the damage had to have been the result of the perpetrator's act.

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Feedback on p165

### 3. The specific Roman delicts

#### 3.1 Theft (*furtum*)

##### 3.1.1 Definition

Theft is the use of a thing contrary to the wish of the owner. Theft is the fraudulent interference with a thing, whether with the thing itself or the use or possession of it, for the purpose of gain. The thief should have had the intention of permanently depriving the victim of his thing. Two forms of theft were recognised, the unlawful appropriation of use where a pledged object without the consent of the pledgor or where a lessee used a hired object for a purpose other than the purpose for which it was hired and appropriation of possession, where a person was unlawfully in possession of a thing, eg. where the owner took back his thing while it was subject to a contract of hire and the lessee was therefore lawfully in possession of the hired object.

##### 3.1.2 The elements of a delict as applicable to theft

Action - the use of a thing contrary to the wish of the owner or the unlawful use or possession of a thing.

Unlawfulness – the appropriation, use or occupation of the thing without the consent of the owner or person entitled to use the thing.

Fault – The perpetrator had to have *animus furandi*, i.e. the intention of steal. Deliberate intention is a requirement.

Damage or loss – the person who is the owner of the thing that has been removed naturally suffers a loss.

Causality – the damage suffered by the victim is due to the action of theft of the perpetrator.

##### 3.1.3 Remedies for the victim

Action for recovery of the thing.

If still in the possession of the thief, the owner could institute the *rei vindictio* against him. If the thing was no longer in the possession of the thief or had been destroyed, the victim could institute the *condictio furtiva* against the thief to claim damages.

### Penal action

Whether or not the thief was caught red-handed, the *actio furti manifesti* or the *actio furti nec manifesti* could be instituted against him. In terms of the *actio furti manifesti* four times the value of the thing was claimed as penalty. If the thief was caught while he was engaged in stealing or caught on the premises where the theft was committed with the thing in his possession or caught on the way to his destination with the thing in his possession, this qualified as caught in the act. If the thief was not caught in the act, the *actio furti nec manifesti* for double the value of the stolen thing was instituted against him.

In the case of theft the victim would institute both an action for recovery and a penal action.

### Activity on P167

#### Feedback on P167

## 3.2 Robbery

### 3.2.1 Definition - Robbery is theft with violence

### 3.2.2 Development of this delict in Roman law

Robbers were not usually caught red-handed and therefore the *actio furti nec manifesti* was usually raised against them. Robbery is a more serious delict than theft and robbers should be more severely punished than thieves.

### 3.2.3 Elements of this delict as applied to robbery

Act – In robbery the act is unlawful appropriation of a thing belonging to another, accompanied by the use of violence.

Unlawfulness – the appropriation of another person’s thing without the consent of that person and the use of violence against the owners of the thing are prohibited by law.

Fault – The required form of guilt for robbery is intent.

Damage – The victim undoubtedly suffers damage because he has been deprived of this thing and has possibly been injured in the accompanying violence.

Causality – The damage suffered by the victim is the consequence of the robber’s deeds.

### 3.2.4 Remedies for the victim

The *actio vi bonorum raptorum* was a penal action through which four times the value of the stolen thing was claimed as a fine. The victim instituted an action for recovery, the *rei vindication* or the *condictio furtiva*.

## 3.3 Damage to property (*damnum iniuria datum*)

### 3.3.1 Development of this delict in Roman law

*Damnum iniuria datum* together with the fine payable were listed individually in the Twelve tables. Eg. The burning down of another person’s vineyards. If a person suffered damage that was not mentioned in the Twelve Tables, he had no remedy. It became necessary to institute a general delict for wrongful damage to property on the basis of which a victim could claim for any damage that was wrongfully done to his property.

In 287BC the *lex Aquilia* was promulgated with the intention of creating a uniform delict of wrongful damage to property.

## Chapter 1

Anyone who wrongfully slew the slave or *pecus* that belonged to another had to pay the injured party the highest value of that slave or *pecus* during the past year.

## Chapter 3

Any person who wrongfully burned, broke or fractured a thing belonging to another, had to pay the injured party the highest value that the thing had during the past 30 days. The *lex Aquilia* did not initially succeed in its purpose of creating a uniform delict to cover wrongful damage to property.

### 3.3.2 Elements of a delict as applied to the early *lex Aquilia*

Act – a direct, positive act qualified as an act for the purpose of *damnum iniuria datum*: the perpetrator had to have caused the damage by an act physically carried out himself.

Unlawfulness – In terms of Chapter 1 and 3 the damage or injury caused had to be unlawful

Fault – whether the perpetrator acted deliberately or negligently or was not at fault was irrelevant.

Damage – Only damage suffered in terms of chapters 1 and 3 could be claimed. The other thing as in chapter 3 was a corporeal thing.

Causation – the damage had to be due to an act by the perpetrator.

### 3.3.3 Extension of the *lex Aquilia*

*Pecus* as in chapter 1 meant to include pigs, camels and elephants.

*Slay* meant to cause death by any direct, positive act.

*Rumpere* in chapter 3 extended to include *corrumpere*, i.e. damage in any manner.

Wrongful wounding of slave or four-footed grazing animals was also made punishable i.t.o. chapter 3

The killing of things other than those mentioned in chapter 1 was made punishable under chapter 3.

### 3.3.4 Elements of a delict as applied to the developed *lex Aquilia*

Act – an indirect act for the purposes of damage to property. Eg. If Brutus knocked Julius' slave down with his carriage, Julius had a claim under the *lex Aquilia*. Even omission was an act, so if Brutus left Julius' gate open and Julius' horses got out, Brutus might be held liable for this omission under the *lex Aquilia*.

Unlawfulness – If the wrongdoer was able to prove a ground of justification, this excluded unlawfulness. Eg. where Brutus killed Julius' slave out of self-defence because the slave was attacking Brutus with a knife. Although killing another's slave was forbidden, Brutus did not act unlawfully, since he was defending his life.

Fault – A wrongdoer could damage a thing belonging to another either deliberately or negligently. The degree of negligence that operated was *culpa levis in abstracto*. If the perpetrator caused damage in circumstances where he had not acted like a *diligens paterfamilias*, he was liable for damage to the property.

Damage – After extension of the delict of *damnum iniuria datum* it was possible to claim for damage to a free person's body. The highest value in chapters 1 and 3 was interpreted as full damage. Full damage were made up of two categories, consequential damage and loss of profit. Consequential damage or *damnum emergens* was damage that flowed naturally from the perpetrator's actions. Loss of profit or *lucrum cessans* was loss of income that the victim suffered due to damage or destruction of his thing.

Causality – the damage had to be due to the perpetrator's action.

### 3.3.5 The *actio legis Aquiliae*

The *actio legis Aquiliae* was an action to institute on the grounds of the delict of *damnum iniuria datum* created by the *lex Aquilia*. It was a mixed action. The fact that the highest value over the past year (chapter 1) or 30 days (chapter 3) could be claimed, which could be more than the actual value, was seen as the penalty element. Originally the *actio legis Aquiliae* was only available to the owner, but extended to include pledgees, borrowers, lessees and usufructuaries.

#### Activity on P171

#### Feedback on P172

## 3.4 Insulting behaviour (*iniuria*)

### 3.4.1 Development of the delict

The Twelve Tables listed specific categories of insulting behaviour with the penalties involved in each case. These penalties were paid to buy off possible vengeance, eg. a person broke another's leg (*os fractum*) and the perpetrator had to pay the injured party 300 coins. By the praetorian period, the penalties prescribed in the Twelve Tables were no longer a deterrent. The praetor created the

*actio iniuriarum* through which the injured person could claim satisfaction from the perpetrator due to any insulting behaviour.

### 3.4.2 What qualified as infringement of the person (*iniuria*)?

Physical attacks on the body (*corpus*) – Any unlawful physical attack on a free person's body constituted infringement of the person (*iniuria*), eg. assault or the threat of physical violence.

Attack on a person's dignity (*dignitas*) – eg. if a person plucked another's toga off in public.

Damaging a person's reputation (*fama*) – where a person spreads false rumours about another to the detriment of the latter's good name.

### 3.4.3 Elements of the delict as applicable to *iniuria*

Act – any act that infringed physical integrity, the dignity or the reputation of the victim qualified as an act for the purposes of *iniuria*. Attacks on a person's dignity or reputation could be committed directly (insulting a person in public) or indirectly (insulting a man's wife).

Unlawfulness – *iniuria* was unlawful

Fault – intent was a requirement for the commission of *iniuria*. The perpetrator had to have *animus iniuriandi*.

Damage – hurt feelings

Causality – the damage had to be caused by the act.

### 3.4.4 The *actio iniuriarum*

The injured party claimed satisfaction with the *actio iniuriarum* and not damages. Satisfaction is comfort money (*solatium*) intended to soothe the feelings of the injured party. There was an overlap in the ambit of the *lex Aquilia* and the *actio iniuriarum*, eg. where Brutus assaults Julius and also

tears his toga. Julius could institute the *actio legis Aquiliae* against Brutus for damage to the toga and the *actio iniuriarum* for *iniuria*.

Activity on P173

Feedback on P174

#### 4. Quasi-delict

There is no difference between the delicts and the quasi-delicts. Both are unlawful acts that cause damage.

The four quasi-delicts were:

*Ludex qui litem suam fecit* where a judge acted in a partial manner and therefore gave a verdict that unfairly prejudiced one party.

*Res effusae vel deiectae* where anything was poured or thrown from a building onto a public street and it hit anyone or caused damage, the injured party could recover his damages from the occupier of the building.

*Res positae vel suspensae*: if a thing was placed on a window sill or suspended from a building (shop signs) and it fell on someone or caused damage, the injured party could recover his damage from the person who placed the thing there.

*Nautae, caupones et stabularii*: Shippers, innkeepers or stable-keepers were liable if one of their employees caused someone else damage.

#### 5. Noxal liability/damage caused by animals

Delictual liability without fault was possible. If an animal caused someone damage or loss, an action for damage could be raised against the owner.

Self-evaluation questions on P175