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To the memory of Neil MacCormick, teacher and friend

Preface

Roman law, as transmitted through the sixth century codification of Emperor Justinian, forms an important part of the intellectual background of many legal systems currently in force in Europe, Latin America, Asia and other parts of the world. Justinian sought to produce, on the basis of the legal heritage of ancient Rome, an authoritative statement of the law of his own day. During the Middle Ages and the Renaissance, however, his system (*Corpus Iuris Civilis*) was adopted through a process known as 'Reception' and applied as the basis of the common law (*ius commune*) of Continental Europe. The growth of the modern nation-state and the unification of national law through codification in the eighteenth and nineteenth centuries engendered the eventual displacement of the *ius commune,* and thus Roman law ceased to exist as a direct source of law. But as the drafters of the codes greatly relied on the *ius commune*, elements of Roman law were incorporated in different ways and to varying degrees into the national laws of Continental Europe and thereby into the legal systems of many countries around the world. But why was Roman law adopted? The medieval reception of Roman law was partly due to the lack of centralized governments and developed formal legal systems and partly due to the fact that the lands formerly governed by the Romans were accustomed to this style of thought, and accorded it wisdom and authority. A third feature, deriving almost completely from the model of the *Corpus Iuris Civilis*, was the desire of most countries to codify their law and the aspirations of later jurists for their studies to conform to this model. But Roman law was adopted not merely because it was admired, nor because its norms were particularly suitable for the social conditions in the early European nation-states (in fact, many norms of Roman law were entirely antiquated). Foremost, it was the perceived superiority of Roman law as a logical, coherent and complete system that led to the adoption of its norms. Thus, the conceptual and normative framework of Roman law furnished the foundation of the legally organized relationships of life and an important common denominator of most Western legal thinking. Knowledge of this framework therefore constitutes an essential component of a sound legal education, for without such knowledge one cannot fully understand the evolution and functioning of contemporary legal systems and institutions rooted in Roman law. To common law

students and lawyers, in particular, such knowledge can provide a key to the common language of almost every other system of law that traces its origins to the European *ius commune*.

The present book begins with a historical introduction, which traces the evolution of Roman law from the earliest period of Roman history up to and including Justinian's codification. This chapter examines the nature and development of the sources of law in their social and political context, the mechanisms by which the various sources were made effective and the ways in which each source influenced the progress of the law. The last part of this chapter outlines the history of Roman law from the early Middle Ages to modern times and illustrates the way in which Roman law furnished the basis of modern European legal systems. Then follows an exposition of the principal institutions of Roman private law: the body of rules and principles relating to individuals in Roman society and regulating their personal and proprietary relationships. Private law greatly overshadowed public law in both its intrinsic merit and subsequent influence. This is because private law had a dominant role in the development of legal norms and was the chief interest of the Roman jurists, the most creative element in Roman legal life. In this part of the book special attention is given to the Roman law of things, which forged the foundations for much of the modern law of property and obligations in European legal systems. Furthermore, since the Romans tended to shape their legal rules in terms of procedural techniques rather than in terms of general and abstract norms, this part of the book also explores the main features of the law of actions and elucidates the implementation of legal judgements. Throughout the work care has been taken to present the major features of Roman private law as a logically interconnected whole. At the same time, emphasis has been laid on those aspects of Roman law that have particular importance to today's lawyer.

This introductory book has been written primarily for students whose course of studies includes Roman law, European legal history and comparative law. It can also prove of value to students and scholars interested in the fields of ancient history and classics. The book endeavours to present the basic principles of Roman private law as clearly and systematically as possible. Each chapter contains a large number of explanatory notes and references to Roman juridical sources, designed to assist the student who wishes to delve deeper into one or more of the topics mentioned. Since readers may not necessarily possess the expertise to study the original ancient texts, all the Latin words and phrases are translated and explained in clear and simple but precise terms. The end of the book lists the bibliographical references for further reading, together with the titles of the studies and research that formed the basis of this work. As long as it is remembered that the book is not devised as a thorough elaboration of all the complexities of Roman private law, and is therefore likely to be used in conjunction with other more detailed materials, it has a place in rendering Roman law more accessible to readers in many diverse fields of legal and historical learning.

The impetus of this book grew from a series of lectures and seminars that I gave at universities and other academic institutions in New Zealand, Australia, Japan, Germany and Italy. I would like to thank, in particular, my students at the

University of Auckland, Niigata University, Osaka University and the University of Queensland for their encouragement and constructive criticism when the themes of this book were discussed in class and seminar presentations. I also wish to thank Professor A. Bürge of the Leopold Wenger Institute at the University of Munich, Professor W. Kaiser of the University of Freiburg, Professor M. Baelz of the University of Frankfurt, Professor R. Eklund of the University of Stockholm, Professor T. Minamikawa of Kyoto University, Professors Y. Ichihara, K. Takeshita and T. Tsunoda of the Institute of Legal Studies at Kansai University, Professor N. Yoshinaka of Hiroshima University, Professor A. Cadoppi of the University of Parma and Dr Nigel Simmonds of the University of Cambridge for their continuing generosity in allowing me access to the library resources and other research facilities of their institutions. Finally, I would like to thank Miss L. Stroud, who has been a superb editor and has made a number of helpful suggestions for improvement, and my publishers for their courteous assistance.

Contents

Abbreviations

Bruns, *Fontes*	*Fontes iuris romani antiqui*, ed. C. G. Bruns, Tubingen 1909, repr. Aalen1969
C	*Codex* of Justinian
C Th	*Codex Theodosianus*
D	*Digest* of Justinian
FIRA	*Fontes Iuris Romani Anteiustiniani*, I-III, ed. S. Riccobono, J. Baviera and V. Arangio-Ruiz, Florence 1940–1943, 2nd edn, 1968
G	*Institutes* of Gaius
Girard, *Textes*	*Textes de droit romain*, ed. P. F. Girard and F. Senn, 7th edn, Paris 1967
Inst	*Institutes* of Justinian
Nov	*Novels* of Justinian
XII T	*Law of the Twelve Tables*

Chapter 1
Sources and Historical Development of Roman Law

1.1 Divisions of Roman Legal History

The history of Roman law is divided into two great phases. The first phase spans more than a thousand years, from the formation of the city-state of Rome to the codification of Justinian in the sixth century AD. Roman law was devised for a small, rural community that developed into a powerful city-state and it evolved as the law of a multinational empire that embraced a large part of the civilized world. During this long process the interaction between custom, enacted law and case law led to the formation of a highly sophisticated system gradually developed from layers of different elements. But the great bulk of Roman law, especially Roman private law, derived from jurisprudence rather than legislation. This unenacted law was not a confusing mass of shifting customs, but a steady tradition developed and transmitted by specialists who were initially members of the Roman priestly class and then secular jurists. In the final stages of this process when law-making was increasingly centralized, jurisprudence together with statutory law was compiled and 'codified'. The codification of the law both completed the development of Roman law and evolved as the means whereby Roman law was subsequently transmitted to the modern world.

The second phase of Roman legal history (occasionally labelled the 'second life' of Roman law) commenced in the sixth century, yet only acquired true significance in the eleventh century when Roman law was 'rediscovered' in Western Europe. This law was initially the object of academic study and then later engaged for a far-reaching reception in large parts of Continental Europe. Particularly important in this process was the work of the medieval jurists who systematically studied, interpreted and adapted Roman law to the conditions and needs of their own era. From the fifteenth century onwards the relationship between the received Roman law, Germanic customary law and canon law was affected in varying degrees by the rise of the nation-state and the increasing consolidation of centralized political administrations. The rise of nationalism precipitated the move towards the codification of the law, which engendered the great European codifications of the

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eighteenth and nineteenth centuries. When new civil codes were introduced in the various European states, Roman law ceased to operate as a direct source of law. But as the drafters of the codes greatly relied on the Roman system, elements of Roman law were incorporated in different ways and to varying degrees into the legal systems of Continental Europe. Moreover, through the process of legal borrowing or transplanting these legal elements permeated the legal systems of many countries around the world.

The history of Roman law in antiquity is traditionally divided into four periods: (a) the archaic period—from the eighth century BC to the late third century BC; (b) the pre-classical period—from the late third century BC to the beginning of the first century AD; (c) the classical period—from the beginning of the first century AD to the middle of the third century AD; and (d) the post-classical period—from the middle of the third century AD to the middle of the sixth century AD. With respect to Roman constitutional history, the archaic period covers the Monarchy and the early Republic; the pre-classical period largely coincides with the later part of the Republic; the classical period covers most of the first part of the imperial era, known as the Principate; and the post-classical period embraces the final years of the Principate and the late Empire or Dominate, including the age of Justinian (AD 527–565). Justinian's codification of the law marks the end of the history of Roman law in antiquity; at the same time, it heralds the beginning of the second phase of Roman legal history (i.e. from the early Middle Ages to modern times).

1.2 The Legal System of Archaic Rome

1.2.1 Historical and Constitutional Background

In the eighth century BC (Roman tradition fixed the date at 753 BC), a settlement of Italic peoples took root on the central Italian plain of Latium in the lower valley of the Tiber River, some fifteen miles from the sea. The formation of this settlement probably derived from a number of neighbouring clans (*gentes*) joining to establish a larger political entity. In early times, the clan (*gens*) was the most important element in society as it performed most of the political, religious and economic functions that were only later gradually assumed by the state. A clan was composed of households (*familiae*) that traced their lineage back to a common male ancestor (real or legendary). The members of a clan bore a common *gens*-name, could hold meetings and pass resolutions that were binding on the members, and they had a common cult. Although in time the central state organization supplanted the clan system, the latter continued to play an important role in social and religious life for a considerable period.

The early Roman society displayed a strongly patriarchal and conservative pattern that remained a distinctive feature of the Romans throughout their history. The cornerstone of society was the household (*familia*), a closely-knit unit

characterized by its social and economic cohesion. The head of the family (*pater familias*) had near absolute power over all persons and all property in his household, even though this power was in practice limited by custom, religion and public opinion. Leading families assumed the role of patrons for a motley class of people, the clients (*clientes*), whose members had a position of complete personal dependence upon the families to which they had attached themselves. A client and patron relationship was hereditary on both sides and based on reciprocity of socially prescribed duties and obligations. The *clientela* phenomenon continued throughout Roman history, although in later ages it played a less prominent role.

Another feature of early Roman society was the division of the population into two classes: the aristocrats or patricians, who increasingly insisted on their economic, social and political predominance; and a heterogeneous group of commoners or plebeians. The patrician aristocracy formed a closed order in society with clearly defined privileges based upon birth and the ownership of landed property. The members of this class enjoyed all the rights of the Roman citizenship—only they were Roman citizens in a full sense (*cives optimo iuris*)—and monopolized political power. The plebeian class was composed largely of small farmers, labourers, artisans and tradesmen. Although its members were Roman citizens, initially they did not enjoy any of the public rights (*iura publica*) of the Roman citizenship such as the right to hold public office (*ius honorum*) in the political, military or religious spheres. According to the first century BC historian Livy,[1] at first only patricians formed a *gens* but the names of early plebeian clans are also cited in the sources.

The economic life of the Romans in the period under consideration was based largely on cattle-rearing and cultivation of the land. It cannot be said with certainty whether the early Romans were familiar with the principle of private ownership. Probably at first only moveables (such as domestic animals and implements) could be privately owned, whilst immoveables were subject to collective ownership by the Roman clans. As their city expanded and contacts with other communities proliferated, the Romans developed an interest in trade, commerce and industry. The early Romans did not use coins in their transactions but pieces of bronze whose value was determined according to their weight. After the introduction of a written alphabet in the late sixth century BC, the Romans began to record their customary rules governing property and draft legal documents for certain economic transactions, last wills and testaments.

By the fifth century, the Roman settlement had begun a process of steady expansion. In 493 BC, Rome concluded a treaty with a league of Latin cities whereby each party undertook to aid the other in the event of war. Thereafter, the Romans concentrated on quelling the power of opposing tribes to the north while gradually dominating the Latin cities. During the fourth and early third centuries, the Romans fought a series of wars against the Samnites (a tribe from the Apennine

[1] *Ab urbe condita* 10. 8. 9.

area); the Latins who rose in revolt; the Celts and the Etruscans; and finally the Greek city-states of southern Italy. By the time these wars were over in 272 BC the Romans had gained control over most of the Italian peninsula. This did not entail the formation of a single state; rather, the various Italian communities were more or less allowed to govern themselves but they were made subordinate to Rome in different ways.

1.2.1.1 The Early Roman State

The early Roman city-state was shaped under the influence of the Etruscans, a highly civilized people who dominated central Italy in the seventh and sixth centuries BC.

Roman tradition declares that during the first two and a half centuries after the founding of the city, a succession of seven kings had governed Rome, the last three of whom had Etruscan origins. The office of king (*rex*) was not hereditary but elective. Furthermore, although technically the king was supreme warlord, priest and judge, his authority was limited by the clan organization and by the characteristically Roman habit of seeking advice before action. The Roman kings turned for advice to a council of clan elders or senate, which probably represented the collective opinion of the patrician class. Besides acting as the king's advisory body, the senate was also entrusted with the task of governing the state during the period between the death of a king and the election of another (*interregnum*) through a succession of senators acting as temporary kings (*interreges*). Since the success of the state ultimately depended on the cooperation of the citizenry, the king and his council found it expedient to inform the people of important decisions and therefore convoked on occasion a gathering called the curiate assembly (*comitia curiata*). This assembly was composed of the thirty *curiae*, or wards, into which the whole citizen body (*populus Romanus*) was divided. The curiate assembly, strictly speaking, did not have any legislative power but one of its most important functions was the formal sanctioning of the laws proposed by the king in exercise of his supreme command (*imperium*). Moreover, this assembly bestowed the *imperium* upon a newly elected king through a special law called the *lex curiata de imperio*. Although the political role of the assembly during the regal era seems to have been a passive one, the idea that political authority rested ultimately with the Roman people as a whole had great importance in the development of Roman political theory.

During the period from the late sixth to the mid-third centuries BC, the Roman state organisation underwent a series of momentous changes. A turning point in the history of this period was the overthrow of the monarchy around 509 BC and the establishment of an aristocratic republic. Perhaps more fundamental was the gradual shift of power from the exclusive control of the patricians towards the plebeians. This transformation prompted by the internal political struggle between the two classes (known as 'the struggle of the orders') was reflected in the creation of institutions specifically designed to safeguard plebeian interests and the opening

of state offices that had traditionally been the preserve of the patricians. By the middle of the third century BC, a precarious equilibrium between the classes had been established and the Roman state was dominated by a new nobility composed of both patrician and wealthy plebeian families. Thus, the fundamentally aristocratic character of the Roman state did not change. What changed was the constitution of the aristocracy in power: the old patrician aristocracy was replaced by a new and exclusive patricio-plebeian nobility based on wealth and office-holding.

The political structure of the republic comprised three interrelated elements: the magistrature (*magistratus*), the senate (*senatus*), and the assemblies of the Roman people (*comitia*).[2]

The highest executive office of the state was held by two annually elected magistrates, named consuls (*consules*). Their functions included command of the army and the power to convene the popular assemblies where their proposed bills were voted on. However, as their title (from *consulere*: to consult) indicates, they were bound by the well-established constitutional principle of consulting the senate on major issues. In times of emergency when the security of the state was threatened, each consul had the right to appoint (with the senate's approval) an extraordinary magistrate, the dictator, in whose hands all state authority was concentrated. However, the dictator's power was limited by the expectation that he would resign immediately upon resolution of the emergency situation or fulfilment of the task he was appointed to tackle. In any event, a dictator could not remain in office for more than 6 months and this rule was apparently engaged without exceptions. During the later Republic, in a great emergency (*ultima necessitas*) the senate could pass a special decree (*senatus consultum ultimum*) that armed the consuls with additional powers and authorized them to initiate any extraordinary measures for averting the danger. From 367 BC, a praetor was elected each year and he controlled the judicial functions relating to the administration of civil law. Around the middle of the third century BC an additional praetor was appointed to supervise litigation in disputes between foreigners, and between foreigners and Roman citizens. The new praetor (*praetor peregrinus*)

[2] The Greek historian Polybius described the Roman constitution as a mixed constitution. The philosopher Aristotle almost 200 years before had defined three types of constitution: the monarchic, in which the power was in the hands of one person; the oligarchic, in which a few people held the power; and the democratic, in which the power was in the hands of the many. Aristotle had an elaborate explanation of how these constitutions changed over time and went in a kind of cycle. Polybius borrowed the basic analytic tool, the idea of three kinds of constitution, but jettisoned the claim that the three inevitably moved in a cycle over a long period. His claim was that the Roman constitution was partly monarchic, partly oligarchic or aristocratic, and partly democratic. This, he argued, was why the Roman constitution was stable and didn't have to change on a cyclic pattern the way Aristotle had predicted constitutions should. As Polybius saw it, the monarchic element in the Roman constitution was represented by the consuls; the oligarchic element was represented by the senate; and the democratic element was represented by the Roman people and their assemblies. See *Historiae* VI. 11.

was distinguished from the original one who was termed *praetor urbanus* as he only had jurisdiction over disputes between Roman citizens (*iurisdictio urbana*). From 443 BC two magistrates, the censors, were elected every 5 years to compile an official list of the citizens of Rome (in 434 BC the duration of the censors' term in office was limited to 18 months). Their chief responsibility was to estimate the wealth of individual citizens and determine the amount of tax that each person had to pay. When it became customary to compose notes on the census list regarding a citizen's misconduct, the censor assumed the additional task of supervising morals. By the end of the fourth century BC, the censors were entrusted with the further task of compiling the roll of senators. From 367 BC, two curule aediles were elected each year to attend to the care and upkeep of the city. They exercised certain legal jurisdiction in market disputes and matters of public order. From 447 BC two magistrates of lower rank, the quaestors, were elected annually to supervise the state treasury. In connection with the magistrature, there should be mention of the tribunes of the plebeians (*tribuni plebis*) who were not originally regarded as magistrates. The office of tribune was introduced at the beginning of the fifth century BC as an exclusively plebeian office. The chief task of its holders was to protect members of the plebeian class against abuses by patrician magistrates through the exercise of their right to veto acts of other magistrates (*intercessio*). When the political differences between the patrician and plebeian classes disappeared in the early third century BC, the tribunes were regarded as magistrates for all the Roman people. In the course of time, they acquired the right to convene and preside over the popular assemblies and to submit legislative proposals to them. It was recognized as a general norm that a person could not be appointed to the highest offices of the state without first progressing through the lower ones—a process referred to as *cursus honorum*. Every magistrate was vested with an executive power (*potestas*) to perform the various duties and responsibilities of his office. In exercise of his *potestas*, a magistrate could issue executive orders (*ius edicendi*) and employ any coercive or punitive measures he considered necessary for the enforcement of his orders (*ius coercendi*, *coercitio minor*). Besides the *potestas* conferred to all state officials, the highest magistracies (the consuls, the praetors and the dictator) were accompanied by a special power known as *imperium*. Only magistrates with *imperium* could assume command of an army, and summon and preside over the senate (*ius agendi cum senatu*) and the assemblies of the people (*ius agendi cum populo*). Moreover, only these magistrates had the full power of *iurisdictio*, i.e. the power to set out the legal principles upon which legal disputes were decided (*ius dicere*: declaring the law), and could impose severe penalties for violations of their orders, including capital punishments (*ius coercendi*, *coercitio maior*).

During the republican period the senate (*senatus*) played a pivotal role in Roman political life. By the middle of the third century BC this body was largely composed of leading ex-magistrates (notably, former consuls and praetors), who held their senatorial office for life. The senate possessed no formal executive authority and its resolutions were officially known as *senatus consulta* and not laws. However, the

prestige and influence of its members and stable constitution meant the senate held the real leadership of Rome in its hands.[3] Within the senate's province fell the conduct of foreign policy and various duties relating to the administration of public finances, such as fixing the budget assigned to each magistrate, the management of public lands (*ager publicus*) and the imposition of special taxation (*tributum*) to cover the expenses of war. Moreover, it was the constitutional practice for magistrates to consult the senate on the formulation and execution of laws and on other important matters of the state. Although a magistrate was not in principle compelled to accept the senate's judgment, he would normally defer to its authority. It is only in times of political crisis and internal disorder that we find legislative proposals were carried in the teeth of senatorial opposition.

Rome's earliest popular assembly (*comitia curiata*) continued to exist during the republican age. However, as a political body it was superseded by the new assemblies that were formed following the military and political reforms of the late sixth and early fifth centuries BC: the assembly of the centuries (*comitia centuriata*) and the assembly of the tribes (*comitia tributa*). Alongside these assemblies was the *concilium plebis*, which was reserved for the plebeians. A feature common to all Roman assemblies, including the *comitia curiata*, was that the formulation of decisions proceeded in two stages: first within the group (*curia*, *centuria* and *tribus*) and then per group in the assembly. Decisions were reached by considering the number of groups that voted for or against a proposal; the vote of each group was determined by the majority of the individual voters it comprised. However, the assemblies differed from each other with respect to composition, powers and scope of competence. The *comitia centuriata*, Rome's principal legislative assembly, consisted of the citizens organized on a timocratic basis into classes and centuries (groups of a hundred citizens). There were five classes in all, each comprising a set number of centuries. The system was far from democratic as the first class consisted of the wealthiest citizens and supplied most of the centuries, and hence could outvote the other four classes in the assembly. The centuriate assembly elected the highest officials of the state and passed laws proposed by magistrates. Moreover, the assembly operated as a court of justice hearing appeals against sentences involving death and other severe punishments imposed by magistrates (*provocatio ad populum*). The assembly of the tribes (*comitia tributa*) was the assembly of the citizens as residents of Rome. The Roman people were divided into urban and rural tribes according to their place of residence. There were four urban tribes (*tribus urbanae*) and several rural tribes (*tribus rusticae*). The rural tribes, mainly comprised of affluent farmers and large landowners, outnumbered the urban tribes (despite the latter containing more citizens): thus, the wealthier citizens exercised the most influence in the assembly. The most important functions of the tribal assembly were the election of the lower officials and voting on laws that had little political importance. The *concilium*

[3] Consider Cicero, *De republica* 1. 32. 56.

plebis, the assembly of the plebeians, was created in 471 BC after the Roman senate recognised the right of the plebeians to hold meetings to elect their leaders (the *tribuni plebis*) and discuss their own affairs. Like the assembly of the tribes, it was organized on a tribal basis. The plebeian assembly passed resolutions, called *plebiscita*, which originally had no binding effect outside the plebeian class. Following the plebeians' success in the struggle of the orders, the *plebiscita* obtained the full force of law and were binding on both patricians and plebeians alike. The formal distinction between the *concilium plebis* and the *comitia tributa* was retained until the close of the Republic. After the middle of the third century BC there were actually very few practical differences between the two bodies with respect to their composition and the laws they enacted. This was largely due to the elimination of the political division between the patricians and the plebeians, and the rapid increase of the plebeian population following the social and economic changes prompted by Rome's expansion.

1.2.2 The Customary Origins of Roman Law

The early Romans called their own law *ius Quiritium,* which is a variation of the term *Quirites* used to address Roman citizens in the *comitia*. In later times this law was referred to as *ius civile*, indicating that it was reserved for the Roman citizen body (*cives Romani*). Like other ancient peoples, the Romans observed the principle of the personality of the laws, according to which each person lived by the law of the community to which he belonged.[4]

The earliest source of Roman law was unwritten customary law, comprising norms (referred to as *mores maiorum*: the ways of our forefathers) that had grown from long-standing usages of the community, as well as from cases that had evolved from disputes brought before the clan patriarchs or the king for resolution. However, archaic Roman law was not marked by uniformity, since the two classes, the patricians and the plebeians, which made up the bulk of the population, appear to have been distinguished not only by the possession of different political privileges but also by the possession of different systems of customary law.[5] A further

[4] According to Gaius: "the rules enacted by a given state for its own members are peculiar to itself and are called civil law." See G 1. 1.

[5] This seems to be evidenced by the existence of dual forms for the attainment of the same end in some areas of Roman law. E.g., we have the marriage by *confarreatio* (a form of marriage involving an elaborate religious ceremony) side by side with marriage by *usus* (an informal variety requiring simply mutual consent and evidence of extended cohabitation); and the testament in the *comitia curiata* (now referred to as *comitia calata*) (*testamentum calatis comitiis*) side by side with the testament '*per aes et libram*' ('with the copper and the scales') or mancipatory will. The exclusion of the plebeians from political office and the priesthood and the denial to them of the right of *conubium* (marriage, intermarriage) with members of the patrician class also point in the direction of a fundamental division between the two classes.

divergence of practice in the primitive society out of which the city-state of Rome gradually evolved derived from the considerable amount of autonomy in legal relations that existed in the clans (*gentes*) out of which the earliest Roman community was formed. Legal development was thus marked by a process of gradually increasing unification: first, the customs of the clans were merged in the customs of a state; then, an attempt was made to create a uniform system by making the law of the patricians approximate as closely as possible to that of the plebeians. It is uncertain when the smaller political units out of which Rome was formed became so thoroughly marshalled under the rule of a common government that the customs of the clans were made to conform to the rules set down and enforced by a single superior authority. On the other hand, Roman tradition does supply a date for the period at which an attempt was made to secure a uniform system of law binding on both patricians and plebeians alike. This traditional date is comprised in the years 451–449 BC—the years which the Romans believed to have witnessed the creation of the Law of the Twelve Tables, the first systematic compilation of Roman law.

Similar to other primitive communities, much of the customary law of archaic Rome developed from a belief in the omnipresence of the gods and their constant interest and interference in human affairs. It is thus unsurprising that many of the norms and formalities employed in legal life reflected a strong religious influence. For instance, a litigant's pleading in a civil suit took the form of a religious ritual, every word and cadence of which had to be learn from a priest. Furthermore, it was believed that grave wrongdoings could invoke the wrath of the gods and entail misfortune for the entire community. Such wrongdoings were deemed to render the offender impious and the ensuing punishment was expiatory in character: its purpose was to restore the state of harmony (*amicitia*) between the community and the gods (the most severe form of atonement was the sacrifice of the offender on the altar of the deity whom he had offended). Even in later historical times, when the process of secularization of Roman law had reached an advanced stage, Rome preserved many traces of these primitive religious beliefs and practices. They can be detected in, among other things, the respect for the auspices, the maintenance of the cumbrous forms of the old system of civil procedure (*legis actio*) and the custody of these forms by the priestly college of the pontiffs, who also served as interpreters of the law.

Notwithstanding the religious significance of early legal norms, the Romans themselves believed that from as early as the time of the kings a distinction began to be made between the functions of religious law (*fas*) and those of secular law (*ius*)—the body of man-made norms governing human relations. Originally the term *ius* (plural: *iura*) denoted that which is due in human relations, the rightful power of a community member to act in a certain manner vis-à-vis his fellow-citizens. It referred to a course of conduct that the community would take for granted and, in that sense, approve (behaviour that did not conform to *ius* entailed an *iniuria*). At first, the exercise of *ius* had no connection with state organization—*ius* pertained to any instance of approved self-help. After the emergence of the state and the development of a formal justice system, *ius* referred to that which was capable of enforcement with the consent of those responsible for safeguarding the

norms of the community. So closely were the ideas of right and satisfaction connected with one another in the minds of the Romans that they employed the same word '*ius*' for right and for court. This association of ideas testifies to the fact that, at a time when there was no science of jurisprudence, the only possible way of distinguishing between the different kinds of *ius* was by appealing to procedure—by pointing to the fact that different kinds of mechanism had been devised for addressing different kinds of claims. The question of the ultimate foundation of *ius* was not one that bothered the Romans to an appreciable degree at any period of their history. They were content to regard it as the product of custom assisted by interpretation. In later times, as the legal system grew in complexity, they supplemented it by acts of legislation. But, even when they did so, they were concerned not so much with the words of the statutory enactment as with the manner in which these words were interpreted. The Romans' dependence on authority and skilled interpretation was a distinctive feature of their approach to law throughout their history. In the earliest phase of Roman history this authority and power of interpretation appear to have been represented by the king and the college of the pontiffs. Only the king and the pontiffs could provide litigants with knowledge of the ritualistic forms that had to be employed in civil procedure. The king, moreover, must have given the ruling in law that determined what form of action should be employed. However, even at this early period, the final settlement of a suit was probably entrusted to a private judge (*iudex*), although the latter's judgment must have been conditioned by the form of action which the king and the pontiffs had considered appropriate to the case in hand. The transition from Monarchy to Republic made little difference in the manner in which the law was disclosed to litigants, except in so far as this transition may have enhanced the role of the pontiffs. The limitations of the office of consul (annuality, collegiality) must have prevented its holders, who were supposed to declare the *ius*, from exercising the authority that had been once wielded by the king. In any event, the patrician aristocracy, out of whose ranks the consuls and pontiffs came, was able to maintain and even strengthen its monopoly of knowledge of the norms and forms of the law.

It is unknown when legal rules began to be formally enacted and stipulated in writing. According to the jurist Pomponius and other authors, a function of the people's assembly (*comitia curiata*) during the monarchy was to vote on the laws proposed by the king. It must be recalled that in the archaic period, legislation in the modern sense and as the Romans understood it in their politically mature eras, was practically unknown. The law was mainly construed as a sacred custom and thus not subject to change by direct legislative means. The role of the *comitia curiata*, like that of the assembly of a *gens*, was in all likelihood a passive one, limited to approving (or disapproving) proposals of an extraordinary nature submitted by the king. Pomponius describes the state of the law during this period as featuring a series of laws, referred to as *leges regiae*, which supposedly emanated from some of the early kings. According to Roman tradition, these laws were collected and

recorded at the end of the regal era by Sextus Papirius, a *pontifex maximus*.[6] The *ius Papirianum*, as this collection was known, is lost to us, but a number of rules ostensibly promulgated by kings have been preserved in the works of later Greek and Roman historians. Some modern commentators remark that these authors' accounts of the so-called 'laws of the kings' were probably based on observations on their own contemporary law and therefore are not very reliable. However, these laws, in the form in which they have come down to us, contain good indications of their authenticity. Some of the relevant norms are quite prehistoric and could never have been valid at any period during the republican era; others pertain to purely religious observances, which may belong to any age, but may be as early as Rome itself. The laws of the kings contain a diversity of norms dealing with social, moral and religious matters, many of which may have been promulgated by the pontiffs over a long period of time. Although it is unlikely that all of these norms go back to the epoch of the kings, many of them must do so, for they reflect an extremely primitive stage of cultural development. In general, the surviving fragments of the *leges regiae* attest to the dominance of religious law (*fas*) during the earliest period of Rome's history.[7]

A characteristic feature of early Roman law was its extreme formalism, indeed ritualism, manifesting the religious origin and character of many legal rules and institutions. In this context, formalism denotes not only the need for compliance with the forms or rules of procedure characteristic of any legal system. It also emphasizes form in every part of the legal system; the casting of all legal acts into an unchangeable form where successful completion depends upon strict adherence to a set ritual engaging certain words or gestures. Archaic Roman law is perceived as formalistic because legal acts, that is, acts that effected or intended to effect changes in the legal relations of individuals, were accomplished with a complicated array of forms. Further, an individual electing to assert a claim at law against another had to mould the claim within the scope of a particular limited cause of action expressed by means of a strictly prescribed formula—the slightest mistake would entail loss of his case. Interpretation might stretch the meaning of certain words, but the words themselves were immutable: only claims adapted in concordance with the words were possible. This form of procedure offered no opportunity for modifying the issue based on the objections issued by the defendant, who could only admit or deny the plaintiff's claim. This system displays an important feature of Roman legal thinking: its *normativity*. For the Romans, the law consisted of rules similar in manner to their religion. The rules of law, consisting of fact-decision relationships, could not be argued for—similarly, a minister of religion was unable to present a rational justification for his prophesies. In each case the link between the facts (the judicial proof, the flying bird) and the decision (an interpretation of the law or a statement concerning divine law—*fas* and *nefas*) remained an inexplicable norm. This perspective emphasizes the *irrational* aspect of archaic decision-making.

[6] D 1. 2. 2. 1–2.

[7] The extant *leges regiae* can be found in FIRA I, 4–18; Bruns, *Fontes*, I. 1–14.

1.2.3 The Law of the Twelve Tables and the Rise of Legislation

A pivotal event occurs in the history of a legal system when laws are enacted in writing: a new source of law emerges, in addition to unwritten customary law, with far-reaching consequences. The Babylonians acquired the *Hammurabi* Code in the eighteenth century BC, the Hebrews the *Pentateuch* Code in the eight century BC, and the Romans the *Law of the Twelve Tables* in the fifth century BC.

The Law of the Twelve Tables emerged from the struggle between the patricians and plebeians: it is the earliest document of Roman law and the first important piece of legislation. The Roman historical tradition, enveloped by ambiguity, records the events leading to its enactment: in 462 BC, Terentius Harsa (a tribune of the plebeians) demanded that the rules of customary law be recorded and made publicly available to halt its arbitrary application by the patrician magistrates who controlled the administration of justice. After several years of strife, the patricians conceded and a three-member commission was dispatched to Greece to study the laws of the famous Athenian lawgiver Solon and those of other Greek city-states. In 451 BC, a board of ten citizens (all of them patricians) was appointed to draft a written code of laws (*decemviri legibus scribundis*). They were invested with supreme political power (*imperium*) for the period in which they were to perform this task, meanwhile the powers of the regular magistrates were suspended. In 450 BC the decemvirs produced a series of laws inscribed on ten tablets (*tabulae*). These laws were considered unsatisfactory, which prompted the election of a second commission of ten men (now incorporating some plebeians) to complete the work. In 449 BC, two further tablets of laws supplemented the existing ten and once the assembly approved the work it was published under the name 'Law of the Twelve Tables' (*lex duodecim tabularum*).[8]

Commentators have questioned the historicity of the second decemvirate, proposing that the work of the original commission was probably completed by the consuls of the following year. Moreover, historians now accept that it is unlikely that a delegation was sent to Greece but some think that if such a mission had existed it may have visited only the Greek cities in Southern Italy. The preserved fragments of the Law of the Twelve Tables reveal very little that can be traced directly to a Greek influence, although certain parallels with the laws of other early societies are observed.[9] A Greek influence on the code, slight though it may have been, was the inevitable result of the prolonged influence of the Greek civilization, through its outposts in Southern Italy and Sicily, on Rome from the days of her infancy. But, in spite of the fact that a few of its ideas may have been borrowed from

[8] D 1. 2. 2. 3–4. See also Livy, *Ab urbe condita* 3. 9. 2–3. 57. 10.

[9] The Law of the Twelve Tables does have some elements in common with Athenian law, but these are not of the kind that could suggest a direct influence. The relevant provisions that, according to Cicero, were extracted from the laws of Solon, pertain mainly to the settling of disputes between neighbours, the right of forming associations (*collegia*) and restrictions on displays at funerals. See Cicero *de leg*. 2. 23. 59; 2. 25. 64.

Greek sources, the Law of the Twelve Tables was basically a compilation of rules of indigenous Roman customary law, designed not to reform but to render the existing law more certain and more clearly known to the populace. Only the most important of these rules were included, while the general framework of the customary law was taken for granted. At the same time, an important objective of the compilers was to eliminate, as far as possible, the divergence in legal systems within the state and to make a common law for Roman society considered as a whole—to find a system of *ius* that would be equally valid for all citizens. In pursuance of this goal, certain disputed or controversial points must have been settled and some innovations made.

The Law of the Twelve Tables is a highly casuistic, case-oriented piece of legislation that reflected the life of a fairly primitive agricultural community and fitted well into the system of unwritten customary law existing at the time. Its provisions are couched in the form of terse commands and prohibitions with a rhythmical cadence that must have facilitated their retention in the memory. But the wording is often abstruse and grammatically ambiguous, and the actual legal principles underlying the various provisions were left unstated as they were probably taken for granted. With regard to the nature of the particular rules themselves, the bulk of the preserved provisions pertain to matters of private law, such as family relations, succession and wills, property, contracts and torts. Some provisions deal with matters of criminal law and sacral law, while only two provisions relate to constitutional law. Special attention is given to the law of procedure, as it would have been requisite for the average member of the community to know the correct procedure for initiating an action to enforce his rights granted by the law. No doubt, this had much to do with the fact that initiating legal suits at this time was surrounded by hosts of technicalities and forms.

The Law of the Twelve Tables contained ordinances on civil, criminal and constitutional law. Table I of the Law prescribed the way a defendant could be summoned by the plaintiff to court and Table II stipulated the rules governing court procedure. However, it is highly unlikely that the compilers went so far as to specify the forms of action, i.e. the actual words and gestures, which had to be employed in any given case.[10] The harsh law of debt, a result at once of freedom of contract and the very severe view that ancient societies took of the defaulting debtor, was maintained. Thus, Table III recognized the right of a creditor to put an insolvent debtor to death or sell him into slavery. But now, probably for the first time, all the stages of the process of execution were made known, the rights of creditors were defined and the avenues of escape open to debtors were clearly described. The power of the head of the family (*patria potestas*) over his family members was given legislative recognition under Table IV. Table V contained rules pertaining to matters of succession and guardianship. One provision stipulated that if a person died intestate or if his will was deemed invalid, his property should pass to his

[10] According to Roman tradition, these forms were not revealed until nearly a century and a half later.

nearest agnates (*agnati*, *sui heredes*) or, in the absence of agnates, to the members of his clan (*gentiles*). According to another provision, if a man was unable to manage his own affairs their person and property should be placed under the power of his agnates or, in default of these, to his *gentiles*. Table VI included provisions regulating the acquisition and transference of property. It was stated, for example, that a person would acquire ownership of landed property upon 2 years of uninterrupted possession, or 1 year in the case of other property (this mode of acquiring property was termed *usucapio*). The transference of property by *mancipatio* (a formal transaction involving an imaginary sale and delivery) or *nexum* (a bilateral transaction accomplished like the *mancipatio*) was also recognized together with an early form of verbal contract known as *stipulatio*. The latter was based on a spoken question (*spondere*?—do you promise on your oath?) followed immediately by a spoken answer (*spondeo*—I promise on my oath). The contract was strictly interpreted on the basis of the pronounced words. Table VII dealt with matters relating to disputes between neighbouring owners and contained provisions prescribing the distance between buildings, the width of roads, and the right of an owner to gather fruits that had fallen from his tree onto neighbouring property. Table VIII contained provisions concerning delicts and crimes, and prescribed the punishments that these entailed. The criminal law of the Twelve Tables reflects a more primitive stage of thought than its civil law provisions (this is unsurprising given that throughout Roman history the criminal law lags far behind the civil law). The Tables recognised the principles of self-help and retaliation, although not without certain limitations. Thus, a person who injured another was exposed to retaliation (*lex talionis*), but the effects of this rule were mitigated by the fact that in many cases the injured party could only seek compensation for the injury suffered. Moreover, the conception of capital punishment as a form of expiation for offences incurring the wrath of a deity remained dominant, even though the number of offences punishable by death was rather limited. Table IX included provisions relating to constitutional law. It rendered it unconstitutional for a magistrate to propose a law imposing penalties or disabilities upon a particular person only, and declared that no one should be put to death except after a formal trial and sentence. It stated, moreover, that only the assembly of the centuries could pass laws affecting the political rights of citizens and that no citizen should be condemned on a capital charge (i.e. a charge involving loss of life, freedom or citizenship) without the right of appeal (*provocatio*) to the assembly. Table X addressed sacral law and matters relating to the burial or cremation of the dead. Finally, Tables XI and XII embodied general provisions (such as the prohibition of intermarriage between patricians and plebeians, Table XI) and rules relating to the liability of a slave's master for offences committed by the former (*noxae deditio*).

Even though archaic in form and content, the Law of the Twelve Tables contains elements indicative of a legal system that had advanced considerably beyond its original, primitive stage. Of particular importance for the subsequent development of the law were the rudiments of interorgan controls to prevent excesses in the administration of justice. But the significance of the Law of the Twelve Tables lays

not so much in its contents as in the fact that it opened up new possibilities. Considered from a political angle, its main achievement was vindicating the monopoly of state authorities over all acts of judicial administration. As it produced a common body of law for the populace regarding the legal matters most important for daily life, private citizens and magistrates alike were made subject to the sovereignty of the law and members of the plebeian class were no longer exposed to the vagaries of customary rules administered by patrician officials. At the same time, the process towards the secularization of the law was accelerated: conduct patterns that were in the past shrouded in religious ritualism were rationalized by general rules of substantive and procedural law in a written form, and thus ascertainable by all people. As the law was now publicized, it began to lose the immutable quality of a religious mystery and evolved into a conventional, human form that was therefore subject to change.

For a thousand years, the Law of the Twelve Tables remained the only attempt ever made by the Romans at a comprehensive recording of their laws. This first attempt ushered in the history of Roman law as we know it and for a thousand years the Romans regarded the Twelve Tables as the basis of their whole legal system despite changed social, economic and political conditions.[11] The perpetuation of the currency and validity of the Law of the Twelve Tables was facilitated by the fact that the norms it contained were continuously modified and extended through interpretation by trained jurists, thus it was adaptable to the changed conditions of later times.

The original text of the Law of the Twelve Tables has not been preserved (the tables on which the Law was written were probably destroyed during the sack of Rome by the Gauls in 387 BC). Our knowledge of its contents is based on various historical and juridical sources (the oldest source dates from the period of the late Republic). However, the contents were not recorded in their entirety by the relevant authors like Cicero, Aulus Gellius and Gaius. They only reproduced fragments that were relevant to them, modernizing the text in language and consciously or subconsciously adapting it to the conditions of their own times. The precise quantity of missing text is unknown as is the arrangement of the original provisions of the Law. Thus, the reconstructions by contemporary Romanist scholars that draw on the extant literary sources are largely hypothetical.[12]

In the period following the enactment of the Law of the Twelve Tables, legislation by popular assembly evolved as a generally acknowledged source of law. However, in comparison to the role of legislation in the Greek world, Roman

[11] The historian Livy refers to the Law of the Twelve Tables as "the source of all public and private law" (*fons omnis publici privatique iuris*). See *Ab urbe condita* 3. 34. 6. Consider also Cicero, *De oratore* 1. 44. 195–196.

[12] See, e.g., R. Schöll, *Leges duodecim tabularum reliquiae*, Leipzig, 1868; FIRA I, 23 ff. Bruns, *Fontes* I, 15 ff. E. H. Warmington, *Remains of Old Latin* III, Loeb Classical Library, 1938, 424 ff. A. C. Johnson, P. R. Coleman-Norton and F. C. Bourne, *Ancient Roman Statutes*, Austin, Texas, 1961, 9 ff. M. Crawford (ed.), *Roman Statutes*, London, 1996.

legislation remained rather underdeveloped. The Romans' reluctance to use legislation as a means of changing their ancient *ius civile* derived from their conservative attitude towards law and the deeply rooted conception of the merits of their ancient customs reinforced by the special position accorded to the Law of the Twelve Tables. As it was not easy to frame statutes in a way that avoided infringement of established norms (especially in the field of private law), the necessary reforms were fashioned in an indirect manner by means of interpretation. Accordingly, the number of statutes that affected the development of private and procedural law was relatively small. The great majority of the statutes enacted during the Republic were concerned with matters relating to the organization of the Roman state. Some statutes had a hybrid character displaying a political basis and also elements that affected the private relations of citizens—this embraced specific laws relating to civil procedure, marriage, debts and testamentary benefits.

Roman legislation was comprised of two kinds: *leges* and *plebiscita*. The former were enacted by one of the *comitia* on the proposal of a consul or praetor and were binding on all citizens; the latter were passed by the assembly of the plebeians (*concilium plebis*) on the proposal of a tribune and were initially only binding on the plebeians.[13] Under the Valerio-Horatian and Publilian laws (449 and 339 BC) the plebeian assembly gained the right of considering and initiating proposals that affected the interests of the whole community. This right was probably acquired and exercised following the creation of increasing facilities for bringing resolutions of the *plebs* as petitions to the assemblies of the people to be confirmed or rejected by the latter. As the *plebs* came gradually to constitute the majority of voters in the assemblies of the people, these petitions must as time went on have been almost invariably confirmed. The distinction between *plebiscita* and *leges* must have been growing more and more formal and unreal when the *lex Hortensia* (287 BC) enacted that henceforth *plebiscita* should have the full force of *leges*.[14] From this time onwards there was no real difference between the *populus* and the *plebs* in matters of legislation (although fundamental changes in the constitution probably required ratification by the *comitia centuriata*). As a result of these developments the *concilium plebis*, convened under the presidency of a *tribunus plebis*, emerged as the most active legislative body. This is evidenced by the fact that the great majority of the *leges* that we can observe in records were, strictly speaking, *plebiscita*.

Important statutes of the early republican period in the field of public law encompass: the *lex Valeria Horatia* (449 BC), which recognized the inviolability of the plebeian tribunes; the *lex Canuleia* (445 BC), which removed the rule prohibiting intermarriages between patricians and plebeians; the *lex Aemilia* (434 BC), which limited the duration of the censorship to 18 months; the *leges Liciniae Sextiae* (367 BC), which admitted plebeians to the office of consul and established the praetorship; the *lex Publilia Philonis* (339 BC), which removed the

[13] G 1. 3; *Inst* 1. 2. 4.

[14] See Aulus Gellius, *Noctes Atticae* 15. 27. 4. And see D 1. 2. 2. 8.

rule directing that the legislative enactments of the popular assemblies had to obtain senate approval after their passage; the *lex Ogulnia de auguribus* (*c*. 326 BC) that granted the plebeians access to the college of the pontiffs; and the *lex Hortensia de plebiscitis* (287 BC) that rendered the resolutions of the plebeian assembly binding on all citizens. In the fourth century BC, many statutes were passed that established a limit on the interest rate charged on debts for borrowed money such as the *lex Duilia Menenia* of 357 BC and the *lex Genucia* of 342 BC. Other statutes eased the debtors' burden with respect to the securities they could be requested to provide against the risk of non-payment, as well as pertaining to the sanctions they incurred for non-payment. Thus the *lex Poetelia Papiria* of 326 BC forbade the private imprisonment of the debtor by the creditor, which entailed the former becoming a slave of the latter.

1.2.4 The Role of Pontifical Jurisprudence

In the period following the publication of the Law of the Twelve Tables, new legal norms were developed chiefly through the interpretation of this law and later statutes. Because a close connection still prevailed between the legal and religious spheres, it is unsurprising that the interpretation of the law and its deriving actions lay in the hands of the pontiffs.

Even though written laws were openly displayed, the interpretation of the terse language of the Twelve Tables and subsequent enactments would be difficult even for those individuals who could actually read them. Moreover, not all relevant norms were expressly stated in the existing statutes and the technical forms prescribed for litigation were not publicly available. As guardians of customary and written law, the pontiffs alone knew all the norms, ritual techniques and documents employed in the administration of justice as well as the authoritative opinions their predecessors had rendered in the past. Thus private citizens had to consult the pontiffs to obtain advice on whether specific rules of law applied to a particular case and the correct procedure in litigation. Despite the emphasis that archaic law attached to the letter of the law and the deriving forms of action, there was a tendency to permit a slightly greater degree of freedom in legal proceedings than was allowed in purely religious ceremonies. Thus, occasionally the pontiffs employed the pretext of interpretation to expand the law to cover new situations.[15]

A well-known example of law-making through interpretation by the pontiffs is the method devised for releasing a son (*filiusfamilias*) from his father's control (*patria potestas*). As Roman society developed in complexity, cases emerged where a son's absolute dependence on the father regarding his legal position had to be overcome so as to sustain the healthy functioning of economic life. Originally, the

[15] D 1. 2. 2. 5–6.

power of the *paterfamilias* over his children (and also over his grandchildren and more remote descendants) entailed complete control over them. Only the father had any rights in private law—he alone was entitled to own property and own all the acquisitions of the subordinate family members. As economic conditions changed, this rigid system could not be absolutely sustained in practice. The problem was resolved by the constructive interpretation of a certain clause of the Law of the Twelve Tables that was apparently designed to protect a son against a father who misused his power. A father could consign a son to another person for money on the understanding that the son obtained manumission upon completion of work for that person. Following the manumission, the son returned automatically into the *potestas* of his father and the sale process could be repeated. Table 4. 2 limited this right of the father by stating that if a father sold his son three times, the latter acquired freedom. The pontiffs seized this provision and engaged the pretence of interpretation to introduce the rule that if a father completed a fictional threefold sale of his son to another person, the son after the third alienation and manumission gained a release from the *partia potestas* and became *sui iuris* (in control of his own affairs). This example displays how a legal provision was utilised to achieve a purpose quite different from that originally contemplated by the legislator and how a new norm was created through interpretation as required by altered conditions.[16] While the pontiffs retained their monopoly in legal matters, it was mainly through their interpretations that innovations in the field of private law could be effected. At the same time, the pontiffs' activities as interpreters of the law forged the groundwork for the subsequent development of Roman legal science.

According to Roman tradition, the pontifical monopoly of legal knowledge came to an end after the publication in 304 BC by a certain Gnaeus Flavius, clerk of Appius Claudius (a prominent patrician who was appointed censor in 312 BC), of a collection of formulas and ritual words that were recited in court when litigation took place (*ius civile Flavianum*). Although any alert citizen must have known a great deal of the information embodied in the *ius Flavianum*, it was now rendered official and the jurisdictional magistrates could no longer refuse what all the people would know to be the law. From the late third century BC, an increasing number of leading Roman citizens adopted the practice of proffering legal advice without being members of the pontifical college. Around 200 BC one of these jurists, Sextus Aelius Paetus Catus, consul in 198 BC, published a book containing the text of the Law of the Twelve Tables, the interpretations of its rules by the pontiffs and secular

[16] Another example of a rule developed through juristic interpretation is the rule relating to the guardianship of freed persons. According to Gaius: "The same law of the Twelve Tables assigns the guardianship of freed men and freed women under puberty to the patrons and their children. This form of guardianship is called statutory, not because it was expressly stated in that body of law, but because it has been accepted by interpretation as if it had been introduced by the words of the statute. For, by reason that the statute ordered that the estates of freed men and freed women who died intestate should go to the patrons and their children, the early jurists deemed that the statute willed that tutories also should go to them, because it had provided that agnates who were heirs should also be tutors." See G. 1. 165.

jurists and a list of the legal forms employed in civil procedure. This work, known as *ius Aelianum*, marks the beginning of Roman legal literature and the transition from the unsystematic approach of the earlier jurists to a new approach that may be termed scientific.[17]

1.3 Legal Development During the Late Republic

1.3.1 Historical and Constitutional Background

The later republican period witnessed a remarkable expansion of Roman territory that culminated in Rome gaining control of the entire Mediterranean basin by the end of the first century BC. This expansion was not the work of one man nor did it occur rapidly, rather it was the outcome of several centuries of conflict and persistent effort.

The third century BC is marked by Rome's two great wars for control of the Western Mediterranean against Carthage, an old Phoenician colony in North Africa and a great maritime power. As a result of victory in the First Punic (Phoenician) War (264–241 BC), Rome acquired her first overseas province, Sicily, and asserted her position as a growing international power. In the Second Punic War (218–201 BC), a resurgent Carthage sought to recover the lost ground by embarking on a program of military expansion in Spain and Italy. Despite the initial successes of her armies, Carthage was finally overwhelmed by the Romans and was reduced to the position of a client-state of Rome. Between 200 and 190 BC, Rome subdued the Celtic tribes of Northern Italy. In the same period she embarked on yet another series of wars, this time in the Greek East. One of Rome's principal opponents was King Philip V of Macedonia, an ally of Carthage in the Second Punic War. Seizing upon Philip's aggressive policies and claiming to act as protectors of Greek freedom, the Romans declared war on Macedonia in 200 BC. Philip's defeat in 197 BC vanquished the Macedonian control of the Greek city-states, although no Greek territory was annexed by Rome this time. In 188 BC, after a 4 year war, the Romans broke the power of Antioch III (King of Syria and Asia Minor) and extended their control over the Eastern Mediterranean. In 148 BC, following a protracted struggle, Macedonia was again defeated and turned into a Roman province. With the dissolution of the Achaean confederacy and the sacking of Corinth in 146 BC, the whole of Greece fell under Roman domination. The same year marks the end of the Third Punic War (149–146 BC), which resulted in the complete destruction of Carthage and the annexation of her territory as part of the Roman province of Africa. In 133 BC, the rich kingdom of Pergamum (situated in the north-west of Asia Minor) was transferred to Rome under the will of its last king

[17] Consider D 1. 2. 2. 7.

(Attalus III). Out of this kingdom, the province of Asia was formed in 129 BC. Rome's victory in the war against King Iugurtha of Numidia in North Africa (112–105 BC) entailed the addition of further territories to the Roman province of Africa. In 88 BC Rome embarked on a series of wars in the East against King Mithridates of Pontus, who had declared himself liberator of the Greeks and launched a campaign aimed at expelling the Romans from Asia Minor and Greece. After Mithradates' defeat in 63 BC, Rome regained control of Greece and a continuous belt of Roman provinces was created along the coasts of the Black and Mediterranean Seas from Northern Asia Minor to Syria and Judaea. Behind these provinces to the east, Rome's sphere of interest was safeguarded through a band of client states that formed a buffer zone against the powerful Parthian Empire. This phase of Roman expansion ceased with the conquest of Gaul by Julius Caesar (58–53 BC) and the annexation of Egypt by Octavian in 30 BC.

As it proved impossible to govern the newly conquered lands from Rome, the relevant task was assigned to specially appointed magistrates and, from the late second century BC, to ex-magistrates (*proconsules* or *propraetores*) chosen by the senate from among its members. Acting as representatives of the Roman state in the provinces assigned to them, these governors had military and administrative duties that embraced the administration of justice. Each province comprised several communities (*civitates*) that enjoyed local self-government but had no political bond of unity. The inhabitants of these communities were not granted Roman citizenship, even though they were required to pay taxes to Rome.

During the late republican period Roman society changed from a small, closely-knit and largely homogeneous grouping into a complex stratified society with disparate and often competing interests. At the top of the social pyramid was the patricio-plebeian nobility that emerged in the closing stages of the struggle of the orders, when office holding ceased to be a prerogative of aristocratic birth. Since the Roman senate consisted largely of members of leading families who had served as magistrates, this new nobility was referred to as the senatorial class (*ordo senatorius*). The chief source of the senatorial families' wealth was landed property, as senators were precluded from engaging in commerce and industry. However, Rome's increasingly sophisticated economic life demanded enterprising men to direct trade, undertake the construction of public works, manage war contracts and collect state taxes. This led to the rise of an important new class of merchants and entrepreneurs, which became known as the equestrian class (*equites*, *ordo equester*). An active and very visible minority within the equestrian class acquired their wealth by entering into contracts with the Roman state for the collection of public revenues. Those who entered into such contracts with the state were referred to as *publicani*. The wealth and influence of this class of businessmen grew rapidly as Rome expanded in territory and her revenues continued to increase. Although excluded from the aristocracy and basically non-political, the equestrians were inevitably drawn into politics whenever the senatorial oligarchy threatened to infringe on their economic prerogatives. Below the *equites* in the social hierarchy were the upper classes of the various communities in Italy and the provinces, whose members tended to be loyal

supporters of Rome and had adopted the Roman culture and way of life. Lower down in this hierarchy were the members of the lower middle class: the small landowners in the country, and the artisans and small traders in the cities. The same broader class also encompassed the bulk of the urban and rural proletariat with a markedly worse economic situation, whose chief means of support was obtained from the state in the form of grants or from the wealthy families to which many of its members had attached themselves as clients. By far the most vulnerable group in society were the slaves (*servi*). In the early republican period, the number of slaves living in Rome was relatively small but this slave population grew rapidly from the mid-third century BC; by the close of the Republic, slave labour was the predominant factor in economic life. The living conditions of slaves varied considerably depending upon their personal skills, education and place of work. Generally, the urban slaves were treated better than those living on country estates and were more frequently released from slavery. After his liberation, a slave was referred to as *libertinus* (freedman) and theoretically had all the rights and obligations of a Roman citizen. In reality, however, freedmen and their descendants were regarded as socially inferior by those with no slaves in their ancestry and were virtually excluded from all the important offices of the state.

An important social and economic development during this period was the gradual decline of the yeoman class that Rome had depended upon economically and for its military strength. Farmers recruited to fight for many years returned to discover their homesteads and fields neglected. As traditional cereal agriculture was no longer profitable (corn and wheat were now imported in large quantities from overseas), these farmers found it increasingly difficult to re-establish themselves. Some enterprising farmers shifted to other products that could be sold more easily to overseas markets, such as olives and grapes, or turned to cattle-rearing. However, the great majority of small proprietors could no longer hold their own against the senatorial estate-owners and were forced to sell or abandon their farms. They drifted to the cities that in the long run offered them limited opportunities for employment. Gradually, whole districts were turned into large cattle-ranches and plantations (*latifundia*) that were owned by a small number of absentee landlords and worked by slaves or tenants. During the late second century BC, thousands of landless and poverty-stricken people from all over Italy moved to Rome where they joined the growing urban proletariat of the city. The transformation of a large part of the Roman citizen body into what became known as the 'Roman mob' had a profound effect on Roman social and political life; it was one of the principal causes of the crisis that led to the weakening and final collapse of the republican system of government.

Rome's dramatic expansion, especially in the Greek-speaking Eastern Mediterranean, also generated profound changes in Roman cultural life. The contact established with the intellectual and artistic milieu of the Hellenistic world resulted in a massive influx of Greek ideas and practices that transformed every aspect of Roman culture, including religion, education, art and science. Particularly influential were the two great schools of Hellenistic philosophy, Epicureanism and Stoicism. As these schools were primarily concerned with teaching people how to live

virtuously in society and how to attain success in public and private life, they accorded well with the practical tendencies of the Roman character. The popularity of these schools was also due to the fact that their teachings best reflected the cosmopolitanism of the times. The Stoic ideal of a world state, in particular, exercised a strong influence on the Roman upper classes and furnished one of the foundations upon which the political philosophy of the Empire was built. At the same time, however, the introduction of Greek models had an erosive effect on the traditional values on which the unity of the Roman society was based. The weakening of the old value system established by a tradition-conscious upper class ultimately undermined social cohesion and was one of the factors that precipitated the socio-political crisis that marks the closing years of the republican period.

1.3.1.1 Constitutional Framework

During this period, the organization of the Roman state did not undergo any major changes as the Romans tenaciously clung to the constitution and accompanying traditions established in the early period. The notion that the constitution should provide for the assembly of the entire citizen body who could personally exercise their rights remained very much alive throughout this era. However, supreme authority lay with the senate that had evolved from an advisory body to the magistrates into an executive body with a wide range of powers over foreign policy, finance, legislation and the administration of justice. The magistrates and the assemblies showed themselves ready to follow the senate's lead; although only popular assemblies had the constitutional right to enact legislation, senatorial resolutions (*senatus consulta*) became regarded in every practical sense as having the force of laws.[18] Political contest mainly occurred within the senate where a number of rival groups of allied families strived to enhance their power and prestige.

From as early as the second century BC, the unavoidable fact emerged that the Roman constitution was flawed. Originally devised when Rome was a small city-state, the constitution appeared inadequate to meet the organisational and administrative needs of the now vast and complex empire. As the Roman territory grew, the Roman citizens scattered in colonies throughout Italy and the provinces encountered increasing difficulties in exercising their political responsibilities through participation in the assemblies. The senate, riven by internal divisions and composed of an aristocracy that grew increasingly corrupt, ultimately could not continue its effective control of the state. Moreover, the array of magisterial offices did not provide for one central position of authority thereby precluding centralized and cohesive control when this was desperately needed to overcome the administrative problems derived from Rome's expansion. This situation

[18] D 1. 2. 2. 9 .

engendered political instability that enabled ambitious political and military leaders to attain absolute power by manipulating the senate and the popular assemblies, and gaining the support of discontented social groups demanding various kinds of reform. As a result, the outward forms of the traditional republican constitution remained in place but were distorted by forces outside the traditional framework. The tensions in the Roman state found expression in an increasingly violent strife that became the norm by the first century BC: conflict erupted between rival factions and individuals within the ruling class, and between the aristocracy and various disadvantaged groups. Octavian emerged from this strife in 31 BC and became the sole master of the Roman world. In the years that followed, the senate and the assemblies legitimised Octavian's *de facto* control of the state by bestowing upon him a range of powers and titles that placed him in a unique position. Armed with these powers, Octavian (who assumed the honorary title Augustus Caesar) ushered in a new constitutional system known as the Principate.

1.3.2 Legislation

As previously noted, in the republican age three legislative assemblies operated in Rome: the *comitia centuriata*, the *comitia tributa* and the *concilium plebis*. Initially, only the laws (*leges*) enacted by the *comitia centuriata* and the *comitia tributa* were binding on the entire populace while the resolutions of the *concilium plebis* (*plebiscita*) were only binding on the plebeians. However, according to Roman tradition, in 287 BC the socio-political developments associated with the struggle of the orders prompted the declaration that the *plebiscita* were binding on all citizens by virtue of the *lex Hortensia de plebiscitis*. In the period following the enactment of this law, the *concilium plebis* gained importance and gradually became the legislative assembly *par excellence* while the *comitia centuriata* remained the senior elective assembly. As the great majority of the statutes enacted after 287 BC were passed by the *concilium plebis*, the *plebiscita* were commonly referred to as *leges*. Originally, a law passed by the people could not come into force until it was approved by the senate (*patrum auctoritas*). This rule was reversed by the *lex Publilia Philonis* of 339 BC that provided the *patrum auctoritas* must be issued before, not after, a legislative proposal was submitted to the people.[19] Thereafter, laws usually had immediate effect following the formal announcement of the assembly's decision endorsing the magistrate's proposal.

In the last century of the Republic, the Roman state was embroiled in a political and administrative crisis and the political role of the assemblies waned. During these events, a legislative proposal sanctioned by the senate was occasionally not presented to the people but immediately entered into force. Moreover, the

[19] Livy, *Ab urbe condita* 8. 12. 14–16.

senate at times assumed the power to declare statutes null and void based on some alleged irregularity or violation of an established constitutional principle. It is thus unsurprising that both the senatorial decrees (*senatus consulta*) and the *leges* are mentioned as sources of law by Cicero.[20] During the first century AD, the government transformed into the bureaucratic administration of a world empire and the mode of creating law by vote of the people gradually discontinued. As a result, the legislative function passed to the senate whose enactments acquired the full force of laws.

In general, the enactment of private law rules by formal legislation was exceptional, and *leges* and *plebiscita* encroached on this sphere of law only with hesitation and within narrowly defined limits. The great majority of statutes pertained to matters of constitutional and criminal law, or immediate political concerns such as the distribution of land, the granting of extraordinary honours and release from debt. Statutes were enacted, for example, to create new magistracies or to define the nature of public crimes and the procedures for dealing with them. Of the few statutes relating to private law, probably the most important was the *lex Aquilia* (third century BC) that recast the whole law of damage to property and had the greatest significance for the further development of the law of delict.[21] The *lex Atinia* (first half of the second century BC) excluded stolen objects (*res furtivae*) from *usucapio* (the acquisition of ownership through possession of an object for a certain prescribed period of time); the *lex Laetoria* (193–192 BC) provided legal protection to minors (persons under 25 years of age) against financial exploitation; the *lex Cincia de donis et muneribus* (*c.* 204 BC) prohibited gifts in excess of a certain amount with the exception of those in favour of near relatives and certain privileged persons; the *lex Voconia* (169 BC) imposed limitations upon the testamentary capacity of women; and the *lex Falcidia* (40 BC) specified the amount of legacies that could be bequeathed.

1.3.3 The Development of Magisterial Law-Making

As a result of Rome's transformation from a small and closed agrarian community into a vast commercial empire, the Romans faced the problem of how to adjust their law so that it might meet the challenges imposed upon it in this new era. In response to this problem, Roman law broke through the barrier of archaic formalism and formed a highly flexible system that could constantly adapt to the changing demands of social and commercial life. The transition to a more flexible system was made possible by the practice of granting wide powers to the jurisdictional

[20] *Topica* 5. 28.

[21] The *lex Aquilia* is discussed in the chapter on the law of obligations below.

magistrates who declared and applied the law, thus enabling them to mould the law in its application.

In civil cases the role of the praetor (the chief jurisdictional magistrate of the state) was to conduct a preliminary investigation where he determined the admissibility of the plaintiff's claim, i.e. whether the plaintiff had an action at law. If he was satisfied on this point, the praetor appointed the judge (*iudex*) before whom the case would be heard; in the opposite scenario, the plaintiff could not proceed to enforce his rights. As previously elaborated, in archaic Roman law, legal suits had to fit into certain set actions and comply with certain strict formalities. If the correct form of action was identified and the requisite formalities were adhered to, the magistrate had little choice but to grant the action and appoint a judge. However, in the later republican period there emerged a far more flexible procedure for initiating legal actions that allowed the magistrate greater discretion and freedom of action. Under this system, litigants could raise claims and concomitant defences that were not provided in the recognized actions. The admissibility of these claims and defences was determined in an informal procedure before the magistrate. The main reason behind this development was that as social and economic life grew in complexity there increasingly emerged cases where a right should clearly have been recognized, but this right and an appropriate legal action were not accommodated by the traditional *ius civile*. The magistrate was thus empowered to proceed beyond the strict letter of the law and admit or reject an action when he considered this right or equitable, even where this was not in accordance with the *ius civile*. He did not accomplish this step by introducing fresh legal rights (magistrates had no formal law-making authority), but by promising the applicant a remedy. He would inform the plaintiff that he now had an action on which to proceed in the subsequent hearing before the judge, and that success at that hearing meant his claim would be enforced by a remedy the magistrate granted. Ultimately, the end result was largely the same: though no civil law right existed, there was a praetorian remedy and hence a praetorian right. At the end of the proceedings before the magistrate, the latter composed a written document (*formula*) that prescribed the direction for the investigation and determination of the case by the judge appointed to try the case. In this document, he authorised the judge to condemn the defendant if certain facts were proven or to absolve the defendant if they were not proven. It must be assumed that the innovations in substantive law introduced through this system were gradual and organic. Whenever possible, the new *formula* was fitted into the system of actions recognized by the *ius civile*; in other cases the magistrate emancipated himself entirely from the established law by instructing the judge to decide the case on the basis of the factual situation, thus in essence functioning as a law-maker.

Every magistrate at Rome was in the habit of notifying to the public the manner in which he intended to exercise his authority, or any change which he contemplated in existing regulations, by means of a public notice (*edictum*). With respect to magistrates who were merely concerned with administrative work, such notices were often occasional (*edicta repentina*). With respect to magistrates

concerned with judicial business, they were of necessity valid for the whole period during which the magistrates held their office (*edicta perpetua*). The edicts of the Praetors were necessarily of this latter type.[22] Although a newly elected magistrate was in theory free to introduce any measures he saw fit, over time it was expected that he would absorb the bulk of his predecessor's edict and make only limited alterations (that part of the *edictum perpetuum* adopted from year to year was referred to as *edictum tralaticium*). No legal obligation was imposed on the magistrate to adhere to the directions set out in his edict, for that was taken for granted. However, the breakdown of good government in the closing years of the Republic prompted the necessary enactment of the *lex Cornelia* (67 BC) that forbade the praetors departing from their *edictum perpetuum*.[23]

The *edictum* of the praetor, in the sense in which this word is commonly used, is really a colloquial expression for the *album*, or great notice board exhibited by that magistrate, which contained other elements besides the *edicta* in their true and proper sense. It contained the *legis actiones* and the *formulae* of the traditional *ius civile*, probably preceded by certain explanatory headings, but by no ruling in law (for the praetor did not create the rulings on which these civil actions and *formulae* were based). But the edict contained also model *formulae* for each promised remedy created by a praetor and his predecessors. Each of these *formulae* must have been preceded, at least eventually, by the ruling in law, which might have grown out of the *formula*, but finally served as its basis and justification.[24] Thus the edictal part of the *album* was really a series of separate *edicta*, each edict being followed by its own *formula*; it was regarded as being a supplement to that portion which specified the actions of the *ius civile*; and it really had this character of being a mere supplement in so far as praetorian actions were rarely granted where a civil action would have sufficed. But its supplementary role had far-reaching implications for the development of the law. This is because the edicts might take cognizance of cases not provided for by the *ius civile* at all, they might replace the mechanism provided by the civil law for attaining a legal end, and they might alter the character of the end itself. The edict of the peregrine praetor was necessarily still more of a substitute for the *ius civile* than that of his urban colleague. For, as the actions of the civil law could not (at least in many cases) be employed by foreigners, the peregrine praetor was obliged to devise equivalents for these actions and the forms by which they were accompanied.

Another perpetual edict valid in Rome was that of the curule aediles. As pertaining to the limited civil jurisdiction these magistrates exercised in the market place, this edict played a part in the development of the Roman law of sale. By far

[22] D 1. 2. 2. 10.

[23] See Dio Cassius, *Historia Romana* 36. 40. 1–2.

[24] In the course of time, the *formulae* used in specific types of cases became relatively fixed and the collection of established *formulae* was constantly augmented by new *formulae*. The number of established *formulae* had become so great by the end of the Republic that there appeared to be a *formula* for every possible occasion. See Cicero, *Pro Roscio comoedo oratio* 8. 24.

more important, however, was the edict issued by the provincial governors (proconsuls or propraetors). These officials issued notices of their intentions with respect to jurisdiction, similar to those of the praetors at Rome as regards their permanent character and the possibility of their transmission, but peculiarly applicable to the particular governor's special sphere of administration. A special edict was issued for each separate province,[25] but this edict's special character did not prevent certain interrelations between the edicts of separate provinces. We know that the provincial edict might be prepared at Rome, before the governor went to his province and although the man who prepared it (usually with the assistance of professional lawyers) sought to model his rules as closely as possible on those of his predecessor in the province to which he was going, yet he might borrow improvements which had been initiated by the governor of some other province. Again, the same man might pass from one province to another, and, much as the circumstances of the separate spheres of government differed from one another, it is inconceivable that he should not have carried some of his favourite rules of procedure with him. In the course of time, a general conception of what a provincial edict should be like must have grown up, the differences between the edicts being probably those of matter rather than of form (the matter being determined by the local customary law of the subject peoples, which Rome meticulously respected). Where there were striking differences of form, these must have been mainly due to the varieties of rights granted by the charters of the different provinces (*leges provinciarum*). It is obvious that where much was granted by charter little was left to the discretion of the governor. Where the charter granted only a few elementary rights, the latter had a much freer hand. One important point in which the governor of a province differed from the praetor at Rome was that he was an administrative as well as a judicial official. Hence the provincial edict had to contain a good many rules of administrative law not to be found in its counterpart at Rome. This portion of the edict spoke about the financial relations of the various political communities of the province to the Roman state and its agents, and laid down the rules governing the relations of the tax farmers (*publicani*) to the taxpayers. The rest of the edict covered the procedure the governor promised to apply for the recovery of certain rights by individuals such as, for example, those entailed in inheritance or the seizure of a debtor's goods. Although these rules were based on Roman law, they were mere outlines capable of adaptation to the local customs of the subject communities. But there was, at least in certain provinces, a portion of the edict, still dealing with the rights of individuals, which assumed no definite shape. There were points on which the governor did not care to frame rules until he knew the emergencies he would have to address.

The various rules and remedies by which the magistrates were actually transforming the old *ius civile* furnished the basis for the development of a new

[25] See, e.g., Cicero *in Verrem* 1. 45. 117.

body of law that was ultimately designated honorary or magisterial law (*ius honorarium*)—because it proceeded from the holders of offices (*honores*)—and that existed in contradistinction with the narrowly defined *ius civile*.[26] The magisterial law served a vitally important function in the Roman legal system in various ways. Firstly, it aided the *ius civile* as the magistrate introduced remedies in addition to those that the civil law provided for the person who possessed a civil law right. For instance, the edict would state that an individual recognized as the owner of property under the civil law might be granted, in addition to the normal action, a speedier magisterial remedy. Secondly, it supplemented the *ius civile* as the magistrate granted remedies to persons who had no rights or remedies under the civil law. For instance, the wife of a deceased person who died intestate without leaving children or relatives had no rights to his estate. However, the edict would grant the widow a remedy to acquire possession of the estate. Thirdly, it amended or corrected the civil law as persons who had no rights or remedies under the civil law were granted remedies by the magistrate at the detriment of those who did have such rights. For instance, the edict might provide that the magistrate would uphold certain wills that did not meet the requirements of the civil law and he would grant a remedy to the person nominated as heir in such a will at the detriment of the intestate heir who would have succeeded under the civil law. Through these means, the magisterial law became the living voice of the law of the Romans. Alongside the rigid and formalistic *ius civile* there emerged a body of law that was progressive and free, and subject to continual change and development.[27] A parallel may be drawn between the Roman *ius honorarium* and English equity. Unlike the English common law and equity, however, the *ius civile* and *ius honorarium* did not operate as two separate systems administered by different courts but were regarded as two sides of the same legal system.

The development of the *ius honorarium* during this period was closely connected with the dramatic increase in contacts between the Romans and non-Roman communities, and the growth in economic relations between Roman citizens and foreigners (*peregrini*). As the granting of Roman citizenship had not kept pace with Rome's expansion, a growing mass of foreigners residing in Roman territory did not have Roman citizenship and therefore no access to the Roman *ius civile* (as already noted, this law was only for Roman citizens and non-citizens were unable to share therein). However, the development of foreign trade and the proliferation of foreigners living in Rome prompted the need to formulate rules applicable to disputes between foreigners, and between foreigners and Romans.

[26] Besides playing a part in the formulation of legislative proposals, the senate indirectly exercised a lawmaking influence by advising the praetors and other jurisdictional magistrates to implement certain lines of policy. In such cases its recommendations would normally be incorporated in the *edictum perpetuum* issued by each magistrate at the commencement of his year of office. In this way, the senate contributed to the development of *ius honorarium.*

[27] D 1. 1. 7. 1. According to the classical jurist Marcianus, "the *ius honorarium* is of itself the living voice of the *ius civile*." See D 1. 1. 8.

The Romans responded to this need by appointing (from *c*. 242 BC) a special praetor, the *praetor peregrinus*, to handle cases involving foreigners. Governors in the provinces were granted jurisdiction over disputes concerning Roman citizens settled there and provincials; and, occasionally, over cases involving foreigners. The edicts of the *praetor peregrinus* and those of the provincial governors engendered a new system of rules governing relations between free men without reference to their nationality. Although this body of law was Roman in origin, it became known as *ius gentium*: the law of nations.

From an early period the Romans realised that certain institutions of their own *ius civile* also existed in the legal systems of other nations. As contracts of sale, service and loan, for example, were recognised by many systems, it was assumed that the principles governing these were everywhere in force in the same way. These institutions which the Roman law had in common with other legal systems were thought of by the Romans as belonging to the law of nations (*ius gentium*) in a broad sense.[28] But this understanding of the *ius gentium* was of little practical value for the Roman lawyer, for the specific rules governing the operation of such generally recognised institutions differed from one legal system to another. When the Romans began to trade with foreigners they must have realised that their own *ius civile* was an impossible basis for developing trading relations. Foreigner traders too had little inclination to conform to the tedious formalities of domestic Roman law. Some common ground had to be discovered as the basis for a common court, which might adjudicate on claims of private international law, and this common ground was found in the *ius gentium*, or the law of nations in a narrow, practical sense. Attending to disputes involving people of diverse national backgrounds would have been difficult without employing rules based on common sense, expediency and fairness that were confirmed by general and prevalent usage among many communities. In contrast to the *ius civile*, the *ius gentium* was thus characterized by its simplicity, adaptability and emphasis on substance rather than form. The absence of any rigid rules in the procedure implemented by the peregrine praetor created sufficient elasticity for its adjustment to the demands of the relevant case. For that reason, not only foreigners but also Roman citizens increasingly resorted to the procedure as a means of resolving legal disputes. The elastic technique of the *praetor peregrinus* was gradually adopted by the *praetor urbanus*, the magistrate in charge of the administration of the Roman domestic law (*ius proprium Romanorum*), when deciding cases between citizens that fell outside the scope of the traditional *ius civile*. At the same time, elements of the *ius gentium* entered the province of Roman domestic law through the urban praetor's edict. In this way, the *ius gentium* became one of the main channels whereby enlightened contemporary thinking (notably Greek ideas) infiltrated the system of Roman law.

It is germane to note at this point that the magistrates were not solely responsible for the creation of the *ius honorarium*. Since magistrates very often possessed little

[28] See G. 1. 1.

knowledge of the law, most of the techniques they engaged to produce the required legal innovations were demonstrated to them by expert jurists (*iurisconsulti* or *iurisprudentes*). The jurists explained the law to magistrates and offered guidance in framing their edicts and drafting the *formulae* used in legal proceedings. Thus, the legal norms incorporated in the *edictum perpetuum* at any given time represented the consensus of opinion of the best-qualified legal minds of the day.

In the absence of an established norm, how did the magistrate (or his legal advisors) decide which rights to protect? The decision appears to have been based largely on the social and ethical values generated by the conditions of the age. These values materialized in appropriate guidelines emphasizing the importance of fairness and honesty in business practices, giving preference to substance over form in transactions and refusing to uphold obligations arising from promises elicited by fraudulent means. The classical jurists used the term *aequitas* (equity) when referring to the basis or the qualifying feature of magisterial measures—both those devised on a case-by-case basis and those promised in the edict. There are two interconnected ways to understand the role of *aequitas* in its relation with positive law: firstly, *aequitas* may be conceived as the substance and intrinsic justification of the existing legal norms; secondly, it may be thought of as an objective ideal at which the law aims, prompting the creation of new legal norms and the modification of those that do not conform to society's sense of justice or meet the need for balance in human relations.[29] It was the second understanding of *aequitas* that served as the basis of the innovations devised by jurisdictional magistrates and jurists. But, one should recall that *ius* or law in a broad sense had positive force rather than *aequitas* as such. Thus, *aequitas* remained confined to a pre-legal sphere until it was transfused into a positive norm; once this transfusion occurred, *ius* had significance rather than *aequitas* that was construed as the matrix. The conception of equity as the touchstone of the norms of positive law obviously inspired Cicero's definition of the *ius civile* as 'the equity constituted for those who belong to the same state so that each may secure his own',[30] and the renowned aphorism of the jurist Celsus, 'the *ius* is the art of promoting that which is good and equitable'.[31] By means of the magisterial edict and the interpretations of the jurists, equitable principles entered into the sphere of law. These principles redressed the formalism and rigidity of the traditional *ius civile* and enabled the creation of new legal norms capable of meeting the needs of a constantly changing society.

[29] Aristotle defined equity (*epieikeia*) as a principle of justice designed to correct the positive law where the latter is defective owing to its universality (*Nic. Ethics*, 5. 10). Legal rules are necessarily general while the circumstances of every case are particular, and it is beyond the power of human insight to lay down in advance a rule which will fit all future variations and complications of practice. Therefore law must be supplemented by equity; there must be a power of adaptation and flexible treatment sometimes resulting in decisions which will even be at variance with formally recognised law and yet will turn out to be intrinsically just.

[30] *Topica* 2. 9.

[31] D 1. 1. 1. pr.

1.3.4 The Growth of Legal Science

As previously elaborated, after the enactment of the Law of the Twelve Tables (450 BC) the authoritative interpretation of private law remained within the province of the pontiffs. However, over time an increasing number of *nobiles* engaged in furnishing legal advice; they were members of Rome's wealthy senatorial class but not associated with the pontifical college. By the end of the second century BC, secular jurists had supplanted the original interpreters of the law. The lay jurists were called *iurisprudentes* (those possessing knowledge of the law) or *iurisconsulti* (those consulted in matters of law). These jurists were largely responsible for the development of Roman legal science. They responded constructively to the changed socio-economic conditions of the times and to new intellectual developments, particularly the influx of Greek science and philosophy. Their work inspired Roman law's most characteristic features: its pragmatism and flexibility, as well as its clearness and intellectual superiority to any previously known body of rules.

Cicero declared that jurists had to be skilled in three respects in matters of law: *agere*, *cavere* and *respondere*.[32]

Agere (literally, to act) meant managing a legal cause or suit. The jurists gave help on matters of procedure and prepared the forms that had to be used by the parties to lawsuits. As noted previously, in the archaic era a person initiating a lawsuit was required to fit his claim within one of the set forms of action prescribed by the law. The rigidity of this system considerably limited the scope of juristic intervention. However, a new flexible system of procedure for initiating legal actions emerged in the second century BC. Under this system, the final settling of the plaintiff's statement of claim was an extremely technical process and this provided broad scope for the intervention of the jurists in litigation. It is important to note, however, that the jurists very rarely argued cases in the courts—this task was left to the *oratores*.[33]

Cavere (literally, to take precautions) meant the drafting of legal documents, such as contracts and wills, designed to preserve a person's interests by protecting them against certain eventualities. This cultivation of forms was one of the most important contributions of the jurists to the development of legal thinking and language. It was mainly through this work of form development over the centuries that Roman legal speech attained its perfection.

Respondere (literally, to answer) meant giving advice or opinions on questions of law. A practice applicable to every field of Roman life was that an individual

[32] *De oratore* 1. 48. 212.

[33] Although trained in law, advocates often relied on the help of jurists in difficult cases to ensure that their clients' claims were properly stated according to the prescribed *formulae*. Moreover, an advocate might seek a jurist's advice when he intended to request the granting of a new form of action from a magistrate (at the *in iure* stage of the proceedings), and when he pleaded the case before the judge (*apud iudicem*). See Cicero, *Topica* 17. 65.

would elicit the advice of competent and impartial persons when contemplating a serious decision. Thus, the jurists gave *responsa* or replies to private citizens involved in lawsuits or other legal business that required attention, and to jurisdictional magistrates and the judges (*iudices*) appointed to decide particular cases.[34] The *responsa* were expressed in a casuistic form: the jurist restated the factual aspects of the case in such a way as to illuminate the legal question presented to him. By drawing on the wealth of legal principles applied in the past or encountered within his own experience, he rendered a decision that only obliquely referred to the principle or rule that supported it. It should be noted that the casuistic form in which the *responsa* were expressed entailed considerable differences of opinion among individual jurists with respect to certain matters.[35] In many cases, opposing points of view were adopted by contemporary or later jurists. Many of these controversies persisted for decades or even centuries.[36]

The consultative activities of the jurists were related to the leadership provided to the people by the aristocracy. Thus, the jurists received no remuneration for their work as they considered it their duty to assist the citizens who consulted them with legal problems. Although legal science did not become a profession for earning a living, it provided an outlet for wealthy and educated citizens aspiring to distinguish themselves in social and political life. As the jurists acquired respect and honour through their activities, they could extend their influence among fellow citizens and widen the circle of their friends and dependants thereby winning their way to high political office.[37]

Besides these practical activities, noted by Cicero, the jurists were occupied by two further tasks that were instrumental in the development of the law: the education of those aspiring to enter the practice of law, and the composition of legal works.

Legal education in republican Rome had a largely practical orientation; there was neither theoretical nor academic legal training or educational institutions where law was formally taught.[38] Upon completion of their basic education, young men would enter the household of a jurist to live with the family. They would attend consultations when clients sought legal advice, and accompany the jurist to the marketplace where they observed him imparting legal advice, drafting legal documents and assisting parties in legal proceedings. In this way, students acquired knowledge of the law through contact with legal practice and professional tradition.

[34] The jurists presented their replies verbally or in writing and the audience which received them was by no means confined to those who sought the jurists' advice.

[35] See Cicero, *De oratore* 1. 57. 242.

[36] The only proof of the validity of a juristic opinion was its acceptance by a court. But even this was but a slender proof, for different jurisdictional magistrates or judges might be under the sway of different jurists.

[37] Cicero, *De officiis* 2. 19. 65.

[38] Systematic instruction by professional law teachers was not introduced until the later imperial age.

Sometimes, the jurists gave opinions when their students raised purely hypothetical cases for discussion. These opinions were almost equal in influence to those given on real facts, and possibly helped to develop Roman law in new and unique directions.

From the second century BC, prominent jurists began to compile books of *responsa* that they had issued and were applied in practice (especially those ratified by virtue of a judicial decision). The need to create such collections derived from the fact that in Rome the administration of private law was not closely regulated by the state (the jurisdictional magistrate always appointed an *ad hoc* judge) and hence judicial decisions were not formally collected on behalf of the state. In their collections the jurists sometimes included summaries of important cases, and recorded the relevant court decisions and the opinions rendered to the parties concerned. The jurists also composed various commentaries or treatises on different branches of the law and, over time, a large body of legal literature materialized. The emergence of such literature is associated with the stimulus that acquaintance with the literary culture of the Greeks provided.

A prominent jurist of the later republican period was Quintus Mucius Scaevola (*pontifex maximus* and consul in 95 BC), reportedly the first jurist who endeavoured to systematize the existing law in a scientific fashion.[39] His chief works included a commentary on the *ius civile* in eighteen books, and a work comprising definitions and classifications of juridical concepts. He is also attributed with formulating certain standard legal clauses and presumptions, such as the *cautio Muciana* (a promise by a legatee that he would return the legacy if he acted against the attached condition) and the *praesumptio Muciana* (the presumption that all the property a married woman possessed was furnished by her husband, until the contrary was proved). As governor of the province of Asia, Scaevola also composed a provincial edict (*edictum provinciale*) that was used as a model by other provincial governors.[40] Other leading jurists of the later republican period included: Manius Manilius (consul in 149 BC), whose work *venalium vendendorum leges* ('conditions of sale for things capable of being sold') comprised model *formulae* relating to contracts of sale; M. Porcius Cato Censorius (consul in 195 BC and censor in 184 BC), whose work *de agricultura* ('on agriculture') incorporated forms and precedents for drafting agrarian contracts; M. Porcius Cato Licinianus, who authored a celebrated treatise on the *ius civile* (*de iuris disciplina*); M. Junius Brutus (praetor in 142 BC), who composed works on the *ius civile*; Gaius Aquilius Gallus (praetor in 66 BC), who introduced the action and exception of *dolus* (a term that merges the ideas of fraud, abuse of right, and the general concept of tort); C. Trebatius Testa, whose work on the *ius civile* was highly regarded by later jurists; P. Alfenus Varus (consul in 39 BC), who produced an extensive work (*Digesta*) in forty books; Servius Sulpicius Rufus (consul in 51 BC), whose writings included an

[39] D 1. 2. 2. 41.

[40] Cicero, *Brutus* 39. 145–46. And see D 1. 2. 2. 41–42.

important commentary on the praetorian edict; and P. Rutilius Rufus (consul in 105 BC), who devised the bankruptcy procedure (*actio Rutiliana*) described by Gaius.[41] Reference should also be made to Aulus Ofilius, a contemporary of Julius Caesar, who was the first jurist to reduce the praetor's edict to some kind of system.[42] Unfortunately, only a few scattered and fragmentary traces of these jurists' works survive mainly through the writings of jurists from the Principate era embodied in the Digest of Justinian.[43]

As the foregoing discussion suggests, Roman legal science evolved largely from legal practice with a notable contribution from the discussion of individual cases. As the jurists gradually acquired familiarity with Greek philosophy and the intellectual methods and tools the Greeks had created, they developed a systematic approach to legal knowledge and to handling legal problems. Thus, acquaintance with the logical syllogism (or reasoned conclusions) enabled them to construct legal concepts in a deductive manner. The jurists engaged the dialectical method: a form of logical analysis that both distinguished between various concepts and subsumed those sharing the same essential characteristics under common heads. This fostered their learning to divide (into *genera* and *species*) and define juridically relevant facts, and thereby distinguish and categorize juridical concepts. For example, Q. Mucius Scaevola in his comprehensive treatise on the *ius civile* first defined the general features of institutions such as possession and tutorship, and then described their various individual forms (*genera*) existing in the legal system. Moreover, familiarity with Greek philosophical ethics inspired awareness of the sociological function of law. As a result, the jurists attached more emphasis on equity (*aequitas*), good faith (*bona fides*)[44] and other general guiding principles.[45] Notwithstanding the influence of Greek thought, the jurists' general outlook on law remained casuistic and practical. They did not seek to construct abstract theories of law nor did they regard arriving at flawless logical conclusions as an overriding

[41] G 4. 35.

[42] See D 1. 2. 2. 44 .

[43] For a reconstruction of works of the late republican jurists see O. Lenel, *Palingenesia iuris civilis*, 2 vols, Leipzig, 1889, repr. Graz, 1960. See also F. Bremer, *Iurisprudentiae ante-hadrianae quae supersunt*, I, Leipzig, 1896.

[44] The concept of good faith (*bona fides*) probably had a Roman origin and initially appeared to be linked with the notion of *fas*, or divine law. However, a Greek influence cannot be ruled out. In the sphere of private law *bona fides* was perceived in two ways: (a) from an objective point of view, *bona fides* was associated with the general expectation that persons should behave honestly and fairly in legal transactions; (b) from a subjective point of view, *bona fides* pertained to a person's belief that his actions were just and lawful and did not violate another person's legitimate interest. Several general rules based on the concept of *bona fides* are included in the sources, e.g. "*bona fides* requires that what has been agreed upon must be done" (D 19. 2. 21); "*bona fides* demands equity in contracts" (D 16. 3. 31. pr).

[45] Quintilianus, *Institutio oratoria* 12. 3. 7: "Those laws which are written or established by the custom of the state present no difficulty, since they call for knowledge, not reasoning. But those matters which are explained in the *responsa* of the jurists are founded either upon the interpretation of words or on the distinction between right and wrong."

priority. Rather, their chief concern was to devise just solutions that were acceptable in practice. This meant exercising mature judgement and practical wisdom in tackling problems derived from individual cases, while considering the position adopted by earlier jurists in past similar cases.

The Roman jurists were typical representatives of the *empirical* or *casuistic* method; they resorted to topical rather than axiomatic reasoning. Topical (or problem) reasoning occurs when one proceeds from the case to identify the premises that would support a solution, and then formulates guiding principles and concepts as a basis for attaining a solution. The rules and concepts devised in this manner are not rigid and inviolable but are subject to change, depending on the circumstances of the relevant case. Moreover, it is generally believed that the Roman jurists reached their conclusions intuitively. This intuitive grasp of the law is attributed to the jurists' innate sense for legal matters and to their experience with the everyday practice of the law. However, it would be a mistake to construe Roman jurisprudence as a merely pragmatic, unprincipled case law or assume that Roman decision-making was based solely on free and creative intuition. A unique quality of the Roman jurists was their ability to extend beyond the accidental elements of the individual case to illuminate the essential legal problem as a *quaestio iuris*. Moreover, their tendency towards systematization not only allowed them to present their casuistic approach in a more simple and elegant manner, but also helped to improve their decision-propositions.[46] As previously observed, this improvement in decisions was closely connected with the requirement for integration in the growing empire and the need to adapt the legal system to its deriving socio-structural changes.

1.4 Law in the Age of Empire

1.4.1 Historical and Constitutional Background

After he gained control of the Roman world, Augustus sought to institute a form of government capable of addressing the Empire's organizational needs while at the same time guaranteeing permanent security. He knew, however, that the Roman

[46] The following extract from Cicero is illuminating: "So I say, Brutus, I think that Scaevola and many others had a practical knowledge of the civil law, but he [Servius] alone mastered it as an art; which he never could have done from the knowledge of the law itself without having in addition that art which teaches us to divide the whole into parts, to describe the unknown by definition, to explain the obscure by interpretation, to see first what is ambiguous, then to distinguish, and finally to provide a standard [*regula*] by which the true and the false may be adjudged and what conclusions may be deduced from what premises and what does not follow. This art, the greatest of all arts, he [Servius] brought to bear on all those things which, scattered, had been given as responses or brought forth at trials. See *Brutus* 41. 152–53.

conception of the state was so entwined with the republican regime that political stability was virtually impossible without upholding the republican traditions. Based on this realistic appraisal of the situation, he engaged masterful manipulations to establish a constitution that artificially preserved the republican institutions while actually creating a new monarchical power and a new dispensation for the provinces. This constitution, known as the Principate (deriving from *princeps* 'the first of the Roman citizens' that also described Augustus), enabled more than two centuries of political stability and the peaceful development of the Empire. The new system of government inaugurated by Augustus was consolidated and developed further by his successors: the Julio-Claudians (Tiberius AD 14–37, Caligula AD 37–41, Claudius AD 41–54, and Nero AD 54–68); the Flavians (Vespasian AD 69–79, Titus AD 79–81, and Domitian AD 81–96); and the Antonines (Nerva AD 96–98, Trajan AD 98–117, Hadrian AD 117–138, Antoninus Pius AD 138–161, and Marcus Aurelius AD 161–180).

The first two centuries of the imperial era have been termed the *Pax Romana*: the Roman peace. Historians have referred to this time as one of immeasurable majesty and as the happiest period mankind had known. By the second century AD, the Roman frontiers had been strengthened and pushed to their greatest extent; peace reigned everywhere in the Empire; and an efficient administration secured order and provided for the good government of the inhabitants. Under the prevailing peace, Roman civilization reached its highest level of achievement and displayed a remarkable power of expansion. The Western provinces were thoroughly Romanized in a short space of time, while the fusion of Greek and Roman elements in the East produced a new and powerful cultural synthesis. These developments were the background to an economic expansion in the Mediterranean world unparalleled before modern times. An enormous increase in commerce and industry occurred, facilitated by the expansion of the Roman road network; the security of transport; the establishment of a currency system for a whole Empire; and the opening of new markets in Italy and the provinces. The backbone of the social, cultural and economic life of the Empire was the network of innumerable cities spread throughout the provinces. These enjoyed a large measure of self-government and all had a share in the same civilization, culture and favourable economic conditions.

During the early imperial age, the social classification of the Romans into the senatorial, equestrian and lower classes remained largely untouched. Besides the traditional classes, the municipal aristocracy in Italy and the provinces formed an increasingly important middle class that was remarkably heterogeneous. This system of social classification determined both the political and economic order, and the constitutional relationships of political power within the Roman state. The social distinction between the upper and lower classes found a clear expression in the notions of *honestior* and *humilior*. The *honestiores* ('honourable') were comprised of the privileged members of the governing class (senators, equestrians, civil servants, soldiers and members of the provincial town councils), whilst those belonging to the lower classes of society were collectively referred to as *humiliores* ('humble'). The *humiliores* had a distinctly inferior standing in the eyes of the law

and were subject to heavy and degrading punishments. By contrast, the *honestiores* were exempted from punishments of a shameful nature and the pronouncements of death and other severe penalties against reputable citizens were very rarely enforced.

From the early years of the Principate age, the Roman citizenship was granted with increasing frequency to individuals or whole communities. In the time of Claudius (AD 41–54), members of the provincial aristocracies were first admitted to the senate and had nearly filled half of this body by Hadrian's reign (AD 117–138). The extension of the Roman citizenship precipitated the process of Romanization in the provinces and reinforced political unity within the Empire's borders.[47] When Emperor Caracalla bestowed Roman citizenship upon all the free inhabitants of the Empire by the celebrated *Constitutio Antoniniana* in AD 212, he was simply perfecting an ancient process. The *Constitutio Antoniniana* was a milestone in the evolution of the Roman state. It signified the triumph of the idea of a supra-national world Empire over the old idea of the city-state. The republican traditions that Augustus had artificially maintained and had become in the course of time a hollow pretence were ripe for collapse.

In the later half of the second century AD, several forces began to gather to complete the transformation of the Empire from its previous structure under Augustus. The most important among these forces originated from the conditions present in the socio-political milieu of the times: the increasing reliance of the emperors on the army as a means of maintaining control of the state; the creation of a vast administrative apparatus that, in the long run, could not be supported by the resources of the Empire; the perpetuation of a class structure that failed to give the producing classes rewards equal to the burdens imposed on them; and the sharp decline of public spirit in a state where servility to imperial authority had replaced active participation in public affairs. With the final abandonment of the principle of diarchy (the double rule of the emperor and the senate) during the reign of Septimius Severus (AD 193–211) and the further militarization of the administration, the army discarded its position as the Empire's servant and became its master. From AD 235, the collapse of the central government authority entailed disorder and civil war as different field armies proclaimed their generals as emperors and used their own strength to plunder the lands of the Empire. The continuous military mutinies and struggles between different pretenders to the throne weakened the state's defences at a time when new external enemies increasingly threatened its frontiers. In the wake of the devastation caused by war and plunder, the

[47] Under the Empire, persons granted citizenship were not required to abandon the citizenship which they had previously held (abandoning one's former citizenship seems to have been a condition for holding the Roman citizenship during the Republic). Thus newly admitted Roman citizens were not released from their civic duties towards the communities to which they belonged. Persons who did not belong to organized communities (*peregrini dediticii*) and who thus lacked citizenship (*nullius civitatis*) could also acquire Roman citizenship but only after they had formally been admitted as citizens of another state.

civilian populations and the economies were severely damaged; law and order disintegrated; commerce and industry came to a standstill; and once flourishing urban centres fell into decay. In the closing years of the third century, the crisis was finally checked under a succession of capable military emperors but only at the cost of establishing a despotic government and a rigidly regulated society.

1.4.1.1 State Organization in the Principate Age

As noted before, after Augustus gained control of the Empire he faced the task of establishing a constitution that would reconcile two apparently contradictory elements: the republican outlook of the leading sections of the Roman citizen body, which still clung to the traditions and institutions of the republican age; and the need for a strong central power to maintain peace and order within the state. The solution he devised involved a unique compromise: outwardly, it restored the republic but actually engendered a new monarchical power that permeated all aspects of government. However, the new political system was heavily encumbered by its contradictions between façade and reality. Despite any success of Augustus' programme, neither he nor his successors resolved the contradictions inherent in the elective theory supporting the new regime and its dynastic practice. In the course of time, the absolutism inherent in the imperial system became progressively more pronounced and, inevitably, the relics of the republican state (senatorial independence of action and the sovereignty of a people legislating and electing magistrates in popular assembly) withered away.

After the establishment of the Principate, the popular assemblies continued to operate but their significance as independent political organs was greatly diminished. In the time of Tiberius, the election of magistrates was transferred from the centuriate assembly to the senate. By the end of the first century AD, popular legislation was superseded by the decrees of the emperor and the resolutions of the senate. As a result, the assemblies became dead institutions but continued to exist in an honorary or ceremonial capacity until the end of the third century AD.

In contrast with the assemblies, the senate received (in theory at least) a considerable accession in dignity as well as extensive electoral and legislative powers. The prestige of the senate was enhanced further by its employment as a court of justice dealing with cases involving offences committed by senators and state officials. Officially, the senate had become a full partner in the government. Theoretically, it was even more: the ultimate source of the emperor' power, as his *imperium* and legitimacy on accession was derived from the senate's approval of his nomination. In fact, however, the senate was much under the control of the emperor who regulated its composition, dominated its proceedings and prescribed its tasks. The elections of magistrates always corresponded with the wishes of the emperor; legislative proposals brought before the senate by the emperor or his representatives were accepted without much debate; the conduct of foreign policy was in the hands of the emperor, who also controlled all the politically important provinces; and the management of public finances was gradually

assumed by the emperor following the establishment of the imperial treasury (*fiscus*). In the end, the division of government between the emperor and the senate was more apparent than real. The emperors owed all their powers to the senate, yet once these powers were given the senate became virtually impotent and unable to retract them (even if it had desired to do so). Although by the third century AD the senate had lost most of its competence, its prestige remained high and membership of that body was still regarded by many as the culmination of a political career.

During the Principate, the traditional republican magistracies continued to exist and their apparent importance was shown by the fact that the emperors would occasionally undertake the consulship, and assume the powers of a tribune and a proconsul. In fact, however, the magistracies now functioned only as pale replicas of their former selves. The consuls no longer directed the political life of the state nor did they hold military command as these functions were transferred to the emperor. Nevertheless, until the closing years of the Empire the consulship remained an important status symbol and a gateway to the highest offices in the imperial administration. The praetors retained the civil and criminal jurisdiction they had held during the Republic. The *praetor urbanus* continued as the chief jurisdictional magistrate for civil suits between citizens; and the *praetor peregrinus* continued to be appointed until AD 212, when Roman citizenship was granted to all the free inhabitants of the Empire. However, their role in the administration of justice gradually decreased in importance following the expansion of the emperor's judicial functions, and the establishment of new civil and criminal courts under the jurisdiction of imperial officials. The tribunes continued to be elected, but their authority was considerably diminished due to the decline of the popular assemblies and their complete dependence on the emperor's will.

By the side of the enfeebled and manipulated republican institutions, a new administrative apparatus with increasing authority burgeoned around the person of the *princeps*-emperor. The powers of the emperor were those held by the higher magistrates of the Republic, but these powers were now combined and concentrated in one person. In the course of time, these powers were extended and the emperor in the end became a governing statesman and ruler with such enormous resources at his disposal that he could personally tackle the tasks of the state. A great deal of the emperor's authority rested upon his *tribunicia potestas*: the power that the tribunes had held under the republican constitution. This allowed him to convene the senate and the popular assemblies, and to submit proposals to them; enabled him to veto acts of other state organs (*intercessio*); imparted him inviolability (*sacrosanctitas*), so that any indignity offered to him could be punished as a crime; and allowed him to appear in the role of the protector of the common man's interests. Moreover, the emperor's proconsular power (*imperium proconsulare*) granted him control over the frontier provinces where the bulk of the army was stationed and secured his supremacy in military and foreign relations matters. The *tribunicia potestas* and the *imperium proconsulare* were supplemented by a number of separate powers conferred by special grants. These grants must originally have been awarded by special statutes and resolutions of the senate, but the practice seems soon to have been adopted of embodying them in a single enactment which was put before the

people for approval at the time when the *tribunicia potestas* and the *imperium proconsulare* were conferred.[48] A great deal of the emperor's might stemmed also from his *auctoritas*: his supreme moral authority and social influence. Armed with such wide powers, the emperor could not fail to exercise a strong guiding influence in the administrative, legislative and judicial fields. This influence asserted itself from the first; yet for at least 200 years there was always a formal and at times a real recognition of the theory on which the Principate was founded—the theory of a dual control exercised by the *princeps*-emperor on the one hand and by the traditional organs of the republican constitution on the other. As already noted, the principal organ by which the republic was represented was now no longer the people but the senate.[49]

As the true master of the state, the emperor marshalled a huge administrative machine: a vast civil service composed of trained, paid and permanent officials. These new officials gradually assumed those duties the emperor deemed impossible or undesirable for the old republican magistrates to perform. The imperial officials differed from the magistrates of the Republic in some important respects: they were chosen by the emperor himself, without the approval of the senate or the popular assemblies, and reported directly to him; they were appointed for an indefinite period, although the emperor could dismiss them at any time at his pleasure; and they were not invested with *imperium* or *potestas*—their only powers were those delegated by the emperor who could approve, reverse or modify their decisions as he thought fit. The most important imperial officials were the praetorian prefect (*praefectus praetorio*) and the city prefect (*praefectus urbi*). The former was originally the commander of the special military units that served as the emperor's personal bodyguard (the praetorian guard). The office evolved into one of the most powerful in the state, and the praetorian prefect became the emperor's chief adviser and executive officer in military and civil matters. From the late second century onwards, he also assumed important judicial functions. The city prefect was responsible for maintaining public order in Rome with the Roman police (the urban cohorts) at his disposal. He had extensive jurisdictional powers as he headed the chief criminal court in Rome and the surrounding area, and also dealt with civil matters connected with his

[48] A fragment of such an enactment is the extant *lex* or *senatus consultum* which enumerates powers with which Emperor Vespasian was invested at his accession (this is known as *lex de imperio Vespasiani*). Although it is generally described as a law, it was probably a decree of the Senate, which was intended to be submitted to the people for their formal approval. The powers of the *princeps* enumerated in this document include the powers of making treaties, proposing candidates for public office, and issuing edicts as interpretations of law. For the text of this law see Girard, *Textes* 106; and see A. C. Johnson, P. R. Coleman-Norton and F. C. Bourne, *Ancient Roman Statutes*, Austin, Texas, 1961, 149.

[49] The term 'diarchy' is sometimes used to describe the joint rule of the *princeps*-emperor and the senate.

criminal jurisdiction. Other important officials of this period were the prefect of the grain supply (*praefectus annonae*), and the prefect of the watch (*praefectus vigilum*). The latter was the head of Rome's fire brigades (*cohortes vigilum*) and his duties included policing the city by night and dealing with fires and any other natural emergencies that might arise. Another category of officials with a varying extent of power embraced the procurators (*procuratores*). Acting as agents of the emperor, procurators carried out a number of tasks within the civil administration, such as the collection of taxes, the management of state revenues and the supervision of public buildings and factories. The most common duty for a procurator was to serve as governor of a minor province or territory. When dealing with important administrative and legal matters the emperors consulted a body of advisors (*consilium principis*) composed of trusted friends, senior state officials and experts. By the middle of the third century AD, this body had assumed most of the functions and duties of the Roman senate. The administrative apparatus of imperial Rome included a complex network of offices (*scrinia*): these were manned initially by slaves and freedmen, and then by members of the equestrian class in later eras (from the second century AD). The *scrinium a rationibus* dealt with matters relating to public finance; the *scrinium a libellis* responded to petitions from private citizens; the *scrinium ab epistulis* handled the emperor's official correspondence; the *scrinium a cognitionibus* investigated judicial disputes referred to the emperor; and the *scrinium a memoria* performed the secretarial work on all decisions, letters, appointments and orders issued by the emperor. State revenues derived from taxation and other sources were deposited in the central state treasury (*fiscus*) managed by the *procuratores a rationibus* or *fisci*.

Probably the weakest point of the constitutional regime of the Principate was that it did not provide for an orderly system of succession to the imperial throne. This weakness stemmed from the contradiction between the emperor's constitutional position as a Roman magistrate whose tenure derived from the senate and the people, and his *de facto* status as a monarch whose maintenance of power ultimately depended on army support. Aware that he could not legally nominate a successor, Augustus (and then the Antonines) adopted the most apparently effective means of ensuring the peaceful succession to imperial power: the designation of a successor by the incumbent emperor, the adoption of the individual designated as the emperor's son, and then the training of the successor for his future duties (by sharing in the government of the state). The system of adoptive emperorship broke down in the late second century AD, and thereafter emperors were made and unmade at the will of different field armies that each backed its own general to power. However, the upheaval of the later Principate age meant the imperial title was itself a very dubious achievement as the generals raised to the throne were confronted with one crisis after another. Whether these generals failed or by drastic measures succeeded, they were almost certain to provoke an attack or their own downfall by usurpation.

1.4.2 The Demise of Popular Legislation

Under the new constitutional order established by Augustus, the vested right of the assemblies to enact legislation was maintained as a regular function. In the early part of this period, several important statutes were passed concerning marriage and divorce: *lex Iulia de maritandis ordinibus* (18 BC), *lex Papia Poppaea* (AD 9)[50]; the criminalization of adultery: *lex Iulia de adulteriis coercendis* (18 BC); the repression of electoral corruption: *lex Iulia de ambitu* (18 BC); the regulation of legal procedure: *leges Iuliae iudiciorum publicorum et privatorum* (17 BC)[51]; the operation of the senate: *lex Iulia de senatu habendo* (9 BC); the testamentary manumission of slaves: *lex Fufia Caninia* (2 BC), *lex Aelia Sentia* (AD 4); and the abolition of agnatic tutelage over women: *Lex Claudia de tutela mulierum* (of unknown date). Some of these laws were passed directly on the emperor's motion while others were passed on the motion of higher magistrates, though obviously the emperor was their real promoter. However, almost since the emergence of the new order, popular legislation was destined to wither away. As the political functions of the assemblies declined rapidly, this form of legislation soon became obsolete and ceased to exist at the end of the first century AD—the last known *lex* was an agrarian law passed in the time of Emperor Nerva (AD 96–98).[52]

1.4.3 The Consolidation of Magisterial Law

Roman law in the early imperial age still comprised the *ius civile*, the original core of the civil law; and the *ius honorarium*, the law derived from the edicts of the jurisdictional magistrates (especially the praetors). However, the productive strength of the magisterial edict began to weaken from the beginning of this period. As the republican magistrates' authority faded away and their cardinal functions were increasingly assumed by the emperor and his officials, magisterial initiatives became increasingly rare and the magistrates' right to alter the edicts on their own authority eroded. Any changes made in the edicts largely embraced measures introduced by other law-making agencies (*leges* or *senatus consulta*).

[50] These laws aspired to promote marriage and the procreation of children, and to check the decline of traditional family values. The *lex Iulia de maritandis ordinibus* introduced several prohibitions on marriage (it prohibited marriages between members of the senatorial class and their former slaves, and between free-born men and women convicted of adultery). At the same time, various privileges were granted to married people who had children whereas severe social and economic disadvantages were imposed on unmarried and childless persons. The *lex Papia Poppaea* excluded unmarried men aged between twenty-five and sixty, and unmarried women aged between twenty and fifty from succession under a will. See Bruns, *Fontes* I, no. 23, 115 ff.

[51] These laws completed the transition from the *legis actiones* to the formulary procedure.

[52] D 47. 21. 3. 1.

Consequently, by the end of the first century AD the law contained in the perpetual edicts of the praetors and other magistrates became solidified and immutable. Recognizing this state of affairs, Emperor Hadrian (AD 117–138) gave the jurist Salvius Iulianus the task of consolidating the *edictum perpetuum* into final form. The edicts of the praetors, aediles and provincial governors were recast, updated and then encapsulated in a compilation that was duly approved by a senatorial resolution in about AD 130.[53] From then on, magistrates were bound to administer justice in individual cases exclusively on the basis of the codified edict; any further necessary changes had to be initiated primarily by imperial enactment.[54]

Although the magisterial edict was no longer a source of new law, for a long period it was still regarded as an important source of law for legal practice. Moreover, the distinction between *ius civile* and *ius honorarium* persevered as long as the judicial system allied to these bodies of law still operated. As new forms of dispensing justice gradually replaced the republican system of legal procedure, the distinction between the two bodies of law (existing as one of form rather than substance) was obliterated. The fusion of *ius civile* and *ius honorarium* was also precipitated by the Roman jurists who gradually removed the boundaries by developing both masses of law in common. In the later imperial era the resultant combination of these two sources of law was designated *ius*, in contradistinction to the body of rules derived from imperial legislation known as *lex*.

1.4.4 Senatorial Law-Making

As elaborated previously, in republican times the senate exercised great influence on legislation but it apparently did not have a formal right to directly enact legislation itself. Its resolutions (*senatus consulta*) had no legal effect unless they were incorporated in a statute or magisterial edict. The last century of the Republic featured a decline in the political role of the assemblies and occasionally a magistrate's proposal approved by the senate came into effect immediately without popular ratification. After the establishment of the Principate, an increasing number

[53] See Aurelius Victor, *De Caesaribus* 19. The text of the codified edict has not survived in its original form. Modern reconstructions are based on commentaries and interpretations of later jurists, especially those of Pomponius, Gaius, Ulpianus and Paulus. See O. Lenel, *Das Edictum perpetuum*, 3rd edn, Leipzig, 1927, repr. Aalen, 1956.

[54] Emperor Hadrian declared that any new point not contemplated in the codified edict should be decided by analogy with it. It is probable that such new points were still drawn attention to in successive edicts, for there is no doubt that the edict still continued to be published annually. Iulianus' work could, therefore, never have been intended to be unchangeable in an absolute sense. Such invariability would have been inconceivable, for although changes in law were now made primarily by means of imperial enactment, yet these very changes would entail related changes in the details of the edict. The fixity of Julianus' edict was to be found mainly in its structure and in its guiding principles—in the way in which the various legal norms were ordered and in the general import of these norms.

of laws originated in this way; by the end of the first century AD, the functions of the statute were assumed by the senatorial resolution.[55] Resembling the pattern followed under the Republic, senatorial decrees were couched in the form of instructions addressed to magistrates and assigned the name of the magistrate who proposed them. However, these decrees were now in most cases initiated by the emperor. From the time of Emperor Claudius (AD 41–54), senatorial decrees were increasingly composed by imperial officials and the relevant proposal was presented in the senate by or in the name of the emperor (*oratio principis*). The senators were then invited to express their views and a vote was conducted. However, the emperor's influence on the senate entailed the latter never failing to agree with the main premises of the proposal. As the movement towards absolute monarchy advanced, the terms of the emperor's proposal were increasingly adopted as a matter of course by the senate without even the pretence of a discussion. By the end of the second century AD, this practice was so routine that it was customary to label a *senatus consultum* as an *oratio* of the emperor on whose initiative the *senatus consultum* was passed. In the third century, emperors no longer submitted their proposals to the senate for approval and thus the senatorial resolutions formally ceased to exist as a source of law.

In the first two centuries of the Principate era, numerous senatorial decrees were issued that effectuated important changes in the areas of both public and private law. One of the earliest and best-known examples is the *senatus consultum Silanianum* of AD 10 that aspired to repress the frequent killing of masters by their slaves.[56] Important senatorial decrees pertaining to private law included the *senatus consultum Velleianum* (ca 46 AD) that forbade women from assuming liability for the debts of others, including those of their husbands[57]; the *senatus consultum Trebellianum* (*c.* AD 56) and the *senatus consultum Pegasianum* (AD 73) that regulated the acceptance of inheritances subject to *fideicommissa* (the *fideicommissum* was a request to an heir to transfer part or all of an estate to another person who was often not qualified to take as heir or legatee)[58]; the *senatus consultum Macedonianum* (second half of the first century AD) that prohibited loans to sons who remained subject to *partia potestas* (such transactions were not deemed invalid but the son could raise against the lender's claim an *exceptio senatus consulti Macedoniani*)[59]; and the *senatus consultum Tertullianum* (*c.* AD 130) that granted mothers the legal right of succession to their children's inheritance.[60]

[55] See G 1. 4; D 1. 3. 9.

[56] It provided that when a master of slaves was killed and the identity of the murderer or murderers remained unknown, all slaves who lived with him had to be tortured and eventually killed. If the victim's heir failed to take steps to have the murder investigated, he would lose his entitlement to the inheritance. See Tacitus, *Annales* 14. 42–45.

[57] D 16. 1. 2. 1.

[58] G 2. 253–254. See also Bruns, *Fontes* I, no. 55.

[59] D 14. 6. 1; C 4. 28. See also Bruns, *Fontes* I, no. 57.

[60] D 38. 17.

1.4.5 Imperial Legislation

The justification for the new constitutional order established by Augustus was found in the fact that a single controlling power was necessary for the command of the army and the administration of the provinces. But it was impossible to create such a power without bringing it into some contact with every department of the state. The guidance of legislation and the administration of justice by an individual will was a necessary consequence of the new political order, and it is possible that this guidance was needed. There is a stage in the history of law where freedom of interpretation may lead to bewildering confusion, and there is a stage in the history of any national judicial organization where drastic reforms are necessary to adapt it to new conditions. The Principate imparted a definiteness to law, but a definiteness that was in no sense intractable. Quite the opposite it prevented law from being narrowly Roman while at the same time it checked it from recklessly incorporating foreign elements. It adapted law to new needs by expanding, but not impairing, its national character. At the same time it widened the scope of jurisdiction by methods that seem to have enhanced the efficiency of the court system, and which brought the provincial world into closer judicial relations with the Rome. The changes brought about both in legislation and in jurisdiction were piecemeal and progressive; and, though they were in theory initiated by the will of individual monarchs, it is important to recall that, in a final analysis, monarchical power was the outcome of the concurrence of many individual wills. For the sake of convenience we are used to treat the *princeps*-emperor as the principal source of law and the chief influence on jurisdiction. Sometimes a purely personal power of this kind may have been realized for a while, although when so realized it always had a flavour of tyranny. But as a rule, when we think of the emperor as a source of law and justice, we should be thinking of his judicial advisers and assessors. The trained jurist played a decisive part in legal progress. His control of the *princeps*, and the *princeps*' control of him, must both be taken into consideration, although the actual extent of the respective influences—of the administrator over the jurist and of the jurist over the administrator—is impossible to determine for any given act or for any given moment of time.

During the early Principate age, the emperors indirectly achieved their legislative goals through the controlled decrees of the senate and enactments of the popular assemblies. But as imperial power grew and the old republican institutions faded away, the emperors started to directly create new legal rules in a number of ways. This direct law-making power was justified on the ground that the *princeps*-emperor had received his power by law (the *lex de imperio*), and so his enactments rested ultimately on the popular will. According to the jurist Gaius, "a constitution of a *princeps* ... has the force of law, since the emperor himself receives his *imperium* by a law".[61] This statement implies nothing less than whatever the

[61] G 1. 5; *Inst* 1. 2. 6; D 1. 4. 1 pr.

emperor decreed as law possessed the validity of a formal statute (*lex*), i.e. a statute like those in the republican period that were formally enacted by a popular assembly and sanctioned by the senate.[62] The true foundation of the emperor's legislative authority is not discovered in legal rationales but in political reality: the emperor's socio-political power evolved so that his assumption of a direct legislative role could not be challenged.

Imperial legislation was designated the common name of imperial constitutions (*constitutiones principis*) and assumed diverse forms: *decreta*, *edicta*, *rescripta* and *mandata*.[63]

The *decreta* (decrees) were decisions issued by the emperor in exercise of his judicial powers on appeal and, on occasions, as judge of first instance. The emperor's appellate jurisdiction was justified on the following ground: as the emperor received his powers from the people and hence acted in their name, an appeal to him was the exercise of the age-old citizen's right of appeal from a magistrate's decision to the judgment of the people in the assembly. Cases referred to the emperor's tribunal were decided in accordance with the existing law. However, as the highest authority in the state, the emperor granted himself considerable freedom in interpreting the applicable legal rules. He could even venture to defy some hitherto accepted rule if he felt that it failed to produce an equitable outcome. For all practical purposes, the emperor's *decreta* were treated as authentic statements of law and binding for all future cases. It should be noted in this connection that as the emperor lacked expertise in legal matters, important questions of law arising in cases brought before the emperor's tribunal would usually be debated and settled at a meeting of the *consilium principis* that embodied some of the best legal minds of the day.

As holder of the magisterial *imperium*, the *princeps*-emperor had the right to issue edicts (*edicta*) that publicized his orders and intentions. The emperor surpassed all other magistrates in authority and his sphere of competence was virtually unlimited: thus, his imperial edicts embraced the whole business of the state, dealing with such divergent matters as criminal law and procedure, private law, the constitution of the courts, and the bestowal of citizenship. The edicts of the *princeps* were, like those of the praetor and other jurisdictional magistrates of the Republic, technically interpretations of law; but, like the praetor, the *princeps* could alter or supplement the law under the guise of interpretation and his creative power, as exercised by his edictal authority, was very extensive. An emperor's edict did not necessarily bind his successors; but if it had been recognized as valid by a succession of emperors, it was deemed to be part of the law, and its subsequent abandonment had apparently to be provided by some definite act of repudiation. It should be noted that Augustus and his immediate successors used their power of issuing edicts sparingly. Only during the late Principate age when the imperial

[62] D 1. 2. 2. 11–12.

[63] D 1. 4. 1 pr.-1. See also G 1. 5.

system moved closer to an absolute monarchy did the emperors regularly employ edicts to achieve aims that, according to the spirit of the Augustan constitution, called for the enactment of legislation by a popular assembly or by the senate. By that time, both comitial and senatorial legislation had disappeared and the capacity of the emperor to create law directly had been recognized as an essential attribute of his office. Probably the best-known example of an imperial edict is the *constitutio Antoniniana* (AD 212) whereby Emperor Caracalla granted the Roman citizenship to all the free inhabitants of the Empire.[64]

The *rescripta* (correspondence) were written answers given by the emperor to petitions or inquiries on legal and other matters raised by state officials and private citizens. There were two types of imperial rescripts: *epistulae* and *subscriptiones*. The former were embodied in a separate document and were addressed to state officials in Rome or in the provinces. The latter were responses to petitions from private citizens written on the margin or at the end of the application itself. Rescripts became particularly important for the development of the law in the second century AD, when it became customary for judges and private litigants to petition the emperors for decisions on difficult questions of law. The emperor would articulate the legal position that applied to a certain stated factual situation and if the judge confirmed the veracity of these facts as stated, he was bound by the imperial decision. Moreover, the emperor's ruling on a point of law contained in a rescript was treated in practice as a binding statement of law for all future cases.

The *mandata* (instructions) were internal administrative directions given by the emperor to officials in his service. The most important *mandata* were addressed to provincial governors and concerned provincial administration (especially its financial side), while others dealt with matters of private and criminal law and the administration of justice.[65] Based on the emperor's *imperium proconsulare*, a *mandatum* was originally strictly personal and remained in force only as long as both the emperor who issued it and the official to whom it was addressed remained in office. When the emperor died or the official was replaced, the *mandatum* had to be renewed. Gradually, the successive renewals created a body of standing instructions (*corpus mandatorum*) that was deemed generally valid for not only state officials but also with respect to the contacts of private citizens with the administrative authorities.[66]

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[64] *Constitutio Antoniniana de Civitate* 1–9 in FIRA I, no. 88. Consider also D 1. 5. 17.

[65] See Dio Cassius, *Historia Romana* 53. 15. 4. Consider also D 29. 1. 1; D 1. 18. 3; D 48. 3. 6. 1.

[66] In the course of time, various compilations of imperial *mandata* were produced that were referred to as *libri mandatorum*. An important collection of imperial mandates is the *Gnomon* of the *Idios Logos*, a work dating from the second half of the second century AD. This work is partially preserved in a papyrus and contains instructions pertaining to the financial administration of Egypt; it also includes several provisions that deal with matters of private law. See FIRA I, no. 99.

Imperial law-making, like the magisterial law-making of the later republican age, formed a new source of free and equitable rules that unravelled the rigidity of the Roman legal system, thereby adjusting it to the socio-economic conditions of an evolving society. However, the multiplicity of the emperor's law-making functions precluded the formation of a homogenous body of law until the later imperial era when attempts were made to introduce order into the mass of imperial constitutions claiming validity in the Empire.

1.4.6 The Culmination of Roman Legal Science

As previously noted, the legal history of the late republican age is marked by the emergence of the first secular jurists (*iurisprudentes*, *iurisconsulti*). Like the pontiffs, the original interpreters of the law, these secular jurists belonged to the senatorial aristocracy (*nobilitas*) and were actively engaged in public life. Their authority in legal matters derived from their highly specialized knowledge, technical expertise and primarily the esteem the general populace held towards them. In a deeply conservative and traditionalistic society, like that of the Romans, the public actions of private citizens and state organs required the support of religious, political and legal authority. In legal matters, private parties and public authorities (including jurisdictional magistrates) thus relied upon the advice from the 'oracles of the law'—the jurists. Both legislation and magisterial law were stimulated and moulded by the jurists, who provided guidance to magistrates in the composition of their legislative proposals and edicts. Furthermore, the jurists contributed to the development of the law through their activities in the day-to-day practice of law, the education of students and the writing of legal works. By the end of the republican era, jurisprudence had arisen to great heights of achievement and formed the most productive element of Roman legal life.

The administrative and judicial authorities in the Principate age faced new demands generated by the Empire's ever-increasing administrative complexity, the expansion of the Roman citizenship in the provinces and the proliferation of legal transactions prompted by the growth of trade and commerce. These new demands could not be adequately addressed without the active assistance of learned jurists. It is unsurprising that not only did the jurists' advisory role increase in importance, but they also commenced a direct involvement in governmental tasks during the Principate era. The emperors employed jurists to assist them in executing the multiplying tasks of administration from as early as Augustus' era with increasing regularity in the later Principate period. Many leading jurists occupied important state posts, from various magisterial positions right up to the prefecture of the praetorian guard. Moreover, distinguished jurists were among the members of the emperor's *consilium* that evolved under Hadrian (AD 117–138) to resemble a supreme council of the state. But the jurists' increased participation in governmental affairs did not entail that the primary focus of their interests shifted away from private law. In this field, the jurisprudence of the Empire absorbed all the legal questions that

had arisen in the republican age. These questions, enriched by the emergence of new issues, were categorized and often adequately answered for the first time.

Continuing the role of their republican predecessors, the jurists of the Empire were engaged in diverse activities in the legal field: they presented opinions on questions of law to private citizens, magistrates and judges (*respondere*); helped litigants on points of procedure, interpreting laws and formulas in their pleas and occasionally arguing cases as advocates themselves (*agere*); and drafted legal documents, such as contracts and wills (*cavere*). However, composing new *formulae* for use in the formulary procedure was no longer a regular task of the jurists. The reason is that by the beginning of the Principate era the contents of the praetorian and aedilician edicts were largely fixed and adequate legal remedies existed. The jurists were also engaged in the systematic exposition and teaching of law. In performing this task, they composed opinions when their students raised questions for discussion based on hypothetical cases. These opinions were almost equal in terms of influence to those formulated for questions arising from actual cases and indirectly helped to develop Roman law in new directions.

In the Principate period, *respondere* (the giving of opinions) evolved as the most important aspect of the jurists' work. An important change regarding this task occurred in the early years of this period with the introduction of the *ius publice respondendi ex auctoritate principis*: the *princeps*-emperor granted certain jurists the right to present opinions and deliver them by the emperor's authority. During the Republic, the jurists' *responsa* had not been legally binding but the judge trying a case would normally accept the opinion of a jurist. By the end of this period, the number of jurists practicing in Rome had greatly increased and it was difficult to ascertain precisely which opinions should be relied upon when they all carried the same weight. As a result, the practice of law was thrown into a state of confusion. Partly to resolve this problem and partly to establish some imperial control over the jurists, Augustus is said to have issued an ordinance investing the opinions of certain pre-eminent jurists with increased authority.[67] The granting of this privilege did not curtail the activity of the unpatented lawyers, although it doubtlessly diminished their influence. However, it gave the response of its possessor as authoritative a character as though it had proceeded from the emperor himself. Although judges were not in principle obliged to accept the opinions of the jurists with the *ius respondendi*, in practice it was very difficult for a judge to ignore the advice of a jurist whose *responsa* were reinforced by the emperor's authority. It may have been understood that the opinion of only one patented jurist was to be sought in any single case, for in the early Principate there seems to have been no provision determining the conduct of a judge when the opinions of his advisers differed. Later it must have been possible to elicit the opinion of several patented jurists on a single legal question. In the early second century AD, Emperor Hadrian promulgated that if the opinions of the jurists possessing the *ius respondendi* were

[67] Amongst the earlier of the patented jurisconsults was Masurius Sabinus, who lived in the time of the Emperor Tiberius. See D 1. 2. 2. 48–50.

unanimous they had the same force as a statute. If there was no unanimity among the jurists, the judge was free to adopt any opinion he thought fit.[68]

From a historical perspective, probably the most significant of the jurists' activities was the writing of legal works. The great majority of juristic works had a casuistic and practical nature: they were developed from legal practice and written primarily for legal practitioners. Only their expository works, such as elementary textbooks and manuals, exhibited the jurists' adoption of a more theoretical or abstract method. Depending upon their subject-matter, the literary works of the jurists can be classified as follows: (a) *responsa*, *quaestiones and epistulae*—collections of opinions or replies delivered by jurists with the *ius respondendi*; (b) *regulae*, *definitiones*, *sententiae*—short statements of the law, in easy to memorise forms, for the use of practitioners and probably also students; (c) *libri* or *Digesta*—general works on the *ius civile* and the *ius honorarium*; (d) *institutiones* or *enchiridia*—introductory or expository works written primarily for beginners and students; (e) monographs on particular laws or legal institutions; and (f) commentaries on the works of earlier jurists. Among the juristic literature of the early imperial period, the Institutes of Gaius is the only work that survives in its original form. The remaining literature is discoverable chiefly in the citations that appear in the Digest of Justinian and other later compilations of law.

As already noted, a most notable feature of Roman jurisprudence was its strictly legal and predominantly casuistic nature. The jurists did not consider it part of their tasks to critique the law from sociological, ethical, historical or other broader points of view. Nor were the jurists interested in the laws and customs of other nations, save insofar as these could be incorporated into the conceptual framework of their own legal system. In general, their attitude towards the law was conservative: they endeavoured to preserve the system in which they worked while at the same time developing it by exploring new ways to put institutions to satisfactory, practical use. In the Principate era, the need arose to systematize the casuistic method adopted by the republican jurists. In response to this need, the jurists of this period created a system and a science that enabled them to develop the law in new directions in line with changing socio-economic circumstances. The starting-point of a systematic statement of law was often a settled case that was then compared with other real or fictitious cases. Other elements contributing to the process were norms (e.g. statutes and juristic *regulae*) as well as various standards used in the normative discourse (e.g. *bona fides*). The function of such elements was mainly explanatory, pedagogical or informative rather than persuasive (especially in juridical treatises): the jurists sought to illustrate the relevant norm or principle through cases demonstrating its actual operation, without immersion in theoretical argument. But Roman jurisprudence did not stop at the level of a purely pragmatic casuistry. As already noted, a remarkable quality of the jurists was their ability to look beyond the accidental elements of the individual case, the *species facti*, and to define the relevant legal problem as a *quaestio iuris*. Their legal genius was exhibited in their

[68] See G 1. 7.

ability to render their decisions or decision-propositions in concrete cases sufficiently flexible for future synthesis into new principles when subsequent experience showed that change was desirable. Although they kept strictly to the doctrines of their law, they understood the sociological import of its rules. The combination of a sure instinct for the necessities of life with the conscious application of firm principles imparted eternal value to the accomplishments of the jurists.

Like their republican predecessors, the jurists of the Empire attached particular importance to the concept of *aequitas* and its role in correcting or expanding the existing body of law so it could meet the demands of social and commercial life. This is reflected in the definition of *ius* attributed to the jurist Celsus as the art of doing equity (*ius est ars boni et aequi*) or, in other words, a technical device for obtaining that which a good man's conscience will endorse.[69] The test of the *bonum et aequum* in this era was still the *ius gentium*, the norms governing civilized society as construed by the Romans. But the Roman *ius gentium* was now declared binding because it was also natural law (*ius naturale*), based on natural reason.[70] The 'law of nature' was a familiar concept to many philosophical systems of antiquity but acquired a more concrete form with the Stoic school of philosophy. According to the Stoics, natural law exists as a reflection of right reason (*recta ratio*) that is universally valid, immutable and has the force of law *per se*, i.e. independent of human positivization. Compliance with its rules is a prerequisite for attaining justice (*iustitia*), as the essence of law (*ius*) in its broadest sense. Although the Stoics' philosophical views on the ideal law or the ultimate nature of justice apparently had no profound effect on the way the Roman jurists executed their traditional tasks, the concept of *natura* provided an

[69] D 1. 1. 1 pr.

[70] However, the assumed connection between *ius gentium* and *ius naturale* is far from clear as no generally accepted definition of natural law is revealed in juridical literature. According to Ulpianus: "Private law is threefold: it can be gathered from the precepts of nature, or from those of the nations, or from those of the city. Natural law is that which nature has taught all animals; for this is not peculiar to the human race but belongs to all animals . . . From this law comes the union of male and female, which we call marriage, and the begetting and education of children . . . The law of nations is that law which mankind observes. It is easy to understand that this law should differ from the natural, inasmuch as the latter pertains to all animals, while the former is peculiar to men." See D 1. 1. 1. A few paragraphs below this quotation from Ulpianus we find the following statement of Gaius: "All peoples who are governed by law and by custom observe laws which in part are their own and in part are common to all mankind. For those laws which each people has given itself are peculiar to each city and are called the civil law . . . But what natural reason dictates to all men and is most equally observed among them is called the law of nations, as that law which is practiced by all mankind." See D 1. 1. 9; and see G 1. 1 and *Inst* 1. 2. 11. In the next few paragraphs appears this definition of law attributed to Paulus: "We can speak of law in different senses; in one sense, when we call law what is always equitable and good, as is natural law; in another sense, what in each state is profitable to all or to many, as is civil law." See D 1. 1. 11. The divergences between these three accounts are evident: Ulpianus asserts that there is a clear difference between natural law and other human laws, the former being regarded as pertaining to the natural drives that men and animals have in common; Gaius and Paulus, on the other hand, perceive the reason for the universal validity of certain principles in their rational character and their recognition by all mankind, as well as in their inherent utility and goodness.

important device for the articulation and systematization of the law. However, the jurists did not juxtapose the law governing social relations in everyday life to a code of ideal natural law functioning as a master model. They developed the content of *natura* in close connection with the practical aspects of legal life and always in response to concrete needs and problems emerging from actual cases. From their viewpoint, discovering the appropriate legal rule or devising an acceptable solution to a legal problem presupposed a reasonable familiarity with both the nature of practical reality and the ordinary expectations that social and legal relations entailed. In this respect, the postulates of nature did not emanate from metaphysical speculation but from the findings of common sense and the need for order in human relations. Thus, in the eyes of the jurists, certain methods of acquiring ownership were 'natural' or derived from natural law as they appeared to follow inevitably from the facts of life such as *traditio* (the most usual form for transferring ownership, involving the informal transfer of actual control over an object on the basis of some lawful cause, e.g. a contract of purchase and sale); and *occupatio* (the acquisition of the actual control of a *res nullius*, an object belonging to no one). Of course, such methods of acquisition were regarded as universal and therefore as facets of the *ius gentium*: the law actually observed by all humankind. The fact that the Roman jurists regarded natural law, in the manner described above, as juridically valid is implied by their identification of *ius naturale* with *ius gentium*. This prevailed even though the former term referred to the supposed origin of a rule or institution and the latter to its universal application. If natural law is interpreted as law that ought to be observed, the identification of *ius naturale* and *ius gentium* is untenable as certain institutions of the law of nations clearly conflicted with natural law precepts. Thus while according to natural law all people were born free, slavery was widely recognized in antiquity as an institution of the law of nations. In view of this detail, the most one can say from a moral-philosophical perspective is that the universal recognition of an institution as part of the law of nations could be regarded to constitute *prima facie* evidence that such an institution originates from natural reason. The Roman jurists, however, never drew a clear distinction between positive law and law as it ought to exist, nor did they adopt the philosophical conception of natural law as a higher law capable of nullifying positive law. They were not social reformers and their conception of natural law does not embrace anything resembling a revolutionary principle to support those rights that are termed in the modern era as 'inalienable human rights'. Thus, no matter how such institutions as slavery or the division of property appeared contrary to natural law they were still perceived as perfectly justified and legal. *Ius naturale* significantly contributed to Roman legal thought, but as a professional construction for lawyers it had little relevance to moral philosophy. It was not viewed as a complete and ready-made system of rules but primarily as a means of interpretation existing in conjunction with the *ius gentium* to enable the

Roman jurists to test the equity of the rules they applied.[71] In this way, *ius naturale* played a key part in the process of adapting positive law to changing socio-economic conditions and shaping the legal system of an international Empire.

At this point, it is important to consider some of the major jurists and the period of their activity. The main sources of our knowledge are the *Enchiridium* (a work of the second century jurist Pomponius), diverse inscriptions and literary works by authors like Tacitus (*c.* AD 55–123), Pliny the Younger (*c.* AD 61–114), Aulus Gellius (*c.* AD 123–170) and Cassius Dio (c. AD 155–235).

The jurists of the early Principate period (27 BC–AD 90) came from urban Roman families or from the Italian municipal aristocracy, and so they possessed a thoroughly Roman background. According to Pomponius, the jurists of this period divided themselves into two schools that formed around two political rivals: Marcus Antistius Labeo and Gaius Ateius Capito. An opponent of the Augustan regime, Labeo never progressed further in his public career than the office of *praetor* and the traditional account holds that he declined an offer of the consulship from Augustus because of his republican convictions. Reputedly an innovator and an exceptionally gifted jurist, he composed numerous highly influential works that included commentaries on the Law of the Twelve Tables and the praetorian edict, a treatise on pontifical law and collections of *responsa*.[72] The school established by Labeo was named after the jurist Proculus, and so was designated the School of the Proculians (*Proculiani*). Capito, elevated to the position of consul by Augustus, was known for his adherence to traditional juristic sources. He wrote treatises on pontifical and public law, a book *de officio senatorio* and collections of *epistulae*. The school founded by Capito was named after his successor Marcus Massurius Sabinus and so was known as the Sabinian School. Sabinus occupies a special position amongst the jurists. He was not a member of the senate nor did he make his career in politics, and he only gained admittance to the equestrian class later in life. Nevertheless, Emperor Tiberius granted him the *ius publice respondendi* in recognition of his outstanding ability as a lawyer. He was the author of a systematic treatise on the *ius civile* (in three books) that became the object of extensive commentary by later jurists in works known as '*ad Sabinum*'. He also produced a commentary on the praetorian edict, a collection of legal opinions and a monograph on theft. Another leading jurist of this period was C. Cassius Longinus, a student of Sabinus whom he succeeded as head of the Sabinian School. He attained the urban praetorship and the consulship (AD 30), and served as governor of Asia and Syria several times between the years AD 40–49. We know his principal work, an extensive treatise on the *ius civile*, mainly from references and fragments integrated in the writings of later jurists. A considerable quantity of literature has been produced by modern commentators on the character and differences between the

[71] See, e.g., D 50. 17. 206.

[72] Consider D 1. 2. 2. 47.

two schools. Many scholars are of the opinion that these schools were essentially in the nature of aristocratic clubs with their own techniques and courses of training. They differed mainly with respect to the methods they adopted for dealing with concrete questions of law rather than in their general philosophical attitudes or principles. From the little we know, it appears that the Sabinians tended to adhere to the letter of the law while the Proculians emphasised the importance of considering the purpose or spirit of the relevant law in the interpretive process.

The jurists of the middle and late Principate periods (AD 90–180 and AD 180–235 respectively) were predominantly natives of the provinces and descendants of Roman and Italian families who had settled outside Italy. Nevertheless, their legal work was thoroughly Roman in character and exhibited very little foreign influence. A notable feature of this age was the increasingly close connection between the jurists and the imperial government. This link, originally established through the *ius respondendi*, was strengthened under Hadrian's reign (AD 117–138) and an increasing number of jurists joined the imperial administration as holders of high state offices. The first major jurist of the middle Principate period was Iavolenus Priscus, who was born about AD 55 and still alive during Hadrian's age. He had an illustrious military and political career: he was consul in AD 86, served as governor of Upper Germany, Syria and Africa and was a member of the imperial council from the time of Nerva (AD 96–98) to the early years of Hadrian's reign. Iavolenus is best known for his *Epistulae*, a collection of opinions in 16 books. He also published commentaries on the works of earlier jurists (*libri ex Cassio*, *ex Plautio*) and a collection of texts from Labeo's posthumous work *posteriora*. Another leading jurist was Publius Iuventius Celsus (*filius*) who succeeded his father, a little known jurist of the same name, as head of the Proculian School. He held the praetorship (AD 106) and consulship (AD 129), served as governor of Thrace and Asia Minor, and was a member of the *consilium principis* under Hadrian. His works include a set of 39 books of *Digesta* as well as collections of *epistulae* and *quaestiones*. He was held in high esteem by his contemporaries and was frequently cited by later jurists. Probably the most important jurist of the second century was Salvius Iulianus, believed to have been born in Hadrumentum in the province of Africa. Like other distinguished jurists, he held a rich succession of offices (tribune, praetor, consul, pontifex, governor of Germany, Spain and Africa) under the emperors Hadrian, Antoninus Pius and Marcus Aurelius. He also served as a member of the imperial councils of Hadrian and Antoninus Pius. His most important works were the consolidation of the praetorian edict (c. AD 130) and his *Digesta*, a collection of *responsa* in ninety books. The *Digesta* was highly regarded by later jurists, as exhibited by the numerous references to this work in juristic literature and the mass of fragments embodied in Justinian's Digest. Two more jurists of this period deserve mention with a focus on their activities as writers and teachers rather than their innovative contribution to Roman legal thinking: Sextus Pomponius and Gaius. Pomponius is best known for his *Enchiridium*, a comprehensive account of the history of Roman law from the regal era to his own day that is incorporated in its entirety in the Digest of Justinian. He also produced a comprehensive commentary on the edict in 150 books, a commentary

on the *ius civile* in 35 books and several monographs on a variety of topics. There is no evidence that he had a political career or issued legal opinions (*responsa*). Our only information on Gaius is that he lived in the second half of the second century and that he was a Roman citizen (even his family name is unknown—Gaius is only a *praenomen* or first name). There is some support for the view that he received his legal education in Rome and that he taught in the provinces (possibly in the East). He is best known for his *Institutiones* (written about AD 160), a systematic textbook for students and the only juristic work from the Principate era that we have inherited nearly in its original length and form (a manuscript of this work was discovered at the beginning of the nineteenth century in the cathedral library at Verona, Italy).[73] He also published commentaries on the Law of the Twelve Tables, the provincial edict (*edictum provinciale*) and the edict of the *praetor urbanus*; monographs on various legal institutions; and collections of opinions. Gaius is not cited by his contemporaries and his works appear to have attained fame only after his death.

The most highly esteemed jurists of the late Principate period (AD 180–235) were Aemilius Papinianus, Iulius Paulus and Domitius Ulpianus. Papinianus was head of the imperial chancery *a libellis*, held the office of *praefectus praetorio* (AD 203–212) and, by virtue of this function, served as a member of the *consilium principis*. He was executed in AD 212 by order of Emperor Caracalla as he purportedly refused to devise a justification for Caracalla's murder of his own brother and co-regent Geta. His principal works include collections of case decisions (*Quaestiones* and *Responsa*), a collection of *definitiones* (in two books) and a monograph on adultery. In the later imperial age, Papinianus' works were regarded as the most important source of juristic law and this is manifested by the numerous fragments embodied in the Digest of Justinian and other post-classical compilations of law. Like other leading jurists of this period, Paulus had a brilliant career in the imperial civil service: he was head of the chancery *a memoria*, member of the *consilium principis* during the reigns of Septimius Severus and Caracalla, and *praefectus praetorio* under Alexander Severus. His numerous works included 80 books on the praetorian edict (*ad edictum*); a treatise on the *ius civile* in sixteen books (*ad Sabinum*); commentaries on various *leges*, *senatus consulta* and the works of other jurists (Iulianus, Scaevola, Papinianus); two collections of *decreta*; and numerous monographs on various subjects in public and private law. Paulus' writings were widely read by later jurists and their authority was confirmed in the Law of Citations (AD 426) where he is listed as one of the 'important five' jurists of the Principate period. Ulpianus, a pupil of Papinianus, held various imperial offices during his lifetime that included head of the chancery *a libellis, praefectus annonae*, *praefectus urbi* and (from 222 AD) *praefectus praetorio*. However, his political influence made him unpopular among the members of the powerful praetorian guard and this led to his assassination in AD 223. Like Paulus, Ulpianus

[73] Recent translations of Gaius' Institutes include: F. de Zulueta, *The Institutes of Gaius*, New York, 1946, Oxford, 1985; W. M. Gordon and O. F. Robinson, *The Institutes of Gaius*, London, 1988.

was a voluminous writer. His contribution to juristic literature includes fifty-one books on the *ius civile* (*ad Sabinum libri LI*); eighty-three books on the edict (*ad edictum libri LXXXIII*); two books of *responsa*; a legal manual for beginners in two books (*institutiones*); collections of *regulae* and *definitiones*; and numerous monographs on individual statutes, various state offices and matters of legal procedure. Almost half of Justinian's Digest (about 42 per cent) consists of materials derived from Ulpianus' works.

In the later half of the third century, Roman jurisprudence lost its vitality and rapidly approached its end. The chief reasons were the collapse of the *Pax Romana*, the demise of the political system of the Principate and the accompanying swift move towards absolutism. The last of the great jurists are considered to include Herennius Modestinus and Aelius Marcianus. Modestinus, a student of Ulpianus, authored many works that embraced an extensive collection of *Responsa* in nineteen books; a work on *differentiae* (controversial questions) in nine books; a collection of *regulae* (rules of law); and a treatise, written in Greek, on the exceptions from guardianship. The authority of his works is confirmed in the Law of Citations where he is listed as one of the 'important five' jurists of the Principate age. Marcianus' most renowned work is the *Institutiones*, an elementary treatise on law in sixteen books that is frequently cited in the Digest of Justinian.

1.5 Legal Development in the Later Imperial Era

1.5.1 Historical and Constitutional Background

We observed earlier that the third century AD featured political, social and economic decay with mounting external pressures that brought the Roman Empire to the verge of collapse. However, the Empire had enough internal strength to recover and endure. In the later part of that century, a succession of capable soldier-emperors (Claudius Gothicus AD 268–270, Aurelian AD 270–275, Probus AD 276–282) began the work of restoring the crumbling state. The work of these emperors paved the way for the systematic changes of structure initiated by Diocletian (AD 285–305) and completed by Constantine the Great (AD 306–337). Like Augustus three centuries earlier, Diocletian realized the temper of the times and integrated the elements developed in the chaotic era into a system that had the permanence of a constitutional form. Thus he succeeded in re-establishing peace and regular government within the realm, and in strengthening the imperial frontiers against foreign foes. However, the reforms of Diocletian and Constantine marked a significant stage in the abandonment of the outward forms and guiding spirit of the Augustan system of government. As the autocratic tendencies that had strengthened over the previous years prevailed, the republican façade of the Principate was replaced by an unconcealed and unlimited monarchy supported by a complex and ever-growing bureaucratic apparatus. The transformation of the Roman state

and society that transpired under Diocletian and Constantine inaugurated the last phase of Roman history, known as the 'Dominate' (*dominatus*), and in many respects it ushered in the medieval world as well.

The Empire in the third century had been plagued by three interconnected problems: the weakness of imperial power, the inadequacy of the Empire's administrative organization and widespread economic decline. The character of Diocletian's regime is reflected in the solutions he devised for these problems. The remedy for the first problem was the elevation of the emperor to the status of an absolute monarch, endowed with the dignity and attributes of an oriental god-king and set apart by an intricate framework of ceremonial and court etiquette. Diocletian's response to the Empire's administrative weakness was the introduction of the system of the Tetrarchy. Recognising that the Empire could not be governed effectively by a single ruler or from a single administrative centre, he devised a system whereby imperial rule was divided while at the same time the principle of imperial unity remained intact. In AD 285, he appointed Maximian (one of his most capable generals) as Caesar and co-ruler. In AD 286, Maximian was promoted to Augustus and acquired rule over the West while Diocletian assumed rulership of the East. In AD 293 each Augustus appointed a Caesar as his assistant and successor, and the four ruled jointly with each controlling one quarter of the Empire. From his capital city of Nicomedia, Diocletian ruled over Asia, Egypt and Thrace; while his Caesar, Galerius, governed the Balkan peninsula. Maximian had a seat of government at Mediolanum (Milan) where he controlled Italy, Africa and Spain; while his Caesar, Constantius Chlorus, ruled over Britain and Gaul. To ensure closer supervision of the provinces, the Tetrarchs drastically reorganized provincial administration: the provinces were reduced in size, more than doubled in number and grouped into new districts called dioceses that were each governed by a vicar. The dioceses were in turn grouped into four prefectures, each headed by a prefect who served directly under one of the four emperors. At the same time, civil authority within a province was separated from military authority in such a manner that effectively foiled any prospect of rebellion from ambitious provincial officials. To reverse the Empire's economic malaise the Tetrarchs instituted currency and taxation reform, enacted price regulation measures and extended state control over the productive resources of the Empire.

In AD 305, Diocletian and Maximian abdicated at the initiative of the former. The two Caesars, Constantius Chlorus and Galerius, became the new *Augusti* and each named a Caesar as his aid and heir. However, when Constantius died in AD 306 the system of Tetrarchy broke down and a power struggle began among the remaining emperors and the sons of Maximian and Constantius. It was not until AD 326 that the conflict was finally settled in favour of Constantine, the son of Constantius. Constantine ruled alone until he died in AD 337, although in AD 317 he appointed his sons as Caesars. The new emperor made full use of his autocratic power to complete the political, administrative, economic and military reforms initiated by Diocletian. During his reign, the aggrandisement of the emperor's position was further exaggerated by the ideological extension of the emperor's ruling power over the entire world; the division of the Empire into provinces, dioceses and prefectures

was mainly retained; the regimentation of large sections of the population into rigidly defined hereditary castes according to occupation, function and office was further recognized; and the Tetrarchs' financial, taxation and monetary policies were continued. Constantine's reign is marked by two dramatic new developments: the rise of Christianity as the dominant religion of the Empire and the establishment of a new imperial capital in the East (AD 330). Perceiving Christianity as a potential binding force within the Empire, Constantine took the new religion under his protection and granted the Church and its clergy numerous rights and privileges. Convinced that unity within the Church was important for sustaining the Empire, he also endeavoured to use his imperial prestige and influence to settle theological disputes that arose among the Church leaders. Constantine's decision to establish a new capital city testifies to the fact that the Empire's political and economic centre of gravity had shifted inexorably to the East. The new city, called Constantine's city or Constantinople, was located on the old site of Byzantium at the crossroads between Europe and Asia Minor. This location not only provided Constantinople with immense economic vitality, but also made it an effective political and administrative centre. Like Rome, the new city was excluded from the standard provincial and diocesan organization; it had its own senate, modelled on that of Rome; its inhabitants received the privilege of free distributions of grain; and the city's highest official was promoted to the rank of the Roman *praefectus urbi* (AD 359). Rome retained its rank as a capital city, although the emperors seldom resided in the location during this period.

Following Constantine's death in AD 337, the Empire was divided among his three surviving sons: Constantine II, Constans and Constantius II. After a period of civil war, the latter became sole emperor in AD 353. He was in turn succeeded by Julian (AD 361–363), known for his failed attempt to revive Roman state paganism. In AD 364, Valentinian I recommenced the division of the Empire's administration and granted the rule of the eastern half to his brother Valens. In AD 378, Valens was killed in battle trying to repel an invasion by the Visigoths and was succeeded by Theodosius I (AD 379) who became sole ruler of the Empire in AD 394. Theodosius, a staunch supporter of Christianity, was the last emperor who ruled over the Roman Empire in its entire extent. After his death, the Empire was divided anew between his two sons: Arcadius (AD 395–408) governed Constantinople and the East; and Honorius (AD 395–423), though only 11 years old, was the nominal ruler of the West. Although a fiction of imperial unity was preserved, the two parts of the Empire increasingly diverged in both the legislative and administration spheres. The division of the Empire appears to have been unavoidable in face of the mounting difficulties confronting the Roman state. In particular, the external pressures on the imperial frontiers increased. By the end of the fourth century, the Rhine-Danube frontier yielded and this accelerated the process of Germanic tribes infiltrating the Empire's provinces so that whole nations migrated into Roman territory. These invasions accompanied and aggravated growing social and economic problems within the Empire itself.

The social and economic development of the Roman world in the later imperial era is directly linked with the profound changes prompted by the crisis of the third

century. The pressure of military, fiscal and administrative demands engendered a hitherto unknown degree of state planning and managerial intervention in every aspect of socio-economic life. The emperors extended the reach of the state: for instance, they compelled citizens to perform various tasks for the state's benefit by rendering these tasks hereditary and creating a vast bureaucratic network in an effort to maintain control. Ultimately, however, this policy failed to accomplish its desired goals and socio-economic conditions steadily deteriorated (especially in the more backward Western provinces). Clear indications of the altered structure and direction of the Roman society embrace: the sharp decline of the free peasantry and the extension of the colonate system over large areas; the decay of the urban aristocracy (*decuriones*, *curiales*) owing to the onerous burden of taxation and the incessant excessive demands imposed upon its members by the state; the power consolidation of the senatorial land barons and the growing inability of the central government to control them; and the further polarization between the impoverished masses (*humiliores* or *tenuiores*) and the concentrated wealth and power of privileged dignitaries (*honestiores* or *potentiores*). The transformation of the Roman state into a machinery of power supported by relatively small groups and the consequent absolutization of state demands provoked the refusal of large sections of the population to identify themselves with the state. With mounting indifference to the state's fate and few individuals prepared to sustain the regime, the forces of dissolution acquired momentum and the demise of the political system of the late Empire appeared unavoidable.

The fifth century witnessed the total disintegration of the Western Roman Empire, in the face of successive large-scale invasions by Germanic tribes. During this period, imperial authority in the West was reduced to a shadow and true power lay in the hands of the German warlords who commanded the barbarized Roman armies. Western Roman Emperors continued to rule in name until AD 476 when Romulus Augustulus was deposed by the German general who had placed him on the throne and the imperial insignia were returned to Constantinople. By AD 500, the Western provinces of the Empire were in the hands of various Germanic tribes: the Ostrogoths ruled Italy; the Vandals had established themselves in North Africa; the Visigoths controlled south-western Gaul and Spain; the Burgundians were settled in south-eastern Gaul; the Franks held northern Gaul; and the Angles and Saxons were settled in England. With the disintegration of the Roman Empire in the West, the public institutions of the Roman state yielded to the more primitive personal loyalty of the barbarians to their chieftains. The urban centres that had been at the heart of Greco-Roman civilization were destroyed or withered away; and economic life reverted to an agricultural and pastoral type geared to maintaining local self-sufficiency.

While the Roman Empire in the West succumbed to the Germanic invaders, the Eastern Empire survived the crisis with its institutions and frontiers largely intact. The emperors at Constantinople successfully guarded their territory in Asia Minor against the restored power of Persia, and resisted the infiltration of the Germanic barbarians and the decentralizing influence of the great land barons. Factors that contributed to the survival of the Empire in the East included its greater material

resources, the strength of its more developed urban society, and the greater homogeneity and loyalty of its population. From this base, the gifted ruler Justinian worked for the restoration of the old Empire to its former greatness.

1.5.1.1 The Late Roman State

With the transformation of the imperial power into an absolute monarchy, the emperor was clearly recognised as divine monarch (*dominus et deus*) and as the sole authority in all spheres of government (administrative, military, legislative and judicial). Moreover, after the elevation of Christianity to state religion he occupied a quasi-ecclesiastical position vis-à-vis the official Church. In this position, the emperor exercised control over Church matters with a responsibility for the formulation and implementation of religious policy. Although in principle the emperor was virtually omnipotent, established norms guided his exercise of functions and powers in the administrative, legislative and judicial spheres.[74] He had the power to change these norms as he saw fit, but as long as they remained in force he was bound to observe them to transform his decisions into practical results. Even though the emperor was held to exist above the laws in the sense that he could not be held responsible for his legislative and administrative acts, he was bound to respect the laws and abide by his own edicts as his authority ultimately rested on obedience to them.

When carrying out the various tasks of government, the emperor relied upon a machinery of official and non-official confidants who proffered him advice and assisted him in the formulation of policy decisions. He also depended upon an apparatus of execution that translated his decisions into the realities of the political process.[75] Among the most important civil functionaries of this period was the *magister officiorum* (master of the offices): he was chief of the imperial secretariats (*scrinia*), supervised the division of the various imperial offices and regulated imperial audiences. Another key official was the *quaestor sacri palatii* (magistrate of the sacred palace) who was the emperor's Minister of Justice. This official prepared the drafts of laws and answers to petitions, and presided over the imperial Council of State when the latter met in the absence of the emperor. The Council of State (*sacrum consistorium*) consisted of the highest officials of the imperial civil service that acted as the emperor's advisory council in legislative, administrative

[74] An emperor was either appointed by another emperor or elected by high military and civilian officials. After his election he was crowned before the soldiers and the populace who saluted him as *Imperator* and *Augustus*.

[75] An important source of information on the administrative organization of the late empire is the *Notitia dignitatum* ('List of Offices'), a handbook of all the officials in the imperial administration dating from the early fifth century AD. See O. Seeck (ed.), *Notitia Dignitatum*, Berlin, 1876 (Eng. trans. W. Fairley, Philadelphia, 1899); R. Goodburn and R. Bartholomew (eds.), *Aspects of the Notitia Dignitatum*, Oxford, 1976.

and judicial matters. It also operated as an imperial court of justice, usually dealing with appeals from decisions of the lower courts.[76] Besides the officials resident at the central imperial court, an important branch of the administrative apparatus consisted of officials engaged in provincial rather than central government. The latter formed a separate administrative hierarchy whose structure was linked with the territorial division of the Empire into prefectures, dioceses and provinces. The highest-ranking civil official of the provincial administration was the praetorian prefect (*praefectus praetorio*), the officer heading the administration of each of the four prefectures (Gaul, Italy, Illyricum and the Orient) into which the Empire was divided. Subordinate to the prefects were the chiefs of dioceses, called vicars (*vicarii*), and the provincial governors. The cities of Rome and Constantinople were exempt from diocesan government and each was administered by a city prefect (*praefectus urbi*). The intricate administrative machinery of the Late Empire was designed to secure efficient administration, and maintain order and regularity for revenue collection and judicial proceedings. Despite the tight controls that theoretically existed, the system was rife with corruption as office holders sought career advancement and self-enrichment at the expense of civilians. The increased burden imposed on taxpayers by the enlarged civil and military establishments was thus aggravated by the officials' extortion practices. In AD 368, the newly created office of *defensor civitatis* or *defensor plebis* was entrusted with the protection of the lower classes within the population against abuses committed by state officials and great landowners. However, the institution of the *defensor civitatis* ultimately failed to achieve its declared goal as many of those individuals who held the office often committed abuses themselves or were prone to manipulation through bribery or intimidation.

During the late imperial age, the institutions of the ancient republican system no longer had the least political importance. The assemblies of the Roman people had long disappeared. Some of the old republican magistracies continued to exist, but they were divested of all their former powers. The consulship was still regarded as a high honour and was frequently held by the emperor himself. However, it was now a purely honorary office without political importance. The praetors and quaestors also continued to exist but only in an honorary capacity. The senate was retained and, in fact, a second senate was established in Constantinople (*c.* AD 340). This body retained a certain prestige and dignity, and its members formed the highest rank of imperial subjects from which the heads of the imperial civil service and army were chosen. However, the actual administration of Rome and Constantinople was in the hands of the urban prefects and their subordinates, and the only political role the senate played was in the inauguration of a new emperor. Occasionally, the senate was requested to offer its advice to the emperor on current affairs; it conferred with imperial officials on matters concerning the senatorial class and presented legislative proposals that were then submitted to the emperor by the city

[76] The *sacrum consistorium* developed from the earlier *consilium principis* as organized by Emperor Hadrian in the second century AD.

prefect. However, it no longer operated as a court of justice with jurisdiction over its own members (trials involving senators now proceeded before the city prefect or a provincial governor).[77]

1.5.2 The Emperor as a Law-Maker

During the late imperial age, the 'pluriformity' that characterized legislative activity during the Principate and the Republic no longer existed. With the transformation of the Roman government into an absolute monarchy, the enactments of the emperors emerged as the only active source of law. At the same time, the theoretical assumption that the emperor was bound by the laws was cancelled by the facts that he stood above the law (*princeps legibus solutus*) and had legislative omnipotence (*quod principi placuit legis habet vigorem*). The imperial enactments with their diverse appellations of *edicta*, *rescripta*, *decreta* or *mandata* were now collectively designated *leges*. These enactments provided the basis for the formation of a new body of law distinct from the old law (*ius vetus*) as traditionally interpreted by the classical jurists. The principal fields of operation of the imperial laws were in public administration and socio-economic policy, but they did effect numerous changes in private and criminal law. Many imperial laws were not strictly Roman in character but exhibited the influence of foreign (especially Greek) institutions. Moreover, since the era of Constantine the Great, imperial legislation was also moulded by ideas derived from Christian ethics.

Depending on their form and scope of application, the majority of imperial enactments fell into two categories: *edicta* or *leges generales* and *rescripta* or *leges speciales*. An edict was usually delivered in the form of a letter addressed to a high official (generally a praetorian prefect) who had a duty to publicize its contents; it could also be addressed to the people or some section thereof (e.g. to the inhabitants of a particular city), or to the senate. Edicts were usually prepared by the minister of justice (*quaestor sacri palatii*) with the assistance of legal experts and discussed in the imperial council (*sacrum consistorium*). After the division of the Empire, they were almost invariably issued in the name of both *Augusti* even when they emanated from only one of them (obviously they had no effect within the realm of the other *Augustus* without the latter's consent).[78] This type of imperial enactment is illustrated by the famous Edict of Prices (*edictum de pretiis*) promulgated by Emperor Diocletian in AD 301 that set maximum prices for a

[77] Nevertheless, senators were often appointed as judges and it appears that the senate of Constantinople did function as a law court from time to time.

[78] This served to emphasize that the empire remained politically united, despite its administrative partition.

wide range of goods and services, and prescribed penalties for profiteering.[79] The rescripts (i.e. the emperor's answers to legal questions invoked by actual cases and submitted to him by private citizens or state officials) remained an important source of law until the time of Diocletian.[80] In AD 315, Emperor Constantine decreed that a rescript must be deemed invalid if it deviated from a *lex generalis*.[81] Moreover, a law issued by Arcadius and Honorius in AD 398 stipulated that a rescript was only binding in the individual case that it concerned.[82] However, Emperors Theodosius II and Valentinian III in AD 426 sought once more to confer imperial rescripts an indirect law-making force. Thus they decreed that as a rescript constituted a declaration of a general principle in an individual case, it could be considered generally binding. This view seems to have prevailed during the late fifth and sixth centuries.[83] As regards the *mandata* and the *decreta*, these essentially fell into disuse during this period (the former were superseded by the edicts while the latter were replaced by the rescripts). A new type of imperial constitution was the *sanctio pragmatica*. This consisted of a reply by the emperor to a petition, but it was deemed a more formal manifestation of the emperor's will than an ordinary rescript and practically had the same effect as a *lex generalis*. Accordingly, it was commonly used in responding to petitions that requested the settlement of matters of general public interest or the issuing of decisions with a scope of application that extended well beyond the interests of the immediately concerned parties. An example of such an enactment is the *sanctio pragmatica pro petitione Vigilii* (AD 554) devised by Emperor Justinian in response to a petition from Vigilius, a bishop of Rome. By this enactment Justinian addressed problems concerning the legal order in Italy, which he had recently recaptured from the Goths. Another kind of imperial constitution often used during this period was the *adnotatio*: a decision of the emperor in response to a petition or any other communication directly addressed to him and written in the margin of the petition (originally, the *adnotatio* seems to have been a written instruction from the emperor for the drafting of a rescript by the imperial bureau *a libellis*). Finally, a form of subordinate legislation was embodied in the edicts of the praetorian prefects (*edicta praefectorum praetorio*). Such edicts mainly addressed administrative matters and were binding within the prefecture of their author if there was no conflict with the general law of the Empire.

[79] See M. Giacchero, *Edictum Diocletiani et Collegarum de pretiis rerum venalium*, Genoa, 1974; H. Blümner, *Der Maximaltarif des Diokletian*, Berlin, 1958; S. Lauffer, *Diokletians Preisedikt*, Berlin, 1971; A. C. Johnson, P. R. Coleman-Norton, F. C. Bourne, *Ancient Roman Statutes*, Austin, Texas, 1961, 235–237.

[80] During Diocletian's reign, when elements of classical legal science still survived, the imperial chancery *a libellis* issued, in the emperor's name, a large number of individual case decisions in the form of rescripts that addressed diverse legal points.

[81] C Th 1. 2. 2. & 3.

[82] C Th 1. 2. 11.

[83] C 1. 14. 3.

Even before the end of the third century, the ever-growing and chaotic mass of imperial enactments created confusion in the practice of law that prompted an urgent need to collect them in an orderly fashion. This led to the publication of two informal collections: the *Codex Gregorianus* (*c.* AD 291) and the *Codex Hermogenianus* (*c.* AD 295). The former contained imperial constitutions (mostly rescripts) spanning the reigns of Hadrian (AD 117–130) to Diocletian; the latter was a supplementary collection of constitutions that were issued during the reign of Diocletian. Although both the above codes were unofficial collections, evidence suggests that their production was approved or authorized by Diocletian's government. This is corroborated by the fact that their authors enjoyed regular access to the archives of the imperial chancery, which suggests they held senior positions in the imperial administration and performed their work under official supervision. The extraordinary authority that the Gregorian and Hermogenian Codes acquired after their publication is a more significant fact that distinguishes them from all private collections of legislation. The courts recognized these codes as authoritative and exhaustive records of all imperial legislation existing up to the date of their publication.[84]

The first official compilation of imperial law was the *Codex Theodosianus*, published by the Eastern Emperor Theodosius II in AD 438. Following its approval by the Western Emperor Valentinian III a few months later, the new code acquired the force of law for the whole Roman Empire (1 January 439).[85] The Theodosian Code was essentially an extension and continuation of the Gregorian and Hermogenian Codes that were used as its models and still engaged by the courts. It embodied over 3,000 constitutions from the time of Constantine (*c.* AD 312) to AD 438. The constitutions issued during the above period that had not been included in the code were declared invalid. The work is divided into 16 books subdivided into titles according to the subject matter, while the constitutions appear in these titles in chronological order. The first 5 books focus on private law; books 6–8 address matters of constitutional and administrative law; criminal law is the subject of book 9; books 10–11 contain the law relating to public revenue; books 12–14 stipulate the rules governing municipalities and corporations; book 15 includes provisions pertaining to public works and games; and book 16 elaborates provisions on ecclesiastical matters. As the above description evinces, the majority of the constitutions embodied in the code are concerned with matters of public law. The Theodosian Code effected a measure of uniformity in the administration of justice and also served as an important vehicle for the propagation of Roman law by furnishing a model for later codifications. Modern reconstructions are based partly on later collections, particularly the *Lex Romana Visigothorum* and the Code of

[84] For a reconstruction of the Gregorian and Hermogenian Codes see P. Krüger, *Collectio librorum iuris anteiustiniani* III, Berlin, 1878–1927; FIRA II, pp. 653–665.

[85] It was declared that the new code would be valid "in all cases and in all courts and shall leave no place for any new constitution that is outside itself, except those constitutions which will be promulgated after the publication of this code." See C Th 1. 1. 6. 3.

Justinian, and partly on two manuscripts dating from the fifth and sixth centuries respectively.[86]

1.5.3 The Law of the Jurists

As previously noted, during the first two centuries of the imperial age the work of the jurists was the most creative element in Roman legal life. However, by the middle of the third century jurisprudence entered a period of rapid decline and the *responsa prudentium* soon ceased to be a living source of law. This development was generated by a combination of factors: the disturbed condition of the Empire; the crisis of the political system of the Principate and the growing absolutism of the emperor who sought to make himself the sole source of legal progress; and the gradual abandonment of the Roman tradition of distilling legal norms from the body of individual cases in favour of a system where decisions in individual cases were controlled by previously formulated general rules. In the Dominate epoch, earlier juristic works were regarded as a body of finally settled doctrine that could be applied in a case at any time. This body of law existed as a synthesis created by the juristic interpretation of rules and principles established by the former agencies of legislation (custom, statutes, senatorial resolutions, magisterial edicts). It constituted a single 'jurists' law' (*ius*) that was now evolved in contrast with the law contained in the enactments of the emperors (*lex*). However, it would be a mistake to conclude that the decline of jurisprudence in the later imperial age was tantamount to a collapse of legal culture in general. Lawyers were still essential in the imperial court, the various government departments, and those agencies in Rome and in the provinces that controlled the administration of justice. But it is clear that in the period under consideration the social position of the lawyers and the character of their work had radically changed. These new lawyers abandoned the legal practices they inherited as members of the senatorial aristocracy, experts in law, and representatives of a great and living tradition: they no longer worked as individuals who presented opinions on legal problems and recorded them in writing. These lawyers were mere state officials, anonymous members of a vast bureaucratic apparatus, who simply prepared the resolutions for issue in the name of the emperor.

In the fifth century, legal scholarship experienced a period of revival centred around the law schools of the Empire. The first law school was probably founded in Rome in the late second century and a second such school was later established in

[86] The most important early edition of the Theodosian Code is that of Gothofredus published in Lyons in 1665. Other editions of the Code were published by Hanel (Bonn 1837) and Th. Mommsen (Berlin 1905). Mommsen's edition (*Theodosiani libri XVI cum constitutionibus Sirmondianis*) is the one most widely used. For an English translation see C. Pharr (ed.) *The Theodosian Code and Novels and the Sirmondian Constitutions*, Princeton, 1952.

Beirut during the third century. As the administrative needs of the Empire grew (especially after Diocletian's reorganisation of the administration), new law schools were established in places such as Alexandria, Caesaria, Athens and Constantinople in the East; and Carthage and Augustodunum in the West. Particularly at the law schools of Constantinople and Beirut, the study of classical legal science was resurrected in a systematic fashion. Initially, tuition at the law schools was delivered in Latin but from the early fifth century Greek replaced Latin as the language of instruction. The teaching was conducted by professional law-teachers (*antecessores*), and the courses offered were components of a fixed curriculum that focused entirely on the study of classical juristic works and imperial constitutions. First, the Institutes of Gaius were discussed and then followed the study of the classical jurists' opinions *ad ius civile* and *ad edictum* embodied in collections (with special attention to the works of Papinianus and Paulus). In the final year, the focus converged on the study of current law and this involved an examination of imperial constitutions dating from the middle of the second century AD. The method of instruction was similar to that used in the schools of rhetoric: a classical work was discussed and clarified step by step and, when possible, compared or contrasted with other relevant works. In this way, general legal principles were formulated and applied to resolve specific problems of law arising from actual or hypothetical cases. At the end of their studies that spanned a maximum of 5 years, students were awarded a certificate that entitled them to serve as advocates in the courts or to join the imperial civil service. Over time, the professional lawyers educated in the law schools (*causidici*, *advocati*) replaced the earlier orators (*oratores*) whose training in law was usually only elementary.[87]

The study of the classical authorities at the law schools of the East engendered a new type of jurisprudence concerned not so much with developing new legal ideas but with understanding and expounding the classical materials in light of the needs and conditions of the times. Despite its lack of originality and its tendency towards simplification, post-classical legal science did succeed in resurrecting genuine familiarity with the entire classical inheritance and facilitating its adaptation to the conditions of the times. The new insight into the essence of the classical law enabled court lawyers trained at the law schools to enhance the technique of imperial legislation and successfully tackle the task of legal codification. It was largely through the work of the late imperial jurists that the spirit of classical legal science was preserved and found its way into the codification of Justinian and thereby into modern law.

The juridical literature of the later imperial age consists largely of compilations of assorted extracts from earlier juristic texts designed to render the works of the classical age more accessible to students and legal practitioners. The authors

[87] An edict of Emperor Leo I, issued in 460 AD, ordained that postulants for the bar of the Eastern praetorian prefecture had to produce certificates of proficiency from the law professors who instructed them. This requirement was soon extended to the inferior bars, including those of the provinces. See C 2. 7. 11.

of these compilations (whose names remain largely unknown) selected parts from the original texts that would appear relevant to contemporary readers, whilst other parts were reproduced in a summary form or altogether omitted if they were deemed useless or superfluous. Occasionally new passages were added to render the material more intelligible or adapt the classical texts to changed conditions. Probably the most important post-classical collection of juristic writings is the so-called 'Vatican Fragments' (*Fragmenta Vaticana*) discovered in 1821 in the Vatican library. This work contains extracts from the writings of the jurists Papinianus, Paulus and Ulpianus who lived in the late second and early third centuries. It also includes imperial rescripts dating from the period AD 205–372 that were reproduced from the Gregorian and Hermogenian Codes. The texts are arranged in titles according to the subject-matter, with each title preceded by a note indicating the name of the jurist from whose work the materials were extracted or, if the text is a rescript, the name of the emperor who issued it.[88] Another work, dating from the early fourth century, is known under the title of *Collatio Legum Mosaicarum et Romanarum* or *Comparison between Mosaic and Roman Laws* (sometimes abbreviated to *Collatio*). This work closely resembles the Vatican Fragments with respect to its content and composition but differs from that text as sentences from the first five books of the Old Testament (especially the sayings of Moses) are embodied at the beginning of every title. In addition, it includes texts not only by Paulus, Ulpianus, Papinianus, but also by Gaius and Modestinus. Ostensibly, the purpose of this work was to compare some selected Roman norms with related norms of Mosaic law to show that basic principles of Roman law corresponded with or possibly derived from Mosaic law.[89] Two other works originating from the same period must also be mentioned: the *Pauli Sententiae* and the *Ulpiani Epitome*. The first mainly consists of brief pronouncements and rules attributed to the third century jurist Paulus. It covers a broad range of topics relating to both private and criminal law, and was probably used as a handbook by legal practitioners. As it is not certain whether Paulus himself ever wrote a book called *Sententiae*, this work is now generally assumed to be a brief presentation of Roman law extracted from the writings of Paulus by an unknown author from the latter part of the third century. We have not discovered this work directly; it exists only through citations in the Digest of Justinian and other post-classical compilations of law.[90] The *Ulpiani Epitome* was probably an abridgment of Ulpianus' work *liber singularis regularum* (Rules of Law in One Book). It was composed in the late third or early fourth century and, like the *Pauli Sententiae*, was probably used by practitioners. This work has reached us in an incomplete form

[88] For the text, see FIRA II, pp. 461–540. A critical edition of this work was produced by Th. Mommsen in (1860)—see P. Krüger, Th. Mommsen & G. Studemund, *Collectio librorum iuris anteiustiniani* III, Berlin, 1927.

[89] The standard modern edition of the *Collatio* is that of Th. Mommsen included in his *Collectio librorum iuris anteiustiniani* III, Berlin, 1927. And see FIRA II, pp. 541–89.

[90] See FIRA II, pp. 317–417, 419–432.

through a manuscript dating from the tenth or eleventh century.[91] Two important works from the East have survived: the Syrio-Roman book of law and the *Scholia Sinaitica*. The first was composed in Greek by an unknown author in the late fifth century and used as a textbook for students in the law school of Beirut.[92] The second was a collection of fragments from a commentary in Greek on the work of Ulpianus' *libri ad Sabinum* that was probably composed at the law school of Beirut where it was used for instructional purposes.[93]

In spite of the existence of the above-mentioned collections, the application of the jurists' law was beset by serious problems. First, the sheer vastness of the classical literature made it virtually impossible for the average lawyer to familiarize himself with the material. Furthermore, the juridical literature comprised a highly extensive range of opinions that often contained contradictory viewpoints. Judges were required to support their decisions by reference to established authority, and often faced the problem of choosing between two or more conflicting sources that appeared to be equally authoritative. The problem was exacerbated by the fact that at a time when legal texts circulated only in manuscript copies, many works attributed to classical jurists were actually not composed by them. This situation caused much confusion in the administration of justice and also opened the door to abuse, as unscrupulous advocates often sought to deceive judges by producing captious quotations from allegedly classical texts. This prompted the urgent need for a more reliable and efficient way of recognizing those works that formed part of the authoritative classical literature and the appropriate solution to adopt if the authorities conflicted in their opinions. The emperors responded to this need by introducing a series of laws: in AD 321, Emperor Constantine decreed that the critical comments (*notae*) that the jurists Paulus and Ulpianus had made in connection with the *responsa* collection of Papinianus were no longer to be used.[94] However, a year later Constantine issued another enactment confirming the authority of Paulus' other works (especially the *Sententiae*).[95] In the end, these measures proved inadequate. Theodosius II (Eastern emperor, AD 408–450) and Valentinian III (Western emperor, AD 423–455) thus formulated a new law on the subject in AD 426. The effect of this so-called Law of Citations was that the works of Gaius, Papinianus, Paulus, Ulpianus and Modestinus were made the primary authorities and the only ones

[91] See FIRA II, pp. 261–301.

[92] FIRA II, pp. 751–98. See also K.G. Bruns & E. Sachau, *Syrisch-Römisches Rechtsbuch*, Leipzig, 1880, repr. Aalen, 1961; P. E. Pieler, *Byzantinische Rechtsliteratur* in H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner*, Bd. 2, Munich, 1978, 393 ff.

[93] FIRA II, pp. 635–52; P. E. Pieler, *Byzantinische Rechtsliteratur* in H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner*, Bd. 2, Munich, 1978, 391 ff. N. van der Wal & J. H. A. Lokin, *Historiae iuris graeco-romani delineatio. Les sources du droit byzantin de* 300 *a* 1453, Groningen, 1985, 20–24.

[94] C Th 1. 4. 1.

[95] C Th 1. 4. 2.

that could be cited in a lawsuit. Gaius was the only jurist of the middle Principate period to be chosen, probably because his work was popular and well known. The other jurists belonged to the later Principate period and so manuscript copies of their works must have been readily available. If the authorities adduced on a particular issue disagreed, then the majority view prevailed; if numbers were equal, then the view of Papinianus had to be followed and only if Papinianus was silent was the judge free to make a choice himself.[96] Although the Law of Citations did not provide a definite solution, it imparted a measure of certainty to the administration of justice and remained in force until the time of Justinian.

1.5.4 Custom and the Rise of 'Vulgar Law'

After the enactment of the *constitutio Antoniniana* (AD 212) that extended Roman citizenship to all the inhabitants of the Empire, the old distinction between *ius civile* and *ius gentium* dissolved as the distinction between *civis* and *peregrinus* vanished: every free man within the Empire was now a citizen, subject to the same Roman law. In fact, however, the imposition of a uniform legal system did not entail the adoption of Roman law pure and simple by the peoples of the Empire nor did it result in the disappearance of local systems of law that continued to apply as customary law.[97] Particularly in the Eastern Mediterranean, the common Greek culture and language had produced a distinct body of law whose origins were located in the Greek city-states as well as the Hellenistic monarchies of Syria and Egypt. This body of law continued to exist alongside Roman law as a supplementary source of legal norms and contributed distinct elements to the Roman system through a process of cross-fertilization. This process had been operative for centuries but accelerated after the Empire's centre of gravity shifted from Rome to Constantinople in the fourth century. Similar processes operated in the Western provinces of the Empire, but also in Italy and Rome itself. As a result, the law that actually applied throughout the realm was a mixture of Roman law and local practices that varied from area to area but lacked the subtlety and sophistication of the classical system. Elements of this so-called 'vulgarised' Roman law (*vulgarrecht*) are clearly visible in imperial constitutions, legal codes and documents of the Dominate period.

The body of law that emerged from the interaction between Roman and foreign systems was undoubtedly inferior to the classical system in terms of logic and

[96] C Th 1. 4. 3.

[97] According to the jurist Hermogenian, an established customary norm had the same force as written law because it was based upon the tacit consent of the citizens. See D 1. 3. 35. This view was endorsed by imperial legislation, under the condition that a customary norm did not contradict a written law and had a logical basis. See C 8. 52. (53.) 2.

abstract refinement. Yet, it was closer to the prevailing conditions of life and thus had some practical advantages. Non-Roman influences are detected at many points of the legal system. For example, Greek-Hellenistic law adopted a narrower conception of paternal authority than Roman law and this influenced Emperor Constantine as he introduced restrictions to the traditional Roman institution of *patria potestas* by conceding that persons *in potestate* could have proprietary rights in certain circumstances. Thus, it was recognized that a child was entitled to the property a mother bequeathed to them, even if the child remained under the *potestas* of their father.[98] The influence of certain Greek customs is also reflected in Justinian's decision to replace the quite complicated *adoptio* procedure of the *ius civile* (concerning the transfer of a person governed by the paternal power of the head of his family to the *patria potestas* of another). He instituted a simpler procedure that merely required the father, child and intending adoptor to appear before an official and have the *adoptio* inserted in the court roll.[99] A feature alien to old Roman law that was adopted from the customs of the near East was the *donatio propter nuptias*: a husband's donation to his wife before the marriage to provide for her domestic needs and ensure that she had an estate should the marriage be dissolved by divorce or by the husband's death. The list of pertinent illustrations could be easily enlarged.

1.6 The Codification of Justinian

1.6.1 Historical Background

While the Western Roman Empire disintegrated under the onslaught of the Germanic tribes, the Empire in the East was able to maintain itself almost intact. Certain territorial concessions were made to the Persians, but the loss of territory was negligible. The wealthiest provinces of the Empire (notably Egypt and Syria) were saved, as were its vital economic centres such as Antioch and Alexandria. During the fifth century, the Eastern Empire experienced a marked economic and cultural upturn. Its political influence in international affairs grew and a certain measure of flexibility returned to its society. When in AD 476 the leader of the mercenary German troops (Odoacer) deposed the last West-Roman emperor, he did not hesitate to recognize the formal overlordship of the emperor at Constantinople. Subsequent Germanic rulers, as well as Roman bishops, followed his example. Despite its imperial authority, comparative wealth and vigorous intellectual life,

[98] C 6. 60. 1.

[99] *Inst* 1. 12. 8.

the Eastern Empire did not attempt to control the political affairs of the West until the reign of Justinian in the sixth century.

Soon after his accession to the throne in AD 527, Justinian set himself the task of restoring the Roman Empire to its earlier grandeur. To this end, he inaugurated a programme centered around three goals: the reassertion of imperial control over the Mediterranean basin; the re-establishment of unity in the Church through the enforcement of religious orthodoxy; and the systematic restatement and reform of the law.

In 532, an 'eternal peace' was concluded with the Persians who were the chief enemies of the Empire in the East. Justinian then turned his attention to the Vandals who were established in North Africa. The Vandal Kingdom collapsed within a year after the commencement of hostilities in 533, but the continued resistance of Berber chieftains delayed the complete pacification of Africa until 548. In 535, Justinian embarked upon his major military programme: the plan for the reconquest of the Italian peninsula, then under the control of the Ostrogoths. After a bitter struggle that endured for nearly two decades, the Ostrogothic kingdom was overthrown and the Empire's ancient capital (Rome) was recaptured. In 554, after a third campaign undertaken against the Visigoths, south-eastern Spain was also added to the dramatically expanded Empire. Within the Empire, Justinian established a firm personal regime and a powerful, though burdensome, bureaucracy and reasserted the emperor's political authority over the Church. He introduced a series of administrative reforms designed to protect his subjects against the rapacity of government officials and to curb the oppression of the rural population by powerful land barons. Moreover, he adopted measures devised to revitalize trade and industry, and embarked on an extensive architectural and artistic program that furnished the Empire with churches, public buildings and fortifications. In the spiritual realm, Justinian was motivated by a genuine piety as well as the unwillingness to tolerate any opposition as he endeavoured to reunite all the branches of the Church and to eradicate all heresies.

Modern historians are generally divided as to their assessment of Justinian and his work. Some point to his authoritarianism and his ruthless suppression of all internal opposition, and to the fact that his reconquest of the West proved ephemeral and exhausted the Empire both economically and militarily (after his death in 568 renewed attacks by Germanic tribes reduced imperial authority in the West to a few strong points). Furthermore, his attempt to terminate the Monophysite heresy ultimately failed and the religious differences between the Eastern and the Western Churches persisted throughout his reign. Others point to his undeniable military successes and to his tremendous internal achievements, notably in the fields of art and law. At a moment when the ancient world was ending, Justinian did succeed in finally assembling and preserving for posterity the heritage of Roman law—an immense body of legal materials spanning hundreds of years of legal development.

1.6.2 The Goals of Justinian's Legislative Programme

In 533, Justinian declared "the Imperial Majesty should not only be made glorious by arms but also armed with laws, so that good government may prevail in time of war and peace alike" (*Prooemium* to the *Institutes*). It is clear that the Emperor saw himself in the role of a great legislator, who would transform the legal world of his realm through an ambitious project of restating, updating and reforming the law.

As noted previously, the imperial government had endeavoured in the fifth century to create some order in the mass of laws claiming validity in the Empire. However, the Theodosian Code (AD 438) was from the outset incomplete as it did not include the important part of Roman law based on the writings of the classical jurists. Furthermore, many new imperial constitutions had been issued in the period following the enactment of that code and several constitutions it embodied became outdated. The Law of Citations (AD 426) had reduced the uncertainty concerning the content and authenticity of juristic works, thus enhancing the chances for uniformity and predictability in judicial decision-making. Yet, from the viewpoint of scientific arrangement and thoroughness it was obviously inadequate. The situation prompted an urgent need for the formulation of a comprehensive, accurate and authoritative statement of the law currently in force that clarified the changes introduced by the post-Theodosian legislation and removed the uncertainty surrounding the application of the jurists' law. The production of such a statement was one of the first tasks that Justinian set himself when he became emperor. At the same time, he resolved to systematize and improve the quality of legal instruction by introducing an educational system based on easily accessible and dependable legal sources. Accordingly, commissions composed of jurists and senior state officials were assigned the task of reviewing the extant body of legal materials with the following goals: (a) the collection and editing, with a view to their current applicability, of all imperial statutes promulgated up to that time; (b) the gathering, updating and harmonizing of the works from the major Roman jurists; and (c) the compilation of a standard textbook that would clearly and systematically introduce the first principles of the law to students. A key figure in this project was Tribonianus, head of the imperial chanceries and Justinian's Minister of Justice. Other major contributors were Theophilus, a professor (*antecessor*) at the law school of Constantinople; and Dorotheus and Anatolius, who taught at the law school of Beirut. As observed earlier, their new insight into the works of the classical age enabled the jurists from these two schools to enhance the standards of legal scholarship and provide the knowledge and methods that made the projected legal reform possible. It should be added that even though it raised the level of judicial activity, the revival of interest in classical law also exacerbated the difficulties of legal practitioners: the classical works were great in number; contained an immense number of cases and problems; and abounded in disputes and contradictions. This precipitated the need for a legislative limitation and simplification of the entire body of inherited legal material.

1.6.3 The Code

1.6.3.1 The First Code

The legislation project started in AD 528, when Justinian entrusted a specifically appointed committee with the task of consolidating all the valid imperial constitutions into a single code. The committee consisted of seven senior state officials that embraced Tribonianus, who was then *magister officiorum*; two distinguished advocates; and Theophilus, a professor at the law school of Constantinople. The committee members were instructed to prepare a collection of constitutions by drawing on the Gregorian, Hermogenian and Theodosian Codes, and on the constitutions issued between AD 438 and AD 529. They were empowered to delete outdated or superfluous elements from the texts, remove contradictions and repetitions, and effect any necessary amendments to update the material. The constitutions were to be divided according to the subject matter and listed in chronological order under appropriate titles. On 7 April 529 the new collection was published under the name *Codex Iustinianus* and from 16 April of that year it acquired the force of law. The older codes and all other imperial enactments that had not been included in this new code went out of force. However, this first code had a short life as the mass of legislation issued by Justinian after 529 soon rendered it obsolete. The only surviving material from the first Code, also known as *Codex vetus* (the old Code), is an index found on a fragment of papyrus in Egypt in the early nineteenth century.[100]

1.6.3.2 The Second Code

At the beginning of 534 Justinian gave orders to Tribonianus, Dorotheus and three advocates to prepare a new edition of the Code. The revised Code was to incorporate under appropriate titles the constitutions issued subsequent to the first Code, including the so-called 'Fifty Decisions' (*quinquaginta decisiones*) that was a series of ordinances whereby Justinian settled certain controversial questions arising from the works of the classical jurists (a collection of these ordinances was published on 17 November 530). Again, the commissioners were given wide discretionary powers: they could remove or omit all obsolete matter and supplement those texts that revealed gaps. The new Code was published on 16 November 534 under the name *Codex repetitae praelectionis* and came into force on 29 December 534. It was declared the sole authority with respect to all imperial legislation that had been issued up to the date of its publication. The Code is divided into 12 books; the first

[100] See B. P. Grenfell, A. S. Hunt, *The Oxyrhynchus Papyri*, London, 1898; P. E. Pieler, *Byzantinische Rechtsliteratur* in H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner*, Bd. 2, Munich, 1978, 412 ff.

book addresses jurisdictional and ecclesiastical matters; books 2–8 are devoted to private law; book 9 pertains to criminal law; and books 10–12 deal with administrative law issues. Each of the books is sub-divided into titles. The titles, in turn, contain the relevant constitutions in chronological order. The headings of the constitutions list the names of the emperors who issued them and the persons to whom they were addressed. The oldest of the approximately 4,500 constitutions dates from the time of Hadrian (early second century AD); the majority (approximately 1,200 constitutions) originate from the reign of Diocletian (late third/early fourth century AD) while about 400 of Justinian's constitutions are included.[101]

Despite Justinian's prohibition, manuscripts began to circulate shortly after the Code came into force that embodied the commentaries and abbreviations of contemporary jurists. One of these manuscripts has been preserved in a fragmentary form through a palimpsest dating from the sixth or seventh century. Between the sixth and ninth centuries, the last three books of the Code were published separately; the constitutions in Greek were removed; and the text was considerably abbreviated. From the ninth century, these abbreviated versions were extended by the addition of materials from complete manuscripts that were apparently still extant. In the sixteenth century, under the influence of the humanist movement, the Greek constitutions were re-incorporated in the text.[102]

1.6.4 The Digest

After the publication of the first Code, Justinian attended to the goal of clarifying and systematizing the law derived from the works of the classical jurists (*ius*). Following the 'Fifty Decisions', mentioned above, the Emperor issued the *Constitutio Deo Auctore* (15 December 530) whereby he entrusted Tribonianus (then Minister of Justice) with the responsibility of coordinating and overseeing this project. In accordance with the Emperor's instructions, Tribonianus chose the members of the committee that was to support him: one senior imperial official, Constantinus; two professors from the law school of Constantinople, Theophilus and Cratinus; two professors from the law school of Beirut, Dorotheus and Anatolius; and eleven distinguished advocates. The commissioners were to study and abridge the works of the old jurists to whom the emperors had given the *ius respondendi* and whose works had been recognized or relied upon by later

[101] The sources of the extracted materials included the *Codices Gregorianus*, *Hermogenianus* and *Theodosianus*; certain collections of post-Theodosian constitutions; Justinian's own enactments; and, to some extent, the *Codex Vetus*.

[102] Modern scholars usually rely on the new complete edition (*editio maior*) of the *Codex Iustinianus* published last century by P. Krüger (Berlin 1877). For the *editio stereotypa* (*minor*) see P. Krüger, *Codex Iustinianus*, in *Corpus Iuris Civilis* II, 11th edn, Berlin, 1954, repr. Dublin and Zurich, 1970.

authorities. All the juristic works had to be considered (i.e. not only those of the five jurists mentioned in the Law of Citations) on their own merits, and no special weight was accorded to the opinions of any jurist because of his personal reputation or earlier influence. Like the compilers of the Code, the commissioners were granted wide discretionary powers: they were free to determine which juristic writings to incorporate; remove superfluous or obsolete institutions; eliminate contradictions; and shorten or alter the texts to adapt them to contemporary requirements taking into consideration current legal practice and changes in the law introduced by imperial legislation. The final work was to assume the form of an anthology of the writings of the classical jurists with exact references, and was to consist of fifty books subdivided into titles (these titles were to be placed in the same order as in the Code). Although the material relied upon spanned hundreds of years of legal development, the compilation was to be a correct statement of the law at the time of its publication and the only authority in the future for jurisprudential works (and the embodied imperial laws).

On account of the zeal and dedication of Tribonianus and the unceasing interest of Justinian himself, the commission finished its work in only 3 years instead of the stipulated 1 years. The work, known as *Digesta* or *Pandectae*,[103] was confirmed on 16 December 533 by the *Constitutio Tanta* (in Latin) or *Dedoken* (in Greek) and came into operation on 30 December 533. From that date, only the juristic texts embodied in the *Digesta* were legally binding; references to the original works were declared superfluous and the publication of commentaries on the Digest was prohibited.[104] As Justinian proclaims in the introductory constitution, nearly 2,000 books (scrolls) containing 3,000,000 lines were digested and reduced to 150,000 lines while 'many things and of highest importance' were altered in the process (there is some scepticism as to whether these remarks should be understood literally). The work integrated the writings of thirty-nine jurists that spanned a period from about 100 BC to AD 300 (the earliest writers excerpted were Quintus Mucius Scaevola and Aelius Gallus while the latest was Arcadius Charisius, who apparently lived in the late third or the first half of the fourth century AD). However, some four-fifths of the work consisted of extracts from the writings by the five great jurists from the late Principate period (Ulpianus, Paulus, Papinianus, Gaius and Modestinus) while the remaining thirty-four jurists contributed only one-fifth of the entire collection. This disparity may be explained by the fact that the works of the five classical jurists mentioned above were the most recent and widely used, and therefore the best preserved.

A question that has puzzled Romanist scholars is how the compilers of the Digest were able to complete their enormous project within such a remarkably short time. According to a widely accepted theory originally proposed by Friedrich

[103] *Digesta* (from *digerere*) means that which has been arranged or systematised; *Pandecta* (from the Greek phrase *pan dehesthe*) signifies an all embracing work or encyclopedia.

[104] See *Constitutio Deo Auctore* 1. 2. 6. 7. 12. Literal translations from Latin into Greek, short summaries (*indices*) and collections of parallel texts (*paratitla*) were permitted.

Bluhme in 1820,[105] the structure of the texts within the various titles suggests that the compilers had divided the relevant juristic works into three groups or 'masses' and that each section was the subject of the work of a separate sub-committee. Thus, the entire committee did not read and abridge all the same works. One group of works consisted of the commentaries of Ulpianus, Paulus and Pomponius on the *ius civile* arranged according to the system devised by the classical jurist Masurius Sabinus in his work *Libri tres iuris civilis* (hence Bluhme refers to this section as the 'Sabinian mass'). The second group, known as the 'edictal mass', comprised the commentaries of Ulpianus and Paulus on the *edictum perpetuum* and other related texts. The third mass contained the juristic opinions (*quaestiones*, *responsa*, *epistulae*) of Paulus, Ulpianus, Papinianus and other jurists. Bluhme called this group the 'Papinian mass' because of the special weight assigned to the *responsa* of Papinianus. Bluhme also distinguished a fourth, smaller group of texts that he referred to as the 'post-Papinian' or 'appendix mass' and this embodied materials from the works of less famous writers. After the different sub-committees completed their work on each group of juristic texts, their members convened to arrange and consolidate the selected fragments into a coherent whole.

When Justinian ordered the compilation of the Digest, he was concerned with preserving the substance of the classical jurisprudence and producing a body of law that would meet the needs of his own time. However, accomplishing both these objectives was an impossible task. In abridging, harmonising and updating the juristic works the compilers made many changes to the texts that sometimes distorted their original meaning and misrepresented the views of their authors. The changes (additions, suppressions, substitutions) to the classical texts initiated by the commissioners are known as interpolations (*interpolationes* or '*emblemata Triboniani*'). Since the sixteenth century, scholars have endeavoured to separate out these interpolations and discover exactly what the classical jurists actually wrote. In the late nineteenth and early twentieth centuries, many scholars in Germany and Italy elaborated techniques (based largely on a linguistic analysis of the texts) for the identification of the interpolations. However, the search for interpolations ultimately acquired a cult-like fervour that entailed great exaggeration over the extent of the changes introduced by Justinian's compilers. Nowadays, scholars are more restrained. In general, a text is likely to be regarded as interpolated if it differs from another version of the same text that has reached us via an earlier reliable source (such as, e.g., the Vatican Fragments or the Institutes of Gaius). Moreover, texts dealing with legal institutions that are known to have been obsolete in Justinian's time are presumably interpolated because the compilers had to adapt them to contemporary conditions.

The earliest surviving manuscript copy of the Digest dates from the sixth century (*c*. 550) and was probably one of the approximately eighty copies produced in Constantinople for use by various government departments. A note on this

[105] F. Bluhme 'Die Ordnung der Fragmente in den Pandektentiteln', *Zeitschrift für geschichtliche Rechtswissenschaft* 4 (1820), 257–472; also in *Labeo* 6 (1960), 50 ff. 235 ff. 368 ff.

manuscript indicates that it was located in Italy during the tenth century and then preserved in Pisa since the middle of the twelfth century (hence its alternative name *Littera Pisana*). In 1406, the Florentines captured Pisa and the document was transferred to Florence where it has since been stored (bearing the name of *Littera Florentina* or *Codex Florentinus*).[106] All other surviving manuscripts of the Digest date from the eleventh century or later, the period that featured the revival of Roman legal studies in Western Europe. Parts of the Digest have also been conveyed to us through the *Basilica*, a Byzantine law code issued in the tenth century by Emperor Leo the Wise. In the late nineteenth century the German scholars T. Mommsen and P. Krüger used the *Codex Florentinus* to produce a work that is now regarded as the standard edition of the Digest.[107]

1.6.5 The Institutes

As an authoritative statement of the law, the Digest was intended for use not only by legal practitioners and state officials but also by those engaged in the study of law. Even before its publication, the work was obviously far too long and complex for students to use (especially for those in their first year of their studies). An introductory textbook was required that would allow students to grasp the basic principles of the law before progressing to the more detailed and complex aspects of legal practice. This idea inspired Justinian to order, in 533, the preparation of a new official legal textbook for use in the Empire's law schools. The task was assigned to a three-member commission consisting of Tribonian and two of the four professors engaged in the preparation of the Digest (Theophilus from Constantinople and Dorotheus from Beirut). The commissioners were instructed to produce a book that reflected the law of their own time, omitting any obsolete matter and incorporating any necessary references to the earlier law. In performing their work, the commissioners relied heavily on the Institutes of Gaius (about two-thirds of Justinian's Institutes consists of materials gleaned from the latter text). They also drew on the *res cottidianae* ('everyday matters'), a rudimentary work attributed to Gaius; introductory works by jurists such as Ulpianus, Paulus, Marcianus and Florentinus; imperial constitutions (including many of Justinian's own enactments); and any accessible parts of the Digest. Unlike the Digest's presentation of material as a collection of extracts, the compilers of the Institutes adopted a narrative style that produced a blended, continuous essay under each title

[106] For a photographic copy of the *Codex Florentinus* see A. Corbino and B. Santalucia (eds), *Justiniani augusti Pandectarum Codex Florentinus*, Florence, 1988.

[107] *Digesta Iustiniani Augusti*, Berlin, 1868–1870, repr. 1962–1963. For a shorter version, see T. Mommsen and P. Krüger, *Iustiniani Digesta* in *Corpus Iuris Civilis* I (pars 2a), 16th edn, Berlin, 1954, repr. Dublin and Zurich, 1973. For an English translation see A. Watson, *The Digest of Justinian*, Philadelphia, 1985.

to increase readability. The completed work was confirmed on 21 November 533 under the name *Institutiones* or *Elementa* (by virtue of the *Constitutio Imperatoriam maiestatem*) and came into force as an imperial statute, together with the Digest, on 30 December 533 (by way of the *Constitutio Tanta* or *Dedoken*).

Justinian's Institutes retained Gaius' division of the subject matter into three parts: the law relating to persons (*ius quod ad personas pertinet*); the law relating to things or property (*ius quod ad res pertinet*); and the law relating to actions (*ius quod ad actiones pertinet*).[108] It also replicated his division of the work into four books. However, otherwise than in Gaius' Institutes, each book is subdivided into titles and the titles into paragraphs. Book one deals with the law of persons, except for an introductory preface on jurisprudential matters and the sources of law; the second book explores the law of property and part of the law of succession; book three addresses the remainder of the law of succession and the major part of the law of obligations; and book four concerns the remaining part of the law of obligations and the law of procedure. In book four, Gaius' discussion of the *legis actio* and the formulary procedures was replaced by a brief description of the *cognitio extraordinaria* (the procedure used in the post-classical period). It was followed by two titles on the duties of a judge (*de officio iudicis*) and on criminal law (*de publicis iudiciis*). Justinian's Institutes are couched in the form of a dogmatic, mechanical lecture that displays much less colour and character than the Institutes of Gaius—features that may well be attributed to the largely derivative nature of the work.

The Institutes became very popular, especially in the lands of the former West-Roman Empire, and therefore its text has been preserved in many manuscript copies. However, nearly all of these manuscripts date from the tenth century or later (only one fragment dating from the sixth century has been preserved). A standard edition of the Institutes was published by P. Krüger in the late nineteenth century.[109]

1.6.6 The Novels

After the publication of the revised Code (534), Justinian's legislative activity continued unabated as political and social developments necessitated changes in the law unforeseen by earlier legislation. Before the end of Justinian's reign, over 150 'Novels' (the name of the new imperial laws deriving from *Novellae leges*) were enacted with the great majority dating from the period prior to Tribonian's death in 546. Although most of these laws addressed matters of administrative and

[108] *Inst* 1. 2. 12.

[109] *Iustiniani Institutiones*, *Corpus Iuris Civilis* I (pars 1a), Berlin, 1872. For English translations see J. A. C., Thomas, *The Institutes of Justinian*, Cape Town, 1975; P. B. H. Birks and G. MacLeod, *Justinian's Institutes*, New York, 1987.

ecclesiastical law, Justinian also introduced important innovations in certain areas of private law such as family law and the law of intestate succession. He intended to officially collect and publish these laws as part of a new edition of the Code, but this never happened. Knowledge of them derives mainly from three later compilations based upon a few private and unofficial collections produced during and after Justinian's reign.

The oldest compilation of Novels is the so-called *Epitome Iuliani*, an abridged version of a collection of 124 constitutions dating from the period 535–555. It was probably intended for use in Italy, as indicated by the fact that the Greek constitutions it contains were translated into Latin.[110] Another work, also written in Latin, is the *Authenticum* (or *liber Authenticorum*) that existed as an anonymous collection of 134 constitutions originating from the period 535–556. Irnerius, a member of the School of the Glossators (eleventh to thirteenth century), regarded it as an authentic official collection of Novels ordered by Justinian for use in Italy (hence its designation as *Authenticum*). However, the prevalent view today is that Irnerius was mistaken and that the work is most likely a poor translation of a so-called *kata podas* (a teaching aid used in the law schools of the East).[111] The most complete collection of Novels is the so-called *Collectio Graeca*, consisting of 168 constitutions issued in Greek by Justinian and his successors Justin II (565–578) and Tiberius II (578–582). It seems to have been published after 575, probably during Tiberius' reign, and survives through two manuscripts originating from the thirteenth and fourteenth centuries. Although the *Collectio Graeca* was prevalently used in the Byzantine East, it was apparently unknown in Western Europe until the fifteenth century. It was introduced in Italy by Byzantine scholars who fled there after the fall of Constantinople to the Ottoman Turks (1453) and brought to light by the humanist scholars of the fifteenth and sixteenth centuries. The *Collectio Graeca* furnished the basis for the modern standard edition of the Novels produced by R. Schöll and G. Kroll in 1895.[112]

The Code, the Digest, the Institutes and the Novels constitute the bulk of Justinian's legislative work. All four compilations together constitute the material known as *Corpus Iuris Civilis*. The latter phrase did not originate in Justinian's time; it was coined by Dionysius Godofredus (1549–1622), author of the first scholarly edition of Justinian's codification (1583).

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[110] For a modern reconstruction of this work see G. Hänel, *Iuliani Epitome Latina Novellarum Iustiniani*, Lipsiae, 1873.

[111] For a modern edition of this collection see G. E. Heimach, *Authenticum*, *Novellarum constitutionum Iustiniani versio vulgata*, I-II, Lipsiae, 1846–1851. And see P. E. Pieler, *Byzantinische Rechtsliteratur*, in H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner*, Bd. 2, Munich, 1978, 409 ff. 425 ff. N. van der Wal and J. H. A. Lokin, *Historiae iuris graeco-romani delineatio. Les sources du droit byzantin de* 300 a *1453*, Groningen, 1985, 37–38.

[112] See *Novellae*, *Corpus Iuris Civilis* III, 10th edn, Berlin, 1972. For the Novels that survived in various papyri and inscriptions see M. Amelotti and L. Migliardi Zingale, *Le costituzioni Giustinianee nei papiri e nelle epigrafi*, Milan, 1985.

1.6.7 Concluding Remarks

Recognizing the role of law as a tool of integration, Justinian aspired to produce a comprehensive, systematic and authoritative statement of the law that would replace all former statements in both juridical literature and legislation and promote legal unity throughout his realm. His intention to create a living system of law on classical foundations is particularly evident in the Digest: the largest and, in many respects, most important part of his codification. However, the accomplished work fell short of this objective and this is unsurprising given the magnitude of the project, its swift completion and, perhaps most importantly, the general intellectual climate of the era—an intellectual climate that was unfavourable to creative legal thinking. The Digest not only reproduced contradictions and repetitions that were often exacerbated by the mutilation or alteration of the classical texts. In many respects, it was also alien to contemporary conditions and thus difficult to apply in practice as a legal source. It is thus unsurprising that not long after the work of codification was completed and in spite of Justinian's ban, manuscripts began to circulate containing translations, abbreviations and explanatory remarks of jurists of the day. Yet there is no doubt that Justinian did succeed in assembling and preserving for posterity the bulk of the Roman legal heritage—an immense body of legal materials spanning hundreds of years of legal development. At the same time, his imperial enactments contained a great deal of reformatory legislation that impressed almost every branch of the law.

Regardless of its limitations, Justinian's legislation is one of the greatest monuments of legal activity the world has known—a work whose importance and influence cannot be overstated. In the Byzantine East, it prevailed as a basic document for the further evolution of law until the fall of the Empire in the fifteenth century. The legislation remained largely forgotten for five centuries in Western Europe until it was rediscovered in the eleventh century. It provided the basis first for an academic revival and then for a far-reaching reception of Roman law as the common law of Continental Europe. As a historical source, Justinian's work also provides a comprehensive picture of the way Roman law and legal thinking evolved from the first century BC until the sixth century AD. It also reveals a great deal on the state of society and culture at the dawn of the Middle Ages.

1.7 The 'Second Life' or Roman Law: A Brief Overview

The legislation of Justinian marks the end of the history of Roman law in antiquity; at the same time, it heralds the beginning of a phase occasionally labelled the 'second life' of Roman law, i.e. its history from the early Middle Ages to modern times. The destiny of Roman law after Justinian's era is beyond the scope of the present work. However, the post-Justinianic development is tremendously significant to the modern jurist as far as Roman law forms an important part of

the intellectual background of contemporary legal culture. A brief survey of the history of Roman law in both the East and West after Justinian's era will be useful in highlighting some of the factors that account for the preservation and later reception of Roman law in Continental Europe.

In the Eastern Empire of Byzantium, the legislation of Justinian remained in force and applied until the fall of Constantinople in 1453. As the most important parts of the codification were written in Latin, it was from the outset difficult to use in a Hellenized environment whose daily life was conducted in Greek. Thus, in the period after Justinian's death various works in the form of translations, summaries, paraphrases, and commentaries on the existing law were produced in abundance. As in the post-classical era, the social conditions and intellectual climate of the Byzantine world required the simplification and popularization of the intricate legal heritage. This inspired the development of a whole new genre of legal literature that included several important legislative works and was designed to adapt the Roman law of Justinian to the prevailing conditions. The most important of these works encompassed: the *Ecloga Legum*, a collection of extracts from Justinian's law codes produced by Emperor Leo III the Isaurian and published in 740 AD; the *Eisagoge* or *Epanagoge*, a formulation of law from a historical and practical perspective devised as an introduction to a new law code under Emperor Basil I (867–886 AD); the *Basilica* (*basilica nomima*), an extensive compilation of legal materials from Greek translations of Justinian's *Corpus* in sixty books that was enacted at the beginning of the tenth century by Emperor Leo VI the Wise[113]; the *Epitome Legum* composed in 913, a legal abridgment based on the legislation of Justinian and various post-Justinianic works; the *Synopsis Basilicorum Maior*, a collection of excerpts from the above-mentioned Basilica that was published in the late tenth century; and the *Hexabiblos*, a comprehensive legal manual in six books compiled around 1345 by Constantine Harmenopoulos (a judge in Thessalonica). Some of these works, such as the *Hexabiblos*, were habitually used throughout the Ottoman period and played an important part in the preservation of the Roman legal tradition in countries formerly within the orbit of the Byzantine civilization.

As noted previously, the collapse of the Roman state in the West entailed the replacement of the once universal system of Roman law with a plurality of legal systems: the Germanic conquerors lived according to their own customs, while the Roman portion of the population remained governed by Roman law. To facilitate the administration of the law in their territories, some Germanic kings ordered the compilation of legal codes containing the personal Roman law that regulated the

[113] The *Basilica* is a monumental work, second only to the codification of Justinian in importance. It constitutes one of our chief sources of information on the Byzantine law and jurisprudence during the Justinianic and post-Justinianic periods. For the standard modern edition of the *Basilica* see G. E. Heimbach, *Basilicorum libri* 60, 1–6, Leipzig, 1833–1850 (with prolegomena, 1870); and see H. J. Scheltema, D. Holwerda, N. van der Wal, *Basilicorum libri* 60, Groningen, 1953–1988. Consider also P. Zepos, *Die byzantinische Jurisprudenz zwischen Iustinian und den Basiliken*, in *Ber. zum* IX *Intern. Byz-Kongr*., V, I, Munich, 1958, 1–27.

lives of many subjects. Among the most important compilations of Roman law that appeared during this period were the *Lex Romana Visigothorum* (AD 506),[114] the *Edictum Theoderici* (late fifth century AD)[115] and the *Lex Romana Burgundionum* (AD 517).[116] When Justinian reincorporated Italy into the empire (AD 553), his legislation was introduced to this realm.[117] However, its validity was only sustained for a brief period as most of the Byzantine territories in Italy fell to the Lombards in AD 568. After that time, Justinian's legislation only applied in those parts of Italy that remained under Byzantine control. The rest of Italy displayed a similar pattern to Gaul and Spain as Roman law prevailed through the application of the personality of the laws principle. It also existed through the medium of the Church, whose laws were imbued with the principles and detailed rules of Roman law. In the course of time, as the fusion of the Roman and Germanic elements of the population progressed, the division of people according to their national origin tended to break down. The system of personal laws was gradually superseded by the conception of law as entwined with a particular territory: a common body of customary norms now governed all persons living within a certain territory. As a result, Roman law as a distinct system applicable within a certain section of the population fell into abeyance. The diversity of laws no longer persisted as an intermixture of personal laws, but as a variety of local customs. However, the customary law that applied in all the regions was a combination of elements from Roman law and Germanic customary law. Moreover, Roman law sustained its potent influence on the canon law of the Church. It also moulded the legislation of the Germanic rulers, who maintained the Roman system of provincial administration in view of its effectiveness. However, in comparison with ancient Roman law, the overall picture of early medieval law exhibits a progressive deterioration that is clearly reflected in the declining standards of legal education. In this respect, the carryover of the Roman legal tradition from late antiquity to the early Middle Ages may be described at best as only a sign of survival and not a revival.

From the eleventh century, transformed political and economic conditions in the West (particularly in Italy), created a more favourable environment for cultural development. The new scholarly enthusiasm for the heritage of classical antiquity and the economic expansion generated by the growth of trade and the rise of towns entailed a renewed interest in Roman law. This interest was precipitated by the discovery at Pisa in 1077 of a manuscript copy of the Digest that dated from the time of Justinian. But the revival of Roman law was also the product of the existing

[114] Promulgated by the King of the Visigoths Alaric II—hence, this code is also known as the Breviary of Alaric (*Breviarium Alarici*).

[115] Enacted by King Theodoric II, ruler of the Visigothic kingdom of Southern France.

[116] This code was composed during the reign of King Gundobad of the Burgundians and was promulgated by his son Sigismund.

[117] Justinian's *Corpus* was introduced in Italy by a special enactment (the *pragmatica sanctio pro petitione Virgilii*) issued by the Emperor on 14 August 554 AD at the request of Pope Virgilius. See Nov. App. VII, 1 in R. Schöll and G. Kroll, *Novellae, Corpus Iuris Civilis* III, Berlin, 1972, 799.

political conditions: the authoritarian tenor of Justinian's *Corpus* was perceived as congenial for buttressing the claims to centralized power by emerging dynastic monarchies.

The centre of legal revival was the University of Bologna, the oldest in Western Europe. This university became the seat of the School of the Glossators, under the leadership of famous jurists such as Irnerius, Rogerius, Azo, Accursius and Odofredus. The jurists of Bologna set themselves the task of presenting a complete statement of Roman law through a painstaking analysis of Justinian's *Corpus*. The jurists' work of interpretation was closely aligned with their methods of teaching and it was executed by means of notes (*glossae*) that elucidated difficult terms of phrases in a text, and provided the necessary cross-references and reconciliations that rendered the text usable. The missing element in the Glossators' approach was the historical dimension; they attached little import to the facts that Justinian's codification was compiled more than 500 years before their own time and was mainly composed of extracts deriving from an even earlier date. Instead, they perceived it as an authoritative statement of the law that was complete in itself as demonstrated by their rational methods of interpretation. They devoted little attention to the fact that the law actually in force was very different from the system embodied in it. Nevertheless, the Glossators succeeded in reviving a genuine familiarity with Justinian's entire work; their new insight into the ancient texts galvanised the development of a true science of law that had a lasting influence on the legal thinking and practice of succeeding centuries.

By the end of the thirteenth century, jurists had shifted attention from the purely dialectical analysis of Justinian's texts to the problems invoked by the application of the customary and statute law. They also explored the conflicts of law that emerged in the course of inter-city commerce. This development is associated with the emergence of a new breed of jurists in Italy, the so-called Commentators. Their primary interest was adapting the Roman law of Justinian to the new social and economic conditions of their own era. Bartolus de Saxoferrato and his pupil Baldus de Ubaldis were among the chief representatives of the School of the Commentators. The Commentators successfully rendered the Roman law of Justinian applicable to the environment of the city-states and small principalities in prosperous Italy. They also conferred a scientific basis to contemporary law, especially to those areas of the law that required the development of new principles for legal practice.

Over time, Roman law as expounded by the Glossators and the Commentators entered the legal life of Continental Europe through the activities of university-trained lawyers and jurists. It formed the basis of a common body of law, legal language and legal science—a development known as the 'Reception' of Roman law. This common law (*ius commune*) served as an important universalizing factor in Europe at a time when there were no centralized states nor unified legal systems, but a multitude of overlapping and often competing jurisdictions of local, feudal, ecclesiastical, mercantile and royal authorities. It should be noted, however, that the process of reception was complex and characterized by a lack of uniformity. The reception of Roman law in different parts of Europe was affected by local

conditions, and the actual degree of Roman law infiltration varied considerably from region to region. In parts of Southern Europe, such as Italy and Southern France, where Roman law was already part of the applicable customary law, the process of reception may be described as a resurgence, refinement and enlargement of Roman law. On the other hand, the process of reception in Germany and other Northern European regions was prolonged and, in its closing stages, much more sweeping. The common law of Europe that gradually emerged towards the close of the Middle Ages derived from a fusion between the Roman law of Justinian, as elaborated by medieval jurists; the (largely Romanized) canon law of the Church; and Germanic law. The dominant element in this mixture was Roman law, although Roman law itself was considerably transformed under the influence of local custom, statutory and canon law.

In medieval and even later times, there was no clear connection between the state and the legal order. The federal constellations, a characteristic feature of feudalism, were not based on the idea of national interests; their role was only instrumental. In contrast, the interests of commerce and agriculture displayed more stability as they were relatively permanent structural elements of life. In relation to these elements, national frontiers were immediately relevant. In the sixteenth and subsequent centuries, the feudal nobility was defeated by a central power that also represented the interests of the expanding urban class and the lower gentry. As a result, the role of legislation gained prominence as a means of centripetal policy. Further, the idea of a national social consensus, or that the members of a nation had common interests, emerged as a basic assumption. During that period, the nascent idea of the nation-state and the increasing consolidation of centralized political administrations diversely affected the relationship between the received Roman law, Germanic customary law and canon law.

The rise of nationalism entailed an enhanced interest in the development of national law and this precipitated the move towards the codification of law. The demand to reduce the law to a code emanated from two interrelated factors: the necessities to establish legal unity within the boundaries of a nation-state, and develop a rational, systematized and comprehensive legal system adapted to the conditions of the times. The then dominant School of Natural Law with its rationalist approach to institutional reform and emphasis on system-building provided the ideological basis of the codification movement, which engendered the great European codifications of the eighteenth and nineteenth centuries. When new civil codes were introduced in the various European states Roman law ceased to operate as a direct source of law. However, as the drafters of the codes drew heavily upon the Romanized *ius commune*, Roman legal concepts and institutions were incorporated in different ways and to varying degrees into the legal systems of Continental Europe. Moreover, through the process of legal borrowing or transplanting, these legal elements permeated the legal systems of many countries around the world.

Chapter 2
The Law of Persons

2.1 Introductory

The Roman law of persons is defined as the body of rules concerned with the legal position of the human person (*persona*) comprising their rights, capacities and duties. It pertained to the various aspects of a person's status (*status* or *condicio*) as an individual, as a member of the community and as a member of a family—hence it includes the law of marriage and family relations. Although the concept of *persona* underwent a long process of evolution, it has meant simply 'human being' (*homo*) since the classical period. Hence even slaves (*servi*) were considered persons, despite the fact that in modern legal doctrine a slave was a legal object of rights and duties whereas a free person was a legal subject or a holder of rights and duties. Although Roman law also recognized non-human subjects of rights and duties, such as private corporations and public enterprises (labelled in contemporary law as 'juristic persons'), these entities were not considered persons for the reason that in the eyes of the law only the natural person was a *persona*.

A *persona* came into being at birth and terminated on death. A free-born person acquired legal capacity at the moment of birth. However, under certain circumstances, the unborn child (*conceptus*) was fictitiously regarded as already born. This legal fiction (known as the *nasciturus* fiction) was usually invoked where it would have been advantageous for the unborn child to be born at a particular stage or time. However, the relevant rights could not be exercised before the birth of the child and could only be exercised if the child was born alive.

2.2 Status and Capacities of a Person

The status of a person was determined by reference to all the rights, capacities and powers attributed to them. The most important factors influencing a person's status were: (a) whether one was a free man or a slave; (b) whether one held Roman citizenship or not; and (c) one's position as a member of a family.

G. Mousourakis, *Fundamentals of Roman Private Law*,
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2.2.1 The Institution of Slavery

All persons, in the eyes of the law, were either free (*liberi*) or slaves (*servi*).[1] Slavery could arise in a number of ways, the principal of these being birth from a slave woman,[2] capture in war[3] and as a punishment. A slave was considered to be both a person (*persona*) and a form of property (*res*) legally existing as the object rather than the subject of rights and duties. As he was the property of his master (*dominus*), a slave lacked legal capacity and this theoretically entitled the master to govern the slave as he pleased.[4] A slave could not contract a lawful Roman marriage, had no standing in the courts and their offspring immediately became the property of the slave's master. However, slaves had limited contractual capacity attached to the condition that whatever they acquired accrued to their masters.[5] It should be noted also that initially a slave could not impose legal duties on his master by his actions. From the republican period, however, the praetor could intervene and grant certain praetorian actions, labelled *actiones adiecticiae qualitatis* (such as the *actio de peculio* and the *actio de in rem verso*), against the master and in favour of third persons who had entered into dealings with a slave. Furthermore, a master could be rendered liable for the delicts of his slave on the grounds of an *actio noxalis*.

Slavery could end with the formal liberation of the slave by his master (*manumissio iusta ac legitima*), or be terminated informally or by legislative enactment. There were three forms of *manumissio*: *vindicta*, *censu* and *testamento*.[6] As the earliest and most common method for freeing a slave, *manumissio vindicta* related to the formal legal process that determined whether a person was free or a slave and consisted of the master publicly pronouncing before a magistrate that the slave was free. A slave's liberation was effected by *manumissio censu* when, at the request of the master, the slave was formally enrolled in the list of Roman citizens (*cives Romani*). *Manumissio testamento* involved a slave's liberation through the testamentary disposition of the slave's master. In such a case, the slave could

[1] G 1. 9: "The first division of men by the law of persons is into freemen and slaves". *Inst* 1. 3 pr; D 1. 5. 3. And see *Inst* 1. 3. 2: "Slavery is an institution of the law of nations (*ius gentium*) whereby one man is, contrary to nature, subject to the dominion of another."

[2] *Inst* 1. 3. 4; D 1. 5. 5. 1.

[3] *Inst* 1. 3. 4; D 1. 5. 5. 1.

[4] G 1. 52: "Slaves are in the power of their masters, a power recognized by the law of nations (*ius gentium*), for in all nations masters are invested with power of life and death over slaves; and (by the Roman law) the owner is entitled to everything acquired by the slave". In the principate era, legislation was enacted restricting the masters' right to mistreat or arbitrarily slay their slaves. See G 1. 53.

[5] An interesting element connected with the slave's contractual capacity was the *peculium*, a form of private property comprised of assets such as a sum of money or an object granted by a master to his slave for the slave's use, free disposal or use in commercial and other transactions. Although, the *peculium* theoretically remained the master's property it was considered in the eyes of the community to belong to the slave himself.

[6] G 1. 17.

become free immediately after the acceptance of the inheritance by the heir or following the fulfilment of certain conditions stipulated by the testator. The liberation of a slave could be informally arranged when a master, in the presence of witnesses, declared his slave to be free (*manumissio inter amicos*), or when he expressed such a wish in a letter (*manumissio per epistulam*), or when he shared his table with the slave (*manumissio per mensam*). Although these methods of liberation provided little security for the slave, if he could prove that the relevant actions transpired he could then refuse to return to slavery by appealing to the praetor.[7]

Liberated slaves or freedmen (*libertini*, *liberti*) were Roman citizens, but enjoyed fewer social and political rights than those with no slaves in their ancestry.[8] A large part of Rome's urban proletariat consisted of liberated slaves, whose rapid increase provoked the unease of free-born citizens.[9] Nevertheless, a large number of freedmen were able to earn a steady income through their involvement in trade, industry and the arts. Many progressed to occupy influential positions in public life, especially in the last century of the Republic and during the period of the Principate.

2.2.2 Free-Born Roman Citizens

Roman citizenship (*civitas Romana*) was usually acquired by virtue of birth from a legal Roman marriage or birth from an unmarried Roman woman. The prerequisites for free birth were that both the father and mother possessed the right to conclude a marriage according to Roman law (*ius conubii*) which, in practice, meant that the parents either had to be Roman citizens or foreigners (*peregrini*) granted the *ius conubii*. In addition, it was of course required that the parents had proceeded through the formalities of a legal marriage (*iustum matrimonium* or *iustae nuptiae*).

Depending on their age, gender and mental capacity, free-born Roman citizens (*cives Romani ingenui*) enjoyed a number of legal capacities or rights. In public law, these citizens had the right to vote in the popular assemblies (*ius suffragii*); the right to stand for public office (*ius honorum*); and the right to occupy military offices in the Roman legions. In private law, they had the right to contract a legal Roman marriage (*ius conubii*); the right to enter into legal transactions and conclude valid legal acts relating, for example, to the conclusion of contracts and the acquisition of property (*ius commercii*); and the right to litigate before the Roman courts. These primary rights of citizenship (*ius civitatis*) engendered a variety of

[7] A liberated slave usually maintained a relationship of dependence with his former master, now referred to as his *patronus*.

[8] Freedmen were excluded from all the important offices of the state and could not serve as members of the senate.

[9] The enormous increase in the number of freedmen and the social problems that this created compelled Augustus to introduce certain limitations on the liberation of slaves, effected by the *lex Fufia Caninia* (2 BC) and the *lex Aelia Sentia* (4 BC).

derivative public and private rights or capacities, such as the right of magistrates to issue binding edicts (*ius edicendi*); the right of higher magistrates to convoke a popular assembly for legislative or other purposes (*ius agendi cum populo*); the right of higher magistrates to veto official acts of other state organs (*ius intercessionis*); the right of the owner of land to construct a building on his plot (*ius aedificandi*); the right of a person to dwell in another's house based on a lease contract or personal servitude (*ius habitandi*); the right of a creditor to sell a pledge given in security if the debtor did not pay the debt due (*ius distrahendi*); and the right to create or inherit under a Roman will (*ius testamenti factio*).[10]

A person entitled to all the rights of the citizenship (*ius civitatis*) was referred to as *civis optimo iure*. However, not all Roman citizens were *cives optimo iure*. Roman women, for example, did not possess the *ius honorum* and the *ius suffragii*, and their contractual capacity initially depended on whether or not they fell under the authority (*manus*) of their husband. Furthermore, only some of the relevant rights were held by persons granted by law a limited Roman citizenship such as the members of certain communities or individuals of high standing in Italy and overseas. As explained earlier, the expansion of Roman territory prompted the granting of Roman citizenship to an ever-growing number of foreigners (*peregrini*)[11] until Emperor Caracalla enacted the famous *Constitutio Antoniana* (AD 212) whereby the citizenship was conferred upon almost all the free inhabitants of the Empire.

2.2.3 Family Relationship

2.2.3.1 *Status Familiae* and *Patria Potestas*

A person's position as a member of a family group (*familia*) played an important part in Roman social and legal life, and was a factor determining the question of whether a person was independent (*sui iuris*) or subject to the control of another (*alieni iuris*). The *alieni iuris* persons were under the authority of the father of the family (*paterfamilias*), the oldest male member of the family, who was entitled as a person *sui iuris* to enjoy the maximum number of rights or capacities that a Roman citizen could possess. The *paterfamilias* was the pivot of the Roman family system, as his power and authority (*patria potestas*) over the members of his family was the tie that held the family together. Usually, the *paterfamilias* had authority over his wife (*uxor*), provided that she had been married to him by virtue of a *cum manu*

[10] The words *facultas* and *potestas* were used to denote a specific right or capacity derived from a primary right.

[11] The Roman citizenship was often granted as a reward for the services or aid which a person or community rendered to Rome.

marriage[12]; his children[13]; his grandchildren and further descendants from marriages of sons in his *potestas*; his legitimised and adopted children; as well as slaves or other individuals similarly dependent on him.[14] The term *agnatio* denoted the relationship between all persons under the *potestas* of the same *pater*, or persons who would have been under such *potestas* if their common *paterfamilias* had still been alive.[15] Regarding persons under the *patria potestas*, it should be noted that a blood relationship (*cognatio*) was irrelevant in early Roman law but gradually evolved as a factor of central importance in the time of Justinian (especially in the field of intestate succession).

Originally, the power of the *paterfamilias* over his dependants was theoretically almost unlimited. He had the right of life and death (*ius vitae necisque*) over the members of his family; that is, the power to kill them, sell them into slavery beyond the city limits of Rome,[16] or simply abandon them if he so wished. However, in practice, such power was limited by custom and public opinion and was only exercised in exceptional circumstances.[17] Furthermore, the *paterfamilias* could marry-off or forbid the marriage or divorce of a dependant as well as give them away for adoption or emancipate them. A *paterfamilias* had a right of action against any person who unlawfully prevented him from exercising control over a child or other dependant.

Those subject to the authority of the *paterfamilias* could not own or acquire any property of their own. Everything a dependant acquired or already had in his possession was deemed the property of the head of the family. However, an exception to this rule emerged in respect of the male descendants of the

[12] The authority or marital power a man had in respect of his wife was referred to as *manus*. As a family member, a wife under the *manus* of her husband stood in the position of a daughter (*filiae loco*) with respect to him. On the other hand, if the marriage was without marital power (*sine manu*) the wife remained under the authority of her own *paterfamilias* or *sui iuris*.

[13] In the classical period, there was a rebuttable presumption that children conceived during a marriage were the legitimate children of the husband and thus in his *potestas*—see D 2. 4. 5. Moreover, daughters-in-law married *cum manu* with sons *in potestate* were in the *potestas* of the *paterfamilias*. Illegitimate children were at all times regarded as persons *sui iuris*.

[14] More specifically, under the *paterfamilias*' authority fell persons *in mancipio*, i.e. persons who had been under the authority of a certain *paterfamilias* and had subsequently been transferred by such *paterfamilias* to the authority of another person. The status of these persons was in many respects similar to that of slaves, although they retained certain rights.

[15] Such persons were referred to as *agnati*, in contradistinction to the blood relatives (*cognati*).

[16] 'Across the Tiber River' (*trans Tiberim*). If a *paterfamilias* sold or otherwise disposed of members of his family within Rome, they did not become slaves but were deemed to be *in mancipio* in respect of the person to whom they were transferred.

[17] Usually the relevant powers could be exercised only after a council of the family (*consilium domesticum*) had granted its approval. This council could also include close family friends, in which case it was referred to as *consilium propinquorum*.

paterfamilias–the *filiifamilias*.[18] Like competent slaves, the *filiifamilias* were allowed *de facto* enjoyment of a *peculium*; a term denoting an estate consisting of various forms of property that gradually became considered, for all practical purposes, the property of the *filiifamilias*. A distinction was drawn between: (a) *peculium profecticium*, which was largely similar to the *peculium* given to a slave (it remained the property of the *pater*, but the *filius* had control over it)[19]; (b) *peculium castrense*,[20] which was the property a *filiusfamilias* acquired during his service in the army (e.g. salary, gifts, plunder) and in respect of which he had total freedom of possession; (c) *peculium quasi-castrense*, which included everything the *filius* acquired from other professions or civil employments and which, in the post-classical era, was equated with the *peculium castrense*; and (d) *peculium adventicium*, which comprised the property a *filius* inherited from his mother (*bona materna*), but was later extended to include everything that did not specifically form part of the *peculium castrense* or *quasi-castrense*. Furthermore, a *filiusfamilias* could be held liable for his delicts or criminal acts but such liability could only be enforced once the *filius* became *sui iuris*, usually after the death of his *paterfamilias*. Originally, the *paterfamilias* could be held liable for delicts committed by the *filiusfamilias* in terms of the *actio noxalis* that gave the father the choice between paying the damages and surrendering the delinquent. However, in later times an action was allowed against the *filiusfamilias* himself.

As Roman society evolved over the course of time, the power of the *paterfamilias* over his dependants considerably decreased. The *ius vitae necisque* became obsolete and was abolished[21] together with the father's power to sell his dependants into slavery.[22] At the same time, various duties were placed on the head of the family with regard to his dependants, such as the duty to provide maintenance and the duty to give his daughter a dowry (*dos*) when she entered into marriage.[23]

The *patriapotestas* came to an end in a number of ways. The most common mode was the death of the *paterfamilias* or a change in his status following a *capitis deminutio* (e.g. loss of citizenship).[24] Moreover, when a daughter entered into

[18] Upon attaining full age, a *filiusfamilias* was accorded in public law the right to vote in the assemblies, stand for public office and serve in the army, but in private law he remained subject to his father's *potestas* and hence had reduced proprietary capacity.

[19] The *actiones adiecticiae qualitatis* were actions whereby a third party who had entered into a legal transaction with a *filius* (or slave) could sue the *paterfamilias* (or the slave's master).

[20] Introduced during the reign of Augustus.

[21] In the time of Hadrian, a father who killed his son was stripped of citizenship and all its attendant rights, had his property confiscated and was exiled.

[22] Under Justinian, the selling of a child was allowed in the case of extreme poverty of the parents, but the child could redeem himself and become free by paying the buyer the price he had paid to his father.

[23] The *paterfamilias* retained only the right to chastise or inflict moderate and reasonable punishment on his dependants.

[24] G 1. 127: "When a father dies, his sons and daughters always become *sui iuris*." And see G 1. 128: "Since one who for some crime loses Roman citizenship, it follows that his children cease to be in his *potestas* exactly as if he had died; for it is against principle that a man of foreign status should exercise paternal power over a Roman citizen."

marriage *cum manu* she immediately fell under her husband's authority. The *patriapotestas* also terminated when the *paterfamilias* gave his child to another for adoption (*in adoptione*), or when he released such child from his paternal power by means of the *emancipatio* process.

2.2.3.2 Adoption

The institution of adoption had great importance to the ancient Romans, especially the members of the upper classes concerned with the continuation of the family line, family name and cult of their ancestors. Thus, the fear that a family might become extinct usually prompted the head of the family to adopt an outsider who, in this way, was brought under his *patriapotestas*.[25] Two forms of adoption existed: *adrogatio* and *adoptio*.[26]

Adrogatio occurred when a *sui iuris* person was brought under the *patriapotestas* of another.[27] The effect of the *adrogatio* was that all persons in the power of the adrogated person (*adrogatus*) as well as his property[28] fell under the *potestas* of the adrogator (*pater adrogans*) as his new *paterfamilias*. Because of its important consequences for social relations, *adrogatio* was originally effected by a legislative act of the people's assembly (*comitia curiata*).[29] In the imperial age, the relevant process took place before the emperor whose approval was expressed by means of an imperial order (*rescriptum principis*).[30] The law of Justinian required that the adrogator was a minimum of 60 years old and unlikely to have children of his own.[31] Moreover, there were specific safeguards in respect of the *adrogatio* of *sui iuris* persons under the age of puberty (*impuberes*).[32] The law first required an intensive inquiry into the circumstances of each particular case to determine whether the *adrogatio* would be beneficial for the child. Furthermore, the adrogator had to provide security that if the *adrogatus* should die while still underage he

[25] Probably the best-known example was the adoption of Octavian—the later Emperor Augustus—by Julius Caesar as his heir and successor.

[26] The literary sources also reference a so-called 'testamentary adoption' denoting the nomination of an individual as an heir according to a will on the condition that he should adopt the name of the deceased or become a member of the deceased person's family.

[27] *Adrogatio* was an institution of great antiquity dating back to the time before the legislation of the Twelve Tables.

[28] This included only his assets and not his liabilities according to the principle that everything acquired by a person under the *potestas* of another accrued to the *paterfamilias* without creating a burden for him.

[29] As women and children below the age of puberty (*impuberes*) did not have access to the assembly, they could not be adopted in this way under early law.

[30] For example, see C 8. 47. 6.

[31] D 1. 7. 15. 2.

[32] According to the jurist Gaius, these requirements had already been introduced during the reign of Emperor Antoninus Pius (138–161 AD). See G 1. 102.

would restore the property of the *adrogatus* to the persons who would have inherited from the latter had there been no *adrogatio*. The adrogator was also not entitled to disinherit or discharge the *adrogatus* from his *potestas* without good cause, in any event not without restoring the property of the latter.[33]

Adoption in the form of *adoptio* transpired when a person *alieni iuris*, i.e. under the power of another, was transferred from the *potestas* of one *pater* to that of another. Although originally this form of adoption was not available in early Roman law, the interpretation of certain principles of the Law of the Twelve Tables and the old *ius civile* facilitated the establishment of *adoptio*. The Law of the Twelve Tables provided that if a father sold his son three times, the son would be released from his paternal authority. This provision was meant to restrain fathers from the regular exercise of the right to sell their children, but expansive interpretation of this rule enabled the early jurists to establish *adoptio*. The relevant procedure was as follows: the original *paterfamilias* sold his son three times to a confidant (*familiae emptor*) by implementing a procedure known as *mancipatio*[34] and the confidant then immediately freed the son twice, whereupon the son reverted to his father's *potestas*; after the third sale the son was not, however, set free but was sold back to the original father in respect of whom he would now be *in mancipio*[35]; at this point the adopting father (*pater adoptans*) stepped forward and instituted proceedings claiming the son from the original father; the latter offered no defence disputing the claim and the praetor (the jurisdictional magistrate) awarded the son to the adopting father.[36] The first stage in the above procedure broke the *potestas* of the original *paterfamilias*, while the second stage transferred the *potestas* by *in iure cessio* ('transfer in law').[37] It should be noted that only sons had to be sold thrice; where other *alieni iuris* persons (such as daughters or grandchildren) were given away for adoption, a single sale by *mancipatio* was sufficient. The transfer of the

[33] *Inst* 1. 11. 3. If the *pater adrogans* disinherited or emancipated the *adrogatus*, the latter could reclaim all his own property plus a quarter of the *pater*'s own property.

[34] This was an early form of contract of sale that was in later times used as a fictitious act relating to certain aspects of the law governing family relationships.

[35] Persons *in mancipio* were free persons who were conveyed to another through *mancipatio*. A person thus transferred, though a freeman and a citizen, was in a position similar to that of a slave. Like a slave, he could not be nominated as an heir by his master unless at the same time he was granted his liberty, and all the property he acquired accrued to his master. On the other hand, as a free person he had certain rights: if insulted he could sue by the *actio iniuriarum*; following his liberation by manumission he was treated as a free-born person (*ingenuus*) rather than a freedman (*libertinus*); his marriage was not affected by his status, and, in the imperial age, his children born after the *mancipatio* were in his *potestas* or in that of his *paterfamilias*. In the time of Gaius the status of civil bondsman only arose: (a) when a *paterfamilias* made a noxal surrender of a dependant (this was in practice limited to males and later abolished by Justinian); (b) momentarily in the process of adoption or emancipation.

[36] G. 1. 134. Gaius refers to this form of adoption as *adoptio imperio magistratus veluti praetoris*—see G 1. 98–99.

[37] As forms of derivative acquisition of ownership, *mancipatio* and *in iure cessio* are discussed in the relevant part on the Roman law of property below.

adoptee from one *patria potestas* to another broke his agnatic relationship with his old family and cancelled his right of succession in that family whilst establishing a new position as though he had been born into the adoptor's family.

Under the influence of certain Hellenistic customs, Justinian considerably simplified the *adoptio* procedure. In the new system, the two *patres* and the *alieni iuris* person who was to be adopted had to appear before a magistrate. The original *pater* would then declare that he wished to give the *alieni iuris* person in adoption and the magistrate recorded this declaration in the court register (*acta*). If the *alieni iuris* person was in a position to do so, he was required to give his consent to the adoption agreement. Justinian also fundamentally changed the effects of *adoptio* by providing that only where the adoptor was a natural ascendant did the adoptee pass into his *patria potestas*—this was known as *adoptio plena*. Where the *alieni iuris* person was adopted by a third party (*extraneus*), the adoptee remained in the *potestas* of his original *pater* thereby retaining his rights of succession in relation to him and also acquiring a right of intestate succession in respect of the adoptor. This form of adoption was referred to as *adoptio minus plena*. According to another rule introduced by Justinian, the *pater adoptans* had to be at least 18 years older than the person to be adopted. Moreover, Justinian's initiatives facilitated the adoption of someone as a child or grandchild and granted women the right to adopt children under certain circumstances, which contrasted with the early law that denied them rights to adopt or adrogate.

2.2.3.3 Emancipation

Emancipation (*emancipatio*) was a formal process whereby a person *alieni iuris* was released from the *patria potestas* by his *paterfamilias* and became *sui iuris*. It was the most common method of terminating paternal power. Just as in the case of *adoptio*, *emancipatio* was derived from the rule of the Law of the Twelve Tables according to which a *paterfamilias* who sold his son three times lost his power over him.[38] In the Principate age this method was effected as follows: the father sold his son by *mancipatio* three times (daughters and grandchildren only once) to a confidant who then granted the son his freedom on two occasions, whereupon he returned to his father's *potestas*, and on the third transaction sold him back to the emancipating father (*pater emancipans*) who in turn freed the son or other dependant. The confidant could grant the son or other dependant his freedom, but this did not usually happen as in such a case the confidant would have acquired certain rights of succession and guardianship over the emancipated person (*emancipatus*) that were generally not intended by the parties involved—it was customary that only the emancipating father himself should be the possessor of such rights.

[38] Rule 4. 2 of the Law of the Twelve Tables quoted in G 1. 132. *Emancipatio* coincides almost precisely with the first stage of the original *adoptio* procedure.

In the later imperial era, the *emancipatio* procedure was considerably simplified. In AD 502, Emperor Anastasius promulgated that *emancipatio* could be accomplished when the son was absent by means of a petition to the emperor whose positive response thereto completed the *emancipatio* without any further formalities.[39] Justinian simplified the relevant process even further by providing that *emancipatio* could be performed by a simple declaration of the parties before a competent official and registration of their agreement in the court register.[40]

The most important consequence of the *emancipatio* was that the *patria potestas* was extinguished and the emancipated person became *sui iuris*.[41] Nevertheless, an emancipated natural-born son remained a cognate of his father and was allowed a right of intestate succession to his father's property.[42]

2.2.3.4 Legitimation

Children born outside a legitimate Roman marriage did not fall under the *potestas* of the father. This meant that such children were seriously disadvantaged in respect of their rights of succession and other rights relating to their father. In response to this problem, the institution of legitimation (*legitimatio*) emerged from mainly legislative action whereby illegitimate children could acquire the status of legitimacy and be brought under the *potestas* of their father.[43]

There were three classes of illegitimate children: (a) *liberi naturales*—children born out of a concubinate (*concubinatus*), a lasting relationship between a man and a woman who lived together without being lawfully married; (b) *spurii* or *vulgo concepti*—children born out of an extramarital affair or out of the relationship between the mother and an unknown father[44]; and (c) *adulterini et incestuosi*—children born from adulterous and incestuous unions.

Legitimatio was closely connected with the institution of *concubinatus*. As a durable monogamous cohabitation between a man and a woman,[45] concubinage bore a great resemblance to regular marriage and as such was not immediately

[39] C 8. 49. 5.

[40] *Inst* 1. 12. 6; C 8. 48. 6. It should be noted that since an early period it was required that the emancipated person should consent to the emancipation or, at least, not oppose it.

[41] In general, it was customary for the emancipating father to give the emancipated person a sum of money or other property (*peculium*) with which the latter could begin his own life. In this way, the emancipated person immediately acquired a limited contractual capacity.

[42] By contrast, the emancipation of an adoptive son ended all relations with the family of adoption, and he became an *emancipatus* of his original family.

[43] *Legitimatio* and the various forms in which it occurred are not encountered in the juristic literature of the classical period—they emerged in the late imperial or post-classical age.

[44] G 1. 64.

[45] *Concubinatus* usually occurred where the parties were unable to formally marry each other because of a difference in social status, or where one or both of them did not possess the right to conclude a lawful Roman marriage (*ius conubii*).

rejected but viewed as an inferior kind of marriage. However, the growing influence of Christian values during the fourth century AD entailed the *concubinatus* falling into disrepute and the imposition of disincentives to concubinate unions in the form of various restrictions placed by the state on the rights of children born out of such relationships (*liberi naturales*). Parents or, where possible, the children themselves could seek to avoid such restrictions by relying on legislative enactments introducing the possibility of legitimising the offspring of a concubinage.

Three distinct forms of legitimation were recognized during the Christian era: (a) *legitimatio per subsequens matrimonium*; (b) *legitimatio per oblationem curiae*; and (c) *legitimatio per rescriptum principis*.

In the case of *legitimatio per subsequens matrimonium*, the legitimation of children born out of a concubinate was accomplished by the subsequent legal marriage of the parents.[46] The following requirements had to be met: (a) the parents must have been able to marry each other at the time of the child's conception; (b) they had to draw up a contract (*instrumentum dotis* or *instrumentum dotale*) as proof of their intention to transform the concubinage into a proper marriage; and (c) the child had to give his (express or tacit) consent to the legitimation agreement.

The *legitimatio per oblationem curiae* was introduced in the fifth century AD and consisted of the enrolment by a father of his illegitimate son as a member of a municipal council (*curia*), a local body charged with the administration of a community and comprised of persons who met certain property qualifications (*decuriones* or *curiales*).[47] The purpose of the relevant legislation was to increase the number of candidates for the office of *decurio*—an office that entailed heavy financial and other burdens for its holders and was therefore increasingly unpopular.[48]

Emperor Justinian was responsible for the creation of the *legitimatio per rescriptum principis*: legitimation by a rescript of the emperor. This form of legitimation occurred in exceptional cases where a marriage between the concubinaries was impossible. In such cases, the father could petition the emperor or enter a request in his will for a rescript legitimating his children by a concubine

[46] This form of legitimation was introduced by Emperor Constantine and refined in its final form by Justinian.

[47] An illegitimate daughter was treated as legitimate if the father gave her a sufficient dowry to enable her to marry a *decurio*.

[48] The *decuriones* were responsible for, among other things, the maintenance of public order in their town, the financing of public games and festivals as well as the construction and upkeep of public buildings and roads. They were also charged with the collection of local taxes and incurred personal liability for the total amount owed to the state with their own property standing surety. Faced with financial ruin, a growing number of *decuriones* sought to escape their responsibilities by fleeing their communities or joining the army. Government measures aimed at halting the depopulation of the local *curiae* were met with little success and, by the fifth century AD, the *ordo decurionum* as a whole faced extinction (especially in the more backward Western provinces).

who was either dead or unfit to marry. The result of such legitimation placed the child under the *potestas* of his or her father.[49]

2.2.4 Capitis Deminutio

In Roman legal terminology, *caput* primarily meant a person or human being. In a derivative sense the term denoted an individual's privileges as a free person, as a member of a family and as a holder of certain social and political rights. The term *status* referred to the position a person occupied in the community by virtue of his *caput*. The loss or impairment of an individual's social and political rights was known as *capitis deminutio* and entailed a curtailment or change of *status* (*status permutatio*). The Roman jurists distinguished between three forms or degrees of *capitis deminutio*: *maxima*, *media* (or *minor*) and *minima*.[50]

Capitis deminutio maxima was the loss of personal liberty, which also entailed a loss of citizenship and family ties. A Roman citizen could be sold into slavery if he committed certain grave offences, including offences connected with military service (such as desertion to an enemy) or for wilfully avoiding enrolment in the censor's books in order to evade taxation.[51]

A *capitis deminutio media* (or *minor*) entailed loss of citizenship but no loss of freedom. In early times, this occurred when a man went into exile or became a member of a foreign state. Under the Empire, a sentence of deportation (*deportatio*) to an island had the same effect.[52]

Finally, the *capitis deminutio minima* involved an alteration in a family relationship which occurred when a person's family ties were dissolved either by their entry into another family (by adoption, adrogation or the *cum manu* marriage of a woman) or by becoming *sui iuris* and the head of a new family following his emancipation.

2.3 Marriage

Marriage in Rome was not a simple institution. There were a variety of different types of marriage that all had varying degrees of recognition and legal impact; and the institution underwent drastic changes in both social and legal senses throughout the ages. For a considerable period of Roman history, marriage was not so much a

[49] If the father had already died, the child was deemed for the purposes of succession to have been in the *potestas* of his father prior to the latter's death.

[50] D 4. 5. 11.

[51] Under the Law of the Twelve Tables, an insolvent debtor was liable to the same penalty but the relevant rule was abolished in later times.

[52] This must be distinguished from relegation (*relegatio*), which denotes the exclusion of a person from residence in a particular territory and did not result in loss of citizenship.

legal institution as it was a simply factual relationship recognized by society. In later times, the influence of Christian dogma and ethics moulded the gradual perception of marriage as a legal relationship with a strong religious character. Notwithstanding these changes, the institution of marriage always held a central place in community life as it was the foundation of the *familia*, the pivot of Roman society. Its cardinal importance is reflected in the famous definition offered by the jurist Modestinus that is recited at the beginning of the title on marriage in the Digest: "Marriage is the joining of a man and a woman in a general communion of life by virtue of the communication of divine and human law".[53]

The importance of the institution of marriage in Roman social and legal life is reflected in the legislative programme Emperor Augustus initiated in this regard. The laws Augustus introduced—the *lex Iulia de maritandis ordinibus* (18 BC), the *lex Papia Poppaea* (9 BC) and the *lex Iulia de adulteriis* (18 BC)—were mainly designed for reinforcing the existing social hierarchy by promoting marriage and the begetting of children as a means of combating the perceived decline of the family and the demographic decline that was especially evident among the upper classes. By means of these laws a number of prohibitions, imperative requirements, rewards and penalties were introduced in respect of married life. It was thus required that men between the age of 25 and 60 and women between the age of 20 and 50 should be married and have children.[54] Non-compliance with this requirement invoked various penalties, such as the partial or total loss of succession rights.[55]

2.3.1 The Betrothal

Marriage usually followed an engagement or betrothal (*sponsalia*). This phase consisted of reciprocal promises by the future husband and wife to contract a legal marriage with each other at a later date.[56] Originally, the betrothal existed in the form of an enforceable agreement that was usually concluded between the respective *patresfamilias* by means of a *sponsio* - a formal oral promise accompanied by certain religious rites. At the close of the republican era, however, the engagement rested only on an informal and unenforceable agreement of the betrothed couple themselves.[57]

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[53] D 23. 2. 1.

[54] Roman couples had to produce at least one legitimate child (D 50. 16. 148) and, if they wished to enjoy certain benefits, free-born persons had to have at least three children. Among other things, it was provided that having three legitimate children would exempt a man from positions of guardianship, which were often expensive.

[55] Augustus' marriage legislation ultimately failed to achieve its main objectives and, by the fifth century AD, most of its provisions had either been abolished or fallen into disuse. However, ethical and socio-economic implications arising from this legislation continued to exist for some time.

[56] D 23. 1. 1: "A betrothal is the mention and promise of a marriage to be celebrated hereafter."

[57] See D 23. 1. 4. pr; D 23. 1. 7. 1. Any penalty attached to the relevant agreement was void as "it was considered dishonest that marriage be enforced by the threat of a penalty." See D 45. 1. 134 pr.

Although a breach of the relevant promise was no longer actionable, it entailed certain legal consequences. For example, if one of the parties terminated the engagement without a good cause or otherwise acted in a dishonourable way that party was branded with infamy (*infamia*) culminating in the loss of esteem among fellow citizens.[58] From the influence of Christian practices in the fourth century AD, it became customary for the betrothed couple to give engagement gifts (*arra sponsalicia*) to each other.[59] These gifts usually served as a guarantee for the fulfilment of the marriage promise since the party who broke off the engagement without proper cause forfeited the gifts he bestowed upon the other party and had to return to the other party double the value of the gifts received by him.

An engagement could be terminated by mutual consent of the parties or upon the death of one of them. It could also be dissolved by a simple declaration of one party, subject to the disadvantages mentioned above. The engagement was likewise terminated if it was revealed during the course of the engagement that the parties did not meet the conditions for a valid marriage.

2.3.2 *Requirements for a Valid Marriage*

A number of conditions had to be fulfilled before a valid Roman marriage (*iustae nuptiae* or *iustum matrimonium*) could take place.

Firstly, it was required that both parties possessed the right to contract a legal Roman marriage (*ius conubii*). Originally, only free-born Roman citizens and specially privileged members of foreign communities had this right.[60] In time and as a result of Emperor Caracalla's constitution granting the Roman citizenship to all inhabitants of the Empire, the *conubium* was extended to all persons except slaves, barbarians and certain condemned persons.

Secondly, both parties had to be of marriageable age. This usually meant that the man had to be at least 14 years old and the girl at least 12.[61]

Thirdly, the parties had to be capable of intermarriage and this presupposed the absence of certain prohibitions or impediments. Probably the most important of these proscriptions were based on relationship by blood, marriage and adoption. Thus ascendants (*adscendentes*) and descendants (*descendentes*) in the direct line could never marry each other. This prohibition was applicable irrespective of whether the relationship at issue rested on *cognatio* (blood relationship), *agnatio* (the relationship among persons who were under the *potestas* of the same *paterfamilias*), or *adfinitas* (the relationship between one spouse and near relatives of the

[58] *Infamia* was a type of sanction attached to various forms of disgraceful behaviour and entailing certain civil disabilities (these differed according to the grounds for the infamy).

[59] The *arra sponsalicia* usually consisted of an amount of money.

[60] G 1. 56.

[61] See *Inst* 1. 10 pr; C. 5. 4. 24.

other).[62] Furthermore, collaterals (*collaterales*) were not permitted to marry each other if they were too closely related—the parties had to be at least four degrees removed from each other and at least two degrees removed from a common ascendant. This prohibition applied to *cognatio*, *agnatio* and *adfinitas* relationships.[63] Any marriage concluded contrary to these prohibitions was absolutely null and void, and constituted the criminal offence of incest (*incestus*) attached to severe penalties.[64]

Moreover, during the course of the centuries a large number of prohibitions against the intermarriage of certain categories of persons evolved from considerations of a social or moral nature as well as related public policy decisions. Differences in respect to social class or rank constituted one of the most important impediments.[65] Thus, intermarriage was forbidden between persons of senatorial rank and freed persons, between Roman provincial officials and native women of the province, and between Christians and Jews.[66] Persons who had committed adultery were likewise prohibited from marrying each other.[67] Similarly, guardians and curators were not allowed to marry persons who had previously been under their guardianship or care. Soldiers on service were originally not permitted to marry, but this prohibition was abolished during the later imperial period. Marriages concluded in conflict with these prohibitions were deemed null and void, and the children born from such marriages were treated as children without a father (*spurii*).[68]

A further impediment was derived from the rule that forbade women from remarrying (after the death of their husbands or after a divorce) before the period known as *tempus lugendi* had elapsed.[69] This period was initially 10 months but was later increased to 1 year—hence it was sometimes referred to as *annus luctus* (year of mourning).[70] One of the main reasons for the introduction of this prohibition was to prevent confusion over the identity of the father of a child born after the husband's death (*turbatio* or *confusio sanguinis*). A marriage that ensued within the

[62] Thus, on the basis of *adfinitas* a person was not allowed to marry his previous mother-in-law (or her father-in-law) while a marriage between brother and sister-in-law on the one hand and parents and stepchildren on the other was likewise prohibited.

[63] Thus brother and sister were not allowed to marry each other, nor could an uncle or aunt marry a nephew or niece. On the other hand, cousins who were four degrees removed from each other were allowed to marry each other.

[64] See G 1. 58–61 and 63–64; *Inst* 1. 10. 1–9 and 12; D 23. 2. 14 pr and 4.

[65] The ban on the intermarriage between patricians and plebeians, which had been included in the Law of the Twelve Tables, was finally removed by the *lex Canuleia* of 445 BC.

[66] C. 1. 9. 6; D. 23. 2. 63.

[67] D 48. 5. 41 pr.

[68] See *Inst* 1. 10. 12.

[69] The *tempus lugendi* had a sacral origin.

[70] See C 5. 9. 2.

annus luctus remained valid, but the woman who violated her mourning duties was branded with infamy (*infamia*) or loss of reputation.[71]

A further requirement for a valid marriage was that the parties should both be unmarried at the time of the conclusion of the marriage. Bigamy or polygamy was not regarded as a crime, but resulted in loss of honour (*infamia*).[72]

Fourthly, if the parties were *alieni iuris* (under the *potestas* of their respective fathers), the fathers' approval of the intended marriage had to be obtained. The requisite consent could be granted expressly or tacitly. However, if a *paterfamilias* refused to grant his consent without reasonable cause the approval could be granted by a specially appointed official at the parties' request.[73]

Finally, the creation of a valid marriage required the parties themselves to share the agreement (*consensus*) that they wished to marry, i.e. to enter into a durable monogamous cohabitation aimed at the procreation of children.[74] The intention of living together as husband and wife (*affectio maritalis*) distinguished a lawful marriage from a concubinate (*concubinatus*) or similar temporary relationship. The *affectio maritalis* could be deduced from the solemn introduction of the bride into the husband's house and the associated religious ceremonies (*deductio in domum mariti*).[75] In the later imperial age, Eastern practices contributed to the emerging custom of composing a written agreement of marriage (*instrumentum dotale*) that recorded and elaborated details such as the proprietary rights of the parties. However, the *instrumentum dotale* did not develop into an essential prerequisite of marriage.[76]

2.3.2.1 Matrimonium Non Iustum

As previously noted, the terms *iustae nuptiae* or *iustum matrimonium* referred to a marriage contracted according to the rules of the Roman *ius civile* between two persons who had *conubium*. The term *matrimonium non iustum* (or *iniustum*), on the

[71] Under later imperial legislation, women who failed to comply with the relevant requirement were excluded from inheritance, legacies and other testamentary entitlements to the deceased husband's estate.

[72] G 1. 63; D 3. 2. 13. 1–6.

[73] D 23. 2. 19.

[74] D 23. 2. 2: "Marriage cannot take place unless all the parties consent, that is to say, those who are united as well as those under whose authority they are." See also D 23. 2. 16. 1. A valid consent presupposed that the parties were mentally sound—an insane person could not conclude a marriage. See *Inst* 1. 10 pr; D 23. 2. 16. 2.

[75] It should be pointed out, however, that these were never regarded as requirements for the conclusion of a valid marriage as manifested by the fact that it was possible for a man to conclude a marriage by way of a letter or even a messenger (see D 23. 2. 5). In this regard, the maxim arose: *consensus facit nuptias* (the mutual consent makes the marriage). See D 35. 1. 15; D 24. 1. 32. 13.

[76] The drafting of a written document (*testatio*) recording the parties' intentions was not uncommon even in the Principate era.

other hand, was used to denote a marriage between two persons one or both of whom did not possess the right to contract a legal Roman marriage (*ius conubii*).[77] Such a marriage involved a union between two foreigners (*peregrini*) either or both of whom did not have *conubium*, or between a Roman citizen and a foreigner without the *ius conubii*.

In *matrimonia iniusta*, the parties did not have the capacity to contract a regular Roman marriage and so the legal effects of such marriage were lacking even though all the other social features of marriage were present such as the intention to be married and the aim of producing children. Children born in a *matrimonium iniustum* were socially legitimate (and not stigmatized as *spurii*), but they were not in their father's *potestas* nor agnatically related to their father. It should be noted, moreover, that the parties intending to form a *matrimonium iniustum* were not hindered by the authorities from forming such a union; they were only denied the effects of a lawful Roman marriage.

With respect to the status of children, the general principle was that where the parents possessed the *ius conubii* and were lawfully married their children acquired the status of the father at the time of conception (a rule of the *ius civile*). In all other cases, the children acquired the status of their mother at the time of birth (a rule of the *ius gentium*).[78]

2.3.3 Forms of Marriage: Cum Manu and Sine Manu

In our previous discussion of the family relationship, we noted that the wife of a *paterfamilias* could fall under his *potestas* when she had married him in a particular way. This form of conclusion of marriage originated in the earliest period of Roman history and was known as *conventio in manum*. *Manus*, the power of the husband over the wife, legally resembled *patria potestas*—in a marriage *cum manu* the wife was 'in the hand' (*manus*) of her husband or, if he was himself *in potestate*, in that of his *paterfamilias*.[79]

[77] This should not be confused with the *matrimonium iuris gentium*, 'peregrine marriage', found as a category of marriage in early twentieth century Romanist terminology but unknown in Roman legal literature. It would be misleading to describe the *matrimonium non iustum* as a *de facto* marriage, since a legitimate Roman marriage was itself a *de facto* relationship based on the parties' consent. The concept of *matrimonium non iustum* should be understood as referring to a marriage without legal effects, rather than a *de facto* marriage.

[78] This rule of the *ius gentium* was qualified by a *lex Minicia* (of uncertain date, probably early first century BC), which provided that a child born of parents of a different *status civitatis* should receive the status of the inferior party. According to this law, the child from a union between a foreigner or Latin without *conubium* and a Roman citizen was deemed a foreigner or Latin.

[79] G 1. 109.

There were three processes by which a woman was transferred into the *manus* of her husband: *confarreatio*, *coemptio* and *usus*.[80]

Confarreatio was a religious ceremony that created both *manus* and the marriage itself.[81] The rite was performed at the bridegroom's house and consisted of the solemn sacrifice of a special loaf (*panis farreus*) to the god Jupiter. Formal words were spoken in the presence of ten witnesses and under the supervision of a priest of Jupiter (*flamen dialis*) and the chief priest (*pontifex maximus*). The ceremony had the effect that the woman came under the protection of the household gods of her husband's family and simultaneously fell under his *manus*.

Coemptio was a purely legal ceremony. It consisted of the formal conveyance of the wife to the husband by means of a fictitious sale conducted according to the technical procedure of *mancipatio* (also employed for *adoptio* and *emancipatio*). Like *confarreatio*, the *coemptio* created both *manus* and the actual marriage.

Usus, the third method of acquiring *manus*, did not involve a specific form of process. One might construe this method as the acquisition of *manus* by prescription: a woman who remained with her husband and under his authority for an uninterrupted period of 1 year fell under his *manus* by *usus*.[82] However, the acquisition of *manus* could not be accomplished if the wife stayed away from the matrimonial home for three successive nights (*absentia trinoctium*) before the year was over.[83]

The main legal effect of the marriage *cum manu* was that the woman passed into the power of her husband or, if he was himself *in potestate*, into the power of his *paterfamilias*. This implies that if she had been *sui iuris,* this mode of marriage rendered her *alieni iuris* and her property at the time of the conclusion of the marriage as well as all that she subsequently acquired passed to her husband or his *pater*. If she had been under the *potestas* of her *paterfamilias*, she left her original family in becoming a member of her husband's family. It should be noted, moreover, that a wife *in manu* was considered to be in the position of a daughter (*filiae loco*) in respect of her husband and in the position of a sister (*sororis loco*) in

[80] G 1. 110–115 b.

[81] This ancient form of marriage ceremony originated in the archaic period and was initially intended for the aristocracy.

[82] *Usus* was probably not a device employed to transform a marriage without *sine manu* into one *cum manu*; rather the marriage was presumed to be *cum manu* from the outset. Thus, *usus* was used if there had been a formal mistake in the case of the *confarreatio* or *coemptio* procedures and the parties still desired the establishment of *manus*. This method for acquisition of *manus* was similar to *usucapio*, by which the lack of ownership in the recipient of a *res mancipi* transferred to him without *mancipatio* would be made good by 1 year of continued possession (or 2 years in the case of land). See the relevant discussion in the chapter on the Roman law of property below.

[83] According to Gaius, the *trinoctium* was an innovation of the Law of the Twelve Tables. This suggests that the legislation contained some express provision on the subject. Furthermore, it appears that the emphasis was on the avoidance of *manus* rather than on its acquisition and this indicates that, prior to the introduction of *usus*, the typical form of marriage was marriage with *manus*.

respect of her children. A woman married *cum manu* was called *materfamilias* and enjoyed the highest regard in the community.

In the earliest stage of Roman history all marriages were *cum manu*, but a new form of marriage emerged during the republican age as family relationships became less rigid and women acquired a greater degree of independence (probably under the influence of Greek individualistic ethics): this novel marriage *sine manu* did not involve *manus*. In the closing years of the Republic and during the Principate, the marriage *sine manu* was the customary form of marriage that had evolved to supersede the *cum manu* marriage by the time of Justinian.[84]

The manner in which a marriage *sine manu* was concluded related to the creation of a *cum manu* marriage by *usus*. As noted earlier, the wife who wished to avoid coming under the *manus* of her husband had only to ensure that she was absent from the marital home for three consecutive nights each year (*absentia trinoctium*). Instead of returning to her own agnatic family, she would return to the marital home on the fourth night and resume her previous position in her husband's household. By repeating this stratagem every year, she could continue in the marriage without ever transferring to the *manus* of her husband. However, when the marriage *cum manu* was later rendered obsolete the requirement of the *absentia trinoctium* for the creation and perpetuation of a marriage *sine manu* became redundant and all marriages were deemed to be *sine manu*.

When a marriage took place *sine manu*, the wife did not come under the power of her husband or his *paterfamilias* as she retained the status held before her marriage. If she had been *sui iuris*, this status prevailed during the marriage and thus all the property she possessed or subsequently acquired remained her own.[85] On the other hand, if she had been under *patria potestas* she remained a member of her original family and all that she acquired accrued to her own *paterfamilias*. In general, there were few legal effects of the *sine manu* marriage as the partners stood legally in the

[84] However, the ancient texts offer very little evidence as to when or how the transition from marriage *cum manu* to marriage *sine manu* occurred. Nineteenth century Roman legal scholarship assigned a date for the appearance of marriage *sine manu* that was extracted from the earliest known texts mentioning it: the tragedy *Cresphontes*, written shortly before 169 BC by Ennius (see Dionysius, *Rhetorica ad Herennium* 2. 24. 38); a commentary by Cato on the *lex Voconia*, enacted in 169 BC (Aulus Gellius, *Noctes Atticae* 17. 6. 1); and the *lex Cincia*, passed in 204 BC (*Fragmenta Vaticana* 302). In all the above texts, there is reference to the conflicting interests of a husband and wife with respect to property and such interests could only have existed in the context of a *sine manu* marriage. From the complete absence of any earlier textual references, Romanist scholars estimated that marriage *sine manu* was first introduced in the later second century BC. However, no clear account of the process that introduced the new form of marriage is offered pursuant to this theory. Some scholars proposed that the *sine manu* marriage was adopted from the Greeks; others expressed the view that it was originally practiced among the plebeians and was subsequently adopted by the entire community. It should be noted, moreover, that a number of more recent studies call in question the above theory and propose that the *sine manu* marriage was possible, even though uncommon, as early as the time of the Law of the Twelve Tables.

[85] As a *persona sui iuris*, the wife could enter into juristic acts (such as contracts) with her husband subject to certain limitations as to her right to stand surety.

same position as strangers to each other. In the course of time, however, the existence of a valid marriage was held to produce certain legal consequences: donations between husband and wife (*donationes inter virum et uxorem*) were prohibited[86]; the parties could not institute defaming actions against each other; and the assumption of liability by a wife for her husband's debt (*intercessio*) was considered null and void. A feature prejudicial to the wife was the so-called *praesumptio Muciana*: the rebuttable presumption that all the property a married woman possessed was given to her by her husband.[87]

An expectation normally associated with marriage was that the wife would share her husband's house as well as his status and social rank.[88] Furthermore, the husband was under the duty to maintain and protect his wife and was not permitted to abandon her or drive her away from the marital house without a properly obtained divorce.[89]

2.3.4 Matters Relating to Matrimonial Property: Dos and Donatio Propter Nuptias

From an early period, a general custom and moral duty for the father required him to bestow upon the bride a fortune or dowry (*dos*) when she entered into marriage. By the time of Justinian this moral duty had developed into a statutorily recognized legal duty.[90] As a general rule the bride's father supplied the dowry, although the relevant duty could also be discharged by the bride herself (if she was *sui iuris*) or another member of her family or even an outsider.[91] The primary purpose of the

[86] However, during the later imperial age this prohibition gradually fell into disuse.

[87] D 24.1.51.

[88] Although a wife was not required to adopt her husband's name, many married women did so, especially during the imperial age.

[89] By means of the *interdictum de uxore ducenda*, a husband could force his wife to return to the marital house if she had voluntarily left. Moreover, if she was forced to stay away by a third person, the husband could take action against such third person by means of the *interdictum de uxore exhibenda*.

[90] C 5. 12. 14. The relevant property could be transferred before or after the conclusion of the marriage without any formality. A *dos* could also be established by means of a unilateral undertaking by the giver to supply the relevant property (*dotis dictio*), or by means of a formal oral agreement generating reciprocal rights and duties with respect to the giving of a *dos*. In the age of Justinian, these formal methods for the creation of a *dos* were replaced by an informal oral or written promise (*pactum legitimum*) to furnish such *dos*. Consider C 5. 11. 6.

[91] When the dowry was provided by the father, or by any ascendant in the paternal line, or even by an outsider as a gift to the father, it was called *dos profecticia* (D 23. 3. 5). A dowry furnished by another person or by the bride herself was referred to as *dos adventicia*. When the dowry was supplied by a third person (*extraneus*) on the understanding that it was to be returned to that person on termination of the marriage it was known as *dos recepticia*.

dowry was to serve as a contribution to the necessary expenses a marriage involved (*ad onera matrimonii sustinenda*), such as those requisite for the maintenance of the common household and the upbringing of children.[92] This emphasis adapted over time to influences such as Christian humanitarian principles, and the chief function of the dowry came to be the protection of the wife and children after the marriage was dissolved by the death of the other spouse or by divorce.

The *dos* could consist of any form of property: corporeal or incorporeal, movable or immovable (e.g., money, land, an inheritance, or any legal act that enlarged the parties' estate).[93] The relevant property transferred to the possession of the husband who, in principle, could use it as he saw fit.[94] Since the early principate period, however, the husband's rights over the *dos* were increasingly restricted to such an extent that his ownership over this property had become mainly formal in Justinian's era. Thus, the husband was required to preserve the *dos* as far as possible and to restore it to the person who supplied it or transfer it to his wife and children on termination of the marriage. Under Justinian's law, ownership of the *dos* was in effect retained by the wife while the position of the husband was in reality that of a usufructuary.[95]

We may now consider the question of what became of the *dos* after dissolution of the marriage. From an early period it was recognized that if the marriage was dissolved the *dos* (or a portion of it) had to be returned to the wife or her family in accordance with the purpose, noted above, of protecting the wife and children under such circumstances. Under the law of Justinian, if the wife died or if the marriage was dissolved by divorce caused by the wife's misconduct the *dos* became the property of the children while the husband retained the use of it.[96] If, on the other hand, the marriage was terminated by the death of the husband or divorce not caused by the fault of the wife, the *dos* had to be returned to the wife.[97]

The return of the *dos* could be claimed by an *actio ex stipulatu* if such return was guaranteed by *stipulatio*[98] between the husband and the provider of the *dos*. Since the republican period, the restoration of the *dos* could be enforced in the

[92] D 17. 2. 65. 16; D 10. 2. 20. 2; D 23. 3. 56. 1.

[93] Whatever was acquired by exploitation of the assets of the *dos* became part of it. D 23. 3. 32.

[94] D 23. 3. 1.

[95] *Usufructus*: the right to use property belonging to another and to take produce from it without damaging or otherwise impairing its substance. On the treatment of *dos* during the reign of Justinian see C 5. 12. 30 pr.

[96] C 5. 13. 1. 6; *Nov* 117. 8 pr; 13. If the marriage was dissolved by the death of the wife, the *dos profecticia* given by her *paterfamilias* had to be returned to him. See C 5. 18. 4.

[97] It should be noted that the parties retained the right to determine in advance what should happen to the dowry after termination of the marriage. Consider C 5. 13. 1. 6.

[98] The *stipulatio* was a formal oral contract concluded in the form of a question and an affirming answer. It could be used for the creation of any kind of obligation, including the promise of marriage and the establishment of a dowry. The nature and development of *stipulatio* is discussed in the chapter on the law of obligations below.

absence of a *stipulatio* by the praetor granting the *actio rei uxoriae* to the wife or, in some instances, her father.[99] Since this action was based on good faith, the judge could take the circumstances of the particular case into account to formulate a decision.[100] By the time of Justinian, the *actio rei uxoriae* had been replaced by the *actio dotis* (also known as *actio de dote*).[101] Furthermore, the wife was accorded a privileged tacit hypothec over her husband's property to secure the return of her dowry. As a result, her action directed at the return of the *dos* was given priority over the claims of any creditor of her husband. In addition, after the termination of the marriage she could initiate an *actio hypothecaria* to claim possession of the property contained in the *dos* from anybody in possession of such property.[102]

The later imperial age featured the development of another institution that originated in the East: the *donatio propter nuptias* (gift on account of marriage). Closely linked with the *dos*, this encompassed a donation given by the husband to the wife with the purpose of providing for her and their children if the marriage was dissolved by divorce or by the husband's death.[103] In time, the tendency developed to regard the *donatio propter nuptias* as serving the interests of the children rather than those of the wife. Thus, the position of a wife who remarried after the death of her husband was merely that of a usufructuary with respect to the donation until the actual ownership over it accrued to the children.[104]

The rules concerning the restitution of the *donatio propter nuptias* in the case of termination of marriage by divorce or the husband's death were very similar to those applicable to the *dos*. Furthermore, just as in the case of the *dos*, the husband had the right of disposal with respect to the donation during the marriage but this right was subject to several limitations almost identical to those relating to the *dos*.

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[99] The development of the *actio rei uxoriae* has been the subject of much controversy among contemporary Romanists.

[100] In certain cases, the husband could exercise specific rights of retention by means of deductions from the dowry. Thus, a deduction applied for goods the husband had donated to his wife during the marriage (*propter res donates*); for property removed by the wife (*propter res amotas*); and where the woman had been guilty of immorality (*propter mores*). It also applied in respect of expenses the husband had incurred with regard to the maintenance of the *dos* (*propter impensas*).

[101] On the recovery of the dowry following the termination of marriage see D 24. 3.

[102] *Inst* 4. 6. 29; C 5. 12. 30 pr-1.

[103] This donation was originally given before the marriage (hence it was referred to as *donatio ante nuptias*). Justinian allowed this fund to be furnished before or after the marriage and altered its name to *donatio propter nuptias*. He provided, moreover, that where a donation had been given before the marriage it could be augmented after the marriage. This was a continuation of a rule introduced by Emperor Justin, Justinian's predecessor.

[104] See C 6. 61. 3; C 5. 9. 3; C 5. 17. 8. 4 & 7.

2.3.5 Dissolution of Marriage

A Roman marriage could be dissolved in various ways: by the death, loss of liberty or loss of citizenship of either party,[105] or by divorce (*divortium*)—the latter existed as the most common form of ending a marriage.

In contrast with modern legal systems that regard divorce as a juristic act performed in a court of law, Roman divorce was a purely factual act initiated by the person concerned in accordance with established religious and moral principles. As a marriage was informally concluded by *consensus*, it could be dissolved by divorce if one or both parties declared the wish to no longer remain married and terminated the cohabitation.[106] However, a temporary abandonment of the common household by a spouse in a state of excitement did not amount to *divortium*. Although no formalities were required for this declaration of separation (*repudium*), to provide certainty as to whether a divorce had actually taken place it was customary to send a letter of separation (*libellus repudii*).[107]

As is often the case in modern and traditional societies, a high divorce rate was viewed as a threat to social stability and hence various measures were introduced at different epochs designed to address this problem. During the earliest period of Roman history, divorce was permitted only if the wife had committed adultery or another serious breach of family or matrimonial duties or if she could not bear

[105] Although enslavement *iure civili* of one of the parties terminated the marriage, there is some uncertainty as to the effect of captivity. The dominant view is that in such cases the marriage was dissolved and not automatically re-established by *postliminium* (the restoration of a former captive to the position he had prior to his enslavement). See D 24. 2. 1. Under Justinian, however, captivity could result in the dissolution of a marriage only if 5 years had passed and the surviving party was convinced that the other party had perished in captivity (*divortium bona gratia factum*). Apart from this situation, the absence of one of the spouses (however prolonged and without news) left the marriage unaffected. If one of the parties lost citizenship (e.g. as a result of a *capitis deminutio*), a regular marriage (*iustum matrimonium*) either became an irregular marriage (*matrimonium non iustum*) or was terminated. Whether the marriage was to be dissolved or not was at the discretion of the party whose status remained unchanged. In Justinian's reign, loss of citizenship did not result in the dissolution of marriage. It should be noted, moreover, that there were cases in which marriage was dissolved by law. These cases occurred where a prohibition or legal impediment in respect of a marriage between the parties emerged after the conclusion of such marriage (such prohibition was known as *impedimentum superveniens*). For example, if a father adopted his daughter's husband or his son's wife the marriage became incestuous and was terminated (a case of *incestum superveniens*).

[106] D 24. 2. 3. It is believed that divorce was infrequent in early times when the marriage *cum manu* was the rule. The dissolution of a *cum manu* marriage was accomplished by a contrary process (*contrarius actus*): by *diffarreatio* where the marriage had been concluded by *confarreatio*; and by the husband fictitiously reselling his wife (*remancipatio*) where the parties had been married by *coemptio*. Usually, however, the marriage bond was severed where the husband repudiated or rejected his wife by means of a unilateral declaration (*repudium*). It should be noted that the wife does not appear to have had the power to request a divorce before the middle of the republican period.

[107] D 24. 2. 7; C 5. 17. 6.

children.[108] Although the relevant moral norms weakened considerably during the later republican age, divorce without a good cause was nevertheless regarded in some sense as dishonourable and entailed certain social sanctions.[109] Soon after his accession to power, Augustus enacted the *lex Iulia de adulteriis* (18 BC) whereby divorce was made compulsory in the case of adultery.[110] At the same time, however, his *lex Iulia de maritandis ordinibus* (18 BC) introduced certain limitations on the right to obtain a divorce. Under the legislation of Christian emperors in the later imperial period, the practice of divorce was further restricted and severe penalties were decreed for those who unilaterally repudiated their marriage without a good reason.[111] However, the principle of the dissolubility of marriage was never called into question.

2.4 Guardianship and Curatorship

In principle, a *sui iuris* Roman citizen enjoyed all the rights of citizenship and could own property as well as perform legal acts. In practice, however, certain *sui iuris* individuals were wholly or partially unable to conduct their own affairs on account of their immaturity, gender, or mental disability or impairment. Such persons were therefore in need of protection and for this reason were placed under guardianship (*tutela*) or curatorship (*cura*).

Two basic forms of guardianship were recognized: namely, guardianship over persons below the age of puberty (*tutela impuberum*) and guardianship over women (*tutela mulierum*). The existence of the latter manifests the essentially patriarchal nature of the early Roman society where a woman always had to remain under the control of a male (whether her father or her husband) or, if she was *sui iuris*, under guardianship. As women became progressively more independent over the course

[108] As already noted, the procreation of children was one of the chief purposes of marriage.

[109] These sanctions included the obligation to return the dowry and the stigmatization of the blameworthy party by the censors for immoral behaviour (*nota censoria*). With respect to the latter, it should be observed that the stigmatized person (*notatus*) was branded with *ignominia* denoting the deprivation of one's good name. This should be distinguished from infamy (*infamia*), the diminution of one's estimation among his fellow citizens that was attached to a variety of forms of disgraceful behaviour. *Infamia* entailed certain civil disabilities that varied according to the grounds for the infamy.

[110] A husband whose wife had committed adultery had to divorce her, otherwise he could be found guilty of match-making (*lenocidium*).

[111] The party who dissolved the marriage without proper cause suffered financial penalties. In certain cases, the woman could even be banished and the man forbidden from ever marrying again. Good causes for divorce included adultery, promiscuous behaviour, abuse, an attempt on life, sorcery and desecration of a grave or tomb. Justinian drew a distinction between justified separation (*repudium ex iusta causa*) and unjustified separation (*repudium sine iusta causa*). In AD 542, he introduced a law prohibiting divorce by mutual consent but this law was repealed by his successor, Justin II, in AD 566.

of time, this form of guardianship lost its significance and had virtually disappeared from the scene at the end of the Principate age.[112]

Curatorship (*cura*) became relevant where a *sui iuris* person above the age of puberty was incapable of managing his own affairs due to some disability. Curatorship occurred in various forms, the most common being curatorship in respect of juveniles above the age of puberty but under 25 years of age (*cura minorum*), insane persons (*cura furiosi*) and prodigals (*cura prodigi*).

2.4.1 Tutela Impuberum

This form of guardianship pertained to persons who were *sui iuris* but still below the age of puberty (*impuberes*) which was classified as under 14 years of age for a male and under 12 years of age for a female.[113] The principal purpose for the creation of guardianship over children of this age was to maintain and safeguard their property interests.[114] The person appointed to protect the person and interests of the *impubes* (now referred to as *pupillus*) was the guardian (*tutor*), and his functions are qualified as a power (*potestas*).[115] Originally, any male Roman citizen above the age of puberty could serve as a guardian but in the later imperial age the minimum age for tutors was raised to 25 years. When guardianship became regarded as primarily a public duty (*munus publicum*), the person appointed as guardian had to accept the office. In certain circumstances pleas for declining this appointment (*excusationes*) were allowed based on, for example, advanced age, the tenure of certain offices or exercise of certain professions.[116]

There were three principal forms of *tutela impuberum*: *testamentaria*, *legitima* and *dativa*.

The *tutela testamentaria* was the most common and important form of guardianship, which dated from the time of the Twelve Tables. This legislation allowed a *paterfamilias* to appoint, in his will, a guardian (or guardians) for his children below the age of puberty who were his *sui heredes*, i.e., those in his *potestas* who would become *sui iuris* on his death.[117]

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[112] In the time of Justinian the *tutela mulierum* was no longer in existence.

[113] The following categories of *impuberes* were recognized: *infantes*, those unable to speak (from AD 407 this category encompassed those below 7 years of age); *infanti proximi*, those who had somewhat exceeded the age of infancy; and *infanti maiores*, those near the age of puberty.

[114] *Inst* 1. 13. 1: "*tutela*. . .is a right and power exercised over a free person who on account of tender years cannot take care of himself, given and allowed by the civil law." And see D 26. 1. 1 pr.

[115] The guardian's *potestas*, however, was not so extensive as the *patria potestas*.

[116] Individuals with physical defects were excluded whereas mental disabilities provided a ground for exemption from appointment as guardians.

[117] This appointment usually occurred when the father foresaw that he would die before his children reached the age of puberty. A guardian could be appointed by testament even for a grandchild of the testator, provided that such grandchild did not have his own *paterfamilias* into whose power he would pass upon the testator's death (G 1. 146). Furthermore, a father could

The *tutela legitima* arose in the absence of a testamentary guardian (*tutor testamentarius*). According to the Law of the Twelve Tables, if a testator failed to appoint a guardian for a child below the age of puberty who was to become *sui iuris* at the testator's death, the nearest agnates (*proximi agnati*)[118] of the child became *ipso iure* (automatically) his or her guardians provided that such agnates were themselves above the age of puberty. In such cases, the guardianship was regarded as having been granted by operation of law (hence the term *tutela legitima*) to those individuals who would be the first to inherit according to the principles of intestate succession (*ab intestato*) from the child if the latter died before reaching the age of puberty. In the time of Justinian, preference was given to the nearest cognatic relatives (*proximi cognati*)[119] rather than the nearest agnates which thereby aligned the appointment of *tutores legitimi* with Justinian's legislation regulating intestate succession.[120]

There were two further cases of guardianship by law, namely pertaining to patrons (*tutela legitima patronorum*) and parents (*tutela legitima parentum*). The former was exercised by patrons (or, after their death, their children) over their freedmen manumitted from slavery while still under the age of puberty.[121] The latter form of *tutela legitima* occurred when a father emancipated his child who was still below the age of puberty. In such a case the father became by law the guardian of the emancipated child.[122]

In the absence of a *tutor testamentarius* or a *tutor legitimus*, certain legislative enactments provided that a magistrate should appoint a guardian for the child - the *lex Atilia* (probably late third century BC) and the *leges Iulia et Titia* (probably late

appoint guardians for children born after his death (*postumi*) or for emancipated children. See *Inst* 1. 13. 4; D 26. 3. 1. 1.

[118] These were persons related to each other in the paternal line and who were under the *potestas* of the same *paterfamilias* or who would have been if he were still alive.

[119] The term *cognatio* (blood relationship) was used to denote persons related through females (*cognati*).

[120] *Nov* 118.

[121] G 1. 165.

[122] *Inst* 1. 18. In this connection, it is germane to reference the so-called 'fiduciary guardianship' (*tutela fiduciaria*). This occurred in early times, when the system of emancipation by sales and manumission remained in force whereby the person who purchased a child from his father for the third time did not remancipate him to the father but manumitted the child himself. This accorded the manumitter (*manumissor extraneus*) fiduciary guardianship over the manumitted child, in the sense that the manumitter was bound to hold the right of succession in trust for the emancipating father. Justinian devised another meaning of the term *tutela fiduciaria* which he recognized as the only applicable meaning. If the emancipating father died while the emancipated child was still under the age of puberty, the guardianship passed to his children. For no particular reason, the latter were referred to as *tutores fiduciarii* and their guardianship was known as *tutela fiduciaria*. Consider on this matter *Inst* 1. 19.

first century BC). This form of guardianship was referred to as *tutela dativa*.[123] The *lex Atilia* stipulated that if the child lived in Rome or Italy the praetor and a majority of the *tribuni plebis* should appoint the guardian. According to the *leges Iulia et Titia*, if the child lived in the provinces the guardian should be appointed by the provincial governor (*praeses provinciae*).[124] In the later imperial age, guardians were appointed in Rome by the praetor or the *praefectus urbi* and in the provinces by the governor.[125]

A special form of official guardianship was the *tutela praetoria*, which was usually instituted in the case of a controversy or conflict of interests between an appointed guardian and his ward during the guardianship. In such a case the praetor appointed a special guardian (*tutor praetorius*) to protect the ward's interests.[126] In the time of Justinian, a *curator* rather than a *tutor praetorius* was appointed for this purpose.

2.4.1.1 Functions and Responsibilities of Guardians

In early times, a guardian's powers and functions were directed at the protection of both the person and property of the ward (*pupillus*). The scope of the *tutela* was almost identical to that of the *patria potestas* and the *tutor* stood in the position of an owner (*domini loco*) in respect of the ward's estate.[127] As Roman law progressed, however, the guardian's functions were limited to the administration of the ward's estate while the care for the ward's person was placed in the hands of the mother or other family members. Moreover, the guardian's role became more specific and his power over the ward's estate was restricted in many ways. An important criterion guiding the execution of a guardian's functions was good faith (*bona fides*) at all times. The relationship of trust between *tutor* and ward was so crucial that, under the law of Justinian, guardianship was regarded as a situation engendering obligations analogous to those that originated from contracts.[128]

A guardian's functions and powers varied depending on the age of their ward. If the ward was an *infans* (i.e. under the age of 7 years) or not much further developed than an *infans* (*proximus infantiae*) and thus totally without legal capacity, he had to rely, in all respects, on the assistance of his guardian who administered the ward's affairs and performed all transactions relating to his estate. Since Roman law did not

[123] A *tutela dativa* could also be established where a *tutor testamentarius* had been appointed subject to a suspensive condition or period of time. Until the relevant condition had been met or time period had elapsed, a *tutor* was appointed by the relevant magistrate. The same occurred where a *tutor* had been nominated under an invalid will.

[124] G 1. 185.

[125] If the assets at issue were relatively small, the appointment of guardians was made by lesser local magistrates. Consider *Inst* 1. 20. 4–5.

[126] G 1. 184.

[127] D 26. 7. 27.

[128] Thus, the *tutela* was viewed as a form of *quasi-contractus*. Consider *Inst* 3. 27. 2. And see the discussion of quasi-contracts in the chapter on the law of obligations below.

recognize a concept of agency,[129] the relevant transactions were entered into by the guardian in his own name and had legal effect towards him rather than the ward.[130]

If the ward was beyond the age of infancy (i.e. over the age of 7), he had limited legal capacity and could enter unassisted into legal transactions whereby his position was improved.[131] However, if the relevant transaction had the potential to worsen the ward's position it could only be performed with the express approval of the guardian (*auctoritas*, *auctoritatis interpositio*).[132] In other words, without the guardian's approval the ward could acquire rights but could not alienate them nor incur duties. As most transactions engendered reciprocal rights and duties, the ward's transactions hinged upon the guardian's approval even if on balance they appeared beneficial for the ward. If the ward entered into a bilateral contract without such approval, the result was classified as a 'limping transaction' (*negotium claudicans*): only the other party was bound to the transaction and not the ward, although the latter could not demand performance from the other party unless he was prepared to do likewise.[133] Furthermore, a guardian who granted his approval irresponsibly and without due attention to the ward's interests could be held personally liable for the detrimental consequences of his approval or the praetor could order the reinstatement of the former legal position (*restitutio in integrum*).[134]

As already noted, initially the guardian was regarded as having the same powers as an owner (*domini loco*) in respect of the ward's estate, which he could alienate as he saw fit. In time, however, the guardian's right to dispose of the ward's property was restricted by a series of measures. Certain acts of the guardian were forbidden, such as donations out of the ward's estate (except small ones within the family)[135] and transactions that could entail a conflict of interests between the guardian and the ward.[136] A further restriction on the *tutor*'s power of alienation was imposed in AD 195 by a resolution of the senate on instigation of Emperor Severus (*oratio Severi*), which prohibited the disposal or encumbrance (by means of a hypothec or

[129] According to the principles of modern agency law, a person (the agent) who acts on behalf of another (the principal) could create both rights and duties in the principal and incur neither himself. In Roman law, the idea of agency emerged in the late post-classical period.

[130] A practical solution to this problem involved using a slave belonging to the ward to enter into legal acts regarding the latter's estate. In such cases, all that the slave acquired accrued to the ward.

[131] *Inst* 1. 21 pr. And see G 3. 107; D 26. 8. 9.

[132] The guardian had to be present and give his assent to the transaction.

[133] For instance, if a ward had without his guardian's approval agreed to sell part of his estate, he acquired a right to the price but could not enforce that right unless he delivered the property—a delivery which itself required the consent of the guardian. If the ward delivered the property in question without the guardian's *auctoritas*, he could reclaim it. The other party, however, could never take the initiative to enforce the relevant agreement.

[134] For an account of the *restitutio in integrum* see the relevant discussion in the chapter on the law of actions below.

[135] D 26. 7. 22; D 27. 3. 1. 1.

[136] D 26. 8. 1 pr.

servitude) of agricultural and undeveloped urban land (*praedia rustica et suburbana*) belonging to the ward.[137] Constantine extended this prohibition to developed urban land (*praedia urbana*) and other valuable assets of the estate, while Justinian limited the *tutor*'s powers even further by only allowing him the right to administer and alienate the proceeds of the estate. It was provided that assets of the estate could be sold only in case of necessity and with the approval of the relevant magistrate.

Moreover, certain obligations were placed upon the guardian: he had to prepare an inventory (*repertorium* or *inventarium*) of all the items belonging to the ward's estate at the commencement of his office,[138] and in certain instances was required to provide security for the safety and proper administration of the estate (*cautio rem pupilli salvam fore*).[139]

A number of remedies were provided against a *tutor* who had been found guilty of maladministration of the ward's estate. If the *tutor* fraudulently embezzled the estate, the ward could institute a remedy known as *actio de rationibus distrahendis* against the *tutor* at the end of the guardianship. This action was delictual in nature and was directed at twice (*in duplum*) the damage suffered by the ward.[140] Another more general action deriving from the republican age was labelled the *actio tutelae*. This was an *actio bonae fidei*[141] that the ward could instigate against his guardian after termination of the *tutela* on the grounds of any dereliction of duty by the latter. With this action, the ward sought the return of any acquisitions made for the estate by the *tutor* as well as the recovery of damages caused by the fraudulent intent (*dolus malus*) or negligence (*culpa*) of the *tutor* during the course of his administration of the ward's estate.[142] Emperor Constantine introduced a further means of protection of the ward's interests that enabled the creation of a tacit hypothec (*tacita hypotheca*) on the *tutor*'s estate to secure any claims the ward might have against his tutor.[143]

It should be noted, finally, that from the time of the Twelve Tables the *tutor* who had acted fraudulently or dishonestly in managing the ward's affairs could always

[137] D 27. 9. 1.

[138] D 26. 7. 7 pr.

[139] G 1. 199; *Inst* 1. 24 pr; D 26. 4. 5. 1; D 46. 6. 11.

[140] D 27. 3. 1. 19–24; D 27. 3. 2; D 26. 7. 55. 1.

[141] The criterion in this case was good faith (*bona fides*). An *actio bonae fidei* presented the judge with a greater latitude of discretion, allowing him to take into equitable consideration all facts relating to the case.

[142] Moreover, where the *tutor* had provided security for the proper management of the ward's estate the latter could enforce it by means of the *actio tutelae*. If the *tutor* was sued by the *actio tutelae* and condemned, he could be branded with dishonour (*infamia*). It should be noted that a guardian could institute an *actio tutelae contraria* against the ward for disbursements from his own estate and damages suffered as a result of the guardianship. See D 3. 2. 1; G 4. 182; D 26. 7. 39; D 27. 4. 1.

[143] C 5. 30. 5; C 5. 37. 20. This allowed the ward to employ the *actio hypothecaria* (also called *actio quasi Serviana*).

be removed by means of a criminal action brought against the *tutor* (*accusatio suspecti tutoris*, *crimen suspecti tutoris*) before the praetor or the provincial governor.[144]

2.4.1.2 Termination of Guardianship

The *tutela impuberum* usually ended when the ward reached the age of puberty. Other ways of termination of the *tutela* were by the death of the ward; the *capitis deminutio* of the guardian; the fulfilment of a condition in accordance with which the guardian had been appointed; a successful claim of exemption (*excusatio*); and a successful *accusatio suspecti tutoris*.

2.4.2 Tutela Mulierum

Women who were neither under the *potestas* of a *paterfamilias* nor under the *manus* of a husband (i.e. women who were *sui iuris*) remained subject to guardianship.[145] According to Gaius, the original reason for the establishment of this form of guardianship (*tutela mulierum*) was the perception that women could be easily manipulated due to their gender 'weakness' (*infirmitas sexus*), natural lack of judgment and intellectual limitations.[146] The appointment of a woman's *tutor* occurred in the same manner as that of the *tutor impuberis*: by testament of the person (father or husband) who had power over her; by law (in which case she was placed under the guardianship of her agnates); or by a magistrate. The principal responsibility of the *tutor mulieris* was to grant his authorization (*auctoritas*) in respect of important juristic acts performed by the woman, such as manumission of slaves, acceptance of an inheritance, preparing a testament and assuming an obligation. As noted earlier, the growing independence of women entailed a gradual demise in the institution of *tutela mulierum* even though in theory it continued to exist until the time of Diocletian (AD 284–305).

2.4.3 Curatorship

Curatorship (*cura* or *curatio*), a familiar institution in the time of the Twelve Tables, was employed whenever a *sui iuris* person above the age of puberty was

[144] D 26. 10; C 5. 43; *Inst* 1. 26; G. 1. 182. As the relevant *crimen* was a matter of public law, the *accusatio suspecti tutoris* could be instituted by any person. The removed *tutor* was usually branded with *infamia*.

[145] Obviously, *sui iuris* girls under the age of puberty were still subject to *tutela impuberum.*

[146] G 1. 144; G. 1. 190.

not capable of managing his own affairs due to some disability. Since the relevant disabilities varied with respect to their nature and cause, different types of curatorship existed and the tasks of the *curator* depended upon the particular disability. Two principal forms of curatorship were elaborated by the Law of the Twelve Tables: over insane persons (*cura furiosi*) and over prodigals (*cura prodigi*). However, since the Principate age the main function of curatorship was the management of the affairs of *sui iuris* persons above the age of puberty but under the age of 25; that is, persons who had not yet reached full maturity (*cura minorum*). A number of other forms of curatorship existed,[147] but the present discussion will be limited to the above-mentioned three kinds.

2.4.3.1 Cura Minorum

In principle, *sui iuris* persons above the age of puberty enjoyed full legal capacity. However, in the later republican period it became obvious that puberty was not an age at which a young person could competently manage his own affairs. Instead of extending the period of *tutela*, the Romans initially sought to address this problem by devising the *lex Plaetoria* (or *Laetoria*) around 200 BC which contained punitive measures designed to protect a minor who had been defrauded in a transaction by another person who took advantage of the former's lack of experience. The relevant transaction, though penalized remained nonetheless valid in principle and the praetor was left with the task of fully implementing the purpose of the statute. The praetor did so in two ways: if the transaction had not yet been carried out and the other party sued, the minor was granted a defence in bar of the action (*exceptio legis Plaetoriae*); if, on the other hand, the transaction had been carried out and the minor had suffered loss, the praetor granted a restoration of the previous legal position or status *quo ante* (*restitutio in integrum*).[148] Because of the possibility of the praetor's intervention, the practice developed where persons wishing to conduct business with a minor required the magistrate's appointment of an independent adult (a *curator*) to approve the transaction. Originally, the *curator* had no formal

[147] These included, for example, the curatorship over feeble-minded or mentally handicapped persons (*mente capti*) and over persons who suffered from certain physical disabilities, such as deaf persons (*surdi*), dumb persons (*muti*) and persons suffering from an incurable illness (*qui morbo perpetuo laborant*). Consider *Inst* 1. 23. 4; D 26. 5. 8. 3; D 27. 10. 2.

[148] D 4. 4. 13. 1. The young person had to request this extraordinary praetorian remedy within 1 year from the time he reached the age of 25 (within 4 years under Justinian's law). The grant of the remedy lay in the magistrate's discretion, although in the course of time certain principles emerged. It was recognized that proof of fraud was not a necessary requirement; it was sufficient that the minor had through inexperience concluded a prejudicial transaction. Moreover, there need not even have been another party to the relevant transaction; for example, the praetor could grant the remedy if the young person unwisely accepted an inheritance through which he became liable for the deceased person's debts. If, however, the transaction was reasonable at the time it was concluded but had subsequently turned out badly, the minor could not rely on such a remedy. On the *restitutio in integrum,* see the relevant section in the chapter on the law of actions below.

legal recognition and this status prevailed for a long time as they were merely deemed someone appointed *ad hoc* when the need arose for a specific transaction. However, from the late second century AD it became possible for a minor to request the appointment of a permanent *curator* to assist him throughout his minority.[149]

Despite the external resemblance between curatorship over minors and tutelage over children, the two institutions differed in some important respects. Probably the most important difference between them was that, otherwise than in the case of the *tutor*, the *curator* did not exercise *auctoritas* but simply had to grant his consent (*consensus*) to the transaction entered into by the minor.[150] As noted earlier, under certain conditions the *tutor*'s *auctoritas* was both necessary and sufficient for the transaction to produce its intended effects. The *curator*'s consent, on the other hand, was neither necessary nor in itself sufficient but existed as only one form of evidence (undoubtedly, the most important evidence) that the transaction favoured the minor's interest. If a minor entered into a transaction that was disadvantageous, he could obtain a *restitutio in integrum* from the praetor regardless of whether he acted with or without a *curator*'s consent (though in the former case, such a remedy would less easily be accorded). In the later imperial age, however, there was a gradual blurring of the distinction between the *curator* and the *tutor* that culminated in the *cura minorum* almost completely assimilated to the *tutela impuberum* by the time of Justinian.[151]

A minor who suffered damage as a result of his *curator*'s negligence or maladministration could employ the *actio negotiorum gestorum* in the same way as a person under tutelage could rely on the *actio tutelae* mentioned previously.[152]

Although in earlier times it appears that a minor was free to decide whether or not he wished to have a *curator*, in Justinian's time the rule prevailed that a minor should always be assisted by a *curator* unless the emperor had granted to the minor *venia aetatis*—a privilege whereby the minor was deemed to have already reached the age of 25 years. Such privilege could be granted only to men over the age of 20 and to women over the age of 18.[153]

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[149] D 4. 4. 1. 3. It was possible for more than one *curator* to be appointed for a single minor. Moreover, a *curator* could be appointed by will in which case his appointment had to be approved by a magistrate.

[150] The *curator*'s consent could be granted before or after the transaction, in the latter case by means of ratification.

[151] Thus, in post-classical law the act of a minor who had a *curator* was deemed void if conducted without the latter's *consensus*. Pursuant to Justinian's law, the relationship between the *curator* and the minor under his curatorship was regarded as a quasi-contract.

[152] The minor could use this action for the recovery of damages caused by the improper management of his affairs by the *curator,* while the latter could institute the *actio negotiorum gestorum contraria* for the reimbursement of expenses he incurred in the execution of his functions.

[153] The *venia aetatis* was usually granted to young persons who displayed a certain degree of maturity and intellectual development. It embodied all the rights associated with full legal capacity (except the right to alienate or hypothecate immovable property without a court decree). This institution has been adopted with variations by many modern legal systems.

2.4.3.2 Cura Furiosi

The curatorship over insane persons (*cura furiosi*) derived from the time of the Twelve Tables which featured provisions for such persons deemed incapable of managing their own affairs[154] and thus had to be placed under the care and custody of their nearest agnates (*proximi agnati*) or kinsmen (*gentiles*).[155] In the absence of such relatives, a *curator* could be appointed by the praetor.[156]

The *curator* had responsibility for the care over both the person and property of his ward, and his functions and responsibilities closely resembled those of the *tutor*. Thus, he administered the ward's affairs and had to authorize all transactions concerning the latter's estate. Furthermore, the *curator* was regarded as being in the place of an owner (*domini loco*) with respect to his ward's estate and could alienate assets of the latter as he saw fit. At the same time, however, he was liable for maladministration and could be sued by means of the *actio negotiorum gestorum* when the curatorship ended.[157]

The *cura furiosi* continued as long as the insanity was present and ended automatically when the ward regained sanity.[158]

2.4.3.3 Cura Prodigi

Cura prodigi was curatorship over a prodigal or spendthrift person, that is, a person who wasted away his property in a reckless and irresponsible way. Although a *prodigus* was not naturally incapable, the Law of the Twelve Tables provided that the estate of such a person could be placed under the supervision of the nearest *agnati* or *gentiles*. In later times, the praetor appointed the *curator prodigi* and this was preceded by a praetorian decree (*interdictio*) that debarred the spendthrift from managing his own property. The *curator prodigi* exercised control only in respect of the spendthrift's property,[159] but not in respect of his person. In all other respects, his functions and responsibilities largely overlapped with those of the *curator furiosi*.

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[154] Like an *infans*, a *furiosus* was regarded as having no *intellectus*, i.e. as being incapable of understanding his actions.

[155] The *cura furiosi* came into effect automatically at the manifestation of insanity.

[156] The father of the insane person could also appoint a *curator* by testament. The law of Justinian stipulated that the appointment of a *curator*, irrespective of the method employed, had to be confirmed by a magistrate. *Inst* 1. 23. 1.

[157] D 27. 3. 4. A *curator* could seek to enforce his claims against his ward by a counter-action (*actio negotiorum gestorum contraria*).

[158] If an insane person experienced a period of lucidness (*intervalla dilucida*) during which he regained his mental capacity, the *cura* was temporarily suspended. The *cura* was automatically restored when the insanity was revived. D 27. 10. 1 pr; C 5. 70. 6; C 6. 22. 9.

[159] The *curator* probably stood in the position of an owner (*domini loco*) in regards to the assets of the spendthrift's property.

Possessing the power of understanding (*intellectus*), the prodigal was not entirely deprived of legal capacity. Just like an *impubes* after *infantia*, he could conduct unassisted legal acts by which his position was improved whilst any transactions he entered into that entailed detriment to his interests were deemed null and void even if he had his *curator*'s *consensus*.

The *cura prodigi* was terminated by the death of the *prodigus*, or when the latter was in a position to establish convincingly that he had reformed himself and abandoned his wasteful ways.

Chapter 3
The Law of Property

3.1 Introductory

The Roman law of 'things' or, in contemporary terms, 'property' covered a much broader field than that encompassed by the modern law of property. One of the reasons for this fact is that the Roman jurists linked the thing (*res*) with any legally guaranteed economic interest, any right or rights having monetary value, that a person could hold in respect thereof. Hence, in their discussion of the law relating to things the jurists included the law of succession and a large part of the law of obligations. Modern legal systems, on the other hand, have adopted a different scheme that restricts the law of things to the law relating to things and real rights while the law of obligations and the law of succession are treated as separate parts of private law. Mainly for reasons of convenience, the present work largely follows the modern approach.

3.2 Definition and Classification of *Res*

The Roman concept of *res* did not remain fixed but underwent considerable development as its use changed following the evolution of society and economic relations. In the primitive agricultural community of the archaic age, only things a person could perceive with his senses, touch, hold and use were of interest (in short, things that were of service to him). In this context, the term *res* denoted merely physical objects; that is, things that could be touched (*quae tangi possunt*), possessed and used by a person.[1] During the later republican era, however, the evolving complexity of Roman

[1] The etymology of certain terms of the Roman law of property appears to support this interpretation of *res*. For example, the derivation of the term *mancipatio* (referring to a formal method of transferring ownership over certain types of property) from the phrase *manu capere* (holding or seizing by hand) suggests that originally only objects that could be delivered by hand (movables) could be privately owned.

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society and economic life meant the notion that there exist things that cannot be touched gained ground. Under the influence of Greek philosophical thought, intangibles and abstract creations of the human mind began to be treated by the Roman jurists as *res*. The practical implication of this evolution was that not only physical objects, but also abstract things (e.g. a debt, a right of way) were regarded as *res*. Eventually everything of economic value or appraisable in money that could be part of a person's estate (in short, all economic assets), whether corporeal or incorporeal, was regarded as *res*.[2] In other words, the term *res* may be understood to refer either to a corporeal object[3] or to the object of a right; furthermore, in its broadest sense, it may denote an estate in its entirety or property in a general sense.[4]

The Roman jurists classified things by reference to their physical nature, usage or the technical legal rules that applied in respect thereof. The various classifications formulated by the jurists are generally the result of historical development and represent an attempt at systematizing the relevant part of private law.

3.2.1 *Res in Nostro Patrimonio and Res Extra Nostrum Patrimonium*

A very early classification of things was between things that could form part of the private estate or assets of an individual, or within the sphere of trade (*res in nostro patrimonio* or *res in commercio*), and things that were not susceptible to private ownership, or outside the sphere of trade (*res extra nostrum patrimonium* or *res extra commercium*).[5]

The *res extra nostrum patrimonium* were, in turn, sub-classified into things subject to divine law or under the protection of the gods (*res divini iuris*) and things subject to human law that accrued to all people collectively (*res humani iuris*).[6] The former category encompassed things dedicated to the heavenly gods by an act of the state (*res sacrae*), such as temples, altars, chapels and groves[7]; things consecrated to the gods of the underworld (*res religiosae*), such as cemeteries; and things

[2] The Roman law of things thus excluded those rights that cannot generally be expressed in monetary terms, such as rights that emerge from the law of persons (e.g. the rights of a *paterfamilias* over his children).

[3] This also encompassed the slave, who was regarded as both a *res* and a *persona*.

[4] This broad understanding of *res* as including both objects and rights capable of being evaluated in monetary terms, developed primarily in connection with the notion of inheritance (*hereditas*).

[5] G 2. 1; *Inst* 2. 1 pr.

[6] G 2. 2: "The principal division of things is into two classes: things subject to divine law and things subject to human law." The *res humani iuris* were either public (and hence not capable of being privately owned) or subject to private ownership. See G 2. 10–11.

[7] Under the law of Justinian, the category of *res sacrae* also encompassed gifts 'duly dedicated to the service of God'. See *Inst* 2. 1. 8.

deemed to be under the protection of the gods because of the purposes they served (*res sanctae*), such as the walls and gates of a fortified city.[8]

Res humani iuris that were not capable of being privately owned included things deemed common to all mankind (*res communes*), such as the air, running water, the sea and its shores[9]; things belonging to the state for use of its citizens (*res publicae*), for example public roads, bridges, harbours, market places and so forth[10]; and things belonging to a particular city or municipality for the use and enjoyment of its inhabitants (*res universitatis*),[11] such as theatres, public baths, sports grounds, halls of justice and the like.[12]

3.2.2 Res Corporales and Res Incorporales

With respect to the *res in nostro patrimonio* (or *res in commercio*), a distinction was drawn between corporeal (*res corporales*) and incorporeal things (*res incorporales*). The former term referred to things that could be touched or perceived by the senses such as a garment, an ox, a table or a house. The term *res incorporales*, on the other hand, denoted intangible things or things not capable of sensory perception that the law recognized and protected, such as real and personal rights.[13]

It is important to note that ownership as such was not considered to be a *res incorporalis*, as ownership could only exist over a corporeal thing and, in this respect, the thing and the ownership right over it formed an indivisible entity. An individual can possess a corporeal object and have rights, such as ownership, over it. However, a *res incorporalis* cannot be understood in this way since it is not

[8] G 2. 3; G 2. 4; G 2. 8. Any wrongful act towards *res sanctae* was punishable by death.

[9] Members of the public had undefined rights of use and enjoyment of the seashore (e.g. they could erect shelters on it and had ownership over them as long as they remained standing), but this did not give them a permanent right to any part of the shore.

[10] A distinction was drawn between rivers that flowed throughout the year, which were regarded as *res publicae*, and rivers or streams that flowed only during the rainy season or at times of floods, which were considered *res communes*. D 43. 12. 1 & 3.

[11] The *res universitatis* may be said to constitute a sub-category of the *res publicae*.

[12] G 2. 10 & 11; *Inst* 2. 1. 1–6. Reference should be made in this connection to the term *res nullius*, meaning things belonging to no one at all (this term encompassed the *res divini iuris* mentioned above). However, as will be explained below, the same term was also used to denote things that were generally susceptible to private ownership but were not at the moment owned, such as wild animals or objects abandoned by their owners (*res derelictae*).

[13] G 2. 12–14. See also *Inst* 2. 2. 1–2: "Corporeal things are those which, by their nature, can be touched, such as land, a slave, a garment. . . .Incorporeal things, on the other hand, are such as cannot be touched but exist in law; for instance, an inheritance, usufruct and obligations." It appears that, initially, only real rights were considered *res incorporales*; it was only at a late stage that personal rights were recognized as also being incorporeal things.

possible to have a right over a right. The right is the abstract relationship between a person and a legally recognized interest, but is not itself the interest. From the Roman jurists' perspective, describing a right as a *res incorporalis* was only a convenient manner of referring to an interest associated with a particular person by virtue of a legal relationship.

Although primarily academic and philosophical in nature, the distinction between *res corporales* and *res incorporales* had some practical importance. This emanated from the fact that only corporeal things could be possessed and consequently several legal concepts with respect to which possession played an essential part were not applicable to *res incorporales*. Because incorporeal objects could not be physically seized as required for possession to exist, they thus could not be acquired or transferred by any method involving the acquisition or transfer of possession.[14]

3.2.3 Res Mancipi and Res Nec Mancipi

The most important classification of things *in commercio* in the pre-classical and classical law was between *res mancipi* and *res nec mancipi*. The former term applied to a certain class of things with respect to which ownership could be transferred only in a formal manner by way of *mancipatio* or *in iure cessio*. *Res mancipi* included land and buildings situated on Italian soil (*ager Romanus* or *praedia italica*)[15]; slaves; farm animals of draft and burden, such as oxen, horses, mules and donkeys; and rustic (not urban) praedial servitudes (*servitutes rusticae*), for example rights of way and of water over land.[16] All other things were *res nec mancipi*. With respect to the latter, ownership could be transferred informally as illustrated by the mode of simple delivery (*traditio*).

The origin of the distinction between *res mancipi* and *res nec mancipi* has been the subject of much controversy among contemporary historians and many explanatory theories have been advanced. All we can say with certainty is that the distinction is related to the fact that certain things were considered as extremely valuable in early times when agriculture played an important role in social and economic life, and were therefore placed in a separate category. It is possible that the original list of things classified as *res mancipi* was different, but at any rate in the later republican age the relevant categories had become fixed and arbitrary.[17]

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[14] Hence, *res incorporales* could not be acquired by *usucapio* nor could they be conveyed by *traditio*.

[15] In later times, lands and buildings situated in certain districts in the provinces were regarded as *res mancipi*, provided that these districts had the *ius italicum* ('Italic right') and so could be considered Italian land.

[16] G 2. 14a-16.

[17] According to Gaius, even though certain beasts (such as camels and elephants) were beasts of burden and draft they were nevertheless not regarded as *res mancipi* because they were not known when the list was compiled. G 2. 16.

As the formal methods for the transfer of ownership became obsolete in the later imperial age, the distinction between *res mancipi* and *res nec mancipi* gradually fell into desuetude to the extent that it had vanished by the time of Justinian's reign.[18]

3.2.4 Res Mobiles and Res Immobiles

A classification of things belonging to the category of *res corporales* distinguished between movables (*res mobiles*) and immovables (*res immobiles*). This division was based on the fact that some things could be physically displaced without sustaining any damage while others could not. Thus land and everything permanently attached to it, such as buildings, trees or plants, were classified as immovable whilst all other things were movable. Although the distinction between movable and immovable things was not nearly as important in Roman law as it is in modern law, it played an important part with regard to the prescriptive acquisition of ownership (*usucapio*),[19] the protection of possession, requirements relating to the purchase of land, and the offense of theft (*furtum*).

3.2.5 Other Classifications of Res

During the republican era a distinction was made between land in Rome and land in Italy confiscated as bounty of war, the so-called *ager publicus*. Land in Rome was subject to private ownership, but the ownership of the *ager publicus* was vested in the Roman people as a whole. In the course of time, portions of the *ager publicus* were sold by auction or were leased on rent to private individuals thereby providing a source of funds for the public treasury, while a large part of it was apportioned amongst citizens (especially army veterans).[20] The public lands sold or given away became private property. In the closing years of the Republic a distinction was

[18] Justinian expressly abolished the formal methods of transferring ownership as well as the distinction between *res mancipi* and *res nec mancipi*. See C 7. 31. 1 (Justinian): "We have abolished the ancient practice of dividing property into *res mancipi* and *res nec mancipi*, so that a similar rule may apply to all property and all localities, and unnecessary ambiguities and differences be finally removed."

[19] According to the Law of the Twelve Tables, the period required for the acquisition of ownership through *usucapio* was 2 years for immovables and 1 year for movables.

[20] The administration of the *ager publicus* was concerned with the so-called agrarian laws (*leges agrariae*), which began to be introduced from as early as the fifth century BC. One of the most important of these was a *lex Licinia Sextia*, enacted in 367 BC. This law limited the amount of land a person could lawfully occupy to a maximum of five hundred *iugera* (about three hundred acres). In the later republican period, however, this law appears to have fallen in abeyance (although it was never formally repealed) and a relatively small number of powerful families gradually came to control tracts of public land exceeding by far the maximum limits prescribed by this law.

introduced between land in Italy and land in the provinces. At this stage Italic land was privately owned but the ownership of provincial land was vested in the state, in either the Roman people or the emperor. The *ager publicus* in the provinces was vast, though in time most of this land also fell into private hands.

Reference should also be made to the distinction between generic and specific things. The former were determined in accordance with their type (*genus*), for example a slave and a bag of barley, whilst the latter indicated a specific thing (*species*), for example the slave Valerius or the first bag of barley.[21] Generic things that could usually be measured, counted or weighed were regarded in later law as replaceable (*res fungibiles*), in contradistinction with specific things that were irreplaceable (*res non fungibiles*). Connected to this classification was the division between things that are consumed by normal use (*res quae usu consumuntur*), for example money, foodstuffs, wine and clothing, and things that are not consumed in such a way.[22] This division had special importance with respect of the law governing contracts of loan as well as usufruct.

Another important distinction existed between divisible things, that is, things that could be divided without either of the divided portions being damaged or diminished in value (e.g. wheat), and indivisible things which encompassed those that could not be divided without damage or loss of economic value (e.g. a cart).[23] Furthermore, some things could form a unit that is either composite (*universitas rerum cohaerentium*), for example a house or a cabinet, or consisting of entirely separate objects (*universitas rerum distantium*), such as a herd of cattle.

Finally, reference may also be made to fruits (*fructus*) as a thing or things derived from another principal thing. Such fruits normally became the property of the owner of the principal thing, although there were certain legal situations in which a person had a right to the fruits from another person's property.[24] Fruits that originated naturally from a thing, such as the fruit of trees, the offspring of animals, milk and wool, were distinguished from civil or legal fruits arising from the use of property through legal transactions, for instance the rent from a lease.[25] Natural fruits were further divided into fruits not yet separated from the principal thing that produced them (*fructus pendentes*), fruits separated from the principal thing (*fructus separati*), and fruits separated and gathered (*fructus percepti*). A final distinction was that between fruits already consumed (*fructus consumpti*) and fruits still existing that were not consumed (*fructus extantes*). The above classifications were relevant with respect to the acquisition of ownership of fruits as well as the determination of the rights of possessors.

[21] D 45. 1. 54.

[22] In general, only generic and replaceable things (*res fungibiles*) are consumable.

[23] D 6. 1. 35. 3.

[24] This occurred, for example, in the cases of *ususfructus* and *emphyteusis* as discussed below.

[25] The terms *fructus naturales* and *fructus civiles* sometimes used to describe natural and civil fruits respectively do not occur in Roman juridical sources.

3.2.6 Real and Personal Actions and Rights

Unlike modern law that places the emphasis on rights, Roman law placed the emphasis on remedies; in other words, on the forms of action rather than the causes of action. The remedy to which a person had recourse when he considered his interests had been impaired or under threat was the crucial factor: because he had recourse to such a remedy, he had a right. An individual's interests could pertain to property or obligations, the difference between the two being the difference between owing and being owed. This difference found expression in the distinction between real actions (*actiones in rem*) and personal actions (*actiones in personam*).[26] By an action *in rem*, the plaintiff sought to establish the strength of his claim to a legal right over movable or immovable property as opposed to a claim of the defendant or to compel the latter to acknowledge such a right.[27] A real action was founded on the claim that the plaintiff had a better right to something than anyone else in the world, and could be instituted against anyone who invaded or disputed such right. With respect to such an action, the plaintiff had to formulate his claim by identifying the missing content of his property right and, in so doing, refer to the party against whom the claim was instituted. An *actio in personam*, on the other hand, was initiated by the plaintiff to enforce performance by the defendant arising from an existing contractual or delictual obligation.[28] Such an action was based on a specific obligation and directed against a determinate person or persons.[29]

[26] G 4. 1. 2. 3.

[27] A real action was also used to institute a claim of ownership over movable or immovable property, but in these circumstances the claim was referred to as *vindicatio*. See G 4. 5; *Inst* 4. 6. 15.

[28] Such performance could include, for example, the delivery of an object or the payment of a sum of money. Among the personal actions, those aimed at compelling the defendant to render or perform something (*dare facere oportere*) were termed *condictiones*. See G 4. 5.

[29] Closely connected with the above-mentioned classification of actions into real and personal is the modern dichotomy between real rights (*iura in re* or *rem*)—the subject-matter of the law of property—and personal rights (*iura in personam*)—the subject-matter of the law of obligations. Although the Roman jurists did not use these terms (as already noted, they spoke in terms of forms of action instead of rights), there is no doubt that the core of their distinction between forms of action is one of substantive law as actions imply and assert rights. The real rights can be said to have been absolute, having effect against the whole world: they could be infringed by anyone and could be protected (by means of real actions) against anyone who infringed them. The personal rights, by contrast, had effect only against a determinate person and could be enforced only against such person. The *iura in re* are usually classified into *iura in re propria* and *iura in re aliena*. The former term denotes the rights a person has over his own property (especially ownership); the latter refers to rights over someone else's property. The *iura in re aliena* are grouped under three categories: servitudes, real security and long-term leases.

3.3 Ownership

In principle, ownership (*dominium* or *proprietas*) was the most complete or extensive right a person could hold in respect of a corporeal thing. The holder of such right had the maximum prerogatives a person could have over an object: he had the right to use, enjoy and even abuse his property (*ius utendi*, *ius fruendi*, *ius abutendi*) as well as to alienate it, in whole or in part, as he saw fit. In short, the owner (*dominus*) could perform virtually any factual or legal act in respect of his property.[30] It should be noted, however, that the right of ownership was not as extensive in early times as it was in later law. The relevant concept underwent a long process of evolution spanning several centuries until reaching its culmination in the republican age.[31]

3.3.1 Forms of Ownership

Roman law recognized two principal forms of ownership; namely, civil ownership (*dominium ex iure Quiritium*) and praetorian or bonitary ownership.[32] The *dominium ex iure Quiritium* was the traditional form of ownership according to the *ius civile* and, as such, could be exercised only by Roman citizens or persons vested with the *ius commercii*. The praetorian or bonitary ownership emerged in the later republican age as a result of intervention by the praetor who, in certain cases, granted legal remedies where a person had an interest deserving of protection in relation to a thing without being the owner of such thing in accordance with the civil law.[33] Probably the best-known example of such ownership occurred when a *res mancipi* had been transferred to someone informally by means of mere delivery (*traditio*) rather than by means of the formal procedures of *mancipatio* or *in iure*

[30] As a real right, ownership can be construed as an absolute right. In this respect, it was clearly distinguished from possession or lesser real rights, such as servitudes and real rights of security (see below). This, however, should not be understood as meaning that there were no limits to the right of ownership. Such a right could be limited by the law (e.g. the owner of a weapon was not allowed to use it to commit a crime), or by the owner himself (e.g. when he agreed to lease his property to another and so divest himself of the use and enjoyment of the property).

[31] In the archaic period, ownership was probably only one of the aspects of the control of the *paterfamilias* over persons and property assets falling under his *potestas*. It existed as the only real right, given that possession in the sense of actual physical control over a thing was not clearly distinguished from ownership; lesser real rights, such as servitudes and usufruct, were viewed as 'partial' ownership. Moreover, it is possible that private ownership as such, especially with respect to immovable property, did not exist at all in the earliest period of Roman history but that ownership was vested collectively in the members of a clan (*gens*).

[32] Two further types of property ownership pertained to that of foreigners (*peregrini*) and in respect of provincial land. Although in principle land in the provinces was the property of the state, it could be possessed, used and enjoyed by private individuals.

[33] See G 2. 40.

cessio as the law required. In such a case, the transferee could not become *dominus ex iure Quiritium* of the property but the praetor intervened and placed such person in the factual position of a civil law owner. The property was then regarded as *in bonis* and the transferee as a bonitary owner who could acquire true Roman law ownership through possession of the thing for a prescribed period by means of *usucapio*.[34]

The various forms of ownership recognized in pre-classical and classical law gradually merged during the post-classical age until there existed only one form of ownership in the time of Justinian, namely, civil ownership.[35]

3.3.2 Acquisition of Ownership

In Roman law, ownership as a real right could be acquired in a prescribed manner. Several modes of acquisition of ownership were recognized. Some of these modes were peculiar to Roman law and, accordingly, derived from the *ius civile*; other modes were also familiar to other peoples and therefore were regarded as originating from the *ius gentium* (identified in this context with *ius naturale*).[36] In accordance with the modern approach to the acquisition of ownership, the modes of acquisition may also be classified into 'original' (or 'natural') and 'derived'. Original modes of acquisition of ownership were those where the person acquired the right of ownership in respect of a thing without intervention by or dependence on another person. This means that the thing in question, although capable of being owned, did not have an owner; or that there was a previous owner but such owner did not cooperate in the ownership acquisition process. The principal modes of original acquisition of ownership were prescription (which assumed various forms), *occupatio* and *accessio*. Derived ownership occurred where a person acquired ownership of a thing from another. In this case, the ownership was transferred (*dominium transferre*) or passed (*dominium transire*) from one person to another

[34] Initially, the transferee's position during the period of *usucapio* was not protected, but the praetor intervened by granting him the *actio Publiciana* and the *exceptio rei venditae et traditae*. The former action was an action *in rem* by means of which the transferee could reclaim possession during the period of *usucapio* from whoever may have held it without lawful title, irrespective of whether or not such person was *bona fide*. The action was based on the fiction that the period required for obtaining the property by *usucapio* was completed. See G 4. 36. If the original owner endeavoured to claim the property from the transferee during the period of *usucapio*, the transferee could raise the defence of *exceptio rei venditae et traditae*—a special defence based on the claim that the property at issue had been sold and delivered to him. Consider D 21. 3. 3. By these devices the holder of the property obtained complete protection during the period of the *usucapio* and had all the practical benefits associated with ownership.

[35] This development was connected with, among other things, the elimination of the distinction between *res mancipi* and *res nec mancipi*.

[36] G 2. 65; *Inst* 2. 1. 11; D 41. 1. 1.

with the cooperation of the first person.[37] The chief forms of derived acquisition of ownership were *mancipatio*, *in iure cessio* and *traditio*.[38]

The above two methods of classifying the modes of acquiring ownership may be reconciled. The original modes of acquisition of ownership emanated from the *ius gentium*, with the exception of prescription which was regarded as belonging to the *ius civile*; while the derived modes originated in the *ius civile*, with the exception of *traditio* which had roots in the *ius gentium*.

An important principle relating to the transfer of ownership was that no one could transfer more rights to another than he himself had (*nemo plus iuris ad alium transferre potest quam ipse haberet*).[39] The practical implication of this principle was that in Roman law a person who was not the owner (*dominus*) of a thing could not transfer ownership of that thing to anyone else.[40]

In the sections below, the principal derivative modes of acquisition of ownership will be first explained and then followed by a discussion of *usucapio* as well as the other forms of original ownership acquisition.

3.3.2.1 Mancipatio

Mancipatio was an ancient and extremely formal institution of the *ius civile* in existence before the time of the Twelve Tables. In later times, this institution could be employed not only to transfer ownership of certain things (*res mancipi*) but also to establish other rights such as servitudes, to emancipate a child, to create marital power (*manus*) over a wife, to compose a testament (*testamentum per aes et libram*) and in other ways.

As a mode of acquisition of ownership, *mancipatio* was in form a combination of a formal cash sale and a solemn conveyance of ownership of a *res mancipi*. Only Roman citizens or individuals possessing the *ius commercii* could acquire ownership in this way. The underlying reason (*causa*) for the ownership transfer could have virtually any nature, such as a contract of sale or a donation.[41] The formal

[37] However, it should be noted that the notion of 'passing' or 'transfer' of ownership did not mean much to the Romans who tended to regard the original ownership right as having been annulled and replaced by a 'new' right.

[38] Other, less important, derivative forms of ownership acquisition included *adiudicatio*: the award of an object arising from a divisory action; *litis aestimatio*: payment of compensation for damages instead of restoration of the property at issue which gave the possessor of the property a vested right that could lead to the acquisition of ownership through *usucapio*; and by statutory right (*lege*). It is interesting to note that both Gaius and Justinian construed the law of succession as a mode of acquisition of ownership of several objects collectively.

[39] D 50. 17. 54.

[40] Consider D 41. 1. 20 pr: "Delivery ought not to transfer, and cannot transfer, to him who receives more than belongs to the person who delivers. If, therefore, anyone had the ownership of a field, he transfers it by delivery, but if he had not, he transfers nothing to him who receives."

[41] If this reason was deemed invalid, it did not preclude the acquisition of ownership by *mancipatio*.

procedure relating to this legal act required the presence of at least five Roman citizens as witnesses and a sixth person (*libripens*) who held a pair of bronze scales. The transferee grasped the object to be conveyed (if it was movable) or a representation of it (if it was immovable) in one hand and a piece of bronze in the other while he formally declared that the object was his in accordance with the ancient civil law (*ius Quiritium*) and that it had been purchased 'with copper and scale'. He then struck the scales with the piece of bronze and handed it to the transferor as a symbol of the price. Assuming that the transferor was owner of the thing, *dominium* passed to the transferee. After the introduction of coined money in the late fourth century BC, the symbolism of the scales in this procedure was retained but the scales were touched with a copper coin.

The *mancipatio* procedure dated back to a time before the appearance of coined money, and it probably developed from a formal cash sale when brass or copper was in fact weighed out on scales (*libra*) by a *libripens* and handed over simultaneously with the transfer of the object sold. However, the weighing and transfer of the bronze appears to have been only symbolical even in the time of the Twelve Tables. In later times *mancipatio* had no necessary relation with sales at all—it was a general mode of conveyance limited to certain kinds of property, whilst any sale that actually occurred was regarded as a separate transaction furnishing the requisite cause (*causa*).[42] Nevertheless, the relevant formal ceremony was retained in order to stress the seriousness of the parties' intentions.

It should be noted, finally, that the person transferring ownership by *mancipatio* had to provide a warranty against the eviction of the transferee from the property. If the acquirer of ownership was evicted after a third person had successfully claimed the property by means of a legal action (*rei vindicatio*), the acquirer could instigate the *actio auctoritatis* against the transferor for double the price paid.[43] Furthermore, the transferor was bound by any formal declarations (*nuncupationes*) he made in respect of certain features or characteristics of the property being transferred. By way of illustration, if the transferor had stated in his *nuncupatio* that the land he was transferring had a certain size and it later turned out to be smaller, the transferee could employ the *actio de modo agri* to claim twice the value of the missing portion.[44]

[42] Hence Gaius calls *mancipatio* a fictitious sale (*venditio imaginaria*). See G 1. 119. It should be noted that the transition from the real to the fictitious sale must have been gradual, although nothing is known about the stages leading to this development.

[43] This could happen if the transferor had not actually transferred ownership because he was not the owner of the property. In such a case, *dominium* did not pass, even if the *mancipatio* procedure was correctly employed, due to the *nemo plus iuris* principle noted earlier.

[44] It should be noted, moreover, that a *pactum fiduciae* could be appended to the *mancipatio* as a means of establishing real security. This consisted of an agreement between the parties whereby the transferee assumed certain duties with respect to the property transferred or the later re-transfer of such property to the transferor. The basis of this agreement was the transferor's trust (*fides*, *fiducia*) in the honesty of the other party. If, contrary to the fiduciary agreement, the latter refused to reconvey the property, the transferor had an action (*actio fiduciae*) against him. At the same time, the other party had an *actio fiduciae contraria* for any claim for expenses or damages he might have against the original owner.

The institution of *mancipatio* became obsolete in the later imperial age and was an unknown legal relic in the time of Justinian.

3.3.2.2 In Iure Cessio

Like *mancipatio*, *in iure cessio* was a formal institution of the *ius civile* and was probably also known at the time of the Twelve Tables. This method of conveyance was used for a variety of purposes: to transfer ownership over corporeal property of every kind, whether *res mancipi* or *res nec mancipi*[45]; to create and extinguish praedial servitudes and usufruct[46]; and to transfer incorporeal objects other than obligations, such as an inheritance.[47] As in the case of *mancipatio*, only Roman citizens or persons possessing the *ius commercii* could employ the *in iure cessio* procedure.

As a mode of ownership transfer, *in iure cessio* (literally 'divesting in law') assumed the form of a fictitious trial concerning an assertion of ownership (*rei vindicatio*) before the praetor (*in iure*) for the purpose of a formal divesting of ownership in respect of an object by one person in favour of another.[48] The person wishing to transfer ownership together with the prospective transferee appeared before the praetor[49] whereupon the transferee, grasping the object to be transferred, formally declared it as his in accordance with the *ius Quiritium*.[50] The magistrate then asked the transferor whether he disputed the claim (*an contra vindicet*) and if the transferor remained silent or said 'no', he awarded the thing to the transferee.[51] As with *manipatio*, any legal cause for the ownership transfer was sufficient as the *in iure cessio* was an abstract mode with a validity independent of such cause. However, otherwise than in *mancipatio*, there was no action derived from the *in iure cessio* to redress the case of eviction.[52]

Although the *in iure cessio* still existed in classical law, it became obsolete in post-classical times and no longer existed in Justinian's era.

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[45] In this respect, it differed from *mancipatio*.

[46] G 2. 29–30.

[47] G 2. 34 & 38.

[48] Since the *in iure cessio* consisted of a procedure in open court, one of its main advantages was the publicity attached to it.

[49] In the provinces, the parties had to appear before the provincial governor.

[50] With respect to both *in iure cessio* and *mancipatio*, the correct use of the prescribed formal words was crucial for the relevant process to produce the intended legal result. Merely uttering the substance of the transferee's assertion was not sufficient.

[51] G 2. 24.

[52] The parties could, however, attach a *pactum fiduciae* to the *in iure cessio* for the purpose of establishing real security.

3.3.2.3 Traditio

The third and undoubtedly most important derivative mode of transferring ownership was delivery or *traditio*. *Traditio* originated from the *ius gentium* and involved the informal transfer of the actual control of a corporeal thing on the grounds of some lawful cause (*iusta causa*). Originally, this mode could only be employed to transfer the ownership of *res nec mancipi* (as already noted, a simple delivery of *res mancipi* did not transfer ownership, but the transferee acquired the so-called 'bonitary ownership' which could be converted to civil law ownership through *usucapio*).[53] When the formal modes of transfer disappeared together with the distinction between *res mancipi* and *res nec mancipi* in the later imperial age, the ownership of all *res corporales* could be conveyed by this method. Indeed, *traditio* was the only form of ownership transfer recognized in the law of Justinian.

It is self-evident that not every transfer of possession entailed a transfer of ownership. In the first place, both the transferor and the transferee had to have the legal capacity to effect such a transfer. This means that both persons had to be Roman citizens or possess the *ius commercii*. Besides the legal capacity requirements relating to age and state of mind applicable to both parties, the person transferring ownership had to be the owner himself (or act as agent for the owner) before ownership could pass (according to the principle of *nemo plus iuris ad alium transferre potest quam ipse haberet*). Secondly, *traditio* only transferred ownership when there was a lawful cause (*iusta causa*), i.e. a transaction in consequence of which ownership usually passed. Such lawful cause or valid ground could be, for example, a contract of purchase and sale, a loan of money, a donation, the giving of a dowry, the making of a gift and the like.[54] Since the significant components were the intention and agreement of the parties that ownership should pass, a putative *causa* was deemed sufficient. For example, if the agreed purpose for the physical transfer was to fulfil a contract of purchase and sale, the ownership was passed even if the sale was legally null and void (e.g. due to an error) and therefore incapable of fulfilment.[55]

However, the question of whether *traditio* was a causal or an abstract mode of property transfer is surrounded by much controversy as the extant sources are not unanimous on the question of whether a real, genuinely existing *iusta causa* was required before ownership could be passed by delivery.[56] The reasonable principle

[53] G 2. 19.

[54] D 41. 1. 31 pr: "A simple delivery of a thing never transfers ownership, unless a sale or another just cause preceded the delivery." And see G 2. 20: "When possession of clothes or gold or silver is delivered on account of a sale or gift or any other cause, the property passes at once, provided that the person who conveys is owner of them."

[55] It was not sufficient that the transferor and transferee had a common intention to convey ownership if there was no agreement between them as to the cause for their doing so. This appears to be the position that prevailed in classical law.

[56] Iulianus (D 41. 1. 36) accepted that a presumed or putative *causa* was sufficient, whereas Ulpianus (D 12. 1. 18 pr) adopted the contrary view.

was ostensibly that the relevant lawful cause had to be actually and effectively present, yet in practice exceptions were allowed for the purposes of utility and equity that accordingly meant an abstract *iusta causa* would suffice in many cases. In such cases, it was not deemed necessary for the lawful cause to be effectively and actually present if the parties had reached an agreement that ownership was to pass on delivery. In other words, a common intention to pass ownership was considered sufficient as the cause was merely one way of proving that intent. As an abstract mode of conveyance, *traditio* did not depend on any 'cause' external to itself but simply required a physical transfer accompanied by the intention to pass ownership.[57]

With respect to the contract of sale as a *iusta causa*, in particular, Justinian stipulated that for ownership to pass the sale had to be for cash and the price had to be paid, or there had to be agreement that the sale was on credit or that security was provided for the payment of the price.[58] Unless one of these three requirements was met, ownership of the object sold did not pass upon delivery.

As already noted, the essence of *traditio* was the transfer of actual control of a thing. In other words, *traditio* required the acquisition of possession *animo et corpore* ('with soul and body') by the transferee. The simplest form of *traditio* involved the physical transfer of a corporeal thing by one party to another. However, complications arose when the thing to be delivered was very large and heavy or immovable. Thus, it was gradually recognized that in certain cases it would be sufficient for establishing possession if the transferee had been placed into a position of control (according to the views of the community) without actual physical contact with the thing. Thus, several methods of constructive or fictitious delivery (*traditiones fictae*) developed alongside the actual physical or hand-to-hand delivery (*traditio corporalis*, *traditio de manu in manum*): the *traditio longa manu*, the *traditio brevi manu*, the *constitutum possessorium* and the *traditio symbolica*.

Traditio longa manu ('long-handed delivery') occurred where the actual control of the thing passed from the transferor to the transferee without any tactile contact with the thing itself.[59] This could happen, for example, when a pile of logs or a tract of land was pointed out by one party to the other and the latter acquired the right to immediately assume possession of the relevant property.[60] The same ramifications would occur in cases where several jars containing fruit or other goods were sold and the acquirer placed a guard over them[61] or when the goods in a storage house

[57] As previously noted, *mancipatio* and *in iure cessio* were also abstract modes of ownership transfer; for both modes it was sufficient that the requisite formal act had been performed irrespective of the reason for doing so.

[58] *Inst* 2. 1. 41.

[59] D 41. 2. 1. 21.

[60] D 41. 2. 18. 2.

[61] D 41. 2. 51.

were sold and the key of the storage house was given to the purchaser so that he would immediately obtain control of the goods contained therein.[62]

Traditio brevi manu ('short-handed delivery') occurred where the intended transferee already had physical control of the thing whose ownership was being transferred, but not as an owner. This occurred, for example, when the object in question had previously been lent or leased to the transferee and while still in his possession the object was later sold, donated or otherwise alienated to him. To avoid the inconvenience of retrieving the thing from the transferee and then handing it over to him again, it was recognized that the mere will (*nuda voluntas*) of the parties allowed the ownership of the thing to immediately pass from one to the other.[63]

Constitutum possessorium was the converse of *traditio brevi manu*.[64] This method pertained to the case where the person wishing to alienate a thing remained in physical control of the thing after the alienation because of a supplementary agreement with the new owner. In such a case it was conceded that possession and therefore ownership of the thing passed, even though there had been no physical transfer at all. This occurred, for example, when the person who sold a tract of land remained in possession of it because he had agreed with the buyer that he would continue in occupation as a tenant. Once again, the bare will (*nuda voluntas*) of the parties was sufficient to transfer ownership.[65]

Finally, symbolic delivery (*traditio symbolica*) occurred where a symbol of the thing whose ownership was being transferred rather than the thing itself was delivered. This happened, for example, when an agreement for the transfer of ownership over an object was recorded in a document that was later handed over to the transferee as a symbol of the object he acquired. In the later imperial age, the tendency to reduce juristic acts to writing became widespread and by the time of Justinian documents were generally adopted in legal practice as a means of ownership transfer. By that time, the agreement between the parties was regarded as the essence of a conveyance; since such agreement was usually embodied in a

[62] D 18. 1. 74; D 41. 2. 1. 21; D 41. 1. 9. 6; *Inst* 2. 1. 45. And see D 46. 3. 79. According to the classical authorities, the transferee can be said to acquire control over the contents of a storage house by *traditio longa manu* when the keys are handed over to him at the storage house. However, under the law of Justinian it seems that when the keys are transferred at a place removed from such storage house this is not *traditio longa manu* but a form of symbolic delivery where the keys symbolize the property delivered.

[63] Consider D 41. 1. 9. 5: "Sometimes, even the mere wish of the owner is sufficient to transfer the property without delivery, as, for instance, if I have lent or hired a thing to you, and then after having deposited it with you I sell it to you... I render it your property by the mere fact that I permit it to remain in your hands on account of it having been purchased." It may be asserted that in such cases the elements of *corpus* and *animus* are separated, as the transfer of physical control precedes the intention to transfer ownership.

[64] The term *constitutum possessorium* is not a classical term but was introduced in the Middle Ages.

[65] D 41. 2. 18 pr; D 6. 1. 77.

document, the transfer of ownership became identified with the delivery of the relevant document.[66]

3.3.2.4 Usucapio

In Roman law, *usucapio* was undoubtedly the most important original mode of acquisition of ownership. In original form, this mode derived from the *ius civile* and was probably already in existence at the time of the Twelve Tables. The essence of *usucapio* was that the possession and use of a thing belonging to another person (not a *res nullius*) for a certain, prescribed period converted the possessor into the owner of that thing.[67] As in modern law, one of the principal purposes of *usucapio* was to establish legal certainty by removing doubt in respect of the right of ownership over a thing after the appropriate period. *Usucapio* also facilitated the proof of such right, since the person who claimed to be the owner of the thing only had to prove that he had been in possession for the prescribed period instead of having to establish the ownership of his predecessors.[68] As commentators remark, *usucapio* was a necessary complement to the principle that no one could transfer more rights to another than he himself had (*nemo plus iuris ad alium transferre potest quam ipse habet*). Although this principle meant that a person who received an object from a non-owner could not himself become owner thereof, *usucapio* presented the possibility for such a person to acquire legal ownership of the object in question if certain requirements were met. Furthermore, as previously observed, in pre-classical and classical law *usucapio* was relied upon to elevate the praetorian or bonitary owner (i.e. the person who acquired a *res mancipi* by means of *traditio*) to the status of civil law owner (*dominus ex iure Quiritium*).

The acquisition of ownership by *usucapio* first presupposed that the object in question was susceptible to *usucapio*. This generally meant that the object had to be capable of being the subject of transactions between Roman citizens (*res in commercio*), as only such things were open to private ownership. Thus, the objects excluded from *usucapio* encompassed *res extra nostrum patrimonium*, such as *res sacrae*, *religiosae* and *sanctae*,[69] as well as land in the provinces that was technically owned by the state.[70] Furthermore, the object in question could be declared

[66] The delivery of immovable property through the handing over of a written document to the transferee was known as *traditio cartae* or *per cartam*, while the relevant document was sometimes referred to as *epistula traditionis*.

[67] According to Rule 6 (3) of the Law of the Twelve Tables (quoted by Cicero in *Topica* 4. 23): "*Usucapio* of movable things requires one year's possession for its completion; but *usucapio* of an estate and buildings, two years." And see G 2. 42: "*Usucapio* of movable property is completed within a year, that of lands and houses within two years; and this was provided by the Law of the Twelve Tables."

[68] G 2. 44.

[69] G 2. 48.

[70] G 2. 46.

inalienable by a rule of law. The two most important instances of such inalienable things were stolen objects (*res furtivae*)[71] and things seized by force.[72] Such things were construed as 'tainted' and only susceptible to *usucapio* if the taint (*vitium*) was expunged by the return of the thing to its rightful owner.[73] In reference to the statement that stolen and forcibly taken things could not be legally acquired by *usucapio*, it should be noted this does not simply mean that the thief or violent dispossessor was incapable of acquiring ownership by *usucapio*: these were precluded by the fact that their possession was not in good faith. It means, rather, that even a person who purchased the thing from them in good faith or received it on some other lawful ground was incapable of acquiring ownership by *usucapio*. Besides the above-mentioned things, excluded from *usucapio* were also dotal immovables, the immovable property of *pupilli* and *minores*,[74] and property belonging to the state treasury (*fiscus*).[75] The second requirement for the acquisition of ownership by *usucapio* was possession: the person who was to acquire ownership had to retain physical control of the property in question for an uninterrupted and prescribed period.[76] Where there had been an interruption (*usurpatio*), *usucapio* failed and the required period of possession started all over again if possession was subsequently restored.[77] However, under certain circumstances it was possible that the periods of possession by two or more successive holders might be added together to the benefit of the last one (*accessio possessionum* or *temporum*). This occurred, for example, where the person who was to acquire ownership by *usucapio* died before the lapse of the requisite period. In such a case, the possession of his heir was regarded as a continuation of that of the deceased.[78]

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[71] The relevant rule was stated by the Law of the Twelve Tables and repeated by the *lex Atinia* (second century BC). It should be noted that theft had a much wider meaning in Roman law than in modern law, as it included not only the actual removal of another person's thing, but any intentional and dishonest dealing with another's movable property (such as selling another person's property without their consent, collecting money from another's debtor without the creditor's consent, and the like).

[72] According to the *lex Iulia et Plautia* (first century BC).

[73] G 2. 45. And see *Inst* 2. 6. 8; G 2. 49; D 41. 3. 4. 6.

[74] The term *pupillus* refers to a person below the age of puberty (*impubes*), while *minores* were persons above the age of puberty but under 25 years. See the relevant discussion in the previous chapter on the law of persons.

[75] An estate without any heir under a will or by intestacy (*bona vacantia*) was capable of being acquired by *usucapio* if it had not yet been reported to the *fiscus*. On this issue, consider D 41. 3. 18; *Inst* 2. 6. 9.

[76] The form of possession required was *possessio civilis*, i.e. possession based on a just legal title (*iusta causa*) and accompanied by the intention of the possessor to appropriate the property for himself. See relevant section below.

[77] D 41. 3. 5. Originally, interruption occurred if the physical control over property was lost, but in Justinian's time the commencement of proceedings for the recovery of possession by the owner was also regarded as an *usurpatio*.

[78] D 41. 3. 20; D 41. 3. 40; D 41. 4. 2. 19.

As already noted, the person who was to acquire ownership by *usucapio* had to remain in possession for the legally prescribed period of time. According to the Law of the Twelve Tables, that period was 2 years in respect of immovable property and 1 year in respect of other things. Justinian extended this period for movables to 3 years and for immovables to 10 years where the original owner resided in the same area (*inter praesentes*) and to 20 years where the parties lived in different districts (*inter absentes*).[79]

Furthermore, the acquisition of ownership by *usucapio* presupposed the existence of a just cause (*iusta causa*) or a just title (*iustus titulus*). 'Just cause' in this context means an antecedent event or transaction by virtue of which the possessor would have become owner of the property under normal circumstances.[80] Examples of such cause or title included purchase and sale, gift, dowry, legacy, discharge of a debt, inheritance and the like. In contrast to the case of *traditio*, an erroneous belief of the acquirer that there was a just cause did not suffice for *usucapio*.[81] In other words, the *iusta causa* had to be real but this rule was flexible in permitting exceptions in certain circumstances.[82]

Closely connected with the issue of *iusta causa* was the requirement of good faith (*bona fides*): the person who acquired possession of the property in question had to honestly believe that the relevant transaction (as a *iusta causa*) made him owner of the property.[83] This generally implied a belief based on a mistake of fact, not of law,[84] that the transferor was the owner or legally competent to alienate the property. In other words, the criterion elaborated for *bona fides* was that the acquirer had to believe in the lawfulness of his acquisition. But where a person acquired a *res mancipi* by *traditio* (rather than *mancipatio* or *in iure cessio*) from the owner, it could hardly be asserted that the acquirer did not know that he had not become the owner and yet he could acquire ownership by *usucapio*. It is important to note that in such a case, analogous to that of the acquirer of property from a non-owner, there was a rebuttable presumption that good faith was present (*bona fides praesumitur*): the person disputing *usucapio* had the onus to establish bad faith

[79] C 7. 31. 1. 2; *Inst* 2. 6 pr.

[80] Under normal circumstances, *usucapio* would not apply since the transferee would have acquired ownership by *mancipatio*, *in iure cessio* or *traditio*. But when the circumstances were not normal, i.e. when the transferee did not become owner as a result of the *nemo plus iuris* principle, *usucapio* could be relied on to: (a) cure a defect in the title of the person who conveyed the thing in question (e.g. sale by a non-owner); or (b) cure a defect in the way in which the thing was transferred (conveyance of a *res mancipi* by mere delivery).

[81] *Inst* 2. 6. 11. See also C 7. 27. 3; D. 41. 3. 27.

[82] A putative or imaginary title was deemed sufficient, for example, where a person was under the impression that he had purchased an object but it transpired later that he had merely borrowed it. Consider on this issue D 41. 10. 3; D 41. 10. 5.

[83] G 2. 43: "We may acquire by usucapio, provided that we have received the objects in good faith, believing the deliverer to be their owner." Consider also G 2. 93; *Inst* 2. 6 pr; D 41. 3. 33. 1; D 50. 16. 109.

[84] D 41. 3. 31 pr.

(*mala fides*). The latter would have to prove not simply that the possessor was in bad faith at the time of the action, but that he was in bad faith at the time of acquiring possession. If the possessor at a later stage lost his good faith by obtaining knowledge of the true situation, his right to become owner of the property in question by *usucapio* was not affected.[85]

3.3.2.5 Longi Temporis Praescriptio

As an institution of the *ius civile*, *usucapio* could be utilized only by Roman citizens or foreigners (*peregrini*) granted the *ius commercii*. Movable objects in the possession of a foreigner as well as land in the provinces, whether it was in the possession of a Roman citizen or a foreigner,[86] were initially not capable of being acquired by *usucapio*. In response to this problem, a new institution originating in the Eastern provinces was introduced in the late second century AD: the *praescriptio longi temporis* (or *longae possessionis*).[87] Initially this institution assumed the form of a defence employed by the possessor of provincial land against the claim of the person originally entitled to the land. This defence was subsequently extended to cases pertaining to movables in the possession of foreigners and became generally applicable after AD 212. For such a defence to succeed, it was required that the possessor had held the land or object for an uninterrupted period of 10 years when both parties lived in the same district (*inter praesentes*) or 20 years when they domiciled in different localities (*inter absentes*).[88] Moreover, the possession of the defendant had to be based on a lawful cause (*iusta causa*) and acquired in good faith (*bona fide*).

Although the *longi temporis praescriptio* was originally a form of extinctive prescription or limitation (the true owner of the land or object forfeited his right by not exercising it for a certain period of time), by the time of Justinian's reign it had evolved (like *usucapio*) into a form of acquisitive prescription. In Justinian's era the institutions of *usucapio* and *longi temporis praescriptio* were fused into one, following the elimination of the distinction between land in Italy and in the provinces as well as between possession by a Roman citizen and possession by a foreigner.[89]

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[85] D 41. 3. 4. 18; D 41. 1. 48. 1. The maxim *mala fides superveniens non nocet* ('supervening bad faith does not harm') sometimes referred to in this regard does not occur in the classical sources.

[86] As previously noted, such land was considered as the property of the Roman people or the emperor.

[87] We first hear of this institution in an imperial constitution (*rescriptum*) of Emperors Severus and Caracalla promulgated in AD 199.

[88] Under the law of Justinian, it appears that the parties had to reside in the same province in order to be regarded as *praesentes*. See C 7. 33. 12.

[89] For the acquisition of movables, Justinian retained the name of *usucapio* and extended the period from 1 to 3 years, while the term *longi temporis praescriptio* was generally applied to the acquisition of land. On the *longi temporis praescriptio* see *Inst* 2. 6 pr; C 7. 31. 1 pr –3; C 7. 33. 1 pr, 1; C 7. 35. 7; C. 7. 39. 8 pr.

3.3.2.6 Longissimi Temporis Praescriptio

In the fourth century AD, a further prescriptive institution known as *longissimi temporis praescriptio* was developed.[90] This innovation assumed the form of a defence that could be employed by a person who had been in possession of any kind of property belonging to another for a very long time (originally forty and eventually 30 years) against the claim of the true owner for its recovery. The possessor could rely on such a defence even if there had not been compliance with the requirements of *usucapio*.[91]

Justinian refined the matter a step further and rendered this form of prescription acquisitive by enacting that if the possessor had acquired the property in good faith, even if without a lawful title, he became the owner thereof after a period of 30 years. This rule applied even if the object in question had been at some time stolen, but was inoperative if the possession of the property had been acquired from the original owner by violence (*res vi possessa*).[92]

3.3.2.7 Occupatio

A form of original acquisition of ownership derived from the *ius gentium* was *occupatio*: the act of taking possession of a thing belonging to no one (*res nullius*) but capable of being *in commercio* with the intention of becoming owner thereof. Things that could be acquired in this way included wild animals, birds, bees and fish; the spoils of war or booty seized from the enemy; an island arising in the sea; things thrown away by a former owner; and a buried treasure.

Firstly, wild animals, birds, bees and fish became the property of the person who captured them for as long as they remained under his actual control.[93] It made no difference on whose land the animal was captured. If the captured animal later escaped, ownership over it was lost at that moment and the animal once again became a *res nullius*.[94] It is important to note that *occupatio* was applicable only to wild animals and never to domestic animals or animals by nature tame, such as sheep, chickens and geese. If a domestic or tame animal wandered away or took flight and 'went wild', the dispossessed owner still retained ownership and thus anyone who seized the creature with the intention of becoming owner committed

[90] The term *longissimi temporis praescriptio* is not of Roman origin but was introduced by the commentators.

[91] C 7. 39. 2–3.

[92] C 7. 39. 8. 1–3.

[93] Merely wounding a wild animal was not sufficient for the acquisition of ownership, since the animal had to be brought effectively under control. See D. 41. 1. 5. 1; *Inst* 2. 1. 13.

[94] This occurred where the actual possession was deemed lost because the animal could no longer be seen or followed without the greatest difficulty. *Inst* 2. 1. 12; G 2. 67; D 41. 1. 1. 1; D 41. 1. 3; D 41. 1. 5 pr.

theft.[95] Migratory animals or animals that had been tamed but had the habit of going away and returning periodically remained the property of the person who had tamed them as long as they retained the habit of returning and had the 'intention to return' (*animus revertendi*).[96]

In principle, things seized from the enemy in wartime became the property of the Roman state. In practice, however, only land and other immovables were transferred to the state while movables became the property of the person who captured them or the commanding officers apportioned them among the soldiers.[97]

An island rising in the sea (*insula in mari nata*) was considered a *res nullius* and therefore became the property of the first person that took possession thereof.[98]

A further example of *res nullius* were abandoned things, or things which an owner threw away or discarded with the intention of relinquishing his ownership (*res derelictae*). Such objects became the property of the first person taking possession thereof with the intention of becoming their owner.[99] The *res derelictae* should be distinguished from things that had been lost without the owner intending to relinquish ownership (even though he had lost physical control of them). The latter things remained the property of the original owner and the act of another person assuming possession thereof could be regarded as theft.[100] The same applied to objects that had been voluntarily abandoned by an owner without the intention of loss of ownership, such as objects thrown overboard in a storm with the purpose of saving the ship.[101]

The final illustration pertains to a treasure trove (*thesaurus*) defined as something valuable hidden away for such a long time that the identity of its owner could no longer be established[102] and thus was considered a *res nullius* and susceptible to *occupatio*. According to a legislative enactment of Emperor Hadrian, a person who found a treasure on his own property became the owner of it whilst the ownership of a treasure discovered on another person's property was equally shared between the landowner and the finder as long as the discovery occurred by chance.[103] If the finding was the result of a deliberate search, the owner of the land in which the

[95] Such animals were subject to the same rules as any other movable property. Consider on this matter D 41. 1. 5. 6; *Inst* 2. 1. 16.

[96] G 2. 68; *Inst* 2. 1. 14–15; D 41. 1. 5. 2–5.

[97] G 2. 69: "Property captured from the enemy also becomes ours by natural law." Consider also D 41. 1. 5. 7; D 41. 1. 7 pr; *Inst* 2. 1. 17.

[98] D 41. 1. 7. 3; *Inst* 2. 1. 22.

[99] D 41. 7. 1; *Inst* 2. 1. 47.

[100] Valuable objects found on the seashore, such as precious stones, gems and jewellery, became the property of the person who found them, except insofar as such valuable objects had been lost without the owner intending to abandon them or relinquish his ownership. See D 1. 8. 3; *Inst* 2. 1. 18.

[101] *Inst* 2. 1. 48; D 14. 2. 8; D 41. 1. 9. 8.

[102] The jurist Paulus defines *thesaurus* as "an ancient deposit of money, of which no memory exists, so that it has no present owner." See D 41. 1. 31. 1. This definition appears to be too narrow, however, as a treasure is not confined to only money. In a constitution of Emperors Leo and Zeno (AD 474) a treasure is defined as "movables hidden long ago by unknown owners." See C 10. 15.

[103] *Inst* 2. 1. 39.

treasure had been found was entitled to the whole trove. Where the treasure was found on public property the finder again retained a half portion whilst the other half was transferred to the *fiscus*.[104]

3.3.2.8 Acquisition of Fruits

A further original form of acquisition of ownership derived from the *ius gentium* was the acquisition of fruits (*acquisitio fructuum*). This mode of ownership acquisition related to natural produce (*fructus naturales*), such as the fruits emanating from trees and plants as well as the offspring of animals.[105] As previously observed, natural fruits were divided into fruits not yet separated from the principal thing that produced them (*fructus pendentes*); fruits separated from the principal thing (*fructus separati*); and fruits separated and gathered (*fructus percepti*). While still attached to the main object that produced them, fruits belonged to the owner of that object. However, when fruits were separated from the main object and thus became separate things the question of ownership over them arose.

The general rule was that the owner of the principal object that produced the fruits immediately became owner of the separated fruits.[106] There were cases, however, where the fruits were acquired by a person other than the owner of the main object. The usufructuary and a lessee or tenant acquired ownership of the fruits by gathering and actually taking possession of them (*perceptio fructum*).[107] On the other hand, the *emphyteuta* (a tenant by *emphyteusis*)[108] and the *bona fide* possessor became owners of fruits by mere separation (*separatio fructuum*).[109]

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[104] The *fiscus* was the treasury of the emperor (*fiscus Caesaris*). Although it was not regarded as the emperor's property, it was controlled by him as a fund used for public purposes. During the principate era the *fiscus* absorbed other public funds, such as the old state treasury (*aerarium populi Romani*), and evolved to become the main state treasury. It should be noted that the person who found a treasure on public land but did not report his find to the *fiscus* lost his share.

[105] The right to civil law fruits was an issue that fell within the domain of the law of contract, and not the law of property (in a narrow sense).

[106] D 6. 1. 44.

[107] It should be noted, however, that the lessee was regarded as becoming owner of the fruits by virtue of the agreement he had with the landlord. His gathering of such fruits presupposed the landlord's consent and was viewed as a form of *traditio brevi manu* by the latter. In contrast, the usufructuary was by the very nature of his right entitled to the fruits, and since he had a right *in rem* his acquisition did not depend on the landlord's consent.

[108] The term *emphyteusis* was used to denote a long-term or perpetual right in a piece of land belonging to another. The holder of such right was entitled to cultivate the land and treat it as his own, on the condition of cultivating it properly and paying a fixed sum to the owner (*dominus*) at fixed times.

[109] Under the law of Justinian, if the owner asserted his title the *bona fide* possessor had to hand over or account for all the fruits in his possession at the time. A *mala fide* possessor was accountable for all the fruits gathered, whether consumed or not, as well as for the fruits that should have been gathered but were not. See *Inst* 2. 1. 35; C 3. 32. 22.

3.3.2.9 Accessio

As an original mode of acquiring ownership, *accessio* emerged from the *ius gentium* but many of the detailed rules governing its operation were purely Roman creations.[110] *Accessio* occurred when separate things belonging to different owners were inseparably joined to each other or merged in such a manner that a new entity or object was established. Such a situation may have been effected by natural processes or by human agency, or by a combination of both. This invoked two questions: who should become the owner of the new composite object, and how was the ex-owner of a vanished thing to be compensated?

The basic principle was that the owner of the principal object also became owner of the composite thing; furthermore, the owner of the minor object had to be reimbursed for his loss of ownership. However, formulating a clear general test for distinguishing between the principal thing and the accessory has proved very difficult as everything is contingent on what has been described by philosophers as the 'elusive notion of identity'. The only simple test the authorities offer revolves around the criterion of value, but this seems inadequate as the principal object is not necessarily the more valuable object of the two. It is thus unsurprising that there were numerous exceptions to the general principles governing *accessio* and, in the course of time, a relatively complex system of rules was developed to meet the requirements of different cases. The same casuistry can be observed with respect to the issue of compensation of the former owner of the minor object. In the discussion below, attention is devoted to the three principal forms of *accessio*: the accession of immovables to immovables; the accession of movables to immovables; and, finally, the accession of movables to movables.

With respect to the merging of immovables with immovables, four forms all involving riparian owners could be distinguished: *alluvio*; *avulsio*; *insula nata in flumine*; and *alveus derelictus*.

The term *alluvio* was used to describe the accretion of land to the boundaries of riparian owners by way of silting caused by the flow of water in a river. This occurred when soil from the land of one riparian owner was gradually and imperceptibly borne by the current of a river and washed against the land of another riparian owner. The latter was then regarded as having obtained ownership of the silt deposits that had come to rest on his property through *accessio*.[111] There was no question of any redress or compensation payments for the owner of the soil that had been lost in this way.

Avulsio occurred when a sizeable piece of land was torn away by the torrent of a river from the land of one owner and deposited on the land of another. In such a

[110] *Accessio* is a broad non-technical term used to describe cases in which there has been an addition to one's right, such as where the object of one's ownership has been enlarged.

[111] D 41. 1. 7. 1; G 2. 70; *Inst* 2. 1. 20. An exception to this rule related to the so-called *ager limitatus*, or land sold by the state and subject to exact limits. Soil added to such land through *alluvio* was regarded as *res publica*. Consider D 41. 1. 38; D 41. 1. 16.

case, the land that had been torn away remained the property of the original owner. However, when the two pieces of land were so joined that trees or plants in the torn off ground established roots in the land to which it had acceded, the riparian owner acquired ownership of the detached part that had been joined to his by way of *accessio*.[112]

The question of ownership of an island that arose in a river (*insula nata in flumine*) has attracted much attention. Although the relevant rules are rather unclear, it appears that if the island was wholly on one side of the river it became the property of the riparian owner on that side. If there were more than one owner, the island was divided by drawing vertical lines from the boundaries of each property to the island. If, on the other hand, the island was not wholly on one side it became the property of the riparian owners on either side of the island. According to modern Roman law scholars, this implies that an imaginary line was drawn along the middle of the river and further lines were extended from such middle line to the boundaries of the riparian owners' properties and in this way the share that each owner had in the island was determined.[113]

Alveus derelictus occurred when a river changed its course and began flowing along another bed. In such a case, the previous riverbed that had dried up was shared by the former riparian owners on a *pro rata* basis in the same way as in the case of the *insula nata in flumine*, while the new bed became a *res publica* like the river itself. If at a later stage the river returned to its original bed and the second bed reappeared, the latter did not revert to its previous owners but was divided according to the same method employed for the first riverbed (i.e., according to the rule that applied to *alveus derelictus* in general).[114] It should be noted, finally, that in the cases of both *insula nata in flumine* and *alveus derelictus* no question of compensation arose.

With respect to the merging of movable things with other movable things, the overall picture is relatively more complicated because in these cases the distinction between principal thing and accessory is difficult or impossible to draw. Generally,

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[112] D 41. 1. 7. 2; G 2. 71; *Inst* 2. 1. 21. The authorities do not offer a clear answer to the question of whether the riparian owner on whose land the torn off ground was attached had to compensate the original owner. It has been proposed that, in view of G 2. 76 and *Inst* 2. 1. 32, the original owner probably had the same rights of compensation as the *bona fide* possessor who had made improvements to another person's property.

[113] G 2. 72; D 41. 1. 7. 3; *Inst* 2. 1. 22.

[114] In such a case, the original owners of the now abandoned riverbed did not necessarily regain their ownership. For example, a small plot of land may have been entirely absorbed by the new bed so that when the river shifted again it accrued not to its previous owner but to his neighbours on either side. Consider *Inst* 2. 1. 23: "If a river entirely leaves its old bed, and begins to run in a new one, the old bed belongs to the landowners on either side of it in proportion to the extent of their riparian interest, while the new one acquires the same legal character as the river itself and becomes public. But if after a while the river returns to its old bed, the new channel again becomes the property of those who possess the land along its banks." And see D 41. 1. 7. 5. Consider also the dissenting opinion of Pomponius in D 41. 1. 30. 3, where the view is expressed that when the river returns to its previous bed the original owners regain their ownership.

the solutions offered were devised casuistically and based on equity or some similar notion rather than on hard and fast legal rules.

Confusio offers a typical example of accession of movables to movables. It occurred when liquid materials (e.g. wine, oil, honey, or molten metals) belonging to different owners were mixed together—a process that may have happened with or without the owners' consent. If the resulting mixture was inseparable, it became common property and the former owners became joint owners in proportion to their individual ownership prior to the *confusio*. In such a case, each joint owner could claim a division by way of the *actio communi dividundo*.[115] If, on the other hand, the mixture was separable (e.g. where molten metals were mixed) there was no joint ownership but each owner retained ownership in respect of his portion of the mixture.[116] In such a case, each owner could demand a separation of the mixture by instituting the *actio ad exhibendum*, and after the separation had taken place, claim his property by way of the *rei vindicatio*.

Closely related to *confusio* was *commixtio*[117]: the mixing of solids, such as grain or corn, that belonged to different owners. If the mixing occurred with the consent of the individual owners, the result was again joint ownership irrespective of whether the components of the mixture were separable. On the other hand, if the mixing had occurred without the owners' consent then each owner retained ownership in respect of his portion of the mixture. This approach to the matter posed no problems where the components could be easily separated, such as in cases where livestock had been mixed; difficulties arose, however, in cases such as those involving grain where it was not feasible to separate the individual grains so that each owner would receive exactly those grains he had owned. In the latter case, the Romans solved the problem by granting the owner who was not in possession of the mixture an *actio in rem* (known as *actio in rem pro modo frumenti*) for the recovery of his appropriate portion. Since it was impossible for a claimant to be given his own grain, the judge divided the mixture and allocated a share to each owner at his discretion by taking into account the quality of the grain belonging to each owner before the mixing occurred.[118]

Textura was another instance of *accessio* whereby the ownership of an object passed from one person to another.[119] It occurred when a person's property was woven or incorporated into that of another such as when gold thread belonging

[115] *Inst* 2. 1. 27; D 41. 1. 7. 8–9; D 6. 1. 4. Besides the *actio communi dividundo*, Pomponius allowed an alternative legal remedy referred to as *vindicatio pro parte*. The latter remedy probably had the same effect as the *actio communi dividundo*. Consider D 6. 1. 3. 2.

[116] D 41. 1. 12. 1.

[117] The term *commixtio* does not occur in Roman legal sources.

[118] *Inst* 2. 1. 28. And see D 6. 1. 5 pr. When coins belonging to different owners were mixed, whether deliberately or not, it was recognized that the possessor of the mixture became its sole owner. In such a case, the former owners could claim only the value of their coins and not the original coins themselves. See D 46. 3. 78.

[119] *Textura* was not a technical concept of Roman law.

to one owner was stitched or woven into the garment of another. In such a case, the owner of the major or dominant object (in our example, the garment) became owner of the minor object (in our case, the thread) even if the latter was more valuable than the former. However, the previous owner had an array of remedies at his disposal depending on the circumstances of the particular case. Thus, in our example, if the gold thread had been stolen, the former owner could institute the *actio furti* or *condictio furtiva*.[120] If it was still feasible to remove the thread from the cloth, the owner of the thread could institute the *actio ad exhibendum* to have the thread detached; and, after separation, initiate the *rei vindicatio* to reclaim his property.[121] If the two objects could not be separated, the praetor could grant the former owner of the thread an *actio in factum* or *actio utilis* by means of which he could claim the value of the thread.[122] Furthermore, if the former owner of the thread was himself in possession of the final product (i.e. the cloth together with the interwoven thread), he could raise the *exceptio doli* as a defence against the *rei vindicatio* of the owner of that product. If such a defence was successful, the owner of the final product was compelled to pay compensation to the former owner of the thread for his loss before he was able to claim the product.[123]

Where an object belonging to one person was attached by means of welding (*ferruminatio*) to that of another so that the two objects became inseparable, the owner of the principal object also became owner of the accessory. Where the two objects had, however, been soldered together (*plumbatura*) they were generally considered separable.[124] In such a case each owner retained his ownership and could employ the *actio ad exhibendum* to effect separation.

Scriptura offers another example of accession of movables to movables. When a person wrote on someone else's parchment or paper, the letters (and naturally the thoughts they expressed) acceded to the material on which they were written. In such a case, the paper was considered the principal element and thus the owner of the paper became owner of the whole (even if the letters were crafted of gold). However, the writer had several remedies at his disposal. Thus, if the writer was in possession of the document and the owner of the paper wished to claim his property by way of the *rei vindicatio*, the writer could rebut the owner's claim by raising the *exceptio doli* until the latter had reimbursed him for his loss (i.e. the writing). If the owner of the paper was in possession of the

[120] See *Inst* 2. 1. 26. The *actio furti* was a penal action brought under civil law to exact a penalty from a thief of goods, while the aim of the *condictio furtiva* was the recovery of stolen property.

[121] D 10. 4. 7. 1–2.

[122] D 6. 1. 23. 5; G 2. 78; *Inst* 2. 1. 34; D 6. 1. 5. 3; D 41. 1. 9. 2.

[123] The mechanism of the *exceptio doli* allowed the judge to take into account the counterclaims of the defendant (such as expenses he incurred on the object claimed by the plaintiff) and condemn the defendant only for the balance.

[124] *Ferruminatio* was considered to be a form of *confusio*, whereas *plumbatura* was regarded as a type of *commixtio*. See D 6. 1. 23. 5; D 41. 1. 27. 2.

document, the praetor could grant the writer an *actio in factum* or an *actio utilis* to claim compensation.[125]

Pictura pertained to the case where a person executed a painting on a canvas or tablet belonging to another, and this mode of accession resembled *scriptura* in many respects but the applicable solution was different. In this case, it was the painting rather than the canvas or tablet that was considered to be the principal element and thus the painter also became owner of the material embodying the painting.[126] If the painting was in the possession of the former owner of the canvas or other material, the painter could claim it by way of the *rei vindicatio*. The previous owner of the material could rebut such a claim by raising the *exceptio doli* until he was compensated for the value of his material. Furthermore, if the painting was in the possession of the artist, the former owner of the material could be granted an *actio utilis* by the praetor to claim the whole picture (almost in the same way as in the case of the *rei vindicatio*). However, otherwise than in the case of *scriptura*, the *actio utilis* of the former owner of the material could be defended by means of an *exceptio doli* if no compensation had been paid for the painting. Such a defence could be relied upon, however, only if the painter had made use of the relevant material in good faith (*bona fide*).[127]

When a movable thing was joined to an immovable one, the latter was without exception regarded as the dominant thing. In this instance, the ownership of the immovable was extended over the movable thing or accessory. This type of *accessio* assumed different forms, however, and the relevant rules differed depending on the circumstances of the case.

Inaedificatio came to the fore when material belonging to one person was used to construct a building on another person's land. The general rule in these cases was that the owner of the land also became owner of the building material in accordance with the principle *superficies solo cedit* ('whatever is attached to the land forms part of it').[128] It is important to note, however, that a distinction was drawn between the case where a person built on his land with material belonging to another and the case where a person built on the land of another with his own material. In the former case, the general rule mentioned above applied: the owner

[125] G 2. 77: "...whatever anyone has written on my paper or parchment, even in letters of gold, is mine, because the letters are merely accessory to the paper or parchment; but if I should bring an action to recover the books or parchments, and do not reimburse the party for the expense incurred in writing, I can be barred by an exception on the ground of fraud." And see *Inst* 2. 1. 33; D 41. 1. 9. 1; D 6. 1. 23. 3; D 10. 4. 3. 14. The value of the writing was probably determined at the judge's discretion.

[126] It should be noted that not all Roman jurists subscribed to this view. Thus, according to Paulus, the painting should accrue to the person who owned the canvas or other material because without such material the painting could not exist. Consider D 6. 1. 23. 3. However, Paulus's approach was rejected by Justinian.

[127] G 2. 78; *Inst* 2. 1. 34; D 41. 1. 9.2.

[128] G 2. 73: "Any building erected on our land by another, even though the latter may have erected it in his own name, is ours by natural law, because the surface is part of the soil."

of the land also became owner of the building material. Nevertheless, under the Law of the Twelve Tables, the former owner of the material could claim restoration of his material by means of the *rei vindicatio* if the building was later demolished. One might say that, in theory, the ex-owner's right of ownership was suspended so long as the building was standing and was revived in the event it was demolished. While the building remained standing, the previous owner of the material was precluded from instituting the *actio ad exhibendum* to have the material detached from the building and, obviously, could not employ the *rei vindicatio* either. On the other hand, the Law of the Twelve Tables accorded him the *actio de tigno iuncto*[129]: a personal action by means of which he could claim double the value of the material if he was not prepared to wait until the building had been demolished.[130] In the case where a person had built on another's land with his own material, the legal position was somewhat hazier. In principle, the general rule prevailed that the owner of the ground became owner of the material but the nature of the relevant remedies varied according to the good or bad faith of the builder. If the builder had acted in bad faith (*mala fide*)—that is, if he was aware of the fact that he was building on another's land and that he was not entitled to do so—the rule was that he could not claim compensation. This approach was based on the assumption that the *mala fide* builder had voluntarily abandoned his material and donated it to the owner of the ground.[131] However, this apparently was a controversial point as there are texts that grant the *mala fide* builder the right to remove his material (*ius tollendi*) after he has left the ground[132] or even an action to claim from the landowner the amount by which the latter was unjustifiably enriched.[133] If the builder had acted in good faith (*bona fide*), he could wait until the building was demolished and then claim his material by means of the *rei vindicatio*. If he was not prepared to wait until the building was demolished, he had a *ius tollendi* that imparted a right to remove his material if he could do so without harm to the site, as well as an enrichment action at his disposal (similar to that available to the *mala fide* builder).[134] In the usual case where the *bona fide* builder was in possession of the land, he could exercise a right of retention by refusing to evacuate it before he was reimbursed to the value of his material and labour costs (including the wages of the labourers used during the course of the building). The possessor could exercise this right by raising the *exceptio doli* as a defence against the *rei vindicatio* invoked by the owner of the land to claim the ground (and the

[129] It would appear that this remedy could originally be employed again the landowner who in bad faith (*mala fide*) used material belonging to another in his building. This accounts for the penalty of double the value of the material—the same penalty as for theft. In time, this remedy became available also against the *bona fide* landowner.

[130] *Inst* 2. 1. 29. Consider also D 10. 4. 6; D 41. 1. 7. 10; D 47. 3; D 6. 1. 23. 6, 7 & 59.

[131] *Inst* 2. 1. 30.

[132] D 6. 1. 37; C 3. 32. 5. 1.

[133] D 5. 3. 38.

[134] D 6. 1. 38; D 5. 3. 39. 1; D 6. 1. 27. 5; C 3. 32. 5. 1.

building).[135] If the building was torn down while the builder was in possession of the ground, the ownership of his material was simply restored to him.[136]

There were two further instances of *accessio* involving the joining of movables to immovables, namely *implantatio* and *satio*. The former occurred when one person planted a tree or plant in the land of another,[137] while the latter transpired when the seeds of one person were sown in another person's land. The general rule that applied in such cases was that the tree, plant or seed became the property of the landowner from the moment that it took root or began to grow. If the plant or tree was planted close to a boundary and its roots penetrated into two neighbouring landowners' grounds, the plant or tree became the joint property of the owners of the two plots of land. If the former owner of the plant, tree or seed was in possession of the land, he could rebut the *rei vindicatio* of the owner of the land by raising the *exceptio doli* until he was reimbursed for his loss.[138] If the former owner had lost possession, the praetor could grant him an *actio utilis* to claim compensation from the landowner.[139]

3.3.2.10 Specificatio

The term *specificatio*[140] refers to the process of creating or bringing into existence a new object (*nova species*) out of existing material, such as wine from grapes, a statue from metal, a boat from timber and a garment from wool. If the creator of the new object was not the owner in whole or in part of the material used, the question of ownership of the object came to the fore.

If the creation of the new thing was preceded by an agreement between the maker and the owner of the material, there was no difficulty in establishing ownership: either the agreement had resolved the question of ownership or, if it did not, the new object would become the joint property of the two parties. However, what if the creator of the new thing had acted without the consent of the owner of the material and the parties could not agree about the ownership of the thing? The two schools of jurisprudence of the classical era, the Sabinians and the Proculians, formulated different answers to this question. The Sabinians declared the opinion that the owner of the material should also become owner of the new object or where there were two or more owners, the latter should own the object jointly and in proportion to their contribution. By contrast, the Proculians held the view that the maker acquired ownership of the thing he

[135] *Inst* 2. 1. 30; G 2. 76; D 41. 1. 7. 12; D 44. 4. 14.

[136] C 3. 32. 2—the relevant rule was applicable to both the good faith and bad faith builder.

[137] The notion of *implantatio* is not of Roman origin.

[138] *Inst* 2. 1. 31 & 32; G 2. 74–76; D 41. 1. 7. 13 & 9 pr. Even if the plant or tree was separated from the soil after it had started to grow, it remained the property of the landowner. See D 41. 1. 26. 1.

[139] D 6. 1. 5. 3.

[140] The concept is not of Roman origin.

had created.[141] Justinian adopted a middle course and ruled that if the new product could be reduced to the material from which it had been created (for example, a golden statuette could be melted down to the original lump of gold), the owner of the material also became owner of the new object; if this could not be achieved (for example, wine could no longer be transformed into grapes), the maker became the owner. Where a new object was created partially out of material belonging to another person, the maker became owner of the object since he had not only made the thing but had also contributed part of the material. Although this case is classified as *specificatio*, it was really a form of *accessio* as the creator acquired ownership of an object that incorporated someone else's material.[142]

The extant authorities are not very clear on the question of what legal remedies could be available to the party who suffered loss as a result of *specificatio*. It seems likely, however, that such party could institute an *actio utilis* or even an enrichment action against the owner of the new object.[143]

3.3.3 Protection of Ownership

Owners could employ a variety of legal remedies to protect their rights, depending on the way in which ownership was infringed. In the illustrative case of theft, the owner could institute the *rei vindicatio* to reclaim his property; he could also seek to exact a penalty from the thief by means of the *actio furti* and, if recovery of the stolen property was impossible, could institute the *condictio furtiva* to obtain compensation for the loss he had suffered. Furthermore, the owner of immovable property had an array of actions and interdicts at his disposal in cases of nuisance; the *actio negatoria* against anyone who claimed a servitude or usufruct over his property; and, in general, any owner could apply the possessory interdicts.

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[141] The two schools also held different views on the question of what constituted a *nova species* or new thing. The Sabinians followed the Stoic philosophy that accorded priority to matter, whilst the Proculians adopted an Aristotelian approach in giving the primacy to form or essence.

[142] G 2. 79; *Inst* 2. 1. 25; D 41. 1. 7. 7; D 6. 1. 5. 1; D 41. 1. 27. 1; D 41. 1. 24 & 26 pr. The 'mid-way house' approach adopted by Justinian has been criticized on the grounds that it takes no account of the relevant importance of the materials used and of the creator's skill and amount of labour required to complete the work; this approach has been abandoned by modern legal systems. Under the French Civil Code, the owner of the material also becomes owner of the object unless the value of the labour far exceeds the value of the material. The German Civil Code, on the other hand, strikes a different balance, providing that the maker should become owner of the new thing unless the value of the labour is far below that of the material used.

[143] See D 24. 1. 29–30. Where the material used in the manufacture of the new product had been stolen, the usual remedies for theft (i.e. the *actio furti* and the *condictio furtiva*) were available. See G 2. 79.

The most important legal remedies an owner could employ, however, were the *rei vindicatio* comprised of an action used to defend civil or 'quiritary' ownership of a thing (movable or immovable) and to recover possession of it from third parties; and the *actio ad exhibendum*, an action usually employed before an owner initiated the *rei vindicatio*.

3.3.3.1 Rei Vindicatio

The *rei vindicatio* was a real action (*actio in rem*) derived from the *ius civile* that served to protect the civil law owner (*dominus ex iure Quiritium*). By means of this action, the owner reclaimed possession of his property from any person in possession of it without holding a right to such possession, irrespective of whether the possessor was *bona fide* or *mala fide*.[144] Such action was directed at the recovery of the property itself and not at the person of the possessor thereof.

The purpose of the *rei vindicatio* was twofold: to determine ownership of the object in question and, once this had been established, to compel the defendant to return the object to its lawful owner or face being ordered to pay a sum of money. The burden fell on the plaintiff to prove that he was the owner of the property in question. In practice, this meant the plaintiff had to show that he had acquired the property by an original form of acquisition or that his predecessor had held a lawful title to such property. If he succeeded, the judge condemned the defendant to restore possession of the property to the owner or, if the thing itself had been lost or destroyed, to pay a sum of money proportionate to the value of the thing. In assessing the amount in question, the judge had to take into consideration the so-called *causa rei* that theoretically included everything the plaintiff would have acquired if the object had been returned to him at the moment of the *litis contestatio*.[145] More specifically, the *causa rei* encompassed the fruits and other proceeds of the thing as well as damages and expenses.[146] The extent of the claim also depended on the possessor's good or bad faith. The *bona fide* possessor was liable for the fruits that were plucked and still in existence (*fructus extantes*) before the *litis contestatio* as well for all fruits (including those that had been consumed or had not been gathered) after the *litis contestatio*. Furthermore, he was liable for intentional damage to the property before the *litis contestatio* as well as intentional and negligent damage to it after this phase

[144] It is germane to reference the distinction between the effective possessor of an object and a mere holder (*detentor*). For example, if A was the *bona fide* possessor of B's object and he (A) let this object to C, A as the lessor was the effective possessor while C as the lessee was the *detentor*. In classical law the *rei vindicatio* could be employed only against the effective possessor of the property but, by the time of Justinian, it could be used against any holder.

[145] The term *litis contestatio* refers to the final act in the proceedings *in iure* by which all the elements of the dispute were finalized and the case was submitted to the judge for examination of the facts and for judgment.

[146] D 6. 1. 33; D 22. 1. 19; D 50. 16. 35; *Inst* 4. 17. 2.

of the civil proceedings. On the other hand, the *mala fide* possessor was liable for all fruits along with all intentional and negligent damage caused to the thing before or after the *litis contestatio*.[147] However, both the *bona fide* and the *mala fide* possessor were entitled to compensation if they had incurred necessary or, under certain circumstances, useful expenses (*impensae necessariae*, *impensae utiles*) in respect of the property as elaborated by the principle that nobody should be unjustifiably enriched at someone else's expense.[148] Furthermore, both had the right to remove and take away any improvements effected by them on the property in question (*ius tollendi*), provided that they could exercise this right without causing harm and the removal was not totally useless.[149]

Under the law of Justinian, the *rei vindicatio* could also be instituted against the so-called 'fictitious possessors' (*ficti possessores*). Such possessors were persons who were no longer in possession of the thing because they had rid themselves of it fraudulently with the purpose of preventing the institution of the *rei vindicatio* against them. The term *ficti possessores* also denoted persons who were not in possession of the object but purported to be the possessors thereof and hence allowed another to launch an action against them with the purpose, for example, of enabling the true possessor to continue a prescriptive period without interruption. The fictitious possessors were sentenced to pay a sum of money as compensation to the deceived plaintiff.[150]

3.3.3.2 Actio Ad Exhibendum

As previously noted, the *rei vindicatio* was a real action by means of which the owner of a thing demanded that possession of his property should be restored to him. Before he could institute this action, however, the owner had to ensure that the object in dispute could be brought before the court and this requirement often meant he had to compel the person in possession of the object to produce it. This task was necessary when the possessor refused to cooperate or denied he had possession of the object in question despite evidence that suggested otherwise. Such a case would prompt a resort to the *actio ad exhibendum* as a prerequisite for the *rei vindicatio*.[151]

The *actio ad exhibendum* was a personal action[152] derived from the *ius civile* that was used to determine whether a particular person had possession of a thing

[147] D 6. 1. 13; D 6. 1. 45; D 6. 1. 15. 3; D 5. 3. 20. 21; *Inst* 4. 17. 2; D 6. 1. 17. 1; D 6. 1. 35. 1; D 6. 1. 62. 1; C 3. 32. 22.

[148] D 5. 3. 38; C 3. 32. 5. 1. It should be noted that if the object had been stolen, the thief was not entitled to compensation in such cases.

[149] It should be noted, however, that the owner of the property could counter the exercise of the *ius tollendi* by an offer of compensation. D 6. 1. 38.

[150] D 5. 3. 13. 13; D 5. 3. 45; D 6. 1. 25; D 6. 1. 27. 3; D 6. 1. 36 pr.

[151] D 10. 4. 1.

[152] D 10. 4. 3. 3.

and, if this was the case, to compel that person to produce it. This action was available not only to the owner who wished to institute a *rei vindicatio* but to any person who wanted a thing to be produced so that he could claim possession of it at a later time. As previously indicated, a specific application of this action was connected with *accessio* when a person's object became attached to that of another in such a manner that a new composite thing was formed. Through the *actio ad exhibendum* the plaintiff sought to compel the person in possession of the composite thing to detach and produce his object, so that the *rei vindicatio* could be instituted afterwards for the recovery of the separated object.[153] Obviously this action presupposed that the separation could be accomplished without damage to the object and while it retained its original identity. Even in cases where the object in question no longer existed (e.g., if it was destroyed or consumed by the defendant) the *actio ad exhibendum* was available to the plaintiff for pursuing damages. A further application of the action was against a person who had rid himself of a thing in bad faith (*mala fide*) with the purpose of avoiding the *rei vindicatio* instigated against him by another person.[154]

In an *actio ad exhibendum* the plaintiff had to prove that the defendant was in possession of the object in question and could produce it. If he succeeded in establishing this proof and the defendant refused to produce the object, the latter was sentenced to pay an amount of money to compensate for the loss incurred by the plaintiff.[155] This amount included the value of the fruits that had meanwhile been produced by the thing.[156]

3.3.3.3 Actio Publiciana

The *actio Publiciana* was an *actio in rem* granted by the praetor to the person who acquired a *res mancipi* in an informal manner by way of *traditio* rather than *mancipatio* or *in iure cessio*.[157] As previously observed, in such a case the acquirer did not become *dominus ex iure Quiritium* of the property but was placed by the praetor in the factual position of a civil law owner. The property was then regarded as *in bonis* and the acquirer as a bonitary or praetorian owner who could become a true owner by means of *usucapio* if he remained in possession of the property for a prescribed period of time. The *actio Publiciana* accorded the bonitary owner virtually the same protection imparted by the *rei vindicatio* to the *dominus ex iure Quiritium*. The bonitary owner who lost possession before the period of *usucapio* was completed could utilize this action to recover possession of the

[153] D 6. 1. 23. 5.

[154] See, e.g., D 12. 4. 15.

[155] In such a case, the plaintiff was reimbursed because he could not claim the thing in a subsequent legal action.

[156] *Inst* 4. 17. 3.

[157] This action was introduced by Publicius, an urban praetor, probably in the first century BC.

property from whoever may have held it without a lawful title, irrespective of whether such person was a *bona fide* possessor. The *actio Publiciana* was an *actio fictitia* as it was based on the fiction that the bonitary owner had already become a true civil law owner through the process of *usucapio*.[158] For the rest, the action was subject to the same rules as those that applied when the *rei vindicatio* was instituted.[159]

In the era of Justinian's reign, the distinction between *res mancipi* and *res nec mancipi* as well as the attached concept of bonitary or praetorian ownership vanished and therefore the above application of the *actio Publiciana* became obsolete. However, Justinian introduced a new application of this action. This innovation pertained to the case where a person received *bona fide* and *ex iusta causa* a thing from a *non-dominus* and was in the process of acquiring ownership of such thing by means of *usucapio*. Such a person could institute the *actio Publiciana* against any person who had assumed possession of the thing without having a lawful title. It should be noted, however, that such action could not be employed against the *dominus ex iure Quiritium*.[160]

3.3.3.4 Actio Negatoria

A further remedy available to the owner was the *actio negatoria*, or 'action of denial'. This action was instituted by the owner of landed property against any person who, without challenging the plaintiff's right of ownership, claimed a servitude or similar right in respect of his land. The aim of such action was to obtain an order of court confirming that the plaintiff had full ownership not encumbered by the existence of any right of the defendant and forbidding the latter from arrogating to himself such right or calling upon him to restore the *status quo*.[161]

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[158] See G 4. 36: "There is a pretended *usucapio* in the action styled Publician. This action is granted to a party who claims property which has been delivered to him for some legal reason, and of which he lost possession before obtaining a title to it by *usucapio*; for because he cannot claim it as his under quiritarian right, the fiction is employed that he has acquired it by *usucapio* and hence, as it were, to have become its owner, by quiritarian right. . ."

[159] The counterpart of the *actio Publiciana* was the *exceptio rei venditae ac traditae*: a defence by means of which a bonitary owner could oppose the *rei vindicatio* of the civil law owner. When this defence was employed the defendant recognized that the plaintiff was the actual owner of the thing in question, but raised the objection that since he had acquired the thing for a good reason (*iusta causa*) and, furthermore, that the thing had been delivered to him it would be inequitable if the owner were to succeed and retrieve possession. Under the law of Justinian, this application of the defence was no longer recognized. However, the defence could still be used by a person who had acquired an object *bona fide* and *ex iusta causa* from a *non dominus*, provided that the latter had in the meantime become a *dominus ex iure Quiritium* of the object and had instituted the *rei vindicatio* against the acquirer. Consider D 21. 3.

[160] If this action was initiated, the *dominus* could bar it by raising the *exceptio iusti dominii* as a defence.

[161] D 7. 6. 5. 6; D 8. 5. 2 pr.

3.3.4 Limitations on Ownership

Even though ownership was the most extensive of all real rights, it could still be limited in various ways: by public law, by the rights of neighbours and by the owner's own voluntary decision to waive some of his rights.

As early as the archaic period, the owner's right of disposal with respect to his property was restricted by various prohibitions of public law.[162] The criterion in these instances was the public interest, and legislation limiting the power of the owner in the interests of public health and safety did feature in Roman law. At the same time, generally established principles of a moral or ethical nature prompted the censors (*censores*) to keep a watchful eye on breaches of the public interest connected with the abuse of ownership rights.[163]

Furthermore, it was possible for an owner to voluntarily limit his right of ownership by giving a lesser or greater degree of control over his property to another person; for instance, by leasing such property to another person or granting them a servitude over it.

Finally, the power of an owner over his property was often limited by various rules of private law; the most important of which pertained to the so-called 'law of neighbours'.

In principle, the owner of land had absolute power over his property and could do as he pleased with the surface of such land, the space above it and the earth below. As the Roman population increased and neighbours dwelled closer to each other, a series of rights and reciprocal duties in respect of the owners of adjacent land developed for the purpose of preventing unreasonable inconvenience to and possible conflict among them.

There was, for instance, an ancient ruling concerning the branches of trees protruding over the boundary of a neighbour's property. The Law of the Twelve Tables provided that the landowner whose property was affected could request a

[162] In the earliest period of Roman law, religious or sacral law played a particularly important role in limiting the power of a *dominus* over his property.

[163] The Law of the Twelve Tables contained several provisions designed, on the one hand, for the maintenance of certain moral standards and, on the other hand, for the protection of public health and safety such as the provisions prescribing the space that should be left between buildings or the width of streets. Furthermore, any uneconomical use of property assets, such as poor utilization of land or excessive expenditure on luxurious improvements, was subject to stigmatization by the censors. The legislation of the classical age launched even more detailed provisions and prohibited, for example, the demolition of buildings without a good cause as well as the construction of buildings above a certain height or too close to public facilities. Moreover, landowners were required to cooperate with the authorities in respect of the construction and maintenance of public buildings, roads, aqueducts, stadiums and the like. Taxation on land and other property assets also came to the fore during this period. The compulsory expropriation of private land in the public interest was generally restrained in early times but became very common during the later imperial age. When these events occurred, the owners of expropriated property were compensated on the basis of a compulsory sale.

pruning of the overhanging branches to a height of fifteen feet. If this request was not complied with, he could employ the *interdictum de arboribus caedendis*.[164] Analogous remedies were available to an owner when the roots of a plant or tree belonging to a neighbour penetrated into his property.

If the fruits of a plant or tree fell on adjoining land, the owner of the plant or tree was allowed to collect his fruit every second day. This right could be enforced by means of the *interdictum de glande legenda*.[165]

If a person artificially directed the flow of rainwater onto the property of a neighbour (e.g. by constructing a building or other work), the latter could employ the *actio aquae pluviae arcendae* to demand restoration of the *status quo*.[166]

If a building or other structure in a dilapidated state threatened to collapse and cause damage to the property of a neighbour, the latter could request the praetor to compel the owner of the defective premises to provide security against possible damage by way of the *cautio damni infecti*.[167] If the owner refused to do so, the praetor could grant a *missio in possessionem* that placed the neighbour in possession of the dangerous building. If the owner remained recalcitrant, a second decree could ensue declaring the neighbour to be bonitary or beneficial owner of the building (and thus in the process of acquiring true ownership by *usucapio*).[168]

Where the owner of a property commenced construction work on his property or an excavation in such a manner that his neighbour or the beneficiary of a servitude feared possible damage to his own property interests, the latter had the right to demand that the owner cease the work (*operis novi nuntiatio*) or provide security against possible future damage by way of the *cautio damni infecti*. If the owner failed to do so, the praetor could grant the *interdictum demolitorium* for the demolition of the work constructed.[169]

Closely connected with the above case was the situation where a person forcibly or clandestinely (*vi aut clam*) erected a structure or did some work on land (such as cutting trees, digging, demolition of an existing building and the like). If such structure or work prejudiced a neighbour, the *interdictum quod vi aut clam* could be instituted against the builder to compel him to restore the *status quo*.[170]

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[164] D 43. 27. If the tree owner did not obey the interdictal order, the landowner concerned could cut the branches himself and retain the wood.

[165] D 43. 28.

[166] D 39. 3. 1 pr. This action had to be instituted before any damage ensued.

[167] Such security was given by means of a stipulation, a formal agreement creating a legal tie between the two parties. In early times, the person concerned could employ the *actio damni infecti* that existed as a remedy probably directed at the payment of a penalty.

[168] See on this topic D 39. 2. 7 pr; D 39. 2. 2.

[169] It should be noted that, under certain circumstances, the owner could ask the magistrate for the annulment of the *operis novi nuntiatio* if he could prove that the complainant had no right to oppose the projected construction.

[170] D 43. 24. 1 pr. According to the jurist Scaevola, acting forcibly (*vi*) meant acting contrary to a prohibition. And see D 43. 24. 1. 5.

An owner of land that had no outlet to a public road and who, therefore, could not reach his property without passing through the land of a neighbour, could claim a way of necessity (*via necessitatis*) over the latter's property.[171]

Smoke or the natural flow of water from a neighbouring property had to be tolerated as long as it remained within reasonable limits. If these limits were exceeded, the *interdictum uti possidetis* could be granted to the person who had been disturbed in the possession of his property.[172]

Furthermore, a neighbour was required to allow a wall belonging to an adjacent property to protrude half a foot over his property.[173]

It should be noted, finally, that a dispute regarding the boundary between neighbouring properties could entail one of the owners instituting the *actio finium regundorum* against the other for the purpose of having the boundary determined anew. In such a case, the judge had the power to transfer a portion of land from one party to the other into full ownership (*adiudicatio*).

3.3.5 Joint Ownership

Joint ownership or co-ownership, denoting ownership of the same object by two or more persons simultaneously, was recognized in Roman law from a very early period.

The earliest form of joint ownership was the *consortium ercto non cito* comprised of a community of *sui heredes*[174] who, after the death of their *paterfamilias*, became joint owners of his property when such property remained undivided. Each of the co-owners had the same right of disposal in respect of the entire estate and could demand the division of the common property by means of the *actio familiae erciscundae*. In the early classical period, this form of joint ownership became obsolete and finally disappeared from the legal scene.

Another form of joint ownership still in existence during Justinian's reign was the *communio pro indiviso* or, as it was later called, *condominium*.[175] It arose when two or more individuals purchased or acquired through inheritance or legacy the same property in common. This form of co-ownership was often voluntarily entered

[171] D 8. 6. 14. 1.

[172] D 8. 5. 8. 5–7; D 8. 5. 17. 2. It appears that an *actio negatoria* was also available to the disturbed neighbour in certain cases.

[173] D 8. 5. 17 pr.

[174] The *sui heredes* were the agnatic descendants of the deceased who were subject to his immediate power and who became *sui iuris* by his death. They formed the first group of heirs according to the Law of the Twelve Tables. See the relevant discussion in the chapter on the law of succession below.

[175] The notion of *condominium* is not used in the Roman juridical literature.

into by partners engaged in a joint business venture.[176] In this case each joint owner had a share in the common property and could use, alienate, pledge or otherwise burden his share as he saw fit. Moreover, in proportion to his share, he had full enjoyment of the common property. However, he did not have the right of disposal in respect of the property as a whole because such disposal required an agreement among all the co-owners. At the same time, each joint owner had the *ius prohibendi*: the power to prohibit other co-owners from using the common property in an extraordinary and hence unacceptable manner.[177] As this suggests, the parties had to reach an agreement on the use or exploitation of the property or when such consensus was elusive they had to terminate the joint ownership.

If the co-owners decided to terminate the joint ownership and divide the common property but could not reach agreement on the appropriate method for this division, any of them could institute one of the actions available in such cases: the *actio familiae erciscundae* for the division of a joint inheritance; and the *actio communi dividundo* for the division of other joint property. If the property in question was divisible, the judge had the duty to order a division according to the share that each owner had in the property and to adjudicate to each a portion thereof (*adiudicatio*). On the other hand, where the joint property was indivisible the judge could award the property to one of the co-owners and at the same time order him to pay a sum of money as compensation to the others. Alternatively, he could rule that the property be sold and the proceeds from such sale be divided among the joint owners.[178]

3.4 Possession

In the previous paragraphs, frequent references emphasized the notion of possession as a key to the acquisition of the right of ownership. For instance, our discussion of the institutions of *occupatio*, *traditio* and *usucapio* noted that assuming possession of an object was the basis of acquiring *dominium* thereof. Despite the close connection between possession and ownership, Roman law drew a clear distinction between the two concepts. As already observed, the right of ownership in respect of an object was the most comprehensive real right recognized in private law. On the other hand, possession was essentially a factual state of affairs, namely,

[176] The emergence of the *communio pro indiviso* is related to the expansion of commercial activities and the development of business partnerships during the late republican age. It is interesting to note that Justinian treated *communio* as a type of quasi-contract. See relevant section in the chapter on the law of obligations below.

[177] Consider on this matter D 8. 2. 27. 1; D 10. 3. 28. Justinian seems to have allowed such a prohibition to be enforced by means of the action for the division of common property (*actio communi dividundo*).

[178] When a division of common property was at issue, the judge had to take into consideration the profits that had accrued to or the losses that had been sustained by one or more of the co-owners in connection with the management of the property so as to effect an equitable distribution of the benefits derived therefrom.

the physical control of a corporeal thing. This difference between being entitled to an object and having physical control of it lies at the root of the distinction between ownership and possession.[179] Although possession was theoretically a matter of fact rather than a right, it was a fact that the law protected by according the possessor certain remedies against others who interfered with his possession or deprived him of it. But why did the law protect possession? The answer to this question seems to lie partly in historical factors and partly in public policy.

In the earliest form of the concept, possession appears to have been invoked in connection to land and, more specifically, public land (*ager publicus*). As pointed out earlier, the expansion of Roman territory entailed large tracts of land falling under the control of the Roman state in Italy and the provinces. Such land was parcelled out and given to individuals for their use and enjoyment as possessors rather than as owners because ownership was vested in the Roman people as a whole.[180] Although such possession was recognized as rightful, its holders could not institute the *rei vindicatio* when they were deprived of it. To remedy this situation, the praetor at a very early stage initiated steps to protect possessors by means of certain remedies known as possessory interdicts (*interdicta*). This manner of protection was soon extended to other forms of rightful possession, such as that of a pledgee, until it became the usual form of possessory protection.

The introduction of remedies designed for the protection of possession is also related to considerations of public policy. While a person possesses an object, and because he possesses it, the impression is projected that such a person has a right to the object. The law has to consider this factual relationship seriously and ensure that third parties are prevented from interfering with it or taking matters into their own hands until and unless due legal process has transpired. The notion that an existing possessory situation must be protected for the time being is expressed by the maxim "*Qualiscumque enim possessor hoc ipso quod possessor est, plus iuris habet quam ille qui non possidet*": "He who has possession has by virtue of his being a possessor a greater right than somebody who does not possess."[181] Although possession by itself was deemed worthy of legal protection, the element had much wider consequences when combined with other factors. As already noted, it was the foundation of the Roman system of ownership as in most cases possession plus another legal fact entailed *dominium*.[182]

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[179] As previously noted, a person may own a thing without possessing it or may possess it without being its owner.

[180] The use and enjoyment of property were the basic elements of possession, as evidenced by the fact that possession was originally known as *usus*. Similar to this was the notion of *habere*, the factual control that the seller had to transfer to the buyer. These forms of factual or physical control furbished the basis for the development of the concept of *possessio civilis* or 'prescriptive possession'.

[181] D 43. 17. 2.

[182] For example, the elements of possession plus time led to ownership by way of *usucapio*; possession plus *iusta causa* resulted in *dominium* or praetorian (bonitary) ownership by way of *traditio*.

Possession in a broad sense assumed many diverse forms and, from an early period, the Roman jurists set themselves the task of elaborating criteria for distinguishing between protected and unprotected possession. However, they did not develop a general theory of possession as they were mainly interested in the practical questions concerning the acquisition and loss of possession rather than the abstract question of its meaning. In this respect, convenience rather than logical consistency determined the scope of the relevant possessory remedies. In general, protected possession had to have two elements: the actual physical control of a thing (*corpus*); and the intention of exercising such actual control, normally as the owner (*animus*).

Although the classical jurists did not adopt a uniform terminology and their views appear unclear or contradictory on certain issues, for present purposes a distinction may be drawn between three types of possession: *possessio civilis*; *possessio ad interdicta*; and *possessio naturalis* or *detentio*.

Possessio civilis (also known as *possessio ad usucapionem*) was a form of protected possession that could lead to full ownership through *usucapio*. The requirements for this type of possession encompassed the actual physical control of the object and a just legal title for possession (*iusta causa possessionis*), such as purchase and sale or the giving of a dowry.[183] This category embraced the cases of a person who acquired a *res mancipi* informally by mere delivery (*traditio*) from the owner as well as the person who acquired an object capable of *usucapio* in good faith (*bona fide*) and based on a just cause from a non-owner. In both cases, these persons acquired actual control over the object *ex iusta causa* and had the *animus domini*. The *possessio civilis* was protected by interdicts and the *actio publiciana* mentioned earlier.

The term *possessio ad interdicta* (possession subject to interdictal protection, also simply referred to as *possessio*) denoted possession that was protected by the *ius honorarium* by means of certain praetorian interdicts. This category encompassed the possessor who had physical control of an object with the intention of retaining it as his own, irrespective of whether he was entitled to such possession or not. Such possessors in this category included the possessor who was an owner in accordance with Roman law, the *bona fide* possessor who honestly believed that he was the owner and even the *mala fide* possessor (such as a thief) who, although he knew that he was not the owner, did not intend to surrender the thing.[184] Furthermore, possessory interdicts were granted to persons who exercised actual control of a thing in the

[183] D 41. 2. 3. 21.

[184] This draws attention to the fact that the essential matter in a possessory interdict was possession and that the question as to the right of the possessor over the object had no relevance. Indeed, as Ulpianus' statement 'ownership has nothing to do with possession' (D 41. 2. 12. 1) suggests, a dispossessor could not even rely on the fact that he was the owner of the thing in question. Such a rigid separation of ownership and possession could entail a paradoxical situation: a person who was deprived of his possession by the owner of the property could be victorious in the possessory interdict but be condemned to return the property to the owner if the latter asserted his ownership right by a *rei vindicatio*. However, in the eyes of the Roman jurists, this situation was preferable to the collapse of the distinction between possession and ownership. It also had the practical advantage of discouraging people from taking matters into their own hands without following the due process of law.

place of someone else, such as the holder of a long-term lease of land in terms of *emphyteusis*, the *superficiarius*,[185] the pledgee, the tenant at will or on sufferance (*precario tenens*),[186] and the *sequester*.[187] These were cases where the owner had parted with possession, while his right of ownership remained intact. In such cases, the possessor's *animus* pertained not to the exercise of *dominium* but to the assertion of a right to possess derived from a previous possessor. As these cases constitute departures from the general principles, they are usually explained by reference to historical factors or on the grounds of practical necessity or convenience.

Finally, the term *possessio naturalis* (also known as *detentio*) denoted the possession of persons who, although they had physical control of a thing, could not seek the protection of possessory interdicts. In such cases, the holder of the thing (*detentor*) did not intend to retain the thing for himself and no *iusta causa possessionis* existed as required for the acquisition of ownership by *usucapio*. This category of possession encompassed holders who exercised physical control of an object on behalf of or in the place of someone else such as the borrower (*commodatarius*), the depositee (*depositarius*), the lessee (including the lessee of land), the contractor, the mandatary and others. If these holders were disturbed in their possession or deprived thereof, they could not employ an interdict or other remedy against the dispossessor. Instead, the possessors had to approach the person on behalf of whom they held the thing as only the latter was entitled to the relevant remedies. For example, if a third party deprived the lessee of the object that had been leased, the lessor could be granted a possessory interdict against such third party. This approach to the matter was based on the assumption that the lessor (the principal) exercised his possession through the agency of the lessee (the *detentor*).

In the time of Justinian, the classical jurists' classification of the various forms of possession was to some extent modified. *Possessio civilis* still existed but had a broader meaning that embraced the possession of the owner as well as that of the person in the process of acquiring ownership by prescription. All other forms of possession were collectively referred to as *possessio naturalis* regardless of whether they were subject to protection by interdicts.[188] Furthermore, in the post-classical

[185] The term *superficies* denoted the right to use what was on the surface of another person's land. The holder of such a right (*superficiarius*) could use, for example, a house built on another's land either in perpetuity or for a very long term by paying the owner an annual rent (*solarium*).

[186] Such person held possession of a thing at his own request pending termination of his possession by the owner whenever the latter decided to do so. D 43. 26. 1.

[187] The *sequester* was a person with whom the parties to litigation deposited the object of the dispute. He had a duty to surrender the object, after the conclusion of the litigation, to the party who won the case. Unlike the normal depositee, the *sequester* was regarded as possessor of the object and was protected by possessory interdicts. D 50. 16. 110; D 16. 3. 17. 1.

[188] Reference may also be made to the so-called 'juridical possession' (*possessio iuris*) relating to the possession of a right such as a usufruct. Since in classical law possession was limited to corporeal objects, such possession was regarded as quasi possession and the same reasoning was applied to praedial servitudes, inheritance and a number of other rights. The quasi-possessor could rely on the usual interdicts or on special interdicts adapted to the particular case.

era the original premise that possession was merely a factual relation was gradually abandoned as the intention of the possessor to be owner of the thing (*animus domini*) was emphasized whilst the element of physical control (*corpus*) was blurred. It was thus recognized that a person could exercise possession *animo solo* even if the actual physical control of the thing had been lost; possession became regarded as a right (*ius possessionis*) and no longer merely a legally relevant factual situation.[189] The theories of nineteenth century Romanist scholars[190] has greatly contributed to this interpretation of the concept of possession evolving as the basis of modern approaches to the notion of possession in law.

3.4.1 Acquisition, Maintenance and Loss of Possession

The Roman law pertaining to the acquisition, maintenance and loss of possession was highly casuistic and no single comprehensive theory of possession capable of accommodating all the relevant rules has been offered. It is thus unsurprising that many 'anomalous' cases of possession exist that may only be explained either historically or on the grounds of convenience. It is sufficient to surmise that in classical law the acquisition of protected possession required the acquisition of physical control of the thing (*corpus*) with the intention of retaining it under such control, normally as an owner (*animus*).[191]

From an early period, it was recognized that possession could be acquired by representation in certain cases. For example, a *paterfamilias* could acquire possession through persons in his *potestas*, a *procurator* could acquire possession for his

[189] Such an approach tended to blur the line between possession and ownership, which the classical jurists so rigorously maintained.

[190] Particularly influential in this respect were the works of the German jurists Friedrich Carl von Savigny and Rudolf von Jhering.

[191] D 41. 2. 1. 3. Later commentators referred to the element of intention as *animus possidendi*: an intention to possess. However, by the time of Justinian the intention in respect of the *possessio civilis* was expressed as *animus domini*: an intention to hold something as an owner. According to the German jurist Savigny, it was the *animus domini* that made possible the distinction between protected possession and mere detention of an object. The detentor did not have possession because he had no *animus domini*. As previously noted, the cases of the *emphyteuta*, the pledgee, the *superficiarius*, the *precario tenens* and the *sequester* (described by Savigny as cases of derivative possession: *abgeleiteter Besitz*) are viewed as exceptional cases that may be explained by reference to the history of the relevant institutions or on the grounds of convenience. Jhering was opposed to Savigny's 'subjective theory' of possession, which places the emphasis on the element of *animus*, and thus presented his own 'objective theory.' According to the latter theory, the element of intention is irrelevant to the distinction between possession and detention. In principle, any person had possession (as required for interdictal protection) if they consciously exercised actual physical control of a thing (*corpus*), whether for himself or another. From this point of view, the cases of detention mentioned earlier (i.e. the cases of the *commodatarius*, the *depositarius*, the lessee, the contractor and the mandatary) are viewed as exceptions introduced for special reasons.

principal[192] and a *tutor* could acquire possession for his ward. By the time of Justinian, possession could generally be acquired through a third party. In such cases, the representative was regarded as exercising the necessary *animus* on behalf of his principal.

Protected possession continued to exist as long as the possessor exercised actual or effective control over the property in question with the requisite intent.[193] However, what amounted to effective or actual control depended on the nature of the object in question as well as on the opinion that prevailed in the community as to what constituted such control in different situations. For example, a greater degree of physical control may be said to have been required for the acquisition of possession of a cart than of a pile of bricks, of a sheep than of a tract of land. Obviously, it was not necessary for a possessor of a plot of land to be present at all times on all parcels of the land. Indeed, land was one of those things with respect to which the element of physical control may be minimal in some cases. A well-known example found in the sources is that of the so-called winter and summer pastures. The possessor of such land did not remain on the property all year, yet in his absence he was still considered to retain possession of it. This interpretation prevailed based on the generally accepted practice in the community that such land was left unoccupied during certain periods of time. As previously noted, during the later imperial era the tendency developed to regard possession as a right and it was thus deemed acceptable that possession could be retained by the exercise of the requisite *animus* alone.

Protected possession was lost as soon as one or both of the essential elements for its existence, namely *corpus* and *animus*, disappeared. This event could occur where the possessor voluntarily surrendered or abandoned the object in question; where he lost the physical control of the thing against his will (e.g. where an animal in his possession wandered off); and where the physical control was externally retained but the person no longer intended to exercise such control.[194] By the time of Justinian, the principle prevailed that a person could retain or relinquish possession *animo solo*.

3.4.2 Protection of Possession

In Roman law, possessory protection was achieved mainly by interdicts (*interdicta*); that is, praetorian orders issued on request in duly justified circumstances. Some of

[192] G 2. 95; *Inst* 2. 9. 5. The term *procurator* denoted the person who administered another's affairs under his authorization. See D 3. 3. 1 pr.

[193] It should be noted that a person could retain possession through a dependant *in potestate*. In time, this principle was extended to other persons acting as representatives such as a lessee, a depositee, a borrower and other detentors.

[194] The unintentional control of an object appears to be a contradiction in terms, but an insane person or a child may exercise control and yet be incapable of forming an intention as required for obtaining and retaining possession.

these interdicts were available for the protection of a specific possessor, while others had general application and could be relied upon by any protected possessor.

Possessory interdicts were classified into three categories: interdicts aimed at obtaining possession (*interdicta adipiscendae possessionis*); interdicts aimed at retaining possession (*interdicta retinendae possessionis*); and interdicts aimed at regaining possession (*interdicta recuperandae possessionis*).[195]

The interdicts directed at the retention of possession were also referred to as prohibitory interdicts (*interdicta prohibitoria*), since they prohibited a person from interfering with or disturbing the possession of another. This category encompassed two particular types of interdict: the *interdictum uti possidetis*, relating to immovables; and the *interdictum utrubi*, relating to movables.[196] A characteristic feature of these two interdicts was that they were directed against both parties in a controversy concerning possession (hence they were also referred to as *interdicta duplicia*). This means that in such cases the praetor had to determine which of the parties before him, relatively speaking, had a stronger claim to the object under dispute.[197]

Furthermore, the interdicts aimed at regaining possession (*interdicta recuperandae possessionis*) were also called restitutory interdicts (*interdicta restitutoria*) as they commanded a person who dispossessed another to restore possession to the latter. The principal interdict in this category was the *interdictum unde vi*, which was used where a person had been deprived of his possession by force.[198]

3.4.2.1 Interdictum Uti Possidetis

The *interdictum uti possidetis* applied only to the possession of immovable property. Its purpose was to protect the party who was actually in possession of such

[195] G 4. 143. In G 4. 142, Gaius refers to the division of interdicts into *interdicta prohibitoria*, *interdicta restitutoria* and *interdicta exhibitoria*, which, according to him, constituted the original classification of interdicts. The two classifications to some extent overlap, since the *interdicta retinendae possessionis* were also *prohibitoria*, while the *interdicta recuperandae possessionis* were simultaneously *restitutoria*. On the *interdicta adipiscendae possessionis* see G 4. 144–147. Consider also *Inst* 4. 15. 1–3.

[196] G 4. 148: "It is the practice for interdicts directed at retaining possession to be granted when a dispute arises between two parties with reference to the ownership of property; and it must be previously ascertained which one of the litigants should have possession, and which one should have a right to demand it; and it is for this purpose that the interdicts *uti possidetis* and *utrubi* have been established."

[197] G 4. 160: "Double interdicts, for instance the *uti possidetis* and *utrubi*, are called double because the position of both litigants in them is the same, and neither is exclusively understood to be defendant or plaintiff, but both of them sustain the parts of defendant and plaintiff. . .."

[198] This category also encompassed the *interdictum de clandestina possessione*, employed against the clandestine usurpation of possession (this had fallen in abeyance by the time of Hadrian); and the *interdictum de precario*, by means of which the person who had gratuitously given another person a thing for his use could demand the restitution of such thing, as well as compensation from the grantee for loss or damage caused by the latter's fraudulent or negligent conduct. See D 43. 26. 2 pr.

property at the time when the interdict was requested against any interference with his possession. The interdict had a prohibitory effect in this instance. However, if the present possessor had obtained his possession by force (*vi*), secretly (*clam*) or by grant at will (*precario*)[199] from the other party, the latter was given possession and protection. In this instance, protection was granted to the party with the strongest possessory claim and, in this respect, the interdict was simultaneously bilateral (*duplex*) and restitutory (*interdictum restitutorium*) in the case where the present possessor was commanded to return possession to his adversary.[200]

3.4.2.2 Interdictum Utrubi

The *interdictum utrubi* related to the possession of movable property. It granted protection to the party who had been in possession of the object in question for the longest period (as against his adversary) during the past year, unless he himself had obtained possession from the opposing party by violence, secretly or by grant at will (*vi vel clam vel precario*).[201] As in the case of the *interdictum uti possidetis*, the *interdictum utrubi* was bilateral and prohibitory as well as restitutory where possession of the object was awarded to the party who was not the present possessor.

3.4.2.3 Interdictum Unde vi and Interdictum Unde vi Armata

The *interdictum unde vi*, also only applicable to the possession of immovables, was available to the possessor who had been deprived of his possession by force. By means of this interdict, the praetor ordered the dispossessor to restore possession of the property in question to the previous possessor unless the latter himself had obtained his possession by force, secretly or by grant at will from his adversary. This interdict had to be requested within a year after possession had been lost.[202]

Similar to the *interdictum unde vi,* the *interdictum unde vi armata* could be requested by a person who had been driven from his land by force of arms.[203] In such a case, it was not necessary for the dispossessed person to claim the interdict within a year of dispossession and it was not required that the party requesting the interdict should himself not have obtained possession *vi vel clam vel precario*.

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[199] In the last case, the possessor held possession of the property only on sufferance.

[200] D 43. 17. 1 pr.

[201] See on this matter D 43. 31. 1; G 4. 150 & 160.

[202] The defence that could be raised if the interdict was claimed after the lapse of the year was referred to as *exceptio temporis*.

[203] To facilitate the distinction between this interdict and the *interdictum unde vi*, the latter interdict was sometimes referred to as *interdictum de vi cottidiana*.

3.4.2.4 Possessory Interdicts Under Justinianic Law

In the time of Justinian, the *interdictum uti possidetis* and the *interdictum utrubi* were merged whereby the principles pertaining to the former were rendered applicable to both immovable and movable property.[204] Moreover, the law of Justinian recognized only a single *interdictum unde vi* that did not feature any distinction between ordinary force and force of arms. The issue of whether the possession had been obtained *vel clam vel precario* was likewise no longer relevant, whilst the requirement that the interdict should be requested within a year probably remained in place.[205]

3.5 Servitudes

So far in this chapter, we have concerned ourselves with ownership (and, related thereto, possession) as the real right that accrued to a person in respect of his own property (*ius in re propria*). We may now proceed to consider the real rights a person could enjoy in respect of property belonging to others (*iura in re aliena*)[206]; in other words, rights imposing restrictions on the exercise of the rights of ownership by the owner. The most important of such rights were servitudes, by virtue of which a person could use another's movable and/or immovable property to a greater or lesser degree. As real rights, servitudes were protected by an *actio in rem* that the holder of a servitude could institute against anyone who infringed upon his right.

Servitudes were divided into two general categories: praedial or real servitudes (*servitutes rerum* or *praediales* or *reales*); and personal servitudes (*servitutes personarum* or *personales*).[207]

3.5.1 Praedial Servitudes

The praedial servitudes were the oldest and most commonly used servitudes known to the Romans and occurred in a great variety of forms. Such servitudes related only to immovable property and were real rights over another's land for the benefit of the owner of neighbouring land. Their purpose was to facilitate the owner of a piece of

[204] *Inst* 4. 15. 4a.

[205] *Inst* 4. 15. 6.

[206] The terms *ius in re propria* and *ius in re aliena* do not belong to the terminology of the classical jurists.

[207] D 8. 1. 1. Two servitudes do not appear to fit into this scheme; namely, the right to raise the height of one's building (*ius altius tollendi*) and the right not to have to receive a neighbour's rainwater (*ius stillicidii vel fluminis non recipiendi*). These were probably not *iura in re aliena* at all, but particular incidents of ownership.

land to have greater use of his property by giving him the right to use another's land in a prescribed way. It is important to emphasize that servitudes adhered to land: one plot of land (referred to as *praedium serviens*: servient plot) yielded a service or bore a burden in favour of another plot of land (called *praedium dominans*: dominant plot). Such servitudes therefore belonged to the holder in his capacity as owner of the dominant tenement and burdened the owner of the servient tenement in his capacity as owner of that piece of land rather than in their personal or private capacity. In other words, the establishment of a servitude entailed a burden on one piece of land and a corresponding benefit for another piece of land, irrespective of the ownership. The ensuing implication meant that even if the ownership of the plots in question changed the servitude continued to exist in favour of the new owner of the dominant plot and against the new owner of the servient plot.

The praedial servitudes were in turn classified into rural praedial servitudes (*iura praediorum rusticorum*) and urban praedial servitudes (*iura praediorum urbanorum*).[208] It should be noted, however, that the distinction between rural and urban praedial servitudes did not correspond to the distinction between country and town but to that between dominant land without buildings and dominant land with buildings. The prevailing principle appears to have been that a servitude was rural if it served a predominantly agricultural purpose and urban if it did not, irrespective of whether it was applicable in an agricultural or an urban area.

3.5.1.1 Iura Praediorum Rusticorum

The rural praedial servitudes were the principal form of servitude in early times when Rome was a largely agricultural society. The economic exploitation of a farming unit necessitated the ceding of certain rights to one's neighbour as long as the benefit for the dominant tenement outweighed the burden imposed on the servient land. The rural servitudes were classified as *res mancipi*[209] and were originally regarded not as real rights but as limited forms of ownership. At a later stage, they were recognized as incorporeal things (*res incorporales*). Examples of rural praedial servitudes encompass the following: *iter*, the right to pass through another's land on foot or on horseback; *actus*, the right to drive draft animals or vehicles across the servient tenement, with the inclusion of the above-mentioned right of passage; *via*, the right to use a road on the servient land for driving in a carriage or riding on horseback (such a road normally had to be eight feet wide and sixteen feet at turnings); *aquaeductus*, the right to draw water across the servient land by means of an aqueduct or furrow; *aquaehaustus*, the right to draw water from a well, lake or river on the servient tenement; *ius pascendi*, the right to pasture cattle

[208] See *Inst* 2. 2. 3 (where it is alleged that such servitudes were also considered to be incorporeal things). And see G 2. 14; D 1. 8. 1. 1.

[209] G 2. 14a & 17.

on another's land; *ius pecoris ad aquam adpulsum*, the right to drive cattle to water for drinking purposes on or across the servient plot; *ius harenae fodiendae*, the right to dig sand from a sand-pit on another's land; *ius calcis coquendae*, the right to dig and burn lime on the servient land.[210]

3.5.1.2 Iura Praediorum Urbanorum

The urban praedial servitudes were concerned with urban utilization (regardless of whether the relevant immovable property was located in a city or the country) and displayed a more recent date than the rural praedial servitudes. These servitudes were classified as *res nec mancipi*[211] as well as *res incorporales*. The diversity of such servitudes are illustrated by the following: *servitus oneris ferendi*, the right to use a building or wall on the servient land to support a building on the dominant land; *servitus tigni immittendi*, the right to drive a beam into a neighbour's building or wall; *servitus altius non tollendi*, the right to forbid a neighbour to raise the height of his building above a certain limit[212]; *servitus stillicidii recipiendi*, the right to construct a building in such a way that rainwater falling on it dripped down on the servient property; *servitus fluminis recipiendi*, the right to discharge rainwater through a gutter or something similar onto the servient land; *servitus ne luminibus officiatur*, the right to prevent a neighbour from erecting anything which would cut off the light falling onto the dominant tenement; *servitus cloacae immittendae*, the right to maintain a drain or sewer through neighbouring premises; *servitus proiciendi protegendive*, the right to construct a building in such a manner that part of the building extended or hung over the servient tenement; and *servitus ne prospectui officiatur*, the right to prevent a neighbour from erecting a structure or planting trees that might obstruct one's view.[213]

3.5.1.3 Requirements and Characteristics of Praedial Servitudes

The Roman jurists developed certain requirements that praedial servitudes had to comply with to ensure that the benefit to the dominant tenement would outweigh the burden imposed on the servient property.

As the above-mentioned examples indicate, praedial servitudes could be either negative or positive: the holder of a servitude could either demand that the owner of the servient property should abstain from certain activity (e.g., erecting a building or

[210] *Inst* 2. 3 pr; D 8. 3. 1 pr; D 8. 3. 1. 1; D 8. 3. 20. 3; D 8. 3. 5. 1; D 8. 5. 4. 6; D 8. 3. 4; D 43. 20. 1. 18.

[211] G 2. 14a.

[212] A counterpart was a servitude known as *ius altius tollendi*, which gave the beneficiary the right to build higher than a certain maximum height.

[213] G. 2. 14; D 8. 2. 2; D 8. 2. 4; D 8. 2. 15; D 8. 2. 20. 3–6; D 8. 1. 7; D 39. 3. 1. 17; D 8. 2. 16; D 8. 5. 17 pr.

structure exceeding a specified height), or was empowered by the servitude to conduct a specific task (e.g., draw water). The holder's right was defined by the nature of the servitude and had to be exercised properly according to the standards set by the community. On the other hand, an important feature of servitudes was that the owner of the servient property was not at all obliged to do something positive. The relevant rule was expressed as follows: 'the nature of servitudes is not such that someone has to do something, but that he has to permit something or refrain from doing something.'[214] An active duty of performance was not required from the owner of the servient tenement since this would restrict his freedom as a person. The only exception to this principle derived from the *servitus oneris ferendi* (the right to have a building on the dominant land supported by a wall or building on the servient land), with respect to which the owner of the servient property had the duty to maintain the supporting wall of the building in good condition at his own expense.[215]

A requirement for establishing a praedial servitude was that the dominant and servient tenements had to exist in the same location. This so-called *vicinitas* requirement implied that the two properties had to be adjacent or so close to each other that one could actually serve the other in an effective way.[216]

Furthermore, as servitudes existed for the benefit of the dominant land rather than merely for a particular owner, the rights they engendered could theoretically be exercised in perpetuity. Some legal discourses state that a perpetual cause or reason (*perpetua causa*) for the servitude had to be present. Consequently, a servitude could not be constituted subject to a resolutive or suspensive condition or term.[217]

A further condition for the existence of a servitude was expressed by the words *nulli res sua servit* ('no one is served by his own property'): an owner of land could not have a servitude over his own property, since a servitude was by definition a *ius in re aliena*. Hence, if the owner of one of the two plots acquired ownership of the other plot or if there was a merger whereby the same person acquired ownership of both tenements, the servitude was terminated and not automatically revived if the ownership of one of the two properties was transferred at a later stage.[218]

As already noted, the holder of a servitude was required to exercise his right in a reasonable manner (*civiliter modo*) so as not to cause unnecessary damage or inconvenience to the owner of the servient tenement.[219]

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[214] *Servitutium non ea natura est ut aliquid faciat quis sed ut aliquid patiatur aut non faciat*. See D 8. 1. 15. 1.

[215] The owner of the servient tenement could avoid this duty only by evacuating his property. Consider D 8. 5. 6. 2; D 8. 2. 33; D 8. 5. 8. 2.

[216] D 8. 1. 8 pr; D 8. 1. 14. 2; D 8. 2. 1 pr; D 8. 3. 5. 1; D 8. 3. 7. 1; D 39. 3. 17. 4.

[217] For example, the right to draw water on another person's land could not exist as a servitude if the well, river or other source of water only had water occasionally or would dry up completely. However, a praedial servitude could exist if the amount of water supply available varied in accordance with the normal change of seasons. D 8. 2. 28.

[218] Consider on this matter D 8. 2. 26; D 8. 6. 1; D 8. 3. 33. 1.

[219] D 8. 1. 9; D 8. 1. 15 pr; D 8. 5. 8. 6.

Another general rule was expressed by the maxim *servitus servitutis esse non potest*: 'there could not be a servitude in respect of a servitude.'[220] This means that the holder of a servitude could not grant a servitude to a third party in respect of the land to which his own servitude pertained.[221] The reason for this limitation was that a servitude, which itself was a right (and thus a *res incorporalis*), could exist only in respect of a *res corporalis* (particularly a *res immobilis*) rather than another right.

As previously noted, a servitude entailed a burden on one property and a corresponding benefit for another property irrespective of the ownership. A related rule elaborated that a servitude was indivisible: if either the dominant or the servient property was divided or came into the hands of more than one owner, the servitude was not similarly divided. Where the dominant tenement was divided, the servitude continued to exist in favour of all the owners. The division of the servient property, on the other hand, theoretically entailed the servitude burdening all the divided portions.[222] However, the judge in effecting the division could limit the exercise of the servitude to a particular portion or portions.[223]

3.5.2 Personal Servitudes

Like the praedial servitudes, the personal servitudes (*servitutes personarum* or *personales*) were real rights over another person's property (*iura in re aliena*). Otherwise than in the case of praedial servitudes, however, these servitudes could be acquired over both movables and immovables, and were designed for the benefit not of a particular property but of their holder in his personal capacity. In other words, there was no question of dominant and servient properties in this case and the holder of a personal servitude did not have to be an owner of land. Furthermore, personal servitudes had limited duration as they were terminated by the death of the holder or the lapse of the period for which they were granted.[224] As a personal servitude adhered to the person of the holder, the relevant right was not transferable or hereditary but the holder could grant the exercise of such right to another.[225]

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[220] D 33. 2. 1.

[221] For example, the holder of the servitude of *via* could not grant a servitude of *iter* to a third party over the land to which the former servitude related.

[222] D 8. 4. 6. 1; D 8. 4. 6. 2 ff. D 8. 4. 18; D 8. 3. 11; D 8. 3. 18; D 8. 3. 23. 3; D 8. 3. 31–32; D 8. 3. 34 pr.

[223] D 8. 6. 6. 1a–d.

[224] D 7. 4. 3.

[225] For instance, the usufructuary of a house could let the house but not transfer the usufruct. In such a case, there was only a personal obligation between the usufructuary and the lessee. Thus, if a third person interfered with the exercise of the servitude it was only the usufructuary and not the lessee who could obtain redress.

In contrast with the large number of praedial servitudes, the number of personal servitudes was restricted to only four: *ususfructus*, *usus*, *habitatio* and *operae servorum vel animalium*.

3.5.2.1 Ususfructus

Usufruct (*ususfructus*) was the earliest and most complete of the personal servitudes. It entailed the right to use the property of another person and to take the fruits thereof without impairing its substance.[226] As a *ius in re aliena*, usufruct could be constituted over immovables, such as land and buildings as well as over movables that could not be consumed by normal use, such as cattle.

The holder of the usufruct or usufructuary (*usufructuarius*) had all the ordinary rights of use and enjoyment of the property to which the usufruct related, but was required to exercise these rights in a reasonable manner (*civiliter modo*).[227] Using the property *civiliter modo* meant preserving the substance and identity of the property intact (*salva rerum substantia*). Thus, the usufructuary could not change the economic function or destiny of the property in question such as by constructing a building or opening a quarry on a farm. Furthermore, the usufructuary was required to maintain the property. If, for example, he had the usufruct of a flock of sheep or a vineyard, he had to maintain such flock or vineyard by replacing the sheep or vine trees that died or were destroyed. If he had the usufruct of a building, he was required to keep the building in repair and pay the requisite taxes in respect thereof. On the expiry of the usufruct, he had to hand the property back in the same condition as when he took it over and was not allowed to remove any improvements he may have initiated.[228]

As already noted, the usufructuary was entitled to take all fruits, whether natural or civil, that the property produced. He acquired ownership of natural fruits (*fructus naturales*) by gathering them (*fructus perceptio*).[229] On the other hand, things that

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[226] *Inst* 2. 4 pr: "Usufruct is the right of using, and taking the fruits of things belonging to others, so long as the substance of the things used remains. It is a right over a corporeal thing, and if this thing perish, the usufruct itself necessarily perishes also." And see D 7. 1. 1 & 2. Jurists describe usufruct as 'partial ownership' (*pars dominii*), since it practically entailed all the benefits usually associated with ownership. In such cases, the actual owner retained bare ownership (*nuda proprietas*) and was entitled to transfer his ownership (*ius abutendi*). However, ownership transference did not affect the usufructary's right since such a right, as a real right, could be asserted against anyone, including the new owner.

[227] The relevant test was that of the honest and diligent father of a family (*bonus et diligens paterfamilias*). Acting contrary to how a *bonus et diligens paterfamilias* would have conducted himself in a given situation furnished the basis for assessing the actor's culpability in a particular case.

[228] The praetor required the holder of a usufruct to provide security for the proper use of the property in question and its restoration.

[229] D 7. 1. 12. 5; D 7. 4. 13; D 22. 1. 25. 1. It should be noted that the child of a slave woman was not considered *fructus*. Thus, it was the owner of the slave woman and not the usufructuary that became owner of the slave's children.

did not yield natural fruits could be leased or let and the holder of the usufruct obtained the proceeds as civil fruits (*fructus civiles*).

The right of usufruct, as a strictly personal right, was neither transferable nor alienable.[230] However, the usufructuary could lease or convey the right of use and enjoyment of the object of the usufruct to a third party as long as he continued to comply with the requirement of maintaining the substance and identity of the property in question.[231] It should be noted that since the usufruct as such was divisible, more than one person could have the right to use the property in question.[232]

Although only a *detentor*, the usufructuary was protected in classical law by a special interdict labelled the *interdictum quem usumfructum* that could be employed to demand the delivery of an immovable attached to his right of usufruct. Justinian regarded the usufructuary as the possessor of both the object and the right of usufruct, and granted him the general possessory interdicts.

As previously noted, in principle usufruct could not be constituted over things that were consumed by use (such as wine, grain or money) for this would conflict with the *salva rerum substantia* requirement. However, a senatorial resolution (*senatus consultum*) passed in the early principate age provided that there might exist what the jurists called a '*quasi ususfructus*' in consumable things. It was recognized that in such cases the usufructuary became owner of the money or other consumable objects, provided he gave security (*cautio usufructuaria*) that on termination of the usufruct he would restore a similar amount of money or quantity of things.[233] In time, the same principle was applied to incorporeal things (*res incorporales*) and thus, for example, a personal claim against a debtor could serve as the object of a *quasi ususfructus*. If a claim pertained to an amount of money, the usufructuary obtained the interest of such amount while the capital remained due to the creditor.[234]

3.5.2.2 Usus

The personal servitude of *usus* or use may best be described as an offshoot of *ususfructus*. It differed from the latter insofar as the holder of the relevant real right (*usuarius*) was entitled to use another's property without taking the fruits thereof.[235] At a later stage of the institution's development, however, the usuary was permitted to take fruits such as wood, milk, fruit or vegetables for his daily

[230] D 23. 3. 66; D 45. 3. 26.
[231] D 7. 1. 12. 2.
[232] D 7. 1. 50; D 7. 1. 13. 3; D 45. 3. 32.
[233] *Inst* 2. 4. 2; D 7. 5. 2 pr.
[234] D 7. 5. 3; D 33. 2. 1.
[235] D 7. 8. 1; D 7. 8. 2 pr.

domestic needs.[236] If the object of the right was a house, he was allowed to live in it with his family, guests and even lodgers but could not let the house to another person.[237] Like the usufructuary, the usuary had to use the relevant property *civiliter modo* and preserve its substance and identity intact (*salva rerum substantia*).

3.5.2.3 Habitatio

The servitude of *habitatio* or inhabitation bore a strong resemblance to both usufruct and use. It entailed the real right, also attached to the person of its holder, to occupy and reside in another person's house.[238] Jurists had questioned whether *habitatio* was a distinct servitude or even a servitude at all. However, Justinian pronounced that it existed as an independent servitude and he further refined the legal device to recognize that the holder of such servitude could not only reside in the house himself but also let it to others (in this respect *habitatio* was different from *usus*).[239]

3.5.2.4 Operae Servorum Vel Animalium

The personal servitude of *operae servorum vel animalium* entailed the real right to use the services of another person's slaves or beasts of burden. Like the usufructuary, the holder of such right was allowed to let the services of the slaves or animals to a third party.[240] In other respects, the rules relating to *usus* also applied in this case.

3.5.3 Constitution of Servitudes

Servitudes, whether real or personal, had to be established by the owner of the relevant property in favour of the holder of the ensuing right. The agreement between the parties did not constitute a servitude but furnished the reason for the legal act whereby the servitude was created. There were a number of methods for establishing servitudes, and they resembled the modes for acquisition of ownership.

Originally the rural praedial servitudes, which were *res mancipi* as previously noted, had to be constituted by way of *mancipatio* or *in iure cessio* in favour of the

[236] D 7. 8. 12. 1 ff. D 7. 8. 15; *Inst* 2. 5. 1.

[237] D 7. 8. 2. 1.

[238] The holder of this servitude had to exercise his right *civiliter modo* and in accordance with the *salva rerum substantia* requirement.

[239] Consider *Inst* 2. 5. 5; D 7. 8. 10 pr; C 3. 33. 13.

[240] D 7. 7; D 7. 9. 5. 3.

owner of the dominant tenement. All other servitudes had to be established by *in iure cessio*. When the distinction between *res mancipi* and *res nec mancipi* was abandoned during Justinian's era, these methods of establishing servitudes fell out of use.[241]

A further method of establishing a servitude was the so-called 'reservation of a servitude' (*deductio servitutis*): a landowner who alienated land by means of *mancipatio* or *in iure cessio* could reserve a servitude on the land being transferred in favour of other (usually adjoining) land over which he retained ownership.[242] In the time of Justinian when these methods for ownership transfer had fallen into disuse, the reservation of a servitude could be entered where a landowner transferred part of his property by *traditio*.[243]

A servitude could also be created by means of a will in which the testator bequeathed the ownership of a property to one person and a servitude over such property to another as a legacy.[244] This mainly applied to personal servitudes, especially usufruct.

When an action for the division of property held in common or an inheritance had been instituted, the judge's award (*adiudicatio*) could establish a servitude in favour of a party if necessary to achieve an equitable division.[245]

Servitudes, being incorporeal things (*res incorporales*), were obviously incapable of transfer by delivery (*traditio*).[246] However, post-classical law recognized that if two parties informally agreed that one would grant a servitude over his property to the other and the latter in fact exercised such servitude by using it (*usus*) while the other party allowed him to do so (*patientia*), a *quasi possessio* of the servitude had been transferred. On this basis, the whole juristic act was then construed as *quasi traditio*. Originally, servitudes constituted in this manner were not deemed to engender a real right, but a praetorian *actio in factum in rem* was later made available to the holder of such servitude.[247]

In the time of Justinian, the most commonly used method of establishing a servitude was by way of 'agreements and promises' (*pactiones et stipulationes*). Originally, this method was applicable to land in the provinces but was later extended to the creation of any form of servitude. Since provincial land could not be privately owned, servitudes over such land could not be constituted by

[241] See G 2. 17; G 2. 29–33.

[242] The process for such a reservation involved a formal statement expressing the intention to retain a servitude that was made in the context of the relevant *mancipatio* or *in iure cessio* procedure (*nuncupatio*).

[243] D 8. 2. 34. And see D 8. 4. 6; D 8. 4. 3; D 8. 4. 7 pr; D 8. 3. 30; D 8. 3. 33 pr; D 7. 1. 32; D 7. 1. 63.

[244] D 8. 2. 31; D 8. 3. 13. 1; D 33. 3. 1; D 7. 4. 5. 3.

[245] D 10. 2. 22. 3; D 10. 3. 7. 1; D 10. 3. 18.

[246] As previously observed, in essence *traditio* was the transfer of possession or physical control of a corporeal object.

[247] D 6. 2. 11. 1; D 8. 1. 20; D 8. 3. 1. 2.

mancipatio or *in iure cessio*. Thus, to enable a person to exercise the rights a servitude entailed, a possessor of provincial land (which, as previously noted, was the property of the state or the emperor) could forge an informal agreement (*pactio*, *pactum*) with that person to grant him a servitude. Such an agreement was accompanied by a formal promise (*stipulatio*) by the person granting the servitude that neither he nor his heirs would interfere with the exercise of the servitude by the other party. Although this mode of establishing a servitude originally resulted only in the creation of a personal right against the promisor and his heirs, in the course of time the right so created was regarded as a real right and its holder was accorded the relevant *actio in rem*.[248]

Finally, a servitude could be established by prescription. Although the *lex Scribonia* (first century BC) abolished the acquisition of servitudes through *usucapio*, in late classical law the *longi temporis praescriptio* of servitudes was permitted in respect of provincial land. Under the law of Justinian, this form of prescription was extended to all types of landed property; the requisite period of prescription was 10 years *inter praesentes* or 20 years *inter absentes*.[249]

3.5.4 Protection of Servitudes

According to the *ius civile*, praedial servitudes were protected by a real action (*actio in rem*) known as *vindicatio servitutis* that the holder could institute against anyone infringing on his servitude.[250] In Justinian's time, this remedy was replaced by the *actio confessoria* available to all holders of servitudes. The purpose of these remedies was to assert the holder's servitude and to force the party who had interfered with it to end the infringement.[251]

A further way in which servitudes were protected was by means of interdicts. These included a number of special interdicts available to the holders of specific servitudes. For example, the holder of the servitude of *iter* or *actus* could employ the *interdictum de itinere actuque privato*.[252] Under the law of Justinian, the holders of servitudes were given exactly the same protection that was granted to ordinary possessors.

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[248] *Inst* 2. 3. 4; *Inst* 2. 4. 1; G 2. 31; D 7. 1. 3 pr; D 7. 1. 25. 7; D 8. 3. 33 pr; C 3. 34. 3.

[249] D 41. 3. 4. 28; D 43. 19. 5. 3; D 8. 5. 10 pr; D 39. 3. 1. 23; C 3. 34. 1 & 2.

[250] An analogous action, called *vindicatio ususfructus*, was available to the holder of a usufruct.

[251] G 4. 3; D 8. 5. 2 pr; D 7. 6. 5. 6; D 8. 5. 4. 2. Servitudes that had been established by way of *pactiones et stipulationes*, *quasi traditio* and prescription were probably protected by an *actio utilis* or *actio in factum*.

[252] Other interdicts available to the holders of real servitudes were the *interdictum de aqua* (designed to protect servitudes consisting of the use of water from another's property), the *interdictum de rivis* (protecting one's access to waterworks, aqueducts, cisterns and such like) and the *interdictum de cloacis* (the interdict on sewers). The right of usufruct was protected by the *interdictum quem usumfructum* and the *interdictum uti possidetis* mentioned earlier. Consider D 43. 19–23; D 43. 16. 3. 13; D 43. 17. 3. 5 & 6; D 43. 17. 4.

3.5.5 Termination of Servitudes

Servitudes were terminated in various ways, depending on the nature of the particular servitude and the way it had been created.

A personal servitude was extinguished when its holder died or underwent a *capitis deminutio maxima* (resulting in loss of liberty) or *media* (resulting in loss of citizenship). Furthermore, if such a servitude had been granted for a specified period or under a resolutive condition it dissolved when the relevant period elapsed or the resolutive condition was fulfilled.

Pursuant to the principle that no one could have a servitude over his own property (*nulli res sua servit*), all servitudes were terminated by merger (*confusio* or *consolidatio*): an event that occurred when the holder of the servitude became owner of the property in respect of which the servitude had been established.[253] Moreover, a servitude ended if the holder ceded his right to the owner of the property in question. This cession was originally effected by means of *in iure cessio*, but under the law of Justinian a mere declaration by the holder of the servitude sufficed.[254] A servitude was likewise extinguished if the property in respect of which it had been granted was destroyed or no longer served its purpose.

Finally, any servitude could be terminated by extinctive prescription if the relevant right had not been exercised for a certain period of time. Originally, the period for extinctive prescription was 1 or 2 years depending on whether the servitude attached to movable or immovable property. Under the law of Justinian, the relevant period was 3 years in respect of movables, and 10 years *inter praesentes* and 20 years *inter absentes* in respect of immovables. It should be noted, however, that the requisite non-use on which the extinctive prescription was based depended on whether the servitude in question was a positive or a negative one. A positive servitude came to an end if the holder simply failed to exercise his right. In the case of a negative servitude, on the other hand, termination occurred when the owner undertaking the burden of the servitude acted contrary to the servitude and the owner of the dominant property had not acted against him during the relevant period.[255]

3.6 Emphyteusis and Superficies

Roman law recognized two further categories of *iura in re aliena* that were treated as a distinct group; namely, *emphyteusis* and *superficies*. These related to long-term contracts of lease over land belonging to the state or a municipality granted by the relevant authorities to individuals. Originating from the public law of the Empire,

[253] *Inst* 2. 4. 3; D 8. 6. 1; D 7. 2. 3. 2 & 6 pr. And see D 7. 4. 5. 2, 8 & 10 pr; D 7. 4. 15; D 7. 4. 3; D 7. 4. 24; D 8. 2. 20. 2; D 33. 2. 30 pr.

[254] G 2. 30; D 8. 3. 20 pr; *Inst* 2. 4. 3; C 3. 33. 16; D 23. 3. 66; D 44. 4. 4. 12.

[255] D 7. 4. 20; D 8. 2. 6; C 3. 34. 13.

these institutions were not fully incorporated into private law until the late post-classical era.[256]

3.6.1 Emphyteusis

The institution of *emphyteusis* had roots in an early form of tenure under lease known as *ager vectigalis*,[257] whereby the state or a particular community or municipality (*municipia*) let tracts of agricultural land in perpetuity or for a long term to an individual conditionally on the payment of an annual rent (*vectigal*).[258] The holder had a right of possession that was protected against interference from third parties by means of the usual possessory interdicts. Furthermore, if unlawfully deprived of his possession, he could endeavour to recover possession of the land by instituting an action referred to as *actio vectigalis* that was analogous to the *rei vindicatio*. Although the holder was not an owner, he had most of the advantages of ownership: he could use the land and acquire fruits therefrom, mortgage it, create servitudes over it and dispose of it by will. By the end of the fifth century AD, this holding of *ager vectigalis* was assimilated to the institution known as *emphyteusis*.

The institution of *emphyteusis* developed in Egypt and North Africa in the third century AD. It assumed the form of leasehold in terms of which the emperors or public authorities granted tracts of barren land belonging to the state to active entrepreneurs for long periods with the understanding that the land would be cultivated.[259] However, the nature of the grantee's interest remained undefined since it was not clear whether he was to be regarded as a purchaser or a lessee. In the fifth century AD, Emperor Zeno ruled that *emphyteusis* was neither a contract of sale or lease but a contract *sui generis* (*contractus emphyteuticarius*) governed by its own rules.[260] In terms of this contract, a tract of land was granted on a long lease or in perpetuity to an individual as against payment of an annual 'ground rent' or 'quitrent' known as *canon*.[261] The grantee obtained a real right that could be

[256] This perhaps explains why they were not classified as servitudes but were regarded as a separate category.

[257] The term *ager vectigalis* is first distinctly mentioned in the legal literature of the early Empire, although the relevant institution was probably introduced in the later republican age.

[258] Originally, the leasing of land belonging to the state was the responsibility of the censors and the term was limited to 5 years.

[259] The new institution had its roots in grants issued in Hellenistic states under the name *emphyteusis* (a Greek term meaning 'grafting' or 'planting'). In the later Empire, grants of this nature were also made by private persons, and in particular by great landed proprietors (civil and ecclesiastical).

[260] It should be noted that in the Western provinces of the Empire the term *emphyteusis* gradually fell into disuse and this form of leasehold became regarded as a kind of ownership.

[261] Justinian enacted that if the holder failed to pay the rent he lost his right after 3 years had elapsed. See C 4. 66. 2.

transferred to his heirs or alienated, subject to the condition that the rent would still be paid. Like the holder of the *ager vectigalis*, the tenant by *emphyteusis* (*emphyteuta*) was entitled to the full use and enjoyment of the land and its products as well as the legal protection of his right by means of an *actio in rem*.[262]

3.6.2 Superficies

Another institution involving a real right on another's property was *superficies*. The final form of this institution pertained to situations where the state or other public authorities granted an individual the right to erect a building on public land and to use it against payment of a yearly rent, referred to as *solarium*. Although the owner of the ground acquired ownership of the building,[263] in accordance with the principle that whatever is attached to land forms part of it (*superficies solo cedit*), the holder of *superficies* (*superficiarius*) had full use and enjoyment of the building for as long as he paid the rent. Furthermore, the right arising from *superficies* could be transferred to the holder's heirs although, originally, it was probably not alienable. The *superficiarius* was protected by a special interdict referred to as *interdictum de superficiebus*,[264] while an *actio in factum* or *actio in rem* in the nature of a vindication was also available to him under certain circumstances. In Justinian's law, the right of the *superficiarius* was regarded as a right *sui generis* nearly as extensive as that of ownership. Such a right was alienable and protected by legal means analogous to those available to the owner.[265]

3.7 Real Security

Roman law recognized two principal forms of security for the performance of an obligation: personal security or suretyship, whereby a person undertook to be personally liable as surety to the creditor for the discharge of the debt[266]; and real security, in terms of which a movable or immovable object or property was offered by the debtor or a third party as security and the creditor was granted a real right in respect thereof. It is important to point out that real security rights were dependent on the obligation they secured. When the secured obligation ceased to exist, the real right of the creditor theoretically ended.

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[262] On the institution of *emphyteusis* see *Inst* 3. 24. 3; D 2. 8. 15. 1; D 6. 2. 12. 2; D 6. 3; C 4. 66.

[263] Just as the grantor of land by *emphyteusis* maintained ownership over it.

[264] This interdict was analogous to the *interdictum uti possidetis*.

[265] D 6. 2. 12. 3; D 18. 1. 32; D 43. 17. 3. 7; D 43. 18. 1 pr −2; D 43. 18. 2.

[266] Personal security and the legal actions arising therefrom are discussed in the chapter on the law of obligations below.

During the history of Roman law, three forms of real security featured: *fiducia cum creditore contracta* or, in short form, *fiducia*; *pignus*; and *hypotheca*.

3.7.1 Fiducia

Fiducia was the earliest form of real security known to the Romans. Derived from the *ius civile*, it prevailed during the republican and early imperial periods.

Fiducia came to the fore when the debtor or a third person transferred ownership of a thing by *mancipatio* or *in iure cessio* to the creditor, subject to an agreement (*pactum fiduciae*) that when the debt was discharged the creditor would reconvey the thing to the original owner.[267] Although the creditor acquired ownership of the property, he could not use or alienate it in the meantime unless the parties had agreed otherwise. The *pactum fiduciae* would contain provisions on these and other matters, such as the creditor's right to sell the property if the debt was not paid as well as the disposal of any surplus arising from such a sale.[268]

Originally, the *pactum fiduciae* was not enforceable but based solely on the transferor's trust (*fides, fiducia*) in the honesty of the creditor. Fairly early, however, the debtor was granted a personal action termed the *actio fiduciae* whereby he could compel the creditor to return the property and to pay compensation for any damage the latter may have caused to it by his fraudulent or negligent conduct.[269] The counterpart of this action was the *actio fiduciae contraria*, which the creditor could institute against the debtor for the recovery of any necessary expenses he had incurred in respect of the property in question.

If the debt was not paid by the agreed date, the creditor originally simply retained ownership of the thing but without the limitations of the *pactum fiduciae*. As the law evolved, however, it became customary for the parties to agree that the object should be sold and the debt paid out of the proceeds of such sale (this agreement was known as *pactum de distrahendo*). In time, an explicit agreement to that effect was no longer deemed necessary since it was taken for granted that the creditor was in such a case entitled to sell the property in question.

With the abandonment of the *mancipatio* and *in iure cessio* procedures in the later imperial era, *fiducia* as a form of security fell into disuse and Justinian's commissioners expunged all reference to it from the classical texts cited in the Digest.

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[267] The reconveyance of the property in question to the original owner could also transpire by way of *mancipatio* (now termed *remancipatio*) or *in iure cessio*.

[268] It should be noted that the institution of *fiducia* could be employed in a number of other ways. Thus, besides the *fiducia cum creditore contracta* the Romans recognized what was known as *fiducia cum amico contracta*. The latter was a form of deposit whereby a person transferred ownership of a thing to a friend for the purpose 'that the thing be safer with him' (G 2. 60). In this case, the depositee assumed the duty to retransfer ownership as soon as the original owner wished him to do so.

[269] Condemnation in an *actio fiduciae* rendered the defendant infamous. See G 4. 182.

3.7.2 *Pignus*

Pignus or pledge as a form of real security took place when the debtor or a third party delivered the possession of a movable or immovable thing to the creditor as security for the fulfilment of an obligation. As in this case the creditor or pledgee did not become owner of the object but only its possessor, the debtor or pledgor was in a less disadvantageous position than in *fiducia*. The transfer of the property in question was accompanied by an agreement (*pactum*) of the parties that the property would be returned when the debtor paid his debt. This agreement constituted the real contract (*contractus re*) of pledge, which is more appropriately discussed in the chapter on the law of obligations below.

The creditor's possession of the object was protected by possessory interdicts against interference by third parties, as well as by the *actio Serviana* or *actio quasi Serviana*. By means of the latter action the creditor could claim possession of the object from any person, including the pledgor, who had taken unlawful possession thereof.[270]

As long as the pledged object remained in the possession of the creditor, the latter was in principle not allowed to use or alienate it unless he and the pledgor had otherwise agreed.[271] One type of agreement that could be used was the *pactum antichreseos* or, briefly, *antichresis* by which the pledgee was permitted to use the object and retain the proceeds thereof for himself as a form of interest on the capital debt.[272] Furthermore, the parties could agree that if the obligation was not fulfilled by a certain date, the pledgee was entitled to sell the pledged object and discharge the debt out of the proceeds of the sale.[273] This agreement, known as *pactum de distrahendo*, evolved during the classical age into a *ius distrahendi* - an implied right on the part of the pledgee to sell the pledge, if the debt was not paid, even if there had been no agreement.[274] Under the law of Justinian, however, the sale of the pledged object was permitted only after the debtor had been condemned to payment of the capital debt or after notice had been given to the debtor on three occasions. The pledgee then had to wait for a period of no less than 2 years before he could proceed to the sale.[275] Finally, the parties could agree that if the principal obligation

[270] But if the pledgor pledged the property of another person, the pledgee's action would be barred, if instituted against the true owner, by means of the *exceptio iusti dominii*—a defence the owner of a thing at *ius civile* could raise against a plaintiff who based his claim only on the element of possession.

[271] If the creditor used or disposed of the thing without such an agreement, he could be found guilty of theft (*furtum*). Consider *Inst* 4. 1. 6; G 3. 196; D 47. 2. 55.

[272] D 13. 7. 33; D 20. 1. 11. 1; D 20. 2. 8.

[273] G 2. 64. Following the sale, any excess (*superfluum*) had to be restored to the pledgor.

[274] D 13. 7. 4.

[275] If no purchaser came forth, the creditor could submit a request to the emperor (*impetratio domini*) to recognize him as the owner of the pledged property. Justinian decreed that if the value of such property exceeded the debt, the surplus had to be restored to the pledgor. See *Inst* 2. 8. 1; C 8. 33. 1 & 2.

was not discharged within a prescribed period the pledgee would automatically become owner of the pledged object himself. However, this agreement (*pactum commissorium* or *lex commissoria*) was deemed detrimental to the pledgor's interests since the pledge was, as a rule, more valuable than the amount of the debt. Consequently, Emperor Constantine prohibited this agreement in the fourth century AD.[276]

After the discharge or extinction of the debtor's obligation, if the creditor did not voluntarily restore the possession of the property to the pledgor, the latter could claim it by means of a personal action termed the *actio pigneraticia*. The same action lay against a creditor through whose fault the pledged object was damaged or destroyed. Furthermore, if the pledgor was the owner of the pledged property he could institute the *rei vindicatio* against any third party in possession of such property.[277]

3.7.3 Hypotheca

The institution of *hypotheca* (hypothec) probably developed as a modification of *pignus*, to which it bore a close resemblance. The chief difference between the two institutions was that whilst in the case of *pignus* the debtor or pledgor delivered possession of the pledged property to the pledgee or creditor, in the case of *hypotheca* no such delivery took place. *Hypotheca* was constituted by a mere agreement whereby the debtor granted the creditor a real right in a thing as security for the discharge of a debt. In this case, neither ownership nor possession of the hypothecated property was transferred.[278]

Hypotheca seems to have evolved from a practice that arose in connection with the leasing of land. The landowner who wished to lease his land to a tenant required security for the payment of the debt, but the tenant often had only movables, such as cattle, slaves, farming equipment and similar property, which he needed to exploit the land (*invecta et illata*). Therefore, the landowner and the tenant would agree that the movables the latter brought onto the leased property as well as the future crop would serve as security for the payment of the rent, but would remain the property of the owner who would also retain possession. Originally, this agreement did not entail any rights, whether real or personal, for the lessor and was thus not enforceable. But by the end of the republican era it was rendered enforceable by means of an interdict, known as *interdictum Salvianum*, which enabled the lessor to obtain possession of the *invecta et illata*

[276] C 8. 34. 3.

[277] On the other hand, the creditor could institute the *actio pigneraticia contraria* against the pledgor for the recovery of damages caused by the object pledged through the latter's fault, and for the reimbursement of necessary expenses incurred in the care of the pledge.

[278] Hence *hypotheca* is sometimes referred to as 'a pledge without possession'.

from the tenant if the rent was not paid.[279] However, this interdict did not grant real security since it could only be employed against the tenant and not against third parties in possession of the objects in question. At a later stage the praetor introduced a more effective remedy in the form of a real action, the *actio Serviana*, by which the landowner as a holder of a real right could claim possession of the *invecta et illata* from any person in possession of such property. Once the landowner had obtained possession of the objects in question, he could proceed to exercise the *ius distrahendi*. Finally, when *hypotheca* was recognized as a form of real security applicable to any form of property and to all cases where a debtor-creditor relationship engendered an obligation, an analogous action developed that was referred to as *actio quasi Serviana* or *actio hypothecaria*.[280]

An advantage of the *hypotheca* was that practically any movable or immovable thing and even incorporeal objects (such as a claim or a usufruct) or future things (for instance, a future harvest) could serve as security.[281] A general hypothec—a hypothec in respect of an entire estate—was also possible.

A hypothec was usually established by agreement (*pactum*) between the creditor and the debtor. The absence of formalities and the consequent lack of publicity entailed a risk of fraud and a new owner always had to take into account the possibility of eviction by means of the *actio hypothecaria*. There were, however, other ways of creating a hypothec. For example, a testator could stipulate in his will that a certain thing or things in his estate were to serve as security for the payment of a legacy. There developed, further, certain tacit or legal hypothecs (*hypotheca tacita* or *legitima*) that were established over a certain object or the whole estate of the debtor by operation of law and without prior agreement between the parties concerned. One of the most important of these hypothecs was the lessor's tacit hypothec over the objects brought onto the leased premises by the lessee (*invecta et illata*) and this hypothec served to secure payment of the rent.[282] Other examples of tacit hypothecs included the hypothec of the imperial treasury (*fiscus*) over the estate of its debtors, mainly in respect of taxes due to it[283]; the hypothec of a person under guardianship or curatorship over the estate of his guardian or *curator* for the fulfilment of obligations towards the

[279] G 4. 147: "The interdict called Salvianum was also one devised for the purpose of obtaining possession; and the landowner can employ it against the property of the tenant which the latter has pledged to him as security for the future payment of rent."

[280] Consider on this matter *Inst* 4. 6. 7.

[281] Obviously, the relevant thing had to be *res in commercio*. It should be noted, further, that under normal circumstances *pignus* was the form of security provided in respect of movables and *hypotheca* in respect of immovables, since the former entailed the transfer of possession while the latter did not. A hypothec over movables was not very effective since such things might be difficult to locate and could easily be removed by a debtor who wished to avoid his obligations or by a third party.

[282] D 20. 2. 2, 3, 4 & 7; D 20. 6. 14.

[283] D 20. 4. 21 pr; D 49. 14. 28 & 37; C 7. 73. 2; C 8. 14. 1 & 2.

former[284]; the hypothec of a wife over the property of her husband for repayment of the dowry[285]; and the hypothec of a claimant to a legacy or *fideicommissum* over the deceased estate as security for the payment of their legacy or performance of the *fideicommissum*.[286]

Since the hypothecated property remained in the hands of the original pledgor, more than one hypothec could be established over the same property to secure obligations to different creditors.[287] However, this had a major disadvantage: it could easily happen that the value of the hypothecated thing fell short of covering the total amount of the debts secured. In general, the creditors would be unaware of this prospect since, as previously noted, *hypotheca* was constituted informally without publicity and Roman law did not require the registration of hypothecs. In such a case, the applicable general rule was that the creditor whose hypothec was created at an earlier stage had a stronger right than that established later (*prior tempore, potior iure*).[288] This meant that the creditor whose hypothec had been created first was the first to satisfy his claim from the proceeds of the sale of the hypothecated property; thereafter, the claims of the successive holders of hypothecs were met until the proceeds were exhausted.[289] The creditors whose hypothecs came last were the ones who suffered the possible loss. It should be noted, moreover, that only the first secured creditor could exercise the right to sell the property at issue (*ius distrahendi*). If he failed to exercise this right, the next holder of a hypothec could come forth and tender payment of the first holder's claim thereby taking his place. This right of a successive holder of hypothec was referred to as *ius offerendi et succedendi*.[290] There were a number of exceptions to the *prior tempore, potior iure* rule insofar as certain hypothecs were deemed privileged and therefore accorded priority, even though other hypothecs may have preceded them chronologically. Examples of such preferent hypothecs were the tacit hypothecs of the *fiscus* and the wife (mentioned previously) and, in later times, hypothecs that were registered with the authorities or effected in writing before three witnesses.[291]

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[284] C 5. 37. 20; C 7. 8. 6.

[285] *Inst* 4. 6. 29.

[286] C 6. 43. 1.

[287] This was not possible in the cases of *fiducia* and *pignus*, since ownership and possession could only be transferred once.

[288] D 20. 4. 11 pr.

[289] Once the claim of any secured creditor became enforceable but was not satisfied, they could claim possession of the hypothecated property by means of the *actio hypothecaria* from any person in possession of it. However, only the first secured creditor had the right to sell such property.

[290] If a creditor sought to enforce his hypothec out of his turn, his action could be barred by the *exceptio rei sibi ante pigneratae*. Consider D 20. 4. 12 pr; D 20. 4. 3 pr; D 20. 4. 11. 4; D 20. 5. 2, 3 & 5 pr; D 20. 6. 1. 1. It should be noted, moreover, that the *ius offerendi et succedendi* was not limited to the immediately succeeding creditor-hypothec holder. For example, the fifth holder in line could pay out the fourth and hence take his place or could pay out the fourth, third, second and first in line so that he himself could effect the sale of the property in question.

[291] C 8. 17. 11. 1.

Finally, as already indicated, the *prior tempore, potior iure* rule could be bypassed by the exercise of the *ius offerendi et succedendi*: a subsequent holder of a hypothec could offer to discharge the debt due to an earlier holder and in this way take his place for both debts.[292]

3.7.4 Termination of Real Security

The real right of the secured creditor could be terminated in a number of ways. The principal methods were the extinction or discharge of the secured obligation; the sale of the thing over which the security had been established, following the debtor's failure to repay the debt at the due date; the destruction of such thing or its removal from the sphere of normal commercial transactions; merger through which the creditor acquired ownership of the property in question (*confusio*)[293]; waiver of his right by the creditor; the exercise of the *ius offerendi et succedendi*[294]; and extinctive prescription.[295]

[292] D 20. 4. 19; D 20. 5. 5; D 20. 4. 12. 6; D 49. 15. 12. 12; C 8. 18. 4.

[293] This occurred where the secured creditor and the debtor became the same person, for example, if one became the heir of the other.

[294] In this case, the right of a creditor was extinguished in favour of the succeeding creditor.

[295] D 20. 6. 6 pr; D 20. 6. 13; D 13. 7. 8. 3; D 20. 6. 8 pr; D 20. 6. 12; D 50. 17. 45 pr. The form of prescription that applied in this case was *longi temporis praescriptio*.

Chapter 4
The Law of Obligations

4.1 Introductory

As mentioned in the discussion of the Roman law of property, the Romans classified the law of obligations as part of the law of property (*ius quod ad res pertinet*) insofar as it was concerned mainly with the acquisition and disposal of things.[1] For the purposes of systematization and alignment with the modern approach to the law of obligations it is convenient to treat it as a separate section of private law.

Similar to the Roman law of property, the Roman law of obligations is particularly important to the modern lawyer as it forms the basis of much of the modern law of obligations in civil law systems. It is important to note, however, that the historical descendancy and considerable degree of coincidence between the two can sometimes be misleading, since during the long course of legal history the same concept may have evolved and acquired a different content.

4.2 The Nature of Obligations

The term obligation (*obligatio*) denoted the legal relationship that existed between two persons, in terms of which one person was obliged towards the other to carry out a certain duty or duties. Obligation may otherwise be defined as a bond recognized by the law (*iuris vinculum*) in terms of which one party, the creditor (*creditor*), had a personal right (*ius in personam*) against the other party, the debtor (*debitor*). It is important to emphasize that the person who bound himself to another as a debtor placed an obligation on only himself and thereby gave the creditor a right against himself, while third parties did not become involved. If the obligation

[1] Consider G 3. 88 ff. *Inst* 3. 13 ff.

G. Mousourakis, *Fundamentals of Roman Private Law*,
DOI 10.1007/978-3-642-29311-5_4,

was not properly discharged, the creditor could institute a personal action (*actio in personam*) against that particular debtor with a view to obtaining a judgment that could be executed against such debtor. With this personal action the creditor claimed that the debtor had to perform something for the creditor, i.e. give something to the creditor, do something for him or refrain from doing something.[2]

The concept of obligation underwent a long process of evolution over a span of several centuries. In the earliest phase of Roman history, the obligation was regarded as a form of personal bondage in accordance with which a person was subject to the physical control of another. This would occur, for instance, where a person had committed a wrongful deed against another and the injured party was granted compensation by being given physical control over the wrongdoer. The latter was then exposed to the revenge of his victim and, originally, he could be slain or sold across the Tiber river (*trans Tiberim*) into slavery. As Roman society evolved, the physical subjection of the wrongdoer to the control of the victim was gradually superseded by the *talio* principle: the notion that the revenge exacted on the perpetrator should not be more severe than the injury caused by him. From an early stage it was recognized, however, that the exercise of revenge could be redeemed or bought off: the injured party could accept an amount of redemption from the malefactor and, in return, waive his right to exact revenge. Out of this practice evolved the ideas of compensation or damages and penalty. In the course of time, the notion of revenge gradually faded away and was replaced by that of a personal bondage or liability from which the perpetrator could release himself by payment of a sum of money. Even since the time of the Law of the Twelve Tables, fixed penalties were prescribed for certain wrongful acts. By the close of the republican age it was recognized that the wrongdoer could not only be released from his bondage if he opted to pay an amount of redemption, but was in fact compelled to release himself in this manner. Thus, the duty to perform as the counterpart of a right to performance became established. Bondage or liability as such then came to the fore principally in cases of malperformance, i.e., where a debtor had not complied with his obligation or had not carried it out properly. This pertained primarily to contracts, but the same idea prevailed in the case of delicts

[2] According to a well-known definition found in the Institutes of Justinian, "an obligation is a legal bond whereby we are bound as of a necessity to perform something according to the laws of our state." See *Inst* 3. 13 pr. Consider also D 44. 7. 3 pr (Paulus *libro secundo institutionum*): "The essence of obligations does not consist in giving us ownership of something or entitling us to a servitude, but in binding a person to us to give, do or perform something." As Paulus's statement indicates, although an obligation is a *res incorporalis* and thus belongs to the Law of Things it invokes a *ius in personam*, i.e., a right available against a specific person, rather than a *ius in rem*, i.e., a right available against any person or, as it is sometimes said, against the entire world. Further, it should be noted that Justinian's (post-classical) definition of obligation is too broad, as it seems to encompass all rights *in personam*. However, obligation in Roman law pertained only to rights *in personam* that could be assessed in monetary terms or belonging to the sphere of proprietary rights. It did not pertain to rights stemming from family relations, or rights created by public law.

with respect to which it was held that the wrongdoer was liable to a penalty or some form of compensation.

Originally, only a limited number of legal acts engendered obligations: certain lawful acts such as *nexum*, with respect to which a person bound himself formally[3]; and delicts such as theft (*furtum*) and unlawful assault (*iniuria*). In the course of time, the Roman law of obligations recognized an increasing number of both lawful and unlawful acts as potential sources of obligations.

4.2.1 Sources and Classifications of Obligations

An obligation derived its specific features from the action in terms of which it was enforced and, in particular, from the relevant procedural formula from which the content or legal cause (*causa*) of the obligation could be inferred. As examples of such legal causes one might mention donation, purchase and sale, legacy, theft, unlawful damage to person or property and many more.

Gaius, in his Institutes, states that obligations fell into two principal categories: obligations arising from contract (*obligationes ex contractu*), and obligations arising from delict (*obligationes ex delicto*).[4] The term *contractus* was understood to denote any lawful juristic act capable of producing rights and obligations, and enforceable by means of an action at law. As the vast majority of lawful juristic acts creating obligations were transacted because there was agreement on the part of the parties to establish an obligation, it was in time recognized that agreement (*consensus*) was the essence of a contract. The *delictum* was an unlawful act (also referred to as *maleficium*) that was detrimental to the lawful rights and interests of another person and which generated an obligation between such person and the malefactor. The content of such obligation was directed at satisfaction, compensation or a penalty (*poena*). Gaius' original dichotomy of the sources of obligations was subsequently deemed unsatisfactory, since an obligation could also arise from a legal act with respect to which there was no agreement on the part of the parties concerned. Accordingly, a third category of obligations (also attributed to Gaius) appears in the Digest: obligations arising from various causes (*obligationes ex variis causarum figuris*) other than from contract or delict.[5] The phrase *variae causarum figurae* refers to juristic acts that were not based on agreement, yet were deemed wholly lawful.

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[3] The *nexum* was a contract of loan that gave rise to personal liability by means of a form of 'self-pledge' and *sponsio*, a unilateral oral promise to render performance. A person who had pledged his body as security for the payment of a debt was said to be bound in the same way as a thing was said to be bound when it was given in pledge for the same purpose.

[4] G 3. 88.

[5] D 44. 7. 1 pr (Gaius *libro secundo aureorum*).

Gaius' final classification was probably the precursor of the fourfold division of the sources of obligations adopted by the compilers of Justinian's Institutes. According to the latter scheme, an obligation may arise: (a) from contract (*ex contractu*); (b) as if from contract (*quasi ex contractu*); (c) from delict (*ex delicto* or *ex maleficio*); and (d) as if from delict (*quasi ex delicto* or *quasi ex maleficio*).[6] The term quasi-contract was used to denote those lawful acts that, although not based on agreement between two or more parties, created an obligation. In contrast, the category of quasi-delict did not differ substantially from that of delict as explained later in this chapter.[7]

A further classification of obligations, recognized from an early period, was that between *obligationes civiles* and *obligationes honorariae* or *praetoriae*. The former derived their authority from the *ius civile* and could be enforced by means of *actiones civiles*, i.e. actions originating from the civil law. The *obligationes honorariae*, on the other hand, arose from the *ius honorarium* and were enforceable by means of *actiones honorariae*, i.e. actions created by the praetor and other jurisdictional magistrates.[8] In this connection reference may also be made to the distinction between obligations of the strict law (*obligationes stricti iuris*) and obligations based on good faith (*obligationes bonae fidei*). An *obligatio stricti iuris* arose from a legal act of the strict and formal *ius civile*. An obligation of this kind was enforced by means of an *actio civilis* and in such a case the judge was bound by the strict letter of the law. An *obligatio bonae fidei*, by contrast, derived from a legal act based on good faith (*bona fides*) and was enforced by an *actio bonae fidei*, i.e. an action whose procedural *formula* required the judge to take the requirements of equity and good faith into consideration.

Finally, a distinction was drawn between *obligatio civilis* in a wider sense and 'natural obligation' (*obligatio naturalis*). *Obligatio civilis* was an obligation arising from a recognized legal source and enforceable by means of an *actio in personam*. On the other hand, the term *obligatio naturalis* denoted an obligation that was only imperfectly protected by law. Such an obligation was not normally enforceable by an action at law and, in the event of an action being granted, execution was not possible. This fact does not mean, however, that natural obligations had no legal significance whatsoever. Thus, it was possible for a person obliged in terms of a natural obligation to perform such obligation or to subject it to personal or real security. Furthermore, such an obligation was susceptible to set-off (*compensatio*) or novation (*novatio*) and could be extinguished through a simple *pactum*.[9] Natural obligations were, for example, those contracted by a slave, or by a *filiusfamilias*

[6] *Inst* 3. 13. 2.

[7] The introduction of quasi-delict as a distinct category was probably connected with Justinian's intention to create a more systematic approach to the law of obligations.

[8] *Inst* 3. 13. 1; D 44. 7. 25. 2.

[9] The issues of *compensatio* and *novatio* are discussed in the section on the termination of obligations below. A *pactum* was a simple agreement, mutual understanding or undertaking that was not formally enforceable.

under paternal power, or by an *impubes* or a *minor* without the consent of his *tutor* or *curator* respectively.[10]

4.3 Obligations Arising from Contracts

4.3.1 Content and Classification of Contracts

It should be noted at the outset that no general definition of contract is found in the sources—only an enumeration of the ways in which a contractual obligation arose. But it appears that when the Romans spoke of obligations arising from contract, they meant obligations arising from agreement (*consensus*). However, the principle that any agreement is legally binding which satisfies certain requirements was the outcome of a long process of legal development. In fact, at the beginning of this process agreement as such was not considered to be a cause of action. Early law appears to have had no more than an undifferentiated idea of debt—that a person owed another a certain object or sum of money. Such debt might be owed because one person had caused injury to another's person or property, or had performed a formal act creating a debt, or, finally, because a person had transferred to another an object or sum of money that the other was not entitled to retain. In the course of time, a distinction was made between these different forms of debt: the first as arising from delict (*ex delicto*), and the other two as arising from contract (*ex contractu*) or quasi-contract (*quasi ex contractu*). From the late third century BC actions enforcing certain informal agreements on the simple ground of their economic utility began to be recognized, but the development went no further. At the height of the classical era no general law of contract existed, but only a number of distinct contracts and related actions. Jurists tended to classify these into two categories, *stricti iuris* and *bonae fidei*, but even in the age of Justinian no general contractual action had been developed. Naturally, however, the causes of action grouped together as contracts shared a common feature: they were all considered to be transactions between consenting parties (*negotia contracta*). In all contracts therefore, and not only in those specifically called consensual, valid consent or agreement was deemed essential.

In contrast to modern law where, if certain conditions are met, an agreement to perform engenders a legally enforceable obligation, Roman law construed the agreement (*conventio*, *pactum*) as only invoking an obligation if the agreement could be classified, on the basis of its form or content, into one of the categories deemed capable of supporting an *actio in personam*. In other words, in order to be

[10] In another sense, the term *naturales obligationes* referred to those legally enforceable obligations that were based on natural reason (*naturalis ratio*) and derived from the *ius gentium*. Consider, for example, D 50. 17. 84. 1; D 12. 6. 15 pr; D 19. 2. 1. See also D 46. 3. 95. 4.

enforceable as a contract there was the further requirement that the agreement had an element referred to as *causa contractus* or reason for the contract. Four such *causae* were recognized and in each case a limited number of agreements, involving the requisite *causa*, formed a contract and gave rise to a legally enforceable obligation or obligations. The four *causae* and, consequently, the four categories of *contractus* were: (a) *contractus re*, i.e. contracts that were constituted by agreement and the transfer of a thing; (b) *contractus verbis*, i.e. contracts that were constituted by agreement and the use of certain formal words; (c) *contractus litteris*, i.e. contracts that were constituted by agreement and formal writing; and (d) *contractus consensu*, i.e. contracts constituted by agreement without anything further.[11] Although the last category forms an exception to the Roman law approach described above, only four contracts could be concluded by mere agreement between the parties.

Contracts (and quasi-contracts) can further be classified into unilateral and bilateral or 'synallagmatic'. A unilateral contract was one in which only one duty of performance was imposed on one of the contracting parties, whilst the other party had a personal right correlative to it. For example, in a loan of money the borrower alone was bound. On the other hand, a bilateral or synallagmatic contract occurred in cases where reciprocal rights and obligations arose.[12] This kind of contract imposed duties on both the contracting parties, who also had personal rights correlative to the duties involved against each other. The aim of bilateral contracts was an exchange of performances as, for example, in the case of purchase and sale or of letting and hiring. It should be noted, further, that with respect to some bilateral contracts a duty existed on both sides from the moment of the conclusion of the contract. These so-called 'perfectly bilateral' contracts are distinguished from those that imposed an immediate duty on one side only, although it was possible for a counterclaim to arise under certain circumstances. For instance, in the contract of deposit the depositary was bound to restore the object deposited while the depositor might under certain circumstances be bound to compensate the depositary for expenses. Such contracts are referred to as imperfectly bilateral.[13]

[11] G 3. 89; *Inst* 3. 13. 2; consider also D 44. 7. 1. 1; D 46. 1. 8. 1. It should be noted that this classification is primarily a classification of obligations rather than of contracts. However, it is commonly applied to the agreements from which the obligations arise, hence the fourfold division of contracts into *re*, *verbis*, *litteris* and *consensu*.

[12] The term 'synallagmatic' is derived from the Greek word *synallagma*, used to denote the reciprocity of such contracts.

[13] It is apposite to note that in bilateral contracts either of the contracting parties could hold back his own performance until such time as the relevant counter-performance had been tendered to him. This defence, that the other side had not yet made performance, was referred to as *exceptio non adimpleti contractus* (exception of a non-performed contract).

Within certain limits any act or omission could form the content of a contract. With respect to the object of a contractual obligation, the terms *dare*, *facere* and *praestare* are encountered.[14] In a broad sense, *dare* meant giving or handing over a thing for the purpose of making the receiver the owner thereof; *facere* denoted doing something and also encompassed refraining from doing something; *praestare* originally meant to bind oneself as surety, to be responsible for certain duties arising from contractual obligations in certain circumstances, but was also used in the wider sense of performing. For the sake of convenience, the content of a contract may generally be described as the 'performance'. Such performance could be specific or determined (*certum*), or not specific or undefined (*incertum*). It could also assume the form of an alternative, facultative or generic performance. In the first case, later termed *obligatio alternativa*, two or more performances were due but the creditor was entitled to only one of them. Unless otherwise agreed, the debtor could choose which performance to deliver.[15] A facultative performance (*obligatio facultativa*) occurred when only one performance was due but the debtor had the capacity (*facultas*) to make another specific performance in the place of the original one. When the object of a performance was specified according to its kind (*genus*), as in the case of replaceable objects, the obligation was termed generic. In such cases, even if the object in question perished, the obligation to perform remained intact.

The judicial proceedings for pursuing enforcement of the obligations arising from contracts could be *iudicia stricti iuris*, i.e. proceedings arising from a juristic act of the strict and formalistic *ius civile* (*negotium stricti iuris*) and introduced by an *actio stricti iuris*; or *iudicia bonae fidei*, that is, proceedings arising from so-called *negotia bonae fidei* and introduced by *actiones bonae fidei*.[16] In the category of *negotia stricti iuris* fell all unilateral contracts that bound the promisor to the exact performance of that which he promised, neither more nor less.[17] The *negotia bonae fidei*, on the other hand, originated from the *ius gentium* and required the parties to perform their obligations in accordance with the requirements of good faith. In this category fell all bilateral contracts in which the parties were bound to perform whatever could be fairly and reasonably required according to the circumstances of the case, which may be either more or less than what was actually promised. *Negotia bonae fidei* (such as the contracts of sale, exchange, hire and partnership) always operated to impose certain duties on the parties, irrespective of whether or not such duties were expressly promised.

[14] G 4. 2; D 44. 7. 3 pr.

[15] If one of the performances was for some reason impossible to deliver, the obligation continued in respect of the remaining performance. Consider on this point D 13. 4. 2. 3; D 18. 1. 34. 6; D 45. 1. 138. 1.

[16] See the relevant discussion in the chapter on the law of actions below.

[17] *Stipulatio*, the most important of unilateral contracts, was a *negotium stricti iuris*.

4.3.2 Formation of a Valid Contract

4.3.2.1 General Requirements

Certain general requirements had to be met if the parties wished to enter into a valid contract.

First, the parties had to be capable of entering into a legally binding agreement. The following categories of persons lacked contractual capacity: (a) slaves (although under certain circumstances the praetor could intervene and render a master liable for contracts entered into on his behalf by a slave); (b) persons without the power of understanding (*intellectus*), i.e. children below the age of 7 years (*infantes*)[18] and insane persons; (c) persons under the power of another (sons under fourteen in *potestas*, daughters in *potestas*, wives in *manu*) where the contract was bilateral[19]; (d) persons *sui iuris* under guardianship where the contract was bilateral and the guardian's approval (*auctoritas tutoris*) was absent; and (e) persons *sui iuris* under curatorship where the contract was bilateral and the curator's consent was absent.

Furthermore, the agreement had to relate to a performance that was definable or determinable[20] and not in conflict with a legal norm or contrary to good morals (*contra bonos mores*).[21] In accordance with the rules of procedure laid down by the praetor, it was important that the performance was appraisable in monetary terms.[22]

Moreover, as a contract created a strictly personal obligation it could only affect the parties who had concluded it and no one else. Thus, a contractual agreement for a performance that was exclusively in the interests of a third party was in principle void.[23]

4.3.2.2 Possibility of Performance

Of special importance was the requirement that the performance was physically and legally possible at the time of conclusion of the contract. If the performance was

[18] This was also the case with children who were close to the age of 7 years, although somewhat over the age of 7 (*infanti proximi*).

[19] A person under the power of another could contract a unilateral agreement in his favour although, in such a case, the benefit would vest in the *paterfamilias*.

[20] It was recognized that the determination of the performance could be left to the judgment of a reasonable man (*arbitrium boni viri*). Consider D 17. 2. 76; D 17. 2. 78. If the third party did not wish to determine the performance, the obligation was declared invalid. See D 19. 2. 25 pr; *Inst* 3. 23. 1; C 4. 38. 15.

[21] For example, see D 2. 14. 27. 4; D 22. 1. 5; D 45. 1. 26–27; D 18. 1. 35. 2; C 8. 38. 4; C 1. 14. 5.

[22] According to the formulary procedure, the condemnatory judgment had to be expressed in pecuniary terms (*condemnatio pecuniaria*). See the discussion of the formulary system in the chapter on the law of actions below.

[23] In the course of time a number of exceptions to this principle were introduced.

impossible no obligation was created, according to the principle *impossibilium nulla obligatio est* ('there is no obligation in respect of impossible things'). Performance was physically impossible, for example, when the object of the performance no longer existed at the time of the conclusion of the contract. An example of legal impossibility was the case where the object of the performance fell outside the ambit of commercial transactions (*extra commercium*).[24] The test for impossibility was purely objective. In other words, where the performance would have been feasible for another person, the fact that, from a subjective viewpoint, it was impossible (or extremely difficult) for the debtor to carry it out was deemed irrelevant.[25] A distinction was drawn between the case where performance was impossible at the time of conclusion of the contract, and the case where performance was rendered impossible by certain events, such as a superior force (*vis maior*) or an accident (*casus fortuitus*), after the contract had been concluded. The Roman law principle *impossibilium nulla obligatio est* was applicable in the latter case as well. Thus, the debtor was released from his obligation to perform in the event the object of the performance perished or fell outside the sphere of commercial transactions or where the performance as such became impossible on some other ground subsequent to the conclusion of the contract and this occurred without any fault (*dolus* or *culpa*) on the part of the debtor, or before the debtor was in default (*in mora*).

In certain cases impossibility of performance did not release the debtor from his obligation to perform. In such cases the creditor could still institute the personal action derived from the contract to claim either the monetary value of the impossible performance or damages depending on the nature of the contract. The distinction between *negotia stricti iuris* and *negotia bonae fidae* mentioned previously played an important part in this regard.

With respect to the *negotia stricti iuris* (such as *stipulatio*), the principle *impossibilium nulla obligatio est* was applied without qualifications, i.e. the debtor was discharged from liability. As this could lead to unjust consequences for the creditor, in pre-classical law the custom developed of entering a clause in the contract whereby the debtor undertook that it would not be on his account

[24] See D 50. 17. 185; G 3. 98–99; *Inst* 3. 19. 1; D 45. 1. 35 pr; D 18. 1. 15 pr; D 18. 4. 1.

[25] Consider D 19. 1. 55; D 45. 1. 137. 4 ff. In the course of time this principle became more flexible with respect to contracts based on good faith (*bonae fidei iudicia*) insofar as certain obligations relating to things falling outside the sphere of commercial transactions were protected by an *actio in factum*. As explained in the chapter on the law of actions below, an *actio in factum* was an 'ad hoc' action granted on equitable grounds to an aggrieved person in a case where neither the *ius civile* nor the praetorian edict offered a satisfactory solution. However, such protection was not available where the debtor was aware of the defective object of performance. See on this issue D 18. 1. 4–6; D 11. 7. 8. 1; D 18. 1. 70; D 18. 1. 45.

that performance became impossible.[26] The relevant principle was expressed in the rule *factum debitoris perpetuat obligationem*: a positive act on the part of the debtor perpetuates the obligation. Thus, if the debtor by a positive and intentional act made performance impossible, he remained bound and the creditor could claim the monetary value of the impossible performance.[27] If performance became impossible after the debtor fell into default (*in mora*), the debtor remained liable in accordance with the rule *mora debitoris perpetuat obligationem*: default on the part of the debtor perpetuates the obligation.

With regard to the *negotia bonae fidei* (such as sale), the principle *impossibilium nulla obligatio est* applied but if performance became impossible as a result of bad faith (*mala fides*) on the part of the debtor, the latter remained liable.

4.3.3 Defects in Agreement

As previously noted, the basis of the Roman contract was the *consensus* or agreement of the parties at the time the contract was made. Where such agreement was lacking or deemed defective, no valid contract could be concluded.[28] As Roman law evolved, it was recognized as a general principle that attention should be paid to the actual intention or will of the parties rather than to the impression or external appearance created by their words.[29] Thus, the strictly formal acts of the old *ius civile* fell into abeyance or were adapted, while novel juristic acts derived from the *ius gentium* were assimilated into Roman law. These acts were largely informal and the actual intention of the parties was the decisive factor.

The principal ways in which the requisite *consensus* might be negated were mistake (*error*), fraud (*dolus*) and duress (*metus*).

4.3.3.1 Error

Error occurred when one or both parties laboured under a *bona fide* mistake, i.e. a belief contrary to the truth, at the time of the conclusion of the contract.[30] Mistake could occur in various forms with different consequences as regards the validity of the relevant agreement. An *error in negotio*, a mistake as to the nature of the legal

[26] In later law this clause was implied.

[27] The debtor's liability in such cases was extended in later times and eventually he was deemed liable for non-performance due to his negligence as well (*culpa debitoris perpetuat obligationem*).

[28] See D 2. 14. 1. 3.

[29] D 50. 16. 219; D 50. 17. 34.

[30] D 2. 1. 15; D 39. 3. 20; D 5. 1. 2 pr; C 1. 18. 1; C 4. 65. 23; D 50. 17. 116. 2. The Roman doctrine of mistake originated in the *contractus consensu*, which hinged upon *bona fides*. The relevant principles were in time made applicable to all contracts based on good faith and, finally, even to contracts *stricti iuris* (such as *stipulatio*).

transaction entered into,[31] and an *error in corpore*, a mistake as to the identity of the object (*corpus*) of the contract,[32] both excluded *consensus* as required for the conclusion of a valid contract. On the other hand, an *error in nomine*, a mistake regarding the name or description of the object of the contract, did not affect the validity of the contract insofar as both parties had the same object in mind.[33] Similarly, a unilateral mistake regarding the motivation of a particular party in respect of the conclusion of the contract was deemed irrelevant.[34] A further case of mistake that could possibly lead to the nullity of a contract was the so-called *error in persona*, a mistake regarding the identity of the other contracting party. This form of mistake, although hardly mentioned in the sources, appears to have rendered the contract void if the identity of the other party was considered to be an essential element of the transaction at issue. Another controversial type of mistake was the so-called *error in substantia* (also known as *error in materia* or *in qualitate*), a mistake as to a material characteristic of the object of the contract. In this case there was agreement about the object of the contract but one or both parties were mistaken about an essential quality of the object—for example, in a contract of sale the purchaser believed that the item he was buying was composed of gold, but it turned out to be of copper. In post-classical law a mistake of this kind would nullify the contract only if the object at issue differed so widely from what it was supposed to be that it fell into a distinct commercial category.[35] Finally, reference may be made to *error in pretio* or mistake as to the price (*pretium*) of the object of the contract, and *error in quantitate* or mistake regarding the quantity of the contractual object. Such mistakes were only partially operative: neither party could enforce the relevant contract at his own figure; but each could, if he so wished, enforce it at that figure of the other. For instance, if in a contract of sale the seller intended a price of 20 and the purchaser a price of 10, the seller could enforce the contract if he was prepared to accept 10, and the buyer if he was prepared to pay 20.

4.3.3.2 Dolus

Fraud (*dolus*), defined as any craft, deceit, or contrivance employed to circumvent, deceive or ensnare another person,[36] could give rise to a delict but it could also negate the consent of parties to a contract. In addressing the question of whether a defrauded person could avoid a contractual obligation, one must again pay attention to the distinction between *negotia stricti iuris* and *negotia bonae fidei*. Where *dolus* transpired in the context of a contract *stricti iuris*, initially the victim of the fraud

[31] For example, consider D 12. 1. 18. 1; D 44. 7. 3. 1; C 4. 22. 5. The concept of *error in negotio* was developed by later commentators.

[32] *Inst* 3. 19. 23; D 18. 1. 9 pr and 34 pr; D 45. 1. 137.

[33] D 18. 1. 9. 1.

[34] Consider, for example, D 45. 1. 22.

[35] See on this point D 18. 1. 9. 2; D 18. 1. 11. 1; D 18. 1. 41. 1; D 19. 1. 21. 2.

[36] This definition is attributed to the jurist Labeo. See D 4. 3. 1. 2.

had no remedy against the defrauder and the contract remained perfectly valid. However, towards the end of the republican age the praetor instigated a change by granting the *exceptio doli* to a party who was induced to conclude such a contract by means of fraud. Although the contract was not deemed *ipso iure* void, the defrauded person could raise this *exceptio* as a defence to bar any action on the contract by the defrauder.[37] There was also an *actio doli*, which the victim of fraud could use to claim compensation for any loss he sustained.[38]

If the contract entered into as a result of fraud was based on *bona fides*, the victim was fully protected and there was no need for special remedies to be introduced and pleaded since good faith did not require performance of an obligation arising from a contract concluded by means of fraud.[39] Therefore, the insertion of an *exceptio doli* into the procedural formula that contained the clause '*ex fide bona*' was superfluous.

4.3.3.3 Metus

Duress (*metus*) consisted in the use of force or the threat of force on the part of one person against another as a result of which the person under duress was compelled to enter into a legal act. According to the old *ius civile*, *metus* had no effect on such legal act and thus a contract *stricti iuris* entered into under duress remained valid in all respects. In the later republican era, the praetor intervened to improve this unsatisfactory situation and recognized *metus* as an independent delict. At the same time, a number of remedies were made available to persons who had been subjected to duress.[40] Thus, a person who was forced into the conclusion of a contract by means of duress could raise the *exceptio metus causa* as a defence against an action by the other party to enforce the contract.[41]

If the contract entered into as a result of duress was based on *bona fides*, the *exceptio metus causa* was superfluous. As good faith did not require performance of an obligation arising from a contract concluded under duress, the judge who had to

[37] D 4. 3. 40; G 4. 117; G 4. 119; G 4. 121; D 44. 4. 2. 3; D 44. 4. 4. 33. A distinction is drawn between the *exceptio doli specialis*, which functioned only as a defence against fraud, and the *exceptio doli generalis*, which operated as a general defence in cases other than those involving fraud.

[38] For a closer appraisal of the *actio doli* see the discussion of delicts below.

[39] Consider, for example, D 19. 1. 41.

[40] It was required that the relevant threat was of such a nature that a reasonable person would have anticipated an imminent danger. For a closer survey of the requirements of *metus* see the relevant section in the part on the law of delicts below.

[41] D 44. 4. 4. 33; G 4. 117; D 4. 2. 9. 3; D 4. 2. 14. 9; C 8. 37. 9 pr. The same defence could also be granted against a plaintiff who did not himself use duress. Other remedies available to the victim of duress were the *restitutio in integrum* and the *actio metus causa*. See the relevant section in the part on the law of delicts below.

decide the relevant dispute could declare such contract invalid, regardless of whether or not the *exceptio metus* had been raised.[42]

4.3.4 Conditions and Terms in Contracts

It was not unusual in Roman law for the parties to subject their contract to certain qualifications. The most important of these were *condicio* (condition), *dies* (period of operation) and *modus* (burden).

4.3.4.1 Condicio

Virtually any legal act and thus also a contract could be rendered subject to a condition or an uncertain future event.[43] The effect of the legal act was then made dependent upon the occurrence of the unforeseeable future event. A distinction must be made between suspensive and resolutive conditions. When a suspensive condition was attached to a contract the relevant obligation arose only if and when the condition was fulfilled.[44] Until this event happened there was no obligation but merely an expectation or hope (*spes*) that the contract would produce its intended result. It should be noted, further, that a partial fulfilment of a suspensive condition was not sufficient: to trigger the operation of the contract the fulfilment had to be complete and unqualified.[45]

A legal act subject to a resolutive condition came into effect immediately, but was terminated as soon as the condition had been realized.[46] It follows that when such a condition was attached to a contract the obligation to perform arose immediately but was extinguished the moment the condition was fulfilled.[47]

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[42] Consider on this point C 4. 44. 1.

[43] However, certain juristic acts, such as *mancipatio*, *hereditatis aditio* and *acceptilatio*, were considered to constitute exceptions to this rule. See D 50. 17. 77.

[44] For example, A promises to give three gold pieces to B if horse X wins tomorrow's race.

[45] On the notion of *spes* consider D 50. 16. 54; *Inst* 3. 15. 4. On partial fulfilment see D 45. 1. 85. 6.

[46] In early law, resolutive conditions attached to juristic acts classified as *negotia stricti iuris* were ineffective as such acts were entered into formally and could only be terminated in a formal way. In later times, however, the praetor gave effect to such conditions by means of the *exceptio pacti conventi*, a defence based on an additional agreement between the parties that modified the original obligation. With respect to juristic acts classified as *negotia bonae fidei*, this problem did not exist since such acts could be entered into and terminated informally.

[47] For example, A promises to pay a sum of money to B regularly until Agrippa returns to Rome. In such a case, it is understood that the performance would terminate as soon as Agrippa returns and if he should return. It should be noted that certain absolute rights, such as freedom and paternal power, could not be made subject to resolutive conditions. Ownership was originally restricted in a similar manner but this restriction was abolished in the time of Justinian.

A condition could be stated positively, when its fulfilment depended upon the occurrence of a future uncertain event, or negatively, when its fulfilment depended upon such future event not taking place. Furthermore, the fulfilment of a condition might be within the control or discretion of one or the other of the contracting parties, in which event the condition was known as a potestative condition (*condicio potestativa*).[48] On the other hand, a casual condition whose realization was independent of the will or discretion of the parties and entirely dependent on chance was referred to as *condicio casualis*. A condition was called 'mixed' (*condicio mixta*) if its fulfilment partly depended upon, and was partly independent of, the will of the interested party, as, for instance, when it depended partly on the will or discretion of a third party or a natural event.[49] It should be noted that under certain circumstances a condition was fictitiously considered to have been realized, namely when the party who had an interest in the fulfilment thereof had intentionally hindered such fulfilment.[50]

An impossible condition attached to a contract or other juristic act caused the whole contract or juristic act to be null and void,[51] and the same was the case with conditions tainted by illegality or immorality.[52] On the other hand, where the coming into effect of a contract or other juristic act was made subject to an event that had already occurred or was certain to occur, the relevant condition was simply ignored or treated as unwritten (*pro non scripto*).[53]

4.3.4.2 Dies

A contract or other legal act could also be made subject to a time clause (*dies*) by means of a provision elaborating that the act would come into effect or terminate after the lapse of a specified period of time. In contrast with the *condicio* noted above that related to the incidence of an uncertain or unforeseeable future event, the *dies* thus related to the occurrence of a certain future event.

A distinction must be drawn between suspensive and resolutive time clauses. A suspensive time clause suspended the legal effect of the legal act until the term

[48] For example, A says to B: "I shall give you a sum of money if you go to Brundisium". It should be noted that if, in this example, the condition had been made subject to the will of the giver of the money, the juristic act at issue was considered void. See D 45. 1. 108 pr & 1. And see D 45. 1. 46. 3; D 45. 1. 17; C 4. 38. 13.

[49] For example, A says to B: "I shall give you a sum of money if Agrippa follows your advice".

[50] See on this point D 35. 1. 24.; D 50. 17. 161; D 18. 1. 41 pr.

[51] In certain cases an impossible condition attached to a legal act was regarded as unwritten and the act was upheld. Consider *Inst* 3. 19. 11. And see G 3. 98; *Inst* 2. 14. 10; D 28. 5. 46; D 35. 1. 3 & 6. 1; D 45. 1. 7; D 45. 1. 137. 6.

[52] *Inst* 3. 19. 14; D 28. 7. 7; D 30. 54 pr; D 35. 1. 71. 1; D 45. 1. 123. Conditions inherently contradictory or otherwise senseless also resulted in the nullification of the legal act at issue. Consider D 28. 7. 16.

[53] *Inst* 3. 19. 11.

was completed.[54] It follows, therefore, that when such a clause was attached to a contract, the relevant obligation came into operation immediately but its execution could be enforced only at the time of completion of the term.[55] A resolutive time clause, on the other hand, terminated the effect of the legal act when the prescribed period of time elapsed. When such a clause was embodied in a contract, the relevant obligation thus arose immediately but was extinguished as soon as the term was completed.[56]

A further distinction can be drawn between *dies certus* and *dies incertus*. Although in either case the future event was considered certain to occur, in the former case the day on which the event would take place was fixed[57] whilst in the latter there was uncertainty as to exactly when that day would eventuate.[58]

4.3.4.3 Modus

Modus was another type of condition sometimes attached to certain juristic acts, such as donations, manumissions of slaves and legacies[59]: it denoted a charge or burden imposed on the beneficiary. An example of the *modus* was the case where a person was given a legacy on the understanding that he maintain the testator's grave or have a monument erected in his memory. Otherwise than in the case of *condicio*, the acquisition of the benefit was not dependent on the execution of the charge and thus the beneficiary acquired the benefit immediately. Moreover, in classical law a *modus* does not appear to have created a readily enforceable obligation on the part of the beneficiary. However, in later law it was recognized that any interested party or, in the absence of such party, the state or church could enforce the charge.[60] The view that the *modus* created an enforceable restriction on a juristic act became prominent in the time of Justinian, who also introduced the possibility of recovering the benefit in the event that the beneficiary did not execute the charge.[61]

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[54] For example, A says to B: "I shall give you a sum of money when your uncle Claudius dies".

[55] In this respect *dies* differed from *condicio*, with respect to which the obligation arose only if and when the condition was fulfilled. See D 44. 7. 44. 1; D 45. 1. 13; D 45. 1. 56. 5.

[56] For example, A says to B: "You may use my boat until your uncle Claudius dies".

[57] For example, A says to B: "I shall give you a sum of money on the first day of April". It should be noted that in early law resolutive time clauses were ineffective in respect of *negotia stricti iuris*. However, the praetor intervened and gave effect to such clauses by means of the *exceptio pacti conventi* or, in some cases, the *exceptio doli*.

[58] For example, A says to B: "I shall give you a sum of money when your uncle Claudius dies".

[59] The term is of late origin.

[60] The relevant action was referred to as *actio popularis*, because it could be instituted by anyone and not only by a specific person.

[61] D 33. 1. 7; D 40. 4. 44.

4.3.5 Contractual Liability

From an early period Roman law set forth various standards or norms of conduct for assessing the liability of parties to a contract. As the Roman jurists tended to decide casuistically (from case to case), the relevant standards varied in accordance with the type of juristic act at issue and the subjective interests of the parties concerned, although in later times there was an attempt to develop a general system.

Classical Roman law recognized three basic forms of liability: *dolus*, *culpa* and *custodia*. As a degree of liability, *dolus* denoted an intentional or conscious wrongdoing on the part of the debtor as a result of which he was unable to carry out his obligations by rendering performance impossible.[62] *Culpa* signified negligence, the unintentional malperformance or non-performance of contractual obligations. However, it appears that in early law *dolus* was sometimes construed to encompass *culpa* as a standard of liability.[63]

The concepts of *dolus* and *culpa* were abstract and generalized, representing a failure to comply with the objective standards of, respectively, good faith (*bona fides*) and the diligence exhibited by a reasonable man (*diligentia boni patrisfamilias*). *Custodia*, by contrast, was defined in a much more concrete and casuistic way. Liability for *custodia* arose in the situation where the debtor had in his possession property belonging to the creditor that he was obliged to return. The law then dictated that the property in question should be kept in careful custody (*custodia*) until its return. This represented a very strict form of liability as the debtor was liable not only for loss or damage caused by his *dolus* or *culpa* but even for fortuitous loss or damage (*casus* or *casus fortuitus*) caused in certain typical ways (e.g. ordinary theft) whether or not he had exercised reasonable care to prevent it. The debtor was released from liability only in cases where the loss or damage had been caused by superior force or an act of God (*vis maior*).[64]

To understand the operation of the contractual liability norms in classical law reference must be made to the familiar distinction between *negotia stricti iuris* and *negotia bonae fidei*. In the case of the former, the debtor was liable when the non-performance or malperformance of the obligation was caused by his fault (*dolus* or *culpa*). In respect of obligations arising from *negotia bonae fidei*, on the other hand, the debtor was liable only for *dolus malus* or deliberate improper conduct that

[62] It should be noted that the term *dolus* was used to denote not only a form of contractual liability but also a specific 'praetorian' delict. Roman law drew a clear distinction between contractual and delictual liability: if there was both a contract and *dolus*, there was contractual liability; on the other hand, if there was no contract and *dolus* existed, the question arose whether such *dolus* was covered by a specific delict. On the issue of delictual liability see the relevant discussion in the part on the law of delicts below.

[63] The term *culpa* was used to denote either fault in a broad sense or negligence in a narrow sense. In the present context, the reference is to *culpa* in the narrow sense of negligence.

[64] Examples of *vis maior* were earthquakes, floods, storms, fires, violent attacks by robbers or pirates and incursion of an enemy.

conflicted with the requirements of good faith.[65] However, those debtors who had a duty of safe keeping (*custodire*) could be held liable for non-performance even in cases where no *dolus malus* existed on their part. As noted above, these debtors were held liable for everything except *vis maior* or an act of God.

In the course of time and under the influence of Greek philosophical thought on the one hand and Christianity on the other, the tendency developed to ground liability exclusively on the element of guilt. As a result, in the post-classical age liability for *custodia* faded away while *dolus* and *culpa* were clearly distinguished and underwent a number of refinements. During the same period, the law schools of the East endeavoured to devise a general system and it is probable that this system was adopted and extended by the compilers of Justinian's law codes. Nevertheless, the terminology of the *Corpus Iuris Civilis* is neither very precise nor consistent and an array of concepts (*dolus*, *culpa*, *culpa lata*, *culpa levis*, *omnis culpa*, *exactissima diligentia* and such like) are used in a rather loose manner.

In the law of Justinian, *dolus* denoted an intentional, malicious or fraudulent action (*dolus malus*) of the debtor while *culpa* was understood to encompass any reprehensible conduct falling short of *dolus*. Normally, *culpa* signified a failure to exercise diligence (*diligentia*). The notion of negligence (*neglegentia*) later became synonymous with *culpa* as a form of blameworthy failure to observe a duty of care.[66] *Culpa* as such occurred in two forms: *culpa levis* and *culpa lata*. Furthermore, within the category of *culpa levis* a distinction was made between what modern commentators have termed *culpa levis in abstracto* and *culpa levis in concreto*.

Culpa lata denoted gross negligence or, as it is stated in a text, 'not knowing what everyone knows', and, for all practical purposes, was equated to *dolus*.[67] A person liable for this degree of negligence exhibited a lack of care and diligence so gross as to suggest bad faith.

Culpa levis in abstracto refers to a failure to exhibit the degree of care expected of a prudent and diligent head of a family (*bonus et diligens paterfamilias*). This degree of *culpa* implied that one's conduct was assessed on the basis of an abstract or objective standard. When such standard was applied, the person concerned was expected to show the highest degree of care (*exactissima diligentia*) and hence he could be held liable for the slightest negligence (*culpa levissima*). This relatively strict form of liability applied to those persons who, in classical law, would normally be liable for *custodia*.[68]

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[65] In classical law *dolus* was synonymous with bad faith (*mala fides*).

[66] However, like in the case of *culpa*, the relevant terminology is not very consistent. Thus, in D 50. 16. 226 it is stated that "gross negligence (*magna neglegentia*) is tantamount to *culpa*, and *magna culpa* is tantamount to *dolus*." Another, apparently interpolated, text (D 17. 1. 29 pr) declares: "gross negligence (*dissoluta neglegentia*) is similar to *dolus* (*prope dolum*)."

[67] D 50. 16. 213. And see D 50. 16. 226; D 50. 16. 223 pr.

[68] D 44. 7. 1. 4; *Inst* 3. 14. 2; *Inst* 3. 24. 5.

Finally, *culpa levis in concreto* occurred when a person failed to exercise the same degree of care as he would normally have exercised in respect of his own affairs (*diligentia quam suis rebus adhibere solet*). This level of liability implied that the conduct of the person concerned was tested against a purely subjective criterion. An example of this type of *culpa* was to be found in the contract of partnership (*societas*).[69]

It should be noted that the sources are often inconsistent as to the standard of liability required in specific types of contract. In general, the incidence of *culpa levis* or *culpa lata* appears to have depended on whether or not the party concerned received a benefit under the relevant contract.[70]

4.3.6 Representation

Modern legal systems recognize that a person may enter into a juristic act by means of an agent or a representative. Where a person enters into a contract with a third party through a representative, the contract exists between the principal and the third party while the representative merely fulfils the role of an instrument of the principal. In Roman law the position was entirely different as representation in legal acts was, in principle, not recognized. From the earliest times the principle that prevailed was that a juristic act was a strictly personal affair that could only have legal effect with regard to those participating in it.[71] However, as early as the republican era and as a result of the expansion of commercial transactions a number of exceptions to this principle were recognized mainly for reasons of necessity and utility.

As noted in the chapter on the law of persons, since an early period persons *in potestate* (such as the slave or *filiusfamilias*) could act as representatives of the *dominus* or *paterfamilias*, insofar as everything they acquired immediately became the property of the *dominus* or *paterfamilias*. This applied irrespective of whether such persons contracted in their own name or in the name of the *dominus* or *paterfamilias*.[72] This situation was confirmed by the fact that a third party who had entered into a legal act with a slave or a *filiusfamilias* could sue the

[69] D 17. 2. 72; D 23. 3. 17 pr; D 27. 3. 1 pr; *Inst* 3. 14. 3; *Inst* 3. 25. 9. And see the discussion of *societas* below.

[70] Thus, according to most sources, the depositee was liable only for *culpa lata* whilst the borrower in the contract of loan for use (*commodatum*) and the pledgee in the contract of pledge (*pignus*) were liable for *culpa levis in abstracto*.

[71] D 44. 7. 11; D 50. 17. 73. 4; G 2. 95; *Inst* 3. 19. 4. It should be noted that certain forms of representation existed in the field of public law. Thus it was recognized that the state could be represented by its officials.

[72] The reasoning behind the recognition of such forms of representation was that as the Roman *familia* constituted a unit, its members were considered to act as members of the unit and not so much as representatives.

dominus or *paterfamilias* directly in respect of the obligation incurred by the slave or son in power.[73] The relevant actions the third party could use in such a case were the so-called *actiones adiecticiae qualitatis*.[74] Among the most important of these praetorian actions were the *actio de peculio*, the *actio de in rem verso* and the *actio quod iussu*.

The *actio de peculio* could be employed where property in the form of money or goods (*peculium*) had been given to a slave or *filiusfamilias* to use and to trade with in dealings. The *peculium* remained the property of the *dominus* or *paterfamilias*, who could be held liable for all debts arising from the commercial dealings of the dependant. However, the extent of liability in such cases was restricted to the maximum value of the *peculium* at the time of judgment.[75] In calculating the value of the *peculium* any amount which the *dominus* or *paterfamilias* owed to the *peculium* or which was owed to him by the dependant was taken into consideration.[76]

Where a slave or *filiusfamilias*, whether or not he had a *peculium*, had entered into a juristic act that entailed benefit to the estate of the *dominus* or *paterfamilias*, third parties could sue the *dominus* or *paterfamilias* with the *actio de in rem verso* for the amount by which he had been enriched.[77] As a true enrichment action, the *actio de in rem verso* was based on the principle that no one should be unjustifiably enriched at the expense of another person.[78] A combination of this action with the *actio de peculio* mentioned above was also feasible.

The *actio quod iussu* lay against a *dominus* or *paterfamilias* who had granted authorization (*iussum*) for the conclusion of a transaction between his slave or *filiusfamilias* and a third person, or who had subsequently ratified such transaction.[79] The *dominus* or *paterfamilias* was held liable in full (*in solidum*) for obligations undertaken within the limits of the authorization.[80]

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[73] It should be noted that, unlike the slave or other dependants, the *filiusfamilias* could in certain circumstances incur a measure of liability.

[74] This term is not of Roman origin. It was introduced in the Middle Ages by the glossators.

[75] *Inst* 4. 7. 4; G 4. 72a; D 15. 1.

[76] G 4. 73; D 15. 1. 5. 4. Reference may also be made in this connection to the *actio tributoria*, which was in truth an action for apportionment. By means of this action creditors could recover at least part of their claims on an insolvent person who used for his business as capital merchandise purchased with the *peculium* received from his *paterfamilias* or, in the case of a slave, his *dominus*. The *paterfamilias* or *dominus* against whom this action lay was required to distribute the assets *pro rata* amongst the creditors, ranking himself only as an ordinary creditor. If a creditor considered that he had been unfairly treated in the distribution process, he could employ this action to have his dividend increased to the proper amount. See G 4. 72. D 14. 4.

[77] Likewise in this case, the time of judgment was the relevant time for the purposes of calculating the amount of enrichment. *Inst* 4. 7. 4a; G 4. 72a; D 15. 3; C 4. 26. 7. 3.

[78] D 15. 3. 3. 2; D 15. 3. 5. 3.

[79] G 4. 70; *Inst* 4. 7. 1; D 15. 4.

[80] The relevant principle was the same as the one that prevails in modern law, i.e. that the principal is liable for the actions of an agent.

Two further actions in this category were the *actio institoria* and the *actio exercitoria*. The former action could be directed against a *dominus* or *paterfamilias* who appointed his slave, son or an independent free person as manager of a business (*institor*). In such a case the *dominus* or *paterfamilias* could be held liable in full (*in solidum*) for obligations incurred by the manager within the scope of the business. Similarly, where a *dominus* or *paterfamilias* appointed his slave, son or an independent free person as captain of a ship, he was liable for the debts incurred by the captain in the exercise of his activities. In this case the *dominus* or *paterfamilias* was referred to as *exercitor* and the relevant action was termed *actio exercitoria*.[81]

Another form of representation originated in the law of procedure where a party to a lawsuit could use a *cognitor* or *procurator* to act on his behalf.[82] In classical law it became customary for a person to appoint a representative to administer his estate as a general agent (*procurator omnium bonorum*) or to manage only one specific affair (*procurator unius rei*).[83] Such *procurator* could even acquire ownership and possession on behalf of his principal, and by the time of Justinian's reign this right was extended to a wide range of legal acts.[84]

Furthermore, the *tutor* and *curator*[85] were in classical law allowed to acquire ownership and possession for persons under guardianship or curatorship while in the law of Justinian these persons could acquire any rights for the ward.[86]

Finally, a form of indirect representation occurred in the context of the contract of *mandatum*, where the mandator had directed the mandatary to assume an obligation by entering into a legal relationship with a third party. In such case the obligation arose between the third party and the mandatary rather than between the third party and the mandator. Nevertheless, the mandator had to accept performance and assume the rights properly incurred on his behalf as well as indemnify the mandatary against any obligation that might arise from the legal relationship.[87]

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[81] *Inst* 4. 7. 2; G 4. 71; D 14. 1; C 4. 25. An extension of the *actio institoria* was the *actio ad exemplum institoriae actionis* (action based upon analogy of the *institoria*) which could be instituted against a principal when the person in control of his estate (*procurator*) had incurred debts in the exercise of his functions. Consider D 14. 3. 19 pr.

[82] See G 4. 82–87; *Inst* 4. 10 pr – 1.

[83] D 3. 3. 1 pr.

[84] See G 2. 95; *Inst* 2. 9. 5; D 41. 1. 13 pr; D 41. 2. 42. 1; D 41. 3. 41; C 7. 32. 1.

[85] On the institutions of tutorship and curatorship see the relevant discussion in the chapter on the law of persons above.

[86] D 26. 7. 27; D 41. 1. 13. 1; D 41. 2. 1. 20; *Inst* 2. 9. 5.

[87] The contract of mandate (*mandatum*) is dealt with in our discussion of the consensual contracts below.

4.3.7 Contractual Agreements in Favour of a Third Party

Since Roman law did not in principle recognize representation in legal acts, a contractual agreement for a performance in favour of a third party or an agreement imposing a duty on a third party was deemed invalid. As already noted, a contract was considered a personal affair that created an obligation only between the immediately contracting parties.[88]

This principle was strictly adhered to with respect to contractual agreements by which performance was to be undertaken by a third party.[89] On the other hand, with respect to agreements entered into in favour of a third party certain exceptions to this general principle were gradually allowed for reasons of necessity or convenience. Thus, a master or *paterfamilias* acquired the benefit of a contract entered into by a slave or *filiusfamilias* respectively, whether the latter contracted in their own name or in his. Where a contract stipulated that performance should be undertaken in favour of both a contracting party and a third person, it was held that only the contracting party acquired a personal right, namely a right to half the value of the benefit stipulated. On the other hand, where performance was stipulated in favour of a contracting party or a third person, the debtor had the option to perform in favour of either the other contracting party or the third person (although only the former acquired a personal right for the full performance). In such a case it was asserted that the third party was merely added for the purposes of performance (*solutionis causa adiectus*).[90]

Justinian declared that a feasible method for making a performance stipulated in favour of a third party enforceable was to render it subject to a penalty clause, for example: "Do you promise to perform in favour of X? If you fail to do so, do you promise to pay me a penalty of such and such an amount?". In other words, this case meant that one stipulated a penalty payable to oneself while performance in favour of a third person was entered as a condition in the contract. Although the third person did not acquire a legal right, the pressure of the penalty ensured performance to the third person.[91]

Furthermore, under Justinian's law it was possible to validly stipulate in favour of an heir after the death of the creditor.[92]

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[88] G 2. 95; C 8. 38. 3 pr. And see D 45. 1. 38. 17; D 45. 1. 126. 2.

[89] For example, the stipulation "do you promise that X will perform?" was void.

[90] See *Inst* 3. 19. 4; G 3. 103 & 103a; D 45. 1. 56 pr-2; D 45. 1. 141. 3 & 5; D 45. 1. 110 pr; D 46. 3. 12. 3; D 46. 3. 59.

[91] Consider *Inst* 3. 19. 19. See also D 45. 1. 38. 17.

[92] C 4. 11. 1; *Inst* 3. 19. 13 & 15. It should be noted that in certain exceptional cases an *actio utilis* or *actio in factum* could be granted to a third party to enforce an otherwise invalid stipulation made in his favour. See D 13. 7. 13 pr; D 24. 3. 45; C 3. 42. 8; C 4. 32. 19. 4; C 5. 14. 7.

4.3.8 Contractual Agreements Involving More Than One Debtor and/or Creditor

In our discussion so far it has been assumed, mainly for reasons of convenience, that a contractual agreement involved one creditor and one debtor. This limitation was not always a uniform feature of contracts, however, as there could be more than one creditor or debtor as well as a plurality of creditors and debtors in respect of a particular obligation.[93] If the relevant performance was divisible, i.e. could be carried out in instalments without altering its character as in the case of money or other consumable goods, the obligation was divided into as many separate obligations as there were creditors and/or debtors. In effect, each debtor was obliged to fulfil only a *pro rata* share of the performance whilst each creditor was entitled only to a *pro rata* share of the performance.[94]

On the other hand, if the performance was indivisible as illustrated where it consisted in the construction of a building or the creation of a servitude, each debtor was obliged to render full performance and each creditor was entitled to the whole of that which was due. In such cases there was only one obligation and the liability of the parties relating thereto was a liability to render full performance (*in solidum*).[95] However, as soon as the whole performance had been accomplished by one of the debtors, or to one of the creditors, the obligation was deemed terminated and thereby the other debtors were discharged and the other creditors had no further claim. The debtor who had tendered full performance had a right of recourse against his fellow-debtors, and the creditor in favour of whom the performance was made had to share that which he had received with his fellow-creditors. It should be noted, however, that the precise nature of the right of recourse depended upon the legal relationship that existed between the contracting parties.[96]

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[93] It would appear that the idea of a plurality of contractual parties was connected with the process of *stipulatio*. The parties could agree that a number of them would be creditors and/or debtors (*correi promittendi*, *correi debendi*), and would stipulate in a prescribed manner by which they would become joint debtors and/or joint creditors (*plures rei stipulandi*, *correi stipulandi*) in respect of one and the same obligation. Such a plurality of debtors and creditors was also possible with regard to other forms of contract. It may be noted that suretyship was essentially a mere system of plural debtors: the principal debtor and the sureties were obliged to perform the same duty and, in principle, the creditor could claim from the principal debtor or from the sureties. See the relevant discussion below.

[94] Consider D 38. 1. 15; D 45. 1. 72 pr; D 45. 2. 11. 1.

[95] Where every debtor was liable *in solidum* and every creditor entitled *in solidum*, the relevant obligation was referred to as ‘solidary’.

[96] The relevant right could be implemented by means of one of the actions of division, the *actio mandati* or, in some cases, the *actio negotiorum gestorum*. As the law developed, a general right of recourse was recognized while, under the law of Justinian, a general right was granted to a debtor who had carried out the performance to claim a cession of rights from the creditors in favour of whom he had performed. By means of the ceded right such debtor could then instigate action against his fellow-debtors. Consider D 19. 2. 47; D 21. 2. 65.

4.3.9 Breach of Contract

As previously noted, when parties entered into a contractual relationship they created an obligation by which one party (the debtor) was obliged to perform in favour of the other (the creditor). When a debtor failed to discharge his obligation, or when he did not properly discharge such obligation, he was liable for non- or mal-performance or what is in modern parlance referred to as 'breach of contract'. Depending on the particular standard of liability relating to the case at issue and the type of action employed, the debtor's failure to perform could entail various consequences.

With regard to actions stemming from the *ius strictum* and directed at making a specific performance in the form of a particular object (*certa res*) or a certain sum of money (*certa pecunia*), the debtor was initially not held liable for impossibility of performance caused by his own fault and hence no damages could be sought in such a case. To remedy this unjust situation, the basic rule was in later times modified by the principle that an obligation remained in force if the impossibility of performance was the result of fault (*dolus* or *culpa*) on the part of the debtor.[97] The debtor was then condemned to pay the creditor a sum of money equal to the cost for the creditor to have the duty performed. As a rule, that compensation included the actual loss the creditor suffered due to non-performance as well as the loss of profit.

With regard to actions arising from *bona fides* and directed at an indefinite object (*incerta res*), the debtor could be held liable if performance was not carried out due to his *dolus* or *culpa*.[98] In the time of Justinian this principle prevailed in respect of all actions, irrespective of whether or not they originated in the *ius strictum* and whether or not they were directed at a specific object.

4.3.9.1 Mora

A special form of non-performance was *mora*: an unjustified delay on the part of a contracting party to discharge an obligation. A distinction is drawn between delay or default of the debtor to make performance (*mora debitoris*) and delay or default of the creditor to accept it (*mora creditoris*).

Mora debitoris occurred when performance was due and possible, but the debtor failed to perform due to his fault. Normally, this transpired when he wilfully (*dolo malo*) deferred or delayed discharging the performance.[99] This invites us to

[97] This principle is usually formulated in the sentence: *factum debitoris perpetuat obligationem* or *culpa debitoris perpetuat obligationem*. See D. 12. 1. 5; D 45. 1. 91. 3.

[98] If, for instance, the depositee made it impossible for himself to return the thing deposited and this was due to his *culpa lata* or *dolus*, he would be held liable. Similarly, in a case of sale, if the vendor was unable to deliver the item purchased owing to his *dolus* or *culpa levis in abstracto*, he remained liable.

[99] D 50. 17. 88; D 40. 5. 26. 1.

consider the question of when performance was due. If the parties had agreed that performance was due before or on a certain day, the debtor fell into default without further notice if he failed to discharge his legal duty at the proper time. This form of default was referred to as *mora ex re*, since no request by the creditor was necessary.[100] On the other hand, if no particular day for performance had been set the creditor first had to request the debtor to fulfil his duty (*interpellatio*) before there could be *mora*. Otherwise, the debtor would not know that the creditor wanted performance and thus there would be no fault on his part. In this case, the default was described as *mora ex persona*.

As regards the legal consequences of *mora debitoris*, attention must be drawn to the distinction between actions arising from *ius strictum* and those arising from *bona fides*. With respect to the former, the principle prevailed that the debtor who was *in mora* had to perform as long as performance could be carried out. If he performed, even though he was in default, his liability was extinguished. However, if performance became impossible after the debtor fell into default there was originally no liability on his part. To rectify this situation the principle was introduced that the debtor's *mora* perpetuated the obligation (*mora debitoris perpetuat obligationem*). This means that the obligation, even though impossible to perform, remained in force after the debtor was *in mora* and the creditor could sue for a sum of money equal to the value of the performance. It is important to note that the debtor remained liable irrespective of the way in which performance became impossible.[101] As this suggests, the *mora debitoris* transferred the risk of supervening impossibility of performance from the creditor to the debtor and this rule applied to all obligations. With respect to actions arising from *bona fides*, a debtor who was *in mora* did not only have to pay a sum of money equal to the value of the performance he failed to render but had to pay all damages suffered by the creditor as well as interest calculated from the time he was in default (*a tempore morae*). By the time of Justinian's reign, this was recognized as a general principle applicable to virtually all contractual agreements.[102]

Mora debitoris dissolved when the attached obligation was extinguished or when the debtor rendered performance or offered to perform. If the creditor failed to accept the tender of performance by the debtor without a just cause (*sine iusta causa*), he himself fell into default.[103] This introduces us to the second form of *mora*, namely *mora creditoris*.

Mora creditoris occurred when the creditor refused without a good reason to accept a properly tendered performance or when he made it impossible for the

[100] D 22. 1. 23. 1. The relevant principle was expressed by the maxim: *dies interpellat pro homine* (the day demands in the place of the creditor).

[101] Such impossibility of performance could have been the result of superior force (*vis maior*) or accident (*casus fortuitus*) or the debtor's *dolus* or *culpa*.

[102] D 22. 1. 32. 2; D 22. 1. 38. 6–8; D 46. 6. 10.

[103] The performance tendered had to be the due performance and this was a question of fact. See on this D 46. 3. 39; C 8. 42. 9.

debtor to discharge his obligation by, for instance, being absent. It should be noted that this form of *mora* arose not only when the failure to accept the performance was due to the creditor's fault, but also where no fault could be attributed to him, for example if his absence was caused by illness or by other reasons beyond his control.[104]

The main effect of the *mora creditoris* meant the debtor was now liable only for *dolus*, i.e. only in cases where he wilfully made performance impossible. In all other cases, the risk of loss or impossibility passed to the creditor.[105] Furthermore, the debtor could claim compensation for damages suffered as a result of the *mora creditoris* (for instance he was entitled to reimbursement of storage or maintenance costs) and could employ the *exceptio doli* as a defence against any claim by the creditor for performance until his damage had been compensated.[106] *Mora creditoris* ceased to exist when the creditor declared his intention to accept the performance.[107]

4.4 Real Contracts

Real contracts (*contractus re*) were agreements that became operative and binding on the transfer of possession or physical control of a tangible thing (*res corporalis*). There were four types of real contract: *mutuum*, *commodatum*, *depositum* and *pignus*.

4.4.1 Mutuum

Mutuum was a gratuitous loan for consumption of money or other things that were weighed, numbered or measured (such as wine, oil, corn, gold or silver).[108] It was the oldest form of *contractus re* which originated from the old *ius civile* and

[104] D 17. 1. 37; D 19. 1. 3. 4; D 19. 1. 38. 1; D 46. 3. 9. 1; D 13. 5. 18 pr. If the creditor believed that he was justified in refusing the tender of performance by the debtor, for example if he *bona fide* believed that the tendered performance was not the due performance, he did not fall in default. See D 13. 5. 17; D 46. 3. 72 pr. It would appear that if the creditor did not accept the performance, he was placed *in mora* by an *interpellatio*.

[105] D 18. 6. 5 & 18; D 24. 3. 9; D 33. 6. 8; D 46. 3. 72 pr.

[106] D 19. 1. 38. 1; D 33. 6. 8; D 18. 6. 1. 3.

[107] D 18. 6. 18; D 22. 1. 7.

[108] These are referred to as '*res fungibiles*': generic things specified according to type or things belonging to a class where all the members thereof are sufficiently similar to be freely interchangeable. In the context of *mutuum*, the rule *genera non pereunt* meant that performance could never become impossible.

therefore belonged to the category of the *negotia stricti iuris*.[109] It was constituted by agreement and the transfer of ownership of an object to another person, on the understanding that the borrower would at a later stage return an object of the same kind, quality and quantity.[110] The contract was deemed to be formed *re* because it became operative when the money or other things were transferred to the person to whom the loan was granted. A mere agreement to lend without such transfer was not sufficient.

Mutuum was a unilateral contract as it imposed a duty only on one side. The person granting the loan acquired a personal right against the borrower, who was required to transfer to the lender (at a time expressly or impliedly agreed, or at a reasonable time after demand) an equivalent amount of money or things of the same kind and quality. The lender (who was the creditor) could enforce the obligation by means of a personal action known as *condictio*.[111] The action was termed *condictio certae creditae pecuniae* where the loan consisted of money, while in the case of a loan of grain (*triticum*) or other fungibles it was called *condictio triticaria*. Insofar as the action was always directed at a specific object or a specific sum of money or amount of generic things it was also known, in its usual form, as *condictio certae rei*.[112] In all cases only the precise amount or quantity that had been transferred could be reclaimed. However, under certain circumstances interest could also be demanded (by means of a separate action) provided that such interest had expressly been agreed in advance by way of another contract, namely *stipulatio*.[113]

[109] This form of contract was connected with *nexum*, an early Roman institution by means of which a person bound himself personally (by a kind of 'self-pledge') to another person for the return of a sum of money he borrowed from the latter. The lender then passed the money over to the borrower (*per aes et libram*) and in this way acquired a form of pledge-right in respect of the borrower's person. As Roman society evolved, *nexum* became obsolete and was finally superseded by *mutuum*.

[110] See *Inst* 3. 14 pr; G 3. 90; D 12. 1. 2 pr-4; D 44. 7. 1. 2–4.

[111] This action originated in the *ius civile* and was therefore an *actio civilis*. See the relevant discussion in the chapter on the law of actions below.

[112] Consider D 12. 1. 9 pr and 8–9; D 12. 1. 15; D 12. 1. 18 pr. On the *condictio triticaria* see D 13. 3.

[113] If one stipulated for interest, one stipulated for the principal at the same time. Where this occurred the *mutuum* agreement was superseded by the stipulation as the obligation was considered to have arisen *verbis*, not *re*. But where the parties wished the *mutuum* to remain in force they could simply attach to it an informal agreement concerning the interest. However, such an informal agreement was unenforceable. D 17. 1. 10. 4; D 19. 5. 24; D 45. 1. 126. 2.; C 4. 32. 3. The maximum rate of interest chargeable was 12% *per annum* in the classical age and 6% in the time of Justinian. See C 4. 32. 26. A particular form of loan of money occurred in the case of marine commerce and was known as *fenus nauticum* or *pecunia traiecticia*. In this context, the money was lent to a ship-owner who intended to use it to buy goods overseas. The loan had to be repaid only when the ship returned. However, if the ship was lost, the money was forfeited. Because of the risk the loan-giver/creditor assumed, the rate of interest he could charge was unlimited, until Justinian fixed it at 12%. Consider D 22. 2. 3; C 4. 32. 26. 1.

According to the *senatus consultum Macedonianum*, passed during the reign of Vespasian (AD 69–79), a loan of money to a *filiusfamilias* was forbidden.[114] This enactment did not dictate that such a loan would be automatically null and void, but gave the son or his father the *exceptio senatus consulti Macedoniani* against the claim of the moneylender even after the son became *sui iuris*.[115] Although such *mutuum* could not be enforced, it was construed as producing a natural obligation (*obligatio naturalis*) that ruled out the *condictio indebiti*[116] and could invoke a civil obligation by novation (*novatio*)[117] when the son was *sui iuris*.

4.4.2 Commodatum

Commodatum or loan for use was established when one person (*commodans* or *commodator*) lent an object free of charge to another (*commodatarius*), usually for a fixed period of time and for a specified purpose.[118] After the agreed period of time for the loan of the object had elapsed, such object had to be returned to the lender. As this suggests, things that were consumed by use (*res consumptibiles*) or fungible things (*res fungibiles*) could not be the object of *commodatum*, save in certain exceptional cases.[119] It should be noted that this contract was not recognized by the old *ius civile* but originated from the *ius honorarium* and was therefore a *negotium bonae fidei*.

As in the case of *mutuum*, the contract of *commodatum* was constituted by agreement and the transfer of the object. Otherwise than in *mutuum*, however, the borrower in *commodatum* (*commodatarius*) did not acquire ownership but only detention (*detentio*) over the thing transferred.[120]

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[114] According to Roman tradition, this senatorial resolution was introduced after a certain Macedo had killed his own father in order to obtain money to repay his debts.

[115] The *senatus consultum Macedonianum* did not apply: (a) where the borrower was *sui iuris*, or had deceived the lender as to his status; (b) where the father had consented to the loan or subsequently ratified it, or had been enriched by it; (c) where the loan did not exceed the *peculium castrense* and *quasi castrense* of the son (see the relevant discussion in the chapter on the law of persons above); (d) where the son after becoming *sui iuris* renounced the benefit of the exception; and (e) where the son had borrowed the money to cover reasonable expenses that did not exceed his usual allowance.

[116] This was an action for the recovery of a payment made by mistake for a non-existing debt.

[117] The term *novatio* was used to denote the termination of an obligation by its transformation into or replacement with a new one. See the relevant discussion in the section on the termination of obligations below.

[118] Consider in general D 13. 6; C 4. 23. The term *commodatarius* is not of Roman origin.

[119] For example, when fruits were borrowed to decorate a shrine prior to a religious ceremony. In such case the fruits themselves had to be returned. See D 13. 6. 3. 6. And see D 13. 6. 4; D 44. 7. 1. 3.

[120] D 13. 6. 8; D 6. 1. 9.

Commodatum may be described as an imperfectly bilateral contract: while in principle it invoked only one obligation (the duty of the borrower to return the same object to the lender after use or at a definite date), a contingent duty might also exist on the part of the lender under certain circumstances.

Besides his basic duty to return the thing on completion of either the time period or purpose for which it was lent, the *commodatarius* was burdened with the obligation to exercise good care of the thing and return it in as good a condition as when he received it (with the exception of reasonable wear and tear). Furthermore, he was not permitted to use the thing except as authorized by the contractual agreement. In classical law his liability for the use of the thing was extensive (*custodia*),[121] although in the law of Justinian he was liable only for *dolus* and *culpa levis in abstracto*. However, if he used the object in an unauthorized way or fell into default (*mora*) he was liable for all risks, even loss or damage caused by superior force (*vis maior*) or accident (*casus fortuitus*), and could also be liable in terms of *furtum usus* or 'theft of use'.[122]

If, after the agreed period of use had elapsed, the borrower did not return the object to the lender or did not return it in a proper condition the lender could employ the *actio commodati* to enforce his personal right against the borrower.[123] This action was directed at the return of the thing borrowed, or the value thereof, together with the fruits or other proceeds derived from it.[124] On the other hand, the borrower could institute the *actio commodati contraria* against the lender for the recovery of extraordinary expenses incurred by him in respect of the maintenance of the thing[125] or for damages caused by the thing due to some defect of which the lender was aware.[126] Both the above actions originated from the *ius honorarium* and were, therefore, based on *bona fides*.[127]

[121] This meant that the *commodatarius* would be free of liability only if impossibility of performance, i.e. the failure to return the thing, was due to superior force (*vis maior*). In other words, if the thing was destroyed by *vis maior* the risk fell on the *commodator*. But if the thing was destroyed or damaged as a result of *dolus* or *culpa* of the borrower, or accident (*casus fortuitus*), the latter was liable. The reason for this high level of liability is attached to the fact that as the *commodatum* was a gratuitous loan, it was primarily the borrower that benefited from it.

[122] D 13. 6. 18 pr; D 13. 6. 5. 7; G 3. 196. It should be noted that the lender could reclaim the thing immediately if the borrower misused it in breach of the contract.

[123] *Inst* 4. 6. 28.

[124] *Inst* 3. 14. 2.

[125] D 13. 6. 18. 2. The borrower had the right to retain the thing (*ius retentionis*) until such expenses were paid.

[126] *Inst* 3. 14. 2*; Inst* 3. 24. 2; G 3. 196 & 197; G 3. 206; G 4. 47; D 13. 6. 1 pr-1; D 13. 6. 5. 2–9; D 13. 6. 5. 12; D 13. 6. 17; D 13. 6. 18 pr & 3; D 47. 2. 60; D 47. 2. 77 pr; C 4. 23. 1 & 4. In general, the lender was liable for *dolus* and, if he benefited from the contract, for *culpa levis in concreto*.

[127] This implies that as the duties of both parties were defined by the requirement of good faith, equitable defences did not have to be raised by *exceptio*.

4.4.3 *Depositum*

The contract of *depositum* came to the fore when one person (the *depositor*) handed over a movable thing to another (the *depositarius*) and the latter undertook to retain the thing in his safe-keeping gratuitously for a given period of time or until the depositor demanded its return. Like the *commodatum*, *depositum* derived from the *ius honorarium* and was therefore a *negotium bonae fidei*. It was constituted by agreement and the actual delivery of the thing.[128] Such delivery caused only physical control or detention (*detentio*) to pass to the *depositarius*, while ownership and protected possession remained with the *depositor*. The *depositarius* could keep the thing but was not entitled to use it; if he did use it, he could be guilty of theft of the use of such thing,[129] unless he had acted in good faith.[130] Furthermore, the depositary had to exercise care of the thing whilst it remained in his safekeeping but his liability for loss or damage of the thing was limited to *dolus* and *culpa lata* (gross negligence). Thus, if the thing was destroyed due to accident (*casus fortuitus*), superior force (*vis maior*) or simple negligence, the depositary was not liable for impossibility of performance.[131]

As in the case of *commodatum*, *depositum* was an imperfectly bilateral contract: although in principle such a contract only created one obligation, under certain circumstances it was possible for a counterclaim to arise. The principal obligation was always the duty of the depositary to return the thing on demand to the depositor in as good a condition as when he received it, together with any produce or accessories.[132] If he failed to do so, the depositor could enforce this obligation by means of the *actio depositi*.[133] A further result of this action, if it proved successful, was loss of honour (*infamia*) for the depositary.[134] On the other hand, the depositary could institute the *actio depositi contraria* against the depositor for compensation of expenses incurred by him in the maintenance of the object in question or for damage he had suffered as a result of *mala fides* on the part of the depositor.[135] Both the above actions derived from the *ius honorarium* and therefore the relevant duties of the parties were determined by reference to the requirements of *bona fides*.

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[128] D 16. 3; C 4. 34. The *depositum* had to be gratuitous; if there was any remuneration the contract was designated as one of letting and hiring (*locatio et conductio*). See D 16. 3. 1. 8–10.

[129] The relevant remedy was the *actio furti*.

[130] G 3. 196.

[131] *Inst* 3. 14. 3. The restriction on the depositary's liability was due to the fact that *depositum* was gratuitous and in the interest of the depositor.

[132] D 16. 3. 1. 24.

[133] See *Inst* 3. 14. 3; D 16. 3. 23; D 16. 3. 29 pr.

[134] D 3. 2. 1; G 4. 182.

[135] D 3. 2. 1; D 16. 3. 5 pr. Like the borrower in the case of *commodatum*, the depositary could exercise the right of retention (*ius retentionis*) until expenses were paid.

Besides the ordinary case of *depositum*, Roman law recognized three special forms of such contract governed by rules that differed in some respects from the usual *depositum*.

The first was the so-called *depositum necessarium* or *depositum miserabile*: a *depositum* created under pressing necessity.[136] This emerged when the depositor was forced to deposit property with someone because of some unforseen emergency (e.g. fire, earthquake or shipwreck), and he thus hardly had the opportunity to choose the depositary. When this event occurred the duties and liabilities of the parties were the same as in the case of an ordinary *depositum*, but if the depositary failed to fulfil his duties and was found to be liable he had to reimburse double (*in duplum*) of what was due to the depositor.[137]

Furthermore, when a dispute arose over a particular object the parties concerned could deposit such object with a third party (known as a *sequester*) for the duration of the dispute. After the dispute was settled, the *sequester* was required to hand over the thing to the successful party. If he failed to do so, the recovery of the object could be claimed by means of an action called *actio depositi sequestraria*. Unlike the normal depositary, the *sequester* had possession of the object, not merely *detentio*, and was protected by possessory interdicts.[138]

Finally, the *depositum irregulare* was a deposit of money or other consumable things on the terms that the depositary should become owner of such things and could use them for his own needs on the condition that he return an equivalent quality and quantity on demand. An example of this form of deposit was money deposited with a banker. Originally, this contractual relationship was considered by the jurists to be *mutuum*[139] but in later law *depositum irregulare* became regarded as a separate entity. This form of *depositum* differed from *mutuum* in that it primarily favoured the depositor, whereas *mutuum* favoured the borrower. Furthermore, unlike *mutuum* that existed as a *negotium stricti iuris*, the *depositum irregulare* was a *negotium bonae fidei*. Thus in the case of the latter contract, interest might be claimed (by means of the *actio depositi*) if such interest had been agreed upon informally or in the case of *mora*, purely on the basis of *bona fides*.[140]

[136] The terms *depositum necessarium* or *depositum miserabile* do not occur in classical literature.

[137] *Inst* 4. 6. 17; *Inst* 4. 6. 26; D 16. 3. 1. 1–4.

[138] On the possessory interdicts see the relevant discussion in the chapter on the law of property above. And see D 16. 3. 5. 1–2; D 16. 3. 6; D 16. 3. 12. 2; D 16. 3. 17. 1; D 50. 16. 110.

[139] Thus the depositor could be granted a personal action (*condictio*) for repayment of the principal sum with the exclusion of any claim for interest.

[140] Consider D 12. 1. 4 pr; D 12. 1. 9. 9; D 12. 1. 10; D 16. 3. 1. 34; D 16. 3. 7. 2–3; D 16. 3. 24; D 16. 3. 25. 1; D 16. 3. 26. 1; D 16. 3. 28; D 16. 3. 29. 1; C 4. 34. 4.

4.4.4 *Pignus*

As noted in the chapter on the law of property, *pignus* or pledge was a form of real security that was established when a debtor or third party handed over a corporeal thing to the creditor as security for a debt on the understanding that the creditor would return the property when the debt was duly paid. The agreement between the debtor or third party and the creditor pursuant to which the security was given constituted a *contractus re* insofar as the transfer of possession constituted the *causa* (*re*) of the contract of *pignus*. Like the contracts of *commodatum* and *depositum*, *pignus* was an institution of the *ius honorarium* and based on *bona fides*.[141]

Pignus was an imperfectly bilateral contract that gave rise to rights and obligations in respect of both the pledgor as well as the pledgee. As long as the pledged object remained in his possession, the pledgee was in principle not allowed to use it unless expressly authorized by the contract.[142] If he did so in bad faith, he could be found guilty of theft.[143] Furthermore, if he did not properly exercise care of the object in question and this entailed damage or destruction then pursuant to the law of Justinian the pledgee was liable for *dolus* and *culpa levis in abstracto* (in classical law probably also liable for *custodia*).[144] But the principal obligation of the pledgee pertained to his duty to return the pledged thing in a proper condition as soon as the debt was extinguished. If he failed to do so, the pledgor could claim the return of the thing or damages by means of a personal action known as *actio pigneraticia*.[145] On the other hand, the pledgee could institute the *actio pigneraticia contraria* against the pledgor for expenses incurred by him in respect of safekeeping the object or for damages he suffered owing to the *mala fides* of the pledgor.[146] If the secured debt was not satisfied, the pledgee was entitled to sell the pledged object. In such case, the pledgor could claim the residue (*superfluum*) of the selling price if the price exceeded the debt for which the pledge had been given.[147]

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[141] The real right stemming from *pignus* granted the pledgee possession that was protected by the possessory interdicts and could be regained, if lost, by means of the *actio Serviana* or the *actio quasi Serviana*.

[142] An agreement by which the pledgee could use the object (*antichresis*) and an agreement by which the pledgee could sell the object (*pactum de distrahendo*) were frequently accommodated by the law. See the relevant discussion in the chapter on the law of property above.

[143] D 47. 2. 55; *Inst* 4. 1. 6.

[144] D 13. 7. 13; D 13. 7. 9 pr; D 13. 7. 20. 2; C 4. 24. 5.

[145] *Inst* 3. 14. 4. And see D 13. 7. 9. 5; D 44. 7. 1. 6.

[146] The pledgee could exercise the right of retention (*ius retentionis*) until he was duly compensated for his loss or damage. See C 8. 26. 1. Consider also D 13. 7. 8 pr; D 13. 7. 36. 1.

[147] C 8. 27. 20.

4.5 Verbal Contracts

Verbal contracts (*contractus verbis*) were contracts that were created by the use of certain formal words (*verbis solemnibus*). One of the earliest known contracts of this kind was *sponsio*: a question and answer format using the solemn verb *spondere* (*spondesne?*: do you solemnly promise?—*spondeo*: I solemnly promise). *Sponsio* is believed to have had a religious origin (it probably began as an oath) and was always confined to Roman citizens. Later this contract became secularised and superseded by the *stipulatio*, one of the most important juristic acts known to Roman law. Both *sponsio* and *stipulatio* were institutions of the *ius civile* and therefore *negotia stricti iuris*. This meant that in terms of validity only the formalities were significant, whilst the question whether agreement (*consensus*) had been reached between the parties was irrelevant. However, by the late classical age *consensus* had become an essential element of the verbal contracts.[148]

4.5.1 Stipulatio

Stipulatio was a unilateral contract that could be employed in various ways in private or procedural law. It consisted essentially of a formal question and an affirming answer that initially had an extremely formal nature, but its forms were progressively simplified and broadened in scope. The contract required a brief and simple ceremony: a question by the creditor/promisee (*stipulator*) containing the terms of the proposed promise and a positive reply by the debtor/promisor (*promissor*) accepting them. The same verb had to be used in both the question and the answer, such as "*spondesne centum dare*?" ("do you solemnly promise to pay one hundred?")—"*spondeo*" ("I promise"). Originally, when *stipulatio* was accessible only to Roman citizens, the verb *spondere* had to be used; but in later times, when the institution was made available to foreigners, other and less formal verbs of promise could also be employed (such as *promittere*, *fideipromittere*, *fideiubere*, *dare*, *facere*) while even Greek equivalents of the Latin words were acceptable. Ultimately, any language could be employed as long as the answer followed the question immediately and both

[148] There were two further forms of *contractus verbis* recognized by Roman law: *dotis dictio* and *iusiurandum liberti* (or *iurata promissio liberti*). See G 3. 95a & G 3. 96. The *dotis dictio* was a method of constituting a dowry (*dos*) by means of a unilateral promise expressed in prescribed words by the donor (the wife, her *pater* or one of her debtors) and delivered in the presence of the husband. This method was abolished by an imperial constitution of 428 AD, which allowed the creation of a dowry by informal agreement. The *iusiurandum liberti* was a solemn promise by which a manumitted slave assumed the duty to render certain services to his patron. Since a slave could not bind himself by a civil law contract, and could refuse to do so after his manumission, his undertaking was usually secured before he was freed by an oath and this created a religious duty for him. After his manumission the *iusiurandum liberti* was employed to produce a civil, contractual obligation. This type of contract still existed in the time of Justinian's reign.

corresponded. As this suggests, *stipulatio* could only be concluded where the parties were in each other's presence (*inter praesentes*),[149] and where the promisor responded positively to the whole question and without qualifying his promise by making it subject to a condition or time clause.[150]

Stipulatio was the most important contract in Roman law because it was not confined to particular transactions but could be used to render any kind of lawful performance binding.[151] For instance, this form of contract could be employed for the transfer of ownership over a sum of money or some other object (e.g. next year's crop); the carrying out of certain work (e.g. the construction of a building); the constitution of a dowry; the assumption of a guaranty for another person's debt; the establishment of certain rights on another's property; the transformation of an existing obligation into a new one (*novatio*); and various kinds of promises in the course of judicial proceedings.[152] As a unilateral contract, *stipulatio* gave rise to only one obligation and one corresponding right: the creditor (*stipulator*) had a personal right against the debtor (*promissor*) while the latter's duty was to perform in favour of the creditor exactly what had been stipulated.[153] The creditor could enforce his personal right with the *actio ex stipulatu*, if performance was undetermined or uncertain (*incertum*); and with the *condictio*, if performance was specific or certain (*certum*).[154]

It should be noted that, initially, a promise made through *stipulatio* engendered an enforceable obligation if the relevant formalities (i.e. the oral exchange

[149] This was probably the most serious drawback of *stipulatio*, because practical considerations sometimes required contractual agreements that could be concluded where the parties were not in each other's presence (*inter absentes*).

[150] D 45. 1. 1. 3. If the promisor's answer contained superfluous words, these words were ignored if the creditor's question was in substance answered. Consider D 45. 1. 65 pr. Further, a promise for a quantity different from that mentioned in the question originally rendered the *stipulatio* invalid. However, in later law such *stipulatio* was deemed valid in respect of the lesser amount regardless of the lack of correspondence between the expressed quantities. See G 3. 102 and *Inst* 3. 19. 5. But compare with D 45. 1. 1. 5.

[151] A promise to perform something that was legally or physically impossible was invalid. In this context impossibility means absolute, not simply relative, impossibility. Moreover, stipulations intended to take effect only after the death of either party were also deemed invalid.

[152] Judicial stipulations might be imposed by the judge and/or the jurisdictional magistrate on one of the parties in litigation. Another important application of the *stipulatio* was as a penalty clause. This occurred in two forms: first, the debtor could promise to pay a penalty if he should fail to discharge an existing obligation; secondly, even though no obligation existed, the debtor could promise to pay a penalty where the creditor wished to compel him to do or refrain from doing something (e.g. "if you sell your flock of sheep without first notifying me, do you promise to pay me ten gold pieces?"). Consider *Inst* 3. 15. 7.

[153] If the parties entered into a transaction from which they desired reciprocal obligations to arise, they could employ more than one stipulation to cover each performance separately. An illustration is where the parties wished to purchase and sell something, the seller would stipulate the price the buyer had to pay and the buyer would stipulate the seller had to deliver the thing purchased.

[154] *Inst* 3. 15 pr; G 4. 136.

of question and answer) had been performed, irrespective of whether or not there was a valid ground or cause (*causa*) for the obligation. As *stipulatio* gave rise to a *iudicium stricti iuris*, the creditor had only to prove the fact that the requisite formalities had taken place. This means that an obligation created by *stipulatio* would be deemed binding even if, for example, the debtor had been forced to consent by violence or fraud. In the course of time, however, the praetor granted the debtor remedies (*exceptio doli*, *metus causa*, *pacti conventi*) that could nullify the effect of *stipulatio* if the obligation the debtor had assumed was not grounded on a just cause. It should be noted, further, that when performance became impossible after the conclusion of the contract, the debtor was in principle discharged from liability. In time, however, a clause was implied by which the debtor undertook that performance would not become impossible owing to his own actions. As previously noted, it was recognized that a positive act or default (*mora*) on the part of the debtor perpetuated the obligation (*factum debitoris perpetuat obligationem*, *mora debitoris perpetuat obligationem*). As this suggests, in the case of supervening impossibility of performance the debtor could not be held liable except where *factum* or *mora debitoris* applied. In the latter case, the creditor could bring an action against the debtor for the monetary value of the impossible performance.

During the republican era, the practice of reducing the *stipulatio* to writing for the purposes of evidence was introduced[155] and such practice was very common under the Empire. Furthermore, witnesses could also be used for evidentiary purposes yet neither the presence of witnesses nor the recording in writing was deemed necessary for the validity of the *stipulatio*. Although the written document was initially regarded as only a piece of evidence, in the course of time more emphasis was placed on the written than the oral form of the contract thereby rendering obsolete the use of the same verb in the question and answer sequence.[156] During the later imperial period, a written promise to pay a sum of money or admission of indebtedness was the most frequently used form of *stipulatio* and the law of Justinian fully recognized this type of contract. However, the relevant obligation was held to arise from the words since *stipulatio* always remained a *contractus verbis* requiring the presence of both parties at the time of its conclusion.[157]

[155] This development was probably the result of foreign, especially Hellenistic, influences.

[156] A verbal contract recorded in writing was known as *cautio*. In AD 472 Emperor Leo I enacted a *constitutio* providing that any expression of intention should be sufficient to create a valid *stipulatio*, but it is plausible that this enactment related to written rather than oral stipulations. Consider C 8. 37. 10.

[157] A rescript of Emperors Severus and Caracalla of AD 200 provided that when a document recorded a promise but not a preceding question a *stipulatio* should be presumed. See *Inst* 3. 19. 17; C 8. 37. 1. A stipulation that had properly been reduced to writing (*cautio*) and declaring the parties to be present always created a strong presumption that the requisite oral act had taken place. However, this presumption could be rebutted by strong evidence that the parties did not meet. It should be noted that if the requirement for the physical presence of the parties was not met, a written stipulation might still be deemed valid as a literal contract (*contractus litteris*).

4.5.1.1 Accessory Stipulations

In addition to the main form of *stipulatio* discussed above, Roman law acknowledged accessory *stipulationes* as illustrated by the *adstipulatio* and *adpromissio*.

The *adstipulatio* involved two or more creditors (*stipulatores*), one acting as a mandatary or agent of the others and one *promissor*. In this case the main *stipulatio* (between the principal *stipulator* and the *promissor*) was reinforced by an additional *stipulatio* in which the debtor promised the same thing to another person (*adstipulator*). In relation to the debtor, the *adstipulator* was virtually a principal but in relation to the original *stipulator* he was only an accessory creditor or mandatary remaining liable to the latter for anything he had received or forgone. The *adstipulator* was entitled to sue on his contract in the case of non-payment, but the first creditor or his heirs could initiate the *actio mandati* to recover what he received from the debtor.[158]

In contrast to *adstipulatio*, the *adpromissio* involved a plurality of debtors/promisors (instead of creditors) where one or more of whom was the mandatary of the principal debtor. In this context, the original *stipulatio* (between the *stipulator* and the principal *promissor*) was reinforced by a separate *stipulatio* whereby a second *promissor* (now referred to as *adpromissor*) promised the same thing the principal *promissor* had already promised. The main *stipulatio* might be followed by *stipulationes* from several fresh promisors. The *adpromissores* were as liable as the principal debtor, each for the whole debt (*in solidum*), while the discharge of the debt by the principal or any one *adpromissor* released the whole group, principal and *adpromissores*. The *adpromissio* was thus a method of creating suretyship by stipulation. In the classical period there were three forms of *adpromissio*: *sponsio*, *fidepromissio* and *fideiussio*.[159] In the course of time the two oldest forms, *sponsio* and *fidepromissio*, disappeared and by the time of Justinian's reign the only means of creating suretyship by stipulation was *fideiussio*.[160]

[158] G 3. 110–117. The *adstipulatio* was relied upon as a means of evading the rules of the *legis actio* system of procedure that made it impossible to institute an action by a representative. Moreover, it was used when a person wanted to ensure that a stipulation for an obligation would be fulfilled for the benefit of his heirs after his death, since a direct stipulation *post mortem* was void. However, the recognition of procedural representation in classical law and the abolition of the nullity of *post mortem* stipulations by Justinian led to the eventual disappearance of *adstipulatio*.

[159] Depending on the form of *adpromissio* employed, the person who occupied the position of a surety was referred to as *sponsor*, *fidepromissor* and *fideiussor*, while the term *adpromissor* was applied indifferently to all three.

[160] On the institution of suretyship see the relevant section below.

4.6 Literal Contracts

Literal contracts (*contractus litteris*) were contracts constituted by agreement and a certain form of writing. Brief references to this type of contract are found in both the Institutes of Gaius and Justinian's Institutes, but the literal contract of Gaius was very different from that of Justinian.[161] Indeed, the old *contractus litteris* had fallen into disuse long before Justinian's time[162] and was to a large extent replaced by the practice of giving an acknowledgment of an obligation in a written instrument.[163]

The old form of *contractus litteris* referenced by Gaius was a *negotium stricti iuris* and involved an obligation to pay money enforceable by means of the *actio* or *condictio certae pecuniae*. Much of the detail is uncertain, but it is clear that this contract was created by an entry (*nomen transcripticium*) in a creditor's ledger or account book (*codex accepti et expensi*) of a fictitious payment to a debtor. There were two entries (*transcriptiones*) of this nature: *a re in personam* and *a persona in personam*. The first occurred when an existing debt between the parties was entered and thereby transformed into a new debt based on a *contractus litteris*. Where the previous claim was based on a *negotium bonae fidei*, this gave the creditor the advantage of a claim based on a *stricti iuris* contract and pursuable by means of the *actio* or *condictio certae pecuniae*. The second came to the fore when a debt still due was entered as discharged and an equivalent sum was entered as being owed by another person who thus became liable for the debt of the former debtor. This might incidentally also have the effect of transforming an earlier obligation into an obligation *litteris*, but its primary purpose was to substitute one debtor for another.[164] As the above description suggests, the *contractus litteris* was in essence a form of novation (*novatio*) whereby one obligation was terminated and superseded by another.[165] As compared with *stipulatio*, this form of contract was very limited in scope (it was available only for money-debts)[166] but had an important advantage: it could also be concluded *inter absentes*.[167]

The form of literal contract based on the *nomina transcripticia* was the only written contract known to Roman law. It presupposed a special system of book-keeping, and

[161] G 3. 128–134; *Inst* 3. 13. 2.

[162] The brevity of Gaius' account of *contractus litteris* appears to suggest that this type of contract was already obsolete even in his day.

[163] *Inst* 3. 21.

[164] Gaius distinguishes the *nomina transcripticia* involving cross-entries from *nomina arcaria* or cash entries, which were entries of actual loans that despite evidence of a *mutuum* did not in themselves amount to a contract. G 3. 131.

[165] If an acknowledgment of debt had been obtained by fraudulent means, the alleged debtor could raise the defence that although he had signed the acknowledgement, the money was never paid to him (*exceptio non numeratae pecuniae*).

[166] Moreover, only Roman citizens could be creditors and there was controversy among the jurists as to whether foreigners (*peregrini*) could be debtors. G. 3. 133.

[167] G 3. 138.

when this system fell into disuse the literal contract disappeared. However, Gaius recounts that in Eastern provinces of the Empire (where Hellenistic legal practices prevailed) other forms of written contract were in use, namely the *syngraphe* (a witnessed document in duplicate signed and sealed by both parties and deposited with an official) and the *chirographum* (a promissory note written and signed by the debtor and delivered to the creditor).[168] In Roman law such documents were considered only as evidence of a previous *stipulatio* or some other transaction, while the nature of such a transaction was not altered by it being reduced to writing.

Even though the old *contractus litteris* had ceased to exist long before the time of Justinian, the compilers of his Institutes invoke reference to what they claim to be a new literal contract. The reference elaborates the practice of giving an acknowledgment of a debt in a written document. Such document might record a debt created by means of *stipulatio* or *mutuum*, although it appears that only the latter was addressed in the Institutes. In principle, this practice was evidence of *mutuum* unless the document could be construed as a promise to repay a loan and thereby considered as evidence of a *stipulatio*. A plausible scenario is that no money had in fact changed hands. If the alleged creditor sued for the money, the alleged debtor could raise the *exceptio non numeratae pecuniae* (i.e. the defence that the money was never paid to him) that reversed the ordinary burden of proof and required the creditor/plaintiff to prove the debt independently of the document. This procedural rule was very beneficial to the alleged debtor and so, to prevent abuse of the defence, a time limit was introduced that was set at 2 years in Justinian's time. After this period had expired, the *exceptio* was no longer available to the alleged debtor who was therefore obliged to pay.[169] But Justinian's jurists found it difficult to assert that the debtor's obligation arose from a *mutuum* as there may not in fact have been any such contract at all. Therefore the jurists used the presumption that the obligation arose from the document. However, the general view among commentators is that in such a case the debtor was not, strictly speaking, bound by the document itself and that this was not therefore a *contractus litteris*; the document actually constituted evidence, which the debtor was no longer allowed to call into question, of a *mutuum*. In other words, if after 2 years the law derived from the mere existence of the document an irrefutable presumption that its contents were true, it seems correct to postulate that the debtor was bound by the writing. This interpretation, however, does not mean that his obligation arose from a literal contract.

4.7 Consensual Contracts

Consensual contracts (*contractus consensu*) were contracts constituted by the mere agreement (*consensus*) of the parties. These contracts were binding as soon as the parties agreed on the basic essentials (*essentialia*) of the contract. Unlike the other

[168] G 3. 134.

[169] Unless the alleged debtor made it perpetual by giving formal notice to the creditor or, in certain cases, by lodging it with the court. C 4. 30. 14. 4.

categories of contract, no further formalities were required such as the transfer of a thing, formal words or writing. According to both Gaius and Justinian, there were four types of consensual contract: purchase and sale (*emptio venditio*), letting and hiring (*locatio conductio*), partnership (*societas*) and mandate (*mandatum*). These forms all originated from the *ius gentium* and were, therefore, *negotia bonae fidei*.[170]

The consensual contracts were central to Roman commercial life and are of great importance to modern law since some of the most significant legal institutions of today are based on this form of contract.

4.7.1 Emptio Venditio

The contract of purchase and sale (*emptio venditio*) was a bilateral contract whereby one person promised to transfer to another a certain thing (*merx*) and the other on his part promised to pay a price (*pretium*).[171] The contract was concluded as soon as the parties reached agreement (*consensus*) to enter into such a transaction, and the reciprocal rights and duties this entailed were defined by the requirements of good faith (*bona fides*).[172] Although some uncertainty exists as to the origins of *emptio venditio*, evidence suggests that it developed from an earlier form of transaction initially involving an immediate transfer of property in exchange for a simultaneous and reciprocal transfer of other property[173] that in later times embraced an exchange for money (this was the case with *mancipatio* as a formal cash sale).[174] After the conclusion of this simple transaction, no outstanding obligation between the parties remained. In the last phase in the development of *emptio venditio* the notion prevailed that the agreement (*consensus*) of the parties to convey, as distinct from the transfer itself, was sufficient to bring the relevant obligation into existence.[175]

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[170] G 3. 135 – 7; *Inst* 3. 22; D 44. 7. 2.

[171] *Emptio venditio* invoked two obligations and was aimed at an exchange of performances. Both parties to the contract had a personal right and duty towards the other party.

[172] *Emptio venditio* was an institution of the *ius gentium* and therefore based on the notion of *bona fides*.

[173] D 18. 1. 1.

[174] The requirement that the parties should discharge their obligations simultaneously was in later times removed and it became possible to grant a purchaser postponement of payment. This marked the beginning of the granting of credit, which was probably effected by means of taking a pledge (*pignoris capio*).

[175] Thus ownership in the object sold did not pass to the buyer until it had been transferred to him by the appropriate method (i.e., in early law by *mancipatio* or *in iure cessio* in the case of a *res mancipi* or by *traditio* in all other cases). In this respect, a rigid distinction was maintained between rights *in rem*, i.e. rights arising from the transfer of ownership in the property, and rights *in personam*, i.e. rights arising from the personal obligations of the parties under the contract.

The contract of sale was concluded and became legally binding when the purchaser (*emptor*) and the seller (*venditor*) came to an agreement to buy and sell, and had reached *consensus* in respect of the object of the sale (*res* or *merx*) and the payment price (*pretium*). Because sale was a *bona fidei* contract the parties had to act in good faith when the contract was concluded. To enforce the reciprocal rights and duties arising from the contract, the parties had recourse to two personal actions: the *actio empti* was available to the buyer as a remedy to claim delivery of the object sold and compensation for damage caused by the malicious intent (*dolus*) or negligence (*culpa levis in abstracto*) of the seller; the *actio venditi*, on the other hand, was available to the seller to pursue the payment of the purchase price together with interest as from the moment of delivery of the object sold.[176]

No set formalities were legally required with regard to the agreement (*consensus*), which could be expressed in any manner such as in writing, orally, through a messenger or otherwise. As in the case of all consensual contracts, it was unnecessary for the parties to appear in each other's presence at the time the contract of sale was concluded. However, the parties were free to subject the agreement to additional requirements or certain conditions. During the classical and post-classical periods it became a common practice to embody a sale agreement in a written document, mainly for evidentiary purposes. Although this was not initially a requirement of validity, Justinian ordained that if the parties had agreed to reduce the agreement to writing, the contract of sale came into force only when the relevant document had been composed.[177] In classical law, a symbolic sum of money or an object of small value (e.g., a coin or a ring) known as *arra* (or *arrha*) was often given by the buyer at the conclusion of a sale as evidence of firm agreement.[178] The giving of *arra* was not required for the conclusion of the contract, although the parties could insist on this practice. However, in later law *arra* assumed a greater significance. Thus, Justinian stated that if the buyer had given the *arra* and subsequently refused to complete the contract he forfeited it, while the seller who repudiated the contract was bound to return twice the value of the *arra*.[179]

The object of the contract of sale (*res* or *merx*) had to be specific (*certum*), in existence or capable of existing[180] and legally capable of being the subject

[176] G 3. 137; D 19. 1. 11 pr; D 19. 4. 1 pr; *Inst* 3. 22. 3.

[177] Before that time either party could retract without liability for breach of contract.

[178] This institution of *arra* or 'earnest' had origins in Hellenistic sale practices.

[179] *Inst* 3. 23 pr; G 3. 139. Consider also C 4. 45. 2; C 4. 49. 3; C 4. 54. 1; D 14. 3. 5. 15; D 18. 1. 35 pr; D 18. 3. 6 pr; D 18. 3. 8; D 19. 1. 11. 6. It should be observed that in Justinian's time the *arra* often constituted a significant proportion of the purchase price and so its function was to make repudiation of the contemplated sale unlikely, especially where the parties had agreed to reduce the contract to writing but the relevant document had not yet been composed. Where the parties did not intend to record their contract in writing and thus this contract became binding when the object of the sale and the price were agreed upon, the function of the *arra* remained probative. Even in this case, the parties could choose to use the *arra* to stipulate the right to resile or even a penalty in the event of malperformance.

[180] For example, see D 18. 1. 57 pr.

of commercial transactions (*res in commercio*). Any clearly defined thing or even a complex of things or assets (e.g. an inheritance), a right or a servitude, could be the object of a sale as long as such thing or things could be privately owned (i.e. they were *in commercio*).[181] Sales of *genera*, things described by kind (*genus*) such as five vats of oil, were not recognized in Roman law as contracts of sale.[182] However, where a person intended to sell a fixed quantity from a certain stock (such as ten bags of corn from his barn), a contract of sale was only constituted when the relevant things had been separated from the whole and specified.[183] Not only things already in existence at the time of conclusion of the contract but also future things (*res futurae*) could be sold. In this regard a distinction was drawn between the sale of a hope or expectation (*venditio spei*)—for example, the next catch of fish—and the sale of an object hoped for or expected to come into being (*venditio rei speratae*)—for example, next year's crop. The first scenario represented an unconditional sale of a hope or expectation for a specific price. It entailed the fact that even if nothing materialized the buyer was still legally obliged to pay the purchase price. In the second case, on the other hand, the sale was conditional insofar as the future thing first had to come into existence before the relevant contract would become legally binding.[184] Finally, it should be noted there was no requirement that the thing sold had to be the property of the seller, since the latter was not obliged to transfer ownership of the thing.[185] On the other hand, where the thing was the property of the buyer, the contract of sale was void.[186]

For a contract of sale to be valid the price (*pretium*) of the object sold had to be fixed (*certum*).[187] In classical law there was dispute among jurists as to whether or not the price could be determined by a third person. However, Justinian recognized the validity of a sale with respect to which the price was left to be fixed by a third person, but the relevant contract came into effect only when the third person had actually determined the price.[188] It was required, further, that the price should consist of money (*in pecunia*) as otherwise it would be impossible to distinguish sale from exchange or barter[189] as well as buyer from seller (their duties being

[181] D 18. 1. 34. 1; *Inst* 3. 23. 5; D 18. 1. 22; D 18. 1. 73 pr; D 18. 1. 6 pr; D 18. 1. 62. 1; D 18. 1. 70; D 11. 7. 8.

[182] Such things could be 'bought and sold' by way of two *stipulationes*.

[183] D 18. 1. 35. 7; D 18. 6. 5.

[184] D 18. 1. 8 pr – 1. Consider also D 18. 4. 11; D 19. 1. 12.

[185] D 18. 1. 28.

[186] D 18. 1. 16 pr. And see D 12. 6. 37; D 50. 17. 45 pr; C 4. 38. 4.

[187] No valid contract of sale was concluded if the price was expressed as 'at a reasonable price', or if it was to be fixed by one of the parties. However, there was a sale if the price was ascertainable by reference, for example, to the price of another property or the rate fixed in the market on a particular day. See D 18. 1. 7. 1.

[188] *Inst* 3. 23. 1; G 3. 140. And see D 18. 1. 7 pr – 1; D 18. 1. 35. 1; C 4. 38. 15 pr – 3.

[189] In contrast with *contractus*, an exchange of one object for another or barter (*permutatio rerum*) was a simple, informal agreement (*nudum pactum*) that was not legally enforceable—it became actionable only in post-classical law. However, it could create an exception to or modification of an existing obligation.

different).[190] Moreover, the price had to be genuine (*verum* or *iustum*), i.e. it had to be an actual price that was more or less in proportion with the value of the object being sold. If it was clearly inadequate (for instance, where a property of considerable value was expressed to be sold for one *denarius*) or if there was no intention for the fixed price to be paid, the transaction was not a sale but a donation or gift.[191] In classical law the principle of free bargaining prevailed and so the amount of the price was left to the unfettered discretion of the parties concerned—the law did not intervene to dictate how they should draw up their sale agreement.[192] However, post-classical law developed the so-called *laesio enormis* ('enormous loss') rule: if land had been sold at less than half its actual value at the time of the sale, the seller could cancel the contract, return the price paid and claim back the land, unless the buyer made up the price to the full value.[193]

4.7.1.1 Duties of the Buyer

The first and most important duty of the buyer was to pay the agreed price to the seller.[194] In principle this payment had to be tendered at the time of delivery of the thing sold, although the parties could agree otherwise.[195] Moreover, the buyer had to reimburse the seller for expenses incurred by the latter in looking after the thing during the period between the conclusion of the contract and delivery.[196] Finally, the buyer was liable to pay interest if he had fallen into default (*in mora*) by failing to render payment on the date specified in the agreement.[197]

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[190] *Inst* 3. 23. 2. And see G 3. 141; D 18. 1. 1 pr – 2; D 19. 4. 1.

[191] D 18. 1. 36.

[192] D 19. 2. 22. 3; D 4. 4. 16. 4. Even where the purchase price was inadequate or excessive, the contract of sale was valid and binding unless there was a question of fraud (*dolus malus*), in which case the aggrieved party could institute an action (*actio doli*) against the defrauder.

[193] C 4. 44. 2; C 4. 44. 8. It appears that the *laesio enormis* rule applied only to land. It should be noted, further, that Roman law did not provide a corresponding remedy for the purchaser who had paid more than twice the fair price. However, medieval jurists broadened the scope of the rule in both directions and applied it by analogy to other *bonae fidei* contracts, such as letting and hiring.

[194] D 19. 1. 11. 2; D 19. 4. 1 pr.

[195] If the seller did not want to deliver the object to the buyer, the latter was released from the obligation to pay the agreed price.

[196] D 19. 1. 13. 22.

[197] D 19. 1. 13. 20; D 19. 1. 38. 1.

4.7.1.2 Duties of the Seller

The principal obligation resting on the seller was to give free and undisturbed possession (*vacua possessio*) of the thing sold to the buyer.[198] The seller had to deliver the thing in accordance with the contract description, together with any accrual yielded by it in the period between the conclusion of the contract and delivery.[199] However, the seller was not bound to make the buyer owner of the thing sold. If he succeeded in delivering possession of the thing to the buyer, it was immaterial whether or not such thing belonged to a third person. As long as the possession of the buyer remained undisturbed, the buyer could not bring any action against the seller on the grounds that the latter had not been the owner of the thing.

It was not necessary that the thing sold was delivered immediately after the conclusion of the contract, but a considerable period of time might elapse between contracting and delivery. During this period the seller was required to take care of the thing and to maintain it in good condition. If the thing should be destroyed or damaged as a result of malicious intent (*dolus*) or negligence (*culpa levis in abstracto*) on the part of the seller, the latter was liable for damages. However, if while in the care of the seller the thing was destroyed or damaged by an act of God (*vis maior*) or accident (*casus fortuitus*), such as an earthquake or fire, the risk was borne by the buyer in accordance with the rule *periculum est emptoris*. This meant that if such destruction or damage occurred, the seller was simply required to deliver the remnants whilst the duty of the buyer to pay the price remained unaffected.[200] The rule applied from the moment the contract of sale became *perfecta*, i.e. when the parties had agreed to buy and sell a particular thing at a fixed price and no suspensive condition appeared in the contract.[201] Although the rule *periculum est emptoris* placed a heavy burden on the buyer, he was to some extent compensated by the fact he was entitled to all accretions to the thing before

[198] D 19. 1. 3.

[199] If the seller delivered less than that agreed in the contract, the buyer had recourse to the *actio empti* for monetary compensation.

[200] It should be noted that if the thing sold was stolen, destroyed or damaged by a third person, the seller was bound to cede to the buyer all rights of action (e.g., *actio furti*, *actio legis Aquiliae*) he had in respect of the thing.

[201] Where a suspensive condition had been included in the contract, such contract became *perfecta* only after the condition was fulfilled. D 18. 6. 8; D 18. 6. 15 pr-1. It should be noted that, originally, according to the principle *res perit domino* (the object is destroyed at the cost of the owner) the seller was liable for destruction of or damage to the thing, given that ownership of such thing had not yet been transferred to the buyer before delivery. Hence it was surmised that the risk was borne by the seller (*periculum est venditoris*). The reason for this probably relates to the fact the seller was initially liable for *custodia*, and therefore he also had to bear the loss or damage caused by *casus fortuitus*. On the other hand, if the loss or damage was the result of *vis maior* it fell outside the *custodia* obligation of the seller and thus such loss or damage was borne by the buyer. In Justinian's system the seller was liable only for *dolus* and *culpa levis in abstracto*, but not if the thing perished or suffered deterioration by accident (*casus fortuitus*).

delivery.[202] It should be noted, further, that this general rule did not apply where the parties had made an agreement to the contrary or where the seller fell into default (*mora*) in completing delivery or was otherwise to blame. In such cases, the risk of destruction of or damage to the thing before delivery remained with the seller.[203]

If the seller was himself owner of the thing sold, the contract of sale was regarded as a *iusta causa traditionis* and in classical law the ownership of the thing passed to the buyer on delivery. Under the law of Justinian, however, delivery of the thing did not transfer ownership upon the buyer unless the full price had been paid or security had been provided for payment thereof.[204] On the other hand, where the seller was not the owner of the thing the principle applied that no one could transfer more rights to another which he himself had not possessed (*nemo plus iuris ad alium transferre potest quam ipse haberet*). This meant the buyer did not acquire ownership, although the possibility of acquisition of ownership by *usucapio* remained open. Where the thing sold belonged to a third party, that party could institute the *rei vindicatio* against the buyer to assert his ownership and evict the buyer from the thing. In such a case, the buyer could institute the *actio empti* for damages but only in the case where the seller had fraudulently sold the thing of a third person. In other cases the buyer had to bear the loss. However, in the course of time a further duty on the seller developed, namely to guarantee against eviction.

Eviction (*evictio*) occurred when a third party deprived the buyer of his possession of the thing sold after delivery to him by instituting an *actio in rem*, such as *rei vindicatio* or *actio Publiciana*. Moreover, eviction (usually related to only a portion of the thing) could transpire when a third party laid claim to another form of real right, such as an usufruct (*vindicatio ususfructus*) or a servitude (*vindicatio servitutis*), in respect of the thing.[205] Originally, when ownership over the thing sold was transferred by *mancipatio* the buyer who was evicted could demand that the seller assist him in defending his title. If the seller declined or if his defence was unsuccessful, the buyer could institute the *actio auctoritatis* for double the price against the seller.[206] This remedy had limited application, however, since it did not apply in cases where *res nec mancipi* were sold or where foreigners (*peregrini*) were involved. In these cases there was no guarantee against eviction and the buyer simply had to bear the loss. In the course of time it became the practice in such cases to conclude *stipulationes* whereby the seller promised to reimburse the buyer in the event the latter was evicted. A distinction was drawn between the *stipulatio duplae* where the seller promised to pay the buyer twice the amount of the purchase price,

[202] *Inst* 3. 23. 3. And see D 18. 6. 7 pr; D 19. 1. 13. 13; C 4. 49. 2. 2; C 4. 49. 13 & 16.

[203] *Inst* 3. 23. 3a. Where the parties agreed that loss or damage caused by accident (*casus fortuitus*) was to be borne by the seller, the rule *periculum est emptoris* applied only when loss or damage was the result of an act of God (*vis maior*).

[204] D 18. 1. 19; *Inst* 2. 1. 41.

[205] These remedies have been discussed in the chapter on the law of property above.

[206] By the time of Justinian this remedy was no longer in use.

and the *stipulatio habere licere* where the seller guaranteed the buyer peaceful use of the thing sold and undertook to compensate him for any damages he incurred as a result of eviction.[207] Nevertheless, in the absence of *stipulatio* the buyer bore the prejudice arising from eviction, unless (as previously noted) he could prove that the seller had acted fraudulently i.e. he had deliberately sold and delivered someone else's thing or his own thing encumbered with a real right (e.g. a servitude), in which case he had the *actio empti* at his disposal. However, as the law evolved it became viable for a prospective buyer to institute the *actio empti* against the seller to compel him to enter into a *stipulatio duplae*. If the seller refused, he was condemned to pay double the price to the buyer (as if he had in fact entered into such *stipulatio*) on the grounds that his failure to secure the buyer against eviction was contrary to *bona fides*.[208] During the classical period it became possible for the buyer to hold the seller liable for damages by means of the *actio empti* in all cases of eviction without the use of *stipulatio*. Such a *stipulatio* was no longer deemed necessary since it was regarded that in every sale there was an implicit guarantee against eviction.[209] The buyer's action in such cases was directed at compensation for the loss he suffered as a result of the eviction, and this included the profit and advantages the buyer had to forgo because he could not possess the object (*lucrum cessans*) as well as consequential damage, i.e. damage he suffered through no longer possessing the object (*damnum emergens*).[210]

Besides an implicit guarantee against eviction, Roman law also recognized the existence of an implicit guarantee against latent defects, i.e. defects that rendered the thing sold unfit for its ordinary or contemplated purpose. Regarding this protection measure, the law also went through a long process of evolution. In early law, the buyer was not protected against the presence of latent defects unless the seller had fraudulently (*dolo malo*) omitted to disclose a defect known to him but of which the buyer was unaware. In such a case the seller could be held liable with the *actio empti* for damages. The same action could be employed by the buyer if the seller had made fraudulent allegations or promises (*dicta et promissa*) concerning the presence or absence of certain qualities in the object sold.[211] However, no general legal duty was placed on the seller to warranty the absence of latent defects. Therefore, in the course of time it was recognized that the parties

[207] The two *stipulationes* probably merged as time passed. See D 45. 1. 38 pr; D 21. 2. 35; D 21. 2. 57 pr; D 21. 2. 37. 1.

[208] D 19. 1. 11. 8; D 19. 4. 1 pr; D 21. 2. 37. 2.

[209] Liability for eviction could be excluded by a special agreement (*pactum de non praestanda evictione*).

[210] D 21. 2. 8; D 21. 2. 60; D 21. 2. 70. Consider also D 21. 2. 1.

[211] D 19. 1. 4 pr; D 19. 1. 6. 4. And see D 18. 1. 43. 2; D 18. 1. 45; D 18. 1. 78. 3; D 18. 6. 16; D 19. 1. 13 pr; D 19. 1. 13. 2; D 19. 1. 21. 2. If a plot of land had been sold by *mancipatio* and the seller had misled the buyer as to its extent, the latter could institute the *actio de modo agri* for double the difference in value. By the time of Justinian this remedy had disappeared together with the institution of *mancipatio*.

could, as in the case of eviction, enter into *stipulationes* whereby the seller guaranteed that the object being sold was free of certain defects or endowed with certain features. If it later transpired that the thing suffered from the said defects or lacked the promised features, the buyer could institute the *actio ex stipulatu* against the seller for damages. In the late republican era the *aediles curules*, officers charged with duties such as policing the city and supervising over markets and market transactions, introduced special provisions in their edict requiring sellers of slaves as well as beasts of draught and burden (*iumenta*) to publicly disclose certain temporary or permanent physical and mental defects (*morbi et vitia*). In respect of slaves, the seller was further required to declare whether the slave was a vagrant (*erro*) or a runaway (*fugitivus*) or burdened with noxal liability (i.e. whether he had committed a delict for which his master could possibly be liable).[212] If the seller failed to declare any of these defects at the conclusion of the contract of sale and such undisclosed defects did thereafter appear, the buyer had a choice of two aedilician actions: the *actio redhibitoria* and the *actio quanti minoris*. By means of the former action, which had to be initiated within 6 months of the sale, the buyer could demand rescission of the sale, return of the purchase price by the seller and the restoration of the thing by the buyer. The latter action, which had to be brought within 12 months of the sale, pursued affirmation of the sale and restitution of the difference between the price paid and the actual value of the defective slave or animal. The aedilitian actions could also be employed by the buyer if the object sold was different from what the seller had stated and promised (*quod dictum promissumve fuit*).[213] With respect to both actions the seller's liability was strict: it arose from the mere presence of the latent defects, while the knowledge or ignorance of the seller was irrelevant.[214] If the seller knew of the defect in the thing sold and did not disclose this information to the buyer, or if he made fraudulent declarations about the thing with a view to inducing the buyer to purchase it, he could be held liable by the buyer with the *actio empti* for damages. Over time the aedilitian remedies were extended to sales of slaves and draught

[212] D 21. 1. 1. 1; D 21. 1. 10 pr-4; D 21. 1. 12 pr. The buyer of a slave could demand that the seller should promise, by means of *stipulatio*, to pay the buyer a sum of money as compensation for the damage the latter would suffer if the slave had any of the defects specified, if such defects had not been brought to the attention of the buyer. If the seller refused to enter into the *stipulatio*, two actions were available to the buyer: the *actio redhibitoria*, whereby he could demand repayment of the price as against a return of the slave to the seller; and the *actio quanti emptoris intersit*, by which he claimed a reduction of the price. See D 21. 1. 60; D 21. 1. 28. And see D 21. 1. 38 pr, where these provisions are repeated in respect of livestock.

[213] Although the distinction between *dictum* and *promissum* is not very clear, it appears that the former term denoted an informal and the latter a formal declaration. Such declarations should be distinguished, however, from common statements of recommendation or of advertising value, with respect to which the seller could not be held liable. On the distinction between *dictum* and *promissum* see D 21. 1. 19. 2.

[214] It is important to note that the buyer could employ these remedies only in cases of latent defects. If the buyer knew of the defect at the time of the sale, or if the defect was such that everybody would have noticed it, no aedilitian remedy was available.

animals outside the market, and eventually by the time of Justinian's reign they encompassed sales of every kind including land. A further development facilitated buyers to use the *actio empti* for the same purposes as those for which the aedilitian remedies had been used.[215] As a result of this broadened scope of the *actio empti*, the aedilitian actions in fact became redundant but were retained as separate remedies in the legislation of Justinian.

4.7.1.3 Conditional Sales

The parties to a contract of sale were free to modify their respective obligations by including supplementary agreements (*pacta adiecta*) in the form of conditional clauses into the contract. For instance, they could agree that the seller had the right to cancel the contract of sale if, within a fixed period of time, he was able to find another buyer willing to pay a higher price for the object sold.[216] Such a supplementary agreement, referred to as *in diem addictio*, was usually construed as introducing a resolutive condition, although it could also be expressed in the form of a suspensive condition.[217] Another type of additional clause was the *lex commissoria*, by means of which the seller reserved the right to rescind the contract if the buyer failed to pay the purchase price within a prescribed time.[218] Reference may also be made to the so-called *pactum displicentiae*, which gave the buyer the right to return the thing to the seller and retrieve his money if, within a certain time, the thing did not satisfy him.[219] Finally, the *pactum de retrovendendo* operated to grant the seller the right to buy back the object sold at an agreed price, within a specified time or at the occurrence of a particular event.[220]

These supplementary agreements could be enforced by means of the *actiones empti* and *venditi*, *actiones in factum* and, in some cases, the *rei vindicatio*.

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[215] D 19. 1. 11. 3, 5 & 8; D 19. 1. 13 pr-3. It should be noted that the relevant guarantee could be excluded by agreement, although the seller might still be liable for bad faith.

[216] In such a case, the seller was required to offer the first buyer the opportunity to increase his bid and keep the thing.

[217] D 18. 2. 1. Consider also D 6. 1. 41 pr; D 18. 2. 2 pr; D 18. 2. 4. 3; D 18. 2. 4. 6; D 18. 2. 8; D 20. 6. 3; D 41. 4. 2. 4.

[218] D 18. 3. 2. And see D 18. 3. 1; D 18. 3. 4 pr and 3; D 18. 3. 8; D 41. 4. 2. 3; C 4. 54. 1–4. The *lex commissoria* was usually formulated as a resolutive condition.

[219] D 18. 1. 3. Consider also D 18. 5. 6; *Inst* 3. 23. 4; D 18. 1. 34. 5; D 18. 6. 4. 1; D 19. 5. 20. 1; D 21. 1. 31. 22–23; D 41. 4. 2. 5; D 43. 24. 11. 13; C 4. 58. 4. The *pactum displicentiae* could operate as a resolutive or a suspensive condition.

[220] D 19. 5. 12. And see D 18. 1. 75; D 19. 1. 21. 5. The *pactum de retrovendendo* was construed as a resolutive condition.

4.7.2 *Locatio Conductio*

The second consensual contract was the contract of letting and hiring (*locatio conductio*), or lease. This contract was concluded when one person (the lessor or *locator*) had consented to give another (the lessee or *conductor*) the use and enjoyment of his thing, services or labour and the latter on his part had consented to pay remuneration. As in the case of the contract of sale, *locatio conductio* developed from the *ius gentium*[221] and was therefore based on *bona fides*.

A contract of lease became valid and binding as soon as the parties had reached agreement on three essential elements (*essentialia*): to let and to hire, the subject matter and the price. It shared features with the case of sale in that no form was legally required and the requisite agreement could be reached in any manner (e.g. by letter or through a messenger). With respect to the subject matter of the contract and in accordance with modern legal systematics, a distinction is made between three types of *locatio conductio*: the letting and hiring of a thing (*locatio conductio rei*); the letting and hiring of services (*locatio conductio operarum*); and the letting and hiring of a piece of work to be done (*locatio conductio operis*). The remuneration or rent had to consist of money[222] that was genuine and certain or ascertainable (*merces certa* or *pretium certum*).[223]

It is clear that letting and hiring was a synallagmatic or bilateral contract giving rise to reciprocal personal rights and duties for both parties to the contract. The lessor could enforce his rights by means of a personal action known as *actio locati*, while the lessee had recourse to the *actio conducti*.

4.7.2.1 Locatio Conductio Rei

As previously noted, *locatio conductio rei* was a contractual agreement whereby the lessor agreed to allow the lessee the use and enjoyment of a particular object. Virtually any object *in commercio*, whether movable (e.g. a ship) or immovable

[221] D 19. 2. 1; D 19. 2. 2 pr.

[222] Where the remuneration was not expressed in monetary terms, the transaction was considered to be an informal agreement or 'empty pact' (*nudum pactum*) that became actionable only in the time of Justinian. There was, however, one exception to the rule that remuneration must consist of money: in the case of certain agricultural tenancies the rent consisted of a fixed quantity or proportion of the produce of the let land (a hiring of this kind was known as *colonia partiaria*). See D 19. 2. 25. 6; C 4. 65. 21.

[223] The amount of money that had to be paid as rent could be determined by a third party (*Inst* 3. 24. 1; G 3. 143), but had to be reasonable. A nominal rental could be construed as a form of donation. See D 19. 2. 46; D 41. 2. 10. 2.

(e.g. a plot of land or a house), could be let.[224] At the parties' discretion a lease could be concluded for a fixed period of time or in perpetuity.[225]

The principal duty of the lessor (*locator*) required him to give undisturbed use and enjoyment of the thing let to the lessee for the agreed period of time. The physical control transferred to the lessee was, however, unprotected *detentio*, i.e. a state of factual control that did not qualify as possession under the law and thus did not have any real operation against third parties.[226] This entailed the protected *possessio* remaining with the lessor, who had a duty to protect the use and enjoyment of the lessee. Consequently, the lessor had to guarantee the lessee's detention of the thing.[227] Furthermore, the lessor was required to maintain the thing in good condition suitable for the purpose of which it was leased.[228] If he deliberately failed to do so, he was liable towards the lessee for damages.

With respect to the obligations of the lessor arising from the contract of *locatio conductio rei*, the applicable standards of liability under the law of Justinian were *dolus* and *culpa levis in abstracto*. This meant that where the lessee suffered damages or was prevented from use and enjoyment of the thing let owing to fraud or negligence on the lessor's part, the lessee could institute the *actio conducti* and hold the lessor liable. Thus, if the lessor knew or ought to have known of latent defects in the thing, he was liable to accept a reduction of rent and to compensate the lessee for damages caused by such defects. On the other hand, if the lessor was unaware of the defects then the lessee could only claim a reduction of the rent. But where the thing proved to be in such a state that rendered it unfit for the ordinary use for which it was intended, the lessor was absolutely liable for return of rent and damages irrespective of whether he knew of the defects or not as in such a case he did not supply what the lessee was entitled to obtain pursuant to the contract.[229] Furthermore, the lessor bore the risk if the lessee was prevented from using and enjoying the object leased due to an act of God (*vis maior*). In such case the lessee

[224] In principle, only non-consumable things (*res non consumptibiles*) could be let—a consumable thing might be let only for display (*ad pompam et ostentationem*). One could not hire one's own thing (D 50. 17. 45 pr), but there was no requirement that the object let had to be the property of the lessor. See D 19. 2. 9 pr & 6. As regards the scope of the contract, the parties could agree that the object let could be used with or without the enjoyment of fruits. Where a slave was leased out for work, the contract was referred to as *locatio servi*. Sub-letting, mainly of houses, was allowed and occurred frequently. See C 4. 65. 6.

[225] The duration of the lease had to be indicated clearly in the contract. On this issue, it should be noted that the letting and hiring of rural property was usually for a term of 5 years. See D 19. 2. 24. 2–4.

[226] In Roman law, this situation was referred to as *possessio naturalis*.

[227] If the lessee was evicted from the thing let as a result of an *actio in rem* brought against him by a third party, the lessor was always liable (even without *dolus* or *culpa* on his side) in terms of a claim for damages instituted by the lessee. See G 4. 153; D 19. 2. 15. 1; D 19. 2. 39.

[228] D 19. 2. 15. 1. And see D 19. 2. 19. 1; D 19. 2. 25. 2.

[229] D 19. 2. 19. 1.

was released from his obligation to pay rent and the lessor was obliged to restore the amount of the rental he had already received.[230]

After the period of the lease had elapsed, the lessor had the duty to accept the thing back and to compensate the lessee for any expenses incurred in preserving the thing from loss or damage, and expenses that increased the value of the property.[231]

With regard to the duties of the lessee or hirer (*conductor*), the most important required him to pay the agreed rent to the lessor[232]; take proper care of the thing as long as it remained in his control[233]; and return the thing to the lessor at the expiry of the lease.[234] During his tenure of the thing, the lessee was liable for *dolus* and culpa *levis in abstracto*.[235] Thus, if the thing was destroyed or damaged while in the lessee's possession as a result of his intentional or negligent conduct, the lessor could institute the *actio locati* for the loss he suffered. On the other hand, if the thing was destroyed or damaged without the lessee's fault as in the case of an unavoidable accident (*casus fortuitus*), the lessee could claim a total or partial remission of the rent (*remissio mercedis*) for the period of non-enjoyment.[236]

As a rule, a contract of *locatio conductio rei* was terminated by the lapse of the period of time for which the contract had been concluded. If no such period was agreed upon, either party could cancel the contract unilaterally.[237]

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[230] D 19. 2. 15. 2.

[231] D 19. 2. 55. 1; D 43. 10. 1. 3. For useful expenses that increased the market value of the property (*impensae utiles*) the lessee probably had a *ius tollendi*. Consider D 19. 2. 19. 4.

[232] The time of payment was usually agreed upon. If this element had not been fixed by agreement, payment was probably due after the lessor had made the thing available to the lessee. If the lessee did not pay the agreed rental, it appears that the lessor was entitled to cancel the lease. See D 19. 2. 56.

[233] D 19. 2. 25. 3–4.

[234] If the lessee failed to return the object leased at the expiry of the contract, he could be condemned to the value of the object. C 4. 65. 33. Furthermore, if the lessee abandoned the object contrary to the terms of the contract and without just cause, he remained liable for payment of the full rental. See D 19. 2. 55. 2.

[235] *Inst* 3. 24. 5. In classical law the standard of liability appears to have been *custodia* in addition to *dolus*. See C 4. 65. 28. See also D 13. 6. 5. 2; D 19. 2. 11. 1–4; D 19. 2. 15. 1.

[236] D 19. 2. 15. 2 ; D 19. 2. 33; D 19. 2. 15. 3–5; C 4. 65. 8.

[237] D 19. 2. 54. 1. A contract of *locatio conductio rei* could be expressly or tacitly renewed if the parties so wished. See on this point D 19. 2. 13. 11. The contract was not terminated by the death of one of the parties, unless this had expressly been agreed upon by the parties. See D 19. 2. 19. 8; C 4. 65. 10. It should be noted, further, that the lessor was entitled to cancel the contract unilaterally if the lessee failed to pay the rent or misused the thing let or if the lessor required the thing for his own use and enjoyment. C 4. 65. 3. On the other hand, the lessee had the unilateral right to terminate the contract if the object leased no longer served the ordinary use for which it was hired. D 19. 2. 13. 7; D 19. 2. 25. 2; D 19. 2. 27. 1.

4.7.2.2 Locatio Conductio Operarum

Locatio conductio operarum was an agreement whereby one person consented to place his services (*operae*) at the disposal of another person, and the latter on his part consented to pay remuneration. The person letting his services was therefore the lessor (*locator*) and could claim his wages by means of the *actio locati*; the person employing such services was the lessee or hirer (*conductor*), and could claim the services by means of the *actio conducti*.

The contract of letting and hiring of services was not as common as it is in present-day law, since most labour was performed by slaves. When the services of slaves were let, as it frequently occurred in practice, the relevant contract was *locatio conductio rei* as hiring a slave's *operae* was tantamount to hiring the slave, i.e. a *res*.[238]

The duties and obligations of the parties arising from the contract of *locatio conductio operarum*, as defined by *bona fides*, were largely the same as in the case of *locatio conductio rei*. The worker had to supply the services and complete the work in the agreed time, and remained liable for any damages arising from fraud (*dolus*) or negligence (*culpa levis in abstracto*)[239]; and the hirer had to accept the services rendered and pay the agreed fee.[240] If the worker was prevented from carrying out the work by some cause extrinsic to himself (for example, by the collapse of the mine due to an earthquake) and without any fault on his part, the hirer (*conductor*) bore the risk and was still required to pay the former his fee.[241] On the other hand, if the worker's failure to perform the services was due to illness, lack of ability to execute the job or some other cause falling into his sphere, then he bore the risk (even if there had been no fault on his part) and the hirer did not have to pay wages.

4.7.2.3 Locatio Conductio Operis

The contract of *locatio conductio operis* came to the fore when one person assumed the duty to perform a specific task or work (*opus*) for another person who had placed

[238] It should be noted that in respect of the contract of letting and hiring of services, the object was usually the services provided by labourers (primarily manual work) and not those provided by professionals such as physicians, teachers, architects or advocates (*oratores*). The services provided by intellectual professionals, referred to as *operae liberales*, could not in classical law be the object of *locatio conductio*, but were usually rendered gratuitously. The persons who employed such services were, however, morally obliged to make an honorary payment (*honorarium* or *salarium*) to the professionals who provided them. In later times, the *honorarium* could be enforced through a *cognitio extraordinaria* (this form of judicial procedure is described in the chapter on the law of actions below).

[239] As under the contract the worker was required to perform his services personally, obviously this duty terminated on his death.

[240] The hirer could also be held liable for *dolus* and *culpa levis in abstracto*.

[241] D 19. 2. 38 pr. And see D 19. 2. 19. 9.

such work out on contract and consented to pay in return.[242] In this context, the object of this contract was not services for a limited time but the completion of a piece of work, such as the manufacturing of an object from material supplied by the employer[243]; the building of a house; the cleaning or repairing of clothes; the training of a slave; the teaching of children; and the transport of goods or persons. The party contracting to perform the work was the lessee, hirer or contractor (*conductor*), while the party commissioning the work was the lessor (*locator*).

The *conductor* had the duty to perform the work properly in the stipulated time or, if no time was fixed, in a reasonable time.[244] During the conclusion and execution of the contract, he was liable for loss or damage caused by his *dolus* or *culpa levis in abstracto*[245] and also for damage that resulted from his lack of skill or expertise (*imperitia*).[246] This meant that if he failed to achieve the outcome agreed upon owing to his fraud or negligence, he was liable for damages by means of the *actio locati*.[247] Furthermore, he was liable on the same basis for the loss of or damage to things that had been entrusted to him by the *locator*.[248]

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[242] As in the other contracts of letting and hiring, the *merces* had to be a specific sum of money.

[243] If the lessee produced the work out of his own material (illustrated by the case of the goldsmith who crafted jewellery using his own gold) the contract exhibited the characteristics of both sale and letting and hiring. According to some jurists, this constituted a sale of the materials and hire of the labour. The view finally prevailed, however, that the whole transaction was a sale. G 3. 147; *Inst* 3. 24. 4; D 18. 1. 20; D 19. 2. 2. 1; D 19. 2. 22. 2. The above is not the only example of a contract that was difficult to classify as sale or letting and hiring. For instance, a grant of agricultural land in perpetuity in return for a yearly rent was similar to letting and hiring since the property remained in the grantor. However, this transaction also resembled sale as, in contrast to a hirer, the grantee had recourse to an action *in rem*. In the later imperial period, Emperor Zeno ordained that such a perpetual grant was neither sale nor letting and hiring, but a special form of contract. This contract was later designated *emphyteusis* (on the institution of *emphyteusis* see the relevant section in the chapter on the law of property above). G 3. 145; *Inst* 3. 24. 3. Furthermore, where gladiators were supplied on the terms that a specified sum of money must be paid for each man who survived unharmed, and a much larger sum for those who were killed or maimed, it was unclear whether the relevant contract was one of sale or letting and hiring. According to Gaius, the prevailing opinion was that those who emerged unharmed should be regarded as hired, whilst those who were killed or disabled as sold. In this case, each gladiator was construed as the subject of a conditional sale and of a conditional hiring. G 3. 146.

[244] D 19. 2. 51. 1; D 19. 2. 58. 1.

[245] In classical law the *conductor* was probably liable for *custodia*, i.e. a degree of responsibility that included loss or damage caused not only by negligence but also by a fortuitous event or accident (*casus fortuitus*). Even under the law of Justinian some *conductores* could be held liable for *custodia*, such as the owner of a warehouse who undertook to store the merchandise of another in it for a fee.

[246] *Imperitia* was considered to be a form of *culpa*. D 19. 2. 9. 5; D 19. 2. 13. 5.

[247] It should be noted, however, that if the *locator* approved the result of the work, the *conductor* was regarded as having fulfilled his obligations. D 19. 2. 51. 1; D 19. 2. 24 pr; D 19. 2. 60. 3; D 19. 2. 36–37.

[248] If in carrying out the work the *conductor* used assistants, he was also liable for loss or damage caused by their negligence. D 19. 2. 25. 7.

The principal obligation of the lessor (*locator*) was to accept the work when completed and pay the *conductor* his remuneration (*merces*, *pretium*).[249] If the work was subject to his approval, he had to approve it within a reasonable time after its completion.

Where the work specified in the contract of *locatio conductio operis* was not executed due to circumstances beyond the control of the parties, the risk was initially borne by the *conductor* who had to forfeit his remuneration. However, later law provided that the *conductor* should bear the risk of damage only if his failure to execute the work derived from a fact that fell within his particular sphere of activity. If, on the other hand, his non-performance of the work was due to a fact that fell within the sphere of the lessor or was the result of an act of God (*vis maior*), the risk fell on the lessor who was still required to pay the *conductor* the agreed fee.[250]

4.7.3 Societas

The third contract in the category of *contractus consensu* was the contract of partnership (*societas*), which was concluded when two or more persons had reached an agreement to pursue a common purpose with the use of common resources. The contract originated in the *ius gentium*[251] and was therefore based on the principle of *bona fides*, by reference to which the partners' duties against each other were defined.[252]

The contract of partnership was formed by a simple agreement (*consensus* or *affectio societatis*)[253] among the parties that like all consensual contracts could be reached in any manner (expressly or tacitly or through a messenger).[254] The

[249] The *locator* was released from his obligation to pay the *merces* if the agreed outcome was not achieved owing to a fact that fell within the liability of the *conductor*.

[250] D 19. 2. 62. Consider also D 19. 2. 33 & 59. A special case of *locatio conduction operis* was the contract for carriage of goods by sea. Because of the perils of sea voyages, a special law so-called *lex Rhodia de iactu* (based on a similar law of the island of Rhodos) was enacted to address the issue of liability for loss of merchandise at sea. According to this law, if the master of a ship in an emergency was forced to jettison some of the cargo to save the ship, the loss was to be shared among the consigners and the shipmaster in proportion to their interests in the whole consignment. D 14. 2. 1–2.

[251] See G 3. 154.

[252] The contract of partnership had its roots in the early Roman institution of *consortium ercto non cito* (partnership by undivided inheritance), i.e. the community of *sui heredes* who decided to administer the estate of the testator jointly rather than dividing amongst themselves. See G 3. 154a. During the republican era the idea of a commercial partnership designed to make profit gradually evolved.

[253] D 17. 2. 31. The term *animus contrahendae societatis* is also used in this regard. See D 17. 2. 44

[254] D 17. 2. 4 pr.

common goal pursued by the partnership could not be unlawful, immoral or in conflict with *bona fides* and had to be for the mutual advantage of the parties.[255] It was required, further, that each partner (*socius*) should make a contribution in some form or other, such as money, goods, services, rights or claims against third persons. It was not necessary, however, that the contribution of the partners to the common business be equal or similar in nature.[256]

Unless otherwise agreed, each partner was entitled to an equal share of the profits or losses. The partners were free, however, to agree on a different allocation of profits and the contract could even exempt a partner from all losses, but not from all profits.[257]

Depending on the particular goal the partners aimed at achieving, a partnership contract could assume one of several forms. The earliest form was the *societas omnium bonorum*, in which all partners' current and future property became joint property or part of a common pool.[258] The second and probably most common form of partnership was the *societas alicuius negotiationis*, in terms of which the purpose of the partners was to engage in one particular kind of business venture (e.g. the transportation of commodities).[259] Similar to this arrangement was the *societas unius rei*, concerned with the exploitation of a single joint asset (e.g. a racehorse) for common benefit.[260] Finally reference may be made to the *societas omnium bonorum quae ex quaestu veniunt*, in which everything the partners acquired from business or professional activities was brought into the partnership.[261]

The *societas*, even in its classical form, had no legal personality.[262] This meant the partnership could not be the owner or possessor of property, debtor or creditor

[255] D 17. 2. 3. 3; D 17. 2. 57.

[256] D 17. 2. 5. 1. And see G 3. 149; D 17. 2. 52. 2; C 4. 37. 1. It was possible to leave the determination of what should be contributed to the judgment of a fair-minded person (*arbitrium boni viri*). Unless otherwise agreed, differences in the form and amount of capital resulted in a corresponding adjustment of profit shares. Consider D 17. 2. 6 & 80.

[257] *Inst* 3. 25. 1; G 3. 149–150; D 17. 2. 29 pr-1; D 17. 2. 30; C 4. 37. 3–4. An agreement whereby one or more of the parties were precluded from sharing in the profits but not the losses was not permitted. Such an agreement was referred to as *societas leonina* in allusion to the fable of the lion and other animals, who having entered into partnership for the purpose of hunting, the lion appropriated all the prey to himself. See D 17. 2. 29. 2.

[258] D 17. 2. 1. 1. Consider also G 3. 148; D 17. 2. 5 pr; *Inst* 3. 25 pr.

[259] G 3. 148. And see *Inst* 3. 25 pr; D 17. 2. 5 pr. A special form of *societas alicuius negotiationis* was the so-called *societas vectigalis*: a partnership directed at the collection of taxes. Those who formed this partnership entered into an agreement with the state in terms of which they became tax-farmers (*publicani*). Under this agreement they were entitled to collect taxes and keep these taxes for themselves, and in return paid the state the agreed price. Similar rules governed other partnerships contracting with the state, e.g. for the exploitation of mines and quarries. Partnerships engaged in the collection of public revenues were generally referred to as *societates publicanorum*.

[260] D 17. 2. 5 pr. See also D 17. 2. 52. 13.

[261] D 17. 2. 7. Consider also D 17. 2. 8; D 17. 2. 71. 1; D 17. 2. 74.

[262] An exception to this rule appears to have been the *societates publicanorum*, i.e. partnerships concerned with the collection of public revenues. The rules governing such partnerships gave them

and neither could it litigate, buy or sell, hire or let and such like. The *socii* were liable for the debts of the partnership while claims of the *societas* against third parties were claims of the *socii*. Furthermore, a partner had no implicit authority to bind his fellow partners even in matters closely connected with the business of the partnership. Thus, when a partner entered into a legal act with a third party he alone was affected by such act and thus became liable to or acquired rights against the third party. Normally, however, *socii* were both entitled and bound to bring their dealings with third parties into the partnership account. Thus, when a partner's share in the profits or losses of the partnership was calculated, the rights and liabilities arising from all his individual transactions were taken into consideration.[263]

With regard to the relationship between the partners, attention must be accorded to the fact that *societas* was a synallagmatic contract giving rise to reciprocal rights and duties. The basis of this relationship, which was viewed as an especially personal one (hence a parallel was sometimes drawn between partners and brothers), was the principle of good faith (*bona fides*).[264] Each partner was required to contribute his share as agreed; share profits and losses equally or as stipulated in the contract; and indemnify the other partners *pro rata* against all expenses or liabilities incurred on behalf of the partnership. In the law of Justinian each partner was liable for malicious intent or fraud (*dolus*) and negligence (*culpa levis in concreto*) in the sense of failing to show, with regard to the activities of the partnership, the same degree of care and diligence that he would show in his own affairs (*diligentia quam suis rebus*).[265] If a partner suffered loss or damage as a result of another partner's fraudulent or negligent action, he could institute the *actio pro socio* against him for damages. The same action could be launched by one or more of the partners against a partner who failed to comply with his obligations as prescribed in the partnership agreement.[266] In such case, the action pursued damages as well as the adjustment of benefits and liabilities arising from the partnership's activities. A partner condemned in the *actio pro socio* underwent loss of honour (*infamia*), since he was regarded as having betrayed the trust placed upon him.[267]

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more permanence and stability as well as facilitating them to operate independently of the fate of individual partners. The reasoning was probably linked to the important role the *societates publicanorum* played in the field of public finances.

[263] D 17. 2. 58 pr; D 17. 2. 68 pr; D 17. 2. 82 & 84.

[264] D 17. 2. 63 pr. See also G 3. 154; D 17. 2. 52. 1.

[265] *Inst* 3. 25. 9. And see D 17. 2. 72; D 2. 13. 9 pr; D 17. 2. 36; D 17. 2. 52. 2–4; D 17. 2. 63 pr.

[266] In early law this *actio pro socio* could only be instituted after the termination of the partnership. However, this rule did have exceptions. See D 17. 2. 65. 15.

[267] G 4. 182; *Inst* 4. 16. 2; D 3. 2. 1. On the other hand, a partner who lost in this action had the *beneficium competentiae*, i.e. he was not declared bankrupt but was allowed to retain an estate large enough to meet his needs.

A partnership could be dissolved in a variety of ways: by a unilateral express declaration to this effect by one of the partners (*ex voluntate*)[268]; if the period agreed upon expired; if the goal for which it was formed had been accomplished or became impossible; or if the communal property was lost or an essential asset passed out of *commercium*. Moreover, since the relationship between the partners was highly personal, the partnership was dissolved by the death of one of the parties.[269] The *capitis deminutio*[270] or insolvency of a partner or the forfeiture of a partner's entire estate also entailed the dissolution of the partnership.[271]

After the termination of the partnership the partners could institute the *actio pro socio* against one another or, where applicable, the *actio communi dividundo* for the liquidation and division of the common property.[272]

4.7.4 Mandatum

The fourth and last of the consensual contracts was mandate (*mandatum*). This came to the fore when an agreement was reached whereby one person (the *mandator*) gave another person (the mandatary or *mandatarius*) a commission to do something gratuitously for him, and the mandatary accepted the commission.[273] The relevant agreement could be formed in any manner (orally, tacitly, in writing or through a messenger).[274] The gratuitous nature of *mandatum*, which distinguished it from the contract of *locatio conductio operis*, is explained on the grounds that the mandatary essentially performed a favour for a friend and, according to the moral code of the Romans, it was his duty to help friends free of charge.[275] However, in the course of time it became an accepted practice to pay the mandatary a fee (*honorarium* or

[268] However, a partner had to fulfil his existing obligations towards the partnership prior to his withdrawal as otherwise his action could be considered fraudulent. If a partner renounced fraudulently (*dolo malo*) or at a bad time for the business, the other partners could hold him liable for damages with the *actio pro socio*. G 3. 151–154; *Inst* 3. 25. 4–8; D 17. 2. 4. 1; D 17. 2. 63; D 17. 2. 64; D 17. 2. 65 pr-10; D 17. 2. 65. 12; C 4. 37. 5.

[269] When a partner died, his rights and liabilities under the contract descended to his heirs, but the partnership was dissolved for all. In such a case the surviving partners might continue without the deceased or admit his heir or another person into the business, but in either case it would be a new partnership.

[270] On the *capitis deminutio* see the relevant section in the chapter on the law of persons above.

[271] According to the jurist Ulpianus, partnership is dissolved (a) by causes connected with the person (*ex personis*); (b) by causes connected with its object (*ex rebus*); (c) by an act of will (*ex voluntate*); and (d) by a juridical act (*ex actione*). D 17. 2. 63. 10.

[272] D 17. 2. 65. 13. And see D 10. 3. 1.

[273] G 3. 155.

[274] D 17. 1. 1 pr. The mandate could be conditional or subject to a time clause. D 17. 1. 1. 3.

[275] D 17. 1. 1. 4. And see G 3. 162; *Inst* 3. 26. 13.

salarium) for his selfless service, and this was not considered contrary to the spirit of the mandate.[276]

Virtually any kind of clearly defined service, whether of a factual or legal nature, could be requested under a mandate as long as it was not illegal, immoral or impossible.[277] Such service might pertain to the performance of a single task, such as the mending or cleaning of clothes, or the management of the affairs of the mandator in general. Furthermore, the mandate had to serve the interests of the mandator or of a third person, jointly or severally. A mandate that produced some benefit for the mandatary was still acceptable, but a purported mandate for the exclusive interest of the mandatary was void and regarded as only free advice.[278]

Mandate was an imperfectly synallagmatic or bilateral contract, in the sense that the duty of the mandator was a contingent one whilst that of the mandatary arose immediately upon the conclusion of the contract. As in the case of other consensual contracts, the mandate originated from the *ius gentium* and was therefore governed by the principle of *bona fides*.[279] It is important to observe at this point that the mandatary did not act as the mandator's agent or representative. Thus where the mandatary entered into a contractual relationship with a third party, the mandator was not directly affected by it, even if such relationship had been concluded during the execution of the mandate.[280]

The principal duty of the mandatary was to carry out the mandate properly and to hand over to the mandator all benefits he acquired during its execution, including rights of action against third parties.[281] As the mandatary was originally considered to be a trusted friend performing a gratuitous service, the early law limited

[276] D 17. 1. 6 pr; D 17. 1. 7; D 17. 1. 36. 1. In post-classical law a mandatary could recover an agreed *honorarium* by means of a *cognitio extraordinaria* before a magistrate. On the *cognitio extraordinaria* see the relevant section in the chapter on the law of actions below.

[277] *Inst* 3. 26. 7. And see G 3. 157; D 17. 1. 6. 3; D 17. 1. 22. 6.

[278] For example, if A advised B to invest B's money in the purchase of landed property rather than lend it out at interest, this did not constitute a mandate but only a piece of advice and thus B had no remedy against A if the advice turned out to be bad. See in general G 3. 155–156; *Inst* 3. 26. 1–6. On the mandate for the benefit of the mandatary see D 17. 1. 2. 6. Reference may be made in this connection to the so-called *mandatum pecuniae credendae*, which arose when a mandatary was instructed to invest his money by lending it at an interest to a third person. Both Gaius and Justinian recognize that this was a valid mandate on the grounds that it did not exist for the exclusive interest of the mandatary (besides the benefit the mandatary received from the interest on the loan, the third person also obtained the benefit of a cash loan). Thus, if the third party failed to repay the loan and the mandatary suffered loss or damage as a result, the latter could act against the mandator. In such a case, the mandator was burdened with the obligation to secure the mandatary if the third party (the principal debtor) did not comply with his obligations. On this basis, this form of mandate was regarded as an informal suretyship.

[279] G 3. 155; G 4. 62; *Inst* 4. 6. 28.

[280] D 17. 1. 26. 8. Consider also D 17. 1. 8. 3; D 17. 1. 12. 9. See also the discussion of representation above.

[281] D 17. 1. 20 pr.

his liability to *dolus* and *culpa lata*.[282] However, in later classical law this liability was extended to include *culpa levis in abstracto*, which meant the mandatary had to exhibit the diligence of a *bonus paterfamilias*.[283] If the mandatary did not comply with his obligations, he could be sued by means of the *actio mandati* (*directa*). This action was aimed at restitution of the gains the mandatary acquired in carrying out the mandate or at compensation for damages owing to his fraudulent or negligent conduct. Condemnation in this action led to *infamia*.[284]

Occasionally, the mandatary incurred certain expenses or suffered loss or damage in the performance of the mandate. Provided that these expenses were necessary and he had not exceeded the mandate,[285] he could institute the *actio mandati contraria* against the mandator to claim reimbursement of expenses or damages.[286]

The contract of mandate was terminated when the mandate had been carried out or when the prescribed time period for its performance had elapsed. Furthermore, either party could revoke the contract provided that execution of the mandate had not yet commenced.[287] Finally, a mandate could be terminated by the death of either party.[288]

4.8 Quasi-Contracts

'Quasi-contract' is an unsatisfactory term applied to certain specific obligations which did not arise from contract or delict but were legally enforceable. These obligations arose from legal acts that resembled contracts in respect of several characteristics, but which were nevertheless not contracts since they were not founded on agreement. These obligations were therefore said to arise 'as if from contract' (*quasi ex contractu*). The most important quasi-contracts were unauthorized administration (*negotiorum gestio*), guardianship (*tutela*) and undue payment (*solutio indebiti*).[289] The institution of *tutela* has been discussed in the chapter on

[282] D 17. 1. 8. 10; D 17. 1. 29 pr.

[283] See D 19. 5. 5. 4; D 50. 17. 23; C 4. 35. 11–13; C 4. 35. 21.

[284] G 4. 182; D 3. 2. 1; D 3. 2. 6. 5.

[285] G 3. 161; *Inst* 3. 26. 8. See also D 17. 1. 5 pr-3; D 17. 1. 41.

[286] D 17. 1. 12. 9; D 17. 1. 15; D 17. 1. 26. 6.

[287] G 3. 159. And see *Inst* 3. 26. 9; D 17. 1. 15; D 17. 1. 12. 16.

[288] If the mandatary had started carrying out the mandate without awareness of the mandator's death, the latter's heirs could still enforce the contract. At the same time, the heirs were liable for claims arising from the execution of the mandate. See in general G 3. 160; *Inst* 3. 26. 10; D 17. 1. 26 pr; C 4. 35. 15.

[289] According to Justinian, the same category encompassed joint ownership (*communio*) (discussed in the chapter on the law of property) and legacy (*legatum*) (discussed in the chapter on the law of succession). It is, however, incorrect to restrict the number of quasi-contracts to these five forms only, since every situation that invoked an obligation that did not meet the requirements of a contract or delict might be treated as a quasi-contract.

the law of persons above. In the following paragraphs attention will be paid to *negotiorum gestio* and *solutio indebiti*. These quasi-contracts arose not from an agreement between parties but from a performance by a person that entailed rights for that person and corresponding duties for another.

4.8.1 Negotiorum Gestio

In our discussion of the contract of mandate it was noted that this contract involved an agreement whereby a person gave another a commission to do something without reward. The relationship known as *negotiorum gestio*[290] was somewhat similar to mandate, but differed in the aspect that there was no agreement between the parties. This relationship emerged when one person (*negotiorum gestor*) voluntarily and without instruction to do so managed the affairs of or performed some service for another (*dominus negotii*). In everyday life this usually arose when a person spontaneously, out of friendship or helpfulness, acted in the interests of another. Provided the *gestor* complied with the requirements of *bona fides*, the service performed might be of any kind: a factual act, a legal act, a single act (e.g. the repair of a building) or a general administration of another's affairs (e.g. becoming a surety). Notwithstanding the absence of agreement, a praetorian edict introduced remedies aimed at compensation for expenses incurred or loss suffered by the parties in the course of the *negotiorum gestio*.

In time and under the influence of the jurists, a number of basic requirements were introduced for a valid and legally binding *negotiorum gestio*. First, the *gestor* had to have the intention to act in the interest of another person (*animus aliena negotia gerenda*) rather than in his own interest.[291] Therefore no *negotiorum gestio* could be established if he acted in order to fulfil a contractual duty of his own, discharged a moral obligation or made a donation.[292] Moreover, the *gestor* had to refrain from acting if the *dominus* had previously forbidden him from acting on his behalf.[293]

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[290] The notion *negotiorum gestio* does not appear in the Roman juridical sources.

[291] D 3. 5. 5. 3; D 3. 5. 5. 5, 8, 11 & 14; D 3. 5. 14; D 3. 5. 16; D 3. 5. 18. 2. A mistake on the part of the *gestor* as to the identity of the *dominus* was irrelevant. D 3. 5. 5. 6; D 3. 5. 5. 1.

[292] D 3. 5. 26. 1; D 3. 5. 33; D 11. 7. 14. 7; D 3. 5. 4. This requirement was not met where a *bona fide* person managed another's affairs in the mistaken belief that they were his own (for example, in the case of a possessor who spent money on the improvement of property that he mistakenly considered to be his own). Nevertheless, equitable considerations allowed for legal remedies in such cases. It should be noted, further, that where the relevant action served the interests of both the *dominus* and the *gestor*, this requirement was satisfied only if the *gestor* could have protected his own interest without protecting the interest of the *dominus*.

[293] D 3. 5. 7. 3; D 17. 1. 40. If the *dominus* had forbidden the *gestor* to meddle in his affairs, the *gestor* could recover his expenses only insofar as the *dominus* had been enriched by the *gestor*'s action. It should be noted, further, that if the *dominus* later approved of the *gestor*'s action (*ratihabitio*), the latter had recourse to the relevant action even if none of the other requirements of the *negotiorum gestio* had been met.

It was required, further, that the *gestor* should act in the best interests of the *dominus* and that his act should in fact be reasonable in the circumstances in which it was rendered. The question of reasonableness was determined by reference to the interests of the *dominus* and not by reference to what the *gestor* himself believed to be reasonable. However, it was not necessary that the outcome of the *gestor*'s action be successful or useful for the *dominus*; if such action was reasonable when undertaken (*utiliter coeptum*), the fact the *dominus* derived no benefit from it was irrelevant.[294]

Finally, later law required the *gestor* to have acted on the expectation that he would have a legal claim to an indemnity for his expenses (*animus recipiendi*).[295] Thus, the relevant action would not be available to him if he intended to provide a gratuitous service.

Negotiorum gestio was an imperfectly synallagmatic or bilateral legal act that originated from the *ius honorarium* and was therefore based on *bona fides*.[296] The *dominus* could institute the *actio negotiorum gestorum directa* against the *gestor* to claim recovery of the proceeds derived from the *negotiorum gestio* and damages caused by the latter's fault. In this regard the *gestor* was liable for *dolus* and *culpa levis in abstracto*, but if he acted in an emergency he was liable for only *dolus*.[297] On the other hand, the *gestor* had recourse to the *actio negotiorum gestorum contraria* whereby he could claim compensation for necessary expenses he incurred or loss or damage he suffered in the execution of the task.[298]

4.8.2 Solutio Indebiti

Undue payment (*solutio indebiti*) occurred when a person, acting under a mistaken belief, transferred money or some other thing to another or discharged another's obligation in settlement of a non-existing debt.[299] In such a case, the law laid a duty

[294] D 3. 5. 9. 1. Consider also D 17. 1. 50 pr; *Inst* 3. 27. 1.

[295] Consider C 2. 18. 11 & 15.

[296] D 3. 5. 17; D 3. 5. 18. 2; D 44. 7. 5 pr; *Inst* 4. 6. 28.

[297] In classical law the *gestor* appears to have been also liable for *custodia*. D 3. 5. 3. 8–9; D 3. 5. 8; D 3. 5. 10; D 3. 5. 20. 3; *Inst* 3. 27. 1.

[298] See D 3. 5. 2; *Inst* 3. 27. 1; D 3. 5. 10. 1; D 3. 5. 44 pr; D 44. 7. 5 pr. It should be noted that expenses incurred by the *gestor* in undertakings that placed an unwanted burden on the *dominus* could not be recovered. For example, if the *gestor* repaired a building that the owner had abandoned because he could not afford the expense, the *gestor* could not claim compensation. Further, it should be noted that the question of expenses was determined by reference to the state of things at the time of the service. Thus, for example, money spent for the treatment of a sick animal could be recovered even if the animal died thereafter.

[299] Payment (*solutio*) embraced any performance whereby one person had been enriched at the expense of another. Such performance must have been undue (*indebitum*) either by civil law or by natural law.

of restitution upon the person who received payment. Because this obligation did not arise from contract, Justinian classified the relevant relationship as a quasi-contract.

Recovery of a payment made without being due could be obtained by means of a special personal action, known as *condictio indebiti*.[300] For the successful institution of this action the plaintiff had to prove that he had *bona fide* erred and had performed while labouring under a mistake (*per errorem*).[301] If he had tendered an undue payment knowingly, it was considered that he had made a donation (and thus he could not reclaim it).[302] On the other hand, the person who received the money or other property also had to believe, *bona fide*, that the performance was due to him—otherwise he would be held to have committed theft (*furtum*).[303] Moreover, ownership must have been transferred by one of the derivative modes of acquisition.[304] Finally, as it is obvious, there had to be no existing debt.

4.8.3 Other Quasi-Contractual Condictiones

As previously observed, the *condictio* was an *actio in personam* arising from the *ius strictum*[305] by which the plaintiff claimed that a specific thing or quantity thereof (in the case of *res fungibiles*), or a fixed sum of money, had to be transferred to him by the defendant.[306] This remedy was used to enforce *stipulatio* and *mutuum*, and was also employed in certain cases where a person acquired something from another's property without a valid legal ground or dishonestly. In these cases the *condictio* arose from quasi-contract and the relevant claim was grounded on the general principle that it is inequitable that one person should unjustifiably be enriched at the expense of another.[307] This principle formed the basis of the *condictio indebiti*, insofar as a portion of a person's property without any legal ground passed to the property of another. If the previous state of affairs was not

[300] *Inst* 3. 27. 6. See also G 3. 91; D 12. 6; C 4. 5; D 44. 7. 5. 3. By the *condictio indebiti* the plaintiff claimed recovery of the same object he had given or, in the case of *res fungibiles*, of the same quantity of the same kind and quality.

[301] The mistake must have been reasonable in the circumstances.

[302] D 12. 6. 1; D 12. 6. 50; D 50. 17. 53. And see D 12. 6. 65. 2.

[303] D 13. 1. 18. Consider also D 47. 2. 43 pr-2.

[304] If the obligation discharged in error did not involve the transfer of ownership of a specific sum of money or object, the *condictio indebiti* could not be employed. However, potential existed for the use of some other action, such as the *actio doli*.

[305] G 4. 5; G 4. 18–19; *Inst* 4. 6. 15.

[306] The *condictio* originated in the *legis actio* procedure (*legis actio per condictionem*). This form of procedure is dealt with in the chapter on the law of actions below.

[307] This principle was based on the notion of equity (*aequitas*). See D 12. 6. 14. Consider also D 50. 17. 206; D 12. 4. 3. 7; D 12. 6. 15 pr; D 12. 6. 64; D 12. 1. 32; D 12. 6. 65. 4; D 12. 6. 66; D 23. 3. 50 pr; D 12. 6. 47; D 25. 2. 25.

restored, the receiver of the property would be unjustly enriched to the detriment of the other party.[308] The most important quasi-contractual *condictiones*, besides the above-mentioned *condictio indebiti*, were the *condictio causa data causa non secuta*; the *condictio ob turpem vel iniustam causam*; and the *condictio sine causa*.

The *condictio causa data causa non secuta* lay where a property was handed over in anticipation of a specific event or the performance of a specific deed by the receiver (e.g. money given as dowry for a future marriage), and this did not eventuate. By means of this remedy the giver reclaimed the property transferred.[309]

The *condictio ob turpem vel iniustam causam* was used for the recovery of a payment made by an innocent person for an illegal or immoral cause (e.g. for a debt contracted under compulsion). The plaintiff had to be free of guilt (*turpitudo*), otherwise he could not launch this action.[310]

Finally, the *condictio sine causa* was a general action introduced in the post-classical period that covered a wide variety of cases where ownership had been transferred without good cause.[311]

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[308] It must be noted at this point that Roman law did not recognize a general enrichment action in the modern sense of the term. What we encounter in the Roman texts is a number of specific actions that can be construed as linked to a general notion of unjust enrichment. It may be asserted that unjust enrichment came to the fore only where a particular action was allowed. Despite the fact that the sources of Roman law do not provide for a general enrichment action, one of the maxims contained in Justinian's Digest prescribes that according to the law of nature it is equitable that no one should be enriched to the detriment of another. See, e.g., D 12. 6. 14; D 50. 17. 206. However, this maxim is not formulated as a directly applicable rule but rather as a general principle of equity from which no cause of obligation (*causa obligandi*) as such can be inferred. The compilers of the Digest regarded this principle as furnishing the basis of an argument that could be used to justify legal opinions. In the later Middle Ages, the European *ius commune* merged a number of different Roman remedies into one *condictio sine causa generalis* or adopted by extensive interpretation the *actio de in rem verso* as a general enrichment action. Later Civil law codes, such as the German BGB and a number of codes modelled on it, adopted a general enrichment action largely based on the legal doctrines of the German Pandectists, especially the writings of F.C. von Savigny.

[309] D 12. 4; C 4. 6; D 12. 7. 4.

[310] D 12. 5; C 4. 7. Where the plaintiff himself had acted in an immoral or unethical manner, his claim could be met with an *exceptio*. See C 4. 7. 2; D 3. 6. 5. 1; D 12. 5. 8; D 12. 7. 5 pr.

[311] See D 12. 7. A number of further *condictiones* may be mentioned: the *condictio furtiva*, employed against a thief for the recovery of stolen property; the *condictio ex lege*, used for the prosecution of any claim which a legal enactment recognized as actionable without indicating the action with which it should be enforced (D 13. 2. 1); and the *condictio certi*, a general action available when a fixed sum or quantity of things (*certum*) was owed from any cause, whether of a contractual, quasi-contractual or delictual nature. (D 12. 1. 9 pr). Besides the *condictio*, the *actio de in rem verso* also served as an enrichment action, although this action could only be granted where the enrichment resulted from a contract entered into by a slave or son *in potestate* of the person who was enriched. Reference may also be made to the so-called praetorian enrichment actions, which included the phrases *in id quod ad eum pervenit* (of what were his earnings) or *quanto locupletior factus est* (to the extent of his enrichment). Examples of such actions include the action against the ward (*pupillus*) who was enriched by entering into a legal transaction without his guardian's consent (D 26. 8. 5. 1); and the previously mentioned *actio negotiorum gestorum contraria*, which in some cases served to claim the amount by which the principal was enriched and not simply the expenses actually incurred (D 3. 5. 5. 5).

4.9 Other Types of Contractual Relationship

4.9.1 Contractus Innominati

As already observed, Roman law recognized only a limited number of contracts. However, there were cases in which there appeared to be a contract but the relevant transaction fell outside the recognized categories of contracts. The term 'unnamed contracts' (*contractus innominati*) was later introduced by jurists to describe enforceable agreements for reciprocal performances which, unlike the recognized types of contract, did not have a name of their own. These agreements resembled the *contractus re* because, as in the case of the real contracts, it was the fact that something had been done on one side that gave rise to the liability on the other. This 'doing' in the case of the normal *contractus re* involved the handing over of a thing (*res*) that had to be returned in kind or *in specie*, whilst in the contrasting case of the *contractus innominati* one party had performed according to the terms of a preceding agreement.

According to the nature of the mutual performances, four different categories of unnamed contracts were distinguished: *do ut des* ('I give, in order that you should give'); *do ut facias* ('I give, in order that you should do'); *facio ut facias* ('I do, in order that you should do'); and *facio ut des* ('I do, in order that you should give').[312]

The most common examples of unnamed contracts encompassed exchange or barter (*permutatio*) whereby the parties agreed that each would transfer something to the other in ownership (e.g. an ox for a horse)[313]; the agreement of hawking (*aestimatum*), whereby the owner of goods handed them over to another person on the understanding that the latter would, within a prescribed period of time, either return the goods or pay the sum agreed upon to the former, while retaining any profit he may have obtained from selling them[314]; and the *precarium*, a gratuitous grant of the enjoyment of a thing revocable at will.[315]

Originally, the *contractus innominati* were regarded as informal, legally unenforceable agreements (*nuda pacta*) from which no obligations arose. In later times the principle prevailed that if one of the parties had already performed his side of the agreement and the other party did not reciprocate, the former party could recover his performance by means of the *condictio causa data causa non secuta* or, in certain cases, the *actio doli*. However, he had no legal action by way of which he could compel the other party to render performance. To address the potential

[312] D 19. 5. 5 pr.

[313] D 19. 4; *Inst* 3. 23. 2; C 4. 64. 3.

[314] D 19. 3; D 19. 5. 13 pr; D 19. 5. 17. 1. Such agreements were often made with second-hand dealers who retained the profit when they sold the items they received at a higher price. It was difficult to identify whether the relevant transaction was a sale, or *locatio conductio operarum*, or *locatio conductio operis*, or mandate.

[315] D 43. 26.

injustice that might arise from this event, the praetor granted in certain cases an *actio in factum* whereby the party who had already performed could force his opposite number to carry out his part of the agreement. By the time of Justinian's reign, this praetorian arrangement was broadened in scope so that the *actio praescriptis verbis* became available in all cases involving a bilateral transaction for reciprocal performances that did not conform to the typical and recognized categories of contracts. This general *bonae fidei* action could be adapted to different legal situations in which a party who had honoured his undertaking claimed performance of the reciprocal duty by the other party.[316]

4.9.2 Pacta

A simple agreement that could not be classified under any of the existing categories of contract was termed a pact (*pactum*) or bare pact (*nudum pactum*).[317] Initially, such an informal agreement was not actionable but could in certain cases be pleaded as a defence.[318] In the course of time, however, certain pacts were made enforceable, i.e. they gave rise to an action and therefore to an obligation, and so became contracts in effect though not in name. In later legal dogma these pacts are referred to as *pacta vestita* or 'clothed pacts' (in contradistinction with the bare pacts) and are classified into three categories: *pacta adiecta*; *pacta praetoria*; and *pacta legitima*.

4.9.2.1 Pacta Adiecta

Pacta adiecta were agreements concluded in connection with one of the recognized contracts and intended to modify the normal rights and duties arising from it.[319] Such *pacta* could be made at the time of the principal contract (*pacta in continenti*) or subsequent to it (*pacta ex intervallo*).[320] In some cases the relevant agreement was aimed at diminishing the liability of the debtor (*pacta ad minuendam*

[316] D 19. 5; C 4. 64. Consider also D 2. 14. 7. 2; D 19. 5. 22; D 18. 1. 50; *Inst* 3. 24. 1; C 2. 4. 6. 1. The standard of liability applicable in such cases was *dolus* and *culpa levis in abstracto*. D 19. 5. 17. 1–2; D 19. 5. 20. 2.

[317] Originally, the term *pactum* denoted a compromise between an offender and the person injured by his wrongdoing (*delictum*) that completely extinguished any obligation arising from the offender's action. Subsequently, the praetor extended the relevant principle by allowing an *exceptio pacti* to be pleaded as a defence to any action.

[318] '*Nuda pactio obligationem non parit sed parit exceptionem*.' See D 2. 14. 7. 4. Consider also C 2. 3. 10; C 4. 65. 27.

[319] For example, an agreement attached to a contract of purchase and sale whereby the seller was released from liability in the event of eviction.

[320] D 2. 14. 7. 5; D 18. 1. 72 pr.

obligationem), e.g. by granting deferment of payment. If the creditor instituted a claim in conflict with this agreement, the debtor could rely on the agreement as a defence against the creditor's action (such a defence was known as *exceptio pacti conventi*).[321] In other cases the purpose of the agreement was to increase the liability of the debtor (*pacta ad augendam obligationem*), e.g. by providing that the debtor should pay interest on the capital amount for a certain period of time.

4.9.2.2 Pacta Praetoria

As the name suggests, the *pacta praetoria*[322] were agreements recognized as binding by the praetor and made enforceable by means of praetorian actions. The principal among these pacts embraced the following: the *constitutum debiti*, an agreement whereby one of two parties undertook to discharge a current debt, whether his own or that of another person, on a specific date[323]; the *receptum arbitri*, an agreement whereby a person undertook to act as arbitrator (*arbiter*) in a dispute submitted to him with the consent of the parties concerned[324]; the *receptum argentarii*, an agreement between a banker (*argentarius*) and a client whereby the former undertook to pay the latter's debt to his creditor[325]; and the *receptum nautarum, cauponum, stabulariorum*, the undertaking of masters of ships, innkeepers and stable keepers to be answerable for the safety of goods entrusted to their charge.[326]

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[321] D 2. 14. 7. 5–7; D 12. 1. 40; C 2. 3. 24.

[322] This notion does not occur in Roman juridical sources.

[323] D 13. 5; C 4. 18. The creditor had the choice of enforcing the performance either on the basis of the original contract or on the strength of the pact. This pact was enforceable by means of the *actio de pecunia constituta*. A pact involving an undertaking that the debt of another person would be paid (*constitutum debiti alieni*) was regarded as a form of suretyship.

[324] D 4. 8; C 2. 55. The agreement between the parties to submit their dispute to an arbitrator was couched in the form of a promise (*compromissum*). If the arbitrator was unwilling to discharge his function, he could be compelled to do so by the praetor. D 4. 8. 15.

[325] If the banker failed to pay the creditor in terms of the agreement with his client, the latter could compel him to do so by means of the *actio recepticia*. The effect of the *receptum argentarii* was thus similar to that of suretyship. In the time of Justinian, the *receptum argentarii* was fused with the *constitutum debiti*. Consider C 4. 18. 2; *Inst* 4. 6. 8; D 2. 13. 6. 3.

[326] D 4. 9. The obligations arising from this agreement were enforceable by means of the *actio de recepto*. A further pact in the category of *pacta praetoria* was the so-called *pactum de iureiurando* (or *iusiurandum voluntarium*). This was an agreement between two parties involved in a legal dispute in terms of which the plaintiff undertook not to institute his claim if the defendant was willing to declare under oath that he did not have an obligation; or the defendant undertook to discharge an obligation if the plaintiff was willing to declare under oath that he had a valid claim. If the plaintiff instituted his claim despite the agreement, his action could be barred by means of a defence (*exceptio iurisiurandi*) granted by the praetor. If, in the second case, the defendant was unwilling to discharge his duties contrary to the agreement, the plaintiff was granted the *actio de iureiurando* to enforce his claim. To succeed in his claim the plaintiff had to prove only that the oath had been taken. See D 12. 2. 3 pr; D 12. 2. 7; D 12. 2. 9 pr-1; C 4. 1. 1.

4.9.2.3 Pacta Legitima

Pacta legitima were agreements recognized and made enforceable by imperial constitutions during the post-classical age. Like the *pacta praetoria* mentioned above, these agreements were not classified as contracts yet they practically had the same effect as the *contractus consensu*. The most important among these agreements embraced the *pactum dotis*, an agreement to supply a dowry; the *pactum donationis*, an agreement to make a donation; and the *compromissum*, an agreement between two parties involved in a legal dispute to refer the matter to arbitration (instead of taking it to court in the usual manner) and abide by the arbiter's decision.[327]

4.9.3 Donation

Donation (*donatio*) was a legal act whereby a person gratuitously enriched another at his expense. It was required that the donor had the intention to make a donation (*animus donandi*) and that the donee accepted the gift. The object of donation could be anything of value, such as transferring the ownership of an object, payment of or release from a debt, and the grant of a servitude or usufruct over property belonging to the donor. A donation might be revoked under certain circumstances (for example, if the donee committed an act of grave ingratitude against the donor).[328]

In the classical period an agreement to give in donation (*pactum donationis*) was not legally enforceable but was only a cause (*causa*) for a legal act, such as the transfer of ownership over a thing. The intention to donate as such was not sufficient for ownership to pass—the handing over of the thing (*traditio*) to the transferee first had to take place. In the later imperial era, however, the agreement to make a gift became regarded as an independent legal act and, by the time of Justinian, it was effective and enforceable as a *pactum legitimum*.[329]

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[327] As previously noted, the *compromissum* was closely related to the *receptum arbitri*. In the time of Justinian the *compromissum* was declared to be binding by the emperor, provided that the parties accepted the arbitrator's decision in writing or did not call it into question within ten days from its pronouncement. See C 2. 55. 5.

[328] D 39. 5. 1 pr; *Inst* 2. 7. 2.

[329] C 8. 53. 25. In Roman law, gifts between living persons (*inter vivos*) were governed by various rules. The *lex Cincia* of ca 204 BC prohibited gifts valued in excess of a certain amount, except where the donor was closely related to the donee. This law was an 'imperfect law' (*lex imperfecta*), and this meant that gifts promised in violation of it were not void. However, the donor could raise a defence (*exceptio legis Cinciae*) if the donee claimed the gift in court (in pre-classical and classical law there obviously was no action on a promise to donate, unless such promise was couched in the form of a *stipulatio*). In the later imperial age the *lex Cincia* fell into disuse and was eventually repealed by Justinian, who allowed donations except in certain exceptional cases (e.g. there was a ban on gifts between husband and wife). Consider D 24. 1. 1. See also D 24. 1. 3 pr-1; C 5. 15. 2; C 5. 16. 6. Furthermore, Justinian promulgated that gifts of a value greater than a prescribed sum

4.9.4 Suretyship

In many cases where a person wished to obtain credit the other party would agree to grant credit only if security for the discharge of the debt was provided. Roman law recognized two basic forms of security: real security, in terms of which a thing was offered by the debtor or a third party as security and the creditor was granted a real right in respect thereof; and personal security or suretyship, in terms of which a person agreed to be personally liable as surety to the creditor for the payment of the debt. The various aspects of real security have already been discussed in the chapter on the law of property. In the present discussion attention is directed to suretyship in general.

Suretyship arose when a third party (the surety) entered into a contractual relationship with a creditor whereby he bound himself to the latter for performance of another person's debt. In this way the creditor, besides his personal right against the principal debtor, acquired a second personal right against the surety.[330]

Suretyship could be created informally or formally. An informal way of establishing suretyship was the so-called *mandatum pecuniae credendae*, which arose when a mandatary was instructed to lend money to a third person. This mandate invoked the obligation on the part of the mandator to secure the mandatary against loss or damage resulting from the third party's failure to repay the loan. In this case, the mandator placed himself in the position of a surety to the mandatary and thereby was liable if the principal debtor did not comply with his obligations.[331]

The usual method for constituting a formal suretyship involved *stipulatio*, in terms of which the person who was to be surety promised the creditor to assume the same obligations and liability as the principal debtor. The earliest forms of suretyship by *stipulatio* in Roman law were *sponsio* and *fidepromissio*, which were distinguished by the form of words employed by the *stipulator*-creditor in addressing the intended surety. These forms of suretyship were in most respects governed by the same rules, except that the *sponsio* was available only to

must be registered in a public archive (except in certain circumstances). An unregistered gift valued in excess of the specified amount was deemed void to the extent of the excess. See C 8. 53. 34 & 35; *Inst* 2. 7. 2.

[330] Personal security was in general preferred over real security for, among other things, it enabled the effective execution of judgment on the person of the judgment debtor.

[331] This special form of mandate was referred to as *mandatum qualificatum*. If the principal debtor did not repay the loan, the mandatary could proceed against the surety by means of the *actio mandati contraria*. See G 3. 156; *Inst* 3. 26. 6. Suretyship could also be informally created by way of *constitutum debiti alieni* and *receptum argentarii* (see the discussion of the *pacta praetoria* above).

Roman citizens.[332] However, both were subject to a number of limitations: they could only be employed when the principal obligation itself was created by *stipulatio*; the obligation of the surety died together with the person who undertook it and, in all cases, was extinguished 2 years after it was established; and where there was more than one surety for the same debt, each was liable only for his *pro rata* share of the debt, even if one or more of his co-sureties were insolvent. These limitations, although largely beneficial to the surety, restricted the scope and usefulness of *sponsio* and *fidepromissio* thereby rendering them unattractive to creditors. Thus, during the later republican age *fideiussio* emerged as a third form of suretyship that was also created by *stipulatio* and not subjected to any of the above-mentioned limitations.[333] This form of suretyship, available to both Roman citizens and foreigners (*peregrini*), gradually superseded the two older forms to the extent that it evolved as the only form recognized in the time of Justinian's reign.

Unlike the earlier forms of suretyship it replaced, the *fideiussio* could be employed to secure any obligation, irrespective of the manner in which it was created. Furthermore, this suretyship was not subject to a limitation period and the

[332] *Sponsio* and *fideipromissio* could be employed only in connection with a *contractus verbis* (mainly *stipulatio*), and were concluded immediately after the principal agreement to which they related. After the prospective principal debtor had promised to discharge an obligation, the creditor turned to the prospective surety and posed the question: "do you promise the same?". In the case of the *sponsio*, the relevant question was framed as *idem dari spondes*? (do you solemnly agree to pay the same?)—to which the surety replied with *spondeo*. In the case of the *fidepromissio*, the question posed was *idem dari fidepromittis*? (do you guarantee the same?)—to which the surety's answer was *fidepromitto*. See G 3. 116; D 45. 1. 75. 6. It is important to note that, as the liability of the surety (*sponsor* or *fideipromissor*) towards the creditor was considered to be independent of the principal obligation, the creditor who wished to enforce an obligation had a choice between the main debtor and the surety. The *lex Apuleia* (enacted in the late third or early second century BC) provided that if there was more than one surety for the same obligation, they would all bear liability in equal shares and if one of them paid to the creditor more than his proper share he could have recourse against the other sureties. The *lex Furia* (of unknown date, but probably later than the *lex Apuleia*) stipulated that sureties were released from their obligations 2 years after the conclusion of the contract. According to the same enactment, where there were several sureties each was liable only for his proportionate share (i.e. if there were four sureties, each was liable for one quarter) regardless of whether or not the other sureties were solvent. Moreover, according to the *lex Cirereia* (of unknown date, probably second century BC) a creditor was required to declare in advance any claims that were secured by sureties and the extent of these sureties. The *lex Cornelia* (first century BC) limited the amount for which one person could stand surety for one debtor in 1 year to 20,000 *sesterces*. Finally, the *lex Publilia* (*c.* 200 BC) provided that a surety compelled to pay the creditor because the principal debtor failed to do so had a right of recourse against the latter by means of the *actio depensi* if he was not reimbursed within 6 months. It should be noted that by the time of Justinian all the above enactments had fallen into disuse.

[333] In the classical era the relevant question was *idem fide tua esse iubes*? (do you pledge your faith for the same?)—to which the person who was to stand as surety replied with *Iubeo*. G 3. 116; D 45. 1. 75. 6. And see D 46. 1. 8 pr. However, in Justinian's time the use of formal words was no longer required and the relevant contract was reduced to writing for evidentiary purposes. Consider *Inst* 3. 20. 8.; D 45. 1. 30.

relevant obligation passed to the surety's heirs.[334] Since the surety (*fideiussor*) was burdened with the same obligation as the principal debtor, if there was more than one surety the creditor could claim the full debt from any of them. A person who bound himself as surety was in all respects regarded as a joint principal debtor, and the creditor could choose against which of the two he wished to proceed against for recovery of the debt.[335] If the creditor opted to act against the surety, the latter could have recourse to all the defences open to the principal debtor insofar as such defences were not linked to the person of the debtor himself.[336] The surety who discharged the debt could recover from the principal debtor by means of the *actio mandati contraria* on the basis of a presumed agreement of mandate between him and the debtor.

Although initially *fideiussio* was far more favourable to the creditor and disadvantageous to the surety than the two older forms of suretyship, over time the legal position of the surety was significantly improved through several measures that introduced certain benefits (*beneficia*) in favour of the surety. The first of these was the 'benefit of division' (*beneficium divisionis*) introduced in the era of Emperor Hadrian (first half of the second century AD). This applied when more than one person had assumed the position of surety for the same debt. If one of them was sued by the creditor, he could demand that the latter should divide his claim *pro rata* among the solvent sureties so that each surety could be liable for only a certain portion of the debt.[337] In the early years of the Empire, a further important development introduced the 'benefit of cession of actions' (*beneficium cedendarum actionum*). By means of this device, a surety could demand that the creditor who wished to claim payment from him should first cede all remedies he might have against the principal debtor to him. This arrangement furnished the surety with a recourse against the principal debtor and any co-sureties, and thus considerably improved his position.[338] Finally, reference should also be made to the so-called 'benefit of excussion' (*beneficium excussionis* or *ordinis*)[339] introduced in the time of Justinian. If the creditor proceeded against the surety, the latter could employ this device and demand that the creditor should first sue the principal debtor. If the

[334] See in general *Inst* 3. 20; G 3. 119a-120; D 46. 1. 1; D 46. 1. 8. 1; D 46 1. 16. 3.

[335] Thus a creditor could elect to proceed against the surety before proceeding against or even demanding performance from the principal debtor. However, in the classical era when *litis contestatio* (joinder of issue—see the chapter on the law of actions below) had been reached in respect of either the surety or the main debtor, any further action against the other was ruled out.

[336] *Inst* 3. 20. 5. See also G 3. 126; D 46. 1. 16. 1 & 70 pr; D 46. 1. 32; C 4. 30. 12.

[337] *Inst* 3. 20. 4. And see G 3. 121-121a; D 27. 7. 7; D 46. 1. 26; D 46. 1. 27. 1; D 46. 1. 51 pr; C 8. 40. 10.

[338] The use of this *beneficium* was exposed to the objection that the payment of the principal debt extinguished the creditor's right of action, so that nothing remained to cede. This problem was circumvented by the use of the fiction that the payment made by the surety was directed not at the satisfaction of the creditor's claim but at the purchase of the latter's right of action. See D 46. 3. 76. On the *beneficum cedendarum actionum* in general see D 46. 1. 17; D 19. 2. 47; D 46. 1. 36.

[339] The notion *beneficium excussionis* does not appear in the Roman juridical literature.

debtor could not perform, the creditor could claim from the surety.[340] It should be noted that in the classical period creditors were unwilling to first sue the principal debtor, unless they were assured of his solvency, as the *litis contestatio* (joinder of issue) in an action against the debtor extinguished the obligation and thus released the sureties. Justinian abolished the consumptive effect of the *litis contestatio* in cases where there was more than one debtor and thereby rendered the *beneficium excussionis* possible.[341]

In the early Principate period measures were introduced designed to protect women willing to bind themselves as sureties or become involved in a similar legal act. The jurist Ulpianus relates that Augustus and Claudius issued edicts that prohibited women from 'interceding' for their husbands, i.e. undertaking liability for their debts.[342] This prohibition was extended by the *senatus consultum Velleianum* (*c.* AD 46), which stipulated that a woman was not permitted to assume liability for another person (*intercedere pro alio*) by standing as surety, granting real security or undertaking other legal obligations.[343] If she did so, the relevant transaction was not deemed void but she could raise the *exceptio senatus consulti Velleiani* as a defence against any claim arising therefrom. This exception was inadmissible, however, if the woman had benefited from such transaction.[344] Finally, Justinian issued a law that declared invalid any agreement whereby a wife bound herself as surety for her husband or accepted a legal obligation in his favour, unless it was clear that such agreement was in her own interest.[345]

4.10 Obligations Arising from Delicts

In modern law a distinction is drawn between delict (or tort) and crime, or between the delictual (or tortious) and criminal aspects of an act. In general, the distinction is between an act that endangers the order or security of the state, and one that violates an individual's rights to his person, property or reputation. The difference between delict and crime corresponds to the difference between the two principal objects the law is concerned with, namely redress and punishment. With respect to delict, the chief aim of the law is to compensate the injured party rather than punish the wrongdoer. With respect to crime, on the other hand, the principal aim of the law is to punish the wrongdoer with a view to preventing him and others from committing

[340] *Nov* 4. And see C 8. 40. 28 pr-1.

[341] It should be noted that the above-mentioned *beneficia* could be renounced by the surety either expressly or tacitly.

[342] D 16. 1. 2 pr.

[343] See in general D 16. 1 & C 4. 29.

[344] D 16. 1. 16. And consider D 16. 1. 21 pr. 1

[345] See *Nov* 134. 8. In later juridical literature the relevant law is sometimes referred to as *Authentica si qua mulier*.

the same or similar crimes in the future and/or satisfying the public sentiment that wrongdoing must be met with retribution.

In Roman law the corresponding distinction was between *delictum* and *crimen*. The term *delictum* or *maleficium* denoted an unlawful act that caused loss or injury to the person, property, honour or reputation of another. From this act there arose an obligation on the part of the wrongdoer to pay a penalty or compensate the victim for the harm suffered. The word *crimen*, on the other hand, signified a wrongful act that was directed against the state or the community as a whole, and prosecuted by state organs. Examples of *crimina* recognized from an early age included treason (*perduellio*), murder (*parricidium*), sacrilege and arson.

Nevertheless, Roman law did not clearly distinguish between the law of delicts and criminal law: the law of delicts, besides being concerned with compensation for the victim, sought also to inflict punishment on the wrongdoer. This can be explained on the ground that the sum payable to the injured party originated as the formalization of the primitive right of revenge. Such sum was a fine (*poena*) imposed as a punishment on the wrongdoer that went, however, not to the state as in the ordinary criminal process, but to the victim. The penal character of the Roman delict was manifested in various ways: first, the sum a wrongdoer was condemned to pay usually far exceeded the cost of the damage suffered by the victim; secondly, if more than one person had jointly committed a delict, each was liable in full and atonement by one did not release the others; and, thirdly, liability *ex delicto* did not descend to the wrongdoer's heirs, since against the latter there was no right of revenge. In Roman law the principal point of distinction between delict and crime was that in the former case the victim could recover compensation and inflict punishment on the wrongdoer by means of a private action in civil proceedings and not through prosecution by state organs.

The dual nature of the Roman law of delict is clearly shown by the types of action the injured party (i.e. the creditor) could institute against the wrongdoer (i.e. the debtor). A distinction is usually drawn between three types of action: *actiones rei persecutoriae*, directed at restoring the victim to the financial position he would have possessed had the harmful event not occurred; *actiones poenales*, by means of which the plaintiff sued for payment of a penalty; and *actiones mixtae*, which as the name denotes combined punitive and compensatory functions. An example of an *actio rei persecutoria* was the *condictio furtiva*, by means of which the victim of theft (*furtum*) could claim the recovery of the stolen property. This action should be distinguished from the *actio furti*, a penal action (*actio poenalis*) directed at the payment of a monetary penalty the amount of which depended on the kind of theft committed.[346]

[346] It should be noted that the method for determining the amount of the penalty in the case of *actiones poenales* was different from the way in which the amount of damages was calculated in the case of *actiones rei persecutoriae*. In some cases a fixed tariff was laid down for penalties, whilst in other cases the penalty was determined by the judge at his discretion and in accordance with what he considered to be 'good and equitable' (*bonum et aequum*). The relevant calculation was usually based on the value of the property affected and, depending on the circumstances, the penalty was proportionate to such amount or was a multiple thereof.

Finally, an example of an *actio mixta* was the *actio legis Aquiliae* that arose from wrongful damage to property. By way of this action the victim could claim damages as well as a penalty from the wrongdoer.[347]

As previously noted, a delict was a wrongful act that gave rise to an obligation between the wrongdoer and the victim. This, however, does not mean that every act whereby a person caused harm to the person or property of another engendered an obligation. For an act to qualify as a delict certain important requirements had to be met.

Originally, the law required that the relevant injury had been caused by a direct physical act. In later law, however, remedies were granted even in a case of indirect causation of damage or, in exceptional circumstances, in the case of an omission. Furthermore, the injury must have been the result of a wrongful act (*damnum iniuria datum*)—*iniuria* in this context meant no more than unlawfulness (*non iure*), i.e. there must have been no lawful defence for the relevant act as there would be, for example, in the case of justifiable self-defence. In primitive Roman law, the element of fault was not expressly required for delictual liability as someone causing harm to the person or property of another was presumed to have acted willingly. In time, however, intent (*dolus*) became an explicit requirement of all delictual liability. Thus, delicts were punishable only if the wrongdoer had committed the relevant act knowingly and intentionally. Negligence (*culpa*) constituted a requirement of liability under the *lex Aquilia*, which was concerned with damage to property. At the final stage of this legal development, the element of fault (*dolus and culpa*) was treated as distinct from wrongfulness which was thus recognized as a separate requirement of delictual liability.[348]

The Roman *delicta privata* developed casuistically and the Roman jurists did not formulate an abstract concept of delict. Justinian follows Gaius in classifying the principal delicts into four categories: theft (*furtum*), robbery (*rapina*), wrongful damage to property (*damnum iniuria datum*) and insult (*iniuria*). There were many other forms of delict (civil and praetorian)[349] but for present purposes this discussion may be restricted to these four categories.

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[347] See *Inst* 4. 6. 18.

[348] Fault could not be attributed to an insane person (*furiosus*) nor to a person below the age of puberty (*impubes*) who was *doli incapax*, i.e. had no capacity of understanding the wrongful character of his actions. See D 9. 2. 5. 2; D 47. 2. 23; D 47. 8. 2. 19.

[349] Reference may be made, for example, to the fraud of creditors (*fraus creditorum*), which came to the fore when a debtor, for the purpose of deceiving creditors, alienated property in order to become insolvent and hence unable to pay his debts. A creditor thus deceived could seek the rescission of such fraudulent alienation by means of the *actio Pauliana*. Other forms of delict were the bribery or corruption of a slave (*corruptio servi*); the violation or desecration of a grave (*violatio sepulcri*); and the unlawful chopping down of trees (*arbores succisae*).

4.10.1 *Furtum*

One of the oldest forms of delict known to Roman law was *furtum*, generally translated as theft. However, the Roman concept of *furtum* was broader in scope than the modern concept of theft.[350] It encompassed not only the actual removal of another's thing but also a diversity of acts involving intentional interference with a movable object without the knowledge of, or contrary to an agreement with, the owner of such object.[351] According to the well-known definition attributed to the jurist Paulus: "Theft is the fraudulent interference with a thing, whether with the thing itself or the use or possession of it, with a view to gain—an action that is forbidden according to natural law."[352] From this definition the principal elements of *furtum* can be derived.

The first element was *contrectatio*: the handling of an object against the will of the owner (*invito domino*) or the person who had a lawful interest in such object. Examples of *contrectatio* included the removal of a thing, embezzlement, receiving stolen goods, disposing of a pledged thing without being authorized to do so (by a *pactum distrahendi*), accepting an object that the owner had handed over by mistake, and hiding an escaped slave. Furthermore, a pledgee or depositee who made use of the pledged or deposited object committed *furtum* as did the borrower who misused the thing lent and even the owner who fraudulently removed a thing from one who had a real right in it or from a hirer with a right of retention for expenses.[353] Secondly, there had to be intent (*dolus malus*) on the part of the thief to appropriate the thing (sometimes referred to as *animus furandi* or *adfectus furandi*) together with the intention to derive some form of gain or profit from such appropriation. Thus, children and insane persons could not commit theft since they lacked the requisite *animus furandi* nor could a person removing or handling a thing under the mistaken belief, for example, that the thing was his or it had been abandoned by its owner.[354] Moreover, the stolen thing had to be a moveable

[350] *Furtum* was derived from the word *ferre* (to bear or carry).

[351] In general, all that was required for the commission of theft was *contrectatio* or the physical handling of an object against the will of its owner. However, in primitive Roman law *furtum* probably referred only to the act of removal of an object (it also included the removal of a person under the *potestas* of another—see G 3. 199). The broadening of its scope in later times was probably due to the fact that the remedies for *furtum* were applied in practice to a diversity of cases lying outside their original scope so that by the time the jurists came to formulate a definition *furtum* could no longer be limited to acts of removal.

[352] D 47. 2. 1. 3. This definition is repeated in the Institutes, with the omission of the phrase "with a view to gain." See *Inst* 4. 1. 1.

[353] G 3. 195–196; G 3. 200; D 47. 2. 15. 1. And see *Inst* 4. 1. 6–7; *Inst* 4. 1. 18; D 13. 1. 18; D 16. 3. 29 pr; D 41. 2. 3. 18; D 47. 2. 25 pr-1; D 47. 2. 48. 1; D 47. 2. 43 pr; D 47. 2. 52. 7; D 47. 2. 68 pr; C 6. 2. 14.

[354] G 3. 197; *Inst* 4. 1. 7. In general, the *animus furandi* of a thief (*fur*) involved his awareness that the owner or the person possessing an interest in the thing would not have allowed the handling; or, according to some jurists, he lacked a reasonable belief that such owner or person with an interest

corporeal object.[355] The act of seizing possession of immovables, even by force, did not constitute theft, although the person who was dispossessed in this manner had remedies for retrieving his possession. Finally, the thing had to be a *res in commercio* in which someone had a lawful interest. Thus there could be no *furtum* if the thing was a *res nullius*, i.e. it belonged to no one.

A distinction was drawn between three basic forms of theft: *furtum rei*, *furtum usus* and *furtum possessionis*. The first, *furtum rei*, was the unlawful appropriation of another person's movable property. This existed as the most frequently occurring form of theft. *Furtum usus*, or theft of use, consisted of the improper use of a thing belonging to another where the thing was obtained from the owner for a specific purpose and was in the possession of the thief. Examples of this kind of theft included those of the *depositarius* who used an object deposited with him for his own purposes, or of the *commodatarius* who used an object handed over as a loan for a purpose different from that for which it had been lent.[356] The third form of theft, *furtum possessionis* or theft of possession, arose when an owner improperly removed his own thing from the possession of another person who had the right to hold it (e.g. a usufructuary or a pledgee).[357]

A further important distinction inhabiting the law of theft was that between manifest theft (*furtum manifestum*) and non-manifest theft (*furtum nec manifestum*). This distinction, recognized by the Law of the Twelve Tables, was important because the punishment imposed for manifest theft was much harsher than that imposed for non-manifest theft. Originally, theft was considered to be *manifestum* if the thief was caught in the act. In the classical era, however, various interpretations of *furtum manifestum* were proposed by the jurists. As Gaius narrates, some jurists maintained that manifest theft was theft detected while being committed; others held that it was sufficient if the thief was found on the premises where the theft was committed; and others, ventured further in proposing that theft was manifest where the thief was caught with the stolen property before he had carried it to his

in the thing would have allowed the handling. Moreover, the law required that the consent of the owner or person having an interest in the thing was actually lacking (and this would be the case even where the owner's consent was induced by mistake, force, fraud or fear). However, there were cases in which the wrongdoer's knowledge that the owner would object did not entail *animus furandi*. For instance, if A damaged B's property out of spite and with no intention of deriving profit, he would be liable for wrongful damage to property (under the *lex Aquilia*) but not for theft. This appears to make the intention to derive profit a necessary element of *animus furandi*. It should be noted that profit or gain was construed broadly to mean any advantage of a pecuniary and non-pecuniary nature.

[355] Originally, it was unclear whether immovables could be stolen but at an early stage the view prevailed that there could be no theft of immovables. However, things attached to land could be stolen when severed.

[356] G 3. 196–197; *Inst* 4. 1. 6–7; D 47. 2. 1. 3; D 47. 2. 12. 2; D 41. 3. 4. 21; D 47. 2. 77 pr.

[357] G 3. 200; *Inst* 4. 1. 10; D 47. 2. 15. 1; D 47. 2. 19. 6; D 47. 2. 75; D 47. 4. 1. 15.

destination.[358] The law of Justinian admitted all the above-mentioned cases as *furtum manifestum*.

According to the Law of the Twelve Tables, a manifest thief (*fur manifestus*) who tried to defend himself with arms or who was caught stealing by night, could lawfully be killed.[359] In all other cases, the thief was presented before a magistrate, flogged and handed over to the person from whom he stole.[360] In the later republican age the penalties established by the Law of the Twelve Tables fell into disuse as a new penal action, the *actio furti manifesti*, for four times the value of the property stolen was created by the praetor. This action remained throughout the ages to the time of Justinian's reign.

In all the cases that did not meet the requirements of *furtum manifestum* the thief was considered to be non-manifest (*nec manifestus*) and the *actio furti nec manifesti*, directed at payment of twice the value of the stolen property, was instituted for the punishment of the thief. [361]

Originally, the *actio furti* could only be instituted by the owner of the stolen property,[362] but in later law it was made available to others who had a legitimate interest in such property, especially persons liable for *custodia*. In general, it may be asserted that the action was available to any person considered to have an interest in the property not being stolen such as the pledgee, the usufructuary, the *bona fide* possessor and other persons in a similar position.[363] It should be noted that where

[358] G 3. 184. Gaius also points out that the third of these perspectives as well as the view that theft should be considered manifest if the thief was seen at any time with the stolen property were not accepted at his time.

[359] In these cases the person who suffered the theft was required to call the people of the neighbourhood together as witnesses.

[360] The position of the thief was apparently similar to that of an *adiudicatus*, i.e. the debtor who defaulted on his debt and was surrendered to the creditor to work off the debt. If the thief was a slave, he was first flogged and then put to death.

[361] The Law of the Twelve Tables provided that a person in whose house a stolen object was detected through a ritual search (*quaestio lance et licio*) was to be regarded as a *fur manifestus*. By the classical era the ritual searching of a house fell into disuse and was replaced by an informal search for which special legal remedies were made available. By way of the *actio furti concepti* the person in whose possession stolen goods were found during such a search was condemned to pay a sum amounting to three times the value of the goods. The *actio furti oblati* could be instituted against a person who had received stolen goods for three times the value of the stolen goods. Moreover, the praetor granted the *actio furti prohibiti* by which a sum amounting to four times the value of the stolen property could be claimed from a person who had obstructed a search for stolen goods; and the *actio furti non exhibiti* against the person who failed to produce stolen goods located on his premises. These actions were no longer in use in the time of Justinian. See in general G 3. 183–194; *Inst* 4. 1. 3–5; D 47. 2. 3; D 47. 2. 5–8; D 47. 2. 50 pr. It should be noted that the person who was condemned in terms of the *actio furti* was branded with *infamia*: the loss of esteem among one's fellow citizens.

[362] See D 47. 2. 47; D 47. 2. 67. 1; D 47. 2. 81. 1.

[363] The relevant interest might be 'positive' such as that of the usufructuary or the pledgee; or 'negative', where a person had the thing in question in his control and was liable to the owner if it was stolen, e.g. the *commodatarius* or the *conductor operis faciendi*, such as a cleaner of clothes (*fullo*). See in general G 3. 203–207; *Inst* 4. 1. 13–17; D 47. 2. 10; D 47. 2. 12.

the *actio furti* was instituted by a person who had an interest in the object stolen, an action by the owner was in principle precluded.[364]

The *actio furti manifesti* could be instituted only against the thief and his accomplices, i.e. those who actually committed the *contrectatio*. The *actio furti nec manifesti*, on the other hand, could be instituted also against the person or persons who assisted the thief by aid and counsel (*ope et consilio*) or who incited him to commit the theft. The liability was cumulative in the sense that each wrongdoer was liable for the same penalties.[365]

In addition to the *actio furti*, the owner of the stolen property could institute an *actio rei persecutoria* for the recovery of such property or its value. One such action was the *actio rei vindicatio*, a real action by means of which he could reclaim the possession of his property from any person (whether *bona fide* or *mala fide*) who may have held it without a right to do so. The *condictio furtiva* was an alternative comprised of a personal action that the owner could launch against the thief or his heirs for the recovery of the stolen object or its value (also applicable to the case where the *rei vindicatio* could not be instituted because the relevant object no longer existed).[366] Depending on the circumstances of the case, other *actiones rei persecutoriae* could apply such as the *actio depositi*.

4.10.2 Rapina

The delict *rapina* (robbery) came to the fore when a person appropriated a moveable corporeal object belonging to another with the use of violence (*vis*). As *rapina* was originally regarded as a form of theft (*furtum*), the rules that applied to theft applied also to robbery. Hence, the person who had been robbed could employ the *actio furti* as well as the *actiones rei persecutoriae* available to the victim of theft.

Since, as a rule, a person who committed robbery was not caught in the act, the punishment for *furtum manifestum* would seldom have applied and thus the robber was liable in terms of the *actio furti nec manifesti* to pay twice the value of the object in question. Such penalty was apparently too light and with the increasing incidents of robbery in the closing years of the Republic the praetor introduced a special action, the *actio vi bonorum raptorum*, in terms of which the robber

[364] It should be observed that the *actio furti* could not in principle be employed within the family circle. Thus, a son could not bring this action against his father nor a husband against his wife (and vice versa). However, if either spouse had taken property belonging to the other in contemplation of a divorce that actually occurred, redress could be sought by a special action referred to as *actio rerum amotarum*. See D 25. 2; C 5. 21.

[365] G 3. 202; *Inst* 4. 1. 11; D 47. 2. 34; D 47. 2. 50. 1–3.

[366] See in general *Inst* 4. 1. 19; D 13. 1; C 4. 8; D 13. 1. 1; D 13. 1. 7. 2; D 13. 1. 8 pr; D 47. 2. 14. 16; D 13. 1. 2–3; D 13. 1. 5; D 13. 1. 7. 2. It should be noted that the *rei vindicatio* could be brought only by the owner, while the *condictio furtiva* could be brought by the owner or the pledgee.

was liable for four times the value of the property that had been taken.[367] If there was more than one robber, liability was cumulative and so each robber had to pay the full penalty. However, the law required that the *actio vi bonorum raptorum* was instituted within a year of the robbery. If this time limit was not met, the action lay only for the value of the stolen object. It should be noted, further, that this action could be instigated by the person who had been robbed (i.e. the person in charge of the object at the moment of the robbery) or by his heirs against the robber and his accomplices (but not against their heirs).[368]

In the classical period the victim of robbery could institute, cumulatively with the *actio vi bonorum raptorum*, an *actio rei persecutoria* (usually the *rei vindicatio* or the *condictio furtiva*) for the recovery of the stolen property or its value. Under the law of Justinian the *actio vi bonorum raptorum* was deemed a mixed action (*actio mixta*), i.e. an action directed not only at the punishment of the wrongdoer but also at the recovery of the object taken or its value in one claim. In practice, this reduced the actual punishment to three times the value of the object and the *actiones rei persecutoriae* (i.e. the *rei vindicatio* or the *condictio furtiva*) were thus precluded.[369]

4.10.3 Damnum Iniuria Datum

Without doubt the most important of all Roman delicts was wrongful damage to property (*damnum iniuria datum*).[370] This delict originated in the *lex Aquilia*, a plebiscite passed probably in the third century BC.[371] Prior to the enactment of this law, the Law of the Twelve Tables and other *leges* provided remedies for several instances of wrongful damage to property. For example, there was the *actio de vitibus succisis*, granted against a person who cut down the vines of another (this was in time extended to apply to the chopping down of trees as well); the *actio de pastu pecoris*, employed against the owner of cattle which trespassed and grazed upon another person's land; and the *actio pluviae arcendae*, available when an owner of land initiated constructions by which the flow of rainwater

[367] As in the case of the *actio furti*, the condemned robber was branded with infamy (*infamia*).

[368] On the *actio vi bonorum raptorum*, see in general G 3. 209; *Inst* 4. 2 pr; D 47. 8. 1; D 47. 8. 2 pr; D 47. 8. 2. 27; D 3. 2. 1; *Inst* 4. 16. 2.

[369] Consider G 4. 8. as opposed to *Inst* 4. 2 pr. And see *Inst* 4. 6. 19; D 13. 1. 10. 1; D 47. 8. 2. 10.

[370] Literally translated as 'damage wrongfully caused'. The legal principles governing *damnum iniuria datum* provided the foundation for some of the basic principles in many modern legal systems relating to the general law of delict with particular reference to wrongful damage to property.

[371] The exact date of this enactment is unknown. Cicero articulates that the enactment originated from a very early age (*pro Tullio*, 4. 8), and some references in the law seem to confirm this view. Later sources speak of this law as being contemporaneous with the *lex Hortensia* of 287 BC. This is probably only a guess, but may be not far from the truth.

was redirected in such a way as to cause damage to neighbouring property. All these specific delicts were superseded by the *lex Aquilia*, which introduced provisions of a general character relating to wrongful damage to property.[372]

The *lex Aquilia* was divided into three sections or chapters. The first and third chapters dealt with wrongful damage to property while the second chapter dealt with the *adstipulator*, a special kind of surety or joint creditor in a *stipulatio*.[373] In the course of time the provisions of the second chapter fell into desuetude,[374] and for present purposes the discussion may be limited to the first and third chapters.

The first chapter of the *lex Aquilia* provided that whoever wrongfully killed another person's slave or four-footed grazing animal (*pecus*)[375] should be condemned to pay the owner the highest value that such slave or animal had in the year preceding the killing.[376] This chapter is limited in primitive style to a specific kind of damage inflicted on particular kinds of property. The use of the verb *occidere* (to slay) indicates that killing effected in another way, in principle, fell outside the ambit of the provision. The word *pecus* introduced a further limitation, since animals that were neither four-footed nor grazing in herds were excluded from the provision.[377] The third chapter, by contrast, manifests a striking advance in juristic thinking: it introduces a general concept of loss (*damnum*) brought about in ways that are described in such a general way that any material damage to property could be said to be covered. This chapter provided that, in cases not covered by the first chapter, if a person caused damage to another by wrongfully burning (*urere*), breaking (*frangere*) or destroying (*rumpere*) his property, he should be condemned to pay to the owner the highest value which the relevant thing had during the preceding thirty days. Although the modes of damaging another's property were initially limited to burning (*urere*), breaking (*frangere*) or destroying (*rumpere*), in the period following the enactment of the *lex Aquilia* the ambit of chapter three was extended by way of interpretation. Thus, the word *rumpere* (destroying) was construed to mean *corrumpere* in the sense of spoiling in general. Furthermore, the terms *occidere* (as encountered in the first chapter), *urere* and *frangere* were likewise extended in scope thereby rendering any form of harm caused by positive conduct to fall under the Aquilian law.[378]

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[372] D 9. 2. 1 pr.

[373] The role of the *adstipulator* has been discussed in the section above dealing with the contract of *stipulatio*.

[374] See D 9. 2. 27. 4; *Inst* 4. 3. 12.

[375] This category of animals encompassed animals normally living in a herd, such as sheep, oxen, horses, mules, donkeys and goats, and later expanded to include pigs and camels. Dogs and wild animals were excluded. See D 9. 2. 2. 2.

[376] *Inst* 4. 3 pr. And see G 3. 210; D 9. 2. 2 pr.

[377] Furthermore, no reference is made to the wrongful wounding of a slave or *pecus*.

[378] The wrongful wounding of another person's slave or four-footed grazing animal, as well as the killing or injuring of animals, falling outside the category of *pecus* were thus assimilated within the scope of the third chapter. See in general *Inst* 4. 3. 13; G 3. 217; D 9. 2. 27. 14; D 9. 2. 27. 15–20; D 9. 2. 27. 22–24; D 9. 2. 27. 33; D 9. 2. 42; D 9. 2. 7. 1–2; D 9. 2. 7. 5; D 9. 2. 7. 7–8; D 9. 2. 27. 6–8; D 9. 2. 27. 12.

The chief requirements of the delict of wrongful damage to property, in its pre-classical form, were that some form of physical damage had occurred entailing economic loss (*damnum*); such damage had been caused wrongfully (*iniuria*), without lawful justification; and moreover, it had been caused directly by a positive act of the wrongdoer to a tangible object (*damnum corpore corpori datum*). Thus damage caused indirectly or through omission (*omissio*) did not fall within the scope of the relevant provisions. Further, it should be noted that fault in the form of intent (*dolus*) or negligence (*culpa*) was not originally a prerequisite of liability under the *lex Aquilia*. This fact can be explained on the grounds that the notion of wrongfulness (*iniuria*) initially referred only to an act carried out unlawfully or without justification (*non iure* or *contra ius*). As this suggests, liability in the absence of a valid justification (such as self-defence, necessity or lawful authority) was absolute. At a later stage, probably before the end of the Republic, it was recognized that liability for damage was contingent on the existence of fault (*culpa*) in its widest sense[379]. However, no clear distinction between the elements of fault and wrongfulness was made. Finally, liability under the Aquilian law presupposed that the object damaged was the property of the plaintiff. Other interested parties who may have suffered loss, such as a usufructuary or a pledgee, had no remedy under this law.

The standard action available to the person who suffered injury under the Aquilian law was the *actio legis Aquiliae*, which was a mixed action (*actio mixta*) insofar as it aimed at recovering the damage inflicted and also punishing the wrongdoer. The punitive element in this action is shown by the fact that the action could not be instituted against the wrongdoer's heirs, unless they had been enriched as a consequence of the wrongful damage to property.[380] It also appears from the fact that the wrongdoer was held liable for the highest value of the damaged property in the preceding year or thirty days rather than for the actual value of such property at the time of the damage.[381] Although the aim of the relevant provisions was to punish the wrongdoer by compelling him to pay more than the actual damages suffered, in some cases the practical result might possibly have been contrary to this goal. Finally, the punitive nature of the *actio legis Aquiliae* is manifested by the fact that where more than one person committed *damnum iniuria datum* the liability was cumulative, i.e. each wrongdoer had to pay the full amount of damages owed to the victim.

Notwithstanding the broadening of Aquilian liability in the pre-classical era, there remained instances of wrongful damage to property with respect to which the *lex Aquilia* did not provide any redress. Consequently, during the classical period the field of application of this law was further extended and adapted to the needs of a developed society. This evolution is displayed by the fact that the *actio legis*

[379] D 9. 2. 5. 1. Consider also G 3. 211.

[380] On the other hand, the heirs of the person who suffered the damage could employ the action. D 9. 2. 23. 8.

[381] *Inst* 4. 3. 9.

Aquiliae, which was originally granted only to the owner of the damaged property or to his heir, was later rendered available (usually in the form of a praetorian *actio in factum* or *actio utilis*)[382] to other interested parties who had suffered financial loss, such as the *bona fide* possessor, usufructuary, pledgee, usuary and lease-holder.[383] Furthermore, contrary to the original *lex Aquilia* that provided a remedy for damage only to a tangible thing (*res*) and not to a person, the relevant action was extended to incorporate physical injury inflicted on a free-born person.[384] Another development of importance, largely derived from the contribution of the jurists, related to the assessment of damages. Whereas the amount of compensation initially depended upon the objective value of the damaged or destroyed object, it was later calculated by reference to the extent to which the interest of the aggrieved party (*id quod interest*) had been affected. This amount was then construed to include consequential damages (*damnum emergens*) as well as lost profit (*lucrum cessans*).[385] In this way, the actual loss suffered by the prejudiced person became redressable.[386]

As previously noted, the *lex Aquilia* originally required that the damage had been caused directly by means of a physical act. However, as Roman society evolved this requirement was considered too restrictive. Thus, the requisite link between cause and effect was discerned even in cases where damage had been caused indirectly and consequently the scope of Aquilian liability was considerably extended. Such a link was recognized, for example, in a case where a slave had been locked up in a barn and died of starvation, or where one helped a slave to escape. In such cases the praetor granted *actiones in factum* or *actiones utiles*, since

[382] An *actio in factum* was an 'ad hoc' action granted on equitable grounds to a person who suffered injury in circumstances not covered by existing law. When such an action was allowed, the actual facts of the case were incorporated into a new formula (*formula in factum concepta*). An *actio utilis* was devised by the praetor to deal with a case which was not covered by the existing law but which was analogous to another case with an available legal remedy. However, there was probably no difference in practice between these actions. Indeed, many examples can be found in the sources in which the *actio utilis* and *actio in factum* seem to have been used interchangeably. For example, see D 9. 2. 7. 6; D 9. 2. 9 pr; G 3. 219.

[383] D 9. 2. 11. 10; D 9. 2. 12; D 9. 2. 17; D 9. 2. 27. 14; D 9. 2. 30. 1.

[384] D 9. 2. 5. 3; D 9. 2. 7 pr; D 9. 2. 13 pr. As a result of this extension of the scope of Aquilian law, *damnum iniuria datum* may seem to overlap to some extent with the delict of *iniuria*. In this respect, it should be noted that the extension was intended to make the relevant action available against a person who caused personal injury through negligence, given that *iniuria* primarily envisaged personal injury that was inflicted intentionally.

[385] *Inst* 4. 3. 10; G 3. 212; D 9. 2. 21. 2; D 9. 2. 22; D 9. 2. 23 pr-7; D 9. 2. 33 pr; D 9. 2. 37. 1; D 9. 2. 7 pr; D 9. 2. 27. 17; D 9. 2. 29. 3; D 9. 2. 41 pr; D 9. 2. 45. 1. It should be noted that sentimental value (*affectiones*) was not taken into consideration.

[386] It should be noted that if the defendant acknowledged liability *in iure*, the case that followed was concerned with establishing the amount of compensation he had to pay. See D 9. 2. 23. 11; D 9. 2. 24; D 9. 2. 25. 2. However, if he denied liability and the ensuing case entailed a judgment against him, he was ordered to pay twice the fixed amount of compensation. See D 9. 2. 2. 1; D 9. 2. 23. 10; G 4. 9; G 4. 171; C 3. 35. 4–5.

the *actio legis Aquiliae* applicable under the *ius civile* was not allowed. No general rule was laid down but these praetorian actions were made available, in a casuistic fashion, whenever the causal link between the wrongdoer's conduct and the damage was recognized by society as existing and not being too remote. A mere omission to act did not give rise to delictual liability. However, this rule was subject to the qualification that a person who had previously made a positive undertaking had to carry it through to its proper completion.[387]

Finally, although initially Aquilian liability only required that the damage caused was done unlawfully (*iniuria*), the jurists began to interpret *iniuria* in a broader sense involving both wrongfulness and fault (*dolus* or *culpa*) as two distinct elements. This development, which culminated in the post-classical era, was probably precipitated by the extension of the casual link from direct to indirect causation. An action causing damage to property was wrongful if it had been committed with intention (*dolus*) or negligence (*culpa*).[388] Furthermore, such action had to be done without lawful justification or excuse. The main defences that could be pleaded by the defendant were self-defence,[389] necessity,[390] acquiescence or consent,[391] incapacity[392] and lawful exercise of disciplinary authority.[393]

[387] A well-known example of an omission giving rise to delictual liability relates to the doctor who failed to provide adequate post-operative care to a patient. See *Inst* 4. 3. 6. Consider also D 9. 2. 8 pr; D 9. 2. 27. 9; D 9. 2. 30. 3.

[388] With regard to negligence as a form of fault it was stated that even the slightest negligence would give rise to liability for damage to property. As previously explained, negligence was construed as a failure to foresee what a reasonable man (*bonus paterfamilias*) would have foreseen. A person practising a profession requiring special knowledge or skill had to exhibit a reasonable degree of such knowledge or skill. Failure to do so amounted to negligence, even though the ordinary reasonable man would not have that knowledge or skill. See in general D 9. 2. 44 pr; D 9. 2. 11 pr; *Inst* 4. 3. 7; *Inst* 4. 3. 8; D 9. 2. 8. 1. See also G 3. 202; G 3. 211; *Inst* 4. 3. 3–4; *Inst* 4. 3. 14; D 9. 2. 5. 1–2; D 9. 2. 6; D 9. 2. 8 pr; D 9. 2. 29. 2–4; D 9. 2. 30. 3; D 9. 2. 31.

[389] This defence was based on the claim that the defendant had caused damage in defending his person or property against the plaintiff. However, for the defence to succeed it was required that the defendant had used no more force than was necessary to prevent the harm. Moreover, where a person in trying to defend himself or his property accidentally inflicted injury on another (*aberratio ictus*: diversion of the blow), he was liable to the third party. On the defence of self-defence see D 9. 2. 4 pr-1; D 9. 2. 5 pr; D 9. 2. 30 pr; D 9. 2. 45. 4.

[390] In this context, the defendant claimed that he had caused damage to another's property to save his own life or to protect his own property. See D 9. 2. 29. 3; D 9. 2. 49. 1; D 47. 9. 3. 7.

[391] It was recognized that where a person expressly consented to certain harm or risk of harm, he had only himself to blame for any actual harm. This ground of justification is recited in modern law as *volenti non fit iniuria* ("no injury is done to a person who consents"). On this defence see D 2. 14. 7. 13; D 9. 2. 27. 29; D 47. 10. 1. 5; D 9. 2. 11 pr; D 9. 2. 7. 4.

[392] Lunatics and children under the age of 7 could not be held liable as they were considered to be incapable of *dolus* or *culpa*. D 9. 2. 5. 2.

[393] No more than a light form of chastisement (*levis castigatio*) was allowed. D 9. 2. 5. 3; D 19. 2. 13. 4.

4.10.4 *Iniuria*

The term *iniuria* in its widest sense signified wrongfulness in general or the absence of a right. As the name of a particular delict, however, it had a more specific meaning: it denoted the intentional and unlawful infringement of the body, honour or reputation of a free person.[394]

Originally there was no general delict of *iniuria*, but the Law of the Twelve Tables recognized a diversity of specific cases in which remedies were granted for attacks on a person's right to his personal integrity. For instance, penalties were imposed for the use of magical incantations or the casting of spells over a person (*malum carmen incantare* or *occentare*).[395] However, the provisions of this law, from which the classical delict of *iniuria* eventually descended, dealt principally with physical assaults. The mutilation or permanent disablement of a limb (*membrum ruptum*) was initially punished by means of *talio* (an eye for an eye and a tooth for a tooth) but could later be redeemed by payment of a penalty; whilst the breaking of a bone (*os fractum*) invoked fixed pecuniary penalties.[396]

In the course of time, the early forms of delict involving injury to person elaborated in the Law of the Twelve Tables were superseded by a general delict of *iniuria*—a development precipitated by the activities of the praetor and completed by the jurists.[397] A pivotal point in this process was the introduction by the praetor of the *actio aestimatoria iniuriarum* in place of the obsolete *talio* and the fixed monetary penalties that had become derisory as a result of inflation. This legal device was a penal action (*actio poenalis*) by means of which the victim could claim an amount assessed in accordance with the circumstances of the case as well as the judge's views on a just and equitable outcome. Originally the action was promised as a separate action in each particular case, but at a later stage it was made applicable to all cases of *iniuria*. At the same time, a series of edicts induced an expansion in the meaning of *iniuria* to include not only physical assaults but also an ever-growing range of offences against a person's honour or reputation.[398]

The principal element of *iniuria* was *contumelia*: a wrongful infringement of another person's bodily integrity, honour or reputation that ultimately encompassed

[394] D 47. 10. 1 pr.

[395] *Malum carmen incantare* and *occentare* are identified by later writers with *iniuria* (as later understood) caused by defamatory words or songs. For example, see Cicero, *De repub*. 4, 10, 12.

[396] Relatively small penalties were imposed for other forms of violence deemed in Roman law as less serious, such as rape, simple wounding and deprivation of freedom. See G 3. 223.

[397] It should be noted that the *lex Cornelia de iniuriis* (81 BC), enacted in the time of Sulla, introduced a remedy in the form of criminal prosecution for certain forms of personal assault and for breaking into another person's dwelling. See D 3. 3. 42. 1; D 47. 10. 5 pr; *Inst* 4. 4. 8. In classical and later law it was possible for the aggrieved person to utilize both civil and criminal remedies. See *Inst* 4. 4. 10.

[398] D 47. 10. 1. 1. The term *convicium* encountered in this section denoted an insult expressed in a crude language. Consider also *Inst* 4. 4 pr-1; G 3. 220. In the course of time the jurists extended the scope of *iniuria* to encompass any wanton interference with another person's rights.

even wanton interference with another person's public or proprietary rights.[399] It was required that the victim had suffered a discernible injury to his feelings or senses. Thus, if the victim did not show immediate resentment it was assumed that he did not feel the injury and the relevant action would not lie.[400] Furthermore, the infringement had to be committed intentionally or deliberately (i.e. with *animus iniuriandi*: an intention of injuring).[401] The delict of *iniuria* did not encompass a negligent or fortuitous act that could cause harm to another person.[402] Finally, the injury-causing act had to be unlawful, i.e. it was committed without a recognized justification or defence. Such defences included the lawful exercise of disciplinary authority,[403] retortion or self-defence,[404] mistake,[405] incapacity,[406] acting in the heat of the moment,[407] acting in jest or joviality,[408] or telling the truth.[409]

[399] Examples of such infringements included assault and battery, defamation, trespass, public abuse against another, malicious prosecution, the exercise of a servitude without a claim of right, the violation of the chastity of a woman or child, threatening, throwing rubbish on a neighbour's property, causing nuisance with water or smoke, making a false announcement that someone owes one a debt, preventing someone from taking a seat in a theatre or from using a public washing facility, and preventing someone from fishing in the sea—in sum, any form of unwarranted interference with another's rights.

[400] See *Inst* 4. 4. 12. It was asserted that such action was one of *vindictam spirans* ('breathing revenge') to indicate that the plaintiff was vengeful and wished for the removal of the *contumelia*.

[401] D 47. 10. 3. 1; G 3. 220; *Inst* 4. 4. 1. The term *animus iniuriandi* does not appear in Roman juridical literature.

[402] As noted earlier, this explains the necessity for expanding the effect of the *lex Aquilia* to provide a remedy for bodily harm caused by negligence.

[403] Deeds committed by an official by virtue of his authority provided no ground for delictual liability for *iniuria*. See D 47. 10. 13. 6. Moreover, it was recognized that a patron or master might legitimately exercise light discipline towards his freedman or slave respectively.

[404] For such a defence to succeed the retortion had to be proportionate to the injury caused. See C 8. 4. 1.

[405] This defence could be relied upon if the defendant *bona fide* believed that he was justified in committing the deed elaborated in the plaintiff's complaint. However, a mistake as to the identity of the victim did not exclude liability for *iniuria*. D 47. 10. 3. 4; D 47. 10. 18. 3.

[406] Lunatics and children under the age of 7 could not be held liable for *iniuria* since they were deemed incapable of forming the requisite intent. D 47. 10. 3. 1. Intoxication was not recognized as a defence in classical law, but it might have been accepted as such in the post-classical period. See C 9. 7. 1.

[407] A defendant could claim that because the injury-causing deed was committed in the heat of anger, during a quarrel or after provocation, he had not formed a clear intention to injure. See D 50. 17. 48.

[408] The defendant might assert that his act or words was intended as a joke. D 47. 10. 3. 3.

[409] The defendant might claim that, when he made the comment complained of, he was simply telling the truth about the misdeeds of the plaintiff. Such a claim operated as a defence on the grounds that a person should not be allowed to recover for injury caused by his own behaviour, as well as on the public policy grounds that wrongdoings should be made public. However, this defence would fail where there was an obligation of secrecy on the part of the defendant arising from a personal or confidential relationship. D 47. 10. 18 pr; D 9. 2. 41 pr.

Delictual liability for *iniuria* could arise directly or indirectly, for example by insulting the wife, children or other dependants of another and thereby injuring the husband, father or master. For a person to claim that he suffered injury indirectly or as a consequence of a wrongful act directed against another (*iniuria per consequentias*), he had to prove that the requisite relationship between him and the person immediately affected existed at the time the injury was inflicted as well as at the time the relevant legal action was instituted. It was required, moreover, that the wrongdoer was aware of such relationship.[410]

As already noted, the action available to the aggrieved person was the *actio aestimatoria iniuriarum* (also referred to as *actio iniuriarum*) in terms of which the judge was required to determine the amount of the penalty in light of all the surrounding circumstances.[411] In this action the injured party made an initial assessment of the amount of the penalty and the judge was instructed to sentence the defendant to what seemed to him as right and equitable (*bonum et aequum*), but not to a larger sum than that demanded by the plaintiff.[412] The *iniuria* could be assessed as slight or grave (*iniuria atrox*), depending on the circumstances in which it was committed. An injury might be *atrox* by reference to the manner in which it was inflicted (*ex facto*); the place where it occurred (*ex loco*); the status of the victim (*ex persona*); and the part of the body injured (*ex loco vulneris*).[413] In the case of *iniuria atrox* the praetor prescribed a sum for which the defendant was required to provide security (*vadimonium*). Such security served as assurance that the defendant would appear in court and defend the action. From this security the sum due to the plaintiff, if the latter won the case, was also paid. The *actio iniuriarum*, being penal, could be brought only by the aggrieved person himself against the wrongdoer personally but not against his heirs.[414] Furthermore, the action was cumulative against accomplices and accessories, i.e. each offender had to pay the full penalty.[415]

[410] G 3. 221; *Inst* 4. 4. 2; D 47. 10. 1. 3. Originally a husband suffered *iniuria* when an offence was committed against his wife only if she was in his *manus* (see the relevant discussion in the chapter on the law of persons above). A wife was not considered to suffer injury by an insult to her husband. It should be noted that if the person immediately affected consented to the injury, this did not preclude his or her relatives from instituting an action against the wrongdoer. See D 47. 10. 26.

[411] G 3. 224; *Inst* 4. 4. 7; D 47. 10. 7 pr; D 47. 10. 17. 5.

[412] In the case involving a claim for *iniuria per consequentias*, the penalty recoverable by the relative was not necessarily the same as that recoverable by the person directly affected by the wrongdoer's action. For example, if the daughter of a state official was insulted, the official would probably recover more than his daughter. See D 47. 10. 30. 1.

[413] G. 3. 222 & 225; *Inst* 4. 4. 7 & 9; D 47. 10. 7. 8; D 47. 10. 8; D 47. 10. 9 pr-4.

[414] D 47. 10. 13 pr; G 4. 112.

[415] D 47. 10. 11 pr; D 47. 10. 11. 6. The action had to be brought within 1 year after the wrongful act complained of had occurred. See C 9. 35. 5. Condemnation in terms of this action entailed *infamia*. D 3. 2. 4. 5.

4.11 Quasi-Delicts

A fourth category of obligations referred to in the Institutes of Justinian are the obligations arising from quasi-delicts (*obligationes quasi ex delicto* or *quasi ex maleficio*). The term *quasi-delictum* denoted a wrongful act that did not qualify as a *delictum* but which nevertheless engendered an obligation between the aggrieved person and the actor, even though the latter may not in fact be blameworthy.[416] Justinian enumerates four kinds of wrongdoing under the heading of quasi-delicts, of which the last three appear to have related to vicarious liability.

4.11.1 Iudex Qui Litem Suam Facit

A judge (*iudex*) who formulated a wrong decision either deliberately or negligently[417] with the result that a litigant wrongfully suffered damage was personally liable and could be sued by the aggrieved litigant with a praetorian action for damages.[418] It should be recalled that a judge in Roman society was originally a private citizen and not necessarily an expert in legal matters. This remained so even at a later stage, when the role of judge was granted to magistrates and imperial officials. Furthermore, if a judge did issue a wrong decision there was either no possibility of appeal or only a limited possibility. It was necessary, therefore, to provide some protection to litigants prejudiced by a wrong or unfair judgment owing to the judge's dishonesty, negligence or ignorance.

4.11.2 Res Deiectae Vel Effusae

The occupier of a building from which objects were thrown (*deiectae*) or poured (*effusae*), no matter by whom, onto a public place could be sued with a praetorian *actio in factum* by passers-by who suffered damage to person or property. It was unimportant whether the damage was caused intentionally, negligently or by accident. If property was damaged, the action pursued twice the amount of damage

[416] The rationale for the classification of certain obligations as quasi-delicts remains unclear. Evidence suggests that this classification originated in the law schools of the Eastern Roman Empire and was probably the result of interpolation. This approach seems to derive support from the fact that in classical law the relevant institutions were subsumed in the category of *obligationes ex variis causarum figuris* (obligations arising from various causes). See D 44. 7. 1 pr.

[417] Such a judge was said to 'make the case his own' (*qui litem suam fecerit*). This phrase originally meant that the judge behaved as if he were a party to the case, not a judge, but it later came to refer to any irregularity in the decision-making process.

[418] *Inst* 4. 5 pr; D 44. 7. 5. 4; D 50. 13. 6.

caused. If a free person was killed, there was a fixed penalty of 50 *aurei*[419]; if he suffered bodily harm, the penalty was determined by the judge by taking into consideration medical costs and other financial losses.[420]

4.11.3 Res Suspensae Vel Positae

An action could be instituted against the occupier of a building when an object was suspended or placed in such a way as to pose a danger to passers-by (e.g. a plant-pot placed on a window-sill). In this case, it also made no difference whether the object was placed in the dangerous position by the occupier or some other person, nor did it matter whether intent or negligence or neither was present. The relevant action was an *actio popularis*, i.e. it could be brought by any member of the community in the interest of public order, and was for a fixed penalty of ten *solidi*. If the object actually fell, it was held to have been thrown down and so the *res deiectae* action mentioned above applied.[421]

4.11.4 Nauta, Caupo, Stabularius

The master of a ship (*nauta* or *exercitor navis*), inn-keeper (*caupo*) and stable-keeper (*stabularius*) incurred vicarious liability for theft of and damage to the property of their clients (passengers or guests) committed by their slaves or employees on board the ship or on the premises in question. Innkeepers were moreover liable for the same wrongful acts of permanent residents. A praetorian *actio in factum*, penal in character, lay for twice the value of the property concerned. In this context, liability was sometimes understood to arise from the negligence of the person in charge of the relevant activity in the choice of his employees.[422]

4.12 Other Forms of Delict

4.12.1 Praetorian Delicts

In addition to the delicts deriving from the *ius civile*, the praetor created a number of penal actions in respect of certain forms of misconduct for which the civil law made

[419] Any member of the public could institute the relevant action within a year (i.e. such action was an *actio popularis*), but preference was usually given to close relatives. D 9. 3. 5. 5.

[420] See *Inst* 4. 5. 1; D 9. 3; D 44. 7. 5. 5.

[421] *Inst* 4. 5. 1–2; D 9. 3. 5. 6–13; D 44. 7. 5. 5.

[422] *Inst* 4. 5. 3; D 44. 7. 5. 6; D 47. 5.

no provision. The wrongdoings to which these actions applied are commonly referred to as praetorian delicts.[423] There were numerous such delicts, but we need only consider the two most important of them, namely duress or compulsion (*metus*) and fraud (*dolus*).

4.12.1.1 Metus

Metus came to the fore when a person was induced by threats of violence to enter into a legal act to his own detriment. If the legal act originated in the *ius civile*, the duress had no effect on it and the act remained perfectly valid in all respects. To rectify this unsatisfactory situation, the praetor intervened and a number of legal remedies were made available to persons subjected to duress, provided the force or threat of force used was of such nature that a reasonable person would have feared imminent danger to his person, property or family. Threats capable of supporting a claim of duress included physical injury, death, enslavement, an accusation on a capital charge, or an attack upon the chastity of the person threatened or a member of his family.[424]

From an early age in legal history, the person forced by duress to conclude a legal transaction arising from the *ius civile* was granted the *exceptio metus* (or *exceptio quod metus causa*) by the praetor as a defence against any person seeking to profit by the transaction in question.[425] However, if the transaction was based on *bona fides*, raising the *exceptio metus* was superfluous as good faith did not require performance of an obligation arising from a transaction concluded under duress.[426]

Where the legal act entered into under duress had already been executed and financial loss had been suffered as a result, the praetor made available to the aggrieved person a *restitutio in integrum* whereby the latter could request the restoration of the legal situation that existed prior to the conclusion of such act. This meant that the relevant legal act was annulled and the payment or other performance already made had to be restored.[427]

A much stronger remedy was the *actio quod metus causa* (also referred to simply as *actio metus causa*), a penal action applicable whenever someone incurred financial loss as a result of duress and that pursued a payment of four times the value of such loss. With the introduction of this action towards the end of the republican age, *metus* was granted recognition as an independent delict. The action

[423] The term is not of Roman origin.

[424] See D 4. 2. 1. A threat to do something lawful or the existence of a vague fear were not sufficient to establish duress. See D 4. 2. 3. 1; D 4. 2. 5; D 4. 2. 6. And see D 4. 2. 4; D 4. 2. 7–9.

[425] D 44. 4. 4. 33. And see G 4. 117; D 4. 2. 9. 3; D 4. 2. 14. 9; C 8. 37. 9 pr. It should be noted that the *exceptio metus* was granted also against a plaintiff who did not himself use duress.

[426] It may be said that the *exceptio metus* was inherent in all *actiones bonae fidei*, i.e. actions with respect to which good faith was explicitly taken into consideration. See C 4. 44. 1.

[427] D 4. 2. 3 pr.

was instituted by the party who suffered loss against any person (even if he were *bona fide*) who profited from the act performed under duress and not necessarily against the wrongdoer. If, for instance, someone compelled another by duress to transfer property to a third party, the person incurring the loss could institute the action against the third party.[428] Furthermore, the action had to be instigated within a year after the legal act in question otherwise the prejudiced party's claim was only for simple damages.[429] It is interesting to note that when this action came to the fore the defendant was given the choice to avoid condemnation by restoring the property he had obtained through duress or, if such property was not restored, to be sentenced to pay four times the value of the plaintiff's loss.[430]

4.12.1.2 Dolus

Dolus (or *dolus malus*) denoted any fraud, deceit or contrivance employed to induce a person to enter into a legal transaction to his own detriment.[431] Just as in the case of duress, *dolus* did not invalidate a transaction that arose from the *ius civile* and the victim had no remedy against the defrauder, except perhaps on the ground that the fraud had induced an error on his part. However, in the first century BC the praetor intervened and granted the *exceptio doli* to the person who had been conned into concluding a legal transaction as a defence against an action aimed at enforcing such transaction.[432] As in the case of duress, raising this defence was not necessary where the legal transaction in question was based on *bona fides*. When the transaction had been executed and loss had already been suffered, the praetor granted *restitutio in integrum* to the defrauded party. This remedy was apparently assimilated at an early stage by the *actio doli* and *dolus* was elevated to the status of an independent delict.

The *actio doli* was a penal action applicable where a person incurred financial loss as a result of fraud and was directed at compensation for the actual loss suffered.[433] This action differed from the *actio quod metus causa* in that it could be brought only against the actual defrauder and not against third parties, probably because it entailed *infamia*.[434] On the other hand, as in the case of the action arising from duress, the *actio doli* had to be instituted within a year and the defendant could avoid condemnation by restoring what he had fraudulently obtained (if he could do

[428] D 4. 2. 9. 8; D 4. 2. 14. 3; D 4. 2. 14. 5.

[429] D 4. 2. 14. 1; D 4. 2. 14. 7; D 4. 2. 14. 2.

[430] D 4. 2. 14. 1; D 4. 2. 14. 3–4; *Inst* 4. 6. 31. It should be noted that condemnation in terms of the *actio quod metus causa* did not give rise to *infamia*.

[431] Consider D 4. 3. 1. 2.

[432] D 4. 3. 40; G 4. 117; G 4. 119; G 4. 121; D 44. 4. 2. 3; D 44. 4. 4. 33.

[433] D 4. 3. 1. 1. The *actio doli* was introduced by the praetor and jurist Aquilius Gallus in ca 66 BC.

[434] D 4. 3. 15. 3; D 3. 2. 1.

so).[435] Finally, it is important to note that the *actio doli* was a subsidiary action (*actio subsidiaria*) since it could be employed only if no other remedy of any kind was available.[436] For example, a person who was induced by fraud to purchase an object could not use this action against the seller, because his action in respect of the sale (*actio empti*) would address the matter.

4.12.2 Noxal Liability

The Roman law of delicts proceeded from the principle that the wrongdoer was personally liable and, accordingly, it was against him that the injured person was entitled to take revenge. The personal nature of delictual liability is reflected in the way Roman law dealt with cases involving wrongful acts committed by persons *in potestate* or slaves. Since no claim in law could be laid against such persons, the claim was laid against the *paterfamilias* or master of the slave (*dominus*) in the form of an *actio noxalis*. If, for example, a slave committed theft, the *actio furti* could be instituted as an *actio noxalis* against the slave's master. Originally, the purpose of the *actio noxalis* was to demand that the *paterfamilias* or *dominus* should surrender the wrongdoer (*noxae deditio*) to the injured person so that vengeance could be taken on him. This entailed a conflict between the injured person's right of revenge and the *potestas* of the father or master, which was in later times resolved by allowing the latter to 'buy off' the injured person by paying a penalty.[437] An important principle in this regard was that noxal liability followed the wrongdoer (*noxa caput sequitur*). This meant that if the dependant person was emancipated or the slave freed before the action was brought, such dependant or slave became personally liable by means of an ordinary action; if the slave was sold, the *actio noxalis* had to be instituted against the person who was his owner at the time of the joinder of issue (*litis contestatio*).[438]

During the late imperial age noxal liability in respect of free-born persons *in potestate* fell into disuse and, accordingly, the *actio noxalis* was retained only in respect of wrongful deeds committed by slaves. [439]

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[435] D 4. 3. 18 pr; *Inst* 4. 6. 31.

[436] D 4. 3. 1. 1; D 4. 3. 1. 4.

[437] D 9. 4. 1. And see *Inst* 4. 8 pr. The term *noxa* denoted both the 'body which inflicted the damage' (*Inst* 4. 8. 1) and the indemnification itself.

[438] D 47. 2. 18; D 47. 2. 41. 2; G 4. 77; *Inst* 4. 8. 5.

[439] *Inst* 4. 8. 7. This development was connected with the fact that the *filiusfamilias* acquired sufficient independence and means (*peculium castrense*) to be able to satisfy claims arising from their own delicts. Moreover, as Roman society evolved, revenge played a lesser part than the payment of money as a means of satisfying an obligation arising from delict. Thus, even with respect to slaves, the whole idea behind noxal liability was no longer revenge, but the need to provide pecuniary satisfaction for the injury caused. Thus, a slave who could find sufficient money to make good the damage he had caused was entitled to be liberated.

4.12.2.1 Actio de Pauperie

Roman law recognized a special form of noxal liability in cases where a four-footed animal caused damage in circumstances in which its owner could not be held at fault. Such damage was known as *pauperies* and gave rise to an *actio de pauperie*—a remedy deriving from the Law of the Twelve Tables—by means of which the owner of the animal could be compelled either to compensate the wronged party or to surrender the animal.[440] Originally the *actio de pauperie* applied to all four-footed animals but was later extended to other animals in the form of an *actio utilis*.[441] At the same time, however, the jurists limited the class of animals covered to domestic animals (such as horses, sheep, oxen and dogs).[442] For the plaintiff to succeed, he had to show that the animal had caused the damage by acting 'contrary to its nature' (*contra suam naturam*).[443] This somewhat obscure phrase means that the animal must have behaved in a manner contrary to what the aggrieved person could reasonably have expected of it, if all circumstances were taken into consideration.[444] If the damage was caused by a wild animal, the *actio de pauperie* did not apply as it was considered to be in the nature of such an animal to cause damage.[445]

4.13 Termination of Obligations

An obligation could be terminated in a number of ways. The principal mode for this event was the performance or discharge of the debt arising from the obligation. Furthermore, an obligation could be extinguished *ipso iure* or by operation of law

[440] D 9. 1. 1 pr; D 9. 1. 1. 11. It should be noted that if the animal died before the joinder of issue (*litis contestatio*), the owner of the animal was not liable at all. But if it died after the *litis contestatio*, the liability to compensate remained intact and the owner, in case of condemnation, had to satisfy the victim's claim. See D 9. 1. 1. 12–14.

[441] The term *actio utilis* denotes an action developed through an extension or modification of an already existing action to address a situation not covered by the present law.

[442] Consider D 9. 1. 1. 2; D 9. 1. 4.

[443] D 9. 1. 1. 7.

[444] Thus, if an animal behaved in a dangerous manner by nature (e.g. a dog that was inclined to bite), the action still applied. On the other hand, a person who was bitten by a another's dog in the street would not have expected to be attacked in such a manner. Moreover, the action would fail if the damage was caused by an animal that had been provoked by the person attacked or had kicked out because it was excited by pain. *Inst* 4. 9 pr; D 9. 1. 5; D 9. 1. 1. 7; D 9. 1. 1. 10.

[445] If a wild animal escaped from captivity and attacked a person, the victim had no claim since such animal became a *res nullius* when it escaped and thus there was no master to sue. It should be noted, however, that the aedilician edict gave an action for damages against any person who kept wild animals near a public road. Furthermore, Justinian extended the scope of application of the *actio de pauperie* to include damage caused even by wild animals. See D 9. 1. 4; *Inst* 4. 9. 1; D 21. 1. 40–42.

on the one hand, or by voluntary action on the other hand. These categories of termination again occurred in diverse forms, as will be explained below.

4.13.1 Performance

The debtor could discharge the obligation by performance or fulfilment (*solutio*)[446] of the duty undertaken. He could do so personally or arrange that it be accomplished by a third person, even if the creditor was unaware of it or had forbidden it. An exception to the rule that anybody could make performance on behalf of the debtor arose in cases where the performance was of such a nature that it could be carried out only by the debtor himself. This would be the case, for example, where an artist had been commissioned to create a particular work of art. The performance could be rendered to the creditor or a third person authorized or appointed by the creditor (for instance, a creditor of the creditor).[447]

The performance had to be that which was due. If the debtor tendered performance of something other than what was due, no release was effected. It was possible, however, for the creditor to accept an alternative performance (referred to as *datio in solutum*) and, in such case, the debtor's obligation was extinguished.[448] Furthermore, performance had to be tendered in full and, unless otherwise agreed, the creditor could reject performance by way of instalments.

The parties often prescribed the time at which and place where performance had to be rendered for the legal act in question. Where the parties had neglected to do so, these particulars were determined by reference to the circumstances of the case, such as the type of performance due and the practical implications of its delivery.[449]

4.13.2 Release

The creditor and debtor could reach an agreement that the latter would be released from the obligation resting on him. In early law such release was effected by means of a formal verbal acknowledgment of performance of an

[446] Derived from the verb *solvere*: to untie the bond or obligation.

[447] *Inst* 3. 29 pr; G 3. 168; D 3. 5. 38; D 46. 3. 49; D 46. 3. 53–54; D 46. 3. 61; D 46. 3. 72. 2; D 50. 16. 47; D 50. 16. 176; C 8. 42; D 13. 7. 11. 5; D 46. 3. 12; D 46. 3. 18; D 50. 17. 180.

[448] According to the prevalent view, proposed by the Sabinian jurists and adopted by Justinian. It should be noted that if the substitute performance was subsequently evicted, the initial obligation would be reinstated. Consider D 46. 3. 46 pr-1; D 46. 3. 98.

[449] D 13. 4. 9; D 38. 1. 21; D 45. 1. 14; D 45. 1. 73 pr; D 50. 17. 14. As previously noted, failure on the part of the debtor to make timeous performance resulted in *mora debitoris*.

obligation created by *stipulatio*. The stipulatory debtor formally asked his creditor whether the latter had received performance (*habesne acceptum?*), and the creditor formally answered that he had (*habeo*).[450] This form of release, known as *acceptilatio*, was possible only if the relevant obligation arose from a verbal contract (*contractus verbis*).[451] Where the obligation had arisen from any other source (sale, loan, delict and such like), the *acceptilatio* could be employed only after the obligation had been transformed into a *contractus verbis* by means of *novatio*. This transformation was effected by a special form of *stipulatio* called *stipulatio Aquiliana*.[452]

In later law, release from an obligation could be effected by means of an informal agreement in terms of which the creditor undertook not to sue the debtor in court for the fulfilment of his obligation (*pactum de non petendo*). Where the debtor was released in this manner from an obligation arising from the *ius civile*, the *exceptio pacti conventi* was granted to him by the praetor as a defence against a claim for performance instituted by the creditor. In the case of an obligation *bonae fidei* arising from the *ius honorarium*, on the other hand, this *exceptio* was not necessary since the debtor was released as soon as the relevant informal agreement had been concluded.[453]

With respect to consensual contracts (*contractus consensu*), it was recognized from an early period that the debtor could be discharged from his obligation by mere agreement, provided that nothing of the contract had yet been executed (*re integra*). It may be asserted that as in such contracts the *consensus* formed the basis of the relevant obligation, the subsequent agreement to release operated as a 'reverse *consensus*' (*contrarius consensus*).[454]

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[450] Gaius refers to this mode of release as an imaginary or fictitious performance (*imaginaria solutio*). By the time of Justinian, it had fallen into abeyance. G 3. 169–170; *Inst* 3. 29. 1; D 18. 5. 3; D 46. 3. 80; D 46. 3. 107; D 46. 4. 1; D 46. 4. 7; D 46. 4. 8. 3; D 46. 4. 19 pr.

[451] It should be noted that where an obligation had arisen from a contract that had been concluded *per aes et libram*, it could be extinguished by a reverse legal act (*contrarius actus*) and the act in this case consisted of a procedure *per aes et libram*. Consider G 3. 173–175. This mode of release (*solutio per aes et libram*) fell into abeyance at an early period and the verbal *acceptilatio* became the only form of release available.

[452] This was introduced by the jurist Gaius Aquilius Gallus in the first century BC as a novating *stipulatio* capable of embracing all obligations, however incurred. *Inst* 3. 29. 2; G 3. 170; D 46. 4. 18.

[453] D 2. 14. 7. 8; D 2. 14. 7. 14; D 2. 14. 17. 1; D 2. 14. 27. 4; D 18. 5. 3. See also G 4. 119; G 4. 121–122; G 4. 126; D 44. 1. 3. A particular type of *pactum de non petendo* was *transactio*: an agreement whereby the parties settled an existing dispute between them. If the dispute related to a particular obligation, such obligation was extinguished by compromise. In the law of Justinian, *transactio* was regarded as a form of innominate contract (*contractus innominatus*). See D 2. 15; C 2. 4.

[454] *Inst* 3. 29. 4. And see D 18. 5. 3; D 18. 5. 5. 1; D 18. 1. 72 pr; D 46. 3. 80; D 46. 3. 95. 12; D 46. 4. 8 pr; D 50. 17. 35; C 4. 45. 1.

4.13.3 Set-Off

Set-off (*compensatio*) was a form of termination of an obligation which came to the fore when two parties were both debtor and creditor with respect to each other. For instance, one party could be creditor to another by virtue of a *stipulatio* for payment of an amount of money while the other party was creditor to the first for payment of a monetary penalty arising from a delict. Instead of compelling the parties to pay each other, it seemed reasonable to allow the discharge of the relevant obligations by an adjustment and settlement of the reciprocal debts. Thus, if the debts were equal they would be discharged entirely; if unequal, the smaller debt would be discharged while the larger would remain in force for the balance. In this way the parties' obligations towards each other could be extinguished entirely or partially.[455]

Classical Roman law recognized a diversity of cases in which *compensatio* could be effected. First, there was the case that arose from a transaction engendering a *iudicium bonae fidei* with respect to which the judge was given full power to resolve controversial matters according to the principles of good faith. In such cases it was possible for the judge to set-off a counterclaim of the defendant originating from the same transaction (*ex eadem causa*) against the claim of the plaintiff. For instance, a case involving a contract of letting and hiring could feature a lessor who had a claim because the lessee had fallen in arrears with his rent and, on the other hand, the lessee had a claim for costs incurred by him in the maintenance of the rented property. Instead of instituting two separate court cases, it was possible for both claims to be brought before the same judge for determining each claim and compensating the two parties against each other.[456] The next case was that of property deposited with a banker (*argentarius*). In this case the principle prevailed that the client's claim for what had been deposited had to be compensated against the banker's claims for payments he made on behalf of the client, and only the balance could be claimed. It was required that the claims of both parties shared the same nature and quality (i.e. for money, as a rule), but they did not have to arise from the same cause of action.[457] A third case referred to in the sources arose when a person bought an insolvent estate. The buyer (*bonorum emptor*) was entitled to bring a claim in favour of the estate only after deduction (*cum deductione*) of a counterclaim the defendant might have had against the estate. The claims in question might have arisen from the same or separate transactions, and did not necessarily have to display a similar nature.[458]

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[455] D 16. 2. 1. Consider also D 12. 6. 30; D 16. 2. 2–3; D 16. 2. 6.

[456] See G 4. 61–63; *Inst* 4. 6. 30; D 16. 2. 7. 1; D 27. 4. 1. 4.

[457] See G 4. 64; G 4. 66; G 4. 68.

[458] G 4. 65–68. A number of further cases of *compensatio* were recognized in classical law. Where the relevant counterclaims were based on *bona fides*, the set-off could be effected by means of an informal agreement. Where, on the other hand, they originated in the *strictum ius*, a claim by a person who had agreed to a set-off could be countered only by means of the *exceptio doli* (according to a rescript of Emperor Marcus Aurelius). In other words, *compensatio* did not take

Justinian extended the applicability of *compensatio* further by providing that all actionable, liquid (*liquida*) claims and counterclaims could by operation of law (*ipso iure*) be set-off regardless of whether they were based on real or personal rights.[459]

4.13.4 Merger

An obligation was extinguished *ipso iure* by merger (*confusio*) when the capacities of the creditor and debtor were combined in one and the same person, for instance when the debtor became the creditor's heir.[460] It should be noted that such *confusio* also discharged the surety, whilst the identification of debtor and surety discharged the suretyship. On the other hand, the obligation to pay the debt remained unaffected if there was an identification of surety and creditor.[461]

4.13.5 Novation

Novation (*novatio*) was the termination of an obligation by its replacement with a new one. In early law *novatio* was effected mainly by means of *stipulatio*, but in later times it could occur by way of an informal agreement (*pactum*).[462] Its importance lay in the fact that it could be used to transform any existing obligation into an obligation *ex stipulatione*. Moreover, it made possible the replacement of one of the parties to an obligation by another, which was particularly important in view of the intensely personal character of obligations.

As a prerequisite of *novatio* the performance due under the new obligation had to be the same as under the old one (*idem debitum*) otherwise both obligations would exist. Nevertheless, some new element (*aliquid novi*) had to be present in the second obligation as well otherwise the new obligation would be redundant and void. Such element could consist, for example, of the substitution of the creditor or debtor by another person, the introduction or removal of a condition or time clause, or the substitution of the object of the obligation (e.g. a sack of grain) by its

place by operation of law (*ipso iure*) but was introduced by way of a defence (*ope exceptionis*). This meant the defendant was entitled to raise the relevant defence and effect the set-off, but he did not necessarily have to do so. See D 16. 2. 18. 1; *Inst* 4. 6. 30; *Inst* 4. 6. 39.

[459] Exceptionally, no counterclaim could be raised for the purposes of set-off against a claim on deposit. Consider *Inst* 4. 6. 30.

[460] D 46. 3. 75. See also G 4. 112; *Inst* 4. 12. 1; D 46. 3. 107; C 8. 37. 13 pr-1.

[461] D 46. 1. 21. 3; D 46. 1. 21. 5; D 46. 1. 5; D 46. 1. 14; D 46. 1. 71 pr; D 46. 3. 93. 2–3; G 4. 113; C 8. 40. 24.

[462] D 46. 2. 1.

monetary value.[463] Under the law of Justinian it was required, further, that the parties should have the intention to novate (*animus novanti*) and have clearly expressed such intention.[464]

By means of *novatio* the old obligation was extinguished by operation of law (*ipso iure*). At the same time, all real and personal collateral securities given in respect of the old obligation were terminated (unless expressly retained for the new obligation) and interest on the old obligation ceased to run.[465]

4.13.6 Delegation

A further method for the discharge of an obligation, closely connected to novation, was delegation (*delegatio*). This occurred when a person authorized another to pay a debt to or assume an obligation towards a third person with a view to effecting a change of creditors or debtors to an existing obligation. In essence this amounted to the transfer of obligations or duties created by a contract to a third party. For example, if A owed B and B owed C, B could direct A to promise to pay C. A's promise to pay C would novate and thus extinguish B's obligation to C. It is important to note, however, that delegation presupposed the co-operation of the persons involved.[466]

4.13.7 Cession

Cession denoted the transfer of a personal right to another in such a manner that the person to whom the cession is made (the cessionary) assumes the place of the creditor, but this device was not feasible in Roman law due to the strictly personal nature of obligations. However, what was in substance the same result was achieved by means of the institution of procedural representation whereby the creditor transferred his right to a representative (*cognitor* or *procurator*) and authorized him to enforce it against his debtor. An obvious problem with this simple device was that, in the eyes of the law, the cedent remained creditor and could at any time before the joinder of issue (*litis contestatio*) release the debtor or accept satisfaction of the debt. In later times an *actio utilis* was granted to the representative under certain circumstances to enable him to enforce the claim in his own name. In the

[463] D 46. 2. See also G 3. 176–179; D 45. 1. 18; D 45. 1. 29 pr; C 8. 41. 3. 1; C 8. 41. 8. *Novatio* could not take place in respect of only part of an obligation.

[464] *Inst* 3. 29. 3a. And see D 46. 2. 24; D 46. 2. 30; D 46. 2. 31 pr.

[465] D 13. 7. 11. 1; D 20. 4. 12. 5; D 46. 2. 18; D 46. 3. 43; C 8. 40. 4.

[466] D 46. 2. 11. Consider also C 8. 41. 1; C 8. 41. 3. 1; D 46. 2. 19; D 46. 2. 33; D 46. 3. 56; D 46. 3. 64.

time of Justinian this remedy became redundant as a result of the recognition granted to the transfer of rights, which elevated the representative (the cessionary) to the position of creditor in place of the original creditor (the cedent).[467]

4.13.8 Further Modes by Which Obligations Were Extinguished

Besides the methods of discharge of obligations mentioned above, an obligation could also be terminated in a number of other ways. These included: a subsequent impossibility of performance, i.e. where the debtor was prevented from discharging his obligation without fault on his part[468]; the death of either party where the relevant obligation was not transmissible (as, for example, in *mandatum*); joinder of issue (*litis contestatio*)[469]; and lapse of time, where this extinguished the right in question (extinctive prescription).[470]

[467] G 2. 39; G 4. 82.-84; G 4. 89; C 4. 10. 1; C 4. 15. 5; C 6. 37. 18; C 8. 53. 33.

[468] Such impossibility of performance might be due to a superior force (*vis maior*) or an accident (*casus fortuitus*) that could not have been foreseen or prevented by the exercise of reasonable care or caution. For example, see D 45. 1. 37.

[469] *Litis contestatio* denoted the close of pleadings, the last act *in iure* before the parties proceeded to trial before the judge (see the relevant discussion in the chapter on the law of actions below). This novated and thus terminated the original obligation, giving rise in its place to a new obligation to fulfil the judgment debt in case of condemnation.

[470] See C 7. 39. 3.

Chapter 5
The Law of Succession

5.1 Introductory

As previously noted, the Roman jurists regarded the law of succession as a part of the law of property since succession was construed as a mode of acquisition of ownership *per universitatem*, i.e. of an estate as a whole, in contrast with acquisition of ownership over individual objects (*singulae res*). Since, however, it was not merely the assets of the deceased that passed to the heirs but also his debts or obligations, the law of succession is more appropriately treated for present purposes as an independent section of private law.

Although there is scant information on the origin of Roman succession, it undoubtedly developed at a relatively early stage of legal history and was closely connected with the institution of the family. *Hereditas*, the original form of succession on death in Roman law, was considered the natural expression of the continuity and solidarity of the early patriarchal family and involved the identification of the heirs with the deceased for religious as well as economic purposes.[1] The Law of the Twelve Tables recognized both intestate and testamentary succession. The rules of intestate succession (succession *ab intestato*) determined who would be heir when the deceased had not himself indicated how his property should be distributed. The rules of testamentary succession (succession *ex testamento*), on the other hand, came into operation after a testator had indicated in a prescribed manner, usually by way of a will, the plans for disposal of his property upon his death. As Roman society evolved, testamentary succession acquired greater importance than intestate succession since the attitude prevailed that every prudent and right-thinking Roman should determine the devolution of their estate by means of a will.

[1] The great importance of succession in early times derived from its connection with religion: it was deemed necessary that someone should take the place of the deceased in carrying out the duties of family worship. In the course of time, a further pragmatic need arose; namely, that creditors should have information on the person designated to tackle payment of the deceased's debts.

G. Mousourakis, *Fundamentals of Roman Private Law*,
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5.2 Intestate Succession

The rules of intestate succession came into operation when a person failed to create a valid will or when the will he composed was later declared legally invalid. Furthermore, these rules came to the fore if the heir or heirs nominated in a will could not accept the inheritance or refused to do so.[2] The law of intestate succession underwent various important phases of development: the sequence of succession on intestacy was first prescribed by the Law of the Twelve Tables; in the later republican age considerable changes were effected by the praetor in an attempt to rectify some defects in the early system; finally, Justinian reformed the law again and thereby created his well-known system that served as the foundation of many modern systems.

5.2.1 Intestate Succession Under the Law of the Twelve Tables

The order of intestate succession as prescribed by the Law of the Twelve Tables placed the *sui heredes* as the first priority, thereafter the *proximi agnati* and finally the *gentiles*.[3]

The first group of heirs entitled to the estate were the *sui heredes*; that is, those free persons who fell under the *potestas* of the deceased and who became *sui iuris* on his death. As a rule, this group included the testator's children (*filii familias* and *filiae familias*) and further descendants (e.g. grandchildren) who did not themselves have a male ascendant who would become *sui iuris* on the testator's death; his adoptive children; his wife, if she had been married to him *in manu*; his children born after his death (*postumi*); and children with respect to whom the testator had commenced emancipation proceedings that had not yet been completed.[4] The *sui heredes* succeeded equally and were compelled to inherit irrespective of whether they wished to do so (hence they were also called *heredes sui et necessarii*).[5]

If there were no *sui heredes*, the estate was transferred to the nearest agnatic relatives (*proximi agnati*). This group was comprised of the collaterals who, through the male line, were most closely related to the deceased and had previously fallen under the *potestas* of a common *paterfamilias*. As a rule, this group included the brothers and sisters of the testator as well as his uncles and aunts or the nearest

[2] See *Inst* 3. 1 pr: "A person dies intestate, who either has made no testament at all, or has made one not legally valid; or if the testament he has made is revoked, or made useless; or if no one becomes heir under it." And see D 38. 16. 1 pr.

[3] XII T 5.4 & 5.

[4] Consider G 3. 1–4; *Inst* 3. 1. 1 ff.

[5] If a *suus heres* was unable to inherit, representation (*representatio*) was possible. This meant that the descendants of an *alieni iuris* (e.g. grandchildren) obtained their parent's share, insofar as they were *alieni iuris* of the testator and became *sui iuris* on his death.

descendants of these persons. The nearest kin succeeded to the exclusion of those who were further removed. In the event there was more than one agnate of the same degree of kinship, the testator's property was divided *per capita*, i.e. each of them obtained an equal share, without the possibility of representation. For example, if there were two brothers they each obtained equal shares and excluded nephews and nieces of the testator related through a deceased third brother. Otherwise than in the case of the *sui heredes*, the *proximi agnati* could lawfully refuse to accept the succession (hence they were described as *heredes voluntarii*), in which case the second tier of nearest *agnati* could succeed.[6]

Finally, if there were neither *sui heredes* nor *proximi agnati* the estate devolved on the *gens* or clan of the deceased—a group of families claiming descent from a common ancestor and connected to each other on the grounds of certain common interests.[7]

5.2.2 *Praetorian Intestate Succession*

As Roman society developed, the system of intestate succession elaborated by the Law of the Twelve Tables proved inadequate in several respects. Among the principal defects was that the system excluded from succession emancipated children or children given in adoption, relations through females, collaterals with respect to whom the agnatic bond had been broken by *capitis deminutio*, female agnates beyond the degree of sisters and blood relations (*cognati*). To address these and other disadvantages, the praetor introduced a series of edicts whereby a new system of intestate succession was gradually developed that finally replaced the old order of the *ius civile*. In these edicts the praetor promised to grant certain persons, who otherwise could not inherit, the possession of the deceased person's estate (*bonorum possessio*) on the understanding that they could acquire ownership of such estate as 'praetorian' or 'bonitary' owners by means of prescription.[8] Following an application by the interested party, the praetor investigated whether the applicant belonged to one of the groups to which *bonorum possessio* was promised and, if this was the case, granted the *interdictum quorum bonorum*. By means of this interdict the assets of the deceased's estate could be claimed from anyone who held them as an heir or simply as a possessor without a title (*sine causa*) and once in possession, *usucapio* of 1 year rendered the possessor heir (*heres*). Although the praetor could not designate anybody as an heir against the existing rules of the *ius*

[6] G 3. 10–11. And see G 3. 12–16. Female agnatic relatives could succeed only if they were sisters of the deceased. Further degrees of female agnates were excluded.

[7] G 3. 17.

[8] G 3. 32. Consider also *Inst* 3. 9.

civile, he could place a person in the position of an heir and thereby achieve the same end result.[9]

The first group of persons who could acquire *bonorum possessio* were the *liberi*, comprising the descendants of the deceased (including emancipated children), irrespective of whether or not they became *sui iuris* on his death.[10] If there were no *liberi* or if the existing *liberi* did not apply for *bonorum possessio* within the prescribed time, the second group that could demand possession were the *legitimi*, i.e. those persons that could inherit in accordance with the Law of the Twelve Tables (*sui heredes*, *proximi agnati*, *gentiles*). The third category of persons who could request possession in default of the above-mentioned groups were the *proximi cognati*, i.e. all blood relations of the deceased through males or females up to and including the sixth degree.[11] Finally, the surviving husband or wife of the deceased could request *bonorum possessio* in accordance with the *edictum unde vir et uxor*. This would only apply in the case of a marriage *sine manu* where both spouses were *sui iuris*.[12]

In default of all the above-mentioned groups, the inheritance was treated as property without an owner (*bona vacantia*) and devolved on the state treasury (*fiscus*).[13]

The praetorian system of intestate succession described above remained in place until the time of Justinian. However, several modifications to that system were introduced during the Principate age to strengthen the position of blood relatives and, more specifically, to improve the rights of succession between mother and child. This was a logical consequence of the increasing emancipation of women especially after the marriage *sine manu* became the prevailing form of marriage in Rome. The most important of these changes were effected by means of two

[9] Originally, this *bonorum possessio* did not operate against third parties who had a claim to the testator's property in accordance with the *ius civile*. In later times, however, such possession was protected by the *interdictum quorum bonorum* and other remedies.

[10] The chief aim of the relevant edict (*edictum unde liberi*) was to facilitate emancipated children to inherit from their father. In this instance, the testator's estate was divided into as many equal portions as there were surviving and predeceased children who left descendants. Each surviving child took one share, and the share of a predeceased child was divided among his children (representation *per stirpes*).

[11] The relevant group included children in an adoptive family; female agnates remoter than sisters; agnates who had suffered a *capitis deminutio*; and other remoter agnates. It should be noted that this was the first time that succession based on *cognatio* was recognized in Roman law. The blood relatives of the nearest degree inherited first to the exclusion of those who were further removed. If there were several such relatives of the same degree, the testator's estate was divided *per capita*, i.e. each of them was given an equal share (as remoter degrees of relationship were excluded, there was no representation *per stirpes*).

[12] The four categories of persons mentioned in this context pertained only to free-born persons (*ingenui*).

[13] This event occurred in accordance with the so-called *leges caducariae* (the *lex Iulia de maritandis ordinibus* and the *lex Papia Poppaea*). It should be noted that as the *fiscus* was not regarded as an heir, it could not be held liable for the debts of the deceased. An heir, on the other hand, was deemed fully responsible for the testator's liabilities and if the assets of the estate were insufficient to satisfy the creditors, he would have to pay from his own pocket.

senatorial resolutions: the *senatus consultum Tertullianum*, passed in the time of Hadrian (AD 117–138); and the *senatus consultum Orfitianum* (AD 178). The former granted a mother who had the *ius liberorum*[14] a right of succession on intestacy to her children's inheritance,[15] while according to the latter the children were the first to succeed to the estate of a mother who died intestate.[16]

5.2.3 Intestate Succession in Justinian's Law

Although the praetorian intestate succession along with the modifications effected by the above-mentioned senatorial resolutions was initially retained by the drafters of the Justinianic codification, Justinian in the late stages of his reign introduced a completely new system of intestate succession based on blood relationship (*cognatio*) by means of two important Novels (*Novellae* 118 and 127).

Under the new system, the descendants (*descendentes*) of the deceased were the first to succeed, regardless of whether they were related through the male or female line. Adopted and legitimized descendants were also included.[17] The testator's estate was divided *per stirpes*[18] and representation (*representatio*) was possible.

If there were no descendants, the estate devolved on the ascendants (*adscendentes*) and the brothers and sisters of the deceased. Where there were only ascendants, the nearer excluded the more remote. If there were more than one ascendant in the same degree (e.g. two grandfathers and a grandmother), the estate was divided and each line of ascendants (i.e. the paternal and maternal line) was given half of the estate. That half portion was then divided *per capita* among the nearest ascendants of each line. If there were surviving full brothers and sisters of the deceased, besides the ascendants, the estate was divided among the nearest ascendants and the brothers and sisters *per capita*—in this case the estate was not divided between the two lines of ascendants. Where there were no ascendants, the estate was divided *per capita* between the brothers and sisters with *representatio*

[14] Free-born women who had three children and freedwomen who had four were released from the guardianship to which women were subject (*tutela mulierum*) by the *ius liberorum*. The women's *ius liberorum* prevailed even where the children were no longer alive.

[15] According to this resolution, the children of the deceased succeeded first, then the father and, subsequently, the mother along with the brothers and sisters.

[16] Later legislation extended this privilege to grandchildren. It should be noted that with respect to both the *senatus consultum Tertullianum* and the *senatus consultum Orfitianum*, it was irrelevant whether the child was legitimate or not.

[17] Under this system adopted descendants had a double succession: to the property of their natural parents and to that of their adoptive parents.

[18] As previously indicated, division *per stirpes* ("per branch") means that each branch of the deceased person's family received an equal share of the estate, regardless of how many people are in that branch. The method of division *per capita*, on the other hand, weighs each person equally, rather than each branch equally.

being allowed. Children (but not further descendants) of a deceased brother or sister could succeed in the place of such brother or sister by way of *representatio*.

If there were no members of the second group, half-brothers and half-sisters inherited *per capita*, and representation by their children (but not by further descendants) was also recognized.

Where there were no representatives of the three classes mentioned above, all other blood relatives had a turn at succession with no limit of remoteness.[19] The estate was again divided *per capita* among the *cognati* with the nearer degree excluding the more remote and without the possibility of representation.

Furthermore, although it was not expressly stated, it would appear that if there were no blood relatives at all the surviving spouse could succeed as a last resort.

If the deceased left no interstate heirs, the estate became *bona vacantia* and was acquired by the state treasury (*fiscus*).[20]

5.3 Testamentary Succession

The law of testamentary succession elaborated the rules pertaining to the creation of a valid will, the nature of the dispositions that could be included in a will and the effect of these dispositions. As these rules were very complicated, the matter was also initially regulated by the *ius civile* and then later by *ius praetorium*. By the time of Justinian, however, the early forms of will had either become obsolete or so radically changed that they were scarcely recognizable.

5.3.1 Early Forms of Will

The earliest form of will known to Roman law was the so-called *testamentum calatis comitiis*: a will created in a strictly formal manner, orally, before the popular assembly (*comitia curiata*). The *comitia curiata* met twice a year under the name *comitia calata* for the specific purpose of ratifying certain ceremonial acts of private law, such as adoptions and the making of wills.[21] It seems probable that

[19] Under the praetorian system of intestate succession, blood relatives beyond the sixth degree could not succeed. This limitation was apparently no longer recognized.

[20] Justinian's system of intestate succession served as a model for the legal systems of Continental Europe and thereby the legal systems of many countries around the world.

[21] The essential element of the *testamentum calatis comitiis* was the nomination of a universal successor (*heredis institutio*). There is in fact a close connection between this form of will and the institution of adoption (*adrogatio per populum*): as *adrogatio* effected an adoption *inter vivos*, so the testament effected an adoption *mortis causa*. In both cases the principal motive was to secure the continuation of the family in the absence of a male descendant. Furthermore, it is probable that through the creation of a testament before the assembly a *paterfamilias* had an opportunity to nominate a successor (usually from among his *sui heredes*) and to explicitly exclude other *sui heredes* whom he considered unsuitable.

originally the assembly had to grant its approval in the form of a legislative act, but in later times the people's role in these cases was confined to merely witnessing the relevant procedure. Another early form of will was the *testamentum in procinctu*: a will created through an oral declaration by a soldier to his fellow soldiers when they were in battle array (*in procinctu*). Both the above forms of will became obsolete and fell into abeyance before the end of the Republic.[22]

A third form of will that emerged at an early stage and continued to be used for a relatively long period was the *testamentum per aes et libram*. This involved an adaptation to the purpose of will-making of the process of *mancipatio* that, as previously noted, was employed in various contexts to render the transfer of rights from one person to another effective. In original form, the *testamentum per aes et libram* consisted of the formal transfer of the testator's estate by way of *mancipatio* to a trustee (*familiae emptor*) with oral instructions (*nuncupatio*) that the latter should divide it among the persons nominated as heirs after the testator's death. In early law the trustee stood in place of an heir (*heredis loco*) and could, in theory, govern the estate in whatever manner he wished as though he were the heir. At a later stage, however, the *familiae emptor* was considered to be no more than an executor of the testator's wishes and could be compelled by the beneficiaries to give effect to the will. Moreover, in the course of time it became customary for the oral instructions of the testator to be reduced to writing for evidentiary purposes.[23] By the time of Justinian the mancipatory testament had become obsolete and fallen into disuse.

The disadvantages of the above-mentioned forms of will, especially their extreme formalism, prompted the praetor to intervene in a similar way as in the case of intestate succession by promising *bonorum possessio* of an estate to persons who were nominated as heirs in a written will sealed by seven witnesses.[24] It should be noted that the *bonorum possessio* granted by the praetor was initially unprotected (*sine re*) and could be successfully challenged by the civil law heir's *ab intestato*. In later times, however, it enjoyed protection (*cum re*) by means of an *exceptio doli* that Emperor Antoninus Pius granted as a defence against a claim by a third party to the estate.[25] This praetorian arrangement remained in place until the time of Justinian.

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[22] G 2. 101: "Originally there were two kinds of wills: parties either made a will at the *comitia calata*, which were assembled twice a year for that purpose; or in the face of the enemy, that is to say when the testator took up arms for the purpose of making war, for the term [*procinctus*] refers to an army ready for battle. Hence, persons made one kind of a will in time of peace and tranquillity, and another when about to go into battle." And see *Inst* 2. 10. 1.

[23] The relevant document was sealed by the *familiae emptor*, the *libripens* and the five witnesses to the *mancipatio* procedure. On the mancipatory testament see G 2. 102–108; *Inst* 2. 10. 1.

[24] The possession of the testator's estate in this case was referred to as *bonorum possessio secundum tabulas*: possession in accordance with a will. See G. 2. 119. The seven witnesses corresponded to the five witnesses of the *testamentum per aes et libram* together with the *libripens* and the *familiae emptor*, who was now regarded as no more than a witness.

[25] Consider G 2. 120–121; G 2. 147.

5.3.2 *Testamentum Tripertitum*

In AD 439 a new form of will was introduced by a constitution of Emperors Theodosius II and Valentinian II,[26] which later became known as *testamentum tripertitum*. This was the principal form of will in Justinian's time. As Justinian himself narrates, the will was called 'tripartite' because its requirements had been derived from three sources: the *ius civile*, which required that the whole will had to be created at one and the same time (*uno contextu*) in the presence of witnesses; the *ius praetorium*, according to which the will had to be sealed by seven witnesses; and imperial legislation, which determined that the testator and the witnesses should each write a *subscriptio*, i.e. a short formal declaration on the will for identification purposes.[27]

5.3.3 *Extraordinary Wills*

In addition to the standard forms of will described above, there existed a wide variety of extraordinary wills that were developed to serve special purposes. In this context, reference should be made to the soldier's will (*testamentum militare*) that was exempt from all the formalities surrounding testamentary succession.[28] It was recognized that a soldier, while on active duty, could give expression to his last will in whatever way he wished. All that was required was his intention to create a will.[29] Even an invalid will composed by a person before he joined the army became valid while he was on active duty as long as he had clearly indicated that he wished it to be his will.[30] Such a will remained valid for 1 year after the soldier's discharge from military service, thereafter he was required to produce a standard will.[31]

Other examples of extraordinary wills included the *testamentum ruri conditum* denoting a will made in a rural or sparsely populated area, for which five witnesses were sufficient; and the *testamentum tempore pestis*, a testament formed during an

[26] C 6. 23. 21.

[27] The word '*subscripsi*' ('I have subscribed') was in most cases sufficient, although other formulae might also be employed. It should be noted that Justinian initially required that the name of the heirs should be written by the testator himself or, alternatively, by the witnesses following an oral pronouncement of the testator, in their *subscriptiones*. However, a later decree of Justinian abolished this requirement. On this form of will consider *Inst* 2. 10. 3 & 4; C 6. 23. 29; *Nov* 119. 9.

[28] The military will, which must be distinguished from the old *testamentum in procinctu*, was introduced by Julius Caesar as a temporary concession and became an established form of will in the Principate era.

[29] However, this did not exempt the soldier from compliance with certain fundamental principles of the *ius civile*. See *Inst* 2. 11 pr.

[30] *Inst* 2. 11. 4.

[31] *Inst* 2. 11. 3. On the soldier's will consider also G 2. 109–111 & 114; D 29. 1; C 6. 21.

epidemic, in which case the testator and the witnesses were not bound to be present simultaneously. Later law also recognized the *testamentum per nuncupationem*, an oral declaration of the testator's will made before seven witnesses; the *testamentum apud acta conditum*, a will composed in the presence of certain legal officials who would record and register it as an official document; the *testamentum principi oblatum*, a written will registered in the imperial chancellery; and the holographic will, which was written by the testator in his own hand and for which no witnesses were required.

5.3.4 *Testamenti Factio*

Evidently, not all persons had the legal capacity to create a will or to receive property under a will. Similarly, not all persons were deemed acceptable to serve as witnesses to the composition of a will. In this regard the term *testamenti factio* ('will-making') was used in connection with the legal capacity or right of a person to create or receive under a will, as well as one's capacity to witness a will.[32]

In principle, every Roman citizen had the legal capacity to compose a valid will as long as he was *sui iuris*, above the age of puberty and mentally sound.[33] Originally, only male citizens could act as testators but the later law entitled foreigners granted the *ius commercii* and women (since the early Principate age) to compose a valid will. Unrehabilitated prodigals and persons under curatorship did not have testamentary capacity.[34] In principle, the testator had to have the

[32] The legal capacity to create a will is referenced in later literature by the term *testamenti factio activa*. This is distinguished from the legal capacity to be instituted as heir in a will, referred to as *testamenti factio passiva*. The term *testamenti factio relativa* denotes the legal capacity to act as a witness to a will. It should be noted, however, that these terms do not appear in the Roman juridical sources.

[33] Persons *in potestate* could not compose a will since such persons, in principle, owned nothing. However, in later law certain exceptions were introduced regarding the *peculium castrense* and *quasi castrense* of the *filiusfamilias* (see the relevant section in the previous chapter on the law of persons). Furthermore, the testament of an insane person was deemed valid if he made it during a 'lucid interval' (*dilucidum intervallum*), i.e. a period during which an insane person regained full mental capacity.

[34] Slaves could not create a valid will, although a master might in effect allow his slaves to dispose of their *peculia* by will amongst themselves. A Roman citizen captured by the enemy was considered to be in the same position as a slave. However, a will he had composed before he was seized during war would be deemed valid by right of *postliminium* (the right in virtue of which a former captive was restored to the position he had prior to his enslavement) if he returned, and by the operation of the *lex Cornelia de captivis* (82–79 BC) if he died in captivity. The latter law introduced what is described as the benefit of the *lex Cornelia* (*beneficium legis Corneliae*) or the fiction of the *lex Cornelia* (*fictio legis Corneliae*). Although the nature of this benefit or fiction remains unclear, it appears that the relevant statute confirmed the succession to the testator's estate as if the latter had never been captured.

capacity to create a will at the time of making his will and retain it without interruption until his death.[35]

In general, any person with testamentary capacity was eligible to receive under a will. However, a category of persons who lacked the capacity to make a will could also be instituted as heirs. Thus persons *alieni iuris*, persons under curatorship (e.g. insane persons and prodigals) and *impuberes* could accept or reject an inheritance with the consent of their father, *curator* or *tutor* respectively. When a testator instituted his own slave as heir, the slave was compelled as a *heres necessarius* to inherit. This event often occurred where a testator wished to liberate his slave, but it could also happen when the testator's estate was so encumbered with debts that he did not wish to burden his natural heirs with it.[36] On the other hand, if the slave of another person was instituted as heir, the slave could only accept on the instruction of his master who actually acquired the inheritance (provided that he had the capacity to inherit). For a certain period in history, women were restricted in their capacity to inherit[37] but this restriction fell into abeyance during the Principate. Moreover, a person could forfeit his right to inherit as a result of the application of a penal provision. Undetermined persons (*personae incertae*) could not inherit at all and this category embraced those whose juristic personality could not be precisely determined in the mind of the testator. Originally, this meant that legal persons like the state, municipalities and religious or charitable organisations could not be instituted as heirs nor could persons not yet born at the time the will was composed (*postumi*). In the course of time, however, the disqualification of *postumi* was removed through modification of the ban on the institution of *personae incertae*. Similarly, exceptions in favour of the state, municipalities, charitable institutions and other corporate bodies were gradually admitted as the notion of juristic personality slowly emerged to the extent that most of the earlier restrictions were removed by the time of Justinian.[38]

The capacity to receive under a will had to exist at the time when the will was composed and again when it took effect, whether this occurred at the time when the relevant estate fell open or on the fulfilment of a specified condition. Whether the requisite capacity existed or not between these two points in time was irrelevant.

In principle, any person who had the legal capacity to compose a will could be a witness to a will but there were some exceptions. In general, it was required that the person designated to act as a witness was a free male person, possessed the *ius*

[35] On the issue of testamentary capacity see D 28. 1. 2 & 4; *Inst* 2. 12.

[36] One could institute a slave as an heir in the last resort also in order to avoid the ignominy of a *post mortem* bankruptcy.

[37] Under the *lex Voconia* (*c*. 169 BC), a woman could not be instituted as heir by a testator whose estate had a value greater than a fixed amount (probably 100,000 *asses* or sesterces). See G 2. 274.

[38] In Justinian's time it was possible to institute the state, the Church and religious or charitable organizations as heir but private associations could only be instituted as heir by special licence. Evidence from the sources suggests that Justinian issued a constitution that finally abolished the general principle that a *persona incerta* could not inherit.

commercii and had reached the age of puberty.[39] Women and deaf or dumb persons could not act as witnesses even after the relevant disqualifications had ceased to apply with respect to testators. Furthermore, certain members of the testator's family who had an interest in the will were likewise excluded such as the person appointed heir and persons in his *potestas*.[40]

It is evident that the capacity to be a witness had to exist only at the time when the will was composed.[41]

5.3.5 *Institution of Heirs*

For a will to be valid it was essential that one or more persons should be instituted as heir (*heredis institutio*). Originally, the institution of an heir or heirs involved a process of certain prescribed formal words inserted at the head of the will.[42] However, in later law such formalities became obsolete and any words could be used as long as the testator's intention was clearly expressed.[43]

As previously noted, in Roman law the heir was a successor under universal title (*titulo universali*) and this meant that he succeeded to all the patrimonial rights and liabilities of the deceased. Consequently, an heir could not be appointed to receive a specific object or objects.[44] The testator could institute one heir for the whole estate or several heirs. In the latter case, he could allot equal or unequal portions to the heirs as he wished but if he did not expressly indicate the portion each heir should receive, the estate was divided into equal shares among them. Furthermore, the testator had to dispose of the whole inheritance, according to the principle that no one was permitted to die partly testate and partly intestate.[45] Thus, if an heir was instituted to a one-half fraction of the estate and no disposition was made of the other half he inherited the entire estate as sole heir. Similarly, if only a portion of the

[39] Although Gaius appears to suggest that only Roman citizens could witness a will (see G 2. 104), foreigners vested with the *ius commercii* also had the legal capacity to be witnesses.

[40] However, it should be noted that a person to whom a legacy had been bequeathed under a will could witness such a will without forfeiting the legacy.

[41] D 28. 1. 22. 1.

[42] Consider G 2. 229; G 2. 116 & 248. The requisite formal words had to be peremptory or imperative, e.g. *Titius heres esto* ('Let Titius be my heir'), or *Titium heredem esse iubeo* ('I direct Titius to be my heir'). The testator could not merely express the desire that someone should be his heir. See G 2. 117.

[43] *Inst* 2. 20. 34; C 6. 23. 15; C 6. 23. 21. 6.

[44] The institution of an heir to a specific object (not to a fraction of the estate) was referred to as *heredis institutio ex re certa*. Although originally such an institution was not valid and rendered the will void, from the time of Augustus it was recognized that an heir thus instituted should be regarded as heir to the entire estate as if the particular object were not mentioned. Under the law of Justinian, if one person was instituted to a particular object and another generally, the first institution was treated as a legacy. See C 6. 24. 13.

[45] An exception was recognized in the case of the military will. *Inst* 2. 14. 5.

estate was divided among several heirs or if one or more of the instituted heirs could not or did not wish to inherit, the remaining portion of the estate accrued to the heirs who inherited in proportion to their shares.[46] The institution of an heir could be made unconditionally (*pure*), or subject to a suspensive condition,[47] term (i.e. a period of time) or restriction (*modus*).[48] However, an heir could not be validly instituted subject to a resolutive condition or term, in accordance with the rule that a person who had once been instituted as an heir never ceased to be heir (*semel heres, semper heres*).[49]

Finally, it should be noted that in relation to the interpretation of a will the usual rules pertaining to duress, fraud and mistake were applicable. In the case of fraud or duress by a designated heir, the will was usually declared null and void and the testator's estate forfeited to the state.[50] In general, mistake (*error*) did not affect the validity of a will but a number of exceptions were recognized under certain circumstances.

5.3.6 Substitution

Substitution (*substitutio*) was the appointment of another heir (*heres substitutus*) by the testator in the place of an instituted heir in the event that the latter could not or did not wish to inherit. To prevent intestate succession from becoming operative, a testator could appoint several substitute heirs for the eventuality that the first instituted heir did not inherit. Roman law recognized three forms of substitution: *substitutio vulgaris*, *substitutio pupillaris* and *substitutio quasi-pupillaris*.

The *substitutio vulgaris* was the usual and least complicated form of substitution which occurred when the testator wished to avoid dying intestate. He simply appointed a second heir as a substitute for the original heir. In this way the testator could appoint a whole succession of substitute heirs in his will with, in the final instance, one of his slaves as a *heres necessarius*.[51] This form of substitution may

[46] If the co-heirs were collectively instituted for more than the deceased's estate was worth, their shares were proportionately decreased. *Inst* 2. 14. 4–8.

[47] In such a case one became heir only if some specified future event occurred.

[48] For example, in accordance with such a *modus* the heir could be burdened with the duty to erect a tombstone for the testator.

[49] Resolutive conditions or terms and impossible conditions were regarded as not written (*pro non scripto*) and the will was construed as if they did not exist at all. See *Inst* 2. 14. 9–10; G 2. 184. The phrase *semel heres, semper heres* is not found in the Roman juridical sources but is derived from texts such as D 28. 5. 89.

[50] Bequests contrary to good morals (*boni mores*) were usually also invalid. On the issues of duress, fraud and mistake see the relevant sections in the chapter on the law of obligations.

[51] As a *heres necessarius*, the slave could not refuse the inheritance.

be described as an institution of an heir subject to a suspensive condition; namely, that the original heir for some reason failed to inherit.[52]

The *substitutio pupillaris* related to the inability of a person below the age of puberty (*impubes*) to compose a will. If a *paterfamilias* thought that his child whom he had instituted as heir might die before reaching the age of puberty, he could by virtue of his *potestas* nominate the person who should succeed in that case. This form of substitution had two aspects: in the first place the testator stipulated that if the child did not for some reason inherit, a third person would inherit in his place; he then supplemented this stipulation by adding that if the child should inherit but die before reaching the age of puberty (i.e., before becoming capable of creating a will), another person would assume his place.[53] The first part of this substitution was no different from the *substitutio vulgaris*, while the second part was termed *substitutio pupillaris*. One might surmise that such a case featured in effect two wills: one of the father himself and one the father composed on the strength of his *potestas* for the *impubes*, who himself could not craft a will. However, such wills could not be separated: if the father's will was deemed invalid the *substitutio pupillaris* would necessarily also be invalid.

The third form of substitution, known as *substitutio quasi-pupillaris* or *substitutio exemplaris*, was introduced by Justinian in respect of persons with mental defects. Following the model of the *substitutio pupillaris*, Justinian empowered a testator to appoint substitutes for his children of further descendants who were insane or otherwise mentally deficient. The right to effect a substitution of this kind could be exercised not only by the *paterfamilias* but also any ascendant, such as a mother who instituted a mentally deficient person as heir. However, the choice of substitutes was limited to descendants or, should there be no such person, brothers and sisters of the insane person. Once again, the underlying idea was that an insane person could not himself compose a valid will and, therefore, this task was performed by an ascendant on his behalf.[54]

5.3.7 Disinheritance

As previously observed, certain heirs (the *heredes sui et necessarii*) inherited automatically and as of right on the death of the *paterfamilias*. Therefore, a testator who wished to create a will that deviated from the rules of intestate succession had to expressly disinherit his *sui heredes*. If he failed to do so, the will was deemed invalid and the estate devolved according to the rules of intestacy.

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[52] The usual form of *substitutio vulgaris* would appear as follows: 'Let Titius be my heir; if Titius shall not be my heir, then let Maevius be my heir." Consider G 2. 174; *Inst* 2. 15 pr.

[53] The relevant formula was as follows: "Let my son Titius be my heir; if my son Titius shall not be my heir, or shall be my heir and die before he becomes his own master (i.e. before reaching puberty), then let Seius be heir." See *Inst* 2. 16 pr.

[54] *Inst* 2. 16. 1; C 6. 26. 9.

Although in principle a *paterfamilias* had the right to dispose of his estate in any manner he wished, the intention of disinheriting (*exheredatio*) a kin had to be conveyed in express terms and in a prescribed manner. In the course of time, a complicated system of rules developed that determined to what extent and under what circumstances a *pater* could or should disinherit his *sui heredes*. Thus the *ius civile* required that a son under his father's *potestas* (*filiusfamilias*) should be disinherited by name (*nominatim*), otherwise the will would be void. Other *sui heredes*, such as daughters, grandchildren and the wife *in manu*, could be disinherited as a group and without being named (*inter ceteros*). If these rules were not adopted, the will was not deemed invalid but the *sui heredes* who had been passed by inherited in equal shares with the *sui heredes* who had been instituted as heirs in the will.[55] Thereafter the praetor extended the existing law by providing, among other things, that all male *liberi* (including *emancipati* and *postumi*) had to be disinherited expressly and by name, whilst female *liberi* could be disinherited collectively. Passing by a *filiusfamilias* still rendered the will void, but in the case of all other descendants the praetor could grant *bonorum possessio* contrary to the testator's will (*contra tabulas*). The praetor's intervention was not designed to disrupt the will technically but to pragmatically enable the succession of all descendants entitled to succeed *ab intestato* who had been passed over in a will.[56] In an attempt to simplify the system of rules relating to disinheritance, Justinian stipulated that the *exheredatio* of all descendants (including *liberi* or *postumi*) had to be effected by name (*nominatim*).[57] If such persons had been passed over, the will was invalid but it appears that *bonorum possessio contra tabulas* could still be granted under certain circumstances.[58] Furthermore, Justinian provided that a person could be disinherited only if there was a valid ground for the testator to do so.[59] This requirement was connected with the material restriction on disherison derived from the institution of *querela inofficiosi testamenti*, which was combined by Justinian with *exheredatio*.

5.3.8 *Querela Inofficiosi Testamenti*

As already noted, in principle a testator was free to dispose of his estate as he saw fit and could disinherit his closest kin as long as he observed the requirements of *exheredatio*. However, from an early period it was recognized that such complete

[55] If *extranei* had been instituted as heirs, the *sui heredes* who had been passed by were entitled to half of the estate. Consider G 2. 123–124.

[56] Disherisons were not affected by the grant of *bonorum possessio contra tabulas*. On the historical evolution of the rules governing disinheritance see *Inst* 2. 13 pr −5.

[57] No formal words were required for the disinheritance. See C 6. 28. 3.

[58] C 6. 28. 6.

[59] The grounds that would justify disinheritance had a predominately casuistic nature and included an attempt by the heir to murder the testator, insulting a forefather and heresy.

freedom of testation might lead to abuse. Therefore, to limit the likelihood that members of the testator's immediate family would be disinherited for reasons that were not valid, a special legal remedy known as *querela inofficiosi testamenti* ('the objection against the unduteous will') was introduced during the later Republic. The underlying principle acknowledged that it was unfair and unduteous of a testator to favour outsiders to the detriment of his own family in the direct line.[60] Thus, members of the family who thought that they had been unjustly disinherited could challenge the will in a special court on the grounds that such a will was an infringement of the testator's natural duties towards his family and relatives. If the complainant succeeded in his *querela*, the will was declared invalid (*testamentum rescissum*) on the basis of the fiction that the testator must have been insane at the time of creating the will[61] and the estate then devolved in accordance with the rules of intestate succession.[62] It should be noted that a *querela* could only be utilized if there was no other legal remedy available.[63] This legal challenge had to be instigated within 5 years after the appointed heirs had entered on the inheritance and the relevant action had to be directed against such heirs themselves.[64]

Originally, the *querela inofficiosi testamenti* could be brought only by the descendants of the testator or, where there were none, by his ascendants. In late classical law, brothers and sisters could also institute the *querela* but only where base persons or persons of ill repute (*personae turpes*) had been preferred to them as heirs.[65] Initially, the *querela* could only be relied upon if the family members concerned had been disinherited without a good reason. In classical law the rule developed that they could utilize this remedy if they received less than a quarter of the amount they would have received had the testator died intestate.[66] This quarter

[60] It should be noted that in the eyes of the Romans the family constituted a unit, and even before the death of the *paperfamilias* the *alieni iuris* members of the family were considered to have some right to the family's estate.

[61] As previously observed, an insane person was incapable of making a valid will.

[62] *Inst* 2. 18 pr; D 5. 2. 2. 3 & 5. If the court reached the conclusion that the disinheritance had been justified, the *querela* would fail. See D 5. 2. 8. 16; C 3. 28. 11. It should be noted that the relevant remedy was excluded if the complainant had at an earlier stage already recognized the validity of the will by, for example, accepting a benefit under it or by entering into an agreement with the appointed heirs.

[63] Thus, a *suus heres* passed over in the will could not rely on the *querela* since he had his remedy by *petitio hereditatis*, a kind of *rei vindicatio* based on a specific title of the plaintiff, i.e. the right of an heir. Similarly, an emancipated son who had been passed over could not institute this remedy because he could be granted *bonorum possessio contra tabulas* by the praetor. But either of them could employ the *querela* if he was disinherited without good cause, as in that case no other remedy was available.

[64] D 5. 2. 8. 10. The claim might under circumstances be directed against the *bonorum possessor contra tabulas*, the *fideicommissarius* and the *fiscus*. Consider D 5. 2. 16. 1; C 3. 28. 1 & 10.

[65] Although the phrase *personae turpes* is not clearly defined, it probably includes persons technically infamous (*infames*) as well as persons of bad character or low social standing. See on this issue C 3. 28. 27.

[66] D 5. 2. 8. 6 & 8; C 3. 28. 31 & 36.

was referred to as *pars legitima* or *portio legitima*.[67] A tendency emerged in post-classical law to keep the will effective as far as possible rather than to invalidate it, and the *querela* had to make way for an action to compel the testamentary heirs to pay out the statutory share in full (*actio ad supplendam legitimam*).[68] The effect of this action was to reduce the amount transferred to the appointed heirs, but the will otherwise remained intact.[69] Justinian later increased the *portio legitima* to one-third of the intestate portion where the testator left up to four children, and to one-half of the intestate portion where there were more children.[70] Furthermore, he specified a number of just grounds for disherison thus resolving much of the uncertainty surrounding *exheredatio*.

5.3.9 Invalidity and Revocation of a Will

In general, the principle prevailed that a will remained valid and enforceable until it was either declared invalid or revoked.[71] A will was deemed invalid when it was not composed in accordance with the prescribed legal formalities or where the requirement of *testamenti factio* had not been met. This outcome also pertained to the cases where a *suus heres* had neither been instituted as heir nor expressly disinherited, or if certain persons had been passed over or disinherited in a will without a valid reason.[72] Furthermore, a valid will would become invalid if the testator suffered *capitis deminutio*[73]; if the instituted heir could not or did not wish to inherit; and where a *suus heres* arrived on the scene after the will had been created (for example, where a child was born to the testator or the testator acquired a new *suus heres* by adoption).[74] If a testator made a valid will at a later stage, the previous will was automatically invalidated,[75] even if it was not explicitly revoked. In early law, destruction of the written document on which the will appeared did not immediately render the will invalid. In later law, however, the will was invalidated under such circumstances.[76]

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[67] It was also known as *quarta falcidia*, as it was laid down by a *lex Falcidia* (40 BC).

[68] *Inst* 2. 18. 3; *Inst* 2. 18. 6.

[69] As in the case of the *querela*, the defendant could raise against this action the defence that the complainant had been justly disinherited.

[70] The share of ascendants and of brothers and sisters remained fixed at one-quarter.

[71] *Inst* 2. 17 pr.

[72] As explained in our discussion of *exheredatio* and the *querela inofficiosi testamenti* above.

[73] However, if the will satisfied certain requirements the praetor could in this case grant the instituted heir a *bonorum possessio secundum tabulas* (possession in accordance with the will). See *Inst* 2. 17. 6.

[74] *Inst* 2. 17. 1 & 4–6; G 2. 131, 138 & 145–147.

[75] G 2. 144; *Inst* 2. 17. 2.

[76] G 2. 151 & 151a. And see C 6. 23. 30.

Another source of invalidity of a will was revocation by the testator. According to the *ius civile*, revocation of the will *per aes et libram* could be effected only by the composition of a new will. This meant that every modification required the creation of a new will. In later law, alterations that did not relate to the institution of heirs could be made by means of *codicilli testamento confirmati* (a codicil confirmed in a testament). Under the law of Justinian it was possible for a testator to revoke his will by making a formal declaration of revocation before three witnesses or a public official, provided that 10 years had elapsed since the creation of the will.

5.4 Codicil

Codicils (*codicilli*)[77] were informal documents used in correspondence, but since the will was the usual method by which a testator could effectively express his last wishes, the informal expression of a last will in *codicilli* had originally no legal value. However, since the time of Augustus these *codicilli* acquired a certain legal effectiveness as a means of expressing a last will.[78] However, not all permissible dispositions by will could be entered into a codicil. In this regard a distinction was drawn between two kinds of *codicilli*: the *codicillus testamento confirmatus* and the *codicillus testamento non confirmatus*. The former was a codicil that had been confirmed by a will either by means of an announcement in a will before the codicil was created or by granting recognition thereto in a subsequent will. In such a codicil any disposition that could be specified in a will, except for the institution of an heir and disinheritance, could be effected.[79] The *codicillus testamento non confirmatus*, on the other hand, was a codicil that was not confirmed by a will. Originally, such a codicil could only create *fideicommissa* but was rendered valid even if the estate devolved according to the law of intestate succession.[80] In the time of Justinian,

[77] Literally 'small letters' that were originally written on tables of wax.

[78] According to the sources, this development was initiated by a Roman citizen, Lucius Lentulus, who shortly before his death in Africa directed a request to Augustus in the form of a *fideicommissum* contained in *codicilli*. Subsequently, on the recommendation of some of the most eminent jurists of the time, the emperor granted recognition to *codicilli* as a means of expressing a last will. See *Inst* 2. 25 pr. For the validity of a codicil as an expression of one's last will it was required that its author should have the *testamenti factio*. D 29. 7. 6. 3. Later imperial legislation required the presence of five witnesses, although in Justinian's time even oral *codicilli* were accepted. Where the codicil was in writing the witnesses had to add a written confirmation (*subscriptio*) at the foot of the document for purposes of identification. Consider C 6. 36. 8. 3. It should be noted that a testator might state in his will that, if the will should be declared void because of some deficiency, it should be treated as a codicil. However, such a statement could have practical consequences only if the will itself had met the requirements for a codicil. Consider D 28. 3. 12. 1; D 29. 1. 3.

[79] D 29. 7. 8 pr & 18; D 50. 16. 123; *Inst* 2. 25. 1 & 2; G 2. 273. And see D 29. 7. 3. 2.

[80] G 2. 270a. If such an unconfirmed codicil existed in addition to a will, it was considered to be independent of whether such a will had validity.

when legacies and *fideicommissa* were placed on an equal footing, legacies could also be established by means of such a codicil.

5.5 Acquisition and Administration of the Inheritance

5.5.1 Acceptance of the Inheritance

After the death of the testator, the vesting of the inheritance depended upon the category of the heir; that is, whether he was a *heres necessarius* or a *heres voluntarius*.

The *heredes necessarii* comprised of the *sui heredes* and the testator's own slaves inherited immediately at the falling open of the inheritance (*delatio hereditatis*),[81] irrespective of whether they wished to do so or not and whether the estate devolved in accordance with the rules of testate or intestate succession.[82] The praetor later realised that this might produce injustice in some cases and thus granted *sui heredes* the right to abstain from the inheritance (*ius abstinendi*). This right would normally be exercised where, for example, the estate was insolvent and the heir had the prospect of having to pay the debts of the testator.[83] Following an heir declining to inherit, the estate would become a *hereditas iacens*, i.e. an estate without an owner, and the creditors could take it over to satisfy their claims.

Heirs who fell outside the category of *sui heredes* were referred to as *heredes extranei* or *voluntarii*. By contrast with the former, such heirs could accept or decline the inheritance as they saw fit since in their case succession did not follow as a matter of course. The acceptance of the inheritance (*aditio hereditatis*) could only occur after the falling open of the estate (*delatio hereditatis*).[84] Originally such acceptance had to be expressed by means of a formal oral declaration (*cretio*), but later it could be established informally by simply acting as an heir (*pro herede*

[81] In classical law this normally occurred at the time of the testator's death. However, where there was a will, the opening of the will was the crucial point or, in the case of a conditional appointment of an heir, the fulfilment of the relevant condition. It would appear that in the time of Justinian the *delatio hereditatis* always took place at the testator's death.

[82] G 2. 157: "They are called necessary heirs for the reason that, under all circumstances, whether they are willing or unwilling, they become heirs in case of intestacy, as well as under the will."

[83] The *ius abstinendi* was not accorded to slaves as *heredes necessarii*. However, a slave who inherited an insolvent estate could request the separation of estates (*separatio bonorum*) in order to keep intact anything that he acquired or would acquire in the future as his own property. G 2. 158; G 2. 153–155.

[84] However, at the request of the testator's creditors the praetor could prescribe the period within which the heir should decide whether he planned to accept the inheritance or not. This period (*spatium deliberandi*) could vary between one hundred days and a year. D 28. 8. 2; C 6. 30. 22. 13a. See also G 2. 167.

gestio).[85] Under the law of Justinian, any expression of the prospective heir's desire to inherit was sufficient.

During the period between the testator's death and the acceptance of the inheritance, the estate was construed as a *hereditas iacens*, i.e. an estate without a lawful owner or an entity that belonged to no one (*res nullius*). Although the assets and liabilities of the estate continued to exist, the creditors had no one to claim from and the position of substitute and intestate heirs remained uncertain.[86] To prevent an endless delay of acceptance, it was recognized that any person (including the creditors) could assume possession of the estate and utilize a special form of prescription (*usucapio pro herede*) to become the persons rightfully entitled to it.[87]

5.5.2 *Separatio Bonorum*

Once succession had taken place, all the assets and liabilities of the testator's estate passed to the heir. The estate of the heir and that of the deceased now merged, and the heir had to pay both his and the testator's debts out of the composite estate. Where the heir's estate was insolvent and that of the deceased was a strong one, such fusion could prove detrimental to the creditors of the deceased estate who, after the testator's death, may have to contend with an insolvent estate (that of the heir). To safeguard the interests of such creditors, the praetor allowed them to claim a guarantee (*satisdatio*) from an heir perceived as unable to pay the debts of the deceased.[88] The logical development of this remedy was an order of the praetor, upon application of the interested creditors, that the two estates should remain separate until the creditors' claims had been met. Such separation of estates (*separatio bonorum*) served to protect the creditors of the deceased by reserving the estate for them to the exclusion of the creditors of the heir, who might be insolvent.[89] The estate was sold and the creditor's claims were paid out of the proceeds, while the residue was transferred to the heir. However, if the claims of the creditors exceeded the proceeds from the sale, they could not claim against the estate of the heir. The *separatio bonorum* had to be applied for within 5 years from the acceptance of the inheritance.

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[85] G 2. 164–167. *Pro herede gestio* pertained to any juridical act that appeared to be that of an heir. See D 11. 7. 14. 8; *Inst* 2. 19. 7.

[86] G 2. 9; D 1. 8. 1 pr.

[87] For this kind of *usucapio*, possession of the relevant estate for a year was sufficient.

[88] D 42. 5. 31 pr. In the case of refusal, the creditors could be granted possession (*missio in possessionem*) of the heir's property.

[89] The *separatio bonorum* was connected with the so-called *beneficium separationis*: the right to have the goods of an heir separated from those of the testator.

5.5.3 *Beneficium Inventarii*

As previously noted, the *sui heredes* had the right to decline the paternal inheritance (*ius abstinendi*) if they thought that the deceased estate was too heavily burdened with debts or even insolvent. The so-called 'benefit of an inventory' (*beneficium inventarii*) was a further remedy introduced into later law by Justinian to protect the heir who was not a *heres suus*. An heir of this kind (*heres extraneus*) was free to choose whether to accept or decline the inheritance, but such choice might be difficult without an investigation of the solvency of the testator's estate. Thus, such an heir was granted the right to compile an inventory of the assets of the estate within thirty days of learning of the inheritance.[90] The inventory had to be completed within sixty days from that date.[91] If the heir chose to make use of this benefit, he could not be held liable for debts above the value of the assets of the inheritance. Although in this case the two estates were not kept separate, the value of the assets of the deceased estate was calculated and the heir was liable to this amount with both his own and the estate's assets.

5.5.4 *Co-heirs*

In early law, when there were more than one *heres suus* they could form a type of common estate referred to as *consortium* or *societas ercto non cito*. The co-heirs (*coheredes*) were, in essence, co-owners of the inheritance and could choose to institute the *actio familiae erciscundae* to effect a division of the common estate. In post-classical law, each co-heir was considered to hold an undivided share in the estate. However, the *actio familiae erciscundae* could still be employed as an action to divide a common estate.[92]

It should be noted that in the calculation of the shares certain assets were taken into consideration that did not belong to the actual inheritance but had to be 'brought in' by the heirs.

5.5.5 *Collatio Bonorum*

Under certain circumstances, an heir could be compelled to restore assets he had previously acquired from the deceased to the estate. This 'bringing in of assets' (*collatio bonorum*) was introduced by the praetor as a result of the

[90] Under normal circumstances, this occurred at the opening of the testator's will or otherwise when *delatio hereditatis* transpired.

[91] C 6. 30. 22. 2a; See also C 6. 30. 22. 11.

[92] D 10. 2; C 3. 36 & 38.

edictum unde liberi, in terms of which the emancipated child (*emancipatus*) could apply for *bonorum possessio* and thus inherit with the *sui heredes* on intestacy from the *paterfamilias*.[93] It was thought that it would be unfair towards the *sui heredes* to divide the inheritance equally among them, since as a rule the *emancipatus* upon discharge from his father's *potestas* received some form of patrimony from his father and could acquire property after his emancipation. On the other hand, everything the *sui heredes* had acquired during the father's lifetime accrued to and increased the property of the father. In order to address this inequitable situation, the praetor decreed that if the *emancipatus* wished to inherit on an equal footing with the *sui heredes* he should first bring the value of his own estate into the inheritance (*conferre*, whence *collatio bonorum*). This did not mean that the *emancipatus* literally had to restore all that he acquired, but it was taken into consideration when his share was calculated.[94]

The same principle was later extended to the case where a father provided his daughter with a dowry (*dos*), which then became the property of her husband as previously noted in this text. If the daughter wished to inherit on the same basis as the *sui heredes*, she had to 'bring in' the value of the dowry (*collatio dotis*).[95]

5.5.6 Remedies of the Heir

5.5.6.1 Hereditatis Petitio

The *hereditatis petitio* was the principal legal remedy available to an heir after he had accepted the inheritance or his share thereof. This remedy originated in the *ius civile* and took the form of an action *in rem* resembling the *rei vindicatio*.[96] By means of this action an heir could claim the whole or any part of the inheritance from whoever had it in his possession, irrespective of whether the possessor was

[93] As explained in the discussion of the praetorian system of intestate succession above.

[94] D 37. 6. 1. The *collatio* was usually preceded by the *emancipatus* giving a guarantee (*satisdatio*). See D 37. 6. 1. 9 ff.

[95] Consider D 37. 7. It should be noted that in later law the principle underpinning the *collatio bonorum* was extended to all descendants of the deceased person: whatever they had received from the deceased until his death (for example, in the form of donations or other benefits) had to be 'brought in' and taken into consideration when their shares in the inheritance were calculated. Of course, the testator could expressly increase the share of a particular heir by declaring that there was no need for *collatio* with respect to such an heir.

[96] Unlike the *rei vindicatio* comprised of an action by which the plaintiff could only claim specific or individual things (*actio in rem specialis*), the *hereditatis petitio* was an *actio de universitate*, i.e. an action that could be used to claim an estate or part thereof as a whole, including incorporeal objects (rights) and liabilities.

bona or *mala fide*.[97] The action was available only to an heir in accordance with the *ius civile* and presupposed that the plaintiff could prove his right in respect of the inheritance claimed.[98]

The *senatus consultum Iuventianum*, passed in the first half of the second century AD, complemented the above remedy by prescribing the liability of the *bona fide* and *mala fide* possessor in respect of fruits, damages and expenses along the same lines as the rules relating to the *causa rei* and the *rei vindicatio*.[99] Thus, the law elaborated that a *mala fide* possessor could be held liable for all damage suffered by the plaintiff as a consequence of his deprivation of possession. The *bona fide* possessor, on the other hand, was liable only to the extent that he had been unjustly enriched at the plaintiff's expense and only insofar as such unjust enrichment was still extant.[100] Fruits or proceeds from the property in question had to be restored by both the *bona fide* and *mala fide* possessor, although only the latter was liable for fruits he had failed to gather due to negligence.[101] Further, as regards necessary expenses incurred by the possessor in respect of the property claimed, the *bona fide* possessor could rely on the *exceptio doli* as a defence against the plaintiff's claim. However, in post-classical law both the *bona fide* and *mala fide* possessors were able to claim compensation for such expenses.[102]

5.5.6.2 Interdictum Quorum Bonorum

As previously noted, *bonorum possessio* was the praetorian counterpart of the civil law succession. Since the *hereditatis petitio* was not available to the praetorian heir, the praetor granted to such heir the *interdictum quorum bonorum* to recover the whole or any part of the estate possessed by another regardless of whether the possessor was *bona* or *mala fide*. However, this interdict could not be instituted against a person whose possession of the object in dispute was in fact based on a valid title (e.g. a contract of purchase and sale).

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[97] The *bona fide* possessor was under the impression that he was the true heir, whilst the *mala fide* one did not claim any valid title (*sine causa*). The same action could be instituted against a non-possessor who purported to be in possession (*liti se obtulit quasi possideret*) or who had fraudulently relinquished possession of the property in question (*dolo desiit possidere*).

[98] Justinian extended the scope of the *hereditatis petitio* to make it also available to the *bonorum possessor* in the form of *hereditatis petitio possessoria*.

[99] See relevant discussion in the previous chapter on the law of property.

[100] The *senatus consultum Iuventianum* was originally concerned with claims of the state treasury against private individuals for the recovery of vacant inheritances. Post-classical and Justinian's law broadened its scope and rendered it applicable to *hereditatis petitiones* among private individuals.

[101] *Inst* 4. 17. 2; D 5. 3. 20. 3.

[102] D 5. 3. 39. 1 & 50.1 as contrasted with D 5. 3. 38.

In post-classical and Justinianic law the distinction between the civil law heir and the praetorian heir disappeared, with the result that any heir had both the *interdictum quorum bonorum* and the *hereditatis petitio* available to him.[103]

5.6 Legacy

A legacy (*legatum*) was a particular form of testamentary disposition whereby the testator left one or more specific objects to some person who was not one of his heirs. Otherwise than in the case of the heir, the legatee (*legatarius*) benefited under a special title (*tituto singulari*) which meant that he only acquired certain individually designated objects (*res singulae*).[104] Moreover, in contrast to the heir as universal assignee, the legatee was not liable for the testator's debts; although he could not take, or having taken retain, the legacy until the debts of the estate were paid. Insofar as the legacy amounted to a diminution of the estate's assets, it may be described as a burden on the heirs.[105]

Originally, a legacy could be bequeathed only in a will after the institution of an heir (*heredis institutio*)[106] and on the premise that the will itself was valid. In later law a legacy could also be created in a codicil confirmed by a will (*codicillus testamento confirmatus*),[107] and in the time of Justinian even in a codicil not confirmed by a will. Furthermore, by Justinian's time the use of formal words was no longer required for the creation of a legacy and any words could be used as long as the testator's intent was clear and unambiguous. The beneficiary in terms of a legacy was required to have the *testamenti factio*.[108] A legacy could not be bequeathed to an unspecified person (*persona incerta*), although a testator could bequeath a legacy to more than one person or even in favour of a person nominated

[103] See on this matter D 43. 2. 1; G 3. 34; *Inst* 4. 15. 3.

[104] Where the legacy consisted of a fraction of the deceased estate (not single things), the legatee was referred to as *legatarius partiarius*.

[105] In D 30. 116 pr, a legacy is defined as "a diminution of the inheritance whereby the testator directs that something that would otherwise form part of the estate going to the heir is to go to some other person." See also *Inst* 2. 20. 1: "a legacy is a kind of gift left by a deceased person." Consider also D 31. 36. It is interesting to note that both Gaius and Justinian shared the opinion that the legacy did not fall within the field of the law of succession because it was not a form of acquisition of ownership of things *per universitatem*. Since, however, the topic of legacy was closely connected with testamentary succession, they felt that they could deal with it as a sub-division of the law of succession. See G 2. 191 and *Inst* 2. 20 pr.

[106] In G 2. 229 it appears that legacies preceding the institution of an heir were void. Justinian departed from this rule in *Inst* 2. 20. 34. And see C 6. 23. 24.

[107] G 2. 270a.

[108] *Inst* 2. 20. 24: "Legacies can be left only to persons who have testamentary capacity, that is, who are legally capable of taking under a will."

as an heir. On the other hand, only an heir who had been appointed in a will could be charged with the payment of a legacy.[109]

In early Roman law there were four types of legacy: the *legatum per vindicationem*; *legatum per damnationem*; *legatum sinendi modo*; and the *legatum per praeceptionem*.[110] Each of these types of legacy had to be created by the use of special formal words and had its own scope of application and effects.[111] In order to address the problems caused by the rigid formalism surrounding the creation of legacies, the *senatus consultum Neronianum* (passed in the first century AD) provided that a legacy expressed in a form that was not applicable thereto should be upheld as valid as if the correct form had been used.[112] This *senatus consultum* had the effect that the various formal requirements concerning legacies gradually became superfluous and Emperor Constantine abolished them in the early fourth century AD.[113] The final step in the process was initiated by Justinian who declared there was only one type of legacy, for which no formal words were needed. The only requirement was that the testator should express his intention to create a legacy in clear terms.[114]

Virtually anything could be the object of a legacy, including rights arising from claims, release from payment of a debt, usufruct or a portion of an inheritance. The testator could even bequeath property belonging to another person (*aliena res*), in which case it was the duty of the heir to buy the property from the owner and to transfer it to the legatee or, if he was unable to do so, to pay the legatee the value of

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[109] A *legatarius* could not himself be burdened with a legacy in favour of another person.

[110] G 2. 192.

[111] The *legatum per vindicationem* was used to make the legatee owner of the thing bequeathed on the death of the testator and without intervention of the heir. In this case the legatee could claim the object from whoever possessed it by means of the *rei vindicatio*. The *legatum per damnationem*, probably the most important form of legacy, had a wider scope. By means of this form the legatee acquired a claim, supported by a strong personal action (*actio ex testamento*), against the heir or heirs for payment of the legacy. The effect was that the legatee was in almost the same position as a creditor of the deceased estate. Virtually any kind of thing could be the object of such a legacy, including incorporeal things, services and even future things. The third type of legacy, the *legatum sinendi modo*, could involve things that belonged to the testator or to the heir at the time of the testator's death. If the heir refused to comply with the testator's order, the legatee could enforce his right by means of the *actio incerti ex testamento* (a personal action) against the heir. The *legatum per praeceptionem* appears to have been the subject of controversy among jurists. According to the *Sabiniani*, such legacy could be bequeathed only in favour of an heir. On the other hand, the *Proculiani* held (and their view finally prevailed) that third persons who were not heirs could also be benefited by this kind of legacy. In effect, if the beneficiary was a third party this form of legacy was, to all intents and purposes, similar to the *legatum per vindicationem*. Where the legatee was an heir, he had a preferent claim against the estate for his legacy and only after the legacy had been paid out to him could he obtain his share of the remainder of the estate. On the history of these legacies see G 2. 191–223.

[112] This meant, in effect, that most legacies deemed invalid due to the use of the wrong form were construed to be a *legatum per damnationem*.

[113] C 6. 37. 21. And see C 6. 23. 15.

[114] C 6. 43. 1; *Inst* 2. 20. 2.

such property. However, things that fell outside the sphere of commercial transactions (*res extra commercio*) or that were already the property of the legatee could not be the objects of a legacy.[115]

A legacy depended on the testator's will coming into effect; if the will for some reason did not become operative then the legacy also took no effect. It should be noted, further, that according to the *regula Catoniana* a legacy had to be valid at the time when it was created. If it suffered from some defect at that time, it was deemed void and could not later be validated even if the defect had in the meantime been removed.[116]

As previously noted, where a *suus heres* had been instituted as heir the will became effective immediately upon the testator's death or the falling open of the inheritance (*delatio hereditatis*). The right of the legatee in respect of the legacy arose simultaneously and he could claim it immediately.[117] A *heres extraneus* or *voluntarius*, on the other hand, had to accept the inheritance (by *aditio hereditatis*) in order to become heir. However, considerable time could elapse before the person nominated as heir made up his mind whether to accept the inheritance or not, and in principle the legatee had no right until the heir accepted. To ensure that the legatee would not forfeit his legacy should he himself die before the heir accepted the inheritance, the jurists developed a doctrine according to which the right of the legatee came into existence on the death of the testator (or when the *delatio hereditatis* occurred) and termed this moment *dies cedens legati*.[118] Such right became enforceable and the legatee or his heirs could claim payment of the legacy on the *dies veniens*, the day on which the legatee accepted the inheritance.

Legacies could be extinguished in various ways and the principal methods were revocation by the testator in a will or a codicil[119]; alteration of the substance of a legacy; destruction of the object of a legacy; the death of the legatee before the *dies cedens* or his refusal to accept the legacy.

5.6.1 Restrictions on Legacies

Under the Law of the Twelve Tables, a testator was free to introduce as many legacies as he wished in his will and could in fact dispose of all the assets of his estate in this way. This, however, could be detrimental to the testator's heirs who, as

[115] A testator might stipulate that the legatee should receive the benefit only after he carried out some duty or charge imposed upon him (*modus*) in conjunction with the benefit.

[116] D 34. 7. The relevant rule was named after the famous jurist Cato.

[117] The exercise by a *suus heres* of his *ius abstinendi* did not negate legacies if the estate was solvent.

[118] If the legacy depended upon a suspensive condition, the term *dies cedens* denoted the day on which the condition was fulfilled.

[119] See *Inst* 2. 21; D 34. 4.

may be expected, would be reluctant to accept an inheritance that was heavily burdened with legacies. If the appointed heirs declined to inherit, the inheritance would devolve according to the rules of intestate succession and the legatees would receive nothing. Two legislative enactments, the *lex Furia testamentaria* (early second century BC) and the *lex Voconia* (169 BC), attempted to address this problem by placing restrictions on testators in regard to the bequest of legacies, but these laws only engendered limited success.[120] Finally, the *lex Falcidia* enacted in 40 BC effectively settled the matter. This law provided that legacies should not exceed three-quarters of the testator's estate, since the heirs were entitled to acquire at least one-quarter of the estate (the so-called *quarta Falcidia*).[121] If the legacies amounted to more than three-quarters of the estate, they were proportionally decreased. The *lex Falcidia* was not applicable to a soldier's will (*testamentum militare*)[122] and Justinian made it possible for any testator to deprive his heirs of the *quarta Falcidia* by express provision in his will.[123]

5.6.2 Remedies of the Legatee

In early law the legatee had a real or personal right, depending on the type of legacy bequeathed to him.[124] In the time of Justinian when only one form of legacy was recognized, the legatee had three actions available to him: a real action (*in rem*) similar to the *rei vindicatio*, by means of which the legatee could claim the object of the legacy from any person who was in unlawful possession thereof; the *actio ex testamento*, a personal action the legatee could institute against the heir for the legacy or its value; and the action arising from hypothec (*actio hypothecaria*), since

[120] The *lex Furia testamentaria* prohibited the bequest of legacies greater than one thousand *asses* each, with the exception of legacies bequeathed to one's nearest relatives, spouse or bride. However, this enactment was not wholly effective as it did not limit the number of legacies of one thousand *asses* each that one could bequeath. The *lex Voconia* provided that the share of the estate left to an heir should not be smaller than the largest legacy. The problem was not satisfactorily addressed in this way either, as the estate could be exhausted by a large number of small legacies, even if the largest of these was smaller than the smallest share of the inheritance. Consider G 2. 225 & 226.

[121] G 2. 227. Where there was more than one heir, each had to have a clear fourth part of the share of the estate to which he was instituted. It was not sufficient that the heirs collectively took one-fourth of the estate between them. The estate's value was calculated as it was at the time of the testator's death; a subsequent increase or decrease did not affect this valuation. In calculating the value of the estate, a deduction was computed in regard to debts, funeral expenses and the value of slaves freed by the will. *Inst* 2. 22 pr-3.

[122] D 29. 1. 17. 4.

[123] Furthermore, under the law of Justinian an heir could not rely on the *lex Falcidia* unless he employed the *beneficium inventarii*.

[124] The relevant actions were the *rei vindicatio* and the *actio ex testamento* respectively.

the legatee was considered to hold a tacit hypothec over the inheritance and the property of the heir as security for the disbursement of the legacy.[125]

5.7 Fideicommissum

The *fideicommissum* was a disposition whereby a testator made an informal request to a person (*fiduciarius*) to convey a benefit from the estate to a third party (*fideicommissarius*). Such a request could be included in a will or in a codicil and was directed at a recipient of a benefit from the inheritance, for example a testate or intestate heir or legatee.[126] Originally, a *fideicommissum* only placed a moral obligation on the *fiduciarius* to carry out the wishes of the testator as a matter of trust (*fiducia*). However, in the time of Augustus it became legally enforceable by means of an extraordinary procedure that took place before a specially appointed praetor known as *praetor fideicomissarius*.[127] This development probably emanated from the need to avoid certain restrictions in the law of succession relating to the institution of heirs and legatees.[128]

Besides the fact that there were no formal requirements with respect to *fideicommissa* and the testator could express his wish to introduce a *fideicommissum* in any manner,[129] the relevant bequest could appear not only in a will but also in a codicil even where such codicil had not been confirmed by a will.[130] In contrast to legacies that could only burden heirs, a variety of persons could be burdened with a *fideicommissum* such as intestate heirs, legatees, *fideicommissarii*, and debtors of the testator—in short, anyone who obtained a benefit from the estate.[131] It should be noted that although the *fideicommissarius* was not required to have the *testamenti factio*, the testator had to possess such a capacity if he was to create a legally enforceable *fideicommissum*. With regard to the vesting and lapse of *fideicommissa* the same principles applied as in legacies, although the issue of the validity of a

[125] See C 6. 43. 1; *Inst* 2. 20. 2. Since Justinian wholly assimilated the legacy and the *fideicommissum*, the legal remedies of the legatee also became available to the *fideicommissarius*.

[126] There was no specific formula for the relevant request, but the commonly used phrase was *fidei tuae committo*: 'I commit myself to your faith or confidence' (hence the term *fideicommissum*).

[127] Where the bequest had been made in the provinces, the relevant procedure transpired before the provincial governor.

[128] For example, the restrictions associated with the *testamenti factio* or the application of the *lex Falcidia*.

[129] G 2. 281; D 32. 11 pr; D 40. 5. 47. 4. A variety of verbs were used in this regard, such as *rogo* (ask), *peto* (request) or *volo* (wish), and of course the phrase *fidei tuae committo*. But mere suggestions or recommendations were not sufficient.

[130] This is one of the principal differences between *fideicommissum* and legacy. Gaius deals with the differences between these institutions in G 2. 268–289.

[131] G 2. 270; G 2. 260 & 271; D 32. 1. 6. Even the state treasury (*fiscus*) as an acquirer of *bona vacantia* could be burdened in this way. Consider D 30. 114. 2.

fideicommissum was in general subject to greater flexibility of interpretation than was the case with legacies.[132]

Virtually anything could be the object of a *fideicommissum* as long as it was *in commercio*, including particular objects, rights and even the entire estate or a large portion thereof. In this respect a distinction was made between two types of *fideicommissa*: the *fideicommissum rerum singularum*, i.e. a *fideicommissum* concerning one or more assets of the estate, which approximated the legacy; and the *fideicomissum hereditatis*, in terms of which an heir (referred to as *heres fiduciarius*: fiduciary heir) was requested to transfer a whole estate or a portion thereof to a third person.[133] In the latter case, the *fideicomissarius* became either successor to the entire inheritance or co-successor with the fiduciary heir.

The disadvantages of the *fideicomissum hereditatis* for the heir are evident. In the first instance, the heir was often no more than an intermediary who obtained no benefits from the inheritance. Secondly, and more importantly, the heir was required to transfer to the *fideicomissarius* only the assets of the estate while he himself remained liable to its creditors. At the same time, whilst debtors of the estate remained liable to him alone, the heir had to hand over to the *fideicomissarius* whatever he recovered from them. In these circumstances an heir could scarcely be blamed if he chose to decline the inheritance, resulting in the devolution of the estate according to the rules of intestate succession. From an early period it became obvious that some method had to be devised to protect the heir, and the steps initiated to achieve this goal constitute an interesting and complicated chapter in Roman legal history. It thus became customary for the heir to sell the inheritance for a nominal price (*nummo uno*) to the *fideicomissarius* by means of a formal *mancipatio*. At the same time, the parties made reciprocal promises or stipulations (*stipulationes emptae venditae hereditatis*) by which the fiduciary heir promised to transfer to the *fideicomissarius* all the proceeds of the inheritance, whereas the latter undertook to indemnify proportionately the heir for payments made to the creditors of the estate.[134] However, this only partly solved the problem as the creditors of the estate who were not bound by the stipulations could still sue the fiduciary heir if the *fideicomissarius* failed to indemnify the heir or where he was unable to pay the estate's debts. To overcome this difficulty, the *senatus consultum Trebellianum* (passed in approximately AD 56) decreed that the *fideicomissarius* would be personally responsible for the liabilities of the estate in proportion with what he received from it and could sue the estate's debtors directly for *pro rata* claims in respect to his share of the estate. This senatorial resolution placed the *fideicomissarius* in the position of an heir (*heredis loco*) and thereby solved the problem caused by the

[132] The *fideicommissum* could be subject to a suspensive condition or period, although the *dies cedens* normally coincided with the testator's death.

[133] G 2. 184 & 277; D 36. 1. 1. 2.

[134] G 2. 252 & 257. The fiduciary heir also had to allow the *fideicommissarius* to institute claims relating to the estate as his representative (referred to as *cognitor* when appointed in a formal manner, and *procurator* when appointed informally).

semel heres, *semper heres* rule.[135] However, the problem of the heir who refused to accept the inheritance on account of him receiving very little or nothing out of it still remained to be addressed. Thus, a second senatorial resolution designated the *senatus consultum Pegasianum* was introduced in about AD 73 with the principal effect of rendering the arrangement of the *quarta Falcidia*, as it applied to legacies, also applicable to *fideicommissa*. As a consequence, the heir was not required to hand over more than three-quarters of his share of the inheritance in respect of *fideicommissa* but, at the same time, he could be forced by the *fideicomissarius* to accept the inheritance if he failed to do so voluntarily.[136]

The complicated legal situation invoked when both the above-mentioned *senatus consulta* were applicable was resolved by Justinian, who combined the two resolutions in one enactment under the name of the *senatus consultum Trebellianum*. According to Justinian's ruling, the fiduciary heir and the *fideicomissarius* were each held liable for a portion of the estate's liabilities in proportion to their shares. At the same time, it was recognized that the heir was in every case entitled to retain a quarter of the inheritance. If, however, the heir was not willing to accept the inheritance, he could be forced to do so. He was then required to convey it to the *fideicomissarius* who acquired both the assets and liabilities of the estate as if he was an heir (*heredis loco*).[137]

The progressive assimilation of *fideicommissa* and legacies during the classical and post-classical periods was brought to its conclusion in the time of Justinian.[138] Since the law now provided that there should be no difference between the two institutions, the legal remedies of the legatee (namely, the *rei vindicatio*, the *actio ex testamento* and the *actio hypothecaria*) also became available to the *fideicomissarius*.

5.8 Donatio Mortis Causa

The *donatio mortis causa* was a gift made by a donor at a time and under the circumstances when he anticipated his own death.[139] It was assumed that in normal circumstances the donor would have preferred to keep the relevant object for

[135] As previously noted, according to this rule once the heir accepted the inheritance he was responsible for the estate's liabilities.

[136] G 2. 254.

[137] *Inst* 2. 23. 7.

[138] C 6. 43. 2. 1. In his *Institutes*, Justinian deals with legacies and *fideicommissa* separately as, according to him, such an approach would facilitate an understanding of the relevant institutions by students.

[139] As the *donatio mortis causa* was closely associated with legacy, it appears appropriate to discuss it in the chapter on the law of succession, although the institution of donation (*donatio*) in general is usually considered to belong to the law of obligations.

himself, but his belief of imminent death prompted the donation so that the donee, rather than his own heir, should receive it.[140]

A distinction was made between three types of *donatio mortis causa*: the first pertained to the case where the donor was not in any danger of dying imminently, but simply foresaw dying at some future time; the second form of donation was that made by a person who expected to die very shortly and who declared that the donation should immediately become the property of the donee; the third type of donation *mortis causa* came to the fore when the donor was facing imminent death, but the donation was made subject to the condition that the relevant property should pass to the donee only after the donor's death.[141] A *donatio mortis causa* failed to take effect if the donor did not die or if he survived the donee, or if he revoked the donation before his death.[142]

By the time of Justinian, the *donatio mortis causa* was largely assimilated to legacy and many of the rules pertaining to the latter were also applicable to the former. For example, persons who could not create or obtain a legacy could not make or take a gift *mortis causa*; furthermore, the provision of the *lex Falcidia* that permitted the heir to retain one-fourth of the inheritance against legatees was also extended to donations *mortis causa*.[143]

[140] D 39. 6. 1.

[141] See D 39. 6. 2.

[142] D 39. 6. 15; D 12. 1. 19 pr; D 39. 6. 18. 1; D 39. 6. 29.

[143] See *Inst* 2. 7. 1: "These gifts in contemplation of death now stand on exactly the same footing as legacies; for as in some respects they were more like ordinary gifts, in others more like legacies, the jurists doubted under which of these two classes they should be placed, some being for gift, others for legacy; and consequently we have enacted by constitution that in nearly every respect they shall be treated like legacies, and shall be governed by the rules laid down respecting them in our constitution. . .".

Chapter 6
The Law of Actions

6.1 Introductory

Roman private law was closely connected with the law of civil procedure, otherwise recognized as the law relating to actions. In a sense, the law of actions may be construed as the most important part of the law. This mainly derives from the fact that the early jurists, the shapers of the *ius civile*, were concerned not so much with the formulation of general principles regarding the rights and duties of individuals, but with establishing the factual circumstances under which an aggrieved person should be granted a legal remedy. In other words, unlike modern lawyers, who tend to emphasize rights and duties, and regard remedies as merely their procedural shell, the Roman jurists attached significance to remedies rather than to rights, to forms of action rather than to causes of action. Thus, the law as a whole had little import for the Romans unless a recognized form of action existed whereby an individual could enforce a claim. As the evolution of Roman private law was greatly influenced by the development of legal procedure, the study of procedural law can illuminate the framework that cultivated substantive private law.

As noted previously, the early Romans used the term *ius* to denote a right or a form of conduct approved by the community. Before the formation of the state there was no comprehensive system of rules or remedies designed to assist an aggrieved person with the enforcement of his rights. The obvious course for an aggrieved person was self-help, for example, by forcibly evicting a trespasser or reclaiming property he was wrongly deprived of by another person. A general awareness existed of the circumstances where such demonstrations of hostile power were *iura* and this was established by custom. The development of the state was accompanied by the formation of rules that required the person aspiring to wield self-help to show actual infringement of his rights, and establishing this proof often necessitated a judicial decision. Only then was the wronged party allowed to execute the decision by means of self-help. The holder of *imperium* had a principal function of declaring the *ius* or identifying rights. In the earliest times, this function of identifying the *ius* was probably undifferentiated from the magistrate's other

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functions. The exercise of his power to issue commands, that could be drastically enforced, assisted the aggrieved party in obtaining the *ius* that was declared as their entitlement. Therefore, if a person possessed or claimed a *ius* against another and secured that person's appearance before the magistrate, he could have both his *ius* confirmed and its exercise protected by the suppression of any resistance. Initially, the magistrate's law-finding activity must have been a relatively simple task as the circumstances where a *ius* was recognized were mainly presumed. But as social and economic conditions changed, magistrates were confronted with unfamiliar claims and forms of *ius*. We may surmise that they denied support for such cases, unless the new *ius* was adapted to resemble a recognized form. In the course of time, a more sophisticated system of rules and principles developed to provide remedies for a variety of infringements on the rights of Roman citizens.

The Roman law of procedure is generally distinguished by three stages of development: the period of the *legis actio* procedure, the period of the formulary system and the period of the *cognitio extraordinaria*. The *legis actio* procedure was used during the Republic; the formulary system featured in the second century BC to the third century AD; and the *cognitio extraordinaria* prevailed during the Empire.

6.2 The *Legis Actio* Procedure

The *legis actio* procedure (literally, an action based on the law) is the earliest form of Roman legal procedure known to us. Its origin is not quite clear. It probably derived from the practice established by custom where contested claims were voluntarily submitted to arbitration, and must have been in habitual use before its formal adoption. We may assume that at some time a *lex* required or permitted a magistrate to enforce a *ius* that was demanded in a particular way, and this procedure was consequently termed *legis actio*. The *legis actio* was essentially a ritual and, as such, was elaborated by the pontiffs. It was conducted orally and divided into two stages. The first stage (*in iure*) proceeded before a consul (or a pontiff) and, after the enactment of the *leges Liciniae Sextiae* (367 BC), before the praetor.[1] The second stage (*in iudicio*, *apud iudicem*) proceeded before a citizen appointed as the judge (*iudex*) by the magistrate and the parties concerned.[2] In certain cases two or more judges were appointed and thus designated as *recuperatores*.[3]

[1] The *aediles curules* and the *quaestores* also exercised jurisdiction in certain cases, but not nearly to the same extent as wielded by the praetor.

[2] The parties could in most cases select a judge of their own choice from a list of citizens qualified to serve as judges in civil and criminal trials (*album iudicum*). During the Republic the *album iudicum* was prepared every year by the praetorian office. At first, the *iudices* were probably chosen from among the senators.

[3] Towards the end of the third century BC, two courts were established to deal with more intricate cases: the court of the *centumviri* and that of the *decemviri stlitibus iudicandis*, which were composed of a hundred and ten judges respectively.

Whenever a Roman citizen wished to raise a dispute and institute legal proceedings against another, he first had to approach a magistrate endowed with the power of *iurisdictio*. This magistrate would determine whether the case was sufficiently strong for referral to a judge for trial and, if so, stipulated the appropriate procedure. This formed the first phase of the *legis actio* procedure, called *in iure*, as the magistrate declared the law (*ius*) applicable to the case.[4] However, the case was only heard if both the plaintiff and the defendant were present at the opening of the proceedings *in iure*.[5] According to the Law of the Twelve Tables (T. 1. 1.), the plaintiff could forcibly compel an absent defendant to appear before the magistrate. However, this action was averted if the defendant produced a guarantor (*vindex*) who would assure their appearance in court at a fixed later date. When both parties appeared before the magistrate, the plaintiff had to pronounce his claim in a set form of words attended by equally formal ritual acts prescribed by law for the relevant case. The defendant had to reply by also employing a mandated combination of words and gestures. The magistrate finally intervened in a prescribed manner so that the case might be sent for trial. The *litis contestatio* (joinder of issue)[6] formed the final act in the proceedings *in iure* as it established the disputed issue. The most important effect of the *litis contestatio* precluded the plaintiff from instigating a fresh action against the defendant for the same claim.

[4] A *legis actio* could be initiated only on certain days, called *dies fasti* (ant. *dies nefasti*). There were 40 days in a year when legal disputes could be presented before the praetor.

[5] As in the modern law of civil procedure, Roman law recognized the existence of two parties to litigation: the plaintiff (*actor* or *petitor*) and the defendant (*reus*). In proceedings concerning the division of common property (*actio communi dividundo, actio familiae erciscundae*), either party was at the same time plaintiff and defendant. Only free persons, who normally had to be Roman citizens, could act as parties to litigation (*litigantes*, *litigatores*, *adversarii*). Other than in certain exceptional cases, *filiifamilias* and *filiaefamilias* were also not permitted to participate in litigation. Boys under the age of 14 and girls under the age of 12 (*impuberes*) could engage in litigation only with the approval of their guardian or tutor (*auctoritate tutoris*), while women were permitted to litigate only under certain circumstances. Children and insane persons were usually represented in court by their tutors or guardians (*tutores*, *curatores*). Under a *lex Hostilia* (an early statute of unknown date), a person who had been taken prisoner in war, or who was absent on an official mission, could be represented by another citizen in a trial involving an allegation of theft committed against the absent person's property (*actio furti*). During the late Republic, foreigners (*peregrini*) could also participate in litigation (disputes between foreigners and between foreigners and Roman citizens were assigned to the *praetor peregrinus*, whose office was established in 242 BC), while entities, such as corporations and similar bodies of persons, could act through their agents. Generally, engaging in litigation on behalf of another person (*alieno nomine*) was banned during the period of the *legis actio* procedure. However, in later times, a party was allowed to conduct his case through a representative who, depending on the method of his appointment, was referred to as *cognitor* or *procurator*. The *cognitor* was nominated by the party he was to represent during the *in iure* phase of the proceedings in a formal manner and in the presence of the other party.

[6] See Festus, '*contestari litem*', in Bruns, *Fontes* II, p. 5.

The use of a formula with the solemn enunciation of prescribed formal words to request a magistrate to exercise his power on one's behalf was an ancient, deeply rooted practice among the Romans, who attached great importance to the efficacy of ceremonial acts in most communal activities. As the *legis actio* was essentially a ritual any mistake, even a trivial one, was necessarily fatal. This is illustrated by a case reported by the jurist Gaius where a man sued another for chopping down his vines. The aggrieved party lost his suit because he used the words 'vines' (*vites*) instead of 'trees' (*arbores*) as prescribed by the Law of the Twelve Tables (T. 8. 11.).[7] As previously elaborated, the pontiffs had knowledge of the formulas a magistrate would likely accept as efficacious. It was a customary practice to consult the pontiffs for some formula even before the *legis actio* became a well-defined and established system.

Five different types of *legis actiones* are mentioned in the sources: the *legis actio sacramento*; the *legis actio per iudicis arbitrive postulationem*; the *legis actio per condictionem*; the *legis actio per manus iniectionem*; and the *legis actio per pignoris capionem*.[8] The first three were applied to resolve a dispute, whilst the last two were used to enforce the execution of a judgement.

The *legis actio sacramento* (action in the law by oath) was the earliest and most important of the *legis actiones*. Gaius describes it as *generalis* (of general application),[9] since it applied to any case where no other action was provided by law. This action could be used to enforce either a real or a personal right and was thus referred to respectively as *legis actio sacramento in rem* (action in the law by oath for a real right) and *legis actio sacramento in personam* (action in the law by oath for a personal right).[10] The name of this *legis actio* derives from the fact that originally both litigant parties had to confirm the justification of their claim in the particular dispute under oath and before witnesses. Each party exhibited proof of their good faith by depositing a wager or stake (*sacramentum*) consisting of a monetary sum.[11]

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[7] G 4. 11.

[8] G 4. 12–29.

[9] G 4. 13.

[10] An *actio in rem* was initiated to establish the plaintiff's claim to some corporeal object (*res*), as opposed to a claim of the defendant, or to compel the defendant to acknowledge some property right, e.g. a servitude (*servitus*) that the plaintiff claimed to possess. This action was founded on the claim that the plaintiff had a better right to something than anyone else in the world, and could be instituted against anyone who invaded or disputed such right. According to Gaius (G 4. 5.), the *actiones in rem* were also referred to as *vindicationes* (vindications). An *actio in personam,* on the other hand, was initiated by the plaintiff in order to compel the defendant to perform a contractual or delictual obligation. Such an action was based on a specific obligation and directed against a determinate person or his heirs. Among the personal actions, those aimed at compelling the defendant to render or perform something (*dare facere oportere*) were termed *condictiones* (G 4. 5.).

[11] The Law of the Twelve Tables (T 2. 1.) provided that when the value of the object in dispute exceeded one thoudand asses, the *sacramentum* was five hundred asses; in all other cases, it was fifty asses. As this was a large sum of money at the time of the Twelve Tables, it effectively limited rash or unwarranted litigation.

The successful party in the subsequent trial retrieved his *sacramentum* whereas the failed party forfeited his *sacramentum* to the authorities who used it to fund religious ceremonies (*ad sacra publica*).[12]

In a *legis actio sacramento in rem* the property in dispute (or a token of the object if it was immoveable) was presented before the magistrate and each party asserted ownership over it by performing certain symbolic gestures and pronouncing prescribed formal words. An altercation then ensued between the parties over their respective titles, and each party supported their assertions by issuing an oath with a monetary sum staked on the outcome (*sacramentum*).[13] An important note is that an issue was not created by assertion and denial, but by the two parties asserting contradictory rights. The magistrate then produced an interim decision assigning possession of the disputed object to one of the parties and demanding security from him.[14] After establishing the question at issue (*litis contestatio*), the *iudex* was nominated to try the case and the *in iure* phase of the proceedings was thus completed.[15]

The *legis actio per iudicis arbitrive postulationem* (action in the law by application for a judge or arbiter) was employed in specific cases where a law had authorized it and was applicable when a claim emerged from a verbal contract (*sponsio*/*stipulatio*)[16] or it was necessary to institute an action for the division of a common estate or inheritance (*actio familiae erciscundae*). Under a *lex Licinia* (an early republican statute of unknown date) this *legis actio* could also be engaged in cases involving a claim directed at the division of joint property (*actio communi dividundo*).

When the parties appeared before the magistrate, the plaintiff stated the cause of his action (e.g. *ex sponsione*) and called upon the defendant to reply. If the defendant denied the plaintiff's claim, the latter requested the magistrate to appoint

[12] The forfeiture of the *sacramentum* was originally regarded as a form of sacrifice to the gods (*piaculum*) aimed at expiating the offence of perjury committed by the party whose assertion was proved false.

[13] In order to avoid later condemnation, a party could acknowledge his opponent's claim (*confessio in iure*), or remain silent, in which case he was regarded as having confessed.

[14] Strictly speaking, it was the magistrate who assumed control over the disputed property and it then existed in the custody of a man endowed with *imperium*. The magistrate could then assign it to either party, and only by such assignment did it transfer into the possession of either claimant.

[15] Very little is known on the way that the *legis actio sacramento in personam* was conducted. Apparently in this case, a simple assertion was issued by the plaintiff, again supported by an oath and backed by a wager, to which the defendant replied by admitting or denying the claim. See Val. Probus 4. 1., in Girard, *Textes* I, 13.

[16] As elaborated in the chapter on the law of obligations, the *stipulatio* consisted of an oral promise or undertaking in terms of which a person solemnly promised to make a specific performance to another person by means of responding in a particular, formal way to a particular question posed to him. The answer had to accord with the question perfectly; any difference or restriction rendered the contract void. This type of contract was used for any kind of obligation, from the payment of money to the most complicated performances.

a *iudex* or an *arbiter* to decide the case. It seems that a *iudex* was appointed in cases involving claims invoked by verbal agreements, whilst cases concerned with the division of joint property were determined by an *arbiter*. In comparison to the *legis actio sacramento*, the *legis actio per iudicis arbitrive postulationem* had the advantages of relative simplicity and no risk to the unsuccessful party of forfeiting a *sacramentum*.[17]

The *legis actio per condictionem* was introduced by the *lex Silia* (*c*. 204 BC) for actions directed at the recovery of a fixed sum of money (*certa pecunia*). It was extended by the *lex Calpurnia* (passed probably in the early second century BC) to encompass claims involving other definite objects (*aliae certae res*).[18] As in the case of the *legis actio per iudicis arbitrive postulationem*, its application was restricted to cases stipulated by legislation. However, the *condictio* as such was an abstract action as the formal words employed in respect thereof omitted reference to a cause of action. The *condictio* was a personal action that could be employed in a variety of cases, such as *mutuum*,[19] *stipulatio certa*,[20] *contractus litteris* (written contract) and *furtum* (theft). It also applied to cases of unjust enrichment when one person dishonestly acquired a benefit from another's property (*ex iniusta causa*) or without any legal justification (*sine causa*).

In a *legis actio per condictionem* the plaintiff declared his claim (i.e. the defendant owed him a certain amount of money or a specific object) and then invited the defendant to acknowledge or deny it. If the defendant denied the plaintiff's claim, the latter 'gave notice'[21] to him to appear before the magistrate after 30 days for the appointment of a *iudex*.

In contrast to the proceedings *in iure*, no formal rules governed the second phase of the procedure that occured before the *iudex* (*apud iudicem*, *in iudicio*).[22] During this phase the judge (*iudex*) conducted the trial based on the evidence produced within the frame established by the magistrate.[23] The judge had no restriction in assessing the evidence and adhered to only certain general rules (for example, it was

[17] There was scant information on this *legis actio* until the discovery of a certain fragment of the Institutes of Gaius in 1933.
[18] G 4. 18–20; *Inst*. 4. 6. 15; Festus, '*condictio*', in Bruns, *Fontes* II, p. 5.
[19] As elaborated in the chapter on the law of obligations, this was a loan for consumption, established when one person transferred the ownership of certain funds or a quantity of replaceable objects to another person on the understanding that an equal amount of money or objects of the same kind and quality would be returned to the giver at some later point in time.
[20] A verbal agreement where the object promised was precisely defined and fixed.
[21] *Condicere*: 'to give notice'.
[22] The office of the *iudex* was intermediate between the modern judge and juror, possessing less power than the former and having more extensive functions than the latter.
[23] The *iudex* was free to conduct the trial when and where he chose and could adjourn the proceedings as necessary. According to a provision of the Law of the Twelve Tables (T 2. 2.), a trial could be postponed if a party fell seriously ill (*morbus sonticus*), or if a party was engaged in another trial involving a foreigner (*status dies cum hoste*). In later years, additional reasons for the postponement of a trial were introduced (Bruns, *Fontes* I, p. 131).

recognized that the plaintiff assumed the burden of proof).[24] After observing the litigants' pleas (*causae coniectio* or *collectio*), hearing their witnesses and advocates,[25] and investigating the matter, he pronounced a verdict orally in the presence of both parties. Before delivering his judgment, the judge could consult anyone he chose or seek the advice of a council appointed by him (*consilum*) when necessary that was usually composed of persons with legal knowledge. No appeal to a higher authority against the judge's verdict was possible, because by accepting the *iudex* through the *litis contestatio* both parties agreed in advance to submit to his verdict.[26]

The *legis actio per manus iniectionem* (action in the law by the laying on of a hand) differed from the aforementioned *legis actiones* that were designed for dispute resolution. It applied to the execution of a judicial decision with a focus on the person of the judgment debtor and not his property.[27] According to the Law of the Twelve Tables (T 3. 1. & 2.), the *legis actio per manus iniectionem* could be engaged against the party condemned (*iudicatus* or *damnatus*) by the *iudex* at the end of the *in iudicio* phase of the proceedings and who had failed to discharge his debt within 30 days after the relevant decision, as well as against the party who acknowledged his debt in the *in iure* phase (*confessus pro iudicato habetur*).[28] If the

[24] Evidence was presented only in relation to matters of fact. Both oral (*testes*) and documentary (*tabulae*, *epistulae*, *codices*, *rationes*) evidence was considered, but oral testimony carried special weight. The Law of the Twelve Tables (T 8. 22.) provided that if a person had observed a transaction *per aes et libram* and refused to appear as a witness, he was declared infamous and incapable (*improbus*) of giving evidence or having evidence given on his behalf (*intestabilis*). (*Per aes et libram* denoted a legal transaction involving the use of copper and scales—e.g. *mancipatio*, *nexum*—and the performance of certain formal acts in the presence of five Roman citizens acting as witnesses.) Before giving evidence, witnesses had to take an oath.

[25] In the republican period the Romans began to engage the use of *oratores* as advocates in litigation. These advocates, who were usually leading citizens, did not act in a professional capacity. Their role was to assist the citizens unable to argue their case themselves either because they lacked the requisite skill or had a lower social status (e.g. *clientes*).

[26] With respect to the *legis actio per iudicis arbitrive postulationem*, the *legis actio per condictionem* and, probably, the *legis actio sacramento in personam*, the judge's verdict expressed the condemnation (*condemnatio*) or exoneration (*absolutio*) of the defendant. Regarding the *legis actio sacramento in rem*, on the other hand, the verdict simply identified the party who should retain the property in dispute. In cases involving an *actio in personam*, the party who lost the case (*iudicatus*) was subject to a *legis actio per manus iniectionem*—one of the two *legis actiones* discussed below.

[27] The relevant procedure and the particular accompanying *legis actio* were not created by the Law of the Twelve Tables, but were apparently in existence before that law was enacted (although they were probably modified by it). The name of the *legis actio* under consideration seems to indicate what all procedures may have been originally, i.e., legalized forms of self-help.

[28] See G 4. 21.; *lex Ursonensis*. 61. 1–2, in Bruns, *Fontes* I, p. 123. The *legis actio per manus iniectione* could be relied on, however, only in those cases where no sureties (*praedes*) had been rendered by the party who was defeated in the trial.

condemned person refused to settle his debt or failed to produce a guarantor (*vindex*),[29] he was assigned by the magistrate to the creditor as his prisoner for 60 days. During this time, the creditor proclaimed the debt sum on three successive market days (*nundinae*).[30] On the third occasion, if no one elected to release the debtor by paying the debt he was reassigned to the creditor. The latter could then sell the debtor into slavery across the Tiber river (*trans Tiberim*) or even, in early times, slay him.[31]

The *legis actio per pignoris capionem* (action in the law by the seizure of a pledge) was also designed for the execution of a judicial decision. However, it was dissimilar to the *manus iniectio* as it was a remedy directed at the property of the debtor.[32] This action enabled a creditor in specified cases to obtain a pledge from the property of the debtor without applying to a magistrate for a judgment.[33] In the cases where this form of execution applied, the creditor had to adopt a prescribed procedure that engaged a set form of words (*certa verba*) declared in the presence of witnesses; thus, the relevant procedure was regarded as a form of statute process.[34]

The *legis actio* procedure gradually fell into disfavour, as its archaism and exaggerated formalism rendered it unsuitable for the needs of a rapidly advancing society. The progressive complexity of social and economic life induced the praetor to devise new forms of action and new procedural *formulae* to accommodate *ad hoc* controversies arising from novel socioeconomic situations. This prompted the development of a flexible form of procedure, known as formulary (*per formulam*) procedure, which predominated during the late Republic and the Principate. After the formulary procedure acquired legislative recognition by the *lex Aebutia* (second

[29] The *vindex* could either pay the judgment debt or defend the debtor by denying that the *manus iniectio* was justified. (G. 4. 21.) If, however, in the subsequent trial the creditor's claim was confirmed, the *vindex* could be condemned to pay double the amount owed by the principal debtor who, after the intervention of the *vindex*, was probably released from the debt.

[30] XII T 3. 5; Aul. Gell. 20. 1. 46–47 in Bruns, *Fontes* I, p.21.

[31] The Law of the Twelve Tables contained a provision (T 3. 6.), which, if literally interpreted, gave creditors permission to divide the body of a debtor into pieces with each creditor seizing a piece proportionate to his claim. Although no evidence in the sources reveals that an execution of this kind ever occured, there is no doubt that in the archaic period the treatment of debtors by their creditors was extremely cruel. The position of debtors seems to have improved with the enactment of several statutes in the fourth century BC. Probably the most important statute was the *lex Poetelia Papiria* of ca. 326 BC, which abolished the extreme penalties of death or sale into slavery that had hitherto applied to defaulting debtors.

[32] G 4. 26–29.

[33] The *pignoris capio*, like the *manus iniectio*, must originally have been regarded as a justified form of self-help and did not constitute a *legis actio* unless it entailed a suit where the creditor was plaintiff. As a remedy, it was allowed in cases of a public character involving claims relating to military service, religion or revenue. In the first case, the remedy was established by custom prior to the enactment of the Law of the Twelve Tables; in the second, it was provided by the Twelve Tables (T 12. 1.); and in the third, it was created by law subsequent to the Twelve Tables (G 4. 28.).

[34] Unlike other forms of statute process, the *legis actio per pignoris capionem* could be applied even in the absence of the debtor and on days when jurisdictional activity was in abeyance (*dies nefasti*). See G 4. 29.

century BC), a plaintiff could choose whether to use the new or the old *legis actio* procedure. Although most claimants selected the formulary procedure because of its deriving advantages, the two types of procedure were used conjunctively until the end of the first century BC when the *legis actiones* were formally abolished by the *leges Iuliae iudiciorum publicorum et privatorum* of Augustus (*c.* 17 BC).[35]

6.3 The Formulary System

As elaborated previously, the earliest form of civil procedure in Roman law was the *legis actio*, so called because the only actions allowed were those created by statutes (*leges*), or closely adapted to the language of statutes by the pontiffs. Under the changed socio-economic conditions of the late Republic, the *legis actio* system gradually fell into disfavour. This mainly derived from its exaggerated formalism, and the prominence of a new and more flexible system: the formulary (*per formulam*) procedure. The formulary procedure was probably first introduced by the *praetor peregrinus* as a way of dealing with disputes involving foreigners. Its application was subsequently extended to cases where both parties to a dispute were Roman citizens and the *legis actiones* were not available by the *lex Aebutia* passed in the second century BC. The reform of civil procedure was completed by the *leges Iuliae iudiciorum publicorum et privatorum* of Augustus in 17–16 BC.[36] One of these laws abolished the *legis actio* procedure except in cases that fell within the jurisdiction of the centumviral court and in certain cases involving a threat of damage to another person's property (*damnum infectum*).[37]

Under the new system, the praetor was free to go beyond the strict letter of the law and accept or refuse a claim on the grounds of what he deemed right and equitable. He did not accomplish this by introducing new legal rights (as indicated earlier, the magistrates had no legislative powers). Rather, he granted the claimant an action and promised to grant a remedy if the facts forming the basis of the claim were validated in the subsequent trial. As in Roman law a right was regarded as a legal right only if it was enforceable by a recognized process of law, by introducing new remedies the praetor was actually creating new legal rights. The praetor's extensive use of the right to regulate the forms of proceedings accepted in court enabled him to eliminate or reduce the unwanted effects of the antiquated rituals attached to the old *ius civile*. At the same time, he created a supplementary body of law based upon common sense, expediency and fairness, the *ius honorarium* or *ius praetorium*, capable of supporting ethical and technical change.

[35] After that time, the *legis actio* procedure was used only in certain exceptional cases.
[36] G 4. 30.
[37] The term *damnum infectum* referred to a damage that threatened a person's property deriving from the defective state of a neighbouring property. The owner of the threatened property had an *actio damni infecti* against his neighbour. See G 4. 31.

The formulary procedure derives its name from the *formula*, a written document containing an exposition of the dispute between litigants and instructions from the praetor to the judge (*iudex*) assigned to try the case. In contrast to the *legis actio* procedure where the plaintiff selected the relevant *legis actio* at his own risk, the magistrate at the request of the party concerned issued the formula in the formulary procedure. When it was requisite to introduce a new *formula* to address hitherto unfamiliar facts, the praetor did so by issuing the appropriate decree in his edict. Thus he established various *formulae* that were moulded by the nature and circumstances of the dispute, and each had its own wording. The forms of action connected with these *formulae* were termed *actiones honorariae*, i.e. actions derived from the *ius honorarium*.[38] The vast majority of the *actiones honorariae* were praetorian creations, although several important actions were created by lesser magistrates such as the curule aediles. The *actiones honorariae* were distinguished from the *actiones civiles*, i.e. the actions originating from the *ius civile*. Several *actiones civiles* were established by legislation, whereas others crystallized from the creative activity of the jurists. When a *formula* pertained to an *actio civilis*, it was designated *formula in ius concepta*, in contradistinction to a *formula in factum concepta* that related to an *actio honoraria*.[39]

The principal forms of action employed by the praetor to deal with cases not covered by the existing law were the *actiones in factum*, the *actiones utiles* and the *actiones fictitiae*. An *actio in factum* (action based on the facts of a particular case) was an 'ad hoc' new action granted to an aggrieved person in a case where neither the *ius civile* nor the praetorian edict were useful and the case situation justified the furnishing of a remedy on equitable grounds. When such an action was allowed, the actual facts of the case were incorporated into a new formula (*formula in factum concepta*). An *actio utilis* ('adapted' or 'analogous' action)[40] was devised by the praetor to tackle a case not covered by the existing law that was analogous to another case with an available legal remedy. Consider the following example: under the *lex Aquilia* (early third century BC), an action was available in a case where a person caused injury to another by directly attacking *vi et armis* the latter's body or property. But the statute did not encompass cases where the injury was caused indirectly, such as when an animal was frightened off a precipice by shouts. However, in such a case the praetor could grant an action (*actio utilis quasi ex lege Aquilia*) to the injured party by adapting the *actio legis Aquiliae*.[41] Related to the *actio utilis* was the *actio fictitia* (action based on a fiction), which enabled the

[38] The word *actio* denoted the right granted by the magistrate to a plaintiff to prosecute his cause before a *iudex*. It also referred to the action of a plaintiff whereby he initiated a suit, as well as to the whole proceedings, or to the *formula* granted for a specific claim. In this last meaning, *actio* was used as a synonym for *iudicium*.

[39] G 4. 47.

[40] Also sometimes referred to as *actio ad exemplum*.

[41] It should be noted that the *actio utilis* and the *actio in factum* were frequently used interchangeably, without any distinction between them. Further, their respective fields of application were not subject to any precise limitations.

praetor to extend the operation of an existing action by using a fiction so that a particular case not covered by the relevant action was placed within its scope. The relevant *formula* instructed the *iudex* to assume that certain facts were present or absent in the presented case, depending on the circumstances of the particular case. For example, if the parties to a dispute were not citizens of Rome, they could access certain actions of the *ius civile* (e.g. the action for theft: *actio furti*) through the addition to the relevant *formula* of the phrase 'as if they were Roman citizens'. Another example of an *actio fictitia* is the *actio Publiciana*. As mentioned earlier, this action enabled a person to reclaim a *res mancipi* when they had acquired it in an informal manner (e.g. by mere *traditio*) and lost possession. Even though they had not yet obtained title, this action was available if they proved that the property was acquired under conditions that placed them in the position of acquiring ownership by *usucapio* (i.e. by remaining in undisputed possession of the property for a certain period of time). This action was an *actio fictitia* as it fictitiously presumed the completion of the period of *usucapio*.

The formulary system featured an important division of actions that had a correlation with the judge's discretion: the division between *actiones stricti iuris* and *actiones bonae fidei*. In actions *stricti iuris* the relevant *formula* had to be strictly construed and the judge could only consider the matters it contained. This category embodied actions based on unilateral contracts, such as the *stipulatio*[42] where the promisor was bound to the precise object promised.[43] On the other hand, the actions *bonae fidei* presented the judge with a greater latitude of discretion whereby he could take into equitable consideration all facts relative to the case whether or not these were stated in the *formula*. This power was granted by the praetor through appending the clause *ex fide bona* (in good faith) to the *formula*. In *bonae fidei* actions the judge could scrutinize the true intentions of the parties. He could consider any equitable defences, even if these were not expressly pleaded, as the *formula* in these cases instructed the judge to ascertain what the defendant ought to do or give *ex bona fide* and to condemn accordingly. Actions *bonae fidei* encompassed those arising from real or consensual contracts, such as *emptio venditio* (sale), *locatio conductio* (hire), *mandatum* (mandate) and *societas* (partnership). During the later republican period, contracts where the parties'

[42] See relevant discussion in the chapter on the law of obligations above.

[43] As previously noted, when fraud was committed in the context of such a contract, the victim initially had no remedy against the defrauder. The only exception was that the fraud had induced a mistake on his part. In the first century BC, the action for fraud (*actio doli*) was introduced for the compensation for any loss sustained. At the same time, the *exceptio doli* was granted to prevent any action based on the contract by the defrauder.

obligations were determined according to the requirements of good faith emerged to play an essential part in economic life.[44]

The *formula* as such was composed of various clauses or sub-divisions, but not all had to exist in every *formula*. According to Gaius, the clauses that normally appeared in a formula were the *demonstratio*, the *intentio*, the *condemnatio* and the *adiudicatio*.[45] In addition, the appointment of the judge (*nominatio iudicis*) was always inserted at the commencement of each *formula*. The *demonstratio* usually appeared at the beginning of the *formula* (directly after the appointment of the judge) and constituted a concise statement of the facts or circumstances upon which the claim was based. This part of the *formula* always began with the word '*quod*': inasmuch (e.g. 'inasmuch as the plaintiff deposited a silver table in the care of the defendant. . .').[46] Next appeared the *intentio* that formed the most important part of the *formula* as it set forth the precise claim or demand of the plaintiff. It started with the phrase '*si paret*' or '*quidquid paret*': 'if it appears', 'whatever it appears'. Depending on whether or not the object of the claim was clearly identified, an

[44] A further division of actions existed between temporary actions (*actiones temporales*) and perpetual actions (*actiones perpetuae*). The former were actions that could be initiated only within a fixed period and the latter were those that could be instigated without any time limitations. For example, the *actiones temporales* embraced the *actiones aediliciae* (actions introduced by the aedilician edict) that had to be instituted within a 6 month period, and the *actiones praetoriae* (actions originating in the praetorian edict) that had to be presented within a year (*actiones annales*). Under the formulary system, a temporary action was transformed into a perpetual one upon completion of the *in iure* phase of the lawsuit (see D 27. 7. 8. 1). In the post-classical period it was recognized that perpetual actions were extinguished after 30 years or, in certain exceptional cases, 40 years from the time the plaintiff could institute legal proceedings. The term *actiones arbitrariae* denoted actions where the judge, if he reached the conclusion that the plaintiff was right, could ask the defendant to restore (*restituere*) the claimed object to the plaintiff. The defendant was absolved if he complied; if non-compliant, the judge could condemn him to pay a sum of money. The latter event had worse results for the defendant than the immediate fulfilment of the judge's order (he might be condemned to pay a higher amount and, in some cases, be branded as an *infamis*). The term *actiones famosae* referred to actions where the condemnation of the defendant entailed infamy (*infamia*), i.e. the diminution of his social standing accompanied by certain civil disabilities (see G 4. 182). Actions that any Roman citizen could instigate as relating to the protection of general public interests (*ius populi*) were called *actiones populares* (see D 47. 23. 1). This category encompassed, for example, the *actio legis Laetoriae* (an action instituted against a person who exploited a minor) and the *actio de albo corrupto* (an action initiated against a person who damaged or falsified the tablet displaying the inscription of the praetorian edict). These actions had a penal character and if the defendant was condemned, the penalty was usually paid to the plaintiff. However, in some cases the penalty was paid to the state or divided between the state and the accuser. Finally, Roman law recognized certain preliminary actions (*actiones praeiudiciales*) that were dissimilar to the ordinary actions as they were not directly associated with specific claims. A preliminary action was concerned with establishing or clarifying certain matters upon which an ordinary action depended (see G 4. 44). The distinction between *actiones in rem* and *actiones in personam* was earlier mentioned.

[45] G 4. 39–44.

[46] It should be noted that the *demonstratio* occurred only when the relevant claim was undetermined and it was hence necessary to furnish additional details in respect thereof.

intentio could be determined (*certa*) or undetermined (*incerta*). An example of an *intentio certa* would read as follows: 'If it appears that the defendant ought to pay the plaintiff the sum of 1000 sestercii…' On the other hand, an *intentio incerta* would be worded in this manner: 'whatever it appears that the defendant ought to pay to the plaintiff…' In actions relating to the enforcement of a personal right (*actiones in personam*), the *intentio* contained the names of both the plaintiff and the defendant. In actions pertaining to the enforcement of a real right (*actiones in rem*) only the name of the plaintiff appeared (e.g., 'if it appears that the slave belongs to Aulus Agerius in accordance with civil law…'). The third part of the *formula* was the *condemnatio*, which delegated the judge power to condemn or acquit the defendant. It is significant that the *condemnatio* was always directed at an amount of money (*condemnatio pecuniaria*), which might be determined (*certa*) or undetermined (*incerta*). In the latter case, the judge was authorized to use his discretion in specifying the amount of money owed.[47] The *condemnatio* was replaced by the *adiudicatio* in actions relating to the division of common property (*actio communi dividundo*), or the division of property among co-heirs (*actio familiae erciscundae*), or the determination of the boundaries of land (*actio finium regundorum*). The *adiudicatio* was a component of the *formula* that authorized the judge to effect a division and to determine an award.[48] It was usually worded in this style: 'whatever part ought to be adjudged to any one of the parties, do you, judge, adjudge it.' A *formula* always included an *intentio* and a *condemnatio* (or *adiudicatio*). Exceptionally, actions concerned with preliminary matters that a subsequent lawsuit depended upon (*actiones praeiudiciales*) only included an *intentio* and not a *condemnatio*. For example, a patron seeking to sue his freedman for failing to perform his duties could initiate a preliminary action to determine whether the defendant was actually a freedman. Such an action was not concerned with the condemnation of the defendant but with simply providing an answer to the question raised.[49]

Besides the standard clauses outlined above, a *formula* occasionally contained additional clauses such as reservations (*praescriptiones*) and one or more defences (*exceptiones*) and counter-defences (*replicationes*) raised by the defendant and the plaintiff respectively. The *praescriptio* was an extraordinary clause that a litigant could elect to have inserted in the *formula* (directly after the appointment of the judge and before the *intentio*) when he wished to precisely limit the extent of the claim. Two kinds of *praescriptiones* were distinguished: the *praescriptio* in favour of the plaintiff (*praescriptio pro actore*) and the *praescriptio* in favour of the defendant (*praescriptio pro reo*). A *praescriptio pro actore* was applied, for instance, in a case where the plaintiff sued for an installment of a debt while retaining his right to later sue for further installments. The *praescriptio* in such a

[47] G 4. 48–52.
[48] G 4. 42.
[49] G 4. 44.

case recited: 'let the action be only for such things as are already due'.[50] A *praescriptio pro reo* was applied, for example, when the defendant wished to express the reservation that a decision in the present case would have a prejudicial effect on the determination in a more important case (*praescriptio praeiudicii*). However, this form of *praescriptio* fell into disuse from an early period and was replaced by the *exceptio*. The latter was a clause in the *formula* inserted by the defendant before the *condemnatio* that contained an assertion that there were circumstances supporting a defence against the plaintiff's claim. For example, a defendant might assert that he owed the sum claimed by the plaintiff but a special agreement entailed the plaintiff assuming the obligation not to sue for the money. In such a case, the defendant's objection would be inserted into the *formula* as a negative condition: the judge may condemn the defendant 'if there has not been an agreement that the plaintiff will not bring an action'. Depending upon their period of operation, exceptions were divided into peremptory or perpetual and dilatory or temporary.[51] A peremptory (*peremptoria*) exception could be invoked without a time limitation (*exceptio perpetua*). If a party failed to raise such an exception during the preparation of the relevant *formula* due to mistake, they could later seek the insertion of an exception in the *formula*.[52] Dilatory or temporary defences, on the other hand, could be raised only within a limited period of time or under certain circumstances.[53] Exceptions were further divided into exceptions based on the *ius civile* (*exceptiones civiles*),[54] and those developed from the praetor's activity (*exceptiones honorariae*).[55] Significant among the *exceptiones honorariae* was the *exceptio doli* that emerged from the claim that the plaintiff had acted fraudulently (*dolo*). Another notable exception in the same category was the *exceptio metus causa*, the defence based on duress. The term *exceptiones utiles* referred to exceptions that the praetor had formulated on the basis of other exceptions located in the *edictum perpetuum*. *Exceptiones in factum*, on the other hand, were new

[50] G 4. 131.
[51] G 4. 120.
[52] G 4. 125.
[53] For example, a defendant might raise a dilatory (*dilatoria*) exception to bar the plaintiff's action on the grounds that the action was instituted prematurely, i.e. before the passing of the prescribed period (*dilatoria ex tempore*). An alternative ground was that the person who launched the action was legally incapable of so acting (*dilatoria ex persona*). In such cases, before the conclusion of the *in iure* phase of the proceedings the plaintiff could withdraw his action and institute it again later, i.e. after the prescribed period had passed, or after the impediment relating to the capacity of the person who instigated the action was removed. If the plaintiff did not withdraw his action, a dilatory exception resembled a peremptory exception as its acceptance entailed rejection of his claim. See G 4. 116, 119, 121–2, 123–124.
[54] For example, the *lex Laetoria* (192–1 BC) provided such an exception. This law aspired to protect persons under 25 years of age (*minores*) who were defrauded in a transaction. Although the transaction may have been *prima facie* valid, the person defrauded could bar the plaintiff's action for payment by raising an *exceptio legis Laetoriae*.
[55] G 4. 118.

exceptions granted by the praetor in response to claims not covered by the exceptions already recognized.[56] The plaintiff could reply to the defendant's *exceptio* by denying the facts that produced the defence, or by raising his own counter-defence against it. For example, the plaintiff might deny the defendant's claim that the former had promised not to institute an action against him by asserting that this promise had subsequently been revoked, or was limited to a specific time period. The plaintiff's counter-defence (*replicatio*) was also inserted into the relevant *formula* as an additional condition.[57] The defendant could respond to the plaintiff's *replicatio* by raising a further *exceptio*, now termed *dublicatio*. This sequence of responses would proceed until each party's case was thoroughly stated.[58] All the exceptions and counter-exceptions were inserted into the relevant *formula*. However, it appears that *exceptiones* were used less frequently due to the proliferation of the *actiones bonae fidei*, i.e. actions where good faith was explicitly taken into consideration.

Envisage a case presented to the praetor where the defendant had promised by a verbal contract (*stipulatio*) to pay the plaintiff 5,000 denarii, but failed to do so. In such a case, the plaintiff could initiate an action against the defendant known as condictio certae pecuniae. The *formula* for this action was elaborated in the praetorian edict and proceeded as follows:

Let X be the judge. If it appears that the defendant ought to pay to the plaintiff 5,000 denarii, let the judge condemn the defendant; if this does not appear, let the judge absolve him.

In this type of case, the judge was instructed simply to examine whether the plaintiff's claim was true or not. The defendant could deny the promise to pay the plaintiff 5,000 denarii as a matter of fact or, if he admitted the existence of the promise, claim that he was no longer bound by it due to the presence of an exceptional circumstance. He might argue, for example, that the plaintiff had later informally agreed to absolve him of the debt. Pursuant to the *ius civile* such an informal agreement did not invalidate the initial promise, yet the praetor could grant the defendant a plea that thwarted the plaintiff's action (*exceptio pacti*). In this event, the defendant's defence would be incorporated in the *formula* as a further condition:

Let X be the judge. If it appears that the defendant ought to pay to the plaintiff 5,000 denarii and if there was no agreement between the plaintiff and the defendant that absolved the latter from the debt, let the judge condemn the defendant; if this does not appear, let the judge absolve the defendant.

[56] Probably during the classical period, a further division of exceptions emerged between personal exceptions (*exceptiones personae cohaerentes*) and non-personal ones (*exceptiones rei cohaerentes*). The former could be invoked only by the defendant himself; the latter could be raised by the defendant or any other person acting on his behalf.
[57] G 4. 126; D 44. 1. 2. 1.
[58] G 4. 127–8.

As stated earlier, the *formulae* for actions *bonae fidei* encompassed the clause *ex fide bona* (in good faith) as a supplementary condition. For example, consider a case where the plaintiff claimed that through a contract of sale (*emptio venditio*) he sold the defendant an ox, but the latter failed to pay the price. In such a case, the plaintiff could be granted an action (*actio venditi*) based on the following *formula*:

Let X be the judge. Inasmuch as the plaintiff has sold the defendant an ox, which matter is the subject of this action, whatever it appears that the defendant in good faith ought to give to or do for the plaintiff, let the judge condemn the defendant to give or do; if it does not appear, let the judge absolve him.

6.3.1 The Course of the Formulary Procedure

Like the *legis actio* procedure, the procedure *per formulam* was divided into two distinct stages: before the magistrate (*in iure*) and before the judge (*in iudicio*, *apud iudicem*).

6.3.1.1 The Procedure *in Iure*

Prior to the commencement of the procedure, the plaintiff announced his intention to institute an action against the defendant (*editio actionis*). The announcement was issued extrajudicially and informally to notify the defendant of the claim and the type of intended action. Thus, it presented him an opportunity to settle the case out of court. In the next step, the plaintiff formally summoned the defendant before the court (*in ius vocatio*). A defendant refusing to appear with the plaintiff before the magistrate could be compelled to participate, even forcibly. This was averted if he could enlist someone to act as surety for him (designated a *vindex*) and hence ensure the defendant's appearance *in iure* at a fixed later date.[59] In later times, the defendant could dispense with using a *vindex* and simply issue a formal promise (*vadimonium*) that he would appear in court.[60]

When the parties appeared before the praetor, the plaintiff made a declaration regarding the nature of his claim and the evidence he proposed to present (also referred to as *editio actionis*). He also requested the praetor to grant an appropriate action (*postulatio actionis*). The praetor refused to furnish an action (*denegatio actionis*) if he concluded from the evaluation of the facts that the

[59] If the defendant failed to appear on the set date, the *vindex* was liable to the plaintiff who could initiate a praetorian *actio in factum* against him.

[60] Moreover, in order to force the defendant's appearance the praetor could issue a *missio in possessionem*. This coercive measure authorized the plaintiff to acquire possession of the defendant's property. In addition, the praetor could grant the plaintiff an *actio in factum* that compelled the defendant to pay the plaintiff a sum of money. Consider G 4. 46. and 183.

plaintiff's claim did not sustain a proper cause of action or that the parties were not contractually capable.[61] However, he would indicate a willingness to grant an action (*dare actionem*) when he thought that legal protection should be provided.

The attention then focused on the defendant, who could either deny the plaintiff's entire claim or request an amendment thereof by means of a *praescriptio* or *exceptio*.[62] If he acknowledged the claim (*confessio in iure*) the proceedings ended as the defendant was already considered condemned (*confessus pro iudicato habetur*).[63] This rule, established by the Law of the Twelve Tables, applied where the plaintiff's claim involved payment by the defendant of a fixed monetary sum (*aes confessum*). However, if the plaintiff's claim did not specify the debt, an immediate execution was impossible and proceedings then continued based upon an *actio confessoria*. This action applied where the defendant had already admitted liability and it was designed to determine the amount of money that he ought to pay the plaintiff. If the defendant remained passive (*indefensus*), he had to forfeit the object claimed (*res indefensa*) in the case of an *actio in rem*, or accept the possible attachment of his estate (following the praetor's issue of a *missio in possessionem*) in the case of an *actio in personam*.

If the defendant elected to defend the case, the next steps were: the appointment of the judge; the formulation of the issues in dispute by means of an appropriate *formula*; and the praetor's order to institute a *iudicium*. As previously indicated, the *formula* was usually selected from the list of *formulae* included in the *edictum perpetuum*. If no appropriate *formula* for the plaintiff's action was located in the edict, the praetor could adapt a *formula* designed to cover cases of a similar nature (*actio utilis*, *actio fictitia*), or compose a *formula* for a new action (*actio in factum*).[64] The *formula* was then presented to the plaintiff (*iudicium dare*) who notified its contents to the defendant in the presence of the praetor. The *in iure* phase of the proceedings was completed by the announcement of the *formula* and its acceptance by the defendant (*iudicium accipere*).[65] This stage of the proceedings that finalized all the elements of the dispute was termed *litis contestatio*. An important consequence of the *litis contestatio* was that the judge could take into consideration the parties' claims as formulated at the time of the *litis contestatio*. Subsequent events did not affect the nature of the case or the basis engaged by the

[61] A plaintiff who was denied an action could present the case before another praetor, or request a tribune to exercise his veto (*intercessio*) against the praetor's decision.
[62] In the *per formulam* procedure, if the defendant raised an exception he was deemed to assume the position of a plaintiff with regard to that exception. See D 44. 1. 1.
[63] D 42. 2. 1.
[64] It is important to remember that in preparing the *formula* the praetor was concerned with effectuating the real intentions of the parties. Initially only the praetor prepared the *formula*, but later the completion of this document involved consultation with the relevant parties.
[65] G 4. 90. and 114.

judge to deal with it.[66] Moreover, after the *litis contestatio* the plaintiff was precluded from instituting legal proceedings against the defendant by using the same action in respect of the same facts or cause of action.[67] The *litis contestatio* also entailed the substitution of the plaintiff's claim by a claim for pecuniary compensation, as the condemnation of the defendant under the formulary system always resulted in a monetary payment to the plaintiff.

6.3.1.2 The Procedure *Apud Iudicem* or *in Iudicio*

In this phase of the procedure, the judge (*iudex unus*, *iudex privatus*), or a panel of judges tried the case with a view to forming a verdict either accepting or rejecting the plaintiff's claim as expressed in the *formula* issued by the praetor.[68] The parties were normally represented by competent advocates (*oratores*) who initially addressed the court by broadly outlining the merits of their case.[69] Before the commencement of the trial, the judge swore a solemn oath that he would exercise his functions lawfully and impartially. The necessary evidence was then presented and the parties or their representatives delivered arguments, which prompted the judge to issue a judgment.[70]

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[66] The death of the plaintiff following the *litis contestatio* did not necessarily entail the extinction of his claim. In such a case, the relevant action could be transferred to the plaintiff's heirs. This occurred even though it was impossible before the *litis contestatio* due to the personal nature of the claim. However, the rule that events transpiring after the *litis contestatio* did not affect the nature of the original claims was subject to certain exceptions. For example, it was recognized that if the object in dispute was accidentally destroyed the defendant was no longer liable. Moreover, in actions relating to property (*actiones in rem*) it was accepted that the unsuccessful defendant had to return to the plaintiff the property claimed and the fruits he collected, or should have collected, from the property.

[67] This rule, also known to modern law, is expressed by the phrase *bis de eadem re ne sit actio* or, briefly, *ne bis in idem*.

[68] Judges played an important part in the development of private law, as their decisions were often scrutinized by the praetor when modifying existing *formulae* or creating new ones.

[69] Although in principle any Roman citizen could serve as an advocate, this task was usually performed by senators or members of the equestrian class. The advocates were persons trained in the art of rhetoric, which was first taught in Rome during the second century BC. An important aspect of the relevant instruction was devoted to the selection of the arguments that must be employed in dealing with a particular legal issue. The courts provided an excellent stage for the display of a person's skills as an orator and powers of persuasion. Forensic advocacy reached its highest point of development during the later republican period when success at the law courts was a key that opened the door to a flourishing political career. Advocates usually referred to previous cases to extract support for their arguments. Their arguments often focused on the interpretation of the praetorian *formula* and the question whether the remedy it granted was justifiable in the circumstances. Thus their views were often considered by the praetor when altering existing *formulae* or developing new ones. In this way, the advocates played a part in the evolution of the *ius praetorium*. During the Republic advocates did not receive any remuneration for their services, although they were occasionally given gifts or small symbolic payments.

[70] The proceedings were not formally recorded, although private records could be compiled by the litigants.

The parties' claims and the presentation of the evidence during the trial were limited to the issues as enumerated in the *formula*. The arguments were primarily concerned with facts: the plaintiff sought to prove the facts that supported his claim; the defendant either denied the factual basis of his opponent's claim, or accepted it but asserted that there were good reasons for recognizing an exception. Arguments might also focus on the interpretation of the law or the *formula* relating to the plaintiff's action. A party could argue, for example, that the law governing the issue should be accorded a broader meaning than the one usually adopted, or that the purpose of the law was different from that assumed by his adversary. Both oral and documentary evidence could be adduced, although the judge had a wide discretion in determining the manner of presentation and permissibility of evidence.[71] In the absence of direct evidence, the court occasionally relied on presumptions (*praesumptiones*) when the existence of certain facts could be logically inferred from other established facts.[72] However, these presumptions were defeasible as they could be refuted by further evidence. Although there was no settled rule pertaining to the onus of proof (*onus probandi*), it was generally recognized that the respective parties must prove their allegations.

After all the evidence was presented and the arguments delivered, the judge pronounced his verdict (*sententia*) usually in the presence of the parties or their representatives.[73] Prior to determining a case, a judge had to acquire the necessary legal knowledge on his own accord. If necessary, he could consult a council (*consilium*) of experts, but did not have to adopt their opinions. When a decision was not attained because the facts or the legal positions were vague or ambiguous, the judge could swear that 'the case is not clear to him' (*rem sibi non liquere*). This entailed the nomination of another judge or the deferral of the decision until more evidence was obtained.[74] In deciding a case, the judge was bound by the wording of the *formula* that formed the basis of the relevant lawsuit. If the plaintiff had claimed that the defendant owed him something, the judge's verdict had to read either

[71] Witnesses (*testes*) were required to swear an oath before presenting their testimony. If a witness was unable to appear in person, his testimony could be read in court after it was recorded in writing (*testimonia per tabellam dare*). The written evidence included letters (*epistolae*), memoranda (*libelli*), written declarations (*cautiones*), private account books (*tabulae accepti et expensi*), wills and other documents. When these documents were produced they were sealed in the presence of witnesses (*obsignatores*) and delivered to the judge who opened them in court. Moreover, the evidence included the results of inspections performed by experts and state officials. A confession before the judge (*confessio in iudicio*) was also relevant as evidence, but its value was determined by the judge at his discretion.

[72] For example, the child of a married woman was presumed to be a legitimate child. See D 1. 6. 6.

[73] D 42. 1. 47. pr. Under the Law of the Twelve Tables, if one of the parties was absent the judge had to wait until noon before he pronounced his verdict. The relevant provision probably still applied in the context of the formulary procedure. However, uncertainty prevails as to whether this provision pertained to the decision of the praetor in the *in iure* phase of the proceedings, or that of the judge in the *apud iudicem* phase.

[74] D 4. 8. 13. 4; D 42. 1. 36. Consider also Aulus Gellius, *N. A.* 14. 2. 25; Cicero, *pro Caec.* 4.

condemno ('I condemn'), or *absolvo* ('I absolve') if the claim proved unfounded.[75] When the judge decided on a divisory action (*actio communi dividundo*), the verdict had to read *adiudico* ('I award').[76] A plaintiff would lose the case if he had elaborated in the *intentio* (i.e. the part of the *formula* containing his claim) a request for more than he was entitled (*plus petere*).[77] If he had requested less (*minus petere*), he was only entitled to what he had asked. In the latter case, the plaintiff could sue again for the remainder of the debt. However, the relevant action could not be granted by the same praetor as it could be blocked by an *exceptio litis dividuae*.[78]

The judge's decision generated an obligation for the unsuccessful party to execute it (*iudicatum facere oportere*).[79] A decision that adjudged an object to one party or, in a divisory action, to several people (*adiudicatio*) actually created new ownership rights on the adjudged property or share. It should also be noted that certain decisions entailed the condemned party enduring a diminution of his estimation among fellow-citizens (*infamia*). This occurred when the person condemned had committed an act involving personal turpitude, such as theft (*furtum*) or wilful fraud (*dolus malus*).[80]

The judge's decision was final. During the Principate era, a right of appeal (*appellatio*) against judicial decisions moulded by the *per formulam* procedure was finally recognized and was directed to the emperor or one of his officials. The purpose of an appeal was either the reversal of a decision or its modification.[81] The validity of a decision could be challenged by the unsuccessful party but a

[75] In the former case, the defendant had to pay the plaintiff a certain sum of money (*condemnatio pecuniaria*) that was often determined by the judge with regards to considerations of good faith and equity.

[76] In some cases, the *adiudicatio* could be accompanied by a *condemnatio pecuniaria*, when this was necessary for the fair division of the common property.

[77] According to Gaius, a plaintiff might have demanded more than he was entitled in relation to the object (*re*), the time (*tempore*), the place (*loco*) and the cause (*causa*) of the relevant action. In a *pluris petitio re* the plaintiff claimed a larger amount than was owed to him; in a *pluris petitio tempore* he requested the payment of a debt before the payment was actually due; in a *pluris petitio loco* he demanded that payment be issued to him at a place different from that originally agreed; and in a *pluris petitio causa* he claimed a specific object although the defendant was entitled to choose between two or more objects. In all the above cases, the plaintiff definitely lost his case. See G 4. 53; *Inst* 4. 6. 33. In some exceptional cases the praetor could grant the plaintiff a *restitutio in integrum*, a special remedy designed to reinstate the parties' former legal position. See Girard, *Textes* I, p. 285.

[78] G 4. 56 and 122.

[79] G 3. 180.

[80] One of the legal consequences of declaring a person an *infamis* was his exclusion from holding public office (*turpi iudicio damnati omni honore ac dignitate privantur*). See Cicero, *pro Cluent*. 42; *pro Sull*. 31. 32.

[81] A judicial decision might be declared invalid if a condition relating to the legality of the relevant process had not been met. For example, this occurred when the decision was issued by a judge who did not meet the prescribed age limit for eligibility.

rejected challenge obliged him to pay double the amount specified in the original judgment (*revocatio in duplum*).[82]

6.3.1.3 Execution of Judgment

If the plaintiff's claim was accepted, the defendant had to comply with the condemnatory judgment. He could comply voluntarily or, if resistant, be compelled to do so by means of a new action, known as *actio iudicati*. The plaintiff instituted the *actio iudicati* against the condemned defendant (*iudicatus*) on the expiry of a 30 day period after his condemnation by the judge (in the *in iudicio* phase) or his acknowledgment of the debt before the praetor (during the *in iure* phase). The *actio iudicati* was instituted in the same way as any other action: it was raised before the praetor (*in iure*) and a new *formula* was composed with a view to investigating the merits of the case. Before the case was referred to a judge for trial, the defendant had to provide security that the debt would be paid if he lost the case (*satisdatio iudicatum solvi*).[83] If the judge discerned that the previous condemnatory judgment had been justified, the defendant was condemned to pay twice the amount specified in the original judgment.

If the defendant was condemned at a trial for an *actio iudicati* or he admitted his debt before the trial ended, execution of the judge's decision followed as a matter of course. Execution could be directed either against the condemned defendant personally or against his property. In the former case, the execution was conducted in the same manner as in the *legis actio* procedure: the praetor issued an order (*decretum*) that authorized the plaintiff to seize and imprison the defendant (*duci iubere*).[84] This form of execution was governed by the provisions of the Law of the Twelve Tables relating to the *manus iniectio iudicati*. However, the provisions regulating a creditor's right to kill his debtor or sell him as a slave no longer applied. In normal circumstances, the condemned defendant worked off his debt under the supervision of the plaintiff. The execution directed at the defendant's person was gradually superseded by execution directed at his property engaging a praetorian decree known as *missio in possessionem*. After the lapse of a certain period (15 or 30 days, depending on the case), the condemned defendant was branded with *infamia*. This did not occur if he or another person acting on his behalf had meanwhile discharged the debt. Usually, the defendant's property was then sold by public auction (*venditio bonorum*) and the plaintiff obtained payment from the proceeds of such sale.[85] When more than one plaintiff existed and the proceeds were not sufficient to cover all the claims, a proportional division of such proceeds was effected among them.

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[82] See, Girard, *Textes* I, p. 345.
[83] G 4. 25.
[84] See Ulpianus, *disp*. 3. 7., in Girard, *Textes* I, p. 454; also in FIRA II, p. 310.
[85] The praetor Publius Rutilius introduced the *venditio bonorum* before 118 BC and this was probably modelled on a similar procedure adopted by the quaestors for enforcing the payment of debts to the public treasury (*aerarium*). G 4. 35.

Following the *venditio bonorum*, the debtor's property was consigned to the highest bidder (*bonorum emptor*). However, the latter did not acquire full ownership before the completion of the *usucapio* period.[86] The buyer of the property could be granted an *interdictum possessorium*[87] for obtaining possession of the property, as well as other actions for the payment to him of debts originally due to the insolvent debtor (*actio Rutiliana*, *actio Serviana*).[88] It should be observed that the insolvent debtor whose property was sold through a *venditio bonorum* was not always released from his obligations towards his creditors. A year after the *venditio bonorum* the creditors could initiate a new sale of any property the debtor had acquired in the interim, if their claims were not fully covered by the proceeds of the earlier sale.

As the *venditio bonorum* entailed grave consequences for the defendant, certain categories of persons were not subjected to this action. These included members of the senatorial class and persons construed by the law as incapable of regulating their own affairs (provided they had no guardian). If a person belonging to one of these categories became insolvent, his property was placed by the praetor's order under the control of an administrator (*curator distrahendorum bonorum gratia*).[89] The latter conducted the sale of the insolvent person's property by individual items (not as a whole) until sufficient money was obtained to satisfy the creditor's claim. This method of execution, termed *bonorum distractio*, did not result in *infamia* for the insolvent person. Finally, a *lex Iulia* introduced in the era of Augustus recognized that a person who became insolvent through no fault of his own could seek permission by the praetor or the provincial governor to surrender his entire property to the creditors (*cessio bonorum*). This tactic averted the consequences (especially the *infamia*) that an execution by a *venditio bonorum* entailed.[90] If the debtor's request was accepted, he was entitled to a *beneficium competentiae*. This special remedy granted the debtor an opportunity to pay his creditors only as far as his means permitted.[91] The property (or part thereof) surrendered was sold at a public auction and the proceeds were divided among the creditors.

6.3.2 Extraordinary Praetorian Remedies

An array of extraordinary legal remedies was developed from the praetor's activities in his capacity as a jurisdictional magistrate. These were classified under four headings: *stipulationes praetoriae*, *missiones in possessionem*, *restitutiones in integrum* and *interdicta*.

[86] G 3. 80.
[87] G 4. 145.
[88] G 4. 35.
[89] D 27. 10. 5.
[90] G 3. 78.
[91] D 42. 3. 4 pr.

6.3.2.1 Stipulationes Praetoriae

The praetor could impose a *stipulatio* (a verbal solemn promise) on one or both litigants in order to ascertain the normal progress of the trial and ensure certain behaviour from the parties by compelling them to assume the duty of performing or refraining from a specific action.[92] Moreover, such a compulsory *stipulatio* could be imposed on a person at the request (*postulatio*) of another to ascertain the latter's protection against certain eventualities.[93] Hence, the praetorian stipulations were categorised: *stipulationes iudiciales* were stipulations aimed at securing the parties' co-operation during a trial; *stipulationes cautionales* entailed the promise of an action to a person if certain circumstances occurred; and *stipulationes communes* were stipulations that related to both the above purposes.[94] If the promise embodied in the *stipulatio* was not fulfilled, an ordinary action lay against the contravening party. Moreover, non-compliance with the praetor's order or the absence of the party designated to assume the obligations imposed by the *stipulatio* could provoke a *missio in possessionem* in favour of his adversary.

6.3.2.2 Missiones in Possessionem

A *missio in possessionem* was a coercive measure applied by the praetor by virtue of his *imperium*. Pursuant to this measure, a person obtained possession of another person's property in terms of the whole estate (*missio in bona*) or some particular object (*missio in rem*). The praetorian decrees concerning *missiones* were issued either to ascertain the normal progress of a trial; or to secure the debtor's property for the satisfaction of his creditors; or to induce the debtor to assume a special obligation through *stipulatio* for security purposes if he refused to do so voluntarily. The legal situation of the party favoured by the *missio* decree varied from real possession to simple custody of the relevant property (or part thereof).

6.3.2.3 Restitutiones in Integrum

The *restitutio in integrum* was a legal remedy invoked when a person who had suffered unjust loss deriving from the strict application of the law requested the praetor to order a restoration of the previous legal position. It amounted to the setting aside of a legal act deemed otherwise lawful under the *ius civile*, on the basis that it would be unfair or inequitable to uphold the consequences of such legal act.

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[92] G 4. 91.

[93] For example, a guardian (*curator*) could be ordered to promise that his administration of the property owned by the person under his protection will not diminish the property's value. See G 1. 199.

[94] See in general D 46. 5.

This remedy was granted by a praetorian decree (*decretum*) after the praetor evaluated the circumstances that prompted the claimant's request (*causa cognita*). The best-known case that engaged this remedy pertained to the legal acts of minors[95] who had entered into transactions under conditions detrimental to their own interests. The circumstances where the praetor would grant a *restitutio in integrum* were enumerated in the *edictum perpetuum*.

6.3.2.4 Interdicta

The *interdicta* were the oldest and probably the most important legal remedies granted by the praetor.[96] An *interdictum* was a summary order issued by the praetor that prohibited a person from acting or persevering with an act, or demanded that he perform a certain act.[97] It was issued under certain circumstances in response to an application by a person who alleged that his right or rights were infringed, and was usually based upon a *formula* embodied in the praetorian edict. A great medley of rights could be protected in this way, such as the right of an individual or the public to enjoy their property without interference, or any right or interest with a private or public nature that was worthy of protection.[98] Evidently, an essential reason for the existence of the interdict was that it provided a swift and convenient means for permanently or temporarily resolving a legal dispute. However, one should note that an *interdictum* was effective only when the person against whom it was issued agreed to comply with the relevant order. If he failed to comply, the claimant could resort to the normal court procedure in order to verify or defend his right.

Three main categories of interdicts existed: the *interdicta exhibitoria*, *interdicta restitutoria* and *interdicta prohibitoria*.[99] An *interdictum exhibitorium* ordered a person to produce (*exhibeas*) a person (e.g. a child or a slave) or an object (e.g. a testament) he possessed, but did not impose the duty to deliver the person or object to the claimant. The *interdicta restitutoria* were concerned with the restoration (*restitutas*) of objects to their former condition, or the restoration of possession to a person who had been deprived of it. An *interdictum prohibitorium* operated to prohibit a person from a specific act, such as from hindering the claimant's exercise of a property right. For instance, if the value of a house would likely be substantially diminished by some act of the person in possession of that house, a

[95] *Minores* were persons who exceeded the age of *impuberes* (14 years for boys and 12 years for girls) and were under 25 years of age.
[96] The *interdicta* and the *restitutiones in integrum* still habitually feature in modern law as adapted in accordance with contemporary requirements.
[97] G 4. 139–140. *Inst* 4. 15. pr.
[98] See, e.g., the *interdictum de locis publicis* in D 43. 8. 1; the *interdictum ne quid in loco sacro fiat* in D 43. 6. 1; and the *interdictum de arboribus caedendis* in D 43. 27. 1. pr. and 7.
[99] G 4. 140. 142.

person claiming a property right over the house could request the issue of an *interdictum prohibitorium* forbidding such an act.[100]

6.4 Civil Procedure in the Principate Era

In the first few centuries of the Principate era, the practice of distributing functions among different sets of authorities also prevailed in the administration of justice. Certain areas of civil and criminal jurisdiction remained with the traditional republican magistrates, while others were transferred to imperial authorities. As the republican element of the constitution withered over time, the latter surpassed and finally replaced the former. In the same period, the senate assumed an original jurisdiction of its own in cases involving certain crimes of a political nature. Whenever the imperial branch took over judicial functions the procedure adopted differed considerably from the traditional formulary procedure. The trial consisted of only one stage and judgment was delivered by a state official with an extensive discretion in applying both the procedural and substantive norms. As a result, litigation could proceed in a simpler and more convenient fashion while the juridical and administrative activities of the state were mainly captured by a central authority. In addition, a hierarchy of courts emerged and a relatively elaborate system of appeals developed from the lower to higher tribunals. The new form of procedure, known as *cognitio extraordinaria* or *cognitio extra ordinem*, did not play such an important a role in the development of Roman private law as the formulary procedure. Nevertheless, it engendered several notable principles that coincide in several respects with modern principles of civil procedure (especially in Civil law jurisdictions).

6.4.1 The Formulary Procedure

As we have observed, during the late Republic the formulary procedure gradually replaced the earlier *legis actio* procedure. By the end of this era, the formulary procedure had evolved as the main form of civil procedure in Rome—a development that acquired statutory sanction by Augustus' judicial reform legislation of 17–16 BC (*leges Iuliae iudiciorum publicorum et privatorum*).[101] In the altered

[100] Furthermore, a distinction was drawn between *interdicta simplicia* and *interdicta duplicia* (see G 4. 156–160; *Inst* 4. 15. 7). With respect to the former, the relevant order addressed one of the parties to a dispute. Regarding the latter, at the same time either party was defendant and plaintiff. This category enveloped, for example, the *interdicta uti possidetis* and *utrubi* that were concerned with the maintenance of an existing possessory situation (see G 4. 139 & 143).

[101] As already noted, one of Augustus' laws abolished the *legis actio* procedure except for cases falling within the jurisdiction of the court of the *centumviri* and for some other special cases. See G 4. 30–31.

conditions of the late Republic, the formulary procedure permitted the jurisdictional magistrates to introduce novel rights and remedies to accommodate the new socio-economic relations of an increasingly sophisticated society. For a great span of time after the establishment of the Principate the normal jurisdiction of the republican magistrates was fully maintained and the *per formulam* procedure remained the customary method for initiating legal action in disputes relating to private law. As explicated previously, the relevant procedure was divided into two phases. In the first place (*in iure*), the praetor determined the admissibility of the plaintiff's claim, i.e. whether the plaintiff should be granted an action at law. If the praetor was satisfied that the plaintiff had an arguable case, the appropriate *formula* was composed that nominated the judge (*iudex*) to try the case, stated the matter in dispute and prescribed the consequences of the judge's decision. The trial occurred in the second phase (*apud iudicem*) where the judge listened to the parties' pleadings, assessed the evidence and rendered a verdict in accordance with the *formula* agreed upon in the *in iure* phase.

The only element that changed in the formulary system during the Principate period was the function of the praetorian edict. As noted previously, in the closing years of the Republic the productive strength of the praetorian edict as a source of law faded and praetorian initiatives became increasingly rare. This trend prevailed during the Principate age and as the praetor's ability to develop new legal remedies diminished, the changes to the edict were based on measures introduced by other law-making agencies, such as statutes and senatorial resolutions. The creation of law administratively by the praetor finally ended during the reign of Emperor Hadrian when the content of the edict was permanently fixed following its codification by the jurist Julian. Thereafter, any requisite changes to the edict could only be introduced by imperial enactment. Although no longer an independent source of law, the praetorian edict perpetuated its contribution to the administration of private law well after the formulary system had fallen into abeyance in the third century AD.[102]

6.4.2 *The Cognitio Extraordinaria*

Since the early Principate age the emperor or a state official acting on his behalf assumed, or was accorded, the right to decide certain cases when the positive law did not provide remedies. This right was effectuated by a procedure called *cognitio extraordinaria* or *cognitio extra ordinem*. The *cognitio* procedure could be employed not only in cases involving private disputes, but also in criminal cases and disputes between private citizens and state organs. The new procedure probably

[102] From the late second century AD, the term *edictum perpetuum* no longer referred to the edict issued by the praetor at the beginning of his year in office but was used to denote the body of the praetorian edict as codified by Julian.

originated from the early practice that allowed jurisdictional magistrates to directly deal with certain cases either on the application of a party or on their own initiative. The magistrates tackled these cases by using their administrative authority to cut through the formalities observed in regular court proceedings. The procedure was widely adopted in the provinces during the later republican period, especially in criminal cases. It was also engaged in cases involving private disputes between foreigners and cases relating to disputes between Romans when not enough Roman citizens were available to serve as judges. Such cases were addressed by the provincial governor either directly or through a delegate (*iudex pedaneus*), without observing the rules governing the ordinary procedure. From the time of Augustus, the *cognitio extraordinaria* was the only form of procedure used in the imperial provinces where the administration of justice was directed by imperial officials who acted as representatives of the emperor (*legati Augusti pro praetore*). By the early second century AD, it had become the regular form of procedure in the senatorial provinces. In Rome and Italy the *cognitio extraordinaria* was employed from the beginning of the Principate, although not on a regular basis. In the course of time, the new procedure gradually superseded the formulary procedure. By the end of the third century AD, it was the ordinary form of procedure throughout the whole empire.[103]

The establishment of the *cognitio* procedure as the main form of legal procedure was partly due to its great simplicity and flexibility. It also partly derived from the fact that, in accordance with imperial ideas, it facilitated the centralization of state authority. The *cognitio extraordinaria* was a device—as had been the formulary technique in the past—facilitating the judicial care of legal situations when the existing positive law did not offer appropriate solutions. At the same time, it became the vehicle for the subsequent evolution of the imperial jurisdiction that competed with, and if necessary, replaced the jurisdiction of the ordinary (republican) jurisdictional magistrates. As the imperial system developed, the state increasingly intervened in the sphere of law. This entailed the situation where legal disputes were no longer based on an agreement between the parties to present such a dispute before a judge, but on the power of the authorities to place a dispute before its officials, attain a resolution and execute the decision. A petition by one of the parties usually initiated the state intervention, but the emperor could also set it in motion by a procedure called *evocatio* that transferred the case to his extraordinary jurisdiction. Thus, cases of special importance could be withdrawn from their regular forum for determination by the *princeps*-emperor sitting, as a rule, in consultation with his legal experts. The emperor could also delegate his jurisdiction to subordinates designated in accordance with the subject matter of the particular case. In Rome and Italy the magistrates concerned were the special praetors, such as the *praetor de liberalibus causis*,[104] the *praetor tutelarius*[105] and the *praetor*

[103] The formulary procedure was finally abolished in AD 342. Consider C 2. 57. 1.
[104] A praetor with special jurisdiction in matters concerning the liberty of an individual.
[105] A special praetor charged with the appointment of guardians and with jurisdiction in disputes between guardians and their wards.

fideicommissarius,[106] and various imperial officials, such as the *praefectus praetorio*, the *praefectus urbi*, the *praefectus annonae*, the *praefectus vigilum* and the *procuratores fisci*. As noted, in the provinces the administration of justice was in the hands of the governors (*praesides*). Often these officials exercised their judicial functions through delegates (*iudices dati* or *pedanei*). These delegates were usually lower state officials appointed by their superiors. This contrasts with the *iudices* appointed by the praetor under the formulary system, who were private citizens chosen by the parties.[107] The practice of appeal from the lower to the higher instance and finally to the emperor ultimately emanated from this technique of delegating judicial functions from the *princeps*-emperor to his high-ranking officials and the latter's authority to sub-delegate the case to their subordinates. The rulings of the emperor as judge in the first instance or in the case of an appeal (*decreta*) were theoretically only binding in the particular case. In the course of time, they came to be regarded as authentic statements of law and binding in subsequent similar cases. Thus, a new body of substantive legal rules evolved from the operation of the new imperial branch of the administration of justice. This new body acquired equal rank with the two traditional legal systems: the *ius civile* based on the Law of the Twelve Tables and the subsequent comitial legislation; and the *ius honorarium* derived from the edicts of the republican magistrates.

The most significant feature of the *cognitio* procedure was the abolishment of the two phases *in iure* and *apud iudicem* and the occurrence of the entire procedure before only one official. The summons, accompanied by the plaintiff's statement of claim (*libellus conventionis*), was issued by the plaintiff to the defendant with the judge's support (*denuntiatio ex auctoritate*), or by the judge on the plaintiff's request.[108] This scheduled a date for the court appearance that was not less than 20 days later.[109] On the appointed day, the parties or their advocates appeared in court and presented their cases and the facts on which they

[106] The praetor charged with jurisdiction in matters concerned with *fideicommissa*. The *fideicommissum* was a request to an heir (*fiduciarius*) to transfer part or all of an estate to another person (*fideicommissarius*), who was often not qualified to acquire property as heir or legatee. Although in republican times it was regarded as a purely moral obligation for the heir to fulfill the testator's wishes, in Augustus' era *fideicommissa* became legally enforceable by means of an extraordinary procedure. This occurred place before the *praetor fideicommissarius* or, where the bequest had been made in the provinces, before the provincial governor.

[107] As the *cognitio* procedure was based largely on written communications, the state officials in charge of the proceedings were assisted by secretaries (*scribae*). Moreover, like the judicial magistrates of the Republic, they often relied on the advice of panels of experts (*consilia*).

[108] The summons of the defendant by the magistrate could be made either by a letter (*evocatio litteris*) or, if the defendant's domicile was unknown, by a public announcement (*evocatio edicto*). See D 5. 3. 20. 6d.

[109] If the defendant failed to appear before the judge, the judge could condemn him by default (*contumacia*). See, e.g., FIRA III, no. 169. In a formulary procedure, on the other hand, the plaintiff had to ensure that the defendant appeared before the magistrate. A judgment by default was impossible as no trial could proceed without the agreement of the defendant.

relied.[110] Evidence might be oral or written, although generally the former was regarded as having relatively little value. After all the evidence was considered and the arguments of the parties heard, the trial culminated in a judgment (*sententia*) from the magistrate-judge. This verdict was recited publicly and in the presence of the parties concerned.[111] Unlike the formulary system where the judgment of the *iudex* was deemed final, the judgment in the *cognitio extraordinaria* could be appealed against—an appeal could ensue from a *iudex pedaneus* to the official who named him, from a lower to a higher magistrate, or in important matters, from a magistrate to the emperor. If the defendant was condemned without further recourse, he was granted a period (at least 4 months) to ensure compliance with the judgment. If the defendant failed to observe the judgment, the plaintiff could request the authorities to initiate steps for executing the judgment. The execution of a judgment could target the debtor's property and thus the relevant property would be officially attached and sold by auction. Alternatively, the execution could be directed against the defendant's person and this entailed the debtor's confinement in a public prison.

6.5 Civil Procedure in the Late Imperial Age

In the fourth century AD, an edict of Emperors Constantius and Constans (AD 342) officially abolished the old *per formulam* procedure that had been wholly superseded by the *cognitio extraordinaria* in the later years of the Principate era.[112] The establishment of the *cognitio extraordinaria* was closely connected with the development of an extensive bureaucratic organization in the late imperial period, which required greater immediate control by officials. The state displayed an increasing tendency to intervene in the legal sphere and consequently the resolution of legal disputes was no longer based on an agreement between the parties to present a dispute before a judge. Such resolutions were now contingent on the power of the administrative apparatus to place a dispute before its officials, attain a determination and execute the decision. The *cognitio* procedure did not exert such a great influence on the development of Roman private law as with the case of the formulary procedure. Yet this procedure enabled litigation to proceed in a simpler and more convenient fashion, and it was ideally suited for the type of state created by Diocletian and his successors.[113] On the other hand, the pace of justice was slow because the courts were always overstretched and judicial magistrates normally had to devote much time to other administrative duties. Moreover, the

[110] The term *litis contestatio* now denoted simply the moment when the judge started to hear the exposition of the case by the parties or their representatives.
[111] See *Pauli Sententiae receptae*, 5, 5a, in Girard, *Textes* I, p. 345.
[112] C 2. 57. 1.
[113] A similar type of procedure was adopted by the ecclesiastical courts that were first instituted by the Church during this period.

cost of litigation was often beyond the means of ordinary people. The costs embraced advocates' fees, bribes to officials and in the case of appeals, long trips to distant cities. In addition, court fees (*sportulae*) were high and inclined to increase despite the government's periodic attempts to curb them.

The first step in a civil action was a declaration by the plaintiff or his representative to a jurisdictional magistrate outlining the factual and legal basis of his case against his adversary, and requesting the start of a trial (*postulatio simplex*).[114] After a preliminary assessment of the plaintiff's case, the magistrate served upon the defendant a summons accompanied by the plaintiff's statement. This form of summons was termed *litis denuntiatio* and was deemed issued by the plaintiff to the defendant with the assistance of the magistrate and under official authorization (*denuntiatio ex auctoritate*). The *litis denuntiatio* mandated the appearance of the defendant before the judge within 4 months to contest the plaintiff's claim. If the defendant failed to appear following three monthly summons (*trina denuntiatione*), the magistrate could prosecute him for insubordination (*contumacia*) or order that he be brought before him by force.[115] By the time of Justinian's reign, the *litis denuntiatio* was superseded by a new method of summoning the defendant: the plaintiff had to submit a statement of claim (*libellus conventionis*)[116] to the relevant judicial magistrate that presented the facts supporting his case and requested the magistrate to summon the defendant. Thereupon the defendant was notified of the plaintiff's claim and granted 10 days (20 days in Justinian's period) to respond in writing (*libellus contradictionis* or *responsionis*)[117] and provide security that he would be present on the day of the trial.[118] If the plaintiff or the defendant did not appear on the day of the trial (*contumacia*, *eremodicium*), a judgment could be delivered by default.[119] However, the matter could be re-instituted and the issues retried later.

On the day of trial, the parties and their legal representatives swore oaths of good faith[120] and proceeded to present the vital facts, and the pro and contra arguments in a brief form.[121] As under the formulary system, the defendant could raise a defence (*exceptio* or *praescriptio*) to counter the plaintiff's claim, for example on the grounds of fraud (*exceptio doli*). Pleas pertaining to jurisdiction or a party's capacity to participate in the process could be treated as preliminary pleas, and

[114] See, e.g., FIRA III, no. 173 (AD 338); Bruns, *Fontes* I, no. 103 (AD 361–363).
[115] If the defendant could not be located he was tried *in absentia* and condemned. D 2. 5. 2. 1; see also *Pauli sententiae receptae* (P.S.), 5. 5a. 6. in Girard, *Textes* I, p. 345.
[116] *Inst* 4. 6. 24.
[117] See, e.g., FIRA III, no. 177 (427 AD).
[118] *Inst* 4. 11. 2. A defendant from the *humiliores* class who failed to supply this guarantee could be detained in prison until the end of the trial; if he belonged to the class of *illustres*, he was relieved from the obligation to provide security—a formal promise under oath was deemed sufficient. C 12. 1. 17. pr.
[119] C 3. 1. 13. 2-2b; *Nov* 112. 3.
[120] C 2. 59. 2.
[121] If the defendant admitted his liability at the outset of the trial, judgment was passed against him immediately and the proceedings concluded.

interlocutory decisions on procedural and other matters were also possible. The term *litis contestatio* referred to the moment when the parties concluded their pleadings.[122] However, the parties were relatively free to modify their claims and defences during the course of the trial.

In the next phase of the proceedings, evidence was presented and arguments delivered. Evidence might be oral or written, but the former was deemed to possess relatively little value.[123] The court summoned witnesses, who were often required to provide surety for their appearance. The presiding judge interrogated these witnesses and their answers were recorded. Generally, the evidence of a single witness did not carry any weight, while the credibility of the presented evidence was contingent on the social status of the witness.[124] In normal circumstances, hearsay evidence was not permissible and declarations issued under oath were now quite general.[125] The acknowledgement of the plaintiff's claim by the defendant before the judge (*confessio*) carried special weight as a means of evidence, but did not necessarily entail the termination of the proceedings.[126] In general, the presiding magistrate had considerable freedom in assessing the evidence within the limits set by the statutory rules governing the trial process and by the instructions of his superiors. In this regard, the introduction of defeasible and indefeasible presumptions (*praesumptiones*) played an important role.[127]

The trial culminated in the magistrate's judgment (*sententia*), embodied in writing and announced publicly in the presence of all the relevant parties at a formal sitting of the court.[128] In contrast to the formulary procedure, the judge in the *cognitio* procedure was free to sentence the defeated party to an atonement other than the payment of damages (*condemnatio pecuniaria*)—for example, he could

[122] C 3. 9. 1. Under the legislation of Justinian, the trial had to be completed within 3 years from the *litis contestatio*.

[123] C 4. 20. 1. Documentary evidence included public records (*instrumenta publica*), such as documents retained by a public authority (*insinuatio actis*) or documents composed by a public organ at the request of the party concerned (*apud acta*), as well as private records. The latter included documents drafted by public notaries (*tabelliones*), written declarations (*cautiones*), letters (*chirographa*) and other records. In general, private records had little evidentiary weight unless they were signed by three credible witnesses attesting to their authenticity (*instrumentum quasi publice confectum*).

[124] See C Th 11. 39. 3; C 4. 20. 4.

[125] The judge could order one of the parties to swear an oath (*iusiurandum iudiciale*), or this oath could be imposed upon one party by the other with the judge's consent (*iusiurandum in iure* or *necessarium*).

[126] See, e.g., FIRA III, no. 178.

[127] A presumption occurred when the existence of a fact not supported by direct evidence was logically inferred from another fact established through evidence. Some presumptions recognized under Justinian's law had the effect that certain facts were considered established in court so long as no counterproof was offered (*praesumptiones iuris*). For example, a presumption was introduced for the event that several persons died simultaneously (e.g. in a fire). It entailed that children below the age of puberty were deemed to have died before their parents, while the elder children were presumed to have died after them. In certain exceptional circumstances a counterproof was not admitted (*praesumptiones iuris et de iure*).

[128] D 42. 1. 47. pr; C Th 4. 17. 1; C 7. 44. 3. 1.

order the defendant to deliver a specific object. Moreover, Justinian stipulated that if the defendant was absolved the judge could condemn the plaintiff to render the verified reparation that he owed in the context of the same transaction.[129] After the publication of the court's decision, the plaintiff was precluded from instigating another action against the defendant for the same object.[130] The defendant could raise an *exceptio rei iudicatae* against such an action—a defence based on the claim that the same matter had definitely been resolved in a previous trial.

As noted earlier, a decision of a judge could be appealed against (*appellatio*) to a higher tribunal and then a superior tribunal until it reached the court of the praetorian prefect. An appeal to the emperor was only feasible in matters of importance and, in most cases, an appeal could not progress beyond two instances.[131] Moreover, during Justinian's reign appeals against interlocutory judgments were in normal circumstances no longer permitted. The relevant party had to issue notice of appeal (*libellus appellationis*) within 2 or 3 days[132] (or within 10 days, in Justinian's time)[133] of the judge's decision, and the appeal proceeded with little delay. The appellate court could confirm the decision, whereupon the appellant incurred penalties to the lower court and the other party. Alternatively, this court could quash or modify the decision but did not remit it for resentencing to the lower court.[134]

Execution under the *cognitio* procedure was simpler than under the formulary system. If the defendant was condemned, he had to comply with the judgment within a minimum period of 2 months (or 4 months, under Justinian) after the announcement of the decision or when the decision was rendered final on appeal.[135] If he failed to comply, the plaintiff could notify the authorities with a request for execution of the decision. Where specific performance was ordered, such as the return of a particular object to the plaintiff, the court could employ its officers to effectuate it or to enforce compliance with the order.[136] Where the condemnation was pecuniary, execution could proceed against the debtor's person or property. In the former case, the debtor would be confined in a public prison. The law forbade an execution against the person that entailed confinement in private prisons,[137] but this was frequently ignored (especially in the Eastern provinces) as revealed by the contemporary literature; the imperial legislation was powerless to change this practice. When execution was levied against the debtor's property, court officers seized the relevant property to retain it as a pledge (*pignus in iudicati causa captum*). If the debtor did not comply with the court's decision within 2 months,

[129] C 7. 45. 14.
[130] D 50. 17. 57.
[131] C 7. 62. 19; C 7. 62. 32; C 7. 70. 1; *Nov* 82. 5.
[132] D 49. 1. 5. 4.
[133] *Nov* 23. 1.
[134] C 7. 62. 6. pr. 4.
[135] C Th 4. 19. 1. pr.; C 7. 54. 2; C 7. 54. 3. 3.
[136] D 6. 1. 68.
[137] C Th 9. 11. 1; C 9. 5. 2.

this property was sold for the benefit of the creditor.[138] If several creditors existed, the entire property of the insolvent debtor could be sold in a piecemeal fashion (*distractio bonorum*) at an auction organized by the administrator of the debtor's estate (*curator bonorum*).[139]

6.5.1 Resolving Private Disputes Through Arbitration

As an extra-judicial method for dealing with private controversies, arbitration (*arbitrium*) was based on a formal agreement (*compromissum*) between the relevant parties to submit their dispute to an arbitrator (*arbiter*) for resolution. The parties selected the arbitrator whose scope of authority was prescribed in the *compromissum*.[140] However, the decision of the arbitrator (*pronuntiatio arbitri*) was not binding unless the parties had assumed the obligation of abiding by the decision by means of reciprocal stipulations backed by penalties.[141] In Justinian's era the arbitrator's decision was binding if both parties had signed it, or if neither party expressed disapproval to the arbitrator or the other party within 10 days from the announcement of the decision.[142]

[138] D 42. 1. 15 pr. - 4.
[139] To avoid the infamy that the compulsory sale of his property entailed, the insolvent debtor could seek the court's permission to surrender his property to the creditors (*cessio bonorum*). D 42. 3; C 7. 71.
[140] The *receptum arbitri* was the formal agreement whereby the nominated arbitrator assumed the task of tackling the dispute. The person who undertook to act as an arbitrator was obliged to perform his duties and could be compelled to do so by the magistrate, unless he demonstrated good reasons for his release from this obligation. D 4. 8. 15.
[141] D 4. 8. 27. 7.
[142] C 2. 55. 5. pr. and 1.

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Index

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