

CVL1019

ROMAN LAW 2



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ROMAN LAW 2

First Year

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The Law of Things

Classification.

What the romans established in their law is still the juridical system in Europe. There is a distinction in the process of the Anglo-Saxon and roman system The main dividing line is that of property which can be owned and that which can never be owned, property which is in the public domain. But even here there are subclassifications of what these are

It is safe to say that things can be classified according to their physical nature or according to the technical rules of their legal nature. These classifications were made by people who looked at a practical approach. On the basis of this classification there is a long period of time where this has been retained and applied.

Things may be classified according to their physical nature, or according to the technical rules of the legal system in question.

The principle of classification is not so simple at RL, as those adopted by the Roman lawyers are in the main, the result of historical development or practical convenience. Justinian begins his second Book by saying "Things are either in our patrimony or outside". By which he meant that there are things which at law or at fact are not the subject of private ownership. Up until today, in lawsuits, lawyers refer directly to these classifications

Res Commune; cannot be owned privately. I am not attaining a title of ownership, but I am attaining the right to enjoy that title which would mean that if someone were to disturb me in my enjoyment I can file a lawsuit.

Res Publicae: in this, there is evidently a concept where object which are used by the public in general so they should not be subject to ownership. The law is extremely technical and can overlap but there are classifications and subsequent sub-classifications.

Res Communes.

Common to all men e.g. the air, running water and the sea-shore. Although such things could not be owned, the law recognised a right to enjoy them: deliberate interference with enjoyment could result in a delictual remedy for insulting behaviour.

Res Publicae.

Public e.g. rivers and harbours.

These were public things, regarded as belonging to the State, e.g. public roads, harbours, ports, certain rivers, bridges and enemy property captured by military action.

Perhaps the most important public property was provincial land, i.e. land in the provinces outside Italy.

A distinction was drawn in the Empire between senatorial and imperial provinces. The former were regarded as belonging to the Roman people, but the latter (generally the most recently acquired) belonged to the emperor. Although provincial land could not be owned privately, proprietary interests in it were possible.

Rivers were regarded as public things if they were perennial i.e. normally flowing all the year round. Although such a river could not be owned, its beds and banks could be; but it seems that the owners of the bank (riparian) could not prevent the public from using the banks to enjoy the rivers. Remedies were normally available to protect the enjoyment or use of public things. Interdicts in particular could be used for this purpose.

Were it to be the case that the river to change its course, now the bed of where it was can be constructed and used by any private property to use.

Res Universitatis: Belonging to a corporate body, such as theatres, racecourses and the like in cities. These were things intended for public use, owned by corporate public bodies such as municipalities and colonies.

This category included, public streets and buildings, parks, stadia.

The category appears under Justinian although the classical period such things were generally described as *res publicae*. If there are whatever you need in a theatre, all of that together is classified as *res publica*.

Causa mortis – I am writing a testament, and I say that all of the object which I own in the theatre I am going to bequeath to person x.

Res Nullius.

Belonging, to no one, a heterogeneous category which included wild animals, abandoned property, and divine things. Could be abandoned property – for ex. I do not need something, and I leave it outside my house it becomes *res nullius*.

Res Sacrae.

Sacred things. Churches and other things dedicated to the service of Cod. Formally consecrated and dedicated to the gods, temples, shrines and sacred groves. After Christianity churches were classed as so as was the ground that they stood on. It is ownership of the church but it is a roman law concept that it is not available for anything else except the following of the church.

Res Religiosae.

Religious things graveyards and graves. Tombs sepulchres, mausoleums, cenotaphs and land used for burial. Certain conditions had to be satisfied before burial ground was classified as 'religious: the burial had to be carried out with the proper rites and it had to be lawful e.g. the XII Tables burial within the city was forbidden.

Tomb inscriptions suggest that the Romans paid scant regard to the rule that tombs and burial land could not be owned privately (sales and gifts are often mentioned).

On this the Digesto .11.7.2.5 says "A tomb is a place where a man's body or bones have been interred. Celsus, however, says: 'Not all of the place chosen for a burial becomes religious, but only as much of it as covers the body'.

If you own a place in a tomb for someone to be buried, you can sell that place to someone to be buried there but it is only limited to that, you cannot build a block of flats.

Res Sanctae.

Sanctioned things such as city walls and gates. Considered to be under the protection of the gods, crucial to the safety of Rome (city walls and gates). Anyone violating them was subject to heavy criminal sanctions including the death penalty.

These are said to be sanctioned, because any offence against them is punished capitally: and penalties imposed by law are termed, sanctions'. The first two of these are said to be a matter of Divini Juris, and the term applies in a way to the third as well (quodammodo divini juris sunt).

The phrase Res Nullius is thus used in various senses:

- a) To include all things which according to Roman ideas are not susceptible of private ownership.
- b) Specifically, as above, of things sacred, religious and sanctioned.
- c) Of things which though susceptible of ownership, are not at the moment owned eg, wild animals uncaptured, or things which have been abandoned by their owner (res derelictae).

The Seashore. The distinction between the categories of public things was not always clear. The seashore certainly lacked a clear legal identity, Dig At. 1. 14pr. shores are public, not in the sense that they belong to the community as such but that they are initially provided by nature and has hitherto become no one's property.

Whilst other texts describe it as being open to all or as common to all or as belonging to the whole people. Dig. The shores over which the Roman people has dominion I consider to belong to the Roman people. Everyone had certainly the right of access to the seashore as in the case of river beds. But shelters and similar erections could be built.

D.41.1.50 Although what we erect on the shore or in the sea becomes ours, a decree of the praetor, nevertheless should be obtained authorising the erection.

Res Corporales Res Incorporales.

Res came to have a potentially much wider meaning, comprising an extended notion of property: it was any asset which had an economic value.

Corporal things are things which can be touched, as land, a slave innumerable. A garment, gold, silver and other things

Incorporeal things are things which cannot be touched. Such are things which consist in a right, as a usufruct, obligations in whatever way contracted.

I can own "his thing" and I can own "this right" each is an asset of value to me and is therefore a res. The chief examples of incorporeal things were rights in property belonging to another person iura in re aliens.

Res Mancipi and Res Nec Mancipi.

Through the whole course of RL, until the distinction was formally abolished by Justinian, things were distinguished as Mancipable and non-mancipable.

Mancipable things were things which were transferred by mancipation.

All other things were non-mancipable. What were res mancipi? A satisfactory definition has proved elusive it is easier to list the things that were recognised as res mancipi than to define the species.

Gaius in his institutes says that it comprises the following things: slaves, beasts of burden, Italic land, houses on such land and rustic praedial servitudes (easements).

Movables and Immovables.

This classification of property distinguished between land (immovables) and anything else (movables) that could be owned privately.

There are differences e.g: the periods of usucapio were not the same. Movables could be stolen, land not. In relation to possession and the possessory interdicts the rules were different.

Ownership.

Roman ownership, or as it was called, ownership by quiritary title (dominium ex jure Quiritium) implies a Roman owner of a Roman thing acquired by Roman process.

It was not available to peregrines, because they were not citizens. It was inapplicable to provincial land because provincial land was not owned by individuals but by the Roman People or the Emperor.

Dominium.

Three basic conditions had to be satisfied in order for a person to have dominium: He or she had to have commercium. The property had to be capable of being privately owned, And the property must have been acquired by an appropriate method of acquisition.

Conditions.

Only Roman citizens, and foreigners to whom commercium had been granted, could have dominium. A person could have dominium only over property capable of being privately owned.

Modes of Acquisition.

The legal processes by which a thing becomes mine. These are distinguished as original and derivative,

The first when the thing of which I became owner had no previous owner, or at least when my ownership stands in no necessary relations to that person who owned it before me;

The second when I derive my title from someone who owned before me, and acquire subject to any real burdens which attach to the property.

Justinian says that we acquire things either by natural law, which he identifies with jus gentium, or by civil law. The first he adds, is plainly the older, since it is as old as the human race.

Acquisition by Civil Law.

The civil law modes described in the text are usucapio and donation, and another of minor importance (jus aderescenti) which Justinian abolished.

In the earlier law however the two principal modes of acquisition by civil law were mancipation and cession in court (cession in jure). Justinian does not mention them. They had passed out of use before his time.

But they are of historical importance and must be considered in some detail i.e. 1. Mancipatio.; 2. In jure Cessio; 3. Usucapio. Donation, which was not in fact usually a mode of acquisition is reserved for separate treatment by R.W Lee.

Mancipatio.

Mancipation is a fictitious sale, a process peculiar to roman citizens. Through Nuncupation which means to make a public declaration. "There are brought together not less than five witnesses, roman citizens above the age of puberty and another person similarly qualified, who is to hold a bronze balance, and is called the libri pens. Then the person who is acquiring by mancipation, taking hold of the thing to be transferred uses the following form of words: 'This man I declare to be mine by quiritary right, and he be bought to me with this bronze and bronze balance' then he strikes the balance with a piece of bronze and gives it to the transferor by way of price"

Gaius speaks of mancipation as a 'fictitious sale, because, though in form a sale, in his time the process was a general mode of transfer, limited indeed to certain kinds of property. but applicable to any kind of transaction, sale, gift, constitution of a dos and others. But originally, the transaction was in fact, what later it was feigned to be, a sale for ready money.

We must ask what things could be conveyed by this process.

The res Mancipi includes: 1. land and houses in Italy and in certain privileged districts outside Italy; 2 rustic servitudes over such land; 3. slaves and beasts of draft and burden.

Everything else, including public land (ager publicus), provincial lands, and urban servitudes were res nec manapu.

In Jure Cessio.

In jure Cessio takes place as follows. 'Before a magistrate of the Roman People, such as the urban praetor, the person to whom the cession is made, holding the thing in question says: "This man I declare to be mine by quiritary right; and when he has vindicated the praetor asks the person who cedes whether he makes a counter-vindication.

If he says no or says nothing, the praetor awards the thing to the person who has vindicated it. This is called a legis-action (statute process). (Gaius).

In jure cession is a method of alienation common to res Mancipi and to res nec Mancipi. It requires three persons i) the person who cedes; i) the person who vindicates; in) the person who awards. The owner cedes: the cessionary vindicates: the praetor awards.

This form of transfer was used for the following purposes:

i) to alienate corporeal property of every kind res Mancipi or res nec Mancipi: ii) to transfer incorporeal things other than obligations, such as an inheritance: iii) to create and extinguish praedial servitudes and usufruct.

For urban servitudes this was the only method available. For rustic servitudes could also be created by mancipation.

Being a *jus civile* mode of acquiring property it was available only to roman citizens and in respect of things susceptible of roman ownership.

Usucapio.

Acquisitive prescription. It may be the case that a person is in possession of property as owner but does not have valid legal title. In such a case most mature legal systems recognise him as the owner, or at least, gives him the substantial advantages of ownership, if he continues to possess for a period defined by law and satisfies other conditions.

In order that property may be so acquired by *usucapio* the following conditions must be satisfied. There must be first a thing which is susceptible, lends itself to ownership, secondly a title, thirdly good faith, fourthly possession and lastly a certain lapse of time.

Usucapio. Res Habilis.

The thing in question must be capable of being the subject of legal transactions between roman citizens (*res in commercio*) and must not be declared incapable of alienation by any rule of law. This thus excludes *res extra commercium* (*res sacrae, religiosae, sanctae*). As also free men, who is not a *res*, and provincial land, which is technically incapable of private ownership. Neither dotal property, nor immovable property of pupil and minors *XXV annis*.

With regards to stolen property (*res furtiva*) neither even if there is a possessor in good faith. However this could be purged if the thing returned to its owner, or at least "if the owner knew where the thing was and there was no obstacle to his vindication of it here it ceased to be *res furtiva*."

Later the *lex Julia et Plautia* extended the same prohibition to things movable or immovable possessed by violence (*res vi possessa*).

Usucapio. Titulusque.

There must be a just cause (*justa causa*) or just title (*justus titulus*) which are equivalent to an antecedent or contemporaneous event which, in normal circumstances, makes the acquisition of possession take effect as acquisition of ownership.

Thus a mere physical handing over of a thing is colourless e.g. momentary convenience or by way of a deposit or loan.

It must be made with the intention of transferring ownership and with the normal consequences the ownership passes. Therefore a man may acquire by way of a sales, gift, legacy etc.

Justinian says that a mistaken belief that a cause exists, when it does not, excludes *usucapio* i.e. A putative title is insufficient There must be an actual sale, an actual donation. In the case of *res nullius* there must have been abandonment by a non-owner and something similar to occupation. However, one must say that as the *Digesto* attest *usucapio* was admitted when the error was excusable.

Usucapio. Fides.

There must be good faith. Person finding himself honestly in possession because he has; i) acquired from a person who had no title to convey the ownership; ii) he has acquired by a process not apt to make him civil law owner. To acquire good faith the acquirer must honestly believe that the transaction has made him owner at least by praetorian title. This generally implies a belief founded in an error of fact, not of law, that the person from whom he thinks that he derives his title was owner or competent to alienate.

It was enough that possession originated in good faith. It was not necessary that good faith should continue during the period of possession. Justinian held that in donation this did not apply, and later canon law required good faith throughout (*mala fides superveniens nocet*).

Usucapio. Possessio.

There must be juristic possession not mere detention. This implies corpus and animus i.e. physical control and the intention to possess as owner. These need not necessarily co-exist in the same persona. A person may acquire and hold possession through a slave, a son in power, or a free agent.

In general, both agent and principal must have the appropriate animus. The agent must intend to acquire possession for his principal not himself. The principal must intend to acquire possession through the agent.

Usucapio. Tempus.

The possession must continue uninterrupted for the period defined and established by law. This was fixed by the XII Tables at two years for immovables, for other things one year. In the latest period these were extended.

Usurpatio is the interruption of tempus. Any actual interruption for however a short time arrested the course of usucapion and wiped out the effect of previous possession. In Justinian's system commencement of legal proceedings for the recovery of possession by the owner had the same effect.

In calculating the time of possession, the heir or honorum possessor was allowed credit for the unbroken possession of his predecessor in title joined to his own.

Adjudicatio.

In certain actions as *judicia divisoria* the judge was directed to award property in severalty among the interested parties.

Actio Communi Dividundo. An action for the division of property owned in common between co-owners.

Actio Familiae Erciscundae. An action of an estate vested in co-heirs in an inheritance.

Actio Finium Regundorum. An action set for the determining of boundaries between owners of property.

Ownership.

The recognition of a variety of proprietary interests necessitated the elucidation of a clearer notion of ownership, the work mainly of the jurists of the late Republic and early Empire.

Dominium was the concept that emerged. It was the highest, the ultimate form of title to property, specifically distinguished from lesser types of propriety interest.

The owner was lord and master *dominus* of his property, entitled to a vindication- the standard proprietary remedy securing the rights of the owner.

The Essentials.

Three basic conditions had to be satisfied in order for a person to have *dominium*

1. he or she had to have commercium
2. the property had to be capable of being privately owned
3. the property must have been acquired by an appropriate method of acquisition.

Elements.

Commercium. Only Roman citizens and non who had been so granted could have dominium.

Privately owned. A person could have dominium only over property capable of being privately owned.

Appropriate. Dominium over res Mancipi could not be acquired unless such property has been transferred by Mancipatio or Cession.

A landowner owned everything above and below the ground.

There was a considerable range of restrictions to which the Roman owner was subject, mostly inspired by also matters of public policy.

Acquisition By Natural Law.

The modes of acquisition by natural law:

1. Occupatio.
2. Accessio.
3. Specificatio.
4. Perception and separation of fruits.
5. Traditio or delivery.

Occupatio.

This means taking possession of a res nullius with the intention of becoming owner.

The following are the principal cases:

1. Wild beasts, birds and fishes.
2. Things taken from the enemy.
3. Precious stones, gems, etc found on the seashore.
4. Unoccupied islands in the sea.
5. Things abandoned by a former owner (res derelictae)

Wild beasts.

These become the property of the captor, whether taken on public or on private land, one's own or someone else's.

If you go on someone else's land for the purpose of hunting or fowling, he may warn you off, if he sees you coming. If you persist in spite of the prohibition, your action assumes a contumelious character, and exposes you to an action injuriarum, but none the less, you are owner of what you take.

Beasts and birds are distinguished in: 1. naturally wild (ferae naturae) and 2. naturally tame (Mansuetae naturae). This is a question of the species to which they belong. Therefore there are wild and tame geese. Creatures wild by nature may in individual cases be more or less tamed or domesticated.

Wild beasts and birds become yours when you take them and remain yours so long as they are under your control. They are deemed to be under your control so long as they are in your sight, and pursuit is not difficult. The same applies to bees which have swarmed from your hive.

Tamed beasts and birds are those which, though naturally wild have acquired a habit of going away and coming back. They remain yours so long as the habit continues. Tame animals are owned like anything else and remain yours, however far afield they may chance to wander and however long they may chance to stay away.

Things taken from the Enemy.

These are said to become our *Jure Gentium*. A statement which requires qualification and clarification. Enemy property is usually at the disposal of the conquering State and is not acquired by individuals. This applies both to land and to booty. This was sometimes distributed amongst the soldiers. If enemy property happens to be in my possession at the outbreak of war I may appropriate it to my own use. Precious stones, gems and so forth found on the sea-shore belong by natural law to the finder.

Unoccupied islands.

If a new island appears in the sea (which is not a frequent event) it belongs to the occupant as being a *res nullius*. In the more frequent event of an island forming in a river, if it occupies the middle part of the stream, it belongs to the riparian owners on either bank of the river in proportion to their frontage.

If the island is nearer to one side, it belongs to the owners on that side.

If a river divides and again unites in a lower part of its course, so as to make an island of somebody's land, there is no change of ownership.

If a river wholly abandons its natural channel and takes a different course, the old bed belongs to the riparian owners in proportion to their frontage on the river: the new channel acquires the legal character of the river, that is to say it becomes public.

Res Derelictae.

On this principle the better view seems to be that if the owner of a thing has abandoned it, and some one else takes possession of it, it immediately becomes his. A thing is said to be abandoned when an owner throws it away with the intention of being rid of it with the consequence that he immediately ceases to be owner.

Accessio.

This is the process by which a principal thing attracts to itself an accessory, so that the owner of the first becomes the owner of the second. The principal thing may be an immovable or movable. The accessory may have been previously owned or unowned (*res nullius*). The accession may be affected by natural processes or by human agency or by a combination of both. The older commentators distinguish these cases of accession as natural, industrial (or artificial and mixed.

Numerous examples are given by the Institutes: i) natural increment; ii) alluvion; islands and river beds; iii) buildings; iv) planting and sowing.

In the case of accessio of a movable to another movable the question may be raised as to which is the principal, and which is the accessory. Usually, the answer is obvious enough. If a hand is added to a mutilated statue, plainly the hand is the accessory. But cases may be imagined in which the solution is not so simple.

The RL texts suggest various criteria. In one place it is said to be a question of appearance and the use to which the thing is reasonably put. In other texts the mental picture which we form of a thing is made the test.

Paulus says: "Proculus points out that we follow the rule which was approved by Servius and Labeo, ie that is anything be added to substances in which a special characteristic is kept in view, the addition is merged in the whole; as a foot or hand (joined on) to a statue, a base or handle to a cup, a leg to a couch, a plank to a ship, a stone to a building, for the whole belongs to him who was previously owner.

If the accessory could be, and was detached, so that it recovered its individual character, it reverted to its former owner, who in the meantime had an action ad exhibendum to require it to be dis-annexed. If this was impossible, he was reduced to claiming compensation by an actio in factum.

Natural Increment & Alluvio.

The owner of the female parent is owner of the offspring. Perhaps this is not so much a case of accessio, as a continuation of the property which I already have in the parent animal.

The same applies to the offspring of female slaves. We may refer to the same head the natural produce of the vegetable kingdom.

Alluvio.

Is defined as "latent increment" this occurs when a river-bank or an island in a river receives accessions of silt deposited by the water. The owner of the land is owner of the accessions. Alluvio does not apply to lands granted by the state and defined by an arbitrary boundary (ager limitatus) , though this may more or less coincide with the line of the stream.

Islands.

Islands in river beds. An island may come into existence in 3 ways:

- 1.By the river dividing its channel and so enclosing a tract of land between its two arms.
2. If part of the river-bed is left dry, but so that the water flows on either side of it.
3. When an island forms on the water's surface.

In the first case there is no change of ownership.

In the two other cases (which are indistinguishable) it is necessary to consider the position of the island in the stream and whether the riparian owners have or have not the right of alluvion.

Justinian on islands.

Justinian says that, if the island is in the middle of the river, it belongs to the riparian owners on the two sides. This implies though the text is not so clear) that a line is first drawn midway between the two banks (per medium filum aquae).

All of the island which falls on either side of the line is assigned to the owner or owners of the corresponding bank of the river, if more than one in proportion to their riparian frontage.

All this supposes that they have the right of alluvion. If they have not, the island is *res nullius* and becomes property of the first occupant.

Rivers.

If a river leaves its bed and flows in a new channel, the old bed accrues to the riparian owners in the same manner as an island formed in the stream: the new channel becomes public like the river itself. If the river again shifts back to the old bed, the new bed in turn accedes to the proprietors on either bank.

From which it follows that, if the whole of a man's land is absorbed in the new channel, he loses it altogether, because his field has ceased to exist, having lost its proper form, and he cannot claim any share in the bed, since he owns no property adjoining.

Building. Inaedificatio.

Normally, if a man builds, he owns the land and owns, or has the disposal of, the material. But there are cases where this is not so. A may build on A's land with B's material; A may build on B's land with A's or C's material. In both cases the result is the same.

The building goes with the land and is the property of the owner of the soil (*superficies solo cedit*), but there is no change in the ownership of the material. While the building stands, however, the owner of the material may not require it to be disannexed. Through the XII Tables if the building fell down the material might be re-claimed. But the law allowed the owner an alternative, to sue for the value of the material. If the material was stolen, he had the remedy of an *Actio de Tigno Injuncto* a penal action for double damages.

If a man builds upon land which he knows does not belong to him i.e. if he possesses in bad faith, the Institutes says that he loses the materials, because he is presumed to have parted with them by his own will.

It seems, however, that in the law of Justinian, if not before he might prove that he had no such intention and recover the materials in the event of demolition.

Further, in the later law, anyone who had built on another's land, and even knowing that it did not belong to him, might remove the building if he could do so without injury to the property (*jus tollendi*).

The builder was not in any event entitled to claim compensation by action, but a bona fide possessor might raise a plea of fraud against an owner seeking to recover his property, if he refused to indemnify him for his outlay, at least to the extent of the enhanced value of land.

Specificatio.

This is the name given to the process of bringing into existence a thing of a new kind (*nova species*) out of existing material, e.g. wine out of grapes, a ship out of timber, a goblet out of gold. If the creator of the "new species" was not the owner of the material, a question arose as to the ownership, upon which the Sabinians and the Proculians took different views.

The Sabinians decided in favour of the owner of the material, because without the material the finished product could not have existed. The Proculians preferred the creator of the new species, a thing which previously had no existence and no owner. Justinian gave authority to a third and intermediate legal opinion.

If the product could be reduced to its original state, as e.g. a gold cup can be resolved into the original lump of metal, there was no change of ownership; in the contrary case the specifier became the owner. In this case, therefore, specification is a mode of acquisition.

It comes near to but is not quite the same as the occupation of a *res nullius*. In fact there never is a *res nullius*, for from the very moment that the new thing exists it has an owner.

Perception and Separation of Fruits.

The term Fruits includes:

- i. the natural and periodic increment of the animal and vegetable kingdoms.
- ii. the industrial produce of cultivated fields and gardens.
- iii. The civil rents and similar profits derived from property.

The rules relating to the ownership of fruits varied according to the nature of the right upon which the claim was based. The owner in possession of land was entitled to the fruits because he was entitled to the land.

Dig. 6, 1.44. Fruits on the tree are deemed to be part of the land." and they continued to belong to the owner of the land after separation.

But there were cases where the fruits were vested in someone other than the owner.

The *emphyteuta* and the *bona fide* possessor of land became owners of the fruits as soon as they were separated from the parent tree (*fructuum separatio*), but the usufructuary not until he had gathered them (*fructuum perceptio*).

A lessee of land (*conductor*) is said to become owner of the fruits by the will of the lessor (*locator*), which is interpreted as meaning by a kind of delivery, taking effect when the lessee gathers them. From this it follows that if the lessor forbids him to gather them they do not become his, though he may have an action on the contract of hire.

Though the *bona fide* possessor acquired the fruits by separation, if his title was challenged by the real owner of the property, he was accountable for fruits of which he was actually in possession at the time. (*fructus exstantes*- *fructus non consumpti*). This rule, though in the Digest interpolated into texts of the classical jurists and in the Code into a constitution of Diocletian (AD 294) was "of much later origin, perhaps not much before Justinian.

The *mala fides* possessor was accountable for all fruits, gathered and consumed, gathered and unconsumed, and for fruits which should have been gathered but were not.

Traditio. Delivery.

This means transfer of possession with the consequence that the ownership of the thing transferred vests in the transferee.

The first essential element is that the thing must admit of delivery, and of acquisition by delivery. This includes in general all corporeal things movable and immovable, excluding incorporeal things.

The second the transferor must be competent to give and the transferee to acquire ownership by this method. To say nothing of rules of capacity applicable to both parties, this means,

normally, on the side of the transferor that he must be owner, or convey the property as agent for the owner, ratification being here as in other cases equivalent to antecedent authority.

The third the transferor must intend to convey, the transferee must intend to acquire the ownership of the thing transferred. Such an intention exists when, and only when tradition takes place for some just cause (*iusta Causa*). It is enough that it exists in the minds of the parties. They may suppose that there is an obligation to deliver the thing in question, when in fact there is not. Nevertheless, the property passes.

The fourth the transferor cannot give what he has not. Dig.41.1.20. "Delivery ought not to transfer, and cannot transfer, to him who receives more than belongs to him who delivers. If therefore, any one had the ownership of a field, he transfers it by delivery, but if he had it not, he transfers nothing to him who receives. Whenever ownership is transferred it passes to the transferee such as it was in the hands of the transferor; if the land was burdened, it passes subject to the servitudes; if free from burden, it passes unburdened; and if the servitudes were owned to the land which was transferred, it passes to the transferee together with the servitudes owed to it."

Fifthly there must be physical transfer of possession or something which in law is an equivalent. These being the following:

- i. *Traditio brevi manu*. This takes place when a person, who is already in possession, but not as owner, is to retain possession as owner e.g. I have lent you a thing for use, now I give it you.
- ii. *Constitutum possessorium*. This is the opposite process. I am in possession as owner. I wish to make you a present of the thing but to continue to have the use of it, for which I am willing to pay. I may without physical transfer make it yours, remaining in possession as hirer not as owner.
- iii. *Traditio Longa Manu*. This takes place when I do not assume physical control, but in order to make a thing mine it is placed in my sight, or I am placed in sight of it so that I can take possession at pleasure.
- iv. *Symbolic Tradition*. This takes place when e.g. the keys of a warehouse are handed over to me in the neighbourhood of the building, by which act the building and its contents are deemed to pass into my possession.

Thesaurus. Treasure.

Paulus describes this as "an ancient deposit of money, of which no memory exists, so that it has no present owner."

However one must say that treasure is not a *res derelicta*, since there has been no abandonment of ownership, nor is treasure confined to money.

There are three possible claimants:

1. the owner of the soil or the movable, in which the treasure is found.
2. the finder,
3. the *fiscus*.

The Institutes attributes to Hadrian the decision that if a man found treasure on his own land he might keep it; if he found it by accident, not by deliberate search, on someone else's land, it went half to the finder, half to the owner of the soil.

Donations.

This is an act of liberality which enriches the donee at the expense of the donor. These gifts are distinguished as i. gifts inter vivos; 2. gifts causa mortis.

When a donation, which is the most frequent case, takes the form of a transfer of ownership, it is usually affected by tradition. In Justinian's system a promise to give was enforceable as a vested pact, which placed upon the donor a duty to deliver.

Donatio Inter Vivos. These were subject to special rules relating to the following:

i). **The Amount.** A lex Cincia by a plebiscite of B.C. 204 introduced the principle that prohibited gifts in excess of a certain unknown amount.

Later Justinian replaced this by requiring registration in Court of donations in excess of 200, or as Justinian enacted, 500 solidi. An unregistered gift in excess of this amount was void to the extent of the excess.

ii). **Persons.** The chief restriction lay in the prohibition of gifts between husband and wife. Such gifts were in general void.

iii). **Revocation.** In the classical period gifts made by patrons to freedmen were revocable at discretion. Under Justinian all gifts might be revoked on the ground of serious acts of ingratitude on the part of the donee, and gifts by patron to freedmen also on the ground of birth of issue to the donor, he being childless at the time of the gift.

Donatio Mortis Causa. This was a gift made in contemplation of death either generally or in view of a particular illness or hazard.

It failed to take effect if the donor survived the donee however if they died simultaneously the gift held good and was subject to an unrestricted power of revocation inter vivos or by last will, which, however, might be expressly renounced.

Servitudes.

There are two forms of Servitudes. The Praedial and the Personal.

However, all had the following common points:

They are all real rights (jura in re aliena) protected by a real action called the action confessoria, while a corresponding action the action negatoria is available to the owner of property who wishes to take active steps to challenge another person's claim to servitude in regard to it.

They are incorporeal things and as such are the subject of special rules as to creation, extinction and in other respects.

They exist over the property of another for the benefit of a thing or a person. In the case of Praedial servitudes the burden imposed on one property (praedium serviens) must always be related to a benefit attached to another property (praedium dominans)

In the case of personal servitudes these last only so long as the person lasts in whose favour they are created. They are determined therefore, by death or capitis deminutio. Further being strictly personal in character, they cannot be transferred to a third person.

Real or Praedial Servitudes.

Real servitudes are either rustic or urban.

The principal rustic servitudes are:

- Iter, the right to go over another man's land on foot or on horseback.
- Actus, the right of passage for a vehicle, the right to drive draught animals and cattle.
- Via, which included the above and something more, in particular, the right to have a metalled track, which by the Law of the XII Tables was to be eight feet wide and sixteen feet where the road turned.
- Aquaeductus, the right to lead water over another's land.

The principal urban servitudes are :

- Servitus Cloacae Immittendae. My right to have a drain through your land serving my house.
- Jus Oneris Ferendi. Servitude of support for a building.
- Jus Tigni Immittendi. Right to drive a balk of timber into my neighbour's wall.
- Jus Stillicidii vel fluminis avertendi vel recipiendi. Right to discharge rainwater by drop from the eaves or from a spout on to neighbouring land i.e. my right to divert or your liability to receive.
- The right of light and prospect.

i) Jus altius non tollendi. My right to require you not to build so as not to interfere with my access of light.

ii) Jus ne Luminibus Officiatur. My right to access of light unimpeded by buildings or trees.

iii) Jus ne Prospectui Officiatur. My right to a pleasing and unimpeded view.

Besides these, mention is also made of Jus Altius Tollendi a right of building higher and Jus Stillicidii vel fluminis non recipiendi aut non avertendi the right that rain-water shall not be received or discharged.

Creation and Extinguishment of Praedial Servitude.

1. In the time of Gaius rustic servitudes were created by mancipation or by in jure cessio, urban servitudes only by in jure cessio. These modes applied to Italian soil.
2. Reservation Deductio. An owner might alienate land by mancipation or in jure cession, and in the later law by traditio, on condition that it was to be servient to land retained.
3. Testament. I might give a legacy of a servitude, thus charging the land in the hands of my heir, or give a legacy of the land with reservation of a servitude, thus entitling my heir to its exercise; or finally, leave the servitude to one person and the land, less the servitude, to another.
4. Lapse of time. Servitudes could not, strictly speaking, be acquired by usucapion, because they did not admit of physical possession, but it seems that in early law the distinction between ownership and servitude was not sharply defined and that servitudes could be acquired by this method, just as rustic servitudes might be acquired by mancipation. Late in the Republic a lex Scribonis forbade the usucapion of servitudes, whether of some or of all is uncertain. But in any event, it was forgotten or circumvented.
5. Quasi-traditio. From an uncertain date, but certainly in the later Empire, if the owner of land acquiesced in the exercise of a positive servitude by a neighbour, the neighbour acquired the servitude by a form of traditio, or by a substitute for traditio. If as might be also the case a document recorded the transaction, the document would of itself be sufficient to convey the right, as it ultimately did in the case of ownership.
6. Adjudicatio. It was competent to the judex in a judicium divisorium to declare a servitude in favour of any of the parties to the litigation.

How were Praedial servitudes extinguished:

1. Surrender or renunciation. In the old law this was affected by in jure cessio, an

action negatoria denying the existence of the servitude, not defended by the owner of the dominant land. A rustic servitude might also be extinguished by re-mancipation. In the later law a servitude could be extinguished by mere agreement.

2. Merger (confusio) viz when the ownership of both the properties vested in the same hands, for no one can have a servitude over his own land (nulli res sua servit).

3. Non use for the statutory period, the period being the same as that required for acquisition which was in the classical two years, under Justinian 10 or 20 years. In the case of urban servitudes, mere non use was not sufficient. There must be obstruction on the part of the owner of the servient land maintained for the required period of years. Better known as Usucapio Liberalis. Dig 41.3.4.28. The better view is that freedom from servitudes may be acquired by usucapio, for the lex Scribonia put an end to the creation of servitudes by usucapio, not to their release. Accordingly if for instance I owe you a servitude of not building higher, and I have maintained a higher building for the statutory period the servitude ends.

4. Term or Condition. A servitude might come to an end by expiry of the time for which it was constituted or by the effect of a resolutive condition.

Personal Servitudes.

The personal servitudes are; usufructus, usus; habitation; operae servorum.

Usufructus. Usufruct. Justinian repeats from the Digest Paul's definition as "the right to use and take the fruits of another man's property, the substance remaining unimpaired" and adds Celsus' for it is a right over a thing, the right necessarily disappears with corporeal thing; if thin

The effect of these together is that the words "the substance remaining unimpaired" must be understood to mean "as long as the property in question lasts". *Salva rerum substantia*. The usufructuary may use and enjoy the property, but may not diminish the substance.

Usufruct.

This was the most important form of personal servitude and the other forms are derivatives of it. The personal servitudes were so designated because they featured a vesting of all or part of the beneficial interest of the right of ownership in a person other than the owner, the right being personal to that person and so inalienable.

Justinian's definition (j 2.4pr) identifies the nature of usufruct as the removal to someone other than the owner of the rights to the use and the fruits, subject to the substance of the property remaining unimpaired.

The obvious necessity that the thing be preserved disallowed action by the usufructuary which might affect the substance of the property. The owner retained the bare property and the right of disposal of it. But the property had to be preserved, and the owner accordingly had no more than a right of alienation of the bare property; in practice the usufructuary had possession and was in a position to protect the property. The existence of the servitude is dependent on the existence of the object.

During the continuance of the usufruct the owner was free to exercise any rights not inconsistent with it: thus to alienate or hypothecate the property. The usufructuary, on the other hand, had all the ordinary rights of use and enjoyment and of taking fruits, but he must exercise these rights in a proper manner.

Thus, the Usufruct of agricultural land "must cultivate in the right way and use the property like a good father of the family."

He might not cut timber trees. He might open and work quarries and the like, if he could do so without undue disturbance of the course of agriculture. He was required by the praetor to give security by stipulation for proper use of the property and for its restoration on the expiry of the usufruct.

A usufruct could not be alienated, that is to say a usufructuary could not convey his right and liability to a third party, but there was nothing to prevent his contracting with another person to allow him to enjoy the benefit of the usufruct while it lasted, whether by way of gift, or hire or sale.

Usus.

This was a right of less extent than usufruct and of less frequent occurrence.

The usufructuary could only use the property to satisfy the personal wants of himself and his family. The usufructuary of a house might occupy it with his wife, family and servants, and receive guests. If he resided in the house himself, he might as Labeo says, take in a lodger, but not lease the house to another person.

Habitatio.

This was the right to use a house.

It had been doubted whether it was a distinct servitude, or indeed a servitude at all.

Justinian pronounced it to be distinct from usufruct and use, and adopted the opinion of Marcellus that the person entitled might not only occupy the house himself, but also let it to others.

Creation of Personal Servitudes.

Personal Servitudes were created in the same way as Praedial Servitudes:

1. In jure Cessio later by pacts and stipulations. ; 2. Reservation on a grant.;
3. Testament. ; 4. Lapse of time. ; 5. Quasi -Tradition. ; 6. Adjudication. ;
7. Statute (leges) (particularly usufruct which in later law the pater familias enjoyed in the bona adventicia of his son and the usufruct of one half which he retained upon emancipation.

Extinguishment.

Personal and Praedial Servitudes were extinguished in the same manner:

1. Surrender or renunciation.
2. Merger (consolidation).
3. Destruction or substantial alteration of the subject matter.
4. Non-use.
5. Term or Condition.
6. Death and capitis deminutio (any capitis deminutio before Justinian, CD maxima and media in his system.)

If the usufructuary was a corporate body, such as a municipality, the usufruct was taken to be constituted for one hundred years which was considered to be the longest duration of human life. Though normally usufruct was a life interest it may be constituted for a definite period, e.g. for ten years, but, in any event, death put an end to it.

Servitudes in general.

Rules of General Application.

1. **Nulli res Sua Servit.** No one can have a servitude over his own property.

Therefore if A has a right of way over B's field and then acquires it by sale, the right of way is extinguished and does not revive if the field is again sold.

Servitude ex destination patrisfamilias. When two houses adjoining each other of the same person are separated. One may find instances where water is carried from one property to the other forming a servitude.

2. **Servitus In Faciendo Consistere Nequit.** A servitude cannot consist in doing. Servitude is a right to require the owner of the servient land to submit to something being done, or to abstain from doing something, on his own land. Such as Positive: allow me to go over his land or Negative: not to build.

He could not be called upon to do something except in the single case of the Jus Oneris Ferendi, which placed upon the owner of the wall the duty of keeping it in repair.

3. **Servitus Servitutis esse non potest.**

There cannot be a servitude of a servitude. Thus, if I have a jus actus or a usufruct over you land I cannot create in favour of another a jus itineris.

4. **A servitude must be exercised civiliter**, that is, in the way least burdensome to the owner of the land.

5. **A servitude must have a perpetual cause.**

This means that the thing over which the right is exercised, as well as the exercise of the right, must be capable of perpetual duration.

6. **Remedies.** The law gave for the protection of servitudes remedies the same as or analogous to those given the protection of ownership. The action confessoria asserting a servitude. Actio Negatoria denying a servitude. Possessory remedies were also available.

Ownership

The recognition of a variety of proprietary interests necessitated the elucidation of a clearer notion of ownership, the work mainly of the jurists of the late Republic and early Empire.

Dominium was the concept that emerged. It was the highest, the ultimate form of title to property, specifically distinguished from lesser types of proprietary interest. The owner was lord and master dominus of his property, entitled to a vindication- the standard proprietary remedy securing the rights of the owner.

Possession.

Possession is the detaining physically of an object together with the use of it as if one is the owner, without the need of a legitimate title.

Detention is thus the material holding of the thing, to have it under your command. The use as an owner taking its benefits. This demands the so called animus possidendi that is the will to hold. Absence of a legitimate title one can thus be a possessor without being the owner. Or be an owner without being in possession as the case of someone whose property has been stolen. He is thus still the owner even if he does not possess.

It is so a form of an intermediate situation but two other forms exist.

A. **Possession corporalis o naturalis.** Detention pure and simple without the animus possidendi those who have physical strength with legal limitations with the clear intention that they are returning the object to their original owner. Corporalis is thus a pure material

position, the second Naturalis a state of fact independently of any legal legitimation or recognition.

B.Possessio Civilis. That pertaining to the owner or the possessor in good faith who can become the owner through Usucapio.

How to Acquire Possession

There must naturally be two elements one must take hold of the thing and have the intention to keep as yours.

Paulus says "Acquistiamo il possesso col corpo e con l'anima, l'anima deve essere sempre nostro il corpo puo essere nostro o altrui."

How to Protect Possession.

The Romans inserted the use of a possessory action through which one asked the court to protect him against illegal possessors. A short route through which the court examines who has legal possession and who has despoiled the other through violence or against his will i.e. during the night.

Use of an interdictory action before the praetor. So called because of the first words used where the praetor orders the party to do some thing or else refrain from doing it.

A distinction was carried thus out between the so called just possession and the unjust allowing the former even the owner due redress the other no.

The Law of Succession

Here we are going to see how the transfer of property of a dead person is legally achieved such that the transfer is legal and such that who acquires does so legally.

The transmission of a universality of objects i.e. all that I possess or the transfer of a share of what I possess or the transfer of a particular object.

The system developed such that the legislator allowed first the transfer of the inheritance through the free will of the person concerned. Then by interpreting what that will is if the decujus left no will. In time the liberty to testate was controlled.

The first instinct was just that of the performance of religious rites. Who should continue worshipping for that particular family. The beauty of it all was just the fact that way back with the XII tables it was felt that it was in coming with the legal order to have such ideas i.e. a legalized transfer at death and not a free for all.

Introduction: Ortolan

The institute of Succession is one of the most interesting. Developed very much and in such a remarkable detail by the roman jurist. The basic concept is that the legislator is here solving two important social problems. le who should or can claim to be the owner of the decujus's (the dead person's) property and secondly is there a legitimate right to the property by certain privileged class of persons.

The Roman jurist managed to solve this by granting the decujus the right to contract with the state. His testament is a legal document accepted by the legal system such that on his death his will be implemented as if he is still alive.

The dead person distributes his property between family or friends and the state is there as a guarantor of the effective mechanism of transmission. It is not a free for all i.e. whoever is first at the site takes all but a perfectly organized method.

1. The human being dies, but his personality remains in immortality, as the soul moves out of the body, the romans say that your soul, your spirit, your juridical personality, comes out and goes into someone else.

2. Your body dies, but in civil law you pass, you die, you are extinguished, but not your juridical personality. You are living in other people.

Successio Causa Mortis - We have so far considered modes of acquisition of property 'inter vivos'. Succession is mode of acquisition 'causa mortis'. This is the transfer of property which takes place at the person's death.

There are two typical forms of succession Ereditas which is succession by universal title; Legacy or succession by particular title; and between the two there is a marked difference.

Institutes |1.9.6.

This may serve for the present as regards the modes of acquisition of single things, for legacies and fideicommissa, by which also single things are acquired, will be more conveniently considered later.

Let us now investigate the modes of universal acquisition. If you are made any one's heir or claim possession of a deceased person's goods or adrogate anyone, or if a deceased person's goods are assigned to you in order to preserve the liberty of slaves, in all these cases such a person's property passes to you in its entirety .

Ereditas is the true succession and in classical law, it is designed simply as succession without necessarily the qualification of universalis, because rather than as a transfer of property this should be regarded as a continuation of the rights and liabilities of the deceased which passed to his heir.

There is no new title of acquisition but the same cause whereby the deceased had acquired the property passes on his successor.

The acquisition by the heir of the property of the deceased and his liability for the debts of the deceased as a whole (per universitatem) were a consequence of concept that the successor replaced his predecessor; the heir stepped into the shoes of the deceased, enjoying the same rights and becoming bound by the same obligations as if he were one person with the deceased.

The Institution of an Heir.

Introduction.

An heir or heirs must be duly instituted. This was essential. The institution of an heir was the essence and foundation of the whole testament.

A will was invalid unless it contained the appointment of an heir (institutio heredis). Gaius described the appointment of an heir as "the source and foundation of the whole will" (Instit. " 229).

Indeed, a will did not have to contain any other provision:

"Some one who does not propose to leave legacies and does not propose to disinherit anyone can make his will in five words, as by saying "Lucius Titus be my heir"; however, what is written here relates to someone who is not making his will in writing. And he will be able to make his will even in three words as saying "Lucius be heir" or both " my " and Titus are superfluous (D 28.5.1.3)

Form of Institution.

The solemn form was "Be Titus my Heir". Titus heres esto: and says Gaius the form " | direct Titus to be my heir" (Titium heredem esse jubeo) seems now to be approved, but not " I wish Titus to be my heir" (Titium heredem esse volo) and the forms " I institute Titus my heir" or " I make Titus my heir" (Titium heredem instituto facio) are generally disapproved.

In the later law this insistence on form was relaxed.^[1]Constantius and Constans A.D. 339 enacted that any form of words would avail which clearly expressed the testator's intention and Theodosius II and Valentinian III A.D. 439 allowed wills to be made in Greek. Lee

The appointment had to be made in a formal manner, using an imperative form of words, e.g.^[1]"Let Titus be my heir' consequently 'I appoint Titus to be my heir' or 'I wish Titus to be my heir' were considered insufficient.

The need for such fine distinctions was obviated in the 4th century A.D. when it was decreed that any form of words was acceptable provided that the intention to appoint an heir was clearly expressed. At all times, however, it was essential that the heir should be named or sufficiently identified. Bronowski.

Place of Institution in the Will.

The Institution of the heir had to come first, because everything else depended upon it. Consequently, a legacy or a gift of freedom which preceded the institution of the heir was of no effect. This requirement was rendered unnecessary by Justinian. Lee.

Digesto 28.5.1.pr. " A person who is making a will should generally start the will with the institution of the heir. It is also permissible to begin with a disinheritance which he makes by name; for the deified Trajan said in a rescript that it is possible to disinherit a son by name even before the institution of the heir."

Anything written before the appointment was invalid if it lessened the rights of the heir, e.g. gifts to other beneficiaries, manumission of slaves. However, disinheriting of others was valid even if written before the appointment of the heir, since the heir's interests were not thereby lessened. The appointment of a guardian before that of an heir was probably valid, although the Sabinians took a contrary view. Borkowski.

The institution must be to the whole inheritance for no one can die partly testate, partly intestate.

An exception was admitted in the case of the military will. A consequence of the rule was that if an heir was instituted to a fraction of the estate, e.g. to one half, and no disposition was made of the other half, he took this half also and was regarded as sole heir.

The same situation arose if for any reason a co-heir failed to take. The others or other took the lapsed share by accrual " jus adrecedendi". Nor was the result different if a testator had named a person heir to some specific thing e.g. to his estate at Capua. The limitation was taken pro non scripto (detracta fendi mentionae or detracta rei mentionae).

Under Justinian, if one person was instituted ex re certa and another generally, the first institution was created as a legacy and other ways had been found of giving effect to a testator's intention. (Lee). The will must cover the whole property Nemo pro parte testatus (Buckland).

An Institution might be Absolute or Conditional.

This means he might be subject to a suspensive condition e.g. be Titus my heir if he has married my daughter within a year of my death, but not to a resolutive condition e.g. Be Titus my heir: if he has not married my daughter within a year of my death, be Sempronius my heir, nor to take effect from a fixed date or to a fixed date (ex-die-ad diem). This would be contrary to the rule "Semel heres semper heres".

One consequence was that an inheritance could not be limited to shift over from one person to another. But under the Empire this was surmounted by means of fidei commissum, and it did not apply to military wills,

If an institution was expressed to take effect from an event which must occur, but at an uncertain date, e.g. Be Titus my heir when Seinus dies. Dies certus an/or/ "incerto quando" it was construed as a suspensive condition and free from objection. Any prohibited condition or time limit attached to the institution was ignored. It was taken "pro non scripto". (Lee).

In the later Republic it came to be accepted that heirs could be appointed subject to a suspensive condition--a condition precedent ie one that had to be satisfied before the heir entered on the inheritance e.g. let Balbus be my heir if he swims across the Tiber. However, as suspensive conditions were potentially a serious hurdle for the designated heir to clear, they were subject to close scrutiny. Illegal, immoral and impossible conditions were struck out, the appointment taking effect unconditionally.

Some jurists, mainly Proculians, argued that such conditions vitiated the whole will but their view did not prevail. Dig .28.7.1 " It is settled that an institution made under an impossible condition or with some other blunder is not vitiated"

What was the test on impossibility? It was objective: the condition had to be impossible in the nature of things. It was not impossible if it could conceivably happen, even if the designated heir found it personally impossible or very difficult to achieve.

For the condition to be struck out, the impossibility had to exist when the testator died; supervening impossibility caused the heir to fail to take, although he might have a claim for compensation in appropriate circumstances: Dig.9.2.23.2.

If I should be instituted heir on the condition of freeing the slave Stichus and he is killed after the testator's death, I can sue for the value of the inheritance in the assessment of my damages, for the condition failed because of the killing" (Lex Aquilia)

Illegality & Immorality.

A condition could be ignored if it was made by a testator of unsound mind. (although the whole will could then be at risk).

Digesto 28.7.27.pr: " A certain man appointed an heir in his will under a condition such as 'If he throws my remains into the sea', the question was asked, when the instituted heir had not met the condition, whether he should be expelled from the inheritance? On this Modestinus replied: "The heir is to be praised rather than accused for not throwing, the testator's remains into the sea according to his wishes but delivering them for burial, as a reminder of the condition of men. But this point must first be investigated, whether a man who imposed such a condition was even not of sound mind."

An Institution might be Absolute or Conditional.

If a condition was resolutive (ie. One which attempted to divest the heir of his position), it was normally ignored since it conflicted with the rule 'Once an heir always an heir.' A condition must not deprive an heir of the inheritance once it was vested in him. (Borkowski)

A heres might be appointed conditionally, ie subject to an event both future and uncertain. A gift to X "if St.Paul's is 400 feet high" was not conditional; it was valid or not according to the facts.

A gift " if X becomes consul" was conditional and there could be no acceptance of it, till X was consul, which he might never be.

Conditional institutions were subject to restrictions, An impossible condition was struck out, the institution being treated as absolute, on the principle of maintaining institutions.

An impossible condition is one not in the nature of things, not an exact idea, but shifting with the advance of knowledge; many modern achievements of severance would have been set down as not in the nature of things.

A testator might institute one or several heirs.

If several, they might be instituted to equal shares or unequal as the testator decides. It was essential that the whole estate should be distributed somehow, for as no one could die partly testate and partly intestate.

Thus it was held that if a testator said "Be Titus and Sempronius my heirs. Be Titus my heir to one half." and forgot to say what share Sempronius was to take, he took the other half. (Lee)

"A testator may institute as heirs persons whom he has never seen, for example a brother's sons abroad, though he does not know them; for a testator's want of knowledge does not render the institution void."

A free man or a slave, his own or some one else's could be instituted.

A freeman could be instituted if he was duly qualified to do so.

A slave, if your own the law required that together with the institution an express gift of liberty but Justinian gave authority to the more indulgent and practical view that the institution held in itself the liberality of freedom.

If he was not your own, he acquired the inheritance for and on half of his master by the acceptance at his order, provided that the master was duly qualified at law to receive himself.(Lee)

A free man or a slave, his own or some one else's could be instituted.

As Lee says: "It may be asked why the testator should institute a slave instead of instituting the master directly. The answer is that the institution of a slave had certain practical advantages; in particular the law forbade any kind of traffic in the succession to a living person, but the slave with the prospect of succeeding formed part of the estate of his master, who could manumit, if he chose (in which case the manumitted slave might accept the inheritance for his own account) , or dispose of him inter vivos or causa mortis. The slave became so to say, a promissory note entitling the holder to claim the inheritance upon the testator's death."

Substitution of Heirs.

If a person was instituted as sole heir and for any reason could not, or did not, accept the inheritance, the will failed and the property went to the heirs ab intestato.

To avoid a priori such a situation, it was the practice for testators, to substitute another person for the instituted heir, if he did not enter. This is known as Ordinary substitution or better *vulagris*.

Thus a testator might name one or several substitutes, and he might name several substitutes to one institute or one substitute to several institutes, or he might substitute the institutes reciprocally one to another. ie Be Titus my heir: if Titus shall not be my heir, be Seius and Sempronius my heirs or; Be Titus and Seius my heirs: if Titus and Seius shall not be my heirs, be Sempronius my heir or

Be Titus my heir to half; be Seius my heir to half. If Titus shall not be my heir, be Seius my heir; if Seius shall not be my heir be Titus my heir.

Pupillary substitution.

This took place when a paterfamilias appointed a child in power his heir and provided a substitute not only for the event of such child not becoming an heir, but also for the event of his becoming heir and dying before puberty, ie. ^[1]~~SEP~~ Before acquiring testamentary capacity on his own account.

In this case as both Justinian and before him Gaius hold, there are, in effect, two wills, or one will disposing of two inheritances, for the testator provides for succession not to his own estate alone, but also to his son's. This principle was carried to the extent that the paterfamilias might disinherit his son and still provide for the devolution of the son's estate.

The father could not however make a will for his son unless at the time he was also making a will for his whole estate, for pupillary substitution was regarded as part of and an accessory to the main will of the parent.

Justinian extended this principle to descendants who were insane. It was more restricted because the testator could not substitute any one he pleased. He had to appoint certain persons i.e. descendants and failing such brothers and sisters of the insane person. Only in default of these the choice to the testator was unrestricted. Lee.

Where a man had a *suus heres*, born or unborn, he might provide for the case in which this *suus* survived him, and so inherited. but died under puberty, and thus unable to make a will of his own.

The father might, in his will, substitute a person to take the inheritance of the child in that event. in effect, making a will for the child, but the original view seems to have been rather that it was another will of the father.

Its validity depended on that of the father, but it could not last beyond puberty. Buckland.

Acquisition of the Succession.

The manner of acquisition is different according to whether the *Heres* is "domesticus or extraneus"; the former acquires 'ipso iure' and is therefore '*Heres Sui et Necessarius*'; the latter by his acceptance, and he is therefore '*Heres Voluntarius*'

Heres Domestici are: the Slaves and the '*Sui juris*', i.e. the *Sui* being *filii familias* subject to the immediate potestas of the *decurus*; for the *Heredes Necessarii*, if they were slaves, the

acquisition 'ipso iure' was a consequence of the dominium of the testator over them, and for the Heredes 'sui et necessarii' it was a consequence of his potestas.

In favour of the latter, the Praetor, not being able to authorize them against the Jus Civile to renounce the succession, introduced the Jus Abstinendi, which though different in name had practically the same effects as Renunciation.

Testamenti Factio.

"Testamenti factio publici iuris est" they are rules established by law as public order which could not be varied. Buckland.

-The testator, heir and the witnesses must have legal competence. The legal personal quality of each must be there as a necessary condition for a will to be valid according to law.

- The testator must be competent to make a will.
- The heir must be competent to be instituted in the will.
- The witness must be competent to witness it.
- Dig. 28.1.2. In the case of someone who is making a will, at the time when he makes the will, soundness of mind is required, not health of body.

Who may make a will. Testamenti factio activa.

The testator must be a Roman citizen. Peregrines could not under jus civile however could under their national legislation.

Slaves could not make a will except, Ulpian says, public slaves of the Roman People, who were allowed to make a will of half of their peculium. Provided further that a master could allow his slave to dispose of his whole peculia amongst the other slaves.

A Roman citizen taken in captivity by the enemy was reduced to slavery. However, if he had made a will before he was taken in captivity it held its ground per postliminium if he escaped and returned and through the Lex Cornelia it remained valid if he died in captivity.

The Lex Cornelia called also as Beneficium Legis Corneliae is explained by Buckland in the following manner: "Probably the lex did not declare the will good, but provided that his estate was to be dealt with as if he had never been captured, and on this the lawyers built the further rule that the case was to be handled as if he had died at capture." Labeo makes it clear, the testator had to have capacity at the time he made the will. Moreover, the capacity, had to continue, as a general rule until the testator's death. If he lost it, the will failed stricti iuris, even if restored before death, the praetor would however grant bonorum possessio in such a case to the heirs under the strength of the "failed" will.

The Testator as a general rule must be sui iuris. This is qualified as persons in power if they are males could be allowed to dispose of their peculium castrense and quasi castrense however bona adventicia could not at any time be so disposed. He must also be above the age of puberty and generally competent to form and express a sound judgment. This meant that insane persons and interdicted prodigals were disallowed.

Women could enter into a will provided she was sui juris and had property to dispose of, but with certain limitations. As she could not appear before the comitia curiata. Moreover, in order to obtain testamentary capacity she had to break away from her agnatic family through a fictitious coemptio which Gaius held that its object was that of giving the woman a fiduciary tutor (i.e. a different one from her original tutor) by whose authority she could enter a will.

Limitations were established also for deaf and dumb persons. Deaf mutes from birth as held by Justinian. No deaf mute person could have made a mancipatory will, and probably before Justinian no such person could make a will without imperial permission.

The capacity must have existed when the will was made, and capacity to have a will, at the death. If in the meantime the power was lost and regained, the will was in general destroyed at civil law. The furiosus was no exception, for he had not lost the capacity to have a will, but a captivus would. If a criminal was after pardoned and completely restored, his will was revalidated, but not if, as was usual, he was merely pardoned.

Testamenti factio passiva.

This capacity to those instituted is wider than the previous, since it includes sons in power and slaves, young children and insane persons. (Lee).

In general, anyone may be instituted who has commercium, but there are so many special cases that it is simpler to enumerate the chief classes who were at various times and for various reasons excluded.

The capacity must exist at testation (postumi given later on as exceptions), at the time of delatio, which is normally the death, but, in conditional institutions, the arrival of the condition, and all the time from delatio to entry. (Buckland)

Peregrini not having commercium were disqualified.

Uncertain Persons (Incertae Personae) – This has. Been described as “one whose personality is not precisely determined in the mind of the testator”(Lee) or better “those whose identity the testator could have formed no certain idea, persons so defined that anyone might chance to come within the terms.”(Buckland) i.e. whoever does the following.

This category was also extended (though at times considered separately) to children who had not been indicated in the will and were born after i.e. either the date of the writing of the testament or after the death of the decujus. “Though the Praetor would give bonorum possessio secundum tabulas.”

To this situation Justinian removed the disqualification so long as the posthumous child was the issue of the testator and a woman to whom he could not get legally married. A further limit was inserted such that the heir must be in existence when the inheritance fell vacant.

Corporate bodies. The traditional difficulty was that there was no specific person (a fluctuating body) to accept the inheritance, as the concept of the Juridical Personality developed later and slower.

Lee says "Exceptionally, a senatus consulta would allow certain municipalities to be instituted by their freedmen and to take generally by way of fideicommissum. Gods and goddesses (with some favoured exceptions) fell under the same prohibition. The State was reluctant to concede corporate personality to combinations of individuals or to foundations.

In the later Empire and particularly Justinian, the permitted scope of such institutions was very much enlarged. It was now possible to institute municipalities, the Church and every kind of religious or charitable foundation but private associations only by a special licence."

Lex Voconia (B.C. 168) introduced a special limitation it held that a woman could not be instituted heir by a testator whose census amounted to 100,000 asses, which placed him in the first class. This prohibition fell into disuse in the early Empire. (Lee)

The rule did not apply on intestacy: it seems that the point was not to bar women from being rich, but from being rich and independent. Succeeding on intestacy they would be in agnatic tutela but if instituted there is some evidence that even if no tutor was appointed they were free from agnatic tutela.

The Capacity to Witness a Will.

Texts say that anyone might witness with whom there was testamenti factio, but, as there were many exceptions not reducible to one principle, it is more exact to say that no one could witness unless he had testamenti factio.

Gaius limits the right to cives, but Latins, even Junian, could be witnesses. Women were excluded. Deaf and dumb people were excluded, the rule surviving, as often, the reason for it. Interdicted prodigi were excluded, apparently as an inference from their incapacity to make a will.

Slaves though there was testamenti factio with them to receive were excluded, but if at the time supposed by all parties to be qualified their attestation was good.

Lunatics and impuberes were excluded for obvious reasons as also those who were intestabiles.

Kinds of Testamentary Heirs.

The last condition for the effective validity of a will was that the heir or heirs should duly enter upon the inheritance. Failing this the will was destitutum considered thus as abandoned by the indicated heirs or else because they died before the testator, or surviving him, died before acceptance or repudiated the inheritance, in this case there was the devolution through intestacy.

There were three classes of testamentary heirs that is, the Necessary (necessarii), the family and necessary or family (sui et necessarii or sui) extraneous (extranei).

The Necessarii Heredes.

These were slaves instituted heirs with a gift of liberty. In the later law the gift of liberty was implied from the institution itself.

He was called so because he could not refuse the inheritance, but as a set off the praetor gave him the right of separation i.e. Beneficium Separationis which allowed him to apply for

"separation of goods", with the consequence that he kept intact anything that he acquired as his own property after the death of the testator and creditors had to be content with the original assets of the estate. The object being a last resort to relieve the memory of the deceased from the ignominy of postmortem bankruptcy.

Institutes say " Hence it comes that testators who have doubts about their solvency are in the habit of instituting a slave or substituting a slave in the second or any remoter place, so that if creditors are not satisfied, it may be the estate of the heir rather than that of the testator which is possessed by the creditors, or sold or divided between them.

Digesto "It should further be known that a slave, granted his freedom and made necessarius heres to an inheritance, since he cannot refuse it, can petition for separation, doubtless because, if he has no dealings with his patron's estate, he is in such a case that any subsequent acquisitions that he makes are to be appropriated to himself."

The appointment was considered to be ineffective unless the slave was expressly freed but Justinian eventually provided that manumission could be implied from the appointment. The normal purpose of appointing a slave as heir was to saddle him with the stigma of a possible insolvency, since the slave could not refuse the inheritance- he was a necessarius.

If a testator had two or more slaves, only one could be appointed as heir, if more than one was named, only the first-named was heir.

Sui et necessarii or sui heredes.

These were descendants in the power of the testator who became sui juris upon his death, and children or further descendants born after his death, who would have been in this position, if born during his lifetime.

A grandchild satisfied these conditions if conceived during the testator's lifetime and if his father had ceased to be in power before the testator's death.

Gaius and Justinian say that sui heredes are so called because they are domestici heredes family heirs and even during the testator's lifetime have in a way a vested interest in the family estate.

This category thus comprised sui heredes, i.e. all those who became sui juris on the testator's death (including children born after the death of the testator). They were termed necessarii because they could not refuse the inheritance if they were appointed- they necessarily became heirs on the death of the testator.

The Digesto says "In the case of sui heredes, formal acceptance is not a requisite because they immediately fall to be heirs by operation of law". Borkowski. A vested interest because even in the lifetime of their parent they are deemed to be in a certain sense owners.

They were sui as, in a sense, heredes to themselves, and necessarii as being heredes without any power to refuse. (Buckland)

By the Jus Civile they could not decline the inheritance as there was the automatic fusion of estates, but later on the praetor gave them the privilege of abstaining through the beneficium abstinendi.

The Insitutes say "They are called also necessary because in every event, whether they wish it or not, they are heirs ab intestato or testamentary."

The Insitutes say "*They are called also necessary because in every event, whether they wish it or not, they are heirs ab intestato or testamentary.*"

Extranei heredes.

Persons who were not subject to the testator's power. These might accept or not as they pleased and per the jus civile might take their own time to do so. The position of extranei was fundamentally different from that of the other types of heir because extranei could refuse to accept - there was no automatic vesting of the inheritance. (Borkowski)

Cretio. It was usual for the testator to set a limit of time normally 100 days within which the heir must make a formal declaration of acceptance (usually made before witnesses), if he meant to accept at all.

Apart from this any indication of the intention to accept the inheritance adire hereditatem and in particular acting as heir pro herede gerere was deemed sufficient.

The practice of directing the heir to make cretio had fallen into disuse before the time of Justinian. Instead of this it was usual for the heir, under pressure from the creditors or at his own instance, to apply to the praetor to fix a period for him to deliberate spatium deliberandi, within which he must accept always if he meant to, or disclaim as Justinian enacted, if he meant to disclaim. Thus, failure to disclaim was interpreted as acceptance.

The time allowed was not less than 100 days and usually not more than 9 months. The time normally ran from the moment when the heir was in a position to accept the inheritance, but the testator could provide otherwise, e.g. time to run from his death or from the opening of the will. (Borkowski)

Meanwhile the inheritance was vacant hereditas jacens and with reference to the heir was said to be delayed delata offered or open for acceptance.

The Digesto says "a delayed inheritance means one which one can acquire by entering upon it".

Who must be Instituted or Disinherited.

Certain persons must be instituted or disinherited.

The Digesto says: Among all the other things which it is essential to look for in drawing up wills the main legal provisions are those concerning the institution of children as heirs or their disherison, so that the will is not broken because they have been passed over: for if a son who is in power has been passed over, the will is invalid.

Firstly per the jus civile sons in power must be either instituted or disinherited in express terms i.e. nominatim. The proper form was Be my son Titus disinherited, Titius filius meus exheres esto. If the testator failed to either institute or disinherit a son in power, the will was invalid. This was the case even though the son died subsequently to the will but before the testator.

The law was settled in this sense in accordance with the Sabinian view. The Proculians had maintained that the will was valid, on the ground that the omission of the son did not render the will void ab initio, but only in the event of the son's survival. Other descendants in power, who on the testator's death would be his sui heredes, must also be instituted or disinherited, but in their case, it was held that a general clause was sufficient. This applied to daughters and to children of sons who owing to death or emancipation of their father were potential sui heredes of the testator.

The rules of disherison originated in early law to protect sui. Sui could not be excluded from benefiting under a will except by express provision to that effect. So the testator could disinherit the sui, but only if he followed the correct form.

The disinherison clause often preceded the appointment of the heirs. Disinherison was common but did not necessarily imply that there were bad relations between the testator and the disinherited person. Disinherited sui would usually receive legacies. A typical will might appoint the testator's sons as his heirs, disinherit his daughters, but leave his wife and daughters appropriate legacies. (Borkowski)

If they were passed over in silence the will was not void, but the person omitted was let in to share along with the instituted heirs that is took a rateable share in competition with sui heredes instituted by the will and half of the inheritance if the person instituted was a stranger to the family which would include an emancipated son.

Grandsons in power would take a son's share between them as representing their deceased or emancipated, father.

The Praetor's Actions.

The praetor extended the rule requiring institution or disinherison to include all descendants whom he admitted to intestate succession in the class unde liberi. This meant that he ignored the effects of emancipation and placed emancipated sons and their issue in the same position as sui heredes.

He required all males, grandsons included to be disinherited nominatim, females inter ceteros, failing which he gave them bonorum possessio contra tabulas. The effect was to upset the will, but technically, for most purposes, and to admit to the succession not only the descendant who invoked the relief, but also all others entitled to succeed ab intestato who had not been duly disinherited.

The praetor made no distinction between men and women, but the Emperor Antoninus Pius reverted to the rule of the jus civile by providing that women were not to take more by bonorum possessio contra tabulas than they would have taken by right of accrual at civil law.

The praetors thus introduced their own rules, mainly in an attempt to achieve consistency with their developments and scheme of intestacy. All male sui, not just sons in power had to be appointed or disinherited by name, as a rule, but a general clause sufficed for the sui. If the will did not satisfy these requirements, the omitted sui could seek bonorum possessio contra tabulas from the praetor. (Borkowski)

Justinian's Changes.

Justinian maintained the praetorian system, but with the more stringent requirement that every dishersion must be made in express terms ie nominatim. Failing this sui heredes could impeach the will as wholly void, other liberi could upset it by obtaining bonorum possessio contra tabulas.

It is to be noted that under Justinian adoptive children need not be taken into account except if the adoptio was plena because they did not any longer leave their family of origin.

Justinian thus typically swept away much of the old law, substituting for it a greatly simplified scheme. The basic position on dishersion was that descendants, whether male or female, had to be expressly disinherited by name. Failure to do so was considered fatal for the will. (Borkowski.)

Querela inofficiosi testamenti

In early law a testator could disinherit his family members provided that he satisfied the requirements of exheredatio. They had no remedy, assuming the will was validly made. But a testator who acted capriciously, disinheriting members of his family for no good reason, could easily incur social opprobrium and the censor's displeasure. Causeless failure to provide for one's family in a will was regarded as a breach of moral duty. In due course this became a legal remedy.

The original justification for allowing such challenges was that the testator must have been insane to make an undutiful will, but this was pretence as it is clear that insanity was not really the issue.

The Digesto says " The supposition on which this action is brought is that the testator was of unsound mind for making a will. And by this is meant not that the testator was really a lunatic or out of his mind but that the will was correctly made but without due regard for natural claims for if he was really a lunatic or out of his mind, the will is void."

In early law a testator could disinherit his family members provided that he satisfied the law.

Who might bring the querela?

Descendants, brothers and sisters, but these only if turpes personae had been preferred to them.

The term turpes i.e, base persons is not precisely defined. It included persons who were considered infames and persons of bad character or low social standing. If children could not, or did not, impeach the will, or impeached it unsuccessfully, or if there were no children, the querela was available to ascendants and, in the same way, ultimately to brothers and sisters.

The querela was not available to anyone who had accepted the will by agreeing to receive benefits under. If the complainant died before the querela was resolved the action passed to his heir.

Querela could only be brought by those who would have succeeded to the deceased's estate both under the ius civile and praetorian had he died intestate. The class was confined to the following: descendants, ascendants, brothers and sisters. In the later Empire collaterals were barred from the action unless a base person had been appointed heir e.g, anyone pursuing a

disreputable profession. Thus if there were no descendants, or none that challenged the will successfully, the right to bring the querela passed to the ascendants. The action was generally not available to anyone who had accepted the will by agreeing to receive benefits under it. Borkowski.

The 4 conditions for this action.

The person filing the action must show that they received less than their fair share of the testator's estate. He need not have been instituted heir, but he should have been provided for by institution or legacy or gift causa mortis.

In the classical period the scope of the querela was considerably widened. It became possible to bring the action on the grounds of inadequate provision as well as total exclusion: the complainant could bring the action even though he had received something under the will. Borkowski

The amount was left to the discretion of the Court to determine. However later it came to be fixed by statute at 1/4 th of what would have taken upon intestacy. This was the proportion of the estate which by the Lex Falcidia the heir was allowed to retain against the legatees.

In connection with the querela it was known as the portio legibus debita or the legitima portio which led to to-day's legitim.

He could not file had he been disinherited on just grounds. Lee.

The essence of the action was that the testator had acted undutyfully, i.e., had unjustly failed to provide for the complainant. Until Justinian the question whether exclusion was unjust was largely a matter for the discretion of the court. Borkowski. He must have no other means of attacking the will a "last resort". If the complainant could avail himself of any other remedy the querela was excluded.

Thus a suus heres passed over in silence could not bring it since he had his remedy by petitio hereditatis and an emancipated son, who had been passed over, could not bring it because he could get bonorum possession contra tabulas from the praetor. But either of them could bring it if he was disinherited without just cause, for in that case no other remedy was available.

The querela was barred by the lapse of 5 years from the time when the heir entered on the inheritance, and there were other circumstances in which it could not be brought, e.g. if the person who might have brought it recognised the validity of the will by accepting a benefit under it or compromised his claim.

The Effects of the Querela inofficiosi testamenti.

If the action was successful the effects were that the will was upset and produced intestacy. If there were two or more instituted heirs, to upset the will completely it was necessary to challenge it as regards each or all of them.

Querela inofficiosi testamenti.

If the complainant attacked one only or successfully attacked one only the will was upset pro tanto. This produced the anomalous result that the testator was taken to have died partly testate and partly intestate, contrary to the general rule. The same consequence followed it

two persons were entitled *pari passu* to attack the will and only one managed to do so successfully.

Querela inofficiosi testamenti.

Bringing the querela was something of a gamble since, if it failed, the complainant might forfeit any benefits under the will: Digesto says: "one should bear in mind that a person who has without justification brought a complaint of undutiful will and has been successful loses what he received under the will, and this is claimed for the imperial treasury on the ground that he did not deserve."

Changes made by Justinian.

Important changes were made to the querela system in the late Empire, especially by Justinian. He restored the original rule that querela was confined to cases where the complainant had been excluded from the will altogether.

He specified various grounds for which exclusion would be considered just, provided that they were stated in the will by the testator. And he insisted that descendants should expressly appoint as heirs those of their descendants who would have a claim on intestacy and vice versa.

Failure to do so rendered the actual appointments invalid, although the rest of the will remained operative, the omitted person becoming heir via the querela procedure. Legitima portio was retained for persons who had been left something under the will, but less than their entitlement. They were given an action to make up for the deficiency. A successful action did not invalidate the will.

Justinian changed the rules of legitima portio as regards the testator's children. If there were 4 surviving children or fewer, they were entitled to a share in a minimum of one third of the inheritance; if five or more they were entitled to at least a half. Borkowski.

i) The Querela was only to lie if the person entitled received nothing at all. If something, however little, was left to him, the will could no longer be impeached and upset, but an action lay to have what was left made up to the statutory amount. Called better Actio ad Supplendam Legitimam.

The result was to reduce the amount which went to the instituted heirs, the will otherwise remaining intact. It was a good defence to this action, as it was to the querela, that the complainant had been justly disinherited.

ii) After the date of the Institutes, Novel 18.1 (AD 536) increased the amount of the legitim in the case of children. If there were not more than four, it was to be one third $\frac{1}{3}$ of the intestate share, otherwise of half. The share of the ascendants and of brothers and sisters remained fixed at one quarter.

iii) the just grounds of exheredation were defined by Novel 115 (AD 542) i.e. 14 in the case of children, eight in the case of parents, three in the case of brothers and sisters. The burden of proof of justifying the ground for disinheritance lay upon the instituted heir.

iv) Lastly through Novel 115 he introduced an entirely new condition by requiring the persons entitled to the legitim, if descendants or ascendants to be instituted heirs but not

necessarily to the amount of the legitim. Failing this the will could be upset, but only as concerns the institution of heirs legacies and fidei commissa remaining the same.

Legacies.

The topic of legacy is intimately connected with testamentary succession, for though there may be a will without a legacy, there cannot be a legacy without a will.

Legacy is vaguely described in the Institutes as "a gift left by a deceased person", and more precisely in the Digesto as "a diminution of the inheritance whereby the testator directs that something which would otherwise form part of the whole estate going to the heir is to go to some other person."

Thus, while inheritance was a form of universal succession, legacy was a form of particular succession; and while the heir was liable for the debts of the deceased, the legatee was not liable for debts, but could not take, or having taken keep, his legacy until the debts were satisfied.

A legacy usually consisted of a gift of a corporal thing or things, determined specifically or generally, but it may assume a variety of forms. Thus, a usufruct or a praedial servitude might be created by way of legacy; the testator might discharge his debtor by leaving him a legacy of the debt, or bequeath the debt to a third person etc.

Under Justinian's legislation legacies were of four modes i.e. per vindicationem, per damnationem, sinendi modo, per praeceptionem. Each of these was created by an appropriate form of words and had its particular effects and consequences. Thus the testamentary disposition may be either by universal title or by particular title.

Legatum per Vindicationem.

The legatee was entitled to vindicate the subject of the legacy that is to claim it from the heir or anyone else in a real action (actio rei vindicationem).

A testator could leave by this method only a thing which belonged to him by quiritary title, both at the date of the will and at the time of death, unless the legacy consisted in "things which are weighed, counted or measured" fungible things in which case it was sufficient that they belonged to the testator at the time of death.

The effect of the legacy was that the thing bequeathed became the property of the legatee by quiritary title from the moment of the acceptance of the inheritance.

The only doubt was if this was so, whether he knew of it or not. The Sabinian view was that it vested forthwith subject to repudiation. The Proculians held that the legacy did not vest until the legatee knew of it and wished it to belong to him. The Sabinian opinion seems to have prevailed.

This type of legacy was also available to constitute a usufruct or praedial servitude over property which belonged to the testator by quiritary title, for in this case also the right vested directly in the legatee and he could enforce it by the appropriate real action i.e. the actio confessoria.

Thus, it was expressed in the direct form: *do lego rem Titio* or *rem capito, sumito* or *habeto*. Ownership was thereby directly transferred to the legatee who enforced his rights by vindication. Consequently, only quiritary property of the testator could be left in this manner.

Per Damnationem.

The testator might give by this method anything whatever, whether it belonged to himself, to his heir, or to a third party.

If it belonged to a third person the heir must acquire it, if he could; otherwise, pay its value. A thing not yet in existence might be bequeathed by this method, as an unborn slave or next year's harvest.

The legatee's remedy was a personal action *actio in personam*.

The formula used was "Be my heir condemned to give" '*dare damnas esto*', or better "my heir must give 'dato' the slave Titus". If the subject of the legacy was a thing precisely ascertained, the double value was recoverable in case of denial of liability. The effect of such a legacy was to confer on the legatee a *jus in personam* against the heir and for this reason had the advantage over the first form of being suitable for any object even if *res aliena* or future things or Services.

Sinendi Modo.

The formula used was "Be my heir condemned to allow Lucius Titius to take and have himself the slave". *Heres meus damnes esto Titium sinere rem capere*.

This was in truth an important modification of the *legatum per damnationem* with the new difference that the *heres* was bound to allow the legatee to take the legacy and could be required to make a formal conveyance.

On the face of it, the duty imposed upon the heir is negative, a duty of sufferance.

But the view prevailed that the heir was required to transfer the thing to the legatee by any appropriate method.

In effect what distinguished this form from the latter was principally, that by this the testator could only dispose of what belonged to himself or to his heir at the time of death and not what belonged to a third person.

Since the property did not vest immediately in the legatee, the appropriate remedy was a personal action.

Per Praeceptionem.

This was a direction that the legatee might take something out of the estate before it was distributed amongst heirs.

The formula was "Let Lucius take the horse in advance". Since an heir could not be charged example *emponius* and Titus were instituted heirs each to one half, and *Sempronius* was given a legacy *per praeeptionem* of the slave, he took one half share in the slave in his

quality as heir, and the other half by virtue of a legacy charged upon the share of the other heir.

The question was debated between the two schools whether a legacy could be left in these terms to a person who was not a co-heir.

The Sabinian view was that it could not. It followed that the only action appropriate in such a legacy was the action given to co-heirs for a division of the inheritance, in which it would be a duty of the judge to see that the subject of the legacy was adjudicated to the person entitled.

The Proculians, on the contrary, held that a legacy expressed in these terms could be left to a stranger, the direction that the legatee should "take in advance" being construed simply as a direction that he should take.

'Titius rem precipito' which on the Proculean view confirmed by Hadrian was a special form of 'Legatus per Vindicationem'. If however the object had been of quiritary property of the testator there was no difference between the two forms as to their effect and remedy.

Senatus Consultum Neronianum.

In process of time it became customary to leave the property both per vindicationem and per damnationem so as to give the legatee the advantages of both and the SCN A.D. 64 provided that if a legacy was left in any form not suited to it, should be construed as if it had been left in the most favorable form, i.e. per damnationem, so as to save its validity.

This SCN brought the importance of forms practically to an end, though if a legacy were valued in the form in which it had been left, the rules of that form applied.

Justinian laid down that all legacies were to be of one nature and to have the same remedy so far as these were applicable to the particular gift.

A choice of three actions was given to the legatee: Actio in rem; Actio in personam (ex-testamento) and 'Actio ipotecaria' which was innovation intended to give greater security by pledging the whole estate for each legacy

Failure of Legacy.

A legatum validly given may fail from a variety of causes, e.g. debts, because creditors must be paid first, death or loss of capacity of the legatee, destruction of the object, by the Lex Falcidia. Failure of the will also normally destroyed all legacies.

Special cases are the following: 1. Ademptio, i.e. revocation of gift, which may be expressed or tacit, i.e. alienation of property. 2. Translatio, i.e. substitution of one gift for another, either of another res or another person. 3. Duae lucrativae cause, if, after the will the legatee received the property as a gift he could claim nothing from the heir.

Had he purchased it he would claim the value. The rule is based on impossibility. Once the legatee is already the owner of the thing it is impossible for the heres to give it to him a second time.

The right to the value of the legacy, if the legatee had paid for it is a relaxation of the rule on the law of equity.

Legacies void ab initio. It was given in the incorrect form (early law), or to a person lacking capacity to take it, or where the will itself was defective for lack of form or capacity.

Failure after making of the will. Even if a legacy was validly made, it could fail on various grounds arising after the time of testation. E.g. the legatee could predecease the decujus or might refuse to take the legacy or the will itself might fail for reasons arising after testation.

They also failed through revocation, which could be either express or implied. The former by use of formal words in a subsequent will. The latter form of revocation occurred where the decujus had already disposed of the object prior his death.

Fidei Commissa.

A request made by a testator to any beneficiary under the will to hand over property to some other persons. This request was either contained in the will or made by a separate Document (codicilli) or by the word of mouth.

A marked distinction between fidei commissa and other formal testamentary provisions is that fidei commissa were never worded in the imperative and the formula was that of entirety.

The beneficiary is trusted to carry out the wishes of the deceased notwithstanding that they are not enforceable. In certain cases, the testator could not achieve his purpose in any other manner e.g. if he intended to benefit an incapable person, or a testator did not want to take the trouble of making a new will.

Succession on Intestacy.

This subject, Buckland points out, is of minor importance both because intestacy was a rare occurrence and because its rules, apart from a few main principles is a mass of detail; its main interest lies in the content change which it underwent, nearly always in one direction; a system resting absolutely on agnation was gradually superseded, at first under the edict and later through express legislation, no one of which natural blood relationship was more and more regarded until in Justinian's final legislation there was no longer any trace of the old civil law notions.

Succession under the XII Tables.

The three classes were:

'sui heredes' i.e. filii familias subject to the direct potestas of the pater familias, on whose death they become 'sui juris', - they succeeded 'in capita'. Filii familias of the second degree are not included in this first class, except in case their own father had predeceased the decujus or had been emancipated, and in this case they succeeded 'in stirpes'.

Succession on Intestacy.

Failing 'heredes sui', the 'proximi agnati'; the rule 'proprior excludit remotiorem' has absolutely sway, so that even if the nearest agnate refused, those to him had no claim.

Failing agnate, the gentiles, i.e. the chiefs of the 'familiae gentilitiae'.

The system of the XII Tables admits Successio Graduum for Successio Ordinum.

The Praetorian Scheme of Succession.

Under the impellent influence of public opinion the edict, unable to give hereditas, declared that the absence of the will, 'bonorum possessio' would be given to claimants in the following order:

Liberi: these are all the children of the deceased without distinction between 'sui' and 'omancipati', provided the latter were natural children or descendants of the deceased.

Legitimi: viz. these called to the succession under Civil Law; these were the agnati, because the 'sui' are included in the first class and the gentiles had long since disappeared; these succeeded failing 'liberi', or if the 'liberi' had not claimed 'bonorum possessio' within the year.

Cognati: This included blood relatives up to sixth degree, and of the seventh degree.

This is the first instant of the right of succession of a mother and a maternal relative being affirmed. Though the rule was 'proximus excludit remotiorem' the praetor allowed fully play to Successio Graduum et Ordinum apart from the case of legitimi, where according to the prevailing view Successio was not allowed.

Vir et Exor: In the absence of blood relatives the praetor gave 'bonorum possession to husband and wife reciprocally.

The System Of The Novels.

The piecemeal changes made by Justinian before the Novels cannot be called a system; the old civil law, altered by Senatus Consulta and Imperial Constitutions, was in the Corpus Juris maintained side by side with the 'bonorum possessio of the praetorian law.

Ten years after the publication of the Institutes, a new system of rules was introduced which look modern and which have been preserved by the Common Law, and with slight modifications are adhered to by our own laws.

The order of succession is shortly the following:

Descendants, without distinction of sex: remoter issue taking their deceased parents' share.

Ascendants: the nearer excluded the more remote; if in the same degree, but in different line, each line took half. Brothers and sisters of the whole blood shared with ascendants, and all took equally; children of deceased brothers and sisters represented their parents, provided there survived a brother or sister with whom to take.

Half-brothers and half-sisters provided there were no children of deceased brothers and sisters.

Brother and sisters with the same rule of representation.

The nearest relatives, 'per capita' with no representation.

Husband or wife reciprocally.

Both Successio Ordinum and Graduum are allowed. If there was no claim, the property passed to the 'Fiscus' subject to the claim of creditors.

The Law of Obligations

Definition: *L'obbligazione è un vincolo giuridico fra due persone determinate, in virtue del quale l'una di queste è tenuta verso l'altra ad una data prestazione, cioè a dare, fare o non fare qualche cosa.* (Serafini)

Paulus Fr. 3, de obl. Et act XLIV7. Just, III, 13

It must be remembered that the law forms used by the Romans had their origin in times when writing was neither easy nor common.

It is not surprising, therefore that among them a form of spoken words, a verbal contract, should hold the place which among us is occupied by written notes.

Since obligations were regarded as creating a personal relationship between the parties, third parties could not generally be affected by them.

Classification of obligations:

- Unilateral or bilateral
- Stricti iuris or bonae fidei or (111) civil or praetorian (jus civile jus honorarium).
This depended on whether the formula in the action that enforced them pointed to a strict or a discriminating application of the law to the facts. Consequently, form was all-important in disputes concerning stricti iuris contracts, whereas in bonae fidei contracts matters such as mistake, fraud and duress could more easily be taken into account. As a general rule, unilateral were stricti iuris and bilateral were bonae fidei.
- The effect of some contracts is to produce a liability which is precisely determined and accurately defined.
- The effect of others is to produce a liability which is not precisely determined nor accurately defined, and which is (at the outset at least) undefinable
- The effect of some contracts is to produce a liability which is precisely determined and accurately defined.
- The effect of others is to produce a liability which is not precisely determined nor accurately defined and which is (at the outset at least) indefinable. Contracts of the former kind are called negotia stricti iuris, contracts of the latter kind negotia bonae fidei.

Negotia stricti iuris.

Negotia stricti iuris are contracts which bind the parties to the exact performance of that which they promised for example the Roman Stipulatio. Negotia stricti iuris are interpreted literally. Nothing is due that has not been promised.

The contents of the obligation to which they gave use are a matter of calculation and can be accurately determined full sense of the term.

In principle, the impossibilium rule was applied without qualifications ie. The debtor was discharged from liability and thus the creditor did not have a claim for the pecuniary value of the performance.

Consequently in pre-classical Roman Law the custom developed of entering a clause in the contract, by which the debtor undertook that it would not be on his account that performance became impossible.

In later law this clause was implied, with the result that in spite of the fact that performance had become impossible the obligation remained in force ie. the debtor was still bound and the creditor could claim the pecuniary value of the impossible performance.

This principle was formulated in two rules:

1. *Factum debtors perpetuat obligationem*: a positive act on the part of the debtor perpetuates the obligation:

2. *Mora debtors perpetuat obligationem*, mora (delay) on the part of the debtor perpetuates the obligation

Negotia bonae fidei.

On the other hand are contracts in which the parties are bound to perform, not what they promised, but rather whatever can be fairly and reasonably required according to the circumstances of the case - which may be either more, or less, than what was actually promised.

The resulting liability is not a matter of calculation and will be variously determined according to the particular circumstances.

The obligation is always incerta, even where there is an express promise, the direct object of which is to dare certam rem, for example, in an exchange.

The nature of the parties liability is expressed in the words *quid dare facere oportet ex bona fidei*. In these cases the debtor had the duty to perform *ex fide bona*, according to the requirements of good faith. This implied that if performance became impossible as the result of bad faith on the part of the debtor, he remained still bound, so *mala fides* made the debtor liable.

Furthermore, in the discussion of each individual contract it will be noticed that a number of debtors were held liable even in cases where there was no question of *mala fides*.

The classical lawyer decided casuistically, from case to case, then contract to contract, and only later an attempt was made to develop a general system of rules.

A second distinction which has to be made in this context, is therefore, the division between classical law and the law of Justinian.

Contractual liability of debtors with regard to negotia bonae fidei (NBF) in classical law.

Since all debtors from NBF had to perform fide bona, every one of them was held liable for mala fides. The concept used in this context was dolus, ie dolus in classical law was synonymous with mala fides ie when one does not act according to the requirements of good faith.

Secondly, a number of debtors were held liable for impossibility of performance, even in cases where no mala fides on their part existed. These debtors had a duty of custodire, safe keeping and the practical implication is, that they were held liable for every thing except vis major, an act of God.

The practical consequences in classical law was that these debtors were liable for their mala fides as well as for casus fortuitus, an accident, e.g. if performance became impossible because the thing in question was stolen and there was no negligence on the part of the debtor, the creditor nevertheless could institute an action for damages against the debtor.

Justinian's changes.

As a result of the influence of Greek philosophy on the one hand and Christianity on the other, the principle developed, that there should be no liability without negligence. This entailed that the liability for custodia had to disappear.

In the Corpus Juris Civilis the standard of liability of each debtor is laid down by each contract. Unfortunately, the terminology of the Corpus Juris Civilis is not very consistent dolus, culpa lata, culpa diligentia quam sus tebus adhi erecticin piersin concreto ect are used rather loosely.

Degrees of contractual liability.

The Justinian system tried to define in the following:

Dolus: In the Justinian law dolus denotes dolus malus, ie intentional or conscious wrongdoing. It is obvious, that all debtors were liable for this kind of dolus.

Culpa: This was meant to include any reprehensible conduct excluding dolus.

Three degrees of culpa were recognized in Justinian's law:

Culpa levis in abstracto. In this instance the debtor had to show the same care as a bonus et diligens paterfamilias, a diligent head of a family.

Other expressions used in this context were exactissima diligentia, the highest degree of care, and culpa levissima, the slightest negligence.

This degree of culpa implied that the debtors conduct was tested against an objective criterion, viz. how would a diligent head of family have acted in similar circumstances?

Those debtors who were liable for custodia in classical law became liable for culpa levis in abstracto in later law.

Culpa levis in concreto. The debtor had to show the same degree of care as he would show in his own affairs.

Culpa lata, gross negligence, which for all practical purposes can be equated to dolus.

Therefore, as a rule, in cases of supervening impossibility, the basic principle of impossibilium nulla obligatio est applied i.e. the debtor was released from his obligation to perform.

However, whether the specific debtor was indeed released from his obligation, depended firstly, on the circumstances under which performance had become impossible and secondly, on the liability of the debtor under the relevant contractual relationship. If a debtor was Liable, the consequence was that the creditor could institute a personal action for damages based on the relevant contract.

Condition.

Conditio, a condition, is an uncertain future event.

A condition may be attached to virtually any legal act and thus also to a contract. The effect of the legal act is then made dependant on the realization or not of a future uncertain event.

A distinction must be made between suspensive and resolutive conditions.

A suspensive condition is one which suspends the effect of the legal act until the condition is realized. It follows that when a suspensive condition is contained in a contract an obligation only arises if the condition is fulfilled. Until this happens there is no obligation but merely a spes, a hope, and if the condition is never fulfilled no obligation will ever arise.

A resolutive condition is one which discharges the effect of a legal act the moment the condition is fulfilled. Prior to the fulfilment of the condition the legal act has full effect. It follows that when a resolutive condition is attached to a contract an obligation is created immediately but the moment the condition is fulfilled the existing obligation is terminated.

Positive and negative condition.

A condition is positive when its fulfilment depends upon the happening of a future uncertain event.

It is negative when it depends upon the future uncertain event not happening.

Conditio potestativa and conditio casualis

A conditio potestativa is a potestative condition where the fulfilment is in the control of the one or the other of the parties.

A conditio casualis is a casual condition where the realization is dependent upon chance and not within the control of the part.

An impossible condition attached to a contract caused the whole contract to be null and void as was the case of conditions tainted by illegality and immorality.

A condition is a future uncertain event. When the effect of a legal act is made subject to the happening or not happening of an event in the past or present, the actual situation must be assessed, and the legal act is valid or void depending on the situation.

Originally, resolutive conditions were ineffective in respect of *negotia stricti iuris*. These legal acts were entered into formally and could be terminated in a formal way.

However, the praetor gave effect to such conditions by means of the *exceptio pacti conventi* or the *exceptio doli*.

In the case of *negotia bonae fidei* this problem did not exist since the *negotia* could be entered into informally and could, therefore, be terminated in an informal way.

Term.

Dies, a term, is a future certain event. A term may be attached to virtually any legal act and this also to a contract. The effect of the legal act is then made dependant on the happening of a future certain event.

A distinction must be drawn between suspensive and resolutive terms.

A further distinction can be made between *dies certus* and *dies incertus*.

In either case the future event is one which is bound to occur, but in the case of *dies incertus* it is uncertain as to exactly when that day is going to come.

Originally, resolutive terms were ineffective in respect of *negotia stricti iuris*. However, the praetor gave effect to such terms by means of the *exceptio pacti conventi* or the *exceptio doli*.

Effects of Obligations.

The primary effect is the moral necessity of the debtor to perform the act which is the object of the obligation. When this is done the '*ius vinculum*' is brought to an end and the debtor released, and for this reason the Roman word for payment is '*solutio*'.

The performance must tally with the obligation with regard to its object, to the quality and the quantity thereof, and to the time and place in which it takes place. If there is a time clause (*dies*) the creditor must not claim before the expiration of such time; otherwise the debtor may be compelled to pay immediately, unless there is a tacit agreement to the contrary.

If the debtor fails to fulfill his engagement within the time agreed upon, he is in the delay (*mora*) and is responsible for the consequences.

The place of payment is that agreed upon expressly or tacitly; in the absence of any agreement, if the object is a specified thing, the place of payment is that where the thing had been received; if the object is a '*genus*', it cannot be said to have any particular situation, and in this and similar cases the place of payment is that of the domicile of the debtor.

The secondary effect of obligations is the liability of the debtor for the loss suffered by the creditor. i.e., in consequence of non-performance. It is a condition of this liability that the performance had become impossible through the debtor's fault, both if such impossibility

were intentionally brought about by him (dolus) and if it were the consequences of his lack of foresight (culpa).

There are two degrees of Culpa; (1) Culpa Lata, or 'magna negligenta' (gross negligence), which is that of a person 'qui non intelligit quod omnes intelligunt; and, (2) Culpa Levis, which consists in the lack of that degree of care proper to a 'bonus pater familias', - this is also called 'Culpa in Abstracto'.

In some cases the debtor is only liable for 'culpa in concreto i.e. for the omission of that degree of diligence which he usually employs in his own affairs (diligentia quam sui rebus), e.g., restitution of dowry, tutores, societas and condominium.

The debtor is never responsible for very slight faults, or in case of accident of 'force majeure'; 'Causa a nemini prestantur'.

Natural Obligations.

These consisted mainly of agreements that were not legally enforceable, but which could have legal consequences.

D. 12.6.64: Suppose an owner has a debt to his slave and pays it after manumission.

He cannot recover, not even if he believed the other could sue him by some action; for his payment acknowledges his natural indebtedness.

For in the sense that free born is the condition of natural law and subject to the invention of the law of the world, so for the condictio the question whether there is or there is not a debt is to be taken on the natural plane.

D.4.5.2.2. "Those who have incurred a change of civil status remain under a natural obligation with respect to matters which have arisen prior to such a change.

General Features of Contracts.

Consensus

- Agreement between the parties was essential to the making of a contract, there had

to be a genuine meeting of minds, a consensus ad idem at the moment when the contract was made.

Ambiguities in the text: Interpretation

- The judge would strive to resolve the ambiguity by considering the conduct of the parties and the custom of the region where the contract was made.

Consensus.

These were interpreted so as to make the transaction as effective as possible. As a last resort, a judge could fall back on the rule that ambiguities were construed against the party who could be regarded as having the principal role in the formulation of the particular term in question.

Jurists wrote that where a term of the contract is obscure, it should be construed against the vendor who stated for, rather than against, the purchase because the vendor could have declared his will more explicitly before the contract was entered into (D.18.1.21)

Mistake.

In diritto classico, il negozio viziato da errore fu considerato inutile, se, oltre a trattarsi di negozio a forma libera e ad averse prova certa dell'errore, quest'ultimo era:

Essenziale e' cioe', tale che in mancanza di tale errore, il negozio non sarebbe stato concluso

Riconoscibile e' cioe', tale da poter essere autonomamente riconoscibile anche dalla contro parte.

Scusabile, e cioe' tale da potersi tollerare in una persona di normale diligenza e intelligenza.

Error in Corpore.

Subject matter: Where one or both parties were mistaken over the identity of the thing that was the central object of the contract:

D.18.1.9 pr "if I thought I was buying the Cornelian Farm and you that you were selling the Semproman Farm, the sale is void because we were not agreed upon the thing sold. The same is true if I intended to sell Sticlus and you thought that I was selling you Pamplus, the slave himself about being there ...

If the mistake was about the identity of some accessory thing, not central to the contract, the mistake was not operative.

Error in Persona.

Identity Where one or both parties were mistaken about the identity of the other party.

But the mistake was only operative in such a case if the identity of the other party was relevant (partially) to essential elements of the contract.

Error in Substantia.

Error about the quantity of the subject matter of the contract. Considered less drastic.

The position appears to have been that such mistake were irrelevant as regards stricti iuris contracts but could invalidate bonae fidei contracts if the mistake was fundamental, e.g. if something that was sold was in a different category from what the buyer supposed.

The following types of mistake were regarded as fatal to a contract:-

Error in Negotio.

Mistaken transaction: where one or both parties were mistaken about the type of transaction intended.

Error in Substantia.

D 18.1.9.2 The next question is whether there is a good sale when there is no mistake over the identity of the thing but there is over its substance; suppose that vinegar is sold as wine,

copper as gold or lead, or something else similar to silver as silver, Marcellus writes that there is a sale because there is agreement in the thing despite the mistake over its substance.

I (Ulpian) would agree in the case of the wine, because the essence is much the same, that is, if the wine has gone sour; if it be not sour wine, however, but was vinegar from the beginning such as brewed vinegar, then it emerges that one thing has been sold as another. But in other cases, I think that there is no sale by reason of the error over the material.'

Duress.

A contract was regarded as made under duress of a party or members of his family had been threatened with 'serious evil' unless he consented to the contract.

D.50.17.116: Nothing is so contrary to consent, which sustains cases of good faith, as force or duress, it is contrary to good behaviours to approve of either of them.

If a party made a 'stricti iuris' contract under duress, the contract was formally valid in early law.

However, the aggrieved party would hope that the praetor might prevent the enforcement of such an agreement or that he would grant restitutio.

In the late Rep the exceptio metus (defensive plea of duress) was allowed against a party trying to enforce an agreement made under duress. Moreover, an actio metus was allowed to an aggrieved party who had suffered loss as the result of duress.

As regards bonae fidei contracts, the most plausible view is that duress did not necessarily invalidate them, but that it was certainly a factor to be taken into account by the judge.

Violence Metus.

Violence is to be understood in the sense of threat that produces fear. The Romans preferred to talk about metus, fear, rather than vis, violence.

The violence considered here is the coercion exerted against another, to induce him to carry out a given shop; (or even to endure the violation of his own right) under the pressure of threats the victim induces himself to do what is imposed on him; and with this he chooses the lesser evil (that is, the act requested instead of the damage threatening him).

Exceptio metus: the victim rejects the perpetrator of the violence, and also the third party who purchased from him, if they want to realise in court the right extorted by violence.

The Praetor says "Where an act is done through fear I will not uphold it." Fear according to Labeo, must be understood to mean not simply any apprehension, whatever but fear of some evil of exceptional severity. The fear which we must hold to be referred to in this Edict is not the fear felt by a weak minded man, but such as might reasonably occur even in the case of a man of through firmness of character.

Finally, the theory on violence (vis) which, due to the threat of an imminent evil or the beginning of the execution of an evil, produces fear (metus) in the soul of the threatened person, and thus acts as a means of constraint on the will. Ortolan page 38.

Metus' is fear of threats which induce a person to assent. In 'Stricti juris judicia' the rule was 'coacta voluntas tamen voluntas est', and contracts could not be avoided on this ground.

Metus, duress, consisted in the use of force or the threat of force as a result of which a reasonable person would fear danger to his person, property or his family.

According to the old *ius civile* it was irrelevant whether a person was induced by duress to conclude a contract; in other words, the contract was perfectly valid. Earlier, in the case of fraud the praetor came to the aid of the defendant by granting the *exceptio metus causa* where he (the defendant) was forced into the conclusion of a contract from the *ius civile* by means of duress.

This implies that the contract in question was not *ipso iure*, automatically, void, but that the person who had suffered duress could raise the *exceptio metus causa* as a defence against the action arising from the contract.

Fraud.

D. 4.3.1.2 every kind of cunning, trickery or contrivance practiced in order to cheat, trick or deceive another.'

Fraud was similar in legal effect to duress. A party induced by fraud to enter a *stricto iuris* contract had no defined remedy as of right until the introduction of the exception *doli* and action *doli* in the late republic. There after the exception *doli* provided a defense if specifically pleaded in the formula.

It did not have to be pleaded in actions arising out of *bonae fidei* contracts since the formula would contain the appropriate good faith clause; thus the judge would be automatically directed in such cases to take good faith into account.

Causa.

Has remained an essential part of today's laws of obligations. This means the internal reason of the contract; why the contract is being drawn up.

If it is illegal, then it is an *alibi*.

The cause was one of the essential elements of the stores of asset attribution. The cause of a legal transaction must always be lawful; in this regard, contrary to what happens in the current legislation, various distinctions were made forms of illegality.

The illicit act was complete and implied the invalidity of the transaction, when the transaction was *iniustus*, that is, contrary to the fundamental principles of the civil law, or *contra bonos mores*, that is, contrary to traditional morality, or *contra leges perfectas*, that is, against mandatory laws which communicated the nullity of the acts carried out in violation of them

The illegality was semi-full when the transaction was contrary to *leges minus quam perfectae* which i.e. communicated only a sanction against the transgressor and not also the nullity of the transaction.

The offense was generic if the transaction was contrary to *leges imperfectae*, that is, to those laws that did not communicate any type of sanction plus their violation. Illegality and

immorality: D. 45.1.26.27. We generally recognize that immoral stipulations have no validity, for instance, if a man promises to commit murder or sacrilege. Indeed, it is part of the proctor's duty to refuse an action on obligations of this kind.

Contracts in Rem.

The Common denominator was that the obligations in these contracts arose from the delivery of a corporeal thing. This includes transactions like mutuum and the loan of money.

It was a unilateral and strict iuris contract, consisting of a 'loan' for consumption of things that could be measured and that were consumable through use, i.e. fungibles.

D. 12.1.2.1 'This kind of lending happens in relation of those things which are dealt in by weight, number or measure.' (Br)

It was a loan of property that is consumed by use, especially money, but also food, drink, oil, corn and the like. The major consequence was that borrower acquired ownership of what was lent, the obligation being to restore the equivalent at the agreed time.

The borrower's liability was absolute, as distinct from strict, in that his obligation to restore was not discharged even if he lost the property through an act of God. (Met 129)

If I go to the bank and I take the loan and the bank gives me the money in my hand. I can use the money for whatever reason I want to because there is the acceptance that once I am in possession of the money, I have full ownership of the money.

With regards to objects that can be consumed you have to give back objects of the equivalent type.

In mutuum the obligation is higher than in stricto juris – it is absolute, there is no reason for you to return the object which someone gave to you.

The contract was gratuitous in the sense that it could not provide for the payment of interest. This rule probably derives from the origin of mutuum as a transaction between friends.

If the lender wished to secure interest, he had to obtain a stipulation from the borrower by which the latter promised repayment of both principal and interest. (Metz 129).

The interest fenus od usurae.

Interest relating to a sum of money to be paid periodically and beforehand. The 'usurrae' were calculated based on the amount of the sum of money and the duration of his obligation.

The 'XII Tabulae' established that no usurrae could be borrowed in excess of one 'uncia' (one twelfth) of the capital for each month. So called fenus unciarum equal to 100% per year.

Republican legislation lowers the cap, a maximum of one cent per month (e.g. 'centesimae umoree') equal to 12% per year.

Post-classical Christian legislation and Giustinianea further reduced the interest rate to 6%.

Anatocismus: expression used to indicate the right to receive interest on other interest that has already expired. (Compound interest)

In Roman law, there was also talk of *umoree umorerum*, wanting to allude to the genome of the production of interest by interests already monthly borrowed. This was expressly forbidden by Justinian.

Compound interest was not allowed. In later law the whole agreement was often made through stipulatio, and thus mutuum lost its importance.

The duty of the borrower to restore.

The borrower had to restore not the thing itself (it would be consumed by use) but the equivalent. This duty was interpreted precisely, the thing that was returned had to be equivalent in size, number and quality to the borrowed thing.

12.1.3 'Even if there is no provision in a loan for consumption that the thing returned should be of the same quality, the debtor is not allowed to give back some things which, though of the same kind, are of inferior quality, for example new wine for old. The reason is that when a contract is made, the nature of the transaction is given effect just as though expressly provided for, and the nature of this one is taken to be that the thing paid back must be of the same kind and quality as the thing given.'

The duties of the borrower could be enforced by *condictio*. The lender in mutuum did not have contractual duties (since the contract was unilateral).

If he lent something for consumption that was defective, he might be liable for delict if he was at fault and damage resulted; but there was no contractual liability.

Fenus Nauticum (Vel pecunia traiectica).

Maritime loan which was used to finance commercial operations. The term *fenus* generally indicated the fruit of the loaned capital.

The *fenus nauticum* was a particular type of mortgage imported from Greek law. It consisted in the loan of a sum of money that was to be transported by sea and used for the purchase of goods or used for the purchase of goods to be transported by sea.

A peculiar character of the operation was the link between the repayment of the borrowed sum and the agreed usury with the successful completion of the commercial activity.

The mortgagor was required to repay the sum only when the money or goods reached their destination. Therefore, the risk of transportation fell entirely on the lender, who, in exchange, was entitled to high interest specifically agreed upon.

If a loan was made to finance the voyage of a cargo ship, the loan was repayable only if the ship completed the journey safely.

The lenders took the risks, so they were allowed to charge unlimited rates of interest, at least until Justinian fixed the maximum at 12% of such loans.

The existence of typical actions to protect the contracting parties is doubted; probably the parties, in practice, resorted to a stipulatio with which the mortgagee required repayment of capital and interest.

Senatus Consultum Macedonianum.

Enacted in the reign of Vespasian (AD 69-79) forbade loans of money to sons in power and remoter issue under potestas (Br).

Filii Familiarum such that a lender could not recover the loan ever after the father's death (Lee)

But the SCM still took effect as instructions to the magistrates, and not precisely as legislation consequently the transaction remained technically valid. If a son borrowed money he was still liable *jure civilis* and the father was liable *jure praetorio* to the extent of the son's *peculium* in the *actio de peculio*. (Lee)

Whereas Macedo's borrowings gave him an added incentive to commit a crime to which he was naturally predisposed and whereas those who lend money on terms which are dubious, to say the least, often provide evil men with the means of wrong doing, it has been decided, in order to teach pernicious moneylenders that a son's debt cannot be made good by waiting for his father's death, that a person who has lent money to a son-in-power is to have no claim or action even after the death of the person in whose power he was. D. 14.6.1.pr

The Praetor gave effect to the SCM by allowing either son or father a plea known as the *exceptio SC Macedoniani*.

However, there were cases in which the exception was not available:

- If the son was generally supposed to be *sui juris* or had given himself out as such.
- If the father had consented to the loan or subsequently ratified it or been enriched by it
- If the son had a *peculium* of his own and the loan was covered by it
- If the son had renounced to the benefit of the exception after becoming *sui juris*
- If, being away from home for the prosecution of his studies, he had borrowed a moderate sum, not in excess of his usual allowance.

Apart from these exceptions the loan produced a natural obligation, so that, once repaid it could not be recovered by the *condictio indebiti*.

Athletes.

Loans made to professional athletes for their maintenance and expenses (D.22.2.5PR)

Other contracts *rem*.

Commodatum - *Depositum* - *Pignus* have certain common characteristics: -

They are all real contracts created by the transfer of a *res*, and consequent displacement, not as in *mutuum* of ownership, but of detention as in *Commodatum* and *Depositum* or of possession as in *Pignus*.

They are all *bonafidei* contracts, imperfectly bilateral, giving rise to a direct action on the one side, to a contrary action on the other.

Depositum.

The obligations in depositum were primarily on the depositee. He had to keep the thing safe but was liable only for dolus. However, dolus was sometimes equated with gross negligence and could consist of the failure to do what a man would do in his own affairs.

According to the following passage attributed to Celsus The statement made by Nerva that gross fault is equivalent to fraud was not accepted by Proculus but seems to me to be very true.

For even if a person is not careful in the degree required by the nature of man, still, unless he shows in the deposit the care customary with him, he is not free from fraud, for good faith is not maintained if he shows less care than in relation to his own affairs: Dig: 16.3.32.)

N.B. It is doubtful whether this controversial text was generally equating dolus with failure to behave as one normally would in one's own affairs, it is more likely that it was concerned with the particular case of deposit.(Zimmerman)

N.B.2. Of course, the parties could agree, as in other contracts, to vary the depositee's duty of care by imposing on him the bonus paterfamilias standard.

But they could not validly agree to absolve him from dolus.

The depositee could not use the deposited thing - if he did so in bad faith, he would be liable for theft. (Borki)

Duties of the Depositarius.

Since deposit was exclusively in the intents of the depositor and gratuitous, the standard of liability of the depositee was low, being only for intentional fault.

He was therefore not liable if the object was lost, damaged, or stolen through non deliberate fault such as carelessness. However, the standard of liability could be increased by special agreement.

N.B. In the event of being condemned for deliberate fault the depositee incurred infamy (infamia).

The purpose of the contract was safekeeping;

Hence any use of the object or indeed any handling of it by the depositee contrary to this purpose constituted not only breach of contract, but theft. (Metz)

The Duties of the depositor.

He was liable, if negligent, for damages caused by the deposited thing, whereby the bonus paterfamilias standard applies.

He had to reimburse the depositee for expenses incurred in looking after the property and in returning it at the venue chosen by the depositor.

'If a deposit is made in Asia to be returned at Rome, it is seen to have been intended that this occurs, not at the expense of him with whom the deposit was made, but at the expense of him who deposited." D. 16.3.12.pr (Bork)

Deposit necessarium: Miserabile.

This was a deposit made upon the happening of civil disturbance, fire, earthquakes or shipwreck.

It gave rise to a claim for double damages, if the property was not returned on demand. (Lee)

The depositary would have to pay damages. They were doubled, if the deposit had been made in an emergency, e.g. during a riot or fire, since in such circumstances the depositor had less opportunity to choose his man.

(D.16.3.1.4) '... when someone has chosen to rely on the trustworthiness of another and the deposit is not returned, he ought to be content with simple damages.

However, when he deposits through necessity, the crime of perfidy increases and the public welfare demands retribution for the sake of protecting the Common Interest; for it is harmful to betray trust in cases of this kind. (Bork)

This remedy was created on an old action of the XII Tables which was given a new scope by the Praetor (Ulpian 16.3.1.1) (Metz)

Depositum Sequestre.

This was a deposit made by two or more persons of a movable or immovable thing, particularly of a thing in litigation (res litigiosa) with a third party called a sequester, on the terms that it was to be delivered to one or other of them in a certain event, particularly in the event of the decision of the litigation.

Unlike an ordinary deposit this type of deposit gave judicial possession, not mere detention, upon the depositary.

The object of this was to prevent usucapio running in favour of one of the parties contrary to the other pending the decision of the law suit. (Lee)

Sequestre was a deposit of property by two or more persons in dispute about their rights in the thing. The purpose of the deposit was that the depositary should hold the property until the dispute was settled.

He received legal possession of the property, thus preventing time running (for the purposes of usucapio) in favour of any of the disputants. When the dispute was settled, the property had to be returned to the successful party. It seems that both land and movables could be the subject of a sequestration (Bork)

Pending the decision of the court the object might be entrusted to a neutral 3rd party who was bound to deliver it to the party to whom it was awarded by the court. The most important difference from ordinary deposit was that the sequester received legally protected possession, not just detention, of the object.

This prevented usucapio from running in favour of the depositor and also meant that the sequester was entitled to the possessory interdicts. (Metz)

Mentre il depositario era considerato semplice detentore, il sequestratario era considerato possessore e poteva esercitare gli interdicta a tutela del possessio.

Depositum Irregolare.

This was a deposit subject to a condition of restitution in genere and not in specie. It took place when money was placed in the hands of a banker or other person, on the understanding that the amount, not the actual coins, should be returned on demand.

This contract resembled mutuum, but its economic purpose was different, because it was a deposit made with a or in the hands of a capitalist, not a loan made by a capitalist, and its legal effect was different. It was bonae fidei, not stricti juris. It might also give rise to infamia. The Senatus Consultum Macedonianum did not apply here. Interest might be claimed under a simple pact, or in the case of mora (late payment). (Lee)

This was a transfer of fungible things (usually money) to a depositee (usually a banker) with the intention that he should become the owner of the property, with a duty to restore the equivalent on demand. This looks very much like mutuum, but the difference was that depositum irregolare was not primarily intended to benefit the transferee he was more a custodian than a borrower) (Bork)

As he was owner the depositee could use the money, in which case it was usual to pay interest on it to the depositor at the end.

There are clearly similarities between this contract and mutuum. However, they were different, the deposit's primary intention was that his money be looked after; the arrangement was mainly in his interest. (Thomas J.A.C Thomas textbook of Roman Law pg 278)

Thomas draws an analogy with modern banking practice; payment into a current account is like an irregular deposit, obtaining an overdraft like receiving a mutuum.

Pignus (Pawn or Pledge).

Definition: It may be defined as a contract whereby a corporal thing is handed over by one to another as security for a debt. This was one of the modes of creating a real security for a debt, differing from Mancipatio cum fiducia because it did not involve transfer of ownership, and from hypotheca because it did involve transfer of possession (Lee).

Pignus was a bonae fidei and bilateral contract, consisting of the transfer of property as security by a borrower to a lender by way of mortgage.

The lender received legal possession of the property (which could be land or movables) (Bork)

The contract became binding on delivery of the pledge to the creditor, and he acquired not ownership but only possession.

The principal obligation was that of the creditor to return the pledge unimpaired once the debt had been paid. (Metz)

Pignus Development.

The earliest form of real security involved the transfer of ownership of an object capable of mancipation to the creditor with an ancillary agreement called Fiducia that the property be emancipated on repayment of the debt.

This was not a satisfactory arrangement from the debtor's point of view since he lost both the use and ownership of his property. Thus, in the late Republic a different form of real security called pledge grew up alongside, fiducia (Metz)

Pignus (Pawn or Pledge).

The lender undertook to recover the property once the debt was fully paid. However, being owner, the lender could sell the property if the borrower defaulted.

Apart from being cumbersome, fiducia had the disadvantage of depriving the borrower of ownership of the thing that had been pledged.

Duties of the Pledgee (Creditor).

To restore the thing when the debt was extinguished If the property was sold, to restore the surplus, if any, after satisfying the debt.

To exercise exacta diligentia. Thus, he must realize the fruits of the property (if there be any) and set them off, first, against interest, then, against capital, unless it was agreed that he was to keep fruits in lieu of interest.

In the case of an ordinary pledge of a movable not to use the thing unless expressly authorized by the contract. If he did so in bad faith, he was guilty of theft. (Lee).

The Duties of the Pledgor (debtor).

These were the following:

to pay necessary and (within reasonable limits) useful expenses incurred by the creditor about the thing pledged, e.g. repairing a house or medical attendance on a slave to pay damages if he had pledged a thing which did not belong to him, and the creditor had in consequence lost the benefit of his security.

Actions.

The pledgor (debtor) had the actio pigneraticia directa to enforce the duties of the pledgee, particularly the duty of restoring the property, when the debt was extinguished.

The pledgee had the actio pigneraticia contraria.

The Verbal Contracts.

Introduction.

Most authors of Roman Law give 'stipulatio' a very important role in the formation of the laws on obligations at Rome.

Opening sentences such as 'Stipulatio is one of the oldest types of Roman contract and typical of Roman Law' are very common. (Dile Tamm. Roman Law and European Legal History, pag.103).

The idea is that this contract was naturally the first due to the obvious fact that the illiterate sections of society were in the majority and secondly because it was the simplest in formality.

The simplicity and apparent informality which this contract might lead one to believe was not the case at Roman Law. (Nicholas Barry Introduction to Roman law page 193)

"What is however surprising is first its extreme simplicity of the form (legal) and secondly its precarious development. We know that it existed already at the time of the twelve tables".

The accepted version of the verbal communication, which the law sanctioned and glorified to the stage of an accepted legal binding link, was allowed to a very strict form. The words held a magical tone and this was also accompanied by clarity in what the parties had agreed to.

The intentions of the parties had to be crystal clear to appropriate the strength of law. Thus the idea was to have a *stricto juris* approach.

The formula was *Dari Spondes* and the reply *spondeo*.

Dig 45.1.51 "A stipulation is a verbal expression in which the man who is asked replies that he will give or do what he has been asked." *Pompous fr 5 & 1 de Verb Paul Sent 11 4.1.*

Definition:

'Stipulatio was a unilateral and *stricti juris* contract consisting of a formal promise made in answer to a formal question.

The language.

The language had to be initially in Latin if both parties were Roman citizens (*ius civile*). Later law allowed the use of Greek language so long as both parties, both also Roman citizens understood the language. (Gaius Institutes II no 92, 93)

The use of Latin was also part of the solemnity and rituality which one finds accompanying other legal operations. This remained even though the parties were not both Roman citizens.

The Verbal Contracts.

There the need for Latin language could be removed and another language used so long as the parties understood them. If the parties were not both Roman the *jus gentium* applied.

The writings of Sabinus, however allow it to be true that all tongues can produce a verbal obligation, provided that both parties understood each other's language, either of their own accord or by means of a truthful interpreter. (Dig 45.1.1.6 page 298 Bronowski).

Parties had to be Present. The parties to the agreement had to be present. This meant that people unable to speak or hear i.e. deaf and mute could not contract. The slave could be a means through whom or if the master would be bound, or also a son on behalf of his father.

The agreement had to be heard i.e. verbally, an audible reply which means that a simple nod is not enough. Though the question and answer need not be given there and then instantly but it needs to be heard.

It was accepted that if Aulus questions but exits the room where he is but returns and, on his return, Numerius replies accepting that it is valid. (Ulpian, Sabinus 48 book (Dig 45 1.1pr 4) Kontra D 45 1.1.37 pr)

The reply must be made when the stipulator is at hand. If after the question, something else was begun the proceeding is invalid, even if the reply is given on the same day. (Borkowski pag 298).

The Agreement.

The idea of the law was that there must be an unequivocal position. The persons contracting must be precise in their intentions. Both being in good faith to each other, without reservations or conditions allowed; no suspensive or resolute conditions unless parties agree specifically to this.

The Ulpian exception is very strange in this field. This jurist's opinion which was accepted by Justinian in his Digest allows agreement if the parties do not agree on the number of objects. If say AA says 20 but NN says 10 there is still agreement on ten and the same applies for the contrary.

The Verbal Contracts.

Further the contract could have a number of articles numbered and complex, which would need to be written in order to have a precise description they would need to be so: Thus one asks do you promise what there is written in the document?

Further the contract could have a number of articles numbered and complex, which would need to be written in order to have a precise description they would need to be so: Thus one asks do you promise what there is written in the document?

Accessory Stipulations.

One could also have accessory stipulatio to the original called 'adstipulator' or adpromissor usually a second creditor who gets the same promise from another person. Which was not much used.

The use of the stipulatio with a penalty clause played a very important role in Roman Law in securing the enforceability of arrangements that could not be decently enforced.

Evidence to Prove - The Verbal obligation.

The evidence needed to prove this verbal obligation pushed the parties to enter this in writing.

The so-called Cautio: Più facile la prova della conclusione della stipulazione solevano chiamare dei testimoni all'atto e stendere un documento scritto che si diceva (definiva) cautio, epistola, leterae, scriptura, instrumentum, chirographum (Cicerone, Paulus) gained importance in classical law. (Serafini pag 92)

This was caused by the ever-growing number of jurists and literate romans who allowed the parties the security of the obligation and thus of the proof necessary when the parties where before the Praetor on any matter.

The Verbal Contracts.

The translation of this obligation in writing started to give that document great importance and it was only in certain instances where proof could be brought forward to attack this rule.

Justinian seems to have allowed evidence showing that the obligation could not have occurred as both parties were not present.

Following a rescript on the late Classical period, it was presumed that a question had preceded the answer if a cautio alleged that a promise had been made (page 299 Bronowski) i.e. this created a distinction in the recording of the Cautio.

Defence Exectio

Stipulatio is a stricti juris obligatio hence there would be no access for the defendant to set up defences unless he had done so on a specific plea contained in an exception before the Praetor. (itlev pag 106).

Execution.

The enforceability of the Stipulatio came if a specific sum was involved through the Condictio Certae Creditae Pecuniae. If for a certain Pecunia, the condictio certae rei or condictio triticaria.

Actio in stipulatio. The latter remedy was less convenient for the plaintiff than a condictio, which did not have to state the basis of liability in the formula of the action.

Consequently, whether property was sufficiently specified (to enable the plaintiff to use a condictio was of procedural importance (page 299 Bronowski 9.43.3)

In Sale.

A supplement for sale the stipulatio was necessary for transactions for the delivery of goods defined according to generis (in genere) since the emptio venditio was only available in a sale of specific goods in specie.

Difference between sale rules came up when. A sale for specific goods was performed through a stipulatio. The essential difference was that the seller was liable only for damages caused by his positive action, not for damage arising from omissions. This was based on the fact that the promissory, promised to deliver and is liable for giving.

Consensual Contracts.

Introduction.

In four cases Consent alone makes a contract.

These are: a) Sale emptio-venditio, b) hire Locatio-Conductio, c) partnership Societas, d)mandate Mandatum.

The presence of the parties is not required, as it is in stipulatio, consequently, the contract can be concluded by letter or by messenger.

All these contracts are bonae fidei and bilateral, giving use to reciprocal actions.

The consensual contracts were bilateral and bonae fidei. Their origins are uncertain, but they were certainly not the earliest contracts to have emerged in Roman Law.

Their development was prompted largely by the needs of the expanding Roman economy in the middle Republic. All consensual contracts had a distinct commercial character. As the influx of foreigners into Rome was one of the signal factors in her economic transformation, the development of the consensual contracts probably owed much to the work of the Peregrine Praetor.

Despite their comparatively late origins, the consensual contracts came to have an immense importance. (Bork)

The principle of liability in the contracts comprising this group is that obligation arises from agreement alone. The principle did not mean that any agreement was legally enforceable. It was restricted to certain standard cases, namely the commercially or practically most important transactions of sale, hire, partnership and mandate.

These developed in the last two centuries of the Republic and so, with the exception of some of the contracts binding by conduct, they were the last of the nominate contracts to emerge.

They were flexible legal instruments characterized by bilateralism and good faith. (Metz)

Sale-Emptio-Venditio.

◦ Definition: Sale may be defined as a contract whereby one person promises to transfer to another a thing and to procure him the undisturbed and permanent possession of it, and the other on his part promises to pay a price.

The contract of sale is complete in according to what the parties intend to conclude it i.e. by spoken or by written words: a) If the parties do not intend to reduce their contract to writing, it is complete as soon as the thing and the price are ascertained; b) If the parties do intend to reduce their contract to writing i.e. do not intend to be bound until they have done so, it is not complete until it has been reduced to writing accordingly.

The instruments must be written by a third party, must be subscribed by the contracting party, and, if they are notarial must be formally completed and released to the parties. This is the effect of Justinian's enactment Iod. 4.21.17, summarized in the Institutes, by which contracts

which the parties have agreed to put into writing 'quos in scriptis fieri placuit: are to be invalid 'non alter vires hebere sancimus' unless the required formalities are observed.

Agreement could be proved in several ways. The conduct of the parties often constituted such proof e.g. shaking hands or exchanging rings. There was no need, however, to prove that the parties had made the agreement in each other's presence D.18.1.12 : 'Sale is a contract of the law of nations and so is concluded by simple agreement, it can thus be conducted by parties not present together, through messengers, or by correspondence.'

Arrha (Caparra).

An expression which, in the evolution of Roman law, took on different meanings.

Originally indicates an institute of Greek origin (arrabon) - consisting in the advance delivery of part of the agreed price for a sale, or of a thing of value, made in order to commit and bind the person who received it, in fact if the person who had given the agreement decided not to oppose it, he lost that is which he had previously handed over to the other; if it was the other person who did not want to contract, he was obliged to return double the artha received.

In Roman law, however, the sale did not immediately translate possession, as in Greek law, but only had obligatory effects, since there was no sense in a function of the arrha as a commitment to sale since such effects derive from the same contractual facts.

Therefore: "The arrha was used for proof purposes, to highlight the conclusion of a contract and the consequent contractual obligations respectively absent."

The delivery of the arrha marked the passage from the preliminary phase of the negotiations to that of the conclusion of the contract; understood in this sense, arrha (called confirmatory arrha) gradually spread in the pre-classical and classical periods.

Jurisprudence held that, as a result of the conclusion of the contract, the arrha must in any case be returned by the person who received it, even regardless of the execution of the contract.

In post-classical law (particularly under Justinian), the arrha took on a different function (we speak of arrha poenitentialis, when two or more subjects had agreed to contract a sale in written form, they could avoid the commitment only if they had not paid an arrha.

Otherwise, respectively, the buyer would have lost the amount paid, or the seller would have had to return double the amount received (depending also, obviously, on whether it was one or the other who wanted to escape the commitment hired)

By an extension the word came to include a deposit on sale i.e. an installment of the purchase price. If the purchaser failed to pay the balance at the time or times agreed the seller might treat the sale as cancelled and keep the deposit. This was the consequence of a special clause in the contract providing that in such event the property should be unsold. It took effect as a Resolutive condition.

The Subject Matter/The Object.

This must be:

- in existence or capable of existing; (you cannot sell a dead slave or a line unicorn);
- in commercio i.e. capable of being owned. (you cannot sell a free man, on a res sacra, religiosa or sancia),
- something in which the buyer acquires an interest under the contract. you cannot buy a thing which is yours already)

If these conditions are satisfied, the most various things may be the subject of the contract; a thing corporeal or a thing incorporeal (as a servitude, a debt an inheritance), a thing now in existence, or a thing which will or may come into existence hereafter - venditio rei speratae i.e. next year's crop - venditio spei ergo what I catch in my net.

In the first case the sale goes off if there is no crop, in the second case you take your chance); a thing which belongs to the seller (res sua), a thing which belongs to someone else (res aliena). (Lee)

D. 18.1.34.1 'There can be a valid sale of anything which one may have, possess or sue for, but there can be no sale of anything which is excluded from commercium by natural law, the law of natures, or the observances of the state.

The general rule was that anything could be sold unless it was excluded from commercium.

But there were some exceptional categories of things which need comment:

Prohibited things.

A number of 'observances of the state' forbade the sale of things in certain circumstances. i.e. A ban was introduced in the early Empire on the selling of houses with a view to their demolition for profit; and there were restrictions on the sale of detail immovables and on the sale of property belonging to wards.

Things excluded from private ownership. Such things could not be the subject of a valid contract of sale if the purchaser knew the facts (D.18.1.6.pr) 'you cannot knowingly buy a freeman or anything, the alienation of which you know to be forbidden, for instance, sacred or religious land or land excluded from private dealings, such as those public lands which are not in private possession but are for public use, such as the Field of Mars.

Things belonging to the purchaser. A sale of property to a man who already owned it was a nullity - the seller has nothing to sell in such a situation. If the buyer bought property in which he had a proprietary interest, but not an absolute one, the sale was valid to the extent to which the buyer's title had been incomplete (co-owner)

D.18.1.18 pr 'Again, if a thing which he owns in common with someone else should be sold to the purchaser is valid in part, in part invalid'.

Non-existent things.

There can be no sale without a thing to be sold. D. 18.1.8 pr; A distinction has to be drawn between things which have ceased to exist before the contract was made i.e. perished things, and those which came into existence after its making i.e. future things.

Perished Things.

A sale of property which had perished or had lost its identity before the contract was made was void D. 18.1.15pr. The rule could apply even where only a part of the subject-matter had perished D. 18.1.44 "Should a man buy together for one price, two slaves, one of whom is dead at the time of the sale, there is no purchase of the other one, either."

However, D.18.1.57pr The issue is largely dependent on how much of the house remains; if the greater part of it has been destroyed, the purchaser will not be obliged to perform the contract and can recover anything which he may have paid; if however, half or less has been consumed by fire, then the purchaser will be required to honour the contract, an estimate being made, on the standard of an honourable man, to relieve him of payment of the amount by which the fire has reduced the value of the house

In this case it was assumed that neither of the parties knew about the state of the house when making the contract. Would knowledge of the facts have made a difference? If both knew that the house had been burned the contract was void. If the buyer knew, but the seller did not, the sale was valid. And if the seller knew, but the buyer did not then (D.18.1.57.1) 'no sale exists, if the whole house was destroyed before the contract was made; but if any part of the building remains, the contract stands, and the vendor must make good his damages to the purchaser.

The Price.

Must consist in Money: Sabinan and Proculians held different views: Proculian prevailed (Metzger to distinguish who is the Seller and who is the Buyer).

Must be certain or ascertainable certain.

If it is fixed by a third party not by one of the parties.

One cannot establish the word "reasonable".

Reasonable (Justum):

Relief: laesio Enormis - more than ordinary prejudice. Introduced by Justinian attributed per interpellatio to Diocletian.

Vendor: who received less than 1/2 of fair price which was that established as it was at the time. He might recover what he had sold, retaining the money paid for it.

Applied to movables:

The purchaser later on had a right to reduce if he had paid more.

Genuine (Verum) - Not a gift masqueraded as a sale.

Not merely intended i.e. pretended pro forma, i.e. given but there is no intention that it should be demanded of or paid.

Merely derisory: (symbolical travesty): a valuable property is expressed to be sold for a symbolic amount.

Duties of the seller.

The Seller was bound to:

- deliver the thing and to give vacant possession.
- to take care of it until delivery.
- to guarantee against eviction.
- to guarantee against undisclosed defects.

Duty to deliver and to give vacant possession:

The Seller was bound to take all necessary steps to transfer to the buyer whatever right he had in the thing sold together with accessories, and in particular to convey it by *mancipatio*, if a *res mancipii*, or by tradition, if it was not.

The transfer of ownership:

The object of the contract of sale being to make the buyer owner, an agreement that the ownership shall not pass was inconsistent with the nature of the contract.

But the seller was not bound to make the buyer owner immediately and directly, he satisfied his duty to deliver, in the absence of expression to the contrary, by giving vacant possession.

The seller was only under an obligation to transfer the possession of the sold thing to the buyer and ensure the buyer's full enjoyment of it (*habere licere*).

A characteristic rule of RL was that the seller did not have a duty to ensure that the buyer acquired the title to what was sold. In fact, Ulpian, Sabinus 34th book: "one selling land does not make the purchaser owner of the land as would one who promised land by stipulation."

He must put the buyer in physical possession, which he cannot do, if for example some other person is in possession by the authority of the praetor, such as legatees or *fidei commissaries* who have been let into possession in security of their claim, or creditors placed in possession of the estate, or if there is an outstanding usufruct.

The seller must give vacant possession, that is to say, "exclusive possession, not defensible by interdict, and free from burdens, interfering with it except such as had been agreed upon".

Thus, a civil law heir does not give *vacua possessio*, if a praetorian successor can displace the purchaser by the interdict "*quorum bonorum*", and if land is burdened with a hypothec, a purchaser may require its liberation.

But a praedial servitude was not considered to interfere with possession.

Consequently, a vendor was not bound to deliver land free of such servitudes unless he had expressly sold it as free (*uti optimus manimusque*). But if he knew that the land was burdened, it was his duty to say so. A lease was no burden on the land, because it gave no real right. (Lee)

A defective title would not arise until a third party with a better title actually deprived the buyer of the possession of the thing - this is known as *evictio*.

In fact, Ulpian, Edict, 33rd book: "And in the first place, the seller must provide the object itself, that is, deliver it. If the seller was its owner, his act (of delivery) makes the buyer the owner also; if he was not, his act obligates the seller only for an eviction, provided that the price was paid or security given for it.

By contrast, the buyer must make the seller owner of the purchase money" (Ditlev)

The vendor must put the buyer into control of the thing; he must give him *vacuo possessio*, and must guarantee him against defects of title but was not bound to make him owner.

Why the rule was put in this way is uncertain. Probably it was to relieve a vendor from the obligation, often troublesome, of proving a perfectly good title, until it was disputed by a third person. (In *permutatio*, probably common with peregrines, the rule was otherwise: ownership must be given).

To give *vacua possessio* was to put the buyer into exclusive possession, not defeasible by interdict, and free from burdens interfering with it except such as had been agreed on.

The existence of praedial servitudes grounded no claim (as they did not prevent possession) unless they were known to the vendor and concealed, or the land was sold free of them, *optimus manimusque*.

Though the vendor was not bound to make the buyer owner, the rule gives a similar result; the simple way of satisfying the rule to make him owner (Buckland)

The seller was not bound to make the buyer owner of the property sold, but should he deliver what he knew he did not own he was liable to the buyer in the contractual action on the ground of fraud for any loss suffered by the buyer (Proculus D18.2682). He was, however, bound to put the buyer into undisturbed possession.

The development of the rules relating to liability on the ground of eviction occurred through the use and interpretation of two traditional stipulations enforceable by the action of debt.

By the *stipulatio duplae*, the seller promised to pay to the buyer double the price should a third person be able to prove a better legal title and secure the buyer's eviction (Pomponius D.21.2.16.1). It was normally given for slaves sold or land, but was not confined to such cases.

By the *stipulatio habere licere* in its original form, the seller promised that neither he nor his heirs would subsequently perform any act by which the buyer's possession would be disturbed. It seems that at least some jurists by the end of the classical period were prepared to continue the *stipulatio habere licere* as applicable to the case in which the buyer's possession was disturbed by a third person, provided the stipulatio was not expressly limited to acts of the seller or his heirs

Duty to take care of the thing until delivery:

It may be that in the classical period, the vendor was liable for *custodia*, (had to keep the thing safe). But in Justinian's system, not more was required of him than that he should exercise *exacta diligentia* (*diligentia in custodiendo*).

He was liable for *dolus* and for the so-called *culpa levis in abstracto* but not if the thing perished by accident or was lost by theft or suffered deterioration, unless he had undertaken to do so, or was in default in making delivery or otherwise to blame. This meant that, in general, the thing was at the risk of the purchaser.

If the thing was stolen, destroyed or damaged by a third person, the purchaser was entitled to call upon the vendor for cession of actions, e.g. *vindicatio*, *actio furti*, *actio legis Aquilae* (Lee).

The next duty of the vendor was to deliver the goods, if the buyer had paid, or was ready to do so, or in some way had fulfilled or was ready to fulfil, his part.

Accessions and fruits since the sale was "*perfecta*" went to him. If, on the land sold, a tree had since blown down, it belonged to him.

Day to day earnings in the meantime of a slave sold, the price of *fructus*, ripe at the time of the contract, received later and other acquisitions of the same type went to the buyer, at least under Justinian.

But where land sold was at the time actually let to a tenant, we are told that any rent paid belonged to the vendor, apart from a (different) agreement (Buckland).

Duty to guarantee against eviction:

The law on this matter went through successive phases.

In the earliest period a purchase by *mancipation* whose title was not defended or not effectually defended by his vendor, so that he suffered eviction, had an action for double the price, the so-called "*actio auctoritatis*".

This was of limited application and in cases to which it was inapplicable, or as a substitute for it, the practice grew up of entering into stipulations in certain cases for double the price to be paid in the event of eviction (*stipulatio duplae*), and in other cases, where the property was less valuable, for a simple guarantee against eviction (*stipulatio habere licere*) which gave rise to a claim for an indemnity, if the title proved defective.

At a later date, these stipulations could be compelled or were implied in the sale and, ultimately, a purchaser whose right to possess was called to question could in any event sue for an indemnity in an action on the contract.

This replaced the *stipulatio habere licere* expressed or implied. But if the property sold was of considerable value it continued to be usual to make an express stipulation for double the price or for less or more, as might be agreed, though even where this had not been done an action might be brought for a multiple of the price, when this was according to local usage.

The action on the stipulation, express or implied, differed from the action for an indemnity in the conditions of its exercise and in the nature of the remedy.

The first lay when an action had been brought against or by the purchaser terminating in an adverse decision on his right to possess.

In the second, it was enough that his right to possess as purchaser was seriously menaced.

In the first the measure of damages was the price or a multiple of the price.

In the second the purchaser claimed general damages and, in particular, the market value of the property at the time of eviction.

Stipulatio duplae. It lay only if there had been an actual eviction, i.e. judgement under which the buyer had given up the thing or paid the damages. If he abandoned it without action, though he knew there was no defence, or if he compromised, he lost the right. If after the judgement the claimant, instead of taking the res, gave it to him, or died leaving no successor, there was no claim under the rule. So if the thing ceased to exist before the eviction, the right was lost if the buyer allowed judgement to go without notifying his vendor.

Eviction was not necessarily of the whole, eviction partes gave a right to a proportionate part, but as a part is not a thing, it was usual, perhaps necessary, to stipulate for the case of eviction of "rem vel partem". A part might be physical or legal, i.e. a usufruct, but not praedial servitudes or accessories (Buckland P. 489-490).

Duty to guarantee against undisclosed defects:

It might be supposed that this guarantee, like the guarantee against eviction (with which it was frequently combined in a single stipulation) would have come to be implied in every contract of sale, but the law took a different line of development.

Here too, the law went through a long period of development:-

In the most ancient period, if land was sold by mancipation and the vendor had misinterpreted its extent, the purchaser had to so-called "action de modo agere" for double the difference in value - in "duplo ejus quod mentitus est"; and he could also sue upon special terms attached to the mancipation (leges mancipii).

Later, the vendor was bound by informal representatives and guarantees (dicta et promessa) made at the time of the sale and was liable for undisclosed defects of which he was aware. But the law did not cast upon him any general duty of warranting the absence of latent defects.

Therefore, if a purchaser wished to protect himself, he had to do so by stipulation, and this came to be the usual cause.

It might be supposed that this guarantee, like the guarantee against eviction (with which it was frequently combined in a single stipulation) would have come to be implied in every contract of sale, but the law took a different line of development.

The curule aediles acting under their powers of police, drew up rules requiring sellers of slaves and cattle to make a public declaration of certain specified defects, moral (in the case of slaves) and physical, and gave actions against them when defects became apparent, whether the sellers knew of them or not.

These were the actio redhibitoria, and the actio aestimatoria or quanti minoris.

The first lay within six months to have the sale rescinded against restoration of the price, if the thing had defects (so-called redhibitory defects) which destroyed or impaired its usefulness to the purchaser.

In the second action, which in similar circumstances could be brought within the year, the purchaser affirmed the sale and claimed a reduction in the price.

The edict of the aediles protected purchasers of slaves and livestock (at first in the market and later anywhere). The civil law gave a remedy only in the circumstances described before.

But ultimately the aedilian remedies came to be extended to every kind of sale. (NB: If the texts could be taken at their face value, this development would seem to have taken place as early as Ulpian or even Labeo. But it is generally agreed that they are interpreted. The development was complete in Justinian's system, if not before.)

The general result was that if a vendor had guaranteed the existence of certain qualities, or the absence of defects, or if he had failed to declare defects of which he was aware, he was liable for general damages.

In other cases, he was limited to the remedies given by the *actio quanti minoris*. (Lee)

The Edict of the Aediles went further, but in a limited manner. It dealt originally only with sale of slaves, the slave-dealer having a very bad reputation. It provided, in classical law, that on such sale in open market, the vendor must declare all of a long list of defects that the slave had: mental, moral or physical.

He must further promise that no such defects (*morbus*, *vitium*) enlisted other than those declared; if he refused to do this an *actio redhibitoria*, to set the contract aside, lay for two months and an action for damages, perhaps the *actio quanto minoris*, for six.

A similar edict was soon introduced for similar sales of any livestock, but it does not seem to have expressly required a promise, though in practice it was so understood, and the defects, *morbus* and *vitium* were all physical.

The action did not arise unless the defect affected value, or if the buyer knew or ought to have known it. That the vendor did not know was immaterial.

The general effect of the action was to end the transaction. The thing was returned and the price repaid, with interest and computation for damages. The thing, with its accessories and damages for any deterioration, and all acquisitions through it, must just be returned, so that the action did not lie if the buyer had put it out of his power to restore, though in general, if the impossibility was not due to his *culpa*, he was still entitled.

The *actio quanto minoris* is not permitted in the texts. It cannot be proved that *redhibitoria* lay for serious and *quanti numeris* for minor effects, but it is likely that they were so employed, and that the *actio exempto* absorbed the principles of *quanto minoris* before it did those of the *redhibitoria*.

The general effect of the texts dealing with measure of damages seems to be that where there was express warranty, the vendor was liable for the whole interest, but apart from this only for the difference between value and the price, unless he knew of the defect.

The rights could be varied by agreement. Sales in which all warranty was excluded. (Buckland).

Duties of the Buyer.

In all these cases, if sued upon the contract, he could plead the defence traditionally known as the exceptio non adimpleti contracts - a plea that plaintiff had not carried out his part of the contract.

It was not really an exception, but an unqualified denial of plaintiff's claim, and 'the plaintiff must prove his performance, while in a true exception the burden of proof was normally on the defendant'.

To take delivery as soon as the seller tendered it, or at the time agreed.

Any costs properly incurred by the seller between the date of the contract and delivery were charged to the buyer.

The chief duties of the vendee can be shortly stated. He must make the vendor owner of the price. Only when he had done this did the property vest in him, at least in later law, even if the goods were delivered, apart from agreement for security or credit.

Hire. Locatio Conductio.

Can be defined as a contract whereby one person agrees to give to another the use or the use and enjoyment of a thing or his services or his labour in return for remuneration, usually in money. (Lee)

A bilateral bonae fidei contract whereby a person (the locator) hired out a thing, or his services, or a piece of work to another person (the conductor). (Bork)

The contract of Sale and Hire have certain similarities.

Lease and hire is close to sale and purchase, and it is formed by the same rules of law. Sale and purchase is contracted if the price is agreed upon; similarly, lease and hire is considered to be contracted once the rent is agreed upon. (D. 19.2.2.pr)

Because of this similarity we find parts of the Digesto which point to the problems which in consequence arose.

"... in some cases, the question frequently arises whether the contract is sale and purchase or lease and hire. For example, if a goldsmith and I agree that he make for me, from his own gold, rings of a fixed weight and form, and if he receives, for example, three hundred (in payment), is this sale and purchase or lease and hire? The general view is that there is a single transaction which is predominantly sale and purchase. But if I give my gold and a fee is set for labour, this is undoubtedly lease and hire." (D. 19.2.2.1)

Hire. Locatio Conductio.

- Subject Matter of the Contract.
- Through the work of commentators three types were identified: • Loc-Cond Rei (the hire of a Thing)
- Loc-Cond Operarum (the hire of Services)
- Loc-Cond Operis (the hire of a piece of work).

Locatio Conductio. Rei.

This occurred where the conductor was allowed the use of a thing by the locator in return for payment.

The contract was made when the parties agreed on the subject matter of the hire and on the amount of payment.

Certainty was required but the contract was valid if the payment was readily ascertainable. Payment normally had to consist of money, although there was an important exception in the case of agricultural land (where part of the produce of the same land was frequently used as payment).

The thing that was hired would normally be a corporeal thing, and something not consumable through use. In certain respects, a greater range of things could be given in hire than could be sold. (e.g. objects given in usufruct)

It was also normal to agree to a period for the duration of the hire, failing which either party could renounce at any time.

If they did not specify the duration, the hire would normally terminate on the expiry of the relevant period. But in the case of agricultural land, an implied reletting was possible on a year-to-year basis. In practice this meant that the conductor would continue as tenant unless he was given notice to quit before the expiry of the original period. However, the implied extension was regarded as a new lease rather than a continuation of the old one.

Hire could end through the destruction or termination of the subject-matter, or through the misconduct of either party.

Thus, if the locator substantially prevented the conductor from enjoying the property, the latter could terminate the contract and sue for damages. Misconduct by the conductor, justifying termination of the contract, occurred primarily where he grossly abused the property or failed to pay the rent.

The death of either party did not terminate the contract, unless the parties had agreed to the contrary.

Duties of the Locator.

He had to deliver the property to the conductor, who received custody (detentio) of it, but not possession.

Any accessories that were normally required for the use of the property had to be handed over.

He had to maintain the hired thing in good repair throughout the period of the hire unless damage had been caused by the negligence of the conductor) .

Thus, if the conductor incurred reasonable expenses in the maintenance of the property, he was normally entitled to recover them.

The locator was liable for damage caused by undisclosed defects of which he was aware or should have been aware.

The standard of care expected of the locator was that of the *bonus paterfamilias*.

Duties of the Conductor.

He had to accept delivery of the hired property and normally had to pay for the hire either by a lump sum or by instalments (ie rent), the latter being more usual in cases of hire for long periods.

Security for the payment of the rent could be expressly agreed, and was implied in the hire of land. "As regards rural land the crops are impliedly taken to be hypothecated to the owner of the land, even if not agreed in so many words." *Digesto* .20.2.7 pr)

The essential character of the property had to be preserved; and it could not be used by the conductor in an unauthorised way.

He had to exercise the care of a *bonus paterfamilias* in his dealing with the property.

At the end of the contract the property had to be returned substantially in its original state, subject to normal wear and tear.

Allowing the property to decrease in value could amount to a breach of this duty "Likewise, the lessee should take care in no way to lower in value the thing's legal or physical condition, nor to allow it to become lower." (*Digesto*. 19.2.11.2).

Locatio Conductio Operarum.

In this form of hire the locator placed his services at the disposal of the conductor in return for payment.

The rules were largely similar to those applicable to the hire of a thing.

The locator had to perform his services with due diligence; if he professed some particular expertise, he had to prove competent for the work he undertook.

The conductor could incur liability through *Tallure*, for example, to provide safe premises or a safe system of work.

The basic rule was that the death of the locator terminated the contract, but not necessarily the death of the conductor.

If the service had not been a purely personal one, the death of the conductor did not end the contract- his heirs were bound. In any case the locator was entitled to payment for the

duration of the hire: "A man who leases out his labour should receive wages for the entire term if he is not responsible for his labour not being rendered" Digesto 19.2.38.pr)

Operae illiberales.

Which type of services could be the subject matter of this contract. The reply seems to be that only those which were typically performed by slaves. Slaves often performed menial tasks but we are aware that these could be used in an extensive range of activities.

Operae illiberales thus came to have a wide meaning, so that the services that were excluded were confined within the so called "liberal" pursuits.

We are led to understand that this development was that those engaged in such pursuits would not wish to perform their services in return for any thing as sordid or menial, or degrading as money.

Ulpianus explains that philosophers could not be hired as they should avoid "mercenary activity", other services that could be hired included those of jurists, advocates, physicians, surveyors and teachers in higher education.

It is held that they earned a living through an honorarium, which could be enforced through mandate.

The distinction seems to be hard to get. Engagement in the creative arts was not generally regarded as a liberal pursuit.

The position as regards teachers to an extent provides some insight such that those in higher education could not be hired, but other teachers could be.

It is safe to conclude that this distinction depended to a great extent on the status of the person performing the services and not solely on the nature of the service provided.

Locatio conductio operis.

This is explained by certain jurists as a hybrid "sui generis" one of the previous two. This occurred where the locator placed a thing with the conductor in order for the latter to do some work in relation to it e.g. X gives Y some bronze with which to make a statue.

The principles relevant to the hire of a thing were largely applicable to LCOS; but whereas in the other types of hire it was the conductor who paid, in the hire of a piece of work it was the locator. The conductor could subcontract the work unless he had promised to do it personally.

If the materials belonged to the person who was working on them, the agreement was normally regarded as sale rather than hire.

But in building contracts under which the builder supplied the materials were regarded, exceptionally as hire. It was common to agree in building contracts that payment should be made in instalments, subject to agreed, satisfactory progress.

The approval of the locator was tested objectively, he could not disapprove without reasonable grounds.

The work had to be completed within the time specified or, if no time limits had been set, within what was considered reasonable for the work entrusted to be finished.

Both parties were required to show the standard of care of a bonus paterfamilias, the locator in relation to the materials supplied, the conductor as regards his work.

Inexperience was not a defence according to the Digesto which held that "inexperience should also be counted as fault, if someone contracts to pasture calves or to repair or to adorn something, he should be held responsible for fault, and it is fault when he errs due to inexperience, since, as Celsus says, it was obviously as a craftsman that he took the job.

Mandatum.

This is a contract whereby one person (mandator) gives another (mandatarius) a task, a commission to perform, do something for him without reward, and the other accepts the commission.

It is held to be imperfectly bilateral as though it gave rise to reciprocal rights and duties, the duty of the mandatarius arises immediately upon the acceptance of the commission while the duty of the mandator to indemnify the mandatarius against loss and liability is merely contingent.

The elements:

A. the object of the contract had to be lawful

It may consist either in general management called Procuratio Omnium Bonorum or in the doing of a specific act Procuratio Unius Rei. It may, but does not necessarily, imply entering into legal relations with 3rd party.

B. The mandator must have an interest in the thing to be done by the mandatarius

It was however held that some mandates which were not directly in the interest of the mandator came to be upheld as a valid contract because by giving a mandate aliena gratia (for a third party alone) or tua et aliena gratia (you and a 3rd party) | placed myself as regards the third party in the position of a negotiorum gestor and as such acquired a personal liability and consequent interest in the execution of the mandate.

C. Mandate must be gratuitous. The rule did not persist in practice or was a matter of form rather than of substance.

Duties of the Parties.

The mandatarius was bound :

A. to execute the mandate, subject to the right of renouncing it re adhuc integra i.e. while he can do so without prejudice to the mandator and subject to just excuse for failure to renounce at all, or in good time.

B. not to exceed the mandate.

C. to exercise exacta diligentia

D. to render accounts.

E. to make over to the mandator all benefits accruing from the mandate including rights of action against 3rd parties

Duties of the Mandator.

These were principally:

A. to indemnify the mandatarius against expense, loss and liability incurred in the execution of the mandate

B. not to revoke the mandate to his prejudice.

Mandate may be Determined.

Mandate ends for the following reasons:

1. by mutual consent (the parties agree in advance for the termination of the mandate after a certain time or in a certain event or by a subsequent agreement)

2. unilaterally. A revocation or renunciation however with consequences except where this was made prior to any execution of the mandate. By the mandator before the mandatarius has done anything in execution of his commission. By the mandatarius so that by renouncing he does not put the mandator in a position in which he cannot conveniently do the thing himself or get someone else to do it for him.

3. By the death of either party.

But if the mandatarius has proceeded to act, or continued to act, in ignorance of the mandator's death he is entitled to be indemnified by the heirs; conversely, the heirs of the mandatarius are bound to take the necessary steps to wind up the business in hand.

The death of either party ended the mandate.

However, if it was the mandator who died, his heirs had to give notice to the promisor and had to reimburse him for expenses incurred up to that time.

By the death of either party.

What if the mandate consisted of a promise to do something after the death of one of the parties? If it was to be performed after the promisor's death, the mandate was void because of the rule of classical law that an obligation could not begin with an heir.

If the mandate was to be performed after the mandator's death, it seems that it could be upheld in some circumstances "Marcellus also tells us that if a man has given a mandate for the erection of a monument to him after his death, his heir can bring an action on mandate"

Partnership Societas.

A bona fide contract whereby two or more persons agreed to associate in a common venture for their mutual benefit.

Partnerships were often formed with a view to making a financial profit but this was not an essential requirement of the contract- the mutual benefit did not have to be pecuniary.

The partnership was a common venture, physically possible, lawful and not immoral or incompatible with good faith.

Each partner had to contribute to the common aim it could be capital, labour or some other skill or expertise. But each contributors did not have to be equal value, and frequently were not.

Each partner had to be allowed a share in the benefits resulting from the partnership; the respective shares would normally be agreed between the partners.

The shares must be entitled to some (not necessarily an equal) advantage.

The shares in profit and loss may be fixed by agreement; failing which, they are deemed to be equal. If the share in profits is fixed, but not in losses, or conversely, the share in the one is taken to be the same as in the other.

An agreement that a partner should have a larger share in profits than in losses was good, and it might even be agreed that a partner should share in profits and not in losses.

But a contract that one should share in losses but not in profits was a lion and jackal arrangement, which was not permitted i.e. *Societas Leonina*.

The essential elements of this contract were the following:

1. A Contribution by each of the partners.

The contribution need not be equal or similar. One partner may contribute his capital, another his industry, for one man's services may be worth as much as another man's money. But each must contribute something to the common interest.

2. A Common Interest.

3. The intention to form a partnership. *Affectio Societatis*. This was the main element to distinguish partnership from other forms of co-ownership.

4. The object must be lawful.

Duties of the Partners.

The duties of the partners between themselves *inter se* were that they are reciprocally bound.

1. Each to contribute his share as agreed.

2. To share profits and losses as agreed.

3. Each to indemnify the other *pro rata* against all expenses and liabilities properly incurred on behalf of the partnership.

4. In all partnership business to exhibit the so called *diligentia quam suis rebus*.

Partnership – Societas.

Partners had to make the agreed contribution and had to share in the administration of the common venture, subject to any contrary agreement.

In the case of a business it was common to appoint a manager but he did not have to be one of the partners. Each partner had to account for his activities in pursuance of the common venture.

If a partner made a contract in relation to partnership business, he alone could sue or be sued on it; but the duty to account for his actions meant that the other parties would be affected by the contract.

Thus, if property was acquired for the partnership, each partner would have a right in personam to secure his respective share.

Partnership. Societas. Remedies.

The main remedy in the contract was the **actio pro socio**.

It could be brought as a friendly suit to make minor adjustments in the position of the partners, or as a hostile one for breach of a partner's duties. In this latter case it had two important consequences 1, the condemnatio resulted in infamia and 2, the termination of the partnership.

Thus the actio pro socio lay to enforce the duties of the partners inter se, and in particular for an account. Condemnation involved infamia. On the other hand, a defendant might plead the beneficium competentiae. Since partners were usually joint owners, they had also the actio comuni dividundo for the division of the common property and adjudication.

Termination of the contract.

Ulpian says that it is dissolved in the following manners:

- 1.By events connected with the person (ex personis)
- 2.By events connected with the subject matter (ex rebus)
- 3.By an act of the will (ex voluntate)
- 4.By a juridical act (ex actione)

By any change in the persons forming the group, particularly by the death of one of the partners; or if one of the partners incurred a forfeiture of the whole of his estate or becoming insolvent, made a cession of his goods to his creditors (cessio bonorum). Death, i.e. it does not continue between the surviving partners nor between them and the heirs of a deceased partner even if it has been agreed ab initio that this should be so.

But the death of a partner did not put an end to the partnership until the other partners had knowledge of it, and until an unfinished business was brought to completion the heir of a deceased partner was expected to show the same diligence as a socius and succeeded to the rights and duties of the deceased so that he might be a party as plaintiff or defendant in an actio pro socio.

It might be agreed in the beginning that if one partner died the survivors should remain in partnership, but this was a new partnership, not the continuance of the old one.

The partnership will end when the object of the *societas* has been accomplished or becomes impossible to accomplish, or when the capital is exhausted. It may also end by the will of the partners or any one of them (*renuntiatio*), or by the arrival of the date, or the happening of the event, fixed in advance for the determination of the partnership.

A partner might at any time renounce the partnership; either expressly or tacitly as by selling his share in the partnership property. But if he renounced unreasonably in breach of an agreement that the partnership was to continue for a certain time, he exposed himself to an *actio pro socio*.

If he renounced with the fraudulent intent of getting a benefit for himself he was obliged to share it, if profitable, with the other partners. If it proved a source of loss, he had to bear the loss himself.

Cassius says he freed his partners from himself but not himself from his partners.

He could also end it by bringing an action for liquidation of the partnership. This was equivalent to renunciation.

Quasi-Contracts.

Quasi-Contracts are a source of obligations arising from the lawful action of one party notwithstanding that the other party did not assent. Being lawful they may not be closed with delicts:

Quia sane non ex malaficio tenentur, quasi ex-contractu teneri videntur' and as the situation created is similar to that resulting from certain contracts, they were described as Quasi-Contracts.

The party who has not assented is nevertheless bound either for the reason that what the other party had done was to his advantage, or on the ground of equity:
"*Nemini licet locupletari cum aliena jactature*".

Justinian says that the resulting obligations arise as it were from contract (*quasi contracto*). Though they resemble obligations arising from contract, positively only in creating an obligation and negatively is not arising from delict.

In his institutes Gaius says nothing of the topic.

Although not stated, the implication is that the cases included in the title are thought to be more akin to contractual than delictual liability.

Negotiorum Gestio.

Consists of the fact that one person, termed one *negotiorum gestor*, has rendered a service to another, termed the *dominus negotiorum* or *dominus rei gestae*, without mandate or other legal obligation.

It emerged into the field of law when the praetor gave an action for an indemnity to a person who in the absence of another had undertaken his defence in judicial proceedings.

Under the influence of the Jurists, it was extended to include services of every kind, whether they took one form of general administration or of single acts.

There was established thus a civil law action with reciprocal obligations.

Elements:

The gestor should have acted in the interest of another person not in his own. Not available to a bona fide possessor who had spent money or property supposing it to be his own.

In principle the gestor should have acted with the intention of binding the other party (that is that he expects that he has a legal claim to an indemnity) (The absence of this element means that it was done gratuitous which amounts to a donation).

He could not either claim under this institute in respect of an act which the dominus had expressly forbidden him to do.

General Duties were:

To render account of his proceedings.

To exercise exacta diligentia covering culpa and dolus. But where it was performed in emergency situations than only dolus.

Negotiorum Gestio.

Bound to indemnify in respect of expenses and liabilities usefully incurred. (si utiliter gessit) (what he did was in the circumstances right. Actions done in the interest of the dominus. Not just good intentions are not enough).

The state of the matter at the moment which is taken into account, not the actual event. (which means that if I spend money for the treatment of a sick slave - reimbursement is due even if he dies).

If I repair a house "which the owner had abandoned because he could not afford the expense of it or one which he did not think is required".

I cannot claim compensation for "to have an action on negotia gestia a man must have managed the affair beneficially, but he does not manage beneficially where he has undertaken something which is not wanted or which would lay a burden on the house holder."

Called also by certain jurists: Uninvited intervention: Where one individual, without being asked, though with the intention of being reimbursed (which distinguished this from donation) intervened in the affairs of another for the latter's profit.

The intervention must be reasonable and useful, provided that it must be useful when done, immaterial that it turned out not to have been beneficial.

As the intervention was made unasked for, he had to show the highest standard of care, not just as he habitually showed.

Dominus had a direct action for any loss incurred through the latter's fault and recover anything which he had acquired as a result of the intervention.

The actio directa et contraria were good faith remedies which grew out of pretorian actions on the case.

The contract of mandate served as ground for negotiorum gestio when the mandator surpassed brief to enrich his master.

Indebiti solutio.

When a person has paid in error what he was not bound to pay, the law lays upon the person who has received payment a duty of restitution (which he is bound to pay just as if he received a loan).

- Has paid

Solutio payment includes any performance whereby one person has been enriched at the expense of another. Usually it will be the handing over of money or some other thing, but it may also consist in undertaking a new liability or in discharging an existing liability.

- In error

Believing payment to be due.

Must be a reasonable mistake in the circumstances and except in women and minors must be one of fact not law.

- When in Doubt

In classical law the dominant view was that doubt did not suffice, but Justinian put it on the same level as error.

In classical law reclaim was not possible even if there was no debt, unless payment was made on the condition that it could be reclaimed were it found not to have been owed. (Ulpianus D12.6.2 pr).

Justinian's view lay that payment in such cases of doubt was treated as a payment in error and therefore could always be reclaimed where there was in fact no debt.

Indebiti Solutio.

- Not bound to pay

Indebitum; i.e. undue; not due when by Civil law or by natural for even a natural obligation excludes the condictio indebiti.

If it does not exist, or has ceased to exist, or has not come into existence a debtor does not pay unduly if he pays in anticipation of the date due or of a condition certain to occur).

Made not to the creditor or the person entitled to receive payment on his behalf.

Made by a person who was not the debtor unless in the name of the debtor and with the intention of discharging the debt

Exceptions.

Those in which denial of liability involved the payment of double damages if claim was established to the satisfaction of the court.

The actio:

Same as mutuum where the appropriate was the *condictio indebiti*; which might be according to circumstances *condicio certae pecuniae*; *condictio utilitaria* or *condictio incerti*.

Gaius: *"If it appears that he ought to give back, just as if he had received a loan."*

However, Gaius himself observes that payment in error cannot be properly classified with mutuum once the latter had become recognized as a contract, since the person who pays wishes to discharge a debt, not to contract one.

The onus of proof was on the person seeking payment.

Extinction of Obligation.**Civil Causes:**

(1) *Solutio*: The binding tie arising from '*obligato*', having served its purpose, was loosened.

'*Solutio*' in early law was release of the debtor in the material sense of the word; the '*obligatio*' had subjected his person to the will of the creditor, and it had been created by the parties having gone through these forms to which the law attached the effect of producing that subjection for the purpose of releasing the debtor, therefore, besides payment, it was necessary that the contrary acts should be performed '*contrarius actus*', he regained his freedom and that he could pronounce the formula '*me a te solvo liberoque*'

When the new modes contracting obligations were admitted without the formalities of *Jus Civile*, mere payment was all that was required for the release of the debtor, and *Solutio* lost its material significance.

The earlier formalities were retained in Classical Law for giving a solemn discharge independently of whether payment had been made or not '*Immaginaria solutio*'.

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The conditions for a valid payment were:

That it must be made to the creditor or to his reprise or he who has the capacity to be his representative or a third person, even though authorized, saving these cases when by agreement or for other reasons the debtor had to discharge the obligation personally.

With regard to its object, it must tally with the object of obligation, saving the agreement of the parties to substitute another object (*datio insolutum*); if the creditor refused to accept payment, the debtor had the right of releasing him by depositing the object 'tuto in loco' or 'in publico'

Performance: Solutio.

Classical Period: any material satisfaction of the creditor's claim; at an earlier stage an obligation voluntarily assumed could only be discharged by reversal of the process by which it was created i.e. *verbis* not just the performance but another formality.

Performance may consist:

in doing the very thing which the creditor was entitled to demand from the debtor; and the debtor was bound to render to the creditor; in doing something which the creditor was willing to accept in its place.

Gaius: whether as Sabinians held this discharged the obligation *ipso jure*;

or Proculian held merely entitled the debtor to plead the *exceptio doli* if served upon;

the Sabinian view prevailed.

It could be settled by 3rd party. Performance by a principal debtor discharged sureties and performance by another debtor discharged a principal debt.

Civil Causes: Novatio:

The substitution be in agreement for the creation of a new obligation instead of the former one, which is consequently extinguished.

Extinction takes place '*ipso jure*', because the co-existence of two obligations having the same object was repugnant to Classical Law.

It follows that the alteration of the obligation by *Novatio* could not concern the object thereof, which had to remain unchanged '*idem debitum*', for otherwise the ground for extinction was lacking.

By Praetorian Law however, if the change of object had been agreed upon between the parties with the intention of putting an end to the former obligation, the person sued '*ex antiquae causae*' had the right to object the '*exceptio pacti*'. Justinian changed the nature of *Novatio* completely, and to the condition of '*idem debitum*' be substituted that of '*animus novandi*':

Concursus Causarum Lucrativum:

It was a rule of Roman Law that two lucrative causes of acquisition of the same thing and by the same person could not co-exist. D.44.7.17

Supervening Impossibility: The typical case is that of the destruction of the object of the obligation.

Confusio: Where the right and the liability vest in the same person.

Release of Debt.

For the validity of release civil law enquired the formalities of *Acceptilatio*, which was originally the 'contrarius actus' of an obligation *verbis* after that payment had been really made; it was subsequently availed of as an '*imaginaria solutio*' for discharging the debtor without satisfaction, and it operated '*ipso jure*'; its use however was limited to obligations arising from *Stipulatio*, so that for other obligations it was not possible to grant an '*ipso jure*' release.

To make this possible the *juris-consult* Gallus Aquilius invented the expedient of changing the former obligation by means of *Novatio* into a *Stipulatio*, which was called after him '*Stipulatio Aquiliana*'.