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Roman law
and European legal history

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Preface

This book is a result of didactic experiences from teaching Roman Law at the University of Copenhagen. A Danish version was originally made with the purpose of satisfying the need for a textbook for introducing law students to modern Roman law scolarship and analysis of Roman legal sources. With time this course of Roman law was included in the curriculum of Erasmus students. An English version was therefore prepared. In this version the basic idea of the textbook is unchanged. It aims at giving a survey of the most important institutions of Roman law and some training in working with the Roman legal sources.

It was also felt necessary to include some remarks on European legal history and this has been done in the second part of the book. During recent years there seems to be a growing interest in the common foundation of European legal thinking. The concept of a new *ius commune* meaning the development of a common basis of modern European law has been introduced and Roman law is constantly mentioned as an important "lingua franca" to the understanding of the common European legal heritage, which due to the reception of both the Civil law and the Common law systems outside Europe is also an important factor in what is called the major legal systems of the world.

The author of this book believes in the fundamental interest of Roman law to the understanding of European legal history and as a tool for easier communication among lawyers from different countries. The legal problems discussed by the Roman lawyers are interesting in themselves and the study of Roman legal texts, even if it is in a translation, is still a mean to help the lawyer improve his abilities. However, the author is well aware of the wisdom of the words of Oliver Wendell Holmes, the distinguished common law jurist and judge, when he said: "A certain amount of education a man must have that constantly is using books. It will save him trouble if he understands an occasional scrap of Latin when he comes across it. But a man may sweep juries before him, command the attention of judges, counsel sagely in great affairs, or be a leader in any senate of the country without nothing of the scholarly about him".

This book can be read without any knowledge of Latin. However, when texts are quoted the Latin text is also given to enable those who want to study the

original texts to make a comparison with the translation into English which is not always irrefutable.

The translation of the Digest edited by Alan Watson for the University of Pennsylvania Press has been used. The Institutes of Gaius are quoted after the translation by W.M. Gordon and O.F. Robinson (Cornell U.P. 1988) and Justinians Institutes from the Edition by Peter Birks and Grant McLeod (Cornell U.P. 1986).

It was also Oliver Wendell Holmes who said about the law: "In order to know what it is, we must know what it has been, and what it tends to become". It is my hope that the study of Roman law and European legal history may show itself useful also in the discussion of the future law of Europe and just fruitful to anyone interested in the most durable heritage of the antique world to modern man.

I thank my colleagues, Professor A. Wacke, Cologne, who has read this book in a Danish version and Professor Hans Ankum, Amsterdam, who has read the English manuscript. They have both made a series of invaluable suggestions and comments. I also thank Drs. M. van Gessel and Eric Pool for their important remarks to chapter five.

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Ditlev Tamm

PART ONE

Roman law

Why Roman law?

»Rome gave civilisation the law« as expressed by Tony Honoré, the English legal historian, when formulating the view that Roman law is the basis of our conception of law, first and foremost as a technique - a scientific way of considering legal phenomena. The European Union of the Treaty of Rome is not a revival of the Roman Empire. The inheritance from Rome and of Roman law has, however, renewed relevance in a Europe where more and more barriers between the nations are being broken down. The understanding of legal traditions as part of a certain legal culture plays an important part in this process.

New and practical reasons have added themselves to the traditional and not always altogether convincing arguments that have been put forward in defence of the study of Roman law. The jurist's world has expanded. Lawyers will increasingly be confronted with foreign law and legal systems which in the main derive from Roman law. Knowledge of Roman law and of European legal evolution is a shortcut to understanding continental European thought as well as an advantage to those who need negotiate with lawyers from other countries.

A basic premise of the book is that the many texts handed down to us from Roman jurists provide rich sources of material both from a legal point of view and from a more general social and historical point of view which are of great importance also in the training of modern lawyers. Therefore, the book stresses the reading and interpretation of texts. That is also the reason why emphasis is placed on so-called classical Roman law as opposed to later Roman law. The study of the method of the great classic jurists is the necessary point of departure for those who want to grasp the peculiarities of the Roman legal system and understand why it was of crucial importance for subsequent European legal evolution. As to the question of why, in this day and age, one should study texts well over a thousand years old, the answer is not just for the pleasure of examining the sources of European legal development and consequently a part of our own legal tradition. Roman law was to be of significance to European thinking in the field of constitutional law during the middle ages and in later times, Roman law has had a decisive influence on legal terminology as well as on the manner in which we still define and solve many legal problems. Basic knowledge of Roman law should, as has already been implied above, lead to a better understanding of certain phenomena of influence in European law. Roman law is to this day the background of the most important of the continental European legal systems in the so-called »famille romano-germanique« (René David), the Romano Germanic family of law comprising not only Germany, France, Italy, The Netherlands, Belgium, Spain, Austria and Switzerland but also several countries outside Europe where European legal codes or systems to a greater or

lesser degree have been adopted. Knowledge of Roman law assists in understanding the peculiarities of those legal systems as well as grasping many of the legal concepts in foreign law.

Roman law is also of interest from a general historical point of view. In a famous chapter of his great work »The Decline and Fall of the Roman Empire«, Gibbon, in the eighteenth century, portrays the peculiarities of Roman law and thereby acknowledges the signal part it plays in our understanding of Ancient Rome. Furthermore, Roman sources of law abund with examples of court decisions which not only illustrate everyday life and its common legal disputes in Rome but may also be of value to modern lawyers. The intention with the texts in this presentation has also been to illuminate Roman legal life in general though this consideration has been overshadowed by the main purpose of this book, viz the consideration of the legal argumentation *per se* and observations on the subsequent fate of Roman legal institutions.

In recent years expecially some German lawyers well trained in Roman law have pointed to the significance of Roman law in the modern unification of law in Europe. This quest for a new *ius commune* will be treated in the end of this book.

CHAPTER ONE

Introduction

1. What is Roman law?

There is no single, simple answer to the question of what Roman law is. This is due to the fact that the historical evolution of Roman law stretches over several centuries and even reaches modern times. Which stage in the development of Roman law is meant when asking what Roman law is? A natural point of departure in answering this question is provided by the Roman legal sources in the form in which they have been handed down to us today. The doctrine of Roman legal sources with it's many peculiarities will be discussed later and so will the later impact of Roman law.

Our knowledge of Roman law is principally based on the *Corpus juris civilis*, the name in use since the sixteenth century for the collection of laws compiled in Constantinople during the years 529-34 on the initiative of the Emperor Justinian. This legislative work consisted originally of three, later of four, distinct parts. Chronologically a first draft of the Codex (529) and then the Digest (530-33) are the oldest parts. In the modern edition, however, the first part is *Institutiones* (abbrev. I.), a textbook on Roman law for use by students at schools of law or those who wanted an introduction to the rather complicated system in the following parts. The basis of this textbook which contains a systematic presentation of Roman law, was an older textbook by Gaius, a jurist from the 2nd century A.D. The *Institutiones* had force of law and were thereby valid on an equal footing with the remaining parts of the legislative work.

Digesta or *Pandectae* is the title of the second and most important part of the legislative work. It contains a long series of extracts from the writings of older Roman jurists. The term *Digesta* was in use before Justinian's time for a certain kind of legal literature and indicated an ordered presentation of the material or an anthology. The use of the Greek word *pandectae* which means all encompassing implied that in the opinion of the compilers, all the Roman legal literature of note had been included. A list of the authors and the works quoted in the Digest called the *Index Florentinus* has been preserved. It tells us that one or

more works of 39 Roman jurists have been quoted in the Digest. Furthermore, other jurists are mentioned in connection with a discussion of their views in excerpts of the works quoted. We are thus acquainted with a little over a hundred Roman jurists. Of the jurists quoted, some appear more often than others. The most important in this respect is *Ulpian* (end of 2nd and first part of the 3rd century A.D.). Approximately a third of the texts in the Digest consists of quotations of his works. One common feature of the jurists quoted is that none of them are Justinian's contemporaries (i.e. 6th century) but belong to the period from the end of the Roman republic to the end of the 3rd century A.D. This period is known as the *classical* period of Roman law. The delimitation of the classical period is open to question. It is, however, this period which is of greatest interest to researchers of Roman law, and it is also where the emphasis of the following presentation is placed. The reason for our interest in this particular period, not just in Justinian's time, is that those Roman jurists we do know about are from the classical period. It is primarily the excerpts from the writings of classical Roman jurists contained in the Digest that have provided the foundation of the study of legal science in Europe.

When it is taken into consideration that the texts we know derive from jurists of the classical period, it is only natural that we should concentrate mainly on the time of Imperial Rome.

The Digest is divided into fifty books, each consisting of a number of titles *(Tituli)* which are again divided into fragments or leges. The Digest is cited thus:
D. 9,2,27, pr., 9 refers to the book, 2 to the title and 27 to the fragment. Pr. is an abbreviation of principium, that being the first part of the fragment. A number of fragments are divided into several sections, each introduced by a principium, followed by the §-symbol, 1, 2, etc. This practice is explained by the original function of the §-symbol as an abbreviation for »signum sectionis«, i.e. a separation indication.

The two last titles of the 50th and last book of the Digests have a special character as they contain some more general maxims of the law. D. 50,16 is headed »The Meaning of Expressions«, whereas D. 50,17 on various rules of early law (*De regulis juris*) contains a series of legal maxims. In later European teaching of Roman law D. 50,17 was often used as a primer as it was considered to contain a condensed version of Roman legal principles. Many of the rules from D. 50,17 have been part of a common legal heritage.

The *Codex* is a collection of imperial legislations. This code superseded all earlier attempts to codify Roman law. The most significant of these attempts was made under Emperor Theodosius in the years 431-38. The result was the *Codex Theodosianus* (438). Justinian's Code (534) is divided into twelve books,

subdivided into titles and constitutions themselves. The reference system is the same as for the Digest, the abbreviation of Code being C.

Additions to the Corpus juris civilis, known as *Novellae*, the Novels (535-565) were made to Justinian's legislative work after the Code was published and are also considered a part of the corpus juris. Many of these laws were couched in Greek.

Justinian's legislative work started out by a law known as the *constitutio Haec*. It appointed a commission of ten men, led by the minister of justice, Tribonian - probably the true initiator - and with the help of two professors of law it started the work on the codification of imperial law that came into force the next year by means of the *constitutio Summa.*

By a *constitutio Deo Auctore* in 530, Tribonianus was ordered to assemble a new commission with a view to collecting the writings of Roman jurists basically for didactic purposes. Besides Tribonian, this commission therefore consisted of four law professors, two from the law school of Beirut, Dorotheus and Anatolius, as well as two from Constantinople, Theophilus and Cratinus, along with 11 other lawyers. After only three years, the work on the Digest or Pandectae was finished and was enacted by the *Constitutio Tanta, Const. Αἐδωκεν* in Greek.[1]

The Digest was such a vast enterprise that a general introduction seemed necessary. Institutiones, a systematic introduction to Roman law, was compiled principally by Theophilus and Dorotheus and acquired legal validity by the *Const. Imperatoriam* as an official textbook at the same moment as the Digest (Dec. 30th 533). Finally it became necessary to revise the Codex and a new *Codex repetitae praelectionis* became law in 534.

Justinian's codification was not a codification in the modern sense. The material in the statute book did not have a uniform nature: The old distinction between the traditional Roman law, *jus*, and later imperial law, *leges*, has been preserved in the division of the work into a codification of statutes, *Codex*, and a collection of jurists' writings, *Digesta*, and partly the *Institutiones*, a textbook in which numerous fragments of textbooks of classical lawyers as Gaius,

1. Through investigation of the work methods used by the commission that elaborated the Digest of Justinian, it has been established that it worked in three sub-commissions of which one was entirely devoted to the task of reading through and choosing extracts from the works of the famous jurist Papinianus. The examination of the labours of the Digest commission, starting with the proposal of this theory by the German researcher, Bluhme, in the beginning of the previous century, was continued in this century by, among others, the English romanist *A.M.Honoré* who in several surveys (see *SZ 87* (1970), p. 246-314, *SZ 89* (1972), p. 351-362 and *SZ 90* (1973), p. 262-304) and *Digest Work in Progress*. An inaugural lecture, Oxf. 1971, was able to convey further information on the working methods of the Digest commission which in turn, led up to the present clear understanding of how the Digest came into existence in such a relatively brief period of time.

Florentinus, Paul and Ulpian have been incorporated. Thus, only a partial synthesis of Roman law had been achieved. The trouble was that two aims were being pursued at the same time. The intention was to produce a practical and usable code though the entire legislative effort was permeated by a desire to preserve as much of the old law as possible. This codification was part of Justinian's overall policy of resurrecting the Roman Empire of the past. So, a compromise between the two aims had to be reached.

A particular complexity of the work is that it is divided into three tomes, each possessing its own system. To this subsequent legislation, *Novellae*, is added. Thus, the legislative work is in four parts in its present form and has been called *Corpus juris civilis* since 1583.

When the Corpus juris was published Justinian proudly wrote that there were no contradictions in the law. If he really believed this, he was deluded. However, his allegation presented a challenge for the future which was taken up in Bologna in about 1100. The main purpose of that project was to eliminate the large number of contradictions present in the texts and bring about harmonisation of their contents.

Research into this period is complicated by the fact that the sources are from more recent times. This is not necessarily a problem if we could assume that the draftsmen of the Digest had quoted the classical jurists correctly. This assumption cannot be readily made, however.

The Emperor Justinian himself stressed that »multa and maxima ... transformata sunt« - that many things had been altered. A brief mention of the socalled question of interpolation is therefore necessary.

Roman law was further developed during the period from the third century, the Justinian period, and it is evident that the sources were changed to bring them into conformity with the law in force at a later stage. Such source changes are termed interpolations. Often, however, it is difficult to see whether an interpolation has been made; sometimes they are referred to as »tribonianisms«, named after Tribonian, the head of the Commission responsible for the compilation of the Digest and chief adviser to the Emperor in his capacity of »quaestor sacri palatii«. Apart from legal adviser, his office comprised preparation of laws though it was hardly comparable to that of minister of justice. Such office devolved to the magister officiorum, the head of the administration of the Department of Justice.[2]

2. For the importance of Tribonian who directed the law commissions which compiled the work that constitutes the fundament of European legal science, see Tony Honoré: *Tribonian*, Oxf. 1978.

It was once assumed that linguistically peculiar words or phrases as well as passages that were clumsily or illogically constructed would indicate the presence of interpolations. Since the 1950s and 1960s the view of this question has changed, so that there is much more scepticism nowadays about any assumption that one is facing a modification of a text made in Justinian's time. We can talk of a »change of paradigm«. The issue has been studied in particular depth in Germany and the modern view is increasingly that the peculiarities of language rather reflect the personalities of the individual jurists who were not equally skilled in style and linguistics. It should also be noted that the works quoted by Justinian could have been altered by others before the 6th Century A.D. and that it does not always follow that a change in formulation necessarily means a change in meaning (the Germans talk about »Textstufen«). This view is supported by the fact that Justinian was an admirer of Classical Rome, the law and order of which he strived to revive by means of his legislative work.

The following pages provide rich opportunities of reading extracts from the Digest, and in so doing it must be borne in mind that there is no certainty that the text in question is in its original form. This difficulty has led some to stress the study of the law of Justinian rather than classical Roman law.

The credit of recognizing that the texts had been tampered with is attributed to French humanists who made the discovery as early as the 16th century.

When the school of interpolation was at its peak a set of [ ] or < > in the text would indicate the presence of an assumed interpolation or a reconstruction. This method of pointing out interpolations has been abandoned and one cannot assume that such suggestions of interpolation will fit in with the prevailing view today. It is generally acknowledged that the old school of interpolationists went too far. However, in each particular case, the possibility of interpolation must be given consideration. In the reproduction in the following pages of the texts, no attempt has been made to indicate whether parts of the text may be considered inauthentic.

The most evident examples relate to Justinian's quotations of later legislation or where it is obvious that expressions known to be obsolete by Justinian's time have been modified or yet again, where the same text is reproduced in different versions in two places.

Further, interpolation may be identified by means of scarse fragments of old legal writings which were left for posterity. Most old Roman legal literature disappeared when the Digest became law - dismissed as unimportant after this event since the Digest received prime force of law to such extent that it was not even to be commented upon. However some fragments survived known as the *ante*-Justinian sources of law. With these, it is sometimes possible to point out differences between texts cited in the Digest and surviving versions of the same

texts. When it is possible to establish their respective ages, it is also possible to see which text comes closest to the original. A particularly important example is the jurist Gaius's textbook, Institutes, which is the basis of Justinian's Institutes. A palimpsest[3] with most of Gaius's text was discovered by the German historian B.G. Niebuhr in a monastic library in Verona at the beginning of the last century. Gaius has thereby become our most important source of knowledge in many areas of classical law, above all, Roman procedure, as well as many legal institutions that had fallen into disuse by Justinian's day and were therefore removed from the texts.

If we return to the question posed at the outset - »what is Roman law« - the answer is only partially provided by referring to the Justinian codifications which became the basis of subsequent European legal development after the rediscovery of Roman law by scholars at Italian universities, in particular Bologna, during the 12th century. Also before Justinian's legislative work, Roman law had undergone changes.

In the following pages we shall, as implied earlier, concentrate principally on the so-called *classical* period of Roman law. The delimitation of this period is debatable. Some see it as starting with Augustus and ending when Diocletian became Emperor in 284[4]. These are the centuries in which the Roman jurists were active and had a decisive influence on Roman law. Other, mainly British, researchers talk about a so-called »formative period« of Roman law from approximately 150 B.C. until the beginning of the second century A.D. and would then consider the classical period proper to be the second and third centuries A.D.[5]

This presentation heavily stresses the reading of Roman legal texts as the best way of understanding the methods of the Roman jurist. Therefore, the emphasis on the classical period. The features of the subsequent development of Roman law are, however, also covered as well as the course of this later development through Justinian's codification to modern-day Western Europe. For reasons of space, much material has been restricted to references to other works. An attempt has been made to stress the point of view that Roman law gains in interest if it is viewed in what the Germans call a »wirkungsgeschichtliches« perspective, which means taking into account the influence the individual insti-

3. The text referred to was a palimpsest, in which Gaius' text had been written over twice. The impressive task of deciphering the text was carried out by two German researchers, Krueger and Studemund.
4. As does Fritz Schulz in *Classical Roman law*, Oxford 1951.
5. See Jolowicz and Nicholas: *Historical Introduction to the Study of Roman Law*, 3rd edition, Cambridge 1972, p. 1 ff.

tutions had on later European legal development. The Roman legal system is, in itself, of interest just as the interpretation (exegesis) of particular parts of the Digest are a suitable basis for developing the faculty for methodical work in any legal study.

Of the oldest Roman law – from what we might call the archaic period – we know precious little until the outlines of a legal system define themselves to us in the form of the famous XII Tables which are usually dated from the middle of the fifth century B.C. (see below, section 3). This legislative work has not been preserved in its entirety though so many references by Roman writers have been found claiming to derive from it that a reconstruction has been attempted. In the following pages reference will be made occasionally to the XII Tables. This applies i.a. to the procedural system though Roman conservatism would ensure that in many areas ancient rules continued to be valid in the classical period.

What characterized classical Roman law will be made clear in the following section about legal sources of the classical period. In a later section about the Roman »legal historian«, Pomponius, we shall have the opportunity to deal more closely with the historical development of Roman law.

2. Gaius on Roman sources of law

The text reproduced below as a point of departure in our discussion of sources of Roman law in the classical period is an excerpt from *Institutiones*, the famous textbook by Gaius from the second century A.D.

Gaius, Institutiones I:

2. Constant autem iura populi Romani ex legibus, plebis citis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium. 3. Lex est, quod populus iubet atque constituit, plebs autem a populo eo distat, quod populi appellatione uniuersi ciues significantur, connumeratis et patriciis; plebis autem appelatione sine patriciis ceteri ciues significantur; unde olim patricii dicebant plebiscitis se non teneri, quia sine auctoritate eorum facta essent; sed postea lex Hortensia lata est, qua cautum est, ut plebiscita universum populum tenerent; itaque eo modo legibus exaequata sunt. 4. Senatus consultum est, quod senatus iubet atque constituit; idque legis vicem optinet, quamuis fuerit quaesitum. 5. Constitutio principis est, quod imperator decreto uel edicto uel epistula constituit; nec umquam dubitatum est, quin id legis uicem optineat, cum ipse imperator per legem imperium accipiat. 6. Ius autem edicendi habent magistratus populi Romani, sed amplissimum ius est in edictis duorum praetorum, urbani et peregrini, quorum in prouinciis iurisdictionem praesides earum habent; item in edictis aedilium curulium, quorum iurisdictionem in prouinciis populi Romani quaestores habent; nam in prouincias Caesaris omnino Quaestores non mittuntur, et ob id hoc edictum in his prouinciis non proponitur. 7. Responsa prudentium sunt sententiae et opininones eorum, quibus permissum

est iura condere, quorum omnium si in unum sententiae concurrant, id quod ita sentiunt, legis uicem optinet; si uero dissentiunt, iudici licet quam uelit sententiam sequi; idque rescripto diui Hadriani significatur.

Gaius, Institutes, First book:
2. The laws of the Roman people are based upon acts, plebeian statutes, resolutions of the Senate, imperial enactments, edicts of those having the right to issue them, and answers given by jurists. 3. An act is law which the people decide and enact. A plebeian statute is law which the plebeians decide and enact. Plebeians and people differ in that the people is the whole citizen body, including the patricians; but the plebeians are the citizens without the patricians. This is why formerly the patricians used to say that they were not bound by plebeian statutes, which were made without their authorization. Subsequently, however, the Hortensian Act was passed providing that plebeian statutes should bind the whole people; and so they were placed on the same level as acts. 4. A resolution of the Senate is law decided and enacted by the Senate; this has also the status of an act, although this point has been questioned. 5. An imperial enactment is law which the Emperor enacts in a decree, edict or letter. It has never been doubted that it has the status of an act, since it is by means of an act that the Emperor himself assumes his imperial authority. 6. The magistrates of the Roman people have the right to issue edicts. The right is found most fully in the edicts of the two Praetors, Urban and Peregrine (whose jurisdiction in the provinces is exercised by provincial governors) and again in the edicts of the curule aediles (whose jurisdiction in the provinces of the Roman people is exercised by quaestors – quaestores are never posted to the Imperial provinces, and on that account this edict is never published in those provinces). 7. Juristic answers are the opinions and advice of those entrusted with the task of building up the law. If the opinions of all of them agree on a point, what they thus hold has the status of an act; if, however, they disagree, a judge may follow the opinion he wishes. This is provided in a written reply by the Emperor Hadrian.

The first two sources of law mentioned by Gaius are *leges* (laws) and *plebiscita*. The power to issue laws devolved on the Roman popular assemblies (*comitiae*). The population of Rome was divided in various ways known as *curiae, centuriae* and *tribus*, each group, according to the criteria of division, having the right to participate in popular assemblies of which there were several.

The earliest was the *comitia* (which was the word for assembly) *curiata*, whereas the *comitia centuriata* was the principal legislative body of the early Republic. The top officials (*magistrati*), consuls, praetors and censors were chosen by this assembly. The comitia centuriata was organized on military lines. A later development was the *comitia tributa* which among other things, appointed minor officials such as the curule aediles, quaestors, etc. and also had legislative powers. A fourth assembly was the *concilium plebis*. Whilst the assemblies mentioned hitherto comprised all the Roman people (*populus Romanus*) the concilium plebis was only for a part of the people, namely, the

plebeians (plebs). From ancient times there had been a conflict between the top rank of society, the patricians who were a land-owning aristocracy and the plebeians who made up the rest of the population. The earliest history of the Roman Empire is, in many ways, shaped by this conflict which eventually led to equality between the two groups. A factor contributing to this equality was the binding force on all Romans attibuted to the decisions made in the plebian assembly, the *concilium plebis*. These decisions were known as *plebisciti* and by the *lex Hortensia* of 287 B.C. acquired the same status as *leges* from the comitia centuriata.

It has often been pointed out as a characteristic of Roman law that, in principle, the Romans were reluctant to develop the law by means of legislation, and basically were hostile towards legislation as such. This applies, until late antiquity, to both the codification of major areas of law and to particular legislation. Thus, a large part of the legislation we do know of, must be seen as part of the resolution of social conflict between patricians and plebeians, e.g. The XII Tables and the *lex Canuleia* of 445 B.C. which allowed marriage between the two classes. The lex Hortensia mentioned above is another example. The Romans were especially hostile to legislation in the sphere of private law. The *lex Aquilia* from the early third century B.C. is, however, a famous example in the area of tort law but the list of other examples of such legislation is not long.

The *Senatus consulta* is the next group of sources of law discussed by Gaius. The Senate or council of elders was one of the pillars of the Roman constitution. As the Senate in the classical period consisted of ex-officials, it was natural that its decisions would obtain particular authority. During the first century A.D. the legislative powers of the popular assemblies were transferred to the senate. The decisions of the Senate which originally had been of advisory character only – albeit of considerable persuasive authority – now obtained real force of law. This took place at the same time as the Senate's independence vis-a-vis towards the Emperor was weakened. Thus, the decisions of the Senate were made in accordance with the wishes of the Emperor in that the view expressed when the Emperor spoke – in his *oratio principis* – to the Senate, was followed when important decisions had to be taken. During the reign of the Emperor Tiberius (14-39 A.D.) the power to appoint officials was also transferred to the Senate.

On the next pages, two senatorial decisions of the first century A.D. bearing on private law will be discussed, they are *SC.* (abbrev. of *senatus consultum*) *Macedonianum* (p. 116) and *SC. Velleianum* (p. 112). In these, it is possible to observe the typical form of advice in the senatorial decision to the official in question.

The *Constitutio principis*, the imperial decree was a source of law which gained increasing importance during the classical period to such an extent that it ultimately replaced other sources in the process of further development of the law. The imperial decrees had several forms. *Decreta* were decisions in specific cases submitted to the Emperor for adjudication. The imperial edict (*edictum*) was an order of universal validity. Such edicts designed for general regulation in a particular legal area dealt with matters of public law and only rarely with private law. One example is the famous *Constitutio Antoniniana* of 212 A.D., granting Roman citizenship to all inhabitants of the Roman Empire. Imperial letters might be in the form of *rescripta* – a sort of legal instruction given in reply to enquiries from officials etc. They might also be orders (*mandata*) directing imperial officials in certain areas and, to such extent as they were available collectively, with binding force on all officials. Alternatively, they might appear as endorsements at the foot of petitions from private individuals (*subscriptiones*).

The foundation of the emperor's legislative power was expressed by the concept of a *lex de imperio*, by which the Roman emperors since Vespasian (69-79 A.D.) transferred their legal authority. This is further developed in a famous text by Ulpian which especially in the Middle Ages became a highly significant contribution to the debate as to where legislative powers were placed.[6]

> Ulpian, Institutiones I (D. 1,4,1 pr.):
> Quod principi placuit, legis habet vigorem: upote quum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.

> Ulpian, Institutes, book 1:
> A decision given by the emperor has the force of a statute. This is because the populace commits to him and into him its own entire authority and power, doing this by the lex regia which is passed about his authority.

The *edicts* were a source of law which, especially in the late Republic and early Empire period, played an important part. Edicts were issued by certain Roman officials upon assuming their function.They would thereby establish the guidelines applying to their tenure of office. The most important officials were the two consuls (*consules*) who were invested with a general civil and military imperium, i.e. commanding authority throughout the Empire. Next in line were the *praetors* who fulfilled particular functions in connection with the exercise

6. See on *imperium* and *lex regia* in W. Ullmann: *Law and Politics in the Middle Ages*, 1975. p. 56 f.

of the power of judgement within civil and penal processes and therefore came to play a crucial role in the development of Roman law. The office of praetor was created in 367 B.C. A particular *praetor peregrinus* was elected in 242 B.C. to take care of the administration of justice between foreigners and presumably also between Roman citizens and foreigners. The previously single praetor was known thereafter as the *praetor urbanus* and was solely preoccupied by the administration of justice among Roman citizens. Eventually, eight praetors were elected of which six handled the criminal law procedure administration of criminal law. After the expiry of their year in office they would normally go to a senatorial province as governors (*propraetores*).

The curule aediles[7] were endowed with cura urbis, i.e. police authority, comprising in particular supervision of public buildings and places. In their capacity of regulating market trade they came to influence an important part of Roman business life (cf. section 22). *Quaestors* were in charge of financial administration. Furthermore, since the end of the 5th century B.C., there was the office of tribune (*tribunus plebis*) who was originally the leader of the plebeians in their struggle with the patricians. This position later became part of the official hierarchy.

Of particular importance in Roman legal life was the *praetor's edict.* It was through the activity of the praetors that a considerable part of the development of Roman private law took place as will be made evident many times in the following ensuing pages. The praetor's edict was renewed annually in connection with the accession to office of the new praetor. Roman officials were only elected for a year at a time. Gradually, fixed guidelines for the drafting of the edict were set. The *edictum tralaticium* was handed down from praetor to praetor until it was finally revised by the jurist Julian as the *edictum perpetuum* during the reign of Hadrian (117-138 A.D.). This activity led to the division between *ius civile* and the law created by the praetor known as *ius honorarium*, a distinction characteristic of Roman law.

Papinianus, Definitiones II (D. 1,1,7):
Ius autem civile est, quod ex legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium venit. 1. Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam, quod et honorarium dicitur ad honorem praetorum sic nominatum.

7. The office of aedile or *aedilis curulis* was also created in 367 B.C., originally as a patrician post, as opposed to the *aedilis plebis*, though later on, the position could be occupied by either plebeians or patricians.

> Papinians, Definitions, book 2:
> Now the *jus civile* is that which comes in the form of statutes, plebiscites, *senatus consulta,* imperial decrees, or authoritative juristic statements. 1. Praetorian law is that which in the public interest the praetors have introduced in aid or supplementation or correction of the *jus civile*. This is also called honorary law (*jus honorarium*) being so named for the high office (*honor*) of the praetors.

The term *Ius civile* used by Papinian has many shades of meaning in Roman law. It can mean Roman law in general though in a narrower sense the expression is used for legislation as opposed to that law created by the Roman praetor, the *ius honorarium*. The criterium is the origin of norms. Ius civile can also be opposed to *ius gentium*. The Romans thereby meant the law that applied to all peoples as opposed to the law in force of each particular state.

Besides praetors, aediles and other Roman officials, edicts were issued by provincial governors such as proconsuls, propraetors or legati. It is not quite clear to whom their edicts applied. Probably, only the Roman citizens living in the provinces were concerned. One of the most important categories in Roman legal literature was commentaries on edicts, above all the praetorian edict. The task of the praetor to *adiuvare* (aid), *supplere* (supplement) and *corrigere* (correct) the ius civile will be illustrated in the many examples in the pages to come.

As a final source of law, Gaius mentions *responsa prudentium*. A distinctive feature of Roman law – certainly the most distinctive in comparison with other ancient legal systems – is the influence wielded by a class of professionally trained jurists. In the following there will be ample opportunity to study the individual jurists and their particular method. As mentioned earlier, excerpts of the writings of about 40 jurists along with some knowledge of around a 100 others have been preserved. Earlier, the prevailing view was that the works of Roman jurists reflected authorial individuality only to a limited extent. The German jurist *F.C. von Savigny* (1779-1861) expressed this at the beginning of the previous century by stating that Roman jurists were »fungible«. In recent years this view has been considerably modified because a number of general studies of the Roman jurists' works[8] are now available in addition to a number of special studies in respect of individual jurists. On this basis, it is now to a greater extent possible to get an impression of the capacities of an individual

8. Particular mention should be made of two major works: *Geschichte der Römischen Rechtswissenschaft* by Fritz Schulz, Weimar 1961 (English version as *Roman Legal Science*, Oxford 1946) and *Herkunft und Soziale Stellung der römischen Juristen* by Kunkel, [Forschungen zum römischen Recht 4], Weimar 1952.

jurist and the present view is that a »Differenzierung« (Kaser) of the various jurists can be established.

The jurists most often quoted in the Digest are all from the beginning of the third century B.C. These are Papinian, Ulpian and Paul. They all held the office of *praefectus praetorio*, chief of the imperial guard who was also head of the court of appeal in certain cases. Of the most renowned jurists, mention will be made of Labeo and Sabinus of the early Empire, Neratius, Celsus and Julian of the beginning of the second century A.D. who sat on Emperor Hadrian's council (*consilium*) as well as Gaius of the second century A.D.

Gaius deals with the particular issue concerning the activity of jurists namely the so-called *ius respondendi*. There are various elements of doubt attached to this law. A widely held view is that, since Augustus, some jurists were granted a certain right to issue responsa in cases with imperial authority *ex auctoritate principis*. If, however, we consult the various sources mentioning such a right, the picture is not so clear (the sources in question are Gaius I, 3 and Pomponius below no. 7). It is especially hard to determine the influence which Hadrian might have had in this area. Gaius holds the view that Hadrian was responsible for attributing statutory force to the jurists' responsa whereas Pomponius to attribute it to Augustus. The influence of opinions made by other jurists is also unsettled.[9]

Whether the classical Roman jurists recognised *customary law* as a source of law is a moot point[10]. Whether the classical Roman jurists recognized custom as a source of law is a moot point. Those who dismiss the possibility of a classical recognition of custom in particular refer to the conceptual identification of custom which differs completely from more recent customary law theory. Under the classical conception, custom primarily consists of rules developed by legal science by means of interpretation and which were constantly adaptable to new situations. A large part of Roman law was built on custom in this sense but it was not a source of law in strictly technical terms.

9. On these problems, see: *Historical Introduction* by Jolowicz and Nicolas, p. 359 ff. Tony Honoré: *Emperors and lawyers*, London 1981, p. 11 s. and for the importance of this discussion for the position of the law professor in modern Europe, James Q. Whitman: *The Legacy of Roman Law in the German Romantic Era*, P.U.C. 1990, p. 58 s., 84 s. and 126.
10. The view held previously was decisively marked by Fritz Schulz's denial that the classical Roman law would have been acquainted with customary law, see his *Principles of Roman Law*. Later on, the opposite point of view was established, only to be refuted by W. Flume in his *Gewohnheitsrecht und römisches Recht*, (Rheinisch-Westf. Ak. der Wiss. Geisteswiss. Vorträge G.201, 1975), which does not acknowledge the existence of customary law in classical Roman law since, as he points out, the Roman jurists did not need custom as a basis for their decisions because they only referred to »hoc jure utimur«.

The conception is complicated by the circumstance that Julian, one of the most prominent Roman jurists, in a famous fragment expressly attributes the same validity to custom (*consuetudo*) as to legislation and also stresses its power to derogate the legislation.

> Iulianus, Digesta LXXXIV (D 1,3,32,1):
> Inveterata consuetudo pro lege non inmerito custoditur, et hoc est ius, quod dicitur moribus constitutum. Nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes: nam quid interest, suffragio populus voluntatem suam declaret, an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.

> Julian, Digest, book 84:
> Age-encrusted custom is not undeservedly cherished as having almost statutory force, and this is the kind of law which is said to be established by use and wont. For given that statutes themselves are binding on us for no other reason than that they have been accepted by the judgement of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding on everyone. What does it matter whether the people declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be repealed not only by the vote of the legislature but also by the silent agreement of everyone expressed through desuetude.

This fragment is considered by many to be unauthentic to the extent that it ascribes general validity to custom beyond the premise which the fragment was originally deemed to deal with. Others point out that the language of the fragment does not give rise to suspicion of interpolation and that in view of the general uncertainty surrounding Roman theory in the area of common law, it cannot be excluded that the fragment is genuine. Post-classical law seems to have recognised a particular common law as a source of law though it is doubtful whether it could derogate the law. In any case, this is denied in a decree by Emperor Constantine (C. 8,52,2). This contradiction (antinomy) between this decree and the fragment of Julian is one of the many questions of doubt in Roman law.

Aequitas, fairness is a philosophical concept which Cicero obtained from Aristotelian philosophy and sometimes mentions as a source of law. In the use of aequitas lies an attempt to soften what is considered to be strict positive law by means of a principle of justice, a notion of equal treatment *aequum*. A similar line of thought emerges in Ulpian's famous definition of justice as the constant and eternal will to give each his due: »Iustitia est constans et perpetua voluntas ius suum cuique tribuendi« (D. 1,1,10). Classical law recognized

aequitas as a principle of interpretation. A celebrated definition is that of Celsus, the law was the art of the good and the equitable: »Jus est ars boni et aequi« (D. 1,1,1). It was particularly in the legal teaching under the tutelage of the praetors that aequitas was taken into consideration. In the classical period there was no contradiction between the law (ius) and aequitas. Not until the time of Justinian was *ius aequum* established as a particular set of rules as opposed to *ius strictum.*

Gaius, Institutiones I (D.1,1,9):
Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur, nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.

Gaius, Institutes, book 1:
All peoples who are governed under laws and customs observe in part their own special law and in part a law common to all men. Now that law which each nation has set up as a law unto itself is special to that particular *civitas* and is called *jus civile*, civil law, as being that which is proper to the particular civil society (*civitas*). By contrast, that law which natural reason has established among all human beings is among all observed in equal measure and is called *jus gentium*, as being the law which all nations observe.

The meaning of *ius civile* is discussed above. In contrast, ius gentium denotes rules common to all peoples. On the one hand, ius gentium was the opposite of the Roman ius civile which applied only to Roman citizens, on the other, in a more theoretical sense, it underlined the contrast between general legal principles and the law in force in a particular state. Ius gentium was now and again identified as *ius naturale*. On one point, however, the rules were at variance. Ius gentium recognized slavery while according to ius naturale, all men were free (D. 1,1,1,4). The jurist Ulpian held the view that the difference between ius naturale and ius gentium was that ius naturale was the law taught by nature to all living creatures about such matters as, for example, the relationship between the sexes, rearing offspring and their upbringing: »Ius naturale est quod natura omnia animalia docuit« (D. 1,1,1,3), whilst ius gentium applied to humans only.

3. Pomponius and the history of Roman law

The Roman jurist Pomponius is not usually considered to be among the greatest. We know, among other things, that he did not have ius respondendi. He lived in the second century A.D. and is principally known for the fragment of his

work, *Enchiridium*, a textbook quoted in the Digest as it contains much information on the history of the most ancient Roman law. The Roman jurists were mainly interested in existing law and only marginally so in the history of legal development. The latest research has, however, to som extent modified the picture of the Roman jurist as uninterested in legal history. Pomponius and Gaius at least are exceptions whose works contain much legal information of a historical nature. The fragment by Pomponius brought below is probably heavily interpolated and, like much of the other information given by Pomponius, some scepticism towards the information given is necessary.

Pomponius starts off with some information about laws decreed by the kings of early ancient Rome and then provides an overview of the subsequent development of the law. Of this long fragment by Pomponius that takes up most of the second title of the first book of the Digest, the section on the origins of the old law of the XII Tables and part of the section on the jurists of the Empire is reproduced here. It starts 510 B.C. when the last Roman king was enthroned.

> Pomponius, Manual (Enchiridium) (D.1,2,2-7 & 47-49):
> 3. Then, when the kings were thrown out under a tribunician enactment, these statutes all fell too, and for a second time, the Roman people set about working with vague ideas of right and with customs of a sort rather than with legislation, and they put up with that for nearly twenty years. 4. After that, to put an end to this state of affairs, it was decided that there be appointed, on the authority of the people, a commission of ten men by whom were to be studied the laws of the Greek city states and by whom their own city was to be endowed with laws. They wrote out the laws in full on ivory tablets and put the tablets together in front of the *rostra*, to make the laws all the more open to inspection. They were given during that year sovereign right in the *civitas*, to enable them to correct the laws, if there should be a need for that, and to interpret them without liability to any appeal such as lay from the rest of the magistracy. They themselves discovered a deficiency in that first batch of laws, and accordingly, they added two tablets to the original set. It was from this addition that the laws of the *Twelve Tables* got their name. Some writers have reported that the man behind the enactment of these laws by the Ten Men was one Hermodorus from Ephesus, who was then in exile in Italy.
> 5. After the enactment of these laws, there arose a necessity for forensic debate, as it is the normal and natural outcome that problems of interpretation should make it desirable to have guidance from learned persons. Forensic debate, and jurisprudence which without formal writing emerges as expounded by learned men has no special name of its own like the other subdivisions of law designated by name (there being proper names given to these other subdivisions); it is called by the common name of »civil law«.

After his account of the regal laws Pomponius turns his attention to the XII Tables and gives various items of information about how they originated. The date is probably not correct. Normally, the law is considered to be from the

mid-fifth century B.C., a date which is partly corroborated by the contents of the law. Earlier, there were doubts as to whether the tradition of the XII Tables was genuine though now they seem to have been dispelled. There is hardly any reason to believe that the law was actually taken from Greece as Pomponius implies. If that was the case, it would be the oldest example of a deliberate and conscious transplant of foreign law. There is, however, considerable concordance between some of the regulations in the XII Tables and contemporary legislation in Greece. This is particularly true in the case of regulations to protect debtors, an area where the law fulfilled some of the requirements of the plebeians in the field of legislation. Greek culture was making great strides at precisely that time. It should be remembered that southern Italy and Sicily were Greek colonies and formed part of Magna Graecia (greater Greece). Thus, there was ample opportunity for the law to be influenced by Greek legal thinking, although it does seem improbable that the law commission actually went to Greece proper. On the premise that the law of the XII Tables was published in response to the demands of the Plebians for an established record of the law in contrast to the uncertainty of the previous legal state, and that a further aim was to give established procedural rules complete with an enforcement system, which, despite its strictness, contained guarantees for the debtor, and finally, if we include the features present in the code indicative of the time of origin, e.g. the ban on luxury at funerals, a Greek influence is imaginable at least as far as the political demand for legislation of such type is concerned. However, the contents of the code on an overall view are of such character that they must be described as Roman.

The foundation for ius civile was laid with the XII Tables and at the same time, the fundamental structures of procedural law and private law were created. It was on this basis that Roman law was to evolve. The areas treated in the code: Civil procedure, enforcement of decisions, and the law governing delicts were all areas subject to constant development. Even the tradition concerning the existence of the XII Tables which, as mentioned earlier, has only survived in the form of fragments scattered around in Roman literature, goes back to the second century B.C. Although details of its origins are non-existent and the account put forward by Pomponius is questionable, the authenticity of the law is no longer in doubt.

Pomponius, l.c.:
6. Then about the same time actions-at-law whereby people could litigate amongst themselves were composed out of these statutes [The laws of the *Twelve Tables*]. To prevent the citizenry from initiating litigation any old how, the lawmakers' will was that the actions-at-law be in fixed and solemn terms. This branch of law has the name *legis actiones*, that is, statutory

> actions-at-law. And so these three branches of law came into being at almost the same time: once the statute law of the Twelve Tables was passed, the *jus civile* started to emerge from them, and *legis actiones* were put together from the same source. In relation to all these statutes, however, knowledge of their authoritative interpretation and conduct of the actions-at-law belonged to the College of Priests, one of whom was appointed each year to preside over the private citizens. The people followed this practice for nearly a hundred years.
> 7. Thereafter, when Appius Claudius had written out these actions-at-law and brought them back to a common form, his clerk Gnaeus Flavius, the son of a freedman, pirated the book and passed it over to the people at large. This service so ingratiated him to the citizenry that he became a tribune of the *plebs*, a senator and a curule aedile. The book which contains the actions-at-law is called *The Flavian Civil Law* (ius civile Flavianum).

Pomponius account on the ensuing development of Roman law and the beginnings of legal science is of great interest though only excerpts can be reproduced here. One of the Roman priesthoods, known as the college of pontifices, disposed over the formulae that were necessary to carry out procedures. These formulae were known as *legis actiones* (see sect. 5). Roman law evolved in the first few centuries through the development of these formulae. The publication of the formulae which was at the root of the development of free juridical interpretational activity labeled *interpretatio* is usually ascribed to Appius Claudius and his clerk Gnaeus Flavius (approx 300 B.C.) according to Pomponius. The truth of this account is, however, in doubt.

The development of a jurist class may well have started later. It was as important as the knowledge of the formulae that the juridical activity of the pontifices, exercised through the *interpretatio* i.e. the interpretation of the legislation was disclosed. While this interpretation was of a conservative nature, the fundamental principles, later developed by the praetors with the assistance of professional jurists, acquired an innovative function to a much greater extent. However, this much is known that in the course of the third century B.C. a secular legal science began to develop. The foundation was thereby laid for the tradition of professional jurists taking part in the solution of legal matters that was to be of such decisive importance to Roman law.

These jurists are discussed above and below section 4.

At this point, all that remains is to adduce a comment on the final part of the fragment by Pomponius which contains several biographies of jurists:

> Pomponius, l.c.:
> 47. After him [scil. Tubero], the leading authorities were Ateius Capito, who was of Ofilius' school, and Antistius Labeo who went to the lectures of all the above, but who was a pupil of Trebatius. Of these two Ateius was consul. Labeo declined to accept office when Augustus made him an offer of the consulship whereby he would have become *consul suffectus* (interim consul).

> Instead, he applied himself with the greatest of firmness to his studies, and he used to divide up whole years on the principle that he spent six months at Rome with his students, and for six months he retired from the city and concentrated on writing books. As a result, he left four hundred manuscript rolls (*volumina*) most of which are still regularly thumbed through. These two men set up for the first time rival sects, so to say. For Ateius Capito persevered with the line which had been handed down to him, whereas Labeo set out to make a great many innovations on account of the quality of his genius and the trust he had in his own learning which had drawn heavily on other branches of knowledge. 48. And so when Ateius Capito was succeeded by Massurius Sabinus and Labeo by Nerva, these two increased the above-mentioned range of disagreements. Nerva was also on the most intimate terms with Caesar. Massurius Sabinus was of equestrian rank, and was the first person to give state-certificated opinions (*publice respondere*). For after this privilege (*beneficium*) came to be granted. it was conceded to him by Tiberius Caesar. 49. To clarify the point in passing: before the time of Augustus the right of stating opinions at large was not granted by emperors, but the practice was that opinions were given by people who had confidence in their own studies. Nor did they always issue opinions under seal, but most commonly wrote themselves to the judges, or gave the testimony of a direct answer to those who consulted them. It was the deified Augustus who, in order to enhance the authority of the law, first established that opinions might be given under his authority. And from that time this began to be sought as a favour. As a consequence of this, our most excellent Emperor Hadrian issued a rescript on an occasion when some men of praetorian rank were petitioning him for permission to grant opinions; he said that this was by custom not merely begged for but earned and that he [the emperor] would accordingly be delighted if whoever had faith in himself would prepare himself for giving opinions to the people at large.

Pomponius mentions, after presenting a long list of jurists of the Republic, the two schools of law of imperial Rome. The nature of these schools is unclear. Maybe they were just places that had libraries where those wishing to specialize in legal science could find what they needed. Tuition was most certainly concentrated there. Legal training which during the Republic was obtained by the aspiring jurist by accompanying a recognized jurist, was taken over by these schools. Occasionally, in parts of the literature, especially in Gaius, we are told of the two schools holding divergent views on a given issue. The founder of one of the schools of law, the *Proculeian* (named after the jurist Proculus), was *Labeo* who is often claimed to be the founder of a new era in legal science. He was, as Pomponius tells us, a full time jurist and unlike many other jurists did not take part in politics as he opposed the regime introduced by Augustus known as the principate which abolished the republican constitution whilst preserving its form. Jurists belonged to the upper crust of Roman society. They came from the families who provided the consuls and later on especially from

the class immediately below, the equestrians (*equites*). One of Labeo's major works is a basic commentary of the praetorian edict, another is a commentary of the XII Tables. *Sabinus*, after whom the second school of law, the *Sabinians*, was named, was the author of a three tome presentation of the *ius civile* which was to form the basis for several commentaries by later jurists.

4. The Roman jurists and their works

The following sections of the present book contain excerpts from the works of several jurists in the form in which they appeared in the Digest. It is fitting at this point to say something about the jurists whose names will be encountered and of the various types or genres of juridical literature they used. Mention has been made above of how the view held earlier (particularly by Leibnitz and von Savigny) that Roman jurists were »fungible« i.e. lacked independent personalities, has been modified in the light of research in recent years. The emphasis therein has been placed on an examination of the works of individual jurists, their family background and social standing, or particular jurists along with their methods in monographs. Particular interest has been taken in other aspects of Roman legal science in recent years, especially the relationship between legal science and the other sciences, known as *artes*, cultivated by hellenism. This applies to rhetoric and dialectics as well as their relationship to legal science. Several accounts from antiquity tell of the tension between jurists on the one hand and rhetoricians who often represented a party in a legal suit on the other. Many rhetors had extensive knowledge of the law viz. Cicero (106-43 B.C.) who, in both his speeches and many of his philosophical writings, *de officiis* (on duties), *de legibus* (on law) and *de republica* (on the state), conveys important information not only of the juridical environment and the relationship between jurists and rhetoricians but also on points of legal detail. That rhetoric, not least the question of how to be convincing about the correctness of an outcome, should be of great significance for the line of argument and stance of a jurist is obvious. The rhetoricians used to reproach the jurists for not generalizing and developing common principles whilst the jurists would underline the importance of an exhaustive knowledge and evaluation of the actual circumstances of a given case. There was, however, mutual influence and in the particular literary genre of Roman jurists that we encounter, *regulae* – a translation of which could be »general legal guidelines« – was developed taking rhetoric into account. Recent Roman legal research has broached other questions such as the relationship to philosophy, grammar and the Roman view of history, and whilst the jurists have hitherto been portrayed as only interested in what was valid law,

attempts have been made to prove to what extent they appealed to policy. Our knowledge of the Roman jurists is principally derived from the Digest and those other preserved fragments of juridical works from the time prior to Justinian. This information – in which the fragment by Pomponius, mentioned above, plays an important part – is complemented by the rest of Roman literature. *Cicero* has already been mentioned. The philosopher *Seneca* of the first century A.D., tutor of Nero, who distinguished himself in so many areas called himself *iurisconsultus* and his writings often contained juridical observations. Other authors made important contributions too, e.g. *Aulus Gellius* of the second century B.C. who in his anthology of literary pearls *Noctes Atticae* (Attic nights) tells us a lot about the law and jurists. To this can be added inscriptions, documents, historical writings and other sources of Roman history. Little has been left for posterity by the jurists of the Roman Republic (until 31 B.C.). Notwithstanding the fact that most of our knowledge of republican jurists is indirect i.e. derived from the writings of later jurists, it is beyond doubt that the basis of later Roman legal science was created in this period. Special mention can be made of *Quintus Mucius Scaevola* ((82 B.C.), called Pontifex to distinguish him from his namesakes), who together with Servius Sulpius Rufus was the most famous of republican jurists. According to Pomponius Q. Mucius' main work is a systematic exposition of the *ius civile*, applying presumably for the first time the dialectic method inspired by Greek philosophy. It would seem that Q. Mucius is the first jurist to expound a genuine private law system by his division of private law into law of succession, law of persons, law of property and law of obligations. His work has not survived but even into the 2nd century A.D. it was commented on and cited by i.a. Pomponius and Gaius.

Servius Sulpicius Rufus was originally a rhetor and a close friend of Cicero. Servius wrote a minor commentary on the praetorian edict, his student, *Ofilius*, carried on in the same vein though the first major commentary on the Praetor's edict which was to set the standard for the future was written by *Labeo* in the first century A.D. *Gaius Aquilius* was a student of Q. Mucius, praetor and a contemporary of Cicero according to whom he created a specific formula for plaintiffs in fraud cases, *actio de dolo malo* (see below sect. 35). *Alfenus Varus* was a student of Servius. In the Digest of Justinian, appear excerpts from a work of his, also entitled *Digesta*.

Of jurists from the first century A.D. mention has been made of *Labeo* whose major work was the commentary on the praetorian edict. Later jurists cite him as an authority. This also applies to *Sabinus*, also mentioned earlier. An oft-encountered literary form are works *ad Sabinum* which pertains to commentaries on an elementary primer written by Sabinus, *libri tres iuris civilis* (Civil law in three tomes). Sabinus' system has been reconstructed on the basis of these

commentaries.[11] Among the names of jurists of the first century A.D. that we will encounter are those of *Mela, Minicius,* a student of Sabinus, *Proculus,* one of the more significant jurists after whom the proculeian school was named, *Pegasus*, probably named after the figurehead of the ship commanded by his father who was a naval officer, and *Urseius Ferox* who apart from a work commented on by Julian, is unknown.

The three most important types of legal literature that we know of had already become distinct during the course of the Republic and the first century A.D. These were the *textbook (institutiones)* and the *commentary* particularly of the Praetor's edict. In the textbooks of ius civile, praetorian law was often discussed and conversely the commentaries mentioned issues of ius civile, though typically they were attached to either civil law or praetorian law. The Digest belong to a third type known as *problemata* literature. This covers compilations of responsa, considerations of a more theoretical nature which were used for teaching purposes, collected in a more or less systematic manner. Other examples in the same genre are works with such titles as *Quaestiones* (questions) and *Epistulae* (letters). Eventually, a system based on an example of this type, the *Digesta* written by the jurist Julian was followed, the first part of which dealt with the edict, the second dealt with senate decisions, laws and imperial decrees in a particular order. Questions pertaining to both ius civile and ius honorarium could be broached here. Furthermore, monographs of the individual legal institutions were written. The commentary format was characteristic of Roman legal science, linked either to the Praetor's edict or as mentioned already to the work of earlier jurists. The *ad Sabinum* or *ad Q. Mucium* commentaries are among the many examples of this.

There are more illustrious names to be encountered among jurists in the second century A.D. *Neratius* and *Celsus* (junior) were both leaders of the Proculeian school and sat alongside Julian on Hadrian's council (consilium). One work by Celsus is known, the *Digesta*, otherwise he is quoted by other jurists. He is particularly famous for the beautiful definition quoted earlier of the law being the art of the good and the fair »ius est ars boni et aequi« and his famous still valid pronouncement on interpretation: »Scire leges non hoc est, verba earum tenere, sed vim ac potestatem« (To know the law is not to understand its wording, but its spirit and meaning, D. 1,3,17). Other jurists describe his formulations as elegant. It has been said of Celsus that he often expressed his opinions in a particularly lively style interspersed with outbursts of temper as it appeared in his occasional characterization of other jurists' opinions as

11. See Schulz (footnote 8) p.186 ff.

being *ridiculum* (ridiculous), *stultum* (stupid), *ineptum* (useless) or vitiosum (harmful).

The most famous jurist of the second century A.D. is *Salvius Julianus* (Julian) considered by some, among them Fritz Schulz, to be the greatest of all Roman jurists. Julian was a member of Hadrian's consilium and was consul in the year 148 A.D. His date of birth is likely to be between 100 and 110 A.D. An inscription discovered in North Africa that is attributed to Julian tells us of his official career from when he was decemvir, that is to say a judge at the court of the *centumviri*, through the time he variously held the offices of imperial quaestor, tribune, praetor, eventually consul and finally, he was appointed governor three times; first of Lower Germany then of Nearer Spain, a prestigious post, and finally, Africa. His time as praetor must have been in one of the years between 135-38 A.D. and it is reasonable to assume that his editing of the praetorian edict, the *edictum perpetuum*, was executed in conjunction with his tenure of the praetorship. Of his writings, the 90 book *Digesta* is most remarkable, it was built up according to the same system that was established in the second century A.D. beginning with the edict and ending with the ius civile and the imperial constitutions. He was the author of some commentaries of the works of two otherwise unknown jurists, Minicius and Urseius Ferox and finally, a great many of his decisions were recorded by his pupil, *Africanus*. In *Quaestiones*, the work of Africanus, it is often said of an opinion that »he« said, answered or thought (»ait«, »respondit« or »putavit«), this a clear indication of Julian's presence[12]. There can hardly be any doubt that Julian, by virtue of his seat on Hadrian's consilium had a great influence on contemporary imperial legislation. His bold suggestions for the renewal of case law were of great importance to later literature.

The contribution of *Pomponius* to legal history has been discussed above. Research in recent years has paid more attention to precisely this jurist and there seems to be a trend towards the re-evaluation of this previously not very highly regarded jurist though a clear picture of his significance can hardly be drawn. He cannot be considered a member of any particular school but seems to have been one of the most prolific jurists, with among other things, a commentary of edicts over 150 books long and the first *ad Sabinum* and *ad Q. Mucium* commentaries. As a jurist, he is overshadowed by Julian, he is, however, often quoted by the eager quoter Ulpian.

12. On the relationship between them, see: *D. 19.2.33: Afrikans Verhältnis zu Julian* by A. Wacke in *ANRW II 15*, p.455 ff.

The fame of *Gaius*[13] rests in particular on his lucid, easy-to-read textbook, *Institutiones*, which provided the basis for Justinian's textbook of the same name. The discovery of the classical foundation has been discussed above. His system is easily accessible with its famous main classification of Persons, Things and Actions (*personae, res et actiones*). The system of Gaius is normally known as the institutional system named after his manual of Roman private law. Gaius further develops the systematic thinking of Q. Mucius in the 1st century B.C. and Sabinus. He thereby with his rather simple divisons lays the foundation of systematic thinking within private law. Especially important were his subdivisions of the notion of »things« (res). He divides things into three parts, physical things, inheritances and obligations. Within obligations he distinguishes between obligations arising on the basis of contract and such that have their origin in wrongful acts, delicts or torts. The institutional system was the basis of Justinian's institutiones and in later European legal science especially since the 17th century it was the private law system in general use. In the beginning of the 19th century the German scholars and Heise further developped the system with a division of private law in the general part, persons, family, property, obligations and succession. This system is i.a. found in the German Code from 1896/1900.

The personality of Gaius remains a mystery to us. His life, origin and career are all unknown. This has made the literature about him even more extensive, seeking i.a. to establish that he must have been a teacher and not a practising lawyer and that he must have been a provincial[14] because none of his contemporaries or later jurists cite him. This is not the place to evaluate this guesswork, reference is made to the literature cited and further references. All we can establish with any certainty is that he wrote his work, *Institutiones*, around 160 A.D. and that it obtained widespread acceptance. On the basis of this observation and the nature of the rest of his production we may perhaps infer that he was not amongst the lowest ranking of jurists. Another textbook work of his is cited in the Digest, *Res Cottidiana* or *Aurea* (Everyday cases or Golden words). He is the author of a commentary on the provincial edict which is unique in legal literature as well as a series of monographs.

Other jurists of the second century A.D. mentioned in the ensuing pages are *Marcellus* from the time of Marcus Aurelius and *Cervidius Scaevola.* Under the Severan emperors (approx. 200 A.D.) the three great jurists, Papinian, Paul and Ulpian were active. *Papinians* enjoyed the special reputation, both in his own

13. See Diosdi in *ANRW II 15*, p. 605 ff. as well as *Gaius* by A.M. Honoré (1962).
14. As does Liebs in *ANRW II 15*, p. 294 f, whilst mentioning another provincial jurist *Callistratus.*

day and later, of being the most prominent of Roman jurists. He also acquired a special reputation for becoming a martyr of the legal profession on the grounds of his alleged murder ordered by the Emperor Caracalla upon Papinian's refusal to defend the murder of the Emperor's brother Geta. *Quaestiones* and *Responsa*, the major works of Papinian, were written in a concise and often difficult style which must have made hard reading even for his contemporaries. In the imperial bureaucracy, Papinian held the high office of *praefectus praetorio*, chief of the praetorian guard and equally the supreme and final instance of appeal of the whole Empire except for the city of Rome. The particular nature of his position may have had a bearing on the universality that he himself often adduced to his own legal statements.

With Ulpian and Paul the classical period came to an end. *Paulus* was an assessor of the praetorian prefect under Papinianus; sat with him on the Imperial council and was later on himself promoted to the position of praetorian prefect. He was the author of several monographs, a major commentary on edicts of 80 books and some works in the *problemata* genre.

Ulpian[15] was also chief of the praetorian guard but apparently did not get on with the troops who murdered him during a mutiny in 228 A.D. He was an adviser to the Emperor Alexander Severus and seems to have had considerable influence on the running of the government. His legal production was enormous and was diligently used by the compilers of the Digest. His greatest work was the commentary in 83 books on the Praetor's and Aedile's Edicts which subsequently became the basis for the part of the Digest pertaining to the edict. As mentioned earlier, the Digest commission operated with three sub-commissions and just as one of these dealt with Papinianus, another tackled edict commentaries (and a third handled the *ad Sabinum* commentaries). Ulpian also wrote a commentary *ad Sabinum* and several monographs about i.a. the duties of particular magistrates while his proximity to the centre of Roman decision making resulted in observations on constitutional law, see D. 1,4,1, pr. (section 2 above). The major commentaries by Ulpian may be considered as the last great effort of the classical period. He is the last jurist with a complete command of classical legal science which he transmits to his contemporaries and posterity by means of citations and commentaries. There is a definite tendency towards authoritative commentary that codifies previous jurisprudence. The work of Ulpian has since been compared to the American *restatements*. Ulpian cites a lot. Thus in his commentaries on the edicts he thus reproduces large parts of the edict which he comments as *lemmata* commentaries in connection with particular terms and phrases. His commentary of the Lex Aquilia (section 32 below),

15. Tony Honoré: *Ulpian*, Oxf. 1982.

is a good example of this. The commentaries on the edicts almost exclusively comprise praetorian law unless as in the case of the Lex Aquilia, it was necessary to discuss ius civile in order to understand praetorian law.

Modestinus is usually mentioned as being the very last of the classical jurists. At the start of the fourth century A.D. *Hermogenianus* published an epitome (extracts) of older legal literature. He is the youngest jurist cited in excerpts by the Digest commission.

The writings of Roman jurists have been handed down to us solely in the extracts in the Digest along with extracts in other works preceding the Digest. The particular works are thus dispersed throughout the various titles of the Digest. An attempt was made in the 19th century of reconstructing the individual works by the German researcher *Otto Lenel* who tried in a magnum opus called *Palingesia juris civilies* (literally, the Rebirth of Civil Law) to put the single fragments in the systematical order which it is believed to have had originally. It goes without saying that this work is indispensable in the study of particular jurists and their works. The knowledge of the original context in which the specific fragments used to belong is also important when it comes to understanding the particular fragment and its scope.

5. Jus and leges

Since the reign of Constantine I (306-337) a distinction was made as to sources of law between what was called *jus*, i.e. the sum total of compiled works of classical jurists sometimes including older imperial law in private codifications, and *leges* which comprised imperial legislation in particular. The jurists still played an important part under Diocletian though under Constantine imperial legislation became the most important source of law by far. At this time, imperial legislation assumed two shapes. There were rescripts in the guise of pronunciations on legal questions on the one hand and ordinary laws, *constitutiones* or *leges generales* on the other. It is a simplification in comparison with the wider choice of forms of imperial legislation known during the principate.

The opinions of the Roman jurists were not seen as a set of binding norms in the classical period. The views of the individual jurists were given more or less weight according to the degree of authority they enjoyed. This changed in late antiquity as the opinions of the classical Roman jurists became binding on judges. There were no new jurists. There was no further access to jurists' class and it became possible to count the jurists or to arrange them in order of precedence. A famous example of the latter process is Valentinian III's Law of citations of 426 (below p. 52) where the number of jurists to be cited in court

is set at five and rules explaining their mutual standing are given along with how the judge should reach his decision.

In the fifth and sixth centuries, knowledge in the West of Roman jurists and their works was much more limited than the selection made in Justinian's legislative work. Besides the *Institutiones* of Gaius and the so-called *Sententiae Pauli*, a third century primer falsely attributed to the great 3rd century jurist[16], all that was known in the West were a few minor extracts from a few other works. There are few traces of independent juridical writings in late antiquity. We know of two works that connect with Gaius' textbook. One is known as the »*Autun commentary on Gaius*« which must have been used for teaching since it is an utterly unoriginal, heavily abridged and rewritten version of Gaius. Another work based on Gaius is the »*Epitome Gaii*« consisting of extracts of Gaius. To these can be added some later notes, the *Interpretationes*, partly to Paulus' Sententiae and partly to the imperial laws. Finally, there is the *Consultatio veteris cuiusdam iuris consulti* which contains miscellaneous advice on procedure in cases of inheritance along with quotes from the writings of jurists and imperial laws. All this is somewhat thin and what has been preserved is rather unoriginal.

From the time of Constantine onwards imperial legislation came to play an ever more important role. After the division of the Roman Empire in 395 into the Eastern and Western parts, in principle, each part had its own legislation though legal unity was reestablished when the so-called *Codex Theodosianus* was issued in 438 under Emperor Theodosius II.[17] During this emperor's reign in 425, legal studies were organized in Constantinople and in 429 the initiative was taken to compile and codify imperial legislation. A commission of nine men carried out the work which was interrupted though later resumed by a new commission which finished its work in 438 with the issuing of the Codex Theodosianus in sixteen tomes. There were two older private compilations of law known as the *Codex Gregorianus* and the *Codex Hermogenianus*. According to its preamble, the purpose of Theodosius' code was to contribute to the clarification of the law and ease the task of jurists and judges who from that point in time on were, in principle, only supposed to use the imperial laws

16. About this work that had a great influence in the West, see D. Liebs: *Römische Jurisprudenz in Africa*, Berlin 1993.
17. The Codex Theodosianus is an official legal code comprising imperial decrees for the years 312 to 438, the year when the code was proclaimed by Emperor Theodosius II. Codex Theodosius (abbrev. C.Th.) has been published as *Theodosiani libri XVI* by Th. Mommsen, Berlin 1904 (3rd impression, 1962). An English translation is provided in *The Theodosian Code* and Novels and the Sismondian Constitutions. A transl. with comm., glossary and biography by Clyde Pharr et al., P.U.C. 1952.

included in the code. Thus, older laws were abolished. This only applied to legislation since Constantine. Older legislation included in one of the two previous codifications was still valid. The Codex Theodosianus applied to both the Eastern and Western parts of the empire as well as to some of the Germanic tribes which had settled within the Roman Empire such as the Burgundians and the Wisigoths (see below p. 193 s.).

With the decline of classical legal science, a new class of lawyers (*advocati*) rose to prominence. In late antiquity, these were seldom professional jurists as such, more often they were people with ordinary rhetorical training. The professional jurist gradually vanished when the imperial *a libellis* rescript chancelleries were dissolved and legal literature came to consist of rhetorical devices and artistic prose.

We do know, besides schools of law in Constantinople and Beirut, of legal tuition in Rome though this came to an end in the fifth century. This is important to the understanding of subsequent events. The Eastern Roman Empire witnessed a renaissance in classical legal science during the sixth century whilst nothing comparable happened in the West.

As will have been apparent from the above, Roman law had a plethora of sources of law. In this context it is characteristic that the law which found support in the various sources was not coordinated into one entity but to be found in three parallel systems of equal validity, viz. the old ius civile, the praetor-made ius honorarium, and the law created by imperial decrees. As jurists, the Romans did not work in a systematic manner, nor was it possible to bring about legal unity through legislation. The codification by Justinian with its division into Digests and a Codex which upheld the separation of jurist law from legislation proper is a good illustration of this point. A consequence of this lack of systematization of the sources of law was that the writings of Roman jurists retained their authority for a long time alongside imperial legislation. During the third century, legal science went into decline and those duties hitherto carried out by a free jurist class were handed on during the bureaucratization in the days of the Empire to the imperial officials who were then responsible for legal development. It was still possible to cite older jurists in court but now that legal science had lost its character of living tradition difficulties arose both in respect of the understanding of the texts and – not least – when it came to the settlement of authority where several conflicting opinions were found to be applicable. Doubt might also arise as to the authenticity of the manuscript of a given juridical author quoted in court. To remedy these deficiencies, which ultimately represented distrust in the judges' ability to arrive at a legally sound decision, the so-called citation laws set up mechanical rules to guide the judge on the authority status of literature quoted before him. The most famous of

these laws was issued by Emperor Valentinian III in 426 A.D., one of the stranger relics of European legal development:

> Impp. Theodosius et Valentinanus aa. ad senatum urbis Romae (Codex Theodosianus 1,4,3). Papiniani, Pauli, Gai, Ulpiani atque Modestini scripta universa firmamus ita ut Gaium quae Paulum, Ulpianum et ceteros comitetur auctoritas lectionesque ex omni eius corpore recitentur. Eorum quoque scientiam, quorum tractatus atque sententias praedicti omnes suis operibus miscuerunt, ratam esse censemus, ut Scaevolae, Sabini, Iuliani atque Marclli, omniumque, quos illi celebrarunt, si tamen eorum libri propter antiquitatis incertum codicum collatione firmentur. Ubi autem diversae sententiae proferentur, potior numerus vincat auctorum, vel, si numerus aequalis sit, eius partis praecedat auctoritas, in qua excellentis ingenii vir Papinianus emineat, qui, ut singulos vincit, ita cedit duobus. Notas etiam Pauli atque Ulpiani in Papiniani corpus factas, sicut dudum statutum est, praecipimus infirmari. Ubi autem eorum pares sententiae recitantur, quorum par censetur auctoritas, quos sequi debeat, eligat moderatio iudicantis. Pauli quoque sententias semper valere praecipimus.
>
> Emperors Theodosius and Valentinian to the Senate of the City of Rome. We confirm all the writings of Papinian, Paulus, Gaius, Ulpian and Modestinus, so that the same authority shall attend Gaius as Paulus, Ulpian and the others, and passages from the whole body of his writings may be cited. 1 We also decree to be valid the opinion of those persons whose treatises and opinions all the aforesaid jurisconsults have incorporated in their own works, such as Scaevola, Sabinus, Julianus and Marcellus, and all others whom they cite, provided that, on account of uncertainty of antiquity, their books shall be confirmed by a collation of the codices. 2 Moreover, when conflicting opinions are cited, the greater number of authors shall prevail, or if the numbers should be equal, the authority of that group shall take precedence in which the man of superior genius, Papinian, shall tower above the rest, and as he defeats a single opponent, so he yields to two. 3 As was formerly decreed, We also order to be invalidated the notes which Paulus and Ulpian made upon the collected writings of Papinian. 4 Furthermore, when their opinions as cited are equally divided and their authority is rated as equal, the regulation of the judge shall choose whose opinion he shall follow. 5 We order that the sentences of Paulus also shall be valid.

The Citation law's system is somewhat complex. Five jurists are ascribed a special authority namely Papinian, Paulus, Ulpian and Modestinus of the third century B.C. and Gaius of the second century B.C. Gaius was probably included because of the fame of his Institutions for he cannot be considered as a jurist on the same level as the other four. Had citation been restricted to just these five the system would have been relatively manageable. This was not the case though, since the jurists quoted by the aforementioned five were also made into authorities. As examples are mentioned Q. Mucius Scaevola of the Republic (maybe the name Scaevola is also an allusion to Cervidius Scaevola of the second century B.C.), Sabinus of the first century, Julian and Marcellus of the

second century. The latter being the pupil of the former and editor of his great work, the Digesta. The judge might still have to make a decision in the light of the opinions of yet more jurists provided that such opinions had been conveyed in a reliable text.

The need for a work such as the Digest of Justinian is more easily understood when one considers the circumstances that led to the creation of this law.

Various forces were instrumental in changing late Roman law after the paralysis of classical jurisprudence since the mid-third century A.D. thereby creating the basis of legal conditions which made citation laws necessary. Particular attention must be paid to the so-called vulgarization of the law which will be discussed below as well as the influence of Hellenism, Christianity and the new form of government which came about as a result of the transition to the Dominate at the end of the third century A.D. The comprehensive economic and social changes in the Roman Empire after the third century collapse must also be taken into account.

The so-called vulgarization of Roman law is considered to be the consequence of the replacement of the juridical training and technique which had shaped Roman law in the classical period by an influence on the legal system of the prevailing views in non-juridical circles. Legislation and jurisprudence eventually fell into the hands of people without the same legal training. The outcome of this development was the creation of so-called *vulgar law*[18] that in many areas replaced classical law.

Vulgarization of Roman law is a catchword which characterizes the development undergone by Roman law in late antiquity. Vulgarization was an expression of the convergence of Roman law and its practical applicability in late ancient Roman society. The vulgarization process was originally the same for the Eastern and Western parts of the Roman empire, a division which becomes still more marked until the ultimate split in 395 A.D. In the Eastern Roman part, the vulgarization process was succeeded by a revival of classical law as represented in Justinian's codifications. In the West the vulgarization continued, but the evolution of the law went thus, that in the West a new culmination was finally reached around 1100 while in the Eastern Roman Empire, Roman law did not undergo an equivalent rebirth as had happened under Justinian.

As mentioned in the first part of this presentation, a characteristic of classical Roman law was that its development was in the hands of a class of professional

18. This designation stems from the German Scholar Ernst Levy who was the first to produce a comprehensive presentation of vulgar law, see in particular *West Roman Vulgar Law: The Law of property* (1951) and *Weströmisches Vulgarrecht: Das Obligationenrecht* (1956).

jurists. Originally, they were independent though in time these jurists were increasingly linked to the emperor as members of his council or officials of the imperial chancery. Towards the end of the third century AD, the classic traditions were continued mainly by the officials of that part of the chancery known as *a libellis*. This was a sort of free legal aid for Roman citizens who when they privately submitted a petition – *libellus* – to this department could obtain a pronunciation on a question of law. The answer would be in the form of an imperial *rescriptum*. When this chancellery was abolished under Emperor Diocletian (284-305) at the end of the third century, the remnants of classical legal tradition, which had been kept alive here until the middle of Diocletian's reign dissappeared. Now the professional jurist was superseded by the official educated in the trivium i.e. grammar, dialectics and rhetoric. This being the fundamental training in language, the rules for logical thought and verbal exegesis. Specific juridical ability was no longer a requirement though officials were given a wide general education. Juridical education became part of the general education of a rhetor. We know of centres of such education in Rome and other Italian cities such as Milan, Ravenna and later on, Pavia. In Spain, there were centres of education in Seville while in Gaul, they were in Paris and Autun. Until recently, research into Roman law has painted a rather poor picture of this period though there are tendencies towards a reevaluation. It has been mentioned that about forty educated lawyers can be identified in Italy in the period after 260 A.D. The term vulgar law is sometimes considered to be inappropriate, and the term »epiclassic« has been suggested for the first of the four centuries between 260 and 640 where traces of legal science are still found in Italy. The point thus made is that there were jurists at some of the centres of education and that several instances of evidence have survived of professional juridical activity in a period where the vulgarization of Roman law is usually presented as the dominant trait.

Vulgar law is not a theoretical system. It was originally considered as a corruption of classical law though later on, vulgarization appeared to be the style in which Roman law was transmitted in imperial legislation from the time of Constantine up until the end of the fifth century, in the laws for Romans under foreign rule or Western Roman legal literature of the fifth and sixth centuries. Whether the term vulgar law is appropriate or not is a disputed point. It points out the differences in the law from classical law and that of Justinian; one should bear in mind that it was law which was adapted to the social and economic circumstances of the day. Vulgar law was the Roman law which the Germanic peoples encountered. Viewed as a phenomenon, vulgarization means the characteristic general style of the time which resulted from the division of the Roman Empire into provinces and the collapse of the professional juridical

tradition. This type of vulgarization did not only apply to legal culture but also to other cultural phenomena of the time.

The tendency towards vulgarization does not imply a popular legal order. On the contrary, it is a characteristic of imperial legislation that it is marked by vulgarization and appears as official vulgar law. What characterizes vulgar law in this form are particular stylistic features: The abandonment of a strict technical vocabulary, moralization and the use of rhetorical language and devices. This reflects the fact that broadly educated men of letters and not professional jurists handled legal matters in the administration. However, to this could be added that there was a general lack of knowledge of legal matters and little understanding of what the rules of law were about. This led to a simplification of the inherited legal order and the adoption of lay points of view that were then incorporated into the legislation. All this being said, it is important to keep in mind that the vulgarization of Roman law was necessary for it to survive into the early middle ages. Vulgar law was an expression of the adaptation of Roman law to changing circumstances.

Whilst the imperial legislation under Diocletian still retained classical ideals, a new trend seems to set in under Constantine allowing a more popular and less professional legal view to be given free rein in legislation. The emperor's legal advisers were no longer appointed from the ranks of professional jurists. Particularly within the areas of property and contract law, there was a watering down of classical concepts whilst private and family law were recast on entirely new legal principles.

The use of the concept of *vulgar* law is contested amongst researchers of Roman law. A system of vulgar law as such cannot be established. It might be more appropriate to talk about a new type of legal culture which diverges from classical law, however, and since the law is being adapted to new circumstances this could be seen as progressive. In the first centuries, this vulgarization was common to both Eastern and Western parts of the Roman Empire, a division defining itself ever more sharply until the final split in 395 A.D. In the Eastern Empire the vulgarization was succeeded by a revival of classical law as expressed in the codification by Justinian. In the West the vulgarization of Roman law continued and in this guise encountered Germanic law after which it lived on in later European law.

6. Some basic principles of Roman private law

Mention was made earlier that the concept of *ius gentium* was used by the Romans in two senses, viz. of the law valid in all states and that which applied

to other people than Roman citizens. In accordance with this, *ius civile* was the law that solely applied to Roman citizens. It was characteristic of Rome that a principle of personality should apply. In principle, Roman law only concerned people holding Roman citizenship and only a part of the Roman Empire's population did so[19]. The population in the provinces lived under their own legal system. If a case was brought before a Roman tribunal and only one of the litigants was a Roman citizen or both litigants were foreign (*peregrini*) Roman law was inapplicable. This could happen in the city of Rome, for example, which had a considerable number of foreigners who could not, however, appeal to their own national tribunals. The conduct of such litigation was the province of a special praetor, the *praetor peregrinus* who developed an independent system for that purpose.

This system possessed features that can be seen as a further development of *ius civile*. The rules of both systems were, to a large extent, the same in that either the peregrin praetor had been influenced by *ius civile* or *ius civile* had been influenced by *ius gentium*. What was created was not an international private legal system in modern terms with its convergent norms aimed at deciding which legal system a particular dispute should be tried under but a truly independent legal system. In the following presentation there will be examples of legal institutions that were peculiar to the Romans as well as those shared by Roman and peregrin alike. Examples of specifically Roman legal institutions will be discussed immediately below. It should be pointed out, however, that certain foreigners had the right to avail themselves of ius civile. This applied to those who were granted *commercium*, the right to trade with or *connubium*, the right to marry Roman citizens.

Moreover, Roman citizenship was bestowed on anyone born in legitimate wedlock (*iustum matrimonium* which required that the person in question had the right to marry Roman citizens) where the *father* was a Roman citizen. Equally, slaves who were set free by Roman citizens became themselves Roman citizens which was indicative of a remarkable liberality. Finally, citizenship could be bestowed on individuals[20] or entire cities.

19. There were various degrees of citizenship, some with fewer rights, others comprising more, se R. Sherwin-White: *The Roman Citizenship*, Oxf. 1973.
20. For example the Apostle Paul was probably a Roman citizen, see the Acts of the Apostles. Though how he came to be a Roman citizen has never been satisfactorily explained. On this, see: *Roman Society and Roman Law in the New Testament* by Sherwin-White. Oxf. 1963, p. 144 ff.

The persons who qualified as subjects to the law (*personae*) were classified in different ways according to their status. In the first book of his Institutes, Gaius made the following classification:

1. Persons can either be free (*liberi*) or slaves (*servi*)
2. When free, they are freeborn (*ingenui*) or freed slaves (*liberti*)
3. Some people are *sui juris* while others are subject to another (*alienio juri subjectus*)
4. Those subject to another may either be *in potestate*, *in manu* or *in mancipio*.

Slaves were considered to be chattels. It is therefore somewhat unsystematic when Gaius includes them in his outline. In many ways, slaves occupied a position midway between objects and persons. Thus they might acquire some rights and under certain circumstances, place their master (*dominus*) under an obligation by means of contract and be provided with various rights (more below section 13).

The *freed* slaves were subject to a set of restrictions in the legal area. They themselves as well as their children were barred from holding public office, the grandchildren were the first to be considered to be full Roman citizens. In relation to their erstwhile master, they along with their family remained in a relationship of dependence known as patronage. The former dominus now became a *patronus* who had a claim in law to special consideration. In the first instance, the freedman had to display *obsequium* (respect) towards his former master. Between him and the former slave a relationship arose which was, in the view of the Romans, akin to that between father and son. Thus the freedman was under a duty (*officium*) to assist his patron in different ways. The freedman could not, therefore, refuse the guardianship (*tutela*) of his patron's children and in any case, he had to support and provide for him. The freedman was not allowed to initiate a lawsuit against his former master unless he was granted special permission to do so by the praetor. The praetor's edict stated categorically that the freedman could not sue and furthermore, prohibited his use of certain defences (especially that of fraud or bad faith, exceptio doli). The punishment for infringing these prohibitions was a fine, though in serious instances, it could be the loss of freedom. A particularly common instance of manumission was when a dominus would free a female slave with a view to contracting a marriage. In this situation, the former slave was not in a position to demand the dissolution of the marriage through divorce as were other Roman women who contracted marriage (see section 36 below). A woman only had the right to manumit and later on, marry a freedman if she herself was freed and the man in question, her former fellow slave. In this connection, the *Senatusconsultum Claudianum* of 52 A.D. may be recalled in which it was stated that if a

freed woman should engage in sexual intercourse with a slave without the master's consent, she would lose her freedom. Furthermore, the patron had certain rights of inheritance towards the freedman. Originally, these only applied where the freedman died childless, but later on, they were expanded to include particularly wealthy freedmen. It was, however, assumed that the freedman had kept his *peculium*, the property with which a master could endow his slave to enable him to undertake independent financial transactions. Finally, the patron could obtain certain labour services (*operae*), such as the administration of part of or the entirety of the master's property by the freedman in question.

Freedmen did, as mentioned earlier, acquire Roman citizenship albeit with certain restrictions. One area in which the use of freedmen played an important role was in public administration during the Empire. The emperor used his personal freedmen (*liberti augusti*) in his administration. Especially during the reign of Claudius (39-54 A.D.) they became very powerful as l.g. the famous freedman Pallas. The emperor's slaves also played a part in the administration. The above-mentioned SC. Claudianum was possibly meant as a means of creating a hereditary class of slaves since the master could impose as a condition to the consent to marriage that any offspring was left with him as slaves.

The manumission of slaves was an important part of Roman culture. During the empire, the trend was definitely towards many releases (*manumissones*). The reasons for this have been discussed and it is pointed out that on the one hand there was a growing tendency to display »humanitas« (Schulz) and on the other, there was a desire to attach many families of former slaves to the former masters through bonds of gratitude in order to ensure the continued worship of the ancestors.

Further restrictions on a person's legal capacity mentioned by Gaius were the personal conditions of either being *sui juris* or *alieni juris*. This distinction must not be confused with the distinction between free persons and slaves. Slaves were *alieno juri subjecti* and this could also apply to certain free persons. Everything that a *filiusfamilias* might acquire devolved on the person in whose power (*potestas*) he was. The relationship of potestas (*in potestate*) was understood to be that of a son (*filiusfamilias*) or daughter to their father or any other ascendents. Some married women found themselves *in manu* (below section 36). Finally, a son could, by means of a legal transaction, be transferred, whereby the filiusfamilias came to be *in mancipio* with that other person.

These somewhat complex concepts that are so characteristic of Roman family law require further explanation. It was a characteristic of Roman public life that relatively young people would be entrusted with important tasks, e.g. the office of *quaestor* could be occupied by those aged only thirty. These same persons,

however, were restricted in terms of private law by the rules of *patria potestas*. This meant that the Roman head of the household had unlimited authority over all his descendants. On the other hand, any boy aged fourteen (*pubes*) (twelve in the case of girls) was considered of age insofar that neither his father nor any other ascendents were still alive.[21] *Patria potestas* comprised free as well as enslaved persons who belonged to the household (*familia*). Part of patria potestas was the right of life and death (*jus vitae necisque*) over subordinates which was first formally abolished in 365 A.D. If the effect of *patria potestas* on the *filiusfamilias* in particular is considered, the legal position was that anything that he acquired belonged to the father just as contractual obligation could be enforced as long as his father was alive.[22] Some options were available however. The father might allow those *in potestate*, whether child or slave, the free use of a special property, the *peculium*. In respect of such property liability towards third parties resulting from obligations assumed by a son or a slave would be transferred to the father within the scope of the peculium.[23]

As long as the father was alive, his children had no property of their own. Everything they acquired went to the father. In order to mitigate the effect of what must sometimes have seemed intolerable in a society that progressed beyond the stage of subsistence farming, the institution of *emancipation* had already been developed by the pontifical college whereby a filiusfamilias could be released from his father's potestas. The father had to take the first steps. A regulation from the XII Tables was used which stated that if a father had sold his son three times to another, as he was entitled to, the son would gain his freedom: »si pater filium ter venum duit, liber esto«. This regulation had originally been intended to prevent the father's abuse of the son's labour but now, with interpretation (*interpretatio*) it was used in a different way. Thus if the father wished to release his son from the patria potestas, he would transfer him three times in succession to another. The son would thereby come under the other's *mancipium*. The »purchaser« would manumit the son who would then revert to the father's *potestas*. The third time round, it was important that the

21. Until the age of fourteen, a child (*impubes*) was under the supervision of a *tutor*. Persons between the ages of fourteen and twenty-five were also given legal protection against the abuse of their inexperience. Since the second century, they had a *curator* appointed to them.
22. On liability for delicts, see section 36 on actio noxalis.
23. See section 30 on *actio de peculio* where other special rules are discussed that made it possible for sons of the household to take on binding obligations while their father was still alive. For example, special rules were evolved concerning the acquisitions made by a filiusfamilias during his military service known as *peculium castrense* over which he had complete control.

»purchaser« would, by means of a legal transaction, »sell« the son back to the father who then released him. This was significant in view of the dependent relationship that freed persons had with those who had released them. The released usually became clients of those who released them and owed them various services just as the freed slave did but this was not normally the desired outcome in the case of emancipation.

The *clientela* relationship was one of the cornerstones of Roman society. Thus the Roman nobility ensured that a host of people were dependent on them and that they would, if needed, vote for them in elections for the magistracy or support them when they needed popular acclaim. The other side of the coin was that the weaker members of society thus acquired a protector whose help they could rely on in case of penury or other emergency such as a lawsuit. In this case, a patron could provide them with legal assistance. The importance of this system of clientage and its significance to Roman society has been more fully appreciated in recent years. The counterpart of the client system on the horizontal plane was friendship (*amicitia*) within Roman nobility. Many of the rules we will be examining subsequently such as the one whereby one could not charge interest on a loan (*mutuum*) or that the execution of an assignment (*mandatum*) was gratuitous, must be seen in the light of such unwritten assumptions.

This affords the occasion to point out yet another factor, namely how Roman society was marked by the difference between high and low. The Roman nobility which occupied most of the posts of the magistracy, consisted of a limited number of families. The upper class »honestiores« consisted of the senatorial class, the equestrian class (*equites*) along with some others such as wealthy freedmen who by virtue of their fortune were raised above the masses of the underclass »humiliores«. Roman law must be seen in the light of this. It is characteristic that virtually all Roman jurists belonged to the upper classes, initially mainly the senatorial class and then to the knights later on. It has been pointed out as being typical that Roman jurisprudence was developed by a rather small group of well-to-do people. Generally, with its well developed notions of property and contract, Roman law was only of interest to this little group. The better off one was in Roman society – as in most societies – the more relevant more and more rules became to one. Some might think that in this, Roman law did not fundamentally differ from other legal systems although it must be acknowledged that precisely classical Roman law can seem harsh to the unpriviledged. The system of clientage may have eased matters for the economically weak and allowed them to assert their rights. As will transpire from the rules to be discussed below such as enforced execution, rules on day labourers or compensation, classical Roman law was not marked by exaggerated concern for the weaker party in law.

CHAPTER TWO

The Family and the Law

7. Roman Marriage

Gaius in his Institutes divided private law into persons, things and actions. What we would call family law was treated in the first book under the category persons. It was a characteristic of Roman family law that old legal institutions such as *patria potestas*, the guardianship of women and the incapacity of sons (and to some extent slaves) to engage in financial transactions on their own were upheld alongside rules which tended to strengthen an individualism which did not comply with the old concept of the Roman family as a collective. The basic institutions of the old system were maintained during the classical period but the family structure was modified, not least by means of imperial statutes.

Family in Roman law differs widely from its modern counterpart as may be seen from the fragment by Ulpian in D. 50,16,195,1-5:

> Idem libro quadragensimo sexto ad edictum. Pronuntiatio sermonis in sexu masculino ad utrumque sexum plerumque porrigitur. 1. »Familiae« appellatio qualiter accipiatur, uideamus. et quidem uarie accepta est: nam et in res et in personas deducitur. in res, ut puta in lege duodecim tabularum his uerbis »adgnatus proximus familiam habeto«. ad personas autem refertur familiae significatio ita, cum de patrono et liberto loquitur lex: »ex ea familia«, inquit, »in eam familiam«: et hic de singularibus personis legem loqui constat. 2. Familiae appellatio refertur et ad corporis cuiusdam significationem, quod aut iure proprio ipsorum aut communi uniuersae cognationis continetur. iure proprio familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut iure subiectae, ut puta patrem familias, matrem familias, filium familias, filiam familias quique deinceps uicem eorum sequuntur, ut puta nepotes et neptes et deinceps. pater autem familias appelatur, qui in domo dominium habet, recteque hoc nomine appellatur, quamuis filium non habeat: non enim solam personam eius, sed et ius demonstramus: denique et pupillum patrem familias appellamus. et cum pater familias moritur, quotquot capita ei subiecta fuerint, singulas familias incipiunt habere: singuli enim patrum familiarum novem subeunt. idemque eueniet et in eo qui emancipatus est: nam et hic sui iuris effectus propriam familiam habet. communi iure familiam dicimus omnium adgnatorum: nam etsi patre familias mortuo singuli singulas familias habent, tamen omnes, qui sub unius potesatte fuerunt, recte eiusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt. 3. Seruitutium quoque solemus appellare familias, ut in edicto praetoris ostendimus sub titulo de furtis, ubi praetor loquitur de familia publicanorum. sed ibi non omnes serui, sed corpus quoddam

seruorum demonstratur huius rei causa paratum, hoc est euctigalis causa. alia autem parte edicti omnes serui continentur: ut de hominibus coactis et ui bonorum raptorum, item redhibitora, si deterior res reddatur emptoris opera aut familiae eius, et interdicto unde ui familiae appellatio omnes seruos comprehendit. sed et filii continentur. 4. Item appellatur familia plurium personarum, quae ab eiusdem ultimi genitoris sanguine profiscuntur (sicuti dicimus familiam Iuliam), quasi a fonte quodam memoriae. 5. Mulier autem familiae suae et caput et finis est.

The use of a word in the masculine gender is usually extended to cover both genders. 1. Let us consider how the designation of »household« is understood. And indeed it is understood in various ways; for it relates both to things and to persons: to things, as, for instance, in the *Law of the Twelve Tables* in the words »let the nearest agnate have the household.« The designation of household, however, refers to persons when the law speaks of patron and freedman: »from that household« or »to that household«; and here it is agreed that the law is talking of individual persons. 2. The designation of households relates also to any kind of body which is covered by a legal status peculiar to its members or common to an entire related group. We talk of several persons as a household under a peculiar legal status if they are naturally or legally subjected to the power of a single person as in the case of a head of a household, the wife of a head of a household, a son-in-power, a daughter-in-power, and those who threafter follow them in turn, as, for instance, grandsons and granddaughters, and so on. Someone is called the head of a household if he holds sway in a house, and he is rightly called by this name even if he does not have a son; for we do not only mean his person but also a legal status; indeed, we can even call a *pupillus* a head of a household. And when the head of a household dies, all the individuals who wer subjected to him begin to hold their own households for as individuals they enter into the category of heads of households. And the same will occur in the case of someone who is emancipated; for when he has been made independent he has his own household. We describe a household consisting of all the agnates under a single legal rule for even if all of them have their own families after the head of the household has died, nonetheless, all of them who were under the power of a single person will rightly be described as belonging to the same household, since they belong to the same house and family. 3. We are also accustomed to describe slaves as forming a household, as we can show in the praetorian edict under the title on theft where the praetor talks about a household belonging to publicans. But there all slaves are not meant but a certain body of slaves collected for one purpose, namely in order to collect taxes. But in another part of the edict, all slaves are included as in the part dealing with gangs of men or force used to seize property or in the action for recovery of something is returned damaged by the activity of the purchaser or his household and in the interdict on the use of force the designation of household covers all slaves. And, indeed, sons are also covered. 4. Likewise, the name of household is also used for several people who descend by blood from the same original founder, as we talk of the Julian household, going back as it were to the origin of records. 5. A woman, however, is both the beginning and end of her household.

Our modern Western concept of marriage as a legal relation between two persons was formed in medieval Canon law. The Romans did not develop the rules of the contract of marriage and of separation or divorce that have been characteristic of the law of marriage. Marriage in Rome is better described as a social fact resulting in certain legal consequences. The most important type of marriage in the classical period was the so-called free marriage, the »liberum matrimonium«. This marriage could be entered into without any formal act and could also be dissolved by the parties themselves. A marriage was established by the will to live as man and wife, the socalled »affectio mariatalis«.

The jurist Modestin has a famous definition of marriage:

Modestinus, regulae I (D. 23,2,1):
Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio.

Modestin, Rules, book I:
Marriage is the union of a man and a woman, a partnership for life involving divine as well as human law.

The fact that no formal requisites were necessary was expressed by the Roman jurists in several ways. The decisive factor was mutual agreement to contract marriage, the »consensus«. Both parties had to agree. The consummation of the martial act was not decisive either but might of course be of some importance for the upholding of the affectio maritalis.

Ulpian, ad Sabinum XXXIV (D. 50,17,30):
Nuptias non concubitus sed consensus facit.

Ulpain, Sabinus, 34th book:
Agreement and not sleeping together creates marrriage.

Paulus, ad edictum XXXXV (D. 23,2,2):
Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorimque in potestate sunt.

Paul, Edict, 45th book:
Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are.

Bethrotals or engagements to marry, which might precede marriage, were also acts of mere consent:

Iulianus, Digesta XVI (D. 23,1,11):
Sponsalia, sicut nuptiae, consensu contrahentium fiunt; et ideo sicut nuptiis, ita sponsalibus filiamfamilias consentire oportet.

Betrothal, like marriage, takes place with the consent of the parties to it. So, as in the case of marriage, a daugher-in-power must consent to her betrothal.

In his account of the traditional Roman marriage in the Institutes, Gaius describes the *manus* marriage which in contrast to a free marriage resulted in legal consequences for the status of the woman. A woman married under manus would come under »the manus« (hand) of her husband, a position similar to a son's under potestate. If she contracted a free marriage her legal position was not changed. Apart from very special situations this kind of marriage had gone out of use in the later Republic and imperial times.

Gaius, Institutiones I:
110. Olim itaque tribus modis in manum conueniebant: usu, farreo, coemptione. 111. Usu in manum conuenibat, quae anno continuo nupta persuerabat; quia enim uelut annua possessione usu capiebatur, in familiam uiri transibat filiaeque locum optinebat. itaque lege duodecim tabularum cautum est, ut si qua nollet eo modo in manum mariti conuenire, ea quotannis trinoctio abesset atque eo modo cuiusque anni usum interrumperet. sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine obliteratum est. 112. Farreo in manum conueniunt per quoddam genus sacrificii, quod Ioui Farreo fit; in quo farreus panis adhibetur, unde etiam confarreatio dicitur; complura praeterea huius iuris ordinandi gratia cum certis et sollemnibus uerbis praesentibus decem testibus aguntur et fiunt. quod ius etiam nostris temporibus in usu est: nam flamines maiores, id est Diales, Martiales, Quirinales, item reges sacrorum, nisi ex farreatis nati non leguntur: ac ne ipsi quidem sine confarreatione sacerdotium habere possunt. 113. Coemptione uero in manum conueniunt per mancipationem, id est per quandam imaginariam uenditionem: nam adhibitis non minus quam V testibus ciuibus Romanis puberibus, item libripende, emit uir mulierem, cuius in manum conuenit.

Gaius, Institutes, first book:
110. Formerly there used to be three methods by which they fell into subordination: by usage, by sharing of bread, and by contrivel sale. 111. A woman used to fall into marital subordination by usage if she remained in the married state for a continuous period of one year: for she was, as it were, usucapted by a year's possession, and would pass into her husband's kin in the relationship of a daughter. The Twelwe Tables therefore provided that if any woman did not wish to become subordinate to her husband in this way, she should each year absent herself for a period of three nights, and in this way interrupt the usage of each year. But this whole legal state was in part repealed by statute, in part blotted out through simple disuse. 112. Woman fall into marital subordination through a certain kind of sacrifice made to Jupiter of the Grain, in which bread of coarse grain is employed, for which reason it is also called the sharing of bread. Many other things, furthermore, have to be done and carried out to create this right, together with the saying of specific

> and solemn words in the presence of ten witnesses. This legal state is still found in our own times; for the higher priests, that is the priests of Jupiter, of Mars and of Quirinus, as also the Sacred Kings, are chosen only if they have been born in marriage made by the sharing of bread, and they themselves cannot hold priestly office without being married by the sharing of bread. 113. Women fall into marital subordination through contrived sale, on the other hand, by means of mancipation, that is, by a sort of imaginary sale; for in the presence of not less than five adult Roman citizens as witnesses, and also a scale-holder, the man to whom the woman becomes subordinate »buys« her.

In the time of the Emperor Augustus a series of statutes introducing restrictions in the freedom of marriage were passed. The statutory rules were especially aimed at conserving and furthering the Roman upper-class, the senatorial class. Thus it was prohibited to marry prostitutes, freed persons or actresses, and all men beween 25 and 60 and women between 20 and 50 were urged to marry or remarry if they were divorced or had lost their spouse. Exemptions were granted in respect of couples who had already three children. The sanction consisted in restrictions in the right to inherit. The rules were found in the *lex Iulia de maritandis ordinibus* (18 B.C.) and the *lex Papia Poppaea* (9 A.D.). Another *lex Iulia de adulteriis* punished what was considered as immoral acts such as fornication and sexual intercourse outside marriage (*stuprum*).

The concubinate (*concubinatus*) seemed to have been rather well known in the Roman upperclass often with a woman of lower status. Through concubinage a lifelong relationship could be established without *affectio maritalis*.

The free marriage did not give the husband any right over his wife's property. Her status was not affected by the marriage. If she was under her father's *potestas* she stayed there. If she was sui iuris she remained so. However, Roman law had rules that prohibited gifts between spouses. According to Ulpian, this rule was given in order to prevent people from impoverishing themselves »though mutual affection....« by means of gifts that are not reasonable, but beyond their means« (D. 24,1,1).

The wife would often bring a dowry (*dos*) into the marriage as her contribution to the subsistence of the family. If a marriage was dissolved the dowry or part of it would normally be restored to her. A complex set of rules regulated the right of dowry.

Guardianship (*tutela*) played an important role in Roman law. Children (*tutela impuberum*) and women (*tutela mulieris*) were under guardianship. The guardian or tutor had to protect his pupil and to give his authority (*auctoritas*) to certain legal acts.

CHAPTER THREE

Roman procedure

8. General outline of the Roman procedural system

Roman substantive law cannot be understood without knowledge of the procedural system. The roman legal system may be described as being action-oriented. Therefore, it is common practise to discuss procedure before broaching substantive law. The correct placing of an introduction to procedure is often subject to doubt. On the one hand, knowledge thereof is crucial in order to understand the actions discussed in the following presentation. On the other hand, the procedural system first springs to life when one is acquainted with the particular actions. The course chosen here is to start with an introduction to procedure ahead of substantive law. Of decisive importance for the understanding of the legal system's practical functions is the insight into the special mechanism whereby it was established in Roman law, whether or not a person could claim certain rights. The deciding factor was whether a given right was covered by a particular *actio*. Whereas modern legal systems, when determining which rights apply to a person, normally take as their point of departure an assessment of the rights themselves, Roman law did the opposite, the point of departure in this case was the procedural system. A claim was viewed as a right only to the extent that it was covered by what can be seen as an already existing access path to having the case tried by the courts. *Actio* is the designation for the basis of proceedings that a claim might come under in order to enjoy the full protection of the law. Stating that Roman law is action-oriented means that the natural point of departure in discussing the individual rights is their procedural protection. As will become apparent from the following presentation, precisely those actiones, arising from the particular issues at law are the skeleton of the presentation of Roman law. To a large extent, the activity of Roman jurists consisted in determining the scope of the individual actiones. Either they advised the parties in a lawsuit on how to justify their claims or defend themselves, or they would advise the praetor who was responsible for the administra-

tion of the judicial system, on whether a particular claim was worthy of legal protection or not.

In summing up, we can say that the Romans did not make too sharp a distinction between the rights themselves and their procedural protection. If we look at the praetor's edict, it is apparent that substantive rights here are formulated as actiones.

Roman judicial procedure underwent several stages of development which mutually overlap. The oldest of these is known as the *legis actiones* (section 9). Characteristic of the classical period is the procedure by *formula* which was gradually replaced by the *cognitio* process (section 15) whilst the Roman system of enforcement is dealt with in section 11. Characteristic of both the legis actiones and the formulary system was their division into two stages: *In iure*, i.e. a hearing in the presence of a Roman official (*praetor*) with a view to establishing the legal basis of the action and *in iudicio* or *apud iudicem*, the court hearing.[1]

9. Legis Actiones

Our knowledge of the oldest Roman legal process derives mainly from the fourth book of Gaius' Institutions. The pronounced attachment to form[2] in this example from Gaius, is typical.

> Gaius, Institutiones IV:
> 11. Actiones, quas in usu ueteres habuerunt, legis actiones appellabantur uel ideo quod legibus proditae erant, quippe tunc edicta praetoris, quibus conplures actiones introductae sunt, nondum in usu habebantur, uel ideo quia ipsarum legum uerbis accommodatae erant et ideo immutabiles proinde atque leges obseruabantur, unde eum qui de uitibus succisis ita egisset, ut in actione uites nominaret, responsum est, rem perdidisse, quia debuisset arbores nominare, eo quos lex XII tabularum, ex qua de uitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.

1. On theories about the causes of this two-way split which has still not been satisfactorily explained, see: *Historical Introduction* by Jolowicz and Nicholas, p. 176 ff.
2. This strict attachment to form that could result in the invalidation of a legal document should the slightest error have crept in, could, as with other archaic features of Roman law such as touching with hand and staff (see below on legis actio per sacramento in rem), originate from sacred or magic rituals. The view put forward by the Swedish legal philosopher, Axel Hägerström in his famous work *Der römische Obligationenbegriff* I-II, Uppsala 1927-41 that such magical notions continued to influence Roman law up until a late date, has, however, encountered considerable resistance.

Gaius, Institutions, fourth book:
11. The actions used by the old lawyers were described as actions in the law, either because they were set out in statutes, since at that time the praetor's edict, which introduced numerous actions, were not yet in use – or because they were precisely adjusted to the words of statutes, and were accordingly observed as immutably as if they had been statutes. This was why the opinion was given that a man who raised an action over the cutting down of vines in a way that used the word 'vines' in the action had lost his case. He ought to have used the word »trees«, because the XII tables, under which the action for cutting down vines was available, spoke in general terms about cutting down trees.

There were five different forms of legis actiones:

1. *legis actio per sacramentum in rem* and *in personam*
2. *legis actio per iudicis et postulationem*
3. *legis actio per condictionem*
4. *legis actio per manus iniectionem*
5. *legis actio per pignoris capionem.*

The last two (4 and 5) deal with enforcement and will be discussed in detail in section 11. The three other legis actiones refer to the earlier stages of the action.

The purpose of *legis actio per sacramentum in rem* was that of vindication. The trial itself had the character of a formalised battle[3]. About the actual procedure, Gaius has this to say:

Gaius, Institutiones, IV:
16. Si in rem agebatur, mobilia quidem et mouentia, quae modo in ius adferri adduciue possent, in iure uindicabantur ad hunc modum: qui uindicabat, festucam tenebat: deinde ipsam rem adprehendebat, uelut hominem, et ita dicebat. HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM; SICUT DIXI, ECCE TIBI, UINDICTAM INPOSUI, et simul homini festucam inponebat. aduersarius eadem similiter dicebat et faciebat. cum uterque uindicasset, praetor dicebat: MITTITE AMBO HOMINEM. illi mittebant. qui prior uindicauerat, sic dicebat: POSTULO, ANNE DICAS, QUA EX CAUSA UINDICAUERIS? ille respondebat: IUS FECI, SICUT UINDICTAM INPOSUI. deinde qui prior uindicauerat, dicebat: QUANDO TU INIURIA UINDICAUISTI, D AERIS SACRAMENTO TE PROVOCO; aduersarius quoque dicebat similiter: ET EGO TE: aut si res infra mille asses erat. scilicet L asses sacramentum nominabant. deinde eadem sequebantur, quae cum in personam ageretur. postea praetor secundum alterum eorum uindicias dicebat, id est interim aliquem possessorem con-

3. The word *sacramentum* seems to refer to the fact that the parties concerned had confirmed their assertions with oaths. The fine that the losing party who must have sworn a false oath, had to pay as penance, would then go to the state treasury. Later on, only the fine remained.

stituebat, eumque iubebat praedes aduersario dare litis et uindiciarum, id est rei et fructuum: alios autem praedes ipse praetor ab utroque accipiebat sacramenti causa, quod id in publicum cedebat. festuca autem utebantur quasi hastae loco, signo quodam iusti dominii ea maxima sua esse credebant, quae ex hostibus cepissent; unde in centumuiralibus iudiciis hasta proponitur.

Gaius, Institutions, fourth book:
16. If it were a real action, they vindicated before the court movable and living property, which could be carried or led into the court, in this way. The claimant would hold a rod; then he would take hold of the actual property, for instance a slave, and say: »I declare that this slave is mine by quiritary right in accordance with my case. As I have spoken, see, I have imposed the claim«, and at the same time he laid the rod on the slave. His opponent likewise said and did the same. When each of them had made his claim the praetor would say: »Both of you, let go the slave.« They then let go of him. The first claimant would then put a question to the other in these words: »I demand that you tell me the grounds of your claim.« The other replied: »I have exercised my right in imposing the claim.« The first claimant would then say: »Inasmuch as you have claimed wrongfully, I challenge you on oath for five hundred »asses«.« His opponent then said likewise: »And I you.« If the property was worth less than a thousand »asses«, the sworn penalty that they named would be for fifty. The following stages were the same as for a personal action. Then the praetor would pronounce on the claim in favour of one of the parties; that is to say, he made one of them interim possessor and ordered him to give his opponent special sureties for the action and the claim, that is, for the property and its fruits. The praetor himself took other special sureties from both parties in the matter of the oath, because that went to the public purse. They made use of a rod, as it were in place of a spear, as a sign of lawful ownership, because they believed that property to which there was the strongest claim of lawful ownership was that which they had captured from the enemy. Therefore a spear is on display before the judges of the centumviral court.

Legis actio per condictionem was carried out as follows: The plaintiff called on the defendant to appear at a meeting (condicere – to serve notice, to engage to meet someone) so as to appoint a judge thirty days hence. The idea behind this delay was to allow for the opportunity of a settlement out of court in the meantime. This legis actio was, in contrast to those mentioned earlier, *abstract* in the sense that it was available irrespective of the nature of the claim at law. However, a definite sum (*res certa*) had to be involved. This legis actio survived the legis actio procedure in the form of an abstract complaint and as *condictio* was used also in the formulary procedure. Thus it was by means of a condictio that demands for repayments for services rendered were lodged (see section 20). We are reminded of this in the designation *condictio indebiti* for demands for repayment.

Gaius, Institutiones IV:
17b. Per condictionem ita agebatur: AIO TE MIHI SESTERTIUM X MILIA DARE OPERTERE: ID POSTULO AN NEGES. aduersarius dicebat non oportere. actor dicebat: QUANDO TU NEGAS, IN DIEM TRICENSIMUM TIBI IUDICIS CAPIENDI CAUSA CONDICO. deinde die tricensimo ad iudicem capiendum praesto esse debebant. condicere autem denuntiare est prisca lingua.

Gaius, Institutions, fourth book:
17b. The action in the law by action of debt was brought as follows: »I declare that you have a duty to give me ten thousand. I demand that you affirm or deny this.« His opponent declared that he had no such duty. The pursuer would then say: »In that you deny it, I serve notice on you to be present in thirty days time to receive a judge.« Then they were required to be present on the thirtieth day to receive a judge. In archaic speech the »condicere« means »to serve notice.«

10. The formulary procedure

The formulary procedure was the form of trial in use during the classical period. Its hallmark was its great flexibility, much greater than that of the *legis actiones*, it was, therefore, a suitable tool in the hands of the praetor during the formative period of Roman law. The formulary procedure had already during the Republic complemented the *legis actiones* and thereby had the inherent advantage that the use of the wrong formula did not mean a loss of rights.
The formulary procedure derives its name from the *formula* that the praetor drew up in concert with the parties to the dispute. It contained the agenda of the trial about to be conducted.

The origins of the formulary system are obscure. Perhaps this form of trial originated in the methods used by the peregrin praetor when deciding in trials of foreigners. Others point out that the formulary procedure can be seen as a development of the legis actio process[4].

Tradition links the *lex Aebutia* of the first half of the second century B.C. with the formulary procedure. The exact contents of this law is a point of controversy. It has been suggested e.g. that the statute may have provided for application of the formulary procedure also between Roman citizens for cases in which the previously applicable *legis actio per condictionem* was no longer applicable. The older system seems to have died away after the appearance of this statute law (Kaser). The final abolition of the legis actio procedure took place thereafter by means of one of the two *leges Iuliae iudiciorum privatorum*

4. On this see *Historical Introduction* by Jolowicz and Nicholas, p. 218.

et publicorum of 17 B.C. except for the centumviral court where legis actiones were still in use (see section 40). The formulary procedure was widely recognized until its merger in the 3rd century A.D. with cognition procedure which had no distinction between hearings *in iure* and *in iudicio*. By Justinian's day the formulary system had fallen into disuse and there is no mention of it in the Digest. It is mostly due to the discovery of the Institutions of Gaius that we can create a picture of how civil procedure was carried out in terms of classical Roman law.

A characteristic trait of the course of procedure in the case of both formulary process and the legisactiones was that the proceedings were split into two phases: *In iure* and *in iudicio (apud judicem)*. The first phase unfolded in the presence of a praetor in order to work out the necessary formula. This formula had to be acceptable to both parties. It was therefore a precondition that both parties were present. The XII Tables had rules about the summons:

Leges XII tabularum, tabula I:

1. SI IN JUS VOCAT, ITO. NI IT, ANTESTAMINO: IGITUR IN CAPITO.
2. SI CALVITUR PEDEMVE STRUIT, MANUM ENDO JACITO.
3. SI MORBUS AEVITASVE VITIUM ESCIT, JUMENTUM DATO. SI NOLET, ARCERAM NE STERNITO.
4. ASSIDUO VINDEX ADSIDUUS ESTO. PROLETARIO QUIS VOLET VINDEX ESTO.
5. REM UBI PACUNT, ORATO.
6. NI PACUNT, IN COMITIO AUT IN FORO ANTE MERIDIEM CAUSSAM COICIUNTO. CUM PERORANTO AMBO PRAESENTES.
7. POST MERIDIEM PRAESENTI LITEM ADDICITO.
8. SI AMBO PRAESENTES, SOLIS OCCASUS SUPREMA TEMPESTAS ESTO.

The XII Tables, Tablet I:

1. When the defendant is summoned by the plaintiff to the court, he must go. If he does not, the defendant must call on bystanders to bear witness. Then the plaintiff must sieze the defendant.
2. Should the defendant try to evade the issue or flee, the plaintiff must detain him.
3. Should the defendant plead age or infirmity then an animal of burden shall be provided for him. Should the defendant refuse the above, then there is no obligation to provide him with a vehicle.
4. A resident should also have a resident as guarantor. A destitute person may have anyone who wishes to be so as a guarantor.
5. Should the case be settled out of court then the official in question must announce it.
6. Should a settlement prove impossible to obtain then the case must be negotiated in Comitium or at the Forum. Both parties must be present during negotiations
7. When Noon has passed the judge must award the object of the suit to who is present.

8. Should both parties be present, the proceedings must be concluded before Sunset.

If the defendant failed to attend the plaintiff might obtain the praetor's assistance to force him to attend.[5] One of the measures available was to order security (*vadimonium*) for which enforcement proceedings were available if the defendant failed to appear.

Before the case was sent on to the judge for trail *in iudicio*, it was necessary that agreement had been reached about the legal dispute and who was to be appointed judge. In order to expedite cases, the praetor had to define and clarify whether the rights the plaintiff thought he had, were indeed protected by law via an existing actio or whether the praetor had to decide to grant a new actio because he found the claim worth protecting. Granting new actions to complement those already in existence was the praetor's most important juridical tool for the further development of the law. Such actiones were known as *actiones in factum*, because they were created on the basis of a concrete case or *actiones utiles* if they were derived from analogies of existing actiones. The praetor could also refuse to let a claim proceed by means of a method known as *denegatio actionis* when it was obvious that the plaintiff's demand enjoyed no protection in law.

The defendant could always allege that he denied that a certain actio was applicable in that particular context or that the praetor should concede a new actio; he could acknowledge the main claim against him but produce some objections (*exceptiones*). All this would have to be settled during the preliminary hearing before the praetor. If one of the parties refused to frame the formula the same sanctions were available to the praetor as towards a party ignoring a writ of summons.

When it was established which actio was to be used, the *formula* was set up. This formula was then handed over to the defendant by the plaintiff in the presence of witnesses. The stage of the trial known as *litis contestatio* was thereby initiated, in the course of which the litigants submitted themselves to the decision of the judge. Litis contestatio meant that the same dispute could not again be submitted for trial. Hence the old phrase: »Ne bis in eadem re sit actio«.

The formula consisted of several parts. The most important were the appointment of a judge, the *intentio* and the *condemnatio*.

5. J.M. Kelly: *Roman Litigation*, Oxf. 1964, offers a fascinating account of the difficulties that could befall those of few means in an as socially unequal community as Rome when they instigated legal proceedings against a stronger party as well as questioning the effectiveness of the legal system in such a situation.

Gaius, Institutiones, IV:
39. Partes autem formularum hae sunt: demonstratio, intentio,...,condemnatio. 40. Demonstratio est ea pars formulae, quae principio ideo inseritur. ut demonstraretur res, de qua agitur, uelut haec pars formulae: QUOD A. AGERIUS N. NEGIDIO HOMINEM UENDIDIT, item haec: QUOD A. AGERIUS APUD N. NEGIDIUM HOMINEM DEPOSUIT. 41. Intentio est ea pars formulae. qua actor desiderium suum concludit. uelut pars formulae: SI PARET N. NEGIDIUM A. AGERIO SESTERTIUM X MILIA DARE OPORTERE: item haec: QUIDQUID PARET N. NEGIDIUM A. AGERIO DARE FACERE OPORTERE: item haec: SI PARET HOMINEM EX IURE QUIRITIUM A. AGERII ESSE.
.....
43. Condemnatio est ea pars formulae, qua iudici condemnandi absoluendiue potestas permittitur. uelut haec pars formulae: IUDEX. N. NEGIDIUM A. AGERIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET, ABSOLUE: item haec: IUDEX N. NEGIDIUM A. AGERIO DUMTAXAT X MILIA CONDEMNA. SI NON PARET. ABSOLUITO: item haec: IUDEX, N. NEGIDIUM A. AGERIO (X MILIA) CONDEMNATO et reliqua, ut non adiciatur DUMTAXAT.

Gaius, Institutions, fourth book:
39. The parts of the formula are these: Statement of the facts alleged, principal pleading, adjudication, condemnation. 40. The statement of facts alleged is that part of the formula which is put at the beginning so that the facts may be stated on which the action is grounded, for instance: »Insofar as Aulus Agerius sold a slave to Numerius Negidius« and »Insofar as Aulus Agerius deposited a slave with Numerius Negidius«. 41. The principal pleading is that part of the formula in which the pursuer summarizes what he claims, for instance: »If it appears that Numerius Negidius is under a duty to pay Aulus Agerius ten thousand« or »Whatever it appears that Numerius Negidius is under a duty to give to or do for Aulus Agerius« or »If it appears that the slave belongs to Aulus Agerius by quiritary right«.
.....
43. The condemnation is that part of the formula which allows the judge the power of condemning or exonerating, for instance: »Judge, condemn Numerius Negidius to pay not more than ten thousand to Aulus Agerius. If it does not so appear, exonerate him« or »Judge, condemn Numerius Negidius to Aulus Agerius« and so forth, not adding »not more than ten thousand«.

Aulus Agerius and *Numerius Negidius* are stock Roman terms for plaintiff and defendant respectively, just as we would talk about A and B or Smith and Jones when illustrating a point. In Latin, Agerius signifies someone who acts or sues while Negidius means someone who contests or denies claim.

The actions may be classified according to their various types:
First, a distinction may be made between actiones civiles and actiones honorariae. *Actiones civiles* were cases deriving from ius civile. The actiones which the praetor created himself on the basis of concrete evaluation of a case or in connection to an established actio were called *actiones honorariae*. The notions

of formula and actio should not be confused. Where an actio civilis was concerned, the *formula* used was known as *in ius concepta*. Characteristic of this action was the use of the formula »dare facere oportere« as in the example below:

Octavius iudex esto:
Si paret Numerium Negidium Aulo Agerio sestertium X milia dare oportere, iudex Numerium Negidium Aulo Agerio sestertium X milia condemnato, si non paret, absolvito.

Octavius, be the judge:
If it transpires that the defendant owes the plaintiff ten thousand sestertii, you, as a judge must condemn the defendant to pay the plaintiff the sum of ten thousand sestertii, if this is not the case, then you must acquit.

Formulae are always prefaced with an order to one or more people (see below) to act as judges.

Those formulas containing actions created by the praetor were called *in factum concepta*, e.g. the formula which could be used in the case of a freed slave filing a lawsuit against his former master, as in the text from Gaius below (no 14). A characteristic of formulae in factum conceptae was that the *intentio* did not refer to an instance in law but to the factual cirumstances of the case.

Gaius, Institutiones IV:
45. Sed eas quidem formulas, in quibus de iure quaeritur, in ius conceptas uocamus, quales sunt, quibus intendimus nostrum aliquid ex iure Quiritium aut nobis dari oportere: sunt et aliae, in quibus iuris ciuilis intentio est. 46. Ceteras uero in factum conceptas uocamus,id est, in quibus nulla talis intentio concepto est, sed initio formulae nominato eo quod factum est, adiciuntur ea uerba. per quae iudici damnandi absoluendiue potestas datur; qualis est formula, qua utitur patronus contra libertum. qui eum contra edictum praetoris in ius uocauit: nam in ea ita est: RECUPERATORES SUNTO, SI PARET ILLUM PATRONUM AB ILLO PATRONO LIBERTO CONTRA EDICTUM ILLIUS PRAETORIS IN IUS UOCATUM ESSE. RECUPERATORES, ILLUM LIBERTUM ILLI PATRONO SESTERTIUM X MILIA CONDEMNATE. SI NON PARET, ABSOLUITE. ceterae quoque formulae, quae sub titulo DE IN IUS UOCANDO propositae sunt, in factum conceptae sunt, uelut aduersus eum, qui in ius uocatus neque uenerit neque uindicem dederit; item contra eum, qui ui exemerit eum, qui in ius uocaretur: et denique innumerabiles eius modi aliae formulae in albo proponuntur.

Gaius, Institutions, fourth book:
45. Now, we call those formulas which are based on state law »framed in law«, such as those in which we claim that something is ours by quiritary right or that there is a duty to give us something or that damages ought to be awarded for theft, and there are others in which the claim is founded on state law. 46. The remainder, however, we call actions »framed on the facts«. In these, no such principal pleading as above is drafted, but the formula begins by naming what has been done, to which are added the words by which the judge is given power to condemn or exonerate. An example of this kind is the

formula used by a patron against a freedman who has summoned him to court contrary to the praetor's Edict. This runs as follows: »Let assessors be appointed. If it appears that this patron has been summoned to court by this (patron) freedman contrary to the Edict of this praetor, assessors, condemn this freedman to pay ten thousand to this patron. If it does not so appear, exonerate him«. The other formulas too which are listed under the heading 'On summons to court' are actions framed on the facts; for instance, that against a person who has received a summons but failed to appear or to send a guarantor in court, and also against someone who has used force to take away a person summoned. Countless other formulas of this kind are set out on the album where the edict is displayed.

An important group of actions belonged to the *bonae fidae iudicia* category. With these, the defendant was not required to produce his defences to the claim through an independent *exceptio*, the judge, however, was required to make an overall evaluation of the case, just as it had to be decided *ex fide bona*. The implications of this will be made clear in section 23 on emptio-venditio.

Gaius, Institutiones IV:
In bonae fidei autem iudiciis libera potestas permitti uidetur iudici ex bono et aequo aestimandi, quantum actori restitui debeat, in quo et illud continetur, ut si quid habita ratione eius, quod inuicem actorem ex eadem causa praestare oporteret, in reliquum eum, cum quo actum est, condemnare. 62. Sunt autem bonae fidei iudicia haec: ex empto uendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, rei uxoriae[6].

Gaius, Institutions, fourth book:
61. In actions of good faith, however, the judge is seen to be allowed full discretion to work out the sum to be restored to the pursuer on the basis of what is fair and reasonable. This includes account being taken of the pursuer's own duties arising from the same grounds of action. Condemnation is for the balance. 62. Now the actions based on good faith are these: Buying and selling, leasing and hiring, unsolicited administration, mandate, deposit, trust conveyance, partnership, guardianship, the action for a wife's property.

An example is the actio used for purchases, though, but, as will appear, the most important types of contract belonged to this group.

Another important distinction was that between actiones *in rem* and *in personam*. Actiones in rem just like the older legis actio per sacramentum related to obtaining the right to a thing. They could be brought against any owner of the object in question who, in return for relinquishing it, could avoid

6. These are supplemented by commodati, pigneraticia, familiae erciscundae, communi dividundo (loan, pledge, division of a heritance or common ownership) on the basis of the Institutions of Justinian 4,6,28.

further litigation and claims. Actiones in personam were aimed at condemnation of a person. Examples of actiones *in rem* are the *rei vindicatio* (section 16) and the *actio hypothecaria* (section 18).

Some actiones were aimed at making the defendant hand over either a specific sum of money or a particular object. These were known as *actiones certae* as opposed to *actiones incertae*.

A peculiarity of the actiones certae was that if the plaintiff demanded too great a sum, called *pluris petitio*, he lost the case because if the judge was using a particular formula with a fixed sum of money, he was not able to award part of the requested amount. At the same time, *litis contestatio* meant that the plaintiff was barred from suing a second time.

In some instances, the defendant could avoid condemnation and conviction by surrendering the disputed item. Normally, it was not possible to demand or offer payment in kind in the Roman legal system, an oddity that was connected to the development of the notion of detention (see section 19). In some cases, the so-called *actiones arbitrariae*, condemnation was only resorted to in the case of a defendant choosing not to pay in kind. Examples of this are *rei vindicatio* (section 16) and *actio quod metus causae* (section 33).

The formulae can be found in the praetor's edict. The parties could start out from there with a possibility for modifications. Yet to be mentioned is the distinction between *actiones directae* and *actiones contrariae* which was of significance in certain so-called »imperfectly synallagmatic« circumstances. An example of this is offered by the *actio mandati* (section 24). By means of a direct actio (*actio directa*), the principal would advance his claim whilst the agent demanding reimbursement for his expenses would resort to an *actio contraria*. A similar set-up applied to the three »real« contracts; *commodatum, depositum* and *pignus* which were all bailment types, viz. gratutious loans for use, deposit and pledge, respectively.

Finally, a particular group of actiones form the category of actiones known as *adjectitiae qualitatis* (see section 28). These actiones were conceded for situations in which there was a need to enter engagements by means of an agent. They applied in the case of contractual engagements entered into by either filiifamilias, servi or in some cases, free intermediaries.

Where the defendant wanted to contest the claim he would have his defences incorporated in the formula in the form of exceptiones. This was, however, not necessary in the case of a bonae fidei judicium, where the judge could decide on the defendant's objections without their being proclaimed during the praetor's hearing of the case. This was a consequence of the use of the *ex fide bona* clause which here as in many other areas (see section 22 on the duties of buyers and sellers) became an important factor in the development of the rules of

Roman law about the mutual obligations of the parties. The example of the statement of objections used in the text by Gaius brought below, pertains to a contract in the form of a *stipulatio* (see section 20) which was a legal relationship considered to be what later terminology would call *actiones stricti iuris*:

Gaius, Institutiones IV:
115. Sequitur, ut de exceptionibus dispiciamus. 116. Conparatae sunt autem axceptiones defendendorum eorum gratia, cum quibus agitur, saepe enim accidit, ut quis iure ciuili teneatur, sed iniquum sit eum iudicio condemnari, uelut si stipulatus sim a te pecuniam tamquam credendi causa numeraturus nec numerauerim: nam eam pecuniam a te peti posse certum est dare enim te oportet, cum ex stipulatu teneris: sed quia iniquum est te eo nomine condemnari, placet per exceptionem doli mali te defendi debere, item si pactus fuero tecum, ne id quod mihi debeas a te petam, nihilo minus id ipsum a te petere possum dari mihi oportere, quia obligatio pacto conuento non tollitur; sed placet debere me petentem per exceptionem pacti conuenti repelli.

119. Omnes autem exceptiones in contrarium concipiuntur, quam adfirmat is cum quo agitur: nam si uerbi gratia reus dolo malo aliquid actorem facere dicat, qui forte pecuniam petit, quam non numeravit. sic exceptio concipitur: SI IN EA RE NIHIL DOLO MALO AULI AGERII FACTUM SIT NEQUE FIAT; item si dicat (ut) contra pactionem pecuniam peti, ita concipitur exceptio: SI INTER AULUM AGERIUM ET NUMERIUM NEGIDIUM NON CONUENIT, NE EA PECUNIA PETERETUR; et denique in ceteris causis similiter concipi solet, ideo scilicet quia omnis exceptio obicitur quidem a reo, sed ita formulae inseritur, ut condicionalem faciat condemnationem, id est ne aliter iudex eum cum quo agitur condemnet, quam si nihil in ea re, qua de agitur, dolo actoris factum sit; item ne aliter iudex eum condemnet, quamsi nullum pactum conuentum de non petenda pecunia factum erit.

Gaius, Institutions, fourth book:
115. Next let us turn to defences. 116. These were developed for the benefit of defenders. For it often happens that someone is liable at state law, but that it would be unjust for him to suffer condemnation in court. Suppose that I have taken a stipulation from you in preparation for making you a loan of money and then I fail to give you the cash. I can definitely make a claim against you for that money. You are under a duty to give it; you are bound by virtue of the stipulation. But because it is unjust that you should be condemned on that account, it is agreed that you should defend yourself by the defence of deceit. Suppose that I have come to an agreement with you that I will not claim what you owe me, nevertheless I can claim that you are under a duty to give me, because an obligation is not discharged by simple agreement. It is, however, agreed that if I do sue, I can be defeated by the defence of agreement.
.....

119. All defences are drafted as a negative of what the defender is affirming. If, for example, the defender is stating that the pursuer has done something in bad faith, such as perhaps suing over money which he did not pay over, the

defence is drafted as follows: »If in this matter nothing either has been done or is being done by deceit on the part of Aulus Agerius«. Again, if he is stating that money is being sued for contrary to an agreement, the defence is drafted: »If no agreement exists between Aulus Agerius and Numerius Negidius that the money at issue should not be sued for«.

For further details on the above-mentioned defence of fraud (*exceptio doli*) reference is made to section 16.

As against the exceptio of the defendant, the plaintiff might, in turn, have objections that could be put forward in a *replicatio*:

Gaius, Institutiones IV:
126. Interdum euenit, ut exceptio, quae prima facie iusta uideatur, inique noceat actori, quod cum accidat, alia adiectione opus est adiuuandi actoris gratia. quae adiectio replicatio uocatur, quia per eam replicatur atque resoluitur uis exceptionis: nam si uerbi gratia pactus sum tecum. ne pecuniam, quam mihi debes, a te peterem, deinde postea in contrarium pacti sumus, id est ut petere mihi liceat, et, si agam tecum, excipias tu, ut ita demum mihi condemneris, si non conuenerit, ne eam pecuniam peterem, nocet mihi exceptio pacti conuenti; namque nihilo minus hoc uerum manet, etiamsi postea in contrarium pacti sumus; sed quia iniquum est me excludi exceptione, replicatio mihi datur ex posteriore pacto hoc modo: SI NON POSTEA CONUENIT, UT MIHI EAM PECUNIAM PETERE LICERET. 126a. Item si argentarius pretium rei, quae in auctionem uenerit, persequatur, obicitur ei exceptio, ut ita demum emptor damnetur, si ei res quam emerit tradita est: et est iusta exceptio, sed si in auctione praedictum est, ne ante emptori res traderetur, quam si pretium soluerit. replicatione tali argentarius adiuuatur: AUT SI PRAEDICTUM EST, NE ALITER EMPTORI RES TRADERETUR, QUAM SI PRETIUM EMPTOR SOLUERIT. 127. Interdum autem euenit, ut rursus replicatio, quae prima facie iusta sit, inique reo noceat: quod cum accidat, adiectione opus est adiuuandi rei gratia, quae duplicatio uocatur. 128. Et si rursus (si) ea prima facie uideatur, sed propter aliquam causam inique actori noceat, rursus adiectione opus est, qua actor adiuuetur, quae dicitur triplicatio. 129. Quarum omnium adiectionum usum interdum etiam ulterius, quam diximus, uarietas negotiorum introduxit.

Gaius, Institutions, fourth book:
126. It happens sometimes that a plea of defence which on the face of it seems right would itself unjustly prejudice the pursuer. There then has to be an additional plea to assist the pursuer. This is called a replication, because by it the force of the plea in defence is turned back and undone. Suppose, for example, I have agreed with you not to sue you for the money which you owe me; then later, we make an agreement to the contrary effect, that I may sue. If I bring my action and you rely on the plea that you should be condemned only if there was no agreement not to sue, that plea of agreement prejudices me; for the plea of defence remains true, despite our subsequent agreement to the contrary. But because it is unjust for me to be defeated by the defence, a replication is allowed me based on the subsequent agreement, in this form: »Unless it was subsequently agreed that I may lawfully sue for the money«. 126a. Again, if a banker is seeking the price of an article which he sold at auction, a defence can be put forward that the buyer is only to be condemned

> if what he bought was delivered to him; this is fair defence. But if it was stated in advance at the auction that the property would not be delivered to the buyer until he had paid the price, the banker has the benefit of this replication: »Unless it was announced in advance that the property would not be delivered to the buyer unless he had paid the price«. 127. It happens sometimes that a replication which may on the face of it be right would itself prejudice the defender. There then has to be an additional plea to assist the defender. This is known as a duplication. 128. And if that in turn seems right on the face of it but would on some grounds unjustly prejudice the pursuer, there has to be an additional plea to assist the pursuer. This is known as a triplication. 129. In practice, the diversity of human affairs sometimes prolongs all these exchanges even further than we have described.

In Gaius' textbook following the section on ordinary trials mention is made of »interdicta«. Gaius' system is somewhat haphazard and the interdicts, which were part of praetorian law, are usually discussed in an other context. The intention behind the interdicts was to give access to summary proceedings on the claim. They would take the form of praetorian bans (*interdicere*: to ban/ prohibit) or orders to the defendant to restore or respect a given state of law. If the defendant complied with the interdict, the case was decided before a tribunal as in an ordinary lawsuit. The interdicts covered an important area in connection with violations of rights of possession, on the protection of possession by interdict in section 16.

When *in jure* proceedings before the praetor were over the case would come before the court and a judge. There were no permanent civil courts in Rome and the judges were private individuals appointed either by the parties in mutual agreement or upon consultation with the praetor on the basis of his list of suitable persons. As a rule, the judges came from the equestrian class.

The number of judges alternated.[7] One man might sit (*iudex unus*) but it was also possible for the praetor in rare cases to appoint a group of three to five or even up to 11 judges who were known as *recuperatores*. The *centumviral* court took a special place, it consisted of around a hundred judges. Even in classical times, this court dealt with inheritance cases. Judges, just like praetors, had little or no specific juridical training. Just as a praetor had his *consilium* of jurists to consult with, so did the judge who also came from the upper echelons of society. In respect of procedure it is further worth noting that jurists were not originally paid for their participation. It was not until Claudius (39-54 A.D.) that fees were paid and then at a maximum amount of 10.000 sestertii.

7. On the reasons for this simultaneous existence of several jurisdictions, see J.M. Kelly: *Studies in the Civil Judicature of the Roman Republic*, Oxf. 1976.

In principle, the judge was supposed to decide the case on matters of proof produced by the parties. It is characteristic of Roman law that Roman legal science has chiefly concentrated on private law. It has been described (by Fritz Schulz) as an »isolation« of private law. Thus, the Romans were not preoccupied by questions of procedure. Some rules of evidence did exist but, on the whole, there was freedom in the area of evaluation of evidence. One jurist, Celsus, seems to have had a certain interest in legal evidence. As a rule, the judge was supposed only to deal with the facts of the case though, on occasion, he might be asked to decide purely legal matters. In the case of *iudicia bonae fidei* the judge's brief was thus more than convicting or acquitting on the basis of the produced evidence, in all other matters, however, his task was mainly to assess the strength of the claim. It was possible for a party to be represented before the judge by an advocate who would often have a training in rhetorics. In a text in his rhetorical work *Topica* (5.28) the orator Cicero mentions some sources of law that Gaius does not, namely, *res iudicata* (jurisprudence), *mos* (custom) and *aequitas* (fairness). The work of Cicero was of a different nature to that of Gaius. Cicero assumed a rhetorical point of view, that is to say he placed the emphasis on finding good, convincing arguments[8]. In this context, references to custom, common practice and fairness were appropriate although from the juridical point of view, these were not sources of law with the same binding nature as the others. Earlier decisions (precedents) might well be invoked in a trial although, they too, were not binding. Justinian entirely forbade the quoting of precedents, his point of view being that judgement should be passed according to the law and not according to precedent »non exemplis, sed legibus judicandum est« (C. 7,45,13).

Conviction always pertained to a pecuniary demand (*Condemnatio semper pecuniara*) which, however, in the particular *actiones arbitrariae* could be waived in case of the voluntary relinquishing of the object of litigation.

Appeal (*appellatio, provocatio*) to a higher court was unknown during the Republic though under the Empire appeal was recognized as an appeal to the emperor, who decided the case by a *decretum*. Originally, the appeal could result in the emperor allowing a retrial. This might seem when, for instance, the reason for losing the lawsuit was that the plaintiff had demanded too great a sum (*pluris petitio*). Later on, a procedure of appeal was established which could be used on the emperor's behalf or on behalf of someone appointed by him. Thus the *praefectus urbi*, the »commandant« of Rome, was the ultimate instance of appeal in Rome as the *praefectus praetorio*, head of the imperial bodyguard, was that of the entire Empire.

8. See Crook, *Law and Life of Rome*, Cambridge. 1967, p. 18 ff and chapter 4.

During the Empire, the formulary procedure was superseded by the *cognitio* procedure. Already, at an earlier date, certain cases were submitted to the procedures known as *cognitio extra ordinem* or *extraordinaria cognitio* which were characterized by a lack of distinction between a stage *in iure* and *in iudicio* sessions. The cognitio procedure was introduced by the emperor and the judge was his delegate. On the emperors order certain cases would undergo the extraordinaria cognitio procedure. In several of the imperial provinces, the legal administration of the governor was carried out in the form of the cognitio procedure and finally, this form of procedure was used whenever the emperor himself was doing the sentencing. This also applied when he passed sentence in cases that had been appealed according to the formulary procedure. The trend was towards the emperor's taking over the administration of justice which was undertaken by permanent judges so that gradually the proceedings changed in character to become a public matter and with the judge being granted a number of powers towards the litigants.

The changes in late antiquity in the administration of the law had as a result that the private judges previously appointed by the praetor or the parties to the dispute were replaced by imperially designated judges. The division of the trial into two stages - *in jure* and *in judicio* - was abandoned and the cognition procedure became common. It was to become the model for subsequent legal development in Europe. The judge became an official who presided over the proceedings throughout and who made decisions on points of fact as well as law. This was an expression of the ultimate derivation of any valid authority to sit in judgement from the emperor as *dominus*. The system of appeals now began to be generally accepted as sentences from a lower instance could be presented to the provincial governor or the *praefectus urbi* and from there to the emperor or those judges to whom he might have delegated ultimate jurisdiction, e.g. the *praefectus praetorio*. A particular administration (*scrinia*) developed in the courts.

Seen in a European perspective, it is the cognitio procedure which provides the basis for the later development of civil procedure. This type of procedure was further evolved under Justinian by strengthening the powers of the judge. Canon law perpetuated this tradition which was the foundation of Italian canon law and became »gemeiner Prozess« in Germany.

11. The Roman system of execution

An important part of the XII Tables was the regulation of rules concerning enforcement of decisions with a view to curbing the most blatant abuse of a

debtor's vulnerable position. Nowadays, the rules seem harsh though they were intended to protect the debtor and originally did so.

Leges XII Tabularum, Tabula III:

1. AERIS CONFESSI REBUSQUE JURE JUDICATIS XXX DIES JUSTI SUNTO.
2. POST DEINDE MANUS INJECTIO ESTO. IN JUS DUCITO.
3. NI JUDICATUM FACIT AUT QUIS ENDO EO IN JURE VINDICIT, SECUM DUCITO. VINCITO AUT NERVO AUT COMPEDIBUS XV PONDO, NE MAJORE, AUT SI VOLET MINORE VINCITO.
4. SI VOLET SUO VIVITO. NI SUO VIVIT, QUI EUM VINCTUM HABEBIT, LIBRAS FARRIS ENDO DIES DATO. SI VOLET, PLUS DATO.
5. Erat autem jus interea paciscendi, ac nisi pacti forent, habebantur in vinculis dies sexaginta. Inter eos dies trinis nundinis continuis ad praetorem in comitium producebantur, quantaeque pecunia judicati essent, praedicabatur. Tertiis autem nundinis capite poenas dabant, aut trans Tiberim peregre venum ibant.
6. TERTIIS NUNDINIS PARTIS SECANTO. SI PLUS MINUSVE SECUERUNT, SE FRAUDO ESTO.

XII Tables, Third tablet:

1. The lawful delay for paying an acknowledged debt and executing a sentence in force is that of thirty days.
2. The debtor may thereafter be seized. He must appear in court.
3. If he does not execute his sentence and should nobody offer to be his guarantor in court, the creditor should lead him forth and tie him up with either a strap or with shackles which must not weigh more than fifteen pounds, they may weigh less.
4. Should the debtor so desire, he is to see to his own fare. If not, he who has put him in chains shall provide him with one pound of spelt daily.
5. There was, however, the right to arrive at a settlement in the meantime but should no other agreement be reached, the debtors were left in chains for sixty days. In the course of this time, they were produced in front of the praetor at the Comitium on three consecutive market days and it was proclaimed how much they had been sentenced for. On the third market day they were either killed or sold beyond the Tiber.
6. On the third market day, they shall cut the debtor to pieces. Should they cut too much or too little, they shall not be made to account for it.

The compulsory execution thus had the nature of *personal execution* which was made valid in law by the *legis actio per manus iniectionem* whereby the creditor whilst pronouncing a specific formula laid his hand on the debtor:

Gaius, Institutiones IV:

21. Per manus iniectionem aeque de his rebus agebatur, de quibus ut ita ageretur, lege aliqua cautum est, uelut iudicati lege XII Tabularum, quae actio talis erat: qui agebat, sic dicebat: QUOD TU MIHI IUDICATUS siue DAMNATUS ES SESTERTIUM X MILIA, QUANDOCUI NON SOLUISTI, OB EAM REM EGO TIBI SESTERTIUM X MILIUM IUDICATI MANUM INICIO, et simul aliquam partem corporis eius prehendebat: nec

licebat iudicato manum sibi depellere et pro se lege agere, sed uindicem dabat qui pro se causam agere solebat, qui uindicem non dabat, domum ducebatur ab actore et uinciebatur.

Gaius, Institutions, fourth book:
21. An action by the laying on of a hand was likewise brought in those matters where such procedure had been provided by a statute, for instance, by the XII Tables for a judgement debt. This action was as follows. The pursuer would say: »Because the court has awarded that you« or »because you are condemned to give me ten thousand, in that you have not paid, I accordingly lay my hand on you for the ten thousand of the judgement«, at the same time taking hold of some part of his body. The judgement debtor could not lawfully shake off the hand from himself and conduct his own action but would appoint a champion, who used to conduct the case on his behalf. A defender who failed to appoint a champion would be led by the pursuer to his house and put in chains.

The system itself was extensively portrayed by the law: The debtor had thirty days in which to satisfy the claim which he himself had acknowledged or which had been established by judgement. Therafter the creditor could lay his hands on him (*manus iniectio*) and lead him before the court. If the debtor still did not fulfil his obligation, the creditor could detain for up to sixty days. In the course of this period, he would be produced in front of a praetor during three consecutive market days with a view to possible redemption. On the third day, the creditor could either kill him or sell him into slavery outside Rome (*trans Tiberim*) since a Roman citizen could not become another Roman citizen's slave. The regulation on the dismemberment of the debtor – which leads one to think of a famous scene from Shakespeare's *The Merchant of Venice* – has caused researchers some difficulty. It is hard to believe that the law would have contained a provision of such gruesomeness. There are those who take the view that this paragraph was apocryphal while others suggest that it might apply to the corpse of the debtor after he had been killed. The provision might then have served as a threat towards the debtor's family in case they were unwilling to redeem the corpse.

The *lex Poetilia* of approx. 326 B.C. defined the powers of the creditor more closely. The right to kill the debtor was abolished and the usual outcome was that the debtor devolved to the creditor as a debt-slave.

As a main rule older Roman law admitted only personal execution. *Real execution*, whereby satisfaction was sought upon the property of the debtor, was only rarely recognized in exceptional cases such as the one mentioned in Gaius as *legisactio per pignoris capionem*:

Leges XII Tabularum, tabula XII (=Gaius, Institutiones IV,28):
1. Lege autem introducta est pignoris capio, veluti lege XII Tabularum adversus eum, qui hostiam emisset nec pretium redderet; item adversus eum, qui mercedem non redderet pro eo jumento, quod quis ideo locasset, ut inde pecuniam acceptam in dapem, id est in sacrificium, impenderet.

The Law of the XII Tables, twelfth tablet (=Gaius, Institutions, fourth book, 28):
1. But then pignoris capio was introduced by law e.g. by the law from the XII Tables against him who having purchased a sacrificial animal, would not pay the price and equally against he who did not pay for the hire of a draught animal that someone had hired out in order to raise funds for a sacrificial repast.

The old personal execution remained in use under the formulary procedure but was gradually repealed in favour of access to compulsory execution upon the debtor's estate, this access was created by the praetor in the form of seizure of the debtor's property (*missio in bona*). A characteristic of this form of real execution was that it had the nature of bankruptcy proceedings. The debtor's entire fortune was seized with a view to compensating all his creditors.

This course of action was initiated by an *actio iudicati*. This complaint had to be used in any case, also in case of personal execution. When the creditor's right to compulsory execution had been established, he was entitled to proceed with either personal execution (in accordance with the XII Tables) or real execution. The real execution was initiated by the seizure of the debtor's property (*missio in bona*). As a rule, a *curator bonorum* was appointed to administer the gross estate. When the seizure was announced, any other creditors were called upon to notify their claims within thirty days. When the deadline had passed and the debtor had still not paid, he was considered to be infamous. Then the estate was put up for sale (*venditio bonorum*) with a view to satisfying the claims. The sale was conducted as an auction, the estate going to the highest bidder (*bonorum emptor*). The sale was not made at a fixed price, it was made to whoever offered the creditors cover for the highest quota of their total claims.

The *bonorum emptor* was, in a legal sense, considered to be the debtor's heir. He was therefore free to avail himself of the actions that had been brought against the debtor just as he could be sued by means of those actions that could be brought to bear against the same. The bonorum emptor could bring an action in two ways. Either by a so-called actio of *name changing* (see section 30) or by an actio known as *ficticia* (see section 16) where he would feign to be the heir. The two types of action are depicted by Gaius thus:

Gaius, Institutiones IV:
35. Similiter et bonorum emptor ficto se herede agit. sed interdum et alio modo agere solet: nam ex persona eius, cuius bona emerit, sumpta intentione conuertit condemnationem in suam personam. id est ut quod illius esset uel illi dari oportere, eo nomine aduersarius huic condemnetur. quae species actionis appellatur Rutiliana, quia a praetore Publio Rutilio, qui et bonorum uenditionem introduxisse dicitur, conparata est superior autem species actionis, qua ficto se herede bonorum emptor agit. Seruiana uocatur.

Gaius, Institutions, fourth book:
35. Similarly, the buyer of a bankrupt estate raises actions as a fictitious heir; but sometimes he prefers to raise an action in another manner. For, having raised the claim in the person of the one whose bankrupt goods he bought, he converts it to his own person in the condemnation, that is, the other party is condemned, for what was the bankrupt's or what was owed to him, in the name of the estate buyer. This kind of action is described as Rutilian because it was established by the praetor P. Rutilius, who is said also to have introduced this forced sale of property. The earlier kind of action, in which the buyer of the estate raises an action with the fiction that he is heir, is called Servian.

To avoid that enforcement proceedings subjected the debtor to infamy it was recognized in imperial times that debtors who became subject to such proceedings through no fault of their own (e.g. because they had been forced to succeed to a deceased person's insolvent estate) might hand over their estate to the creditors in a so-called *cessio bonorum* whereby no infamy arose.

In the post-classical period these enforcement forms were retained but they were supplemented by extended access to take individual objects in execution. This gradually became the common procedure. Furthermore, under Justinian, the so-called *beneficium competentiae* was recognized whereby limits were set as to the extent to which a creditor in pursuit of his rights could deprive a debtor of necessary possessions.

Where a debtor had taken measures detrimental to the interests of his creditors (*in fraudem creditorem*) the praetor might concede certain legal measures. Under Justinian, these were brought together in a single, particular actio known as the *actio Pauliana* against people who had obtained advantages at the creditors expense, even though they might have been acting in good faith at the time.

CHAPTER FOUR

Roman law of property

12. The Roman conception of property law

Roman property law presents many characteristic features. Although in Roman law we find the point of departure for the treatment of many questions of law concerning property which we still deal with today, classical Roman law presents several peculiarities, sometimes of a rather complex nature, the purposes of which must be known in order to understand how the system worked.

The *absolute* character of Roman ownership is often stressed. The meaning of this, is that the owner of an object basically has the right to dispose of the object as he sees fit. His right is not restricted to specialised faculties. It is the most embracing right of the thing. He also has the right to demand its return from anyone into whose hands it may unlawfully fall.

There were, however, in Roman law certain limitations which applied to the owner's right of disposal in relation to others. This manifested itself in rules of nuisance as well as rules for the protection of slaves and the right to transfer limited rights to others was also recognized e.g. in the form of a user's rights or servitudes. Roman law did, however, only recognize a limited number of *actiones in re* over the property of others. In this area also, the priority of ownership was preserved in that it came back into full vigour when the restricted rights lapsed.

Another characteristic feature was that the distinction between *real property* and chattels which plays an important role in present-day use of the many rules of property law, was considered of limited importance by the Romans (see however below section 16 on usucapio). What was of decisive importance, as to the rights one acquired at a property transfer, was not the distinction between real property and chattels but an ancient distinction between what was known as *res mancipi* and other things, *res nec mancipi*. Such res mancipi which mainly comprised land in Italy, slaves and beasts of burden (see below section 15) could only be transferred at particular ceremonies.

It was typical of the absolute nature of ownership that the Romans should view common ownership with scepticism and that, in their regulation, they should favour individual rights at the expense of common ownership. Among other things, this manifested itself in the decision as to whom the property rights devolved on, in the case of building or plantation on someone else's land. In this instance, a principle expressed as *superficies solo cedit* meant that the landowner always gained the property rights. The possibility of, for example, owner-occupied flats was thereby excluded since the owner of the site was always recognized as owner of the rest.

The Roman term for the right of ownership is *dominium* though sometimes it is also referred to as *proprietas*. It is of crucial importance to realize that the Romans had different types of ownership, in order to understand the Roman system. The starting point was the ownership known as quiritarian, *dominium ex jure Quiritium*, which devolved on Roman citizens only and which, now and again, required the observation of certain forms and rituals so that it could be transferred from one Roman citizen to another. Only land in Italy, not land in the Roman provinces, could be made the object of what was actually a property right. In the meantime in praetorian law an ingenious system had been evolved to protect the interests of a Roman citizen who had acquired something without fulfilling the conditions to acquire the particular quiritarian right, and sometimes even provided protection against the quiritarian owner. The praetor could offer such protection by granting the party concerned a legal position similar to that of the quiritarian owner. This particular title created through the praetor's protection was called *bonis habere* (see section 17).

What is equally important in this context is the part played by the notion of possession, *possessio*. Not everybody who might happen to hold something would be recognized in Roman law as the *possessor*. For that purpose, certain conditions had to be met. However, possession had important legal consequences attached to it in terms of protection of possession as well as possession progressing to outright ownership (see section 16 on *usucapio* and section 16 on *actio Publiciana in rem*).

The object of Roman property law was designated *res* (thing). Almost all things might qualify as objects of property law. A later term *res extra commercium* designated the items which could not be submitted to the law of private property. Gaius has listed some of the cases which belonged to this category. This concerns those objects designated as *res divini iuris* (those things that are the object of divine law), namely, *res sacrae* which comprised temples et al. along with *res religiosae*, graves and other things devoted to the gods of the underworld. Also outside the sphere of private property were what in Justinian law is called *res communes omnium*, things that were common to all such as air,

water or the sea along with *res publicae*, things that were public property such as harbours, arenas, theatres or market places. Such things could not, of course, be objects of the law of private property.

However, Roman law made some concessions in affording protection with a personal action for those who acquired such things not aware of their legal position, e.g.:

> Modestinus, regulae V (D. 18,1,62,1.):
> 1. Qui nesciens loca sacra vel religiosa vel publica pro privatis comparavit, licet emptio non teneat, ex empto tamen adversus venditorem experietur, ut consequatur quod interfuit eius, ne deciperetur.

> Modestinus, Rules, fifth book:
> 1. If a person unwittingly buys sacred, religious or public land as being private, then, although there is no valid purchase, he can nonetheless have the action on purchase against his vendor for the damage he has suffered.

The problems broached here really belong to that area of the law of obligations which addresses cases where the debtor is physically or legally in no condition to fulfil his obligation, i.e. a situation of impossibility. It is fitting at this point to take special notice of the consideration shown for the good faith of the buyer. Even if there was what we would call a legal impossibility in the case of the purchase of objects not subject to the law of private property, it was gradually recognized that the seller could incur a liability according to an *actio empti* or an *actio in factum* (see section 22) towards the purchaser when the latter was acting in good faith.

13. The treatment of slaves[1]

A characteristic feature separating to a particular degree Roman views on law from contemporary legal conceptions is that human beings could be considered to be *res* and as slaves be subject to the law of property[2]. The Roman sources of law mention *servus*, *homo* and *mancipium*, this last term reflecting the fact that slaves formed one of the most important groups of *res mancipi*. The legal

1. The literature available about slavery during antiquity is very comprehensive. See Buckland: *The Roman Law of Slavery*, 1908; M.I. Finlay (ed.): *Slavery in Classical Antiquity*, Cambridge 1960. An intriguing question is that of Roman law foundations of modern slave law, see e.g. A. Watson: *Slave Law in the Americas*, Georgia 1989.
2. Slavery was, however, very much in evidence in Germanic legal systems, on this see *Sklavenrecht zwischen Antike und Mittelalter I* by Herman Nehlsen, Göttingen 1972.

position of slaves was not in all respects the same as that of things in general. There was an evolution in this area, particularly during the Empire, which led to a series of restrictions being placed on the owner's right of disposal. In the meantime, the XII Tables had already granted slaves a special position in relation to other things. As is mentioned below (section 32), it was possible to demand compensation for bodily harm inflicted on a slave. The fine, however, was only half that charged in a case involving a free man. In other pieces of legislation, slaves were still viewed as objects. For example, the compensation for injury to a slave according to the famous *lex Aquilia* (section 33) was calculated in direct proportion to his market value. As mentioned earlier, the slave did not possess property. He might, however, dispose of a peculium placed at his disposal by his owner (*dominus*) and might render his master vicariously liable for tortious acts. As for his capacity to bind his master through entering an agreement see section 6 and below section 30 on *actiones adiectitiae qualitatis*. Slaves might furthermore be appointed testamentary heirs (the inheritance naturally devolved on the dominus), be members of religious communities and were entitled to rest in peace once buried. On the other hand, the *dominus* had, prima facie, an unrestricted right to chastise and even slay his slave and in the case of public prosecution, a slave, as opposed to a free person, could be subjected to torture. During the Empire, the view of the position of the slave changed. Though it was clear that the institution of slavery itself was not drawn into doubt[3], there were many interventions by the emperors in the field of the law of private property in order to ban cruel treatment of slaves. See Gaius *Institutiones* I, 53 and:

> Ulpian de officio proconsulis VIII sub titulo de dominorum saeuitia (=collatio legum mosaicarum et romanarum[4] 3,3,1-6 and D. 1.6.2):
> 1. Si dominus in servum saeuierit uel ad inpudicitiam turpemque uiolationem compellat, quae sint partes praesidis, ex rescripto diui Pii ad Aurelium Marcianum proconsulem Baeticae manifestatur. 2. Cuius rescripti uerba haec sunt: »Dominorum quidem potestatem in suos seruos inlibatam esse oportet nec cuiquam hominum ius suum detrahi: sed dominorum interest, ne auxilium contra saeuitiam uel famem uel intolerabilem iniuriam denegetur his, qui iuste deprecantur. 3. Ideoque cognosce de querellis eorum, qui ex familia Iuli Sabini ad statuam confugerunt, et si uel durius habitos, quam aequum est, uel infami iniura adfectos cognoueris, uenire iube, ita ut in potestatem Sabini non reuertantur. Quod si meae constitutioni fraudem fecerit, sciet me admissum seuerius executurum«. 4. Diuus

3. Apart from remarks to the effect that although warranted by *ius gentium*, slavery could hardly be recognized by *ius naturale* (see above, section 2).
4. A collection of Roman sources of law from the beginning of the fourth century A.D. which, as the title suggests, was intended to compare a set of rules from Mosaic law with some from Roman law.

etiam Hadrianus Vmbram quandam matronam in quinquennium relegauit, quod ex leuissimis causis ancillas atrocissime tractaret. 5. Item diuus Pius ad libellum Alfi Iuli rescripsit in haec uerba: »Servorum obsequium non solum imperio, sed et moderatione sufficientibus praebitis et iustis operibus contineri oportet. 6. Itaque et ipse curare debes iuste ac temperate tuos tractare, ut ex facili requirere eos possis, ne, si apparuerit uel inparem te inpediis esse uel atrociore dominationem saeuitia exercere, necesse habeat proconsul v.c., ne quid tumultuosius contra accidat, praeuenire et ex mea iam auctoritate te ad alienandos eos conpellere. Glabrione et Homullo cons.«

Ulpian, on the proconsular office, book eight, under the title of the cruelty of slaveowners:
What the governor must do when a slaveowner has mistreated a slave or forced him into unchastity or odious violence, is evident from Pius' rescript to Aurelius Marcianus, proconsul of Baetica. 2. The wording of the rescript is as follows: »The power of the owner over his slaves should be without restriction and no-one should deprive him of his right. But it is in the interests of the owner that assistance against cruelty, starvation and inadmissible violations should not be refused those who request it with good cause. 3. Therefore, examine the complaints of those from the household of Julius Sabinus who have fled to the statue. Should you then find that unjustifiably harsh action or that shameful wrongs have been inflicted on them, then ensure that they are put up for auction so that they do not fall back into the hands of Julius Sabinus. But should he act against my command, he must then know that I will punish this offence harshly«. 4. Hadrian once banished a woman by the name of Umbra for five years because for no good cause, she mistreated her maids. 5. After a request from Alfus Julius the deified Pius also wrote with the following words: »The obedience of slaves shall not be obtained solely through command but also with reasonableness, the provision of necessities and just actions. 6. Therefore it is up to you to treat your slaves fairly and with moderation so that, without difficulty, you may request their services so that the distinguished proconsul were it to transpire that the costs are too high for you or you exercize your power with cruelty should not feel the necessity in order to avoid riots and protect you from harm with the authority vested in him by me to force you to sell them. (152 A.D.)

The first of the imperial rescripts quoted above, mentions the right of asylum for slaves who sought refuge by the statues of the emperor. The protection in law that made the killing of slaves equivalent to manslaughter was first conceded during the reign of Constantine (Fourth century A.D.).

14. Nuisance

Another area where restrictions in property rights were recognized was in the relationship between neighbours. Roman law set certain limits on the extent to which a proprietor, in the exploitation of his property, could annoy others. Examples of remedies in such cases are the *cautio damni infecti* and *operis novi denuntiatio* which would protect neighbours who were endangered by the conditions of af run-down neighbouring house or by a new construction which could prevent him from using his property. *Aemulatio* is a later word for the use of one's property with the only intention to harm others. A text by Ulpians (D. 39,3,1,12) gives a person a right to divert his neighbour's water supply as long as it does not happen with the intent to harm (»animo ... nocendi«). The following well-known Ulpian fragment, quoting the jurist Aristo from the time of the emperor Trajan (98-117 A.D.) on the nuisance which a cheese factory may inflict illustrates the issue:

Ulpian, ad edictum XVII (D. 8,5,8,5 et 6):
5. Aristo Cerellio Vitali respondit non putare se ex taberna casiaria fumum in superiora aedificia iure immitti posse, nisi ei rei serviunt: nam servitutem talem admittit, idemque ait: et ex superiore in inferiora non aquam, non quid aliud immitti licet: in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat, fumi autem sicut aquae esse immissionem: posse igitur superiorem cum inferiore agere ius illi non esse id ita facere. Alfenum denique scribere ait posse ita agi ius illi non esse in suo lapidem caedere, ut in meum fundum fragmenta cadant. dicit igitur Aristo eum, qui tabernam casiariam a Minturnensibus conduxit, a superiore prohiberi posse fumum immittere, sed Minturnenses ei ex conducto teneri: agique sic posse dicit cum eo, qui eum fumum immittat, ius ei non esse fumum immittere, ergo per contrarium agi poterit ius esse fumum immittere: quod et ipsum videtur Aristo probare, sed et interdictum uti possidetis poterit locum habere, si quis prohibeatur, qualiter velit, suo uti. 6. Apud Pomponium dubitatur libro quadragensimo primo lectionum, an quis possit ita agere licere fumum non gravem, puta ex foco, in suo facere aut non licere. et ait magis non posse agi, sicut agi non potest ius esse in suo ignem facere aut sedere aut lavare.

Ulpian, Edict, book 17:
5. Aristo states in an opinion given to Cerellius Vitalis that he does not think that smoke can lawfully be discharged from a cheese factory onto the buildings above it, unless they are subject to a servitude to this effect, and this is admitted. He also holds that it is not permissible to discharge water or any other substance from the upper onto the lower property, as a man is only permitted to carry out operations on his own premises to this extent, that he discharge nothing onto those of another; and he adds that smoke just as well as water is discharge. Thus, the owner of the upper property can bring an action against the owner of the lower, asserting that the latter does not have the right to act in this way. Finally, he (Aristo) notes that Alfenus tells us that an action can be brought, alleging that a man does not have the right to hew

stone on his own land in such a way that broken pieces fall on to my (the plaintiff's) ground. Hence, Aristo holds that the man who leased a cheese factory from the authorities of Minturnae, can be prevented by the owner of the building from discharging smoke above it, but that the authorities of Minturnae are liable to him on the lease. He adds that in the action against the man who is discharging the smoke, the allegation can be made that he has no right to do so. Thus, on the other hand, an action will lie in which the plaintiff may allege that he has a right to discharge smoke; this also has Aristo's approval. Further, the interdict *uti possidetis* may be employed, if a man is prevented from using his own land in the way he wishes. 6. A doubt is raised by Pomponius in the forty-first book of his Readings, as to whether a man can bring an action alleging that he has a right or that another has no right to create a moderate amount of smoke on his own premises, for example, smoke from a hearth. He says that the better opinion is that such an action cannot be brought, just as an action cannot be brought to maintain that one has the right to light a fire or sit or wash on one's own land.

15. Acquisition of ownership by mancipatio, in iure cessio and traditio

A fundamental distinction within Roman property law extending even until classical times was the distinction between *res mancipi* and *res nec mancipi*, which in importance, as mentioned above, overshadowed that between real property and chattels. The distinction has its roots in the old Roman agrarian society but it persisted throughout the classical period and it was only under Justinian that it was rendered meaningless in law. Res mancipi was viewed by the Romans as a group of things which were typically used in agriculture. It comprised the soil itself (*fundus*, *praedium* or *solum*), though this only applied to Italian soil[5], it comprised slaves, certain animals, namely those which could be used for breeding purposes or as draught animals on a farmstead, e.g. horses, cows, donkeys, but not – and this is explicitly stated in the sources – dromedaries and elephants even when domesticated for use as beasts of burden; also dogs were not included in the category of *res mancipi*. Finally, certain servitudes, namely the vital rights of way and water rights were res mancipi. The meaning of the distinction between res mancipi and res nec mancipi, was, in classical times mainly rested in the manner of the *transaction*. The conveyance of the actual Roman civil property right (*dominium ex iure Quiritium*) to *res mancipi* had to take place under the observation of certain solemn formalities known as *mancipatio*, a sale made in the presence of witnesses where the price

5. On *solum provinciale* that in principle, belonged to the Roman people or the emperor, see section 17 below.

was symbolically weighed or *in iure cessio*, a kind of mock hearing before the praetor. Gaius informs us about the procedure involved in these forms of purchase, the origins of which lie far back in Roman legal history.

Mancipation went thus:

Gaius, Institutiones I:
119. Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam venditio; quod et ipsum ius proprium civium Romanorum est. eaque res ita agitur: adhibitis non minus quam quinque testibus ciuibus Romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit, rem tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO ISQUE MIHI EMPTUS ESTO HOC AERE AENEAQUE LIBRA; deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco. 120. Eo modo et seruiles et liberae personae mancipantur. animalia quoque, quae mancipi sunt, quo in numero habentur boues, equi, muli, asini, item praedia tam urbana quam rustica, quae et ipsa mancipi sunt, qualia sunt Italica, eodem modo solent mancipari. 121. In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae seruiles et liberae, item animalia, quae mancipi sunt, nisi in praesentia sint, mancipari non possunt – adeo quidem ut eum, qui mancipio accipit, adprehendere id ipsum, quod ei mancipio datur, necesse sit: unde etiam mancipatio dicitur, quia manu res capitur -, praedia uero absentia solent mancipari. 122. Ideo autem aes et libra adhibetur, quia olim aereis tantum nummis utebantur...

Gaius, Institutes, first book:
119. Mancipation, then, as we have also said earlier, is a sort of imaginary sale; it is also part of the law peculiar to Roman citizens. It is carried out as follows. There are brought together not less than five witnesses, adult Roman citizens, together with another of the same status, who holds bronze scales and is called »the scale-holder«. The person who is taking by mancipation, while holding the object says the following words: »I declare that this man is mine by quiritary right and let him be bought to me with this bronze and bronze scales«. Then he strikes the scales with the bronze, and gives it to him from whom he is taking by mancipation by way of a price. 120. Both slaves and free persons are mancipated in this way, as also animals which are capable of mancipation. In this category are counted cattle, horses, mules and donkeys; again any land, urban and rustic, which is itself capable of mancipation as is Italian land, is customarily mancipated in this way. 121. The mancipation of land differs from the mancipation of other things in this alone, that persons, slaves and free, and animals which are capable of mancipation, cannot be mancipated unless they are physically present. This is so true that it is necessary for the person who is accepting by mancipation to take hold of whatever is being transferred to him; this, too, is why it is called mancipation, because the thing is taken (capitur) by hand (manu). Land, on the other hand, is customarily mancipated in its absence. 122. The reason, then, for the use of the bronze and the scales is because in earlier times, men used only copper monies.....

Mancipatio was an abstract form of transfer which furnished the acquirer with the title irrespective of the nature of the legal background. It was, originally, a cash sale where the weight was used to weigh the purchase price disbursed in the form of copper (*aes*) pieces. It was not until the beginning of the first Punic war in 269 B.C. that copper was minted as coin in Rome[6]. In the meantime, the pontifical college had already recognized that the piece of copper in use, had only a symbolic value which meant that mancipatio could also be used for the presentation of gifts, for credit sales or in other circumstances where a transfer of ownership was desired without the need for immediate compensation. Mention was made of *mancipatio nummo uno* - with a single coin - a symbolic sale which is a good illustration of how the Romans adapted old rituals to the requirements of a new age.

On *in iure cessio* Gaius says:

Gaius, Institutiones II:
22. Mancipi uero res sunt, quae per mancipationem ad alium transfurentur; unde etiam mancipi res sunt dictae. quod autem ualet mancipatio, idem ualet et in iure cessio. 23. Sed mancipatio quidem quemadmodum fiat, superiore commentario tradidimus. 24. In iure cessio autem hoc modo fit: apud magistrarum populi Romani uel praetorem (uel apud praesidem prouinciae) is, cui res in iure ceditur, rem tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO; deinde postquam hic uindicerauit, praetor interrogat eum, qui cedit, an contra uindicet; quo negante aut tacente tunc ei, qui uindicerauit, eam rem addicit: idque legis actio uocatur. hoc fieri potest etiam in prouinciis apud praesides earum. 25. Plerumque tamen et fere semper mancipationibus utimur: quod enim ipsi per nos praesentibus amicis agere possumus, hoc non est necesse cum maiore difficultate apud praetorem aut apud praesidem prouinciae agere.

Gaius, Institutes II:
22. On the other hand, things capable of mancipation are those which are transferred to someone else by mancipation, which is just why they are so called. But an assignment in court has the same effect as a mancipation. 23. We explained in the previous commentary how a mancipation takes place. 24. Assignment in court, however, is done in this way: In the presence of a magistrate of the Roman people such as the Urban Praetor (or provincial governors) the assignee takes hold of the thing and says »I say that this slave is mine by quiritary right«; and then after he has made his vindication, the praetor asks the assignor whether he is making a counter-vindication. If he says that he is not or is silent the magistrate awards the thing to the person who vindicated; and this called an action in the law. This can also take place in the provinces in the presence of the governor. 25. But generally, in fact more or less always, we mancipate. For there is no point and no need to do

6. The unit of value during the late Republic and Empire was the Sestertius, four of which made up a Denarius.

> with greater difficulty in the presence of a praetor or the governor of a province what we can do ourselves in the presence of friends.

These peculiar and primitive ritual formulas were used by the Romans until the late classical period when they were buying slaves or other *res mancipi* from one another. However, as will be apparent immediately below, the veneration for the rituals of the past could lead to their being overtaxed and they were consequently replaced by *traditio*, an informal manner of transfer developed later on. Still, we must picture Cicero, Caesar or Seneca getting ownership of slaves under the exchange of the formulas of mancipation.

Mancipatio and in iure cessio could only be used by Roman citizens and only in respect to *res mancipi*. This, however, did not have the less acceptable consequence that foreigners could not acquire or transfer property rights or that a purchaser could not acquire the title to things that were not *res mancipi*, or again, that *res mancipi* conveyed by other means than those prescribed were not subject to property law. Different rules applied to these instances but in all these cases, legal protection in some form or other was conceded for the rights acquired.

Alongside the formal ceremonies of transaction, the Romans recognized the informal *traditio*, handing over the thing, as a basis for the acquisition of property. This was the way whereby Roman citizens acquired ownership (*ex iure Quiritium*) of items that were *res nec mancipi*. In the case of res mancipi, ownership was not acquired, only possession (*possessio*). This was remedied in the meantime by allowing possession to mature into full ownership at the expiry of a brief prescriptive deadline (see section 16 below on *usucapio*). If the assignor was a foreign citizen, a foreign slave dealer for instance, use could not be made of the two types of formalized transaction.

He could only transfer possession by means of *traditio*, this possession, however, was protected by the praetor just as though it was a title. The property right that devolved on Roman citizens acquiring *res mancipi* from the owner through *traditio* before the expiry of the prescriptive deadline was called an *in bonis* right (see on the means used by praetors to protect this form of ownership section 17).

The informal transfer by *traditio* differed from *mancipatio* and in *iure cessio* in other respects than just the form. At this point, particular notice should be taken of one thing. The two formal methods of transfer were, as mentioned above, *abstract* in the sense that they conveyed the title of property irrespective of whether a valid legal background existed or not. Traditio was, however, at least in the the 3rd century what we would call a *causal* legal transaction which means that one of the conditions for traditio to be legally binding was that there was a valid legal basis (*causa*) that could justify the transfer of title. This causa

could be sought in a legal transaction which lay at the root of the transfer or the fulfilment of a debt. The evaluation of whether the transfer had taken place for a valid reason – *ex iusta causa* – rested on different premises in the two cases. In the case of a legal transaction such as sale (*ex causa emptionis*) or a gift (*ex causa donationis*), the transaction had to be valid in law for traditio to be legally binding. However, should the causa consist of the fulfilment of a debt (*ex causa solutionis*) there was no requirement that the debt be validly contracted but that the title to what had been handed over was transferred independently.

Two remarkable texts deal with the conflict which could arise when the parties were in disagreement on the nature of the *causa* of the transfer:

Ulpian, Disputationes VII (D. 12,1,18 pr.):
Si ego pecuniam tibi quasi donaturus dedero, tu quasi mutuam accipias, Iulianus scribit donationem non esse: sed an mutua sit, videndum, et puto nec mutuam esse magisque nummos accipientis non fieri, cum alia opinione acceperit, quare si eos consumpserit licet condictione teneatur, tamen doli exceptione uti poterit, quia secundum voluntatem dantis nummi sunt consumpti.

Ulpian, Disputations, seventh book:
If I give you money as a gift but you receive it as a loan for consumption, Julian writes that there is no gift. But is it a loan for consumption? In my view, it is not. Furthermore, the property in the coins does not pass to the recipient, albeit his belief at the time of receipt was to the contrary. If he uses up the money, the *condictio* lies against him, but he will be able to meet it with the defense of fraud on the ground that it was in accordance with the will of the giver that the coins were used.

Iulianus, Digesta III (D. 41,1,36):
Cum in corpus quidem quod traditur consentiamus, in causis vero dissentiamus, non animadverto, cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi. nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus.

Julian, Digest, third book:
When we indeed agree on the thing delivered but differ over the reasons of delivery, I see no reason why the delivery should not be effective; an example would be that I consider myself bound under a will to transfer land to you and you think that it is due under a stipulation. Again, if I give you coined money as a gift and you receive it as a loan, it is settled law that the fact that we disagree on the grounds of delivery and acceptance is no barrier to the transfer of ownership to you.

These two texts which complement each other, are difficult to interpret and possibly a mere example for students and not the expression of a true conflict. It is often hard to see whether the particular conflicts dealt with by the jurists are fiction or reality. The problem in the first of the two texts arises because each of the parties held a different view of the legal transaction that formed the basis of the transfer. One party wants to make a gift while the other believes it to be a loan. Then, subsequently, each party wanted the other to regard it as he did. In the view of Ulpian, the transfer of property was invalid in this case. In principle, the return of the money could be sought by means of a *condictio*. Ulpian, however, seeks to give the recipient the possibility of objecting to the demand of restitution should the money have been spent, on the grounds that this was the original intention. The use of the objection of fraud seems to assume that the recipient was in good faith in believing that the giver intended the land or sum as a gift but how can this be when he believes this to be a loan? What Julian meant in the second text is unclear. He could hardly have been of the opinion that no demands should be made of a *causa* although it does look that way. It is a fact that Julian was in many ways a pioneer but with this he would have anticipated a development which did not start until Justinian. What he probably meant with this decision, in this particular instance, was that it would have been unreasonable to consider the transaction invalid because the parties disagreed on its legal basis when it was evident that a transfer was intended. This is clearly the situation in the case where the donor wants to make a gift and the donee believes it to be a loan. The situation might be different in the reverse case. It will be seen that Roman legal texts often raise more questions than they answer.

During the late classical period, mancipation and *in jure cessio* gradually fell into disuse to be completely abolished by Justinian along with the distinction between *res mancipi* and *res nec mancipi*. For this reason, *traditio* often appears on its own in the Digest where previously *mancipatio* and the like would have been.

16. Usucapio

The Roman institution of prescriptive right served another purpose than that which we attribute to it in modern practice.

The extent to which acquisition by prescription is at all referred to nowadays is usually as a means of establishing rights of servitude or sometimes, acquiring the title to small parcels of boundary land. Our system of registration has, in the main, made the acquisition of large areas of land by prescription, impossible.

Prescription in Roman law served a different purpose. It was, above all, the means whereby a transfer behind which there lay valid title in principle but was tainted by some legal deficiency, could be made into a valid acquisition.

In classical Roman law acquisition by presciption required a good title, a *justus titulus* and that the claimant had possession. There was also a requirement of *bona fides* with respect to the existence of the good title with the claimant. In this context this implies that the claimant was required to honestly believe that assignor was the owner of the thing or at least could lawfully assign it, e.g. as an agent or a guardian.

> Modestinus, Pandectae V (D. 50,16,109):
> »Bonae fidei emptor« esse videtur, qui ignoravit eam rem alienam esse, aut putavit eum qui vendidit ius vendendi habere, puta procuratorem aut tutorem esse.

> Modestin, Encyclopaedia, fifth book:
> »A purchaser in good faith« seems to be someone who did not know that the thing belonged to someone else or thought that the seller had the right to sell, for instance, a procurator or a tutor.

Good faith had to be present at the time the acquisition of the possession was initiated[7] whilst the circumstance that the acquirer might later be seen to be in bad faith (*mala fides superveniens*) did not prevent acquisition by prescription.

Another important area for usucapio was the creation of *dominium ex iure Quiritium* alongside with the right *in bonis* e.g. where an object that was *res mancipi* was transferred by *traditio*.

The period of prescription was brief. Two years, in the case of real property and one year for chattels. These brief deadlines, after the expiry of which the acquirer became owner *ex iure Quiritium*, were a counterbalance to the extensive rights of vindication discussed below. However, not all objects were subject to prescription. The XII Tables had already forbidden prescription of a stolen object (*res furtiva*), a concept that the Romans extended far. The rules of *usucapio* applied only to Roman citizens. So the acquirer had to be a Roman citizen and the item acquired must be the subject of *dominium ex iure Quiritium*.

For all titles of the acquisition of possession it was a requirement that there should be a *justus titulus*. In some rather special cases the question is discussed

7. When canon law in the Middle Ages took over the institution of prescription, it was required, in concordance with the normal requirement of canon law for sincerity in legal matters, that the good faith should endure throughout the entire period of prescription which, in canon law, could last from thirty to forty years.

what happened if the acquirer only believed that there had been a valid legal ground for acquisition of possession and subsequently it was disclosed that this had not been the case at all? The question arises here of the legal effect of the so-called *titulus putativus*. Roman jurists highly disagreed on this point as the following texts will make evident:

Ulpian, ad Sabinum XXX III (D. 41,3,27):
Celsus libro trigensimo quarto errare eos ait, qui existimarent, cuius rei quisque bona fide adeptus sit possessionem, nihil referre, emerit necne, donatum sit necne, si modo emptum vel donatum sibi existimaverit, quia neque pro legato neque pro donato neque pro dote usucapio valeat, si nulla donatio, nulla dos, nullum legatum sit. idem et in litis aestimatione placet, ut, nisi vere quis litis aestimationem subierit, usucapere non possit.

Ulpian, on Sabinus, thirty-first book:
Celsus, in his thirty-fourth book, says that those people are mistaken who hold that if a man takes possession of a thing in good faith, he can usucapt it as his own, and it is irrelevant whether he did or did not buy it, whether or not it was given to him, provided that he thinks he bought it or received it as a gift, because there is no effective usucapion if there is not, in truth, a legacy, a gift, or a dowry, although the recipient believes so. The same applies in respect of an award of the value in lieu of restoration of the thing itself in that unless the party concerned genuinely accepts an award of the value, the thing will not be open to usucapion[8].

Africanus, Quaestiones VII (D. 41,4,11):
Quod volgo traditum est, eum, qui existimat se quid emisse nec emerit, non posse pro emptore usucapere, hactenus verum esse ait, si nullam iustam causam eius erroris emptor habeat: nam si forte servus vel procurator, cui emendam rem mandasset, persuaserit ei se emisse atque ita tradiderit, magis esse, ut usucapio sequatur.

Africanus, Questions, seventh book:
The common opinion that one, who thinks himself to have bought something when in fact he has not, cannot usucapt, is, says (Julian), true insofar as the purchaser has no good ground for his mistaken belief; for if the slave or the procurator whom he charged to buy the thing should persuade him that he had bought it and, on that ground, deliver it, the better view is that uscapion will follow.

The problem is unsolved in classical law. Celsus and Ulpian did not think that prescription could be gained if there was a misconception as to the legal instance that formed the basis of the claim. Julian, referred to by *ait* (Africanus was his pupil and often cites his master, see above section 4) did believe, however, that prescription was only out of the question if the acquirer had no

8. See section 17 on litis aestimatio.

good cause for his misconception. Whereas some of the older Roman jurists such as Julian had recognised putative title, Roman law from Diocletian onwards took the opposite view.

The rules of prescription were complemented by other legal institutions. Usucapio only applied to things subject to dominium ex iure Quiritium and for that reason did not apply to real property in the Roman provinces. By means of the so-called *praescriptio longi temporis*, access was created for the prescriptive acquisition in such cases as well after a ten or twenty year deadline (for people within the same region or not, respectively).

Justinian welded the two institutions of prescription together and created the *usucapio ordinaria* (three years delay for chattels and ten to twenty for real property). In force alongside this was the so-called *usucapio extraordinaria* or *praescriptio longissimi temporis* which had a delay of thirty or forty years (thirty years normally and forty for certain complaints such as mortgage and claims against the church).

17. The protection of ownership and possession through interdicts, rei vindicatio and actio Publiciana in rem

For the protection of property rights, Roman law conceded to an owner an actio in *rem*, known as *rei vindicatio*. There were two versions of this actio, the principal one being the rei vindicatio *per formulam petitoriam*, which went thus:

> Si paret, illam rem, qua de agitur, ex jure quiritium Auli Agerii (AA) esse, neque illa res AoAo restituetur, quanti ea res est, tantam pecuniam Numerium Negidium AoAo condemnato, si non paret absolvito.

> Should it transpire that the disputed object belongs to the plaintiff by quiritarian right and that the said object is not restored to the plaintiff, then the defendant shall be sentenced to pay the plaintiff a sum of money equivalent to the value of the object in question, should it not, then the defendant must be acquitted.

By means of this complaint, the owner could claim the property from anyone in whose possession it might have fallen and who refused to hand it over. The possessor did not need to get engaged in litigation in the meantime, all he needed to do was return the disputed object. This followed from the *in rem* nature of the action. Should the possessor take the position that he would neither take part in litigation nor surrender the object, the plaintiff could cause the object to be produced by means of an *actio ad exhibendum* in the case of

chattels (the so-called *interdictum quem fundum* served a similar purpose in the case of real property). This action also enabled him to demand the separation of the object in case it had been incorporated in a greater whole.

A dispute on who was to have the possession (*possessio*) of the object would usually precede the action of vindication. The Roman doctrine on possession is one of the classics of jurisprudence and has been the subject of much debate. Therefore a brief outline of it will be sketched here.

Possession was originally a factual relationship to an object. Possession did not necessarily imply any right. Possession was often seen as an expression of material right though he who was in possession of something in bad faith would be considered possessor. It is important to keep possession and ownership separated – *nihil habet commune proprietas cum possessione* (ownership has nothing in common with possession) Ulpian said (D. 41,2,12,1) – but they do nonetheless clearly have many points in common.

Not everyone who actually had an object at his disposal would be recognized as its possessor. For that purpose certain conditions had to be met, expressed in the terms »*animo et corpore*«. The actual keeping in hand which did not have the nature of possession was designated *detentio*. Paulus defines in D. 41,2,31 those requirements of a possessio that could enjoy legal protection under the praetor's interdicts, thus: »We obtain possession by physical disposition and the will to dispose, not solely by either disposition or will« (Et apiscimur possessionem corpore et animo, neque per se animo aut per se corpore).

Many attempts have been made to find the basic underlying principle of the Roman doctrine of possession. In *Das Recht des Besitzes* (The Law of Possession), a most famous monograph of 1803, the German jurist F.C. von Savigny sought to place the emphasis on the will, *animus*, of the possessor which he explained was *animus domini*, the will to possess as owner. Later on in the nineteenth century, another view was expounded by another German jurist, R. von Jhering, which placed disposal, *corpus*, at the heart of the matter. Both theories can contribute in the illumination of the more obscure aspects of the Roman sources of law on possession. Roman law admitted protection of certain types of possession, even in the case of the possessor not wanting to seek ownership. This applied in four cases, namely, the holder of a pledge, certain categories of borrowers (in the case of what was known as *precarium*), *emphyteuta*, a sort of tenant as well as a *sequester*, a particular keeper of an object in dispute at court. These instances could be explained with Jhering's theory though not by von Savigny's. On the other hand it was contrary to Jhering's principle that a holder of a thing on somebody else's behalf, e.g. as a bailee, would have no protection as holder.

The Austrian Romanist Kaser has set up a historical explanation[9] which takes its point of departure in the protection of possession originally enjoyed by possessors of state land, *ager publicus*, wherefrom it was extended to other cases where there was a particular need for it. The purpose of the protection by praetor's interdict according to this point of view was to establish who was to be the defendant in a vindication trial. Pledge-holders, *emphyteuta* and sequesters, whose need for protection was particularly evident, were afforded the protection by interdict as well as the *precario tenens* whose possession was historically rooted in the transfer of *ager publicus* by sub-letting to clients and freedmen.

Where a long standing situation of possession had been infringed in that one of the parties had taken an object from the other, he who had lost his possession could try to obtain help from the praetor to restore the violated situation of possession. This took place in the form of a particular procedure of *interdict*. Had possession been removed from someone by force, he could demand its return with the help of the *unde vi* interdict as long as the use of force had taken place within the last year. In the meantime, he who had removed the possession could by means of an objection – *exceptio ritiosae possessionis* – make the point that the plaintiff had possessed the item unlawfully since he had acquired it through *vis*, *clam* or *precario ab altero* i.e. through violence, in secrecy or as a loan on demand with respect to the plaintiff. However, if the robbery of the possession had taken place with the help of armed men, the *interdictum de vi armata* could be used and the praetor made no exceptions in these cases.

The conflict over possession could have arisen as a dispute between several people about who should hold possession without anyone having dispossessed anyone else. In this instance, an interdictum *utrubi* was used in the case of chattels whereby possession went to the one who had held possession for longest in the past year. In the case of real property, an interdictum *uti possidetis*[10] pertained where possession went to the one who had or had been the last to have rightful possession of the property.

9. *Eigentum und Besitz*, p. 239 ff. and 270 f. A lucid presentation of the intricate rules of possession is to be found in the *Textbook of Roman Law* by J.A.C. Thomas, Amsterdam, 1976, p. 138 ff.
10. Interdicts took their names from the first word or words of their formulation in the praetor's edict: Uti, eas aedes quibus de agitur nec vi nec clam nec precario alter ab altero possidetis, quo minus ita possideatis vim fieri veto (Insofar that you possess the disputed buildings and no one takes possession from the other through violence, secrecy or on demand, thus shall you possess and I forbid the the use of force). For a description of the procedure *de armata* see Bruce W. Frier: *The Rise of the Roman Jurists Studies in Cicero pro Caecina*, P.U.C. 1985.

The decision of the question of possession had important consequences for the procedure of vindication. Whoever was granted possession in the procedure of interdict gained the advantage in terms of evidence. He could then expect his opponent to seek to win the object from him by means of a *rei vindicatio*, a precondition for this was, however, that the plaintiff could prove his better right to the object and this often proved to be extremely difficult. In the procedure about possession, the question of ownership was therefore also likely to be resolved.

Incidentally, this Roman distinction between a specific trial for possession (sometimes called *possessorium*) and one for ownership (*petitiorium*) had important consequences for subsequent European legal development, in that it formed the basis for the *exceptio spolii* recognized in canon law (on that basis, also an *actio spolii*) whereby a bishop driven from his possessions was not under any obligation to take part in any litigation until his possessions were restored to him. This exceptio and actio were extended to apply to others irrespective of how the possession had been lost. At the same time, secular law, in a continuation of Roman law, evolved a rapid legal means known as *summariissimum* where the question of possession was dealt with before the trial proper on real rights.

Where the owner of the object was successful in his demand by means of rei vindicatio, difficulties might arise as to the extent of the claim of vindication. What if the possessor had improved the item and what to do should he have enjoyed the benefits in all good faith? A couple of concrete decisions in an imperial decree of 239 A.D. sheds some light on these conflicts:

Imp. Gordianus A. Heresiano (C. 3,32,5):
Domum, quam ex matris successione ad te pertinere et ab adversa parte iniuria occupatam esse ostenderis, praeses provinciae cum pensionibus quas percepit aut percipere poterat et omni causa damni dati restitui iubebit. 1. Eius autem quod impendit rationem haberi non posse merito rescriptum est, cum malae fidei possessores eius quod in rem alienam impendunt, non eorum negotium gerentes quorum res est, nullam habeant repetitionem, nisi necessarios sumptus fecerint: sin autem utiles, licentia eis permittitur sine laesione prioris status rei eos auferre.

Emperor Gordianus to Heresianus:
A house which you prove to be yours since it is an inheritance from your mother and to have been unlawfully appropriated by your opponent, the provincial governor will order that it be restored to you along with any income from rent that your opponent enjoyed or may have enjoyed as well as compensation for any damage done. 1. It has rightly been decided that no consideration be taken of any expenses he may have incurred since possessors in bad faith have no claim for reimbursement of expenses that they, without acting as business agents for others, use on their own items, unless

they had necessary expenses; were they useful, however, they are allowed to remove their items without degrading the original condition of the object.

The conflict addressed here concerns a holder in bad faith (*malae fidei possessor*). He would have to restore any benefits received. In regard to expenses he had incurred on the property (*impensae)* a distinction was made between necessary and unnecessary expenses. It was no bar to a claim for necessary expenses that the holder had been in bad faith and such holder was also entitled to remove any improvements to objects made at his expense when such removal could be done without damaging the object itself (*sine laesione prioris status*).

For good faith holders the position was somewhat different as the following text by Celsus shows:

Celsus, Digesta III (D. 6,1,38):
In fundo alieno, quem imprudens emeras, aedificasti aut conseruisti, deinde evincitur: bonus iudex varie ex personis causisque constituet. finge et dominum eadem facturum fuisse: reddat impensam, ut fundum recipiat, usque eo dumtaxat, quo pretiosor factus est, et si plus pretio fundi accessit, solum quod impensum est. finge pauperem, qui, si reddere id cogatur, laribus sepulchris auitis carendum habeat: sufficit tibi permitti tollere ex his rebus quae possis, dum ita ne deterior sit fundus, quam si initio non foret aedificatum. constituimus vero, ut, si paratus est dominus tantum dare, quantum habiturus est possessor his rebus ablatis, fiat ei potestas: neque malitiis indulgendum est, si tectorium puta, quod induxeris, picturasque corradere velis, nihil laturus nisi ut officias. finge eam personam esse domini, quae receptum fundum mox venditura sit: nisi reddit, quantum prima parte reddi oportere diximus, eo deducto tu condemnandus es.

Celsus, Digest, third book:
You inadvertently bought land belonging to another, built and planted on it, and then were evicted by the owner; the good judges order will vary according to the people involved and the facts of the case. Suppose the owner would have done the same as you. In that case, in order to get his land back, he must pay your expenses to the extent that the value of the land has been increased, or if the increase in value is more than the expenses, then only the amount you expended. Suppose the owner is a poor man who, if made to pay such a sum, would have to give up his household gods and ancestral graves. In that case, it is enough that you be allowed to take away what you can from the building materials, so long as the land is not thus put in a worse condition than it would be in, if there had been no building. Our decision is that if the owner is prepared to pay the possessor as much as he would have if he took the materials away, he should have the power to do so. There must be no indulgence to malice. If, say, you want to scrape off plaster which you have put on walls, and deface pictures, that will serve no other purpose than to annoy. Suppose the owner is someone who wants to sell the land as soon as he gets it back; unless he pays what we said should be paid in the first case, then the judgement against you is reduced by that amount.

The jurist Celsus (second century A.D.) has, in this fragment, pointed out the various things that the good judge (*bonus judex*) should take into consideration when deciding whether someone who is losing something by vindication, is entitled to reimbursement for his expenses (*impensae*). The last part of the fragment (from »constituimus« – we demand – onward) must be an interpolation based on an imperial decree. However, it cannot be excluded that the rule on malice contained in it is older.

The means whereby those who had incurred expenses would advance their claims for refunding was the *exceptio doli*[11] which could be raised against the demand of vindication. When this exceptio was put forward the demand for vindication could not be acceded to before the plaintiff had satisfied the defendant. Until that point, the defendant was able to retain the object in dispute. Exceptio doli, expressed thus: »Si in ea re nihil dolo malo factum sit neque fiat« (if in this matter, there is or there will not be any act of deceit) originated in cases of fraud though its area of application was widened to include some cases where it seemed unreasonable or there was a conflict with *bona fides* – a concept used in its broad sense – if someone was able to make a legal claim without further ado. »Dolo facit qui petit quod redditurus est« (he acts with deceit who claims on that which is to be returned), as Paulus said in D. 44,4,8,pr.

Should the judge conclude that the possessor of a thing should return it, he would initially pronounce an order (*pronuntiatio*) giving the defendant the possibility to surrender (*restituere*) the item to prevent being ordered to pay. This was because *rei vindicatio* was an *actio arbitraria* where conviction could be avoided by returning the object in question. Establishing what amount the defendant had to pay (*litis aestimatio*) could be done by the judge carrying out an investigation so as to discover the true value of the object.

However, the judge could use the method of letting the plaintiff declare under oath the value represented by the object. This *iuramentum in litem* then formed the basis of the setting of the sum of condemnation. After this, the object itself devolved on the defendant. Somehow, he must thereby have acquired the legal status of an owner, the details of this however are unavailable.

The use of *rei vindicatio* did presuppose Quiritarian ownership. Therefore it could not be used by those who were not Roman citizens. Nor could it be used in the case of objects not subject to quiritarian property. In such cases a particular *actio* was used that aimed at undisturbed possession as opposed to outright ownership. Finally, the action could not be used in the case of an object that had not been transferred in the prescribed manner as was the case with *res mancipi* which had not been transferred by *mancipatio* or in *jure cessio* and where

11. See section 35 on *actio doli*.

ownership could only be obtained by the acquirer after the prescription deadline. What was the legal situation of the *bonitarian* owner in the period of transition until he became Quiritarian owner? The answer is that the praetor had created a particularly ingenious means of helping an *bonitarian* owner (and possessors in good faith *ex iusta causa*), namely, the so-called *actio Publiciana in rem* which was developed in Cicero's day (first century B.C.). This actio was known as an *actio ficticia* whereby it is implied that this actio was based on a fiction, namely that of the *in bonis* owner having become a Quiritarian owner. This took place by the praetor suggesting to the judge that he treat the case of property conflict as though the prescriptive deadline had expired. The formula for this sort of action where the *in bonis* owner could forward his claim of vindication was based on *rei vindicatio* with the addition of the fiction that the *usucapio* deadline had expired and went thus:

> Si quem fundum Aulus Agerius emit et is ei traditus est, biennio possedisset, tum si eum fundum quo de agitur eius ex jure Quiritium esse oporteret, neque is fundus (arbitrio judicis) restituetur, quanti ea res erit tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvito.
>
> If the piece of land that the plaintiff bought and it was handed over to him would have belonged to him in Quiritarian law under the condition that he had been in possession of it for two years, and if the piece of land will not be returned (according to the judgement), then as judge you must condemn the defendant to pay the sum of money which will correspondend to the value of the land or else acquit him.

In the case of a Quiritarian owner being faced with a demand for the surrender of his property, he could, in turn, claim his ownership by raising an *exceptio dominii*. If the owner was called Sempronius, the exceptio would look like this:

> »si non is fundus quo de agitur ex iure Quiritium Sempronii est.«
>
> »Unless the disputed property belongs to Sempronius by Quiritarian right.«

This exceptio could be countered by the plaintiff's objection that Sempronius had sold and handed over the object to him. This objection of *rei venditae et traditae* could put forward as a *replicatio*:

> »si non Sempronius eum fundum quo de agitur AoAo vendidit et tradidit.«
>
> »Unless Sempronius has sold and handed over the property to the plaintiff.«

If, however, it had been someone else who had unlawfully handed over the property of Sempronius then, of course, this replicatio could not be used.

Finally, mention should be made of the *actio negatoria* used by an owner against anyone trying to exercize a servitude on his property. In this case, rei vindicatio did not apply. Actio negatoria was countered by an *actio confessoria* whereby the holder of the servitude made it effective.

18. Alluvio, specificatio and accessio

Some of the conflicts at law which Roman jurists made much of were those that arose when the property of different people interconnected against the owner's will. Such conflicts are less frequent in practical legal life but so much the better suited as battlegrounds for theoretical hair-splitting.

We must probably suppose that it was more for the sake of education than as part of the execution of practical deed that the Romans made these issues the object of such meticulous scrutiny. We will examine a couple of examples of the rules in Roman law on conflicts of this kind. The first example from Justinian's Institute is about the case of *alluvio*.

Institutiones 2,1,20-21:
Praeterea quod per alluvionem agro tuo flumen adiecit, iure gentium tibi adquiritur, est autem alluvio incrementum latens. per alluvionem autem id videtur adici, quod ita paulatim adicitur, ut intellegere non possis, quantum quoquo momento temporis adiciatur.Quodsi vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit, palam est eam tuam permanere. plane si longiore tempore fundo vicino haeserit arboresque, quas secum traxerit, in eum fundum radices egerint, ex eo tempore videtur vicini fundo adquisita esse.

Justinian's Institutes, second book:
The law of all peoples makes yours any alluvial accretion which a river adds to your land. An alluvial accretionis is one which goes on so gradually that you cannot tell at any one moment what is being added. If the river's current tears however away a piece of your land and carries it down to your neighbour, it clearly remains yours. If after a longer period it attaches itself to the neighbour's land and trees which it took with it drove roots into that land, it will then have become part of his land and as such, his.

In order to illustrate the Roman reasoning in a couple of other instances, we will also mention the so-called *specificatio* which pertained in the case of a new object being the outcome of objects joined together:

Gaius, Res cottidianae sive Aurea II (D. 41,1,7,7):
Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species

effici possit: veluti si ex auro vel argento vel aere tuo vas aliquod fecero, vel ex tabulis tuis navem aut armarium aut subsellia fecero, vel ex lana tua vestimentum, vel ex vino et melle tuo mulsum, vel ex medicamentis tuis emplastrum aut collyrium, vel ex uvis aut olivis aut spicis tuis vinum vel oleum vel frumentum. Est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod Sabinus et Cassius senserunt, si non possit reverti, verius esse, quod Nervae et Proculo placuit. ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest: ac ne mulsum quidem ad mel et vinum vel emplastrum aut collyria ad medicamenta reverti possunt. videntur tamen mihi recte quidam dixisse, non debere dubitari, quin alienis spicis excussum frumentum eius sit, cuius et spicae fuerunt; cum enim grana, quae spicis continentur, perfectam habeant suam speciem, qui excussit spicas, non novam speciem facit, sed eam quae est detegit.

Gaius, Everyday issues or Golden words, second book:
When someone makes something for himself out of another's materials, Nerva and Proculus are of the opinion that the maker owns that thing because what has just been made previously belonged to no one. Sabinus and Cassius, on the other hand, take the view that natural reason requires that the owner of the materials should be owner of what is made from them, since a thing cannot exist without that of which it is made. Let us say, by way of example, that I make some vase from your gold, silver or copper or a ship, cupboard or benches from your timber, a garment from your wool, mead from your wine and honey, a plaster or eye-salve from your drugs, wine, oil or flour from your grapes, olives and ears of corn. There is, however, the intermediate view of those who correctly hold that if the thing can be returned to its original components, the better view is that propounded by Sabinus and Cassius but that if it cannot be so reconstituted, Nerva and Proculus are sounder. Thus, a finished vase can be again reduced to a simple mass of gold, silver, or copper; but wine, oil or flour cannot again become grapes, olives or ears of corn; no more can mead be reconstituted as wine and honey or the plaster or salve as the original drugs. In my view, however, there are those who rightly say that corn threshed from someone's ears of corn remains the property of the owner of the ears; for since the corn already has its perfect form while in the ears, the thresher does not make something new, but merely uncovers what already exists.

What we have here is a dispute on doctrine between the Proculean and Sabinian schools of thought. In and among the Digest and Institutes, these issues are mentioned though it is difficult to establish hard and fast criteria for the differences between these schools on this basis. In the long run, the middle solution quoted above triumphed through reiteration and was eventually authorized by Justinian.

Another familiar conflict attaches itself to the concept of *accessio* which occurs when things are joined without consequent production of a new thing. In this case, the Romans made the distinction between what could be considered

the main thing, the thing of primary importance, and what had to be viewed as the accessories.

Institutiones 2,1,33:
Litterae quoque, licet aureae sint, perinde chartis membranisque cedunt, acsi solo cedere solent ea quae inaedificantur aut inseruntur: ideoque si in chartis membranisve tuid carmen vel historiam vel orationem Titius scripserit, huius corporis no Titius, sed tu dominus esse iudiceris, sed si a Titio petas tuos libros tuasve membranas esse nec impensam scripturae solvere paratus sis, poteris se Titius defendere per exceptionem doli mali, utique si bona fide earum chartarum membranarumve possessionem nanctus est.

Iustitian's Institutes, 2,1,33:
Writing, even in letters of gold, becomes part of the paper or parchment, just as fixtures on or in land merge in the land. Suppose Titius writes a poem or a history or a speech on your paper or parchment. A judge will find that you, not Titius, are owner. But if you vindicate the books or papers and are not prepared to pay him for the expenses of writing, Titius will have the plea (exception) of deceit. That assumes he acquired possession of the paper or parchment in good faith.

19. Security by fiducia, pignus and hypotheca

The provision of security played an important part in Roman society. Arrangements purporting to secure one party against the other party's non-performance of his obligations are met with everywhere. In section 23 below examples of security placed in respect of performance of sales contracts are given. Other examples include requirements for security on the takeover of users (*usus* and *usufructus*), a dowry, etc. The security would be either personal, i.e. a guarantee, cf. section 20 or real in the form of a mortgage to secure the payment of a debtor's own debt or that of a third party.

The idea of raising capital for business purposes by means of mortgage was alien to Roman thinking and really belongs to the period around 1800 when in several European countries, an attempt was made to encourage the granting of credit through the tightening of rules governing the mortgage of real property. Therefore it was difficult to establish whether property or an object were subject to mortgage.

Fiducia was perhaps the earliest form of security. The arrangement involved an agreement made in connection with property transfers whereby the transferee was bound to reconvey the property to the transferor under certain provisions. The agreement was protected by an *actio fiducia*. In the event that the transferee would subsequently renege on the agreement he was in breach of trust and

liable to a conviction of infamy. Fiducia remained in use throughout the entire classical period alongside other forms of security.

Pignus and *hypotheca* were other variants of the law of mortgages and pledges. The Romans used the two expressions interchangeably. Pignus could signify both mortgage and pledge and the term hypotheca was also used about pledges.

Pignus must be the earliest of the two in the sense of pledge. Upon payment of his debt, the debtor might reclaim the object pledged on a contractual action, *actio pigneraticia directa*. Conversely, a creditor might recover expenses incurred for keeping it. Recovery of possession of the thing might also be claimed by the pledgor on an *actio hypothecaria* and his right of possession was protected in the same way as an owner's right by praetor interdicts.

In the event of a breach it is presumed that the creditor was free to keep the pledge without settling a surplus, if any, with the debtor. Later this arrangement required a special agreement, the so-called *lex commissoria*[12]. In classical times, however, it was more often the case that the pledgeholder could dispose of the pledged item and settle accounts with the pledger later (*pactum de vendendo, ius distrahendi*). Lex commissoria agreements were forbidden by Emperor Constantine in 326 A.D. as a way of protecting the interests of the debtor:

> Imp. Constantinus ad populum (C. 8,34(35),3):
> Quoniam inter alias captiones praecipue commissoriae pignorum legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri. Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteriti praesentia quoque depellit et futura prohibet, creditores enim re amissa iubemus recuperare, quod dederunt.

> Emperor Constantine to the people:
> Since the cruelty involved in the use of the lex commissoria, among other harmful dispositions, is on the increase, We hereby declare it to be invalid and that henceforth all memory of it will be erased. If anyone should be tormented by such a contract may this decree bring him relief, in that it along with the earlier provisions rescinds the existing ones and forbids them in the future. We do expressly order that the creditors, when they relinquish the item, shall be given back what they lent.

The pledgeholder could not use the pledge as he saw fit. If he did, he was guilty of theft according to an *actio furti* (see section 31). The same applied should he

12. Other than designating the agreement mentioned here, the term *lex commissoria* was also used in the case of the right of a vendor to rescind a purchase deal because of the delay of the purchaser in paying (see section 29).

dispose of it in spite of an agreement to the contrary. The creditor could, however, use the pledge insofar that there was a particular agreement that he could seek compensation through use of the property, the so-called *antichresis* (disposable pledge).

The recognition of a particular law of mortgage in Roman law was the result of prolonged development. Its origins are to be found in the contractual relationship between landowners and tenant farmers. *Colonus* was the designation for whoever leased a small plot of land for a fee to the owner. The basic legal position was designated *locatio-conductio* (see section 25 below). Should the colonus not fulfil his obligations, the owner of the land could obtain the praetor's assistance in seeking compensation through the items the colonus had brought with him, his *invecta* and *illata* as they were called. The legal means whereby the praetor secured the owner's right to satisfaction through those items was known as *interdictum Salvianum*. This interdict had the drawback that it was only available against the colonus himself and not against possible assignees. The praetor did later on concede the actio known as *Serviana* which, in an expanded form, also applied outside the tenancy relationship. The actio in question was known as the *actio quasi Serviana* (quasi: almost, as though) or *actio hypothecaria*.

Institutiones 4,6,7:
Item Serviana et quasi Serviana, quae etiam hypothecaria vocatur, ex ipsius praetoris iurisdictione substantiam capit. Serviana autem experitur quis de rebus coloni, quae pignoris iure pro mercedibus fundi ei tenentur: quasi Serviana autem creditores pignora hypotecasve persequuntur. inter pignus autem et hypothecam quantum ad actionem hypothecariam nihil interest: nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur. sed in aliis differentia est: nam pignoris appellatione eam proprie contineri dicimus, quae simul etiam traditur creditori, maxime si mobilis sit: at eam, quae sine traditione nuda conventione tenetur, proprie hypothecae appellatione contineri dicimus.

Institutes 4,6,7:
The Servian action and the quasi-Servian, called the action on a mortgage, are also praetorian. The Servian lies for claim to the goods of an agricultural tenant. These are security for the rent. The quasi-Servian action is used by creditors to enforce their pledges and mortgages. This action on mortgage draws no distinction between pledge and mortgage. Both terms can be used whenever debtor and creditor agree that some item of property shall be security for the debt. In some contexts there is a difference. For »pledge« properly applies to a thing which is immediately handed over to the creditor, especially to a movable, while we use »mortgage« in its narrower meaning, where the thing is charged by agreement, without being handed over.

To illustrate the large amount of detailed issues which might arise in Roman mortgage law a couple of characteristic decisions will follow below.

One condition for recognition of the mortgage was an underlying debt relationship. It was sometimes doubtful at which point in time a debt was to be deemed to have been established, which is evident from the fragment below, and which also goes to illustrate a typical situation, viz. a lease contract (for a bathhouse) requiring placing of security, in this context represented by a slave.

Africanus, Quaestiones VIII (D. 20,4,9, pr):
Qui balneum ex calendis Iuliis proximis conduxerat, pactus erat, ut homo Eros pignori locatori esset, donec mercedes solverentur: idem ante calendas Iulias eundem Erotem alii ob pecuniam creditam pignori dedit. consultus, an adversus hunc creditorem petentem Erotem locatorem praetor tueri deberet, respondit debere: licet enim eo tempore homo pignori datus esset, quo nondum quicquam pro conductione deberetur, quoniam tamen iam tunc in ea causa Eros esse coepisset, ut invito locatore ius pignoris in eo solvi non posset, potiorem eius causam habendam.

Africanus, Questions, eighth book:
A man who had rented baths from the first of the following month of July agreed that a slave Eros should be mortgaged to the lessor until the rent was paid. Before the first of July he mortgaged Eros to another creditor for a loan. Asked whether the praetor should protect the landlord against the latter creditor in a suit for Eros, he answered that he should. Although, when Eros was mortgaged, nothing was yet owing for rent, even then the position of Eros was that he could not be released from mortgage without the landlord's consent. So the landlord should have priority.

Claims could be subject to mortgage:

Paulus, ad edictum XXIX (D. 13,7,18 pr):
Si convenerit, ut nomen debitoris mei pignori tibi sit, tuenda est a praetore haec conventio, ut et te in exigenda pecunia et debitorem adversus me, si cum eo experiar, tueatur. ergo si id nomen pecuniarium fuerit, exactam pecuniam tecum pensabis, si vero corporis alicuius, id quod acceperis erit tibi pignoris loco.

Paulus, Edict, twentynineth book:
Suppose that it is agreed that my debtor's bond shall be your *pignus*. That agreement is to be respected by the praetor in such a way that assistance should be given to you in claiming the money and to my debtor if I should go against him. Thus, if the bond promised money, you will apply its money proceeds to your own claim, and if it promised a thing of some kind, whatever you get you will hold as a *pignus*.

Roman law also recognized general mortgages:

Ulpian, ad edictum LXXIII (D. 20,1,6 et 7):
Obligatione generali rerum, quas quis habuit habiturusve sit, ea non continebuntur, quae verisimile est quemquam specialiter obligaturum non fuisse, ut puta supellex, item vestis reliquenda est debitori, et ex mancipiis quae in eo usu habebit, ut certum sit eum pignori daturum non fuisse, proinde de ministeriis eius perquam ei necessariis vel quae ad affectionem eius pertineant.

Paulus, ad edictum LXVIII:
vel quae in usum cottidianum habentur Serviana non competit.

Ulpian, Edict, seventythird book:
A general mortgage of present and future assets does not cover things which someone is likely not to mortgage specially. Thus, the debtor must be allowed to keep household equipment, clothing and slaves so employed that he would certainly not want to mortgage them, for example, in servants essential to him or with whom he was on affectionate terms.

Paulus, Edict, sixtyeighth book:
And the Servian action does not lie for slaves in everyday service.

Although Roman law in the classical period did not acknowledge the so-called *beneficium competentiae* in case of enforced execution (indigence benefit as mentioned in section 11), apparently, there were limits to the extent one could divest a distinguished Roman of the requisites of everyday comforts.

When a creditor made use of the *actio hypothecaria* to obtain the delivery of what had been mortgaged in case of non-fulfilment and the debtor opposed delivery, the demand, just as in *rei vindicatio*, was converted into a demand for money (the *actio hypothecaria* was also an *actio arbitraria*). When determining the size of the monetary compensation the situation would differ according to whether the mortgage was for your own debt or that of a third party:

Ulpian, ad edictum LXXIII (D. 20,1,3):
Si res pignerata non restituatur, lis adversus possessorem erit aestimanda, sed utique aliter adversus ipsum debitorem, aliter adversus quemvis possessorem: nam adversus debitorem non pluris quam quanti debet, quia non pluris interest, adversus ceteros possessores etiam pluris, et quod amplius debito consecutus creditor fuerit, restituere debet debitori pigneraticia actione.

Ulpian, Edict, seventythird book:
If the mortgaged property is not handed over, the amount due from the possessor must be assessed by the judge, but differently against the debtor and other possessors. Against the debtor, the debt, which is the extent of the creditor's interest, is the maximum. Against others, the assessment can be greater and if there is a surplus, the creditor must pay it to the debtor by the action on mortgage.

Several rights of mortgage could be established on the same object and the individual pledgeholders went up the ladder of priority when the creditor ahead of them obtained satisfaction. Only the first in the line of priority had the right to dispose of the pledged item though subsequent pledgeholders did have the right to redeem priorities ahead of them (what was later on to be called *ius offerendi et succedendi*).

Characteristic of the development of mortgage law in the late classical period is the growing recognition of statutory general mortgage. Of particular importance to later legal development was the recognition of the mortgage right of minors on the fortune of their curator as well as a wife's mortgage right to enable the return of her dowry.

CHAPTER FIVE

Contracts

20. The concept of obligatio and the various types of contract[1]

In many ways Roman contract law was unique. To a modern reader whose point of departure is present-day law and its freedom of form and contract type the most salient feature is that the choice open to Roman contract partners was limited when they wanted to enter a contract. Prima facie, Roman law only recognized quite specific types of contract.

Agreements made outside the recognized forms were not protected in law as the actio necessary for their enforcement was lacking. Only gradually did the praetor recognize contract types other than the existing by extending granting of action to cases which did not fit the set forms. An example will illustrate the position: At an early stage the Romans would recognize a special type of informal sales agreement (*emptio venditio*) conditional upon mutual exchange of a piece of property and a purchasing sum.

In contrast, exchange relationships (*permutatio*) which are to a large degree similar to a sale were without legal protection until a special group of so-called *innominate* contracts which included the concept of exchange was recognized by the praetor. The individual contract relationships will be discusssed in detail later. At this stage it will suffice to note that the four types of contract recognized in Roman law were as follows:

Verbal contracts	(mainly *stipulatio*)
Real contracts	1) *mutuum* (loan for consumption)
	2) *commodatum* (gratuitous loan for use)
	3) *depositum* (gratuitous safe keeping)
	4) *pignus* (pledge)

1. A very stimulating up to date basic book on Roman Law of obligations is R. Zimmermann: *The Roman Law of obligations*, 1990.

Consensual contracts
1) *emptio-venditio* (sale)
2) *locatio-conductio* (hire and several other contracts)
3) *mandatum* (gratuitous service upon demand)
4) *societas* (partnership)

A last group was the so-called *literal* contract which in some cases could be linked to bookkeeping.

Another characteristic is that Roman contract law to a great extent was without the legal configurations which we have come to regard as essentials in a modern developed economic society today.[2] Indeed the economy of the Roman empire was at a stage so primitive that we would label it a third-world economy in modern parlance.[3]

Company law was not very well developed in Roman law. The limited liability company belongs to the period of development after the seventeenth century though not even the Roman concept of a liable partnership, as will become apparent in the discussion of the *societas* (section 25), had a suitable configuration to serve as a basis for large business operations. Thus, the possibility for establishing a limited liability company was utterly lacking. Companies with their own legal personalities were equally unknown. They presupposed a development which started in canon law in the 13th century with its completion in the romanistic theory of the 19th century.

The assignment of debts was alien to Roman law.

Though a legal state gradually developed through various constructions whereby an assignee of a debt would obtain the same legal status as the original creditor the process was difficult, and recognition of relationships similar to those arising with negotiable instruments and the extinction of defences and rights attached to such instruments was never reached. Security types of quite vital importance today such as money orders and especially bills of exchange are also much later developments. The banking system in Rome was primitive and would probably not go beyond deposits (*depositum*) and money transfers by written orders (*iussum*), which are treated in more detail in section 20. Long-term deposits involving interest accrual and granting of substantial credit seem to have been unknown. Indeed it would seem that in many of the provinces institutions of a banking character did not exist at all.[4]

2. On this see: *Law and Life of Rome* by Crook, p. 206 ff. as well as *Principles of Roman Law*, Oxford 1936 by Schulz.
3. See: *The Roman Economy* by Duncan-Jones, p. 1.
4. See: Duncan-Jones *The Roman Economy*, p. 300, Rostovzeff *An economic and Social History of the Roman Empire I*, second edition, 1967, p. 180 ff. and Crook *Law and Life of Rome*, p. 232.

Concepts such as copyright, patenting, competition rights and other immaterial rights were completely unknown.

The concept of direct representation i.e. when a person may acquire rights or assume obligations through another's legal transactions was unknown in Roman law in the case of relations between free persons (see more on this in section 30 on *actiones adjectitiae qualitatis*). This was partly compensated by the possibility to acquire rights through the legal transactions of a slave or a filiusfamilias, (see section 6 above and section 30) and by the *actio exercitoria* and the *actio institoria* (also section 30) in special cases.

In sale of goods law the rules on defective goods and defective title to goods were complex and originally deriving from a varity of sources such as aediles edicts or praetorian practice. At this point it may be noted that an informal sales agreement, *emptio venditio*, was only available for a sale of specific goods whereas a sale of unascertained (or generic) goods which was of vital importance e.g. in the corn trade, would require the use of the more complex stipulation form (section 21).

The practical form of Roman contract law and not least the transactions meant to be regulated thereby do seem, to modern eyes used to »capitalist« forms of law such as companies, securities, debt based credit, bulk purchase, etc., rather primitive in many ways but the rules fulfilled their task in Roman society. The disparity between an initially rather inflexible system of contract developed during the Republic and social realities was sometimes so pronounced that further development was necessary. Thus, the classical Roman jurists were successful in making the system work on several points. This was principally due to two factors. In part the development that took place of the concept of *bona fides* as an expression of the duties incumbent on the parties to a contract and partly the praetor's willingness to assist in the enforcement of informal agreements (*pacta*) which could either be independent in nature (*pacta praetoria*) or align itself with one of the recognized contractual conditions (*pacta adjecta*)[5].

The background for the development of the legal conditions necessary for a more advanced economy is not to be found in Roman law but in subsequent development. Roman law, however, is excellent when it comes to the rules of

5. Subsequent European legal development broke away from the narrow Roman contractual framework, see James Gordley: *The Philosophical Origins of Modern Contract Doctrine* (1991). Not least in the sphere of moral theology and in accordance with that, in canon law as well the validity of any agreement (*pactum*) was upheld. This was also the view of natural law and expressed in the formula »pacta sunt servanda«, Liebs: *Römisches Recht*, p. 219 ff. On later development, see: *Die vertragrechtliche Obligation bei den Klassikern des Vernunftrechts, Festschrift Welzer* by Wieacker, Berlin (1974), p. 7 ff.

the central law of obligations which determine the duties of the respective parties in a question of debt. In this or any case, by pointing out the significance of the concrete circumstances of the particular legal case, Roman legal thinking was singularly advanced. Also many rules of special contracts such as sale, agency, deposit etc. were very well developed and have been adopted by modern codifications.

Before describing specific contract relationships it is convenient to discuss the important concept of obligation.

The concept of obligation[6] which may be translated as the law governing debts was used in Roman law to designate a claim for debt or other obligation with the possibility of enforcement if the debtor failed to perform voluntarily.

The recognition of this concept was the result of lengthy legal evolution. The point of departure must be seen in the light of the fact that there is not necessarily a connection between *debt* and *liability*. So if we look at the oldest stages of Roman law as they are known to us, the assumption of a debt did not necessarily mean that there was the possibility of enforcing fulfilment thereof on the person in question. Promises were not automatically endowed with the force of law. That would require a particular assumption of the liability as well. The XII Tables recognized a set form whereby liability was assumed known as *nexum*. A famous passage of the Tables states the ensuing: »When one enters agreements or wants to lay hands on something, as the tongue has pronounced, it shall be law« (Table VI, 1) (Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto). *Nexum*, just like *mancipatio*, was carried out with scales and a piece of copper (*per aes et libram*) and general opinion held that it gave the creditor the right to exact personal execution from whoever had entered the obligation. *Nexum* is the oldest contract type which would cause liability to arise. Soon after, the area was extended with i.a. the *stipulatio* referred to below and the *actio de modo agri* guarantee (cf. below p. 124). The model must be sought in the law of delicts where it was customary to regard those who committed a harmful act as personally liable in the sense that the injured party or his family could avenge themselves on his person. Nexum is an artificial creation of this situation of liability. A later stage in the development seems to have been that personal liability made way for the demand for the actual compensation or payment that would end the liability, in the same way as the law of delicts acknowledged that the payment of a penalty would avert revenge. The legal duty is then shifted from liability to compensation and the debtor was considered to be bound to make a payment (*ligare* – to bind). The

6. See A. Watson: *The Roman Law of Obligations in the Later Republic*, Oxf 1965 and Jolowicz and Nicolas: *Historical Introduction*, p. 164 et seq.

circumstance that liability had been regarded as the primary aspect, was still the basis of the formula of *condemnation* where the fact that one could always pay a sum of money (*condemnatio semper pecunia*) reflected the thought of a solution by payment that removed liability.

In classical law the term obligatio covers both the active and passive sides of the debt relationship[7]. At the outset of the classical period, obligatio only designated obligations under *ius civile* though later on it included obligations under praetorian law as well. Roman law did not know of an expression equivalent to our »*claim*« versus *debt*. The active side consisted of the individual actions as they were effectuated by means of a formula. According to their origins in civil and praetorian procedures respectively, a distinction can be made between *actiones civiles* and *actiones honorariae*. The formula »dare facere oportere« was still reserved for *actiones civiles*.

Not all obligations had their corresponding *actio*. For example, engagements entered into by slaves or filiifamilias could not be enforced through an actio unless they came into the special instances where the praetor would concede an actio against the dominus or father. The engagements were, however, not invalid, they were characterized as natural obligations, *obligationes naturales*. Thus security in the form of mortgage or personal guarantee might be placed for such obligations. It was also possible to make them subject to *novatio* (section 21) or set-off while payments already made could not be reclaimed by *condictio indebitii*.

21. Stipulatio and suretyship

Stipulatio is one of the oldest types of Roman contract and typical of Roman law. It was a verbal contract, entered into by the use of certain very simple formulae:

> Gaius, Institutiones III:
> 92. Uerbis obligatio fit ex interrogatione et responsione, uelut DARI SPONDES? SPONDEO DABIS? DABO, PROMITTIS? PROMITTO, FIDEPROMITTIS? FIDE PROMITTO, FIDEIUBES? FIDEUBEO, FACIES? FACIAM. 93. Sed haec quidem uerborum

7. The position of Roman law on this issue was a point of controversy for a long time. In the seventeenth century, two jurists, the Frisian jurist *Ulric Huber* and the German *Feltmann* discussed the concept of obligatio. Feltmann understood this to be the passive side as opposed to the *actio* (*in personam*) as the active side of the relationship whilst Huber included both passive and active sides in his view of the concept of obligatio so that out of the relationship of obligation there arose an actio in personam on behalf of the creditor.

obligatio DARI SPONDES? SPONDEO propria ciuium Romanorum est: ceterae uero iuris gentium sunt, itaque inter homines, siue ciues Romanos siue pregrinos, ualent, et quamuis ad Graecam uocem expressae fuerint, uelut hoc modo δώσεις; δώσω· ὁμολογεῖς; ὁυολογῶ· πίστει κελεύεις; πιστει κελεύω· ποιήσεις; ποιήσω, etiam hae tamen inter cives Romanos ualent tamen, si modo Graeci sermonis intellectum habeant; et e contrario quamuis Latine enuntientur, tamen etiam inter peregrinos ualent, si modo Latino sermonis intallectum habeant, at illa uerborum obligatio DARI SPONDES? SPONDEO adeo propria ciuium Romanorum est. ut ne quidem in Graecum sermonem per interpretationem proprie transferri possit, quamuis dicatur a Graeca uoce figurata esse.

Gaius, Institutes III:
92. An obligation by words is created by question and answer, such as: »Do you solemnly promise to give? I solemnly promise. Will you give? I will give. Do you promise? I faithfully promise. Do you faithfully authorize? I faithfully authorize. Will you perform? I will perform«. 93. But note that the form using the term »solemnly promise«, in Latin »spondere«, is confined to Roman citizens; the others are part of the law of all peoples and so are valid between any parties, whether Roman citizens or foreigners. Even if they are put into Greek, like this, for instance: »Will you give? I will give. Do you promise? I promise. Do you faithfully authorize? I faithfully authorize. Will you perform? I will perform« they are valid between Roman citizens, provided that they **understand** Greek; conversely even if Latin is used the obligations are valid between foreigners, provided that they understand Latin. But the obligation using the form, »Do you solemnly promise to give? I solemnly promise« is so much confined to Roman citizens that it cannot properly be translated - not even into Greek, although the verb »spondere« is said to be derived from the Greek.

The entry into an agreement in the form of a stipulatio demanded that both parties were present and that their statements were in conformity. In his account on stipulatio Ulpian refers to a number of situations which might arise in that connection.

Ulpian, ad sabinum XLVIII (D. 45,1,1,pr.-4):
Stipulatio non potest confici nisi utroque loquente: et ideo neque mutus neque surdus neque infans stipulationem contrahere possunt: nec absens quidem, quoniam exaudire invicem debent, si quis igitur ex his vult stipulari, per servum praesentem stipuletur, et adquiret ei ex stipulatu actionem. item si quis obligari velit, iubeat et erit quod iussu obligatus. 1. Qui praesens interrogavit, si antequam sibi responderetur discessit, inutilem efficit stipulationem: sin vero praesens interrogavit, mox discessit et reverso responsum est, obligat: intervallum enim medium non vitiavit obligationem. 2. Si quis ita interrogavit »dabis«? responderit »quid ni«?, et is utique in ea causa est, ut obligetur: contra si sine verbis adnuisset, non tantum autem civiliter, sed nec naturaliter obligatur, qui ita adnuit: et ideo recte dictum est non obligari pro eo nec fideiussorem quidem. 3. Si quis simpliciter interrogatus responderit: »si illud factum erit, dabo«, non obligari eum constat: aut si ita interrogatus: »intra kalendas quintas«? responderit: »dabo idibus«, aeque non obligatur: non enim sic respondit, ut interrogatus est. et versa vice si interrogatus fuerit sub condicione, responderit pure, dicendum erit eum non obligari, cum adicit aliquid vel detrahit obligationi, semper pro-

bandum est vitiatam esse obligationem, nisi stipulatori diversitas responsionis ilico placuerit: tunc enim alia stipulatio contracta esse videtur. 4. Si stipulanti mihi »decem« tu »viginti« respondeas, non esse contractam obligationem nisi in decem constat. ex contrario quoque si me »viginti« interrogante tu »decem« respondeas, obligatio nisi in decem non erit contracta: licet enim oportet congruere summam, attamen manifestissimum est viginti et decem inesse.

Ulpian, Sabinus, fortyeighth book:
A stipulation can only be effected when both parties can speak and therefore neither a mute nor a deaf person nor an *infans* can contract a stipulation; nor, indeed, can someone who is not present, since they should both be able to hear. If, therefore, such a person wishes to make a stipulation, he does so through a slave who is present and acquires an action on a stipulation. Also if someone wishes to be bound by an obligation, let him order it and he will be bound in respect of the order. 1. When someone who is present asks a question but leaves before an answer is made to him, he makes an ineffective stipulation; if, however, he is present and asks, then leaves, and the reply is made to him on his return, he creates an obligation; for the interval in between does not vitiate the obligation. 2. If a man asks »will you give« and the other replies »why not«, he will certainly be in the position of being bound but not if he has nodded assent without speaking. For it is a matter not only of civil law but also of natural law that a man who nods assent in this way is not bound; and for that reason it is right to say that a guarantor on his behalf is equally not bound. 3. If someone who is asked without qualification replies »if such and such happens, I shall give«, it is clear that he is not bound; or if he is asked »within five days of the Kalends« and replies »I shall give on the Ides« it is equally clear that he is not bound; for he did not reply in the same terms as the question. And contrarywise, if he was asked conditionally and replied unconditionally, it must be said that he is not bound. When he adds anything to the obligation or subtracts from it, it is always agreed that the obligation is vitiated, unless the stipulator immediately approves the variation in the reply; for in that case another stipulation seems to have been contracted. 4. If, when I stipulate »ten«, you reply »twenty«, it is clear that an obligation has only been made for ten. Conversely, also, if I should ask for »twenty« and you reply »ten«, an obligation will only have been made for ten. For granted that the sum ought to be consistent, yet it is absolutely obvious that ten is part of twenty.

It was of no relevance to the validity of the contract whether it had been entered in writing. However, already in classical law, the written form gained significance as evidence that the contract had been entered into. As time went by, this developed into the settlement in writing (*cautio*) of an agreement becoming the decisive factor. Justinian was later to establish that the written document in itself was the proof of a *stipulatio* having been contracted and that this supposition could only be denied in certain circumstances such as when there was evidence that the parties could not have been present at the same time.

An important principle of Roman law was that a person could not, as a matter of course, be entitled or for that matter, placed under obligation by the contracts of a third party. The Romans could not conceive that rights could apply to others than those directly involved, therefore Roman law did not recognize the promises for a third party as being valid nor would it recognize direct representation. This universal basic rule that no-one could establish rights on behalf of and to the advantage of others was expressed clearly in connecting with *stipulatio*:

> Ulpians ad Sabinum IL (D. 45,1,38,17):
> Alteri stipulari nemo potest, praeterquam si servus domino, filius patri stipuletur: inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: cterum et alii detur, nihil interest mea. plane si velum hoc facere, poenam stipulari conveniet, ut, si ita factum non sit, ut comprehensum est, committetur stipulatio etiam ei, cuius nihil interest: poenam enim cum stipulatur quis, non illud inspicitur, quid intersit, sed quae sit quantitas quaeque condicio stipulationis.

> Ulpian, on Sabinus, fortynineth book:
> No one can stipulate on behalf of another, except where a slave stipulates for his master, a son for his father; for obligations of this kind were devised in order that each man should acquire for himself what is of benefit to him; but it is of no benefit to me that something should be given to another. Clearly, if I wish to do this, it is right to stipulate a penalty, so that, if things are not done just as was specified, the stipulation should apply even to the man who does not benefit; for when someone stipulates a penalty, the question under consideration is not what benefit there may be, but the extent and condition of the stipulation.

Thus, according to Ulpian, the promise of a contractual penalty was used as a circumventing transaction when establishing rights on behalf of a third party in that the aspect of interest did not apply in this case.

Stipulatio is comprised in the legal relationships we describe as *stricti juris*. Hence there would be no access for the defendant to set up defences unless he had done so in a specific plea contained in an *exceptio* before the praetor.

Thus the entering of a contract of sale would require that each party bound himself individually for the performance of the contract. Claims based on stipulation were enforceable by a *condictio certae creditae pecuniae* but only where a specific sum was involved. As mentioned above, this condition was developed on the basis of the *legis actio per condictionem* from the legis actio procedure which originally contained a request to the defendant to appear in court within thirty days. After the introduction of the formulary procedure the condictiones which were applicable in their abstract form irrespective of the

legal relationship involved, were used where a certain pecunia or other definite sum (*certa res)* was involved.[8]

The latter case was termed *condictio certae rei* or *condictio triticaria* as a reflection of the area in which it was commonly applied, viz. contracts for the sale of corn.[9] In the case of an unspecified payment, an *actio incerti ex stipulatu* was used.

The formulas for *condictio certae creditae pecuniae* and *condictio certae rei* were as follows:

Condictio certae creditae pecuniae:
Si paret Numerium Negidium Aulo Agerio duo milia sestertium dare oportere Numerium Negidium Aulo Agerio duo milia sestertium condemnato, si non paret absolvito.

Should it appear that the defendant owes the plaintiff two thousand sestertii then he must be sentenced to pay two thousand sestertii, if not, he must be acquitted.

Condictio certae rei:
Si paret Numerium Negidium Aulo Agerio tritici Africi optimi modios centum dare oprtere quanti ea res erit, tantam pecuniam condemnato, si non paret absolvito.

Should it appear that the defendant should deliver to the plaintiff one hundred measures of the finest African corn then he must be sentenced to pay as much as it is worth, if not, he must be acquitted.

The stipulation form was necessary for transactions for the delivery of goods defined according to genus (*in genere*) since the *emptio venditio* contract of sale was only available in a sale of specific goods (*in specie*). Such sale could also be governed by stipulation. In that case a seller's liability was different from the liability incurred in an *emptio-venditio* sale. By stipulatio, the seller was only

8. A stipulatio could also be *causal* i.e. expressly refer to the underlying legal relationship e.g. sale (ex empto). In that case, should the causal relationship not hold, the stipulation was void. According to French and Italian law - this not being directly derived from Roman law - a promise requires a legal basis (*causa*) in order to be valid. The German BGB does not, however, have such a requirement. Particularly on the relationship between causa and the requirement for consideration in English law: Buckland and McNair: *Roman Law and Common Law*, (1965) p. 221 ff.
9. As is known, the import of corn from Africa in particular, played a crucial role in Roman affairs, see for example, Rostovzeff (see footnote 51) p. 201 and on prices, Duncan-Jones (see footnote 51) p. 345 ff. The area of *condictiones* was later expanded to loans (*mutuum*) and during the Empire, to several similar cases where the purpose of the payment was not fulfilled (*datio ob causam, causa non secuta*), the purpose was illegal (*ob turpem causam*) or demand for repayment in case of payment due to incorrect assumption of debt (*condictio indebiti*).

liable for damage caused by his positive action, not for damage arising from omission[10].

Paulus, ad Plautium XVII (D. 45,1,91,pr.):
Si servum stipulatus fuero et nulla mora intercedente servus decesserit: si quidem occidat eum promissor, expeditum est. sin autem neglegat infirmum, utrum, quemadmodum in vindicatione hominis, si neglectus a possessore fuerit, culpae huius nomine tenetur possessor, an culpa, quod ad stipulationem attinet, in faciendo accipienda sit, non in non faciendo? quod magis probandum est, quia qui dari promisit, ad dandum, non faciendum tenetur.

Paulus, on Plautius, seventeenth book:
If I stipulated for a slave and before any question of delay arose, the slave died, if indeed the promisor killed him, the stipulation is actionable. But if, however, he neglects him when ill, the question of the promisor's liability depends on whether, as in the case of a vindicatio for the slave, the possessor is liable on the ground of negligence if he neglected him, as also should be one who promised delivery, or whether negligence in the case of a stipulation should be limited to commission and not omission. And this is the better view because one who promised to deliver is liable for giving not for acting.

This restriction of liability to positive acts was a result of the wording of the formula with stipulatio certae which read »*dare oportere*« in contrast to the contractual formula of contracts *ex bona fide* which read »*quiquid ex bona fide dare facere oportet*«.

The termination of the obligation created by stipulatio was effected by *acceptilatio* whereby the debtor would ask the creditor in prescribed form whether he had obtained satisfaction: »Quod ego tibi promisi habesne acceptum« (Have you received what I promised you) to which was answered »habeo« (I have).

One area in which the stipulatio form was important was with money advances as the real contract mutuum would not include entitlement to claim interest. Therefore interest payment had to be specifically agreed in stipulatio form. Money loans might also be established by stipulatio form in other cases though it is not always evident from the circumstances why they were granted.

One example may be seen from a formula concerning a money loan brought to light among several other Roman wax tables Roman in the course of some excavations in 1959. The table contains a plaint formula concerning stipulatio for a loan dated 52 A.D. So far this formula is the only one ever found concerning a concrete case. A possible explanation of the absence of seal witnesses is that the table may be only a draft prepared by one of the litigants for a document by which witnesses confirm that praetor has issued a formula of the tenor

10. In purchase (*emptio venditio*) there was liability according to the formula »quidquid dare facere oportere ex fide bona« also for behaviour incompatible with *bona fides*.

stated but that for some reason the final formula has not been prepared. It would seem that two different debt relationships are involved in the two tables which were to be decided by the same judge on the basis of a *conditio certae creditae pecuniae*.

In J.G. Wolf's reconstruction the contents of the tables found are as follows:

Ea res agetur de sponsione
C(aius) Blossius Celadus iudex esto
si parret C(aium) Marcium Satu(rninum)
C(aio) Sulpicio Cinnamo HS I)) m (dare)
oportere q(ua) d(e) r(e) agitur
C(aius) Blossius Celadus iudex C(aium)
Marcium Saturninum HS I)) m
C(aio) Sulpicio Cinnamo cond(em)nato
si non parret absolvito
C(aius) Blossius Celadus iudex esto
(si par)ret C(aium) Marcium (Satur)ninum
(C(aio)) Sulpicio Cinnam(o HS) I)) m m m
(d)are oportere q(ua) (d(e) r(e) agi)tur
C(aius) Blossius Celadus (i)udex
(C(aium)) Marcium Satu(r)ninum (HS) m m ((I))
(C(aio) Su)lpicio Cinnam(o con)demnato
si non parret absolvito
iudicare iussit P(ublius) Cossinius Priscus IIvir
(Actu)m Puteol(is)
(F)austo Cornelio Sul(la Fel)ice
(Q(uinto) Marcio barea Soreno Cos

This case is about a promise by stipulatio
Caius Blossius Celadus be judge
Should it appear that C. Marcius Saturninus
ought to pay C. Sulpicius Cinnamus the 6000 sestertii
that are the substance of this case,
C. Blossius Celadus as judge must
sentence C. Marcius Saturninus to pay the 6000 sestertii
if not, then he must be acquitted
C. Blossius Celadus be judge
Should it appear that C. Marcius Saturninus
ought to give C. Sulpicius Cinnamus the 8000 sestertii
that are the substance of this case
C. Blossius Celadus must as judge
sentence C. Marcius Saturninus to pay the 8000 sestertii
if not, then he must be acquitted
Publius Cossinius Priscus as duumvir ordered that
this case be tried
in Puteolis
whilst Faustus Cornelius Felix and
Q. Marcius Barea Soranus were consuls (52 A.D.).

Gaius devotes a lengthy explanatory discussion to the differences between the various forms of guarantee and the various laws which defined the legal position of the guarantor. We shall look at a couple of the rules that were characteristic of the three varieties of personal security. The most important were the two forms of stipulation *sponsio* and *fidepromissio* as well as *fideiussio* which eventually superseded the two others. A common feature of sponsio and fidepromissio was that they could only be used in connection with claims in stipulation form. Sponsio took place through the use of the formulas »idem spondesne« (do you promise the same) uttered by the creditor to the guarantor who then replied »spondeo« (I do so promise). This form could only be used by Roman citizens while others had to use the question »Idem promittis«. A further drawback of these formulas other than that they were solely connected to the verbal contract stipulatio, was that they lapsed upon the death of the guarantor. A fideiussor was available for all kinds of agreement, whether or not they had been reached *re*, *verbis*, *litteris* or *consensu* (as real, verbal, literal or consensual contracts). It would also bind any heirs of the fideiussor. The formula »(quod Titius debet) idem fide tua esse iubesne? iubeo« (what Titius owes, do you solemnly promise to do the same? I swear) was used to create a suretyship of fideiussio. Examples of this may be found in the contracts of sale reproduced in section 23 below.

If there were several guarantors, by fideiussio, each of the fideiussiors could originally be asked for the entire guaranteed sum. This was modified under Hadrian who, in a decree, introduced an institution later to be known as *beneficium divisionis* whereby the creditor had to seek a proportion of his claim from each of the solvent guarantors. In contrast sponsores and fideipromissores were liable only for a part proportional to the number of guarantors, whether they were all solvent or not.

In principle a creditor was free to choose whether to raise his claim for the debt against the principal debtor or against the surety. The so-called *beneficium ordinis* allowing the surety to claim prior establishment of the principal debtor's inability to pay was not introduced until Justinian. However, it was of some importance from whom the creditor claimed the debt. Thus if he failed to claim from a debtor who was solvent he might be sued in defamation by an *actio injuriarum* for the damage the debtor's reputation might have suffered by his appearing insolvent. On the other hand, if he claimed from the debtor and a subsequent action established that the debtor was unable to pay the claim against the surety was defeated. The effect involved here was called *consumptio litis* which would arise by *litis contestatio* in the course of the action against one of the parties. It is unsettled whether this litis consumptio effect would set in by all forms of suretyship but it is generally presumed that it would. The issue is related to the so-called correlate character of the guarantee obligation. In classi-

cal Roman law, where several debtors were liable, their liability was joint and several. Joint conditions of debt can be further classified in Roman law from the viewpoint of whether any suit against one of the debtors nullified the entire relationship or whether the complete repayment by one of the parties had that effect. The first type of joint conditions of debt were known as correal obligations. Should the nature of an engagement be that of a correal obligation, it not only meant that fulfilment by one of those under obligation extinguished the claim but also that any action (actio) brought against one of the debtors meant that the obligation of the other debtors lapsed when *litis contestatio* had begun. With *litis contestatio* the obligation simply fell away. This last rule was not repealed until Justinian's time.

The issue of the surety's possible access to recourse against the principal debtor was subject to special rules which were interrelated with the problems concerning assignment of debts. Only where the surety had accepted to guarantee the debt upon agreement with the debtor would the issue present few problems. For in that case the surety might apply a so-called *actio mandati contraria* (cf. below section 24) granting him a claim for the expenses he had incurred in the course of discharging the duties undertaken by him.

Outside this scenario matters were more complicated. After the satisfaction of his claim, the creditor was incapable of reassigning the claim to the surety as the claim had ceased to exist by litis contestatio. Nor could he have assigned the debt to the surety at an earlier stage because Roman law did not originally recognize that assignment of debt might be made.

In time, however, it became possible for another creditor to whom a claim had been assigned, to make use of an *actio utilis* which made his claim valid in competition with that of the original creditor. The effect on guarantee of all this was that it was recognized that the guarantor could seek recourse against the principal debtor as long as he had obtained the cession of the claim before the moment of *litis contestatio* in the case (against himself).

The construction by which the surety bought the claim from the creditor did not make possible the transfer of the action after the *litis contestatio*. The payment did not terminate the obligation because it was considered as the payment of the price for the action not as the payment of the debt. Classical Roman law already knew of such an assignment of a claim to the guarantor but it was only in Justinian's day that a general right to obtain the transfer of a claim against the principal debtor was conceded to the guarantor (*beneficium actionum cedendarum*). As mentioned in section 26 an agency construction was also possible by which the assignee was considered procurator in *rem suam* but the drawback of such arrangment was that the agency would lapse on the death of the assignee.

The guarantee obligations were collateral to the main obligation and not allowed to exceed such obligation. From this followed that the surety was entitled to raise the same defences as the debtor, e.g. for the termination of the debt or for its discharge on grounds of invalidity. This would not apply, however, where circumstances were involved which the guarantee was intended to secure the creditor against e.g. that the principal debtor was not bound himself (e.g. a slave or an impubes).

Under Justinian *sponsio* and *fideipromissio* were abolished and only *fideiussio* was retained as a guarantee.

A special rule attached to the non-entitlement of women to undertake guarantee obligations as provided in the famous *Senatusconsultum Velleianum* from the first century A.D. which is usually quoted as a manifestation of the »senile conservatism« which was prevailing in the Senate at the time. The rule provided that women should be barred from interceding, i.e. undertaking obligations on behalf of others e.g. by placing security for the debt of a third party or guarantee the repayment of a loan granted to a third party.[11]

Ulpian, ad edictum XXIX (D. 16,1,2,pr-1):
Et primo quidem temporibus diui Augusti, mox deinde Claudii edictis eorum erat interdictum, ne feminis pro viris suis intercederent. 1. Postea factum est senatus consultum, quo plenissime feminis omnibus subventum est. cuius senatus consulti verba haec sunt: »Quod Marcus Silanus et Velleus Tutor consules verba fecerunt de obligationibus feminarum, quae pro aliis reae fierent, quid de ea re fieri oportet, de ea re ita censuere: quod ad fideiussiones et mutui dationes pro aliis, quibus intercesserint feminae, pertinet, tametsi ante videtur ita ius dictum esse, ne eo nomine ab his petitio sit neve in eas actio detur, cum intercesserint pro viris suis, cum eas virilibus officiis fungi et eius generis obligationibus obstringi non sit aequum, arbitrari senatum recte atque ordine facturos ad quos de ea re in iure aditum erit, si dederint operam, ut in ea re senatus voluntas servetur.

Ulpian, Edict, twentynineth book:
Now, in the reign of the deified Augustus, and then soon afterwards in that of Claudius, it was forbidden by imperial edict for women to intercede on behalf of their husbands. 1. Thereafter, a senatus consultum was enacted by which help was given in a very full manner to all women; the wording of the senatus consultum follows: »Because Marcus Silanus and Velleus Tutor, the consuls, had written what ought to be done concerning the obligations of women who became debtors on behalf of others, the senate lays down the following: Although the law seems to have said before what pertains to the giving of verbal guarantees and loans of money on behalf of others for whom

11. On this, see: *Zur Geschichte des Senatus consultum Velleianum* by Dieter Medicus, Cologne 1957. This principle was retained for a very long time and was still mentioned by the nineteenth century lawyers.

women have interceded, which is that neither a claim by these persons nor an action against the women should be given, since it is not fair that they perform male duties and are bound by obligations of this kind, the senate considers that they before whom the claim would be brought on this matter would act rightly and consistently if they took care that with regard to this matter the will of the senate was observed.«

Another area where the stipulation form was used was that of *novatio* whereby an obligation was brought to an end by replacing it with a new one brought about by stipulation. Due to the difficulties associated with the recognition of the assignment of claims, this institution came to play a prominent role. A transfer of debt could also be carried out by *novatio*.

22. On real contracts, particularly mutuum

Roman contracts were classified according to the manner in which they were established. The decisive and legally binding factor that concerned real contracts was the handing over to the debtor of a sum of money along with a duty to restore the such sum. This payment was regarded as being *res* and consequently the contract was viewed as a real contract. The most significant of the real contracts was *mutuum* – a loan for consumption – the objects of which were money and other fungibles. No particular *actio* was connected to *mutuum*. The demand for repayment had to be advanced by means of the *condictio certae creditae pecuniae* mentioned in the previous section. The claim on the basis of the *mutuum* real contract could only comprise the sum handed over to the other. Where interest on the sum was desired such arrangement required a separate stipulatio as presented in the contract below (from 162 A.D.) since interest was not to be charged by way of such *condictio*:

Denarios LX qua die petierit probos recte dari fide rogauit Iulius dari fidepromisit Alexander Caricci: et se denarios LX, qui supra scripti sunt, mutuos numeratos accepisse et debere se dixit: et eorum usuras ex hac die in dies XXX (centesimas singulas) dari Iulio Alexandro eiue ad quem ea res pertinebit fide rogauit Iulius Alexander, dari fide promisit Alexander Caricci. id fide sua esse iussit Titius Primitius de sorte supra scripta cum usuris recte probe soluenda.

Actum Alburno Maiori XIII kalendas Nouembres Rustico II et Aquilino cos.
(Nomina signatorum)

In the case of sixty denarii in good coin which are to be payed upon demand, Julius Alexander is requested to give a promise and Alexander, son of Caricius, does promise to pay and declares that he has received the said sixty denarii as a loan and that he owes them. As to the interest which as of today is set at one percent per month, to be paid to Julius Alexander or to whom it

may devolve onto, Julius Alexander is asking for a promise and Alexander Caricius promises to pay. Titius Primitius places himself under obligation as a guarantor for the said sum including interest and all in good coin.

In Alburnus Maior, on the 20th of October whilst Rusticus, for the second time, and Aquilinus were consuls.

(Signatures).[12]

In the classical period, a maximum yearly rate of interest of 12 per cent p.a. or 1 per cent a month, the so-called *centesimae* was recognized. The common rate of interest was at 6 per cent (*usurae semisses*). Previously much higher rates had been recognized and for maritime loans the rate continued to be free.

Moneylending was a common business activity for wealthy Romans. On a professional basis, moneylending was carried out by the so-called *daneista* or *faenerator* (foenus loan) or *nummularii* or *mesularii*. The business carried out by the *argentarii* which was governed by various sets of special rules, was that closest to banking. It is difficult to get a clear picture of banking activity in Rome though there is no doubt as to the importance of the activities of the argentarii when it came to turnover. A special set-off rule also applied by which the *argentiarii* could only set up claims against their clients for the surplus of their total claim after deduction of their own debts to the client in question. Argentarii were also subject to a particular rule which meant that they could only set up a claim against their clients for the surplus to what they were owed after they themselves had set off what they owed to the client from the claim. Banking business seems to have included deposit with interest (*depositum irregulares*) or without interest in the case of *depositum* (*regulare*) where the money was not subject to further loan. Money was transferred from one place to another. Banking came to Rome from Greece[13] and was often in the hands of Greeks. The one man enterprise was the usual organisation and not large banking organizations set up on company lines.

The following fragment by Africanus sheds some light on the conditions for establishing *mutuum* and question of interest:

Africanus, Quaestiones VIII (D. 17,1,34 pr.):

Qui negotia Lucii Titii procurabat, is, cum a debitoribus eius pecuniam exegisset, epistulam ad eum emisit, qua significaret certam summam ex administratione apud se esse eamque creditam sibi se debiturum cum usuris semissibus: quaesitum est, an ex ea causa credita

12. On the basis of *FIRA* III nr. 122 and Bruns p. 352. From the Transylvanian Tables of 162 A.D. that were discovered in the first half of the previous century in what is now Rumania but used to be the province of Dacia.
13. On the loaning of money and banking in Rome, see Rostovzeff (footnote 51) p. 179 with notes, as well as Crook: *Law and Life of Rome* p. 232.

pecunia peti possit et an usurae peti possint. respondit non esse creditam: alioquin dicendum ex omni contractu nuda pactione pecuniam creditam fieri posse, nec huic simile esse, quod, si pecuniam apud te depositam convenerit ut creditam habeas, credita fiat, quia tunc nummi, qui mei erant, tui fiunt: item quod, si a debitore meo iussero te accipere pecuniam, credita fiat, id enim benigne receptum est. his argumentum esse eum, qui, cum mutuam pecuniam dare vellet, argentum vendendum dedisset, nihilo magis pecuniam creditam recte petiturum: et tamen pecuniam ex argento redactam periculo eius fore, qui accepisset argentum, et in proposito igitur dicendum actione mandati obligatum fore procuratorem, ut, quamvis ipsius periculo nummi fierent, tamen usuras, de quibus convenerit, praestare debeat.

Africanus, Questions, Eighth book:
A man who, as procurator, was administering the affairs of Lucius Titius, after recovering money from his debtors, sent him a letter in order to let him know that he had in his hands a certain sum resulting from his administration and that if it were lent to him, he would then owe it as a debt at six percent interest; the question was asked whether on that basis the money can be claimed as lent and whether the interest can be claimed. He (Julian) gave the opinion that it was not lent; otherwise it would have to be held that following any transaction money (due) could become a loan by bare agreement. And this was not the same as the case where, if it has been agreed that money deposited with you should be lent to you, it becomes a loan, because then the actual coins which were mine become yours; (nor) again as the case where, if I had authorized you to receive money from my debtor, it becomes a loan; for that is accepted as a matter of benevolent construction. (He went on to say that) from these remarks it could be argued that a man who, wishing to give money as a loan for consumption, had given silver to be sold would not, for all that, be right to claim the money as lent; and yet the money derived from the sale of the silver would be at the risk of the man who had received the silver. And, therefore, in the case under consideration, it must be held that the procurator would be liable under the action on mandate, to the effect that although the coins would be put at his risk, yet he ought to pay the interest on which there had been agreement.

Here, as elsewhere, Africanus seems to be repeating the opinion of his teacher, Julian. It is evident how it is maintained that mutuum can only be established by handover. The mere agreement that money held on behalf of others can serve as mutuum is not enough. However, a *mutuum* was recognized in the case of an order (*iussum*) to receive a sum, e.g. for a bank connection, to collect outstanding debt, though this is not the case in this instance. Therefore, one could not advance a claim on the money by using the loan action (the *condictio* referred to) which had not allowed interest payments either. In the case at hand, we are facing a procuratorship i.e. the situation where someone is appointed to administer someone else's property. The basis for this was the *mandatum* (see section 26 below). Julian therefore concludes that the money can be claimed through the mandatory complaint whereby the business initiator carries out the execu-

tion of his business that made liability for interest possible. Another question not really properly answered here is that of whether it is the procurator or the initiator who becomes the owner of the money received from the debtors. This question is related to the fact that Roman law did not recognize direct representation (see section 28 below). Therefore, the procurator became the owner of the money. The comparison with the deposit situation in the quoted text would seem to indicate that this was also Julian's view. Naturally, in the case of *mutuum* as with other legal transactions, a condition for taking up the obligation with legally binding effect was that the debtor was *sui juris*. A father or dominus was not liable for loans taken up by people who were not sui juris unless the granting of the loan took place in a legal circumstance with the presence of a particular *actio adjectitiae qualitatis* (see section 30 below) which was to the creditor's advantage. The credit rating of persons subject to someone else's potestas was, for that reason, not very high.

Originally, a claim against a *filiusfamilias* could be advanced when he became *sui juris* but in a famous senatorial decision, the *SC. Macedonianum* from Emperor Vespasian's time (69-79 A.D.), the background of which was that in order to become *sui juris*, a certain Macedo had tried to kill his father, it was decided that filiifamilias were not obliged to pay their debts issued from *mutuum*, even on becoming *sui juris*. The wording was preserved by Ulpian:

Ulpian, ad edictum XXIX (D. 14,6,1,pr.-1):
Verba senatus consulti Macedoniani haec sunt: »Cum inter ceteras sceleris causas Macedo, quas illi natura administrabat, etiam aes alienum adhibuisset, et saepe materiam peccandi malis moribus praestaret, qui pecuniam, ne quid amplius diceretur incertis nominibus crederet: placere, ne cui qui filio familias mutuam pecuniam dedisset, etiam post mortem parentis eius cuius in potestate fuisset, actio petitioque daretur, ut scirent, qui pessimo exemplo faenerarent, nullius posse filii familias bonum nomen exspectata patris morte fieri«. 1. Si pendeat, an sit in potestate filius, ut puta quoniam patrem apud hostes habet, in pendenti est, an in senatus consultum sit comissum: nam si recciderit in potestatem, senatus consulto locus est, si minus, cessat: interim igitur deneganda est actio.

Ulpian, Edict, twentyninth book:
The senatus consultum Macedonianum reads as follows: »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 wrongdoing, 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.« 1. Any uncertainty whether or not the son is in power, such as arises if his father is in enemy captivity, makes it uncertain whether or not the senatus consultum has

been contravened; if the son falls back into power, the senatus consultum will apply, otherwise not. Meanwhile, therefore, the action must be refused.

SC. Macedonianum contained an injunction for the praetor to generally refuse access to action (*denegatio actionis*) against the son of the household also in the case where, later on, he was no longer subject to patria potestas, unless the paterfamilias or the son himself after he had become *sui juris* acknowledged the debt obligation. The main motivation behind this senatorial decision according to the reasons stated was not a desire to protect the filiusfamilias but to ensure the head of the household against persecution and plots. The strong reproaches against the moneylenders were characteristic of this senatorial decision, they are a good illustration of the broader, moralizing and instructive style of the senatorial decisions which in principle were meant to be advice for the officials as opposed to the more peremptory fashion of the laws.

Real contracts form a heterogeneous group solely held together by the establishing element wiz. the handing over of a payment with the duty of restoration. Originally, their only protection seems to have been that of the praetor *in factum* and later on by a formula *in ius* concepta.

23. The contract of sale - emptio venditio

Emptio venditio is the term for the Roman contract of sale. The concept involved a contract based on consent entered only on the basis of the mutual agreement of the parties. A sale might also be agreed in the abstract *stipulatio* contract form which was indeed necessary where the sale involved unascertained goods or a credit sale since *emptio venditio* was only applicable in a sale of specific goods against cash.

The advantage of *emptio venditio* was, however, that the contract was mutually binding and of more importance - that this element brought the legal relationship under the special standard of honesty prevailing in the *bona fides* rules.

The special interest attached to the emptio venditio is not least attributable to the possibility it offers of following the development of the bona fides concept. Though the legal position of a buyer was hereby improved, the rules governing a seller's obligations under emptio venditio were still of such character as to require supplementary stipulations.

The *formula* for the buyer's *actio empti* (whose counterpart was the vendor's *actio venditi*) was couched *thus*:

Quod Aulus Agerius de Numerio Negidio fundum Cornelianum, quo de agitur, emit quidquid paret ob eam rem Numerium Negidium dare facere oportere ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvito.

As the plaintiff has bought the disputed Cornelian land, whatever it appears that the defendant should give and do in this instance according to the rules of bona fide is what the judge should sentence him to do, should it not appear so, he must be acquitted.

This formula which emphasized whether a breach of faith (*bona fides* breach) had occurred had been developed by praetor since the second century A.D. The origin of consensual contracts is uncertain but it is likely that they developed on the basis of old Roman concepts such as *fides* – and as regards mandatum also on *amicitia* (friendship) – in the process of the economic boom after the second Punian war (218-201 A.D.). The formula constitutes the basis both for determining a seller's obligations (*actio empti*) and, as an *actio venditi*, for those of a buyer.

A sale would require a subject matter of sale and a fixed purchase sum. No particular form requirements attached to the contract e.g. in respect of writing as Greek law dictated or for deposits etc. (arrha). Roman law was thus in this respect at a more advanced level than the other known legal systems of antiquity.

Gaius, Institutiones III:
139. Emptio et uenditio contrahitur, cum de pretio conuenerit, quamuis nondum pretium numeratum sit ac ne arra quidem data fuerit: nam quod arrae nomine datur, argumentum est emptionis et uenditionis contractae.

Gaius, Institutes III:
139. The contract of sale is concluded when the parties agree on the price. It makes no difference if it is not then paid or if no token of agreement is given. A token of agreement only goes towards proving that a contract of sale has been made.

In the classical period, the fixing of prices was unrestricted, later – probably under Diocletian – a change was made which meant that a claim for the annulment of the sale could be made, should the seller have sold an item for less than half its value. This was known as *laesio enormis* which is based on the idea that things objectively have a fair price (*iustum pretium*). This legal institution was revived during the reign of Justinian and in medieval moral theology this way of thinking was to be significant later on in the development of business ethics when it came to setting standards for how high the asking price could be for a given item.

A condition for entering a valid sales agreement was that the object for sale existed in fact and could be paid for. It was recognized, however, that a valid contract of sale could be concluded concerning objects which would only later come into existence (*emptio rei speratae*) e.g. next years harvest, which is a conditional sale, or an anticipated result or a purchase at chance (*emptio spei*) such as the catch of a hunting or fishing expedition (*captus*), which was an unconditional sale:

Pomponius, ad Sabinum IX (D. 18,1,8,pr.-1):
Nec emptio nec venditio sine re quae veneat potest intellegi, et tamen fructus et partus futuri recte ementur, ut, cum editus esset partus, iam tunc, cum contractum esset negotium, venditio facta intellegatur: sed si id egerit venditor, ne nascatur aut fiant, ex empto agi posse. 1. Aliquando tamen et sine re venditio intellegitur, veluti cum quasi alea emitur. quod fit, cum captus piscium vel avium vel missilium emitur: emptio enim contrahitur etiam si nihil inciderit, quia spei emptio est: et quod missilium nomine eo casu captum est si evictum fuerit, nulla eo nomine ex empto obligatio contrahitur, quia id actum intellegitur.

Pomponius, Sabinus, ninth book:
There can be no sale without a thing to be sold. Nevertheless, future produce and offspring are validly purchased so that when the offspring is born, the sale is regarded as having been complete from the time of agreement. But if the vendor takes steps to prevent the birth or the growing of produce, he will be liable to the action on purchase. 1. Sometimes, indeed, there is held to be a sale even without a thing, as where what is bought is, as it were, a chance. This is the case with the purchase of a catch of birds or fish or of largesse showered down. The contract is valid even if nothing results, because it is a purchase of an expectancy and in the case of largesse, if there is an eviction from what is caught, no purchase proceedings will lie, because the parties are deemed to have contracted on that basis.

It was not possible to buy a thing of one's own. This was a case of legal impossibility and agreements about impossible services were not valid. This was the point made by Celsus in his famous sentence (D. 50,17,185): »Impossibilium nulla obligatio est« (There is no obligation to the impossible). Starting with the concept of *bona fides*, there was, however, a development on this point in that although the definite majority of Roman jurists viewed a purchase as void, there was a definite wish to protect the buyer in good faith.

In the case quoted below, the ground given – »quia nulla obligatio fuit« – seems to deny responsibility according to the law of sales and only to grant the right to demand the return of the paid sum of purchase.

Pomponius, ad Sabinum IX (D. 18,1,16,pr.):
Suae rei emptio non valet, sive sciens sive ignorans emi: sed si ignorans emi, quod solvero repetere potero, quia nulla obligatio fuit.

Pomponius, Sabinus, ninth book:
Regardless of the purchaser's state of knowledge, purchase of one's own property is void; but if he bought in ignorance, he can recover the price he paid, because he was under no obligation.

In the case of actual impossibility such as a house, object of the sale, having burned down before the sale had been agreed, Roman jurists would sometimes make a subtle – and not always very transparent – evaluation of whether the object of the sale could still be said to exist, whereby one of the decisive factors was whether more or less than half of the house had been burnt down:

Paulus, ad Plautium V (D. 18,1,57,pr.-1):
Domum emi, cum eam et ego et venditor combustam ignoraremus. Nerva Sabinus Cassius nihil venisse, quamuis area maneat, pecuniamque solutam condici possi aiunt. sed si pars domus maneret, Neratius ait hac quaestione multum interesse, quanta pars domus incendio consumpta sit, quanta permaneat, ut, si quidem amplior domus pars exusta est, non compellatur emptor perficere emptionem, sed etiam quod forte solutum ab eo est repetet: sin vero vel dimidia pars vel minor quam dimidia exusta fuerit, tunc coartandus est emptor venditionem adimplere aestimatione viri boni arbitratu habita, ut, quod ex pretio propter incendium decrescere fuerit inventum, ab huius praestatione liberetur. 1. Sin autem venditor quidem sciebat domum esse exustam, emptor autem ignorabat, nullam venditionem stare, si tota domus ante venditionem exusta sit: si vero quantacumque pars aedificii remaneat, et stare venditionem et venditorem emptori quod interest restituere.

Paul, Plautius, fifth book:
I bought a house, both the vendor and I being unaware that it had been burned down. Nerva, Sabinus and Cassius say that even though the site remains, there is no sale and the price, if paid, can be recovered by condictio. But where part of the house is still standing, Neratius says that 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 he may have paid; if, however, half or less has been consumed by fire, then the purchaser will be required to honor 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. 1. Now if the vendor knew of the fire but the purchaser did not, 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 seller was only under an obligation to transfer the possession of the sold thing to the buyer and ensure the buyer's free enjoyment of it (*habere licere*). A characteristic rule of Roman law was that the seller did not have a duty to ensure that the buyer acquired the title to what was sold.

Ulpian, ad Sabinum XXXIV (D. 18,1,25,1):
Qui vendidit necesse non habet fundum emptoris facere, ut cogitur qui fundum stipulanti spopondit.

Ulpian, Sabinus, thirtyfourth book:
One selling land does not have to make the purchaser owner of the land as would one who promised land by stipulation.

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

Ulpian, ad edictum XXXIII (D. 19,1,11,2):
Et in primis ipsam rem praestare venditorem oportet, id est tradere: quae res, si quidem dominus fuit venditor, facit et emptorem dominum, si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum aut eo nomine satisfactum. emptor autem nummos venditoris facere cogitur.

Ulpian, Edict, thirtythird 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.

The condition set here that the purchase sum be paid was already found in the Law of the XII Tables.

It is doubtful what was the underlying cause of the unique position of defective title in Roman law. A possible explanation is that *emptio-venditio* may have originated from the relationship between Roman citizens and foreigners where there was no poossibility of transferring quiritarian ownership. The rule may be connected to practical difficulties encountered by the seller in substantiating his ownership.

Anyway, the sale in itself did not lead to a transfer of ownership even if the seller was the owner but to that end, the prescribed forms were available, namely, *mancipatio*, *in iure cessio* or *traditio*. On the other hand, however, the buyer oddly enough, assumed the risk of the object of sale already when making the purchase as expressed in the rule *periculum est emptoris*, a legal standpoint that must be seen in connection with the restriction of *emptio-venditio* to the sale of specified items.

The liability which could be placed *ex empto* in the case of *evictio*, covered the buyer's entire interest in the object lost through vindication (*eius quod interest*), the interest known as that of positive fulfilment:

Iulianus, Digesta XV (D. 21,2,8):
Venditor hominis emptori praestare debet, quanti eius interest hominem venditoris fuisse. quare sive partus ancillae sive hereditas, quam servus iussu emptoris adierit, evicta fuerit, agi ex empto potest: et sicut obligatus est venditor, ut praestet licere habere hominem quem vendidit, ita ea quoque quae per eum adquiri potuerunt praestare debet emptori, ut habeat.

Julian, Digest, fifteenth book:
One selling a slave will have to make good to the purchaser what it is worth to him that the slave belong to the vendor. Accordingly, if he be evicted in respect of the issue of a slave-woman or an inheritance that the slave accepted at his command, he can bring the action on purchase; and just as the vendor is bound to give free and uninterruptible possession of the slave whom he sells, so, equally he is liable to the purchaser for what the latter would acquire through the slave.

Liability in respect of defective title would comprise the total interest of the buyer, e.g. to include the child of a woman slave who would follow the mother and any incidental interest e.g. inheritance lost to a buyer along with a slave. Sometimes, however, a need to restrict such liability has apparently been felt:

Paulus, Quaestiones V (D. 19,1,43,i.f.):
De sumptibus vero, quos in erudiendum hominem emptor fecit, videndum est: nam empti iudicium ad eam quoque speciem sufficere existimo: non enim pretium continet tantum, sed omne quod interest emptoris servum non evinci. plane si in tantum pretium excedisse proponas, ut non sit cogitatum a venditore de tanta summa (veluti si ponas agitatorem postea factum vel pantomimum evictum esse eum, qui minimo veniit pretio), iniquum videtur in magnam quantitatem obligari venditorem.

Paulus, Questions, fifth book:
Next, as to the buyer's expenses in training the slave, I think the action on purchase suffices also for things of this sort; for it includes not just the price, but the buyer's entire interest in not losing the slave by eviction. Obviously, if you hypothesize that the price is now so greatly exceeded (by the slave's worth) that the seller gave no consideration to such an amount, for example, if you suppose that a slave sold for a small price was evicted after being made a charioteer or a stage dancer, then it seems unfair that the seller be obligated for a great amount.

Since the damage suffered by the buyer in the case of the loss through vindication of a thing could be difficult to gauge, it was often the case that an agreement in the form of a stipulation was reached in connection with the sales agreement, whereby the seller undertook to pay, as a rule, twice the value of the thing to the buyer in case of loss through eviction, this was known as *stipulatio duplae*. Its origin is probably to be found in the liability known as *auctoritas* which lay with a seller who transferred his goods to the buyer by *mancipatio*.

This liability involved an obligation to provide a guarantee against defective tide, that was exactly twice the price of the object. Should the transfer have taken place by traditio in connection with emptio-venditio, any liability would have had to be specifically arranged. We do have examples of this in surviving legal documents from the Roman Empire that contain this particular liability adopted by stipulation in contracts of purchase (see text p. 170 below).

On one point there was an attempt to remedy the unreasonableness towards the buyer inherent in the fact that he could invoke the seller's liability for defective title only after having lost the thing through eviction. It was the jurist Africanus, a pupil of Julian, who tells us of the exception Julian would make in the case of the seller having acted fraudulently:

> Africanus, Quaestiones VIII (D. 19,1,30,1):
> Si sciens alienam rem ignoranti mihi vendideris, etiam pruisquam evincatur utiliter me ex empto acturum putavit in id, quanti mea intersit meam esse factam: quamvis enim alioquin verum sit venditorem hactenus teneri, ut rem emptori habere liceat, non etiam ut eius faciat, quia tamen dolum malum abesse praestare debeat, teneri eum, qui sciens alienam, non suam ignoranti vendidit: id est maxime, si manumissuro vel pignori daturo vendiderit.

> African, Questions, eighth book:
> If you knowingly sell another's object to me and I am unaware of this, he (Julian) thought that even before an eviction I will succeed in an action on the purchase to the extent of my interest in the thing becoming mine. Although this is normally the case that the seller is liable only for the buyer's having quiet possession and not for making the object his property, still if a person knowingly sells to an unwitting buyer an object that is another's and not his own, he is liable; for he should be held responsible for there being no bad faith, and this especially if he sells to someone who will manumit or give in pledge.

The seller was liable for *licere habere* and for there being no deceit. Here, Julian was pointing out a way to circumvent the principle of eviction. If the buyer wanted to get rid of the item, he was then, of course, in a very weak position since that option was closed to him even if the object were not subject to vindication. Julian's rule is, however, certainly not restricted to this particular case but applies to all situations of *dolus malus*.

The rules of *emptio venditio* only applied in a sale of individually ascertained goods. It is important to note that the original application of *emptio venditio* was thus restricted to the transfer of specific objects. A sale of generic goods, e.g. »a hundred bushel of African wheat« would require *stipulatio*. On the background of this restriction of the *emptio venditio* the rules on defective goods and the rules on passing of risk must also be deemed to be limited to specific goods. The object to be transferred was usually present at the agreement of the pur-

chase. This was necessary when there was a transfer of ownership in the form of *mancipatio* or *in iure cessio*, for immovables represented by a symbol, and this, of course, also applied to *traditio*. Although the principle of *caveat emptor* (buyer beware) is not Roman in this form, a similar rule did initially apply barring the buyer from making the seller liable for defects after he had had the opportunity to examine the item. There was a particular exception only in the case of real property. Had the transfer taken place by *mancipatio* and the seller had guaranteed that the area sold was of a certain size, the buyer could then make him liable for the missing acreage through an *actio de modo agri*. It should be noted that in the case of mancipatio of real property there was no requirement for the presence of the property itself.

On the obligation to guarantee the fulfilment of agreements reached through mancipatio the XII Tables provided:

Lex XII tabularum, tabula VI:
1. Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto.
2. Cum ex XII tabulis esset ea praestari, quae esset lingua nuncupate, quae qui infitiatus esset, dupli poenam subiret, a juris consultis etiam reticentiae poena est constituta.

XII Tables, sixth table:
1. When one enters an agreement or wishes to lay hands on something, it shall be as the tongue has spoken.
2. Since, according to the XII Tables, liability was only for what had been pronounced, he who denied was to pay a fine of twice the amount which, later on, the jurists were to establish also in the case of silence.

The rules governing the seller's liability for defects which were eventually developed in Roman law did not stem from this particular instance of liability but from the rules set down by the curule *aedile* governing trade in the market place. The curule aedile was a Roman official whose office comprised police supervision. He was charged with the inspection of public amusements, public places and markets. In his edict, he would prescribe in greater detail, the rules governing trade in the marketplace. The wording of this edict was preserved by Ulpian and enables us to see how there were regulations for the sale of slaves as well as for the sale of cattle:

Ulpian, ad edictum aedilium curulium I (D. 21,1,1,-2):
Aiunt aediles: »Qui mancipia vendunt certiores faciant emptores, quid morbi vitiive cuique sit, quis fugitivus errore sit noxave solutus non sit: eaque omnia, cum ea mancipia venibunt, palam recte pronuntianto. quodsi mancipium adversus ea venisset, sive adversus quod dictum promissumve cum veniret, fuisset, quod eius praestari oportere dicetur: emptori omnibusque ad quos ea res pertinet iudicium dabimus, ut id mancipium redhibeatur. Si quid autem post venditionem traditionemque deterius emptoris opera familiae procuratorisve

eius factum erit, sive quid ex eo post venditionem natum adquisitum fuerit, et si quid aliud in venditione ei accesserit, sive quid ex ea re fructus pervenerit ad emptorem, ut ea omnia restituat. item si quas accessiones ipse praestiterit ut recipiat. item si quod mancipium capitalem fraudem admiserit. mortis consciscendae sibi causa quid fecerit, inve harenam depugnandi causa ad bestias intromissus fuerit, ea omnia in venditione pronuntianto: ex his enim causis iudicium dabimus«. 2. Causa huius edicti proponendi est, ut occuratur fallaciis vendentium et emptoribus succurratur, quicumque decepti a venditoribus fuerint: dummodo sciamus, venditorem, etiamsi ignoravit ea quae aediles praestare iubent, tamen teneri debere, nec est hoc iniquum: potuit enim ea nota habere venditor; neque interest emptoris, cur fallatur, ignorantia venditoris an calliditate.

Ulpian, Curule Aedile's Edict, first book:
The aediles say: »Those who sell slaves are to apprise purchasers of any disease or defect in their wares and whether a given slave is a runaway, a loiterer on errands or still subject to noxal liability; all these matters they must proclaim in due manner when the slaves are sold. If a slave be sold without compliance with this regulation or contrary to what has been said of or promised in respect of him at the time of his sale, it is for us to declare what is due in respect of him; we will grant to the purchaser and to all other interested parties an action for rescission in respect of the slave. The purchaser, however, will have to make good in such cases all of the following: any deterioration in the slave after the sale and purchase which is attributable to the purchaser himself, his household or procurator; anything born of or acquired through the slave since the sale; and anything else that accedes to the slave consequent upon the sale or any profits which the purchaser acquires through him. Equally, there will be due to the vendor any accessories which he himself may have provided. Again, vendors must declare at the time of sale all that follows: any capital offense committed by the slave; any attempt that he has made on his own life; and whether he has been sent into the arena to fight wild animals. On these grounds, also we will give the action. In addition, we will grant the action if it be alleged that a slave has been sold, with deliberate wrongful intent, in contravention of our provisions.« 2. This edict was promulgated to check the wiles of vendors and to give relief to purchasers circumvented by their vendors. It must, however, be recognized that the vendor is still liable, even though he be unaware of the defects which the aediles require to be declared. There is nothing inequitable about this; the vendor could have made himself conversant with these matters; and in any case, it is no concern of the purchaser whether his deception derives from the ignorance or sharp practice of his vendor.

As to the purchase of livestock, the following applied:

Ulpian, ad edictum aedilium curulium II (D. 21,1,38,pr.):
Aediles aiunt: »Qui iumenta vendunt, palam recte dicunto, quid in quoque eorum morbi vitiique sit, utique optime ornata vendendi causa fuerint, ita emptoribus tradentur. si quid ita factum non erit, de ornamentis restituendis iumentisve, ornamentorum nomine, redhibendis in diebus sexaginta, morbi autem vitiive causa inemptis faciendis in sex mensibus, vel quo minoris cum venirent fuerint, in anno iudicium dabimus«.

> Ulpian, Curule Aedile's Edict, second book:
> The aediles say: »Those who sell pack and draught animals must declare with all due publicity any disease or defect which the beasts have and must deliver them to purchasers in the best trappings in which they were displayed for sale. Should this not be complied with, we will grant an action for the trappings within sixty days; but if the sale is to be rescinded because of a defect in or disease of the beast, the action will lie for six months, or if a diminution of the price be sought, for a year.«

According to these rules, when offering slaves or draught animals for sale, the seller had a duty to inform potential buyers whether they had any defects due to disease or other causes (*morbus* and *vitium*). Were he not to do this or were he to declare the item sound and free of defects, he incurred a liability for such declaration towards the buyer who then, should it prove necessary, had the right to rescind the purchase by means of the *actio redhibitoria* which had to be brought to bear within six months. Where the purchaser wanted to maintain the purchase, he could already in classical times, avail himself of the *actio quanti minoris* whereby he could within a year, demand a proportional reduction in the sum of purchase. As to the buyer's exercise of these rights, it was irrelevant whether the seller had acted in good or in bad faith. Alongside the liability for those shortcomings mentioned in the edict, the seller was also liable if he had given a guarantee or had acted deceitfully.

In order to overcome the brief timelimits laid down in the aedilic actions, a buyer could also demand that the seller assume the responsibility for these particular defects via stipulation. We have preserved a document[14] from the province of Dacia in 142 A.D. concerning the sale of a slave, which shows this stipulated responsibility:

> Dasius Breucus emit mancipioque accepit puerum Apalaustum, sive is quo alio nomine est, natione Graecum, apocatum pro uncis duabus, denariis DC de Bellico Alexandri, fide rogato M. Vibio Longo. Eum puerum sanum traditum esse, furtis noxaque solutum, erronem fugitivum caducum non est praestari: et si quis eum puerum quo de agitur partemue quam quis ex eo euicerit, quo minus emptorem supra scriptum eumue ad quem ea res pertinebit uti frui habere possidereq recte liceat, tunc quantum id erit, quod ita ex eo evictum fuerit, tantam pecuniam duplam probam recte dari fide rogauit Dasius Breucus, dari fide promisit Bellicus Alexandri, idem fide sua esse iussit Vibius Longus.
>
> Proque eo puero, qui supra scriptus est, pretium eius (denarios) DC accepisse et habere se dixit Bellicus Alexandri ab Dasio Breuco.
>
> Actum kanabis legionis XIII geminae XVII kal. Iunias Rufino et Quadrato cos.

14. The text is reproduced in slightly rewritten form on the basis of Bruns in *FIRA III* no. 88, p. 329.

Dasius Breucus has bought and by mancipation, received the boy Apalaustus or whatever his name is, of Greek origin, recieved for two ounces, for six hundred denarii from Bellicus, son of Alexander, with Vibius Longus as guarantor.

That the boy is handed over in good health and that there is no accompanying liability for theft or replacement, that he does not wander about, display tendencies to flee or has been confiscated by the public authorities and that should someone claim him wholely or in part so that the buyer or whomsoever he should devolve onto, cannot enjoy an undisturbed possession of him, then he will pay twice the amount that the buyer had to part with, this is a promise that Dasius Breucus has asked for and Bellicus, son of Alexander, has given him such a promise, with Vibius Longus as guarantor.

Bellicus, son of Alexander, declares that he has received the purchase sum of six hundred denarii.

In the camp of the thirteenth legion on the sixteenth of May while Rufinus and Quadratus were consuls (142 A.D.).

The actual transfer of the slave took place by *mancipatio*. The expression »apocatum pro uncis duabus« is uncertain[15]. The typical defects against which the seller guarantees are listed in the contract - the same ones as in the curule aedile's edict - just as he warrants to the buyer the undisturbed possession of the item. Should this not be the case, he has bound himself by stipulation to pay the buyer a compensation twice the value of the slave.

In comparison with the protection afforded by the aediles to buyers of slaves and draught cattle, the ordinary protection afforded by *actio empti* was rather poor. Though through the activity of the praetor there was a gradual expansion of the area of liability so that by the time of the reign of Nero (first century A.D.), similar rules applied to purchases outside the marketplaces. The seller had an *ex bona fide* liability when he had given a guarantee (*dictum*) or acted fraudulently. This meant that he had to inform potential buyers about any defects which he knew of. Equally, the liability was extended so that it not only comprised the defective item itself but in some cases, any consequent damage as well:

15. See: »*Apochatum pro uncis duabus*« by A. Watson in *Revue Internationale des droits de l'antiquité* (RIDA) 3. X. (1963), p. 247-254, who is of the opinion that the formula might have been intended to restrict the seller's liability via *actio autoritatis*.

Pomponius, ad Sabinum IX (D. 19,1,6,4):
Si vas aliquod mihi vendideris et dixeris certam mensuram capere vel certum pondus habere, ex empto tecum agam, si minus praestes, sed si vas mihi vendideris ita, ut adfirmares integrum non sit, etiam id, quod eo nomine perdiderim, praestabis mihi: si vero non id actum sit, ut integrum praestes, dolum malum dumtaxat praestare te debere. Labeo contra putat et illud solum observandum, ut id nisi in contrarium actum sit, omnimodo integrum praestari debeat: et est verum, quod et in locatis doliis praestandum Sabinum respondisse Minicius refert.

Pomponius, Sabinus, ninth book:
If you sell me a vessel with the specification that it has a definite capacity or is a definite weight, I may sue on the purchase if you fall short. But if you sell me a vessel with the assurance that it is sound and it is unsound, you will be held responsible to me also for what I lose on this account; however, if we did not arrange that you be held responsible for its soundness, (a jurist held that) you should be held responsible for bad faith. Labeo thinks the opposite, that the sole valid rule is that a sound vessel be provided in every case unless the parties arranged otherwise; this view is correct. Minicius reports Sabinus' response that this is the standard also for leased storage jars.

Where the seller had sold a vessel, he vouched for its expected usefulness and was liable if this was not the case. As far as we can tell from the fragment by Pomponius, it is doubtful whether the sale of a jar implied a guarantee of its soundness. That the seller guaranteed for this was the opinion of Labeo and Pomponius. However, Sabinus did not apparently share that opinion but thought that there was only liability in the case of the seller having undertaken to guarantee the soundness of the jar, unless it was a case of fraud. We know from elsewhere (D. 19,2,19,1), however, that it was commonly held – as is evident – also by Sabinus, that whoever leased vessels also vouched for their soundness. In this and other areas, the rules of purchase (*emptiovenditio*) and the rules of hire (*locatioconductio*) were related.

Where the subject-matter of sale had dangerous properties or the sale was otherwise within the area of what we would today term product liability, the jurist, Julian, made a distinction between fraud and other cases:

Ulpian, ad edictum XXXII (D. 19,1,13, pr.):
Iulianus libro quinto decimo inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto: ait enim, qui pecus morbosum aut tignum vitiosum vendidit, si quidem ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus, si id ita esse scissem: si vero sciens reticuit et emptorem decepit, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morbosi pecoris perierunt, quod interfuit idonea venisse erit praestandum.

Ulpian, Edict, thirtysecond book:
Julian, in the fifteenth book (of his Digest), distinguishes between the knowing and unknowing seller with regard to condemnation in an action on purchase. He says that if he acted unknowingly in selling a diseased herd or an unsound timber, then in an action on purchase he will be held responsible for the difference from the smaller amount I would have paid had I known of this. But if he knew and kept silent and so deceived the buyer, he will be held responsible to the buyer for all losses sustained due to this sale. Therefore, if a building collapsed due to the timber's unsoundness, he must make good the building's calculated worth; if herds die through contagion from the diseased herd, he should be held responsible for the interest in this not having occurred.

The expression »*quod interest*« used to describe the buyer's compensation claim (inter fuit) is ambiguous. It designates an approximation of a concrete measure of compensation which is measured differently in a member of situations. In this fragment, Julian distinguishes between the seller in bad faith and a seller in good faith. The honest seller is only liable for the depreciation in value due to defects of the sold object while the dishonest seller is also liable for consequential damages.[16] On the other hand, in the preceding text by Pomponius, the honest seller was also liable for consequential damages. Julian's rule seems to have had the curule aedile's edict's ruling on defects as a model, whilst Pomponius, i. a., assumes the existence of an implied guarantee of the item's general usefulness.

Of particular significance to the sale of real property, was the rule that the existence of limited rights such as servitudes, did not mean that the seller was liable for these unless he had specifically assumed such liability. Among the preserved case documents of the Roman Empire was this example of a conveyance of real property[17]:

Andueia Batonis emit mancipioque accepit domus partem dimidiam, interantibus partem dextram, quae est Alburno Maiori uico Pirustarum inter adfines Platorem Acceptyanum et Ingenum Callisti denariis trecentis de Veturio Valente.

Eam domus partem dimidiam, qua de agitur, cum suis saepibus saepimentis finibus aditibus claustris fienestris, ita uti clao fixsa et optima maximaque est, Andueia Batonis habere recte liceat.

16. If an *actio serviana* (for mortgages, however, was brought with success against the buyer of a *fundus* the seller was responsible.
17. According to *FIRA III*, no. 90 and Bruns, p. 331. The text in question was found on a tablet in a Transylvanian goldmine in 1855. The tablet dates from the year 159 A.D. and is also remarkable due to the fact that the mancipation form was used although land in the provinces, Dacia in this case, was not *res mancipi*.

Et si quis eam domum partemue quam quis ex ea euicerit, quo minus Andueia Batonis eiue ad quem ea res pertinebit habere possidere usu capere recte liceat, tum quantum id erit quod ita licitum non erit, tantam pecuniam recte dari fide rogauit Andueia Batonis, dari fide promisit Veturius Valens. Proque ea domus partem dimidiam pretium (denarios) CCC Veturius Valens ab Andueia Batonis accepisse et habere se dixit. Conuenitque inter eos uti Veturius Valens pro ea domo tributa usque ad recensum dependat.

Actum Alburno Maiori pridie Nonas Maias Quintillo et Priscus cos.

Andueia, son (or daughter) of Bato buys and receives through mancipation half a house, namely the right half, seen at the entrance, situated at Alburnus Maior in the village of Pirustae between the properties of Plator Acceptianus and Ingenus Callistus, for the sum of three hundred denarii from Veturius Valens.

Andueia will have the full undisturbed enjoyment of half the house in question with hedges, fencing, entrances, masonry, windows and fixtures, free from encumbrances. And if anyone should claim the house in its entirety or for a part so that Andueia or whom the court might award the right to quiet possession and undisturbed enjoyment together with the prescriptive right as much as it is worth, since the enjoyment thereof is disturbed shall be the amount Andueia asks for as a promise and Veturius Valens promises to pay. For half the house, Veturius Valens declares that he has received a sum of three hundred denarii. It has further been agreed between them that Veturius wiil pay the expenses incurred in running the house until the next census.

Albunus Maior, the sixth of May whilst Quintillus and Priscus were consuls.

As a further example of a Roman contract of purchase with stipulated liability for defects, one from Egypt concerning the sale of a slave in 166 A.D.[18] will be reproduced below:

C. Fabullius Macer, optio classis praetoriae Misenatium III Tigride, emit puerum, natione Translfuminianum, nomine Abban quem et Eutychen siue quo alio nomine uocatur, annorum circiter septem, pretio denariorum ducentorum et capitulario portitorio, de Q. Iulio Prisco, milite classis eiusdem et triere eadem. Eum puerum sanum esse ex edicto, et si quis eum puerum partemue quam eius euicerit, simplam pecuniam sine denuntiatione recte dare stipulatus est Fabullius Macer, spopondit Q. Iulius Priscus: id fine sua et auctoritate esse iussit C. Iulius Antiochus, manipularius III Virtute. Eosque denarios ducentos, qui supra scripti sunt, probos recte numeratos accepisse et habere dixit Q. Iulius Priscus uenditor a C. Fabullio Macro emptore, et tradidisse ei mancipium supra scriptum Eutychen bonis condicionibus.

Actum Seleuciae Pieriae in castris in hibernis uexillationis classis praetoriae Misenatium VIIII Kalendas Iunias, Q. Seruilio Pudente et A. Fufidio Pollione cos.

18. *FIRA III*, no. 132.

C. Fabullius Macer, petty officer on the trireme Tigris, attached to the praetorian fleet at Misenum, has bought a boy of Mesopotamian origin called Abbas, also known as Eutyches or other names, who is about seven years of age, for the sum of two hundred denarii and the import duty from Q. Julius Priscus, able seaman with the same fleet and the same ship. That the boy is healthy in accordance with the edict and that should anyone advance a claim, partial or entire, on the boy, then, without appeal, the equivalent of the boy's value will be paid, has been promised by Quintus Julius Priscus to Fabullius Macer. The sailor, C. Julius Antiochus promises to be guarantor. Q. Julius Priscus, seller, declares that he has recieved the sum of two hundred denarii from the buyer, C. Fabullius Macer, as mentioned above and that he has handed over to him the slave Eutyches in good condition.

Seleucia in Pieria at the winter moorings of the praetorian fleet at Misenum, the twentyfourth of May whilst Quintus Servilius Pudens and A. Fufidius Pollio were consuls. (166 A.D.)

Failure to deliver the subject matter in due time (*mora*) did not provide the buyer with immediate remedies other than the possibility of a cause of action against the seller for the value of the object in question. There was no access in Roman law for rescission of the contract in such cases. However, as regards the seller's remedies for the buyer's non-payment in due time a right to withdraw from the contract could be agreed under a so-called *lex commissoria* clause. In some cases, however, the seller would incur liability for damages. Thus, he was liable under the strict rules of *custodia* as long as he had the object in his custody. This implied as will be treated in more detail in section 27 below, that he was only exempt from liability where certain cases of *vis major* would lie but not in the case of e.g. theft. He was held to be liable if, through his positive actions or through negligence, he had caused damage to the object or it had been destroyed while in his custody after the time at which it should have been handed over. It is a moot point what the liability in the case of overdue debt payments comprised. A widely held view was that the seller could only be made liable for the interest attached to the object proper:

Paulus, ad edictum XXXIII (D. 19,1,21,3):
Cum per venditorem steterit, quo minus rem tradat, omnis utilitas emptoris in aestimationem venit, quae modo circa ipsam rem consistit: neque enim si potuit ex vino puta negotiari et lucrum facere, id aestimandum est, non magis quam si triticum emerit et ob eam rem, quod non sit traditum, familia eius fame laboraverit: nam pretium tritici, non servorum fame necatorum consequitur, nec maior fit obligatio, quod tardius agitur, quamvis crescat, si vinum hodie pluris sit, merito, quia sive datum esset, haberem emptor, sive non, saltem hodie dandum est quod iam olim dari oportuit.

Paul, Edict, thirtythird book:
When the seller is responsible for nondelivery of an object, every benefit to the buyer is taken into account provided that it stands in close connection

with this matter. If he could have completed a deal and made a profit from wine, this should not be comprised in, no more than if he buys wheat and his household suffers starvation because it was not delivered; he receives the price of the grain, not the price of the slaves killed by starvation. An obligation does not increase because it is carried out slowly, although it would grow greater if wine were worth more today, and rightly so; for if the wine had been delivered, I as buyer would have it, and if not, that which should have been delivered previously is due now.

Where the buyer was in delay with the payment of the purchase price, interest would accrue only on the claim for the price but the buyer would incur no further liability for the effects that the delay in payment might attract:

Hermogenianus, Epitomae II (D. 18,6,20):
Venditori si emptori in pretio solvendo moram fecerit, usuras dumtaxat praestabit, non omne omnino, quod venditor mora non facta consequi potuit, veluti si negotiator fuit et pretio soluto ex mercibus plus quam ex usuris quaerere potuit.

Hermogenian, Epitome of law, second book:
If the purchaser is late in paying the price, he will only have to pay interest, not everything that the vendor might have gained if he had not been in delay; for instance, if the vendor was a trader and could have gained more than the amount of interest by his dealings.

24. On Mistake (Error) in Purchase

As has been mentioned several times, a sustained development of general rules in the law of obligations is not a feature of Roman law. Thus, as regards mistake in contractual relationships no general rules existed. On the effect of mistake (*error*) in contractual matters there was thus no set of general rules. Opinions were, however, expressed by Roman jurists in connection with *emptio-venditio* on the significance of disagreement between buyer and seller about the object of sale. The rules that can be derived from the decisions of Roman jurists, approach the question of mistake in a completely different fashion than we do today. Nowadays we distinguish between mistake due to divergence between intent and declaration and mistake due to misconception, on the basis of the doctrine laid down in the first half of the previous century by the famous German jurist *von Savigny*. The technical designations for these two types of mistake are spurious and genuine (also called *error in motivis*) respectively. This distinction was unknown to the Romans. The cause of the mistake was considered irrelevant and there was no question of taking any notice of the purely motivational mistake. The Roman jurists would start off in this matter

by examining what the mistake pertained to. The precondition of a valid purchase agreement was that there was *consensus*, agreement between the parties as to what the object for sale was. If the mistake led to dissensus, that is to say, the lack of consensus, it was this circumstance which might make the transaction void:

Ulpian, ad Sabinum XXVIII (D. 18,1,9,pr.):
In venditionibus et emptionibus consensum debere intercedere palam est: ceterum sive in ipsa emptione dissentient sive in pretio sive in quo alio, emptio imperfecta est. Si igitur ego me fundum emere putarem Cornelianum, tu mihi te vendere Sempronianum putasti, quia in corpore dissensimus emptio nulla est. idem est, si ego te Stichum, tu Pamphilium absentem vendere putasti: nam cum in corpore dissentiatur, apparet nullam esse emptionem.

Ulpian, Sabinus, twentyeighth book:
It is obvious that agreement is the essence in sale and purchase; the purchase is not valid if there is disagreement over the contract itself, the price or any other element of the sale. Hence, if I thought that I was buying the Cornelian farm and you that you were selling the Sempronian, the sale is void because we were not agreed on the thing sold. The same is true if I intended to sell Stichus and you thought that I was selling you Pamphilius, the slave himself not being there. Since there is no agreement on the object of sale, there is manifestly no sale.

The rules on mistake are naturally connected to *consensual contracts*. Whether one of or both the parties were mistaken was immaterial. Some more examples of the solution of such conflicts will shed some light on the Roman view of mistake:

Ulpian, ad Sabinum XXVIII (D. 18,1,14):
Quid tamen dicemus, si in materia et qualitate ambo errarent? ut puta si et ego me vendere aurum putarem et tu emere, cum aes esset? ut puta cum coheredes viriolam, quae aurea dicebatur, pretio exquisito uni heredi vendidissent eaque inventa esset magna parte aenae? venditionem esse constat ideo, quia auri aliquid habuit. nam si inauratum aliquid sit, licet ego aureum putem, valet venditio: si autem aes pro auro veneat, non valet.

Ulpian, Sabinus, twentyeighth book:
What is there to be said when both parties are mistaken as to materials and quality? Either when I thought I was selling and you thought you were buying gold, for example, and it turned out to be copper? Or when co-heirs sold what was thought to be a solid gold bracelet to one of the heirs at a high price and later on, it turned out to be largely made of copper? In this case, the sale stands because there was some gold in it; because when something is gilded, the sale is valid, although I thought it was solid gold; however, should copper be sold as gold, the sale is void.

Two situations prevail here. In one, copper is being sold as gold, in the other, a gilded bracelet (*viriola*) is being sold as though it was solid gold. When *aes* (copper) is sold as *aurum* (gold) there is a mistake as to the identity of the object of sale. When a gilded bracelet is sold as being made of solid gold, the identification of the item is still correct: A bracelet and there is some gold in it. The mistake in the first case leads to the annulment of the sale whilst the mistake in the second case does not. The different cases of so-called *error in materia* or *error in qualitate* thus require concrete judgement.

Ulpian, ad Sabinum XXVIII (D. 18,1,9,2):
Inde quaeritur, si in ipso corpore non erratur, sed in substantia error sit, ut puta si acetum pro vino veneat, aes pro auro, plumbum pro argento vel quid aliud argento simile, an emptio et venditio sit. Marcellus scripsit libro sexto digestorum emptionem esse et venditionem, quia in corpus consensum est, etsi in materia sit erratum. ego in vino quidem consentio, quia eadem in prope *ousia* est, si modo vinum acuit: ceterum si vinum non acuit, sed ab initio acetum fuit, ut embamma, aliud pro alio venisse videtur. in ceteris autem nullam esse venditionem puto, quotiens in materia erratur.

Ulpian, Sabinus, twentyeighth book:
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 and lead as silver or something else similar to silver as silver. Marcellus, in the sixth book of his Digest, writes that there is a sale because there is agreement on the thing despite the mistake over its substance. I would agree in the case of the wine, because the essence is much the same, that is, if the wine had 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 the other cases, I think that there is no sale by reason of the error over the material.

This Ulpian fragment seems to be heavily interpolated. A distinction is made between *error in corpore,* always deemed operative, i.e rendering the sale void, and *error in substantia* which would have such effect only in certain cases.

The jurist Marcellus (second century) cited here, would not hold invalidity to lie even if vinegar had been sold for wine, copper for gold etc. In contrast Ulpian would find invalidity here apart from the case in which the vinegar had in fact been wine gone sour since he would hold that there was identity on account of the similiarity of properties between what was bought and sold. In the other cases including where the subject matter sold had originally been vinegar the sale would be for something different - *aliud pro alio* - which prevented consensus. Here, the question of identity is also decisive, although solved in a different fashion. In the view of some, Marcellus' decision can be said to derive from an older point of view that would not let *error in materia* lead to annulment. Later on, when the properties that led to mistakes were

examined in order to ascertain whether they were significant or not (Ulpian) by being decisive in whether an error in substantia could lead to an annulment, these groups of instances were to be fused together (*error in materia* and *error in substantia*) and in both cases, there was to be an evaluation of its importance. However, it hardly seems possible to maintain such a distinction between cases of *error in materia*, *error in substantia* and *error in qualitate*.

Decline in quality did not lead to annulment:

> Paulus, ad Sabinum V (D. 18,1,10):
> Aliter atque si aurum quidem fuerit, deterius autem quam emptor existimaret: tunc enim emptio valet.

> Paulus, Sabinus, fifth book:
> It would be different if the thing was gold, although of a quality inferior to that supposed by the purchaser. In such a case, the sale is good.

In one of his early works Julian set up a rule that deviated from this, in that he claimed that the sale of a silver covered table as solid silver led to annulment:

> Iulianus, ad Urseium Ferocem III (D. 18,1,41,1):
> Mensam argento coopertam mihi ignoranti pro solida vendidisti imprudens: nulla est emptio pecuniaque eo nomine data condicetur.

> Julian, Urseius Ferox, third book:
> You unwittingly sold me, who did not know the facts, a silver covered table as solid silver; the purchase is of no effect and a condictio will lie to recover the money paid.

This decision is at variance with the view put forward by Ulpian, Paulus and Marcellus and was later relinquished by Julian – though it was still included in the Digest.

25. Locatio conductio

Under the designation locatio conductio, the Romans grouped together several different types of contract which, seen with modern eyes, could only to a very limited extent come under the same heading. The peculiarity of locatio conductio is that it comprises several contracts, the so-called *locatio conductio rei*, the equivalent of hire of objects, *locatio conductio operis*, the placing out of a piece of work to be done and *locatio conductio operarum*, a contract for services. The parties to the contract were termed locator and conductor, respectively. The *locator* was the party who made a thing available, e.g. renting it out, the party

who wanted a labour result of the piece of work contract or the party placing his services at the disposal of another in the services contract. On the other hand, the conductor is the one who takes the object away as hirer, the one who engages himself to do a work (*l.c. operis*) or the employer who takes the labourer with him (*l.c. operarum*). *Locatio conductio rei* was the type of contract regulating the renting out of rooms in the notorious tenements (*insulae*) of Rome where the risk of fire and frequent collapses threw the rules on the landlord's responsibility into grim relief, bringing it into play if the rented rooms should be destroyed during the tenancy.[19]

This contract type comprised other forms of tenancy as well. Thus, in Rome, some general rules have been discovered which regulated the conditions of tenancy involved in the renting of space in a large warehouse, known as the *lex horreorum*[20] (regulations for the renting of storage space) of which extracts are brought below:

In his horreis Imperatoris ... Caesaris Augusti locantur mercatoribus frumentariis armaria et loca cum operis cellarariorum ex hac die et ex kalendis Ianuariis.

Lex horreorum:

Quisquis in annum futurum retinere uolet quod conduxit armarium aliudue quid, ante idus decembres pensione soluta renuntiet.

...

Quisquis in his horreis conductum habet, elocandi et substituendi ius non habebit. Inuectorum in haec horrea custodia non praestabitur. Quae in his horreis inuecta inlata erunt, pignori erunt horrearío, si quis pro pensionibus satis ei non fecerit.

...

Quisquis habent conductum horreum sua ibi reliquerit et custodi non adsignauerit, horrearius sine culpa erit.

In these storage spaces belonging to the Emperor ... cupboards and rooms are let out to merchants and corn traders, these are under supervision as of today and from the first of January

Regulation:

Should there be a wish to extend the tenancy for a further year, notice thereof should be given and the rent paid before the thirteenth of December.

...

Those that rent storage space do not have the right to sublet the space, in part or in its entirety. There is no liability for (custodia[21]) items deposited in this warehouse. The owner of the warehouse has a right of mortgage on items in storage in the case of unpaid rent.

19. An attractive study of Roman upper-class rental is Bruce W. Frier: *Landlords and Tenants in imperial Rome*, P.U.C. 1980.
20. See *FIRA III*, no. 145, Bruns, p. 371.
21. See section 28 below.

...
The owner is not held responsible (culpa) for items left by a tenant without the supervisor being told thereof.

Another area of equal economic importance in which *locatio conductio rei* was applied was for leasing of land for agricultural exploitation.

Within the category of *locatio conductio operis* both minor agreements on repairs and more complex building contracts such as the erection of house would be fitted. We do not know much about how widespread this type of contract was. Many wealthy Romans owned slaves who specialized in different crafts. On the other hand, Rome possessed a class of small independent craftsmen.

The Roman slave teams probably meant that work contracts only found a more limited use. That many free and freed persons were obliged to take paid physical labour in order to make ends meet is made evident in several sources. Thus Roman writers such as Cato, Varro and Columella write that it is advisable to employ free men rather than slaves for seasonal work and more to the point, for particularly dangerous work, as the death of a slave meant a loss in capital investment.

One example of a labour contract is contained in a contract from 164 A.D. concerning undertaking of work tasks in connection with minor operations in the province of Dacia (present day Romania) which must be considered in conformity with Roman law and not merely as a local legal institution:[22]

Macrino et Celso cos. XIII Kalendas Iunias. Flauius Secundinus scripsi rogatus a Memmio Asclepi, quia se litteras scire negauit, it quod dixsit se locasse et locauit operas suas opere aurario Aurelio Adiutori ex hac die in idus Nouembres Proxsimas (denariis) septaginta cibarisque.[23] Mercedem per tempora accipere debebit conductori supra scripto. Quod si inuito conductore recedere aut cessare uoluerit, dare debebit in dies singulos (sestertios) V numeratos de summa mercedis. Quod si fluor impedierit, pro rata conputare debebit. Conductor si tempore peracto mercedem soluendi moram fecerit, eadem poena tenebitur exceptis cessatis tribus.
Actum Immenoso Maiori.

Whilst Macrinus and Celsus were consuls, the twentieth of May. I, Flavius Secundinus, at the request of Memmius Asclepius, who claims he is illiterate, have written that he has declared that he has hired out his labour to work in the goldmines for Aurelius Adiutor from today until the next ides of November for the sum of seventy denarii plus board. He will be entitled to draw his

22. *FIRA III*, no. 150, Burns, p. 370.
23. Another way of reading it is *liberisque* which could mean that the terms of the contract also included Memmius Asclepius's children.

wages in instalments. He shall carry out his work in a good state of health for the employer mentioned above. Should he wish to retire or stop, without the consent of his employer, he must then pay five sestertii in cash out of his wage each day. Though should it be due to flooding that the work is interrupted, then the wage will be reduced proportionately. In the case of the employer not paying the wage on time after completion of the work he shall pay the same, though with a delay of three days.

It must be assumed that this contract was made between a Roman mineowner and a native Dacian, who by the contract submitted himself to Roman law. It is remarkable and an expression of the apparently rather poor legal protection afforded to wage earners that the risk of the work being interrupted by flooding (*fluor*) had to be borne by the worker although one would expect the employer to be the one to bear the risk for such a obstacle to the work. Should one of the parties not keep to their part of the agreement in time, a conventional fine was imposed.

26. Mandatum and negotiorum gestio

Mandatum was a consensual contract, whereby a person undertook to perform a task for someone else. It was a precondition that the task was carried out gratuitously. This feature of the contract must be seen in the context of that characteristic trait of Roman society, the relationship of loyalty that was an upshot of the requirement for mutual *fides*. Of particular importance was the bond of loyalty between friends (*amicitia*) though favours owed or an earlier bond of dependency could still engage one to afford assistance in the form of advice (consilium) or deed. The letters of Cicero contain many examples of that obligation (*officium amici*) of mutual help that went with friendship.

Paulus, ad edictum, XXXII (D. 17,1,1,4):
Mandatum nisi gratuitum nullum est: nam originem ex officio atque amicitia trahit, contrarium vero est officio merces; interveniente enim pecunia res ad locationem et conductionem potius respicit.

Paulus, Edict, thirtysecond book:
There is no mandate unless it is gratuitous. The reason is that it derives its origins from duty and friendship, and the fact is that payment for services rendered is incompatible with this duty. For if money is involved, the matter rather pertains to hire.

Out of mandate came an actio called *actio mandati directa* which was the complaint whereby the assignor (initiator) demanded the execution of the task

and the result thereof; there also came an *actio mandati contraria* whereby he who carried out the assigned task (the agent) could demand the reimbursement of his expenses. *Mandatum* belongs to the socalled »imperfecty synallagmatic contracts« which had one formula for the principal claim (*directa*) and another (*contraria*) with an exchange of the names for the counterclaim. Actio directa went as follows:

> Quod Aulus Agerius (AA) Numerio Negidio (NN) mandavit ut, etc... qua de re agitur, quidquid paret ob eam rem NmNm AoAo dare facere oportere ex fide bona, eius iudex condemnato, si non paret absolvito.
>
> As the plaintiff asked the defendant to etc., which is the disputed point, as much as it should appear that the defendant for that reason owes the plaintiff in good faith, that is the amount that you as judge will sentence the defendant to pay, should it not appear so, then acquit him.
>
> The actio contraria was the other way round: Quod Numerius Negidius Aulo Agerio mandavit...etc.

Condemnation on the basis of an *actio mandati directa* resulted in infamy. Infamy could be avoided if the defendant satisfied the claim during the trial. If he failed to do so there was a breach of faith which would lead to infamy. As already mentioned, the *mandatum* relationship was gratuitous. Notwithstanding, it gradually became recognized that a fee might be payable. The payment of such fee was, however, not actionable on the formulary procedure but only by a process of *cognitio extraordinaria.*[24]

> Impp. Severus et Antoninus AA. Leonidae (C. 4,35,1):
> Adversus eum, cuius negotia gesta sunt, de pecunia, quam de propriis opibus vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experii: de salario quod promisit a praeside provinciae cognito praebebitur.
>
> Emperors Severus and Antoninus to Leonidas:
> You may bring an action against the person whose business you carried out, for the expenses incurred in so doing, paid for from your own means or from means borrowed from others, through the mandate claim on capital and interest. For the fee that you were promised, the provincial governor will grant access to prosecution.

Since the agency was prima facie a gratuitous service in the interest of the principal the agent would be liable only for *dolus* as towards the principal. This

24. See section 10 above.

liability, however, was extended to include all *culpa* during the reign of Justinian.

Roman law did not recognize direct representation. Those who were directly empowered or placed under obligation by legal transactions undertaken by agents as part of their assignment were therefore the agents themselves. If the task was the purchase of a slave for example, then the ownership of the slave would have to be independently transferred from the agent to the principal at a later stage:

> Ulpian, ad edictum XXXI (D. 17,1,8,9,-10):
> Dolo autem facere videtur, qui id quod potest restituere non restituit. 10. proinde si tibi mandavi, ut hominem emeres, tuque emisti, teneberis mihi, ut restituas. sed et si dolo emere neglexisti (forte enim pecunia accepta alii cessisti ut emeret) aut si lata culpa (forte si gratia ductus passus es alium emere), teneberis. sed et si servus quem emisti fugit, si quidem dolo tuo, teneberis. si dolus non intervenit nec culpa, non teneberis nisi ad hoc, ut caveas, si in potestatem tuam pervenerit, te restituturum. sed et si restituas, et tradere debes, et si cautum est de evictione vel potes desiderare, ut tibi caveatur, puto sufficere, si mihi hac actione cedas, ut procuratorem me in rem meam facias, nec amplius praestes quam consecuturus sis.

> Ulpian, Edict, thirtyfirst book:
> However, a man who has not handed over what he is able to hand over is held to have acted in bad faith. 10. And so if I have given you a mandate to buy a slave and you have bought (him), you will be liable to me for his delivery. Indeed, you will be liable, if you have neglected to make the purchase as a result of bad faith (for example, if you accepted a bribe from a third party to stand down so that he could buy the slave), or if you have failed to make the purchase through gross negligence (for example, if, being kindly disposed toward another, you have allowed him to buy the slave). Further, even if the slave whom you purchased has fled, you will be liable if this was the result of bad faith on your part. but if there has been no bad faith or fault, you will only be liable to give an undertaking that you will turn the slave over to me, should it become possible for you to do so. Furthermore, if you hand him over, you must convey to me. And if an undertaking has been given in respect of eviction, or you are in a position to request that such an undertaking be given to you, I think it sufficient if you allow me to take over this action, by making me a procurator in connection with my own affairs; nor will you be liable to pay any more than you would obtain.

By *mandatum in rem suam* the Romans meant an instance at law where a person, on someone else's behalf, though in his own interest, would execute a task such as the one mentioned above where an actio was used that devolved on to someone else (see section 23 on cessio).

The task that was to be performed for the principal might be of a more or less comprehensive nature, e.g. the above mentioned purchase of a slave or the ad-

ministration of a person's entire property. An example of the latter is afforded by the Roman *procurator*,[25] the business manager in the service of wealthy Romans who employed him to administer their financial affairs. The basis of the procurator's activity was, during the Empire at least, a *mandatum*.[26]

Originally, the post of procurator seems to have been one of those which could be imposed on a freedman as part of the work services (*operae*) owed to his erstwhile master. He was later to get the position of *negotiorum gestor*, until it was finally recognized that a procurator could be an equal partner in a contractual relationship on the basis of mandatum. Whilst Roman law, as mentioned earlier, did not recognize direct representation, an exception was made in the case of procurators. The obligations they entered into within the scope of their authority could be made binding on the person who had set their task by means of a special *actio ad exemplum institoriae actionis* which can be traced back to the jurist Papinianus. It was equally recognized that they could acquire possession (*possessio*) on behalf of another and probably the ownership as well, to the extent that possession was a precondition thereof. In other cases, the procurator himself was entitled.

A somewhat peculiar legal situation might arise if a mandate was given by a slave to a third party with a view to such third party's releasing the slave by purchase as the following rather special text reveals:

> Papinianus, Quaestiones XXVII (D. 17,1,54,pr.):
> Cum servus extero se mandat emendum, nullum mandatum est. sed si in hoc mandatum intercessit ut servus manumitteretur nec manumiserit, et pretium consequetur dominus ut venditor et affectus ratione mandati agetur: finge filium naturalem vel fratrem esse placuit enim prudentioribus affectus rationem in bonae fidei iudiciis habendam.
>
> Papinianus, Questions, twentyseventh book:
> When a slave gives a mandate to a third party to buy him, the mandate is of no effect. But if the mandate was for the purpose that the slave should be manumitted and the buyer does not manumit, the master will recover the price, as seller, and there will be an action on mandate by reason of affection; suppose that it his is natural son or brother (for the jurists have agreed that account is to be taken of affection in actions of good faith).

A slave was incapable of disposing of property items belonging to his master, in this case the slave's own person. However, in one particular situation the mandate was deemed to be valid and capable of supporting an *actio mandati* in

25. See the text of Africanus quoted above, p. 115.
26. See A. Watson: *The Law of Obligations in the Later Roman Republic*, p. 193 ff.

addition to the claim for the purchase viz. where the buyer contrary to the mandate failed to set the slave free.

The term *affectus* used for cause here denotes the special dependance dictated by friendship and kinship but has nothing to do with the modern sense of »sentimental value«. The seller's interest in the execution of the mandate is fixed in money terms here.

The authenticity of this text is doubtful. If it is genuine, then it is a somewhat rare example of the concession of an *actio* for purposes other than economic, in this case the enforced execution of a release,[27] in that the point of the contract had to be the granting of the rights of *patronus* to the buyer towards the freedman.

Whilst the content of *mandatum* was the execution of tasks for others upon request, *negotiorum gestio* was the unsolicited management of other peoples' affairs. From this came the *actio negotiorum gestorum directa* to benefit the person whose interests were being taken care of and which sought compensation for harm done through *dolus*.The negotiorum gestor could, on the other hand, seek reimbursement for his expenses through an *actio negotiorum gestorum contraria*. Whether it was other peoples' affairs or not was, on the whole, objectively decided in classical law although the subjective view of the gestor was sometimes taken into account. According to the law of Justinian, only the intent was examined and thus an actio was denied to those who managed other peoples' affairs in the belief that it was their own. A condition for a gestor obtaining an actio was that the measures he took were appropriate (*utiliter gesta*). It was, however, not a condition that his efforts to avoid harm were crowned with success:

Ulpian, ad edictum X (D. 3,5,9,1,-2):
Is autem qui negotiorum gestorum agit non solum si effectum habuit negotium quod gessit, actione ista utitur, sed sufficit, si utiliter gessit, etsi effectum non habuit negotium. 2. et ideo si insulam fulsit vel servum aegrum curavit, etiamsi insula exusta est vel servus obiit, aget negotiorum gestorum: idque et labeo probat.

Ulpian, Edict, tenth book:
A person who brings an action for unauthorized administration will have the use of that action not only if he was succesful in the business he transacted, but it is enough that he acted beneficially, even if what he did was unsuccessful. For this reason, if he shored up a tenement or took care of a sick slave,

27. The slightly odd family relationships revealed by the text could exist between two half brothers when the one had been born in *justae nuptiae* and the other in concubinage with a slave and therefore became a slave himself.

even if the tenement was burned down or the slave died, he will bring an action for unauthorized administration. Labeo too supports this view.

27. Roman company law

Modern company law with its variety of company organisations under which people may join together in a common business effort did not originate in Roman law under which only a somewhat rudimentary company form was recognized. The origin of the Roman partnership contract (*societas*) is doubtful. Often the origins are indicated as a community between heirs which would arise on the death of a *pater familias* and a corresponding legisactio available from the praetor outside family relationships for people who wished to establish a company. A fragment by Gaius (Institutiones III, 154a and b) describes this old Roman legal institution which is termed a *consortium*. According to another view, the *societas* is not a later development of the societas *ercto non cito* but an independant creation due to the new pattern of economic requirements in the late Republic. The societas type that we find in classical Roman law can be considered undeveloped according to modern standards. There were no rules to enable the partnership as such to make agreements and it was out of the question to give property as such an independent legal personality, whilst the liability of the participants was limited.

In his textbook, The Institutes, Gaius sketches the particular rules:

Gaius, Institutiones III:
148. Societam coire solemus aut totorum bonorum aut unius alicuius negotii, ueluti mancipiorum emendorum aut uendendorum. 149. Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. quod Quintus Mucius contra naturam societatis esse existimauit et ob id non esse ratum habendum, sed Seruius Sulpicius, cuius etiam praeualuit sententia, adeo ita coiri posse societatem existimauit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa uidaetur, ut aequum sit eum cum hac pactione in societatem admitti: nam et ita posse coiri societatem constat, ut unus pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia ualet. 150. Et illud certum est, si de partibus lucri et damni nihil inter eos conuenerit, tamen aequis ex partibus commodum ut incommodum inter eos commune esse; sed si in altero partes expressae fuerint, uelut in lucro, in altero uero omissae, in eo quoque quod omissum est, similes partes erunt. 151. Manet autem societas eo usque, donec in eodem sensu perseuerant; at cum aliquis renuntiauerit societati, societas soluitur, sed plane si quis in hoc renuntiauerit societati, ut obueniens aliquod lucrum solus habeat, ueluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiauerit societati, ut hereditatem solus lucri faciat, cogetur hoc lucrum communicare: si quid uero aliud lucri fecerit, quod non captauerit, ad ipsum solum pertinet. mihi uero, quidquid omnino post renuntiatam societatem adquiritur, soli conceditur. 152. Soluitur

adhuc societas etiam morte socii, quia qui societatem contrahit, certam personam sibi eligit. 153. Dicitur etiam capitis deminutione solui societatem, quia civili ratione capitis deminutio morti coaequatur; sed utique si adhuc consentiant in societatem, noua uidetur incipere societas. 154. Item si cuius ex sociis bona publice aut priuatim uenierint, soluitur societas. Sed haec quidem societas, de qua loquimur, id est quae nudo consensu contrahitur, iuris gentium est; itaque inter omnes homines naturali ratione consistit. 154a. Est autem aliud genus societatis proprium ciuium Romanorum olim enim mortuo patre familias, inter suos heredes quaedam erat legitima simul et naturalis societas, quae appellabatur ercto non cito, id est dominio non diuiso: erctum enim dominium est, unde erus dominus dicitur; ciere autum diuidere est: unde caedere et secare et diuidere dicimus. 154b. Alii quoque qui uolebant eandem habere societatem, poterant id consequi apud praetorem certa legis actione, in hac autem societate fratrum..... ceterorumue, qui ad exemplum fratrum suorum societatem coierint, illud proprium erat, quod uel unus ex sociis communem seruum manumittendo liberum faciebat et omnibus libertum adquirebat: item unus rem communem mancipando-.

Gaius, Institutes, third book:
148. Partnerships usually cover either all the partner's worldly wealth or else a single business, for instance, buying and selling slaves. 149. However, there was a great question whether a partnership could be formed on such terms that one party would take a larger part of the profit but a smaller share of loss. And Quintus Mucius thought not, because it was contrary to the nature of partnership. But Servius Sulpicius, whose view has prevailed, considered that such a partnership could be made; indeed, he went so far as to say that the contract can be entered on the terms that one party makes no contribution at all to the loss, but takes a share in any profit, as long as his services are regarded as so valuable that it is fair to him to be brought into the partnership on those terms. For it is now accepted that a partnership agreement can validly require one party to put up money but not the other, while still giving both parties equal shares in profit. Some peoples'services are often as valuable as a money contribution. 150. And this is certain, that if nothing is agreed among them about the shares of profit and loss, then both advantage and disadvantage must be shared equally. But if shares are stated for the one, the profit for instance, but not stated for the other, then the shares for the one not stated will be the same. 151. A partnership lasts as long as the partners remain of the same mind but ends when one party renounces. Clearly though, if someone withdraws with an eye to a profit for himself alone, for example, where a partner with me in all wordly wealth is left heir to somebody's estate and renounces the partnership in order to take the inheritance himself, he will be compelled to share his profit. But if he makes some gain without having snatched at it, it does go to him alone. I, on the other hand, keep for myself anything at all which I receive after the renunciation. 152. Partnership is also dissolved by the death of a partner, because when one enters a partnership one does so with a specifically chosen person. 153. It is said that partnership

is also dissolved by status-loss[28] because, according to the principles of state law, status-loss is equivalent to death; but the truth is that, if the people still want to be partners, a new partnership is held to come into being. 154. Again, if the estate of any of the partners is sold up by public or private creditors, the partnership is dissolved. But note that the partnership of which we are speaking, that is, one contracted by mere agreement, is part of the law of all peoples and so as a matter of natural reason it can subsist among all men. 154a. There is another kind of partnership peculiar to Roman citizens. For in former times on the death of the head of a family there arose among his immediate heirs a kind of partnership which was at the same time statutory and natural; it was called »ercto non cito«, that is »ownership undivided«; for »erctum« means ownership and hence »erus« is a word for »owner«; and »ciere« means to »divide«, so that »caedere« to strike, and »secare« to cut, are related words for division. 154b. Other people also, if they wanted to have this kind of partnership, could achieve that before the praetor using a set action in the law. However, in this partnership between brothers and between other people entering a partnership in imitation of brothers, a special feature was that even one of the partners by manumitting a slave held in co-ownership made him free and the freedman of all of them; again, one partner by mancipating a thing held in co-ownership made it the property of the recipient.

Characteristic of the Roman partnership contract was, to begin with, that the company was built upon the participants' *consensus* in the sense that it only lasted for as long all the participants were in agreement on continuing the partnership. If only one partner wished to withdraw, the partnership was dissolved.

Also characteristic was that none of the partners could act on behalf of the company and, as mentioned, that there was no possibility of limiting the liability of the participants towards third parties. The participants were jointly liable for any engagements undertaken in common. By his own actions, an individual participant would only commit himself or become entitled to benefit himself but by virtue of the partnership contract he might obtain a right to have any loss covered by the other partners or incur a duty to transfer a property benefit to the company.

Where one of the partners demanded an internal settlement of the dispute this was possible by an action called »*actio pro socio*«. This action terminated the partnership. It is also characteristic that there was no possibility of forcing a settlement between the partners during the continuance of the partnership. Partnerships would also come to an end in the event of a partner's death, bank-

28. A restriction in a person's legal competence through *capitis demunitio* could be the consequence of a loss of freedom, civil rights or change of family (through *conventio in manum* or adoption for example).

ruptcy or undergoing *capitis deminutio* (deterioration of status and consequent limitation of legal capacity). The participants were liable, in the common relationship, for *dolus*, in the classical period, also for *culpa* when common property was damaged, and for *custodia* should one of the partners have a thing deposited with him. Later on, this liability was extended to *diligentia in suis rebus* where the degree of care shown by the person in question, in managing his affairs, was emphasized.[29]

Where the partnership comprised property the rules governing *communio* which are often treated by Roman jurists in a *societas* context were applicable. They allowed each partner the free disposal of his ideal share and barred the possibility of binding the individual partner by majority decisions. The dissolution of the partnership would be effected by an *actio communi dividundo*.

The societas rules may be viewed as an expression of a Roman legal principle that emphasized individual enterprise and individual ownership at the expense of common ownership. On some individual points, however, a development may be traced, Thus, the Digests contain a decision by the classical jurists granting a person (*magister navis, institor*) employed by a partnership the possibility of committing the partnership as such (D. 14,3,13,2) and there are also some uncertain texts which indicate that a partner may sometimes act on behalf of the whole partnership (D. 14,1,1,25 and D. 14,1,2,3).[30]

The societas contract seems to have occupied an important area in Roman business life when it came to gaining financial rewards from the slave trade and the moneylending business[31]. Cicero's speech *pro Sexto Roscio Comoedo* is about a partnership where one partner provided a slave with a talent for acting and the other, his ability to train the slave to be an actor. The example below of a Roman societas contract[32] from 167 A.D. is about moneylending activities in the province of Dacia:

> Inter Cassium Frontinum et Iulium Alexandrum societas danistariae ex X Kalendas Ianuarias quae proximae fuerunt Pudente et Pollione cos. in pridie idus Apriles proximas uenturas ita conuenit ut, quidquid in ea societati ab re natum fuerit lucrum damnumve acciderit, aequis portionibus suscipere debebunt.
>
> In qua societate intulit Iulius Alexander numeratos siue in fructo (denarios) quingentos et Secundus Cassi Palumbi seruus actor intulit (denarios) ducentos sexaginta septem pro Frontino ...chum ...ssum Alburno debebit.

29. See more on this in section 28.
30. See Crook:*Law and Life in Rome*, p. 241.
31. Societas seems to have even played an important role in providing the basis for associations of private tax collectors (known as *societates publicanorum*) and other forms of public enterprise.
32. From *FIRA III*, no. 157; Bruns, p. 376.

In qua societate si quis dolo malo fraudem fecisse deprehensus fuerit, in asse uno (denarium) in (denarium) unum denarios XX alio inferre debebit, et tempore peracto deducto aere alieno siue summam supra scriptam sibi recipere siue, si quod superfierit, diuidere debebunt. Id fari fieri praestarique stipulatus est Cassius Frontinus spopondit Iulius Alexander.

De qua re duo paria tabularum signatae sunt.

Item debentur Cossa denarii L, quos a socis suprascriptis accipere debebit.

Actum Deusare V Kal. Apriles Vero III et Quadrato cos.

Between Cassius Frontinus and Julius Alexander an agreement has been reached upon the setting up of a partnership with the aim of running a financial loan establishment whilst Pudens and Pollio were consuls (166 A.D.) from the twentythird of December to the twelfth of April next year on the terms that all takings and expenses of the said establishment will be divided equally. Julius Alexander put five hundred denarii in cash or from returns on interest into the company and Secundus, slave of Cassius Palumbius put in two hundred and sixtyseven denarii on behalf of Frontinus...

To the partnership, in case of fraudulent behaviour on the part of one of the parties to the contract, shall be paid one denarius to the as and twenty denarii to the denarius to the other party and when the time has expired, each party with a deduction of any eventual debt, will have to receive the sum mentioned above or in case of a surplus, will share it. Cassius Frontinus has requested a promise that this would be fulfilled and Julius Alexander has so promised.

Two pairs of tablets have been signed on this matter.

Equally, the sum of fifty denarii is owed Cossa who shall receive it from the said partnership members.

In Deusaris, the twentyeighth of March whilst Verus, for the third time, and Quadratus were consuls.

The parties to the contract inserted a special clause on the liability for fraudulent action by one of the said parties. The restriction of liability to *dolus* was in accordance with Roman law, although already in classical times, a reciprocal responsibility for all *culpa* existed – the peculiar touch is the adoption of a set fine. Apparently, the aim was to thereby avoid the dissolution of the partnership through *actio pro socio*.

In the post-classical period, private company law was largely forced out of the picture by the compulsory associations due to public legislation, this was a typical feature of late Roman society. The classical principles of *societas* were not upheld in their pure form in the Western Roman vulgar law, though in Justinian's day, there was a return to classical law which was only subjected to a few reforms.

28. Transport by sea

In Roman law there were various specific rules governing transport by sea. Particularly well known are the rules on shipping loans and general average.

The maritime loan, the contract of repair with *foenus nauticum*, was granted for the fitting out of ships or the purchase of goods. A characteristic of the actual shipping loan was that the creditor assumed the risk of the voyage, since a demand for repayment depended on its successful conclusion. On the other hand, in compensation for the large risk, which can be compared with that in case of modern maritime insurance, there was no fixed ceiling to the rate of interest charged by the creditor. Rules on this were found in D. 22,2.

Of particular note was the so-called *lex Rhodia de iactu* which is preserved in the Digest (14,2). It is not known whether this was a particular law from Rhodes or whether the title from the Digest derived from a general mercantile marine custom of the Mediterranean though it is also possible that the Romans themselves developed the rules on the basis of their own concept of *locatio-conductio*. The rules pertain to *iactus* or general average i.e. the situation where when under way, it turns out to be necessary to jettison some of the cargo in order to complete the voyage. According to the rules, the resulting loss would be covered by all who had an interest in the successful conclusion of the voyage. The basic idea was that the sacrifice of certain items of cargo was undertaken in everyone's interest to avoid impending danger. The juridical execution of these principles gave rise to difficulties already because there only existed a contractual obligation between the individual cargo owners or passengers and the ship's master, but not reciprocally between them.

Therefore, only the master could secure the fulfilment of the claims. The ship's master (*magister*) was liable toward the charterers and had himself a right of recourse against the other people on board:

> Paulus, ad edictum XXXIV (D. 14,2,2,pr.):
> Si laborante nave iactus factus est, amissarum mercium domini, si merces vehendas locaverant, ex locato cum magistro navis agere debent: is deinde cum reliquis, quorum merces salvae sunt, ex conducto, ut detrimentum pro portione communicetur, agere potest. Servius quidem respondit ex locato agere cum magistro navis debere, ut ceterorum vectorum merces retineat, donec portionem damni praestent. immo etsi retineat merces magister, ultro ex locato habiturus est actionem cum vectoribus: quid enim si vectores sint, qui nullas sarcinas habeant? plane commodius est, si sint, retinere eas. at si non totam navem conduxerit, ex conducto aget, sicut vectores, qui loca in navem conduxerunt: aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas haberent.

Paulus, Edict, thirtyfourth book:
If goods have been jettisoned because the ship was in difficulty, the owners who have lost their cargo for whose carriage they contracted may sue the captain on their contracts. Then, the captain may bring an action on his contracts of carriage against the others whose goods were saved, so as to distribute the loss proportionally. Servius once advised that the suit on the contract of carriage against the captain is to make him hold onto the cargo of the other shippers until they pay their part of the loss. But even if the captain does not retain their goods, he will still have an action against the shippers; for there might be people who have no baggage. But certainly, it is more convenient to detain any baggage they have. If he has hired the whole ship, he may bring an action on that charter just as passengers would who had chartered space on the ship; for it is only fair that the loss be shared by all those whose property has been saved by means of sacrifice of the property of others.

The same point of view appears in the fragment below, which illustrates it particularly well against the underlying conflict:

Paulus, ad edictum XXXIV (D. 14,2,2,2):
Cum in eadem nave varia mercium genera complures mercatores coegissent praetereaque multi vectores servi liberique in ea navigarent, tempestate gravi orta necessario iactura facta erat: quaesita deinde sunt haec: an omnes iacturam praestare oporteat et si quis tales merces imposuissent, quibus navis non oneraretur, velut gemmas margaritas? et quae portio praestanda est? et an etiam pro liberis capitibus dari oporteat? et qua actione ea res expediri possit? placuit omnes, quorum interfuisset iacturam fieri, conferre oportere, quia id tributum observatae res deberent: itaque dominum etiam navis pro portione obligatum esse. iacturae summam pro rerum pretio destribui oportet. corporum liberorum aestimationem nullam fieri posse. ex conducto dominos rerum amissarum cum nauta, id est cum magistro acturos. itidem agitatum est, an etiam vestimentorum cuiusque et anulorum aestimationem fieri oporteat: et omnium visum est, nisi si qua consumendi causa imposita forent, quo in numero essent cibaria: eo magis quod, si quando ea defecerint in navigationem, quod quisque haberet in commune conferret.

Paulus, Edict, thirtyfourth book:
A vessel carrying diverse cargoes shipped by many merchants in addition to many passengers, both slave and free, was overtaken by a serious storm and had to be lightened. The questions put were whether the people whose goods, such as jewels and pearls, added no weight to the ship had to contribute like everyone else, in what proportion the loss should be applied, whether anything was due in respect of the free passengers, and by what action the matter should be proceeded with. It was agreed that all those who had benefitted by the jettison must make their contribution, including the owner of the ship for his part because the contribution is levied on property preserved. The total amount of the loss should be apportioned in relation to the market value of the property, freedmen not being valued. The owners of the property sacrificed should sue the mariner, that is the captain, on the contract of carriage. When it was asked whether the value of everyone's clothes and jewelry should be taken into account, it was agreed that one should take account of

the value of all property except what was put on the ship for purposes of consumption, such as foodstuffs, the reason for the exception being that if victuals ran short during the voyage, everyone would make common cause with what he had.

Rules similar to those on jettison applied when the ship had to be ransomed from pirates:

Paulus, ad edictum XXXIV (D. 14,2,2,3):
Si navis a piratis redempta sit, Servius Ofilio Labeo omnes conferre debere aiunt: quod vero praedones abstulerint, eum perdere cuius fuerint, nec conferendum ei, qui suas merces redemerit.

Paulus, Edict, thirtyfourth book:
Servius, Ofilius and Labeo say that everyone should contribute if the ship is ransomed from pirates. But the owners must bear the loss of any property stolen by the robbers and a person who ransoms his own goods has no claim for a contribution.

The settlement only covers those items used to pay the ransom on the ship and is thereby in the common interest though it did not extend to other stolen items.

It is a disputed point, to what extent it was a condition for the settlement of the loss that the jettison actually served its purpose, i.e. saving the ship. The jurist Callistratus (beginning of second century A.D.) notes a decision that would indicate that this was a requirement:

Callistratus, Quaestiones II (D. 14,2,4,pr.-1):
Navis onustae levandae causa, quia intrare flumen vel portum non potuerat cum onere, si quaedam merces in scapham traiectae sunt, ne aut extra flumen periclitetur aut in ipso ostio vel portu, eaphe scapha summersa est, ratio haberi debet inter eos, qui in nave merces salvas habent, cum his qui in scapha perdiderunt, proinde tamquam si iactura facta esset: idque Sabinus quoque libro secundo responsorum probat. contra si scapha cum parte mercium salva est, navis periit, ratio haberi non debet eorum, qui in nave perdiderunt, quia iactus in tributum nave salva venit. 1. Sed si navis, quae in tempestate iactu mercium unius mercatoris levata est, in alio loco summersa est et aliquorum mercatorum merces per urinatores extractae sunt data mercede, rationem haberi debere eius, cuius merces in navigatione levandae navis causa iactae sunt, ab his, qui postea suae per urinatores servaverunt, Sabinus aeque respondit, eorum vero, qui ita servaverunt, invicem rationem haberi non debere ab eo, qui in navigatione iactum fecit, si quaedam ex his mercibus per urinatores extractae sunt: eorum enim merces non possunt videri servandae navis causa iactae esse, quae perit.

Callistratus, Questions, second book:
If a ship is so laden that it cannot enter a river or port, and in order to lighten the ship lest it come to harm outside the river or in the harbour or port, some of the cargo is transferred to a dinghy, those whose cargo is safe on board the ship are liable to contribute to those who lose their property in the dinghy, if

> it sinks, just as if their property had been jettisoned. Sabinus accepts this in the second book of his Replies. In contrast, if the dinghy is saved with its part of the cargo and the ship goes down, those who lose their goods in the ship have no claim because jettison comes into contribution only if the ship is saved. 1. Sabinus also advised that if a ship that had been lightened in a storm by throwing overboard the goods of one merchant is sunk at a later stage of the voyage and the goods of some other merchants are recovered by paid divers, the merchant whose goods were jettisoned is entitled to a contribution from those whose goods were subsequently recovered by the divers. But those whose goods are not so recovered have no recourse against the person whose property was jettisoned during the voyage even if divers can get some of it back for him, since their goods cannot be seen as having been jettisoned to save a sinking ship.

This fragment deals with four situations. The facts of the matter in the first instance are straightforward, part of a ship's cargo is transferred to a lighter so as to ease the entry into the harbour. Should the lighter founder, the loss is to be shared. If, however the lighter is saved but the ship founders, there is no distribution as the »nave salva« condition – that the ship is safe – is not fulfilled.

Another situation is where cargo is jettisoned whereupon the ship sinks elsewhere. In that case distribution shall be made if cargo capable of contributing to such distribution is later salvaged from the wreck. Conversely, there is no contribution for those whose goods were jettisoned in order to save the ship (in case of subsequent salvage) as the ship was lost anyway. This last outcome is somewhat inconsistent as the ship, we are told, was saved in the first instance. The reasoning must have been that jettisoned items were not eligible for contribution.

29. On Contractual liability

As mentioned elsewhere, the Roman jurists were anything but systematic. As to the development of the rules which we, would nowadays, classify under the general law of obligation, there were thus no set principles, the rules are to be found through an evaluation of particular decisions in relation to particular contractual conditions. The picture is especially hard to grasp when we inquire into the points of view according to which liability for breach of contract was placed. To start with, we will examine the liability of the debtor according to the various types of contract.

In various instances of *bonae fidae iudicia* (see section 8 above) liability only extended to *dolus*. This was, originally, also the case for mandatum and depositum, fiducia, tutela and societas. In German research into Roman legal science, the principle of utility (»Utilitätsprinzip«) is used, meaning that the

parties to a contract who did not gain thereby or have any other interest in it, would normally only be liable for *dolus* while other parties were liable for both *dolus* and *culpa*. This principle was not consistently adhered to since liability for *culpa* was placed in several such cases.

In other instances, the liability was stricter, in that, besides *culpa*, it comprised many cases where the debtor was not to blame subjectively but where he was liable if he was unable to ascribe the damage to what we call *vis major*. Whether this was the case was ascertained by purely objective standards. Theft, for example, was not considered vis major though robbery was. Such liability was termed *custodia*. The liability comprised was for the custody of an object and would typically arise when an object was lost as a result of inadequate supervision. On this measure a party who had been entrusted with the possession of an object under a contract of hire as a hirer or repairman (*conductor*), as a borrower (*commodatarius*), as a seller up to *traditio* (*venditor)* or a *socius* who had possession of an object belonging to the partnership. Custodia liability also applied to captains, innkeepers and stable keepers in respect of the property items brought by the guests. This was known as *receptum nautarum cauponum stabulariorum.*

With regard to the special actions »*stricti juris*«, e.g. under *stipulatio*, liability was, as already mentioned (section 21), limited to cases in which the failure of proper performance was attributable to a positive act by the party at fault or in which the object had been lost following a deliberate delaying of delivery on the part of the debtor (*perpetuatio obligationis).*

In post-classical Roman law there was a steady evolution towards the recognition of a general standard of culpa in the estimation of contractual liability (*dolus* and *culpa*) that resulted in the delimitation of different categories of responsibility. The general norms of liability were now *dolus* and *culpa* which applied in most of the cases which, earlier, had been judged according to the standard of dolus (though not e.g. *depositum*) or according to liability of custodia.

A special standard known as *diligentia quam in suis rebus* (*adhibere solet*) was used in some instances where the emphasis was placed on the care taken by the debtor in the management of his own affairs. There are many theories about which cases this was applied to though *tutor*, *socius* and *depositarius* were examples of instances where the person in question could free himself of the liability by reference to his meticulousness in his personal affairs. A third group was where liability was limited to *dolus* and *culpa lata* (gross negligence). To this, occasionally, were added *tutor*, *depositarius* and *mandatarius*.

On the responsibility for *mora* (delay) occasioned by the debtor through positive action or this being due to the object's destruction after the onset of delay (*perpetuatio obligationis*)

as far as this could be ascribed to him according to the rules mentioned above (see section 21).

In deciding whether there was a case of breach of contract, according to the conditions mentioned above, the distinction between strict and not so strict claims was significant in that the choice of wording in the formula was crucial.

In the case of »*stricti iuris*« obligations concerning *certa pecunia* or generic goods the performance of the duty was in principle always possible and according to the wording of the complaint, particular liability for the delay was out of the question, all that could be raised was a demand for the specific performance or payment of its value in coin.

In the case of a strict claim (stricti iuris) concerning *certa res*, the destruction of the object meant that the debtor was released from his duty to deliver. However, liability for the value of the lost object could be brought to bear on him according to the principle of *perpetuatio obligationis* or if the debtor had caused the destruction of the object through his own actions. In the case of *formula incerta*, the debtor was liable according to the formula »*quidquid dare facere oportere*« used in case of the creditor's loss through non-fulfilment.

In the case of *bonae fidei iudicium* the debtor was liable for any instance of his having not fulfilled the special *ex fide bona* obligations towards the creditor or having acted in a fraudulent manner at the conclusion of a contract, see section 22 above on the liability for impossible performance at purchase and section 20 on subsequent impossibility.

30. On the liability for contracts entered into by others

Roman law did not, as has already been mentioned, recognize direct representation whereby a person could as a matter of course establish rights or enter engagements on behalf of another. It was a basic principle that no one could acquire rights through another free man[33]. In the same way the general rule was – this applied to both free people and people *in potestate* – that by entering contracts one could not commit others. As an ever developing economy of trade and finance accentuated the need to enter legal transactions without the actual presence of the parties concerned being necessary, this state of the law must have seemed more and more unsatisfactory. It was partly remedied by the arrangement whereby *filiifamilias* or *slaves* made acquisitions on behalf of the *dominus*. This compensated to a significant degree for the absence of direct representation. A rule of direct representation was never evolved in Roman law though there were many attempts to circumvent the strict rules in different ways.

The state of the law was as follows:

33. Gaius II, 95 expresses it thus: *per extraneam personam nobis adquiri non posse* (through a stranger there can be no acquisition for us).

Acquisition of rights might be effected via slaves and children acting so to speak as their master's »auxiliary arm« (as the German scholar Kaser expresses it). Apart from such agents only one special exemption was recognized, viz. that (since the second century A.D.) a *procurator* might acquire possession and sometimes property rights on behalf of the person whose property he held in trust. Similar rules were applicable for a guardian (*tutor*) towards his ward.

Contractual obligations, however, were only binding on those who had entered them. This was where praetorian law came into the picture. It gave a remedy in some cases thus recognizing the right of a third party to bring an action against a head of a household on the basis of engagements entered into by slaves or sons (in some special instances, even *free* persons). These actions, granted by the praetor in such circumstances were called *actiones adjectitiae qualitatis* because they created a further obligation besides that already entered into by the slave or the son which could not be enforced as it was an *obligatio naturalis*. The basis for the use of these special actions was usually a business deal concluded by contract. These actions took their point of departure from the ordinary contract complaints. The only modification was that there was a switch of names so that in the formula the condemnation mentions another person than the intention. These were also known as name change actions. The system will be made evident in the examples below.

If the head of the household had authorized his son or slave to undertake a certain legal transaction then the *actio quod jussu* was used. Its formula went thus:

> Quod iussu Numerii Negidii Aulus Agerius Gaio cum is in potestate Numerii Negidii esset, togam vendidit, qua de re agitur, quidquid ob eam rem Gaium AoAo dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvito.

> As the plaintiff has sold the toga which is what this case is about, on the orders of the defendant to Gaius whilst he was in the defendant's potestas, whatever Gaius owes the plaintiff for that reason is what the judge should sentence the defendant to pay the plaintiff, if this is not the case, he must be acquitted[34].

Had the slave or son disposed over their own property, provided by the head of the household (*peculium*), the head of the household could be sued by means of an *actio de peculio* for the satisfaction of creditors within the limits set by the

34. In the case of a slave, the formula would have been built upon the fiction of the slave being free. A slave could not be bound by obligation according to ius civile.

size of the peculium. If the peculium was insufficient, an *actio tributoria* could oblige him to provide a proportionate compensation within the limits of the peculium. An *actio de in rem verso* was granted if the head of the household had been enriched through the action of his slave or son. The order could not go beyond the extent of the enrichment.

Had a person employed someone else as the manager of a shop (*taberna*) or any other venture, he was liable for the legal transactions undertaken by such third party, designated as *institor*, in the course of carrying out his duties. The liability was enforceable via an *actio institoria*. The starting point was a passage in the praetor's edict which went: »*Quod cum institore gestum erit, eius rei nomine cui praepositus fuerit, in eum, qui eum praeposuerit, iudicium dabo*«. (After having had dealings with an institor, I will sue his employer should this matter pertain to what he is employed for).

The formula might read as follows:

> Quod Aulus Agerius de Lucio Titio, cum is a Numerio Negidio tabernae instructae praepositus esset,ius rei nomine decem pondo olei emit, qua de re agitur, quidquid ob eam rem Licium Titium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato etc.
>
> As the plaintiff bought ten pounds of oil which is what this case is about, from Lucius Titius when he was entrusted by the defendant with the running of a shop, what Lucius Titius should do in this instance towards the plaintiff is what the judge should sentence the defendant to etc.

Finally there was an *actio exercitoria* for use against a shipowner on the duties assumed by a captain (shipowner-*exercitor*).[35] *Actio institoria* and *actio exercitoria* was also available when he who had acted on behalf of another was a *free* person.

35. See to actio institoria and actio exercitoria, J.-J. Aubert: *Business Managers in Ancient Rome,* A Social and Economic Study of Institores, 200 B.C.-A.D. 200, Leiden 1994. A. Kirschenberger: *Sons, Slaves and Freedmen*, 1987, p. 90 s.

CHAPTER SIX

Criminal Proceedings and Torts

31. Private and Public Penalties[1]

In older Roman law as in other ancient legal systems the area pertaining to the modern law of torts (within the province of private law) and criminal law (which is a matter of public law) was merged. Though the present account is in the main focused on private law, criminal law is briefly to be treated here to supplement the sections on individual (private) criminal proceedings.

Only a few crimes such as treason (*perduellio*) or sacrilege were considered serious enough to warrant public intervention. In the case of murder, theft, robbery, assault and so on, it was generally up to the individual to seek redress. There was a gradual development in Rome of the system of public prosecution in that it included more and more delicts in its purview so that all sanctions that went beyond pure redress (*talion*) were referred to the public criminal law. Classical Roman law was in this respect still at an intermediate stage.

Under the law of the Twelve Tables the following acts were considered criminal offences (*crimina*): Murder of near relatives (*parricidium*), arson, theft (*furtum*), the destruction of crops by night, perjury, and witchcraft practicing. The arrangement would seem to have left it to the individual to pursue and enforce the punishment sanctioned when the requirements for such pursuit were satisfied by substantiation before a jury. However, this investigation was unnecessary if the criminal had been caught in the act.

Crimes against the state were adjudicated by the popular assembly, originally the *comitia centuriata*, later on the *concilium plebis*. During the reign of Augustus the senate took over the adjudication of trials for treason and procedures

1. The classic presentation of Roman criminal law is: *Römisches Strafrecht* by Mommsen (1899) which in respect to older criminal procedure is nowadays supplemented by *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens* by Kunkel (1962). See also *Historical introduction* by Jolowicz and Nicholas, p. 318 ff. F. Robinson: *The Criminal Law of Ancient Rome* (1995).

concerning provincial extortion (*repetundae*). The other crimes could only be pursued privately under the supervision of a praetor who, in this respect, was in turn guided by a college of jurors (*consilium*). Particular tasks for the maintenance of law and order in Rome were the preserve of the so-called *tresviri capitales*, who would handle city crime.

Under Sulla (82-79 B.C.) a programme of legislative reform was enacted which extended a tendency of the second century B.C. towards the establishment of public tribunals (*iudicia publica*) with juries, *quaestiones perpetuae*, with set powers though with changing membership.[2] Decisions were majority decisions and there was no possibility of appeal. Such jury courts were introduced for most crimes through the legislative reforms of Augustus (*lex Iulia iudiciorum publicorum*) of 17 B.C.. There were thus special courts for manslaughter, assault and battery (*vis publica*), adultery (*adulterium*) and so forth. A charge could be made by any citizen (*delator*) as long as it was endorsed by the praetor. On the other hand, the state could not intervene without a charge being brought.

During the Empire, there seems to have been a development whereby the *praefectus urbi* and the *praefectus praetorio* influenced the administration of criminal justice in rivalry with the jury courts, so that there was, just as in civil procedure, a tendency towards *extra ordinem* procedure.

Some delicts, regarded nowadays as public crimes, were still considered private (*iniuria*, *furtum* and *damnum iniuria datum*).

32. Furtum

The Roman *furtum* is normally translated as theft. In using this translation, one should be aware that the Roman concept of *furtum* through time underwent an evolution whereby several instances which today would not be considered theft were included in the concept.

In the XII Tables, we find various regulations concerning theft:

Lex XII tabularum VIII:

12. SI NOX FURTUM FAXSIT, SI IM OCCISIT, JURE CAESUS ESTO.
13. LUCI...SI SE TELO DEFENDIT,...ENDOQUE PLORATO.
14. Ex ceteris...manifestis furibus liberos verberari addicique jusserunt (Xviri) ei, cui furtum factum esset..; servos...verberibus afficie saxo praecipitari; sed pueros impuberes praetoris arbitratu verberari voluerunt noxiamque...sarciri.

15a. Concepti et oblati (furti) poena ex lege XII tabularum tripli est. - b. ..lance et licio...

2. A.H.M. Jones: *The Criminal Courts of the Roman Republic and Principate* (1972).

16a. SI ADORAT FURTO, QUOD NEC MANIFESTUM ERIT..., b. DUPLIONE DAMNUM DECIDITO.

XII Tables, eighth table:

12. If he commits theft at night and should one kill him, then he will have been rightly killed.
13. In daylight..., should he defend himself with a spear,... and he must call out for help.
14. They (the decemvirii) ordained that a thief caught in the act, were he a free man, was to be scourged and then handed over as slave to the victim. Slaves caught in the act were to be scourged and then thrown off the rock. Whilst, children were to be scourged as the praetor saw fit and make good the damage.
15a. In the case of furtum conceptum and furtum oblatum, the fine is then tripled according to the XII Tables. b. with loincloth and bowl ...
16a. If there is a lawsuit for theft without the thief being caught in the act, b. the fine will be doubled.

A distinction was drawn between *furtum manifestum* where the thief was caught red-handed and *furtum nec manifestum*. The situation that the stolen goods were found during a search of the thief's quarters was equivalent to furtum manifestum.

This search was carried out in a particularly solemn fashion. A designation of this has been preserved in the formula »lance et licio« which is usually understood to mean that the searcher carried out the search on his own wearing a loincloth and holding a bowl. The meaning behind this is obscure. Maybe it is an ancient sacrificial rite; a similar procedure is known in many instances of Indo-german legal dispositions.

Furtum manifestum gave the victim the right to kill the thief when he was caught at night or fought back with a weapon in daylight. Later on, it became standard practice to hand over the thief as slave to the victim. *Furtum nec maifestum* carried with it a fine of twice the value of the stolen goods.

If stolen goods were found on a person's property, without the use of the ritual search procedure, it was considered a case of *furtum concepti* which entailed a fine of three times the value of the stolen goods. If the goods had been planted there by the real thief, whoever had been sentenced for *furtum conceptum*, could retaliate through an *actio furti oblati*.

In the course of the second century B.C., the concept of theft was extended by praetorian legal formation. Embezzlement belonged to *furtum*. Symptomatic of this extension, is the story related by two Roman authors, Valerius Maximus and Aulus Gellius about a man who had rented a horse in order to make a journey to the town of Ariccia, approximately twenty-five kilometres away from Rome. Upon arrival at Ariccia, he rode through the town and up on to a

hill so as to enjoy the view. The owner of the horse had him condemned for *furtum*. A significant extension of concept of furtum was linked to such instances of unlawful use, as this mortgage situation:

Gaius, ad edictum provinciale III (D. 47,2,5,5,pr.):
Si pignore creditor utatur, furti tenetur.

Gaius, Provincial Edict, third book:
Should the creditor use the security, he is then held responsible for theft.

The same applied if the pledgee disposed of the pledge in spite of an agreement to the contrary or before the expiry of the deadline:

Javolenus, ex Cassio XV (D. 47,2,74):
Si is, qui pignori rem accepit, cum de vendendo pignore nihil convenisset, vendidit, aut ante, quam dies venditionis veniret pecunia non soluta, id fecit, furti se obligat.

Javolenus, From Cassius, fifteenth book:
A person who sells a thing pledged to him, when no agreement had been made that he have power of sale, or, his debt remaining unpaid to him, sells before the time when he would have been authorized to sell it, makes himself guilty of theft.

Furtum required as subject a piece of chattel but it might also arise without the modern day condition of the violation of possession having been fulfilled. Someone holding something in good faith did thus commit *furtum* if he sold the thing after having discovered that it was not his. Even the person who received a payment which he knew he was not entitled to from a person who was mistaken could be pursued by an *actio furti*. Hiding a runaway slave (D. 47,4,1,pr.) was considered to be furtum. Another source tells us, however, that it was not theft to abduct a female slave in order to satisfy a sexual urge since there was no intent of theft (D. 47,2,39,pr.) or to use someone else's donkey for the purpose of insemination as long as it was returned after use (D. 47,2,52,20).

The rules concerning *furtum manifestum* were eventually changed so that the penalty was set at a fine of four times the value of the stolen item. This was necessary after the extension the concept had undergone in practice.

The subjective conditions were that the thief had acted intentionally, *dolo malo*. In post-classical times a sort of motive of enrichment, a particular *animus lucri faciendi* was added.

The common theft action was *actio furti* which would normally comprise the double amount of the value of the object. It was possible to combine this actio with *rei vindicatio* to enable the victim of the theft to reclaim his property. An

alternative action, *condictio ex causa furtiva*, was also available. While *actio furti* was available to anybody who had an interest in the thing, e.g. a user, the *condictio ex causa furtiva* was restricted to the owner and had the advantage that ownership need not be proved as in *rei vindicatio* and that compensation might be sought even if the thing had been destroyed. While *actio furti* was limited to be brought against the thief proper, *condictio ex causa furtiva* might be set up against everybody who had obtained an enrichment by the theft including e.g. the thief's heirs on his death.

The private pursuit of cases of theft was of course only effective insofar that the thief was able to pay the fine (*poena*) and the value of the thing. However, experience showed that the payment of a fine was not an effective deterrent in the case of this particular delict. Extraordinary legal proceedings against crimes of enrichment were developed during the Empire for the *praefectus urbi* and other officials to whose discretion the level of sentencing was left. At the same time, public prosecution of particularly serious types of theft was enacted as a supplement to private criminal law. Finally, a new concept of crime was introduced, the *stellionatus* concept (stellio=lizard) which was the equivalent in criminal law of *dolus malus* (section 32).

33. Actio legis Aquiliae[3]

The *lex Aquilia* forms the basis of the European law of damages. Study of this law which was originally adopted by the Roman popular assembly in the third century B.C. does, however, shed light on more than just the starting point of the development of the European law of damages. The lex Aquilia holds an important position in the study of Roman law since it is an example of the interpretation of sources of law and serves as a basis for understanding the formation of praetorian law.

The law consists of three chapters of which the first and the last are of interest here:

3. See besides the text books on Roman Law (Kaser, Schulz and so on): *Das Schadensersatzrecht der lex Aquilia* by Herbert Hausmanninger, Vienna 1976 (5th. ed. 1996) as well as dissertations in the homage volume *Daube Noster*, Edinburgh and London, 1974 and *The Law of Obligations in the Later Roman Republic* by A. Watson, p. 234 ff. R. Zimmermann: *The Law of Obligations* (1990).

Gaius, ad edictum provinciale VII (D. 9,2,2,pr. & 1):
Lege Aquilia capite primo cavetur: »si quis servum servamve alienum alienamve quadrupedemve pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto«: et infra deinde cavetur, ut adversus infitiantem in duplum actio esset.

Gaius, Provincial Edict, seventh book:
The first chapter of the lex Aquilia provides as follows: »If anyone kills unlawfully a slave or a servant-girl belonging to someone else or a four footed beast of the class of cattle, let him be condemned to pay the owner the highest value that the property had attained in the preceding year.« 1. And next it is provided that the action should be for double the value if the defendant denied his liability.

Ulpian, ad edictum VIII (D. 9,2,27,5):
Tertio autem capite ait eadem lex Aquilia: »Ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus trigenta proximis, tantum aes domino dare damnas esto«.

Ulpian, Edict, eighteenth book:
In its third chapter the lex Aquilia says: «In the case of all other things apart from slaves or cattle that have been killed, if anyone does damage to another by wrongfully burning, breaking or spoiling his property, let him be condemned to pay to the owner whatever the damage shall prove to be worth in the next thirty days.«

According to this, the law comprised the killing of slaves and four footed cattle on the one hand and damage to other property on the other. As to the date of the law, we do know that it was a legally binding decision made by the popular assembly. Therefore, it must stem from a point in time after the *lex Hortensia* of 286 B.C. had attributed the validity of law binding on all Roman citizens, to the decisions of the popular assembly. For other reasons it is reasonable to assume that it does not antedate this period by much.

On the basis of the lex Aquilia, an *actio legis Aquiliae* was conceded the formula of which went thus:

Octavius iudex esto.
Si paret Numerium Negidium illum servum iniuria occidisse quam ob rem, quanti is servus in eo anno plurimi fuit, tantam pecuniam Numerius Negidius Aulo Agerio dare oportet, tantam pecuniam duplex iudex Numerium Negidium Aulo Agerio condemnato. Si non paret absolvito.

Octavius, be judge.
Should it appear that the defendant has wrongfully killed the slave and for that reason should pay the plaintiff an amount equivalent to that of the highest value of the slave last year, that is the amount that you as judge should

sentence the defendant to pay twofold to the plaintiff. Should it not appear so, then he must be acquitted.

Throughout the entire classical period actions on the *lex Aquilia* were available for compensation claims. On numerous points the provisions were specified or their application extended partly by interpretation (*interpretatio*), partly via praetorian law.

In classical times the individual computation of the extent of the damage was evolved. As an example may be mentioned that the measure of damages to an owner of a team of two horses would take into account the increased value it had to him that the horses were a »team«. The same applied if a slave who was a member of an orchestra or theatre company was killed.

Prima facie the entitlement to compensation was limited to the owner. Later developments would recognize other parties as entitled as well e.g. a user (*usufructar*). However, two distinct features deriving from the origin of the law as a criminal action were retained, viz. that several tortfeasors would be liable cumulatively, i.e. the injured party might claim the full amount of damages from each of them although one of them had paid – and no action would lie against the heirs of the tortfeasor.

The particular regulations in the law on the setting of the calculation of damages based on the maximum value during the past year did allow for any transitory drop in value to be ignored. The meaning of the reference to »the next thirty days« in the law's third chapter has been disputed. Probably, what is meant is the ensuing thirty days. Although the text can be read to mean that the full value of the object had to be repaid irrespective of whether only a transitory damage had been caused, this is hardly likely to be the case. Only depreciation in value of which the extent could be assessed after thirty days had to be compensated for.

Damages could only be awarded for financial loss,[4] there was no legal remedy for »sentimental value«.

Paulus, ad Plautium II (D. 9,2,33, pr.):
Si servum meum occidisti, non affectiones aestimandas esse puto, veluti si filium tuum naturalem quis occiderit quem tu magno emptum velles, sed quanti omnibus valeret. Sextus quoque Pedius ait pretia rerum non ex affectione nec utilitate singulorum, sed communiter fungi: itaque eum, qui filium naturalem possidet, non eo locupletiorem esse, quod eum plurimo, si alius possideret, redempturus fuit, nec illum, qui filium alienum possideat,

4. Which also applied to compensation for battery (including blemishing and disfigurement) for which free persons were not eligible though in the case of slaves, it applied as it pertained to a depreciation of their market value.

tantum habere, quanti eum patri vendere posset, in lege enim Aquilia damnum consequimur: et amisisse dicemur, quod aut consequi potuimus aut erogare cogimur.

Paul, Plautius, second book:
If you kill my slave, I think that personal feelings should not be taken into account (as where someone kills your natural son whom you would be prepared to buy for a great price) but only what he would be worth to the world at large. Sextus Pedius says that the prices of things are to be taken generally and not according to personal affections nor their special utility to particular individuals; and accordingly they say that that he who has a natural son is none the richer because he would redeem him for a great price if someone else possessed him, nor does he who possesses someone else's son actually have as much as he could sell him for to his father. For under the lex Aquilia, we sue for the amount of the harm suffered and we are said to have lost whatever we could have gained or what we are obliged to pay out.

On the extensions that the law received in respect to the choice of harmful actions for which compensation could be claimed, we are enlightened by a section of Justinian's *Institutiones* pertaining to the third chapter of the lex Aquilia:

Institutiones 4,3,13:
Itaque si quis servum vel eam quadrupedem quae pecudum numero vulneraverit, sive eam quadrupedem quae pecudum numero non est, veluti canem aut feram bestiam, vulneraverit aut occiderit, hoc capite actio constituitur. in ceteris quoque omnibus animalibus, item in omnibus rebus quae anima carent damnum iniuria datum hac parte vindicatur. si quid enim ustum aut ruptum aut fractum fuerit, actio ex hoc capite constituitur: quamquam poterit sola rupti appellatio in omnes istas causas sufficere: ruptum enim intellegitur, quod quoquo modo corruptum est. unde non solum usta aut fracta, sed etiam scissa et collisa et effusa et quoquo modo perempta atque deteriora facta hoc verbo continentur: denique responsum est, si quis in alienum vinum aut oleum id immiserit, quo naturalis bonitas vini vel olei corrumperetur, ex hac parte legis eum teneri.

Institutes 4,3,13:
The third section provides for all other loss. If someone wounds a slave or livestock quadruped, or if he wounds or kills a quadruped not classed as livestock such as a wild beast or a dog, an action lies under this section. It gives a remedy for loss wrongfully caused when any animal or any inanimate thing is burned or damaged or broken. The word »damaged« – Latin verb »rumpere« – could have covered all these cases, since it is construed to include every kind of spoiling (Latin »corrumpere«). That word covers not only burning and breaking but also tearing, spilling, squashing and every sort of ruining and making worse. There is authority that if someone adds something to another's wine or oil to spoil its natural quality, he becomes liable under this section.

The initial premise in determining the kinds of damage which (*damnum*) were comprised by the law was that it was directly inflicted by physical means

(*corpore*). The formula »damnum corpore datum« was used by the Romans or as Gaius put it (3,219): »Si quis corpore suo damnum dederit«:

Institutiones 4,3,16:
Ceterum placuit ita demum ex hac lege actionem esse, si quis preacipue corpore suo damnum dederit, ideoque in eum, qui alio modo damnum dederit, utiles actiones dari solent: veluti si quis hominem alienum aut pecus ita incluserit, ut fame necaretur, aut iumentum tam vehementer egerit, ut rumperetur, aut pecus in tantum exagitaverit, ut praecipitaretur, aut si quis alieno servo persuaserit, ut in arborem ascenderet vel in puteum descenderet, et in ascendendo vel descendendo aut mortuus fuerit aut aliqua parte corporis laesus erit, utilis in eum actio datur.

Institutes 4,3,16:
The conclusion was reached that the statutory action lies only where someone causes loss immediately by his bodily force. Where people cause loss in other ways the practice is to give actions based on the policy of the statute. These policy actions are given against one who shuts up another's slave or animal so that it dies of starvation, drives a draught animal so hard that it is injured, harasses an animal till it throws itself over a cliff or induces another's slave to climb up a tree or go down a well so that in climbing up or down, he is killed or injured.

Prima facie it was thus necessary that there had been immediate or direct infliction of damage caused by the positive action of the responsible party, although with the passage of time, the area of damages was expanded so as to include indirect damage and compensation for negligence.

This development did not come about through interpretation of the law but by way of the praetor conceding an *actio utilis* in several particular instances. The extracts from the commentary on the edict by Ulpian brought below are, in this respect, particularly enlightening and at the same time show how the commentary goes through the edict word by word (as a so-called *lemmata* commentary).

Ulpian starts out with the interpretation of the word »occidere« (to kill) in the praetor's edict which did enumerate the cases where actions could be conceded (7,1-5) and then proceeds to discuss »mortis causam praestare« (to provide cause of death) (7,6-7 and 9, pr.-3) as the basis for expanding the area of liability. Finally (11, pr.) is about a situation where the damage was caused by the actions of several people, also those of the victim.

Ulpian, ad edictum XVIII (D. 9,2,7,1,-7):
1. Occisum autem accipere debemus, sive gladio sive etiam vel alio telo vel manibus (si forte strangulavit) vel calce petiit vel capite vel qualiter qualiter.

Ulpian, Edict, eighteenth book:

1. Now we must accept »killing« to include the cases where the assailant hit his victim with a sword or a stick or other weapon or did him to death with his hands (if, for example, he strangled him) or kicked him with his foot or butted him or any other such ways.

2. Sed si quis plus iusto oneratus deiecerit onus et servus occiderit, Aquilia locum habet: fuit enim in ipsius arbitrio ita se non onerare. Nam et si lapsus aliquis servum alienum onere presserit, Pegasus ait lege Aquilia eum teneri ita demum, si vel plus iusto se oneraverit vel neglegentius per lubricum transierit.

2. But if one who is unreasonably overloaded throws down his burden and kills a slave, the Aquilian action lies; for it was within his own judgement not to load himself thus. For even if someone slips and crushes another man's slave with his load, Pegasus maintains that he is liable under the lex Aquilia provided he overloaded himself unreasonably or negligently walked through a slippery place.

3. Proinde si quis alterius impulsu damnum dederit, Proculus scribit neque eum qui impulit teneri, quia non occidit, neque eum qui impulsus est, quia damnum iniuria non dedit: secundum quod in factum actio erit danda in eum qui impulit.

3. Thus, if someone does damage through being pushed by someone else, Proculus writes that neither is liable under the lex; the one who pushed is not liable because he did not kill, nor is the one who was pushed because he did not do the damage unlawfully. According to this view, an *actio in factum* will be given against the one who pushed.

4. Si quis in colluctatione vel in pancratio, vel pugiles dum inter se exercentur alius alium occiderit si quidem in publico certamine alius alium occiderit, cessat Aquilia, quia gloriae causa et virtutis, non iniuriae gratia videtur damnum datum. hoc autem in servo non procedit, quoniam ingenui solent certare: in filio familias vulnerato procedit, plane si cedentem vulneraverit, erit Aquiliae locus, aut si non in certamine servum occidit nisi si domino committente hoc factum sit tunc enim Aquilia cessat.

4. If a man kills another in a *colluctatio* or in the *pancratium* or in a boxing match (provided the one kills the other in a public bout), the lex Aquilia does not apply because the damage is seen to have been done in the cause of glory and valour and not for the sake of inflicting unlawful harm; but this does not apply in the case of a slave because the custom is that only freeborn people compete in this way. It does, however, apply where a son-in-power is hurt. Clearly, if someone wounds a contestant who has thrown in the towel the lex Aquilia will apply, which is also the case when he kills a slave outside the contest, except if he was entered for a fight by his master; then the action fails.

5. Sed si quis servum aegrotum leviter percusserit et is obierit, recta Labeo dicit lege Aquilia eum teneri, quia aliud alii mortiferum esse solet.

5. But if someone gives a light blow to a sickly slave and he dies from it, Labeo rightly says that he is liable under the lex Aquilia; for different things are lethal for different people.

6. Celsus autem multum interesse dicit, occiderit an mortis causam praestiterit, ut qui mortis causam praestitit, non Aquilia sed in factum actione teneatur. Unde adfert eum, qui venenum pro medicamento dedit et ait causam mortis praestitisse, quemadmodum eum qui furenti gladium porrexit: nam nec hunc lege Aquilia teneri, sed in factum.

6. Celsus says it matters a great deal whether one kills directly or brings about a cause of death, because he who furnishes an indirect cause of death is not liable to an Aquilian action but to an *actio in factum* wherefore he refers to a man who administered poison instead of medicine and says that he thereby brought about a cause of death in the same way as one who holds out a sword to a madman; and such a man is not liable under the lex Aquilia but to an actio in factum.

7. Sed si quis de ponte aliquem praecipitavit, Celsus ait, sive ipso ictu perierit aut continuo submersus est aut lassatus vi fluminis victus perierit, lege Aquilia teneri, quemadmodum si quis puerum saxo inlisisset.

7. But if a man throws another off a bridge Celsus says that regardless of whether he is killed by the impact or merely drowns at once or whether he perishes from exhaustion because he is overcome by the force of the current, there is liability under the lex Aquilia, just as if one dashes a child against a rock.

The fundamental distinction between direct (*occidere*) and indirect (*mortis causam praestare*) cause of death comes out very clearly in the following famous example:

Ulpian, ad edictum XVIII (D. 9,2,9,pr.-4):

9. pr. Item si obstetrix medicamentum dederit et inde mulier perierit, Labeo distinguit, ut, si quidem suis manibus supposuit, videatur occidisse: sin vero dedit, ut sibi mulier offerret, in factum actionem dandam, qua sententia vera est: magis enim causam mortis praestitit quam occidit.

Ulpian, Edict, eighteenth book:

9. Labeo makes this distinction if a midwife gives a drug from which the woman dies: If she administers it with her own hands it would appear that she killed; but if she gave it to the woman for her to take herself an actio in factum must be granted. This opinion is correct; for she provided a cause of death rather than killed.

1. Si quis per vim vel suasum medicamentum aliqui infundit vel ore vel clystere, vel si eum unxit malo veneno, lege Aquilia eum teneri, quemadmodum obstetrix supponens tenetur.

1. If someone administers a drug to anyone by force or persuasion, either in a drink or by injection or rubs him with a poisonous potion, he is liable under the lex Aquilia.

2. Si quis hominem fame necaverit, in factum actione teneri Neratius ait

2. Neratius says that if a man starves a slave to death he is liable to an actio in factum.

3. Si servum meum equitantem concitato equo effeceris in flumen praecipitari atque ideo homo perierit, in factum esse dandam actionem Ofilius scribit: quemadmodum si servus meus ab alio in insidias deductus ab alio esset occisus.

3. If when my slave is out riding you scare his horse so that he is thrown into a river and dies as a result, Ofilius writes that an actio in factum must be given in just the same way as when my slave is lured into an ambush by one man and killed by another.

4. Sed si per lusum iaculantibus servus fuerit occisus, Aquiliae locus est: sed si cum alii in campo iacularentur, servus per eum locum transierit, Aquilia cessat, quia non debuit per campum iaculatorium iter intempestive facere; qui tamen data opera in eum iaculatus est, utique Aquilia tenebitur.

4. But if a slave is killed by people throwing javelins by way of sport, the Aquilian action lies. On the other hand, if when other people were already throwing javelins in a field a slave walked across the same field, the Aquilian action fails, because he should not make his way at an inopportune time across a field where javelin throwing is being practised. However, anyone who deliberately aims at him is liable under the lex Aquilia.

Ulpian's javelin example (9,2,9,4) is based on a speech by the Greek rhetor Antiphon (480-411 B.C. approx.). In this speech, the defender of a boy who killed another whilst throwing spears, seeks to place the entire blame on the deceased by maintaining that the latter caused his own death by moving into the path of the spear. The only person who is truly guilty is the deceased who ran forward of his own free will. In the same way, Ulpian wants to place the blame entirely on one person, the thrower of the spear or the slave.

Ulpian, ad edictum XVIII (D. 9,2,11,pr.):
Item Mela scribit, si cum pila quidam luderent, vehementius quis pila percussa in tonsoris manus eam deieceritet et sic servi quem tonsor radebat, gula sit praecisa adiecto cultello: in quocumque eorum culpa sit, eum lege Aquilia teneri. Proculus in tonsore esse culpam et sane si ibi tondebat, ubi ex consuetudine ludebatur vel ubi transitus, frequens erat, est quod ei imputetur: quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se quaeri debere.

Ulpian, Edict, eighteenth book:
Further, Mela writes that, when some people were playing with a ball, one of them hit it hard and it knocked the hands of a barber with the result that the throat of a slave that the barber was shaving was cut by the jerking of the razor. On which of the parties does fault lie? For it is he that is liable under the lex Aquilia. Proculus says that the blame is the barber's and surely, if he was doing shaving in a place where people customarily played games or where there was much going to and fro, the blame will be imputed to him; but it is no bad point in reply that if someone entrusts himself to a barber who has his chair in a dangerous place he has only himself to blame for his own misfortune.

There are three possible ways of placing the blame for the mishap: On the ballplayer, on the barber and on the slave himself. According to Mela, either the barber or the ballplayer are liable, or both of them together. Proculus would place it squarely on the barber whilst Ulpian points out that this does presuppose that the barber's shop is located in a place where balls might land without any fault on the part of the players. Ulpian concludes with a somewhat cynical choice of words that there was a possibility that the slave himself was to blame.

The interpretation of the word »*iniuria*«[5] was to be of particular significance in the subsequent spread of *lex Aquilia* as a basis of a common rule for compensation for damage to property. At this point, it should be pointed out that the Romans did not draw a sharp distinction between what we would call objective unlawfulness and the question of guilt. The expression »*iniuria*« was already during the Republic interpreted as a claim for *dolus* or *culpa*. Intent was not a precondition though a subjective demand for due care had been formulated by the republican jurists. Two examples illustrate this. The first is a citation by Paulus of the republican jurist Quintus Mucius Scaevola. The second is from the republican jurist Alfenus:

Paulus, ad Sabinum X (9,2,31):
Si putator ex arbore ramum cum deieceret vel machinarius hominem praetereuntem occidit, ita tenetur, si is in publicum decidat nec ille proclamavit, ut casus eius evitari possit. sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi: culpam autem esse, cum quod a diligente provideri potuerit, non esset provisum aut tum denuntiatum esset, cum periculum evitari non possit. secundum quam rationem non multum refert, per publicum an per privatum iter fieret, cum plerumque per privata loca vulgo iter fiat. quod si nullum iter erit, dolum dumtaxat praestare debet, ne immittat in eum, quem viderit transeuntem: nam culpa ab eo exigenda non est, cum divinare non potuerit, an per eum locum aliquis transiturus sit.

5. On the significance of the word *iniuria*, see section 34 below on a particular delict involving the violation of another person.

Paulus, Sabinus, tenth book:
If a pruner threw down a branch from a tree and killed a slave passing underneath (the same applies to man working on a scaffold), he is liable only if it falls down in a public place and he failed to shout a warning so that the accident could be avoided. But Mucius says that even if the accident occurred in a private place, an action can be brought if his conduct is blameworthy; and he thinks there is fault when what could have been foreseen by a diligent man was not foreseen or when a warning was shouted too late for the danger to be avoided. Following the same reasoning, it does not matter much whether the deceased was making his way through a public or a private place, as the general public often make their way across private places. But if there is no path, the defendant should be liable only for positive wrongdoing, so he should not throw anything at someone he sees passing by; but, on the other hand, he is not deemed to be blameworthy when he could not have guessed that someone was about to pass through that place.

The measure of care applied is objective and the decisive factor is the standard which a careful *pater familas* would have applied in the situation. *Diligentia* means conscientousness, care.

In the following text »*iniuria*« pertains to the question of whether there was a situation of self defence, i.e. whether there were objective grounds for exemption from liability in damages:

Alfenus, Digesta II (D. 9,2,52,1):
Tabernarius in semita noctu supra lapidem lucernem posuerat, quidam praeteriens eam sustulerat, tabernarius eum consecutus lucernam reposcebat, et fugientem retinebat, ille flagello quod in manu habebat, in quo dolor inerat, verberare tabernarium coeperat,ut se mitteret: ex eo maiore rixa facta tabernarius ei, qui lucernam sustulerat, oculum effoderat; consulebat, num damnum iniuria non videtur dedisse, quoniam prior flagello percussus esset? Respondi, nisi data opera effodisset oculum, non videri damnum iniuria fecisse, culpam enim penes eum, qui prior flagello percussit, residere: sed si ab eo non prior vapulasset, sed cum ei lucernam eripere vellet, rixatus esset, tabernarii culpa factum videri.

Alfenus, Digest, second book:
One night a shopkeeper had placed a lantern above his display counter which adjoined the footpath, but some passerby took it down and carried it off. The shopkeeper pursued him, calling for his lantern, and caught hold of him; but in order to escape from his grasp, the thief began to hit the shopkeeper with the whip that he was carrying on which there was a spike. From this encounter, a real brawl developed in which the shopkeeper put out the eye of the lantern-stealer, and he asked my opinion of whether he had inflicted wrongful damage, bearing in mind that he had been hit with the whip first. My opinion was that unless he had poked out the eye intentionally, he would not have appeared to have incurred liability, as the damage was really the lantern-stealer's own fault for having hit him first with the whip; on the other hand, if he had not been provoked by the beating, but had started the brawl when

trying to snatch back his lantern, the shopkeeper would appear to be accountable for the loss of the eye[6].

The »*iniuria*« claim further implied that there were some cases of damages where the perpetrator was not held to be liable for damages that could be kept out of the equation. This was also of significance in the evaluation of damage inflicted by lunatics or children where the question of subjective grounds for exemption arises, just as in the evaluation of the insanity of the perpetrator.

Ulpian, ad edictum XVIII (D. 9,2,5,2):
Et ideo quaerimus, si furiosus damnum dederit, an legis Aquilia actio sit? et Pegasus negavit: quae enim in eo culpa sit, cum suae mentis non sit? et hoc est verissimum. cessabiat igitur Aquilae actio, quemadmodum, si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit. sed et si infans damnum dederit, idem erit dicendum. quodsi inpubes id facerit, Labeo ait, quia furti tenetur, teneri et Aquilia eum: et hoc puto verum si sit iam iniuriae capax.

Ulpian, Edict, eighteenth book:
And accordingly, the question is asked whether there is an action under the lex Aquilia if a lunatic causes damage. Pegasus says there is not; for he asks how there can be any accountable fault in him who is out of his mind; and he is undoubtedly right. Therefore, the Aquilian action will fail in such a case, just as it fails if an animal has caused damage or if a tile has fallen; and the same must be said if an infant has caused damage, though Labeo says that the *pubes*, he could be liable under the lex Aquilia in just the same way as he could be liable for theft. I think this is correct provided that the child were able to distinguish between right and wrong.

Thus, lunatics (*furiosi*) could not have damages awarded against them according to Aquilian law. As Ulpian tells us, the same applied to damage caused by animals. Particular *actiones noxales* pertained in these cases, as will be discussed below. The whole question of damages was somewhat more complex when it came to children. A distinction was drawn between *infantes*, children who had yet to speak, and *impuberes infantiae maiores*, a state which lasted until the onset of sexual maturity which was set at age fourteen for males and age twelve for females. Among the *impuberes infantia maiores* a further distinction was drawn between those closest to infancy, *infanti proximi*, and those who were older, *pubertate proximi*. Originally, all impuberes were liable in the

6. In this instance, the limit of legitimate self-defence was exceeded. The legal solution in this fragment was perhaps based on Greek law whereby the first one to strike a blow was liable.

law of delicts though in the late classical period, the delict liability was restricted in that in each case, the child's soundness of mind was evaluated.

Whether free persons were protected by the law or whether it applied solely to slaves and livestock is a controversial issue. There is a single instance (Ulpian, D. 9,2,12,pr. and 1) where it is implied that a free person, who was serving in complete good faith as a slave (*liber homo bona fide serviens*) was protected through the granting of an actio utilis, the authenticity of this fragment is, however, disputed. Furthermore, the Digests contain an example of the use of lex Aquilia in the case of personal injury. Julian thus uses an example concerning a filiusfamilias who has been put in apprenticeship in order to throw some light on the meaning of the word »*iniuria*«, that is, a situation akin to that of injured slaves:

Ulpian, ad edictum XVIII (D. 9,2,5,3):
Si magister in disciplina vulneravit servum vel occiderit, an Aquilia teneatur, quasi damnum iniuria dederit? et Iulianus scribit Aquilia teneri eum, qui eluscaverat discipulum in disciplina: multo magis igitur in occiso idem erit dicendum. proponitur autem apud eum species talis: sutor, inquit, puero discenti ingenuo filio familias, parum bene facienti quod demonstraverit, forma calcei cervicem percussit, ut oculus puero perfunderetur. dicit igitur Iulianus iniuriarium quidem actionem non competere, quia non faciendae iniuriae causa percusserit, sed monendi et docendi: sed lege Aquilia posse agi non dubito.

Ulpian, Edict, eighteenth book:
If a teacher kills or wounds a slave during a lesson, is he liable under the lex Aquilia for having done unlawful damage? Julian writes that a man who had put out a pupil's eye in the course of instruction was held liable under the lex Aquilia. There is all the more reason therefore for saying the same if he kills him. Julian also puts this case: A shoemaker, he says, struck with a last at the neck of a boy (a freeborn youngster) who was learning under him, because he had done badly what he had been teaching him with the result that the boy's eye was knocked out. On such facts, says Julian, the action for insult does not lie because he struck him not with the intent to insult, but in order to correct and teach him; he wonders whether there is an action for breach of contract for his services as teacher, since a teacher only has the right to administer reasonable chastisement, but I have no doubt that action can be brought against him under the lex Aquilia.

Ulpian, ad edictum XXXII (D. 19,2,13,4):
Item Iulianus libro octagesimo sexto digestorum scripsit, si sutor puero parum bene facienti forma calcei tam vehementer cervicem percusserit, ut ei oculus effunderetur ex locato esse actionem patri eius: quamvis enim magistris levis castigatio concessa sit, tamen hunc modum non tenuisse: sed et de Aquilia supra diximus, Iniuriarum autem actionem competere Iulianus negat, quia non iniuriae faciendae causa hoc fecerit, sed praecipiendi.

Ulpian, Edict, thirty-second book:
Julian wrote further in the eighty-sixth book of his Digest that if an apprentice is doing poor work and a cobbler strikes his neck with a shoe last so forcefully that his eye is knocked out, his father has an action on the lease (of a job); for although teachers are allowed to punish mildly, this one did not observe the limits. I spoke above about the Aquilian action. Julian denies that an action for insult lies because he did this not to insult but to instruct[7].

We know that Roman apprentices often recieved wages. It would therefore be quite natural to discuss the responsibility according to the *ex locato* plaint, i.e. on the basis of the conditions of hired labour. Julian even discusses the lex Aquilia and the particular plaint for bodily harm, *actio iniuriarium*, which will be discussed below. We are faced with the situation of competing claims for damages. It goes without saying that the lex Aqulia could not be used directly in this case but that an *actio utilis* could be granted. There are not many sources besides these two examples of the use of the lex Aquilia in the case of free persons, but it seems that the *paterfamilias* could sue the man who had wounded or killed his *filiusfamilias* with an analoguous *actio legis Aquiliae*. However, it was only in the case of physical harm that *lex Aquilia* could be brought to bear in the case of free people. Should the injured party die, those left behind had no redress. As a general rule, Roman law did not know of compensation in the case of the death of a breadwinner.

This examination of the lex Aquilia will be concluded here with a fragment that places the responsibility for a traffic accident and in addition to its discussion of the three possible situations of liability, shows a bit about the daily dangers in the city of seven hills:

Alfenus, Digesta II (D. 9,2,52,2):
In clivo Capitolino duo plostra onusta mulae ducebant: prioris plostri muliones conversum plostrum sublevabant, quo facile mulae ducerent: inter superius plostrum cessim ire coepit et cum muliones, qui inter duo plostra fuerunt, e medio exissent, posterius plostrum a priore percussum retro redierat et puerum cuiusdam obtriverat: dominus pueri consulebat, cum quo se agere oporteret, respondi in causa ius esse positum: nam si muliones, qui superius plostrum sustinuissent, sua sponte se subduxissent et ideo factum esset, ut mulae plostrum retinere non possint atque onere ipso retraherentur, cum domino mularum nullam esse actionem, cum hominibus, qui conversum plostrum sustinuissent, lege Aquilia agi posse: nam nihilo minus eum damnum dare, qui quod sustineret mitteret sua voluntate, ut id aliquem feriret: veluti si quis asellum cum agitasset non retinuisset, aeque si quis ex manu telum aut aliud quid immisisset, damnum iniuria daret. sed si mulae, quia aliquid

7. A newly discovered source (designated PSI XIV 1449) adds to the use of the lex Aquilia in this instance in that by lex Aquilia the father can obtain compensation for the son's diminished work capacity (quod minus ex operis filii sui propter vitiotum oculum sit habiturus cp. D. 9.2.7) along with medical fees.

reformidassent et muliones timore permoti, ne opprimerentur, plostrum reliquissent, cum hominibus actionem nullam esse, cum domino mularum esse, quid se neque mulae neque homines in causa essent, sed mulae retinere onus nequissent aut eum coniterentur lapsae concidissent et ideo plostrum cessim redisset atque hi quod conversum fuisset onus sustinere nequissent, neque cum domino mularum neque cum hominibus esse actionem. illud quidem certe, quoquo modo res se haberet, cum domino posteriorum mularum agi non posse, quoniam non sua sponte, sed percussae retro redissent.

Alfenus, Digest, second book:
Some mules were pulling two loaded carts up the Capitoline. The front cart had tipped up, so the drivers were trying to lift the back to make it easier for the mules to pull it up the hill, but suddenly it started to roll backwards. The muleteers, seeing that they would be caught between the two carts, leapt out of its path, and it rolled back and struck the rear cart, which careened down the hill and ran over someone's slave boy. The owner of the boy asked me whom he should sue. I replied that it all depended on the facts of the case. If the drivers who were holding up the front cart had got out of its way of their own accord and that had been the reason why the mules could not take the weight of the cart and had been pulled back by it, in my opinion no action could be brought against the owner of the mules. The boy's owner should rather sue the men who had been holding up the cart; for damage is no less wrongful when someone voluntarily lets go of something in such circumstances and it hits someone else. For example, if a man failed to restrain an ass he was driving, he would be liable for any damage that he caused, just as if he threw a missile or anything else from his hand. But if the accident that we are considering had occurred because the mules had shied at something and the drivers had left the cart for fear of being crushed, no action would lie against them; but in such a case, action should be brought against the owner of the mules. On the other hand, if neither the mules nor the drivers were at fault, as, for example, if the mules just could not take the weight or if in trying to do so, they had slipped and fallen and the cart had then rolled down the hill because the men could not hold it when it tipped up, there would be no liability on the owner or on the drivers. It is quite clear, furthermore, that however the accident happened, no action could be brought against the owner of the mules pulling the cart behind; for they fell back down the hill not through any fault of theirs, but because they were struck by the cart in front.

The European significance of lex Aquilia is closely tied in with the penetration of the *culpa* principle. In German legal science of the seventeenth and eighteenth centuries, in the so-called *usus modernus pandectarum*, actio legis Aquiliae was developed into a general plaint of damages without being tied down by the limitations of the Roman legal principles which stemmed from the origins of the princple in legal action along with the abandonment of the particular elements of criminal law.

34. Actio injuriarium

The word *injuria* appears in various contexts and with various meanings in Roman law. In the *lex Aquilia* it denotes an act which is wrongful in the sense of »culpable«. Actio injuriarum was the action available in certain cases to an injured party who had suffered deliberate bodily harm (*dolus malus*) from another. In classical times the harm would include both bodily harm and damage to one's reputation.

At the age of the Twelve Tables the concept was limited to bodily harm:

Lex XII Tabularum, tabula VIII:
2. SI MEMBRUM RUPSIT, NI CUM EO PACIT, TALIO ESTO.
3. Iniuriarum actio aut legitima est aut honoraria. Legitima ex lege duodecim tabularum: qui iniuriam alteri facit, V et XX sestertiorum poenam subit. quae lex generalis fuit; fuerunt et speciales velut manu fustive si os fregit libero, trecentorum, si servo, CL poenam subit sestertiorum.
4. SI INIURIAM ALTERI FAXSIT XXV POENAE SUNTO.
5. rupsit in lege XII Tabularum significat damnum derit.

XII Tables, eighth table:
2. Should he have broken another's limb and no settlement is reached, then the same injury must be inflicted on him.
3. Plaint in the case of physical injury is based on the law or the praetor's edict. According to the XII Tables: He who injures another shall pay him a fine of twenty-five (as). Special rules decreed in the case of someone breaking another person's bones by hand or with a stick, had to pay a fine of three hundred as for a free person and a hundred and fifty as for a slave.
4. Anyone inflicting a violation on someone should pay him a fine of twenty-five as.
5. Broken, according to the XII Tables means the infliction of damage.

The Law would distinguish between various cases: For »gross« bodily harm the basis would be the principle of *talio* if a conciliatory settlement could not be reached. For fractures of the limbs of another a penalty of 300 as was payable if the victim was a free man, or 150 as if he was a slave. It is remarkable that in this context slaves would enjoy protection on the same principles as free men albeit with half the compensation. For other bodily harm which might come under the injuria category a penalty of 25 as was payable.

In connection with the injuria concept another delict within the scope of the Twelve Tables may be mentioned, viz. the singing of satirical songs - of a defamatory nature - which would attract the death penalty:

Lex XII Tabularum, tabula VIII:
1.a. SI QUIS OCCENTASSIT QUOD ALTERI FLAGITIUM FACIAT.-
b. XII tabulae cum perpaucas res capite sanxissent, in his hane quoque sanciendam putaverunt: si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri.

XII Tables, eighth table:
1.a. Should anyone sing of another committing a crime.
b. Although there were few cases where the sanction of the XII tables was death, they did think it was to be used in the case of a person singing or composing a song accusing another of having committing a crime or being dishonourable.

The usual process of inflation led to the fine of twenty five as being considered unreasonably small by the time of the late Republic. An anecdote related by Aulus Gellius derived from Labeo's commentary of the XII Tables tells us of the background to the change that took place due to the intervention of the praetor in the evaluation of the damage suffered through physical violation.

Aulus Gellius, Noctes Atticae 20,1,13 (Labeo, Ad XII Tabulas):
Lucius Veratius fuit egregie homo improbus atque immani vecordia. Is pro delectamento habebat os hominis liberi manus suae palma verberare. Eum servus sequebatur ferens crumenam plenam assium. Ut quemque depalmaverat, numerari statim secundum XII Tabulas XXV asses iubebat. Propterea praetores postea hanc abolescere et relinqui censuerunt iniuriisque aestimandis recuperatores se daturos edixerunt.

Aulus Gellius, Attic Nights:
Lucius Veratius was a particularly malicious and mad man. He took pleasure in striking free persons in the face with the palm of his hand. A slave carrying a bag full of money would be right behind him. As soon as he had hit someone, he would order that the victim be paid twenty-five asses in accordance with the XII tables. That is why the praetors later on thought it was best to abandon this arrangement and in their edict, prescribed the establishment of a jury court.

At the same time, as mentioned in section 31 above, criminal tribunals were set up where the victims could demand that the perpetrators be punished.

Besides a change in sanctions, the praetorian creation of law also brought about an extension of the area of indictable offenses:

Institutiones 4,4,1:
Iniuria autem committitur non solum, cum quis pugno puta aut fustibus caesus vel etiam verberatus erit, sed etiam si cui convicium factum fuerit, sive cuius bona quasi debitoris possessa fuerint ab eo, qui intellegebat, nihil eum sibi debere, vel si quis ad infamiam alicuius libellum aut carmen scripserit composuerit ediderit dolove malo fecerit, quo quid eorum fieret, sive quis matremfamilias aut praetextatum praetextatamve adsectatus fuerit,

sive cuius pudicitia attemptata esse dicetur: et denique aliis pluribus modis admitti iniuriam manifestum est.

Institutes, 4,4,1:
Contempt is committed not only when someone is struck with a fist or with clubs, or even flogged; but also when a vocal attack is made on him; when his goods are seized like a debtor's by someone who knows he owes him nothing; when someone writes, makes up or publishes a defamatory book or poem, or intentionally procures its writing, composition or publication; or when someone follows about a lady or a youth or a girl, or indulges in sexual harassment; also of course in many other ways.

Thus the iniuria concept would comprise a number of defamatory acts sometimes of a more special nature e.g. the act of »*convicium*« whereby people would gather with defamatory intent in front of the house of a Roman to sing satirical songs etc. or pudicitia ademptata which denoted indecent assaults or attempts to entice somebody into prostitution.

35. Actio quod metus causa and actio de dolo

The praetor created entirely new plaints besides those created through the extension of the area of delicts such as furtum, lex Aquilia and iniuria. Two plaints date from the unsettled times of the last century of the Republic[8]. The *actio quod metus causa*, originally known as the *formula Octaviana* of approx. 80 B.C., could be used against whoever had obtained an advantage through threats and the penalty was the fourfold value of the advantage. This action had to be brought within a year. Whoever was targeted by the action could, however, avoid the penalty by relinquishing the advantage in question. This was thus an instance of an *actio arbitraria*. In the case of demands aimed at the victim of the coercion, an *exceptio metus causa* was granted to the latter.

Actio doli or more accurately, *actio de dolo malo* was introduced by the jurist *Gaius Aquilius*, in which capacity, we do not know. Cicero relates in his work *de Officiis III*, 58-59, the story of a man who was lured into buying a country property in the belief that the place was ideal for angling. This belief was fraudulently conveyed to him by the seller who had arranged for several anglers to land their catch from elsewhere, on his property in order to create the impression of a wealth of fish. As this episode took place before the »invention« of the actio de dolo malo, there was, however, no possibility of redress. It is in this

8. On this see: *Violence in Republican Rome* by Alan Lintott, Oxford 1968.

context that Cicero mentions Gaius Aquilius as the originator of this action. Actio de dolo malo was a plaint against fraud, it was, however, subsidiary to other plaints that might stem from the same instance. What the Romans understood by the notion of *dolus* is uncertain. It seems to have comprised more than volunteering false information or suppressing information and to have included a broad range of acts in breach of *bona fides*.

Ulpian, ad edictum XIX (D. 4,3,1,pr.):
Hoc edicto praetor adversus varios et dolosos, qui aliis offuerunt calliditate quadam, subvenit, ne vel illis malitia sua sit lucrosa vel istis simplicitas damnosa. 1. Verba autem edicti talia sunt: »Quae dolo malo facta esse dicentur, si de his rebus alia actio non erit et iusta causa esse videbitur, iudicium dabo«.

Ulpian, Edict, eleventh book:
By this edict the praetor affords relief against shifty and deceitful persons who by a certain cunning have harmed others, so as to prevent either their wickedness benefitting the former or their simplicity harming the latter. 1. And in fact these are the words of the edict: »Where something is alleged to have been done with a malicious or fraudulent intent and there is no other relevant action and there seems to be a reasonable ground, I will grant an action.«.

36. On damage caused by things

As for damage caused by slaves or persons in potestate, already under the XII Tables the *actiones noxales* applied:

Lex XII Tabularum II:
2.a. SI SERVUS FURTUM FAXIT NOXIAMVE NOXIT.-
b. Ex maleficiis filiorum familias servorumque noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem sufferre, aut noxae dedere.- Constitutae sunt aut legibus aut edicto praetoris: legibus velut furti lege XII Tabularum, etc.

XII Tables, second table:
2.a. Should a slave steal or cause damage...
b. From harmful actions committed by a son of the household or a slave is derived the noxal plaint, whereby the father or master may either compensate for the damage or surrender the wrongdoer. Noxal liability is enforced by law or praetorian edict. By law, in the case of theft for example, by the XII Tables ...

In the case of damage caused by animals (*pauperies*) an actio *de pauperie* applied with rules similar to those in *actiones noxales*:

Lex XII Tabularum VIII:

6. Ulpian, ad edictum XVIII, (D. 9,1,1.pr.)
   Si quadrupes pauperiem fecisse dicetur ... lex voluit aut dari id quod nocuit, ... aut aestimationem noxiae offerri.

XII Tables, eighth table:

6. Ulpian, Edict, eighteenth book.
   Should a four-legged animal cause damage, the law prescribed that either what had caused the damage be surrendered or that an offer to have the damage estimated should be made.

Finally, the *actio de deiectis vel effusis* which could be brought against the inhabitant of a building from which lethal objects fell. Where a person is killed hereby, a penalty of fifty thousand sestertii was imposed.

CHAPTER SEVEN

Succession

37. General remarks

It is often said that wills play an especially important part in Roman law compared to intestate succession. The purpose of the will (*testamentum*) was to appoint an heir and of course we must bear in mind that only a small part of Roman citizens would have any property of importance to hand over to an heir. Wills were therefore mainly interesting to property owners. They gave the *paterfamilias* another means of dominating his family as he could decide in his will who was to inherit him and he could within certain limits disinherit a family member, whom he disliked.

Questions of wills played an important role in Roman legal science. A substantial part of the Digests concerns questions of interpretation of wills.

The Law of the XII Tables divides the heirs into several classes. The next successors, the socalled *sui heredes*, were those who became free of a relation of potestas upon the death of a relative. Those were children *in potestate* or a woman *in manu*. They authomatically and necessarily became heirs – *heredes necessarii* – and could only by a special permit of the praetor – a *beneficium abstinendi* – free themselves from taking over the inheritance and possible debts of the deceased. The second class consisted of agnates. They were persons being under *patria potestas* of the same person or who would be under the potestas of the same forefather, if this was still alive. They had to accept the inheritance (socalled *aditio hereditatis*), if they wanted to be heirs.

This order of succession according to *ius civile* was modified in classical time by praetorian law. The praetor could call others to take the inheritance against the rules of *ius civile*. Such an heir called by the praetor was not called *heres* but *bonorum possessor*. The praetor would call upon all children unconditionally of their status of emancipated or not – in this case he gives the *bonorum possessio* in the class *unde liberi*. Children who had been emancipated and who wanted to inherit had to bring into account what they had gained since the

emancipation in order to create equilibrium with those children that had remained under potestas. This act was called *collatio bonorum.*

The second group protected by the praetor was the »unde legitimi«, the agnates, and the cognates were the third class. Husband and wife (*unde vir et uxor*) were only the forth class.

Two important senatusconsulta (SC) improved the position of children versus their mother and vice versa. The *SC Tertullianum* (130 A.D.) gave the mother a privileged position together with the sisters who share the father with the deceased with regard to the agnates with respect of her deceased children. The *SC Orfitianum* (178 A.D.) gave children a similar position with respect to their mothers.

In Justinian's times important modifications were made by *Novellae* 53, 118 and 127. The first calls of heirs were from now the descendance, parents and sisters or brothers were the second class, and the third class consisted of half-sisters and halfbrothers. Other relatives - agnate or cognate - came into the fourth class.

38. Silvanus' Testament

In 1939 a testament[1] made 143 A.D. by a certain Silvanus and written in wax on a tablet of wood was found in Egypt. It was made by mancipation, a procedure described by Gaius. The procedure entailed that testator would sell his property to a buyer (*familiae emptor*) who would, in the presence of five witnesses and on the same lines as with mancipatio in a property conveyance - strike a pair of scales, held by a sixth person, a *libripens*, with a piece of bronze declaring that he would buy the property of the testator. Subsequently the *familiae emptor* was obliged to distribute the inheritance according to the instructions given by testator. He was not himself an heir. Thereafter the testator declared that his last will was recorded in the the tablets of the testament.

Gaius, Institutiones, II:
104. Eaque res ita agitur: qui facit testamentum, adhibitis, sicut in ceteris mancipationibus, v testibus ciuibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam, in qua re his uerbis familiae emptor utitur: FAMILIAM PECUNIAMQUE TUAM ENDO MANDATELA CUSTODELAQUE MEA ESSE AIO EAQUE, QUO TU IURE TESTAMENTUM FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC AERE, et ut quidam adiciunt, AENEAQUE LIBRA, ESTO MIHI EMPTA; deinde aere percutit libram idque aes dat testatori uelut pretii loco. deinde

1. See FIRA III nr. 47 and RHD 23 (1945) p. 123 ff.

testator tabulas testamenti tenens ita dicit: HAEC ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT, ITA DO ITA LEGO ITA TESTOR ITAQUE UOS, QUIRITESTESTIMONIUM MIHI PERHIBETOTE; et hoc dicitur nuncupatio: nuncupare est enim palam nominare, et sane quae testator specialiter in tabulis testamenti scripserit, ea uidetur generali sermone nominare atque confirmare.

104. The procedure is as follows: As in other mancipations the person making the will assembles five adult Roman citizens as witnesses and another to hold a pair of scales and after writing out his will he mancipates his property to somebody in name only. In these proceedings the property-purchaser says: »I declare that your »family« and property are in my administration and custody; let them be bought to me with this bronze, and (as some add) the bronze scales, so that you can lawfully make a will according to the public statute«. Then he strikes the scales with the bronze and gilves it to the testator as if it were the price; then the testator, holding the tablets of the will in his hand, says: »These things, as they have been written on these wax tablets, I thus convey, I thus bequeath, I thus attest; and so you Roman citizens stand witness for me«. This is called the declaration. For to declare means to announce openly and this means that the testator is regarded as specifying and confirming by his general statement what he has written in detail in his will.

Sivanus' testament runs like this:

Antonius Siluanus eques alae I Thracum Mauretanae, stator praefecti turma Valeri, testamentum fecit. Omnium bonoroum meorum castrensium et domesticum M. Antonius Satrianus filius meus ex asse mihi heres esto: ceteri ali omnes exheredes sunto: cernitoque heriditatem meam in diebus C proximis: ni ita creuerit exheres esto. Tunc secundo gradu [..] Antonius R.. [.....] . [.] . [.]. lis frater meus mihi heres esto, cernitoque hereditatem meam in diebus LX proximis; cui do lego, si mihi heres non erit, denarios argenteos septingentos quinquaginta. Procuratorem bonorum meorum castrensium ad bona mea colligenda et restituenda Antoniae Thermuthae matri heredis mei supra scripti facio Hieracem Behecis duplicarium alae eiusdem, turma Aebuti, ut et sipsa seruet donec filius meus et heres suae tutellae fuerit et tunc ab ea recipiat: cui do lego (denarios) argenteos quinquaginta. Do lego Antoniae Thermuthae matri heredis mei supra scripti denarios argenteos quingentos. Do lego praefecto meo denarios argenteos quinquaginga. Cronionem seruom meum post mortem meam, si omnia recte tractauerit et tradiderit heredi meo supra scripto uel procuratori, tunc liberum uolo esse uicesimamque pro eo ex bonis meis dari uolo.

Hoc testamento dolus malus habesto.

Familiam pecuniamque testamenti faciendi causa emit.

Nemonius duplicarius turmae Mari, libripende M. Iulio Tiberino sesquiplicario turmae Valeri, antestatus est Turbinium signiferum turmae Proculi.

Testamentum factum Alexandreae ad Aegyptum in castris Augustis hibernis legionis II Traianae Fortis et alae Mauretanae, VI kal. Apriles Rufino et Quadrato cos.

Antonius Silvanus, a knight of the first Mauretan detachment of Thraces, in the service of the prefect, from the esquadron of Valerius, has made his last will. My son M. Antonius Satrianus shall inherit all my belongings both in the camp and at home. All other persons shall be disinherited. In the course

of the first coming hundred days he shall formally declary his will to take the inheritance by cretio. If he fails to do so he shall not inherit. In this case...in the second place... Antonius R... my brother shall be heir and declare his will by cretio within 60 days. To him I give as a legacy - if he does not inherit 750 silver Denars. As administrator of my goods acquired during service I appoint Hierax, the son of Behex, duplicarius in this same detachment, in the esquadron of Aebutius, so that he can collect my belongings and hand them over to Antonia Thermutha, who is the mother of my abovementioned heir in order that she can keep them, until my son and heir is free from her guardianship and takes them over from her. And to him I give as a legacy 50 silver Denars. I give as a legacy 500 silver Denars to Antonia Thermutha, the mother of my abovementioned heir. To my prefect I testate 60 silver Denars. I want mt slave Cronion to be free after my death, if he administrates all well and handles it over to my above mentioned heir or to my administrator. The inheritance tax has to be paid from the estate.

No fraud shall be connected to this will.

Nemonius, duplicarius in Marius' esquadron, has acquired my belongings with repect to the will. Libripens was M. Iulius Tiberinus sesquiplicarius in the esquadron of Valerius, the first witness was Turbinius, standard-bearer of Proculus' detachment.

The testament was made in Alexandria in Egypt in Augustus' winter camp of the second legion Troiana Fortis and the Mauretan attachment, on March 27th in the consulate of Rufinus and Quadratus.

The decisive element of the Roman will was the appointment of an heir (*heredis institutio*). Where such appointment was not made the whole will was void. In the present will testator appoints his son to the exclusion of everyone else who are generally disinherited by the application of the fixed formula: »*Exheredes sunto*«. This was necessary to bar legal heirs from succeding to the estate. Where testator wished to disinherit a *filius familias* he would have to do so by express mentioning of the name. These form requirements were necessary to uphold the will if a *filius familias* had been disinherited. In other cases the disinherited persons would take inheritance under the ius civile along with the appointees under the will. Praetor went even further and would disregard the appointment of the heir named under the will by the so-called *bonorum possessio contra tabulas*.

A will was required to cover the whole estate of the testator. It was not possible to dispose of a part of the estate. This rule has been coined in the famous maxim »nemo pro parte testatus, pro parte intestaus decede potest« (nobody can die both with and without a will). Heirs might take the whole inheritance when they had been instituted - ex asse - as in Silvanus will, or two or more heirs might divide the heritance.

The *cretio* mentioned in the will was the acceptance of the inheritance by a formal declaration normally used by other heirs than the *heredes sui* to ascertain

that they wanted to be heirs. The first heir being instituted under the condition of performing the *cretio* within a certain delay, another person could be made an heir subsequently. In this way more heirs could be appointed alternatively.

The testator was free to decide who he wanted as heir, however certain limits were put to the discretion of a pater familias. It was considered a violence of familial piety if he left his family without support. A socalled *querela inofficiosi testamenti* could be made before the Court of the Centumviri in such a case if the heir was left with less than a fourth of what would have been his heritance if he had not been disinherited. According to Justinian law the will was variable if the person belonging to the person to whom a *portio legitima* was due received nothing from the testator. They had an *actio ad supplendam legitimam* if they had received less than the due portion.

A will could also have dispositions regarding the freeing of slaves and legacies. The total amount of legacies was not allowed to exceed three quarters of the estate. The heir thus had to take at least a fourth of the estate, known as the »quarta Falcidia« as a *lex Falcidia* (40 B.C.) provided that the total sum of legacies should be cut down if they exceeded the three fourths of the estate mentioned.

Silvanus' will does not mention the so-called fideicommissum by which a testator might ask somebody to perform a certain act, e.g. free a slave or pay out a legacy. The validity of the *fideicommissum* was not dependant on the formal rules concerning the setting up of wills.

Augustus introduced a 5% tax on heritance, the so- called *vicesima hereditatis*.

PART TWO

European legal history

– a survey

From Roman Law to European Law

When European law is referred to today the usual association is to the supranational system of law of the European Union. However, this part of the book is not concerned with European law in that context. The subject area here relates to the legal thinking which has historically determined European legal development and which is somehow of a common context whether due to a common background in Roman law or to foreign law influence. Europe does not have and has never had a common legal system, however, viewed in a legal perspective, Europe does present a sort of unity. In this part of the book, a closer examination will be made of this context. It is a journey through the development of European law with a view to uncovering links between national law and the *ius commune* – the generel concepts of European law based on Roman law or the Roman foundations of the Civilian Tradition. It is also an introduction to European legal evolution as such – or at least, to some of the key persons, concepts and legal problems of which some knowledge is useful for those about to enter the modern European legal world.

In this context, Europe is above all Western Europe. The Holy Roman Empire and the Catholic Church were instrumental in the spreading of Roman law throughout Western Europe. Eastern Europe went its separate way. The main cultural language was Greek, not Latin, unlike Western Europe. The schism in the church from the eighth century onwards defined itself in 1054 with a separation in distinct Western European Catholic and Eastern European Orthodox churches.

The old Byzantine Empire and its heirs, Russia and the Turks were latecomers to European legal development. In itself, Eastern Europe is not a single unit. The existence of an eastern bloc since the end of the second world war for many years was hiding the peculiarity of the individual nations. The countries which until the end of the first world war were part of the Austro-Hungarian empire, share a common history with Europe proper. The history of Poland has, throughout the centuries, been affected by its juxtaposition between Western and Eastern Europe which has threatened its existence and sometimes led to its dissolution as an independent state. In Poland Catholicism has been a dominant force and Poland therefore belonged to the Latin cultural tradition. After a period of communist domination since the end of the 1940ies the Eastern European countries have returned to their European roots. Seen from the legal historical point of view, Eastern Europe is closely tied to the rest of Europe. This applies especially to those countries influenced by Latin culture such as Poland, the Czech Republic, Slovakia, Hungary, Romania, Slovenia and Croatia while the areas to the East and South-East, although sharing a Christian culture

and some knowledge of Roman law, belong to the Eastern Greek culture and distinguish themselves from Western Europe.

In Europe before 1800, legal science was not kept within national boundaries. The study of law rested on the same basis throughout Europe. For a long time, there was a dearth of scientific study of national law and it was considered progressive when some universities in the 18th century started the study of national law initially alongside that of Roman law and eventually instead of it. Nowadays, it is not the legal science but the lawyers themselves who are crossing the boundaries of different legal systems. In this context, it can be useful to know what distinguishes them, what unites them and the historical reasons why.

CHAPTER ONE

From Byzantium to Bologna

Corpus Juris Civilis, the great compilation made by the Emperor Justinian was created in Byzantium and was never valid in its entirety in the West. After Justinian had conquered parts of Italy, the Code was enacted there by means of a *sanctio pragmatica* in 554. Only the *Institutiones*, *Codex* and subsequent imperial legislation seem to have had any impact in the West by early medieval times, where part of Roman law was transmitted through the *Epitome Justiniani*. One or more manuscripts of the Digests were, however, extant in Italy and one of them survived through that period until it was discovered in Northern Italy by the end of the eleventh century. Sight was lost of the Digests around 600 and they only reappeared around 1076 later to form the basis of a new line in legal studies at Bologna which was to be the basis of European legal science.

1. Europe and the Roman law

As we saw in the first part of this book, Roman law may be traced back to approx. 450 B.C., the point in time at which tradition will place the creation of the XII Tables which formed the basis of the subsequent development of Roman law. From about 100 B.C. to about 300 A.D., Roman law had its most fruitful development. Roman law as the basis of European legal evolution was largely created in the first three centuries of our era.

Main emphasis in the study of Roman has traditionally been placed within private law. As already mentioned »Rome gave civilization the law« (T. Honoré), as a doctrine not for human conduct but for legal concepts which we apply to describe the legal position of man, e.g. in contract, in testate succession, matrimonial issues, duties and property rights. Therefore Roman law survived the Roman Empire as a method and techniques and as the scientific way of viewing legal phenomenae.

As we have seen our knowledge of Roman law derives mainly from the compilation of Roman legal sources which took place under Justinian in the sixth century A.D. at Constantinople. The contemporary study of Roman law takes its point of departure in Justinian's codification though a main preoccupation of the Roman law scholars is the attempt to recreate the legal conditions in the classical period from which the sources derive. However, Roman law also has a history after the collapse of the Roman Empire which will be related in this second part of the book.

Shortly before 1100 the study of the Roman sources of law was started at Bologna – the so-called Bologna school. Thereby was inaugurated a new phase in the history of Roman law, its propagation all over Europe as the basis for the study of legal science. Shortly after the Second World War a German scholar, Koschaker, wrote a famous book on the importance of Roman Law for the recreation of the law in defeated Germany. The title of this book »Europa und das römische Recht« or »Europe and Roman law« can be taken as a summation of the endeavours to propagate the importance of Roman law for the development of Western law. In recent years legal historians have both been interested in classical Roman law and in the later »post Bologna« European development of the law. This chapter will, however, expound the period between classical law and the revibal of Roman law in Bologna. The period from about 300 to 1100 will be highlighted as part of a more complex question, viz. how it came about that a legal system such as Roman law which was created with a view to operating within certain historical limits defined by the roman empire was capable of surviving the fall of the empire and become the basis of law in a Europe which from an economic, social and cultural aspect was quite different from the geographical sphere of its original application.

The first scientific presentation of Roman law in the Middle Ages was *Geschichte des Römischen Rechts im Mittelalter* (A History of Roman Law in the Middle Ages) (1815), a major work by the famous German legal historian Friedrich Carl von Savigny. This work falls in two parts with the rise of the Bologna school as its dividing line. In the first describing the development of Roman law prior to Bologna, von Savigny defines the task of the researches thus:

> »In this work, which aims to tell of the fate of Roman law in the Middle Ages, each people and each period must be taken on its own so as to elucidate what it is that is Roman law and works as such. However, these investigations require a common foundation. The states of the Middle Ages into which the Empire of the West dissolved, point back to the condition of the Empire before the collapse. It is therefore imperative to define the shape of Roman law in the fifth century A.D., this can only be done if one is prepared to look back at the history that went before.«.

Von Savigny's contribution to research was fundamental to the study of Roman law in medieval times.

A modern day Savigny, entitled Jus romanum medii avei ((IRMAE) both explores and provides a new account of the pre-Bologna history of Roman law.

But the main principle remains the same as with Savigny, viz. that there is identity between the Roman law of then and today and that development has been one of continous evolution. It is the same Roman law that we encounter in different guises and aspects.

The identification is »Europe« and Roman law, or ius commune in the description of the importance of Roman law to later European legal development. But this development took different courses in the Eastern and Western parts of the Roman empire. In the Eastern Roman Empire, Byzantium, classical Roman law was revived in the sixth century under Justinian, a development which had been prepared by schools of law in Constantinople, Beirut and several other places. In the West, however, Roman law was in decline until the eleventh century.

2. Roman Law in the West: Breviarium Alaricianum

The penetration of the Germans and the Goths into the Western part of the Roman Empire posed new legal problems. The question of which law to be applied was initially resolved according to a personality principle. The law was personal in the sense that Roman citizens in the new states created within the Roman Empire were still under Roman law even in a foreign dominated area, while the foreign tribes brought their own law with them which in the ensuing years was written down in Latin.

The development of Roman law in the West took place without any significant knowledge of Justinian's legislative work. We know of three laws in Latin for Romans under foreign rule issued after the fall of the Western Roman Empire in 476.

The so-called *Edictum Theoderici* is traditionally seen as a code issued by Theoderic the Great (493-526) for the Ostrogoths in Italy. A disputed theory has it that it is a Wisigothic code issued by King Theoderic II in the mid-fifth century. The code is based on *Codex Theodosianus* and subsequent imperial legislation, on *Pauli Sententiae* as well as works by Ulpianus.

The *Lex romana Burgundionum* dates from about 500, it was a code for Roman inhabitants of the Burgundian Empire. It is based on imperial legislation, *Pauli Sententiae* and the *Institutiones* of Gaius. This code shows affinity

with the contemporary *Lex Burgundionum*[1] for the Burgundian inhabitants of the empire.

However, the most important of the three codes we know of for Roman subjects under foreign rule is the so-called Breviarium Alaricianum or Lex romana Visigotorum from 500 A.D. This code was promulagated for Roman subjects in the West Gothic empire in Southern France and Spain. This code represents by far the most comprehensive and valuable compilation of Roman law in Western Europe but within legal historical research the code was for a long period overshadowed by the Corpus juris despite its importance as a basis of European legal development in early Middle Age. The code sustained its position as the basis of Roman law application in Western Europe for a substantial period in Spain and in France even longer. Just as other sources of law from late antiquity the breviary consists of *ius* as well as of *leges*. It is a compilation of older law and does not contain new legislation. The contents are mainly imperial decrees organized in the same fashion as in the *Codex Theodosianus*. The imperial laws are accompanied by explanatory notes known as *interpretationes*. The second part of the law is an epitome of excerpts from the *institutiones* of Gaius which is followed by a third part, the *Pauli Sententiae*, fragments of jurists' writings and a single fragment from Papinianus. Thus, this code consists just as the slightly later *Corpus juris* of Justinian of a textbook along with the writings of jurists and imperial legislation.

Breviarium Alaricianum was, according to tradition, issued by the Visigoth King Alaric II. The Visigoths were the first to follow the example of Roman emperors in using legislation as part of the organization of their empires. Alaric II's predecessor Euric had issued a *Codex Euricianus* in 476 for the Visigoths though questions have been raised as to whether this first Visigoth law should not also be ascribed to Alaric II, thus making him a legislator for Romans and Visigoths alike. Another theory holds that the law of 476 and the *Lex romana Visigotorum* were territorial laws and not tribal laws. According to this, the Lex romana Visigotorum would be a supplement to *Codex Euricianus*.

The Visigothic empire in Southern France disappeared in 507 and the code can be dated to 506. The German legal historian Bruck held the view that the code was issued in an attempt to win over the Roman inhabitants to the Visigoth cause in the struggle against the advancing Franks under King Clovis. King Alaric II fell in battle in 507 against the Franks and the general view of the achievements during his reign has since been unfavourable. Another German

1. English translation by Katherine Fischer Drew: *The Burgundian Code*, Phil. 1972, where the act of writing down Germanic customary law is described as »triumph of Roman influence«.

legal historian, Herman Nehlsen, has more recently tried to reevaluate Alaric and has pointed out that there is no evidence that the Roman inhabitants had been illoyal to him and he has also pointed out that there is no evidence that the Roman inhabitants had been illoyal to him and he has also pointed out that the code reflects the favourable attitude of the Visigoths towards the church. Above all, the law shows that through the assumption of the right to issue law, the Visigoth kings saw themselves as the successors of the Roman emperors. Instead of an attempt to accomodate the Romans, the law should be seen as the expression of a strong ruler's legislative pretensions, hereby drawing a picture of Alaric as a strong ruler. Thus, the law should be seen as reflecting an upturn after a period of decline immediately preceding it and ascribing the Germanic Codex Euricianus traditionally dated 476 to Alaric would fit in this picture.

In the so-called *commonitorium* contained in the code as a preamble, Alaric explains the background for its promulgation, i.e. to remedy such law as may appear unjust and to clarify points of obscurity or ambiguity. For that purpose the law was to be compiled in a code prepared by a commission chosen from clergy and nobility. Judges were prohibited, under death penalty, from applying law not contained in the code in future. Thereby Roman legal material was considerably simplified. Only 400 of about 3.400 laws recorded in the *Codex Theodosianus* were thereafter valid in Western Europe. At the same time, there was a drastic reduction in available legal literature.

Breviarum Alaricianum ceased to apply in the Visigoth empire in Spain when the *Lex Visigotorum* (also known as the *Forum Judicum* from which the Spanish *Fuero juzgo* derives) was issued in 654 under King Reccesvind.[2] This code applied to both Visigoths and Romans. However, the breviary still applied in Southern France eventually supplanting the *Lex romana burgundionum*. Knowledge of the breviary reached Switzerland where it formed the basis of the *Lex romana curiensis* of the late 8th century.

Not until 1150 did the knowledge of Justinian codification supplant the application of the breviary from legal practice outside Italy. In Italy itself, it was less significant as the knowledge of the *Institutiones*, *Codex* and the imperial novellae in the shape of the Byzantine *Epitome Juliani* persisted. Other older legal works known in the West are the four tome *Exceptiones legum romanorum* apparently from Provence in the early twelfth century and the *Brachylogos* from the Orléans area in France.

This period did not see actual legal training in Western Europe though some legal knowledge is mentioned in connection with the *trivium* education as part of the teaching of grammar or dialectics at the monastic and cathedral schools

2. Translation by S.P. Scott: *The Visigothic Code*, Boston 1910 (reprint 1982).

then being established. Isidore of Seville's *Etymologiae*, from the beginning of the seventh century, also contains legal material mainly derived from non-jurist authors or from the *Breviarium Alaricianum* or the Institutes of Gaius. Sentences from Isidore were taken up in Visigoth legislation, in canon law and also in Nordic law.

3. Byzantine law

In the Eastern Roman Empire, Byzantium, a particular Byzantine law developed in the period after Justinian where Greek eventually completely replaced Latin as the language of the law. The attempted revival of the classical tradition came to a speedy conclusion soon after the reign of Justinian. The Byzantine Empire entered a severe crisis. The empire's finances had dried up. In the sixth century, Byzantium attempted to reconquer Italy from the Ostrogoths and Africa from the Vandals, however, these attempts failed in the long run and at the same time, the Persians entered the eastern part of the empire thus reducing it to Southern Italy, the Aegean islands and the western part of Asia Minor (Anatolia). The empire was finally only defended by the heavily fortified city of Constantinople which withstood a Turk invasion from the east until 1453.

During the 6th and 7th centuries, the Digest was not forgotten completely. Law was taught in Constantinople and Beyrut but gradually (843-1025) Justinian's legal work was replaced by a series of compendia in Greek based on his law.[3] In the eighth century where basic rules of private and criminal law were compiled under the Emperor Leo the Isaure in a so-called *Ecloge* (741) that is reminiscent of late classical vulgar law without scientific pretentions. The law of Justinian did undergo a renaissance in the ninth century under the Macedonian dynasty. The »Macedonian renaissance« (843-1025) aimed at cleaning up the law – the so-called *anacatharsis* – by purging it of all the accumulated distortions of the preceding period. A new legal text was issued by Emperor Leo VI (886-911) entitled *Basilica*, which contained recomposition and systematization of Justinian's law which was later complemented by several new codes, *novellae*, just as in Justinian's day. Some works of legal science from this period have been preserved. Byzantium did not rise again after the Venetian invasion by the »Fourth Crusade« of 1204 though we do know of some legal works from following centuries. An example of this is the *Hexabiblos*

3. For a short history of Byzantine Law see (in French) N. van der Wal & J.H.A. Lokin: *Historiae juris graeco-romani delineatio* – histoire du droit byzantin de 300 à 1453, Groningen 1985.

(which means six books) by Konstantin Harmenopoulos of 1345. The work after 1453 under Turkish rule perpetuated the old *ius graeco-romanum* which remained in force until Greece and the other new states previously under Ottoman rule that became independent in the nineteenth century and got their own codes. Hexabiblos was declared the new code of the independent Greece and it was only substituted by a new German inspired code in 1946.

4. Salic Law, Carolingian renaissance and Anglo-saxon legislation

What is now France was, in early medieval times, ruled by the Merovingian and Carolingian dynasties. Under the Merovingians, the first Frankish kings, codes for the Franks were promulgated. Two codes are known, the *Pactus Legis Salica*[4], promulgated by Clovis (481-541) at the same time as the earliest Visigothic laws, and the later *Lex Ribuaria*.

The Salian code is remarkable for its detailed rules of theft. The second chapter of the *Pactus Legis Salica* deals with the theft of pigs:

Concerning the theft of pigs

1. If anyone steals a piglet that is not yet weaned from the first or the middle enclosure (known in the malberg as *chrannechaltio leschalti*), and it can be proven that he did this, let him be held liable for 120 denarii (one gross dozen [*tualepti*]), which make three solidi.
2. But if he steals [a piglet] from within the third enclosure (known in the malberg as *chrannechaltio*), let him be held liable for 600 denarii, which make fifteen solidi, in addition to its value and a fine for the loss of its use.
3. But if anyone steals a piglet from a pigsty which is locked, let him be held liable for 1800 denarii, which make forty-five solidi.
4. If anyone steals a piglet that can live without its mother from the field (known in the malberg as *hymnisfith* or *tertega*), and it can be proven that he did this, let him be held liable for forty denarii, which make one solidus, in addition to its value and a fine for the loss of its use.
5. If anyone strikes a sow so that it no longer can give milk (known in the malberg as *narechalti*), and it can be proven that he did this, let him be held liable for 280 denarii, which make seven solidi, in addition to its value and a fine for the loss of its use.
6. If anyone steals a sow with piglets (known in the malberg as *focichalte*), let him be held liable for 700 denarii, which make seventeen and one-half solidi.
7. If anyone steals a one-year old pig (known in the malberg as *ingimus bataria*), and it can be proven that he did this, let him be held liable for 120 denarii, which make three solidi, in addition to its value and a fine for the loss of its use.

4. English translation by Katherine Fischer Drew: *The Law of the Salian Franks*, Phil. 1991.

8. If anyone steals a two-year old pig (known in the malberg as *ingimus suaini*), let him be held liable for 600 denarii, which make fifteen solidi, in addition to its value and a fine for the loss of its use.
9. This compensation is to be observed in similar judgments on up to two pigs.
10. If anyone steals three piglets or more (and up to six heads, known in the malberg as *ingimus texaga*), let him be held liable for 1400 denarii (twice 700) [*tua septun chunna*], which make thirty-five solidi, in addition to their value and a fine for the loss of their use.
11. If anyone steals a piglet from a herd of pigs (known in the malberg as a *suainechalte*) while the swineherd keeps watch, and it can be proven that he did this, let him be held liable for 600 denarii, which make fifteen solidi, in addition to its value and a fine for the loss of its use.
12. If anyone steals af fattened piglet that is not quite a year old (known in the malberg as *drache*), let him be held liable for 120 denarii, which make three solidi, in addition to its value and a fine for the loss of its use.
13. But if anyone steals [a piglet] that is older than a year (known in the malberg as *drache*), let him be held liable for 600 denarii, which make fifteen solidi, in addition to its value and a fine for the loss of its use.
14. If anyone steals af boar (known in the malberg as *christiau*), and it can be proven that he did this, let him be held liable for 700 denarii, which make seventeen and one-half solidi, in addition to its value and a fine for the loss of its use.
15. If anyone steals a lead sow (known in the malberg as *chredunia*), and it can be proven that he did this, let him be held liable for 700 denarii, which make seventeen and one-half solidi, in addition to its value and a fine for the loss of its use.
16. If anyone steals a consecrated gelded boar (known in the malberg as *barcho anomeo chamitheotho*), and it can be proven with witnesses that it is concecrated, let him be held liable for 700 denarii, which make seventeen and one half solidi, in addition to its value and a fine for the loss of its use.
17. Likewise, concerning af gelded boar that is not consecrated (known in the malberg as *barcho*, or in other words, *bagine*), let him be held liable, if he steals it [and] it can be proven, for 600 denarii, which make fifteen solidi, in addition to its value and a fine for the loss of its use.
18. If anyone steals twenty-five pigs (known in the malberg as *sonista*), where there were not more in that herd, and it can be proven that he did this, let him be held liable for 2500 denarii (twice 1500) [*tua zumis fitmiha chunna*], which make sixty-two and one-half solidi, in addition to their value and a fine for the loss of their use.
19. But if more than twenty-five pigs are stolen (known in the malberg as *texaga*), and several others which have not been stolen are left, and it can be proven that he did this, let him be held liable for 1400 denarii, which make thirty-five solidi, in addition to their value and a fine for the loss of their use.
20. But if fifty pigs are stolen and if others are still left in that herd (known in the malberg as *sonista*), and it can be proven that he did this, let him be held liable for 2500 denarii, which make sixty-two and one-half solidi, in addition to their value and a fine for the loss of their use.

Charlemagne, crowned as emperor in 800 is not only a symbol of European union but also one of the great legislators in history. During his reign, the ancient Frankish tribal laws were supplemented by the so-called capitularies

issued by the king. *Capitularies* were the laws and administrative rules issued by the Carolingian kings, though similar forms of legal delimitation had been used earlier. For a brief period under the strong rule of Charlemagne, a period known as the Carolingian renaissance, the capitularies became an important tool of government. They were divided into chapters, *capituli*. By granting *consensus*, consent, to these laws, the population recognized them as valid and undertook to respect them. A similar procedure was used much later in Denmark when a royal decree from the year 1200 on manslaughter was issued with the consent of the most prominent men of the realm.

Just as with later Danish provincial laws there were no editorial changes to the original Frankish codes (*leges*). Such changes did not occur till after Charlemagne's coronation as emperor in 800 upon which he regarded himself as a legislator on a par with the Roman emperors.

Wherever the new peoples encountered Roman culture a desire to legislate would arise. The codes were originally written in Latin. The oldest Germanic codes written in the mother tongue were the so-called »deoms« of the Anglo-Saxon King Athelbert of Kent from about 600. In older English legal language codes are termed »dooms«. The word *law* has been borrowed from Danish, *lagu*, which supplanted the old Anglo-saxon word *aew* (ever). The issuing of these laws was probably connected to the resumption of contact with Rome when the missionary Augustine came to England around 600, since then there was an unbroken row of Anglo-saxon laws.

At about the same time as the Anglo-Saxon laws were created, in Northern Italy, the Lombard king issued his *Edictum Rothari* of 643, whilst other Germanic peoples of Central Europe acquired their own laws such as the Alemanni and the Bavarians with the *Lex Alamannorum* and the *Lex Baiuvarorum* respectively, later on the Friesians, Saxons and Thuringians got their own written laws.

5. Feudal law and Lombard Law

Feudal law was the law regulating the relationship between the feudal lord and his tenant (vassal). The system was developed in France under the Carolingians, in Lombard law and was of great significance in England after the Norman conquest of 1066. It contained rules on land rights and on certain crimes which could lead to loss of rights (felony). An important part of feudal law besides the rules governing the personal ties between lord and tenant and property rights were the rights of a public nature such as the judicial and administrative authority which might be delegated to the tenant. An important distinction in this area

was between the greater and the lesser right of jurisdiction depending on whether capital punishment was available or not.

The point of departure was the legal situation that arose when a person, the tenant, received a piece of land from the lord as a *beneficium* against undertaking to provide personal service of a military nature (*officium*). The relationship might also arise when a person handed over free land (*allodium*) as a feud and undertook the duty to perform military service for enjoyment of the protection. The development of the feudal institution was probably connected to the rise to prominence of cavalry in warfare and the consequent obligation to furnish a certain number of horsemen in wartime.

Feudal law was an important component of medieval law in France and Germany. Knowledge of it is important in order to understand English law which to a wide extent represents a development of continental feudal law. The rules of English land law are in particular reminiscent of the old feudal law.

The tenant owed allegiance to his lord for which he would be rewarded by rights of property over a piece of land. In English law the relationship between the parties is termed »tenure« and the impact of feudal law on the rules relating to land and the right to succession to land was for a long period considerable. Otherwise feudal law lost its significance from the 13th century coinciding with its introduction as a subject of scientific study at the universities.

The Langobards who settled in Northern Italy had their law written down already in 643 as the *Edictum Rothari* which is considered to be a rather outstanding piece of legislation.[5] Rothari was king of the Langobards from 636 till 662. In the preamble of the Edict the King says that »we have perceived it necessary to improve and to reaffirm the present law, amending all earlier laws by adding that which is lacking and eliminating that which is superfluous. We desire that these laws be brought together in one volume so that everyone may lead a secure life with law and justice ...«

Later kings added to the edict and the Langobard law was compiled in the so-called *Liber papiensis* to which was added a commentary, the *Expositio ad librum papiensem* or *Lombarda* which was a systematic presentation of Langobard law. These works, ascribed to the Pavia school of law are signs of a high level of studies of Langobard law though it is doubtful whether they were known in Bologna before 1200. Lombard feudal law that applied in Italy was particularly subject to scientific scrutiny. The Lombard sources of law, *Lombarda* and *Liber Papiensis* were glossed in Pavia. Around 1150, a collection of feudal law the *Libri Feudorum* appeared in Milan. The study of feudal law

5. English translation by Katherine Fischer Drew: *The Lombard Laws*, Phil. 1973.

became part of the study of Roman law at Bologna and the *Libri Feudorum* were commented on by a prominent medieval jurist such as Bartolus.

The rules concerning feudal hierarchy and rights of succession were particularly important. A book on English law known as *Glanvill* was published around 1190, dealing with the law as common law and feudal law. The German **Eike von Repgow** published an account of feudal law as part of his *Sachsenspiegel* about 1235. Feudal and common law were often combined, as we can see in a famous written account of French common law in Beauvaisis (north of Paris) by Philippe de Beaumanoir dating from approx. 1280.

6. Continuity or renaissance?

It is disputed in legal history whether the appearance of a new school of law in Bologna by end of the 11th century was an expression of continuity or that of a break – a renaissance. The German legal historian Herman Fitting produced a thesis of continuity claiming that there was an unbroken tradition stretching from the antique law schools of Rome through medieval Ravenna and Pavia to Bologna. The Dutch Romanist Conrat, however, denied that the study of Roman sources of law could be older than the eleventh century. A central point of the argument that the part of the *Corpus juris* comprising the writings of Roman jurists, namely the Digest was unknown in the West until the end of the 11th century. In terms of science, it was grammar and not legal science that was studied in the preceding period as the German Romanist Gentzmer sharply announced, in pointing out that the hypothesis of continuity was a product of nineteenth century doctrine on evolution.

The continuity hypothesis does not have many supporters nowadays. Irnerius, who traditionally is viewed as the founder of the study of law at Bologna really did start up something new around 1100. His contemporaries knew him as »Lucerna juris«, the lantern of law. However, the scene had been illuminated already by the mid-eleventh century. There were new centres of jurisprudence in Pavia based on Langobard law as well as in France, in Provence and around Orléans. The study of Roman law changed in the course of the eleventh century. The upturn in legal studies that occurred seems to have been the result of the new spiritual movement expressing a general change in the cultural patterns of the period by the American scholar Charles H. Haskins called »The Renaissance of the Twelfth Century« or the proto-renaissance. The early scholasticism is also an expression of a revised scientific attitude and the scholastic approach had a great significance to the scientific method used at Bologna university, where Irnerius around 1100 began to work on the Roman sources of law, primarily the

Digest of Justinian, thereby founding the school of glossators that gave legal science an entirely new basis.

CHAPTER TWO

European Legal Unity and Ius Commune

The appearance of a *ius commune* – the common or the general law – *gemeines Recht* in German or *diritto commune* in Italian – is the designation for the historical phenomenon that Justinian´s Roman law as treated by the Bologna school of law, in the Middle Ages became the basis of legal science not just in Italy but also in large parts of Europe where it remained in force until the advent of the great codifications around 1800. Roman law was subject to much modification and attempts to adapt it to local laws which in the period around 1200 were written down as new laws in the states of Europe. The connection with the Church was of great importance to the spread of Roman law, as canon law and Roman law were the two universal legal systems – *utrumque ius* – studied at the universities. The study of Roman law and canon law and the new scientific method in legal studies being taught at the universities were the driving force behind the spreading of Roman law throughout Europe even to such countries as Denmark and the other Nordic countries which did not, however, consider Roman law as applicable in the absence of other legislation as was the case in most of the rest of Europe except England.

7. The Bologna School of Law

European legal history proper started in the end of the 11th century and accelerated in Bologna. The school of law arising there, the glossator school, was the first important step on the road to a European legal science built on Roman law. In the twelfth century students started to flock to Northern Italy, mainly to Bologna, already a centre of learning, where the so-called trivial sciences (grammar, dialectics and rhetoric) were taught as the basis of the education of notaries and administrators. Not far away, at Pavia, Lombard law had been taught though to what extent this had a bearing on the establishment of a school

of law in Bologna is not known with certainty.[1] Bologna, however, had other necessary prerequisites for becoming a centre for legal science. It was an important trading city, geographically situated on the border of imperial and papal territory. It was the place where those people lived who were capable of creating the new legal study.

The development of the Bologna school of law and thereby of a European legal science is closely connected to the discovery of a single manuscript of Justinian's Digest. A complete manuscript from the time of Justinian (6th century) was captured in the eleventh century by the Pisans in a war with Amalfi. Later on, it came to Florence where it has since been kept under the name of *Littera Florentina*. Already by the end of the eleventh century, a copy had been made of this ancient manuscript and it was this socalled *Vulgata* manuscript also known as *Littera Bononiensis* that was to form the basis of juridical studies in Bologna which soon comprised both Roman law and canon law. The period between 1150 to 1250 is often referred to as the »juridical century« due to this increased interest in and study of Roman and canon law. To this may be added the efforts made all over Europe during the thirteenth century to put local law down in writing.

Bologna became a most attractive center of learning frequented by students from all Western Europe desirous of gaining knowledge of the new line of study. Nobody can have been able to thoroughly grasp the immense subject-matter after just some years of study. Many students belonged to the clergy of their country. They would have learned on their return some Roman law and the main features of canon law, which would often be the main topic of study as the »modern« law.

Roman law required much more extensive scholarly work in order to make it accessible. Lectures specifically devoted to the *Digesta*, *Codex* and *Institutiones* were given. Gradually a system of comments - the so-called glosses - was added to the law giving definitions and references or surmises on the relationship between several parallel issues in the text. These explanations were written as notes or glosses in the margin or between the linies of the manuscripts, hence the name »school of glossators« given to the compilers.

The most well-known glossators are Irnerius and his four students: Martinus, Bulgarus, Hugo, and Jacobus. We know little of Irnerius or the foundation of the Bologna school but the decisive factor was the finding of the complete text of Justinian's Digests. It is possible that the appearance occurred in connection

1. For an affirmative view, see Charles M. Radding: *The Origins of Medieval Jurisprudence - Pavia and Bologne 850-1150*, Yale 1988, who draws a line from the Lombard law judges of Pavia's sacred palace to the Bologna school of Roman law.

with an examination of old documents which might be used to support the case of one or the other party in the dispute between pope and emperor (between sacerdotium and regnum – which was raging in those days. Now the intellectual requirements for understanding and applying the Digests which had been unknown for several years were present.

The glossators did not only produce glosses but also other forms of literature corresponding to the manner of teaching. One of the literary genres was a so-called »summa« by which individual legal issues were treated in a summary form. The *summa* of **Azo** (approx. 1200) is the most famous. For the glosses, the most well known standard work was that by **Accursius** (around 1185-1263), the *Glossa ordinaria* of about 1235 which contained 96.940 glosses. This collection of glosses was a private venture, maybe even a family venture as some of the glosses were authored by his son, Franciscus. Accursius assembled and selected existing glosses and probably wrote some himself. This work was a great success. It was not continued but it was regarded as the best and most complete »apparatus« for the use of Justinian's Statute book. The »gloss« had such an authority that only the glossed part of Roman law was recognized in practice. Thus, it gave rise to the saying: »Quidquid non agnoscit glossa, nec agnoscit curia« (what the gloss does not recognize, the court will not recognize either).

An account of the teaching methods in Bologna from the 13th century reveals how the lectures which were held separately for the Digests, Codex and Institutiones would follow Justinian's code systematically. First, there would be a discussion and explanation of each book and title, then the paragraph in question and its placing in the context. The basis would be the legal text which was explained while parallel paragraphs (*similia*) and any contradictory paragraphs (*contraria*) would be cited. Reconciliation was achieved by distinctions (*distinctiones*). Subsequently examples of the argumentative value of the text for litigation purposes were cited and passages of particular importance highlighted. In connnection with the general slowly progressing exposition of the corpus juris, »exercises« were held on difficult legal issues (*quaestiones)* lending themselves to treatment in disputation form. In the thirteenth century, the study of law was set at about five but also more years, eventually extended with a further year for canon law.

In order to use older glossed versions of the Roman legal texts, it is necessary to know the classification of the Corpus juris that was used at the university of Bologna. The manuscripts used were divided into books and titles though the individual fragments lacked numbers. They were therefore designated by their first words as lex. The entire work was divided into five parts. The Digests constituted the first three parts which were designated *Digestum vetus* (Old digest), *Infortiatum* and *Digestum novum* (New digest). The fourth

part consisted of the first nine books of Justinian's Codex whereas *Institutiones*, *Authenticum* (collection of novellae) and the last three books of the Codex constituted the fifth part.

Methodologically the glossators were influenced by the prevailing scholastic philosophy of the day. This method had been developed by theologists and would endeavour to reach harmonization via dialectics, i.e. by posing arguments for opposite points of view. The Bible was the starting point for the theologians, that of the glossators was the legislative works of Justinian which in the same way were viewed as an authoritative text that needed explanation. The glossators did not always adhere strictly to the text when they tried to adapt it to the social conditions of the day. The text by Ulpianus quoted above (D. 9,2,7,4) in which damages were not awarded after wrestling matches (according to the Lex Aquilia as the bouts were held for honour and glory) was transformed by the glossators so as to apply to knights' tournaments. The glossators were aware that the students came in order to acquire practical juridical skills and not out of curiosity for historical accounts of the legal system of Ancient Rome.

8. Bartolus and Baldus

»Nemo jurista nisi Bartolista« – »no one is a jurist who is not a Bartolist« was a phrase widely used of jurists in medieval and more recent times. Reference is here made to the most famous jurist of the Middle Ages, the Italian **Bartolus** whose comments on Roman law and other works enjoyed overwhelming authority for a very long time.[2] Bartolus (1313-1357) started his legal studies already at the age of 14 in Perugia. In 1333 he came to Bologna where he attained a doctorate of law the following year at the age of 20. After practising some years as a judge in Todi and Pisa and continuing his studies privately he lectured for four years in Pisa and then in Perugia where he remained until his death.

The great amount of Bartolus' works, which has been retained for posterity, is symptomatic for the types of legal literature applied by the glossator school successors, the so-called commentators. The works include very comprehensive comments (hence the term commentators) a large amount of the Digests and Codex, a number of monographies (*tractatus*) on selected legal themes and

2. See about Bartholus – »un personaggio mitica in un età d'oro« – and the development of Ius commune, Manlio Bellomo: *L'Europa e il diritto comune*, Roma 1987, esp. p. 195.

about 400 responsa (*consilia*). Since the 15th century Bartolus' works and the single work of Accursius, *Glossa Ordinaria*, were books of authority both in university teaching and in practice. Where no express statutory rule was available, Bartolus' rule was used. Indeed, in some places his work was tantamount to Roman law.

Bartolus is probably the most important representative of scholastic legal science. His pupil **Baldus** (1327-1400) did an intense work in the field of responsa. Up to three thousand responsa besides other works of his have been preserved. Juridical responsa for judges or the parties in a trial now began to play an increasingly important role. The concept of *communis opinio* emerged, as the view which could be considered to be the prevailing one as most jurists would have pronounced themselves in favour of it.

The successors of the glossator school are nowadays sometimes designated as conciliators – counsellors – or more often as commentators whilst earlier they were rather pejoratively called post-glossators. Their most important contribution was the adoption of Roman law to the legal situation in Italy where custom or local laws (*statuta*) were in force. A problem encountered in that context was which legal system to give precedence, in other words, the question of the ranking of the various sources of law. It was in connection with the resolution of this question that Bartolus, among others, laid the foundations for the development of international private law by forming the so-called theory of statutes. The decisive principle was that of Roman law having subsidiary validity as *ius commune* in relation to the particular law. The particular law however should in turn be subject to narrow interpretation. In practice, as the courts came to be presided over by judges who were trained in Roman law, it was presumed that anyone invoking local law had to provide evidence of its validity.

Ius commune was not accepted universally, however. The development of the English legal system followed its own course without a Roman law model as did Swiss law in which the attitude of non-reception is well reflected in the phrase »Wir Eidgenossen fragen nicht nach Bartele und Baldele« (We, the Swiss, do not ask about Bartolus and Baldus) also is a sign of a more distant relation to the *ius commune* tradition.

In many important areas of private law the new learned law taught at the universities was a decisive factor in shaping medieval legal thought. This applied e.g. to the concept of property which was divided into two categories in medieval legal theory in an effort to adjust it to contemporary practice. To medieval eyes, the use of an object or of real property was the decisive factor and not merely an abstraction. Bartolus paved the way for a new definition by defining property as the right of disposal unrestricted by law. In feudal law a

distinction was made between *dominium directum* and *dominium utile*. *Dominium utile* (utile = useful) was the right vested in whoever had the actual use of the thing as he had a hereditary right of usage. *Dominium directum* and with it the legal rights of disposal was the right of the landowner or feudal lord. In reality this theory was probably based on a misunderstanding of the sources. As mentioned above, the Roman praetor could sometimes grant special *actiones utiles* to protect property rights. The glossators concluded from this the existence of a particular *dominium utile*. This theory of the divided property right was of great importance in later European law.

The commentators also developed a new doctrine of criminal law with the notion of criminal responsibility (*dolus, culpa*). Also the concept of legal personality arose at this time.

The law of procedure was developed into an independent discipline. *Speculum judiciale* by **Gullielmus Durantis** from around 1270 is considered to be a major work in this field. In this period a practical legal science was founded in Europe. Roman law was instrumental in the building up of a modern state based on a powerful rule. Jurists and princes had no difficulty in agreeing that the prince should be legislator and head of state just as the Roman emperors had been. However the jurists demanded that the prince schould respect the law. As Bartolus put it the prince was no tyrant as long as he acted according to the law (»secundum ius«) but he was a tyrant if he did not rule by the law (»iure«).

This was of great significance for the Holy Roman Empire which was often seen as the continuation of the Roman Empire. Roman law was a source of legitimacy for the king or the emperor's right to create law. Principles which could be based on Roman legal texts such as »Quod princeps placuit legem habet vigorem« or the notion that the emperor had received the power to legislate through a *lex Regia* or, again, that he was »legibus solutus« free of or raised above the law were well suited in supporting the royal or imperial claim to legislative power. The pupils of Irnerius, the four doctors, »quattuor doctores«, started this tradition of close cooperation between temporal power and the law by contributing in 1158 to the establishment of the imperial rights of the Holy Roman Emperor, Friedrich Barbarossa over the Italian city states with which he was then in conflict. In return, the emperor granted special privileges to the university and the learned class.

9. Roman law in Germany

The development of the study of law at Bologna based on the Roman legal texts was a pattern which endured long into the future. A more practically oriented

course of study was only to be found in England. In some places, such as the Nordic countries the number of trained jurists was so low that they only had a limited influence on the creation of law. Elsewhere it was of decisive importance for legal development that learned jurists took the seat as judges in court, in the administration or at other places where they could influence legal thinking. In Germany the much discussed phenomenon of what is called the »reception« of Roman law led to a new scientific view, the »scholarification« or »Verwissenschaftlung« as the German scholar Wieacker puts it, in the years up to 1500. The idea of a reception of Roman Law was also linked with the idea that the Holy Roman Empire was the successor to the Roman Empire. This view is considered less decisive and in general the penetration of Roman law is now conceived as a question of method and therefore no longer, as it was earlier, as a German national tragedy. Thus Roman law is no longer considered alien to national law but is seen as the entry of a new legal method taught by the universities. As a German legal historian puts it: »Modern research views the reception in a common European perspective and considers it to be a scholarization of the law along with a fundamental change in legal outlook that came about through legal theory, administration and stipulation being transferred to a class of scholars« (Hans Schlosser). The trained jurists, however, were not always well received – »Juristen, böse Christen«, denoting that lawyers were bad christians, was a well known remark in the sixteenth century.

A significant notion in connection with the reception of Roman law is that of the Holy Roman Empire. The Empire – »Das Reich« – was based on the idea that the Roman Empire had been replaced by a new empire, thus making the Holy Roman Emperor the successor of the Roman emperors. According to this notion the Holy Roman Emperors could still decide that their decrees be recorded as part of Justinian's *Novellae*. This was done in the form of *Authenticae*, additions to the *Novellae*. According to medieval myth, the introduction of Roman law in Germany was due to a imperial command of the Emperor Lothar II (1075-1137). However, this so-called legend of Lothar was already refuted in the seventeenth century by the jurist and physician, Hermann Conring. The theory of the Holy Roman Empire being the inheritor of the Roman Empire still did have some impact on the assumption of the validity of Roman law although as mentioned above, it was the practical reception that was decisive.

The foundation of the Holy Roman empire took place with the coronation of the German emperor Otto in 962 and it persisted until 1806 when the last Holy Roman Emperor, Joseph II renounced the title and became Emperor of Austria. The empire never developed a strong central power. Germany was split up into several territories and cities, each of which had their own government and law.

To a certain extent local customary law was written down in the Middle Ages. The most famous example is the private collection of the law of Saxony known as the *Sachsenspiegel* from 1235. Its author, **Eike von Repgow** was one of the local »Schöffen«, laymen who decided in cases along with the judge. Other local customs were written down as »Weistümer«.

The cities had their particular municipal laws, »Stadtrechte«. As a corollorary of the the German colonization of the Baltic Region and Eastern Europe, the laws of leading German cities as Lübeck or Magdeburg were transferred from their original home to the new cities. These cities were in a way legally subordinated to the mother city whose court was then considered to be superior (*Oberhof*) to which the daughter city could send complex cases and cases for appeal to be decided. This process was known as »*Aktenversendung*«. It could also take place when a court wanted a pronunciation on a case from the nearest university. At both the court of appeal and at the universities, university trained jurists would give their opinion on the case and they would use Roman law in so doing. Thus, »Aktenversendung« became one of the ways of furthering the impact of Roman law. The *Reichkammergericht*, a common court of appeal for the entire Holy Roman Empire using Roman law was founded in 1495. So, according to the Reichs-Kammergerichtsordnung, sentencing was to be according to »des Reichs gemeinen Rechten« (the common law of the Realm) besides the »statutes and customs of hereditary and sound decrees«. The tribunal consisted of sixteen judges of which half had to be trained jurists. Already in the sixteenth century, this requirement was extended to all the judges. During the seventeenth century, the number of judges was raised to about fifty. The procedure of the court was written. »Gemeines Recht« was supposed to be subsidiary according to the statutes of the court but in practice Roman law prevailed. Should customary law be used, its existence had to be proven before the court. There was no such requirement for Roman law since »ius novit curia« (the law is known by the court).

The Reichskammergericht handled many cases and was the pattern for the setting up of similar courts of appeal in the individual German states. In central Europe, the Roman-canonic doctrine of court procedure supplanted the old way of administrating the law. This new administration of the law was also the work of the commentators and was based on a development of the Roman *cognitio* procedure. It was characterised not just by its written form but also by its division of the course of the case into a series of stages directed by the judge. The plaintiff presented and proved his allegations (*positiones*), the defendant had a right to reply and present evidence, all in a particular order.

10. Canon law

Canon law was to a great extent the first modern Western European legal system.

The history of canon law is as old as the Church itself. Already at an early stage the clerical sources of law, the decisions of church meetings (*canones* – hence the term canon law) and papal letters were collected. A widely used eighth century compilation was the *Dionysio-Hadriana*, it was, however, devoid of system and there had been no accompanying scholarly treatment of the sources. It was decisive that the ecclesiastic legal material was worked on at Bologna in the mid twelfth century. The resulting compilation was known as the *Concordia discordantium canonum* (harmonization of conflicting canon rules) or as Gratian's Decree (*Decretum Gratiani*) after its author. It may be considered as one of the most influential legal works of all time. On the basis of a rather tenuous evidence, **Gratian** is identified as a camaldulensian monk connected to the St. Felix et Nabor monastery in Bologna. The Decree is dated around 1140 and his death before 1160. Even the authenticity of this information has recently been challenged so that all we can say with any certainty is that a person called Gratian must have carried out a substantial part of the work on the text which bears his name and that he must have been a tutor who was well versed in theology, with a keen interest in juridical points of view and that he worked in Bologna during the 1130s and 40s.

Gratian's work is a collection of canons, of papal letters (*decretales*) as well as several texts and excerpts from the theological works of the church fathers. Not only did he produce the hitherto most comprehensive compilation of the sources of canon law, he did so in a systematic fashion and specifically described the legal problems involved. Just like the glossators, Gratian sought to overcome the contradictions in the sources through the use of *distinctiones*. Thus he distinguished e.g. between just and unjust war in order to harmonize the regulations which allowed or forbade the participation of clergy in warfare. The first part of his work was called *Distinctiones*, it comprised the general rules of canon law. *Causae*, the second part of the work, consists of several fictitious cases at law which provide the opportunity to explore various juridical questions. The view of Gratian as a teacher derives from this pedagogical approach. So, the Decree is both codification and textbook and ever since the twelfth century has been used as such by countless generations of students who wanted to learn about ecclesiastic law.

The Decree was also the subject of scholarly treatment in that a particular science of canon law was established alongside Roman legal science. The scholars were referred to as *canonists* and *legists*, respectively. Those who worked

on the Decree were called decretists while those canonists who commented on subesequent canon law, the collections of decretal law, were known as decretalists. There was a formal explosion in the issue of papal letters or decretals in the twelfth and early thirteenth centuries. At this time the papal throne was occupied by eminent jurists. **Alexander III** (1159-1181) under whom a new matrimonial law was drawn up, had taught law at Bologna as had **Innocent III** (1198-1216) and **Gregory IX** (1227-1241). We know of about two thousand decretals from these three popes alone. Various collections (especially well known are the five collections, the *Quinqve Compilationes Antiquae*) of these letters were published though the first official collection was issued after Pope Gregory IX had called on the Spanish canonist **Raymundus de Peñaforte** to edit a definitive collection. Raymundus did so by summarizing the letters and decisions, omitting the superfluous, and then dividing the work under five headings, *iudex* (on judges), *iudicium* (on trial), *clerus* (on the clergy), *connubium* (on marriage) and *crimen* (on crimes). The collection was published in 1234 entitled *Liber decretalium extra Decretium vagantium* (collection of decretals in circulation outside (*extra*) the Decree). This collection is usually referred to as the *Liber Extra*. As in the case of individual items of Roman law, a gloss was attached to it. The authoritative decretal gloss was the work of **Johannes Teutonicus**. The *Liber Extra*, just as Gratian's Decree, was the basis of teaching. This was underlined by the fact that it came into force when it was sent to the universities of Bologna and Paris. Later popes added new decretal collections, Boniface VIII added the *Liber Sextus* in 1298 and Clement V added the *Constitutiones Clementinae 1317*.

Corpus juris canonici became the common designation for the collections of canon law under which they were issued in revised form in 1582. This collection was the official legal code of the Roman Catholic Church until 1917 when the *Codex juris canonici* replaced it. A new code came into force in 1983.

The study of Roman law and canon law were closely connected in that the basic education of the canonist was Roman law which was widely considered to be the law of the church unless it conflicted with canon law. Roman law, as any secular law, was a maid who had to follow in the path of her mistress, canon law, as a contemporary expression put it.[3] In those days, canon law was a living legal system which gained new sources whereas Roman law was set. Canon law was a modern and dynamic system of law.

Many of the legal doctrines developed in church law were inspired by Roman law. Thus, the church took over parts of the Roman doctrine of *error* from

3. Anders Sunesen, the archbishop of Denmark, used this rhetoric figure shortly after 1200 in his poem *Hexaëmeron*.

mercantile law and transferred it to the law of matrimonies in the case of mistake that might occur pertaining to the other party upon entering matrimony. The Roman procedure was also of great significance to the church, this is reflected in the term Roman-canonical procedure. Ecclesiastic law was taught as a separate discipline distinct from theology as such. A »judicialization« of the church took place. It was also characteristic that the legislative authority of the pope was an important element in the strengthening and centralization of the papacy which, as mentioned above, was headed by people who often were more renowned as jurists than as theologians.

The heyday of canon law was in the twelfth and thirteenth centuries. At the end of the eleventh century, the church under Pope Gregory VII had freed itself from the secular state and the independence it had obtained was reflected in the establishment of a strong organization with the pope as supreme legislator and the bishopric being the principle centre of ecclesiastic jurisdiction. This jurisdiction was usually exercised by legally trained officials.

Canon law exerted a significant influence on secular law during the Middle Ages. Large parts of the legal system, in the view of the church, were subject to the decisions of church tribunals according to canon law.

Several groups of persons enjoyed clerical forum - *privilegium fori* - and thus could not be summoned by a secular court. This applied to clergymen and also to students according to a decision by Friedrich Barbarossa in 1158. »*Personae miserabiles*«, that is to say, paupers, widows, orphans, pilgrims etc., were also the responsibility of the church.

The ecclesiastic procedure had concepts of evidence different from the secular. In 1215 the church excluded the clergy from assisting at proof by ordeal and took a critical view of the practice of the swearing of oaths by compurgators often used in secular law. The influence of the church led to the increasing use of jurors and eventually also to that of witnesses and documentary evidence in secular courts. Ecclesiastic courts likewise had a permanent system for appeal which served as an example for lay courts.

Canon law also showed the way forward in the area of substantive law.

The canonical law of matrimony was based on other principles than was the secular.[4] Marriage was a sacrament which could be instituted only by the agreement (*consensus*) of the two parties as apposed to the secular view that marriage was a family affair. That the ecclesiastic view prevailed is one of the many revolutions in legal thought which took place in the Middle Ages.

4. Brundage: *Law, Sex and Christian Society in Medieval Europe* (1987). R. Weigand: *Liebe und Ehe im Mittelalter* (1993) (abstracts in English).

In the area of the law of wills and succession, canon law was based on Roman law which had the testament as a central institution. The testatory freedom was seen as the freedom to bequeath one's fortune to the church or other »pious causes« (*piae causae*). The church relaxed the Roman formal requirements and introduced rules about executors, interpretation of wills and about the relationship between testamentary and intestate succesion.

Canon law also developed a particular protection of possession in the same way that Roman law knew of possessory protection through interdict. By means of the *actio spolii*, a clergyman bereft of the possession of his belongings, whether chattels or real property, could demand its return without having to provide proof of ownership.

In contract law, a doctrine was developed which unlike the Roman typology, recognized the validity of informal agreements (*pacta nuda*) as well. A basic tenet of canon law was that all agreements should be honoured: »Pacta sunt servanda.« An important element of canonical contract law was establishing what kind of profit had to be characterized as usury (*usura*) and therefore as impermissible and what kind of profit was permissible.[5] The point of departure was that the lending out of money should not give the lender any profit. The reasoning behind this point of view was that the lender would in such a case profit from something which did not belong to him but to God, namely, time. The usurer was a thief of time and therefore a sinner. It is thus in *Clementinae* (1317) which reproduces a decision of the council of Vienne in 1311:

> »It is by means of a serious complaint that we have come to know of certain authorities rendering themselves guilty of an offense to God and their fellows in that they, in flagrant violation of the laws both Divine and human, do in their ordinances allow not only the charging and payment of interest but even force debtors to pay interest and in accordance with the purpose of their legal regulations, do put obstacles in the way of those who seek the return of interest payments already made and through such unreasonable and deceitful legislation prevent the return of interest being sought. We intend to counter this corrupting abuse and with the approval of the Holy Council have decided that all persons in positions of authority, mayors, officials, councillors, judges, counsels or others who would dare to deliberately issue ordinances of this kind or passing judgement to the effect that interest should be paid or that already paid interest should not be voluntarily paid back in full, are exposing themselves to the threat of excommunication and they will incur the said punishment lest they strike the offending ordinances from their book of statutes (insofar that they are authorized to do so) within three months, or if they should in the future dare to follow such ordinances or customs. § 1. Furthermore, as moneylenders usually undertake such transactions in a secret and fraudulent manner, as they can only be convinced of the sinfulness of usury with the greatest of difficulty: We decide that they shall be forced to show their accounts to the church censors in the case of interest payments. § 2. We further ordain

5. See John T. Noonan: *The Scholastic Analysis of Usury*, Harvard U.P. 1957.

> that should someone render himself guilty of the said mistake and obstinately maintain that usury is not sinful, then he shall be punished as a heretic. Therefore, we order that the church authorities' inquisition against heresy must not fail to intervene with a pursuit of heresy against those who are accused or suspected of such a mistake.«

Canon law also developed a doctrine of the relationship between the church as an institution – »universitas« or »corpus« – and the individual members, wherein the starting point was found in the rules of Roman law on *collegia* and *corpora* in part because of the view that the corporation consisted of its individual members who therefore had a right to share in the decision making. This led to the development of a doctrine of participation in decision making whereby the majority principle came to play a part.

In canon law, a doctrine of criminal law was developed based on the culprit's subjective relationship to the concept of guilt as a central element whilst secular law in particular focussed on awarding damages according to the seriousness of the harm inflicted.

11. Italy and Spain

Ius commune – the two universal legal systems, Roman or civil law and canon law – gained acceptance in very different ways in the various European states. Its influence was first apparent in Italy and Southern France.

Still what we in contrast to *ius commune* call *ius proprium* – the local law – showed an enormously diversified pattern in medieval Europe. The law could be based on customary law or local statutes. In the following chapters some important lines in local law will be traced.

In Italy special mention should be made of the *Regnum Siciliae* in the 13th century which consisted of most of Southern Italy and Sicily.

In 1231 the emperor Frederic II (d. 1250) of the house of Hohenstaufen in Melfi promulgated a law book, the *Liber Constitutionum*, which has become famous as a first sign of a royal will to legislate. This law book was divided in three parts. It was a first sign of what has been characterized as a »Drang zur Kodifikation« – a movement towards royal legislation to be observed in several European countries.

In Germany in a process that had been fulfilled around 1500, Roman law was embraced in its entirety (*in complexu*). In Spain Roman law was opposed to the local law known as *fueros*. During the reign of Alfonso X of Castille in the years around 1260, a major work of legislation *Las Siete Partidas* was completed showing clear signs of Roman influence. However, it had subsidiary validity and first came into force in 1348.

12. The Nordic countries

In the Nordic countries, canon law provided the first encounter with learned law. In the writing down of the Nordic provincial laws around 1200, considerable canonical influence is revealed in respect of marriage, wills, trials and criminal law. We do not know what the law looked like before the provincial laws but it is certain that since such a large part of the laws' contents are due to the encounter with Western European legal culture, especially canon law, it must have been substantially different.

The period from about 1150 to 1250 was known as the »juridical century«. This designation covers the law school at Bologna where the renaissance of Roman law and the founding of the study of canon law were the starting point, though it is equally apposite in the case of the North. It was at this time that the oldest preserved Nordic sources of law were made, viz. the provincial laws of Norway, Denmark and Sweden.

The oldest Norwegian provincial laws from the twelfth century are named after the four Norwegian jurisdictions, thus they are called the laws of the Frostating and the Gulating and the Christian laws of the Eidsivating and the Borgarting.

In Denmark the kings made use of expressions taken from Roman law such as »legem condere« on the laying down of the law and considered violations thereof to be »crimen majestatis«, aggravated lesé majesté, so as to underpin their power. The famous words in the preamble of the Jutland law »*Society shall be founded upon law*« referring to the early Roman principle of ensuring that legislation would be part of social structure. In Denmark laws existed for Scania[6] and Sealand (The Laws of Valdemar and Erik) and a Law of Jutland issued by the king *Valdemar II* in 1241. The preamble to this law is nearly in its entirety based on the Decretum Gratiani. The preamble runs:

> »Society shall be found upon law Land must be settled through the rule of law. But were each person willing to be satisfied with his own property and to let others enjoy equal justice, then men would not need laws. But no law is as good to follow as truth. But wherever men are in doubt about the truth, there the law shall seek out what the truth is.
>
> Were there not law in the land, then he would have the most who could seize the most. Therefore shall the law be made for all men, that just men and the peaceful and the innocent may enjoy their peace, and unjust men and the evil obey that which is written in the law and, for that reason, not dare to carry out the evil which they have in mind. Indeed it is also right for them whom the fear of God and the love of justice are unable to attract to good,

6. Anders Sunesen who was archbishop of Lund and possibly shortly after 1200 made his Latin rendition of Scanian law, the *Liber legis Scaniae*.

that the fear of the authorities and the penal code of the land prevent them from doing evil and punish them if they do evil.

The law shall be honest, just, and tolerable, in accordance with the customs of the land, appropriate and useful and clear, so that all men are able to know and understand what the law says. The law shall not be made or written for any man's special advantage but in accordance with the needs of all men who live in the land. Nor shall any man judge contrary to that law which the king gives and the assembly adopts, but in accordance with that law shall the land be judged and governed. That law which the king gives and the assembly adopts, the king can not change or revoke without the consent of the country, unless it is obviously contrary to God.

The function of the king and of the authorities who are in the land is to supervise judgments and exercise justice and to save those being subjected to coercion, such as widows and defenseless children, pilgrims, foreigners and poor men – those who are most often coerced – and not to let evil men who will not mend their ways live in his hands; for in punishing or killing evil-doers, he is the servant of god and the guardian of the land. Just as the Holy Church is governed by the Pope and bishop, so shall each land be governed and defended by the king or his officials. For this reason, all who live in his land owe him obedience, subservience, and obeisance, and in return he is obliged to give them all peace. This shall all temporal officials also know, that with the power which God placed in their hands in this world, He also gave them His holy church to defend against all demands upon it. But if they become forgetful or biased and do not defend it as is right then they shall on Judgment Day answer for it, if the freedom of the church and the peace of the land have been diminished on their account in their time.«

In Sweden, provincial laws of the thirteenth and fourteenth centuries have been preserved. They are grouped as the Göta laws and the Svea laws. The most famous of these is the *Uppland law* which was issued in 1296. In the letter by which the law is given force is mentioned the need to change the law: »For with the passage of time and people passing away as others appear, the behaviour of people towards each other changes; in time, many new events take place, furthermore, much is only mentioned with a few words in the old law and not as clearly as it should be. In these instances, changes are made to both the ecclesiastic and imperial laws so that something is abolished, something is completed with precise wording and something else again is laid down utterly anew.« Both canon law and Roman law are mentioned here as models.

The preamble to the Uppland law is also characteristic and reminiscent of that of the law of Jutland. It reads:

»The Good Lord Himself instituted the first law and sent it to his people through Moses who was the first legislator of his people. Thus also does the absolute ruler of the Swedes and the Goths, King Birger, son of King Magnus, issue this book to all those living between the Sav river and Ødemarken which contains the rules of Viger and Uppland law.

The law will be laid down and provide a guide for all the people, rich and poor alike, so that they may tell wrong from right. The law shall defend the poor, provide peace for the peaceable but be a deterrent to the violent. The law shall honour the wise and the just but punish the unwise and unjust. If all were just, there would be no need for law.«

The Hälsinge law from the 14th century applied to the North of Sweden and probably also in Finland.

Magnus Lagabøtar's land law of 1274 in Norway and *Magnus Erikson's* land law of 1350 in Sweden are examples of statute books with nationwide validity whilst the provincial laws of Denmark dating from the beginning of the thirteenth century retained their validity until the Danish code of 1683.

The university education of jurists was the main premise for the reception of Roman law. Since the twelfth and thirteenth centuries students from the North had travelled to the Italian universities where they registered as members of a particular »natio Germanica« – a German nation that also comprised the Nordic countries. Students from Denmark came to Bologna and other universities and once they had returned were employed by the church or perhaps went into the kings service. They were, however, normally not employed in the law courts. Secular justice continued to be in the hands of lay judges. Learned judges would not have had any particular role to play considering the nature of the systems of evidence and appeal. Trained jurists did sit in ecclesiastic courts, though. We know of one, *Knud Mikkelsen*, bishop of Viborg († ca.1480) who wrote a learned gloss in Latin for the Jutland law which could be used by other clergymen when they encountered local law in the course of their duties. In his gloss, Knud Mikkelsen explained the difference between the local law – Jutland law – and Roman and canon law. Similar works were known of elsewhere.

The extent of ecclesiastic legal administration in Denmark is unknown, though there are grounds for assuming that Danish church courts, like those in other countries, did not restrict themselves to marital and testamentary cases but that the more reassuring procedural handling of cases in these courts would have attracted the parties to a contract case for instance or other types of case.

However, Roman law was not recognized as a subsidiary *ius commune*.

By the end of the 17th and the beginning of the 18th centuries new codes were issued in the Nordic countries. These codes, however, to a very high degree were based on medieval legislation and later royal statutes. In Denmark a Danish Code was issued in 1683[7] and four years later in 1687 a Norwegian Code was issued that was based on the Danish Code.

Absolutist government had been introduced in Denmark in 1660 and the Danish Code and its constitutional counterpart, the *Lex Regia* from 1665 which was partly incorporated into the code, may be seen as impressive examples of the reception of ideas of sovereignty, *raison d'Etat* and *jura majestatis*, including the power to legislate common during that period of history.

7. See Ditlev Tamm: The Danish code of 1683 – An early European code in an International context, Scandinavian Studies in Law 28 (1983), p. 164-80.

The Danish Code was a product of political changes and an endeavour to unify the law of the country. It was not a reform law. The Danish Code was available to the rest of Europe in German, Latin and English translations. A special friend of the Danish Code, *Jeremy Bentham*, probably read it in its Latin version, and about a hundred years later in his treatise, »A General View of a Complete Code of Laws« gave the following assessment of the Danish Code:

> »Of all the codes which legislators have considered as complete, there is not one which is so. The Danish is the most ancient code; it is dated 1683; the Swedish code is dated 1734; the code Frédéric, 1751; the Sardinian, 1770.
>
> In the preface to the Danish code, it is expressly stated to be complete. However, it contains nothing about taxes, no regulations relating to professions, nothing about the succession to the crown, nothing about the powers of any subaltern officers, except those of justice; nothing respecting international law; no formularies, either for contracts, or the disposal of goods, or different stages of procedure. It is, however, the least incomplete of all the codes.«

If Bentham had been interested in Roman Law and not only more generally in codifications, he would have noticed that Roman Law did not play an important part in the Danish code. However, examples can be found of articles in the Code based on Roman law. Such influence is especially clear in the chapter on *crimen laesae majestatis*, but can also be traced in articles concerning private law, for example the introduction of the concept of *contra bonos mores*.

The code is of a casuistic nature in that its rules are often formulated by way of examples instead of abstract principles just as the laws upon which it is based.

New professional courts were established in Sweden during the seventeenth century, the so-called Hovrätter (the Svea Hovrätt in Stockholm being the first in 1614). The juridically trained judges were familiar with Roman law. However the Swedish code of 1734 was, like the Danish code of 1683, rather a compilation of older laws in force than a modern codification, so the significance of Roman and natural law to this book were limited.

13. Roman law and customary law in France

Through the Breviarium Alaricianum, Roman law was known in the South of France after the downfall of the Roman Empire and in the towns of Orléans, Toulouse and Montpellier important centres of study for Roman law were developed. However, the teaching of Roman law at Paris university had been forbidden by a papal bull in 1219. The ban was probably due to the wish of the king of France as a part of French national aspirations to reject any pretense by

the Holy Roman emperor to be legislator in France as well. Roman law was imperial law, however, the French monarch regarded himself as »emperor« in his own country: »Rex in regno suo imperator est.«.

Around 1300, the university of Orléans became the centre for the study of Roman law in France. Two famous jurists worked there, **Jacques de Révigny** and **Pierre de Belleperche**. Two future popes, Clement V and John XXII taught at Orléans. The Italians designated the French jurists as *Ultramontani* – those beyond the mountains. Their methods differed from those of Bologna and other Italian universities. Their adherence to the glosses was far less strict and they displayed greater interest in practical legal questions thus helping to pave the way for the commentators.

According to the general theories of *ius commune*, Roman law was subsidiary to the royal legislation and local custom (*coutumes*). Roman law was given authority as *raison écrite* – as written reason. It was applied »imperio rationis, non ratione imperii« (by virtue of its reason and not as imperial law).

In the northern part of France, the *pays du droit coutumier*, Roman law did not even have subsidiary status. Customary law held sway here, the most important custom being *La coutume de Paris*.

No jurist travelling to Paris can avoid noticing the impressive Palais de Justice on the Ile de la Cité not far from the cathedral of Nôtre Dame. Since the end of the thirteenth century, this place has been the seat of a court. This particular court became known as the *Parlement de Paris*, traces of which are to be found in the present building. Until the time of the French Revolution the Paris Parliament played an important part both as a court and political organ. Its most significant function was to be a sentencing organ and unlike the English parliament, it was not a representative assembly. Its task was to take care of the sentencing powers hitherto vested in the king's person. Politically, the parliament gained significance as a counterweight to the king in the seventeenth century.

In 1278, the Parlement de Paris obtained its definitive shape and a permanent seat in Paris. The procedure was established through royal legislation. In that same year, lawyers were prohibited from invoking Roman law in cases from those parts of France which were covered by customary law, and the Paris Parliament, the most prestigious court of France, relied on customary law in appeal cases, not Roman law. Judges and lawyers were thus here, unlike their counterparts in Germany, cut off from using their expertise in Roman Law, whilst in Germany it was precisely the gradual penetration of the new technique which paved the way for the reception of Roman law. As will be seen later, the differences between French and German law to a high degree derive from the contrasting receptions of Roman law in the two countries.

Thus Roman law met with opposition in France in contrast to its ready reception in Germany. One of the obstacles to its acceptance was the system of well-established legal positions based on custom law which meant that the Western part of France instead of the jus commune retained its own position of »pays de droit coutumier«.

A royal official was attached to the parliament to handle the king's interests in certain trials and generally ensure the maintenance of order. He was designated the *procureur-général*, a title and position retained today in romanistic trial systems and at the European Court of Justice. This official was also chief prosecutor and thereby head of the prosecuting authority, *le Parquet*.

Parliaments as courts and with the political role of registering royal legislation were also established outside Paris. Should they refuse to register a law, it could not come into force, unless the king, by means of a so-called *lit de justice*, himself presided over the court by being present in the parliament to ensure that the law was registered. The judges of the parliaments were appointed for life since the fifteenth century. The offices were often acquired through purchase and the judges thus had a particular interest in asserting their rights. They thereby also played an important role as a counterbalance to the landowning nobility – *la noblesse d'épée*. Judges were considered to be *noblesse de robe*.

As the exercizer of the king's right to pass sentence, the Paris parliament felt that it was justified in creating law independently and on occasion to deviate from the law. The parliament never gave reasons for its decisions though it did keep its own register of the judgements and the reasons underlying them.

Legal procedure was settled in more detailed terms by the so-called *Ordonnance de Montil-les-Tours* in 1454. In that connection it was also decided that local customs should be edited in writing for purposes of legal certainty and safety. So, at the close of the fifteenth century, the writing down of customary laws took place as the result of an official royal initiative which meant that the next century saw the emergence of customary law in written form. However, legal unity was far from obtained in the *pays du droit coutumier*. It is assumed that when the French Revolution broke out in 1789, over three hundred customary laws existed in Northern France.

The writing down of custom also provided the opportunity to reform the law and to start a national legal literature in the form of commentaries to the customary laws. This type of legal literature was in the main unaffected by the humanist trend among French romanists discussed below. However, the most significant jurists were not teaching at the universities but were working as judges or lawyers. Like in England it was the practitioners who moulded the law. The English jurists, however, had no university education whereas the French combined theoretical training with practical juridical activity.

Of the authors encountered when examining French legal history at that time, **Charles Dumoulin** (1500-1566) and **Jean Domat** (1625-1696) are the most wellknown. Dumoulin, who was initially a lawyer at the Parlement de Paris, has been known for his efforts to establish a common customary law for the entire area of custom. Jean Domat worked as a lawyer in Clermont. His most famous work *Les lois civiles dans leur ordre naturel* of 1694 was an attempt to portray Roman law in a natural system. This work became one of the main sources of the Code civil.

A draft version of a statute book based on customary law was produced by the president of the Paris parliament, **Guillaume de Lamoignon** (1617-1677). At the same time, by the order of **Colbert**, Louis XIV's chief minister, three important laws, on civil procedure (1667), criminal law and criminal procedure (1670), were issued along with a mercantile law (1673) and a maritime law (1681). These last two laws turned out to be significant preparations for the later Code de commerce.

14. Humanism and legal science

Humanism, the new learning of the fifteenth and sixteenth centuries, led to a new approach in legal research. The Humanists were antiquarian, and therefore looked for the original meaning of the sources of law. They were philologists. i.e. linguistically critical towards the inherited texts. The humanist contribution to legal science may be summed up under the following headings:

The humanists wanted new source versions, *ad fontes* (back to the sources) was one of the catchphrases of the time. They read Greek – »*graeca leguntur*« – in contrast to the medieval jurists. Thus, they had a new independent access to the texts that did not require the use of a gloss as an authority. The actual teaching of law was also changed as the humanists emphasized the *Institutiones* as the introduction to the study of Roman law. Hence they would read the Digest Book 50 Title 17 which contained basic legal precepts and then the serious study of the texts themselves would start. Also, the humanists were dissatisfied with the system of the Digest and sought to resystematize it in new ways.

Humanism had only a limited impact on juridical practice in Italy, whereas Holland and France were important centres of humanist legal science. The expression »elegant jurisprudence« is often used, it is derived from the Italian humanist Lorenzo Valla (1405-1457) who had underlined elegance as a part of presentation. In Italy a denomination of »i culti« was used – i.e. the cultivated

ones to describe those who connected the study of law with knowledge of antiquity.

Three jurists are often mentioned as founders of the humanistic renaissance of legal science: The Italian **Alciat** (1492-1550), the German **Ulrich Zasius** (1461-1535) and the Frenchman **Guillaume Budé** (1467/68-1540).

A different approach to Roman law study was developed in France during the sixteenth century under the influence of humanism. This was the *mos gallicus* which underlined the close study of the original sources in order to find out what the original classical jurisprudence was like. This gave rise to the learned study of sources of Roman law guided by the new educational ideal which proposed a return to the classics. The demand was »back to the sources« and in the area of language, this led to the requirement for a pure classical Latin as opposed to the simpler, more idiomatic medieval Latin. The French school was of great significance to the study of Roman law as it initiated, with the premises of textual criticism and philological considerations, an examination of the Roman legal texts with a view to establishing what was classical and what could be considered to be additions from Justinian's time. The research into interpolation had begun.

The university of Bourges was a centre of humanist law studies to which Alciat was attached and where the most illustrious figure at the school, **Jacques Cujas** (1522-1590) worked in the period of 1555 to 1590. It is probably only in the 19th century that his work and effort have been matched by the works and editions of Roman law by the German historian, Th. Mommsen. The street in Paris in which the law library - Bibliothèque Cujas - lies also bears his name. Cujas had originally studied at Toulouse starting his university career there. The Florence manuscript of the Digest had been published in 1553 making this prime source of Roman legal texts available for scrutiny. Cujas wrote, among other things, about the works of other jurists e.g. Papinianus and Africanus and he published several of the pre-Justinian sources. He was also interested in the Greek texts of the Corpus juris and in Byzantine law. This was novel since during the Middle Ages these texts were neglected on the view that »Graeca non leguntur« (Greek is not to be read). He was aware of interpolations in the text and, among other things, pointed out how the word *traditio* had been inserted in many sources instead of *mancipatio* which had fallen into disuse by Justinian's day. Cujas also appreciated the systematic advantages of the Institutes over the Digest and thus played a part in giving this introductory textbook a more prominent place in the study of Roman law.

Significant progress in the study of law in the sixteenth century came about with the appearance of printed texts and books. The Florentine manuscript was published in 1553 and later on, **Dionysius Godefroy** (1549-1622) produced a

critical version of the entire Corpus juris which remained the standard version until the 19th century. However, the French humanist legal scientists were not only historians, they wanted authentic and accurate texts so that Roman law could be used correctly in practice.

Hugo Doneau or **Donellus** (1527-1591), a contemporary of Cujas, who created a large comprehensive Roman legal system – *Commentarii juris civilis* in 28 tomes, was critical of Roman law and denied that it was the manifestation of universal reason. Donellus was particularly dissatisfied with the systematic aspect of Roman law and developed his own natural system. On the same track though even more critical was **Fr. Hotman** (1524-1590) whose *Anti-Tribonien* is at once a critique of Tribonians legal work, the Code of Justinian, and a contribution in favour of legal unity in France based on a scientific treatment of local laws, primarily that of Paris, *la Coutume de Paris*. With Hotman one finds the thought of a purely national law free of foreign influences.

The humanists strengthened the perception that Roman law could not be used indiscriminately and were thereby not only kindling interest in those parts of Roman law which could be seen as common legal principles but also in national law as such.[8]

It was due to the influence of humanist ideals that Roman law was introduced as a subject at the time of the refounding of Copenhagen university after the reformation. In the statutes of the university of 1539 it is pointed out that the university's sole professor at law was to teach Roman law and the classical authors. It is further pointed out in the statutes to justify the study of Roman law that it was recognized as written reason also by other countries than the Holy Roman Empire and that it would be useful to know in order to ascertain the extent to which the country's own laws were rational or not. A picture of the conception of law in Denmark around 1600 when natural law was considered central, is drawn by the historian Arild Huitfeld: »Imperial law is a law in its own right, as are English and Polish law, our law is different, everyone in their own right though disparate yet equal in natural law which is amongst us all.« Roman law was taught at Copenhagen university and the oldest preserved textbook is a collection of the Roman legal regulations published by the law professor Nicolaus Theophilus in 1584.

8. On German Humanism, see the works by Guido Kisch: *Studien zur humanistische Jurisprudenz*, Bern 1972; Melanchtons Rechts und Sociallehre, Berlin 1967; *Erasmus und die Jurisprudenz seiner Zeit*, 1960.

15. Usus modernus pandectarum and the Dutch elegant jurisprudence

Usus modernum pandectarum – modern use of the pandects (Roman law) is the designation for the new style of legal studies, introduced in Germany around 1600 that culminated in the 18th century to continue into the 19th. German *usus modernus* works were used as textbooks in several countries in Northern Europe in the seventeenth and eighteenth centuries. **Samuel Stryk** (1640-1710), one of the most famous jurists of his day, was a professor at Frankfurt a.d. Oder, Wittenberg and Halle. Other centres of the new method were Tübingen, Rostock and Leipzig. The aim was to make Roman law practically useful through bringing together the presentation of the useable parts of Roman law with the law otherwise pertaining in Germany, that is, local laws and ordinances. This meant that the legal matter had to be organized and that common legal principles had to be developed on the basis of the often casuistic Roman legal texts. Besides Stryk's works, **Georg Adam Struve's** (1619-92) *Iurisprudentia Romano Germanica* was also widely used. A particularly comprehensive presentation of Roman law in almost a hundred volumes was published around 1800 by the German jurist C.F. Glück (1755-1831). All the contemporary learning in the field of Roman law was assembled here in the same way that Ulpian, 1500 years previously, had left the knowledge of Roman law of his time for posterity – and for Justinian.

In the seventeenth century, the Netherlands were one of the most important centres of legal study. The university of Leyden (founded 1576) was particularly well known, though other smaller universities enjoyed good reputations as well. This applied e.g. to Franeker, a small town beside the Zuiderzee, where the famous jurist **Ulric Huber** (1636-94) was a professor at one time. Dutch legal science pursued the same goal as the German *usus modernus* school which was to make Roman law usable in practice. The starting point for the Dutch was that the humanist tradition – *mos gallicus* – was to be united with practical requirements. Several Dutch jurists of that time achieved international fame. Besides Ulric Huber, there were jurists such as **Cornelis van Bynkershoek** (1673-1743), **Arnoldus Vinnius** (1588-1657), **Gerard Noodt** (1647-1725) and **Johannes Voet** (1647-1713).

The so-called Roman-Dutch law, developed at Dutch universities, is still playing a role in the law of South Africa and Sri Lanka.

16. England

English law is unique. Roman law influence was very limited and generally the development of English law up to the 18th century only registers few links to continental law which for its part had no contact with English law before that time. England has its own legal history whereas Scotland in deliberate opposition to England maintained continental contacts which is reflected in the substantial impact of Roman law on their system. Scottish law may therefore be listed among the systems influenced by ius commune.

Common law was the law applied by the Royal courts, the Court of Common Pleas, the Court of King's Bench, and the Court of the Exchequer. Under the reign of Henry II (1154-1189) judges were sent from the King's council, the *curia regis*, to decide legal issues in local areas (circuits). During the 13th century the *curia regis* became a professional court of law. Disputes were heard by the King in council - *coram rege* - or in his absence in King's Bench. In the 14th century the central court of common pleas became a permanent court but circuit judges continued their practice of travelling the country. A prosecution jury, Grand jury, was applied until 1933 whereas a petty jury under the IV Lateran Council of 1215 replaced the system of trial by ordeal and compurgation.

The writ was a central element in common law procedure. Writs were royal orders to the local sheriff instructing him to undertake certain legal steps against the defendant and only such writs were capable of forming the basis of a common law process. The 12th and 13th centuries saw the development of a large number of new writs to cover various types of grievance. Though, as has been mentioned, English law developed without noiticeable Roman law influence, some structural similarities may be found, notably in the characteristic feature of the system described as » a system of remedies, not rights«. Just as a right in Roman law had to have a corresponding *actio* in order to count in court, it was the existence of a writ that suited the case at hand which ensured that the case could be tried by a common law court. Writs have been compared to Roman actiones.[9]

The famous legal textbook, *Glanvill*, describes i.a. the writ system. Some Roman law influence is traceable in the text. It was written shortly before the year 1200.

Another writer from the 13th century, **Henry Bracton**, is traditionally regarded as heavily inspired by Roman law. Thus in his *De legibus et consuetudinibus angliae* (on the Laws and Customs of England) the following passage may

9. See Buckland and NcNair: *Roman Law and Common Law* (1965).

be read: »As all law with which we shall deal, in accordance with English law and legal values, pertains either to people, things or plaints, and since people are the most important as all law springs from their decisions; we shall therefore first look at the people and their standing which is different and distinct, then shall we look at peoples' rights as they apply to them. The primary and briefest classification of people is that all human beings are either free (*liber*) or unfree (*servi*)...«

The English legal historian *Maine* considered in the previous century the Roman influence on Bracton to be very strong: »That an English writer at the time of Henry III should have been able to put off his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence...«

In reality, Bracton's reliance on Roman law is far less pronounced than the reading of a quotation like the one above would seem to indicate. Bracton's account was based on common law as practiced by the English courts. Paradoxically, the origins of this law are not English at all but derive from European feudal law and other continental law brought over by the Norman conquerors in 1066.[10]

Though Roman law played a modest role in England knowledge of Roman law was required of the jurists attached to the old ecclesiastical courts hearing matrimonial disputes. At English universities the study of Roman law was described as civil law.

The study of Roman law at Oxford had been forbidden by the king in the mid-twelfth century. A teacher from Bologna, **Vacarius** had taught Roman law there. However, it is uncertain how extensive this ban was. The training of lawyers took place at the so-called Inns of Court of which there were four in London.

The Inns provided teaching, moots and visits to the courts with a view to training the students for a lawyer career. Senior lawyers were known as *serjeants* from whose ranks the royal judges were recruited. Serjeants obtained a monopoly of audience at the Court of Common Pleas. The number of judges and lawyers was never high. During the 14th and 15th centuries the number of judges at the two royal courts, Common Pleas and King's Bench, was 7 or 8 and the exclusive character was also true of the serjeants in the law group.

10. See R.C. van Caenegem: *The Birth of Common Law* (1973).

The language of English law was French not Latin which also distinguishes it from the law taught at universities. About 1300 England had developed its own separate system but its independence was in fact recognized before that time. »*Nolumus leges Angliae mutare*« could be read in 1236 (we will not change the laws of England) in response to the attempts by the Church of introducing the principle *legitimatio per matrimonium subsequens* (that children born out of wedlock shall become legitimate upon a subsequent marriage).

Already at an early stage English courts tried to maintain their independence of the King and their right to disregard laws which were contrary to common law. This is revealed from a statement of particular notority from the beginning of the 17th century made by the then Lord Chief Justice, *Edward Coke*, to the King, James I, that he was not entitled to participate in passing judgments. On the other hand, the English King had sworn to do equal right and justice but in the long run the view of judicial independence prevailed.

The Chancery originally functioned as a government office but gradually became the place for grievances for which the common law writs offered no remedy. In this way the Chancellor was capable of supplementing or rectifying common law – on the same lines as the Roman praetor would do to *ius civile* in Roman law – and its volume of business increased heavily.

The basis of Chancery decisions was *equity* (justice) and good faith, and the system of law applied there retained its name of equity even after its development into a system as rigid as common law itself. Thus, in the 17th century the rules of equity were firmly established. The development of equity and its application is as complex as common law and some influence from canon law and Roman law may be traced.

Alongside common law courts and the Chancellor's court a number of ecclesiastical courts existed applying Canon law in which the business was conducted by jurists trained in Roman law and Canon law. The so-called Admiralty court with jurisdiction in maritime and commercial disputes would also apply civil law.

17. Lex mercatoria

Lex mercatoria is the designation for the customs of mercantile law developed since the Middle Ages. In Roman law, commercial law was not singled out as a specific discipline but several legal systems do possess commercial statute books such as the French *Code de Commerce*.

A characteristic of Roman contract law was that any agreement could be entered by stipulation through the exchange of simple formalities. The consen-

sual contract was also a flexible means of entering agreements. Maritime trade had its particular set of rules such as *lex Rhodia de jactu*, the particular *actiones adjectitiae qualitatis* such as *actio exercitoria* and *actio institoria* contained elements which a common European commercial law could build on.

Several customs relating to *sea trade* were developed by the trading ports of the Mediterranean. The most widespread was the collection produced at Barcelona known as the *Consolat del mar*. The title of consul was bestowed on the judges of trade cases before the local guilds or representatives of the country in question on location. Consolat del mar was the model for the Northern European rules of maritime trade, collected in the so-called *Rôles d'Oléron* (named after an island off the French Atlantic coast). These rules in turn influenced the sea law of Visby which applied in the Baltic and also contained regulations from Hanseatic law. German law in particular, as it was developed through the judgements pronounced by the council of Lübeck, was soon to influence the development of mercantile law in Northern Europe.[11]

The Late Middle ages was a period of intense economic *inventiveness*.

In the market places a large business for goods and money was conducted. As a means of money transfer and to avoid risks of money carriage, the use of the bill of exchange.[12] New types of company appeared to supplement Roman law's *societas unius rei* or *omnium bonorum*, e.g. the so-called *compagnia* of long-term duration and capable of incurring liability on its own. The parties would remain in their hometown and leave the commercial travelling to younger merchants who would also act as permanent agents in other cities.

In maritime trade the so-called *commenda* or *societas maris* was developed from the classical maritime loan. By this arrangement a person might invest money in a ship and cargo and obtain a share of the proceeds without incurring liability otherwise in connection with the voyage. This is the original form of the subsequent limited partnership. The beginnings of maritime insurance were made on the pattern of arrangements in the 14th century of spreading the risk among several parties, thus reducing individual loss upon the payment of a premium when investing in a *commenda*.

11. Ditlev Tamm: A Retrospective Study of Legal Regulation of the Trade between the Baltic Sea Countries, *Suum Cuique* (1993), p. 65-73.
12. For an introduction to these questions of economy and law in the Middle Ages see J. Kirschner (ed.): *Business, Banking and Economic Thought in Late Medieval and Early Modern Europe* – Selected studies of Raymond de Roover, Chicago 1974; Vito Piergiovanni (ed.): *The Growth of the Bank as Institution and the Development of Money-Business Law*, Comparative Studies in Continental and Anglo-American Legal History Band 12, Berlin 1994.

The joint stock companies appear in this period, the first being in Genoa in 1346. Other mercantile customs applied to sale of goods, e.g. the custom of good-title-acquisition granted to an innocent purchaser of stolen goods in a market sale. Also the practice of recognizing contracts which did not fit into Roman law categories came about – thus an informal promise would be held to be binding here.

CHAPTER THREE

Natural law and Enlightenment

The Enlightenment was a brief period in the history of Europe. It reached its peak in the eighteenth century, leaving a lasting impression in the shape of the great codes which are still in force in several European countries. The Enlightenment is closely connected to modern thought on natural law. However, around 1800, natural law begins to lose ground to legal positivism and the historical school.

18. Natural law

Rationality, secularization and equality are some of the key words in understanding the changes in inherited society and its values which occurred during the Enlightenment. To this may be added a large amount of optimism, manifest in the belief that a better society could be created through legislation and other measures. The belief in progress – the belief that reason could create the best of all possible worlds – was part of this optimism. The faith in reason – rationality – led to reforms of the penal code and criminal procedure and it led to a rejection of the view that the Bible and Roman law were definitive authoritative sources. Secularization had an implicit requirement that the relationship between church and state be set on a different basis and a demand for tolerance. The requirement for equality implied a demand for the breaking down of the class based society, of equality before the law and political reforms. The French Revolution was a product of these thoughts.

Seen from a legal point of view, the Enlightenment meant that the legal order was put before the tribunal of reason. Roman law was unsystematic, intractable and hard to grasp. Instead, what was wanted were brief and clear rules, systematically organized, so that everybody could understand them. This meant a new law and new codes designed to implement the new law in practice. The result was a break with the inherited legal order but also the end of European unity in legal science based on the *ius commune*. The great teachers of natural law who

through their work created the basis of much of the new law, were read throughout Europe. Subsequent legislation was national legislation.

The idea of a legal order based on human nature has been developed in many different guises throughout history. Just like the notion that there are unchanging, timeless principles that defy time and place, the notion of natural law is an eternal theme in the history of legal philosophy. In Ancient Greece, this thought was reflected in the conflict between the ideal unwritten standards pertaining in nature – *physis* – and the arbitrary norms of everyday existence – *nomoi*. Sophocles (500 BC approx.) highlights this problem in his tragedy *Antigone*. Antigone's brother is killed in a civil war. According to the rules of nature, she has a duty to ensure that he is buried. Kreon, the king of Thebes, however, considers himself to be the injured party and has forbidden the burial under penalty of death. Antigone chooses to follow the rules of nature and acts against the king's decree. She explains the reasons for her stance in a speech to him thus: »For it was not God who ordained it, nor justice that rests mightily with the ruler of the dead, it is only they who have the right to ordain thus. I did not think that your commands were of such a power – you are but mortal – that they should go ahead of the unwritten everlasting laws of God. They did not appear yesterday to last until today, they are eternal and no one knows when they were created.«

The ideas of natural law entered Roman law in a form influenced by stoic philosophy. In his philosophical treatise *De legibus* (On laws), *Cicero* refers to »that highest of laws which has existed at all times and came about before there was any written law and long before there was any organized state.« Within Roman law, Gaius worked with the idea of *ius naturale* as a yardstick of justice. Slavery conflicted with natural law and only held in terms of *ius gentium* which, in the main, followed natural law. It was the law »quod naturalis ratio inter omnes homines constituit« (prescribed by natural law for all human beings). In Ulpian's point of view, natural law matched the law of nature that pertained to all living creatures, from which marriage and the duty to raise children were derived. Natural law was »quod natura omnia animalia docuit« (what nature teaches all living creatures).

The thought of eternal universal reason, as we encountered it with Cicero, was introduced to the Christian world view as the eternal divine law – *lex aeterna* – which had created and organized the world by the most influential of the Church Fathers, *St. Augustine* (354-430).

In canon law Gratian identified the laws of nature with those of God as they had been revealed to mankind in the Bible. Mankind could not entirely recognize *lex aeterna* as an innate natural law (*lex naturalis*). The laying down of positive human law (*lex humana* or *lex positiva*) had a different source of origin

than natural law and had to give way as it was but an imperfect realization of the laws of nature.

In *Summa Theologica*, the theological *magnum opus* of **Thomas Aquinas** (1225-1274), these thoughts were developed further in that law was now seen as an integral part of God's order of creation. The origin of law was with God – *lex aeterna* – and was revealed to mankind in various ways. *Lex aeterna* – the eternal divine law – could thus be recognized by mankind as natural law (*lex naturalis*) or as that law revealed by God – primarily the ten commandments – *lex divina*. The human law issued by the authority installed by God, *lex positiva* or *lex humana* was to seek its justification in and be derived from the laws of God and nature and could only be considered valid if it was in accordance with the above mentioned laws.

The scholastic system of Thomas Aquinas dominated the medieval legal world and has since been the basis of catholic legal theology. During the 16th and 17th centuries, Spanish theologians and jurists continued along these lines. We talk of the *Second Scholastic Period* (la seconda scolastica). Some of them were connected to the famous university of Salamanca and are mentioned as the school of Salamanca. The great discoveries and the conquest of America had given rise to new ethical questions, namely about the right to conquer land and about how Christians and heathens should co-exist. Did the Christians have a right to use force against the non-christian natives? In a famous controversy around 1550 the answer of **Bartomé de las Casas** (1474-1566) was no, whereas **Juan de Sepùlveda** (1490-1573) supported the view that the Indians could not claim any protection. The Salamanca school drew new conclusions from the basic principles of natural law and thereby contributed to the development of international law and the so-called natural private law.

Francisco de Vitoria (1485-1546) of the Salamanca school is generally considered to be the founder of international law. Other important names of the sixteenth and seventeenth centuries are **Diego de Cobarrubias y Leyva** (1512-1577) – called »the Spanish Bartolus« – **Luis de Molina** (1535-1600) and **Francisco Suarez** (1548-1617)

Another point of view as to the validity of natural law was that of the so-called nominalists of the late Middle Ages of whom the most famous was William of Occam (1290-1349). According to their voluntaristic point of view, man could not recognize the law of God through natural law which rested entirely on the autonomous will of God to decide what was good or evil. Thus, there was no absolute natural law but only a relative one.

The relationship between Roman law and natural law was not closely defined by the doctrine of natural law. For some, Roman law was reason in writing

(*ratio scripta*) whilst others regarded it as a product of history with all the shortcomings of its time, therefore in need of correction.

Part of the picture of the evolution of the viewpoint of natural law are the new views of the world and mankind generated during the Renaissance. The discoveries made by natural science – that the Sun and not the Earth was the centre of the known universe (Copernicus) – that it is gravity and not inherent forces which control the motion of objects (Galilei) – or that it was at all possible to conceive of mechanistic laws of nature (Newton), these were all realizations which also led to speculation on whether there were universal laws governing human co-existence.

A new view of natural law began to crystallise around 1600. Its point of departure was the nature of man as a rational being along with discussion of the rights and duties of man as a citizen in society. This gave rise to the development of new and large systems of natural law which were not derived from higher norms. These systems were directly based on human nature as the basis of the principles governing society. This was a legal order which could and was to determine positive law.

It was in this form that natural law became the dominating philosophy of social affairs during the sixteenth and seventeenth centuries. Roman law was still the core of legal studies and several passages which were published as natural law did, in fact, stem from Roman law. However, natural law evolved its system on another basis. Towards the end of the seventeenth century, the basis of natural science was a methodical one. The method known as the demonstrative or geometric method was used in developing the legal thesis of the basic principles of natural law.

The Dutch **Hugo Grotius** (1583-1645) is traditionally considered to be the founder of the new school of natural law. Religious strife in Holland led to his imprisonment and later exile. He lived in Paris and served as Swedish ambassador for a long time. Grotius was a universal genius. A considerable amount of his writings has been preserved, comprising theological and legal works,[1] speculations in philology along with tragedies and poetry. His *Mare Liberum* – on the freedom of the seas – derived from a conflict between the Dutch and the Portuguese in 1609. In this work, Grotius enunciated the famous principle of the freedom of the seas. His major work is *De jure belli ac pacis libri tres* from 1625 (Three books on the laws of war and peace). Here, Grotius attempted to establish the basic principles of peaceful co-existence between the nations and between people amongst themselves. He discussed the rules that sustain human

1. In 1618 he wrote a basic work on Dutch law following the system of Gaius' Institutions, *Inleidinghe to het hollandsche Rechtgeleerdheit.*

society, to which belong, according to him, »to renounce that which belongs to others, to return what we obtain from others or the profit derived thereby, to compensate for damage done and deserved punishment among men.« This was the shared existence built upon the fundamental urge of humans to live in society. They were rules that had to be the same in all civilized societies and they could be recognized by comparing the laws of civilized peoples. They could also be recognized as principles of reason which would apply, according to an oft quoted phrase of Grotius, even if God did not exist: »Etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum aut non curari ab eo negotio humana« (Even if we were to presume that God did not exist, which would be a crime to do or we were to suppose that he did not concern Himself with human affairs).

A famous chapter of the Introduction to the *De jure belli ac pacis* runs:

> »11. What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him. The very opposite of this view has been implanted in us partly by reason, partly by unbroken tradition, and confirmed by many proofs as well as by miracles attested by all ages. Hence it follows that we must without exception render obedience to God as our Creator, to Whom we owe all that we are and have; especially since, in manifold ways, He has shown Himself supremely good and supremely powerful, so that to those who obey Him He is able to give supremely great rewards, even rewards that are eternal, since He Himself is eternal. We ought, moreover, to believe that He has willed to give rewards, and all the more should we cherish such a belief if He has so promised in plain words; that He has done this, we Christians believe, convinced by the indubitable assurance of testimonies.«

This phrase was, however, not quite as epoch making as has been previously supposed. Similar ideas were uttered by Spanish scolastic writers around 1600, though it did blaze the trail for a new universal system which could unite all human beings regardless of religion. *Ius divinum* was not the basis, it was a system based solely on human reason and thus it was independent of any legislator. The work of Grotius was widespread throughout Europe. It was not an interconnected system, there were many citations from the Bible, the authors of classical antiquity and not least, the Spanish scholastics. Nevertheless, it did provide the basis of the development of a systematic science of natural law.

Natural law was formed into a coherent doctrine according to the methods of Descartes and the mathematicians (*more geometrico*) by the German teacher of natural law, **Samuel Pufendorf** (1632-1694). Pufendorf was the first German professor of natural law, initially at Heidelberg then summoned by the Swedish king at the new founded university of Lund in 1668. There he published his main work on natural law *De jure naturae et gentium libri octo* of 1672. An

abridged »popular« edition of his work appeared the year after titled *De officio hominis et civis iuxta legem naturalem libri duo* (two volumes on the duties of man and the citizen in natural law), which, in a concise and succinct manner, prescribed those duties incumbent on a human being as such and as a citizen of a society. This work gained widespread recognition and was translated into several languages. It says about the foundation of natural law that »everyone should endeavour to promote and maintain the best interests of the community of man in general. Wherefrom it follows that as one who has a certain goal should also want the means to reach the said goal without which it cannot be attained, then all this is held to be directed by natural law which is necessary and generally contributes to this common sociality.« According to this, the natural laws are »those rules one should follow in order to be a congenial and useful member of the human community.«

Pufendorf's system was devoid of a religious basis, it was utterly rational and autonomous. Basic concepts of this system were the inability of man to cope without rules (*imbecillitas*), a concept influenced by the Englishman Thomas Hobbes, and man's needs of a communal life (*socialitas*). Pufendorf's system laid the foundations for the development of the general part (*allgemeiner Teil*) which is a characteristic feature of modern statute books and his thoughts on free will have contributed to the evolution of a science of criminal law based on the doctrine of guilt. Pufendorf's works were widely read and even had a certain impact on American legal thinking in the 18th century.

Pufendorf's pupil, **Christian Thomasius** (1655-1728) made the university of Halle a famous place of learning. Thomasius worked in the Prussian state and provided some of the basic principles for the reform of the legal order which were to be carried out by the prince. He thus demanded the establishment of a penal code and criminal procedure without the use of torture and he did not admit that witchcraft and heresy were crimes. He was critical of Roman law and preferred to emphasize what he considered to be German law and thus played an important role in the introduction of the teaching of national law at the university. An example of this is to be found in his attitude towards the *lex Aquilia*, the reception of which in Germany he denied, in that he advocated an objective principle of liability in relation to the injured party. His chief work on natural law was the *Fundamenta juris naturae et gentium* of 1705, in which he makes a complete separation of natural law from law and morality. A particularly controversial issue was his assertion that natural law did not prohibit the marriage of closely related people.

The philosophy of natural law taught by **Christian Wolff** (1679-1754) gained widespread acceptance in the eighteenth century. Wolff was a professor of mathematics as well as natural and international law at Halle. His output was

enormous and universal in its scope, as Wolff's aim was to produce a system which would comprise all the actions of man. His method was – in the words of Spinoza – the mathematical-demonstrative. All passages were derived from basic principles where the demand for perfection played a central part. Any action which served to perfect mankind was thereby right, whilst conversely, the interference in the sphere of others was to be rejected: »It is precisely for this reason that the laws of nature (*lex natura*) oblige us to carry out those actions that seek to perfect mankind and its standing and avoid those actions that seek to render mankind and standing imperfect« as Wolff writes in his *Institutiones Juris Naturae et gentium* (§ 43). Wolff's philosophy was based on a doctrine of duty – duties to oneself and others. His method in drawing up legal principles has exerted a strong influence on posterity as has his idea of the legal system as a closed and logical system. His main work is the *Ius naturae methodo scientifica pertractum* in eight volumes (1740-48).

A totally different conception of natural law from Wolff's is found with his contemporary the Frenchman **Montesquieu** (1689-1755) whose work on the spirit of the law (*De l'Esprit des Loix)* 1748, provided a new approach. On the basis of a number of observations on the individual states' conditions and factors which might influence their legislation he would advocate a natural law conception under which the main emphasis for the legislator was not only to be placed on certain supreme principles of rationality but also on concrete contemplation. A new science of legislation was evolved on this basis which did not see natural law as universal but which adapted the laws to the conditions of each country such as its form of government, geographical location, religion, climate, economy etc. In his work on the spirit of the law (I, 3), Montesquieu starts out with the general view of natural law which he then proceeds to modify:

> »Law, in general, is human reason insofar that it rules over all the peoples of the earth; and the laws governing public life and the citizens should only be exceptional to the extent that human reason sees fit.
>
> They should be peculiar to the people for whom they were made as it is a great coincidence if the laws of one nation suit another nation.
>
> They must be in accordance with the nature and the principle of the form of government in place or that form one wishes to establish; whether they determine the type of government as political laws or underscore them as civic laws.
>
> They should be in accordance with the natural state of the country; with the climate, be it icy cold, sultry or temperate; with the state of the land; with its location; with its size; with the mode of life of its inhabitants, whether they are hunters, farmers or herders; they should match the degree of freedom that the form of government can allow, the religion of the inhabitants, their proclivities, their wealth, their number, trade, their mores and customs. In brief, the laws are in accordance with each other; in accordance with their origins, with the intentions of the legislators, with the order of things which has led to their existence. It is from all these points of view that they are to be observed.

> This is what I undertake to do in this work. I will examine all these relationships: together, they form that which is called the Spirit of the Law.«

This was a relativistic natural law which pointed towards a new, more historicizing view of the law.

19. Codifications of natural law in Germany and in Austria

The great systems of natural law paved the way for new codes which ousted Roman law as valid law. The final phase of natural law, in particular, set the stage for the execution of demands for reform by legislation. During the eighteenth century, these reforms were enacted all over Europe. Enlightened monarchs ensured the enactment of the demands of the day in Germany, Austria, the Italian states, principally Tuscany, in Russia, Spain and Portugal, the Nordic countries and the Netherlands. France also passed new laws though the reforms were not effective. The revolution broke out in 1789. It had its statute book in the form of the *Code civil* 1804.

We often talk about the movement of *codification*, a term coined by the English utilitarian, *Jeremy Bentham* (see p. 240). It started off with the civil code of the duchy of Bavaria, issued in 1756 as the *Codex Maximilianeus Bavaricus civilis* which, notwithstanding its Latin title, was written in German. This code, the work of the jurist **Kreittmayr** (1705-1790), still acknowledged the subsidiary validity of Roman law as opposed to the later Prussian and Austrian statute books. Parts of this statute book remained in force until the German civil code, the BGB, in 1900.

The Prussian code was the product of lengthy preparation. In the course of the 18th century, Prussia had become a European great power and the statute book was part of the effort to unify the various parts of the country into a whole. Earlier attempts in 1714 and in 1746 did not have the desired effect. So in 1780, Frederick the Great started up the reform effort again and the two jurists, **C.G. Suarez** and **E.F. Klein** prepared a draft. The work was completed by 1791. In 1794, the new statute book was issued as the *Allgemeines Landrecht für die preussischen Staaten* (ALR). This was not just a civil code as it also comprised the laws of state and administration and criminal law whilst procedure was codified in a particular *Allgemeine Gerichts-Ordnung für die preussischen Staaten* of 1793. With more than 17.000 regulations, the area covered by the 1794-statute book was enormous as it regulated the slightest details of the lives of the subjects. Thus does an oft quoted regulation establish the duty of a mother to breastfeed her child: »Eine gesunde Mutter ist ihr Kind selbst zu seugen verpflichtet. Wie lange sie aber dem Kind die Brust reichen

solle, hängt aber von der Bestimmung des Vaters ab«[2], (see ALR II 2 § 67 and 68).

The »social model« of the Landrecht is the pre-revolutionary society of classes. Equality before the law was not introduced and the statute book draws sharp distinctions between the different classes, peasants, citizens, officials, nobility with different privileges and duties. The »Landrecht« was organizationally indebted to Pufendorf and Wolff. Private law was classified according to the institutional system of Roman law into persons, things and actions, i.e. contracts and delicts. In scientific terms, this extremely detailed book was less interesting. This derived in part from the ban on commentaries of the book which forbade the interpretation of the laws in commentaries and judgements as any doubts as to the meaning of the laws had to submitted to a special law commission. Thus legal science still retained a more fertile area for work: The Roman law.

The first efforts of codification in Austria were marked by Empress Maria Theresa's (1740-1780) attempts at reform. A commission was appointed in 1753 though its draft of a *Codex Theresianus* was considered to be too comprehensive. The work was continued and in modified form, part of the work came into force as the *Josephinisches Gesetzbuch* (after Emperor Joseph II) in 1787. A new commission was set up in 1790 headed by the jurist **C.A. von Martini** and under his leadership natural law was introduced into legislative work, a process continued by a new commission headed by natural law teacher **Franz von Zeiller** (1751-1826). He brought the work to its completion as the *Allgemeines bürgerliches Gesetzbuch für die gesamten deutschen Erbländer der österreichischen Monarchie* (ABGB) which came into force in 1811 and still to this day forms the basis of Austrian private law. The ABGB deals exclusively with private law. It consists of three parts comprising the laws of the persons, property and obligations originally in 1502 paragraphs to which in the years of 1914-16 the so-called »Teilnovellen« were added so as to bring the law up to date. The code did not allow supplementing via old customary law but required that in the absence of an express statutory provision to support his view a judge would be referred to using analogies or natural principles of law (»natürliche Rechtssprinzipien.«)

2. «A healthy mother has a duty to suckle her child herself. For how long time she has to give her child her breast is dependant on the decision of the father«.

20. England

Eighteenth century English law was, on the whole, unaffected by the new tendencies and reforms in Europe. Common law was upheld as a set of unwritten rules based on ancient customary law, interpreted and enforced by the courts which were still centered at Westminster Hall in London. Equity had nothing in common with natural law but had evolved into a set of rules as rigid as common law and administered at the Court of Chancery.

During the 18th century the famous judge **Lord Mansfield** (1705-93) played an outstanding part as Chief Justice of King's Bench. Mansfield was of Scottish descent and thoroughly versed in continental law. He is merited i.a. for incorporating mercantile law, built to a large extent on continental practices, into English common law thereby creating a modern system comprising rules on credit, negotiable instruments, insurance, banking etc. Hence Mansfield is considered the founder of English commercial law. But otherwise English law and English jurists had no significant importance in the transformation of the English society following the Industrial Revolution. English jurists would stick to their inherited system and did not consider themselves as »social engineers«.

In 18th-century-England legal science had a place of almost trifling significance until a Chair in law was offered at the University of Oxford. Its first occupant was **William Blackstone** (1723-1780) who was inspired by the ideas of the Age of Enlightenment and whose name is inextricably related to his analysis and exposition of the main principles of English law in his major work *Commentaries on the Laws of England* (1765-68 with numerous later editions). A special further advantage of Blackstone's work was that it was written in English and thus would attract a readership outside the narrow circle of judicial lawyers whose favourite language of Law French became disused in the 18th century.

Another famous English jurist from that period was **Jeremy Bentham** (1748-1832) who held a critical view of English law and was closer to continental thinking. The term »codification« (from Latin *code* - *codex* and *facere* - do) is attributed to him. Bentham was the greatest theorist and most ardent supporter of codification of the law. He was not influenced by natural law but developed his own philosophy, the so-called utilitarianism whose basic principle was the promotion of the »greatest happiness for the greatest number of people« a slogan which was not coined by Bentham himself. Any legal rule was to be judged according to its utility value. Codes are to contribute to create legal safety and clarity (cognoscibility). In numerous more or less completed works Bentham advocated legal reform, e.g. in his *Principles of Morality and Legislation* (1780-89). His manuscripts were translated already at an early stage into French and

were often better known in England in their French versions than in the English originals. In his own lifetime Bentham's reform plans were not very successful in England but the 19th century saw the realization of some of them. Thus during the years following 1832 a number of obsolete statutory provisions were abolished. In the 1870s a comprehensive procedural reform was effected whereby the old distinction between common law courts and equity courts was removed and with the introduction of a modern system of appeal. Rights of appeal were granted for decisions made by High Court to the Court of Appeal and House of Lords was retained as the ultimate appellate Court.

CHAPTER FOUR

The period after 1800

European legal unity disappeared in the nineteenth century. The unity that had existed hitherto had been one of legal science knowing no boundaries. The source of authority was the Corpus juris and the legal science built upon it. During the Enlightenment and the period of the new codifications, law had again risen to prominence in a form closely tied to the nation state. The ideal of the complete codification which was to ensure the rights of the citizens was not compatible with an independent legal science or practice of the law which would give the points of view of individual persons – or a small group of jurists – far too much power. The authority to establish law was taken over by legislative power.

21. From ius commune to national law

In most European states where Roman law had been in force, codes were introduced in the course of the nineteenth century. The new codes were national codes. Often, the publication of a code was part of the creation of the nation state – the two concepts are closely related.

Not all countries acquired new codes. The trend towards private legislation is at its most visible in France and those countries influenced by the French example. Only a century after Germany got a civil code, whereas other countries such as England and the Nordic countries did not get one at all. In Sweden a draft code was finished in 1827 which showed strong influence from the Code civil. The wish to work out a code was expressed in the Norwegian constitution of 1814 and much effort was put into the idea of a codification over a long period of time in Norway. In Denmark, the issue was raised in the 1830s and again at the turn of the century without result.

Despite the legal diversity of Europe during the 19th century, there was still much that connected in spite of the national boundaries. The predominant political trends, liberalism, conservatism and socialism made themselves felt at

different times and places with varying force all over Europe. The rise in population, the drop in mortality, technical advances, industrialization, the improvement in communications, a new agrarian structure, free market economies and the rise of new social classes were trends which could be pointed out at some time or other throughout Europe. This meant that European countries were faced with uniform problems requiring a legal solution. They were solved by each country in the form of national legislation and the countries which got started later on could benefit from the experiences of the other countries. In the field of commercial law, new legal configurations appeared and entirely new legal disciplines were thus developed in company law, the law of private organizations, labour law, competition law as well as the law of incorporeal rights. Liberalism represented a demand for freedom in economic life, free transferability of real property along with a desire to free family law from the ties with the church which the conservative forces were trying to preserve in reaction to the thoughts of the revolution. Conservatives also opposed the legislative ideology of the Age of Enlightenment and sought to promote legal development by means of legal science and practice.

Industrialization led to demands for an organized capital market. Exchanges and banks, shares and bonds were gaining in importance in the credit market. An industrial bank, the *Crédit Mobilier* was established in France in 1857 and the *Crédit Foncier*, a credit institution had been opened the year before. They were to set the standard adhered to by equivalent financial institutions all over the world. The trade union movement made advances in the second half of the century, large industrial combines came about and the cooperative movement began to take shape. The legal order was facing many challenges in the nineteenth century.

According to the prevailing doctrine of the sources of law, legal science and practice could only have a limited influence on the creation of law. Nonetheless, French legal practice – jurisprudence – was of great significance in the fleshing out of the Code civil. This applies particularly to the general formulations, e.g. in art. 1382 of the Code civil on damages when there is »faute« and general clauses such as the later BGB's »Treu and Glaube« (good faith) clause (art. 242) which opened up the way for law creating jurisprudence. The development of rules on objective responsibility in French law is an example of the significance of the courts' practice.

22. Code civil and French Legal Science: L'école de l'exégèse

The *Code civil* of 1804 is a code entirely devoted to private law. It was supplemented by the *Code de commerce* of 1807 which dealt with mercantile law and the *Code de procédure civil* of 1806 which contained the civil law procedure based on principles of orality and publicity. These three codes, along with the code of criminal law, the *Code pénal* of 1810 and the code on criminal procedure, the *Code de procédure criminelle* of 1808, constitute the famous five Napoleonic codes – »les cinq codes«.

The Code civil is a product of the French Revolution. It is built upon the notion of the freedom and equality of all citizens. The great significance of the Code civil throughout Europe as the code of a new age, was an important factor in the maintenance of partial European unity in the area of law despite the national differences which arose with the collapse of *ius commune*. The rules of the Code civil are couched in terms of general principles and the aim is not to strive for thorough regulation of each particular subject area dealt with by the code. Systematically, the Code civil like Gaius' Institutions is built up on the three divisions of personal law (Des Personnes), the law governing things (Des biens et des différentes modfications de la propriété) and the acquisition of rights (Des differentes manières dont on acquient la propriété) collected in 2281 articles.

The French *Code de commerce* of 1807 was to be of prime importance for the development of European company law in the 19th century. For the first time, general rules were given for the setting up of different types of capital based companies. The most important of which were the limited company (*la société anonyme*) and the limited partnership (*la société en commandite par actions*). It was characteristic of French law that prior permission or concession had to be obtained in order to set up joint stock companies whereas the normative system whereby a company may be set up without any special permission as long as certain preset legal conditions are met, derives from English law.

Political revolutions and the elaboration of new codes are closely connected. The revolutionary constitution of 1791 had already formulated the demand for a new code: »Il sera fait un code des lois civiles communes à tout le royaume.« This was the demand answered by the Code civil. This code, like other revolutionary codes was not solely intended to collect and organize the law in force. It was also a reforming code which was used as a tool in the development of society. It was based on the desire for renewal and progress. Codes of this nature could derive from enlightened monarchs who were aware of the spirit of the age and set about reforming as did Frederick the Great of Prussia and Maria Theresa, Empress of Austria. Or else, like the Code civil, they could be started

in the midst of revolution thereby becoming part of the popular demand for reform then to be carried out and enacted by a strong will to legislate once the revolution was over.

The Code civil was the result of a committee work leading to great results in a short period of time. The code appears in large parts as a synthesis of the legal orders of the two areas of law of old France, the *pays de droit coutumier* and the *pays de droit écrit*. Representatives of both systems worked on the commission drawing up the law. Napoleon himself took an active part in the legislative work, especially at its early stages where the discussion was of the less legally and technically intricate area of personal and family law. He foresaw himself that the memory of his law would outlast that of his military victories. A visit to Napoleon's tomb at les Invalides in Paris shows the great significance attributed to his code civil as one of the reforms whereby Napoleon had overcome insecurity and inequality. A series of bas-reliefs in the gallery around the grave depict the reforms of Napoleon and one of them is specially devoted to his reforms of the law.

The five French codes that were issued in rapid succession in the years between 1804 and 1811 are often called the codes of Napoleon. This is a reflection of the importance of the will to legislate that was the fundamental premise for the solution of the task of equipping France with an entirely new legal base in record time. The task consisted in at once creating legal unity, incorporating some of the new principles which had been expressed in the legislation of the Revolution – the so-called »droit intermédiaire« – and to attain such a level of clarity about what the law was that commentaries would be superfluous.

When Napoleon became first consul and then head of government after the coup of November 1799, he proclaimed that the Revolution now rested in the principles which had brought it about and therefore it was effectively over: »La révolution est fixée au principes qui l'ont commencée, elle est finie.«

Less than a year later, a four-man legal commission was set up where **Fr. Tronchet** represented customary law whilst another member, **J. Portalis** (1745-1807) was an eminent expert on Roman law. None of the members of the commissions were university teachers though they were lawyers or judges as were the remaining two members, **F. Bigot de Préameneu** and **J. de Maleville**. A particularly prominent role in the legal work was played by Portalis, who in a famous introductory speech to the legislative work – *Discours préliminaire* – expressed the idea that codes were not merely aimed at legal technical adjustment but that they were also an important part of the development of society: He underlined that codes were not revolutionary innovations but that they were based on past experience. A particularly famous formulation of his encapsulated this idea in the sentence that statute books were not made but that they made

themselves in time: »Les codes se font avec le temps, mais à proprement parler, on ne les fait pas«.

Portalis saw the inviolability of property rights under the control of the head of family and the family itself, also under the authority of the husband and father, as the pillars of social order. This latter principle was expressed in the first volume of the statute book whilst the second and third volumes contained the rules governing property rights and the forms of its transfer.

The draft of the law commission was sent to the courts for an appraisal and then it was treated by the council of state, le Conseil d'État, under the leadership of one of the protagonists of the Revolution, **J.J. Cambacerès** (1753-1824). As mentioned earlier, Napoleon also took part in the council of state's meetings on the statute book and it was here that it acquired its final form. In the course of a year, the successive parts of the code were approved by the legislative assembly (the so-called tribunat) and on March 21st 1804, the entire law was enacted under the name of *Code civil des Francais*. In 1807, its name was changed by law to Code Napoléon but this designation did not survive the fall of the emperor in 1814.

In many ways *code civil* appears as a synthesis of old and new. The fundamental principles of the Revolution, freedom and equality and the demand for a uniform law for the whole of France were realized here whilst at the same time old sources of law were widely built upon. This applied to customary law, principally in the form assumed by the most important collection of customary law, *la Coutume de Paris* which before the Revolution, enjoyed a high reputation all over France. Roman law also played a part, especially since it had been reorganized by the famous jurist of the seventeenth century, **Jean Domat**. Other legal literature was also used from, among others, the two eighteenth century jurists, **Francois Bourjon** (d. 1757) and **Robert Joseph Pothier** (1699-1772) whose *Traité des obligations* had a decisive influence on the relevant part of the Code civil.[1] Also present in the picture of the sources of the Code civil are the three great laws or as the French call them, the *ordonnances*, elaborated during the reign of Louis XV by his chancellor Daguesseau. They were laws of the years 1731 to 1747 about gifts, testaments and substitution by *fidei commissio*.

The new principles manifested themselves in the family law through the retention of the *marriage civil* introduced during the Revolution along with divorce and equality before the law. The rules governing the transfer of property rights were also changed, as in art. 1138:

1. See A.-J. Arnaud: *Les origines doctrinales du Code civil français*, 1969.

»The obligation to transfer the said object is absolute upon the mere agreement of the contracting parties. This makes the creditor the owner and the risk involved with the item devolves on him when the moment of obligatory delivery arises even if the transfer has not taken place unless the debtor is delayed in delivering the item in which case the risk attached to the item remains with the latter.«

Freedom of contract was introduced, according to art. 1108:

»Four conditions are important for the validity of an agreement:
- Consent of the party entering an obligation,
- The ability of the party to agree to a contract,
- A specified item that is the object of the contract,
- Admissible legal grounds (cause) for the obligation.«

The medieval ban on interest rates was rescinded. However, despite proclamations about the introduction of the principle of equality, different types of inequality were contained by the code. The legal position of a married woman was particularly weak, she was not a member of the family council but was submitted to the authority of the husband as head of the household with a duty to obey him. The relationship between master and servant was also based on inequality. Thus regulation in the Code civil (art. 1781) established that in the case of a dispute about payment or the discharge for reciprocal duties, weight should only be attached to the employer's version of events: »Le maître est cru sur son affirmation.«

Children born out of wedlock had no rights vis-á-vis the father since »La recherche de la paternité est interdite«. This principle was later abolished.

The enactment of the new civil code in France was accompanied by thorough reforms of the procedural system. They took place through the issue of the *Code de procédure civil* in 1806. Its arrangement of the administration of justice still applies in France to this day. All small and private jurisdictions were abolished and a uniform procedural system was introduced. The basic principles of process used by the new law on procedure were largely based on the ordonnance on procedure of Louis XIV and Colbert from 1667 (*Ordonnance civile sur la réforme de la justice*). One of the many utopian ideas of the Revolution had been that trials could be done away with altogether. Therefore, the courts and legal education were to be abolished, the laws were to be simplified and all cases to be settled through conciliation to the greatest possible extent. During the Revolution, a permanent conciliation structure (préliminaire de réconciliation) had been set up and this institution was preserved although it soon lost its importance. The introduction of Justices of the Peace – juges de paix – was carried through, however, as well as the requirements of giving a legal reasoning for judgments and of a reduction in the number of appellate courts.

The basic structure of the new court system was already introduced during the Revolution. It is built on a uniform hierarchical system where the ordinary lower instance is a *Tribunal de grande instance* and the instance of appeal is a number of *Cours d'appel*. The uniformity of the practice of the laws is supervised by a *Cour de cassation*. This court may annul decisions made by a court of appeal if they infringe the law. The case may then be referred to another court of appeal for further treatment. However, the *Cour de cassation* does not have the power to make decisions in the cases. Neither France nor many other countries which introduced upper courts had had a superior nationwide common supreme jurisdiction before. The establishment of such a court was a major step on the way to legal unity. The establishment of a supreme court in the court systems also secured judicial independence as towards the executive power which had had easier access to interfere with court decisions when such supreme appeal was not available.

The new Code meant the end of the era of natural law in France. The legal order was from then on based on the Code civil which did not admit the use of natural law as a subsidiary source of law as had been the case in the previous century. The statute book reigned supreme as source of law while all other sources of law such as custom which had previously played such an important part, or practice, were reduced to playing a totally subordinate role. The same applied to legal science – whose task was now to interpret the Code civil. 19th century French legal science was also characterized as *l'école de l'exégèse* (from exegesis – interpretation).[2]

With the introduction of the Code civil, it was established that legislation was the highest authority. In the mid-nineteenth century, a French professor put it this way, that he did not know about civil law as all he taught was the statute book: »Je ne connais pas le droit civil, je n'enseigne que le Code Napoléon.« This thought was symptomatic of the legal scientific method used in countries that had acquired new codes. Although, nowadays, this method's rigour has been abandoned, its influence was considerable and there are still traces of that school.

Just how restricted the task that now devolved to jurisprudence was, will be made plain by comparing it with the task of the courts, as it was drawn up in terms of doctrine after the Code civil came into force. The task of the judge was viewed as being limited to passing judgement and he had to be wary not to enter legislative territory. A famous Belgian jurist, **François Laurent** (1810-1887), put it this way: »Le législateur ne doit pas être juge et le juge ne doit pas être

2. See N. Gläser: Lehre und Rechtsprechung im französischen Zivilrecht im 19. Jahrhundert, *Ius commune*, Sonderheft 81 (1996).

législateur.« Originally, what had been intended with the Code civil was a system that completely barred the judge from independent creation of law. Should a judge encounter a problem which legislation did not address, he was to take it to the legislator who would then have to decide about the interpretation of the law – this was known as »référé législatif.« In the definitive version of the Code civil, this arrangement was altered in that the judge was now not allowed to avoid making a decision because legislation did not address the problem or was vague or insufficient (C.c.art. 4). In such a case, the judge had to give a ruling himself.

The new Code gave legal science a substantially different position than it had occupied before. It was no longer seen as an independent source of law. Its task was restricted to interpreting the letter of the law and give a coherent presentation of the legal regulations. It was not to provide a critique of the law or contribute to its further development – that was the task of the legislator. Only statute law was a source of law. However, in spite of the limited area of legal science, several legal scientists acted with great authority. One influential jurist was **Troplong** (1765-1869), whose *Le droit civil expliqué suivant les articles du Code* (1833-1855) comprised twenty-seven volumes.

The first systematic presentation of French law after the Code civil was penned by the German jurist **C.S. Zachariae** (1763-1843) and appeared as the *Handbuch des Französichen Rechts* (first edition 1808). His system was later incorporated by two French jurists, **Aubry** and **Rau** whose *Cours de droit civil francais* (1838 with many subsequent editions) was for a long time the authoritative systematic presentation (the term *méthode synthétique* was used) of French law as opposed to a commentary of the law (*méthode analytique*).[3] The aim of the presentation was to find the »principes« of the Code civil through close analysis of the text. Emphasis was also placed on understanding the individual passages of the law in relation to other rules in the statute book. Not much was made of the historical context of the code nor of its connection to previous law.

A more critical view of the Code civil than that of the école de l'èxégèse is found with **François Gény** (1861-1959) who in his *Méthode d'interprétation des sources du droit privé francais* of 1899 was critical of the fact that the code and justice were almost interchangeable and strove to point out the significance of the co-operation between legal practice – *la jurisprudence* – and legal science. No statute could exhaustively deal with all the questions of law. »Gap-filling« was necessary and had to take place through the »libre recherche scienti-

3. A. Bürge: *Das französische Privatrecht im 19. Jahrhundert*, Frankft. 1991.

fique«. The expression »les faits sociaux«, on social realities which a court would have to take into account was also derived from Gény.[4]

A set book on French law is the *Traité élémentaire de droit civil* of 1899 by **Marcel Planiol**. Another well known jurist of that period is **Esmein** who was the founder of the leading legal journal *Revue trimestrielle de droit civil* which was started in 1902.

The criticism of the closed universe in which the exegetes of the Code civil used to move around has left its mark on recent books of French law which now include other sources of law such as legal critiques and comparative law.

French law had an enormous influence outside France[5] on the double character of the French Civil Code as both French national Law and European law.

French jurists were widely read in those countries under the influence of the Code civil including Belgium, Holland, Italy, Spain, Portugal and Romania. In Italy, after the Risorgimento, in 1865 a *Codice civile* was passed which was modelled on the French statute book. Both before and after the enactment of the statute book, the influence of French legal science in Italy was strong. However, also German legal science was important in Italy resulting in a combination of French-inspired legislation and German-inspired legal science.

Code civil does not apply only in France. After the annexion by Napoleon of what is now Belgium and Holland, the code came into force there as well (1811) and it continued to apply in Belgium after its secession from Holland in 1830 whilst Holland acquired a new code in 1838 (*Burgerlijk Wetboek)* which to a large extent was based on Code Civil. Wherever Napoleon ruled, his law was also introduced, so that in Italy and in the conquered part of Germany, the left bank of the Rhine, Code civil came into force.

During the nineteenth century, the Code civil was the model of many civil codes in Southern Europe, viz. Spain and Portugal as well as Latin America and in the former French colonies. It is possible to speak of a completely French »jurisdiction« in which the legal order was built on the principles of Code Civil. After Napoleon's downfall, Code Civil remained in force in many places or, as happened in a number of Italian states, new codes were introduced on the model of Code Civil.

With the introduction of the Code civil in so many countries, the old European legal unity in the form of *ius commune* disintegrated. Even where it was still in force it assumed new and different shapes, this was not least the case of German legal science which went off on its own path.

4. P. Grossi (ed.) *François Gény e le scienze del Nuovecento*, Quaderni Fiorentini 20 (1991).
5. Reiner Schulze (ed.): *Französisches Zivilrecht in Europa während des 19. Jahrhunderts*, Berlin 1994.

In Spain, a *Código civil* was passed (1889) which was also modelled on the French code. Roman law had applied hitherto as it had been preserved in the older Spanish sources of law. Outside Castille local *fueros* in the field of family law and succession law were still valid besides the Code. Since the introduction of the Código civil, Spanish legal science has been affected by both French and German legal science.

In the Canadian province of Quebec, French law applies in part as it does in the state of Louisiana in the USA.

In Latin America, the Code civil was introduced in Haiti and in Bolivia (1831). However, the two statute books introduced in Chile (1853) and Argentina (1869) along with a law in draft form in Brazil all displayed greater independence as they were based on the preparatoty work of three great legislative figures who were all familiar with Roman law, European legislation and legal science (Andrés Bello in Chile, Texeira de Freitas in Brazil and Vélez Sarsfield in Argentina). Those three codes formed the basis of the law in other Latin American countries.

23. German Legal Science in the 19th century

The star attraction of the Berlin University Law Faculty in the first half of the 19th century was the celebrated jurist, **F.C. von Savigny** (1779-1861), the leading figure of the German historical school. In 1802, with a monography on possession he had established himself as an excellent researcher of Roman law with an entirely new methodical outlook. Some years later he published his presentation of the history of Roman law in the Middle Ages. In 1814 a pamphlet by the German jurist **A.F.J. Thibaut** (1772-1840) advocating the preparation of a code for all Germany provoked a rejoinder from Savigny, entitled *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (On the Vocation of our time towards Legislation and Legal Science) in which he disclaimed the capability of his own contemporaries to prepare codes. This triggered off the so-called codification dispute which was to have far-reaching consequences for the views in respect of the new codes. Von Savigny criticized the natural law codifications and argued that the advancement of the law was best ensured through legal science - as in Ancient Rome - and not through codes. His fundamental point of view was that there was an organic connection between the law and the people and that legislation was an arbitrary encroachment in legal evolution which happened discreetly through its own inner workings and forces (»durch innere stillwirkende Kräfte). The law thus lived in the people, and the lawyers, as the people's representatives, had to carry out the necessary

adaptation of the law to suit new times. This could not be achieved by legislation. In »Vom beruf«, von Savigny gave his view a famous formulation in that he compares the law with a triangle:

> »In every triangle there are certain regulations which are necessarily followed by all others due to their connections: For instance, that the triangle is defined by two sides and the angle in between. In the same manner, any part of our law has such parts whereby the others are automatically defined: we may call these the guiding principles. To feel one's way towards them and by using them as points of departure so as to recognize the inner connections and nature of the relationships of legal concepts, this belongs to the most arduous tasks of our science, in fact, it is precisely this which gives our work its scientific nature. Where the code appears at a time not capable of mastering this art the resulting inconvenience is inevitable. Administration of justice will appear to be governed by the code but in reality by something else beyond the code as the genuinely ruling source of law.«

The purpose of legal science according to von Savigny was to »pursue any given matter to its roots, thus discovering its organic principle whereby that of it which still has life must be separated from what has already died thus belonging to history.«

In 1815 Savigny founded the journal which gave the historical school its name – *Zeitschrift für die geschichtliche Rechtswissenschaft* (Review of Historical Legal Science), where in an introductory treatise he defined the difference between historically conscious jurists and others whom he regarded as lacking a method. Von Savigny considered Roman law to be the true German national law and it was through his writings on Roman law and his lectures on the subject that he attained fame as a legal scientist. In the 1840s he started the publication of a major juridical work on the modern application of Roman Law, *System des heutigen römischen Rechts*.

Whilst von Savigny worked as a Romanist on Roman law, there were others who used a correspondingly historical method on ancient German law. They were known as the Germanists of whom the most important was **K.F. Eichhorn** (1781-1854) the author of *Deutsche Staats- und Rechtsgeschichte* (1808-23).

In the wake of von Savigny, Roman law and the scientific treatment of the ancient Roman sources of law were the basis of German law in force centrally in Germany. Nineteenth century German legal science is extremely comprehensive and is characterized by several dominating juridical figures who were regarded as celebrities in all Europe. German jurists were proud of their legal science, for as one of the most famous jurists in Germany, *Bernhard Windscheid*, wrote in 1847 they had been educated by a legal science much richer and profounder than any other: »Das Mass unserer Kräfte ist grösser, nicht durch unser verdienst, sondern weil uns eine Wissenschaft ganz andere Reichtums und ganz anderer Tiefe erzogen hat.«

In Austria the position was different. In that country a legal science attached to the code ABGB reminiscent of the French code de l'exégèse was prevailing in the 19th century. Its best known jurist was Joseph Unger (1828-1913).

In the mid-nineteenth century, German legal science was in the hands of the so-called »Begriffsjurisprudenz« or jurisprudence of concepts. The method of conceptual jurisprudence dominated German jurisprudence also after the entering into force of the new German code, the BGB, in 1900 until it was replaced by other methods. The basis of legal science was the Roman sources of law. Therefore the main direction of German legal science was often described as »pandect science« reflecting its allegiance to the *Pandectae*, another name for Justinian's Digest. The method was all about developing juridical concepts that could express the true nature of the particular legal institutions, so that these concepts could again be used to derive new legal maxims. This way of proceeding is known as construction (»Konstruktion«). The idea was to gain a view of the legal system and fill out any holes in the system by conclusions drawn from the basic concepts. The principal representative of this school was **G.F. Puchta** (1798-1846). Another renowned members of this school of thought – who was later to turn himself against this method – was **Rudolf von Ihering** (1818-92) who, in an oft quoted phrase, expressed the wish that through working on Roman law, one could reach beyond it: »Durch das römische Recht über das römische Recht hinaus.« The conceptual jurists often looked back in legal history and there they found old legal institutions which could be used in a new context. An example is provided by the jurist **I. Bekker** who towards the 19th century developed the doctrine of the so-called »Zweckvermögen« (litterally: fortune of finality) as a contribution to the resolution of the problems attached to the concept of legal personality. Such property might be given separate legal status. In this area Bekker was inspired by the rules of Roman law governing *peculium* which the Roman pater familias might grant to a son or a slave.

Among the German jurists of particular repute was Jhering whose fame extended to most of Europe. In his later legal writings, especially *Der Zweck im Recht* (1877-1883) he abandoned the conceptual jurisprudence in favour of the view that the decisive factors in legal development were the interests governing society. The often quoted phrase of »purpose creating the right« (»Der Zweck ist Schöpfer des ganzen Rechts«) was coined by Jhering. In his work on the spirit of Roman law, *Geist des römischen Rechts* (1852-1865 with several later editions) Jhering set up a new concept of subjective law as the legally protected interest. His earlier commitment to conceptual jurisprudence was renounced in his book *Scherz und Ernst in der Jurisprudenz* (Joke and Seriousness in the Law) of 1884 where he says in a chapter called »Conceptual Heaven«:

»Since you are a Romanist, you will go to the Jurisprudence of Concepts – Heaven. There you will find all the legal concepts you worked with so much on Earth, though not in their imperfect form, not in that damaged form due to the manipulations of legislators and practitioners on Earth, but in their perfect, spotless purity and ideal beauty. Here, the legal theoreticians are rewarded for their services rendered on Earth to the juridical concepts in that now they see with complete clarity what on Earth they only saw in a veiled guise, they are face to face with them and comport themselves as their equals. Questions, the answers to which they searched for in vain during their earthly existence, are presently answered by the concepts themselves. There are no civilistic conundrums here, the constructs of *hereditas jacens*, the correal obligation, the right to rights, the nature of possession, the difference beetween *commodatum* and *precarium*, the mortgage rights in one's own possessions and whatever names these problems go under which have given the disciple of wisdom so much to do on his passage on Earth, here, they are all resolved.«

On the basis of Ihering's principles, the so-called jurisprudence of interest (Interressenjurisprudenz) was developed which viewed the legal standard as that obtained as a result of the decisions on conflicts in society between different interests. The task of legal science was then to demonstrate which interests the legislator had in mind. The judge, in deciding cases, was to find the norm thus created whit a view to resolving that particular type of conflicts of interest, there were also certain ethical considerations involved. This realization was particularly promoted in the so-called *Wertjurisprudenz*.

24. The German civil code (BGB)

The new German Reich founded in 1871 after the French-German War had a civil code in 1896. It came into force in the year 1900. Germany was divided into single states who all had their own statute books to some extent – the most well known being, apart from the Prussian Landrecht, the code of Saxony of 1863. The political preconditions for a single unifying code were not precent. The so-called German league (*Deutscher Bund*) that was in existence from 1815 to 1866 could only recommend but not enforce legislation. It did manage to introduce a general commercial statute book (ADHGB) in 1861. It was not until the proclamation of the German Empire in 1871 that the conditions enabling implementation of large-scale new legislation were established.[6] In 1877, a common law on civil procedure was passed (*Reichs-Civilprozessordnung*) and shortly before that in 1874, work had been started on a civil code. The influence of the historical school prolonged the process and proceeded to make the basis of a new statute book seem very shaky indeed: The question was whether

6. See Michael John: *Politics and the Law in Late Nineteenth-Century Germany*, Oxf. 1989.

Roman or German law should be the basis, if time could be considered ripe for such a project at all.

A preparatory commission submitted its report in 1874 on the fundamental principles of a new statute book. On that basis, the statute book was divided into a general part (Allgemeiner Teil), the law of obligations (Schuldrecht), property law (Sachenrecht), family law (Familienrecht) and succession law (Erbrecht). Each of the statute book's parts was entrusted to an editor whose draft was then discussed by a commission. A particularly important part in the creation of the German statute book was played by one of the period's greatest Romanist jurists, **Bernhard Windscheid** (1817-92), the author of a *Lehrbuch des Pandectenrechts* (1862-1870 with many new editions) which was one of the standard works of German legal science. An initial draft of the BGB was made available to the public in 1889. It encountered quite a lot of criticism from, among others, the famous Germanist **Otto von Gierke** (1841-1921), author of the classic work *Das deutsche Genossenschaftsrecht* (1868-1913 in four volumes). The law commission was reproached for placing too much emphasis on Roman law and was based on a model of society where the weak would come to grief because of its liberal stamp. The latter view was expressed in a book, *Das bürgerliche Recht und die besitzlosen Volksklassen* from 1890 (The civil law and the non-owing classes) by **A. Menger** (1841-1906), an Austrian jurist. The definitive text was produced by a new law commission (1890-95) whose draft was approved in 1896 and came into force on the first of January, 1900.

The structure of the BGB is so complex and its language so technically legal that it is difficult to grasp for non-jurists. It is strictly systematical and structured on an elaborate inner logic. A characteristic feature is the large amount of references and cross references which secures coherence but obscures the general overview. An example of the difficulties in using the code is provided by the rules on purchase. The main principle is to proceed from general provisions to specific provisions. This means that the general part of the code must be consulted first, then the general part of the law of obligations, then the general part of contract until the special rules governing purchase are reached (Art. 433 et seq).

The BGB contains so-called general clauses in the general section of which art. 242 is particularly well known:

> »Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.« (The debtor has a duty to perfom his action in the way demanded by good faith with regard to commercial custom).

As in France, a considerable part of German legal science is to be found in commentaries on the BGB. In principle, all questions of law were to be resolved

on the basis of the law. One example is provided by the so-called »positive Vertragsverletzungen«, i.e. violations of a debtor's obligations which are not directly referred to in the code.

The coming into force of the BGB raised the question of the extent to which judges were bound by it. The so-called »Freirechtsschule« (Free rights' school) maintained that the judge had a right to create law alongside the set laws.

The BGB is a typical product of the nineteenth century, it has, however, remained in force in Germany and withstood attempts by the Nazis to replace it with a »Volksgesetzbuch« (Peoples' code). It is a statute book which requires great familiarity with the inner coherence of the entire law if it is to be used and applied. Whereas German private legal science of the 19th century was of considerable importance to the rest of Europe the influence of German law diminished after the BGB was introcuced. The remains of ancient common European legal culture, which had characterized the great names of German »Pandektenwissenschaft«, were lost at the advent of the BGB which was a national statute book which was intractable into the bargain.

The BGB did influence the legal work of the Swiss in 1907 and 1911 as well as the supplement of 1914-16 to the Austrian statute book. The Swiss statute book (ZGB) was based on a draft by the jurist **Eugen Huber** (1849-1923) who, in his commentary on the code expressed the view that codifications were usually conservative in nature: »Im allgemeinem lässt sich wohl sagen, dass bei der Kodifikation die Konservierung der Neuerung vorgeht.« The opening paragraph of the Swiss statute book states the principle that should the judge not find the solution to a legal conflict in which he was to adjudicate in the code, he was to use the solution he would have chosen if he had been a legislator himself.

The Swiss *Zivilgesetzbuch* and *Obligationenrecht* were introduced in Turkey as part of Kemal Atatürk's reforms during the 1920's.

In Japan, there had been an awareness of the qualities of the BGB even before it came into force in Germany, so equivalent laws were passed, though not in the area of family law. The BGB also served as an example in South America, as in the case of Peru. The Greek civil code of 1946 was also based on the BGB. Thus like the example of a Romanistic legal family in which French law plays the most important role a German legal family may be said to exist, albeit of somewhat lesser extent.

To this group The Netherlands may to some extent be included considering the legislative reform work which was in process there since World War II with a view to preparing a new code which makes provision for the development of Dutch law, influenced i.a. by German law which has occurred since the *Burgerlijk Wetboek* from 1838. The first part of the work was initially carried

out mainly by **E.M. Meijers** (1880-1954) who was a teacher of civil law and a legal historian. The new Code (Nieuwe Burgerliik Wetboek) came into force in 1992.

25. Eastern Europe

Eastern European legal history is closely connected to the shifting political circumstances. South-Eastern Europe, the modern day states of Greece, Bulgaria, Romania and parts of former Yugoslavia were under Turkish rule for a long time. Poland was partitioned by Russia, Austria and Prussia and subject to different laws while the present Slovakian and Czech republics and Hungary kept their own law as part of the Austro-Hungarian dual monarchy.[7] Each country has its own tradition.

A codification was carried out in Romania in 1864 that was modelled on the Code civil whereas in the other South-East European nations legal systems with elements of several legal orders continued to prevail. The ALR applied to the Prussian administered part of Poland whilst the ABGB influenced those parts of Eastern Europe under Habsburg domination.

During the eighteenth century, Russia had come into close contact with the rest of Europe. In the 1720's, under Czar Peter the Great, reforms, in part influenced by Swedish practices, were carried out. The ideas of the Enlightenment had a definite though limited effect under Catherine the Great towards the end of the eighteenth century. It was not until the end of the Napoleonic wars, which brought many Russians to Western Europe that more extensive reforms of the legal system were carried out. *Zvod zakonov*, a new statute book, was introduced in 1832. It was a comprehensive legislative work in fifteen volumes with over forty thousand articles. Western European influence was limited, but it is noticeable in the organization of private law based on that of the Code civil. There was a thorough reform of procedure based on the French laws of procedure, the *Code d'instruction criminelle* and the *Code de procédure civile* in the 19th century, but a new civil code was not made until 1922. Public and verbal procedure were introduced and the independence of the prosecution and courts was ensured. Russia remained an autocracy in terms of constitutional law.

The Russian czarist regime never had a modern civil code. During the communist regime codes were made in 1922 and 1964. After the fall of the Soviet

7. As to the position of Eastern Europe in a European legal context see T. Giaro: *Europäische Privatrechtsgeschichte: Werkzeug der Rechtsvereinheitlichung und Produkt der Kategorienvermengung*, Ius commune XXI (1994), p. 15.

Union and the transition to a market economy it has been necessary to draft a new code. Important legislation on property and on commercial activities was made in 1990 and in 1992 preparation for at new civil code were started. In 1995 Book I of a new code was enacted. It has 453 articles containing general principles of civil law, the law of persons, property and obligations. In 1996 the second part of the code came into force. It contains rules on specific contracts and torts. A third part (on immaterial rights, succession and international private law) is being prepared. The new code is based on the ideas of market economy, private property, freedom of commerce and freedom of contract.[8]

26. England

The development in England was different from that on the continent.[9] The methods developed through the study of the new European codifications were not directly adopted in England. However German legal science did influence some English and American jurists who, in the 19th century, sought to summarize parts of English law in textbooks. However, the basis of English law was still the case law of common law as administered by the courts whereas the teaching of law and legal science only played a minor role. However in later years attempts are being made to point to the interrelationship between continental and common law.[10] The study of Roman law reigned supreme in Germany, thanks to the influence of von Savigny whereas, in England, as Pollock, the legal historian writes: »The literature on Roman law to be found in our own language was, with few exceptions, antiquated or contemptible.«[11] Even if English jurists did not have a legal scientific tradition or the implements to bridge English and continental legal science it is now acknowledged that continental ideas in a variety of forms have been received by the common law culture in the 19th and 20th centuries. The great innovators of English law were and to a certain extent still are the judges who generally enjoy greater authority and prestige in England than university professors. The attitude has changed

8. See Oleg Zadikov: Das neue Gesetsbuch Russlands, *Zeitschrift für Europäisches Privatrecht* 1996, p. 260-272.
9. For a history of modern English law see W.R. Cornish & Gide N. Clark: *Law and Society in England 1750-1900*, London 1989.
10. See M. Reimann (ed.): *The Reception of Continental Ideas in the Common Law World 1820-1920*, Comparative Studies in Continental and Anglo-American Legal History Band 13, Berlin 1994. Here is also stressed the the fact that continental ideas seem to have been more influent in the U.S.A. than in England in the 19th century.
11. *Introduction* to Henry Sumner Maine's *Ancient Law* of 1920.

gradually however, and some years of law studies at a university are now a requirement before embarking on a professional legal career. English law is now a University study whereas Roman law – or civil law – has been reduced to a subsidiary subject. The times are over when the question posed by Dicey, the famous English constitutional law professor, in his inaugural lecture (1883) »Can English law be taught at the University?« can be asked again.

English legal philosophy, in particular, has contributed to European legal thinking. The positivist, **John Austin**, of the previous century (1790-1859) may be mentioned, though his *Province of Jurisprudence Determined* of 1832 was not well recieved by English practitioners of the day. Well known legal historians are **Henry James Sumner Maine** who wrote *Ancient Law* (1881) and **Maitland** and **Holdsworth** who undertook thorough examinations of the unique history of English law.

In recent years, legislation, statute law, has played an increasingly important role. The old dichotomy between common law and »Civil law« still endures, and even if reconciliation is under way, and similarities between English law and continental law are more often stressed, English law still has a distinct character from continental law.

27. »The Third Reich« and the law

There has been increasing interest in the legal conditions pertaining in Nazi Germany (1933-1945) in recent years. Several new monographs and compilations have brought hitherto unknown or suppressed aspects of legal life to light. Perversion of the law is a phrase often used in connection with the Nazi legal order. The period between 1933 and 1945 in Germany belongs to European legal history as an example of how a state based on the rule of law can, in a short period of time, be turned into the opposite through the use of legal means.

When Hitler, came to power in 1933, a swift dismantling of the 1919 constitution which had provided the foundation of the so-called Weimar Republic, was set in motion. By means of an »Ermächtigungsgestz« of 1933, the Reichstag handed over legislative power to the government, the state became a one-party state where only the National Socialist party (DNSAP) was recognized and all power was concentrated in the hands of the Führer, Adolf Hitler whose will thus became the law.

In criminal law the rescinding of the ban on analogy was lifted (Analogieverbot) which meant that not only could crimes be punished under criminal statutes but also if they were deemed to be crimes that ought to be punished according to so-called »sound popular feeling«: »... die nach dem Grundge-

danken eines Strafgesetzes und nach gesundem Volksempfinden Bestrafung verdient.« The expression »nach gesundem Volksempfinden« was one of the ways in which National Socialist thinking infiltrated the legal system.

The National Socialist leadership abjured Roman law as an individualistic and anti-social legal system which did not serve the interests of the community which was why the BGB, in part inspired by Roman law, was subjected to criticism. A popular statute book (Volksgesetzbuch) with the proper Nazi spirit was to replace it. An Akademie für Deutsches Recht (Academy for German Law) was established which was to create the scientific basis for legal reform and work on the new statute book was initiated which was to be in vain.

The so-called Nuremberg laws of 1935 forbade the marriage of Jews and non-Jews and generally started a deterioration of the legal position of Jews which culminated in the Holocaust.

One way of introducing National Socialist principles in civil law was provided by the general clauses of the BGB which could be interpreted by the courts as containing a reference to »gesundes Volksempfinden«. Thus, contracts drawn up with Jews could be rendered void and through the same interpretation, Jewish tenants lost all protection against unfair eviction.

Ancient concepts chosen from German legal history were incorporated in National Socialist ideology such as »Treue« (Fidelity), »Gehorsam« (Obedience), »Genossenschaft« (Community), »Gefolgschaft« (Partisanship), »Sippe« (Kinship) and so on. In general, references to Germanic law were used to legitimize injustice. Thus, it was maintained that the Germanic peoples had put homosexuals to death as part of the extermination of sexual deviants. Some prominent jurists and Germanists actively endorsed the new regime whilst others remained neutral. However, there was no direct use of ancient German legal history to legitimize National Socialist concepts since most of the concepts had been formulated and shaped already in the previous century by the constructive methods of conceptual jurisprudence which meant that they were far removed from their historical sources. They were no longer historical concepts but in their present form, they could be used for any purpose. A »Germanic« property concept could be used in many ways.

After the war, natural law had a renaissance for a while in an attempt to explain away the law of the Third Reich as an »Unrecht« due to the judges positivist view of the law. Modern historical legal research into National Socialist law has led to somewhat more realistic points of view and indicates the general clauses and the increased powers of discretion of judges as ways of penetration for Nazi ideology.

28. Europe after 1945

It is sometimes maintained that The second World War did not end until the years after 1989 with the fall of the Berlin wall separating the Eastern and Western parts of the City and with the introduction of new regimes in the former socialist countries in Europe. However, already shortly after 1945 initiatives were taken to create new institutions with a view to preventing a new situtation that could lead to a European war and other organs that could secure Human Rights.

A decisive role in the endeavours to create a supranational organisation to decide over those means of production that were essential to military rearmament was played by the highranking French civil servant **Jean Monnet**. He conceived the idea of a European Coal- and Steel Community which as a supranational organ would have the power of decision that formerly belonged to the two great powers France and Germany individually. It was out of this community that the EEC and the European Union later developed. The essential innovation was that this new community was given supranational power and thus meant a limit to the sovereignty of the member states. It was the French Foreign Minister Maurice Schumann who in 1950 announced the plan for the new organisation saying: »L'Europe ne se fera d'un coup, ni dans une construction d'ensemble; elle se fera par des réalisations concrètes créant d'abord une solidarité de fait« (Europe is not made at once nor as a common construction; it will be made by concrete achievements, creating first a solidarity as a fact).

The European Coal and Steel Community was established in 1952 and in 1957 the Treaty of Rome setting up the EEC was signed.

Within the EEC (now the EU) common institutions were created, including a European Council of Ministers, a European Commission, a European Parliament and a European Court of Justice. Within the community a new law has been created as a way to a new European legal order. The harmonization of law within the EU does not aim at a general harmonization of European law. Lots of differences are accepted and probably will continue to be so, the aim being the harmonization of such rules that are important in the creation of a common market. Several commissions within the framework of the community have worked on legal harmonization. Important results have been reached within the field of company law, product liability, sale patents, and several other matters.

Also the idea of a European code has been forwarded in 1989 and again in 1994.[12]

In the field of Human Rights an important step was taken when in 1949 the European Council was set up. The creation of the United Nations 1945 and the Tribunal of Nuremberg to prosecute German war criminals may be seen as signs of a growing consciousness for a common action in the field of Human Rights. The former British Prime Minister Winston Churchill played an important role in the creation of the European Council. The first achievement of this organisation was the European Convention on Human Rights from 1950. The organs of the Convention are a Commission and a Court of Human Rights which have had an increasing importance for the development of the concept of Human Rights in Europe as these organs have had a very dynamic view on Human Rights. An important innovation was the individual right for citizens of the states that have signed the convention to take action before the Commission. The convention has had an important impact on parts of family law and in procedural and criminal law but less in the fields of property and obligations.

The creation of the European Community and the European Council have been important steps on the road to a common European concept of law.

29. Towards a new ius commune?

As we have seen throughout this book, there are many examples in European law of one country's law being affected by the legal order of another country. »Legal transplants« (Alan Watson) is a term which has been used when describing the transfer of legal regulations or views from one legal system to another. It is an old phenomenon in European law.

European law is in a phase of integration nowadays. Initiatives from EU organs play a significant role in important parts of the legal system. Roman law plays a limited part and its importance as a subject for study is diminishing even in the Romanist countries. In the years after 1945 a rising influence of American law in Europe can be noted, reminiscent of the reception of *ius commune* in medieval Europe. This reception is promoted by the study of legal science in the United States by young European jurists, however, the fact that American law has taken a new position in Western Europe since the war is also due to

12. A recent result is the presentation of »Principles of European Contract Law« prepared by a commission chaired by Ole Lando. See *Principles of European Contract Law. Part I: Performance, Non-performance and Remedies. Prepared by the Commission on European Contract Law*. Edited by Ole Lando and Hugh Beale (1995).

American economic and political prominence in world affairs. Just as in the case of medieval European universities, a large amount of the legal development in the U.S. takes place at the Ivy league universities. It is a common phenomenon in Europe that bright young jurists – and budding scientists – go to the United States for part of their education. These jurists will, later on, take key positions in administration, in courts as lawyers and in the education of new jurists, just as medieval jurists trained in Bologna and elsewhere, did in their time. An important factor is the leading position of the English language in Europe, not least as the lingua franca in the field of science. This closely corresponds to the position of Latin in the past.

An example of Americanization is the adoption of contract types such as leasing, factoring and franchising. Deregulation and privatization are other trends which originated in the U.S. The issues of pollution and gene technology were first raised in the U.S. The fully industrialized, post-industrial society for the first time gave rise to new legal problems in the States, now these probleems are becoming universal.

To a considerable extent, the reception of American law is due to a need for new regulations, though, unlike the course of events in the Middle Ages, American law encounters developed legal systems. However, U.S. influence is just an example of a new supra-national tendency. EU law is another and international conventions lay the foundations of new law. A recent example is the convention on international trade (CISG). Part of the working out of international regulations is that jurists from different legal backgrounds have to work together in order to achieve results. Jurists from countries with a Romanist tradition encounter jurists versed in Common law or Scandinavian law. Roman law has never reigned supreme in Europe and what significance it had is waning fast, whereas the tradition of legal science which started in Rome had an effect that means it is still an important component of the basis of a still developing European law. Knowledge of Roman law and European legal development contribute to better understanding and participation in the increasingly vital dialogue on the future legal order of Europe.

Among legal historians there is a recent and still ongoing discussion whether a new *ius commune* can be created on the basis of Roman law. Roman law has had a strong impact on the national European codes in the 19th century and before that time Roman law was the common basis of legal studies. The period of national codes is relatively short compared to the centuries of *ius commune*, it is maintained. On the other hand, it is a fact that even if »the European side of English law« is stressed the Anglo-American common law is quite different from Roman Law which may also be said to apply to Scandinavian law albeit to a lesser extent. And it must also be kept in mind that European harmonization

takes place in fields of law which have never been treated by the Roman jurists. But even if the role of Roman law in the coining of legal solutions may be somewhat limited the importance of Roman law as background for the understanding of foreign laws is undeniable. The existance of a *ius commune* in former times shows us that at some moment it was possible to have a common field of European law.

Especially in Germany there has been much writing on the prospect of a new European *ius commune*. Germany was the country which maintained its Roman law tradition until less than a century ago. Roman law plays a role in this conscience of unity. German scholars have mentioned the need for European manuals of law and European legal concepts in order to place the harmonization that goes on within a coherent system. A »Europäisierung der Rechtswissenschaft« – a »europeanising of legal science« was demanded by Helmut Coing 1990. *Ius commune* and American law are living examples as to the possible success of unification of law in wider areas. Even if the idea of a new *ius commune* and a European Code may be an utopia it is a fact that unification and harmonization are in process. Roman law is still relevant to those who want to understand more of the law in a changing world where the law never ceases to develop.

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Select Bibliography

See also references in the footnotes above

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