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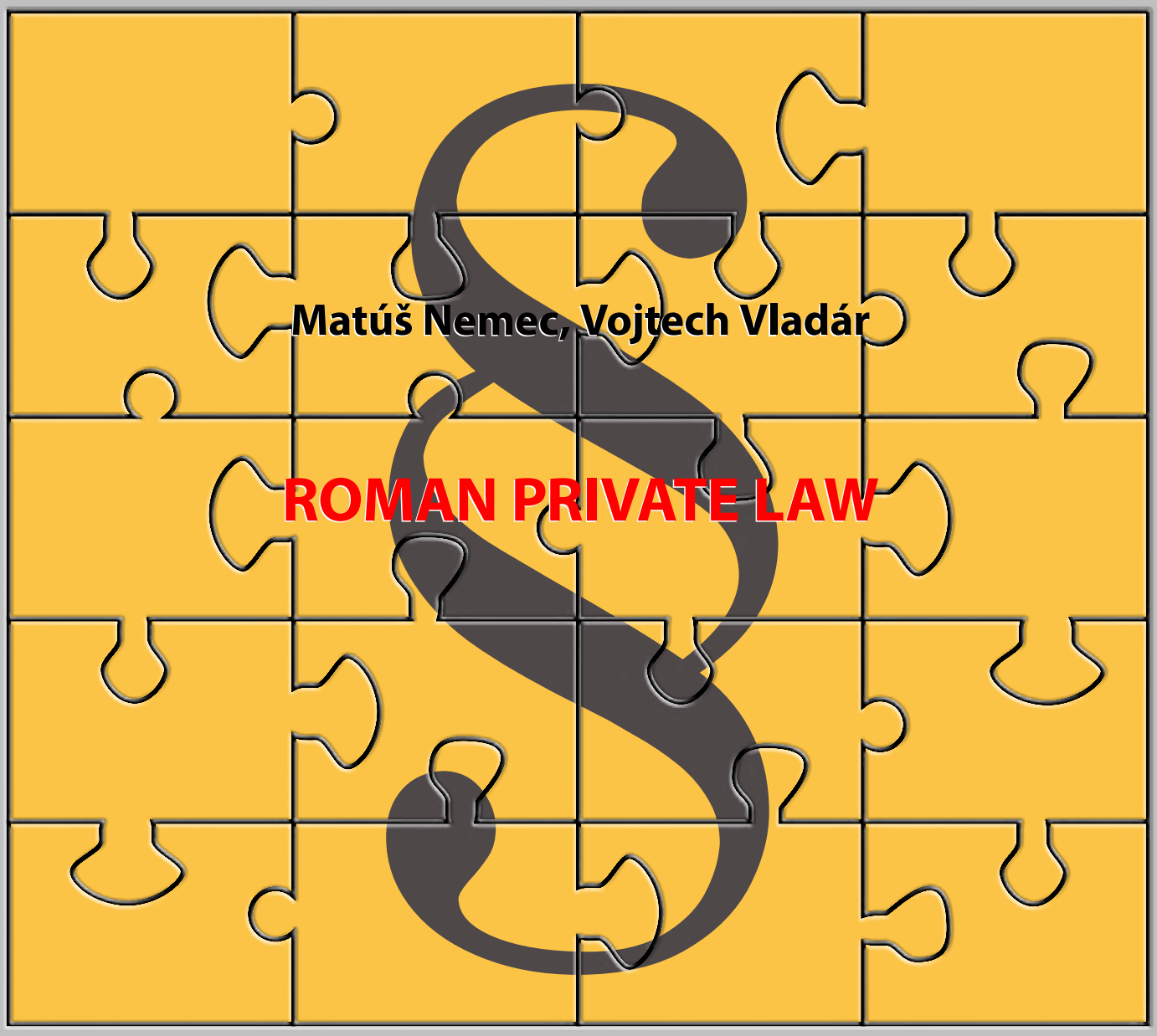

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ROMAN PRIVATE LAW

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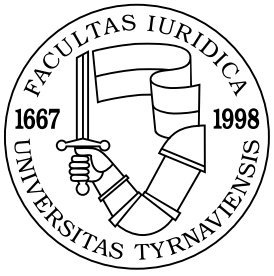

Roman Private Law

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Chapter I
THE CONCEPT AND SOURCES OF ROMAN LAW

1. Law in objective meaning

In objective meaning law is a summary of standards (i.e. common binding rules of behavior), which create specific system i.e. law order.

The components of the norm of law are:

- it defines the rule of behavior (to do something or not to do);
- its common binding (it binds all members of a certain community);
- it is established by an authorized legal authority (lawgiver in a country, community od customary law);
- its respecting is able to be enforced by judical authorities (judge, court)

Reason of binding of law is the belief of community members regarding the legally binding of law.

Subject of law are the terms (relations between the people in the society). But the law regulates only those terms, which are important in security of authorized interests of community members. These terms are terms between people (community members) each other, personal relations in the family and property relations between the people. About this writes lawyer Ulpianus (Domitius Ulpianus, cca. 170-228 A.D) in the Digest:

Ulp. D. 1,3,41: *Totum autem ius constitit aut in adquirendo aut in conservando aut in minuendo: aut enim hoc agitur, quemadmodum quid cuiusque fiat, aut quemadmodum quis rem vel ius suum conservet, aut quomodo alienet aut admittat.*	**Ulp. D. 1,3,41:** Hence all law consists either in the acquisition, preservation, or diminution of right; for it has reference to the way in which anything becomes the property of a person, or how he can preserve it or his rights, or how he can alienate or lose them.

Important characteristic feature of law norms is their normative abstractness, i.e. that they modify behavior in an unspecified number of cases, which repeat and for not specified recipients. About the aims of law regulating writes Celsus (Publius Iuventuis Celsus, 67-130 A.D.) and Ulpian:

Cels. D. 1,3,4: *Ex his, quae forte uno aliquo casu accidere possunt, iura non constituuntur:* **Cels. D. 1,3,5:** *nam ad ea potius debet aptari ius, quae et frequenter et facile, quam quae perraro eveniunt.* **Ulp. D. 1,3,8:** *Iura non in singulis personas, sed generaliter constituuntur.*	**Cels. D. 1,3,4:** Laws are not established concerning matters which can only happen in a single instance. **Cels. D. 1,3,5:** For laws ought to be adapted to events which frequently and readily occur, rather than to such as rarely happen. **Ulp. D. 1,3,8:** Laws are not established for individuals, but for general purposes.

2. Law in subjective meaning

In subjective meaning law is read as authorization, admitted by the body of laws, which to an authorized results from a norm of objective law and which can he bring into effect by his own mind. Subjective law at the same time also defines range of his power, so the individual rights of other members of the community would be not broken.

3. Sources of Roman law

Under the concept of law source it is needed to differentiate source in an material form and in an formal form. In material form the source of law is the community as corpus with all the phenomenon, which affect the content of law norms. (morale, traditions, religion, economic phenomenon)

Formal sources of law are the acts of the lawgiver, with which he expresses his will to regulate normative behavior of the community members. Formal law sources are also the direct reason of existence of the law (law norms). Only in them can recipients find their subjective authorizations and subjective duties.

Forms, in which lawgiver introduces formal law sources are different and depend on quantity of cirstumstances, but basic two forms are:

- written law *(ius scriptum)*, in actual meaning normative law acts;
- unwritten law, i.e. custom *(ius non scriptum)*, that is normative behavior of community of customary law.

About customary law writes lawyer Julianus (Salvus Julian, cca 110-170 A. D.) and Hermogenian (Aurelius Hermogenianus, turning point of the 3rd and 4th century):

Jul. D. 1,3,32,pr.: *De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet.*	**Jul. D. 1,3,32, pr.:** In cases where there are no written laws, that should be observed which has been established by usage and custom, and if anything is lacking therein, then whatever is nearest to, and resulting from it should be observed; and if even this does not exist, then the law which is used by the City of Rome must be followed.
Hermog. D. 1,3,35: *Sed et ea, quae longa consuetudine comprobata sunt ac per annos plurimos observata, velut tacita civium conventio non minus quam ea quae scripta sunt iura servantur.*	**Hermog. D. 1,3,35:** Those rules which have been approved by long established custom and have been observed for many years, by, as it were, a tacit agreement of citizens, are no less to be obeyed than laws which have been committed to writing.

Components of Customary law, which is one of the oldest form of the Roman law are, that it is a rule of conduct with a steady content, which is held for a long time with belief about its legal binding. By completing these components a custom becomes a law rule and a law source.

3.1. Types of sources of Roman law

About individual sources of creation of law introduces lawyer Gaius (cca 110-179 A.D) in his Institutes:

Gai. Inst. 1, 2: *Constant autem iura populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium.*	**Institutes of Gaius 1, 2:** The civil law of the Roman people consists of laws, plebiscites, decrees of the Senate, constitutions of the princeps, the edicts of those who have the right to promulgate them, and the opinions of jurists.

In the Roman state belonged to the formal sources of law:

a) laws *(leges)* - decisions of wise men, accepted common (D. 1,3,1);

b) plebiscites or decisions of plebs *(plebiscita)* – decisions of comitia of populus;

c) decrees of the Senate *(senatusconsulta)* – primarily Senate had only an advisory role, later his decisions were generally bind as normative acts;

d) edicts of magistrates *(edicta magistratum)* – binding year programs of consistor´s actions, containing decrees related with the administration, justiciary (list of provided facilities of processual security)

e) jurisprudence *(jurisprudentia)* – answers of lawyers belongs to the most significant sources of law in the age of classic law; lawyer´s work was:
   - to actionare *(agere)* – to help participants of proceeding with conceiving suing formulas;
   - to protect *(cavere)* – to help with making contracts and with generally legal proceedings;
   - to write *(scribere)* – introduces the literature activity of lawyers (writing of special books);
   - to delivery opinions *(respondere)* – for the purpose of the correct application of law lawyers were delivering opinions (advisory opinions) in individual cases (especially interpretations in case of doubt); emperor Augustus commanded, that law experts should publish opinions under authority of his allowance, e.ei. authority of Caesar *(ex autoritate principis).* In this way was constituted the law to provide opinions. This opinion was bound to serve and also to solve the case with similar factual features in the future. Lawyer Pomponius writes about the opinions in Digest:

Pomp. D. 1,2,2,49: *Et, ut obiter sciamus, ante tempora Augusti publice respondendi ius non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant: neque responsa utique signata dabant, sed plerumque iudicibus ipsi scribebant, aut testabantur qui illos consulebant. Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit, ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit. Et ideo optimus princeps Hadrianus, cum ab eo viri praetorii peterent, ut sibi liceret respondere, rescripsit eis hoc non peti, sed praestari solere et ideo, si quis fiduciam sui haberet, delectari se populo ad respondendum se praepararet.*	**Pomp. D. 1,2,2,49:** It may be observed in passing that before the days of Augustus the right of delivering opinions in the public interest was not granted by the head of the state, but any persons who felt confidence in their own learning gave answers to such as consulted them; moreover they did not always give their answers under seal; they very often wrote to the judge themselves, or called upon those who consulted them to testify to the opinions they gave. The Divine Augustus was the first to lay down, in order to ensure greater authority to the law, that the jurisconsult might deliver his answer in pursuance of an authorization given by himself; and from that time such an authorization was asked for as a favour. It was in consequence of this that our excellent Emperor Hadrian, on receiving a request from some lawyers of praetorian rank for leave to give legal opinions, answered the applicants that this privilege was not usually asked for but granted [or that there was no leave asked for this practice, it was simply carried out], consequently, if any one were confident of his powers, he (the Emperor) would be much pleased to find that he took steps to qualify himself for delivering opinions to the citizens.

Into the system of sources we can also include the norms of customary law. But the norms of customary law (customary law was the basis of the Law of Twelve Tables) gradually declined and its importance in the post-classical period of the Roman law, i. e. in the absolute monarchy (dominate) becomes the only form of the source of law (lex generalis).

3. 2. Justinian´s codification

The emperor of the Byzantine empire (East Roman Empire) Justinian I. tried to resurrect the authority of the former Roman empire.

Justinian appointed the commission led by Tribonian, succesful lawyer from Constantinople, as a chief editor to collect Roman law from earlier period and to arranged it into the system. The original norms, however, could be adapted to the requirements

of time (this process is called interpolation and modified texts as interpolated). The collection originally had the name *tria volumina* (three volumes). Its fame, however, became with the name *Corpus Juris Civilis* (Body of Civil Law) – this name shall be assumed in the 12th century, after the resurrection of Roman law and its study at medieval universities (especially in Bologna), and with the contribution of the Church and especially of the Pope's in 12th and 13 century. The parts of the Codification were published in stage and it contains of these parts:

a) Justinian´s code

Justinian`s code contains the edicts of Roman emperors from the beginning of the 6th century, which were published in the Hermogenian`s Code (collection of constitutions of the Roman emperors mostly from the years 293–294 A. D.), Gregorian`s Code (collection of constitutions of Roman emperors over a century and a half from the 130`s to 290`s A. D.) and in the Theodosian Code (compilation of the Roman law published under the christian emperors since the year 312 A. D.).

b) The Digest

The Digest (or Pandecta) is the collection of the classical Roman jurisprudence. It contains fragments from the books of classical lawyers (Gaius, Celsus, Julianus, Ulpianus, Pomponius, Modestinus, Papinianus, Javolenus and others). The Digest is divided as follows: books *(libri)* – title *(tituli)* – law *(leges)* – paragraphs *(sectiones)*. In the beginning of every fragment is the name of lawyer, than the position data in The Digest and in the end is the name of the work, from which is given fragment (e. g.: Paulus, D. 12,5,1,1 on Sabinus). The Digest is structured to fifty books and was published in 533 by the constitution *Deo auctore* („With God`s help").

c) Institutes of Justinian

A textbook for young students of law base on the Institutes of Gaius, took name Institutes *(Institutiones seu Elementa)*. This parto of Justinian`s codification were uused at the law schools in the Constantinople and Beirut. The Institutes were published in 533. After the Justinian`s death they ceased to use until the time of reception of Roman studies in the 12th century.

Chapter II
THE DIVISION OF ROMAN LAW

1. Public Law

1. 1. Public Law – the concept

The division of law to the public and private is situated in the first book of Digest, whose author is lawyer Ulpianus:

Ulp. D. 1,1,1,2: *Huius studii duae sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. Publicum ius in sacris, in sacerdotibus, in magistratibus constitit. Privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.*	**Ulp. D. 1,1,1,2:** Of this subject there are two divisions, public and private law. Public law is that which has reference to the administration of the Roman government; private law is that which concerns the interests of individuals; for there are some things which are useful to the public, and others which are of benefit to private persons. Public law has reference to sacred ceremonies, and to the duties of priests and magistrates. Private law is threefold in its nature, for it is derived either from natural precepts, from those of nations, or from those of the Civil Law.

The field of public law is characterized by state, or by other public interest. Into the field of public (all-society) interest belongs primarly internal and external security of the state and anti-crime protection of the citizens. To the public interest also comes under chain of reclaimability of subjective rights and duties at the court and function of state administration. In the Roman state existed, moreover, as a special public interest, religious worship.

1. 2. Branches of Roman public law

In light of contemporary understanding of the fields of law we can divide Roman law into the next branches (which are the social interests protected by law order):

- constitutional law; this branch of law regulates the structure of legislative institutions, government and justiciary, relations between them and their powers;
- administrative law; this branch of law regulates the executive power of magistrates and other officials of the state and power of the municipal institutions;
- penal law; this branch of law takes up the bodies of the public offences – crimes *(crimina publica)* and establishes the rules of procedure in punishing the offenders;

With regard to the fact that the law order is a unity, it does not exists any exact boundary between the field of public law and private law. These two areas of law sometimes overlap each other – e. g. in the branch of law, that is - considering to the character of the protected interest - private, it is possible to find norms, regulating social relations with public aspect for the purpose of public interest and certainty (e. g. testamentary capacity).

1. 3. Attributes of public law

Important attributes (characteristics) of the norms falling into the field of public law and distinguishing them from the norms regulating private legal relations are as follows:

a) The precedence of all-society interest

The stability of the state, which is the protector of public interests requires to guarantee them a priority to the interests of private persons (individual interests).

b) The coercive character of the norms of public law

Public law relations are not based upon the contractual principle, whereupon they don `t rise from the legal acts (i. e. as an expression of animus of private persons); the norms of public law have imperative (mandatory) character as a *ius cogens* and they represents a will of legislative authority of the State, enforcing loyalty with regard to the public security, relation to the state executing authorities and obligations concerning state aims (i. e. paying taxes);

As a consequence of that, norms of public law, asi it expresses Papinianus (Aemilius Papinianus, 142-212 A.D.), cannot be changed by the contracts of private persons, because they consistently protects all-society interests first of all.

Pap. D. 2,14,38: *Ius publicum privatorum pactis mutari non potest.*	**Pap. D. 2,14,38:** Public law cannot be changed by the contracts of private persons.

c) Subordination of subjects of public law relationship

In the public law, the state or another public authority, in the relationship to everyone, is in the position of superiority and it applies its enactive competences to require fulfilling obligations under the rules of public law; in this hierarchical relationship has the state (public) authority competence and the subordinate subject has to fulfill its legal duties.

d) Strict interpretation of the norms of public law

The norms in the public law have to be in the case of dubiousness concerning fact *(dubium facti)* or law *(dubium iuris)* interpretated strictly or restrictively. This rule requires to find a reason of the norm with regard to the common sense of the words, that are used in the norm, in order to get legal certainty (i. e.in the penal law in order to eliminate spreading of the subject mater of the crime). If the character of the concrete case requires it, the dubious norm have to be interpretated restrictively (under the limit of common sense) in order to coarctation of the sphere of action of the norm.

In connection with this principle comes to the fore another principle, applying in the praxis of public authorities in the field of public law. It implies that these authorities can practise only that, what the law order allows them. This is because the public authorities as representatives of the State do not show their own (private) will, but the will (ideas) of the legislator (lawmaker). These ideas are expressed in the content of the norms of public law (constitutional, administrative and penal law).

e) Prohibition of analogia

If the authority with power to application the law finds, that the law does not provide an existing social relationship, it cannot proceed by analogia, with regard to the principle of legal certainty.

That means, in this case the legal authority cannot applicate the norm, regulating similar social relationship - e. g. in the field of penal law it cannot subsume the act, which has become, but it is not a criminal offence, under the the subject mater of that criminal offence, which has some characteristics of similar, but another criminal offence, regulated and punished by the norms of penal law.

f) Public relationship is not subject to judicial jurisdiction

Social relations regulated by the norms of public law are not subject to judicial

jurisdiction. The content of these relations does not consists of rights and obligations, but it consists of competences of legal authorities to order and to exact fulfilling obligations under the rules of law. These obligations are exacted in the administrative procedure by the administrative authorities of the State or another public institutions (municipalities).

2. Private law

2. 1. The Concept

Initially, in the Roman law was the most important criterion for difference between the private and public law the existence and character of causa in the concrete relationship. Private physical or juridical persons satisfie in the social relations only their own private needs (interests) by means of juridical acts. The juridical acts were the essential criterion for the advisement, that the social tie (relation) belongs the field of private law.

By means of juridical acts private persons realizes their subjective rights, resulting from the norms of objective law. Law order in this respect provides to the private persons ambit of latitudes in their relationships, in order to be able to hold their own property and family interests a way they think is the best for them.

The State - its legislative authority - created in these kinds of relations only minimal framework by means of some mandatory norms *(ius cogens),* which are be to respected in the realisation of subjective rights. This category of Roman law, also used in the contemporary law, is called „private autonomy".

The basis of private autonomy consists of norms, providing opportunities for subjects to applicate their own regulation, differently from the regulation in the law order (e.g. in the civil code). This kind of norms is called dispositive *(ius dispositivum).*

The trend in development of the Roman law brought into the foreground an idea, that the essential criterion distinguishing the field of private and public law is utility or interest *(utilitas)* - individual or all-society (public).

2. 2. The characters of private law and its norms

Like the norms of public law as well as private relationships have their characters or attributes, that differ them from the norms of public law.

a) Protection of the private interests

The lawgiver by means of the norms of private law provides to private persons possibilities to satisfy their needs and interests, which are distinguished and necessary for them. In order to have private persons (as the subjects, entities of law) possibility, not an obligation, to use the rights, resulting from the norms of law order (objective law).

Exercising these subjective rights the state power regulates only those wherewithal suppositions, that are important in order to guarantee legal certainty in rights and obligations as a content of existing legal relations. This aim is achieved by establishing the essential components of the juridical act *(essentialia negotii)* as an unconditional content of juridical act.

b) Dispositive norms

The lawgiver establishes the rules of conduct contained in the norms of private law as dispositive, so the subjects (private persons) may choose to modify their own relationship differently than these aspects are established in the norms of objective law. It is application of th rule that the norms of private law can be changed (modified) by the contracts of private persons. *Stricto sensu* it does not mean, that the subjects change the law (they are not in the position of lawgiver an they have not its competence). The reason of this rule is, that if they do not want to add any other content in their contract, which is different from the norm in the law code, it will be valid the norm of the law code as a natural part *(naturalia negotii)* of juridical act with regard to their contract.

Subjects may also include into their relationship other provisions as supplementary elements *(accidentalia negotii)* and these provisions will be in effect as a inseparable components of their contract. The same holds about the realisation of the unilateral juridical acts (e.g. testament as a last will of testator).

c) Equal position of the subjects of the relationship

The parties of the private law relationship have for the recovery of their rights and obligations equal position with regard to the protection of these rightis (claims) in the litigation.

d) Extensive interpretation of the private law norms

If there are factual or juridical doubts about the sense of the norm of law (strictly about the used words) concerning individual rights and obligation and their content, scope and importance, it is allowable (i fit is appropriate) to apply an extensive interpretation of these norms.

In this way of interpretation the content, scope and importance of rights are changed and using this method, interpretation of the doubtful word (words) follows up to the maximal limit of the common sense of the (doubtful) word in the norm. Furthermore, using wide-spred interpretation, the sense of the word follows up beyond the limit of the word (or words) in the norm and (in the larger context, sense) it takes a new meaning. However, the interpretation of the norms of law have to be done with regard to its sense and to the will of the lawgiver. Celsus writes about it in Digest:

Cels. D. 1,3,17: *Scire leges non hoc est verba earum tenere, sed vim ac potestatem.* **D. 1,3,18:** *Benignius leges interpretandae sunt, quo voluntas earum conservetur.* **D. 1,3,19:** *In ambiqua voce legis ea potius accipienda est significatio, quae vitio caret, praesertim cum etiam voluntas legis ex hoc colligi possit.*	**Cels. D. 1,3,17:** To know the laws is not to be familiar with their phraseology, but with their force and effect. **D. 1,3,18:** Laws should be interpreted liberally, in order that their intention may be preserved. **D. 1,3,19:** When the terms of the law are ambiguous, that meaning is to be accepted which is without incongruity; especially when the intention of the law can be ascertained therefrom.

e) Analogia (analogy) in private law

If in the process of application in the field of privte law the authority detected a „gap in law" (*lacuna iuris* or *vacuum iuris*), he authority with competence to apply is able to serach another valid norm of law, which regulates similar situation (social relation) and apply it to the existing situation (legal relationship), which is to be decided. Using analogia it should be exercised cautiously in order to eliminate inappropriate norms in the proce of application. There also have to be a certainty concerning the intention and purpose of the norm. Analogia requires following succession:

- analogia of law *(analogia legis)*; this level of analogia uses similar laws;
- analogia of law order *(analogia iuris)*; this level of analogia uses common rules of private law (also from Roman law);

The lawyer Julianus submits this opinion concerning analogia and its application in the law:

Jul. D. 1,3,12: *Non possunt omnes articuli singillatim aut legibus aut senatus consultis comprehendi: sed cum in aliqua causa sententia eorum manifesta est, is qui iurisdictioni praeest ad simila proceder atque ita ius dicere debet.*	**Jul. D. 1,3,12:** All matters cannot be specifically included in the laws or decrees of the Senate; but where their sense is clear in any instance, he who has jurisdiction of the same can apply it to others that are similar, and in this way administer justice.

The most important form of using analogia in Roman civil law are praetorian actions, so called *actiones utiles*. These actions are extension of an existing actions *(actiones civiles)* on the basis of utility *(utilitas)*. In the strict sense this action was probably only one type of actions, which were given by praetor *(actiones honorariae)* in the cases, that have been not protected by the civil law. Proceeding using the method *per analogiam* is also - in larger sense - when the praetor provided the *exceptio*, based on

his jurisdiction, not in the norms of the civil law.

f) Private relationships are subject to the judicial power (jurisdiction)

In contrast to the public law relations are the private law relations subject to the judicial power. Private persons are able to put an action *in faciae curiae* in order to recover their individual (subjective) rights. That means, the judge *(iudex)* - in Roman law as a private (and virtuous) man *(arbiter boni viri)* - has competence to decide the controversy concerning subjective rights.

2. 3. Branches of private law

The Roman law concept of the structuring of law we cannot define the branches (sectors) of the private law asi it is possible in the modern age. The only component binding our view with the concept of Roman law is, that in the branch of Roman private law belonged actually all those social relationships, which still refers to the contemporary civil law. Moreover, we can conclude taht in the branch of Roman private law belonged also labor relations, i. e. relationships between employee and employer with regard to their individual private interests, in Roman law named „hire of services" *(locatio conductio operarum)*.

At present, labor relations are regulated also by the imperative (mandatory) norms. This fact is construed as a public interest protecting with lawgimer with regard to the special interests, e. g. some categories of employees (women, especially pregnant women, handicaped persons, non-adults persons) and special labor conditions (maximal length of working time, safety and protection of helath in work). Civil law also includes norms regulating relationships between merachants (in modern sense) and relations in the family as a juridical bond between *pater familias* as a head of family and other members of the family.

From this point of view we can divide Roman private law into these branches (categories of social relationships):

- civil law; there are norms regulating the relations between private persons, physical and juridical (apart from bussiness relations) with regard to their own property and family interests;
- bussiness (merchant, commercial) law; there are norms, regulating relation between private persons with regard to the merchant; this category *stricto sensu* is not a special branch of private law;

From the other point of view we can divide Roman private law and its norms into the following categories, concerning the reason (causa) of their creation, validity and effectuality:

- civil law *(ius civile)*,
- praetorian or honorary law *(ius praetorium, ius honorarium),*
- law of nations *(ius gentium)*,
- natural law *(ius naturale)*.

This division of the law is described by lawyer Ulpianus in the following fragment:

Ulp. D. 1,1,1,3: *Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri.*	**Ulp. D. 1,1,1,3**: Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures which deduce their origin from the sea or the land, and it is also common to birds. From it proceeds the union of male and female which we designate as marriage; hence also arises the procreation of children and the bringing up of the same; for we see that all animals, and even wild beasts, appear to be acquainted with this law.
D. 1,1,1,4: *Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit.*	**D. 1,1,1,4:** The Law of Nations is that used by the human race, and it is easy to understand that it differs from natural law, for the reason that me latter is common to all animals, while the former only concerns men in their relations to one another.

With regard to these categories of the laws of norms lawyer Paulus (Julius Paulus, turn of the 2nd and the 3rd century) submits the various meanings of the term „law":

Paul. D. 1,1,11: *Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. Altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile. Nec minus ius recte appellatur in civitate nostra ius honorarium. Praetor quoque ius reddere dicitur etiam cum inique decernit, relatione scilicet facta non ad id quod ita praetor fecit, sed ad illud quod praetorem facere convenit.*	**Paul. D. 1,1,11:** The term „law" is used in several ways. First, whatever is just and good is called law, as is the case with natural law. Second, where anything is useful to all or to the majority in any state, as for instance the Civil Law. Nor is honorary law less justly so designated in Our State, and the Praetor also is said to administer the law even when he decides unjustly; for the term has reference not to what the Praetor actually does, but to that which it is suitable for him to do.

a) Civil law (ius civile)

The ancient Roman law has been going in the application of the law from the principle of personality. The essence of this principle is based on the idea – still valid in the law theory - that the rules (norms) of law bind only the citizens, wherever they are.

Another pinciple, using in the modern age, means, that the law order is applied only at the territory of the concrete state - in principle to all people, that are located within the territory of the (concrete) state, i. e. the citizens *(cives)* and the foreigners *(peregrini)*.

Ancient Roman law regulated these social relationships, which came into being (existed) only among the Romans (Roman citizens). The sources of Roman civil law were:

- laws *(leges)*,
- decrees (enactments) of the Senate *(senatusconsulta)*,
- enactments of the Plebeian councils *(plebiscita)*,
- customs *(consuetudinem)*,
- edicts of the magistrates *(edicta magistratuum*),
- jurisprudence *(jurisprudentia),*
- imperial constitutions, or edicts of the emperors *(constitutiones principum)*.

Ulpianus defined (D. 1,1,6,1) civil law as a system of norms, which are written - laws published by lawgiver *(ius scriptum)* - or which are unwritten (customs as rules of abearance, resulting from the long-term usage in the society as a kind of tacit consens connected with the recognition of this rule with force of effectuality. The various sources of law are mentioned by Papinianus:

Pap. D. 1,1,7, pr.: *Ius autem civile est, quod ex legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium venit.*	**Pap. D. 1,1,7, pr.:** Ius autem civile est, quod ex legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium venit.

After the year 212 A. D. (in this year emperor Caracalla granted the right to a Roman citizenship to all inhabitants in the Roman empire) Roman law had to be applicated also in the provinces of Roman empire, but their inhabitants did not want to applicate the Roman rules in their own relationships. So in the each province was, in principle, still applicated its own law (rules). The Roman lawyers solved this situation in the practice of application of law using the law of province as a customary law with the effects in the Roman civil law.

b) Pretorian or honorary law (ius honorarium)

In order to more flexibility of the traditional Roman civil law, to overcoming the principle of personality, to mitigate excessive rigidity of Roman civil law and in the interest of equity in the legal relationships, the magistrates (administrative authorities) used to applicate their enactory competence in the field of judicial affairs *(ius edicendi)* to publish edicts in written form *(edictum*) or in the oral form *(coram)*. This fact is mentione by Pomponius and this lawyer also writes, why the office of *praetor urbanus* has been constituted:

Pomp. D. 1,2,2,10: *Eodem tempore et magistratus iura reddebant et ut scirent cives, quod ius de quaque re quisque dicturus esset seque praemuniret „praemunirent", edicta proponebant. Quae edicta praetorum ius honorarium constituerunt: honorarium dicitur, quod ab honore praetoris venerat.*	**Pomp. D. 1,2,2,10:** At the same time there was also magistrates who dispensed justice, and in order that the citizens might know what law was to be applied in any matter and defend themselves accordingly, they proposed edicts, which Edicts of the Praetors constituted the honorary law. It is styled honorary, because it originated from the office of the Praetor.
D. 1,2,2,27: *Cumque consules avocarentur bellis finitimis neque esset qui in civitate ius reddere posset, factum est, ut praetor quoque crearetur, qui urbanus appellatus est, quod in urbe ius redderet.*	**D. 1,2,2,27:** And as the consuls were called away by distant wars, and there was no one who could dispense justice in the State, it happened that a Praetor also was created, who was styled „Urbanus", because he dispensed justice in the city.

In the field of private law had this competence another state administrative authorities (magistrates):

- urban praetor *(praetor urbanus)*,
- foriegn praetor *(praetor peregrinus)*,
- curul aedil *(aedile curul)* and questor of the province of the Roman people (not in the provinces of Emperor!),
- governor of the province,
- quaestor financial.

Among these authorities had most important function magistrates named praetors, in particular *praetor urbanus*. This magistrate had only administrative competence in judicial affairs, but he could de facto create law through an Edict (praetorian edict), which he published in the beginning of term of office, containing various institutes of law (e. g. *exceptio, restitutio in integrum, actiones utiles*) and this was the way to modificate law order. These institutes as a result of praetor`s activity *(ius praetorium)* were, with regard to praetor`s competence (jurisdiction) capable to make rigid civil private law *(ius civile)* more flexible and equitable. Papinianus expressed this fact in the following fragment:

Pap. D. 1,1,7,1: *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.*	**Pap. D. 1,1,7,1:** The Praetorian Law is that which the Praetors introduced for the purpose ***of aiding, supplementing, or correcting*** the Civil Law for the public interest; which is also designated honorary law, being so called after the „honor" of the Praetors.

Besides the above-mentioned special competences, praetor had ordinary competence to publish following acts:

- *iudicium dare,* i. e. praetor´s competence to grant an action or to reject an action *(denegatio actionis)*;
- *iudicare iubere*, i. e. praetor´s order to the private judge to pass judgment according to the terms of the written formula of action *(iussum iudicandi)*;
- publishing common procedural acts to guarantee individual rights in the litigation;
- *iurisdictio voluntaria,* i. e. the intervention of praetor in cases in which there is no quarrel between the parties and the ficticious trial serves only as a way of performing certain juridical acts or transactions (*in iure cessio, adoptio, manumissio);*

c) Law of nations (ius gentium)

Primarly in the commercial (trade) relations between the Roman citizens and foreigners have been seen negative effects concerning the application of the principle of personality – conflict of Roman law *(ius civile)* and the law of foreigner subject in concrete relationship. That is to say, if the foreigner had not a Roman individula right named *ius commercii* (right to trade), he was expelled from the trade relations (make contracts) with Roman citzens.

To solve this problem, which was an impediment in the development of trade relations between the Romans and foreigners, was established in the half of the third century a new public office (authority), called *praetor peregrinus*, with competence to arbitrate causes, which arised on the territory of the Roman empire and had these parties:

- Roman citizen and foreigner,
- two foreigners (mutually).

This event is mentioned by lawyer Pomponius:

Pomp. D. 1,2,2,28:	**Pomp. D. 1,2,2,28:**
Post aliquot deinde annos non sufficiente eo praetore, quod multa turba etiam peregrinorum in civitatem veniret, creatus est et alius praetor, qui peregrinus appellatus est ab eo, quod plerumque inter peregrinos ius dicebat.	Then, after some years, this Praetor, not being found sufficient because of the great crowd of foreigners who came into the city, another Praetor called „Peregrinus“ was appointed, for the reason that he usually dispensed justice among foreigners.

These relationships – with an „alien element“ (which was the foreigner) containg civil and commercial (trade) matter *praetor peregrinus* arbitrated in principle free (from Roman civil law) – in that sense, that he was not bound by the norms of Roman *ius civile* and with regard to his jurisdiction (competence) he could apply at the lis (controverse) with above mentioned parties the rules, that he considered as appropriate in

order to decide (arbitrate) their controversy. In the practice of application at the court of praetor peregrinus have been gradually established new rules (norms), indicated by Roman lawyers with a term *ius gentium*. These norms were characterized by Roman lawyers as a law common to all men (nations) an which resulted from natural reason *(naturalis ratio)*, as Gaius wrote in the Digest:

Gaius D. 1,1,9: *Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur ... quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.*	**Gaius D. 1,1,9:** All nations who are ruled by law and customs make use partly of their own law, and partly of that which is common to all men. ... But whatever natural reason has established among all men is equally observed by all mankind, and is called the Law of Nations, because it is the law which all nations employ.

The law of nations was created primarly using customary law, the elements of Roman civil law and also using the elements of law of foreigner (which was the part of concrete relationship). Law of nations is characterized, in contrary to Roman civil law, by informality and flexibilty – these qualities were given to it by *praetor peregrinus* (his competence) and they also conduced to applicate the law of nations in the relationships between the Roman citizens mutually.

Through the rules of the court of praetor peregrinus was gradually broken the principle of personality and this was the start point in the practice of application the new principle (criterion) – principle of teritoriality.

Ulpian submitted the nature of the law of nations:

Ulp. D. 1,1,1,4: *Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit.* **D. 1,1,4:** *Manumissiones quoque iuris gentium sunt. ... Quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi.*	**Ulp. D. 1,1,1,4:** The Law of Nations is that used by the human race, and it is easy to understand that it differs from natural law, for the reason that me latter is common to all animals, while the former only concerns men in their relations to one another: **D. 1,1,4:** Manumissions also, are part of the Law of Nations ... This takes its origin from the Law of Nations; since, according to natural law all persons were born free, and manumission was not known, as slavery itself was unknown; but after slavery was admitted by the Law of Nations, the benefit of manumission followed, and while men were designated by one natural name there arose three different kinds under the Law of Nations, that is to say freemen, and, in distinction to them, slaves, and as a third class, freedmen, or those who had ceased to be slaves.

But the differences between the civil law and the law of nations lost their function and importance when the new forms of law (imperial constitution; *constitutio principis*) - with regard to the new and major position of the Emperor – did not make differences between the Roman citizens and foreigners. With regard to this fact, the number of foreigners in the Roman empire decreased, especially from the year 212 A.D., when Emperor Caracalla published Constitutio Antoniana, which guaranteed to everyone in Roman empire an individual right to be a citizen of Roman state (imperium). In the time of government of Justinian I were in practice all habitants of Roman empire its citizens.

In the following fragment the lawyer Hermogenianus, indicates the institutes of property law, which appeared as a result of the practice at the court of *praetor peregrinus*:

Hermog. D. 1,1,5: *Ex hoc iure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes conductiones, obligationes institutae: exceptis quibusdam quae iure civili introductae sunt.*	**Hermog. D. 1,1,5:** By this Law of Nations wars were introduced; races were distinguished; kingdoms founded; rights of property ascertained; boundaries of land established; buildings constructed; commerce, purchases, sales, leases, rents, obligations created, such being excepted as were introduced by the Civil Law.

Law of nations *(ius gentium)* as a law common to all men (nations) may not be understood in contemporary sense as a special branch of law, which is called public international law, regulating the relations between the sovereign states and which is characterized by contractual nature. Ius gentium was created by the public authority of Roman state – *praetor peregrinus*. The range of relationships, regulating by this specific system is closer (but it is not the same!) to another field of law, called private international law. The sources of Roman law of nations existed in following forms:

- edicts of *praetor peregrinus (edicta)* - as an analogia to edicts of *praetor urbanus*,
- decisions of *praetor peregrinus* in individual cases *(decreta),*
- quasi-international treaties *(foedera pacis).*

d) Natural law (ius naturale)

The concept of natural law had not in the Roman concept of law clearly and certain place. Even though, that the Roman lawyers mentioned this term in the sources, it is probably as a result of influcence of greek philosophy, which Cicero put into the Roman society. Cicero in his work *De re publica* (Treatise On The Commonwealth) summarized the basic idea of ancient philosophical thought. Cicero construed, or perceived, natural law as a real rational law, which is immutable and eternal, as it is indicated in above mentioned work:

Cicero, De Re Publica III, 33:	**Cicero, Treatise On The Commonwealth, III, 33:**
Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna ... nec vero aut per senatum aut per populum solvi hac lege possumus ... nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit ...	There is a certain true law, right reason, congruent with nature, poured out onto everyone, constant, eternal ... and in truth we are not able to be released from this law by the Senate or by the people ... nor will there be one law in Rome, another in Athens, another now, another in the future, but one law eternal and immutable will bind together all nations at all times ...

Lawyer Gaius identified *ius gentium* with *ius naturale*. According to another lawyer, Ulpianus, it exists difference between the law of nations and natural law - norms of the law of nations regulates only the relations concerning people, but the natural law is common to all creatures (beings), i. e. men, animals and birds. In the Digest is mentioned by Ulpian the following definition of natural law:

Ulp. D. 1,1,1,3: *Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri.*	**Ulp. D. 1,1,1,3:** Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures which deduce their origin from the sea or the land, and it is also common to birds. From it proceeds the union of male and female which we designate as marriage; hence also arises the procreation of children and the bringing up of the same; for we see that all animals, and even wild beasts, appear to be acquainted with this law.

Although the lawyers expressed very often along the lines of natural law, it cannot be certainly said, that it would be in the qualitatively same position as Roman civil law (in contemporary sense the positive law). Natural law represented a rather basic starting point, which was in principle, with regard to the civil law, something like a supertemporal category, that can be regarded by lawyers in the proces of interpretation and in decision-making. But they did not perceived natural law as a source of law, *stricto sensu* as a source of indiviual rights and obligations in the human relations. The natural law can be found in following institutes of Roman law:

- consanguinity („blood relation" between certain persons as an impediment of matrimonium – Paul. D. 23,2,14,2),
- manumission (emancipation from slavery; Ulp. D. 1,1,4),
- acquisition of ownership by accession (Gai. Inst. 2,72-75),
- acquisition of ownership by taking *(occupatio)* and traditio (Gai. Inst. 2,66-68)
- acquisition of ownership by specificatio (Gai. Inst. 2,79),
- self-defence (Gai. D. 9,2,4 pr.),
- theft *(furtum)*, which is directly prohibited by natural law (Paulus):

Paul. D. 47,2,1,3: *Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve. Quod lege naturali prohibitum est admittere.*	**Paul. D. 47,2,1,3:** A theft is the fraudulent handling of anything with the intention of profiting by it; which applies either to the article itself or to its use or possession, when this is prohibited by natural law.

In addition, a very important category of law, with basis in the natural law, was in the Roman law a natural obligation *(obligatio naturalis,* Ulp. D. 15,1,11,2). Such acts made by slaves an sons under paternal power were perceived as debts that are „equitable by nature" as Ulpian expressed that:

Ulp. D. 15,1,11,2: *Sed si a debitore dominico servus exegerit, an domini debitorem se fecerit, quaeritur: et Iulianus libro duodecimo digestorum non aliter dominum deducturum ait, quam si ratum habuisset quod exactum est: eadem et in filio familias dicenda erunt. et puto veram iuliani sententiam: naturalia enim debita spectamus in peculii deductione: est autem natura aequum liberari filium vel servum obligatione eo quod indebitum videtur exegisse.*	**Ulp. D. 15,1,11,2:** Where, however, a slave has exacted payment from a debtor of his master, the question arises whether he has made himself a debtor to his master? Julianus, in the Twelfth Book of the Digest, says that the master will not be entitled to make a deduction, unless he ratified the collection of the money, and the same must also be said in the case of a son under paternal control. I think that the opinion of Julianus is correct, for we take into account natural debts in deductions from the peculium; for natural equity requires that a son or a slave should be released from liability because he seems to have exacted what was not due.

This kind of obligation was reflected as a real act (with regard to the sources it was only act of slave), which had effects in the law, with regard to importance of economic (commercial) affairs. Lawyer Paulus expressed the importance of natural law (and as a consequence also the importance of natural obligations) by following words:

Paul. D. 1,1,11: *Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale.*	**Paul. D. 1,1,11:** The term „law" is used in several ways. First, whatever is just and good is called law, as is the case with natural law.

Natural law as a real (actual) legal category began to exercise its influence on the law in the age of emperor Justinian I. This concept was a starting point in the legislative practice and also in the administrative and judicial affairs. Natural law has been got into this position due to strong christian background of the Justinian`s government.

Chapter III
JURIDICAL ACTS

1. Terminology

The sources of Roman law does not submit any definition of the term „juridical act". It would be in the contrary to the nature of Roman legal thought, which did not tend to generalize, i. e. create something universally valid, when in the social relations naturally occur specifics. Accordingly, Roman lawyers did not create an abstract concept, which would include all possible cases (relations) containing the same characteristics of the juridical act in the field of private law.

Nevertheless, we can find in the various fields of Roman law some general terms, which designated certain acts, especially property acts. These terms are:

- *nexum* (the oldest form of pecuniary obligation; ; its strict conditions were alleviated by *Lex poetelia papiria de nexis* from the year 326 B.C.;
- *actus legitimus* (in a broader sense as an „act in accordance with law"),
- *contractus* (term used in the field of obligations arising from contracts)
- *negotium* – as a term for the act of transfer of property rights, alternatively as a term for contract; often used to refer to the other facts, e. g. economic activity of a man; as a mater concerning civil or penal procedure *(negotium forense)*; the most correct term with regard to the concept „juridical act" is a term *negotium nullum*, which identified invalid (nonexistent) act *(nullius momenti)*. Some examples of „null act" introduces Julian:

Julianus, D. 12,6,33: *Si in area tua aedificassem et tu aedes possideres, condictio locum non habebit, quia **nullum negotium** inter eos contraheretur: nam is, qui non debitam pecuniam solverit, hoc ipso aliquid negotii gerit: cum autem aedificium in area sua ab alio positum dominus occupat, **nullum negotium** contrahit. Sed et si is, qui in aliena area aedificasset, ipse possessionem tradidisset, condictionem non habebit, quia nihil accipientis faceret, sed suam rem dominus habere incipiat. Et ideo constat, si quis, cum existimaret se heredem esse, insulam hereditariam fulsisset, nullo alio modo quam per retentionem impensas servare posse.*	**Julian, D. 12,6,33:** If I build on your unoccupied land, and you obtain possession of it afterwards, there will be no ground for an action for recovery, because ***no business contract*** **(i.e. null act)** was made between us; for he who pays money which is not due, by this act transacts business to a certain extent, but when the owner of land takes possession of a building erected thereon by another, ***no business transaction*** takes place; for, in fact, even if a person who built upon the land of another should himself deliver possession, he would not have a right of action for recovery, because he would not, in any respect, have transferred the property to him who received it, as the owner would merely have obtained possession of what was already his. Therefore it is established that if the party who thought himself to be an heir should prop up a house which was part of the estate, he could be reimbursed for his expenses in no other way than by retaining the property.
Gai. Inst. 3, 106 (Just. Inst. 3,19): *Furiosus nullum negotium gerere potest, quia non intellegit quid agit.*	**Institutes of Gaius 3, 106 (Just. Inst. 3,19):** An insane person cannot transact any business, because he does not understand what he is doing.

1. 1. The concept of the juridical act

In contrast to the modern unerstanding of the the term „juridical act", dividing material (substantive) law from the procedural law and which consequently divides procedural acts from the substantives, Roman private law considered the acts of the parties in the civil procedure, in accordance with a disposition principle, as an expressions of their will (*in ius vocatio*, *actio*, *litiscontestatio*), causing legal effects, which praetor only authorized.

For Roman private law, especially in the classical period, is characterized that it assumed only specific and concrete types of acts and only these acts are protected by actions.

1. 2. Conceptual characteristics of juridical act

With regard to the above-mentioned can be given the definition of the juridical act asi t has been used in the variou fiels of Roman private law.

Juridical act is an external manifestation (expression) of the internal will of the acting peson intended to have legal effects, that means to establish, modify or dissolve individual rights and obligations, which law order construed with this expression of will. With regard to this fact, we can distinguish, whether as a result of this expression of will are:

- juridical acts - expression of will in accordance with law order as acting person intended;
- unlawful acts; unlawful act is directly against the law (*contra legem)* and the effects of this act results by force of law;
- juridical facts - expression of man, which is not a result of mental activity, but it is based on the enactment of law and have proximate law effects – e. g. denunciation as an appeal adressed from creditor to debtor to pay the debt.

2. Legal facts

From a systematic perscpective we need to define what is legal fact. The legal facts are the circumstances of various classes, which are the cause of legal effects. If these circumstances create a complex unity, we call it subject mater. As a legal fact can be:

- legal event (e. g. expression of will at transfer of ownership; birth of man),
- legal state (e. g. right of creditor to the pignus).

According to their objective nature we can divide them as follows:

- positive (possession, ownership),
- negative (losing time-limit to do any legal act).

2. 1. Subjective and objective legal facts

The most important classification of the legal facts is if they are a manifestation of a human behavior (expression of man's will) with legal effects (subjective legal facts) or they are as a result of an other, objective legal fact, which has legal effect. In this category we recognize two classes of legal facts:

a) Subjective legal facts

Juridical act is classified as a subjective legal fact, seeing that its legal effects depend on expression of will of acting man. The acting of man can be as a active action or as a omitance *(omittere)*, which is also called qualified inaction. In a broader sense this includes any gestio of man, internal factors of man's life, which may take legal consequence (respectability, honesty or dishonesty, ignorantia, dupery).

b) Objective legal facts

The objective legal facts are factors with legal effects, which does not depend on the man's will. This category includes natural events, if they are, in connection with another legal act, capable to cause legal effects, e. g. if natural disaster destroyed house as an object of ownership. Another event is – in the case of alluvium *(alluvio)* - when movable property is joined to immovable property, also without expression of man's will. This is a case of acquisition of ownership by accession.

2. 2. Effects of the legal acts

Legal acts are capable to cause:

- acquisition of subjective individual right (i. e. the connection of right with certain subject as its proprietor); acquisition may be constitutive (if individual right is created per acquisition) or derivative (if individual right is transfered from one subject to another).
- extinguishment of right (or obligation),
- modification of subjective right (or obligation),
- application of sanction, establishing by law order.

3. Types of juridical acts

There are some categories of juridical acts according to various criteria:

a) Act of property law and act of family law

Subject of juridical act in the field of property law is appreciable by money. This can be a juridical act in the field of obligations (e. g. sale, loan, deposit, letting and hiring) or in the field of law of things (mancipatio, traditio, institution of servitude).

Subject of juridical act in the field of family (personal) law is certain aspect of the status of man and that is the reason why this act is not appreciable by money (e. g. acts which are the expression of the patria potestas - *emancipatio*.

b) Unilateral and bilateral acts

Bilateral act requires for the purpose of its validity consensual expression of will of two persons, which are the parties of the contract (e. g. letting and hiring, sale, loan, deposit, *stipulatio, societas, mandatum*). Unilateral act requires for its validity an expression of will of one person, which is either adressed to another certain person (manumission from slavery, *emancipatio*) or is adressed to uncertain persons (testament, empowerment).

c) Formal act and informal act

Formal juridical act requires for its validity preservation certain form, which is established by law order (e. g. testament, mancipatio as an formal transfer of ownership, stipulatio, mutuum – loan for consumption). Informal juridical acts are those, that are valid without any certain form of expression of will. Decision about the form of these acts is reserved to the acting parties. The informal acts in the Roman law are in principle causal acts (e. g. *commodatum* - loan for use, not for consumption; letting and hiring, *traditio* as an infomal transfer of possession or ownership).

d) Juridical acts inter vivos and juridical acts mortis causa

Juridical acts *inter vivos* (between the living people) shall take effects during the life of its participants. To this category of acts belong all contracts, *mancipatio* and *traditio*. The legal effects of the jusridical acts *mortis causa* depend on the moment of the death of acting person (e. g. testament, legacy, *donatio mortis causa* - donation depending on donator's death).

e) Ungratuitous acts and gratuitous acts

Juridical ungratuitous (onerous) acts are those, in which both parties of bilateral act have actions to claim for protect their subjective (individual) rights (e. g. sale, hire). Gratuitous (lucrative) act is a kind of act, which requires rendering from one party of the act without rendering from the second party of act (gratituous acts are bilateral: *deposit, commodatum* - loan for use).

f) Abstract acts and causal acts

Juridical abstract acts are those, whose validity does not depend on the existence of causa (as a reason of their conclusion) and in the judicial controversy causa is not an object of probation. In the juridical causal acts the validity of them depends on the existence of its causa, which is the part of its content. Expression of will in these acts is intented on the causa. It is necessary to prove the causa in the judicial controversy.

Juridical abstract acts undermined the principle of legal certainty and that was the reason to admit them only as extraordinary acts in specific situations which required security and certainty of transfer of the property (acts of alienation). Any incurrable inequities were corrected by praetor by giving an actio in personam to recover unjust enrichment, but only from subjects, acquring enrichment from these acts.

g) Juridical acts in the field of civil law and honorary law

Juridical acts based on the norms of civil law are protected by actions of civil law. These acts are reserved only for Roman citizens and have abstract nature. They have

to be done in the prescribed form, e. g. as follows:

- *mancipatio* (alienation of ownership to the *res mancipi*);
- *sponsio* (ceremonial promise);
- *in iure cessio* (a case of ficticious litigation or conveyance authorized by State authority using the machinery of the court - in order to transfer civil ownership, to manumission of slave or to institute of servitude);
- *emancipatio* (act of pater familias as a manumittor, containing manumission of his son or daughter from his power, i.e. from *patria potestas*);

Acts, which came from praetorian jurisdictional power, were protected by praetorian actions (*actiones utiles, actiones in factum*). The special kind of protection enjoyed the acts, which were constituted as a result of law of nations (*ius gentium*). The foreigners could also be a party of these acts.

4. Essentials of a valid juridical act

The above mentioned essentials of the juridical act are those circumstances, which are required to validity of the act. These circumstances are as follows:

- personal capacity to make juridical acts (capacity to act),
- expression of will,
- conformity of internal will and its expression,
- content of juridical act is recognized by law order.

4. 1. Capacity to make juridical acts

It is a person`s ability to express its own will, which has law effects with regard to the law order. The law effects may be:

- establishment, modification and termination of the legal relations;
- establishment, modification and termination of subjective individual rights and obligations;

This capacity expresses in various fields of law and in connection with this it has in the above mentioned branches of law specific preconditions. The capacity to make juridical acts expresses as follows:

- contractual capacity, i. e. a ability to make contractual juridical acts and be liable for them;
- delictual capacity, i. e. ability to be liable for acts, which are against law - delicts *(contra legem);*
- procedural capacity *(ius postulandi)*, i. e. an ability of person to submit petitions before the court;
- testamentary capacity, i. e. ability to make valid testament (last will) and also ability to be a heir.

The qualifications for the capacity to make juridical acts are as follows:

a) certain age of acting person (men – 14 years; women – 12 years);

b) mental health of acting person.

These two factors form together the basic conditions (assumptions) of personal responsibilty for juridical acts, which depends on the capability to assess the consequences of acting. Besides the mental ilness and the lack of prescribed age could limite the capacity to make juridical act also another factors, i. e.:

- female gender; women could not make valid juridical acts, if their property position could become worse, or, if as a result of these acts could be a damnum; these acts of women required the authorization of their tutor.
- prodigality (persons, who wasted inherited property, could not make those juridical acts, which would make any damnum at their property);
- physical disability (physical defect), from which results inability to make certain acts with regard to the nature of the defect;
- dishonesty, which occured by practising certain professions (prostitution, gladiator, bawd) or also by living in bigamy and by execution of judgment.

4. 2. Expression of will

The fact, that juridical act is an expression of will of acting man, means, that the law order gives a great importance to the will and to its expression. But the different meaning of will and of expression of will is reflected in three doctrines (theories):

a) theory of expression – which takes the major importance to the external characters and the content of the will is in principle irrelevant; the validity of the act depends on the fact, if this expression could recipient (counterparty) understand as an expression of will; as it is in the *Law of the twelve tables* (the sixth table): *uti lingua nuncupassit, ita ius esto* („what a party has named by word-of-mouth, that shall hold good“);

b) theory of will – which gives the accent to existence of real (serious) will of acting man in order to get validity of the juridical act;

c) theory of reliance – it emphasises, that although it is necessary to based on the will, incurrable conflict has to be solve in the interest of legal certainty in legal relations, on behalf of the expression, which is objectively recognizable. In order to protect the individual rights of bona fide persons praetor protected parties in the cases in which, to support the real will (intention), the juridical act occured an substantial error *(error in substantialibus),* psychical violence or dolus.

In bilateral juridical acts it was necessary to find out if there has been consensus regarding the expressions of will of the parties. Interpretation of the contract required as a basis the objective sense of the expressions. As an expresssion were considered that factors, which the party of juridical act, with regard to the circumstances, knew or had to know as a meaning of expression.

Incurrable dissensus makes the formal juridical acts in principle invalid and regarding the informal juridical acts it is possible to use the interpretation of the will of the acting man if it is helpful to get a consensus and make the act valid.

In the case of dissensus, which occured to both parties, concerning error in material substantial circumstances (e. g. *error in causa, error in persona, error in corpore*), it caused nullity of the act *(negotium nullum).*

4. 3. Correspondency of will and its expression

Expression of will itself does not guarantee the validity of juridical act. It is necessary to explore, if acting man really expresses his will – so that is clear from his expression, what he wants to accomplish by juridical act. In fact, it can be the situation, in which exists disharmony of will and its expression, caused by various (internal or external) factors.

4. 3. 1. Disharmony of will and its expression

Although the Emperor Justinian I established in his era that the will is almost a *conditio sine qua non* of valid juridical act, in no period of development of Roman law existed that any kind of error occurs invalidity of juridical act. With regard to disharmony of internal will and its expression (external will) there are two different categories of disharmony:

- unconscious (simple) disharmony (error);
- conscious disharmony (mental reservation, simulation).

a) Error

Error is an unconscious lack of will as a result of incorrect or deficient ideas regarding the circumstances of juridical act. Error may concerns about following factors (circumstances):

- legal or factual,
- substantial (essential) or unsubstantial.

Juridical error *(error iuris)* refers to the law effects of the act and is caused by ignorance of law. This kind of error is irrelevant and ignored and has no legal effects. From this rule of law were established in Roman law exceptions in behalf of soldiers, under-ages and women (if the act occurs them a damage). Lawyer Paulus writes about juridical error in the Digest:

Paul. D. 22,6,9: *Regula est iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. Videamus igitur, in quibus speciebus locum habere possit, ante praemisso quod minoribus viginti quinque annis ius ignorare permissum est. Quod et in feminis in quibusdam causis propter sexus infirmitatem dicitur: et ideo sicubi non est delictum, sed iuris ignorantia, non laeduntur. Hac ratione si minor viginti quinque annis filio familias crediderit, subvenitur ei, ut non videatur filio familias credidisse.*	**Paul. D. 22,6,9:** It is a rule of law, that ignorance of law prejudices, ignorance of fact does not. In what cases does this apply? Those under twenty-five are allowed to be ignorant of the law. So are women in some case, owing to the infirmity of their sex. Hence, apart from delict, they are not prejudiced by ignorance of law. So if a minor lends money to a son-in-power, he obtains relief and is treated as not having lent it to a son-in-power.

The different regarding consequences between the *error iuris* and *error facti* is expressed in the Justinian´s Code:

Cod. Just. 1,18,10: *Cum quis ius ignorans indebitam pecuniam persolverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est.*	**Just. Cod. 1,18,10:** When anyone, in ignorance of the law, pays money, he cannot recover it. For you know that money paid but not owing can be recovered only when paid in ignorance of the facts.

Error in fact (ignorance of fact; *error facti*) concerns about the facts and its influence on the validity of juridical act is only in the situation of error concerning expression and with regard to the content of juridical act. But we can observe to the *error facti* (in above-mentioned situations) only if it has following qualities:

- substantial (essential),
- excusable (justifiable) and
- act does not relates to the rights of other persons.

Error is non-substantial and consequently irrelevant, if it pertains to the circumstances, which the acting man did not take into the content of the act. This includes error in motive and error in expression (pronouncement).

Substantial (or essential) error *(error essentialis)* relates to the essential elements of the expression of will. If the acting man (party of the act) would know them, he would never done the act. Essential error pertains to following circumstances:

- causa of juridical act *(error in negotio)*;
- personal error *(erro in persona)*;
- error in matter of act *(error in corpore)*;
- error in qualities (attributes) of mater; this error is relevant only if the qualities identified the matter of the act and this kind of error is, consequently, very close to *error in corpore*.

Ulpian submits, in the case of sale of slave, about *error in qualitate* the different

between *error in virginitate* and *error in sexu*:

Ulp. D. 18,1,11,1: *Quod si ego me virginem emere putarem, cum esset iam mulier, emptio valebit: in sexu enim non est erratum. Ceterum si ego mulierem venderem, tu puerum emere existimasti, quia in sexu error est, nulla emptio, nulla venditio est.*	**Ulp. D. 18,1,11,1:** If, however, I think that I am buying a virgin, when she is, in fact, a woman, the sale is valid; there being no mistake over her sex. But if I sell you a woman, and you think that you are buying a male slave, the error over sex makes the sale void.

Excusable error *(error probabilis)* is an error, which can occurs to the common (ordinary) man following regular care.

The importance and consequence of error is, that the acting man, which is in error (error must be essential and excusable) has a right to take an action regarding nullity of act before the court.

b) Mental reservation

Mental reservation (reservatio mentalis) belongs to the the conscious disharmony of internal will and its expression. Its essence is the secret reservation of acting man, which excludes the effects of the act. Although the acting man does not expresses his real will and without reference to the reasons of mental reservation is the act valid. In the cases of psychical violence praetor allows to the party, which has made an act under the violence, an action or exception. With regard to the essence of mental reservation is very important the next fragment of Celsus:

Cels. D. 2,15,12: *Non est ferendus qui generaliter in his, quae testamento ei relicta sunt, transegerit, si postea causetur de eo solo se cogitasse, quod prima parte testamenti ac non etiam quod posteriore legatum sit. Si tamen postea codicilli proferuntur, non improbe mihi dicturus videtur de eo dumtaxat se cogitasse, quod illarum tabularum, quas tunc noverat, scriptura continerentur.*	**Cels. D. 2,15,12:** It should not be tolerated that a party may make a compromise with reference to legacies left to him in general terms by will, and afterwards claim that his object was not to compromise except with reference to what was left him in the first part of the will, and not with reference to what was left him in the last part. But where codicils are produced, I think that he could not improperly say to me that he only was thinking about what was contained in those pages of the will of which he knew at the time of the transaction.

c) Simulation and dissimulation

If participants only simulate (sham) juridical act, i. e. if they don`t intend it seriously,

this is a simulation (simulatio). Simulated juridical act is not valid, because both parties have not intention to engender legal effects of the act, which is simulated. Regarding this case writes Modestinus (Herennius Modestinus, 1st half of the 3rd century A.D.):

Mod. D. 44,7,54: *Contractus imaginarii etiam in emptionibus iuris vinculum non optinent, cum fides facti simulatur non intercedente veritate.*	**Mod. D. 44,7,54:** Fictitious contracts are not legally binding, even in the case of sales, for the reason that they are only simulated, and are not based on truth.

By using of simulated act the acting parties sometimes try to cover an another juridical act, which is by the law order prohibited. This acting is in theory of law called dissimulation *(dissimulatio)*and the act is invalid. The weel known case of this acting is mentioned by Javolenus:

Javol. D. 24,1,64: *Vir mulieri divortio facto quaedam idcirco dederat, ut ad se reverteretur: mulier reversa erat, deinde divortium fecerat. Labeo: Trebatius inter Terentiam et Maecenatem respondit si verum divortium fuisset, ratam esse donationem, si simulatum, contra. Sed verum est, quod Proculus et Caecilius putant, tunc verum esse divortium et valere donationem divortii causa factam, si aliae nuptiae insecutae sunt aut tam longo tempore vidua fuisset, ut dubium non foret alterum esse matrimonium: alias nec donationem ullius esse momenti futuram.*	**Javol. D. 24,1,64:** A man gave something to his wife after a divorce had taken place, to induce her to return to him; and the woman, having returned, afterwards obtained a divorce. Labeo and Trebatius gave it as their opinion in a case which arose between Terentia and Maecenas, that if the divorce was genuine, the donation would be valid, but if it was simulated, it would be void. However, what Proculus and Caecilius hold is true, namely, that a divorce is genuine, and a donation made on account of it is valid, where another marriage follows, or the woman remains for so long a time unmarried that there is no doubt of a dissolution of the marriage, otherwise the donation will be of no force or effect.

d) In fraudem legis agere

However, the effects of certain prohibited act can be achieved – contrary to the law (*contra legem)* – by acting, which covers law order and is prohibited by it. This procedure, which is legal and in accordance to law, acting parties try to achieve the effects of any other act, but prohibited by law. This procedure - which is inadmissible - is called in the law theory as *„in fraudem legis agere"* (in fraud of the law). Ulpianus submits about this acting following reflection:

Ulp. D. 18,1,38: *Si quis donationis causa minoris vendat, venditio valet: totiens enim dicimus in totum venditionem non valere, quotiens universa venditio donationis causa facta est: quotiens vero viliore pretio res donationis causa distrahitur, dubium non est venditionem valere. Hoc inter ceteros: inter virum vero et uxorem donationis causa venditio facta pretio viliore nullius momenti est.*	**Ulp. D. 18,1,38:** Where anyone sells property at a low price for the purpose of making a donation of the same, the sale will be valid; for we hold that a sale made of the entire amount of anything is not valid where this is done solely for the sake of making a donation, but when the property is sold at a lower price on account of a donation, there is no doubt that the sale will be valid. This rule applies to transactions between private individuals; but when a sale is made at a low price on account of a donation between husband and wife, it is of no force or effect.

5. The contents of juridical act

Roman law is characterized by certian types of acts, which are recognized by law. In the field of obligations put Ulpian (D. 2,14,7,4) a following rule *(regula iuris)*: *„nuda pactio obligationem non parit"*. This rule expressed that in classical Roman law existed in the law order only *„numerus clausus"* of acts, which were protected by action. This principle is expressed, in particular, by certain types of actions, protecting certian subjective rights. The other actings of people were protected only by using praetor's jurisdiction in accordance to principles of equity and justice (honorary law). The contents of juridical act has also to be regulated by certain limits, establishing by law and which are expressed in three categories of components of juridical act:

- essential (substantial; *essentialia negotii*);
- natural *(naturalia negotii)*;
- accidental *(accidentalia negotii)*.

The limitations of civil law were overcame by praetor´s jurisdiction and this fact explains Papinian:

Pap. D. 19,5,1: *Nonnumquam evenit, ut cessantibus iudiciis proditis et vulgaribus actionibus, cum proprium nomen invenire non possumus, facile descendemus ad eas, quae in factum appellantur. Sed ne res exemplis egeat, paucis agam.*	**Pap. D. 19,5,1:** It sometimes happens that existing and common actions will not lie, and we cannot find the proper name for the proceeding; so we readily have recourse to those designated in factum. In order that examples may not be wanting, I will give a few.

5. 1. Essential components of juridical act

However, the juridical act, as it is a manifestation of the will, is characterized by this, that it contents create the parties in accordance to their own wills and commercial needs. Nevertheless, beside creating the content of juridical act, the law order requires from acting parties to take such elements into the content of their act, which are for every juridical act substantial (constitutive) and without them the juridical act would be not valid with regard to the law order.

Consequently, for every type of juridical act law order provides some essential components, which have to be as a necessary contents of valid juridical act, with regard to the concrete type of it. So, that means, i. e. in the contract type „sale" *(emptio venditio)* are essential components an consent regarding the „object sold" and price; in the contract type named „letting and hiring" *(locatio conductio)* are the essential components consent regarding the object of letting and hire cost; „loan for use" *(commodatum)* has the only essential, substantial component the delivery, a mere physical transfer of the object of use.

5. 2. Natural components of juridical act

Participants of the juridical act are able to agree circumstances - in accordance to the disposition principle – which precisely define the contents of act. If they do it, these circumstances become an integral part of juridical act as its natural components. If the parties don`t agree that, there are effective these circumstances, which are established by law order as circumstances presumably given by acting parties. (i. e. in the case of sale - unless the parties agree otherwise, the price have to be paid immediately after conclusion of sale.)

5. 3. Accidental components of juridical act

Participants of the juridical act can establish, in accordance to private autonomy, also another circumstances as a contents of juridical act. There are such circumstances, which are not obligatory part of juridical act, but the party can add them to the juridical act (in the bilateral act by a consent). As a consequence of that, these added circumstances become an integral part of the juridical act. Accidental components of the juridical act in the Roman law were these circumstances:

a) *conditio* (condition); is a possible, future, uncertain event (circumstance), from which depend the effects of the juridical act; it can be resolutive (if the condition is fulfilled, the effects of juridical act are lapsed for good) or suspensive (if the condition is fulfilled, the juridical act comes into effect); condition cannot be added to formal civil acts *(*e. g. *mancipatio, in iure cessio)* and to another certain acts (marriage, acceptance of an inheritance by an heir) in order to create immediately law effects.

b) *dies* (date); a certain time, taken by acting party into the contents of juridical act; when the time expirates, the effects of act are either lapsed *(dies ad quem)* or created *(dies a quo).*

c) *modus* (modus, mode); accidental establishment, added to the gratuitous acts, binding the donatory to a certain conduct; the effects of the act depends only on expiry of the time.

Chapter IV
LAW OF PERSONS

1. Natural persons

The essential concept of Roman law of persons is term *„caput"* (head, personality). The term *caput liberum* determines the status of free persons and the term *caput servile* determines the status of a slave. The term status in a broader sense determines the legal position of a person in three categories:

- *status familiae;* position of a person in the family (household) as a juridical bond;
- *status libertatis*; position of a human being as a slave or a free;
- *status civitatis*; position of people, whether they are Roman citizens or foreigners.

There is also another important division in the field of law of persons - whether a person is *sui iuris* (person of its „own power") or *alieni iuris* (person of „alius power").

2. Legal personality

Legal personality is an ability to have subjective rights and obligations. This capacity has static nature, forasmuch as it not depends on the active conduct, but the substantial factor is, that the rights and obligations can be connected to a certain person:

- by its own conduct (if person is capable to make juridical acts), or
- by conduct of alius (if person is not capable to make juridical acts), i. e. conduct of tutor and curator;

The pre-requisities of the legal personality concerning natural person (not juridical person) was factical cirmstance (birth of a person) and legal circumstances (status familiae, status libertatis and status civitatis).

Legal personality was limited by following circumstances:

a) *minutio existimationis* (loss of honour) – in a broader sense this concept determines various levels of „losing civic honour", i. e. partial disqualification, or impairment of man`s civic honour without destroying his legal personality *(caput)* with regard to the law order. Loss of honour had two forms – infamy *(infamia)* and turpitude – ill fame *(turpitudo)*.

- *infamia* was a status, which conditions were regulated by law (by statutes or

in praetorian edict); praetor in the edict enumerated, to whom and in which situations he declined to grant to certain right (i. e. deny the right to make motion before court; right of being represented by an *procurator* or *cognitor* in an action, prohibition of marriage with certain categories of persons, prohibition of testimony before court); infamous were e. g. persons living in bigamy, gladiators, histrions, persons condemnated for certain delicts (theft, rapine, injuria) and also for certain contracts (mandate, deposit); condemned person was to the future considered as „infamous". Gaius explains above-mentioned procedure by following words:

Gai. Inst. 4,182:	**Institutes of Gaius 4,182:**
Quibusdam iudiciis damnati ignominiosi fiunt, uelut furti, ui bonorum raptorum, iniuriarum, item pro socio, fiduciae, tutelae, mandati, depositi. sed furti aut ui bonorum raptorum aut iniuriarum non solum damnati notantur ignominia, sed etiam pacti, ut in edicto praetoris scriptum est; et recte. plurimum enim interest, utrum ex delicto aliquis an ex contractu debitor sit. nec tamen ulla parte edicti id ipsum nominatim exprimitur, ut aliquis ignominiosus sit, sed qui prohibetur et pro alio postulare et cognitorem dare procuratoremue habere, item procuratorio aut cognitorio nomine iudicio interuenire, ignominiosus esse dicitur.	In certain actions persons who are condemned become infamous, as in those of theft, rapine, and injury, also in cases of partnership, trust, guardianship, mandate, and deposit. In actions of theft, rapine, and injury, not only are the persons convicted branded with infamy, but also where a compromise is made, as is stated in the Edict of the Prćtor; and this is proper, for it makes a great deal of difference whether anyone becomes a debtor on account of the commission of a delict, or under a contract. But while it is not expressly stated in any part of the Edict that a party is to become infamous, still he is said to be infamous who is forbidden to represent another in court, or to appoint, give, or have an agent or attorney, or to intervene as agent or attorney in a case.

- *turpitudo* (ill fame); unlike infamy this status depends not on the norms of law, but on the social verdict, public opinion and on the judge`s verdict in the individual case, based on his free discretion; judge has competence to prohibite infamous to act as a guardian, to prohibite infamous, to acquire an obligatory part of heritage at interest of siblings;

b) women – they were not capable (qualified) to have paternal power or to be a guardian *(tutor*), to be a wittness concerning mancipation and testament.

Legal personality (status) was in Roman law construed by three constituent elements, which expressed the position of a person:

- as a member of family (as a system of agnates under the power of pater familias),
- as a Roman citizen or foreigner,
- as a slave or a free person.

The person of full status was the one who had all three elements. The only person

with full status was a *pater familias* - personally free man with Roman citizenship as a head of family of agnates. Loss, or absence of any element resulted in loss of civil status *(capitis deminutio)*, either „greatest" *(capitis deminutio maxima)*, or „middle" *(capitis deminutio media),* or „least" *(capitis deminutio minima)*. Lawyer Paulus described it in the Digest:

Paul. D. 4,5,11: *Capitis deminutionis tria genera sunt, maxima media minima: tria enim sunt quae habemus, libertatem civitatem familiam. Igitur cum omnia haec amittimus, hoc est libertatem et civitatem et familiam, maximam esse capitis deminutionem: cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis deminutionem: cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat.*	**Paul. D. 4,5,11:** There are three kinds of changes of civil status, the greatest, the middle, and the least; as there are three conditions, which we may have, namely, those of freedom, citizenship, and family. Therefore, when we lose all of these, that is to say freedom, citizenship, and family, the greatest change of civil status ensues; but where we lose citizenship and retain freedom, intermediate loss of civil status occurs; and when freedom and citizenship are retained, and only the family position is altered, it is established that the least change of civil status takes place.

3. Law of the family

3. 1. Status familiae

Family in the Roman legal thought was not a biological bond and in this sense it is designated by term „family of agnates" *(familia)*, which formed not only legal, but also an economical entity. Family of agnates stricto sensu was a entity, group of persons, consisting of a *pater familias* as a head of it and other members under his power. The causes of subordination could be following circumstances:

- *patria potestas* (paternal power over the natural and adoptive children),
- *manus* (power over the wife, if the marriage was *cum manum conventionem*),
- *mancipium* (the other, free persons, which were working temporarily under the power of *patris familias),*
- *dominica potestas* (power over the slaves in a broader sense and also over the all things, belonging to household).

Biological, i. e. blood relationship was in the family of agnates irrelevant.

a) Patria potestas

Paternal (parental) power constituted the power over the children of head of the family, whether they were biological or adoptive. It was caused by these circumstances:

- birth of a child in a Roman legal marriage *(matrimonium legitimum)*, which was a matrimony between two Roman citizens or between Roman citizen and a person with *ius connubii*; the test, if the child is legitimate (lawful) or not (i.e. illegitimate) was the time of its birth. With regard to the legitimacy of the newborn child the law order established a following presumption:

Paul. D. 4,5,11: *Septimo mense nasci perfectum partum iam receptum est propter auctoritatem doctissimi viri Hippocratis: et ideo credendum est eum, qui ex iustis nuptiis septimo mense natus est, iustum filium esse.*	**Paul. D. 1,5,12:** That a child can be born fully formed in the seventh month is now a received wiev due to the authority of that most learned man Hippocrates. Accordingly, it is credible, that a child born in a seventh month of a lawful marriage is a lawful (legitimate) son of the marriage.

The children, which were born after the 182th day after the entering the marriage and before the 300th day after divorce or death of spouse, were legitimate *(filii iusti)*. This is a consequence of a principle, which is stated in the following fragment:

Paulus, D. 2,4,5: *Quia semper certa est, etiam si volgo conceperit: pater vero is est, quem nuptiae demonstrant.*	**Paulus, D. 2,4,5:** This is for the reason that the mother is always certain, although she may have been given to promiscuous intercourse; but the father is he whom the marriage indicates as such.

The children, which were born to a non-married woman are illegitimate *(vulgo concepti)*. Roman law order established, concerning them, that they have no father, because it is uncertain, who is its father. These childs have consequently blood-relatives only by mother. Gaius stated this principle in the following fragment:

Gai. Inst. 1,64:	**Institutes of Gaius 1,64:**
Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur neque liberos: Itaque hi, qui ex eo coitu nascuntur, matrem quidem habere videntur, patrem vero non utique, nec ob id in potestate eius sunt, quales sunt ii, quos mater vulgo concepit: Nam et hi patrem habere non intelleguntur, cum is etiam incertus sit; unde solent spurii filii appellari vel a Graeca voce quasi σποραδην *concepti nel quasi sine patre filii.*	Therefore, if anyone should contract a nefarious and incestuous marriage he is considered to have neither a wife nor children, hence the issue of such a union are considered to have a mother but no father, and for this reason are not subject to paternal authority, but resemble children whom the mother has conceived through promiscuous intercourse; and they, in like manner, are understood to ***have no father, as he also is uncertain****;* therefore they are ordinarily called illegitimate children, either from the Greek word meaning conceived indiscriminately, or because they are children without any father.

- adoption of a person, which is *alieni iuris;*
- adrogation of a person *sui ius* (with all his *familia,* if he had, and with all his property).

Paternal power consisted of these rights:

- *ius exponendi* (exposure), i.e. paterfamilias had (in the early old law) right to expose newborn child as a sign of intention to reject the child (or, he can accept it). This cruel right was later restricted and during the reign of the Emperor Valentinian I was the exposure prohibited:

Cod. Just. 8,51,2:	**Cod. Just. 8,51,2:**
Unusquisque subolem suam nutriat. quod si exponendam putaverit, animadversioni quae constituta est subiacebit.	Everyone should nourish over his own offspring. If anyone exposing them, he will be liable to the penalty laid down for this.

- *ius vitae necisque*, i. e. the power of life and dead and minor violence; classical law regarded a killing of a son, except under the formal domestic judgment as a criminal *(crimen publicum)*. There was also a „right of killing" *(ius occidendi),* established by Emperor Augustus (cca in the year 18-17 B.C.), which allowed *a pater familias* to kill his daughter in paternal power and her lover, when he took them in adultery;
- *ius vendendi* (power of sale), i.e. power to sell a child into the real slavery „over the river Tiber" (trans Tiberim);
- *ius noxae dandi,* i.e. power to sell to a civil bondage and for a noxal surrender for a wrongs *(delicta)*; about this kind of right, which was also joined with the responsibility of *paterfamilias (dominus)* regarding delicts of his sons and slaves writes Gaius:

Gai. Inst. 4,75:	**Institutes of Gaius 4,75:**
Ex maleficio filiorum familias seruorumque, ueluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominoue aut litis aestimationem sufferre aut noxae dedere. erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisue damnosam esse.	Noxal actions are granted on account of offences committed by sons under paternal control, or by slaves; as, for instance, where they commit theft or injury; so that the father or master is permitted either to pay the damages assessed, or to surrender the culprit by way of reparation; for it would be unjust for the misconduct of a son or a slave to cause any loss to his parent, or his master, except by the forfeiture of the body of the son or the slave.

- *ius vindicandi,* i.e. right of action for the recovery of the child from anyone detaining his child;
- right to veto matrimonium and to control divorce.

Persons under the paternal power are *alieni iuris* and they does not acquire subjective rights and obligations. Adults in paternal power have right to marry *(ius connubii)* and filiusfamilias (i.e. son under the paternal power) has all rights in the field of public law.

Family of agnates terminated in the moment of the death of *patris familiae*. All persons, which were in this moment in paternal power were consequently *sui iuris*. Paternal power ended throughout the life by emancipation, i.e. by act of *pater familias*, making his child free from paternal power. This person was from this moment *sui iuris*. About emancipation writes Gaius in his Institutions:

Gai. Inst. 1, 132:	**Institutes of Gaius 1, 132:**
Praeterea emancipatione desinunt liberi in potestate parentum esse. Sed filius quidem tribus mancipationibus, ceteri vero liberi sive masculini sexus sive feminini una mancipatione exeunt de parentium potestate: Lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis: ‚Si pater ter filium venum duit a patre fliius liber esto'.	Again, children cease to be under parental authority by means of mancipation. A son, however, by three mancipations, and other children either of the male or female sex by a single mancipation, are released from paternal power; for the Law of the Twelve Tables only mentions three mancipations with reference to a son, as follows: „If a father sells his son three times, let him be free from the control of his father."

b) Manus

Woman as a wife under *manus* was under the power of her husband with certain rights (e.g. *ius vindicandi*). She was as a *loco filiae*, i.e. as a sister of her children with regard to the law.

There were three ways of acquiring *manus*:

- *coemptio* (a modified form of a bride purchase; it was a sale of a wife *per aes et libram*);
- *confarreatio* (religious ceremony at the altar of Jupiter, with a sacrifice and with consumption of a cake with assisting pontifex);
- *usus* (a rule, that one year`s not interrupted cohabitation turned informal union into a matrimonium with *manus*.

Matrimonial power over the wife of husband which was *alieni iuris*, was executed by his *pater familias*.

c) Mancipium

In consequence of his potestas a *pater familias* could mancipate his child to another person, for in the old times of the republic his *patria potestas* was hardly distinguished from property. A husband had the same power over a wife *in manu*. Accordingly a child *in potestate* and a wife *in manu* were properly *res mancipi*; and they were said to be *in mancipio* (civil bondage). Still such persons, when mancipated, were not exactly in the relation of slaves to the persons to whom they were mancipated; but they occupied a status between free persons and slaves, which was expressed by the words *mancipii causa*. Such persons as were *in mancipii* causa were not *sui iuris*; and all that they acquired, was acquired for the person to whom they were mancipated. But they differed from slaves in not beng possessed; they might also have an injuriarum action for ill-treatment from those who had them *in mancipio*, and they did not lose the rights of *ingenui* (who was born as a free person), but these rights were only suspended. As to contracts, the person with whom they contracted might obtain the sale of such property (bona) as would have been theirs, if they had not been *in mancipii causa*; persons *in mancipii causa* might be manumitted in the same way as slaves. The situation of a debtor who was adjudicated to his creditor resembled that of a person who was *in mancipii causa*.

d) Dominica potestas

About the potestas of master over slaves submits Gaius in his Institutes:

Gai. Inst. 1,52:	**Institutes of Gaius 1, 52:**
In potestate itaque sunt servi dominorum. Quae quidem potestas iuris gentium est: Nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse, et quodcumque per servum adquiritur, id domino adquiritur.	Slaves are in the power of their masters, and this power is acknowledged by the Law of Nations, for we know that among all nations alike the master has the power of life and death over his slaves, and whatever property is acquired by a slave is acquired by his master.

3. 2. Status libertatis

The substantial division in the field of the law of persons concerning the position of the free persons and slaves is expressed in the Institutes of Gaius:

Gai. Inst. 1,9:	**Institutes of Gaius 1,9:**
Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.	Certainly, the great divide in the law of persons is this: all men are either free or slaves.

Status libertatis expressed a position of a man as a free person (either sui iuris or alieni iuris) or as a slave. A free person had legal personality (status), it did not have a slave. It began (arised) at birth and the „being" must have a „human form". Lawyer Paulus describes it as follows:

Paul. D. 1,5,14:	**Paul. D. 1,5,14:**
Non sunt liberi, qui contra formam humani generis converso more procreantur: veluti si mulier monstrosum aliquid aut prodigiosum enixa sit. Partus autem, qui membrorum humanorum officia ampliavit, aliquatenus videtur effectus et ideo inter liberos connumerabitur.	Those beings are not children (free) who are born formed in some way which is contrary to the likeness of the human race; as, for instance, where a woman brings forth something monstrous or prodigous (unnatural). A child, however, which has more than the ordinary number of human limbs seems to be, to some extent, completely formed, and therefore may be included among children.

The Roman law order also reserved certain rights - not obligations - to the fetus *(nasciturus),* but under the condition of birth. It is reflecfted in the following fragment of Digest:

Paul. D. 1,5,7:	**Paul. D. 1,5,7:**
Quae liberis damnatorum conceduntur. Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur: quamquam alii antequam nascatur nequaquam prosit.	A child (fetus) in its mother's womb is cared for just as if it were in existence, whenever its own advantage is concerned; although it cannot be of any benefit to anyone else before it is born.

Legal personality extincted in the moment of physical death or in the case of enslavement *(capitis deminutio maxima)*.

a) The Legal position of the slaves

Slave was a human „thing", without legal personality, objects of subjective rights, which belonged to their master *(dominus)*. Ulpian describes it:

Ulp. D. 28,1,20,7: *Servus quoque merito ad sollemnia adhiberi non potest, cum iuris civilis communionem non habeat in totum, ne praetoris quidem edicti.*	**Ulp. D. 28,1,20,7:** A slave cannot participate in the formalities attaching to the execution of a will, and very properly, as he has no share whatever in the rights conferred by the Civil Law, or indeed in those granted by the Praetorian Edict.

The basis of the legal position of the slave we can exemplify in following fragments of various Roman lawyers:

Florentinus D. 1,5,4: *pr. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur.* *1. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.* *2. Servi ex eo appellati sunt, quod imperatores captivos vendere ac per hoc servare nec occidere solent.*	**Florentinus D. 1,5,4:** Pr. Freedom is one`s natural power of doing what one pleases, save insofar asi t is ruled out either by coercion or by law. 1. Slavery is an institution of Law of nations, whereby someone is against nature made subject to the ownership of another. 2. Slaves are so-called, because military commanders have a custom of selling their prisoners and thereby preserving rather than killing them: and indeed they are said to be in mancipia, because they are captives in the hand of their enemies.
Just. Inst. 1,16,4: *Servus autem manumissus capite non minuitur, quia nullum caput habuit.*	**Just. Inst. 1,16,4**: A slave does not suffer loss of status by being manumitted, for while he had no caput (civil status).
Ulpián D. 50,17,32*:* *Quod attinet ad ius civile, servi pro nullis habentur; non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines æquales sunt.*	**Ulp. D. 50,17,32***:* Before the Civil law a slave is nothing, but not before the Natural law; for in the eye of Natural law all men are equal.

The position of a slave in the family of agnates was very similar to the status of *filiusfamilias.* A sane adult slave was capable to make juridical acts. But he could not make juridical acts for themselves, only for his master. Gaius writes in his Institutes:

Gai. Inst. 2,87 (D. 41,1,10,1) *Igitur quod liberi nostri, quos in potestate habemus, item quod serui nostri mancipio accipiunt uel ex traditione nanciscuntur siue quid stipulentur uel ex aliqualibet causa adquirunt, id nobis adquiritur: ipse enim, qui in potestate nostra est, nihil suum habere potest; ...*	**Institutes of Gaius 2,87 (D. 41,1,10,1)** Anything, which our slaves receive by delivery and anything which they acquire, whether on a stipulation or any other ground, is acquired by us. For a person in the power of another can hold nothing for himself; ...

A slave can made juridical act on special order of his master *(iussum)* or he can made juridical acts concerning a master´s property, which master give a slave for use and enjoyment - *peculium* (but it was still an ownership of a master). Pomponius describes peculium in following fragment:

Pomp. D. 15,1,4,2:	**Pomp. D. 15,1,4,2:**
Ex his apparet non quid servus ignorante domino habuerit peculii esse, sed quid volente: alioquin et quod subripuit servus domino, fiet peculii, quod non est verum.	It follows, that it is what the slave holds with the master´s consent which constitutes the peculium, not what the slave holds without his master´s knowledge; otherwise, a thing which the slave filches (steals) from his master would form part of the peculium and that is not the law (truth).

The peculium can be given in various forms, e. g. as agricultural instruments, commercial establishment, industrial shop, eventually it can consist of another slaves, or individual pieces of master´s property. Peculium was not a static fund, but could grow and diminish according to the slave´s bussines ability.

Master of the slave was responsible for the acts of his slaves (and also his sons under the paternal power). This responsibility had these forms:

- for the whole obligation which the slave took on master´s order *(actio quod iussu);*
- for the peculium amount (actio de peculio); about this action writes Ulpian:

Ulp. D. 15,1,1,pr.:	**Ulp. D. 15,1,1,pr.:**
Ordinarium praetor arbitratus est prius eos contractus exponere eorum qui alienae potestati subiecti sunt, qui in solidum tribuunt actionem, sic deinde ad hunc pervenire, ubi de peculio datur actio.	The Praetor judged it to be the proper way to first explain the contracts of those who are subjected to the authority of another which give a right of action for the entire amount, and then to come to the present one, where an action is granted on the peculium.

- *actio de in rem verso;* if the master used, what was received by slave concering peculium, for his own benefit;

The power over the slave, however, was qualitatively differnt from the paternal power. Master could, in accordance to his rights, freely dispose of slave: he could sell the slave, deliver him into the deposit, hire him, manumit him, loan him for use. Similar to the *filiusfamilias,* a master had a right to make a choice whether to pay for harm caused by his slave or hand him over to the injured party. After the master´s death, a slave belongs to the inheritance as a component of it, as distinct from a *filiusfamilias*, which becomes a heir.

In the oldest Roman law a master could do with a slave what he wanted, as a consequence of that, he had an unlimited power of life and death. But the brutal treatment could result in disharmony from the censor´s authority and resulted in legal dis-

grace. The protection against brutality regarding life of the slaves was established in some laws. An unjusting killing of alien slave was regulated in the 1st century B.C. as a *crimen publicum*. Some limits were introduced (1st century A.D.) as concerning the criminal liability of owners who unjustly killed own slave and forced sale of slaves unjustly tortured. In the year 10 A.D., the *Senatusconsultum Silanianum* established, that, if the master was murdered, all slaves which were under the roof, were to be questioned under torture and condemned to death unless they could prove they had done everything they could to save their master:

SC Silanianum, 38 (Ulp. D. 29.5.1.38):	**SC Silanianum, 38 (Ulp. D. 29,5,1,38):**
Si dominus mortifere vulneratus supervixerit nec de quoquam servorum suorum conquestus sit, etiamsi sub eodem tecto fuerunt, tamen parcendum illis erit.	If someone committed the murder (of a master) in the presence of his slaves, and they could have prevented it, they should be punished, but if they were unable to prevent it, they will be free from liability.

But, *Senatusconsultum Silanianum* gave freedom to a slave who discovered the murderer of his master. Emperor Domitian (81-96 A.D.) established, that the castration of male salves is prohibited.

Private slave (not public slave) could not be a party to a civil marriage *(matrimonium legitimum)*. However, sexual cohabitation between male and female slave *(contubernium)* was recognized for the purpose of blood relation, i. e in the case, when a child was born in *contubernium* and both parents were later manumissed, this child could not enter into civil marriage with a parent because of the blood tie (relationship), which was established as a impediment of marriage.

As a basic rule of the law of nations was that a child get the status of its mother in the moment of birth. Slavery by birth arised if the mother was a slave (in a momen ofa birth) and the status of a father was unsubstantial (irrelevant.). A child born to a father, which was a Roman citizen and its mother was a slave, was in *dominica potestas* of mother´s master. Emperor Hadrian established, that a child born to a slave mother was free if his mother had been free at the time of conception or at any time before the birth *(favor libertatis)*.

Enslavement

In early law the pater familias had the right to sell his children into the slavery. This enactment, banned in the time of Republic, was revived in the later Empire in limited form, i.e. that only the new born child could be sold into the slavery.

Enslavement could be arised as a punishment in these circumstances:

a) delict - i.e. when a free man was caught as a thief, he became a slave of a victim;
b) avoid a duty – man, ho avoided to fulfill his obligation, has been listed into the census, lost liability to be taxed and could be enslaved by the State;
c) ingratitude – a former slave, which was manumissed, could be reenslaved by his patron in specific circumstances, e.g. in the case of ingratitude;
d) in the case, when a female Roman citizen cohabitated with male slave and after the warning of the slave´s master she did not interrupted this cohabitation,

then she could be enslaved by the owner, in accordance to a magistrate´s decree. This case was regulated in the *Senatusconsultum Claudianum* (enacted in the year 52 A.D.);

e) if someone as a free man, pretending to be a slave, try to sell himself into the slavery as an arrangement for an accomplice to sell him to an unsuspecting customer. Then, the free man established his liberty and share the price with the seller – his accomplise.

The capture in a war was a most important mode of enslavement in the late Republic. It occured when the foreigner was captured in a war against Rome as a prisoner. The prisoners of war became the slaves of the state *(servi publici).* Enslavement occured also in the time of peace, when foreigner was arrested on territory of Roman empire, having no lawful reason for his presence there. If a Roman citizen was captured by the enemy, Roman civil law recognized him as a „slave of the enemy". As a consequence, he incurred *capitis deminutio maxima* (loss of the whole status). The law order considered this situation using a fiction, that the captive Roman citizen died at the moment of capture. If the captive returned to Roman territory, he enjoyed a legal benefit entitled *postliminium* (re-entering the boarders). The re-entering man regained freedom and all his former rights are restored. But his marriage, if it was dissolved in the time of captivity, did not revive. If re-entering man was former *filiusfamilias*, he became subject to the same paternal power. This juridical institute is listed in the Digest:

Pomponius, D. 49,15,5, pr. 1:	**Pomponius, D. 49,15,5, pr. 1:**
Postliminii ius competit aut in bello aut in pace. *1. In bello, cum hi, qui nobis hostes sunt, aliquem ex nostris ceperunt et intra praesidia sua perduxerunt: nam si eodem bello is reversus fuerit, postliminium habet, id est perinde omnia restituuntur ei iura, ac si captus ab hostibus non esset. Antequam in praesidia perducatur hostium, manet civis. Tunc autem reversus intellegitur, si aut ad amicos nostros perveniat aut intra praesidia nostra esse coepit.*	The right of postliminium applies both in war and peace. In war, when those, who are our enemies have captured someone on our side and have taken him into their own fortifications; for if during the same war he returns he has postliminium, that is, all his right are restored to him just as if he had not been captured by the enemy. Before he is taken into the enemy fortifications, he remains a citizen. He is regarded as having from the time when passes into the hands of our allies or begins to be within our own fortifications.

Release from slavery

Release from slavery had various form, most important was a manumission, the act of master, whereby the salve gets freedom. The effect of the formal manumission was, that a former slave acquired a Roman citizenship. With regard to the civil law, the slavery ended by these formal modes of *manumissio*:

- *vindicta*, i.e. as a result of a fictitious litigation concerning the status of a man; „the assertor of liberty" (adsertor libertatis) declared by claiming, before master, his slave and magistrate, that a slave is free, touching him with a ceremonial rod; the master, without exception, made a *cessio* of a slave;
- *census*, i.e if a slave was enrolled on the census (list) with the approval of his

master and with the consent of a censor;

- *testamentum*, i.e. when a master granted freedom to his slave in his last will (testamentum, legatum) by imperative words;
- *manumissio in ecclesia,* i.e. a slave was manumited from slavery by declaration of his master before a bishop and the assembly of christians; it was established by Emperor Constantine the Great.

The informal modes of manumission occured, when a master showed a clear intention that a slave should be recognized as free. The modes of informal manumission were:

- *per epistulam*, i.e. by letter containing above-mentioned intention;
- *inter amicos*, i.e if the intention to release was declared in the presence of the friends of a master or in the presence of the members of his family.

In later law, in accordance with the principle *favor libertatis*, every act of master, showing an intention of equality of his slave with him, was recognized as release from slavery.

The legal consequence of informal manumission was, with regard to the civil law, that the slavery persits, but the „slave" was protected by praetor as a free person (in the form of exeption to the action), if the master should try to exercise his rights regarding *dominica potestas*.

Release from slavery resulted into the new relationship between the former master and his slave. This relationship was called patronage *(clientela)*, former master was named „patron" *(patronus)* and former slave was named „freedman" *(cliens)*. Patron had certain rights with regard to the freedman and these rights are recognized as following duties of a freeman:

- *operae* (services);
- *munera* (gifts) – in the specific ocassions;
- *obsequium* (respect) – certain form of obedience as between parent and child;
- *bona* (property) – patron had right to succeed to a freedman´s estate if the latter died without intestate and without leaving heirs;
- *restitutio natalium* (the restoration of birthrights) – the Emperor could declare, in accordance to patron´s consent, the freedman as a freeborn citizen, when a patronage would be terminated.

3.3. Status civitatis

a) Roman citizens

The basic rights of Roman citizens *(cives Romani),* which resulted from the norms of law order, were in the field of private law the followings:

- *commercium;* a right to participate in the commercial transactions regulated by *ius civile* (Roman civil law); including to make formal juridical acts (e.g. mancipa-

tion; stipulation – oral solemn act; bringing an action, testament); as a privilegium was granted to Latins in order to support their trade with Romans;

- *testamenti factio;* a right to participate in the making of a last will, either as a testator or as a witness a testament of a specific person and also it means the capacity to be made a beneficiary;
- *connubium;* a right to enter into the civil marriage *(matrimonium iustum),* which was originally limited only to patricians; *Lex canuleia* (445 B.C.) permitted civil marriage between patricians and plebeians.

In the field of public law had Roman citizens these rights:

- a right to appeal against the death sentence to the whole Roman community *(populus Romanus);*
- *ius suffragii*; a right to vote in public assemblies; women had not this right;
- *ius honorum*; a right to stand in a public Office, i.e. magistracy (praetor, censor, consul, aedil); women had not this right;

To the basic duties of Roman citizens belonged a military service in legions and payment of taxes.

Acquirement of the Roman citizenship depended on following circumstances:

- principle of personality, and
- status depending on birth,
- formal act of manumission from slavery, or
- special grant.

The child in principle took the status of its mother. As a consequence of the rule: *„mater semper certa est"* („the mother is always certain" - Paulus, D. 2,4,5) a child was born a Roman citizen if its mother has been a Roman citizen at the time of a child´s birth. But in the case of a Roman civil marriage *(matrimonium iustum)* was applicable a rule, that the child took the status of its father in the time of conception.

The another mode of acquirement of the Roman citizenship was a manumission from slavery by any formal mode, i.e. in accordance to Roman civil law. As a special privilegium could be acquired a citizenship in the individual case (as a reward for special services to Rome, to veterans, to magistrates from non-citizen communities) or in the case of a certain community of foreigners as a grant of citizenship. A woman-foriegner could acquire a Roman citizenship only by entering into the Roman civil marriage with a male - Roman citizen.

b) Foreigners (peregrini)

The legal position of the foreigners was based on their own law with regard to the principle of personality (the law order of the state is applicable only to its citizens). Some communities concluded a quasi-international convention with Rome (foedus), hence, they were called „allied cities" *(civitatis foederatae)*. These cities (communities, nations) were free from taxes and they had a possibility to use their own law. In a case, that any state had no *foedus* with Roman state, the citizens of that state were in a position of an enemy (hostis), if they were located on the territory of Roman empire. With

regard to above mentioned existed following categories of foreigners:

- *cives sine suffragio* - the inhabitants of *municipia*, being of foreign blood and language, were without the public rights of Roman citizenship (but they had *ius suffragii*); they had *ius commercii, ius connubii* and *testamenti factio*; to this inhabitants belonged *Latini prisci* („ancient" Latins), which were allied to Rome in the Latin league. In the year 338 B.C. *Latini prisci* were given full Roman citizenship;
- *dediticii* (*nullius certae civitatis cives*); these inhabitants are described by Gaius:

Gai. Inst. 1,14:	**Gai. Inst. 1,14:**
Vocantur autem peregrini dediticii hi, qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde victi se dediderunt.	Those foreigners are called deditied, who, having formerly taken up arms and fought against the Roman people afterwards have been conquered and have surrendered at discretion.

- *peregrini;* peregrines were free inhabitants of foreign territories, which were not Roman citizens nor Latins; they were subject to their own municipal law; the rights of Roman citizens were occasionaly granted them, either as a right to a community or to individuals; in the relations with Romans law of nations was the system of norms, which were applied to them. And peregrines, living within the boundaries of Roman empire also acquired right to a Roman citizenship in 212.

This condition existed until 212 A.D., when Emperor Antonius Caracalla (emperor from 198 to 217) granted the right to a citizenship to all inhabitants of the Roman empire, except the *dediticii*.

Ulp. D. 1,5,17:	**Ulpian, D. 1,5,17:**
In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt.	According to a Constitution of the Emperor Antoninus, all those who were living in the Roman world were made Roman citizens.

4. Marriage in Roman law

4. 1. Marriage as a private matter with legal consequences

Marriage (matrimony) in Roman law was a social reality, which was not *stricto sensu* a juridical act. It was a social fact with certain legal effects (consequences). As a lawyer Modestinus describes (D. 23,2,1), it was *"the union of a man and woman, a partnership for life, involving divine as well as human law."* From the above-mentioned resulted, that the preferred aim of marriage was a common life and the basis for legitimate children.

Roman matrimony was strictly monogamic. It was forbidden to marry a second time while a first marriage was in effect.

4. 2. Formal requirements of marriage

a) Certain age

The marriage was forbidden until the betrothed reached puberty. To ascertain the right time, the couple originally had to be physically examined until this procedure was replaced and official age limits were introduced. According to these, females had to have reached the age of twelve, males the age of fourteen, this being the common normal age at which the necessary physical capacity is developed, thus, male or female, which were not physical capable *(castratus)*, could not enter marriage.

A Roman citizen was considered after attainment of puberty. If he or she married before, thus lacking legal capacity, this marriage was considered a voidable transaction coming into force only with reaching sexual maturity.

b) Conubium

Only Roman citizens could enter into the marriage according to Roman law, or else the people who had been endowed with *conubium*, i.e. the special right for foreigners granted in individual cases to enter into the marriage with a Roman citizen. A marriage, where one or both lacked *conubium,* was ruled by the law of nations *(ius gentium)*.

c) Consent

The law order required to a validity of a marriage an intention to enter marriage *(affectio maritalis),* which was manifested by a matrimonial consent, that they regarded them as a man and wife. This consent could be proved by various ways, e.g. that couple had undergone a traditional Roman marriage ceremony, or if the couple gave a matrimonial vow in the presence of special witness *(auspex)*. The legally important moment was a *deductio in domus mariti* (leading into a husband´s home).

4. 3. Impediments of marriage

a) Status

During era of the Roman republic two major kinds of social rank can be distinguished: plebeians and patricians. The first represented the rank of most people, the

"plebs", the latter consisted of the successful nobility who clung to their power. Plebeians and patricians could not intermarry with regard to the Laws of the Twelve tables (Table XI, 1) until the *lex Canuleia* (published in the year 445 B.C.) allowed marriage between them.

b) Religious reasons

The Vestal virgins could not enter marriage and if they lost their virginity, they were condemned do the death. Later, in the age of christian emperors, the number of impediments in this category increased in (monks, priests). The marriages between christian and jew were also prohibited.

c) Consanguinity

Marriage was prohibited for persons which were in the certian blood relation. The lineal ascendents and descendents could not enter marriage. Also collaterals could not enter marriage, if at least one of them was only one degree removed from the common ancestor, i.e. uncle and niece, aunt and nephew and, of course, brother and sister, as Gaius writes:

Gai. Inst 1,61:	**Institutes of Gaius 1,61:**
Sane inter fratrem et sororem prohibitae sunt nuptiae, sive eodem patre eademque matre nati fuerint sive alterutro eorum: Sed si qua per adoptionem soror mihi esse coeperit, quamdiu quidem constat adoptio, sane inter me et eam nuptiae non possunt consistere; cum vero per emancipationem adoptio dissoluta sit, potero eam uxorem ducere; sed et si ego emancipatus fuero, nihil inpedimento erit nuptiis.	Marriage is indeed prohibited between brother and sister, whether they are born of the same father or mother or merely of one of these parents in common; but although legal marriage cannot take place between me and my sister by adoption as long as the adoption continues to exist, still if the adoption is dissolved by emancipation I can marry her, and if I should be emancipated, no impediment to the marriage will exist.

Marriage between a child of divorceéd wife and her later husband was prohibited. A marriage did not become forbidden *ex post facto.*

As adopted relatives were considered in the same line as blood relations, adoption marriages among them were also prohibited. Affinity effected a prohibition of marriage only in the direct line.

d) Other impediments of marriage

High provincial magistrate could not enter marriage with a person of this province, unless they had been betrothed before he held the office. There was also prohibited a marriage between a *tutor* or *curator* and a person, which was or had been his ward.

Due to moral grounds emperor Augustus established a prohibition of marriages between senators and prostitutes, procurers and actors. Modestinus writes about it:

Mod. D. 23,2,42 pr.-1:. *Semper in coniunctionibus non solum quid liceat considerandum est, sed et quid honestum sit.* *1. Si senatoris filia neptis proneptis libertino vel qui artem ludicram exercuit cuiusve pater materve id fecerit, nupserit, nuptiae non erunt.*	**Mod. D. 23,2,42 pr.-1:** As far as marriages are concerned, it is always necessary to consider not just what is lawful but also what is decent. If the daughter, granddaughter, or great-granddaughter of a senator marries with a freedman, or someone who was an actor, or whose father were actors, the marriage will be not valid.

4. 3. Legal effects of marriage

The legal effects of marriage depended on the fact, if the marriage was "free" *(matrimonium sine manu)* or "strictly" *(matrimonium cum manu)*. In the second case, a wife became subordinated under the matrimonial power of her husband.

Marriage *cum manum conventione* effected a fundamental change in the wife's legal status. She left her former family and became part of her husband's household and family. Her former paterfamilias completely lost power over her, his paternal power", any possibly existing guardianship expired as well as any agnatic relations within her former family. As a legal consequence the woman lost her hereditary rights within the former family.

A woman, which entered into marriage received the status of "a wife", *(honor matrimonii)*, which distinguished her from being a concubine. She took on her husband's place of residence and was considered legal resident of the municipality to which her husband belonged. Furthermore, marriage effected affinity and its ensuing impediments to marriage.

A wife was held in high esteem, a fact which effected an equally high self-esteem in this role. She was considered the centre of the family, "ruling" the household, bearing and raising children, thus giving meaning to the position of a respectable wife.

The effects of marriage regarding proprietary interests differ according to the various kinds of marriage. First and foremost, it has to be differentiated between a marriage which led to *manus* and a marriage which did not.

The latter had no effects on the couple's property, whatsoever. Their respective means were kept separately, each spouse was liable only for his or her own debts. The husband gained no control over his wife's property.

A *manus*, however, effected consequences also with regard to the property. Everything what a wife possessed was transferred to her new husband with speaking the wedding vows. What is more, the wife was even bound to deliver a dowry *(dos)*, either through her *pater familias* or her own means on condition of a marriage which was admitted by civil law.

4. 4. Divorce of a marriage

a) Reasons for divorce

Romans perceived divorce as a natural institute and it could be easily gained during the pre-classical and classical period. Only during the reign of Augustus there were strict limits to it as will be shown later. Therefore the following exposition refers to the time before that era.

In the times of the ancient kings as well as in the republican era divorce was a natural, common right. Emperor Alexander Severus gave an principle (Cod. Iust. 8,38,2): *"Libera matrimonia esse, antiquitus placuit"* ("antiquity agreed that marriage should be without compulsion"). The right to get a divorce could not even be ruled out by contract or be made more difficult by contractual penalties. According to the principle of freedom of divorce no reasons had to be given in order to get divorced.

It can be supposed, however, that most divorces were sought for good reason *(magna causa)* as any other idea seems quite out of touch with reality. Divorce for no reason at all has most likely been highly exceptional, especially since it led to open disapproval for moral reasons and usually caused sincere social disadvantages.

On the other hand, a divorce for good reasons endowed the husband with great financial advantages. If his wife as at fault, he could keep one sixth of the original dowry for each child, while otherwise he had to give back the whole sum to his divorced wife. The sum he could keep was limited to one half of the dowry, though, notwithstanding a greater number of children. Only in case of his wife's adultery the husband could keep another sixth of the dowry.

b) Legal ban of divorce concerning the "flamen Dialis"

The priest of Jupiter *(flamen Dialis)* was one of the three highest priests in Rome. The others were the *"flamen Martialis"*, the priest of Mars, and the *"flamen Quirinalis"*, the priest of Quirinus.

The *flamen Dialis* had to be the offspring of a confarreatio and could marry himself only by confarreatio. His marriage could not be dissolved and was the foundation for his office as flamen. In case his wife died, he even had to retire from his office.

The flamen's rank as well as the emphasis on the sacred confarreatio resulted in a legal ban of divorce, which stayed in effect even if there had been serious reasons. Historians know of only one exception, since a *flamen Dialis* managed to get divorced under the express consent of Emperor Domitianus.

c) Divorce as a will of both parties

At first, a wife never had the right to seek a divorce from her husband. Only he could dissolve a marriage.

Nevertheless, the wife could seek a consent with her husband thus making divorce

a mutual aim. If both had reached a consent, no other means were necessary to get divorced than to mutually declare the divorce. Such uncontested divorces were not uncommon.

Outwardly a divorce could be perceived by the ensuing formal splitting up of the spouses: Their cohabitation ended, a temporary split-up was insufficient.

All in all it is noteworthy, that at least in an uncontested divorce a wife under matrimonial power *(manus)* could express her own will with regard to divorce and even had a right to participate.

d) Unilateral divorce

In ancient law only the husband or his substitute in power was allowed to declare a unilateral divorce thus dissolving his marriage, while a unilateral divorce initiated by a wife was completely impossible. The practice of unilateral divorces was based on the repudiation *(repudium)* of a wife who had committed adultery or other serious offences. This act was called "*repudium*" an still is the technical term for a declaration of divorce today.

The correct words for a declaration of divorce *(repudium)* are said to have been written down as early as the Twelve tables. The words *(formulae)*, which were used to express a will to repudiation are as follows:

„exi" („come out"), or
„i foras" („away"), or
„baete foras" ("go away"), or
„tuas res tibi habeto" ("take what belongs to you")

Although these formulae and actions were typical for divorces, it is most probable, that such formal requirements never existed. Having power over his wife, a husband was allowed to repudiate his wife from his family by divorce any time. However, these rules were changed in the republican era.

From then on the wife, too, had the right to dissolve her marriage by a unilateral declaration of divorce in presence of her husband or his substitute in power. This was rather revolutionary, the wife still being under her husband's power in a manus. The husband´s supremacy, however, was seriously weakened with regard to marriage and divorce.

Naturally, in marriages without a manus there were no limitations with regard to divorces which could have discriminated against the wives. Lacking the *manus*, these marriages could be dissolved righteously by unilateral declarations of divorce by either spouse, husband or wife.

e) Legal consequences of divorce

Divorce and release of the wife from his manus placed an obligation on the husband to return the dowry (dos) to his former wife since its purpose was to provide for the wife after the dissolution of her marriage – either by her husband´s decease or by divorce.

This obligation was even recoverable by law, either an *actio ex stipulatio* or an *actio*

rei uxoriae. The first enforced an stipulation of return which had been agreed on handing over the dowry in the first place.

The *actio rei uxoriae* was a special kind of law suit which had been created only for the purpose of recovering the dowry. It was based on the principle of in bonum et aequum, which meant that the wife should get back the worth of the dowry in the same kind of things she had brought into marriage with her. This principle follows the ideas of reasonableness and fairness.

The origin of this kind of law suit is unknown. It is supposed, though, that it was applied in cases in which the wife was divorced without fault. This seems reasonable because otherwise she would have been without any provision although she had not been to be blamed for the divorce.

The wife had a right to get back her dowry herself, if she was not under the paternal power any more. In all other cases whoever had power over her was entitled to the return of the dowry; that person, however, needed the wife´s consent in order to bring an action. The Romans called that *adjuncta filiae persona*. A daughter did not have to give her explicit consent, it was sufficient if she did not explicitly disagree with her father's bringing about the action. Furthermore, a daughter was not allowed to refuse her consent without good reason.

Chapter V
THE LAW OF THINGS

1. Concept

Special concept of "the Law of Things" couldn't be found within the sources of Roman law. Its character and content could be derived from the concept of relationship between the right and action and in a broader sense from the character of an absolute dominion of a man – head of the family (*pater familias*) over persons subordinated to him which was manifested through absolute rights of the family and property nature. Out of these rights Romans put into the realm of the law of things those rights that had a property nature. These rights are characterized by being applicable against everyone (*erga omnes*) and being protected through an action *in rem*.

1.1. Subject of the Law of Things

The subject of the Law of Things is the property (*patrimonium*) and things belonging into it. Things in the basic sense could be (Gai. Inst. 2,13-14; D. 1,8,1,1):

a) material things (*res corporales*), i.e. things that could be touched and that could be subject of a property right (*dominium*),

b) proprietary rights different from the property right/ownership (*res incorporales*), i.e. things that couldn't be touched, e.g. servitudes (*iura praediorum*), rights of inheritance (*ius successionis*), usufruct (*ususfructus*), obligations (*obligationes*).

1.2. System of the Law of Things

Real rights are being divided into two basic categories:

a) real rights to one's own thing (*iura in re propria*) – representing an absolute dominion over a thing; property rights belongs into this category:

- under the civil law (*dominium ex iure Quiritum*), protected through civil law actions and
- praetorial ownership (*in bonis esse* – so-called bonitary ownership), protected through a praetorial action *actio Publiciana*, in which the praetor for the purposes of evidence pretend that the prescriptive period of the possessor has lapsed and thus puts him into the position of a owner *ex iure Quiritium* during

legal suit;

b) real rights to somebody else's thing (*iura in re aliena*) – authorizing its holder to a limited authority over somebody else's thing:

- servitudes (*praediorum servitutes)* – the right of use of somebody else's land,
- right of enjoyment (*ususfructus)* – the right of use of somebody else's fruit-bearing thing and to enjoy its fruits,
- right to use (*usus)* – the right of usage of somebody else's thing,
- hereditary tenancy of land (*emphyteusis*),
- hereditary right to a building (*superficies*),
- lien (*fiducia*, pledge, mortgage).

1.3. Actio in rem

Right to a thing (*ius in rem*) as an absolute subjective right was protected through a real action (*actio in rem*) through which the plaintiff enforces that a specific thing is his or enforces a specific other exclusive right operating against everybody. Real actions under the civil law were called *vindicationes* (Gai. Inst. 4,5). According to the type of real right they were protecting they are being termed as:

- *rei vindicatio* (action enforcing dominion over a thing as a subject of ownership),
- *vindicatio servitutis* (action enforcing comity of a praedial servitude),
- *vindicatio ususfructus* (action enforcing comity of a personal servitude),
- *vindicatio pignoris* (action of praetorial law protecting the right of a pledge for handing over the pledged thing).

In classical Roman law the essence of what is the plaintiff enforcing through an action *in rem* is his assertion of an absolute and exclusive dominion over a thing against everyone (whether in full or limited scope). Since with the right to a thing there is no bearer of a subjective duty towards the entitled, as a result the action formula does not name the defendant and it is assumed that if the plaintiff proves his right the violator has to give way so that the holder of the real right can exercise complete dominion over the thing.

2. The term „thing"

In the narrow sense and from the positive viewpoint a thing according to Roman law is such a material body (*res corporales*), which is as a separate object capable of being a subject of an absolute subjective right within the private law. In a broader sense, it also immaterial things (*res incorporales*), though existing only legally and not physically.

Thus defined things are subject to trading (*res in commercio*) and an individual may acquire their ownership or limited real rights to them.

The negative definition of things states that outside this category, i.e. excluded

from trading (*res extra commercii*) are:

a) public things (*res publicae*), i.e. those that were designed for public use (streets, ports, theaters, spas, state slaves) or those that are shared by all in accordance with natural law (air, rivers, sea and seashores within the borders of the Roman Empire); public things are not a property of any particular individual but are owned by everybody collectively;

b) things of divine law, i.e.

- things consecrated to the divine cult (*res sacrae*) – temples and cult objects which were publicly consecrated; their value couldn't be expressed in monetary terms (Ulp. D. 1,8,9,5);
- things consecrated to the cult of the deceased (*res religiosae*) – graves of Roman citizens as well as slaves;
- sacred tings (*res sanctae*) – city walls, battlements and gates.

Things of divine law are "in the ownership of no one" (*in nullius bonis sunt* – Marc. D. 1,8,6,2).

2.1. Component of a thing

Component of a thing is not a thing in legal sense. It could be present within a singular or a compound thing.

a) A singular thing

Thing consisting of components that are not independent is referred to as a singular (simple) thing because its components form an organic unity created through connecting (*accessio*). Connecting may occur through:

- welding of metal components (*ferruminatio*),
- taking roots of a tree or other plants into the ground (*implantatio*),
- sowing of seeds into the ground (*satio*),
- constructing a building with foundations fixed with ground (*inaedificatio*).

The real right to originally independent things (components) terminate after the connecting takes place.

b) A compound thing

If the thing is made up of separate components, it is a compound thing. It is created through a mechanical connecting of separate components, which maintain their essence. Although its components may still be subject to real rights of different individuals, outwardly only the owner of a compound thing acts in legal relations, as long as the connection of individual components lasts. Any prospective real rights to components could be recovered after their separation through an action *actio ad exhibendum.*

2.2. A collective thing

Singular things that are not materially connected, but are united in pursuit of a common economic interest (for which they are intended), they constitute a collective thing. Subject of a real right, even in case of different holders, could fundamentally be only individual pieces since the whole is subject to change of individual (singular) items. The whole is legally significant in case of enforcement of e.g. a right of enjoyment (*ususfructus*) or of a herd of animals (*vindicatio gregis*), as indicated in the latter case by Ulpianus:

Ulp. D. 6,1,1,3: *Per hanc autem actionem non solum singulae res vindicabuntur, sed posse etiam gregem vindicari Pomponius libro lectionum vicensimo quinto scribit. Idem et de armento et de equitio ceterisque, quae gregatim habentur, dicendum est. Sed enim gregem sufficiet ipsum nostrum esse, licet singula capita nostra non sint: grex enim, non singula corpora vindicabuntur.*	**Ulp. D. 6,1,1,3:** By means of this action not only can specific property be recovered, but, Pomponius, in the Twenty-fifth Book of Passages, says that an action may be brought for a flock, and also for a herd of cattle, and for a stud of horses, as well, and it may be said for all other animals which are kept together in droves. It is sufficient if the flock itself belongs to us, even though individual heads of the same may not be ours, for it is the flock which is claimed, and not the individuals constituting the same.

2.3. Accessory

Legally separate thing which is determined by owner's decision to be used for the main thing as its accessory is not a component and therefore could be a subject of a real right. Since the purpose of things which form the accessory (usage in accordance with their economic goal) only becomes apparent in connection with the main thing, their economic servility comes to the fore (e.g. key and lock). Consequently an accessory suffers the legal fate of the main thing, unless it is proved otherwise or unless the thing constituting an accessory has its own economic purpose (e.g. a barrel).

2.4. Fruits

Fruits (*fructus*) are a regular, recurring economic yield of fruit-bearing thing. The essence of the fruit-bearing (parent) thing does not change and retains its economic purpose as well.

Child of a slave is not a fruit, because child (even in regards to a slave, i.e. a thing in the legal sense) cannot be regarded as a thing with an economic purpose. Meat and fur are also not fruits, because they are not a regular and recurring yield.

As long as the fruit is connected to the fruit-bearing thing, it is not a separate thing

thus it is not an independent subject of real right. Through separation from a parent thing fruits become things to which a subjective right could be obtained.

As fruits under the Roman law were considered:

a) Natural fruits (fructus naturales)

This category included organic yields of a parent thing (e.g. fruits, grain, flowers and leaves, milk, eggs, animals' young, wool from animals) and yields of inorganic nature (minerals, e.g. coal, ore).

b) Civil fruits (fructus civiles)

The term civil (legal) fruits denotes a regular economic yield of a legal relationship *(loco fructum)* in the form of a monetary improvement, e.g. lease, tenancy, usage of work of somebody else's slaves.

2.5. Fungible and infungible things

A thing, which it is possible within the legal trade to replace (substitute) by another piece of a thing of the same kind, is referred to as a fungible thing. In the legal relationship they are defined by weighing, counting or measuring (Paul. D. 12,1,2,1). The criteria determining a subjective right, or an obligation are type, quality and quantity. Included in this category were mainly wine, grain, money, flour. Since the species does not perish obligation of the debtor who is burdened with the risk (*periculum*) cannot terminate.

A thing, which is determined within a legal relationship through specific characteristics that distinguish it from others of the same species, is known as an infungible thing. Subjective duty is bound to satisfaction through the same thing, i.e. its delivery, respectively its return. Thing determined through specific characteristics is e.g. a specific cow, a specific slave or a specific table. The nature and degree of individualization of the thing is governed by the will of the parties, from which subsequently derives the nature of the subjective right, respectively the subjective duty within that particular contract. The risk of an accidental destruction, or damage of the thing determined through specific characteristics is basically the burden of the owner of the thing.

2.6. Mancipable and non-mancipable things

The most important difference is related to the things mancipable (*res mancipi*) and non-mancipable (*res nec mancipi*). This distinction is connected to singling out of the economically most important and most valuable things of the Roman familia from the property of *patris familiae*. These included:

- lands in Italy (urban as well as rural),

- slaves,
- domestic four-footed animals designated for hauling and carrying of burdens,
- rural praedial servitudes.

An essential element with this division is a different way of transfer of ownership in trade, which with the mancipable things had to be done through *mancipatio* or *in iure cessio*, i.e. formal legal acts. This feature makes the transfer of title character of publicity and enhances the protection of the rights of third parties in business relationships.

All the other things were non-mancipable and the transfer of title for them could have been made through an informal legal act (*traditio*) with consideration to the nature of the thing (e.g. *traditio longa manu, traditio brevi manu*). Division of thing to the mancipable and non-mancipable was abolished by the emperor Justinian; as a result *mancipatio* as a special mode of transfer of ownership. Differences concerning the mancipable and non-mancipable things could be found in the Gaius' Institutes:

Gai. Inst. 2,19-22:	**Institutes of Gaius 19-22:**
19. Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem.	19. Things which are not saleable by mancipation become the property of others absolutely by mere delivery; if they are corporeal and on this account are capable of being delivered.
20. Itaque si tibi uestem uel aurum uel argentum tradidero siue ex uenditionis causa siue ex donationis siue quauis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim.	20. Therefore, if I deliver to you a garment, or some gold or silver, either by way of sale or donation, or for any other reason, the property immediately becomes yours, provided I am the owner of the same.
21. In eadem causa sunt prouincialia praedia, quorum alia stipendiaria, alia tributaria uocamus: stipendiaria sunt ea, quae in his prouinciis sunt, quae propriae populi Romani esse intelleguntur; tributaria sunt ea, quae in his prouinciis sunt, quae propriae Caesaris esse creduntur.	21. To the same class belong lands in the provinces, some of which we designate as taxable, and others as tributary. Those are taxable which are situated in the provinces and are understood to be the property of the Roman people; those are tributary which are situated in the provinces and are considered the property of the Emperor.
22. Mancipi uero res sunt, quae per mancipationem ad alium transferuntur; unde etiam mancipi res sunt dictae. quod autem ualet mancipatio, idem ualet et in iure cessio.	22. On the other hand, things susceptible of sale are such as are transferred to another by mancipation, from whence they are styled mancipable, and this has the same validity as a transfer in court.

2.7. Divisible and non-divisible things.

Things, that could be divided without the loss of their integrity and economic pur-

pose, are divisible in the legal sense (e.g. piece of land, food, wood, coal). These things even after the division retain their nature and the divided parts continue to retain their value, which can be expressed as a proportion to the whole before the division (in the form of a fraction or a percentage).

In the legal sense, the non-indivisible things cannot be divided without the loss of their integrity and economic purpose. After their eventual division their nature as well as value ceases completely (e.g. a broken vase, a destroyed statue, a cut-up the painting). This category of things is significant mainly in relation with a co-ownership and its dissolution.

2.8. Consumable and non-consumable things.

Things that through their usage for their own purpose are extinguished (consumed) are called consumable (e.g. food, wood and coal as fuel, stone as building material). If the thing can be used in accordance with its economic purpose repeatedly and without loss of its value, the thing is non-consumable. If the value of the thing through its use gradually and naturally decreases, such a thing is referred to as a wearable thing (e.g. clothing).

The importance of this distinction surfaces when defining an object of certain contracts. Consumable things are defined generically as an object of the contract (e.g. loan) and consequently is defined the obligation of the debtor. Non-consumable things are being defined through specific characteristics (e.g. as with the custody, lending, or leasing of a thing) and from it derives the obligation of the debtor, content of which is to return the same thing.

3. Ownership

3.1. The term "ownership"

Concept of ownership in the Roman law is based on the position of head of the family (*pater familias*). From under his absolute power over everything in the house (*manus*) were gradually set aside material things and power over was termed as *dominium ex jure Quiritium*, which was the only form of ownership under the civil law and it took the most prominent place within the private law sphere. Conceptual definition of ownership is best expressed by its attributes.

The attributes of the Roman ownership are:

a) Direct dominion over the thing

Within the system of real rights ownership is at its peak. There is no other real right which would correspond with the content of ownership. Essential though is the mode of legal protection of ownership. Within the formula process the action to pro-

tect ownership in the *intentio* merely states the existence of the plaintiff's ownership and contains no so-called claim that had developed only later within the construct of ownership protection.

b) Exclusivity of ownership

The construct of ownership allowed the owner to exclude everybody else from impacting on the thing, i.e. it operates *erga omnes*. This led to the situation that the only way in which participation of several persons on ownership was the co-ownership existing only in ideal proportions.

c) Unlimitedness (universality) of ownership

It is characteristic for the ownership that only it concentrates in itself all the privileges that grant the owner different options of use of the subject of ownership. These privileges create an integral unity in that sense that they operate each in its own particular direction. In addition to the unlimitedness in the real-right sense, the ownership is unlimited in terms of time, i.e. in terms of its duration. Other real rights (real rights to somebody else's thing) were in their nature basically just limitation of the ownership, they derived from it, and therefore they didn't have the nature of independent rights. The limitation of the ownership and with it associated creation of limited real rights of another person to his thing was strictly up to the decision of the owner (unilaterally in case of servitudes or pursuant to an agreements, e.g. in case of a lien). If the limit was terminated, all ownership privileges were returned to the owner automatically. This phenomenon is known as elasticity (flexibility) of ownership.

3.2. Subject of ownership

Subject (holder) of ownership could have been natural (physical) persons and legal entities. Roman State was also a subject of ownership, especially in the public law sphere, especially ownership of public land (*ager publicus*). If the state exceptionally entered into a private-law relationship (i.e. relationship subject to the jurisdiction of a court), then the subject of ownership was the Treasury (*aerarium*) and within the legal relationship the state was represented by an officer (*magistratus*). Things owned by the state couldn't be owned by citizens. Subjects of ownership were also other legal entities (e.g. municipalities, villages, societies).

A natural person is capable to be a subject of ownership in accordance with the natural law. But in Rome after the decline of gender arrangements the nature of agnate family assumed that the subject of ownership could be only *pater familias*; since he was the only one within the agnate family a person *sui iuris*. Outside the agnate family, however, even women *sui iuris* (those who were not under the paternal or marital power) could have been subject of ownership. Persons who were *alieni iuris* and slaves couldn't acquire any subjective right for themselves and therefore they couldn't be holders of ownership. Foreigners couldn't acquire ownership *ex iure Quiritium* (*do-*

minium ex jure Quiritium), only ownership under their domestic law, or the jurisdiction of the alien praetor (*ius gentium*).

3.3. Object of ownership

The object of ownership in the private law could have basically be those things that were not excluded from trade in the legal sense. The object of the ownership *ex iure Quiritium* as a real estate could have been only Italian land *(fundus italicus),* not the land in the provinces which was in the ownership of the state. If a Latin under his right to trade *(ius commercii)* had acquired Italian land, he acquired ownership only according to the law of his Latin municipium. Foreigners (*peregrini*) were allowed to acquire ownership of Italian land only toward the end of the republic, and even then only under the alien law *(ius gentium)*. Italian land was not taxed. Also slaves were objects of ownership.

3.4. Types of ownership

a) Ownership ex iure Quiritium

The civil law *(ius civile)* provided legal protection only for the ownership *ex iure Quiritium.* This type of ownership could have been acquired only by Roman citizens and it was characterized by a strict formalism which is typical for ancient period of Roman state. The formality of the ownership *ex iure Quiritium* surfaces with transfer of mancipable things when it was necessary to make the transfer through a formal legal act – mancipation.

b) Praetorial (bonitary) ownership

Praetor as a holder of imperium within his jurisdiction had protected in certain defined situations civilian possessors against an owner *ex iure Quiritium* by paralyzing civil-law effects of certain legal acts in the interest of fairness and decency. Therefore Roman citizens had, in accordance with this practice, two types of ownership available to them (*duplex dominium*, Gai. 1.54) – ownership *ex iure Quiritium* and bonitary ownership. That is to say that praetor in such a situation was not competent to bestow protection through a civil action, but a situation worthy of protection he termed as "is a property of" (*in bonis esse*). The other person, who has an ownership *ex iure Quiritium* to the same thing, has according to the praetor *nudum ius Quiritium*.

Acquisition of bonitary ownership could have happened especially in these instances:

- transfer of mancipable thing only through an informal mode (*traditio*) based on accepted legal cause *(ex iusta causa)*,

- acquisition (transfer) of a thing based on a legal cause from a non-owner who has additionally become an owner.

During the suit of a plaintiff who is an owner *ex iure Quiritium* and a defendant who is a bonitary owner the praetor granted an exception of a sold and transferred thing *(exceptio rei venditae et traditae)* and if the defendant proved the exception, he was acquitted. Through lapse of prescriptive period he acquired ownership *ex iure Quiritium*.

If the thing was taken away from the bonitary owner by anyone, he was granted by the praetor the action *actio Publiciana*, which was effective against everyone *(erga omnes)*. In this action the praetor for the purposes of the suit pretended in favor of the bonitary owner (civil possessor) that the prescriptive period has elapsed and if the possessor (bonitary owner) proved to the judge all the other presumptions of acquisition of the ownership *ex iure Quiritium* through prescription (usucapio), the bonitary owner won the suit. Through lapse of prescriptive period he acquired ownership *ex iure Quiritium*.

Gradually the praetor granted legal protection in other situation when the possessor had the thing in property *(in bonis res esse)*:

- occupation of a derelict thing (during the classic law period),
- by the praetor granted possession of inheritance *(bonorum possessio)* with a effect *cum re,*
- praetorial induction into bonitary ownership of a neighbor's building in case of danger *(missio in possessionem)*,
- purchase of the whole property at an auction.

c) Provincial ownership

Land in the provinces was the property of the Roman state (i.e. of the Roman people or the emperor). After the seizure the state had left it in possession of provincial population or had granted its possession to the Roman citizens. They had acquired a status similar in its content to the ownership *ex iure Quiritium* and an analogous legal protection. For the provincial land a benefit called *stipendium* (land in the senatorial province) or *tributum* (land in the imperial province) had been paid to the Treasury.

c) Ownership of foreigners

In suits between a Roman citizen and a foreigner or between two foreigners that were conducted on within the Roman empire the alien praetor *(praetor peregrinus),* who was competent to adjudicated in these suits basically absolutely freely, could take into consideration ownership of the foreigner who was a party to the suit.

3.5. Acquisition of ownership

Originally, the oldest Roman law has always seen the acquisition of ownership from the predecessor as an emergence of a new right, i.e. not as a transfer of rights. Only

classical Roman law developed a construct of a singular succession into ownership of the predecessor. Acquirer of the ownership of a thing obtains the thing with the same rights and those burdened with the same burdens as it was with the predecessor.

Person who is an alienor must be the owner of the thing since as states Ulpianus (D. 50,17,54): *"nemo plus iuris ad alium transferre potest, quam ipse haberet"* (nobody can transfer to another more rights than he has himself). Furthermore the alienor must be entitled to dispose with the thing (take legal action with it) and he must be competent to act legally. Eventual limitation of possibility of alienation of the thing does not impact on the transfer of ownership, it only constitutes an eventual responsibility of the alienor for eviction (i.e. responsibility for dispossession of the thing in the legal suit) and the effects are present only between the parties of the transfer.

Important distinction is the mode of acquiring of the ownership. Theory of the pandect law (19th century) developed a theoretical concept of an original and derived mode of acquiring ownership, which was taken over by the modern civil law.

3.5.1. Original mode of acquisition of ownership

If the acquirer does not derive his ownership of the thing from the predecessor, he acquires through an original mode of acquisition of ownership. Acquisition is being made through an unilateral legal act of the acquirer. It is irrelevant that the thing has sometime in the past been a subject of ownership of someone else; it is essential that at the time of acquisition the ownership is being created through an unilateral declaration of will of the acquirer. Among these modes the following circumstances (causes) were included:

- occupation,
- discovery of a treasure,
- fusion,
- commingling/commixtion,
- mingling,
- processing.

a) Occupation

Occupation as a mode of acquiring of ownership presupposes following factual circumstances:

- grasping of a thing into possession *(adprehensio),*
- will to retain the thing *(animus possidendi),*
- the thing is at the moment of occupation without a dominus, i.e. it does not belong to any one *(res nullius).*

It means that through an unilateral grasping of nobody's thing in conjunction of declaration of will to retain it originates the ownership. Factual circumstances of the occupation and the reason for its recognition to be found in the natural law is stated

by the lawyer Gaius:

Gai. D. 41,1,3, pr. *Quod enim nullius est, id ratione naturali occupanti conceditur.* **Gai. Inst. 2,66:** *Nec tamen ea tantum, quae traditione nostra fiunt, naturali nobis ratione adquiruntur, sed etiam occupando ideo res adquisierimus, quia antea nullius essent; qualia sunt omnia quae terra mari caelo capiantur.*	**Gai. D. 41,1,3, pr.** For what does not belong to anyone by natural law becomes the property of the person who first acquires it. **Gai. Inst. 2,66:** Property which becomes ours by delivery can be acquired by us not only by natural law, but also what we appropriate by occupancy as previously unowned; such as all things, which are captured on land, or in the sea, or in the air.

The object of occupation could have been only things that didn't belong to anybody. Those were in the Roman law considered to be:

- *wild animals (ferae bestiae)* living naturally free in the wild; the hunter acquired ownership of the caught animals regardless of whether the land belonged to him or not except for situations when the land-owner reserved the hunt for himself. If the caught wild animal later fled the owner (disappeared from sight) or was so distant that its re-capture would be difficult, the ownership was terminated; to be wild animals were also considered fish, birds and bees (ownership of the bees was acquired through closing them in the hive - Just. Inst 2,1,13);
- *abandoned things (res derelictae)* - i.e. if the owner waived his ownership of the thing through disposal of possession of the thing and declaration of will to let it be;
- *newly formed island at sea (insula in mari nata);*
- *things found on the seashore (res inventae in litore maris)* – they may not, however, come from a wrecked ship;
- *abandoned riverbed (alves derelictus);*
- *enemies' things in the Roman territory (res hostiles)* – things of war opponents and things of foreigners whose states didn't have a contract of protection with Rome in the moment of outbreak of war and their things were on the Roman territory; this category did not contain spoils of war;
- *abandoned, i.e. wild land (ager desertus)* – during the post-classical period those were mainly land on borders and that land that were abandoned by the owner because he didn't want to pay taxes; such land became ownership of that person who had seized the land and was willing to pay taxes for it;

b) Discovery of a treasure

Circumstances constituting a discovery of a treasure (thesaurus) show small differences to occupation. Treasure was money or other valuable things that were hidden

for so long within another thing that it is not possible to remember whom did they belong, i.e. who was their owner. Lawyers Paulus and Tryphoninus (Claudius Tryphoninus, turn of 2nd and 3rd century A.D.) about the treasure state:

Paul. D. 41,1,31,1: *Thensaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat: sic enim fit eius qui invenerit, quod non alterius sit. Alioquin si quis aliquid vel lucri causa vel metus vel custodiae condiderit sub terra, non est Thensaurus: cuius etiam furtum fit.*	**Paul. D. 41,1,31,1:** A treasure is an ancient deposit of money, the memory of which no longer remains, so that it now has no owner. Hence, it becomes the property of him who finds it, because it belongs to no one else. On the other hand, if anyone, for the sake of profit, or actuated by fear, with a view to its preservation, hides money in the ground, it is not a treasure, and anyone who appropriates it will be guilty of theft.
Tryph. D. 41.1.63 pr*.:* *Si is qui in aliena potestate est Thensaurum invenerit, in persona eius cui adquirit hoc erit dicendum, ut, si in alieno agro invenerit, partem ei adquirat, si vero in parentis dominive loco invenerit, illius totus sit, si autem in alieno, par***s.**	**Tryph. D. 41.1.63 pr.:** If anyone who is under the control of another finds a treasure, it must be said with reference to the person for whom it is acquired that if the former finds it upon the land of another, he will be entitled to half of it; but if he finds it upon the land of his father or master, the whole of it will belong to the latter; (and only half, if it is discovered upon the land of someone else).

Ownership of the treasure was acquired by the finder in the moment of discovery even without the occupation, if the treasure was discovered at his land. If the finder had discovered the treasure at another's land, the emperor Hadrianus determined (Just. Inst. 2,1,39) that if the finder discovered the treasure by chance, the landowner will acquire ownership of half of the treasure from the moment of discovery, i.e. also without occupation *(ipso iure).* If someone was deliberately searching for the treasure on another's land without permission and found it the treasure belonged to the landowner from the moment of discovery. Concealment of discovery was in the Roman law considered to be a theft (delict under the civil law).

c) Fusion

Fusion *(accessio)* in the legal sense means extinction of an originally separate thing by attachment to another thing (considered to be a main thing) into one unit, for as long as the attachment lasts. The attachment may have occurred with a movable thing with an immovable thing (i.e. land) and with two movable things.

If the attachment was between the movable thing and land that has no fixed measured boundaries *(ager arcifinius),* there were these instances:

- silt to the land *(alluvio),*
- attachment of piece of land, which was brought by water to the land *(avulsio)*,
- accruing of abandoned riverbed to the shore,
- accruing of an island emerged in the river to the shore land.

In attachment of a movable thing property to land, which has measured boundaries, i.e. to the land that does not have a river as a border *(ager limitatus)*, there were these options:

- grain sown into land *(satio)*,
- planting of a plant into the land and its rooting *(implantatio)*,
- erection of a building with firm foundation in the land *(inaedificatio)*.

In these instances the Roman law the principle that surface gives way to the bottom *(superficies solo cedit)* was applied. The effect of this principle is that the owner of the main thing, which is in case of attachment of movable thing with immovable always the land, becomes the owner of the whole. Ownership of the movable thing gives way to the ownership of the land. The thing that was attached to the land becomes an integral part of the land and ceases to exist as a separate object of law and it suffers the future legal fate of the land.

Regarding the attachment of a movable thing to an immovable thing Gaius in his textbook of law states the following:

Gai. Inst. 2,70: *Sed et id, quod per alluuionem nobis adicitur, eodem iure nostrum fit: per alluuionem autem id uidetur adici, quod ita paulatim flumen agro nostro adicit, ut aestimare non possimus, quantum quoquo momento temporis adiciatur: hoc est, quod uolgo dicitur per adluuionem id adici uideri, quod ita paulatim adicitur, ut oculos nostros fallat.*	**Institutes of Gaius 2,70:** Land acquired by us through alluvion also becomes ours under the same law. This is held to take place when a river, by degrees, makes additions of soil to our land in such a way that we cannot estimate the amount added at any one moment of time; and this is what is commonly stated to be an addition made by alluvion, which is added so gradually as to escape our sight.
Gai. Inst. 2,73: *Praeterea id, quod in solo nostro ab aliquo aedificatum est, quamuis ille suo nomine aedificauerit, iure naturali nostrum fit, quia superficies solo cedit.*	**Institutes of Gaius 2,73:** Moreover, any building erected on our land by another, even though the latter may have erected it in his own name, is ours by Natural Law, for the reason that the surface is part of the soil.
Gai. Inst. 2,75: *Idem contingit et in frumento, quod in solo nostro ab aliquo satum fuerit.*	**Institutes of Gaius 2,75:** The same rule also applies to grain which has been sowed by another upon our land.

When attaching two movable things it is crucial which thing has retained its original purpose after the attachment. That one was after the attachment considered being the main thing and its owner acquired ownership of the whole. Gaius in his Insti-

tutes states about the attachment of two movables:

Gai. Inst. 2,77: *Eadem ratione probatum est, quod in cartulis siue membranis meis aliquis scripserit, licet aureis litteris, meum esse, quia litterae cartulis siue membranis cedunt: itaque si ego eos libros easue membranas petam nec inpensam scripturae soluam, per exceptionem doli mali summoueri potero.*	**Institutes of Gaius 2,77:** It is settled by the same rule that whatever anyone has written on my paper or parchment, even in letters of gold, is mine, because the letters are merely accessory to the paper or parchment; but if I should bring an action to recover the books or parchments, and do not reimburse the party for the expense incurred in writing, I can be barred by an exception on the ground of fraud.
Gai. Inst. 2,78: *Sed si in tabula mea aliquis pinxerit ueluti imaginem, contra probatur: magis enim dicitur tabulam picturae cedere. cuius diuersitatis uix idonea ratio redditur: certe secundum hanc regulam si me possidente petas imaginem tuam esse nec soluas pretium tabulae, poteris per exceptionem doli mali summoueri; at si tu possideas, consequens est, ut utilis mihi actio aduersum te dari debeat; quo casu nisi soluam inpensam picturae, poteris me per exceptionem doli mali repellere, utique si bonae fidei possessor fueris. illud palam est, quod siue tu subripueris tabulam siue alius, conpetit mihi furti actio.*	**Institutes of Gaius 2,78:** If, however, anyone paints anything on a tablet belonging to me, as for instance, a portrait, the contrary rule is adopted, for it is said that the tablet is accessory to the painting; but a good reason for this difference hardly exists. According to this rule it is certain that if you bring an action for the portrait as yours, while I am in possession of the same, and you do not pay me the value of the tablet, you can be barred by an exception on the ground of fraud. But, if, you are in possession, the result will be that I should be granted an equitable action against you, in which instance unless I pay the expenses of the painting, you can bar me by an exception on the ground of fraud, just as if you were a possessor in good faith. It is clear that if either you, or anyone else should steal the tablet, I will be entitled to an action of theft.

d) Commingling/commixtion

When have been mixed two powdery solid substances belonging to two different owners based on their agreement and their separation is not possible because they are indistinguishable, there exists an co-ownership to the mixture in proportion to the ratio of values of the mixed things. If it was possible to separate the substances, each owner retained his ownership to his substance since the substance has in spite of mixing retained its integrity. If mixing *(commixtio)* occurred by an act of one without the will (consent) of the other, there is no co-ownership but both retain their ownership.

Claiming (i.e. vindicating through *actio in rem*) was possible for each owner only for that particular amount that corresponds with the value of his thing that was present in the mixture:

Ulp. D. 6,1,5, pr.: *Idem Pomponius scribit: si frumentum duorum non voluntate eorum confusum sit, competit singulis in rem actio in id, in quantum paret in illo acervo suum cuiusque esse: quod si voluntate eorum commixta sunt, tunc communicata videbuntur et erit communi dividundo actio.*	**Ulp. D. 6,1,5, pr.:** Pomponius also says that where grain belonging to two persons was mixed without their consent, each one of them will be entitled to an action in rem for such an amount of the heap as appears to belong to him: but, where the grain was mingled with their consent, it will then be held to be in common, and an action for the division of property owned in common will lie.

When have been mixed such substances which in view of their nature and properties could have been separated, the co-ownership did not exist, but each owner could sue for delivery of his own substance. Also Ulpianus writes about this thus:

Ulp. D. 6,1,5,1: **...** *Sed si plumbum cum argento mixtum sit, quia deduci possit, nec communicabitur nec communi dividundo agetur, quia separari potest: agetur autem in rem actio.*	**Ulp. D. 6,1,5,1:** ... Where, however, lead is mixed with silver, for the reason that it can be separated it will not become common property, nor can an action for the division of common property be brought: but an action in rem will lie because the metals can be separated.

However, when the result of mixing is such a mixture that the individual substances cannot be separated, but none of the substances loses its integrity (e.g. mixing copper with gold creates an alloy), owners may sue according to their ownership shares *(vindicatio pro parte)*:

Ulp. D. 6,1,5,1: *... Sed si deduci, inquit, non possit, ut puta si aes et aurum mixtum fuerit, pro parte esse vindicandum: nec quaquam erit dicendum, quod in mulso dictum est, quia utraque materia etsi confusa manet tamen.*	**Ulp. D. 6,1,5,1:** ... But he says that, where they cannot be separated, as for instance, where bronze and gold are mixed, suit for recovery must be brought in proportion to the amount involved; and what was stated with reference to the mixture of honey and wine will not apply, because though both materials are mingled, they still remain.

When occurs mixing of money of two different owners so that they couldn't tell which coins belonged to whom before the mixing, ownership was acquired by the

one who has mixed the money. The one, whose ownership was terminated by mixing of the money, could only recover damages. In case the one who has mixed the money did not do it in good faith (i.e. thief), the robbed one could use an action to a fine *(actio poenalis*).

Javol. D. 46,3,78: *Si alieni nummi inscio vel invito domino soluti sunt, manent eius cuius fuerunt: si mixti essent, ita ut discerni non possent, eius fieri qui accepit in libris Gaii scriptum est, ita ut actio domino cum eo, qui dedisset, furti competeret.*	**Javol. D. 46,3,78:** When money belonging to another is paid without the knowledge or consent of the owner, it still continues to be his property. If it is mixed with other money, so that it cannot be separated, it is stated in the Books of Gaius that it will belong to the person who receives it; so that an action of theft will lie in favor of the owner against him who paid the money.

e) Mingling

When mingled (*confusio*) two substances of two different owners and it were possible to separate them, each owner retained his ownership. When mingled two different substances so that they couldn't be separated, ownership to the mingled substance was acquired in an original mode by whomsoever mingled the liquids, because neither substance after the mingling has retained its integrity (e.g. in case of mingling of honey and wine, as states Ulpianus):

Ulp. D. 6,1,5,1 *Idem scribit, si ex melle meo, vino tuo factum sit mulsum, quosdam existimasse id quoque communicari: sed puto verius, ut et ipse significat, eius potius esse qui fecit, quoniam suam speciem pristinam non continet.*	**Ulp. D. 6,1,5,1** He also says that if a mixture should be made of my honey and your wine, some authorities think that this also becomes common property: but I maintain the better opinion to be, (and he himself mentioned it) that the mixture belongs to the party who made it; as it does not retain its original character.

f) Processing

Processing (*specificatio*) means such modifying of a thing (material) through work which leads to creation of a new thing. If someone treated other's matter, there were three different views among Roman lawyers on who acquires the ownership of the new thing. The Sabinian School defended the position that the new thing belongs to the owner of material (emphasis on substance), the Proculian School granted ownership of the new thing to the person who processed the material (focus on form). Ac-

cording to the opinion, which was developed from the starting point of two previously stated opinions and which was stabilized, the new thing was acquired by the owner of material when the thing could be put back into its original form. Where this was not possible, ownership of the new thing was acquired by the processor. If the processor acted maliciously (not *ex bona fidei*) he was responsible from theft. Gaius brings the following communication about the processing:

Gai Inst. 2,79:	**Institutes of Gaius 2,79:**
In aliis quoque speciebus naturalis ratio requiritur: proinde si ex uuis aut oliuis aut spicis meis uinum aut oleum aut frumentum feceris, quaeritur, utrum meum sit id uinum aut oleum aut frumentum an tuum. item si ex auro aut argento meo uas aliquod feceris uel ex tabulis meis nauem aut armarium aut subsellium fabricaueris, item si ex lana mea uestimentum feceris uel si ex uino et melle meo mulsum feceris siue ex medicamentis meis emplastrum aut collyrium feceris, quaeritur, utrum tuum sit id, quod ex meo effeceris, an meum. quidam materiam et substantiam spectandam esse putant, id est, ut cuius materia sit, illius et res, quae facta sit, uideatur esse, idque maxime placuit Sabino et Cassio; alii uero eius rem esse putant, qui fecerit, idque maxime diuersae scholae auctoribus uisum est: sed eum quoque, cuius materia et substantia fuerit, furti aduersus eum, qui subripuerit, habere actionem; nec minus aduersus eundem condictionem ei competere, quia extinctae res, licet uindicari non possint, condici tamen furibus et quibusdam aliis possessoribus possunt.	Where the nature of the article is changed recourse to natural law is also required. Hence, if you make wine, oil, or grain, out of my grapes, olives, or heads of wheat, the question arises whether the said wine, oil, or grain is mine or yours. Likewise, if you manufacture a vase out of my gold or silver, or build a ship, a chest, or a bench with my lumber, or you make a garment out of my wool, or mead out of my wine and honey; or a plaster or eye-wash out of drugs belonging to me, the question arises whether what you have made out of my property is yours or mine. Certain authorities hold that the material or substance should be taken into consideration, that is to say, that the article manufactured should be deemed to be the property of him to whom the material belongs, and this opinion was adopted by Sabinus and Cassius. Others, however, hold that the article belongs to him who manufactured it, and this doctrine was approved by authorities of the opposite school, who also agreed that the owner of the material and substance was entitled to an action of theft against the party who had appropriated the property; and also that a personal action would not lie against him because property which has been destroyed cannot be recovered; but, notwithstanding this, personal actions can be brought against thieves and certain other possessors.

3.5.2. Derivative mode of acquisition of ownership

With the derivative mode the acquirer derives his ownership from the ownership of his predecessor to the same extent and content. Acquisition is realized based on agreement through bilateral legal act through which the ownership is transferred in such a way that the alienor is giving it up and the acquirer is accepting it. The acquirer acquires the same legal status with the thing as his predecessor to the extent defined by the legal act. Derivative modes of acquisition of ownership in Roman law were:

- mancipation (*mancipatio),*
- tradition *(traditio)*,
- iniurecesio *(in iure cessio)*.

a) Mancipation

Mancipation is an abstract formal bilateral legal act of alienation between Roman citizens, through which the acquirer obtains from the alienor the ownership *ex iure Quiritium* of a mancipable thing. When one of the parties of mancipation was a foreigner with the Roman *ius commercii*, he acquired ownership rights only according to his municipality (not the *dominium ex iure Quiritium*). When the object of mancipation was a non-mancipable thing (*res nec mancipi*) the result was the invalidity of mancipation. Presumptions of validity of mancipation and of achievement of its effects were:

- participation of alienor and acquirer (persons *sui iuris* or *alieni iuris*), representation was not possible with the exception of guardian of a mentally ill person *(curator furiosi)*;
- presence of five witnesses (adult male Roman citizens);
- presence of Roman citizen holding the scale *(libripens);*

The acquirer grasped the object of mancipation, uttered the prescribed mancipation formula, struck the scales with a piece of copper and symbolically handed over the copper "instead of the purchase price" (*pretii loco*) to the alienor. If the alienor was not an owner *ex iure Quiritium* the transfer of ownership *ex iure Quiritium* did not occurre as a result of the above-mentioned principle: "nobody can transfer to another more rights than he has himself" *(nemo plus iuris ad alium transfere potest quam ipse habet)*.

Abstractness of mancipation as a legal act was expressed mainly from 4th century B.C. due to the introduction of coinage. This circumstance led to the fact that the mancipation, originally a real contract of sale in which the object of purchase and the purchase price were handed over simultaneously, since this time the transfer of ownership for any reason and validity of mancipation was absolutely independent on the existence or non-existence of the legal cause. Suing was possible only through an action *in personam* of the one who has been unjustifiably enriched through the mancipation. In Justinian law the mancipation was extinguished (he had extinguished the division of things as things mancipable and things non-mancipable) and tradition has become an universal mode of transfer of ownership. Gaius describes mancipation in his Institutes thus:

Gai Inst. 1,119: *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 civibus 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.*	**Institutes of Gaius 1,119:** Mancipation, as we have mentioned above, is a kind of fictitious sale, and the law governing it is peculiar to Roman citizens. The ceremony is as follows: After not less than five witnesses (who must be Roman citizens above the age of puberty) have been called together, as well as another person of the same condition who holds a brazen balance in his hand and is styled the "balance holder," the so-called purchaser, holding a piece of bronze in his hands, says: *"I declare that this man belongs to me by my right as a Roman citizen, and let him be purchased by me with this piece of bronze, and bronze balance"*. Then he strikes the scales with the piece of bronze, and gives it to the so-called vendor as purchase money.

b) In iure cessio

In iure cessio is an abstract formal bilateral legal act of alienation between Roman citizens through which the acquirer obtains from the alienor the ownership *ex iure Quiritium* of mancipable as well as non-mancipable things. It was a feigned vindication in front of a magistrate. The acquirer of the thing took it and uttered a vindicatory formula and the "defendant" as opposed to a real legal suit did not utter the contra-vindication, i.e. he remained silent, which meant that he had given up his ownership. The magistrate (praetor) then granted the ownership to the plaintiff *(addictio)*.

Participants of the iniurecesio could be only persons *sui iuris* (i.e. persons competent to be a procedural party), while representation was not possible. To the act of iniurecessio there couldn't be inserted a condition or a time imposition. *In iure cessio* and its proceedings are also mentioned by Gaius in his Institutes:

Gai Inst. 2,24:	**Institutes of Gaius 2,24:**
In iure cessio autem hoc modo fit: apud magistratum populi Romani uelut praetorem urbanum [aut praesides prouinciae] is, cui res in iure ceditur, rem tenens ita dicit: HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO; deinde postquam hic uindicauerit, praetor interrogat eum, qui cedit, an contra uindicet; quo negante aut tacente tunc ei, qui uindicauerit, eam rem addicit; idque legis actio uocatur. hoc fieri potest etiam in prouinciis apud praesides earum.	A transfer of property in court takes place as follows: He to whom the property is to be conveyed appears before a magistrate of the Roman people, for example, the Praetor, and holding the property in his hands, says: „I DECLARE THAT THIS SLAVE BELONGS TO ME BY QUIRITARIAN RIGHT." Then, after he makes this claim, the Prćtor interrogates the other party to the transfer as to whether he makes a counter-claim, and if he does not do so, or remains silent, he adjudges the property to the party who claimed it. This is called an act of legal procedure, and it can even take place in a province before the governor of the same.

c) Delivery (tradition)

Delivery or tradition *(traditio)* was primarily a mode of transfer of possession according to the alien law (*ius gentium*). It was a bilateral causal informal legal act, which led to two possible consequences:

- to the transfer of civil possession to mancipable things; thus gained possession was protected by the praetor through the action *actio Publiciana* (i.e. so that such a possessor had a chance to acquire ownership *ex iure Quiririum* through usucapio),
- to the transfer of ownership *ex iure Quiririum* to non-mancipable things.
- Objective elements of tradition (in order to achieve its validity and effects) were these circumstances:
- transfer of possession (delivery of the thing),
- ownership of the alienor,
- permissibility of cause according to law (through which the legislator defines the goal of the cause) and
- existence of a valid cause of transfer of possession through tradition *(iusta causa traditionis),* i.e. by the civil law accepted reason/cause for acquisition of ownership; such reasons were especially contract of sale, loan, donation, creating of a dowry and settlement of a debt.

Cause (reason) of tradition must objectively exist at the time of transfer and must be apparent to both parties based on their agreement. Dissent in the cause in tradition leads to invalidity of the tradition and its effects, as is stated in the Ulpianus' fragment in Digesta:

Ulp. 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.*	**Ulp. D. 12,1,18, pr.:** If I give you money as a present, and you accept it as a loan, Julianus says that it is not a present; but we should consider whether it is a loan. I think, however, that it is not a loan, and that the money does not, as a matter of fact, become the property of the party who receives it, as he did so with a different opinion. Hence, if he spends the money, although he is liable to a personal action for its recovery, he can, nevertheless, make use of an exception on the ground of fraud, because the money was expended in accordance with the wish of the party who gave it.

3.5.3. Acquisitive Prescription (Usucapio)

Acquisitive prescription is a mode of acquiring of ownership that presupposes:

- acquisition of possession of the thing *(possessio)* – i.e. person must physically seize the thing with a will to hold it;
- good faith of the possessor at the moment of acquisition of the thing *(bona fides)* – at the moment of acquisition of possession the possessor is convinced that he is not in breach of another person's subjective right;
- legal cause for acquiring possession of the thing *(iustus titulus)* – acquiring of possession happens in accordance with law, i.e. based on a cause recognized by civil law as such that can lead to acquisition of ownership *ex iure Quiritium* (e.g. occupation, purchase);
- the thing must be part of trade relationships *(in commercio)* – it must be possible to acquire subjective right to the thing,
- lapse of prescriptive period set by law *(tempus)* – a person acquiring his right by prescription shall keep the thing for an uninterrupted period of one year (if the thing is movable) or two years (if the thing is immovable).

After fulfilling these presuppositions such a person acquires ownership *ex iure Quiritium* and ownership *ex iure Quiritium* of his predecessor is terminated.

Acquisitive prescription has characteristics of original as well as derivative mode of acquisition of ownership – possession is acquired through an unilateral act but the thing is not abandoned (it has an owner who is at the moment of seizing unknown).

4. Possessio

4. 1. The term

Unlike ownership, the essence of which is the direct legal dominion over a thing, possession *(possessio)* is a factual state and it can be defined as a de facto dominion over a thing. The merits of possession consists of two elements, namely:

- *corpus* (physical power over a thing),
- *animus* (will to have a thing for oneself or for another).

Possession is a circumstance totally independent from ownership. Possessor doesn't have to be an owner and in a suit for possession is a question (evidence) of ownership legaly irelevant, as well as in a suit for ownership is irelevant question who has the thing in possession. Similarly i tis important to distinguish possession *(possessio)* from one of owner's privileges which is a right to hold his thing *(ius possidendi)*.

Despite this significant difference possession was granted only under those pressupostions that were required for ownership - the object of possession could only be things *in commercio* and the subject of possession could only be persons *sui iuris*, i.e. those that could acquire property. Out of these pressupostions is derived possibility of the possessor to acquire ownership (through acquisitive prescription).

The importance of possession as a legal institute is given because of the fact that the law in certain cases, for reasons of fairness and equity, protects the possessor (mainly the one acting in good faith).

Roman law concept of possession denotes different situations, from which it is possible to create two categories of persons who have power over a thing, who are not owners of the thing but they are not possessors in the strict sense:

a) detentors – these include lender (who is using lended thing); depositary (cares for another's thing); mandatary (controls the thing for the mandator); lessee (who is using leased another's thing); owner of the thing in such cases retains possession and carries it out through these persons; detentor has power over the thing with a will to carry it out for another, i.e. for the owner

b) derived possessors – are those persons who have factual power over another's thing and at the same time they have a right that is being enacted upon this thing (pledgee, holder of the hereditary tenancy of land, holder of the hereditary right to a building and holder of the usufruct);

c) thief as a possessor – the thief has a factual power over the thing as well as will to retain it but it is in conflict with the law (this is sistuation is illegal).

4. 2. Types of possession

In Roman law, the term possessio denoted several states of facts of de facto power over a thing.

a) Civil possession

Civil possession *(possessio civilis)* refers to a connection of factual power over a thing and will retain the thing oneself *(animus rem sibi habendi)* based on a reason, which is capable, in accordance with objective law, to lead to the acquisition of ownership:

- through an immediate handing over of non-mancipable things *(iusta causa traditionis)* or
- through acquisitive prescription, i.e. after fulfilling the other requirements *(iusta causa usucapionis);* in this instance it was an acquisition of mancipable thing through tradition or acquisition of thing from a *bona fides* non-owner;

The acquisition reasons, which led to the acquisition of ownership were purchase, loan, donation, provision of advancement, provision of a dowry, real bequest, settlement of a debt, occupation of an abandoned thing, acquision of thing through inheritance, occupation of a thing belonging to the vested inheritance.

b) Natural possession (detention)

Detention or natural possession *(possessio naturalis)* is a factual power over a thing obtained from whatever reason that is not illegal. The will *(animus)* of the natural possessor lies in thatt he knows that the thing is not his and that he has to return it. The reason of acquisition of detention is acknowledged by law but it cannot lead to acquisition of ownership through acquisitive prescription nor through tradition. Such reasons are e.e. deposit, borrowing, pledge, lease.

c) Possession in good faith

If whoever who physically controls a thing is convinced that he is not violating the right of another (reasonably believes he is the owner), he is a possessor in good faith. The significance lies in the fact that a possessor in good faith, if all other presuppositions are met, may acquire ownership *ex iure Quiritium* or if he has possession in good faith of a fruit-bearing thing he acquires ownership of fruits through their separation.

d) Possession in bad faith

Possessor in bad faith is whoever physically controls a thing about which he knows that he is not its owner and despite that he wants to keep it. He couldn't acquire ownership of such thing through acquisitive prescription and law provides him with legal protection only in a single circumstance (interdict *de vi armata* against expulsion from land through qualified violence of a group of people).

e) Lawful possession

When the possession is acquired for a reason (cause) recognized by law, we speak about a lawful possession (e.g. purchase). Unlawful possession is acquired for a reason that is in contradiction to law (e.g. stealing of a thing or occupation of another's thing in good faith that it does not belong to anyone).

f) Interdictal possession

Possessio ad interdicta is possession protected by praetor through interdicts. Praetor granted interdictal protection to whomever exercised control over a thing for himself without consideration for reason of acquisition, i.e. if the possession was *possessio iusta* (proper possession) or even *possesssio iniusta* (possession in contradiction to law). The purpose was mainly public order and also because the state of possession constitutes a (rebuttable) presumption that this state of affairs is in accordance with law. This presumption can be successfully rebutted by the owner of the thing during the lawsuit, i.e. in a suit about ownership.

4. 3. Protection of possession

Possession was protected by praetor through interdicts. Interdicts are tools of execution of his administrative power for maintenance of public order in property relations. Since the object of possessory suit is a factual situation, only evidence of factual reality, not subjective rights, are accepted. Possessory suit is litigated in order to protect:

- against disturbance of possession *(interdicta retinendae possessionis)*,
- against dispossession *(interdicta recuperandae possessionis)*,
- for recovery of possession (*interdicta adipiscendae possessionis)*.

4. 4. Acquirement of possession

Acquisition of possession presupposes two presumptions – *corpus* (physical seizure of the thing) and *animus* (will to retain the thing). With regard to whether the acquisition takes place through a unilateral or bilateral legal act we distinguish two modes of acquisition: occupation and tradition.

Original mode of acquisition of possession is occupation, similarly to ownership. It lies in seizing of the thing with the will to obtain that thing for oneself *(animus possidendi)*. Depending on whether the thing which is the object of occupation is *res nullius* or not, the occupation can be:

- lawful (occupation of thing that belongs to no one),
- unlawful (occupation of another's thing, either knowingly or unknowingly).

Derivative mode of acquisition of possession is tradition *(traditio)*. Tradition is

a bilateral legal act in which someone (alienor) gives up his possession to a certain non-mancipable thing and somebody else (acquirer) receives this thing. Tradition could be done in several ways:

- tradition "from hand to hand";
- tradition of long hand *(traditio longa manu)* – if transferring land;
- tradition of short hand *(traditio brevi manu)* – if the existing detentor acquires ownership (along with possession at the same time) to the same thing without actual transfer;
- symbolic tradition – if the object of tradition is a thing that is not possible to "seize as a whole" (e.g. building) this thing is transferred through its typical symbol (e.g. keys);
- *constitutum possessorium* – the existing possessor based on an agreement, i.e. without physical tradition "transfers" possession onto another based on a certain legal cause and based on other legal cause "receives" it back (fiction of double transfer).

Acquisition of possession through a slave and subordinate son (*filius familias*) is possible if it is with the knowledge (*animus possidendi*) of the one to whom they re subordinate for him; then they acquire possession as an "acquisition tools". Without knowledge of the holder of power acquisition of possession through a third person is possible only if the slave or *filius familias* has been entrusted with his master's property for management *(peculium).*

4. 5. Termination of possession

Termination of possession takes place:

- through loss of legal capability of the possessor *(capitis deminutio),*
- after the possessor's death,
- destruction of the thing (death of an animal, slave, burning down of the building, melting of a ring),
- if the thing ceases to be an object of trade *(res extra commercio),*
- through a loss of the thing,
- when the thing is stolen,
- through abandonment of the thing,
- through tradition of the thing.

Emphasis on the element of will in possession led to the fact that Roman law admitted retaining of possession in a variety of situations in which the element of *corpore* was weakened so that the possessor did not directly exercise control over the thing. About this principle - "will retains possession" *(possesssio animo retinetur)* – writes Gaius in his Institutes:

Gai. Inst. 4,153:	**Institutes of Gaius 4,153:**
Possidere autem uidemur non solum, si ipsi possideamus, sed etiam si nostro nomine aliquis in possessione sit, licet is nostro iuri subiectus non sit, qualis est colonus et inquilinus. per eos quoque, apud quos deposuerimus aut quibus commodauerimus aut quibus gratuitam habitationem praestiterimus, ipsi possidere uidemur. et hoc est, quod uolgo dicitur retineri possessionem posse per quemlibet, qui nostro nomine sit in possessione. quin etiam plerique putant animo quoque retineri possessionem, id est ut, quamuis neque ipsi simus in possessione neque nostro nomine alius, tamen si non relinquendae possessionis animo, sed postea reuersuri inde discesserimus, retinere possessionem uideamur. apisci uero possessionem per quos possimus, secundo commentario rettulimus; nec ulla dubitatio est, quin animo possessionem apisci non possimus.	We consider a party to be in possession not only where we ourselves possess, but also where anyone is in possession in our name, although he may not be subject to our authority; as, for instance, a tenant or a lessee. We are also considered to have possession by means of those with whom we have deposited property, or lent it for use, or to whom we have granted gratuitous lodging, or the usufruct or use; and this is what is commonly called the power of retaining possession of property by anyone who possesses it in our name. Again, many authorities hold that possession can be retained merely by intention; that is to say, that though we ourselves may not be in possession, nor anyone else in our name, still, if there be no intention of relinquishing possession, and we leave the property, intending afterwards to return, we are deemed to have retained possession of it. We stated in the Second Commentary by what persons we could obtain possession, nor is there any doubt that we cannot obtain it by mere intention.

Possession of land does not terminate when the possessor departs with the intent to return (though not immediately). If someone secretly occupies this land, possession terminates, according to the prevailing interpretation, only if the possessor did not protect the land at all or if he tried unsuccessfully to expel the invaders. These situations are described and dealt with by lawyers Ulpianus and Paulus:

Ulp. D. 41,2,6,1: *Qui ad nundinas profectus neminem reliquerit et, dum ille a nundinis redit, aliquis occupaverit possessionem, videri eum clam possidere Labeo scribit: retinet ergo possessionem is, qui ad nundinas abit: verum si revertentem dominum non admiserit, vi magis intellegi possidere, non clam***.**	**Ulp. D. 41,2,6,1:** Labeo says that where a man goes to a market, leaving no one at home, and on his return from the market finds that someone has taken possession of his house, the latter is held to have obtained clandestine possession. Therefore, he who went to the market still retains possession, but if the trespasser should not admit the owner on his return, he will be considered to be in possession rather by force than clandestinely.
Paul. D. 41,2,7: *Sed et si nolit in fundum reverti, quod vim maiorem vereatur, amisisse possessionem videbitur: et ita Neratius quoque scribit.*	**Paul. D. 41,2,7:** If the owner is unwilling to return to the land because he fears the exertion of superior force, he will be considered to have lost possession. This was also stated by Neratius.

In case if someone's slave has escaped (*servus fugitivus*), his possession terminates only after somebody else takes possession of the slave with the intention to retain the slave and thus acquires possession. This situation is expounded upon in Julius Paulus' Opinions:

Pauli Sententiae 2,31,37: *Servus, qui in fuga est, a domino quidem possidetur, sed dominus furti actione eius nomine non tenetur, quia in potestate eum non habet.*	**The Opinions of Jul. Paul. 2,31,37:** A fugitive slave still remains in the possession of his owner, but his owner is not liable to the action of theft on his account, because he is not under his control.

Chapter VI
LAW OF OBLIGATIONS

1. The term "obligation"

Obligation *(obligatio)* is a legal relationship between creditor and debtor which has originated based on a cause recognized by the law and based on which is the debtor obliged to perform something to the creditor and if he doesn't perform then the creditor could sue him and if the valid judgment is not performed then the creditor may execute.

2. Elements of an obligation relationship

Every obligation must have:

a) Subjects

Obligation occurs always between two subjects, the creditor *(creditor)* and the debtor *(debitor)*. Subject of obligation can only be one person, but on either side of the obligation there may be several persons (plurality of subjects). Between the subjects of the obligation a legal bond *(iuris vinculum)* is established, and since it is based on legal norms (not based on moral, political or social norms). Subject of an obligation relationship according to the civil law could essentially be only a person *sui iuris*, i.e. a person who could own property since the obligation relationships have proprietary nature.

b) Content

Obligation has certain content (object) which is defined as performance. Performance constitutes debtor's debt and the debtor is directly bound to make a performance. Obligation provides the creditor with a subjective right to a certain behavior of the obligated debtor. Content of the obligation is basically a set of rights and duties of its parties (subjects). Performance could have in the legal sense three forms (Gai. Inst. 4,2):

- *dare*, i.e. to give, which means a duty to transfer ownership or servitude
- *facere,* i.e. to act, which means whatever other performance lying in a duty to

actively act (it comprises all kinds of acts) or to refrain from certain acts (omissions) - e.g. delivery of a thing, return of a thing, transfer of possession or detention, execution of work, manufacture of a piece of work, not releasing of a slave;

- *praestare oportere*, i.e. to guarantee, which means to have a duty to give performance alongside the main debtor as a guarantor or in some other sense a duty to be responsible for non-performance of the obligation *(praestare dolus, culpam, custodiam)* – guarantee for a certain result.

c) Legal protection

An important element of obligation is its legal protection. It depends on the reason which led to the creation of the obligation. If the reason of obligation has been recognized by law as a certain type, civil law (*ius civile*) grated such an obligation legal protection in an action *in personam* corresponding to a particular type of obligation. Action *in personam* operates only between the parties of the obligation (*inter partes*) – it protects the relative subjective right, which is temporary.

3. Division of obligations

It is possible to divide obligations according to several criteria such as:

- reason (source) of creation of the obligation
- distribution of rights and duties of creditor and debtor
- participation of subjects on the part of creditor or debtor

3. 1. Categories of obligations according to the reason (source) of their creation

a) Contracts

The reason for creation of obligations from contracts *(obligationes ex contractu)* is an agreement which is based on the consensus of the parties (bilateral legal act). Consensus lies in the uniting of will of the contractual parties on essential elements of the contract according to its type. The resulting consensus then gives rise to obligation. This category includes literary, consensual, verbal and real contracts. Contracts may be unilaterally and bilaterally binding.

b) Delicts

Obligations from delicts *(obligationes ex delicto)* are being created based on unlaw-

ful act of offender by fulfilling typical elements of a certain delict introduced in law, i.e. through law itself. Delict is a unilateral act in contradiction with norms of private law (civil or praetorial). The reason for creation of a delictual obligation is law. Delictual act affects in the sphere of property, family or personality of an injured party. Among the delicts according to civil Roman law were theft, unlawful harming of somebody else's thing and insult. Through praetors' jurisdiction were suable some other acts, e.g.

- fraud/deception *(dolus)* or coercion *(metus)*;
- robbery *(rapina)* – theft while using violence against a person even with usage of a weapon;
- damage of a grave *(sepulchrum violatum)* – opening of other's grave with aim to secretly bury somebody else or damage of a gravestone;
- acceptance of money in order to sue unlawfully *(calumnia);*
- throwing out or pouring out of something from the building *(de effusis et deiectis);* obligation arose for the inhabitant of the building if as a result of this act the thing did cause physical harm to a free person in a public place – action was available to anyone *(actio popularis);*

c) Quasi-contracts

If the reason for creation of obligation does not have its foundation in consensus, the Justinian law termed this situation as *obligationes quasi ex contractu*. These situations may lie in a unilateral act that leads to:

- somebody else's benefit (managing somebody else's affairs without a mandate – *negotiorum gestio),*
- enrichment to the detriment of somebody else (unjustified enrichment).

Managing somebody else's affairs without a mandate presupposes voluntary action through wich somebody manages unexpected affairs to the benefit of somebody else without an express command from this person (factual or legal action). The action must have been undertaken beneficially even if the result didn't have to be positive (e.g. effort to save a drowning somebody else's slave, though not successful). The obligation lied in the duty of the beneficiary to recompense the provider (gestor) expenses necessary for the action he took.

In the second instance the duty arises to the one who has enriched himself to hand over the unjustified enrichment. Reasons that led to unjustified enrichment may have been:

- enrichment out of unmoral reason *(condictio ob turpem causam)*,
- enrichment out of illegal reason *(condictio ob iniustam causam)*,
- enrichmnet out of acceptance of non-debt *(condictio indebiti)*,
- enrichment out of performance for a purpose that didn't occur *(condictio causa data causa non secuta),*
- enrichment without legal foundation/reason *(condictio sine causa).*

d) Quasi-delicts

Actions that were in contradiction with law but the fault was missing (no-fault liability), were termed as *obligationes quasi ex delicto* by the Justinian law. Originaly this category also encompassed cases of noxal liability, i.e. duty of the paterfamilias to carry consequences in these cases:

- unlawful action of slaves or sons' in power (*filiusfamilii*),
- if a domesticated animal caused damage to somebody else (in a sudden rage or by grazing of vegetation).

The reason for existence of obligation here is action that causes harm/damage to somebody else but there is no fault (malice or negligence). Contemporary terminology labels these situations by a term "strict liability.

Justinian law had regulated theses quasi-delicts:

- laying or hanging of a thing in a hazardous place *(de posito vel suspenso)*; obligation came into being if there was a threat that a thing placed in such a way may cause damage to somebody; action was available to anyone *(actio popularis);*
- damaging of things of passangers on a ship by the shipmaster or his employees,
- damaging of things of customers of an inn by innkeeper or his employees.

e) Other reasons of creation of an obligation

Innominate contracts

Outside of closed system of obligations from typical contracts (consensual) there have developed certain situations in which consensus existed but for some other purpose than the civil law anticipated and therefore it was not possible to subsume such claims under any particular action formulas. Roman classical law most likely in such cases granted action with formulation *actio praescriptis verbis*, through which with the aid of a more detailed formulation of action's intention *(demonstratio)* it was possible to sue various situations, similarly to actions founded on good faith.

Jistinian law had granted legal protection to agreements in which the obligation came into existence because one of the parties had already provided the performance. Granted action aimed to provide the consideration or under certain circumstances even for return of what was already performed. These agreements were termed innominate contracts *(contractus inominati)*. Justinian' compilers fashioned according to the content of the mentioned agreements four categories of reciprocal rights and duties:

- *do ut des* („I will give so that you would give", i.e. transfer of ownership from one party obligates the other party to make a transfer of ownership as well, e.g. exchange of one thing for another thing),
- *do ut facias* („I will give so that you would do", i.e. transfer of ownership from one party obligates the other party to certain action),
- *facio ut des* („I will do so that you would give"),

- *facio ut facias* („I will do so that you would do").

Informal agreements

Other reasons for occurrence of an obligation were also different informal agreements which preatorial as well as civil law termed as covenants *(pacta)*. Depending on where their basis lay there were distinguished:

- side covenants of the *bona fidei* contracts *(pacta adiecta)* – their basis was consensus between the creditor and the debtor;
- praetorial covenants *(pacta praetoria)* – basis for occurance of obligation was in the praetorial jurisdiction;
- legal covenants *(pacta legitima)* – informal agreements to which the civil law granted legal importance (e.g. agreement on impermissibility of retaliation of injured against the delinquent in case of delict).

Donation

Special reason of occurrence of obligation was donation *(donatio)*. It pressupossed decrease in property of the donor and the corresponding increase in property of the beneficiary. The reason for occurrence of obligation lied in the will of the donor to increase property of the beneficiary *(animus donandi)*.

3. 2. Division of obligations according to distribution of rights and duties between the parties

From this point of view obligations may be unilateral (unilaterally binding) and bilateral (bilaterally binding). Unilateral obligations are those in which only one party has an obligation, the other party has only right. Unilateral obligations presuposse an action only for one party of the obligation. These include e.g. loan and stipulation.

Bilateral obligations are those for which the law foresees two actions. In the case of equal bilateral obligations, both parties have always reciprocal right and obligation (e.g. contract of sale, contract of lease) and therefore are always available both actions. Bilateral unequal obligations reflect the unequalilty of rights and duties in the sense that there is always a primary obligation, protected through action *actio directa*, and a second action (*actio contraria*) is granted for the protection of secondary obligation, if it in the given obligation relationship arises. Such obligations are for example borrowing (there always arises an obligation to return the thing for the one who has used the borrowed thing; however there may or may not occur an obligation for the one providing the thing to recompense unforeseen costs to the user of the thing that were not caused by the user), deposit, contract of mandate .

3. 3. Division of obligations according to participation of subjects on part of creditor or debtor

If there are on the part of creditor or debtor participating several subjects, the obligation may be:

- solidary

- cumulative.

a) Solidary obligations

Object of a solidary obligation is one obligation (debt) that has:

- one debtor against several creditors (active solidarity), or
- several debtors against one creditor (pasiv solidarity).

In both instances the debt should be performed only once.

In case of pasive solidarity the creditor is entitled to ask for performance of the whole obligation (debt, *solidum*) from whichever debtor and by his performance the whole obligation is terminated. The other debtors are released from the obligation. If the debt is due the creditor is entitled to sue whichever debtor, but this will consummate the actions against all the other debtors.

With the active solidarity the debtor may perform the whole obligation (debt) to whichever creditor and thus the obligation terminates, i.e. he is not entitled to perform antyhitng to the other creditors.

- Solidary obligations were created:
- based on an agreement (in form of "collective" stipulation or contract of mandate),
- based on law *(ex lege)* – codelinquent when it came to damages, co-owners, several guardians or in case of partners based on a contract of association, as is written by Ulpianus in Digest:

Ulp. D. 35,2,62: *In lege Falcidia hoc esse servandum Iulianus ait, ut, si duo rei promittendi fuerint vel duo rei stipulandi, si quidem socii sint in ea re, dividi inter eos debere obligationem, atque si singuli partem pecuniae stipulati essent vel promisissent: quod si societas inter eos nulla fuisset, in pendenti esse, in utrius bonis computari oporteat id quod debetur vel ex cuius bonis detrahi.*	**Ulp. D. 35,2,62:** Julianus says that, in estimating the portion due under the Falcidian Law, the following rule should be observed, namely, where there are two promising, or two stipulating debtors, and they are partners, the common obligation should be divided between them; just as if each one had stipulated or promised to pay the amount individually. If, however, no partnership existed between them, the matter would remain in abeyance, and a calculation should be made in order to determine what is due to the estates of the creditors, or what should be deducted from those of the debtors.

From the reason of creation of the solidary obligation was deduced a possible recourse claim of the debtor who has performed the whole debt against the other solidary debtors or a duty of the creditor who has accepted the whole performance of the debt to provide proportional parts to other solidary creditors. This duty existed only if

there was a legal relationship between solidary creditors (debtors) either based on the contract of mandate, contract of association or stipulation. According to Justinian law the performing solidary debtor could demand from the creditor cession of the action *(beneficium cedendarum actionum)*, which would mean that the debtor that had performed the whole debt would become a creditor against the other solidary debtors.

b) Cumulative obligations

Cumulative obligations are arising from delicts, i.e. only based on law. The performances are being cumulated, i.e. each debtor is obliged to perform the whole debt or each creditor is entitled to demand the whole debt from the debtor. These obligations were for a fine.

4. Natural obligation

In Roman classical law the term natural obligation *(obligatio naturalis)* denoted relationships created by a slave which, if instead of the slave a free person was party of such relationship these would have been obligation under civil law, protected by an applicable action *(obligatio civilis)*. Relationships created by a slave though, due to a imperfection on the subject of obligation, were not protected through an action and according to civil law they did not exist. These relationships had a character of proprietary relationship though and the term *obligatio naturalis* had meant that it was a real natural act with practical consequences which were under certain circumstances protected by praetor. Analogically were within the classical law viewed (though not being termed as *obligatio naturalis*) actions of:

- persons in power if the paterfamilias entrusted them with a *peculium* (adult son in father's poweer), or if they contracted under his direct order;
- persons in mancipium (free persons temporarily due to a certain reason in power of paterfamilias, e.g. lessor of work labor, captain of a ship owned by the head of the family).

Legal protection of the natural obligations at first comprised of a possibility of the creditor to keep what was already performed by the natural debtor, i.e. slave, son *(solutio retentio)*. In addition praetor granted based on an institute of adjectic liability against the paterfamilias for the actions of the mentioned persons in power – so-called action with substitution of subjects.

5. Alternative obligation

Alternative obligation *(obligatio alternativa)* lies in the fact that the debtor is obliged for two things but he must perform only one of them. If the right of choice is debtor's he can claim it *(ius variandi)* untill the judgment is pronounced. If the choice (between two things) is creditor's the alternative terminates by submitting an action with stating of the choice. If he sues alternatively the judge must take it into consideraton in his judgment.

If the right of choice is debtor's and one of the things ceases to exist by chance or through his fault, his obligation becomes a simple obligation (the alternative teminates). If subsequently the other thing ceases to exist by chance, debtor's obligation terminates as a whole.

If the right of choice is creditor's and one thing ceases to exist due to a fault of the debtor, the creditor could claim damages for the destroyed thing or performance of the other. If one thing ceases to exist by chance the creditor may demand only the other one.

6. Object (content) of obligation

6. 1. Performance – the term and its elements

Content of obligation is performance. It can be any act (omission of acting) – *dare, facere, praestare*, which is the debtor obliged to provide for creditor for his satisfaction *(satisfactio)*.

Performance must be:

- certain; i.e. it must be obvious what is the duty of debtor so that he can perform his obligation; performance must be decided upon by the parties or justly decided upon by a third person, i.e. by a just man *(boni viri arbitrium);* performance must not be decided upon by will of only one party.
- appraisable in money, i.e. so it was in order with the principle of pecuniary condemnation (judgment of conviction in a legal suit must have been for a monetary amount); this element expresses the proprietary character of obligation relationships.
- objectively possible, i.e. if at the time of creation of obligation the performance was physically or legally impossible, the obligation is not valid (since it is not possible to be performed). Malice of the seller in the contract of sale, however, in certain cases does not invalidate the obligation it only founds a liability for damages. Subjective impossibility of performance have no effect on the validity of obligation, for example in case of insolvency of the debtor. Venuleius (Venuleius Saturninus, third century A.D.) writes about this in Digest:

Ven. D. 45,1,137,4: *Illud inspiciendum est, an qui centum dari promisit confestim teneatur an vero cesset obligatio, donec pecuniam conferre possit. Quid ergo, si neque domi habet neque inveniat creditorem? Sed haec recedunt ab impedimento naturali et respiciunt ad facultatem dandi. Est autem facultas personae commodum incommodumque, non rerum quae promittuntur.*	**Ven. D. 45,1,137,4:** It should be considered whether someone who has promised to pay a hundred *aurei* becomes liable immediately, or whether the obligation remains in abeyance until he can collect the money. But what if he has no money at home, and cannot find his creditor? These matters, however, differ from natural obstacles, and involve the ability to pay. This ability, however, is represented by the ease or difficulty of the person, and does not refer to what is promised;

- permissible, i.e. what is the object of performance must not be in contradiction to law, good morals nor must it circumvent the law.

6. 2. Types of performance

a) Generic and individual performance

Performance is determined as generic if its object is a certain quantity of substitutable things. There can be no objective impossibility of performance, since the genus of debt couldn't be extinguished and the debt can be satisfied by any piece of the given type. Consequently, chance burdens the debtor.

If the object of performance is an individually defined thing the debtor is obliged to perform the same thing and basically the destruction of a thing by chance burdens the creditor.

b) Severable and non-severable performance

Object of performance is severable when it is possible to perform the debt in parts and the partial performances makes together the value of the whole performance (e.g. return of a loan). Severable are in principle performances whose content is to give somenting *(dare)*, except for the case when the object of performance is a non-divisible thing (obligation ot hand over to the buyer e.g. a vase, a horse or a statue).

Non-severable performance is such that it is not possible to perform in parts becase the partial performances would not constitute the value of the whole performance. Usually those are performances whose content is an obligation to do something *(facere).*

c) Certain and uncertain performance

The scope of certainty or uncertainty of performance is defined by formulation of statement of claim in an action which can be defined certainly *(intentio certa)* and uncertainly *(intentio incerta)* and by conviction, which in dependency of intention will be for a certain amount of money *(condemnatio certa)* or for an uncertain amount *(condemnatio incerta)*, that will be determined according to several criteria (appraisal of the thing by the judge, free consideration of the judge according to the rules of decency and fairness, defining of the whole interest of the plaintiff):

- maximally certain performance is such that in the intention of the action is for payment of a certain monetary amount (*certa pecuniae* – e.g. with a loan, stipulation); eventual judgment of conviction must be for an amount defined in the intention; analogically it is in case that the intention of an action is for return of a certain thing *(certa res)* defined by genus, quality and amount (e.g. with a loan, stipulation) – actions in these cases are termed as *condictiones;* certain performance is also for working for a certain number of days (*certa dies)* according to the work contract;
- more uncertain is defined performance *(intentio arbitraria)*, if in the intention is a demand for return of a thing with accession (fruits), e.g. with a lending, deposit; the amount in the judgment of conviction will be dependent on appraisal of the judge;
- higher uncertainty – if according to the intention the conviction should be dependant on a free consideration of the judge but in accordance with decency and fairness (e.g. with an obligation to pay damages when damaging or destroying a thing – killing of somebody else's slave because of negligence, or with an obligation to reimburse costs expended for a thing);
- maximum uncertainty – if the judge when passing judgment on the amount payable in case of judgment of conviction should take into consideration the whole legal relationship between the parties and condemn for "everything that the defendant should give or do in favor of the plaintiff".

d) Alternative possibility of performance

Alternative possibility of performance *(facultas alternativa)* exists when the obligation is simple (debtor is obliged to perform one thing), but the debtor has a possibility to exempt himself by performing other thing (e.g if he destroyed the object of the obligation). This other thing is not an object of the obligation, it is only on object of the performance *(in solutione)* and the creditor doesn't have a right to claim the other thing. If the thing that is in the obligation ceases to exist due to chance, the obligation terminates in its entirety and the alternative is groundless.

7. Termination of obligations

Obligation could terminate according to civil law or praetorial law. In the first instance the obligation terminated *ipso iure*, in the latter there was still an action available but by use of exception *(ope exceptionis)* praetor declined the action if the defendant proved the statement included in the exception.

7. 1. Satisfaction

Satisfaction *(solutio)* means payment or rendering a performance the debtor was obliged to perform. Ulpianus states about this in his commentary to Sabinus (book XLV.):

Ulp. D. 50,16,176:	**Ulp. D. 50,16,176:**
„Solutionis" verbo satisfactionem quoque omnem accipiendam placet. „Solvere" dicimus eum, qui fecit quod facere promisit.	It has been established that every kind of satisfaction should be understood to be included in the term „payment." We say that he has paid who has done what he promised to do.

The obligation terminates through satisfaction only if the debtor performs:

- to the creditor (to any other person only in case if he is authorized to accept the performance, e.g. *filius familias*, slave, guardian, subsidiary creditor, mandatary);
- at the agreed-upon time (if the term of maturity is not set then the creditor can claim the performance immediately after the creation of the obligation with a stipulation that the debtor has time for its rendering appropriate for the circumstances of the performance);
- at the agreed-upon place (if there is no agreement as to the place of performance than the place should be such that arises from the natural character of the object of performance, e.g. if the object is a individually defined thing then the place of performance is where this thing is located; if the place of performance couldn't be set by using the previous criteria then it should be performed at the place of residence of the debtor);
- an agreed-upon object (the obligation terminates even if the creditor decides to accept for the purpose of satisfaction from the debtor some other thing than what was agreed-upon).

Through satisfaction the obligation terminates according to civil law.

7. 2. Informal release

Release from obligation in an informal way is a bilateral legal act that is abstract *(nudum pactum)*, which means that it could be used for several reasons:

- *compositio*, i.e. compensation or exemption from a owed fine due to a delict;

- *pactum de non petendo*, i.e. agreement on non-enforcement of the debt (praetor grants the defendant an exception *exceptio pacti);*

7. 3. Novation and delegation

Novation *(novatio)* is a bilateral formal legal act *(stipulatio novatoria),* through which in classical law the original obligation was terminated in such a way that the legal relationship was replaced in:

- subject (new creditor or debtor),
- form of obligation (nonformal debt wsa replaced by a formal one);

In Justinian law it was neccessary for termination of obligation to only express a novation intent *(animus novandi)* to terminate the original obligation. In this way it was possible to gain through novation also a new content of the obligation (e.g. addtion of a condtion, period of maturity, new cause).

Delegation *(delegatio)* is an order of one person (delegant), so that the other person (delegee) performed something or pledge something to a third person (delegator). The legal relationship between the participation person then:

- could have existed before the delegation (delegation leads to novation),
- didn't have to exist before the delegation (delegation does not lead to novation).

These reasons for termination of obligation according to civil law.

7. 4. Compensation

Compensation *(compensatio)*, or recompense is a way of termination of obligation according to praetorial law by dudecting of obligation from a counter-obligation of the same persons. In classical law it was allowed only with the *bona fidei* contracts if their mutual claims have arisn from the same reason *(eadem causam),* they must have been stated in the intention of formula of an action with a clause *ex fide bona* (exception in the formula process couldn't reduce the amount for which the defendant should be condemned). Judgment in such case was subject to a free consideration of the judge and so if he took into account the circumstances rationalizing the compensation, the judgment was always for the remainder (saldo), resulting from deduction. Obligation terminates due to a judgment. Compensation is defined by Modestinus and described by Gaius:

Mod. D. 16,2,1: *Compensatio est debiti et crediti inter se contributio.* **Gai. Inst. 4, 63:** *Liberum est tamen iudici nullam omnino inuicem conpensationis rationem habere; nec enim aperte formulae uerbis praecipitur, sed quia id bonae fidei iudicio conueniens uidetur, ideo officio eius contineri creditur.*	**Mod. D. 16,2,1:** Set-off is a contribution made between a debt and a credit. **Institutiones of Gaius, 4, 63:** The judge also has a right not to consider any set-off, at all, as he is not expressly directed to do so by the terms of the formula; but, for the reason that this seems to be proper in a bona fide action, it is therefore held to be part of his duty.

Justinian permitted compensation of whichever claims (not only from the same reason) and its effects came about *ipso iure*. Compensateable obligations must have been:

- reciprocal (creditor of the obligation is at the same time debtor of a debt, i.e. counter-obligation),
- valid, i.e. they have to exist at the time of the suit,
- mature and claimable,
- liquidable, i.e. promptly provable.

7. 5. Other reasons of termination of obligation

Among othe reasons of termination of obligation belong:

- additional impossibility of performance (only if the object of performance was individually defined thing),
- *confusio* (union of creditor and debtor in one person, e.g. through inheritance),
- death (only if the obligations are actively or passively non-inheritable),
- *transactio*, i.e. reconciliation (agreement on mutual concessions in order to avoid the suit),
- *acceptilatio* (formal release by an reverse legal act than at the creation of the obligation),
- *praescriptio longi temporis* (through lapse of time the claims become statute-barred in accordance with a Constitution of the Emperor Teodosius II. from year 424 A.D.)
- *concursus causarum* (if the creditor has accepted the performance in the form of an individually defined thing for a different than an agreed-upon reason).

8. Liability for failure to perform the obligation

Primary duty of debtor is to satisfy the obligation. If he does not satisfy it adequately and in time, then comes to the fore a secondary duty which is liability for

failure to perform the obligation. If he has caused the failure to perform of obligation then he has a duty to pay compensation/damages that was caused to the creditor. If the debtor failed to perform and is liable for it then applied the principle: *culpa debitoris perpetuari obligationem*, i.e. debtor's fault causes continuation of the obligation, due to which the debtor must perform secondary performance determined by a judgment (payment of compensation/damages) even in case an additional impossibility of performance. Presumptions of occurence of debtor's duty to pay compensation are:

- damage was caused by the debtor (subjektiv side of occurence of liability),
- occurence of damage, its cause (objektive side of occurence of liability),
- causal relation between the debtor's actions and occured damage.

8. 1. Fault

Commonly the term "fault" is understood as a deliberate action of a person that leads to a certain adverse consequence (i.e. to a damage in the broadest sense). It is the subjective part which is a psychological relationship of the acting person to the consequent that is significant. It has a certain scope, from an intention to a negligence.

Roman law recognized only two levels of fault – malicious intent *(dolus malus)* and negligence *(culpa).* Malicious intent represented deliberate/intentional breach of a contractual duty arising from rules of decency, gallantry, trust *(bona fides).* As Paulus states:

Paul. D. 44,4,8, pr.: *Dolo facit, qui petit quod redditurus est.*	**Paul. D. 44,4,8, pr.:** He is guilty of fraud who demands something which he should return.

When creating a contract exclusion of liability for a future malicious intent by consent of the parties was in Roman law prohibited.

Negligence (culpa) is a breach of debtor's duty to keep necessary care (diligentia) in the affair in which he was liable. Assessment of the extent of duties is evaluated with consideration of a proper/ordinary man *(pater familias)*, i.e. abstractly *(culpa in abstracto)*. Unlike with malicious intent negligence is lacking the awareness of evil.

Post-classical law divided negligence into gross and light negligence. The original term "negligence" was here termed as "gross negligence" *(culpa lata)* with the same content. The light negligence *(culpa levis)* had meant neglect of care taken by a attentive landlord *(diligens pater familias)*, not the average man. In some cases (partners in a contract of association, co-heirs, guardian) the scope of fault from negligence was assessed in accordance with affairs of the acting person, i.e. in accordance with criteria of the specific person *(culpa in concreto)* as is he caring for his own affairs.

8. 2. Principle of utility

Principle of utility (usefulness) was applied with the contracts bona fidei. According to this principle was the scope of liability assessed depending on which contrac-

tual party benefits from it (interest in its satisfaction). If both parties benefit (essentially contracts for consideration) then both are liable for *dolus* and*culpa* (e.g. purchase, lease, contract for work done), if the contract is benefitial only for the creditor then the debtor is liable only for *dolus* (e.g. deposit).

8. 3. Chance

In classical law applied the principle that nobody is liable for chance. Chance *(casus)* is an event that is independent from the will of man and therefore he cannot influence it. Eventual damage that occurs due to its occurence burdens the owner of the thing who is essentialy the creditor *(casum sentit dominus)*. If it is a chance that is unforseeable and by human power unavoidable *(vis maior)*, the debtor is liable for it only if:

- he is a thief (he owes from a delictual obligation),
- he in contradiction with the contract commited a theft of benefit *(furtum usus)*,
- he is in delay due to his own fault.

Lesser chance *(casus minor, custodia)* is an circumstance caused by a third person (or an animal) which could have been avoided if the debtor took better care of the thing. The debtor was liable for *custodia* only rarely – if he benefited from the contract or if it was in his interest for the thing to not be stolen (in such a position was an user of a borrowed thing, some makers based on a contract for work done). Debtor's liability for *custodia* may be established aslo by an agreement of parties.

8. 4. Payment for damages

Duty to pay for damages evaluated according to subjective criteria on side of the creditor consisted of that which represented the whole interest of the creditor on non-realized performance. In this expression the damage represented:

- real damage *(damnum emergens)*, i.e. a proprietary value by which was the damaged creditor's property decreased and
- loss of profits *(lucrum cessans*), i.e. a value which would have definitely been gained by the damaged through a ordinary course of events it there was no damage;

Proprietary damage and loss of profits constitute together the whole interest *(interesse)*, i.e. difference between the current state of damaged' property and the state that would have been if there was no damage.

9. Contractual obligations

Contractual obligations were protected through actions *actio in personam* that apply only between parties of a particalar contract. Every recognized contract, i.e. which was recognized by ius civile, had a corresponding action *in ius conceptae (iudiciae bona fidei* or *actiones stricti iuris)* and the contractual obligations outside the system of civil

law were protected by praetorial *actiones in factum conceptae* or *actiones utiles*. According to the mode of creation there were contracts consensual, real, verbal and literal.

9. 1. Consensual contracts

Among consensual contracts belonged contract of sale, contract of mandate, lease and contract of association. They are informal contracts, causal and bilateral. The are created through an agreement on essential elements and were protected through actions *bonae fidei* in which the judge could have taken into account adjacent agreements, circumstance which impacted upon the consensus (error, fraud, coercion) and scope of liability (fault). Origin of consensual contracts is in the practice of alien praetor.

9. 1. 1. Contract of sale

Contract of sale is a bilateral equal contract that is created through an agreement on the object of purchase and purchase price. The object must be individualized and the amount of purchase price must be certain, i.e. defined by a certain amount of money. The purchased thing must be part of trade relationships *(in commercio).*

The seller is obliged to:

- transfer possession of the purchased thing to the buyer (to claim fulfillment of this duty has the buyer *actio empti*) a
- secure its uninterrupted use to the buyer (so that the buyer could acquire ownership through acquisitive prescription),
- hand over to the buyer all fruits produced by the purchased thing after the creation of the contract of sale.
- The buyer is obliged to:
- pay the purchase price immediately, if they didn't agree on a different time of payment (he is obliged to transfer ownership of money to the seller – to claim the purchase price the seller has available *actio venditi*),
- recompense the seller for inevitable and useful expenses he had with the thing until its transfer;

The seller is from the time the contract came into being liable for damages occured due to his fault and lesser chance *(custodia)*. Risk of destroying or damaging of the thing due to the *vis maior* burdens the buyer *(periculum est emptoris)* and therefore if the thing perishes by chance before transfer of the thing, the buyer still must pay the purchase price.

The seller is liable for legal defects of the purchased thing and subsequently for eviction. Such situation is when the buyer after the transfer of the thing into his possession is sued by a third party (with a real right to this thing, e.g. pledgee, owner, holder of ususfruct) for its extradition. If the buyer notifies the seller about the suit with the third party, the seller is obliged to stand in his stead at the trial (as a procesual representative or through an intervention in the trial).

Liability for eviction originated:

- based on the mancipation; action of the damaged buyer *(actio auctoritatis)* then claimed double of the purchase price from the the seller;
- based on the stipulation; if the purchased thing was transferred by tradition the liability for eviction came into being only after creating of a special contract in form of a stipulation with a claim of double of the purchase price *(stipulatio duplae)*;

Liability for factual (physical) defects of the thing was essentially a burden of the buyer if the seller didn't know about them (with the exception of a purchased land if it didn't have the acrage declared by the seller at the time of creation of the contract of sale). Liability of the seller must have otherwise been constituted by a special agreement on attributes which the purchased thing should have. Only later in accordance with the edict of aediles curules was the seller at the markedt obliged to notify the buyer of the defects of slaves and livestock or he was obliged to guarantee through the stipulation that the slave is without defect. If defects came to light the buyer has *actio redhibitoria* for termination of the contract of sale (because of the defect the thing couldn't be used at all) or *actio quanti minoris* for proportional decrease of purchase price (because of the defect use of the thing is impeded). Situation, who is liable for physical defect if the seller assured the buyer that the slave is without defect, was dealt with by Ulpianus:

Ulp. D. 19,1,13,3: *Quid tamen si ignoravit quidem furem esse, adseveravit autem bonae frugi et fidum et caro vendidit? Videamus, an ex empto teneatur. Et putem teneri. Atqui ignoravit: sed non debuit facile quae ignorabat adseverare. Inter hunc igitur et qui scit praemonere debuit furem esse, hic non debuit facilis esse ad temerariam indicationem.*	**Ulp. D. 19,1,13,3:** What would be the case, however, if the vendor was not aware that the slave was a thief, and had given the assurance that he was frugal and faithful, and sold him at a high price? Let us see if he would be liable to an action on purchase. I think that he would be liable, but suppose that he was ignorant of the character of the slave? He ought not to assert so positively something that he did not know. There is then a difference between this instance and that where the vendor knew the character of the slave, for he who knows should warn the purchaser that he is a thief, but in the other instance, he should not be so ready to make a rash statement.

To a contract of sale (to its essential elements) could the parties add different additional agreements (e.g. on re-purchase, on re-sale, on trial purchase, reservation of a better deal).

9. 1. 2. Lease

Lease was a bilateral equal contract that appeared in three distinct forms:

- lease of a thing,
- lease of labor (contract of employment),
- lease of result of work (contract for a work done).

a) Lease of a thing (locatio conductio rei)

The lessor *(locator)* yields to the lessee *(conductor)* non-consumable thing for using in compliance with its purpose in exchange for a agreed-upon rent. If the object of a lease is fruit-bearing thing the contract is termed as "usufructuary lease" and the rent could be agreed-upon to be paid partly in extracted fruits/the produce. The period of lease is determined by the contract, local customs or the lease terminates by a unilateral termination of the contract due to grave reasons (e.g. long-term non-payment of rent, bad condition of the leased thing, necessary repair of the leased building).

The lessor is obliged to maintain the thing in condition fit for use and reimburse all costs of repairs. He is liable for legal defects of the thing and factual defects if he fraudulently withheld information about them. The lesseee is obliged to pay rent essentially after the termination of the lease. In accord with the principle of utility (usefulness) both parties are liable for their own fault *(dolus, culpa).* For *custodia* and chance is liable the lessor since he is the owner of the thing. The lessor has available *actio locati* to claim the rent and the lessee has *actio conducti* to claim the obligation of the lessor to maintain the thing in usable state. If the lessor sells the leased thing during the lease to a third party, he is liable for damages incurred by the lessee in case the new owner deprives him of use of the thing.

b) Contract of employment (locatio conductio operarum)

The lessor (laborer) exchanges the use of his labor for a certain wage. He is obliged to work personally, properly, according to instructions of the lessee and he is liable for damages caused by him. The lessee (employer) is obliged to pay him the agreed-upon wage *(merces)*, create and maintain appropriate working conditions. Through the action *actio locati* the laborer claims his wages and through the action *actio conducti* the employer claims appropriate completion of the work or damages caused by the underwork. The object of contract of employment could have been only unqualified manual work *(operae illiberales).*

c) Contract for a work done (locatio conductio operis)

The provider (*conductor*) udertakes to perform or execute a particular piece of work and he promises to produce a certain specified result for the person commissioning the enterprise (the customer/ *locator*). The object of this contract was qualified

work performed by a craftsman *(artifex)* – e.g. building of a house, transport of goods, cleaning of clothes, teaching the craft.

The customer is obliged to provide the material and to pay a salary (reward, rent). He has a right to a proper manufacture of the work and to approve the delivered completed work. The provider is obliged to manufacture and deliver the work and has a right to be paid the agreed-upon salary. He is liable for any damage caused to the work and for damage caused by his inexperience and unprofessional approach. If the work was manufactured with aid of other, by the provider authorized persons, he is also liable for damage caused by them, i.e. for a bad choice of persons *(culpa in eligendo)*. For the theft of things accepted by the provider *(custodia)* is liable the provider only if he is a cleaner (repairman) of clothes and a tailor as evidenced by a text in Gaius'Institutes:

Gai. Inst. 3,205:	**Institutes of Gaius 3,205:**
Item si fullo polienda curandaue aut sarcinator sarcienda uestimenta mercede certa acceperit eaque furto amiserit, ipse furti habet actionem, non dominus, quia domini nihil interest ea non periisse, cum iudicio locati a fullone aut sarcinatore suum consequi possit, si modo is fullo aut sarcinator rei praestandae sufficiat; nam si soluendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio conpetit, quia hoc casu ipsius interest rem saluam esse.	Moreover, if a fuller receives clothes to be cleaned or pressed, or a tailor receives them to be repaired, for a certain compensation, and loses them by theft, he, and not the owner, will be entitled to bring the action; because the owner is not interested in their not being lost; as he can recover the value of the clothing in the action of leasing against the fuller, or tailor, provided the said fuller or tailor has sufficient property to make good the loss; for if he should not be solvent, then, for the reason that the owner is unable to recover what belongs to him, he can himself bring the action of theft, because, in this case, it is to his interest that the property should be saved.

9. 1. 3. Contract of mandate *(mandatum)*

Contract of mandate is a bilateral unequal contract based on which the mandatarius undertakes to procure for the benefit of the mandator grauitously some affair (a thing, a legal act, a factual act). If the object of obligation is management of a whole property then the mandatarius is called *procurator* (Ulp. D. 3,3,1, pr.). Contract of mandate could be entered into for the benefit of a third party. If the cause was only for the benefit of mandatarius it would be a non-binding advice *(consilium)*.

The mandatarius is obliged to execute the mandate faithfully and after the end of procurement of affairs to provide an accounting and hand over to the mandator whatever he received on account of or in the execution of the mandate. He has a right to be reimbursed for any expenses that he might have incurred on behalf the mandator and a right to payment for damages suffered in direct connection with the execution of the mandate *(ex causa mandati)*. To claim the stated he has available *actio mandati*

contraria. He is liable only for malicious intent *(dolus)*. If he renunciates the contract *(renuntiatio)* at an importune moment he must reimburse the mandator for potential damages.

Since the mandatarius acts in his own name, i.e. he is only an indirect representative of the mandator (the mandatarius acquires while executing the mandate for himself), the mandator is obliged to accept everything the mandatarius had acquired (to release him from contracted obligations). If the mandatarius fails in his duties the mandator has *actio mandati directa* which if used successfully causes mandatarius'loss of honor *(infamia)*.

If the mandatarius has exceeded the scope of instructions, he was acting on his own behalf and the mandator wasn't obliged to accept anything from him. In this case the mandatarius was liable even for a chance.

9. 1. 4. Contract of association *(societas)*

Contract of association was a bilateral equal contract of two or more persons bound to achieving a common goal through reciprocal performances (work, money, things, reputation). The purpose of such contract was to through a common efforts reach a goal that wasn't achievable by an individual through his own strength (preservation of common property and its management, business based on several activities). Corporations were divided to businesses (aimed at profitable activities) and others (aimed at non-profitable activities). Corporation didn't have its own legal personality. Property put into the corporation were co-owned by the partners, rarely it could remain in ownership of the one partner and in this case the common purpose was being served only through the profit from this investment. Every partner had a right to portion of the profits.

Partners were obliged to:

- perform promised deposits (according to their character),
- be faithful to the partners in his actions; from the relationships of partners that was based on trust if followed that the partners were liable only for malicious intent (possibly for care which they were taking with their own affairs – *culpa in concreto*); execution of obligation against the partners could have been only proprietary (not personal).
- participate in the losses of the corporation (depending on the size of investments of individual partners).

Corporation dissolved:

- by an agreement of partners,
- by resignation of a partner,
- in case of death of a partner,
- after the lapse of appointed time,
- by achieving the appointed goal,
- by litigating to settle mutual personal obligations *(actio pro socio),* i.e. action for termination of a corporation.

For division of property that was co-owned by partners there was an action *actio communi dividundo*.

As a representative of partners in a business corporation based on their authorization acted:

- administrator of the business corporation *(institor tabernae)*, or
- administrator of a sailing corporation, i.e. ship's captain *(magister navis)*.

Obligations of administrators against third parties within the business were claimable based on the adjectic liability. Obligations of partners against third parties gradually took on the character of solidary obligations.

Contract of association created on the principle that one or several partners should take participate only in profits and other partners should participate only in loss is invalid. Such a corporation was termed as lion's corporation (*societas leonina*) described by Ulpianus in D. 17,2,29,2 as contrary to decency and justice.

9. 2. Real contracts

Real contracts are informal gratuious contracts with emphasis on cause that come into being through a physical delivery of a thing to the contractual party based on a previous agreement. The most significant real contracts were loan, borrowing and deposit. Real delivery of a thing with the aim to create a lien (*pignus*) abides by an analogical regulation as does the deposit.

9. 2. 1. Loan *(mutuum)*

Loan is a unilaterally binding contract lying in a transfer of ownership to money or to consumable thing of a certain type, quality and amount with a duty to return the same amount, quality and type (of money or other things). The debtor is burdened with a risk of damage occuring for whatever reason *(dolus, culpa, custodia, vis maior)* since he is owner of the loaned things, he can use them in a whatever way he wants. Interest *(usurae)* did not result from the loan as such but they had to be agreed-upon through a specific formal contract and analogically they were claimable separately. Since it is a unilateraly binding contract only the provider of the loan has an action - *actio certae creditae pecuniae* (if the object of the loan are money) or *actio certae creditae rei* (if the object of the loan are other things). They are actions *stricti iuris*, i.e. the judge couldn't take into consideration any special circumstances of the legal relationship. If after the disclosure of all evidence it is evident that the plaintiff claimed more that he was entitled to *(pluspetitio)* the judgment was one of acquittal.

9. 2. 2. Borrowing *(commodatum)*

Borrowing is a bilateral unequal contract lying in a transfer of detention to an individually defined (essentially) non-consumable movable thing in the interest of its gratuitous usage in accordance with its natural purpose. The recipient was obliged

to return the thing at a time appointed by agreement or on request (if the due date wasn't agreed-upon). The recipient was liable for damage caused by his fault and *custodia* (theft and damage of the thing by a third party or an animal) under the principle of utility (usefulness) which is essentially on his side. *Vis maior* burdens the provider of the thing as its owner. If the recipient has used the thing contrary to its purpose or contrary to the agreement, he was commiting a theft of benefit *(furtum usus)* and consequently he was burdened by the risk of damage caused by the vis major. The recipient could through an action *actio commodati contraria* after the conclusion of the borrowing claim reimbursement of unforseen useful costs expended on the thing (e.g. treatment of a slave) and payment of damages caused by the borrowed thing. The provider has *actio commodati directa* for return of the thing with a possible accession and for payment of possible damages. The character of the actions is *bonae fidei*. *Mora debitoris* led to a duty to pay late charges. *Mora creditoris* moderated the liability only to the malicious intent.

9. 2. 3. Deposit

Deposit is a bilateral unequal contract lying in transfer of detention of a non-consumable individually defined thing to the depositary for the purpose of its protection without the right to use the thing (it could be agreed-upon but with a possible higher liability of the depositary). The depositary was obliged to care for the thing and to protect it against damage. However he was liable only for damages caused with malicious intent. If he acrued any expenses related to care and protection of the thing he could have claimed them through an action *actio depositi contraria* together with the right to retain delivery of the thing (lien) as long as the depositor didn't pay the expenses. If he used the thing he committed a theft of a benefit (*furtum usus)* and furthermore he was liable for damages caused by a chance.

The depositor could through an action *actio depositi directa* claim return of the thing at the appointed time (or on request) and payment of damages caused by the depository with a malicious intent for his whole interest *(quod interes)*. Actions are *bonae fidei*.

If the object of deposit were money which were not in a sealed pouch with an agreement that the depository could use them if he would need them *(depositum irregulare)* the deposit would transform into a loan but only at the moment of their usage (i.e. taking away from the place of deposit with the intent to use them) with all the consequences (change in liability, change in rights and duties). Such a case is described by Ulpianus:

Ulp. D. 12,1,10: *Quod si ab initio, cum deponerem, uti tibi si voles permisero, creditam non esse antequam mota sit, quoniam debitu iri non est certum.*	**Ulp. D. 12,1,10:** If, however, when I deposited the money with you in the beginning, I permitted you to make use of it, if you wished to do so; it is held that the loan does not exist before the money is removed, since it is not certain that anything is owing.

9. 3. Verbal contracts

Verbal contracts were formal unilaterally binding contracts needing a verbal form with prescribed words (verbs) affirming the consensus of parties. They served mainly as an insurance for already existing obligations created from a different reason. These included for example:

- stipulation,
- *fideipromissio* (creation of a guarantor's obligation through a promise, it was available for foreigner as well),
- *dotis dictio* (establishment of dowry through a unilateral declaration of a head of the family in front of the future husband).

The most significant verbal contract was stipulation.

9. 3. 1. Stipulation

Stipulation *(stipulatio)* was a verbal contract that came into being by an answer of a future debtor with a verb "I promise" *(„Spondeo")* to a question of a future creditor asked with a verb "Do you promise?" *(„Spondes?").* Of course that in the question was included the content of the obligation as well (e.g. "Do you promise to return to me 1000 sestertium?"), but since the stipulation was a strictly abstract legal act the reason of creation of the obligation was exclusively in the used prescribed words even despite a possible uttered cause which was a reason for creating a stipulation. The purpose of stipulation was to insure or transform already existing obligations or to create new obligations, e.g. so that the unenforceable obligations become enforceable (stipulation of natural obligations). Disadvantages of the stipulation were that it was possible to only create unilateral obligations and that the parties must have been personally present. In the period of post-classical law the significance of vebal form of stipulation disapeared and a presupposition of existence of stipulation was authenticated without anything else the document of stipulation.

9. 4. Literal contracts

Literal contract has as a reason for creation of obligation a written entry - *transcrip-*

tio. It could have been in two forms:

- change of a monetary debt based on a certain causa for a literal one, i.e. written debt;
- remittance of a debt, i.e. change of a monetary debt of one person for a literal debt of another person.

In both cases the reason for a new debt is a written (literal) entry. The sole purpose of *transcriptio* was a renewal of obligation (the original obligation with its causa was terminated, a new obligation came into being which reason for creation was *transcriptio*).

10. Delicts

Among the delicts acording to Roman law *(delicta privata)* belonged unlawful acts infringing into the private sphere unlike the public crimes *(crimina publica)* which were infringing social (public) interest of Roman municipality *(civitas)*, e.g. murder, incendiarism, treason, contempt of the emperor. Common attributes of delictual obligations were:

- presence of an action based on fault (essentially a malicious intent, unlawful harming of somebody else's thing requires only negligence);
- essentially they were tied to the person of delinquent (at the beginning they were passively as well as actively non-inheritable);
- noxality, i.e. for delicts committed by persons *alieni iuris* and slaves were liable those in whose power these persons were (*pater familias*, or the slave's owner);
- cumulative liability (every one from several accomplices of a delict could be sued separately);
- delictual capacity didn't have mentally ill persons;

Legal protection was provided through penal actions *(actiones poenales)* through which it was possible to claim a fine or through mixed actions *(actiones mixtae)* through which it was possible to claim partly payment of damages and partly a fine.

10. 1. Theft *(furtum)*

Theft was a delict according to civil law lying in an intentional unlawful usurpation of somebody else's movable thing with an intent to enrich oneself (mercenariness). The usurpation included these situations (there always had to be present malicious intent):

- retaining of possession of somebody else's thing;
- usage of somebody else's thing in contradiction to an agreement *(furtum usus)*, e.g. with deposit;
- taking away of one's own thing from possession of a bona fides possessor, pledgee and holder of the usufruct;

- intentional acceptance of an eroneously rendered performance.

For theft civil law provided actions *actio furti* and *condictio furtiva*.

Through the action *actio furti* it was possible to claim a fine and it was available essentially to a robbed owner. Besides him it was available to the one who had some other real right to the thing (pledgee, holder of the usufruct) and the one who had an interest in that so the thing was not stolen (the provider of a work if the delivered material was stolen from him; robbed user of a borrowed thing). The fine for theft was a double of the stolen thing's value or quadruple of its value (if the perpetrator was caught in the act of theft – *furtum manifestum*). To claim return of the stolen thing or to claim payment for damages if the thing was destroyed, the robbed owner was granted *condictio furtiva*.

10. 2. Unlawful harming of somebody else's thing *(damnum iniuria datum)*

This is a delict according to civil law (*lex Aquilia*, the law of the plebeian assembly from the 1st century B.C.). According to this law liable was the one who:

- killed or othewise damaged (injured) somebody else's slave or a four-footed herd animal.
- damaged some other, not his thing.

Presuppositions of establishment of liability were:

- unlawfulness of the act (disculpating reasons were olny acts in extreme emergency or in self-defence),
- action based on fault (action with a malicious intent or gross negligence; for establishment of liability omission of action was not enough),
- occurence of damage (i.e. proprietary detriment – death, injury, destruction, damage),
- the object of damaging action was somebody else's thing,
- typical action (the action must have lied in immediate physical action upon the thing).
- Through praetorial so-called similar actions *(actiones utiles)* liability was established even in analogical situations:
- if the damage was caused indirectly (the damage did not occur due to an immediate physical action upon the thing, e.g. a thrown stone injured slave's head),
- if the integrity of a thing was not broken by the action but a damage was incured (sinking of a ship if there was an intetionally cut off the rope which tied it to the tier),
- if other animals than a herd ones were killed or injured (dog, lion, bear, birds).

In these instances if all other presuppositions of establishment of liability were fulfilled, praetor granted actions contrived for a factual situation *(actiones in factum concepta)*.

The action according to the lex Aquilia *(actio legis Aquilie)* was used to claim a fine

which was equal to:

- the highest value of the killed slave or animal during the last year before its killing,
- the highest value of a damaged thing during the last 30 days before its damage plus other interest of the injured (loss of profit, medical expenses).

Justinian law granted the action even in a case if somebody damaged physical integrity of a free person.

10. 3. Fraud *(dolus)*

In year 66 B.C. praetor Aquilius Gallus established an action against acts causing damage that has attributes of fraud (intentional misguidance of other so that he made a certain legal act which he wouldn't otherwise do) or of a malicious damage of other person (misguidance is missing).

Praetor in these situations if the damaged who had performed based on the fraud didn't have any other action available, subsidiarily granted an action *actio doli* through which it was possible to claim payment of all damages. Proving of a fraund in front of a judge was problematic though. If the person damaged through fraud was in a position of a defendant, praetor had granted exception *exceptio doli* against the action of the fraud who was claiming performance of the obligation. It was irelevant wether the fraud came about at the creation of the legal act or afterwards.

10. 4. Coercion *(metus)*

This is a praetorial delict established probably around year 80 B.C. Praetor protected a person who under the threat of unlawful detriment to himself or members of the family from somebody else was coerced to make a legal act to avoid the threatening damage. Factual attributes of coercion were these:

- coercion must arouse legitimate fear, i.e. threatened detriment was big (detriment to health),
- the fear was the result of the threat (causality between coercion and fear),
- the threat was immediate (feasible in reality),
- the threat was illegal/unlawful (it was not a reason which could with the respect of the actor be considered as justified).

Praetor granted the coerced an action *actio quod metus causa* (restitution of everything the coercer gained from the act) or an exception *exceptio metus* to prove of coercion in front of the judge and a consequent dismissal of the petition. In case of a serious detriment he subsidiary granted also *restitutio in integrum* (praetor in this case on the instigation of the damaged through a decree terminated, after examination of the case without a subsequent trial in front of a judge, all effects and consequences of the legal act made under coercion).