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THE MUNICIFENT DONOR AND HIS REVENGE ON THE UNGRATEFUL DONEE: THEN AND NOW

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Abstract: *This article focuses on the munificent donor and the ungrateful donee. Various relevant topics will be discussed, such as the nature of a donation, the requirement of registration and the circumstances that could lead to the revocation of a gift. The position in Roman, Roman-Dutch and South African law will be researched, with a view to determining whether and to what extent the latter two legal systems were built on Roman law.*

Keywords**:** *Donatio*; donor; donee; *donatio inter vivos*; *revocatio*; *lex Cincia de donis et muneribus*; *insinuatio*; *animus donandi*; ingratitude; *liberalitas*; *munificentia*; generosity.

1. Introduction

According to Julian "when someone makes a gift with the intention that it should immediately become the property of the recipient and will not revert to himself in any circumstances, and he does this for no other reason than to practice liberality and generosity" this may be regarded as "a gift in the proper sense".[1] A donation in Roman law may therefore be defined as "[a]n act of liberality by which the donor (*donator*) hands over or promises a gift to the donee with the intention to make a gift (*animus donandi*) and without expecting any reciprocal performance".[2] By means of this act of liberality, the donee was enriched at the expense of the donor.[3] According to the *Oxford Universal Dictionary* a "munificent" person is one who is "splendidly generous in giving" or "characterized by splendid or princely generosity".[4] Such a person would usually be regarded as superior and exceptional. The distinguishing feature of a gift is the underlying motive, namely the *animus donandi* or the motive of liberality.

Various rules governed gifts between the living (*donationes inter vivos*).[5] Firstly, public policy limited the amount or size of donations in order to curb extravagance. In early Roman law the right to make gifts was restricted by the *lex Cincia de donis et muneribus*, a *plebiscitum* dating from 204 B.C. and the size of gifts was limited to a specified maximum.[6]

Justinian abrogated this law and allowed unrestricted donations except in special cases, for example gifts between husband and wife (*donatio inter virum et uxorem*).[7] During the later Empire[8] a system of registration of all gifts, *insinuatio*, was introduced by

Constantine.[9] According to Justinian, unregistered gifts whose value exceeded 500 (initially 300 hundred) *solidi* were void in respect of the excess.[10]

Secondly, gifts could only be made to certain people.[11] Thirdly, because there were so many kinds of gifts there were no formal requirements during the classical period. Delivery of a gift was, however, required for the transfer of ownership to the donee.[12] Fourthly, although initially gifts *inter vivos* were irrevocable, a right to revocation developed over time.

In this article I shall briefly discuss the nature of a donation and the registration of gifts and then focus on the revocation of gifts in Roman law. In addition I shall pay attention to these aspects of gifts in Roman-Dutch and South African law in order to determine to what extent Roman law underpinned modern law in this regard.

2. Roman law

2. 1. What is a donatio?

A donation was regarded as a special kind of consensual contract since the donee did not have to do anything in return for the gift.[13] "*Donatio*" therefore comprised all transactions by means of which one person gave something to another out of pure liberality. Although the intention was not that the donee should do something in return for the gift, he was forbidden to do anything negative. Where a donation resulted in the transfer of a physical thing it was not a mode of acquisition, but a *iusta causa* in a contract.[14] During the post-classical period a donation was still only a *causa*.[15]

Classical lawyers regarded donation as a disposition for the benefit of another person, who would not have to do or pay anything in return for it.[16] Provided the donor acted with an *animus donandi*, a variety of legal acts constituted a donation.[17] During the classical period gifts were therefore not perceived as a special kind of transaction; they were regarded as merely providing a *causa* for various types of acts by means of which a person disposed of money, property or possessions in favour of another without receiving anything in return.[18]

Emperor Constantine approved of liberality and made large donations. His charitable attitude was inspired by the Christian principles which were gradually gaining ground at that time and which promoted acts of generosity and charity.[19] In his time donations gave rise to many problems that he wished to clarify. He acknowledged them as valid legal transactions. He considered a donation to be a bilateral act that was performed instantly and resulted in the immediate transfer of ownership from the donor to the donee.[20] It was no longer the *causa* of the transfer; it was now one of its modes. This was in line with the general development of post-classical law away from the classical distinction between an obligatory act and the transfer of ownership.

During the post-classical period a donation was consequently an agreement in terms of which one person would donate something of value to another (who accepted it) without being paid for it. The donor had to have the intention, based on his *liberalitas*, to make a donation (*animus donandi*), which could only be revoked under certain exceptional circumstances.[21]

Since Constantine's well-meant reforms had created new problems, Justinian decided to simplify and restate the law relating to donations. Like Constantine, Justinian favoured acts of liberality and promoted generosity and he, too, was influenced by the teachings of Christianity.[22]

To a certain extent he revived the classical concept, thus distinguishing between the obligatory contract and those acts required to fulfil the obligations flowing from the contract.[23] Once again the promise of a gift (which could be an informal agreement between the parties[24]) became binding and enforceable.[25] Thus Justinian created a new contract, namely donation.[26]

By the time of the Justinian period the promise or agreement to give a gift was therefore considered to be a legal agreement (*pactum legitimum*) constituting a binding consensual contract.[27] In donations as well as other contracts in which only one party did or gave something, the agreement was constituted by the acceptance.[28]

In *Codex* 5.16.27.1 Justinian provided general guidelines for the application and reform of the law of donations. The donor's intention to donate was acknowledged as the distinctive element establishing a donation. Julian's definition of a donation in the *Digest* text[29] emphasises the donor's noble spirit. He was required to have been moved to perform an unselfish act of liberality. It is interesting that Zimmermann mentions Paul's "cheerful giver"[30] in this regard. There is some reasonable and just motive for the donor's act, such as the mere pleasure of doing good.

In Justinian's law donations were governed by a number of rules, of which I shall now discuss a few.

2.2. Registration of gifts exceeding 500 solidi

Justinian determined that gifts exceeding, initially, 300 *solidi*,[31] and thereafter 500 *solidi*, had to be registered in court by the donor (*insinuatio*).[32] This would, *inter alia*, formally manifest the donor's intention of munificence. Apart from the fact that large gifts were generally frowned upon,[33] official registration was an indication that large gifts were exceptional and brought them into the public domain. The recipients of such generous gifts were expected to appreciate them. The emperor could keep the donees under close scrutiny to prevent munificent donors from being humiliated or maltreated. It would therefore be known that the gifts had indeed been given if the donor wished to revoke the gift because of ingratitude.

2. 3. Revocation of gifts

Gifts were generally not revocable.[34] In the *Institutes*, Justinian explicitly states that *donationes inter vivos*, once given, cannot easily be reclaimed.[35] Once a donor had made his will clear the gift were complete.[36] However, in respect of ordinary gifts a right of revocation on the ground of ingratitude was gradually introduced, and much of this legislation has survived. This was consistent with introducing good ethics into the law of donations, closely examining the donor's motives and determining whether the donee's conduct measured up to certain minimum standards.

During the third century Emperor Philip declared that a gift made by a patron to a freedman (*libertus*) was revocable if he became ungrateful and insolent.[37] Subsequently, in

A.D. 349, Constantine and Constans granted to certain mothers the right to revoke gifts made to children if they proved ungrateful.[38] The right to revocation was gradually extended to other donor/donee relationships.[39] In the year A.D. 426 Theodosius and Valentinianus determined that neither a father, grandfather nor great-grandfather could revoke donations to a son or daughter, grandson, granddaughter or great-grandson or great-granddaughter who had been emancipated, unless clear evidence proved that the person to whom the donation had been made was guilty of a lack of filial affection and gratitude to an extent recognised as sufficient in law.[40]

Subsequently Justinian in a constitution determined that for certain reasons, donors could revoke their gifts. This was to ensure that a donor would not injure or harass an ungrateful recipient of a gift.[41] Justinian then extended revocation on the grounds of ingratitude to cover all donees, expressly limiting the grounds for revocation[42] to the following types of ingratitude towards the donor: extreme insults or violent behaviour towards him; treachery causing him to suffer heavy pecuniary loss, thus decreasing his estate; or exposing him to a life-threatening situation.[43]

The emperors were obviously concerned about the feelings of munificent donors who were maltreated by ungrateful donees. They did not wish the donor's liberality to be scorned by an ungrateful beneficiary.[44] The reason for the introduction of the right of revocation was therefore the wish to "punish" the ungrateful donee.

The donor was allowed to revoke a gift, but his successors were *not*. In *Codex* 8.55(56).1.3 Emperor Philip stated that the right of revocation was reserved to those who had made the gift and did not extend to their children or heirs.[45] Subsequently the Emperors Constantius and Constans declared that a mother's right to revoke a gift was a personal one that could not lie "against an heir or be transferable to an heir".[46] Actions for revocation could consequently not be instituted against the successors of either the donor or the donee. Justinian confirmed this when, in A.D. 530, he decreed that the provisions on revocation applied only to the original parties ("*primas personas*").[47] The emperors seemed to agree that if the donor himself did not revoke the gift during his lifetime because of ingratitude shown to him,[48] no one else should act against the ungrateful donee. No action relating to the gift could be instituted against the successors of either the donors or the donees.

If revocation was sought, a judicial enquiry into the allegation of ingratitude was required. Only if there was ingratitude of the type mentioned above that was proved in court by indisputable evidence, might donations be revoked.[49] The effect may have been to revoke the gift *in rem* or to give a remedy *in personam*. In Justinian's law, where appropriate, a *vindicatio utilis* was allowed,[50] which indicates that ownership was considered to revert automatically to the donor. The effect of the decree seems to have been the *ipso facto* forfeiture of the gift.[51]

3. Roman-Dutch law

3. 1. What is a donation?

In Roman-Dutch law a donation or gift was considered to be a consensual contract.[52] A distinction was drawn between the contract, which binds the parties, and the transfer, which passed the property.[53]

De Groot (1583-1645) defines a donation or gift as a promise in terms of which a person out of *liberality* binds himself to give something to another without receiving anything in return.[54] According to Simon van Leeuwen (1626-1682) a donation may be described as a voluntary delivery to another, through *liberality*, of something for no cause (except liberality).[55] Voet (1647-1713) says that "the generous and permissible giving or promising of something" may be regarded as a donation[56] and Van der Linden (1756-1827) regards a gift or donation as an agreement in terms of which a person through liberality irrevocably gives something to another who accepts it.[57] The abovementioned definitions of donation by some of the most important Roman-Dutch authors lead to the conclusion that the characteristic feature of a donation or gift in Roman-Dutch law was that it was given out of liberality. De Groot expands on this, stating that the words "out of liberality" are specifically important for they indicate that it might otherwise be presumed that the promise had been made out of ignorance and would not give rise to a legal obligation.[58]

3. 2. Registration of gifts

There is some uncertainty about the Roman-law rule that gifts in excess of 500 *aurei* had to be registered in Roman-Dutch law. According to De Groot, "as a restraint upon excessive liberality", Roman law provided that no donation exceeding 500 *aurei* would be valid unless it was reported and registered.[59] He further says that he found no reference to such acts in Roman-Dutch law, "perhaps because excessive liberality has not been known here". Van Leeuwen doubted whether the Roman-law rule, declaring gifts in excess of 500 *aurei* invalid in order to prevent "excessive and inconsiderate liberality" unless confirmed by a legal document before the local magistrate, was still valid among the Dutch.[60] However, he argued that since it had never been formally abolished it should be accepted that it was still valid.[61] Voet states that this rule was indeed admitted into Roman-Dutch law and had not been changed by any statute or usage.[62] Later Van der Keessel (1738-1816) confirmed that the Roman-law rule that gifts in excess of 500 *aurii* must be registered had been adopted by the Dutch.[63] This registration could, however, be replaced by a solemn cession of immovable property made in court or in the case of movables a declaration before a notary and witnesses. Van der Linden, with reference to De Groot 3.2.15, stated that the Roman-law rule that gifts might not exceed 500 *aurei* was no longer in force "in that form" in Holland.[64] However, immovable property given as a gift had to be transferred before the court.

Despite these contrasting opinions it may be accepted that the rule was indeed adopted in Holland, but not widely applied. The reason may merely have been that the Dutch were not known for their liberality and that very few gifts in excess of five hundred *aurei* were given. There do not seem to have been many liberal donors. However, once the donation had been registered or a cession or declaration had been made, the gift had been formalised. There were thus witnesses to an act that seems to have been rather exceptional: gifts of such liberality were not the norm and their formalisation could afterwards protect the donor if he was treated with gross ingratitude and wished to revoke the gift.

3. 3. The revocation of gifts

As in Rome, donations were in principle irrevocable. However, there were exceptions to this rule. De Groot started off by stating that as a rule gifts were irrevocable, but in the very next paragraph he said that they might be revoked in certain circumstances.[65] He then mentioned various grounds for revoking a donation, but did not making any specific mention of ingratitude on the part of the donee. Examples of such grounds were that the donee had threatened the donor's life or struck him, or attempted to ruin him financially.[66] In addition, malicious slander and any other great injury could also lead to revocation. With reference to the revocability of donations, Leeuwen stated that gifts might be revoked and cancelled because of "*great* ingratitude and injury" done to the donor.[67] He mentioned a few examples of such deeds, for instance the donee had made an attempt on the life of the donor or attacked him violently or harmed his reputation, had denied assistance to a donor who was living in reduced circumstances, and the like.[68] Voet explicitly mentions five grounds for revoking a gift to an ungrateful donee, even though the donor had sworn not to revoke.[69] Such an oath was void since it could tempt a donee to do wrong and would imply that the donor had formally undertaken to forgive the donee for any future offence.[70] The grounds for revocation mentioned by Voet are "when the donee has laid wicked hands upon the donor, or has contrived a *gross* and actionable wrong, or some huge volume of sacrifice or a plot against his life, or has not obeyed conditions attached to the donation".[71] According to Van der Linden, although valid donations were by nature irrevocable,[72] they could be revoked under certain circumstances such as the donee's *gross* ingratitude and ill-treatment of the donor.[73]

In Roman-Dutch law the right of revocation was available to all donors, but not to their children or grandchildren. It is interesting to note that neither Maasdorp's translation of De Groot's *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (*An Introduction to Roman-Dutch Law*)[74] nor the Fockema-Andreae-edition[75] mentions this. In the Dovring-translation of De Groot, an additional sentence in 3.2.17 states that the donor's successors were not entitled to revoke donations because of the donees' ingratitude.[76] Voet likewise states that an action to revoke a gift on the grounds of ingratitude does not pass to and against heirs.[77] The revocation of gifts because of ingratitude was probably thought to avenge the wrong the donee had committed against the donor and was therefore not granted to or against an heir.[78] The action was limited to the wronged donor and if he had suffered in silence at the hands of the donee, his successors could not institute an action against the ungrateful donee or his successors.[79]

Voet explains that this is what the Emperors (Philip and Justinian) intended when they said that the revocation of a gift on the ground of ingratitude would be personal in the sense that it had the effect of punishment or vengeance and could consequently not be granted to or against an heir.[80] He asserts that since the revocation of a donation on the grounds of the donee's ingratitude involves avenging the wrong inflicted on the donor by the ungrateful donee, it is certain that the relevant action could not be granted to the children of either the donor or the donee.[81]

4. South African law

4. 1. What is a donation?

A donation, in South African law, is a contract, which must therefore comply with all the requirements of the law regarding contracts.[82] Thus the general rule that acceptance is necessary applies to the contract of donation in South Africa.[83] Maasdorp, with reference to various Roman-Dutch authors, simply defines a donation in South African law as follows: "A donation is an agreement whereby a person, who is under no legal obligation to do so, gives, or promises to give, something to another, without receiving or stipulating for anything in return."[84] In *Malaba v. Malaba* Judge Ndou stated that "a donation, *schenking*, is a contract whereby one person, who is not under obligation to do so, but out of sheer liberality, promises to give another person something without receiving anything in return. ... The motive should be a disinterested benevolence and for moral purposes".[85] As in Roman and Roman-Dutch law, the distinguishing feature of a donation is the motive of liberality, the *animus donandi*. It is interesting to note that these modern-day South African definitions make use of essentially the same words and formulations as are found in the Roman and Roman-Dutch law definitions of a donation.

4. 2. Registration of gifts

South African courts decided early on to follow Roman and Roman-Dutch law practices regarding donations and determined that gifts exceeding 500 *aurei* had to be registered in the Registry of Deeds in order to be valid.[86] The courts then attempted to determine what the present-day value of an *aureus* was and in *Thorpe's Trustees v. Thorpe's Tutor* De Villiers C.J. stated that an *aureus* was worth one sovereign sterling.[87] A donation would be revocable in respect of the amount exceeding £500 unless it was registered in the Deeds Office or embodied in a notarial deed.[88] The General Law Amendment Act of 1956,[89] which was later replaced by section 43 of the General Law Amendment Act of 1968, introduced some changes. Donations made after this legislation came into force are not invalid merely because they are not registered or notarially executed. Such executory contracts must, however, be embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses in order to be valid.[90] In *Avis v. Verseput* J.A. Tindall stated that complying with the formal requirement of registration (*insinuatio*) was in the interests of the donor and his heirs. It gave the donor time to reconsider his donation and become more cautious so that the interests of his heirs were safeguarded.[91] The munificent donor's impulsive liberality was therefore inhibited and he was granted some kind of protection.

4. 3. Revocation of gifts

In South African law, as in Roman and Roman-Dutch law, it is generally accepted that donations *inter vivos* may be revoked because of the "gross" ingratitude of the donee.[92] The onus is on the donor claiming revocation to prove that the motive for the

transfer of the property to the donee was sheer *liberality* or generosity, in other words, a donation.[93] The donor's only aim is to benefit the donee. He is entitled to revoke the donation on the ground of ingratitude, even though he may previously have expressly agreed otherwise. Voet's list of acts constituting gross ingratitude has been quoted and accepted in South African case law and other legal literature.[94] The ingratitude must be of a sufficiently serious nature and it has been stated that it must be accompanied by *dolus.*[95]

From the South African common law and case law it appears that ingratitude would be an acceptable reason for revocation of a gift.[96] In *Malaba v Malaba*, for example, it was stated that a donation could be revoked in exceptional circumstances, namely gross ingratitude on the part of the donee or ill-treatment by him/her of the donor.[97] Since it was found that there was no donation in this case, the donee's ingratitude was not relevant.

Although "*dolus*" was not a requirement for ingratitude in Roman and Roman-Dutch law, and it had not been expressly stated in South African law, it now seems that the ungrateful donee may be required to have acted with *dolus.* As early as 1943, A.J.A. Fischer said "the plaintiff wilfully and maliciously caused the defendant great inconvenience and loss".[98] A person acting "wilfully and maliciously" may certainly be said to act with *dolus*. Many years later, in 2005, Owens stated that in that the ingratitude on the part of the donee had not only to be sufficiently serious, it also had to be accompanied by *dolus*.[99] Then, in 2006, the judgment in *Fenton v. Fenton* showed Mrs. Fenton to have undoubtedly acted wilfully and caused the donor great unhappiness.[100] From the evidence in that case it appears that the plaintiff's son and daughter-in-law maltreated, insulted and shouted at Mr. Fenton's elderly father (the donor), who was eventually told to leave the house. A.J. Mabuso found that "their act of ordering the plaintiff out of their house in that manner" could be regarded as an act of ingratitude. The plaintiff was consequently entitled to revoke his donation.

The right to revoke a gift because of the donee's ingratitude does not devolve on the heirs or successors of the donor.[101]

5. Conclusion

Throughout the ages it has generally been accepted that donors were exceptional persons. Donees who acted with (gross) ingratitude after they had been given something out of liberality were consequently considered to have conducted themselves shockingly badly. Through the revocation of the gift, their reprehensible behaviour could consequently be punished severely by the donor. This is indicative of the gravity with which the ungrateful donee's maltreatment of the donor was regarded. Besides, donors would usually have been family members and older people, obviously an aggravating factor in the eyes of the donor and society.

From the discussion *supra* it is clear that definitions of donations in Roman, Roman-Dutch and South African are almost identical: "*Donatio*" basically comprised all transactions in which a person with the *animus donandi* gave something to another out of pure liberality.

As far as registration of the donation is concerned, Roman law, from as early as the time of the *lex Cincia*, required gifts exceeding specific amounts to be registered. By

the time of Justinian it was 500 *solidi*, a huge amount. The general opinion amongst the Roman-Dutch writers was that Roman-Dutch law had adopted the Roman-law rule that no donation exceeding 500 *aurei* would be valid unless it was reported and registered. The purpose of registration in these two legal systems seems to have been more or less the same, namely to formalise the donation and make it public. Bringing it into the public domain served as protection for the donor if he was maltreated by the donee. South African courts followed these practices regarding registration. Changes were introduced as time went by, but the principles remained the same and the same reasons applied, namely that registration gave the donor time to reconsider his donation. Besides granting protection to the donor, it also safeguarded the interests of the donor's heirs.

Although in Roman law valid donations were by their nature irrevocable, it gradually became possible for the donor to revoke gifts if the donee was found guilty of ingratitude towards the donor. Roman-Dutch authors were likewise of the opinion that a gift could be revoked on the grounds of the donee's gross (or great) ingratitude. To judge by the South African common law and case law, acts of gross ingratitude can also lead to the revocation of gifts in South African law. All three legal systems provided for the revocation of gifts because of the donee's ingratitude. The acts of ingratitude mentioned in Roman, Roman-Dutch and South African law are basically the same.

Although it had not previously been stated in Roman or Roman-Dutch law that the ungrateful donee had to have acted with *dolus* we find A.J.A. Fischer stating, in *Avis v. Verseput*, that the donee must "wilfully and maliciously have caused the defendant (donor) great inconvenience and loss"[102]. In addition Owens explicitly states that the donee had to have performed the act of gross ingratitude with *dolus.*[103] If one considers the acts that were regarded as constituting ingratitude or gross ingratitude in Roman, Roman-Dutch and South African law, it is clear that they could not have been committed in the absence of *dolus*. Surely a person could not try to murder or seriously insult the donor or intentionally deprive the donor of property without *dolus*? None of these acts could have been performed in the absence of wilfulness on the part of the donee. One may therefore accept that *dolus* was implied in the very nature of such acts and that the donee undoubtedly acted with *dolus* when performing them.

In addition, the fact that the successors of neither donor nor donee could succeed to their predecessors is yet another indication that the donee's conduct prompting revocation by the donor was regarded as repulsive and offensive (which again implied *dolus*), and that revocation was seen as punishment and revenge. It would not be regarded as fair and just to act against the innocent successors of either original party.

The repugnance with which the Romans, the Roman-Dutch and the South Africans have viewed donees who maltreat their donors, indicates that this is a universal and timeless attitude. Society, over a period of more than two thousand years, has continued to strongly disapprove of blameworthy acts of ingratitude against a donor. If someone receives something for nothing, he is expected to demonstrate his gratitude by his actions.

The discussion above of gifts in Roman, Roman-Dutch and South African law shows clearly that Roman law constituted the foundation or basis of the Roman-Dutch and

South African law regarding donations. Although small changes have been introduced over time, definitions, registration and revocation remain fundamentally unchanged. It is clear that in respect of donations Roman-Dutch and South African law have built solidly on the foundations of Roman law.

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1 See *D.* 39.5.1*pr.* Julianus *libro septimo decimo digestorum*: "dat aliquis ea mente, ut statim velit accipientes fieri nec ullo casu ad se reverti, et propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exerceat." All English translations of Justinian's *Digest* in this article are taken from T. Mommsen, P. Krueger & A. Watson *The Digest of Justinian* University of Pennsylvania Press, Philadelphia, Pennsylvania. See, however, also *D.* 15.3.10.7 Ulpianus *libro vicesimo nono ad edictum*.

2 A. Berger *Transactions of the American Philosophical Society. Encyclopedic Dictionary of Roman Law.* The American Philosophical Society, Philadelphia (1991) p. 442. Further P. Jörs, W. Kunkel & L. Wenger *Römisches Recht* (4th ed. H. Honsell, T. Mayer-Maly & W. Selb) Springer-Verlag, Berlin (1987) p. 354: "Die Schenkung im eigentlichen Sinn erfolgt aus Freigiebigkeit (*liberalitas*, *munificentia*)"; M. Kaser *Das Römische Privatrecht* vol. 1 2nd ed. C.H. Beck'sche Verlagsbuchhandlung, München (1971) p. 601; R. Sohm *The Institutes. A Textbook of the History and System of Roman Private Law* (tr. by J.C. Ledlie) 3rd ed. Clarendon Press, Oxford (1935) at pp. 211-212 defines a gift as a transaction whereby one person, from motives of liberality, that is with a motive of enriching another person, makes over to that other person some property or benefit. See, further, A. Wacke "Europäische Spruchweisheiten über das Schenken und ihr Wert als rechtshistorisches Argument" in R. Zimmermann, R. Knütel & J.P. Meincke (eds.) *Rechtsgeschichte und Privatrechtsdogmatik* (C.F. Müller Verlag, Heidelberg, 1999) at p. 329, where he states that although "[n]iemand gibt umsonst", the donor nevertheless expects some acknowledgement and gratitude from the donee as well as a "himmlischen Lohn" for his good deed (*cf*. n. 30). According to Wacke (quoting Gregor von Tours at pp. 338-339) "richtig schenken" is an art. See, further, Seneca (*De vita beata* 24.1) which reads as follows: "Errat si quis existimat facile rem esse donare."

3 R.W. Lee *The Elements of Roman Law with a Translation of the Institutes of Justinian* Sweet and Maxwell Limited, London (1956) p. 147.

4 For *munificentia* see *The Oxford Universal Dictionary Illustrated* 3rd ed. Clarendon Press, Oxford (1964) *sv* "Munificent" and "Munificence" at p. 1298. The word is derived from *munificus* (generous, liberal) = *munus* (gift) + *facere* (to make).

5 See *D.* 39.5 *De Donationibus*; *Codex* 8.53(54) *De Donationibus*; *Codex* 8.55(56) *De Revocandis Donationibus*; and *Inst.* 2.7 *passim.*

6 Unless they were made to certain specified people, such as parents or children: see Sohm (*supra*, n. 2) p. 212. R. Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* University Press, Oxford (1996) pp. 482-483 surmises that the *lex Cincia* (204 B.C.) may have been enacted during a period of economic difficulty when the Second Punic War was finally coming to an end. However, it was more likely that it constituted part of the *leges sumptuariae* that were issued to limit large gifts in order to prevent some families from accumulating huge amounts of money, property and possessions through which they could obtain political influence.

7 *Cf*. *D.* 24.1.1 Ulpianus *libro trigesimo secundo ad Sabinum*; *D.* 24.1.3*pr*.-1 Ulpianus *libro trigesimo secundo ad Sabinum*; *Codex* 5.3.1 (Impp. Severus et Antoninus AA. Metrodoro); *Codex* 5.15.2 (Imp. Alexander A. Papinianae (229)); *Codex* 5.16.6 (Imp. Alexander A. Nepotiano (229)). See, also, M. Kaser *Das Römische Privatrecht* vol. 2 2nd ed. C.H. Beck'sche Verlagsbuchhandlung, München (1975) p. 399.

[8] The *lex* appeared to be still in force in A.D. 341; *C. Th.* 8.12.6 Impp. Constantius et Constans (341).
[9] *Codex* 8.53(54).34 Imp. Justinianus A. Demostheni pp. (529); *Inst.* 2.7.2.
[10] J.A.C. Thomas *Textbook of Roman Law* North-Holland Publishing Company, Amsterdam (1981) p. 192. *Codex* 8.53(54).36.3 Imp. Justinianus A. Johanni pp. (531). In exceptional cases, if these gifts were donated to charity, the Church or the Emperor, they would nevertheless be valid.
[11] See Thomas (*supra*, n. 10) p. 192.
[12] *Codex* 8.53(54).6 (Impp. Diocletianus et Maximianus AA. Calpurniae Aristaenetae (286)).
[13] See M. Kaser & R. Knütel *Römisches Privatrecht* 19th ed. Verlag C.H. Beck München (2008) at p. 259: "Die Schenkung (*donatio*) ist eine *unentgeltliche* Zuwendung, also eine solche, für die der Geber keine geltwerte oder sonstige Gegenleisting erwartet."
[14] *Cf.* W.W. Buckland *A Text-Book of Roman Law from Augustus to Justinian* 3rd ed. rev. P. Stein University Press Cambridge (1963) p. 253; Kaser vol. 1 (*supra,* n. 2) p. 602; *Codex* 8.53(54).35.5b (Imp. Justinianus A. Iuliano pp. (530)); *Inst.* 2.7.2; *D.* 39.5.22 (Modestinus *libro octavo differentiarum*) and 24 (Iavolenus *libro quarto decimo ex Cassio*).
[15] Kaser (*supra*, n. 7) p. 394.
[16] Kaser (*supra*, n. 2) pp. 601ff.
[17] *Cf*. *D.* 39.5.34*pr*. Paulus *libro quinto sententiarum*; *D.* 39.5.14 Julianus *libro septimo decimo digestorum*; *D.* 24.1.49 Marcellus *libro septimo digestorum*; *D*. 12.1.20 Julianus *libro octavo decimo digestorum*: "donationem non esse, quia non ea mente pecunia daretur, ut omnimodo penes accipientem maneret"; *Codex* 5.3.1 (Impp. Severus et Antoninus AA. Metrodoro); *Codex* 3.32.2.1 (Impp. Severus et Antoninus AA. Aristaeneto (213)). It appears that the intention of the giver is of the utmost importance and relevance. For the classical lawyers, donation was a disposition for the benefit of another person, who was not expected to give anything for it. Various legal acts constituted a donation if they were intended to confer a gratuitous benefit on the donee, since the special characteristic of a gift was the motive underlying it, namely the *animus donandi* or motive of liberality. *Cf*. Kaser (*supra*, n. 2) pp. 601ff; Zimmermann (*supra*, n. 6) pp. 479-480; Sohm (*supra*, n. 2) p. 212; Kaser-Knütel (*supra*, n. 13) p. 260.
[18] *Cf*. Kaser-Knütel (*supra*, n. 13) p. 260.
[19] Zimmermann (*supra*, n. 6) p. 491.
[20] Zimmermann (*supra*, n. 6) p. 492.
[21] *D.* 39.5.1*pr.* Julianus *libro septimo decimo digestorum*; *Inst.* 2.7.2.
[22] *Codex* 5.16.27.1 Imp. Justinianus A. Iohanni pp. (530): "Cum itaque in utroque casu oportet augusto remedio causam dirimi, cum nihil aliud tam peculiare est imperiali maiestati quam humanitas, per quam solam dei servatur imitatio, in ambobus casibus donationem firmam esse censemus."
[23] Zimmermann (*supra*, n. 6) p. 494-495; Kaser (*supra*, n. 7) p. 282ff. As far as donations are concerned, *cf*. *Codex* 8.53(54).35.5b Imp. Iustinianus A. Iuliano pp. (530): "non ex hoc …. "; and *Inst* 2.7.2: "et ad exemplum … ".
[24] *Inst* 2.7.2: "Perficiuntur autem cum donator suam voluntatem scriptis aut sine scriptis manifestaverit."
[25] Zimmermann (*supra*, n. 6) p. 495.
[26] Kaser (*supra*, n. 7) p. 396. *Cf. Codex* 4.21.17*pr*. Imp. Iustinianus A. Menae pp. (528). See, also, Wacke (n. 2) who confirms that it was indeed a contract in which the donee was required to accept the gift. The donee had a choice in this regard: see *D.* 50.17.69 ("Invito beneficium non datur") and *D.* 39.5.19.2 ("Non potest liberalitas nolenti adquiri").
[27] *Codex* 8.53(54).25 Imp. Constantinus A. ad Maximum pu. (316); *Codex* 4.21.17*pr.* Imp. Iustinianus A. Menae pp. (528). *Cf*. Kaser-Knütel (*supra*, n. 13) p. 260: "Sie wird auch als blosses *Versprechen* wieder verbindlich gemacht … Damit wird das Schenkungsversprechen ein *selbständig* obligierender, durch *Konsens* begründeter *contractus*."

[28] W.W Buckland & A.D. McNair *Roman Law and Common Law* (2nd and rev. ed. F.H. Lawson) University Press, Cambridge (1952) p. 233.

[29] See *D*. 39.5.1*pr*. Julianus *libro septimo decimo digestorum.*

[30] Zimmermann (*supra*, n. 6) p. 496. See 2 Corinthians 9:7: "Every man according as he purposeth in his heart, *so let him give*, not grudgingly, or of necessity; for God loveth a cheerful giver". *Cf*. also Exodus 25.2.

[31] *Codex* 8.53(54).33*pr*. Imp. Iustinianus A. Menae pp. (528).

[32] *Codex* 8.53(54).36.3 Imp. Iustinianus A. Iohanni pp. (531).

[33] Gifts were, *inter alia*, limited in value since a donation could impoverish a *familia*: see L. Waelkens *Civium Causa. Handboek Romeins recht* Uitgeverij Acco, Leuven (2008) p. 361.

[34] Kaser (*supra*, n. 2) p. 604; W.W. Buckland *A Manual of Roman Private Law* 2nd ed. University Press, Cambridge (1939) p. 151; Wacke (n. 2) pp. 347-348, 350-351.

[35] *Inst.* 2.7.2: "sciendum tamen est , quod, etsi plenissimae sint donationes, tamen si ingrati existant homines in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam praestavimus certis ex causis eas revocare, ne, qui suas res in alios contulerunt, ab his quondam patiantur iniuriam vel iacturam, secundum enumeratos in nostra constitutione modos" ("One thing, however, should be known and that is that, even though gifts be fully perfect, if the persons, so advantaged by the boon, be ungrateful, we have provided in a constitution that, for certain causes, the donors shall be at liberty to revoke their gifts so that, according to the provisions set out in our constitution, people shall not have conferred their property on others at whose hands they suffer any wrong or harassment"). All texts and translations from the *Institutes* of Justinian are derived from J.A.C. Thomas *The Institutes of Justinian. Text, Translation and Commentary* Juta & Company Limited, Cape Town (1975).

[36] *Inst*. 2.7.2.

[37] See *Codex* 8.55(56).1*pr.* et 2 Imp. Philippus A. Agilio Cosmiano (249 A.D.). *Cf. Vat. Frag.* 272: "Hoc tamen ius stabit intra ipsorum tantum liberalitatem, qui donauerunt: ceterum neque filii eorum neque successors ad hoc beneficium peruenient; neque enim fas est omnimodo inquietari donationes, quas is qui donauerat in diem uitae suae non reuocavit."

[38] *Codex.* 8.55(56).7*pr*. Impp. Constantius et Constans AA. ad Philippum pp. (349). See also *Vat. Frag.* 272 "Nam qui obsequio *suo* liberalitatem patronorum prouocauerunt, sunt digni quin eam [non] retineant, cum coeperint obsequia neglegere, cum magis eos conlata liberalitas ad obsequium inclinare debeat quam ad insolentiam erigere." This fragment mentions ingratitude but does not make it essential. However, *Codex* 8.55(56).1 Imp. Philippus A. Agilio Cosmiano (249) does: "Etsi perfectis donationibus in possessionum inductus libertus quantolibet tempore ea quae sibi donata sunt pleno iure ut dominus possederit, tamen, si ingratus sit, omnis donatio mutata patronorum voluntate revocanda sit." This is confirmed by later legislation. Buckland (*supra*, n. 34) p. 152; Kaser (*supra*, n. 2) p. 604. Further *Pauli Sententiae* 1 1B 2: "Ingratus libertus est, qui patrono obsequium non praestat, vel res eius filiorumve tutelam administrare detractat."

[39] *Vat. Frag.* 248. See, also, *C. Th.* 8.13.1-2 Impp. Constantius et Constans AA. ad Philippus, pp.

[40] *Codex* 8.55(56).9 Impp. Theodosius et Valentinianus AA. ad Senatum (426). It is interesting to note that although the word "gross" is not mentioned in any of the constitutions, Sohm (*supra*, n. 2) at p. 212 states that gifts were revocable on the ground of *gross* ingratitude.

[41] *Codex* 8.55(56).10*pr*.-1 Imp. Iustinianus A. Iuliano pp. (530).

[42] "Ex his enim tantummodo causis."

[43] *Codex* 8.55(56).10.1 Imp. Iustinianus A. Iuliano pp. (530).

[44] *Codex* 8.55(56).10.1 Imp. Iustinianus A. Iuliano pp. (530).

[45] "Hoc tamen ius stabit intra ipsos tantum, qui liberalitatem dederunt. Ceterum neque filii eorum neque successores ad hoc beneficium pertinebunt."

[46] *Codex* 8.55(56).7.3 Impp. Constantius et Constans AA. ad Philippum (349).
[47] *Codex* 8.55(56).10.2 Imp. Iustinianus A. Iuliano pp. (530).
[48] According to Justinian, if the donor had kept silent about the donee's ingratitude, his silence should be permanent.
[49] Thomas (*supra*, n. 10) pp. 192-193.
[50] *Codex* 8.55(56).7 Impp. Constantius et Constans AA. ad Philippum (349).
[51] Buckland (*supra*, n. 34) pp. 151-152.
[52] *Cf.* R.W. Lee *An Introduction to Roman-Dutch Law* 5th ed. Clarendon Press, Oxford (1961) pp. 285-286.
[53] H de Groot *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (tr. A.F.S. Maasdorp *The Introduction to Dutch Jurisprudence of Hugo de Groot* 3rd ed. J.C. Juta & Co., Cape Town (1903)) at 3.2.14. See also Lee (*supra*, n. 52) p. 285.
[54] See De Groot (*supra*, n. 53) 3.2.1 with reference to *D.* 39.5.1 Julianus *libro septimo decimo digestorum.* See, also, H. de Groot *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (notes by S.J Fockema Andreae; 3rd ed L.J. van Apeldoorn) S. Gouda Quint., Arnhem (1926) 3.2.1: "Schenckingen is een toezegging, waer door iemand aen een ander niet zijnde verbonden, uit *weldadigheid* hem zelve verbind om dien iet van 't sijne te geven … ." *Cf.* F. Dovring, H.F.W.D. Fischer & E.M. Meijers (eds.) *Hugo de Groot, Inleidinge tot de Rechtsgeleerdheid* Universitaire Pers, Leiden (1952) 3.2.1.
[55] S. van Leeuwen *Het Rooms-Hollands-regt* (rev. and ed. by C.W. Decker and tr. by J.G. Kotzé *Simon van Leeuwen's Commentaries on Roman-Dutch Law*) vol. 2 Sweet and Maxwell Limited, London (1923) 4.30.1.
[56] J. Voet *The Selective Voet being the Commentary on the Pandects* vol. 6 (tr. P. Gane) Butterworth & Co. (Africa) Ltd., Durban (1957) 39.5.1.
[57] J. van der Linden *Van der Linden's Institutes of the Law of Holland* 2nd ed. (tr. G.T. Morice) T. Maskew Miller, Cape Town (1922) 1.15.1.
[58] (*supra*, n. 53) 3.2.4 .
[59] De Groot (*supra*, n. 53) 3.2.15. See, however, Lee (supra, n. 52) p. 287 who states, with reference to Voet 39.5.18, that Justinian's constitution (*Codex* 8.53(54).36.3) requiring registration of gifts had been adopted in Dutch law. See Dovring, Fischer & Meijers (*supra*, n. 54) 3.2.15.
[60] With regard to the rule that gifts larger than 500 *aurei* had to be registered, Van Leeuwen (s*upra*, n. 55) at 4.30.4 mentions that there was uncertainty about the value of the 500 gold coins in his time.
[61] Leeuwen (*supra*, n. 55) 4.30.3.
[62] Voet (*supra*, n. 56) 39.5.18.
[63] D.G. van der Keessel *Theses Selectae* (tr. C.M. Lorenz *Select Theses on the Laws of Holland and Zeeland* J.C. Juta, Cape Town (1884)) 3.2.19 (489).
[64] Van der Linden (*supra*, n. 57) 1.15.1.
[65] See De Groot (*supra*, n. 53) 3.2.16.
[66] De Groot (*supra*, n. 53) 3.2.17: such as endangering the life of the donor, or striking him, or attempting to ruin him financially. He also refers to other causes mentioned in *Codex* 8.53(54).35.5 Imp. Iustinianus A. Iuliano pp. (530) and *Codex* 8.55(56).10.1 Imp. Iustinianus A. Iuliano pp. (530).
[67] Van Leeuwen (*supra*, n. 55) 4.30.7: "groote ondankbaarheid" ("gross ingratitude").
[68] With reference to *Codex* 8.55(56)10 Imp. Iustinianus A. Iuliano pp. (530).
[69] Voet (*supra*, n. 56) 39.5.22.
[70] *Cf*. *D*. 2.14.27.3-4 Paulus *libro tertio ad edictum.*
[71] Voet (*supra*, n. 56) section 22 with reference to *Codex* 8.55(56).10.1 Imp. Iustinianus A. Iuliano pp. (530).
[72] See Van der Linden (*supra*, n. 57) 1.15.1 where the author already in the definition of a donation states that a donation "is an agreement by which a person through liberality *irrevocably* parts with something … ."

[73] *Cf*. Van der Linden (*supra*, n. 57) 1.15.1. Further *Codex* 8.55(56).10.1 Imp. Iustinianus A. Iuliano pp. (530); De Groot (*supra*, n. 53) 3.2.17; Van Leeuwen (*supra*, n. 55) 4.30.7; Voet (*supra*, n. 56) 39.5.22; Van der Linden (*supra*, n. 57). *Cf*., also, Lee (*supra*, n. 52) pp. 288-289 who refers to Justinian in *Codex* 8.55(56).10 Imp. Iustinianus A. Iuliano pp. (530) in order to determine what constituted "gross ingratitude".

[74] (*supra*, n. 53).

[75] (*supra*, n. 54).

[76] (*supra*, n. 54) 3.2.17.

[77] Voet (*supra*, n. 56) 39.5.23.

[78] *Cf*. *Inst.* 4.12.1; *D*. 2.11.10.2 Paulus *libro primo ad Plautium*.

[79] *Codex* 8.55(56).10.2 Imp. Iustinianus A. Iuliano pp. (530).

[80] Voet (*supra*, n. 56) 39.5.23. *Cf*. *Codex* 8.55(56).7.3 Impp. Constantius et Constans AA. ad Philippum (349); *Codex* 8.55(56.10) Imp. Iustinianus A. Iuliano pp. (530).

[81] *Inst* 4.12.1; *D*. 2.11.10.2 Paulus *libro primo ad Plautium*.

[82] See L.F. van Huyssteen, S.J.W. van der Merwe & C.J. Maxwell *Contract Law in South Africa* 2nd ed. Kluwer Law International, Alphen aan den Rijn (2012) par 153. See, also, par. 331 where the authors state that the agreement to give a donation is not a contract and must therefore be distinguished from the contract of donation.

[83] R.H. Christie *The Law of Contract in South Africa* LexisNexis Butterworths, Durban (2006) p. 57. *Cf*. *D.* 50.17.69 Paulus *libro singulari de adsignatione libertorum*: "*Invito beneficium non datur*."

[84] A.F.S. Maasdorp *Maasdorp's Institutes of South African Law* vol. 3 9th ed. (ed. and rev. C.G. Hall) Juta, Cape Town (1978) p. 61. *Cf*. De Groot (*supra*, n. 53) 3.2.1; Van Leeuwen (*supra*, n. 55) 4.30.1; Voet (*supra*, n. 56) 39.5.1; Van der Linden (*supra*, n. 57) 1.15.1. See, also, P.R. Owens (rev. B. Wunsh and 2nd ed. H. Daniels) "Donations" in *The Law of South Africa* 2nd ed. vol. 8 part 1 in par. 301 p. 370 who defines a donation as "an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something (this includes the gratuitous release or waiver of a right) to another person, called 'the donee', with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage".

[85] [2005] JOL 15248 (ZH) pp. 7-8 with reference to *Avis v. Verseput* 1943 A.D. 331 at p. 364 and p. 366 (Tindall, A.J.) and see also at pp. 382-384 (Fischer A.J.A.); *Commissioner for Inland Revenue v. Estate* Hulett 1990 (2) SA 786 A.D. at 801; *Estate Jager v. Whittaker* 1944 A.D. 246 p. 250. In *Fenton v. Fenton* [2006] JOL 17940 (T) at pp. 2-3 A.J. Mabuse quoted a more detailed definition of a donation from (allegedly) "*Potte v. Rand Township Register*" (*Potter v. Rand Townships* Registrar): "[A] donation is an agreement which has been induced by pure benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something to another person, called the donee, with the intention to enrich the donee, in return for which the donor receives no consideration nor expects any further advantage".

[86] See, for example, *Thorpe's Executors v. Thorpe's Tutor* (1886) 4 SC 488 at p.190; *Estate Phillips v. Commissioner for Inland Revenue* 1942 A.D. 35 at p. 43-44. *Cf*. Van Huyssteen *et al* (*supra*, n. 82) par. 157.

[87] (1886) 4 SC 488 at p. 490. Smith J. concurred, stating, however, that according to *Smith's Dictionary* ("one of the best authorities") the *aureus* was worth £1 1s 1d. *Cf. Haines' Executor v. Haines* 1917 E.D.L. 40 at pp. 66-67.

[88] See *Avis v. Verseput* 1943 A.D. 331 at pp. 347-349.

[89] Later replaced by section 43 of the General Law Amendment Act of 1968. See *Commissioner of Inland Revenue v. Estate Hulett* 1990 (2) SA 786 (A) pp. 793-801.

[90] Section 5 of Act 50 of 1956. See, also, Act 70 of 1968 section 43. *Cf*. Maasdorp (*supra*, n. 84) p. 66; Christie (*supra*, n. 82) pp. 123-124.

[91] *Avis v. Verseput* 1943 A.D. 331 p. 365.

[92] In *Avis v. Verseput* 1943 A.D. 331 p. 384 A.J.A. Fischer in passing mentioned that the donor had the right to revoke a gift on the ground of gross ingratitude. Owens (*supra*, n. 84) in par. 310 p. 379.

[93] *Kay v. Kay* 1961 (4) SA 257 (A.D.) pp. 260-261. *Avis v. Verseput* 1943 A.D. 331 at 364. A *donatio propria* was defined as a gift given to another (the donee) with the proviso that it would not revert to himself and that it was made with the intention of exercising his liberality and generosity.

[94] Voet (*supra*, n. 56) 39.5.22. See Van Leeuwen (*supra*, n. 55) 4.30.7; Van Leeuwen *Censura Forensis* 2.8.18; De Groot (*supra*, n. 53) 3.2.17-21. *Cf*. *Thorpe's Executors v. Thorpe's Tutor* (1886) 4 SC 488.

[95] *Avis v. Verseput* 1943 A.D. 331 pp. 384-385 and pp. 386-387. See also Owens (*supra*, n. 84) p. 379 .

[96] With reference to De Groot (*supra*, n. 53) 3.2.17 and Voet (*supra*, n. 56) 39.5.22.

[97] [2005] JOL 15248 (ZH) p. 7 with reference to *Ahrend v. Winter* 1950 (2) SA 682 (T).

[98] *Avis v. Verseput* 1943 A.D. 331 pp. 384-385.

[99] Owens (*supra*, n. 84) p. 79. Voet (*supra*, n. 56) 39.5.22: (1) a physical attack by the donee on the donor; (2) where the donee intentionally causes the donor a loss of property; (3) where the donee tries to kill the donor; and (4) if the donee fails to comply with the stipulated conditions of the contract. See, too, *Mulligan v. Mulligan* 1925 W.L.D. 178 at p. 182 with reference to Voet (*supra*, n. 56) 39.5.22 where he states that a gift can [also] be revoked "for similar and other weighty reasons".

[100] In *Fenton v. Fenton* [2006] JOL 17940 (T) at pp.11-12 A.J. Mabuse held that the right to revoke a gift on the ground of ingratitude is recognised in Roman-Dutch law and was followed in earlier South African cases.

[101] See Owens (*supra*, n. 84) p. 380 with reference to Voet (*supra*, n. 56) 39.5.23.

[102] *Avis v. Verseput* 1943 A.D. 331 at pp. 384-385.

[103] Owens (*supra*, n. 84) p. 379.