

Examining the ‘objects of property rights’ – lessons from the Roman, Germanic and Dutch legal history

Mzukisi Njotini*

LLM LLD

Senior Lecturer, School of Law, College of Law, Unisa

OPSOMMING

Onderzoek ’n ondersoek na die “voorwerpe van eiendomsreg” – lesse uit die Romeinse, Germaanse en Nederlands regsgeeskiedenis

Hierdie artikel ondersoek die geskiedenis van eiendomsreg, of, dalk beter gestel, eiendom as ’n voorwerp vir sekere regte. Die vraag word gevra of eiendomsreg slegs van toepassing is op tasbare voorwerpe, en of dit die gemeenskap is wat bepaal wat eiendom, en die reg daaromtrent, is. Die motivering vir die ondersoek is die ontstaan van ’n informasie- en kennisgedrewe samelewing. Kennis word gedeel en uitgeruil – maar is dit eiendom? Die evolusie van regte ten opsigte van eiendom in die Romeinse, Germaanse en Nederlandse regsgeeskiedenis word ondersoek.

1 Introduction

Property or the objects that are or should be accorded the status of property for legal purposes seem to depend on the social circumstances of a specific society during a particular point in time. This is the position because property seems to amount to those things that a particular society during a particular period in time regards as of interest to it. Sometimes, it is even stated that the starting point is that all objects of property must or should be corporeal or tangible.¹ In other words, rights in property vest or ought to vest in those things that have a tangible existence. Tomkins and Jencken provide that rights in property exist in a subjective sense.² In this sense, these rights refer to ‘the power or dominion which a person is entitled to exercise over an object, in which exercise there is involved the freedom of the will’.³

* This contribution is based on a research done for the author’s LLD thesis, entitled “E-Crimes and E Authentication – A Legal Perspective” for which the author is registered for at the University of South Africa (UNISA).

1 See CG van der Merwe *Sakereg* (2ed 1989) 24-25, PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman’s The law of property* (5 ed 2006) 14-19.

2 Tomkins & Jencken *A compendium of the modern Roman law founded upon the treatises of Puchta, Von Vangerow, Arndts, Franz Moehler, and the Copus Juris Civilis* (1870) 40.

3 *Ibid.*

Given the importance of rights in determining whether an object is property in law, this article is limited to the study of property as a right or property as an object of rights. Thus, the meaning and nature of the legal entitlement which a person has or is deemed to have over or in respect of his or her object are discussed. The latter investigation looks at whether the meaning and nature of the rights in property depend on the necessities of a particular society.

The scrutiny above is motivated by the emergence of a new society, that is, an information or knowledge society. According to Soete, this is a society where high volumes of information are shared, exchanged and disseminated.⁴ Specifically, information is one of the essential assets for the existence of an information society. In order to study the objects of rights within the latter society, the historical developments of property as a right are examined in this article. This investigation focuses on the evolution of the rights in property in Roman, Germanic and Dutch legal jurisprudence.

2 Roman Law

2 1 Old Roman Law (250 BC)

Principally, old Roman law recognised that a relationship exists between a person and a thing or *res*.⁵ In view of this, the law of things was dealt with as the progression from the law of persons. Specifically, Table IV.V of the Law of the Twelve Tables (the Twelve Tables) regarded property as that which could be acquired by Roman citizens. Roman citizens had several actions against those who interfered with their property. The most notable actions were the *actio in rem* and *actio in personam*.⁶ The *actio in rem* protected a person's use and enjoyment of his corporeal and physical *res*, and the *actio in personam* was a claim which a person had that others should acknowledge that the property is subject to his use and enjoyment.⁷

The Twelve Tables did not particularly differentiate between things as such. It was only required that a thing must be capable of being touched, that is, the so-called *quae tangi possunt* requirement. Van Warmelo supports the view regarding the tangibility of a *res*.⁸ He states that 'in an early and unsophisticated community, the interests of the person were

4 See Soete *Building the European information society for us all: final policy report of the high level expert group* (1997) 11.

5 Maine *Ancient law: its connection with the early history of society and its relation to modern ideas* (1897) 258-259.

6 Nasmith *Outline of Roman history from Romulus to Justinian (including translation of the Twelve Tables, the Institutes of Gaius, and the Institutes of Justinian), with special reference to the growth, development and decay of Roman jurisprudence* (2006) 327-328.

7 Mousourakis *Fundamentals of Roman private law* (2012) 312.

8 Van Warmelo *An introduction to the principles of Roman civil law* (1976) 63.

centred on what he could see and touch and perceive with his senses'.⁹ Therefore, if a person could possess a thing it was consequently concluded that such a thing served the interests of such a person.¹⁰ Van Warmelo then submits that 'in the early Roman community possession of objects was the centre of all interests'.¹¹

The term interest is significant to an examination of property as an object of rights in old Roman law. This is the position because the Twelve Tables did not explicitly refer to the notion of ownership. Specifically, the position in old Roman law regarding ownership can be summarised as follows:

(The) technical word for ownership of things: it (ownership) was an element of the house-father's *manus*. In time, although it is impossible to say when, the word *dominium* came into use; but, so far as can be discovered, it did not occur in the Tables, and must have been of later introduction. In those days, when a man asserted ownership of a thing, he was content to say, – 'It is mine,' or 'It is mine according to the law of Quirites'.¹²

Therefore, *dominium* was only 'one manifestation of the comprehensive domestic powers which the *paterfamilias* wielded over certain persons (*patria potestas* over his children in power, *manus* over his wife) no less than over his property'.¹³

2 2 Pre-Classical Roman Law

Pre-classical Roman law was a further development of old Roman law. This law classified property into corporeal things or *res corporales* and things incorporeal or *res incorporales*.¹⁴ Corporeal things referred to tangible objects.¹⁵ The examples were land, a slave,¹⁶ a garment, gold and silver. Incorporeal things were intangible objects, for example an

9 *Ibid.*

10 *Ibid.*

11 Johnson *Roman law in context* (1999) 53.

12 Muirhead *Historical introduction to the private law of Rome* (1998) 126. See also, Bouckaert 'What is property?' 1990 *Harvard Journal of Law and Public Policy* 781.

13 Kaser *Roman private law* (translated by Dannenbring) (1980) 115. See also, Muirhead *Historical introduction to the private law of Rome* 3rd ed (1916) 120.

14 Cairns 'The definition of slavery in eighteenth-century thinking' in J Allain (ed) *The legal understanding of slavery* (2012) 61-62.

15 Sohm *The institutes: a text-book of the history and systems of Roman private law* 2nd ed (1901) 320.

16 In relation to a slave being an object of property in pre-classical Roman law, Buckland states that a slave 'was the one human being who could be owned. There were men in many inferior positions which look almost like slavery: there were the *nexus*, the *auctoratus*, the *addictus* and others. But none of these was, like the slave, a *Res*'. See Buckland *The Roman law of slavery: the condition of the slave in private law from Augustus to Justinian* (2010) 10.

inheritance, usufruct, obligation or servitude.¹⁷ The last-mentioned things had the quality of being rights over property.¹⁸

The inclusion of slaves in the definition of *res corporales* is instructive. This is the case because pre-classical Romans accepted that, by virtue of the *ius gentium*, that is, the laws common to all, certain human beings were free whereas others were not.¹⁹ Slaves were classified as those humans that lacked freedom. Accordingly, their position in pre-Roman law was the following:

Being endowed with reason ... he (slave) was inevitably a peculiar thing and could, for example, acquire rights for his master. But he himself had no rights: he was merely an object of rights, like an animal.²⁰

Given this, slaves were the property of their master and consequently subjected to the ownership of the latter.²¹

2 3 Classical Roman Law

Classical Roman law was the law which was essential to the history of the Roman law of property. Most of the legal ideas which grew from classical Roman law continue to influence the modern understanding of property. Furthermore, this law characterised a period wherein the notion of *dominium*, as opposed to the word *belonging to*, was expressly conceived.²² On the one hand, the owner of a thing was referred to as a *dominus*, *propriarius*, or *dominus proprietatis*.²³ In some cases, the notion of *esse alicuius* was used in order to demonstrate that a thing was owned by another person.²⁴ Ownership had to do with an interest which

17 Sohm *supra* n 15 at 320.

18 De Zulueta *The Institutes of Gaius: part ii commentary* (1963) 62.

19 Cairns *supra* n 14 at 61-62.

20 Nicholas *Introduction to Roman law* (1987) 69.

21 Cairns *supra* n 14 at 61.

22 Schulz *Classical Roman law* (1961) 338-339.

23 *Ibid.*

24 *Ibid.* Roman law jurists differed as to the true nature of *dominium*. There are some who argue that ownership was the most comprehensive private right to a thing which a private person could have. See Kaser *Roman private law* (translated by Dannenbring) 2nd ed (1968) 92 and Declareuil *Rome the law-giver* (1970) 158. In this sense, it amounted to a legal right over a thing which gave the holder the full power of enjoyment and use. See Sohm *supra* n 15 at 325. Accordingly, a Roman owner had unrestricted right of control over a thing, and could claim the thing he owned wherever it is and no matter who possesses it. Jolowicz & Nichols *Historical introduction to the study of Roman law* 3rd ed (1972) 140. However, there are also those who question the reality of the aforementioned viewpoint. This opposition rests on the premise that it is illogical as a 'proposition that the owner of a sword could do what he liked with it, including applying it to the neck of his neighbour's slave'. See Birks 'The Roman law concept of *dominium* and the idea of absolute ownership' 1985 *Acta Juridica* 1 and Scott 'Absolute ownership and legal pluralism in Roman law – two arguments' 2011 *Acta Juridica* 24. It is particularly submitted that the view on the absolute nature of *dominium* was inconsistent with the earlier attempts in the old and pre-classical Roman law of property in relation to the control, use and

a person possessed to use, enjoy, destroy and transfer his property subject to certain limitations.²⁵ These restrictions could be established by the 'rules of nuisance as well as the rules for the protection of slaves and the right to transfer limited rights to others ... e.g. in the form of a user's rights or servitudes'.²⁶

A comprehensive approach was generally preferred regarding the meaning of the term property.²⁷ Property referred to the totality of the objects that were of economic value to a person,²⁸ the so-called *res in commercio*.²⁹ The examples included a building, land, animals, slaves, gold or silver.³⁰ In addition, property was 'any legally guaranteed economic interest having monetary value, that a person could hold in respect thereof'.³¹ In view of its monetary value, humans (Roman citizens) had an interest in property. This interest was protected by various laws, for example natural law or *iure naturali*, and civil law or *ius civile*.³²

Lastly, classical Roman law differentiated between corporeal and incorporeal things, *res mobilis* (movable things) and *res immobilis* (immovable things), *res Mancipi* and *res nec Mancipi*.³³ Corporeals were the original category of things that were recognised in classical Rome.³⁴ They were one of the classical groups of objects that were regarded as *res in patrimonio*.³⁵ They included property that was perceptible through the senses.³⁶ Examples of corporeals were the land, house, horse, slave, garment, gold or silver.³⁷ Incorporeals, for example a right, servitude, inheritance, *hereditas*,³⁸ were traditionally not regarded as *res* in the true

enjoyment of property. See Table VII of the Twelve Tables and Gaius 4 (limitations on the control of slaves).

25 Garnsey *Thinking about property: from Antiquity to the Age of Revolution* (2007) 177, Buckland *A manual of Roman private law* (1939) 111 and Buckland *The main institutions of Roman private law* (1931) 93.

26 Roby *Roman private law in the times of Cicero and of the Antonines* (1902) 414.

27 Buckland *The main institutions of Roman private law supra* n 24 at 91.

28 Kaser *supra* n 24 at 80.

29 *Ibid.*

30 *Ibid.*

31 Moussourakis *supra* n 7 at 119.

32 Mommsen *The Digest of Justinian* (1985) 1.1.11.

33 This research does not examine the difference between *res mobilis* and *res immobilis*, *res Mancipi* and *res nec Mancipi*. It simply discusses the distinction between corporeals and incorporeals. Furthermore, it is acknowledged that other differences were made between property or *res*. Examples of these included *res divini iuris* or things dedicated to the gods, *res publicae* or public properties, *res omnium communes* (air, water or the sea) and *res in commercio* (*res nullius* or ownerless things, consumable things and *res fungibiles* money, wine or grain and divisible things). See Sohm *supra* n 15 at 302-305.

34 Thomas *The Institutes of Justinian: text, translation and commentary* (1975) 73.

35 Van Warmelo *supra* n 8 at 65-66.

36 Moussourakis *supra* n 7 at 121.

37 *Ibid.*

38 Sohm *supra* n 15 at 225.

legal sense. This was because these things were regarded as interests that accrue over *res corporales*. Therefore, any attempt to regard the latter things as *res* for legal purposes could denote that an interest, being the *res incorporeales*, could have an interest, for example ownership, in another interest.³⁹ Over a passage of time, the strict meaning that was ascribed to incorporeals was discarded. Consequently, a convenient mode of expressing these things was adopted. Following that, it became common to accept that a person could also have an interest in particular abstract and non-physical entities.⁴⁰ The aforesaid interest did not necessarily amount to ownership. It was simply associated to a *res quae tangi non possunt* or an interest to or over intangible things.⁴¹

2 4 Post-Classical Roman Law

Post-classical Roman law was influenced by two systems of law. These were the developments of the Roman vulgar law in the West and the Roman law under Justinian in the East.

2 4 1 Roman Law in the West

Roman law in the West grew out of the practical consideration of old Roman law sources between 350 AD until 550 AD.⁴² This law was 'averse to strict concepts and neither able nor inclined to live up to the standards of classical jurisprudence with regard to the artistic elaboration or logical construction'.⁴³ It did not differentiate between ownership and possession, that is, the factual control of a thing. In most cases, the vibrant meaning of ownership as found in classical Roman law was diluted. Because of this development, the concept of *dominium* 'once radiant with lucidity, appeared largely drained of substance and void of any precise meaning'.⁴⁴ Notions such as *possidere*, *possessio* and *possessor* were particularly applied as a replacement to ownership.⁴⁵ Accordingly, the right to possess which was referred to as the *inconcussum possessionis ius, ut dominus possidet* or *iure dominium possidere*, as opposed to a *dominium* over a thing gained prominence.⁴⁶

2 4 2 Roman Law in the East

Roman law in the East distinguished between things in general. There were objects that were capable of being owned and those that could not be owned (*de iure personarum exposuimus*).⁴⁷ The objects that were capable of being owned were referred to as the *res nostro patrimonio* and

39 Van Warmelo *supra* n 8 at 66.

40 *Ibid.*

41 *Idem* 65.

42 Levy *West Roman vulgar law: the law of property* (1951) 2.

43 Berman *Law and revolution – the formation of the Western legal tradition* (1983) 53.

44 Levy *supra* n 42 at 61.

45 *Idem* 26-27.

46 *Idem* 27.

47 Institutes of Justinian 2.1.

those that were incapable of being owned were called *res extra nostrum partimonium*.⁴⁸ Other divisions of property were also made possible, for example those things that were common to all,⁴⁹ public things,⁵⁰ things belonging to the community⁵¹ and those that belonged to no one.⁵²

Furthermore, this law created a distinction between corporeal and incorporeal property.⁵³ Corporeals were defined as those things that, by nature, could be observed and touched.⁵⁴ The examples included the land, a slave, garment, gold and silver.⁵⁵ Incorporeals included the things that were recognised by the law despite the fact that they could not be observed and touched.⁵⁶ The examples were an inheritance, usufruct and obligation.⁵⁷

3 Germanic Law

3 1 Old Germanic Law

In old Germanic law, property or *Sache* was regarded as the impersonal corporeal pieces of the outer world.⁵⁸ Being so, it was said that property belonged to people collectively.⁵⁹ For example, people would seize the land and this land would consequently belong to all of them as a unit. Because of this, rights in property were held by families and kinship and did not amount to absolute individual rights.⁶⁰ Words like *eigen* or *eigan* and *haben*, were frequently used in order to demonstrate who had ownership in each case.⁶¹ These words explicitly showed the persons who possessed the rights over property in old Germanic law.

48 *Ibid.*

49 For example the air, running water, rivers, the sea and seashores. See Institutes of Justinian *supra* n 47 at 2.1.1.

50 The examples of these are the river banks, seashores, things lying under the sea, earth or sand. See Institutes of Justinian *supra* n 47 at 2.1.4-5.

51 For example cities, theatres and *stadia*. See Institutes of Justinian *supra* n 47 at 2.1.6.

52 Institutes of Justinian *supra* n 47 2.1. Things belonging to no one were sacred things, religious things or those things that were placed under divine protection. See Institutes of Justinian *supra* n 47 at 2.1.7.

53 *Idem* 2.2.

54 *Idem* 2.2.1.

55 *Ibid.*

56 *Idem* 2.2.2.

57 *Ibid.*

58 Hübner *A history of Germanic private law* (1968) 160.

59 Murray *Germanic kinship structure: studies in law and society in Antiquity and the early Middle ages* (1983) 18 and Calisse *A history of Italian law* (1969) 653.

60 Bouckaert *supra* n 12 at 780.

61 Hübner *supra* n 58 at 227.

Old Germanic law regarded ownership as the fullest right that could be possessed over things.⁶² This right was in respect of property in its entirety.⁶³ However, there are some, for example Calisse who submit that it was not always necessary in old Germanic private law that ownership should be in respect of the whole property. Specifically, it was possible to have a situation where one person was the owner of a house and the other of the land on which a house was built.⁶⁴ With this in mind, the powers and rights to exercise ownership could be bestowed on a certain collective or landholding corporate group.⁶⁵ This collective had to use these rights for the common benefit of all the members of the community. The manner of exercising this use depended on whether the property belonged to the tribe or to the family.⁶⁶

Despite the above-mentioned, developments in the law of property necessitated that ownership of property should also be extended to other personal things, for example carts, flocks, fruits, clothes and weapons. These modifications in the law of property were compelled by the confrontation of old Germanic law with Roman law.⁶⁷ Accordingly, the nature of property was no longer only limited to that which a tribe or family could have *dominium* over. Particularly, property could also refer to those objects that were or could be held or belonged to an individual (*allodium*).⁶⁸ This was precisely the step towards recognising the existence of the rights in (individual) things or *Sachenrechte*.⁶⁹ These rights were separated into those in respect of corporeal and incorporeal things.⁷⁰ An important point about all this is that a certain category of slaves (*servi casati*) could own certain land cultivated by them.⁷¹ Therefore, they were allowed, within the parameters of the law, to enjoy all the fruits of their labour.

In relation to corporeals (land, animal, gold, silver and certain precious stones), it was stated that ownership was vested in these things by virtue of them being capable of being touched (*res quae tangi possunt*). However, it was argued that corporeals were not naturally property for legal purposes. They only became property in the legal sense as soon as legal rights were attached to them.⁷² These rights were called *dengliche*

62 *Ibid.*

63 *Ibid.*

64 Calisse *supra* n 59 at 671.

65 Murray *supra* n 59 at 19.

66 Calisse *supra* n 59 at 657-664. See also, Vinogradoff 'The organisation of Kinship' in Krader (ed) *Anthropology and early law* (1966) 57.

67 Murray *supra* n 59 at 179-180. Vinogradoff refers to this confrontation as rather startling, in the sense that 'it seemed at the outset as if there would not be much room for Roman doctrine in a country with a German-speaking population of Germanic stock'. See Vinogradoff *Roman law in medieval Europe* 3rd ed (1929) 119.

68 Calisse *supra* n 59 at 665.

69 Hübner *supra* n 58 at 162.

70 *Ibid.*

71 Calisse *supra* n 59 at 416.

72 Hübner *supra* n 58 at 161.

or real rights. The aforesaid rights secured for the owner the direct control of a thing subject to certain legal limits.⁷³ Other rights (including rights in property), inheritance and usufruct were regarded as incorporeal things.

3 2 Frankish Law

Frankish law consisted of the practices which were followed by the West German tribes across the Rhine. Although Roman law had a strong influence on these usages,⁷⁴ the law that was followed was far removed from its classical Roman law formulations.⁷⁵ Specifically, the feudal system marked a shift in the manner in which the relationship between a person and a thing, that is, a fief, could be understood.⁷⁶ This system had its roots in the feudal law. It marked a regime of underdevelopment⁷⁷ and a system of exploitation.⁷⁸ It reflected the particular viewer's biases, values and orientations.⁷⁹ The feudal system represented itself in situations where a weaker person, namely the peasants or vassal, would turn to a stronger man, that is the lord, in order to derive some forms of rights in property. In this sense, the vassal became a tenant over property held by the lord.⁸⁰ For purposes of studying the law of property, the lord (the king or the church) was at the top of the property law chain while the peasants were at the bottom.⁸¹ Accordingly, the right (*droit*)⁸² to property did not bestow on the holder (peasant) ownership of the property.⁸³ It only amounted to that which a king or church could grant to a vassal.⁸⁴ Because of this, the vassal was prevented from transferring the rights that flowed from this property.⁸⁵

Feudal law exasperated the proper development of the Roman law of property. It specifically treated the classical Roman law term *dominium*

73 *Idem* 162.

74 Stein *Roman law in European history* (1991) 41-42 and Wallace-Hadrill *The long-haired kings and other studies in Frankish history* (1962) 1-2.

75 Van Caenegem *An historical introduction to private law* (1992) 21-24.

76 The word feudalism can be traced to the later part of the eighteenth century. Its origin 'must be looked for in Frankish kingdom of the Merovingians, and more particularly in the heart of the kingdom between the Loire and the Rhine'. See Ganshof *Feudalism* (translated by Grierson) (1996) 3. For further interesting reading, see Davies & Fouracre (eds) *Property and power in the early middle ages* (1995) 4-15.

77 Okey *Eastern Europe 1740-1980* (1982) 21.

78 Lyon *The Middle ages in recent historical thought: selected topics* (1965) 13.

79 Brown 'The Tyranny of a construct – feudalism and historians of mediaeval Europe' 1974 *The American Historical Review* 1086.

80 Volokh 'Property rights and contract form in Medieval Europe' 2009 *American Law and Economics Review* 422.

81 Pejovich *The economics of property rights: towards a theory of comparative systems* (1990) 8-9.

82 McSweeney 'Property before property – Romanising the English law of land' 2012 *Buffalo Law Review* 1147.

83 Brissaud *A History of French public law* (as translated by Garner) (1969) 339-340.

84 Anderson *Passages from antiquity to feudalism* (1974) 147-148.

85 *Ibid.*

as denoting simply a beneficial right or *usufructus*.⁸⁶ Thus, a vassal only had *proprietas* or right of control. This *proprietas* was limited in that it did not necessarily mean that the property could be alienated or inherited.⁸⁷ It only meant that the vassal was a recipient or *bucellarius*.⁸⁸ Therefore, the right to control the property depended on the continuation of the relationship between a vassal and the *dominus*, namely the king or the church.⁸⁹

Regardless of above-mentioned, a difference was created between corporeals or *fief corporel* and incorporeals or *fief incorporel*.⁹⁰ Land, office and animals were regarded as *fief corporel*. Household goods were excluded from the definition of *fief corporels*.⁹¹ The reason for this was that these goods were perishable by nature.⁹² *Fief incorporels* included rights, *usufructus*, inheritance and income.⁹³

4 The Romanists

4.1 Glossators

The Glossators were experts of Roman law, located in Bologna, Italy between 1100 and 1250 AD.⁹⁴ Their position in relation to the law was that they 'had an unsurpassed knowledge of the Roman source materials and for them law as a concept and legal science (*scientia juris*) was equivalent to Roman law'.⁹⁵ However, this knowledge of Roman law was hampered by the fact that the 'society in which they lived was anything but Roman'.⁹⁶

The Glossators commented on the phrases and texts that were contained in the *Corpus Iuris Civilis* by means of Glosses. However, the Glossators deviated from the old, pre-classical and classical Roman law of property in relation to the wording to be preferred when referring to the legal rights that a person had to property. In particular, they spoke about the *ius in re* as opposed to an *actio in rem*.⁹⁷ In modern English, the term *ius in re* is interpreted to mean a property right.⁹⁸ This right to property, of which *dominium* was the most important, amounted to an

86 Brissaud *supra* n 83 at 88.

87 Levy *supra* n 42 at 89-90.

88 *Ibid.*

89 *Ibid.*

90 Brissaud *supra* n 83 at 265.

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 Garnsey *supra* n 25 at 195.

95 Samuel 'The many dimensions of property' in J McLean (ed) *Property and the constitution* (1999) 43.

96 *Ibid.*

97 Tuck *Natural rights theories: their origin and development* (1979) 16.

98 It is accepted that Bartolus de Saxoferrato (1313-1357) mentioned a third form of *dominium*. This he referred to as *quasi dominium*. However, this form of ownership did not found favour. See Feenstra '*Dominium* and *ius in*

ius perfecte disponere.⁹⁹ This *ius perfecte disponere* granted to the owner of an object the full or complete disposal over a corporeal thing.¹⁰⁰ They then described these rights as either those that belong as an individual possession to each person, assigned to him by law or those over which a person had capacity and power assigned by law.¹⁰¹ In more abstract terms, *ius perfecte disponere* bestowed on the *dominus* the 'claim to total control against the entire world'.¹⁰²

Lastly, the glossators recognised that the starting point to the study of rights over property is the acceptance of the exclusive connection between a person and a thing.¹⁰³ In so doing, they recognised that a division existed between corporeals and incorporeals. The rights to corporeal and incorporeal things were referred to as the *ius reale*, that is, real rights.¹⁰⁴ These rights did not necessarily translate to ownership. They merely denoted that, due to the close association between a person and a thing, a person had an interest over property.¹⁰⁵ Provided this interest existed, a person had the necessary *ius reale* over property.¹⁰⁶

4 2 Ultramontani

The Ultramontani were the French Romanists who resided in the North of Italy across the mountains.¹⁰⁷ They were typically French-speaking and belonged to the school of Orléans.¹⁰⁸ They followed the work of the Glossators of Bologna. However, the manner in which the Ultramontani viewed Roman law was greatly influenced by the domestic French and Canon laws which existed during their time. In relation to the law of property, the Ultramontani provided a much more refined approach to property.¹⁰⁹ The refinement of their view is particularly made explicit by Du Plessis.¹¹⁰ Du Plessis states that the

re aliena – the origins of a civil law distinction' in Birks (ed) *New perspectives in the Roman private law of property: essays for Barry Nicholas* (1989) 113.

99 Bartolus de Saxoferrato (1314-1357) spoke, for example of *quid ergo est dominium? Responde est ius de re corporali perfecte disponendi, nisi lege prohibeatur*. See Bartolus ad D 51.2.17.1.

100 Garnsey *supra* n 25 at 198 and Visser 'The 'absoluteness' of ownership – the South African common law perspective' 1985 *Acta Juridica* 39-52 43.

101 Garnsey *supra* n 25 at 202.

102 Tuck *supra* n 97 at 15.

103 Samuel *supra* n 95 at 47.

104 Pottage & Sherman 'On the prehistory of intellectual property' in Howe & Griffiths (eds) *Concepts of property in intellectual property law* (2013) 22.

105 *Ibid.*

106 *Ibid.*

107 Du Plessis *Barkowski's textbook on Roman law* 4th ed (2010) 376.

108 Knoll 'Nations and other bonding groups at late medieval central European universities' in Van Deusen & Koff (eds) *Mobs: an interdisciplinary inquiry* (2010) 85-86.

109 Van der Walt *Die ontwikkeling van houeenskap* (1985) 183.

110 See in general, Du Plessis 'Towards the medieval law of hypothec' in Cairns & du Plessis (eds) *The creation of the ius commune: from Casus to Regula* (2010).

scientific approach of the school of Orleans (ultramontani), which influenced legal science during the thirteenth century, was not exactly revolutionary, but their approach towards textual analysis and textual authority was novel.¹¹¹

These French Romanists distinguished between corporeals and incorporeals. For example, Jacques de Revigny (1230-1296 AD), in his *Lectura supra Codice*, spoke about certain tangibles such as agricultural land, cattle and house.¹¹² In relation to incorporeal objects, especially those that are attached to land, Revigny mentioned a hypothec as an example.¹¹³ Furthermore, usufructs, gains or profits from tangible property were the kinds of intangibles that were recognised and protected by the law of property.¹¹⁴ This recognition and protection did not necessarily exist because *dominium* over these things was possible. It existed because a person had an interest in the aforementioned property.¹¹⁵

5 Canon Law

Canon law (and later, Church law) is the whole body of legal rules which was developed in order to deal with matters that fell within the domain of the Roman Catholic Church.¹¹⁶ This law regulated the relationship between the Church and the secular sphere.¹¹⁷ Canon law developed separately from Roman law. Besides this separation, Canon law relied heavily on certain principles of Roman law for its sustenance. One example is the principle that regulated the property of the Church. Accordingly, it is conceivable that the Roman law of property was applied by the Church – only insofar as this law was not in conflict with Canon law.¹¹⁸

The acceptance of the notion of individual rights to property by Canon law is difficult to establish with precision. For example, Canonists differentiated between the *ius* of a heavenly origin and those granted by human or positive law. In relation to the first-mentioned, reference was made to common property. This common property was regarded as the property of God. Being so, God had ascribed this property to humans for their common nourishment. This view was held because the earth belonged to the Lord.¹¹⁹ Consequently, all earthly property was to be held in common in accordance with God's wishes.¹²⁰ As for the second-mentioned rights, Canonists, for example Gratian, held that *dominium*

111 *Idem* 172.

112 De Revigny *Lectura supra Codice* on C 4.65.5.

113 *Ibid.*

114 Van der Merwe & Verbeke (eds) *Time-limited interests in law* (2012) 25-26.

115 *Ibid.*

116 Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 160.

117 *Ibid.*

118 Tamm *Roman law and European legal history* (1997) 212.

119 Digest 8.C.1.

120 *Ibid.*

over these objects was ascribed to private individuals.¹²¹ However, the manner in which this ownership was exercised was determined by the creator of this *dominium* – that is, the emperor.¹²²

One of the most prominent jurists of Canon law by the name of Bonagratia of Bergamo (1265-1340 AD) deferred with the above-mentioned.¹²³ Bonagratia referred to the term *habere*. *Habere* meant three things.¹²⁴ Firstly, it signified the actual *dominium* of the *dominus*.¹²⁵ Secondly, it was interpreted to mean the *usus facti*, that is, the *usufructus* without a legal title to the property itself.¹²⁶ Thirdly, *habere* symbolised the modern idea of possession.¹²⁷ This view by Bonagratia's was followed by William of Ockham. Initially, Ockham defined property as a competence (*facultas*) to claim a good.¹²⁸ He then referred to this good as the *ius*. The *ius* represented the unique power to deal with the good itself, that is, the *facultas utendi*.¹²⁹ Following this, rights in property were deemed to have vested in the *dominium* of the human person¹³⁰ and the rights to the use of a thing belonging to another without prejudice to the substance of the thing itself.¹³¹ These rights were vested in both *res corporales* and *res incorporale*.¹³²

6 Sixteenth Century

6 1 *Mos Italicus*

Mos italicus was the Italian law that was followed and applied during the sixteenth century. This law relied extensively on Bartolus de Saxoferrato's (1313-1357 AD) ideas on law.¹³³ It is argued that the influence that Bartolus had on the *mos italicus* was by no means accidental. It existed because Bartolus was one of the most famous jurists of the Middle Ages.¹³⁴ His ideas on law were particularly authoritative in

121 Helmholz 'Human rights in the Canon law' in Witte & Alexander (eds) *Christianity and human rights: an introduction* (2010) 101.

122 *Ibid.*

123 Shogimen *Ockham and political discourse in the late Middle ages* (2007) 41-42.

124 Van der Walt *supra* n 108 at 213.

125 *Idem* at 214.

126 *Idem* at 214.

127 *Ibid.*

128 Bouckaert *supra* n 12 at 787.

129 JW Robinson *William of Ockham's early theory of property rights in context* (Leiden, 2008) at 208.

130 'Dominium est postesta human principalis rem temporalem in iudico venticandi et omni modo, qui non est a iure naturali prohibitus, pertrectandi'. See Van der Walt *supra* n 108 at 215.

131 'Usus est ius utendi rebus alienis, salva rerum substantia'. See Van der Walt *supra* n 108 at 215.

132 *Ibid.*

133 J Woolfson *Padua and the Tudors: English students in Italy, 1485-1603* (Cambridge, 1998) at 45-46 and Van der Walt *supra* n 108 at 233.

134 Tamm *supra* n 118 at 206.

Italy for a long period of time. Because of this importance, the phrase *nemo jurista nisi Bartolista* (no one is a jurist who is not a Bartolist) was commonly used.¹³⁵

Jacobus Menochius (1532-1607 AD) held the view that property meant that which belonged to a person and is, in turn, his own object.¹³⁶ If this was established, Menochius argued that the latter could dispose freely of property.¹³⁷ However, Gomezius spoke of *dominium* as the right to a corporeal thing in terms of which a person had *libere disponendi*. To this end he accepted that only one form of *dominium* existed in law. This acceptance is made evident by the following passage:

An sit autem duplex dominium directum et utile aut unum tantum sit, est controversum inter doctores et Batolum. Sed unicum tantum dominium esse in punto iuris posset defendi cum Duarenus. Alias dixi quod est detentatio, et illa nihil aliud est quam sole, nuda, et simplex insistentia rei quae consistit in facto, ex qua ne dominium nec possessio aliqua resultat propter qualitatem personae vel rei, vel ex ipsa natura actus: puta si traditur mihi aliqua res, vel ego eam accipio, et est actus per quem non potest causari possessio iuridica, certe tunc dico habere nudam detentationem: et illa dicitur nuda et simplex detentatio.¹³⁸

In this passage, Gomezius acknowledged the challenges that were created by Bartolus' theory of *duplex dominium*. He stated that the basis of the law – presumably, Gomezius was referring to the classical Roman law – was that there is only one form of *dominium*.¹³⁹ Having stated all this, Gomezius distinguished between *dominium* and what he referred to as *detentatio*, that is, discretion over the object of property as guaranteed and protected by the law.¹⁴⁰

6.2 *Mos Gallicus*

Mos gallicus was a humanist method of reasoning, developed in Italy and centred or based in France.¹⁴¹ The contribution of this humanist model to law can be summarised as follows:

135 *Ibid.*

136 Menochius' *Consilia*.492.12.

137 Van der Walt *supra* n 108 at 234.

138 In English, the aforementioned passage can be translated to mean that 'whether there are two kinds of ownership or there is only one is a matter that the jurists of the Bartolus theory do not have agreement. *Detentatio* I said, which is the other, and that is nothing other than the sun, on the bare, and the task, which consists of a simple fact, for the sake of the quality of the results from any person or is not to be the dominion nor the possession of the thing or by reason of the nature of the act: for example, if it is handed down to me, a real thing, or I receive it, I will, by means of which it cannot be caused, and it is an act of the inheritance of the law, indeed, we shall, I say to have a bare *detentationem*: naked and simple, and it is said *detentatio*'. (Own translation).

139 Grossi *A history of European law* (2010) 16.

140 *Ibid.*

141 Goddu *Copernicus and the Aristotelian tradition: education, reading, and philosophy in Copernicus's path to Heliocentrism* (2010) 178.

The humanists wanted new source versions, ad fonts (back to the sources) was one of the catchphrases of the time. They read Greek – graeca leguntur – in contrast to the medieval jurists. Thus, they had a new independent access to the texts that did not require the use of a gloss as an authority. The actual teaching of law was also changed as the humanists emphasised the Institutiones as the introduction to the study of Roman law ... the humanists were dissatisfied with the system of the digest and sought to resystematise it in new ways.¹⁴²

Jacques Cuiacius (1522-1590) was one of the most prominent jurists of this law. In relation to property, Cuiacius found it difficult to define the ambit of the rights to property belonging to a vassal and those of a superior. His solution to this was simply that: ‘the nature of the vassal’s right to property was a usufruct with undivided *dominium* vesting in the superior’.¹⁴³ By this, he sought to align his theory of property, especially ownership, with that of the classical Romans and with feudal law.

6 3 Moral Philosophers

One of the most essential philosophers of this time is Thomas Aquinas. In his *Summa Theologica*, Aquinas differentiated between things by stating that:

We can consider a material object in two ways. One is with regard to its nature, and that does not lie within human power, but only divine power, to which all things are obedient. The other is with regard to its use. And here man does have natural *dominium* over material things, for through his reason and will he can use material objects for his own benefit.¹⁴⁴

He then referred to the first-mentioned objects as those things that God gave to mankind in common.¹⁴⁵ Consequently, the rights which flowed from this property were ascribed to the natural law.¹⁴⁶

In relation to the second-mentioned property, Aquinas submitted that God (the creator of all property) retained the absolute *dominium* over property. This meant that a person simply had a usufruct over property. Accordingly, a person possessed only the power and privilege of making

142 Tamm *supra* n 118 at 222.

143 Cairns ‘Craig, Cujas and the definition of *feudum*’ in Birks (ed) *New Perspectives in the Roman law of property: essays for Barry Nicholas* (1989) 81.

144 Aquinas *Summa theologica* 2a 2ae. 66. 1.

145 *Ibid.*

146 *Ibid.* In relation to *ius naturale*, Aquinas stated that ‘something can be said to according to *ius natural* in two ways. One, if nature inclines us to it: such as not to harm another human being. The other, if nature does not prescribe the opposite: so that we can say a man is naked under the *ius natural*, since he received no clothes from nature but invented them himself. In all this way the common possession of all things, and the equal liberty of all is said to be according to the *ius natural*: for distinctions between possessions and slavery were not the product of nature, but were made by human reason for the advantage of human life’. See Aquinas *supra* n 144 2ae, 94.5.)

a purposive use of things.¹⁴⁷ This power to use property had to be exercised within limits, as set out by natural law.¹⁴⁸

Furthermore, Aquinas inquired whether the possession of exterior things is natural to man or not.¹⁴⁹ He also investigated whether 'it is lawful that anyone should possess anything as his own'.¹⁵⁰ In response to this, Aquinas argued that man had a natural *dominion* over private property. This ownership arose from human agreement, which is the domain of positive law.¹⁵¹

7 Pandectists

The Pandectists' theory of law was based on a method of reasoning which was referred to as *Private Law Dogma*. This method was drawn from an idea which Georg Friedrich Puchta (1798-1846) developed called the *Genealogy der Begriffe*, that is, the genealogy of legal concepts.¹⁵² From this, a philosophical way of interpreting texts or documents was established. This resulted in the law which was conventionally used becoming a product of rigorous scientific deductions and being more refined.¹⁵³ In relation to ownership, Puchta referred to a thing as denoting the exclusive authority to use and dispose of a thing.¹⁵⁴ He talked of an easement in the sense of a property right. According to Puchta, rights either belonged to an individual or a family.¹⁵⁵ He then referred to these rights as the private rights. The latter rights were in Puchta's view private in nature and were separated from public rights and ecclesiastical rights.¹⁵⁶ They were recognised as the most important of the rights.¹⁵⁷ According to Heinrich Dernburg (1829-1907), they were referred to as '*die wichtigste ist das Eigentumsrecht*', that is, the most important of the rights.¹⁵⁸

Furthermore, the Pandectists had a more grounded view of the notion of *dominium*. On the one hand, Thibaut developed an approach to ownership which was more aligned to that of the classical Roman law. He rejected the medieval idea of property as generating dual ownership.¹⁵⁹ He stated that the separation between *dominium directus*

147 O'Rahilly 'S. Thomas's theory of property' 1920 *Studies: An Irish Quarterly Review* 339.

148 Ignatieff & Hont (eds) *Wealth and virtue: the shaping of political economy in the Scottish enlightenment* (1983) 27.

149 Aquinas *supra* n 144 at 2.2, 66, 1-2.

150 *Ibid.*

151 *Ibid.*

152 Siltala *Law, truth, and reason: a treatise on legal argumentation* (2011) 188.

153 Van der Walt *supra* n 108 at 332.

154 Gordley *The Jurists: a critical history* (2013) 225.

155 Korkunov & Hastings *General theory of law* (1909) 244.

156 *Ibid.*

157 Van der Walt *supra* n 108 at 338.

158 As quoted in Van der Walt *supra* n 108 at 338.

159 Whitman *The legacy of Roman law in the German Romantic era: historical vision and legal change* (1990) 180.

and *dominium utile* had no place in the law of property.¹⁶⁰ This rejection resulted in the acceptance of only one form of *dominium* over property, namely, direct ownership. Van der Walt finds justification for this viewpoint by saying that property rights were seen to be part of the external sphere of the individual.¹⁶¹ Bernhard Windscheid (1817-1892) also provided a useful guide illuminating the rejection of *duplex dominium*.¹⁶² Firstly, Windscheid spoke of ownership as an exclusive or individualistic right.¹⁶³ Secondly, he talked of ownership as an absolute right.¹⁶⁴ Thirdly, he referred to ownership as an abstract right, in the sense that an owner possessed certain powers by virtue of having ownership of property.¹⁶⁵

Having examined the above-mentioned, it would appear that the Pandectists recognised that the objects of rights are corporeal and incorporeal things.¹⁶⁶ These rights do not necessarily translate to ownership. Accordingly, an interest in property was enough as a justification that rights in property existed in law.¹⁶⁷

8 Dutch Developments

Some of the prominent jurists of the Dutch law of property were Hugo de Groot (1583-1645)¹⁶⁸ and Johannes Voet. Grotius dealt with private property in *De Jure Belli ac Pacis*.¹⁶⁹ In this work, Grotius spoke of property that God conferred on all humans.¹⁷⁰ In relation to this property, he contended that humans had a general right, as opposed to a private right. This general right related only to the right to use the property.¹⁷¹ Therefore, a human 'could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed'.¹⁷² Furthermore, Grotius retained the mediaeval Roman law approach to property. He equated property with *gerechtigheid*, that is, a right.¹⁷³ Rights, in this sense, meant subjective rights. These rights came into being through a steady process of individuals dealing with each

160 As quoted in Whitman *supra* n 159 at 180.

161 Van der Walt *supra* n 108 at 333-334.

162 Windscheid *Lehrbuch des Pandektenrechts* 7th ed (1863) 490-493.

163 *Ibid.*

164 *Ibid.*

165 *Ibid.*

166 Raff *Private property and environmental responsibility: a comparative study of German real property law* (2003) 136.

167 Van der Walt *supra* n 108 333-334.

168 Hereinafter referred to as Grotius.

169 Grotius *De Jure Belli ac Pacis* (1625) II.II.II.1.

170 *Ibid.*

171 De Araujo 'Hugo Grotius, contractualism, and the concept of private property – an institutionalist interpretation' 2009 *History of Philosophy Quarterly* 356.

172 Grotius *supra* n 169 II.II.II.1.

173 Wilson *Savage Republic: De Indis of Hugo Grotius, republicanism, and Dutch hegemony within the early modern world-system* (2008) 235.

other.¹⁷⁴ The rights were to be exercised in a manner considerate of the property rights that other persons possessed.¹⁷⁵

Furthermore, Voet stated that there were certain things over which private ownership was impossible.¹⁷⁶ He then followed the Roman law approach to property by calling these objects the *res nullius* and *res derelictae*.¹⁷⁷ The examples of these things included wild animals, birds, fish, shells, the sea, rainwater and abandoned property.¹⁷⁸ He also stated that some things can be owned. In this respect, they can be the object of rights.¹⁷⁹ The examples were corporeal and incorporeal property. In relation to incorporeals, Voet argued that these things did not possess a tangible existence.¹⁸⁰ However, they were still property for purposes of the law.¹⁸¹ This recognition existed because incorporeal things had an inherent value to the person who had an interest in them.¹⁸² This value was attributable to ownership and was not only equated to a monetary value.

9 Conclusion

Society determines the kind of property that should be regarded as the object of rights. This determination often depends on the prevailing needs of a particular society during a specific period in its history. For example, in old Roman law the interests in property, as opposed to rights in property, in the form of actions, that is, *actio in rem* and *actio in personam*, were vested only in corporeals. The word 'belong' was thus preferred in old Roman law in order to indicate whether a person had an interest in property. However, pre-classical and classical Roman law extended the interests in property to both corporeals and incorporeals. Importantly, the view in classical Roman law was that corporeals and incorporeals must be of economic value to a person. In other words, a person had to have an interest in property, which was calculated to be economic in nature. Objects such as the land, house, horse, slave or a usufruct were deemed to be those things over which a person could have such an interest. Specifically, classical Roman law introduced the notion of ownership to the domain of the law of property. It stated that a *dominus* or *proprietary* could use, enjoy, destroy and transfer his property subject only to the limitations that were set out by the law.¹⁸³

174 De Araujo *supra* n 171 at 356.

175 Grotius *supra* n 169 at I.I. and VIII.2.

176 Voet 45.1.6.

177 *Idem* 41.1.16.

178 Van der Merwe & Pope 'Property' in Du Bois (ed) *Wille's principles of South African law* 9th ed (2007) 416.

179 Voet 1.8.11.

180 *Ibid.*

181 *Ibid.*

182 *Ibid.*

183 Garnsey *supra* n 25 at 177.

The radiance and substance of the above-mentioned eloquent construction of property was shattered in post-classical Roman law. Particularly, Roman law in the West substituted *dominium* with *possessio*. Thus, the interest which a person could have in property was described as the *inconcussum possessionis ius, ut dominus possidet* or *iure dominium possidere*. This un-classical Roman law view was consequently altered in Germanic law. Specifically, this law recognised ownership as the fullest right that could be possessed over objects. This right was individualistic in nature, that is, the *Sachenrechte*. It was called the *deligliche*. Despite this, Germanic law deviated from the old, pre-classical, classical and post-classical Roman law by submitting that *servi casati* were not property for purposes of the law. These categories of slaves could, in the same way as any other person, also have an interest in property.

The recognition of real rights in studying property as an object of rights is essential to the history of the law of property. For example, the Glossators attempted to align their approach to property with old Roman law by invoking what they called the *ius in re*. By this, they advocated the view that rights (*ius*) in property (*in re*) could no longer be equated to the old Roman law actions, namely, *actio in rem* and *actio in personam*. Consequently, they submitted that the rights which a person had to property were *ius reale*.¹⁸⁴ This real right jurisprudence seems to have been followed by the Pandectists and Dutch law. On the one hand, the Pandectists, for example Puchta, argued that a person had an ‘exclusive authority’ to use, enjoy and dispose of the property which he or she owned.¹⁸⁵ Exclusive authority was a term used in order to illustrate that a person possessed ‘private rights’ to property, or what Dernburg referred to as ‘*die wichtigste ist das Eigentumsrecht*’.¹⁸⁶ On the other hand, the Dutch law retained the medieval Roman law view of property. It stated that property rights are subjective in nature. They arise by virtue of the fact that humans interact with each other almost daily. Accordingly, a need arises to protect the rights that humans possess over those objects that are of inherent interest to them.

Therefore, it is essential to understand that the objects of rights are a product of an evolving system of law. This system develops because the society within which it applies is not stagnant and inflexible. Given this, it becomes clear that the needs of modern societies, for example an information society, will determine or indicate the objects that are of particular interest to a person (and not necessarily ownership). For example, there is nowadays a growing increase in the use of electronic information or data¹⁸⁷ for electronic communication or related

184 Pottage & Sherman *supra* n 104 at 22.

185 Gordley *supra* n 154 at 225.

186 See Van der Walt *supra* n 108 at 338.

187 In terms of section 1 of the Electronic Communications Act 25 of 2002 the word ‘data’ refers to the electronic representation of information in any form.

purposes. The fact that this electronic information has become a 'public good' motivates this increase.¹⁸⁸ Specifically, the proliferation of information in an information society has resulted in governments, businesses and individual computer users developing an interest in this information or data. For legal purposes, this has meant that the rights in property should or will have to be extended, in order to regulate non-traditional forms of property, for example information.

188 Elkin-Koren and Salzberger *Law, economics and cyberspace: the effects of cyberspace on the economic analysis of law* (2004) 49-50.