

***Jus Quaesitum Tertio – a Res, not a Right?***

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## INTRODUCTION

Until recently, the law pertaining to *jus quaesitum tertio* in Scotland was regarded as problematic.<sup>1</sup> It was said to be ‘behind the times’,<sup>2</sup> not least for the fact that the archaic Latin epitaph served to obfuscate the practical utility of ‘third party rights’.<sup>3</sup> In 2016, the Scottish Law Commission noted that ‘[C]lear, readily comprehensible terms are likely to benefit... the many people who draft and interpret contracts’<sup>4</sup> and consequently recommended that steps ought to be taken to ‘modernise’ not only the substance of the law in this area,<sup>5</sup> but also the language used to express that law.<sup>6</sup> To that end, the Contract (Third Party Rights) (Scotland) Act 2017 was passed by the Scottish Parliament.

It is difficult to take issue with the admirable aims of this legislation. Indeed, poor lawyer-client communication remains the most commonly cited cause of complaint concerning solicitors in Scotland<sup>7</sup> and so any move to combat the use of unnecessary legalese should be applauded. With that said, this article will present something of a defence of the practice of referring to certain legal terms in Latin formally for the simple fact that doing so keeps alive, for the Scots scholar and lawyer, the link between the past and the present of Scots law. Seemingly ‘archaic’ terms, such as *jus quaesitum tertio*, embody a rich history which no modern English term can hope to capture. This, as shall be shown, is of immense benefit to both jurists and legal practitioners.

This paper seeks to mount its defence by considering three particular difficulties with the theoretical operation of the common law doctrine of *jus quaesitum tertio* in Scotland.<sup>8</sup> These issues were noted by the Scottish Law Commission<sup>9</sup> and thus form part of the framework which drove the impetus to reform. The first of these issues concerned the creation of *jura quaesitum tertio* which served to benefit unborn children. Since the existence of a right is contingent on the existence of a ‘person’ who is the beneficiary of that right,<sup>10</sup> the fact that two contracting parties could lawfully create a *jus quaesitum tertio* to benefit an unborn child – a legal non-person – seemed incongruous with the contemporary understanding of what a legal ‘right’ is.<sup>11</sup>

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<sup>1</sup> See Lorna MacFarlane, *Third Party Rights: Behind the Times*, (04/09/2013), JLSS

<sup>2</sup> Douglas Mathie, *Third-party rights – Scots Law stuck in the 17 Century*, August 2010, accessible at: <https://brodiestechblog.wordpress.com/2010/08/26/third-party-rights-%E2%80%93-scots-law-stuck-in-the-17thcentury/>

<sup>3</sup> MacFarlane, *Third Party Rights*, (2013); Scottish Law Commission, *Review of Contract Law Report on Third Party Rights*, [2016] (Scot. Law Com. No 245), para.1.4

<sup>4</sup> SLC, *Report*, [2016], para.3.3

<sup>5</sup> See SLC, *Report*, [2016], Appendix A.

<sup>6</sup> See SLC, *Report*, [2016], Chapter 3, *passim*.

<sup>7</sup> Scottish Legal Complaints Commission, *Annual Report 2016 – 2017*, p.15

<sup>8</sup> Since abolished by s.11 of the 2017 Act.

<sup>9</sup> See Scottish Law Commission, *Review of Contract Law - Discussion Paper on Third Party Rights in Contract*, [2014] SLC Discussion Paper No.157, para.2.29-2.32

<sup>10</sup> See the Stair Memorial Encyclopaedia, Vol XI, paras 1073 and 1078

<sup>11</sup> See Stair, *Institutions I*, 10, 4; Bankton, *Institute, I*, 11, 6; Erskine, *Institute, III*, 1, 8

The second issue concerned the irrevocable nature of *jura quaesitum tertio* in Scots law.<sup>12</sup> Once created, an enforceable *jus quaesitum tertio* could not be destroyed or altered by the contracting parties.<sup>13</sup> This was so in spite of the general principle of contract law that the terms of a contract can be varied at any time where the contracting parties consent to such change. This facet of *jura quaesitum tertio*, consequently, ostensibly stood at odds with the general principles of Scottish contract law.<sup>14</sup> The third issue concerned the fact that, though the law pertaining to *jus quaesitum tertio* was seemingly concerned only with personal rights, this area of law had a tendency to become ‘clouded’ by its close functional links to matters of law which are concerned with real rights.<sup>15</sup> ‘Title conditions’, prior to the introduction of the Title Conditions (Scotland) Act 2003,<sup>16</sup> were routinely created by means of an express or implied *jus quaesitum tertio*.<sup>17</sup> Although seemingly categorised as rights *in personam*<sup>18</sup> rather than *in rem*,<sup>19</sup> ‘real conditions’ of this kind were thought to be ‘correctly classified as part of the law of property’,<sup>20</sup> the subject matter of which is said to be ‘real rights’. As there is an ‘unbridgeable divide’ between real rights and personal rights in Scots law,<sup>21</sup> the reason for these close links has hitherto been unclear.

To facilitate discussion, this article is, itself, divided into three sections. The first of these provides a historic overview of the concept of *jus quaesitum tertio* before concluding by contextualising the problems posed above in this introduction. The second section discusses the etymology of the juridical term ‘*ius*’ and seeks to define it within the context of both Gaius and Justinian’s *Institutes*. In the third and final section, this paper provides a full discussion of the division of law into the categories of persons, things and actions and undertakes an analysis of the emergence of the law of obligations as a separate legal category. Ultimately, this paper concludes by submitting that it may be that the doctrine of *jus quaesitum tertio* stood as an example of an element of law caught in the gap left between the modern Scots law of property and the modern law of obligations, when the latter finally broke off from the law pertaining to things in the seventeenth century and became, itself, a distinct category of law.<sup>22</sup>

## A. *JUS QUAESITUM TERTIO*

The notion that the parties to a bilateral agreement may create an enforceable benefit and confer such on a third party has a long history in Scots law; indeed, one of the earliest cases

<sup>12</sup> See *Carmichael v Carmichael’s Executrix* 1920 SC (HL) 195; *East Dunbartonshire Council v Smith* LTS/LO/1995/16

<sup>13</sup> SLC, *Report*, [2016], para.1.8

<sup>14</sup> Indeed, it was considered a ‘key concern’ with the common law: MacFarlane, *Third Party Rights*, (2013)

<sup>15</sup> SLC, *Discussion Paper*, [2014], para.2.22; for a discussion of ‘real rights’ and an analysis of the alleged *numerus clausus* of ‘real rights’ present in Scots law, see Roderick R. M Paisley, *Real Rights: Pragmatic Problems and Dogmatic Rigidity*, [2005] Edin. L.R 267, pp.268-269

<sup>16</sup> See the discussion in Andrew Steven and Scott Wortley, *Is That Burden Dead Yet?*, JLSS (19/06/06)

<sup>17</sup> Kenneth Reid, *The Title Conditions Bill*, JLSS (01/11/00)

<sup>18</sup> Notwithstanding the fact that ‘*the right of the third party is not contractual*’: See William McBryde, *The Law of Contract in Scotland*, (3<sup>rd</sup> Edition) (Edinburgh: W. Green, 2007), para.10.23

<sup>19</sup> Kenneth Reid, *The Law of Property in Scotland*, (Edinburgh: LexisNexis, 1996) para.346

<sup>20</sup> Reid, *Property*, para.346

<sup>21</sup> *Burnett’s Trustee v Grainger and Another* [2004] UKHL 8; para.87

<sup>22</sup> The division of law into (classically) persons, things and actions and (contemporarily) persons, things, actions and obligations.

on the matter was decided by the Court of Session in 1591.<sup>23</sup> Unlike in English law, wherein the principle of ‘privity of contract’ remained sovereign until legislative intervention expressly provided for the creation of third party rights,<sup>24</sup> Scots law historically recognised that an individual may sue the parties to a contract, notwithstanding the fact that said individual was never party to that contract, if the individual in question explicitly or implicitly benefits from the grant of a *jus quaesitum tertio*.<sup>25</sup>

The salient features of a *jus quaesitum tertio* are as follows: The primary contracting parties (termed the ‘stipulator’ and the ‘debtor’)<sup>26</sup> contract so as to confer an enforceable benefit of some kind or another upon a third party, who is not otherwise party to the agreement.<sup>27</sup> In so contracting, the stipulator and the debtor must intend to confer an enforceable right upon that third party.<sup>28</sup> Although the word *jus* may be translated as ‘duty’ as well as ‘right’, the primary contracting parties cannot contract so as to impose an obligation or a duty on the third party without that third party’s consent;<sup>29</sup> they may only confer a right (or other benefit).<sup>30</sup> Similarly the third party is not obliged to notify the contracting parties that he or she has accepted the conferring of the right in order to bring the *jus quaesitum tertio* into lawful existence.<sup>31</sup>

In order for the third party right to be effective, the contract must ensure that the intended third party can be properly identified – either by specifically naming an individual person or by allowing the identification of the interested third party by reference to the membership of a class of specific persons.<sup>32</sup> Further to this, the party may be identified as *any* person, if the contract provides that said person must first fulfil a set of specified criteria, as in *Kelly v Cornhill Insurance Company Ltd*,<sup>33</sup> indicating that suspensive or resolute conditions may be legitimately incorporated into contracts providing for third party rights. The *jus quaesitum tertio* does not come into existence on the fulfilment of such condition; it exists as a part of the contract before this time and simply becomes enforceable once the suspensive or resolute condition is met.<sup>34</sup>

The question of the irrevocability of *jura quaesitum tertio* proved controversial throughout the history of the concept in Scots law and this particular point has raised wider

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<sup>23</sup> *Wood v Moncur* 1591 Mor. 7719

<sup>24</sup> Via the introduction of the Contracts (Rights of Third Parties) Act 1999; for a study on the emergence of the concept of privity, see Vernon V. Palmer, *The Paths to Privity: The History of Third Party Beneficiary Contracts at English Law*, (New Jersey: The Lawbook Exchange, 1992), *passim*

<sup>25</sup> James C.D. Sandeman, *Green’s Encyclopaedia of the Law of Scotland*, Vol.VII, (Edinburgh: W. Green and Son, 1898) pp.205-207

<sup>26</sup> Scottish Law Commission, *Constitution and Proof of Voluntary Obligations: Stipulations in Favour of Third Parties*, [1977] SLC Memorandum No.38

<sup>27</sup> See SLC, *Discussion Paper*, [2014], para.2.3

<sup>28</sup> *Denny’s Trs v Dumbarton Magistrates* 1945 SC 147; McBryde, *Contract*, , para.10.12

<sup>29</sup> *Howgate Shopping Centre Ltd v GLS 164 Ltd*. 2002 SLT 820.

<sup>30</sup> SLC, *Report*, [2016], para.2.23

<sup>31</sup> Stair, *Institutions*, I, 10, 4-5

<sup>32</sup> As in *Rose, Murison and Thomson v Wingate, Birrell & Co.’s Trustees* (1889) 16 R 1132 and *Thomson v Thomson* 1962 SC (HL) 28

<sup>33</sup> 1964 SC (HL) 46

<sup>34</sup> See *Love v Amalgamated Society of Lithographic Printers of Great Britain and Ireland* 1912 SC 1078 and the comment in SLC, *Discussion Paper*, [2014], para.2.75

questions concerning the theoretical framework in which the doctrine operated. As noted above, a *jus quaesitum tertio* could become extant – and irrevocable – without the third party having expressly intimated acceptance of it.<sup>35</sup> While the courts have consistently maintained that a simple term in favour of a third party is not sufficient to deprive the debtor and stipulator of their ordinary right to vary their contract as they so consent,<sup>36</sup> *per Carmichael v Carmichael's Executrix*, a *jus quaesitum tertio* could become irrevocable in a number of ways: by delivery or intimation of the contract to the third party, or otherwise putting the contract out of the power of the contracting parties; by registration of the contract; by dint of the third party's knowledge of the contract term in its favour; or by dint of the third party's reliance upon the contract term in its favour.<sup>37</sup>

The Scottish Law Commission noted that while matters such as delivery or intimation of the contract to the third party, or the registration of the contract with the Books of Council and Session, might indicate as a matter of course that the contracting parties have “*moved beyond the stage of thinking about the creation of a right for the third party to a concluded intention that such a right should exist*”,<sup>38</sup> the latter two reasons for irrevocability set forth by Lord Dunedin in *Carmichael* appear unrelated to the question of the intentions of the contracting parties.<sup>39</sup> Rather, in the Commission's view, these seem to be “*driven more by considerations of fairness and justice to the third party when other objective manifestations of the contracting parties' intention have not taken place*”.<sup>40</sup> Quite why a *jus quaesitum tertio* should be irrevocable consequently appears inconsistent with the general rules of Scots law.

Conscious of this consideration, Dunedin held the view that irrevocability was the salient feature of any given *jus quaesitum tertio*, not merely a consequential aspect of a successfully concluded example.<sup>41</sup> This view, however, attracted much academic criticism as ‘*a disingenuous gloss on Stair*’;<sup>42</sup> indeed, by the time of the Scottish Law Commission's 2014 discussion paper, the views of Dunedin and Stair were seen as so divergent that they were described as ‘opposing’ one another.<sup>43</sup>

The now-prevailing view of Stair's work maintains that he considered that the *jus quaesitum tertio* came into being as a unilateral promise, made by the contracting parties, to the non-contracting third party.<sup>44</sup> On this view, the *jus quaesitum tertio* was only irrevocable once the third party became aware of their right, expressly intimated an acceptance of the right, or undertook reasonable actions on the assumption that they were entitled to the third party right. Since *jura quaesitum tertio* could only arise from the creation of a contract, however, many commentators felt that the analysis of the *jus quaesitum tertio* as a species of unilateral obligation was inadequate, and preferred to regard the doctrine as a separate matter, with its

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<sup>35</sup> *Carmichael v Carmichael's Executrix* 1920 SC (HL) 195

<sup>36</sup> SLC, *Discussion Paper*, [2014], para.2.58

<sup>37</sup> *Carmichael v Carmichael's Executrix* 1920 SC (HL) 195

<sup>38</sup> SLC, *Discussion Paper*, [2014], para.2.62

<sup>39</sup> SLC, *Discussion Paper*, [2014], para.2.62

<sup>40</sup> SLC, *Discussion Paper*, [2014], para.2.62

<sup>41</sup> *Carmichael v Carmichael's Executrix*, p.199; see also SLC, *Stipulations*, [1977], p.9

<sup>42</sup> Muirhead, *Roman Law*, p.79

<sup>43</sup> SLC, *Discussion Paper*, [2014], para.1.14

<sup>44</sup> Stair, *Institutions*, I, 10, 4-5

own *sui generis* character.<sup>45</sup> The difficulty with the decision in *Carmichael* in respect of revocability therefore retains some significance, on this view, as even – indeed, especially – a *sui generis* approach to *jus quaesitum tertio* would similarly be required to remain consistent with the underlying rules of the Scots law of obligations.

In spite of the noted controversy, the treatment of *jus quaesitum tertio* by Stair has long been regarded as seminal; indeed, so great is the influence of his seventeenth century work that some Scottish solicitors felt that, until the introduction of the 2017 Act, the law on this matter was ‘stuck in the 17<sup>th</sup> century’.<sup>46</sup> The Scottish Law Commission certainly preferred Stair’s original conceptualisation of the *jus quaesitum tertio* as a species of unilateral promise to Dunedin’s view or any *sui generis* approach in their 1977 memorandum<sup>47</sup> and it appears that, for all the later comment, in propounding what has since been regarded as his own school of thought, Dunedin simply believed that he was continuing in the vein that Stair intended.<sup>48</sup> It is, however, apparent that, while Stair’s treatment of *jus quaesitum tertio* certainly was foundational in providing the first general statement of the Scots law pertaining to third party rights, his work was ultimately built on a solid jurisprudence of over a century past.<sup>49</sup> The Lords of Session had consistently recognised the legitimacy of third party rights throughout the course of the seventeenth century<sup>50</sup> and it is apparent that the existence of the concept was not regarded as a controversial element of Scots law, or the wider *jus commune*, at the end of the sixteenth century.<sup>51</sup> The mediaeval canon lawyers had, by this time, done much to develop and entrench the idea of *jus quaesitum tertio* in the positive law,<sup>52</sup> thus, though there was some element of what an English jurist might term ‘privity’ present in Continental European and Scots jurisprudence at this time<sup>53</sup> – indeed, the notion was present before the equivalent emerged in English law<sup>54</sup> – the *jus commune* conceptualisation of ‘privity’ appears dilute when compared directly to the evolution of its robust English cousin.<sup>55</sup>

The term ‘privity’ itself has been described as ‘mysterious and undefined’,<sup>56</sup> for good reason. As Vernon Palmer notes, “*it is surely a generic term that has acquired diverse meanings and functions in different periods and contexts... [the term] conceals a lengthy evolution and a vast inventory of ideas, rules and principles*”.<sup>57</sup> The use and understanding of

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<sup>45</sup> SLC, *Discussion Paper*, [2014], para.2.3

<sup>46</sup> Douglas Mathie, *Third-party rights – Scots Law stuck in the 17 Century*, August 2010, accessible at: <https://brodiestechblog.wordpress.com/2010/08/26/third-party-rights-%E2%80%93-scots-law-stuck-in-the-17thcentury/>

<sup>47</sup> SLC, *Stipulations*, [1977], p.5

<sup>48</sup> *Carmichael v Carmichael’s Executrix*, p.200

<sup>49</sup> Hector MacQueen, *Third Party Rights in Contract: Jus Quaesitum Tertio*, in Kenneth Reid and Reinhard Zimmerman (Eds.) *A History of Private Law in Scotland*, Vol. II (Oxford: OUP, 2000), pp.221-222

<sup>50</sup> *Auchmoutie v Hay* (1609) Mor. 12126; *Supplicants v Nimmo* (1627) Mor. 7740; *Kenton v Ayton* (1634) Mor. 7721; See also Sir Thomas Hope’s *Major Practicks*, (1608-33) II, 1, 30 (1616); II, 3, 37 (1612)

<sup>51</sup> MacQueen, *Jus Quaesitum Tertio*, p.223

<sup>52</sup> J.T Cameron, *Jus Quaesitum Tertio: The True Meaning of Stair I.x.5*, [1961] Jur. Rev. 107

<sup>53</sup> Palmer, *Privity*, (1992), p.1

<sup>54</sup> Palmer, *Privity*, (1992), p.1

<sup>55</sup> Palmer, *Privity*, (1992), pp.1-2

<sup>56</sup> Arthur I. Corbin, *Corbin on Contracts*, Vol. IV (West Publishing: 1952), para.778

<sup>57</sup> Palmer, *Privity*, (1992), p.6

the term varies widely even between Common law jurisdictions.<sup>58</sup> It is, however, apparent that – even if only as a consequence of the term’s versatility, the word ‘privity’ may be interpreted as a wide blanket-term which encapsulates three key principles of Roman law: *Alteri stipulari nemo potest* (no-one is able to contract for another),<sup>59</sup> *per extraneam personam nihil adquiri posse* (nothing is able to be acquired through [the actions of] an extraneous person)<sup>60</sup> and *ex nudo pacto non oritur actio* (no action arises from bare agreement).<sup>61</sup>

Thus, in spite of the Latin nomenclature of the term *jus quaesitum tertio*, and the concept’s significant role in *jus commune* jurisprudence, *jura quaesitum tertio* were not recognised in Roman law and the contemporary Scottish doctrine of *jus quaesitum tertio* is not Roman in origin.<sup>62</sup> Indeed, the concept of third party rights was ostensibly anathema to three principles of Roman law mentioned above and as such, as MacQueen wryly notes, with the affirmation of Viscount Haldane that English law ‘knows nothing of a *jus quaesitum tertio* arising by way of contract’ in 1915,<sup>63</sup> the supposedly ‘home-grown’ English Common law became, in this respect, the most Roman of all modern jurisdictions in Europe.<sup>64</sup>

Since the theoretical underpinning of the Scottish concept of *jus quaesitum tertio* was not Roman in origin, and the pre-Stair Scottish authorities did not seem to concern themselves with the theoretical framework in which the concept operated,<sup>65</sup> it is small wonder that Stair’s view proved so influential; in conceptualising the *jus quaesitum tertio* as a species of unilateral obligation, Stair provided not only the first general statement of, but also the first justification for the existence of, third party rights in Scotland.

The conceptualisation of *jus quaesitum tertio* as a species of obligation, has, however, proven theoretically problematic. The modern Scots understanding of obligations as providing persons with a kind of ‘personal right’ necessitates an extant beneficiary of such rights;<sup>66</sup> yet, as a long list of authorities makes apparent, no beneficiary needed to exist at the time of the creation of a *jus quaesitum tertio*.<sup>67</sup> Additionally, the close proximity in which *jura quaesitum tertio* operated in respect of real rights was considered problematic, given the ‘unbridgeable divide’<sup>68</sup> between real and personal rights in Scots law.<sup>69</sup> The interrogation of the concept of *jus quaesitum tertio* as a species of promise may suffice in almost all situations, but it does not answer why two seemingly incompatible types of right come (apparently) illogically close to one another so often in this particular area of law.

<sup>58</sup> Palmer, *Privity*, (1992), pp.8-10

<sup>59</sup> See Dig.45.1.38.17; see also Gaius, *Institutiones*, II, p.95

<sup>60</sup> See Justinian, *Institutiones*, II, IX

<sup>61</sup> See Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, Vol.I (New Jersey: The Lawbook Exchange, 1887), Editor’s Preface, p.40

<sup>62</sup> See Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (1990), p.34

<sup>63</sup> *Dunlop Pneumatic Tyre Co. v Selfridge* [1915] AC 847

<sup>64</sup> MacQueen, *Jus Quaesitum Tertio*, p.221

<sup>65</sup> MacQueen, *Jus Quaesitum Tertio*, p.223

<sup>66</sup> Stair Memorial Encyclopaedia, Vol XI, paras 1073 and 1078

<sup>67</sup> Stair, *Institutions* I, 10, 4; Bankton, *Institute*, I, 11, 6; Erskine, *Institute*, III, 1, 8; *Morton’s Trustees v Aged Christian Friend Society of Scotland* (1899) 2 F 82; SLC, *Discussion Paper*, [2014], paras.2.29-2.32

<sup>68</sup> In the words of Lord Rodger: *Burnett’s Trustee v Grainger and Another* [2004] UKHL 8; para.87

<sup>69</sup> See Professor Kenneth Reid’s commentary in the *Stair Memorial Encyclopaedia*, Vol. XVIII, para.402

The solution to these issues – a solution, which remains consistent with the view that the irrevocable nature of *jura quaesitum tertio* arises as a consequence, rather than as a constitutive element of, the creation of such *jura* – lies in the conceptualisation of all *iura* in Justinian's *Corpus Iuris Civile*. Commonly translated as 'right' in both the objective sense (as something that is correct, or 'right') and the subjective sense (as a 'right' enjoyed by a person), the etymology of the word '*ius*' is particularly complex;<sup>70</sup> indeed, the scholarship of numerous authors (foremost amongst them the French scholar Michel Villey) indicates that the Romans themselves had no concept of subjective 'rights'<sup>71</sup> and so to equate the Latin '*ius*' with the English term 'a right' is to err. One must consequently consider alternative understandings at all times when dealing with such a complex term.<sup>72</sup> In the *Corpus Iuris Civile* itself, *obligationes* are classified as but one example of *res incorporales* created *iure* – by law, or by dint of the law's authority.<sup>73</sup> Accordingly, the 'rights' arising from obligations were governed under the broader legal category of the *ius quod ad res pertinet* – the law pertaining to things.<sup>74</sup>

On a wholly Romanistic view, therefore, a *jus quaesitum tertio* may be conceptualised not as a right, but as a *res incorporalis* which is created by the force of the private law when the stipulator and debtor contract. This interpretation, it is submitted, explains simply why a *jus quaesitum tertio* may be legitimately created with a view to benefitting an entity which does not, yet, juristically exist; the incorporeal thing is created and exists as an intangible object which the beneficiary of the *jus quaesitum tertio* may claim once they achieve a juristic existence; since the *jus quaesitum tertio* is not a right, it does not matter that there is no extant beneficiary at the time of its creation. Similarly, this view explains why the *jus quaesitum tertio* is irrevocable once it has been created: if the *jus quaesitum tertio* exists as a *res incorporalis*, once the *jus quaesitum tertio* is conferred on the third party by the debtor and the stipulator, the debtor and the stipulator no longer hold any legal interest in the thing, although they themselves created it. The interests of the third party are protected by the principles of the *ius quod ad res pertinet* since they enjoy a *jus quaesitum tertio* in their favour: The third party, in a sense, holds a 'real right' in or to the 'personal right' that is the *obligatio*.<sup>75</sup>

As might be inferred from the final sentence of the preceding paragraph, this conceptualisation also addresses why *jura quaesitum tertio* consistently mixed juristic oil and water – real rights and personal rights. Although these concepts are seemingly dissonant,<sup>76</sup> it is apparent that in Roman law the concepts, as understood today, did not exist and so cannot

<sup>70</sup> As Tuck notes, Latin has now enjoyed a literary history of some nineteen hundred years and so has existed for a greater length of time as a written language than English has existed as a spoken language: Richard Tuck, *Natural Rights Theories: Their Origins and Development*, (Cambridge: CUP, 1979), p.7

<sup>71</sup> See Michel Villey, *L'idée du Droit Subjectif et les Systèmes Juridiques Romains*, [1946] *Revue Historique De Droit* 201-228; Barry Nicholas, *An Introduction to Roman Law*, (Oxford: Clarendon Press, 1962), p.100; Tuck, *Natural Rights Theories*, (1979), p.7; Brian Tierney, *The Idea of Natural Rights*, (Cambridge: Eerdman's, 1997), p.1; Ernest Metzger, *Actions*, in Ernest Metzger (Ed.), *A Companion to Justinian's Institutes*, (London: Duckworth, 1998) pp.208-209

<sup>72</sup> The word *ius* may be taken to have such varied meanings as 'an oath', 'a duty', 'the law', 'a law court', 'legal authority', 'justly', 'correct' and 'soup'; all of these possible alternatives (save, perhaps, the last of the given examples), among others, must be considered by the translator whenever they are faced with this mercurial term.

<sup>73</sup> Justinian, *Institutes*, Book II, para.1-2

<sup>74</sup> Justinian, *Institutes*, Book II, Title II

<sup>75</sup> Hence – though the point is not moot – it might be inferred, even in the absence of authority, that the third party may revoke or renounce the right at their leisure: See McBryde, *Contract*, para.10-32

<sup>76</sup> See *The Stair Memorial Encyclopaedia* Vol. 18, para.402



be regarded as fundamentally distinct from one another. In the absence of a developed doctrine of subjective rights, Roman law cannot be said to have spoken of ‘rights’ arising under contract, or of ‘ownership’, or of ‘property’ at all: As Villey discusses, *dominium* did not refer to a ‘right’ in Roman law<sup>77</sup> and so, since ‘property’ was not a right, the word *ius* simply cannot have meant ‘right’.<sup>78</sup> The fact that real rights and personal rights are commonly Latinised as ‘*ius in re*’ and ‘*ius in personam*’ is misleading; to paraphrase Professor MacCormick it is not only bad grammar and bad Latin to refer to rights *in rem*, but the ‘inconclusive character’ of the English-language literature on this topic provides further justification for avoiding the use of the word ‘rights’ in relation to Roman *res* altogether.<sup>79</sup>

It is clear that this melding of the language of ‘real’ and ‘personal’ rights appears repugnant to contemporary Civilian doctrine and so this theory of *jus quaesitum tertio* is undoubtedly controversial. A simple objection may be raised in relation to it by reference to the fact that, just as the Romans had no conception of ‘rights’, neither did their legal system recognise the existence or possibility of contracts creating a *jus quaesitum tertio*. To this objection it may be countered that, although the notion that one could create a *jus quaesitum tertio* was itself alien to Roman law, the wider principles of Roman law as set out in the *Corpus Iuris Civile* nevertheless govern the operation of the doctrine in modern Scots law, since Scotland (along with South Africa)<sup>80</sup> remains an uncodified example of a ‘living’ Roman legal system.<sup>81</sup> Accordingly, in building any theory of *jus quaesitum tertio*, it is legitimate – indeed, it is submitted, necessary – to first consider the governance of *iura* and *obligationes* in the operation of Roman law.

Other objections may be legitimately raised which criticise the conceptualisation of a *jus quaesitum tertio* as a species of *res*; it is hoped that the following sections of this paper, which discuss the nature of the Roman *ius quod ad res pertinet* and its connection to the modern Scottish division of law, will address some of these concerns.

## B. *De Rerum Divisione*

The Roman *rerum divisione* is elegant in its simplicity. According to Professor Gretton, this ‘Gaiian schema’ continues to form the foundational framework of almost all modern systems of property law, including those in Common law jurisdictions.<sup>82</sup> The basic division of things into tangible and intangible objects set out under the heading *De Rebus Incorporalibus* is identical in the work of both Gaius and Justinian:

<sup>77</sup> Villey, *L’idée du Droit Subjectif*, [1946], pp.201-228; *Du Sens de l’expression Jus in Re en Droit Romain Classique*, [1949], pp.417-436; *Le ‘Jus In Re’ du Droit Romain Classique au Droit Moderne*, [1950], pp.187-225; ‘*Suum Jus Cuique Tribuens*’, (1956) pp.361-371; *Les Origines de la Notion du Droit Subjectif*, (1952) pp.221-250; *La Genèse du Droit Subjectif Chez Guillaume d’Occam*, [1964], pp.99-127; *La Formation de la Pensée Juridique Moderne*, (1968), *passim*.

<sup>78</sup> See Villey, *ibid*. See also Tuck, *Natural Rights Theories*, (1979), p.8

<sup>79</sup> Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, (Oxford University Press, 2007) para.8.1

<sup>80</sup> Which, like classical and Justinianic Roman law, contemporaneously lacks any concept of *jus quaesitum tertio*, having instead developed a separate, yet apparently analogous, strand of jurisprudence concerning the concept of *stipulatio alteri*: See Philip Sutherland, *Third-Party Contracts* in Hector MacQueen and Reinhard Zimmermann (eds.), *European Contract Law; Scots and South African Perspectives* (Edinburgh: EUP, 2006), p.208

<sup>81</sup> Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford: Hart, 2013), p.2

<sup>82</sup> George Gretton, *Ownership and its Objects*, [2007] *Rechts Zeitschrift* 802, *passim*

*Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales eae sunt, quae sui natura tangi possunt: veluti fundus homo vestis aurum argentum et denique aliae res innumerabiles. Incorporales autem sunt, quae tangi non possunt. Qualia sunt ea, quae in iure consistunt: Sicut hereditas, usus fructus, obligationes quoquo modo contractae.*<sup>83</sup>

Translated, the passage reads:

‘There exist some things which are corporeal and others which are incorporeal. Corporeal things are those which are tangible by nature, such as farmland, human beings, clothes, gold, silver, and other innumerable things. Moreover, there are incorporeal [things], which are not capable of being touched. Such things exist only in law [or ‘by the law’s authority’]: such as inheritance, usufruct and obligations, however these are acquired.’<sup>84</sup>

There have been several problematic translations of this short paragraph,<sup>85</sup> many of which have served to confound a proper analysis of the rationale behind the division of things. Commonly, the issue stems from translators interpreting the listed *res incorporales* as ‘rights’,<sup>86</sup> as this is generally how modern jurists would conceptualise things such as inheritance and usufruct today.<sup>87</sup> Since *dominium* – what would today be understood as the ‘right of ownership’ – is absent from the presented list of *res incorporales*, the Gaian schema has been criticised as ‘incoherent’: As ownership is, in the modern Civil law, understood as the ‘sovereign, or primary real right’,<sup>88</sup> the apparent absence of this concept from the enumerated list of *res incorporales* has consistently puzzled scholars.<sup>89</sup>

To understand the Roman juristic conceptualisation of incorporeal things as akin to rights is, however, plainly wrong. As indicated above, it is apparent that the Romans had no concept of subjective ‘rights’<sup>90</sup> and that they managed to craft their complex and enduring legal system without any need for recourse to them.<sup>91</sup> Accordingly, the absence of *dominium* from the enumerated list of exemplary *res incorporales* is hardly problematic; not only was

<sup>83</sup> Justinian *Institutes*, Book II, Title II; Gaius, *Institutes*, Book II, para.12

<sup>84</sup> Author’s translation.

<sup>85</sup> Indeed, Moyle’s own translation is deficient, as indicated below.

<sup>86</sup> See, in particular, the translations of Justinian’s *Institutes* by Moyle and (separately) Scott - J.B Moyle *Imperatoris Iustiniani Institutiones*, (3<sup>rd</sup> Edition) (Oxford: Clarendon Press, 1896), p.217; Samuel P. Scott, *The Institutes of Justinian*, (Cincinnati, 1932) Book II, para.12

<sup>87</sup> It is natural, when using the English language, to speak of a ‘right of inheritance’, or a ‘right of usufruct’, for example.

<sup>88</sup> John Erskine of Carnock, *An Institute of the Law of Scotland*, (8<sup>th</sup> Edition) (J.B Nicholson, 1871) II.i.1; Erskine’s definition would fit perfectly at home in French law (see Françoise Moulin and Edwige Laforêt, *Introduction au Droit*, (Dunod, 2009), p.253), South African law (see J.R.L Milton, *Ownership*, in Reinhard Zimmerman and Daniel Visser, *Southern Cross: Civil Law and Common Law in South Africa*, (Oxford: Clarendon Press, 1996) p.699) and other Civilian and Civilian-influenced legal systems: See Jane Ball, *The Boundaries of Property Rights in English Law*, Report to the XVIIth International Congress of Comparative Law, July 2006 [2006] EJCL: <http://www.ejcl.org/103/art103-1.pdf>

<sup>89</sup> See Francesco Giglio, *Pandectism and the Gaian Classification of Things*, [2012] University of Toronto Law Journal 1 and the discussion in Gretton, *Ownership and its Objects*, [2007], *passim*.

<sup>90</sup> Michel Villey, *L’idée du Droit Subjectif*, [1946], pp.201-228; Nicholas, *Roman Law*, p.100; Tuck, *Natural Rights Theories*, (1979), p.7; Tierney, *The Idea of Natural Rights*, (1997), p.1; Metzger, *Actions*, pp.208-209

<sup>91</sup> Tierney, *The Idea of Natural Rights*, (1997), p.1

*dominium* not considered a ‘right’ or ‘*ius*’ in Roman law,<sup>92</sup> it was also not considered a *res* by the jurists since a *res* was an entity of some kind over which one enjoyed *dominium*.

The difficulty of what, precisely, *dominium* was considered to be by Roman law has attracted a great deal of academic commentary<sup>93</sup> and, just as many lawyers schooled in the Common law tradition find it difficult to define what is meant by the word ‘property’ juridically,<sup>94</sup> the word *dominium* has managed to evade precise definition in Civilian<sup>95</sup> jurisprudence.<sup>96</sup> Over time, some competing theories – notably the ‘merger’ interpretation and the ‘titularity’ approach<sup>97</sup> – have, however, gained mainstream prominence, if not acceptance in academic circles.

The ‘merger interpretation’, which was favoured by the German Pandectists,<sup>98</sup> maintains that *res incorporales* are themselves rights – either ‘real’ or ‘personal’ – but that they are also, at the same time, things which may be the object of a right of ownership; the ‘right of ownership’ being, on this view, a right unlike any other.<sup>99</sup> On this view, although the ‘right of ownership’ itself is an incorporeal thing in ordinary parlance and a ‘right’ in law, it is ultimately incomparable to other rights and incorporeal things given that it confers sovereignty over a *res* on the one who holds it. When one claims *dominium meum est*, one essentially claims no more than *meum esse*. When one asserts *res meum est* there is an underlying implication that one has a ‘right’ to the thing, in modern parlance. The merger interpretation, therefore, fits well with Professor Reid’s assertion that ‘*property law is the law of things and of rights in things*’.<sup>100</sup> It also reconciles the classical Roman law with the developments which occurred in the Civilian tradition which grew out of it. If one accepts the merger interpretation, then according to both the classical Roman law and the Civilian law, *dominium* confers on the *dominus* a real right to the *res* which grants the *dominus ius disponendi* over it.<sup>101</sup> In addition, though possession is

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<sup>92</sup> Michel Villey, *Du Sens de l’expression Jus in Re en Droit Romain Classique*, [1949], pp.417-436; *Le ‘Jus In Re’ du Droit Romain Classique au Droit Moderne*, [1950], pp.187-225; Tuck, *Natural Rights Theories*, (1979), p.8

<sup>93</sup> See the discussion in Gretton, *Ownership and its Objects*, [2007], *passim*

<sup>94</sup> See George W. Paton and David P. Derham, *A Textbook of Jurisprudence*, (4<sup>th</sup> Ed.) (Oxford University Press, 1972) p.505; Margaret Davis, *Property: Meanings, History, Theories*, (Oxford: Routledge-Cavendish, 2007) p.3

<sup>95</sup> It is noted that, though Scotland is an example of a ‘mixed’ legal system, the authors of the 2009 *National Report on the Transfer of Moveables* described the modern property law of Scotland as ‘*resolutely Civilian*’ – see David Carey-Miller, Malcolm Combe, Andrew Steven and Scott Wortley, *National Report on the Transfer of Moveables in Scotland*, in Wolfgang Faber and Brigitta Lurger (Eds.), *National Reports on the Transfer of Moveables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus*, (Sellier, 2009) p.311

<sup>96</sup> Indeed, the term *dominium* was never defined in the Roman sources, perhaps indicating heed of Priscus’ well-founded statement ‘*each definition in the Civil law is dangerous, for those that cannot be subverted are rare*’; see Dig.50.17.202

<sup>97</sup> Discussed in Gretton, *Ownership and its Objects*, [2007], *passim*

<sup>98</sup> Giglio, *Pandectism and the Gaian Classification of Things*, [2012], p.5

<sup>99</sup> Peter Birks, *The Roman Concept of Dominium and the Idea of Absolute Ownership*, [1985] *Acta Juridica* 1, pp.26

<sup>100</sup> Reid, *Property*, para.11

<sup>101</sup> Bartolus de Saxoferrato, *In Primam Digesti Novi Partem Commentaria ad Dig. 41.2.17.1 No.4*, (1574; Electronic Edition by A.J.B Sirks, 2004); David L. Carey Miller and David Irvine, *Corporeal Moveables in Scots Law*, (W. Green, 2005) para.8.01

ultimately unrelated to *dominium*,<sup>102</sup> *domini* are generally granted a right to possess their *res*.<sup>103</sup> On this view of the Gaian schema, to legitimately call a thing ‘mine’ is to have ownership of the thing<sup>104</sup> and to have ownership of a thing is to have the right to use, destroy, or to profit from that thing, in addition to the right of alienation<sup>105</sup> or sale (*commercio*).<sup>106</sup>

In spite of the popularity of the merger interpretation, and its consistency with the understanding of ‘property’ in Anglo-American law<sup>107</sup> as well as contemporary Civilian jurisprudence, it has not been immune to criticism<sup>108</sup> and it is ultimately evident that it is fatally flawed due to its overly rights-centric nature. By conceding that the *res incorporales* are ‘rights’, and conceptualising *dominium* itself as a ‘right’, the merger interpretation clearly fails to describe adequately the Gaian *Rerum Divisione* in terms consistent with the absence of a language of rights. Additionally, taken to its logical extreme, the division between *dominium* and *possessio* – two concepts which ‘have nothing in common with one another according to Roman law<sup>109</sup> – would break down if the merger interpretation was an accurate reflection of Roman *dominium*, since, if ‘ownership’ is to be fully identified with the object that is owned, as the merger interpretation necessitates, then one cannot, in law, say ‘I have the thing!’ and mean no more than that they have simple factual sovereignty over – or *possessio* of – a thing, since having a thing, on this view, necessarily implies ownership.<sup>110</sup>

The titularity interpretation, pioneered by Professor Ginossar,<sup>111</sup> provides a more appropriately Roman understanding of *dominium*. According to this view, ‘ownership’, is conceptualised as the relationship between a person and a thing by which that thing belongs to the person.<sup>112</sup> According to Ginossar’s view, the relationship (*dominium*) between the person and the thing confers ‘title’ to the thing upon the person; this ‘title’ is recognised by the law and grants an innumerable number of things which might be termed ‘rights’ to the title-holder, but is not itself a ‘right’ as it has no correlative obligation.<sup>113</sup> This interpretation explains why *dominium* is omitted from the *res incorporales* by Gaius and Justinian; they saw no need to define the ‘right of ownership’ as there is no such right.<sup>114</sup> A ‘right of ownership’, though ostensibly an incorporeal thing, cannot be ‘owned’ as it is not a *res*; the phrase describes the

<sup>102</sup> Dig. 41.2.12.1; Eric Descheemaeker, *The Consequences of Possession*, (Edinburgh: Edinburgh University Press, 2014), p.1

<sup>103</sup> *Encyclopaedia of the Laws of Scotland*, Vol.12 (W. Green, 1930) p.205, para.436

<sup>104</sup> Gretton, *Ownership and its Objects*, [2007], p.807

<sup>105</sup> *Anstruther v Anstruther* (1836) 14 S.272

<sup>106</sup> Paul Du Plessis, *Borkowski’s Textbook on Roman Law*, (Oxford: Oxford University Press: 2015) p.160

<sup>107</sup> See, for example, the definition of ‘property’ proffered in the American Encyclopaedia of Jurisprudence: Am. Jur. 2d, *Property*, § 1

<sup>108</sup> See Henri de Page, *Traite Elementaire de Droit Civil Belge V*, (1941) 5, 536; Nicholas, *Roman Law*, p.107; Paton and Derham, *Jurisprudence*, (1972) p.509; George Gretton, *Ownership and its Objects*, (2007) *Labels Zeitschrift* Vol 71, *passim*; Giglio, *Pandectism and the Gaian Classification of Things*, [2012], p.7

<sup>109</sup> Dig. 41.2.12.1

<sup>110</sup> Gretton, *Ownership and its Objects*, [2007], p.807; F.H Lawson, *A Common Lawyers Looks at the Civil Law*, (Michigan: Ann Arbor, 1955), p.112

<sup>111</sup> See S. Ginossar, *Droit Réel, Propriété et Créance: Élaboration d’un Système Rationnel des Droits Patrimoniaux*, (Paris: Librairie Generale de Droit et de Jurisprudence, 1960), *passim*

<sup>112</sup> Ginossar, *Droit Réel, Propriété et Créance*, (1960), pp.46-47

<sup>113</sup> Giglio, *Pandectism and the Gaian Classification of Things*, [2012], pp.11-12

<sup>114</sup> Gretton, *Ownership and its Objects*, [2007], p.806

relationship which one has with a *res*. A ‘right of usufruct’, conversely, can be owned as it is simply a *res*. According to this interpretation, *dominium* may be exercised over *res incorporales* as they, like *res corporales*, are capable of forming part of one’s patrimony.<sup>115</sup> *Dominium* itself does not form a part of the patrimony; only the thing over which title is enjoyed does so.

‘Patrimony’ has been defined as the institution by which the ownership of goods gains significance and by which proprietary rights may be exercised in Civilian legal systems.<sup>116</sup> As a result of the doctrine of *pater familias*, however, *res* were not held in patrimony by individuals in Roman law, but rather they were owned by the whole *familia*.<sup>117</sup> Anything that was ‘owned’ by the *familia* was legally administered and maintained by the *pater* as the representative of the familial unit.<sup>118</sup> Individuals were not responsible for their own accounts; the *pater* was answerable in respect of the assets and liabilities of the *familia*.<sup>119</sup> A *pater* was, essentially, ‘a debtor and creditor as regards other citizens’.<sup>120</sup>

According to the titularity interpretation, the *pater* is to be regarded as the individual in whom title is vested in Roman law; in modern law, since each individual legal person enjoys control of their own patrimony, every legal person who owns a (corporeal or incorporeal) thing is viewed as enjoying title to that thing in law. Thus, it is apparent that the titularity interpretation is consistent with the use of the English word ‘property’ as a word with two distinct meanings in Roman law and Civilian milieu. It recognises that, firstly, the word may refer to *dominium*, or the state of having ownership of a particular *res*, or ‘thing’ and that the word might secondly be used to refer to the *res*, or ‘thing’, which is held in a person’s patrimony.<sup>121</sup>

With that said, it may appear philosophically absurd, *prima facie*, to state that a person might enjoy a ‘relationship’ with a thing, and so the titularity interpretation may be doubted on this ground. To make such a claim is, however, problematic in itself; as is made clear by the Gaian *Rerum Divisione*, human beings are themselves categorised as corporeal things in Roman law.<sup>122</sup> The word ‘*homo*’ is used by both Gaius and Justinian, indicating that it was not

<sup>115</sup> Gretton, *Ownership and its Objects*, [2007], p.806

<sup>116</sup> Christopher Berry Gray, *The Philosophy of Law: An Encyclopedia*, (Routledge, 2013) p.266

<sup>117</sup> Carlos Amunategui Perello, *Problems Concerning Familia in Early Rome*, [2008] Roman Legal Tradition 37

<sup>118</sup> Richard P. Saller, *Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household*, [1999] *Classical Philology* 182, p.184

<sup>119</sup> Laurent L.J.M Waelkens, *Medieval Family and Marriage Law: From Actions of Status to Legal Doctrine*, in John W. Cairns and Paul J. du Plessis (eds.), *The Creation of the Ius Commune: From Casus to Regula*, (Edinburgh: Edinburgh University Press, 2010) p.107

<sup>120</sup> *Ibid.* citing the *Codex Expensi et Accepti*; It ought to be noted that, though the direct translation of *pater* is ‘father’, and though the *paterfamilias* was typically male, biological fatherhood was not a necessary pre-requisite of the designation, as indicated by Dig. 1.6.4; 32.50.1. Any citizen – male or female – who was *sui iuris* – in their own power – was recognised as a *pater* by law, as indicated in Dig. 1.6.4 – although the designation of *paterfamilias* could only ever be applied to women in a reduced sense as they could never hold *patria potestas* – paternal power over life and death – over their children, as men could: See Richard P. Saller, *Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household*, [1999] *Classical Philology* 182; Gaius, *Institutes*, Book II, para.104

<sup>121</sup> Robson and McCown adopt this usage in their introductory text on Scottish property law: See Peter Robson and Andrew McCown, *Property Law*, (2<sup>nd</sup> Edition, W. Green/Sweet and Maxwell, 1998) para.1.02

<sup>122</sup> Gai, *Institutiones*, Book II, para.12; Justinian, *Institutiones*, Liber Secundus, II, para.1-2

simply the bodies of slaves which were subject to the *ius quod ad res pertinet*,<sup>123</sup> but rather the corporeal existence of all human bodies.<sup>124</sup> Accordingly, in any system which regards all human beings, legally, as ‘things’, it cannot be regarded as absurd to say that a person has a relationship with a thing – to state such is simply to say that a certain thing, albeit a thing with special status (an entity designated *persona*) is regarded as having a relationship with another thing in law.

The distinction between human beings who are regarded as mere ‘things’ and nothing more and those who were afforded the superior status of personhood was determined by the wider private law, which was itself divided under three distinct headings: ‘*all the law which we make use of has reference either to persons or to things or to actions*’.<sup>125</sup> According to this division of law, *personae* were simply those human beings whose lives fell to be governed by the *ius quod ad personas pertinet*, while slaves were those whose lives were governed by the rules of the *ius quod ad res pertinet*. It is notable, here, that Roman law had no separate category dealing with the *ius quod ad obligationes pertinet*; these rules of law fell, along with many other aspects of private law, under the broad heading of the *ius quod ad res pertinet*.

On the basis of the above, however, it is submitted that, as the titularity interpretation can be considered consistent with both classical and post-Justinianic Roman law, as well as contemporary Scots law, *dominium* is best understood according to this approach. It is now consequently appropriate to consider the Romanistic understanding of the words *ius* and *obligationes*. Although the latter could be contemporaneously translated as ‘obligations’, and thus might be thought analogous in substance and in form to the modern interpretation of that term, the word *obligatio* did not, in fact, solely denote an obligation under which one was placed *ex voluntate* or *ex lege*. Rather, it usually meant ‘*to be in the position where one benefitted from an agreement which laid an obligation (in our sense [of the term]) on the other party*’.<sup>126</sup> Thus, to have an *obligatio* in Roman law was to have an asset (or a liability) in one’s patrimony; the value of the benefit (or the cost of the liability) would be added to (or subtracted from) the sum total of the value of the patrimony of the *familia*.

By the time of the later Roman Empire, the Emperor came to be regarded as the ultimate *pater – pater patriae*<sup>127</sup> – with whom all Roman citizens could be said to have a bilateral relationship.<sup>128</sup> The title of *pater patriae* was originally a legally insignificant honorific,<sup>129</sup> however the Emperor Augustus appears to have regarded the receipt of the title *pater patriae* as the pinnacle of his political career.<sup>130</sup> He and his successors styled themselves as *patres* of the Empire, with each citizen forming a part of their *familia*.<sup>131</sup> Over time, the concept of Rome

<sup>123</sup> In spite of what Poste’s translation of Gaius and Scott’s translation of Justinian appear to suggest: See E.A. Whittock, *Institutes of Roman Law, by Gaius, with a Translation and Commentary by the Late Edward Poste*, (Oxford: Clarendon Press, 1904), Book II, para.12; Samuel P. Scott, *The Institutes of Justinian*, (Cincinnati, 1932) Book II, para.12

<sup>124</sup> Subject, of course, to the Praetorian maxim *dominus membrorum suorum nemo videtur* – see Dig.9.2.13.

<sup>125</sup> *Gai Institutionum Commentarii Quattuor*, Commentarius I, 8; Justinian, *Institutiones*, Liber Primus, II, para.12

<sup>126</sup> Tuck, *Natural Rights Theories*, (1979), p.9

<sup>127</sup> ‘Father of the country’.

<sup>128</sup> Tuck, *Natural Rights Theories*, (1979), pp.8-9

<sup>129</sup> Anne K. O’Keeffe, Augustus as Paterfamilias, [2004] University of Georgia MA Thesis, p.9

<sup>130</sup> Ellen O’Gorman, *Love and the Family: Augustus and the Ovidian Legacy*, [1997] Arethusa 106

<sup>131</sup> O’Keeffe, *Augustus as Paterfamilias*, [2004], p.85

as a *familia* with her leaders as *patres* appeared to develop and be retroactively applied: Livy lauded Romulus as *regem parentemque urbis*<sup>132</sup> and celebrated Camillus as *conditorque alter urbis* and *parens patriae*.<sup>133</sup> The influence that these political developments exerted on the development of Roman law cannot be overstated. Indeed, it appears that, as a result of these developments, the legal concept of *peculium* appeared to be thereafter, and retroactively, applied to the Roman lawyer's plain analysis of the concept of 'property'.

In Roman law, the word *peculium* was used to denote some part of the patrimony of a *paterfamilias* over which the *pater* ceded limited authority or control to a member of the *familia* over whom the *pater* enjoyed either *potesta* or *dominium*.<sup>134</sup> By this legal mechanism, those who were not *sui iuris* could be said to 'own' property in practice,<sup>135</sup> although the true benefits of the proprietary relationship remained with the *pater*.<sup>136</sup> The confusion of the concept of *dominium* as an example of a *ius* appears to have developed as the idea of *dominium* as the complete and total mastery over a tangible or juristic *res* which one held in one's estate became increasingly remote, as the Emperor claimed to hold the power and authority to intervene in almost all aspects of the lives of the citizenry.<sup>137</sup> Accordingly, it appeared to the average observer that *dominium* was simply another kind of *ius*, since the authority which one held over one's patrimony was granted by dint of agreement with the Emperor.<sup>138</sup>

The claim that 'property' may be understood as *peculium* granted to, and forming a part of the estate of, *patres* by the State finds some support in Roman literature, wherein Plautus appears to use *peculium* to mean 'property' in its widest sense;<sup>139</sup> Cicero, too, equated *peculium* with 'property' when decrying the populace as materialistic:<sup>140</sup> *cupiditate peculii*.<sup>141</sup> Pliny the Younger is most explicit about the connection:<sup>142</sup> He expresses the view that slaves were to view their owner's *familia* as their own State or city,<sup>143</sup> an idea which appears to have roots in the writings of Seneca.<sup>144</sup> Just as a *paterfamilias* could cede control of a part of the patrimony of the *familia* to an individual in that *familia* in the form of a *peculium*, so too could the *pater patriae* cede control of a part of the patrimony of the Empire to a citizen of the Empire. Consequently, just as a slave could only control property within the household and subject to

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<sup>132</sup> Liv. 1.16.3

<sup>133</sup> Liv. 5.49.7

<sup>134</sup> Sebastian Lohsse, *Peculium*, in Roger S. Bagnall, Kai Brodersen, Craige B. Champion, Andrew Erskine and Sabine R. Huebner (Eds.), *The Encyclopaedia of Ancient History*, (Wiley, 2012)

<sup>135</sup> Dig.15.5.1.4

<sup>136</sup> Sebastian Lohsse, *Peculium*, (Wiley, 2012)

<sup>137</sup> Tuck, *Natural Rights Theories*, (1979), p.10

<sup>138</sup> Tuck, *Natural Rights Theories*, (1979), pp.10-12

<sup>139</sup> '*Etiam opilio qui pascit, mater, alienas ovis, aliquam habet peculiarem*': Plautus, *Asinoria*, III.1 (Loeb Classics), p.180: See the commentary by Boaz Cohen, *Peculium in Jewish and Roman Law*, [1951] Proceedings of the American Academy for Jewish Research 135, p.138

<sup>140</sup> *Paradoxa Stoicorum*, (Loeb Classics), p.291

<sup>141</sup> '*Covetous of property*', per Boaz Cohen, *Peculium in Jewish and Roman Law*, [1951] Proceedings of the American Academy for Jewish Research 135, p.138

<sup>142</sup> Richard Gamauf, *Slaves Doing Business: The Role of Roman Law in the Economy of a Roman Household*, [2009] *European Review of History* 331

<sup>143</sup> Pliny, *Epistularum Libri Decem*, 8.16

<sup>144</sup> Sen. *Epistulae Morales*, 47.14

the authority of the *pater*, so too can it be said that Roman citizens only legally control property within the confines of the State, subject to the authority of the *pater patriae*.

Accordingly, it is apparent from the above that the concept of *dominium* was never a *ius* in Roman law, although it did take on the appearance as such in the later Empire. Initially, it appears that the term *ius/jus* was used to represent the favourable judgement of a lawsuit – i.e., the winner of the legal case was *ius*, or ‘right’.<sup>145</sup> From this, the word took on its nature as synonymic with ‘law’; thus Paulus was able to distinguish the law of nature from the law of the State by describing that which is always fair or good as *ius naturale* and that which is of best for all or most in civil society as *ius civile*<sup>146</sup> and, ‘at a lower level’,<sup>147</sup> particular rules of law could be described as *ius* since they denoted what was ‘right’ in particular circumstances.<sup>148</sup>

The early use of the term also indicates that, although the term did not extend to cover criminal matters,<sup>149</sup> it was ‘generally taken to be the right [correct] way in which two disputants should behave towards each other’.<sup>150</sup> Over time, the word evolved to take on other meanings, however, these ‘newer’ uses remained tied to the existence and operation of interpersonal relationships.<sup>151</sup> In addition to denoting a particular rule of law and the manner in which disputants were to correctly interact with one another, a *ius* was also a species of *res incorporalis* which could be created by way of a legally binding agreement between private *personae*.<sup>152</sup> Such agreements did not necessarily create constructs which would be considered ‘rights’; an *obligatio* could create a liability, or an immunity, or a duty. Tuck takes the *iura praediorum* listed by Gaius<sup>153</sup> as exemplary of this kind of use, noting that no individual had the ‘right’ to tolerate their neighbour’s overflowing gutter, rather, they were duty-bound to do so.<sup>154</sup>

It is notable that the *iura praediorum* are ‘also called *servitudes*’.<sup>155</sup> As a legal construct, servitudes would generally be regarded as a kind of ‘real’ right in modern Scots and Civil jurisprudence,<sup>156</sup> since no particular person is bound *in personam* by the servitude.<sup>157</sup> This modern distinction between ‘real’ and ‘personal’ rights has no bearing on the creation of any kind of *ius* by dint of agreement in Roman law, however; to make brief, forgivable, use of ‘bad grammar and bad Latin’,<sup>158</sup> both *iura in rebus* and *iura in personas* were species of *obligatio*. The *iura praediorum* gained a juristic existence as the result of agreement between neighbours.

<sup>145</sup> Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims*, (Edinburgh: EUP, 1966), p.4

<sup>146</sup> Dig.1.1.11

<sup>147</sup> Tuck, *Natural Rights Theories*, (1979), p.8

<sup>148</sup> Peter Stein (Ed.), *William W. Buckland’s Textbook of Roman Law*, (Cambridge: CUP, 1963) p.167

<sup>149</sup> Tuck, *Natural Rights Theories*, (1979), p.8

<sup>150</sup> Tuck, *Natural Rights Theories*, (1979), p.8

<sup>151</sup> Tuck, *Natural Rights Theories*, (1979), p.8

<sup>152</sup> Tuck, *Natural Rights Theories*, (1979), pp.8-10

<sup>153</sup> Gaius, *Institutes*, in Francis De Zulueta (Ed.), *The Institutes of Gaius, Part I, Text with critical notes and translation*, (Oxford: Clarendon Press, 1946), p.68

<sup>154</sup> Tuck, *Natural Rights Theories*, (1979), p.9

<sup>155</sup> As Gaius states himself: Gaius, *Institutes*, Book II, Title II, para.3

<sup>156</sup> Roderick R.M Paisley, *Real Rights*, [2005], p.268

<sup>157</sup> See William M. Gordon, *The Struggle for Recognition of New Servitudes*, [2009] Edin. L.R 139, *passim*

<sup>158</sup> See page 11, *supra*



In the absence of such agreement, they would not exist. Thus, it is plain to see that these *iura* could be considered *obligationes* created *iure* – which would evidently mean that they would also be conceptualised as *res incorporales* in law<sup>159</sup> – notwithstanding the fact that servitudes best fit within the modern category of ‘real’ rights.

The notion of *dominium*, as ‘mastery of one’s estate’ pre-dated the ascendancy of the *pater patriae* as a legally significant figure and so it seems that, in spite of appearances, *dominium* did not arise as a result of a bilateral agreement. As it cannot be considered an *obligatio*, it consequently falls outwith the scope of *iura* and cannot be called either a *ius* or a *res incorporalis*, explaining why, precisely, it is nonsense to talk of the concept of ownership itself as a ‘thing’ in both Roman and modern law.<sup>160</sup> It is apparent that the confusion of the concept of *dominium* with the concept of *ius* stemmed from the relationship which existed between the citizens of the Empire and the Emperor himself. *Iura* were created by bilateral relationships and, as all citizens were conceptualised as having a bilateral relationship with the Emperor, and as the concept of *peculium* was already familiar to Roman law, it was facile for lawyers and laypersons to consider *dominium* as a kind of *ius* against the Emperor, as a *peculium* was a kind of *ius* against one’s *pater*. Though this analysis may have appeared natural to those who first carried it out, however, it served only to confound the efforts of future scholars to uncover what, precisely, the relationship between *dominium* and *ius* was.<sup>161</sup> With the above discussion in mind, however, it is possible to properly define the terms *dominium*, *ius* and *obligatio* within the context of Roman law.

*Dominium*, therefore, denoted the relationship which existed between a person and a thing. The nature of this relationship provided the *dominus* with naturally unlimited power and control over the thing in question. Such naturally unlimited freedom is, however, inimical to the operation of ordered civil society; consequently, *dominium* is ordinarily limited *iure* (by law). Such limits were governed by the bilateral relationship between citizen and Emperor, but this relationship presupposed *dominium*; it did not create the initial relationship between *persona et res*.

*Obligationes* were not ‘obligations’ in the modern sense of the term; rather, they were incorporeal things – *res incorporales* – which formed a part of the patrimony of a *persona*. It is true to say that *obligationes* were *iura* in Roman law, but it is erroneous to so translate the word *ius* as ‘legal right’ in our modern sense of that concept. *Ius* must be understood as having a broader meaning than ‘legal right’ and one must appreciate that, on occasions on which the term may appear analogous to the modern understanding of subjective rights, there is no differentiation made between ‘real’ or ‘personal’ subjective rights. In summary, to quote Dr Tuck, ‘*dominium and ius were both used, under the later Empire, in ways very similar to which we use the term ‘right’, but the explanation for this is to be found in a very different kind of theory from any which we use the word ‘right’ to expound*’.<sup>162</sup>

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<sup>159</sup> Ernst Levy, *West Roman Vulgar Law: The Law of Property*, (Philadelphia: The American Philosophical Society, 1951), *passim*

<sup>160</sup> See Gretton, *Ownership and its Objects*, [2007], *passim*

<sup>161</sup> See Silvestro Mazzolini da Prierio, *Summa Summarum quae Silvestrina Nuncpatur*, (Bologna, 1515), Book I, p.159

<sup>162</sup> Tuck, *Natural Rights Theories*, (1979), p.13

If this view is taken to its extreme, then, philosophically, the language of ‘rights’ is nugatory;<sup>163</sup> juridically, the language of rights serves only to cloak the operation of altogether different concepts such as relationships, duties and obligations. To say that one has a legal right may be a useful shorthand for indicating that one has a legal entitlement as a result of one’s relationship with another, or as a result of another’s duty, but it can serve no other, grander purpose; indeed, to use this language can obscure that which requires to be clarified.

Accordingly, it is submitted that, on an analysis of Scots common law through the lens of Ginossar’s titularity interpretation of the Gaian schema, just as a ‘right of tenancy’ can be regarded as a ‘thing’ that is held in *dominium* by a *persona*, so too can it be said that one may ‘own’ a *jus quaesitum tertio*, notwithstanding the fact that a modern Scots scholar could differentiate a right of tenancy from a *jus quaesitum tertio* by reference to the fact that the former represents a ‘real right’ and the latter a ‘personal right’. It is plain that the concept of a *jus quaesitum tertio* fits within the parameters of *res incorporales* as described by both Gaius and Justinian. A valid *jus quaesitum tertio* was an intangible construct which existed in law, or by dint of the law’s authority. They were necessarily ‘good’ – to play on the dual meaning of that term<sup>164</sup> – as to enjoy the benefit of a *jus quaesitum tertio* is to hold in one’s patrimony an asset. In addition, the concept falls within the Roman legal definition of the term *obligatio*, as this term did not simply mean ‘obligation’ in the sense of a task that one is obliged to perform; the word also extended to cover, among other things, the income arising from a concluded contract, or any such asset arising from an obligation of any kind.<sup>165</sup>

Furthermore, it is clear that this Romanistic analysis of *jus quaesitum tertio* also serves to explain why, prior to the 2017 Act, concepts which are not ‘rights’ could be conferred upon third parties in contract and termed *jus quaesitum tertio* in law: All of the possible *iura* which may be conferred on a third party by a *jus quaesitum tertio* are juristic *obligationes*, therefore they are all *res incorporales*, even if they are not ‘rights’. It may be stretching the English word ‘right’ to describe the provision of immunity from liability as a ‘right’, but it is certainly not stretching the Latin word *ius* to include this conception under that umbrella term. Hence, though Scots law was in the process of creating ‘*its own rules for third-party remedies*’ prior to the abolition of *jus quaesitum tertio*,<sup>166</sup> it is thought that property law may have offered guidance as to the enforcement of the third party’s ‘right’.

In a similar vein, the seemingly confused common commixture of ‘real’ and ‘personal’ rights in this area of law is explained. Since both real and personal ‘rights’ were simply species of *iura* arising from the provision of private agreement in Roman law, and since all *obligationes* were *res incorporales*, it may be concluded that *jura quaesitum tertio* in Scotland, though ostensibly governed under the heading of the law of obligations, actually fell into the gap of nondescript ‘thing law’ left between the law of obligations and the law of property when the former developed into a distinct legal category. The following question then arises; if, prior to the introduction of the 2017 Act, the Scots law of *jus quaesitum tertio* was ‘stuck in the

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<sup>163</sup> Tuck, *Natural Rights Theories*, (1979), p.6

<sup>164</sup> Just as corporeal moveable property may be termed ‘goods’ in Scots law, so too did the Romans use the word *bona* to describe *res corporales* – Lord MacKenzie, *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland*, (4<sup>th</sup> Edition) (Blackwood and Sons, 1876) p.171

<sup>165</sup> Tuck, *Natural Rights Theories*, (1979), p.9

<sup>166</sup> See McBryde, *Contract*, para.10-23

seventeenth century’, would the commixture of real and personal rights have appeared as anathema to Stair and his contemporaries as it does to the modern Scots legal commentator? To address this question, the development of the distinction between the Scottish law of things and the Scottish law of obligations must be considered.

### C. *De Iurum Divisione*

Just as the work of Justinian and Gaius on *de Rebus Incorporalibus* has, at times, suffered from poor translation, so too has the term *ius quod ad res pertinet* been misrepresented by expression in the English language. It is common for English speakers to consider the *ius quod ad res pertinet* as the law pertaining to property, yet, as alluded, in Roman law the scope of this area of law was much wider. As indicated above, the *ius quod ad res pertinet* concerned the law pertaining to ‘things’, but this word has been said to be thought too ‘undignified’ to represent an important area of law such as the law of property<sup>167</sup> and can only be regarded as more so in respect of the word’s actual purview in Roman law.<sup>168</sup>

Although some commentators have suggested that the Roman jurists clearly had tangible, corporeal objects in mind when considering the *ius quod ad res pertinet*,<sup>169</sup> this claim is not borne out by the true translation of the word *res*. The Romans ascribed as broad a meaning to the term as a modern English speaker may ascribe to the word ‘things’. Not only did the Romans evidently recognise *res incorporalis*<sup>170</sup> and consider *obligationes* to be *res*,<sup>171</sup> but in fact the Roman conception of *res* was so broad as to include even non-patrimonial aspects of a person’s existence<sup>172</sup> – that which defines ‘*who a person is rather than what a person has*’.<sup>173</sup> In Prichard’s words, ‘*one only has to investigate the term ‘respublica’ (often merely res, in fact) to see just how far the word could be stretched*’<sup>174</sup> and, as Lord MacKenzie observed, ‘*in legal phraseology the word res or thing comprehends not only material objects, but also the actions of man*’.<sup>175</sup>

If the word ‘property’ may be termed mercurial,<sup>176</sup> then the word ‘things’ is almost indescribable. It is plain that the word has a meaning beyond the corporeal; a concept such as that of *jus quaesitum tertio* is as much a ‘thing’ as a table is, for example. The Roman jurists evidently treat obligations as incorporeal juristic things which possessed an economic value.<sup>177</sup>

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<sup>167</sup> Reid, *Property*, para.1

<sup>168</sup> ‘Thing-law’ extended to cover the laws of contract, delict, unjustified enrichment and property: See Robin Evans-Jones and Geoffrey MacCormack, *Obligations*, in Ernest Metzger, *A Companion to Justinian’s Institutes*, (London Duckworth, 2002), p.127

<sup>169</sup> William W. Buckland, *The Main Institutions of Roman Private Law*, (Cambridge: Cambridge University Press, 1936) p.91; Rudolph Sohm, James Crawford Ledlie, Bernhard Erwin Grueber, *The Institutes of Roman Law*, (Gorgias Press, 2002) p.225

<sup>170</sup> Justinian, *Institutes*, 2.2

<sup>171</sup> A.M Prichard, *Leage’s Roman Private Law*, (3rd Edition) (MacMillan and Co., 1961) p.185

<sup>172</sup> Paton and Derham, *Jurisprudence*, (1972), p.507

<sup>173</sup> Whitty and Zimmerman, *Rights of Personality in Scots Law*, para.1.2.1

<sup>174</sup> Prichard, *Leage’s Roman Private Law*, (1961) p.185

<sup>175</sup> MacKenzie, *Studies in Roman Law*, (1876), p.167

<sup>176</sup> Paton and Derham, *Jurisprudence*, (1972), p.505

<sup>177</sup> See Evans-Jones and MacCormack, *Obligations*, (2002), p.127; it is notable that ‘things’ did not necessarily need to be imbued with any economic value in order to be governed by the *ius quod ad res pertinet*, however, as the existence of the several, yet similar, doctrines of *res extra commercium et res extra nostrum patrimonium*

Accordingly, that the Roman lawyers and jurists dealt with *obligationes* as if they were simply things like any other *res in commercio* raises no conceptual difficulty; according to the Romanistic *iurum divisione*, they were simply such things.

Although it is apparent that, in the mid-seventeenth century, Roman law was not regarded as binding on the Scottish courts,<sup>178</sup> it is equally clear that it was certainly referred to on numerous occasions by the Court of Session and that Roman principles of law were used to settle some issues.<sup>179</sup> In such instances, the Court did not rely on the citation of Roman law as authority so much as an indication of the most equitable manner to resolve the dispute at hand. Thus, the Romanistic *iurum divisione* was not necessarily made use of by the early Institutional writers simply because it was Roman in origin, but rather because this tripartite was seen as a ‘natural’ order of law in this time period.<sup>180</sup> The influence of the Roman law is manifest in the writings of both Craig and MacKenzie. The structure of Craig’s *Jus Feudale*<sup>181</sup> clearly indicates that the institutional writer took the Institutional division of law into persons, things and actions into account when composing the treatise.<sup>182</sup> The later writer, MacKenzie, made clear use of Roman law in his textbook on Scots law;<sup>183</sup> indeed, so much so that Erskine appears to have (erroneously)<sup>184</sup> believed that MacKenzie considered Roman law a part of the written law of Scotland.<sup>185</sup> Even in the 21<sup>st</sup> century, there remains much truth in MacKenzie’s statement that ‘[Roman] law is much respected generally, so it has great influence in Scotland except where our own express Laws or Customs have receded from it’.<sup>186</sup>

Although Stair was initially critical of the Romanistic tripartite division,<sup>187</sup> he nevertheless acknowledged its utility and made use of it, to a limited extent, in composing the second edition of his seminal work, the *Institutions of the Law of Scotland*<sup>188</sup> (the last edition of the work published in the author’s lifetime). Thus, though the concept of *jus quaesitum tertio* did not attract the attention of Stair’s predecessors, Craig and MacKenzie,<sup>189</sup> it is apparent that the thinking employed by the jurists of the seventeenth century remained grounded in the Romanistic tripartite division of law into the categories of *persons, things and actions*, and that

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demonstrates: See Adolf Berger, *Encyclopedic Dictionary of Roman Law*, (Philadelphia: The American Philosophical Society, 1953) p.678

<sup>178</sup> *Pinkill v. Lord Balcarras* (1649) 1 B.S. 441

<sup>179</sup> See David Baird Smith, "Roman law" in *Sources and Literature*, in William J. Dobie, "Udal law" in *An Introductory Survey of the Sources and Literature of Scots Law*, (Publications of the Stair Society, 1, Edinburgh, 1936), pp.171-182

<sup>180</sup> William M. Gordon, *Roman Law in Scotland*, in R. Evans-Jones, *The Civil Law Tradition in Scotland*, The Stair Society, Supplementary Series, Vol. II (Edinburgh, 1995), p.17

<sup>181</sup> Craig, *Jus Feudale: Tribus Libris Comprehensum*, (1732), *passim*.

<sup>182</sup> William M. Gordon, *Roman Law in Scotland*, (1995), p.16

<sup>183</sup> George MacKenzie, *The Laws and Customes of Scotland, In Matters Criminal. Wherein is to be seen how the Civil Law, and the Laws and Customes of other Nations do agree with, and supply ours*, (Edinburgh: James Glen, 1667)

<sup>184</sup> Gordon, *Roman Law in Scotland*, (1995), p.19

<sup>185</sup> Erskine, *Institutes*, 1,1,41.

<sup>186</sup> Mackenzie, 1,1,7.

<sup>187</sup> Stair, *Institutes*, 1, 1, 23

<sup>188</sup> James Viscount of Stair, *The Institutions of the Law of Scotland: Deduced from its Originals, and Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighbouring Nations : In IV Books*, (2<sup>nd</sup> Edition) (Edinburgh: 1693)

<sup>189</sup> MacQueen, *Jus Quaesitum Tertio*, (2000), p.228

the more modern quadripartite Scots division of law into *persons, things, obligations and actions* was either unknown, or (at most) emergent and embryonic, in the period in which the concept of *jus quaesitum tertio* came to be developed.

Accordingly, when Craig posits his statement that '*the law of Scotland borrows directly from that of Rome in the chapters of paction, transaction, restitution, arbitration, servitudes, contracts – whether bonae fidei or stricti juris, nominate or innominate – eviction, pledge, tutory, legacies, actions, exceptions, obligations and, finally, reparation*',<sup>190</sup> it must be borne in mind that, at the time of Craig's writing, these matters fell to be governed by the law pertaining to things. Such is evident from the nature of the matters nominated by Craig; although servitudes and contracts can be distinguished, in modern law, by speaking of the division and distinction between real rights and personal rights, such a division clearly did not inform the fundamentals of Scots law in its early stages.

As such, it is of small wonder that so much of the law of *jus quaesitum tertio* appeared incongruous with the thinking typically applied by a modern Scots lawyer. The division of law into the rules pertaining to persons, things, obligations and actions that strikes the modern scholar as obvious would have been considered novel at the time of Stair's writing. Prior to this point, the *ius commune* operated on the simpler Romanistic *iurum divisione* of persons, things and actions, with the notion of '*obligationes*' forming but a small part of the law under the wider umbrella *ius quod ad res pertinet*. Accordingly, the reason for the often close connection between 'real rights' and 'personal rights' in matters pertaining to *jus quaesitum tertio* is obvious; if both kinds of 'right' are examples of *obligationes* in the Roman sense, then they are both juristically *res incorporales* and governed by the law pertaining to things, notwithstanding the fact that the law of obligations has emerged and existed as a distinct branch of law since early modern times.

Although Scots law may have since receded from the Romanistic *iurum divisione*, it is apparent that there are still elements of the law in which a Romanistic analysis may provide the solution to perceived, yet ultimately illusory, problems. This is certainly true if Scots law truly is an example of a 'living Roman legal system', as the rhetoric of numerous legal commentators suggests. In any area of law which has become 'stuck in' a time period since past, while the wider law has moved on, it is evident that certain problems will strike the modern scholar as manifest, where a lawyer versed in the law of that period would see no such issue.

## D. CONCLUSION

From the above, it may be concluded that, in Scots law, a *jus quaesitum tertio* was not, in fact, a 'right', but rather a 'thing' which, when created, existed subject to the rules of property law rather than the caprices of the law of obligations. This is so because the concept existed within the gap left between the law pertaining to things and the law of obligations when the latter became its own, distinct, branch of law according to the Scottish division of law.

Thus, it is plain that if the beneficiary of a *jus quaesitum tertio* is understood as the owner (or prospective owner) of a *res incorporalis* created by an act of private law, then the simple proposition that a *jus quaesitum tertio* is a *res* rather than a right explains both why a

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<sup>190</sup> Craig, *Jus Feudale*, 1, 2, 14

*jus quaesitum tertio* can be created to benefit an entity which did not exist at the time that the *jus* was created and additionally explains why, at common law, a *jus quaesitum tertio* cannot be altered or destroyed by its creators once it has been made. Furthermore, by distancing itself from the language of ‘rights’, this analysis provides a clear explanation for the reason that ‘real’ and ‘personal’ rights come into such close proximity in matters relating to *jus quaesitum tertio*; such a distinction did not exist in the classical *ius quod ad res pertinet* and so a concept such as *jus quaesitum tertio*, would not be equipped to operate in a manner sensitive to this separation.

It is also ultimately submitted that the thesis espoused in this paper is consistent with Stair’s own analysis. If one accepts the view that a *jus quaesitum tertio* arises as a result of promise, then there is no need for one to be troubled by the supposed problems set out in the introduction, so long as one recognises ‘promise’ to be a kind of *obligatio*, and acknowledges that such *obligationes* may yet be conceptualised as *res* for certain purposes in law. The intermingling of ‘real’ and ‘personal’ rights is not problematic on this analysis; indeed, it is apparent that the law pertaining to things may yet have some say in the governance of certain parts of the law of obligations and the chasm between ‘real rights’ and ‘personal rights’ may not be so wide as it may seem to the modern Scots or Civilian scholar.

It is consequently concluded that the phrase *jus quaesitum tertio* merits continued usage in the classroom, if not the courtroom – though, admittedly, the subject matter of those classes will likely be property law or Roman law, rather than the modern Scots law of contract. Although the use of ‘plain words’ incontrovertibly benefits everyone who comes into contact with the legal profession, it is important for Scottish legal professionals to retain, at the back of their minds, a certain understanding of whence our law came, if only so that they can continue to guide it on the right path in the future.