

## OBLIGATIONS AS PROPERTY

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### I INTRODUCTION

It is often asserted that there is a clear and important distinction between property and obligations and that these concepts are mutually exclusive. The idea is based on the proposition that rights *in rem* are property rights and rights *in personam*, that correlate with obligations, are personal rights and not property rights. A recent expression of this idea is reflected in Worthington's view that equity has effectively eliminated the divide between property and obligation.<sup>1</sup> Worthington proceeds on the basis that there is a 'general assumption that there is a sharp doctrinal and functional divide between property and obligation'.<sup>2</sup> A significant difficulty with this approach is that it is irreconcilable with the case law indicating that a debt, which is a common personal right or right *in personam*, is a property right.<sup>3</sup>

One suggestion put forward to reconcile this obvious difficulty is the proposition that property is used in private law in two senses: a narrow sense limited to rights *in rem*, and a broader sense to include some, or perhaps all, rights *in personam*.<sup>4</sup> This approach suggests that private law uses two fundamentally different definitions of property within a single legal system. That is equally problematic. The author rejects this approach and challenges a fundamental principle that the approach is built on: that only rights *in rem* are true property rights. The author argues that the place of property and obligation

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1 Sarah Worthington, 'The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Thomson Reuters, 2005) 93.

2 Ibid.

3 See, eg, *Loxton v Moir* (1914) 18 CLR 360, 379 (where Rich J said that a 'right to sue for a sum of money is a chose in action, and it is a proprietary right'); *Yanner v Eaton* (1999) 201 CLR 351, 388 (where Gummow J observed that a 'common law debt, albeit not assignable, was nevertheless property'); *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 574 (where Lord Goff observed that a debt owed by a bank 'constitutes a chose in action, which is a species of property').

4 Robert Chambers, *An Introduction to Property Law in Australia* (Lawbook Co, 2<sup>nd</sup> ed, 2008) 5.

in private law can only be fully understood once the proposition that property rights are restricted to rights *in rem* is rejected. Far from property and obligations being mutually exclusive, it will be argued that obligations are simply one side of *one type* of property right.

The origin and usage of the private law description of rights *in rem* and rights *in personam* will be examined. It will be shown that Austin<sup>5</sup> adapted these terms from Roman law. Further, it will be argued that Austin's thesis that these terms represent a distinction between property rights and non-property rights<sup>6</sup> must be rejected. Other interpretations of Roman law will be examined to support the rejection of Austin's approach. The supposed difficulties that arise due to the courts' considering the benefit of obligations to be property rights will also be examined. It will be argued that when the rights *in rem* definition of property rights is rejected these apparent problems disappear.

Examination of the concept of property is not a pure academic debate. Property is at the heart of private law. Clearly we need to understand what property is and where property fits within private law. Much can depend on a clear understanding of the concept of property. The introduction of the *Personal Property Securities Act 2009* (Cth) ('PPSA') provides a timely reminder that we need to understand the boundaries of property. Accordingly the treatment of obligations under the PPSA will also be examined. It will be seen that the PPSA treats debts as items of personal property which is consistent with the central argument advanced in the paper.

## II RIGHTS *IN REM* AND RIGHTS *IN PERSONAM*

Care should be taken in deriving any definition of property from the Roman classifications because the classifications were never presented as a means of defining property. In common law systems property is defined by reference to what the courts, over time, hold to be property rights. The following analysis of rights *in rem* and rights *in personam* shows that the narrow definition of property based on rights *in rem* must be rejected because it is adapted from Roman law but without regard to the definition of property adopted by common law courts.

### A Roman Systems of Classification

The dominant classification in Roman law, adopted by both Gaius and Justinian, distinguished between persons, things and actions.<sup>7</sup> For current purposes the focus is on things, with a particular emphasis on whether things equate with property or whether some subset of things equates with property. In

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5 John Austin, *Lectures on Jurisprudence* (J Murray, 5<sup>th</sup> ed, 1885) vol 1.

6 Ibid 371.

7 Gaius, *Institutes* (W M Gordon and O F Robinson trans, *The Institutes of Gaius*, Duckworth, 1988) 23 [Book 1.8]; Justinian, *Institutes* (Peter Birks and Grant McLeod trans, *Justinian's Institutes*, Duckworth, 1987) 39 [Book 1.2].

the *Institutes* Gaius discussed things under three headings in Books II and III – singular acquisition, acquisition by succession, and obligations.<sup>8</sup> But these three headings do not represent the classification of things into mutually exclusive categories. Rather, they explain the different means by which rights can be acquired and obligations can be created. A right to a thing can be acquired through such means as taking from nature, occupation, accession, manufacturing and so on.

The discussion by both Gaius and Justinian of how things can be acquired and created should not be confused with their classification of things. In relation to the classification of things, Gaius adopted a system that classified things in three ways. First he made a distinction between things existing under divine law and those existing under human law.<sup>9</sup> This is essentially a division of things into two categories so as to identify which things can be subject to rights by people, restricted to those things existing under human law.<sup>10</sup> Gaius then divided things existing under human law into public things and private things. Private things were those capable of belonging to individuals, whereas public things belonged to the whole body of people.<sup>11</sup> Finally, private things capable of belonging to private individuals were then divided into corporeal things and incorporeal things.<sup>12</sup> Gaius described corporeal things as ‘tangible things, such as land, a slave, a garment, gold, silver, and countless other things’.<sup>13</sup> By contrast incorporeal things are ‘things that are intangible, such as exist merely in law, for example an inheritance, a usufruct, *obligations* however contracted’.<sup>14</sup> Justinian used a similar classification.<sup>15</sup>

It is critical to note that specifically included in the classification of things in this Roman classification were intangible things including obligations.<sup>16</sup> To understand why obligations are potentially property, it is important to note that there are two aspects of an obligation: a benefit and a liability. Obligation is often used as if it has only a single dimension, that of a liability. But in the classification of things by Gaius and Justinian it is clearly the benefit of an obligation that is being classified.

A critical point about this Roman scheme of classification is that it was not a classification of property rights. However, two potential definitions of property could be derived from the Roman schemes of classification. The first possible definition of property would consist of rights to *all things* in the private domain. This would be a wide definition of property. The second possible definition of

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8 Gaius, *Institutes* (Francis de Zulueta trans, *The Institutes of Gaius Part I: Text with Critical Notes and Translation*, 1946) 65, 151 [Book 2.13].

9 Gaius, above n 7, 125 [Book 2.2].

10 Ibid 127.

11 Ibid.

12 Ibid.

13 Gaius, *Institutes*, above n 8, 67–9 [Book 2.13].

14 Ibid 69 [Book 2.13] (emphasis added).

15 Justinian, above n 7, 55 [Book 2.1], 61 [Book 2.2].

16 Gaius, above n 8, 69 [Book 2.13].

property is all things in the private domain *other than* obligations and other intangibles. This would be a narrow definition of property.

### B Austin's Adaption of Roman Law

The phrases rights *in rem* and rights *in personam* are terms *adapted* from Roman law and used in some contexts as a division of rights into property rights and personal rights. Austin equated rights *in rem* with dominion and rights *in personam* with obligations when he said that:

[A] *jus in rem* ... avails against the world at large, in contradistinction to *jus in personam*, which avails only against certain or determinate individuals.

By *jus in rem* and *jus in personam*, the authors of those terms intended to indicate this broad and simple distinction; which the Roman lawyers also marked by the words *dominium* and *obligatio* – terms, the distinction between which was the groundwork of all their attempts to arrange rights and duties in an accurate or scientific manner.<sup>17</sup>

But the terms rights *in rem* and rights *in personam* were not themselves used in Roman law. Roman law divided *actions*, not rights, between those *in rem* and those *in personam*. Gaius introduced the notion of actions *in rem* and actions *in personam* in Book IV of the *Institutes*, where he was clearly only dealing with actions.<sup>18</sup> The two different types of actions only represented the *procedural method* used. There is no indication that the classification of actions in this way has any connection with the classification of rights. In fact the ‘modern concept of “a right” was almost unknown in classic Roman times’.<sup>19</sup> Gaius described an action *in personam* as ‘one in which we proceed against someone who is under contractual or delictual obligation to us, an action, that is, in which we claim “that he ought to convey, do, or answer for” something’.<sup>20</sup> By contrast, an action *in rem* ‘is one in which we claim either that some corporeal thing is ours, or that we are entitled to some right, such as that of use or usufruct, of foot- or carriage-way, of aqueduct, of raising a building or of view’.<sup>21</sup>

As Noyes has explained, the terms actions *in rem* and actions *in personam* were merely ‘names for the two types of action without, to any considerable extent, grounding the distinction upon any fundamental basis other than the procedural form itself’.<sup>22</sup> The differences between the terms *in rem* and *in personam* are only differences in ‘the method of attack not in the character of the right’.<sup>23</sup> Sohm had earlier expressed views consistent with this approach when he explained that rights *in personam*, or obligatory rights, correlate with the liability of a single person, while rights *in rem* only give rise to an obligatory right when a

17 Austin, above n 5, 383.

18 Gaius, above n 7, 403 [Book 4.1].

19 C Reinold Noyes, *The Institution of Property: A Study of the Development, Substance and Arrangement of the System of Property in Modern Anglo-American Law* (Longmans, Green and Co, 1936) 288.

20 Gaius, above n 8, 233 [Book 4].

21 Ibid.

22 Noyes, above n 19, 191–2.

23 Ibid 343.

right *in rem* is violated.<sup>24</sup> Sohm clearly was of the view that both rights *in personam*, or obligatory rights, and rights *in rem*, or real rights, formed the law of property when he said that ‘the Law of Property is divided into the Law of Things (which is concerned with real rights) and the Law of Obligations (which is concerned with obligatory rights).’<sup>25</sup> Sohm concluded that one of the great departments of private law was ‘the Law of Things and Obligations, being the law of property.’<sup>26</sup> Sohm could not be any clearer that obligations are property. Noyes also concluded that ‘all obligations are property.’<sup>27</sup> What is significant about Sohm’s analysis of private law and his definition of property is that Sohm was a German lawyer writing on the history and system of Roman private law in the late 19<sup>th</sup> century.<sup>28</sup>

Noyes suspected that ‘subsequent thinkers, influenced by the unique authority of Roman law, have unconsciously organized the system of rights and duties upon this rather accidental and local, or at least primitive, foundation’.<sup>29</sup> Noyes, with specific reference to Austin, said that ‘the uncontested supremacy of Roman law in the theoretical field seems to have blinded the English legal philosophers’ and that the influence of Roman law ‘has been more constraining than developing’.<sup>30</sup> Noyes concluded that the influence of Roman law has led to great confusion in our law of property partly due to a combination ‘of indigenous structure with exotic theory.’<sup>31</sup>

It is clear that the distinction between an action *in rem* and an action *in personam* was only a distinction relating to procedure. The distinction tells us nothing about the nature of the underlying right and in particular whether or not the underlying right is a property right or a non-property right. There is no indication that Gaius or Justinian divided things into property rights and non-property rights.

### C Rejecting Austin’s Approach

To explain why we should reject the view that the only true property rights are rights *in rem* it is necessary to examine alternative definitions of property. This will assist in determining whether or not the narrow or the wide definition of property rights is the preferred approach. It is important to appreciate that in early scholarship on property, the terms ‘property’ and ‘proprietary’ often had different meanings. Property was a narrower concept and appears originally to have been limited to tangible property. However, modern usage of the terms is consistent

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24 Rudolf Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law* (James Ledlie trans, Clarendon Press, 3<sup>rd</sup> ed, 1907) 263–4.

25 Ibid 159.

26 Ibid 160.

27 Noyes, above n 19, 343 n 156.

28 Sohm was Professor of German Law and Ecclesiastical Law in the University of Leipzig and the first English edition of his work was published in 1892 based on the fourth edition of the German original. See Sohm, above n 24, ii–iii.

29 Noyes, above n 19, 193.

30 Ibid 286.

31 Ibid.

with them having an identical meaning. Their original meaning can be seen from Salmond's explanation of property. Salmond made a distinction between *proprietary rights in rem* and *proprietary rights in personam*.<sup>32</sup> He described property rights as limited to proprietary rights *in rem* and obligations as dealing with proprietary rights *in personam*.<sup>33</sup> Based on this approach he advocated the following definition of property:

[Property] includes not even all proprietary rights, but only those which are both proprietary and real. The law of property is the law of proprietary rights *in rem*, the law of proprietary rights *in personam* being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property; but a debt or the benefit of a contract is not.<sup>34</sup>

It can be seen that Salmond adopted a narrow definition of property but described rights that fall outside of the narrow definition as nevertheless proprietary. That is, Salmond defined property rights as a subset of a broader category of proprietary rights. But importantly Salmond did not refer to these 'non-property' proprietary rights as personal rights. Salmond observed that the major distinction in private law is the distinction between proprietary rights (which comprise property rights and obligations) and personal rights (being rights to personal integrity).<sup>35</sup> Salmond identified personal, or non-proprietary, rights as those concerned with 'life or liberty or reputation'<sup>36</sup> and these rights formed 'the law of status'.<sup>37</sup> He argued that the distinction between proprietary rights and personal rights reflected the fact that proprietary rights are 'the elements of a [person's] *wealth*' and personal rights are 'merely elements in his [or her] *well-being*'.<sup>38</sup> Buckland adopted a similar view to Salmond. But Buckland described this wider category as property rights,<sup>39</sup> whereas Salmond described this wider category as proprietary rights.

In dividing proprietary rights into property rights and obligations, it may be that Salmond misunderstood the classification of private law in the civil law system as it derived from Roman law. Salmond noted that the civil law 'is divisible into three great departments, namely the law of property, the law of obligations, and the law of status'.<sup>40</sup> In contrast Sohm, a German civil law scholar, expressed the view that private law 'consists of three great departments' and those departments are: 'the Law of Persons, being the law of proprietary capacity'; 'the Law of Things and Obligations, being the law of property'; and 'the Law of Family and Inheritance'.<sup>41</sup> For current purposes the fundamental

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32 John Salmond, *Jurisprudence* (Stevens and Haynes, 5<sup>th</sup> ed, 1916) 385.

33 Ibid.

34 Ibid 386.

35 Ibid 385.

36 Ibid 386.

37 Ibid 385.

38 Ibid 208.

39 William Buckland, *Elementary Principles of the Roman Private Law* (Cambridge University Press, 1912) 58. The title of Chapter III in Buckland's book is 'The Law of Things. Property'.

40 Salmond, above n 32, 385.

41 Sohm, above n 24, 160.

difference is that Sohm viewed things and obligations as collectively amounting to property whereas Salmond viewed these as separate categories of proprietary rights with property being restricted to rights *in rem*.

Nicholas,<sup>42</sup> like Buckland and Salmond, recognised the broader category of things and observed that in Roman law, *res* included physical objects such as houses and abstract things such as debts.<sup>43</sup> Nicholas described this wider group of things as 'economic assets'.<sup>44</sup> Despite recognising the existence of this wider group of things Nicholas rejected it as representing property rights in favour of a narrow definition of property rights when he said that a person's economic assets 'are either what he [or she] owns or what he [or she] is owed; they are either rights *in rem* or rights *in personam*. Rights *in rem* are the province of the law of property, rights *in personam* of the law of obligations.'<sup>45</sup> Accordingly, for Nicholas, property rights equated with rights *in rem* and economic assets comprised both rights *in rem* and rights *in personam*. Like Nicholas, Birks also made a distinction between rights *in rem* and rights *in personam* as a distinction between property rights and non-property rights.<sup>46</sup>

The common theme from this analysis is that there is a broad category of things. The critical question is whether this broad category represents property rights, or property rights form only a subset of this broader category. As outlined above Buckland and Sohm referred to this wider category as representing property rights whereas Austin, Salmond, Nicholas and Birks adopted the narrow category as representing property rights. Resolving this question is not just of academic interest. Those taking security over personal property under the new *PPSA* will want to have confidence that what is provided as security is in fact a property right.

Buckland and Sohm were not alone in adopting the wider category as property rights. A number of other interpretations of Roman law also adopt Buckland and Sohm's interpretation and reject the narrow definition of property rights advocated by Austin, Salmond, Nicholas and Birks. These interpretations reflect the view that the term *res* or thing, inclusive of intangible things, equates with property rights. For example, VerSteeg<sup>47</sup> argues that 'the Roman concept of *res*, property, encompassed all things which had economic value.'<sup>48</sup> Another recent interpretation is that of Justice Emmett,<sup>49</sup> who notes that Roman law was divided into persons, things and actions.<sup>50</sup> Justice Emmett then notes that the second division, things, describes 'property in the broadest sense.'<sup>51</sup> In his paper, Justice Emmett included a diagrammatical representation of the law of things as

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42 Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962).

43 Ibid 98.

44 Ibid.

45 Ibid 158.

46 Peter Birks, *Unjust Enrichment* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 29.

47 Russ VerSteeg, 'The Roman Law Roots of Copyright' (2000) 59 *Maryland Law Review* 522.

48 Ibid 531.

49 Justice Arthur R Emmett, 'Roman Traces in Australian Law' (2001) 20 *Australian Bar Review* 205.

50 Ibid 209.

51 Ibid.

contained in the *Institutes* and divided property between corporeal and incorporeal things.<sup>52</sup> Accordingly it would appear that Justice Emmett interprets property rights in Roman law as equating with the broad category of rights concerning tangible and intangible things. Harris<sup>53</sup> takes a similar approach and explains why a narrow definition of property, as something less than wealth, can have absurd results:

Wealth can be excluded from 'property' only if we adopt a static and fragmented understanding of the concept. My property would consist only of those tangible things that I own, or in respect of which I have lesser rights *in rem*. If I sell all my tangible assets and put the money in the bank, or use the proceeds for investment in intangibles, I become propertiless.<sup>54</sup>

In light of the approach adopted by Harris it is useful to observe that a number of textbooks that deal with property rights published from the late 19<sup>th</sup> century through to the early 21<sup>st</sup> century, consistently recognise intangible rights, like debts, as personal property rights.<sup>55</sup> These textbooks accept the significant body of case law that intangible things can be the object of property rights and either expressly or implicitly reject the Austinian definition of property rights.

It is also of some significance that Austin indicated that he may have had some doubts in his interpretation of property rights. When asserting that property rights are represented by rights *in rem* and obligations are represented by rights *in personam*, Austin made the following comments:

This is not a hasty surmise, but the result of a careful and ample induction, founded on a most diligent study of the Institutes of Gaius and of Justinian, and an attentive perusal of the Pandects or Digest of the latter. Nor is this opinion confined to myself; otherwise I should, of course, *feel much less confidence in its correctness*. But I share it with men such as Thibaut and Feuerbach, men of indefatigable perseverance and of a sagacity never surpassed.<sup>56</sup>

What is remarkable about this passage is that Austin qualifies his conclusion and admits that, without a similar conclusion having been reached by others, he would feel much less confident in its correctness. In the above passage Austin made specific reference to Thibaut. In an English translation of Thibaut's *System des Pandekten Rechts*, Lindley<sup>57</sup> comments on Thibaut's distinction between rights *in rem* and rights *in personam* and importantly notes that the 'division of

52 Ibid 249.

53 James Harris, 'Property – Rights *in Rem* or Wealth?' in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law* (Oxford University Press, 2002) 51.

54 Ibid 56.

55 See, eg, Joseph Darlington, *A Treatise on the Law of Personal Property* (T & J W Johnson & Co, 1891) 9–10; Godfrey G W Millard and Basil B A Helmore, *The Law of Personal Property in New South Wales* (Law Book Co of Australasia, 5<sup>th</sup> ed, 1947) 9; David T Oliver, *Goodeve's Modern Law of Personal Property* (Sweet & Maxwell, 6<sup>th</sup> ed, 1926) 1–2; F H Lawson and Bernard Rudden, *The Law of Property* (Oxford University Press, 3<sup>rd</sup> ed, 2002) 37; Joshua Williams, *Principles of the Law of Personal Property* (Sweet & Maxwell, 18<sup>th</sup> ed, 1926) 30.

56 Austin, above n 5, 383–4 (emphasis added). The references to 'Thibaut' and 'Feuerbach' are references to Anton Friedrich Thibaut and Paul Anselm von Feuerbach.

57 Nathaniel Lindley, *An Introduction to the Study of Jurisprudence; Being a Translation of the General Part of Thibaut's System des Pandekten Rechts* (William Maxwell, 1855).



actions into those *in rem* and *in personam* was not founded on any corresponding division of rights'.<sup>58</sup> Lindley went on to comment that:

the division of actions into those *in rem* and those *in personam* will be best understood if reference is made to the nature of the rights which they were respectively instituted to protect, and to the Roman mode of bringing actions. Now, all civil rights are divisible into two great classes, viz, *those with which anybody, and those with which only some ascertained person or persons can interfere*. The duty correlative to a right of the first class is imposed upon all persons indiscriminately, and not by virtue of any particular transaction in which they have taken part; whilst a duty correlative to a right of the second class is imposed upon some person or persons in particular, by virtue of some transaction in which such person or persons have themselves been concerned.<sup>59</sup>

This commentary on Thibaut's work by Lindley is consistent with the proposition that although Thibaut made a distinction between rights *in rem* and rights *in personam*, it only reflected different types of rights between rights that could be interfered with by anybody and rights that could only be interfered with by specific persons. In the translation of Thibaut's work by Lindley there is no reference to this distinction representing a distinction between property rights and non-property rights.<sup>60</sup> As Lindley makes clear, it is a division of rights between two great classes: '*those with which anybody, and those with which only some ascertained person or persons can interfere*'.<sup>61</sup> It also supports the notion that there is a significant difference between a duty of non-interference and an obligation. A duty of non-interference is a duty imposed on all persons whereas an obligation relates to one or more specific individuals. Pollock commented on the distinctive nature of an obligation, using the example of a contract, as follows:

This definite relation of claim and duty was called an obligation by the Roman lawyers, and is still so called everywhere, save that in English-speaking countries an unfortunate habit has arisen of using 'obligation' in a lax manner as coextensive with duties of every kind.<sup>62</sup>

As Pollock explains above, and as Thibaut also recognised, there is clearly a critical difference between a duty and an obligation. Where a person is under an obligation there will be a right held by another person that correlates with that obligation. These rights and obligations reflect a direct link between identifiable individuals. In the property context obligations are owed to identifiable individuals. By contrast, duties of non-interference are not owed to any particular person. We *have a duty* not to interfere with things, but that is not a duty owed directly to identifiable individuals.<sup>63</sup> Duties and obligations also have another important difference in the property context. If I have an obligation to pay you \$100 then that obligation reflects a reduction of my overall wealth. That is, my

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58 Ibid appendix, xli.

59 Ibid (emphasis added).

60 Ibid 54–6, 138–40.

61 Ibid appendix, xli (emphasis added).

62 Sir Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (Macmillan and Co, 4<sup>th</sup> ed, 1918) 87.

63 James J E Penner, *The Idea of Property in Law* (Oxford University Press, 2000) 84.

obligation is also an actual liability often measured in monetary terms. Duties of non-interference on the other hand have no immediate effect on my wealth. It is *only* if I breach a duty that a potential obligation to pay damages will arise. Unlike duties of non-interference, obligations are generally measured in money terms or capable of being measured in money terms. As Anson explained, '[t]he matter of the obligation, the thing to be done or forborne, must possess or must be reducible to a pecuniary value.'<sup>64</sup> An obligation 'must have some ascertainable value in order to distinguish legal from moral and social relations.'<sup>65</sup> Sohm was of the same view when he said that an obligatory right 'is a right to require another person to do some act which is reducible to a money value'.<sup>66</sup>

Turner<sup>67</sup> was also a critic of Austin's analysis describing it as 'a piece of juristic skittles of little or no importance'.<sup>68</sup> In *Livingston v Commissioner of Stamp Duties (Q)*<sup>69</sup> Kitto J in the High Court of Australia expressly approved of Turner's views and commented that 'more hindrance than help is likely to come from an attempt to classify [rights] according to Austinian terminology'.<sup>70</sup> More recently in the High Court in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*,<sup>71</sup> McHugh ACJ, Hayne and Heydon JJ referred to the distinction between rights *in rem* and rights *in personam* without referring to it as a distinction between property rights and non-property rights.<sup>72</sup>

This examination of alternative views suggests that a definition of property as a subset of things is an entirely arbitrary definition and is no more than an assertion by Austin later adopted by Salmond,<sup>73</sup> Nicholas<sup>74</sup> and Birks.<sup>75</sup> The definition is not derived from case law nor is it purported to be. It appears to be nothing more than an assertion originally made by Austin and later adopted by others. Austin's division of rights is no more than an assertion that property rights are only those rights that can be interfered with by people generally. There is no judicial authority for such an assertion and Austin made no effort to demonstrate that his definition of property was consistent with the case law. Austin's interpretation uses two different Roman classifications to arrive at a single conclusion. He takes the Roman classification of things and the Roman classification of actions, and merges the two classifications together to produce a classification of rights comprising property rights and non-property rights. He does this by simply asserting that rights that are protected by actions *in rem* are

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64 Sir William R Anson, *Principles of the English Law of Contract and of Agency in Its Relation to Contract* (Clarendon Press, 5<sup>th</sup> ed, 1888) 7.

65 Ibid.

66 Sohm, above n 24, 358.

67 Richard R W Turner, *The Equity of Redemption: Its Nature, History and Connection with Equitable Estates Generally* (Cambridge University Press, 1931).

68 Ibid 150.

69 (1960) 107 CLR 411.

70 Ibid 448.

71 (2004) 220 CLR 472.

72 Ibid 490–1.

73 Salmond, above n 32, 385.

74 Nicholas, above n 42, 158.

75 Birks, above n 46, 29.

property rights and rights that are protected by actions *in personam* are non-property rights. No such assertion, or conclusion, was ever made in Roman law by Gaius or Justinian. The preferred approach is to recognise that a person who has the benefit of an obligation has a property right. Then it is clear that the benefits of obligations represent *part of* a wider group of property rights and not something entirely separate from property rights.

### III THE MYTH OF THE PROPERTY/OBLIGATION DIVIDE

A critical issue in understanding property is how and why rights such as debts are property rights. A debt clearly differs from items of tangible property such as land or motor vehicles. Understanding property, and having a working definition of property, is critical in private law and especially so when the focus is on the *PPSA*. Any uncertainty on what is property has the potential to create difficulties in relation to security over rights if it is unclear whether the relevant right is a property right. It is worth focussing on the nature of an obligation because those who adopt a narrow definition of property do so by expressly excluding obligations from their definition of property and warn of the dangers of including obligations within the concept of property.

Pretto-Sakmann<sup>76</sup> provides a recent argument that adopting a wide definition of property would dissolve the distinction between property and obligations because rights *in personam* 'are clearly not property rights unless and to the extent that property is given the very broad and all-encompassing sense of wealth'.<sup>77</sup> She goes on to argue that to use property in that sense 'is to dissolve the distinction between property and obligations'.<sup>78</sup> Pretto-Sakmann concludes that '[s]upposing, as must be, that we do not intend to dissolve that distinction, we have to say that property rights are only those rights which are *in rem*'.<sup>79</sup>

But including the benefit of obligations within property does not merge both sides of obligations with property; only the benefit side of obligations falls within property. The liability side of obligations remains distinct from property and thus the property and obligation distinction is not dissolved.

Pretto-Sakmann<sup>80</sup> accepts that an obligation has two sides or ends: at one end is a right and at the other is an obligation.<sup>81</sup> In the context of a debt the right to be paid correlates with an obligation to pay. One person has an asset and the other a liability. The right to be paid is a property right, and thus legitimately falls within the law of property, and the obligation to pay forms part of the law of

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76 Arianna Pretto, 'Primary Rights and Rights *in Rem*' in Peter Birks and Arianna Pretto (eds) *Themes in Comparative Law* (Oxford University Press, 2002) 65.

77 Ibid 78.

78 Ibid.

79 Ibid 79.

80 Arianna Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-Shares* (Hart Publishing, 2005).

81 Ibid 28.

obligations. To include the right to be paid as part of the law of property does not cause the distinction between property and obligations to collapse.

To understand why this is the case it is helpful to use four descriptive terms to explain the different aspects of the law of property and how property, duties and obligations fit together within private law. Two of the four terms represent property rights while the other two represent duties and obligations. The first two of the four terms, 'rights *in rem*' and 'rights *in personam*' are the well-established descriptive labels for the respective rights. However, the distinction between the correlative duties and obligations to these rights have not yet been adequately described. Helpfully Penner has suggested that the duty that correlates with a right *in rem* should be described as a 'duty *in rem*'<sup>82</sup> and that is very appropriate as a description of the third of the four terms. But what is missing is a descriptive label for the liability side of a right *in personam* that distinguishes the liability from the benefit side of an obligation and also distinguishes an obligation owed from a duty of non-interference. To date such an obligation or liability is referred to as an obligation but this immediately creates ambiguity because there are two sides to an obligation: in the context of a debt, a right to be paid and an obligation to pay. Accordingly the term obligation is of limited use where precision of language is essential. It is therefore proposed that when referring to the liability side of an obligation it would assist to describe such an obligation as an 'obligation *in personam*', which is adopted here as the description of the fourth term needed to adequately describe the different aspects of property.

With these four descriptions it becomes much clearer that a property right *in rem* has a correlative duty *in rem*, a duty of non-interference, and a right *in personam* has a correlative obligation *in personam*. The law of property consists of rights *in rem* and rights *in personam*. The law of obligations (when viewed from the perspective of liabilities) consists of the law of obligations *in personam*. Accordingly property can include such rights as debts and other contractual rights without the distinction between property and obligations collapsing. Obligations *in personam* always refer to obligations owed to identifiable individuals. The distinction between these obligations and property is not lost by including the benefit of an obligation within the law of property. In the context of a debt the right to be paid is a property right. That is, the benefit side of the obligation is a property right.

Pretto-Sakmann is also concerned that the distinction between property and obligations can become blurred in the insolvency context.<sup>83</sup> She uses the example of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*<sup>84</sup> where the claimant bank accidentally made a payment of US\$2 000 687 twice and the recipient bank went into liquidation shortly after receiving both payments. Justice Goulding held that the recipient bank held the proceeds of the mistaken payment

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82 Penner, above n 63, 84.

83 Pretto-Sakmann, above n 80, 29–30.

84 [1981] Ch 105 ('*Chase Manhattan*').

on trust for the claimant bank.<sup>85</sup> But it is important to appreciate that in such circumstances the claimant bank had a dual claim against the recipient bank because the courts have used a trust to provide an *additional remedy* in favour of the claimant bank. The claimant must elect to pursue one claim or the other. In the *Chase Manhattan* context of a mistaken payment an obligation to repay the mistaken payment is imposed on the recipient when they become aware that they have received a mistaken payment.<sup>86</sup> But the court in *Chase Manhattan* also imposed a trust over the proceeds received by the recipient bank. This provides an *additional remedy* for the mistaken payer. The recipient is now a trustee and the mistaken payer can elect to collapse the trust and receive the funds as a return of trust property. In the insolvency context the mistaken payer is in a better position, not because the distinction between property and obligations has been blurred, but because an additional property right has been created: equitable ownership of the proceeds of the mistaken payment. It is not that the original obligation, in the sense of a right to be repaid, has been transformed from a non-property right to a property right. Rather, an additional property right of a very different character has been created.<sup>87</sup>

Similar circumstances arise in relation to stolen money and stolen goods pursuant to what has been referred to as the 'theft principle'.<sup>88</sup> The cases concerning the theft principle are useful examples of other circumstances where additional property rights are created as occurred in *Chase Manhattan*. In *Black v S Freedman & Co*,<sup>89</sup> Black was an accountant employed by Freedman & Co where he stole cash belonging to his employer. Black deposited some of the funds into a bank account held by his wife and also acquired some circular notes in her name, an early form of traveller's cheque. The plaintiff did not bring an action in conversion<sup>90</sup> or money had and received but instead successfully claimed that they had legal property rights to both the money in Mrs Black's bank account and the circular notes. Mrs Black appealed to the High Court of Australia, where O'Connor J adopted a principle, not previously adopted by the

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85 Ibid 119.

86 There is some debate as to whether the obligation arises at the moment of receipt or when the recipient is aware of the receipt: see John Tarrant, 'Mistaken Payments: Obligations of a Recipient' (2007) 21(2) *Commercial Law Quarterly* 13.

87 Not all property rights have the same characteristics: see John Tarrant, 'Characteristics of Property Rights' (2008) 16 *Australian Property Law Journal* 51.

88 *Cashflow Finance Pty Ltd (in liq) v Westpac Banking Corporation* [1999] NSWSC 671 (14 May 1999) [408] (Einstein J). For a discussion of the theft principle see John Tarrant, 'Theft Principle in Private Law' (2006) 80 *Australian Law Journal* 531. The theft principle has recently been challenged and defended: see Susan Barkehall Thomas, 'Thieves as Trustees: The Enduring Legacy of *Black v S Freedman & Co Ltd*' (2009) 3 *Journal of Equity* 52; John Tarrant, 'Thieves as Trustees: In Defence of the Theft Principle' (2009) 3 *Journal of Equity* 170. For a discussion of the theft principle in the banking and commercial context see Vicky Priskich, 'Theft, Fraud and Mistaken Payments: Personal and Proprietary Remedies in Banking and Commercial Cases' (2008) 19 *Journal of Banking and Finance Law and Practice* 163.

89 (1910) 12 CLR 105.

90 For a recent examination of the tort of conversion see Simon Douglas 'The Nature of Conversion' (2009) 68 *Cambridge Law Journal* 198; Sarah Green and John Randall, *The Tort of Conversion* (Hart Publishing, 2009).

courts, that where money is stolen 'it is trust money in the hands of the thief'.<sup>91</sup> When the theft principle is applied to stolen money the property right to the stolen money acquired by the thief is held on trust for the benefit of the victim of the theft.<sup>92</sup> The result is that the victim receives an equitable proprietary right to the stolen money. That is, the thief's common law possessory title to the money is held on trust.

But importantly the victim of a theft still has their right to pursue a claim for conversion. This creates a similar set of rights that arose in *Chase Manhattan*. A mistaken payer can either pursue a claim in unjust enrichment and argue there is an obligation on the recipient to repay the mistaken payment; or the mistaken payer can pursue their equitable property rights over the proceeds, a right created for them by the courts. In the case of the theft of money or goods the victim has similar rights. The victim can pursue a claim in tort for conversion and argue there is an obligation to pay damages; or the victim can pursue their equitable property rights over the proceeds of the theft, again a right created for them by the courts. The High Court of Australia made it clear when applying the theft principle in *Creak v James Moore & Sons Pty Ltd*<sup>93</sup> that a victim of a theft must elect to pursue one claim or the other.<sup>94</sup> The victim cannot claim twice.

As can be seen from these cases of mistaken payments and theft it is possible to create dual rights. If a common law claim is successfully pursued for damages for conversion or a claim for restitution for unjust enrichment then the successful claimant will receive a court order that the defendant owes a sum of money. That can be pursued as the enforcement of an obligation. Alternatively the plaintiff could proceed to vindicate their equitable property rights. The existence of these dual rights in the insolvency context does not blur the line between property and obligations. Where a debtor is insolvent it is preferable to vindicate the equitable property right because property rights held on trust by an insolvent debtor do not form part of the debtor's bankruptcy estate. Accordingly in the case of a mistaken payment, as occurred in *Chase Manhattan*, the mistaken payer does not have an obligation transformed into a property right, rather they have two property rights. One is a right to be paid which correlates with an obligation on the recipient to repay the mistaken payment. The other property right is equitable ownership of the proceeds. Thus the distinction between property and obligations does not collapse in these circumstances. The mistaken payer does not, as Pretto-Sakmann suggests, attempt to move their claim 'out of the law of obligations and into the law of property'.<sup>95</sup>

Chambers is also of the view that property rights are generally restricted to rights *in rem*<sup>96</sup> and refers to the so-called distinction between property and

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91 *Black v S Freedman & Co* (1910) 12 CLR 105, 110.

92 See John Tarrant, 'Property Rights to Stolen Money' (2005) 32 *University of Western Australia Law Review* 234, 245.

93 (1912) 15 CLR 426.

94 *Ibid* 433 (Griffith CJ), 436 (Barton J).

95 Pretto-Sakmann, above n 80, 30.

96 Chambers, above n 4, 6.

obligations as ‘the great property/obligations divide’.<sup>97</sup> Accordingly he concludes that ‘by definition, the law of obligations excludes the law of property’.<sup>98</sup> But Chambers realises, correctly, that having property law and the law of obligations examined separately effectively divides private law down the middle with the possibility that like cases might not be treated alike.<sup>99</sup> To address this issue Chambers suggests that property and obligations should be integrated within an expanded framework of obligations.<sup>100</sup> But that would only be necessary if the distinction between property and obligations based on rights *in rem* and rights *in personam* was valid. As outlined earlier, the distinction between rights *in rem* and rights *in personam* as a distinction between property rights and non-property rights is nothing more than an assertion by Austin which has been rejected by other scholars and by the courts. The problem that Chambers attempts to solve is not a real problem at all. The problem only arises if the Austinian division of rights is accepted. If Austin’s division is rejected then there is no problem in need of a solution. When it is accepted that there is no problem in need of a solution those taking security under the *PPSA* will have greater confidence that they are taking security over personal property.

To understand the possible divisions of private law the following table depicts some of the main building blocks of private law. The table includes property rights *in rem* and their correlative duties *in rem*, or duties of non-interference. The table also includes rights *in personam* that correlate with obligations *in personam*, as distinct from duties *in rem*. It is not suggested that this table includes all of private law. There are complexities in relation to trusts and some property rights such as intellectual property and goodwill which are not necessary to explore here. Accordingly the table is designed to depict only the major components of private law that are sufficient for current purposes. The important components of private law can be depicted as follows:

Rights <i>in rem</i>	Duties <i>in rem</i>
Rights <i>in personam</i>	Obligations <i>in personam</i>

Chambers sees property and obligations as two mutually exclusive parts of private law because he divides the above table horizontally. That is, for Chambers the top half is the law of property and the bottom half is the law of obligations. Adopting a rights *in rem* definition of property leads to this inevitable division. But if the rights *in rem* definition of property is rejected, as it should be, then the appropriate division of private law in the above table is a vertical division. That is, the law of property is reflected in the left half of the

97 Robert Chambers, ‘Integrating Property and Obligations’ in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (UCL Press, 2004) 127, 128.

98 Ibid 127.

99 Ibid 128.

100 Ibid 143.

table and the law of obligations owed and duties owed is the right half of the table. The law of obligations does not need to be integrated into property law. The law of obligations is directly connected to the law of property by virtue of being the correlative of *some property rights*, those property rights that correlate with obligations. The content of a right *in rem* correlates directly with the duty *in rem* recognised by Penner and discussed above.<sup>101</sup> Using an example of personal property, the right to enjoy the use of a motor vehicle correlates directly with the duty of others in society not to interfere with the motor vehicle. That is, the recognition of a duty of non-interference by the law gives content to the correlating right *in rem*. In the same way an obligation gives content to a property right *in personam*. For example, an obligation to pay \$100 gives content to the correlative right which is the right to be paid \$100.

Whereas Chambers is of the view that there is work to do to integrate property and obligations, Worthington is of the view that equity has effectively eliminated the divide between property and obligation.<sup>102</sup> Like Chambers, Worthington proceeds on the basis that there is a 'general assumption that there is a sharp doctrinal and functional divide between property and obligation'.<sup>103</sup> This represents the express adoption by Worthington of the view that rights *in rem* are property rights and rights *in personam* are obligations.<sup>104</sup> The express reference by Worthington to an 'assumption' only supports the proposition advanced in this paper that the Austinian division of rights is simply an erroneous assertion.

It is also worth examining the insolvency context to highlight how one side of an obligation forms part of the law of property. In the insolvency context it is important to understand why a person who has the benefit of an obligation might obtain some priority in an insolvency. It is submitted that it is *never* solely on the basis that they have the benefit of an obligation, for example, because they are owed a debt. There must be something more, some right in addition to having the benefit of an obligation owed by the insolvent debtor. That additional right might be a property right in the form of equitable ownership or it might be a form of security. An additional right might, for example, be created by a court because of a mistaken payment<sup>105</sup> or it might arise from a theft.<sup>106</sup> What is important here is that the divide between property and obligation does not collapse. Rather, in addition to having an obligation, that is the benefit of a debt owed to the creditor by the debtor, the creditor has an *additional right* in the form of equitable ownership of some asset owned by the debtor at law. Under insolvency regimes if an asset is held on trust by an insolvent debtor then that asset does not form part of the asset pool available to his or her creditors. The creditor obtains a

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<sup>101</sup> Penner, above n 63, 84.

<sup>102</sup> Worthington, above n 1.

<sup>103</sup> Ibid 93.

<sup>104</sup> Ibid 103.

<sup>105</sup> *Chase Manhattan* [1981] Ch 105.

<sup>106</sup> *Black v S Freedman & Co* (1910) 12 CLR 105; *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426.



better outcome, not by virtue of having the benefit of an obligation, but by virtue of an equitable property right to some asset held by the debtor at law. The asset is simply removed from the debtor and either given to the creditor as a result of collapsing the trust or a new trustee could be appointed.

In relation to security interests a creditor does not receive any form of priority based solely on having the benefit of an obligation owed by an insolvent debtor. Rather, a creditor receives priority by virtue of having negotiated for a security interest, for example, when loaning money to the debtor that gave rise to the relevant obligation. Obligations in these circumstances can arise in two different contexts. First, the property provided as security may itself be the benefit side of an obligation, for example, an accounts receivable. The second context where an obligation arises is where a debtor obtains a loan and enters into an obligation to repay that loan. They might, as part of the transaction, provide security for that loan. They are providing security to secure their obligation to pay the lender and they may provide that security in any number of ways. If they choose to provide debts owed to them (the benefit side of obligations) as the relevant security then security is taken by their lender over those assets. These discrete parts of a secured loan transaction need to be clearly stated so that it is clear what side of an obligation is being referred.

The distinction can be seen from the provisions of the *PPSA*. These provisions can best be examined by reference to an example. Assume XYZ Co wants to borrow \$100 000 from ABC Bank and the bank will only lend the money if the loan is secured. Assume that XYZ Co has \$140 000 of debts ('the Debts') due to it from other companies it has sold goods to. XYZ Co has no security from its debtors but is nevertheless owed \$140 000 on an unsecured basis. XYZ Co wishes to use those Debts, items of personal property, as security to borrow \$100 000 from ABC Bank. The transaction is to be structured by ABC Bank taking a security interest, to be registered under the *PPSA*, over the Debts. ABC Bank lends \$100 000 to XYZ Co under a loan agreement and accordingly XYZ Co is under an obligation to repay ABC Bank \$100 000. That obligation is secured by ABC Bank taking security in the form of a security interest registrable under the *PPSA*. Under this arrangement the debts owned by XYZ Co are used as security for the performance of XYZ Co's obligation to repay ABC Bank \$100 000. Section 10 of the *PPSA* defines 'account' as a monetary obligation that arises from disposing of property or granting a right, or providing services, in the ordinary course of a business. The definition explains, by way of example, that credit card receivables are included in the definition of 'account'. In the same way the Debts owed to XYZ Co by its customers would fall within the definition of 'accounts' in the *PPSA*. That is, the Debts are an item of personal property that can be offered as security. When XYZ Co borrows \$100 000 from ABC Bank and provides the Debts as security, XYZ Co falls within the definition of 'debtor' in section 10. Debtor is defined to include a person who owes payment or performance of an obligation that is secured by a security interest in personal property. So XYZ Co owes \$100 000 under a secured loan agreement and would be a debtor under the *PPSA*. The security interest provided by XYZ Co over the Debts falls within the definition of 'security interest' in section 12 of the *PPSA*.

Section 12 provides that a security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation.

Accordingly the property regime used in the *PPSA* is entirely consistent with the proposition that an obligation, or more specifically the benefit of an obligation, is a property right. It can also be seen from this analysis that it is always something *other than an obligation* that is providing a better outcome to a creditor in an insolvency situation. In the example above the fact that XYZ Co has an obligation to repay \$100 000 to ABC Bank does not, of itself, provide ABC Bank with any priority at all. It is only because the transaction includes an additional element of a security interest (in this example a security interest over personal property) that ABC Bank has priority. There is no artificial priority arising simply because there is an obligation to repay the \$100 000 under the loan agreement. The concern expressed by Pretto-Sakmann is based on the unsound foundation that only rights *in rem* are property rights. Based on that foundation the idea that obligations are one side of some property rights is rejected by those scholars in favour of a view that obligations correlate with rights *in personam* that are in some way mutually exclusive from property rights. That position must be rejected because the courts recognise the benefit of obligations as property rights<sup>107</sup> and as discussed above the *PPSA* adopts that common law definition of property.

Nothing is gained from adopting a narrow view of property rights, that is inconsistent with the case law, to preserve some supposed critical distinction between property and obligation. As Turner argued, the Austinian division is nothing more than 'juristic skittles'.<sup>108</sup> The Austinian division of rights has been rejected by many scholars including Harris,<sup>109</sup> Noyes,<sup>110</sup> Sohm,<sup>111</sup> Buckland<sup>112</sup> and VerSteeg.<sup>113</sup> It is nothing but an erroneous assertion.

## IV CONCLUSION

The assertion that rights *in rem* and rights *in personam* represent a distinction between property rights and non-property rights, together with the related 'assumption that there is a sharp doctrinal and functional divide between property and obligation',<sup>114</sup> must be rejected. The distinction of rights in this way does not represent a distinction between property rights and non-property rights. The distinction between rights *in rem* and rights *in personam* is a distinction between

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107 *Loxton v Moir* (1914) 18 CLR 360, 379; *Yanner v Eaton* (1999) 201 CLR 351, 388; *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, 574.

108 Turner, above n 67, 150.

109 Harris, above n 53, 56.

110 Noyes, above n 19, 343.

111 Sohm, above n 24, 263.

112 Buckland, above n 39, 58.

113 VerSteeg, above n 47, 531.

114 Worthington, above n 1, 93.

two different types of property rights: those that correlate with a duty of non-interference and those that correlate with an obligation *in personam*. The common law courts have adopted a wide definition of property rights which comprise both rights that correlate with a duty of non-interference and rights that correlate with obligations. This definition of property is entirely consistent with Roman law as reflected in Sohm's important work on Roman law. The recognition of the approach to property rights adopted by the courts is critical in identifying the broad category of property rights within private law. It is also critical in understanding the provisions of the *PPSA*. The benefit of an obligation is a personal property right. That personal property right can be used as security in relation to an obligation to repay a loan. Debts are property rights and are correctly recognised as such by the common law and by the *PPSA*.

The so-called problem, that obligations and property need to be integrated, is not an issue at all. Obligations already form an important part of the law of property. The benefit side of an obligation represents a property right that correlates with the liability side of an obligation. That is, the benefit side of an obligation is already an important part of private law.