THE THING AND JUDICIAL METHODOLOGY IN RESOLVING NOVEL PROPERTY CLAIMS: IT MATTERS WHEN IT MATTERS

P.T. BABIE*

This article explores, in a very preliminary way, two issues that emerge when Bruce Ziff's identification of two judicial methodologies in resolving novel property claims is coupled with the two currently dominant theories of property. First, that there is an intuitive correspondence, or correlation, between judicial approach and theory of property produces two correlatives — the attributes-property as things correlative, and the functional-property as relations correlative. And, second, in neither of the two correlatives is the thing or subject-matter of property merely a dispensable backdrop to the inquiry; rather, for both, the thing remains absolutely essential to understanding what property is and concluding that it exists in any given case. But less certainty exists as to when a court must take account of the thing in the context of a discrete novel property claim. Perhaps the most that can be claimed is that it matters when it matters.

TABLE OF CONTENTS

I. INTRODUCTION

We know a great deal about what property is, and perhaps even more about how it is said to be justified. Or, perhaps more accurately, we might say that there is quite a lot written about the substantive content of property and its justification; whether all that theory gets us any closer to understanding what property really is, or whether it is or ought to be justifiable, is unclear. Yet in all of that writing, or theorizing, we learn comparatively little about a question in equal measures theoretical and practical: how does a judge, when faced with a novel claim, decide whether something can be called property and when it cannot? Given the importance of that question, one might expect it to concern the property theorist. For Bruce Ziff, it does. In *Principles of Property Law*, Ziff tells us how judges go about deciding cases of first impression involving a claim to property, identifying two judicial methodologies: the "attributes" and the "functional."[1]

* Bonython Chair in Law and Professor of Law, Adelaide Law School, The University of Adelaide.
1 Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018) at 60–61.

Ziff's attributes approach involves a judge looking for family resemblances, with the focus of:

> [T]he inquiry hing[ing] on whether the right being asserted looks like property: one searches for a strong family resemblance. The quest is to find a normative basis for recognition internal to (immanent in) the law of property, thereby expanding the field of ownership in a way that preserves the coherence of the law of property.[2]

The functional approach, conversely, focuses on the function or role that property serves in a society, with a judge:

> look[ing] … at the policy factors at play. It takes account of how property, as a tool of social life, should be used. This approach recognizes that property is not an acontextual entity that demands conceptual purity, but a purposive concept, to be used to meet social needs. Here one sees that property is inseparably tied to social values.[3]

But does a judge's conception of property affect the methodological approach used in resolving a novel claim? Does a theory of property lend itself to the use of one or the other of the approaches Ziff identifies? An answer to that question requires a brief consideration of the recent divide that has opened between those who conceive of property as a relationship between persons in respect of things and those who see it as a relationship between persons and things enforceable against others.[4] Joseph William Singer, the leading exponent of the former, social relations[5] or progressive[6] view of property, writes: "property concerns legal relations among people regarding control and disposition of valued resources. Note well: Property concerns relations *among people*, not relations between people and things."[7] While rare, some judges do hold the progressive view of property.[8]

Opponents, however, argue that for the progressive view "[t]hings form the mere backdrop to … social relations, and a largely dispensable one at that."[9] For these theorists, property is rights in things; Henry E. Smith writes that:

> Property is a platform for the rest of private law [, which] takes seriously the need for baselines in general and the traditional ones furnished by the law in particular. And nowhere is this issue of baselines more salient than in property.… [T]he baselines that property furnishes, as well as their refinements and equitable safety valves, are shaped by information costs. For information-cost reasons, property is, after all, a law of things.
>
> …

---

2 *Ibid* at 60–61 [footnotes omitted].
3 *Ibid* at 61 [footnotes omitted].
4 Jane B Baron, "Radical Contingency and the Bundle of Rights" in Chris Bevan, ed, *Research Handbook on Property Law and Theory* (Cheltenham, UK: Elgar, 2023) [forthcoming in 2023].
5 Joseph William Singer, "Property and Social Relations: From Title to Entitlement" in GE van Maanen & AJ van der Walt, eds, *Property Law on the Threshold of the 21st Century* (Tilburg: Maklu, 1996) 69.
6 Gregory S Alexander, Eduardo M Peñalver, Joseph William Singer & Laura S Underkuffler, "A Statement of Progressive Property" (2009) 94:4 Cornell L Rev 743.
7 Joseph William Singer & Nestor M Davidson, *Introduction to Property*, 6th ed (Philadelphia: Aspen, 2022) at 2.
8 *State v Shack*, 277 A (2d) NJ 369 at 372 (NJ Sup Ct 1971).
9 Henry E Smith, "Property as the Law of Things" (2012) 125:7 Harv L Rev 1691 at 1691.

> An "in rem" right originally meant a right "in a thing," and I argue that it is the mediation of a thing that helps give property its in rem character — availing against persons generally.[10]

In some ways, Smith's view is not new. Other legal traditions, such as the historical civilian,[11] and even the common law prior to the twentieth century, treated property as a thing.[12] In the twentieth century, however, property was recast as abstract rights and interests, with the progressive view taking hold.[13] Yet notwithstanding its seeming supersession in theoretical discourse by the progressive view, today many, if not most judges in most jurisdictions resort to the property as rights in things view.[14] Perhaps one of the best-known examples of this is the High Court of Australia's decision in *Yanner v. Eaton*, in which a majority wrote that "'property' is a comprehensive term [which] can be used to describe all or any of very many different kinds of relationship between a person and a subject matter."[15]

This short essay considers, in a very preliminary way, whether the two dominant theories of property correspond to Ziff's two judicial methodologies for resolving novel claims; in doing so, it explores the role played by the thing in the judicial inquiry. The essay contains three parts. Part II suggests that there is an intuitive correspondence, or correlation, between judicial methodology and theory. Two correlations are proposed: the "attributes-property as things" correlative and the "functional-property as relations" correlative. Part III argues that in neither correlative is the thing merely a dispensable backdrop; rather, for both, the thing is absolutely essential to understanding what property is. Part IV concludes; while the thing undoubtedly matters in both correlatives, less clarity exists as to when it should be invoked as part of a discrete novel property claim.

II. TWO CORRELATIVES

Intuition suggests that a judicial methodology naturally correlates to a theory of property. The attributes approach holds intuitive appeal for one who subscribes to the property as the law of things view, thus forming a correlative compound "attributes-property as things." Similarly, the functional approach takes as its intuitive correlative the progressive view, forming a "functional-property as relations" correlative.

A. ATTRIBUTES-PROPERTY AS THINGS

When we think of attributes, a question arises: attributes of what? Ziff's answer directs our attention to a right claimed as property. Does that right have the attributes of or a "strong family resemblance" to a right that has previously been recognized as property? That focus in turn draws our attention to the thing over which that right might exist. Indeed, the claim that property is the law of things requires one to look for in rem rights in relation to things; or, put another way, the attributes approach is one that searches for the attributes of *things*

---

10 *Ibid* at 1691.
11 *Ibid*.
12 Robert W Gordon, "Paradoxical Property" in John Brewer & Susan Staves, eds, *Early Modern Conceptions of Property* (London, UK: Routledge, 1995) 95 at 95.
13 *Ibid*.
14 Michael A Heller, "Three Faces of Private Property" (2000) 79:2 Or L Rev 417 at 429–430.
15 *Yanner v Eaton*, [1999] HCA 53 at para 20 [*Yanner*]. See also Justice Dixon in *Penfolds Wines Pty Ltd v Elliott*, [1946] HCA 46 at 222.

previously said to be the subject of property. And judges typically make this connection. A review of most cases involving novel property claims reveals a judicial analysis not of the right claimed, but of the things previously said to be the subject-matter of property and which look like the thing currently under consideration by the court. In doing so, a judge focuses on the thing for which proprietary status is sought.

This is true of any number of novel property claims, from crocodiles[16] to cryptocurrency,[17] and everything in between. Ziff provides a list of things about which there is ongoing judicial uncertainty: cultural artefacts;[18] university degrees;[19] government-issued licences to fish;[20] domain names;[21] one's personality or celebrity;[22] patents over such things as mice;[23] genetically modified plant cells;[24] isolated human genes[25] or other genetic material;[26] human pre-embryos;[27] cells extracted from a spleen;[28] the right of next-of-kin to a human brain in paraffin;[29] the distinctive sound of a singer's voice;[30] an entertainment spectacle;[31] and "know how."[32] Applying this approach to any of these and myriad other claims, a judge might reason: "this thing, whatever it is, cannot be property because those things like it that have come before were also not property, and so, only those things that are like those that have come before and that have been recognized as property can now be treated as property." Or conversely, that the thing before the court is very like other things previously recognized as property, and so can be treated as property. In every case, it is not the right to which the court adverts, but the thing. A focus on the right, then, is, by its very nature, a focus on the thing. This produces the attributes-property as things correlative.

B. FUNCTIONAL-PROPERTY AS RELATIONS

Because it directs attention to the nature of a social relationship between persons, the functional approach seems tailor-made for the property as relations view of property. If property, as a concept, is a shorthand way of describing legal relationships, then it is an impossibility for a person to have a relationship with an inanimate subject-matter, or thing, whatever it might be. The core of ownership — use, exclusivity, and alienability — involves the exercise of rights against other *people*, not things. One exercises decision-making authority[33] or agenda-setting[34] against others, not things. If a court looks at the functions that property is intended to serve — the policy factors at play in the relationship between persons

16 *Yanner*, *ibid*.
17 *Ruscoe v Cryptopia Ltd (Liquidator of)*, [2020] NZHC 728 [*Ruscoe*].
18 Ziff, *supra* note 1 at 54–56.
19 *In re Marriage of Graham*, 574 P (2d) 75 (Colo Sup Ct 1978).
20 *Saulnier v Royal Bank of Canada*, 2008 SCC 58.
21 *Tucows.com Co v Lojas Renner SA*, 2011 ONCA 548.
22 *Athans v Canadian Adventure Camps Ltd* (1977), 17 OR (2d) 425 (H Ct J).
23 *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76.
24 *Monsanto Canada Inc v Schmeiser*, 2004 SCC 34.
25 *Association for Molecular Pathology v Myriad Genetics Inc*, 569 US 576 (2013); *D'Arcy v Myriad Genetics Inc*, [2015] HCA 35.
26 *Re Cresswell*, [2018] QSC 142.
27 *Davis v Davis*, 842 SW (2d) 588 (Tenn Sup Ct 1992).
28 *Moore v Regents of University of California*, 793 P (2d) 479 (Cal Sup Ct 1990).
29 *Dobson v North Tyneside Health Authority*, [1996] EWCA Civ 1301.
30 *Midler v Ford Motor Co*, 849 F (2d) 460 (9th Cir 1988).
31 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937), 58 CLR 479 (Aus HC).
32 *Tri Pacific Gas Corporation v HMTQ / Ray Roth v Her Majesty the Queen*, 2007 FCA 38.
33 C Edwin Baker, "Property and its Relation to Constitutionally Protected Liberty" (1986) 134:4 U Pa L Rev 741 at 742–43.
34 Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275.

— and whether those functions are evident in a given novel relationship, it necessarily focuses on the legal relationship between persons.

We might pause briefly here to consider the central element of Ziff's functional approach: a court must take a look at the policy factors at play in the relationship between persons; property is a purposive concept used to meet social needs, inseparably tied to social values. Joseph William Singer and Jack M. Beermann provide useful illumination of this point, arguing that "property rights depend … on a host of instrumental and value judgments and cannot be derived simply by a logical process that appears to be value neutral and nondiscretionary."[35] Crucially, this means that

> because property rights help to structure human relationships, they are dynamic rather than static. Because property is socially and politically constructed, the scope of property rights changes over time as social conditions and relationships change. This is because the *social meaning* of a property right depends on its effects in the real world on human relationships.[36]

In every case, the meaning of property can and often will differ depending upon the surrounding social context.

In novel claims, then, looking at relations between persons in respect of things, it is entirely possible that a given novel relationship may constitute property quite irrespective of whether the subject-matter of that relationship, the thing, looks like other things previously recognized as property. The function or role played by the relationship governs the recognition of property. In other words, if we look at the functions that a given set of relationships serve in respect of a given thing, what we might see is that those functions constitute property even if the thing itself may not satisfy some arbitrary reified list of attributes drawn from previously decided cases or legislation. The focus in resolving novel property claims, then, is not the thing, but relations between persons in respect of those things. This produces the functional-property as relations correlative. But does recognizing this correlative require that we treat the thing as a largely dispensable backdrop to the resolution of a novel property claim? No.

III. IMPORTANCE OF THE THING

Even if I am wrong in my correlatives, the thing, the subject-matter, always matters. In *Principles of Property Law*, Ziff mentions briefly the role played by the thing in property theory as part of elaborating the two judicial methodologies.[37] Here I want to make that connection a bit more explicit for both correlatives, but especially in relation to the functional-property as relations correlative.

It might appear that the two correlatives gravitate toward a specific view of the thing in resolving novel claims. Thus, an attributes-property as things approach may be more suited to those novel claims that deal with real property, given the concern with the *numerus*

---

35 Joseph William Singer & Jack M Beermann, "The Social Origins of Property" (1993) 6:2 Can JL & Jur 217 at 228 [emphasis in original].

36 *Ibid*.

37 Ziff, *supra* note 1 at 66–67.

clausus principle.[38] Conversely, it may be that the functional-property as relations approach deals best with personal property claims, because it attempts to determine what, from a policy perspective, the parties are trying to achieve in claiming proprietary effect.

But both of these initial assumptions can be rebutted — the attributes approach is sometimes used when considering personal property claims, and the functional approach can be found in addressing interests claimed to constitute novel real property. Consider an example of each: cryptocurrency as an example of the former, and the Canadian oil and gas royalty as an example of the latter. In both cases what we see is that the thing, the subject-matter of property, however that conclusion is arrived at, is given paramount importance as part of the analysis.

There is already a good deal of judicial analysis of the proprietary status of cryptocurrency.[39] The 2020 New Zealand decision in *Ruscoe v. Cryptopia*[40] demonstrates the typical judicial approach. Justice Gendall stated the issue this way: "A crypto-coin can never become the subject matter of … a proprietary right … unless it is first recognised as an object of property."[41] To determine if it could be so recognized, Justice Gendall applied Lord Wilberforce's four indicia of property in *National Provincial Bank Ltd. v. Ainsworth*,[42] concluding that they were met. Justice Gendall then sought to analogize cryptocurrency to existing choses in action or choses in possession: non-enforceable debt claims;[43] copyright;[44] shares;[45] licences and quotas;[46] carbon credits;[47] electronic payments through the banking system; a trustee's right of indemnity conferring a proprietary right in trust assets;[48] and cases which found digital information to be property.[49] While the analogy might not be perfect with respect to any of those existing categories, Justice Gendall concluded that was no reason to deny that cryptocurrency is a novel form of property. As such, Justice Gendall found that cryptocurrency was capable of constituting property.[50]

The converse is the case where a functional-property as relations approach is used in resolving a novel claim to real property. For a very long time in Canadian law, the oil and gas royalty was not considered a proprietary interest in land. *Saskatchewan Minerals v Keyes*[51] stated the orthodox position: such a royalty, notwithstanding the parties' intentions to the contrary, was, at most, contractual.[52] In dissent, however, Justice Laskin addressed the

---

38 *Ibid*.
39 *AA v Persons Unknown*, [2019] EWHC 3556 (Comm).
40 *Ruscoe*, *supra* note 17.
41 *Ibid* at para 63, quoting David Fox, "Cryptocurrencies in the Common Law of Property" in David Fox & Sarah Green, eds, *Cryptocurrencies in Public and Private Law* (Oxford: Oxford University Press, 2019) 139 at 141.
42 *National Provincial Bank Ltd v Ainsworth*, [1965] 1 AC 1175 (HL (Eng)) at 1247–48 (a right or interest "must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability").
43 *Gwinnutt v George*, [2019] EWCA Civ 656.
44 *Copyright Act 1994* (NZ), 1994/143, s 14.
45 *Money Markets International Stockbrokers Ltd (Liquidator of) v London Stock Exchange Ltd* (2001), [2001] EWHC 1052 (Ch).
46 *Commonwealth of Australia v WMC Resources Ltd*, [1998] HCA 8.
47 *Armstrong DLW GmbH v Winnington Networks Ltd*, [2012] EWHC 10 (Ch).
48 *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth*, [2019] HCA 20.
49 *Dixon v R*, [2015] NZSC 147.
50 *Ruscoe*, *supra* note 17 at 123–24.
51 *Saskatchewan Minerals v Keyes*, [1972] SCR 703 at 717.
52 *Ibid* at 703.

question whether such a royalty could constitute a rent charge, and in doing so, considered whether such an interest could exist in an incorporeal interest in land. This was known as the "no rent on a rent" prohibition. Justice Laskin concluded that

> [t]he language of "corporeal" and "incorporeal" does not point up the distinction between the legal interest and its subject-matter. On this distinction, all legal interests are "incorporeal", and it is only the unconfronted force of a long history that makes it necessary in this case to examine certain institutions of property in the common law provinces through an antiquated system of classification and an antiquated terminology.[53]

For Justice Laskin, the focus of the inquiry was a subject-matter which, while not a physical thing, was a thing nonetheless — a legal thing; namely, a bundle of rights. On this analysis, even a freehold estate in land is, in truth, an incorporeal interest in the sense that it does not confer absolute ownership of the land itself, but of an incorporeal "estate," or bundle of rights. Sir Frederick Pollock and Frederic William Maitland called this treatment of the bundle of rights as a thing the "thinglikeness" of property.[54] The estate or subsidiary interest is a thing like any other, and that ought to be the focus; and if it is, then, for Justice Laskin, the common law contains sufficient flexibility as to allow its concepts, notwithstanding seemingly rigid historical rules to the contrary, to adapt and apply to new circumstances.

The Supreme Court of Canada has since adopted Justice Laskin's reasoning as the controlling position, taking a functional-property as relations approach to support its conclusion. In *Bank of Montreal v. Dynex Petroleum Ltd*,[55] Justice Major summarized the dispute at issue as "pit[ting] [an] ancient common law rule [the no rent on a rent prohibition] against a common practice in the oil and gas industry."[56] And Justice Major concluded that:

> The effect of Laskin J.'s reasons [in *Keyes*] was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests…. [T]he intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only.[57]

This shifted the emphasis of the analysis from a strict reading of the grant to the intentions of the parties, and specifically, the "grantor's intentions[, which] can only be determined in the context of the entire agreement."[58] This combined Justice Laskin's focus on the thing with an analysis that gives sway to the parties' intentions; in other words, a functional approach allows the conclusion that the oil and gas royalty is capable of constituting a rent charge — with the thing itself, the bundle of rights created by the parties, forms the subject-matter of that property. The functional approach considers what the parties seek to create, which is a thing capable of forming the subject-matter of property, the content of which is filled by the parties' intentions.

---

53 *Ibid* at 722.

54 Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, vol 2 (Cambridge, UK: Cambridge University Press, 1968) at 136.

55 *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7.

56 *Ibid* at para 4.

57 *Ibid* at paras 11–12.

58 David LeGeyt et al, "Let's Talk About Royalties: The Continued Uncertainty Surrounding the Creation and Legal Status of the Overriding Royalty" (2019) 57:2 Alta L Rev 335 at 342.

But there is another reason why the thing becomes relevant, even for the functional-property as relations correlative, perhaps especially for it. The reason is identified by Singer and Beermann, who note that "[a]s … relationships change, rights that served the function of giving the holder legitimate personal security and autonomy may increasingly allow that holder to exert illegitimate power over others in ways that deny them the same rights to security and autonomy."[59] It becomes impossible, then, to avoid the thing in considering whether property exists in a novel set of circumstances as part of the process of adaptation of existing forms, or in the recognition of new ones when doing so facilitates harm to others. Treating the thing as invisible can lead to just such iniquitous, abhorrent results. A functional approach can, by focusing only on the relationship to the exclusion of the subject-matter, render invisible the potential for serious harm.

Consider the range of real property uses that might be invisible to an analysis which focuses solely on relations: the abhorrent treatment of human persons as slaves; the environment when treated as a common dumping ground for waste such as air and water pollutants and greenhouse gases;[60] land inhabited by Indigenous persons treated as not possessing the land;[61] land the ownership of which is restricted through the use of racial restrictive covenants;[62] or land otherwise available for public accommodation restricted to members of defined racial groups through an owner's claims to be free to do as suits preferences.[63] The same difficulties can arise in relation to personal property[64] — some question the very foundations of copyright, a predominant form of novel property over the last century.[65] And sometimes the subject-matter of personal and real property may interact in surprising ways over the long-term. Early in 2023, activists in Georgia sought to prevent the development of a parcel of land for residential use which had been the location for The Weeping Time, the largest single auction of enslaved people in the history of the United States, which occurred in Savannah 150 years ago.[66] What began as the subject-matter of personal property in the abhorrent practice of slavery, has become the subject-matter of real property, the place where the auction was held and its preservation as the location of The Weeping Time. In both of its manifestations, the subject-matter of property in The Weeping Time remains absolutely essential.

---

59 Singer & Beermann, *supra* note 35 at 228.

60 Hidefumi Imura, "The Environment as a Commons: How Should It Be Managed?" in Hidefumi Imura, ed, *Environmental Systems Studies: A Macroscope for Understanding and Operating Spaceship Earth* (Yakohama: Springer, 2013) 85.

61 *Mabo v Queensland [No 2]*, [1992] HCA 23, which abolished the morally abhorrent doctrine of fictional *terra nullius*. While I was writing this article, I visited the site of the Eumeralla Wars of 1830–1860 in which British colonists massacred large numbers of the Gunditjmara Aboriginal people in what is now south-west Victoria, Australia. If there was no one on the land, of course, there would have been no need of a war with those non-existent people, which demonstrates the evils attendant upon ignoring the thing (here, the factual reality of the land) when using a functional approach.

62 Ziff, *supra* note 1 at 450–53. See also Fred de Sam Lazaro, "How the Twin Cities Is Trying to Close the Racial Gap in Home Ownership," *PBS NewsHour* (13 August 2021), online (video): [perma.cc/9JM5-TB8K].

63 Joseph William Singer, "We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom" (2015) 95:3 BUL Rev 929.

64 Ziff, *supra* note 1 at 15–16, 61.

65 Paul J Heald, *Copy This Book!: What Data Tells Us About Copyright and the Public Good* (Stanford: Stanford University Press, 2020).

66 Benedict Moran & Anne Azzi Davenport, "Activists Fight to Memorialize Site of Largest Slave Auction in American History," *PBS NewsHour* (28 December 2022), online (video): [perma.cc/U6FR-95SR].

Space prohibits an exhaustive analysis. Yet, the examples noted here demonstrate, at least as a preliminary matter, that it *is* still necessary to consider the thing, because it might tell you something about whether it, or the relationship that refers to it, ought to be recognized as property. What else could Ziff have meant by saying that the functional approach is typified by looking at the policy factors at play other than that this approach necessarily demands that we focus on the subject-matter of the novel form of property? It is in looking at the thing that we can conclude, as the civilians once did, that some things simply cannot be the subject-matter of property.[67] And that pertains whether one adopts a property as things or a property as relations view.

IV. CONCLUSION: IT MATTERS WHEN IT MATTERS

Theorizing judicial methodology when dealing with novel property claims stands as one of Bruce Ziff's landmark contributions to our understanding of property. In this essay, I correlate Ziff's two methodological approaches with the two currently vogue theories of property. In doing so, I hope also to have shown that a functional-property as relations approach to novel claims hardly consigns the subject-matter of property to the periphery or background of the inquiry. Rather, it brings the thing to the foreground, placed in its proper context, as the subject-matter of legal rights which can only, by their very nature, exist between people. It is only in that way that we can understand what policy factors might come into play in recognizing property to exist in novel circumstances. So, the thing unquestionably matters.

When or how do we know when the thing matters? Here, clarity proves elusive. There may undoubtedly be instances where the thing will have little relevance for or bearing upon a given novel property claim. Still, there are enough examples to suggest that such cases may be infrequent if not rare. While we can say that the thing matters in most cases, in working out how we know that it should be adverted to as part of the judicial methodology, and how much it matters, perhaps all that we can say is that the thing matters when it matters.[68]

---

[67] In Roman law, things (*res*) were classified according to whether they could be owned privately or not, as either private property (*in patrimonio*) or outside the sphere of private property (*extra patrimonium*): G 2.1-2, G 9-11; Inst 2.1. Things that could not be privately owned were *res communes* (things common to all), *res publicae* (public things belonging to the state), *res universitatis* (things intended for public use owned by corporate public bodies), *res nullius* (things belonging to no one), *res sanctae* (things protected by the gods), *res religiosae* (things related to and used for public burial), and *res sacrae* (things formally consecrated and dedicated to the gods): Paul du Plessis, *Borkowski's Textbook on Roman Law* (Oxford: Oxford University Press, 2010) at 152–53.

[68] Adapting US Supreme Court Justice Potter Stewart's famous "I know it when I see it" standard in *Jacobellis v Ohio*, 378 US 184 at 197 (1964).

[*this page is intentionally blank*]