

THE FUNDAMENTAL DIFFERENCES IN THE PRINCIPLES GOVERNING PROPERTY LAW AND SUCCESSION

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1 Introduction

South African law is un-codified, developed, Roman-Dutch law. As such it is founded on a strict adherence to well-defined principles and the logical application of these principles guarantees legal certainty. This strict adherence to principles also vouches for an aversion against a pragmatic, casuistic and utterly uncertain deliverance to judicial gut feeling of presumed fairness and equity.¹ Judges are supposed to know the difference between sitting on a bench under a palm tree, pronouncing according to the current feeling of what may be equitable according to the flavour of the day and sitting on a bench in a court of law and finding the legal principles that govern the case at hand.²

2 Property law / the law of things

The law of things or property law³ is restricted to the legal relation between a legal subject and an object that fulfils *all* the requirements of the definition of a “thing” as an object of a real right – being a specific individual aspect⁴ of the physical nature outside of a person,⁵ that contains space,⁶ is at whom governable by human effort⁷ and is sufficiently scarce to be worthwhile.⁸

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¹ “Our law does not recognise courts of equity with jurisdiction to ‘oversee’ contractual transactions between parties who freely and voluntarily contract with each other on certain terms, ... This is not surprising inasmuch as the Dutch Courts, unlike the English Courts until the Judicature Act 1873 became operative in 1875, did not administer a system of equity as distinct from a system of law. Roman-Dutch law is itself inherently an equitable legal system. In administering the law the Dutch Courts paid due regard to considerations of equity but only where equity was not inconsistent with the principles of law. Equity could not override a clear rule of law” *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 582J and 606A.

² “The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair” *Midland Bank Plc v Cooke* 1995 4 All ER 562 571 with reference to *Springette v Defoe* 1992 2 FLR 388.

³ Both terms have lately been used extensively to translate what is known in German law as *Sachenrecht*, in Afrikaans as *sakereg* and in Dutch as *zakenrecht*. As the translation of a “saak” as object of a real right, is never “a property” but rather a “thing”, the law of things is the more correct translation and the only one recognized in the *Trilingual Legal Dictionary* by Gonin and Hiemstra. This is the position although even the Dutch have opted under the new Code for the term “goederenrecht” instead of the previous “zakenrecht” because the new code does include aspects that would not have qualified as “zaken”. This does, however, make no positive contribution towards clarity of definitions because the matrimonial property regime or “huwelijksgoederenrecht” also encompasses distinctly more than the proprietary relations between the spouses with regard to real rights, as it also includes pension rights and even the reciprocal claims and duties towards maintenance. It is not always clear whether the fathers of the new Dutch code after the demise of Meijers really because of them being converted to a new belief, consciously decided that the object of a “goederenrecht” should rather be “goed” with as plural “goedere” as the dominant term in a goodstrain.

⁴ A part of a complex thing loses its individuality because of *accessio* and ceases to be the object of a real right eg the pistons or sleeves contained in the engine of your BMW motorcar do not retain their individuality and cannot be the object of another real right but is encompassed within the real right of ownership of the car.

⁵ No body parts can form the object of real rights like spare parts to cars.

⁶ Energy like electricity or wind does not fulfil this requirement and cannot be the object of a real right – although Dutch law of old did know a so-called limited real right on wind catching for the wind mills. The object of the real right was not the wind but the neighbour’s land as to which the holder of this limited real right held a negative servitude to limit the owner of the adjacent property in the path of the prevailing winds from erecting any structure that would limit the force of wind necessary to turn his windmill – see Ketelaar *Oude Zakelijke Rechten Vroeger, Nu en in de Toekomst* (1978) 133-196. The CFR in the preamble to book 8 (cl 1:101.4(b)) wisely explicitly excludes electricity from the application of the norms of property law. In *S v Ndebele* 2012 3 SA 226 (GSJ) 235F-238F it was held that “[t]he fact that an incorporeal cannot form the subject of theft

The vague and unscientific so-called definitions of property old – of which some examples follows – are justly no longer acceptable when law is studied and applied as a legal science:

- Property is “[e]very object of which the law takes cognizance.”⁹
- “The term ‘property’ (*res*) is applied in law to everything which can be the object of a right, that is, everything with respect to which one person may be entitled to a right and another person subject to a duty.”¹⁰ These definitions would clearly wrongly label personality rights such as to physical integrity, security within the marriage relationship or the honour and good name also as “property”.
- Property is “[a]nything with money value.”¹¹ Although money does make the world go around, it need not be elevated to the one and only distinctive qualification for a thing as object of a real right, because hopefully the personal rights to performance or the copy right of an author to his book or the composer’s to his composition is also recognised as objects of respectively a personal right or an immaterial property right and as such endowed with legal protection although clearly not a thing and not the object of a real right to which real remedies apply.

South African law is for purposes of the law of things not inclined to include within the folds of real rights mere entitlements with regard to so-called incorporeal things. Unless this distinction is upheld, the clear divide between the different proprietary rights becomes watered down. Soon some misguided protagonist will insist on the application of typical remedies from the law of things such as the *mandament van spolie* or the *actio negatoria* even with regard to a personal right to claim water or electricity or a mere privilege afforded to one holding a thing in a precarious relationship as could have been the position regarding the use of a farm track in Stellenbosch. The plaintiff in *Van Rhyn NNO v Fleurbaix Farm (Pty) Ltd* alleged that his irregular use of the track was governed by what he deemed to be an

has been recognised as a difficulty, particularly where money and shares are concerned. ... The underlying objection to holding that an incorporeal is capable of theft is the requirement that there should be a *contractatio* ... In *S v Mintoor* 1996 1 SACR 514 (C), ... it was held that electricity is an energy and that energy is incapable of theft. ... It was submitted that I should consider developing the common law to encompass energy as a thing capable of theft. In my view, I do not have to do so and I do not deal further with this issue.” Clearly it is unnecessary to include energy within the folds of a thing as object of a real right if only to criminally prosecute the unilateral appropriation of energy against the clear regulations governing usage on payment of electricity.

⁷ The 163 houses and other property in the submerged towns of Graun and Reschen under the Reschensee in the Italian Tirol that were submerged in 1950 after the completion of the big dam built for irrigation and the hydroelectricity power station, can still be admired by divers but no longer complies with this requirement and does not form an object of a real right of anybody. The same used to apply to the valuables contained in the wreckage of the Titanic lying at great depth and practically out of reach of any person’s whims to move it around.

⁸ “Worth” is not to be restricted to market value and may include scarcity value or sentimental value. “’n Saak is iedere selfstandige deel van die stoflike natuur wat ruimte in beslag neem en wat vatbaar is vir menslike beheer en vir die mens van nut en waarde is” – Sonnekus 1990 TSAR 321. “’n Saak is ’n selfstandige natuur- of kultuurproduk wat buite die mens geleë is, vir juridiese heerskappy vatbaar is en vir die mens van nut en waarde is” – Van der Merwe *Sakereg* (1989) 23. “Zaken zijn de voor menselijke beheersing vatbare stoffelijke objecten” a 3:2 NBW en Brahn *Zwaartepunten van het Nieuw Vermogensrecht* (1989) 21. “Zaak is ieder deel der stoffelijke natuur, dat aan de macht van de mens kan worden onderworpen, voor hem van waarde is en volgens verkeersopvattingen als een geïndividualiseerde geheel kan worden beschouwd” – Asser-Mijnssen-De Haan *Zakenrecht* 3.1 (1992) 46. “Eine Sache ist ein selbständiger körperlicher dinglicher Rechtsgegenstand ... Körperlichkeit ist dreidimensionale (räumliche) Ausgedehtheit und stofflicher Inhalt. Zur räumlichen Ausgedehtheit gehört fest räumliche Begrenztheit” – E Wolf *Lehrbuch des Sachenrechts* (1979) 14. “Sachen sind nur körperliche Gegenstände; denn nur diese sind körperlich faßbar und beherrschbar” – Baur *Lehrbuch des Sachenrechts* (1988) 10. “Sachen sind nur greifbare Gegenstände” – M Wolf *Sachenrecht* (1989) 5.

⁹ Lee *An Introduction to Roman-Dutch Law* (1953) 120.

¹⁰ Maasdorp *The Law of Things* (1976) 1.

¹¹ Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 571.

unregistered personal servitude of way.¹² Because no physical possession of the road was proven, the only virtual form of “dispossession” entailed a so-called dispossession of the perceived “right” to use the way. Because no right can exist without a clearly defined source of the perceived right,¹³ the precarious holder lacks fulfilment of this requirement.¹⁴ As is the position with the purported dispossessed claimant with the mandament who cannot prove previous possession, without fulfilment of the first requirement this possessory remedy cannot apply.

No real right can be acquired or transferred with relation to any entity that does not fulfil all the requirements of this definition. For this reason it is impossible to acquire a real right to the roof tiles of a building or to the flat on the 10th floor of an apartment building held in a share block scheme because these items (ie the roof tiles on the roof of the building or the apartment on the 10th floor) lack the requirement of individual specificity.¹⁵ It is no longer the object of a real right, but forms part of the building attached to the soil and the only real right concerned is the ownership in the land on which the building has been erected. This does not exclude the possibility that when the building is demolished, from the resulting rubble lying in a heap after the demolishers have completed their task, the roof tiles and intact doors may regain individuality and once more become objects of individual real rights – but only after regaining individual specificity.

Real rights do form part of the assets of a legal subject in combination with the other proprietary rights ie personal rights and immaterial property rights and the estate of a legal subject comprises of the sum of the assets of the subject combined with all the liabilities of the subject. Should the liabilities outweigh the assets, the estate is insolvent. It is clear that the umbrella term “proprietary rights” cannot be used as a synonym for an element of the umbrella term, be it property law or the law of things.

The restrictive use of the term “property” in the fundamental rights section on the protection of property ie section 25 of the Constitution of the Republic of South Africa, 1996 does, however, entice lawyers to broaden the constitutional safeguards to encompass also other proprietary rights and in so doing to extend the constitutional safeguards to all proprietary rights against arbitrary deprivation or expropriation by the state or other authorities. Although a lofty reason, it does not excuse a sloppy handling of legal definitions in all respects.

Because of the danger for misunderstanding this difference, the term “law of things” is preferred to the term “property law”. As long as the legal terms and norms are subjected to a

¹² 2013 5 SA 521 (WCC). “Nec precario” is translated in Afrikaans as “nie ter bedde nie”, which as a pun indicates that the holder is in a precarious position and should stay on his knees praying that the privilege will not be repealed – because it may happen at the whim of him that bestowed the privilege. Since Roman law times the holder on *precario* was not even allowed to claim acquisition of the property by way of prescription as indicated by the well-known phrase *nec vi, nec clam* and *nec precario* that was still retained in the previous Prescription Act 18 of 1943. The phrase was dropped from the formulation of the current Prescription Act 68 of 1969 in s 1 because the definition of “possession openly as if he were the owner” is wide enough to exclude the holder with *precario*.

¹³ In the absence of a registered servitude and no fulfilment of the requirements for acquisitive prescription, the only other source for a claimed right would have been an agreement as source for a personal right. Because the owner of the deemed servient property only recently acquired the property no agreement between the litigants could be proven and even if an agreement did exist between the claimant and the predecessor in title (which was not proven either) a resultant personal right would not be enforceable against the current owner unless the doctrine of notice applied – which was not the case.

¹⁴ By definition the holder by *precario* never becomes the holder of any right to remain in possession of the privilege bestowed on him.

¹⁵ It is not gain said that a valid contract may be concluded for the sale of the roof tiles, but the contract is no source of real rights and the buyer at most acquires a personal right to claim performance from the seller.

scientific analysis as a science¹⁶ and not merely handled as if tools of a trade like that of a plumber,¹⁷ it is of the utmost importance to keep to the correct formulation in order to distinguish properly between the various components of subjective rights as the subject of private law. As Savigny formulated, in the scientific study of law and its applications, everything depends on the correct use of the “leitenden Grundsätze”.¹⁸ Only if the practitioner is unconcerned with the true difference between a contractual right as licensee to perform the music of a composer as a personal right, the immaterial right of copy right as an intellectual property right and the ownership of the bookseller in the printed partiture or music score, may all assets be bundled under the same nomenclature as “property”. For a legal scientist this is unacceptable and tantamount to mental laziness.

Due to the abstract system being used in South African law as in German law, great emphasis is placed on the content of the real agreement apart from the contractual agreement, for all derivative modes of acquisition of property rights.¹⁹ Unless both the transferor and

¹⁶ *Regswetenskap of Rechtswissenschaft*. Brunner emphasized that the study of law was as late as 1852 classified as a trade and no object of scientific study 1996 *WPNR* (6207) 27. Von Savigny “Jurisprudenz als selbständige Wissenschaft” (as formulated by Mazzacane *Friedrich Carl von Savigny. Vorlesungen über juristische Methodologie 1802- 1842* (1993) 37) also emphasized the importance of a scientific study of the law: “Die wissenschaftliche Charakter unsrer Arbeit, kommt von den Herausfühlen den Zusammenhang und der Verwandtschaft aller juristischen Begriffe und Sätze” – *System des römischen Rechts*. See also von Jhering’s rhetorical question: “Ist die Jurisprudenz eine Wissenschaft?” as title of his inaugurationsadress in Vienna in 1868 and Stolker “‘Ja, geléerd zijn jullie wel!’ Over de status van de Rechtswetenschap” 2003 *NJB* 766-778. See also “Van Rhee: ‘Een verstoring van de systematiek zal immers uiteindelijk leiden tot het instorten van het met zorg opgetrokken geheel, tot een teloorgaan van de objectieven samenhang (en... tot het verdwijnen van de rechtszekerheid) waardoor de rechtswetenschap verwordt tot loutere geleerdheid die op het predikaat ‘wetenschap’ geen aanspraak kan maken. Om dit te voorkomen, dient overigens ook de rechtspraak vanuit rechtswetenschappelijk perspectief te worden benaderd” – “Geen rechtgeleerdheid maar rechtswetenschap!” 2004 *RMThemis* 196 198. Van Rhee emphasized that Donellus, a member of the law faculty in Leiden in the 16th (1527-1592), was already the pioneer in this scientific study of legal norms and nobody less than von Savigny acknowledged his primary ground-breaking role and contribution in this regard. Donellus is honoured as one of the founding fathers of the European legal science encompassing the scientific method – see Ahsmann *Collegia en Collegs Juridisch Onderwijs aan die Leidse Universiteit 1575-1630 in het bijzonder het disputeren* (1990) 60 ff. No wonder that Posner tried in vain to find “the precise instrumentation, and exact vocabulary, a clear separation of positive and normative inquiry...” (as quoted by Stolker 769). Common law is very often nothing but common – casuistic case based and judge made law and as such in stark contrast with the *ius commune*. Not an example to be followed and it never fails to surprise how eagerly young continental lawyers try to bend over backwards to accommodate the strangeness of the English legal norms without realising that the strangeness is not to be admired but rather pitied. This may be the reason for the following remark by Leijten JCM “Over wetten, rechtspraak en rechtsgeleerden” 1996 *WPNR* (6207) 2-5 “Als wetenskappers honden waren, zouden arresten bomen zijn”(3). Barendrecht JM “Rechtswetschap: Stoffig of inventief?” 1996 *NJB* 705-71. Weimar “Vom Recht, von Gerichten und Juristen” parting lecture on acceptance of the status of Emeritus from Zürich University (2004).

¹⁷ The impression does exist that the latter approach may underlie the attitude often found amongst Anglo-American lawyers not quite at home within the logical constraints governing a principle based legal system as eg the German or Dutch legal systems.

¹⁸ von Savigny *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) 22.

¹⁹ The adherence to the abstract system is directly attributed to the South African court of appeal’s following von Savigny’s construction in *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 AD 369 411 with reference to *Savigny II Obligationsrecht* (par 78). It has been constantly repeated since see *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) 44G-J: “In view of this body of authority I believe that the time has come for this court to add its stamp of approval to the viewpoint that the *abstract theory of transfer applies* to immovable property as well. In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so-called real agreement or ‘saaklike ooreenkoms’. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 3 SA 917 (A) 922E-F; *Dreyer v AXZS Industries (Pty) Ltd* [2006 5 SA 548 (SCA)] par 17).

transferee have respectively the *animus transferendi* and *accipiendi domini* the latter may not lay claim to the acquisition of the intended real right notwithstanding the fulfilment of all the other requirements for the derivative acquisition of the real right concerned. This has been reconfirmed lately in two very important decisions by the full bench of the supreme court of appeal in *Nedbank Ltd v Mendelow*²⁰ and *Quatermark Investments (Pty) Ltd v Mkhwanazi*.²¹

This emphasis on the subjective content of the real agreement applies also to the presumed acquisition of a limited real security right of mortgage if the perceived mortgagor never acquired the ownership to the perceived bonded property because the signature of the erstwhile owner had been falsified and she never intended to enter into a real agreement regarding the transfer of her ownership to the perceived mortgagor, as happened in the Nedbank case. For succession in title regarding any real right all the requirements of the law of property need to be heeded.

3 *The law of succession*

The principles of the law of succession only find application if after the demise of the subject the executor of the estate in fulfilling his duties as administrator of the deceased's estate,²² is left with a solvent estate after all liabilities have been met. The principles of succession (irrespective whether testate or intestate) do not even come into play if the estate of the deceased is found to be insolvent.

The law of succession is not restricted to the assets that formed part of the estate of the deceased. The deceased is entitled to include in his will a provision that after his demise his neighbour's Audi should be legated to his secretary. This is deemed a valid disposition and not in conflict with the *nemo plus iuris* rule that in general limits the disposer's actions to those rights that does belong to him or at least to those as to which he possesses the *ius disponendi*. This rule points to the fact that the principles of the law of succession are distinct from those of property law. Such a disposition over assets that does not form part of the testator's estate is correctly interpreted as placing a duty on his executor to try to enter into negotiations with the neighbour as owner of the Audi to acquire the Audi using money available in the estate of the deceased and then to complete the indicated bequest by transferring the acquired Audi to the secretary as legatee.

In principle the norms of property law should not govern the acquisition of a personal right as regulated by the law of succession. It is noteworthy that the Common Frame of Reference

Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, *eg* sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement (see *eg* *Preller v Jordaan* 1956 1 SA 483 (A) 496; *Klerck NO v Van Zyl and Maritz NNO* [1989 4 SA 263 (SE)] 274A-B;...)” and in *Meintjes NO v Coetzer* 2010 5 SA 186 (SCA) 193H-I: “In the present case, not only was there no valid deed of alienation of the disputed portions of the farm to the first and second defendants, as the deceased's signature thereon had been forged, but the necessary transfer documents had also been similarly falsified. In these circumstances, despite the registrar of deeds having effected registration of transfer, there can be no doubt that *the deceased never intended to transfer ownership* of the two disputed portions of the farm to the first and second defendants at the time registration of transfer was effected. *She therefore remained the owner thereof*” – my emphasise.

²⁰ 2013 6 SA 130 (SCA).

²¹ 768/2012) [2013] ZASCA 150 (01-11-2013).

²² As to the development relating to the executor in Roman-Dutch Law see Van Zyl *Universele Opvolging in die Suid-Afrikaanse Erfreg* (1981) 36 ff. Historically the role of the executor is linked to the German common law construct of the *Salman*, *Treuhand* or *Testamentsvollstrecker*. The *Salman* originally developed as a loop hole to circumvent the unwanted consequences of compulsory intestate succession in an era when Germanic law did not recognize freedom of testamentary disposition under the rule *solus deus heredem facere potest* – “een erfgenaam wordt geboren en niet gekoren”. Under the *Lex Salica* titel 46 provision was made for a subject fearing that he is in the departure lounge nearing the final exit, to transfer his assets to his *Salman* in the trust that the latter will live up to his undertaking *ie* to dispose of the assets after the demise of the transferor according to the latter's wishes. See De Blécourt and Fischer *Kort Begrip van het Oud-Vaderlands Burgerlijk Recht* (1967) 337 375.

leaves no doubt about the adherence to this fundamental truth by its founding fathers when it is stated up front: clause 1:101 of Book 8 with regard to the acquisition and loss of ownership of goods: “This Book does not apply to the acquisition or loss of ownership of goods by: (a) universal succession, in particular under the law of succession and under company law;” The norms of the law of succession do not govern the *transfer* of for instance the real right of ownership of the deceased in his green Mercedes to his grandchild as indicated legatee in his last will, but do govern the legal norms determining under what circumstances a named beneficiary in the will of the testator will be entitled to claim performance as fulfilment of his personal right to claim transfer of the ownership in the Mercedes from the executor. The norms of succession also determine why the named beneficiary is termed an unworthy beneficiary because he murdered the testator²³ or misbehaved in withholding the needed maintenance and support from the frail and mentally handicapped old grandfather troubled by progressing dementias.²⁴ Under these circumstances the rogue will notwithstanding the testamentary clause not be vested with a personal right to claim the benefit from the executor.

Up to the moment when the executor had completed the first liquidation and distribution account potential hopeful beneficiaries have at most acquired a personal right with an uncertain content irrespective whether the right originated in the norms of intestate succession or the last will of the deceased.²⁵ The source of the personal right of the beneficiary is the objective norms of the law of succession and not a division of property law and does not originate from an agreement between the testator and his heirs and is not founded on consensus.²⁶ As is the position regarding a gift amongst the living,²⁷ the bequeathed does not have to accept the personal right resulting from the norms of the law of succession and does have the entitlement²⁸ to waive the personal right – provided that his/her competencies are not restricted at the stage when he/she exercises this competency.²⁹ If the beneficiary has been sequestered at *dies cedit* or *dies venit* his competencies to dispose of assets in his estate are limited to safeguard the interest of his creditors and he can no longer waive the benefit of the personal right acquired by reason of the law of succession.³⁰ In contrast to the position of the recipient of the donation, it is presumed that the beneficiary under the law of succession did *adiate* and repudiation is seen as the exception. Repudiation is thus handled as a resolute condition and *adiation* is not conditional on the subjective

²³ “Die bloedige hand en neemt geen erfenis”.

²⁴ See the discussion by Sonnekus “Verwaarlosing, representasie en onbevoegdheid in die intestate erfreg” 1997 *THRHR* 504-509.

²⁵ *Greenberg v Estate Greenberg* 1955 3 SA 361 (A) 364. See also Sonnekus “Adiasie, insolvensie en historiese perke aan die logiese” 1996 *TSAR* 240-254.

²⁶ The norms of the law of succession had been identified correctly as the source of the vested right “to claim from the deceased’s executor at some future point in time ...” *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656 692.

²⁷ Other than a gift that is a multilateral legal act although a unilateral contract resulting in rights and obligations for only one party respectively, a vesting of a personal right by the norms of the law of succession is not classified as a legal act at all and merely the result of an operation by law. (Executing a will by a testator is a unilateral legal act and depends only on the will of one party and not dependent on consensus by both parties.)

²⁸ This is often wrongly identified as a right of election or as a competence. It is neither but the entitlement of every holder of right to consciously decide to waive the right, to forfeit the use or to abandon his ownership provided that his competency to dispose of his assets is unfettered.

²⁹ In *Badenhorst v Bekker NO* 1994 2 SA 155 (N) the court followed the reasoning in this regard by Sonnekus and it was later confirmed by the supreme court of appeal in *Du Plessis v Pienaar NO* 2003 1 SA 671 (SCA).

³⁰ Sonnekus “Adiasie, insolvensie en historiese perke aan die logiese” 1996 *TSAR* 240-254. *Durandt NO v Pienaar No* 2000 4 SA 869 (C) 875F “For the foregoing reasons my conclusion in the present case is that the insolvent’s repudiation of her inheritance, prior to her sequestration but while she was in insolvent circumstances, did not amount to a disposition of property and accordingly that it is not liable to be set aside under s 26 of the Insolvency Act as a disposition without value.”

acceptance of the inheritance.³¹ For this reason the benefit had vested even though the heir was totally unaware of the bequest before his own demise. In these circumstances the vested bequest forms part of the heir's estate notwithstanding his/her unawareness of the fact.

The sources of personal rights have since Roman law times been identified as *ex contractu*, *ex delicto* and *ex variis causarum figuris* and the latter includes the norms of objective law labelled as the law of succession.³² These personal rights of the beneficiaries did not vest before the demise of the deceased. Before *dies cedit* the hopeful heirs at most have a *spes* but no proprietary rights at all concerning the assets in the estate of the potential testator and cannot rely on the *spes* as an enhancement of his/her credit worthiness. This is the position irrespective whether the *de cuius*³³ executed a valid will or not. No rights originate from the mere execution of a valid will before the demise of the testator and the personal estates of the hopeful named beneficiaries are not enhanced by a single cent by the execution of the will.

4 *No universal succession*

Because of the fundamental differences between the norms governing the acquisition of personal rights, immaterial property rights and real rights, South African law of succession does not provide for a universal succession in all undefined proprietary rights or assets under one umbrella.³⁴ In *Estate Smith v Estate Follett* the court of appeal held:

“In South Africa when the word inheritance is used it no longer has exactly the same signification as the *hereditas* of the Roman and Roman-Dutch law. The notion of an inheritance as the whole estate of a deceased person, a *universitas* of rights and liabilities, which vests on adiation in the heir no longer exists in our law. Under our system of administration of the estates of deceased persons an heir is in effect a residuary legatee, see *Snyman and Snyman v Basson* (1915 TPD 368) and when we speak of his ‘inheritance’ we mean either the property which he is entitled to claim from the executors of the estate of the deceased, or his legal right to claim such property derived from the will. The heir in this sense is entitled, after confirmation of the executors’ account, to certain rights of action against the executors to claim what is due to him whether it be payment of money or delivery of movables or transfer of immovable property.”³⁵

Neither is any provision made for the transfer of the whole sum of all proprietary rights of a legal subject to another in a single sweep.³⁶ The nearest possibility to a universal succession is when all the shares in a company are ceded to a new owner and by holding all the shares the holder effectively controls all the assets of the company. Technically the shareholder is, however, merely the holder of personal rights against the company as a legal person and although effectively controlling the assets of the legal person these assets still do not form part of the holder's estate. He is not the owner of the cars or delivery trucks of the company and as such does not have a single real right in those things.

³¹ In this respect it differs vehemently from the Roman law concept of *aditio hereditatis*. This the court of appeal held “The oft-repeated saying that a legatee does not acquire a legacy unless he accepts it, misplaces the stress; it would be more correct to say that he acquires a right to the subject-matter of the bequest unless he repudiates it” *Crookes, NO v Watson* 1956 1 SA 277 (A) 298A.

³² Amongst with *inter alia negotiorum gestio* and the *condictiones* of unjustified enrichment.

³³ Just *Inst* 3 2 6 – literally “the party whose succession is in question”.

³⁴ The passionate plea by Van Zyl *Universele Opvolging in die Suid-Afrikaanse Reg* (1981) for a rekindling of universal succession correctly found no followers.

³⁵ 1942 AD 364 383.

³⁶ I cannot agree with my neighbour to transfer to him “all my assets” and at most my neighbour may acquire from such a contractual agreement an “*ius in personam ad rem acquirendam*” with regard to the real rights encompassed in my assets. Until he can compel me to fulfil my promised performance and to actively contribute by transferring or registering the relevant real rights to him, the neighbour at most would have acquired a personal right to claim specific performance against me, but no real rights. The same applies to the individual personal rights contained in my assets eg my claim against my bank with regard to the credit in my savings account.

The position governed by the principles of so-called “boedelhouderskap” also known as the rule in *Brown v Rickard*³⁷ must be clearly distinguished from universal succession. In the instance of *boedelhouderskap* the surviving spouse of a couple who had been married in community of property is recognised as the “holder for life” of the sum of the erstwhile common property of which he/she had been the co-owner by virtue of the norms of matrimonial property law since the conclusion of the marriage and will as a consequence not be in the same position as a beneficiary who had not been the rightful owner of any aspect of the estate of the deceased before his demise. *Boedelhouderskap* is consequently not a residue of universal succession but may rather be equated to rudimentary form of a “bewindstrust” with elements of a *fideicommissum residui*.

5 What becomes of the proprietary rights of the deceased at his/her demise?

Because South African law does not make provision for universal succession, there is no presumption that all the beneficiaries or even all the intestate beneficiaries acquire at the demise of the deceased co-ownership of all the property of the deceased. The most acceptable construction accepts that no subjective right can exist in a vacuum without a holder of the right. A subjective right requires two simultaneous relations: the subject-object and subject-subject relations. Unless a logical solution can be constructed, this would have resulted in a free for all situation after the demise of the deceased as all and sundry would have been entitled to lay claim to whatever assets he or she could lay hands on as *res nullius*. If the erstwhile assets suddenly no longer belonged to a rights holder, it would in the case of things become *res nullius* which is prone to original acquisition by occupation by who-ever got to exercise exclusive possession with at least the *animus domini*.³⁸ The resulting chaos is prevented by the norms of the law of succession.

At the demise of the deceased it is accepted that all assets and liabilities that were contained in the estate of the deceased are transferred legally to the master of the supreme court and after the latter’s issuing of letters of executorship the assets and liabilities are transferred to the appointed executor who holds it *qualitate qua* until his completion of his duties regarding the administration of the estate. Only then will the executor with the application of the normal norms and principles of the law of things or other disciplines of proprietary rights transfer the rights to the rightful beneficiaries. If the relevant asset happens to be the ownership to the Mercedes the real right will be transferred to the beneficiary in accordance with the relevant mode of delivery³⁹ and with compliance of the requirements of a real agreement, ie *animus transferendi* and *accipiendi domini* by the parties. If the asset to be transferred is a personal right or immaterial property right, the right will be transferred by cession.

From the foregoing it is clear that the final acquisition of the ownership to the Mercedes by the beneficiary as legatee is not the result of any norm of the law of succession but is

³⁷ (1883) 2 SC 314 318.

³⁸ The so-called default claim of the state or *fiscus* to any *bona vacatia* is much more limited than is popularly accepted. Roman-Dutch law as received in South Africa never attained any feudal elements and South African law does not premise from a perceived principle that the state is the default holder of all rights. Not even land is safeguarded against the classification of *res nullius* should the owner abandon his/her ownership. On abandonment the thing as *res derelictus* becomes *res nullius* and may be acquired by any possessor with the *animus domini*. This applies equally to the abandoned old washing machine and to the worthless plot in downtown where due to increased criminal activity no buyer can be interested to acquire the property and no financial institution will consider lending money against a bond over it. If the city council nevertheless persists in levying rates and property taxes on this worthless property, the owner will be well advised to simply unilaterally abandon it and in so doing to rid himself of the ownership to which the levying of the municipal rates and taxes is attached.

³⁹ Be it eg *traditio vera, simbolica* or *brevi manu*.

governed exclusively by the norms of property law. Because South African property law in conformity with German law follows an abstract system of derivative acquisition of the real rights, and this requires a strict adherence to the elements of a real agreement, it is clear that there is absolutely no room for the derivative acquisition of a real right in the absence of a real agreement. The beneficiary according to either the norms of intestate or testate succession need not be partaking in the last vigil at the death bed of the deceased to be able to form subjectively the *animus accipiendi domini* at the second of the demise of the erstwhile owner to acquire the real right in the bequeathed Mercedes because no real rights are transferred or acquired by any beneficiary at that second. The beneficiary at most acquires a vested personal right against the executor to be appointed but the content of this right is still unclear because the liquidation and distribution account had not been approved yet and it is unclear whether enough free residue will be available in the estate to give effect to the last will of the testator. For the acquisition of this undefined personal right according to the norms of the law of succession, no real agreement is necessary and accordingly also no *animus accipiendi* on the part of the beneficiary.

Should the named beneficiary himself pass away after the vesting of his personal right but even before becoming aware of the fact that the right has vested in his estate, the vested right forms an asset in his estate even though the content of the acquired proprietary right is still unclear.

As an asset in his estate the vested right may even be attached by his creditors should he be in default with regard to his liabilities and at least have been provisionally sequestered. Although the beneficiary does have in principle an election to either accept or to decline the benefit bestowed upon him by the deceased, the insolvent beneficiary lacks the necessary capacity to decline and consequently divest himself of the benefit acquired because of the windfall out of the estate of the deceased. Any attempt to decline the bestowed benefit will be classified as an unlawful attempt to dispose of assets to the detriment of his creditors and will be without any legal effect.⁴⁰

5 Conclusion

The clear division between the different sub-disciplines within private law that lies at the root of the distinction between eg the law of property, succession, persons and family including husband and wife and the matrimonial property law and the law of obligations under which the norms of the law of contract, delict, *negotiorum gestio* and unjustified enrichment can and should be distinguished. This division is founded on reason and has stood the test of time very well. It still provides the backbone for the distinction between the different books of the main stream civil codes in the continental legal systems as it had done since Roman law times. South African law is not keeping bad company by adhering to its roots in this regard. Mere mental laziness does not provide a good enough excuse to depart from this scientific categorisation of these norms of private law. Notwithstanding the usage of a term like “successor in title” to refer to the transferee of a real right acquired in a derivative mode, the term “successor” as used in this regard has no commonality with the law of succession that applies only after the demise of the erstwhile title holder.

⁴⁰ See s 29-31 of the Insolvency Act 24 of 1936 on voidable and undue preferences.