

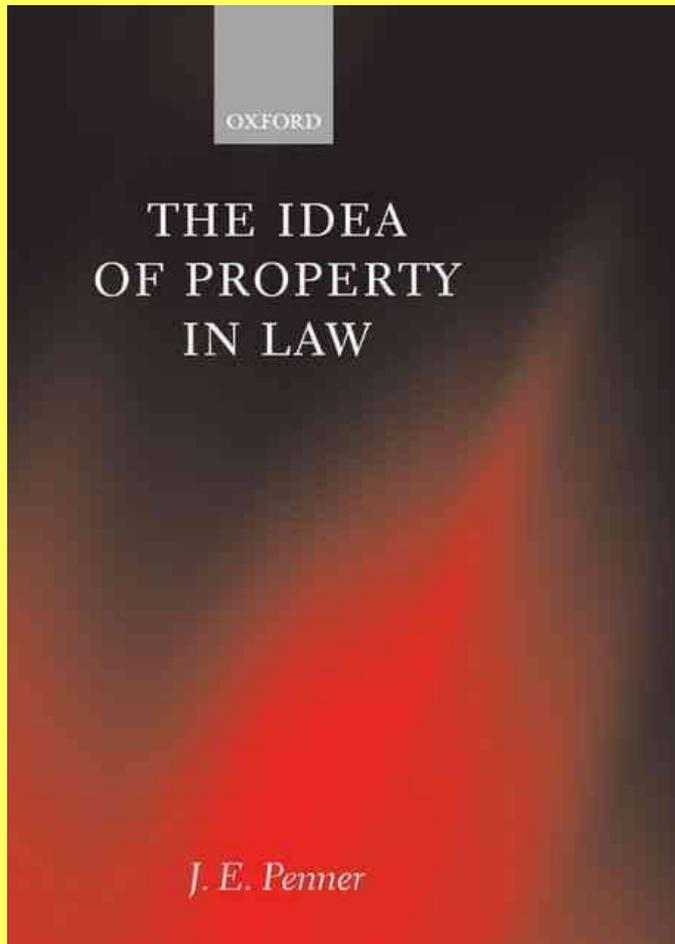
***Res incorporalis* and the debate about the materiality of the object of property in the light of Roman-law tradition**

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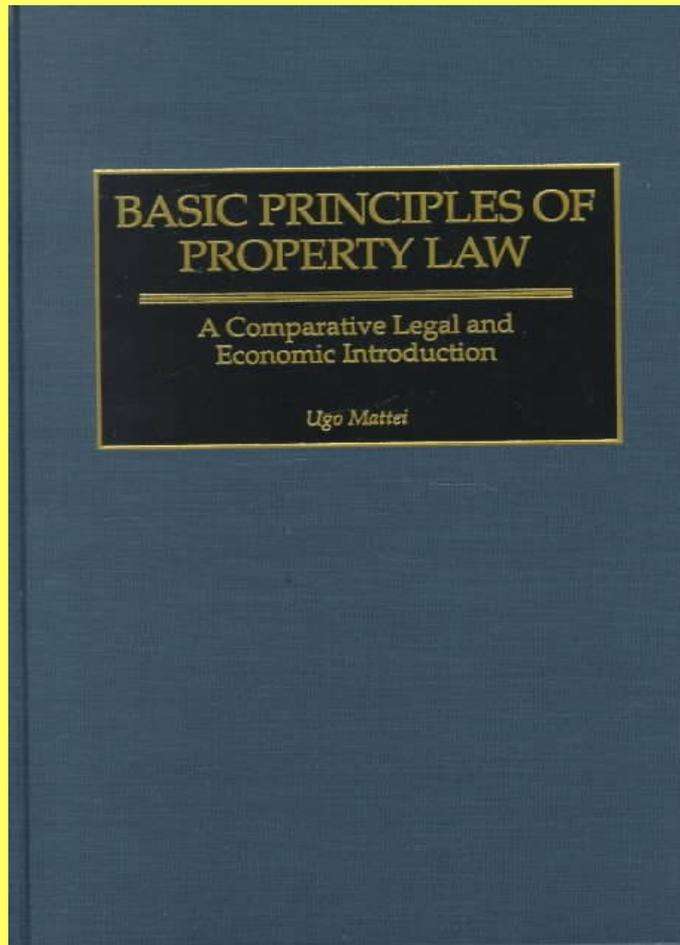


The object of property – a hard question



- „Most persons familiar with philosophical treatises on property are never faced with the task of thinking about why some things are objects of property and others are not. Typically, philosophical works purporting to concern property start with a kind of justifiable evasion of this task”.

The object of property – a hard question



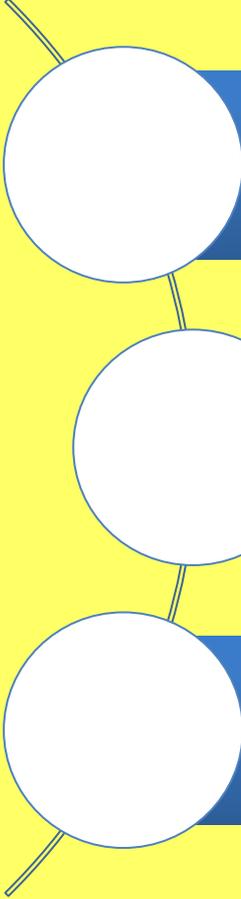
- „Possibly in no area of the law does one find more diveristy among legal systems than in the domain that we may call <the object of property>”

The object of property – a hard question

- Flemming v. Nestor 363 US (603) 1960)
- Is the termination of benefits from the Social Security program the case of a deprivation of property?
- „The New Property”

The object of property – a hard question

The New Property

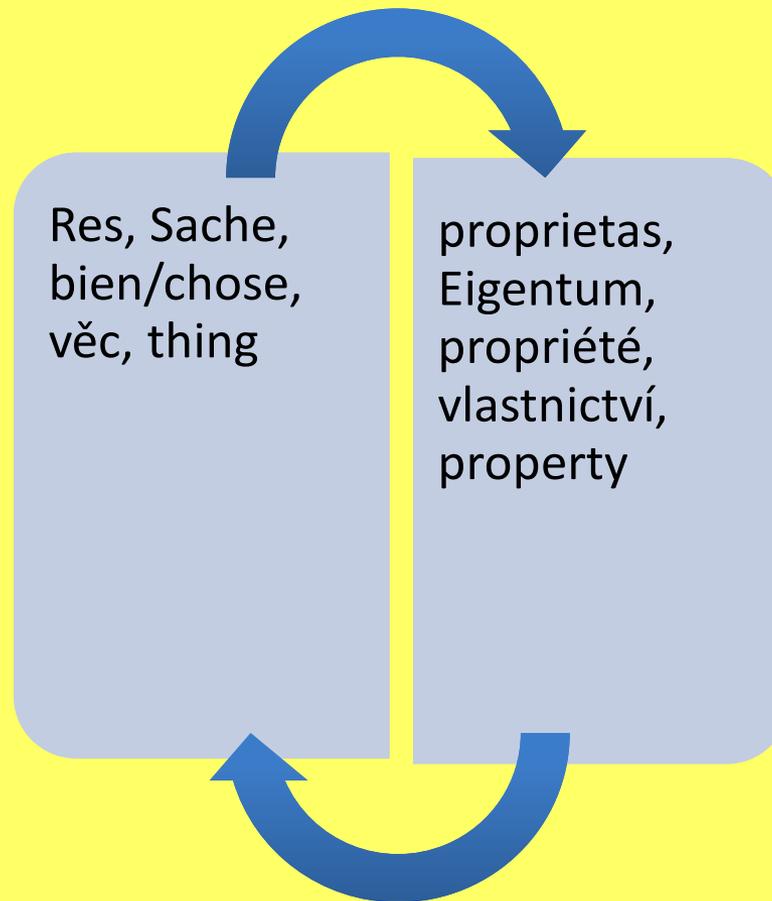


” As social or economic conditions change, elements of the existing conceptual apparatus of legal analysis become increasingly strained and eventually are unable to accommodate the new phenomena”

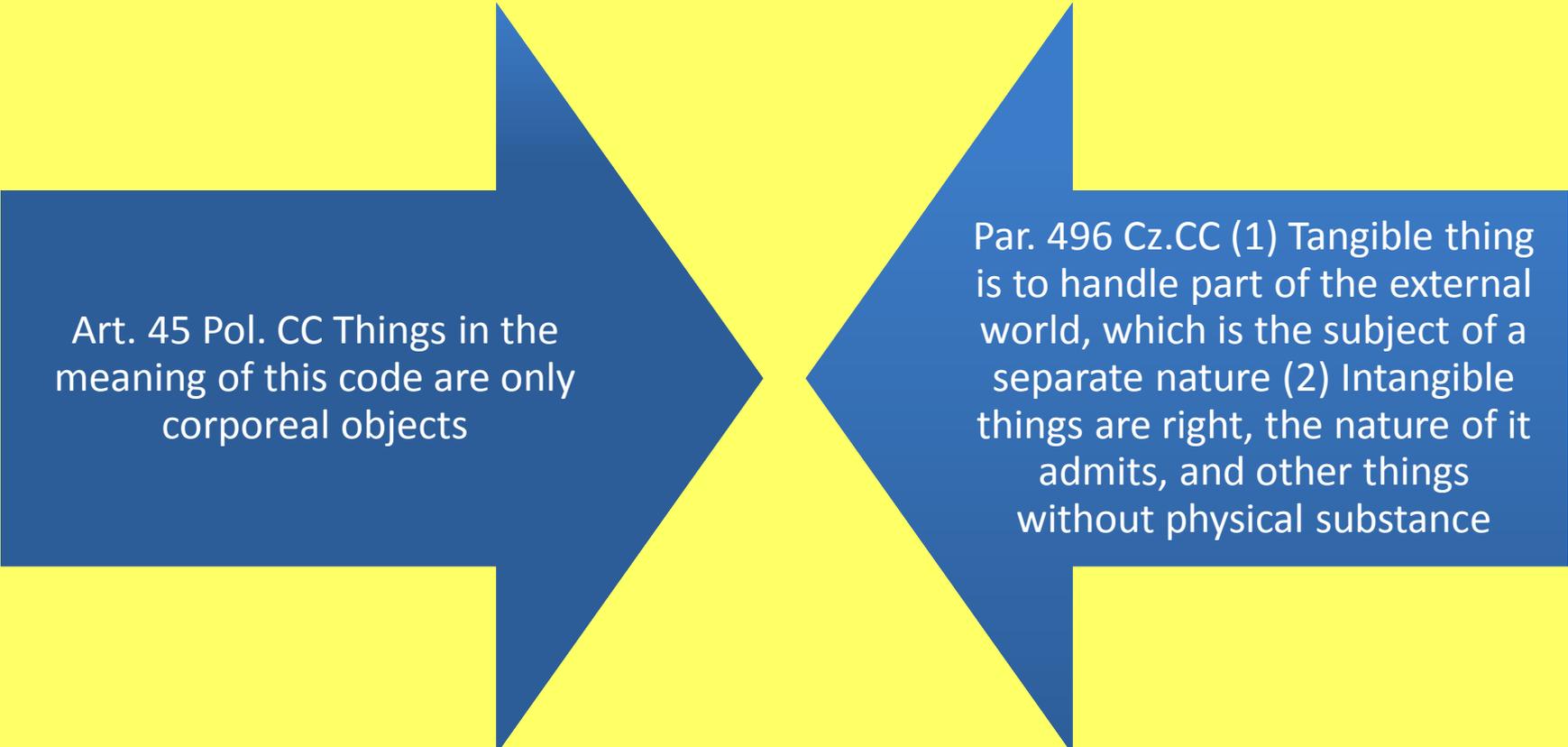
„ The political foundations of the new property idea are essentially those of the conventional or common-law conception of property, stripped of its formalistic dressing”

Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of Scientific Turn in Legal Analysis* (CAL)

The object of property – a hard question



The object of property – a hard question

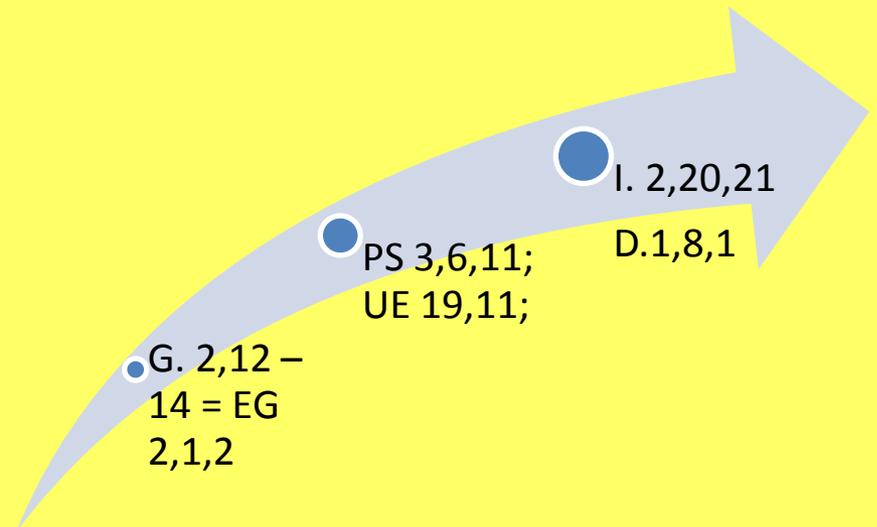


Art. 45 Pol. CC Things in the meaning of this code are only corporeal objects

Par. 496 Cz.CC (1) Tangible thing is to handle part of the external world, which is the subject of a separate nature (2) Intangible things are right, the nature of it admits, and other things without physical substance

Division into tangible and intangible things in Roman legal sources

- *res corporales* and *res incorporales*



Roman law and the materiality of the object of property

Roman law – res corporales

German civil code

The perception of Roman law by modern experts in civil law – „*limitation of thing as an object of property to material objects is a result of the impact made by the Roman law*”.

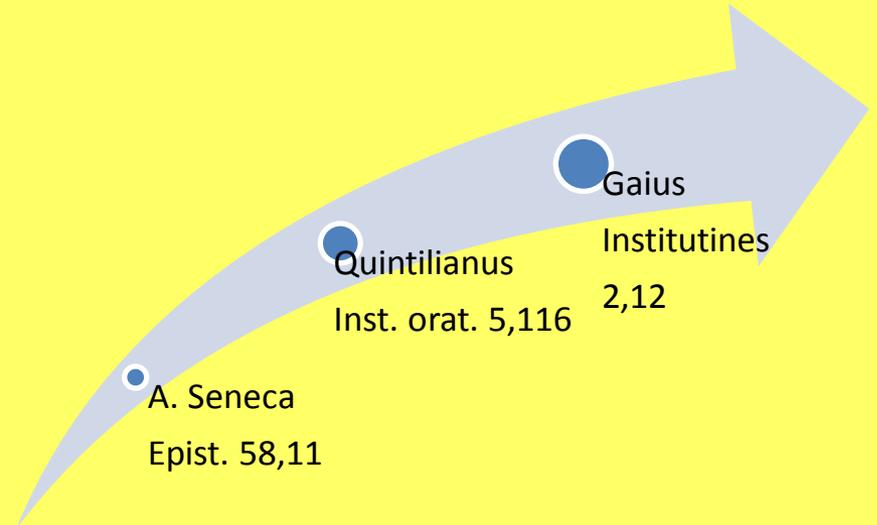
Fundamental questions

-
- - how important was the theoretical distinction of the materiality quality in the ancient Roman law for the idea of property ?
- - what were the basic results of the division into res corporales and incorporales in the ius commune for the forming of fundamental notions of property law as bien in France or Sache in Germany and for development of dogmatic ideas of what may constitute the object of property ?

The meaning of division into res corporales and incorporales in the ancient Roman law

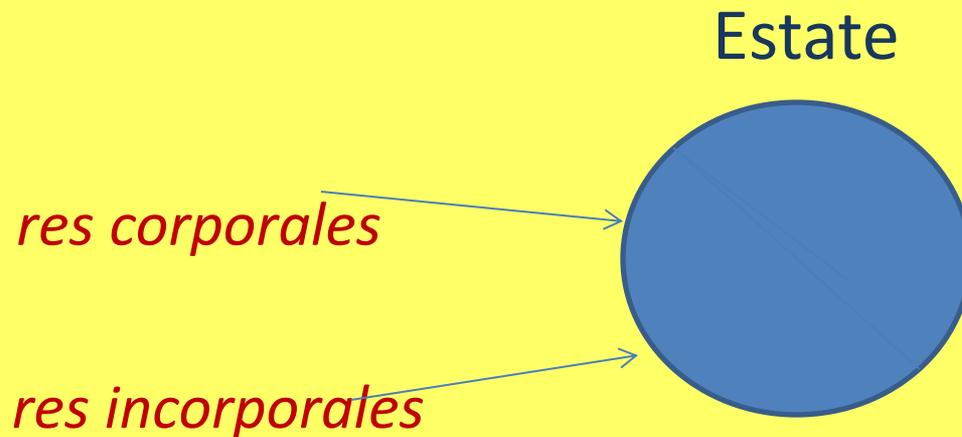
- A. Seneca (Epist. 58,11)

- *Quod est*
 - » *Corporalis*
 - » *Incorporalis*



The meaning of division into *res corporales* and *res incorporales* in the ancient Roman law

G. 1,12 – 14

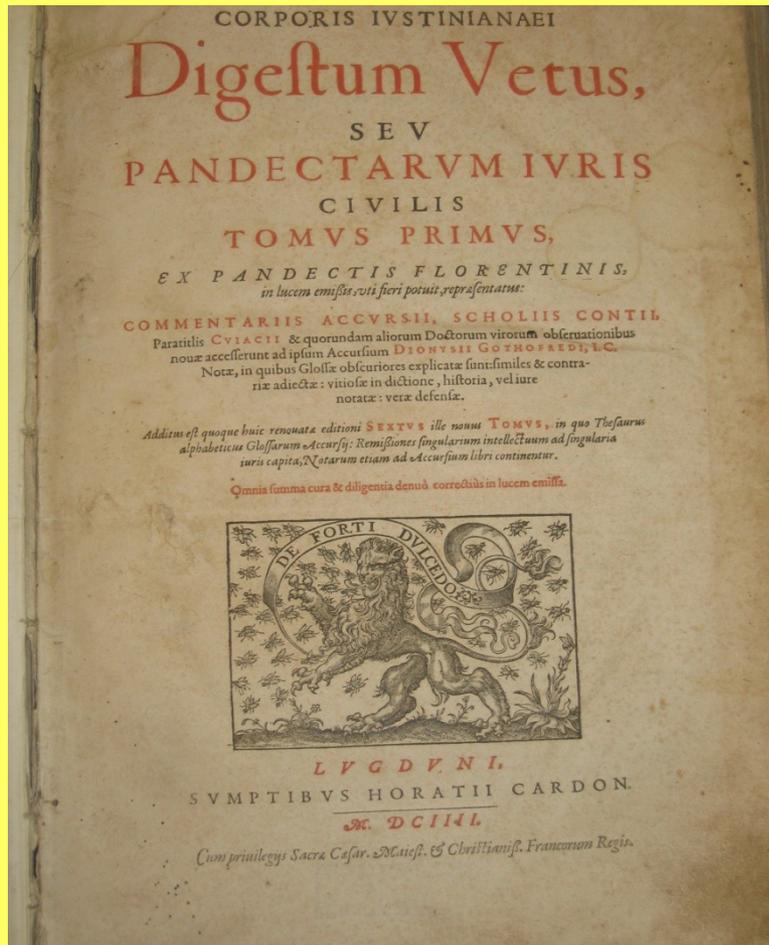


The meaning of division into *res corporales* and *incorporales* in the ancient Roman law

- Pomponius , libro 30 *Ad Sabinum* (D.41,3,30pr.)
- ***Corpus*** as the object of property
- - *uno spiritu*
- - *quod ex contingentibus*
- - *quod ex distantibus constat*



The issue of relation between res corporales and incorporales



The
opposition
model

Coordination
Model

The issue of relation between *res corporales* and *incorporales* – opposition model

Gl. ad D.1,8,1,1 <*nam*> the purpose of this conjunction is to stress the difference between *res incorporales* (right to use) and *res corporales* (material objects that can be gained, e.g. fruits)

French legal humanism (16th century) – an idea of the „unreality” of *res incorporales*

German pandectistic and interpretation of BGB (19th-20th centuries) - the notion of *res corporales* as legitimization the limitation of objects of property to material objects.

The issue of relation between *res corporales* and *incorporales* - coordination model

The principle actio iudicatur mobilis vel immobilis secundum rei que in ea continetur (14th century, Batolus de Saxoferrato, *Commentaria. Infortiatum*, k. 23).

The rejection of the uniform approach to *res incorporales* (16th century, H. Donellus, *Commentariorum iuris civilis*, lib. V, cap. 1)

The idea of a dynamic nature of bien and chose (20th century, M. Planiol, *Traite elementire de droit civil*, t. 1)

The issue of relation between res corporales and incorporales - coordination model



A precise definition of the object of property

The idea of property as a legal control of material objects (F. K. Savigny, System des heutigen Roemischen Rechts, t. 1)

The doubts of pandectistic jurists concernig strict limitation object of property to material objects.

The definition of thing (Sache) in 90 BGB

The Roman division into *res corporales* and *incorporales* and the criticism of a strict limitation of property to material objects

1.

- Idea of reinterpretation of *res incorporales* in context of „new rights” such as copyright (E. I. Bekker)

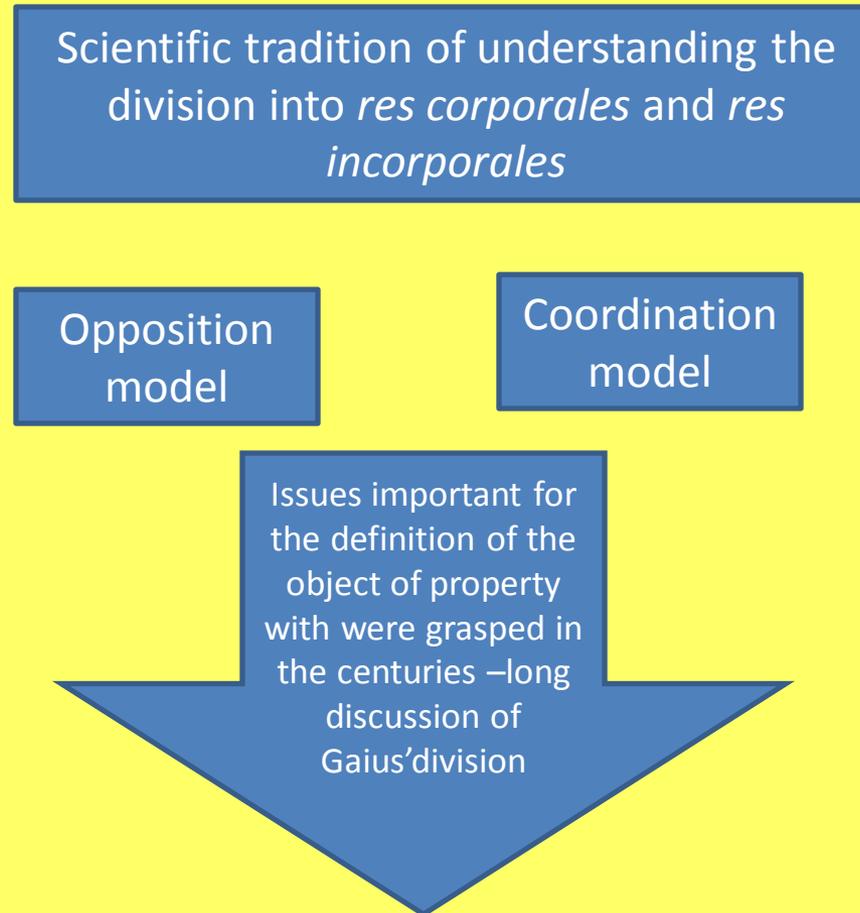
2.

- Problems concerned legal nature of electric current and software

3.

- Criticism of pandectistic vision „systems nature” of the division into *res corporales* and *incorporales*

The Roman law tradition as an inspiration for a discussion on the boundaries of the object of property



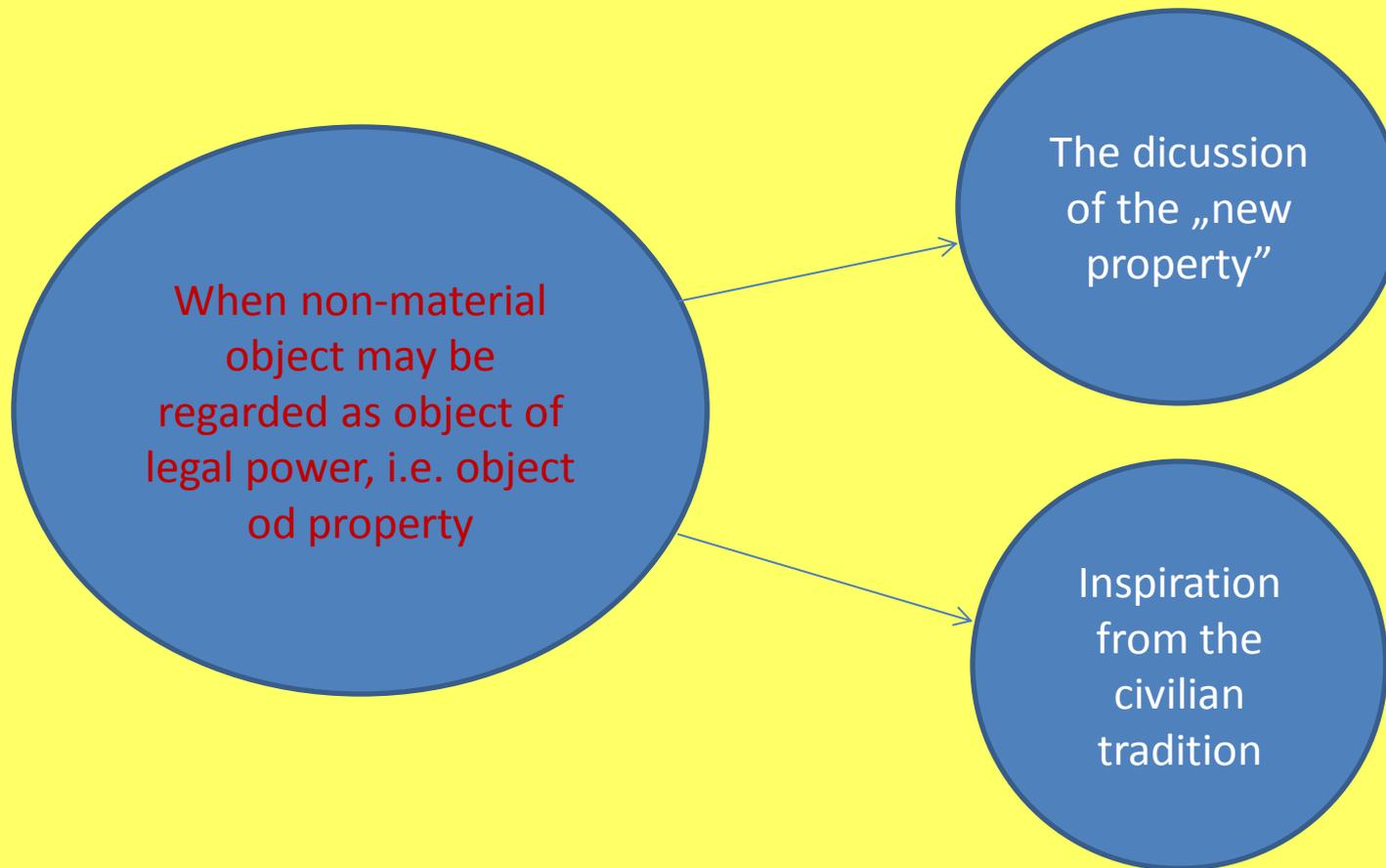
The Roman law tradition as an inspiration for a discussion on the boundaries of the object of property

- Vital issues important for the definition of the object of property which were grasped in the centuries-long discussion of division into *res corporales* and *incorporales*:
 - - question of the uniform approach to *res incorporales* (H. Donellus);
 - - dynamic character the notion of thing (M. Planiol)
 - - erroneous application of the division into *res corporales* and *res incorporales* in the pandectistic debate dedicated to the system of private law

The Roman law tradition as an inspiration for a discussion on the boundaries of the object of property

- The historic and comparative reflection on the division into *res corporales* and *res incorporales* inspires to hypothesise that also non – material objects should be regarded as the object of legal power, i.e. object of property

The Roman law tradition as an inspiration for a discussion on the boundaries of the object of property



The Roman law tradition as an inspiration for a discussion on the boundaries of the object of property

- D.41,3,30,pr. (Pomponius, libro 30 *ad Sabinum*)

Rerum mixtura facta an usucapionem cuiusque praecedentem quaeritur. Tria autem genera sunt corporum; quod continetur uno spiritu (...) ut homo, tignum, lapis (...), alterum, quod ex contingentibus, hoc est pluribus inter se cohaerentibus constat, (...); ut aedificium, navis (...) tertium, quod ex distantibus constat, ut corpora plura non soluta, sed uni nomini subiecta veluti populus, legio, grex (...).

- D.41,3,30pr. – 1. Pomponius, *On Sabinus, Book XXX*.
- It is asked whether a mixture of different things interrupts the usucaption which has begun to run with reference to each of them. There are three kinds of things which can be divided; first, those which are included in a substance of the same nature, (...), as a slave, a piece of timber, a stone, and other property of this kind. Second, things which are joined by contact, that is to say, which have coherence, and are connected, as a house, a ship, a cupboard. Third, such as are formed of distinct objects, as different bodies which are not united but are included under a single appellation, for instance, a people, a legion, a flock. (...)

The Roman law tradition as an inspiration for a discussion on the boundaries of the object of property

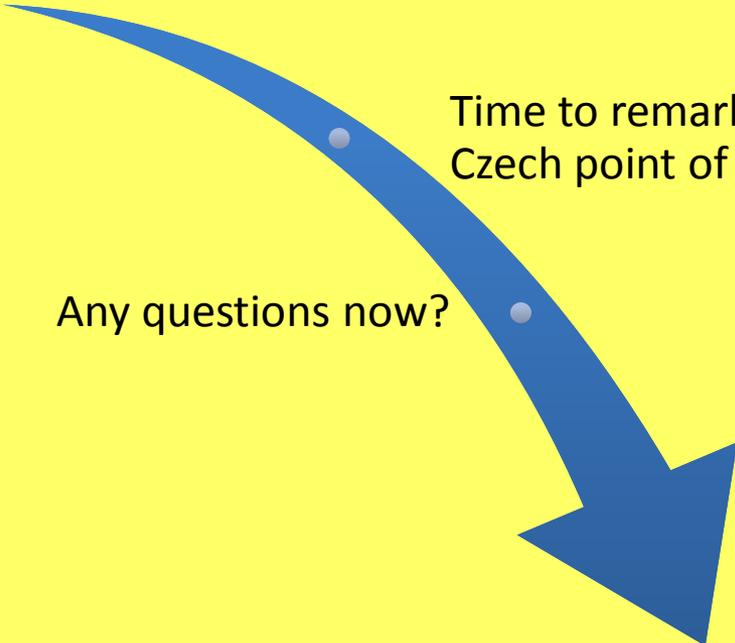
- D.41,3,30,pr. – 1 (Pomponius, libro 30 *ad Sabinum*)

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- - the object may be individualised
- - its individualisation can be put to practical use;
- - its individualisation is in accordance with the law and good customs.

The end

Thank you for the
attention



Time to remarks from the
Czech point of view

Any questions now?

Further questions:
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