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'RES CORPORALES' AND 'RES INCORPORALES'. ROMAN FOUNDATION AND CURRENT DEVELOPMENT OF A BIPARTITION[***]

ABSTRACT. *The article aims to critically reconstruct the dichotomy res corporales-res incorporales from Gai 2.12-14. In particular, attention is focused on the historical origin of the distinction and the discretional criterion underlying it, on the comparison between this distinction and the further distinction relative to res mancipi-res nec mancipi, and, finally, on the developments that the conceptual pair finds in the main modern codifications.*

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1. The centrality of Gai 2.12-14

It is well known that the legal studies conducted over the centuries on the distinction between *res corporales* and *res incorporales* adopted Gai 2.12-14[1] as a starting point. The fragment is also found in the Justinian compilation in Gai. 2 *inst*. D. 1.8.1.1 and I. 2.2.2[2], as well as in Ep. Gai. 2.1.2-3, Paul. Sent. 3.6.11 and Tit. Ulp. 19.11 and 15[3]. These latter cases, however, show some more marked textual variants. In addition,

[1] Gai 2.12: *Quaedam praeterea res corporales sunt, quaedam incorporales.* 13. *<Corporales> hae, quae tangi possunt, velut fundus homo vestis aurum argentum et denique aliae res innumerabiles.* 14. *Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae iure consistunt, sicut hereditas ususfructus obligationes quoquo modo contractae. nec ad rem per<tinet, quod in hereditate res corporales con>tinentur, et fructus qui ex fundo percipiuntur, corporales sunt, et quod ex aliqua obligatione nobis debetur, id plerumque corporale est, veluti fundus homo pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. eodem numero sunt iura praediorum urbanorum et rusticorum. ... ius altius tollendi aedes (?) et officiendi luminibus vicini aediumaut non extollendi, ne luminibus vicini officiatur. item fluminum et stilicidiorum idem ius ... ius aquae ducendae. haec iura praediorum (?) tam urbanorum quam rusticorum servitutes vocantur.*

[2] Gai. 2. *inst*. D. 1.8.1.1: *Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales hae sunt, quae tangi possunt, veluti fundus homo vestis aurum argentum et denique aliae res innumerabiles: incorporales sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt, sicut hereditas, usus fructus, obligationes quoquo modo contractae. Nec ad rem pertinet, quod in hereditate res corporales continentur: nam et fructus, qui ex fundo percipiuntur, corporales sunt, et id quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus homo pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. Eodem numero sunt et iura praediorum urbanorum et rusticorum, quae etiam servitutes vocantur*; I. 2.2.2: *Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales eae sunt quae sui natura tangi possunt: veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles. Incorporales autem sunt quae tangi non possunt. qualia sunt ea quae in iure consistunt: sicut hereditas, usus fructus, obligationes quoquo modo contractae. nec ad rem pertinet quod in hereditate res corporales continentur: nam et fructus qui ex fundo percipiuntur corporales sunt, et id quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus, homo, pecunia: nam ipsum ius hereditatis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. Eodem numero sunt iura praediorum urbanorum et rusticorum, quae et servitutes vocantur.*

[3] Ep. Gai. 2.1.2: *Praeterea quaedam res corporales sunt, quaedam incorporales. Corporals sunt, quae mani tangi possunt: velut ager, mancipium, vestis, aurum, argentum, et his similia. Incorporales sunt quae tangi non possunt, qualia sunt ea, quae non in corpore, sed in iure consistunt, sicut hereditas et obligationes de diuresis contractibus scriptae. Et licet hereditas vel emptio aut diversi contractus res corporals in se habeant, ius tamen ipsius hereditatis vel emptionis aliorumque contractuum incorporale est.* 3. *Incorporalia etiam sunt iura praediorum urbanorum vel rusticorum. Praediorum urbanorum iura sunt stillicidia, fenestrae, cloacae, altius arigendae domus aut non erigendae, et luminum, ut ita quis fabricet, ut uicinae domui lumen non tollat. Praediorum vero rusticorum iura sun tuia, vel iter, per quod pecus aut animalia debeant ambulare vel ad aquam duci, et aquaeductus: quae similiter incorporalia sunt. Haec iura, tam rusticorum quam urbanorum praediorum, sevuitutes appellantur*; Paul. Sent. 3.6.11: *Sinendi modo tam corporales res quam quae in iure consistunt legari possunt: et ideo debitori id quod debet recte legatur*; Tit. Ulp. 19.11: *In iure cedi res etiam*

some references are scattered in the Gaian institutions (Gai. 2.17; 2.19; 2.28; 2.38; 3.83; 3.85; 4.3)[4], in the Digest (Ulp. 19 *ad ed.* D. 10.3.4 pr.; Iav. 4 *ex Plaut.* D. 12.6.46; Maec. 2 *fideicomm.* D. 32.1.95; Ven. 10 *act.* D. 34.4.32 pr.; Gai. 7 *ad ed. prov.* D. 41.1.43.1; Gai. 4 *ad ed. prov.* D. 41.3.9; Ulp. 3 *de off. cons.* D. 42.1.15.9) and in C. 7.33.12.4 (*Imp. Iustinianus A. Iohanni pp.* a. 531)[5].

incorporales possunt, velut usufructus et hereditatis et tutela legitima libertae; 19.15: *Res autem corporales, quasi singulae in iure cessae essent, transeunt ad eum, cui cessa est hereditas.*

[4] Gai 2.17: *Sed item fere omnia, quae incorporalia sunt, nec mancipi sunt, exceptis servitutibus praediorum rusticorum; nam eas mancipi esse constat, quamvis sint ex numero rerum incorporalium*; 2.19: *Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem*; 2.28: *Res incorporales traditionem non recipere manifestum est*; 2.38: *Obligationes quoquo modo contractae nihil eorum recipiunt: nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo, quibus res corporales ad alium transferuntur, id efficere possum; sed opus est, ut iubente me tu ab eo stipuleris; quae res efficit, ut a me liberetur et incipiat tibi teneri. quae dicitur novatio obligationis*; 3.83: *Etenim cum pater familias se in adoptionem dedit mulierve in manum convenit, omnes eius res incorporales et corporales, quaeque ei debitae sunt, patri adoptivo coemptionatorive adquiruntur exceptis his, quae per capitis deminutionem pereunt, quales sunt usufructus, operarum obligatio libertorum, quae per iusiurandum contracta est, et lites contestatae legitimo iudicio*; 3.85: *Item si legitimam hereditatem heres, antequam cernat aut pro herede gerat, alii in iure cedat, pleno iure fit ille heres, cui cessa est hereditas, proinde ac si ipse per legem ad hereditatem uocaretur; quod si postea quam heres extiterit, cesserit, adhuc heres manet et ob id creditoribus ipse tenebitur; sed res corporales transferet, proinde ac si singulas in iure cessisset, debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt*; 4.3: *In rem actio est, cum aut corporalem rem intendimus nostram esse aut ius aliquod nobis conpetere, velut utendi aut utendi fruendi, eundi, agendi aquamve ducendi vel altius tollendi prospiciendive, aut cum actio ex diverso adversario est negativa.*

[5] Ulp. 19 *ad ed.* D. 10.3.4 pr.: *Per hoc iudicium corporalium rerum fit divisio, quarum rerum dominium habemus, non etiam hereditatis*; Iav. 4 *ex Plaut.* D. 12.6.46: *Qui heredis nomine legata non debita ex nummis ipsius heredis solvit, ipse quidem repetere non potest: sed si ignorante herede nummos eius tradidit, dominus, ait, eos recte vindicabit. eadem causa rerum corporalium est*; Maec. 2 *fideicomm.* D. 32.95: *'quisquis mihi heres erit, damnas esto dare fideique eius committo, uti det, quantas summas dictavero dedero'. Aristo res quoque corporales contineri ait, ut praedia mancipia vestem argentum, quia et hoc verbum 'quantas' non ad numeratam dumtaxat pecuniam referri ex dotis relegatione et stipulationibus emptae hereditatis apparet et 'summae' appellatio similiter accipi deberet, ut in his argumentis quae relata essent ostenditur. voluntatem praeterea defuncti, quae maxime in fideicommissis valeret, ei sententiae suffragari: neque enim post eam praefationem adiecturum testatorem fuisse res corporales, si dumtaxat pecuniam numeratam praestari voluisset*; Ven. 10 *act.* D. 34.4.32 pr.: *Detrahere legatis vel adicere, si nihil praeter pecuniam numeratam legatum sit, promptum est: cum vero res corporales intervenient, et scriptura difficilior fit et obscura portio*; Gai. 7 *ad ed. prov.* D. 41.1.43.1: *Incorporales res traditionem et usucapionem non recipere manifestum est*; Gai. 4 *ad ed. prov.* D. 41.3.9: *Usucapionem recipiunt maxime res corporales, exceptis rebus sacris, sanctis, publicis populi romani et civitatium, item liberis hominibus*; Ulp. 3 *de off. cons.* D. 42.1.15.9: *Sed utrum confessum nomen tantum capi possit an etiam si neget quis se debere, videamus. Et magis est, ut id dumtaxat capiatur, quod confitetur: ceterum si negetur, aequissimum erit discedi a nomine, nisi forte quis exemplum secutus corporalium pignerum ultra processerit dixeritque ipsos debere iudices de nomine cognoscere, ut cognoscunt de proprietate: sed contra rescriptum est*; C. 7.33.12.4 (*Imp. Iustinianus A. Iohanni pp.* a. 531): *Eodem observando et si res non soli sint, sed incorporales, quae in iure consistunt, veluti usus fructus et ceterae servitutes.* Moreover, the expression

This overview suggests that we should think of these multiple sources as branches of a core one, namely Gai 2.12-14. The statement concerning the significance of these passages with regards to the origin of the reflection on the 'things' in question, has to be deepened further.

To assert that the Gaian fragments ideally constitute the origin of any research on the subject is not to deny the existence of any elaboration of the distinction between *res corporales* and *res incorporales* prior to the Gaian manual, be it in a purely philosophical or even legal sense (albeit at an embryonic level), as will be seen below[6]. More simply, it is intended to highlight how the division in question is the first to soar to a juridical nature in ancient Rome, as emphasized by a large number of authors[7].

corpus is, in some cases, contrasted with *ius* (Ulp. 15 *ad ed.* D. 5.3.18.2; Ulp. 39 *ad ed.* D. 37.1.3 pr.; Ulp. 53 *ad ed.* D. 39.2.13.1; Ulp. 53 *ad ed.* D. 39.3.8; Pomp. 33 *ad Sab*. D. 39.5.9 pr.; Ulp. 71 *ad ed.* D. 43.26.2.3; Ulp. 75 *ad ed.* D. 44.2.7 pr.; Paul. 2 *inst*. D. 44.7.3 pr.), in others to money (Iav. 4 *ex Plaut*. D. 12.6.46; Maec. 2 *fideicomm*. D. 32.95).

[6] See *infra*, § 3.

[7] See entry '*Res*', in *Vocabularium Iurisprudentiae Romanae*, vol. V, Berlin, 1939, pp. 100 ff.; entry *'Res'*, in *Oxford Latin Dictonary*, edited by P.W. Glare, Oxford, rist. 2005, pp. 1625 ff.; O. Stobbe, *Handbuch des Deutschen Privatrechts*, vol. I, Berlin, 1885, p. 520; E.I. Bekker, *System des heutigen Pandektenrechts,* vol. I, Weimar, 1886 (ref. Aalen, 1979), p. 288; Id, *Allerlei von den dinglichen Rechten insbesondere von den Rechten an eigner Sache*, in «Zeitschrift für die vergleichende Rechtswissenschaft», II, 1890; p. 20; F. Regelsberger, *Pandekten*, vol. I, Leipzig, 1893, pp. 359, pp. 366 f.; B. Windscheid, *Lehrbuch des Pandektenrechts*, vol. III[9], Frankfurt am Main, 1906, § 137; C. Fadda - P.E. Bensa, *Note al secondo libro di* B. Windscheid, *Diritto delle Pandette*, vol. IV, Torino, 1926, pp. 183 ff.; V. Scialoja, *Teoria della proprietà nel diritto romano*, vol. I, Roma, 1933, pp. 21 ff.; G. Pugliese, *'Actio' e diritto subiettivo*, Milano, 1939; M. Villey, *L'idée du droit subjectif et les systèmes juridiques romains*, in «Revue historique de droit français et étranger», XXIV-XXV, 1946-1947, pp. 209 ff.; H. Pflüger, *Über körperliche und unkörperliche Sachen*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXV, 1947, pp. 339 ff.; R. Monier, *La date d'apparition du 'dominium' et de la distinction juridique des 'res' en 'corporales' et 'incorporales'*, in *Studi in onore di S. Solazzi nell'anniversario del suo insegnamento*, Napoli, 1948, pp. 357 ff.; H. Kreller, *'Res' als Zentralbegriff des Institutionensystem*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXVI, 1948, pp. 572 ff.; B. Albanese, *La successione ereditaria nell'antico diritto romano*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», XX, 1949, pp. 356 ff.; G. Pugliese, '*Res corporales', 'res incorporales' e il problema del diritto soggettivo*, in «Rivista italiana per le scienze giuridiche», V, 1951, pp. 237 ff., now in *Scritti giuridici scelti*, Napoli, 1985, pp. 225 ff.; B. Biondi, *I beni*, in *Trattato di diritto civile italiano*, a cura di F. Vassalli, vol. IV.1, Torino, 1953, pp. 21 ff.; Id., entry *Cosa corporale ed incorporale (dir. rom.)*, in *Novissimo digesto italiano*, vol. IV, Torino, 1959, pp. 1014 ff.; F. Wieacker, *Griechische Würzeln der Institutionensystems*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXX, 1953, pp. 103 ff.; G. Astuti, entry *Cosa* (*dir. rom. e interm*.), in *Enciclopedia del diritto*, vol. XI, Milano, 1962, pp. 5 ff.; G. Grosso, *La distinzione tra 'res corporales' e 'res incorporales' e il secondo capo della 'lex Aquilia'*, in *Synteleia. Vincenzo Arangio-Ruiz*, a cura di A.

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As for the scope of the bipartition in Roman law, there has been no shortage of voices claiming that it had a mere educational function. This can be presumed by the lack of evidence showing that each of the two *species* of *res* created a distinct legal regime applied in practice. In addition, it can be inferred from the reticence of Roman jurists of the advanced classical age to resort to such distinction[8].

However, this assumption is worthy of reconsideration in light of multiple arguments. The Gaian categories represent «uno strumento di architettura giuridica, per dare armonia al discorso»[9] on the subject of *res*, which is especially meaningful for the understanding of the Gaian institutional tripartition of *ius* into *personae*, *res* and *actiones.* Under the tripartition, property, limited real rights, inheritance, and obligations are notoriously considered *res incorporales*. It is then undeniable that focusing on these categories amounts to «l'operazione più lineare compiuta nell'ambito della giurisprudenza romana, per organizzare in una visione d'insieme l'intera disciplina dell'appropriazione e dello scambio»[10], «in vista della soluzione di concreti problemi di regime giuridico»[11].

Afferrare l'inafferrabile. I giuristi e il diritto della nuova economia industriale fra Otto e Novecento, a cura di A. Sciumé ed E. Fusar Poli, Milano, 2013, pp. 71 ff.; Id., *'Res incorporales', 'objetos corporales', 'objetos inmateriales'. Nota sull'itinerario moderno di un concetto antico*, in «Roma e America», XXXVII, 2016, pp. 171 ff.; E. Stolfi, *Per una genealogia della soggettività giuridica: tra pensiero romano ed elaborazioni moderne*, in *Pensiero giuridico occidentale e giuristi romani. Eredità e genealogie*, a cura di P. Bonin, N. Hakim, F. Nasti e A. Schiavone, Torino, 2019, pp. 59 ff.; P. Polito, *Some Considerations on the Relationship between 'res incorporales' and 'Immaterialgüterrechte'*, in *Messages from Antiquity. Roman Law and Current Legal Debates*, edited by U. Babusiaux and M. Igini, Köln, 2019, pp. 33 ff.; G. Turelli, *Modello sistematico e sensibilità storica in Dalmacio Vélez Sársfield*, in *Europa e America Latina. Due continenti, un solo diritto. Unità e specificità del sistema giuridico latinoamericano*, vol. I, a cura di A. Saccoccio e S. Cacace, Torino-Valencia, 2020, pp. 119 ff.; R. Cardilli, *Fondamento romano dei diritti odierni*, Torino, 2021, pp. 265 ff.

[8] See among others, Burdese, *'Res incorporalis'*, cit., p. 109; Id., *Manuale di diritto privato romano*, Torino, 1993 (rep. 2010), p. 168, in the footsteps of Orestano, *Il problema*, cit., p. 174; more generally, on the Gaian system, M. Fuhrmann, *Das systematische Lehrbuch. Ein Beitrag zur Geschichte der Wissenschaften in der Antike*, Göttingen, 1960, pp. 104 ff. and nt. 4 for further bibliographical references; W. Flume, *Die Bewertung der Institutionen des Gaius*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXXIX, 1962, pp. 22 ff.

[9] In these terms Turelli, *'Res incorporales' e beni immateriali*, cit., pp. 1 ff.

[10] In this sense, see Brutti, *Il diritto*, cit., p. 260.

[11] Thus Burdese, '*Res incorporalis',* cit., pp. 98 ff., especially p. 98.

2. The textual reconstruction and interpretation of Gai 2.12-14

In light of the above, it is time to read Gai 2.12: *Quaedam praeterea res corporales sunt, quaedam incorporales.* 13. *<Corporales> hae, quae tangi possunt, velut fundus homo vestis aurum argentum et denique aliae res innumerabiles.* 14. *Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae iure consistunt, sicut hereditas ususfructus obligationes quoquo modo contractae. nec ad rem per<tinet, quod in hereditate res corporales con>tinentur, et fructus qui ex fundo percipiuntur, corporales sunt, et quod ex aliqua obligatione nobis debetur, id plerumque corporale est, veluti fundus homo pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. eodem numero sunt iura praediorum urbanorum et rusticorum ... ius altius tollendi aedes (?) et officiendi luminibus vicini aediumaut non extollendi, ne luminibus vicini officiatur. item fluminum et stilicidiorum idem ius ... ius aquae ducendae. haec iura praediorum (?) tam urbanorum quam rusticorum servitutes vocantur*.

The first task is to identify the textual formulation of Gai 2.14[12], which wavers between two reconstructive hypotheses.

On the one hand, there is the text from the Veronese palimpsest, *quae iure consistunt*, in which, according to Studemund, there is no possibility to read the preposition *in* between *quae* and *iure*[13]. On the other hand, the integration of *in* is justified by other commentators[14] on the basis of the already mentioned Gai. 2 *inst.* D. 1.8.1.1, Ep. Gai. 2.1.2, Paul. Sent. 3.6.11 and C. 7.33.12.4 (*Imp. Iustinianus A. Iohanni*

[12] On the state of the manuscript and the additions commonly accepted by the publisher, see the in-depth outline by Nicosia, *Ea quae iure consistunt*, cit., pp. 822 ff., where an extensive bibliography is provided.

[13] G. Studemund, *Apographum,* Lipsiae, 1874 (rep. Osnabrück, 1965), p. 56, r. 20; Id, *Supplementa*, in P. Krüger, *Collectio librorum iuris anteiustiniani in usum scholarum*, vol. I[4], Berolini, 1899, p. XXVII; sharing the *lectio* Polenaar, Gneist, Dubois, Mispoulet, Kniep, Girard, De Zulueta and Reinach; for further discussion, see Nicosia, *Ea quae iure consistunt*, cit., p. 824.

[14] These are Huschke, Kübler and Bizoukides, taken from M. David, H.L.W. Nelson, *'Gai Institutionum commentarii quattuor'. Text und Kommentar*, Leiden, 1960, p. 240. In support of the integration in recent decades, see Bretone, *I fondamenti*, cit., p. 143, nt. 51; Tondo, *Appunti*, cit., p. 635, nt. 27; Falcone, *Osservazioni*, cit., pp. 129 f.; Stolfi, *Per una genealogia*, cit., p. 75.

pp. a. 531, reporting the syntagma *in iure*)[15].

What might seem to be, at a first glance, a marginal problem of *restitutio textus*, is instead far from negligible and is preliminary to any conceptual and systematic in-depth study of the subject[16].

Schematically, we can observe how opposites strands of thought have been grafted onto each *lectio*, even though there are interpretative paths that deviate from them in terms of conclusions, albeit starting from a reconstruction of the source common to the main trail from which they branched[17].

The first path, still followed by most scholars, is the one traced by Orestano in favour of the construction *quae iure consistunt*. According to this view, it cannot be excluded that the insertion of *in* was the work of the post-classics and Justinianes[18] following their interpretation of the Gaian original, according to which the *res incorporales* would identify with 'legal relations'[19] or with 'rights'[20]. By adopting an objective perspective, Orestano interprets the fragment in the sense that the *res incorporales* find their foundation in the *ius*, representing «un *quid* che ha esistenza per il diritto e nel diritto: *iure*»[21].

There is no doubt that these arguments, both in the palimpsest and in later

[15] See *supra*, ntt. 3 and 5.

[16] As Orestano, *Il problema*, cit., p. 152: «può apparire una sottigliezza ed invece vi è una differenza profondissima»; recently, Falcone, *Osservazioni,* cit., p. 129, emphasised the importance of the issue.

[17] These are Grosso, *Problemi sistematici*, cit., p. 41, nt. 3; C. Möller, *Die Servituten*, Göttingen, 2010, p. 228. Both, while starting from the reconstruction *quae in iure consistunt*, substantially recover Orestano's position in the sense that the *res incorporales* find their foundation in *ius.*

[18] Orestano, *Il problema*, cit., pp. 151 f.; taken up by Nicosia, *Ea quae in iure consistunt*, cit., pp. 831 f.; Id, *Iuris consultorum acutae ineptiae*, in *Studi in onore di R. Martini*, vol. II, Milano, 2009, p. 892 nt. 78; notes also in Id., *Quasi pretii loco*, in «Iura», LX, 2012, p. 11, nt. 20.

[19] I quote Scialoja, *Teoria*, vol. I, cit., p. 24.

[20] Thus V.-Al. Georgescu, *Études de philologie juridique et de droit romain*, vol. I, *Les rapports de la philologie classique et du droit romain*, Bucarest-Paris, 1940, p. 82 and nt. 3; Pugliese, *'Res corporales'*, cit., pp. 247 f.

[21] Orestano, *Il problema,* cit., p. 152; in an adhesive sense, among more recent authors, see Cursi, *'Res incorporales'*, cit., 181 and nt. 36; A. Guzman Brito, *El carácter dialéctico del sistema de las 'Institutiones' de Gayo*, in *Estudios de Derecho romano en homenaje al prof. Dr. d. Francisco Samper: con ocasión de su jubilación en la Pontificia Universidad Católica de Chile*, coordinado por P.-I. Carvajal Ramirez, Santiago (Chile), 2007, p. 449; Brutti, *Il diritto*, cit., p. 260; Turelli, *'Res incorporales' e 'beni immateriali'*, cit., pp. 2 ff.; Cardilli, *Fondamento,* cit., pp. 274 ff.

evidences, are articulate, thorough and elegant[22]. This is further buttressed by the recent support manifested by those who adhere to the opposite view and who herald the authenticity of the syntagma *in iure consistunt.*

However, it appears more prudent to stick to the dictate of the manuscript, also in light of the fact that, despite the apparently convincing motivations behind the aforementioned integration, one is forced to relegate them into the realm of conjecture, in the absence of any conclusive data.

Behind such a *lectio* there seems to lurk a pitfall that is anything but negligible. This is the risk of leaning towards in the identification of '*res incorporales*' with 'rights', as a reflection of the reinterpretation of the terms in a subjectivist key. Such an interpretation would flatten the terms in a way that reflects the modern Leibnizian dichotomy *subiectum-obiectum* (analogous to Hobbes' almost contemporary attestations), in which the former is the sole holder of legal situations and is able to influence the surrounding reality thanks to its own *voluntas*, no longer subject to the dictates of the *ius*[23]. Indeed, some have seen in the *res incorporales* the *tout court*

[22] He considers unlikely both the hypothesis that a plurality of subjects, operating autonomously and in different places and times, had felt the need for an amendment that reflected their post-classical and Justinian conception, and that there was a connection between the Digest sources and a single reworking of the Gaian manual, which would have been the first to accept the amendment in question Falcone, *Osservazioni*, cit., p. 133. In favour of the genuineness of the addition, according to the author, Pomp. 29 *ad Sab.* D. 43.26.15.3: *Precario habere etiam ea quae in iure consistunt possumus, ut immissa vel protecta*, a passage considered genuine and classical. In an adhesive sense, see Stolfi, *Per una genealogia*, cit., p. 75.

[23] G.W. Leibniz, *Nova methodus discendae docendaeque jurisprudentiae*, II.10, in *Variorum opuscula*, Pisis, 1799, p. 195; for bibliography, see Id., *Il nuovo metodo di apprendere ed insegnare la giurisprudenza. In base ai principi dell'arte didattica premessi nella parte generale, e alla luce dell'esperienza*, saggio introduttivo, introduzione e note di C.M. de Iuliis, Milano, 2012, pp. 64 ff. and nt. 92. There are many quotations attesting to Leibniz's knowledge of Hobbesian thought, reported by R. Palaia, *Unità metodologica e molteplicità disciplinare nella 'Nova Methodus discendae docendaeque iurisprudentiae'*, in *Unità e molteplicità del pensiero filosofico e scientifico di Leibniz. Simposio internazionale (Roma, 3-5 ottobre 1996)*, a cura di A. Lamarra e R. Palaia, Firenze, 2000, p. 150; I. Birocchi, *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*, Torino, 2002, p. 215; S. Ciurlia, *Diritto, Giustizia, Stato. Leibniz e la rifondazione etica della politica*, Lecce, 2005, pp. 38 ff. Also significant is the essay by T. Ascarelli, *Hobbes and Leibniz and legal dogmatics*, in T. Hobbes, G.W. Leibniz, *Testi per la storia del pensiero giuridico*, Milano, 1960; on which see G. Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, 1976, p. 134, nt. 98; M. Grondona, *Storia, comparazione e studio del diritto: Tullio Ascarelli, 'Hobbes e Leibniz e la dogmatica giuridica'. Un esercizio di lettura*, in *Diritto: storia e comparazione. Nuovi propositi per un binomio antico*, a cura di M. Brutti e A. Somma, Frankfurt am Main, 2018, pp. 219 ff. About the impact of Leibnizian construction on the interpretation

equivalent of modern subjective rights[24]. Such a reconstruction is fruit of the advent of the 'Copernican revolution' brought about by natural law and clashes with the objective reading of *ius.* Such an objective reading is suggested here by the context[25], given that the Roman conception is more apt to contemplate *divisiones rerum* in which «è la cosa stessa che esprime la sua natura come tale riconosciuta e tutelata dal diritto degli uomini»[26]. At the same time, one can detect significant inconsistencies with the Roman conceptual framework, which places *personae* and *res* on the same level, as centers of legal relations[27].

A different way of overcoming both the problem of textual reconstruction and the opposition between subjective and objective perspective that result of the Pandectistic influence could leverage on the etymology of *res*, for some closely connected to *reor* (think)[28]. Thus, *ab origine*, *res* would have been *incorporalis*, or rather conceived as an intangible entity, created by the mind, and relevant for the legal thought.

Having fixed these points, we can then proceed to a translation of the passage

of Roman sources, see Stolfi, *Per una genealogia*, cit., pp. 63 ff.; Cursi, *'Res incorporales'*, cit., p. 183; R. Fiori, *La definizione della 'locatio conductio'. Giurisprudenza romana e tradizione romanistica*, Napoli, 1999, pp. 331 ff., where extensive bibliography; Id., *Il problema dell'oggetto del contratto nella tradizione civilistica*, in *Modelli teorici e metodologici del diritto privato. Obbligazioni e diritti reali*, Napoli, 2003, pp. 203 ff.

[24] Kreller, *'Res'*, cit., pp. 583 f., whose thesis has remained a *unicum* in the doctrinal landscape. For an in-depth examination of the different positions on the long-standing issue of subjective rights, see Stolfi, *Riflessioni*, cit., pp. 132 ff. and ntt. 41, 42, where extensive bibliographical references; previously, *ex multis*, see O. Robleda, *El derecho subjetivo in Gayo*, in *Studi in onore di G. Scherillo*, vol. I, Milano, 1972, pp. 7 ff.; B. Albanese, *Appunti su alcuni aspetti della storia del diritto soggettivo*, in *Scritti in onore di A.C. Jemolo*, vol. IV, Milano, 1963, pp. 1 ff.; Pugliese, *'Actio'*, cit., pp. 37 ff., pp. 71 ff.; C. Gioffredi, *Osservazioni sul problema del diritto soggettivo nel diritto romano*, in «Bullettino dell'Istituto di Diritto Romano», LX, 1957, pp. 227 ff.

[25] It should be pointed out that, in the perspective adopted here, *ius* presents two 'indistinct souls', i.e. the subjective and the objective, identifiable from time to time by the context: on the subject, cf. paradigmatically A. D'Ors, *Aspectos objectivos y subjectivos de 'ius'*, in *Studi in memoria di E. Albertario,* vol. II, Milano, 1953, pp. 277 ff.; R. Santoro, *Potere ed azione nell'antico diritto romano*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», XXX, 1967, pp. 457 ff.; B. Albanese, *Premesse allo studio del diritto privato romano*, Palermo, 1978, pp. 76 ff.; C. Pelloso, *Studi sul furto nell'antichità mediterranea*, Padova, 2008, pp. 164 ff.; Id., *Il concetto di 'actio' alla luce della struttura primitiva del vincolo obbligatorio*, in *'Actio in rem' e 'actio in personam'. In memoria di M. Talamanca*, a cura di L. Garofalo, vol. II, Padova, 2011, pp. 130 ff. and nt. 1.

[26] Thus Cardilli, *Fondamento,* cit., p. 268.

[27] In this sense, Orestano, *Il problema,* cit., pp. 105 ff.; followed by Cursi, *'Res incorporales'*, cit., p. 184.

[28] Ae. Forcellini, *Totius Latinitatis Lexicon,* vol. III, Patavii, 1805, entry *Res*, p. 730.

in the following terms: secondly, some things are corporal, others incorporeal. Corporal (things) can be touched, such as the land, the slave, the garment, gold, silver, and in short, many other innumerable objects. Incorporeal (things) are those that cannot be touched, such as those that can be found in law, such as inheritance, usufruct, obligations in any way contracted. It is not relevant that corporal things are contained in the inheritance, that the fruits which are received from the land are corporal, or that what is owed because of some obligation is in most cases a corporal thing, such as a property, a human being, money. This is because the 'right' of inheritance is incorporeal, and the 'right' of usufruct, as well as the 'right' of obligation, is incorporeal. The same class of things includes urban and rustic servitudes[29].

3. The historical origin of the classification and the discretionary criterion

As anticipated, the antithesis between *res corporales* and *res incorporales*, as well as the discretional criterion chosen in it, is not as ancient «quanto la sua applicazione»[30].

The Gaian scheme is centred, to a first approximation, on the dichotomy between corporality or tangibility and incorporeality or intangibility. More precisely, the conceptual assumptions on which it is based are influenced by conceptions that find their origins in Greek philosophical thought – in particular Aristotelian and Stoic – and, subsequently, Roman[31]. In this sense, the reference to works on grammar[32],

[29] I reproduce, subject to some minor modifications, the translation proposed by CARDILLI, *Fondamento*, cit., p. 273.

[30] Cf. V. SCIALOJA, *Teoria*, vol. I, cit., p. 21.

[31] On this point see P. BONFANTE, *Corso di diritto romano*, vol. II, *La proprietà*, Milano, 1926, pp. 8 f.; SCIALOJA, *Teoria*, vol. I, cit., pp. 22 f.; GEORGESCU, *Études*, vol. I, cit., pp. 77 ff.; W. FLUME, *Die Bewertung der Institutionen des Gaius*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXXIX, 1962, pp. 25 f.; ORESTANO, *Il problema,* cit, pp. 145 ff.; ZAMORANI, *Gaio*, cit., pp. 363 f.; GROSSO, *Problemi*, cit., pp. 47 ff.; F. BONA, *Il coordinamento*, cit., pp. 420 ff.; G. PUGLIESE, *Dalle 'res incorporales' del diritto romano ai beni immateriali di alcuni sistemi giuridici odi odieri*, in «Rivista trimestrale di diritto e procedura civile», XXXVI, 1982, p. 1138, ntt. 1 and 2; A. GUZMAN BRITO, *Las cosas incorporales en la doctrina y en el derecho positivo*, Barcelona-Buenos Aires-México D.F.-Santiago de Chile, 1995, pp. 19 ff.; BRETONE, *I fondamenti*, cit., pp. 169 ff., pp. 182 ff.; More recently, see BRUTTI, *Il diritto*, cit., p. 260; CURSI, *'Res incorporales'*, cit., p. 181, nt. 37; STOLFI, *Riflessioni,* cit., pp. 132, nt. 38 and 136 f.; CARDILLI, *Fondamento*, cit., pp. 273 f. Claims the autonomy of the elaboration of Roman jurispru-

rhetoric[33] and dialectics[34], which can be traced back to an age not very distant from Gaius, is significant. This interpretation is countered by those who believe that both the distinction in question and the distinctive criterion contained therein were adopted for the first time, in their purely technical-legal meaning, by Gaius[35].

On closer inspection, with regard to the development of the classification *res*

dential thought MONIER, *La date*, cit., pp. 360 ff. In a doubtful sense, see recently FALCONE, *La definizione*, cit., p. 94, according to whom «quanto alla bipartizione interna alle *res*, alcuni dati testuali mostrano senz'altro che, nel periodo tra fine della repubblica e primo Principato, in ambiente giurisprudenziale come nella cultura retorica e filosofica un'attenzione per il profilo dell'incorporeità di determinate entità era ben radicata: ma nessuno di tali riscontri consente conclusioni circa la preesistenza o meno a Gaio della specifica classificazione '*res corporales-res incorporales*'».

[32] Charis. *Ars gramm*., II, 193, 14 ff. V. BONA, *Il coordinamento*, cit., p. 421, nt. 31 ff. More recently FALCONE, *Osservazioni*, cit., pp. 131 ff. On the incidence of grammatical theories see J. STROUX, *Die griechischen Einflüsse auf die Entwicklung der römische Rechtswissenschaft*, in *Atti del Congresso internazionale di diritto romano (Bologna-Roma 17-27 aprile). Milano*, vol. I, Pavia, 1934, pp. 111 ff., now in *Römische Rechtswissenschaft und Rhetorik*, Potsdam, 1949, pp. 81 ff.; F. WIEACKER, *Griechische Wurzeln des Institutionensystems*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXX, 1953, pp. 106 ff.; M. KASER, *Gaius*, cit., pp. 138, 142; H.J. METTE, '*Ius civile in artem redactum*', Göttingen, 1954, p. 22, nt. 4.

[33] Cic. *top*. 5.26-27, on which see *infra* and Quint. *inst*. 5.10.116: *Tum secundo gradu, non potuisse donari a victore ius, quia id demum sit eius quod teneat: ius, quod sit incorporale, adprendi manu non posse.*

[34] Sen. *ep.* 6.6.11: *Etiamnunc est aliquid superius quam corpus. Dicimus enim quaedam corporalia esse, quaedam incorporalia. Quid ergo erit, ex quo haec deducantur? illud, cui nomen modo parum proprium inposuimus quod est'. Sic enim in species secabitur, ut dicamus: 'quod est' aut corporale est aut incorporale.* 12. *Hoc ergo est genus primum et antiquissimum et, ut ita dicam, generale … Illud genus 'quod est' generale, supra se nihil habet; initium rerum est; omnia sub illo sunt. …* 14. *'Quod est' in has species divido, ut sint corporalia aut incorporalia nihil tertium est.* It only needs to be added that the recalled testimony (as well as that of Carisio's source, cf. *supra*, nt. 26) moves on a terrain extraneous to legal experience, so that its scope should be reduced.

[35] PUGLIESE, *'Res corporales'*, cit., p. 247; ID., *Dalle 'res incorporales'*, cit., pp. 1138 f.; KASER, *Gaius und die Klassiker*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXX, 1953, pp. 127 ff., especially 142 ff.; ZAMORANI, *Gaio*, cit., pp. 362 ff., especially p. 364, nt. 15, where he points out that the work «presenta forti legami con la persona di Gaio». On this last aspect recently see BALDUS, *I concetti*, cit., pp. 46 ff. and previously, among others, ROBBE, *Osservazioni*, cit., pp. 111 ff. On the relationship between the Gaian systematics and the expository model of the Sabinian school recently see STOLFI, *Riflessioni*, cit., p. 138, nt. 57. Regarding methodologies in the drafting of the Gaian manual, with specific reference to the use of expository schemes only with regard to legal institutions, see F. WIEACKER, *Über das Verhältnis der römischen Fachjurisprudenz zur griechisch-hellenistischen Theorie*, in «Iura», XX, 1969, pp. 463 ff.; BONA, *Il coordinamento*, cit., p. 413, nt. 13. More generally on the autonomy of the Gaian text from the thought of others summarises the debate M. MIGLIETTA, *'Servus dolo occisu'. Contributo allo studio del concorso tra 'actio legis Aquiliae' e 'iudicium ex lege cornelia de sicariis'*, Napoli, 2001, p. 14, nt. 23, as well as, more recently, the contributions in *Le istituzioni di Gaio: avventure di un 'bestseller'. Trasmissione, uso e trasformazione del testo*, a cura di U. Babusiaux e D. Mantovani, Pavia, 2020.

corporales-res incorporales, it must be said that there was no unity of view within the Greek schools of philosophy[36], especially with regard to the index through which corporal reality could be identified. Very briefly, the concept of tangibility proper to Aristotelian philosophy is linked to a peculiar idea of *corpus*, according to which what can be perceived through the senses is only a bodily thing. Differently, things that cannot be touched but only conceived with the intellect are incorporeal[37]. On the other hand, according to the current of Stoicism, everything that produces an effect is *corpus*, «così che la voce sarebbe corporale perché produce effetto sull'apparato uditivo»[38].

The distinction in question – with regard to which the Aristotelian conception seems to have been preferred by Roman thought as opposed to the Stoic one – was first accepted by the Latin rhetorical and philosophical reflection and later adopted, with some adjustments, by Roman jurists.

Traces of categorisation can first be found in Cicero[39], albeit expressed in a different way. I refer to Cic. *top*. 5.26: *Definitionum autem due genera prima: unum earum rerum quae sunt, alterum eorum quae intelleguntur*. 27. *Esse ea dico, quae cerni tangi que possunt, ut fundum aedes, parietem stillicidium, mancipium pecudem, supellectilem penus et cetera; quo ex genere quaedam interdum vobis definienda sunt. Non esse rursus ea dico, quae tangi demonstrari ve non possunt, cerni tamen animo atque intellegi possunt, ut si usus capionem, si tutelam, si gentem, si agnationem definias, quarum rerum nullum subest [quasi] corpus, est tamen quaedam conformatio insignita et inpressa*

[36] On this point, see also H. Göppert, *Ueber einheitliche, zusammengesetzte und gesamt-Sachen nach römischen Recht*, Halle, 1871 (rep. Roma, 1970); P. Sokolowski, *Die Philosohie im Privatrecht, Sachbegriff und Körper in der klassichen Jurisprudenz und der modernen Gesetzgebung*, vol. I, Halle, 1902, pp. 43 f. With specific reference to the different approaches to the distinction in Greek and Latin philosophy see especially Scialoja, *Teoria*, vol. I, cit., pp. 22 ff. With reference to the sources, in addition to those indicated specifically for each philosophical current, see also Arist. *phys* 4.7; Agost. *civit*. *Dei* 8.6; Lact. *inst. div.* 7.12; Tert. *hermog*. 35; *anim*. 5; *carne Chr*. 2; *Marc*. 4.8.

[37] Arist. *anima* 2.11; 3.12; *Phys*. 4.

[38] Thus, the recent re-edition of Grosso, *Corso*, cit., p. 11; Dio. Laer. *phil*. 7.1.140 ff.; Sext. Emp. *corp*. 3.

[39] It is only worth pointing out that, in the past, the earliest example in Roman thought was thought to be some verses by Lucretius in *rer. nat.* 1.303-305: *quae tamen omnia corporea constare necessest / natura, quoniam sensus inpellere possunt; / tangere enim et tangi, nisi corpus, nulla potest res.* On this point, see. Georgescu, *Études*, vol. I, cit., p. 78; Monier, *La date*, cit., pp. 360 f.; G. Franciosi, *'Usucapio pro herede'. Contributo allo studio dell'antica 'hereditas'*, Napoli, 1965, p. 37, nt. 89; Orestano, *Il problema*, cit., p. 146, nt. 79.

intellegentia, quam notionem voco[40].

This is a distinction that the Arpinate also applies to law. In this sense, it can be noted that the usucapion – unlike in the legal texts where it does not appear – is identified as an example of *res incorporalis*. This is because it is a thing that cannot be perceived with the senses, but only through the intellect. As far as *res corporales* are concerned, the exemplification of the *stillicidium* is striking. The latter, according to Roman jurists, fell among the *res incorporalis* as a servitude – understood here as the material fact of the fall of water. But the distinction above is also relevant in its more general philosophical scope: according to Cicero, the *res incorporales* are the concepts of the human mind that do not have an objective existence, while *res corporales* are the things *quae cerni et tangi possunt*. In other words, those that have objective existence.

Having dealt with the contours of the relationship between the Greek and Roman philosophical conceptions, some authors believe that the concepts underlying the adoption of the distinction in question in Roman jurisprudence[41] indicate a process of dematerialization of the *res incorporales* that are traceable in the Festus' voice of

[40] On the passage see B. Albanese, *La successione ereditaria in diritto romano antico*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», XX, 1949, pp. 364 ff. More recently Zamorani, *Gaio*, cit., p. 299; Bretone, *I fondamenti*, cit., pp. 170 f.; Id., *Il diritto invisibile. Concetti e metafore nel 'Sistema' di Savigny*, in «Materiali per una storia della cultura giuridica», XXXIV, 2004, p. 23 and nt. 11; Nicosia, *Ea quae iure consistunt*, cit., pp. 828 f. On the subject, see also Cic. *top*. 5.29, as well as Boeth. *in Top. Cic.* 50.3: *Omnia enim quae definiuntur aut corporalia sunt aut incorporalia. Ea vero, quae corporalia sunt, esse dicit; quae incorporalia non esse*.

[41] Monier, *La date*, cit., pp. 357 ff.; Villey, *L'idée*, cit., pp. 209 ff.; Id. - M. Villet, *Les origines de la notion de droit subjectif*, in «Revue historique de droit français et étranger», XXIV, 1946-1947, pp. 221 ff.; Pugliese, *'Res corporales'*, cit, pp. 225 ff.; P.E. Sokolowski, *Die Philosophie im Privatrecht*, vol. I, Aalen, 1959, pp. 41 ff.; G. Segrè, *Corso di diritto romano: le cose, la proprietà e gli altri diritti reali (Anno Accademico 1926-27)*, Torino, 1927, pp. 204 ff.; Stroux, *Die griechischen Einflüsse*, cit, pp. 94 ff.; G. Grosso, *Appunti sulle distinzioni delle cose nelle Istituzioni di Gaio*, in *Studi di storia e diritto in onore di E. Besta per il XL anno del suo insegnamento*, Milano, 1939, pp. 35 ff.; Georgescu, *Études*, vol. I, cit., pp. 77 ff.; K. Kagan, *'Res corporalis' and 'res incorporalis'. A Comparison of Roman and English Law of interest for life*, in «Tulane Law Review», XX, 1945-1946, pp. 98 ff. and XXI, 1946-1947, pp. 74 ff.; Kaser, *Gaius*, cit., pp. 127 ff.; Flume, *Die Bewertung*, cit., pp. 25 f. There are those who have traced the use of the dichotomy in question, which includes the trichotomy of *ius quod ad personas, ad res, ad actiones pertinent*, to a typically Roman legal experience of pontifical origin. In this sense see O. Karlowa, *Römische Rechtgeschte*, vol. I, Leipzig, 1885, p. 725; F.X. Affolter, *Das römische Institutionen-System: sein Wesen und seine Geschichte*, Heidelberg, 1897, pp. 2 ff. They consider instead that the classification penetrated Roman jurisprudence before Gaius, already from the end of the republic or the beginning of the principate, V. Arangio-Ruiz, *Istituzioni di diritto romano*[14], Napoli, 1960, pp. 162 f.; Pugliese, *'Res corporales'*, cit., p. 247; Id., *Dalle 'res incorporales'*, cit., pp. 1138 f.; Robbe, *La 'successio'*, cit., pp. 39, 46, 85 f.; Id., *Osservazioni,* cit., p. 118; Bona, *Il coordinamento*, cit., p. 428, nt. 46.

possessio: *Possessio est, ut definit Gallus Aelius, usus quidam agri aut aedificii, non ipse fundus aut ager. Non enim possessio est <ex iis> rebus quae tangi possunt neque qui dicit se possidere <is suam rem> potest dicere* rell., contained, as known, in the work *de verborum quae ad ius civile pertinent significatione*[42]. In this context, between the end of the 2nd and the beginning of the 1st century BC, Elio Gallo, when specifying the legal meaning of *possessio*, speaks of *res quae tangi (non) possunt*, and possession, which defined in terms of the *usus* of the fund, distinguishes itself from the fund (unlike the Gaian approach, in which, as is well known, the quiritarian dominion of the fund coincides with the fund itself, i.e. the *res* is considered as one with the right of ownership over the *res* itself)[43].

Additional evidence of such discussion, albeit with suspicions of interpolation, was found in Paul. 15 *ad Sab*. D. 8.1.14 pr.: *Servitutes praediorum rusticorum etiamsi corporibus accedunt, incorporales tamen sunt et ideo usu non capiuntur: vel ideo quia etc.*[44]. With respect to this, it is possible to point out that Paulus «ben potrebbe aver derivato la nozione di incorporalità dei *iura* e la correlativa distinzione delle *res* o dallo stesso substrato culturale, per cui la nozione è trafilata in Gaio o, immediatamente, dallo stesso patrimonio di scuola che altri possono aver recepito da Gaio ed anonimamente trasmesso»[45].

Further reference to the binomy corporality-incorporeality is believed to be found in an Ulpian passage, contained in Ulp. 39 *ad ed.* D. 37.1.3.1: *Hereditatis autem bonorumve possessio, ut Labeo scribit, non uti rerum possessio accipienda est: est enim iuris*

[42] The text reproduced here is that of Lindsay, 260. Cf. Voci, *Diritto*, vol. I², cit., p. 160; Orestano, *Il problema*, cit., p. 145. More recently, see Cursi, *'Res incorporales'*, cit., p. 181 and nt. 38; on the work of Elio Gallo, G. Falcone, *Per una datazione del 'De verborum, quae ad ius pertinent, significatione' di Elio Gallo*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», XLI, 1991, pp. 242 ff.

[43] On testimony and, more generally, on the relations between *possessio* and *res incorporales* see G. Nicosia, '*Possessio e res incorporales*', in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», LVI, 2013, pp. 275 ff.

[44] Voci, *Diritto*, vol. I², cit., p. 161; Orestano, *Il problema*, cit., p. 148 and nt. 84. On the passage see F. Schulz, *Sabinus-Fragmente in Ulpians Sabinus-Commentar*, Halle, 1906, p. 95., now in «Labeo», X, 1964, p. 272.

[45] Bona, *Il coordinamento*, cit., p. 427. It is only appropriate to point out that the doctrine compares the affirmation of the conception of servitudes as *res incorporales* with the enactment of the *lex Scribonia* on which recently see G. D'Angelo, *Sulla 'lex Scribonia de usucapione servitutum'*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», LVI, 2013, pp. 9 ff.

magis quam corporis possessio. Denique etsi nihil corporale est in hereditate, attamen recte eius bonorum possessionem adgnitam Labeo ait. Here, while pointing out that *hereditas* (and *bonorum possessio*) is a *ius* and not a *corpus*, Ulpianus quotes Labeo, who lived between the end of the first century BC and the beginning of the first century AD.

Finally, with regards to evidence dating back to the mid-2nd century AD, in addition to the fundamental fragment of Gai 2.12-14, it is also worth mentioning Pomp. 29 *ad Sab*. D. 43.26.15.2: *Precario habere etiam ea quae in iure consistunt possumus, ut immissa vel protecta*. In this fragment, Pomponius uses the expression *ea quae in iure consistent* to specify a new scope of application of the precarious concession. The expression could, to a certain extent, be considered consolidated, i.e. «già acquisita al sapere giurisprudenziale»[46].

4. The most notorious among the absentees: property

The Gaian classification, in particular the concept of *res incorporales*, «stabilisce una connessione teorica tra nozioni»[47] [establ]. The connection is sometimes implicit – such as that of property –, other times «distanti – per esempio quelle di obbligazione e di servitù, –, oppure tra nozioni che si incrociano nell'uso pratico, così l'*hereditas* può comprendere le obbligazioni»[48]. It is a matter of taking a closer look at the scope of the distinction with reference to the broader theme of *res* as dealt with in the Gaian manual, thus the repercussions of the distinction from different points of view, i.e. in relation to property (absent from the aforementioned list), to the further fundamental partition between *res mancipi* and *res nec mancipi* and, in connection with the latter, to the treatment of the modes of transfer of *dominium* (where *traditio*, as we shall see, is excluded for any *res corporalis*).

The translation of the Gaian witness contained in Gai 2.12-14 is central to the

[46] In this sense see Falcone, *La definizione,* cit., p. 95, nt. 122.

[47] Brutti, *Il diritto*, cit., p. 261.

[48] *Ibid.*, p. 261.

study of the distinction in question and gives us an open-ended and non-exhaustive list[49] of 'things' in which the *res incorporales* are identified with patrimonial legal relations, in the sense of elements of patrimony[50].

A first peculiarity characterizing Gaius' treatment of the *res incorporales* concerns the lack of reference to property, that is «il più importante dei rapporti patrimoniali»[51]. In this regard, it seems difficult to think that Gaius set it aside out of forgetfulness[52]. According to a widespread opinion, the Antonine jurist would have preferred to structure his dissertation by identifying the *dominium* with the bodily thing that constitutes its object, thereby omitting to include the *dominium* itself in the list of incorporeal things[53]. This perspective has been considered by most as the expression of

[49] See P. Greco, entry *Beni immateriali*, in *Novissimo digesto italiano*, vol. II, Torino, 1958, p. 358; Voci, *Diritto*, vol. I[2], cit., pp. 160 f.; Bretone, *I fondamenti*, cit., pp. 144 f.; F. Gallo, *Recensione* a Bretone, *I fondamenti*, cit., p. 137 and 144, where he recalls the absence of *dominium* from *res incorporales* to conjecture that the list in question also included the *lites contestatae legitimo iudicio* and the *ius adgnationis*. To the contrary, M. Villey, *Le 'ius in re' du droit romain classique au droit moderne*, in *Conférences faites à l'Institut de Droit Romain en 1947*, Paris, 1950, pp. 187 ff. On Villey's reflections, see N. Rampazzo, *Diritto soggettivo e 'ius' nella visione di Michel Villey*, in «Revue internationale des droits de l'antiquité», LIV, 2007, pp. 379 ff., as well as M. Miceli, *L'aktionenrechtliches Denken' dei giuristi romani e le forme dell'appartenenza*, in *'Actio in rem' e 'actio in personam'. In ricordo di M. Talamanca*, a cura di L. Garofalo, vol. I, Padova, 2011, in particular pp. 116 ff.

[50] V. Grosso, *Problemi*, cit., p. 51; Burdese, *Considerazioni*, cit., pp. 23 ff. On closer inspection, there are those who consider that the notion of *res incorporalis* extends beyond patrimonial relationships, thus also to personal and procedural ones. On this point, recently see Stolfi, *Riflessioni*, cit., p. 136, ntt. 52 ff. See also G. Grosso, *Corso*, cit., p. 12, nt. 17; F. Gallo, *Recensione* a Bretone, *I fondamenti*, cit., in «Iura», XLIX, 1998 (publ. 2002), p. 137.

[51] Grosso, *Corso*, cit., p. 12.

[52] This is certainly not the context in which to address the relevance of the issue within the Roman legal experience. In general terms, see Scialoja, *Teoria*, vol. I, cit., pp. 260 ff.; L. Capogrossi Colognesi, *La struttura della proprietà e la formazione dei 'iura praediorum' nell'età repubblicana*, vol. I, Milano, 1969, pp. 349 ff.; Id., entry *Proprietà* (*dir. rom.*), in *Enciclopedia del diritto*, vol. XXXVII, Milano, 1988, pp. 160 ff. More recently, among many, T. dalla Massara, *Antichi modelli e nuove prospettive del diritto dominicale*, in «Contratto e impresa/Europa», 2010, pp. 724 ff.; Id, *Il paradigma proprietario nell'ordine frattalico delle fonti*, in *Studi in onore di M. Pedrazza Gorlero*, vol. I, *I diritti fondamentali tra concetti e tutele*, Napoli, 2014, pp. 161 ff.; P. Grossi, *La proprietà e le proprietà nell'officina dello storico*, Napoli, 2016; C.A. Cannata, S. Roncati, *Materiali per lo studio dei diritti reali*, Torino, 2021, pp. 47 ff.; M. Miceli - L. Solidoro, *In tema di proprietà: il modello romano nella tradizione giuridica*, Torino, 2021.

[53] Cf. Affolter, *Das römische Institutionen-System*, cit., pp. 374 ff.; P. Girard, *Manuel élémentaire de droit romain*[7], Paris, 1924, p. 264; Bonfante, *Corso*, vol. II, cit., p. 9; E. Betti, *Istituzioni di diritto romano*, vol. I, Padova, 1942, p. 354; Biondi, entry *Cosa corporale*, cit., p. 1014; Grosso, *Problemi*, cit., p. 43; Gioffredi, *Aspetti*, cit., p. 252; Pugliese, *Dalle 'res incorporales'*, cit., pp. 1139 ff.; Gallo, *Recensione* a Bretone, *I fondamenti*, cit., p. 138; Voci,

a typical Roman mindset, which concerns the way of conceiving the development of *dominium* in an economic-patrimonial sense. More in detail, the distinctive trait of the Roman mentality would be none other than that of understanding «la proprietà, per il suo carattere di signoria generale e assoluta sulla cosa, che investe questa nel complesso delle sue utilizzazioni»[54], therefore identifying property «colla cosa stessa nella destinazione di questa all'assoggettamento e sfruttamento da parte dell'uomo»[55].
Departing from this reading, Falcone has recently reinforced the idea that «la mancanza della proprietà dall'elenco delle *res quae in iure consistunt* e l'implicita assunzione delle *res corporales* quali cose in proprietà si spiegano partendo non da una generale rappresentazione (romana) della proprietà, bensì dalle specifiche scelte sistematiche gaiane»[56]. Systemic indications in support of such an interpretation can be found on the repeated use of the lemma *proprietas* in Gai 2.30 and Gai 2.33[57], which, alone, could refute what has been stated above. Secondly, indications can be found in the reference to the modes of transfer of *dominium* over the *res*. As we shall see, these are centred on the distinction between *res corporales* and *res incorporales*, which in turn is related to the further categorisation between *res mancipi* and *res nec mancipi*[58]. In short, the inclusion of property among *res incorporales* would have created a 'short circuit' in the system, determined by the fact that the transfer of *dominium* over *res nec mancipi* occurred by *traditio* and the latter was, however, incompatible with a *res incorporalis*[59].

Diritto, vol. I², cit., p. 162. More recently, see Brutti, *Il diritto*, cit., 262; Romeo, *L'appartenenza*, cit., pp. 72 ff.; Cursi, *'Res incorporales'*, cit., p. 182 and nt. 40; Falcone, *Osservazioni*, cit., pp. 162 ff.; Stolfi, *Per una genealogia,* cit., p. 77.

[54] Thus Grosso, *Corso*, cit., p. 12.

[55] *Ibid*. Falcone, *Osservazioni*, cit., p. 164, ntt. 99 and 100, who considers that there are some objections against the very underlying assumption of this allegedly typically Roman perception of property.

[56] Falcone, *Osservazioni*, cit., p. 164.

[57] Gai 2.30: *Ususfructus in iure cessionem tantum recepit. Nam dominus proprietatis alii usufructum in iure cedere potest, ut ille usumfructum habeat et ipse nudam proprietatem retineat. Ipse usufructuarius in iure cedendo domino proprietatis usumfructum efficit, ut a se discedat et conuertatur in proprietatem; alii uero in iure cedendo nihilo minus ius suum retinet; creditur enim ea cession nihil agi*; 2.33: *Quod autem diximus usumfructum in iure cessionem tantum recipere, non est temere dictum, quamuis etiam per mancipationem constitui possit eo, quod in mancipanda proprietate detrahi potest; non enim ipse ususfructus, apud alium proprietas sit.*

[58] On these aspects, see *infra*, § 5.

[59] In this sense see Stolfi, *Riflessioni*, cit., p. 142; Falcone, *Osservazioni*, cit., p. 165.

5. The relevance of the distinction in relation to the further partition between 'res mancipi' and 'res nec mancipi' and, in connection, to the modes of property transfer

In the second book of the *Institutiones* devoted to the *res*, Gaius proceeds with various classifications of things[60]. Within the sphere of *res privatae* and alongside the partition relating to *res corporales* and *incorporales*, he includes the further partition between *res mancipi* and *res nec mancipi*[61].

The Gaian dissertation about *res corporals - res incorporales* covers a strong systematic value and a broader scope than that which could be attributed to it at first glance. On the one hand, the *divisio* at stake is intertwined with the further partition between *res mancipi* and *res nec mancipi* (Gai 2.17)[62]. On the other hand, and in connection to what was said above, it constitutes the starting point for the treatment of the modes of property transfer. Reflecting on the effects that the qualification in comment may thus allow us to clarify not only the scope and meaning of the conceptual binomy *res corporales-res incorporales* (both notions and of the criterion on which the distinction is based, including the connections that can be traced with the modern and contemporary development of the categories[63]), but also the regime of circulation of the various *res* anchored to it.

With regard to the first aspect – i.e. the distinction between *res mancipi* and *res nec mancipi* – Gaius turns to *res mancipi* and *res nec mancipi* (Gai 2.14 ff.; I. 1.120)[64] after listing the *res incorporales* (*hereditas*, usufruct, *obligationes*, prior servitudes). In a nutshell, *res mancipi* were the land on Italic soil, slaves, draught and pack animals, and

[60] L. Lantella, E. Stolfi, M. Deganello, *Operazioni elementari di discorso e sapere giuridico*, rist. Torino, 2005, especially pp. 143 ff., where they speak of «classificazioni a due livelli».

[61] On this partition, see *infra*, § 5.

[62] Gai 2.17: *Item fere omnia quae incorporalia sunt, nec mancipi sunt, exceptis servuitutibus praediorum rusticorum; name as mancipi esse constat, quamuis sint ex numero rerum incorporalium.*

[63] On this point, see *infra*.

[64] Gai 2.14 ff.; Gai 1.120: *Eo modo serviles et liberae personae mancipantur; animalia quoque quae mancipi sunt, quo in numero habentur boves, equi, muli, asini; item praedia tam urbana quam rustica quae et ipsa mancipi sunt, quali sunt Italica, eodem modo solent mancipari.*

the servitudes on rustic land; all other *res* were *nec mancipi*.

It is apparent how, even in this categorisation of *res*, there is a mixture of things and rights, that is to say between *corpora* and *iura*. Legal doctrine that attempted to justify this questioned the possibility of adopting the same explanation offered for the similar problem regarding the distinction between *res corporales* and *incorporales*. This is, as already pointed out[65], the involvement in them of only patrimonial elements, in contrast with property, materialised in the thing[66]. In other words, the question has been raised as to whether the ownership of Italic land, slaves, draught animals and pack animals, and rustic servitudes can be considered *res mancipi*. On the contrary, whether the ownership of other corporal things, such as urban servitudes, and in general of all *res incorporales* except rustic servitudes can be considered *res nec mancipi*.

On closer inspection, this arrangement does not correspond to the thinking of the Romans and does not appear to correctly reflect the sources. It seems reasonable to believe that the mixture of things and servitude rights, found within the category of *res mancipi*, had a historical reason. This relates to the development over time of rustic servitudes, which were first understood in terms of *res corporales* and were later included in the field of application of the *mancipatio* as *res mancipi* (unlike the other servitudes considered as *iura*). In essence, Gaius would have constructed the distinction between *res mancipi* and *res nec mancipi* for reasons of 'system harmony'. According to his view, certain *res incorporales* would fall under the *res nec mancipi* while all *res corporales* would fall under the *res mancipi*. What follows is that the category of *res mancipi* would end up including not only corporal things but also *iura praediorum rusticorum.* This is also evident in the treatment of the modes of transfer of *res*, where the incidence of the distinction between *res mancipi* and *res nec mancipi* «esplica fondamentalmente nel

[65] See *supra*, § 4.

[66] On the relationship between the distinctions see Grosso, *Appunti*, cit., pp. 45 ff.; Id., *Corso*, cit., pp. 65 ff.; S. Solazzi, *Glosse a Gaio. II*, in *Per il XIV centenario delle Pandette e del Codice di Giustiniano*, Pavia, 1934, pp. 331 ff., now in *Scritti di diritto romano*, vol. VI, Napoli, 1972, pp. 299 ff.; G. Segrè, *Se i fondi provinciali fossero 'res nec mancipi'*, in «Atti della Regia Accademia delle Scienze di Torino», LXXII, 1936-1937, pp. 84 ff., now in *Dalla radice pandettistica alla maturità romanistica. Scritti di diritto romano*, a cura di N. Scapini e con una prefazione di G. Grosso, Torino, 1974, pp. 577 ff.; F. Gallo, *Studi sulla distinzione tra 'res mancipi' e 'res nec mancipi'*, Torino, 1958, pp. 150 ff., edita nuovamente, con una nota di lettura di F. Zuccotti, in «Rivista di diritto romano», IV, 2004, pp. 1 ff.

modo di trasferimento della proprietà, in cui appunto avviene quello scambio tra cosa e diritto, che dà materia al parallelo tra *res corporales* e *res incorporales*»[67].

With specific reference to the second aspect – the application of the distinction in relation to the modes of transfer of *dominium* – Gaius specifies that *res mancipi* and *nec mancipi* also differ from each other in the ways property is transferred over them (Gai 2.18)[68].

More precisely, the *traditio* was used to transfer ownership of a *res nec mancipi*. On the other hand, for the *res mancipi*, *mancipatio* or *in iure cessio* was necessary (Gai 2.19-22)[69]. The Antonine jurist then returns to the *res incorporales* to specify the type of transaction that could be used in relation to the individual category in question. He points out the inapplicability of the *traditio* to all *res incorporales*, due to the fact that the latter could not be touched and could not be the object of material delivery[70]; the applicability of *in iure cessio* to urban servitudes and of *mancipatio* to rustic ones; the applicability of *in iure cessio* to usufruct (in the case of provincial funds, also of *pactiones et stipulationes*) and *hereditas*. Lastly, with regard to *obligationes*, Gaius specifies that none of the three mentioned modes of property transfer was applicable, so that if one wanted to transfer the ownership of a claim it was necessary to sign a *stipulatio* between the debtor and the third party (*obligationis novatio*) (Gai 2.28-39)[71].

[67] Thus Grosso, *Corso*, cit., p. 66.

[68] Gai 2.18: *Magna autem differentia est inter mancipi res et nec mancipi.* On the coordination between the distinctions see Grosso, *Appunti*, cit., pp. 45 ff.; G. Scherillo, *Lezioni di diritto romano. Le cose*, Milano, 1945, pp. 11 ff.; Gallo, *Studi*, cit., pp. 235 ff.; G. Franciosi, *Studi sulle servitù prediali*, Napoli, 1967, pp. 62 ff.; Zamorani, *Gaio*, cit., pp. 364 ff. Fundamental on this point is the work of Bona, *Il coordinamento*, cit., pp. 409 ff.; Robbe, *La 'successio'*, cit., p. 47, nt. 37; Id., *Osservazioni*, cit., pp. 123 ff.; Romeo, *L'appartenenza*, cit., pp. 25 ff.

[69] Gai 2.19: *Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem. Itaque si tibi vestem vel aurum vel argentum tradidero sive ex venditionis causa sive ex donationis sive quavis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim* 2.21: *In eadem causa sunt provincialia praedia, quorum alia stipendiaria, alia tributaria vocamus: stipendiaria sunt ea, quae in his provinciis sunt, quae propriae populi Romani esse intelleguntur; tributaria sunt ea, quae in his provinciis sunt, quae propriae Caesaris esse creduntur. Mancipi vero res sunt, quae per mancipationem ad alium transferuntur; unde etiam mancipi res sunt dictae. quod autem valet mancipatio, idem valet et in iure cessio.*

[70] The problem of the relationship between *possessio* and *res corporales-incorporales* also relates to the transfer by *traditio,* on which see Nicosia, *'Possessio'*, cit., pp. 279 ff.

[71] Gai 2.28. *Res incorporales traditionem non recipere manifestum est.* 29. *Sed iura praediorum urbanorum in iure cedi*

All this being said, it is evident how the antithesis *res corporales-res incorporales* filters and harmonizes itself with the treatment of the modes of property transfer. In this regard, the «empirico e non univoco»[72] coordination between the two aspects seems to be explained in the light of the systematic structure chosen by Gaius. That is, by looking precisely at the individual things included in the *res incorporales*, as he deals with the *traditio*, *mancipatio* and *in iure cessio* – already examined in Gai 2.18-27. In other words, the Antonine jurist's attempt to bring the two main distinctions closer together can be justified in the light of the rational and «esauriente» character[73] (although, as we said, not exhaustive)[74] of the classification *res corporales-res incorporales*.

tantum possunt; rusticorum vero etiam mancipari possunt. 30. *Ususfructus in iure cessionem tantum recipit: nam dominus proprietatis alii usumfructum in iure cedere potest, ut ille usumfructum habeat et ipse nudam proprietatem retineat. ipse usufructuarius in iure cedendo domino proprietatis usumfructum efficit, ut a se discedat et convertatur in proprietatem; alii uero in iure cedendo nihilo minus ius suum retinet: creditur enim ea cessione nihil agi.* 31. *Sed haec scilicet in Italicis praediis ita sunt, quia et ipsa praedia mancipationem et in iure cessionem recipiunt. alioquin in provincialibus praediis siue quis usumfructum ius eundi agendi aquamue ducendi vel altius tollendi aedes aut non tollendi, ne luminibus vicini officiatur, ceteraque similia iura constituere velit, pactionibus et stipulationibus id efficere potest; quia ne ipsa quidem praedia mancipationem aut in iure cessionem recipiunt.* 32. *Sed cum usufructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in prouinciis per in iure cessionem constitui posse.* 33. *Quod autem diximus usumfructum in iure cessionem tantum recipere, non est temere dictum, quamuis etiam per mancipationem constitui possit eo, quod in mancipanda proprietate detrahi potest; non enim ipse usufructus mancipatur, sed cum in mancipanda proprietate deducatur, eo fit, ut apud alium usufructus, apud alium proprietas sit.* 34. *Hereditas quoque in iure cessionem tantum recipit.* 35. *Nam si is, ad quem ab intestato legitimo iure pertinet hereditas, in iure eam alii ante aditionem cedat, id est antequam heres extiterit, proinde fit heres is, cui in iure cesserit, ac si ipse per legem ad hereditatem vocatus esset: post obligationem vero si cesserit, nihilo minus ipse heres permanet et ob id creditoribus tenebitur, debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt; corpora vero eius hereditatis proinde transeunt ad eum, cui cessa est hereditas, ac si ei singula in iure cessa fuissent.* 36. *Testamento autem scriptus heres ante aditam quidem hereditatem in iure cedendo eam alii nihil agit; postea vero quam adierit si cedat, ea accidunt, quae proxime diximus de eo, ad quem ab intestato legitimo iure pertinet hereditas, si post obligationem in iure cedat.* 37. *Idem et de necessariis heredibus diversae scholae auctores existimant, quod nihil videtur interesse, utrum aliquis adeundo hereditatem fiat heres an inuitus existat. quod quale sit, suo loco apparebit: sed nostri praeceptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem.* 38. *Obligationes quoquo modo contractae nihil eorum recipiunt: nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo, quibus res corporales ad alium transferuntur, id efficere possum; sed opus est, ut iubente me tu ab eo stipuleris; quae res efficit, ut a me liberetur et incipiat tibi teneri. quae dicitur novatio obligationis.* 39. *Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri*.

[72] Bona, *Il coordinamento*, cit., p. 435.

[73] *Ivi*, p. 450.

[74] See *supra*, § 4.

Under this distinction, it is not the legal figures that find form and substance in the world of the *ius* to be examined, but rather the means of transferring the ownership of a *ius*. Essentially, Gaius would have held that «ogni altra classificazione di cose, egualmente attinente agli 'elementi del patrimonio' potesse essere in qualche modo coordinabile»[75] with this distinction. The latter, however, would have proved unsuitable to ground the systematics of the ways of property transfer, thus leaving room for the further distinction between *res mancipi* and *nec mancipi*, which showed itself – although in progressive decline – still functional for this purpose[76].

6. 'Res incorporales' and intangible goods in the European Roman tradition: the German experience

The Gaian category of *res incorporales* was faithfully interpreted, according to its original meaning, by the medieval and modern Roman tradition. Mention should be made, in extreme summary and limited to the most significant authors, to Accursio, Azone, Donello and Hilliger[77].

More complex was the matter concerning the interpretations of the ancient model from the 18th century onwards. European legal science, especially German one, rediscovered the partition, which was seen with much interest as an element of comparison in the debate about the qualification of intellectual works.

[75] Bona, *Il coordinamento,* cit., p. 450. See also Grosso, *Corso,* cit., pp. 13 f., who, in the parallel highlights the procedural profile relating to *rei vindicatio*, *petitio usus fructus* and *vindicatio servitutis*.

[76] With reference to this aspect, more extensively discussed in the discussion devoted to *res mancipi* and *res nec mancipi*, see, among others, M. Kaser, *Eigentum und Besitz im älteren römischen Recht*[2], Köln-Graz, 1956, pp. 8 ff., and Id., *Der römische Eigentumsbegriff,* in *Deutsche Landesreferate zum VI International Kongress für Rechtsvergleichung (Hamburg, 1962),* Berlin-Tübingen, 1962, pp. 20 ff., as well as A. Guarino, *Diritto privato romano*[11], Napoli, 1997, pp. 353 ff.

[77] Cf. Accursio's explanation in Glossa *plerumque* ad Inst. 2.2.2; Azo, *Summa Codicis,* ed. Venet. 1572, III, 1, c. 206; H. Doneau, *De iure civili commentarius*, IX. 7 (*Opera omnia*, vol. II, Lucae, 1763, pp. 1193 f.); as well as XX. I (*Opera,* cit., vol. V, Lucae, 1764, pp. 759 ff.; O. Hilliger, *Notae ad Donelli de iure civ. Comment. Opera omnia*, cit., V, p. 761, n. 2. For further discussion, see Pugliese, *Dalle 'res incorporales'*, cit., pp. 1142 ff.; Guzman Brito, *Las cosas*, cit., pp. 42 ff.

The reflection was deepened later during the 19th century and at the dawn of codification, when German doctrine – having inherited (and shared by the most[78]) the materialistic conception of property, coinciding with the thing itself (*res corporales*)[79], later incorporated in § 90 BGB[80] – reasoned on the question of the protection of copyright, which was necessarily excluded from the dominical paradigm[81]. In this context, a link was effectively established between *res incorporales* and intellectual works[82], both in terms of continuity and in terms of fracture.

As for the correspondence between the legal figures, it is undeniable that the

[78] Exception made, in the German panorama, for R. von Jhering, *Rechtsschutz gegen injuriöse Rechtsverletzungen*, in «Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts», XXIII, 1885, merged in *Gesammelte Aufsätze aus den Jahrbüchern für die Dogmatik des heutigen römischen und deutschen Privatrechts*, vol. III, Jena, pp. 375 ff., which supports the idea of intellectual property, although it does not identify the *res incorporales* with intangible goods. On the contrary, the scholars of the Historical School, G. Hugo, *Lehrbuch einies civilistischen Cursus*, vol. I[6], Berlin, 1820, p. 260, p. 262; F.K. Savigny, *Das Recht des Besitzes*[4], Gießen, 1822, p. 142; G.F. Puchta, *Pandekten*[12], Leipzig, 1877, pp. 216 f.; Id, *Vorlesungen über das heutige römische Recht*, vol. I, Leipzig, 1873, p. 324; the forerunners of the Pandectist School, L.A. Warnkönig, *Commentarii juris romani privati*, vol. I, Leodii, 1825, pp. 339 f.; J.F.L. Göschen, *Vorlesungen über das gemeine Civilrecht*, vol. II, Göttingen, 1839, pp. 19 ff.; F.A. Schilling, *Lehrbuch für Institutionen und Geschichte des römiscen Privatrechts,* vol. II, Leipzig, 1837, pp. 222 ff., pp. 487 ff. (whereas, with specific regard to scientific positivism, see paradigmatically C.F. Mühlenbruch, *Doctrina Pandectarum*, vol. II, Halis Saxonum, 1831, pp. 12 ff., pp. 67 ff.; A.F.J. Thibaut, *System des Pandekten-Rechts*, vol. I, Jena, 1803, p. 168; vol. II, p. 23); as well as the components of the Pandectics themselves, E. Böcking, *Pandekten des römischen Privatrechts*, vol. I[2], Bonn, 1853, pp. 243 ff.; F.L. Keller, *Pandekten*, vol. I[2], Leipzig, 1866, pp. 249 ff.; K.A. von Vangerow, *Lehrbuch der Pandekten*, vol. I[7], Marburg, 1875, pp. 539 ff.; C.G. von Wächter, *Pandekten,* vol. I, Leipzig, 1880, p. 176, pp. 255 ff.; A. von Brinz, *Lehrbuch der Pandekten*, vol. I[2], Erlangen, 1873, pp. 468 ff.; L. Arndts, *Lehrbuch der Pandekten*[9], Stuttgart, 1877, p. 53; L. Kuhlenbeck, *Von den Pandekten zum bürgerlichen Gesetzbuch*, vol. I, Berlin, 1898, pp. 263 ff.; vol. II, Berlin, 1899, pp. 385 ff.; Bekker, *System*, vol. I, cit, p. 63; O. Wendt, *Lehrbuch der Pandekten*, Jena, 1888, p. 15; J. Baron, *Pandekten*[8], Leipzig, 1893, pp. 234 ff.; F. Regelsberger, *Pandekten*, vol. I, Leipzig, 1893, p. 359; H. Derbnburg, *Pandekten*, vol. I[7], Berlin, 1902, pp. 154 ff., pp. 443 ff. On Windscheid's thought, see what will be said in more detail *infra*. For an overview of the issue, see Cursi, *'Res incorporales'*, cit., pp. 190 f.; previously, among others, Tellegen, *'Res incorporalis'*, cit., pp. 35 ff. More generally, on the acceptance-displacement of bipartition in European codes, see Guzman Brito, *Las cosas*, cit., pp. 43 ff.

[79] See *infra*, § 4.

[80] § 90 BGB: Sache im Sinne des Gesetz sind nur körperliche Dinge. Commenting on the provision in the broader framework of the Gaian bipartition Vincenti, *'Res'*, cit., pp. 20 f.; Cursi, *'Res incorporales'*, cit., pp. 190 f.

[81] For further discussion, see Cursi, *'Res incorporales'*, cit., pp. 189 ff.

[82] On this subject, see recently Turelli, *'Res incorporales' e beni immateriali*, cit., p. 17; in the wake of Pugliese, *Dalle 'res incorporales'*, cit., pp. 1175 f.

nature of things (*corporales-incorporales*, corporal-incorporal) is a strong point of contact, useful for the definition of intellectual makings without corporeality as objects of law[83]. However, the absence of these creations – which already existed in ancient Rome – from the list of *res incorporales* should be emphasised, demonstrating their irrelevance as 'things' or 'goods' in the legal sense, as well as the exclusion of any right over them for their author[84]. It is then necessary to reflect on the naturalistic and conceptual distinction between *res* and goods: the former are intangible entities, of «mera consistenza giuridica»[85], conceivable as elements of the patrimony, «centri di imputazione di relazioni giuridiche»[86]. The latter, on the other hand, exist in the reality of facts, regardless of the legal world[87], and constitute objects of law[88].

[83] Scialoja, *Teoria*, vol. I, cit., p. 21, p. 25; Fadda, Bensa, *Note*, cit., p. 187; Biondi, *I beni*, cit., *pp.* 21 ff.

[84] To the traditional extraneousness of copyright to Roman legal experience (see, for all, A. Guarino, *Diritto privato romano*[12], Napoli, 1990, pp. 312 f., nt. 18.2; Pugliese, *Dalle 'res incorporales'*, cit., p. 1175 and nt. 56; Id., *Istituzioni di diritto romano,* Padova, 1986, p. 504; Guzman Brito, *Las cosas*, cit., pp. 56 ff.) opposes U. Bartocci, *Aspetti giuridici dell'attività letteraria in Roma antica,* Torino, 2009, pp. 36 ff., pp. 49 ff., pp. 230 ff., who does not exclude forms of protection of intellectual work or in any case regulatory solutions favourable to authors. *Contra*, G. Santucci, *Diritti dell'autore in Roma antica?*, in «Index», XXXIX, 2011, pp. 143 ff., in particular p. 149, according to whom there would be no indication, not even indirect, of a legal protection of the author. With respect to the *tabula picta* hypothesis, (Gai 2.78; Gai. 2 *rer. cott.* D. 41.1.9.2; Paul. 21 *ad ed.* D. 6.1.23.3; I. 2.1.34), for Pugliese, *Istituzioni*, cit., p. 504, it is also possible to qualify the case in terms of specification; Brutti, *Il diritto*, cit., p. 289, also observes that *pictura* is seen as a material entity, different from intellectual creations and immaterial goods. On this subject, see most recently Turelli, *'Res incorporales' e beni immateriali*, cit., pp. 9 ff.

[85] Pugliese, *Delle 'res incorporales',* cit., p. 1182.

[86] Orestano, *Il problema*, cit., pp. 111 ff.

[87] Pugliese, *Delle 'res incorporales'*, cit., p. 1182; recently, in an adhesive sense, Turelli, *'Res incorporales' e beni immateriali*, cit., p. 15; Polito, *Some Considerations,* cit., p. 39.

[88] In this view, the category of *res incorporales* would thus be expanded to include 'objects of law', as Bekker, *System*, vol. I, cit., p. 62; on the subjectivist perspective that makes 'object of law' what is not 'subject of law', see Cursi, *'Res incorporales'*, cit., p. 200. An echo of this approach, as will be discussed in more detail *infra*, § 8, can be found in the definition of goods *under* Art. 810 of the Civil Code, according to which they are «le cose che possono formare oggetto di diritti»: on this point, see Cardilli, *Fondamento*, cit., p. 265. If not all things are goods, at the same time, our code does not exclude the possibility that there may be goods other than things, whose desirability for the subject derives from a qualifying procedure that does not imply material physicality, according to N. Lipari, *Le categorie del diritto civile*, Milano, 2013. On the conceptual distinction between 'thing' and 'good' in legal terms, fundamental S. Pugliatti, entry *Beni (teoria generale)*, in *Enciclopedia del diritto*, vol. V, Milano, 1959, pp. 164 ff.; Id., entry *Cosa (teoria generale)*, in *Enciclopedia del diritto*, vol. XI, Milano, 1962, pp. 19 ff.; V. Zeno-Zencovich, entry *Cosa*, in *Digesto delle discipline privatistiche - Sezione civile*, *vol.* IV, Torino, 1989, pp. 440 ff.; for an analysis of the concept of thing in the digital era, see M. Giuliano, *Le risorse digitali nel paradigma dell'art. 810 cod. civ. ai tempi della 'block-*

Aware of this discontinuity and in the attempt of enhancing it from a terminological point of view, Stobbe suggested a change in the wording. Instead of 'things', he resorted to the term intangible 'goods'[89], thus charting a course that led to Kohler's elaboration of the theory of *Immateralgüterrechte*[90].

In this framework, Windscheid's thought is of particular interest, as it winds its way through his *Lehrbuch des Pandektensrecht* and gives us two different meanings of the expression 'incorporeal things'.

Starting from the assumption that the patrimony is made up of rights, he observes that its elements, even in the legal lexicon, are generally indicated by the things to which the rights refer. What follows is that – since property is a 'corporeal thing' – rights over the objects of others and obligations, existing only in the mind, are to be defined as incorporeal things. The reasoning, on closer inspection, distinguishes the components of property into corporal and incorporeal things, depending on the object of reference. It is no coincidence that the reference to Gaius is explicit and the use of the construction 'objects of right' is absent[91].

However, the locution is later used to classify 'things subject to law'. According to the scholar, positive law can go well beyond the correlation between the concept of thing and corporeality and treat even merely fictitious things, called 'incorporeal things', as objects of legal relations. These include, under Roman law, rights and universality of things, and within the legal experience contemporary to the author, intellectual property. The risk of a change of perspective is immediately perceived by Windscheid, who takes care to clarify the conceptual distinction between the ancient *res incorporales*, and the

chain'. Parte prima, in «La nuova giurisprudenza civile commentata», 2021, pp. 1224 ff.

[89] O. Stobbe, *Handbuch des Deutschen Privatrechts*, vol. I, Berlin, 1885, p. 520; in similar terms, Bekker, *System*, vol. I, cit., p. 288; Id., *Allerlei von den dinglichen Rechten insbesondere von den Rechten an eigner Sache*, in «Zeitschrift für die vergleichende Rechtswissenschaft», II, 1880, p. 20; Regelsberger, *Pandekten*, vol. I, cit., p. 359, pp. 366 f.

[90] By this, meaning the patrimonial rights to intellectual creations according to the conception of J. Kohler, *Zur Konstruktion des Urheberrechts*, in «Archiv für bürgherliches Recht», X, 1895, pp. 241 ff.; Id, *Die Idee des geistigen Eigenthums*, in «Archiv für die civilistische Praxis», XXXII, 1894, pp. 141 ff.); excluding the moral ones, later included in the more recent monistic theory of E. Ulmer, *Urherberund Verlagsrecht*[3], Berlin-Heidelberg-New York, 1980, *passim*, as Cursi, *'Res incorporales'*, cit., p. 192, nt. 84.

[91] Windscheid, *Diritto*, cit., pp. 118 ff., especially p. 120, nt. 5 for the reference to Gaius.

modern 'incorporeal things', objects of law[92]. This explains the meaning of the listing: the new category includes certain figures that already existed in ancient Rome[93].

One must therefore give the German scholar credit for having reaffirmed the boundaries of the category in accordance with the 'Roman law of the Romans'[94], highlighting its discontinuity with respect to 'incorporeal things', object of law', but not for this reason diminishing its value. On the contrary, the Gaian systematics continues to be a valuable element of comparison in the making of ideas at the basis of German codification.

7. Things and intangible assets in the Italian legal experience: the digital era and the new challenges of the metaverse

In current Italian law, the fundamental distinction *res corporales-res incorporales* (and the elements included therein, presented as *divisio rerum* in the Roman sources) is referred to goods and rights (Art. 812 et seq. of the Civil Code)[95].

The overturn of the Roman paradigm and the change in the conception of property, affirmed in the context of the Enlightenment but already traced by the humanists through the 'two-faced' use of the term *dominium*[96], are also recognised in

[92] *Ivi*, p. 477, nt. 3.

[93] Thus Turelli, *'Res incorporales' e beni immateriali*, cit., pp. 22 ff.

[94] I borrow the expression from R. Cardilli, *Das römische Recht der Pandektistik und das römische Recht der Römer*, in *Wie pandektistisch war die Pandektistik*?, herausgegeben von H.-P. Haferkamp und T. Repgen, Tübingen, 2017, pp. 83 ff. As we have seen, the interpretation of Gai 2.12-14 restores the opposition between the Roman law of the Romans and the bourgeois Roman law.

[95] For a comparison with experiences other than the Italian one, see recently Cursi, *'Res incorporales'*, cit., pp. 183 ff., especially p. 201, who points out that «lo schema espositivo che ricorre nella dottrina tedesca, francese, italiana riguardo le *res incorporales* prevede la conservazione del contenuto originario romano (i diritti, con l'estensione all'universalità di cose, con l'aggiunta delle produzioni intellettuali, concepite come 'cose oggetto di rapporti giuridici')».

[96] See, among many references, H. Doneau, *Commentarius de iure civile*, IX.8, § 5 ff., in *Opera omnia*, vol. II, Milano, 1828, pp. 1193 ff. See also P. Grossi, *Il dominio e le cose, percezioni medioevali e moderne dei diritti reali*, Milano, 1992, pp. 385 ff.

the French Civil Code, which hinges on a single form of individual property[97]. Overall, «una simile rimodulazione del rapporto fra soggetto e beni apre naturalmente la strada all'applicazione della nuova concezione proprietaria a tutte le cose sia materiali che immateriali»[98].

In the Italian Civil Code, the notion of goods is contained in Article 810, according to which «sono beni le cose che possono formare oggetto di diritti». On the other hand, the «pre (e quindi extra) giuridica»[99] notion of 'thing', otherwise seen as «il nome più indeterminato e più comprensivo della lingua italiana»[100], is implied and absorbed within the legally relevant notion of good[101].

Today, the interpreter called upon to reflect on the notion of 'good' and, before that, of 'thing' within the confines of our current civil code[102], does not have an easy

[97] With regard to the French experience and the different perspectives taken in doctrine see, among others, Ed. Fuzier-Hernan-A. Darras-Th. Griffaud, *Code civil annotés*, Paris, 1900, pp. 606 ff.; M. Planiol, *Traité èlémentaire de droit civil,* vol. I[5], Paris, 1908, pp. 820 ff.; against the theory of intellectual property see K.S. Zachariae von Lingenthal, *Manuale del diritto civile francese,* vol. I, a cura di C. Crome, Milano, 1907, p. 449. More recently, see G. Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, 1976, pp. 182 ff.; P.M. Vecchi, *Possesso, possesso dei diritti e dei beni immateriali ed acquisto del diritto mediante il decorso del tempo*, in *Uso, tempo, possesso dei diritti. Una ricerca di diritto positivo*, a cura di E. Conte, V. Mannino e P.M. Vecchi, Torino, 1999, pp. 216 ff.; Cursi, *'Res incorporales'*, cit., pp. 187 ff.

[98] Cursi, *'Res incorporales',* cit., p. 187.

[99] Thus Zeno-Zencovich, entry *Cosa*, cit., p. 438.

[100] In these terms, see entry *Cosa*, in *Enc. giur. Treccani online.*

[101] The literature is endless In general terms, see B. Biondi, entry *Cosa* (*dir. civ.*), in *Novissimo digesto italiano*, vol. IV, cit., pp. 1007 ff.; Pugliatti, entry *Beni*, cit., pp. 164 ff.; Id., entry *Cosa*, cit., pp. 19 ff.; Zeno-Zencovich, entry *Cosa*, cit., pp. 438 ff. Among many, see Biondi, *I beni*, cit.; F. De Martino, R. Resta, G. Pugliese, *Della proprietà*, in *Commentario del codice civile* a cura di A. Scialoja e G. Branca, Bologna-Roma, 1976, pp. 1 ff.; D. Messinetti, entry *Oggetto dei diritti*, in *Enciclopedia del diritto*, vol. XXIX, Milano, 1979, pp. 808 ff.; Aa.Vv., *Dalle 'res' alle 'New Properties'*, a cura di G. De Nova, B. Inzitari, G. Tremonti e G. Visentini, Milano, 1991; S. Rodotà, *Tecnologie e diritti*, Bologna, 1995; A. Gambaro, *Il diritto di proprietà*, a cura di G. De Nova, B. Inzitari, G. Tremonti e G. Visentini, Milano, 1991; A. Zoppini, *Le 'nuove proprietà' nella trasmissione ereditaria della ricchezza (note a margine della teoria dei beni)*, in «Rivista di diritto civile», 2000, I, pp. 185 ff.; M. Costantino, R. Pardolesi, D. Bellantuono, *I beni in generale*, in *Trattato di diritto privato. Proprietà*, vol. I[2], Torino, 2005, pp. 3 ff.; A.T. Scozzafava, *I beni*, in *Trattato di diritto civile del Consiglio nazionale del Notariato*, diretto da P. Perlingieri, Napoli, 2007, pp. 12 ff.; A. Jannarelli, F. Macario, *Della proprietà*, in *Commentario del codice civile* a cura di E. Gabrielli, Milano, 2012, pp. 5 ff.; F. Piraino, *Sulla nozione di bene giuridico in diritto privato*, in «Rivista critica del diritto privato», 2012, pp. 470 ff.; A. Gambaro, *I beni*, Milano, 2012; C.M. Bianca, *Diritto civile*, vol. VI, *La proprietà*[2], Milano, 2017, pp. 33 ff.

[102] For a look at the subject of 'European law of things' see most recently, C. von Bar, *Questioni fondamentali per la*

task. This happens essentially for three reasons: first, as explained above, because of the very meaning of 'good' contained in the Civil Code, which comes to be identified with that of the object of rights. Second, because of the «disinvoltura polisemica»[103] with which the terms 'good' and 'thing' are used by the legislator, doctrine and jurisprudence. Third, because of the comparison with the 'new goods' (various are the terms on the point: immaterial goods, intangible goods, virtual goods) resulting from the technological development of an increasingly globalised society. Such a comparison imposes an interpretative effort on the jurist in order to include within the notion of 'good' – and therefore of 'thing' – even entities without a corporeal dimension. In other words, they must include 'goods' whose desirability for the owner derives from a qualifying procedure that does not imply a material physicality[104].

In the context of modern economics, significant examples on the subject are to be found, for example, in the usucapion and pledge of shares in Limited Liability Companies (*S.r.l.*)[105] but also, with regard to rights in rem over a company share, in the usufruct of shares[106]. Indeed, in all these hypotheses, it is a matter of reconciling the

comprensione del diritto europeo delle cose, in «Rivista di diritto civile», 2018, pp. 571 ff.

[103] Thus P. Grossi, *I beni: itinerari fra 'moderno' e 'post-moderno'*, in «Rivista trimestrale di diritto e procedura civile», 2012, pp. 1059 ff.

[104] Lipari, *Le categorie,* cit. In general terms, see M. Are, entry *Beni immateriali* (*dir. priv.*), in *Enciclopedia del diritto*, vol. V, Milano, 1959, pp. 244 ff. Among others, see S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata*, Bologna, 1990, pp. 883 ff.; G. De Nova, *I nuovi beni come categoria giuridica*, in *Dalle 'res' alle 'New Properties'*, cit., pp. 13 ff.; M. Trimarchi, *Nuovi beni e situazioni di godimento*, in *Il diritto civile oggi. Compiti scientifici e didattici del civilista (Atti del I Convegno Nazionale S.I.S.Di.C., Capri, 7-9 aprile 2005),* Napoli, 2006, pp. 575 ff.; D. La Rocca, '*New Assets and New Rights'. Sull'attualità della teoria dell'oggetto giuridico*, in *Studi in onore di D. Messinetti*, a cura di F. Ruscello, Napoli, 2008, pp. 505 ff.; Aa.Vv., *Diritti esclusivi e nuovi beni immateriali*, a cura di G. Resta, Torino, 2010, pp. 21 ff.; A.M. Gambino, *Diritto d'autore e nuovi processi di patrimonializzazione*, in «Diritto industrilae», 2011, pp. 114 ff.

[105] See recently, C. Rinaldo, *Usucapione e acquisto 'a non domino' delle quote di partecipazione in società a responsabilità limitata*, in «Rivista di diritto civile», 2017, pp. 631 ff.; E. Battelli, *Il pegno sui beni immateriali. Contributo allo studio del pegno non possessorio sugli 'intangible assets'*, Milano, 2021, in particular pp. 219 ff. and the bibliography cited therein. With regard to guarantees on intangible rights and, in particular, *Intellectual Property Rights* see, among many, C.S. Zimmerman, L.J. Dunlop, *Overview: Intellectual Property. The New Global Currency*, in *The New Role of Intellectual Property in Commercial Transactions*, edited by M. Simensky and L.G. Bryer, New York, 1994, pp. 3 ff.; F. Mezzanotte, *Garanzie del credito e proprietà industriale: riflessioni sulla 'collateralization' delle licenze esclusive*, in «Rivista di diritto civile», 2014, pp. 1168 ff.

[106] Most recently, see C. Rinaldo, *Usufrutto di azioni e diritto di recesso,* in «Rivista di diritto civile», 2022, pp. 585

traditional system of real rights with the thrust of commercial practice, since the problem concerns the application of civil law institutions (usucapion, pledge, usufruct), inherent to a *res corporales*.

In addition to this, among the numerous figures created as a result of the rise of new technologies[107], a very important role is nowadays played by information, particularly digital information[108] and the storage system connected to it, i.e. the *Blockchain*[109]. The jurist's attention to the protection of such an 'asset' concerns both the individual's interest in holding, enjoying and disposing of that specific information that is the subject of intellectual property, and the possible violation of *ius excludendi* as a subjective right[110].

The problem lies in the difficulty of reconciling the notion of 'good' with the incorporation or intangibility of digital information. More specifically, the push of technological innovation and the arrival of 'new goods' would impose a change of

ff. See also A. Asquini, *Usufrutto di quote sociali e azioni*, in «Rivista del diritto commerciale», 1947, I, pp. 25 ff.; G.C.M. Rivolta, *Azioni e quote sociali: pegno di usufrutto, pegno di nuda proprietà e diritto di voto*, in «Rivista di diritto civile», 1998, I, pp. 583 ff.; D. Poletti, *Decadenza o metamorfosi dell'usufrutto? Spunti per una riflessione*, in *Le società*, 2016, pp. 930 ff.; A. Valzer, *Usufrutto sulle partecipazioni sociali e riserve*, in *Patrimonio sociale e governo dell'impresa*, a cura di G.A. Rescio e M. Speranzin, Torino, 2020, pp. 110 ff.

[107] By way of example, think of the computer program, works of *industrial design*, *software* and its algorithm, databases, and secret information, on which see A. Blandini, entry *'Know-how'*, in *Enciclopedia del diritto*, *Aggiornamento*, vol. I, Milano, 1997, pp. 725 ff.; V. De Sanctis, entry *Autore* (*diritto di*), in *Enciclopedia del diritto*, *Aggiornamento*, vol. II, Milano, 1998, pp. 104 ff.; G. Sena, entry *Invenzioni industriali*, in *Enciclopedia del diritto*, *Aggiornamento,* vol. II, cit., pp. 456 ff.; Id., entry *'Design'* (*disegno industriale*), in *Enciclopedia del diritto*, *Aggiornamento*, vol. II, cit., pp. 287 ff.; G. Ettore, entry *Banche dati* (*tutela delle*), in *Enciclopedia del diritto*, *Aggiornamento*, vol. V, Milano, 2001, pp. 130 ff.

[108] On the notion of information, see Zeno-Zencovich, entry *Informazione* (*profili civilistici*), in *Digesto delle discipline privatistiche - Sezione civile*, vol. IX, Torino, 1993, pp. 420 ff.

[109] M. Maugeri, entry *'Smart Contracts'*, in *Enciclopedia del diritto*, *I Tematici*, vol. I, *Contratto*, a cura di G. D'Amico, Milano, 2021, pp. 1132 ff., in particular pp. 1133 f., where he expands on his bibliography, he specifies that the *Blockchain* «si può immaginare come una lavagna infinita indelebile, un *database* distribuito che vede ogni modifica soggetta all'approvazione di tutti i nodi. Una lavagna, semplificando molto, in cui si può leggere a chi appartengono alcuni valori e che consente di tracciare, in modo indelebile, tutti i passaggi fra questi valori … È un sistema che sfrutta la crittografia e permette di conservare informazioni digitali garantendo integrità e data delle registrazioni … Il modo di registrazione sommariamente descritto è quello tipico delle criptovalute. In particolare è quello di *Bitcoin*». See also Giuliano, *Le risorse,* cit., pp. 1214 ff.; Id., *Le risorse digitali nel paradigma dell'art. 810 cod. civ. ai tempi della 'blockchain'. Parte seconda,* in «La nuova giurisprudenza civile commentata», 2021, pp. 1456 ff.

[110] Zeno-Zencovich, entry *Cosa,* cit., p. 454.

paradigm. The latter would be no longer anchored to the proprietary regime, but to that of common goods or *commons*[111], i.e. the general mandatory model[112].

If one is to describe in its essential features the model of protection of information as a legal asset identified by civil law, the reference goes to intellectual property law, declined, as is known, in its different forms of industrial property law and copyright[113]. The scheme adopted is that of the Roman model of *dominium* over *res corporales*. For some decades now, this model has been the subject of criticism, and the «perplessità che denunciano l'inadeguatezza di questa concezione»[114] operate «su due versanti: dogmatico giuridico e politico-economico»[115].

On closer inspection, however, the different theoretical positions that emerge

[111] From the perspective of the commons see LIPARI, *Le categorie*, cit., pp. 133 ff. See also A. IULIANI, *Prime riflessioni in tema di beni comuni*, in «Europa e diritto privato», 2012, pp. 617 ff. More generally, on the paradigm shift, see recently ZENO-ZENCOVICH, '*Big data' e epistemologia giuridica*, in *Dati e algoritmi. Diritto e diritti nella società digitale*, a cura di S. Faro, T.E. Frosini e G. Peruginelli, Bologna, 2020, pp. 13 ff., now in *Scritti in onore di M.G. Losano. Dalla filosofia del diritto alla comparazione giuridica*, a cura di L.L. Alix e A. Somma, Torino, 2021, pp. 574 ff. The literature on the subject of *beni comuni* or *commons* (the latter is the expression used by North American scholars of *Law and Economics*, on which, for all, M. HELLER, *Commons and anticommons*, Northampton, 2009) is vast and heterogeneous. Among the many contributions see S. CASSESE, *I beni pubblici. Circolazione e tutela*, Milano, 1969; P. GROSSI, *Un altro modo di possedere: l'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Milano, 1977; ID., *La proprietà*, cit.; M. ARSÌ, *I beni pubblici*, in *Trattato di diritto amministrativo, vol.* II, a cura di S. Cassese, Milano, 2003, pp. 1705 ff.; F. CORTESE, *What are Common Goods? Pictures from the Italian Debate*, in «Polemos», XI, 2017, pp. 417 ff.; AA.VV., *I beni pubblici. Dal governo democratico dell'economia alla riforma del codice civile*, a cura di U. Mattei, E. Reviglio e S. Rodotà, Milano, 2010; U. MATTEI, A. QUARTA, *The Turning Point in Private Law Ecology, Technology and the Commons*, Cheltenham, 2019. In a historical perspective, with specific reference to the category of 'common good' in the medieval experience, see R. FERRANTE, *Per una storia giuridica dei beni comuni. Il governo del territorio nell'esperienza storico-giuridica*, a cura di P. Ferretti, M. Fiorentini e D. Rossi, Trieste, 2017, pp. 173 ff. With regards to Roman law instead, see recently D. DURSI, *'Res communes omnium'. Dalle necessità economiche alla disciplina giuridica*, Napoli, 2017; M. FALCON, *'Res communes omnium'. Vicende storiche e interesse attuale di una categoria romana*, in *I beni di interesse pubblico nell'esperienza giuridica romana*, a cura di L. Garofalo, vol. I, Padova, pp. 107 ff.

[112] P. RESCIGNO, *Disciplina dei beni e situazioni della persona*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», V-VI, 1976-1977, pp. 861 ff.

[113] G. GIACOBBE, entry *Proprietà intellettuale*, in *Enciclopedia del diritto*, vol. XXXVII, Milano, 1988, pp. 368 ff.; F. BENUSSI, entry *Proprietà industriale*, in *Digesto delle discipline civilistiche - Sezione commerciale*, vol. XI, Torino, 1995, p. 418; A. MUSSO, entry *Proprietà intellettuale*, in *Enciclopedia del diritto*, *Annali*, vol. II.2, Milano, 2008, pp. 890 ff.; ID., entry *Proprietà industriale*, in *Enciclopedia del diritto*, *Annali*, vol. II.2, cit., pp. 868 ff.

[114] CURSI, *'Res incorporales',* cit., p. 175.

[115] *Ibid.* and the extensive bibliography cited there.

regarding the use of 'proprietary logic' for the protection of intangible goods as *res incorporales* (protection of an absolute right[116]; protection of the broader category of belonging[117]; protection of a monopoly right)[118] never lead towards a total liberation from this logic. The latter continues to resist the tremors caused by the 'society of technology'[119] in the face of the unstoppable process of digitalization and, on the other hand, of the necessary protection of free competition in the market.

In the current state of affairs, the relationship between the adoption of the proprietary conception, and the legal qualification of the new intangible goods highlights a profound tension which is ineliminable, as it is due to the comparison between different cultural models (as seen, the Roman and the naturalistic legal models). The hermeneutic solicitation just outlined ultimately forces us to rethink the traditional legal categories[120], in order to adapt them to the hyper-connected new reality, material and at the same time virtual (in synthesis *onlife*)[121], always closer to finding space in the metaverse, where the relationship 'human-*res*' is projected.

[116] Pugliatti, *La proprietà nel nuovo diritto*, Milano, 1954, pp. 252 ff.

[117] Scozzafava, *I beni e le forme giuridiche di appartenenza*, Milano, 1982, pp. 556 ff.

[118] R. Franceschelli, *Monopoly structure of industrial law institutions*, in «Rivista di diritto industriale», 1956, I, pp. 137 ff.

[119] Both case law and national and European legislators continue to refer to the proprietary model of copyright. See Sena, *Giurisprudenza sulla natura giuridica del diritto di autore*, in «Rivista di diritto industriale», 1953, II, pp. 82 ff.; Vecchi, *Possesso*, cit., pp. 216 ff. At the European level see N. Boschiero, entry *Beni immateriali* (*dir. internaz. priv. e proc.*), in *Enciclopedia del diritto*, *Annali*, vol. II.2, cit., pp. 115 ff.; M. Libertini, entry *Concorrenza*, in *Enciclopedia del diritto*, *Annali*, vol. III, Milano, 2010, pp. 191 ff. Please note the recent Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, which was implemented in Italy by Legislative Decree 8 November 2021, no. 177. On this subject see Aa.Vv., *Il diritto d'autore nel mercato unico digitale*, a cura di A. Cogo, in *Giur. it.*, 2022, pp. 1253 ff.

[120] In this regard, Cursi, *'Res incorporales'*, cit., pp. 202 ff. wonders whether «sia praticabile una tutela risarcitoria per i danni patrimoniali e non patrimoniali (*ex* Art. 2059 cod civ. e Art. 2043 cod. civ.) derivanti dalla lesione di diritti sulle creazioni dell'ingegno, che soppianti il tradizionale schema reale», as happens with the model of *personal property* in the *common law* tradition.

[121] L. Floridi, *The Onlife Manifesto: Being Human in a Hyperconnected Era*, Heidelberg-New York-Dordrecht-London, 2015; Id., *La quarta rivoluzione. Come l'infosfera sta trasformando il mondo*, Milano, 2017.

8. The Gaian bipartition in the Latin American Roman tradition

The Gaian bipartition was also a fruitful model of comparison for the Latin American legal experience of the modern age[122].

As far as Argentine law is concerned, it is especially significant to retrace the stratification of the Code, in order to recover the original draft of the former *Código civil*. The latter was conceived between 1864 and 1869 by the great jurist Dalmacio Vélez Sársfield, a specialist of Roman law and the Romanesque tradition[123]. The text, albeit with some modifications, was transposed into the so-called Código civil velezano of 1871, which was reformed in 1968, with the extension of the applicability of the provisions relating to things to energy and natural forces susceptible of appropriation[124].

Specifically of interest here are Article 2311, «se llaman cosas en este Código los objetos corporales susceptibles de tener un valor», and Article 2312, «los objetos inmateriales susceptibles de valor, e igualmente las cosas, se llaman bienes. El conjunto de los bienes de una persona constituye su patrimonio». In the second provision, it is possible to notice how the *genus* 'beni' include both things such as corporeal objects and intangible objects, both of which have value and form the basis of a person's patrimony.

The provision is very stimulating as a synthesis of ancient and contemporary solutions. With regard to the innovative profile, it introduces the category of goods, a trace of which can already be found in *Las Siete Partidas*[125]. With regard to the Roman

[122] For an initial framing of the distinction in Latin American codifications, see Guzman Brito, *Las cosas*, cit., pp. 46 ff.

[123] On the figure and contribution of the Argentine scholar, see A. Cháneton, *Historia de Vélez Sársfield*, vol. II, Buenos Aires, 1938; A. Díaz Bialet, *El derecho romano en la obra de Vélez Sársfield*, Cordoba, 1949; R. Zorraquin Becú, *La formación intelectual de Vélez Sársfield*, in «Revista del Instituto de Historia del Derecho Ricardo Levene», XV, 1964, pp. 156 ff.; the essays in the volume *Dalmacio Vélez Sársfield e il diritto latinoamericano. Atti del Congresso Internazionale (Roma, 17-19 marzo 1986)*, a cura di S. Schipani, Padova, 1991; A. Levaggi, *La formación romanistica de Dalmacio Vélez Sarsfield*, in «Studi sassaresi», V, 1981, pp. 317 ff.; M. Rosti, *Il contributo di Vélez Sársfield al diritto dell'Argentina indipendente*, in «Materiali per una storia della cultura giuridica», XXXIII, 2003, pp. 465 ff.

[124] The reform only touches Article 2311, to which the following paragraph is added: «las disposiciones referentes a las cosas son aplicables a la energía y a las fuerzas naturales susceptibles de apropiación», by Ley 26 abril 1968, no. 17.771.

[125] *Part.* 2.17 pr., in the edition *Las Siete Partidas del Sabio Rey don Alfonso el nono*, nuevamente Glosadas por el

inheritance, there is an evident enhancement of the interpretation of the bipartition, so much so that *res corporales* and *incorporales* are part of the patrimony, which for the Argentine scholar is still composed of *derechos reales* and *derechos personales*[126]. Velezano's thought thus seems to be the forerunner of one of the interpretations elaborated by Windscheid in his *Lehrbuch des Pandektensrecht* around the incorporeal things as parts of the patrimony[127]. This is because the Argentinean reflection predates the construction of the theory of the *Immaterialgüterrechte.*

A further trace of the recovery of the Roman classification at the basis of the new legal architecture can be found in the terminology of Article 2311, as formulated in the *Código civil* velezano *ante* riforma. The use of the adjective *corporales*, of clear Gaian matrix, is not accidental[128], but rather an apposition that will be changed to *materiales*, probably considered more suitable to represent entities such as energy and natural forces[129].

The roots of Velezano's thought, once German influence is excluded, are then to be found in the landscape of the Latin American legal system.

Even today, Article 565 of the Chilean Code reports the distinction between *cosas corporales* and *cosas incorporales*[130] and defines the later partition through the reconstruction of Gai 2.14 proposed by David and Nelson (*in iure consistunt*): «incorporales las que consisten en meros derechos, como los créditos, y las servidumbres activas»[131].

Licenciado Gregorio López, Salamanca, 1555, respectively volumes II, p. 53; III, pp. 172 f.; for the reconstruction of the passages in the manuscripts, see Díaz Bialet, *El derecho romano*, cit., vol. III, pp. 394 f., pp. 501 f. On this point, see Turelli, *Modello*, cit., pp. 127 f.

[126] D. Vélez Sársfield, *Notas al Código civil de la República Argentina,* Buenos Aires, 1872, pp. 335 f.

[127] See *supra*, § 6.

[128] In this sense, Turelli, *'Res incorporales', 'objetos corporales'*, cit., p. 178; summarised in Id., *Modello*, cit., pp. 126 f.

[129] The legislator may have been inspired in this sense by A.G. Spota, *Tratado de Derecho Civil,* I, Buenos Aires, 1953, pp. 198 f.; as noted by M. Mariani de Vidal, *Derechos reales*, vol. I[4], Buenos Aires, 2004, pp. 11 f.; *Código civil y comercial de la Nación Comentado*, Buenos Aires, 2015, pp. 46 f.

[130] Art. 565: Los bienes consisten en cosas corporales o incorporales. Corporales son las que tienen un ser real y pueden ser percibidas por los sentidos, como una casa, un libro. Incorporales las que consisten en meros derechos, como los créditos, y las servidumbres activas. For a comment, see Guzman Brito, *Las cosas*, cit., pp. 49 ff.

[131] On this point, see Turelli, *'Res incorporales', 'objetos corporales'*, cit., p. 179.

Not far off is the wording of the Louisiana *Civil Code* of 1825 (which remains substantially similar to the current code in its layout)[132], which Vélez Sársfield had the opportunity to consult. Article 451 states «things are divided, in the second place, into corporeal and incorporeal: corporeal things are such as are made manifest to the senses – which we may touch or take, which have a body, whether animate or inanimate. Of this kind are fruits, corn, gold, silver, clothes, furniture, lands, meadows, woods and houses; incorporeal things are such as are not manifest to the senses, and which are conceived only by the understanding, such as the rights of inheritance, services and obligations». The resonance of the Gaian model is evident, especially in the illustrative list of incorporeal things, whose features endure after millennia of history[133]. It should also be noted that the classification is part of the broader tripartition *persons*, *things* and *actions*, according to Article 439 of the Civil Code, corresponding to the Gaian systematics. Also, the influence of the distinction of Cic. *top.* 5.26-27 between res *quae sunt* and *res quae intelleguntur*[134] is clearly perceivable.

To return to the *Código* Vélez Sársfield, greater attention should now be paid to the lexical discrepancy between *objetos corporales* and *objetos inmateriales* contained at Articles 2311 and 2312. The reason for this discrepancy is probably to be found in the influence exercised by the Brazilian jurist Augusto Teixeira de Freitas on Vélez Sársfield[135].

The latter, in his *Notas*, recalls the Note to Article 317 of the *Esboço de Código Civil* signed by the former[136], strongly critical of the Gaian bipartition, due to the confusion generated by the interweaving of material things and rights on things: the

[132] Art. 461 - Corporeals and incorporeals. Corporeals are things that have a body, whether animate or inanimate, and can be felt or touched. Incorporeals are things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property.

[133] On this point, see C.P. Sherman, *Roman Law in the Modern World*, Boston, 1917, p. 142.

[134] On which see *supra*, § 3.

[135] On the subject, see A. Burdese, *Il sistema del codice civile argentino e la distinzione tra diritti personali e reali (dal pensiero di Teixeira de Freitas a quello di Vélez Sársfield)*, in *Dalmacio Vélez Sarsfield e il diritto latinoamericano*, a cura di S. Schipani, Padova, 1991, pp. 157 ff.

[136] Vélez Sársfield, *Notas*, cit., p. 132, picks up A. Teixeira de Freitas, *Esboço de Código civil*, Rio de Janeiro, 1860, p. 213.

incorporeality of ancient *res* clashes with the corporeity of all things in the modern conception. Abandoning the tripartition of the Gaian systematics, Teixeira de Freitas adopts the bipartition of real rights-personal rights, redefining the notion of thing, confined «alle cose esistenti materialmente in natura e suscettibili di valutazione economica, senza pertanto considerare, oltre ai diritti reali aventi ad oggetto le medesime, i diritti su cose incorporali, quale la proprietà letteraria, scientifica e artistica»[137]. Therefore, he preferred to reason by adopting the specula of *objetos*, *materiaes* and *immateriaes*[138].

Here, the terminological difference could be explained by Vélez Sársfield's sharing of Teixeira de Freitas' position, who nevertheless does not refuse the use of the Romanesque lexicon *corporales* to define material entities, essentially corresponding to Teixeira de Freitas' 'things'. Ultimately, the partition *res corporales-res incorporales* does not turn out to be a normative solution applicable *tout court* in the 19th century Argentine codification project[139].

The abandonment of the Roman category is today confirmed by the current *Código civil y comercial de la Nación*. Article 16, dedicated to *Bienes y cosas*, provides that «los derechos referidos en el primer pàrrafo del artículo 15 pueden recaer sobre bienes susceptibles de valor económico. Los bienes materiales se llaman cosas. Las disposiciones referentes a las cosas son aplicables a la energía y a las fuerzas naturales susceptibles de ser puestas al servicio del hombre»[140]. The only *cosas* to be mentioned are *bienes materiales* (non *corporales*) for two reasons. First, materiality has become a marginal element, supplanted by 'the value' as the new guiding criterion[141]. Second, both 'non-material economic values' and transactions concerning intangible things are

[137] A. Burdese, *La distinzione tra diritti personali e reali nel pensiero di Teixeira de Freitas*, in *Augusto Teixeira de Freitas e il diritto latinoamericano. Atti del Congresso Internazionale del Centenario di Augusto Teixeira de Freitas (Roma, 12-14 dicembre 1983)*, a cura di S. Schipani, Padova, 1988, p. 306.

[138] Teixeira de Freitas, *Esboço*, cit., pp. 214 ff.; on which see Turelli, *'Res incorporales'*, *'objetos corporales'*, cit., p. 181.

[139] In this sense, Turelli, *'Res incorporales', 'objetos corporales'*, cit., p. 182.

[140] For a commentary, see Mariani de Vidal, *Derechos*, cit., pp. 9 ff.

[141] Thus the commentary in *Código*, cit., pp. 46 f.; on the notion of value, not to be reduced to mere economic value, see *Ivi*, p. 15.

regulated by Article 764, which extends the application of the rules concerning obligations to give «a los casos en que la prestación debida consiste en transmitir, o poner a disposición del acreedor, un bien que no es cosa».

Nevertheless, the central role assumed by Gai 2.12-14 on the 'data-science' level, to quote Orestano, is undeniable. The Roman structure, in other words, once again confirms itself as a tool for the foundation of reasoning of the legal architectures that follow it. Perhaps, it manifests with greater vigor its own inescapability precisely at the moment when those constructions of thought depart from the original foundations, which – although buried by new ones – remain an ineliminable portion of the ground on which the work rests.

9. Chinese codification and the Roman tradition: the Gaian bipartition in doctrinal constructions

In the new Civil Code of the People's Republic of China (PRC), which entered into force on 1 January 2021, there is no textual reference to the Gaian bipartition[142]. Instead, Title V, headed 'On Subjective Civil Rights', mentions goods, and not 'things', as is the case in most codes today.

However, this does not diminish the importance nor the vitality of the Roman paradigm, underlying the systematics of property law[143].

[142] On the path of Chinese codification, see O. Diliberto, *La lunga marcia. Il diritto romano nella Repubblica Popolare Cinese*, in *Disegnare il futuro con intelligenza antica. L'insegnamento del latino e del greco antico in Italia e nel mondo*, Bologna, 2012, pp. 53 ff.; Fei Anling, *Elaborazione e caratteristiche del Codice civile cinese*, in «Roma e America», XLI, 2020, pp. 133 ff.; M. Timoteo, *Il nuovo Codice civile cinese: prime riflessioni,* in «Roma e America», XLI, 2020, pp. 233 ff.; Diyu Xu, *Il modello cinese di codificazione civile,* in *Codice civile della Repubblica Popolare Cinese*, trad. it. di Meiling Huang, introduzione di Diyu Xu, a cura di O. Diliberto, D. Dursi e A. Masi, Pisa, 2021, vol. III ff.

[143] In general, on the relations between the Roman legal system and Chinese law, see S. Porcelli, *Diritto cinese e tradizione romanistica. Terminologia e sistema*, in «Bullettino dell'Istituto di Diritto Romano», CX, 2016, pp. 254 ff.; R. Cardilli, *Diritto cinese e tradizione romanistica alla luce del nuovo Codice della Rpc*, in *Mondo Cinese*, no. 167, year XLVII no.1, 2019, pp. 26 ff.; S. Schipani, *Vie dei Codici civili e Codice civile cinese*, in «Roma e America», XLI, 2020, p. 192; S. Porcelli, *Il Codice civile della Repubblica Popolare Cinese frutto del dialogo tra Cina e diritto romano*, in «Roma e America», XLI, 2020, pp. 265 ff.

In this regard, it is worth mentioning that legal science accepts the binomial *res corporales-res incorporales* not only in the manual[144], but also in the commentaries of the new code. Specifically, particularly significant is the mention of the bipartition in the commentary to Article 115 (already present in the general part of the Code dating back to 2017 and then accepted in the current text), dedicated to the distinction between immovable and movable goods and the admissibility of the right as the object of another right[145].

It can thus be observed how, in the Chinese legislative text, the adoption of a solution conforming to most European models established in modern times is not matched by the abandonment of the ancient Roman system, which continues to be an indispensable point of reference for interpreters.

[144] Among the most influential, see for all J. Ping, *Minfaxue,* Beijing, 2016, p. 223; W. Liming, *Minfa*, Beijing, 2015, p. 92.

[145] For the text of the provision in Italian, see *Codice civile della Repubblica Popolare Cinese*, cit., p. 26. As for commentary, see S. Hong, *Zhonghua Renmin Gongheguo Minfa Zongze tiaowen shuoming, lifa liyou ji xiangguan guiding*, Beijing, 2017, p. 272.