

SIR WILLIAM BLACKSTONE AND THE DOCTRINE OF SUBJECTIVE RIGHTS*

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SUMMARY

The doctrine of subjective rights forms part of South African jurisprudence. This is not the case in English law, which, for instance, does not clearly distinguish between property, as a legal object, and property rights. However, if one considers Sir William Blackstone's famous definition of property in his *Commentaries on the Laws of England*, it does contain some features of the doctrine: the definition is about the "right of property" and its features. Property as object, and right of property as a right, are distinguished. A right of property has entitlements and operates against third parties. A property right involves a legal relationship between a person and a thing, as well as a legal relationship between a person and third parties. In conclusion, the Blackstonian definition contains features of the doctrine of subjective rights that are useful when analysing property rights in English common law systems.

"Give us the tools, and we will finish the job." - Winston Churchill

1 INTRODUCTION

The doctrine of subjective rights was developed in Europe by the nineteenth-century Pandectists.¹ It was introduced into Afrikaner academia² by Prof W A Joubert and the doctrine became accepted as part of South African jurisprudence.³ Even though the doctrine is not free from criticism,⁴ it

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¹ Van der Merwe "Things" in Joubert and Faris (eds) *LAWSA* 27 (2014) par 59. For a historical overview of the evolving meaning of subjective rights, see Van der Walt "Skerwe uit die Geschiede van die Leerstuk van Subjektiewe Regte" 1996 *TSAR* 521 626.

² Joubert *Grondslae van die Persoonlikheidsreg* (1953) 13 119–121; Joubert "Die Realiteit van die Subjektiewe Reg en die Betekenis van 'n Realistiese Begrip Daarvan vir die Privaatreg" 1958 21 *THRHR* 12 98.

³ For instance, by Van Heerden *Grondslae van die Mededingingsreg* (LLD thesis, UOVS) 1958; Van der Merwe *Die Beskerming van Vorderingsregte uit Kontrak Teen Aantasting Deur Derdes* (LLD thesis, UOVS) 1958; Van der Walt *Risiko-Aanspreeklikheid uit Onregmatige Daad* (doctoral thesis, UNISA) 1974; Neethling *Die Reg op Privaatheid* (LLD thesis, UNISA) 1976; Neethling *Persoonlikheidsreg* (1985); Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985); Van Warmelo *Regsleer*,

remains a useful tool for the analysis of private law rights⁵ and it was also extended to public law during the 1980s.⁶

The doctrine of subjective rights has no home in English law.⁷ For instance, English property law does not clearly distinguish between property as an object, and property rights; notions such as right, title and interest are used interchangeably.⁸ However, if one considers Sir William Blackstone's famous definition of property in his *Commentaries on the Laws of England*,⁹ it does contain some features of the doctrine. William Blackstone's *Commentaries* of 1765 was the first legal treatise to describe comprehensively the English common law as it existed in the mid-eighteenth century.¹⁰ The Blackstonian definition, therefore, pre-dates the works of the

Regswetenskap, Regsfilosofie (1973); Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 2ed (1982) ch 2 3 4 10–12; Van der Vyver and Joubert *Persone- en Familiereg* 3ed (1991) 1–32; Van der Vyver "The Doctrine of Private Law Rights" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 210; Sonnekus and Neels *Sakereg Vonnisbundel* 2ed (1994) 6–19; Van Niekerk "Is Persoonlikheidsregte Subjektiewe Regte?" 1990 15(2) *Tydskrif vir Regswetenskap* 28 29; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 381F–383C/D. Scott ("Deliktereg 1985: 'n Besinning oor Teorie, Praktyk en Onderrig" 1985 18 *De Jure* 122 139) states that the *Tommie Meyer* decision constitutes "n triomf vir daardie teoretici waarvan Joubert die eerste was, wat die aanwending van die Vastelandse teorie oor subjektiewe regte in ons eie deliktereg bepleit het". See further *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 (2) SA 627 (T) 642A 641G–H; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 381C–D.

⁴ See Lewis "Book Review Sakereg" 1991 108 *SALJ* 369; Van der Walt "Kritiese Vrae oor die Leerstuk van Subjektiewe Regte in die Suid-Afrikaanse Regsleer" 1996 28 *De Jure* 43; Kleyn "Dogmatiese Probleme Rakende die Rol van Onstoflike Sake in die Sakereg" 1993 26 *De Jure* 1 7–8. Knobel ("Trade Secrets and the Doctrine of Subjective Rights" 2001 64 *THRHR* 572 579–538) discusses criticism of a general nature and soundly counters such criticism. Specific criticism within the context of property law is discussed under heading 3 below.

⁵ See Van der Vyver "Expropriation, Rights, Entitlements and Surface Support of Land" 1988 105 *SALJ* 1; Badenhorst "Transfer Development Rights in America: Just Compensation, Fair Compensation or No Compensation" 1987 *TSAR* 214 217–219; Badenhorst, *Die Juridiese Bevoegdheid om Minerale te Ontgin in die Suid-Afrikaanse Reg* (LLD thesis, University of Pretoria) 1992; Badenhorst "Mineral Law and the Doctrine of Rights: A Microscope of Magnification?" 2006 27 *Obiter* 539.

⁶ Van Wyk ("Privaatreg, Publiekreg en Subjektiewe Regte" 1980 13 *De Jure* 1) raised the issue whether an individual has subjective rights in public law and whether such rights should be recognised. A theory of public subjective rights has subsequently been developed in public law jurisprudence (see Venter *Die Publiekregtelike Verhouding* (1985); Venter "Publieke Subjektiewe Regte: 'n Beskouing oor die Regsverhouding Tussen Staat en Burger" (Wetenskaplike bydraes van die PU vir CHO) 1980 Reeks H74; Robinson "'n Regsteoretiese Perspektief op die Publieke Subjektiewe Regsleer as Verklaringsmodel van die Publiekregtelike Verhouding" 1988 3.2 *SA Publiekreg* 210.

⁷ Samuel ("Le Droit Subjectif and English Law" 1987 46 *Cambridge Law Journal* 264) is of the opinion that it is misleading to view the common law through a "subjective right structure" (273) and maintains that the concept of a subjective right has no place in the common law (284–286).

⁸ See further Badenhorst "Towards a Civilised Theory of Property Rights in Australian Law" 2019 27 *Australian Property Law Journal* 134 136.

⁹ Blackstone *Commentaries on the Laws of England* A Facsimile of the First Edition of 1765–1769 (1979) vol 2 ch 1.

¹⁰ Selected Editions of Blackstone's Commentaries in the Creighton Law Library Venteicher Rare Book Room Collection <https://culibraries.creighton.edu/rarebook/Blackstone> (accessed 2022-06-23).

nineteenth-century Pandectists, which makes it even more interesting to analyse.

This article discusses the presence of some of the features of the doctrine that occur in Blackstone's definition. An analysis of the Blackstonian definition within English law is not intended. The article first discusses the doctrine and the importance of being aware that a subjective right involves dual relationships. The article subsequently deals with specific criticism against the doctrine within the context of property law as a prelude to the definition of Blackstone. The subjective right categories are also restated owing to recognition of new legal objects and criticism against the doctrine. A classification of entitlements for purposes of property law is also suggested. The article examines Blackstone's definition of property through a subjective right structure to illustrate which elements of the doctrine are present. Such analysis only focuses on two types of subjective right, namely personal and real rights. The author concludes that the Blackstonian definition of rights to property contains some of the features of the doctrine of subjective rights, which may be used as a tool for rights analysis in the English common law systems.

2 DOCTRINE OF SUBJECTIVE RIGHTS

A legal subject is the bearer of subjective rights (including entitlements), competencies, and legal duties.¹¹ In terms of this doctrine, a subjective right is the claim of a legal subject as against other persons to a legal object.¹² An entitlement constitutes the contents of a right.¹³ A competence is the capacity of a person to exercise the functions of a legal subject.¹⁴ A legal duty is the converse of a subjective right.¹⁵

That to which a holder of a subjective right has a claim is a legal object.¹⁶ The doctrine traditionally distinguishes between the following legal objects:¹⁷

- a) corporeal things;¹⁸
- b) immaterial (or intellectual)¹⁹ property, namely the products of the human intellect and spirit which have been embodied in some externally perceivable form;²⁰

¹¹ Van der Vyver and Joubert *Persone- en Familiereg* 38. See Knobel 2001 *THRHR* 574.

¹² Van der Vyver 1988 *SALJ* 6.

¹³ *Ibid.*

¹⁴ See Joubert 1958 *THRHR* 115; Van der Vyver 1988 *SALJ* 6. For instance, at a certain age, a person of sound mind is competent to execute a will.

¹⁵ Joubert 1958 *THRHR* 13.

¹⁶ Van der Vyver and Joubert *Persone- en Familiereg* 9.

¹⁷ Joubert 1958 *THRHR* 113; Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 407; Van der Vyver and Joubert *Persone- en Familiereg* 9; Van der Vyver in *Huldigingsbundel vir WA Joubert* 231–237; Midgley "Delict" in Joubert and Faris (eds) *LAWSA* 3ed 15 (2016) par 80; Knobel 2001 *THRHR* 574. See, however, Devine ("The Object of a Legal Right" 1965–1966 *Acta Juridica* 118–120), who suggests the following legal objects: (a) corporeal things, (b) immaterial property, (c) other rights, and (d) personal qualities.

¹⁸ Van der Merwe conventionally defines a "thing" (*LAWSA* 27 par 18) as "a corporeal object external to man which is an independent legal entity susceptible to private ownership and valuable and useful to legal subjects."

- c) interests of personality – namely, one's good name, physical integrity, honour and privacy;²¹ and
- d) performances – in other words, doing something or refraining from doing something.²²

Subjective rights are classified in accordance with the differing nature of their objects:²³

- a) a right to a corporeal thing is a real right;²⁴
- b) a right to immaterial (or intellectual) property is an immaterial (or intellectual) property right;²⁵
- c) a right to an interest of personality is a right of personality; and
- d) a right to performance is a personal right;²⁶

An entitlement “denotes what a person, by virtue of having a right to a legal object, may lawfully do with the object of his right”.²⁷ The following entitlements, which are not a closed list, can be distinguished:²⁸

- a) possession – that is, the entitlement to have the legal object under your control;
- b) use and enjoyment – that is, the entitlement to use and enjoy the legal object;
- c) disposal – that is, the entitlement to determine what may and what may not be done with the legal object;
- d) consummation and destruction – that is, the entitlement to consume the legal object or to destroy the legal object in any way; and
- e) alienation – that is, the entitlement to transfer the ownership of a legal object to another legal subject.

¹⁹ Like Knobel (2001 *THRHR* 575), the term intellectual property is preferred. Neethling (“Persoonlike Immaterieelgoedereregte: ‘n Nuwe Kategorie van subjektiewe regte” 1987 50 *THRHR* 316 318–320) has identified earning capacity and creditworthiness as a fifth object, namely personal immaterial property, that is, intangible products of the human mind or endeavour which relate to one's personality. The corresponding right is a personal immaterial property right.

²⁰ Such as patents and copyright. Knobel (2001 *THRHR* 589–590) argues that trade secrets should also be recognised as an object of an independent subjective right, namely an intellectual (immaterial) property right.

²¹ Knobel 2001 *THRHR* 575.

²² *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O) 603E; *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd* 2011 (2) SA 157 (SCA) par 31; *Absa Bank Ltd v Keet* 2015 (4) SA 474 (SCA) par 21; *Ethekwini Municipality v Mounthaven (Pty) Ltd* 2018 (1) SA 384 (SCA) par 13.

²³ Van der Vyver and Joubert *Persone- en Familiereg* 3–14; Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 421–429; Knobel 2001 *THRHR* 575.

²⁴ *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd supra* par 31; *Absa Bank Ltd v Keet supra* par 21.

²⁵ Like Knobel (2001 *THRHR* 575), the term intellectual property right is preferred.

²⁶ *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds supra* 603E; *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd supra* par 31; *Absa Bank Ltd v Keet supra* par 21; *Ethekwini Municipality v Mounthaven supra* par 13.

²⁷ Van der Vyver 1988 *SALJ* 6.

²⁸ Van der Vyver and Joubert *Persone- en Familiereg* 19–20.

A subjective right involves dual relationships: first, the legal relationship between the right holder and the legal object (subject/object relationship), and secondly, the legal relationship between the right holder and third parties (subject/third-parties relationship).²⁹ In terms of the first relationship, the holder of the right may use, enjoy and dispose of the legal object.³⁰ The second relationship requires others to refrain from infringing upon the holder's relationship to the legal object.³¹

The importance of the dual relationships of a subjective right is apparent if one considers the theoretical weakness of the personalist theory of the (South African) common law, which is used to distinguish personal and real rights, with reference to the operation of such rights against third parties.³² In terms of the personalist theory, a real right is said to be absolute in the sense that it operates against the whole world, while a personal right is relative in the sense that it is only enforceable against the other party to the obligation.³³ When it is maintained that a real right operates against the whole world and a personal right against a person, the subject/third-parties relationship of a real right is erroneously compared with the subject/object relationship of a personal right.³⁴ However, in terms of the doctrine of subjective rights, a real right operates more absolutely than a personal right, by bestowing on the holder a direct power or absolute control over the thing, while a personal right operates only against the other party within the subject/object relationship.³⁵ In terms of the subject/third-parties relationship, both real and personal rights operate against third parties although the degree of operation differs.³⁶

In conclusion, personal or real rights are enforced relatively and absolutely, respectively, within the subject/object relationship while, both rights are absolutely protected against interference from other persons within the subject/third-parties relationship.³⁷

²⁹ Joubert 1958 *THRHR* 114; Van der Vyver in *Huldigingsbundel vir WA Joubert* 214; Knobel 2001 *THRHR* 574.

³⁰ Midgley in *LAWSA* 15 par 80; Knobel 2001 *THRHR* 574.

³¹ Midgley in *LAWSA* 15 par 80; Knobel 2001 *THRHR* 574–575.

³² Badenhorst 2006 *Obiter* 540.

³³ Muller, Brits and Pienaar *Silberberg and Schoeman's The Law of Property* 6ed (2019) 8. See *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* *supra* 602H–603B; *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) 583E; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) par 16; *XZS Industries v AF Dreyer (Pty) Ltd* [2004] 4 SA 186 196F/G; *ABSA Bank Ltd v Keet* *supra* par 20; *Majola v Country Cloud Trading* 2019 (5) SA 195 (KZP) par 34 40.

³⁴ Sonnekus and Neels *Sakereg Vonnisbundel* 90–91.

³⁵ See Van der Walt "Personal Rights and Limited Real Rights: An Historical Overview and Analysis of Contemporary Problems Related to the Registrability of Rights" 1992 55 *THRHR* 188–189; Badenhorst "The Distinction Between Real Rights and Personal Rights in the Deeds Registration System of South Africa – Part Two: Pragmatic Distinction Between Real Rights and Personal Rights" 2022 *AJICL*.

³⁶ Muller *et al Silberberg and Schoeman's The Law of Property* 59; Sonnekus and Neels *Sakereg Vonnisbundel* 90–91; Badenhorst 2022 *AJICL*.

³⁷ See Van der Walt 1992 *THRHR* 191–192.

3 CRITICISMS AGAINST THE DOCTRINE OF SUBJECTIVE RIGHTS FROM WITHIN PROPERTY LAW

The first point of criticism against the doctrine is its inability to accommodate the notion of incorporeals.³⁸ The doctrine restricts the objects of real rights to corporeal things. However, Roman law and Roman-Dutch law recognise not only corporeal objects as things, but also incorporeals (rights).³⁹ South African legal practice and legislation also recognise incorporeals (rights) and real rights.⁴⁰ Such recognition confirms the notion of a subjective right being the object of another subjective right.⁴¹ The construction of a right being the object of another right is inconsistent with the clear distinction that is made by the doctrine between subjective rights and legal objects.⁴² If things are not limited to corporeal objects, it becomes difficult to distinguish between real rights, immaterial property rights and personality rights.⁴³

The counter-arguments to the first point of criticism include, first, that incorporeals are an exception to the doctrine.⁴⁴ With the statutory abolition of mineral rights in South Africa,⁴⁵ which have served as the object of real rights in some instances, the number of incorporeals is substantially reduced, while some of the remaining exceptions are merely creatures of statute.⁴⁶ Secondly, an incorporeal may simply be recognised as a new legal object with a corresponding new subjective right.⁴⁷ In other words, other rights may serve as a legal object.⁴⁸ As incorporeals do exist, the pragmatic approach would be to recognise incorporeals as a new legal object. Thirdly in terms of a Romanist or retro approach⁴⁹ to the notion of property,

³⁸ Van der Walt 1992 *THRHR* 170 190–19; Kleyn 1993 *De Jure* 1 8. See further Cloete “Onstoflike Sake in die Nuwe Suid-Afrikaanse Reg” (LLD thesis Pretoria) 2001; Cloete “Die Plek en Rol van Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg: ‘n Kritiese Oorsig” 2003 *Obiter* 65.

³⁹ Muller *et al Silberberg and Schoeman’s The Law of Property* 17.

⁴⁰ See the examples given by Van der Merwe *Sakereg* (1989) 22; Kleyn 1993 *De Jure* 5; Muller *et al Silberberg and Schoeman’s The Law of Property* 19; Cloete “Historiese Onderskeid Tussen Stoflike en Onstoflike Sake in die Suid-Afrikaanse Sakereg: ‘n Sinopsis” 2005 38 *De Jure* 316–317.

⁴¹ Muller *et al Silberberg and Schoeman’s The Law of Property* 19.

⁴² Van der Merwe *Sakereg* 21. See, however, Kleyn 1993 *De Jure* 8–9 10.

⁴³ Van der Merwe *Sakereg* 21. See, however, Kleyn 1993 *De Jure* 9.

⁴⁴ See Van der Merwe *Sakereg* 22 62 63; see however Kleyn (1993 *De Jure* 5–6) and Cloete (2005 *De Jure* 295 316–318) who reject this approach.

⁴⁵ S 110 of the Mineral and Petroleum Resources Development Act 28 of 2002; s 53 of the Mining Titles Registration Amendment Act 24 of 2003.

⁴⁶ Cloete (2005 *De Jure* 317 n 172) provides examples of such creatures of statutes: mortgages of leases and personal servitudes (in terms of the Deeds Registries Act 47 of 1937); real rights in respect of immaterial property (in terms of the Patents Act 57 of 1978) and attachment of incorporeal things (Rules of the High Court).

⁴⁷ See, for instance, Badenhorst (1987 *TSAR* 219) who recognises air space, i.e., a cubic entity, as a new object and transfer development rights as the corresponding subjective right. Other examples of such objects are given, namely electricity or nuclear energy (219).

⁴⁸ Devine 1965–1966 *Acta Juridica* 113 114 119.

⁴⁹ Kleyn and Borraine (*Silberberg and Schoeman’s Law of Property* 3ed (1992) 19) define a thing as “anything whether corporeal or incorporeal, that is of use and/or value to man and that is regarded as *in commercio*”. See also Kleyn 1993 *De Jure* 1 and 13.

corporeality as a characteristic of a thing can be disregarded altogether. In terms of such an approach, rights to corporeal and incorporeal things (other rights) are in both instances real rights. The conventional approach of limiting things to corporeals⁵⁰ is, however, theoretically sound as being in line with property law theory.⁵¹

A second point of criticism is that it is doubted whether the doctrine means, “all rights that relate in any way to a thing are inevitably and automatically real rights”.⁵² For instance, does a right to claim delivery of a movable thing, or transfer of ownership of land, also constitute a real right because it indirectly relates to a thing? The answer to this point of criticism is that it is possible (within the boundaries of the doctrine) to distinguish between a personal right (which is indirectly concerned with acquiring a thing or land) and real rights (which have a thing or land as a direct object).⁵³ The personal right (to the delivery of a thing or to a transfer of land) has performance as its object,⁵⁴ and is, therefore, a personal right.

The above-mentioned personal rights (that relate indirectly to land) are referred to in conveyancing law and practice as *iura in personam ad rem acquirendam*⁵⁵ (personal rights in respect of registrable real rights). Such a right is said to have as its object a further right, such as the right of ownership.⁵⁶ Despite being personal in nature, the courts indicate that it is “trite law that rights of the class *iura in personam ad rem acquirendam* become real rights on registration” in the deeds office.⁵⁷ The doctrine of subjective rights clearly shows that the act of registration cannot magically convert a personal right (with its corresponding object, namely performance) into a real right (with its corresponding object, namely a thing or land).⁵⁸ The Constitutional Court decided in *Ethekwini Municipality v Mounthaven (Pty) Ltd*⁵⁹ that a right to claim transfer of land is a personal right.⁶⁰ The court held that such personal right is terminated upon registration.⁶¹ The court accepted that acquisition of ownership takes place because of the registration of

⁵⁰ See the conventional definition of a thing in fn 18 above.

⁵¹ Van der Merwe *Sakereg* 21–22.

⁵² Van der Walt 1992 *THRHR* 191.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ De Villiers CJ, while dealing with the registrability of a right in the deeds office, mentioned a special category of personal right that exists prior to registration of a real right in *Registrar of Deeds (Tvl) v the Ferreira Deep Ltd* 1930 AD 169 180: “That personal rights, *iura in personam*, are not capable of registration is a truism. The definition of such rights excludes their registration. But that does not apply to the class of personal rights which are known as *iura in personam ad rem acquirendam*. As contracts, with few exceptions, give rise only to personal rights, this class of right, although relating to immovable property, is a personal right until registration, when it is converted into a real right by such registration.”

⁵⁶ Devine 1965–66 *Acta Juridica* 19.

⁵⁷ *Upper Kubusie Village Managements Board v Nel* [1968] 2 All SA 437 (E) 440; *Ex parte Menzies* 1993 (3) SA 799 (C) 806F–G. In *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd supra* par 31, Harms DP (incorrectly) indicates that a personal right “matures into a real right on registration”.

⁵⁸ Badenhorst “Registrability of Burdens to Develop Land and Reversionary Rights in Terms of the Deeds Registration Act 47 of 1937” 2020 *TSAR* 463.

⁵⁹ 2019 (4) SA 394 (CC).

⁶⁰ *Ethekwini Municipality v Mounthaven (Pty) Ltd supra* par 18.

⁶¹ *Ibid.*

transfer of ownership and not because of the registration or conversion of a *ius in personam ad rem acquirendam*.⁶² It is correct that *iura in personam ad rem acquirendam* are indeed personal rights, which are not registrable in the deeds office.⁶³

As to this second point of criticism, the doctrine illustrates and confirms the importance of distinguishing between the different objects of rights and of the fact that a right indirectly relates to a thing does not make it a real right or detract from the usefulness of the doctrine.⁶⁴

A third point of criticism is raised within the context of the age-old civil law debate whether possession is a subjective right or merely a factual situation.⁶⁵ The doctrine is said to be unable to explain the existence and protection of possession as a subjective right.⁶⁶ For instance, if possession is recognised as a subjective right, the possession of a thief, which is treated as unlawful possession, would constitute an (unlawful) subjective right to a thing,⁶⁷ which constitutes a *contradictio in terminis*. The inability to explain possession as a subjective right is attributed to the terminological inadequacies of the doctrine and is not because possession is not part of property law.⁶⁸ Without discussing the intricacies of possession, it is submitted that a distinction should be made between a right of possession and possession as a factual situation. If the right to possession is lawfully acquired, it should be recognised as a subjective right: the entitlement of possession is acquired from the owner of a thing and is contained by a subjective right, namely a real right with a thing as its object.⁶⁹ If a person is

⁶² *Ibid.*

⁶³ Badenhorst 2020 *TSAR* 460 477.

⁶⁴ The (incorrect) view is at times held (that a personal right can also pertain to a thing), which complicates the distinction between the said rights. This erroneous view is avoided if the doctrine of rights, which focuses on the object of a right to distinguish between rights, is however, kept in mind.

⁶⁵ See Muller *et al Silberberg and Schoeman's The Law of Property* 310–311.

⁶⁶ Van der Walt "The Doctrine of Subjective Rights: A Critical Reappraisal From the Fringes of Property Law" 1990 53 *THRHR* 316 324 325.

⁶⁷ Van der Walt 1990 *THRHR* 322.

⁶⁸ Van der Walt 1990 *THRHR* 324. Van der Walt (1990 *THRHR* 325–329) proposes a system based upon subjective relationships rather than subjective rights to resolve the terminological deficiencies.

⁶⁹ That would be in terms of the following formulation of the subtraction from the dominium test suggested by Badenhorst and Coetser ("Pearly Beach Trust v Registrar of Deeds 1990 4 SA 614 (C)" 1991 24 *De Jure* 376 389): "If a legal transaction involves the transfer of an entitlement of ownership of land to a person other than the owner of land, a subtraction of ownership of such land takes place and the right encompassing the entitlement qualifies as a real right." See, however, Van der Merwe (*Sakereg* 173–176 and 458), who argues that upon the grant of a limited real right, an owner does not transfer entitlements to another person but only agrees to the suspension of some of the owner's entitlements. Sonnekus ("Notariele Binding, Deeltitels en 'n Erfdiensbaarheid om te Parkeer" 2017 *TSAR* 116 134) correctly explains that upon the grant of a limited real (for instance, a servitude) by an owner of land, the grantee of the right acquires limited entitlements while, the exercise of corresponding limited entitlements of the owner are accordingly restricted. Because of the absence of an entitlement of disposition, the holder of a limited real right (for instance, in case of a servitude), in turn cannot grant entitlements to third parties (Sonnekus 2017 *TSAR* 135–136). Upon termination of the limited real right, ownership expands back to its original form by operation of law without the need to retransfer the entitlements back to the owner (see Sonnekus 2017 *TSAR* 134–135).

merely in possession, as in the case of a thief, the protection of possession by the *mandament van spolie* is for policy reasons (and does not contradict the possible recognition of the right of possession as a subjective right).

4 DOCTRINE OF SUBJECTIVE RIGHTS RESTATED

In response to the criticism from within property law against the doctrine and possible extensions of the categories of legal objects, as indicated in the footnotes, the author wishes to propose that subjective rights be classified as follows, with reference to the following legal objects:

- a) a right to a corporeal thing is a real right (or property right);
- b) a right to incorporeal property⁷⁰ is an incorporeal⁷¹ property right;
- c) a right to intellectual property⁷² is an intellectual property right;
- d) a right to personal intellectual property⁷³ is a personal intellectual property right;
- e) a right to aspects of personality is a right of personality; and
- f) a right to performance is a personal right.

The following classification of entitlements of ownership have been suggested (within the context of registration of real rights in the deeds office),⁷⁴ namely, the entitlements:

- a) to use and enjoy (*ius utendi*);
- b) to possess (*ius possidendi*);
- c) to enjoy fruits (*ius fruendi*); and
- d) of disposition (*ius disponendi*),⁷⁵ which in turn is made up of the entitlement:
 - i of alienation, namely, by sale, exchange or donation;⁷⁶
 - ii to encumber ownership of land by, for instance, granting a servitude, a long-term lease or a mortgage in respect of the land; and
 - iii to enjoy the fruits of the disposition.

5 BLACKSTONE'S DEFINITION

Chapter one of volume two of Blackstone's *Commentaries* has the heading "Property, in General". This may create the impression that his definition is

⁷⁰ For instance, other subjective rights (see fns 17 46), electricity and nuclear energy (see fn 47).

⁷¹ It is acknowledged that all subjective rights are incorporeal in nature. The incorporeal label may thus be confusing.

⁷² See fn 20.

⁷³ See fn 19. Namely, earning capacity and creditworthiness as legal object.

⁷⁴ See Badenhorst 2022 *AJICL*.

⁷⁵ Van Der Vyver "Expropriation, Rights, Entitlements and Surface Support of Land" 1988 105 *SALJ* 1 11.

⁷⁶ Either *inter vivos* or *mortis causa*.

about property and not a right to property.⁷⁷ The definition, however, reads as follows:⁷⁸

“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”

Features of the doctrine of subjective rights are present in the Blackstonian definition, as discussed below.

First, the definition is about the “right of property” and not the wide (undefined) English law notion of “property”. At the outset of chapter one of volume two of his *Commentaries*, Blackstone explains that the previous volume deals with the rights of persons while the second volume is dealing with *jura rerum* (rights of things). According to Blackstone, *jura rerum* are “those rights which a man may acquire in and to such external things as are unconnected with his person”.⁷⁹ The right of property is thus the “right” of a person to a thing.⁸⁰ Because possession is a right or title in English law,⁸¹ possession would simply be a right to a thing.

Secondly, the definition contains some of the features of the right to property: a right of property is solely vested in a legal subject.⁸² This type of vesting provides exclusivity to the holder of the right.⁸³ The description of “despotic” should not be interpreted to mean that the exercise of the right to property is absolute or unrestricted⁸⁴ as Blackstone does recognise that restrictions can be imposed on the exercise of rights by the law of the land.⁸⁵ The right to a thing is a despotic power over such a thing in terms of the subject/object relationship of a right of property. “Dominion” (which means sovereignty of control over things) denotes some form of legally authorised power over a thing.⁸⁶ In other words, it tells us about the existence of some proprietary power between a person and a thing.⁸⁷

Thirdly, things (*res*) are the relevant legal objects.⁸⁸ Blackstone states in so many words that “the objects of *dominion* or property are things”.⁸⁹ Things exist independently, on their own, are external to persons and are legally

⁷⁷ See for instance Gray, Edgeworth and Foster (*Property Law in New South Wales* 3ed (2012) 1) who merely accept it is a definition of “property”. The Blackstonian definition is quoted as reading: “Property is the sole and despotic ...”.

⁷⁸ Vol 2 ch 1.

⁷⁹ Blackstone *Commentaries on the Laws of England* vol 2 ch 1.

⁸⁰ Badenhorst 2019 *Australian Property Law Journal* 153–154.

⁸¹ See Blackstone *Commentaries on the Laws of England* vol 2 ch 14.

⁸² Badenhorst 2019 *Australian Property Law Journal* 139.

⁸³ *Ibid.*

⁸⁴ According to Rose (“Canons of Property Talk, or, Blackstone’s Anxiety” 1998 108 *Yale Law Journal* 601 604), the description of property as an exclusive dominion “was in a sense a trope, a rhetorical figure describing an extreme or ideal type rather than reality”. See further Rose 1998 *Yale Law Journal* 631.

⁸⁵ Blackstone *Commentaries on the Laws of England* vol 1 ch 1.

⁸⁶ *Yanner v Eaton* [1999] HCA 53 par 17 and 18. See Gray *et al Property Law in New South Wales* 3; Badenhorst 2019 *Australian Property Law Journal* 139.

⁸⁷ Badenhorst 2019 *Australian Property Law Journal* 139.

⁸⁸ Badenhorst 2019 *Australian Property Law Journal* 153.

⁸⁹ Blackstone *Commentaries on the Laws of England* vol 1, ch 2.

demarcated.⁹⁰ Things, as legal objects, can be corporeal (tangible) or incorporeal (intangible) in nature.⁹¹ The same problem raised earlier with incorporeals would exist if the doctrine of subjective rights were to be applied in English property law. Blackstone also recognises the object of a personal right, namely performance, which entails “to do or not to do a particular” act.⁹²

Fourthly, the right to property also involves the exercise of entitlements by virtue of such a right.⁹³ In an earlier passage of his *Commentaries*, Blackstone states that the right of property “consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land”.⁹⁴ This statement seems like a listing of the content (entitlements) of a right of property. This statement is, however, made in volume one, chapter one of his *Commentaries*, which volume deals with the law of persons. Chapter one specifically deals with the “absolute right, inherent in every Englishman” for purposes of the law of persons. The capacity of a person to own and deal with property is thus rather a competency. From the definition, it appears that the exercise of dominion constitutes the exercise of entitlements by virtue of a subjective right. English law recognises incidents of property as the content of a property right.⁹⁵

Fifthly, a property right involves a legal relationship between a person and a thing, as well as a legal relationship between a person and third parties. The first relationship involves the exercise of entitlements by virtue of the right to property (“despotic dominion”), while the second relationship involves the exclusion of all other persons “in the universe” from interfering with the right holder’s exercise of property entitlements.⁹⁶

Sixthly, a property right is exercised to the exclusion of third parties (“any other individual in the universe”).⁹⁷ In English law, property rights are said to be enforceable in respect of a thing (*in rem*), while personal rights are only enforceable against a particular person (*in personam*).⁹⁸ This corresponds with the distinction between “absolute” rights and “relative” rights in the personalist theory of civil law.⁹⁹ As indicated before, personal and real rights

⁹⁰ Badenhorst 2019 *Australian Property Law Journal* 137. Existing outside a person is also a requirement of a thing in South African law (see fn 18).

⁹¹ See Blackstone *Commentaries on the Laws of England* vol 2 ch 2.

⁹² Blackstone *Commentaries on the Laws of England* vol 2 ch 30.

⁹³ Badenhorst 2019 *Australian Property Law Journal* 154.

⁹⁴ Blackstone *Commentaries on the Laws of England* vol 1 ch 1 III; Krier “Of Property Rights and Rights to Property” 2015 41.3 *Ohio N U L Rev* 589 596.

⁹⁵ Honoré (*Making Law Bind: Essays Legal and Philosophical* (1987) 165) listed the following incidents of ownership, namely, the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights of transmissibility and absence of term, the duty to prevent harm, liability to execution and the incidents of residuary, but concedes some overlapping of incidents take place (see further Honoré *Making Law Bind: Essays Legal and Philosophical* 165–75).

⁹⁶ Badenhorst 2019 *Australian Property Law Journal* 155–156.

⁹⁷ Badenhorst 2019 *Australian Property Law Journal* 154.

⁹⁸ See, for instance, Hohfeld “Fundamental Legal Conceptions as Applied in Judicial Reasoning” 1917 26 *Yale Law Journal* 710 714.

⁹⁹ Honoré “Rights of Exclusion and Immunities Against Divesting” 1960 34 *Tulane Law Review* 453 453.

are enforced relatively or absolutely, respectively, within the subject/object relationship while both rights are absolutely protected against interference from other persons within the subject/third-parties relationship. In English law, there is also a realisation that all rights in a sense operate *in rem*¹⁰⁰ or absolutely. This truth becomes apparent when one focuses on the subject/third-parties relationship that is inherent in a subjective right.

Some of the features of the Blackstonian definition survived in modern law and still serve as identifiers of property or property rights.¹⁰¹ The High Court of Australia accepted in *Yanner v Eaton*¹⁰² that “property” is a “description of a legal relationship with a thing” (rather than an object) and that it “consists primarily in control over access”.¹⁰³ This relationship may be broadened to contain the dual relationships of a subjective right. The ability to control access to a thing is based upon the absolute operation of a property right in terms of the subject/object relationship of a subjective right. The theoretical pitfalls in the distinction between rights *in rem* (absolute in their operation) and rights *in personam* (relative in their operation) still occur in English law¹⁰⁴ and can be resolved if the dual relationships of a subjective right are recognised and correctly applied. The Blackstonian definition contains features of the doctrine of rights that are useful in the analysis of property rights in English common law systems.¹⁰⁵

6 CONCLUSION

Upon examination of Blackstone’s definition of property through the lens of subjective rights, it becomes clear that the definition contains features of the doctrine of subjective rights. It is a definition of the right of property to a thing as a legal object. Things may be corporeal or incorporeal. The right of property involves dual relationships: the right of property is an authorised power of control over a thing within the subject/object relationship of a subjective right. The exercise of a right to the exclusion of third parties forms part of the subject/third-parties relationship. A right of property has as its content certain entitlements or incidents. These entitlements are exercised by virtue of the existence of a subjective right. By recognising the dual relationships of a subjective right as part of the property relationship, the pitfalls in the distinction of rights by virtue of their operation against third parties can be avoided. The answer is that personal or property rights are

¹⁰⁰ Honoré 1960 *Tulane Law Review* 459.

¹⁰¹ See for instance Gray *et al* (*Property Law in New South Wales* 3–4) who extract the following characteristics of a property right from the Blackstonian definition: (a) a property right involves the exercise of dominion or control; (b) a property right includes the right to exclude others; (c) a property right applies to external things.

¹⁰² *Supra* par 17.

¹⁰³ *Yanner v Eaton supra* par 18.

¹⁰⁴ Hohfeld 1917 *Yale Law Journal* 710 714; Edgeworth, Rossiter, O’Connor and Godwin *Sackville & Neave: Australian Property Law* 10ed (2016) 9. Hohfeld 1917 *Yale Law Journal* 713 shows that the phrases “in personam” and “in rem” are ambiguous.

¹⁰⁵ See the attempt by Badenhorst (2019 *Australian Property Law Journal* 134) to view Australian property law through the lens of a subjective right structure. See also a similar attempt in respect of Australian mineral law (Badenhorst “Towards a Theory on Publically-Owned Minerals in Victoria” 2014 22 *Australian Property Law Journal* 157).

enforced relatively and absolutely, respectively, within the subject/object relationship while both real and personal rights are absolutely protected against interference from other persons within the subject/third-parties relationship. Some of the features of the doctrine of subjective rights may be used as a tool to analyse property and other rights in English law, which is often said to be rich in detail but poor in principle. Perhaps these features are so universal and logical that they can apply to all legal systems.