Res divini juris as res extra commercium: a Comparative Analysis of Doctrine and Case Law

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Abstract:
The Roman law doctrine *res extra commercium* has excluded certain objects from civil-legal transactions, some of which were related to divine service or otherwise religious purposes. The Roman law doctrine designated them as *res divini juris*, which referred to all the objects dedicated to the Gods. The theory of *res divini juris* developed predominantly in civil law jurisdictions based upon the basis of the old Roman law doctrine, and could be found in legal literature, textbooks, legislation and, case law. Since the times of the Ancient Rome, the attitude to the legal status of *res divini juris* gradually alterated, as well as the scope of its encompassment. Despite being formally excluded from any civil-legal transactions, such objects ceased to be completely excluded from legal relationships and disputes, and are afforded with proper legal protection. Throughout the ages, courts in different states have applied and discussed the doctrine of *res divini juris* in various legal disputes. Complicated legal disputes concerning res divini juris also arise a question, of whether *res divini juris* are always *res extra commercium*, and if not, what are the exceptions from the rule, if any? Finally, could it be estimated, what chattels may belong to *res divini juris*? Do the valuable archeological findings belong to *res divini juris*? The article discusses the existing law doctrine of *res divini juris* and the applicable case law in a form of a comparative analysis in order to establish the legal status of *res divini juris*.

Keywords: res divini juris; res sacrae; res extra commercium; ecclesiastical law; churches; divine service; Roman law; civil law; administrative law

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1. Introduction

The Roman law doctrine of *res extra commercium* presupposed the existence of objects that are excluded from trade and civil-legal transactions by religious reasons, nature, political reasons, or a matter of necessity.[1] The Roman law divided all the existing things (objects, chattels) into *res divini juris* and *res humani juris*.[2] *Res divini juris* bear such characteristics because of their peculiarity of being consecrated, being used for divine services, or are considered to be sacred owing to other different reasons. The latter involved *res sacrae* and *religiosae*, whereas walls and gates (*res sanctae*) also belonged to *res divini juris* to a certain extent.[3] Upon the commentaries of Gai, Book 2, *res sacrae* were dedicated to the higher Gods (*Diis Superis*), whereas *res religiosae* were dedicated to the earthly Gods (*Diis Manibus*).[4] Upon Gai, the objects that belonged to divine law did not belong to anyone (*nullius in bonis*).[5] According to the Italian legal scholar L. Mortara, the origination of *res divini juris* in Roman law was predefined by the pagan idea of deity, which presupposed an anthropomorphic idea of the Gods, who also possessed their rights akin to people, and *res divini juris* were the legacy of the Gods, not of the people.[6] L. Mortara called *res divini juris* to be *res nullius* in a metaphorical sense, since *res divini juris* were excluded from trade (*res extra commercium*) and the right to these things remained in the Gods, who lived out of commerce, but not because an object of property did not exist at all. This tradition was maintained in the Roman Empire before the rise of Christianity, but when it became the official religion of the Roman Empire, the attitude began to alterate, since the Christian God was considered to be far from mundane things, and the rights on *res sacrae* were lodged to the church institutions; in the late Roman Empire, *res sacrae* became the legacy of the church institutions, and any objects which were used for worship became *res sacrae* by their character. Hence, the Christian Church was provided property rights to the sacred objects, which were legally transformed from *nullius in bonis* to *bonis ecclesiae*, and have maintained the status of *res extra commercium* on basis of the notion of the need to protect the moral interests of the society, which lies in the protection of cult.[7]

The legal doctrine of *res divini juris* involves a considerable range of objects, which are commonly used and maintained in churches and other houses of worship, which are consecrated, or are sacred symbols. The doctrine of *res divini juris* was covered by legal scholars in jurisdictions, whose legal systems were founded with a strong influence of Roman law – mainly, the German states of the 19th century and Imperial Austria (in both the Habsburg era and the period of Dual Monarchy); in France, the doctrine is impliedly used in case law, but usually not referring to the Latin doctrines by its original name.

The aim of the article could be summarized as follows:

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1 BARON, J. *Pandekten*. Leipzig: Verlag von Duncker & Humblot, 1876, pp. 72–74 (§ 49).

2 BÖCKING, E. *Pandekten des römischen Privatrechts aus dem Standpunkte unseres heutiges Rechtssystems*. Erster Band. Bonn, 1853, pp. 248–250 (§ 48–49). (As variants, according to Böcking, other spelling of *res humani juris* may be found – for instance, *res hominum, res purae, res humanae* and *res profanae*.)

3 D. 1.8.1 (*Gai 2 inst.*).

4 *Gai* 2.4.

5 *Gai* 2.9.

6 MORTARA, L. (note). In: *Corte di Cassazione di Firenze*, Udienza 16 febbraio 1888, Il Foro Italiano, Vol. 13, Parte Prima: Giurisprudenza Civile e Commerciale, pp. 1189–1199.

7 MORTARA, L. (note). In: *Corte di Cassazione di Firenze*, pp. 1190–1192.

1) to discuss the legal status of *res divini juris* and other doctrines similar and adjacent to it in the legal scholarship and textbooks, based on Roman law, as well as to review the scholarship of more modern times in order to investigate of whether did the legal doctrines change with the passage of time, or not;
2) to review the outstanding court decisions, which deal with the application of the principles of *res divini juris* in disputes encompassing civil, ecclesiastical and administrative law. The application of the principles laid down in the doctrine of *res divini juris* in case law depicts, that it still exists and did not vanish into history.
3) to provide a contemporary look on the classification of *res sacrae* and provide the examples of objects which fall under such definition according to the legacy of court practice, which will include both historical and more modern specimen.
4) to discuss the alteration of the doctrine of *res divini juris* during the last centuries, and to provide the examples of its use in the case law of different courts, mainly in civil and ecclesiastical disputes.

2. The doctrine of res divini juris

2.1 A classical view

The basic classification of *res divini juris*, according to celebrated textbooks, legal literature and case law, should look as follows:

1. *Res sacrae*. The *res sacrae*, literally meaning "sacred things" from Latin language, usually refer to objects that are used for religious services. The sense of *res sacrae* in Ancient Rome, according to the commentaries of Gai, was the following: only that thing could be considered as sacred, which was consecrated by the authority of Roman people, or by a promulgated law, or by an act of Senate.[8] Upon the German scholar E. Siebenhaar *res sacrae* are objects, which are devoted to God and are used for religious practices; the *res sacrae* are excluded from trade because they are the objects, which are used in divine services.[9] C. G. von Wächter mentioned that the *res divini juris* belonged to God, and because of this, the given things could not become an object of property or commerce, and each civil-legal transaction concerning them was regarded as void.[10] Siebenhaar also considered, that the following objects should be considered as *res sacrae*: the churches themselves, as well as the items used for the administration of sacraments, the baptism and the communion. The mentioned items are *res extra commercium* in the sense that they do not belong to anybody (*res nullius*), even to the church itself.[11] However, the German jurisprudence of the XIX century displayed that church pews did not belong to *res sacrae*,[12] and the courts considered them to be as

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8 *Gai* 2.5.

9 SIEBENHAAR, E. *Lehrbuch des Sächsigsten Privatrechts*. Leipzig: Druck und Verlag der Roßberg'schen Buchhandlung, 1872, p. 71 (§ 37, II).

10 VON WÄCHTER. C. G. *Pandekten* (Th. 1). Leipzig: Druck und Verlag vom Breitkopf und Härtel, 1880, pp. 274–275 (§ 60, I).

11 SIEBENHAAR, E. *Lehrbuch des Sächsigsten Privatrechts*, pp. 71–72 (§ 37, II).

12 Oberlandesgericht zu Darmstadt, Urt. vom 12. September 1856. In: Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten. Herausgeben von J. A. Seuffert und E. A. Seuffert. 11 Band. München: Literarisch-artistliche Anstalt der J. G. Gotta'schen Buchhandlung, 1857, pp. 415–416.

an *easement*, that is a personal right to use someone else's property, to which I and my colleague, Dr. J. Machovenko have dedicated a whole chapter of a recent article.[13] The High Court of Bavaria found in its 1878 judgment that the designation of *res sacrae* as *res nullius* is in accordance with Justinian law.[14] The Polish lawyer H. Insadowski, in terms of applying the term *res nullius* to *res divini juris*, argued that *res nullius* usually mean objects not belonging to anybody and which may be appropriated, but the said notion could not be applied to sacred objects: such peculiarity, upon the view of H. Insadowski arose because *res divini* juris were included into *res nullius* without any reservations. Hence, it would be correct to say that *res nullius* include not only all *res divini juris*, but to some objects from *res humani juris* as well. Insadowski also claimed, that the status of *res sacrae* relating to a certain object could be withdrawn in case the sacred object terminated to be sacred for some reason and it could became an object of *res in commercio*, and thus it could become encompassed into the scope of civil-legal transactions, which was made by a formal act that was named *profanatio*, or *evocation*.[15] In the law of Imperial Austria, the *tombstones* were considered *res extra commercium*, but the Supreme and Cassation Court of Imperial Austria held that they were not exempt from execution, in contrast to the items used in divine services, whereas tombstones were never used as such.[16] The German Supreme Court recognized church bells to belong to *res divini juris* and, consequently, to *res sacrae* in its notable 1903 judgment, which will be discussed below.[17] The Federal Administrative Court of Germany came to the same conclusion in the judgment of October 7, 1983.[18] The Italian legal scholar G. Dattino paid attention to a multitude of legal disputes within the courts of the Kingdom of Italy in the second part of the XIX century concerning the legal status of churches, arguing that in some instances, churches were even found to be *res in commercio* based on the fact that there were no peculiarities of state property in them, whereas the other positions held, that all the churches opened for public divine services, and recognized by authorities, should be regarded as natural good, being thus classified as state property and being inalienable, whereas the third position lied in the notion that the churches are *res extra commercium* not only because they are *res sacrae*, but because they are brought out of civil-legal transactions when they are devoted for public use and are of state or municipal property. There was an exception, according to Dattino: when churches belonged to private persons or belonged to certain fraternities,

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13 LYTVYNENKO, A. A. – MACHOVENKO, J. G. The legal status of church pews in certain civil law jurisdictions, *International Comparative Jurisprudence* 9, No. 1 (2023), pp. 1–23.

14 Oberster Gerichtshof für Bayern, IV. Senat, Urt. vom 14 Januar 1878, Nr. 4. In: Sammlung vom Entscheidungen des obersten Gerichthofes für Bayern in Gegenstanden des Civilrechts und Civilprozesses. Siebenter Band. Erlangen: Verlag vom Palm & Enke, 1880, Entsch. Nr. 87, pp. 203–209.

15 INSADOWSKI, H. Res sacrae w prawie rzymskiem. *Studjum z sakralnego prawa rzymskiego*. Lublin, 1931, pp. 78–79, 83.

16 K. K. Oberster- Gerichts und Cassationshof, Entsch. vom 19 Febr. 1907, Nr. 2296. In: Sammlung von Zivilrechtlichen Entscheidungen des k.k. Obersten Gerichthofes. Herausgeben vom Leopold Pfaff, Josef v. Schey und Vinzenz Krupský. Fünfundvierzigster Band (Neue Folge, XI. Band). Wien: Verlag der Manzschen k.u.k. Hof-Verlags u. Universitäts-Buchhandlung, 1910, Entsch. Nr. 4459, pp. 841–843.

17 Reichsgericht, V. Civilsenat, Urt. vom 19. November 1903, Rep. V. 218/03. In: Entsch. RG in Zivilsachen Bd. 56, Entsch. Nr. 6, pp. 25–28.

18 Bundesverwaltungsgericht, Urt. vom 7. Oktober 1983, BVerwG 7 C 44.81, at para. 10.

they were *res in commercio* and could be subject to alienation.[19] To wit, the Italian Civil Code contained no provisions relating to the regulation of sacred objects; so, according to the case law, the given issue should be resolved by the principle of analogy, in this case, with the property belonging to the state or the provinces and municipalities.[20] It should be denoted, that occasionally, *res sacrae* were provided with an additional classification, which divided them into *res consecratae* (that is, the consecrated objects) and *res benedictae* (the blessed objects), as well as *res ecclesiasticae* (things that are church property). For instance, such classification may be found in the work of the German lawyer P. Hergenröther, who held that *res consecratae* included the following things: ciboria, monstrances, vessels for holy water, crucifixions, tabernacles, church bells and churchyards[21] (to wit, the Austrian Imperial Supreme and Cassation Court has found in its 1877 judgment that the sacristy belongs to *res sacrae*;[22] many English cases, discussed below, also dealt with the issue of sale of different items upon a faculty of a consistory court, which were used for divine services),[23] whereas *res benedictae* included liturgical vestment, veils, balls and purifiers.[24] The term "*res ecclesiasticae*", according to Italian scholars F. Schupfer and G. Fusinato, was distinct from "*res sacrae*" and they were derivatives of the former one: for instance, the right to hold a pew in a church did not contradict the initial destination of sacred objects – it was, according to their view, a temporary item, but it was connected with the qualities of a sacred item, which belonged to the building of the church.[25] Another, different classification could be found in "A Dictionary of Christian Antiquities", Vol. 1, written by the English scholars W. Smith and S. Cheetsham, according to which, the term r*es ecclesiasticae* could be understood in reference of all church property, which could be divided into *res spirituals*, used for priesthood, as sacraments and altars, and *res temporales*, which "… contribute to the welfare rather of the body than the soul".[26]

2. *Res religiosae*. Res religiosae, upon their original designation, were the tombs. Occasionally the cemeteries were also referred to be *res religiosae*. According to the Italian legal scholar L. Mortara (1888), the things religious (*res religiosae*) are not the things, which belong to religion, but the ones whom certain circumstances lodged the character

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19 DATTINO, G. *La commerciabilita della chiesa*. Napoli: Editore Federico Corrado, 1892, pp. 10–11.

20 Corte di Appello di Venezia, Udienza 3 marzo 1887. In: *Il Foro Italiano*, Vol. 12, Parte Prima: Giurisprudenza Civile e Commerciale, pp. 379–382, and in: *La Legge*: monitore giudiziario e amministrativo del Regno d'Italia. Anno XXVII – 1887. Volume II. Roma: Ufficio di Direzione ed Amministrazione, pp. 271–272.

21 HERGENRŐTHER, P. *Lehrbuch des katholischen Kirchenrechts*. Freiburg in Breisgan: Perder'sche Verlagshandlung, 1888, pp. 523–524.

22 K. K. Oberster Gerichts- und Cassationshof, Entsch. vom 28 März 1877, Ziffer 13.853. In: Plenarbeschlüsse und Entscheidungen des k.k. Cassationshofes, veröffentlicht im Auftrage des k.k. Obersten Gerichts- als Cassationhofes. Zweiter Band. Entscheidungen Nr. 101–200. Wien: Manz'sche k.k. Hofverlags- und Universitäts-Buchhandlung, 1880, Entsch. Nr. 148, pp. 277–281.

23 *In Re St. Helen's*, Brant Broughton, [1973] 3 W.L.R. 228, [1974] Fam. 16 (adjudicated on October 18, 1972)

24 HERGENRŐTHER, P. *Lehrbuch des katholischen Kirchenrechts*, pp. 523–524.

25 SCHUPPER, F. – FUSINATO, G. *Rivista Italiana per le Scienze Giuridiche*. Volume III. Roma: Ermano Loescher & Co., 1887, pp. 76–77.

26 SMITH, W. – CHEETHAM, S. (Eds.), *A Dictionary of Christian Antiquities, being a continuation of the "Dictionary of the Bible"*. Volume I. Boston: Little, Brown and Company, 1875, pp. 597–598.

of religious objects, such as the soil, where an inhumation of a deceased person was made.[27] The Prussian Supreme Tribunal acknowledged in its 1869 judgment, that it was believed, that churchyards belonged to *res religiosae*, but the law did not exclude civil-legal transactions concerning the churchyards.[28] The 1832 judgment of the High Court of Appeals at Jena also referred to a churchyard as *res religiosae*.[29] Upon the German legal scholar E. Böcking, the sense of the institute of *res religiosae* is the scope of a certain private place, where a deceased person is buried, that is *locus religiosus* by means of a perpetual funeral of the deceased, and has to be treated equally to *res sacrae*.[30] Upon the commentaries of Gai, Book 2, the land may become religious because of a will of a certain individual by the fact burying a body of a deceased person therein, in case the funeral is in the business of the said individual.[31] The actual existence of the whole legal institute of *res religiosae* in Ancient Rome, according to E. Bonduel was because of the cult of the deceased, which existed within Roman people. E. Bonduel, having researched upon the legal doctrines of Ancient Rome, found, that any Roman citizen could build a tomb, and to bury a deceased person therein; hence, any person could technically create *res religiosae*. Before any person deceased was buried in the tomb, the tomb was an object *res in commercio,* that is, any civil-legal deeds could be permissible concerning it, such as a sale or a gift; it was sound in terms of the fact that many tombs were built far in beforehand. Hence, the place became *locus religiosus* by the fact that a deceased person was buried therein; Bonduel held, that in case the burial place was empty, then it was called *locus purus* in Roman legal terminology.[32] Bonduel found, that *cenotaphs* in some cases may also become *res religiosae*; mentioning that there were two types of cenotaphs – the ones built for famous deceased people, which had already been buried, and for the ones, whose cadavers had never been found: only in the latter case a cenotaph could become *res religiosae*.[33] The tombs had either a civil, or a religious character in Ancient Rome (as it has been discussed above, an empty tomb could be purchased, sold, etc.), and moreover, the tomb did not become *res religiosae*, when the burial was temporary, not perpetual. Despite there were many customs and traditions in terms of burials, Bonduel concluded that in order to become *res religiosae*, the mere fact of burial was necessary from a legal point of view. He also mentioned, that there was a honorable role of *curator funeris*, who was to conduct the process of the funeral of the deceased, and was appointed by this person during its life,

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27 MORTARA, L. (note). In: Corte di Cassazione di Firenze, pp. 1189–1199.

28 Preußische Obertribunal, I Senat, Erkenntniß vom 24. Mai 1869. In: Entscheidungen des Königlichen Ober--Tribunals, herausgeben im amtlichen Auftrage von den Ober-Tribunals-Räthen Dr. Decker, Dr. Voswinckel und Heinhus. 61 Band. Berlin: Carl Heymann's Verlag, 1869, Entsch. Nr. 28, pp. 219–226.

29 Oberappellationsgericht zu Jena, Erkentniß vom 28 Februar 1832. In: Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten. Herausgeben von J. A. Seuffert. Sechster Band. München: Literartistliche Anstalt der J. G. Cotta'schen Buchhandlung, 1853, pp. 180–181 (Entsch. Nr. 140).

30 BŐCKING, E. *Pandekten des römischen Privatrechts aus dem Standpunkte unseres heutiges Rechtssystems*, pp. 248–251 (§ 48–49).

31 *Gai* 2.6.

32 BONDUEL, E. *Droit Romain des res religiosæ & du jus sepulcri*. Thése pour le doctorat. Lille: Imprimerie Victor Ducoulombier, 1888, pp. 13–14, 24–27.

33 BONDUEL, E. *Droit Romain des res religiosæ & du jus sepulcri*, pp. 27–28.

which was more close to the role of an executor in modern law.[34] The German lawyer W. von Blume mentioned the lack of legal regulation in terms of defining who and in which manner has to conduct the funeral in old German law,[35] and this issue was regulated by courts, which resolved such disputes, for instance, in relation of the manner of the funeral in case the deceased had not left any instructions concerning it.[36] Bonduel found, that in case of the lack of an existing will of the deceased regarding the funeral, it was up to the heirs, or occasionally to the next of kin to provide the preparations for the funeral and the funeral itself.[37] The casket and the clothes of the deceased is also considered to be *res divini juris*, but seemingly of lesser value; J. Baron denoted, that canon law has not dedicated any considerable attention to their legal status, hence they had to be considered to be *res nullius*.[38] In French law, the concept of *res religiosae* seems not to be used in a direct sense, since the legal status of cemeteries is defined as municipal or communal property, upon which civil-legal transactions, such as concession, may be legitimately performed.[39] In the judgment of the Court of Napoli, Italy of 1955, the Court adhered to the position that the classic Roman law concept of *res divini juris* was likely to presuppose the existence of certain legal relations in respect with funerals, *ius sepulchri*, and the initial concept had considerably weakened, if not became extinct by the time of Justinian's codification.[40]

3. *Res sanctae*. For some reasons, legal literature and textbooks had paid relatively little attention to this constituent of *res divini juris*. Dernburg denoted that certain things belonging to the state and to the communities were given to the custody of the Gods, such as the town's walls and gates thus becoming *res sanctae*.[41] C. G. von Wächter mentioned, that most of the textbook sources merely cited the town walls as *res sanctae*, and the *res sanctae* themselves were usually protected from any use by very high fines. Upon the fact that *res sanctae* were *nullius in bonis*, von Wächter concluded,

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34 BONDUEL, E. *Droit Romain des res religiosæ & du jus sepulcri*, pp. 36–38.

35 VON BLUME, W. *Frage des Totenrechts*, Archiv für das Civilistische Praxis, Band 112, Heft 1 (1914), pp. 367–427.

36 See, for instance, Reichsgericht (VI. Zivilsenat), Urt. vom 28. October 1920, VI 261/20. In: Entsch. RG. Zivilsachen, Bd. 100, pp. 171–174, Entsch. Nr. 50; Reichsgericht (VI. Zivilsenat), Urt. vom 5. Juli 1923, VI 1308/22. In: Entsch. RG. Zivilsachen, Bd. 108, pp. 217–221, Entsch. Nr. 62, Bundesverwaltungsgericht, Urt. v. 08.07.1960, Az.: BVerwG VII C 123.59, Bundesverwaltungsgericht, Urt. v. 16.12.1966, Az.: BVerwG VII C 45.65, Staatsgerichtshof Hessen, Urt. v. 03.07.1968, Az.: P.St. 470.

37 BONDUEL, E. *Droit Romain des res religiosæ & du jus sepulcri*, pp. 36–39.

38 BARON, J. *Pandekten*, pp. 72–74 (§ 49).

39 (1) Cour de Cassation (France), Chambre des Requêtes, 12 avril 1902, Reported in French n: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1903. Paris, Librairie de la Sociéte du Recueil Général des Lois et des Arréts et du Journal du Palais. Parte I, pp. 161–166 (*Sirey 1903 I 161, 161–166*).

(2) Conseil d'Etat (France), 25 novembre 1921. In: Recueil de la Gazette des Tribunaux. Journal de Jurisprudence et des Debats judiciaires. Paris, pp. 160–162. (Rec. *Gazette des Tribunaux, 1921 II 160, 160–162*.)

40 Tribunale di Napoli, Decreto 26 febbraio 1955. In: *Il Foro Italiano*, Vol. 79, Parte Prima: Giurisprudenza Constituzionale e Civile, pp. 825–828.

41 DERNBURG, H. *Pandekten*. Erste, verbesserte Auflage. Berlin: Verlag vom P. B. Müller, 1888, p. 160 (§ 70).

that *res sanctae* should be treated as *res publicae*.[42] C. Müllenbruch in his treatise called *res sanctae* to be pacified things subject to specific protection and they were held to be indestructible; Müllenbruch mentioned, that the term *res sanctae* could be applicable to certain living people.[43] The idea that *res sanctae* applied to living people of certain ranks was developed by the English lawyer J. Taylor, who claimed that the persons of princes, ambassadors and magistrates applied to this concept as well; he also found that apart from the walls and gates of the city, the laws could also be accounted as *res sanctae*, as well as the trophies and boundaries.[44] Sir Patrick MacChombaich de Colquhoun upheld the afore-mentioned view in his treatise on Roman law, additionally mentioning the person of the emperor, the tribunes and their close relatives, and held, that the boundary stones and proclamation tablets of the magistrates were considered to be *res sanctae* as well, denoting the origin of the sanctity of the walls of the city in the foundation of Rome.[45] An extended view on the gist of *res sanctae* could be also found in the work of D. Bloch, who provided an analysis of different Roman law sources in order to answer the question of the gist of the gates and walls of the city as *res sanctae*. First, he mentioned that the original Gai's institutes provided that *res sanctae* were *res divini juris* "to a certain extent", but for what reason it was "certain"? D. Bloch contended that the sanctity of *res sanctae* was made by human action and orders: for instance, he paid attention on the inhibition to climb over the walls or to use ladders in order to climb them over, or anyhow damage them, also mentioning that even the reparation of the city walls could not be made without the permission of the Emperor, or the Praeses.[46] Upon Ulpian, denoted D. Bloch, the term *sanctus* does not derive from the meaning of *sanctity*, but from the fact that they are protected by a *sanction*, being neither *res sacrae*, nor being in profane use. So, Ulpian held that *sanctum* was actually what was maintained by sanction. Bloch also contended that attributing *res sanctae* to the city walls was based upon the legend of the foundation of Rome, when Remus was slayed for desiring to climb over the city walls in mockery of Romulus; the rule of leaving Rome only through the gates was preserved in Roman law.[47] In the French synopsis of Justinian's Institutes, *res sanctae* were referred to as the ones, which are protected by the sanction of a punishment, giving as an example the walls and the gates of the states, since such are sanctioned by a capital punishment to those, who violate the

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42 VON WÄCHTER, C. G. *Pandekten* (Th. 1). Leipzig: Druck und Verlag vom Breitkopf und Härtel, 1880, pp. 274–275 (§ 60, I, 2.).

43 MŰHLENBRUCH, C. J. Lehrbuch des Pandekten-Rechts. Nach der dritten Auflage der Doctrina Pandectarum Deutsch bearbeitet. Th. 2. Halle: bei C. U. Schwetschke und Sohn, 1836, p. 7 (Zweites Buch, Kap. I, § 216).

44 TAYLOR, J. *Elements of the Civil Law*. The Third Edition, Corrected and Enlarged. London: Printed for Charles Bathurst, Bookseller, in Fleet Street, 1786, p. 471 (*Res nullius*, III).

45 MACCHOMBAICH DE COLQUHOUN, P. *A Summary of the Roman Civil Law*, illustrated by commentaries on and paralles from the Mosaic, Canon, Mohammedan, English and Foregn law. London: William Benning and Co., Fleet street.; J. H. Parker, Oxford: McMillan & Co, Cambridge. Second Volume, 1851, pp. 11–12 (§ 929).

46 BLOCH, D. J. Res Sanctae in Gaius and the Founding of the City, *Roman Legal Tradition* 48, no. 3 (2006), at pp. 52–53.

47 BLOCH, D. J. *op. cit.*, pp. 55–56, 62.

walls and the gates.[48] This legal concept seems to have been obsolete and left in history, and, as C. G. von Wächter mentioned in his textbook, it transformed into *res publicae*. For instance, at present day, there is no fashion of building towns in a fortress-like style, which would presuppose the existence of the walls of the city, or any specific entrance gates, and the historical gates or walls, which were preserved from ancient times, are likely to be classified as *res publicae*.

2.2 Other aspects of res divini juris*: discussion on the alteration of application and possible other elements of* res divini juris

In a nutshell, the *res sacrae*, *religiosae* and *sanctae* were doctrines of Roman law, which had lost their original applicability in the law of the XIX century, as noted by E. Heymann speaking about old German law: for instance, objects of *res sacrae*, on practice, could become the property of church institutions or of even private persons (see the judgment of the German Supreme Court of 1893 in detail below). In terms of the graves (*res religiosae*), Heymann also discussed the case of the German Supreme Court of 1881, where a parcel of land was legitimately sold with an adjacent grave,[49] whereas *res religiosae* could become *res sacrae* or *res publicae*, and the Roman law doctrine of *res sanctae* became obsolete, and did not receive any continuation in contemporary law. Despite the main principles of *res sacrae* are preserved in modern law, it could be concluded, that the key point of the maintenance of *res sacrae* was to continue being *res extra commercium*, that is being out of public and profane use (*usus profano*).[50] Upon such conclusions, it could be established, that even in case the basic elements of *res divini juris* are preserved, that is, their main core is to remain *res extra commercium*, despite the fact, that they already may be kept in the property of certain entities. At the same time, these property rights seem to be limited by the destination of the sacred objects, and legal deeds cannot be freely performed upon such objects. As the reader will find below, the English case law hints that the sell or alteration of sacred objects could be performed, but after an order of a court of ecclesiastical jurisdiction (English ecclesiastical courts are one of the few preserved and active courts in the world that have a limited jurisdiction of resolving church matters).

Three other aspects, which cover adjacent objects, according to the view of the author, could also be considered *res divini juris* according to the factual circumstances:

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48 *IMP. JUSTINIANI INSTITUTIONUM SYNOPSIS.* Nova editio auctior & emendatior. Cadomi: Excudebant Antonius Cavellier & Joannes-Claudius Pyron, Universitatis Typographi, 1737, p. 58.

49 Reichsgericht, III. Civilsenat, Urt. vom 18. Februar 1881, C. III. 286/80. In: J. A. Seuffert's Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten. Neue Folge sechster Band. Der ganzen Reiße sechsunddreißigßter Band. Herausgeben von H. F. Schütt. München und Leipzig. Druck und Verlag von R. Oldenbourg, 1881, p. 264, Entsch. Nr. 176. Number of the judgment according to: Blätter für Rechsanwendung, zunächst in Bayern, gegrundet von Johann Adam Seuffert und Christian Carl Glück und herausgeben von Karl von Hettlich. III. Ergänzungsband, abgeschlossen mit dem 1. Semester 1882. Erlangen, 1882. Verlag von Palm & Enke, pp. 214–215.

50 HEYMANN, E. *Wird nach römischem Recht die Verjährung von Amtswegen berücksichtigt?*, Inaugural Dissertation. Breslau: Schletter'sche Buchhanlund (Frank & Meigert), 1894, pp. 43–44. (Note: since 1945, *Breslau* belongs to Poland, in 1946 the name of the city was officially changed to *Wrocław*. Book citation provided as in the original.)

4. *Locus religiosus*. Locus religiosus is a place, where a deceased person is permanently buried, and the fact of such permanent burial creates a *locus religious*.[51] Upon the sources of Roman law, when someone brings a cadaver for a temporal interment, it will not become a *locus religiosus*, but a *locus profanes*;[52] in case the body was brought in the owner's land unwillingly or ignorantly, then it cannot make a *locus religiosus*, but in case it is done with the will of the owner's place, then the place would become a *locus religious*.[53] This Roman law concept seems to be applicable, firstly, to the tombs which are already in perpetual use by the fact of funeral, and next, according to more modern jurisprudence relating to the findings of the tombs, which may contain valuable items, it is difficult to say, whether such tombs still fall under the classic understanding of *locus religiosus* and *res religiosae*. The judgment of the Court of Appeals of Bordeaux of 1899 has drew a distinction between finding ancient tombs on cemeteries or other burial places, and in other places, which are not ordinarily used for burial.[54] Upon such distinction, in the latter case, ancient tombs, especially with adjacent valuable items, could not be observed as *locus religiosus*. To a certain extent, the original sense of *locus religiosus* in German law was declared obsolete since the judgment of the German Supreme Court of 1881,[55] whereas the Prussian Supreme Tribunal discussed this doctrine in its 1876 judgment.[56]
5. *A corpse*. Quite a lot has been said concerning *res religiosae*, which, as the reader remembers, were designated as the tombs in Roman law. However, what legal status the corpse itself should possess? The sources of Roman law, unfortunately, seemed to be silent in terms of defining the legal status of a corpse. O. Robinson argued that quite a lot of misdemeanors in Roman law were connected either to maltreatment of graves, or funeral customs, which had their origination in the Twelve Tables, such as the prohibition of collecting the remains for a re-burial, sprinkling the corpse with wine, or smoothing the funeral pyres with an axe, damaging graves or tombstones, as well as a prohibition of a violation of sepulture, forbidding to bury any other deceased person in a place (*locus religiosus*), where any other deceased person had been buried before. According to O. Robinson, the rule of conducting the sepulture outside of the city was

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51 BŐCKING, E. *Pandekten des römischen Privatrechts aus dem Standpunkte unseres heutiges Rechtssystems*, pp. 248–251 (§ 48–49).

52 D. 9.7.5 *De religiosis*, 5 (*Julius Paulus*, Book 3).

53 D. 9.7.7 (4) *De religiosis*, 7 (4) (*Antonin*).

54 Cour d'Appel de Bordeaux, 21 mars 1899. In: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1900. Paris: Librairie de la Sociéte du Recueil Général des Lois et des Arréts et du Journal du Palais. II Partie, p. 103 (*Sirey 1900 II 103*).

55 Reichsgericht, III. Civilsenat, Urt. vom 18. Februar 1881, C. III. 286/80. In: J. A. Seuffert's Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten. Neue Folge sechster Band. Der ganzen Reiße sechsunddreißigßter Band. Herausgeben von H. F. Schütt. München und Leipzig. Druck und Verlag von R. Oldenbourg, 1881, p. 264, Entsch. Nr. 176. Number of the judgment according to: *Blätter für Rechsanwendung, zunächst in Bayern*, gegrundet von Johann Adam Seuffert und Christian Carl Glück und herausgeben von Karl von Hettlich. III. Ergänzungsband, abgeschlossen mit dem 1. Semester 1882. Erlangen, 1882. Verlag von Palm & Enke, pp. 214–215.

56 Preußische Obertribunal, VI Senat, Erkenntnis vom 16. November 1876, Nr. 283. Sen. VI. 1875. In: Entscheidungen des Königlichen Ober-Tribunals, herausgeben im amtlichen Auftrage von den Ober-Tribunals-Räthen Dr. Sonnerschmidt, Clauswiß und Hahn. 76. Band. Berlin: Carl Heymann's Verlag, 1876, Entsch. Nr. 26, pp. 248–252.

not rather dictated by the considerations of public health (that is, hygiene), but were rather based on the view of Cicero that cremation pyres could make damage to property.[57] Roman law in its developments coined certain private law institutes in terms of burials, for instance, it was admissible to agree that in rural areas, a body of a deceased person could be buried in someone else's land; after becoming *locus religiosus*, the tomb became *res extra commercium*.[58] So, if we go further, it was admissible to be a proprietor of a burial plot, located in someone else's property, likely in the shape of a superficies (see also the judgment of the Prussian Supreme Tribunal of 1876),[59] which will apparently go out of commerce after the burial takes place. According to such conditions, we may also presume, that in case a *locus religiosus* is *res extra commercium*, than a corpse should be recognized as *res extra commercium* as well. The Swiss lawyer C. E. Cramer, who was known to defend a doctoral thesis upon the legal status of a corpse, mentioned, that the corpse was sacred enough to create a *locus religiosus* by the mere fact of being buried there.[60] Did this fact (and as it was mentioned before, the burial of a deceased person in a grave made this place *locus religiosus*)[61] make the corpse to be equal to *res sacrae*? C. E. Cramer concludes, that the corpse is excluded from any civil-legal transactions, which could technically equate a corpse to *res extra commercium*, but Cramer interrogates, whether such equation is stringently correct? The corpse cannot be acquired, it is not an asset, whereas the items, which are *res extra commercium* usually *are* assets, and their value is inactive only within the time fragmenton where the item is *res extra commercium*, and apparently, when the item has gone out of the status of *res extra commercium*, then its value may become active. This could not be said about the corpse upon the conclusions of Cramer, who found, that the corpse should be considered as a thing (*res*), but in a non-legal sense of the word, and is an *isomorphism of a living person*, whereas not being actually a *res extra commercium*.[62] Hence, the special legal status of the corpse would look twofold upon the conclusions of Cramer: a corpse is *ipso facto* a *res extra commercium*, since it bears the peculiarities of other *res extra commercium* in terms of being excluded from trade and from other civil-legal transactions; but at the same time, it does not contain the feature of being an *asset* and having value as any other things, which are *res extra*

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57 ROBINSON, O. The Roman Law on Burials and Burial Grounds. *Irish Jurist*, *new series* 10, no. 1 (1975), pp. 175–186, see in particular pp. 176–177.

58 ROBINSON, O. *Irish Jurist*, *new series* 10, no. 1 (1975), p. 178.

59 Preußische Obertribunal, VI Senat, Erkenntnis vom 16. November 1876, Nr. 283. Sen. VI. 1875. In: Entscheidungen des Königlichen Ober-Tribunals, herausgeben im amtlichen Auftrage von den Ober-Tribunals-Räthen Dr. Sonnerschmidt, Clauswiß und Hahn. 76. Band. Berlin: Carl Heymann's Verlag, 1876, Entsch. Nr. 26, pp. 248–252.

60 CRAMER, C. E. *Die Behandlung des Menschliches Leichnams im Civil- und Strafrecht*. Inaugural--Dissertation zur Erlangung der juristlichen Doctorwürde der hohen staatwissenschaftlichen Fakultät der Universität Zürich, vorgelegt von Carl Erwin Cramer aus Zürich. Zürich: Typ. Orell Füssli & Co, 1885, pp. 11–12.

61 BŐCKING, E. *Pandekten des römischen Privatrechts aus dem Standpunkte unseres heutiges Rechtssystems*, pp. 248–251 (§ 48–49).

62 CRAMER, C. E. *Die Behandlung des Menschliches Leichnams im Civil- und Strafrecht*. Inaugural – Dissertation zur Erlangung der juristlichen Doctorwürde der hohen staatwissenschaftlichen Fakultät der Universität Zürich, vorgelegt von Carl Erwin Cramer aus Zürich. Zürich: Typ. Orell Füssli & Co, 1885, pp. 36–42.

commercium. For instance, a church building is an asset, and is a *res extra commercium* at the time it is used for public worship. It may be used for such needs forever, but it is not always so (for example, in the judgment of the German Supreme Court of 1893, the chapel ceased to be a house of public worship and was acquired in a private order by the defendant, which was found to be done legitimately, according to the findings of the courts).[63] However, the same cannot be said concerning a corpse. In terms of the protection of a corpse from the side of criminal law, the interests were in the state, in the society, but not in the corpse itself, and the misdemeanors in terms of the corpses are not classified in the same way, as are the violations of honor, property, etc.[64] According to Cramer, the only destination of the corpse is to be buried, and at least, to find its final rest owing to demise, and there is no other interest or will from the side of the society in terms of a corpse (however, other authors had a somewhat different view, to which we will turn later). Hence, Cramer concluded, that a corpse is excluded from any civil-legal transactions.[65] There were other, concurring views in terms of the legal status of a corpse. For instance, H. Dernburg in his textbook discussed the legal status of the corpse throughout the objects, which are *res extra commercium*, but he concluded, that the corpse is not actually excluded from civil-legal transactions: for instance, he found that occasionally the corpses could be sold for scientific purposes after the death of the person[66]. The German lawyer G. Crusen in his work relating to the protection of piety by the criminal law outlined three approaches towards the legal status of the corpse, which could be found in the literature of those days; upon the prevailing view, the corpse could not be an object of any civil-legal relationships; upon the other approach, a corpse is a thing (*res*), according to H. Dernburg (whom we cited earlier), but the sale of a corpse by the heirs of the deceased will be *contra bonos mores* (contrary to good morals); and the latter approach represented the view that despite the corpse was out of civil-legal transactions, there could be civil-legal relationships in terms of entrusting relationships of the surviving relatives, which are not contrary to good morals.[67] But at the same time, history knows many interesting instances, where corpses were far from being excluded from civil-legal transactions. For instance, in France, during the Ancien Régime, corpses could even be tried for certain crimes or misdemeanors: an outstanding case was heard before the Parliament of Rouen in 1686 (see in more detail below), where the hints of the text could bring the reader to a view that it was far not the only case, where a corpse was prosecuted. J. Guyot mentioned that courts could even appoint

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63 Reichsgericht, V. Civilsenat, Urt. vom 8. Februar 1893, Rep. V. 252/92. In: Entsch. RG. Zivilsachen Bd. 31, pp. 217–222, Entsch. Nr. 46

64 CRAMER, C. E. *Die Behandlung des Menschliches Leichnams im Civil- und Strafrecht*. Inaugural--Dissertation zur Erlangung der juristlichen Doctorwürde der hohen staatwissenschaftlichen Fakultät der Universität Zürich, vorgelegt von Carl Erwin Cramer aus Zürich. Zürich: Typ. Orell Füssli & Co, 1885, pp. 42–45.

65 CRAMER, C. E. *Die Behandlung des Menschliches Leichnams im Civil- und Strafrecht*, p. 64.

66 DERNBURG, H. *Pandekten*. Erste, verbesserte Auflage. Berlin: Verlag vom P. B. Müller, 1888, p. 162 (§ 69, II).

67 CRUSEN, G. *Der strafrechtliche Schutz des Rechtsguts der Pietät*. Berlin: Verlag von J. Guttentag (D. Collin), 1890, pp. 36–37. Published in: Abhandlungen des kriminalistischen Seminars. Herausgeben von Dr. Franz von Liszt, ord. Professor der Rechte in Halle a/S. Zweiter Band, 1. Heft. Crusen: Der strafrechtliche Schutz des Rechtsguts der Pietät. Berlin: Verlag von J. Guttentag (D. Collin), 1890, pp. 36–37.

a curator for a corpse, if it was somehow involved in court proceedings.[68] Some insights concerning the status of the corpse can be also found in J. Guyot's legal encyclopedia, who held, that court proceedings could not concern deceased people, at least in later Ancien Régime, whereas reckoning up a couple of cases from the earlier times, which proved that it was eventually possible. However, it was not clear when did such obscure "practices" cease to exist, or if they actually ceased to exist. For instance, other sources confirm the existence of the institute of a curator for a corpse in court proceedings, if it was believed, that the deceased was a magician.[69] It was also known, that upon a Royal Decree from March 1707, § 24 the magistrates and the hospital directors had to provide the corpses for anatomical demonstrations and for surgical operations (though it is not clear how the cadaver could be used for a surgical operation, especially in those days)[70]. Despite an unauthorised exhumation was considered an indictable offense, records displayed some legal cases, where surgeons bought exhumed cadavers, which were sold by the defendant.[71] J. Guyot described an obscure practice of immediate autopsies, where it was performed stringently after the last visible breath, as well as putting out corpses in public at a prison, which was then called a "morgue", so that somebody could recognize it; J. Guyot also mentioned, that the investigations had frequently found mutilated bodies of deceased parishioners with viscera filled with lumber,[72] which implied, that the bowels and alike were removed, most likely in hospitals. Still, these times have ultimately passed and have nothing to do with the present days, but the reader should take into account, that the views on the legal status of the corpse did not always bear the same piety, as it is at present day. In terms of defining the legal status of the corpse, a judgment by the Civil Court of Piacenza, Italy of 1881 determined that the corpse was not only as an object excluded from any civil-legal transactions, but was a sacred thing as well.[73] Discussing the problem of defining the legal status of a corpse at such a length, the reader may ask, why did all these discussions evolve? The answer could be sought in case law and the views of courts upon the given subject in relation with the legal dispute, which was adjudicated most frequently not in relation to a corpse as such. In English law, both the courts and the doctrine did not recognize property rights in a deceased person's body, and the authority governing and ruling in matters of

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68 Parlement de Rouen, 31 Octobre 1686, Arrêt rendu par le Parlement de Rouen le 31 Octobre 1686 dans un procés fait au cadavre. D'un noveau converti. Bordeaux: Imprimerie G. Gounouilhou, M.DCC.LXXVI. (1876) – 15 p.

69 THÈAUX, M. Pages d'historie judiciaire. Le crime de sorcellerie. *La Revue du Palais*. Première Année. Tome Troisième. Paris, 1897, pp. 103–135 (see in particular pp. 130–134).

70 GUYOT, J. N. *Répertoire universel et raisonne de jurisprudence civile, criminelle, canonique et bénéficiale; ouvrage de plusieurs jurisconsultes*. Tome Second. Paris: chez Visse, libraire, 1784, pp. 591–595.

71 Parlement de Paris, 12 juillet 1683. In: GUYOT, G. N. *Répertoire universel et raisonne de jurisprudence civile, criminelle, canonique et bénéficiale; ouvrage de plusieurs jurisconsultes*. Tome Second. Paris: chez Visse, libraire, 1784, p. 595.

72 GUYOT, J. N. *Répertoire universel et raisonne de jurisprudence civile, criminelle, canonique et bénéficiale; ouvrage de plusieurs jurisconsultes*. Tome Second. Paris: chez Visse, libraire, 1784, pp. 594–596.

73 Trib. civ. di Piacenza, 4 aprile 1881. In: *La Legge Monitore Giudiziario ed Amministrativo del Regno Italia*. Anno XXI – 1881. Volume II. Roma: Ufficio di Direzione ed Amministrazione, p. 780. Also reported in French in: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Anne 1882. Paris: Librairie de la Société du Recueil Général des Lois et des Arréts et du Journal du Palais. Partie IV, pp. 23–24 (*Recueil Sirey 1882 IV 23*).

the deceased was fully attributed to ecclesiastical law.[74] This doctrine of "no property in a dead body" seems to originate from the dictum of Lord Coke, who held that "the burial of the cadaver (that is caro data vermibus), is nullius in bonis, and belongs to ecclesiastical cognizance; but as to the monument, action is given at the common law for defacing thereof".[75] This dictum could be found in several court decisions in United States,[76] and was also mentioned in the Canadian case of *Miner vs. C.P.R.* (1911) as a citation from older English case law authorities.[77] The *Haynes's Case*, which was cited in respect with the rule of "no property in a dead body", was heard in the Lent Assise, Leichester, and was adjudicated by the justices at Sergeant's Inn, Fleet-street, in 1572. Strictly speaking, this case discussed not the *res extra commercium* status of the corpse, but rather its inability to possess property rights in the winding sheets. In this case, the defendant dug up four corpses and stole the winding sheets from them, then burying the cadavers back. The Court held, that the property in the sheets remained in the owners, and the cadaver had no legal capacity to take a gift in the sense of the winding sheet: "… but a dead body being but a lump of earth hath no capacity", and defendant was indicted for taking the winding sheets.[78] There was another dictum by Sir William Blackstone in his Commentaries, where he said that despite the heir of the deceased may have property in the grave monuments, he could not have property in the bodies of the deceased or the ashes, citing *Haynes's Case*.[79] In the Canadian case of *Miner vs. C.P.R.*, adjudicated in 1911, the Court also paid thorough attention on the legal status of a cadaver, discussing the Haynes's Case and other English authorities in the judgment, where the said Court held that *Haynes's Case* did not give a direct authority as to the legal status of the cadaver, and the doctrine was formed by *obiter dictum*,[80] and was later accepted in case law.[81] In Scotland, the Court of Session expressed its legal position towards the arrest of the corpse for debts in a 1677 judgment as: "… it is reprobated by us as a most barbarous, inhuman custom".[82] Modern Scottish jurisprudence assumes that there shall be no property rights in a cadaver, but the heirs shall have

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74 For legal scholarship discussing the said doctrine, see, for instance, KUZENSKI, W. F. *Property in Dead Bodies*, 9 Marq. L. Rev. 17 (1924), at pp. 18, 21–22; CHATTIN, T. M. Jr. Property Rights in Dead Bodies, 71 W. Va. L. Rev. 377 (1969), at pp. 377–381. For case law, see, for instance: *Williams v. Williams* (1881) 20 Ch. D. 659 [1881 W. 247], at pp. 659–668 (adjudicated on March 8, 1881). The same doctrine was also discussed in a more recent case relating to an autopsy, where the brain of the deceased person was extracted and the heirs claimed to return it back: *Dobson & Ors v. North Tyneside Health Authority & Anor.* [1996] EWCA Civ. 1301, [1997] 1 W.L.R. 596, etc. (adjudicated on June 26, 1996).

75 COKE, E. *The Third Part of the Institutes of the Laws of England*. London: Printed for E. and R. Brooke, Bell-Yard near Temple-Bar. MDCCXCVII (1797), at p. 203.

76 See, for instance, *Lavigne v. Wilkinson*, 116 A. 32, 32 (N.H. 1921) (adjudicated on December 6, 1921), *Matter of Johnson*, 169 Misc. 215, 217 (N.Y. Surr. Ct. 1938) (adjudicated on September 12, 1938).

77 *Miner vs. C.P.R.* 3 Alta. L.R. 408, at p. 412 (adjudicated on June 17, 1911)

78 *Haynes's Case* [1572] 77 Eng. Rep. 1389, 12 Co. 113

79 BLACKSTONE, W. *Commentaries on the Laws of England in Four Books*. Additional notes and the Life of the Author by SHARSWOOD, G. In two volumes. Vol. II – Books II, III and IV. Philadelphia: George W. Childs, 628 & 630 Chestnut str., 1866, p. 429.

80 *Miner vs. C.P.R.*, 3 Alta. L.R. 408, at pp. 412–413 (adjudicated on June 17, 1911).

81 *Williams v. Williams* (1881) 20 Ch. D. 659 [1881 W. 247], at pp. 659–668 (adjudicated on March 8, 1881).

82 *Anent The Arresting of Corpses*, Court of Session, 1 June 1677, [1677] 3 Brn 136, Advocates' MS. No. 565, § 4, folio 283.

a right to custody and burial.[83] The doctrine seems to support this position as well.[84] In a notable Australian judgment of *Doodeward v. Spence* (1908), the High Court of Australia referred to an unburied corpse awaiting for funeral as *nullius in rebus*[85] (in fact, the given case considered a trover lawsuit of the plaintiff, who used to own a body of Siamese twins that were kept in a jar filled with spirit, and was seized of it), whereas the Court concluded that since specific skill was applied to maintain the body, then the plaintiff could legitimately claim property rights over it.[86]

6. *Treasures*. This part was not included in classically shaped form of the classification of sacred objects, but historical case law development showed that it is necessary to give a more considerable look upon the problem of proprietary rights in objects, which are found dug into the soil, and found by a mere coincidence. In the old French legal doctrine, the tombs and valuable items therein were not automatically considered as treasures,[87] whereas according to § 716 of the Napoleon Civil Code, the treasure could not be held to be anyone's property, technically being a *res extra commercium*, whereas it had to be decided, whether the finding was an actual treasure, and a tomb, according to the factual circumstances, could not always be regarded as such, but rather depending on what was found in it.[88] For instance, the 1806 case heard by the Court of Appeals of Bordeaux underlines, that not all the tombs, even with the subsistence of certain valuable items therein, could be considered as treasurers, and thus as *res extra commercium* in the sense of § 716 of the Civil Code.[89] More than ninety years later, the Court of Appeals of Bordeaux has arrived to a different conclusion in terms of a similar situation – when the tomb is found not in the place of its special destination (i.e. not at a cemetery or a private burial plot), then the finder of the treasure and the owner of the soil may have the right to claim a half of the treasure.[90] The French legal doctrine was not unanimous in terms of acknowledging ancient tombs in terms of treasures, finding that if tombs are not treasures *per se*, the valuable items, which often used to be decorations could be considered as such;[91] to constitute a treasure, it is not necessary for the coins or other valuable items to

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83 *SC, Re Judicial Review*, [2011] ScotSC CSOH 124 (P 561/11), at para. 52 and 63 (adjudicated on August 3, 2011).

84 BROWN, J. Theft, Property and the Human Body – A Scottish Perspective, *Journal of Medical Law and Ethics*, 2013, Vol. 1, Nr. 1, pp. 43–49 (see in particular at pp. 46–48).

85 Doodeward v. Spence [1908] HCA 45, [1908] ArgusLawRp 91, 15 Argus L.R. 105, p. 106 (adjudicated on July 31, 1908)

86 Doodeward v. Spence [1908] HCA 45, pp. 108–109 (per Barton, J.).

87 LOISEAU, J.-S. *Dictionnaire des arrêts modernes, ou Répertoire analytique, sommaire et critique de la nouvelle jurisprudence française civile et commerciale*. Par M. Loiseau. Tome Second. Paris: aux Archives du droit français, chez Clament frères, 1809, p. 407.

88 LOISEAU, J.-S. *Dictionnaire des arrêts modernes, en matière civile et criminelle, de procédure et commerciale*. Par M. Loiseau. Tome Premier. A Paris: chez Néve, libraire de la Cour de Cassation, au Palais de Justice, No. 9, 1814, p. 836.

89 Cour d'Appel de Bordeaux, 6 août 1806. In: Journal du Palais: recueil le plus ancien et le plus complet de la jurisprudence française. Troisième édition / Par Ledru-Rollin, Docteur en Droit, Avocat a la Cour Royale de Paris. Tome Sinquième, An XIV – Mars 1807. Publié par F.-F. Patris, proprietarie du journal. A Paris, 1837, pp. 447–448.

90 Cour d'Appel de Bordeaux, 21 mars 1899. In: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1900. Paris, Librairie de la Sociéte du Recueil Général des Lois et des Arréts et du Journal du Palais. II Partie, p. 103 (*Sirey 1900 II 103*).

91 CARPENTIER, A. – FRÈREJOUAN DU SAINT, G. *Répertoire général alphabétique du droit français*: contenant sur toutes les matières de la science et de la pratique juridiques l'exposé de la législation, l'analyse

be made from gold or silver, but such items have to be precious in general.[92] The French jurisprudence also showed that it was not necessary for a treasure to be buried in the soil: in a 1854 judgment of the Court of Rouen, a young workman (defendant in the case) found an ingot of gold in the attic of a house, where he was working, and the said ingot was hidden in a wooden frame, being covered with plaster; by error, he thought it was an ingot of copper, not of gold, and sold it to a local merchant, who discovered that it was a golden ingot in fact, and called the owner of the house (plaintiff in the case), where he was working, and returned the ingot of gold to the owner. It was also known, that the owner of the house several times strived to find valuable things in the attic, but had never found any; nor anything was known concerning the position of the previous owner of the house, who remained unknown, and apparently, no one from the side of the previous owner of the house intervened into the dispute claiming any rights to the ingot. The court held, that under the general rule, a treasure belongs to the owner of the fund in case it was found not accidentally, but due to the work aimed at discovering it, and despite the older efforts of the owner of the house, there was no actual work done to discover treasures. Hence, the court of first instance ordered the owner of the house to return the ingot to the defendant's guardian so that the golden ingot could be properly sold. The Rouen Court of Appeals affirmed this judgment.[93]

3. The legislation, judicature and doctrine on the application of the doctrine of *res divini juris* in certain jurisdictions

The Roman law doctrine of *res divini juris* presupposed that they were excluded from any civil-legal transactions, which included all consecrated objects. However, times have changed, and the concept of applying *res extra commercium* to all *res divini juris* alterated as well. The courts arrived to different conclusions regarding the legal status of *res divini juris* as items being *res extra commercium*, and occasionally, courts had established, that the doctrine of *res extra commercium* should be somehow adherred to the present day conditions, finding that the essense of *res extra commercium* would rather apply in terms of: 1) on one hand, recognizing property rights in an object of *res divini juris*, for instance, in a church, by a local community or a parish, and 2) on the other hand, finding that such object of property may not be ordinarily sold, purchased or gifted, as ordinary chattels may be, and it may be used solely for the purpose of its destination, that is, to be a house of worship. Such conclusions could be made from the judgment of the Higher Court of Bavaria of January 14, 1878,[94] where the Court provided a thorough analysis of

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critique de la doctrine et la solutions de la jurisprudence. Publié par M.M. A. Carpentier, G. Frèrejouan du Saint. Tome trente-sixième. Paris: Librairie de la societé du Recueil Sirey, 1905, p. 99 (§ 35–47).

92 Cour d'Appel de Bordeaux, 21 mars 1899. In: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1900. Paris, Librairie de la Société du Recueil Général des Lois et des Arréts et du Journal du Palais. II Partie, p. 103 (*Sirey 1900 II 103*).

93 Cour de Rouen, 3 janvier 1853. In: Jurisprudence Générale. Recueil périodique et critique de jurisprudence, de legislation et de doctrine en matiére civile, commerciale, criminelle, adminstrative et de droit public. Par M. Dalloz ainé, par M. Armand Dalloz, son frère, par M. Èdouard Dalloz fils. Annèe 1854. A Paris: au Bureau de la Jurisprudence Génèrale, Rue de Seine, no. 34. II Partie, pp. 117–118 (*Dall. Per. 1854 II 117*).

94 Oberster Gerichtshof für Bayern, IV. Senat, Urt. vom 14 Januar 1878, Nr. 4, Sammlung vom Entscheidungen des obersten Gerichthofes für Bayern in Gegenstanden des Civilrechts und Civilprozesses. Siebenter Band. Erlangen: Verlag vom Palm & Enke, 1880, Entsch. Nr. 87, pp. 203–209.

Roman law and Canon law doctrines relating to *res sacrae*. Earlier, the Higher Court of Appeals of Jena in its 1832 judgment, which was a dispute over the defendants' passing through a churchyard, belonging to the plaintiffs, held that the Roman law doctrine of *res religiosae*, which presupposed that these objects were exempt from any civil-legal transactions, could not be applicable in its classic meaning.[95] This seems to be the same principle in more modern English law, where the parishes sought a faculty (a court order from an ecclesiastical court) in order to sell or remove some peculiar church property (i.e. a removal of a church spire for the needs of safe aircraft flights,[96] sale of 16th century pots,[97] or a painting at a church,[98] sale of flagons,[99] sale of communion vessels,[100] retention of an icon and a candle stand,[101] removal of pews replacing them with chairs,[102] and reordering the church interior.[103] In the case of *Escot Church, Re* (1979), the Consistory Court of Exeter held, that once a chattel was gifted to a church, i.e. a painting, it became dedicated to the God's service, it could not be returned, and the property rights in it belonged to the churchwardens.[104] The Court of Cassation for the Grand Duchy of Hessen in its judgment of May 26, 1873 also determined, that the communities may retain property rights over a Catholic church building, and courts have jurisdiction to adjudicate the case which would involve a proprietary dispute in terms of a church.[105] The Court of Cassation of France in its judgment of December 1, 1823 has deduced the *res extra commercium* status of churches on basis of 1790–1791 laws, which abolished different privileges of *Ancien Régime* nobility (as some representatives of which could own churches, chapels, pantheons as their private property in the era of *Ancien Régime*), as well as the Royal Ordinance of the King François I of September 24, 1539; to wit, the Court of Appeals and the Court of Cassation in this case referred to churches in French language as "hors le commerce", that is "out of commerce".[106] In other cases, people who found ancient tombs could claim proprietary rights over the objects they had found there,

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95 Oberappellationsgericht zu Jena, Erkentniß vom 28 Februar 1832. In: Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten. Herausgeben von J. A. Seuffert. Sechster Band. München: Literartistliche Anstalt der J. G. Cotta'schen Buchhandlung, 1853, pp. 180–181 (Entsch. Nr. 140).

96 *St. Edburga, Abberton, Re; St. James, Bishampton, Re*, [1962] P. 10, [1961] 3 W.L.R. 87, [1961] 2 All. E.R. 429, [1961] 4 W.L.U.K. 10, [1962] P. 10.

97 *In Re St. Gregory's, Tredington*, [1971] 2 W.L.R. 796, [1972] Fam. 236 (adjudicated on October 28, 1970).

98 *In Re St. Helen's, Brant Broughton*, [1973] 3 W.L.R. 228, [1974] Fam. 16 (adjudicated on October 18, 1972).

99 *St. Mary of Charity (Faversham), Re* [1986] Fam. 143, [1985] 3 W.L.R. 924 (adjudicated on June 8, 1985).

100 *The Vicar and Churchwardens of St. Mary, Northolt v Parishioners; The Rector and Churchwardens of St. George-In-the-East v Parishioners*, [1920] P. 97 (adjudicated on February 25, 1920).

101 *In Re St. Michael and All Angels, Great Torrnigton*, [1985] 2 W.L.R. 857, [1985] Fam. 81 (adjudicated on December 18, 1984 and February 18, 1985).

102 *In Re St. Mary's, Banbury*, [1987] 3 W.L.R. 717, [1987] Fam. 136 (adjudicated on October 4, 1986); *In Re Holy Cross, v. Pershore*, [2001] 3 W.L.R. 1521, [2002] Fam. 1 (adjudicated on September 15, 2000).

103 *In re St. Alkmund, Duffield*, [2013] Fam. 158 (adjudicated on October 1, 2012).

104 *Escot Church, Re*, [1979] Fam. 125, [1979] 3 W.L.R. 339 (adjudicated on May 31, 1979).

105 Großherzoglich Hessischer Cassationshof, 26. Mai 1873. In: Entscheidungen des Großherzoglich Hessischen Cassationshofs in Civil- und Strafsachen aus dem Jahre 1873. Darmstadt: Druck und Verlag der L.C. Mittich'schen Hofbuchdruckerei, 1874, pp. 18–27.

106 Cour de Cassation (France), 1re decembre 1823. In: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Tome XXIV. (An. 1824). 1re Partie. Jurisprudence de la Cour de Cassation. Paris, Imprimerie de L.-É. Hernan, pp. 161–164 (*Sirey 1824 I 161, 161–164*).

or at least, their value.[107] Items, found in ancient tombs by means of archeological search or by mere coincidence, have a questionable legal status, since by fact, these items could not be considered *res divini juris* or anyway *res extra commercium per se*.

3.1 Imperial Austria

3.1.1 In overall

Both legal doctrine and case law of Imperial Austria affirmed the application of the doctrine of *res divini juris* in Austrian law, despite the doctrine was formed in a somewhat different way and was not completely alike the initial Roman law doctrine, though being quite similar to it. As it was mentioned before, a questionable feature in earlier Austrian law relating to *res divini juris* was the legal protection of tombstones as *res extra commercium* from the procedure of execution – that is, the seizure of an item belonging to an indebted person according to a court order. L. Geller in his article mentioned that the initial concept of *res sacrae* was unknown to Austrian civil law.[108] Under the Imperial Austrian Law of June 10, 1887, § 1, objects that are used for divine services by a legitimately recognized church or religious community, were considered exempt from the procedure of execution, which also involved True Crosses.[109] In case law, sacred objects were referred to as "*res sacrae*",[110] and occasionally were referred to as "*relics*".[111] L. Geller also wrote, that the concept of *res sacrae* in Austrian law is different from Roman law, since in Rome, the things became *res sacrae* by the fact of being consecrated, whereas the Imperial Austrian Law of June 10, 1887 did not require these items to be consecrated in order to become

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107 (1) Tribunale di Firenze, 7 april 1900. Reported in French in: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1903. Paris, Librairie de la Société du Recueil Général des Lois et des Arréts et du Journal du Palais. Parte IV, pp. 21–23 (*Sirey 1903 IV 21, 21–23*).

(2) Oberlandesgericht Karlsruhe, 4. Juli 1898, reported in French in: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1900. Paris, Librairie de la Société du Recueil Général des Lois et des Arréts et du Journal du Palais. Parte IV, pp. 9–11 (*Sirey 1900 IV 9, 9–11*).

108 GELLER, L. Zur Executionsnovelle vom 10. Juni 1887, *Österreichisches Zentralblatt für Juristische Praxis*. Herausgeben von Dr. Leo Geller. 5 Band. Wien, 1887. Verlag von Moritz Perles, pp. 577–581.

109 Geseß vom 10. Juni 1887, betreffend die Abänderung, beziehungsweise Ergänzung einiger Bestimmungen des Executionsverjahrens zur Vereinbringung von Geldvorderungen. RGBl. Jahrgang 1887, Nr. 74, pp. 365–370.

110 See the following judgments:

(1) K.K. Oberster Gerichts- und Cassationshof, Entsch. vom 28 März 1877, Ziffer 13.853. In: Plenarbeschlüsse und Entscheidungen des k.k. Cassationshofes, veröffentlicht im Auftrage des k.k. Obersten Gerichts- als Cassationhofes. Zweiter Band. Entscheidungen Nr. 101–200. Wien: Manz'sche k.k. Hofverlags- und Universitäts-Buchhandlung, 1880, pp. 277–281, Entsch. Nr. 148.

(2) K.K. Oberster Gerichts- und Cassationshof, Entsch. vom 19 Febr. 1907, Nr. 2296, Sammlung von Zivilrechtlichen Entscheidungen des k.k. Obersten Gerichthofes. Herausgeben vom Leopold Pfaff, Josef v. Schey und Vinzenz Krupský. Fünfundvierzigster Band (Neue Folge, XI. Band). Wien, 1910. Verlag der Manzschen k.u.k. Hof-Verlags u. Universitäts-Buchhandlung, Entsch. Nr. 4459, pp. 841–843.

111 K.K. Oberster Gerichts- und Cassationshof, Entsch. vom 4. Juli 1911, R. I, 439/11. In: Sammlung von Zivilrechtlichen Entscheidungen des k.k. Obersten Gerichthofes. Herausgeben vom Leopold Pfaff, Josef v. Schey und Vinzenz Krupský. Achtundvierzigster Band (Neue Folge, XIV. Band). Wien: Verlag der Manzschen k.u.k. Hof-Verlags u. Universitäts-Buchhandlung, 1913, Entsch. Nr. 5522, pp. 475–476.

exempt from the procedure of execution.[112] He held, that this category involved all movable objects, which were used for divine services, including church pews and seats in the synagogue, and found that the exemption from the procedure of execution related to both movable and immovable objects; moreover, the exemption also considered these objects by the time they were already used in divine services – thus, before being used for such purposes, these objects were not exempt from the procedure of execution.[113] After the adoption of the Imperial Austrian Law of June 10, 1887, there were proposals to exempt not only *res sacrae* from the procedure of execution, but also the monasteries, schools, workhouses and hospitals.[114] A. Randa called the churches *res publicae* in Austrian law according to the fact that the project of the Austrian Civil Code considered them as such. The objects, used for divine services were exempt from civil-legal transactions, and at the same time, they were considered to be property of church institutions.[115] J. Krainz found that the original destination of *res divini juris*, which were *res extra commercium* in Roman law, had considerably altered in Austrian law: for instance, the church buildings were the property of the church institutions and could be sold, the cemeteries either belonged to the churches, or to a local community (and hence it could not be claimed that they did not belong to anyone), and what as to *res sanctae*, they became either *res publicae*, or financial property.[116] The legislation of Imperial Austria had established the principles of *res extra commercium* towards certain religious items: according to the Royal Decree No. 2234 (November 25, 1826), since the True Crosses and relics were not the objects of assessment and sale, their seizure in cases of execution or testament was barred.[117] The Royal Chancery Decree No. 6777 (September 30, 1805) allowed sale of monstrances and pyramids, but the sale of True Crosses and the sacred objects was strictly forbidden, since the sacred objects were not subject to any pecuniary assessment and were not allowed for purchase or sale.[118] This Decree seems to have its roots in Roman law, since according to the Digest of Justinian, 1.8.9.5., anything that is sacred, cannot be subject of an appraisement.[119] L. Geller denoted that the tombs were exempt from the procedure of execution as well.[120] It is quite interesting, since the tombs are apparently not used in divine services

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112 GELLER, L. *Österreichisches Zentralblatt für Juristische Praxis*, pp. 577–581.

113 GELLER, L. *Österreichisches Zentralblatt für Juristische Praxis*, pp. 578–579.

114 Aus dem Vereinen, Juristische Geselschaft, Juristische Blätter. Eine Wochenschrift. Herausgeben und redagiert von Dr. Max Jurian. 16. Jahrgang. Wien: K.k. Hofdruckerei Carl Fromme, 1887, p. 188.

115 RANDA, A. *Das Eigenthumsrecht nach österreichischem Rechte mit Verücksichtigung des gemeinen Rechts und der neueren Geseßbücher*. Band 1. Leipzig: Druck und Verlag vom Breitkopf und Pärtel, 1884, pp. 43–44.

116 KRAINZ, J. *System des österreichischen allgemeinen Privatrechts*. Band 1. Wien: Manz'sche k.k. Hofverlags- und Universitäts-Buchhandlung. 1885, pp. 68–69 (II A, § 84).

117 Hofdekret vom 25sten November 1826 Nr. 2234, an sämmtliche Appellations-Gerichte, in Folge höchster Entschließung vom 10. November 1826, über Vortrag der vereinten Hofkanzlen. Siebente Fortseßung der Geseße und Verfassungen im Justiz-Sache unter Seiner jeßt regierenden Majestät Kaiser Franz. Von dem Jahre 1826 bis 1830, p. 56.

118 Hofkanzlendekret vom 30. September 1805 Nr. 6777, Sammlung der Gesetze, welche unter der glorreichsten Regierung Kaisers Franz des II. in den sämtlichen k. k. Erblanden erschienen sind in einer chronologischen Ordnung. Von Joseph Kropatschek. Zwanzigster Band. Wien, ca. 1805, p. 644.

119 D. 1.8.9 (5) (Ulpian, *On the Edict*, Book LXVIII).

120 GELLER, L. Theorie und Praxis des Pfandrechts Erläuterungen zu den §§ 447–466 BGB, *Österreichisches Zentralblatt für Juristische Praxis*. Herausgeben von Dr. Leo Geller und Dr. Herman Jolles. XXXVII. Band. 1919. Wien: Verlag von Moritz Perles, 1920, pp. 593–562 (see particularly at p. 601).

(as the law mentioned that only the objects used for divine services could be exempt from execution), though the tombs may be consecrated. What is also remarkable, the tombstones were not considered *res extra commercium* in old German law,[121] but in Switzerland, the Federal Tribunal found that tombstones were *res extra commercium*.[122] In Austrian law, the tombstones became *res extra commercium* only after they were used upon their original destination, that is to be a monument in honor of the deceased person; before that, any civil-legal relationships relating to sell, the type and peculiarities, or remuneration for the manufacturing of a tombstone are typical for civil law, such as the manufacturing and delivery of any other goods, and the disputes relating to manufacturing of the tombstone could be found in the practice of the Imperial Supreme and Cassation Court.[123]

3.1.2 Are tombstones exempt from the procedure of execution on by the fact of being res extra commercium?

The practice of the Imperial Supreme and Cassation Court revealed that tombstones were actually not exempt from execution. When we discussed the exemptions from the procedure of execution, according to § 1 of the Imperial Austrian Law of June 10, 1887, the reader may note, that the law stipulates about the objects, which were used in divine services, outlining the True Crosses. However, do tombstones belong to items, which are used in divine services? This is a very good and a correct question, which was also stated by the Austrian Imperial Supreme and Cassation Court in the judgment no. 2296 (1907), where the Court provided a thorough explanation of why a tombstone is not exempt from execution. Additional facts concerning the judgments of the first and second-instance courts of this case were provided by the Czech journal *Pravník*, as the case originated and was heard by the courts of Cisleithania, which was then under the jurisdiction of Imperial Austria, and since Imperial Supreme and Cassation Court heard the cases originating from Cisleithania in cassation order,[124] the final judgment was delivered by it. A widow, whose deceased husband was buried at a Catholic Church cemetery (churchyard), was indebted and she lodged a lawsuit to the court in order to stop the procedure of execution, which involved seizing of the tombstone of her deceased husband at a the said cemetery. The Circuit Court of Mariánské Lázně by the judgment of January 7, 1907, case no. E 782/6-6 dismissed her claim, finding that according to § 39 (2) of the Order of Execution, the procedure

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121 Kgl. Landgericht zu Frankfurt a.M., Dritte Civilkammer, 14. Dezember 1892. In: Rundschau. Sammlung vom Entscheidungen in Rechts- und Verwaltungssachen aus dem Bezirke des Oberlandesgerichts Frankfurt am Main. Herausgeben von der Juristischen Gesellschaft uz Frankfurt am Main. 1892. Sechsundzwanzigster Jahrgang. Frankfurt a. M.: Verlag der Alfred Neumann'schen Buchhandlung (E. v. Mager), 1892, Entsch. Nr. 17, pp. 278–280.

122 Bundesgericht (Schweiz), Entscheid vom 11. Februar 1904. In: Entscheidungen Bundesgerichts (BGE), Bd. 30, I 166, pp. 166–170.

123 K.K. Oberster Gerichts- und Cassationshof, Entsch. vom 14. Mai 1891, Nr. 4730. In: Sammlung von Civilrechtlichen Entscheidungen des k.k. obersten Gerichtshofes. Herausgeben von Leopold Pfaff, Josef v. Schey und Vincenz Krupský. Neunundzwanzigster Band. Wien: Verlag der Manz'schen k.u.k Hof-Verlags- u. Univ.-Buchhandlung. Druck von Carl Gerold's Sohn, 1895, Entsch. Nr. 13778, pp. 332–333.

124 During the Austrian-Hungarian Dual Monarchy Period (1867–1918), the majority of cases from appellate districts were heard by the Imperial Supreme and Cassation Court (*K.K. Oberster Gerichts- und Cassationshof*) in cassation, whereas the other cases were heard by other courts of cassation instance – namely, the Hungarian Royal Supreme Court (*Curia Regis*), the Romanian High Court of Cassation and Justice (*Înalta Curte de Casaţie şi Justiţie*) and the Croatian BanTable (*Banski Stol*).

of execution is cancelled if it relates to the objects which are not subject to execution, but a tombstone is not an object used for religious services in the sense of § 250 of the Order, and nor it was included into the list of objects exempt from execution in § 251 of the Order, and the Court did not agree with plaintiff's contention that the gravestone was included into the concept of family image, and was a honorific mark, but again, such interpretation had nothing to do with the provisions of the Order, where several objects were exempt from execution under §§ 250–251 of the Order; nor a tombstone may be estimated as an accessory of the cemetery; moreover, the Circuit Court also claimed, that the cemeteries, in contrast to Roman law, where the cemeteries were considered as *res sacrae*, in Austrian law, are in the property of church institutions or private persons, and hence they cannot be accounted as *res extra commercium* anymore. The District Court of Cheb in its judgment of January 26, 1907, case no. R IX 30/7-1 found for the plaintiff, quashing the judgment of the Circuit Court. The District Court stopped the procedure of execution, finding that the Royal Decree of August 23, 1784, § 7,[125] allowed the relatives and friends to install monuments from the feeling of piety to their deceased loved ones, and thus, it became the obligation of the administration of the cemeteries to allow installing monuments on the graves. Hence, the installed tombstone on the grave becomes a part of the grave, and becomes *res extra commercium* upon the time when it is a part of the grave, and cannot be seized. The District Court also held that the fact of excluding church cemeteries from legal transactions is dictated by the norms of canon law in terms of *res sacrae* and what is more, it is derived from religious and sanitary norms. The Supreme Court decided to reinstate the judgment of the first-instance court. The Supreme Court observed the conclusion of the District Court, which established, that a tombstone is an object attached to the tomb, and hence is *res extra commercium*, and since it became a part of the tomb, it was exempt from execution. Despite the tombstone, as the Supreme Court found, was *res extra commercium* in terms of civil-legal deeds, it does not mean, that it is exempt from the procedure of execution. The Court emphasized, that there were no legal norms, stipulating that the tombstones were a part of the tomb, or were declared an accessory (of the tomb) in the sense of §§ 294–297 of the Civil Code of 1811. The tombstone was neither an accessory of the cemetery, nor was it a sacred object, and it was not important that the consecration was made out of piety suggestions. Since the tombstone was not among the objects, which were not subject to execution under §§ 250–251 of the Order on Execution, the tombstone on the Catholic Church cemetery, where the years and birth and death of the plaintiff's deceased husband were engraved, was an asset in the sense of § 448 of the Civil Code of 1811, and hence it may be seized in the procedure of execution.[126] Hence, the pro-

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125 Hofdekret vom 23. August 1784, Ziffer No. 2951, P.G.S. Bd. 6, p. 565; also could be found in the collection of legal acts for the Kingdom of Bohemia, Vol. 2, Nr. 231 (the name and requisites of the book as of the original): Vollständiger Auszug aller für das Königreich Böheim unter glorreichester Regierung Joseph des Zweyten ergangenen Geseßen. In chronologischer Ordnung gesammlet und in alphabeitscher Ordnung verzeichnet von Johann Wenzl Roth, Advokaten. Zweyter Band. Prag: in der k.k. Re malschulbuchdruckerey, 1785, pp. 107–109 (Nr. 231).

126 K.K. Oberster Gerichts- und Cassationshof, Entsch. vom 19 Febr. 1907, Nr. 2296. In: Sammlung von Zivilrechtlichen Entscheidungen des k.k. Obersten Gerichthofes. Herausgeben vom Leopold Pfaff, Josef v. Schey und Vinzenz Krupský. Fünfundvierzigster Band (Neue Folge, XI. Band). Wien: Verlag der Manzschen k.u.k. Hof-Verlags u. Universitäts-Buchhandlung, 1910. Entsch. Nr. 4459, pp. 841–843. The case,

cedure of execution could apply to tombstones even despite the fact they were considered *res extra commercium* in civil law.

3.1.3 Proprietary rights to a cemetery on basis of a lengthy possession

Another judgment originating from Cisleithania, adjudicated by the Imperial Supreme and Cassation Court in 1906, related to the legal status of the cemetery and proprietary rights on it. Despite the same Court earlier recognized, that under the norms of canon law, a cemetery, from a legal point of view, should be understood as *res sacra*,[127] it already does not mean that the cemetery belongs to nobody. In this case, a Roman-Catholic parish church filed a lawsuit against a local municipality demanding a parcel of land, which was previously used as a cemetery. The judgment of the Court of first instance dismissed the claim, finding that the possession of the said parcel of land was of public character, and was not within the classical meaning of possession (in civil law). The representatives of the church filed an appeal and the District Court of Chrudim in it its judgment no. Bc I 1/6-19 of January11, 1906, upheld the appeal of the church. The reasoning of the Court of Appeals was the following. The parish chancery used to collect the burial fees for over 40 years, and the patronage service, whom the fees were handed over, and managed its property. Repairing works were also conducted at the cemetery, and the undertakers were accepted; the administration also received grass and harvest from the trees growing in the cemetery, and hence, the Court found that the parish church was in an unequivocal possession of the cemetery. The municipality objected, claiming that the possession of the cemetery by the parish church cannot lead the acquisition of any property rights; the defendant found, that the burial fee should be reviewed as a kind of a mine tunnel in the sense of the Mine Tunnel Patent of 1750, and hence, as the Court of first instance found, the fee was administrative, not an act of civil law; also establishing that the use of grass, etc., could create an easement, but not property rights, and found, that the cemetery repairs were also public, and the cemetery was a common good. What is more, the representatives for defendant showed a protocol of 1881, which reserved the rights for the municipality to the cemetery, if a new was established, and the parish board was to govern it on behalf of the municipality. However, the District Court nevertheless found for plaintiff, finding that the burial fee are the outcomes of private law, and the taxes are settled by administrative bodies, since public legal norms are invoked within burial. The Court also discarded that burial fees are collected because graves are a "tunnel", since the burial fees, in fact, were used for the maintenance of the cemetery; by the mere fact the burial fees are controlled by the administrative authorities, they would not become a sort of common good – the court denotes that to rule otherwise would mean that in any case where administrative

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reported with more details concerning the judgments of the Circuit Court and District Court, were also published in the Czech journal *Pravník* (citation according to the original):

(1) C. k. okresní soud v Mariánských Lázních, usnesení ze dne 3. ledna 1907 č. j. E 782/6-6

(2) C. k. krajský soud v Chebu, usnesení ze dne 26. ledna 1907 č. j. R IX 30/7-1

(3) C. k. nejvyšší soud, rozhodnut ze dne 19. února 1907 Č. 2296. / Pravník 1908, Roč. XLVII, Sešit 6, str. 221–223.

127 K.K. Oberster Gerichts- und Cassationshof, Entsch. vom 4. Juni 1902, Nr. 7784. In: Sammlung von Zivilrechtlichen Entscheidungen desk.k. Obersten Gerichthofes. Herausgeben vom Leopold Pfaf, Josef v. Schey und Vinzenz Krupský. Neununddreißigster Band. (Neue Folge, V. Band). Wien: Verlag der Manzschen k.u.k. Hof-Verlags u. Universitäts-Buchhandlung, 1904. Entsch. Nr. 1929, pp. 444–445.

authorities are involved, the private law relationships would vanish, whereas in fact, it is apparently not so. The Court also denoted that possession is predefined by the purpose an object is used – the cemetery was used for the burial of the deceased, which was never disputed, and the Court did not agree with defendant's statements that the possession was improper or it was willful and the public register note that the cemetery was in the list of public property (*res publicae*), as the Court held, did not make the municipality the owner of the cemetery, since this register of public property was not used to determine proprietary rights. So, the court concluded that the plaintiff unequivocally possessed the disputed cemetery for over 40 years and thus acquired property rights to it. The Imperial Supreme and Cassation Court decided to dismiss defendant's appeal. As it goes from the reasoning of the Court, the cemeteries, supervised by the state, are not public property (*res publicae*), and are either the property of the church, or the municipality, and if the church can be the proprietor of the cemetery, property rights could be acquired by possession (and so it was, as of the circumstances of the case). The Imperial Supreme and Cassation Court agreed with the finding of the Court of Appeals, that the adherence to the aim of the object is necessary to define the proprietary rights, and agreed that the plaintiff church had used the cemetery continuously for over forty years, without any objections from the side of the defendant, performed different services and functions within funerals by clergymen, the church also hired and paid the workers for the use of the cemetery, conducting repairing works and managed the burial fees, which was never anyhow objected by the defendant. Hence, the Court concluded, that the plaintiff church acquired the property rights over the disputed parcel of land.[128]

3.2 France

3.2.1 Ancien Régime

According to the laws and customs of the Ancien Régime, churches and other objects used for divine services, as well as some other *res sacrae* items were declared to be out of commerce unless the proprietor was the founder or the patron of the church. Namely, Art. 14 of the Royal Ordinance of the King François I of September 24, 1539 held:

> We, in order to put an end to different debates and contentions among our subjects, have ordered, that no one of whatever quality and condition whatsoever, shall claim any right or possession, authority, prerogative or preeminence within churches or chapels, whether to have pews, seats, oratories, stools, armrests, burning graves, titles, coats of arms, crests or other signs of their houses, unless they are founders or patrons of such churches or chapels, and that they can promptly inform them by letters or titles of foundation, and by sentences or judgments given with full knowledge of the facts and with legitimate parties …[129]

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128 (1) C. k. krajský soud v Chrudimu, rozsudek ze dne 11. ledna 1906, Bc I 1/6-9
(2) C. k. nejvyšší soud, rozhodnut ze dne 28. března 1906, Č. 3606. In: *Pravník*, 1906, Roč. XLV (45), str. 305–310. The information on the judgment of the trial court not given.

129 Ordonnance de François 1er du 24 septembre 1539, La grande conference des ordonnances et edits royaux. Tome Premier. A Paris: Chez Denis Thierry. 1678. Liure I, Titre II, Partie I, p. 12

As it may be deduced from the text of the Ordinance, certain people still would have a proprietary right to churches and other *res sacrae* items under certain circumstances. As the French lawyer J. Guyot denoted in his repertoire of jurisprudence, higher honorable rights in respect with the churches and adjacent objects were attributed only to church patrons and members of high courts, such as the right to have a honorable seat (pew) at the church, the right to receive consecrated bread, as well as a step to the offertory and the procession. J. Guyot outlined, that these honorable rights were dictated by the matter of decency. There were certain persons, to whom some other privileges were granted, which were mainly lower court judges, landlords as well as noblemen with titles.[130] J. Guyot claimed, that the given rules relating to the rights of different noblemen in respect with churches and adjacent objects, as well as honorable rights, all derived from the Royal Ordinnance of the King François I of September 24, 1539. He continued, that it was not possible to purchase these rights, or to cede them, acknowledging that there was some litigation relating to such rights those days.[131] The honorable rights in churches in the French provinces were given by custom, the highest of which were lodged to the founders and the patrons of the church, whereas even the members of high courts had somewhat lesser honorable rights, but their amount was the first after the founders and the patrons of the church.[132] Church bells were and still remain an inalienable part of any church. It was considered a privilege of parish churches to possess two or three bells, and most other churches usually had one bell.[133] Abbe Bacalerie called church bells to be the voice of the community to whom it had belonged, since it announced all concordant events in its life, such as holidays and mournings as well as marking the hours for different events. There is some case law legacy in respect with church bells to which we will turn below.[134] A very interesting case was reported relating to church bells, which occurred in the early 17th century. A manufacturer of church bells once sold a church bell to the inhabitants of the church, but he was not paid, and he sued the inhabitants, asking the court to allow him to climb up and take off the bells, and he was previously not let to do so, since the church bells had already been consecrated and hence went out of commerce (*res extra commercium*), and so plaintiff could not claim them back. But at the same time, according to the judgment of the Parliament of Paris of February 17, 1603, the Court ruled that unless the inhabitants paid for the manufacturing of the bells, they would be taken off.[135] There is more evidence in terms of legal relationships regarding church bells in the epoch of Ancien Régime in France. J. B. Denisart

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130 GUYOT, J. N. *Répertoire universel et raisonne de jurisprudence civile, criminelle, canonique et bénéficiale; ouvrage de plusieurs jurisconsultes*. Tome Sixiéme. Paris, chez Visse, libraire, 1784, pp. 488–490.

131 GUYOT, J. N. *Répertoire universel et raisonne de jurisprudence civile, criminelle, canonique et bénéficiale; ouvrage de plusieurs jurisconsultes*, p. 490.

132 DU SAUZLET, M. *Abrege du recueil des actes, titres et memoires concernant les affaires du clerge du France un table raisonnee*. A Paris: chez Guillaume Desprez, Imprimeur ordinaire du Roi & du Clerge de France, 1764, p. 941.

133 BACALERIE, E.-J. ABBE. La paroisse rurale dans l'ancienne France et en particulier dans le Toulousain. In: *Bulletin archéologique et historique de la Société archéologique de Tarn-et-Garonne*. Tome XVI. Année 1888. Montauban, 1888, pp. 19–42; see in particular at p. 23.

134 BACALERIE, E.-J. ABBE. *Bulletin archéologique et historique de la Société archéologique de Tarn-et--Garonne*, pp. 21–22.

135 Parlement de Paris, 27 février 1603. In: TROPLONG, R. T. *Droit civil expliqué*. Tome Premier. Paris: Charles Hingray, Libraire-Éditeur, 1854, p. 250.

discussed in his jurisprudence repertoire, that the Toulouse Cathedral of 1590, allowed using only those church bells, which were blessed by the bishop, who also could appoint the priests (mostly, the parish priests) and the place for this ceremony. The King's Council decision of February 10, 1690 established, that in case the bishop did not consecrate the church bells within a week of time, then the capitul could appoint someone from his members for the blessing[136] (the jurisprudence repertoire of Merlin de Douai gives a slightly different interpretation of the said decision, namely that the capitul could send a deputy to ask the bishop to conduct the ceremony; if the bishop was out of town, or did not wish to consecrate the church bells, then the capitul could appoint one of his members to conduct the said ceremony).[137] The Melun Ordinnance, § 3, forbad the parishioners to insist on the priests from ringing the bells beyond the permitted time. Denisart mentioned a judgment of the Parliament of Toulouse of May 21, 1665, where the Court found, that the church bells could not be rung after the death of the parishioners, interred in the parish, unless the priest would be informed and would consent to ring them.[138] Merlin de Douai also mentioned a regulation of the Parliament of Paris dated September 17, 1646, which established that the church bells were not allowed to be casted without the permission of the bishop, and two copper blades were ordered to be made: one in the sacristy, and the other should be placed in the bell tower, with an engraving of the year and the name of the king.[139] In the older times, as Merlin de Douai wrote, village inhabitants used to ring the church bells very frequently during storms, which caused the lightnings, strike the ringers and the churches were unfortunately set on fire. These occasions seemed to be continuous, until a local bailiff applied to the Parliament of Paris to resolve this situation. Merlin de Douai reports the judgment of May 21, 1784, which has considerable reader interest and reveals, why all the casualties actually happened. The Court mentioned, that all the parishioners within the bailiff's jurisdiction had a custom to start ringing the church bells when a storm was approaching, believing that the divine powers would protect them from it. The Court had admitted, that this custom had nothing to do with the laws of physics, but instead, there was plenty evidence establishing that the lightning usually hit exactly the bells in such situations, and reckoned up a very unfortunate event, when a lightning hit the bells on twenty-four churches in Brittany from the commune of Langenau to Saint-Pol-de-Léon on the night of April 14/15, 1718, and these were the ones, where the church bells were rung, and the churches, where the bells were not rung, were not damaged by the lightning. The Court also reckoned up, that seven people died after a lightning hit the bell at a church in Aubigny-sur-Nère on June 11, 1775. The Court admitted that despite the inhibitions of the pastors and the village judges, the village inhabitants were not convinced to stop ringing the bells during storms. Hence, the Court came to a conclusion that it is necessary

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136 DENISART, J.-B. *Collection de décisions nouvelles et de notions relatives a la jurisprudence*. A Paris: chez la Veuve Desaint, 1786, pp. 569–570.

137 MERLIN DE DOUAI, P.-A. *Répertoire universel et raisonné de jurisprudence / par M. Merlin*, Ancien Procureur-Général á la Cour de Cassation. Tome Troisiéme. Paris, 1817, p. 13.

138 DENISART, J.-B. *Collection de décisions nouvelles et de notions relatives a la jurisprudence*. A Paris: chez la Veuve Desaint, 1786, pp. 569–570.

139 Parlement de Paris, 17 septembre 1646. In: MERLIN DE DOUAI, P.-A. Répertoire universel et raisonné de jurisprudence / par M. Merlin, Ancien Procureur-Général á la Cour de Cassation. Tome Troisiéme. Paris, 1817, p. 13.

to forbid the church elders and the bell ringers within the jurisdiction of the Court to ring the church bells during the storm, and imposed a money fine of 10 livres for doing so for each the first time, and 50 livres, or even a greater fine for each subsequent violation of the inhibition to ring the church bells during the storm.[140]

The legacy on the law relating to sepulture in Ancien Régime also knows other examples. P. J. Brillon, referring to J. Papon's case law collection, recalled a judgment of the Parliament of Paris of 1388, which abridged an ancient custom of the church officials to appoint a plenipotentiary person to write a "posthumous testament" for a person which had died intestate, and this "testament" was made for the benefit of the church officials; only after such a "testament" the deceased could be buried in consecrated soil[141]. C. Mey mentioned the date of this judgment as August 14, 1388.[142] There is some legacy approving the existence of the institute of a "corpse curator" applied in cases relating to the investigation for religious crimes and exercising magic, which was still believed to exist in the XVII century. A judgment by the Parliament of Rouen dated September 10, 1643 demonstrated a rather obscure situation with an investigation relating to possession by evil forces and magic. The bishop ordered to incarcerate a nun, who blamed a recently deceased church official in impiety and exercising magic, who was buried at the monastery. The tomb of the said official was haunted with repeated disorder, and so the bishop decided to order to exhume his body, even without an appropriate judicial approval, and to bring it to a public tomb, where it was soon found and recognized. Next, the relatives of the deceased filed a lawsuit to the Parliament of Rouen. The nun was questioned, and she told numerous stories concerning the impiety of the deceased man, and because of this, a curator for the body of the deceased was appointed, since according to the views of those days, it could be a corpse of a magician; it was followed by the questioning of other nuns and forensic expertises, upon which the Parliament of Rouen had finally declared that the afore-mentioned nun and several other nuns were possessed by the evil forces.[143]

The French law of the period of Ancien Régime in respect with *res sacrae* was quite similar to the basic interpretation of Justinian law. Such explanations could be found in the work of Claude de Ferrière: the items, which were attributed to Divine Law were classified as sacred items, religious items and holy items (it is notable, that the terms were pronounced in French, not in Latin). The sacred objects included churches and places, which the presents to God are maintained; sacred objects also included all items, used for divine services, which are not subject to any alienation. The religious items contained a substantial degree of holiness, which did not allow it to be constantly used by people – C. de Ferrière refers

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140 Parlement de Paris, 24 mai 1784. In: MERLIN DE DOUAI, P.-A. Répertoire universel et raisonné de jurisprudence / par M. Merlin, Ancien Procureur-Général á la Cour de Cassation. Tome Troisiéme. Paris, 1817, p. 14.

141 Parlement de Paris, 14 août 1388. BRILLON, J. P. *Dictionnaire des arrets, ou jurisprudence universelle des parlaments de France, et autres tribunaux*. A Paris: Chez Guillaume Cavelier, dans la grand'Salle du Palais, à l'Ecu de France, & à la Palme, 1711, p. 561, Nr. 53 (date as provided by C. Mey, see note 119 *infra*).

142 MEY, C. *Apologie des jugemens rendus en France contre le schisme par les Tribunaux séculiers*. Troisiéme Edition, corrigée augmentée. Tome III, 1753, p. 519.

143 Parlement du Rouen, 10 septembre 1643. In: THÈAUX, M. *Pages d'historie judiciaire. Le crime de sorcellerie. La Revue du Palais*. Première Année. Tome Troisième. Paris, 1897, pp. 103–135 (see in particular pp. 130–134).

to cemeteries, whereas the holy objects are the things, which are very bound to be used or maltreated.[144] As it may be remembered from different legal literature, *res sanctae* are not strictly the same as *res sacrae*, their holiness may also be sacral from the point of view of law or custom – for instance, C. de Ferrière referred to *walls*, which is an apparent reference to the walls of Rome, the maltreatment of which in Ancient Rome would toll to capital punishment. A very similar classification was given by Fieffé-Lacroix, de Neufchâteau, who claimed, that such objects should be classified as: a) sacred items, consecrated to God by pontiffs; b) religious items, such as a place of burial of a deceased person (to wit, the Prussian Supreme Tribunal directly referred to it by the term "*locus religiosus*" (which was used in Ancient Rome) in its 1876 judgment,[145] as it was originally named in Roman law); c) holy items, also mentioning the gates of the city.[146] P.-A. Merlin de Douai mentioned that many legislative efforts were put in the earlier times, when all the banquets and other similar celebrations were terminated in the houses of the churches. A special protection for *res sacrae* was established in Art. 2, Title 2 of the Law of July 22, 1791, as of which any tortfeasor, who would outrage any object of worship, or the religious ministers upon the place of divine services, or interrupted the service, would be either fined for a maximum of 500 Fr., or an imprisonment of a maximum of a year, such cases were to be heard by the justice of the peace. In Ancien Régime, the churches also served an asylum, and those, who were sheltered there, were also relieved from any persecution – P.-A. Merlin de Douai underlines this aspect as a shape of specific respect for the churches.[147] The ancient French court books also contained mentions of *res sacrae*. For instance, in the judgment of the Parliament of Paris dated February 25, 1650, which was a dispute involving a repayment of debts and the seizure of the property of the monastery, the Court held, that the sale of the sacred objects of the monastery, the chapel and the dormitory is so strongly forbidden, that even after the demolishment, the place maintains its original condition.[148] This seems to be a rendition of the Digest of Justinian, 1.8.6.3., upon which, a temple, which was once made sacred, remains sacred even after the edifice is destroyed.[149]

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144 DE FERRIÈRE, C. *La jurisprudence du digeste, conferee avec las ordonnances Royaux, les Coutumes de France, et les decisions des Cours souveraines, Où toutes sortes du matieres du Droit Romain, & Droit Coutumier, sont traitées suivant l'usage des Provinces de Droit écrit & de la France Coutumiere. Par M. Claude de Ferriére*. A Paris: chez Jean Cochart, au cinquiéme pillier de la grande Salle du Palais, au S. Esprit. 1678, p. 23.

145 Preußische Obertribunal, VI Senat, Erkenntnis vom 16. November 1876, Nr. 283. Sen. VI. 1875. In: Entscheidungen des Königlichen Ober-Tribunals, herausgeben im amtlichen Auftrage von den Ober-Tribunals-Räthen Dr. Sonnerschmidt, Clauswiß und Hahn. 76. Band. Berlin: Carl Heymann's Verlag. 1876, Entsch. Nr. 26, pp. 248–252.

146 FIEFFÈ-LACROIX, de NEUFCHÂTEAU (VÔGES), Les élémens de la jurisprudence: suivis du détail des matières continues dans le digeste, le code et le novelles; de la signification des termes et des règles du droit ancien. A Metz: Chez C.-M.-B. Antoine, Imprimeur et chez Devilly, Libraire, 1807, p. 43.

147 MERLIN DE DOUAI, P.-A. *Répertoire universel et raisonné de jurisprudence.* Quatrième Tome. Paris: Chez Garnery, 1808, pp. 465–466.

148 Parlement de Paris, 25 fevrier 1650. In: Journal des principales audiences du Parlement. Depuis l'année mil six cens vingt-trois iusques à present; Auec les Arrests interuenus en icelles. Par M^{e} Iean du Fresne, Advocat en ladite Cour de Parlement. A Paris: Chez la Veusue Gervais Alliot, Henry le Gras, la Veusue Edme Pepingve, 1658, pp. 607–610.

149 D. 1.8.6.3. (Marcianus, *Institutes*, Book III).

3.2.2 The case of the Moncaut church (1817–1823)

The case of the Moncaut church, upon which the Court of Cassation of France rendered its final judgment of December 1, 1823, provided a considerable analysis of the *res extra commercium* status of churches. The *res extra commercium* legal status of the church lies upon the principle, that the church is excluded from civil-legal transactions, may not become an object of a possessory claim, and remains *res extra commercium* until it preserves its original destination as a house of worship. The church and the adjacent chattels and buildings were then designated as a fabric (Fr. *Fabrique*), which received its name after the enactment of the Law on December 30, 1809. The facts of this case were the following. The elders (administrators) of the fabric of the parish church of Moncaut walled up the doors and demolished the inner staircase in the chapel of St. Joseph, being adjacent to the parish church. Soon, a sieur (plaintiff), claiming that he, as were his ancestors, was the owner of the chapel, sued the church elders demanding restoration, and he assured, that the chapel once belonged to the castle he also owned, not being a constituent of the parish church, and the walled-up doors were used as a means of communication between the castle and the chapel (both of which he claimed ownership of). The administrators of the parish church denied the claim, assuring that the chapel is in the possession of the parish, and has always been such. The defendants also emphasized, that the church is consecrated, and hence is considered to be *res extra commercium*. The Justice of Peace of the town of Nérac (Judgment of October 28, 1817) upheld the lawsuit of the sieur, finding, that in contrast to churches (the chapel was a consecrated building as well), it was widely known, that chapels could earlier belong to private persons, and could be inherited (seemingly, it was the reference to *Ancien Régime*), and this principle could be applicable to the chapel, which was in dispute, as well, and the witness testimony showed that both plaintiff and his ancestors had frequently used the said doors, leading to their castle, the plaintiff and his ancestors made the restoration of the chapel and bought decoration for it, and used to own it peacefully for many years. The Court of Civil Cases of Nérac (Judgment of July 6, 1819), hearing the given case in appellate order, upheld the appeal of the defendants. The Court found that is an omnipresently-established principle, that consecrated items are out of commerce, and they neither belong to anyone (to wit, the Higher Court of Bavaria in its 1878 judgment held that *res sacrae*, that is the church in that case, is *res nullius*),[150] and could not be acquired by prescription or by a possessory claim. This principle, held the Court, was well-established in jurisprudence and was proclaimed in the Royal Ordinance of the King François I of September 24, 1539, Art. 14 (cited above). The Court of Civil Cases of Nérac also denoted, that the first-instance court did not consider the newly-established French legislation (meaning the legislation of 1790–91 abolishing different privileges of the nobility, who possessed them during the era of *Ancien Régime*),[151] which cancelled the privileges of the nobility relating to churches as well. Hence, the Court of Civil Cases of Nérac found for defendants, quashing the judgment

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150 Oberster Gerichtshof für Bayern, IV. Senat, Urt. vom 14 Januar 1878, Nr. 4. In: Sammlung vom Entscheidungen des obersten Gerichthofes für Bayern in Gegenstanden des Civilrechts und Civilprozesses. Siebenter Band. Erlangen: Verlag vom Palm & Enke, 1880, Entsch. Nr. 87, pp. 203–209.

151 Décret de l'Assemblée Nationale, Concernant l'abolition de plusieurs droits seigneuriaux, notamment de ceux qui étaient cidevant annexés à la justice seigneuriale, et le mode de rachat de ceux qui ont été précédemment déclarés rachetables. – du 13 avril 1791. Procés-Verbal de l'Assemblée Nationale, imprimé par son ordre (1789–1791). Treizieme Livraison. Tome Sinquante-Deuxiéme, p. 9 (Art. XIII).

of the justice of peace. It should be denoted, that it was established in French case law, that a successor of a founder or patron of the church could preserve some rights, such as the right to hold a church pew in the church, where his ancestors used to be the owners during the era of *Ancien Régime*,[152] but at the same time, this situation was even not applicable to the present case, since plaintiff did not manage to prove anyhow, that his ancestor(s) were the actual founder(s) of the church. In terms of the relation of the chapel to the church, the Court established, that the chapel was built in a way to constitute an inalienable part of the church, and hence, it has to be regarded as sacred, and destined for divine service, and so, the chapel is not subject to prescription or may become a subject of a possessory claim. Even if not mentioning, that the new laws have abolished the privileges of the nobility, the plaintiff could nevertheless not prove any title in the church he or his ancestors had; moreover, just technically, the plaintiff was neither a founder or the owner of the church before, but he used to be a patron of the church, so he could not have any proprietary rights in the church. The plaintiff filed an appeal in cassation, where he claimed, that the appellate court did not apply the provisions of the 1539 Ordonnance and the 1790–91 laws correctly; plaintiff stated, that it was not necessary to decide of whether the churches were *res extra commercium* from a legal point of view, but he claimed proprietary rights in a room, or rather a building adjacent to his castle, and hence, he found he could file a lawsuit because of the acts of the defendants, who found that it was necessary to demolish the stairs and wall up the doors. He also found, that the 1539 Ordonnance provisions applied only to founders and the patrons of the churches, but he did not claim that he was a founder or a patron of the church, and he only filed a possessory claim, and he did not claim any rights of founders of patrons, and hence, he also believed, that the provisions of the laws of July 12, 1790 and April 20, 1791 were not applicable towards him. The defendants in their response claimed, that it was not true, that the plaintiff was interested in a certain room or building adjacent to the church, but they claimed that the plaintiff was interested in a chapel, which was also a place of public worship, and hence was *res extra commercium*. The Court of Cassation found, that the Court of Civil Cases of Nérac correctly established, that until churches and chapels maintain their destination as houses of worship, they cannot be a subject of a possessory claim. As the lower court found, that the chapel is a part of the Moncaut church and divine services were held there, and the church enterprise was possessing it when the disputed works took place, hence the Court found the given lawsuit to be inadmissible. Hence, the appeal was dismissed.[153]

3.2.3 The case of Isle-Aumont cemetery (1902)

This case was a dispute between the communes of Isle-Aumont on one hand, and Bordes d'Isle-Aumont and Vendue-Mignot on another hand concerning the latter commune's right to have participation the income from the concession of a local cemetery. This case also emphasizes the fact that cemeteries definitely could be an object of civil-legal transactions

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152 Cour d'appel de Caen, 3 juill. 1901, Jurisprudence Générale. Recueil périodique et critique de jurisprudence, de legislation et de doctrine en matiére civile, commerciale, criminelle, adminstrative et de droit public. Par M. Dalloz ainé, par M. Armand Dalloz, son frère, par M. Èdouard Dalloz fils. Annèe 1903. A Paris: au Bureau de la Jurisprudence Génèrale, Rue de Seine, no. 34. II Partie, pp. 211–212 (*Dall. Per. 1903 II 211, 211–212*).

153 Cour de Cassation (France), 1re decembre 1823. In: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Tome XXIV. (An. 1824). 1re Partie. Jurisprudence de la Cour de Cassation. Paris: Imprimerie de L.-É. Hernan, pp. 161–164 (*Sirey 1824 I 161, 161–164*).

in French law, and hence, they could not be considered as *res religiosae* in the sense of classic Roman law. So, the facts were the following. The three communes from time immemorial were forming a parish, having the same church, presbytery and the cemetery, which became the object of the dispute at stake. This cemetery was used as a place for burial by all the three communes. In 1847, the commune of Isle-Aumont received a concession to the cemetery and the Municipal Council of Isle-Aumont established a rate, upon which 2/3 of the income from the concession will be transferred to the fund of the municipal governor of Isle-Aumont, which will be used for the benefit of the commune, and 1/3 will be given for the benefit of paupers. The commune of Isle-Aumont was the only commune, which collected the incomes received from the concession, but it managed the local cemetery as well. This state of affairs ran from 1847 until 1895, when the communes of Bordes d'Isle-Aumont and Vendue-Mignot decided to file a lawsuit against the commune of Isle-Aumont in order to ascertain that they were the co-owners of the cemetery and so they could participate in the income received from the concession. The Court of Civil Cases of Troyes in a judgment dated August 12, 1896, ruled that the plaintiff-communes were the co-proprietors of the disputed cemetery. The Court reckoned up, that the given communes were the parts of the same parish from *time immemorial*, where, as it was already mentioned before, the same presbytery, church and the cemetery were located, and the co-proprietorship of the former two had never been disputed, whereas when the act of concession was performed in 1847, the other communes, who were called to discuss this issue, initially did not object to it, but continued to bury the deceased ones at the same cemetery hence making use of it and so it could be observed as possession. The defendant commune held it was the sole proprietor since it received the benefits from the concessions and maintained the cemetery, but the Court held that the commune of Isle-Aumont had its concession not as a transfer of property, but as mere municipal taxes and that the expenditures for the maintenance and reparation works on the cemetery were only the consequences of the incomes from the concession. Therefore, the Court decided that the two other communes (plaintiffs) were the co-proprietors of the cemetery with the defendant commune, and had the right to participate in the incomes of the concession from one hand, and obliging themselves to participate in the expenditures for the maintenance of the cemetery, as well as recover all the sums collected before the lawsuit, such as concession prices. The appeal was heard before the Paris Court of Appeals on January 31, 1900, which confirmed the judgment of the Court for Civil Cases of Troyes and rejected the appeal of the commune of Isle-Aumont. The Court established, that before the French Revolution, the cemetery was the property of the parish, which already then encompassed Bordes d'Isle-Aumont, Isle-Aumont and Vendue-Mignot (which were now separate communes), and parish cemeteries were and remained communal property and were not alienated by revolutionary laws (to wit, private churches and chapels, which used to exist in Ancien Régime, were alienated thereafter), and the obligation of the communes to have their own cemetery was not absolute and did not violate property rights that existed before. The commune of Isle-Aumont appealed to the Court of Cassation, providing a set of arguments, which the author finds considerable to be mentioned. Foremostly, the appellant contended, that the finding of the Court of Appeals relating to the established fact that the disputed cemetery was the property of the parish before the French Revolution, which constituted Bordes d'Isle-Aumont, Isle-Aumont and Vendue-Mignot, was not based upon any documents, and upon the

Ancien Régime laws, the cemeteries used to belong to church fabrics, and hence, they were in fact alienated by revolutionary laws, and if the said laws alienated the cemeteries, then property rights are vested to the commune (where the cemetery is located). Secondly, the appellant contended that the dispute was of administrative jurisdiction and the Court of first instance, upon the appellant's point of view, could not proclaim the communes of Bordes d'Isle-Aumont and Vendue-Mignot to be the co-proprietors of the cemetery without annulling the decree of the prefect, dated December 20, 1847, which presupposed that 2/3 of the concession income to be vested to the fund of municipal governor, and 1/3 to the benefit of the poor, and the given decree could be annulled (if annulled) only by an administrative authority. Finally, appellant claimed, that the mayor of the commune, where the said cemetery is located, has an exclusive right to carry out any acts of disposal there, and the product of the concession had the character not of a sale price, but a municipal tax, and thus only the commune whose mayor could provide the concession could receive benefits from it. The Court of Cassation of France decided to dismiss the appeal, and responded to these contentions in it authoritative judgment. Firstly, the Court held that all the three communes, which were litigants, formed a parish from *time immemorial*, and were still joint for the divine services and the funerals, used the disputed cemetery for purposes of burial also from *time immemorial*, and this possession, which was also from *time immemorial*, was actually joined, and the possessive acts of the commune of Isle-Aumont were not enough to establish a unilateral property right, and this property right was not established by the commune, and even the revolutionary laws, that alienated the cemeteries from the fabrics did not lodge any exclusive property right, and so the lower courts declaring the two other communes to be the co-proprietors of the cemetery, were correct in their findings. In respect with the second contention, the Court said, that the judgment below was limited in terms of the legal consequences of co-proprietorship, and did not deal with the questions of sharing communal property or fruits, and hence the judgment was within the Court's jurisdiction and its limits could not be restricted by the prefect's order of December 20, 1847, which also did not rule upon any issues of proprietary rights. Speaking of the last contention, the Court denoted that appellant did not speak of the mayor's exclusive right to grant concessions, only claiming sole proprietorship of the disputed cemetery before the courts of lower instances, finding that this issue would require a new review and deciding upon it, held it inadmissible in cassation order. For these reasons, the appeal was dismissed.[154]

3.2.4 The case of the Trainel church bells (1910)

The church bells, as the legislation and further case law showed, belonged not only to *res sacrae*, but also to *res publicae* in the sense of the application of them to a certain extent.

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154 Cour de Cassation (France), Chambre des Requêtes, 12 avril 1902, Reported in French in: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1903. Paris, Librairie de la Sociéte du Recueil Général des Lois et des Arréts et du Journal du Palais. Parte I, pp. 161–166 (*Sirey 1903 I 161, 161–166*). Also reported in: Dalloz. Jurisprudence générale. Recueil périodique et critique de jurisprudence, de législation et de doctrine. Année 1903. A Paris: au Bureau de la Jurisprudence Générale, pp. 497–500 (*Dall. Per. 1903 I 497, 497–500*); Pandectes françaises périodiques: Recueil mensuel de jurisprudence et de législation. Tome Dix-Neuvième. 1904. Paris: Librairie Marescq Ainé A. Chevalier-Marescq et Cie. (Éditeurs) / Librairie Plon Plon-Nourrit et Cie (Imprimeurs), pp. 497–500 (*Pan. fr. 1904 I 497, 497–500*).

According to § 27 of the Law of December 9, 1905 Concerning the Separation of the State and Church[155], the use of church bells has to be regulated by a municipal order, and in case of discrepancies between the mayor and the president or the director of the religious association, the use of church bells has to be settled by the prefecture's order. A similar situation occurred in the commune of Trainel (Aube), where the only church bells existed at an ancient hospice, whose chapel was not opened for free visiting anymore. The mayor of the commune gave a specific order in 1908, where he prescribed the commune servant to ring the bells as provided in the order, and gave further prescriptions concerning the amount and length of ringing, and planned to use the chapel's bells for messaging for the visit of the President of the Republic, the National Day, as well as for the local celebrations. The prefect of Aube annulled the majority of the provisions of the mayor's order, finding them contrary to the law. The dispute was resolved by the Conseil d'Etat, which acts as the administrative court of the highest instance in France. The Conseil d'Etat found, that in some occasions, the mayor still could use the church bells, but these occasions were exceptional, and were based upon § 97 of the Municipal Law of April 5, 1884,[156] prescribing the local authorities to maintain peace and security, according which, the mayor's order provided that the church bell ringing for ceremonial and funeral services could be stopped during epidemics, during certain time periods, during thunderstorms, or in case the church steeple is not solid enough to ensure public safety, as well as empowering the mayor to ring the bells in cases of common peril – in such cases, as held by the Conseil d'Etat, the mayor used the police powers vested to him under § 97 of the Municipal Law of April 5, 1884. Hence, in such occasion, whereas the prefect of Aube annulled the said order of the mayor, he exceeded his powers, concluded the Conseil d'Etat. At the same time, the mayor could exercise the use of church bells not in all the occasions. The Conseil d'Etat found, that the church bells were the property of the hospice, and the norms of § 27 of the Law of December 9, 1905 Concerning the Separation of the State and Church, and §§ 50–51 of the Decree of March 16, 1906 on Public Administration for the Fulfillment of the Law of December 9, 1905,[157] upon which the melodies of the bell ringing were regulated, related to houses of worship used for public divine services, whereas the chapel in the hospice was not opened for public divine services, and hence, the mayor could not provide regulation for the use of church bells.[158] From this judgment of Conseil d'Etat, it follows, that the mayor could make an order for the use of church bells in a number of exceptional cases, where such empowerment was provided by law, which related to the fulfillment of public safety.

3.3 Italian law

Italian jurisprudence shows adherence to the sources of Roman law when resolving disputes relating to *res divini juris*, which is clearly shown in the case of the Church of Saint

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155 Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat.

156 Loi du 5 avril 1884 relative à l'organisation municipale.

157 Décret du 16 mars 1906 portant règlement d'administration publique pour l'exécution de la loi du 9 décembre 1905 sur la séparation des Eglises et de l'Etat en ce qui concerne l'attribution des biens, les édifices des cultes, les associations cultuelles, la police des cultes.

158 Conseil d'Etat (France), 16 décembre 1910. In: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1913. Paris: Librairie de la Société du Recueil Sirey. III Partie, pp. 71–72 (*Sirey 1913 III 71, 71–72*).

Lucifer (1896). Other cases indicate, that despite the lack of legal regulation on sacred objects, the courts broadly used the principle of legal analogy and the sources of Roman law, which used to regulate this issue in Ancient Rome.

3.3.1 The case of the cemetery in Sciacca (1869)

The given case was adjudicated by the Palermo Court of Appeals on December 3, 1869, and involved the question of an alienation of land, which was supposed to be used as a soil for an (initially) temporary cemetery, where the deceased, having died due to a contagious disease were interred. So, the facts were the following. Plaintiff, a cavalier, owned a plot of land in Ferraro, Sciacca. In 1865, the municipal board of Sciacca decided to alienate a part of the land belonging to him in order to set up a cemetery (it was planned to be a temporary cemetery) for the inhumation of victims of Asian cholera, which broke out in the municipality. In late 1865, the plaintiff brought an action to return his land back, but the Court of Sciacca in its judgment of June 2, 1868 dismissed his claim, only ordering to repay him a compensation instead. The plaintiff demanded that the land, alienated for the cemetery should be surrounded by walls and the road to the city should be built, including appropriate walls, and asked to conduct an expertise in order to designate how much land should be used for this purpose, the length of the wall etc. The Court in its judgment of June 1, 1869 considered that the alienation of land was temporary, and directed the expertise, though a limited one. The Court of Appeals did not agree that the alienation of land was temporary, and in order to adjudicate the case, the Court discussed both the provisions of the Law of March 20, 1865 on Public Health,[159] as well as sources of Roman law, which related to cemeteries and sepultures. Firstly, the Court held, that the cemetery which is used for the inhumation of deceased people, who died owing to a contagious disease, could not be a temporary cemetery, but should remain everlastly a societal property, and the land owner (that is the plaintiff) had not only a full right to have a compensation recovered, but also any other damages sustained because of the alienation of land, and to demand the surrounding the cemetery with walls (here, the Court added, that the cemetery was already "a sacred and religious place"), as well as constructing the road equipped with walls (that is, how the plaintiff initially demanded to do). The Court accentuated that according to Art. 73 of the Law on Public Health, a temporary alienation for the concerns of public health should not exceed two years (whereas the cemetery actually stood more), and Art. 71 of the same law held, that these temporary measures could not be prolonged over the term of two years from the date they initially took place. The Court also indicated, that the mayor, who was present at the court proceedings, asked not to return the land to the owner (and here the Court emphasizes, that it was impossible to do so even if there was such intention), and found it also inappropriate to construct any walls for the cemetery, at the same time, he proposed to return the alienated land after ten years (whereas the inhumations continued to occur). The Court reminded that according to Art. 78 of the Law on Public Health, the closed cemeteries would remain abandoned for ten years, and only after that, the municipal health board could undertake the transfer of the mortal remains to an another cemetery. Hence, the given provision was inapplicable in the case at stake,

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159 *Legge del 20 marzo 1865 n. 2248 sulla Sanità Pubblica*. In: Gazzetta Ufficiale del Regno d'Italia n. 101 del 27 aprile 1865.

since the inhumations were not interrupted at the disputed cemetery; moreover, there were new inhumations of the deceased, who died because of ordinary illnesses. The Court also emphasized that Art. 68 of the Law on Public Health inhibited the provincial prefect to order transportation of dead bodies beyond the municipality, who had died from contagious diseases, which was, according to the Court, founded upon the main obligation of the authorities to take care of the population's health and to protect it by various legislative acts, eliminating even the smallest hazards. The Court reminded that even if a body of a deceased person, which was a victim of plague, is dug out and if it went into contact with open air, it could awake the virus, which was concealed in the grave, and the contagion could widespread again. Hence, held the Court, it is legally impossible that the cemetery, where thousands of victims of Asian cholera were buried, could be returned back to agriculture, since firstly, these acts could not be made without the collection of mortal remains as of Art. 87 of the Law on Public Health, and the collection of these remains is impossible in the view of Art. 68; henceforth, such cemetery should everlastly remain a cemetery. Then the Court interrogated, that even if it is possible to renovate the land for agriculture, where the cemetery was located, would that be possible from a moral and factual point of view? Firstly, the Court reckoned up the defendant's position, that the soil becomes more fruitful if dead bodies are interred therein, and held, that probably no ploughman would not fear to work with a plough knowing that there are sacred mortal remains there. The Court stipulated, that the religious veneration of the tombs is instinctive for a human, and it has always been so, especially being strongly developed in Ancient Rome, where disinterment was strongly prohibited by the law. For instance, the Court cited Ulpian, who approved the position of Labeo, upon the question of whether an owner of the land is entitled to disinter a corpse without the order of a pontifex or princeps, replied that he had to wait the permission of a pontifex or princeps, and otherwise, one who conducted the disinterment could be sued for an injury;[160] next, the Court cited the Edict of Emperor Septimius Severus, under which the bodies, which were not handed down for permanent burial, could be transferred[161] (this Edict, upon the comment of R. G. Pothier, allowing the transfer of the corpses, which were not prepared for a perpetual burial, forbad holding or molesting them, or preventing their transfer through the cities; then, Emperor Marcus Aurelius ordered, that the ones who transfer the corpse through the villages or the cities, shall not be anyhow punished, but shall not act so without a proper authorisation of those who may allow to do it).[162] The Court also reckoned up the consultation of the Senate, prohibiting profanation of tombs by permutation and inhibiting them from any other use, and the Edict of Marcus Aurelius, which held, that the body, which is interred into the soil, shall not be disturbed.[163] So, the Court found, that since the municipality of Sciacca could not return the land which was alienated from the plaintiff, and which had to remain the cemetery, the municipality had to provide the surrounding of the cemetery by walls not less than two meters high, to build a road that would lead to the cemetery, which would respectively be equipped with walls by its edges, and the price of the land alienated and the land which will be used

160 D. 11.7.8 (De religiosis). (*Ulpian*, ad Edictum).

161 D. 11.7.54 (De religiosis et Sumptibus Funerum, etc.).

162 POTHIER, R. G. *Le Pandette di Giustiniano*. Volume I. Venezia: Dalla Tipografia Giustiniania, 1841, p. 566.

163 D. 9.7.25, *De religiosis et Sumptibus Funerum, etc*. (*Marcianus*, Book 3).

thereafter will be compensated to plaintiff, apart from other damage sustained. The Court also ordered that the plaintiff shall be relieved from the land duty concerning the land, which must remain municipal property, and hence, the extended expertise was ordered. So, the judgment of the court of first instance was quashed.[164]

3.3.2 The case of Saint Lucifer Church in Cagliari (1896)

This case was adjudicated by the Court of Appeals of Cagliari on June 6, 1896 and considered the question of property rights to a church building. In 1890, the Archbishop of Cagliari founded the church as a branch of the parish under the title "*Vergine del Rimedio*" and appointed a priest, who would conduct the church services. Soon the director of a hospice, which was located nearby claimed he interfered into the church services, restricting the freedom of the said priest, and since he was making claims regarding to the property of the church, the parish priest complained to the mayor, who called the director of the hospice and they agreed to resolve the dispute by a collegium of arbiters who had to resolve the following questions: 1) firstly, is the church of Saint Lucifer, adjacent to the hospice, considered to be the property of the municipality, or the hospice?; 2) does the municipality have patronage rights to the church?; 3) who has the right to conduct services at the church? The case went to the arbiters, which found that firstly, none of the parties claiming the property rights over the church have such rights; and secondly, patronage rights and presentation belongs to the municipality; the hospice had no right to interfere with the divine services and the church priest, who was proposed by the church authorities, has the autonomous right to conduct these services. The hospice lodged an appeal to the Cagliari Court of Appeals giving the same three questions for consideration. The hospice insisted to bear property rights upon the disputed church, since it was, according to appellant, a public deed of donation, an agreement which was concluded between the municipality and the Dominicans-Fathers dated November 26, 1683, and since sacred objects are hereditary property, they, according to the appellant's view, were subject to sale, and moreover, the Bulla of Pope Pius VII dated August 26, 1803, which was furnished with an exequatur of civil authorities affirmed the proprietary rights to the hospice, and by virtue of which the authorities disposed of the church to a moral institute as was the hospice, and even if this proof was not sufficient, the adverse possession, found the appellant, would be in favor of the hospice. The Court reckoned up, that in Ancient Rome, religion already had temples, priests, and there were sacred objects; they were called sacred, since these objects were dedicated to the Gods (*deo dicatae*). With the emergence of Christianity, the religion's legacy also became sacred, and the things belonging to the church were designated as *nullius erant in bonis*, that is things which did not have a legal entity which could make it its own ones, and it constituted a common legacy, the incomes from which were used to cover the expenses of the cult, and since they were supposed to be eternal, the alienation of it was forbidden, and it was considered to be *res extra commercium* because it was presupposed to serve its eternal purpose. Upon Cavallari, from a Christian point of view, it would be inhibited to alienate the sacred legacy, as it has to be eternal and inexhaustible,

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164 Corte di Appello di Palermo, 3 dicembre 1869. In: Annales della Giurisprudenza Italiana. Raccolte generale delle decisioni delle Corti di Cassazione e D'Appello. Volume IV. Anno 1870. Firenze: Tipografia di Luigi Niccolai, 1870. Corti d'Appello, pp. 16–18.

and the alienation is forbidden since they are sacred to the God. So, the Court held that if the laws regulating sacred items in the Pagan era were applicable to the same in the Christian times, it is comprehensible why their alienation was forbidden, again citing Cavallari with a reference to Justinian's Institutes – what is *res divini juris*, is *nullius in bonis*, and that sacred things are the ones which are appropriately consecrated to the God by pontiffs, such as sacred buildings and gifts, which were prohibited from alienation, except from the cases of redemption from captivity.[165] So, concluded the Court, this is why the Roman law both in Pagan and Christian eras considered sacred things, devoted to divine services to be *res extra commercium* with very few exceptions. From the above-given statements, the Court made an inference that if the alienation was impossible, then the divine services had to be performed in consecrated churches, used for public benefit, that is the said churches had to be initially designated for public use, and by "public" it had to be meant not what the owner presented, but the use which everybody has a right of. So, the Court noted, that it is necessary to define of whether the Church of Saint Lucifer had the characteristics of *res extra commercium* so as to deduce its ability to become an object of donation. Both parties of the case agreed, that the church was built for municipal funding and on behalf of Saint Lucifer, who was the citizen and the bishop of the city (in the IV century *Anno Domini*), the municipal coat of arms was installed on the main doors and the altar of the church, hence the municipality constructed it for the benefit of the town's inhabitants. If the church was initially designated for public use, and was consecrated for divine services, it became at the very moment inalienable, and the municipality could not dispose of this property, and the afore-mentioned public act dated November 26, 1683 could give the Dominicans to a right of use, but not a property right to the Church of Saint Lucifer. Having analyzed the public act of November 26, 1683, the Court came to a conclusion that it was rather a concession act, and the church thus was provided for a beneficial use, but not in the sense of a property transfer. Speaking of the other two questions, not material with the legal status of the church and its *res extra commercium* characteristics, the Court ruled, that the municipality of Cagliari maintained its patronage rights over the church, which certainly included honorary rights, and that the office of the priest would belong to the municipality, since it is a logical continuation of patronage rights; the priest, which is proposed by the archbishop and according to the consent of the municipality, will have an autonomous right to conduct the respective church services. So, the Court ruled that the collegium of arbiters correctly answered all the three questions.[166]

3.3.3 The case of the Florence Vases (1900)

This case was adjudicated by the Court of Florence on April 7, 1900, which concerned the question of the existence of proprietary rights in archeological findings, which involved different ancient objects, including a large number of vases, found by the plaintiff. The case circumstances were the following: the plaintiff, a young man, who was working at the vineyards belonging to a nobleman (defendant), was digging a pit and found a large stone on the depth of 1,30 meters. The plaintiff asked his companions for help to take

165 D. 1.7.8.

166 Corte di Appello di Cagliari, 6 giugno 1896. In: Annali della Giurisprudenza Italiana. Raccolta generale di decisioni in materia civile e commerciale, di diritto pubblico e amministrativo e di procedura civile. Volume XXX. Firenze: Stabilimento Tipografico G. Civelli, 1896, pp. 268–274.

away the stone, but he noticed that the stone actually opened an entry, where they found a large number of ancient objects, and notified the working manager of their discovery. After a week of time, the owner of the vineyards arrived, accompanied with a professor of archeology, and they found, that it was a family burial plot, which was shaped in the style of a chamber, dug into a tuff including a pilaster and a bench, and was dated III century B.C., and included funerary urns, bronze mirrors, golden items, coins, as well as a considerable amount of different vases: bronze vases, a collection of glazed vases, painted vases from Campania, earthenware vases and a large amount of other miscellaneous objects. Later, all the objects were extracted, and brought to the nobleman's mansion, where he organized a museum, also providing several items to the Central Etruscan Museum in Milan. The plaintiff, as the other workers, who helped to extract the ancient objects, was paid for work and did not claim any proprietary rights in terms of them. But several years passed, and the plaintiff ceded his rights on the objects found several years before to a man from Certaldo, who undertook to assert all the plaintiff's rights in terms of the items, which were found back then. The defendant became aware that plaintiff was going to claim his rights in the ancient items, but refused to recognize his rights; next, the plaintiff and the man referred above sued him, demanding to return a half of the ancient items – either the objects themselves, or their value. Defendant responded, that according to § 714 of the Italian Civil Code, the plaintiff could not claim his part, since the treasure was not found, upon his view, by chance. The Court of Florence held, that the primary task of the court was to establish, whether the finding of the plaintiff constitute a treasure in the meaning of the legislation, and to determine why the items were in the tomb; as it was claimed, they could not be regarded as movable objects, as they were found in an ancient tomb, hence they were buried, not as something temporary with a possibility to become the property of their finder, and thus, they were meant to be joined in a "fund" (as stated in the judgment's text) by the one who had buried them. The Court held, that the idea of the treasure does not depend upon the intent of why the valuable items were buried, and it is not necessary that these valuable objects were buried voluntary by someone; for instance, the Court mentioned that even when valuable objects that were buried because of cataclysms, or, for instance, memorable medals, buried on behalf of putting the first stone of a memorial, were also considered to be treasures (and apparently, in this case, the items found by the plaintiff were a treasure in the sense of § 714 of the Italian Civil Code). So, the Court found that it was not necessary to determine the actual intention of the original owner of the items and their original destination, but to review their actual condition and characteristics. Defendant still insisted, that the intention of the person, who buried the items in the tomb should be determined, as he found, that § 714 of the Italian Civil Code dealt with movable objects, whereas, upon his view, the original owner of the valuable objects, which were found in the tomb put them therein for them to become immovable. The Court found, that such allegation was incorrect, since the movable character of the object could be basically defined whether it could be carried from one place to another without damage to the building where it was maintained, and hence, the material peculiarity of the item itself should be considered, and what is necessary to define is the peculiar individuality of the objects which were claimed (as we may remember, it was never mentioned that either the vases, or any other objects were attached to the building in any way). Concerning the intention of the person, who buried the said treasure, the Court held that it is often impossible to determine

it because of the lapse of time, and so, the Court held, that it is unnecessary to concern the intention. Next, the Court held, that the destination place of each item has got its time limits: if it is not terminated after the death of the owner then it should last as long do the relationships between the person operating this destination and the heirs of the owner. Such relationships had apparently terminated with the lapse of time, since over the years, the *res extra commercium* destination of the tombs had disappeared, they ceased to become sacred. From the point of view of § 414 of the Italian Civil Code, there were three classes of objects of buildings by destination – 1) the ones in the building placed for the service of the fund; 2) the ones for the exercise of industry; 3) movable objects placed in the fund for personal use. From the given classification, the Court determined that the valuable items could be classified by the third category. Therefore, the Court held that the last what had to be determined whether the treasure was found by chance. Defendant objected to it, claiming he had known the "archeological" nature of the land from the previous owner, that there were some findings of ancient objects at the land, and the works, which brought to the discovery of the treasure were made on basis of special knowledge of the terrain and in anticipation of new discoveries, and the workers were told to pay attention on ancient objects while at work; however, these allegations were not proved by sufficient evidence. Even had the defendant proved that he really had the intention to search for any treasures, then the person, who discovered it, still would have the right to a half of the treasure. The discovery should be considered as "by chance" in case the discoverer did not work upon the finding of the treasure, and it was established, that the plaintiff's work did not toll to searching for treasures, but digging a pit for vast cultivation, and the plaintiff had no intention to search for treasures. In relation to defendant's argument, where he contended that the workers were asked to pay attention to ancient objects, the Court held, that even if this had been so, the doctrine and case law showed that the only situation when the discoverer would be deprived from the part in the treasure is that if he had worked to find the treasure. Upon such conclusions, the Court found for the plaintiff.[167]

3.4 Germany

In this section, we will discuss the legal positions of the highest German courts in the XIX and XX century concerning *res divini juris*. There were a lot of judgments of German first-instance and appellate courts in relation to *res divini juris*, which require a distinct article to be featured in, so for the matter of brevity, only the judgments of the highest courts will be discussed.

3.4.1 The legal nature of a burial place at a churchyard

The judgment of the Prussian Supreme Tribunal of 1869 dealt with the question of the status of church cemeteries as *res religiosae*, that is the objects, which are out of civil-legal transactions as *res extra commercium*. The plaintiff, a colon and a member of a local evangelical community, sued the church community claiming five burial places, located near the building of the church, which, as he contended, belonged to his colonate and of which

[167] Tribunale di Firenze, 7 april 1900. Reported in French in: Recueil général des lois et des arrêts, ne matiére civile, criminelle, commerciale et de droit public. Fondé par J.-B. Sirey. Année 1903. Paris, Librairie de la Sociéte du Recueil Général des Lois et des Arréts et du Journal du Palais. Parte IV, pp. 21–23 (*Sirey 1903 IV 21, 21–23*).

he claimed a hundred and fifty years of possession. Plaintiff alleged that the defendant was in fault by destroying the burial mounds and laying a road through his burial places and demanded continuing using the burial places. The defendant claimed the nullity of the plaintiff's claim in a hereditary burial in the said graves and the plaintiff's complaint in terms of laying the road in 1868. The Herford District Court in a judgment of July 1, 1868 dismissed the plaintiff's complaint, finding that the place of burial could not be owned by prescription in overall, the plaintiff did not present enough proof that he and his ancestor were the actual owners of the burial plot; the Paderborn Court of Appeals in its judgment of December 4, 1868 affirmed the judgment of the first-instance court. The Supreme Tribunal, despite finding the plaintiff's appeal to be justified, left the judgment of the Paderborn Court of Appeals without change. The findings of the Supreme Tribunal in respect with this case were the following. The Court reckoned up, that the judgment of the court of appeals was based upon Part I, Chapter 9, § 581 of the *Allgemeinen Landrecht für die Preußischen Staaten* (hereinafter – the A.L.R.), and the church management had their regulations in terms of when anybody deceased at a community, the body was buried in a certain order. The Court held, that it is said, that the cemeteries are *res religiosae*, meaning they are excluded from civil-legal transactions, and this notion relates to the entire cemetery or a concrete place in it; next, the Court reckoned that church-related chattels, like the pews were in a certain way included in civil-legal transactions (namely, A.L.R. Part II, Chapter 11, § 685), as well as church positions (namely, Part II, Chapter 11, § 681–682, but these do not apply to the graves; the A.L.R. only recognized hereditary family graves, which could be acquired by conferment, and these did not apply to the graves located on churchyards. Next, the Court reminded, that according to Part I, Chapter 9, § 580 of the A.L.R., the chattels and rights may be acquired by prescription to the extent that these rights and chattels may be transferred to the acquirer.Since the next provision of the A.L.R. (Part I, Chapter 9, § 581) held that things, which are *res extra commercium* could not be acquired by prescription, the Supreme Tribunal put up a question that had to be decided – whether the churchyards are fully excluded from civil-legal transactions, or not? The A.L.R. gave the answers to this interrogation – under Part II, Chapter 11, § 183, the church cemeteries which belonged to churches, were usually the property of the church communities, and no provision barred from giving the parishioners the right to a hereditary burial there; and according to Part II, Chapter 11, § 185, in case of the transfer of the burial places, the citizens, who had hereditary burials, could claim a certain burial place at a new churchyard free of charge (Part II, Chapter 11, § 590). Apparently, the afore-mentioned provisions displayed, that the churchyards were not strictly *res extra commercium*, and certain civil-legal interaction could be quite possible relating to them. What is more, the church patron could possess considerable rights in terms of the burials: he and his family could claim a place at the church burial vault (Part II, Chapter 11, § 590), and if such vault is barred by the state laws, then he may have a free privileged place at the churchyard (Part II, Chapter 11, § 591). From all the mentioned above, it could be concluded, that hereditary burial plots did exist, and the court of appeals mentioned, that such rights could be acquired by *award*. The Court concluded that it has to be understood, that the hereditary burials are the same as the church positions and the church pews by the mode of acquirement, upon the latter, the Supreme Tribunal had already found that it might be acquired by inheritance. Henceforth, the plaintiff's appeal was justified, but the dismissal of the lawsuit seems sound

from the reason, established by the first-instance court: the plaintiff had ascertained that the burial plot containing five burial places should be understood as a hereditary burial, which previously belonged to his father and grandfather, and were in possession for over fifty years. The Court denoted, that it was important that the plaintiff was a parishioner of the church, with whose community he litigated, and supposedly, after death, plaintiff and his ancestors were likely to be interred in the churchyard, but any further right could not be derived from a mere burial at a churchyard, which required proving a hereditary burial relating to the funeral at a certain place, and hence the plaintiff had to prove that his father or grandfather owned these burial places in the past. However, the plaintiff did not provide any substantial evidence, which would affirm his exclusive right to the use of the burial mound. Hence, the Supreme Tribunal found that the judgment of the court of appeals will remain unchanged[168]. This judgment shows that the concept of *res religiosae* was, if not inapplicable, then at least considerably altered both in legislation and applicable case law – the A.L.R., having entered into force in 1795, did not exclude churchyards from the civil-legal transactions as *res sacrae*, *res religiosae* or as *res extra commercium* in overall – instead, a number of civil-legal transactions in regard with burial plots were allowed. Which is more important in terms of the Roman law doctrine, according to Part II, Chapter 11, § 183, the churchyards belonging to churches were, as a rule, declared to be the property of the church communities, which already brought the cemeteries away from the doctrine of *res religiosae*, as the objects not belonging to anyone, to the objects, which were belonging to a certain owner (that is, the church community), but its sense of being *res extra commercium* presupposed its inapplicability of other conjectural use, as any other thing, which is an object civil-legal transactions.

3.4.2 A civil-legal dispute over a burial plot

The Prussian Supreme Tribunal dealt with the question of applying the Roman law concept *locus religiosus* in its 1876 judgment, which we have briefly discussed above. It was a civil dispute concerning the place of burial: plaintiff and his wife, the heiress of her mother, which was the second wife of the deceased inn-keaper, sued the inn-keeper's son for burying the body of his deceased brother at a private burial plot, finding that the said plot was bought not by the inn-keeper, but his second wife for herself and her heirs. The District Court of Wiesbaden found the claim well-founded, finding that the claimed right could be based upon superficies, but the court dismissed the lawsuit on the foundation of the establishment of the fact that the deceased innkeeper was the actual purchaser of the burial plot. The plaintiffs appealed, but the Wiesbaden Court of Appeals found the claim to be unfounded, since beside the question of whether the rules of Roman law could be used as a source of law for disputes relating to the use of graves on cemeteries and churchyards, which usually excluded the graves from civil-legal transactions, would the plaintiff's claim not violate existing police regulations? Hence, plaintiffs had no right to claim which could only the proprietor do, and the chattel right was not established, and the presuppose of

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168 Preußische Obertribunal, I Senat, Erkenntnis vom 24. Mai 1869. In: Entscheidungen des Königlichen Ober--Tribunals, herausgeben im amtlichen Auftrage von den Ober-Tribunals-Räthen Dr. Decker, Dr. Doswinckel und Heinhus. 61. Band. Berlin: Carl Heymann's Verlag, 1869. Entsch. Nr. 28, pp. 219–226.

superficies was even less justified, since the Nassau Law of May 15, 1851[169] had required to be such record entered to a stock book. Plaintiffs filed an appeal in cassation, which was upheld by the Supreme Tribunal, which came to the following findings. The Court held that the provisions of the Nassau Law of May 15, 1851 did not provide for establishing burial plots as a right to land or as a chattel right, which could be recorded to the stock book. The Court ruled that it is a very limited right, which is closely related to the destination of the churchyard, even if it is lodged for an unlimited period of time, it continues to exist until the churchyard is acting as such (supposedly, this right could be called a personal easement – A. L.). The Court held, that it was not necessary to find whether such right could have a real character, but this right definitely could not be considered as *in rem*, according to which an appropriate record could be made in the stock book. The Supreme Tribunal found, that the Court of Appeals erred in the finding that in order to state such claim, there had to be a property right. Had the given claim been founded upon removing a corpse from a place, where it had been interred unauthorized, it would definitely require proprietary or chattel (*in rem*) rights from the side of the claimant. The Court notes, that the Roman law had a type of legal action as *actio in factum*, which was a lawsuit against those, who had interred a corpse in an existing place of burial without authority, and in such cases, a proprietary or chattel right is not necessary, since a place of burial as *locus religiosus* could not be an object of private rights in Roman law. Hence, the Court, plaintiff's appeal should be upheld in terms of the burial place at a churchyard, and the foundation of the claim may be only contested in terms of the police regulations regarding removal of the corpses. Hence, the Supreme Tribunal ruled to quash the judgment of the Court of Appeals.[170]

3.4.3 A property right to a church building by a private person: when is it legitimate?
In the judgment of February 8, 1893, the German Supreme Court established that under certain circumstances, a private person might legitimately own a church. The given case started from a dispute at a village between the local Catholic community (plaintiff) and the owner of a mansion (defendant), who owned a church building for over a decade. The Catholic community (the plaintiff) asserted that the church was public, and was used for divine services until the year 1878, whereas the defendant claimed, that it was a private chapel, belonging to the mansion, and it is rarely used for divine services. Back in 1878, the defendant acquired the said mansion, which was empty at that time, and the defendant ascertained that the land register books considered the church as a building adjacent to the mansion. It was also known, that the defendant kept the keys to the church, and later, they became the object of litigation, since the defendant had refused to hand in the said keys to the representatives of the Catholic community. The church also included a churchyard and a bell tower with two church bells. The Land Court ruled that the church was the property of the plaintiff with all adjacent objects, and the defendant was obliged to hand in the keys of the church to the plaintiff. The High Land Court quashed the judgment of

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169 Geseß num. 8 den 15. Mai 1851, Verordnungsblatt des Herzogtums Nassau. Drei und vierzigster Jahrgang. Wiesbaden: gerdruckt bei Wilhelm Gustav Riederl, 1851, pp. 59–66.

170 Preußische Obertribunal, VI. Senat, Erkenntnis vom 16. November 1876, Nr. 283. Sen. VI. 1875. In: Entscheidungen des Königlichen Ober-Tribunals, herausgeben im amtlichen Auftrage von den Ober-Tribunals-Räthen Dr. Sonnerschmidt, Clauswiß und Hahn. 76. Band. Berlin: Carl Heymann's Verlag, 1876, Entsch. Nr. 26, pp. 248–252.

the Land Court, finding that the defendant had correctly acquired the church building (in 1878), which was supported by the information from the land register books. The Supreme Court observed two questions in terms of the proceedings, namely: 1) is the acquisition of the church building by the defendant admissible, as such? 2) Did the acts of defendant correspond to good morals and whether it was established by substantial factual basis? The answer to this question, upon the Court, may be given from, on one hand, the general rights in terms of the acquisition of any property; 2) and on the other hand, concerning the objects, which relate to *res extra commercium* and the objects, which are entirely dedicated to religious aims (*res sacrae*, *religiosae*). The judge of the High Land Court, as denoted by the Supreme Court, correctly found that the modern law had different views on the subject than Roman law, where the said objects were entirely exempt from humane property. According to the A.L.R., Part II, Chapter 11, § 170, church buildings entirely belonged to religious communities for the aim to which they were destined (that is, for divine services), and A.L.R., Part II, Chapter 11, § 183 applied the same to church cemeteries, which belonged to distinct churches. Hence, from one hand, it established a real civil right of the church communities, but from the other, the provisions mentioned that the afore-said was as a rule. Hence, the Supreme Court concluded that apart from the religious communities, churches may belong to mundane corporations and even to private persons (such a conclusion demonstrates a considerable departure from Roman law, and it is seemingly dictated by considerable changes in the societal life and transformation in civil law). Hence, the Court found that if private persons may *be* the owners of a church, then they may *become* such owners, and one cannot exclude the possibility of one becoming such owner, which is apparently logical. Having reviewed the conclusions of the High Land Court, the Supreme Court found that the defendant had indeed acquired the church as a cadaster part of the mansion he acquired in 1878. Hence, the Supreme Court found that the High Land Court had correctly quashed the decision of the Land Court in the part which related to the proprietary rights on the church and adjacent objects (the churchyard and the bell tower), but there was a different situation in terms of the church keys. If the church was dedicated to public worship by a Catholic community, then this condition could not be withdrawn by a private law act, including the change of the owner. If the church is used for public worship, then the defendant had no right to preclude the plaintiff to use the church for public worship by seizing the keys. From this point of view, the Court of Appeals had to observe the lawsuit as a claim for handing in the keys from the church. Hence, the judgment of the High Land Court was set aside and returned back to the court of appeals, and the other claims of the appeal were dismissed by the Supreme Court.[171]

3.4.4 Is nuisance for ringing the church bells actionable?

The German Supreme Court adjudicated a peculiar case in 1903, where the plaintiff lodged a lawsuit to inhibit the ringing of church bells, which were places very close to his domicile. The facts of the case were the following. Plaintiff used to live in a house, built in 1847; in 1900, the defendant parish built a wooden bell tower with three bells intact (two large bells and one small), located around four and a half meters near plaintiff's house. The plaintiff

171 Reichsgericht, V. Civilsenat, Urt. vom 8. Februar 1893, Rep. V. 252/92. In: Entsch. RG. Zivilsachen Bd. 31, pp. 217–222, Entsch. Nr. 46.

was annoyed with the ringing of the bells, finding that it negatively affected his use of the house, and filed a lawsuit before the Land Court of Manningen to terminate the ringing of church bells. Despite the plaintiff's lawsuit was dismissed on first instance, the High Land Court of Yena upheld the plaintiff's appeal, ruling that the defendant was thereby barred from ringing the bells installed in 1900 as long as the plaintiff owned his house. The parish filed an appeal to the Supreme Court, which quashed the judgment of the High Land Court and remanded it for a new judgment. The reasoning of the Supreme Court was the following. The Court held, that despite the sacred things, which are called *res divini juris*, or *res sacrae*, to which the churches and the church bells belong, are completely excluded from civil law transactions, they are under the regulation of both civil and administrative law, and accordingly, it had to be determined whether the conditions of public or private law exist under which the present case should be reviewed. So, according to the legislation, the church community encourages its members for divine services by ringing the church bells, and invites them for public divine services or funerals, and these rights, as outlined by the Court, are so concordant that they are not lodged to private persons or to the religious communities which are not completely recognized by the state. Hence, the right to ring the church bells is given for the benefit of their community members and for the benefit of the state, since, as the Court held, it belongs to public law. The church bells, explained the Court, may be also used for various instances, even for warning of a fire, and such acts are made for the community, and are rather a public law act. However, denoted the Court, this public-legal character of the use of church bells does not mean that there are no remedies for an abuse of this right, but the Court ruled, that ordinary courts are unlikely to have jurisdiction over the questions of temporary restrictions or the annulment of empowerments to ring the church bells, but this is up to those bodies, which control the fulfillment of administrative law. The same, held the Court, applied to church pews, to which certain private rights could lie, whose use and management was the explicit issue of the church itself and its officials, whereas actions relating to church pews could lie in terms of compensation or transfer of rights. And what is applicable to church pews,[172] the same should apply to church bells even more, since they usually lack any special rights of private persons. So, the Court came to a conclusion, that action was likely to be inadmissible itself, but the inadmissibility of the lawsuit was not discussed in the judgment of the Court of Appeals, and for this reason, the Court held that the High Land Court's judgment had to be quashed; the Court also outlined, that it was unnecessary to discuss whether the plaintiff had the right to recover damages because of ringing of the bells, since such action in fact was not filed[173].

3.4.5 What things belong to res sacrae?

The German Federal Supreme Court has provided a definition of *res sacrae* in the criminal case no. 1 StR 506/65, where five defendants were convicted for a theft of church property (defendant 1 and 2) and for keeping the stolen property (defendant 3). The first

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172 In terms of the legal status and disputes over church pews in the German law of the XIX century, see in more detail: LYTVYNENKO, A. – MACHOVENKO, J. The legal status of church pews in certain civil law jurisdictions. *International Comparative Jurisprudence* 9, no. 1 pp. 1–23 (see especially at pp. 14–17).

173 Reichsgericht, V. Civilsenat, Urt. vom 19. November 1903, Rep. V. 218/03. In: Entsch. RG in Zivilsachen Bd. 56, pp. 25–28, Entsch. Nr. 6.

defendant took off and stole the heads of the angels from the altar, a tin candlestick, the statue of Jesus Christ and the statues of the saints, as well as the Oil Painting. He later claimed in his appeal, that the stolen works of art were not the objects, which were dedicated to church services (and hence, he did not agree to the conviction under § 243 (1) of the Criminal Code), to which the Federal Supreme Court did not agree. The Court held, that the objects dedicated for worship to God are all the objects, which serve this purpose both to be worshipped on them, and together with them; so it relates not only to the objects, which actually had been consecrated, such as altars, chalices, monstrances, jewelry and accessories, but also to other objects, which are the subject of religious cult and are maintained in the church. The Court also denoted that the fact that some of the stolen objects were kept in the sacristy, did not alter the situation with the defendant's conviction under § 243 (1) of the Criminal Code; to wit, the German Supreme Court had earlier defined in its 1911 judgment, that a sacristy is a place, which is included into the building of the church, and is used for church services.[174] The defendant also protested to the fact that the Land Court considered the increase of thefts from churches, but the Supreme Court found, that prevention could be considered a part of overall foundations of handing down a conviction sentence; and it was not necessary to use the statistics of crime, the statistics used was not only within the judicial district of the court, and the court is not obliged to announce all the significant aspects of why the conviction sentence is handed down, explained the Federal Supreme Court. Hence, the conviction of the first defendant was affirmed. As to the second defendant, she filed an appeal in both grounds of law and procedure. The latter is immaterial for the needs of the article, so we will omit it. In terms of appeal on grounds of law, the second defendant claimed, that the stolen items did not belong to the objects, which were used for divine services. However, the Federal Supreme Court found that it was correct from the side of the Land Court to establish, that all the stolen items were used within divine services. This also applied to votive tablets – these tablets, as explained the Court, express gratitude by means of words or drawings initially were religious confessions used for fulfillment of vows, testifying for popular faith, devotion and veneration of the Mother of God, or the saints. Hence, it would be correct to establish, that the votive tablets were also included into the scope of items, were dedicated to divine services in the sense of § 243 (1) of the Criminal Code. The conviction of the second defendant was also confirmed. What as to the third defendant, who was convicted for a "simple" theft by stealing other tablets, the Court found, that those tablets were not intended for use in the church, and by the consecration of the tablets, the church acquired the property rights over them, and the lower court had concluded that they neither lost, nor acquired the status of an object, dedicated to divine service. So, the conviction of the third defendant was also affirmed; the facts relating to the conviction of the fourth and fifth defendants is immaterial for the needs of the article, so these facts will be omitted for the matter of brevity. The Federal Supreme Court dismissed the appeals of all the defendants in the case.[175]

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174 Reichsgericht, I. Strafsenat, Urt. vom 21. September 1911, g. W. I 537/11. In: Entsch. RG. Strafsachen Bd. 45, pp. 243–247, Entsch. Nr. 56.

175 Bundesgerichtshof, Urt. v. 3. Mai 1966, 1 StR 506/55, WKRS 1966, 12065.

3.5 England

The English case law relating to *res divini juris* mainly constitutes disputes on sale of objects, which are used for divine services, and occasionally the modification of church buildings due to different circumstances. Such cases are resolved by consistory courts (by far, English ecclesiastical courts are one of the few remaining courts of ecclesiastical jurisdiction in the world, and are still actively and successfully operating). According to Sir Robert Phillimore, the disputes relating to church goods were also resolved in consistory courts in the XIX century, which resolved them in the same manner – i.e. defining which acts of the parties of the proceedings were legitimate, and which were not, granting faculties, etc.[176] Let us observe several English cases relating to *res divini juris*.

3.5.1 Sale of communion vessels

In the case of *The Vicar and Churchwardens of St. Mary, Northolt v Parishioners; The Rector and Churchwardens of St. George-In-the-East v Parishioners* (1920), which was adjudicated by the Consistory Court of London, the Court decided not to grant a faculty for the sale of two communion vessels, which was asked by the church officials. The case featured two different causes, which were filed by the officials of the parish church of St. Mary, Northolt (the vicar and the churchwardens) and the officials of the parish church of St. George-In-the East (the rector and the churchwardens), as well as defendants were the parishioners of the afore-mentioned churches. According to the facts of the case of St. George-in-the-East, the faculty was asked for the reasons of a deplorable condition of the parish church, which necessitated considerable repairs, as well as the three mission buildings, which were also in a poor condition; it was expected that the immediate purpose of the sale was to obtain money for repairing a heating apparatus in the church and providing the church with electric light; in terms of the case of St. Mary, the sale was necessitated to cover the expenditures for repairing the church, namely the roof and the porch, as well as to repair the windows in the church, which dated back to the thirteenth century *Anno Domini*. What as to the communion vessels, they had the following features:

1) St. George-In-the-East: the plate consisted of two flagons, two chalices and two patens, which were made of solid silver, dated around 1729, and two flagons, two chalices and one dish, dated 1810, and was once lent to an another church. These appliances had not been used for many years, and had been replaced with modern vessels. Initially, it was asked to grant a faculty for sale of vessels with no restrictions.
2) St. Mary: the petition for the sale related to the sale of a silver chalice and a paten, dated 1702. The said things were already not in use and were replaced by a silver gilt chalice and paten.

The Court held, that under the general rule, the church goods could not be sold without the consent of the Ordinary and the parish, but the Court has to be satisfied, that the items for sale should not be in profane use (the Court later denoted, that a secular use – i.e. to be used in an another church or at a museum, would be nevertheless admissible). The principle of not allowing church goods in common use, upon the Court, lied in the Constitution of Archbishop Edmund Rich, and held that the contemporary religious feelings

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176 PHILLIMORE, R. *Ecclesiastical Law of the Church of England*. Vol. II. London: Henry Sweet, 3 Chancery Lane: Stevens & Sons, 119, Chancery Lane; Law Booksellers & Publishers, 1873, pp. 1791–1796.

did not alter the ancient principle – in fact, this was the same principle as the maxim of *res extra commercium* applies to *res sacrae* in the context of Roman law. The Court also emphasized, that there shall not be a situation, when the vessels, made for the Holy Communion would be sold and kept as an ornament by a rich man, or may be resold without any restrictions; even if the use after the sale is secular, then the vessels would be nevertheless associated with the worship at the church where they were used, and in case they were once presented by a donor, then it would definitely not correspond to the wish of the donor. The Court also denoted, that it is quite clear, that the disputed vessels had already stopped from being used, but it would be permissible to give them on loan to a museum to be deposited, and in such case, they would remain the property of the church. Hence, the Court found that the sale of vessels would not be justified in both cases.[177]

3.5.2 Removal of a church spire as an obstacle for aircraft

In the case of *St Edburga's, Abberton, Re* (1961), the Minister of Aviation petitioned the Worcester Constistory Court to remove a church spire belonging to the Abberton Church, which was located around two miles from the Pershore airfield; the given claim was founded upon the consideration of a possibility of accident. The Chancellor, hearing the case at first instance, did not grant a faculty, finding that the risk of danger of accident was not too high to justify the removal of the church spire; an appeal was lodged. From the side of the petitioner, it was contended, that the Court of first instance did not consider the evidence thoroughly enough, and next, it was necessary to consider the risk at two points – the likelihood of the accident and its consequences, had it ever occurred. It was also claimed, that the trial Court did not consider that the Minister undertook to restore the church spire if, or when there was no more risk of danger. From the side of the Bishop of Worcester, it was contended, that the Chancellor's decision, who heard the case at first instance, was correct, and the matters alike should be resolved by the Parliament, and not solely by an ecclesiastical court. Before the Court of first instance, the witnesses in support for the petition held, that flying methods could be modified in case of hazard, and the chancellor was right in his decision that it was not shown that there existed a considerable necessity to remove the church spire, thus encroaching upon consecrated property. The Worcester Consistory Court ruled to allow the appeal. At first, the Court held, that it has jurisdiction to resolve such dispute: the Court said, that altering the building of a church is a serious issue to be adjudicated, and given the fact that the ecclesiastical court has power to issue an order on a demolition of a church, it apparently could grant an order concerning the alteration of a church building, and also affirmed that the Court of Arches has jurisdiction to grant the appeal in such cases. The parish was small, and the parishioners mostly approved that the church spire could be removed in case of necessity for the safety of aircraft, though several local church officials opposed to it, claiming that firstly, spires were rare in that part of Worcestershire, and next, the removal of the church spire could create a somewhat hazardous precedent. In question of the risk to the aircraft, the Court established that the church spire was in the line of the airfield's runway, and by estimating the risk, the Court held, that two factors are to be considered: namely, the likelihood of the accident, and the

177 *The Vicar and Churchwardens of St. Mary, Northolt v Parishioners; The Rector and Churchwardens of St. George-In-the-East v Parishioners*, [1920] p. 97, pp. 97–104 (adjudicated on February 25, 1920).

consequences of it, had it occurred. The Court found, that the risk was quite considerable, and had an airplane collided with the spire, the consequences could be very deplorable, but the likelihood of such incident was hardly predictable. Upon the views of the aircraft officials, acting as witnesses, the church spire could eventually cause an accident. Having considered the necessary evidence and witness testimony, the Court found that it was necessary to allow the appeal and remit the case to the Court of first instance.[178]

3.5.3 Sale of antique flagons

In the case of *In Re St. Gregory's, Tredington* (1970), adjudicated by the Arches Court of Canterbury, the church authorities and the parochial church council sought a faculty for the sale of two antique silver flagons (pots), dating back to the XVI century, which were previously used as communion vessels. The main reason for the sale was the detrimental financial situation of the church fabric, desperately needing repairs; the Chancellor, hearing the case at first instance, refused to lodge a faculty, and this judgment was appealed. The said judgment was founded upon the following grounds: firstly, many parishioners opposed to the sale, though no point of view of the parish was presented; next, the chancellor considered that the parish was not a poor one, and third, that the archdeacon's evidence in terms of his desire of some portion of the proceeds of the sale to be used within the parish and beyond. On appeal, the Court was asked to reverse the decision and authorize the sale of the communion vessels without restrictions of their future use. The Court summarized the claim, establishing that the flagons were made in 1591 and were given to the church as early as 1638. The petitioners sought the faculty claiming that the flagons were already not necessary for the church, as their function was performed by a communion plate, and the money from the sale was expected to be spent mostly on the church fabric. The Court established, that the chancellor had jurisdiction to authorize the sale of the said flagons, and according to the old English church law doctrine, the churchwardens could not dispose of church of the goods alone, without the consent of the parish, sidemen or vestry, occasionally, a court faculty was obtained for the sale of certain church goods. The Court, referring these rules to the book of Sir Robert Phillimore, Dean of the Arches,[179] found, that despite the said church goods were not in commerce in the ordinary meaning of the term (*res extra commercium* in the doctrine of Roman law), the said goods could be sold according to the consent of other church institutions or a court faculty. The chancellor exercised his discretion to determine that the petition should be dismissed, and the Court of Appeals (in this case, the Arches Court) has discretion to rule on the case as it would find appropriate. From the established evidence, the Court concluded, that the flagons were really not necessary for the church, since the communion plate carried out its function, but it had to be determined of whether there was a financial emergency. The Court determined that the parish actually was at a financial crisis, and necessitated costs for repair, which were considerable; later, the Court agrees that the flagons were a part of the history of the church, but at the same time, their sale would save the financial situation of the church.

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178 *St. Edburga, Abberton, Re; St. James, Bishampton, Re*, [1962] P. 10, [1961] 3 W.L.R. 87, [1961] 2 All. E.R. 429, [1961] 4 W.L.U.K. 10; [1962] P. 10, at pp. 10–18 (adjudicated on April 13, 1961).

179 PHILLIMORE, R. *Ecclesiastical Law of the Church of England*. Vol. II. London: Henry Sweet, 3 Chancery Lane: Stevens & Sons, 119, Chancery Lane; Law Booksellers & Publishers, 1873, pp. 1791–1796.

Hence, the Court decided to allow the appeal and thus granted a faculty for the sale of the flagons with no restrictions of their future use.[180]

3.5.4 Property rights to a painting in a church

In 1979, the case of *In re Escot Church*, adjudicated by the Consistory Court of Exeter, considered quite an unusual question relating to the property rights in a picture, which was given to the church by the family of the petitioner. The forbearers of the petitioner built the Escot Church and over the following years, the petitioner's family participated in the furnishing of the church. The petitioner used to be one of the churchwardens, and was a patron of the church at the time as the case was heard. Some years prior to 1977, the family of the petitioner gave an oil painting of the Holy Mother and the Child to the church, which used to be maintained there; the painting was unfortunately in a poor condition, and in 1977 it was sent to be restored, after which it hung at the church for some time as it used to before, after which the painting was taken to Talaton Rectory for a safe maintenance where it thereafter remained. In October 1977, the petitioner claimed that the painting was given to the church on loan, ascertaining the painting came from the Escot House and asking the said painting back; in November 1977 he petitioned the Consistory Court of Exeter seeking a faculty for the return of the painting. The petition was objected by the Reverend of the Church, who asked to prove of whether the painting came from the Escot House, and even if so, he found that it was not a loan, but a gift, and hence it thereafter belonged to the Church. The Court established that if the painting once belonged to the family of the petitioner, but this painting was once provided by his family to the Escot Church, then the property to this painting would be in the churchwardens, and it would be same as if the petitioner's family gave it to the church without any specific intention to give it to the Church, hereby intending to dedicate the disputed work of art to God's service. The Court also established that the painting came from Escot House, albeit it was not clear when it was precisely given to the church, as it was not marked in the church good inventories, apart from one writing mentioning that two pictures came in 1950. According to the witness in the case, who used to live in the same parish for his entire life, the painting was introduced to the church between the mid-1940s and mid-1950s, and so the Court found that it was highly likely, that the writing of the inventory relating to the two pictures in 1950 seemed to be the approximate date when the disputed painting was actually brought to the church. The mother of the petitioner, according to him, found this painting somewhere in the 1950s, and according to her ascertaining at the hearing of the case, she never intended to gift the painting to the church, and did not expect that the painting would hang there for such a long time. The Court held, that if giving the painting to the church was a mere loan, then it would be different from all other things, which were considered to be gifts, and nothing indicated that giving the disputed painting to the Church was a mere loan, and the Court came to a conclusion, that had it been a loan, the painting would not have hung there for such a long time with no communication in this respect. Two other witnesses indicated they spoke to the petitioner at the time when the painting was restored in regard with it, and he also did not mention that the painting was given by a loan, so the Court held, that had

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180 *In Re St. Gregory's, Tredington*, [1971] 2 W.L.R. 796, [1972] Fam. 236, pp. 236–247 (adjudicated on October 28, 1970).

it been a loan, the petitioner would have said so. Hence, the Court decided, that since the mother of the petitioner gave the painting to the Church in or about 1950, then the disputed painting was passed to the custody of the churchwardens, who acquired the title in it (there was evidence that there were talks in the Church concerning the possible sale of the picture in 1977, but the picture was not sold, and the Court mentioned, that the petitioner's possible title in the painting was not discussed until these events; hence the Court arrived to a conclusion that the family of the petitioner would be displeased had the painting been sold. Upon such considerations, the petition was dismissed.[181]

Inferences

The given article displayed that all objects used for divine services or otherwise considered to be sacred (*res divini juris*) have a very specific legal regime, and they fall under the doctrine of *res extra commercium*. In Roman law, such objects were completely excluded from civil-legal transactions; the concept of *res divini juris* was divided into three constituents, namely *res sacrae*, *res religiosae* and *res sanctae*. *Res sacrae* referred to all objects, used for divine services and this group was and still is the most frequent from all *res divini juris*. *Res religiosae* referred to the objects relating to the Roman cult of the deceased, including graves and cemeteries; it also created a distinct concept of *locus religiosus*, referring to a grave, where a deceased person was legitimately buried. *Res sanctae* mainly referred to the city walls (despite other interpretations, expanding this concept also exist), the holiness of which was predefined by the legend of the foundation of Rome.[182] A considerable change of the overall concept throughout the centuries was noticeable in the judgments of the courts in the XIX century, where the courts recognized, that the concept of *res divini juris* was altered in the everyday practice – for instance, churches and church goods were already considered as the property of church authorities. The transit from the classic meaning of *res divini juris* as *res extra commercium* to a modern *res divini juris* as *res extra commercium* displays, that at present day, the objects, which are *res divini juris*: 1) are not *res nullius*, and may become the subject of property rights and certain legal deeds, 2) they are *res extra commercium* as long as their original destination is preserved; 3) *res divini juris* possess certain pecuniary value, which could be estimated, but they are out of civil-legal transactions as long as they maintain their original destination; 4) civil-legal transactions relating to *res divini juris*, such as sale, are already not prohibited by the law, but their sale presupposes that such objects cannot be in *usus profano*, and it may require a specific procedure, for instance, the consent of church authorities or a court order affirming the legitimacy of the sale. The article discussed quite a lot of court cases, where the courts discussed the concept of the constituents of *res divini juris*, and having analyzed the judgments in general, the author has arrived to the conclusion, that the Roman law concept of *res divini juris* is not used in its classic shape, but has considerably altered. Nevertheless, the concept of *res sacrae* is still preserved in a shape relatively close to classical; the basic features of *res religiosae* have also remained as a legacy of centuryfold piety towards to deceased ones. For instance, in old Austrian law, as it was discussed above, the tombstones were considered *res extra commercium*, but at the same time, tombstones were not exempt

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181 *Escot Church, Re*, [1979] 3 W.L.R. 339, [1979] Fam. 125 (adjudicated on May 31, 1979).

182 BLOCH, D. J. *op. cit.*, pp. 55–56, 62.

from the procedure of execution. *Res sanctae* became obsolete in modern law; its original sense was applicable in Rome, where the walls of the city were considered to be *sanctus* by the law. The author discussed other concepts, relating to *res divini juris* to a certain extent. The most lengthy discussion related to the legal status of a cadaver, upon which, it could be defined as *res extra commercium* in the sense of being excluded from any civil-legal transactions, but legal relationships in terms of the heirs' duty to provide the funeral do exist and are accepted in jurisprudence. To sum up the article concisely, the concept of *res divini juris* still exists at present time, but has considerably altered under the influence of the change in civil-legal relationships. At the same time, their *res extra commercium* status still remains by the fact they are exempt from civil-legal transactions, and even if sold, they cannot be in common use, unless they cease to be used in their original destination (for instance, the original destination of the church is to be a house of worship, and the church is *res sacrae* as long, as it retains the destination of a house of worship). Upon such conclusion, the research done in the article affirms that *res divini juris* are *res extra commercium* – even in spite of the changes in the approaches to the legal status of *res divini juris*.