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## **Loca Infecta : A Jurisprudence of Hauntings**

“If thou art of God, speak; if thou art not of God, be gone” (Taillepie 1605, 168).

Adam Gearey

### **Introduction**

The jurisprudence of hauntings describes the law of *loca infecta* or places infested by *malorum spirituum*. Law’s response to hauntings can be traced back to *The Digest* and reached a particular intensity in the early modern period. Its norms continue to cast their shadows over contemporary cases.<sup>1</sup> We will approach this ancient problem through French customary law and the clause de spectres.<sup>2</sup> Etymologically, the clause is the lock or the bolt of a door, keeps something out. Or in. It seals or opens the “passages between one order and another.”<sup>3</sup> Peter Goodrich’s notion of “spectral” jurisprudence will be our guide to what slips between worlds: those confusions of the natural order that cause the dead to walk at night, spirits to infect houses and animals to talk like men. How does law deal with such disturbances? We will read between a number of texts that includes treaties by Le Loyer,<sup>4</sup>

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<sup>1</sup> What is the relationship between a jurisprudence of hauntings and hauntology? This is a complex question. A proper answer would require an extended engagement with Derrida, Mark Fisher and others. In the briefest of terms, a jurisprudence of hauntings does not present itself as a hauntology because it begins from a starting point that, at least at first regard, has nothing to do with the thought of Hegel, Heidegger or Marx. Derrida’s elaboration of the term begins with these philosophers and refigures ontology as hauntology. Fisher’s appropriation of the term brings with it certain equivocations: the “supernatural” is certainly in play, but, Fisher deploys the term to describe an experience of vertigo and inertia linked to the implosion of a vibrant, experimental culture in the decades after the 1980s. A jurisprudence of haunting has very little to do this trajectory, although one might look to the traces of hauntings in films such as *Late Night Horror* (BBC 1968), *The Dead of Night* (BBC 1972) and *The Stone Tape* (BBC 1972). A more focused understanding of the relationship between a jurisprudence of hauntings and hauntology would perhaps begin from the cryptology of ‘Fors’ *The Georgia Review* 31 (1977), 64-116 and Nicolas Abraham and Maria Torok *The Wolfman’s Magic Word* (Minneapolis: University of Minnesota Press, 1986) and follow this line of Derrida’s thinking into ‘Force de Loi: Le Fondement Mystique De L’Autorite’ *Cardozo Law Review*, 11 (1990), 920-104, and the mysterious reference to a ‘treatise on ruins’ that may have been forthcoming (1009).

<sup>2</sup> The term “*clause des spectres*” is taken from Callard’s invaluable work *Spectralities in the Renaissance* (Oxford: OUP, 2022). Callard shows how the clause was recognised in French law between 1570 and 1670, and cites a text of 1688 by Claude de Ferrière as the terminal point of the clause’s legal recognition. *Spectralities* notes the echoes of ‘the clause’ in *Strambovsky v Ackley*. Callard’s text can thus be read as a Goodrichian genealogy of what could be termed the court’s ‘spectral jurisdiction’. Spectral jurisdictions have a presence in *Oedipus Lex*, but, in a more extended way, could also be used to described certain features of the courts of love. In this essay the term will be aligned with a jurisprudence of hauntings- or spectral jurisprudence- and is thus a creative elaboration of a concept rather than its application. The *Discours des spectres* is the title of Pierre Le Loyer’s Treatise, published in 1586, but the ‘discourse on spectres’ will be used in this essay as a general description of a series or circuit of texts on ghosts and hauntings.

<sup>3</sup> Peter Goodrich, *Oedipus Lex* (Berkeley: University of California Press, 1995), p. 10.

<sup>4</sup> Pierre Le Loyer, *Discours des spectres ou visions et apparitions d’esprits . . .* (Paris: Nicolas Buon, 1608). *A Treatise of Specters or Strange sights, visions and apparitions . . .* [Translated by Zacchary Jones (London: Val Simmes for Mathew Lownes, 1605).

Lavater<sup>5</sup> and Taillepied.<sup>6</sup> As well as Goodrich's work, our "circuit of texts" will also include judgments of the French customary courts and the work of John and Sarah Austin. Our terminal point will be a series of contemporary authorities on stigmatised property: the house of horror and the haunted house.<sup>7</sup>

Ghosts continue to haunt the modern law of property. How, then, can we approach a jurisprudence of hauntings?

Goodrichian method will show the importance of staging an encounter between positivism, the theory of the imago and early modern law. Although it never admitted its fears, positivism always had the ghostly at its heart. Goodrich prompts us to think in terms of a strange torsion of legal categories. Given limits of space, it is necessary to restrict our studies of positivism to one of its most troubled figures, John Austin. We will elaborate Goodrich's Legendrian studies on the mirror and the imago to identify Austin's fundamental concept: the vinculum. The vinculum articulates legal status around the fundamental distinction between person and thing. Reading the jurisprudence of the *loca infecta* into Austin's work ruins this distinction. Legal status is ghostly.<sup>8</sup> Our way into spectral jurisprudence will be via Sarah Austin's letters and her work on *The Lectures* after her husband's death. Sarah Austin played the role of the "widow" who "looks back upon a body now absent" and is forced to deal with "the event of death and the silence or absence it engenders."<sup>9</sup> She makes visible a theme only indirectly considered by John: property (and texts) can be imprinted by emotion. Things can be animated. Property can be enchanted or cursed. Drawing on Goodrich's "genealogy[ical]" method we will look to those texts that evoke the "other scene" of the imago; the key to a spectral jurisprudence of affect and the "enchanted boundary."<sup>10</sup> Appropriately, the title of

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<sup>5</sup> Ludwig Lavater, *De Spectris* (Leiden: H. Verbies, 1569). Translated as *Of Ghostes and Spirites Walking by Nyght, and of Strange Noyses, Crackes, and Sundry Forewarnings, Whiche Commonly Happen Before the Death of Menne, Great Slaughters, & Alterations of Kyngdomes* (London: Henry Benneyman for Richard Watkyns, 1572).

<sup>6</sup> Noël Taillepied, *Psychologie, ou Traité de l'apparition des esprits, à scavoir des âmes séparées, fantomes, prodiges et accidens merueilleux qui précèdent quelquefois la mort des grands personnages ou signifient changemens de la chose publique* (Paris, Guillaume Bichon, 1588). Translated as *A Treatise of Ghosts: Being the Psychologie, Or Treatise Upon Apparitions and Spirits, of Disembodied Souls, Phantom Figures, Strange Prodiges, and of Other Miracles and Marvels, which Often Presage the Death of Some Great Person, Or Signify Some Swift Change in Public Affairs* (London: Fortune Press, 1933).

<sup>7</sup> Hauntings have always confronted treatise writers with the problem of taxonomy: how do ghosts relate to other phenomena? Our objective in this paper is to keep the focus on hauntings. The associated problems of demonic infestation or witchcraft appear somewhat to one side. This, of course, does raise problematic questions of the nature of the phantom, and how hauntings are to be distinguished from, for example, demonic possession, the use of magic and charms, shape shifting and manifestation. In the theological debates with which we will engage, the distinction between the demon and the ghost is important; as is the concern of how haunting is fixed in a certain place. Taxonomically, the ghost is something that remains when other phenomena, both natural and super natural, have been defined and dismissed; and, whilst its nature may be hard to determine, existing as it does between two worlds (a cloud, a vapour, a shadow, even a sack of feathers), the ghost confronts the law with a particular issue. In terms of the typology of the un-natural, then, the devil and the monster are distinct from the spectre, but still an important part of the differentiation of the phenomena. The differences between Catholic and Protestant accounts of ghosts exploited these classifications. The protestant ghost seems to take on a more physical form than the Catholic, to the extent that Lavater understands that ghosts are bodies possessed by the devil, rather than souls seeking help of the living, as this would be to credit the Papish doctrine of purgatory. See Lavater, *Of Ghostes and Spirites*, pp.173-4.

<sup>8</sup> See Pierre Legendre, 'The Other Dimension of Law,' *Cardozo Law Review*, 16 (1995), 943-962.

<sup>9</sup> Goodrich, *Oedipus Lex*, p.23.

<sup>10</sup> Goodrich, *Oedipus Lex*, p. 6. The "enchanted boundary" is taken from a study of the prosecution of Helen Duncan, a medium charged under the Witchcraft Act 1735. See Donald J. West, 'The Trial of Helen Duncan',

the book that brings together Sarah Austin's work evokes a genealogy: *Three Generations of English Women*; Sarah, her mother and daughter.<sup>11</sup> We will leave the last word to Lucie Austin, Lady Duff-Cooper who had an intuitive understanding of ghosts, dreams and the importance of the mirror.

Our genealogy moves beyond this particular framing. We need to appreciate the genius of the French customary courts and their strange legacy. Admittedly, Austin never engaged with this peculiar body of law and it has, at best, a distant trace in modern law. But we need to listen to dim echoes in the jurisprudential ether. The rulings of the customary courts of Bordeaux and Paris made use of ancient and Christian learning. Drawing on the Roman doctrine of *timor causa*, the customary courts developed the rules that related to *loca infecta* and the just fear of phantoms. Our studies on spectral normativity will outline an early modern jurisprudence of status where the legal subject is understood as the one who can face a spirit encountered in the corridors of a house or manifesting at the foot of a bed and deploy the right signs and rituals to exorcise his home.

This might strike the reader as quaint superstition. But *loca infecta* have become stigmatised property, or property somehow marked by a dreadful event. Stigmatised property does have a presence in modern case law. Our argument does not just note this unusual area of real estate and conveyancing. At stake is a particular moment in the development of the law of property. We will touch upon this broad historical theme. The early modern figure of the house and its restless spirits are moments in a much broader and incomplete transition: the commodification of things. The norms that articulated *timor causa* are reshaped as law deals with property stigmatised by events in its past. Stained or troubled property is well known outside of law. Lethbridge's notion of the ghoul and the stone tape are one approach to this broader problem. It would be correct to say that *loca infecta* were certainly not in the mind of Justice Rubin when he ruled in *Stambovsky v Ackley* that "as a matter of law" a house can be haunted.<sup>12</sup> A similar point could be made about Parker CJ's ruling that appeared to give judicial recognition to a poltergeist 'infestation.' We need to determine the precise forms of the continuing presence of the discourse on spectres. The moments of this montage are held in a sequence by a Goodrichian amulet that enables one to talk with spirits, to catch, as it were, the mutters and whispers of the dead; voices in the static; those who will not lie still and will not stop talking.

### **Imago and Vinculum**

Goodrich's work on spectral jurisdictions locates him in a venerable tradition. Jurists have often been visited by spirits. The Neapolitan doctor of civil law, Alessandri, had the most dreadful encounter with a ghost who shared his bed one night. Felix Hemmerlin, another learned doctor of law and Provost of Solothurn in Switzerland, recorded numerous encounters with the occult, once witnessing the splitting in twain of a pillar that he took to be

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*Proceedings of the Society for Psychical Research*, XLVIII, 32-64, p. 49. A jurisprudence of haunting would have to consider the norms that relate to the manifestation of spirits (and other phenomena) by mediums, but this is outside the scope of this essay.

<sup>11</sup> Janet Ross, *Three Generations of English women; Memoirs and Correspondence of Susannah Taylor, Sarah Austin, and Lady Duff Gordon* (London: T.F. Unwin, 1893).

<sup>12</sup> *Stambovsky v Ackley* 169 A.D.2d 254 (N.Y. App. Div. 1991).

an omen of civil unrest.<sup>13</sup> It may even be that the disposition to scholarship makes one particular susceptible to apparitions.<sup>14</sup> Taillepied's treatise contains many accounts of scholars whose melancholic ways opened them to hauntings, or worse; a pact with the devil for worldly success.<sup>15</sup> A warning against rushing to judgement on matters of spirits can be found in Lavater's report of the strange experience of a "raue and wise man" who was a magistrate in the Territorie of *Tigurie*. One summer morning the magistrate saw a man whom he knew "defiling himself with a Mare" in a meadow. He immediately went to the man's home, only to be informed by the person in question that he had not stepped out of his door all morning and had witnesses to prove it. If the magistrate was not wise to the ways in which spirits could deceive, he could have sent an innocent man to "the rack."<sup>16</sup> Another magistrate in the same province witnessed a strange event which can only be explained as a portent of his death by drowning in a swollen river.<sup>17</sup> Other treaties remind that the evidence of ghosts is admissible in court. In 1662, the Justices of the Peace for the East-Riding of Yorkshire, took evidence under oath from one Isabel Binnington of Great Driffield. Binnington claimed that the spirit of Robert Eliot has appeared to her. With a distinct cockney accent, the ghost told her that he had been murdered and buried by the chimney in Binnington's house.<sup>18</sup> Human bones were indeed found under the hearth.

Did positivism turn its back on such superstition? If we take Austin's *Lectures* as one of the founding moments of modern jurisprudence, then it is worth noting that Austin was himself prone to melancholy, and thus on Lavater's understanding of "melancholicke m[e]n", particularly susceptible to hauntings.<sup>19</sup> This observation would resonate with Goodrich's vision of jurisprudence as a melancholic science. Our suspicions that Austin is a focal point of the spectral infestation of legal theory are confirmed. Sure enough, it does not take much further probing to find that there are restless spirits in the province of jurisprudence. Something unpleasant came with the inheritance of Roman law. Austin sought to lay bare the "ligament"<sup>20</sup> or the vinculum, the "essence" of duty and hence the "bond" of the law.<sup>21</sup> The vinculum attaches "indefinitely upon all mankind" and grounds the law of persons or status.<sup>22</sup>

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<sup>13</sup> Taillepied, *A Treatise of Ghosts*, pp. 92-3.

<sup>14</sup> Peter Goodrich, *Oedipus Lex* (University of California Press, 1995).

<sup>15</sup> Taillepied, *A Treatise of Ghosts*, 96.

<sup>16</sup> Lavater, *Of Ghostes and Spirites*, p.91.

<sup>17</sup> Lavater, *Of Ghostes and Spirites*, pp.165-6.

<sup>18</sup> Anonymous, *The Examination of Isabel Binnington of Great Driffield, aged 28 years, or there abouts, taken by Sir Thomas Rennington Knight, and Tho. Crompton Esq two of His Majesties Justices of the Peace for the East-Riding, the second day of September Anno Dom* (Com. Ebor. Early English Books Online Text Creation Partnership 1662), pp.5-6.

<sup>19</sup> Lavater, *Of Ghostes and Spirites*, p. 14.

<sup>20</sup> John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law, Volume I* (London: John Murray, 1885), p.285.

<sup>21</sup> John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law, Volume II* (London: John Murray, 1885), p221.

<sup>22</sup> Austin, *Lectures on Jurisprudence, Volume II*, p.966. Austin traces the word sanction back to sanctum, which "is said to be derived from sagmina, the name of certain herbs which the Roman ambassadors bore as marks of inviolability" (Austin 1885 524). On Festus' authority, sanctum relates to herbs (verbena) that were sagmina (sacred herbs) torn up by the roots and given to officials engaged in legal business. Austin limits the sense of sanctum to the description of one who is inviolate, and hence able to command punishment. Clearly the sense of sanctum is more profound and worrying. It testifies to the sacred rituals out of which law emerged. Sagmina were sacred as they came from a particular place. Sagmina are, then, perhaps a figure of a passage between two worlds. The use of sagmia in *remediis publicis*, for expiation and lustration, suggests something of this mystical property, and indicates a genealogy that Austin would rather ignore. At the heart of positivism are rituals that are akin to exorcism.

Status, is of course, legal status. The subject is constituted as “a bonded bond, a bound bond, a binding bond.”<sup>23</sup> How does this work in Austin’s terms? The bond creates a nexus of duty and right. As Austin was not interested in interiority he imagined the bond as some kind of external ‘grid’.<sup>24</sup> The terms in rem and in personam compose the grid.<sup>25</sup> In rem and in personam are elements or knots in the vinculum that enables a piece of property (for example) to be owned by a person. But, property is something more than a thing. *Three Generations of English Women*, an account of Sarah Austin, her mother and her daughter, is an oblique commentary on *The Lectures*. Sarah Austin knew how an imago creates the emotional life of property.<sup>26</sup> Houses provide the images through which we live. Our lives are marked out by memories of rooms, halls, gardens, paths, yards and driveways. These identifications are based on, but extend far beyond, the legal grid of duties and rights. Home is a bond between a particular piece of property, a family and its memories.<sup>27</sup> *Three Generations of English Women* reproduces a letter written by Sarah Austin after John’s death. She speaks of her editorial work on the *Lectures* in “his room”, surrounded by “very objects that speak of him.”<sup>28</sup> Austin’s own spirit, it would seem, had become tied to a place and to things. Sarah Austin goes on to describe the obligation she is under to write “about him”; a task more difficult than editing as it involves summoning the dead. Her writing is interrupted by “tears and sobs.”<sup>29</sup> So, read through Sarah Austin, *The Lectures* encrypt a jurisprudence of the imago.<sup>30</sup> What if this peculiar learning both recalls and carries forward ancient learning on hauntings?

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<sup>23</sup> Legendre, ‘The Other Dimension of Law,’ p. 953.

<sup>24</sup> Austin, *Lectures I*, p. 238. Austin feared “wanton digression” into the “Philosophy of Mind.” See Austin, *Lectures II*, p. 422. His fear is entirely consistent with his positivism: an approach that rejects mental states in favour of observable ‘facts.’ But there may be more to this avoidance of interiority. Perhaps Austin was afraid of what he might find.

<sup>25</sup> Rights in rem do not refer to things, but to the compass of the right. It is a right that can bind anyone. Rights in personam describe rights that bind specific others. In the ownership of property, rights in rem determine the duties of forbearance in relation to the property owner’s title to a thing. When a contract transfers a right in rem, it is an “instrument” with a “double aspect” binding both a person and an estate, Austin, *Lectures I*, p. 258-9. An agreement that a thing passes subject to a contract specifies when “the thing becomes mine.” See Austin, *Lectures I*, p. 257). Austin thus emphasises those moments of transition where property, or the substance of rights and duties, change hands.

<sup>26</sup> Ross, *Three Generations*, p. 110

<sup>27</sup> Ross’s text describes the various houses that the John, Sarah and Lucie Austin inhabited. Sarah was celebrated for the salons she ran in Paris. In London, the Austins lived alongside Bentham and J.S. Mill. John absented himself from social gatherings, so that he could work alone in an upstairs room. He appeared only for dinner and remained largely silent throughout the evening.

<sup>28</sup> Ross, *Three Generations*, p.372.

<sup>29</sup> Ross, *Three Generations*, p.373.

<sup>30</sup> Return briefly to Goodrich’s psychoanalytic concerns with the figure of the mirror and to the construction of identity. The mirror provides an imago. This reflection of the gaze back on itself enables the articulation of something that will be identified as the self or the self-same. Goodrich is building on Lacan and Legendre. Lacan’s statement about the unconscious and language is transformed by Legendre into the idea that the unconscious is structured by a legal phantasy. A phantasy connects desires to particular institutions. Goodrich extends this point. The “intimacy” of one’s own subjectivity (one’s sense of one’s self; the idea that I am I) is already the law speaking; the law is always already speaking. Goodrich, *Oedipus Lex*, p. 3. The imago can be understood as the “material presence” of the image in the self. Goodrich, *Oedipus Lex*, p. 57. Presence to self, the fundamental substratum of subjectivity, takes an immaterial form. In Austinian terms, the imago structures subjectivity through a nexus of duties and rights. But, the subject as a legal subject depends on something prior: an identification of itself through its reflection: “[t]he image....is at best an epistemic form...through which the subject learns and recollects.” Goodrich, *Oedipus Lex*, p. 58. Reflection, as imago, is, then, a way of knowing

Our first reference point is Giovanni Cristoforo Porzio's *Treatise*.<sup>31</sup> Porzio's text introduced an important argument in relation to property. A lease could be cancelled if there was evidence of infestation by *malorum spirituum*.<sup>32</sup> Porzio's doctrine, which took the name of *timor causa*, had its roots in *The Digest*.<sup>33</sup> Given the terms of the relevant sections, it is not surprising that these passages could be interpreted to deal with the problem of infected property. The lease is something that retains traces of other people.<sup>34</sup> Property carries with it the spirit of the lessor, who whilst no longer in residence, can compel the tenant to act in certain ways.<sup>35</sup> The law of leases applies to burials<sup>36</sup> and sealed doors,<sup>37</sup> to strange powers that may spoil crops,<sup>38</sup> to houses that turn out to be ruins, and fields littered with broken columns.<sup>39</sup> Rules define when a house can be torn down, the fate of troubled property.<sup>40</sup> *The Digest* also contains provisions that relate to crumbling houses<sup>41</sup> and land abandoned without clear cause.<sup>42</sup> Rules also cover how buildings can be shut up and the terms in which seemingly abandoned buildings can be entered. What is the price to be paid, and who pays it when a bridge or a threshold is crossed?<sup>43</sup> The unquiet spirits in the cases that we will go on to examine assert a peculiar principle: *loca infecta* always belongs to someone else. Or to something else.

This returns us to our very peculiar problem. What if the imago which distinguishes between person and thing, somehow came loose? Can the boundary between *res* and *personam* blur? If we follow the discourse of the spectre, we will see how courts have produced a jurisprudence around this most bizarre point.

### **Vexed by Unquiet Spirits**

To begin with the facts: a ruling of André de Nesmond in the Bordeaux Parlement in 1594. The case concerned a house in the Rue de la Rouselle in Bordeaux. A certain La Tappaye had taken out a lease on the property from Louise Bouard in 1591. La Tappaye abandoned the house a year before the end of the period of rental. As Madame Bouard would not terminate

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the self, of being able to form an object of the self. We think of ourselves as a subject who owns an object. Goodrich's qualifier 'at best' signifies that the epistemology of the image is only a way of thinking through a psychoanalytic register of a more ancient problem. This is the problem that Sarah Austin grappled with in her letters and editorial work. We cannot untangle all the various tangled threads of this theme, but the fundamental point is that there is something disturbing about the imago. Although the imago attaches interiority to law, it is not a secure bond. Goodrich notes that imago is open to communications with "spirits, demons, aereall and ghostly forms" which could "inhabit" or take over the soul. Goodrich, *Oedipus Lex*, p. 61. Does the slippage of the imago provide a theoretical insight into the peculiar connection between law, subjectivity and ghosts?

<sup>31</sup> Giovanni Cristoforo Porzio, *Treatise Super Tres Priores Institutionum divi Iustiniani libros commentaria* (Pavie, 1483).

<sup>32</sup> Callard, *Spectralities in the Renaissance*, p. 86.

<sup>33</sup> *The Digest* book 19 in S.P. Scott, *The Civil Law* (Cincinnati: Central Trust Co 1932).

<sup>34</sup> *The Digest* 19.1.10.

<sup>35</sup> Callard, *Spectralities in the Renaissance*, p. 86.

<sup>36</sup> *The Digest* 19. 1. 1. If ground is purchased and dedicated as a site for a burial, and a house built on it before the internment, then the purchaser has a right to action against the vendor, provided no internment has taken place. *Digest* 19. 6. 3.

<sup>37</sup> *The Digest* 19.2.25.2.

<sup>38</sup> *The Digest* 19.2.25.6.

<sup>39</sup> *The Digest* 19.2.25.7.

<sup>40</sup> *The Digest* 19.2.30.

<sup>41</sup> *The Digest* 19.2.33.

<sup>42</sup> *The Digest* 19.2.55.2.

<sup>43</sup> *The Digest* 19.2.60. 8.

the lease, La Tappaye sublet the property to M. Guyton, who also abandoned the property. Whilst Bouard achieved judgment against La Tappaye in the lower court, an appeal to the Parlement reversed the decision. De Nesmond's ruling confirmed the admissibility of the case: the appellant's house was indeed "vexed and made unquiet by spirits or demons."<sup>44</sup> Guyton's evidence goes into detail. The spirit appeared 3 or 4 times a week, taking the form of a little child. It moved furniture and utensils, and manifesting in the bed room, changed its form again, becoming a white shape, growing and shrinking. The form drifted up to the top of the bed and then suddenly moved down, as if jumping onto the stomach of the unfortunate person who was lying below. The spirit was also able to smother sleepers. It slapped and hit people and moved things throughout the house, causing noises and uproar.<sup>45</sup>

A second case.<sup>46</sup> The report of the Rue du Collège St Denis affair is significant as it contains an extended reference to Cicero.<sup>47</sup> In making use of Cicero, the advocate indicated to the court that a spirit could be sent to protect the order of property. The judges should accept that Anne de Moulin's ghost could have spoken to her husband in "visions" as he lay between sleep and consciousness.<sup>48</sup> Cicero's *Oratio pro domo sua* is a discourse on messages between the sacred and the temporal, and the correct order of their transmission. The house as home appears in the *Oratio* as fundamental to the order of the republic, the family, property and the gods: "hearth and altar."<sup>49</sup> The ghostly evidence suggests that the accused, a certain d'Arconville, had committed a heinous dishonour to "property and the sacred rites of the family."<sup>50</sup>

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<sup>44</sup> André de Nesmond, *Remontrances, ouvertures de Palais et arrestz prononcés en robes rouges, par Messire André de Nesmond, seigneur de Chézac, premier président au Parlement de Bordeaux. Ed. par François-Théodore de Nesmond*, (Paris: chez Pierre Cusset, 1656), p.430.

<sup>45</sup> One might imagine that Bachelard's thinking would be useful for the development of a jurisprudence of hauntings- in particular- his concern with houses, rooms, cellars and garrets. Whilst the *Poetics of Space* does not touch on hauntings, Bachelard's engagement with the novels of Henri Bosco could clearly be extended in this direction. See, in particular, Henri Bosco, *Un Rameau de la Nuit* (Editions Flammarion, 1950). See Gaston Bachelard *The Poetics of Space* (Boston: Beacon Press, 1958).

<sup>46</sup> Pierre de L'Estoile, diarist, book collector and former law student, took a house in the Rue du collège Saint Denis in Paris. The house had been the site of brutal murders a year and a half before L'Estoile moved into the property. Callard, *Spectralities*, p. 36. The cousin of one of the victims, Anne De Moulin, stood trial accused of this "detestable" and "inhuman" act. Callard, *Spectralities*, p. 248. It was alleged that Jacques Blosset d'Arconville had murdered his cousin so he could inherit the house in the Rue du collège. Barnabé Brisson, who represented De Moulin's husband, stated that Anne de Moulin's ghost had appeared to Charles de Moulin and named d'Arconville as perpetrator of the "massacre." The court did not accept this argument, and a later hearing affirmed that d'Arconville had inherited the property. The terrible reputation of the house did not prevent de L'Estoile from taking on a further lease of the house, and later buying it himself. Callard, *Spectralities*, p. 37. Brisson's advocacy in the case is notable for its reference to Martial's epigrams, and above all, Cicero's *Oratio pro domo sua*. The epigrams is an admission by Brisson that ghostly evidence was not convincing- he effectively asked the court to believe the testimony in the same way that Martial accepts Caesar's progress to Hypborean shores although 'witness is there none'- yet "every voice tells us". Martial. *Epigrams, Volume II: Books 6-10*. ed and trans. D. R. Shackleton Bailey (Cambridge, MA: Harvard University Press, 1993).

<sup>47</sup> Parlement de Paris, *Recueil de plaidoyez notables de plusieurs anciens et fameux Advocats de la Cour de Parlement faicts en causes celebres, dont aucunes plaidées en presence des Roys. Et divers arrests intervenus ... sur les dictz plaidoyez* (Paris: 1611).

<sup>48</sup> *Recueil de plaidoyez notables*, pp. 257-8.

<sup>49</sup> Marcus Tullius Cicero, *Orations Volume III*, trans. C.D. Yonge (London: C. Bell and Sons, 1913), p.2.

<sup>50</sup> Cicero, *Orations*, p.17.



These cases revisit the jurisprudence of the *vinculum* and the *imago*. In the Rue de la Rouselle case, De Nesmond accepted that a house could be haunted. He relied on the authority of authors who testified that spirits could be fixed to places. Suetonius tells of the house where Caligula died, a place where no one was able to spend the night. In the 25<sup>th</sup> book of *Civitas Dei*, St Augustine's account of Hesperius of Fussala speaks of "vexed places." Hesperius suffered the "molestations" of a most terrible haunting and took to keeping his cattle in his chambers to save them from the torments of the spirits.<sup>51</sup> Gregory Magnus tells of a haunted house in Corinth where the spirit could speak. Further evidence is provided by the case of La Maison d'Eubalide: a black phantom showed itself at night in the form of a dog, a lion and a bull. These exemplary hauntings relate to particular features of the La Rouselle affair. Figures form in the air, disembodied voices speak from nowhere, and things move as if possessed by an agency of their own. Many authorities speak of similar phenomena. Metaphrastes tells of a vexed house where pebbles rained down on those at dinner and furniture was pushed over. The spirit responsible took the form of a rat or a snake. Felix Malleolus writes of a house rendered uninhabitable by shadows and phantoms.<sup>52</sup> These are not the ghosts who inhabit deserts, islands or mines, or, like the spirit described by Strabo and Pausanias, haunted the isles of Lypata and took the name of Gello.<sup>53</sup> De Nesmond is concerned with spirits that infect Christian homes necessitating the demolition of the property; the fate of the Chateaux de Biscestre, close to Paris.<sup>54</sup> Indeed, there are so many phantoms in houses around Nimes that people will not visit the city after dark. And this is to say nothing of the notorious chateaux of Lusignan and the Zutelle Palace in Bordeaux, whose precincts are racked by strange noises and nightly uproars.<sup>55</sup>

De Nesmond was aware that the spectre disturbs the organisation of the law: the division between people and things. Also at stake is the equally fundamental Aristotelean understanding of the human being as the speaking animal. If animals can speak, and property infested by disembodied spirits, then the law confronts something of a problem. But the law can make room for unruly spirits. De Nesmond returns to the specific problem of spectral form. Aquinas, St Denis and Gregory of Nicea are cited as authorities on the existence of "creatures incorporeal" or "figures imprinted on air."<sup>56</sup> This is a central theme in the discourse on spectres. A spectre is something that shows itself: whose appearance testifies to a power of coming into being through "secret and hid operation[s]."<sup>57</sup> This "hidden and concealed" nature defines the spectre as something unnatural (or entirely appropriate to its own nature). Indeed, dreams share their mysterious qualities with spectres but are also located within the dreaming mind of the material body. Animals dream like men, but, in keeping with the "order of things", their dreams are "bruitsh." So, the division between man

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<sup>51</sup> De Nesmond, *Remonstrances*, p. 173.

<sup>52</sup> De Nesmond, *Remonstrances*, p. 416.

<sup>53</sup> De Nesmond, *Remonstrances*, p. 411.

<sup>54</sup> *La Chasse donnée aux épouvantables esprits du château de Biscestre, près la ville de Paris, par la démolition qui en a été faite; avec les étranges tintamarres et effroyables apparitions qui s'y sont toujours vus* (Paris: Chez Jean Brunet, 1634).

<sup>55</sup> *La Chasse*, 10.

<sup>56</sup> De Nesmond, *Remonstrances*, pp. 363 and 369. There are certainly good angels, who as messengers to men, are permitted by God to take on something like a bodily form- but this power is not extended to evil spirits (De Nesmond 1656 363). But, there must be some power that allows apparitions to "show themselves" as they did to Cassius (De Nesmond 1656, 365, 360).

<sup>57</sup> Lavater, *Of Ghostes and Spirites*, p.98.

and animal can be sustained, and the dream (the theatre of images) can be linked to what distinguishes men from beasts. Men are capable of “discourse.” Discourse is the mark of a “reasonable soul.”<sup>58</sup> Can jurisprudence assist the reasonable man to deal with bad dreams and ghosts?

In cases of haunted property, it would be fair to say that the judges of the French courts are effectively working through a set of concerns about the imago. Something invisible that shows itself has agency: a hidden form of non-corporeal being. These themes are bound up with the doctrine of just fear. The doctrine requires genuine fears to be distinguished from madness and derangement. These themes translate into the principles of *timor causa*. *Timor causa* presuppose a ghostly form fixed at particular sites or *loca infecta*. The doctrine assumes that a ghost, an image, can somehow drift free of the body. We might even say that the spectral jurisdiction understands that interiority can be caught in the knotting of the vinculum and attached to a res. It would follow that spirits are, in a peculiar way, real. No doubt the jurisprudence of the spectre requires much further clarification, but it would be reasonable to say that the law approached *loca infecta* in a methodical way. If a property is haunted, then one should be able to break a lease. The concept of just fear becomes a mark of a particular kind of subjectivity: that which can confront what has become somehow detached and is no longer part of a material body; an immateriality walking abroad.

This is easier to put in theological terms and attests to Goodrich’s point about the importance of the “ritual” forms that travel with law. Ritual articulates what cannot otherwise be said. Indeed, the theology of purgatory provides a figure for a function detached from a body. Whilst the Lateran Council asserted that there was no possible communication between the “weight of matter” and the airy world of spirits, the Council also allowed that there were ways of moving between worlds. Theological orthodoxy held that souls that could leave the body and be condemned to spend time in purgatory.<sup>59</sup> Indeed, the law followed theology is asserting that souls who had not yet reached purgatory still wandered the earth in torment.

If the courts accepted that that houses could be visited by spirits, it was necessary to determine the norms that relate to hauntings. The encounter with an apparition is an exercise in “how we conduct ourselves”<sup>60</sup>---a spiritual discipline for those not easily frightened but willing to acknowledge that an encounter with a ghost will have a worrying physical effect that causes the hair “to rise and prickle.”<sup>61</sup> In such a situation, a person of fortitude must remember a “sovereign remedy.”<sup>62</sup> Not every strange noise in the night in the manifestation of a ghost. If there is evidence of an “infestation”, such as the “upsetting of tables and chairs...a wrack and hurly burly” then it is necessary, to say out loud, and “boldly”:

“If thou art of God, speak; if thou art not of God, be gone.”<sup>63</sup>

Lavater has slightly different instructions that appear to rest on the sanctity of property. In banishing a spirit one should calmly state: “I am owner of this house, and not thou, unto

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<sup>58</sup> Lavater, *Of Ghostes and Spirites*, p. 14.

<sup>59</sup> De Nesmond, *Remonstrances*, pp. 416.

<sup>60</sup> Taillepied, *A Treatise of Ghosts*, p.xix.

<sup>61</sup> Taillepied, *A Treatise of Ghosts*, p.167.

<sup>62</sup> Taillepied, *A Treatise of Ghosts*, p. 173.

<sup>63</sup> Taillepied, *A Treatise of Ghosts*, p. 168.

whome ther is an other place apoynted.”<sup>64</sup> If these words do not bring the haunting to an abrupt end, then a person of fortitude must not blaspheme or rail against the spirit. There is no point drawing one’s sword and charging a manifestation. Authority suggests that, at best, one will encounter a “soft feathery substance” or, more disturbing still, a sense of being in the midst of “skeltering... wooden billets.”<sup>65</sup>

The only effective response is prayer, for this is “spiritual warfare.”<sup>66</sup> Haunting is bound up with texts and their affects (Matthew 15, 19-20 and Mark 9, 27-28). Taillepie’s advice to the haunted assumes the power of words and the efficacy of the scriptures. Indeed, according to Firmian’s *Divine Institutions*, IV, 26-7 and the texts of the Church Fathers, the most effective defence against a vexatious spirit is the sign of the cross, traced on one’s forehead.<sup>67</sup> The sign of the cross is fortified by pronouncing the “name of Jesus” whose power extends to heaven and earth, and to those “under the earth.”<sup>68</sup> The sovereign power of these instruments, though, seem to have a peculiar limit. Words only affect a certain kind of spectre. “[M]ere shadows” that have “neither volition nor intelligence” and are outside of Holy Writ. In the terms of Le Loyer’s categories, such shadows are “manifesting” immaterialities. Outside of the jurisdiction of sacred words and signs.<sup>69</sup>

But the vexatious spirit is subject to norms. The surest response to a stubborn haunting is to take confession, which is “dreaded and loathed by all evil Spirits”, and the sacrament of penance also has a most profound effect. The Gospel passages on the exorcism of a man possessed by spirits describes how the possessing spirit left the body in “black clouds of stench”- the physical form taken by sins being driven from the body by words, a purification which must be followed by communion which welcomes the sinner back into the mystical body of Christ. The communion re-asserts an order where the true believer receives God’s protection, and the evil spirit, as an intelligence, knows that it has been subjected to norms that expel it from the body it has possessed. A similar point could be made in relation to the effects of holy water. Holy water must be sprinkled both on the person and the affected ‘room’ in the morning and the evening. This detail suggests that the action of the blessing on the water has an effect that must be renewed. If not, the power of the words leaks into empty air.

### **“As a Matter of Law, this House is Haunted”**

Haunted property and the just fear of spirits retain a presence in the law. We will examine the celebrated case of *Stambovsky v Ackley*, *Sykes v Taylor Rose*<sup>70</sup> and the *Lowe Cottage* case.<sup>71</sup> In some ways at least, these cases take us back to the problem that preoccupied Austin: how to clarify the way in which the vinculum binds, given that it is necessary to deal with interior, affective states. The problem of the ghost drifts back into jurisprudence. But, the issue of legitimate fear, a form of interiority that marks out the status of the legal subject as a Christian, is subtly transformed in the cases on stigmatised property. The question remains:

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<sup>64</sup> Lavater, *Of Ghostes and Spirites*, p. 192.

<sup>65</sup> Lavater, *Of Ghostes and Spirites*, p. 169.

<sup>66</sup> Lavater, *Of Ghostes and Spirites*, p.169.

<sup>67</sup> Taillepie, *A Treatise of Ghosts*, p. 170.

<sup>68</sup> Taillepie, *A Treatise of Ghosts*, p. 171.

<sup>69</sup> Le Loyer, *Treatise of Specters*, p. 168.

<sup>70</sup> *Sykes v Taylor Rose* [2004] EWCA Civ 299

<sup>71</sup> Unreported, but see <https://www.theguardian.com/uk/1999/jan/19/martinwainwright>.

how does the transfer of an estate deal with affect, with emotion, or horror imprinted onto property? That the answer engages contract doctrine and the equitable remedy of rescission, suggests that there is a genealogical link between the modern law and the jurisprudence of hauntings.

For Austin the contract that transfers a right in rem is an “instrument” with a “double aspect” that binds both a person and an estate.<sup>72</sup> The *vinculum* speaks through the contract and the conveyance. With the conveyance of real property comes the coexistence of numerous obligations over a single estate. The act of transfer between vendor and purchaser must reckon with a history of obligation. Austin’s *Lectures* do not go into any detail about caveat emptor but his analysis of bona fide purchaser rule does bring into focus this peculiar feature of property: the issue of how the past, with its obligations and secrets might be erased through an ‘honest’ or bona fide exchange: through a correct ritual. Might Austin’s “double aspect” be one way of unlocking the words and signs that enable a spirit to be moved on and *loca infecta* cleansed? Austin does not comment on the etymology of the word conveyance, but if he had, it would have returned him to the old French *convoier* “to accompany or escort.” We know from the sections of *The Digest* discussed above that there are things that might also travel with a transfer of property.

The modern law of *loca infecta* is focused on what the vendor knew. Was the vendor being honest? Property remains an “index or sign” that gestures towards something hidden.<sup>73</sup> Obligations that bind must not be concealed. Something invisible must show itself.

*Stambovsky v Ackley*, in straight legal terms, is an authority that recognises (on certain narrow facts) that a contract for the conveyance of realty could be rescinded. But Justice Rubin shared Sarah Austin’s double vision in this regard. He saw the traces of those others that had inhabited 1 LaVeta Place in Nyack. The purchaser could not have been expected to know the local reputation of the house, nor to have discovered from a physical inspection of the property traces of a haunting. Helen Ackley’s own “promotional efforts”, her description in a local newspaper article of the property as “riverfront Victorian (with ghost)” are echoes of the court accepting Isabel Binnington’s evidence. But, in *Stambovsky* the haunting enters into the very “essence of the bargain between the parties.”<sup>74</sup> At least indirectly, Justice Rubin follows De Nesmond in acknowledging *loca infecta* are a matter for law. Justice Rubin renders a pithy summary of the discourse on spectres: the “source of the spectral apparitions seen by defendant seller” might be either “parapsychic or psychogenic” but the law can claim a jurisdiction over spectres.<sup>75</sup>

What are the terms of this jurisdiction? The doctrine of caveat emptor was considered in *Stambovsky*. Entirely appropriately, the haunted house is constructed in law through the norms that relate to a warning. The doctrine of caveat emptor articulates the terms in which real property moves, or, more precisely, the way in which real property can carry imprints of others that a vendor may or may not be under a duty to disclose. But the case law equivocates around the very issue we have been thinking about: the extent to which an imago can become imprinted on a res. In *Stambovsky*, the imprint existed, but it was not a physical mark on the

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<sup>72</sup> Austin, *Lectures I*, pp. 258-9

<sup>73</sup> Austin, *Lectures I*, p.10

<sup>74</sup> *Stambovsky*, at 256.

<sup>75</sup> *Stambovsky v Ackley*, at 256.

property. The facts were different in *Sykes v Taylor-Rose*. In the British case, the articulation of the duty of disclosure is presented as a form of subjective honesty: had the vendor been honest in believing that the purchaser did not need to be informed of the house's past? In *Sykes*, the vendors did not reveal their knowledge that a brutal murder had taken place in the house. Traumatized, the vendors had left the property, but returned to take up residence again and put the house back on the market. Their solicitor had advised them that they did not have to reveal their knowledge of the murder, in the same way that they had not been informed of the murder when they originally bought the house. A secret can remain a secret.

The Court of Appeal's ruling is paradoxical. In asserting that the vendor's belief only had to be honest, and did not require justification on reasonable grounds, the court provided the terms in which the past can be made to disappear. Yet, at the same time, the stigma remains and travels with the property as it passes from hand to hand.<sup>76</sup>

There is a general 'structure' to this problem. How it is possible to move between the visible and the invisible, between the physical and the immaterial so that the two worlds are kept in their proper places; so that a *res* is just a *res*? Defining these boundaries requires a definition of the non-fearful person: the proper subject of the law, "the reasonable man."<sup>77</sup> This figure emerges as the one who sees and knows what is probably the case. Once one is correctly constituted as a legal subject, the essential link with property, exchange and inheritance can be made. It is worth keeping in mind the *Lowe Cottage* case, decided by Derby County Court in 1999. The case was presented by the press as a judicial exorcism of a haunted house, a rebuttal of evidence given by a couple who had bought the cottage and withheld payment on account of paranormal activity. The judge who presided over the case rejected testimony as to the spectral presence of a pig faced boy and other apparitions. He also expressed concerns about the mental health of the defendants (concerns that the defendants themselves rejected). In his judgment, Judge Peter Stratton made an oblique reference to the discourse on spectres. The non fearful person is the sane person of this world, whose constitution is properly that of the legal subject. A "Christian man" ought to know how to "gouverne hym selfe, beyng vexed with euyl spirites." Some spirits might be evil demons, but others are merely the products of "brainsicke persons" suffering from deranged visions.<sup>78</sup> But this does not mean that ghosts and demons do not visit men. How else can we deal with the fact that the common law recognises poltergeists?<sup>79</sup>

As the case report in *McGee* tersely puts it: "a tenant and his family slept away from their house because of the attentions of a poltergeist." *Mc Gee* had obtained a reduction in rent because of these "attentions." The rent assessment panel overturned this decision, and *McGee* successfully appealed to the High Court. Lord Parker accepted that the "tenant and his

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<sup>76</sup> A variation on this theme are actions bought against vendors of allegedly haunted houses. Chingle Hall in Lancashire, described as "the most haunted house in England", was the subject of hearing at Liverpool High Court in 1994. The purchasers successfully argued that they were misled as to the potential of a property for commercial exploitation. See <https://www.independent.co.uk/news/uk/haunted-house-professor-awarded-pounds-71-000-1412148.html>.

<sup>77</sup> Le Loyer, *Treatise of Specters*, p.108.

<sup>78</sup> Lavater, *Of Ghostes and Spirites*, un-numbered page.

<sup>79</sup> *McGee v London Rent Assessment Panel* [1969] 1 WLUK 246. See also *The Journal for the Society of Psychical Research* 34 (1947-48), 130-132. In 1947 an application was made to Luton Council's Assessment Committee for a reduction of rates on a house alleged to be haunted. The claim was unsuccessful. The council's investigations, including two seances, failed to find convincing evidence of a haunting.

family...were fully convinced that this was a haunted house and that there were ghosts that manifested themselves from time to time, and that there were poltergeists.” The property was investigated by Tom Perrott, a noted researcher in parapsychology. The ratio of the case appears to be that “that there was no evidence of negligence or breach of the tenancy agreement.”

Does McGee provide judicial recognition of a haunting?<sup>80</sup>

### **Bring Blankets and a Looking Glass**

If we read between Austin, Goodrich and the jurisprudence of the haunting, we arrive at a rare and peculiar ‘spectral jurisdiction’ – a jurisprudence of the mirror, of the non-substantial differentiator and bridge between worlds. We have explored connections between property and affect that flicker at the edges of Austin’s understanding. The French cases, going back to *The Digest*, suggest a shadowy recognition of the hold that prior owners have over their property; whether they are living, dead or ghosts. But, the final word can be left to John and Sarah Austin’s daughter, Lady Duff-Gordon, whose grave (if one can find it) is in the City of the Dead in Cairo. As a child, Lucie Austin wore snakes in her hair. She would no doubt have appreciated that a jurisprudence of hauntings takes the form of a circuit of texts best described as a poetic jurisprudence. Writing to her editor from Egypt, Lady Duff Gordon provides the most bold understanding of hauntings:

“How nice it would be if you could come with the Consul-general. Only please bring blankets and a looking-glass. Mahbrook broke the only one I had. An eunuch here who is a holy man tells me he saw my boat coming up heavily laden in his sleep, which indicates a ' good let.’<sup>81</sup>

The mirror, the lease, the dream.

"[U]n peu unmanageable."<sup>82</sup>

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<sup>80</sup> The property in question was 69 Spencer Rd., Stoke Newington. The house was demolished some years ago. The poltergeist allegedly took the form of a woman with hollow eyes. See

[https://www.paranormaldatabase.com/london/lonpages/londdata.php?pageNum\\_paradata=6&totalRows\\_](https://www.paranormaldatabase.com/london/lonpages/londdata.php?pageNum_paradata=6&totalRows_)

<sup>81</sup> Ross, *Three Generations*, 551.

<sup>82</sup> Katherine Frank, *Lady Duff-Gordon: Passage to Egypt* (London: Hamish Hamilton, 1994), p.71. A comment of Sarah Austin’s on her daughter’s behaviour.