(a) Distinguish between the law of property and the law of things. (4)

**ANSWER:**

In the **broad sense** the word “property” in the law of property refers to everything that forms part of a person’s estate. (1) In a **narrow sense** property law refers to the law of things, which is the system that regulates legal (½) relationships (½) between legal subjects (1) in regard to a **particular legal object**, that is, a thing. (1)

Patrimonial law is divided into the law of **property**, the law of **succession**, the law of **obligations** and **intellectual property law**. Patrimonial law therefore regulates all rights which have assets in a person’s estate as objects. (1) In this broad sense everything that forms part of a person’s estate can be described as “property”. Property therefore includes a **variety of assets**, such as things, personal rights and immaterial property rights.

The law of **things** can be defined as a branch of the private law which consists of a number of legal rules that determine the nature, content, vesting, protection, transfer and termination of various real relationships between a legal subject and a **thing**, as well as the rights and duties ensuing from these relationships.

(Maximum 4 marks)

**Summary:**

<table>
<thead>
<tr>
<th>Property law in the broad sense</th>
<th>Property law in the narrow sense</th>
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(b) Distinguish between a real right and an entitlement. (5)

**ANSWER:**

A real right is a lawful (1) real (1) relationship between a legal subject and a thing (1) which confers direct control over the thing on the legal subject, as well as the relationship between the legal subject and all other legal subjects who must respect this relationship.

The term entitlement refers to the content (1) of a right. The entitlements of a real right determine which acts (1) a legal subject may perform in regard to a thing, eg, may sell or use the thing.

(c) Distinguish between: a legal object and a thing. (4)

**ANSWER:**

A legal object can be defined as every object (1) with which a legal subject has a legally recognised (1) relationship. Legal objects may be divided into things, performances, immaterial property and personality property.

A thing is a specific (1) legal object (1) characterised as follows: it is an independent part of the corporeal world that exists outside humans, is subject to human control and is of value to humans.

(d) Distinguish between a real relationship and a real right. (4)

**ANSWER:**

A real (the word “real” comes from the Latin word “res” meaning a thing) relationship is the particular (½) legal relationship (½) between one or more legal subjects (½) and a thing (½). A real relationship is broader (1) than a real right since real relationships include real rights, (1) as well as certain unlawful (1) real relationships. A lawful real relationship is therefore known as a real right. Only lawful real relationships, namely ownership and lawful holdership, confer real rights. Unlawful real relationships, namely possession and unlawful holdership, cannot confer any real rights. A real right can therefore be defined as a lawful (1) real (1) relationship between a legal subject and a thing (1) which confers direct control over the thing on the legal subject, as well as the relationship between the legal subject and all other legal subjects who must respect this relationship.

(Maximum 4 marks)
1. Briefly explain and criticise the different tests/theories which are applied to determine whether a specific right is a real or a personal (creditor's) right. (12)

**ANSWER:**

The **personalist theory** place emphasis is on the person against whom (1) the right may be enforced. In terms of this theory a **real right** operates absolutely (1), in the sense that it is enforceable against “the world at large”. Recognition of and compliance with such a right (for example, ownership) may be enforced against anyone (1). Whatever my relationship with someone might be, that person will have to recognise my ownership of a certain thing, and I can, in principle, claim my thing from anyone who is in control of it, for example, an owner can claim his motorcar from a person who bought it form a thief.

A **personal right** (creditor's right or claim), on the other hand, has relative (1) operation. It can be enforced only against the particular person (1) who has a duty to perform in terms of an obligation. For example, a contract can be enforced against the other contracting party (the debtor) only, or, in a delict, damages can be claimed only from the person who caused the damage (apart from certain exceptions).

**Criticism:** The fundamental criticism levelled against this theory is that it overemphasises the absolute operation of real rights (1), which do not, in reality, always and necessarily operate absolutely. There are cases, for example, where the owner of a thing is prevented by the operation of estoppel from enforcing his/her right of ownership against another person. Estoppel operates if the owner has culpably created the impression that a third person was the owner or had authorisation (acted as the representative of the owner) to alienate the thing.

It should be remembered that personal rights do not always (1) have only relative operation either. In exceptional circumstances they operate absolutely and have to be respected by outsiders, such as in the case of a service contract. It has been held that an outsider may not **intentionally** interfere in the relationship between an employer and an employee.

Another objection to the absoluteness of real rights in the personalist theory is that other rights (1), such as personality rights (for example, rights to integrity or reputation) and immaterial property rights (for example, patent rights and copyright), also operate absolutely. This argument also has little substance, since the theory is used to distinguish between real and personal rights for a particular reason. It is valuable to demarcate the
boundary between the law of things and the law of obligations, but, in particular, to determine which rights may be registered against land in terms of section 63(1) of the Deeds Registries Act 47 of 1937.

The classical theory corresponds to the original Roman-law distinction. It distinguishes between real and personal rights with reference to the nature of the object to which each right pertains. Real rights, according to this theory, concern the relationship between a person and a thing. A real right confers direct control and the right of disposal over a thing. Personal rights, on the other hand, concern the relationship between persons. A personal right entitles the creditor only to claim performance from a particular person. The object of the right is therefore performance.

Criticism: Although some criticism can also be levelled at this distinction, in most instances this criterion will help to determine whether one is dealing with a real right, or not. However, it is sometimes difficult to determine exactly what is meant by a direct relationship with a thing. Certain personal rights ultimately also have a thing as their object, but they are not real rights, for example, personal rights to acquire a thing (iura in personam ad rem acquirendam). We are dealing with such rights when, for example, X buys a car from Y. In terms of the contract X has a right to the car, but this is only a personal right. Before delivery X has a personal right to claim delivery of the car (ius in personam ad rem acquirendam). X acquires a real right (ownership) only after delivery of the car to him/her.

(Maximum 12 marks)