

Iusta Causa Traditionis and its History in European Private Law

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Abstract: The causal and abstract transfer theories regarding the transfer of ownership and other real rights developed in the 19th century. Before this time, from the medieval glossators to the 18th century, there were no consistent transfer theories at all. Legal history shows that a middle position between abstract and causal is possible. This perspective may be important when harmonisation of European property law forces us to opt for a harmonised transfer system: the choice is not confined to either causal or abstract but may cover midway solutions as well.

Résumé: Les théories du transfert causales et abstraites concernant le transfert de la propriété et d'autres vraies droits se sont développées au 19^{ème} siècle. Avant ce temps, à partir des glossateurs médiévaux au 18^{ème} siècle, il n'y avait aucune théorie du transfert logique du tout. L'histoire légale prouve qu'une position moyenne entre l'abstrait et le causal est possible. Cette perspective peut être importante quand l'harmonisation de la loi européenne de propriété nous force à opter pour un système de transfert harmonisé: le choix n'est pas limité au causal ou à l'abstrait mais peut aussi bien couvrir les solutions intermédiaires.

Zusammenfassung: Die kausalen und abstrakten Übertragungstheorien in Bezug auf die Übertragung von Eigentum und anderen dinglichen Rechten entwickelten sich im 19. Jahrhundert. Vor dieser Zeit, von den Glossatoren des Mittelalters bis zum 18. Jahrhundert, existierten überhaupt keine einheitlichen Übertragungstheorien. Die Rechtsgeschichte zeigt, dass eine mittlere Position zwischen abstrakten und kausalen Theorien möglich ist. Diese Perspektive könnte Bedeutung erlangen, wenn die Harmonisierung des europäischen Eigentumsrechts eine Entscheidung für ein harmonisiertes Übertragungssystem nötig macht: Es besteht nicht nur die Wahl zwischen kausal oder abstrakt, sondern auch vermittelnde Lösungen sind möglich.

1 Introduction

In this article we shall examine the history of the causal and abstract transfer theories. We shall see that in their modern form the two systems were both created only in the beginning of the 19th century. The causal system was introduced into French law by the *Code Civil* of 1804. The concept of real agreement (*dinglicher Vertrag*) and the abstract transfer system as applied in German law up to the present day have been introduced into German law by F.C. von Savigny and his followers in the first decades of the 19th century. The origin of these systems, however, is much older and we will see that they both developed from a common base: Roman law. Accordingly, the modern dichotomy between causal and abstract transfer systems cannot be appreciated properly without analysing these developments. To give an example, both in creating the real agreement and in developing the abstract system Savigny was influenced considerably by Donellus and the theories of the medieval glossators and commentators. The main argument put forward by Savigny to defend his abstract system can be found already in the writings of the glossators.

To understand how the modern transfer systems came into being we should analyse in rough the transfer theories of the glossators, commentators and later generations of jurists. We will then see that the abstract transfer system is based on certain texts from the learned law during and after the Middle Ages.

In the learned law before Savigny we will not find any consistent transfer theory in the modern sense of the word. There seems to be no *communis opinio* and, what is more, even statements of one and the same author are often in conflict. Yet, these statements, however conflicting and vague, have in common that they are the result of a controversy over how the opaque and confusing Roman law sources should be interpreted, a debate which has been going on for centuries. One thing was clear: for a transfer of ownership to be valid Roman law required a *iusta causa traditionis*. This requirement could not be denied. The controversy was about the meaning of the term *iusta causa*.

2 The root of the problem

2.1 *The confusing Roman basis*¹

In D. 41,1,31, pr. Paulus says: “*Traditio* alone will never pass ownership; it will, however, if a sale or another sufficient ground has preceded on the basis of which *traditio* has followed.”²

The controversy was fuelled especially by the well-known antinomy in the Digest between Julianus and Ulpianus. They both commented on the following case. Someone transfers money to another with the intention of making a gift; the other party, however, accepts the money as a loan rather than as a gift. Thus, there is no agreement about the *causa traditionis*, the legal ground why ownership should pass. On the other hand, there is agreement about the fact that ownership should be transferred. Both parties intend ownership to pass, but for different legal reasons. As there is no agreement about the gift or the loan there is no contract between the parties. According to Julianus (D. 41,1,36) ownership passes nonetheless: “When we agree on the thing that is transferred, though disagree about the legal ground of the transfer, I see no reason why the transfer should be ineffective, for example when I think that under a will I am bound to you to transfer land while you think it is due to you under a stipulation. For, also if I give you coined money as a gift and you accept it as a loan for consumption, it is certain that the passing of ownership is not impeded by us disagreeing about the legal ground of the transfer.”³ Ulpianus, on the other

1 I will discuss only the main passages which played a vital role in the controversy.

2 Numquam nuda traditio transfert dominium, sed ita, si venditio aut aliqua iusta causa praecesserit, propter quam traditio sequeretur.

3 Cum in corpus quidem quod traditur consentiamus, in causis vero dissentiamus, non animadverto, cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi. nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus.

hand, referring to the same example, disagrees and claims that ownership does not pass (D. 12,1,18, pr.): “If I have given you money as a gift and you accept it as a loan for consumption there is no gift according to Julianus. But it is yet to be seen whether it is a loan. I think that there is no loan, and, what is more, that ownership of the coins does not pass to the recipient, because the latter has accepted them with a different intention.”⁴

For centuries, since the rediscovery of the Digest, jurists have been trying, unsuccessfully though, to explain this contradiction. Because the Digest was used as a source of law contradictions were very troublesome. Moreover, Justinian had promised the Digest to be free of contradictions.⁵ Consequently, from the time of the glossators until the abolition of Roman law as a source of law jurists have often been keen to solve these contradictions by cunning interpretation.

Yet, it is important to realize that the Roman jurists did not know any consistent transfer theory. They were not interested in dogmatics and building theories. What is more, Julianus and Ulpianus may simply have had different views on the matter. Or perhaps the dominant view had changed in Ulpianus’ time. After all, Ulpianus was from a later generation.⁶ Therefore any attempt to reconcile these conflicting statements in the Roman sources is doomed to fail.

2.2 *Has Julianus D. 41,1,36 been interpolated?*

Some problems of interpretation have been caused by Justinian himself. In classical Roman law there were three methods of transferring ownership: the ancient *in iure cessio*, *mancipatio* and a relatively new form called *traditio*. As *in iure cessio* had already become obsolete in the classical period⁷ I will concentrate on *mancipatio* and *traditio*. Assets valuable to agriculture such as immovables within the Italic region, slaves, large cattle and rural servitudes could be transferred only by way of *mancipatio* (they were therefore called *res mancipi*).⁸ For that reason *mancipatio*, an abstract form of transfer,⁹ was the most important method of transferring ownership. For the transfer of other assets, which were often less valuable, *traditio* sufficed. However, a *traditio* of Italic land was very common, as the formalities of *mancipatio* were cumbersome. Although *traditio* of *res mancipi* did not pass quiritarian ownership, it gave the buyer a strong position against the seller and third parties which was

4 Si ego pecuniam tibi quasi donaturus dederō, tu quasi mutuam accipias, Julianus scribit donationem non esse: sed an mutua sit, videndum. et puto nec mutuam esse magisque nummos accipientis non fieri, cum alia opinione acceperit.

5 Constitutio Tanta, 15.

6 Julianus died between 170 and 180; Ulpianus lived from about 170 till 223. See J.E. SPRUIT, *Enchiridium*, 3rd ed., Deventer 1992, pp 305-306.

7 M. KASER, *Das römische Privatrecht*, vol. I, Munich 1971, p 415.

8 KASER I, p 414.

9 KASER I, p 414.

hardly less than quiritarian ownership, namely bonitarian ownership.¹⁰ It enabled the buyer to usucapt the land within two years.¹¹

In Justinianian law *traditio* had become the sole form of transfer: its scope was extended to cover the *res Mancipi* of classical Roman law. By this time *mancipatio* itself had fallen into disuse.¹² As the classical texts were to receive force of law, they had to be updated to reflect the modern Roman law of Justinian's time. Accordingly the word *traditio* was interpolated for *mancipatio*. As a result, texts originally written specially for the abstract *mancipatio* could easily give the impression of *traditio* being abstract. Moreover, Justinian's jurists failed to make clear whether or not the transfer of ownership should be regarded as abstract or causal.

Since Justinian's order to interpolate *traditio* for *mancipatio* was published in his *Code*¹³ it was known to the glossators and later generations that some passages containing the word *traditio* might be corrupt. Yet, it was unknown exactly which texts had been interpolated. At the end of the 19th century Otto Lenel suggested that the first example in Jul. D. 41,1,36, a transfer of land, might originally have referred to *mancipatio* rather than *traditio*.¹⁴ I doubt that there is any compelling reason to accept this interpolation. An argument in favour of the interpolation is that *traditio* of Italic land did not pass ownership to the buyer and merely gave him an *actio Publiciana* and the *exceptio rei venditae ac traditae* (thus bonitarian ownership), and the text does not speak of usucapion.¹⁵ The text seems to treat the outright transfer of quiritarian ownership, but this is not certain. What is more, the example may refer to a *traditio* of provincial land. A stronger argument against interpolation is the beginning of the second example, or rather the connection between the two examples (*nam et si...*). Julian adstructures the validity of the transfer of land by pointing out that also in the case of the coins ownership passes. However, it would be unlogical to use an instance of *traditio* as an argument for the validity of *mancipatio*. So, accepting an interpolation of *traditio* for *mancipatio* would take away the logical connection between the two examples.

Anyhow, we will probably never be sure about the exact meaning of Jul. D. 41,1,36. I should stress that the correct interpretation of the famous antinomy and

¹⁰ KASER I, p 416.

¹¹ KASER I, p 423.

¹² M. KASER, *Das römische Privatrecht*, vol. II, Munich 1975, p 282.

¹³ C. 7,31,1,5.

¹⁴ See O. LENEL, 'Quellenforschungen in den Edictcommentaren', ZSS Rom, vol. 3 (1882), pp 179-80. Yet, he makes clear that there is no certainty. However, the interpolation is accepted without any expression of doubt by, among others, J.C. VAN OVEN, *Praeadvies over causa en levering*, The Hague 1924, p 29, fn. 1; A. EHRHARDT, *Iusta causa traditionis*, Berlin/Leipzig 1930, p 16, fn. 21; KASER I, p 417, fn. 41. The interpolation has been doubted by, among others, Rudolf Hoening in his book *Die Übereinstimmung Julians mit Ulpian in der Beurteilung des Dissensus in Causa traditionis*, Leipzig/Vienna 1913, esp. pp 14-17.

¹⁵ See for this argument: VAN OVEN, *Praeadvies*, pp 29-30.

the question whether *traditio* was causal, is of no interest to us here. The following survey will examine the influence of these confusing texts in legal history from the time of the glossators.

2.3 *Three different theories*

From the time of the glossators the requirement of *iusta causa* has been explained in many different ways. The explanations tend to vary from jurist to jurist, and even within the writings of one and the same jurist inconsistent explanations may be found, so that the jurist in question seems to hover between two different lines of thought. A transfer theory was created only by Savigny and his pupils in the beginning of the 19th century. The learned law of the Middle Ages, humanists and later generations of jurists did not bother to create any transfer theory.

Still, to analyse their statements I will make use of three main types of transfer system as a reference point. I will call these transfer theories the *causa vera* theory, the *animus dominii transferendi* theory and the abstract theory. It should be noted, however, that there is no proof that any of these systems has ever been in existence before the 19th century.

The *causa vera* theory requires a valid legal ground. When, for instance, a thing is being transferred on the basis of a contract of sale whereas in reality the contract has never existed, ownership does not pass. Such a contract, which exists only in the minds of the parties, is often called a putative contract, or a putative legal ground (*causa putativa*) in contrast with a valid or true legal ground (*causa vera*). Similarly, ownership cannot pass under a void contract.

According to the *animus dominii transferendi* theory, or short the *animus* theory, ownership may pass even though the contract is void or merely putative, provided there is genuine consensus between the parties that ownership should pass. A contract of sale, to take an example, is not entirely unimportant, as it is an indication that the parties intend to transfer ownership. Yet, the essential requirement is the parties' will to transfer ownership. And this will can be present even if the contract is void or merely putative.

Now, a contract may be void for various reasons, illegality, for example, or a defect of will such as fraud (*dolus*). In some of these instances the voidness of the contract does not entail that there is no mutual will to transfer ownership. Where a contract is void for illegality the parties' will to transfer ownership will normally not be affected by the contract being illegal. On the other hand, where there is a defect of will there is no true consensus between the parties that ownership should pass. As we shall see, within the group of jurists who hold that ownership may pass under a putative or invalid *causa* we can make a further distinction according to their opinion on the consequences of defects of will.

A true respect for the parties' will should involve acknowledging that a defect of will in the underlying contract affects both the contract and the transfer. If one of the contracting parties has entered into a sales contract under the influence of a

defect of will, the contract does not accord with his true will. Nor does the transfer of ownership made to execute the contract. I will call this transfer theory which respects the true will of the parties the *animus* theory. On the one hand, the theory recognizes that a putative or invalid *causa* suffices to transfer ownership, on the other hand, defects of will affect both the contract and the transfer.

To other jurists a transfer may be valid even if the underlying contract has been entered into under the influence of a defect of will. In their theory the transfer of ownership and thus the parties' will to transfer ownership is abstracted from any underlying *causa traditionis*. This theory is called the abstract theory. It is the theory which has been introduced into German law by Savigny and his followers.

3 The *iusta causa traditionis* before Savigny

3.1 The glossators and commentators¹⁶

3.1.1 *Causa putativa*

In a gloss on D. 41,1,31, pr. (Paulus' remark on the *iusta causa* requirement), Rogerius (?-1170?)¹⁷ writes that the *iusta causa* is needed only as an indication of the transferor's will to transfer. "This is said [i.e. that a *iusta causa* is required] so as to facilitate proving that the person who has transferred possession had the will to transfer ownership, but not in order that ownership will not pass whenever the *traditio* is not preceded by a *iusta causa*, as when you pay, wrongly believing you are obliged to."¹⁸ This opinion necessarily entails that *iusta causa* is no longer required for a valid transfer, as long as the will to transfer and accept ownership is plain. Yet, Rogerius does not expressly draw this conclusion.

Martinus Gosia (?-1150s?)¹⁹ and Accursius (among 1182/85-1260/63)²⁰ both emphasize the importance of the transferor's will to transfer.²¹ Martinus Gosia, and in

16 See in general: J.G. FUCHS, *Iusta causa traditionis in der Romanistischen Wissenschaft*, Basel 1952 and J.H. DONDORP & E.J.H. SCHRAGE, *Levering krachtens geldige titel, enige grepen uit de geschiedenis van de vereisten voor eigendomsoverdracht*, Amsterdam 1991. See for the influence of fraud on the transfer of ownership: J.E. SCHOLTENS, 'Justa causa traditionis and contracts induced by fraud', SALJ vol. 74 (1957), p 280 et seq. I will confine myself to only a small number of jurists.

17 Hermann LANGE, 'Römisches Recht im Mittelalter', vol. 1, *Die Glossatoren*, Munich 1997, pp 192-94.

18 Gloss *propter quam traditio sequeretur* on Paul. D. 41,1,31, pr., in G. DOLEZALEK, 'Der Glossenapparat des Martinus Gosia zum Digestum Novum', *ZSS Rom* vol. 84 (1967), pp 245-349, at p 304: 'Hoc ideo dicit, quoad eum, qui tradidit dominium transferre volisse facilius probari possit, non autem ideo quod dominium non transferatur quandoque, quamquam tradendi causa iusta non precesserit, veluti si te obligatum putans indebitum solueris'.

19 LANGE, *Die Glossatoren*, pp 170-71.

20 LANGE, *Die Glossatoren*, pp 335-337.

21 DONDORP & SCHRAGE, pp 47-48.

his footsteps Accursius, try to reconcile the Julianus/Ulpianus antinomy by distinguishing two cases, a technique often used by the glossators to solve contradictions.²² After all, if Julianus and Ulpianus are talking of different cases, their solutions need not be conflicting. The two glossators consider the possibility that in Jul. D. 41,1,36 ownership passes because in this example the transferor does not care on which legal ground ownership passes to the acquirer, whereas in Ulp. D. 12,1,18 ownership does not pass because here the transferor insists on making a gift and consequently does not want ownership to pass on another legal ground.²³ In short, ownership may in certain instances pass without there being a valid underlying contract, namely where despite disagreement about the legal ground there is agreement that ownership should pass.

To defend his point of view that a putative *causa* sufficed to pass ownership Accursius referred to the *condictio indebiti* of Roman law, an argument used frequently in the following centuries and which in the 19th century was to be used by Savigny to defend his abstract transfer system. If a thing had been transferred without *causa* a *condictio indebiti* was available to claim the thing back, a personal action ex unjustified enrichment. According to Accursius this can be explained only when a transfer without *causa* is valid. For, if the transfer were invalid the transferor would not need a *condictio* as he still had ownership and thus an action of revindication. In order to prevent any contradiction with Paulus' requirement of *iusta causa* Accursius had to say that *iusta causa* does not necessarily mean a *valid causa* and that a putative *causa* sufficed to meet the requirement.²⁴ As a result, for a valid transfer of ownership the *Glossa Ordinaria* required agreement between the transferor and transferee that ownership should pass, and in addition a transfer of possession.²⁵

²² Martinus Gosia and Accursius also make other distinctions to explain the antinomy: see DONDORP & SCHRAGE, pp 47-48; FUCHS, pp 39-41.

²³ MARTINUS GOSIA, gloss on Jul. D. 41,1,36 (ed. Dolezalek, ZSS Rom vol. 84 (1967)), p 308: '...Vel hic voluit dominium transferri omnino quacumque causa obligationis, sive ea qua putavit sive alis...'. (...Or, here [i.e. in Julianus' example] he wanted to transfer ownership anyway on the basis of whichever obligation, either the obligation he had in mind or any other...).

ACCURSIUS, gloss *non fieri* on Ulp. D. 12,1,18, pr.: '...Hic erat certa causa exvolebat dominium transferre, scilicet donatio, nec ex alia causa volebat rem ad alium pertinere; ibi etiam aliter volebat fieri rem accipientis'. (Here [i.e. in Ulpianus' example] he wanted to transfer ownership on the basis of a certain legal ground, namely a gift, and he objected to the thing belonging to the other party on another legal ground. There [i.e. in Julianus' example] he accepted the thing to become the acquirer's also on any other legal ground.).

²⁴ Gloss *iusta causa* on Paul. D. 41,1,31: '...vera vel putativa: alioquin si dicas ex putativa non transferri dominium, totus titulus de condictione indebiti obstaret; qui titulus habet locum, quando transfertur dominium alicuius rei ex putativa causa...'. (real or putative: otherwise if you say that ownership cannot be transferred on the basis of a putative legal ground, the entire title on the action ex unjustified enrichment would be contrary to this; this title is applied where ownership of a thing is transferred on the basis of a putative legal ground...).

²⁵ E. LANDSBERG, *Die Glosse des Accursius*, Leipzig 1883, p 106.

Many of the commentators, such as Jacques de Révigny (?-1296),²⁶ Bartolus de Saxoferrato²⁷ (1313-1357)²⁸ and Baldus de Ubaldis (1320/27-1400)²⁹ shared the glossators' views. Jacques de Révigny³⁰ and Baldus³¹ claim that it is not the contract which forms the basis of the passing of ownership but rather the owner's will to transfer.

We can therefore say that during the period of the glossators and commentators in principle a *causa putativa* or an invalid contract sufficed to let ownership pass.³²

3.1.2 Defects of will

The above makes clear that in the period of the glossators and commentators most jurists in principle did not insist on a valid legal ground. Yet, we cannot infer from these passages which of them followed the *animus* theory and which the abstract theory. To ascertain this we should do an extra test.

As I have said before, the sole difference between the *animus* theory and the abstract theory consists in their treatment of defects of will. In an abstract system the fact that one of the parties entered into the contract under the influence of a defect of will cannot automatically hamper the passing of ownership.³³ In the *animus* theory, on the other hand, such a defect prevents ownership from passing. So, in order to find authors who endorse the abstract theory rather than the *animus* theory we should focus on their opinion about the consequences a defect of will has on the passing of ownership. For the following reasons, however, such an enquiry is very difficult.

First, the modern sharp distinction between void and voidable has fully developed only in the late 18th³⁴ and 19th century. True, in Roman law, and accordingly, in the learned law after the rediscovery of the Digest, there were cases of nullity *ipso iure*, i.e. nullity working automatically and, on the other hand, cases in which nullity could be achieved only by judicial decision at the request of the person entitled to

26 H. COING (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 1 (Mittelalter), Munich 1973, p 281.

27 Comment on Afr. D. 12,1,41, Venice 1585, fo. 21, 3rd col.

28 J.L.J. VAN DE KAMP, *Bartolus de Saxoferrato*, 1313-1357, Amsterdam 1936, p 4 and 148; COING, *Handbuch*, vol. 1, p 269.

29 COING, *Handbuch*, vol. 1, p 269.

30 *Lectura super Codice*, lecture on C. 4,50,6, Paris 1519 (repr. Bologna 1967), fo. 205, 2nd col.

31 Comment on C. 4,50,6, Venice 1577, fo. 127, 4th col.-fo. 128, 1st col. (nrs 32-35); comment on C. 2,3,20, Venice 1577, fo. 114, 2nd and 3rd col.

32 There were, however, instances in which, according to some of these jurists, a *causa putativa* did not suffice. See DONDORP & SCHRAGE, pp 62-63 and FUCHS, p 42.

33 In some cases, though, it may be held that the act of transfer itself is also executed under the influence of the same defect of will (in modern German law this is called *Fehleridentität* (identity of defect), cf. *infra* § 7.2).

34 Although Pothier does not use the terms "void" and "voidable" he makes a clear distinction of the two cases. See: *Traité des obligations*, part 1, ch. 1, sect. 1, Art. 3; *Traité du contrat de vente*, part 5, ch. 2, Œuvres de Pothier, vol. 2, Paris 1848, p 13 et seq. and vol. 3, Paris 1847, p 139 et seq.

plead nullity.³⁵ Yet, void and voidable as legal concepts were created only in the 19th century by German legal science, by Savigny among others.³⁶ What is more, there was hardly any consensus among medieval jurists which defects of will entailed voidability and which voidness of the contract.

Secondly, to make things worse, there was no agreement about the legal consequences of voidability. Naturally, after the contract had been avoided, the transaction had to be undone. Where an object had been handed over, the thing had to be returned. The claim to have the transaction undone was often called *restitutio in integrum*. Yet, it is unclear whether it was a personal or a real action. Nor was it known whether or not *restitutio* had retroactive effect.

But only where avoidance has retroactive effect can examples of avoided contracts be used to demonstrate which of the three transfer systems was supported. If a jurist says that avoidance of the contract does not affect the passing of ownership this could be an indication that the jurist supported the abstract theory. However, it is also possible that in his view the passing of ownership is not affected because of the avoidance having no retroactive effect. For this reason we should use examples of avoidance only if we know that the jurist in question holds that avoidance has retroactive effect. I have not yet found any unequivocal instance.

As a result, to ascertain which transfer system the glossators and commentators and later generations of jurists adhered to we should examine cases where the contract is void rather than voidable. As for void contracts the best example is the *dolus causam dans contractui*. It indicates a form of fraud so serious that it has induced the victim to entering into the contract.³⁷ By many Italian glossators and commentators it was accepted that this kind of fraud rendered certain kinds of contract, namely the *contractus bonae fidei*³⁸ void *ab initio*, or void *ipso iure*, as it

35 KASER I, § 60; H. KANTOROWICZ, *Studies in the glossators of the Roman law*, Cambridge 1938, p 76.

36 See M. HARDER, *Die historische Entwicklung der Anfechtbarkeit von Willenserklärungen*, AcP 173 (1973), p 209 et seq. This creation was made possible by the development in the 18th and early 19th century of the concept of legal act. See Harder, p 216 et seq. See also H. HAMMEN, *Die Bedeutung Friedrich Carl v. Savignys für die allgemeinen dogmatischen Grundlagen des Deutschen Bürgerlichen Gesetzbuches*, Berlin 1983, p 123 et seq. Kantorowicz seems to suggest, however, that the distinction between void and voidable can already be found in Bulgarus' *De dolo summa*: see KANTOROWICZ, *Studies*, p 76.

37 It was distinguished from *dolus incidens*, a less severe form of fraud. Here it was assumed that without fraud the defrauded party would still have entered into the contract, though under conditions more favourable to him.

38 All consensual contracts such as sale belonged to this category.

was then called.³⁹ Yet, to be certain which transfer theory an individual jurist followed we have to check if he indeed acknowledges that fraud turns the contract void.⁴⁰

Applying this “*dolus test*” it turns out that a number of important glossators and commentators assert that in the case of *dolus causam dans contractui a contractus bonae fidei* is void but that it passes ownership nonetheless, if followed by *traditio*. Such a statement is an unequivocal indication for the abstract theory. The view is lucidly expressed by Rogerius in the following words: “If someone has been induced to sell as a result of fraud, the transfer of possession following the sale passes ownership to the acquirer, although the sale is void *ipso iure*.”⁴¹ Other advocates of this view I have found are Accursius,⁴² and the commentators Bartolus,⁴³ Baldus⁴⁴ and Jacques de Révigny.^{45 46} However, we should always bear in mind that these jurists were not yet thinking in general rules and abstract concepts intending to build

39 See for example AZO, *Lectura super Codicem*, on C. 2,20 and C. 2,54, ed. Paris 1577 (repr. Turin 1966), p 116 and 155; AZO, *Summa super Codicem*, de dolo malo rubrica, ed. Pavia 1506 (repr. Turin 1966), p 41.

40 *Metus* (duress) does not offer a good test because in Roman law there was controversy about the consequences of duress. According to Paulus (D. 4,2,21,5) a contract made under the influence of duress was nonetheless valid. The opposite view that such a contract is void can be found for example in Ulp. D. 50,17,116, pr. See A.S. HARTKAMP, *Der Zwang im römischen Privatrecht*, (thesis Amsterdam 1971) Amsterdam 1971, § 14 and 15 (pp 102-126).

41 Enodationes quaestionum super Codice: “Si enim quis, ut venderet, dolo fuerit inductus, licet ipso iure venditio non valeat, traditio tamen, que ex ea sequitur, dominium ad accipientem transfert”. Published in KANTOROWICZ, *Studies*, p 289.

42 Gloss *locum habere* on Ulp. D. 4,3,7, pr.: “Item nonne rei vindicatio locum habet cum dolus dedit causam contractui? Respondeo non. quia ex inutili contractu transit dominium...”. (Moreover, is not a revindication available where the contract has been induced by fraud? My answer is no, because ownership passes on the basis of an ineffective contract...).

43 Comment on C. 2,4,19, Venice 1585, fo. 55, 4th col.-fo. 56, 2nd col.

44 Comment on C. 2,4,19, Venice 1577, fo. 129, 1st col.: “Respondeo, quod in bonae fidei contractibus [dolus causam dans contractui] excludit qualitatem substantialem: quae inest a propria & speciali natura contractus, & ideo vitiat...sed quando ratio ordinata ad impediendam obligationem, & non dominium impediendum, ibi impeditur obligatio, sed non dominium...nam obligatio non potest esse sine vero & efficaci contractu, sed dominium potest transferri ex causa putativa: unde non requirit efficaciam precedentis contractus. Fundatur enim solum in quadam sua immediata causa, scilicet in consensu transferendi dominii, & non in robore contractus,...”. (My answer is that in the case of contracts *bonae fidei* [*dolus causam dans contractui*] excludes an essential characteristic which originates in the proper and special nature of the contract, and for that reason it vitiates the contract... However, as the reason is to impede the obligation, and not the [passing of] ownership, the obligation is impeded, but not [the passing of] ownership... For an obligation cannot exist without a true and effective contract; ownership, on the other hand, may pass on the basis of a putative legal ground: hence the validity of the preceding contract is not required. [The transfer of] (O)wnership namely is based merely on its immediate cause, which is the agreement about the transfer of ownership, rather than the validity of the contract...).

45 *Lectura super Codice*, on C. 4,44,2, Paris 1519 (repr. Bologna 1967), fo. 201, col. 4.

46 Other commentators sharing this view are mentioned in: SCHOLTENS, ‘Justa causa traditionis and contracts induced by fraud’, *SALJ* vol. 74 (1959), p 284, fn. 18.

a flawless and consistent legal system: they have not been trying to design a general theory about the transfer of (certain kinds of) property. Consequently, even though in the case of fraud the transfer is clearly abstract we cannot conclude that the abstract theory applied to other defects in the *causa* as well. We should not be surprised to find in the writings of the very same jurists statements that are inconsistent with the abstract system.

Martinus Gosia stresses that if one of the parties has transferred ownership under the influence of a mistake, the transfer is void if as a result of the mistake there is no genuine will to transfer.⁴⁷ Bulgarus' (before 1100?-?)⁴⁸ account on fraud does not fit the abstract transfer theory. In a *summula* on the subject he claims the following: "Although the transfer of possession has passed ownership to the buyer, justice, which is done when the judgment about the fraud is passed, discovers the transfer of possession to have been, as it were, void."⁴⁹ The first subordinate clause (Although... to the buyer/*licet... transtulit*) may give the impression of Bulgarus adhering to an abstract transfer system. Nonetheless, I think that Bulgarus regards the contract as voidable rather than void. It would explain why in his opinion ownership initially passes to the buyer.⁵⁰ It then reverts in the seller upon avoidance of the contract.

Bartolus agrees with Martinus Gosia that if mistake has taken away the genuine will to transfer ownership the transfer is void.⁵¹ In Baldus' comment on C. 4,44,2 we can read that when a contract of sale is avoided because of *laesio enormis*⁵² the avoidance annuls a right of *pignus* (pledge) or *hypotheca* (hypothec) granted by the buyer to a third party prior to the avoidance.⁵³ Baldus' explanation

⁴⁷ Martinus' gloss on Jul. D. 41,1,36 as edited by Dolezalek in ZSS Rom vol. 84 at p 308). Cf. Dondorp and Schrage, pp 46-47.

⁴⁸ LANGE, *Die Glossatoren*, pp 162-163.

⁴⁹ In his *De dolo summula*: 'Cum enim nulla sit venditio, cui dolus causam dederit,... Cum ergo venditio suo effectu destituitur, sequens traditio rescinditur, que, licet dominium in eumentem transtulit, equitate tamen illa, que expeditur, cum iudicium de dolo ventilatur, quasi nulla fuisse detegitur'. Published in: Kantorowicz, *Studies*, p 243. (For, as a sale induced by fraud is void,... As then the sale is without any effect, the subsequent transfer of possession is rescinded. Although the transfer of possession has passed ownership to the buyer, justice, which is done when the judgment about the fraud is passed, discovers the transfer of possession to have been, as it were, void.)

⁵⁰ If, on the other hand, Bulgarus really had in mind voidness *ab initio* his statement that ownership passes would accord only with an abstract transfer theory. Still, in that case the last sentence saying that the *traditio* is deemed to be void would be discordant. In an abstract system the voidness of the contract would never be able to affect the passing of possession and/or ownership as well.

⁵¹ Bartolus' comment on Afr. D. 12,1,41, Venice 1585, fo. 21, 3rd col.

⁵² Lit.: severe impairment. It indicates the situation in which the price of a thing sold is less than half its market value at the time of the sale. It developed in post-classical Roman law. See Kaser II, § 264 III.

⁵³ Baldus on C. 4,44,2, Venice 1577, fo. 118, co. 4.

strongly suggests that to his mind the third party's real right lapses because the buyer's right of ownership reverts to the seller with retroactive effect. Undoubtedly, it is impossible to reconcile such a statement with an abstract transfer theory.⁵⁴ It is clearly in contradiction with his own statement about the consequences of fraud.⁵⁵

Another indication for a non-abstract view is to be found in Baldus' passage on fraud. It discloses that as to fraud the so-called *Ultramontani*, the commentators from the South of France, do not agree with Baldus' view. They do accept that in the case of *dolus causam dans contractui* ownership may pass to the acquirer. Yet from the transfer being valid they draw the conclusion that the contract affected by fraud should be considered valid as well because a void legal ground cannot have legal effects.⁵⁶ Clearly this reasoning is consistent only with a causal transfer theory.

When focusing on their views about the meaning of *iusta causa traditionis* it seems as if the glossators and the commentators we have examined all adhere to one and the same transfer theory; for they all agree that a putative legal ground suffices to transfer ownership. Still, the *dolus* test demonstrates that there is no such unanimity. It shows that in this period of legal history elements of all three theories, the *animus* theory, the abstract and the causal theory can be found, at least in an undeveloped form.

3.2 *Duarenus, Donellus and Cuiacius*

As did some of the glossators and commentators Donellus (Doneau, 1527-1591), who was influenced considerably by the *Glossa Ordinaria*,⁵⁷ emphasized the vital impor-

⁵⁴ See Baldus on C. 4,44,2, Venice 1577, fo. 118, col. 4: "...resoluto iure pignorantis resolvitur ius recipientis", (when the pledgor's right has been rescinded, the acquirer's right [i.e. the third party's right of security] is rescinded,...). Baldus' explanation reads as follows: "...quia res non erat pignorantis iure perpetuo, & irrevocabili, sed erat revocationi subiecta. Et ideo finito iure creditoris, quod non erat perpetuum, nec efficaciter radicatum, finitur ius acceptoris,...". (...because the thing did not belong to the pledgor in perpetuity and irrevocably but was subjected to revocation. And for that reason, when the creditor's right [i.e. the buyer's right] has been ended, which was not perpetual and had not rooted effectively, the acquirer's right [i.e. the third party's right] ends...). Although Baldus does not use the term 'retroactivity' nor states that the security right is deemed to have been granted by a non-owner, which would be a clear indication for ownership reverting to the seller retroactively, the above passage is hard to explain in a different sense. If this is right, the passage accords only with a causal system, or, as the passage is about a defect of will, the *animus* theory.

⁵⁵ See fn. 44 *supra*.

⁵⁶ See BALDUS, on C. 2,4,19, Venice 1577, fo. 128, 4th col., nr. 9, and VINNIUS, *Selectarum iuris quaestionum libri duo*, I, XII, Rotterdam 1685, pp 64-65; BACHOVEN, in M. Wesenbeck, *Commentarii in Pandectas juris civilis et Codicem Justinianum olim dicti paratitla* (with notes and observations by Bachoven), Leiden 1649, p 137 (Wesenbeck's comment on D. 4,3 [De dolo malo]), fn. 1. Regrettably the *Ultramontani* are merely referred to as a group; no individual names are mentioned.

⁵⁷ LANDSBERG, *Die Glosse des Accursius*, p 111, fn. 3. The *Glossa Ordinaria* has had an enormous influence on jurists of later centuries.

tance of the *animus domini transferendi*, the will to transfer ownership. He wrote that the *causa* merely confirms and shows the transferor's will to make a transfer.⁵⁸ From this Donellus draws the following conclusion: if the *causa* is merely an indication for the transferor's will to transfer ownership, a *causa* is not essential for the transfer, provided the transferor's will to transfer can somehow be ascertained.⁵⁹ Consequently, only two requirements are vital for a transfer of ownership: transfer of possession and the transferor's and acquirer's will to transfer ownership.⁶⁰ Explaining this Donellus recalls that Accursius used the example of an undue payment to prove that the *causa* may be either real or putative, and he adopts the reasoning.⁶¹

In itself the above passage does not yet determine whether Donellus adheres to the *animus* theory or to the abstract theory. Both theories emphasize the importance of the parties' will to make a transfer. To ascertain which transfer theory Donellus advocates we should examine his treatment of defects of will, as we have done before with the glossators and commentators. We should find out whether in his view ownership may pass under a contract that is void for a defect of will. Unfortunately this is quite difficult to ascertain.

In a paragraph on the general requirements for the validity of contracts Donellus writes that *error* (mistake), *metus* (duress) and *dolus malus* (fraud) render a contract void because they take away the consensus which is a vital requirement for the validity of any contract.⁶² From his treatment of *metus* we can infer, although with some difficulty, that where the owner of a thing makes a transfer under the influence

58 Cf. Rogerius in fn. 18 *supra*.

59 Commentarii de iure civili, 4,16, Hannover 1612 (ed. by Scipio Gentilis), p 141.

60 Ibidem.

61 Ibidem.

62 Commentarii de iure civili, 12,6 and 7, Opera omnia, vol. 3, Lucca 1763, p 471 et seq., especially pp 481-482. On p 483 he refers to the adage *coactus volui, tamen volui* (he consented under duress, still he consented) based on Paul. D. 4,2,21,5. Yet, this does not change his view that in the case of a contract *bonae fidei* the consent and thus the contract is void. He uses the reference only to explain why a contract *stricti iuris*, such as a *stipulatio*, made under the influence of duress is not void *ipso iure*.

of duress ownership passes to the acquirer despite the contract being void.⁶³ As to *dolus malus* Donellus is even less clear. Yet, notwithstanding the lack of lucid statements about the passing of ownership and the use of indefinite terms we can say that also in the case of fraud ownership passes.⁶⁴

From these passages it can be inferred that Donellus advocated what was later to be called the abstract transfer theory. In § 4.1 we will see that Savigny in his turn refers to Donellus to support the abstract theory. He was influenced substantially by Donellus' thoughts.⁶⁵ It is known that he admired Donellus and read his works thoroughly.

However, we cannot say that Donellus' view evidently prevailed in the period of the humanists. His master, Duarenus, is ambiguous on the matter, and Cuiacius clearly disagrees with him.

⁶³ Commentarii de iure civili, 15,39,22-26, Opera omnia, vol. 4, Lucca 1764, pp 373-375. For instance p 373: "Nam dominus qui rem suam tradidit alienandi causa, dominium amisit translatum in alienum... Nec obstat, quod metu coactus dominus...id fecit. Nam ut dixi initio, etsi nisi cogere nollit, tamen coactus voluit". (For the owner who transfers the possession of his thing in order to alienate it, passes ownership to the other party. And it is no obstacle that the owner did this because of duress. After all, as I have said in the beginning, although without the duress he would not have intended, because of it he nonetheless did intend). p 375: "Res ablata sic restituitur, si ut tradita est, ita veteri domino retradatur... Scilicet ut traditione nova recipiat vetus dominus dominium & possessionem, quae per metum amiserat. Traditione enim dominia transferuntur" (A thing taken away is restituted if it is retransferred to the former owner in the state in which it was transferred... Undoubtedly, in order that through a new *traditio* the former owner regains the ownership and possession which he transferred because of duress. After all, ownership is transferred by *traditio*.)

I have translated the verb *amittere* with 'to pass [ownership]' because from his chapter on *metus* it appears that Donellus uses the verb to indicate a transfer of ownership or possession: he uses *alienare* and *amittere* as synonyms. From the Middle Ages the word *amittere* is used also to denote a transfer, a meaning that cannot be found in classical Latin. See O. PRINZ (ed.), *Mittelateinisches Wörterbuch, bis zum ausgehenden 13. Jahrhundert*, vol. 1, Munich 1967, col. 570.

However, on p 373 Donellus oddly relies on the adage *coactus volui, tamen volui* to explain why ownership passes. I assume that, like in 12,7 (see previous fn.), Donellus does not mean that the contract is valid despite *metus*, as this would not accord with his lengthy and clear treatment of the general requirements for the validity of contracts (12,7).

⁶⁴ Commentarii de iure civili, 15,41, Opera omnia, vol. 4, p 391 et seq. Here evidence is indirect only. In many passages, e.g. on pp 391-392, pp 428-429, Donellus speaks about an owner who has transferred his thing under the influence of duress. He does not add whether the transfer is valid, thus conveying the impression it is.

⁶⁵ See for example Chr. BERGFELD, SAVIGNY und DONELLUS, H. Coing (ed.), *Vorträge zum 200. Geburtstag von F. C. von Savigny*, Ius commune, Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, vol. 8, Frankfurt a/M 1979, p 24 et seq., especially p 25, fn. 8.

Felgenträger notes that often through Savigny's words Donellus is speaking directly to us. See: *Friedrich Carl v. Savignys Einfluß auf die Übereignungslehre*, Leipzig 1927, p 38. Yet, Savigny may also have been influenced directly by Accursius' *Glossa Ordinaria*, as in the years in which he developed the abstract transfer system he was intensively studying Accursius' Gloss for his book *Geschichte des römischen Rechts im Mittelalter* (see Felgenträger, p 38).

Duarenus (Duaren, 1509-1559) gives an inconsistent analysis of the matter. In his treatment of the *condictio indebiti* he states that if someone pays money or transfers a thing⁶⁶ without being obliged to, ownership passes to the recipient. The payor is given a personal action for the return of the thing.⁶⁷ Furthermore Duarenus writes that *dolus causam dans contractui* renders a contract of sale void *ipso iure*,⁶⁸ but that ownership nonetheless passes to the recipient.⁶⁹ The defrauded party may be given a remedy, *restitutio in integrum*, to claim the thing back. These passages seem to be an unequivocal confirmation of the abstract transfer theory. However, in the treatment on acquisition of ownership Duarenus contradicts himself saying that when as a result of mistake the owner transfers an asset which he did not intend to transfer, ownership does not pass. This passage is incompatible with an abstract theory.

Cuiacius (Cujas, 1522-1590), one of Donellus' most important contemporaries, undoubtedly disagreed with Donellus' view. In a very lucid exposition he asserted that for a transfer of ownership the underlying contract had to be valid.⁷⁰

⁶⁶ Duarenus uses the term payment, but note that the term comprises a money payment as well as a transfer of other kinds of property.

⁶⁷ F. DUARENUS, *De condictione indebiti*, cap. I, Opera omnia, vol. 3, Lucca 1766, p 319.

⁶⁸ De dolo malo, cap. I, Opera omnia, vol. 1, Lucca 1765, p 146.

⁶⁹ De in integrum restitutionibus, cap. I, Opera omnia, vol. 1, p 135.

⁷⁰ CUIACIUS, Commentarius ad titulos quosdam digestorum, comment on the title *de dolo malo*, Opera omnia, Napels 1722, vol. 1, p 975b: 'Restat igitur, dolo ab emptore adhibito, ut ipso iure venditio nulla sit. Ubi autem ob eam causam nulla venditio est, quod dolo emptoris circumscriptus venditor servum vendiderit, & nulla manumissio est quasi facta a non domino: ex nullo enim contractu dominium non transfertur, licet possessio transferatur,..'. (So, the conclusion is that if fraud is committed by the buyer the sale is *ipso iure* void. Furthermore, where for this reason the sale is void, because the seller defrauded by the buyer sells a slave, the act of freeing the slave is also void, as if it were done by a non-owner: after all, ownership cannot be transferred on the basis of a void contract, even if possession is transferred,...).

CUIACIUS, In libros IV priores Codicis Justiniani, on C. 4,50, Opera omnia, Napels 1722, vol. 10, p 1017: '...: falsum est enim, quod tentat Accursius ex inutili contractu dominium adquiri per traditionem: nam si inutilis est contractus, ergo & nuda traditio'. (...: namely, Accursius' view that by means of *traditio* ownership may be acquired on the basis of a void contract is wrong: for when the contract is void, the mere *traditio* is void as well.).

3.3 *The Roman-Dutch law*

Legal historians usually call the transfer system of Roman-Dutch law (17th-18th century) abstract.⁷¹ Yet, to my mind this qualification is misleading. It is the result of applying the modern distinction between causal and abstract transfer systems to a period in which the distinction had not yet developed. In such a classification there is no room for midway solutions. As a result a transfer system that suffices itself with a putative legal ground, a system in between the causal and the abstract system, is often regarded as an abstract system thus obscuring the difference between the *animus* theory and the true abstract system as applied in modern German law.

Many statements by Roman-Dutch jurists can be found which do not fit into a causal transfer system. From this many legal historians seem to draw the conclusion that because the transfer system is not causal it must be abstract, wrongly making the impression that a third system cannot exist. In fact, most of the passages quoted to demonstrate that the Roman-Dutch transfer system was abstract are no proof at all for an abstract system in the modern sense of the word, that is, an abstract system as applied in German law. On the contrary, several statements can be found that fit into the *animus* theory better than into an abstract theory.

Paulus Voet,⁷² for instance, states that the *causa traditionis* need not be valid and that it may even be putative, provided the parties both intend ownership to pass.⁷³ It is a statement that in itself fits perfectly into the *animus* theory.

However, to find out whether certain Roman-Dutch jurists may be regarded as adhering to the *animus* theory or rather to the abstract theory, we should scrutinize what they write about the consequences of defects of will, as we have done in the analysis of the glossators, commentators and humanists. Here we will encounter the

⁷¹ See E.M. MEIJERS, 'Levering en rechtstitel', *Verzamelde privaatrechtelijke opstellen*, vol. 2, Leiden 1955, p 80 et seq.; L.J. VAN APELDOORN, 'Levering en titel van eigendomsovergang in het oude Nederlandsche recht', *WPNR* 1929, pp 711-714 and 723-725; A.S. DE BLÉCOURT & H.F.W.D. FISCHER, *Kort begrip van het oud-vaderlands recht*, 7th ed., Groningen 1959, p 153; C.G. VAN DER MERWE, *Sakereg*, 2nd ed., Durban 1989, pp 307-308; C.G. VAN DER MERWE & M.J. DE WAAL, *The law of things and servitudes*, Durban 1993, p 152; D.L. CAREY MILLER, *Transfer of ownership*, in R. Feenstra and R. Zimmermann (eds), *Das römisch-holländische Recht, Fortschritte des Zivilrechts im 17. und 18. Jahrhundert*, Berlin 1992, p 521 et seq., at pp 537-539, and CAREY MILLER, *The acquisition and protection of ownership*, Cape Town/ Wetton/ Johannesburg 1986, pp 125-127; DE VOS, UCT Lecture Notes, p 60, as referred to in Carey Miller, *The acquisition*, p 127.

⁷² Paulus VOET, *In quatuor libros Institutionum Imperialium Commentarius*, vol. 1, comment on Inst. 2,1,41-43, nr. 3, Utrecht 1668, p 466: 'Traditio enim sine causa ad effectum domini transferendi pro nulla habetur... Nec interest causa sit vera, modo habilis & justa, an putativa, cum & haec ad dominium transferendum sufficiat'. (For *traditio* without a legal ground aiming at the transfer of ownership is held ineffective... It is also irrelevant whether the legal ground be valid, merely appropriate and *iusta*, or putative, since the latter also suffices to transfer ownership.)

⁷³ Other, less important authors holding the same opinion are mentioned by Van Apeldoorn at p 724.

same difficulties: there is no clear distinction between void and voidable, and there was hardly any consensus among Roman-Dutch jurists which defects of will entailed voidability and which ones voidness of the contract.⁷⁴ In addition, it was not settled whether avoidance had retroactive effect. Of course, the party who had acted under the influence of a defect of will could claim that the transaction should be undone. The claim was called *restitutio in integrum* or *relief*. However, there was controversy about whether it was a personal or a real action.⁷⁵

In Roman-Dutch law it was generally accepted that *dolus causam dans contractui* rendered a *contractus bonae fidei* void *ipso iure*. Still, for every individual jurist we need to check if he indeed follows this line. I have found four jurists who expressly say that *dolus causam dans contractui* indeed makes a contract *bonae fidei* void *ipso iure* and who, in addition, draw the conclusion that as a consequence the transfer of ownership based on the contract is void as well. These jurists are Huber,⁷⁶ Bronchorst,⁷⁷ Wissenbach⁷⁸ and Johannes Voet. It is lucidly brought forward by Johannes Voet saying: “If a *contractus bonae fidei* has been made as a result of fraud, it is *ipso iure* void, so that *restitutio* is not necessary... And since something which is void cannot have any consequences, it follows that neither ownership nor any other right can be held to have passed to the buyer on the basis of the *traditio* following the transaction. For, never a bare *traditio* transfers ownership; it does so only if the *traditio* has been preceded by a sale or another legal ground *which is valid*.”⁷⁹ Moreover, their views accord with a decision of the Court of Holland, Zeeland and Friesland affirmed by the

⁷⁴ Cf. L. WINKEL, *Die Irrtumslehre*, in Feenstra and Zimmermann (eds), *Das römisch-holländische Recht*, Fortschritte des Zivilrechts im 17. und 18. Jahrhundert, Berlin 1992, pp 225-244.

⁷⁵ According to Vinnius, who describes the controversy, *restitutio* was a personal action. See: A. VINNIUS, *Selectarum iuris quaestionum libri duo*, I,XI, Rotterdam 1685.

⁷⁶ U. HUBER, *Praelectionum juris civilis tomi tres*, Louvain 1766, on the title *de dolo malo* (D. 4,3), vol. 2, pp 169-170: “Ni per textus legum sit, vereor, ut ratio juris cogat, ei quod nullum, quod nihil est, τῶ μὴ ὄντι, tam notabilem effectum tribuere, qualis est dominii translatio”. (Unless it is on the basis of a legal text, I fear that the legal system does not require one to attribute to something which is void, which is nothing, the non-existing, so notable an effect as the transfer of ownership). Note that τῶ should be τῷ.

⁷⁷ E. BRONCHORST, *Enantiophanon centuriae quatuor*, cent. I, assertio 57, Leiden 1598, pp 73-75: ‘Ex nullo enim et inutili contractu dominium non transfertur’. (For, on the basis of a void and ineffective contract ownership does not pass).

⁷⁸ J.J. WISSENBACH, *Excercitationum ad quinquaginta libros pandectarum partes duae*, Lib. IV, disputatio XIII (nr. 34), Franeker 1661, pp 107-108: “Dolus dans causam contractui bonae fidei, hunc vitiat ipso iure, ita ut ex eo nulla detur actio... Ex nullo enim contractu non transfertur dominium”. (Fraud which has induced a bona fide contract annuls the contract *ipso iure*, so that it [i.e. the contract] does not give any action... For ownership cannot be transferred on the basis of a void contract).

⁷⁹ *Commentarius ad Pandectas*, vol. 1, comment on D. 4,3: “Si dolus causam dederit contractui bonae fidei, is ipso iure nullus est, ut restitutione opus non sit... Cumque id quod nullum est, nullum possit effectum producere; consequens est, ut neque dominium neque jus ullum aliud ex subsecuta ad negotium nullum traditione possit videri in emtorem translatum: nunquam enim nuda traditio dominium transfert: sed ita, si venditio aut alia justa causa *eaque valida* praecesserit”. [italics mine]

Supreme Court of Holland, Zeeland and Friesland.⁸⁰ The texts clearly do not fit into an abstract transfer system. When assuming that the Roman-Dutch transfer system was abstract, as do most legal historians, these passages can be explained only by calling them exceptions to the general rule. On the other hand, when distinguishing three transfer systems rather than two, it appears that the passages about fraud are not at all inconsistent with the statements that ownership may pass under a putative contract. When explaining the Roman-Dutch transfer system as adhering to the *animus* theory both groups of statements are consistent without the need of describing the fraud cases as exceptions. For, fraud, a defect of will, eliminates one of the parties' will to transfer ownership, which in the *animus* theory is fatal to a valid transfer.

On the other hand, there are also jurists who evidently adhere to the abstract transfer theory, at least as regards fraud. In a text about fraud Vinnius says that *dolus causam dans contractui* renders the contract void but that the voidness of the contract does not affect the passing of ownership.⁸¹ Here Vinnius refers to the controversy between the *Ultramontani* and the *Citramontani*, the Italian commentators, about the consequences of *dolus causam dans contractui*, and joins Baldus' view on fraud (i.e. the abstract transfer). Also Noodt adheres to the abstract transfer system.⁸²

⁸⁰ The undated decision has been reported in C. NEOSTADIUS, *Utriusque Hollandiae, Zelandiae, Frisiaeque curiae decisiones*, in the chapter *decisiones Supremi Senatus Hollandiae, Zelandiae et Frisiae*, decisio V, The Hague 1667, p 137. The core of both courts' reasoning has been summarized in the heading: 'Emptionem, cui causam dolus dedit, adeo, ipso jure, nullam esse, ut venditori, traditae rei vindicatio, etiam adversus tertium possessorem, competat'. (That the contract of sale, which has been entered into as a result of fraud, is void *ipso iure*, so that the seller is given an action to revindicate the thing of which possession has been transferred, even against a third party possessor). Johannes Voet refers to the case approving of the judgment: see *Commentarius ad Pandectas*, IV,III,3.

⁸¹ VINNIUS, *Selectarum iuris quaestionum libri duo*, I, XII.

⁸² G. NOODT, 'De forma emendandi doli mali', *Opera omnia*, Leiden 1767, vol. 1. In chapter 3 et seq. Noodt extensively describes that fraud renders *contractus bonae fidei* void. In chapter 15, p 317 he mentions the consequences for the transfer of ownership: 'Altera difficultas est, quod ex contractu in quo apparet dolus malus, dominium traditione transferri potest: cum ex regula juris nuda traditio numquam transferat dominium: nisi venditio aut alia justa causa praecedat, propter quam traditio sequatur... Sed nec objectio facit moram iudicio meo. non enim vult illa regula, ut dominium traditione mutetur, utique praecedere causam veram ac jure firmam: sed praecedere venditionem, aut similem causam, ob quam dominium transferri solet: sive re vera praecedat, sive praecedere tradentis spe aut opinione praesumatur... nec semper veram quaerit causam. satis ei est, aliquam tradentis opinione subesse. Nam & indebitum per errore solutum, dominium in accipientem transfert...'. (The other difficulty is that on the basis of a contract in which there is fraud ownership can be transferred, despite the legal rule that *traditio* alone will never pass ownership unless a sale or another legal ground precedes after which *traditio* follows... But in my considered judgement the objection does not stand in the way. For this rule does not require that in order to exchange ownership by *traditio* a true and valid legal ground should precede in any case. Rather it requires that a sale or a similar legal ground precede on the basis of which ownership is usually transferred, a legal ground which either precedes in reality or is assumed to precede in the transferor's expectation or opinion... It [i.e. the law] does not always require a valid legal ground; it suffices if some legal ground exists in the mind of the transferor. For, also what has been paid by mistake and was not due passes ownership to the acquirer).

Apparently Roman-Dutch jurists were divided over how to interpret the *iusta causa* requirement. Some jurists maintain that despite the contract being void ownership still passes to the acquirer. Others refuse to acknowledge that a contract which is void *ipso iure* may pass ownership.

3.4 *A fragmentary image*

From the preceding we can learn that the history of the *iusta causa* requirement renders a highly fragmented and inconsistent picture. The different texts making up the Digest were ambiguous and even inconsistent. Being directly based on these texts the learned law, not unexpectedly, was hardly more consistent. In the period from the rediscovery of the Digest up to the beginning of the 19th century we can find fragments of all three transfer theories. Neither in the Middle Ages nor in the humanist period nor in Roman-Dutch law can we find any majority view about the interpretation of the *iusta causa* requirement.

What is more, even within the writings of one and the same jurist we may often find conflicting statements, especially among medieval jurists: they felt themselves strongly bound to the texts of the *Corpus Iuris Civilis* and were not yet concerned in building a consistent legal system.

True, already the commentators have started to structure some parts of law.⁸³ Yet, the building of a consistent legal system began only in the period of the humanists⁸⁴ and especially in the period of natural law.⁸⁵ Nonetheless, even in this period or in Roman Dutch law jurists do not normally develop a general transfer theory. They tend to treat the question only, or at least mainly, in comments about fraud. Still, in many instances their arguments are laid down in very general formulations and are not at all limited to fraud cases. They are often based on reasons that may claim general application, such as the opinion that a void contract cannot have any legal consequences, or that it cannot transfer ownership. It seems that in these cases the concept of fraud merely functioned as the *sedes materiae*⁸⁶ for general remarks about the validity of a transfer. Yet, the authors usually did not indicate unequivocally whether or not their remarks applied also to other defects in the underlying contract.

⁸³ P. KOSCHAKER, *Europa und das römische Recht*, 4th ed., Munich/Berlin 1966, pp 90-94.

⁸⁴ G.C.J.J. VAN DEN BERGH, *Geleerd recht*, 4th ed., Deventer 2000, pp 62-63.

⁸⁵ KOSCHAKER, ch. 14 and 15; H. COING, *Europäisches Privatrecht*, vol. 1, § 9 (pp 67-72).

⁸⁶ Lit.: place of the subject, i.e. the place in a book where a certain subject-matter is treated. Justinian's Digest or Codex, to take an example, are not at all systematically arranged. Comments on these texts usually follow the structure of the text commented upon, somewhat like the German comments on the German civil code. When the author wants to give a more general account of a legal problem he still needs some title in the Digest or Codex as a peg to hang his account on. It is obvious that in such a book the accounts are not always limited to the title in question.

Having seen the division of opinion in all these periods I think the traditional view that in the learned law of these centuries the abstract theory dominated is not tenable.⁸⁷ It is true, within these periods elements may be found that fit into an abstract theory. Still, the picture is not that clear.

The passages I have quoted before inevitably lead to the conclusion that in the period before the beginning of the 19th century no transfer theories existed. We do find a lot of statements about the meaning of *iusta causa traditionis* but no general theory in the modern sense of the word: a theory applicable to all possible defects in the underlying *causa traditionis*. Moreover, in none of the periods analysed can we find a majority view. It would be anachronistic and therefore wrong to use the divide causal/abstract to analyse transfer “theories” from a period before the divide had originated.

4 The German abstract system

4.1 *Its origin: Savigny*

4.1.1 *Savigny and the titulus and modus theory*

From the second half of the 18th century the so-called *titulus and modus*⁸⁸ theory began to prevail in Germany. It was the period of the late *Usus Modernus Pandectarum* and the late *Vernunftrecht*, the synchronous natural law movement. According to this theory a transfer of ownership requires a *titulus* and a *modus*. Here *titulus* is the equivalent of *causa*, and *modus*⁸⁹ indicates the requirement of *traditio*. When confined to the voluntary transfer of ownership the theory is nothing new: just a new name for a well-established theory. Yet, the theory was new in that some authors extended the two requirements of *titulus* and *modus* to cover other acquisitions of real rights as well, for example original acquisition.⁹⁰ The *titulus and modus* theory is important only in that Savigny dissociated himself from this theory in developing the abstract transfer system.

⁸⁷ The view that the abstract theory dominated is generally accepted. The view is supported by for example Meijers, Van Oven, Fuchs, Dondorp and Schrage.

⁸⁸ See COING, *Europäisches Privatrecht*, vol. 1, § 30; vol. 2, § 72. The theory was incorporated into the Prussian codification of 1794, the *Allgemeines Landrecht für die Preußischen Staaten*, in I, 9, § 1 and 2, and into the Austrian codification of 1811, the *Allgemeines Bürgerliches Gesetzbuch*, in § 380. See also Fuchs, pp 70-81.

⁸⁹ I.e. the manner in which ownership had to be transferred.

⁹⁰ Cf. FUCHS, p 77 et seq.; JOHOW, *Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich, Sachenrecht, Begründung, erster Band*, Berlin 1880, p 628 et seq., published in: ‘Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches, Sachenrecht’, vol. 1, Allgemeine Bestimmungen, Besitz und Eigentum, ed. by W. Schubert, Berlin/New York 1982.

A new theory emphasizing the requirement of *titulus* next to *modus* might give the impression of demanding a valid legal ground.⁹¹ Still, it is not simple to answer the question whether it indeed required a *causa vera* or whether a *causa putativa* sufficed: within the *titulus and modus* theory both opinions were put forward.⁹² Thus the new word *titulus* is no more revealing than the old term *iusta causa traditionis*. It would therefore be misleading to associate the term *titulus* with a causal system in the modern sense of the word, that is, with the *causa vera* theory. On the contrary, the distinction between causal and abstract transfer theories and accordingly the dilemma of choosing between them was unknown before Savigny's abstract transfer system became generally accepted. In this time one does not find any consistent and elaborate theories about whether the transfer needs a valid *causa*.⁹³

Now, in the early 19th century Savigny began to challenge the then prevailing *titulus and modus* theory.⁹⁴ From lecture notes made by various students we know that already in the winter of 1815/1816 he had rejected the *titulus and modus* theory and had developed the concept of real agreement.⁹⁵ Savigny published his new ideas only much later, in 1840,⁹⁶ yet many of his pupils had already disseminated the new theory from the 1820s onwards.⁹⁷

4.1.2 Savigny's main arguments

The most important arguments Savigny used in developing the abstract transfer system were the gift from hand to hand (*Handschenkung*) and the *condictio indebiti* (claim ex undue payment). These arguments can be regarded as both systematic and historical: they are based on the system of Roman law. Like the learned jurists of the

⁹¹ The theory is often seen as a causal transfer system. See for instance COING, *Europäisches Privatrecht*, vol. 1, p 180; BRANDT, *Eigentumserwerb und Austauschgeschäft*, Leipzig 1940, p 52.

⁹² According to Ranieri the opinion that a *causa putativa* sufficed prevailed. See F. RANIERI, 'Die Lehre der abstrakten Übereignung in der deutschen Zivilrechtswissenschaft des 19. Jahrhunderts', in H. Coing and W. Wilhelm (eds), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*, vol. 2, Frankfurt a/M 1977, p 90 et seq., at p 91; RANIERI, 'Brevi note sull'origine della nozione di negozio reale ed astratto', TR vol. 38 (1970), p 315 et seq., at pp 327-328.

⁹³ A.F.J. THIBAUT, *System des Pandektenrechts*, 7th ed., Jena 1828, vol. 1, § 148-152 and vol. 2, § 592. C.F. MÜHLENBRUCH, *Doctrina Pandectarum*, vol. 2, 4th ed., Halle 1839, § 246.

⁹⁴ As we have just seen, the *titulus and modus* theory was extended beyond its original scope of application. The extension was unnecessary and complicated. Savigny was therefore right in rejecting this extension. Yet he overreacted by rejecting the theory altogether, not only its extension to other forms of acquisition but also its original field of application: the voluntary transfer. Of course his argument was unconvincing. Savigny used the aberrations of the theory as an argument to repudiate the theory itself.

⁹⁵ FELGENTRÄGER, pp 32-34. First steps towards this rejection can be found already in his lectures of the winter of 1803-1804 (see FELGENTRÄGER, pp 27-31).

⁹⁶ *System des heutigen römischen Rechts*, vol. 3, Berlin 1840, p 312 et seq.; *Das Obligationenrecht*, vol. 2, Berlin 1853 (repr. Aalen 1987), p 254 et seq.

⁹⁷ FELGENTRÄGER, p 37 and 41-45.

preceding centuries the Historical School was founded on the interpretation of classical and Justinianian Roman law. Historical arguments were of great importance, and for that reason Savigny stressed that his theory accorded with the true nature of Roman law. At the same time, though, the Historical School had to adapt Roman law to the modern requirements of the time, because in 19th century Germany Roman law applied as a secondary source of law. As a result, the Historical School was in fact not primarily historical, that is, concerned in reconstructing genuine Roman law. It transformed Roman law into a logical system of concepts and thus continued the efforts at systematisation of its predecessor, the school of natural law,⁹⁸ which the Historical School attacked so fiercely for deviating from the true nature of Roman law in order to build a logical system of law. So, in its approach towards Roman law two opposing viewpoints were vying for prominence: historical and systematic arguments. This conflict had existed ever since Roman law was applied in practice, but it became all the more notable when the pandectist movement began to stress the historical argument, thus wrongly suggesting the predominance of history over systematics. Even so, in some instances practicality seems to have been of lesser importance than authenticity, that is, what was then thought to be true Roman law.

In D. 41,1,31, pr., quoted above, Paulus seems to require that the *iusta causa* precede the *traditio* (...si venditio aut aliqua iusta causa praecesserit...). Accordingly, the *iusta causa* requirement was often, also during the *Usus Modernus*, called *iusta causa praecedens* (preceding legal ground). Commonly, the requirement was illustrated with the example of a preceding contract obliging to make a transfer. Using the example of giving a coin to a beggar Savigny attacked this interpretation of *iusta causa* demonstrating that in the case of a gift from hand to hand there is no preceding contract. According to notes students made of Savigny's lectures he said the following: "But what about the gift? Here there is no obligatory relation at all, here the mere factual transfer of possession is the transfer of ownership, as a result of which their opinion [i.e. the opinion of jurists who require a preceding obligatory relation] has been completely disproved; for it is the donor's will that makes the donee owner, nothing else. So, we should use the term *iusta causa* only to denote the owner's will to transfer ownership through *traditio*."⁹⁹ To support his theory he then referred to Donellus.¹⁰⁰

⁹⁸ See KOSCHAKER, *Europa und das römische Recht*, ch. 14 and 15, esp. pp 250-251, 270, 275, 278-279.

⁹⁹ Lecture notes from 1815/16 cited by Felgenträger, pp 33-34: 'Aber wie steht es mit der Schenkung? Da ist ja gar kein obligator. Verhältnis, hier ist ja die bloße factische Tradition der Übergang des Eigenthums, wodurch nun ganz die Ansicht jener umfällt; denn die Absicht des Gebers macht den Beschenkten zum Eigenthümer, nichts anderes. Iusta causa müssen wir also nur nennen, die Absicht des Eigenthümers mit der Tradition das Eigenthum zu übertragen'. See also the lecture notes from 1820/21 cited by Felgenträger on pp 35-36. See also *Das Obligationenrecht*, vol. 2, pp 256-257.

¹⁰⁰ FELGENTRÄGER, p 34. The lecture notes refer to Donellus' comment on C. 4,50,6.

Later he slightly changed his definition of *iusta causa*. In a lecture held in 1827¹⁰¹ and subsequently in his *Obligationenrecht* (1853)¹⁰² he said that, although *iusta causa* and the will to transfer are closely related concepts, it would be wrong to say that *iusta causa* is the will to transfer. Rather, *iusta causa* is the legal relationship from which the will to transfer can be inferred. Savigny thus joins Donellus in regarding the *iusta causa* as an indication of the owner's will to transfer, an opinion which was brought forward already by Rogerius.

So, from the fact that the gift from hand to hand is not preceded by any obligation Savigny deduces that *iusta causa* is not necessarily a preceding contract, that the *iusta causa* may consist also in the transferor's intention to make a gift. As an example he added the loan for consumption, another instance where the transfer is not necessarily preceded by an obligation to make the transfer.

It is indeed true that a gift from hand to hand is not preceded by an obligation to make the transfer. It is the very definition of a gift from hand to hand: a *contractus re* which comes into being only as a result of the transfer of ownership to the donee. Yet, the particular *causa* in question should be defined more accurately. a gift from hand to hand involving a transfer of ownership entails two different agreements: a real agreement, in which the parties agree about the transfer of ownership, and in addition the agreement that the transfer should be a gift. The real agreement is needed only when the gift consists in transferring ownership, or in the creation or transfer of a limited real right. The latter agreement, on the other hand, is always needed. In a causal transfer system it is this agreement which forms the *iusta causa* of the transfer.¹⁰³ Von Tuhr summarizes both elements defining the gift from hand to hand as an "enrichment conferred by way of gift" (*Zuwendung causa donandi*).¹⁰⁴

Savigny is right in saying that the gift from hand to hand is not preceded by an obligation. Still, the example does not compel us to adopt the *animus* or the abstract theory. In fact, it was fit only to demonstrate that the traditional definition of *iusta causa* was too strict: that the *iusta causa* may consist in something other than a preceding contract, for example the agreement that the transfer should be a gift. Yet it does not prove that the transfer may be valid even if the underlying contract (here the agreement about the transfer being a gift) is not.

As a second argument Savigny referred to the Roman actions ex unjustified enrichment, especially the *condictio indebiti*. We have seen that Accursius used the same argument in the *Glossa Ordinaria*. The argument was to be used for centuries since. It became one of the core arguments against requiring a valid *causa*. The

¹⁰¹ FELGENTRÄGER, p 36.

¹⁰² *Das Obligationenrecht*, vol. 2, p 258.

¹⁰³ See L.P.W. VAN VLIET, *Transfer of movables in German, French, English and Dutch law*, Nijmegen 2000, ch. 6, § 7 *in fine*.

¹⁰⁴ A. VON TUHR, *Allgemeiner Teil des bürgerlichen Rechts*, vol. III, Munich/Leipzig 1918, § 72, especially p 74 et seq.

reasoning is as follows. Where possession of a thing has been transferred to another person without a legal ground, for instance because the underlying contract is void or has been avoided, Roman law offers a *condictio*. This is a personal claim rather than a real claim based on ownership. It aims at undoing the unjustified enrichment.¹⁰⁵ Due to the Roman principle of *condemnatio pecuniaria* the claim is for the return of the thing or its value. From a personal action being available it is then concluded that ownership nonetheless passed to the other person. Had it not passed, the claimant would not have needed this *condictio* as he could still make use of the *rei vindicatio*.

The argument is unpersuasive: it is wrong to say that because a *condictio indebiti* is available the transferor must have lost ownership. It is not superfluous for a causal transfer system to give the transferor two remedies: a *rei vindicatio* and in addition a *condictio indebiti*. True, normally the owner will rely on his revindication as it is an action which works as against everyone. Yet, the object transferred may be lost, consumed or sold to a bona fide third party. Moreover, the transferee may have acquired ownership of the thing as a result of original acquisition. The transferor will then have to resort to the *condictio* because it is the only remedy left to him. For that reason a causal system offers both actions. The *rei vindicatio* and the *condictio indebiti* are two parallel actions which amplify one another. As a consequence, the fact that the transferor is given a *condictio* does not lead to the conclusion that he has lost ownership: he may have more than just one remedy.¹⁰⁶

Still, if in classical Roman law the owner had in principle two actions, the *rei vindicatio* and the *condictio indebiti*, it is remarkable that none of the classical texts mentions the availability of the *rei vindicatio* in these instances. Clearly this gives strength to the *condictio indebiti* argument, especially in a movement involved in the reconstruction of true Roman law. Van Oven has explained this peculiarity of the Roman texts as follows. When *traditio* was introduced into Roman law as a means of transferring ownership the system of *condictiones* had already fully developed. The system had been created to fit the abstract *mancipatio*, which was the oldest form of transfer. And, even after *traditio* had been introduced *mancipatio* remained the most important form of transfer: it dominated the minds of classical jurists. This may explain why the availability of the *rei vindicatio* alongside the *condictio indebiti* cannot be found in the classical texts.¹⁰⁷

¹⁰⁵ KASER I, p 592 et seq.

¹⁰⁶ See P. SCHOLTEN, *Zakenrecht*, 7th ed., Zwolle 1933, p 153; W. ZWALVE, *Hoofdstukken uit de geschiedenis van het Europese privaatrecht*, vol. 1 (Inleiding en zakenrecht), Groningen 1993, p 155. Note that even Meijers, an advocate of the abstract theory, rejected the *condictio indebiti* argument for this reason: E.M. MEIJERS, *Levering en rechtstitel*, p 81.

¹⁰⁷ VAN OVEN, *Praeadvies*, p 15 and 33-35.

4.1.3 Savigny's role

The abstract theory was not entirely new: significant fragments of the theory can be found already in for example Baldus' and Donellus' writings. Still, Savigny's role in developing the abstract system should not be underestimated. First of all, he created a new concept, the real agreement. Since the rediscovery of the Digest, it is true, many jurists have claimed that agreement between the transferor and acquirer should suffice to let ownership pass. Thus the rudiments of the concept of real agreement existed already. Still, Savigny seems to have been the first to regard the agreement as a separate legal act, distinct from the underlying contract. He calls it *dinglicher Vertrag* (real agreement).¹⁰⁸ Second, he and his followers developed the existing fragments into a consistent theory and gradually turned it into the prevailing theory in Germany. This is the importance of Savigny for the German transfer theory.

4.1.4 Abstraction from the *causa traditionis*

In Savigny's theory the transfer is independent of any possible *causa traditionis*. Defects in the underlying contract do not affect the validity of the transfer of ownership. That is to say, if there is no valid *causa* ownership nevertheless passes to the acquirer. And if ownership has been transferred on the basis of a voidable contract, avoidance of the contract does not invalidate the transfer. Savigny himself mentioned only the influence of mistake (*Irrtum*) on the transfer of ownership. He wrote that if the owner is induced to transfer ownership as a result of mistake, he may undo the transfer with one of the *condictiones* offered by Roman law. Here Savigny refers to the *condictio indebiti*, among other things.¹⁰⁹ His followers then applied the same principle to all other defects of will and formed it into the abstract transfer system that we can now find in modern German law. Still, the vital step was taken by Savigny himself in the above example of mistake.

In itself Savigny's creation of the real agreement was not yet decisive for the development of the abstract system. Certainly, it would have been impossible for Savigny to develop the abstract system without the concept of real agreement. Without distinguishing the legal act of transfer from the underlying *causa* it is impossible to regard the transfer as abstracted from the *causa*. But, as such the latter

¹⁰⁸ See FELGENTRÄGER, p 34; SAVIGNY, *System des heutigen römischen Rechts*, vol. 3, Berlin 1840, pp 312-313; SAVIGNY, *Das Obligationenrecht*, vol. 2, p 257, fn. (m).

¹⁰⁹ *Das Obligationenrecht*, vol. 2, p 261: 'Wenn das Eigenthum auf eine, an sich gültige Weise freiwillig übertragen wird (durch Mancipation, Tradition u.s.w.), der vorige Eigenthümer aber zu dieser Uebertragung bestimmt wird durch mangelhafte Beweggründe, insbesondere durch Irrtum, so ist die Uebertragung an sich gültig und wirksam, sie kann aber hinterher angefochten und entkräftet werden durch eine Reihe sorgfältig ausgebildeter Conditionen...'. (If ownership is transferred voluntarily in a way that is in itself valid (through *mancipatio*, *traditio* etc.), but the owner is induced to transfer by flawed motives, especially mistake, the transfer is in itself valid and effective, yet it can afterwards be challenged and neutralized by a number of carefully drafted *condictiones*...).

concept does not yet determine the question whether the transfer is causal or abstract. The existence of a real agreement does not exclude that the transfer system is causal.

4.1.5 *Protection of third parties?*

In modern German law it is often said that the principle of abstraction has the effect of protecting third parties. A defect in the contract rendering it void or voidable does not automatically affect the validity of the transfer. As a result the acquirer, who has become owner, is able to transfer ownership to a third party. Thus, the third party cannot be affected by a defect in the contract between the second transferor and his predecessor. Such a protection of third parties was useful in the 19th century because Roman law and, accordingly, the German *gemeines Recht* knew only a very limited protection of third parties in the form of acquisitive prescription (*usucapio*). Savigny, however, did not use this argument to support the abstract transfer system.¹¹⁰ Apparently, the protection of third parties did not play any role in the creation of the new transfer system. The argument was advanced only much later, when the abstract system was generally accepted.¹¹¹

4.2 *Modern German law*

4.2.1 *Codification of the principle of abstraction*

When in 1874 the first drafting commission started to make preliminary drafts for a German civil code it codified the principle of abstraction with only little debate.¹¹² In addition to using the *condictiones* argument¹¹³ it emphasized that the principle of abstraction was needed to make a sharp distinction between the law of obligations and the law of property.¹¹⁴ Furthermore, it was stressed that the real agreement was by definition an abstract legal act.¹¹⁵ These are clearly non-arguments. In reality no valid argument was brought forward to support the choice. It is striking to see that

110 RANIERI, *Die Lehre der abstrakten Übereignung*, p 103.

111 H. DERNBURG, 'Beitrag zur Lehre von der justa causa bei der Tradition', *AcP* 40 (1857), p 1 et seq., at p 2.; R. VON JHERING, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 3, 3rd ed., Leipzig 1877, pp 207-208.

112 See W. SCHUBERT, *Die Entstehung der Vorschriften des BGB über Besitz und Eigentumsübertragung. Ein Beitrag zur Entstehungsgeschichte des BGB*, Berlin 1966, pp 101.

113 See Motive, vol. 3, pp 7-9 (Mugdan, vol. 3, pp 4-5).

114 Motive, vol. 3, p 7 (Mugdan, vol. 3, p 4). See also JOHOW, *Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich*, Sachenrecht, Begründung, erster Band, Berlin 1880, pp 629-630, published in W. Schubert (ed.), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches*, Sachenrecht, vol. 1, Allgemeine Bestimmungen, Besitz und Eigentum, Berlin/New York 1982. This is the explanation added to the preliminary draft of the law of property made by Johow. It was the basis for deliberations of the first drafting commission. The commission finished its work publishing the first draft (*Erster Entwurf*) and the *Motive*, the explanation to it.

115 Motive, vol. 3, p 8 (Mugdan, vol. 3, p 5).

the codification of the abstract transfer system was explained only so briefly, because from the preliminary discussions of the first drafting commission we can learn that among the draftsmen there was no unanimity in favour of the abstract system. Far from it: some of the draftsmen had proposed to adopt the French consensual system for the transfer of movable property. The proposal was rejected by 6 members to 5.¹¹⁶ Although after the first draft was published in 1888 the principle of abstraction was criticized by some jurists,¹¹⁷ the second drafting commission maintained the principle,¹¹⁸ despite serious opposition within the commission.¹¹⁹

In the preliminary draft of the *Bürgerliches Gesetzbuch* a general protection of third parties was consciously left out.¹²⁰ Therefore, like in the *gemeines Recht*, in this draft the principle of abstraction still had the function of protecting third parties.¹²¹ In a later stage, however, the first drafting commission decided to provide for a general third party protection after all.¹²² Yet the draftsmen did not draw the conclusion that as a result the principle of abstraction was no longer needed to protect third parties. This protection is clearly superfluous because even if Germany had opted for a causal system the subsequent acquirer would have been sufficiently protected.¹²³ In the case of an invalid or non-existing *causa traditionis* a causal system would prevent ownership from passing to the acquirer. Under § 932 BGB a second acquirer would be protected against the first acquirer's lack of ownership, provided he is in good faith. If under this provision protection is available for him, the second acquirer will become owner of the asset.

4.2.2 *Subsequent developments in the 20th century*

In the 1930s and 40s criticism of the principle of abstraction showed a huge increase. Many jurists, especially the nazi jurists, argued for the abolition of this principle.¹²⁴ As to the transfer of movables they proposed either a consensual transfer system or a

¹¹⁶ See SCHUBERT, *Die Entstehung der Vorschriften*, p 144.

¹¹⁷ SCHUBERT, *Die Entstehung der Vorschriften*, p 118 et seq.

¹¹⁸ SCHUBERT, *Die Entstehung der Vorschriften*, p 131 and 161.

¹¹⁹ From O. VON GIERKE & E. STROHAL. See U. EISENHARDT, *Die Entwicklung des Abstraktionsprinzips im 20. Jahrhundert*, in G. Köbler and H. Nehlsen (eds), *Wirkungen europäischer Rechtskultur, Festschrift für Karl Kroeschell zum 70. Geburtstag*, Munich 1997, p 215 et seq., at p 217.

¹²⁰ SCHUBERT, *Die Entstehung der Vorschriften*, p 26; JOHOW, *Entwurf*, pp 740-750, 766-767.

¹²¹ Together with prescription.

¹²² See SCHUBERT, *Die Entstehung der Vorschriften*, pp 149-154. It was laid down in § 877 of the first draft.

¹²³ See also STAUDINGER-WIEGAND, 1995, § 929, Rdnr. 27; W. WIEGAND, *Die Entwicklung des Sachenrechts im Verhältnis zum Schuldrecht*, AcP 1990, p 112 et seq., p 136; WOLFF/RAISER, *Sachenrecht*, p 238.

¹²⁴ Among others Ph. Heck, Heinrich Lange, H. Krause, J. Hedemann, W. Felgenträger, H. Brandt and Th. Süß. See EISENHARDT, 'Die Entwicklung des Abstraktionsprinzips' im *20. Jahrhundert*, pp 218-228.

causal tradition system. The Nazi Party, who despised the *Bürgerliches Gesetzbuch* as a product of a liberal and individualistic era, prepared a draft for a new civil code, the *Volksgesetzbuch* in which the principle of abstraction was to have been abolished. Yet, in 1943 the project was discontinued and the new civil code was never promulgated.¹²⁵ After the Second World War criticism largely disappeared in West-Germany. In East-Germany it continued and led to the adoption of the causal system for the transfer of movables in the 1975 civil code (*Zivilgesetzbuch*) of the German Democratic Republic.¹²⁶ Since the reunification of Germany the principle of abstraction applies to all states of the Federation again.¹²⁷

5 French law

We have just seen that Savigny and his pupils developed the abstract system into a general transfer theory which at the end of the 19th century was adopted by the draftsmen of the German civil code. To find out how the causal system in its modern form has originated we should examine French law.

According to Pothier, whose writings have had an enormous influence on the draftsmen of the *Code Civil*, a putative legal ground suffices to transfer ownership.¹²⁸ In his treatment of the *condictio indebiti* he writes that someone who transfers a thing wrongly believing he is under an obligation to do so has the will to transfer ownership. And if the acceptant has the will to acquire ownership of the thing, there is a mutual intention to transfer ownership. To Pothier this suffices to let ownership pass. The transferor, though, is given a personal remedy to claim the thing back. In short, *error in causa*, mistake about the legal ground of the transfer, does not bar the passing of ownership.¹²⁹

Pothier's treatment of the defects of will makes clear that he does not adhere to the abstract theory. He gives a very lucid exposition about the consequences defects of will have on the passing of ownership. Avoidance (*rescision*) of the contract

¹²⁵ Eisenhardt, pp 221-228.

¹²⁶ Par. 25 and 26 *Zivilgesetzbuch* (1975). Although the paragraphs themselves are far from clear, the official comment on § 26 makes clear that the transfer needs a valid underlying contract obliging to make the transfer. See *Kommentar zum Zivilgesetzbuch der Deutschen Demokratischen Republik vom 19. Juni 1975 und zum Einführungsgesetz zum Zivilgesetzbuch der Deutschen Demokratischen Republik vom 19. Juni 1975* (edited by the Ministry of Justice), 2nd ed., Berlin 1985, p 59.

¹²⁷ Art. 8 of the Treaty between the Federal Republic of Germany and the German Democratic Republic of 31-8-1990 taking effect from 3-10-1990, the so-called *Einigungsvertrag*. Cf. J. ISENSEE & P. KIRCHHOF (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 9 (Die Einheit Deutschlands, Festigung und Übergang), Heidelberg 1997, § 209, Rdnr. 6 et seq.

¹²⁸ *Traité du droit de domaine de propriété*, part 1, ch. 2, sect. 4, Art. 2, § 3, *Œuvres de Pothier*, vol. 9, Paris 1846, p 180.

¹²⁹ *Traité du contrat de prêt de consommation et des matières qui y ont rapport*, part 3 (traité du quasi-contrat appelé promutuum et de l'action condictio indebiti), sect. 2, Art. 7, *Œuvres de Pothier*, vol. 5, Paris 1847, p 118.

has retroactive effect, that is to say, the contract is deemed never to have existed. Consequently, ownership, which has been transferred to the acquirer, reverts automatically to the transferor with retroactive effect, because the legal ground on the basis of which the acquirer holds the asset has been avoided. The transferor is deemed always to have been owner of the asset. Being owner he may revindicate the asset.¹³⁰ If before avoidance of the contract the acquirer has transferred the asset to a third party or burdened it with a limited real right, the rights acquired by these third parties lapse when the contract between the first and second party is avoided. As the second party is deemed never to have become owner, he has never been able to transfer the asset or grant a limited real right, for no one may transfer more right than he himself has.¹³¹ ¹³² Now, such automatic reversion of ownership in the first party is unthinkable in an abstract transfer system. On the other hand, where in Pothier's view a putative legal ground suffices to transfer ownership his transfer "theory" cannot be causal. His thoughts would, however, be compatible with the *animus* theory.

In 1804 French law abolished the Roman requirement of *traditio* and opted for a so-called consensual system for the transfer of ownership. In the new system ownership passes in principle when the contract obliging to make the transfer is made. It is often called *effet translatif des obligations* (translative effect of obligations).¹³³ When this system was introduced there was no longer any choice whether to adopt the abstract, *animus*, causal theory or any other theory. A *traditio* system in principle allows for the adoption of any of these transfer theories. However, when ownership passes on the basis of the contract, that is, when the contract itself is said to pass ownership, the contract must be valid in order to transfer ownership. So, by opting for a consensual transfer system the French *Code Civil* automatically ruled out the abstract and the *animus* theory.

Probably the draftsmen did not realize at the time. The draftsmen of the *Code Civil* regarded the introduction of the consensual system as a mere codification of a long-standing practice: since it was usual in old French law to insert in contracts for the sale of immovables a clause that possession was transferred, ownership normally

¹³⁰ *Traité du contrat de vente*, part 5, ch. 2, sect. 2, Art. 1, § 1, *Œuvres de Pothier*, vol. 3, Paris 1847, p 139.

¹³¹ *Ibidem*, § 2, Paris 1847, p 148; *ibidem*, § 4, Paris 1847, p 154.

¹³² Pothier illustrates it by giving an example of *lésion* (*laesio enormis*: severe impairment of the seller caused by the thing being sold for an extremely low price). Yet it is clear that according to Pothier the same reasoning applies to other defects of will which turn the contract voidable: *violençe* (duress) and *dol* (fraud). See: *Traité des obligations*, part 1, ch. 1, sect. 1, Art. 3, § 2 and 3, *Œuvres de Pothier*, vol. 2, Paris 1848. In his view, by the way, a contract entered into under influence of mistake (*erreur*) is void rather than voidable. See *ibidem*, § 1.

¹³³ As a general rule it is to be found in Arts. 711 and 1138 cc. It is repeated in Arts. 938 (gift), 1583 (sale) and 1703 (barter). See in general VAN VLIET, *Transfer of movables* (fn. 103), ch. 3.

passed at the time the contract was made.¹³⁴ They seem to have overlooked that in the new transfer system a putative legal ground no longer suffices to transfer ownership. An explanation may be that there were hardly any practical consequences. As to avoidance of contracts nothing had changed: also in the new French legal system avoidance has retroactive effect and causes ownership to revert to the transferor, avoiding not only the acquirer's right of ownership, but also any real rights (ownership or limited rights) given to third parties.

Toullier, who wrote one of the first comments on the *Code Civil*, adopts Pothier's reasoning about the consequences of avoidance. Yet, here, in a section on *rescission*, he does not explain that in the new consensual transfer system avoidance of the contract *necessarily* entails avoidance of the passing of ownership.¹³⁵ In his treatment of the *condictio indebiti*, however, Toullier does make this link. He stresses that a mere transfer of possession does not suffice to pass ownership, that always a *iusta causa* is needed, especially under the *Code Civil* in which *traditio* is no longer a way of transferring ownership. The passage is not entirely unambiguous, but if I understand Toullier correctly he means that in a system in which the contract itself transfers ownership the *iusta causa* must be valid *by definition*. He rejects Pothier's opinion that in the case of *error in causa* ownership passes, saying that there is no true will to transfer where the will is a result of a mistake.¹³⁶

Still, apart from this very brief remark by Toullier, thrown in as an *obiter dictum*, the question whether the legal ground of the transfer should be valid seems to

¹³⁴ This rule did not apply in the whole of France. In the *pays de nantissement*, for example, ownership of land passed to the acquirer only after registration. See A.-M. PATAULT, *Introduction historique au droit des biens*, Paris 1989, p 207.

¹³⁵ C.B.M. TOULLIER, *Le droit civil français*, 5th ed., vol. 7, Paris 1830, nr. 549-550. Cf. also C.-S. ZACHARIAE, C. AUBRY & C. RAU, *Cours de droit civil français*, 2nd ed., Brussels 1842, vol. 1, § 336; F. LAURENT, *Principes de droit civil français*, 2nd ed., Brussels/Paris 1878, vol. 19, nr. 72 et seq., vol. 17, nr. 78 et seq., at nr. 81. See for modern French law: Cour de Cassation 6 Dec. 1967 (Bull. Civ. 1967, I, no 358, p 269) discussed by J. CHEVALIER in Rev.trim. dr. civ. 1968, pp. 708-709.

¹³⁶ TOULLIER, vol. 11, nr. 58 and nr. 95, 5th ed., Paris 1830, pp 71-72 and 119-120. At pp 123-124, by the way, Toullier seems to contradict himself. If someone erroneously transfers a thing to another without there being any obligation to do so he may claim the thing back from the recipient. But what if the latter transfers it to a third party before the owner claims the thing back? Does the owner have an action as against the third party? According to Toullier the third party is protected against such an action provided he is in good faith. Oddly, however, Toullier seems to explain this by saying that as against the third party the second party has become owner because despite the *error in causa* the owner was truly willing to transfer ownership. A remarkable revival of the analysis Pothier used under pre-civil code law to explain the same case. See: *Traité du contrat de prêt de consommation et des matières qui y ont rapport*, part 3 (*traité du quasi-contrat appelé promutuum et de l'action condictio indebiti*), section 2, Art. 7.

This strange passage by Toullier seems to have led Ranieri to claim, wrongly to my mind, that during the first decades after the promulgation of the *Code Civil* a putative legal ground sufficed to transfer ownership. See RANIERI, *Die Lehre der abstrakten Übereignung*, pp 109-111.

be hardly discussed in 19th century French law books. Of course you cannot expect these authors to use the terms “causal transfer system” or “abstract transfer system”. The terms “causal” and “abstract” used to denote different transfer systems were not yet known at the time. Even in Germany the term “abstract transfer”, mentioned by Savigny and his pupils, became part of the jurist’s vocabulary only from the 1840-50s.

Nonetheless, from a systematic point of view we can say that the question whether the transfer system should be causal or abstract had been decided by the *Code Civil*. Whether we should regard the French causal system as based on Roman law or on writings of the learned jurists is difficult to say. Although there was an eminent French jurist in the humanist period who adhered to the causal theory, Cuiacius, neither the draftsmen of the *Code Civil* nor the early 19th century French authors refer to Cuiacius’ theory. The draftsmen do not even discuss the meaning of the *iusta causa* requirement in Roman law. This all demonstrates that the choice for a causal system was not made deliberately. Far from this, the causal system is merely a logical consequence of the consensual transfer system.¹³⁷

6 Dutch law

Understandably, the same terminological problem applies to 19th century Dutch law: the terms “causal” and “abstract” were unknown for the larger part of the century. What is more, as in France there was no discussion about whether or not a transfer needs a valid legal ground.

As to the first half of the 19th century research in Dutch law is hampered by the lack of extensive and authoritative legal literature. In addition, it seems that in this period there has been no case law relevant to our question. In order to ascertain which transfer theory dominated we should rely on the various civil codes and draft civil codes made in this period. Unfortunately these texts do not offer a clear answer: they are often indefinite.

In article 589 beginning and subs. 3 and 4 the *Wetboek Napoleon* of 1809 requires for a transfer to be valid “that it be executed on the basis of some legal ground fit to transfer ownership” (subs. 3) and “that it be executed with the apparent intention to let ownership pass” (subs. 4).¹³⁸ According to Van Oven, a view I share, the provision seems to require a valid legal ground, thus adhering to the causal

¹³⁷ The causal system, it is true, might be said to be based indirectly on Roman law; for the consensual transfer system is in its turn a consequence of the frequent use of *constitutum possessorium* in the transfer of immovables.

¹³⁸ Om levering bestaanbaar te doen zijn, is het noodig:
(...)

3. dat zij gedaan worde op grond van eenigen titel, geschikt om eigendom over te dragen; en

4. dat zij gedaan worde met het blijkbaar oogmerk, om den eigendom te doen overgaan.

The text of the provision is almost identical to the preceding draft by Van der Linden (1807-1808). See J. VAN DER LINDEN, *Ontwerp burgerlijk wetboek 1807/1808*, book 2, title 2, section 2, Art. 23, ed. by J.Th. de Smidt, Amsterdam 1967, p 80.

transfer theory. If the term “legal ground” in subs. 3 were to include a putative legal ground, the provision would suffice itself with the parties’ will to transfer and acquire ownership. The legal ground would be no more than an indication for the parties’ will. If this reading were true subs. 4 requiring the parties’ will to transfer would obviously be a duplication. So, if the draftsmen had wished to codify the abstract theory, they would most probably have left out the third subsection.¹³⁹

The *Wetboek Napoleon*¹⁴⁰ was an adapted version of the French *Code Civil* specially made for the Kingdom of Holland; it was in force only for a very short period: a few months after its promulgation at 1 May 1809 the Kingdom of Holland was dissolved and annexed to the French empire, and 1 March 1811 the French civil code was introduced in the Netherlands. This brought into Dutch law the causal and consensual transfer system of the *Code Civil*. After the Netherlands had regained independence in 1813 the *Code Civil* was not immediately abolished. It was intended to be replaced in due time with a Dutch civil code. Eventually the *Code Civil* was to have force of law until 1838, when the Dutch civil code was promulgated.

The draft civil codes of 1816 and 1820, which never became law, codified a transfer system that was certainly not causal. Article 1129 of the 1816 draft, which article is identical to article 1018 of the 1820 draft, provides that ownership passes when the transferor and acquirer agree about the passing of ownership, even if there is a misunderstanding between the parties about the legal ground of the transfer (*error in causa*).¹⁴¹ It is not evident whether in these provisions the modern abstract theory is laid down. The last part of the section (after the semicolon) suggests that in

¹³⁹ VAN OVEN, *Praeadvies*, pp 93-94.

¹⁴⁰ Full title: *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* (lit: ‘Code of Napoleon written for the Kingdom of Holland’).

¹⁴¹ ... Wanneer echter de overdrager en de aannemer het ten aanzien van den eigendoms-overgang eens zijn, gaat de eigendom over, al ware het ook dat er ten aanzien van den eigenlijken regtsgrond eene dwaling bij eene der partijen had plaats gehad; behoudens hetgeen hieronder nader omtrent de gevolgen van dwaling in overeenkomsten, zal gezegd worden.

(Where, however, the parties agree about the passing of ownership, ownership passes, even if one of the parties is mistaken about the true legal ground; except for what will be further said hereunder about the consequences of mistake in contracts).

the case of other kinds of mistake the passing of ownership is hampered.¹⁴² ¹⁴³ If this is correct the 1816 and 1820 drafts had a transfer system more akin to what I call the *animus* theory.¹⁴⁴

The 1838 civil code is even less clear. As to the transfer of ownership article 639 of the *Burgerlijk Wetboek* provides that ownership may be acquired through transfer on the basis of a legal ground fit to pass ownership, executed by a person privileged to dispose of the thing.¹⁴⁵ Regrettably, the article does not indicate whether the legal ground should be valid. Accordingly, the omission prolonged an ambiguity that had been in existence for hundreds of years in the learned law based on the *Corpus Iuris Civilis*.

The question whether the legal ground should be valid was discussed in Dutch legal literature only from the second half of the 19th century. Writing about undue payment Diephuis said that a putative legal ground does not suffice to let ownership pass, a view that is undoubtedly causal.¹⁴⁶ Opzoomer, on the other hand, an author strongly influenced by German legal literature, adhered to the abstract theory, referring to Windscheid, Puchta, and to Donellus as well.¹⁴⁷

Whereas for the larger part of the 19th century Dutch law was under a strong influence of French law, in the last decades of the century the influence of the

¹⁴² Nothing is explicitly said about the consequences of mistake on the passing of ownership. The provision on mistake which Art. 1018 of the 1820 draft refers to is Art. 2278, reading: ‘Dwaling maakt geene overeenkomst nietig, dan wanneer men gedwaald heeft in het wezen der zaak, die het onderwerp der overeenkomst uitmaakt. Dwaling maakt mede geene overeenkomst nietig, wanneer men alleenlijk gedwaald heeft in den persoon, met wien men meende te handelen, ten zij de overeenkomst voornamelijk uit aanmerking van dezen persoon is aangegaan’. (Mistake renders a contract void only if one was mistaken about the substance of the thing which is the subject-matter of the contract. Furthermore, mistake does not render a contract void if one was mistaken only about the person one was thinking to deal with, unless the contract was made especially for this person).

Most probably *wezen der zaak* was intended to denote the physical object that had to be transferred. As a result it may be translated with *substance of the thing*. The wording seems to derive from Pothier, via Art. 1110 *Code Civil*. Illustrating the meaning of *substance de la chose* Pothier gives examples about the sale of physical objects. See *Traité des obligations*, part 1, ch. 1, sect. 1, Art. 3, § 1, *Œuvres de Pothier*, vol. 2, Paris 1848, pp 13-14.

¹⁴³ Oddly neither Meijers nor Van Oven pays attention to this part of the provision. See MEIJERS, *Levering en rechtstitel*, pp 84-86; VAN OVEN, *Praeadvies*, pp 94-95.

¹⁴⁴ Van Oven, on the other hand, who does not distinguish between the abstract and *animus* theory, says that the 1820 draft undoubtedly adhered to the abstract theory. See *Praeadvies*, p 95.

¹⁴⁵ Art. 639 BW 1838: ‘Eigendom van zaken kan op geene andere wijze worden verkregen, dan door... opdracht of levering, tengevolge van eenen regtstitel van eigendoms-overgang, afkomstig van dengenen die gerechtigd was over den eigendom te beschikken’. At the dotted place the article deals with other means of acquiring ownership.

¹⁴⁶ DIEPHUIS, *Het Nederlandsch burgerlijk regt*, vol. 11, Groningen 1888, pp 68-70.

¹⁴⁷ C.W. OPZOOMER, *Het burgerlijk wetboek verklaard*, vol. 3, 2nd ed., Amsterdam 1876, pp 258-259. Here we can find Savigny’s unconvincing argument of the gift from hand to hand, and the equally weak reference to the *titulus and modus* theory (for these arguments see § 4.1 *supra*). Cf. OPZOOMER, vol. 6, 2nd ed., The Hague 1891, p 223 et seq.: on pp 225-226 he refers to Donellus.

German pandectistic school was growing rapidly. When in 1899 part of a draft for a new Dutch civil code was published, the so-called *Ontwerp 1898* (the 1898 draft), it proposed to codify the abstract transfer theory.¹⁴⁸ Yet the draft never became law.

In the beginning of the 20th century more and more authors joined the causal/abstract debate and, as a result, it developed into a famous controversy among Dutch jurists.¹⁴⁹ The abstract theory was defended by among others Suijling,¹⁵⁰ Hofmann¹⁵¹ and Meijers,¹⁵² the man that was to become the father of the new civil code. Advocates of the causal theory were among others Scholten¹⁵³ and Van Oven.¹⁵⁴ In this period the *Hoge Raad*, the Dutch Supreme Court, was unable to make up its mind and, accordingly, it gave a number of vague and inconsistent judgments some of which could be regarded as adhering to the causal theory, others as opting for an abstract theory.¹⁵⁵

In 1939 the *Hoge Raad* accepted the causal transfer system in a case about the assignment of claims.¹⁵⁶ Since the decision was confined to assignment of claims it was still unsettled whether the causal system applied also to the transfer of other assets. As to movable property the debate was finally settled in 1950 in favour of the causal theory by the *Hoge Raad*'s judgment in *Damhof/de Staat*.¹⁵⁷

The new 1992 civil code explicitly laid down the causal system. When after the Second World War Meijers was appointed to draft a new civil code he codified the causal system, despite having been one of the most prominent advocates of the abstract transfer system.¹⁵⁸ In what would later become article 3:84 subs. 1 Meijers unequivocally laid down that the *causa*, called *titel* in Dutch, should be valid.

148 See Art. 105, *Ontwerp tot herziening van het burgerlijk wetboek, tweede boek*, The Hague 1899, p 156; see also the comment on this article, *Ontwerp tot herziening van het burgerlijk wetboek, tweede boek, toelichting*, The Hague 1899, p 373. The official comment refers to the German civil code. In the comment the abstract theory is regarded as generally accepted. No evidence is quoted, however.

149 See about this debate: A.F. SALOMONS, *2014 tot 1950, De geschiedenis tot 1950 van de vertrouwensbescherming bij overdracht van roerende zaken door een beschikkingsonbevoegde*, (thesis Amsterdam, UvA), s.l. 1997, ch. 9, § 1.

150 J.Ph. SUIJLING, *Inleiding tot het burgerlijk recht*, vol. 5 (Zakenrecht), Haarlem 1940, nr. 245 et seq.

151 L.C. HOFMANN, *Het Nederlandsch zakenrecht*, Groningen/Batavia 1944, p 227.

152 *Levering en rechtstitel, Verzamelde privaatrechtelijke opstellen*, vol. 2, p 80 et seq.; *Levering en onderliggende rechtsverhouding (causa), Verzamelde privaatrechtelijke opstellen*, vol. 2, p 131 et seq.

153 C. ASSER, *Handleiding tot de beoefening van het Nederlandsch burgerlijk recht*, vol. 2, 4th ed., ed. by P. Scholten, Zwolle 1905, pp 97-99, and all subsequent editions edited by him.

154 VAN OVEN, *Praeadvies*, p 106 et seq.

155 See ASSER-BEEKHUIS, *Zakenrecht*, vol. 1, 11th ed., Zwolle 1980, pp 180-181; SALOMONS, *2014 tot 1950*, ch. 10, § 2.2.

156 HR 9 February 1939, NJ 1939, 865 (*Woldijk/Nijman*).

157 HR 5 May 1950, NJ 1951, 1.

158 Parl. Gesch. Boek 3, pp 316-317.

7 Choosing between causal and abstract in future?

It seems as if harmonization of European property law would involve choosing either the causal or the abstract system. The most important practical consequence of such a choice will undoubtedly be the different protection of the parties to the transfer against insolvency of the other party. Yet, a satisfactory protection against insolvency cannot be obtained merely by opting for a certain transfer system. For that reason insolvency arguments should not be decisive in making this choice. We should concentrate on systematic, that is dogmatic, arguments. In doing so it should be possible to opt for a transfer system that is consistent in its treatment of defects of will.¹⁵⁹

7.1 *Internal inconsistency of the abstract theory*

When confining oneself to systematic arguments it is to my mind obvious that the abstract transfer system has inconsistencies. Like the adherents of the causal system also Savigny and his followers stress the importance of consensus for the passing of ownership. However, according to the abstract theory the transfer of ownership is valid even when one of the contracting parties has entered into the contract under the influence of mistake, fraud, or any other defect of will. Clearly there is no real consensus here. That is the very reason why the party who acted under the influence of a defect of will is given the power to avoid the contract.¹⁶⁰ He should be able to undo the entire transaction. Yet the abstract theory is far from consistent here: the victim, it is true, has the power to avoid the contract, but the avoidance does not affect the transfer based on this contract. The transfer is regarded as a neutral legal act uninfluenced by any possible defects in the parties' will. In doing so the abstract system in reality disregards the parties' will. By ignoring the true will of the parties where there is a defect of will Savigny negates the importance of the parties' will and negates one of the foundations of his own theory.

The principle of abstraction makes an artificial segregation between two legal acts which economically and in the mind of the parties are part of one and the same transaction. The transfer takes place for a certain reason, for example to make a gift or to fulfil a sales contract. These legal motives cannot be disregarded. When a party in reality did not consent to the contract in question, he certainly did not want the transfer of ownership based on it.¹⁶¹

7.2 *The modern German abstract system*

In modern German law the abstract system has been smoothed down considerably. The real agreement needed to transfer ownership consists of two corresponding

¹⁵⁹ See VAN VLIET, *Transfer of movables*, ch. 7, § 2.3.

¹⁶⁰ Note that in Savigny's time a sharp distinction between void and voidable legal acts had not yet been fully developed. As a result the terminology was unsettled. Here I use modern terminology.

¹⁶¹ Cf. Stadler, who acknowledges this relation between the contract and the transfer. She nonetheless remains faithful to the abstract system. See A. STADLER, *Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion*, Tübingen 1996, p 179.

Willenserklärungen (declarations of intention). As a result the provisions on *Willenserklärung* in the *Bürgerliches Gesetzbuch* apply to real agreements as well. These provisions are to be found in the *Allgemeiner Teil* (General Part) of the *Bürgerliches Gesetzbuch*, in the paragraphs 116 et seq. The rules contain, among other things, provisions about defects of will (*Willensmängel*: § 119 and 123), illegality (*Gesetzesverstoß*: § 134) and public morality (*Sittenwidrigkeit*: § 138). As a consequence the real agreement may be void or voidable on one of these grounds in the same way as the underlying contract.

That being so, the effects of the principle of abstraction are somewhat mitigated where the defect in question affects the contract as well as the transfer. If a contract has been made under the influence of fraud or duress (*Täuschung* or *Drohung*: § 123) the transfer will as a rule be voidable on the same ground. Similarly, where the contract is void for undue influence (§ 138 subs. 2) the transfer is taken to be void as well.¹⁶² Such a parallel defect of will is called identity of defect (*Fehleridentität* or *Fehlerkongruenz*). However, it is not accepted that a defect of will within the contract automatically affects the subsequent transfer as well. *Fehleridentität* is accepted only in a small number of cases. Fraud and duress seem to be the only cases in which identity of defect is commonly accepted. Where the contract has been made under the influence of a mistake (*Irrtum*: § 119), which is the most common defect of will, the mistake will normally not render the transfer of ownership voidable. The difference seems quite arbitrary. Still, although a contract of sale and its execution (the transfer of ownership) are part of one and the same economic transaction, the legal act of transfer is seen as a “neutral” act which as a rule cannot be affected by defects of will. This isolation of the transfer from any defects in the underlying contract is often based on the odd argument that a wide application of *Fehleridentität* would erode the principle of abstraction.¹⁶³

As the real agreement is a legal act the provisions on conditional legal acts (§ 158-163 BGB) can be applied to real agreements as well. According to these paragraphs a real agreement may be made subject to a suspensive or resolutive condition (*aufschiebende* and *auflösende Bedingung*) or a condition of time (*Zeitbestimmung*, *Befristung*). An example of a transfer subject to a suspensive condition is a transfer with retention of ownership, which is expressly provided for in § 455 BGB. A resolutive condition means that the legal act is valid and effective until the occurrence of some uncertain event. A transfer subject to such a condition passes ownership, but when the condition is fulfilled, the legal act of transfer falls away and as a result ownership reverts to the transferor.¹⁶⁴ The resolutive condition opens the possibility

¹⁶² STAUDINGER-WIEGAND, 1995, § 929, Rdnr. 18 et seq.; Westermann, Sachenrecht, § 4 IV.

¹⁶³ STAUDINGER-WIEGAND, 1995, § 929, Rdnr. 18.

¹⁶⁴ Ownership does not revert with retroactive effect, but the reversion nonetheless works as against everyone. See § 158-159 BGB and A. VON TUHR, *Allgemeiner Teil des bürgerlichen Rechts*, vol. III, pp 319-323.

for the parties to stipulate that the real agreement be valid only if and as long as the underlying contract is valid. This enables them to deviate by agreement from the principle of abstraction.¹⁶⁵ Consequently, the abstract system is *ius dispositivum*.

Not only has the abstract system been watered down, in addition the system is no longer generally accepted. Criticism of the abstract system, which started in the beginning of the 20th century, persists, but at the same time there is a countermovement strongly defending the advantages of the system.¹⁶⁶

7.3 *A midway solution*

History shows that we are not forced to choose between two extremes: causal and abstract. The division into these two uncompromising transfer theories is of relatively recent date: the beginning of the 19th century. In the period before the 19th century the learned law had no transfer theories whatever. When examining the different interpretations of the *iusta causa* requirement proposed in this period it appears that these do not fit into the division causal/abstract. So, from a historical point of view there is no valid reason to confine our choice to the extremes of causal and abstract. Nor is there any dogmatic argument for doing so.

Several learned jurists in the period before 1800 seem to opt for some midway solution: their statements fit into a theory which I have called the *animus* theory. Now, although it is very unlikely that such a theory has ever been current, the *animus* theory may be a useful compromise for future law to bridge the gap between causal and abstract transfer systems.

In such a theory all defects of will are treated equally. Avoidance of the contract for a defect of will nullifies the transfer as well. To use German terminology, as regards defects of will there should always be *Fehleridentität*, identity of defect. In the *animus* theory ownership passes only if there is a genuine will to make the transfer. A valid contract is not needed, however. Where for example the contract is void for illegality ownership nonetheless passes to the acquirer because there is a true will to make the transfer. From a systematic point of view I should say that the *animus* theory is certainly more consistent than the abstract theory. And, although no transfer theory can claim any convincing historical justification it must be said that the *animus* theory accords well with many statements quoted in paragraph 3 of this article. If there are good reasons to adopt the *animus* system in future law it obviously requires a solid protection of third parties in good faith.

¹⁶⁵ STAUDINGER-WIEGAND, 1995, § 929, Rdnr. 29-31. A similar interdependence between the *causa traditionis* and the real agreement can be obtained when the parties expressly or implicitly consider these legal acts as one integrated legal act in the sense of § 139 BGB. See Staudinger-Wiegand, 1995, § 929, Rdnr. 27. As to the principle of abstraction and its decline see: W. WIEGAND, 'Die Entwicklung des Sachenrechts im Verhältnis zum Schuldrecht', *AcP* 1990, p 112 et seq.

¹⁶⁶ See for example STADLER, *Gestaltungsfreiheit*.

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