

TRACES OF THE DUALIST INTERPRETATION OF GOOD FAITH IN THE *IUS COMMUNE* UNTIL THE END OF THE SIXTEENTH CENTURY

András Földi* **

Professor Laurens Winkel has published papers on so many topics that it was not difficult to choose one through which I may express my respect for him in this *Festschrift*. Since Professor Winkel is renowned, among other things, as an expert on the principles of Roman law, I hope he will find pleasure in reading my modest contribution to the history of one of the most important such principles, good faith.¹

The dualist interpretation of good faith (*bona fides*) clearly distinguishes (1) subjective *bona fides* characterised by belief in the lawfulness of, among other things, one's possession (*guter Glaube, goede trouw*) from (2) objective *bona fides* (good faith and fair dealing, *Treu und Glauben, redelijkheid en billijkheid*).² The dualist interpretation, as will be shown below, derives from the older *ius commune*, and gained importance only after a monograph on the subject was published by Carl Georg von Wächter in 1871.³ Since then the dualist interpretation has been embraced the world over.⁴

“Subjective monism”, on the other hand, which identifies *bona fides* with its subjective interpretation, has become obsolete.⁵ Nevertheless, dualism still competes

1 See e.g. Winkel, *The role of general principles in Roman law*, *Fundamina* 2/1 (1996) 103 ff.; idem, *Ratio decidendi Legal reasoning in Roman law*, in: Bryson/Dauchy (eds.) *Ratio Decidendi Guiding Principles of Judicial Decisions*, I (2006) 9 ff.

2 Cf. Földi, *Remarks on the notion of bona fides*', *Annales Univ. Budapest* 48 (2007) 59; idem, *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea* [book-review], *SZ* 124 (2007) 606; idem, *Osservazioni intorno al cd. dualismo della bona fides*', *Studi Antonino Metro*, II (2010) 483 ff.

3 Wächter, *Die bona fides' insbesondere bei der Ersitzung des Eigenthums* (1871).

4 See e.g. Martins Costa, *A boa fé no direito privado* (1999); Novaretti, *General clauses and practice. The use of the principle of good faith in the decisions of Chinese courts*, *European Review of Private Law* 18 (2010) 953 ff.

5 Romain, *La théorie critique du principe général de bonne foi en droit privé* (2000).

* Professor of Roman Law and Comparative Legal History, Eötvös Loránd Tudományegyetem, Budapest.

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with “objective monism”, which is dominant in Austrian law.⁶ As to the future, it cannot be ruled out that a pluralist interpretation, which acknowledges various meanings of *bona fides*, will prevail.⁷

To understand all aspects of *bona fides*, we should conduct a comparative legal historical survey, since there have been few other legal institutions with histories so beleaguered by mystifications and false points of departure.⁸

The notion of *bona fides* is an intellectual product of ancient Rome. Roman jurists explored its content in detail. Their interpretation may be described as spontaneous (“naïve”) and monist. Apparently they did not distinguish the various meanings of *bona fides*.⁹

The same naïve monism characterised medieval jurists for a long time. Considering that *fides* was the central category of medieval thinking and that, when analysing *bona fides*, the glossators focused on the *bona fides* of possessors,¹⁰ one might suppose that *bona fides* became subjectivised during the Middle Ages, but it is impossible to prove that hypothesis. Even though the possessor’s *bona fides* was treated as a subjective criterion during the Middle Ages,¹¹ this by no means meant that *bona fides* was subjectivised in contracts. In this respect, greater stress was laid on the moral content of *fides Christiana*, which emphasised the objective requirements of good faith and honesty, referring to them as foundations of the Christian ethic.¹² In this connection, the medieval canonists identified *bona fides* with *bona conscientia*, sincere conviction comparable to religious belief, while they saw *mala fides* as a manifestation of *peccatum*.¹³ That approach undoubtedly had a strong influence on the legists too.

6 Rainer, *La buona fede (‘Redlichkeit’) nel diritto austriaco*, in: Garofalo (ed.) *Il ruolo della buona fede oggettiva nell’esperienza giuridica storica e contemporanea*, III (2003) 229 ff.

7 Cf. Zimmermann/Whittaker, *Coming to terms with good faith*, in: Zimmermann/Whittaker (eds.) *Good Faith in European Contract Law* (2000) 690 ff. Cardilli, Dajczak, Fiori, Stolfi and Zannini warn of dangers of dualist interpretation: see Garofalo (n. 6) I-IV, cf., with detailed bibliographic data, Földi, *Notion of bona fides*’ (n. 2) 603 ff.

8 Cf. Duve in: Schmoeckel/Rückert/Zimmermann (eds.) *Historisch-kritischer Kommentar zum BGB*, II/1 (2007) 287.

9 Nevertheless, in one place (D. 16.3.31pr.), Tryphoninus states that in contracts *bona fides* requires maximum equity (“*Bona fides quae in contractibus exigitur aequitatem summam desiderat ...*”). In the light of this statement Tryphoninus could imagine more than one type of *bona fides*. But the Roman jurists did not discuss that issue in detail.

10 Massetto, *Buona fede nel diritto medievale*, Digesto⁴, Discipline privatistiche, Sezione civile (quoted on the basis of the DVD-edition of 2011).

11 Troje, *Guter Glaube*, HRG I (1971) 1867 states that, as for usucaption, in canon law the *bona fides* of the claimant was reinterpreted, “moralised” and subjectivised. It is very uncertain, however, exactly what subjectivisation meant. The rule *mala fides superveniens nocet* certainly indicates that *bona/mala fides* was treated as a subjective (“psychological”) criterion. The glossators discussed in depth questions such as how long a claimant needs to be in *bona fides* in usucaption, cf. below, n. 50.

12 Troje, *ibid.*; Massetto (n. 10); Rodríguez López, *La bona fides’ en los textos cristianos*, in: Garofalo (n. 6) III 255 ff.

13 Troje, *ibid.*; Gordley, *Good faith in contract law in the medieval ius commune*, in: Zimmermann/Whittaker (n. 7) 94. The idea of “*bona conscientia*” has present-day echoes in the phrase “equity and good conscience”, which is referred to in the context of courts of arbitration in trade disputes and is contrasted with the “strict rules of law”, see Meyer, *Bona fides’ und lex mercatoria’ in der europäischen Rechtstradition* (1994) 97.

Inasmuch as the meaning of *bona fides* was transformed during the Middle Ages, it is appropriate to speak of its objectivisation. Thus wherever *bona fides* was mentioned in contracts, *aequitas* was emphasised, to the point of sometimes overshadowing *bona fides*,¹⁴ and there was a tendency to equate *bona fides* with equity.¹⁵

Having studied Roman law, the glossators and commentators undoubtedly used the term *bona fides* in more than one sense,¹⁶ but they usually treated *bona fides* as a unified notion. Studies by James Gordley remind us that, whereas the monist interpretation of *bona fides* characterised medieval thinking in general, we should also take note of certain types of pluralism, which derived from scholastic thinking.¹⁷ For instance, Baldus wrote that *bona fides* may be a criterion in determining whether a contract may serve as basis for a law suit and, if a contract is binding, it may help to determine the scope of a debtor's obligations. In the latter sense, *bona fides* may mean the absence of *dolus* and may refer to the parties' obligations stemming from a contract on the basis of "natural equity" even if the contract is silent about them.¹⁸

When Franciscus Aretinus (Franciscus de Accoltis, 1418-1486)¹⁹ explicitly expounded a dualist doctrine of *bona fides*, he may have included Baldus' pluralism among his sources. Commenting on the division of actions into *bonae fidei* and *stricti iuris actiones* in Inst. 4.6.28 he wrote as follows:

Notare autem debes in principio, quod duplex est bona fides. Una quae est contraria dolo et fraudi. Et hoc modo omnes contractus bonae fidei sunt: in omnibus enim debet abesse dolus et fraus. Est et alia bona fides, quae antonomatice vocatur bona fides propter exuberantem fidem quae est in ea. Ab ista bona fide dicuntur contractus in isto § enumerati, bon. fi. Sed domine, quae est exuberantia fidei quae est in ista sive in istis actionibus? Respon. Frater, ex hoc quod in eis multa eveniunt ex bono et aequo, de quibus non fuit actum inter partes. In contractibus autem stricti iuris solum eveniunt ea de quibus actum est inter partes ut venirent. De actione depositi quando ipsa sit bonae fidei, nemini venit in dubium quantum ad aliquid. De ipsa tamen dixerunt quidam antiqui, quod simpliciter est

14 Beck, *Zu den Grundprinzipien der 'bona fides' im römischen Vertragsrecht*, in: *Festgabe August Simonius* (1955) 25.

15 Even the glossators referred to *bona fides* in contract as a synonym for equity, see Gordley (n. 13) 94 ff. Cf. Winkel, *General principles* (n. 1) 114.

16 Massetto (n. 10) writes that the medieval jurists learned about objective *bona fides* from Tryphoninus D. 16.3.31pr. (quoted in detail above, n. 9), while they learned about subjective *bona fides* from Modestinus D. 50.16.109 ("Bonae fidei emptor esse videtur, qui ignoravit eam rem alienam esse, aut putavit eum qui vendidit ius vendendi habere, puta procuratorem aut tutorem esse."). I think that other passages may also serve as a basis for the dualist interpretation of *bona fides*, but legal literature coming down to us from before the fifteenth century contains hardly any evidence of its presence.

17 Gordley (n. 13) 94 ff.

18 Baldus, *Commentaria*, ad C. 4.10.4, quoted by Gordley (n. 13) 109 f. Cf. Winkel, *Ratio decidendi* (n. 1) 22; Dajczak, *The Nature of Contract in Reasoning of Civilian Jurists* (2012) 59.

19 Franciscus was highly respected in his own time and subsequently. As stated by Lange/Kriechbaum, *Römisches Recht im Mittelalter. II Die Kommentatoren* (2007) 856, one of the most noteworthy accomplishments of Franciscus was that his *casus* were included in the *Glossa ordinaria*. We agree with the renowned authors that the style of Franciscus' text is reminiscent of the Middle Ages rather than the modern age; however, we think that his statement on the dual character of *bona fides* may have been an absolutely innovative conclusion in his time.

bonae fidei, in quatuor tamen casibus, puta tumultus, incendii, ruinae, naufragii. Dominus autem Ia.²⁰ dicit quod actio depositi bonae fidei est.²¹ (Let us first of all note that *bona fides* is twofold in meaning. In one of its meanings it is the opposite of fraud and deceit. In that sense all contracts are based on *bona fides* because all of them must be free of fraud and deceit. There is another type that we call *bona fides* proper for the sake of making it more comprehensible because of its correlation with utmost faith. It is with reference to that type of *bona fides* that we call contracts listed in this section as *bonae fidei* contracts. What then is meant by utmost faith that is referred to in actions of this type? We can answer that question by stating that they include many consequences based on equity about which the parties have not agreed in advance. By contrast, in the case of *stricti iuris* contracts, only what the parties have agreed in advance can be taken into consideration. In the case of the action of deposit, that being a *bonae fidei* action, no one doubts that this rule has to be applied. However, as far as this action is concerned, some jurists of old said that it refers only to the basic meaning of *bona fides* with the exception of the occurrence of, for instance, public disturbance, fire, earthquake or shipwreck. But Iason de Mayno is of the view that the action of deposit is a *bonae fidei* action.²²)

Franciscus regards *bona fides* as a twofold notion, yet the way he interprets dualism differs from its modern interpretation as outlined in the introduction to this paper. The first meaning to which Franciscus refers and which he defines as the opposite of *dolus* and *fraus* is far from identical to subjective *bona fides*. Subjective *bona fides* is narrower than that notion because it denotes a concrete state of mind. The second meaning that Franciscus discusses is, however, identical to objective *bona fides*.

As regards the first meaning of *bona fides* mentioned by Franciscus, he is content to give it a negative definition in passing but does not describe it in detail. Conversely, he provides ample information on the second meaning of *bona fides*. *Fides exuberans* may create rights and obligations even though the parties have not agreed to them. That idea is reflected centuries later – as mediated by early modern jurists (e.g. Domat) – in article 1135 of the French *Code civil*²³ and § 863 of the original text of the Civil Code of Austria.²⁴

It may seem surprising that Franciscus specifically mentions deposit as an example of *fides exuberans*,²⁵ which under Roman law could only be free of charge; consequently, a debtor would only be liable for *dolus* and *culpa lata*. When seeking an explanation for

20 According to the friendly information by Andrea Landi the abbreviation refers to Iason de Mayno (1435-1519).

21 Quoted from *Glossa ordinaria* using the following edition: *Institutionum sive Primorum totius iurisprudentiae elementorum libri quattuor* (Lugduni 1572) 491.

22 The translation above and the ones that follow below are not literal translations but are interpretative ones.

23 Desgordes, *La bonne foi dans le droit des contrats rôle actuel et perspectives* (1992) 19.

24 Cf. Rainer (n. 6) 234.

25 *Fides exuberans* appears in common law in the form of *uberrima fides*. In the case of contracts *uberrimae fidei* (e.g. insurance contracts) the parties have a greater obligation to share all relevant information, see Atiyah, *An Introduction to the Law of Contract* (1995⁵) 254.

that, we can turn to Tryphoninus who says in connection with deposit that *bona fides* as the backbone of contracts requires maximum equity.²⁶

Overall, we have good reason to appreciate Franciscus' text because it is submitted that he was the first author to give a dualist interpretation of *bona fides*. As against modern dualism, we can refer to this as a "protodualist interpretation". In our view, Franciscus' protodualism prepared the ground for a modern dualist interpretation of *bona fides*, which was to follow in the not too distant future.

Although Franciscus' protodualism apparently gained ground only slowly and to a limited degree,²⁷ modern dualist interpretations of *bona fides* emerged in the second half of the sixteenth century. Gian Paolo Massetto has pointed out that Juan Medina (1490-1547) a Spanish theologian and jurist, was a pioneer in that he distinguished two meanings of *bona fides*. Medina called subjective *bona fides* "speculativa" and wrote about it as follows:

[p]ro scientia seu credulitate, qua quis credit ... non alienum, sed suum esse, quod possidet ... aut se debitorem alicuius rei esse.²⁸ (*Bona fides*, in terms of thinking or believing, means that somebody thinks that the thing he possesses does not belong to someone else but is his own ... or he thinks that he is a debtor in a certain obligation.)

Medina called objective *bona fides* "practica" and wrote about it as follows:

[p]ro conscientia quae dictat quid agendum, quid non agendum, aut quid liceat agere, quid non; quid liceat retinere, quid non²⁹ (*Bona fides* in terms of conscience³⁰ determines what is to be done and what is not to be done, what may be done, what not; what may be retained, what not)

The innovative aspects of Medina's statement are, firstly, that going beyond Franciscus' negative definition concerning one of the meanings of *bona fides* (the absence of *dolus*), he pointed out the positive (psychological) content of subjective *bona fides* and, secondly, he juxtaposed two categories of *bona fides* as manifested in thinking and action.

Medina's argument is also innovative because he is not concerned with contract law only. In relation to subjective *bona fides*, he also considers the acquisition of property and, in relation to objective *bona fides*, he deals with a broad range of acts of legal relevance.

Rebuffus (Pierre Rebiffé, 1487-1557)³¹ expounded a modern dualist interpretation similar to that of Medina:

26 See n. 9 above.

27 This is somewhat strange because the above text, alongside other statements of Franciscus, was incorporated in the *Glossa ordinaria*. Consequently, as from the sixteenth century, the subject indexes attached to the printed editions of the *Corpus iuris glossatum* included an entry that referred to the dual character of *bona fides*, at least the index of the edition referred to above (n. 21) contains such an entry ("Bona fides est duplex").

28 Medina, *De paenitentia, restitutione et contractibus*, II (1590) 177, quoted by Massetto (n. 10).

29 Medina, *ibid.*, quoted by Massetto (n. 10).

30 As pointed out above, identifying *bona fides* with conscience is an idea that is rooted in canon law.

31 Rebuffus excelled in analytical thinking: see Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1996)³ 833.

[*Bona fides*] duobus modis vocatur ... Primo cum quis ignorat rem esse alienam, utpote quia putabat vendentem esse dominum; vel si alienam esse sciret, tamen putabat venditorem ius vendendi habere ... *Bona fide agere* dicitur, qui sine ullo dolo et figmento, vere atque diligenter agit, quod agendum suscepit.³² (*[Bona fides]* has two meanings ... We speak of it, first, when someone is unaware that a thing belongs to someone else, for instance because he thought that the seller was the owner, or he knew that the thing belonged to someone else but thought that the seller was entitled to sell it ... A person is said to act *bona fide* if he fulfils the obligation that he has entered into without any fraud or deceit, as well as honestly and prudently.)

Like Medina, Rebuffus considers not only contract law, but, in respect of objective *bona fides*, a broad range of acts of legal relevance. However, here Rebuffus does not engage in an analytic discussion as Medina did but, by means of the phrase *bona fide agere*, refers to all possible legal relations.

Let us add that unlike Medina's interpretation of subjective *bona fides*, which has medieval and partly theological roots, that of Rebuffus is clearly inspired by Roman law, and specifically by Modestinus D. 50.16.109.³³ Rebuffus' use of the expression *bona fide agere* also shows the influence of Roman-law phraseology.³⁴

Although Donellus, too, propounds a dualist view, his dualism to some extent demonstrates a return to Franciscus' "protodualist" interpretation:

Bona fides ... duobus modis consideratur: uno modo, ut praestetur alteri ex contrahentibus quod ex bono et aequo praestari oportet, etiamsi de eo praestando aperte nihil convenerit. Altero modo consideratur in hoc, ut nihil fiat contra bonam fidem, id est nihil dolo malo, nihil metu. Et si quid contra factum sit, ne ratum sit quod ita gestum est. Priore modo bona fides consideratur tantum in contractibus bonae fidei.³⁵ (We speak of *bona fides* ... in two senses: in the first sense it means that a party to a contract has to do for the other party whatever he has to do on the basis of equity. The second meaning requires that nothing should be done that contradicts *bona fides*, that is, there should be no fraud or duress. And if anything has been done contrary to *bona fides*, it should be considered invalid. *Bona fides* as construed in the first sense only plays a role in *bonae fidei* contracts.)

Like Franciscus before him, Donellus interprets the two types of *bona fides* in regard to contracts only. He does not describe subjective *bona fides* in positive terms but in negative ones (the absence of *dolus* and *metus*). Nevertheless, there are conspicuous differences between his arguments and those of Franciscus. Firstly, Donellus reverses the order. Unlike Franciscus, Medina or Rebuffus, he begins with objective good faith and only after that discusses the other type of *bona fides* that is contrary to *dolus* and

32 Rebuffus, *In tit. Dig. de verborum et rerum significatione commentaria* (1614) 400 ff., quoted by Massetto (n. 10).

33 For this text see n. 16 above.

34 On the meaning and importance of *bona fide agere*, see Talamanca, *La bona fides' nei giuristi romani*, in: Garofalo (n. 6) IV, 248 ff.

35 Donellus, *Opera omnia*, VII (1765) 830 ff., quoted by Luchetti/Petrucci (eds.) *Fondamenti romanistici del diritto europeo. Le obbligazioni e i contratti dalle radici romane al Draft Common Frame of Reference*', I (2010) 39.

metus. Donellus seems to have followed a logical approach when discussing legal issues.³⁶ Besides, reversing the order was justified by historical considerations.³⁷ There is a further difference: Donellus writes of the criteria of *bona fides* in its second sense in more general terms, and also refers to the aspect of validity.

It seems there were few followers of dualism at that time; nor could it gain wide currency during the ensuing three centuries. Like those of earlier times, the majority of the sixteenth-century jurists were probably either monists (e.g. Budé, Sozzini),³⁸ or were conscious (Bargagli, Covarruvias) or less conscious (Cuiacius, Stracca) pluralists.

As for the conscious pluralists, Brissonius may also be called a “trialist”. Declaring in advance that the term *bona fides* is used in various senses,³⁹ he defines three clearcut meanings: (subjective) *bona fides* being the opposite of *mala fides*,⁴⁰ *bona fides* that is of crucial importance in all contracts and that he regards as the opposite of *fraus*, *dolus*, *astutia(e)* and *malitia(e)*⁴¹ and, finally, *bona fides* that is synonymous with *bonum et aequum* and applies in *bonae fidei* actions.⁴² Brissonius offers a detailed discussion of all three meanings. In his in-depth analysis not even the notion of subjective *bona fides* seems to be a homogeneous category.⁴³

Also Celso Bargagli († 1593) seems to expound a pluralist interpretation when he states that “bonae fidei verbo plura continentur”.⁴⁴

Cuiacius’ pluralism seems to be less conscious. His commentary on Papinianus D. 46.6.12. appears to suggest that he was a pluralist:

Quid igitur est bona fides? Hoc loco est aequitas arbitri et officium boni viri, hoc est bona fides quam bonus vir existimaturus est. Arbitr et bonus vir idem est.⁴⁵ (What then is *bona fides*? In this case it means the equity of the judge and the duty of the honest man, that

36 Cf. Stein, *Roman Law in European History* (1999) 81.

37 *Bona fides* was originally an objective notion. Its subjective interpretation emerged not earlier than late preclassical law. Cf. recently Behrends, *Zum Beispiel der gute Glaube!*, in: *Festschrift Bruno Huwiler* (2007) 30.

38 The long domination of (naive) monism is eloquently illustrated by Tuschius’ survey of literature, *Practicæ conclusiones iuris in omni foro frequentiores*, I (1605), 554 ff.; II, (1605) 337. The collection of quotations of encyclopedic dimensions by Cardinal Domenico Toschi offers a survey of interpretations of *bona fides* by the glossators, commentators and jurists of his own era. In that survey no explicit reference can be found to the various meanings of *bona fides*.

39 “Bonae fidei verbum varie sumitur”. Brissonius, *De verborum quae ad ius pertinent significatione* (1578) 77.

40 Idem 77 ff.

41 Idem 78 f.

42 Idem 79-81.

43 In the revised edition of Brissonius’ work (Brissonius/Tabor/Itter 1683) the number of sources referred to increased but the difference between the various meanings seems to have been somewhat blurred. Unlike Brissonius, Tabor and Itter (op. cit. 162) cite the passage from Tryphoninus D. 16.3.31 (cf. n. 9) in order to illustrate the second meaning rather than the third one. Note that this text, in line with Brissonius’ plausible method, would better illustrate the third meaning.

44 Bargalius, *Tractatus de dolo* (1604) 702, quoted by Massetto (n. 10).

45 Cuiacius, *Opera*, IV (1777) 295.

is, *bona fides* is what an honest person considers it to be. The judge and the honest man mean the same.)

It is submitted that the phrase “hoc loco” permits the conclusion that in other contexts Cuiacius could have attributed other meanings to *bona fides*. However, it is not easy to know precisely what other meanings Cuiacius attributed to *bona fides*. In connection with C. 4.46.2, which refers to subjective *bona fides* – Cuiacius speaks of “sincera fides” (obviously inspired by the views of the canonists), then, not entirely consistently, he discusses the differences between *bonae fidei* and *stricti iuris* actions.⁴⁶ His other analyses also lead one to question whether he had a definite opinion on the character of *bona fides*. Commenting on Modestinus D. 50.16.109, Cuiacius discusses the subjective character of the buyer in compliance with the text,⁴⁷ but omits to say that this meaning of *bona fides* differs, e.g., from “arbitrium boni viri” with which he equated *bona fides* in some places (“nam idem est bona fides et arbitrium boni viri”).⁴⁸ Significantly, Cuiacius argues that *bona fides* excludes both *dolus* and *culpa*.⁴⁹ In that respect it is highly unlikely that Cuiacius would have considered a possessor’s error caused by negligence to have excluded subjective *bona fides*.

Covarruvias – also called “Bartolus of Spain” – gave a pluralist interpretation to *bona fides*. Discussing *dubium*, which has been a controversial issue in the assessment of *bona fides* in the *ius commune*,⁵⁰ Covarruvias aptly writes:

Sunt enim et alii colores medii inter album et nigrum atque ideo ad negationem unius coloris non sequitur positio alterius contrarii.⁵¹ (Since there are colours [i.e. especially doubt] between white [i.e. good faith] and black [i.e. bad faith] the denial of one colour does not signify the approval of another.)

Benvenuto Stracca (1509-1578) also seems to have been a pluralist if we consider his statement that the type of *bona fides* that should usually be considered in dealings among tradesmen runs contrary to the rigid and formal interpretation of statutes.⁵²

Finally let us make some general observations. The Roman jurists never contrasted the objective and subjective aspects of *bona fides*, yet they provided an ample basis on

46 Idem VIII (1780) 1068.

47 Idem VIII (1780) 538.

48 Idem IV (1777) 512.

49 Idem IX (1781) 457.

50 Accursius (Gl. ad C. 7.32) pointed out that whoever is not acting in *bona fides* is not necessarily acting in bad faith. Like Covarruvias, Accursius argued that a *bonae fidei* possessor thinks that he is an owner whereas a *malae fidei* possessor is certain that he is not an owner. Doubt is a third state of mind as compared to good faith and bad faith. Doubt, if it was not present at the start of possession and assuming *bona fides*, did not – according to the mainstream interpretation – prevent usucaption. By contrast, a possessor who had doubts right from the outset was not entitled to usucaption, but to acquire the fruits only. See Massetto (n. 10). As pointed out by Repgen, *Guter Glaube*, HRG II² (2012) 622, the presumption of *bona fides* considerably reduced the practical importance of the said controversies. It is hardly accidental that in German law even today *guter Glaube* in usucaption is determined according to similar considerations, cf. Baur et al., *Sachenrecht* (2009¹⁸) 741.

51 Covarruvias, *Opera omnia* (1594) 395, quoted by Massetto (n. 10).

52 Stracca, *Tractatus de mercatura seu mercatore* (1553) VII 2, quoted by Meyer (n. 13) 64.

which those coming after them might do so.⁵³ However, in the Middle Ages and in the early modern age the majority of jurists interpreted *bona fides* in a monist manner, that is to say, in a “naive monist” way, thus ignoring the differences between the various meanings. It should be emphasised that “naive monism” is preferable to “subjective monism”, which distorts or even falsifies the essence of *bona fides* and which was unknown prior to the modern age.

During the early modern age, when the need arose to define *bona fides*, a certain type of objective monism appears to have become dominant, whose advocates unhesitatingly equated *bona fides* with *aequitas*. One of those jurists was Guillaume Budé,⁵⁴ the famous French humanist. Benincasius similarly categorically declared that “bona fides nihil aliud est quam *aequitas iuris gentium*”.⁵⁵ Mariano Sozzini (Soccini, 1482-1556) may also be called an early objective monist, who defined the meaning of *bona fides* on the basis of canon law and the precept *suum cuique tribuere*.⁵⁶

In the course of my (limited) research so far I have not found indications that the (proto)dualist interpretation of *bona fides* appeared before the fifteenth century. The dualist interpretation of *bona fides* first appeared, in the form of protodualism, probably in a work by Franciscus Aretinus in the second half of the fifteenth century. Modern dualism emerged in the first half of the sixteenth century in works by Medina and Rebuffus. Donellus was also a dualist but his interpretation resembles Franciscus’ protodualism. More than three centuries passed before the modern dualist interpretation gained wide currency. That is probably because the majority of humanists and later also a number of pandectists had an aversion to classifications of a scholastic type that lacked some firm source. Such caution favoured the monist or pluralist interpretation of *bona fides*.

The progress that led from the sixteenth-century antecedents to the triumph of dualism since the end of the nineteenth century may form the subject of another paper.

Abstract

The dualist interpretation of good faith (*bona fides*) clearly distinguishes subjective good faith (*guter Glaube, goede trouw*) from objective good faith (good faith and fair dealing, *Treu und Glauben, redelijkheid en billijkheid*). The Roman jurists never contrasted these aspects. Even in the Middle Ages and in the early modern age the majority of jurists interpreted good faith in a monist manner. The dualist interpretation of good faith first appeared – in the form of a certain “protodualism” which was different from the modern dualist interpretation outlined above – probably in a work by Franciscus Aretinus in the

53 Nevertheless, renowned scholars (Bruns in the nineteenth century, and recently Söllner) have maintained that in Roman law the possessor’s *bona fides* never had a subjective meaning, cf. Földi, *Osservazioni* (n. 2) *passim*.

54 Budaeus, *Annotationes in XXIII Pandectarum libros* (1546) 9 f., quoted by Massetto (n. 10).

55 Benincasius, *Ad titulum De actionibus’ interpretatio* (1561) 198¹⁰⁹, quoted by Massetto (n. 10). Cf. Coing (ed.) *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, II/1 (1977) 406.

56 Socinus, *Prima pars consiliorum* (1550) 36.9, quoted by Massetto (n. 10).

second half of the fifteenth century. Modern dualism appeared in the first half of the sixteenth century in works of Medina and Rebiffus. Donellus' dualism was similar to Franciscus' protodualism. More than three centuries passed before modern dualism gained wide currency after the publication of Wächter's monograph in 1871. That is probably because the majority of humanists and subsequently also a number of pandectists had an aversion to classifications of a scholastic type lacking some firm source. Such caution favoured the monist or pluralist interpretation of good faith.