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THE CHARACTERISTICS OF AN ABSTRACT SYSTEM FOR THE TRANSFER OF PROPERTY IN SOUTH AFRICAN LAW AS DISTINGUISHED FROM A CAUSAL SYSTEM

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1 Introduction

Two divergent systems are usually differentiated between when it comes to the way in which real rights are transferred from one person to another, namely abstract and causal systems. The purpose of this article is to determine the features of each system, the respect in which they differ from each other, and the practical implications of the distinction. At the centre of the differentiation is the relationship between the obligatory agreement (usually referred to as the *causa*), delivery in the case of movables (*traditio*) or registration in the case of immovable property, and the intention of transferring real rights, which is construed as a real agreement in an abstract system. Since the real agreement is one of the features which distinguish the two systems from each other[1] the characteristics of this agreement will be highlighted. Furthermore, the *causa* concept lies at the root of the distinction. Therefore, the concept as such and the question whether or not a *iusta causa* is a requirement for the transfer of real rights in an abstract system is necessarily raised.
For the purposes of this discussion reference will be made throughout to the South African and German legal systems as examples of an abstract system, which will be compared with the French legal system as being an example of a causal system, and the Dutch system, which can be described as a mixed system.[2]

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1 The construction of the real agreement is anchored in an abstract system.

2 Although the system which is applied in the Netherlands is described as a mixed system, this does not prevent the causal aspects found in the system from being proffered as characteristics of a causal system.

2 Characteristics of a pure causal system

In a pure causal system (such as the system which is applied in France), real rights are transferred to the transferee by conclusion of the obligatory agreement.[3] Delivery is no separate requirement for the transfer of real rights, and it is also no juridical act. It is nothing more than a mere physical act by means of which the transferee is placed in control of the thing so that he can exercise the powers of the owner. The intention at the stage when the thing is delivered (the *animus* or mental disposition which delivery is incidental to) is therefore irrelevant. What is indeed important is the intention of the parties at the moment the obligatory agreement comes into being. Since the mutual intention to transfer and to receive real rights (the *animus transferendi et accipiendi dominii*) is already contained in the obligatory agreement,[4] it is not construed as an independent real agreement that is detached from the obligatory agreement.[5] A separate real agreement therefore has no right of existence in a causal system. Real rights are simply transferred as a result of consensus between the parties (also referred to as transfer by consensus or c*onsensualism*).[6]

A *iusta causa traditionis* is a requirement for the transfer of real rights in a causal system. Literally translated, the concept *causa traditionis* refers to the *reason* or the *legal ground for delivery*,[7] such as a preceding obligatory agreement (for instance a contract of purchase and sale) or other juridical fact which could serve as justification for the transfer of real rights (such as an exchange, a will or *collatio*).[8] The reason why the transferor delivers the thing to the transferee is thus usually because some

3 Consult *inter alia* ss 711, 1138 and 1583 of the French *Code Civil* 1804. Drobnig "Transfer of Property" 1005; Bell, Boyron and Whittaker *Principles of French Law* 280-283; Halpérin *French Civil Code* 42-46; Marsh *Comparative Contract Law* 238-244.

4 It appears for instance from the fact that the parties closed a deed of sale, an agreement of exchange or a settlement which is expressly or by implication aimed at the transfer of real rights.

5 The obligation is not merely a source of the parties' intention (not simply a means of proof); it is the embodiment of the intention itself. *Iusta causa* and the *animus transferendi dominii* are in other words equated. Consult Cronjé 1984 *THRHR* 202; Den Dulk *Zakelijke Overeenkomst* 14.

6 See Drobnig "Transfer of Property" 1005; Nicholas *French Law of Contract* 154-155; Marsh *Comparative Contract Law* 238-244; Dondorp and Schrage *Levering* 3; Hallebeek 2004 *Codicillus* 6 *et seq*. But see fn 16 below for criticism of the use of the term *consensualism* to distinguish between causal and abstract systems.

7 *Causa* can also be translated with *cause, foundation* and *legal basis* for delivery.

8 Carey Miller *Acquisition* 124: " ... the causal approach requires a linking *causa* or basis - typically, an underlying contract - which can be seen as the *raison d'être* for delivery". Pitlo, Reehuis and Heisterkamp *Goederenrecht* 83; Halpérin *French Civil Code* 42.

or other obligation compels him to do so. The term *iusta* says that the legal ground should also be valid and enforceable. In other words, the obligatory agreement or other juristic fact by virtue of which delivery takes place should be *valid* and enforceable.

Should the thing be delivered by virtue of a null and void *causa,* it is therefore obvious that no real right will be transferred because there is no *legal ground* or *reason* (*causa*) for the transfer.[9] This is so, even though the parties intended to transfer the right concerned, because delivery is not an independent requirement and the intention at this stage is irrelevant. The intention to transfer is in other words not construed as a separate (real) agreement; it forms part of the preceding agreement or other juristic fact. A separate real agreement therefore has no right of existence in a causal system. The *causa* (in the sense described above) is all important; hence the term *causal* system.

The requirement of a *iusta causa traditionis* for the transfer of real rights stems from Roman law.[10] However, there was no consensus regarding the precise meaning that had to be attached to the concept *iusta*. It can be translated with *valid*, but also with *appropriate* or *acceptable*. In other words, uncertainty prevailed with respect to the question as to whether the concept *iusta causa* refers to an *objective valid* reason for transfer, or merely to an appropriate reason for transfer. The origin of the uncertainty is two texts from the *Digest* which apparently were in conflict with each other, namely *Digest* 41 1 36 (Julian) and *Digest* 12 1 18 *pr* (Ulpian). The question which came under discussion here was, amongst others, if property is transferred if the transferor hands money to the transferee as a donation, but he accepts it on the assumption

9 The *causa* can for instance be null and void due to a defect in form, or because it is contrary to the public order or the *boni mores*, or because it is contrary to a statutory provision, or because the alienation has taken place through a person who has no legal capacity to act, or because the parties have fiduciary transfer in mind (sec 3:84(3) *NBW*). Pitlo, Reehuis and Heisterkamp *Goederenrecht* 85-87, 92 *ff*; Bell, Boyron and Whittaker *Principles of French Law* 302 *ff*, 426-428, 440 *ff*.

10 *Digest* 41 1 31 *pr*. Consult furthermore Gaius *Institutiones* 2.19-20; Zuluetta *Gaius* 61; Diósdi *Ownerskip* 140-143; Feenstra *Grondslagen* 47, 57 62-63; Honsell, Mayer-Maly and Selb *Römisches Recht* 158; Kaser *Privatrecht* 416-417, 546; Pugsley 1974 *THRHR* 13; Pugsley 1975 *THRHR* 323; Zimmermann *Obligations* 237-238; Lokin "Overdracht" 11-12, 16; Van Zyl *Romeinse Privaatreg* 144; Snijders and Rank-Berenschot *Goederenrecht* 265-266; Pitlo *Zakenrecht* 192; Asser, Mijnssen and De Haan *Zakenrecht* 177; Mijnssen and Schut *Levering en Overdracht* 53; Schoordijk *Vermogensrecht* 263; Wiarda *Cessie* 138.

that it is lent to him.[11] Ulpian held the opinion that ownership was not transferred because no valid obligatory agreement existed.[12] It seems that he insisted on a *iusta causa* as a requirement for the transfer of property. It has been pointed out above that a *iusta causa* in the sense of a *valid* and enforceable obligatory agreement or other juridical fact that obliges the transferor to deliver the thing is a requirement for the transfer of real rights in a causal system.[13] Should the agreement be null and void, there is no legal basis (*causa*) for delivery; hence no real right will be transferred. Ulpian's viewpoint thus serves as justification for a causal system.[14]

3 Characteristics of an abstract system

Unlike the situation in a causal system, obligatory agreement and delivery are distinguished from each other in an abstract system as being two separate juridical acts. The obligatory agreement creates only an obligation which obliges the parties to perform, but it does not result in the transfer of real rights.[15] In order to bring about transfer (and for the execution of the obligatory agreement) the transferee also has to take control of the thing by means of an act of delivery (*traditio*), or immovables need to be registered. The principle of *traditionalism* as opposed to the principle of *consensualism* applies.[16]

11 The facts are given here in a rather simplified manner. A detail discussion does not fall within the scope of this article, but the following sources may be consulted in this regard: Dondorp en Schrage *Levering* 21-22; Ehrhardt *Justa Causa* 137; Fuchs *Iusta Causa* 135; Hazewinkel-Zuringa *Mancipatio* 135-140, 164-165; Honsell, Mayer-Maly and Selb *Römisches Recht* 159; Lokin *Leerstukken* 167-168; Lokin "Overdracht" 168; Molkenteller *Dinglichen Vertrag* 63-64, 67-69; Van Oven *Romeinsch Privaatrecht* 76-79, 227-228; Pflüger "Zwei Digestenstellen" 44; Pugsley 1975 *THRHR* 323; Van Oven *Causa en Levering* 30-31; Wolf *Error* 102, 104 *ff*.

12 There was no obligation on the transferor to donate the money. The agreement was void because the parties were not unanimous regarding the nature of the agreement.

13 The reason (*causa*) why the transferor delivers the thing is because he is obliged to do so, owing to a preceding obligation to deliver – the *legal foundation or basis* (*causa*) for the transfer of real rights is the obligation.

14 Although the Romans did not judge the transfer process in terms of causal and abstract, elements of the respective systems were indeed present in Roman law. Consult Eisele 1885 *Jhjb* 14-16; Hazewinkel-Zuringa *Mancipatio* 140, 164-165; Hijmans *Zakenrecht* 117-118; Honsell, Mayer-Maly and Selb *Römisches Recht* 159; Lokin *Leerstukken* 168; Lokin "Overdracht" 168; Molkenteller *Dinglichen Vertrag* 63-64; Van Oven *Romeinsch Privaatrecht* 78-79.

15 Unlike in the English and French legal systems, the conclusion of a contract does not result in the transfer of real rights *ipso facto*. Delivery is also not simply a factual act; it is a separate juridical act.

16 See Dondorp and Schrage *Levering* 3; Hallebeek 2004 *Codicillus* 6 *et seq*. Although the dichotomy between *consensualism* and *traditionalism* is useful to distinguish between those systems where transfer takes place by virtue of mere consensus between the parties (*causal* systems) and those systems where mere consensus is not enough because there should also be

However, in itself delivery will not suffice to bring about the transfer of real rights. The transferor has to deliver the thing with the intention of transferring real rights and the transferee has to take control of the thing with the intention of obtaining real rights. Although the intention forms part of the act of delivery, it is nevertheless a separate requirement for the transfer of real rights. In an abstract system the mutual intention of transferring and receiving real rights is considered a real agreement.[17] This agreement is of crucial importance to an abstract system because, along with delivery, it determines whether or not real rights are transferred to the transferee, and not the obligatory agreement.[18] The concept *abstract system* is derived precisely from the fact that the real agreement is an independent agreement which is separated from the preceding obligatory agreement. As an abstract juridical act, the real agreement displays two characteristics in particular:

3.1 The content of the agreement

Unlike the situation in a causal system, where the mutual intention to transfer and to receive real rights is implied in the obligatory agreement, such an intention is abstracted[19] from the preceding obligation in an abstract system and attached to the act of delivery.[20] What is more, the intention of the parties is construed as an independent real agreement. As the agreement's content consists merely of the mutual intention to transfer and to receive real rights, which intention is abstracted from the *causa*, reference is made to this characteristic of the real agreement as the

delivery (*traditio*), it should be kept in mind that the term *consensualism* is insufficient to distinguish between *causal* and *abstract* systems. Also in an abstract system there should be consensus between the parties (real agreement) in order for transfer to take place.

17 In an abstract system there is differentiation not only between obligatory agreement and delivery as two independent juristic acts, but also between obligatory agreement and real agreement, a differentiation unknown to a causal system.

18 The real agreement is characteristic of an abstract system, which distinguishes it from a causal system. In a causal system the real agreement does not make any sense. See Drobnig "Transfer of Property" 1014; Cronjé 1984 *THRHR* 203-204; Krause 1939 *AcP* 312, 319.

19 The concept *abstract* is used in imitation of the German terminology, where the word *Abstraktion* is used in the sense of *separation, distinction* or *isolation*.

20 In an abstract system the parties' primary intention, at the moment the obligatory agreement is entered into, is only to bring about an obligation, and not to transfer real rights. The intention to transfer real rights in future (which by implication can be read into the obligatory agreement) is also not sufficient to bring about transfer. See Carey Miller *Acquisition* 125.

contential abstraction. However, the agreement in itself does not suffice to bring about the transfer of real rights; the thing also needs to be delivered.

3.2 An independent agreement with its own requirements

Apart from its contents, the real agreement also needs to be "externally" abstracted or distinguished from the obligatory agreement. This entails that the real agreement is an independent agreement which needs to comply with its own requirements. The question as to whether the agreement is valid or not therefore also needs to be answered independent of the validity of the obligatory agreement or other juridical fact which obliges the transferor to deliver. Should delivery take place on account of a void obligatory agreement or other juridical fact, the specific real right will be transferred to the transferee notwithstanding its being null and void, on condition that a valid real agreement exists. The effect of this is that a valid obligatory agreement is not a requirement for the transfer of real rights in an abstract system. Rather, the fact is acknowledged that the parties can have the intention of transferring real rights, even if the obligatory agreement is null and void and even if they are aware of it.[21] Whether the parties in the case of a void obligatory agreement nevertheless had the intention of transferring real rights (whether or not there is a real agreement), is a factual question which needs to be answered in the light of the circumstances of each case.[22]

From the discussion above it is clear that the characteristic of the external abstraction is directly related to the question as to whether or not a valid obligatory

21 Consult Baur and Stürner *Sachenrecht* 47; Cronjé 1978 *THRHR* 242-243; Van der Merwe *Sakereg* 17, 306; Badenhorst, Pienaar and Mostert *Law of Property* 74-76; Carey Miller *Acquisition* 121, 124; Sonnekus *Vonnisbundel* 392; Laurens *Saaklike Regte* 285; Van der Walt and Pienaar *Property* 126; Delport and Olivier *Vonnisbundel* 275; *Kriel v Terblanche* 2002 6 SA 132 (NK).

22 The fact that the obligatory agreement or other juridical fact is null and void does not mean to say that the real agreement is also null and void. However, it is indeed possible that the same defect which brings about nullity of the obligatory agreement can also lead to the nullity of the real agreement. Whether the obligatory agreement or the real agreement, or both, are affected by the defect is, however, a factual question the answer to which depends on circumstances. However, it would be incorrect to say that the nullity of the obligatory agreement also leads to the nullity of the real agreement. The validity of the real agreement should be judged separately. Consult Badenhorst, Pienaar and Mostert *Law of Property* 79-80 and *Kriel v Terblanche* 2002 6 SA 132 (NK) 147E for guidelines in this respect.

agreement is a requirement for the transfer of real rights. It has also been indicated that this question was already in dispute in Roman law. While Ulpian insisted on a valid and enforceable *causa*, Julian in turn held the opinion that property was transferred even if a valid obligatory agreement did not exist and even if the transferor therefore was not obliged to transfer the money. It thus seems that he did not insist on a *iusta causa* in the sense of a valid obligatory agreement. To him, the decisive question was whether or not the parties had the intention to transfer property. It should be clear that Julian's stance in this respect could be the foundation on which an abstract system (in present-day terms) could be built. Should the transferor deliver a thing owing to a void agreement, real rights will be transferred to the transferee, notwithstanding the fact that he was not obliged to deliver.[23] In those cases where delivery takes place due to a null and void agreement, the reason or *causa* for delivery is not to be found in the fact that he is obliged to deliver, but because he intends to deliver or he mistakenly thinks that he is obliged to deliver. Usually such a faulty assumption (or supposed legal ground which is non-existent) is referred to as a *putative causa*.[24] Whilst the concept *iusta causa* (the reason for delivery) in a causal system refers to a valid obligation or other juridical fact which obliges the transferor to deliver, in an abstract system it includes an agreement that is null and void or another legal ground which is non-existent, but which the parties mistakenly thought existed.

4 Practical implications of the differentiation between the two systems

Theoretical doctrines, however, are never ends in themselves, but important only in so far as they analyse the working of the law in practice and ensure the cohesion and consistency of the different rules of a legal system. Therefore, the crux of the

23 The transferor will for instance not be obliged to deliver if the deed of sale is null and void, or if the will on account of which the delivery has taken place has been revoked.

24 The parties for instance are under the impression that they have closed an agreement, but later it emerges that no agreement has been established because it is null and void and that nothing was owed. There will be a *putative causa* in the following cases too: if the executer transfers erroneously on the basis of the rules of the law of intestate succession, whilst a valid will exists; if he transfers by virtue of a will that has been revoked whilst he was not aware of it; if he transfers on the basis of customary law (the law of succession relating to Black persons), which he incorrectly thinks is applicable to the case involved, whilst it is not.

matter is: what difference does it make whether one follows the *causa* or the abstract theory?[25]

When judging the pros and cons of each of the systems, the legal position of the respective parties, namely the transferor, the transferee and third parties, as it appears in each system, necessarily needs to be taken into consideration. This also entails that the interests of the respective parties must be balanced.

In a causal system the transferor undoubtedly finds himself in a favourable position *vis-à-vis* the transferee, since he retains his real right if the thing is delivered on account of a void *causa*.[26] He can therefore reclaim the thing with the *rei vindicatio* from the transferee or any third party to whom the thing has been transferred (even if the third party is *bona fide*), because the transferor is still the holder of the right. Since the transferee has no right to dispose of the thing, he can also not transfer the thing to someone else. Should the transferee be declared insolvent whilst the thing is still under his control, it does not fall in his insolvent estate.[27]

Should the contract not be void, but voidable[28] and it becomes void after the thing has already been delivered, or after registration has taken place, voidance has real effect with retroactive operation up until the date of conclusion of the contract. This means that delivery had taken place by reason of a void *causa*, that transfer is null and void with retroactive effect and that the thing by operation of law (*ex lege*) returns to the transferor. The transferor is regarded to have always been the holder of the right and he is therefore not prejudiced by the insolvency of the transferee. Voidance further also has an absolute effect. This means that the transferor is also

25 Silberberg *Property* 148.

26 It has been indicated above that a *iusta causa* is a requirement for the transfer of real rights. Should the thing be delivered by virtue of a void agreement, no real rights are transferred. Nicholas *French Law of Contract* 79; Youngs *English, French and German Law* 555-557.

27 Drobnig "Transfer of Property" 1007-1008; Nicholas *French Law of Contract* 80, 154-155; Bell, Boyron and Whittaker *Principles of French Law* 448ff; Marsh *Comparative Contract Law* 253-257 (but see 261-263); Snijders and Rank-Berenschot *Goederenrecht* 272; Asser, Mijnssen and De Haan *Zakenrecht* 178-179; Pitlo *Zakenrecht* 209; Pitlo, Reehuis and Heisterkamp *Goederenrecht* 85-86; Konings *Openbare Registers* 141.

28 In the Netherlands the title in the following circumstances will be voidable: in the case of error (sec 6:228, 6:230 *NBW*), compulsion, fraud (sec 3:44 *NBW*), incapacity to act (sec 3:32 *NBW*), mental illness (sec 3:34 *NBW*), abuse of circumstances (sec 3:44 *NBW*) and prejudice to creditors (sec 3:45 *NBW*).

considered to be the holder of the right as far as third parties are concerned and that he can claim the thing with the *rei vindicatio* from any person who has control over it.[29]

Protagonists of the causal system justify the system with the following arguments: it protects real rights as a legal institution; the owner should lose his real rights only if an agreed foundation exists for such a loss (hence transfer must rest on a valid obligatory agreement); the legal norms and provisions of a statute that prohibits agreements based on policy considerations must be adhered to. Should an agreement be null and void because it is prohibited by law, such a null and void agreement should also have no legal consequences. No fault can be found with this argument, especially not if the parties are aware of the defect, or if only the transferee was aware of it. Had the transferor been responsible for the defect, or if he had delivered the thing while being aware of the defect, it is, however, debatable in consideration of fairness whether or not he deserves protection.

In an abstract system the transferor is in an unfavourable position *vis-à-vis* the transferee and third parties since a real right is transferred to the transferee notwithstanding the nullity of the obligatory agreement. In his turn, the transferee may transfer the same real right to a third party, who will become the holder of the right.[30] Furthermore, should the transferee after delivery be declared insolvent, the fact that a real right has been transferred means that the thing falls in his insolvent estate and that the transferor is only a concurrent creditor. Should the first transferor establish, after transfer, that the contract of sale (for instance) is void, he can therefore not reclaim the thing with the *rei vindicatio* from the transferee or third party to whom he has transferred it in the meantime, because he is no longer the holder of the right. However, this does not mean to say that his hands are tied and that the transferor is worse off when his position is compared with that of the transferee.

29 See sec 3:53(1) *NBW*; Pitlo, Reehuis and Heisterkamp *Goederenrecht* 86-87; Snijders and Rank-Berenschot *Goederenrecht* 272, 275; Dondorp and Schrage *Levering* 7-8. Bell, Boyron and Whittaker *Principles of French Law* 451; Nicholas *French Law of Contract* 76-81; Youngs *English, French and German Law* 557.

30 Provided there was a valid real agreement and the parties had the intention of transferring the real right. Should that not have been their intention, the right would not be transferred and the transferor would have a real action.

Because the thing has been transferred *sine causa*, he has the *condictio indebiti* at his disposal, by means of which he can reclaim the thing or the value thereof from the transferee.[31] In other words, the only difference between the two systems, when the position of the transferor is compared with that of the transferee, is that the remedies available to the transferor differ.[32] However, the transferor has no claim based on the *condictio indebiti* against *bona fide* third parties that have received the thing from the transferee, unless the thing has been transferred to the third party without value.[33]

Whilst the *causal system* gives preference to the interests of the transferor *vis-à-vis* the transferee, it gives insufficient protection to *third parties* against the disadvantageous consequences of delivery owing to a void or voidable obligation. The system can be criticised because it can be unfair towards third parties that presume that the person who has physical control over the thing, or in whose name land has been registered, is also the owner (especially if the third party was not aware or could not have been aware of the fact that someone else is the owner of the thing – if he is *bona fide*). In the Netherlands the legal position of *bona fide* third parties has improved considerably, since the *Nieuw Burgerlijk Wetboek* of 1992 now grants better protection to them than was the case under the *Burgerlijk Wetboek* of 1838. The third party transferee will become the owner even if he obtained the thing from a person who is not entitled to dispose of the thing concerned, on condition that

31 Provided the transferee is enriched to the detriment of the transferor. Defects in the underlying agreement are, in other words, not completely irrelevant. The *condictio* is granted because the person who transferred without a reason should be protected in appropriate circumstances. Transfer is never a goal in itself. Should the thing be delivered owing to an illegal contract, the *par delictum* rule will, however, prevent him from acting with the *condictio*. See Badenhorst, Pienaar and Mostert *Law of Property* 77-78; Dondorp and Schrage *Levering* 7-8; Van Oven *Romeinsch Privaatrecht 75;* Lokin *Leerstukken* 159.

32 However, it should be granted that the transferor can be worse off when he institutes a *condictio*, as opposed to the *rei vindicatio*. The *condictio* is for instance a personal action which forgoes the characteristics of pursuance and preference. Furthermore, should the transferor have erred and was mistakenly under the impression that he was obliged to perform, he would also succeed with the *condictio* only if it was an excusable error. See De Vos 1976 *TSAR* 79.

33 Consult Badenhorst, Pienaar and Mostert *Law of Property* 79; De Vos 1976 *TSAR* 79; De Vos *Verrykingsaanspreeklikheid* 23, 30, 66-67, 156 and 187; Van der Merwe *Sakereg* 17, 306; Van der Walt and Pienaar *Property* 126-127, 159; Sonnekus *Vonnisbundel* 466; *Kriel v Terblanche* 2002 6 SA 132 (NK); Asser and Beekhuis *Zakenrecht* 176; Konings *Openbare Registers* 141; Pitlo *Zakenrecht* 206; Pitlo, Reehuis and Heisterkamp *Goederenrecht* 87-88; Snijders and Rank-Berenschot *Goederenrecht* 269-271.

the requirements mentioned in the act are complied with.[34] The respective provisions are exceptions to the requirement that the transferor must be entitled to dispose of the thing. It has also resulted in the *nemo plus iuris* rule being eased considerably for the sake of the protection of *bona fide* third parties.[35]

As against the causal system, in an abstract system third parties find themselves in a favourable position – real rights are transferred to the transferee, even if the thing is delivered by virtue of a void obligatory agreement. Should the transferee be sequestrated after delivery, the thing falls into his insolvent estate. The transferor then has only a concurrent claim, which is scant consolation.[36] The criticism against the system is that the insolvent's creditors share in the yields of a thing which, in terms of a void juristic act, came into his hands. No reason exists why they have to be favoured in such circumstances to the detriment of the transferor, especially not if the transferee was *aware* of the defect or was responsible for it. Should the transferor have been aware of the defect in the legal basis for delivery and not the transferee, it can again be argued that it is just fair for real rights to pass, especially if it transpires that, notwithstanding his knowledge of the defect, he still intended to transfer the real right concerned.

Finally it is pointed out that third parties also enjoy protection by virtue of the doctrine of estoppel. In appropriate circumstances the transferor can in terms of this doctrine be prohibited from claiming his thing from the third party with the *rei vindicatio*. Should the transferor neglect to claim the thing immediately from the transferee to whom he transferred, he makes a misrepresentation to the third party that the transferee has obtained a legal title which is transferrable. He can be held to this misrepresentation if the requirements for estoppel are met.[37]

34 Also see s 1141 *Code Civil* 1804; Bell, Boyron and Whittaker *Principles of French Law* 451; Drobnig "Transfer of Property" 1007. S 2279 also protects the good faith transferee in that it provides that, in case of movable property, possession is equivalent to title.

35 See eg ss 3:86, 3:88, 3:24, 3:26 and 3:36 *NBW*. The provisions are not discussed in more detail, but consult Asser, Mijnssen and De Haan *Zakenrecht* 184; Pitlo, Reehuis and Heisterkamp *Goederenrecht* 88-89; Mijnssen and Schut *Levering en Overdracht* 142-143.

36 Should a transferor for instance have transferred a piece of land to an insolvent owing to a void agreement, the prejudice is obvious.

37 See Badenhorst, Pienaar and Mostert *Law of Property* 79; Van der Merwe *Sakereg* 307; Van der Walt and Pienaar *Property* 149. In the Netherlands (a causal system) third parties are protected against prejudice caused by misrepresentation by the owner-transferor in terms of sec 3:36

Protagonists of the abstract system are nevertheless prepared to accept that creditors of the transferee and third parties are unduly favoured by the system, since it grants *bona fide* third parties considerable protection, even when it is to the detriment of the transferor.[38] The third party to whom the transferee has transferred the thing in the meantime becomes the owner, notwithstanding the fact that his predecessor had obtained the thing by reason of a void agreement. The transferor will therefore not be able to claim from the third party with the *rei vindicatio*. This favourable position of third parties is, amongst others, justified with an appeal to the publicity principle, legal certainty and considerations of equity. Third parties that rely, as they are entitled to, on the apparent legal certainty of the transferor's title and regard him as the holder of the right,[39] should not be disappointed regarding their trust. In this respect the abstract system promotes legal certainty, since it prevents that doubt regarding the validity of the obligatory agreement or other juridical fact which obliges the transferor to deliver from also impacting on the validity of the act of delivery. Outsiders can accept that the person who is apparently the holder of the right is indeed entitled to dispose of a thing.[40] Should a third party not have known, or was not supposed to know, that the transfer to his predecessor had taken place in terms of a void agreement, it would be unfair to sacrifice his rights in favour of the transferor. The reasoning is that a defective agreement as the legal basis for delivery falls rather within the terrain of responsibility of the transferor than within that of the third party, especially if he was aware of the defect. On considerations of fairness the transferor should bear the risk of a defective *causa*. Third parties should not be prejudiced by it.[41]

NBW. Consult Pitlo, Reehuis and Heisterkamp *Goederenrecht* 81; Snijders and Rank-Berenschot *Goederenrecht* 335; Asser, Mijnssen and De Haan *Zakenrecht* 175.

38 Drobnig "Transfer of Property" 1017-1018.

39 Because he is, for instance, indicated in the deeds register as the true owner, or because he is physically in control of the thing.

40 Although the system occasionally can be unfair towards the transferor, his interests are sacrificed for the sake of legal certainty and commercial interaction.

41 Van der Merwe *Sakereg* 17-18, 306-307; Van der Merwe "Sakereg" para 299; Carey Miller *Acquisition* 124; Badenhorst, Pienaar and Mostert *Law of Property* 79. The abstract principle is criticised in German law. The criticism is understandable there, because in German law *bona fide* acquisition of property is possible and the reasoning is exactly that third parties are sufficiently protected in this manner. However, the creditors of third parties cannot be protected by *bona fide* acquisition of property. See Cronjé 1978 *THRHR* 243.

The abstract approach is criticised because, in the opinion of the critics, it is outrageous to attach any legal consequences to a transfer which, for instance, arose from a legally prohibited ground (*causa*).[42] The reasoning is that it is irrational to acknowledge the consequence as valid if the cause is prohibited. As far as they are concerned, no legal consequences should arise from a void obligatory agreement, and the act of execution should also be null and void, because it is subjected to the same prohibitions. The critics of the system furthermore point out that specific policy considerations usually are fundamental to a legal rule by means of which a specific juridical act is prohibited on account of its being null and void. In an abstract system the policy considerations and the accompanying goal pursued with such a legal norm can be nullified. It is then of no use.[43]

The necessity of choosing between the causal and the abstract systems arises only in those exceptional cases where the obligation or other legal ground is null and void, where there is legally no foundation by virtue of which delivery takes place and both parties nevertheless have the intention to transfer real rights. Should A for instance think he is selling the thing involved to B, but B is of the opinion that he is receiving a gift, no valid obligatory agreement comes into being due to the lack of consensus. However, both parties intended to transfer property to B through delivery.[44] In such a situation there is one of two choices: (1) property is indeed transferred (abstract) or (2) property is not transferred (causal).

5 Is a causa a requirement at all in an abstract system?

In Roman law and even long after, the point of view occurred that although a valid obligation or other legal ground (*iusta causa*) might not have been a requirement for the transfer of real rights, a reason (*causa*) for transfer had to exist. This view still

42 As already indicated, real rights can be transferred in an abstract system, even though the obligatory legal ground is null and void, for example because the prescribed requirements regarding form have not been met.

43 Consult Asser and Beekhuis *Zakenrecht* 179-180; Pitlo *Zakenrecht* 204, 209-210. The last-mentioned nevertheless grants that this viewpoint is also subjective and that there is still room for an opposite viewpoint. He points out that a marriage concluded with a view simply to obtaining another nationality is nevertheless valid.

44 However, each party has another reason (or legal ground) which forms the basis for his intention to transfer the property. Consult Carey Miller *Acquisition* 124.

occurs today. It is justified with the argument that no one transfers something without a reason and that the transfer of property must always rest on one ground or another, which legally serves as justification for the transfer of real rights – real rights cannot be transferred unless a legal basis exists which is *suitable* for bringing about the transfer.

However, this viewpoint cannot be supported. Should the *causa*, in the sense of an obligatory agreement or other legal ground which obliges a party to deliver, not have to be valid, it is senseless to insist at all on a *causa* (obligation) as a requirement for transfer of real rights. If the viewpoint is followed through to its logical consequences, it amounts to a void obligation or other legal basis which is non-existent, but which the parties mistakenly think exists (a putative *causa*), being a requirement for the transfer of real rights.[45] It is proposed that if the *causa*, in the sense of some or other obligation or other legal ground does not have to be valid, it is unnecessary to insist at all on a *causa* as a requirement for the transfer of real rights in an abstract system. Only a valid juridical act can really be legally obligatory. It is suggested that a *causa* as a requirement for the transfer of real rights should be given up in an abstract system. Alternatively another meaning should be attached to the concept.[46]

In Roman law an obligatory agreement was a requirement for the transfer of real rights.[47] Therefore, the definition of the *causa* concept with reference to such an agreement was indeed meaningful. However, in an abstract system it serves no purpose to describe the *causa* with reference to the obligatory agreement, since it is no substantive law requirement for the transfer of real rights.[48] What is indeed

45 This would be like saying that real rights will be transferred only if a void obligation exists.

46 See Badenhorst, Pienaar and Mostert *Law of Property* 76: "However, if this *causa* does not have to be valid, it can hardly be a legal requirement for the effectiveness of transfer ..." Should a *putative causa* be a requirement for the transfer of real rights, it is no longer an abstract system. Scholtens 1957 *SALJ* 281-283 holds the opinion that it is an *intermediate system* (in other words, something in between a causal and an abstract system), whilst De Vos 1976 *TSAR* 84 calls it a diluted causal system. See also Silberberg *Property* 138; Van der Merwe *Sakereg* 309-310.

47 Refer to the sources mentioned in fn 10 above. In addition consult: Kaser *Privatrecht* 249; Zimmermann *Obligations* 680; Van Oven *Causa en Levering* 39; Hazewinkel-Zuringa *Mancipatio* 202-213.

48 In the vast majority of cases delivery will indeed take place owing to a legal obligation which will also be the *reason* or *legal ground* (*causa*) for delivery. But if the agreement is null and void and property is nevertheless transferred, it is of no use to define the *causa* with reference to a valid *causa*. A definition is meant to provide for all possibilities, as far as possible.

required is that both parties should have the intention to transfer and to receive real rights. The *causa* therefore refers to the mutual intention to transfer and receive real rights, which is nothing less than the real agreement.[49] The reason why the transferor delivers the thing not important is in any case when the requirements for the transfer of real rights are under discussion. What is indeed important, and this is what the law is interested in, is the reason for the transfer. Should delivery take place by virtue of an obligatory agreement that is null and void, the reason or *causa* for the transferor to deliver the thing is in any case not because he is obliged to do so through an obligation but because he *intends* to transfer a real right (or because he mistakenly thinks he is obliged to do so).[50]

Should this viewpoint be correct (and it is suggested that it is indeed so), the *causa* concept would be superfluous in an abstract system, because it hwould have been incorporated into the real agreement. It would be unnecessary to insist on a *causa* (which is the intention to transfer real rights) as a requirement for the transfer of real rights and, besides, to also require a real agreement (i.e. the intention to transfer and to receive real rights).

In Roman law the *causa* for delivery (preceding obligation) and the *causa* for the transfer of property (the intention to transfer real rights) were not distinguished from each other.[51] Not one single text exists in the *Corpus Iuris Civilis* that expressly states the intention to transfer as a requirement for the transfer of real rights (it simply played a subordinate role), and also no text exists that defines the *causa* with reference to the transferor's intention. Julianus' point of view, which is described above, does present links for the fact that the reason or *causa* for delivery can be found in the intention to transfer real rights, but no consensus exists regarding the

49 But see Scholtens 1957 *SALJ* 280 who defines "the circumstances underlying the intention to transfer ownership by *traditio*" as the *causa*.

50 The reason (*causa*) for *delivery* and the reason (*causa*) for the *transfer of property* (which do not necessarily correspond in an abstract system) need to be differentiated from each other. In a causal system, the reason for delivery will necessarily also be the reason for transfer, because delivery is not an independent act.

51 Dondorp en Schrage *Levering* 17; Van Oven *Romeinsch Privaatrecht* 72-74; Hazewinkel-Zuringa *Mancipatio* 216-217; Kaser *Privatrecht* 417; Jahr 1963 *ZSS* 141, 169, 174; Honsell, Mayer-Maly and Selb *Römisches Recht* 157-158; Molkenteller *Dinglichen Vertrag* 64-66; Delport *Lewering en Registrasie* 108.

precise interpretation that should be attached to the text.[52] During the Middle Ages it was indeed realised that two different *causae* need to be distinguished from each other, namely (i) the *causa remota* (preceding the obligation or supposed obligation), which is not always the actual reason for the transfer of real rights, and (ii) the actual or immediate reason for transfer (*causa immediata* or *efficiens*), which can be found in the intention of the transferor.[53]

Savigny[54] rejected the viewpoint that a preceding obligation (*causa remota*) is a requirement for transfer of real rights. He emphatically declared that the actual reason why the transferor delivers in the case of a void agreement is not because he is obliged by reason of an obligation, but because he has the intention of transferring real rights. Therefore, the intention to transfer real rights (*causa immediata*) is defined as the *causa*. However, he later changed his mind and then took the viewpoint that the *causa* is the circumstances from which the intention to transfer real rights can be deduced (for instance the preceding valid or void obligation). Savigny did not proffer reasons for the change in his viewpoint, but there is a strong probability that he did it because in a legal-historical sense it is incorrect to define the *causa* as the intention. The concept has always referred to a preceding obligation. His definition, therefore, did not correspond with the sources, and he was aware of the fact that his theory had to correspond with classical Roman law. Although he attempted to keep as close as possible to the historic meaning of the concept with his new definition (*causa* is the circumstances from which the intention can be determined, for instance the preceding obligation), the irony is that it is also incorrect in a legal historical and linguistic sense. Translated literally, *causa* means the foundation or reason for delivery and not the circumstances from which the intention can be deduced. In any case, this viewpoint confuses *factum probandum* with *factum probans*.

52 No clarity exists regarding what Julianus' viewpoint actually was, and no definite conclusions can be drawn from it. Consult the sources referred to in fn 11 above.

53 Consult *inter alia* Fulgosius *ad Digesta* 12.1.18 (in Fuchs *Iusta Causa* 52); Baldus *ad Digesta* 4.3.7 *pr;* Donellus *Iure Civili* 4.16a nd Donellus *Opera* 4.16.

54 Consult Savigny's lectures of 1815-1816 in Felgentraeger *Savignys Einfluß* 32-33, 33-34, the lectures of 1820-1821 in Felgentraeger *Savignys Einfluß* 35-36 and Savigny *Obligationenrecht* 256.

The fact that a preceding obligatory agreement or other juridical fact which obliges delivery in an abstract system is not a requirement for the transfer of real rights does not mean to say that it is entirely irrelevant. The importance of the obligatory agreement in an abstract system lies in the fact that it can serve as proof that the parties, at the moment when the thing was transferred, had the intention of transferring real rights. Although an obligatory agreement is not a substantive law requirement for the transfer of real rights (it is not a *factum probandum*), it is a means of proof from which the parties' intention to transfer real rights can be determined (it is a *factum probans*).[55] From the agreement it can be deduced whether the intention was directed at the transfer of real rights (as with purchase and exchange), or not (as with hire and pledge).[56] The form in which the agreement is moulded is, however, not necessarily an indication of their intention. Time and again, in the light of the facts of each case, it should be determined what the parties' actual intention was.[57] Even a void obligatory agreement can serve as proof of the parties' intention. In *Krapohl v Oranje Koöperasie Bpk*[58] the court for instance deduced from the void obligatory agreement that the parties indeed intended to transfer real rights.[59] The intention can also be deduced from circumstances other than the preceding agreement, and there can be more direct evidence of the parties' intention to transfer and receive real rights. Should such evidence indeed be available, it is

55 *Commissioner of Customs and Excise v Randles Brothers and Hudson* 1941 AD 369, 398-399 and 411; *Krapohl v Oranje Koöperasie* 1990 3 SA 848 (A) 864; *Concor Construction v Santambank* 1993 3 SA 930 (A) 933 F-G; *Bank Windhoek v Rajie* 1994 1 SA 115 (A) 141 D-E, 144 I; Carey Miller *Acquisition* 123, 132-134; Badenhorst, Pienaar and Mostert *Law of Property* 76; Van der Merwe *Sakereg* 303; Cronjé 1978 *THRHR* 229-230, 240-241; Hazewinkel-Zuringa *Mancipatio* 130-131; Savigny *Obligationenrecht* 258, 259. In this respect the function of the obligatory agreement differs from that in Roman law, where it was indeed a substantive law requirement. Refer to the sources mentioned in fn 10 and 49 above.

56 If the parties actually meant pledge, they could not have had transfer of property in mind. See *Bank Windhoek v Rajie* 1994 1 SA 115 (A) 141 D-E, 144 I.

57 Consult *Commissioner of Customs and Excise v Randles, Brothers and Hudson* 1941 AD 369; *Bank Windhoek v Rajie* 1994 1 SA 115 (A) 142 D-G, 144 I - 145 B. *Concor Construction v Santambank* 1993 3 SA 930 (A) 939 B-D; *Quenty's Motors v Standard Credit Corporation* 1994 3 SA 188 (A).

58 *Krapohl v Oranje Koöperasie* 1990 3 SA 848 (A) 864. See also Van der Merwe *Sakereg* 306.

59 A void agreement can, however, also justify the conclusion that the parties did not intend to transfer property. *Concor Construction v Santambank* 1993 3 SA 930 (A) 933 F-G: "Equally, the absence of such an agreement may, depending upon the circumstances, be evidence of the absence of any such intention". The nature of the deduction depends on circumstances. See also Van der Merwe *Sakereg* 313; Van der Walt and Pienaar *Property* 126.

unnecessary to rely on the underlying legal foundation for drawing conclusions in this regard.[60]

6 The Netherlands as an example of a mixed system

The characteristics of the abstract and causal systems in the pure form of each were discussed above. Different variations also occur, however, between a pure causal system (which insists on a valid preceding obligatory agreement as the foundation for transfer) and a pure abstract system (where the intention of the parties will always be decisive), since a specific legal system may in practice display elements of both systems. The application of abstract and causal can fluctuate, depending on the circumstances and the problem situation being addressed.[61] For the purposes of this investigation the Netherlands will be taken as an example of such a mixed system and the characteristics thereof will be compared with those of the French system (as an example of a pure causal system) on the one hand and the South African and German systems on the other (as examples of abstract systems).[62] This comparison indicates that the system of the Netherlands displays the characteristics of an abstract system, but that it also contains features of a causal system.

6.1 Characteristics of an abstract system

The rule of Roman law (which is also applied in Roman-Dutch law), namely that real rights cannot be transferred simply by agreement but that the thing must also be delivered, is still applied these days in the Netherlands. As in South Africa and Germany, distinction is also drawn between a preceding obligation or other juridical fact which obliges the transferor to deliver, on the one hand (*causa* or *title*), and delivery (*traditio*) on the other, as being two separate *juridical acts*. The obligatory

60 See *Commissioner of Customs and Excise v Randles, Brothers and Hudson* 1941 AD 369, 411.

61 Systems cannot be divided into watertight compartments. See Carey Miller *Acquisition* 126; Scholtens 1957 *SALJ* 281; Silberberg and Schoeman *Property* 77.

62 The question as to whether a causal or abstract system is applied in the Netherlands was controversial for many years. The *Hoge Raad* brought an end to the controversy by deciding that the causal doctrine was applicable. Consult, amongst others, *HR* 5 May 1950 *NJ* 1951 1; *HR* 10 December 1952 *NJ* 1953 550 (immovables); *HR* 9 February 1939 *NJ* 1939 865 (session); *HR* 12 June 1970 *NJ* 1970 203. Sec 3:84 (1) *NBW* now requires a legally valid *title*, which makes it clear that a causal system is applicable. Also Pitlo, Reehuis and Heisterkamp *Goederenrecht* 111-112. As will become evident from the discussion hereafter, it is, however, not a pure causal system.

agreement does not yet transfer real rights; it only creates rights and obligations. The act of delivery (which is a separate requirement for the transfer of real rights) in turn aims at complying with the obligation which arises from the agreement and from ending the obligation. The Dutch system therefore differs from a causal system as it is applied in France in this respect, that real rights are not transferred by the conclusion of the obligatory agreement; a separate act of delivery also has to take place.[63]

In an abstract system, acknowledgement of delivery (*traditio*) as a separate juridical act in the process of transfer leads to the mental disposition with which the act of delivery is executed (the mutual intention of transferring and receiving real rights) to be construed as a separate real agreement. Although the *Nieuw Burgerlijk Wetboek* does not require a real agreement for the transfer of real rights in the Netherlands, there is no doubt that a real agreement is indeed a requirement and that it fulfils an important function.[64] However, there are also academics and practitioners in the Netherlands that subject the real agreement to criticism, as it is redundant in their opinion.[65] As the real agreement is one of the outstanding characteristics of an abstract system, the Dutch system is abstract in this respect (*contential abstraction*).[66] It differs from a pure causal system (such as that in France), where the intention of transferring and receiving real rights does not exist independently of the obligatory agreement, but forms an inherent part of that agreement.

The statement is often come across that a causal system is applied in the Netherlands. It should, however, now be clear that such a statement is incorrect. This statement is founded on the fact that a valid obligatory agreement is a requirement for the transfer of real rights in the Netherlands, which is a characteristic

63 In France delivery is not a juridical act with its own legal consequences; it is merely a factual act. A pure causal system (as in France) therefore is contradictory to Roman-Dutch law. See also Carey Miller *Acquisition* 124-125; Marsh *Comparative Contract Law* 238-244.

64 Cronjé 1984 *THRHR* 200 loses sight of this. He sees nothing but the fact that a causal system is usually associated with the rule that real rights are not transferred if the obligatory agreement is null and void.

65 A real agreement according to them is a requirement for the transfer of real rights only in an abstract system. See eg Den Dulk *Zakelijke Overeenkomst* 18-19; Van Oven 1935 *WPNR* 70. Furthermore Cronjé 1984 *THRHR* 202-205.

66 As has already been remarked, the construction of the real agreement goes hand in hand with an abstract system (it is the creation of an abstract system).

of a causal system. It is, however, not realised that the Netherlands also displays the following characteristics of an abstract system, namely (1) real rights are not transferred by means of the obligatory agreement; an act of delivery must also take place; and (2) a real agreement (which forms part of the act of delivery) is a requirement for the transfer of real rights.

6.2 Characteristics of a causal system

The Dutch legal system does indeed also display the characteristics of a causal system, as applied in France, since a valid obligatory agreement is a requirement for the transfer of real rights. If an obligatory agreement is null and void, this prevents the transfer of real rights. In this respect it differs therefore from the South African and the German systems. Although a real agreement is a separate requirement for the transfer of real rights in the Netherlands, the practical value of the real agreement is limited by the requirement that the obligatory agreement has to be valid.[67] Should the obligatory agreement be null and void, real rights will not be transferred even if the parties had the intention of transferring and even if there is a valid real agreement. The question as to whether or not a valid real agreement exists is therefore relevant only if the obligatory agreement is valid. The circumstances could for instance have changed since the conclusion of the contract to such an extent that one or both parties at the time of delivery (for instance due to defects with consensus) no longer have the intention to transfer the specific real right. Other factors may also prevent the transfer of real rights, for instance the fact that the transferor is no longer entitled to dispose of the thing. Real rights will in these circumstances not be transferred, not because the obligatory agreement is null and void, but because no valid real agreement exists. The real agreement is necessitated precisely by the fact that delivery in the Netherlands (unlike in France) is a separate requirement for the transfer of real rights, and that it entails more than simply a factual act.

Should the obligatory agreement be valid, there are no essential differences between the abstract system as it is applied in South Africa and the system as it is applied in

67 Pitlo, Reehuis and Heisterkamp *Goederenrecht* 114; Drobnig "Transfer of Property" 1015-10164.

the Netherlands. The question as to whether or not real rights are transferred depends in both systems only on whether or not a valid real agreement exists. If not, in both systems real rights will not be transferred.

7 Conclusion

a) In a causal system real rights are transferred by conclusion of the obligatory agreement which should be valid and enforceable. The mutual intention to transfer and receive real rights is not construed as an independent real agreement. It is contained in the obligatory agreement. A real agreement has no right of existence in a causal system. The transferor finds himself in a favourable position in relation to other parties while *bona fide* third parties undoubtedly get the worst of the deal since they have no protection against* the disadvantageous consequences of delivery owing to a void obligation.

b) In an abstract system the obligatory agreement is not sufficient for the transfer of real rights. The thing should also be delivered and there should be a valid real agreement which consists merely of the mutual intention to transfer and to receive real rights. The real agreement is a characteristic of an abstract system which distinguishes it from a causal system. Compared with those subject to the causal system, the transferee and third parties find themselves in a favourable position *vis-à-vis* the transferor. The abstract system also contributes towards easier determination of the point of time when an exchange of title takes place.[68]

c) In a causal system the concept *iusta causa* refers to a *valid* and enforceable obligatory agreement or other juridical fact which obliges the transferee to deliver the thing. In an abstract system it serves no purpose to describe the *causa* with reference to the obligatory agreement, since it is not a substantive law requirement for the transfer of real rights. The *causa* concept refers rather to the mutual intention to transfer and to receive real rights, which is nothing less than the real agreement. Since the *causa* is contained in the real

68 See Van der Merwe *Sakereg* 17.

agreement it has no further use in an abstract system and should be abandoned.

d) The Dutch system displays the characteristics of an abstract system in that a separate act of delivery should exist and a valid real agreement is a requirement for the transfer of real rights. On the other hand, it displays the characteristics of a causal system since a valid obligatory agreement is a requirement for the transfer of real rights.

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List of abbreviations

AcP	Archiv für civilistische Praxis
Jhjb	Jherings Jahrbücher für die Dogmatik des Heutigen Römischen und Deutschen Privatrechts
NBW	Nieuw Burgerlijk Wetboek
SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman Dutch Law
TSAR	Tydskrif vir Suid-Afrikaanse Reg / Journal of South African Law

WPNR	Weekblad voor Privaatrecht, Notaris-ampt en Registrasie
ZSS	Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Romanistische Abt)

THE CHARACTERISTICS OF AN ABSTRACT SYSTEM FOR THE TRANSFER OF PROPERTY IN SOUTH AFRICAN LAW AS DISTINGUISHED FROM A CAUSAL SYSTEM

PJW Schutte*

SUMMARY

Two divergent systems are usually differentiated between when it comes to the way in which real rights are transferred from one person to another, namely abstract and causal systems. In this article the features of each system, the respect in which they differ from each other, and the practical implications of the distinction are established. It appears that in a causal system real rights are transferred by conclusion of the obligatory agreement, which should be valid and enforceable. The mutual intention to transfer and to receive real rights is not construed as an independent real agreement as it is contained in the obligatory agreement. In a causal system the transferor finds himself in a favourable position in relation to other parties while *bona fide* third parties undoubtedly get the worst of the deal since they have no protection against the disadvantageous consequences of delivery owing to a void obligation.

In an abstract system the obligatory agreement is not sufficient for the transfer of real rights, the thing should also be delivered and there should be a valid real agreement which consists merely of the mutual intention to transfer and to receive real rights. The real agreement is a characteristic of an abstract system which distinguishes it from a causal system. Compared with the position of those in the causal system, the transferee and third parties find themselves in a favourable position *vis-à-vis* the transferor.

In a causal system the concept *iusta causa* refers to a *valid* and enforceable obligatory agreement or other juridical fact which obliges the transferee to deliver the thing. In an abstract system it serves no purpose to describe the *causa* with reference to the obligatory agreement, since it is not a substantive law requirement for the transfer of real rights. The *causa* concept refers rather to the mutual intention to transfer and to receive real rights, which is nothing less than the real agreement. Since the *causa* is contained in the real agreement it is no longer of any use in an abstract system and should be abandoned.

The Dutch system displays the characteristics of an abstract system in that a separate act of delivery should exist and a valid real agreement is a requirement for the transfer of real rights. On the other hand it also displays characteristics of a causal system, since a valid obligatory agreement is a requirement for the transfer of real rights.

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