

VERTOON DIE *CORPUS IURIS CIVILIS* KENMERKE VAN 'N ABSTRAKTE STELSEL VAN EIENDOMSOORDRAG?

P JW Schutte**

Summary

It is generally accepted that an abstract system for the transfer of property is applied in South Africa. Characteristic of an abstract system is that the different legal acts which form part of the process, namely the obligatory agreement, delivery of the thing concerned or registration and the real agreement are separated from each other. The real agreement is an agreement between the transferor and the transferee based on a meeting of the minds; it is directed at the transfer of ownership by delivery and should be distinguished from the underlying *causa* (for example an obligatory agreement). The real agreement merely consists of the transferor's intention to transfer property and the transferee's intention to receive property. A second characteristic of the real agreement is that it should meet its own requirements. It is therefore not dependent on the validity of the preceding obligation or any other legal act. This means that ownership will pass from the transferor to the transferee even though the underlying obligatory agreement is invalid.

The real agreement is an invention of the German jurist Friedrich Carl von Savigny. The purpose with this article is to ascertain whether or not Roman law at the time of Justinian reflects any of the characteristics of an abstract system and the real agreement (which is generally associated with an abstract system). Can it be said that Savigny based his theory on Roman law? It appears from

* Does the *corpus iuris civilis* show characteristics of an abstract system of transfer of property? ** BA, B Juris, LL B, LL D, Senior Lecturer, Faculty of Law, North-West University (Potchefstroom Campus).

this paper that a clear distinction was drawn in Roman law between the *causa* (obligatory agreement) and delivery (*traditio*). Ownership in movable and immovable property did not pass directly by virtue of the conclusion of the contract of sale or donation (*causa*) - the thing concerned had to be delivered to the transferee in a legally accepted way as well. Although there is no clarity regarding the question of whether or not a valid *causa* was a requirement for the transfer of ownership, it can be stated with a fair amount of certainty that the *causa* had to be valid in those cases where delivery was effected by virtue of sale and donation. If the *causa* was invalid, ownership did not pass, even though the parties had the intention to pass ownership. In this regard Roman law at the time of Justinian reflects the characteristics of a causal system. However, if the thing was delivered on account of a *dos* or *solutio* by virtue of a *stipulatio* (and maybe also *mutuum*), there was no prior obligatory agreement and *traditio* was not affected by the *causa* at all. Ownership had passed merely by virtue of the intention to transfer and to receive ownership. In other words, Roman law portrays characteristics of an abstract system in these situations.

Regarding the question whether or not the reciprocal intention to transfer and to receive ownership had been construed as an independent agreement which should be distinguished from the obligatory agreement, it appears that that was not the case. Because of the dual nature of the contract of sale in Roman law (it created an obligation but it was also *iusta causa traditionis*), it was accepted that the intention to transfer and to receive ownership was actually contained in the obligatory agreement. It did not exist on its own as a separate agreement (except in cases of a *dos*, *solutio* and *mutuum*). However, it emerges that the intention was emphasised more and more and that it was gradually loosened from the *causa*. The loosening, however, existed merely in the vision that the intention to pass ownership (as contained in the *causa*) can continue to exist on its own even though the *causa* appears to be invalid. The bond between *causa* and *traditio* was not yet finally broken, because it was still the intention at the time of the obligatory agreement that effected the passing of ownership. The conclusion is that there was no sign of a real agreement which merely consisted of the reciprocal intention to transfer and receive ownership and which existed independently from the underlying obligatory agreement.

Keywords

Transfer of property; abstract system of transfer of property; causal system of transfer of property; real agreement; intention to transfer property; animus possidendi; possessio; iusta causa traditio; mancipatio; solutio; stipulatio; mutuum; Savigny; Roman law; formalities – writing.

Sleutelwoorde

Oordrag van eiendomsreg; abstrakte stelsel van oordrag van eiendomsreg; kousale stelsel van oordrag van eiendomsreg; saaklike ooreenkoms; bedoeling om eiendomsreg oor te dra; animus dominus; diminium; iusta causa traditio; mancipatio; solutio; stipulatio; mutuum; Savigny; Romeinse reg; skrif as vormvereiste.