

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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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

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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.

KEYWORDS: Causal and abstract systems for the transfer of real rights; transfer of real rights; contentual abstraction; external abstraction; real agreement'; *animus transferendi et accipiendi*; consensualism; traditionalism; *iusta causa traditionis*; *causa remota*; *causa immediate/causa efficiens*; legal ground or reason for transfer; void obligatory agreement; *bona fide* third parties; *rei vindicatio*; Savigny