

# Potestas alienandi

*Transfer of ownership by a non-owner  
from Roman law to the DCFR*



ISBN: 9789462403246

Published by:

Wolf Legal Publishers (WLP)

PO Box 313

5060 AH Oisterwijk

The Netherlands

E-Mail: [info@wolfpublishers.nl](mailto:info@wolfpublishers.nl)

[www.wolfpublishers.com](http://www.wolfpublishers.com)

**Publisher:** Willem-Jan van der Wolf

**Illustrations:** Estefania Carrasco Marambio

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## **Potestas alienandi**

Transfer of ownership by a non-owner  
from Roman law to the DCFR

Vervreemdingsbevoegdheid  
Eigendomsoverdracht door een niet-eigenaar  
vanaf het Romeinse recht tot het Ontwerp voor een Gemeenschappelijk  
Referentiekader

Thesis

to obtain the degree of Doctor from the  
Erasmus University Rotterdam  
by command of the Rector Magnificus  
prof.dr. H.A.P. Pols

and in accordance with the decision of the Doctorate Board  
the public defense shall be held on  
Thursday 22 September 2016 at 15:30  
by

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## Foreword

The completion of the present research would not have been possible without the help and support of a significant number of people and organizations, to whom I would like to express my gratitude, even if it is only in a few words.

To begin with, the Chilean government was so kind as to fund the full period of my PhD studies through the programme of Scholarships for Doctoral Studies Abroad of CONICYT.

My stay in the Netherlands was also made possible due to efforts of my *promotores* Laurens Winkel and Tammo Wallinga. To them I am deeply indebted not only from a professional and academic point of view, but also because of their warmth and affection throughout these years. I am also thankful to my colleagues and the staff at the Erasmus School of Law with whom I shared so much, and especially to Emese von Bóné and Tineke van de Pas.

I would also like to thank the members of the reading commission for their comments, and Prof. Dr. Thomas Finkenauer in particular for providing an extensive list of textual remarks.

I cannot leave out my friend Carlos Amunátegui, who stood at the crib of this work and offered valuable comments on it over the years.

Countless other colleagues and friends – both in the Netherlands and elsewhere – have helped me over the years to discuss my research, provided me with materials or simply gave me useful tips. I hope each of them finds a piece of themselves in this work.

On a more private level, special thanks are due to my parents Leonora and Juan Miguel, who offered me their unconditional support throughout this process, often helping me to cover expenses related to my research that were beyond the possibilities of a modest grant holder.

Finally, I do not have enough words of gratitude and praise for my beloved wife Estefanía, who had no hesitation in joining me in this adventure and helped me in every possible way. Without her, this endeavour would have not have been possible. This book is dedicated to her.



## Abbreviations

<b>AA</b>	Ars Aequi
<b>AcP</b>	Archiv für die civilistische Praxis
<b>AD</b>	Anno Domini
<b>Afr.</b>	Africanus
<b>AHDE</b>	Anuario de Historia del Derecho Español
<b>Alf.</b>	Alfenus
<b>art.</b>	Article
<b>AUPA</b>	Annali del Seminario Giuridico dell'Università di Palermo
<b>Bas.</b>	Basilicorum libri LX
<b>BC</b>	Before Christ
<b>BGB</b>	Bürgerliches Gesetzbuch (German Civil Code)
<b>BIDR</b>	Bullettino dell'Istituto di Diritto Romano
<b>BS</b>	Bas. Series B: Scholia (quoted after page and line)
<b>BT</b>	Bas. Series A: Textus (quoted after page and line)
<b>BW</b>	Burgerlijk Wetboek (Dutch Civil Code)
<b>c.</b>	Capitulum / Canon (when quoting the <i>Decretum Grat.</i> ) / circa
<b>C.</b>	Codex Iustinianus / Causa (when quoting the <i>Decretum Grat.</i> )
<b>cf.</b>	confer
<b>col.</b>	Column(s)
<b>CTh</b>	Codex Theodosianus
<b>D.</b>	Digest / Distinctio (when quoting the <i>Decretum Grat.</i> )
<b><i>Decretum Grat.</i></b>	Decretum Gratiani
<b><i>dig.</i></b>	digestorum
<b><i>ed.</i></b>	ad Edictum
<b><i>ed.</i></b>	Edited by / editor(s) / edition
<b><i>ed. prov.</i></b>	Ad Edictum Provinciale
<b>ED</b>	Enciclopedia del diritto
<b>EP</b>	Das Edictum Perpetuum
<b>et al.</b>	et alii
<b>f.</b>	Folium / Folia. The folium may be <i>rectum</i> (r) or <i>versum</i> (v).
<b>FIRA</b>	Fontes Iuris Romani Antejustiniani
<b>FV</b>	Fragmenta Vaticana
<b>Gai</b>	Gai Institutionum
<b>Gai.</b>	Gaius
<b>gl.</b>	Gloss
<b>GROM</b>	Groninger Opmerkingen en Mededelingen
<b>gr.</b>	Greek
<b>Hermog.</b>	Hermogenian

ABBREVIATIONS

<i>i.f.</i>	in fine
<b>Index</b>	Index, quaderni camerti di studi romanistici
<b>Ind. Itp.</b>	Index Interpolationum
<b>Inst.</b>	Institutes of Justinian
<b>IVRA</b>	IVRA, Rivista internazionale di diritto romano e antico
<b>Jav.</b>	Javolenus
<b>Jherings Jb.</b>	Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts
<b>Jul.</b>	Julian
<b>Lab.</b>	Labeo
<b>Labeo</b>	Labeo, Rassegna di Diritto Romano
<b>Marcell.</b>	Marcellus
<b>Mod.</b>	Modestinus
<b>n.</b>	Note
<b>nr.</b>	Number(s)
<b>NJ</b>	Nederlandse Jurisprudentie
<b>NMai</b>	Novellae Maiorani
<b>NMar</b>	Novellae Marciani
<b>NNDI</b>	Novissimo Digesto Italiano
<b>Nov.</b>	Iustiniani Novellae
<b>NSev</b>	Novellae Severi
<b>NT</b>	Novellae Theodosii
<b>p.</b>	page(s)
<b>Paling.</b>	Palingenesia iuris civilis, Lenel, Leipzig 1889.
<b>Pap.</b>	Papinianus
<b>Pomp.</b>	Pomponius
<b>pr</b>	principium
<b>PS</b>	Pauli Sententiae
<b>PS Int.</b>	Pauli Sententiae interpretatio
<b>q.</b>	Quaestio (when quoting the <i>Decretum Grat.</i> )
<b>repr.</b>	reprint
<b>rer. cott.</b>	rerum cottidianarum sive aureorum
<b>resp.</b>	responsorum
<b>rev.</b>	Review
<b>RE</b>	Pauly-Wissowas Realencyclopädie der classischen Alterthumswissenschaft
<b>REHJ</b>	Revista de Estudios Histórico-Jurídicos
<b>RHD</b>	(Nouvelle) Revue Historique de Droit Français et Étranger
<b>RIDA</b>	Revue Internationale des Droits de l'Antiquité
<b>Sab.</b>	Sabinus
<b>Sab.</b>	ad Sabinum
<b>Scaev.</b>	Cervidius Scaevola
<b>SCDR</b>	Seminarios Complutenses de Derecho Romano

## ABBREVIATIONS

<i>Sch. ad</i>	Scholion to
<b>SDHI</b>	Studia et Documenta Historiae et Iuris
<b>s.v.</b>	sub voce
<b>SZ</b>	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung
<b>Theoph. Par.</b>	Theophili antecessoris Paraphrasis Institutionum
<b>Tit. Ulp.</b>	Tituli XXVIII ex corpore Ulpiani
<b>transl.</b>	translated by
<b>TRG</b>	Tijdschrift voor Rechtsgeschiedenis
<b>Ulp.</b>	Ulpianus
<b>vol.</b>	volume
<b>WPNR</b>	Weekblad voor Privaatrecht, Notariaat en Registratie
<b>X</b>	Liber Extra (Decretales Gregorii IX)



## Introduction

The problem of whether a non-owner can validly transfer ownership is a key issue in property law, both from a practical and from a theoretical perspective. The possibility that an authorized non-owner may validly transfer ownership grants agility to everyday transactions by reducing the need of the physical presence of the owner. Moreover, it enables the property of those who cannot dispose over their goods – such as a bankrupt society or a lunatic – to be adequately administered by someone else. From a dogmatic perspective, the subject offers the peculiar complexity of being a crossroads between the law of property and the law of obligations, where numerous elements interplay in order to determine whether ownership is transferred or not.

Considering the significance of this subject, it is no wonder to find in Roman law abundant cases in which a non-owner may transfer ownership. This rich case law has been dealt with in several studies, such as the monographic works of Alberto Burdese<sup>1</sup>, María Victoria Sansón Rodríguez<sup>2</sup> and Geert Potjewijd<sup>3</sup>. Burdese and Sansón moreover confronted their viewpoints in a series of articles between 2009 and 2012<sup>4</sup>. A doctoral dissertation regarding the subject in Byzantine law was also defended in 1989 by Nebrera<sup>5</sup>, but was never commercially published and can only be found in a couple of Catalan libraries under the Greek title “Ἡ τραπευτικὴ κατὰ γνώμην τοῦ δεσπότη”, escaping – somehow – the attention of scholars so far. Other authors such as Miquel<sup>6</sup> and Wieling<sup>7</sup> have also made valuable contributions to the understanding of this subject, the former one being moreover closely connected with the research done by Sansón and Nebrera<sup>8</sup>. It is worth noting that most of these studies offer the remarkable feature of being generally unaware of each other, due to the relatively close – or even simultaneous – date of publication, which grants a high level of independence to their approach to the problem. Finally, there are

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<sup>1</sup> Burdese, *Lex commissoria* (1949); Burdese, *Autorizzazione* (1950).

<sup>2</sup> Sansón, *Potestas alienandi* (1988), p. 227-338; Sansón, *La transmisión* (1998).

<sup>3</sup> Potjewijd, *Beschikingsbevoegdheid* (1998).

<sup>4</sup> Burdese, *Potestas alienandi* (2009); Burdese, *Agire per altri* (2010), p. 3-23; Sansón, *Representación* (2012), p. 1-20.

<sup>5</sup> Nebrera, Ἡ τραπευτικὴ (1989).

<sup>6</sup> Miquel, *Exceptio rei voluntate* (1988), p. 675-690; Miquel, *Traditio rei alienae* (1993), p. 269-283; Miquel, *Patris iussu* (1993), p. 559-563.

<sup>7</sup> Wieling, *Drittwirkungen* (1993), p. 235-267.

<sup>8</sup> In the case of Sansón, as her *Doktorvater*; regarding Nebrera, suggesting her the subject for her research, as shown in Nebrera, Ἡ τραπευτικὴ (1989), p. ix-x. It is therefore no wonder that the views of these three authors are often strongly related.

numerous works which grant considerable attention to the transfer of ownership by a non-owner when discussing other legal institutions<sup>9</sup>.

Despite the contributions just mentioned, there is still much to be said about this subject, which to a great extent remains understudied, unlike its much more popular relative, the *acquisition* of ownership through another person. Burdese would in fact begin his monographic study of 1950 by pointing out the limited research on the subject<sup>10</sup>, an observation which he could repeat sixty years later<sup>11</sup>. The present work attempts therefore to tackle this problem in a comprehensive way, focusing mainly on Roman law, to which the first and most extensive part is dedicated. A fundamental point which runs through most of the present study is the critical revision of certain views inspired by anachronistic dogmatic conceptions with which modern scholars have approached Roman sources. An overview of the current literature on the subject shows that the works of the 19<sup>th</sup> century Pandectist scholars had a decisive influence in the understanding of the transfer of ownership by a non-owner, providing accurate concepts which have been a cornerstone for the interpretation of Roman sources by modern scholars. Among these concepts that of ‘direct representation’ has had a decisive impact on the study of Roman sources, and particularly the idea that Roman law knew a fundamental prohibition on direct representation which was only gradually overcome by jurists. This theory has served as a starting point for most contemporary scholars when approaching the transfer of ownership by a non-owner, which is why its reassessment can help to understand numerous problems, including the legal grounds – and even the possibility – of the *traditio nomine alieno*, the possibility of transferring Quiritary ownership by a non-owner, the significance of the various praetorian defences on the subject, the nature of the delivery performed by the *nuntius* or the *curator furiosi* or the possibility for a non-owner to perform the *mancipatio*, among others.

Another key point of the present study regards the systematization of the transfer of ownership by a non-owner. The subject has only been studied incidentally until now, and therefore the current work attempts to shed some light on certain systematic issues which are decisive to understand the place of the transfer of ownership by a non-owner in Roman law, such as the exceptional character of the *traditio* by a non-owner within the requirements to transfer

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<sup>9</sup> See e.g. Kaser, *Verfügungsakte* (1950), p. 59–85; Claus, *Gewillkürte Stellvertretung* (1973), p. 306–315, 332–333, 362–363; Jahr, *Begriff des Eigentums* (1984), p. 69–102; Wacke, *Libera administratio peculii* (2006), p. 251–316; Coppola Bisazza, *Dallo iussum domini* (2008), p. 94–110; 222–235; 276–290; Miceli, *Rappresentanza* (2008), p. 162–188.

<sup>10</sup> Burdese, *Autorizzazione* (1950), p. 7: “Nella letteratura romanistica il regime della alienazione eseguita, mediante *traditio*, dal terzo estraneo su autorizzazione del domino della cosa, non ha mai trovato, a nostro modo di vedere, esauriente trattazione: per lo più o lo si è ignorato del tutto, o ci si è limitati alla generica affermazione dell’accoglimento del principio della rappresentanza diretta in tema di *traditio*, ovvero ancora si sono occasionalmente analizzati singoli testi sul tema”. A similar criticism, specifically for the transfer of ownership through a slave, is made by Ankum, *Mancipatio by slaves* (1978), p. 1.

<sup>11</sup> Burdese, *Potestas alienandi* (2009), p. 17.

ownership, the role of the *nemo plus* rule or the relation between the *voluntas domini* at the delivery and the problem of the *iusta causa traditionis*.

The second part of this study traces the evolution of the transfer of ownership by a non-owner from the glossators to our days. The main reason for studying the reception of Roman law is that the doctrines of Pandectist scholars concerning the transfer of ownership by a non-owner were equally decisive for the development of modern private law in Europe as they were for the study of Roman law, since in both cases the notion of direct representation played a key role. Since German scholars had Roman sources as a starting point to develop their theories, a reassessment of the significance of the doctrine of direct representation in Roman sources inevitably invites for a critical approach to the transfer of ownership by a non-owner in modern private law. The emphasis in this second part is therefore placed on problems of legal systematization, and particularly on the *nemo plus* rule and the significance of the doctrine of direct representation.

Having a broad historical basis for the analysis of modern law, attempts have been made to offer a wide comparative analysis, including recent developments such as the Draft Common Frame of Reference (DCFR). The aim has not been to offer exhaustive references to legal scholarship and case law, but rather to illustrate the main lines of evolution of the subject in different jurisdictions. Central to this analysis are the developments which took place in Germany in the course of the 19<sup>th</sup> century, which spread rapidly into the private law of different European jurisdictions. Other legal systems were less influenced in this point by German scholarship, offering a model for the transfer of ownership by a non-owner which to a great extent remained closer to the Roman sources. The contrast between these various jurisdictions invites therefore to draw a comparison in order to determine the dogmatic and practical consequences which follow from the different approaches to the problem.

Since this study deals with topics of both Roman and modern private law, attempts have been made to make the texts quoted available to a wide audience. Accordingly, all sources reproduced in the body of the text and which are originally written in a language other than English have been translated. In the case of Greek and Latin sources, the editions and translations which have been used can be found at the Bibliography under the title "Editions of Greek and Latin sources".



## **Part 1**

# **Transfer of ownership by a non-owner in Roman Law**



# Chapter 1. *Potestas alienandi*: terminological and systematic starting points

## 1. 'Direct representation' in the analysis of Roman sources

There is one notion in particular which runs through the analysis of most modern authors dealing with the transfer of ownership by a non-owner: the concept of 'direct representation'. The fact that modern scholarship feels comfortable describing Roman law by resorting to a notion which only appeared in relatively recent times immediately raises a methodological concern. This concern could appear to be of limited importance, considering that Roman law scholars have learnt to live with the use of rather anachronistic notions. Roman sources offer a limited amount of dogmatic concepts, and it was particularly the job of the 19<sup>th</sup> century German Historical School to reduce the enormous mass of Roman case law to a systematically organized body with clear-cut concepts. Considering the Roman inspiration of this system, it would seem reasonable to make use of the concepts built by the Historical school to approach Roman law, which moreover helps the scholar to bring his ideas across in a simple way through clear technical notions<sup>1</sup>. Nonetheless, the use of anachronistic notions in legal history is a serious methodological issue, which is normally addressed when a concept belonging to modern legal thought is used to approach the Roman sources, as is for instance the case with notions such as 'subjective rights'<sup>2</sup> or 'human rights'<sup>3</sup>. Scholars often declare that Roman law scholarship should avoid referring to modern legal categories, scorning those who do so as 'Pandectists' or 'neo-Pandectists'<sup>4</sup>. However, the problems of working exclusively with ancient notions prove most of the time to be unsurmountable for the modern scholar<sup>5</sup>. This is why some authors admit the use of present-day notions when describing ancient legal institutions, especially in a heuristic function, providing the scholar

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<sup>1</sup> It is because of the lack of technical vocabulary in ancient legal sources that Feenstra, RHD 31 (1953), p. 300-301 and Hoetink, *Notions anachroniques* (1955), p. 16-17 agree that anachronistic notions are a necessary tool for legal historians.

<sup>2</sup> An overview on the way scholars approach this notion in Roman law is given by Megías, *El derecho subjetivo* (2003), p. 35-54.

<sup>3</sup> See Giltaij/Tuori, *Human rights in Antiquity* (2015), p. 39-63; Trisciuglio, *Diritti umani* (2015), p. 57-61.

<sup>4</sup> Bretone, *La 'coscienza ironica'* (1997), p. 187-201. Critical of Bretone's views is Behrends, *Die Person* (1998), p. 26-60, who discards that the reference to modern legal institutions necessarily involves a form of 'neo-Pandectism' (p. 58).

<sup>5</sup> Hoetink, *Notions anachroniques* (1955), p. 6-7: "la question de la légitimité des concepts anachroniques n'est pas résolue par la remarque par trop simpliste que l'historien doit reproduire fidèlement et objectivement la réalité du passé. [...] Dès qu'on reconnaît que l'histoire ne s'efforce pas à reproduire le passé, mais à construire une image du passé à l'aide des matériaux que le passé nous a laissés, on est amené à admettre que l'histoire peut faire usage des notions qui comme telles n'étaient pas présentes dans le passé".

with a basic starting point of analysis and a working hypothesis<sup>6</sup>. The legal scholar should nonetheless realize that he makes use of an anachronistic notion and accordingly should apply it in a way which does not by itself explain the ideas or actions of the past<sup>7</sup>. In this way, the proper justification of the use of modern notions would prevent these concepts from bringing along a distortion in the understanding of history by explaining past ideas or actions in a conceptual framework which is alien to the past. If this methodological starting point is not observed, the study of history would lose its meaning by merely reflecting modern institutions<sup>8</sup>, which is even more true concerning Roman law: if the study of Roman jurisprudence simply becomes a Latinized restatement of modern law, not only will modern scholarship offer an artificial image of ancient institutions, but the resulting outlook will present no value for the critical analysis of modern law.

Scholars dealing with the transfer of ownership by a non-owner since the second half of the 20<sup>th</sup> century have in many cases kept an attentive eye for modern law. For example, the works of Potjewijd and Sansón dedicate considerable attention in their introductory chapters to the systematization of the problem in modern private law<sup>9</sup>. The fact that modern law is used by these authors as a reference point for their analysis cannot be criticized, as it was said in the previous paragraph<sup>10</sup>. More arguable is the use of modern technical notions in order to explain Roman law, as if Roman jurists had worked with an analogous conceptual framework in order to reach their solutions. For example, Miquel declares that the Dutch concept of '*beschikkingsbevoegdheid*' (faculty to dispose) as it appears in the Dutch *Burgerlijk Wetboek* would accurately render the Roman notion of *potestas alienandi*<sup>11</sup>, or that the German notions of '*Ermächtigung*' and

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<sup>6</sup> Hoetink, *Notions anachroniques* (1955), p. 10 and especially 16.

<sup>7</sup> Hoetink, *Notions anachroniques* (1955), p. 15-16: "... les notions anachroniques ne sont jamais permises à titre d'explication causale ou psychologique des gestes de des pensées des hommes d'autrefois, parce que là nous nous mouvons dans l'orbite de la réalité du passé, que nous essayons de reconstruire". Later on (p. 17) the author asks: "Mais, a-t-on dit, pour expliquer d'une façon juridique la cohérence et les rapports entre les règles et les institutions d'un droit appartenant au passé l'historien du droit peut-il se passer des termes et des notions empruntés à la dogmatique moderne?" to which he responds: "Je crois qu'en effet il ne peut pas s'en passer absolument, mais qu'il ne faut pas en faire usage sans qualification expresse".

<sup>8</sup> Hoetink, *Notions anachroniques* (1955), p. 13: "Il y a un grand danger à ne porter sur le passé qu'un reflet de la lumière du présent".

<sup>9</sup> Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 1-8; Sansón, *La transmisión* (1998), p. 7-15, 25-27.

<sup>10</sup> Winkel, *Regulae Iuris* (2001), p. 414: "We could even say that legal history can fulfil its role as a critical form of comparative law only if it is constantly linked with actual legal problems".

<sup>11</sup> Miquel, *Savigny y el nacimiento* (2003), p. 5768.

‘*Stellvertretung*’ can be used to approach the solutions given by Roman jurists<sup>12</sup>. In the course of the present study, it will be shown that the use of such modern terms is often misleading when approaching the Roman sources.

Particularly problematic in relation to the use of modern legal terminology is the way in which modern scholars have described the evolution of the notion of ‘direct representation’ in Roman legal thought. The basic outlook on this point since the second half of the 19<sup>th</sup> century has been that Roman law initially forbade any possible form of direct representation<sup>13</sup>. If a person wanted to perform any act which brought along a legal consequence for him, he had to do it himself. This state of affairs is normally attributed to a series of general features of the primitive law of the Romans, such as its formal character, the peculiar structure of the Roman family and the condition of free men. Accordingly, the prohibition of direct representation was a sort of ‘negative principle’ in pre-classical Roman law, as Coppola Bisazza critically observes<sup>14</sup>. However, the expansion of trade and the subsequent need to act through intermediaries, among other factors, would have led Roman jurists to develop a series of mechanisms to avoid this general principle, such as the so-called *actiones adiecticiae qualitatis*. This and other mechanisms which allow a third party to carry out a legal act are therefore regarded by modern scholars as exceptions to the general prohibition of direct representation in Roman law.

To properly determine the value of the traditional view regarding direct representation in Roman law, it is essential to identify its origins. Coppola Bisazza claims that the idea of a ‘prohibition of direct representation’ is to be found for the first time in the works of the Glossators<sup>15</sup>, and particularly in the gloss *Nihil agit* of Accursius to Inst. 3,19,4<sup>16</sup>. Accursius declares that this text contains a general rule, namely that no one can stipulate on behalf of another person, but he proceeds to offer a list of sixteen exceptions in which this is indeed possible. Although Accursius does present a general rule and the exceptions to it, Coppola Bisazza goes too far when declaring that the idea of a ‘general prohibition of direct representation’ can be identified in the Accursian gloss, particularly since the concept of direct representation itself had not yet come into existence. This does not mean that the text is of no meaning for the evolution of the problem, since it indeed shows that already at an early stage of the reception of Roman law jurists were deriving general conclusions from the analysis of the *Corpus Iuris Civilis* regarding the possibility to act on behalf of someone else, which in the case of the *stipulatio* meant that such a possibility was

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<sup>12</sup> Miquel, *Exceptio rei voluntate* (1998), p. 677. This distinction is also to be found in Jörs/Kunkel/Wenger (1949), p. 102–103 and Rabel, *Grundzüge* (1955), p. 182–192. More subtle is Jörs/Kunkel/Wenger (1987), p. 113 n. 5.

<sup>13</sup> The modern views on the subject are described in detail by Coppola Bisazza, *Dallo iussum domini* (2008), p. 3–10.

<sup>14</sup> Coppola Bisazza, *Dallo iussum domini* (2008), p. 3.

<sup>15</sup> Coppola Bisazza, *Dallo iussum domini* (2008), p. 355.

<sup>16</sup> Inst. 3,19,4: “Si quis alii, quam cuius iuri subiectus sit, stipuletur, nihil agit...”

generally excluded. However, it must be noted that scholars did not always offer a uniform view on the problem of obligations concluded through a third party<sup>17</sup>, and accordingly the ideas of Accursius cannot be seen as definitive on this point.

The origin of the idea of a primitive prohibition of direct representation is rather to be found in the writings of the 19<sup>th</sup> century German Historical School<sup>18</sup>, in the context of the consolidation of a technical notion of direct representation. It should be borne in mind that during the first half of the 19<sup>th</sup> century this concept still had a very vague meaning, and German legal scholars gradually began to apply the notion of *Stellvertretung* to describe certain problems in Roman law, such as the *actiones adiecticiae qualitatis* or the acquisition of ownership through a non-owner. Inevitably this resulted in a more uniform approach to various problems involving acts concluded by a person on behalf of someone else. This uniform approach eventually led to a historical reconstruction of the evolution of direct representation in Roman law by Mühlenbruch as early as 1817<sup>19</sup>. According to this author, numerous texts, including D. 50,17,73,4, D. 41,1,53, C. 4,27,1pr, Inst. 2,9,5 and D. 50,17,123pr, showed that the general principle in pre-classical Roman law was that each person could only carry out acts affecting himself<sup>20</sup>. These quotations are especially eloquent since some of them are expressed in a succinct way which gives them the appearance of an essential truth, including the rules “*alteri stipulari nemo potest*”<sup>21</sup> – no one can stipulate on behalf of another – “*per extraneam personam nobis adquiri non posse*”<sup>22</sup> – no one can acquire through a person outside the family – and “*nemo alieno nomine lege agere potest*”<sup>23</sup>. The idea that originally Roman law did not allow another person to conclude acts which directly affect another one found moreover support in the fact that some scholars considered that the *mancipatio* could only be performed by a non-owner *fiduciae causa*, i.e. if he first became owner himself<sup>24</sup>. However, according to Mühlenbruch, such a general prohibition on direct representation would have soon some become problematic for commerce, and numerous exceptions would have accordingly been introduced to it. Having lost most of its practical application, the primitive rule remained of importance in two groups of cases: (1) legal acts belonging to the *ius civile*, such as the *stipulatio* or the *mancipatio*, which could only be performed personally due to the ancient

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<sup>17</sup> See Bayer, *Vertrag zugunsten Dritter* (1995), p. 5–56; Hallebeek/Dondorp, *Contracts for a Third-Party* (2008), p. 21–91.

<sup>18</sup> Miceli, *Rappresentanza* (2008), p. 15.

<sup>19</sup> Mühlenbruch, *Cession* (1817), p. 28–34. His ideas on the subject are still found in the expanded third – and final – edition of 1836 (p. 41–47) which is further quoted here.

<sup>20</sup> Mühlenbruch, *Cession* (1836), p. 43–44: “Den in diesen und andern Stellen enthaltenen Bestimmungen lag ursprünglich ein Hauptgedanke zum Grunde, der nämlich: dass Jeder für sich in Person handeln müsse”.

<sup>21</sup> Inst. 3,19,4 and 19; D. 45,1,38,17; D. 50,17,73,4.

<sup>22</sup> Gai 2,95; Inst. 2,9,5; D. 45,1,126,2; C. 4,27,1pr.

<sup>23</sup> D. 50,17,123pr (Ulp. 14 *ed.*): “No one can legally act on behalf of another” (transl. Watson).

<sup>24</sup> See Chapter 5, Section 1 below.

ban on direct representation; (2) the acquisition of rights through another person, which could not take place through a free person, who could only gain possession on behalf of someone else.

At around the same time Savigny developed his own ideas concerning direct representation in Roman law, which would decisively influence both the understanding of Roman law and that of modern private law<sup>25</sup>. His ideas on the evolution and application of direct representation were first briefly presented in 1814<sup>26</sup>, being further expanded in his *System*<sup>27</sup> and later in detail in his *Obligationenrecht*<sup>28</sup>. The greatest contribution of his ideas was to add a practical angle to this problem, which would favour the acceptance of direct representation in German private law. During the first half of the 19<sup>th</sup> century there was in fact an ongoing debate in Germany concerning whether direct representation was admissible in legal practice<sup>29</sup>. Savigny would contribute to solve this problem through a detailed account of the evolution of direct representation in Roman law, which follows the ideas of Mühlenbruch to a great extent by taking as a starting point the idea of a pre-classical prohibition of direct representation. According to Savigny, the reason behind the prohibition of direct representation in Roman law was the formalistic nature of the old *ius civile*, which would have required that anyone who wanted to carry out an action which would bring along legal consequences to himself should perform it personally. The main practical relief to this situation was the structure of the Roman family, since the acts of those individuals under the domestic power of the *paterfamilias* would lead to a direct patrimonial increase – never decrease – of the later. The general ban of direct representation, however, should have soon become an obstacle for trade and therefore Roman jurisprudence came up with a series of exceptions which reduced its practical scope. Despite such exceptions, the general principle forbidding direct representation would have continued to apply in traditional and formal acts such as the *stipulatio*, precisely due to the fact that their formal character prevented the application of these innovative remedies. Savigny would find a confirmation of this theory in D. 41,1,53, where Pomponius declares that one may acquire according to the *ius civile* through persons *in potestate*, like when a *stipulatio* is concluded by one of them, while possession can be acquired *naturaliter* by any person<sup>30</sup>. According to Savigny, this would prove the decisive distinction made by Roman law between formal legal acts of the *ius civile*, regarding which direct representation was not allowed and

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<sup>25</sup> Regarding the ideas of Savigny on direct representation see Müller, *Die Entwicklung* (1969), p. 156; Mohnhaupt, *Savignys Lehre* (1979), p. 60-77; Hölzl, *Savignys Lehre* (2002).

<sup>26</sup> Savigny, *Vom Beruf* (1814), p. 102-103.

<sup>27</sup> Savigny, *System* (1840) III, p. 90-98.

<sup>28</sup> Savigny, *Das Obligationenrecht* (1853) II, p. 21-88.

<sup>29</sup> Müller, *Die Entwicklung* (1969), p. 155.

<sup>30</sup> D. 41,1,53 (<Pomp.> 14 *ad Quintum Mucium*): “Ea quae civiliter adquiruntur per eos, qui in potestate nostra sunt, adquirimus, veluti stipulationem: quod naturaliter adquiritur, sicuti est possessio, per quemlibet volentibus nobis possidere adquirimus”.

where only the intervention of a person *alieni iuris* was possible, and the innovative applications introduced by jurisprudence regarding informal legal acts<sup>31</sup>. It should moreover be noted that Savigny did not study the problem of direct representation exclusively in the field of the law of obligations, but considered this doctrine to apply generally to patrimonial acts *inter vivos*<sup>32</sup>, which is why he thinks that problems such as the acquisition of possession should also be approached as a matter of direct representation, along with the conclusion of contracts through a third party, the acquisition of rights in general and the transfer of ownership.

This elaborate historical outlook served a very practical purpose in Savigny's time, since it provided him with the grounds for the acceptance of direct representation in German private law<sup>33</sup>. He observed in the first place that the prohibition of direct representation concerned mainly acts of the old *ius civile*, which were no longer in use in the 19<sup>th</sup> century<sup>34</sup>. Accordingly, there was no reason to uphold the old prohibition. Moreover, since modern law did not grant the *paterfamilias* the possibility of acting through slaves or sons-in-power, Savigny considered it all the more important to plainly accept direct representation in modern law. Therefore, his historical considerations regarding Roman law allowed him to introduce this doctrine with an unlimited scope of application into the legal system of his time.

Some of the ideas of Savigny regarding direct representation have been rendered obsolete by later scholarship<sup>35</sup>. However, his historical reconstruction of the evolution of direct representation in Roman law was an immediate success, being closely followed by scholars throughout the 19<sup>th</sup> century<sup>36</sup>. The main commonplaces which are to be found in the writings of that period dealing with this topic are: (1) that the old *ius civile* knew a general prohibition of direct

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<sup>31</sup> Savigny, *Das Obligationenrecht* (1853) II, p. 42-48.

<sup>32</sup> Savigny, *Das Obligationenrecht* (1853) II, p. 41: "Zum richtigen Verständniss dieser wichtigen Stelle muss aber voraus daran erinnert werden, dass sowohl der alte, strenge Grundsatz, als dessen neuere Umbildung, keinesweges allein auf die Entstehung der Obligationen, also auf die Verträge, sich bezog, sondern auf alle Rechtsgeschäfte überhaupt, die das Vermögen zum Gegenstand haben; also auch im Eigenthum, und den Rechtsinstituten, die sich dem Eigenthum anschliessen (...)". See also Savigny, *System* (1840) III, p. 91-92.

<sup>33</sup> Savigny, *System* (1840) III, p. 98; Savigny, *Das Obligationenrecht* (1853) II, p. 51, 68-73.

<sup>34</sup> Savigny, *System* (1841) III, p. 98: "Was ist nun von diesem Justinianischen System der Vertretung noch übrig in unsrem heutigen Recht? Wir haben keine Stipulationen und keine Sklaven mehr. Daher besteht für uns nur noch: die unbeschränkte Zulassung der freien Vertretung, indem in unsrem Recht alle Handlungen naturale sind, und indem die notwendige Vertretung durch Sklaven nicht mehr vorkommen kann".

<sup>35</sup> See Hölzl, *Savignys Lehre* (2002), p. 221 ff. Critical on Savigny's interpretation of the sources is Kreller, *Stellvertretung* (1948), p. 221.

<sup>36</sup> Wächter, *Handbuch* (1842) II, p. 676-679 (§ 88); Puchta, *Institutionen* (1842) II, p. 330-336 (§ 203); Buchka, *Stellvertretung* (1852), p. 1-120; Exner, *Rechtserwerb durch Tradition* (1867), p. 125-127; Pernice, *Labeo* (1873) A, p. 488 ff.; Mitteis, *Stellvertretung* (1885), p. 9-77; Sohm, *Institutionen* (1908), p. 256-262.

representation, which encompassed all patrimonial acts, including the transfer of ownership; (2) this prohibition was gradually overcome through juristic innovations, and mainly by the activity of the praetor; (3) such innovations did not affect the old acts of the *ius civile*, where the prohibition remained in force. A definitive formulation on the evolution of direct representation would be offered by Mitteis<sup>37</sup>, whose opinions have remained as the main reference point for legal scholars since the 20<sup>th</sup> century and up to this day when approaching this subject. Subsequent works dealing with direct representation in Roman law have therefore seldom departed from the main guidelines developed in the 19<sup>th</sup> century regarding the origins and evolution of this institution<sup>38</sup>.

One of the main problems which arise from the traditional reconstruction of the evolution of direct representation is that it is not clear what a general ban of direct representation would imply. This uncertainty is intimately related to the fact that 'direct representation' is a modern notion, which does not find an even remote equivalent in Roman sources. Considering that the notion of direct representation was unknown to the Romans, it is certainly awkward to declare that Roman law 'forbade' it<sup>39</sup>. Scholars since the 19<sup>th</sup> century have been aware of the dangers of resorting to the notion of 'direct representation' to approach the Roman sources, but have nonetheless yielded to the fascination of resorting to it. In order to cope with the evident methodological problems this involves, numerous authors have in fact proposed various distinctions when introducing the idea of 'direct representation' in the analysis of Roman sources which serve as a guideline to evaluate the existence of this institution in Roman law<sup>40</sup>. This approach, however, far from resolving the methodological problems, introduces further complications, since it is ultimately left to each author to determine whether Roman law can be seen as acknowledging direct representation based on the features which are considered more representative of this institution. Due to the use of this vague starting point to approach ancient sources, Roman law

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<sup>37</sup> Mitteis, *Römisches Privatrecht* (1908), p. 203-213.

<sup>38</sup> See e.g. Siber, *Römisches Recht* (1928) II, p. 411-416; Riccobono, *Lineamenti* (1930), p. 389-447; Betti, *Diritto romano* (1935), p. 400-405; Voci, *Modi di acquisto* (1952), p. 81-91; Rabel, *Grundzüge* (1955), p. 182-192; Bonfante, *Corso* (1968) II/2, p. 210-214; Kaser, *RPR* (1971) I, p. 260-267; Claus, *Gewillkürte Stellvertretung* (1973), p. 9-13; Hamza, *Rappresentanza* (1980), p. 193 ff.; Plescia, *Development of agency* (1984), p. 171-190; Jörs/Kunkel/Wenger (1987), p. 111-114; Nebrera, *Ἡ τραπευτικὴ* (1989), p. 283 ff.; Flume, *Das Rechtsgeschäft* (1992), p. 751; Zimmermann, *The law of obligations* (1996), p. 34-35, 47-54; Finkenauer, *Direkte Stellvertretung* (2008), p. 442-448.

<sup>39</sup> Coppola Bisazza, *Dallo iussum domini* (2008), p. 10: "In realtà, nell'ordinamento giuridico romano non vi poteva essere nessun divieto di rappresentanza diretta, dal momento che non solo il nome ma neppure l'idea di questo istituto erano noti". Similarly Hamza, *Rappresentanza* (2010), p. 2-4, who stresses the anachronism behind the use of this notion to describe Roman sources.

<sup>40</sup> Mitteis, *Römisches Privatrecht* (1908), p. 204; Arias, *Representación* (1941), p. 4-6; Kreller, *Stellvertretung* (1948), p. 221-222; Röhrmann, *Stellvertretung im altgriechischen Recht* (1968), p. 1-2; Claus, *Gewillkürte Stellvertretung* (1973), p. 1-5; Finkenauer, *Direkte Stellvertretung* (2008), p. 441-442.

scholarship does not offer a uniform, clear view of what the primitive ban of direct representation would imply, and there is a great variety of opinions concerning the existence of direct representation in Roman law, which in the end depend essentially on the willingness of each author to identify this modern institution in classical sources by focusing on particular aspects. For instance, some authors tend to approach direct representation as a typically modern legal phenomenon, and therefore claim that Roman law would have only accepted forms of indirect representation<sup>41</sup>. This also leads some scholars to claim that only a messenger (*nuntius*) could perform acts on behalf of the principal and produce direct and binding effects for him<sup>42</sup>. However, others seem to understand that the gradual exceptions which Roman jurists formulated to the primitive ban on direct representation would imply that Roman law did know cases in which someone acted in a way equivalent to a modern direct representative, even when this was exceptional<sup>43</sup>. This ambivalent approach is also found regarding other laws in Antiquity, and therefore scholars occasionally discuss the existence of direct representation in Greek or Egyptian law<sup>44</sup>.

Considering the problems which follow from the use of the notion of ‘direct representation’ to describe Roman sources, it seems advisable to ban this concept altogether from the study of Roman law. Scholars have always acknowledged that this notion finds no equivalent institution in Rome, which is why it is difficult to see what advantage may follow from its use. Instead, the misunderstandings and ambiguities deriving from its application are evident. This is why in the 20<sup>th</sup> century some isolated voices such as that of Buckland<sup>45</sup> and Cappellini<sup>46</sup> urged scholars to avoid approaching direct representation in Roman law as a uniform phenomenon, and the recent studies of Coppola Bisazza and Miceli have stressed that the way in which this problem is dealt with in Roman law must be deeply revised<sup>47</sup>. Only once the uniform approach to direct representation in Roman law is abandoned will scholars be able to gain a clear insight into the institutions now analysed within this framework.

The artificial character of the uniform approach to the problem of direct representation in Roman law is not only evident because of the lack of an even remotely analogous notion in classical sources, but particularly due to the absence

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<sup>41</sup> See e.g. Mühlenbruch, *Cession* (1836), p. 46; Zimmermann, *The law of obligations* (1996), p. 49-54; Schäfer, *Spitzenmanagement* (1997), p. 21-26.

<sup>42</sup> Zimmermann, *The law of obligations* (1996), p. 50.

<sup>43</sup> See e.g. Arias, *Representación* (1941), p. 6-18; Arangio-Ruiz, *Mandato* (1949), p. 49; Finkenauer, *Direkte Stellvertretung* (2008), p. 440-497.

<sup>44</sup> See e.g. Röhrmann, *Stellvertretung im altgriechischen Recht* (1968); Förster, *Stellvertretung in koptischen Texten* (2010), p. 328-335; Velissaropoulos-Karakostas, *Droit Grec* (2011) II, p. 119-125 refers instead to “L’assentiment de tiers” (the consent of the third person), which is certainly a better starting point to address the sources.

<sup>45</sup> Buckland, *Main institutions* (1931), p. 161.

<sup>46</sup> Cappellini, *Rappresentanza* (1987), p. 442.

<sup>47</sup> Coppola Bisazza, *Dallo iussum domini* (2008), p. 3-14; Miceli, *Rappresentanza* (2008), p. 12-18.

of evidence regarding the existence of a primitive prohibition of direct representation. Since the works of Mühlenbruch and Savigny, scholars have assumed from a handful of texts that the general rule governing legal acts in Roman law is that no one could perform acts which would directly affect a third person. Among these texts, the ones more commonly regarded to express this ancient view are the rules *alteri stipulari* and the *per extraneam personam*. However, none of these texts seems to have had an overarching validity in Roman law: the *alteri stipulari* rule would apply specifically to the *stipulatio*, while the *per extraneam personam* rule would in turn be referred to the acquisition of possession and, consequently, ownership. Moreover, the scope of both rules has been clearly delimited by later scholarship, which has shown that they have a relatively reduced field of application. On the one hand, since an influential study by Ankum the *alteri stipulari* rule is considered by most authors to have been relevant only in the context of the stipulations involving an obligation of *dare*<sup>48</sup>, and even those who do not explicitly agree with this reconstruction acknowledge nonetheless its limitations through the considerable number of exceptions it faces<sup>49</sup>. Regarding the *per extraneam personam* rule, it should be noted that it was not completely excluded to acquire ownership through an authorized *sui iuris* – provided some requirements were met – but that this rule rather stresses that in such case the acquisition of ownership did not take place in the same automatic and inevitable way as regarding the *alieni iuris*<sup>50</sup>. The rule “*nemo alieno nomine lege agere potest*” is also usually mentioned as proof of the primitive prohibition of direct representation, but it has in fact a rather restricted scope of application since it does not apply to every *actus legitimus*, but refers specifically to the possibility of acting through another person in the *legis actiones*<sup>51</sup>. This is why the text is to be found within the *Palingenesia* among matters dealt within centumviral courts<sup>52</sup>, where the *legis actiones* continued to be used (Gai 4,31). Therefore, none of these rules can be seen as proclaiming a general prohibition of direct representation, which shows that scholars tried to draw far-reaching conclusions out of a few texts that had only a limited scope of application, granting them an overarching validity in order to favour their own views.

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<sup>48</sup> Ankum, *Alteri dari stipulari* (1970), p. 21-29; Kaser, *Zur Interessenbestimmung* (1975), p. 75-87; Kaser, *RPR* (1975), p. 339 n. 30; Zimmermann, *The law of obligations* (1996), p. 35-40; Hallebeek, *Contracts for a Third-Party* (2008), p. 8-14. Against this view Weimar, *Eigentumsübergang* (1993), p. 566.

<sup>49</sup> Finkenauer, *Direkte Stellvertretung* (2008), p. 493.

<sup>50</sup> Numerous studies have confirmed this view: Roby, *Roman Private law* (1902) I, p. 400-401; Corbino, *La 'pro Caecina'* (1982), p. 278, 283; Corbino, *Forma librare* (1984), p. 2267-2271; Klinck, *Erwerb durch Übergabe* (2004), p. 356-358; Briguglio, *Studi sul procurator* (2007), p. 538-551; Coppola Bisazza, *Dallo iussum domini* (2008), p. 209-222; Miceli, *Rappresentanza* (2008), p. 265-277. Other authors still prefer to grant this rule the status of a general prohibition of direct representation, such as Zimmermann, *The law of obligations* (1996), p. 34 and 47.

<sup>51</sup> Roby, *Roman Private law* (1902) I, p. 404-405.

<sup>52</sup> Lenel, *Paling.* (1889) II, col. 494.

Despite the limited scope of texts such as the *alteri stipulari* rule, one can understand that jurists in the 19<sup>th</sup> century could get the impression that Roman law had a general ban on direct representation, particularly considering that in general terms Roman sources exclude the possibility that the agreement between two individuals may create obligations regarding a person who did not intervene in such an act. In this sense, apart from the rule *alteri stipulari* one can identify other general claims stressing this point, such as the rule *nemo factum alienum promittere potest*<sup>53</sup>. Even the *per extraneam personam* rule is applied occasionally to indicate that one cannot become obliged through the acts of another person<sup>54</sup>. Such texts should however be approached in the framework of the law of obligations – where they moreover face countless exceptions – and not be seen as applying to every possible act within patrimonial law. It is also worth noting that these general rules did not have such dramatic practical consequences as it is usually thought, not only because of the possibility of acting through slaves and sons-in-power, but also due to the existence of flexible rules regarding procedural representation which allowed for instance that one person appointed *cognitor* or *procurator in rem suam* may sue for an obligation concluded by someone else<sup>55</sup>. Similarly, the rules regarding the *delegatio* would enable to conclude a wide variety of acts through another person, despite the fact that jurists approached them as two separate acts – one between the person giving the order and the one receiving it, another between the person who received the order and the third party<sup>56</sup>.

Outside the framework of the law of obligations, there are no general statements which ban acts that could be seen as cases of ‘direct representation’, besides the *per extraneam personam* rule – which, as already mentioned, did not have an absolute validity concerning the acquisition of ownership. There are in fact countless cases in which a third party may carry out a legal act which directly affects another person<sup>57</sup>. Despite the fact that no general rules are to be found forbidding ‘direct representation’ in these cases, the traditional model of the evolution of direct representation viewed them as exceptions to the original ban, including under this category the cases in which ownership was transferred by a non-owner. Savigny had to fit the problem of the transfer of ownership by a non-owner within his general theory, which is why he presented it as one of the

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<sup>53</sup> See on this rule Finkenauer, *Direkte Stellvertretung* (2008), p. 445. See also D. 44,7,11 (Paul 12 Sab.).

<sup>54</sup> D. 45,1,126,2.

<sup>55</sup> See on these institutions Gehrich, *Kognitur und Prokurator* (1963); Rozwadowski, *Trasferimento dei crediti* (1973), p. 27 ff.; Quintana/Blanch, *Nuevas consideraciones* (1998), p. 321–353.

<sup>56</sup> Regarding *delegatio*, see in particular the recent and detailed works of Alonso, *Delegación* (2001–2002) and Zandrino, *Delegatio* (2010–2014). On the distinction concerning procedural representation and *delegatio* see Zimmermann, *The law of obligations* (1996), p. 60–61 and Alonso, *Delegación* (2001) I.1, p. 38–71.

<sup>57</sup> See Chapter 1, Sections 2(b) and 2(c) below. For some basic distinctions on this point see Kreller, *Stellvertretung* (1948), p. 222.

exceptions that jurists had to introduce to meet the needs of commerce<sup>58</sup>. Such claim fits adequately with his general theory, but has no basis in the texts regarding the transfer of ownership considering that at no point do the sources indicate that the transfer of ownership by a non-owner was an innovation with regard to a previous state of affairs. On the contrary, several texts show that the transfer of ownership by a non-owner would normally take place within the framework of the *ius civile*<sup>59</sup>. In fact, Savigny claimed that the *per extraneam personam* rule would originally have been “*per extraneam personam nihil adquiri (neque alienari) potest*”, and that only at a later stage was this rule applied only to acts of the *ius civile*<sup>60</sup>, which shows to what extent his theories lacked a solid basis in the sources. At this point it becomes clear how far Savigny was willing to take his theory on the evolution of direct representation in Roman law, since he not only assumes that rules such as the *nemo stipulari* had an overarching application within their corresponding fields, but also that they would express a principle that would govern every aspect of private law, covering even those problems where no analogous ‘ban on direct representation’ may be found in the sources. That Savigny would uphold his theory despite the lack of evidence shows that we are not dealing with a careful reconstruction by an antiquarian, but rather with an instrumental interpretation of classical sources which had a very practical purpose: to show that the ‘general prohibition of direct representation’ in Roman sources was in fact a phenomenon which should be understood under circumstances specific to ancient Rome that were not to be extended to 19<sup>th</sup> century Germany, particularly since Roman jurists had themselves already overcome such a prohibition to a large extent. Having fulfilled a relevant practical function in the law of its time, this model is however unsuitable to describe the evolution of Roman law and must therefore be discarded.

The uniform approach to the evolution of direct representation in Roman sources has had far-reaching consequences for the study of several aspects of the transfer of ownership by a non-owner. Several modern ideas concerning the transfer of ownership by a non-owner in Roman law find their origin in Savigny’s reconstruction and will accordingly be revised in the following chapters. For instance, numerous scholars since the 19<sup>th</sup> century list the transfer of ownership by a non-owner among the exceptions which Roman jurists

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<sup>58</sup> Savigny, *System* (1840) III, p. 94: “Ein so beschränkender Grundsatz konnte sich nicht erhalten, sobald der Verkehr lebendiger und vielseitiger wurde. Man fieng daher an, in einzelnen Fällen auch eine freie Stellvertretung zuzulassen. (...) Sehr natürlich wurde dann auch bei der Veräußerung durch Tradition, eben so wie bei der Erwerbung durch dieselbe, die Vertretung zugelassen, die dabei durch eigene Sklaven und Kinder eben sowohl als durch freie Menschen bewirkt werden konnte”. See also Savigny, *Das Obligationenrecht* (1853) II, p. 23 n. (c); p. 47.

<sup>59</sup> See on this point Chapter 2, Section 1(a).

<sup>60</sup> Savigny, *Vom Beruf* (1814), p. 102-103.

developed against the general prohibition of direct representation<sup>61</sup>. This in turn led to an intense debate concerning the possibility that a non-owner may transfer ownership through *mancipatio* or *in iure cessio*<sup>62</sup>. The root of this discussion is that, according to Savigny's theory, such acts could not be performed by someone other than the owner, since they were archaic modes to transfer ownership belonging to the *ius civile*<sup>63</sup>. Moreover, Savigny's ideas have provided the ground for another disagreement among contemporary scholars: whether or not the transfer of ownership by a non-owner can be performed in the name of the owner, in what we would nowadays label as a case of *contemplatio domini*<sup>64</sup>. These varying interpretations show the misunderstandings which take place when taking the notion of 'direct representation' as a starting point for the analysis of Roman sources.

In order to overcome the traditional notions regarding the existence of direct representation in Roman law, the current research attempts to offer a fresh view through a more source-oriented approach. This implies avoiding the reference to a general and uniform Roman notion of 'direct representation', and instead assess on their own merits the cases where the acts of an individual affect the legal sphere of another one who did not take part in the act. This piece-meal approach follows therefore the general methodological guidelines of the works of Cappellini, Coppola Bisazza and Miceli<sup>65</sup>. It is moreover worth noting that there have already been attempts to revise the convenience of the use of the notion of direct representation regarding the transfer of ownership by a non-owner in Roman law, as can be seen by the objections made by Burdese to the distinctions that Sansón proposed regarding the significance of the *contemplatio domini* for the transfer of ownership<sup>66</sup>. This and other problems which have traditionally been taken over by general preconceptions will be reviewed, including the origins of the transfer of ownership by a non-owner, the possibility of a non-owner to act *nomine alieno* and to transfer ownership through *mancipatio* and *in iure cessio*. This latter point moreover involves revising other more specific issues, such as the significance of the *nemo plus iuris* rule.

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<sup>61</sup> See e.g. Wächter, *Handbuch* (1842) II, p. 676; Mitteis, *Römisches Privatrecht* (1908), p. 207-213; Popesco-Ramniceano, *Représentation* (1927), p. 53 ff.; Siber, *Römisches Recht* (1928) II, p. 412-413; Riccobono, *Lineamenti* (1930), p. 437-443; Arangio-Ruiz, *Mandato* (1949), p. 188; Burdese, *Autorizzazione* (1950), p. 86-87; Rabel, *Grundzüge* (1955), p. 186; Claus, *Gewillkürte Stellvertretung* (1973), p. 307; Hamza, *Rappresentanza* (1980), p. 196; Flume, *Das Rechtsgeschäft* (1992), p. 751; Hernanz, *Iussum* (1993), p. 70 ff.; Weimar, *Eigentumsübergang* (1993), p. 551 ff.; Zimmermann, *The law of obligations* (1996), p. 51; Guzmán, *DPR* (2013) I, p. 504; Perani, *Pignus distrahere* (2014), p. 51-52.

<sup>62</sup> See Chapter 5 below.

<sup>63</sup> Savigny, *System* (1840) III, p. 95-96; Savigny, *Das Obligationenrecht* (1853) II, p. 40-42.

<sup>64</sup> See Chapter 2, Section 5 below.

<sup>65</sup> Miceli, *Rappresentanza* (2008), p. 15.

<sup>66</sup> Burdese, *Potestas alienandi* (2009), p. 15-29. See on this point Chapter 2, Section 5 below.

## 2. ‘Potestas alienandi’ and similar legal institutions

As declared in the previous section, this work attempts to study the transfer of ownership by a non-owner on its own, not as part of an overarching problem of direct representation. This in turn brings along other methodological remarks concerning the framework and boundaries of this topic which will be studied in the present section, namely: (a) Is it acceptable to approach the different cases of transfer of ownership by a non-owner as part of a common notion of ‘*potestas alienandi*’?; (b) What is the relationship between this problem and other cases in which an individual experiences other forms of patrimonial decrease through the intervention of an authorized non-owner?; (c) And finally, is it possible to equate the acquisition and the transfer of ownership through a non-owner?

### a. Terminological issues: ‘*potestas alienandi*’ as conceptual framework.

When studying the cases in which a non-owner may transfer ownership in Roman law, a first inconvenient refers to the absence of a clear concept which encompasses such cases. Modern Roman law scholarship has coined the term ‘*potestas alienandi*’ based on the text of Gai 2,62: “*Accidit aliquando, ut qui dominus sit, alienandae rei potestatem non habeat, et qui dominus non sit, alienare possit*”<sup>67</sup>. It should however be noted that this does not introduce a clear-cut concept, but simply explains that the general rule – i.e. that only the owner may transfer ownership – may be subject to exceptions, in which case the ‘*alienandae rei potestas*’ or faculty to dispose is either denied to the owner or bestowed upon someone else. The expression ‘*potestas alienandi*’ is found scattered throughout Roman sources<sup>68</sup> and appears to be interchangeable with a wide range of equally general expressions, such as ‘*potestas abalienandi*’<sup>69</sup>, ‘*potestas distrahendi*’<sup>70</sup>, ‘*potestas donandi*’<sup>71</sup>, ‘*potestas transferendi*’<sup>72</sup>, ‘*potestas vendendi*’<sup>73</sup>, ‘*facultas alienandi*’<sup>74</sup>, ‘*facultas abalienandi*’<sup>75</sup>, ‘*facultas distrahendi*’<sup>76</sup>, ‘*facultas donandi*’<sup>77</sup>, ‘*facultas transferendi*’<sup>78</sup>,

<sup>67</sup> Gai 2,62: “It sometimes happens that an owner does not have the power to alienate and that a non-owner does” (transl. Gordon/Robinson, modified).

<sup>68</sup> C. 2,18,17; C. 5,9,3,1; C. 5,37,16; C. 6,61,4,3. The term appears again in Inst. 2,8pr (*alienandae rei potestatem*), which follows closely on the text of Gaius.

<sup>69</sup> CTh 3,8,2,1; CTh 16,2,27pr.

<sup>70</sup> CTh 8,18,2 (*interpretatio*); CTh 10,19,1; CTh 16,2,27pr; NMar 7; C. 8,17,8.

<sup>71</sup> CTh 8,18,2 (*interpretatio*); CTh 16,2,27pr; CTh 16,5,36pr; NMar 3 (*interpretatio*); NSev 1 (*interpretatio*); NT 11 (*interpretatio*).

<sup>72</sup> CTh 3,13,3,1; C. 11,50,2,3.

<sup>73</sup> C. 4,51,6. The expression can also be found in Cicero, *De lege agraria* 1,7; 2,34; 2,63.

<sup>74</sup> CTh 8,18,2; C. 1,2,14,1; C. 1,3,33; C. 4,6,3; C. 5,9,3pr; C. 5,17,8,7a; C. 5,27,4pr; C. 6,61,4pr and 3.

<sup>75</sup> CTh 3,8,2pr; C. 5,9,3,1.

<sup>76</sup> PS Int. 2,5,1; CTh 12,3,2pr.; C. 4,10,7,1; C. 4,40,1; C. 5,4,14; C. 8,27,6; C. 8,27,11; C. 8,27,14; C. 8,27,16; C. 8,27,19; C. 10,34,1pr.

<sup>77</sup> CTh 4,6,4; CTh 16,5,40,4; CTh 16,7,7,1; C. 1,2,14,1; C. 1,3,33; C. 1,5,4,3; C. 1,7,4,1; CTh 3,12,3 (*interpretatio*); D. 39,5,7,3.

'*facultas vendendi*'<sup>79</sup>, '*ius alienandi*'<sup>80</sup>, '*ius distrahendi*'<sup>81</sup>, '*ius donandi*'<sup>82</sup>, '*ius vendendi*'<sup>83</sup>, '*libertas donandi*'<sup>84</sup>, '*alienandi licentia*'<sup>85</sup>, '*donandi licentia*'<sup>86</sup>, '*transferendi licentia*'<sup>87</sup> or '*vendendi licentia*'<sup>88</sup>. These expressions are used quite freely when describing the situations in which an owner may be prevented from transferring ownership or where a non-owner may transfer ownership, being only possible to attach a more distinctive value to those terms which refer to a particular *iusta causa traditionis*, which is particularly the case when reference is made to the *donatio*. On the other hand, the reference made to the '*venditio*' in expressions such as '*ius vendendi*' seems to cover a broad field of cases of alienation, not only those which take place in the context of a sale, which can be explained by the fact that the term '*venditio*' can be used to refer in general to the alienation<sup>89</sup>. Leaving aside these minor differences, the expressions mentioned here are applied in an interchangeable way, although it is possible to identify certain general trends regarding the context or period in which each of them is used. There are moreover other more general terms, such as '*facultas dandi*'<sup>90</sup>, '*ius dandi*'<sup>91</sup>, '*licentia dandi*'<sup>92</sup>, '*potestas dandi*'<sup>93</sup>, '*ius concedendi*'<sup>94</sup> and '*potestas concedendi*'<sup>95</sup>, which are only occasionally used in the context of the transfer of ownership<sup>96</sup>, being however more commonly applied to indicate a wide array of other faculties.

The variety of expressions related to the transfer of ownership by a non-owner presents the terms *ius*, *facultas*, *potestas* and *licentia* as interchangeable. This does not mean that these terms are synonyms, but they do appear to overlap to a certain extent, particularly when describing the general capacity or possibility to perform certain acts. This in turn makes it possible to dismiss some objections of

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<sup>78</sup> C. 4,41,1; C. 8,10,6,1. Similarly CTh 2,17,1,4 (*interpretatio*); C. 1,2,14pr.

<sup>79</sup> CTh 3,1,6; CTh 10,12,1pr; CTh 16,5,40,4; C. 1,5,4,3; C. 4,42,2,1; C. 10,3,1; D. 24,3,57; D. 7,1,9,7.

<sup>80</sup> CTh 5,19,1; D. 30,114,12.

<sup>81</sup> D. 30,41,7; D. 49,14,5,1; C. 8,18,2pr; C. 8,29,1pr. On the use of this expression in the context of the pledge see Perani, *Pignus distrahere* (2014), p. 32–34.

<sup>82</sup> CTh 16,5,65,3; D. 2,14,28,2; D. 50,17,163.

<sup>83</sup> C. 2,12,16; C. 7,26,1; D. 38,5,1,12; D. 50,16,109; D. 50,17,163. The expression can also be found in Frontinus, *De aquaeductu* 95 (*ius dandae vendendaeve aquae*).

<sup>84</sup> CTh 3,18,2.

<sup>85</sup> CTh 8,18,1,1; CTh 8,18,2; NT 14,5 = C. 5,9,5,3; C. 5,12,29pr; C. 6,61,4,3.

<sup>86</sup> CTh 10,19,11; CTh 16,5,58,4.

<sup>87</sup> CTh 10,19,11; C. 11,78,2pr.

<sup>88</sup> CTh 8,4,10; CTh 10,19,11.

<sup>89</sup> See on this point Chapter 2, Section 4(a) below.

<sup>90</sup> C. 3,3,1; C. 5,12,14; D. 43,8,6; D. 45,1,137,4.

<sup>91</sup> CTh 4,9,1; C. 3,38,2; C. 7,10,7pr; D. 5,1,12,2; D. 5,1,81; D. 26,5,3; D. 26,5,13pr; D. 27,8,1,1; D. 35,1,43,2; D. 40,9,15pr; D. 43,20,1,42; D. 49,1,23,1; D. 49,4,1,1; Inst. 1,24,4.

<sup>92</sup> C. 3,3,2,1.

<sup>93</sup> C. 3,1,5; C. 3,3,2pr; D. 1,18,6,8; D. 47,10,17,20.

<sup>94</sup> D. 43,24,3,4; D. 47,10,20; D. 48,19,8,1; D. 50,17,163.

<sup>95</sup> C. 7,32,7; D. 47,10,20.

<sup>96</sup> See e.g. C. 5,12,14; D. 45,1,137,4; C. 7,32,7; D. 50,17,163.

modern scholars, such the allegations of interpolation regarding texts containing expressions such as ‘*ius vendendi*’ based on an allegedly post-classical origin, since they would reflect an approach to the notion of *ius* akin to the modern ‘subjective rights’<sup>97</sup>. Such a claim fails not only considering the inclusion of the notion of *ius vendendi* in various texts, including *De Aquaeductu* of Frontinus<sup>98</sup>, but also because of the dynamic and versatile significance of the word ‘*ius*’ in Roman jurisprudence, which covers the power to transfer ownership as well. Accordingly, the contrast which the notion of ‘*ius*’ offers in relation to *facultas* and *potestas* in other contexts<sup>99</sup> plays no role on this point.

Despite the lack of terminological uniformity and the modest dogmatic scope of most of the above-mentioned expressions, jurists have been keen to build general systematizations by using expressions such as the above-mentioned. Donellus, for instance, mentions among the general requirements to transfer ownership by *traditio* that the transferor must have the *potestas rei transferendae*, the faculty to transfer the object<sup>100</sup>, in order to encompass under one requirement the *traditio* by the owner, the possibility of legal prohibitions to dispose and the possibility of transferring by a non-owner. More recently, Roman law scholars such as Miquel began using the term ‘*potestas alienandi*’ in order to formulate with accuracy one of the requirements to transfer ownership, instead of simply declaring that the transferor must be the owner. The expression was adopted by authors such as Sansón, Nebrera and recently even by Burdese<sup>101</sup>. Considering the modest position of this expression in Roman law, it may be argued that the introduction of the term ‘*potestas alienandi*’ forces the Roman sources too much, generating a conceptual framework which does not fit Roman jurisprudence. In other words, Roman law scholars could be artificially building an accurate concept where Roman sources are just discussing a series of abnormal cases.

The methodological concerns around the notion of ‘*potestas alienandi*’ are not unsurmountable if one considers that the term is introduced with a consciously instrumental value: to convey more accurately the personal circumstances under which the *tradens* may transfer ownership, avoiding the general claim that the *tradens* must be the ‘owner’. Miquel does in fact present the term with great methodological caution, emphasizing that although this concept is more accurate and accordingly more adequate as a general requirement for *traditio* in the eyes of

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<sup>97</sup> D’Ors, *Concepto de ius* (1953), p. 298.

<sup>98</sup> Frontinus, *De aquaeductu* 95: “(...) *ius dandae vendendaeve aquae* (...)”

<sup>99</sup> See on this point D’Ors, *Concepto de ius* (1953), p. 293-294 (*ius* and *potestas*) and 295 (*ius* and *facultas*).

<sup>100</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 3 (I, col. 731).

<sup>101</sup> Burdese, *Potestas alienandi* (2009), p. 18; Burdese, *Agire per altri* (2010), p. 3. Other authors who make use of this notion are Cuena Casas, *Poder de disposición* (1996), p. 33-35; Belda Mercado, *Presupuestos* (2001), p. 34-39; Miceli, *Rappresentanza* (2008), p. 171; Alonso, *Bibliothèque enkteseon* (2010), p. 11-16. The term is also used in the work of Koutsouradis, entitled “*La restriction de l’alienandi potestas contractuelle en droit romain*” (Acta legalia quotannis edita a schola iurisprudentiae 3 [1991], p. 439-463), which has however remained inaccessible in the course of this research.

a modern legal scholar, Roman jurists would normally simply demand the *tradens* to be the owner<sup>102</sup>. The expression retains therefore the merely descriptive value it has in the Institutes of Gaius, having an instrumental function in describing the requirements to transfer ownership in a more simple and clear way, and does not introduce relevant distortions in the analysis of Roman sources as long as this instrumental role is borne in mind.

It should moreover be noted that the fact that the term '*potestas alienandi*' is presented as merely descriptive and instrumental does not imply that Roman jurists approached the cases in which ownership is transferred by a non-owner as a host of situations which were unrelated to one another. Even when there is not a uniform concept to describe the topic, it is evident that the existence of a series of general expressions to address it – *potestas alienandi*, *ius vendendi*, etc. – shows indeed that Roman jurists approached the cases which fall under such terms as a common phenomenon. This conclusion is reinforced by the fact that different cases of alienation by a non-owner are often grouped together when discussing specific issues<sup>103</sup>. It is therefore no wonder that Roman jurists did in fact apply a relatively uniform set of rules to determine the outcome of different cases in which a non-owner would transfer ownership. The problem of the *potestas alienandi* can therefore be dealt with as a whole without forcing the sources.

The only serious concern one may formulate against the notion of '*potestas alienandi*' is that it has a certain level of ambiguity, since Gai 2,62 introduces two different problems: on the one hand, the cases in which a legal prohibition to dispose affects the owner (*qui dominus sit, alienandae rei potestatem non habeat*) illustrated by the case of the *fundus dotalis* of Gai 2,63; on the other hand, it also addresses the cases in which someone different from the owner may alienate (*qui dominus non sit, alienari possit*), serving as examples in Gai 2,64 the guardian of the lunatic, the *procurator*, and the creditor of pledged property. In other words, if one simply states that someone does not have '*potestas alienandi*' it is not immediately clear whether a non-owner is simply not authorized to dispose – e.g. a non-authorized *procurator* – or whether someone faces an actual legal prohibition to dispose – e.g. a husband who alienates the *fundus dotalis* without the consent of his wife. This ambiguity is also to be found in the use of other mentioned expressions – *potestas alienandi*, *ius vendendi*, etc. – since they are used alternatively to describe either a case of authorization to dispose or the existence of a prohibition to dispose. In order to avoid this terminological ambiguity the

<sup>102</sup> Miquel, *Compraventa y transmisión* (1993), p. 106–107.

<sup>103</sup> See e.g. Gai 2,64, (*procurator, curator furiosi*, pledge creditor), D. 18,1,15,2, D. 50,16,109 (*procurator, tutor*), D. 44,3,15,2–4 (*mandatarius*, slave, son-in-power, *tutor, curator furiosi*) or D. 6,1,41,1 (slave, son-in-power, *procurator*); D. 41,1,35 (*procurator, tutor*); D. 17,1,5,3–4 (*mandatarius*, slave); D. 18,1,63pr (slave, freeman); D. 20,6,7,1 and C. 2,12,16 (*procurator, servus actor*). Special attention is given in Chapter 2, Section 3 to the comparison in D. 39,5,9,2 (Pomp. 22 *Sab.*) between the alienation by a son-in-power *iussu domini* or *voluntate domini*, and to the alienation performed by the owner himself or by a *sui iuris* authorized by him.

term '*potestas alienandi*' is used in the present work to generally describe the faculty to validly transfer ownership by the owner himself – who is normally the person entitled to dispose over his property – and particularly by an authorized non-owner as those described in Gai 2,64. This is in fact the core subject of the present work, which can be rendered into a number of equivalent expressions such as 'authorization to dispose', 'faculty to dispose', 'power to alienate' or 'power to dispose'. On the other hand, the term 'legal prohibition to dispose' will be reserved to describe the cases in which someone is prevented from transferring ownership due to the existence of a legal prohibition, as is the case in Gai 2,63.

b. Cases of patrimonial loss caused by a non-owner.

Having established that the term '*potestas alienandi*' is an acceptable conceptual framework to deal with the transfer of ownership by a non-owner, the next obstacle is to determine whether other cases in which a non-owner carries out a legal act which negatively affects someone else's patrimony should be analysed together with the problem of the *potestas alienandi*. Wieling, for instance, when dealing with the *traditio* by a non-owner, brings up a text concerning the manumission by a non-owner, thereby implying a close link between both problems<sup>104</sup>. Sansón also deals sporadically with cases in which an object is consecrated to the gods by a non-owner or where a non-owner pledges someone else's property. Potjewijd goes even further, and deals simultaneously throughout his study not only with the cases in which ownership is transferred but also with those in which a non-owner constitutes a right of pledge, addressing occasionally other forms of alienation<sup>105</sup>. In all of these cases, the owner's patrimony is negatively affected: in the case of the *manumissio* and the consecration, the effects for the owner are as serious as in the cases in which ownership is transferred to someone else, while in the case of the pledge the owner may only eventually lose his property. Considering that the transfer of ownership by a non-owner is only one of the cases in which an individual experiences a patrimonial decrease through the acts of an authorized third person, one may wonder whether all such cases should be dealt jointly in order to gain a proper understanding of them.

The similarities between the cases presented above are all the more evident due to the continuous reference to the owner's intent (*voluntas domini*), since it is common that the acts which are performed over assets of an individual who has authorized them will have the same effects as if performed by the owner himself. There are in fact texts where it is explicitly laid down that a non-owner can only make the owner's position worse if authorized by him, as does Gaius in the context of the payment by a non-owner:

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<sup>104</sup> Wieling, *Drittwirkungen* (1993), p. 236.

<sup>105</sup> E.g. Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 138 n. 64, where he mentions the faculty to render a piece of ground a *locus religiosus*.

D. 3,5,38(39) (Gai. 3 *de verborum obligationibus*): Solvendo quisque pro alio licet invito et ignorante liberat eum: quod autem alicui debetur, alius sine voluntate eius non potest iure exigere. Naturalis enim simul et civilis ratio suasit alienam condicionem meliorem quidem etiam ignorantis et inviti nos facere posse, deteriores non posse<sup>106</sup>.

In this text, Gaius declares the general validity of a payment performed without the consent or the knowledge of the debtor. This case is contrasted with the situation in which someone attempts to collect someone else's debt without the creditor's consent, which according to Gaius would be unacceptable. The reason for this distinction is declared in categorical and abstract terms: "For the principles of both natural justice and the civil law are in favour of our being able to improve another's position, even without his knowledge and agreement, but not of our being able to make it worse" (transl. Watson). The final sentence of this text cannot be seen as a universal rule which perfectly described how Roman law approaches acts affecting the legal sphere of another individual. It is for instance not true that anyone may acquire possession for a person – an act which can be seen as improving the position of the latter – who is *invitus vel ignorans* of this acquisition. There is also no reference to acts conducted by persons such as legal guardians, regarding which the owner's will or knowledge plays no relevant role, but where the improvement or worsening of the position of the owner which follows from his own acts does play a relevant role<sup>107</sup>. Despite these imperfections, Gaius considers so convincing that one may improve another's position without his knowledge and agreement, but not make it worse, that he even considers this idea as agreeing with both the *naturalis* and *civilis ratio*. Another well-known text offering a similar general thought comes from the work of Ulpian:

D. 39,3,8 (Ulp. 53 *ed.*): In concedendo iure aquae ducendae non tantum eorum, in quorum loco aqua oritur, verum eorum etiam, ad quos eius aquae usus pertinet, voluntas exquiritur, id est eorum, quibus servitus aquae debebatur, nec immerito: cum enim minuitur ius eorum, consequens fuit exquiri, an consentiant. Et generaliter

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<sup>106</sup> D. 3,5,38(39): "Anyone paying on behalf of someone else, even without his knowledge and agreement, frees him from liability, but another person cannot lawfully demand payment of what is owing to anyone without his consent. For the principles of both natural justice and the civil law are in favour of our being able to improve another's position, even without his knowledge and agreement, but not of our being able to make it worse" (transl. Watson).

<sup>107</sup> See Chapter 3 below.

sive in corpore sive in iure loci, ubi aqua oritur, vel in ipsa aqua habeat quis ius, voluntatem eius esse spectandam placet<sup>108</sup>.

This fragment deals with the constitution of a servitude which affects the owners of other lands, and will be dealt in further detail in the context of the *in iure cessio*<sup>109</sup>. For the time being it is worth noting that Ulpian claims in general terms that, whenever someone's rights are diminished, the person affected must grant his consent (*cum enim minuitur ius eorum, consequens fuit exquiri, an consentiant*). The text offers therefore an additional confirmation that Roman jurists would offer a basic guideline when dealing with the different cases of patrimonial loss carried out by a non-owner.

There are numerous texts which follow the basic guidelines offered above, especially when someone performs an act which involves an object belonging to someone else. In the context of the transfer of ownership, it is often indicated that ownership will pass if the non-owner acts according to the owner's authorization (*voluntate domini*)<sup>110</sup>. Moreover, the appropriation of someone else's object will only be considered *furtum* if it is performed *invito domino*<sup>111</sup>. It should also be noted that numerous legal acts concerning a particular object will only be validly performed if the owner grants his consent to them, the pledge<sup>112</sup> by an authorized non-owner being a well-documented example which has been studied in detail<sup>113</sup>. The same can be said about the constitution of *iura in re aliena*<sup>114</sup> or the manumission<sup>115</sup> of slaves by a non-owner. The consequences of the *conmixtio* will also be different if the owner of the goods involved grants his authorization<sup>116</sup>. Another eloquent case is the consecration of objects to the gods<sup>117</sup>, which could also be validly performed by an authorized non-owner

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<sup>108</sup> D. 39,3,8: "In a matter of concession of the right to carry water across land, the consent must be sought not only of those on whose property the water originated but also of those who have a right to use the water, that is, those to whom a servitude on the water is owing. This is not unjustified since, when their rights are being diminished, one must necessarily inquire whether they are agreeable. As a general rule, it is agreed that consideration must be given to the consent of anyone who has an interest in the land itself on which the water originates or in the rights pertaining to that land or in the water itself" (transl. Watson).

<sup>109</sup> See Chapter 5, Section 5 below.

<sup>110</sup> See Chapter 2 below.

<sup>111</sup> See Chapter 2, Section 2 below.

<sup>112</sup> See e.g. D. 13,7,20.

<sup>113</sup> Wubbe, *Res aliena* (1960); Apathy, *Verpfändung* (1984), p. 1-15; Ankum, *Verpfändung* (2009), p. 35-44; Potjewijd, *Tekst & Uitleg* (2014), p. 77-81.

<sup>114</sup> E.g. the right to carry water across land (D. 39,3,8; 39,3,10; C. 3,34,4).

<sup>115</sup> D. 23,2,51,1.

<sup>116</sup> D. 41,1,7,8-9 and 12 (Gai 2 *rer. cott.*).

<sup>117</sup> D. 1,8,6,4 (Marcianus 3 *inst.*) / Inst. 2,1,9: "in alienum locum concedente domino licet inferre". Note that the general rule, according to which the land must belong to the person burying the body, is given by Gai 2,7: "Religiosum vero nostra voluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat". On the faculty of an authorized non-owner to render a place *locus religiosus* by burying

despite its evident archaic and sacred character. This shows once again that Roman law knew no such thing as a general ban on legal acts affecting another person. Numerous other cases can be named where the *voluntas domini* plays a decisive role in order to determine the way in which an individual is affected by the acts of another one. Concerning damages in general, for instance, if the act which causes them was authorized by the owner of the damaged object, the person causing it will not be held liable<sup>118</sup>. All of these solutions show that, generally speaking, the *voluntas domini* is required in a series of cases to determine whether an act which is detrimental to an individual may affect him directly<sup>119</sup>.

The above-mentioned cases do not allow identifying a general theory elaborated by Roman jurists concerning the acts which may directly affect another person, but there are some basic guidelines which helped the jurists to determine the outcome of different cases. It is moreover noteworthy that Roman jurists often compare various cases in which an individual affects the position of the other in order to determine the scope of the faculties of the third person, as it can be seen in the following text:

D. 12,2,17,2 (Paul 18 *ed.*): Si tutor qui tutelam gerit aut curator furiosi prodigive iusiurandum detulerit, ratum id haberi debet: nam et alienare res et solvi eis potest et agendo rem in iudicium deducunt<sup>120</sup>.

In order to determine whether the oath given by a legal guardian when exercising his office would be valid, Paul resorts to an argument *a fortiori*, presenting other cases in which the position of the individual is affected even more radically by the intervention of his legal guardian, since the latter also has the power to alienate his property, receive payments addressed to him and sue on his behalf. This shows to what extent the various cases in which the position of an individual is made worse by the activity of another are approached by Roman jurists, to a great extent, as part of a common problem, despite the great conceptual differences between them. This joint analysis of different cases where the owner's position is made worse is moreover to be found in several other texts<sup>121</sup>.

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someone see Kaser, *Pfandrecht* (1976), p. 265 n. 199; Kaser, *Grabrecht* (1978), p. 35 n. 86. See moreover D. 21,2,51,2 (Ulp. 80 *ed.*).

<sup>118</sup> See e.g. D. 39,3,19 (Pomp. 12 *ad Quintum Mucium*); D. 43,16,1,12 (Ulp. 69 *ed.*); Inst. 4,4,11.

<sup>119</sup> For other contexts where the *voluntas domini* plays a relevant role see e.g. D. 39,5,6; C. 3,38,2.

<sup>120</sup> D. 12,2,17,2: "An oath tendered by a *tutor* in the exercise of guardianship or by the *curator* of a lunatic or spendthrift is to be considered good, since they are able to pass property in goods and receive payment, and when they sue, the matter is validly brought into issue".

<sup>121</sup> See e.g. Gai 3,154b (*mancipatio* or manumission by one of the co-owners); D. 27,10,17 (manumission and donation by the *curator furiosi*).

The similar treatment between the different cases in which the position of the owner is made worse can also be observed in the fact that many of these cases can even be covered by the same word: *alienatio*. This term has indeed a very wide scope, which may refer in general to any loss of a right or an object, while the most restricted sense of it refers to the transfer of ownership<sup>122</sup>, as shown in C. 5,23,1<sup>123</sup>. Particularly famous regarding the scope of this expression is the definition of '*alienatio*' provided by Paul, which covers cases such as the toleration of the acquisition by usucapion by someone else or the loss of a servitude due to the lack of use of it<sup>124</sup>, but there are other texts which grant this expression a similarly wide scope<sup>125</sup>. Justinian moreover includes under the prohibitions to alienate not only the impossibility to transfer ownership, but also to perform acts such as the manumission of slaves, the constitution of a servitude, usufruct or pledge, among other similar acts<sup>126</sup>, which in fact are often referred to in other contexts as alienations<sup>127</sup>.

At this point it becomes evident that there are important similarities in the way Roman jurists approach the transfer of ownership by a non-owner and other cases in which the condition of the owner is somehow made worse: not only does the owner's authorization play a decisive role in such cases, but they are often dealt with jointly and even under the general term '*alienatio*'. Accordingly, there seems to be nothing wrong in Potjewijd's choice to deal simultaneously with cases of transfer of ownership and of constitution of a pledge, since in practical terms the rules given by the Roman jurists on these subjects have a common ground and operate similarly on numerous occasions. Despite the similarities between the different cases where a non-owner authorizes an act which affects his patrimony, the current research deals exclusively with the cases in which a non-owner transfers ownership over an asset to someone else. The main motivation behind this choice is that, while there are some general guidelines which apply to most cases of patrimonial loss performed by a non-

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<sup>122</sup> See Heumann/Seckel, *Handlexikon* (1926), p. 27, s.v. *Alienatio*.

<sup>123</sup> C. 5,23,1 (Severus/Antoninus, 213): "... Est autem alienatio omnis actus, per quem dominium transfertur".

<sup>124</sup> D. 50,16,28pr (Paul 21 *ed.*): "'Alienationis' verbum etiam usucapionem continet: vix est enim, ut non videatur alienare, qui patitur usucapi. Eum quoque alienare dicitur, qui non utendo amisit servitutes. Qui occasione acquirendi non utitur, non intellegitur alienare: veluti qui hereditatem omittit aut optionem intra certum tempus datam non amplectitur".

<sup>125</sup> See e.g. D. 23,5,1pr (Paul 36 *ed.*), regarding the *missio in possessionem* that takes place due to the omission by the owner of granting a *cautio damni infecti*, which is qualified by Paul as a non-voluntary alienation (*alienatio non est voluntaria*).

<sup>126</sup> C. 4,51,7 (Justinian, 531): "Sancimus, sive lex alienationem inhiberit sive testator hoc fecerit sive pactio contrahentium hoc admiserit, non solum domini alienationem vel mancipiorum manumissionem esse prohibendam, sed etiam usus fructus dationem vel hypothecam vel pignoris nexum penitus prohiberi: similique modo et servitutes minime imponi nec emphyteuseos contractum, nisi in his tantummodo casibus, in quibus constitutionum auctoritas vel testatoris voluntas vel pactionum tenor qui alienationem interdixit aliquid tale fieri permiserit".

<sup>127</sup> See e.g. D. 37,12,2 (Gai. 15 *ed. prov.*), with reference to the manumission.

owner, there are several features which are only found in the context of the transfer of ownership. For instance, the problem of the *iusta causa* is absent in the context of the pledge and the manumission, which is why all the problems related to the structure of *traditio* are non-existent in these cases. The sources require moreover a certain agreement between the transferor and the acquirer in certain contexts at the moment of the delivery, which is completely absent in unilateral acts such as the manumission. Furthermore, some general rules may not apply to every case of patrimonial loss, such as the *nemo plus iuris* rule (D. 50,17,54). This rule can be used to approach the transfer of ownership or the constitution of a pledge, but plays no role regarding manumission, where nothing is transferred to someone else<sup>128</sup>. Moreover, the various cases of patrimonial decrease can have completely different outcomes, as happens in cases where a manumission and a *traditio* by a bonitary owner take place: in the former case the slave will not be considered to be free, while in the latter the acquirer will gain a bonitary ownership which will grant the transferee the same unassailable position of his predecessor. Accordingly, by focusing on the transfer of ownership by a non-owner on its own, it is intended to avoid an excessive abstraction of a subject which was approached in a mainly casuistic way by Roman jurists. All of this, however, does not mean that sources dealing with other cases of authorized patrimonial loss will be neglected altogether, since they do offer interesting points of comparison and therefore will be brought up in order to ratify or clarify the results obtained in the study of the *potestas alienandi*, particularly regarding the significance granted to the *voluntas domini*, which is the main common element among these various cases.

This brief overview of the different applications which the *voluntas domini* has in Roman law shows how inadequate it is to have the modern concept of ‘direct representation’ as a starting point for the analysis of Roman sources. For acts which make the position of another person worse, the general guideline to follow is that the owner will be directly affected as long as the other person is authorized by him (*voluntas domini*) or by the law, as happens with legal guardians. The underlying idea behind these solutions is not so much that a non-owner will perform an act *on behalf* of the owner, but rather that he will be authorized by the latter to do something which is in itself detrimental to the position of the owner, as it is to manumit, pledge, destroy, consecrate, alienate, etc. For instance, if ownership is transferred through a non-owner acting *voluntate domini*, he is being authorized to perform an act which in itself negatively affects the position of the owner, since he will lose an asset. Whether this loss may involve a subsequent gain for the owner – e.g. the price of the sale – is conceptually independent from this initial act, which is why one cannot approach both as a whole by describing them through the concept of direct representation.

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<sup>128</sup> Medieval jurists would nonetheless apply this rule in the context of manumission. See Chapter 7, Section 4.

In fact, there may be no positive consequence for the owner following the authorization given by him for an act which will have a negative impact on his patrimony, which is why the general reference to the *voluntas domini* in this context is rather to be seen as an abdicative act rather than a case of direct representation. Moreover, the reference to the notion of ‘direct representation’ to describe Roman sources can be completely misleading, since it introduces a uniform approach to problems which are dealt in a casuistic way by classical jurists.

Finally, it is worth noting that none of the provisions mentioned here regarding the *voluntas domini* can be framed within the idea of a primitive prohibition of direct representation in Roman law, since they all seem to bear direct consequences for the *ius civile*. The traditional reconstruction of the evolution of *Stellvertretung* in Antiquity can accordingly be discarded, not only because there were numerous cases in which the intervention of an authorized non-owner would bear direct consequences for the person issuing the authorization, but further due to the lack of proof that all of these cases were introduced as exceptions to a primitive ban on direct representation.

c. Acquisition and payment by a third person.

The transfer of ownership by a non-owner has traditionally not only been studied in close correlation with other cases in which an owner experiences a patrimonial loss through the acts of an authorized non-owner, as shown in the preceding section, but also with other situations in which the owner is directly benefited by the acts of another person, as happens when someone acquires an object on his behalf or pays a debt of his. The former case in particular receives significant attention when dealing with the transfer of ownership by a non-owner, particularly since the evolution of both problems is usually assumed to be identical and authors at times fill in the missing information in one topic by resorting to the other one. The reason behind such an approach is by no means evident. One may suspect that it has something to do with a symmetrical way of thinking, according to which one could expect that similar rules apply to institutions which appear to be two sides of the same coin, as happens with the acquisition and transfer of ownership. Behind these thoughts, one could moreover distinguish the influence of the doctrine of direct representation, which would cover both problems and thereby grant them a uniform treatment, as is the case in several contemporary legal systems. Such a uniform approach, however, does not suit the Roman sources<sup>129</sup>.

The problem of the acquisition of ownership through a third party has been the subject of extensive studies, which shows the complexity of this topic. The rule *per extraneam personam* plays a key role in determining whether the

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<sup>129</sup> See Buckland, *Main institutions* (1931), p. 161 ff.

acquisition of ownership takes place in a necessary way, since everything which a person *alieni iuris* acquires will automatically become part of the patrimony of the *paterfamilias* due to the former's lack of independence. The acquisition may also take place through an independent person (*sui iuris*), but in this case the *dominus negotii* will only become owner if a series of requirements related to the acquisition of possession are met, such as the explicit declaration of the agent of acquiring the possession on behalf of someone else. Only if the agent acquires the possession for the *dominus negotii* will the latter obtain ownership over the object.

Compared to this problem, the transfer of ownership by a non-owner appears to be relatively simple. There is in fact no general principle according to which the acts of alienation performed by *sui iuris* will automatically affect the owner, which is evident considering that the *ratio* behind the *per extraneam personam* rule only covers the cases in which the patrimony of the *paterfamilias* is increased: everything which a person who is legally subordinate to another acquires automatically increases the latter's patrimony. No equivalent ground can be found to declare that every transfer of ownership by an *alieni iuris* automatically affects the owner, which is why there is no justification for distinguishing between the transfer of ownership performed by a *sui iuris* and an *alieni iuris*.

Despite some conceptual similarities one may identify between the acquisition and the transfer of ownership through a third person, it seems clear that both topics are completely different. This circumstance becomes evident if one considers a structural difference: in the case of the acquisition of ownership through a third person, the patrimony of the *dominus negotii* increases, whereas in the transfer of ownership it decreases. Both situations bear therefore only an apparent similarity, being in fact largely opposite. This is why, as mentioned above, the rule *per extraneam personam* applies naturally to the acquisition of ownership, but has no equivalent significance for the transfer of ownership. This in turn shows that the rule *per extraneam personam* cannot be seen as shedding any light on the evolution of the transfer of ownership by a non-owner, as if both were part of a common development. The sources themselves often stress the vital differences between both problems. Ulpian, for example, declares in the second book of his Institutes (D. 1,3,41) that every *ius* consists in either acquiring, keeping or diminishing<sup>130</sup>, which in turn implies distinguishing how something may come to be somebody's and how he may alienate or lose it, thereby setting both issues on different systematic levels. Some authors have indicated that this text may be the result of the generalization by Justinian's

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<sup>130</sup> D. 1,3,41 (Ulp. 2 *inst.*): "Totum autem ius consistit aut in acquirendo aut in conservando aut in minuendo: aut enim hoc agitur, quemadmodum quid cuiusque fiat, aut quemadmodum quis rem vel ius suum conservet, aut quomodo alienet aut amittat" (Every *ius* [right] consists either in acquiring, keeping or diminishing; for the question is either how something may come to be somebody's or how a person may keep a thing or keep his *ius* or how he may alienate or lose it [transl. Watson, modified]).

commissioners of a more specific problem, such as the *iura praediorum*<sup>131</sup>, but even if that were the case it would still show that Roman jurisprudence approached problems of acquisition and alienation separately. Moreover, one cannot discard that this text was originally intended to cover the acquisition, conservation and loss of ownership and other rights, especially considering that Ulpian refers his tripartite division to “things and rights” (*rem vel ius*). This broad expression resembles the general systematization offered by Gaius in his Institutes, in which he covers under the concept of ‘res’ both ownership (*res corporales*) and various *iura* (*res incorporales*).

Other texts explicitly distinguish the way in which one must approach acts that increase the patrimony of another person and those that decrease it. In the previous section D. 3,5,38(39) was mentioned, where Gaius claims in general terms that “the principles of both natural justice and the civil law are in favour of our being able to improve another’s position, even without his knowledge and agreement, but not of our being able to make it worse” (*Naturalis enim simul et civilis ratio suasit alienam condicionem meliorem quidem etiam ignorantis et inviti nos facere posse, deteriorem non posse* [transl. Watson]). There is even a similar *regula iuris* which is also the work of Gaius, being however exclusively applied to the acts through slaves: D. 50,17,133 (Gai. 8 ed. Prov.): “*Melior condicio nostra per servos fieri potest, deterior fieri non potest*”<sup>132</sup>. It becomes therefore clear that one cannot apply the rules of one group of cases to the other simply because in both groups an act is concluded through another person.

Because of the significant differences between the transfer and the acquisition of ownership through a third person, the latter problem will not be dealt with in this study. Moreover, an attempt will be made to revise the points in which scholars have derived conclusions for the transfer of ownership by drawing analogies from the acquisition of ownership. An interesting example of this is found in the work of Burdese<sup>133</sup>, who considers that the power to dispose of slaves and *fili* stems from their particular status in relation to the *paterfamilias* – an allegation which, as mentioned above, is rather to be applied exclusively to the acquisition of ownership. To the same line of thought belongs Potjewijd<sup>134</sup>, who decides – unlike Burdese – to exclude from his research the transfer of ownership performed by *fili* and slaves, adducing that in the case of an *alieni iuris* the ground for the validity of the alienation would be related to their particular status. The application of features corresponding to the acquisition of ownership to the study of the transfer of ownership by a non-owner is also found in the work of Sansón<sup>135</sup>. This author, when faced with the scanty evidence concerning whether

<sup>131</sup> D’Ors, *Concepto de ius* (1953), p. 298–299.

<sup>132</sup> D. 50,17,133: “Our condition can be improved but not worsened by our slaves”.

<sup>133</sup> Burdese, *Autorizzazione* (1950), p. 21. This idea is followed by Perani, *Pignus distrahere* (2014), p. 52.

<sup>134</sup> Potjewijd, *Beschikkingbevoegdheid* (1998), p. 124 and 126.

<sup>135</sup> Sansón, *La transmisión* (1998), p. 68 n. 118; p. 72–74; p. 96 n. 247.

the alienation by a non-owner should be performed *nomine alieno*, resorts to the rules concerning the acquisition through a third party and concludes that it is relevant that the agent acts on behalf of the *dominus negotii*. In this case the analogy between the acquisition and transfer of ownership appears once again to be inadequate, since the need to act *nomine alieno* has a specific ground in the context of the acquisition of possession which is completely absent in order to transfer ownership<sup>136</sup>. These problems will be studied in further detail in the following chapters.

A similar problem to that of the acquisition by a third person takes place regarding the payment done by someone who is not the debtor, which is often studied closely to the transfer of ownership by a non-owner<sup>137</sup>. One may understand that both problems could be set side by side, since they could even coincide in a specific case, such as the payment carried out by a third person who pays with the owner's money and following his instructions. In such case, the non-owner would be simultaneously transferring ownership and paying a debt which is not his own. Nonetheless, most of the discussion of the payment by a non-owner falls outside the problem of the transfer of ownership by a non-owner, since the most controversial cases are precisely those in which the third person pays with his own money and without the owner's authorization. In such cases, as noted above<sup>138</sup>, Roman jurists would offer a solution which was only applicable to cases in which the owner derives a benefit from the conduct of the third person, namely that the act conducted by the latter would directly affect his position even if he had not authorized it. The solution is completely different regarding the cases in which the owner would suffer a patrimonial loss as a result of the acts of the non-owner. In such situations the owner's authorization was indispensable, as highlighted by Gaius in D. 3,5,38(39)<sup>139</sup>. Accordingly, just as in the case of the acquisition by a non-owner, the payment by a non-debtor cannot be regarded as an institution closely linked to the transfer of ownership by a non-owner, being in fact approached by Roman jurists as an opposite problem, in which the principal does not lose something, as happens in the *traditio*, but rather becomes richer.

It is important to keep in mind the fundamental distinction between the way the *solutio* by a non-debtor and the *traditio* by a non-owner operate in order to avoid extrapolating to the transfer of ownership features which only apply to the payment. This is particularly the case regarding the need to act *nomine alieno*. In the case of the payment by a third person, it is of course essential that he indicates precisely whose debt is he paying, in order that this precise debt is extinguished.

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<sup>136</sup> See Buckland, *Main institutions* (1931), p. 170.

<sup>137</sup> Regarding the payment by a *procurator* see Apathy, *Procurator und solutio* (1979), p. 65-88.

<sup>138</sup> Chapter 1, Section 2(b).

<sup>139</sup> Chapter 1, Section 2(b) above. The idea according to which one may pay without the knowledge or authorization of the debtor is also laid down in D. 46,3,53 (Gai. 5 *ad edictum provinciale*) and Inst. 3,29pr.

The main texts dealing with the payment by a third person stress that the knowledge or authorization of the debtor is not needed for the validity of the payment, it being however essential that he acts on behalf of the debtor. When conveying this solution it is explicitly indicated that this applies to the cases where the condition of the principal is improved by the acts of the third person, and not to those where his patrimony is diminished, as happens with the delivery of his ownership. Accordingly, peculiar features of the payment by a non-owner such as the need to act *nomine alieno* cannot be considered to apply instantly to the problem of the transfer of ownership by a non-owner.

### 3. Ownership and *potestas alienandi*, systematic considerations

As it was mentioned in the previous section<sup>140</sup>, the Roman sources often use expressions such as *potestas alienandi* or *ius vendendi* to succinctly declare that someone may be entitled to transfer ownership. However, the existence of such expressions does not imply that Roman jurists would generally declare that one of the requirements for the transfer of ownership is the *potestas alienandi* of the *tradens*. Instead, Roman sources usually have as a more simple starting point that the *tradens* must be owner<sup>141</sup>. To name just a few: D. 18,1,74 declares that if the transferor is not the owner usucapion will start at once<sup>142</sup>, which implies that ownership is not transferred; D. 41,1,20pr and D. 50,17,54<sup>143</sup> categorically establish that one cannot transfer what one does not have, which in the first text means that only the owner can transfer ownership; D. 18,1,28<sup>144</sup> determines that the sale by a non-owner is valid as such, but that it will not transfer ownership. Particularly interesting is moreover the opening text of Gaius dealing with the transfer of ownership by *traditio*:

Gai 2,18-20: (18) Magna autem differentia est inter Mancipi res et nec Mancipi. (19) Nam res nec Mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem. (20) Itaque si tibi vestem vel aurum vel argentum tradidero sive ex

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<sup>140</sup> Chapter 1, Section 2(a).

<sup>141</sup> Whether he must be a *dominus ex iure Quiritium* will be discussed in the following sections.

<sup>142</sup> D. 18,1,74 (Pap. 1 *def*): “Clavibus traditis ita mercium in horreis conditarum possessio tradita videtur, si claves apud horrea traditae sint: quo facto confestim emptor dominium et possessionem adipiscitur, etsi non aperuerit horrea: quod si venditoris merces non fuerunt, usucapio confestim inchoabitur”. See on this text Miquel, *Contrato real abstracto* (2003), p. 5764.

<sup>143</sup> See on this text Chapter 6 below.

<sup>144</sup> D. 18,1,28 (Ulp. 41 *Sab*): “Rem alienam distrahere quem posse nulla dubitatio est: nam emptio est et venditio: sed res emptori auferri potest”.

venditionis causa sive ex donationis sive quavis alia ex causa, statim  
tua fit ea res, si modo ego eius dominus sim.<sup>145</sup>

The basic rule is clear: the delivery which follows a *iusta causa* will transfer ownership if it is done by the owner of the delivered thing, and it will not transfer ownership if performed by a non-owner. The owner alone has the power to alienate. Moreover, when discussing the acquisition through usucapion, Gaius shows once again that it is essential for the transfer of ownership that the transferor is the owner. This is in turn emphasized by the description of the content of the good faith of the acquirer as the belief that it was the owner who performed the *traditio*:

Gai 2,43: Ceterum etiam earum rerum usucapio nobis competit, quae non a domino nobis traditae fuerint, sive mancipi sint eae res sive nec mancipi, si modo eas bona fide acceperimus, cum crederemus eum, qui tradet, dominum esse.<sup>146</sup>

All of these texts could give the impression that for Roman jurists only the true owner would be able to transfer ownership. However, several other texts, while maintaining as the basic starting point that the transferor must be owner, introduce further clarifications which narrow down in a more accurate way the requirements to transfer ownership. Particularly eloquent in this regard is Gai 2,62-64, which is introduced with the phrase: “*Accidit aliquando, ut qui dominus sit, alienandae rei potestatem non habeat, et qui dominus non sit, alienare possit*”<sup>147</sup>. The wording of the text shows that we are dealing with cases which depart from the general rule, since it “sometimes happens” that someone different than the owner can transfer ownership, or that the owner cannot transfer ownership. The starting point or general rule is clearly that the *tradens* must be owner, but this notion can be subject to clarifications<sup>148</sup>. Miquel stressed that the text of Gai 2,62-64 should therefore be interpreted as the last part of a sequence of texts, narrowing down the general notions laid down in Gai 2,20

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<sup>145</sup> Gai 2,18-20: “(18) Now, there is a great difference between *res mancipi* and *nec mancipi*. (19) For *res nec mancipi* become the full property of someone else by the very act of delivery, provided that they are corporeal and so capable of delivery. (20) And so, if I deliver to you clothing or gold or silver, whether on the basis of a sale or a gift or on any other basis, it immediately becomes yours, provided that I am owner of it” (transl. Gordon/Robinson, modified).

<sup>146</sup> Gai 2,43: “But we can also usucapt things which have not been delivered to us by the owner, whether they are *mancipi* or *nec mancipi*, provided that we receive them in good faith, in the belief that the person who delivered them was owner” (transl. Gordon/Robinson).

<sup>147</sup> Gai 2,62: “It sometimes happens that an owner does not have power to alienate and that a non-owner does” (transl. Gordon/Robinson).

<sup>148</sup> Buckland, *Interpolations* (1941), p. 1309; Zulueta, *Institutes of Gaius* (1953) II, p. 74; Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 9-10.

and Gai 2,43, according to which the transferor should be the owner<sup>149</sup>. Gai 2,62–64 ends the general analysis of the acquisition of ownership by *traditio* and usucapion with a more accurate criterion which narrows down the previous general statements on the subject.

While discussing the systematic role of Gai 2,62–64, it must be pointed out that the position of this fragment within the work of Gaius was a controversial matter in the editing history of the Institutes. The first editions located the passage in its current place<sup>150</sup>, following the original order of Gaius' exposition, where the text is divided between f. 102v and f. 85r of the Veronese palimpsest<sup>151</sup>. In 1834, however, Heimbach pointed out that the location of this fragment could be questioned for two reasons<sup>152</sup>. First of all, the topic seemed to be intimately related to the alienations by the *mulier* and *pupillus* located in Gai 2,80–85. Therefore, it would be more reasonable to place Gai 2,62–64 before Gai 2,80–85. Additionally, Heimbach argues that the words “*Ergo ex his quae diximus*” at the beginning of Gai 2,65 could be properly referred to the topics covered in Gai 2,22–61, but would not fit with the additional topic of Gai 2,62–64. Heimbach's considerations were accepted by Huschke<sup>153</sup>, who adds as an additional argument that the topics dealt with in Gai 2,62–64 and Gai 2,80–85 are set side by side in the Institutes of Justinian (Inst. 2,8, “*Quibus alienare licet vel non*”). According to Huschke, the juxtaposition of these texts in Justinian's Institutes would in this way demonstrate the original order of Gaius' text.

The opinion of Heimbach and Huschke found some initial resistance, being criticized by Böcking<sup>154</sup> in his first editions of the Institutes. It was also refuted by Mommsen in his *Epistula Critica* which precedes the first edition of the Institutes by Krüger and Studemund<sup>155</sup>. Mommsen considered that Gai 2,62–64 was related

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<sup>149</sup> Miquel, *Compraventa y transmisión* (1993), p. 101–107; Miquel, *Traditio rei alienae* (1993), p. 272–273.

<sup>150</sup> Göschen, *Gaii Institutionum* (1820), p. 91–92; Lachmann, *Gaii Institutionum* (1841), p. 69–70.

<sup>151</sup> See the recent photomechanical reproduction of the manuscript in Briguglio, *Gai Codex Rescriptus* (2012), p. 229 and 266.

<sup>152</sup> Heimbach, *Ueber Ulpian's Fragmente* (1834), p. 34–35.

<sup>153</sup> Huschke, *Iurisprudentiae anteiustinianae* (1861), p. 149, n. 42. This opinion is maintained in later editions of his *Iurisprudentiae anteiustinianae*: cfr. Huschke, *Iurisprudentiae anteiustinianae* (1867), p. 159–160, n. 45; Huschke, *Iurisprudentiae anteiustinianae* (1886), p. 234 n. 5 already records Mommsen's observation (*quidquid Mommsenus commendandi vel excusandi eius gratia in ed. Kr. 2 contra dicat*) but does not accept it. Only in the posthumous sixth edition by Seckel and Kübler (Huschke/Seckel/Kübler, *Iurisprudentiae anteiustinianae* [1903], p. 66) did the fragment return to its traditional position.

<sup>154</sup> Böcking, *Gaii Institutionum* (1841), p. 65 n. 1.

<sup>155</sup> Krüger/Studemund, *Gai Institutiones* (1877), p. XIX–XX, now in Mommsen, *Emendationes Gaianae* (1905 [1877]), p. 41–42: “*Displicet transpositio Heimbachiana. Gaiana dispositio commoda magis quam accurata hic eo nititur, quod primum agitur de rerum alienatione, ad quem tractatum usucapio quoque redigitur utpote iustae alienationis legitimum supplementum, deinde transitur ad rerum acquisitionem eam, quae non ab alienatione pendet, qualis est occupatio et specificatio. Locus autem, quatenus res recte alienentur a non domino vel alienari nequeant a domino, aperte prioris tractatus appendix est, quo ipso*

to the subjects treated earlier in Book 2 and therefore it would be correct to keep this passage after Gai 2,61. Mommsen deems that the position of this text could be explained by considering Gai 2,62–64 to be an appendix of the preceding topics added afterwards by Gaius, thereby breaking with the original, more fluid sequence. His opinion would however not be followed by Krüger and Studemund, who followed Heimbach's opinion in that same edition containing Mommsen's *Epistula Critica*, placing Gai 2,62–64 before Gai 2,80<sup>156</sup>. In subsequent editions Krüger and Studemund quoted Mommsen's observation, but never abandoned their position<sup>157</sup>, a decision which was criticized by Gradenwitz<sup>158</sup>. Heimbach's *transpositio* would prevail for the rest in the 19<sup>th</sup> century, as can be seen in later editions by Böcking<sup>159</sup>, Gneist<sup>160</sup>, Polenaar<sup>161</sup> and Poste<sup>162</sup>.

Despite the merits of Heimbach's theory, it had an inherent speculative nature which makes its results dubious<sup>163</sup>. It is therefore no wonder that during the 20<sup>th</sup> century the tendency was reversed and most editions of the Institutes of Gaius located Gai 2,62–64 in its original position, without much discussion on the point<sup>164</sup>. Some scholars focused their attention on determining which parts of the text of the Veronese palimpsest could be signalled as later additions to the original text. This would explain the arrangement of the contents of Book 2, and in this context both Gai 2,62–64 and Gai 2,65–79 were suspected – by different authors – to have been added to at a later stage<sup>165</sup>. Regarding these allegations, Nelson has observed that the insertion of texts at a later stage cannot be discarded, but that the structure of Book 2 can be better explained considering the existence of previous systematic models followed by Gaius<sup>166</sup>. There are in any case good reasons to preserve the text of Gai 2,62–64 in its original position. Firstly,

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loco in Gai libro legitur. Postea eum adiectum videri a Gaio et aliquando § 61 et § 65 continuo se excepisse sane probabile est”.

<sup>156</sup> Krüger/Studemund, *Gai Institutiones* (1877), p. 50 and 53.

<sup>157</sup> Krüger/Mommsen/Studemund, *Gai Institutiones* (1923), p. 56.

<sup>158</sup> Gradenwitz, *Natur und Sklave* (1900), p. 176 n. 1.

<sup>159</sup> Böcking, *Gaii Institutionum* (1866), p. 89–90.

<sup>160</sup> Gneist, *Institutionum* (1880), p. 78.

<sup>161</sup> Polenaar, *Syntagma Institutionum* (1876), p. 53, n. 1.

<sup>162</sup> Poste, *Gai Institutiones* (1904), p. 168.

<sup>163</sup> This becomes obvious when reading the imaginative ways to explain how the original text was altered, such as Böcking's colourful narration of a drowsy scribe (*somniculosus homo*) whose clumsiness led him to copy one folium before another and to keep silence after noticing it. See Böcking, *Gaii Institutionum* (1866), p. 90.

<sup>164</sup> See e.g. Seckel/Kübler, *Gai Institutiones* (1939), p. 67–68; David/Nelson, *Gai Institutionum, Text* (1960), p. 79; Girard/Senn, *Textes de Droit Romain* (1967), p. 75 n. 9; FIRA (1968) II, p. 57–58; Manthe, *Gaius Institutiones* (2004), p. 132.

<sup>165</sup> See on this point Gradenwitz, *Natur und Sklave* (1900), p. 176–177; Krüger, *Zur Stellung* (1901), p. 49–51; Kniep, *Gai Institutionum* (1912) II, p. 204–205, 221–222 and 233–234; Fuhrmann, *Zur Entstehung* (1956), p. 145–148; Liebs, *Rechtsschulen* (1976), p. 231

<sup>166</sup> Nelson, *Überlieferung* (1981), p. 382 n. 68. See moreover p. 296–297, where a parallel is drawn between the arrangement of the topics in Book 2 of the Institutes and in the *Res Cottidianae*.

Bizoukides and Nelson have indicated that the arrangement of the topics under discussion in the Institutes of Justinian does not prove anything regarding the text of Gaius, especially considering that the compilers could modify the content and sequence of the text<sup>167</sup>. Nelson also claims that Studemund and Krüger went too far when altering the position of Gai 2,62–64, since these texts fit adequately with the general treatment of the different modes of acquiring indicated in Gai 2,65<sup>168</sup>. It has moreover been observed that Gai 2,62–64 does fulfil a meaningful role in its original context by drawing a limitation to the general guidelines on the transfer of ownership presented before<sup>169</sup>. As mentioned above, the text complements in the first place the notions on the transfer of ownership as expressed in Gai 2,20, showing that the faculty to transfer ownership not always corresponds to the owner. It is moreover significant that Gai 2,62–64 is not located right at the beginning of the study of the voluntary transfer of ownership, closer to Gai 2,20, but at the end of the study of the acquisition of ownership through usucapion, since it helps as well to narrow down the scope of texts such as Gai 2,43. Through the clarification of Gai 2,62–64 we become aware that one should consider whether the transferor has *potestas alienandi* or is subject to a prohibition to dispose in order to determine if the usucapion will take place. Additionally, the notion of *potestas alienandi* offers a more accurate content of the good faith of the acquirer: he may be aware that he is not dealing with the owner, but rather with someone with *potestas alienandi*, in which case he would be in good faith as well<sup>170</sup>. Such clarification can even be found in the definition of ‘purchaser in good faith’ given by Modestinus:

D. 50,16,109 (Mod. 5 *pandectarum*): Bonae fidei emptor esse videtur, qui ignoravit, eam rem alienam esse, aut putavit eum, qui vendidit, ius vendendi habere, puta procuratorem aut tutorem esse<sup>171</sup>.

As it is common among Roman jurists, the starting point is that the owner must be directly involved in the transfer of ownership, which implies that the good faith of the acquirer would consist in the belief of receiving the object from the owner. However, a subsequent clarification in the second part of the text shows that the good faith may as well refer to the *ius vendendi* of the transferor, as would

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<sup>167</sup> Bizoukides, *Gaius* (1938) II, p. 68; Nelson, *Überlieferung* (1981), p. 382 n. 68.

<sup>168</sup> Nelson, *Überlieferung* (1981), p. 382 n. 68.

<sup>169</sup> Zulueta, *The Institutes of Gaius* (1953) II, p. 74: “(...) in Gaius the natural place for the subject of power to alienate is the present, after modes of alienation with their supplement usucapion (...)”. See moreover Nelson, *Überlieferung* (1981), p. 382; Miquel, *Compraventa y transmisión* (1993), p. 101–107; Sansón, *La transmisión* (1998), p. 31–40.

<sup>170</sup> Miquel, *Compraventa y transmisión* (1993), p. 107.

<sup>171</sup> D. 50,16,109: “A purchaser in good faith seems to be someone who did not know that the thing belonged to someone else or thought that the seller had the right to sell, for instance, a *procurator* or *tutor*” (transl. Watson). On this definition see Hausmaninger, *Die bona fides* (1964), p. 10–12.

be the case if he receives from a *procurator* or *tutor*, thereby making the text more accurate.

There are other texts which, in a similar way to Gai 2,62 and D. 50,16,109, offer a further clarification to the criterion according to which the transferor must be the owner. For instance, C. 4,51,6 indicates that the alienation of certain objects carried out by a non-owner cannot be detrimental to the owner, inserting however in the middle of the text the proviso “not pledged to him or over which he has no power of sale by reason of his office” (transl. Blume)<sup>172</sup>. The *vendendi potestas* mentioned in this text fulfils the same role as the *potestas alienandi* of Gai 2,62 and the *ius vendendi* of D. 50,16,109, i.e. to show that other people different than the owner may transfer ownership as well. A similar clarification is found in the writings of Venuleius regarding the *accessio possessionis* in D. 44,3,15 (Venul. 5 *interdictorum*): while he initially declares that the *accessio possessionis* will only take place if an object is received by someone who had the possession over the object (D. 44,3,15,1), he then clarifies that one must also consider that this possession can be granted through someone acting under a contract of mandate (D. 44,3,15,2), by a *filius* or slave duly authorized or acting within their *peculium* (D. 44,3,15,3), or by a *tutor* or *curator* (D. 44,3,15,4). Considering that Venuleius discusses the transfer of possession, it is no wonder that he avoids general terms referring to the transfer of ownership such as *potestas alienandi* or *ius vendendi*.

At this point it should be noted that the texts in which it is declared in abstract terms that a non-owner may transfer ownership are rather exceptional. As shown at the beginning of this section, Roman jurists are comfortable in most cases with declaring that the transfer of ownership should be carried out by the owner. Miquel has observed that for modern scholars it would be better to more accurately state that ownership must be transferred by someone with *potestas alienandi*, but that this is not the approach of Roman jurisprudence, which rather uses ‘ownership’ as a starting point which is narrowed down through notions such as *potestas alienandi*<sup>173</sup>. Roman jurists appear therefore to tolerate a certain degree of inaccuracy for the sake of simplicity, which implies that one should not take some texts too literally. When Roman sources demand the transferor to be ‘owner’ they do not imply, for instance, that every transfer of ownership by a non-owner should be considered as performed by the owner himself, or that only the owner can transfer ownership. Such considerations play a decisive role when approaching the *nemo plus* rule (D. 50,17,54) in Chapter 6 below.

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<sup>172</sup> C. 4,51,6 (Diocletian/Maximianus, 294): “Nemo res ad te pertinentes non obligatas sibi nec ex officio vendendi potestatem habens distrahendo quicquam tibi nocere potuit”.

<sup>173</sup> Miquel, *Compraventa y transmisión* (1993), p. 106–107.

#### 4. Grounds for the *potestas alienandi*

##### a. General distinctions on the source of the *potestas alienandi*.

From what has been studied so far, the cases in which a non-owner has the *potestas alienandi* seem to be nothing but a group of exceptional cases. If this was the case, one would not be able to assume that the different cases in which a non-owner transfers ownership have an inner connection or a common way to operate. They could simply be individual exceptions to the general rule, having further nothing in common. There are however clear similarities among the different cases, which allows to group them in two main categories: those in which the ground for the *potestas alienandi* is the owner's authorization (*voluntas domini*) and those in which it stems from a legal provision, where the owner's intent plays no relevant role. Most authors dealing with the transfer of ownership by a non-owner have in fact worked with this basic distinction<sup>174</sup>. The analysis of Roman sources quickly shows that in a large group of cases the *voluntas domini* is explicitly signaled as a decisive element to determine the transfer of ownership, as will be seen in further detail in Chapter 2. Next to this group, there are other cases which are more difficult to label as a group because they seem to have little in common apart from the fact that the *voluntas domini* plays no relevant role in them, as happens with the alienations carried out by legal guardians. Maybe the most adequate way to describe this group, apart from the negative feature of the absence of the *voluntas domini*, is by highlighting that in such cases the *potestas alienandi* is derived from a legal provision.

Gai 2,64 is often signaled as indicative of the central position of the *voluntas domini* in order to distinguish the different cases of *potestas alienandi*, showing moreover the convenience of distinguishing the cases of transfer of ownership by a non-owner by attending to the source of the authorization:

Gai 2,64: Ex diverso agnatus furiosi curator rem furiosi alienare potest ex lege XII tabularum; item procurator < ca. 22 > est; item creditor pignus ex pactione, quamvis ea res non sit. Sed hoc forsitan ideo videatur fieri, quod voluntate debitoris intellegitur pignus alienari, qui olim pactus est ut liceret creditori pignus vendere, si pecunia non solvatur<sup>175</sup>.

<sup>174</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 8 (I, col. 733-734); Burdese, *Autorizzazione* (1950), p. 11-23; Angelini, *Il procurator* (1971), p. 149 n. 229; Corbino, *Fonna librare* (1984), p. 2262; Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 143; Sansón, *La transmisión* (1998), p. 40-49.

<sup>175</sup> Gai 2,64: "On the other hand, under the Twelve Tables the agnatic *curator* of a lunatic can alienate the lunatic's property; also a *procurator* < 22 missing letters >; again, a creditor, under his agreement, can alienate a pledge despite not being its owner. But here the explanation is perhaps that he alienates the pledge with the assent of the debtor, he having

In this text, Gaius presents three cases of non-owners with *potestas alienandi*, along with a short description of them. In the first place, he mentions the *curator furiosi*, whose faculty to dispose stems from statute, namely the Twelve Tables. Gaius presents afterwards the *procurator*, a typical case where the owner grants his authorization for the delivery, but a *lacuna* in the Veronese palimpsest denies us more information on the point. Finally, the case of the pledge creditor is presented, regarding which Gaius doubts whether the power to dispose follows from the debtor's authorization (*voluntas debitoris*) or not. This places the *voluntas domini* at the base of the distinction between the grounds for the *potestas alienandi*.

While Gai 2,64 would appear to offer a neat distinction between cases where the authorization to dispose stems from a legal provision and from the owner's consent, there is an element in the wording of the text which introduces some uncertainty on the general sense of the text, namely that Gaius, when explaining the alienation by a pledge creditor, seems to draw a contrast with what has been said before by saying "*Sed hoc forsitan ideo videatur fieri, quod voluntate debitoris intellegitur pignus alienari...*" Gaius could therefore be seen as claiming that in this case, unlike the previous ones, the ground for the transfer of ownership would be the *voluntas domini*. However, this interpretation cannot be accepted. The main reason for this is that there are numerous texts in classical jurisprudence where the *procurator* is explicitly mentioned as transferring ownership *voluntate domini*<sup>176</sup>. The exact scope of the phrase "*Sed hoc forsitan ideo videatur fieri...*" may have well related to whatever Gaius said in the *lacuna* "*item procurator < ... > est*", and the lack of information on this point inevitably casts a shadow of doubt on the exact meaning of the rest of the text. Only a clear lecture of this passage would offer the prospect of solution on this point<sup>177</sup>. Until this may happen, assuming that the delivery by the *procurator* was not regarded as performed *voluntate domini* appears to be one of the least probable conjectures. Much more likely is that Gaius simply was explaining what exactly "*ex pacto*" in the previous phrase meant, including the alienation by a pledge creditor among the cases in which the transfer of ownership takes place *voluntate domini*<sup>178</sup>. Accordingly, the text shows some hesitation regarding the ground for the transfer of ownership by a pledge creditor, without attempting to draw a sharp contrast with the cases listed before. Nonetheless, the reference to the *voluntas debitoris* in the context of the

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previously agreed that the creditor should have power to sell the pledge, if the debt were not paid" (transl. Gordon/Robinson, modified).

<sup>176</sup> See e.g. D. 6,1,41,1 (Ulp. 17 *ed.*); D. 6,2,14 (Ulp. 16 *ed.*); C. 2,12,16 (Diocletian/Maximianus, 293). There is moreover a famous text of Gaius, D. 41,1,9,4 (Gai. 2 *rer. cott.*), where someone who has the *libera negotiorum administratio* is regarded to act *voluntate domini*, and while it is not self-evident that the text refers specifically to a *procurator*, it does seem applicable to this case as well.

<sup>177</sup> Böhm, *Gaiusstudien* (1977) XV, p. 12-19 offers a reconstruction of Gai 2,64 – and not only of the *lacuna* regarding the *procurator* – that attempts to solve some of the odd features of the traditional text of Studemund, but which cannot be seen as definitive.

<sup>178</sup> Similar views are offered by Angelini, *Il procurator* (1971), p. 149 n. 229.

transfer of ownership by a non-owner would bear a different systematic significance in Justinianic times, as it is shown below<sup>179</sup>.

The fact that Gaius hesitates to label the case of the pledge creditor seems to be grounded in the curious nature of this institution, which offers very peculiar features with regard to other cases where a non-owner may transfer ownership, particularly considering that the transferor does not act in the interest of the owner<sup>180</sup>. The reference to a *voluntas domini* may nonetheless have appeared to be adequate at the time of Gaius, since the creditor could only sell the pledge if he had agreed explicitly on this point with the debtor<sup>181</sup>. In the event that the latter could not pay his debt, he would therefore be seen as approving of the sale on account of the previous *pactum* concluded with the creditor. The *voluntas domini* would therefore only be relevant at the time the *pactum de vendendo* was concluded, which is why his subsequent opposition to the sale would be irrelevant for the transfer of ownership<sup>182</sup> – unlike the rest of the cases where a non-owner alienates *voluntate domini*<sup>183</sup>. This tension between the original *pactum de vendendo* and the intent of the debtor at the time of the sale by the creditor are expressed by Cervidius Scaevola, who declares that the creditor may sell in the terms of the agreement even if the object was sold against the debtor's will (*licere ex pacto pignus vendere idque vendiderim... licet invito te pignora distracta sint*), since the latter agreed to the sale by the previous *pactum* in the event of noncompliance (*iam enim illo in tempore, quo contrahebas, videri concessisse venditioni, si pecuniam non intulisses*). Considering these peculiarities surrounding the transfer of ownership of the pledged object, it is no wonder that Gaius may have had some hesitation when defining the legal grounds for the transfer of ownership in such case<sup>184</sup>.

The significance of the *voluntas domini* in the context of the alienation of the pledge evolved towards the end of the 2<sup>nd</sup> century AD, when the possibility to sell the object was regarded as tacitly included in every pledge unless explicitly excluded. This implied that the delivery would be regarded to take place *voluntate domini* even if there was no explicit *pactum de vendendo*<sup>185</sup>. Eventually, the possibility to sell the object became an essential part of the pledge, and could not

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<sup>179</sup> Chapter 6, Section 4 below.

<sup>180</sup> Perani, *Pignus distrahere* (2014), p. 42, 101.

<sup>181</sup> See D. 20,1,35 (Labeo 1 *pithanon a Paulo epitomarum*); D. 47,2,74 (Jav. 15 *ex Cassio*).

<sup>182</sup> D. 44,3,14,5 (Scaev. *libro singulari quaestionum publice*): “Item si mihi pignori dederis et convenerit, nisi pecuniam solvisses, licere ex pacto pignus vendere idque vendiderim, emptori accessio tui temporis dari debet, licet invito te pignora distracta sint: iam enim illo in tempore, quo contrahebas, videri concessisse venditioni, si pecuniam non intulisses”. In the same sense C. 8,36(37),1 (Severus/Antoninus, 207): “Cum creditor pignus vendit, non potest videri litigiosae rei emptio contrahi, etsi debitor interdicat, ne venditio perficiatur”. See moreover Perani, *Pignus distrahere* (2014), p. 24 ff., 123-124.

<sup>183</sup> See Chapter 2, Section 1(b) below.

<sup>184</sup> See Buckland, *Per liberam personam* (1939), p. 208-210.

<sup>185</sup> See D. 13,7,4 (Ulp. 41 *Sab.*); C. 8,27,7 (Gordianus, 238). See on this evolution Bueno Delgado, *Pignus gordianum* (2004), p. 109 ff.; Perani, *Pignus distrahere* (2014), p. 31-32.

be excluded by the parties<sup>186</sup>. Justinian would claim in Inst. 2,8,1 to have made things more clear on this point for creditors and debtors<sup>187</sup>, referring to a constitution (C. 8,33,3)<sup>188</sup> of the year 530 in which he established a procedure for selling the pledge in case there was no particular agreement on the subject. These developments, however, do not imply that the *voluntas* of the debtor was rendered irrelevant, since any conditions which had been agreed for the alienation of the pledge would be decisive to determine the *ius distrahendi* of the creditor. Jurists would therefore continue to regard the *voluntas domini* as the legal basis for the transfer of ownership by a pledge creditor even after the need for an explicit *pactum de vendendo* was suppressed.

b. The *libera administratio peculii*, a *sui generis* ground for the alienation.

Having sketched the two general grounds for the *potestas alienandi*, the *libera administratio peculii*<sup>189</sup> appears to be a case which has a place of its own within classical sources, and which is often sharply distinguished from the much more general reference to the *voluntas domini*, as the following text shows:

D. 6,1,41,1 (Ulp. 17 *ed.*): Si servus mihi vel filiusfamilias fundum vendidit et tradidit, habens liberam peculii administrationem, in rem actione uti poterō. Sed et si domini voluntate domini rem tradat, idem erit dicendum: quemadmodum cum procurator voluntate domini vendidit vel tradidit, in rem actionem mihi praestabit<sup>190</sup>.

As it will be shown below<sup>191</sup>, Roman jurists make use of a wide array of expressions when dealing with the authorized transfer of ownership by a non-owner, all of which inevitably fall under the overarching concept of *voluntas*

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<sup>186</sup> PS 2,5,1. See Perani, *Pignus distrahere* (2014), p. 34–38.

<sup>187</sup> Inst. 2,8,1 *i.f.*: “sed ne creditori ius suum persequi impedirentur neque debitores temere suarum rerum dominium amittere videantur, nostra constitutione consultum est et certus modus impositus est, per quem pignorum distractio possit procedere, cuius tenore utriusque parti creditorum et debitorum satis abundeque provisum est”.

<sup>188</sup> C. 8,33,3,1 (Justinian, 530): “Sancimus itaque, si quis rem creditori suo pignoraverit, si quidem in pactione cautum est, quemadmodum debet pignus distrahi, sive in tempore sive in aliis conventionibus ea observari, pro quibus inter creditorem et debitorem conventum est. Sin autem nulla pactio intercesserit, licentia dabitur feneratori ex denuntiatione vel ex sententia iudiciali post biennium, ex quo attestatio missa est vel sententia prolata est, numerandum eam vendere”.

<sup>189</sup> This topic has been studied in detail by Wacke, *Libera administratio peculii* (2006), p. 251–316.

<sup>190</sup> D. 6,1,41,1: “If a slave or a son in parental power, having free management of his *peculium*, has sold and delivered land to me, I can bring an action *in rem* for it; and if he delivers his principal’s thing with his principal’s consent, the same applies. So also when a *procurator* has sold and delivered with his principal’s consent, that will give me an action *in rem*” (transl. Watson).

<sup>191</sup> Chapter 2, Section 3.

*domini*, being the owner's authorization the decisive element behind the transfer of ownership. This is however not the case when a son-in-power or a slave receives the free administration of his *peculium*, which Ulpian distinguishes as a different legal basis for the *potestas alienandi* to that of the *voluntas domini*. The ground for this distinction would appear to be that the *filius* or slave who has the *libera administratio peculii* acts in an autonomous way. The *voluntas* of the *pater* or owner has therefore no part to play in this context. This does not imply, however, that in other contexts the *filius* or slave cannot transfer ownership *voluntate domini*, since Ulpian explicitly mentions this possibility, declaring that the consequence of such a *traditio* would be identical (*idem erit dicendum*). Accordingly, it seems convenient to separate the *libera administratio peculii* and the *voluntas domini* as legal grounds for the transfer of ownership<sup>192</sup>. The fact that Ulpian sets the cases of delivery by a non-owner who has the *libera administratio peculii* apart from those where the delivery is performed *voluntate domini* shows that he is dealing with a rather *sui generis* case.

There are numerous other texts which stress the autonomous position of the *filius* or slave who have the *libera administratio peculii*, as well as the distinction of this case as a ground for the transfer of ownership in relation to the acts carried out *voluntate domini*. A clear example is to be found in D. 44,3,15,3<sup>193</sup>, where Venuleius declares that the buyer will have the *accessio possessionis* of the previous owner, when the acquirer receives from a *filius* or slave: (1) if the alienation was performed with the authorization of the *pater* or owner (*voluntate patris dominive*); (2) or if the slave or *filius*, having the (*libera*) *administratio*, sold an object belonging to his *peculium*. From a systematic perspective it is moreover noteworthy that the author deals separately with the delivery which takes place in the context of a contract of mandate (D. 44,3,15,2) and that which is performed by a *tutor* or *curator* (D. 44,3,15,4). Another similar distinction is to be found in the following constitution of the year 294 AD:

C. 4,26,10pr-1 (Diocletian/Maximianus, 294): (pr) Si liberam peculii administrationem habentes equas cum fetu de peculio servi venumdederunt, reprobandi contractum dominus nullam habet facultatem. (1) Quod si non habentes liberam peculii

<sup>192</sup> Andrés Santos, *Subrogación real* (1997), p. 189-194; Wacke, *Libera administratio peculii* (2006), p. 251-316; Coppola Bisazza, *Sostituzione volontaria* (2007), p. 529; Guzmán, *DPR* (2013) I, p. 633; Samuel, *Le statut de l'esclave* (2013), p. 300 ff.

<sup>193</sup> D. 44,3,15,3 (Venul. 5 *interdictorum*): "Sed et si a filio vel servo rem emero, accessio temporis et quo apud patrem aut dominum fuit ita danda est mihi, si aut voluntate patris dominive aut cum administrationem peculii haberet vendidit". See on this text Buckland, *Mancipatio by a slave* (1918), p. 378; Wacke, *Libera administratio peculii* (2006), p. 290. A similar distinction is also to be found in D. 41,2,14pr (Paul 68 *ed.*): "Si servus vel filius familias vendiderit, dabitur accessio eius, quod penes me fuit, scilicet si volente me aut de peculio, cuius liberam peculii administrationem habuerunt, vendiderunt". See on this text Buckland, *Mancipatio by a slave* (1918), p. 377; Wacke, *Libera administratio peculii* (2006), p. 290.

administrationem rem dominicam eo ignorante distraxerunt, neque dominium, quod non habent, in alium transferre possunt neque condicionem eorum servilem scientibus possessionis iustum adferunt initium (...)<sup>194</sup>

This text draws a clear distinction between the acts performed by slaves within their *peculium* and outside it in case they have the *libera administratio*. In both cases, the slaves transfer goods belonging to the owner, but the results are very different. On the one hand, if they sell and deliver assets of their *peculium*, the owner is seen as having no faculty to condemn such an act. On the other hand, if they sold goods outside their *peculium* without the authorization of the owner, ownership will not be transferred. The text refers specifically to the ignorance of the owner (*rem dominicam eo ignorante*) but it will be shown below that *scientia* and *voluntas* are used in an interchangeable way in the context of the transfer of ownership<sup>195</sup>.

Some scholars tend to identify a tacit authorization or a general consent by the owner when he grants the *libera administratio peculii*<sup>196</sup>, an idea which blurs the distinction between *libera administratio peculii* and the *voluntas domini* as grounds for the transfer of ownership. Such idea, however, does not agree with the systematic perspective of the above-mentioned texts, at least in the context of the transfer of ownership. Moreover, admitting such a tacit authorization stretches the idea of *voluntas domini* to such an extent that it almost deprives it of meaning. A comparison with the situation of the *procurator omnium bonorum* at this point is interesting, since he may as well administer a portion of someone else's patrimony. As shown below<sup>197</sup>, the *procurator* is seen as acting *voluntate domini* only concerning the transfer of ownership of things that are normally sold according to the nature of the administered patrimony. For further alienations, he inevitably needs a special authorization from the owner. This limitation shows that Roman jurists were not willing to stretch the concept of *voluntas domini* too much. Moreover, the sources do not cover the *libera administratio* under the general requirement of the *voluntas*, nor do they set both ideas on the same level, but instead offer a continuous contrast between them, as the above-quoted texts show. Against these considerations, it may be argued that the will of the *dominus*

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<sup>194</sup> C. 4,26,10pr-1: "If slaves who have free management of their *peculium* have sold mares heavy with foals, the master has no right to annul the sale. (1) But if slaves who do not have free management of their *peculium* sell the master's property without his knowledge, they cannot transfer ownership which they do not have to another, not does such a transfer give a lawful beginning of possession (so as to set the statute of limitation in motion) to those who know the servile condition of the seller. Hence, it is clear that a defence of possession during the prescriptive period cannot avail such possessors, and persons therefore, who buy such movable property (from such a slave) are liable, in an *actio furti*" (transl. Blume, modified).

<sup>195</sup> Chapter 2, Section 3.

<sup>196</sup> Buti, *Studi sulla capacità* (1976), p. 97 n. 58.

<sup>197</sup> Chapter 2, Section 4(b) below.

or *pater* granting the *libera administratio peculii* does not seem to be completely irrelevant, considering that the *filius* or slave cannot donate the goods within their *peculium*, since these assets are not granted with the aim of being wasted away. This can in turn be discarded by noting that in this case there is no reference to the actual intent of the owner, but rather an objective criterion which jurists do not relate to the *voluntas domini*.

The distinction between the cases where the owner grants the *libera administratio peculii* and those where the slave or son-in-power acts *voluntate domini* should be borne in mind when approaching the acts concluded with regard to the *peculium*. When a slave delivers an object which does not belong to his *peculium*, it is essential for the transfer of ownership to take place that he acts according to the *voluntas domini*. However, when the slave is granted a *peculium*, he may carry out several basic acts of administration over it, regarding which the delivery seems to take place *voluntate domini*. This in turn implies that those conveyances performed by the slave within his *peculium* will in principle transfer ownership and affect the person of the principal, as the following text dealing with the *actio tributoria* shows:

D. 14,4,5,18 (Ulp. 29 *ed.*): Sed si dedi mercem meam vendendam et exstat, videamus, ne iniquum sit in tributum me vocari. Et si quidem in creditum ei abiit, tributio locum habebit: enimvero si non abiit, quia res venditae non alias desinunt esse meae, quamvis vendidero; nisi aere soluto vel fideiussore dato vel alias satisfacto, dicendum erit vindicare me posse<sup>198</sup>.

The text discusses whether the owner of the slave, who handed over to him an object in order to sell it, should be treated simply as a concurrent creditor regarding the claims on the *peculium*. The basic problem at this point is to determine whether the object entered into the slave's *peculium*, which is in fact the case according to Ulpian if the owner was credited for the value of the object. If the object becomes part of the *peculium*, the owner is treated simply as a concurrent creditor, but if that is not the case he will be able to recover it through the *rei vindicatio* (*dicendum erit vindicare me posse*).

Despite the fact that having a *peculium* grants the son-in-power or slave a certain *potestas alienandi* over the goods which conform it, the existence of a *peculium* does not always imply that the owner grants a *libera administratio* over it. Accordingly, a distinction should be made between the mere *concessio peculii* and

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<sup>198</sup> D. 14,4,5,18: "If I hand over property for sale and it is still in physical existence, it may seem hard that I should be called into the distribution. Distribution will be appropriate if I have become a mere creditor, but otherwise I should be able to claim the goods as my property, since even if I had sold them, they would only cease to be mine if the price had been paid or security given or satisfaction provided in some other manner" (transl. Watson).

the (*libera*) *administratio peculii*<sup>199</sup>, since the faculty to dispose is much broader in the latter case.

c. *Fiducia* and *delegatio*.

Besides the cases mentioned so far, it is worth noting that there are some institutions which fulfil the same practical function as the delivery by a non-owner, but where the *potestas alienandi* of the transferor actually derives from his ownership over the transferred goods. In other words, the transferor is not an authorized non-owner, but rather the owner himself. This is particularly the case regarding the transfer of ownership by *fiducia*, where the original owner may transfer ownership to a friend asking him to convey the object to another person (*fiducia cum amico*). Similarly, the owner may transfer ownership to his creditor in order to secure a debt (*fiducia cum creditore*)<sup>200</sup>. Both applications resemble the transfer of ownership in the context of a contract of mandate and pledge respectively, and these institutions in the course of time would in fact replace the *fiducia*. Since this is not an actual case of transfer of ownership by a non-owner, and considering that the *fiducia* takes place exclusively in the context of formal ways to transfer ownership, only incidental reference will be made to this institution when dealing with the *mancipatio* by a non-owner<sup>201</sup>.

Another case in which the intermediary has the position of an owner takes place in the context of the *delegatio*, particularly when a person orders another one to deliver an object belonging to himself to a third person (*delegatio tradendi*)<sup>202</sup>. Normally the context of the *delegatio* in this case would be the existence of a debt between the person giving the order and the one receiving it, according to which the former would agree that the delivery to the third person would amount to the delivery to himself. The main objective behind this kind of *delegatio* is to simplify legal relations by avoiding a double delivery, and from the perspective of the law of obligations, jurists regard the case of the *delegatio tradendi* as a double delivery which could extinguish the obligations between the contractual parties. However, the situation is different from the point of view of the law of property, since the person who received the order to deliver remained owner of the delivered object, and therefore the *translatio* would take place *a domino*<sup>203</sup>. Only in specific cases do jurists claim that one should regard the person

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<sup>199</sup> Andrés Santos, *Subrogación real* (1997), p. 189-194; Wacke, *Libera administratio peculii* (2006), p. 259 ff.

<sup>200</sup> On the different applications of the *fiducia* see Noordraven, *Die Fiduzia* (1999), p. 42 ff.; Dunand, *Le transfert fiduciaire* (2000), p. 84-88.

<sup>201</sup> See Chapter 5, Section 2 below.

<sup>202</sup> See on this subject Betti, *La attuazione* (1933), p. 143-281 and Betti, *Sul carattere causale* (1936), p. 127-130, who approached the *delegatio dandi* in the broader context of the classical system of transferring ownership, in order to test his ideas concerning the significance of the agreement at the delivery.

<sup>203</sup> Alonso, *Delegación* (2001) I.1, p. 128-139; Zandrino, *Delegatio* (2014), p. 47-48.

who ordered the delivery to become owner at least for a moment, but according to modern scholarship these have an exceptional nature<sup>204</sup>. Despite the fact that the *delegatio tradendi* fulfils a similar practical function to the cases of transfer of ownership by a non-owner, it has a completely different theoretic framework and – unlike the *fiducia* – there is no practical superposition between these different problems, which is why this institution will receive no further attention and will only be brought up when it may clarify a particular problem concerning the transfer of ownership by a non-owner<sup>205</sup>.

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<sup>204</sup> See on this point Alonso, *Delegación* (2001) I.1, p. 210-224; Zandrino, *Delegatio* (2014), p. 63-73.

<sup>205</sup> This is particularly the case regarding the *error in dominio*, which is studied in Chapter 2, Section 6(b) below.



## Chapter 2. *Voluntas domini* as basis for the *potestas alienandi*

### 1. General features of the *traditio voluntate domini*

#### a. *Voluntas domini* and the *ius civile*.

Since the general theory concerning the evolution of direct representation in Roman law suggests that the possibility of transferring ownership was part of a series of innovations which overcame the limitations of the *ius civile*<sup>1</sup>, it is appropriate to examine in the first place the consequences which the transfer of ownership by a non-owner brought along, and particularly whether Quiritary ownership could be transferred in this way. Concerning this point, the sources do not suggest that we are dealing with an innovative solution. In fact, already at an early stage the authorization of the owner (*voluntas domini*) appears as a widespread legal basis to determine the transfer of ownership by a non-owner<sup>2</sup>. The relevance of this authorization can be found in works of Alfenus, regarding the case of the co-owner who can dispose of his share, being able to transfer ownership over the common object only if he is authorized by the other co-owners<sup>3</sup>. In this case, we are told that the *scientia*<sup>4</sup> of the brothers or their *ratihabitio* will enable the co-owner to transfer ownership over a common object. If he does not obtain such consent, the co-owner will only transfer ownership over his share. Other institutions show the importance of the *voluntas domini* at the delivery among early jurists, and namely the rules concerning *furtum*, regarding which at least since Sabinus it is explicitly stated that theft will only take place when the object is lost *invito domino*. Concerning the transfer of ownership, this implies that any delivery performed without the owner's

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<sup>1</sup> See e.g. Burdese, *Autorizzazione* (1950), p. 86: "Dall'insieme delle documentazioni testuali in materia, risulta dunque pienamente riconosciuto dalla giurisprudenza classica l'effetto traslativo del negozio di *traditio* effettuato dal terzo dietro autorizzazione *ad hoc* del *dominus*. Ci si potrebbe chiedere come si sia pervenuti ad una siffatta estensione, al semplice estraneo autorizzato, della legittimazione a *tradere*, chè indubbiamente ciò rappresenta una innovazione rispetto a quello che dovette essere il primitivo regime, ispirato al criterio della legittimazione del solo *dominus* o di soggetti aventi una posizione personale giuridica equiparata". In the same sense Kaser, *RPR* (1971) I, p. 267 n. 59: "Die Zustimmung wirkt offenbar nur honorarrechtlich"; Guzmán, *DPR* (2013) I, p. 504.

<sup>2</sup> Regarding the much earlier alienation by one of the co-owners in the *consortium ercto non cito*, see Chapter 5, Section 2 below.

<sup>3</sup> D. 24,1,38,1 (Alf. 3 *dig. a Paulo epitomatorum*): "Idem iuris erit, si ex tribus fratribus unus uxorem haberet et rem communem uxori donasset: nam ex tertia parte mulieris res facta non est, ex duabus autem partibus reliquis, si id scissent fratres aut posteaquam donata esset ratum habuissent, non debere mulierem reddere".

<sup>4</sup> On the significance of this term see Chapter 2, Section 3 below.

authorization will not only not transfer ownership, but will moreover render the object delivered a *res furtiva*<sup>5</sup>.

Apart from the antiquity of specific provisions and opinions, the sources continuously stress that the *traditio voluntate domini* produces the same effects as the delivery performed by the owner himself, which in turn seems to imply that the non-owner can transfer the *dominium ex iure Quiritium*<sup>6</sup>, as will be shown below. Considering that such a delivery produces effects according to the *ius civile*, the sharp distinction which Savigny attempts to build between the old *ius civile* and later innovations regarding 'direct representation' is nowhere to be seen.

As will be shown below, numerous texts bring up the *voluntas domini* in concrete cases to determine whether ownership is transferred<sup>7</sup>, but there are a few which are particularly interesting due to the general way in which this criterion is presented, including the following text from Gaius' *Res cottidianae*:

D. 41,1,9,4 (Gai. 2 *rer. cott.*). Nihil autem interest, utrum ipse dominus per se tradat alicui rem, an voluntate eius aliquis. Qua ratione si cui libera negotiorum administratio ab eo, qui peregre proficiscitur, permissa fuerit, et is ex negotiis rem vendiderit et tradiderit, facit eam accipientis<sup>8</sup>.

In this text, Gaius draws an equivalence between the effects of the *traditio* performed by the owner himself or by someone acting with his authorization. The emphatic "it is of no consequence" (*Nihil autem interest*) used when introducing both cases indicates that the result of the delivery in either situation would be the same. Gaius presents as an example the case of a non-owner to whom the free administration of the affairs of the owner was given, which would take place in the context of a general mandate and/or the appointment of a *procurator*<sup>9</sup>. For the time being it is enough to note that Gaius equates the effects of the transfer of ownership performed by the owner himself to the delivery *voluntate domini* by a non-owner. Similar ideas are also found in D. 6,1,41,<sup>10</sup>

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<sup>5</sup> See Chapter 2, Section 2 below.

<sup>6</sup> Sansón, *La transmisión* (1998), p. 47

<sup>7</sup> See also Potjewijd, *Beschikkingbevoegdheid* (1998), p. 130-131.

<sup>8</sup> D. 41,1,9,4: "It is of no consequence whether the owner delivers the thing personally or through someone acting on his behalf. Hence, if that other has been given free administration of the affairs of the owner, who is going on a journey, and he sells and delivers something, he makes it the property of the recipient" (transl. Watson).

<sup>9</sup> Traditionally scholars assumed that this fragment referred specifically to a *procurator*. See Miceli, *Rappresentanza* (2008), p. 178 n. 138. However Angelini, *Il Procurator* (1971), p. 124 highlights that the text does not mention this institution, being nonetheless applicable to it. Concerning the *libera administratio* in this text see Chapter 2, Section 4(b) below.

<sup>10</sup> D. 6,1,41,1 (Ulp. 17 *ed.*): "Si servus mihi vel filiusfamilias fundum vendidit et tradidit, habens liberam peculii administrationem, in rem actione uti potero. Sed et si domini

which has been studied above<sup>11</sup>. The case refers to the transfer of ownership of provincial land<sup>12</sup>, where the acquirer is shown as having an *actio in rem*<sup>13</sup> after receiving the object from a non-owner with *potestas alienandi*. The text presents two different grounds for the *potestas alienandi*: on the one hand, the *libera administratio* of a slave or son-in-power who acts within his *peculium*, and on the other hand the *voluntas domini*, which can underlie the delivery performed by a *sui iuris* as well as by an *alieni iuris*. This text not only shows that the *libera administratio peculii* and the *voluntas domini* are different grounds for the transfer of ownership, but it also puts the different cases on the same level<sup>14</sup>: in the first case, the acquirer will become owner, having accordingly an *actio in rem* to recover it (*in rem actione uti poterit*). This is the same consequence which follows if the slave or son-in-power acts *voluntate domini* (*idem erit dicendum*) or if a *procurator* does so (*in rem actionem mihi praestabit*).

The idea that the non-owner acting *voluntate domini* can transfer ownership in the same terms as the owner is emphasized in another text of Ulpian:

D. 50,17,165 (Ulp. 53 *ed.*): Cum quis possit alienare, poterit et consentire alienationi. Cui autem donare non conceditur, probandum erit nec, si donationis causa consenserit, ratam eius voluntatem habendam<sup>15</sup>.

This text shows that the equivalence between the transfer of ownership by an owner and by an authorized non-owner also implies that the disadvantages which the owner faces cannot be avoided through the intervention of an agent: while the owner may consent that someone else transfers ownership, his intention will not be held valid if he himself could not transfer ownership.

All the texts presented so far indicate that the *traditio voluntate domini* has the same consequences as that performed by the owner himself<sup>16</sup>, which would suggest that Quiritary ownership could also be transferred in this way. This conclusion is ratified by the Institutes of Gaius. In Gai 2,20 we are told that the owner who delivers a *res nec mancipi* with a *iusta causa traditionis* transfers ownership immediately (*statim tua fit ea res*), which shows that the acquirer will

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voluntate domini rem tradat, idem erit dicendum: quemadmodum cum procurator voluntate domini vendidit vel tradidit, in rem actionem mihi praestabit”.

<sup>11</sup> Chapter 1, Section 4 above.

<sup>12</sup> See Chapter 5, Section 2 below.

<sup>13</sup> Sansón, *La transmisión* (1998), p. 42-47 discusses which *actio* would be dealt with in this text.

<sup>14</sup> Hernanz, *Iussum* (1993), p. 78-80; Sansón, *La transmisión* (1998), p. 44, 46-47.

<sup>15</sup> D. 50,17,165: “Anyone who can alienate can also consent to alienation. Anyone who is not allowed to give must prove his case, and if he grants it for the sake of giving, his intention is not to be regarded as valid” (transl. Watson).

<sup>16</sup> See moreover D. 12,4,3,8 (Ulp. 26 *ed.*) *i.f.*; D. 17,1,5,3 (Paul 32 *ed.*); D. 24,1,5pr (Ulp. 32 *Sab.*). Concerning the pledge see also D. 20,1,21pr (Ulp. 73 *ed.*) and CTh 2,30,2.

not have to wait the period prescribed for the acquisition by *usucapio*<sup>17</sup>. Since the text of Gai 2,62-64 serves to clarify the previous statements in Gai 2,20 and Gai 2,43 regarding the ownership of the *tradens*<sup>18</sup>, one is drawn to assume that a non-owner with *potestas alienandi* will as well transfer ownership *statim*<sup>19</sup>.

Leaving aside the texts which draw an equivalence between the delivery by an owner and by an authorized non-owner, one can also obtain valuable information on the transfer of Quiritary ownership from the analysis of praetorian defences. If the *traditio voluntate domini* did not grant Quiritary ownership, one should expect the acquirer to have a mere praetorian defence against the owner in case the latter reclaimed the object. A defence based on the owner's authorization is indeed to be found in the following text of Ulpian:

D. 6,2,14 (Ulp. 16 *ed.*): Papinianus libro sexto quaestionum scribit: Si quis prohibuit vel denunciavit ex causa venditionis tradi rem, quae ipsius voluntate a procuratore fuerit distracta, et is nihilo minus tradiderit, emptorem tuebitor praetor, sive possideat sive petat rem. Sed quod iudicio empti procurator emptori praestiterit, contrario iudicio mandati consequetur: potest enim fieri, ut emptori res auferebatur ab eo, qui venire mandavit, quia per ignorantiam non est usus exceptione, quam debuit opponere, veluti 'si non auctor meus ex voluntate tua vendidit'<sup>20</sup>.

This text will be studied in further detail when dealing with the equitable remedies granted to correct the general criterion of the *voluntas domini*<sup>21</sup>, but for now it is enough to observe the attribution of property on the first part of the fragment. In this case, the owner of an object orders his *procurator* to sell and deliver it to another person, but after the sale has been concluded the owner forbids the *procurator* to deliver the object. We are then told that, if the *procurator* decides to deliver the object despite the owner's prohibition, the buyer will be protected by the praetor (*emptorem tuebitor praetor*) whether he defends himself

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<sup>17</sup> Miquel, *Compraventa y transmisión* (1993), p. 102. 'Statim' can however also be linked with the controversy regarding payment and the transfer of ownership. See Honoré, *Sale and Transfer* (1983), p. 57-58.

<sup>18</sup> Chapter 1, Section 3 above.

<sup>19</sup> Sansón, *La transmisión* (1998), p. 38-40.

<sup>20</sup> D. 6,2,14: "Papinian, in the sixth book of his Questions, writes: Where, at "A's" request, something of his has been sold by his *procurator* and "A" then forbids delivery of the thing sold, or notifies to that effect, but the *procurator* nevertheless delivers it, the praetor will protect the buyer, whether he is in possession or is suing for the thing. If the *procurator* incurs liability to the buyer in an action on the sale, he may sue "A" by *actio contraria* on the mandate. It may happen that the principal who gave the mandate to sell recovers the thing from the buyer, because the latter, through ignorance, has failed to raise a defence which he ought to have pleaded, such as 'unless the seller to me sold at your request'" (transl. Watson).

<sup>21</sup> Chapter 4, Sections 1 and 2 below.

from the owner or if he has to recover the object. This protection would stem from the abusive behaviour of the owner, who induces his *procurator* to conclude a contract of sale – being therefore personally bound towards the buyer – and afterwards seeks to prevent him from fulfilling the contractual obligations which stem from it.

The existence of the *voluntas domini* at the moment of the sale and its absence at the moment of the delivery is the central problem of the text. The fact that the buyer has the bonitary ownership reveals that the lack of *voluntas domini* at the delivery prevented the acquisition of the *dominium ex iure Quiritium*, which remains therefore in the hands of the *dominus negotii*. As Quiritary owner, the *dominus negotii* can even seek to reclaim the object from the buyer, being in fact successful if the latter does not resort to the praetorian exception “unless the seller to me sold at your request” (*si non auctor meus ex voluntate tua vendidit*). This shows that the decisive element for the transfer of Quiritary ownership is the existence of a *voluntas domini* at the time of the delivery; since this authorization is lacking at the time of the delivery, the acquirer will only obtain bonitary ownership, having an *exceptio* on account of the intent of the owner at the time the sale was concluded (*si non auctor meus ex voluntate tua vendidit*).

The reference to the authorization of the principal is also to be found in D. 41,4,7,6<sup>22</sup>, where Julian presents the case of a *procurator* who is authorized in general terms to sell a piece of land, and who asks for less than a third of the price which he could have obtained in order to cause loss to the owner. The acquirer will not become owner, and will only be able to usucapt<sup>23</sup> the object as long as he is in good faith, which will be excluded in case he colluded with the seller to obtain an uneconomic price. In the latter case he could attempt to use the *exceptio rei voluntate eius venditae*, making thereby reference to the original authorization by the owner, but that a *replicatio doli* would discard his pretension on the object. The case will be analysed further below<sup>24</sup>, but for now it is only relevant to observe that ownership is not transferred due to the abusive conduct of the seller, even when his actions formally fell within the *voluntas domini*. Just as in D. 6,2,14, the transferee may resort to an exception which makes reference to the *voluntas domini*, but in this case it will be unsuccessful due to the existence of *dolus* on his side.

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<sup>22</sup> D. 41,4,7,6 (Jul. 44 *dig.*): “Procurator tuus si fundum, quem centum aureis vendere poterat, addixerit triginta aureis in hoc solum, ut te damno adficeret, ignorante emptore, dubitari non oportet, quin emptor longo tempore capiat: nam et cum sciens quis alienum fundum vendidit ignoranti, non interpellatur longa possessio. Quod si emptor cum procuratore collisit et eum praemio corripit, quo vilius mercaretur, non intelletur bonae fidei emptor nec longo tempore capiet: et si adversus petentem dominum uti coeperit exceptione rei voluntate eius venditae, replicationem doli utilem futuram esse”.

<sup>23</sup> The compilers modified the original reference to the usucapion: Lenel, *Paling*. I (1889), col. 439; Levy/Rabel, *Ind. Itp.* (1935) III, col. 212.

<sup>24</sup> Chapter 2, Section 4(c) and Chapter 4, Sections 1 and 2 below.

It is noteworthy that only in these two cases (D. 6,2,14 and D. 41,4,7,6) an exception is built on the reference to the *voluntas domini*, which implies that Quiritary ownership is not transferred and that a praetorian remedy would be used in an attempt to challenge the claim of the owner. There is, on the other hand, no evidence of such an exception in case the delivery indeed took place *voluntate domini* and without any form of abusive conduct. If the previous owner attempts to recover the object, it will be enough for the acquirer simply to prove that the delivery was indeed performed *voluntate domini*. In other words, the trial would revolve around the proof of the claim of the plaintiff – whether he is indeed the owner – and there will be no need to resort to a particular *exceptio*. This can be seen in the following imperial constitution from the time of Alexander Severus:

C. 7,26,4 (Alexander, 224): Venditioni ancillae consensum dedisse diversam partem si probaveris, retractando contractum, quem ipsa ratum habuit, non audietur. Sed et hac probatione cessante, si bona fide emptam ancillam a venditore bona fide distrahente temporis spatio usuceperis, intentio proprietatem vindicantis tenere non potest<sup>25</sup>.

In this case, we are told that an acquirer is being sued by the previous owner. The buyer argues that the previous owner authorized the sale, and if he proves this fact, the latter will not be heard. In case the acquirer cannot prove the existence of this authorization (*Sed et hac probatione cessante*) he will be able to acquire ownership through usucapion. There is no mention of an *exceptio* which refers to the owner's previous authorization, as is the case in D. 6,2,14 and D. 41,4,7,6. The reason for this is that we are dealing with a *rei vindicatio*, where the only point which must be ascertained is whether the plaintiff is *dominus ex iure Quiritium*. If the principal did authorize the delivery, he will lose the *rei vindicatio* on account of the acquisition of Quiritary ownership by the buyer. The whole trial revolves around a problem of the *ius civile*, and therefore the praetor does not have to provide any particular remedy concerning the authorization of the owner. It will be left to the *iudex* to determine who was the *dominus ex iure Quiritium*. The same can be seen in other texts dealing with the transfer of ownership by a non-owner which stress the importance of proving the

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<sup>25</sup> C. 7,26,4: "If you have proved that the other party gave his consent to the sale of the female slave, he shall not be heard in order to revoke the contract which he himself ratified. If, however, you cannot produce this proof, but you bought the slave in good faith from a seller who transferred in good faith, you will have acquired her by usucapion on the ground of lapse of time, and the attempt of the claimant to hold the property will be of no avail" (transl. Blume, modified).

authorization of the owner<sup>26</sup>. This explains why the only known cases of exceptions which refer to the owner's authorization refer to specific situations in which Quiritary ownership was not transferred, and where the praetor would in principle protect the acquirer on account of the original authorization of the owner (D. 6,2,14 and D. 41,4,7,6). The fact that normally the *voluntas domini* would deserve particular attention *apud iudicem* instead of *in iure* explains why there are so few cases dealing with the *exceptio rei voluntate eius venditae*.

Finally, a text of Javolenus eloquently shows in D. 39,5,25 that the authorization of the owner at the delivery was a relevant element of the old *ius civile*<sup>27</sup>. This text – which is analysed in further detail below<sup>28</sup> – presents the case of a non-owner who was instructed to make a gift in the name of the principal. The agent, however, decides to disobey this instruction by making the gift in his own name. The disobedience of the owner's instruction inevitably implies that ownership cannot be transferred, since the delivery did not take place *voluntate domini*. Nonetheless, Javolenus is willing to grant the acquirer an *exceptio doli* against the principal if he attempts to recover the object. At this point a clear contrast is drawn between the strict application of the *ius civile*, which prescribes that ownership should not be transferred (*quantum ad iuris suptilitatem accipientis facta non est*), and the possibility to offer a more liberal solution through a praetorian defence (*sed benignius est, si agam contra eum qui rem accepit, exceptione doli mali me summoverti*). The fact that an early classical jurist as Javolenus indicates that it is in accordance with a rigid application of the law that ownership should not pass in such a case unequivocally shows that the *voluntas domini* is a decisive element for the transfer of ownership by a non-owner according to the *ius civile*.

Since the sources show that the *voluntas domini* at the delivery would produce effects according to the *ius civile*, the reference to this authorization can be seen as sufficient proof for the possibility of transferring Quiritary ownership. This is particularly relevant concerning the delivery by a pledge creditor, which according to Weimar could only grant bonitary ownership to the acquirer<sup>29</sup>. This author indicates that modern scholars have paid little attention to determine whether the *voluntas domini* at the delivery may be enough to transfer Quiritary ownership<sup>30</sup>, which led him to study the problem specifically in the context of the delivery by a pledge creditor. Facing the lack of conclusive evidence on this

<sup>26</sup> See e.g. C. 8,15,2 (Severus/Antoninus, 204): “Si probaveris praesidi hortos de quibus agebatur tuos esse, intellegis obligari eos creditori ab alio non potuisse, si non sciens hoc agi in fraudem creditoris ignorantis dissimulasti”. See also C. 7,26,1 (Antoninus, 213).

<sup>27</sup> D. 39,5,25 (Jav. 6 *epistolarum*): “Si tibi dederim rem, ut Titio meo nomine donares, et tu tuo nomine eam ei dederis, an factam eius putes? Respondit: si rem tibi dederim, ut Titio meo nomine donares eamque tu tuo nomine ei dederis, quantum ad iuris suptilitatem accipientis facta non est et tu furti obligaris: sed benignius est, si agam contra eum qui rem accepit, exceptione doli mali me summoverti”.

<sup>28</sup> Chapter 2, Section 5 and Chapter 4, Section 5 below.

<sup>29</sup> Weimar, *Eigentumsübergang* (1993), p. 551-569.

<sup>30</sup> Weimar, *Eigentumsübergang* (1993), p. 553.

specific point, Weimar studies some texts which in his opinion prove that the pledge creditor can only grant bonitary ownership. However, his claims are far from convincing. For example, he claims that the phrase “*ne melioris conditionis emptor sit, quam fuerit venditor*” in D. 16,1,32,1<sup>31</sup> would show that the pledge creditor cannot transfer Quiritary ownership, since he does not have the *dominium ex iure Quiritium* himself<sup>32</sup>. According to Weimar, this would be an application of the *nemo plus* rule. The author thus draws a distinction that is far from clear or relevant in the text, which is formulated in very general terms. That this is a forced interpretation can be seen not only from the fact that the *nemo plus* rule does not stand in the way of the transfer of ownership by an authorized non-owner<sup>33</sup>, but especially because an analysis of the cases of transfer of ownership *voluntate domini* shows that the delivery by a non-owner will produce effects according to the *ius civile*. Weimar also brings in support of his thesis the general claim according to which the pledge creditor could not mancipate<sup>34</sup>, which he uses to determine the significance of the reivindication in D. 13,7,13pr<sup>35</sup>. Such a belief, however, is grounded exclusively on the general theories concerning the impossibility of direct representation affecting the *actus legitimi*<sup>36</sup>. Considering that the author subscribes to the traditional theories on the evolution of direct representation in Roman law<sup>37</sup>, one can suspect that his findings are driven by the thought that the transfer of ownership by a non-owner would be an exception to the primitive prohibition of direct representation, and would accordingly not be approved by the *ius civile*<sup>38</sup>. These preconceptions decisively affect the author’s approach to the sources. A broader analysis of the transfer of ownership by a non-owner shows that the *traditio voluntate domini* could in fact grant Quiritary ownership to the acquirer. The fact that the delivery by a pledge creditor was regarded as taking place *voluntate domini* can therefore be

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<sup>31</sup> D. 16,1,32,1 (Pomp. 1 *senatus consultorum*): “Si mulier rem a se pignori datam per intercessionem recipere velit, fructus etiam liberos recipit et, si res deterior facta fuerit, eo nomine magis aestimetur. Sed si creditor, qui pignus per intercessionem acceperit, hoc alii vendidit, vera est eorum opinio, qui petitionem dandam ei putant et adversus bonae fidei emptorem, ne melioris conditionis emptor sit, quam fuerit venditor”.

<sup>32</sup> Weimar, *Eigentumsübergang* (1993), p. 561.

<sup>33</sup> See Chapter 6, Section 3 below.

<sup>34</sup> Weimar, *Eigentumsübergang* (1993), p. 566-567.

<sup>35</sup> D. 13,7,13pr (Ulp. 38 *ed.*): “Si, cum venderet creditor pignus, convenerit inter ipsum et emptorem, ut, si solverit debitor pecuniam pretii emptori, liceret ei recipere rem suam, scripsit Iulianus et est rescriptum ob hanc conventionem pigneraticis actionibus teneri creditorem, ut debitori mandet ex vendito actionem adversus emptorem. Sed et ipse debitor aut vindicare rem poterit aut in factum actione adversus emptorem agere”.

<sup>36</sup> See Chapter 5, Section 2 below for further references.

<sup>37</sup> Weimar, *Eigentumsübergang* (1993), p. 551-553.

<sup>38</sup> Weimar, *Eigentumsübergang* (1993), p. 569 declares in fact that he suspects that the transfer of ownership by a non-owner in general would only grant bonitary ownership, which is why the scope of the *actio Publiciana* in classical Roman law would be much broader than it is suspected.

regarded in itself as conclusive evidence that in this case Quiritary ownership could be transferred as well<sup>39</sup>.

The significance for the *ius civile* of the *voluntas domini* at the delivery shows why it was possible for Roman jurists to accept that the pledge creditor could transfer ownership. Modern scholars have often felt puzzled at the fact that the pledge creditor could have the same faculty to dispose as the owner. The *fiducia* is perceived to be more adequate to a primitive legal mind-set, according to which one must become owner in the first place in order to be able to transfer ownership<sup>40</sup>. Following this line of reasoning, it seems anomalous that jurists would be willing to accept that the non-owner could transfer ownership<sup>41</sup>. Considering the traditional theories on direct representation, it is no wonder that some scholars developed theories according to which the pledge creditor would alienate as an owner<sup>42</sup>. Particularly interesting are the ideas of Manigk and Kaser, who suggested the notion of *Verfallspfand*, according to which the creditor would become owner when the debtor failed to fulfil his obligations<sup>43</sup>. A related idea, offered by Koschaker and Kaser – in an earlier contribution – is that there would have been a divided ownership (*geteiltes Eigentum*) between the owner and the pledge creditor<sup>44</sup>. Both theories would successfully explain why the pledge creditor might alienate as an owner, but they are nowadays completely abandoned. Modern scholars now highlight that the authorization of the owner – first through a *pactum de vendendo*, later implicit in the pledge – would be the legal basis for the transfer of ownership, which would pass directly from the debtor to the acquirer<sup>45</sup>. One should add at this point that there is nothing anomalous in the transfer of ownership by the pledge creditor in the context of the *ius civile*. The fact that the pledge was developed at a later stage than the *fiducia* does not necessarily mean that the possibility of a non-owner to transfer ownership was also introduced in a late stage. On the contrary, Roman jurists seem to have resorted to an element of the *ius civile* – the validity of the *traditio*

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<sup>39</sup> The possibility of the pledge creditor to transfer Quiritary ownership is also acknowledged by Perani, *Pignus distrahere* (2014), p. 89-91.

<sup>40</sup> See e.g. Burdese, *Lex commissoria* (1949), p. 131-132; Perani, *Pignus distrahere* (2014), p. 51.

<sup>41</sup> Burdese, *Lex commissoria* (1949), p. 132; Perani, *Pignus distrahere* (2014), p. 20.

<sup>42</sup> It is also worth noting that De Francisci, *Trasferimento* (1924), p. 256 ff. offered a concept of derivative modes of acquisition according to which the alienation by the pledge creditor would in fact be understood to be done by the debtor. Contrary to this construction are Burdese, *Lex commissoria* (1949), p. 133-134 and Perani, *Pignus distrahere* (2014), p. 21-22, 101-103.

<sup>43</sup> Manigk, *Pignus* (1941), p. 1248 ff.; Kaser, *Pfandrecht I* (1976), p. 244-247. Critical on this notion are Burdese, *Lex commissoria* (1949), p. 132; Frezza, *Le garanzie* (1963) II, p. 82-84; Noordraven, *D. 13,7,6pr* (1980), p. 249-251; Perani, *Pignus distrahere* (2014), p. 20-21, 104-105.

<sup>44</sup> Koschaker, *SZ 63* (1943), p. 439; Kaser, *Fremdbesitz* (1944), p. 391-394.

<sup>45</sup> See Burdese, *Lex commissoria* (1949), p. 134-139; Perani, *Pignus distrahere* (2014), p. 23 ff., 91, 105, 127, 143 ff.

*voluntate domini* – to introduce through the *pactum de vendendo* at the pledge the possibility of transferring ownership over the pledge.

The study of the sources conclusively shows that there is no evidence to claim that the *traditio* by a non-owner would have been an exception to a general prohibition on direct representation of the *ius civile*. On the contrary, it is perfectly clear that a non-owner acting *voluntate domini* would transfer ownership according to the *ius civile*. One may therefore discard the idea according to which the transfer of ownership by a non-owner was an innovation which went against the basic principles of the *ius civile*, which shows that the traditional theory on the evolution of direct representation fails completely in the context of the transfer of ownership. Despite the lack of evidence regarding an original prohibition of direct representation in the context of the alienation by a non-owner, modern scholars have stood by this reconstruction. The lack of attention for the *voluntas domini* at the delivery as a characteristic feature of the *ius civile* may have been favoured by the fact that modern scholarship, during a considerable part of the 20<sup>th</sup> century, approached with mistrust the references to subjective elements such as the *animus* or the *voluntas* in Roman sources. Such subjective references, it was argued, were typically postclassical and would have been characteristic of Byzantine scholarship, not of classical Roman law<sup>46</sup>. Numerous doctrines found in classical sources were revised from this viewpoint. It was for instance claimed that the *animus furandi* was alien to the classical sources<sup>47</sup>, as well as the *animus novandi*, *animus possidendi* or the *affectio maritalis*<sup>48</sup>. Dieter Simon described the evolution of this portrait of an ‘*animus*-obsessed’ late period, which has been progressively abandoned by contemporary scholars<sup>49</sup>. There are however certain fields in which this historical reconstruction was particularly influential, which is the case regarding the transfer of ownership. Fritz Pringsheim, one of the lead defenders of the so-called *animus* theory, explicitly applied this historical reconstruction to describe the evolution of the *animus transferendi domini* at the delivery, which he considered a typically Byzantine innovation<sup>50</sup>. In the same line Riccobono, when dealing with the evolution of direct representation, approached the references to the *voluntas domini* in the context of the *traditio* – including some cases of delivery by a non-owner – as latter innovations of the

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<sup>46</sup> See e.g. Gradenwitz, *Interpolationen* (1887), p. 170 ff.; Pringsheim, *Animus* (1933), p. 43–60, 379–412; Schulz, *Geschichte* (1961), p. 155–157, 373.

<sup>47</sup> See Chapter 2, Section 2 below.

<sup>48</sup> For an account of the different applications of the *animus* theory see Apathy, *Animus novandi* (1975), p. 15–20. The problem of the *animus* in the Roman law of marriage is particularly discussed by Simon, *Die animusbesessene Spätzeit* (1995), p. 253 ff.

<sup>49</sup> Simon, *Die animusbesessene Spätzeit* (1995), p. 253–283. A more recent contribution concerning the significance of the *animus* in different contexts within classical Roman law is offered by Sicari, *Ancora su animus* (2007), p. 393–444.

<sup>50</sup> Pringsheim, *Animus* (1933), p. 55–60. In p. 381 the author applies his ideas also to a case of transfer of ownership by a non-owner, which in his opinion could not have direct consequences in Classical Roman law.

“*domma della volontà*”<sup>51</sup>. Moreover, modern Roman law scholars gradually subscribed to the view that classical law knew a causal transfer system in which only the intent expressed at the *iusta causa traditionis* was relevant, as it will be shown below<sup>52</sup>. This historical reconstruction seems to leave no room for a particular intent at the delivery, which is why scholars may have not been too keen to elaborate on the idea of the *voluntas domini* as part of the *ius civile*, especially when approaching the transfer of ownership. Instead, scholars adhered to the traditional view, according to which direct representation was unknown to the old *ius civile*, and that the transfer of ownership by a non-owner *voluntate domini* would have been one of the many innovations introduced at a later stage of development to cope with the needs of commerce. However, these theories are not in accordance with the Roman sources, which show the central importance of the *voluntas domini* in the analysis of the *potestas alienandi* for the *ius civile*.

b. Significance of the *voluntas domini*: revocation, death and ratification.

The fact that the *voluntas domini* was decisive for the transfer of ownership by a non-owner in the context of the *ius civile* does not mean that this was a static element which classical jurists simply had to apply in a mechanical way. For example, it has been indicated that jurists introduced innovations concerning the *voluntas domini* in the context of the pledge, considering that the pledge creditor would be authorized to sell even if there was no explicit *pactum de vendendo*<sup>53</sup>. This shows that the scope and significance of the *voluntas domini* at the delivery was not a rigid element, but was open for the interpretation of jurists. Moreover, Roman jurists would draw different conclusions and offer various interpretations concerning the significance of the owner’s authorization for the transfer of ownership. Perhaps one of the most widespread features of this *voluntas* is its revocable and informal nature, which implies that the authorization of the owner may be withdrawn or disappear after it has been granted<sup>54</sup>. Accordingly, if the owner changes his mind, or if he is no longer able to agree to the transfer of ownership – due to death, mental inability, etc. – the non-owner will no longer be seen as acting *voluntate domini*. In other words, it is not enough for the owner to have agreed to an alienation, since his authorization must hold until the moment of the delivery. Potjewijd expresses this circumstance by claiming that normally the delivery is the moment in which the faculty to dispose is tested<sup>55</sup>. This can be clearly seen in the above-studied case of D. 6,2,14, where the owner

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<sup>51</sup> Riccobono, *Lineamenti* (1930), p. 437–443.

<sup>52</sup> See on this point Chapter 2, Section 6(a).

<sup>53</sup> Chapter 1, Section 4(a) above.

<sup>54</sup> An exception to this is the *voluntas domini* in the context of the pledge, which cannot be revoked by the owner of the object. See Chapter 1, Section 4(a) above.

<sup>55</sup> Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 70, 152–153.

arbitrarily decides to forbid his *procurator* to deliver the object, a prohibition which in fact prevents the transferee from acquiring Quiritary ownership. The fact that the owner originally consented to the sale is only relevant to the praetor, who creates a defence based on this fact. This defence is however not infallible, as shown in D. 41,4,7,6.

The need for the *voluntas domini* at the delivery can also be seen in cases where there is no delivery by a non-owner, but where there is a preceding *iusta causa traditionis* and the delivery is pending. In such circumstances, despite the existence of *iusta causa*, it is still necessary for the owner to agree to the delivery, which implies that the transferee cannot become owner by snatching the object without the owner's consent, as can be seen in the following text by Paul:

D. 41,2,5 (Paul 63 *ed.*): Si ex stipulatione tibi Stichum debeam et non tradam eum, tu autem nactus fueris possessionem, praedo es: aequè si vendidero nec tradidero rem, si non voluntate mea nactus sis possessionem, non pro emptore possides, sed praedo es<sup>56</sup>.

In this case, an owner stipulated that he would deliver the slave Stichus, and since the owner does not do so, the transferee decides to take the slave himself, without the owner's consent (*non voluntate mea*). This qualifies the transferee as a robber (*praedo*), preventing not only the immediate transfer of ownership, but even an eventual acquisition through usucapion, as will be seen in the following section. Particularly relevant at this point is to observe that the owner's *voluntas* cannot be simply derived from a preceding *stipulatio*, according to which he was bound to transfer ownership. The owner must grant his consent, the absence of which will prevent the transfer of ownership, and in this particular case – due to the conduct of the transferee – will prevent the usucapion from taking place as well.

The informal and revocable nature of the *voluntas domini* grants this element a relatively volatile nature, since the original authorization may suddenly disappear, which is particularly noticeable in the cases where the owner dies before the delivery takes place:

D. 12,1,41 (Afr. 8 *quaest.*): Eius, qui in provincia Stichum servum kalendario praeponerat, Romae testamentum recitatum erat, quo idem Stichus liber et ex parte heres erat scriptus: qui status sui ignarus pecunias defuncti aut exegit aut credidit, ut interdum stipularetur et pignora acciperet. Consulebatur quid de his iuris esset. (...) Quas vero pecunias ipse credidisset, eas non ex maiore

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<sup>56</sup> D. 41,2,5: "If I owe you Stichus on a stipulation and do not deliver him but you obtain possession of him, you are a robber; equally, if I sell a thing and do not deliver it, but you obtain possession of it without my consent, you do not possess it as purchaser but you are a robber" (transl. Watson).

parte, quam ex qua ipse heres sit, alienatas esse: nam et si tibi in hoc dederim nummos, ut eos Stichus credas, deinde mortuo me ignorans dederis, accipientis non facies: neque enim sicut illud receptum est, ut debitores solventes ei liberentur, ita hoc quoque receptum, ut credendo nummos alienaret. Quare si nulla stipulatio intervenisset, neque ut creditam pecuniam pro parte coheredis peti posse neque pignora teneri. (...) <sup>57</sup>

Africanus discusses in this long text – only partially reproduced here – the fate of the business activities conducted by the slave Stichus after the death of his master, having moreover been freed by the latter in his will and even named co-heir. Being ignorant of these circumstances, he carries on with his activities as a moneylender, which poses the problem of the consequences of such acts. Regarding the transfer of ownership over the money which Stichus handed over, Africanus considers that he only can be seen as transferring ownership in proportion to his share in the inheritance. This implies that the intent of the master is no longer to be considered, but only that of the new co-owners. As already mentioned, if one of the co-owners transfers ownership without the authorization of the others, he will only be transferring ownership in proportion to his share <sup>58</sup>. Africanus moreover stresses this point by introducing a hypothetical case, in which someone gives money to his slave in order to lend it to Stichus, dying before the money is delivered without the slave knowing it. In such circumstances, says Africanus, the property does not pass to the recipient, being even more evident in this case – due to its simplicity – that the lack *voluntas domini* stands in the way of the transfer of ownership <sup>59</sup>. The same rule applies moreover to other problems, such as the constitution of a pledge, as can be seen in the final sentence of the text quoted.

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<sup>57</sup> D. 12,1,41: “Out in a province a moneylender put a slave, Stichus, in charge of his account book, and then, when his will was read at Rome, it turned out that Stichus was made free and, as to part, his heir. Unaware of his status, Stichus called in and lent out the dead man’s money, sometimes taking stipulations and receiving pledges. The questions were asked as to the law on these facts. (...) As for the money he himself had lent out, no property in it had passed larger than his own share in the estate; for even if I give you coins for the very purpose of your lending them to Stichus and then I die and you hand them over in ignorance of my death, the property in the coins does not pass to the recipient. For the holding that debtors who paid him were released did not entail the further proposition that he validly alienated the coins he lent out. Hence, in the absence of a stipulation a co-heir could not, according to his share, make a claim as for money lent, and the pledges were not binding. (...)” (Transl. Watson).

<sup>58</sup> See D. 24,1,38,1 (Alfenus 3 *dig. a Paulo epitomatorum*), studied in Chapter 2, Section 1(a) above.

<sup>59</sup> Lenel, *Africans Quästionen* (1931), p. 35 n. 7 considers the text *nam... facies* to be the result of a later gloss, since the reference to Stichus does not really play any role in the example given. However, the reference to the death of the owner of the other slave does round up nicely the argument of Africanus, which is why Lenel’s claim may be too rash.

Similar solutions in case the owner dies before transferring ownership are to be found in the writings of Julian<sup>60</sup>, which would indicate that Africanus was reproducing the opinions of his master. One may however identify differences of opinion among classical jurists concerning the significance of the delivery after the death of the owner, since Pomponius considers that ownership will be transferred if the agent did not know about the death of the owner or the opposition of the heirs<sup>61</sup>. Ulpian would not take into account the opinion of the owner, but simply the fact of the death and the subsequent lack of *voluntas domini*. In D. 23,3,9,1<sup>62</sup> this jurist analyses a case where an owner delivers an object under the condition to serve as a dowry after the marriage. However, the owner dies before the marriage takes place. In these circumstances, it is argued that ownership cannot be transferred, since the new owner – the heir – cannot be dispossessed without his consent (*a quo discedere rerum non posse dominium invito*)<sup>63</sup>. Similar notions can be found in D. 27,9,1,3<sup>64</sup>, where an owner is presented as having some objects on sale, dying afterwards without leaving any particular instructions in his will concerning such sale. Ulpian decides that the sale should not be carried out after his death, referring to the absence of a clear intent by the owner in that sense: “for one who wanted to sell himself did not necessarily want them sold after his death” (*non enim utique qui ipse voluerit vendere, idem etiam postea distrahenda putavit*). Equally important is to bear in mind that only the heirs have now the power to dispose, and therefore it is their intent which is decisive for the transfer of ownership.

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<sup>60</sup> See D. 39,5,2,6 (Jul. 60 *dig.*), discussed in Chapter 2, Section 3.

<sup>61</sup> D. 41,2,33 (Pomp. 32 *Sab.*): “Fundi venditor etiamsi mandaverit alicui, ut emptorem in vacuum possessionem induceret, priusquam id fieret, non recte emptor per se in possessionem veniet. Item si amicus venditoris mortuo eo, priusquam id sciret, aut non prohibentibus heredibus id fecerit, recte possessio tradita erit. Sed si id fecerit, cum sciret dominum mortuum aut cum sciret heredes id facere nolle, contra erit”.

<sup>62</sup> D. 23,3,9,1 (Ulp. 31 *Sab.*): “Si res alicui tradidero, ut nuptiis secutis dotis efficiantur, et ante nuptias decessero, an secutis nuptiis dotis esse incipiant? Et vereor, ne non possint in dominio eius effici cui datae sunt, quia post mortem incipiat dominium discedere ab eo qui dedit, quia pendet donatio in diem nuptiarum et cum sequitur condicio nuptiarum, iam heredis dominium est, a quo discedere rerum non posse dominium invito eo fatendum est. Sed benignius est favore dotium necessitatem imponi heredi consentire ei quod defunctus fecit aut, si distulerit vel absit, etiam nolente vel absente eo dominium ad maritum ipso iure transferri, ne mulier maneat indotata”. See on this text Potjewijd, *Beschikking-bevoegdheid* (1998), p. 79 and 259; Stagl, *Favor dotis* (2009), p. 197 ff.

<sup>63</sup> In the end Ulpian decides that the thing should be nonetheless given to the husband as dowry on account of the *favor dotis*, and therefore the heir should be constrained to agree to the act of the deceased (*imponi heredi consentire ei quod defunctus fecit*) or otherwise ownership should be granted to the husband *ipso iure*. It should however be borne in mind that, as the text itself indicated, this is an exceptional solution. See on this text Stagl, *Favor dotis* (2009), p. 197 ff.

<sup>64</sup> D. 27,9,1,3 (Ulp. 35 *ed.*): “Si defunctus dum viveret res venales habuerit, testamento tamen non caverit, uti distraherentur, abstinendum erit venditione: non enim utique qui ipse voluerit vendere, idem etiam postea distrahenda putavit”.

It is also worth noting that the *voluntas domini* seems to operate in a similar way regarding other legal acts which involve a patrimonial loss for the owner, although the outcome may vary according to the particular features of each act. For instance, Julian discusses the importance of the *voluntas patris* when the *paterfamilias* gives authorization for the manumission to his son but dies before it takes place, determining that according to the *favor libertatis* the slave should become free if the owner did not change his mind<sup>65</sup>. Otherwise, the manumission is not seen as taking place *voluntate patris*. The owner's death seems to prevent the act from taking place *voluntate domini*, which is also to be seen in the way Paul conveys Julian's opinion in another passage<sup>66</sup>. However, the peculiarities of the manumission lead Julian to accept a different outcome by way of exception through the reference to the *favor libertatis*. It is moreover noteworthy that in the case of the manumission both texts consider that the *voluntas domini* is regarded to be extinguished by the mere change of mind of the owner, even if it was not communicated to the person performing the act before carrying it out<sup>67</sup>. All of this shows that, while jurists could apply similar notions when dealing with different acts involving patrimonial loss, the solutions could vary significantly. It is moreover significant to find again in the context of the developments of the *voluntas domini* the name of Julian, since it could indicate that some of the innovative interpretations considering this element found their origin in the works of this jurist.

Returning to the *voluntas domini* in the context of the transfer of ownership, it should be borne in mind that the fact that the *voluntas domini* is tested at the *traditio* implies not only that the extinction of the original consent – due to the express prohibition, death or other cause – prevents the transfer of ownership from taking place, but also that if the owner gains knowledge of the sale of an object belonging to him concluded by someone else and authorizes the delivery, ownership will be transferred through the subsequent *traditio* performed by the authorized non-owner:

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<sup>65</sup> D. 40,2,4pr (Jul. 42 *dig.*): “Si pater filio permiserit servum manumittere et interim decesserit intestato, deinde filius ignorans patrem suum mortuum libertatem imposuerit, libertas servo favore libertatis contingit, cum non appareat mutata esse domini voluntas. Sin autem ignorante filio vetuisset pater per nuntium et antequam filius certior fieret, servum manumisisset, liber non fit. Nam ut filio manumittente servus ad libertatem perveniat, durare oportet patris voluntatem: nam si mutata fuerit, non erit verum volente patre filium manumisisse”.

<sup>66</sup> D. 40,9,15,1 (Paul 1 *ad legem Iuliam*): “Iulianus ait, si postea, quam filio permisit pater manumittere, filius ignorans patrem decessisse manumisit vindicta, non fieri eum liberum. Sed et si vivit pater et voluntas mutata erit, non videri volente patre filium manumisisse”.

<sup>67</sup> D. 40,2,4pr: “...Sin autem ignorante filio vetuisset pater per nuntium et antequam filius certior fieret, servum manumisisset, liber non fit...”

D. 41,3,44,1 (Pap. 23 *quaest.*): Constat, si rem alienam scienti mihi vendas, tradas autem eo tempore, quo dominus ratum habet, traditionis tempus inspiciendum remque meam fieri<sup>68</sup>.

This text by Papinian is particularly clear, stressing that the *traditio* is the moment at which it is relevant that the owner authorizes the transfer of ownership: “it is the time of delivery to which we look” (*traditionis tempus inspiciendum*). It is in principle only relevant for the transfer of ownership that the non-owner is authorized by the owner at the moment of the *traditio*. A contract of sale concluded by a non-owner without the owner’s consent will not be in itself invalid. This is why the terms used in expressions such as ‘*ius vendendi*’ should not be literally understood as ‘the right to sell’, since the sale itself can be concluded even by an unauthorized non-owner. This idea agrees with the general notions concerning the transfer of ownership in Roman law, since in several texts it is laid down that the sale of an object belonging to someone else is valid<sup>69</sup>, but that the subsequent delivery will not transfer ownership. The text just quoted exemplifies this general approach, but the opinion normally quoted as the conclusive demonstration of this point is the following:

D. 18,1,28 (Ulp. 41 *Sab.*): Rem alienam distrahere quem posse nulla dubitatio est: nam emptio est et venditio: sed res emptori auferri potest<sup>70</sup>.

Scholars have pointed out that the text is a generalization, the original text dealing exclusively with a case of pledge, as its paligenetic location shows<sup>71</sup>. Nonetheless, Daube has indicated that this generalization only aimed at expressing an idea which “went without saying”<sup>72</sup> for classical jurists, and accordingly one cannot question its validity in classical Roman law.

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<sup>68</sup> D. 41,3,44,1: “It is settled that if you sell me someone else’s thing, I being aware of the fact, but you deliver it only once the owner has ratified the transaction, it is the time of delivery to which we look, and the thing becomes mine” (transl. Watson).

<sup>69</sup> Concerning the sale see the account of Talamanca, *Vendita* (1993), p. 337 ff. Regarding the stipulation the text of D. 45,1,137,4 (Venonius 1 *stipulationum*) is particularly interesting. These rule may have been different for other *iustae causae*, such as the *donatio*, as shown by D. 39,5,9,3 (Pomp. 38 *Sab.*): “Donari non potest, nisi quod eius fit, cui donatur”.

<sup>70</sup> D. 18,1,28: “There is no doubt that one can sell a third person’s property; there is a valid sale and purchase, even though the thing may be taken away from the purchaser” (transl. Watson).

<sup>71</sup> Lenel, *Paling.* (1889) II, col. 1167 shows that book 41 of Ulpian’s *ad Sabinum* dealt with theft, which leads Lenel to locate this text within fragment 2874, before D. 13,7,4, which dealt with the alienation by a pledge creditor and the fact that he may commit theft if exceeding the terms of the agreement.

<sup>72</sup> Daube, *Generalizations* (1953), p. 191.

According to the above-mentioned texts, ownership will not be transferred if at the moment of the delivery the non-owner is not authorized to transfer ownership. It is however possible that a delivery which did not transfer ownership due to the lack of *voluntas domini* is later ratified by the owner. In this case, the transfer of ownership takes place due to the *ratihabitio* (ratification) of the owner, which implies that an act which was not originally valid will bear the same consequences as if it had been authorized from the beginning, provided the person whose authorization was lacking grants it later<sup>73</sup>. This explains the general claim of Ulpian, according to whom the *ratihabitio* could be equated to a mandate (*rati enim habitio mandato comparatur*)<sup>74</sup>. Roman jurists apply this doctrine in several cases to the transfer of ownership<sup>75</sup>, granting the same consequences to the delivery that was authorized beforehand, which implies that the transferee will even be able to acquire the *dominium ex iure Quiritium*<sup>76</sup>. All of this shows that the *voluntas domini* has a central role when determining the attribution of property, being of secondary importance whether this authorization comes before or after it takes place<sup>77</sup>. It is this close similarity which often leads jurists to deal jointly with cases in which the authorization was either given before or after a particular act was concluded<sup>78</sup>. Despite the ratification, it is however worth noting that the owner will be able to claim the price from the transferor<sup>79</sup>, which shows that the ratification does not imply that the owner will allow the transferor to retain the profits of the act<sup>80</sup>.

The variety of opinions concerning the *voluntas domini* shows that, while this element was decisive for the transfer of ownership according to the *ius civile* from time immemorial, the exact significance of it was open for interpretation. The sources in fact offer numerous examples of innovative opinions and disagreements among Roman jurists concerning when a non-owner should be regarded as acting *voluntate domini*, as it will be shown in the following sections.

<sup>73</sup> Among the general texts dealing with the *ratihabitio* see D. 46,8,12,1 (Ulp. 80 *ed.*); D. 46,3,12,4 (Ulp. 30 *Sab.*); D. 50,17,60 (Ulp. 10 *disputationum*); D. 50,17,152,2 (Ulp. 69 *ed.*).

<sup>74</sup> D. 46,3,12,4 (Ulp. 30 *Sab.*): “Sed etsi non vero procuratori solvam, ratum autem habeat dominus, quod solum est, liberatio contingit; rati enim habitio mandato comparatur”.

<sup>75</sup> The *ratihabitio* in the case of the transfer of ownership has been studied in detail by Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 171 ff.

<sup>76</sup> Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 178.

<sup>77</sup> Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 166, 174.

<sup>78</sup> Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 174 ff. Regarding the transfer of ownership see e.g. D. 24,1,38,1 (Alfenus 3 *dig. a Paulo epitomatorum*). The same principle is moreover applied in other contexts: D. 13,7,20; D. 20,1,16,1; D. 39,3,10,1.

<sup>79</sup> C. 3,32,3pr-1 (Alexander, 222): “Mater tua vel maritus fundum tuum invita vel ignorante te vendere iure non potuit, sed rem tuam a possessore vindicare etiam non oblato pretio poteris. (1) Sin autem postea de ea venditione consensisti vel alio modo proprietatem eius amisisti, adversus emptorem quidem nullam habes actionem, adversus venditricem vero de pretio negotiorum gestorum exercere non prohiberis”. See on this text Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 191-192

<sup>80</sup> This point has been recently studied by Isola, *D. 3,5,8* (2015), p. 107-125.

For the time being it is important to bear in mind that, while the consequences of an act performed *voluntate domini* are already clear among the *veteres*, later jurists will have considerable freedom to determine the significance of this concept. This is an essential point in order to understand the *Rechtsfindung* carried out by Roman jurisprudence in the context of the transfer of ownership by a non-owner.

## 2. *Traditio invito domino, furtum and the possibility of usucapion*

Through the set of texts quoted in the previous section, it has become clear that the *traditio voluntate domini* bears the same consequences as the delivery performed by the owner himself. One may at this point wonder about the consequences of the delivery performed *without* the owner's authorization. Under this general label, one can group seemingly different cases, such as the delivery performed by someone who had no relation to the owner and the delivery by someone who exceeds the owner's instructions or acts in complete opposition to them. Such situations bear in fact completely different consequences from the point of view of the law of the obligations, but from the point of view of the transfer of ownership they are approached in the same way, since in none of these cases is ownership transferred. The acquirer could in principle only eventually acquire ownership through usucapion, as shown in the Institutes of Gaius, provided that he received the object in good faith:

Gai 2,43: Ceterum etiam earum rerum usucapio nobis competit, quae non a domino nobis traditae fuerint, sive mancipi sint eae res sive nec mancipi, si modo eas bona fide acceperimus, cum crederemus eum, qui traderet, dominum esse<sup>81</sup>.

The good faith regarding the requirement of the *potestas alienandi* will therefore give the acquirer only a *possessio ad usucapionem*. While in the usucapion of *res mancipi* delivered by *traditio* (Gai 2,41) the position of the acquirer would be very solid due to the praetorian protection – the acquirer having in fact the thing *in bonis* – such protection is much more restricted in the usucapion which follows from the delivery by a non-owner: the praetor will protect the transferee in specific cases, for instance by granting the *exceptio rei voluntate eius venditae* (D. 41,4,7,6) or the *exceptio si non auctor meus ex voluntate tua vendidit* (D. 6,2,14), as well as the *actio Publiciana* (D. 6,2,14). The *actio Publiciana* in such case would allow the acquirer to recover his possession against anyone who had a lesser right than himself, which meant that he would not succeed in recovering the object

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<sup>81</sup> Gai 2,43: “But we can also usucapt things which have not been delivered to us by the owner, whether they are *mancipi* or *nec mancipi*, provided that we receive them in good faith, believing that the person who delivered them was owner” (transl. Gordon/Robinson, modified).

from the Quiritary owner, who would defend himself with an *exceptio iusti dominii* (D. 6,2,16–17).

At this point, it should be noted that despite these broad general rules, in several cases the *traditio* performed by a non-owner would not lead to the acquisition through usucapion due to the prohibition to acquire stolen objects (Gai 2,45) and the wide concept of *furtum* in classical jurisprudence (Gai 2,50), which implied that most cases in which the *traditio* was not authorized would fall under the category of *furtum*. Gai 2,45–51 deals with cases of illegal alienations, in which the possessor will not be able to acquire ownership by usucapion even if he acquired in good faith<sup>82</sup>. Regarding objects which were stolen or taken by force, there were clear statutory provisions which prevent their acquisition through usucapion. The first of them is the Law of the Twelve Tables, which forbade the acquisition of stolen goods, being later complemented by the *Lex Atinia* of the 2<sup>nd</sup> century BC<sup>83</sup>. According to these regulations, no one could acquire ownership over the stolen good (*aeterna auctoritas esto*). The *Lex Iulia et Plautia de vi* established moreover an analogous prohibition concerning objects taken by force. The prohibition concerning objects stolen or taken by force implied that the object itself was tainted by a prohibition of usucapion, the good faith of the acquirer being accordingly irrelevant to remedy that element. Gai 2,49 shows this by declaring that the prohibition does not concern exclusively the thief himself – who cannot anyhow acquire through usucapion since he is in bad faith – but anyone who subsequently acquires the object<sup>84</sup>.

According to Gaius, the prohibition of acquiring stolen goods would significantly limit the scope of application of usucapion because most cases of transfer of ownership by an unauthorized non-owner fall under the category of *furtum*, and only some specific cases would escape from the scope of application of the mentioned prohibition:

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<sup>82</sup> Gai 2,45: “Sed aliquando etiamsi maxime quis bona fide alienam rem possideat, non tamen illi usucapio procedit (...)” (But sometimes usucapion will not work to the advantage of the possessor of another’s thing, even although his possession is definitely in good faith [transl. Gordon/Robinson]).

<sup>83</sup> Gai 2,45 does not mention the *Lex Atinia*. Other texts discussing this prohibition mention both the Law of the Twelve Tables and the *Lex Atinia* (Inst. 2,6,3; D. 41,3,33), or just the latter text (D. 41,3,4,6; D. 50,16,215). The relationship between both legal texts regarding the prohibition to usucapt stolen object has been subject to considerable scholarly debate. See on this point Jolowicz, *De Furtis* (1940), p. lxxxviii–lxxxix; Sirks, *Furtum* (2013), p. 492–493, 500–501.

<sup>84</sup> Gai 2,49: “Quod ergo vulgo dicitur furtivarum rerum et vi possessarum usucapionem per legem XII tabularum prohibitam esse, non eo pertinet, ut ne ipse fur quive per vim possidet, usucapere possit (nam huic alia ratione usucapio non competit, quia scilicet mala fide possidet), sed nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat”. This irrelevance of the good faith of the acquirer is also stressed in other texts, such as C. 7,27,7: “(...) non permittit usucapionem fieri, licet bona fide possideatur”.

Gai 2,50: Unde in rebus mobilibus non facile procedit, ut bonae fidei possessori usucapio competat, quia qui alienam rem vendidit et tradidit, furtum committit; idemque accidit etiam, si ex alia causa tradatur. Sed tamen hoc aliquando aliter se habet; nam si heres rem defuncto commodatam aut locatam vel apud eum depositam existimans eam esse hereditariam, vendiderit aut donaverit, furtum non committit; item si is, ad quem ancillae ususfructus pertinent, partum etiam suum esse credens vendiderit aut donaverit, furtum non committit; furtum enim sine affectu furandi non committitur. Aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur<sup>85</sup>.

The text shows that the wide concept of *furtum* which was used in Roman law allows usucapion of someone else's property in those cases where there was no intention to steal. Gaius presents as examples fairly specific cases, such as the sale by an heir of an object which the deceased person had borrowed, believing that the latter was actually the owner. This misconception would even include cases of *error iuris*, as the example of the *partus ancillae* shows, where the person with a usufruct over a female slave sells her offspring under the belief that he is entitled to do so. These examples give the impression that usucapion will only rarely take place when an unauthorized non-owner delivers an object. This view, however, may be misleading, and since the subjective representation of the *tradens* is presented as the decisive element in order to determine whether *furtum* takes place, further analysis on the notion of *furtum* is needed in order to understand the role of the *voluntas domini* and the intention of the non-owner regarding this element.

The study of *furtum* in Roman law has been surrounded by controversy regarding which elements were considered relevant and to what extent by classical jurists in order to configure this crime, which are generally described as the appropriation of the object (*contrectatio*) done without the owner's consent (*invito*

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<sup>85</sup> Gai 2,50: "And so with moveable things such a possessor cannot often rely on usucapion, because someone who sells and delivers another's property commits theft; the same applies even if the delivery is on some other basis. Yet sometimes the result is different. Suppose that an heir, in the belief that it forms part of the inheritance, sells or gifts something that had in fact been given on loan or hired to or deposited with the deceased; he does not commit theft. Again, a person with a usufruct in a female slave who sells or gives away the offspring in the belief that they are his does not commit theft. Theft is not committed without intent to steal. There are also other ways that someone can transfer a third party's property to another without the taint of theft and leave it possible for the recipient to usucapt the thing" (transl. Gordon/Robinson). This text was laid down in similar terms in the *Res cottidianae*, as can be seen in D. 41,3,36 (Gai. 2 *rer. cott.*).

*domino*)<sup>86</sup> and with a theftuous intent (*dolo malo*, or with *animus furandi*)<sup>87</sup>. The subjective position of the owner is traditionally less controversial than the other two. Some authors claim, based on Plautus' comedy 'Poenulus', that in the pre-classical period the owner's subjective stance was irrelevant, but this isolated evidence of the subject seems to be overrated<sup>88</sup>. Be it as it may, that the *furtum* must be performed *invito domino* appears in a text by Sabinus brought down to us by Gellius:

Aulus Gellius, *Noctes Atticae* 11,18,20: Verba sunt Sabini ex libro iuris civilis secundo: qui alienam rem adtrectavit cum id se invito domino facere iudicare deberet, furti tenetur.

Apart from this text, numerous other reference from authors both before and after Sabinus stress the importance of the owner's state of mind<sup>89</sup>. This element is also included in the description of *furtum* given by Gaius:

Gai 3,195: Furtum autem fit non solum cum quis intercipiendi causa rem alienam amovet, sed generaliter, cum quis rem alienam invito domino contrectat<sup>90</sup>.

The unwillingness of the owner is once again clearly presented as an element of the *furtum* with the words '*invito domino*'. This would seem to present the owner's unwillingness as a clear-cut criterion to determine the existence of *furtum*, but there are several other texts which make reference to an additional element, which is the *dolus*, the subjective representation of the non-owner in regard to the owner's will. This element is already clearly sketched in the above-quoted text of Sabinus, which does not merely require that the *furtum* takes place '*invito domino*', but that the non-owner in fact should be considered to act against the owner's will (*invito domino facere iudicare deberet*). A specific intent is also discernible in

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<sup>86</sup> In the following paragraphs theft will be generally described as committed by the non-owner against the owner, despite the fact that in specific cases it is the owner himself who commits *furtum* over his property, as shown for example in Gai 3,200.

<sup>87</sup> Nicholas, *Theophilus and Contrectatio* (1983), p. 121.

<sup>88</sup> For an analysis of the *furtum* in the *Poenulus* see Salomón, *Sine vitio* (2003), p. 46; Stringini, *Furtum en Poenulus* (2009), p. 1-28. In this play, a pimp was held liable for *furtum* even though the stolen goods were placed under his power by instigation of the owner himself. However, the scene would appear to tell us more about the *furtum conceptum* than about the requirements to configure *furtum* in general, and therefore care should be taken not to give it an excessive dogmatic significance regarding this last point. On the complex nature of *furtum conceptum* see Sirks, *Furtum* (2013), p. 487-492.

<sup>89</sup> See e.g. D. 47,2,92(91) (Lab. 2 *pithanon a Paulo epitomatorum*); D. 13,1,20 (Tryph. 15 *disput.*); D. 24,1,63 (Paul 3 *ad Neratium*); D. 16,3,11 (Ulp. 41 *Sab.*); D. 47,2,48,2 (Ulp. 42 *Sab.*).

<sup>90</sup> Gai 3,195: "Theft is committed not only when someone removes something belonging to another to have it for himself but, more comprehensively, whenever someone handles something belonging to another without the owner's consent" (transl. Gordon/Robinson).

Gai 3,195 under the words “*intercipiendi causa*” (to have it for himself) and it is the dominant idea in a subsequent text referring to a case of *furtum usus*:

Gai 3,197: Placuit tamen eos, qui rebus commodatis aliter uterentur quam utendas accepissent, ita furtum committere, si intellegant id se invito domino facere eumque, si intellexisset, non permissurum; at si permissurum credant, extra furti crimem videri, optima sane distinctione, quod furtum sine dolo malo non committitur<sup>91</sup>.

In this case, the non-owner’s *dolus* is presented as the decisive element to determine whether the borrower did or did not commit theft through the use of the borrowed object, which Gaius declares to be an “excellent distinction” (*optima sane distinctione*), adding “since theft cannot be committed without wrongful intent” (*quod furtum sine dolo malo non committitur*). Gaius would highlight the importance of the non-owner’s subjective representation in other contexts, such as Gai 2,208, where it is stated that “theft depends on intent” (*furtum ex adfectu consistit*), or Gai 4,178, where we are told that “calumny, like the crime of theft, lies in the intention” (*calumniā enim in adfectu est, sicut furti crimen*).

The importance of *dolus* by the non-owner is highlighted in numerous other classical texts, such as the famous definition of *furtum* by Paul, who describes it as “*contractatio rei fraudulosa lucri faciendi gratia*” (D. 47,2,1,3 [Paul 39 *ed.*])<sup>92</sup>, or Ulpian’s quotation of Pedius, according to whom “*nemo furtum facit sine dolo malo*” (D. 47,2,50,2 [Ulp. 37 *ed.*]). The non-owner’s subjective state of mind appears as a decisive element to determine the outcome of several cases<sup>93</sup>, and it is moreover mentioned in passing in other contexts, being normally referred to as *dolus malus*, but also through the equivalent expressions *affectus / animus furandi, celandi or lucri faciendi*<sup>94</sup>. Despite the wide use of these concepts among Roman jurists, its validity

<sup>91</sup> Gai 3,197: “But it was accepted that borrowers who put the thing to an extra use only commit theft if they know the owner does not consent and would not consent if he knew; if they believe he would allow it, they are not liable. This is an excellent distinction, since theft cannot be committed without wrongful intent” (transl. Gordon/Robinson, modified). The text is reproduced in Inst. 4,1,7.

<sup>92</sup> See also PS 2,31,1: “Fur est qui dolo malo rem alienam contractat”. Paul’s definition in D. 47,2,1,3 is traditionally regarded as altered by the compilers, but scholars have been keen to point out that even if this was the case, the elements included in this text remain representative of the notion of *furtum* in classical Roman law. Others consider the passage genuine, such as Thomas, *Animus furandi* (1968), p. 31–32.

<sup>93</sup> See in particular D. 47,2,21,3 (Paul 40 *Sab.*); D. 47,2,43,1; 43,6; 43,10 (Ulp. 41 *Sab.*); D. 47,2,46,7 (Ulp. 42 *Sab.*); D. 47,2,48,3 (Ulp. 42 *Sab.*); D. 47,2,77(76)pr (Pomp. 38 *ad Quintum Mucium*). An account of the texts within D. 47,2 where the intentional element is relevant is offered by Milella, *Il consenso* (1988), p. 391 n. 1. See moreover MacCormack, *Furtum and contractatio* (1977), p. 132.

<sup>94</sup> A detailed account on the different expressions which convey the intention of the non-owner is given by Milella, *Il consenso* (1988), p. 391–392. See further on this point Desanti, *Dolo nel furto* (2010), p. 17 n. 3. Some authors consider these expressions as alternative ways to convey the idea of the *dolus malus*, including Albanese, *Furtum II* (1957), p. 76 and

in classical jurisprudence has been questioned for a long time. Authors such as Huvelin and Albertario considered that references to subjective representations regarding *furtum* were a typically post-classical element which led to the systematic modification of classical solutions. Even after the most extreme aspects of this reconstruction were abandoned, scholars often approached the references to a special *animus* at the moment of theft with caution<sup>95</sup> – particularly the *animus lucri faciendi* – generally claiming that the intention of the non-owner would have had a marginal role in the classical Roman law of theft, almost exclusively limited to the *furtum usus*.

The suspicions regarding the *animus furandi* are motivated to a great extent by the fact that a particular *dolus* or *animus* only seems relevant in specific cases, especially when the owner himself handed over the object, and therefore one has to determine the state of mind of the owner in order to determine the existence of theft. There are, moreover, documented disagreements among classical jurists regarding the exact significance of this element and a gradual evolution towards more objective solutions can be observed, particularly regarding whether theft can be committed *solo animo*<sup>96</sup>, or whether a non-owner who erroneously believes to act *invito domino* commits theft<sup>97</sup>. Despite all of this, it cannot be denied that the non-owner's subjective representation did play a role in the Roman law of theft throughout the classical period, even if it was only in specific cases. Scholars have moreover traced back this element to Quintus Mucius Scaevola, showing that it was not a mere casual innovation of Sabinus which was soon abandoned, but rather that it continued to be used by jurists – experiencing, no doubt, certain changes – throughout the whole classical period<sup>98</sup>. Therefore, it may be agreed that the *dolus malus* of the non-owner, as well as other more specific references to his state of mind, played a marginal role in the Roman law of theft, being nonetheless a decisive element to determine the outcome of certain cases. In other words, the irrelevance in most cases of a special subjective representation by the thief does not preclude that this element would have been useful to determine the outcome in some cases, even outside the scope of the *furtum usus*<sup>99</sup>.

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Guzmán, *DPR* (2013) II, p. 276. Less willing to put these expressions on an equal level are Huvelin, *Furtum* (1915), p. 787 n. 1, and Jolowicz, *De Furtis* (1940), p. lvii-lviii.

<sup>95</sup> See on this point Watson, *Definition of furtum* (1960), p. 199; Desanti, *Dolo nel furto* (2010), p. 36–40.

<sup>96</sup> Aulus Gellius, *Noctes Atticae* 11,19,23; D. 41,2,3,18 (Paul 54 *ed.*); D. 47,2,1,1–2; D. 47,2,52,7; D. 47,2,68(67)pr. See on this point Thomas, *Animus furandi* (1968), p. 6–7.

<sup>97</sup> Gai 3,198; D. 47,19,6; D. 47,2,44,1 (Pomp. 19 *Sab.*); D. 47,2,46,8. See on this point Jolowicz, *De Furtis* (1940), p. lvi-lvii; Milella, *Il consenso* (1988), p. 392–398, 412–414; Desanti, *Dolo nel furto* (2010), p. 32–36.

<sup>98</sup> On the value of this element in classical jurisprudence and its various applications see especially Thomas, *Animus furandi* (1968), p. 1–32; Pugsley, *Animus furandi* (1984), p. 2425–2426; Ibbetson, *Contractatio* (1994), p. 58–61; Milella, *Il consenso* (1988), p. 403 ff.; Desanti, *Dolo nel furto* (2010), p. 27–32.

<sup>99</sup> See e.g. the cases discussed by Thomas, *Animus furandi* (1968), p. 1–32, where only p. 26–30 deal with the *furtum usus*.

MacCormack has stressed that the components of theft – including the *animus lucri faciendi* – presented in texts such as Paul’s definition of theft should rather be approached as “a useful guideline or a convenient summary of the main characteristics of *furtum* than as a statement of the necessary and sufficient conditions on the occurrence of *furtum*”<sup>100</sup>. Accordingly, one cannot expect the *animus furandi* to be of relevance in every case of *furtum*, and the scope of this element may have been a point of controversy among classical jurists<sup>101</sup>. Finally, it should be noted that authors have been more critical regarding special *animi* (*lucrandi, celandi, etc.*), but that the fact that a general *dolus malus* is necessary for the existence of *furtum* is broadly accepted<sup>102</sup>.

Whatever the exact importance of the subjective representation of the non-owner in classical Roman law, it should be borne in mind that this element is particularly relevant when the owner voluntarily hands over an object to the non-owner, as happens in several cases where the non-owner transfers ownership over the object. Accordingly, it is no wonder that the *dolus malus* or *animus furandi* plays a significant role in cases where an unauthorized non-owner performs the *traditio* in order to determine the existence of *furtum*. Several cases in which a non-owner performs the *traditio*, either without being authorized at all to do so or exceeding the faculties granted to him, would fall under the concept of *furtum*, and accordingly the possibility of acquiring through usucapion will be excluded. For instance, we are told that the *falsus procurator* who received money with the instruction to pay a debtor with those specific coins will commit *furtum* if he appropriates them and uses other coins<sup>103</sup>, just as he who sells *nomine proprio*, having been told by the owner to sell *nomine alieno*<sup>104</sup>. An identical outcome is found in the case regarding the sale of a pledge by the creditor, since the *traditio* of the pledge without having the owner’s authorization, before the time agreed, or violating in any other way the terms of the *pactum de distrahendo*, would make the creditor liable for *furtum*<sup>105</sup>. Liability for *furtum* will arise not only when someone exceeds the limits of the authorization to act, but also where there is no authorization whatsoever to perform a certain act, as may happen with a slave regarding objects of his master<sup>106</sup> or a co-owner concerning the common property<sup>107</sup>. In all of these cases the delivery takes place *invito domino*, precluding thereby the transfer of ownership and determining at the same time the existence of theft. The fact that in many of these cases there was no room for usucapion can be seen by examining the title “*De usucapione pro emptore vel transactione*” (C. 7,26),

<sup>100</sup> MacCormack, *Furtum and contractatio* (1977), p. 130; see also p. 142-145. This idea is further subscribed by Zimmermann, *Law of Obligations* (1996), p. 926-927.

<sup>101</sup> See on this point MacCormack, *Furtum and contractatio* (1977), p. 130-131.

<sup>102</sup> Thomas, *Animus furandi* (1968), p. 30; Watson, *D. 47.2.52.20* (1969 [1991]), p. 303 n. 3.

<sup>103</sup> D. 47,2,43,1.

<sup>104</sup> D. 39,5,25.

<sup>105</sup> D. 47,2,73; D. 13,7,4; 13,7,5.

<sup>106</sup> D. 47,2,57(56),3; C. 4,26,10,1.

<sup>107</sup> D. 17,2,45. On the need for *dolus* in this case see D. 17,2,51pr.

which contains mostly cases in which usucapion does not take place due to the fact that the object was stolen or taken by force<sup>108</sup>, thus confirming the statement of Gai 2,50 according to which usucapion would not take place easily (*non facile procedit*) in the context of movable things.

The possibility of usucapion in cases of unauthorized delivery by a non-owner is however not as restricted as it would seem. If the lack of authorization of the owner were the only relevant element to determine the existence of *furtum*, then certainly every *traditio* by an unauthorized non-owner would necessarily constitute a case of theft, usucapion being automatically excluded. However, the non-owner's subjective representation adds a fundamental element to the equation. As indicated above, Gaius declares in Gai 2,50 that "theft is not committed without intent to steal" (*furtum enim sine affectu furandi non committitur*)<sup>109</sup>, which is almost identical to the statement in Gai 3,197, according to which "theft cannot be committed without wrongful intent" (*furtum sine dolo malo non committitur*). The significance of this subjective representation with regard to the prohibition of usucapion can only be fully understood by considering the broad scope of this element. Gaius gives a rather limited image in Gai 2,50, presenting exclusively cases in which the non-owner believes with a great degree of certainty to be owner himself. This view, however, can be complemented through other numerous references to the scope of the *dolus malus* of the non-owner, particularly in cases of *furtum usus*, which offer as a common feature that the non-owner received the object from the owner himself. At this point it is interesting to indicate the more lenient approach to the non-owner's state of mind in Gai 3,197, since we are told there that borrowers only commit theft if they know the owner does not consent and would not consent if he knew: "if they believe he would allow it, they are not liable" (*si permissurum credant, extra furti crimen videri*). As shown in this text, it is not strictly necessary for the non-owner to think that he acts according to the owner's intent, but he will even escape liability for *furtum* if, knowing not to be authorized, he believes the owner would approve it. Such notion restricts significantly the scope of application of *furtum*, introducing an extremely flexible criterion, which involves the subjective evaluation by the non-owner of the owner's likely subjective response. The same idea is conveyed by Sabinus, who appears to be slightly more strict when demanding that the non-owner 'should consider to act against the owner's will' (*invito domino facere iudicare deberet*)<sup>110</sup>, which nonetheless implies a subjective representation of the owner's state of mind. A similar idea is also to be found in D. 12,4,15 (Pomp. 22 *Sab.*) where Pomponius quoted Proculus, who determines that someone will be held liable for theft "for he has used property belonging to another knowing he was doing so without the owner's consent or that the owner,

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<sup>108</sup> C. 7,26,1; 2; 3; 5; 6; 7.

<sup>109</sup> This text is also recorded in D. 41,3,37.

<sup>110</sup> Aulus Gellius, *Noctes Atticae* 11,18,20.

if he knew, would forbid it”<sup>111</sup> (transl. Watson). This text again confronts us with the possibility that the non-owner may act without an express prohibition by the owner, determining that only in case he knew that the owner would forbid his acts he would be liable for *furtum*. This thought is moreover expressed in another text of Pomponius:

D. 47,2,77(76)pr (Pomp. 38 *ad Quintum Mucium*): Qui re sibi commodata vel apud se deposita usus est aliter atque accepit, si existimavit se non invito domino id facere, furti non tenetur. Sed nec depositi ullo modo tenebitur: commodati an teneatur, in culpa aestimatio erit, id est an non debuerit existimare id dominum permissurum<sup>112</sup>.

In this case the non-owner actually uses the thing in a different way to that which was agreed, but he is nonetheless not considered as committing *furtum* if he did not believe to act contrary to the owner’s intent. A key element of this evaluation is presented at the end of the text, where again we are confronted with a reference to the non-owner’s subjective representation of the owner’s likely response. The need for a high level of certainty on behalf of the non-owner regarding the owner’s approval is therefore clearly sketched, and the leniency behind this notion would be later expressed even more clearly by Ulpian:

D. 47,2,46,7 (Ulp. 42 *Sab.*): Recte dictum est, qui putavit se domini voluntate rem attingere, non esse furem: quid enim dolo facit, qui putat dominum consensurum fuisse, sive falso id sive vere putet? Is ergo solus fur est, qui adtrectavit, quod invito domino se facere scivit<sup>113</sup>.

This fragment again emphasizes the importance of the non-owner’s subjective representation in order to determine the existence of theft. Particularly remarkable is however the flexibility with which this element is applied, since

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<sup>111</sup> D. 12,4,15 (Pomp. 22 *Sab.*): “(...) quia re aliena ita sit usus, ut sciret se invito domino uti aut dominum si sciret prohibitorium esse”. See on this text Thomas, *Animus furandi* (1968), p. 28–29; Desanti, *Dolo nel furto* (2010), p. 23–24.

<sup>112</sup> D. 47,2,77,(76)pr: “One who uses a thing which he has borrowed or which was deposited with him otherwise than on the terms on which he accepts it, will not be liable for theft, if he believes that he is not acting contrary to the owner’s will. In no way will he be liable on a deposit. On the question whether he be liable on a loan there will need to be an evaluation of fault on his part. Should he not have believed that the owner would allow what he did?” (transl. Watson).

<sup>113</sup> D. 47,2,46,7: “It is rightly said that no one who thinks the owner to consent to his dealing with the thing is guilty of theft; for how does a person deal dolously with a thing, when he thinks the owner would have been in agreement, whether his belief be sound or unfounded? He alone is a thief who tampers with a thing in the knowledge that its owner would not consent” (transl. Watson, modified).

Ulpian discards the existence of *dolus* if the non-owner “thinks the owner would have been in agreement, whether his belief was sound or unfounded” (*putat dominum consensurum fuisse, sive falso id sive vere putet*). It is important at this point to note not only that the ground of the belief may not be completely sound, but that this uncertainty may refer to a consent which the owner has not given, but which he may give in the future (*dominum consensurum fuisse*). The subjective requirement exempting the non-owner from liability is therefore significantly relaxed, referring thus to a belief – sound or not – that the owner would agree, despite the absence of a preceding agreement. In contrast, the subjective representation needed to configure the crime is limited to the positive knowledge of acting against the owner’s intent: “*Is ergo solus fur est, qui adtrexavit, quod invito domino se facere scivit*”. This positive knowledge is found in other texts dealing with *furtum*, such as D. 13,6,14 (Ulp. 48 *Sab.*) (*tibi scienti nolle me tibi commodari*) and C. 7,27,7 (*Sciens servum alienum contra domini voluntatem venundans furtum committit*). The sources therefore show that at some point in the classical period, as Jolowicz states it, “nothing less than real *dolus* is sufficient to justify a condemnation for theft”<sup>114</sup>.

At this point it should be noted that it is not completely clear whether classical jurisprudence experienced a significant evolution regarding the content of the subjective representation of the non-owner. It is commonly held that Sabinus would have been stricter on this point, expecting the non-owner to act on a reasonable ground, a requirement which would have been gradually relaxed, until late classics like Ulpian would have been satisfied even with an unfounded belief<sup>115</sup>. It is however difficult to elucidate this point, especially since most texts dealing with the subjective representation of the owner do not elaborate on this issue. The text of D. 16,3,11 (Ulp. 41 *Sab.*)<sup>116</sup> could help to solve this problem,

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<sup>114</sup> Jolowicz, *De Furtis* (1940), p. lvi. In similar terms Desanti, *Dolo nel furto* (2010), p. 36: “Riguardo al caso del furto d’uso, dunque, ciò significava che la mera convinzione di operare invito domino non appariva di per sé sufficiente; il *dominus*, infatti, doveva risultare *invitus* per davvero; e l’agente, dunque, doveva essere consapevole della sua contrarietà. Detto altrimenti, non bastava che egli ‘credesse’, ma era necessario che ‘sapesse’ di usare la cosa senza il permesso del proprietario”.

<sup>115</sup> See among others Jolowicz, *De Furtis* (1940), p. lvi; Zulueta, *Institutes of Gaius* (1953) II, p. 204.

<sup>116</sup> D. 16,3,11 (Ulp. 41 *Sab.*): “Quod servus deposuit, is apud quem depositum est servo rectissime reddet ex bona fide: nec enim convenit bonae fidei abnegare id quod quis accepit, sed debet reddere ei a quo accepit, sic tamen, si sine dolo omni reddat, hoc est, ut nec culpa quidem suspicio sit. Denique Sabinus hoc explicuit addendo: ‘Nec ulla causa intervenit, quare putare possit dominum reddi nolle’. Hoc ita est, si potuit suspicari, iusta scilicet ratione motus: ceterum sufficit bonam fidem adesse. Sed et si ante eius rei furtum fecerat servus, si tamen ignoravit is apud quem deposuit vel credidit dominum non invitum fore huius solutionis, liberari potest: bona enim fides exigitur. Non tantum autem si remanenti in servitute fuerit solutum, sed etiam si manumisso vel alienato, ex iustis causis liberatio contingit, scilicet si quis ignorans manumissum vel alienatum solvit. Idemque et in omnibus debitoribus servandum Pomponius scribit”. See on this text Albanese, *Furtum II* (1957), p. 59; Milella, *Il consenso* (1988), p. 400–402.

since it discusses whether a person who receives something in deposit from a slave will fulfil his contractual obligations by restoring it back to the same slave, and in this context the state of mind of the non-owner is discussed in detail, including the opinions of Sabinus. Unfortunately, it is not entirely clear where the opinion of Sabinus ends and that of Ulpian begins, and therefore it is not possible to determine which author requires a “*iusta ratio*” for the restitution. The elucidation of this problem exceeds the margins of the present research, and for the time being it is enough to establish that the non-owner’s subjective representation may exclude the existence of *furtum* if he thought that the owner would approve of his actions. Moreover, it should be noted that Roman jurists appear at times to be quite lenient considering the soundness of that belief, which can be derived not only from Ulpian’s “*falso id sive vere putet*” (D. 47,2,46,7) but also from the fact that even an *error iuris* would be tolerated in this regard, as shown in Gai 2,50<sup>117</sup>.

The flexibility which the non-owner’s subjective representation introduces in determining the existence of *furtum* would allow that several cases in which the *traditio* is actually performed *invito domino* are not considered as theft, enabling therefore the transferee to acquire through usucapion. Gai 2,50 offers two cases in which the non-owner actually believes to be the owner, as is the heir who delivers an object which the deceased person did not own and the person with a usufruct who sells the offspring of a female slave. The field of cases expands if one considers as well the cases in which the *tradens* believed to be acting according to the owner’s intent, even when in reality that was not the case. A clear case in this regard, already studied in the preceding section, takes place when the owner dies before the delivery has been performed, in which case the delivery by a previously authorized agent will not transfer ownership, despite his complete ignorance regarding the latest developments concerning the owner. The ignorance of this circumstance, however, is relevant to preclude the existence of *furtum*, and therefore the transferor will grant the acquirer a *possessio ad usucapionem* due to the absence of *dolus* which follows from his ignorance of his lack of authorization. Papinian offers a solution which shows the significance of the subjective representation of the heirs in such case:

D. 17,1,57 (Pap. 10 *resp.*): Mandatum distrahendorum servorum defuncto qui mandatum suscepit intercidisse constitit. Quoniam tamen heredes eius errore lapsi non animo furandi, sed exsequendi, quod defunctus suae curae fecerat, servos vendiderant, eos ab emptoribus usucaptos videri placuit. (...) <sup>118</sup>

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<sup>117</sup> See also D. 17,1,57 (Pap. 10 *resp.*), which will be studied below.

<sup>118</sup> D. 17,1,57: “It was established that a mandate to sell off slaves had lapsed with the death of the person who undertook the mandate. However, because his heirs had fallen into error and, with the intention not of theft but of carrying out the duty which the deceased had assumed, had sold the slaves, it was agreed that those [slaves] appeared to have been

An individual was bound by a contract of mandate to sell a number of slaves, but before he could do so he died, which implies the extinction of the contract. The heirs, however, in what appears to be a remarkable case of *error iuris*, think that it is their duty to carry out the obligations which the deceased had assumed, and proceed to sell the slaves. In this case, the lack of a theftuous intent (*non animo furandi*) excludes the possibility of theft, and accordingly the slaves can be usucaptured by the buyer (*eos ab emptoribus usucaptos videri placuit*).

There are other situations in which the non-owner may wrongfully think to act according to the owner's authorization, as happens in various cases of *error in dominio*. This problem is analysed below<sup>119</sup>, but for now it is enough to indicate that there are cases in the sources, in which the person who performs the delivery does not have the position regarding the object which he thought he had. In many of these cases the delivery is performed by an owner who is not aware of his condition of owner<sup>120</sup>, in which case jurists since Marcellus consider that the *traditio* is not performed *voluntate domini*, but nonetheless do not mention the existence of a *furtum*. In other cases, the delivery is performed by a non-owner who wrongfully believes himself to be the owner, at the request of the true owner who ignores that he in fact is the owner<sup>121</sup>. Again, the delivery by the non-owner will not be concluded *voluntate domini*, but there is no indication of the existence of *furtum*, which can easily be explained because of the subjective representation of the *tradens*, who believes to be acting under the owner's authorization.

Apart from the cases in which the transferor is unaware that he does not act *voluntate domini*, the broad scope of the subjective representation of the *tradens* excludes the existence of *furtum* in cases where the non-owner knows that he is not acting according to the owner's authorization, having however reason to believe that the latter would approve of his actions. At this point, it should be considered that in a number of cases the relationship between owner and the *tradens* is not governed by a contractual regulation which sharply determines the boundaries of the owner's authorization, as will be seen in the following section. Moreover, even in some cases where the owner's authorization is clearly defined, the *tradens* may realize that the owner would have expected him to exceed his original instructions in view of particular circumstances, acting therefore as a *negotiorum gestor*<sup>122</sup>. This makes room for a number of cases in which the non-

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usucaptured by their buyers. (...)” (transl. Watson). See on this text Thomas, *Animus furandi* (1968), p. 18-19.

<sup>119</sup> Chapter 2, Section 6(b) below.

<sup>120</sup> First case described in D. 17,1,49 (Marcell. 6 *dig.*); D. 41,1,35 (Ulp. 7 *disputationum*); D. 12,4,3,8 (Ulp. 26 *ed.*).

<sup>121</sup> Second case described in D. 17,1,49 (Marcell. 6 *dig.*); D. 18,1,15,2 (Paul 5 *Sab.*)

<sup>122</sup> Watson, *D. 47.2.52.20* (1969 [1991]), p. 306. It is however worth noting that a *negotiorum gestum* could nonetheless be liable for theft, as shown by Finazzi, *Negotiorum gestio* (2006) II.1, p. 62-66, even if such cases would have been rare, as pointed out by the author in p. 65.

owner believes to act in the way the owner expects him to do, even if he knows that the latter did not explicitly authorize a particular act. The non-owner may for instance act in a particular case motivated by *amicitia* or *fides*, believing that, although the owner did not expressly authorize a particular act, he would do so if he were present. Viewed from the perspective of the law of property, such a *traditio* cannot transfer ownership, since there is no *voluntas domini*, but the *tradens* may well count on the owner's *ratihabitio* once the latter gains knowledge of the situation. The possibility of *furtum*, on the other hand, would be completely excluded on account of the subjective representation of the non-owner regarding the likely attitude of the owner, and therefore the transferee would have gained *possessio ad usucapionem*.

There is moreover nothing anomalous in the fact that *furtum* is excluded due to the subjective representation of the non-owner, even if this consists on a vague conception of what the owner would expect in a particular situation. Particularly in the cases of *furtum* in which the owner has voluntarily handed over the object, the subjective element is of the utmost relevance to determine the existence of the crime, since there may be much room for uncertainty, especially if the relationship of the parties is governed by social notions such as *amicitia* and *fides*<sup>123</sup>. If the non-owner dealing with someone else's ownership, be it in a clumsy or unfounded way, honestly intended to look after the best interest of the owner, it would have been excessive to consider such behaviour as theftuous.

The distinctions regarding the non-owner's state of mind may contribute to understand some texts traditionally considered as troublesome, as happens with the following one of Alfenus:

D. 41,3,34 (Alf. 1 *dig. a Paulo epitomatorum*): Si servus insciente domino rem peculiarem vendidisset, emptorem usucapere posse<sup>124</sup>.

This text presents the curious case in which a slave sells an object belonging to his *peculium* without the knowledge of the owner (*insciente domino*), granting thereby the acquirer a *possessio ad usucapionem*. This implies in the first place that we are not dealing with a slave who has the *libera administratio peculii*, since in that case the owner's consent would be irrelevant. While the lack of the owner's authorization prevents the transfer of ownership from taking place, it is clear that we are not dealing with a *res furtiva*, since the prohibition of usucapion does not apply. The brevity of the text – belonging precisely to an abridgment, an *epitome* – gives few clues, forcing the interpreter to determine why the lack of *voluntas domini* prevents the transfer of ownership but does not configure a case of *furtum*, or at least does not give place to the prohibition of the *Lex Atinia*. Numerous

<sup>123</sup> Desanti, *Dolo nel furto* (2010), p. 26-27 and 36-38 highlights this circumstance with regard to the *commodatum* and *depositum*.

<sup>124</sup> D. 41,3,34: "If a slave, his owner being unaware of the transaction, sells something belonging to his *peculium*, the purchaser can usucapt it" (transl. Watson).

explanations have been offered to that effect. Huvelin, for instance, argues that this would be a case of *furtum improprrium*, since there is no *subreptio* by the slave<sup>125</sup>, but this interpretation fails to explain why other Roman jurists would treat similar cases as *furtum*<sup>126</sup>. Roth, on the other hand, finding no explanation for this text, follows Cuiacius in introducing the word ‘*non*’ before ‘*usucapere*’, so that the complete opposite – and more predictable – solution is given<sup>127</sup>. This seems however an extreme solution, which finds moreover no support in the text of the Basilica, which also allows the *usucapio* to take place<sup>128</sup>, as Fargnoli has observed<sup>129</sup>. This latter author considers that the reason why there is no *furtum* is that a delivery *insciente domino* would not be equivalent to a delivery *invito domino*, the latter qualifying the delivery as a *furtum* but not the former<sup>130</sup>. Such a distinction, however, finds little support in the sources since, as will be seen in the following section, both problems are usually set on a same level by Roman jurists. Labeo, for instance, considers that there is no *furtum* if the owner knew about the actions of the non-owner but did not do anything about it<sup>131</sup>, making therefore knowledge and approval equivalent in practical terms. Ulpian even explicitly gives ignorance and disapproval the same significance when declaring in D. 47,2,48,3 (Ulp. 42 Sab.): “*Vetare autem dominum accipimus etiam eum, qui ignorat, hoc est, qui non consentit*”<sup>132</sup>. The following fragment (D. 47,2,48,4) moreover pictures the non-owner’s lack of authorization through the words “*inscio aut invito*”. Accordingly, no structural difference can be seen between an act *invito domino* and *insciente domino*.

Even when the owner’s ignorance does not seem to imply something essentially different to his formal disapproval, the reference to the *inscientia domini* may nonetheless contain the key to the understanding this text, pointing to the absence of *dolus* in the seller. The slave, in the administration of his *peculium*, may have considered that the sale of a particular object fell within his powers of administration, or that the owner would certainly approve of this particular act if he knew about it, thereby delivering the object to the buyer in good faith. He may have even experienced some doubts but, according to some of the criteria mentioned above, his level of certainty might have been enough to assume that the owner would approve if he knew. In this way, the expression ‘*insciente domino*’ indicates that the slave does not act against a clear instruction of the owner (*invito*

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<sup>125</sup> Huvelin, *Furtum* (1915), p. 498.

<sup>126</sup> For other critical remarks on Huvelin’s explanations see Fargnoli, *Furtum* (2006), p. 46–47.

<sup>127</sup> Roth, *Alfeni Digesta* (1999), p. 79.

<sup>128</sup> Bas. 50,3,32 = D. 41,3,34 (BT 2349/23).

<sup>129</sup> Fargnoli, *Furtum* (2006), p. 47 n. 133.

<sup>130</sup> Fargnoli, *Furtum* (2006), p. 48.

<sup>131</sup> D. 47,2,92(91) (Lab. 2 *piihanon a Paulo epitomatorum*): “*Si quis, cum sciret quid sibi subripi, non prohibuit, non potest furti agere*”. On this text, as well as on the relation between *scientia* and *voluntas*, see Milella, *Il consenso* (1988), p. 398–399.

<sup>132</sup> D. 47,2,48,3: “*We regard as a prohibiting owner one who does not know, one, in short, who does not actively agree*” (transl. Watson).

*domino*), but rather in the absence of it. If the owner later finds out about the sale and disapproves of it, it will become clear that ownership was not transferred, but the original subjective representation of the contracting parties remains intact, therefore granting the transferee a *possessio ad usucapionem* despite having acquired *insciente domino*. The only doubt which remains is whether Alfenus in the original, unabridged text, would have been more explicit regarding the subjective representation of the non-owner, or whether the mere reference to the owner's ignorance would have been enough to make this circumstance evident. If that was the case, the sharp distinction between the delivery *insciente domino* and the delivery *invito domino* made by Fagnoli would have to be adopted, at least regarding the solutions of early classical jurists, it being however clear that in most cases ignorance and disapproval would be equivalent notions regarding *furtum*.

It is moreover helpful, in order to understand the decision in D. 41,3,34, to compare it to a case where the basic facts would appear to be identical, but where the slave is liable for *furtum*:

D. 47,2,57(56),3 (Jul. 22 *dig.*): Cum autem servus rem suam peculiarem furandi consilio amovet, quamdiu eam retinet, condicio eius non mutatur (nihil enim domino abest): sed si alii tradiderit, furtum faciet<sup>133</sup>.

In this case, just as in D. 41,3,34, reference is made to a slave who delivers an object belonging to his *peculium*. A significant difference, however, is that Julian stresses the theftuous intent (*furandi consilium*) of the slave. As long as the slave does hold the object, his intent alone will not be enough to make him liable for theft, which would confirm that *furtum* cannot be committed *solo animo*. Only once he delivers the object he will become a thief. In principle, both in D. 41,3,34 and D. 47,2,57(56),3 a *translatio insciente domino* takes place, but it is the clearly theftuous intent in the second case which configures the existence of *furtum*, an intent which is absent in the text of Alfenus.

Another difficult text is discussed by Ulpian, being located under the title dealing with the *exceptio rei venditae et traditae*:

D. 21,3,1,5 (Ulp. 76 *ed.*): Si quis rem emerit, non autem fuerit ei tradita, sed possessionem sine vitio fuerit nactus, habet exceptionem contra venditorem, nisi forte venditor iustam causam habeat, cur

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<sup>133</sup> D. 47,2,56(57),3: "When a slave abstracts with theftuous intent a thing which is part of his *peculium*, so long as he holds it, its legal state is unchanged (for the master loses nothing); but if he delivers it to someone else, he commits theft" (transl. Watson). The text is discussed by Thomas, *Animus furandi* (1968), p. 16-17.

rem vindicet: nam et si tradiderit possessionem, fuerit autem iusta causa vindicanti, replicatione adversus exceptionem utetur<sup>134</sup>.

In this text we are told that the owner sold an object but did not deliver it, despite which the buyer gained possession of it without any flaw (*sine vitio*). In this circumstance, the praetor will grant the acquirer a defence against the owner, which will however not be successful if the latter has a good reason to resort to the *rei vindicatio*. The text poses a riddle for scholars: how can the buyer acquire *sine vitio* if he did not obtain the thing from the seller? This question is all the more intriguing considering that the above-studied<sup>135</sup> text of D. 41,2,5<sup>136</sup> offers an identical case, where a slave was owed on account of a stipulation but the other party gains possession without the owner's consent (*non voluntate mea nactus sis possessionem*), which instantly renders the acquirer a robber (*praedo*). Also in D. 41,2,6pr we are told that if the thing is delivered with the knowledge or intent of the owner the acquirer gains a *possessio bonae fidei*<sup>137</sup>. Under this framework, it seems impossible that a non-owner can acquire a *possessio sine vitio* if the delivery was not authorized by the owner, which is why Sansón and Salomón consider that in this case the object was obtained *voluntate domini* by the acquirer<sup>138</sup>. This claim cannot however be accepted, considering that if the delivery was performed by a non-owner *voluntate domini* – as Sansón thinks<sup>139</sup> – it seems hardly possible that a classical jurist would consider that the *traditio* did not take place, especially since the *traditio* by an authorized non-owner was consistently placed on the same level as that performed by the owner himself.

The meaning of D. 21,3,1,5 only becomes clear if one accepts that a *traditio invito domino* does not instantly render the delivered object a *res furtiva*, due to the decisive role of the intention of the person performing the delivery. One can

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<sup>134</sup> D. 21,3,1,5: “Put the case that a person buys something which is not delivered to him but of which he acquires possession without any flaw in the manner of his acquisition; he will have this defence against the vendor unless the later can show good cause why he should assert title to the thing; for even if the vendor did himself deliver possession but has good ground for asserting his title, he will have an answer to the defendant's defence” (transl. Watson).

<sup>135</sup> Chapter 2, Section 1(b) above.

<sup>136</sup> D. 41,2,5 (Paul 63 ed.): “Si ex stipulatione tibi Stichum debeam et non tradam eum, tu autem nactus fueris possessionem, praedo es: aequae si vendidero nec tradidero rem, si non voluntate mea nactus sis possessionem, non pro emptore possides, sed praedo es”.

<sup>137</sup> D. 41,2,6pr (Ulp. 70 ed.): “Clam possidere eum dicimus, qui furtive ingressus est possessionem ignorante eo, quem sibi controversiam facturum suspicabatur et, ne faceret, timebat. Is autem qui, cum possideret non clam, se celavit, in ea causa est, ut non videatur clam possidere: non enim ratio optinendae possessionis, sed origo nanciscendae exquirenda est: nec quemquam clam possidere incipere, qui sciente aut volente eo, ad quem ea res pertinet, aut aliqua ratione bonae fidei possessionem nanciscitur. Itaque, inquit Pomponius, clam nanciscitur possessionem, qui futuram controversiam metuens ignorante eo, quem metuit, furtive in possessionem ingreditur”.

<sup>138</sup> Sansón, *La transmisión* (1998), p. 183-184; Salomón, *Sine vitio* (2003), p. 42-43. Other scholars simply regard the text as heavily interpolated: Gonvers, *L'exceptio* (1939), p. 132.

<sup>139</sup> Sansón, *La transmisión* (1998), p. 183.

therefore agree with Sansón in conceiving that in this text the delivery was performed by a non-owner<sup>140</sup>, especially since it is hardly imaginable how else the acquirer could have gained possession over the object *sine vitio*. Moreover, that the delivery took place by a non-owner can be derived from the fact that the final sentence of the text presents the case where the owner himself performs the delivery (*nam et si tradiderit possessionem...*), which would draw a clear contrast with the first case. While the delivery is performed by a non-owner, he cannot be regarded as delivering *voluntate domini*. In this context, the only possibility for him not to commit *furtum* is to exclude the *dolus malus* or *animus furandi* at the delivery. One can for instance imagine that the owner only wanted to deliver in certain conditions, which the non-owner in charge of the delivery ignored, delivering the object in a way which conflicted with the owner's intent but without being aware of it.

Since several cases of delivery *invito domino* did not automatically lead to the application of the prohibition of usucapion of stolen goods, it becomes clear what the scope of the prohibition of usucapion really is. The statement of Gai 2,50, according to which usucapion does not take place easily (*non facile procedit*) in the context of the delivery by a non-owner, should therefore not be understood as "usucapion hardly ever takes place", but simply as a warning against the broad scope for usucapion which seems to flow from Gai 2,43. The somewhat specific examples which he offers allow him to emphasize this idea, but the final sentence of Gai 2,50 (*Aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur*<sup>141</sup>) shows that the possibility of usucapion is not so dramatically restricted as it would seem. Moreover, in the *Res cottidianae* we find a text which follows closely on Gai 2,51, discussing the same examples, and where it is said that "There are many ways in which it can happen that a person, labouring under a misapprehension, may sell or give as his own what in fact belongs to another and yet the thing can be usucapted (...)"<sup>142</sup> (transl. Watson). The fact that in one text we are told that usucapion "*non facile procedit*" and in the other that it "*potest pluribus modis accidere*" makes it clear that the cases of *traditio invito domino* leading to usucapion were not as restricted as traditionally thought. Finally, it is worth noting that also in the eyes of the compilers the scope of usucapion was not dramatically limited by *furtum*, since Theophilus is more

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<sup>140</sup> Sansón, *La transmisión* (1998), p. 183. Against this view Gonvers, *L'exceptio* (1939), p. 58.

<sup>141</sup> Gai 2,50: "There are also other ways that someone can transfer a third party's property to another without the taint of theft and leave it possible for the recipient to usucapt the thing" (transl. Gordon/Robinson).

<sup>142</sup> D. 41,3,36pr-1 (Gai. 2 *rer. cott.*): "(pr) Potest pluribus modis accidere, ut quis rem alienam aliquo errore deceptus tamquam suam vendat forte aut donet et ob id a bonae fidei possessore res usucapi possit: veluti si heres rem defuncto commodatam aut locatam vel apud eum depositam existimans hereditariam esse alienaverit. (1) Item si quis aliqua existimatione deceptus crediderit ad se hereditatem pertinere, quae ad eum non pertineat, et rem hereditariam alienaverit, aut si is, ad quem usus fructus ancillae pertinet, partum eius existimans suum esse, quia et fetus pecudum ad fructuarium pertinet, alienaverit".

emphatic than Gaius when declaring that he just presented “very few cases” where a delivery *invito domino* will not be regarded as *furtum*, while there are “very many cases” in which this happens as well<sup>143</sup>. Considering all of this evidence, one may dismiss the opinions of those authors<sup>144</sup> who consider that usucapion played only a minor role concerning movables which were delivered by a non-owner.

Apart from the absence of *dolus* or *animus furandi* by the *tradens*, there are other cases in which usucapion can take place, even when it is clear that the delivery was performed *invito domino*. This may happen, as Gaius himself tells us, in the delivery of immovable property, since most Roman jurists excluded the possibility of *furtum* in such cases, as shown in Gai 2,51<sup>145</sup> – an exception which however does not apply to things taken by force<sup>146</sup>. It should moreover be borne in mind that only things which have an owner can be stolen<sup>147</sup>, and accordingly there is no *furtum*, for instance, regarding objects of a *hereditas iacens*<sup>148</sup>. It may also happen that the *voluntas domini* is not relevant in the first place to transfer ownership, as happens when a son-in-power or slave has the *libera administratio peculii*. In all of these cases, however, the acquirer must be in good faith in order to gain *possessio ad usucapionem*, since otherwise an essential element for the acquisition through usucapion will be absent<sup>149</sup>.

Having reviewed the significance of *furtum* in relation to the transfer of ownership by a non-owner, it becomes clear that the possibility of usucapion is not as restricted as it is usually thought. Nonetheless, it does seem that the position of the acquirer is rather unbalanced with regard to that of the owner, the latter being in a considerably more solid position than the former. On the one hand, the owner can exercise, along with the *actio furti*, an *actio rei persecutoria*, which can either be the *rei vindicatio* – in case that the object can still be found – or a *condictio furtiva*. The possibility of success of the owner’s claim concerning the acquirer is moreover secured, as long as the object can be found, by the prohibition to acquire ownership over the *res furtiva*, which would only be lifted once the object returned to him. The transferee, on the other hand, will not only

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<sup>143</sup> Theoph. Par. 2,6,6: “Καὶ ἐγὼ μὲν ὀλίγιστά σοι εἶπον θέματα, ἡ δὲ τῶν πραγμάτων περίστασις ἐπινοεῖν δύναται πάμπολλα ἐν οἷς εὐρεθῆσεται τὸ ἀλλότριόν τις ἐκποιῶν παρὰ γνώμην δεσπότου καὶ FURTIVON αὐτὸ μὴ ἀποτελῶν” (It is but a very few cases that I have mentioned to you, but circumstances may give rise to very many cases where a man will be found alienating, against the owner’s will, a thing belonging to another person, without rendering it a stolen thing [transl. Murison]).

<sup>144</sup> E.g. Pampaloni, *Furto* (1941 [1894]), p. 235 ff.; Schulz, *Principles* (1936), p. 248.

<sup>145</sup> See also D. 41,3,38 *i.f.* (Gai. 2 *rer. cott.*); D. 47,2,25pr (Ulp. 41 *Sab.*). Concrete examples of this can be seen in D. 41,4,7,6, D. 21,3,1pr-1 and D. 44,4,4,32. It should however be noted that an early classical jurist as Sabinus did accept the *furtum* regarding immovable property, as can be seen in Aulus Gellius, *Noctes Atticae* 11,18,13.

<sup>146</sup> Gai 2,51. See also C. 7,26,5.

<sup>147</sup> D. 47,2,43,5 (Ulp. 41 *Sab.*).

<sup>148</sup> Gai 3,201; D. 9,4,40 (Jul. 22 *dig.*); D. 25,2,6,6 (Paul 7 *Sab.*); D. 47,2,69-71 (Marcell. 8 *dig.*); D. 47,4,1,15 (Ulp. 38 *ed.*); D. 47,19,6 (Paul 1 *ad Neratium*).

<sup>149</sup> See e.g. C. 4,51,1.

lack in several cases a *possessio ad usucapionem*, but his possession may even be qualified as vicious due to the lack of the owner's *scientia* or *voluntas*<sup>150</sup>. His good faith will moreover be of no importance if the thing received is a *res furtiva*, since, as it was shown above, the prohibition of the *Lex Atinia* taints the object itself, disregarding the representation of the transferee. The subjective conceptions of the acquirer can in fact only work to his disadvantage, since in case he receives from a non-owner who believes to be acting *voluntate domini*, while the acquirer knows that this is not the case, he will be prevented from acquiring through usucapion due to his bad faith regarding the *potestas alienandi* of the transferor (Gai 2,43 and 49). In this sense, Roman law offers a very different outlook to that of many modern legal systems, where the subjective good faith of the acquirer in itself justifies the acquisition of ownership by a non-owner. The modern regulation on this point was motivated by the attempt to protect legal certainty in commerce, but for the Romans – who were not indifferent to the interests of commerce – such notions are almost completely absent, favouring systematically the position of the owner<sup>151</sup>. Only very isolated cases can be found in Roman law which resemble the modern *a non domino* acquisition of ownership. This is the case in a constitution of emperor Zeno (5<sup>th</sup> century AD) which lays down a *privilegium fisci* according to which everyone acquiring something from the *fiscus* would become owner, even if the *fiscus* was not actually owner itself<sup>152</sup>. An earlier, more shy example of the protection of legal certainty can be found in D. 44,4,4,23 (Ulp. 76 *ed.*), where Ulpian considers more practical to grant an *exceptio* to the acquirer against a *pupillus* who attempts to recover an object fraudulently alienated by his guardian, adducing, among other elements, that the other party could not be aware of the inner relationship between *tutor* and *pupillus* (*unde enim divinat is, qui cum tutore contrahit?*)<sup>153</sup>.

### 3. *Voluntas domini* and personal relations between owner, transferor and acquirer. The case of the *nuntius*

The transfer of ownership by a non-owner may involve a series of complex personal relationships which arise between the owner and the transferor in the first place, and between the transferor and the acquirer. In the latter case, it

<sup>150</sup> See on this point D. 41,2,6pr (Ulp. 70 *ed.*).

<sup>151</sup> See on this point Schulz, *Principles* (1936), p. 248; Burdese, *Autorizzazione* (1950), p. 87; Burdese, *Error in dominio* (1953), p. 44; Kaser, *RPR* (1971) I, p. 413 and *RPR* (1975) II, p. 276; Potjewijd, *Beschikingsbevoegdheid* (1998), p. 13; Sansón, *La transmisión* (1998), p. 239-241; Longchamps, *Nemo plus iuris* (2015), p. 81.

<sup>152</sup> C. 7,37,2-3 and Inst. 2,6,14. There are earlier constitutions which indicate that this privilege already existed in a similar form at the time of Alexander Severus, being however referred to objects in which the *fiscus* is co-owner. See C. 10,4,1 (Alexander, 225); C. 4,52,2 (Gordianus). See on this *privilegium fisci* Lenz, *Privilegia fisci* (1994), p. 75 ff.; Murillo, *Communium rerum alienatione* (2008), p. 669.

<sup>153</sup> Knütel, *Dolus tutoris* (1986), p. 123. See on this text Chapter 4, Section 6.

should be noted that the absence of direct representation in the Roman law of obligations implies that the acquirer cannot in principle direct himself against the principal who authorized the delivery<sup>154</sup>. Instead, the non-owner/transferor will inevitably be bound towards the other party, as the following text shows:

D. 3,3,67 (Pap. 2 *resp.*): Procurator, qui pro evictione praediorum quae vendidit fidem suam adstrinxit, etsi negotia gerere desierit, obligationis tamen onere praetoris auxilio non levabitur: nam procurator, qui pro domino vinculum obligationis susceperit, onus eius frustra recusat<sup>155</sup>.

In this case, the person who performed the delivery no longer acts as the owner's *procurator*, but this circumstance will not excuse him from responding for the obligations regarding the buyer, who bought from the *procurator* and not from the owner. Accordingly, the fact that the non-owner assumed an obligation *pro domino* and that he no longer acts as the *procurator* of the delivered thing is completely irrelevant with regard to the purchaser, since the parties which concluded the sale will remain contractually bound to each other.

That the non-owner/transferor and the acquirer are the only parties to the contract can lead to interesting consequences, as is the case in the text of D. 6,2,14, where the prohibition to deliver notified by the owner to the seller after the sale was concluded leaves the latter in an impossible situation regarding the buyer, since the seller will still be obliged to deliver while the owner remains unconnected to the sale. The responsibility for the breach of the obligations arising from the sale would exclusively affect the seller/non-owner, and the owner could only eventually be made accountable through an *actio mandati contraria* for the loss that the seller may suffer. The praetor remedies this situation in this particular case in a more straightforward way by simply granting the buyer the *in bonis* protection in case the seller delivers despite the owner's prohibition.

Another text which reflects the consequences of the obligatory link between transferor and acquirer and the exclusion of the owner from this relation is D. 17,1,49 (Marcel. 6 *dig.*), where someone sells an object on behalf of a person who seemed to be the owner, when in fact the person in charge of selling was the owner. This case will be discussed in further detail when dealing with the *error in dominio*<sup>156</sup>, but for the time being it is worth noting that the seller will remain, despite his error, personally bound to protect the buyer against eviction

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<sup>154</sup> Potjewijd, *Beschikingsbevoegdheid* (1998), p. 125–126.

<sup>155</sup> D. 3,3,67: "A *procurator* who has given a guarantee against a successful claim for property which he has sold, even if he has ceased to act as agent, will still not receive the praetor's help to free him from the burden of his obligation; for it is in vain that a *procurator* who has taken on the bond of an obligation on his principal's behalf tries to rid himself of his burden" (transl. Watson). See on this text Finkenauer, *Direkte Stellvertretung* (2008), p. 481–483.

<sup>156</sup> Chapter 2, Section 6(b).

(*obstrictum emptori*), and accordingly will not be able to claim from him the object sold.

Having as a starting point the strict separation between the owner and the transferor concerning the obligations arising from the contract, it should be noted that this distinction was significantly softened through the *actiones adiecticiae qualitatis*, by means of which the praetor allowed the third party to direct himself not only against the other contracting party, but also against the principal. Initially these actions only referred to specific situations, such as when the *pater* grants a *peculium* to his son-in-power or slave (*actio de peculio*) or if the *dominus negotii* appoints a manager for his business (*actio institoria*). Nonetheless, Papinian extended this latter remedy even to the acts concluded by a *procurator*, as shown by a well-known text:

D. 19,1,13,25 (Ulp. 32 *ed.*): Si procurator vendiderit et caverit emptori, quaeritur, an domino vel adversus dominum actio dari debeat. Et Papinianus libro tertio responsorum putat cum domino ex empto agi posse utili actione ad exemplum institoriae actionis, si modo rem vendendam mandavit: ergo et per contrarium dicendum est utilem ex empto actionem domino competere<sup>157</sup>.

This famous text represents<sup>158</sup> a break-through in legal thinking, being widely commented when discussing the historical development of direct representation since Papinian extends to the principal the responsibility for the obligations concluded by his *procurator*, signaling thereby the decline of the traditional resistance to bind someone to a contract concluded by another person. From the perspective of the transfer of ownership there is nothing new here – the authorized non-owner, as usual, validly transfers ownership – but from the point of view of the responsibility for eviction it improves the position of the acquirer in case the owner gave a mandate to sell (*si modo rem vendendam mandavit*), since the purchaser will not have to settle for seeking responsibility only from the agent.

The existence of the *actiones adiecticiae qualitatis* shows that the personal relationship between the principal and the transferor/non-owner could be relevant for the claims which the acquirer could make for any breach of the contract. This in turn raises the question of whether the existence of different

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<sup>157</sup> D. 19,1,13,25: “If a *procurator* sells and gives a *cautio* [against eviction] to the buyer, should an action be given both to and against the owner [the *procurator*’s principal]? Papinian, in the third book of his *Responsa*, thinks the owner can be sued on the purchase in an action analogous to the model of the action for a business manager’s conduct, provided that he mandated the object’s sale. Therefore, conversely it should be ruled that the owner has an analogous action on the purchase” (transl. Watson).

<sup>158</sup> Among the extensive literature discussing this fragment, see Briguglio, *L’interdipendenza* (2007), p. 100 ff.; Miceli, *L’interdipendenza* (2007), p. 111 ff.; Finkenauer, *Direkte Stellvertretung* (2008), p. 479–481.

personal relations between the owner/principal and the non-owner/transferor would be relevant for the transfer of ownership. As has been shown, the relationship between the transferor and the acquirer was governed by the contractual relation binding them, which could eventually affect the *dominus negotii*. On the other hand, the personal relationships between the owner and the transferor present a less defined outline. Transactions involving the transfer of ownership could be carried out by a variety of persons of different social standing, and give place to different consequences from the perspective of the law of obligations. In order to transfer ownership it was only essential for the delivery to be performed with the owner's authorization, i.e. *voluntate domini*. The fact that the personal relationship between the parties is of secondary importance as long as the existence of the owner's authorization is there can be seen from the fact that in some texts, it is not even clear what the personal relationship between the parties is, stressing only the fact that the alienation takes place according to the owner's instructions<sup>159</sup>.

Numerous examples can be found where there is no clear underlying contractual relationship, but simply a specific authorization – which is only occasionally described as a *iussum* – to perform a particular act. An example which has already been mentioned is the alienation of a common object by one of the co-owners who acts with the authorization of the other co-owners. In a state of co-ownership, the different individuals involved could agree at the beginning of their relationship the circumstances under which the common property or each share could be sold<sup>160</sup>, or could simply grant their approval at a later stage to an alienation performed by one co-owner individually. In these cases there is no reference to a specific contract between those authorizing and the co-owner transferring ownership, but a mere informal authorization suffices to transfer of ownership. Similarly, however, those parties which concluded a contract of *societas* can grant authorization to a single individual among them to transfer ownership of a common object<sup>161</sup>. The fact that in this case there is a contractual relationship among the parties does not add any additional elements to determine the transfer of ownership: the existence of an authorization is by itself enough.

A similar contrast to that of the co-owners and the partners in a *societas* can be seen in the case of the *procurator* and the *mandatarius*. From his origins, the *procurator* appears to have been a rather vague institution within the legal world, and in the last decades the opinion which has become dominant is that his

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<sup>159</sup> See D. 39,5,2,6 (Jul. 60 *dig.*); D. 39,5,25 (Jav. 6 *epistulae*); D. 46,3,17 (Pomp. 19 *Sab.*)

<sup>160</sup> See e.g. D. 8,5,20,1 (Scaev. 4 *dig.*).

<sup>161</sup> D. 12,1,26 (Paul 32 *ed.*): “Si socius propriam pecuniam mutuam dedit, omnimodo creditam pecuniam facit, licet ceteri dissenserint: Quod si communem numeravit, non alias creditam efficit, nisi ceteri quoque consentiant, quia suae partis tantum alienationem habuit”. See also D. 17,2,45 (Ulp. 30 *Sab.*), concerning the theft of the common thing.

function had more of a social than a legal content<sup>162</sup>. Recently, Klinck has even claimed that the term ‘*procurator*’ had no legal significance, except perhaps regarding the *procurator ad litem*<sup>163</sup>. Contrary to this opinion, there are several texts<sup>164</sup> where we are told that the *procurator* could transfer ownership within certain limits<sup>165</sup>, which shows that the sole fact of being *procurator* did have some legal significance, at least regarding the *potestas alienandi*<sup>166</sup>. The existence of such power to dispose appears to be disconnected from the particular legal framework that would govern the personal relations between principal and *procurator*, which is in itself a controverted issue. According to scholars, initially the relationship between principal and *procurator* would have been governed by the *actio negotiorum gestorum*, and only around the time of Julian would jurists have framed this institution within the contract of mandate<sup>167</sup>. While this evolution had relevant consequences for the personal claims that may rise between both parties, it appears to have been of little significance for the transfer of ownership, where the decisive element for the transfer of ownership was the *voluntas domini*<sup>168</sup>. This can be seen in D. 6,2,14, where the existence of a contract of mandate between owner and *procurator* implies that the latter may sue the principal with the *actio mandati contraria*, but the ground for the transfer of ownership, as the text explicitly shows, is that the non-owner transfers *voluntate domini*<sup>169</sup>. One can therefore discard the opinion of Klinck, who considers that every transfer of ownership by a *procurator* would only be valid due to the existence of a contract of mandate<sup>170</sup>. The existence of a contract of mandate only appears to be relevant in this context when the *procurator* requires a special authorization to transfer ownership over some goods, which could be granted through a contract of mandate<sup>171</sup>.

Another clear example where there is no underlying contractual relationship between the owner and the transferor is that of the alienation performed by a slave or a son-in-power. As shown above, the persons *alieni iuris* could transfer ownership in two cases: (1) if they had the *libera administratio peculii*; (2) if they acted *voluntate domini*. As long as these individuals are duly authorized, the

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<sup>162</sup> This view was already defended by Schlossmann, but only after the monographic study of Angelini did it become widespread among scholars.

<sup>163</sup> Klinck, *Procurator* (2007), p. 25-52.

<sup>164</sup> E.g. Gai 2,64; D. 6,1,41,1.

<sup>165</sup> On the scope of the power of the *procurator* see Chapter 2, Section 4(b) below.

<sup>166</sup> See Chapter 2, Section 4(b) below.

<sup>167</sup> See on this point Finazzi, *Negotiorum gestio* (1999) I, p. 176-190, 215-277; Klinck, *Procurator* (2007), p. 32-41; Burdese, *Potestas alienandi* (2009), p. 19.

<sup>168</sup> This is explicitly declared in D. 6,1,41,1. Also D. 41,1,9,4 makes reference to the *voluntas domini* of someone who has broad powers of administration, although Gaius does not explicitly mention that he is dealing with a *procurator* in this case.

<sup>169</sup> Other texts present the *procurator* as bound towards the owner by a contract of mandate, such as D. 17,1,49 (Marcell. 6 *dig.*) and C. 4,35,12 (Diocletian/Maximianus, 293).

<sup>170</sup> Klinck, *Procurator* (2007), p. 42-44.

<sup>171</sup> See on this point Chapter 2, Section 4(b) below.

outcome of the *traditio* performed by them is identical to that of a person *sui iuris*. Both groups of persons are in fact set on equal ground on this point by the above-mentioned text of D. 6,1,41,1 (Ulp. 17 *ed.*). There is, accordingly, no reason to exclude the alienations by a person *alieni iuris* from the general analysis of the *potestas alienandi*, or to understand that they take place on a different legal ground<sup>172</sup>. The role of the *voluntas domini* in the delivery by a person *alieni iuris* is highlighted in numerous texts, including the following:

D. 39,5,9,2 (Pomp. 38 *Sab.*): Quod filiusfamilias patris iussu aut voluntate donavit, perinde est, ac si pater ipse donaverit aut si mea voluntate rem meam tu nomine tuo Titio dones<sup>173</sup>.

Pomponius makes it clear that the gift made *voluntate domini* by the son-in-power will have the same consequences as if performed by the owner himself. Moreover, it is worth noting that the text puts ‘*iussum*’ on the same level as ‘*voluntas*’. This could appear to indicate a different ground for the transfer of ownership by a non-owner, and in fact Miquel considers that the delivery *iussu domini* is to be distinguished from that performed *voluntate domini*, the former being performed on behalf of the owner and the latter not. However, as will be shown below<sup>174</sup>, such interpretation is not firmly rooted in the sources. These expressions should rather be seen as set on an equal ground with each other, as well as with the other cases shown in the text, which could therefore be seen as indicating that the same result will be achieved: (1) if the gift is done *iussu domini*; (2) if done *voluntate domini*; (3) if the owner (the *pater*) makes the gift himself; (4) if ‘you’ – we may assume, a *sui iuris* – perform the gift on your behalf with the owner’s authorization.

Concerning the person *alieni iuris* it is also worth noting that the grounds for which the *pater* may be liable for the contracts concluded by them do not necessarily coincide with the ground upon which ownership is transferred. In other words, it is possible that the *pater* is liable for the contract concluded despite not having authorized the transfer of ownership over a particular object. This is for instance the case in the *actio de peculio*, which is granted against the principal merely because of the concession of a *peculium* to his slave or son-in-power and without taking into account whether he authorized a particular act to take place<sup>175</sup>.

<sup>172</sup> As claimed by Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 126.

<sup>173</sup> D. 39,5,9,2: “Any gift made by a son-in-power on the instructions of or with the consent of his father has the same standing as if the father made the gift himself or as if you gave some property of mine to Titius in your own name with my consent” (transl. Watson).

<sup>174</sup> Chapter 2, Section 5.

<sup>175</sup> See Gai 4,72a: “... Licet enim negotium ita gestum sit cum filio servove, ut neque voluntas neque consensus patris dominive intervenerit, si quid tamen ex ea re, quae cum illis gesta est, in rem patris dominive versum sit, quatenus in rem eius versum fuerit, eatenus datur actio...”

Returning to D. 39,5,9,2, the fact that Pomponius explicitly declares that the delivery *iussu domini* produces the same effects as that performed *voluntate domini* is a first sign of the fact that Roman jurists often resort to various terms to refer to the owner's authorization. One may in fact identify cases in which the owner's authorization to transfer ownership is not only rendered through the reference to existence – or lack of – *voluntas domini*<sup>176</sup>, but also to the *scientia*<sup>177</sup>, *consensus*<sup>178</sup>, *praepositio*<sup>179</sup>, *iussum*<sup>180</sup>, *mandatum*<sup>181</sup>, *ratihabitio*<sup>182</sup>, *propositum*<sup>183</sup> or *permissum*<sup>184</sup>, to name a few<sup>185</sup>. It is however worth noting that these expressions may also take place in other contexts where there is no transfer of ownership by a non-owner. For instance, similar expressions – *iussum/iubere*, *voluntas*, *permittere/permissum*, *mandare* – are used in the context of the *delegatio tradendi*<sup>186</sup>, where the delivery is performed *a domino*<sup>187</sup>. The terminological coincidence at this point is nothing strange, since the authorization given in the context of the *delegatio* shares several features with the *voluntas domini* in the delivery by a non-owner, as are its revocability, informal character, the possibility of ratifying it, etc.<sup>188</sup>, all of which are moreover features which are readily noticeable among different cases where someone authorizes a third person to perform an act involving a patrimonial loss. Moreover, expressions such as *iussum* have such a broad meaning that they can even indicate the delivery following the intent as manifested by the deceased in the testament<sup>189</sup>. Nonetheless, whenever the above-mentioned expressions are used in the context of the transfer of ownership by a non-owner who follows the

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<sup>176</sup> See e.g. D. 6,1,41,1 (Ulp. 17 *ed.*); D. 21,2,61 (Marcel. 8 *dig.*); C. 5,12,14 (Diocletian/Maximianus, 293); C. 8,20,1 (Caracalla, 214); C. 3,32,3pr (Alexander, 222). See on this point Miceli, *Rappresentanza* (2008), p. 185.

<sup>177</sup> D. 24,1,38,1 (Alf. 3 *dig. a Paulo epitomatorum*); D. 41,2,6pr (Ulp. 70 *ed.*) (*sciente aut volente*); C. 4,26,10pr-1 (Diocletian, Maximianus, 294); C. 3,32,3pr (Alexander, 222).

<sup>178</sup> D. 1,19,1,1 (Ulp. 16 *ed.*); D. 50,17,165 (Ulp. 53 *ed.*); C. 3,29,8,1 (Diocletianus/Maximianus, 294); C. 3,32,3,1 (Alexander, 222); C. 4,51,5 (Diocletian, 294); C. 7,32,7 (Diocletian/Maximianus, 293); C. 8,53(54),14 (Diocletian/Maximianus, 293).

<sup>179</sup> D. 12,1,41 (Afr. 8 *quaest.*).

<sup>180</sup> D. 18,1,15,2 (Paul 5 *Sab.*) (*iussu meo alii tradideris (...) iussu meo alii tradas*).

<sup>181</sup> D. 17,1,57 (Pap. 10 *resp.*); D. 41,4,14 (Scaev. 25 *dig.*); D. 44,3,15,2 (Venuleius 5 *interdictorum*).

<sup>182</sup> D. 24,1,38,1 (Alf. 3 *dig. a Paulo epitomatorum*); D. 41,3,44,1 (Pap. 23 *quaest.*).

<sup>183</sup> D. 18,1,15,2 (Paul 5 *Sab.*).

<sup>184</sup> D. 12,6,53 (Proc. 7 *epistularum*) (*a domino id permissum non esset*).

<sup>185</sup> See e.g. D. 17,1,5,4 (Paul 32 *ed.*) (*praeceperit*); D. 20,6,10,1 (Paul 3 *quaestionum*): “Idemque est in omnibus, quibus concessum est rem alienam vendere...”. In contexts outside the transfer of ownership there are similar expressions indicating the owner's authorization, such as *'patientia'*, which is to be found in D. 39,3,19 (Pomp. 12 *ad Quintum Mucium*) (damages by an authorized neighbour).

<sup>186</sup> Alonso, *Delegación* (2001) I.1, p. 27 ff.; Zandrino, *Delegatio* (2010), p. 57–65.

<sup>187</sup> See on this point Chapter 1, Section 4(c) above.

<sup>188</sup> See on this point Alonso, *Delegación* (2001) I.1, p. 81 ff.

<sup>189</sup> See e.g. D. 12,6,67pr (Scaev. 5 *dig.*).

indications of the owner, it is safe to claim that they all have an equivalent significance from the perspective of the law of property.

Considering the variety of expressions used by Roman jurists, the key issue is to determine whether any of them conveys a different significance for the purpose of the transfer of ownership, as is the case in the alienation by a son-in-power or slave with the *libera administratio peculii*. From the manner in which the sources approach this problem, it would appear that most of the expressions mentioned here only reflect differences in the particular relationship between the owner and the transferor, differences which are however in principle of no significance for the transfer of ownership. This is particularly the case with references to the existence of a *mandate*, *iussum* or *praepositio*. When approaching a problem exclusively from the perspective of the transfer of ownership, the expression '*voluntas domini*' appears to be the most general term used to refer to the owner's authorization, which can be observed by the use of this expression by Roman jurists when discussing the transfer of ownership by an authorized non-owner in general terms, such as D. 41,1,9,4 or D. 6,1,41,1, as well as by its application when solving concrete cases, including D. 6,2,14. However, there are other general expressions which can replace '*voluntas domini*', as happens when reference is made to the owner's *scientia*, *consensus*, *ratihabitio* – before the delivery – or *permissum*. The fact that the different expressions and cases covered here have an equivalent significance regarding the transfer of ownership by a non-owner becomes moreover evident not only by the fact that they all have the same consequence, but especially due to the fact that Roman jurists often name the different cases side by side when discussing the problem of the transfer of ownership by a non-owner<sup>190</sup>. It should be borne in mind that the problem is completely different regarding the *libera administratio peculii*, which is often presented as an individual ground for the transfer of ownership, next to the *traditio voluntate domini*, and even leads to different practical results.

The outlook offered here illustrates that the different obligatory relationship which may arise between owner and transferor/non-owner should not lead to an isolated treatment from one another. From the perspective of the transfer of ownership, the significance of the *voluntas domini* remains largely unaltered. However, while the consequences from the perspective of the transfer of ownership are basically the same in all of these cases, the owner's authorization acquires particular features in each of them. In certain cases, such as the *praepositio*, it appears as a more general agreement for a series of operations, while the *iussum* refers normally to a more specific authorization. In both of these cases, moreover, the owner's authorization to dispose is essentially unilateral, even if it takes place in the context of a contract binding the parties<sup>191</sup>. These differences

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<sup>190</sup> See Chapter 1, Section 2(a) above.

<sup>191</sup> Potjewijd, *Beschikingsbevoegdheid* (1998), p. 158 regards that the *voluntas domini* as essentially unilateral. This does not mean that the existence of an underlying agreement between the parties is irrelevant. For instance, D. 6,2,14 (Ulp. 16 *ed.*) and D. 17,1,49

are largely irrelevant to determine the transfer of ownership, and the only possible exception in this regard is that Roman jurists take into account the importance of the *fides* which governs for instance the acts of the *procurator*, to introduce some equitable considerations to the attribution of property, but it is not even clear if the decision is inspired in this case on the personal relation as such or on objective criteria regarding the best administration of the owner's goods<sup>192</sup>. Apart from this circumstance, the different forms which the owner's authorization may adopt are only relevant insofar as they show that such authorization may present itself in different ways. One of the most curious manifestations of this authorization takes place when the owner has a mere *scientia* of the delivery, which will be reviewed in further detail in the following paragraphs.

The knowledge (*scientia*) of the owner is referred to in several cases by Roman jurists as sufficient for the transfer of ownership by a non-owner to take place<sup>193</sup>. It is interesting at this point to draw a parallel with the law of theft, since, as shown in the previous section, the *scientia domini* is not essentially different to the *voluntas domini*, but it does introduce certain nuances to the latter, more general notion, which allow for instance to preclude the existence of *furtum* in case the delivery is performed *insciente domino*. Similarly, there seems to be an equivalence between the *traditio invito domino* and that *insciente domino*, since in both cases ownership will not be transferred. It is moreover worth noting that in different contexts, Roman jurists consider that the lack of objection of someone who knows of someone else's act affecting him can be seen as an authorization, as is explicitly declared in the context of mandate<sup>194</sup>, theft<sup>195</sup> and the constitution of mortgage<sup>196</sup>. In the context of manumission, it is also pointed out that the ignorance of owning a slave excludes the possibility of the latter being manumitted due to the impossibility of a *voluntas domini* aimed at that objective<sup>197</sup>, which again draws a strong link between knowing and willing. An equivalence between these two elements is also to be found in the transfer of ownership, specifically a case of co-ownership:

D. 21,2,12 (Scaev. 2 *resp.*): Quidam ex parte dimidia heres institutus  
universa praedia vendidit et coheredes pretium acceperunt: evictis

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(Marcel. 6 *dig.*) present some applications of the *actio mandati contraria* against the owner, showing a more bilateral setting for the relationship between owner and transferor.

<sup>192</sup> See on this point Chapter 2, Section 3(d) below.

<sup>193</sup> E.g. D. 24,1,38,1 (Alfenus 3 *dig. a Paulo epitomatorum*); D. 41,2,6pr (Ulp. 70 *ed.*).

<sup>194</sup> D. 50,17,60 (Ulp. 10 *disputationum*): "Semper qui non prohibet pro se intervenire, mandare creditur".

<sup>195</sup> D. 47,2,92(91) (Lab. 2 *pithanon a Paulo epitomatorum*)

<sup>196</sup> C. 8,15,2 (Severus/Antoninus, 204).

<sup>197</sup> D. 40,12,28 (Pomp. 12 *ad Quintum Mucium*): "Non videtur domini voluntate servus in libertate esse, quem dominus ignorasset suum esse (...)" See on this text Chapter 2, Section 6(b) below.

his quaero, an coheredes ex empto actione teneantur. Respondi, si coheredes praesentes adfuerunt nec dissenserunt, videri unumquemque partem suam vendidisse<sup>198</sup>.

In this case, one heir obtains half of a piece of land, but proceeds nonetheless to sell it as a whole, distributing the price obtained among the other coheirs. Scaevola wonders about the responsibility of the other heirs in case the buyer is evicted, which in turn implies determining whether they approved of such a sale. The answer implies that the coheirs were present at the sale but did not actively approve nor disapprove (*praesentes adfuerunt nec dissenserunt*), and under this circumstance Scaevola considers that they can be seen as selling their own share. The knowledge of an act without objecting it has therefore the same consequence as that actively authorized, being considered as performed by the owner himself.

Despite what has been said so far, the basic equivalence between *scientia* and *voluntas* in the context of the transfer of ownership does not imply that acts *invito domino* and *insciente domino* are identical in every aspect. The fact that Roman jurists explicitly draw an equivalence between knowing about someone else's act – while tolerating it – and actively approving of it shows that there is a substantive factual difference. It seems in fact more serious to act against the will of the owner than only without his knowledge, as can be seen in the fact that the existence of *furtum* will be more likely to take place in a delivery *invito domino* than in that *insciente domino*, as shown in the previous section. Ulpian, for example, declares that “Someone who can alienate against the will of others can do so all the more if they are in ignorance or absent”<sup>199</sup> (D. 50,17,26, transl. Watson, modified), which makes it clear that it is worse to alienate against the will of the owner than simply without his knowledge. It is worth noting that Lenel<sup>200</sup> locates this text in the context of the faculties of the co-owners, and specifically following D. 10,2,43, which deals with the faculty of a co-heir to ask for the division of the inheritance even against the will of the others. It is however not entirely clear in which circumstances the co-heir could alienate against the will of the others, and it seems more tempting to follow the opinion of Fleckner, according to whom the text could originally refer to the manumission by a co-owner<sup>201</sup>. Moreover, it cannot be excluded that the text referred to a case of transfer of ownership, perhaps by a legal guardian, especially considering that Lenel also considers the first title of Ulpian's 30<sup>th</sup> book *ad*

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<sup>198</sup> D. 21,2,12: “Someone, being instituted heir as to half, sold land and all the heirs took the price; the question is: If there be eviction from that land, are the coheirs generally liable to the action on purchase? My reply is that if the co-heirs were present and did not dissent, each will be deemed to have sold his own share” (transl. Watson, modified).

<sup>199</sup> D. 50,17,26 (Ulp. 30 *Sab.*): “Qui potest invitis alienare, multo magis et ignorantibus et absentibus potest”.

<sup>200</sup> Lenel, *Paling.* (1889) II, col. 1131.

<sup>201</sup> Fleckner, *Antike Kapitalvereinigungen* (2010), p. 358 n. 105.

*Sabinum* “*De emptione et venditione*”<sup>202</sup>. Whatever the case may be, the text shows that classical jurists did not give an identical value to the alienation *invito domino* and *insciente domino*, and that the compilers emphasized this point by making a *regula iuris* out of it. All of this evidence shows that, while there is a basic factual difference between acts performed *invito domino* and *insciente domino*, there is no relevant difference regarding the transfer of ownership, in which context Roman jurists set *voluntas* and *scientia* at the same level.

The evidence presented so far shows that the *scientia domini*, despite its peculiar features, can be listed among the other expressions which ultimately refer to the *voluntas domini*. Having mentioned the most common manifestations of the *voluntas domini* as legal basis for the delivery, there remains a case where it is not clear that the transfer of ownership takes place by virtue of the owner’s authorization, namely when the delivery is performed by a messenger (*nuntius*). The figure of the *nuntius* has remained to a large extent enigmatic for modern scholars from a legal point of view, and since the 19<sup>th</sup> century it is sharply distinguished from other forms of intermediation. The reason for this distinction lies in the different consequences which follow in the field of the law of obligations from the agreements concluded by a messenger, since the sources show that the *dominus negotii* would be bound directly by the agreement concluded through a letter or messenger<sup>203</sup>, unlike any other case of intermediation in Roman law. This circumstance, no doubt, sets the *nuntius* on a completely different level from any other case in which a contract is concluded through someone else. The reason generally given for this essential difference is that the messenger would not conclude the agreement himself, but rather act as an instrument to convey the will of the owner. This distinction, however, does not necessarily play a relevant role in the context of the transfer of ownership by a non-owner, where the personal relationship between owner and transferor is of secondary importance, the key issue being the *voluntas domini* of the owner. One could therefore be drawn to think that the *nuntius*, as every other case of authorized delivery by a non-owner, will only transfer ownership if he delivers *voluntate domini*, which would appear to be confirmed by a solution given by Julian:

D. 39,5,2,6 (Jul. 60 *dig.*): Sed si quis donaturus mihi pecuniam dederit alicui, ut ad me perferret, et ante mortuus erit quam ad me perferat, non fieri pecuniam dominii mei constat<sup>204</sup>.

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<sup>202</sup> Lenel, *Paling.* (1889) II, col. 1127.

<sup>203</sup> D. 18,1,1,2 (Paul 33 *ed.*): “Est autem emptio iuris gentium, et ideo consensu peragitur; et inter absentes contrahi potest, et per nuntium, et per litteras”. See also Gai 3,136; C. 4,50,9 (Diocletian/Maximianus, 294).

<sup>204</sup> D. 39,5,2,6: “But if someone who intends to make me a gift of money gives it to somebody to bring it to me and then dies before this is done, it is established that the money does not come into my ownership” (transl. Watson).

In this text the person performing the delivery is not explicitly labelled a ‘*nuntius*’, but scholars have traditionally assumed him to be so<sup>205</sup>, perhaps on account of the humble role of the agent, who simply has to bring over (*perferre*) an object. The owner in this case hands over an object to his *nuntius*, so that the latter takes it as a gift to someone else. However, the death of the owner before the object has been delivered prevents the transfer of ownership from taking place. This case resembles other solutions presented above<sup>206</sup>, in which the death of the owner precludes the existence of a *voluntas domini* at the delivery and therefore the passing of ownership, due to the lack of *potestas alienandi*<sup>207</sup>.

The context of the fragment provides vital information in order to understand the significance of this text. Within D. 39,5,2, Julian describes several problems related to the intervention of an intermediary when making a gift. In D. 39,5,2pr-4, he discusses whether the gift itself is valid and who is bound by the stipulation concluded by another person. D. 39,5,2,5 and 7, on the other hand, focus on the gift made under a condition (*condicio*), discussing whether ownership is transferred or not. D. 39,5,2,5 in particular mentions that ownership will be transferred even if the condition was fulfilled after the death or insanity of the donor, i.e. even after he could no longer agree to the gift<sup>208</sup>. Julian appears to focus for a moment in D. 39,5,2,6 on the general rules regarding the death of the donor, before reassuming the problem of the gift under condition in D. 39,5,2,7. The text of D. 39,5,2,5 becomes therefore key for the understanding of D. 39,5,2,6, not only because the latter appears to develop a particular point of the former, but also because they offer opposite results. The outcome offered by Julian in D. 39,5,2,5 is in itself remarkable considering that the jurist sees no problem for the transfer of ownership in the fact that after the death of the donor ownership lies with another person, who did not agree to the transfer of ownership<sup>209</sup>. Ulpian, as shown above<sup>210</sup>, would offer in D. 23,3,9,1 (Ulp. 31

<sup>205</sup> Siber, *Römisches Recht* (1928) II, p. 410, 412; Kaser, *RPR* (1971) I, p. 267 n. 12; Guzmán, *DPR* (2013) I, p. 646.

<sup>206</sup> Chapter 2, Section 1(b).

<sup>207</sup> Nonetheless Guzmán, *DPR* (2013) I, p. 646 considers that ownership is not transferred due to the lack of a *iusta causa traditionis*: since the *nuntius* would only bring forward the will of the owner in order to make a gift, this author argues that death of the owner would prevent the formation of the *iusta causa traditionis*. One could however hardly expect Julian to harbour such thoughts, considering his opinions regarding the need for an agreement on the *iusta causa traditionis* in D. 41,1,36 (Jul. 13 *dig.*). It seems therefore more likely that Julian would approach this case in the context of the lack of *voluntas domini* of the *traditio* by a non-owner.

<sup>208</sup> D. 39,5,2,5 (Jul. 60 *dig.*): “Si pecuniam mihi Titius dederit absque ulla stipulatione, ea tamen condicione, ut tunc demum mea fieret, cum Seius consul factus esset: sive furente eo sive mortuo seius consulatum adeptus fuerit, mea fiet”.

<sup>209</sup> The contrast between both solutions is further discussed by Haymann, *Textkritische Studien* (1920), p. 95-97; Voci, *Modi di acquisto* (1952), p. 110-111; Masi, *Studi sulla condizione* (1966), p. 142-44; Schiemann, *Pendenz* (1973), p. 10-12, 97-98; Stagl, *Favor dotis* (2009), p. 197-203.

<sup>210</sup> See Chapter 2, Section 1(b).

*Sab.*) a similar outcome only on account of the *favor dotis*, considering that in principle ownership should not be transferred. The problem behind this case refers to the effects of the death of the owner concerning the *potestas alienandi* while the condition is pending. In this context, Julian would bring up the text of D. 39,5,2,6 to show that the outcome is different when the death takes place before the delivery without there being a pending suspensive condition. That the author draws a contrast between this text and the case of D. 39,5,2,5 is shown by the introductory word *sed*<sup>211</sup>. Accordingly, Julian applies in D. 39,5,2,6 the general rule found among Roman jurists concerning the death of the owner before the delivery, according to which ownership cannot be transferred unless the heirs grant their agreement to the delivery<sup>212</sup>.

The analysis of D. 39,5,2,6 reveals that the delivery by a *nuntius* does not provide a separate legal basis for the transfer of ownership by a non-owner. Just as most cases reviewed so far, ownership will be transferred as long as the delivery takes place *voluntate domini*. Moreover, it would appear that the text does not specifically discuss the delivery by a *nuntius*. In fact, the idea of the owner who “*dederit alicui, ut ad me pefferet*” can be understood, in light of the contrast between the cases presented in D. 39,5,2,5 and D. 39,5,2,6, simply as a general reference to the delivery by a non-owner. Whatever the case may be, it is clear that the situation of the *nuntius* does not stand out as having an independent ground for the transfer of ownership, and therefore in the context of the transfer of ownership it does not have the peculiar status it has in the law of obligations.

The fact that the delivery by a *nuntius* has no special place in the general analysis of the *potestas alienandi* shows that some of the assumptions of modern scholars on the subject are not based on the sources. It is indeed often claimed that the alienation by a *nuntius* would have a distinctive character and should be set apart from other cases, but it is not clear what would be so peculiar about it. Some authors stress that the main difference would be that the *nuntius* would act on behalf of the owner<sup>213</sup>, something which allegedly would be excluded in other cases where ownership is transferred by a non-owner. This idea seems to rely on the vague notions regarding the notion of direct representation in Roman law, excluding that the alienation by a non-owner in Rome could present identical features to that of modern law by resorting to the *nuntius*. Others indicate that the act of the *nuntius* would consist in merely bringing over an object regarding which the parties had already agreed on the *iusta causa traditionis*<sup>214</sup>. It is at times also assumed that sources where the non-owner is simply presented as ‘bringing over’ something would indicate that the non-

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<sup>211</sup> Concerning the differences between D. 39,5,2,5 and D. 39,5,2,6, it is not necessary to look for a missing *non* in the latter text which would harmonize both solutions, as claimed by Voci, *Modi di acquisto* (1952), p. 111.

<sup>212</sup> Stagl, *Favor dotis* (2009), p. 207.

<sup>213</sup> See e.g. Sansón, *La transmisión* (1998), p. 99.

<sup>214</sup> Zulueta, *Institutes of Gaius* (1953) II, p. 75.

owner acts as a mere *nuntius*<sup>215</sup>. There is however no evidence in the sources to support any of these claims, while the general categories used by Roman jurists appear to be sufficient to determine the legal grounds of the alienation in this case: ownership will be transferred because the delivery is performed *voluntate domini*, and as soon as the owner's authorization is lacking the *potestas alienandi* of the non-owner will vanish.

The analysis of the different personal relationships which may exist between the owner and the transferor/non-owner shows that, from the perspective of the transfer of ownership, the reference to the *voluntas domini* covers almost every case in which the owner authorizes someone else to alienate his property. This basic requirement to grant the *potestas alienandi* to an authorized non-owner is therefore either expressed through this or other equally general terms, or through the reference to the specific personal or obligatory relationship between owner and transferor. The only notable exception on this point is the delivery performed by an *alieni iuris* acting within his *libera administratio peculii*, which the sources explicitly set aside regarding the transfer of ownership. In this context, the *voluntas domini* is approached as a flexible element, which can encompass different situations and which is to a considerable extent open to juristic interpretation, as becomes clear in the equivalence between *scientia* and *voluntas*. This overarching and dynamic approach will become even more evident through the study of the scope granted by jurists to the *potestas alienandi* which stems from the owner's authorization, which will be dealt with in the following section.

#### 4. Scope of the *potestas alienandi* of the authorized non-owner

##### a. Complying with specific instructions.

When the owner authorizes the transfer of ownership, the more specific his instructions are, the easier it becomes to determine the scope of his authorization. If the owner gives specific instructions to carry out a business, the noncompliance of them by the non-owner will determine that ownership is not transferred at all. In other words, regarding the transfer of ownership, exceeding the instructions of the owner has the same consequence as not being authorized at all. Numerous decisions reflect this basic idea. Paul demands in general terms in D. 17,1,5,<sup>1216</sup> that the limits of the mandate must be respected, applying this idea in D. 17,1,5,3<sup>217</sup> to a case in which the *mandatarius* sells for 90 what he was told to

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<sup>215</sup> Such is the case regarding D. 39,5,2,6, D. 39,5,10 and D. 39,5,25. An account on the debate on this point is given by Sansón, *La transmisión* (1998), p. 97.

<sup>216</sup> D. 17,1,5,1 (Paul 32 *ed.*): “Diligenter igitur fines mandati custodiendi sunt; nam qui excessit, aliud quid facere videtur”.

<sup>217</sup> D. 17,1,5,3 (Paul 32 *ed.*): “Item si mandavero tibi, ut fundum meum centum venderes, tuque eum nonaginta vendideris, et petam fundum, non obstat mihi exceptio, nisi et reliquum mihi, quod deest, mandatu meo, praestes, et indemnem me per omnia conserves”.

sell for 100. The consequence of this transgression is that ownership will not be transferred and the owner will be able to recover the sold object. The same consequence is prescribed in D. 17,1,5,4<sup>218</sup> to the alienation by a slave for a lower price than that set by his owner. Likewise, Ulpian quotes Celsus in D. 21,3,1,3<sup>219</sup> when stating that, if a non-owner sells an object at a lower price than that set by the owner, the object would not be considered as alienated (*non videtur alienata*), and the owner will recover what belongs to him. There are of course other instructions which may be disregarded by the non-owner apart from the price of the object to be sold. C. 4,35,12<sup>220</sup> generally demands that if specific conditions have been laid down in the contract of mandate and the delivery performed by the *mandatarius* over a piece of land contravenes the terms of the contract, ownership will not be transferred, unless the owner ratifies the sale. Accordingly, any disobedience by the non-owner of the owner's instructions may prevent the transfer of ownership, as happens when he acts *nomine proprio*<sup>221</sup> despite being told to alienate on behalf of the owner, or when the pledge creditor sells the pledge in a way which exceeds the terms of the *pactum de distrahendo*<sup>222</sup>. It is worth noting that in these latter cases the sources explicitly mention the existence of *furtum*, and therefore the lack of the *voluntas domini* signals at the same time the impossibility to transfer ownership and the existence of a delict.

It is at this point worth noting that Roman jurists offer a rather strict interpretation of what the *voluntas domini* implies for the transfer of ownership by *traditio*. One could in fact think that the non-owner who exceeds the owner's authorization would act validly at least regarding part of the operation, but Roman jurists did not see it that way, and the delivery which implies a breach of the owner's instruction is regarded to take place *invito domino*, just as if there was no authorization at all. Only the *ius honorarium* would correct some of the most unfair consequences which could derive from this situation<sup>223</sup>, but for the *ius civile* there would be no *voluntas domini* which would allow the transfer of ownership<sup>224</sup>.

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<sup>218</sup> D. 17,1,5,4 (Paul 32 *ed.*): “Servo quoque dominus si praeceperit, certa summa rem vendere, ille minoris vendiderit, similiter vindicare eam dominus potest, nec ulla exceptione summoverti, nisi indemnitas ei praestetur”.

<sup>219</sup> D. 21,3,1,3 (Ulp. 76 *ed.*): “Celsus ait, si quis rem meam vendidit minoris, quam ei mandavi, non videtur alienata, et si petam eam, non obstat mihi haec exceptio; quod verum est”. See on this text Sansón, *La transmisión* (1998), p. 105–107, 211–213.

<sup>220</sup> C. 4,35,12 (Diocletian/Maximianus, 293): “Cum mandati negotii contractum certam accepisse legem adseveres, eam integram secundum bonam fidem custodiri convenit. Unde si contra mandati tenorem procurator tuus ad te pertinentem fundum vendidit nec venditionem postea ratam habuisti, dominium tibi auferre non potuit”.

<sup>221</sup> D. 39,5,25 (Jav. 6 *epistolarum*).

<sup>222</sup> D. 47,2,73; D. 13,7,4 (Ulp. 41 *Sab.*); D. 13,7,5 (Pomp. 19 *Sab.*).

<sup>223</sup> See Chapter 4, Section 3 below.

<sup>224</sup> That this solution is by no means intuitive can be seen in the fact that in a scholion to the Paraphrase of Theophilus to Inst. 2,1,42, the scholiast indicates that the words *κατὰ γνώμην* (*voluntate*) imply that the transferee would only become owner if the authorization

While most texts offer a consistent outlook on the consequences of exceeding the instructions of the owner regarding the transfer of ownership, there are a couple of divergent opinions, the first of which is the following:

D. 18,1,63pr (Jav. 7 *ex Cassio*): Cum servo dominus rem vendere certae personae iusserit, si alii vendidisset, quam cui iussus erat, venditio non valet. Idem iuris in libera persona est, quum perfici venditio non potuit in eius persona, cui dominus venire eam noluit<sup>225</sup>.

Javolenus claims in this case that if a non-owner sells to a different person from that indicated by the owner, the sale itself will not be valid (*venditio non valet*). It would therefore appear that in the opinion of Javolenus the disregard to the owner's instructions would not only prevent the transfer of ownership, but that the sale itself would not be valid. Such an opinion appears to be completely inconsistent with everything seen so far, particularly from the perspective of the law of obligations, where the owner's intent is normally considered of no significance regarding the sale concluded between the non-owner and the purchaser. Moreover, the fact that the sold object would be rendered a *res furtiva* through the disregard of the owner's instructions cannot by itself make the sale invalid, unless both parties knew about it, as shown in D. 18,1,34,3 (Paul 33 *ed.*). If the sale was indeed invalid in the case under discussion, a very odd consequence would follow, namely that the parties to the sale would not be mutually bound at all and the purchaser would have no ground to sue the seller in case of eviction. The awkwardness of this solution has motivated all kinds of explanations, including the usual accusations of interpolation. Sansón considers that the invalidity of the sale should be explained within the peculiar features of the *traditio iussu domini*<sup>226</sup>, an idea which is however not shared in the present book<sup>227</sup>. Elsewhere, Sansón considers that Javolenus would declare "*venditio non valet*" in order to stress the fact that the sale will not serve as a *iusta causa usucapionis* due to the fact that the disregard of the owner's instructions would render the object sold a *res furtiva*<sup>228</sup>. More plausible seems the explanation of Burdese, who considers that Javolenus is plainly saying that ownership will not be transferred, without really questioning the validity of the sale itself, as would

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of the previous owner completely covered the acts concluded by the non-owner, quoting in this regard D. 17,1,5,3. The scholion is edited by Ferrini, *Scolii Gr. Par. 1364* (1929 [1886]), p. 176, and commented by Nebrera, *Ἡ τραδίτιων* (1989), p. 96-108.

<sup>225</sup> D. 18,1,63pr: "Suppose a master to direct his slave to sell something to a particular person; if he sells to someone other than that person, the sale is null; the same would apply if the master asked a freeman to sell it; a sale cannot be brought to completion, if made to someone to whom the principal has no intention to sell" (transl. Watson, modified).

<sup>226</sup> Sansón, *La transmisión* (1998), p. 220.

<sup>227</sup> See on this problem Chapter 2, Section 5 below.

<sup>228</sup> This possibility is moreover acknowledged by Sansón, *La transmisión* (1998), p. 108.

follow from the ambiguous significance of the word ‘*valet*’<sup>229</sup>. Despite the disbelief of Sansón<sup>230</sup>, this explanation not only brings the text in harmony with the rest of the evidence on the subject – including other opinions of Javolenus himself<sup>231</sup> – but it does also agree with the scope of the term *venditio*, which is used in the sources not only to refer to the sale as *iusta causa traditionis*, but also to indicate an alienation in general, including at times even cases where ownership is not transferred as the result of a sale<sup>232</sup>. This circumstance is particularly relevant in relation to the ‘perfection’ of the sale, since this idea can be used to indicate the moment in which the contract becomes binding between the parties<sup>233</sup>, but it is also applied to describe the fulfilment of the obligations arising from the contract of sale<sup>234</sup>. This implies that the words “*perfici venditio non potuit in eius persona*” should not be understood as referring to the validity of the sale itself, but rather to the fact that the sale will not produce the same consequences with regard to a different person – literally, cannot be brought to completion<sup>235</sup> (*perfici*) – indicating thereby that ownership cannot be transferred in the context of such a sale. Therefore, Javolenus does not say anything new in this text, despite the fact that his choice of words could have been better.

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<sup>229</sup> Burdese, *Autorizzazione* (1950), p. 16 n. 16 and p. 79–80; Burdese, *Error in dominio* (1953), p. 27 n. 10. For example, the validity of the *venditio* refers in fact to the alienation in D. 20,6,4,2 (Ulp. 78 *ed.*).

<sup>230</sup> Sansón, *La transmisión* (1998), p. 108 considers that this idea is hard to believe.

<sup>231</sup> See D. 39,5,25 (Jav. 6 *epistolarum*).

<sup>232</sup> See on this point Dirksen, *Manuale latinitatis fontium* (1837), p. 988; Heumann/Seckel, *Handlexikon* (1926), p. 617, s.v. *venditio*: “auch bedeutet venditio überhaupt s. v. a. Veräußerung, Verfügung, Zuwendung (l. 8 § 11 D. 20,6 cf. l. 29 § 1 D. 40,7)”. See e.g. D. 40,7,29,1 (Pomp. 18 *ad Quintum Mucium*): “(...) lex duodecim tabularum emptionis verbo omnem alienationem complexa videretur (...)”; D. 20,6,8,11 (Marcianus *libro singulari ad formulam hypothecariam*): “Venditionis autem appellationem generaliter accipere debemus, ut et si legare permisit, valeat quod concessit (...)”; D. 17,1,57 (Pap. 10 *resp.*).

<sup>233</sup> E.g. D. 18,1,35,5 (Gai. 10 *ed. prov.*); D. 18,6,8pr (Paul 33 *ed.*); C. 4,50,9 (Diocletian/Maximianus, 294). Pringsheim, *Animus* (1933), p. 58–59 considers the latter text to be referred to the transfer of ownership, which seems however unlikely: the reference to an *epistula* at the perfection of the sale seems to indicate the conclusion of the contract rather than the transfer of ownership.

<sup>234</sup> E.g. D. 18,1,57,1 (Paul 5 *ad Plautium*): “non compellatur emptor perficere emptionem”; D. 18,5,8 (Scaev. 2 *resp.*): “Titius Seii procurator defuncto Seio ab eo scriptus heres, cum ignoraret, fundum vendente servo hereditario, quasi procurator subscripsit: quaesitum est, an cognito eo, priusquam emptio perficeretur, a venditione discedere possit. (...)” Zedler, *Universal-Lexicon* (1745) XLVI, col. 1173 would accordingly accurately define “venditio perfecta” as: “ein vollkommener Verkauf, oder ein solcher, zu dessen Würcklichkeit seit weiter nichts fehlt, und bei welchem auch schon die Uebergabe der verkaufften Sache erfolget”. Oberländer, *Lexicon* (1753), p. 708 even focuses exclusively in the need for a delivery when explaining the expression ‘venditio perfecta’ in the following terms: “eine vollkommene Verkaufung wird genennt, wann die Tradition erfolget ist”.

<sup>235</sup> Hence, the translation offered here reads “a sale cannot be brought to completion”, which is preferred to the one offered by Watson, *Digest*: “a sale cannot stand”.

b. *Potestas alienandi* of the *procurator omnium bonorum*.

While the approach of classical sources to the cases in which a non-owner exceeds the owner's authorization is uniform regarding cases where the owner gives specific instructions, the general outlook is not so clear when the non-owner has general powers of administration. This problem has been especially debated in the context of the extension of the powers of the *procurator omnium bonorum*, which led in the past to widespread controversy among modern scholars. A traditional view, defended by Bonfante and adopted by many others after him, was that the *procurator* had originally unlimited faculties of administration and could therefore transfer ownership with considerable freedom<sup>236</sup>. Only in Justinianic times were these faculties restricted, and since that time the *procurator* needed a special mandate from the owner in order to transfer ownership over administered goods. This theory relied heavily on the interpolationistic method, regarding as postclassical several texts which demanded a special mandate so that the *procurator* could transfer ownership. While these notions found some resistance from the beginning, only Angelini would manage to refute them in a compelling way by showing that already in classical times the *potestas alienandi* of the *procurator omnium bonorum* was limited to acts which fell within the ordinary powers of administration<sup>237</sup>. This opinion was soon adopted by scholars<sup>238</sup>, who saw in it a consistent approach of the sources dealing with the faculty to dispose of the *procurator* without having to resort to the interpolationistic method. The basic distinction to be made on this point is whether the alienation refers to goods which fall within the ordinary administration of the *procurator* or not: if they do, no additional authorization by the owner is needed; if they do not, the owner will have to explicitly allow the *procurator* to dispose of them. This basic criterion follows clearly from the following text of Modestinus:

D. 3,3,63 (Mod. 6 *differentiarum*): Procurator totorum bonorum, cui res administrandae mandatae sunt, res domini neque mobiles vel immobiles neque servos sine speciali domini mandatu alienare potest, nisi fructus aut alias res, quae facile corrumpi possunt<sup>239</sup>.

<sup>236</sup> Bonfante, *Facoltà e decadenza* (1921 [1898]), p. 250–261.

<sup>237</sup> Angelini, *Il Procurator* (1971), p. 17 ff.

<sup>238</sup> Kaser, *RPR* (1975) II, p. 101; Hamza, *Rappresentanza* (1980), p. 210; Miquel, *Traditio rei alienae* (1993), p. 273; Wieling, *Drittwirkungen* (1993), p. 288; Coppola Bisazza, *Sostituzione volontaria* (2007), p. 528 ff.

<sup>239</sup> D. 3,3,63: “A *procurator* for the whole of an estate who has been given a mandate for its administration cannot, without a specific mandate from his principal, alienate his principal's property whether movables, immovables, or slaves, apart from fruits or other things which can easily spoil” (transl. Watson).

This text is as clear as one could expect, limiting the faculty to dispose of a *procurator* who has been given a general administration to the fruits and other things which can easily spoil, i.e. objects which are normally expected to be alienated by someone in charge of the administration of someone else's estate. For those things which do not fall within this category, no alienation is possible unless the owner explicitly authorizes it. The text refers to a special mandate of the owner (*speciali domini mandatu*), which does not however mean that this authorization could only be given through a separate contract of mandate, since it could also be granted at the time the general powers of administration were granted<sup>240</sup>. That the transfer of ownership is performed *speciali mandatu*, moreover, does not indicate anything different from the requirement for a *voluntas domini* at the delivery, as can be seen in the following text:

C. 2,12,16 (Diocletian/Maximianus, 293): Procuratorem vel actorem praedii, si non specialiter distrahendi mandatum accepit, ius rerum dominii vendendi non habere certum ac manifestum est. Unde si non ex voluntate domini vendentibus his fundum comparasti, pervides improbum tuum desiderium esse dominium ex huiusmodi emptione tibi concedi desiderantis<sup>241</sup>.

This constitution not only deals with the *procurator*, but also with the (*servus*) *actor*, which is no wonder considering that both individuals may find themselves in a similar situation, namely as having broad powers of administration granted by the owner. Both individuals are in fact again mentioned side by side in a similar context by Gaius, when discussing who may agree to a sale:

D. 20,6,7,1 (Gai. libro singulari ad formulam hypothecariam): Videbimus, si procurator omnium bonorum consensit vel servus actor, cui et solvi potest et in id praepositus est, an teneat consensus eorum. Et dicendum est non posse, nisi specialiter hoc eis mandatum est<sup>242</sup>.

Both in C. 2,12,16 and D. 20,6,7,1, the requirement for these individuals to transfer ownership is the same as that mentioned in D. 3,3,63, namely a special mandate to transfer ownership. Particularly in C. 2,12,16 we find ourselves in

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<sup>240</sup> See e.g. D. 17,1,60,4 (Scaev. 1 *resp.*), which is studied in further detail below.

<sup>241</sup> C. 2,12,16: "It is certain and plain that a *procurator* or business agent (*actor*) of a piece of land has no right to sell, unless he has received a special mandate to transfer ownership. Hence if you purchased the farm from them, who were the vendors, without the consent of the owner, you clearly understood that your demand to be declared that the ownership be conceded to you pursuant to such purchase, is not honest" (transl. Blume, modified).

<sup>242</sup> D. 20,6,7,1: "We must see whether the consent of a general *procurator* or a slave who is appointed agent to receive payments is effective. It is not held effective unless they face a specific authority to consent" (transl. Watson).

familiar ground, with expressions like *ius vendendi*, which situate the problem within the general framework of the *potestas alienandi*. Even more meaningful is that this constitution mentions that if special authorization was given to these individuals, the delivery would not take place according to the owner's intent (*non ex voluntate domini*) and that accordingly ownership would not be transferred. This shows that the general problem discussed is always to be approached within the framework of the *voluntas domini*, which serves Roman jurists to determine the scope of the *potestas alienandi* of an authorized non-owner. When general powers of administration are granted to a *procurator* or slave, the *voluntas domini* will only include the alienations which take place as part of the ordinary administration. The *voluntas domini* will only encompass other objects when the owner especially authorizes their alienation. The only awkwardness which may seem to derive from this distinction is that in the first case the *voluntas domini* is presumed, while in the second it is explicit. Roman jurists, in fact, were willing to resort to some objective criteria in order to determine the faculty to dispose of the *procurator*, as can be seen in the following text:

D. 30,39,10 (Ulp. 21 *Sab.*): Sed et ea praedia Caesaris, quae in formam patrimonii redacta sub procuratore patrimonii sunt, si legentur, nec aestimatio eorum debet praestari, quoniam commercium eorum nisi iussu Principis non sit, cum distrahi non soleant<sup>243</sup>.

When dealing with legacies, Ulpian declares that there is no *commercium* regarding the land of the Emperor which is under the administration of the *procurator*. The fact that in this case we are told that there is no *commercium* can be explained because there can be no usucapion against the Emperor, just as other objects previously mentioned in D. 30,39 cannot be acquired in this way. The exception to this are the alienations which are authorized by the Emperor (*nisi iussu Principis*). Again, the reference to the *iussum* of the owner does not mean in itself anything else – from the perspective of the transfer of ownership – than the fact that the non-owner must be especially authorized. Up this point, the text only ratifies the general ideas to be found in D. 3,3,63, D. 20,6,7,1 and C. 2,12,16. However, the closing words “*cum distrahi non soleant*” add a new piece of information, since they present a more objective criterion to determine the scope of the *potestas alienandi* when only general powers of administration are given, namely that the *procurator* will only be able to carry out alienations which are customary to his administration. In this particular case, since the alienation of land is not one of the acts carried out in the course of the normal administration

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<sup>243</sup> D. 30,39,10: “And if a bequest should be made of estates of Caesar which form part of his patrimony and are under a *procurator* of the patrimony, their value should not be paid either, because there can be no commerce in them without the emperor's consent, as it is not the custom to sell them” (transl. Watson).

of the land of the Emperor, the delivery carried out by the *procurator* will not transfer ownership. Accordingly, the scope of the *potestas alienandi* of the *procurator* would vary according to the specific features of the administered business.

The application of such objective criteria can also be seen in the context of the pledge of the owner's goods in D. 13,7,11,7<sup>244</sup> and D. 13,7,12<sup>245</sup>. In the first text, Ulpian declares that a *procurator* will be able to resort to the *actio pignoratitia in personam* if he received a mandate to give in pledge. This idea is complemented by the compilers through the second text, belonging to Gaius, where we are told that the *procurator* who has the administration of the entire property may also give in pledge the objects "of people who do usually borrow money against pledges" (transl. Watson). This text contains therefore the same objective criterion as that of D. 30,39,10, namely that the faculties of administration of a *procurator* who is generally commissioned with the management of someone's property can be determined by the regular way in which such patrimony is administered.

The significance granted to the *voluntas domini* in the context of the transfer of ownership by a *procurator* shows once again that Roman jurists felt free to offer innovative views regarding what exactly did this authorization imply. This is why the owner's *voluntas* could cover different situations, ranging from those in which the will is merely presumed to those in which it is explicitly manifested, granting all of them an identical legal consequence.

There are several other texts which confirm the scope granted to the *voluntas domini* when general powers of administration are granted to a non-owner. For instance, it is stated in D. 19,1,13,25 (Ulp. 32 *ed.*) that an *actio ad exemplum institoriae* will be granted against the owner "*si modo rem vendendam mandavit*", which once again shows the need for a special authorization in the context of alienations performed by a *procurator*. There are moreover numerous examples of general powers to administer in which the faculty to dispose of particular objects is explicitly included, showing thereby the importance of these special authorizations. Some of these examples can be found in the Digest itself (D. 17,1,60,4) but the greater part of them come from papyrological evidence<sup>246</sup>.

Among the abundant texts dealing with the *potestas alienandi* of the *procurator*, D. 41,1,9,4<sup>247</sup> is considered by some authors to be particularly troublesome, since no reference is made to a special authorization to dispose. It was in fact this text which was considered by scholars such as Bonfante to represent the classical doctrine regarding the powers of the *procurator*, since no limitations are set beforehand to his administration. Even among the more recent studies on the

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<sup>244</sup> D. 13,7,11,7 (Ulp. 28 *ed.*): "Sed si procurator meus vel tutor rem pignori dederit, ipse agere pignoratitia poterit: quod in procuratore ita procedit, si ei mandatum fuerit pignori dare".

<sup>245</sup> D. 13,7,12 (Gai. 9 *ed. prov.*): "Vel universorum bonorum administratio ei permissa est ab eo, qui sub pignoribus solebat mutuas pecunias accipere".

<sup>246</sup> Angelini, *Il Procurator* (1971), p. 137 ff. See also Straus, *L'achat* (2004), p. 21 ff.

<sup>247</sup> See Chapter 2, Section 1(a) above.

subject, the text is regarded with suspicion. Some scholars consider that the statement of Gaius could be brought under the guidelines presented so far by taking into account the words “*is ex negotiis rem vendiderit et tradiderit*” – rendered in Inst. 2,1,43 “*ex his negotiis*” – which implies that ownership will be transferred as long as the *procurator* acts “within the framework of his business”, i.e. when carrying acts of ordinary administration. Accordingly, the alienations performed by the non-owner would take place *voluntate domini* as long as they take place in the context of the ordinary administration<sup>248</sup>. While this is an interesting approach, another relevant element to which little attention has been paid is the fact that the owner grants the “*libera negotiorum administratio*” to the non-owner<sup>249</sup>. This expression is not as common in the sources as the “*libera peculii administratio*” of slaves and sons-in-power<sup>250</sup>, being applied to refer to the administration conducted by persons *sui iuris* who are granted broader faculties than those comprised in an ordinary administration. This circumstance is shown by D. 3,3,58, where we are told that a *procurator* who has the *libera administratio rerum* can demand payment, make novations and barter<sup>251</sup>, all of which are acts which would normally require a special authorization. Noteworthy is the inclusion among these of the possibility of bartering, which shows that this *libera administratio* allows the transfer of ownership as well, a conclusion which is ratified by D. 3,3,59, which adds that such *procurator* is also seen as authorized to pay the creditors<sup>252</sup>. Considering that the *libera administratio* implies having faculties which would normally have to be granted through a special authorization, the *Handlexikon* of Heumann and Seckel accurately translates the word ‘*liber*’ in contexts such as ‘*administratio*’ as ‘unlimited’ (*unbeschränkt*)<sup>253</sup>. Accordingly, in the context of D. 41,1,9,4, the concession of a *libera negotiorum administratio* would imply that the administrator has a broader *potestas alienandi*, despite being limited to that which he has to administer (*ex negotiis*), which is why Gaius selects this case as a prototypical example of an alienation performed *voluntate domini*. In the context of the delivery by a *procurator*, this *libera administratio* does not imply a different ground for the transfer of ownership, since Gaius considers this case to be an example where the delivery takes place *voluntate domini*. This contrasts with the alienations performed by slaves and sons-in-

<sup>248</sup> Angelini, *Il Procurator* (1971), p. 127.

<sup>249</sup> Wacke, *Libera administratio peculii* (2006), p. 307-308.

<sup>250</sup> See Chapter 1, Section 4(b) above.

<sup>251</sup> D. 3,3,58 (Paul. 71 *ed.*): “Procurator, cui generaliter libera administratio rerum commissa est, potest exigere, novare, aliud pro alio permutare”.

<sup>252</sup> D. 3,3,59 (Paul 10 *ad Plautium*): “Sed et id quoque ei mandari videtur, ut solvat creditoribus”. Angelini, *Il Procurator* (1971), p. 128 highlights that an important feature of the payment by an authorized *procurator* is that it will transfer ownership over the principal’s property given in payment.

<sup>253</sup> Heumann/Seckel, *Handlexikon* (1926), p. 313. The word ‘*liber*’ plays there a key role, which is why the “*libera negotiorum administratio*” should be distinguished, for instance, from the “*universorum bonorum administratio*” of D. 13,7,12 (Gai. 9 *ed. prov.*), which only grants ordinary powers of administration to the non-owner.

power, where the *libera peculii administratio* is clearly distinguished as a separate legal basis for the transfer of ownership from that of the *voluntas domini*<sup>254</sup>. It is not clear why jurists approached these two cases in such different way, and the lack of clear sources regarding the *libera negotiorum administratio* of the *procurator* prevents us from offering a solution to this problem.

c. *Bona fides* and *potestas alienandi*.

Besides determining the significance of the owner's authorization in the context of general acts of administration, Roman jurists developed particular solutions in order to avoid abusive or fraudulent conducts by the non-owner which seemed to fall within the terms of the authorization. One of the key elements in this evolution appears to be the notion of *fides*, which governs in several cases the conduct of an intermediary, as happens with the *procurator* and the *mandatarius*. Regarding the contract of mandate, the *fides* played a fundamental role and served as a basic guideline concerning the way in which the parties must behave<sup>255</sup>. This is particularly the case regarding the obligations arising between the parties, but some texts also take the *fides* into consideration to determine whether ownership is transferred by the *mandatarius*. C. 4,35,12<sup>256</sup>, for example, requires that the terms laid down by the owner must be complied with in accordance to the good faith (*bona fides*) by the non-owner performing the delivery. This text, however, has an odd character, since after requiring that the terms of the contract must be complied with according to good faith (*secundum bonam fidem custodiri convenit*) it derives from this idea that if a *procurator* sells a piece of land without following the terms of the mandate, ownership will not be transferred. The awkwardness of this line of thought is that the reference to the *bona fides* seems rather superfluous, since the outcome can rather be explained due to the absence of the *voluntas domini* at the delivery, which is why the solution is considered non-classical by Burdese<sup>257</sup>. Despite this opinion, Sansón considers that the reference to the *bona fides* of the *procurator* may have something to do with the possibility of acquiring through usucapion<sup>258</sup>. The above analysis of the *traditio invito domino* and its relation to *furtum* shows in fact that the intention of the non-owner and his subjective representation of the owner's authorization may be decisive in determining whether ownership is transferred or

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<sup>254</sup> See Chapter 1, Section 4(b) above.

<sup>255</sup> Schermaier, *Bona fides* (2000), p. 80.

<sup>256</sup> C. 4,35,12 (Diocletian/Maximianus, 293): "Cum mandati negotii contractum certam accepisse legem adseveres, eam integram secundum bonam fidem custodiri convenit. Unde si contra mandati tenorem procurator tuus ad te pertinentem fundum vendidit nec venditionem postea ratam habuisti, dominium tibi auferre non potuit".

<sup>257</sup> Burdese, *Autorizzazione* (1950), p. 52. Potjewijd, *Beschikingsbevoegdheid* (1998), p. 132 even omits commenting the reference to the good faith in this text, assuming that the problem revolves around the owner's authorization.

<sup>258</sup> Sansón, *La transmisión* (1998), p. 92.

not<sup>259</sup>. Accordingly, it would not be alien to classical law to signal the non-owner's lack of good faith as the reason why ownership is not transferred, particularly since it does not only imply that the instructions of the owner were not followed, but also that this disobedience was deliberate and therefore there would be no room of usucapion on account of the *res* becoming *furtiva*.

While the text of C. 4,35,12 cannot be considered as essentially non-classical or inaccurate, it does not seem to add anything new to what we already know about the transfer of ownership by a non-owner. There is however another context in which the consideration of the *bona fides* of the non-owner leads to a very innovative outcome, as can be seen in the following text:

D. 17,1,60,4 (Scaev. 1 *resp.*): Lucius Titius fratris filio commisit rerum suarum administrationem ita: Σεῖῳ τέκνω χαίρειν. ἐγὼ μὲν κατὰ φύσιν εἶναι νομίζω τὸ ὑπὲρ πατρὸς καὶ τῶν τοῦ πατρὸς υἰῶν πραγματεύεσθαι δίχα τοῦ τινὰ ἐπιτροπικὸν αἰτεῖν. εἰ δὲ δεῖ καὶ τοιοῦτου τινός, ἐπιτρέπω σοι περὶ πάντων τῶν ἐμῶν ὡς θέλεις πραγματεύεσθαι, εἴτε πωλεῖν θέλεις εἴτε ὑποτίθεσθαι εἴτε ἀγοράζειν εἴτε ὀτιοῦν πράττειν, ὡς κυρίῳ ὄντι τῶν ἐμῶν ἐμοῦ πάντα κύρια τὰ ὑπὸ σοῦ γινόμενα ἡγουμένου καὶ μηδὲν ἀντιλέγοντός σοι πρὸς μηδεμίαν πράξιν. Quaesitum est, si quid non administrandi animo, sed fraudulenter alienasset vel mandasset, an valeret. Respondi eum, de quo quaeretur, plene quidem, sed quatenus res ex fide agenda esset, mandasse. Item quaero, an, cum Seius magistratu functus debitor exstisset, Lucius Titius eo nomine conveniri possit vel res eius obligatae essent propter verba epistulae supra scripta. Respondi neque conveniri posse neque res obligatas esse<sup>260</sup>.

<sup>259</sup> Chapter 2, Section 2 above.

<sup>260</sup> D. 17,1,60,4 (Scaev. 6 *Dig.*): “Lucius Titius entrusted the management of his affairs to his brother’s son as follows: ‘To Seius the son, greetings. I consider it natural that a son should undertake business on behalf of his father and of those connected with his father without anyone asking for his authorization. But if there is a need for something of the kind [that is, such authorization], I entrust you with the management of all that is mine to deal with as you see fit, whether you wish to sell, to pledge, to buy or to do any [other] thing, as master of my affairs. All that is done by you will be regarded as authorized by me, and I shall not countermand you in any matter’. If [Seius] should have alienated or mandated anything fraudulently and not with the intention of [honest] administration, would it hold good? I gave the opinion that the person who was the subject of the inquiry had indeed given the mandate in very broad terms, but within [the assumption] that his affairs should be managed in good faith. Again, when Seius, after undertaking the duty of a magistracy, had fallen into debt, could Lucius Titius be sued on that account, or his property made subject to a pledge because of the words of the letter quoted above? I gave the opinion that he could not be sued and that his property was not subject to pledge” (transl. Watson).

The facts are the following: Lucius Titius entrusts the management of his affairs in the broadest possible terms to his nephew Seius, in the context of a contract of mandate. Regarding the faculty to dispose, the owner mentions explicitly that Seius is authorized to transfer ownership as he sees it fit, authorizing beforehand any acts of alienation. The terms of the mandate confirm the need for a special authorization in order to transfer ownership over goods which fall outside the strict limits of an ordinary administration<sup>261</sup>, and from the broad terms used by the owner in this case it would appear that there is no act of alienation which escapes the powers of the non-owner. Seius, however, performs a series of acts not with the intention of administering his uncle's affairs properly, but fraudulently (*non administrandi animo, sed fraudulenter*)<sup>262</sup>. What "fraudulenter" means in this context is not entirely clear, but since Seius was authorized to alienate as he pleased one may assume that it refers to acts which cause loss to the owner and which could not possibly be seen as part of an honest administration of the owner's affairs<sup>263</sup>. In this context, Cervidius Scaevola is asked whether such alienations should hold. One could expect in principle a positive answer, since the owner did in fact grant an absolute power to dispose in the most emphatic possible way. Scaevola, however, considers that in such a case the acts carried out by the nephew will not hold, since the owner gave such broad authorization in the assumption that Seius would manage his affairs according to the good faith (*res ex fide agenda esset*). Accordingly, the jurist manages to introduce an objective limitation in the *potestas alienandi* of the non-owner through an interpretation of the *voluntas domini* in the light of the notion of *fides*<sup>264</sup>, which governs a *bonae fidei* contract as that of mandate. In view of the *fides*, the owner cannot be seen as authorizing dishonest or fraudulent acts, which instantly limits the *potestas alienandi* of his trusted nephew.

The *voluntas domini* is thus once more approached by jurists as a flexible concept, being adapted in order to avoid an unfair result. In this particular case, the interpretation of the owner's authorization has the additional peculiarity of referring to the requirements of the *fides*, which derives from the personal relationship between the parties, thereby making this last element relevant in order to determine the extent of the *potestas alienandi* of the non-owner. That the faculties of the contracting parties could be determined through general notions such as the *fides* is not an isolated phenomenon. There are several texts which

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<sup>261</sup> Angelini, *Il Procurator* (1971), p. 145; Sansón, *La transmisión* (1998), p. 93.

<sup>262</sup> Pringsheim, *Animus* (1933), p. 382 considers the reference to the *animus administrandi* of the non-owner to be of postclassical origin, which would contrast with the objective reference to the *fides*. However, such observation is rooted on his suspicion to any subjective references in classical sources. One may in fact explain why the acts of the nephew are contrary to the *fides* precisely because of his underlying intentions. The significance of the intent of the non-owner at the delivery has been stressed in Chapter 2, Section 2 above.

<sup>263</sup> Pringsheim, *Animus* (1933), p. 381 understands *fraudulenter* as "not in the true interest of the owner".

<sup>264</sup> Miquel, *Quaestiones* (1992), p. 18 and 163; Sansón, *La transmisión* (1998), p. 93.

resort to notions such as the *fides* or the *vir bonus* in order to limit the way in which too general or undetermined powers can be exercised. Stephanus would in fact make use of such notions when discussing the boundaries of the contract of mandate, including D. 17,1,60,4 in his analysis<sup>265</sup>. It is nonetheless remarkable that Roman jurists would be willing to apply such notions to the transfer of ownership as well, thereby making an even more accurate use of the requirement of the *voluntas domini*, according to which not only is it necessary that the non-owner is explicitly authorized to transfer ownership, since the owner would moreover be regarded to expect the transferor to behave according to the *fides*.

Similar considerations also played a role regarding the alienations concluded by a *procurator*. It is not entirely clear why some texts dealing with the transfer of ownership are referred to the *procurator*, while others – such as D. 17,1,60,4 – indicate the existence of a mandate. Nonetheless, this distinction does not seem to be decisive for the point under discussion, since the sources provide identical outcomes, as shown in the following text:

D. 41,4,7,6 (Jul. 44 *dig.*): Procurator tuus si fundum, quem centum aureis vendere poterat, addixerit triginta aureis in hoc solum, ut te damno adficeret, ignorante emptore, dubitari non oportet, quin emptor longo tempore capiat: nam et cum sciens quis alienum fundum vendidit ignoranti, non interpellatur longa possessio. Quod si emptor cum procuratore collusit et eum praemio corruptit, quo vilius mercaretur, non intellegitur bonae fidei emptor nec longo tempore capiet: et si adversus petentem dominum uti coeperit exceptione rei voluntate eius venditae, replicationem doli utilem futuram esse<sup>266</sup>.

This decision of Julian shares with the previous one of Scaevola the fact that the non-owner does not formally exceed the boundaries of the owner's authorization, since he simply sells for a lower price than that which he could have obtained. Additionally, also in this case there is a fraudulent intent on the side of the non-owner, since his purpose is to cause loss to the owner (*ut te damno adficeret*). The only problem about this text is that Julian is much more laconic in

<sup>265</sup> BS 703/13–24. See on this text De Jong, *Mandatum incertum* (2012), p. 297–302; De Jong, *Ανὴρ ἀγαθός* (2013), p. 351–359.

<sup>266</sup> D. 41,4,7,6: “Suppose that your *procurator*, who could have obtained a hundred gold pieces for the land, asks only thirty for the sole purpose of causing you loss; there can be no doubt that, he being unaware of this fact, the purchaser will acquire title by long possession; for even when one aware of the facts sells a third person's land to one who is not, nothing prevents long possession. But if the purchaser should be in collusion with the *procurator*, bribing him to sell at an uneconomic price, he will not be held a purchaser in good faith and so will not acquire the land through. And if, when the principal sues, the purchaser should invoke the defence that the thing was sold with his consent, a replication of fraud will be effective against him” (transl. Watson, modified).

his solution than Scaevola, since he simply tells us that the purchaser will only be able to acquire through usucapion if he was unaware of the intention of the transferor, something which he considers beyond doubt (*dubitari non oportet*). Therefore, much goes unsaid, and particularly why ownership is not transferred in the first place, considering that the non-owner did not formally contravene the owner's authorization. Since the outcome is similar to that offered by Scaevola, we can only assume that Julian was not willing to cover under the *voluntas domini* acts which are openly dishonest and abusive. Thus, once again this *voluntas* would have a content determined by the jurists. The silence on this point raises the question of whether the *fides* also plays a role in the solution of Julian regarding the limitation of the *potestas alienandi* of the non-owner, as Miquel and Sansón think<sup>267</sup>. Despite the lack of an explicit mention, this seems plausible considering that this element also had a central role concerning the acts concluded by a *procurator*<sup>268</sup>. It is on the other hand undeniable that the *dolus* of the purchaser who bribes the *procurator* in order to obtain an uneconomic price does play a role in determining his position, since his defence against the owner's claim, based on the latter's authorization of the delivery – *exceptio rei voluntate eius [sc. domini] venditae* – will be met with a *replicatio doli* which will check his fraudulent behaviour.

Another solution offering an analogous limitation of the faculty to dispose of the *procurator* comes from Ulpian:

D. 1,19,1pr-1 (Ulp. 16 *ed.*): Quae acta gestaque sunt a procuratore Caesaris, sic ab eo comprobantur, atque si a Caesare gesta sunt. (1) Si rem Caesaris procurator eius quasi rem propriam tradat, non puto eum dominium transferre: tunc enim transfert, cum negotium Caesaris gerens consensu ipsius tradit. Denique si venditionis vel donationis vel transactionis causa quid agat, nihil agit: non enim alienare ei rem Caesaris, sed diligenter gerere commissum est<sup>269</sup>.

This text has proven very challenging for modern scholars, who disagree on the exact problem addressed by Ulpian. Some claim that it deals with a case of *error in domino*, since the *procurator* would be mistakenly giving as his own something

<sup>267</sup> Miquel, *Quaestiones* (1992.), p. 24–25, 84–88; Sansón, *La transmisión* (1998), p. 18, 95.

<sup>268</sup> Cicero, *Topica* 42: “Si tutor fidem praestare debet, si socius, si cui mandaris, si qui fiduciam acceperit, debet etiam procurator”.

<sup>269</sup> D. 1,19,1pr-1: “Whatever acts and deeds are performed by the imperial *procurator*, they obtain the same force and validity from him as if they had been done by the emperor. (1) If the imperial *procurator* makes a conveyance of a piece of property which belongs to the emperor as being his own property, then in my opinion he does not transfer ownership. For he transfers it in those cases in which he executes the conveyance as Caesar's agent with his express consent. Accordingly, if he should purport to act by way of sale or gift or settlement out of court, his act is a nullity. For his commission is not to alienate Caesar's property, but to administer it carefully” (transl. Watson).

which belongs to the Emperor<sup>270</sup>. There is however no sign of a mistake, which is why this position has gradually lost supporters. Others have focused their analysis on the need for a special authorization (*consensus*) of the owner so that the *procurator* may transfer ownership, which led to the claims of interpolation of the text and their later refutation once Angelini's views became dominant<sup>271</sup>. Sansón, moreover, has used this text to support her views regarding the difference between the delivery *nomine proprio* and *nomine alieno*<sup>272</sup>. However, the most satisfactory approach to this text is given by Burdese, who stresses the fraudulent behaviour of the *procurator* to determine the outcome of the case. Only this interpretation successfully explains the obligation to carefully administer (*diligenter gerere*) the Emperor's property mentioned in the text, an aspect which either goes unobserved or is discarded as interpolated by other authors discussing the text.

Following Burdese's approach, it becomes clear what the significance is of the fact that the *procurator* delivers the thing that is the Emperor's property "as being his own" (*quasi rem propriam*). As will be shown below<sup>273</sup>, it is largely irrelevant whether the delivery by a non-owner takes place *nomine proprio* or *nomine alieno*, as long as the transferor follows the owner's instructions<sup>274</sup>. In D. 1,19,1,1, however, there is no reference to a such limitation, and Ulpian just reminds us that ownership will only be transferred as long as the *procurator* follows the owner's consent (*cum negotium Caesaris gerens consensu ipsius tradit*). Apparently, there is no special authorization to transfer ownership in this case, since we are told that the *procurator* was not commissioned to transfer ownership of the Emperor's property (*alienare ei rem Caesaris*) but rather to administer it carefully (*diligenter gerere*). The fact that this requirement is not met in the present situation throws light on the significance of the delivery performed by the *procurator* of the object "as being his own", since it indicates that there is a fraudulent component in his behaviour. In this particular context, one may well assume that the *procurator* alienates to his personal advantage some objects under his administration, presenting himself as the true owner when selling, donating or settling in court. The main problem to be considered in this context is whether he was authorized to conclude any of these acts, which is why Ulpian highlights this point. However, the *potestas alienandi* of the *procurator* is also limited by the fact that he must administer in a careful and faithful way, which is why it is not enough to formally adhere to the owner's instructions; a fraudulent administration will just as well set the alienation beyond the limits of his *potestas alienandi*. Both the owner's formal instructions and the need to administer faithfully interact in this case, which is why one may assume that even if some of

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<sup>270</sup> See e.g. Voci, *Modi di acquisto* (1952), p. 101-102; Guzmán, *DPR* (2013) I, p. 650 n. 1073.

<sup>271</sup> See on this evolution Sansón, *La transmisión* (1998), p. 71.

<sup>272</sup> Sansón, *La transmisión* (1998), p. 94.

<sup>273</sup> Chapter 2, Section 5.

<sup>274</sup> This is why the disobedience of the owner's instructions to deliver on his behalf prevents the transfer of ownership in D. 39,5,25 (Jav. 6 *epistolarum*).

the alienations did fall within the formal boundaries of the Emperor's authorization, the fraudulent behaviour of the *procurator* will exclude the transfer of ownership. This interpretation agrees moreover with that of another decision of Ulpian found in D. 27,10,10,1 (Ulp. 16 *ed.*)<sup>275</sup>, where a *curator furiosi* transfers an object of the lunatic “*quasi suam*”, which leads the author to deny the transfer of ownership on account that the thing was not transferred while administering the lunatic's affairs. The agreement between both solutions is by no means casual, especially if one considers that they are to be found within the same book of Ulpian's Commentary to the Edict<sup>276</sup>.

A problem which D. 1,19,1,1 leaves unanswered is whether the notion of *bona fides* plays a relevant role in the decision. It is evident that if the owner fraudulently delivered some objects to his own advantage, he would not be acting in a loyal way, but this does not mean necessarily that Roman jurists had the notion of *bona fides* in mind. The same problem is to be seen in D. 41,4,7,6, where one may assume that the intention to harm the owner (*ut te damno adficeret*) is incompatible with the requirements of the *bona fides*, despite the fact that this notion is not brought into analysis. In the end, the exclusion of the *potestas alienandi* of the non-owner when he administers in an abusive way appears to be based on some basic objective notions of what a good administration should be, which are described only in D. 17,1,60,4 with reference to the requirements of the *bona fides* (*quatenus res ex fide agenda esset*). It remains therefore enigmatic whether the *bona fides* would play a role in the decisions of Julian and Ulpian, or whether Scaevola was only resorting to this notion in an attempt to offer a clearer view of what was expected from the non-owner. However, as will be shown below, there are several cases in which Roman jurists apply similar objective criteria to determine the transfer of ownership in cases where the *potestas alienandi* does not stem from the owner's authorization, many of which do not take place within a personal relationship governed by the *fides*. Accordingly, it would appear that the restriction of the *potestas alienandi* in order to avoid an uneconomical administration is not necessarily linked to the notion of *fides*, despite the fact that in certain contexts jurists may resort to this notion for that purpose.

#### d. Filling the *lacuna* of Gai 2,64.

The decisions reviewed so far show the great flexibility with which Roman jurists approached the notion of *voluntas domini*, since the *potestas alienandi* of an authorized non-owner could be restricted through an objectified *voluntas*, particularly when the owner's authorization was too broad or let the door open

<sup>275</sup> See on this text Chapter 2, Section 4(c) below.

<sup>276</sup> Lenel, *Paling.* (1889) II, col. 511-512 actually sets both texts side by side in fragments 565 and 566, under the rubric “*De Publiciana in rem actione*”. See moreover Lenel, *EP* (1927), p. 171 n. 1.

for abusive acts of his intermediary. The great inventiveness of Roman jurists to determine the scope of the *voluntas domini* in such cases finds an curious corollary in the modern attempts to fill a famous *lacuna* in Gai 2,64, where the circumstances under which a non-owner may transfer ownership are described. Since Roman law offered so many different approaches on the subject, the various attempts to reconstruct the *lacuna* based on dogmatic considerations have reflected the wide array of solutions offered by Roman jurisprudence<sup>277</sup>. Among the most famous reconstructions one finds that of Mommsen, who conjectured that the text should have made reference to the loyal behaviour of the *procurator* (*item procurator <si quid ne corrumpatur distrahendum> est*)<sup>278</sup>. Another conjecture was provided by Krüger<sup>279</sup>, who relied on the ideas of Gaius in D. 41,1,9,4 to fill the *lacuna*, according to which the *procurator* could transfer ownership if he had the *libera administratio* (*item procurator <rem absentis, cuius negotiorum libera administratio ei permissa> est*). This view was particularly successful among those who favoured the view that the *procurator* had a broad power to dispose in classical times<sup>280</sup>, but its validity is not necessarily linked to these notions. David and Nelson would agree with this conjecture, but finding it too long for the length of the gap in the text proposed instead “*procurator <rem absentis, si hoc ei concessum> est*”<sup>281</sup>. Angelini offered another reconstruction which stressed the need for a special authorization to transfer ownership, filling the *lacuna* with the words “*item procurator <cui hoc specialiter mandatam> est*”<sup>282</sup>. All of these reconstructions reflect different approaches to the *potestas alienandi* in the sources, and therefore none of them seems to be more accurate than the others from a strictly dogmatic perspective<sup>283</sup>: it is in fact equally true according to the sources that the fraudulent acts of the non-owner would prevent the transfer of ownership, that a *procurator* with the *libera administratio* would be able to transfer

<sup>277</sup> See on this point David/Nelson, *Gai Institutionum, Kommentar* (1960), p. 276; Girard/Senn, *Textes de Droit Romain* (1967), p. 76; Böhm, *Gaiusstudien* (1977) XV, p. 16-17; Miceli, *Rappresentanza* (2008), p. 171-177.

<sup>278</sup> Mommsen, *Emendationes Gaianae* (1905 [1877]), p. 42. This reconstruction was later followed by Bizoukides, *Gaius* (1937) I, p. 101.

<sup>279</sup> Krüger/Studemund, *Gai Institutiones* (1877), p. 53. This reconstruction was later followed in FIRA (1968) I, p. 58. Zulueta, *Institutes of Gaius* (1946) I, p. 80-82 also adheres to this reconstruction, but points out (p. 82 n. 1) that Mommsen’s conjecture is closer to the letters which can be read.

<sup>280</sup> Bonfante, *Facoltà e decadenza* (1921 [1898]), p. 250-261; Miceli, *Rappresentanza* (2008), p. 176.

<sup>281</sup> David/Nelson, *Gai Institutionum, Kommentar* (1960), p. 276.

<sup>282</sup> Angelini, *Il procurator* (1971), p. 149. This reconstruction is however not held as definitive, and recently Manthe, *Gaius Institutiones* (2004), p. 132 proposed yet another one: “*qui pecuniae administratione permissa est*”.

<sup>283</sup> Other reconstructions are however less plausible, such as that of Knip, *Gai Institutionum* (1912) II, p. 23-24, who in an attempt to make sense of some of the more readable letters of the text proposes “*procurator <iure civili, cum a praetore alienari concessum> est*”, which does not fit with the sources on the subject, despite the claims of Knip, *Gai Institutionum* (1912) II, p. 208 in regard to D. 3,3,67.

ownership, and that a special authorization would be needed regarding the alienation of objects not comprised in the ordinary administration. Considering the content of this *lacuna*, we will have to wait for the ongoing research of Briguglio<sup>284</sup> to shed more light on the point. One should however not expect a revolutionary piece of information concerning the faculty to dispose of the *procurator*, as the sources already offer a complex, yet consistent picture on the subject.

### 5. *Traditio nomine proprio and nomine alieno*

One of the subjects where the opinions of scholars differ the most concerns the possibility and significance of the delivery performed by the non-owner on behalf of the owner (*nomine alieno*) or on behalf of himself (*nomine proprio*). The confusion on this point stems originally from the application of the notion of ‘direct representation’ to describe the transfer of ownership in Roman law. Some scholars consider that the non-owner could only alienate *nomine proprio*, as an ‘indirect representative’, and not on behalf of the owner<sup>285</sup>. The idea according to which a third party could directly affect the principal by acting on his behalf may have seem far too modern, and therefore had to be excluded or restricted to the case of the *nuntius*<sup>286</sup>. Other authors were led to the opposite conclusion: since the transfer of ownership was an exception to the primitive ban on direct representation, the non-owner would have been able to act as a ‘direct representative’, i.e. *nomine alieno*<sup>287</sup>. Such deductions, however, are based on vague doctrinal standpoints, which have little or no support in the sources.

Sansón and Miquel developed a more elaborate explanation of the significance of the *traditio nomine proprio* and *nomine alieno*. They distinguish different legal grounds for the transfer of ownership depending on whether the delivery was performed on behalf of the owner or not. In the case of Miquel, the distinction is based on the analysis of two texts which have already been reviewed here, D. 39,5,9,2 (Pomp. 33 *Sab.*) and D. 6,2,14 (Ulp. 16 *ed.*). Regarding the first text, Miquel offers an original interpretation, according to which this fragment would compare two different grounds for the *potestas alienandi*, which would be distinguished through the conjunction “*aut*” (*Quod filius familias patris iussu aut voluntate donavit*). The meaning of each of these different concepts – *iussu*

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<sup>284</sup> See on the new techniques used to read the Veronese Palimpsest Briguglio, *Gai Codex Rescriptus* (2012), p. 1-51. Despite the enhanced photomechanical version offered in this edition, it has remained far from my modest abilities to offer a reconstruction of the text under discussion.

<sup>285</sup> Jörs/Kunkel/Wenger (1987), p. 113; Zimmermann, *The law of obligations* (1996), p. 51.

<sup>286</sup> See on the *traditio* by a *nuntius* Chapter 2, Section 3.

<sup>287</sup> Knipf, *Gai Institutionum* (1912) II, p. 23 n. 8 considers the alienation by a *procurator* in Gai 2,64 as “Ein altes Beispiel für unmittelbare Stellvertretung”. See also Siber, *Römisches Recht* (1928) II, p. 413. Plescia, *Development of agency* (1984), p. 172-175, 182, 185 only accepts a *traditio alieno nomine* in Justinianic law.

and *voluntate* – would then be developed in the second part of the text, where the distinction would again be signaled through the use of “*aut*” (*perinde est, ac si pater ipse donaverit aut si mea voluntate rem meam tu nomine tuo Titio dones*). The result of this is that Miquel extracts two separate statements from this text: “*Quod filiusfamilias patris iussu donavit, perinde est ac si pater ipse donavit*” and “*Quod filiusfamilias patris voluntate donavit perinde est ac si mea voluntate rem meam tu nomine tuo Titio dones*”<sup>288</sup>. In the first case, the existence of a *iussum* would imply that ownership is transferred on behalf of the owner (*ac si pater ipse donaverit*), while the delivery *patris voluntate* in the second case would be done on behalf of the non-owner/transferor (*tu nomine tuo*). That the term *traditio voluntate domini* indicates exclusively a delivery *nomine proprio* is then explained through D. 6,2,14, where we are told that the purchaser did not make use of the *exceptio si non auctor meus ex voluntate tua vendidit* precisely because he ignored the existence of a principal (*per ignorantiam [sc. facti] non est usus exceptione*). This interpretation leads Miquel to draw a parallel with modern institutions of private law, since the delivery *iussu domini* would be equivalent to the modern transfer of ownership in the framework of direct representation – *Stellvertretung* in BGB §§ 164 ff. – and the delivery *voluntate domini* would find a parallel in the modern ‘authorization’ – *Ermächtigung* in BGB § 185<sup>289</sup>.

Sansón also makes use of the distinctions between an alienation performed *nomine alieno* and *nomine proprio*, resorting to the notions of “representación directa”, “poder”, “apoderamiento” and “autorización” – the Spanish equivalents of *Stellvertretung*, *Vollmacht*, *Bevollmächtigung* and *Ermächtigung* – in order to describe the legal grounds for the *potestas alienandi*<sup>290</sup>. Such notions are applied as a basic framework throughout her studies to determine the outcome of the transfer of ownership, considering that the alienation *mandatu domini* by a *procurator* would be grounded in his ‘poder’ or ‘apoderamiento’ – i.e. *Vollmacht*, *Bevollmächtigung* – while the delivery *voluntate domini* would be based on the owner’s ‘autorización’ – i.e. *Ermächtigung*. In the first case, the delivery would take place on behalf of the owner, while on the second case it would be performed *nomine proprio*. However, the precise terminology borrowed from modern private law finds no equivalent in Roman law, and when distinguishing between the delivery *mandatu domini* and *voluntate domini* to indicate different legal grounds for the delivery the author is forced to focus her attention on specific texts – excluding more relevant evidence – in order to make her findings

<sup>288</sup> Miquel, *Traditio rei alienae* (1993), p. 270.

<sup>289</sup> Miquel, *Traditio rei alienae* (1993), p. 275.

<sup>290</sup> See e.g. Sansón, *La transmisión* (1998), p. 67: “En principio, parece que entregar *voluntate domini* y enajenar *mandatu domini* no son expresiones que se correspondan totalmente. Mientras esta última da la impresión de hacer referencia a la idea de poder o apoderamiento, aquella de entregar *voluntate domini* parece más bien indicar un acto de autorización del *dominus*”. For similar expressions, see moreover p. 68; 71-78; 96-98; 108-109; 219 ff. These ideas are already found in Sansón, *Potestas alienandi* (1988), p. 272-273, influencing Nebrera, *Ἡ τραπεζίτιον* (1989), p. 119 ff.; 254 n. 71.

consistent. Despite the complications which Sansón faces when applying this distinction, she holds tenaciously to it as basic guideline for approaching the *potestas alienandi* in Roman sources, and even defended its validity<sup>291</sup> from the criticism of Burdese<sup>292</sup>.

The standpoints of Sansón and Miquel may appear odd from a methodological perspective, since these authors are keen to fit the Roman sources into a modern dogmatic framework for the transfer of ownership by a non-owner. This approach, however, has deep roots in modern Roman law scholarship, as can be seen from the authors quoted by Sansón and Miquel in support of their approach<sup>293</sup>, which include names such as Mitteis, Rabel and Kaser, among others. These Spanish scholars attempted therefore to apply in a fully consistent way the ideas of their German predecessors, and it was only when an effort of such scale was carried out that the flaws of the theoretical model became evident.

A less dogmatic examination of the sources reveals that acting *nomine proprio* or *nomine alieno* had no decisive consequence for the transfer of ownership, or at least did not provide a different legal ground. This has already been highlighted by Burdese<sup>294</sup>, and in a more incidental way by Wieling<sup>295</sup> and Potjewijd<sup>296</sup>. The central element to determine the attribution of property by a non-owner was that the delivery took place *voluntate domini*. The only significant difference between acting on behalf of the owner or not is that the content of the *bona fides* of the acquirer would vary for the purpose of acquiring through usucapion. The good faith of the purchaser could indeed also refer to the *potestas alienandi* of a non-owner, as shown in the definition of *bonae fidei emptor* in D. 50,16,109 (Mod. 5 *pandectarum*), who is described as “*qui ignoravit, eam rem alienam esse, aut putavit eum, qui vendidit, ius vendendi habere, puta procuratorem aut tutorem esse*”<sup>297</sup>. This shows in turn that there was nothing special about a non-owner who openly delivered on behalf of someone else, apart from the fact that the good faith of the purchaser would consist not in believing to acquire from the owner, but rather from a non-owner with *ius vendendi*. These ideas are applied to a concrete case in the following text:

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<sup>291</sup> Sansón, *Representación* (2012), p. 1-20.

<sup>292</sup> Burdese, *Potestas alienandi* (2009), p. 15-29; Burdese, *Agire per altri* (2010), p. 15-18.

<sup>293</sup> Miquel, *Traditio rei alienae* (1993), p. 275 n. 10.

<sup>294</sup> Burdese, *Autorizzazione* (1950), p. 73-79, as well as p. 84: “... il principio che va sotto la denominazione di rappresentanza diretta non era affatto sconosciuto ai classici, anche se, per il normale atteggiarsi degli interessi in gioco, non apparisse necessario quello che si suole considerare elemento essenziale del fenomeno rappresentativo, vale a dire la *contemplatio domini*, l’*agire nomine alieno*”.

<sup>295</sup> Wieling, *Drittwirkungen* (1993), p. 244 n. 80.

<sup>296</sup> Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 142-143.

<sup>297</sup> See on this text Chapter 1, Section 3 above.

D. 41,4,14 (Scaev. 25 *dig.*): Intestatae sororis hereditas obvenit duobus fratribus, quorum alter absens erat, alter praesens: praesens etiam absentis causam agebat, ex qua hereditate suo et fratris sui nomine fundum in solidum vendidit Lucio Titio bona fide ementi: quaesitum est, cum scierit partem fundi absentis esse, an totum fundum longa possessione cepit. Respondit, si credidisset mandatu fratris venisse, per longum tempus cepisse<sup>298</sup>.

In this fragment, Cervidius Scaevola presents the case of two brothers who inherited a piece of land from their sister, the one being present and the other absent. The brother who was present decides to sell it to Lucius Titius, who buys in good faith (*bona fide ementi*). When asked whether the buyer would usucapt considering that he knew that part of the land was of an absent person, Scaevola shows what would be the content of the good faith of the purchaser in this case: believing that the seller was acting according to the mandate of his brother. Only if the sale took place under this supposition will the buyer be in good faith, setting him on the path to acquire by usucapion.

The texts dealing with the *bona fides* of the transferee show in the first place that there was no obstacle for the delivery taking place *nomine alieno*, as some modern scholars assume. If the delivery could only take place *nomine proprio*, the consequence would be rather odd with regard to the good faith of the purchaser, since any inquiry into the faculty to dispose would be *per se* excluded, the transferee always presenting himself as the true owner. If this was the case, the good faith as a requirement for usucapion would have little meaning, since the acquirer would not be able inquire about the *potestas alienandi* of the seller.

The sources feature many cases where the transferee would be completely aware of acquiring from a non-owner. This would be particularly the case for individuals who were *praepositi* working at places where it would be publicly announced who was in charge of selling what. One may have an idea of how clear the person of the principal normally was by the fact that the *actiones adiecticiae qualitatis* would be directed against him, which shows that normally he would be perfectly identifiable. In some cases, the purchaser would be immediately aware of purchasing from a non-owner, as if he bought from someone whom we knew to be a slave or from a son-in-power. In all of these cases, the *contemplatio domini* would normally have no decisive effects for the

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<sup>298</sup> D. 41,1,14: “The inheritance of their intestate sister devolved upon her two brothers, one of whom was present, the other, absent; the brother who was present conducted also the business of the absentee and, in the name of his brother and his own, sold all the land from the inheritance to Lucius Titius who bought it in good faith. The question was: since he knows that part belongs to an absentee, can the purchaser usucapt the whole? The reply was that if he believed the vendor to have his brother’s mandate to sell, he would acquire ownership by long possession” (transl. Watson, modified).

obligations arising from the agreement or for the transfer of ownership<sup>299</sup>. Regarding the obligations, on the one hand, the agent would only bind himself to the other party, leaving the principal outside of the obligatory link, and acting on his behalf would not alter this. This is shown by D. 3,3,67 (Pap. 2 *resp.*), where we are told that the *procurator* who sold “*pro domino*” – on behalf of the owner – would be nonetheless personally bound towards the purchaser<sup>300</sup>. Regarding the transfer of ownership, on the other hand, it is irrelevant as well whether the agent identifies himself as such or not, as long as he acts *voluntate domini*. Only for the usucapion would it be relevant on whose behalf the non-owner acted, since it would determine the content of the good faith of the acquirer. Finally, it is worth noting that in the context of the sale of a pledged object, the creditor would make clear that he is not the owner of the sold object, since this circumstance would free him from the liability following from the eviction of the sold object<sup>301</sup>.

The claim that the distinction between delivering *nomine alieno/nomine proprio* is irrelevant appears however to be challenged by the following text:

D. 39,5,25 (Jav. 6 *epistolarum*): Si tibi dederim rem, ut Titio meo nomine donares, et tu tuo nomine eam ei dederis, an factam eius putes? Respondit: si rem tibi dederim, ut Titio meo nomine donares eamque tu tuo nomine ei dederis, quantum ad iuris supilitatem accipientis facta non est et tu furti obligaris: sed benignius est, si agam contra eum qui rem accepit, exceptione doli mali me summoveri<sup>302</sup>.

The owner gave a specific instruction to the non-owner, who was to perform a gift to Titius on behalf of the owner (*dederim rem, ut Titio meo nomine donares*). The non-owner, however, disobeys this instruction and delivers *nomine proprio*. Accordingly, ownership is not transferred, not because there is anything wrong in general regarding *traditio nomine proprio*, but because the owner’s instructions were not followed. This implies that the delivery did not take place *voluntate domini*,

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<sup>299</sup> The main exception to this regards the *solutio*, where normally it would be essential for the transfer of ownership to act *nomine debitoris*. See on this point D. 46,3,17 (Pomp. 19 *Sab.*) below. It should however be noted that this follows from the peculiarities of payment – see Chapter 1, Section 2(c) above – and cannot be extended to any case of transfer of ownership by a non-owner.

<sup>300</sup> See on this text Chapter 2, Section 3 above.

<sup>301</sup> D. 21,2,68pr (Pap. 11 *resp.*). See on this point Perani, *Pignus distrahere* (2014), p. 38–42, 54.

<sup>302</sup> D. 39,5,25: “If I have given you some property to give to Titius in my name and you give it to him in your own name, do you think that the property becomes of Titius? He replied that if I have given you some property to give to Titius in my name and you give it to him in your own name, as far as a strict interpretation of law goes, the property does not become the recipient’s and you will be liable to a charge of theft. However, the more liberal view is that if I were to bring an action against the recipient, I would be successfully opposed by a defence of fraud” (transl. Watson, modified).

which is also why the transferor will commit *furtum*. All of this shows that the significance of delivering *nomine proprio* / *nomine alieno* depends exclusively on the instructions of the *dominus negotii* and has nothing to do with the structure of the *traditio voluntate domini* itself. It is moreover worth noting that in the opinion of Javolenus this would be the regular outcome of the case according a strict interpretation of law (*quantum ad iuris subtilitatem*), which shows that he is reproducing a well-accepted view, introducing an innovative opinion regarding the *exceptio doli* only towards the end of the text<sup>303</sup>.

A similar case is conveyed by Pomponius regarding the payment through a third person:

D. 46,3,17 (Pomp. 19 *Sab.*): Cassius ait, si cui pecuniam dedi, ut eam creditori meo solveret, si suo nomine dederit, neutrum liberari, me, quia non meo nomine data sit, illum, quia alienam dederit: ceterum mandati eum teneri. Sed si creditor eos nummos sine dolo malo consumpsisset, is, qui suo nomine eos solvisset, liberatur, ne, si aliter observaretur, creditor in lucro versaretur<sup>304</sup>.

As mentioned above<sup>305</sup>, the payment performed through an agent is governed by different rules from the transfer of ownership by a non-owner, since in the first problem it is essential, in order to release the debtor from his obligation, that the agent acts in his name. In this text, however, both problems are intertwined, since the discussion centres on the transfer of ownership of money when an agent pays the debt. Pomponius quotes the opinion of Cassius, according to whom if a person was instructed to make a payment in the name of the debtor and instead makes the payment on behalf of himself, neither of them will be released. This implies that both the principal and the agent had individual debts with regard to the creditor, and that the agent used the money given to him to pay his own debt<sup>306</sup>. In the case of the principal/debtor, he is not released from his debt because the payment was not made on his behalf (*quia non meo nomine data sit*). Regarding the agent, the reason why he will not be released is that he did not transfer ownership over the money, “because he gave another’s money” (*quia alienam dederit*). This succinct explanation implies that the agent could have only

<sup>303</sup> See on this point Chapter 4, Section 5 below.

<sup>304</sup> D. 46,3,17: “Cassius says that if I give money to someone to pay to my creditor and he pays it in his own name, neither of us is released, not I, because the payment was not in my name, not he, because he gave another’s money; but he will be liable [to me] in the action on mandate. Should the creditor, however, without bad faith spend the coins, the person in whose name they were paid over will be released in order to avoid that, by following a different solution, the creditor should make profit” (transl. Watson, modified).

<sup>305</sup> Chapter 1, Section 2(c).

<sup>306</sup> This is also the interpretation of Franciscus Accursius in his gl. *Cassius* ait to D. 46,3,17: “Casus: Debebam Sempronio centum aureos. Dedi tibi hanc summam, ut eam Sempronio pro me solveres. Tu nequam homo, quia forte eidem debebas, dedisti hanc pecuniam tuo nomine, non meo...”

transferred ownership over the coins if he had acted *voluntate domini*, but since this would involve acting *nomine alieno* he could not have appeared paying his own debt. From the moment he disobeys the order to act *nomine alieno* and pays his own debt he loses the *potestas alienandi* granted by the owner, becoming moreover liable to the *actio mandati* (*mandati eum teneri*) and to the *actio furti*<sup>307</sup>. Therefore, acting on behalf of the owner is only relevant for the transfer of ownership as far as it implies following the owner's authorization to transfer ownership.

Apart from the texts mentioned so far, there are very few cases in which the sources mention at all that the non-owner transferred *nomine proprio* or *nomine alieno*, which is in itself a clear sign of the minor role that this element had in the context of the transfer of ownership. Miquel made use of the reference to the *traditio nomine alieno* at the end of D. 39,5,9,2 to claim the existence of different legal grounds for the alienation depending on whose behalf the alienation took place<sup>308</sup>. His interpretation, however, is highly unlikely, particularly because it would offer a completely *sui generis* distinction which is not to be found in the Roman sources. If one attends to the considerable amount of texts addressing the transfer of ownership by a non-owner, the only general distinctions regarding the *potestas alienandi* refer to the role of the *voluntas domini*, the concession of the *libera administratio peculii* by the owner or the existence of a legal provision. Accordingly, it appears that the best interpretation of D. 39,5,9,2 is that Pomponius was simply offering a number of cases in which the consequence of the delivery would be identical.

Another element which makes Miquel's reconstruction unconvincing is that D. 39,5,9,2 does not really revolve around the contrast *nomine proprio* / *nomine alieno*. Miquel assumes that the *iussum* would imply to act in the name of the owner, but the sources offer numerous examples where this is not the case<sup>309</sup>. Neither is it possible to understand the phrase "*ac si pater ipse donaverit*" as implying a delivery *nomine alieno*. Instead, this idea seems to indicate an equivalence in the result of the delivery, just as the sentence "*Nihil autem interest, utrum ipse dominus per se tradat alicui rem, an voluntate eius aliquis*" in D. 41,1,9,4 puts on the same level the delivery *voluntate domini* with the one performed by the owner himself. The fact that both Gaius (D. 41,1,9,4) and Pomponius (D. 39,5,9,2) draw a parallel with the alienation by an owner reaffirms that the latter author is only indicating different circumstances in which the delivery will produce the same consequence.

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<sup>307</sup> D. 47,2,52,16 (Ulp. 37 *ed.*): "Iulianus libro vicensimo secundo digestorum scripsit, si pecuniam quis a me acceperit, ut creditori meo solvat, deinde, cum tantam pecuniam eidem creditori deberet, suo nomine solverit, furtum eum facere".

<sup>308</sup> See Chapter 2, Section 3 above.

<sup>309</sup> That the existence of a *iussum* was not equivalent to acting on behalf of the principal can be seen in Gai. 3,167a: "Illud quaeritur, an quod nomen domini adiectum efficit, idem faciat unius ex dominis iussum intercedens (...)"

Maybe one of the most interesting arguments offered by Miquel to prove that the delivery *voluntate domini* takes place *nomine proprio* refers to his interpretation of D. 6,2,14, where he highlights that the purchaser did not use the corresponding praetorian defence “*per ignorantiam*”. According to Miquel, this cannot refer to a problem of *ignorantia iuris* concerning the existence of this defence<sup>310</sup>, but rather indicates the unawareness at the time of the delivery that the transferor was acting under the instructions of the owner who later claims the object back. Miquel considers that the ignorance of the purchaser would be caused by the fact that the *traditio voluntate domini* was always performed *nomine proprio*, and therefore the transferee would not gain notice of who the real owner was. The problem of this interpretation is that Ulpian does not present the ignorance of the purchaser as a necessary consequence of the *traditio voluntate domini*, but rather as something that may happen (*potest enim fieri...*). Therefore, if the ignorance of the purchaser indeed refers to the unawareness of who the original owner was, it is clear that he would not have been necessarily ignorant of this fact. Otherwise, there would have been no point in granting an *exceptio* based on a circumstance which the purchaser could not possibly know. It seems therefore more plausible that the ignorance of the acquirer refers to an *error iuris*, as Winkel claims<sup>311</sup>, which would explain why his ignorance does not necessarily follow from the context of the case. Another possibility is that the case refers indeed to an *error facti* of the acquirer regarding the existence of the principal, but that such mistake did not follow necessarily from the fact that the delivery was performed by an agent. Whatever the case may be, it follows that D. 6,2,14 does not draw a clear link between the *traditio voluntate domini* and the *contemplatio domini* at the delivery.

Sansón would develop a much more complex outlook on the Roman sources than Miquel, based on the general distinction between the delivery concluded *nomine proprio* and *nomine alieno*. However, the few texts which grant a relevant role to this distinction lead Sansón to seek support for her ideas in texts that are not so compelling. For example, she signals the vital importance of the need to act *nomine alieno* by a *procurator* in D. 1,19,1,1, where the alienation is excluded because he delivered “*quasi rem propriam*”<sup>312</sup>, which would also be the case in D. 27,10,10pr. These texts, however, refer to the problem of the abusive and disloyal behaviour of the *procurator* and the *curator furiosus*<sup>313</sup>, respectively, and therefore provide no support to identify two different legal grounds for the delivery<sup>314</sup>. Additionally, the author does not apply her general dogmatic framework to texts which do refer to the *contemplatio domini* – such as

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<sup>310</sup> This point is however not as clear as Miquel holds, and in fact the opposite view is held by Winkel, *Error iuris* (1985), p. 136-137.

<sup>311</sup> Winkel, *Error iuris* (1985), p. 136-137.

<sup>312</sup> Sansón, *Potestas alienandi* (1988), p. 273-274; Sansón, *La transmisión* (1998), p. 71-72.

<sup>313</sup> See Chapter 2, Section 4 and Chapter 3, Section 2.

<sup>314</sup> This is the interpretation defended by Burdese, *Potestas alienandi* (2009), p. 21 and 29.

D. 41,4,14<sup>315</sup> – and in other cases – as in D. 41,1,9,4<sup>316</sup> – assumes that the delivery takes place on behalf of the owner. Moreover, probably one of the most decisive elements in Sansón’s analysis is the use of texts dealing with the *acquisition* by a non-owner, where there is much more information available regarding the significance of acting on behalf of the owner or not. The repeated reference to the *contemplatio domini* on this context leads Sansón to assume that analogous rules should have governed the transfer of ownership by a non-owner<sup>317</sup>. It is, however, not possible to apply by analogy the rules concerning the acquisition of ownership by a third person to the transfer of ownership by a non-owner, as already shown above<sup>318</sup>, since the basis of their validity is completely different. Accordingly, despite the apparent similarities between both groups of cases, they should in fact be regarded as essentially different, particularly since in the case of the acquisition the patrimony of the principal is enlarged, while in the case of the alienation it is diminished. It is moreover worth noting that the *contemplatio domini* plays a decisive role for the acquisition due to the focus on whether the principal becomes possessor, but in the context of the transfer of ownership the central problem is whether the delivery takes place *voluntate domini* or not.

The analysis of the Roman sources reveals that the *contemplatio domini* does not play a decisive role to determine the attribution of ownership when the delivery is performed by a non-owner. This element will only be relevant when, according to the owner’s instructions, the delivery had to be performed *nomine alieno* or *nomine proprio*, but in this context the outcome of the case revolves once more around the central element to determine the *potestas alienandi* of the authorized non-owner: the compliance with the *voluntas domini*. It is therefore not possible to distinguish different grounds for the transfer of ownership depending on behalf of whom the delivery is concluded. This in turn shows that modern dogmatic concepts such as that of ‘direct representation’ are of no use when describing Roman sources, as already highlighted by Burdese<sup>319</sup>. Roman law scholars should accordingly strive for a more source-oriented terminology and abandon the clear-cut legal concepts borrowed from modern private law more than a century ago, which provide a dogmatic framework which distorts a proper understanding of the *potestas alienandi* in Roman law.

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<sup>315</sup> Sansón, *La transmisión* (1998), p. 104–105.

<sup>316</sup> Sansón, *La transmisión* (1998), p. 77.

<sup>317</sup> Sansón, *La transmisión* (1998), p. 68 n. 118; p. 72–74; p. 96 n. 247.

<sup>318</sup> Chapter 1, Section 2(c).

<sup>319</sup> Burdese, *Potestas alienandi* (2009), p. 29; Burdese, *Agire per altri* (2010), p. 23: “Nell’ambito della realtà considerata, non sembra poi riscontrabile alcuna ipotesi che possa considerarsi espressione, in termini moderni, del fenomeno di rappresentanza c.d. diretta, ove contrassegnata dalla *contemplatio domini*, il cui ricorrere si avrebbe solo in casi particolari e non allo scopo di rispondere ad istanze di affidamento da parte dell’acquirente”.

## 6. *Voluntas domini, iusta causa traditionis and error in dominio*

### a. *Voluntas domini* and the structure of *traditio*.

The study of the sources so far has revealed the key position of the *voluntas domini* in order to determine the *potestas alienandi* of a non-owner. While this is an element of undeniable importance in classical jurisprudence, the fact that a specific intent must exist at the time of the delivery has been the subject of a long-standing controversy concerning the nature of the classical *traditio* and the significance of the *iusta causa traditionis*. During most of the 20<sup>th</sup> century, Roman law scholars were divided on this point in two main groups: on the one hand, some authors favoured a more abstract approach, which would imply that it would only be decisive that the parties agreed on the transfer of ownership at the time of delivery; on the other hand, some scholars regarded the classical *traditio* as essentially causal, claiming that the only truly decisive agreement for the transfer of ownership was the one reached at the *iusta causa traditionis*<sup>320</sup>. According to the latter view, most of the texts which highlight the importance of a particular intent at the time of the delivery would be of postclassical origin<sup>321</sup>, many of which would have originally referred to the *mancipatio* or *in iure cessio*. However, some scholars favour an intermediate approach, acknowledging that while Roman law required a *iusta causa traditionis*, a certain intent or agreement could take place at the delivery. Several formulas have been used in this regard, and while some authors demand only a specific intent on the part of the transferor in order to transfer ownership<sup>322</sup>, others consider that an actual agreement must take place between both parties in order to transfer ownership<sup>323</sup>. The terms *animus adquirendi et transferendi domini* are often to be found in such dogmatic framework. Such concessions were criticised by other scholars, who defended a strictly causal approach according to which the *traditio* would be an exclusively material act where no special agreement needs to take place. According to this view, every form of intent or agreement at the delivery should be related to the *iusta causa traditionis*<sup>324</sup>. Despite this resistance, scholars gradually developed more nuanced views on the subject, which avoid defending a strictly causal or abstract

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<sup>320</sup> The *status quaestionis* on this subject is described by Miquel, *Compraventa y transmisión* (1993), p. 90-101.

<sup>321</sup> See in particular Pringsheim, *Animus* (1933), p. 55-60; Jörs/Kunkel/Wenger (1949), p. 129. On the claims according to which the references to a subjective *animus* or *voluntas* would be typically postclassical see Chapter 2, Section 1(a) above.

<sup>322</sup> Biondi, *Istituzioni* (1965), p. 258-259; Guarino, *Diritto Privato Romano* (2001) II, p. 256, 694.

<sup>323</sup> Betti, *La attuazione* (1933), p. 153-157; Betti, *Sul carattere causale* (1936), p. 117-119; Cuena Casas, *Poder de disposición* (1996), p. 51-53; Belda Mercado, *Presupuestos* (2001), p. 40-46; Giuffrè, *Il diritto* (2006), p. 287-288; Talamanca, *Elementi* (2001), p. 226-227.

<sup>324</sup> Lokin, *Traditio* (1971), p. 125-129; Guzmán, *DPR* (2013) I, p. 647-648; [Miquel, foreword to] Sansón, *La transmisión* (1998), p. 2-3; Salomón, *Sine vitio* (2003), p. 23-49; D'Ors, *DPR* (2004), p. 241-244; Lokin, *Prota* (2012), p. 147-148.

model by showing that while some elements in Roman law suggest a causal system – such as the general requirement of a *iusta causa traditionis* – other features are more ‘abstract’<sup>325</sup>. In other words, the terms ‘causal’ and ‘abstract’ may fall short when describing the Roman sources, since the key importance of the *iusta causa traditionis* does not exclude the fact that a particular intent at the time of the delivery may be relevant for the transfer of ownership. This is why some authors have observed that a clear-cut distinction between ‘abstract’ and ‘causal’ systems of delivery was only developed in a consistent way by legal scholarship in the course of the 19<sup>th</sup> century<sup>326</sup>, and therefore it is not easy to fit Roman jurisprudence under this conceptual framework.

The problem of the *iusta causa traditionis* is relevant for the study of the *potestas alienandi* due to the fact that the controversy regarding the agreement relevant for the transfer of ownership influenced to some extent the significance granted to the fact that the delivery could be performed *voluntate domini* by a non-owner. For example Betti, who granted considerable importance to the agreement of the parties at the time of the delivery, would approach some cases of *delegatio tradendi* as part of the need to reach an agreement at the time of the delivery which would ratify the intent given at the *iusta causa traditionis*<sup>327</sup>. While this theory does not really concern the delivery by a non-owner, Sansón considered it to adequately describe some aspects of the *potestas alienandi*<sup>328</sup>, although later in her work she would state that the *voluntas domini* at the delivery cannot be considered as part of a separate requirement for the transfer of ownership in Roman law<sup>329</sup>. Similarly Miquel, in the foreword to Sansón’s work, claimed that the *potestas alienandi* should be understood as an objective and autonomous requirement for the transfer of ownership, and not be approached as part of a subjective *animus* required at the time of the delivery<sup>330</sup>, following thus a strictly causal understanding of the transfer of ownership by *traditio*. On the other hand Potjewijd would conceive the delivery by the non-owner as a ‘compound title’ (*samengestelde titel*) formed by the intent of the owner who authorizes the delivery and the will of the agent who performs the *traditio*, which should coincide in order to transfer ownership<sup>331</sup>. In this way, the author avoids acknowledging the intent at the delivery as an independent requirement for the transfer of ownership, and instead identifies it with the title of the delivery.

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<sup>325</sup> Examples of this more eclectic approach are Potjewijd, *Beschikingsbevoegdheid* (1998), p. 12-13; Lovato, *Traditio e conventio* (2001), p. 79-133; Lambertini, *Iusta causa traditionis* (2007), p. 2745-2756.

<sup>326</sup> Van Vliet, *Iusta causa traditionis* (2003), p. 360-361.

<sup>327</sup> Betti, *La attuazione* (1933), p. 173-174, 245-247; Betti, *Sul carattere causale* (1936), p. 127-130.

<sup>328</sup> Sansón, *La transmisión* (1998), p. 70 n. 127 and p. 176.

<sup>329</sup> Sansón, *La transmisión* (1998), p. 223.

<sup>330</sup> [Miquel, foreword to] Sansón, *La transmisión* (1998), p. 2-3.

<sup>331</sup> Potjewijd, *Beschikingsbevoegdheid* (1998), p. 145, 149-151, 197. This notion is borrowed from Dutch private law, as shown in Chapter 8, Section 5 below.

An assessment on the nature of the classical system for transfer of ownership would exceed the margins of the present research. It is however important to note that the references to a particular intent at the delivery were by no means alien to classical Roman law, which is why one cannot follow the claim that the need for such an intent would be typically post-classical. The relevance of such a *voluntas* is of course undeniable in the numerous cases studied so far where the owner's authorization serves as the basis for the *potestas alienandi* of a non-owner. The intent at the moment of the delivery is in no way dependent on a previous *iusta causa traditionis*, which is why ownership will not be transferred if the owner forbids the delivery – even after there is an agreement regarding the *iusta causa traditionis*, as in D. 6,2,14 – or loses his own faculty to dispose – due to death, insanity etc. – before the conveyance takes place. It is moreover interesting that Roman jurists at times even discuss this problem along with other cases where the *voluntas domini* plays a relevant role for the transfer of ownership. This is particularly the case in a famous text of the *Res cottidianae* of Gaius reproduced in the D. 41,1,9,3–8 and included as well in Inst. 2,1,42–48, which shows the general significance of the *voluntas domini* in D. 41,1,9,3:

D. 41,1,9,3 (Gai. 2 *rer. cott.*): Hae quoque res, quae traditione nostrae fiunt, iure gentium nobis acquiruntur: nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi<sup>332</sup>.

Since the text generally highlights the importance of the *voluntas domini* at the delivery, it has been traditionally regarded as particularly representative of an abstract system of delivery<sup>333</sup>, considering that it lays an emphasis on the will at the delivery, not in the preceding *iusta causa traditionis*. Others have attempted to avoid this interpretation by pointing out that this text follows the acquisition of ownership through *occupatio* and *accessio*, where the *voluntas* has no role to play. Accordingly, when beginning the study of the *traditio* a mention to the importance of the intent of the parties regarding the transfer of ownership would be in place in order to offer a contrast with the other ways of acquiring ownership<sup>334</sup>. Such an approach cannot be followed, not only because the *voluntas domini* does play a role in certain cases of *accessio*, but especially because Gaius explicitly develops the applications of this *voluntas* for the transfer of ownership, the first of which – D. 41,1,9,4 – highlights its role for the transfer of

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<sup>332</sup> D. 41,1,9,3: “Those things, again, which are delivered to us become ours under the law of nations; for nothing is so adequate to natural equity as that effect should be given to the intent of an owner who wishes to transfer his thing to someone else” (transl. Watson, modified).

<sup>333</sup> Lokin, *Traditio* (1971), p. 130.

<sup>334</sup> Miquel, *La doctrina* (1961), p. 518–519; Guzmán, *DPR* (2013) I, p. 647; Miquel, *Savigny y el nacimiento* (2003), p. 5763.

ownership by an authorized non-owner. The *voluntas domini* forms the unifying thread of the rest of the text, since it is applied in D. 41,1,9,5–6 to explain certain cases of *traditio ficta*<sup>335</sup> and again in D. 41,1,9,7–8 to determine whether ownership over abandoned and jettisoned objects can be acquired. All of this does not imply that Gaius proposes here an abstract model of delivery, but simply that the intent at the delivery could play a relevant role in particular circumstances.

Apart from these applications, the *voluntas domini* also plays a role in other contexts, particularly when the delivery does not take place immediately after an agreement is reached regarding the *iusta causa traditionis*. One may for instance find in the sources cases in which a buyer snatches the object he bought from the seller without his consent, where ownership is not transferred because the object was not obtained *voluntate domini*<sup>336</sup>. The *traditio* would also not seem fit to transfer ownership if the owner loses his *potestas alienandi* – e.g. by becoming a lunatic – after an agreement has been reached regarding the *iusta causa traditionis*, and no ownership will be transferred if the acquirer refuses the delivery and the transferee nonetheless leaves the thing at his home<sup>337</sup>. There are also numerous texts where the owner may recover an object which he delivered under duress<sup>338</sup>. Considering all of this evidence, it seems that scholars who defend a strictly causal model of transfer of ownership in Roman law by denying any possible significance of the intent at the delivery are carried too far in their zeal to offer a fully consistent model, having to force the sources in order to extract the desired interpretation. This is the case, for instance, of the work of Salomón<sup>339</sup>, who can only discard the significance of the *voluntas* at the delivery by claiming that the cases where such an intent is to be found cannot be considered as cases of *traditio*, but as mere analogies made by the Roman jurists of the ‘prototypical’ *traditio*, which would consist in the delivery from hand to hand.

The text of D. 41,1,9,3 is usually confronted with Gai 2,20, which includes among the requirements to transfer ownership by *traditio* the need for a *iusta causa traditionis*, ownership over the object and that the delivered object is a *res nec mancipi*. According to some scholars, the omission of any reference to the *voluntas* at the delivery would show that this text represents the classical doctrine, while

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<sup>335</sup> The intent of the acquirer is moreover signalled as relevant for the acquisition of ownership in D. 41,2,1,21 (Paul 54 *ed.*).

<sup>336</sup> D. 41,2,5 (Paul 63 *ed.*): “Si ex stipulatione tibi Stichum debeam et non tradam eum, tu autem nactus fueris possessionem, praedo es: aequè si vendidero nec tradidero rem, si non voluntate mea nactus sis possessionem, non pro emptore possides, sed praedo es”. This text is dealt in Chapter 2, Section 1(b) above. See on this and similar texts Betti, *Sul carattere causale* (1936), p. 118–119 n. 7. Contrary to this interpretation is Salomón, *Sine vitio* (2003), p. 46 ff.

<sup>337</sup> Guzmán, *DPR* (2013) I, p. 647.

<sup>338</sup> E.g. D. 4,2,9pr (Ulp. 11 *ed.*) *if.*; D. 43,16,5 (Ulp. 11 *ed.*); C. 2,19,3 (Gordian, 238). Regarding *metus* in the context of the sale and/or delivery see Hartkamp, *Der Zwang* (1971), p. 166–172; 178–181; Du Plessis, *Compulsion* (2004), p. 20–22.

<sup>339</sup> Salomón, *Sine vitio* (2003), p. 24 ff.

D. 41,1,9,3 reflects post-classical trends and would probably not even correspond to Gaius. There is however no contradiction between both texts, since the fact that the *voluntas domini* at the delivery is not mentioned in Gai 2,20 only shows that this element was not *always* relevant for the transfer of ownership. This agrees with the fact that the fragments following D. 41,1,9,3 describe only isolated applications of the *voluntas domini* in specific situations. The differences between the Institutes of Gaius and the *Res cottidianae* are also breached if one considers that the former work also makes reference to the *voluntas domini* at the delivery, since in Gai 2,64 the legal basis for the *potestas alienandi* of the pledge creditor is precisely the *voluntas debitoris*<sup>340</sup>.

From the texts reviewed so far, it would appear that the *voluntas domini* would provide a general framework to approach several problems related to the transfer of ownership by *traditio*. This of course does not imply that all the solutions in which reference is made to this element would be self-evident; on the contrary, jurists apply the *voluntas domini* in a dynamic way which leaves plenty of room for innovation – as already seen in various cases of *potestas alienandi* – which can lead in turn to divergent views when dealing with particular problems. Particularly noteworthy is a contribution by Lovato<sup>341</sup> concerning the role of the agreement at the delivery among four different texts located within book 7 of Ulpian's *Disputations*: D. 41,2,34, dealing with the *traditio longa manu* and the acquisition of possession through a *procurator* or slave; D. 39,5,13, which discusses the acquisition or ownership through a *servus communis*; D. 41,1,35, addressing a case of *error in dominio*; and D. 12,1,18, concerning the agreement of the parties to transfer ownership when the *iusta causa traditionis* is not entirely clear<sup>342</sup>. Lovato shows in a compelling way that the common thread which runs through these texts is the relevance of a *conventio* between the parties at the delivery, which would therefore have a decisive role in determining the outcome of the transfer of ownership in several contexts. That some of these cases could lead to disagreement, as happens in the acquisition through a third person or regarding the agreement on the *iusta causa traditionis*, is only a consequence of the contrasting opinions regarding the significance of the owner's *voluntas* – or the agreement between the parties – at the delivery, but does not imply that Roman law was inconsistent regarding the requirements to transfer ownership: it was generally clear that the *voluntas* played a certain role at the delivery, but it was left to the jurist to determine exactly what role this was.

Despite the fact that already classical jurisprudence granted the *voluntas domini* a significant role at the delivery, one could still argue that Justinianic law gave much more emphasis to the *voluntas* at the *traditio* from a systematic perspective.

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<sup>340</sup> Sansón, *La transmisión* (1998), p. 46.

<sup>341</sup> Lovato, *Traditio e conventio* (2001), p. 79–133.

<sup>342</sup> Recently Schermaier, *Consensus* (2014), p. 115 has also framed the discussion regarding the agreement on the *iusta causa traditionis* under the general evolution of *consensus* in Roman classical law.

A contrast can be drawn at this point if one compares the Institutes of Gaius with those of Justinian: while both Gaius and Justinian omit any reference to a particular *voluntas* when drawing the general requirements to transfer ownership in Gai 2,20 and Inst. 2,1,40-41 respectively, Justinian introduces in Inst. 2,1,42-48 the text of the *Res cottidianae* found in D. 41,1,9,3-8, thereby bestowing great attention on the *voluntas domini*. It is therefore no wonder that Byzantine legal scholarship would grant this element a particular significance when discussing the general requirements to transfer ownership<sup>343</sup>. For instance, already Theophilus would not include the *iusta causa traditionis* as a requirement for the transfer of ownership, declaring more generally that the delivery must be made with the intention to transfer ownership<sup>344</sup>. Miquel has shown that subsequent scholars would offer progressively abstract formulations, until eventually late Byzantine jurists presented a systematization of the transfer of ownership by delivery which matches many of the features of Savigny's *dinglicher Vertrag*<sup>345</sup>.

The evolution of the *voluntas domini* in Byzantine legal scholarship is without any doubt fascinating from the point of view of legal systematization, since it shows that the *voluntas domini*, which in classical Roman law fulfilled a relevant role only in particular cases, was gradually approached as a central requirement for the transfer of ownership and eventually absorbed the need for a *iusta causa traditionis*. However, such an evolution seems to be of little moment for the practical outcome of numerous cases traditionally solved through the reference to the *voluntas domini*. Already in classical law jurists resorted to this element to resolve various problems, and the fact that this *voluntas* was listed by Byzantine scholars among the basic requirements to transfer ownership brought almost no change to their analysis, which is particularly the case regarding the situations involving the transfer of ownership by a non-owner *voluntate domini*<sup>346</sup>. It is accordingly difficult to agree with Nebrera, who claims that the need for a *voluntas domini* as a basis for the *potestas alienandi* would be part of the gradual abstraction of the transfer of ownership by *traditio* in Byzantine scholarship,

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<sup>343</sup> Concerning the structure of the *traditio* in Byzantine law see Betti, *Il dogma bizantino* (1930), p. 304-334; Fuchs, *Iusta causa traditionis* (1952), p. 16-26; Miquel, *La doctrina* (1961), p. 515-529.

<sup>344</sup> Theoph. Par. 2,1,40: εἰς δὲ τὸ διὰ TRADITIONOS μεταθεῖναι με τὴν δεσποτείαν δεῖ ταῦτα συνδραμεῖν, ὥστε δεσπότην εἶναι τὸν TRADITEUONTA καὶ ψυχῇ τοῦ βούλεσθαι μεταθεῖναι τὴν δεσποτείαν ποιεῖσθαι τὴν TRADITIONA καὶ σωματικὸν εἶναι τὸ TRADITEUOMENON (To pass ownership by delivery, these conditions must concur: the deliverer must be owner; the delivery must be made with the intention of passing the ownership; and the thing delivered must be corporeal [transl. Murison]).

<sup>345</sup> Miquel, *La doctrina* (1961), p. 515-529. This interpretation was earlier set forth by Jörs/Kunkel/Wenger (1949), p. 129 n. 18, but criticized by Fuchs, *Iusta causa traditionis* (1952), p. 24-26. On the ideas of Byzantine scholars on this point see moreover Pringsheim, *Animus* (1933), p. 59.

<sup>346</sup> The only relevant innovation of Byzantine scholars in this regard was that the delivery was considered to be performed by the owner himself for systematic purposes, as will be shown in Chapter 6, Section 4.

granting more importance to the intent at the delivery<sup>347</sup>. The fact is that numerous references to this *voluntas* can be found in classical jurisprudence, and therefore it is not possible to see in this regard a Byzantine innovation, or that there is an evolution which relates specifically to the general structure of the transfer of ownership by *traditio*. It is moreover worth noting that Nebrera is not alone in her general standpoint, since other scholars have also approached the references to the *voluntas domini* at the delivery by a non-owner as a typically post-classical or Byzantine element, despite the enormous evidence in classical sources regarding this point. Such notions, however, are only rooted on general preconceptions regarding the character of Roman and Byzantine law while disregarding the sources.

The fact that there is no innovation concerning the need and significance of the *voluntas domini* as ground for the *potestas alienandi* can be seen from the analysis of a scholion dealing with D. 6,2,14<sup>348</sup>, extensively analysed by Miquel and Nebrera<sup>349</sup>. It consists of an old scholion, which Zachariae considered to be by Stephanus<sup>350</sup>, an opinion which has been reproduced by Miquel and Nebrera despite the fact that the authorship of Stephanus was not accepted in the critical edition of Scheltema, Van der Wal and Holwerda. When discussing the outcome of this case, the scholiast would observe that ownership is not transferred (εικότως οὐ μετηνέχθη δεσποτεία) because the delivery was not performed according to the owner's authorization (ἢ τραδιτίων παρὰ γνώμην αὐτοῦ ἐγένετο), quoting as the legal basis of his decision Inst. 2,1 (μαθὼν ἐν τῷ α'. τι. τῆς Β'. τῶν Ἰνστι.) – certainly referring to Inst. 2,1,42-43 – where, in the words of this author, it is pointed out that the *traditio* transfers ownership to the acquirer over the delivered object as long as it is done with the owner's intent (ἢ τραδιτίων ἐπὶ τὸν λαμβάνοντα μεταφέρει τὴν τοῦ τραδιτευομένου πράγματος δεσποτείαν, ὅτε κατὰ γνώμην γίνεται τοῦ δεσπότου). This analysis offers interesting features, such as the suppression of the distinction between having something *in bonis* or *ex iure Quiritium* highlighted by Miquel and Nebrera, which leads to a rather odd situation when determining whether ownership was transferred or not. It is also curious that the scholiast mentions that the sale is valid because it was concluded according to the owner's intent (ἢ πρᾶσις κατὰ γνώμην δεσπότου τὴν ἀρχὴν γενομένη ἔρρωται), which is certainly not a very classical remark considering that in Roman law it was normally irrelevant for the

<sup>347</sup> Nebrera, Ἡ τραδιτίων (1989), p. 109 ff.; 159-163; 171-173; 341-345.

<sup>348</sup> BS 902/30-35 (*Sch. ad Bas.* 15,2,14,2): Τουτέστι δίδοται αὐτῷ καὶ νεμένῳ παραγραφῇ ἐκπεσόντι τῆς νομῆς Πουβλικιανῆ. Εἰ γὰρ καὶ ἡ πρᾶσις κατὰ γνώμην δεσπότου τὴν ἀρχὴν γενομένη ἔρρωται, ὅλως, ὅτι ἡ τραδιτίων παρὰ γνώμην αὐτοῦ ἐγένετο, εικότως οὐ μετηνέχθη δεσποτεία. Οἶδας γὰρ μαθὼν ἐν τῷ α'. τι. τῆς Β'. τῶν Ἰνστι., ὅτι τότε ἡ τραδιτίων ἐπὶ τὸν λαμβάνοντα μεταφέρει τὴν τοῦ τραδιτευομένου πράγματος δεσποτείαν, ὅτε κατὰ γνώμην γίνεται τοῦ δεσπότου.

<sup>349</sup> Miquel, *Exceptio rei voluntate* (1988), p. 686-687; Nebrera, Ἡ τραδιτίων (1989), p. 151 ff.; Miquel, *Traditio rei alienae* (1993), p. 278-280.

<sup>350</sup> Zachariae, *Supplementum Basilicorum* (1846), p. 48.

validity of the sale whether the owner authorized it or not. From the perspective of the legal sources it is moreover remarkable that an indication is made to a particular legal provision – Inst. 2,1,42–43 – as the reference point regarding the need for a *voluntas domini* when the delivery was performed by a non-owner. Apart from such peculiarities, the decision introduces no innovation in comparison to classical jurisprudence, since the significance granted to the *voluntas domini* experiences practically no change. The fact that the owner's intent at the delivery played moreover for Byzantine jurists a central role in the systematization of the requirements to transfer ownership did not bring along any changes in the particular outcome which traditionally followed from the application of this notion: both classical Roman law and Byzantine law would resort to the *voluntas domini* at the delivery to determine the outcome of particular cases. Accordingly, there is no reason why compilers should have felt the need to modify classical texts in order to grant the *voluntas domini* an even more significant practical role.

Other texts show that there is no real correlation between the gradual changes experienced by the structure of *traditio* and the *voluntas domini* as ground for the *potestas alienandi*. For instance, Byzantine jurists would grant this *voluntas* a more restricted role regarding the *error in dominio*, as will be seen in the following section. Accordingly, the evolution on this point is opposite to what one should expect according to the theories of Nebrera<sup>351</sup>.

The study of Roman sources conducted so far shows that there is no obstacle to acknowledge that already in classical law the *voluntas* at the delivery occasionally played a relevant role to determine whether ownership was transferred or not. Moreover, the systematic changes which affected the *traditio* in the *Corpus Iuris* did not introduce far-reaching consequences for the practical outcome of cases where the *voluntas* was applied, at least concerning the cases where the *potestas alienandi* stems from the owner's consent. In other words, while the general understanding or systematization of the requirements to transfer ownership experienced some changes in classical Roman law, the practical role of the *voluntas* at the delivery seems to have undergone little changes, the most relevant of which concerns the *traditio ficta*. The fact that Nebrera claims that a fundamental change took place between Roman law and Byzantine law can only be explained because her approach to classical Roman law is rooted in the theories of Sansón, which lay more emphasis on the fact that the non-owner acts *nomine alieno* or *nomine proprio*. If one acknowledges instead that the *voluntas domini* was already in classical law the main requirement to determine the *potestas alienandi* by an authorized non-owner, it becomes evident that the basic approach to this problem is identical in Roman and Byzantine law. All of this enables an approach to the sources free of dogmatic prejudices, since it cannot be argued

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<sup>351</sup> Regarding the *error in domino* in Byzantine scholarship see Nebrera, *Ἡ τραδίτιων* (1989), p. 253–259, who fails to prove what the essential difference would be regarding classical Roman law when analysing D. 17,1,49.

that classical law had a strictly causal system of delivery, and that accordingly every form of intent or agreement should be seen as a postclassical innovation. The *voluntas domini* in the context of the *potestas alienandi* can therefore be considered a relevant element for the transfer of ownership in both classical and Justinianic law, remaining largely unaffected by the broader changes which took place in the context of the structure and requirements of the *traditio* such as the relevance of the *iusta causa traditionis*. This also implies that scholars should not strive to frame the *traditio voluntate domini* performed by a non-owner within a specific ‘causal’ or ‘abstract’ structure of delivery, especially since these terms are rather inadequate to describe Roman sources.

b. *Error in dominio* and *voluntas domini*.

The fact that the *voluntas domini* at the delivery should be approached independently from the general problem of the *iusta causa traditionis* and the structure of the transfer of ownership is particularly meaningful for the study of the so-called *error in dominio*, which takes place when someone mistakenly delivers an object of his own thinking it belongs to someone else or vice versa. The sources appear to offer contradicting evidence regarding the solution of this problem, since some texts deny that ownership may be transferred in such circumstances while others allow it. The analysis of this problem has traditionally been approached through the controversy regarding the *iusta causa traditionis*: on the one hand, authors such as Voci considered that the fact that ownership could not be transferred if there was a mistake at the delivery would prove the significance of the agreement at the delivery, thus confirming his abstract approach to the transfer of ownership; on the other hand, scholars favouring a causal understanding of the *traditio* such as Reggi considered that the truly classical solution would be to allow the transfer of ownership despite the existence of an error at the delivery<sup>352</sup>. According to the latter view, the texts which denied the transfer of ownership because of the lack of *voluntas* at the delivery would be of postclassical origin, reflecting therefore the abstract structure of the delivery in this period. Since most scholars over the last decades subscribed to an eminently causal model of delivery, the dominant view was that classical Roman law did not grant any particular relevance to the *error in dominio*. The decisive rule in this point would instead be “*plus est in re quam in existimatione mentis*”, which would determine that the subjective representation of the *tradens* would play no role in the transfer of ownership<sup>353</sup>.

Since the problem of the *iusta causa traditionis* has traditionally played a key role in the discussion of the *error in dominio*, some authors have provided another insight by avoiding discussing this problem as a mere appendix of the discussion

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<sup>352</sup> Reggi, *Error in dominio* (1952), p. 88-114.

<sup>353</sup> Lokin, *Traditio* (1971), p. 128; Guzmán, *DPR* (2013) I, p. 649-650.

regarding the structure of the transfer of ownership by *traditio*. Burdese proposed to set the analysis of the problem outside the controversy of whether the *traditio* was originally causal or abstract<sup>354</sup>, and in this more impartial setting concluded that the *error in dominio* was in fact relevant for the transfer of ownership. However, despite his original distance to the causal/abstract dilemma, he could not avoid drawing some general conclusions regarding the structure of the *traditio* and the role of the *animus transferendi et acquirendi domini*<sup>355</sup>. Similarly, Harke would consider in principle that acknowledging the relevance of the *error in dominio* would imply a certain *animus* at the delivery which would contradict the structure of *traditio* as presented in Gai 2,20<sup>356</sup>, but he does not let this objection take over most of his analysis of the individual texts, and instead bypasses this problem by claiming that this error would not be referred to the intent at the delivery as such<sup>357</sup>. There is however no need for such considerations when approaching the *error in dominio*, since the *voluntas domini* did play a relevant role already in classical jurisprudence, being an element in constant development in the hands of jurists. This is why Lovato, who approaches the *error in dominio* in the larger context of the controversies regarding the *voluntas* at the delivery, has no general systematic or dogmatic remark against the relevance of the owner's intent at the delivery concerning the *error in dominio*<sup>358</sup>. The following paragraphs will likewise approach the problem of the *error in dominio* within the general framework of the *voluntas domini* as shown in the present chapter.

To determine the significance of the *error in dominio* according to classical Roman law, it is first of all necessary to determine what texts actually refer to this problem. This point is of the utmost relevance, since scholars who claim that the *error in dominio* had no consequence for the transfer of ownership usually rely mostly on texts which are considered by Burdese and Harke to be unrelated to this subject<sup>359</sup>. The first of them is D. 1,19,1,1, already studied above, where Ulpian declares that the delivery of a *res Caesaris* performed “*quasi rem propriam*” by his *procurator* does not transfer ownership<sup>360</sup>. According to some scholars, this would show that the subjective representation of the transferor cannot affect the consequences that the delivery would normally have, i.e. the fact that the *procurator* believed to be owner will not suffice to transfer ownership<sup>361</sup>. Similar arguments are used when discussing another text by Ulpian:

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<sup>354</sup> Burdese, *Error in dominio* (1953), p. 23–24.

<sup>355</sup> Burdese, *Error in dominio* (1953), p. 45–47.

<sup>356</sup> Harke, *Error in dominio?* (2004), p. 130.

<sup>357</sup> Harke, *Error in dominio?* (2004), p. 132–133, 136, 150–151.

<sup>358</sup> Lovato, *Traditio e conventio* (2001), p. 129–133.

<sup>359</sup> Burdese, *Error in dominio* (1953), p. 24–27; Harke, *Error in dominio?* (2004), p. 131–132.

<sup>360</sup> D. 1,19,1,1: “Si rem Caesaris procurator eius quasi rem propriam tradat, non puto eum dominium transferre: tunc enim transfert, cum negotium Caesaris gerens consensu ipsius tradit. Denique si venditionis vel donationis vel transactionis causa quid agat, nihil agit: non enim alienare ei rem Caesaris, sed diligenter gerere commissum est”.

<sup>361</sup> Guzmán, *DPR* (2013) I, p. 650.

D. 27,10,10,1 (Ulp. 16 *ed.*): Curator furiosi rem quidem suam quasi furiosi tradere poterit et dominium transferre: rem vero furiosi si quasi suam tradat, dicendum, ut non transferat dominium, quia non furiosi negotium gerens tradidit<sup>362</sup>.

In this case, it is not a *procurator*, but instead a *curator furiosi* who delivers a thing belonging to the lunatic “as if it were his own” (*quasi suam*) and does not succeed to transfer ownership, which would confirm that the subjective belief of the transferor is of no significance<sup>363</sup>. Such an interpretation has however been contested because neither of these texts actually refers to a case where the transferor commits an error regarding the ownership of the delivered object. In fact, not only is there no indication of the existence of such a mistake, but both texts even explicitly indicate that ownership is not transferred because the conduct of the transferor does not constitute a loyal administration. In the case of D. 1,19,1,1, this is shown by the words “*diligenter gerere commissum est*”<sup>364</sup>, an idea which is conveyed in equivalent terms in D. 27,10,10,1, where it is pointed out that ownership was not transferred “*quia non furiosi negotium gerens tradidit*”<sup>365</sup>. Accordingly, the true problem in these texts is that the non-owner exceeds the limits of his *potestas alienandi* through his disloyal administration<sup>366</sup>. In such a context, the fact that the transferor delivers the thing “*quasi suam*” would probably indicate that he sought to obtain for himself whatever profit derived from such an act – e.g. to keep the price obtained in a sale – and not that he mistook an object of the owner as his own. This would also explain why in D. 27,10,10,1 the delivery by the *curator furiosi* of a thing of his own “*quasi furiosi*” would transfer ownership, since he would knowingly transfer ownership over an object of his own in order to take care of the interests of the person under his custody.

Having discarded these texts as irrelevant for the *error in dominio*, we may focus on those which are explicitly referred to this subject, among which a fragment of Ulpian’s *Disputationes* is especially clear:

D. 41,1,35 (Ulp. 7 *disputationum*): Si procurator meus vel tutor pupilli rem suam quasi meam vel pupilli alii tradiderint, non recessit

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<sup>362</sup> D. 27,10,10,1: “The *curator* of a lunatic could indeed convey his own property as if it belonged to the lunatic and so transfer ownership, but if he conveys the lunatic’s property as if it were his own, it must be said that this does not transfer ownership because he did not convey it while administering the lunatic’s affairs” (transl. Watson).

<sup>363</sup> Guzmán, *DPR* (2013) I, p. 650.

<sup>364</sup> See Chapter 2, Section 4 above.

<sup>365</sup> See Chapter 3, Section 2 below.

<sup>366</sup> Burdese, *Error in dominio* (1953), p. 24–27; Harke, *Error in dominio?* (2004), p. 131–132. According to these authors, neither would there be an error regarding the ownership of the delivered goods in D. 27,9,5,2 (Ulp. 35 *ed.*).

ab eis dominium et nulla est alienatio, quia nemo errans rem suam amittit<sup>367</sup>.

The fragment describes the delivery performed by a non-owner – *procurator* or *tutor* in this case – over a thing of his own as if it belonged to the owner, to which Ulpian offers a straightforward solution by claiming that ownership will not be transferred, because no one can lose his property through error (*quia nemo errans rem suam amittit*). This reasoning was seen by Reggi as a clear example of the abstract model of delivery of Justinianic law, regarding the text to be interpolated as a whole<sup>368</sup>. It was also argued that this solution would be inaccurate and could accordingly not agree with classical legal thought, since ownership could for instance be transferred in the case of the *solutio indebiti*. Burdese did not consider any of these arguments strong enough to assume a radical modification of the text by the compilers, especially criticising that Reggi would assume an interpolation based exclusively on dogmatic considerations. Lovato<sup>369</sup> has moreover highlighted that it seems particularly unlikely that the compilers would have modified the text in order to grant greater significance to the *error in dominio*, considering that Byzantine scholars offered a restricted interpretation of the cases in which this error would be relevant, as attested by some old scholia discussing this subject<sup>370</sup>.

The general rule “*nemo errans rem suam amittit*” may certainly be inadequate to address other problems regarding the transfer of ownership, but its inaccuracy is compellingly explained by Lovato within the context of Ulpian’s *Disputationes*, which contain mainly excerpts of the teaching conducted by Ulpian to public audiences in an oral way<sup>371</sup>. With this in mind, Lovato shows that Ulpian would often resort to broad statements for argumentative and rhetoric purposes, being better understood in the oral context in which they were issued, where the speaker would assume some specific knowledge in the audience that would allow a proper understanding of a specific assertion<sup>372</sup>. In the case of the *nemo errans* rule, this implies that Ulpian did not attempt to present a universal truth for legal thinking, but simply to formulate in a convincing and succinct way the general implications of an error at the time of the delivery<sup>373</sup>.

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<sup>367</sup> D. 41,1,35: “If a *procurator* or a *tutor* should deliver his own thing to someone, thinking it to be mine or the property of his *pupillus*, he does not lose ownership in it, and the alienation is null, since no one can lose his property through error” (transl. Watson).

<sup>368</sup> Reggi, *Error in dominio* (1952), p. 114.

<sup>369</sup> Lovato, *Traditio e conventio* (2001), p. 132; Lovato, *Disputationes* (2003), p. 134.

<sup>370</sup> BS 2249/10 – 2250/13 (*Sch. ad Bas.* 38,9,5).

<sup>371</sup> Lovato, *Disputationes* (2003), p. 3-15.

<sup>372</sup> Lovato, *Disputationes* (2003), p. 101 ff.

<sup>373</sup> Lovato, *Traditio e conventio* (2001), p. 133; Lovato, *Disputationes* (2003), p. 135.

Lovato also highlights that the decision given in D. 41,1,35 fits with other solutions given by Ulpian within book seven of his *Disputationes*<sup>374</sup>, where the intent at the delivery plays a fundamental role to determine the transfer of ownership<sup>375</sup>. There is in fact nothing alien to classical law about attending to the owner's intent at the delivery, and in fact in this case the *traditio* did not properly take place *voluntate domini*. Harke considers the phrase “*nemo errans rem suam amittit*” related to the rule “*errantis nulla voluntas est*”, since the person who performs a delivery under mistake does not validly consent<sup>376</sup>. This link, however, does not mean that the error of the *tradens* refers to the existence of an authorization, as Harke claims in order to avoid a contradiction with the classical structure of the *traditio* as presented in Gai 2,20<sup>377</sup>. As pointed out above, already in classical jurisprudence the *voluntas domini* at the delivery was decisive for the transfer of ownership in several circumstances.

Another text where the *error in dominio* prevents the transfer of ownership is the following:

D. 18,1,15,2 (Paul 5 *Sab.*): Si rem meam mihi ignorantem vendideris et iussu meo alii tradideris, non putat Pomponius dominium meum transire, quoniam non hoc mihi propositum fuit, sed quasi tuum dominium ad eum transire: et ideo etiam si donaturus mihi rem meam iussu meo alii tradas, idem dicendum erit<sup>378</sup>.

In this text, a person buys an object which belongs to himself without knowing it, and instead of requesting the seller to deliver him the object, gives him a *iussum* to deliver it to another person. The text sets therefore the opposite case to that of D. 41,1,35, since in D. 18,1,15,2 we find a non-owner who is instructed to transfer ownership by the true owner who erroneously considered the former to be owner, while in D. 41,1,35 the owner delivers an object of his own on the assumption that it belongs to another person. According to Paul, Pomponius considered that the reason behind the impossibility to transfer ownership is that it was not the intention (*propositum*) of the person giving the *iussum* that his own property should be transferred, but someone else's. It should moreover be borne in mind that this text does not refer to a normal case of *traditio* by a non-owner,

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<sup>374</sup> For the controversy regarding the authorship of this work see Lovato, *Disputationes* (2003), p. 16–21.

<sup>375</sup> Lovato, *Traditio e conventio* (2001), p. 129–130.

<sup>376</sup> See on this point Harke, *Error in dominio?* (2004), p. 135–136.

<sup>377</sup> Harke, *Error in dominio?* (2004), p. 136.

<sup>378</sup> D. 18,1,15,2: “Pomponius says that if you sell me what, in fact, belongs to me although I do not know it and, at my behest, deliver it to someone else, my ownership does not pass to him, because my intention was that not my ownership but yours should be transferred to him. It follows that the same holds good if, intending a gift to me of what is really mine, you, on my instructions, deliver the thing to someone else” (transl. Watson, modified). See on the translation of this text van der Ven, *D. 18,1,15,2* (1998), p. 91–99.

but to a *delegatio tradendi*<sup>379</sup>, since the person performing the delivery follows the *iussum* of another person to transfer an object allegedly belonging to him to a third person<sup>380</sup>.

Reggi saw in the existence of a *delegatio* an indication that the decision in classical Roman law should have been different<sup>381</sup>, since Pomponius followed the theory of Celsus, according to whom in the case of the delegation ownership would pass to the person giving the *iussum* at least for a moment<sup>382</sup>. This would in turn imply that the error of the person carrying out the delivery would not be relevant, and accordingly the original solution of Pomponius would have been to allow the transfer of ownership. In the opinion of some scholars<sup>383</sup>, the modification of the classical solution would be due to the Justinianic conception of *traditio*, which abandoned the strict causal system of delivery of classical Roman law.

Once again, the objections of Reggi are driven almost exclusively by dogmatic preconceptions concerning the structure of the transfer of ownership by delivery. The claims regarding the significance of the opinions of Pomponius on *delegatio* are moreover blown out of proportion. Already Betti and Burdese claimed that such ideas had a limited scope of application, not being applicable to this particular case<sup>384</sup>. This opinion is moreover confirmed by the study of Alonso on the *delegatio* which stresses that only in particular circumstances would jurists such as Celsus, Pomponius and Ulpian resort to the idea that the *delegatio* involved a double transfer of ownership<sup>385</sup>, which is why it is not possible to claim that Pomponius would understand that every *delegatio* involved that ownership should first pass to the person granting the *iussum*. Accordingly, Alonso considers that the solution given in D. 18,1,15,2 agrees perfectly with the classical system of delegation, where ownership is transferred directly from the person who received the *iussum* to the transferee. There is accordingly nothing alien to classical law in the text, since it does not only reflect the normal attribution of property in the context of the *delegatio*, but it also shows that the intent of the owner is vital for the transfer of ownership to take place. In fact, in this particular case ownership is not transferred because it was not the owner's intention that his own property should be delivered (*quoniam non hoc mihi propositum fuit*). This in turn shows that the difference in the facts between

<sup>379</sup> Alonso, *Delegación* (2001) I.1, p. 222; Zandrino, *Delegatio* (2010), p. 59 n. 128.

<sup>380</sup> On the distinction between the *traditio* by a non-owner and the *delegatio tradendi*, see Chapter 1, Section 4(c) above.

<sup>381</sup> Reggi, *Error in dominio* (1952), p. 111-113.

<sup>382</sup> The famous opinion of Celsus in this regard is reproduced in D. 24,1,3,12 (Ulp. 32 *Sab.*), and that of Pomponius in D. 47,2,44pr (Pomp. 19 *Sab.*). Scholars consider that Pomponius follows Celsus on this point: Alonso, *Delegación* (2001) I.1, p. 222; Zandrino, *Delegatio* (2014) II, p. 201 n. 218 (with further bibliographical references).

<sup>383</sup> Lange, *Das kausale Element* (1930), p. 60-61; Reggi, *Error in dominio* (1952), p. 112-113.

<sup>384</sup> Betti, *La attuazione* (1933), p. 232; Burdese, *Error in dominio* (1953), p. 30.

<sup>385</sup> See Alonso, *Delegación* (2001) I.1, p. 222-223 concerning the opinion of Pomponius in D. 47,2,44pr.

D. 41,1,35, and D. 18,1,15,2 is not decisive to the outcome of the case<sup>386</sup>, since the outcome of the delivery will be the same when the owner mistakenly delivers his own property on the idea that it belonged to someone else (D. 41,1,35) and when the owner orders the delivery of something which he considers to be someone else's while in fact belonging to him (D. 18,1,15,2). In both cases, the owner will be mistaken regarding the property of the delivered goods, which is why ownership cannot be transferred<sup>387</sup>.

The relevance of the *voluntas domini* at the delivery is attested by yet another text:

D. 17,1,49 (Marcell. 6 *dig.*): Servum Titii emi ab alio bona fide et possideo: mandatu meo eum Titius vendidit, cum ignoraret suum esse, vel contra ego vendidi illius mandatu, cum forte is, cui heres exstiterit, eum emisset: de iure evictionis et de mandatu quaesitum est. Et puto Titium, quamvis quasi procurator vendidisset, obstrictum emptori neque, si rem tradidisset, vindicationem ei concedendam, et idcirco mandati eum non teneri, sed contra mandati agere posse, si quid eius interfuisset, quia forte venditurus non fuerit. Contra mandator, si rem ab eo vindicare velit, exceptione doli summovetur et adversus venditorem testatoris sui habet ex empto iure hereditario actionem<sup>388</sup>.

In this text, Marcellus discusses the significance of the *error in dominio* regarding two cases. In the first case, someone (*ego*) purchases a slave that did not belong to the seller, but to Titius. The purchaser (*ego*) then gives the slave to Titius so that he will deliver him through *traditio* to a third person as a *procurator*, which he proceeds to do while being unaware of the fact that he (Titius) was in fact the owner of the slave. The second case presents a reversed problem, where someone (*ego*) purchases a slave which did not belong to the seller, nor to Titius, but in the meantime the real owner dies leaving Titius as his heir, who was not involved in this sale. Without being aware of this circumstance, Titius gives a mandate to the purchaser and putative owner (*ego*) to sell the object. This second case seems

<sup>386</sup> Alonso, *Delegación* (2001) I.1, p. 222 n. 3.

<sup>387</sup> Harke, *Error in dominio?* (2004), p. 142-143.

<sup>388</sup> D. 17,1,49: "I have in good faith bought Titius' slave from someone else and possess him; Titius sold him on my mandate, not knowing him to be his own; or, on the contrary, I sold him on [Titius'] mandate and by chance he to whom [Titius] becomes heir had bought him. What is the position regarding the right of eviction and the mandate? My view is that Titius, although he sold [the slave] as if he were a *procurator*, is under an obligation to the buyer and that if he had handed the property over, he should not be allowed a *vindicatio*. Accordingly, he is not liable on mandate, but, on the other hand, he can raise an action on mandate if he should have had an interest, perhaps because he was not going to sell [the slave]. The mandatory, on the other hand, if he wishes to claim the property from him, is met by a defence of fraud, but he has by right of inheritance the testator's action on sale against the seller" (transl. Watson, modified).

rather odd, since one would normally not expect that someone who does not consider himself owner to order someone else to transfer ownership, which is why this part of the text has been frequent target of accusations of interpolation<sup>389</sup>. This should however be understood as a case of *delegatio tradendi*, where Titius would order the purchaser of the slave to deliver it to another person<sup>390</sup>. Accordingly, Marcellus would be dealing first with a case where the parties attempt to carry out a transfer of ownership by a non-owner *voluntate domini*, and secondly with a *delegatio* where ownership is supposed to be transferred by the owner himself. The fact that both cases would be dealt jointly shows that the rules concerning the *error in dominio* apply equally to them, as already claimed when discussing D. 18,1,15,2.

Marcellus announces that the text deals with the right of eviction and the mandate (*de iure evictionis et de mandatu quaesitum est*), discussing whether the true owner may recover the object delivered once he finds out the truth. Scholars argue in particular what defence is given against the owner in the first case, while in the second it is explicitly shown that the acquirer will have an *exceptio doli*. Such problems will be dealt with in further detail when discussing the praetorian corrections to the transfer of ownership by a non-owner<sup>391</sup>. For now it is enough to indicate that the peculiarity of this text lies in the fact that in both cases the owner draws a claim which is contradictory to his previous behaviour: in the first case in the context of the sale which he concluded – as Marcellus explicitly mentions – and in the second as the person who orders the delivery in the context of a *delegatio*. In none of these cases will ownership be transferred due to the lack of *voluntas domini*, but in each of them the *rei vindicatio* will meet a praetorian remedy based on the previous acts of the owner. Nonetheless, the owner will retain the possibility to seek responsibility from the person who ordered him the delivery – in the first case – or who performed the delivery on his instruction – in the second case. Therefore, this text confirms the relevance of the *error in dominio*, both in the context of a *traditio* which was supposed to be performed by a non-owner – just as in D. 41,1,35 – and when it was intended to be done by the true owner who follows the *iussum* of another individual – as happens in D. 18,1,15,2.

Having these three texts – D. 41,1,35, D. 18,1,15,2 and D. 17,1,49 – as a basic proof of the relevance of the *error in dominio* for the transfer of ownership, there are other fragments which deal with related problems, shedding further light on this issue. One group of texts refer to the problem of the freeman who thought to be a slave (*liber homo bona fide serviens*), where the problem of the *error in dominio* underlies several cases, since the putative slave may convey things of

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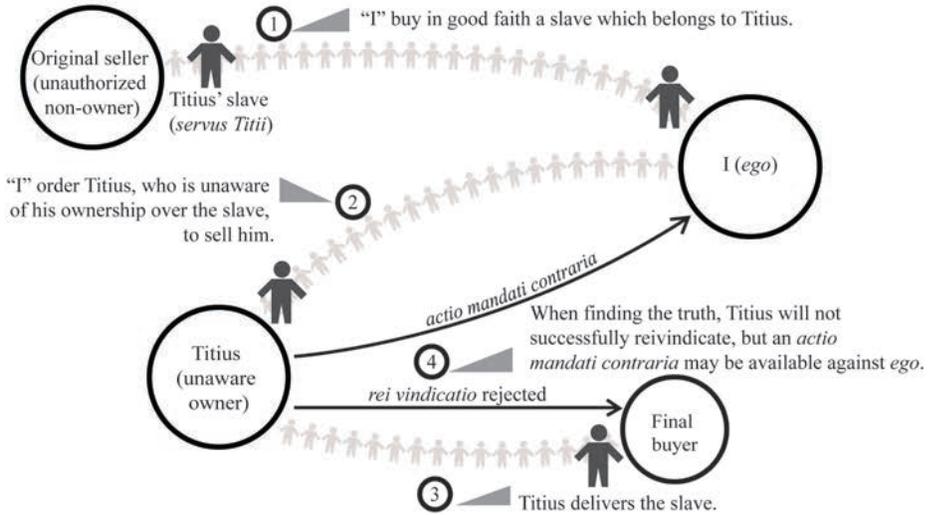
<sup>389</sup> Burdese, *Autorizzazione* (1950), p. 71.

<sup>390</sup> That the existence of a *delegatio* is indicated by reference to the existence of a mandate is moreover nothing new. See on this point Zandrino, *Delegatio* (2010), p. 66, 110–166.

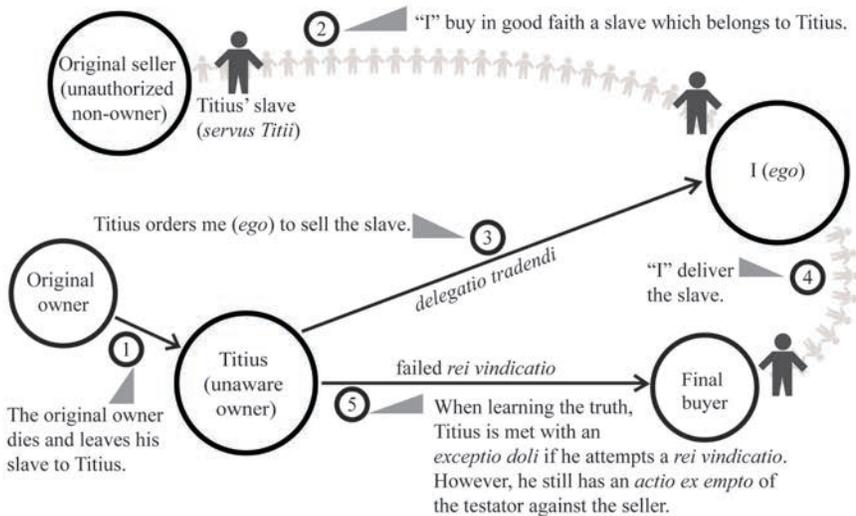
<sup>391</sup> Chapter 4, Section 5 below.

D. 17,1,49 (Marcell. 6 dig.)

1) First case:



2) Second case:



his own on the assumption that they belong to someone else. This is indeed the problem in the following text of Ulpian:

D. 12,4,3,8 (Ulp. 26 *ed.*): Suptilius quoque illud tractat, an ille, qui se statuliberum putaverit, nec fecerit nummos accipientis, quoniam heredi dedit quasi ipsius heredis nummos daturus, non quasi suos, qui utique ipsius fuerunt, adquisiti scilicet post libertatem ei ex testamento competentem. Et puto, si hoc animo dedit, non fieri ipsius: nam et cum tibi nummos meos quasi tuos do, non facio tuos. Quid ergo, si hic non heredi, sed alii dedit, cui putabat se iussum? Si quidem peculiares dedit, nec fecit accipientis: si autem alius pro eo dedit aut ipse dedit iam liber factus, fiet accipientis<sup>392</sup>.

A slave is set free in his master's will, but he believes he is only a *statuliber* and that accordingly he must pay the heir a certain amount of money in order to become free. Under these circumstances, the ignorant freedman would in fact be delivering coins belonging to himself. The fact that the slave acquired ownership over the coins after the death of the owner (*adquisiti scilicet post libertatem ei ex testamento competentem*) would show that they were part of the *peculium* which the slave used to administer, since manumitted slaves would normally gain ownership over their *peculium*<sup>393</sup>. Since the slave delivered his own coins, the text poses the question of the ownership over them. This fragment is to be found at the end of a large passage dealing with the *condictio*, which could make the reader wonder whether ownership was transferred, considering that the *condictio* would only take place when ownership was indeed transferred. The text, however, leaves no room for doubt, since it is clearly stated that ownership was not transferred (*non fieri ipsius... non facio tuos*), unlike any of the fragments preceding it.

Since ownership was not transferred, the question then is what exactly prevented the transfer of ownership. According to Reggi, since the putative slave thought he was paying the heir with money of the *peculium*, he could not have possibly had the intention of transferring ownership due to the fact that the heir would appear to be the actual owner of the coins delivered to him<sup>394</sup>. In other words, the putative slave would only seek to perform a physical delivery of

<sup>392</sup> D. 12,4,3,8: "He also goes rather nicely into the question whether one who thinks he is a *statuliber* fails to pass title to coins which he pays the heir, given that he thinks they belong to the heir when they are really his own, acquired after his freedom became effective under the will. I think that if he pays with that intention, no property passes. What if he pays someone other than the heir, believing himself directed to do so? If the coins come from the *peculium*, no title passes to the recipient. However, if someone else pays on his behalf or he himself pays after becoming free, title will pass to the recipient" (transl. Watson, modified).

<sup>393</sup> Brinkhof, *Peculium* (1978), p. 169-172. Roman jurists did not accept that the payment made by the *statuliber* could be done with money not belonging to his *peculium*, as shown in D. 40,7,39,2 (Jav. 4 *ex posterioribus Labeonis*).

<sup>394</sup> Reggi, *Error in dominio* (1952), p. 106-108.

objects which, in his view, belonged to the recipient. According to this view, Ulpian would only accept the transfer of ownership when the transferor did in fact seek to transfer ownership, as would happen when another one gave on his behalf (*si autem alius pro eo dedit*) or when the slave paid himself after being freed (*ipse dedit iam liber factus*).

Several objections can be made to Reggi's view. It is in the first place not entirely clear that the *statuliber* who pays the heir is merely seen as performing a physical delivery. For instance, in D. 40,7,39,2<sup>395</sup> Labeo and Trebatius are reported to claim that if a *statuliber* paid with money that the heir gave him for business "he would be deemed to be returning it rather than giving it" (transl. Watson) and therefore he would not become free. This would suggest that the *statuliber* would only become free when he could actually be seen as performing a 'dare', even when he was not technically an owner. However, even if this was not the case, the key of the solution lies clearly in the intent of the owner/putative slave at the delivery, as shown by the words "*si hoc animo dedit, non fieri ipsius*". This idea is moreover stressed by the general claim "*nam et cum tibi nummos meos quasi tuos do, non facio tuos*", which Harke<sup>396</sup> has rightly pointed out to refer generally to the *error in dominio*, and not to the particular case of the *statuliber*. The decision agrees with the general views reviewed so far, where the intention of the owner is decisive for the transfer of ownership. Since the owner was mistaken about the property of the delivered coins, he would not transfer ownership. There is moreover no need to refer this mistake to the underlying *causa*, as Harke points out in order to defend a strictly causal structure of *traditio*<sup>397</sup>: there is nothing new in demanding a particular *animus* by the transferor at the delivery.

The significance of the *error in dominio* in this case is also to be seen in the fact that the same solution is given if the putative slave delivered the object to a third party on the assumption that he was ordered to do so (*alii dedit, cui putabat se iussum*): according to Ulpian, if he delivered something belonging to his *peculium* he would not transfer ownership (*Si quidem peculiares dedit, nec fecit accipientis*). Just as in the payment to the heir, the putative slave would be delivering something of his own – having acquired ownership over the assets of his *peculium* – on the assumption that he was not the owner of it. Ulpian would then compare this situation with the delivery performed by the freedman who is aware of his condition or by someone on his behalf, where ownership would indeed be transferred: "*si autem alius pro eo dedit aut ipse dedit iam liber factus, fiet accipientis*". The insertion of this idea is certainly a bit odd, leading Burdese to regard it as an

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<sup>395</sup> D. 40,7,39,2 (Jav. 4 *ex posterioribus Labeonis*): "Si heres servo pecuniam ad negotiandum dedisset, statuliberum eam ipsam numerando liberari ex testamento non posse Labeo Trebatius responderunt, quia reddere eam magis quam dare videretur. Ego puto, si peculiares nummi fuerunt, ex testamento eum liberum futurum".

<sup>396</sup> Harke, *Error in dominio?* (2004), p. 138.

<sup>397</sup> Harke, *Error in dominio?* (2004), p. 138.

addition by the compilers which would merely indicate cases where the *tradens* has the *potestas alienandi*<sup>398</sup>. While this final sentence certainly does not follow the flow of ideas of the text, there is nothing alien to classical law about comparing the validity of the delivery by the owner and an authorized non-owner, which is why one cannot assume that the text is interpolated simply because it does not meet the expectations of a modern reader.

A final argument in favour of the idea that D. 12,4,3,8 reflects the relevance of the *error in dominio* is the fact that the author of the text is Ulpian, who features in D. 41,1,35 enouncing the rule “*nemo errans rem suam amittit*”, which is in accordance with the general claim “*cum tibi nummos meos quasi tuos do, non facio tuos*” of D. 12,4,3,8. It is moreover worth noting that in the latter text Ulpian introduces the solution as a personal opinion (*Et puto...*), something which contributes to the understanding of the historical evolution of the *error in dominio* in Roman sources. Up to this point, among the jurists who consider that ownership will not pass when there is an *error in dominio*, the earliest is Marcellus (D. 17,1,49), active in the second half of the 2<sup>nd</sup> century AD<sup>399</sup>. Later we find the opinion of Paul (D. 18,1,15,2) and of Ulpian (D. 41,1,35 and D. 12,4,3,8). Considering that the *voluntas domini* at the *traditio* was an element in constant evolution in the hands of Roman jurisprudence, one may not assume that the *error in dominio* played an identical role for earlier jurists.

The fact that an evolution took place regarding the *voluntas domini* and the relevance of the *error in dominio* is readily noticeable when one examines the solutions given to similar cases by earlier jurists. As mentioned above, D. 12,4,3,8 is preceded by a series of cases discussing the *condictio*, among which the texts in D. 12,4,3,5-7 deal as well with a delivery by a *liber homo bona fide serviens* who pays to the heir as a *statuliber*. The fact that these paragraphs deal with cases which are largely identical to that of D. 12,4,3,8 in the context of a *condictio* is by itself remarkable, since in the latter text Ulpian assumes that ownership was not transferred in the first place. Burdese attempted to avoid the contradiction by claiming that normally jurists would approach this problem in the context of the *condictio* because when the delivered object is money, as happens when the *statuliber* pays the heir, it would be common that the *consumptio nummorum* would force the original owner to claim his ownership back through a *condictio*<sup>400</sup>. A better explanation is however to be found in the fact that the different solutions correspond to the opinions of different authors, whose opinions are reproduced by Ulpian. In D. 12,4,3,5, Ulpian<sup>401</sup> wonders whether a putative slave who paid

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<sup>398</sup> Burdese, *Error in dominio* (1953), p. 35.

<sup>399</sup> Kunkel, *Herkunft* (1967), p. 213.

<sup>400</sup> Burdese, *Error in dominio* (1953), p. 32-33.

<sup>401</sup> D. 12,4,3,5 (Ulp. 26 *ed.*): “Si liber homo, qui bona fide serviebat, mihi pecuniam dederit, ut eum manumittam, et fecero: postea liber probatus an mihi condicere possit, quaeritur. Et Iulianus libro undecimo digestorum scribit competere manumisso repetitionem. Neratius etiam libro membranarum refert paridem pantomimum a Domitia Neronis filia

his master in order to become free could use the *condictio* against him once he found out that he was free from the start, quoting in this regard the opinion of Julian and Neratius, who were in favour of granting the *condictio*<sup>402</sup>. Celsus would apply the same decision to the payment by a *statuliber* in D. 12,4,3,6<sup>403</sup>, an opinion which this jurist would also apply in D. 12,4,3,7<sup>404</sup> when the slave was only made unconditionally free through a codicil while the testament compelled him to pay a sum to the heir. After quoting and discussing these opinions, Ulpian introduces an original view in D. 12,4,3,8, since he does not approach the delivery by a putative *statuliber* in the context of the *condictio*, but rather within the framework of the transfer of ownership<sup>405</sup>. The facts are in fact identical to those upon which Celsus grants the *condictio* in D. 12,4,3,6, but in the meantime jurists have developed the implications of the *voluntas domini* at the delivery, which according to Ulpian would involve that the *error in dominio* prevents the transfer of ownership. The shift in the approach to this problem is undeniable, describing neatly the significance granted to the *voluntas* at the delivery when the owner is under error: while earlier jurists such as Neratius, Celsus and Julian were only willing to grant a *condictio*, the consolidation of the relevance of the *error in dominio* by the time of Ulpian would grant a completely different approach to these cases. Accordingly, one cannot approach Roman jurists as presenting a unique, coherent approach to the problem of the *error in dominio*, since the relevance of this element would evolve under the dynamic notion of the *voluntas domini*. It is only safe to claim that, by the 3<sup>rd</sup> century AD, jurists have derived from this *voluntas* that a mistaken owner would not transfer ownership. The idea of an evolution of the significance of an *error in dominio* had already been sketched by Schulz<sup>406</sup>, and even if Burdese did not consider his ideas convincing<sup>407</sup>, the opinions gathered by Ulpian in D. 12,4,3,5–8 seem to confirm some of the guidelines of the theory of Schulz.

The fact that the *error in dominio* was only seen as preventing the transfer of ownership in the course of the second half of the 2<sup>nd</sup> century AD contributes to

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decem, quae ei pro libertate dederat, repetisse per iudicem nec fuisse quaesitum, an Domitia sciens liberum accepisset”.

<sup>402</sup> The opinion of Julian concerning a similar problem is also reproduced by Ulpian in D. 17,1,8,5 (Ulp. 31 *ed.*), although in this case the money was given to a third person in order to free him. See on this text Buckland, *Slavery* (1908), p. 349.

<sup>403</sup> D. 12,4,3,6 (Ulp. 26 *ed.*): “Si quis quasi statuliber mihi decem dederit, cum iussus non esset, condicere eum decem Celsus scribit”.

<sup>404</sup> D. 12,4,3,7 (Ulp. 26 *ed.*): “Sed si servus, qui testamento heredi iussus erat decem dare et liber esse, codicillis pure libertatem accepit et id ignorans dederit heredi decem, an repetere possit? Et refert patrem suum Celsum existimasse repetere eum non posse: sed ipse Celsus naturali aequitate motus putat repeti posse. Quae sententia verior est, quamquam constet, ut et ipse ait, eum qui dedit ea spe, quod se ab eo qui acceperit remunerari existimaret vel amiciosem sibi esse eum futurum, repetere non posse opinione falsa deceptum”.

<sup>405</sup> The ground for the solution given in D. 12,4,3,8 is therefore completely different to those in the previous cases, contrary to the opinion of Reggi, *Error in dominio* (1952), p. 108–109.

<sup>406</sup> Schulz, *Concursus Causarum* (1917), p. 141–145.

<sup>407</sup> Burdese, *Error in dominio* (1953), p. 45.

understand the solutions of earlier jurists on this problem. Cervidius Scaevola, for instance, still approaches the payment made by a *liber homo bona fide serviens* as a *statuliber* in the context of a *condictio* in D. 12,6,67pr<sup>408</sup>. In fact, the only solution of this period granting any relevance to the *error in dominio* would be that of Marcellus in D. 17,1,49. Only after Ulpian had ascertained that “*nemo errans rem suam amittit*” could a change of paradigm be introduced into this problem.

Similar considerations can be made regarding D. 12,1,41<sup>409</sup>, where Africanus discusses the validity of a series of transactions, including the *traditio* of coins, concluded by a slave after the death of his owner, who declared him heir in his testament. The problem was already discussed in the context of the cases where the owner granting his authorization for the delivery dies before it takes place<sup>410</sup>. The solution given by Africanus is in agreement with the opinion of Julian, according to which the *voluntas domini* would disappear once the owner died. Since the slave was set free by the owner in his will, he can be considered a *liber homo bona fide serviens*, but Africanus does not pay attention to the fact that he unknowingly delivers objects which he now partially owns. Instead, the jurist focuses on the fact that the freedman is only owner of a share over the delivered object and that he does not have the authorization of the other co-owners to deliver. According to the traditional views found already in Alfenus (D. 24,1,38,1), the co-owner who does not have the authorization of the other co-owners for the delivery will only transfer ownership over his share, a solution which is reproduced by Africanus in this context. All of this involves a considerable degree of sophistication regarding the significance of the *voluntas domini* at the delivery, but the relevance of the *error in dominio* had not yet been established by the jurisprudence of his time, which is why no additional considerations are made regarding this point. One may therefore approach the solution in the context of the evolution of the *voluntas domini* instead of looking

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<sup>408</sup> D. 12,6,67pr (Scaev. 5 *dig.*): “Stichus testamento eius, quem dominum suum arbitrabatur, libertate accepta, si decem annis ex die mortis annuos decem heredibus praestitisset, per octo annos praefinitam quantitatem ut iussus erat dedit, postmodum se ingenuum comperit nec reliquorum annorum dedit et pronuntiatus est ingenuus: quaesitum est, an pecuniam, quam heredibus dedit, ut indebitam datam repetere et qua actione possit. Respondit, si eam pecuniam dedit, quae neque ex operis suis neque ex re eius, cui bona fide serviebat, quaesita sit, posse repeti”. The text is located by Lenel, *Paling.* (1889) II, col. 219-220 under the rubric “*De condictione*”.

<sup>409</sup> D. 12,1,41 (Afr. 8 *quaest.*): “Eius, qui in provincia Stichum servum kalendario praeposuerat, Romae testamentum recitatum erat, quo idem Stichus liber et ex parte heres erat scriptus: qui status sui ignarus pecunias defuncti aut exegit aut credidit, ut interdum stipularetur et pignora acciperet. Consulebatur quid de his iuris esset. (...) Quas vero pecunias ipse credidisset, eas non ex maiore parte, quam ex qua ipse heres sit, alienatas esse: nam et si tibi in hoc dederim nummos, ut eos Sticho credas, deinde mortuo me ignorans dederis, accipientis non facies: neque enim sicut illud receptum est, ut debitores solventes ei liberentur, ita hoc quoque receptum, ut credendo nummos alienaret. Quare si nulla stipulatio intervenisset, neque ut creditam pecuniam pro parte coheredis peti posse neque pignora teneri”.

<sup>410</sup> Chapter 2, Section 1(b) above.

for evidence of interpolations, as previous authors defending the relevance of the *error in dominio* have attempted<sup>411</sup>.

Having a broad outlook of the evolution of the significance of the *error in dominio* concerning the *traditio*, one cannot complain about the amount or quality of the texts addressing this problem. It is therefore not necessary to resort to the solutions to this problem in other contexts, such as manumission or legacy, in order to have further clarity. Scholars questioning the relevance of the *error in dominio* have traditionally relied to a great extent on texts dealing with these subjects, since they offer several examples where the belief of the owner is irrelevant to the outcome of the act. Regarding manumission the text normally quoted corresponds to Julian:

D. 40,2,4,1 (Jul. 42 *dig.*): Quotiens dominus servum manumittat, quamvis existimet alienum esse eum, nihilo minus verum est voluntate domini servum manumissum et ideo liber erit. Et ex contrario si se Stichus non putaret manumittentis esse, nihilo minus libertatem contingere. Plus enim in re est, quam in existimatione et utroque casu verum est Stichum voluntate domini manumissum esse. Idemque iuris est et si dominus et servus in eo errore essent, ut neque ille se dominum nec hic se servum eius putaret<sup>412</sup>.

The text leaves no room for doubt: if the owner manumitted a slave which he deemed to belong to someone else, and even if the slave did not think he belonged to his manumitter<sup>413</sup>, the manumission will nonetheless be considered to take place *voluntate domini*. Julian even presents an aphorism to support this outcome: “For the facts matter more than what is believed” (*Plus enim in re est, quam in existimatione*)<sup>414</sup>. An opposite solution is however given by Julian’s contemporary Pomponius:

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<sup>411</sup> Voci, *L'errore* (1937), p. 98; Burdese, *Error in dominio* (1953), p. 36–37. The latter author envisages however the possibility of an evolution of the jurisprudence in this point (p. 37): “Qualora poi non si ritenessero fondati – come io ritengo – i sospetti di alterazione si potrebbe ancora pensare ad una incertezza di opinione sussistente in proposito prima dell’età dei Severi”.

<sup>412</sup> D. 40,2,4,1: “Whenever a master manumits a slave, even though he believes that the slave is owned by someone else, it still remains true that the slave was manumitted by wish of the master, and for this reason he will be free. And conversely, if Stichus supposed that he was not owned by the manumitter, nonetheless, he becomes free. For the facts matter more than what is believed, and in both cases, it is true that Stichus was manumitted by wish of the master. The same rule of law holds even if master and slave erroneously believed, the one that he was not the master, the other that he was not his slave” (transl. Watson).

<sup>413</sup> The error of the slave seems however completely irrelevant. See Burdese, *Error in dominio* (1953), p. 40.

<sup>414</sup> Regarding the use of this aphorism by Julian see Wacke, *Plus est in re* (1996), p. 342–244.

D. 40,12,28 (Pomp. 12 *ad Quintum Mucium*): Non videtur domini voluntate servus in libertate esse, quem dominus ignorasset suum esse: et est hoc verum: is enim demum voluntate domini in libertate est, qui possessionem libertatis ex voluntate domini consequitur<sup>415</sup>.

In this case, the jurist considers that the ignorance of the owner concerning his position with regard to the manumitted slave will indeed prevent the manumission from being effective, because the act cannot be regarded to take place *voluntate domini*.

What can explain these contradicting views? Burdese and Provera have claimed that each text would refer to a different kind of manumission, the one of Julian to the *manumissio vindicta*, and that of Pomponius to an informal manumission<sup>416</sup>. The fact that in the first case we are told that “*plus est in re...*” could accordingly be explained because the *manumissio vindicta* was a formal and abstract act, which would produce legal consequences by the mere performance of it, being irrelevant what the intent of the person performing it was. On the contrary, in the informal manumission described by Pomponius the owner’s intent will be the only thing which matters, which is why a mistake on his behalf would affect the legal grounds for the manumission.

The problem with these distinctions is, in the first place, that there is little evidence to prove that different types of manumission are addressed in each text. While in the case of D. 40,2,4,1 both the title of the Digest and Lenel’s Palingenesia indicate that it dealt with the *manumissio vindicta*<sup>417</sup>, there is no similar evidence concerning D. 40,12,28. Burdese claims that the reference to the *voluntas domini* would be a sure giveaway that the text refers to an informal manumission, which in turn forces him to regard as interpolated the reference to this element in D. 40,2,4,1<sup>418</sup>, since the majority of scholars consider that there would be no place for a special *voluntas* at the act of the *manumissio vindicta*. This choice is not only arbitrary – why not regard D. 40,12,28 as interpolated as well? – and based on broad and largely unproven principles concerning the structure of the *manumissio vindicta*<sup>419</sup>, but also removes almost all the reasoning behind Julian’s decision. In fact, this text indicates twice that the manumission can be regarded as taking place *voluntate domini*, an idea to which one can relate on an intuitive level: if the owner did carry out a legal act which such specific

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<sup>415</sup> D. 40,12,28: “A slave is not deemed to enjoy freedom by the wish of his owner, when the owner had not known that the man was his; that is right; for a man only enjoys freedom by the wish of the owner, when he obtains the possession of freedom in accordance with that wish” (transl. Watson).

<sup>416</sup> Burdese, *Error in dominio* (1953), p. 37–41; Provera, *Errore* (1956), p. 175.

<sup>417</sup> D. 40,2, “*De manumissis vindicta*”; Lenel, *Paling.* (1889) I, col. 430 also sets the text under the rubric “*De manumissis vindicta*” in the original work of Julian.

<sup>418</sup> Burdese, *Error in dominio* (1953), p. 39–40.

<sup>419</sup> Harke, *Error in dominio?* (2004), p. 144 claims in fact that the *voluntas domini* played a relevant role both in the *manumissio vindicta* and in informal forms of manumission.

consequences as the manumission, there is certainly some ground to regard his mistake concerning ownership as irrelevant in order to determine his intent when carrying out such an act<sup>420</sup>. Accordingly, Julian and Pomponius appear to be discussing the same basic problem<sup>421</sup>, drawing nonetheless opposite conclusions.

The contradiction between the solutions of Julian and Pomponius is better explained in the general context of the evolution of the *voluntas domini* in Roman jurisprudence. The opinion of Julian is in fact consistent with that reported by Ulpian in D. 12,4,3,5, where Julian was willing to grant a *condictio* – not a *rei vindicatio* – to the *liber homo bona fide serviens* who paid to his putative master. As noted above, this opinion shows that at the time of Julian jurists had not considered the *error in dominio* to be something which would stand in the way of the *voluntas domini*. The same line of reasoning is found in D. 40,2,4,1, where Julian explicitly declares that the manumission of a slave whom the owner wrongfully considers to belong to someone else can nonetheless be considered to take place *voluntate domini*. The opinion of Pomponius shows that the interpretation regarding the meaning of the *voluntas domini* in relation to the *error in dominio* not only changed in relation to the transfer of ownership, but also in the context of the manumission. In fact, the evolution may have first taken place regarding the manumission, since the solution of Pomponius in D. 40,12,28 would precede that of Marcellus in D. 17,1,49. The contradiction between D. 40,2,4,1 and D. 40,12,28 is therefore to be regarded as part of the general evolution of the *voluntas domini* in Roman jurisprudence.

Scholars have also attempted to draw an analogy regarding the case of the legacy, where the Institutes of Justinian explicitly declare that if the deceased bequeathed something which he wrongfully considered to belong to someone else, his legacy would nonetheless be valid<sup>422</sup>. Once again, we are left with a similar sentence to that of Julian in D. 40,2,4,1, since the Institutes give as ground for this solution “*nam plus valet quod in veritate est quam quod in opinione*”. The text deserves however less attention, since it refers to a problem where a direct analogy with the transfer of ownership by *traditio* is not possible<sup>423</sup>. The impossibility to draw an analogy is particularly clear considering that the *voluntas defuncti* referred to in the text involves a completely different problem from that of the *voluntas domini* found at the *traditio* or manumission, which in fact disappears with the death of the owner. One should accordingly avoid the excessive abstraction behind the attempt of building a general theory of the *error in dominio* in Roman law. After all, it should not be forgotten that the term *error in dominio* is not to be found in the Roman sources, and that there is no

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<sup>420</sup> Harke, *Error in dominio?* (2004), p. 146.

<sup>421</sup> Harke, *Error in dominio?* (2004), p. 144.

<sup>422</sup> Inst. 2,20,11: “Si quis rem suam quasi alienam legaverit, valet legatum: nam plus valet quod in veritate est quam quod in opinione. Sed et si legatarii putavit, valere constat, quia exitum voluntas defuncti potest habere”.

<sup>423</sup> Burdese, *Error in dominio* (1953), p. 41.

indication that jurists would have developed a consistent theory which would govern every patrimonial act in an identical way. The way in which Roman jurists reason at this point is much less principle-oriented than what modern jurists would like, and the interpreter will be better off by focusing on the casuistic approach behind each solution.

The problems derived from the principle-based approach to Roman sources can be seen in the fact that numerous scholars traditionally denied the relevance of the *error in dominio* due to the fact that it would contradict the rule “*plus est in re quam in existimatione*”. This rule has already appeared in the decision of Julian in D. 40,2,4,1, being moreover to be found in an alternative form in the just-mentioned text of Inst. 2,20,11 dealing with legacies. This idea is moreover phrased in similar terms in numerous other texts, which have merited the attention of modern scholarship<sup>424</sup>. This general idea is applied in different contexts, but the only one truly relevant for the present study is that of D. 40,2,4,1. The main consideration to be borne in mind regarding these various texts is that one should not grant an excessive ‘normative value’ to *regulae* or topical arguments, which usually serve the sake of eloquence<sup>425</sup>. For example, in the case of D. 40,2,4,1 Julian offers a solution which is entirely based on the interpretation of the *voluntas domini* at the manumission, where the “*plus est in re...*” only makes the argument more convincing. This idea is also applied in numerous text to determine whether the person who thought to acquire from an unauthorized non-owner would acquire ownership in case the transferor could indeed validly transfer ownership<sup>426</sup>, where the general outcome will be that ownership will be transferred, although the subjective representation of the acquirer could prevent him from becoming a *bona fide* possessor if ownership was not transferred. These consequences do not follow from the “*plus est in re...*” argument, but rather from general rules governing the transfer of ownership<sup>427</sup>. Moreover, the limited significance of this rule can be attested by the fact that one may find an inverted formulation of it in D. 29,2,15 (Ulp. 7 *Sab.*) where Ulpian claims that “*plus est in opinione quam in veritate*”.

Considering the modest role of the “*plus est in re...*” rule, as well as the fact that Roman jurists do not appear to have attempted to develop a comprehensive and consistent theory of the *error in dominio*, there seems to be no good reason to bring the cases of the *traditio* and manumission under this general rule. The only case where such a rule is applied in this context is D. 40,2,4,1, which represents

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<sup>424</sup> See in particular Wacke, *Plus est in re* (1996), p. 309-357; Harke, *Error in dominio?* (2004), p. 146-149.

<sup>425</sup> See on this point Chapter 6, Section 3 below.

<sup>426</sup> D. 22,6,9,4 (Paul *libro singulari de iuris et facti ignorantia*): “Qui ignoravit dominum esse rei venditorem, plus in re est, quam in existimatione mentis: et ideo, tametsi existimet se non a domino emere, tamen, si a domino ei tradatur, dominus efficitur”. See moreover D. 41,3,44,1; D. 41,4,2,2; D. 41,4,2,15; FV 260.

<sup>427</sup> Wacke, *Plus est in re* (1996), p. 355: “Unsere *regula* erzeugt jedoch selbst keine Wirkungen; sie beschreibt vielmehr bloß bereits von Rechts wegen eintretende Wirkungen”.

an interpretation of the *voluntas domini* by Julian which would soon be abandoned by other jurists. It is therefore much more accurate to approach the solutions given by Roman jurists to the *error in dominio* in the context of *traditio* and manumission following the juristic development of the *voluntas domini* in these cases, rather than to force them into fitting within the “*plus est in re...*” rule.

The main concluding remark regarding the relevance of the *error in dominio* for the transfer of ownership by acts *inter vivos* is that the scope given to the *voluntas domini* played a central role in the solutions given by Roman jurists. Up to the mid-2<sup>nd</sup> century AD, the mistake by the owner regarding the ownership of the object was not considered an obstacle for the transfer of ownership or for the validity of the manumission. Julian would even explicitly declare that a manumission in such a case should be regarded as performed *voluntate domini* (D. 40,2,4,1). However, at around that time, jurists began to consider that such an error would imply that there was no *voluntas domini* at the act, an idea which would be consolidated by the time of Ulpian, who could generally claim that “*nemo errans rem suam amittit*” (D. 41,1,35). This evolution shows that jurists were open to revise the significance granted to this old requirement of the *ius civile*.

As already mentioned, the central role of the *voluntas domini* to determine the outcome of the transfer of ownership in the *error in dominio* does not pose a threat to the causal understanding of the structure of the transfer of ownership by *traditio* in Roman law. The interpreter must simply accept that, in particular circumstances, Roman jurists did consider the *voluntas* at the delivery to determine the consequence of the transfer of ownership, which is particularly the place when this took place by a non-owner. It is far too theoretical to see in this approach a reflection of a general abstract or causal approach to the transfer of ownership. Modern Roman law scholarship would be in fact better off without these claustrophobic labels, which force the solutions of Roman jurists into narrow concepts that were certainly alien to them. Classical jurisprudence did not develop a complex model regarding the role of the intent at the delivery based on the role of the *iusta causa traditionis*; on the contrary, the importance of the agreement on the *iusta causa traditionis* seems to have been approached within the general problem of the significance of the *voluntas domini*. This can be seen not only in the fact that Ulpian tackled this problem in the 7<sup>th</sup> book of his Disputations (D. 12,1,18) along with other cases where the *voluntas domini* plays a decisive role, but is also illustrated by the fact that the compilers located D. 41,1,35 (Ulp. 7 *disp.*) and D. 41,1,36 (Jul. 13 *dig.*) side by side, the one dealing with the *error in dominio*, the other with the agreement on the *iusta causa traditionis*. Moreover, the differences between the significance of the *voluntas domini* do not seem so categorical between acts traditionally considered ‘causal’ and ‘abstract’ if one considers that among the cases studied in this section the *voluntas domini* appears to fulfil a relevant role not only for the transfer of ownership by *traditio* (D. 18,1,15,2), but also in the context of the *mancipatio* (D. 17,1,49) and the *manumissio vindicta* (D. 40,2,4,1).

Having acknowledged that the *voluntas domini* in several cases plays a relevant role for the *traditio*, one may see to what extent is the *error in dominio* governed by considerations regarding the *voluntas domini* in the case of the transfer of ownership, instead of avoiding this reference, as several scholars defending a strictly ‘causal’ system have done before. It was already mentioned that Burdese attempted to avoid references to the debate on the *iusta causa traditionis*, despite which he would nonetheless state in his concluding remarks that the relevance of the *error in dominio* should not be seen as a confirmation for an *animus transferendi domini*<sup>428</sup>. Similarly Harke considered that granting any relevance to the intent at the delivery would imply a contradiction to the causal structure of the *traditio* as presented in Gai 2,20, which leads him to deny the importance of the *voluntas* at the delivery. Instead, he explains the solutions given by Roman jurists under broader considerations regarding the notion of error in Roman law, claiming that ownership would not be transferred when the mistake of the owner would affect the very essence of the act which was intended to be carried out<sup>429</sup>. While this approach may offer valuable insight into some of the solutions provided by earlier jurists – such as that of Julian in D. 40,2,4,1 – it is however clear that the *voluntas domini* did play a central role in the evolution of the relevance of the *error in dominio* in the transfer of ownership. Considering that there is nothing alien to classical law in granting the *voluntas* a certain role at the delivery, one may confidently state that, in the course of the second half of the 2<sup>nd</sup> century AD, jurists began to consider that the *error in dominio* would prevent the transfer of ownership in cases of transfer of ownership *inter vivos* and in the case of manumission, since the act could not be regarded as performed *voluntate domini*.

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<sup>428</sup> Burdese, *Error in dominio* (1953), p. 46–47.

<sup>429</sup> Harke, *Error in dominio?* (2004), p. 150–151: “Dieser läßt das bei Gaius (inst. 2.20) überlieferte Prinzip unberührt, wonach der von einer *causa* getragene Realakt der *traditio* ohne weiteres Eigentum an einer *res nec Mancipi* überträgt. Der Satz: *nemo errans rem suam amittit*, setzt kein Verfügungsgeschäft mit Eigentumsübetragungswillen voraus, sondern kommt nur dann zum Zuge, wenn der Verfügende einer Fehlvorstellung über einen begleitenden Rechtsakt unterliegt”.

## Chapter 3. Legal provisions as basis for the *potestas alienandi*

### 1. *Potestas alienandi* of legal guardians

Along with the cases in which a non-owner transfers ownership *voluntate domini*, Roman jurists often mention cases where the *potestas alienandi* stems from a particular legal provision, as does Gaius when mentioning the faculty of the *curator furiosi* to sell goods belonging to the lunatic, which stems from the Law of the Twelve Tables<sup>1</sup>. Despite the common juxtaposition between these different kinds of cases<sup>2</sup>, it should be noted that the legal basis which explains the transfer of ownership is completely different. The cases in which the *potestas alienandi* stems from a legal provision, as mentioned above<sup>3</sup>, confront the interpreter with a number of cases which offer no fundamental common guiding principle other than the fact that in all of them the possibility and way in which the faculty to dispose is exercised is not determined by the owner's will, being instead fixed beforehand by the law. This signals an essential difference with those cases in which ownership is transferred *voluntate domini*, which serves as a binding element that determines the way in which the transfer of ownership takes place in those various cases. The cases where the *potestas alienandi* stems from specific legal provisions offers a much more fragmentary outlook, since each of them may be governed by rules which may not be applicable to other, similar cases. This, however, does not exclude that there are some common patterns among these cases, which will be stressed in the following paragraphs. This is due to a great extent to the fact that Roman jurisprudence played an important role in establishing the features of these figures. When it is claimed that in these cases the *potestas alienandi* is determined by law, it should not be thought that there are statutory provisions, such as *leges* and *senatus consulta*, which extensively regulate the faculties of the non-owner. Instead, statutory provisions offer normally only a starting point that is further developed by jurists, which results in the expansion or restriction of the circumstances in which a non-owner may transfer ownership without having to count on the owner's consent. Moreover, since much of the development of these cases is owed to the work of Roman jurisprudence, it is not uncommon that jurists apply specific solutions to similar cases, which gives them a higher degree of uniformity. This uniformity would apparently increase

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<sup>1</sup> Gai 2,64: "Ex diverso agnatus furiosi curator rem furiosi alienare potest ex lege XII tabularum".

<sup>2</sup> See e.g. D. 15,1,21,1 (*tutor impuberis, curator furiosi, procurator*); D. 41,1,35 (*procurator, tutor impuberis*); D. 44,3,15,2-4 (*mandate, slave, son-in-power, tutor impuberis, curator furiosi*); D. 50,16,109 (*procurator, tutor impuberis*).

<sup>3</sup> Chapter 2, Section 2(a).

under Justinian, since scholars often claim that he extended the rules dealing with one specific kind of legal guardian to other cases<sup>4</sup>.

Most of the cases in which a legal provision authorizes a non-owner to transfer ownership are closely related to a legal prohibition to transfer ownership, where the law not only determines that a particular owner may not transfer ownership, but also the legal guardian who may do so in his place and in what way. The case which is more commonly mentioned, following the text of Gaius, is the *curator furiosi*, but one should also bear in mind other cases in which a non-owner may transfer ownership, such as the *tutor impuberis* – mainly when the *pupillus* is still an *infans* – and the *curator prodigi*.

Since the *potestas alienandi* is granted to legal guardians when the owner faces a legal prohibition to dispose, one may wonder whether the *tutor mulieris* should be studied along with these other institutions. The negative answer seems intuitive, since the *tutor mulieris* does not carry out himself the alienation of the goods belonging to the *mulier*, but simply has to authorize – through his *auctoritatis interpositio* – the alienation performed by her in particular circumstances. Likewise, the *tutor impuberis* may appear in certain cases simply to be authorizing the transfer of ownership and not carrying it out himself, particularly when the *pupillus* is an *impubes infantia maior* and can therefore act for himself, provided he obtains the *auctoritatis interpositio*. Despite the fact that in such cases the *tutor mulieris* and *tutor impuberis* do not carry out the transfer of ownership themselves, this latter institution is dealt with in the context of the general problem of the *potestas alienandi* in the Institutes of Justinian<sup>5</sup> (Inst. 2,8,2), in the title dealing with the problem of “Those who may alienate or not” (Inst. 2,8, “*Quibus alienare licet vel non*”) and after the alienation by a pledge creditor (Inst. 2,8,1). As mentioned above<sup>6</sup>, this gave place to the theory according to which the study of the *potestas alienandi* and the *tutela* originally would have also been dealt with side by side in the Institutes of Gaius. This led several editors to place Gai 2,62–64 immediately before Gai 2,80–85, which deals with the alienations by the *mulier* and *pupillus*. Even when this *emendatio* is no longer accepted, it cannot be denied that there is indeed a close link between both texts. This link is also visible in the Institutes of Gaius, considering that Gai 2,63 deals with the case of an owner – the husband – who can only dispose of his property – the *fundus dotalis* – with the authorization of another person – his wife –, which resembles to some extent the need for authorization of the *tutor* described in Gai 2,80–85. Some authors have attempted to take the link between both groups of cases even further by focusing on the letters R U identified by Studemund<sup>7</sup> before the rubric “*De pupillis an aliquid a se*

<sup>4</sup> Guzmán, *DPR* (2013) I, p. 453. On the interpolation of texts referring to the *curator minoris* and the *tutor impuberis* see Buckland, *Text-book* (1963), p. 171 n. 1.

<sup>5</sup> The *tutela mulierum* is of course not dealt with within this title, being absent from Justinianic law.

<sup>6</sup> See Chapter 1, Section 3.

<sup>7</sup> Studemund, *Gaii Institutionum* (1874), p. 73.

*alienare possunt*” preceding Gai 2,80, and which are normally seen as meaning “*Rubrica quinta*”<sup>8</sup>. Kniep<sup>9</sup> has suggested that this would mean that Gai 2,80 introduces the fifth case in which an owner may not transfer ownership, since previously the cases of the *fundus dotalis* (Gai 2,63), the lunatic, the alienation through a *procurator* and the pledge creditor (Gai 2,64) would have been mentioned. However, this explanation cannot be accepted, considering that at least in the case of the alienation by a *procurator* and a pledge creditor the owner does not forfeit his power to alienate<sup>10</sup>.

The link between the cases dealt with in Gai 2,80–85 and the more general text Gai 2,62–64 lies in the fact that the alienation by a *mulier* or a *pupillus* falls within the cases where, in the words of Gai 2,62, “*qui dominus sit, alienandae rei potestatem non habeat*”, since the owner must comply with a specific requirement in order to transfer ownership, just as happens with the owner of the *fundus dotalis* in Gai 2,63. All of these cases can accordingly be framed within the general problem of the illegal alienations, and one may understand that Justinian would set the case of the *pupillus* within Inst. 2,8, offering a good fit with the general topic dealt with in this title. Nonetheless, since in the case of the *tutor impuberis* and the *tutor mulieris* it is the owner himself who – complying with certain conditions – performs the transfer of ownership, these cases would seem to pose a different problem to those in which a non-owner transfers ownership himself, as happens with those described in Gai 2,64. Despite this essential difference, it should be observed that it is particularly difficult to draw a clear line between both groups of cases, particularly since at times one institution can work in both ways. This is the case regarding the *tutela impuberis*, where the *tutor* would necessarily have to alienate if the *pupillus* was an *impubes*, but only eventually would do so if the *pupillus* was an *impubes infantia maior* and could accordingly act by himself with the authorization of the *tutor*. This duality can also be observed in other kinds of guardianship, such as the *curator minoris (xxv annis)*. It is also worth noting that the sources often deal jointly with the alienation by different kinds of legal guardians<sup>11</sup>. Even if one admits that some of the texts that offer such a joint analysis are the result of interpolations, it is clear that already classical jurists would offer in several cases common rules for different forms of legal guardianship.

Along with these kinds of legal guardians, it should be noted that there are other kinds of *curatores*, such as the *curator bonorum captivi* and the *curator ventris*, whose administration falls on a certain patrimony which does not have a current

<sup>8</sup> David/Nelson, *Gai Institutionum*, Text (1960), p. 84; Böhm, *Gaiusstudien* 15 (1977), p. 115. Kniep, *Gai Institutionum* (1912) II, p. 205 reads instead “*regula quinta*”.

<sup>9</sup> Kniep, *Gai Institutionum* (1912) II, p. 204–205, 221.

<sup>10</sup> See on this point Chapter 2, Section 3(a).

<sup>11</sup> See e.g. Gai 1,199; D. 12,2,17,2 (Paul 18 *ed.*); D. 14,4,3,1 (Ulp. 29 *ed.*); D. 27,9,8,1 (Ulp. 2 *de omnibus tribunalibus*); D. 41,2,14,1 (Paul 68 *ed.*); D. 47,2,33 (Ulp. 41 *Sab.*); D. 44,4,4,25 (Ulp. 76 *ed.*); D. 47,2,57(56),4 (Jul. 22 *dig.*); D. 50,4,1,4 (Hermog. 1 *epitomarum*); C. 5,37,22 (Constantine, 326).

owner, since the captive is actually a slave who loses his patrimony and the *nasciturus* has not yet become owner. Such curators have a very limited power to dispose concerning the goods which they administer, and in fact Hermogenian indicates that such kinds of guardians differ greatly (*magna est differentia*) from cases such as the *curator furiosi*, the *curator (tutor) impuberis* and the *curator prodigi*, since these latter three can broadly administrate the affairs of the owner, while the former cases only have the *custodia* over the goods, being able to sell only those which deteriorate<sup>12</sup>. Nonetheless, Hermogenian himself deals jointly with these different kinds of legal guardianship in another text<sup>13</sup>, and since they do have a certain – albeit very limited – power to alienate they cannot be excluded from the current outlook.

It should be noted in passing that there are other cases in which a non-owner derives from the law the faculty to transfer ownership over someone else's property. Some cases resemble the position of a legal guardian, as happens with the administrators of the *piae causae*<sup>14</sup>. Also public officials could be entitled to transfer ownership over things belonging to the *fiscus*<sup>15</sup>. It is however not always clear whether we are dealing with an act governed by institutions of 'private' law, as happens with the "*ius dandae vendendaeve aquae*" mentioned by Frontinus as belonging to certain magistrates<sup>16</sup>, while Ulpian reserves it for the emperor<sup>17</sup>. At this point, it is worth noting that the nature of the faculty to dispose appears to be completely unrelated to the general rules reviewed so far when the attribution of property takes place through the *addictio* of the magistrate<sup>18</sup>, as happens for instance in the *sectio bonorum* of confiscated property or the *venditio sub hasta* of spoils of war<sup>19</sup>. There are moreover some cases where the attribution of property does not take place by a non-owner who is authorized by the law, but rather by

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<sup>12</sup> D. 26,7,48 (Hermog. 1 *ius epitomarum*): "Inter bonorum ventrisque curatorem et inter curatorem furiosi itemque prodigi pupillive magna est differentia, quippe cum illis quidem plane rerum administratio, duobus autem superioribus sola custodia et rerum, quae deteriores futurae sunt, venditio committitur".

<sup>13</sup> D. 50,4,1,4 (Hermog. 1 *epitomarum*). Other example of a text dealing jointly with these different kinds of legal guardians is D. 40,5,36pr (Marcianus 16 *fideicommissorum*).

<sup>14</sup> See on the faculty to dispose of these administrators Sánchez, *Fundaciones* (2002), p. 929-951.

<sup>15</sup> D. 49,14,5,1 (Ulp. 16 *ed.*): "Si ab eo, cui ius distrahendi res fisci datum est, fuerit distractum quid fisci, statim fit emptoris, pretio tamen soluto".

<sup>16</sup> Frontinus, *De aquaeductu* 95: "Ad quem autem magistratum ius dandae vendendaeve aquae pertinuerit, in eis ipsis legibus variatur. Interdum enim ab aedilibus, interdum a censoribus permissum invenio; sed apparet, quotiens in re publica censores erant, ab illis potissimum petitum, cum ei non erant, aedilium eam potestatem fuisse". The meaning of the *ius dandae vendendaeve* is discussed by Tarwacka, *The Roman Censors* (2014).

<sup>17</sup> D. 43,20,1,41-42: "(41) Permittitur autem aquam ex castello vel ex rivo vel ex quo alio loco publico ducere. (42) Idque a principe conceditur: alii nulli competit ius aquae dandae".

<sup>18</sup> See on this institution Lévy-Bruhl, *Addicere* (1947), p. 141-160; Wolf, *In iure cessio und manumissio* (2013), p. 381-382.

<sup>19</sup> See on public auctions García, *Ventas por subasta* (2005), p. 41-63.

the law itself (*ipso iure*)<sup>20</sup>. Considering that these institutions have additional features which exceed the margins of the present research, they will be excluded from further analysis.

As mentioned before, the cases in which a legal guardian is appointed to administer someone else's patrimony – and consequently to transfer ownership in certain cases – are laid down by various legal provisions, often through a first mention in a particular statute – such as the Twelve Tables – from which they started developing. This law contains in fact provisions concerning the *curator furiosus*<sup>21</sup>, the *prodigus*<sup>22</sup>, the *tutela impuberis*<sup>23</sup> and the *tutela mulieris*<sup>24</sup>. The succinct original provisions on legal guardians were complemented in the course of time, particularly through the activity of the praetor, the interpretation of jurists or new statutory provisions. This led to new rules which govern the way in which these legal guardians would be appointed and how should they carry out their administration<sup>25</sup>. Legal guardians who were in charge of the administration of the owner's patrimony could transfer ownership over his assets<sup>26</sup>, but could only do so within a rather strict framework determined by the administration in the best interest of the owner, and therefore acts which implied gratuitously disposing or renouncing a right or a position would normally be excluded, such as the dedication of objects to the gods<sup>27</sup>, manumitting slaves<sup>28</sup> or making gifts which went beyond what was considered customary<sup>29</sup>. Moreover, the *Oratio Severi* of 195 AD laid down clear rules regarding the *tutores*, forbidding them to alienate rustic or suburban land unless they obtained the authorization by the corresponding magistrate<sup>30</sup>. The prohibitions laid down by the *Oratio Severi* would later be extended by jurisprudence to cover other cases, such as the

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<sup>20</sup> See e.g. D. 23,3,9,1 (Ulp. 31 *Sab.*): "...Sed benignius est favore dotium necessitatem imponi heredi consentire ei quod defunctus fecit aut, si distulerit vel absit, etiam nolente vel absente eo dominium ad maritum ipso iure transferri, ne mulier maneat indotata". See on this point Stagl, *Favor dotis* (2009), p. 204–205.

<sup>21</sup> Tab. 5.7a: "Si furiosus escit, adgnatum gentiliumque in eo pecuniaque potestas esto".

<sup>22</sup> D. 27,10,1pr (Ulp. 1 *Sab.*); D. 27,10,13 (Gai. 3 *ad edictum provinciale*); Tit. Ulp. 12,2.

<sup>23</sup> C. 5,30,1 (Diocletian/Maximianus, 290); D. 26,4,1pr (Ulp. 14 *Sab.*); Inst. 1,15pr.

<sup>24</sup> Gai 2,47.

<sup>25</sup> Concerning the *cura prodigi* see D. 27,10,1pr (Ulp. 1 *Sab.*); Tit. Ulp. 12,3; PS 3,4a,7.

<sup>26</sup> See e.g. D. 12,2,17,2 (Paul 18 *ed.*): "Si tutor qui tutelam gerit aut curator furiosi prodigive iusiurandum detulerit, ratum id haberi debet: nam et alienare res et solvi eis potest et agendo rem in iudicium deducunt"; D. 27,10,10,1 (Ulp. 16 *ed.*): "Curator furiosi rem quidem suam quasi furiosi tradere poterit et dominium transferre (...)".

<sup>27</sup> D. 27,10,12 (Marcel. 1 *dig.*): "Ab adgnato vel alio curatore furiosi rem furiosi dedicari non posse constat: adgnato enim furiosi non usquequaque competit rerum eius alienatio, sed quatenus negotiorum exigit administratio".

<sup>28</sup> D. 27,10,17 (Gai. 1 *de manumissionibus*).

<sup>29</sup> On the prohibition to make gifts, see e.g. D. 26,7,22 (Paul 3 *ed.*); D. 26,7,46,7 (Paul 9 *resp.*); C. 5,37,16 (Diocletian/Maximianus, 293) *if.* On the possibility to perform customary gifts see D. 26,7,12,3 (Paul. 38 *ed.*).

<sup>30</sup> D. 27,9,1pr–2 (Ulp. 35 *ed.*).

alienation of land possessed in good faith<sup>31</sup> and the administration by other legal guardians<sup>32</sup>. Other legal provisions dealing with the faculties of legal guardians to transfer ownership would be enacted later, such as C. 5,37,22 (Constantine, 326), which deals in detail with the faculties of the *tutores* and *curatores* on this point.

Considering that the appointment and administration by legal guardians was fixed beforehand, it becomes necessary to determine what the consequence of an alienation carried out against these provisions would be. At this point it is worth noting that, in the cases where the owner is affected by a prohibition to dispose, this normally implies that the transgression of this prohibition does not only prevent the transfer of ownership from taking place, but also excludes the acquisition through *usucapio*. This general rule suffers exceptions in particular cases. It is for instance abandoned regarding the *mulier* who acts without the authorization of her *tutor* due to the progressive emancipation of women. The usucapion could also be admitted *utilitatis causa* regarding the alienation performed by a lunatic. All of this does not imply that similar consequences apply to the alienation performed by a non-owner who does not have the faculty to dispose regarding the goods of the owner who suffers a prohibition to dispose. This problem covers a wide variety of cases, such as the alienation by someone who was not appointed at all as a legal guardian<sup>33</sup>, who cannot administer the owner's affairs despite being a legal guardian<sup>34</sup>, who omitted some of the requirements concerning his appointment or who acted beyond the legal faculties granted to him. In such cases ownership will not be transferred, but the possibility of usucapion will not be automatically excluded<sup>35</sup>. As long as the sale of the legal guardian is not in itself subject to a prohibition to dispose it will serve as a valid *iusta causa* and usucapion will follow, although in particular cases an *in integrum restitutio* in favour of the ward could be granted<sup>36</sup>. However, there were certain prohibitions to dispose which could affect the alienation of legal

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<sup>31</sup> D. 27,9,5,2 (Ulp. 35 *ed.*). The doctrine is divided concerning whether the prohibition was also extended in classical times to the pledge of the land of the *pupillus*. See on this point Biscardi, *L'oratio Severi* (1970), p. 248-250.

<sup>32</sup> D. 27,9,8,1 (Ulp. 2 *de omnibus tribunalibus*); C. 5,70,2 (Gordianus, 238).

<sup>33</sup> D. 27,9,8pr (Ulp. 2 *de omnibus tribunalibus*): "Qui neque tutores sunt ipso iure neque curatores, sed pro tutore negotia gerunt vel pro curatore, eos non posse distrahere res pupillorum vel adulescentium nulla dubitatio est". This text is discussed by Seiler, *Negotiorum gestio* (1968), p. 229-230. See moreover D. 26,7,47,3 (Scaev. 2 *resp.*), D. 27,5,2 (Celsus 25 *dig.*) and D. 44,4,4,24 (Ulp. 76 *ed.*). The latter two fragments are analysed below. For D. 26,7,47,3 see Seiler, *Negotiorum gestio* (1968), p. 229; Sansón, *La transmisión* (1998), p. 115.

<sup>34</sup> D. 26,8,4 (Pomp. 17 *Sab.*).

<sup>35</sup> On the possibility of usucapion see e.g. D. 26,8,4 (Pomp. 17 *Sab.*); D. 27,5,2 (Celsus 25 *dig.*). D. 26,7,47,3 (Scaev. 2 *resp.*) declares that the ward will be able to exercise the *rei vindicatio* "si manet res", which is interpreted by Kübler, *Die Vormundschaftliche Gewalt* (1939), p. 191, that the object has not yet been consumed, while Seiler, *Negotiorum gestio* (1968), p. 229 and Sansón, *La transmisión* (1998), p. 115 understand that usucapion has not yet taken place.

<sup>36</sup> D. 4,4,49 (Ulp. 35 *ed.*).

guardians, such as those established by the *Oratio Severi*, the violation of which would prevent the purchaser from acquiring through usucapion<sup>37</sup>. The *tutor* could also be seen as committing theft in particular circumstances<sup>38</sup>, giving the transferred object the character of theftuous and thereby excluding the possibility of usucapion.

Finally, it should be noted that the failure to comply with one of the requirements of administration not always will lead to the impossibility of transferring the *iustum dominium*. This is particularly the case regarding the *cautio* which the *tutor* must grant when assuming his office, which during the classical period was only compulsory for the *tutores honorarii*<sup>39</sup>, i.e. those designated according to rules laid down by the praetor. This implies that the failure to grant this surety in the context of the transfer of ownership will only lead to a praetorian defence, normally in the form of an *exceptio*<sup>40</sup>. Only after the distinction between civil and praetorian remedies had lost any significance could it be generally claimed that the *tutor* who did not grant the proper surety could not transfer any property of the ward<sup>41</sup>.

## 2. *Alienatio administrationis causa, bona fides and furtum*

Up to this point we have only encountered more or less fixed rules which govern the alienations by legal guardians. It is however worth noting that Roman jurists also resorted to general notions which make reference to the administration of the owner's affairs in his best interest in order to determine the validity of an alienation. An example of this technique can be seen in the following rescript:

C. 5,37,16 (Diocletian/Maximianus, 293): Non omni titulo rerum pupilli potestatem alienandi tutores habent, sed administrationis tantum causa distrahentes, quae venum eis dare licet, iustam causam possidendi comparantibus praestant. Cum itaque donare nulla ratione res eorum quorum administrant negotia potestatem habent, vindicare dominium a possidentibus non prohiberis<sup>42</sup>.

<sup>37</sup> Sansón, *La transmisión* (1998), p. 113-114.

<sup>38</sup> D. 26,7,55,1 (Tryphoninus 14 *disputationum*); D. 47,2,33 (Ulp. 41 *Sab.*).

<sup>39</sup> Gai 1,199-200. See on this point Guzmán, *Caución tutelar* (1974), p. 83-95.

<sup>40</sup> On the relevance of the surety given by the legal guardian for the transfer of ownership see D. 27,5,2 (Celsus 25 *dig.*); D. 27,10,7,1-2 (Jul. 21 *dig.*); D. 44,4,4,23-24 (Ulp. 76 *ed.*). The fact that only a praetorian protection *ope exceptionis* was offered in the classical period is stressed by Guzmán, *Caución tutelar* (1974), p. 99-100.

<sup>41</sup> C. 5,42,5pr (Constantine/Maximianus, 305): "Tutor, qui satisdationem, cum dare debuit, minime interposuit, nihil omnino ex bonis pupilli alienare potest". Equally categorical is C. 5,42,3pr (Diocletian/Maximianus, 287). See on this point Guzmán, *Caución tutelar* (1974), p. 100.

<sup>42</sup> C. 5,37,16: "Guardians do not have unlimited power to alienate the property of their ward. They can give proper possession to purchasers only when in the course of their

This point deserves special attention, since it shows that Roman jurists were not willing to grant validity to any act which could formally be seen as part of the guardian's power to alienate, but would rather examine if it took place *administrationis causa*. The making of a gift is shown as a typical case where the alienation does not take place *administrationis causa*, and therefore the ward will be able to recover the object by resorting to the *rei vindicatio*. There are a significant number of texts which contain similar solutions, such as the following:

D. 27,10,17 (Gai. 1 *de manumissionibus*): Curator furiosi nullo modo libertatem praestare potest, quod ea res ex administratione non est: nam in tradendo ita res furiosi alienat, si id ad administrationem negotiorum pertineat: et ideo si donandi causa alienet, neque traditio quicquam valebit, nisi ex magna utilitate furiosi hoc cognitione iudicis faciat<sup>43</sup>.

Gaius excludes in principle the possibility that the *curator furiosi* may perform a manumission, since this act is not regarded as part of his powers of administration, pointing out that alienations performed by him are only valid if they belong to the *administratio negotiorum*. A parallel is then drawn with the alienation *donandi causa*, which will normally be ineffective. Nonetheless, Gaius points out that the donation will however transfer ownership if from it follows a great benefit for the lunatic, which shows that even the most common examples of acts not normally covered under the concept of administration will be valid if they, in one way or another, improve the position of the owner. Conversely, this implies that the acts which could be seen as part of the administration of the owner's affairs could be revised attending to the convenience for the owner. Ulpian, for instance, considers that the pledge given by the *curator furiosi* will only be valid if it was granted with the best interest of the lunatic in mind<sup>44</sup>.

A similar guideline is used by Ulpian in another case dealing with the *curator furiosi*:

D. 27,10,10,1 (Ulp. 16 *ed.*): Curator furiosi rem quidem suam quasi furiosi tradere poterit et dominium transferre: rem vero furiosi si

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administration they sell property on a ground which gives the right to do so. Since, therefore, they have no power to donate the property of persons whose affairs they manage, you are not forbidden to reclaim the property from the possessor thereof" (transl. Blume, modified).

<sup>43</sup> D. 27,10,17: "A lunatic's *curator* ought in no way to grant freedom because this is not a matter of administration. In so granting, he only alienates the lunatic's property if this is part of the administration of his affairs. So if he alienates as a gift, the delivery will not be valid unless, in the judge's opinion, it is done for the greater benefit of the lunatic" (transl. Watson).

<sup>44</sup> D. 27,10,11 (Paul 7 *ad Plautium*) "Pignus a curatore furiosi datum valet, si utilitate furiosi exigente id fecit".

quasi suam tradat, dicendum, ut non transferat dominium, quia non furiosi negotium gerens tradidit<sup>45</sup>.

In the first part of the text, we are told that the delivery of a thing belonging to the lunatic by the *curator furiosi* “as if it belonged to the lunatic” will transfer ownership, while in the second part it is said that such a delivery performed “as if it were his own” (the guardian’s) will not transfer ownership. The exact significance of these expressions is a controversial matter, and for a considerable time it was considered that they referred to a case of *error in dominio*, where the guardian thought to deliver something of the lunatic when in fact it belonged to himself and vice versa<sup>46</sup>. Another opinion is that the text would demonstrate the key role which the *contemplatio domini* plays at the delivery, since acts performed *nomine alieno* would transfer ownership, while those performed *nomine proprio* would at most grant bonitary ownership<sup>47</sup>. Despite these ideas, the prevailing opinion<sup>48</sup> is that the key to this text is that the guardian would not have performed an act of administration in the best interest of the lunatic, an interpretation which agrees with the *ratio* offered at the end of the text (“because he did not convey it while administering the lunatic’s affairs”). Accordingly, the expression “*quasi suam tradat*” should be seen as indicating that the guardian performed the delivery as if the thing were his own, having his own interest in mind and not that of the lunatic. It may be not too adventurous to assume that in such a case the benefit which arises from the operation, whatever it may be, goes to the person of the guardian. This interpretation also agrees with that of D. 1,19,1,1 (Ulp. 16 *ed.*)<sup>49</sup>, found within the same book of Ulpian’s Commentary to the Edict, where ownership over an object delivered by a *procurator* “as being his own property” (*quasi rem propriam*) is not transferred, because he is not seen as administering carefully (*diligenter gerere*).

Up to this point it could appear that Roman jurists made use of a strictly objective criterion, which would be to determine in each case whether a particular act of alienation can be regarded as performed *administrationis causa* or not. It would moreover seem from the text of D. 27,10,17 that it would be mainly the judge’s duty (*cognitio iudicis*) to determine whether the owner derives a benefit from the guardian’s actions. There are however other texts which are more subjectively oriented in their approach, particularly due to the reference to

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<sup>45</sup> D. 27,10,10,1: “The *curator* of a lunatic could indeed convey his own property as if it belonged to the lunatic and so transfer ownership, but if he conveys the lunatic’s property as if it were his own, it must be said that this does not transfer ownership because he did not convey it while administering the lunatic’s affairs” (transl. Watson).

<sup>46</sup> De Francisci, *Trasferimento* (1924), p. 192-193; Voci, *L’errore* (1937), p. 96-97.

<sup>47</sup> Sansón, *La transmisión* (1998), p. 122-123. The opinions of Sansón regarding the significance of the *contemplatio domini* at *traditio* are discussed in Chapter 2, Section 5 below.

<sup>48</sup> Betti, *Esercitazioni* (1930), p. 107-109; Burdese, *Autorizzazione* (1950), p. 16-18.

<sup>49</sup> See on this text Chapter 2, Section 3(d) above.

the *bona fides* or *dolus* of a legal guardian. The first of these concepts is referred to in the following text:

D. 26,7,12,1 (Paul 38 *ed.*): Quae bona fide a tutore gesta sunt, rata habentur etiam ex rescriptis Traiani et Hadriani: et ideo pupillus rem a tutore legitime distractam vindicare non potest: nam et inutile est pupillis, si administratio eorum non servatur, nemine scilicet emente. Nec interest, tutor solvendo fuerit nec ne, cum, si bona fide res gesta sit, servanda sit, si mala fide, alienatio non valet<sup>50</sup>.

Paul declares in this text that acts performed by a *tutor* in good faith will be upheld, which in turn means that if he transferred ownership the *pupillus* will not be able to exercise the *rei vindicatio*, without clarifying whether this implies a *denegatio actionis* or the existence of a particular *exceptio*. Considering that legal guardians would have been able to transfer Quiritary ownership, the former option appears more likely. It is further argued that the reason for this solution is that otherwise no one would buy from a *tutor*. This seems to indicate that this is a somewhat innovative solution, but the reference to the ratification (*rata habentur*) of this practice by rescripts by Trajan and Hadrian – about which we know nothing further – rather shows that an already existing solution was confirmed on this ground. The final sentence stresses the validity of an alienation performed by the *tutor* in good faith, and the opposite solution in case he acts in bad faith. That the relevance of good faith is no innovation of Paul's can be seen in the fact that Africanus before him, when discussing the conditions for a *statuliber* to become free and his collusion with the *tutor* to whom he had to render account of the money, indicates that in the latter case he will not be freed since the transaction “should take place in good faith without fraud on the part of the *statuliber* and the *tutor* in accordance with the regular practice for the alienation of property of a *pupillus*”<sup>51</sup> (transl. Watson).

While it could appear that Paul resorts exclusively to subjective elements to determine the validity of the sale, it should be noted that the text refers to a thing “lawfully alienated” (*legitime distractam*)<sup>52</sup>. The reference to the good or bad faith of the *tutor* seems therefore to merely complement the general notions regarding

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<sup>50</sup> D. 26,7,12,1: “What is done in good faith by a *tutor* is ratified in accordance with the rescripts of Trajan and Hadrian; and therefore, a *pupillus* cannot vindicate property lawfully alienated by a tutor; for it is also injurious to *pupilli* if their administration is not upheld, because surely no one would buy. Nor does it matter whether the *tutor* was solvent or not, since, if the business was carried out in good faith, it should be upheld, if fraudulently, the alienation is not valid” (transl. Watson, modified).

<sup>51</sup> D. 40,4,22 (Afr. 9 *quaestionum*): “(...) ut bona fide et citra fraudem *statuliberi* et *tutoris* id fiat, sicut et in alienationibus rerum *pupillarum* servatur (...)”

<sup>52</sup> Conversely, Burdese, *Autorizzazione* (1950), p. 18 does not see any need for the term *legitime* and considers it interpolated, following *Ind. Itp.* (1931) II, col. 131, despite discarding the opinions of the authors there quoted regarding other aspects of the text.

the limits of his administration, emphasizing the subjective stance of the *tutor* regarding the convenience of the alienation. The fact that the good or bad faith of the legal guardian does not replace the requirement according to which the administration must be carried out in the owner's best interest, but rather complements it, can be seen in the texts dealing with the theft by a legal guardian. A distinctive feature of the theft by legal representatives is that normally the owner's will is irrelevant, and therefore the criterion to determine the existence of *furtum* is not that the legal guardian acts '*invito domino*', but rather that he administers in a perfidious way, as Tryphoninus puts it when discussing the theft by a *tutor impuberis* in D. 26,7,55,1 (Tryphoninus 14 *disputationum*): "(...) *Sed tutores propter admissam administrationem non tam invito domino contrectare eam videntur quam perfide agere (...)*"<sup>53</sup>. That the *tutor* administers in a disloyal or perfidious way which allows qualifying his acts as theftuous does not simply mean that his management makes the situation of the owner worse. Just as in other cases in which a non-owner already has in his power the object belonging to another one<sup>54</sup>, the subjective representation of the legal guardian plays a decisive role in order to determine the existence of *furtum*. The significance of the *animus furandi* is not only to be seen in Tryphoninus' reference to the perfidious way in which the *tutor* conducts himself, but it is moreover explicitly declared by Ulpian:

D. 47,2,33 (Ulp. 41 *Sab.*): Tutor administrationem quidem rerum pupillarium habet, intercipiendi autem potestas ei non datur: et ideo si quid furandi animo amoverit, furtum facit nec usucapi res potest. Sed et furti actione tenetur, quamvis et tutelae agi cum eo possit. Quod in tutore scriptum est, idem erit et in curatore adulescentis ceterisque curatoribus<sup>55</sup>.

In this fragment we are told that the administration which the *tutor impuberis* has does not give him the faculty to take away (*intercipiendi potestas*), which confirms that the acts concluded by legal guardians must take place *administrationis causa*. However, if he takes goods with the intention to steal (*animus furandi*) he will commit *furtum*, and the things which he takes, being *res furtivae*, will not be acquired through usucapion by subsequent possessors. From this text it becomes

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<sup>53</sup> D. 26,7,55,1: "(...) The *tutores*, however, because they have accepted the administration, are seen not so much as appropriating the property against the owner's will, as in acting in a perfidious way (...)" (transl. Watson, modified).

<sup>54</sup> See Chapter 2, Section 2 above.

<sup>55</sup> D. 47,2,33: "A *tutor* has the administration of the estate of his *pupillus*, but he is not allowed to take away from it; hence, if he should take something with the intention to steal he commits theft, and the thing is incapable of usucapion. And he is liable to the action on theft, even though he is also liable to the action on tutelage. What has been written in relation to the *tutor* of a *pupillus* applies also to the case of a minor and to other curators" (transl. Watson, modified).

clear that not every form of bad administration amounts to *furtum*, but only those cases in which the legal guardian has the *animus furandi*.

The requirements and consequences of the theft of a *tutor* are also sketched by Julian:

D. 41,4,7,3 (Jul. 44 *dig.*): Si tutor rem pupilli subriperit et vendiderit, usucapio non contingit, priusquam res in potestatem pupilli redeat: nam tutor in re pupilli tunc domini loco habetur, cum tutelam administrat, non cum pupillum spoliat<sup>56</sup>.

That no special reference to the *animus furandi* is to be found in this text can be explained by the fact that the conduct of the *tutor* leaves no room for doubt concerning his intentions, since he snatches an object belonging to the ward in order to sell it. Julian's final remark, according to which the *tutor* is regarded to act *domini loco* when he administers the tutelage and not when he despoils the ward, accounts in principle only for the fact that ownership is not transferred, since the acts concluded by the *tutor* are not performed *administrationis causa*.

The preceding texts show that the administration in the owner's best interest and the reference to the good or bad faith of the legal guardian are not conflicting criteria to determine the transfer of ownership. The basic element to analyse is that the management of the legal guardian takes place *administrationis causa*, which is a relatively flexible notion that considers the best interest of the owner, according to which even the binding force of some legal prohibitions affecting the legal guardian can be modified. Considering the flexibility of this criterion, the reference to the existence of bad faith on the side of the legal guardian may be a key element in order to determine at what point he exceeds the limits of his administration. The deliberately disloyal management will lead to qualifying the alienations performed by the legal guardian as *furtum*, which will prevent the acquisition through usucapion<sup>57</sup>. The significance of this fact, however, should not be blown out of proportion, and just like not every delivery performed *invito domino* is to be considered *furtum*<sup>58</sup>, not every case of bad administration by a legal guardian will be theftuous: a positive intention to commit theft will be required to qualify the delivered object as a *res furtiva*. Accordingly, the alienation performed by a legal guardian which has such

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<sup>56</sup> D. 41,4,7,3: "If a *tutor* should appropriate a thing belonging to his *pupillus* and sell it, there can be no usucapion of it until it returns into the control of the *pupillus*; for a *tutor* is regarded as an owner in the affairs of his ward, only when he is administering his guardianship, not when he is despoiling the *pupillus*" (transl. Watson).

<sup>57</sup> Sansón, *La transmisión* (1998), p. 117-120 considers that the conveyance performed *mala fide* by a legal guardian does not necessarily imply that he commits *furtum*, but it does not seem feasible to make a distinction between *mala fides* on the one hand and *dolus* or *animus furandi* on the other one. If a legal guardian, intentionally and with a fraudulent intent, exceeds his faculties of administration, he will inevitably be seen as committing *furtum*.

<sup>58</sup> See Chapter 2, Section 2 above.

detrimental effects for the owner that it cannot be considered to have taken place *administrationis causa* will not amount to *furtum* if the transferor did not consider to exceed his faculties of administration, just as the acts of alienation of someone who believes to have been lawfully appointed as a legal guardian without it being so.

### 3. Possibility to transfer the *dominium ex iure Quiritium*

Since it is clear that legal guardians could transfer ownership, the question rises on whether they would be able to transfer ownership in the same way as the owner would if he was not affected by a prohibition to dispose, and particularly whether Quiritary ownership could be transferred. An affirmative answer seems in principle intuitive, considering that this was the case regarding the *traditio voluntate domini* and that it seems rather odd that someone who draws his *potestas alienandi* from a legal provision could not achieve the same result. There are moreover several texts which stress that a legal guardian would act *domini loco*, and among them the following text regarding both the *tutor* and the *curator*:

D. 47,2,57(56),4 (Jul. 22 *dig.*): Qui tutelam gerit, transigere cum fure potest et, si in potestatem suam redegerit rem furtivam, desinit furtiva esse, quia tutor domini loco habetur. Sed et circa curatorem furiosi eadem dicenda sunt, qui adeo personam domini sustinet, ut etiam tradendo rem furiosi alienare existimetur. Condicere autem rem furtivam tutor et curator furiosi eorum nomine possunt<sup>59</sup>.

In the context of theft, Julian indicates that the *reversio* of the stolen object also takes place if the *tutor* is the one who receives it, since he is considered to be in the place of the owner (*domini loco*). Following this idea, we are told that the same can be said about the *curator*, which even implies that he must be deemed to transfer ownership when performing the *traditio* over assets of the lunatic. The text leaves little room to doubt that the effects of the delivery will be identical to that performed by the owner himself, and this is not the only case in which it is declared that a legal guardian acts *domini loco*<sup>60</sup>. Moreover, several other fragments also grant the acts performed by a legal guardian the same consequences as if they had been carried out by an owner not affected by a prohibition to dispose or by a non-owner acting *voluntate domini*. According to Paul, for instance, the ward

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<sup>59</sup> D. 47,2,57(56),4: “An administering *tutor* can make a *transactio* with the thief, and if he recovers the stolen thing into his control, it is no longer a stolen thing; for a *tutor* is in the position of an owner. The same must be said regarding the *curator* of a lunatic, who has to such an extent the role of the owner that even by delivering a thing belonging to the lunatic he is deemed to alienate it. A *tutor* and the *curator* of a lunatic can also bring a *condictio* for stolen goods in the name of the *pupillus* or lunatic” (transl. Watson, modified).

<sup>60</sup> See e.g. D. 26,7,27 (Paul 7 *ad Plautium*); D. 41,4,7,3 (Jul. 44 *dig.*).

cannot exercise the *rei vindicatio* over assets lawfully alienated by his *tutor*<sup>61</sup>, which indicates that the *iustum dominium* was indeed transferred by the latter. Moreover Gaius declares in Gai 2,47<sup>62</sup> that according to the Law of the Twelve Tables the *traditio* of a *res mancipi* performed by a woman would only lead to usucapion if it was authorized by her *tutor*, which grants this *traditio* the same consequences – a *possessio ad usucapionem* – as if it was performed by an owner not affected by a prohibition to dispose. It is also reported that the *accessio possessionis* will take place if the *traditio* is performed by a legal guardian, just as if it was performed by the owner himself, by an authorized non-owner or by a son-in-power or slave acting within the *libera administratio peculii*<sup>63</sup>.

All of these texts presented so far seem to show that acts concluded or authorized by a legal guardian would bear the same consequences as if performed by the owner, and one could expect accordingly that the *dominium ex iure Quiritium* was granted to the acquirer. There are, however, a significant number of texts in which the position of the acquirer appears to be protected exclusively through praetorian remedies, showing that he does not have Quiritary ownership. Some scholars consider that this would imply that legal guardians were not able to transfer the *dominium ex iure Quiritium*, an opinion which agrees with the traditional view according to which Roman law would originally have excluded that a non-owner according to the *ius civile* could directly affect the position of the owner, and that only at a later stage the praetor would have protected the acquirer. Such an approach, however, forgets that not every form of legal guardianship has the same source, and that besides the *curatores* and *tutores ‘legitimi’* – those whose guardianship stemmed from a statutory provision such as the Law of the Twelve Tables – there were a significant number of cases in which the prohibition to dispose and the subsequent concession of the *potestas alienandi* to a guardian stemmed from the activity of the praetor, making them accordingly ‘*honorari*’. Only regarding this latter group would the *potestas alienandi* of a legal guardian refer exclusively to the transfer of praetorian ownership. This can be seen through the analysis of texts dealing with praetorian prohibitions to dispose, such as the following:

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<sup>61</sup> D. 26,7,12,1 (Paul 38 *ed.*): “Quae bona fide a tutore gesta sunt, rata habentur etiam ex rescriptis Traiani et Hadriani: et ideo pupillus rem a tutore legitime distractam vindicare non potest (...)”

<sup>62</sup> Gai 2,47: “Item olim mulieris, quae in agnatorum tutela erat, res mancipi usucapi non poterant, praeterquam si ab ipsa tutore auctore traditae essent: id ita lege XII tabularum cautum erat”.

<sup>63</sup> D. 41,2,14pr-1 (Paul 68 *ed.*); D. 44,3,15pr-6 (Ven. 5 *interdictorum*).

D. 27,10,10pr (Ulp. 16 *ed.*): Iulianus scribit eos, quibus per praetorem bonis interdictum est, nihil transferre posse ad aliquem, quia in bonis non habeant, cum eis deminutio sit interdicta<sup>64</sup>.

Ulpian reproduces here the opinion of Julian, according to whom those under a praetorian prohibition to dispose could not transfer ownership over their assets because they do not have them *in bonis*. The fragment is located by Lenel under the rubric *De Publiciana in rem actione*, and according to him it would have dealt specifically with the cases of delivery *a domino*<sup>65</sup>. This does not imply that the person affected by the praetorian prohibition to alienate can transfer the *nudum ius Quiritium*, since other texts show that the acquirer may only acquire through usucapion in such cases, and only if he was unaware of the condition of the transferor<sup>66</sup>. Nonetheless, the text shows the fundamental link between the praetorian prohibitions to dispose and the possibility to transfer the praetorian ownership.

Having the basic guideline according to which the effects of the alienation by a legal guardian would be determined by the source of his *potestas alienandi*, it is worth noting that it is not always clear when we face a *legitimus* or a *honorarius* guardian. Clear references to the problem inevitably became blurred in Justinian's compilation, from which we can only distinguish the existence of various pieces of legislation determining or confirming the faculties of certain legal guardians<sup>67</sup>, as well as the intervention of the praetor, either generally granting faculties of administration in new cases, by bestowing specific praetorian exceptions in particular cases or by fixing the specific duties and faculties of the guardian in the decree granting the administration. It is therefore often unclear whether classical jurists would regard the *potestas alienandi* in specific cases as stemming from statutory provisions or from the activity of the praetor.

One should moreover not exclude that the praetor may intervene in a particular case for causes unrelated to the source of the legal guardian's *potestas alienandi*. This seems to be the case in the following text:

D. 27,10,7,1 (Jul. 21 *dig.*): Curator dementi datus decreto interposito, uti satisdaret, non cavit et tamen quasdam res de bonis eius legitimo modo alienavit. Si heredes dementis easdem res vindicent, quas curator alienavit, et exceptio opponetur 'si non curator vendiderit', replicatio dari debet 'aut si satisfactione

<sup>64</sup> D. 27,10,10pr: "Julian wrote that those who were forbidden to deal with their goods by the praetor could not convey anything to anybody, because they have no goods since they are forbidden to alienate" (transl. Watson).

<sup>65</sup> Lenel, *Paling.* (1889) II, col. 511 n. 5; Lenel, *EP* (1927), p. 169.

<sup>66</sup> D. 18,1,26 (Pomp. 17 *Sab.*); D. 41,3,12 (Paul 21 *ed.*); D. 41,4,7,5 (Jul. 44 *dig.*).

<sup>67</sup> See e.g. D. 26,7,12,1 (Paul. 38 *ed.*): "Quae bona fide a tutore gesta sunt, rata habentur etiam ex rescriptis Traiani et Hadriani (...)".

interposita secundum decretum vendiderit'. Quod si pretio accepto curator creditores furiosi dimisit, triplicatio doli tutos possessores praestabit<sup>68</sup>.

Julian presents in this fragment the case of a *curator furiosi* who was ordered by the praetorian decree conferring him this quality to give a surety, and without doing so he proceeds to lawfully alienate (*legitimo modo alienavit*). We are then told that the heirs of the lunatic may attempt a *rei vindicatio*, to which the acquirer of the goods may bring up the defence 'unless the *curator* sold it', which will in turn be met with a *replicatio* referring to the existence of a surety by the *curator*. If the legal guardian had granted no surety, but nonetheless had administered in the interest of the lunatic – paying off the lunatic's creditors with the money he obtained from the transaction – the acquirer would be able to repel the lunatic's heirs with a *triplicatio doli*, which would be grounded on the fact that while the lunatic lost an asset belonging to him, his position was not really made worse by the management of the *curator*<sup>69</sup>.

The most puzzling element concerning D. 27,10,7,1 is that this is the only known text in which a reference to the *exceptio si non curator vendiderit* is made, which makes one wonder why no other reference to it can be found in the numerous cases in which a *curator furiosi* – or any other legal guardian – transfers ownership. According to some scholars, this text would prove that every alienation performed by a *curator furiosi* could only provide a bonitary ownership to the acquirer<sup>70</sup>, which is why the *rei vindicatio* of the heirs can only be faced with an *exceptio*. Others simply regard the text as decisively interpolated, since the words "*legitimo modo*" used to describe the alienation would have been introduced by the compilers to make reference to the prohibition arising from the *Oratio Severi*, which would have been introduced after the time of Julian<sup>71</sup>. Solazzi and Gonvers in particular consider that ownership is not transferred because of the failure of the *curator* to grant the *satisfactio*<sup>72</sup>, an idea which, however, does not take into account that this was a requirement of the *ius honorarium* that could not possibly affect the transfer of the *iustum dominium*. A more complete explanation can be found in the fact that the underlying reason

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<sup>68</sup> D. 27,10,7,1: "A *curator* appointed for a lunatic and ordered by decree to give security did not do so, but transferred certain objects from the property in a lawful manner. If the lunatic's heirs claim the objects which the *curator* transferred and the defence is raised 'unless the *curator* sold it', a *replicatio* ought to be given 'if he sold it after giving security according to decree'. If the *curator* paid off the lunatic's creditors with the money he received, the possessors will be protected by a *triplicatio* of fraud" (transl. Watson, modified).

<sup>69</sup> Guzmán, *Caución tutelar* (1974), p. 98; Carbone, *Satisfactio tutoris* (2014), p. 32-33. It is worth noting that according to Gai 1,199 the purpose of the surety was to prevent the consumption and diminishing of the owner's goods (*consumantur aut deminuantur*).

<sup>70</sup> Guzmán, *DPR* (2013) I, p. 455.

<sup>71</sup> Beseler, *Miscellanea* (1925), p. 249.

<sup>72</sup> Solazzi, *La minore età* (1912), p. 142; Gonvers, *L'exceptio* (1939), p. 81.

for the failure in transferring ownership does not lie in the lack of *potestas alienandi* or the existence of a prohibition to dispose, but rather in the fact that the *curator* is performing a *traditio* instead of a *mancipatio*. While D. 27,10,7,1 does not give many clues on this point, another decision within the same fragment leaves little room for doubt:

D. 27,10,7,3 (Jul. 21 *dig.*): Quaesitum est, an alteri ex curatoribus furiosi recte solvetur vel an unus rem furiosi alienare possit. Respondi recte solvi. Eum quoque, qui ab altero ex curatoribus fundum furiosi legitime mercaretur, usucapturum, quia solutio venditio traditio facti magis quam iuris sunt ideoque sufficit unius ex curatoribus persona, quia intellegitur alter consentire: denique si praesens sit et vetet solvi, vetet venire vel tradi, neque debitor liberabitur neque emptor usucapiet<sup>73</sup>.

In the first part of the text the possibility of the existence of more than one *curator furiosi* is presented, along with Julian's opinion that the payment or alienation performed by one of them will be valid. It is then claimed that if a piece of land is lawfully purchased (*legitime mercaretur*) from one of the legal guardians, the acquirer will be able to usucapt. The fact that ownership is not successfully transferred and consequently that the purchaser only has a *possessio ad usucapionem* is rather unexpected, since we have just been informed that one of the *curatores* may validly pay or transfer ownership. The explanation according to which "payment, sale and delivery (*traditio*) are matters of fact rather than of law and so it is enough if one of the *curatores* acts, the other being taken to agree" only reveals that the other *curator* is seen as agreeing, and the final sentence shows that if he forbids the payment, sale or *traditio*, the possibility of acquiring through usucapionem will be excluded. Some authors have seen in this fragment, just as in D. 27,10,7,1, a piece of evidence that legal guardians would not be able to convey Quiritary ownership, but at most a *possessio ad usucapionem* that might be protected by the praetor<sup>74</sup>. There is however an alternative explanation for the defective transfer of ownership in this text, which is to be found in the fact that the *curator* performs a *traditio* over a *res Mancipi* (a piece of land). The outcome in such circumstances is in fact the same as that reported by Gai 2,47, according to which the delivery of a *res Mancipi* by a *mulier* who is authorized by her *tutor* would lead to the acquisition by usucapionem. Considering all of this, it is worth

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<sup>73</sup> D. 27,10,7,3: "It was asked whether a payment can properly be given by one of two curators of a lunatic or whether one could alienate the lunatic's property. I replied that it was rightfully paid. Further someone who bought the lunatic's estate in a lawful manner from one of the curators can usucapt, because payment, sale and delivery are matters of fact rather than of law and so it is enough if one of the *curatores* acts, the other being taken to agree. But if the other is present and forbids the payment, or forbids the sale or delivery, the debtor is not discharged, nor can the buyer usucapt" (transl. Watson, modified).

<sup>74</sup> Guzmán, *DPR* (2013) I, p. 455.

noting that already Lenel<sup>75</sup> thought that the text referred to a case where the lunatic's piece of land was not lawfully purchased (<non> *legitime mercaretur*). While the specific reference to the unlawfulness of the alienation is not expressed in the current form of the text<sup>76</sup>, it appears highly probable that it is due to the fact that the *fundus* was alienated by resorting to the *traditio* instead of the *mancipatio*, which would have granted the acquirer the same position as if the *traditio* had been performed by an authorized owner. The fact that only a *possessio ad usucapionem* was granted in this case may have escaped the eyes of Justinian's commissioners, who would have been more interested in preserving the rules expressed by Julian regarding the plurality of *curatores*.

A similar reconstruction can be made regarding D. 27,10,7,1, since we are not informed of the underlying reason behind the failure in the transfer of Quiritary ownership. Lenel suspects that the original text would have reported that ownership was unlawfully alienated (<non> *legitimo modo alienavit*), perhaps a case where a *res Mancipi* was not conveyed through *mancipatio*, because otherwise the buyer would have obtained the *iustum dominium*<sup>77</sup>. Accordingly, both D. 27,10,7,1 and D. 27,10,7,3 would have been subject to corrections regarding the validity of the alienation by the *curator*. It is most likely that the author would have therefore analysed the alienation by a *curator* who not only had given no *satisdatio*, but also alienated in way which did not grant the *dominium ex iure Quiritium*, probably by conveying a *res Mancipi* through *traditio*. This would explain better the resulting *formula*, and particularly the role of the *exceptio*: the lunatic would remain Quiritary owner of the delivered objects, which would later pass to his heirs, who decide to make use of the *rei vindicatio*, being however repelled with the *exceptio si non curator vendiderit*. This defence would therefore be an adaptation of the *exceptio rei traditae et venditae*, but since it was not the owner himself who sold and delivered, reference is made to the intervention of the *curator*<sup>78</sup>. In other words, the defence was not granted because the alienation was performed by a legal guardian, but because there was a particular obstacle for the transfer of ownership, which in D. 27,10,7,1 and D. 27,10,7,3 was the *traditio* of a *res Mancipi*. This would explain the exceptional position of the *exceptio si non curator vendiderit* in Roman law and why it is not to be found more often in cases where a legal guardian would transfer ownership. Only the omission by the *curator* in granting a *cautio* would neutralize the claim to the *exceptio si non curator vendiderit*, thus showing the relevance in the eyes of the praetor of duly granting this surety, which does not exclude the application of a general *triplicatio doli* in turn.

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<sup>75</sup> Lenel, *Paling*. (1889) I, col. 375 n. 4.

<sup>76</sup> Lenel, *Paling*. (1889) I, col. 375 n. 3.

<sup>77</sup> Lenel, *Paling*. (1889) I, col. 375 n. 1.

<sup>78</sup> Lenel, *EP* (1927), p. 511 n. 11; Gonvers, *L'exceptio* (1939), p. 92. According to these authors, the adapted version of the *exceptio rei venditae et traditae* would be "*si non curator Ai Ai fundum quo de aqitur No No vendidit et tradidit*".

#### 4. Ownership over the administered goods?

The evidence presented so far shows that the alienations performed or authorized by a legal guardian will have the same consequences as those carried out by an owner who has the *potestas alienandi*. There are moreover several texts which show the broad faculties to administer and transfer ownership of legal guardians, leaving little room for doubt concerning the broad scope of their *potestas alienandi*<sup>79</sup>. Considering moreover that legal guardians would transfer the *iustum dominium*, it appears that their faculty to dispose stems from the *ius civile* and that it would have been acknowledged since a very early stage. This idea, however, was not consistent with the view of some scholars who considered that the *ius civile* would have precluded any form of direct representation. The point was even more problematic considering that the broad faculties of legal guardians would seem to allow them to carry out formal acts in order to transfer ownership such as the *mancipatio* or the *in iure cessio*, which would imply that already in a primitive stage Roman law knew some forms of ‘direct representation’. Mitteis came up with an alternative explanation for this, declaring that the *curator furiosi* would have had a ‘quasi-dominical power’ (*quasi-dominikale Gewalt*) which would enable him to alienate the lunatic’s property even by *mancipatio*<sup>80</sup>. Mitteis points out to the well-known text of the Law of the Twelve Tables “*Si furiosus escit, adgnatum gentiliumque in eo pecuniaque potestas esto*” (Tab. 5.7a) to confirm the existence of this power over the lunatic. This fragment, however, only grants a *potestas* over the person of the lunatic and his *pecunia*, which would not seem to include his *res Mancipi*<sup>81</sup>. In fact Lenel seems to have been willing to accept only the possibility that a *curator furiosi* could transfer ownership over *res nec Mancipi*<sup>82</sup>, for which he probably had this text in mind. In order to overcome this clear objection, Mitteis claimed that jurists would have certainly extended this rule to the *familia* of the lunatic<sup>83</sup>, but he is not capable of bringing any further evidence on the point.

The very feeble ground on which the ideas of Mitteis were based contrasts with the great enthusiasm with which scholars received them<sup>84</sup>, perhaps due to the fact that it was the only way to uphold the traditional interpretation regarding

<sup>79</sup> See regarding the *curator furiosi* e.g. Gai 2,64; D. 40,1,13 (Pomp. 1 *ex Plautio*); D. 27,10,17 (Gai. 1 *de manumissionibus*); D. 47,2,57,4 (Jul. 22 *dig.*).

<sup>80</sup> Mitteis, *Römisches Privatrecht* (1908), p. 210.

<sup>81</sup> This is the traditional view, but Diliberto, *Cura furiosi* (1984), p. 85-96 claims that ‘*pecunia*’ could cover more than *res nec Mancipi* in this text.

<sup>82</sup> Lenel, *Paling.* (1889) II, p. 511 n. 7: “*nec Mancipi sc.*”

<sup>83</sup> Mitteis, *Römisches Privatrecht* (1908), p. 210 n. 18.

<sup>84</sup> See e.g. Kniep, *Gai Institutionum* (1912) II, p. 236; Siber, *Verwaltungsrecht* (1917), p. 83-84; Siber, *Römisches Recht* (1928) II, p. 413; Guarino, *Notazioni IV-V* (1949), p. 194-198; Burdese, *Lex commissoria* (1949), p. 168-169; Burdese, *Autorizzazione* (1950), p. 14-15; Rabel, *Grundzüge* (1955), p. 184-185; Gallo, *Ossezzazioni sulla signoria* (1956), p. 212; Gallo, *Potestas e Dominium* (1970), p. 55; Weimar, *Eigentumsübergang* (1993), p. 551; Perani, *Pignus distrahere* (2014), p. 25, 50-51; Longchamps, *Nemo plus iuris* (2015), p. 78.

the evolution of direct representation. The idea of a ‘quasi-dominical power’ was even applied by scholars to other legal guardians, such as the *curator prodigi* or the *tutor impuberum*<sup>85</sup>, which had not been envisaged by Mitteis at all. Kübler, for instance, claimed that the *tutor* was not included among the cases mentioned in Gai 2,64 because all of the individuals mentioned in this text were *non domini*, while the *tutor* would actually act in the capacity of an owner<sup>86</sup>. The reason for the expansion of this theory was that it was adopted by some scholars dealing with the structure of the primitive Roman family. Bonfante, for instance, claimed that the *potestas* of the *curator furiosi* would have the same content as that exercised by the *patefamilias* over his wife, slaves and *fili*, and accordingly he would be the owner of the lunatic’s property. This opinion is followed by other scholars, such as Guarino<sup>87</sup>. Moreover, Arangio-Ruiz<sup>88</sup> and Kaser<sup>89</sup> have stressed that in pre-classical times there would be no possible distinction between ownership and the power to alienate – a thought certainly inspired by the theory of a primitive prohibition of direct representation – which implies that those in charge of administering other people’s property would actually have to become owners themselves.

Despite the general claims on the point, little evidence has been brought to support the idea of a ‘quasi-ownership’ of the legal guardian. For example, it is often argued that the reference to the legal guardian acting ‘*loco domini*’ would be a clear indication of the fact that he would originally have been considered owner of the administered goods. This can hardly be seen as convincing evidence considering that this expression only indicates that legal guardians are regarded to take the place of the owner – the lunatic or ward – who therefore keeps his ownership over the administered goods. Moreover, some scholars have claimed that the *curator furiosi* would become owner of the administered goods because the state of mental insanity would have been regarded in Rome as incurable and definitive<sup>90</sup>, a claim which has however been discarded by later studies on the subject. Regarding the views on the structure of the primitive Roman family and the position of the *patefamilias*, it cannot be discussed here which is the most plausible theory on the subject. However, it is worth noting the clear anachronism of looking for ‘ownership’ and ‘ownership-like’ figures in pre-

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<sup>85</sup> Siber, *Verwaltungsrecht* (1917), p. 83; Arangio-Ruiz, *Erede e tutore* (1946 [1930]), p. 149–167; Levy-Bruhl, *La tutelle* (1948), p. 318–323; Guarino, *Notazioni IV-V* (1949), p. 194–198; Rabel, *Grundzüge* (1955), p. 184–185; Weimar, *Eigentumsübergang* (1993), p. 551; Perani, *Pignus distrahere* (2014), p. 25. See for further references Kaser, *Ehe und conventio* (1950), p. 91 n. 79.

<sup>86</sup> Kübler, *Vormundschafiliche Gewalt* (1939), p. 83.

<sup>87</sup> Guarino, *Notazioni I-III* (1948), p. 21–46; Guarino, *Notazioni IV-V* (1948–1949), p. 194–217.

<sup>88</sup> Arangio-Ruiz, *Erede e tutore* (1946 [1930]), p. 164. This idea is followed by Perani, *Pignus distrahere* (2014), p. 51.

<sup>89</sup> Kaser, *Inhalt patria potestas* (1938), p. 70 ff.; *Mores Maiorum* (1939), p. 35 ff.; *Conventio in manu* (1950), p. 91 ff.

<sup>90</sup> Guarino, *Notazioni IV-V* (1949), p. 197–198.

classical Roman law, projecting thereby notions of the late Republic into the analysis of earlier terms such as *potestas*. The notion of ‘*potestas*’ has in fact a vague content, and for instance Capogrossi Colognesi considers that it only referred to the power over people, while the idea of ‘*mancipium*’ would be the predecessor of the idea of ‘*dominium*’<sup>91</sup>. This author would moreover emphasize that the *potestas* of the *curator furiosi* cannot be seen as involving *dominium* over the assets of the lunatic<sup>92</sup>. Archi and Lanza would also exercise caution when approaching the notion of *potestas* in relation to legal guardians in the Twelve Tables, avoiding granting it a specific technical meaning<sup>93</sup>.

Leaving aside these specific points, the more arguable aspect of the theory of a ‘quasi-ownership’ of legal guardians is that it was built on preconceptions concerning the evolution of ‘direct representation’ in Roman law which have no support in the sources. Accordingly, the starting point from which this idea was brought into life seems to have become obsolete. This is why Diliberto, who approached the origins of the *cura furiosi* without pretending to defend any specific theory of direct representation, reached very different conclusions concerning the significance of the *potestas* of this legal guardian. In fact, he observed that the rights of the lunatic were not extinguished or absorbed by his *curator*<sup>94</sup>, which would imply that the transfer of ownership performed by him would indeed take place *a non domino*<sup>95</sup>. It is therefore no wonder that the lack of evidence to hold that the *curator furiosi* acted as a *dominus* has led more and more scholars to simply consider him as acting as a non-owner<sup>96</sup>.

Finally, it should be borne in mind that, even if at the time of the Twelve Tables the *potestas* of legal guardians would comprise an ownership-like power, evidence suggests that already at a very early stage Roman jurists granted them the *potestas alienandi* over the administered goods. It is for instance noteworthy that legal guardians were able to transfer the *dominium ex iure Quiritium* not only through *traditio*, but also through formal ways of transferring ownership<sup>97</sup>, being moreover regarded as acting *domini loco*. Since legal guardians could exercise such

<sup>91</sup> Capogrossi Colognesi, *Struttura della proprietà* (1969) I, p. 464-465. See on this point Amunátegui, *Potestas manus* (2012), p. 60, 84-85.

<sup>92</sup> Capogrossi Colognesi, *Struttura della proprietà* (1969) I, p. 145 n. 246: “Si consideri come neppure in diritto classico si possa tradurre, in relazione a tale fattispecie, il termine *potestas* in *dominium* sulla *pecunia*, né, per il *furiosus* si possa parlare anche allora di alcun altro tipo di potere familiare all’infuori di una generica *potestas*”.

<sup>93</sup> Archi, *Curatela* (1981 [1962]), p. 181: “In proposito tuttavia conviene non dimenticare che *potestas* è termine che indica una nozione di potere colta nella sua realtà effettuale, senza pretesa di una precisa qualificazione giuridica. In altre parole, dall’*in potestate esse* non è possibile dedurre con rigida formula la situazione giuridica nella quale si trova la persona o la *res*, su cui il potere si esercita. E ciò soprattutto nell’epoca decemvirale, anteriore all’elaborazione delle categorie dovute alla giurisprudenza repubblicana”. Lanza, *Furiosus* (1990), p. 31 ff.

<sup>94</sup> Diliberto, *Cura furiosi* (1984), p. 44-48, 101-106.

<sup>95</sup> Diliberto, *Cura furiosi* (1984), p. 88.

<sup>96</sup> See e.g. Albanese, *Atti negoziali* (1982), p. 355.

<sup>97</sup> See on this point Chapter 5, Section 4.

broad powers, which are moreover in agreement with the *ius civile*, one could in fact assume that the way in which the *curatores* and *tutores* carry out their administration in classical law is a surviving institution from pre-classical times rather than an innovation of the classical period.

## Chapter 4. Praetorian remedies regarding the transfer of ownership by a non-owner

In the previous two chapters it has been shown that Roman jurisprudence made use of some broad notions which could be refined by jurists. In those cases where the owner authorized the delivery the *voluntas domini* played a central role, and while this notion belonged to the *ius civile*, jurists could develop different ideas regarding what the scope and implications of it were. In particular cases where it was clear that an act was performed *voluntate domini*, jurists would resort to other notions such as the *bona fides* to prevent the transfer of ownership from taking place. The idea of an honest and loyal administration played moreover a key role in the cases where the *potestas alienandi* stemmed from a legal provision, therefore preventing legal guardians from abusing their position. All of this shows that already in the sphere of the *ius civile* jurists had a considerable amount of tools to refine their solutions and avoid unfair outcomes. Nonetheless, the intervention of the praetor became indispensable in many cases, which leads to the study of a series of additional remedies which modified the practical solutions offered by jurists. In this chapter, attention will be paid to those praetorian remedies which modified the outcome prescribed by the *ius civile*. A revision of this problem is justified considering that scholars have often misunderstood the significance of the transfer of ownership by a non-owner for the *ius civile*. Since it has been shown that a non-owner could transfer Quiritary ownership under certain circumstances, it becomes imperative to determine the significance of the praetor's intervention in the context of the transfer of ownership by a non-owner.

### 1. *Actio Publiciana*

a. D. 6,2,14.

The *actio Publiciana* would be granted by the praetor in a great variety of situations in order to enable an acquirer who had not become owner according to the *ius civile* – and therefore could not resort to the *rei vindicatio* – to recover the possession of the object in case of losing it<sup>1</sup>. One of the applications of the *actio Publiciana* concerning an alienation carried out through an – originally – authorized non-owner is to be found in a text of Ulpian which conveys the opinion of Papinian:

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<sup>1</sup> On the active legal standing for the *actio Publiciana*, see Apathy, *Die publizianische Klage* (1981), p. 12–13; Apathy, *Publiciana ohne Ersitzungsbesitz* (1984), p. 749–758; Wubbe, *Ergo et Publicianam* (1995), p. 647–656.

D. 6,2,14 (Ulp. 16 *ed.*): Papinianus libro sexto quaestionum scribit: Si quis prohibuit vel denunciavit ex causa venditionis tradi rem, quae ipsius voluntate a procuratore fuerit distracta, et is nihilo minus tradiderit, emptorem tuebitor praetor, sive possideat sive petat rem. Sed quod iudicio empti procurator emptori praestiterit, contrario iudicio mandati consequetur: potest enim fieri, ut emptori res auferebatur ab eo, qui venire mandavit, quia per ignorantiam non est usus exceptione, quam debuit opponere, veluti ‘si non auctor meus ex voluntate tua vendidit’<sup>2</sup>.

As explained above<sup>3</sup>, this fragment deals with a case where the owner initially authorizes his *procurator*, in the context of a contract of mandate, to sell an object belonging to him. However, after the sale has been concluded, the owner decides to revoke his authorization. Despite the owner’s prohibition, the *procurator* delivers the object to the buyer, who will then be protected by the praetor either if he possesses or if he reclaims the object (*sive possideat sive petat rem*). While the text does not explicitly say that he may recover through the *actio Publiciana*, there is little doubt on the point, considering not only that the text is inserted in the Digest under the title “*De Publiciana in rem actione*”, but also that Lenel’s Palingenesia locates it under the same title in Ulpian’s work<sup>4</sup>. Moreover, an old scholion of the Basilica explicitly declares that the praetor in this case grants the *Publiciana*<sup>5</sup>. The text also mentions that the acquirer may oppose the *exceptio si non auctor meus ex voluntate tua vendidit* against the owner. The possibility of using this defence is introduced in a rather cumbersome way, since we are told that if the acquirer does not make use of this exception he may hold the *procurator* – with whom he concluded the sale – liable, which in turn will grant the *procurator* an *actio mandati contraria* against the owner who originally authorized the sale. It is clear that ownership was not transferred in the first place because the delivery was not performed *voluntate domini*, since the owner withdrew his authorization before the delivery took place<sup>6</sup>. In this context it is however more enigmatic that the praetor would be willing to protect the

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<sup>2</sup> D. 6,2,14: “Papinian, in the sixth book of his Questions, writes: Where, at “A’s” request, something of his has been sold by his *procurator* and “A” then forbids delivery of the thing sold, or notifies to that effect, but the *procurator* nevertheless delivers it, the praetor will protect the buyer, whether he is in possession or is suing for the thing. If the *procurator* incurs liability to the buyer in an action on the sale, he may sue “A” by *actio contraria* on the mandate. It may happen that the principal who gave the mandate to sell recovers the thing from the buyer, because the latter, through ignorance, has failed to raise a defence which he ought to have pleaded, such as ‘unless the seller to me sold at your request’” (transl. Watson).

<sup>3</sup> See in particular Chapter 2, Section 1(a) above.

<sup>4</sup> Lenel, *Paling.* (1889) II, col. 514, under the rubric “*De Publiciana in rem actione*”.

<sup>5</sup> BS 902, 30–31 (*Sch. ad Bas.* 15,2,14,2): Τουτέστι δίδεται αὐτῷ καὶ νεμένῳ παραγραφῇ ἐκπεσόντι τῆς νομῆς Πουβλικιανῇ.

<sup>6</sup> Burdese, *Potestas alienandi* (2009), p. 22; Sansón, *La transmisión* (1998), p. 99.

transferee despite the fact that he acquired *invito domino*. In order to determine the reason for the praetorian protection, it is essential to examine some difficult aspects of the case<sup>7</sup>.

The first odd feature of this case is that, while the non-owner delivers *invito domino*, there is no reference to the existence of *furtum*, which would render the delivered object a *res inhabilis* for usucapionem. This has led some scholars to assume that the text must have dealt with a piece of land<sup>8</sup>, where the possibility of *furtum* was excluded. There is however no reference to this in the text, which deals simply with a *res*<sup>9</sup>. One could also think that the non-owner delivered the object before he had notice of the owner's prohibition, which could exclude the existence of any *dolus malus* or *animus furandi*. The text, however, does not allow this interpretation, since we are told that the owner forbade or notified the transferor (*prohibuit vel denunciavit*) and that the latter nonetheless – i.e. despite the prohibition – delivered it (*nihilo minus tradiderit*). Considering this, the best interpretation may be that this delivery can indeed be considered a case of *furtum*, since the transferor acts openly against the owner's authorization, but that nonetheless the praetor decides to grant the *Publiciana*. It is in fact not uncommon that the *Publiciana* would be granted to an acquirer who did not have the *possessio ad usucapionem*, as Apathy has demonstrated<sup>10</sup>. Moreover, the sources present other cases, such as D. 39,5,25<sup>11</sup>, where the acquirer will be protected by the praetor – in this case, through an *exceptio doli* – despite the fact that the unauthorized delivery rendered the thing a *res furtiva*. Accordingly, there is no incompatibility between the existence of *furtum* and the praetorian protection.

Another point which remains problematic is whether the delivery took place *nomine alieno* or *nomine proprio*. Already Voci claimed that the ignorance of the acquirer which leads him not to make use of the exception (*per ignorantiam non est usus exceptione*) would show that he was unaware of the fact that he had acquired by a *procurator*, which would in turn show that the latter had delivered the object *nomine proprio*, without mentioning that he was acting on behalf of someone else<sup>12</sup>. As shown above<sup>13</sup>, Miquel and Sansón would follow this interpretation, which fits their own theories concerning the importance of the *contemplatio domini* in order to distinguish the legal grounds for the transfer of ownership by a non-owner<sup>14</sup>. One may however hardly derive from this text that the transferee was necessarily unaware of who the principal was, since we are merely told that it may happen (*potest enim fieri...*) that the buyer was in a state of ignorance. This is

<sup>7</sup> For a detailed analysis of the facts surrounding the case see further Krampe, *Emptorem tuebitur praetor* (2005), p. 183-186.

<sup>8</sup> Von Tuhr, *Actio de in rem verso* (1895), p. 101.

<sup>9</sup> Krampe, *Emptorem tuebitur praetor* (2005), p. 183-184.

<sup>10</sup> Apathy, *Publiciana ohne Ersitzungsbesitz* (1984), p. 749-758

<sup>11</sup> See on this text Chapter 4, Section 5 below.

<sup>12</sup> Voci, *Modi di acquisto* (1952), p. 85-86.

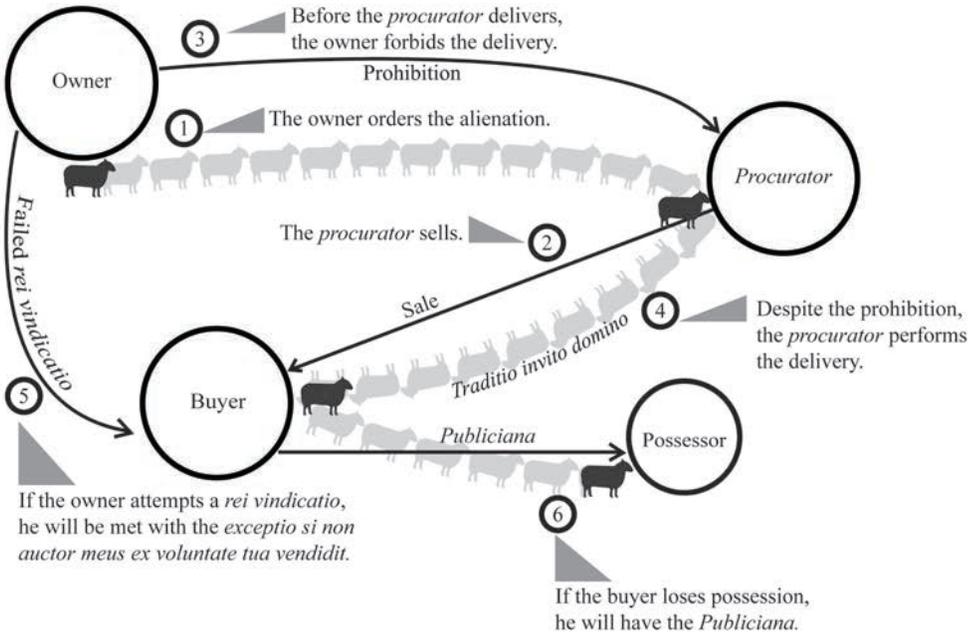
<sup>13</sup> Chapter 2, Section 5.

<sup>14</sup> Sansón, *La transmisión* (1998), p. 88. Similarly Nebrera, *Ἡ ἀρχαία* (1989), p. 132-134.

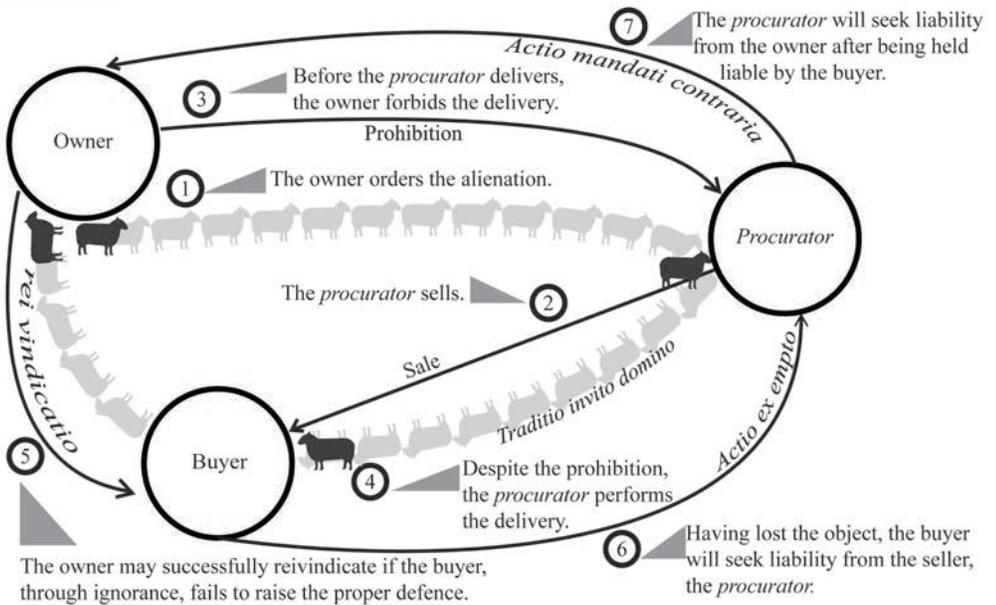
CHAPTER 4. PRAETORIAN REMEDIES REGARDING THE TRANSFER OF OWNERSHIP BY A NON-OWNER

D. 6,2,14 (Ulp. 16 ed.)

1) First case:



2) Second case:



why authors like Benke consider the ignorance of the relation between owner and seller as a mere possibility<sup>15</sup>. Moreover, if the acquirer was necessarily unaware of who the principal was, he would hardly ever be able make use of the said exception against the owner.

There is an additional difficulty regarding the transferee's ignorance as mentioned in the text, since it is not clear whether it deals with an *ignorantia facti* – concerning either the fact that he was buying from a *procurator* or that the owner had forbidden the sale – or an *ignorantia iuris* – regarding whether he did or did not have a defence at his disposal. According to most scholars, the ignorance concerned the fact that the transferor was acting under the instructions of the owner who later claims the object back<sup>16</sup>. Winkel<sup>17</sup>, however, considers that the text could be referred to an *error iuris*, which would be dealt with in the context of the claims arising between owner/principal, non-owner/seller and acquirer/buyer, showing that if the latter did not know of the existence of the exception, he could nonetheless make the seller liable through an *actio empti*. It seems in any case difficult to distinguish whether the buyer did not use the exception because he ignored the facts on which it was based or simply ignored the existence of this exception, since it would appear that in either case he could nonetheless claim liability from the seller. For the present research it is only essential to highlight that it is not decisive for the outcome of the case whether the transferor acted *nomine alieno* or *nomine proprio*.

Having a clear outlook on the case, it becomes possible to determine the legal grounds for the praetorian protection, which is not explicitly expressed in the text. A considerable number of theories have been offered at this point. Voci thought that the praetorian protection was based on the acquirer's good faith, who would have ignored the owner's prohibition<sup>18</sup>, but it is hard to see how the *bona fides* of the acquirer merits such an exceptional protection in this particular case. Others consider that the owner's *voluntas* at the *traditio* would be presumed by his *voluntas* at the sale. Guzmán, for instance, makes this claim under the general idea that only the intent as given at the *iusta causa traditionis* was relevant for the transfer of ownership, which implies that a revocation of the authorization after the sale was concluded would not prevent the transfer of ownership<sup>19</sup>. This idea, however, crashes against the abundant evidence which shows that only the intent at the moment of the delivery is relevant to determine the transfer of ownership<sup>20</sup>. Sansón also considers that the *voluntas* for the delivery

<sup>15</sup> Benke, *Zu Papinians actio* (1988), p. 630.

<sup>16</sup> Schlossmann, *Stellvertretung* (1900) I, p. 176, 179–180; Burdese, *Autorizzazione* (1950), p. 51; Voci, *Modi di acquisto* (1952), p. 85; Benke, *Zu Papinians actio* (1988), p. 630; Nebrera, *Ἡ παράδοσις* (1989), p. 132–133 n. 7; Babusiaux, *Id quod actum est* (2006), p. 151–152.

<sup>17</sup> Winkel, *Error iuris* (1985), p. 136–137.

<sup>18</sup> Voci, *Modi di acquisto* (1952), p. 86.

<sup>19</sup> Guzmán, *DPR* (2013) I, p. 645–646.

<sup>20</sup> Chapter 2, Section 1 above.

would be somehow presumed by the *ius honorarium* from the previous authorization given to sale<sup>21</sup>, but this presumption is nowhere to be found in other cases where the authorization disappeared before the delivery takes place – either due to death or to voluntary revocation – and where no equivalent praetorian protection is granted.

Another explanation was given by Burdese, who in his first work on the subject considered that the reason for the praetorian protection was to simplify the relations between *dominus*, *procurator* and acquirer<sup>22</sup>. This idea of procedural economy cannot, however, explain by itself the ground of the decision, and in a later work Burdese pointed out that the protection granted to the acquirer was based on the equitable extension of the owner's intent given at the sale<sup>23</sup>. Similarly, other authors have claimed that the ground for this protection was the *venire contra factum proprium* principle, since the intimate connection between the sale and the subsequent *traditio* made it unacceptable for the owner to ban the delivery once an agreement was reached concerning the *iusta causa traditionis*<sup>24</sup>. The reference to this aphorism may seem anachronistic, since it only appeared as such in the writings of Azo<sup>25</sup>, but it does nonetheless convey the idea that the owner in D. 6,2,14 is incurring in a contradiction to his previous behaviour which the praetor is not willing to tolerate<sup>26</sup>. This need for an equitable correction of the normal outcome is especially necessary in this case due to the fact that the prohibition of the owner puts the *procurator* in an impossible position: on the one hand, he is already bound by the contract of sale to deliver the object to the buyer, but on the other hand the prohibition of the owner will prevent him from validly transferring ownership. In this context, the praetor will protect the contracting parties by granting the acquirer an *exceptio* to defend himself against the owner, which would in turn avoid the *procurator* to incur in any liability towards the buyer. Only if the acquirer does not make use of this exception will the owner/principal recover the sold object, which will in turn trigger an *actio empti* by the buyer against the *procurator*/seller, and subsequently an *actio mandati contraria* from the latter against the principal.

The abusive behaviour of the owner/principal is the key element which determines that the acquirer is protected by the praetor in this particular case and not in other situations where the owner's authorization did not extend to the delivery. There is another element, which is not usually taken into account,

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<sup>21</sup> Sansón, *La transmisión* (1998), p. 99-100; 210-211.

<sup>22</sup> Burdese, *Autorizzazione* (1950), p. 50-51.

<sup>23</sup> Burdese, *Potestas alienandi* (2009), p. 22.

<sup>24</sup> Riezler, *Venire contra factum* (1912), p. 18-20; Miquel, *Quaestiones* (1992), p. 147; Miquel, *Traditio rei alienae* (1993), p. 276; Sansón, *La transmisión* (1998), p. 211; Potjewijd, *Beschikingsbevoegdheid* (1998), p. 147.

<sup>25</sup> Azo, *Brocardica* (Basel 1567), p. 121-123.

<sup>26</sup> Regarding the *venire contra factum proprium* principle in Roman law and medieval scholarship the reader may consult in the foreseeable future the monographic work of Lisa Isola.

which explains the scope of the protection granted to the acquirer: the fact that he will not have a *possessio ad usucapionem*. In other cases in which the authorization of the owner is revoked or extinguished before the delivery takes place, the acquirer may at least acquire ownership through usucapion, as happens in those cases where the agent was not aware of the death of the owner at the time of the delivery. Moreover, the fact that the acquirer obtains the *possessio ad usucapionem* would allow him to make use of the *Publiciana* in case he loses control over the object. The only scenario in which he will be defeated is if the owner who did not authorize the sale reclaims the object before the period for the usucapion is completed. In the case described in D. 6,2,14, however, the fact that the agent knowingly carried out the delivery against the owner's instructions will render the object a *res furtiva*, regarding which usucapion will not be possible. Nonetheless, Papinian considers that the acquirer should be protected, disregarding the fact that the delivery did not take place *voluntate domini*. Considering that the core of the problem stems from the abusive prohibition of the owner, he will be prevented from claiming the object through an *exceptio*. This protection, however, would only be enough if the acquirer could later become owner through usucapion, because then his position would be secured. But since the acquirer cannot rely on acquiring through usucapion, the praetor grants him the *Publiciana* so that he may have the thing *in bonis*, being able both to recover the object and to deter the claims of the previous owner.

b. D. 17,1,57.

While the application by Papinian of the *actio Publiciana* to a case where the delivery was performed *invito domino* was unusual, there is another text in which this jurist shows how far he was willing to go in extending the scope of the *Publiciana*:

D. 17,1,57 (Pap. 10 *resp.*): Mandatum distrahendorum servorum defuncto qui mandatum suscepit intercidisse constitit. Quoniam tamen heredes eius errore lapsi non animo furandi, sed exsequendi, quod defunctus suae curae fecerat, servos vendiderant, eos ab emptoribus usucaptos videri placuit. Sed venaliciarium ex provincia reversum publiciana actione non inutiliter acturum, cum exceptio iusti domini causa cognita detur neque oporteat eum, qui certi hominis fidem elegit, ob errorem aut imperitiam heredum adfici damno<sup>27</sup>.

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<sup>27</sup> D. 17,1,57: "It was established that a mandate to sell off slaves had lapsed with the death of the person who undertook the mandate. However, because his heirs had fallen into error and, with the intention not of theft but of carrying out the duty which the deceased had assumed, had sold the slaves, it was agreed that those [slaves] appeared to have been usucapted by their buyers. [It was also agreed,] however, that the slave-dealer on his return

The text was already studied when dealing with the lack of *dolus malus* or *animus furandi* by the non-owner who performs the delivery<sup>28</sup>, since it illustrates that the *error iuris* is enough to exclude this element from the delivery. In this case, a slave-dealer grants a mandate to sell off slaves before leaving on a journey. The person in charge of selling dies in the meantime, which inevitably means that the mandate was extinguished. The heirs, however, believe themselves to be bound to carry out the mandate and sell the slaves – probably at a low price, which would explain why the slave-dealers would rather have the slaves returned to him. Since the heirs are not delivering with a theftuous intent (*non animo furandī*), the buyers will be granted a *possessio ad usucapionem*. Papinian offers the puzzling opinion that the slave-dealer, upon his return, may validly (*non inutiliter*) recover through the *actio Publiciana* the objects which the buyers acquired in the meantime through usucapion. Such a decision seems to go against the very nature of the *Publiciana*, not only because the slave-dealer has no possession at all, but also because he would recover from the *dominus ex iure Quiritium*<sup>29</sup>. The awkwardness of such a solution explains why some manuscripts – including the *Codex Florentinus*<sup>30</sup> – actually deny the *Publiciana* by reading “*non utiliter*”. It is however clear that the text originally read “*non inutiliter*”, not only because the opinion of Papinian is oriented at justifying this solution – to avoid the slave-dealer to suffer loss because of the inexperience of the heirs of the person he relied upon – but also because the scholia of the 6<sup>th</sup> century to the *Basilica* confirm this lecture<sup>31</sup>. Particularly interesting at this point is a scholion by Dorotheus which explicitly declares that the true reading is “*non inutiliter*”, despite the fact that some copies of the *Digest* offer a different version<sup>32</sup>. This corruption is therefore easily explained as a ‘polar error’, where a scribe copied the opposite to what he saw in the assumption that the original text could not possibly be correct.

Brandsma and Sansón have carried out detailed studies on this text, to which the reader is referred for further detail<sup>33</sup>. For the purpose of the present study it is enough to note that Papinian does not deal in this case with an ordinary *Publiciana*, but rather with the *actio Publiciana rescissoria*, which enables the person

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from the province would have a competent *actio Publiciana*, since the defence of ownership is [only] granted after investigation of the facts and it is not right for someone who chose a particular man for his trustworthiness to suffer loss because of the mistake or inexperience of his heirs” (transl. Watson).

<sup>28</sup> Chapter 2, Section 2 above.

<sup>29</sup> See Brandsma, *Publiciana rescissoria* (1992), p. 44–52.

<sup>30</sup> For other versions in medieval manuscripts see Brandsma, *Publiciana rescissoria* (1992), p. 44.

<sup>31</sup> See on this point Brandsma, *Publiciana rescissoria* (1992), p. 43; Sansón, *Publiciana rescissoria* (1998), p. 389.

<sup>32</sup> BS 792/19–20 (*Sch. ad Bas.* 14,1,57): Δωροθέου. Πουβλικιανήν ῥεσκιςορίαν. Τοῦτο δὲ τὸ ῥητὸν NON INUTILITER θέλει, εἰ καὶ τινα τῶν ἀντιγραφῶν οὐκ ἔχουσιν οὕτω... See Brandsma, *Publiciana rescissoria* (1992), p. 43.

<sup>33</sup> Brandsma, *Publiciana rescissoria* (1992), p. 41–59; Sansón, *Publiciana rescissoria* (1998), p. 383–393. See moreover Nebrera, *Ἡ τραδιτίων* (1989), p. 178–223.

making use of it to recover the object by rescinding the usucapion of the acquirer. The exact way in which the *Publiciana rescissoria* operates in this case has been greatly debated, but both Brandsma and Sansón have concluded that it consists in an *in integrum restitutio* which takes place through the refusal of the praetor, *causa cognita*, to grant the *exceptio iusti domini* to the acquirer<sup>34</sup>. It remains in any case exceptional that a jurist would be willing to correct the attribution of property through usucapion to protect the slave-dealer who was absent from the inexperience of the people who received the slaves. Such a solution shows that the restricted limits within which usucapion took place in classical law were considered at times to lead to unfair results. The solution given by Papinian can therefore be seen as preceding other developments which would take place in post-classical law, such as the longer periods to become owner by usucapion or *praescriptio*, particularly when they take place *inter absentes*<sup>35</sup>. Nonetheless, Papinian's solution did not have such far-reaching consequences, since it appears that the *Publiciana rescissoria* could only be brought for a period of one year<sup>36</sup>.

Another application of the *Publiciana* is made by Julian in D. 21,2,39,1 (Jul. 57 *dig.*), but since this text deals with the *mancipatio* by a slave it will be studied in further detail below<sup>37</sup>.

## 2. *Exceptio si non auctor meus ex voluntate tua vendidit*

The analysis of D. 6,2,14 in the previous section already introduced us to the study of the *exceptio si non auctor meus ex voluntate tua vendidit*, which can be granted to the acquirer against the owner who reclaims an object after having authorized the sale of it but not its subsequent delivery. It was already highlighted that this exception is only granted on grounds which are relatively specific to this case. It is particularly significant that the owner acts in an abusive way by inducing his *procurator* to sell and then forbidding him to carry out the delivery. Moreover, the fact that the acquirer did not have a *possessio ad usucapionem* seems to play a relevant role as well. This praetorian defence is seldom found in the sources, but another text of Julian seems to refer to it as well:

D. 41,4,7,6 (Jul. 44 *dig.*): Procurator tuus si fundum, quem centum aureis vendere poterat, addixerit triginta aureis in hoc solum, ut te damno adficeret, ignorante emptore, dubitari non oportet, quin emptor longo tempore capiat: nam et cum sciens quis alienum fundum vendidit ignoranti, non interpellatur longa possessio. Quod

<sup>34</sup> Brandsma, *Publiciana rescissoria* (1992), p. 54-59; Sansón, *Publiciana rescissoria* (1998), p. 390.

<sup>35</sup> C. 7,31,1 (Justinian, 531): "...nihil inhumanius erat, si homo absens et nesciens tam angusto tempore suis cadebat possessionibus".

<sup>36</sup> See D. 44,7,35pr (Paul 1 *ed.*), commented by Brandsma, *Publiciana rescissoria* (1992), p. 55-56; Sansón, *Publiciana rescissoria* (1998), p. 390.

<sup>37</sup> Chapter 5, Section 3 below.

si emptor cum procuratore collusit et eum praemio corrupit, quo vilius mercaretur, non intellegitur bonae fidei emptor nec longo tempore usu capiet: et si adversus petentem dominum uti coeperit exceptione rei voluntate eius venditae, replicationem doli utilem futuram esse<sup>38</sup>.

This case was already reviewed in the context of the scope of the *voluntas domini*, where it was determined that the abusive behaviour of the *procurator* would exclude his *potestas alienandi* at the delivery<sup>39</sup>. The acquirer would nonetheless be able to acquire ownership through usucapion, unless he colluded with the seller in order to obtain the object at an uneconomic price – which would exclude his *bona fides* as a possessor. According to Julian, this would also imply that he cannot successfully make use of the *exceptio rei voluntate eius venditae*, which would meet a *replicatio doli* granted to the owner based on the fraudulent behaviour of the acquirer.

While D. 41,4,7,6 only emphasizes the restricted scope of the *exceptio* under discussion, it would appear possible to derive *a contrario sensu* that, if the acquirer did not collude with the seller, he could successfully resort to the *exceptio rei voluntate eius* [*sc. domini*] *venditae* against the owner's *rei vindicatio*. This conclusion does not agree with the general evidence found in the sources, since the acquirer who obtains an object from a non-owner *voluntate domini* does not have to resort to a particular praetorian defence against the plaintiff's claim. Instead, he will only have to prove the existence of the owner's authorization<sup>40</sup>. If normally no praetorian defence was needed for the acquirer who received an object *voluntate domini*, what would explain that it is discussed at the end of D. 41,4,7,6? At this point, it is worth noting that there is a common feature between the cases in which this exception is applied: the lack of a *possessio ad usucapionem*. In D. 6,2,14, the usucapion cannot take place due to the lack of *potestas alienandi* of the transferor who knowingly acts *invito domino*, thereby rendering the thing delivered *furtiva*. On the other hand, in the second case described in D. 41,4,7,6 the usucapion is excluded due to the lack of *bona fides* by the acquirer regarding the lack of *potestas alienandi* of the transferor. It would therefore appear that the defence presented in these texts only could be granted when the usucapion was

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<sup>38</sup> D. 41,4,7,6: "Suppose that your *procurator*, who could have obtained a hundred gold pieces for the land, asks only thirty for the sole purpose of causing you loss; there can be no doubt that, he being unaware of this fact, the purchaser will acquire title by long possession; for even when one aware of the facts sells a third person's land to one who is not, nothing prevents long possession. But if the purchaser should be in collusion with the *procurator*, bribing him to sell at an uneconomic price, he will not be held a purchaser in good faith and so will not usucapt the land. And if, when the principal sues, the purchaser should invoke the defence that the thing was sold with his consent, a replication of fraud will be effective against him" (transl. Watson).

<sup>39</sup> Chapter 2, Section 4(c).

<sup>40</sup> See Chapter 2, Section 1(a) above.

excluded, most likely to remedy the situation of the acquirer by attending to the fact that the owner had initially authorized the alienation of the object.

Considering the similarities between the *exceptiones* contained in D. 41,4,7,6 and D. 6,2,14, it is safe to claim that, despite being formulated with a different wording (*exceptio rei voluntate eius venditae / exceptio si non auctor meus ex voluntate tua vendidit*) they are essentially the same remedy. It appears to be an *exceptio in factum* that the praetor grants the acquirer for equitable reasons<sup>41</sup>, which takes into account the initial authorization given to alienate in order to limit the use of the *rei vindicatio*. Moreover, the limited scope of this *exceptio* – only to be found in cases where the acquirer does not have a *possessio ad usucapionem* – would distinguish it from the broader *exceptio rei venditae et traditae*, which could be used in a wider range of situations to protect that acquirer who has a *possessio bonae fidei* from the claims of the owner, as will be shown in the following section.

### 3. *Exceptio rei venditae et traditae*

a. D. 21,3,1,2-3.

A text of Ulpian located under the Digest title *De exceptione rei venditae et traditae* poses the question of the extent to which the *exceptio rei voluntate eius venditae* could be distinguished from the *exceptio rei venditae et traditae*:

D. 21,3,1,2 (Ulp. 76 *ed.*): Si quis rem meam mandatu meo vendiderit, vindicanti mihi rem venditam nocebit haec exceptio, nisi probetur me mandasse, ne traderetur, antequam pretium solvatur<sup>42</sup>.

In this text we are told by Ulpian that the buyer can make use of ‘this defence’ – considered by most scholars to be indeed the *exceptio rei venditae et traditae*<sup>43</sup> – when the owner granted a mandate to sell and then tries to recover the object. However, according to Ulpian, such a defence will be of no avail if it is proven that the owner ordered beforehand that the *traditio* should only take place after the buyer had paid the price. The text has raised wide controversy among scholars concerning what exactly prevented the transfer of ownership and which was the defence granted to the acquirer. The most widespread opinion is that the *dominium ex iure Quiritium* would not be transferred because the text deals with the *traditio* of a *res mancipi*<sup>44</sup>. Some scholars in particular consider that the text

<sup>41</sup> Sansón, *La transmisión* (1998), p. 208, 215, 231.

<sup>42</sup> D. 21,3,1,2: “If someone, acting on my mandate, sells a thing belonging to me, I shall be defeated by this defence in the event that I seek to assert title to it after the sale; unless it be proven that my mandate was that the thing should not be delivered until the full price had been paid” (transl. Watson, modified).

<sup>43</sup> Lenel, *Paling*. (1889) II, col. 860; Burdese, *Autorizzazione* (1950), p. 80.

<sup>44</sup> Pringsheim, *Kauf* (1916), p. 77; Burdese, *Autorizzazione* (1950), p. 80; Potjewijd, *Beschikingsbevoegdheid* (1998), p. 148–149.

would prove the importance of paying the price for the transfer of ownership in the context of a *mancipatio*<sup>45</sup>. Sansón, however, considers that the key to this text lies in the fact that it was unclear whether the owner had authorized the sale, which is why it would be relevant to determine whether the instruction regarding the payment was given beforehand or not<sup>46</sup>. According to Sansón, this implies that the *exceptio* mentioned in D. 21,3,1,2 was basically the same *exceptio in factum* as that of D. 41,4,7,6 and D. 6,2,14.

The interpretation of Sansón cannot be admitted, since there would be no need to resort to an *exceptio* in the first place if the underlying problem for the transfer of ownership was exclusively whether the owner authorized the delivery and under what conditions he did so. The controversy would then be restricted exclusively to proving the owner's authorization: if the delivery was performed *voluntate domini*, the acquirer would have become Quiritary owner and the previous owner would fail in his claim; if, on the other hand, the *traditio* took place *invito domino*, the owner would recover his property. In other words, there is no place for an *exceptio* when the only point under discussion is the existence of the *voluntas domini* at the delivery by a non-owner<sup>47</sup>. This becomes clear when reading the fragment immediately following D. 21,3,1,2<sup>48</sup>:

D. 21,3,1,3 (Ulp. 76 *ed.*): Celsus ait: si quis rem meam vendidit minoris quam ei mandavi, non videtur alienata et, si petam eam, non obstabit mihi haec exceptio: quod verum est<sup>49</sup>.

In this case, the reason why ownership is not transferred is the lack of *potestas alienandi* of the non-owner, who acts *invito domino* by selling the thing at a lower price than that which was instructed<sup>50</sup>. Under these circumstances, we are told that the thing is not deemed to have been alienated (*non videtur alienata*) and that the *exceptio* will not be available against the owner (*non obstabit mihi haec exceptio*). There is in fact no need for a praetorian defence in this case, since the controversy will consist in proving an element of the *ius civile*: whether the delivery was performed *voluntate domini* or not<sup>51</sup>.

D. 21,3,1,3 poses a basic, rather uncomplicated case, in which ownership is not transferred if the delivery is performed *invito domino*. The outcome to such a problem is determined exclusively by the rules of the *ius civile*, and there is no

<sup>45</sup> Meylan, *Paiement du prix* (1930), p. 480; Romano, *Trasferimento* (1937), p. 188-190.

<sup>46</sup> Sansón, *La transmisión* (1998), p. 40-42, 99-100, 213-215.

<sup>47</sup> See on this point Chapter 2, Section 1(a) above.

<sup>48</sup> Burdese, *Autorizzazione* (1950), p. 81.

<sup>49</sup> D. 21,3,1,3: "Celsus says that if my mandatary has sold a thing of mine at a price lower than that which I specified, the thing is deemed not to have been alienated; and so if I claim the thing as mine, this defence will not lie against me; this is correct" (transl. Watson, modified).

<sup>50</sup> See Chapter 2, Section 4(a) above.

<sup>51</sup> See similarly C. 7,26,4 (Alexander, 224), discussed in Chapter 2, Section 1(a) above.

need to resort to a praetorian defence. The fact that in D. 21,3,1,2 the acquirer needs to resort to an *exceptio* against the owner's *vindicatio* shows that there is another underlying reason why ownership is not transferred. Considering that the immediately preceding fragments (D. 21,3,1pr-1)<sup>52</sup> deal with the *traditio* of a *res Mancipi* – a piece of land – it appears more adequate to follow the majority of scholars in assuming that ownership was not transferred in D. 21,3,1,2 because the transferor delivered a *res Mancipi* by *traditio*. The relation between D. 21,3,1,2 and D. 21,3,1,3 shows that Ulpian is simply extending the rules concerning the owner's authorization – developed under the *ius civile* – to the field of praetorian defences. The basic solution is provided by the *ius civile* and reproduced in D. 21,3,1,3: the non-owner who fails to observe the instructions of the owner does not convey ownership, allowing the owner to reclaim the object through the *rei vindicatio*. In D. 21,3,1,2, Ulpian applies this solution to a case where the *dominium ex iure Quiritum* was not transferred in the first place due to the failure to comply with formal requirements, which does not imply that the *voluntas domini* ceases to play a relevant role: if the owner did authorize the whole operation, the *exceptio rei venditae et traditae* will suffice to repel his *rei vindicatio* (*Si quis rem meam mandatu meo vendiderit, vindicanti mihi rem venditam nocebit haec exceptio*); if, however, it is proven that the non-owner did not deliver according to the instructions of the owner, the defence of the acquirer will be of no avail (*nisi probetur me mandasse, ne traderetur, antequam pretium solvatur*). In other words, the only peculiarity of the *exceptio rei venditae et traditae* in case of a *traditio* of a *res Mancipi* by a non-owner is that it becomes relevant to determine whether ownership was not transferred simply because of the fact that no formal mode of transferring ownership was used – in which case the acquirer will have the thing *in bonis* – or if the non-owner additionally did not act *voluntate domini*. In the latter case, the *exceptio rei venditae et traditae* will not suffice to repel the claim of the object, since there is an additional circumstance which prevents the transfer of ownership from taking place, namely the lack of *voluntas domini*.

b. D. 21,3,1,5.

Ulpian would later, within the same fragment, discuss another case which presents similar features to those described in D. 21,3,1,2:

D. 21,3,1,5 (Ulp. 76 *ed.*): Si quis rem emerit, non autem fuerit ei tradita, sed possessionem sine vitio fuerit nactus, habet exceptionem contra venditorem, nisi forte venditor iustam causam habeat, cur

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<sup>52</sup> See on these texts Chapter 4, Section 3 below.

rem vindicet: nam et si tradiderit possessionem, fuerit autem iusta causa vindicanti, replicatione adversus exceptionem utetur<sup>53</sup>.

In this text, Ulpian describes two different cases. In the first case, an object is sold to another person, who gains possession of it without obtaining it by the delivery of the owner. The basic facts surrounding this text have been discussed above<sup>54</sup>, where it was claimed that it is most likely that the delivery of the sold object was performed by a non-owner who acted *invito domino*, but who nonetheless did not deliver with *dolus malus* or *animus furandi*. In this context, the acquirer will be granted ‘the *exceptio*’ – without further clarification – to repel the owner’s *rei vindicatio*, although the latter will be able to recover if he had a good cause (*iusta causa*) to assert his title to the thing. While this would appear to indicate that the underlying problem behind the failure to transfer ownership is the lack of *voluntas domini* at the delivery, the text then offers a second case, much simpler than the first one, in which we are told that if the owner himself performs the delivery, he will have a *replicatio* against the *exceptio* of the acquirer. However, why would the acquirer have an *exceptio* in the first place? Why did the delivery of possession by the owner himself not simply transfer the *dominium ex iure Quiritum* to the acquirer? At this point, it becomes clear that Ulpian continues to discuss, just as the first paragraphs of this fragment, the *traditio* of a *res Mancipi*. The case offers therefore great similarity to D. 21,3,1,2, since in the first part it addresses a case where the delivery took place *invito domino*, and in the second part a case where the *tradens*, being the owner, had *potestas alienandi*.

Given these basic facts, it becomes clear that the *exceptio* which is mentioned is the *exceptio rei venditae et traditae*, which the acquirer of the *res Mancipi tradita* will oppose to the owner’s *rei vindicatio*. The peculiar feature of this case in relation to D. 21,3,1,2 is that an additional problem is discussed, namely whether the owner who sold had a good cause (*iusta causa*) not to deliver the object. This point is discussed regarding each of the cases within the text. Regarding the first case, one can conceive that the owner could have good motives to delay the delivery, which is why an unauthorized delivery could indeed be harmful to his interests. In the second case it is however more enigmatic what good reason could the owner, who performs the delivery himself, adduce in order to recover the object<sup>55</sup>. Whatever this *iusta causa* may be, the owner is granted a *replicatio* against the defence of the acquirer, which will enable him to recover the object

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<sup>53</sup> D. 21,3,1,5: “Put the case that a person buys something which is not delivered to him but of which he acquires possession without any flaw in the manner of his acquisition; he will have this defence against the vendor unless the later can show good cause why he should assert title to the thing; for also if the vendor did himself deliver possession but has good ground for asserting his title, he will have an answer to the defendant’s defence” (transl. Watson).

<sup>54</sup> Chapter 2, Section 2 above.

<sup>55</sup> Gonvers, *L’exceptio* (1939), p. 58 thinks that it may be related to the existence of a prohibition to dispose.

despite having delivered it himself. Does this *replicatio* have a role to play in the first case as well? The lack of evidence on this point makes it difficult to offer a categorical answer, but it is nonetheless clear that in the first case the delivery did not take place *voluntate domini*, which according to D. 21,3,1,2 would allow the owner of the *res Mancipi* who did not authorize the delivery to recover it. Considering this, it seems likely that the owner will simply obtain a *replicatio* in both cases, especially if one understands “*nam et si tradiderit possessionem... replicacione adversus exceptionem utetur*” as “for also if the vendor did himself deliver possession... he will have a *replicatio* to the defendant’s *exceptio*”<sup>56</sup>, which would indicate that already in the first case the *replicatio* was available. The latter interpretation seems more adequate, considering that the existence of a *iusta causa* to recover would probably be brought into the discussion through a *replicatio in factum*.

The study of D. 21,3,1,2 and 5 shows that Ulpian addressed, in the context of the *exceptio rei venditae et traditae*, two cases in which a *res Mancipi* was delivered by a non-owner through *traditio*, discussing how the owner would confront the *exceptio* of the acquirer. In both cases, Ulpian extends the general solutions of the *ius civile* to the praetorian ownership, since the *traditio* performed over a *res Mancipi* will confront the original owner with the *exceptio rei venditae et traditae*, but he will nonetheless be able to recover if he proves that he did not authorize the delivery. In other words, the acquirer of a *res Mancipi* by *traditio* will not have the thing *in bonis*, as he normally has, if the delivery was not performed *voluntate domini*. This shows that the *exceptio rei venditae et traditae* will never be able to repel on its own the claim of the owner who did not authorize the delivery, and therefore has a very different scope of application from the *exceptio si non auctor meus ex voluntate tua vendidit* discussed in the previous section. There is accordingly no confusion between these two praetorian defences, even in the work of a jurist like Ulpian who, as will be seen in the next section, was not always keen to offer clear boundaries to the scope of application of different praetorian defences.

#### 4. Convalescence of the delivery

The scope of application of the various *exceptiones* may sometimes overlap, as it can be seen in the context of the ‘convalescence’<sup>57</sup>. This term can be used to describe those situations in which an act which was in itself invalid bears legal consequences due to the occurrence of a particular incident, despite the fact that

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<sup>56</sup> Watson, instead, prefers to translate “*nam et si*” as “for even if”. Instead, D’Ors et al., *Digesto* (1972) II, p. 75 translate “for also if” (*pues también si*), just as Spruit et al., *Corpus Iuris Civilis* (1996) III, p. 703 (*want ook indien*).

<sup>57</sup> It is worth noting that Roman legal sources only resort to the verb *convalescere*, not to the noun *convalescentia*. See Heumann/Seckel, *Handlexikon* (1926), s.v. *Convalescere* (p. 106).

the act was not ratified by the corresponding person<sup>58</sup>. The best-known case of convalescence in the context of the transfer of ownership is the rejection of the *rei vindicatio* of the owner of an object who had initially delivered it as an unauthorized non-owner, and that only later became owner<sup>59</sup>. In such case, the seller does not ratify the delivery once he becomes owner, but the mere fact of him becoming owner in this circumstances will prevent him from reclaiming the object. This famous problem has been preserved in different fragments within the Digest:

D. 6,1,72 (Ulp. 16 *ed.*): Si a Titio fundum emeris Sempronii et tibi traditus sit pretio soluto, deinde Titius Sempronio heres extiterit et eundem alii vendiderit et tradiderit, aequius est, ut tu potior sis. Nam et si ipse venditor eam rem a te peteret, exceptione eum summoveres. Sed et si ipse possideret et tu peteres, adversus exceptionem dominii replicatione uteris<sup>60</sup>.

D. 21,2,17 (Ulp. 29 *Sab.*): Vindicantem venditorem rem, quam ipse vendidit, exceptione doli posse summoveri nemini dubium est, quamvis alio iure dominium quaesierit: improbe enim rem a se distractam evincere conatur. Eligere autem emptor potest, utrum rem velit retinere intentione per exceptionem elisa, an potius re ablata ex causa stipulationis duplum consequi<sup>61</sup>.

D. 21,3,1pr-1 (Ulp. 76 *ed.*): Marcellus scribit, si alienum fundum vendideris et tuum postea factum petas, hac exceptione recte repellendum. (1) Sed et si dominus fundi heres venditori existat, idem erit dicendum<sup>62</sup>.

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<sup>58</sup> See Potjewijd, *Beschikingsbevoegdheid* (1998), p. 6 and 211 ff.

<sup>59</sup> Potjewijd, *Beschikingsbevoegdheid* (1998), p. 213 ff.

<sup>60</sup> D. 6,1,72: “‘A’ buys from Titius land belonging to Sempronius, and on his paying the price, it is delivered to him. Then, Titius becomes heir to Sempronius and sells and delivers the same land to ‘B’. It is fairer that ‘A’ should have the prior claim. For even if Titius should sue him for the land, ‘A’ may defeat him with a defence. And if Titius were in possession and ‘A’ should sue him, ‘A’ would have a *replicatio* to counter his defence of ownership” (transl. Watson).

<sup>61</sup> D. 21,2,17: “No doubt exists that if a vendor claims ownership of a thing which he himself sold, he can be defeated with the defence of fraud, even though his assertion of ownership is under a different title; for it is scandalous of his to seek to evict his purchaser from what he himself sold. For his part, however, the purchaser has the option of invoking the defence, thus countering the claim and so keeping the thing, or of allowing the thing to be taken from him and recovering double the price on the stipulation” (transl. Watson, modified).

<sup>62</sup> D. 21,3,1pr-1: “Marcellus writes that if you sell a third person’s land and then claim it as your own, you will correctly be defeated by this defence. (1) The same applies, even if the true owner of the land become heir to the vendor” (transl. Watson).

D. 21,3,2 (Pomp. 2 *ex Plautio*): Si a Titio fundum emeris qui Sempronii erat isque tibi traditus fuerit, pretio autem soluto Titius Sempronio heres exstiterit et eundem fundum Maevio vendiderit et tradiderit: Iulianus ait aequius esse priorem te tueri, quia et si ipse Titius fundum a te peteret, exceptione summooveretur et si ipse Titius eum possideret, publiciana peteres<sup>63</sup>.

D. 44,4,4,32 (Ulp. 76 *ed.*): Si a Titio fundum emeris qui Sempronii erat isque tibi traditus fuerit pretio soluto, deinde Titius Sempronio heres extiterit et eundem fundum Maevio vendiderit et tradiderit: Iulianus ait aequius esse praetorem te tueri, quia et, si ipse Titius fundum a te peteret, exceptione in factum comparata vel doli mali summooveretur et, si ipse eum possideret et publiciana peteres, adversus excipientem ‘si non suus esset’ replicatione uteris, ac per hoc intellegeretur eum fundum rursus vendidisse, quem in bonis non haberet<sup>64</sup>.

All of these texts have the peculiarity of discussing an identical problem<sup>65</sup>, and three of them (D. 6,1,72; D. 21,3,2; D. 44,4,4,32) even comment the exact same case, as seen from the names used to describe the parties involved. Titius, a non-owner, sells and delivers through *traditio* a piece of land, belonging to Sempronius, to a first acquirer (‘you’). Since Sempronius did not authorize the delivery, ownership could not have been transferred. However, an unexpected development takes place, since Sempronius dies and leaves Titius as his heir, thereby making him owner of the object he delivered before. In this scenario, Titius should have to ratify the previous delivery to the first acquirer (‘you’) in

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<sup>63</sup> D. 21,3,2: “Let us suppose that you buy land from Titius which, in fact, belongs to Sempronius and that it is transferred to you; then, the price having been paid, Titius becomes heir to Sempronius and sells and transfers the same land to Maevius. Julian says that it is you who are to have the protection of the law, because, even if Titius himself were claiming the land from you, he would be defeated by this defence and if he were in possession of the land, you could claim it from him by the Publician action” (transl. Watson). Scholars argue whether the text should read *priorem* or *praetorem*. See on this point Lenel, *Paling.* (1889) II, col. 79 n. 10; García Garrido, *Venta a non domino* (2006 [1997]), p. 365; Ter Beek, *Dolus* (1999), p. 899 n. 1.

<sup>64</sup> D. 44,4,4,32: “If you have bought land, which belonged to Sempronius, from Titius, and the land has been delivered to you and the price paid, and then Titius became heir to Sempronius and sold and delivered the said land to Maevius, Julian said that it would be equitable that the praetor should protect you, because, if Titius himself had claimed the land from you, he would also be barred by a defence devised *in factum* or by a defence of fraud, and if you yourself were in possession of the land and had brought a Publician action, you would use a replication against one who pleaded the defence that ‘it was not your property’, and thereby it was accepted that he had sold land of which he did not have bonitary ownership” (transl. Watson).

<sup>65</sup> Also D. 6,2,9,4 (Ulp. 16 *ed.*) and D. 19,1,31,2 (Nerat. 3 *membranarum*) deal with similar cases. However, they do not analyse the praetorian defences, which is why they will be not discussed here.

order to make him owner, but instead decides to take advantage of the situation and transfers the object to a second acquirer, Maevius. Being these the basic facts, most scholars also assume that the second conveyance performed by Titius was a *mancipatio*<sup>66</sup>, since this mode of transferring ownership did not require a physical delivery<sup>67</sup>, which would explain why was it possible for Titius to transfer ownership over an object which he had already delivered. This would moreover agree with the fact that in most texts it is explicitly mentioned that the disputed object is a piece of land, i.e. a *res mancipi*<sup>68</sup>.

The different texts offer basically the same outcome, since the non-owner who later acquired ownership (Titius) will be prevented from successfully reclaiming the object from the first acquirer ('you') through a *rei vindicatio*, being met with a praetorian defence. Moreover, some of the texts – D. 6,1,72; D. 21,3,2; D. 44,4,4,32 – explicitly declare that the first acquirer may recover through the *actio Publiciana* and a subsequent *replicatio*, which shows that he has the thing *in bonis*. Therefore, the praetor corrects the *ius civile* and protects the first acquirer despite the fact that he did not receive the object *voluntate domini*<sup>69</sup>. The motivation behind this remedy rests on equitable grounds<sup>70</sup>, as Julian is reported to have claimed in D. 44,4,4,32 (*Iulianus ait aequius esse praetorem te tueri*) and D. 21,3,2 (*Iulianus ait aequius esse priorem te tueri*). Ulpian himself reproduces this view in D. 6,1,72 (*aequius est*), which is further developed by him in D. 21,2,17 by claiming that he who tries to evict his purchaser from that which he sold to him acts in an indecent way (*improbe*).

While the general outcome of these cases is identical, the specific defence granted to the acquirer differs in the opinions of jurists. In D. 44,4,4,32, Ulpian reports that Julian granted an *exceptio in factum* or an *exceptio doli*, and in D. 21,3,1pr he indicates that Marcellus would grant an *exceptio rei venditae et*

<sup>66</sup> Lenel, *Paling.* (1889) II, col. 79; 511; 865 n. 2; Pringsheim, *Eigentumsübergang* (1930), p. 418; Gonvers, *L'exceptio* (1939), p. 51; Koschaker, *Convalida* (1953), p. 3, 49-50, 79; Ranieri, *Alienatio conualescit* (1974), p. 8; Apathy, *Die actio Publiciana* (1982), p. 176-178; Ankum, *Propriété bonitaire relatif* (1985), p. 133 ff.; Sansón, *La transmisión* (1998), p. 185 n. 131; Potjewijd, *Beschikkingsbevoedheid* (1998), p. 213 n. 5; 215 n. 13; 217; Ankum, *Fusion and transfusion* (2001), p. 121-122; Koops, *Koop en traditio* (2014), p. 51-52.

<sup>67</sup> This point is however not completely conclusive, considering that the requirement of a physical delivery in the context of the *traditio* was also considerably relaxed regarding immovable property.

<sup>68</sup> If the second conveyance was indeed a *mancipatio*, it appears that the rules on convalescence would have nonetheless been applicable to the delivery of *res nec mancipi*, which is why D. 21,2,17 is written in broader terms. See Potjewijd, *Beschikkingsbevoedheid* (1998), p. 218.

<sup>69</sup> The lack of a *voluntas domini* is particularly clear in some texts dealing with the convalescence in the context of the pledge, such as D. 13,7,41 (Paul 3 *quaestionum*) (*rem meam obligaverat sine mea voluntate*) and D. 20,1,22 (Mod. 7 *differentiarum*) (*rem meam ignorante me creditori suo pignori obligaverit*). See on these texts Potjewijd, *Beschikkingsbevoedheid* (1998), p. 253-254 and 259 n. 161.

<sup>70</sup> See Potjewijd, *Convalescentie* (1996), p. 27-28; Potjewijd, *Beschikkingsbevoedheid* (1998), p. 238-239; Ter Beek, *Dolus* (1999), p. 901-902; Koops, *Koop en traditio* (2014), p. 51-52.

*traditae*<sup>71</sup>. In D. 21,2,17, however, Ulpian himself claims that there is no doubt that an *exceptio doli* will be in place. Scholars have long debated why jurists would provide the buyer different defences, and what would this imply for the evolution of the *exceptio in factum*, the *exceptio doli* and the *exceptio venditae et traditae*<sup>72</sup>. For instance, some scholars claim that the *exceptio venditae et traditae* was applicable to similar cases already before Marcellus<sup>73</sup>, while Koschaker considers that it was precisely this jurist who expanded the scope of application of this defence<sup>74</sup>. Others think that this expansion would only have taken place in the time of Justinian<sup>75</sup>. The answer to this problem also determines the scope of application granted to the *exceptio doli* within the general context of the convalescence of the delivery<sup>76</sup>. It has moreover been pointed out that the differences regarding the specific defence given by the praetor would not be so relevant in the time of Ulpian due to the progressive abandonment of the formulary procedure, which implies that it was no longer essential to draw a clear distinction between the specific *exceptio* which should be invoked considering that the effect reached would be identical<sup>77</sup>. This would explain why Ulpian had no problem in bringing up different *exceptiones* for the same problem when quoting the ideas of different jurists, reproducing their original views without attempting to offer a definite answer to the problem.

While the debate concerning the original scope of the *exceptio doli* and the *exceptio rei venditae et traditae* exceeds the margins of the present research, it is worth noting that the application of the latter defence by Marcellus seems rather out of place in the context of the convalescence of the delivery. The *exceptio doli* seems in fact more suitable considering the abusive and contradictory behaviour of the plaintiff<sup>78</sup>, which is why the concession of the *exceptio rei venditae et traditae* by Marcellus suggests an innovative expansion of the field of application of this

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<sup>71</sup> Although no express reference is made to this defence, the text is not only found under the Digest title “*De exceptione rei venditae et traditae*”, but is moreover located under the rubric “*Rei venditae et traditae*” by Lenel, *Paling.* (1889) II, col. 860. See Koschaker, *Convalida* (1953), p. 7-10; Kaser, *RPR* (1971) I, p. 439 n. 12; Potjewijd, *Convalescentie* (1996), p. 25-26; Wacke, *Konvaleszenz der Verfügung* (1997), p. 210; Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 214. Contrary to this view is Koops, *Koop en traditio* (2014), p. 53 n. 37.

<sup>72</sup> For a *status quaestionis* on this point see Ranieri, *Alienatio convalescēt* (1974), p. 5 n. 6; Sansón, *La transmisión* (1998), p. 161, 175-179; Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 219 n. 24; Ter Beek, *Dolus* (1999), p. 897-902.

<sup>73</sup> Wubbe, *Res aliena* (1960), p. 39 ff.; Kaser, *In bonis esse* (1961), p. 195-197.

<sup>74</sup> Koschaker, *Convalida* (1953), p. 9-11.

<sup>75</sup> Gonvers, *L'exceptio* (1939), p. 49; Ankum, *Propriété bonitaire relatif* (1985), p. 134 n. 58.

<sup>76</sup> See on this point Bonfante, *Exceptio rei venditae* (1918), p. 453-454; Sansón, *La transmisión* (1998), p. 169-172.

<sup>77</sup> Koschaker, *Convalida* (1953), p. 10; Tondo, *Convalida* (1959), p. 93-100; Wesener, *Nichtediktale Einreden* (1995), p. 121-122; Sansón, *La transmisión* (1998), p. 178, 185 and 194.

<sup>78</sup> See similar cases of application of the *exceptio doli* in Chapter 4, Section 5 below. Concerning the pertinent application of this defence to the convalescence of the delivery see Ter Beek, *Dolus* (1999), p. 901-902.

defence. The underlying facts of the case in D. 21,3,1pr show that this jurist is dealing with a situation in which someone delivered through *traditio* a *res Mancipi invito domino*, attempting to reivindicate after he has become owner himself (*si alienum fundum vendideris et tuum postea factum petas*). The concession of the *exceptio rei venditae et traditae* in such a context seems odd considering that the guidelines offered later by Ulpian in D. 21,3,1,2 and 5 would not seem to allow this defence in this particular case. Ulpian, as shown in the previous section, considers that the owner of a *res Mancipi* can recover it if the *traditio* was performed *invito domino* by a non-owner. If, however, the owner authorized the *traditio*, he will be met with an *exceptio rei venditae et traditae*. In the case of the convalescence examined in D. 21,3,1pr, the *traditio* of the *res Mancipi* was performed *invito domino*, which would in principle exclude the *exceptio rei venditae et traditae*, at least according to the scope granted to this defence at the time of Ulpian. However, this case has a peculiar feature, namely that the plaintiff was in fact the person who performed the delivery *invito domino*. By granting the *exceptio rei venditae et traditae* in this context, Marcellus seems to regard as decisive only the fact that the person who sold and delivered was the same one who later reclaims the object as its true owner, which is why he considers that the *exceptio rei venditae et traditae* would be in place<sup>79</sup>. Accordingly, in the eyes of this jurist, the fact that the *traditio* was not authorized by the owner at the time it took place would not be an obstacle to resort to this praetorian defence if the plaintiff was the one who carried out the delivery. That this interpretation was too liberal may explain why it was not followed by any earlier or later jurists. Ulpian may have accordingly reproduced the opinion of Marcellus rather anecdotally when dealing with the *exceptio rei venditae et traditae*, as the only jurist who would be willing to make use of this defence in the context of the convalescence of the delivery<sup>80</sup>.

### 5. *Exceptio doli*

Apart from the case of convalescence of the delivery, there are other situations where the transfer of ownership is performed by a non-owner in which the *exceptio doli* is invoked. All of these applications show the rather residual role of the *exceptio doli*, since they tackle a great variety of situations where no other defence is available, but where nonetheless the praetor checks different forms of abusive or fraudulent behaviour.

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<sup>79</sup> Koschaker, *Convalida* (1953), p. 9-10 considers that Marcellus may be fighting the opinion of Julian by offering an application by way of analogy of the *exceptio rei venditae et traditae*.

<sup>80</sup> Koschaker, *Convalida* (1953), p. 10 considers that there may even be a certain criticism from Ulpian to Marcellus on this point.

a. C. 8,44,11.

The *exceptio doli* is to be found explicitly applied to the transfer of ownership by a non-owner in a constitution of the time of Alexander Severus:

C. 8,44(45),11 (Alexander, 231): *Exceptioe doli recte eum submovebis, quem ab auctore tuo fideiussorem accepisti, si eius nomine controversiam refert, quasi per uxorem suam, antequam tu emeris, comparaverit, qui vendenti adeo consensum dedit, ut se etiam pro evictione obligaverit*<sup>81</sup>.

In this case, a non-owner delivered an object to the buyer, while a *fideiussor* who granted security to the buyer against eviction was in fact owner of the thing at the time of the delivery. The warrantor then decides to reclaim the object from the buyer, arguing that he had become owner of the thing through his wife. There is nothing wrong with this *rei vindicatio* from the perspective of the *ius civile*, since the owner did not in fact grant his authorization for the sale of his own property, but merely intervened as a warrantor<sup>82</sup>. Nonetheless, the praetor considers that this latter circumstance implies that the owner can be regarded to have authorized the sale, since he even became a warrantor against eviction (*adeo consensum dedit, ut se etiam pro evictione obligaverit*). It is noteworthy that this consent is not taken into account as a *voluntas domini* which would grant the owner Quiritary ownership – since he did not actually authorize the sale – but is only considered to grant an *exceptio doli* against the owner. The jurists of Alexander’s chancery appear therefore to be cautious regarding the actual existence of a *voluntas domini* at the delivery<sup>83</sup>. The *exceptio doli* is especially justified considering that the warrantor/owner appears to have been aware of the

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<sup>81</sup> C. 8,44,11: “You will rightly defeat by the defence of fraud him whom you received as surety for your vendor and who raises a dispute on the ground that he bought the property, through his wife, before you bought it, since he gave his consent to the sale to you, even to the extent that he became a warrantor against eviction” (transl. Blume, modified).

<sup>82</sup> See Krüger, *Exceptio doli* (1892), p. 61; Costa, *L’exceptio doli* (1897), p. 32; Tondo, *Convalida* (1959), p. 113–114; Schanbacher, *Die Konvaleszenz* (1987), p. 145 n. 768; Wacke, *Konvaleszenz der Verfügung* (1997), p. 215–217; Ter Beek, *Dolus* (1999), p. 1189–1190.

<sup>83</sup> Considering that there was not truly a *voluntas domini* aimed at the *traditio*, it is no wonder that the jurists of Alexander’s chancery would prefer to grant a praetorian defence instead of considering that Quiritary ownership was transferred. It is therefore not necessary to assume that the praetorian protection takes place in the context of the *traditio* of a *res mancipi*, as assumed by Potjewijd, *Beschikingsbevoegdheid* (1998), p. 197. Moreover, if that were the case, one would expect the praetor to grant an *exceptio rei venditae et traditae*, as shown in Chapter 4, Section 3 above.

fact that he was the owner all along<sup>84</sup>, since he does not invoke a mistake on this point. But even if the owner was not aware of his condition, the sole fact that someone who has obliged himself to protect the buyer from eviction would later reclaim the object from the latter seems enough to motivate the intervention of the praetor on account of his contradictory and malicious behaviour<sup>85</sup>.

b. D. 17,1,49.

Another case where the *exceptio doli* is brought up in the context of the transfer of ownership by a non-owner refers to the *error in dominio* as described by Marcellus in D. 17,1,49<sup>86</sup>. This text, which was already analysed above<sup>87</sup>, contains two cases: in the first one, the owner delivers as *procurator* an object which he ignores to be in fact his own; in the second one, the owner – who again is unaware of his condition – orders a seller to deliver the object of the sale to a third party in what seems to be a case of *delegatio*. What is particularly interesting for the purpose of the praetorian remedies is that the owner will be met – at least in the second case – with an *exceptio doli* if he reclaims his property, which was not transferred due to the lack of *voluntas domini*. Regarding the first case we are only told that the *rei vindicatio* will not be granted to him because he is obliged towards the buyer, having sold as a *procurator* (*quamvis quasi procurator vendidisset, obstructum emptori neque, si rem tradidisset, vindicationem ei concedendam*). To properly understand the defence granted to the owner, it is also worth noting that the text discusses the transfer of ownership over a slave, which is reported to have taken place through *traditio*, at least in the first case. This would imply that already from the start the delivery by *traditio* could not transfer the *dominium ex iure Quiritium* over the slave.

The ground for the *exceptio doli* in the second case is most likely the contradictory behaviour of the non-owner, who first orders the delivery of the object and then reclaims it<sup>88</sup>. Regarding the first case, Marcellus conveys the ground for his decision – the seller cannot simply reclaim the object, being

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<sup>84</sup> Koschaker, *Convalida* (1953), p. 30; Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 196 n. 86. Krüger, *Exceptio doli* (1892), p. 61 claims that the owner must have been unaware of his condition, while Wacke, *Kowaleszenz der Verfügung* (1997), p. 216 considers this possible.

<sup>85</sup> See Gonvers, *L'exceptio* (1939), p. 112; Koschaker, *Convalida* (1953), p. 31; Tondo, *Convalida* (1959), p. 112-114; Ter Beek, *Dolus* (1999), p. 1189-1190.

<sup>86</sup> D. 17,1,49 (Marcell. 6 *dig.*): “Servum Titii emi ab alio bona fide et possideo: mandatu meo eum Titius vendidit, cum ignoraret suum esse, vel contra ego vendidi illius mandatu, cum forte is, cui heres exstiterit, eum emisset: de iure evicitonis et de mandatu quaesitum est. Et puto Titium, quamvis quasi procurator vendidisset, obstructum emptori neque, si rem tradidisset, vindicationem ei concedendam, et idcirco mandati eum non teneri, sed contra mandati agere posse, si quid eius interfuisset, quia forte venditurus non fuerit. Contra mandator, si rem ab eo vindicare velit, exceptione doli summovetur et adversus venditorem testatoris sui habet ex empto iure hereditario actionem”.

<sup>87</sup> Chapter 2, Section 6(b).

<sup>88</sup> Regarding the *exceptio doli* in the *delegatio* see Zandrino, *Delegatio* (2014), p. 106 ff.

himself personally obliged to protect the buyer from eviction – which also involves a contradictory behaviour<sup>89</sup>. It is however not clear what exactly renders the *rei vindicatio* ineffective. At this point it should be borne in mind that there are two different legal grounds which explain why the transfer of ownership did not take place in the first case: first of all, the transferor delivered a *res Mancipi* by *traditio*, which would not grant the *dominium ex iure Quiritium* to the acquirer; secondly, since the *tradens* was not aware of being owner of the thing delivered, the *traditio* cannot be seen as taking place with the intent of the owner, as already shown when discussing the *error in dominio*. Since the *traditio* of a *res Mancipi* took place *invito domino*, it is useful to recall D. 21,3,1,2 and 5<sup>90</sup>, according to which the *exceptio rei venditae et traditae* will be of no avail against the owner if he did not authorize the delivery. It should however be borne in mind that the text belongs to Marcellus, who expanded the scope of the *exceptio rei venditae et traditae* to cases where the plaintiff is the same person who delivered the object, despite the fact that the delivery took place *invito domino*, as shown when discussing D. 21,3,1pr<sup>91</sup>. It seems therefore likely that Marcellus would grant in the first case the *exceptio rei venditae et traditae*, as most scholars think<sup>92</sup>. This would moreover explain why the *exceptio doli* is only explicitly granted in the second case, where no other praetorian remedy seems available. Nonetheless, the equivocal wording of the text leaves the door open for debate<sup>93</sup>.

c. D. 39,5,25.

The *exceptio doli* finds other applications regarding cases where the owner actually intended to transfer ownership through another person, as can be seen in D. 39,5,25<sup>94</sup>, which was already analysed above<sup>95</sup>. In this case, the owner gave instructions to another person to perform a gift to Titius on his behalf, i.e. acting *nomine alieno*. The non-owner, however, decides to perform the gift on behalf of himself (*nomine proprio*). Since this is an infringement of the owner's instructions,

<sup>89</sup> See on this point Costa, *L'exceptio doli* (1897), p. 31-32; Zilletti, *Errore* (1961), p. 127-129; Ter Beek, *Dolus* (1999), p. 965.

<sup>90</sup> Chapter 4, Section 3 above.

<sup>91</sup> Chapter 4, Section 4 above.

<sup>92</sup> Costa, *L'exceptio doli* (1897), p. 28; Betti, *Esercitazioni* (1930), p. 119; Reggi, *Error in dominio* (1952), p. 98; Wolf, *Error* (1961), p. 76; Ter Beek, *Dolus* (1999), p. 963 n. 8; Harke, *Error in dominio?* (2004), p. 139-140.

<sup>93</sup> Other scholars think that the text deals rather with a case of *denegatio actionis*: Voci, *L'errore* (1937), p. 90; Burdese, *Autorizzazione* (1950), p. 70; Burdese, *Error in dominio* (1953), p. 28. Later Voci, *Modi di acquisto* (1952), p. 106 n. 1 would claim that in the first case the plaintiff would either face a *denegatio actionis* or an *exceptio doli*.

<sup>94</sup> D. 39,5,25 (Jav. 6 *epistolarum*): “Si tibi dederim rem, ut Titio meo nomine donares, et tu tuo nomine eam ei dederis, an factam eius putes? Respondit: si rem tibi dederim, ut Titio meo nomine donares eamque tu tuo nomine ei dederis, quantum ad iuris supilitatem accipientis facta non est et tu furti obligaris: sed benignius est, si agam contra eum qui rem accepit, exceptione doli mali me summoveri”.

<sup>95</sup> Chapter 2, Section 5 above.

the *traditio* will take place *invito domino* and ownership will not be transferred because of the lack of *potestas alienandi*<sup>96</sup>. Moreover, the conscious disobedience of the owner's intent renders the thing delivered a *res furtiva*<sup>97</sup>. This allows the owner to exercise the *rei vindicatio* against the acquirer, but in this particular case Javolenus is willing to grant the latter an *exceptio doli*.

Some scholars have regarded the last sentence of the text as interpolated, considering the reference to the *benignitas* as a typically postclassical element<sup>98</sup>. Such claim is however unfounded, since scholars have shown that there is nothing alien to classical law about the references to the *benignitas*<sup>99</sup>. On the contrary, in this particular case the contrast between *iuris subtilitas* and *benignitas* is the key to understanding the innovative solution offered by Javolenus, who acknowledges that according to a strict interpretation of the *ius civile* (*quantum ad iuris subtilitatem*) the acquirer would not become owner, but that it is more liberal (*benignius est*) to protect the acquirer by resorting to the *ius honorarium*<sup>100</sup>. It is however not evident what the grounds for this innovation are, which has been used to reaffirm the claims of interpolation. Hausmaninger thinks that the claim of the plaintiff would be a case of *venire contra factum proprium*<sup>101</sup>. MacCormack claims that the owner has formed an expectation on the person of the acquirer, an interpretation which cannot be accepted considering that the delivery was not performed *nomine domini*<sup>102</sup>. More appealing is MacCormack's indication that the owner takes advantage of his agent's disobedience in order to deprive the acquirer from the object. Potjewijd<sup>103</sup> offers a more complete outlook on the

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<sup>96</sup> Some authors claim that ownership was not transferred because there was no *causa traditionis* between the principal and the acquirer: Costa, *L'exceptio doli* (1897), p. 33; Eckardt, *Iavoleni Epistulae* (1978), p. 26; Hausmaninger, *Subtilitas iuris* (1986), p. 64; Ter Beek, *Dolus* (1999) II, p. 846 n. 1. This view cannot be accepted, since the lack of *voluntas domini* in this case signals a problem of *potestas alienandi* at the delivery, and not the absence of a *iusta causa traditionis*. This is also the opinion of Thomas, *Animus furandi* (1968), p. 29-30 n. 130; Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 137.

<sup>97</sup> See on this point Schlossmann, *Stellvertretung* (1900) I, p. 303-304 n. 1; Albanese, *Furtum I* (1953), p. 193.

<sup>98</sup> Costa, *L'exceptio doli* (1897), p. 34; Levy/Rabel, *Ind. Itp.* (1935) III, p. 106; Riccobono, *Lineamenti* (1930), p. 440; Burdese, *Autorizzazione* (1950), p. 76-77; Koschaker, *Convalida* (1953), p. 81 n. 200; Albanese, *Furtum I* (1953), p. 192-193; Thomas, *Animus furandi* (1968), p. 29-30 n. 130; Sansón, *La transmisión* (1998), p. 97.

<sup>99</sup> Wubbe, *Benignus redivivus* (1968), p. 237-262; Wubbe, *Benigna interpretatio* (1972), p. 295-314; Palma, *Benignior interpretatio* (1997). Further on the classical nature of the *benignitas* see Hausmaninger, *Benevolent* (1981), p. 1139-1156; Hausmaninger, *Subtilitas iuris* (1986), p. 63-70; Hendel, *D.* 28, 4, 3 (2013), p. 419-431.

<sup>100</sup> Riccobono, *Lineamenti* (1930), p. 440; Eckardt, *Iavoleni Epistulae* (1978), p. 25-26; Hausmaninger, *Benevolent* (1981), p. 1144-1145; Hausmaninger, *Subtilitas iuris* (1986), p. 64-65; Hausmaninger/Gamauf, *Roman Property Law* (2012), p. 117.

<sup>101</sup> Hausmaninger, *Subtilitas iuris* (1986), p. 64. Also Ter Beek, *Dolus* (1999) II, p. 845-846 stresses the fundamental contradiction between the initial intention of the owner and the subsequent *rei vindicatio*.

<sup>102</sup> MacCormack, *Dolus* (1986), p. 260.

<sup>103</sup> Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 137.

problem by showing that there was no actual damage to the principal – he intended anyhow to make a gift – and that the acquirer would inevitably have found out through the lawsuit who the real donor was. It is true that the owner had an interest in appearing as the generous donor, and in fact Schlossmann has pointed out that there does follow a certain profit from the fact of appearing as the donor instead of the donor’s agent<sup>104</sup>. Nonetheless, this can hardly be seen as a solid reason to actually reclaim the object from the acquirer. Since the acquirer will find out who the owner was, the owner cannot be seen as having an interest in recovering the object which he intended to donate in the first place. This is why he is regarded to act in an abusive way when resorting to the *rei vindicatio*, which leads the praetor to grant the *exceptio doli* against him.

d. D. 17,1,5,3–4.

Paul presents a similar outcome in another case where the transferor does not follow the owner’s instructions:

D. 17,1,5,3–4 (Paul. 32 *ed.*): Item si mandavero tibi, ut fundum meum centum venderes, tuque eum nonaginta vendideris, et petam fundum, non obstabit mihi exceptio, nisi et reliquum mihi, quod deest, mandati meo, praestes, et indemnem me per omnia conserves. (4) Servo quoque dominus si praeceperit, certa summa rem vendere, ille minoris vendiderit, similiter vindicare eam dominus potest, nec ulla exceptione summoveri, nisi indemnitas ei praestetur<sup>105</sup>.

The text deals with a common form of infringement of the owner’s intent, in which the transferor sells at a lower price than that indicated by the owner<sup>106</sup>. In D. 17,1,5,3 Paul declares that if the non-owner sells a piece of land for ninety, having been ordered in the context of a contract of mandate to sell for one hundred, the owner will be able to reclaim the land and ‘a defence’ will prevail against him (*et petam fundum, non obstabit mihi exceptio*), unless the owner gets the difference in the price from the seller. In D. 17,1,5,4 practically the same case is drawn regarding an alienation by a slave, where again we are told that the owner

<sup>104</sup> Schlossmann, *Stellvertretung* (1900) I, p. 303–304 n. 1. This author quotes in this regard D. 47,2,55(54),1 (Gai. 13 *ed. prov.*): “...species enim lucri est ex alieno largiri et beneficii debitorem sibi acquirere”.

<sup>105</sup> D. 17,1,5,3–4: “Again, if I give you a mandate to sell my farm for one hundred and you sell it for ninety and I bring an action for the farm, a defence will not prevail against me, unless you make good to me the balance which is outstanding under the terms of my mandate and generally ensure that I suffer no loss. (4) Further, if a master instructs his slave to sell something at a certain price and the slave sells at a lower figure, the master is similarly entitled to bring a vindication for the thing, and no defence will prevail against him, unless he is given security against financial loss” (transl. Watson).

<sup>106</sup> See also D. 21,3,1,3, studied in Chapter 4, Section 3 above.

may bring the *rei vindicatio* and that no *exceptio* will avail against him, unless he receives security against financial loss. While none of these texts mentions the ground for this decision, it seems more likely that it lies in the fact that the owner would suffer no damage from the acts of the transferor, and therefore it would not be acceptable for him to regain the property over the delivered goods.

While the outcome of Paul's reasoning is clear, it goes again without saying what praetorian defences are being discussed. Concerning D. 17,1,5,3, where we are told that 'the defence' will not prevail against the claim of the owner of the delivered piece of land, it is only possible that such defence would be the *exceptio rei venditae et traditae*, which would not be effective against the owner since the delivery was not performed *voluntate domini*, just as seen in D. 21,3,1,2. In D. 17,1,5,4, on the other side, it does not seem relevant to determine which particular defence would be available in principle, since we are simply told that no defence (*nec ulla exceptio*) will prevail against the owner. Having this starting point, both texts present an exception to this general rule following the word "nisi" (unless...) in case the owner suffers no loss, either because the seller gave him the difference in the price or because he was granted a security regarding the loss. This solution has traditionally been considered to be a Justinianic addition to the original text<sup>107</sup>, since Paul would have followed the opinion of Sabinus as conveyed in Gai 3,161<sup>108</sup>. According to this text, if someone was ordered to buy a piece of land for 100 and instead buys at 150, he cannot bring the *actio mandati contraria* against the owner even if he lets him have the land for the price which the latter had commissioned. Moreover, it is often claimed that this solution would confuse problems belonging to the law of obligations and to the law of property.

The allegations against the classical origin of D. 17,1,5,3-4 are however not unsurmountable. Sansón in particular has pointed out that Paul may be adopting a more liberal view in this particular case and that, due to the absence of a *voluntas domini* at the delivery, he simply grants an *exceptio doli* to protect the acquirer<sup>109</sup>. The author cautiously observes that the text does not grant much ground to support any definitive conclusion, but the possibility that an *exceptio doli* is available is in fact more likely, for instance, than the *exceptio rei venditae et*

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<sup>107</sup> Pringsheim, *Gai. Ver. 3, 161* (1939), p. 349-351; Gonvers, *L'exceptio* (1939), p. 91; Arangio-Ruiz, *Mandato* (1949), p. 185; Burdese, *Autorizzazione* (1950), p. 82-83; van Warmelo, *Lashebbber* (1964), p. 5. Much more cautious is Watson, *Mandate* (1961), p. 191-194.

<sup>108</sup> Gai 3,161: "Cum autem is, cui recte mandaverim, egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest inplere eum mandatum, si modo implere potuerit; at ille mecum agere non potest. Itaque si mandaverim tibi, ut verbi gratia fundum mihi sestertiis C emereres, tu sestertiis CL emeris, non habebis mecum mandati actionem, etiamsi tanti velis mihi dare fundum, quanti emendum tibi mandassem; idque maxime Sabino et Cassio placuit. Quod si minoris emeris, habebis mecum scilicet actionem, quia qui mandat, ut C milibus emeretur, is utique mandare intellegitur, uti minoris, si posset, emeretur".

<sup>109</sup> Sansón, *La transmisión* (1998), p. 213.

*traditae* that Burdese<sup>110</sup> thought to identify – be it as a postclassical addition – in this text. This latter theory seems particularly unlikely considering that ownership is not transferred in this context due to the lack of *voluntas domini*, which would not enable the acquirer to successfully repel the *rei vindicatio* of the owner of the delivered *res mancipi*. The possibility to resort to the *exceptio doli* would moreover offer a similar outcome to that given by Javolenus in D. 39,5,25, where the owner cannot be seen as having a real interest in recovering the thing. At this point it could be argued that this solution is opposite to that given regarding the acquisition of ownership through a third person (Gai 3,161), but then again it is important to bear in mind that one must be particularly careful when drawing analogies between the cases where ownership is acquired and those where it is transferred. Moreover, Gai 3,161 only deals with the problem of acquisition through an agent regarding the law of obligations, denying the *actio mandati contraria* against the principal. In D. 17,1,5,3–4, on the other hand, nothing is said concerning the relationship between agent and principal, but only between principal and acquirer, in which context an *exceptio doli* against the *rei vindicatio* does not seem out of place. Both problems would be confused by authors like Arangio-Ruiz, who claimed that in the original text Paul was dealing with the relationship between principal and agent, and therefore the outcome of D. 17,1,5,3–4 should be understood within the general problem regarding the cases where an agent exceeds the powers granted to him by the principal<sup>111</sup>. This connection is nonetheless by no means evident, especially since the relation between principal/owner and acquirer as described in this text can be perfectly explained through the general rules concerning the transfer of ownership by a non-owner, the only innovation being the concession of a defence against the *rei vindicatio* in case the owner suffered no harm. That the particular relation between owner and transferor is of little moment for the outcome of this case can moreover be seen in the fact that the same solution is given in D. 17,1,5,3 and D. 17,1,5,4, despite the fact that the first case deals with the alienation performed in the context of a contract of mandate while in the second case the authorized *tradens* is merely a slave.

Rather different is the situation concerning the approach to this identical problem in the *Pauli Sententiae*:

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<sup>110</sup> Burdese, *Autorizzazione* (1950), p. 83.

<sup>111</sup> Arangio-Ruiz, *Mandato* (1949), p. 185: “In verità l’opinione dei più fra gli studiosi, che Paolo si sia limitato a dirimere la controversia di proprietà fra mandante ed acquirente, non suffragata: a buon conto, il giureconsulto non discetteva in sede di proprietà, ma in sede di mandato, ed ogni lettore diligente doveva attendersi che egli dicesse se ed in quali limiti spettasse, rispettivamente al mandante o al mandatario o ad entrambi, l’*actio mandati*”.

PS 2,15,3: Certo pretio rem iussus distrahere si minoris vendiderit, mandati iudicio pretii summa poterit integrari: venditionem enim dissolui non placuit<sup>112</sup>.

The text grossly oversimplifies the classical solutions regarding the mandate to dispose<sup>113</sup>, first of all by claiming that all the principal can do when the agent sells for less is to recover the difference in the price from him because “the sale cannot be set aside” (*venditionem enim dissolui non placuit*). Neither in Gai 3,161 nor in D. 17,1,5,3-4 does the problem revolve around the validity of the sale, which will in fact be perfectly valid. The only problem is that, since the seller did not act *voluntate domini*, he will not have the *potestas alienandi* and the owner may recover through a *rei vindicatio* from the seller, who will then be able to bring an *actio empti* against the seller. None of this implies setting the sale aside. One may however understand that by ‘*venditio*’ the text does not refer to the sale, but to the transfer of ownership as such<sup>114</sup>. If that was the case, the *Pauli Sententiae* would simply state that ownership cannot be reclaimed. Whatever the case may be, this solution merges the *ius civile* and the *ius honorarium* in an abbreviated way which is highly non-classical.

## 6. Praetorian remedies concerning alienations by legal guardians

It was already shown<sup>115</sup> when dealing with D. 27,10,7,1<sup>116</sup> that the *exceptio rei venditae et traditae* finds an application as well when ownership over a *res Mancipi* is transferred through *traditio* by a legal guardian, which is phrased by Julian as the *exceptio si non curator vendiderit*. Apart from this specific text, no further reference is found in the sources concerning this praetorian defence. There are however several other praetorian defences which modify the general rules regarding the transfer of ownership by a legal guardian. An example of this can be found towards the end of D. 27,10,7,1, where we are told that if the plaintiff presents a *replicatio* which mentions that the *curator* did not duly grant the surety for administering the lunatic’s property, the legal guardian could make use of a *triplicatio doli* if he had used the money gained from the sale to pay the creditors

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<sup>112</sup> PS 2,15,3: “If a person who was ordered to sell property for a certain price sells it for less, the entire sum can be recovered by an action of mandate, for it has been held that the sale cannot be set aside” (transl. Scott, modified).

<sup>113</sup> Arangio-Ruiz, *Mandato* (1949), p. 187-188; Watson, *Mandate* (1961), p. 192; Nörr, *Mandatsexzeß* (1993), p. 379-381.

<sup>114</sup> See Chapter 2, Section 4(a) above.

<sup>115</sup> Chapter 3, Section 2 above.

<sup>116</sup> D. 27,10,7,1 (Jul. 21 *dig.*): “Curator dementi datus decreto interposito, uti satisdaret, non cavit et tamen quasdam res de bonis eius legitimo modo alienavit. Si heredes dementis easdem res vindicent, quas curator alienavit, et exceptio opponetur ‘si non curator vendiderit’, replicatio dari debet ‘aut si satisfatione interposita secundum decretum vendiderit’. Quod si pretio accepto curator creditores furiosi dimisit, triplicatio doli tutos possessores praestabit”.

of the lunatic. The legal grounds of this *triplicatio* is that the position of the lunatic was not made worse by the administration of his *curator*, which is why the absence of a *satisfactio* would be of no real significance<sup>117</sup>. Therefore, the normal outcome of the case would be corrected through a praetorian defence which would prevent an abusive claim from the owner.

It is worth recalling at this point that the most common objective of the praetorian innovations granted in the context of the alienations by a non-owner was to limit the scope of the *potestas alienandi*. This need arises from the fact that the legal guardian would validly transfer ownership as long as he acted *administrationis causa* and in good faith<sup>118</sup>, which left the door open for cases in which someone could, with the best of intentions, conclude ruinous business for the owner. The praetor gradually introduced limitations in order to protect the owner, as can be seen in the following text:

D. 4,4,49 (Ulp. 35 *ed.*): Si res pupillaris vel adulescentis distracta fuerit, quam lex distrahi non prohibet, venditio quidem valet, verumtamen si grande damnum pupilli vel adulescentis versatur, etiam si collusio non intercessit, distractio per in integrum restitutionem revocatur<sup>119</sup>.

Ulpian reports here that the praetor would be willing to grant the *in integrum restitutio* for acts concluded by the *tutor* which cannot be seen as forbidden by the law and where there was no collusion with the acquirer, but which nonetheless result in a significant loss for the ward. Particularly interesting about this text is that it shows to what extent lawful acts of administration could be nonetheless highly detrimental for the owner, even if there was no intention by the legal guardian to worsen the situation of the ward. The praetor corrects this state of affairs so that the position of the ward will be even stronger regarding the administration of this *tutor*.

Another similar case in which the *in integrum restitutio* is granted in order to remedy the consequences of a lawful – albeit detrimental – administration:

D. 4,4,47pr (Scaev. 1 *resp.*): Tutor urgumentibus creditoribus rem pupillarem bona fide vendidit, denunciante tamen matre emptoribus: quaero, cum urgumentibus creditoribus distracta sit nec de sordibus tutoris merito quippiam dici potest, an pupillus in integrum restitui

<sup>117</sup> Guzmán, *Caución tutelar* (1974), p. 98. It is worth noting that according to Gai 1,199 the purpose of the surety was to prevent the consumption and diminishing of the owner's goods (*consumantur aut deminuantur*).

<sup>118</sup> Chapter 3, Section 2 above.

<sup>119</sup> D. 4,4,49: "If the property of a *pupillus* or young person has been sold and no statute forbids the sale, it is certainly valid, but still, if the *pupillus* or young person suffers a considerable loss, even if there has been no collusion, it is revoked by means of *restitutio in integrum*" (transl. Watson).

potest. Respondi cognita causa aestimandum, nec idcirco, si iustum sit restitui, denegandum id auxilium, quod tutor delicto vacaret<sup>120</sup>.

A *tutor* finds himself forced to sell some of the goods of the ward in order to meet the claims of the former's creditors. That this state of affairs is not particularly favourable is evident from the warning of the mother to the buyers against the transaction. Nonetheless, the *tutor* is reported to sell in good faith and to be free of any accusation of corruptness, which seems to imply that these sales can be seen as taking place *administrationis causa*. Just like in the previous case, the detrimental results of a lawful administration lead the praetor to remedy this situation by granting an *in integrum restitutio* which will allow the ward to recover his goods.

Another interesting example in which the praetor may correct the normal outcome is to be found in an opinion by Ulpian:

D. 44,4,4,23 (Ulp. 76 *ed.*): Illa etiam quaestio ventilata est apud plerosque, an de dolo tutoris exceptio pupillo experiēti nocere debeat. Et ego puto utilius, etsi per eas personas pupillis favetur, tamen dicendum esse, sive quis emerit a tutore rem pupilli sive contractum sit cum eo in rem pupilli, sive dolo quid tutor fecerit et ex eo pupillus locupletior factus est, pupillo nocere debere, nec illud esse distinguendum, cautum sit ei an non, solvendo sit an non tutor, dummodo rem administret: unde enim divinat is, qui cum tutore contrahit? Plane si mihi proponas collusisse aliquem cum tutore, factum suum ei nocebit<sup>121</sup>.

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<sup>120</sup> D. 4,4,47pr: "A *tutor* at the urging of the creditors sold in good faith property of his *pupillus*, although the mother warned the buyers against the transaction. I ask whether the *pupillus* can obtain *restitutio in integrum* since the property has been sold at the urging of the creditors and no accusation of corruptness can properly be brought against the *tutor*. My reply was that there must be an investigation into the case and the question of *restitutio* considered and that should *restitutio* be just, help should not be refused on the ground that the *tutor* had committed no delict" (transl. Watson).

<sup>121</sup> D. 44,4,4,23: "The question was also discussed among several as to whether a defence of fraud on the part of a *tutor* ought to avail against his *pupillus* if the latter sues. And I consider more useful that, although *pupilli* are to be benefited through such persons, it nonetheless must be said that the defence must avail against the *pupillus* if the *tutor* did something fraudulently and the *pupillus* was enriched thereby, whether someone has purchased the property of the *pupillus* from his *tutor* or whether a contract was made with him with respect to the property of the *pupillus*; and a distinction must not be made as to whether or not a guarantee was given by the *tutor* or whether or not he was solvent, as long as he was administering the property; for how is the person who contracts with the *tutor* to guess this? Surely, if you tell me that someone has colluded with the *tutor*, his act will clearly prejudice him" (transl. Watson, modified).

The text is one among several fragments in which Roman jurists discuss whether the *dolus* of the *tutor* would harm or benefit the position of the ward<sup>122</sup>. Particularly interesting about Ulpian's text is that it discusses the problem in the context of the transfer of ownership, evaluating the possibility of granting an *exceptio* based on the *dolus* of the *tutor* to the acquirer whose position is challenged by the ward who wants to recover his ownership. Some examples are set forward in which the *tutor* could act fraudulently, such as the alienation by the *tutor* of goods belonging to the ward, the conclusion of contracts which affect his property or the production of fraudulent acts which enrich the *pupillus*. The opinion of Ulpian seems to be very innovative if compared to that of Paul in D. 26,7,12,1, where the possibility that ownership is transferred is simply excluded (*alienatio non valet*) if the *tutor* acted in bad faith. Ulpian, quite conversely, is of the opinion (*ego puto*) that it is more practical to grant a praetorian remedy to protect the acquirer. The departure from the traditional rules is shown by the reference to the guideline according to which the position of the ward should be improved by the acts of his *tutor* (*per eas personas pupillis favetur*). The main problem regarding this text, however, is to understand the reason behind Ulpian's decision, especially considering that, in the way the text has come down to us, the only element which appears to be decisive is the fact that the *tutor* has the administration of the ward's property<sup>123</sup>, which is also the case in the fragment following it (D. 44,4,4,24). This idea is linked to the fact that it would be intolerable for legal certainty to allow the ward to recover if the *tutor* acted fraudulently, since the other party could not be aware of this circumstance. This thought seems to inspire as well the closing sentence, according to which if the other party colluded with the *tutor* he will not be able to raise this defence.

The problem behind Ulpian's decision is that it is in complete contradiction with every other text examined so far. Until now it has been shown that legal guardians must not exceed their faculties of administration, and that if they perform acts which cannot be seen to take place *administrationis causa* the owner may recover his property before it is acquired through usucapion. Moreover, the fact that the legal guardian acts in bad faith normally appears as a decisive factor to determine the unlawfulness of his alienation, turning the delivered asset into a *res furtiva* which cannot be usucapted. Confronted with all of this evidence, Ulpian's solution appears to be highly dissonant, and scholars have often regarded it as heavily interpolated<sup>124</sup>.

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<sup>122</sup> See on this subject Knütel, *Dolus tutoris* (1986), p. 101-126.

<sup>123</sup> Knütel, *Dolus tutoris* (1986), p. 121.

<sup>124</sup> Solazzi, *Azioni del pupillo* (1955 [1912]), p. 531-532. For an outlook on these claims see Knütel, *Dolus tutoris* (1986), p. 121 n. 107. More recently Martens, *Durch Dritte* (2007), p. 75, who cannot conceive that an *exceptio* would be granted under the circumstances described here.

Among the various attempts to explain the text, the more solid one appears to be to correct “*sive*” for “*si*” in “*sive dolo quid tutor fecerit et ex eo pupillus locupletior factus est*”, proposed by Knütel<sup>125</sup> and already accepted in the Dutch translation of the *Corpus Iuris Civilis*<sup>126</sup>. According to this, the enrichment of the ward would be one of the decisive elements to grant the *exceptio*, which makes more sense in the general context of the fragment than to list the possibility of enrichment along with the cases in which the *tutor* concludes a specific act affecting the ward, as happens in Watson’s translation of the Digest: “(...) the defence must avail against the *pupillus*, whether someone has purchased the property of the *pupillus* from his *tutor* or whether a contract was made with him with respect to the property of the *pupillus* or whether the *tutor* did something fraudulently and the *pupillus* was enriched thereby (...)”. Moreover, to understand the enrichment of the *pupillus* as a condition for the *exceptio* also agrees with several other texts regarding the question of whether the *dolus* of the *tutor* harms the ward, since they show that only if the *pupillus* does become richer due to the *dolus* of the *tutor* will this latter element harm the position of the ward<sup>127</sup>.

The fact that the acquirer will only obtain an *exceptio* against the claim of the *pupillus* if the latter was enriched by the fraudulent acts of his *tutor* offers a coherent outlook with the opinions of Roman jurists reviewed so far. The fraudulent administration of the *tutor* will prevent the transfer of ownership from taking place, which is why the remedy proposed by Ulpian appears as a praetorian correction to this unavoidable outcome. Moreover, the chance that the ward will become richer because of the fraudulent administration is not as restricted as some authors consider<sup>128</sup>, and one can in fact conceive that acts by which the *tutor* violates prohibitions such as those laid down by the *Oratio Severi* may have a positive effect in the situation of the *pupillus*<sup>129</sup>. This could imply that the acquirer may not obtain a *possessio ad usucapionem*, which would be the case anyhow if the *dolus* of the *tutor* enables to qualify his conduct as *furtum*, thereby rendering the object delivered a *res furtiva*. That the praetor would be willing to offer his protection even when the thing cannot be acquired by usucapion is not to be considered impossible<sup>130</sup>. In this context, the claim of the ward to recover his property may appear abusive considering that his position was not made worse by the fraudulent acts of the *tutor*, which is precisely what motivates the

<sup>125</sup> Knütel, *Dolus tutoris* (1986), p. 122 n. 117.

<sup>126</sup> Spruit *et al.*, *Corpus Iuris Civilis* (2001) VI, p. 176 n. 1.

<sup>127</sup> D. 26,9,3 (Pap. 20 *quaestionum*): “*Dolus tutorum puero neque nocere neque prodesse debet: quod autem vulgo dicitur tutoris dolum pupillo non nocere, tunc verum est, cum ex illius fraude locupletior pupillus factus non est (...)*”. See also D. 4,3,15pr (Ulp. 11 *ed.*); D. 14,4,3,1 (Ulp. 29 *ed.*); D. 15,1,21,1 (Ulp. 29 *ed.*); D. 19,1,13,7 (Ulp. 32 *ed.*). On the relevance of the ward’s enrichment regarding the *dolus tutoris* see Knütel, *Dolus tutoris* (1986), p. 105-112.

<sup>128</sup> Martens, *Durch Dritte* (2007), p. 74-75.

<sup>129</sup> Knütel, *Dolus tutoris* (1986), p. 122.

<sup>130</sup> See on the possibility to obtain the *actio Publiciana* despite not being able to usucapt Apathy, *Publiciana ohne Ersitzungsbesitz* (1984), p. 749-758.

existence of prohibitions of alienation and the limits to the latter's administration. Ulpian rightfully observes that the solvency of the *tutor* or the question of whether he granted a surety has no significance to determine the outcome of the case, which can be explained by the fact that the position of the ward and his creditors has actually improved as a result of the tutor's fraudulent administration. What is however considered relevant by Ulpian is that the *tutor* is in charge of the administration of the ward's property, not so much because he alienates *administrationis causa* – since he actually exceeds his faculties – but rather because the transferee could not know that the *tutor* was acting fraudulently, which motivates the opposite solution in case he colluded with the *tutor*. This solution thus provides a rare example in which Roman jurists modify the normal outcome of a case regarding the transfer of ownership to favour the protection of legal certainty in commercial transactions, but this concern can only be understood in the present case due to the enrichment of the ward. If the position of the ward was made worse due to the fraudulent transactions of his *tutor*, there would be no room for the *exceptio*.

The significance of the appointment of the *tutor* for the administration of the affairs of the ward to determine the outcome of the case becomes evident when examining Ulpian's text following D. 44,4,4,23:

D. 44,4,4,24 (Ulp. 76 *ed.*): Si quis non tutor, sed pro tutore negotia gerat, an dolus ipsius noceat pupillo, videamus. Et putem non nocere: nam si is, qui pro tutore negotia gerebat, rem vendiderit et usucapta sit, exceptionem non nocere pupillo rem suam persequenti, etiamsi ei cautum sit, quia huic rerum pupilli administratio concessa non fuit<sup>131</sup>.

Before examining this text, it is worth noting that there is an earlier text from Celsus which appears to be closely related to that of Ulpian:

D. 27,5,2 (Celsus 25 *dig.*): Si is, qui pro tutore negotia gerebat, cum tutor non esset, rem pupilli vendidit nec ea usucapta est, petet eam pupillus, quamquam ei cautum est: non enim eadem huius quae tutoris est rerum pupilli administratio<sup>132</sup>.

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<sup>131</sup> D. 44,4,4,24: "If someone is administering affairs as a *tutor*, but without being so, let us see whether his fraud avails against the *pupillus*. And I would think that it does not avail; for if he who administered affairs on behalf of the *tutor* sold property and it was not yet usucapted, the defence does not avail against the *pupillus* if he claims his property, even if a guarantee has been given to him, because the administration of the affairs of the *pupillus* has not been entrusted to him" (transl. Watson, modified).

<sup>132</sup> D. 27,5,2: "If someone who administered the affairs as a *tutor*, but without being so, sold the property of the *pupillus* but it has not been usucapted, the *pupillus* can reclaim it, even when the *tutor* gave security; for such administration of the property of the *pupillus* is different from that of a *tutor*" (transl. Watson).

The paligenetic analysis of both texts reveals a link between them, since their location according to Lenel's Palingenesia would be under the rubric "*De exceptionibus*"<sup>133</sup>, which is in turn the subject dealt with in the 44<sup>th</sup> book of the *Edictum Perpetuum*<sup>134</sup>. That Ulpian was aware of the opinions of Celsus on the subject is moreover shown in the first paragraph of Ulpian's fragment (D. 44,4,4pr), which begins with a quote of Celsus' opinion ("*Apud Celsum quaeritur...*"). Lenel decides to ignore this link and, perhaps due to the fact that D. 27,5,2 does not make any reference whatsoever to an *exceptio*, corrects the number of the book of Celsus' *digestorum* from 25 to 27, in order to place it under the rubric "*Rem pupilli salvam fore*"<sup>135</sup>. This *emendatio* does not appear to be entirely justified, not only because the surety plays no relevant role in Celsus' text (*quamquam ei cautum est*), just as in that of Ulpian (*etiamsi ei cautum sit*), but because it seems evident that Ulpian and Celsus are dealing with the same issue, and Ulpian's fragment deals explicitly with an *exceptio*.

The comparison between both texts reveals that Ulpian closely follows on the model of Celsus, following even the same sequence of ideas: someone who is not appointed as a *tutor* sells an asset of the ward, who will be able to reclaim it despite the surety granted by the *protutor* because the latter did not have the administration of the ward's affairs. The only substantial difference is that Ulpian adds that the *protutor* acts fraudulently<sup>136</sup>, resuming therefore in this fragment the discussion of whether an *exceptio* should be granted on account of the *dolus* of the *tutor* (D. 44,4,4,23). The link between these texts also throws light on the problem discussed by Ulpian. First of all, it becomes clear that Ulpian's text does not deal with a case in which someone acts on behalf of the *tutor*, as conveyed in Watson's translation<sup>137</sup>, but rather with the problem of the administration by someone who acts as a *tutor* without being appointed to do so. Under this framework, both Celsus and Ulpian deal with the sale concluded by the *protutor* and the possibility of the ward to recover his property. The fact that in both texts the ward is able to successfully reclaim his property enables us moreover to perform a minor correction regarding Ulpian's text, where the *littera Florentina* reads "*rem vendiderit et usucapta sit*", by changing the "*et*" into a "*nec*"<sup>138</sup>. According to this modification, the thing would have been sold but not yet

<sup>133</sup> Lenel, *Paling.* (1889) I, col. 161; II, col. 863-864.

<sup>134</sup> Lenel, *EP* (1927), p. 501-513.

<sup>135</sup> Lenel, *Paling.* (1889) I, col. 162 n. 2.

<sup>136</sup> Not every case where someone acted as a *tutor* without being authorized to do so implied a fraudulent motive, as can be seen in D. 27,5,1,1 (Ulp. 36 *ed.*): "*Pro tutore autem negotia gerit, qui munere tutoris fungitur in re impuberis, sive se putet tutorem, sive scit non esse, finget tamen esse*".

<sup>137</sup> "If someone is administering affairs not as a tutor, but on behalf of a tutor..." (transl. Watson).

<sup>138</sup> Seiler, *Negotiorum gestio* (1968), p. 230 n. 9, with further references. This correction has also been adopted in the Dutch translation of the Digest, as can be seen in Spruit *et al.*, *Corpus Iuris Civilis* (2001) VI, p. 176 n. 2, as well as by Sansón, *La transmisión* (1998), p. 116.

usucapted, which agrees with the general meaning of the text, according to which the ward would indeed be able to recover and no defence would avail against him. This modification also agrees with the texts of Celsus, which describes the property of the ward as not yet usucapted (*nec ea usucapta est*).

Both Celsus and Ulpian agree on the outcome of the case and the ground of it: the ward will be able to recover his property, because the *protutor* did not have the administration of the ward's affairs. This decision shows that there is a fundamental difference between this case and that laid down in D. 44,4,4,23. While the transfer of the *iustum dominium* will not take place both when the *tutor* exceeds his faculties of administration and when he is not appointed *tutor* at all, Roman jurists appear to be willing to grant praetorian remedies only in the former case, first of all because the *pupillus* could become richer but also in order to protect the legal certainty in contracts concluded with a *tutor* who is lawfully appointed. This implies that these considerations play no role<sup>139</sup> when the person fraudulently acting as a *tutor* has not been actually appointed, making the outcome of the case more straightforward: ownership will not be transferred and the ward will be able to recover his goods once he is old enough, or through his real *tutor*. Only Ulpian explicitly declares that the *exceptio* will not avail against the ward, but it is nonetheless likely that the text of Celsus would have also been framed within the study of the *exceptiones* arising in the administration of *tutores* and *protutores*, considering the position of the text within the Palingenesia and the link with D. 44,4,4,24. Perhaps the original context was the *exceptio rei venditae et traditae*<sup>140</sup>, but one cannot rule out that it would deal specifically with the *exceptio* which arises from the *dolus* of the *tutor*, since this subject was a matter of concern already for earlier jurists<sup>141</sup>. It is accordingly difficult to determine whether the reference to the *dolus* of the *tutor*, which is one of the few elements mentioned by Ulpian which do not feature in the text of Celsus, was indeed discussed in the preceding text by Celsus or whether he was dealing with a different problem. It could indeed be the case that Ulpian was addressing a problem which was not discussed by Celsus – the *dolus* of the *tutor* – and that he structured his outcome on the text of this author, assessing (*putem*) that the element which determines the outcome in D. 27,5,2 would be equally relevant to solve the case of the *protutor* acting fraudulently. Be that as it may, the absence of any reference to an *exceptio* in D. 27,5,2 may be explained by the fact that the *exceptio* has no role to play here, and the contrast with other cases in which the *exceptio* was indeed

<sup>139</sup> Whether the enrichment of the ward as a result of the management of the *protutor* – by receiving the price of the sold object – will grant an acquirer an *exceptio doli* against his claims is a matter of controversy among modern scholars, but it is not discussed in the sources. See on this point Seiler, *Negotiorum gestio* (1968), p. 229 n. 3; Sansón, *La transmisión* (1998), p. 115 n. 325.

<sup>140</sup> Seiler, *Negotiorum gestio* (1968), p. 229.

<sup>141</sup> See e.g. D. 26,7,61 (Pomp. 20 *epistolarum*), where Aristo's opinion regarding the *culpa tutoris*, as well as D. 26,9,3 (Pap. 20 *quaestionum*), where Sabinus' views are conveyed regarding the *dolus tutoris*, as well as D. 50,17,198 (Jav. 13 *ex Cassio*).

CHAPTER 4. PRAETORIAN REMEDIES REGARDING THE TRANSFER  
OF OWNERSHIP BY A NON-OWNER

relevant could be expressed in an equally clear way by simply showing that the ward will be able to successfully recover his ownership – which implies that no defence will avail against him – if the person who delivered his property had not been appointed *tutor*.

## Chapter 5. *Mancipatio* and *in iure cessio* by a non-owner

It was pointed out incidentally in the last chapter that there is very limited information regarding whether a non-owner could transfer ownership through one of the so-called “formal” ways to transfer ownership – i.e. *mancipatio* and *in iure cessio*. Therefore, while it is commonly agreed that the prohibitions to dispose (e.g. Gai 2,63) also affect the *mancipatio* and *in iure cessio*, it is not clear to what extent the cases mentioned in Gai 2,64 apply to these formal ways of transferring ownership. This uncertainty is caused by the very limited available references to the *mancipatio* and *in iure cessio* in the sources. Due to this circumstance, it has been considered convenient to deal with the transfer of ownership by a non-owner through *mancipatio* and *in iure cessio* only after drawing a clear picture concerning the problem in the context of *traditio*. There is moreover a particular circumstance for approaching this problem in a separate chapter, namely the decisive influence of the traditional ideas regarding the ‘prohibition of direct representation’ in Roman law. As mentioned above<sup>1</sup>, these formal ways of transferring ownership have been traditionally regarded by some scholars as unsuited to be concluded by a non-owner due to the primitive ban which Roman law would initially have applied regarding direct representation. Since the traditional theories on this point have been contested throughout the present study, this chapter attempts to revise the evidence on the subject without having as a starting point that formal ways of transferring ownership necessarily had to be performed by the owner due to a primitive prohibition of direct representation.

### 1. Direct representation and *mancipatio* or *in iure cessio* by a non-owner

Considering that there is very limited evidence regarding formal modes of transferring ownership, and particularly concerning the possibility for a non-owner to perform them, it becomes important to determine what led scholars to lay their attention on this point in the first place. After all, if the sources rendered no evidence whatsoever on this point, there would be little need to discuss it in the first place. While the main reason since the 19<sup>th</sup> century had to do with the theories concerning direct representation in Roman law, the discussion regarding the *mancipatio* and *in iure cessio* by a non-owner can be traced back the 16<sup>th</sup> century. It was Jacobus Raevardus (1535-1568) who first claimed that Roman law did not accept that an *actus legitimus*, i.e. an act belonging to the old *ius civile*, could be performed through another person<sup>2</sup>. This author took as a starting point for his discussion whether an *hereditas* could be acquired through a *procurator*

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<sup>1</sup> Chapter 1, Section 1 above.

<sup>2</sup> Raevardus, *De auctoritate prudentum* (1566), p. 36-51.

performing the *cretio*, which Duarenus (1509–1559) had considered possible<sup>3</sup>. Raevardus claimed that it was not possible to conclude these acts through another person on account of the rule “*Nemo alieno nomine lege agere potest*” of D. 50,17,123pr<sup>4</sup>, and therefore excluded that a number of acts could be performed in this way, including the *mancipatio*<sup>5</sup>. Following this idea, Raevardus conceived that the only way in which the *mancipatio* could take place through another person was to transfer ownership to him in the context of the *fiducia*, so that he could in turn perform the *mancipatio*<sup>6</sup>. As an example of this practice, the author quotes the case of Cicero, *Ad Atticum* 13,50,2, where a series of owners convey ownership through *mancipatio* to the slave of an individual so that the acquirer may in turn perform the *mancipatio* to the buyer at an auction. This would explain the need to resort to the *fiducia* and the significance of this institution in Roman law in relation to the *mancipatio*. The views of Raevardus would not be universally accepted, being for instance contested by Conradi (1701–1748), who not only discarded the ideas of Raevardus concerning the acquisition of the *hereditas* through a *procurator* performing the *cretio*<sup>7</sup>, but also his theories concerning the role of the *fiducia* in relation to the *mancipatio* through another person<sup>8</sup>. Regarding the text of Cicero, *Ad Atticum* 13,50,2, Conradi considers that it in no way suggests the existence of a transfer of ownership through *fiducia*, but that instead the owners would give the auctioneer an authorization to transfer through *mancipatio* by means of the slave sent to them<sup>9</sup> – a reading which the author claims to draw from the commentaries of Paulus Manutius (1512–1574)<sup>10</sup>. Other authors, such as Averanius (1662–1738) were more receptive of the ideas of Raevardus, claiming that it was indeed a *regula iuris* that an *actus legitimus* could not be concluded through another person, which would imply among other things that a *mancipatio* could only be performed by a

<sup>3</sup> Duarenus, *Disputationum anniversariarum* (Luca 1768), lib. 2 cap. 27, p. 76–77.

<sup>4</sup> D. 50,17,123pr (Ulp. 14 *ed.*): “No one can legally act on behalf of another” (transl. Watson).

<sup>5</sup> Raevardus, *De auctoritate prudentum* (1566), p. 39–40: “Alieno nomine lege agree nemo poterat, capit. cxxiii. de reg. iur. [D. 50,17,123] Hoc est usitata legis actionum solemnna apud magistratus populi Rom. nemo alterius nomine poterat exercere. capit. xv. in fi. de adop. [Inst. 1,11,12]. Et idcirco per alium mancipare, per alium adire hereditatem, per alium manumittere, per alium adoptare, et sic deinceps, nemini fuisse liberum videtur”.

<sup>6</sup> Raevardus, *De auctoritate prudentum* (1566), p. 41–51.

<sup>7</sup> Conradi, *De pacto fiduciae* (Helmstedt 1732), p. 12–14.

<sup>8</sup> Conradi, *De pacto fiduciae* (Helmstedt 1732), p. 23–25.

<sup>9</sup> Conradi, *De pacto fiduciae* (Helmstedt 1732), p. 24: “Enimvero, quomodo fiduciaria mancipatio quaedam hoc in loco intelligi possit, non animadvertimus... Cicero debuit Vestorii servo iubere, id est mandare, ut pro sua parte Heterio manciparetur fundus Brinnianus, ut ita, Cicerone auctore, Vestorius, qui, uti supra vidimus, hereditatem, in qua iste fundus erat, pro Cicerone creverat, fundum Puteolis recte, ex voluntate domini, mancipio dare posset”.

<sup>10</sup> Manutius, *Commentarius in epistolas* (Venice 1568), p. 644 notes, when commenting the words “ut ipse ei Puteolis recte mancipio dare posset”: “ut caveretur Heterio; cui si fundum iniussu Ciceronis Vestorius dedisset, non bene dedisset”.

non-owner who received the thing *fiduciae causa* from the owner, as the above-quoted letter of Cicero would prove<sup>11</sup>.

Considering these developments, it becomes clear that Mühlenbruch and Savigny were not offering a completely innovative view when claiming that Roman law originally did not allow to conclude legal acts through another person, since this idea followed already from preceding scholars. The influence on this point is not to be doubted, especially considering that Mühlenbruch would often quote Averanius to support some of his views on the subject<sup>12</sup>. To a considerable extent, Mühlenbruch reproduces some of the views of previous authors regarding the acceptance of an inheritance, *acceptilatio*, *mancipatio* and other *actus legitimi*, which is why Cicero, *Ad Atticum* 13,50,2 is again brought into discussion, as an example that the only way for a non-owner to perform the *mancipatio* was to acquire the thing himself in the first place *fiduciae causa*<sup>13</sup>. His contribution is mainly to add other pieces of evidence that could support the claim that there was a general impossibility to act through another person<sup>14</sup>. Moreover, both Mühlenbruch and Savigny expanded the original claim of previous scholars by claiming the existence of a general ban on 'direct representation' in Roman law, which not only went beyond the *actus legitimi*, but also casts a shadow of doubt over every text where the idea of 'direct representation' could be identified. While developing these general notions, very little attention is bestowed in actually proving that the *mancipatio* or *in iure cessio* cannot be concluded by a non-owner, normally resorting to very general texts which deal with other problems. This in turn shows that these scholars rely more on the general consistency of their theories than on the scarce evidence on the topic<sup>15</sup>.

It has already been discussed above that there is no solid ground to claim the existence of a primitive ban of direct representation in Roman law<sup>16</sup>. Scholars have moreover pointed out that some *actus legitimi* could in fact be performed through another person<sup>17</sup>. However, the idea that formal acts for transferring ownership could not be performed by a non-owner was firmly rooted in the general notions regarding the evolution of direct representation in Roman law. Mitteis would be the first author to gather and discuss most of the evidence available concerning the possibility of concluding a *mancipatio* and *in iure cessio* through another person, striving to show that classical Roman law would not

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<sup>11</sup> Averanius, *Interpretationum juris* (Leiden 1753) I, lib. I, cap. XII, n. 54, (p. 106).

<sup>12</sup> Mühlenbruch, *Doctrina Pandectarum* (1831) III, p. 323 (§ 694) n. 5; Mühlenbruch, *Cession* (1836), p. 45 n. 75; p. 46, n. 77.

<sup>13</sup> Mühlenbruch, *Cession* (1836), p. 46, n. 77.

<sup>14</sup> Mühlenbruch, *Cession* (1836), p. 41-42.

<sup>15</sup> Mühlenbruch, *Cession* (1836), p. 42-43 n. 69; p. 46, n. 77; Savigny, *System* (1841) III, p. 93 n. (c); p. 95. See moreover Puchta, *Institutionen* (1842) II, p. 331.

<sup>16</sup> Chapter 1, Section 1 above.

<sup>17</sup> See e.g. Hellmann, *Stellvertretung* (1882), p. 106; Roby, *Roman Private law* (1902) I, p. 404-405.

accept this. Due to the scarcity of sources on this point, Mitteis focused mainly on the cases where the sources were more generous, namely those in which a slave or legal guardian appeared to perform a *mancipatio* and those where a son-in-power carried out the *manumissio vindicta* following the authorization of his father<sup>18</sup>. His claims would set the mood for the discussion of this point throughout the 20<sup>th</sup> century, which would always find its starting point in the ideas of Mitteis. While his views have been questioned by some scholars, the idea that classical Roman law did not allow formal modes of transferring ownership to be concluded by a non-owner has remained dominant<sup>19</sup>, influencing the approach to several problems. Following this idea, for instance, it is usually claimed that the *nemo plus* rule, which is to be found within fragments originally dealing with formal modes of transferring ownership (D. 50,17,54 and D. 41,1,20pr), could only be truly applied to the *mancipatio* and the *in iure cessio*, because only in these cases was it not possible for a non-owner to transfer ownership<sup>20</sup>. Moreover, it is often claimed that the only way in which a non-owner may perform the *mancipatio* is to receive the thing *fiduciae causa* in order to retransfer through *mancipatio* himself<sup>21</sup>. Other ideas have been derived from this view as well, such as the claim of Sansón that the *actio Publiciana* may have originally been used to protect the acquirer who received through *mancipatio* an object from an authorized non-owner<sup>22</sup>.

Since the idea of a primitive ban on direct representation finds little support in the sources, and considering that this idea served as the main ground for scholars to claim that a non-owner cannot resort to formal ways of transferring ownership, one may wonder: how strong are the arguments to defend this position nowadays? After all, it is more than clear that scholars until Mitteis denied the *mancipatio* or *in iure cessio* by a non-owner precisely on the assumption that this would not fit with their general views on direct representation, not because the sources offered a clear view on the subject. In fact, before Mitteis offered a careful overview of the sources, scholars relied almost exclusively on general statements, and seldom did they bring specific texts to support their views. Mitteis himself pointed out the lack of evidence to support his position, for which he blamed the compilers<sup>23</sup>. It is evident from the analysis of this debate

<sup>18</sup> Mitteis, *Manumissio vindicta* I (1900), p. 199-211; Mitteis, *Manumissio vindicta* II (1904), p. 379-381; Mitteis, *Römisches Privatrecht* (1908), p. 208-211.

<sup>19</sup> See e.g. Popesco-Ramniceano, *Représentation* (1927), p. 53-57; Siber, *Römisches Recht* (1928) II, p. 412-413; Burdese, *Autorizzazione* (1950), p. 21 n. 30; Kaser, *Verfügungsakte* (1950), p. 66; Kaser, *RPR* (1971) I, p. 267 and 286; Claus, *Gewillkürte Stellvertretung* (1973), p. 307; Hernanz, *Iussum* (1993), p. 70 ff.; Weimar, *Eigentumsübergang* (1993), p. 552; Andrés Santos, *Subrogación real* (1997), p. 190; Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 135; Perani, *Pignus distrahere* (2014), p. 52 n. 124.

<sup>20</sup> See Chapter 6 below.

<sup>21</sup> Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 128-129, 143-144, 178.

<sup>22</sup> Sansón, *Función originaria* (1997), p. 152; Sansón, *La transmisión* (1998), p. 151 ff.

<sup>23</sup> Mitteis, *Manumissio vindicta* I (1900), p. 201; Mitteis, *Römisches Privatrecht* (1908), p. 208 n. 16: “Der Quellenbeweis für die Unmöglichkeit stellvertretender

that the categorical way in which the doctrine has traditionally denied the possibility to transfer ownership through formal ways by a non-owner openly contrasts with the very weak textual foundations on which this opinion rests, which have been traditionally adapted to fit within this general theory. The discussion therefore shows the existence of an untested preconception: the complete prohibition of direct representation in formal ways to transfer ownership. This starting point is all the more dangerous considering that it is normally left open where exactly can we identify a case of ‘direct representation’ in the sources, which is why Buckland, when criticizing the claims of Mitteis, wittily pointed out that although the general notions regarding direct representation in Roman law were not unfounded, the different sets of rules in Roman law did not approach the issue from the point of view of a general prohibition of direct representation<sup>24</sup>. He therefore urged that “[i]n discussing this question [the possibility that a slave may mancipate] it is necessary to avoid assumptions as to what they [the Romans] must have held, and, in particular, the assumption that wherever we see representation they also did”<sup>25</sup>.

At this point it becomes clear that, unless one assumes from the start that no *actus legitimus* could be concluded through another person, it is difficult to derive from the sources that ownership could not be transferred through *mancipatio* by a non-owner. That the arguments in favour of this starting point have become obsolete in the course of time can be seen in the fact that Ankum, when concluding his first contribution regarding *mancipatio* by slaves, discusses what the ground would have been to deny this possibility<sup>26</sup>. When doing so, he discards the traditional ground upheld by previous scholars, namely that slaves could not conclude formal acts of alienation (*förmliche Verfügungsgeschäfte*). Ankum shows that in fact it is well documented that slaves could perform various formal acts – acquire through *mancipatio*, *stipulatio* and *cretio* – and that they could also carry out acts of alienation such as the *traditio* and the pledge. He therefore deduces that the ground for this prohibition must lie elsewhere, and most likely in the fact that a slave could not fulfil the role of an *actor* to defend the acquirer in case the latter was evicted, since slaves could not appear in court as parties. These ideas merit several observations. First of all, it is worth noting that the 19<sup>th</sup> century theory of a general prohibition regarding acts concluded by another person – particularly formal acts – no longer finds a solid ground, since by the time Ankum wrote this article the evidence originally presented on behalf of this notion no longer seemed equally convincing. This is also the reason why the author does not look

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Manzipsationsveräußerung ist freilich nicht ganz leicht zu führen, weil die klassischen Erörterungen über diese Frage von den Kompilatoren gestrichen sind”. Corbino, *Forma librale* (1984), p. 2258 accordingly notes that although there is an extremely authoritative doctrinal tradition denying the possibility to mancipate by a non-owner, the textual support for that opinion is not as strong as it would seem.

<sup>24</sup> Buckland, *Mancipatio by a slave* (1918), p. 372.

<sup>25</sup> Buckland, *Mancipatio by a slave* (1918), p. 373.

<sup>26</sup> Ankum, *Mancipatio by slaves* (1978), p. 13.

for a general ground which would cover every case of *mancipatio* by a non-owner, but only attempts to explain the case of the slave on its own. It is however not particularly convincing that the impossibility of slaves to appear as parties in trial would explain their inability to perform the *mancipatio*, considering that the same objection could be made regarding every case in which a slave was party to a contract, since never could the slave appear in trial to demand or answer for his contractual obligations.

## 2. General evidence on the *mancipatio* by a non-owner

Considering that traditionally scholars have found a starting point for denying the *mancipatio* by a non-owner in preconceptions which are nowadays largely obsolete, what actual evidence can be brought up to deny that a non-owner may transfer ownership through *mancipatio*? First of all, it is worth noting that there is not a single text which can be seen as a general prohibition regarding the intervention of another person. On the contrary, there are several texts where ownership is acquired through a person performing the *mancipatio* on behalf of someone else<sup>27</sup>, as can be seen in two texts of Gaius dealing with acquisitions through *alieni iuris*:

Gai 2,87: Igitur quod liberi nostri, quos in potestate habemus, item quod servi nostri mancipio accipiunt vel ex traditione nanciscuntur sive quid stipulentur vel ex aliquolibet causa adquirunt, id nobis adquiritur...<sup>28</sup>

Gai 3,167: Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut mancipio accipiendo illi soli adquiret, velut cum ita stipuletur: TITIO DOMINO MEO DARI SPONDES? aut cum ita mancipio accipiat: HANC REM EX IURE QUIRITIVM LUCII TITII DOMINI MEI ESSE AIO, EAQUE EI EMPTA ESTO HOC AERE AENEAQUE LIBRA<sup>29</sup>.

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<sup>27</sup> Corbino, *Forma librare* (1984), p. 2258-2261.

<sup>28</sup> Gai 2,87: "First we acquire things which descendants within our power and also our slaves obtain by mancipation or delivery, or when they take stipulations for anything or when things come to them on any other basis..." (transl. Gordon/Robinson).

<sup>29</sup> Gai 3,167: "A slave held in co-ownership certainly acquires for his owners in proportion to their shares. That does not apply where he acquires for one of the owners by taking a stipulation in his name alone or by receiving a mancipation in his name, as where, for instance, he takes a stipulation in these words: 'Do you solemnly promise to give to my owner Titius?' or when the mancipation takes the form: 'I say that this thing belongs by Quiritary right to Lucius Titius my owner and let it be bought for him with this bronze and these bronze scales'" (transl. Gordon/Robinson). See on the distinctions within this text Corbino, *Forma librare* (1984), p. 2268.

These texts show that the *mancipatio* was not as inflexible as it is usually thought, and that the intervention of another person was not excluded by its very nature or because of a general ban on direct representation. Even though the acquisition of ownership does not allow establishing a direct analogy with the transfer of ownership, the texts show at least that the intervention of intermediaries in formal acts of transfer of ownership and in the name of the owner was not something unheard of in Roman law<sup>30</sup>. It could be argued that the text deals with the acquisition of a slave, which was precisely one of the cases in which ownership was acquired directly by the owner through the intervention of another individual. It is however difficult to think of a reason why a slave could intervene only acquiring ownership, and not disposing of it, particularly since, as Buckland has pointed out, the acquirer has a much more active role in the *mancipatio* than the transferor<sup>31</sup>. Moreover, there is no structural feature of the *mancipatio* which would enable a slave only to acquire and not to transfer, unlike what can be seen in other *actus legitimi*. For instance, while a slave could take the *acceptilatio* on behalf of his master, he could not grant it even if he was authorized, because in that case he should have pronounced the fixed words ‘*habeo acceptum*’, for which he did not have the proper position<sup>32</sup>. Similarly, as it will be shown below, Gai 2,96 excludes that an *alieni iuris* may acquire through *in iure cessio*, since they cannot appear vindicating, having nothing of their own. No similar structural obstacle is to be found in the case of the *mancipatio*, which is why it seems safe to assume that a non-owner could both acquire and transfer ownership on behalf of someone else by resorting to it.

That a slave could acquire for his owner is also attested by epigraphic sources, such as the *formula Baetica*<sup>33</sup>, which contains a *mancipatio fiducia causa* where a slave appears to acquire through *mancipatio* on behalf of his owner. A more recent discovery concerns the sale of the girl Fortunata, which was edited first by Tomlin<sup>34</sup> and later by Camodeca<sup>35</sup>, and where we find again a slave acting as the *mancipio accipiens* on behalf of his master. Considering both the juristic and epigraphic evidence on the subject, it is rather puzzling that Reduzzi Merola would claim as ‘evident’ that the parties did not actually conclude a *mancipatio*<sup>36</sup>.

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<sup>30</sup> Buckland, *Mancipatio by a slave* (1918), p. 372: “it is not easy to see why the rule against representation should not equally have excluded acquisition by *mancipatio* through a slave, which it certainly did not. And if the power to acquire did not rest on representation, it is not obvious why the power of alienation, so far as it existed, should be thought of as resting on this conception”.

<sup>31</sup> Buckland, *Mancipatio by a slave* (1918), p. 373: “A slave could acquire for his master by *mancipatio*, and his is the more remarkable in that it was the acquirer who took the active part and spoke the formal words... It is therefore not unthinkable that with authorization he could take the more passive part which falls to the transferor”.

<sup>32</sup> Buckland, *Mancipatio by a slave* (1918), p. 373.

<sup>33</sup> FIRA (1968) III, p. 296-297. See on this text Chapter 5, Section 3 below.

<sup>34</sup> Tomlin, *The Girl* (2003), p. 41-51.

<sup>35</sup> Camodeca, *Puella Fortunata* (2007), p. 397-404.

<sup>36</sup> Reduzzi Merola, *D. 21,2,39,1* (2004), p. 320 n. 15.

Moreover, even if in fact the *mancipatio* had become ‘degenerated’ in provincial legal practice and was simply mentioned in acts of sale as an empty formality, as some scholars consider<sup>37</sup>, one can well assume that this practice was modelled after the common legal practice in Roman law, namely that a slave could acquire for his master through *mancipatio*, instead of understanding that an act of sale would contain an element contrary to the law<sup>38</sup>.

The possibility that a non-owner could acquire through *mancipatio* for someone else was not restricted to slaves or other *alieni iuris*, as we find in the *Tabula Erculanensis* 87,11,9-11, that bears witness to the restitution through *mancipatio* of a *fundus dotalis*, which is performed to a freedman who acts on behalf of his patron<sup>39</sup>. This evidence, to the dismay of some scholars<sup>40</sup>, seems to openly contradict the principle *per extraneam personam nobis adquiri non posse*, questioning at the same time that Roman law would not have accepted forms of ‘direct representation’ in legal acts concluded by a *sui iuris*<sup>41</sup>. Another piece of evidence in favour of the acquisition by *mancipatio* through another person can be found in Cicero’s *Pro Caecina*, which has been studied by Corbino<sup>42</sup>. The central point of the *oratio* is whether a certain Aebutius, who was commissioned by Caesennia to acquire a piece of land at an auction, acquired the land for himself or for Caesennia. Caecina – Caesennia’s heir – claimed that the land became property of Caesennia because Aebutius had acquired by mandate of her. Different arguments come into play to determine who acquired ownership: whether Caesennia had given a mandate to Aebutius to acquire ownership; whether Aebutius acted *nomine alieno* or *nomine proprio*, and what had Caesennia instructed him regarding this point; whether Aebutius used Caesennia’s money to buy the *fundus*; whether it was known at the auction that he was acting on behalf of Caesennia. As Corbino has shown, this discussion can only take place if is peacefully accepted by both parts that it was possible for a *sui iuris* to acquire ownership through *mancipatio* on behalf of another person. Otherwise one could

<sup>37</sup> Camodeca, *Puella Fortunata* (2007), p. 400.

<sup>38</sup> Coppola Bisazza, *Dallo iussum domini* (2008), p. 108 n. 42.

<sup>39</sup> FIRA (1968) III, p. 612-614. See in general on this text Arangio-Ruiz/Pugliese Carratelli, *Tabulae Herculanae V* (1955), p. 470 ff.; Cosentini, *La dote di Paolina* (1971), p. 715-733; Corbino, *Mancipio asse aere*, p. 463-467; Coppola Bisazza, *Dallo iussum domini* (2008), p. 284-287.

<sup>40</sup> Arangio-Ruiz/Pugliese Carratelli, *Tabulae Herculanae V* (1955), p. 477 – and later Arangio-Ruiz in FIRA (1968) III, p. 613 – attempt to explain the acquisition of property by *mancipatio* through a freedman in a way compatible with the principle *per extraneam personam nobis adquiri non posse*, indicating that this would be due to a certain subsistence of links of subordination between a *patronus* and his *libertus*, opinion which is however authoritatively discarded by Cosentini, *La dote di Paolina* (1971), p. 731, who finds no proof of this relationship. Cosentini, *La dote di Paolina* (1971), p. 733 and Orestano, *Rappresentanza* (1967), p. 798 n.1 hypothesize that the *libertus* would draw this faculty to acquire by acting as a *procurator*, but Corbino, *Forma librare* (1984), p. 2261 declares that if that were the case, one could expect to see that circumstance in the document itself.

<sup>41</sup> See Corbino, *Forma librare* (1984), p. 2258-2261.

<sup>42</sup> Corbino, *La ‘pro Caecina’* (1982), p. 277-287.

have expected Aebutius to defend himself by invoking the rule *per extraneam personam*. This *oratio* appears therefore as a compelling refutation for the general validity of this rule, particularly regarding the *mancipatio*<sup>43</sup>.

The existence of a primitive ban on transferring ownership by *mancipatio* through a non-owner is moreover difficult to harmonize with the fact that in the primitive *consortium ercto non cito* one of the co-owners could validly mancipate a common thing:

Gai 3,154b: ...In hac autem societate fratrum ceterorumve, qui ad exemplum fratrum suorum societatem coierint, illud proprium erat, [unus] quod vel unus ex sociis communem servum manumittendo liberum faciebat et omnibus libertum adquirebat: item unus rem communem mancipando eius faciebat, qui mancipio accipiebat<sup>44</sup>.

Most scholars have pointed out that this text most probably does not refer to a case in which one of the co-owners is authorized by the others to carry out the manumission or *mancipatio*<sup>45</sup> – which would directly prove that an authorized non-owner could perform the *mancipatio*. If that was the case, there would be nothing special about this ancient institution, which is precisely the point which Gaius is trying to make, since in classical law it was also possible for one of the co-owners to transfer ownership if he was authorized to do so by the others. It is therefore not possible to see this text as an example of ‘direct representation’<sup>46</sup>. Nonetheless, this information certainly does not fit well with the idea that pre-classical Roman law did not allow that an act performed by another person could have direct consequences to the owner – if anything, it would prove the opposite, namely that in some cases even an unauthorized non-owner could affect the position of the owner. In this particular case, the unauthorized non-owner would validly transfer through *mancipatio* the ownership of the other co-owners<sup>47</sup>, which shows that there is nothing fundamentally wrong concerning the possibility that a non-owner may affect the position of the owner by resorting to formal ways of transferring ownership. At this point, it is worth noting that this text only became available to scholars in the thirties of the 20<sup>th</sup> century,

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<sup>43</sup> Corbino, *La ‘pro Caecina’* (1982), p. 285-287 however observes cautiously that his conclusions would be more limited if the acquisition through a third person could only take place in the context of an auction and through *addictio*. The scarce information on this subject prevents therefore from holding his conclusions as definitive.

<sup>44</sup> Gai 3,154b: “...However, in this partnership between brothers and between other people entering a partnership in imitation of brothers, a special feature was that even one of the partners by manumitting a slave held in co-ownership made him free and the freedman of all of them; again, one partner by mancipating a thing held in co-ownership made it the property of the recipient” (transl. Gordon/Robinson).

<sup>45</sup> Buckland, *Alienation and manumission* (1942), p. 486.

<sup>46</sup> Claus, *Gewillkürte Stellvertretung* (1973), p. 62-64.

<sup>47</sup> See on this text Gutiérrez-Masson, *Del «consortium»* (1987), p. 95-101.

remaining therefore unknown to those who conceived the idea of a primitive prohibition of direct representation.

While there are no texts which would generally indicate the impossibility of concluding a *mancipatio* through a non-owner, there are other fragments which suggest that it was in fact possible for a non-owner to *mancipate*. For instance, some texts dealing with the transfer of ownership by a non-owner are phrased in such general terms that they seem to encompass every mode of transferring ownership. That is the case in Gai 2,62-64<sup>48</sup>, where Gaius refers generally to the *alienatio* by a non-owner<sup>49</sup>, without restricting its scope to the *traditio*. Moreover, we are explicitly informed by Gaius that the prohibition in Gai 2,63 covered also the cases of *in iure cessio* and *mancipatio*<sup>50</sup>, which shows that the problem of the *potestas alienandi* as generally framed in Gai 2,62-64 also covers formal ways of transferring ownership. This agrees with the fact that the text stands at the end of the part where Gaius deals with the transfer of ownership in general and the acquisition through *usucapion*, since the text would concern all of these modes of acquiring ownership.

Another text which would appear to comprise the different modes of transferring ownership is to be found in the *Codex*:

C. 7,26,1 (Caracalla, 213): Mancipia tua si ab eis distracta sunt, qui ius vendendi non habuerunt, vindicare ea potes. Nec enim usucapi ab emptoribus potuerunt, cum illicita venditione furtum contractum sit<sup>51</sup>.

The text grants the possibility to the owner of slaves who have been transferred by someone who does not have the *ius vendendi* to recover them by resorting to the *rei vindicatio* (*vindicare ea potes*). As it stands, the text does not seem to have undergone any modifications, escaping from remarks even in the *Index Interpolationum*<sup>52</sup>. The fact that a non-owner may have the *ius vendendi* to alienate is formulated with general terms (*distrahere*), which do not seem to refer exclusively to the *traditio*. If that were the case, the owner would anyhow have the *rei vindicatio*, since the non-owner would have performed a *traditio* over a *res Mancipi* which would have only granted the acquirer the bonitary ownership. None of these problems are present in this text, which sets it apart from other fragments dealing with the *traditio* of a *res Mancipi* by a non-owner, such as

<sup>48</sup> Corbino, *Forma librare* (1984), p. 2261-2262.

<sup>49</sup> Gai 2,62: "...alienandae rei potestatem... alienare possit"; 2,63: "prohibetur alienare"; 2,64: "...alienare potest... voluntate debitoris intellegitur pignus alienari".

<sup>50</sup> Gai 2,63: "...quamvis ipsius sit vel Mancipatum ei dotis causa vel in iure cessum vel usucaptum".

<sup>51</sup> C. 7,26,1: "If your slaves were sold by those who had no right to sell, you may vindicate them. Nor could the purchasers acquire ownership by prescription, since the unlawful sale constituted theft" (transl. Blume, modified).

<sup>52</sup> Broggini, *Ind. Itp.* (1969), p. 122.

D. 21,3,1,2 and D. 21,3,1,5<sup>53</sup>. It would therefore appear that the problem of the *ius vendendi* over *res Mancipi* is unrelated to the particular mode of transferring ownership which is used.

There are other texts within the Justinianic compilation where the activity of the compilers did not hide completely the evidence concerning the transfer of ownership through formal acts by a non-owner, as can be seen in the following text:

D. 6,1,41,1 (Ulp. 17 *ed.*): Si servus mihi vel filiusfamilias fundum vendidit et tradidit, habens liberam peculii administrationem, in rem actione uti potero. Sed et si domini voluntate domini rem tradat, idem erit dicendum: quemadmodum cum procurator voluntate domini vendidit vel tradidit, in rem actionem mihi praestabit<sup>54</sup>.

In this case, which was already discussed above<sup>55</sup>, we find a series of non-owners who may validly transfer ownership – granting the acquirer an *actio in rem* – over a *res Mancipi* – a piece of land – as long as they have the *libera administratio peculii* or act *voluntate domini*. Buckland and Corbino claimed that, if the text referred to Italic land, the transfer of ownership must have taken place through a formal way of transferring ownership<sup>56</sup>. Against this view it is usually argued that the text was located by Lenel under the rubric “*Si praedium stipendiarium vel tributarium petatur*”<sup>57</sup>, which would clearly show that we are dealing with a *fundus provincialis*<sup>58</sup>. Accordingly, the *actio in rem* granted to the acquirer in the text would not be the *rei vindicatio*, but a provincial equivalent or the *actio Publiciana*. It is however worth noting that Lenel was not entirely convinced of locating fragments 585–589 of Ulpian under this rubric, reporting that he only did so because they appeared to be referred to the transfer of a piece of land by *traditio*<sup>59</sup>. It is moreover not clear whether all of these texts referred indeed to provincial land, or whether they dealt exclusively with the transfer of ownership by *traditio*.

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<sup>53</sup> Chapter 4, Section 3 above.

<sup>54</sup> D. 6,1,41,1: “If a slave or a son in parental power, having free management of his *peculium*, has sold and delivered land to me, I can bring an action *in rem* for it; and if he delivers his principal’s thing with his principal’s consent, the same applies. So also when a *procurator* has sold and delivered with his principal’s consent, that will give me an action *in rem*” (transl. Watson).

<sup>55</sup> Chapter 1, Section 4(a) and Chapter 2, Section 1(a) above.

<sup>56</sup> Buckland, *Mancipatio by a slave* (1918), p. 377; Corbino, *Legittimazione a mancipare* (1976), p. 70 n. 53

<sup>57</sup> Lenel, *Paling*. (1889) II, col. 515.

<sup>58</sup> Ankum, *Mancipatio by slaves* (1978), p. 14 n. 14; Ankum, *Mancipatio by slaves* (1984), p. 17.

<sup>59</sup> Lenel, *Paling*. (1889) II, col. 515 n. 5: “Fr. 585–589 sub hac rubrica non sine dubitatione collocavi: moveor autem eo, quod in his omnibus de fundo agi videtur non per mancipationem, sed per traditionem”. See moreover Lenel, *EP* (1927), p. 188 n. 6.

In some of them there is no room for discussion. For instance, in D. 6,1,77<sup>60</sup> – fragment 589 of Ulpian in the *Palingenesia* – we find a woman who donates land through a letter to another person who was on that land at that time, thereby transferring him possession and granting him an *actio in rem*. This can only happen in the context of the *traditio*, and therefore the text cannot possibly have referred to formal ways of transferring ownership. Other texts are less clear on the point, and particularly D. 39,6,29<sup>61</sup> – fragment 587 of Ulpian in the *Palingenesia* – which does not refer to a *fundus* in the first place, leading Erman and Lenel to suspect that the text must have been interpolated<sup>62</sup>. Moreover, this text not only refers to the *actio in rem*, but it also explicitly grants the donor a *rei vindicatio* (*donator poterit rem vindicare*). All of this makes it even more doubtful that Ulpian was dealing exclusively with the *traditio* of provincial land. Concerning D. 6,1,41,1, there is also an interesting piece of evidence which could show that the text originally also dealt with the *mancipatio*, namely that towards the end we are told that an authorized *procurator* ‘sold or delivered’ (*vendidit vel tradidit*). This is one of the few elements of the text which appears to be truly anomalous<sup>63</sup>, leading scholars to claim that the text would originally read “*et tradidit*”<sup>64</sup>. It is however rather inexplicable that the compilers would have modified the original “*et*” for “*vel*”. A much more likely explanation for this odd conjunction is to be found in a similar case of interpolation, where the compilers render the original “*stipulando aut mancipio accipiendo*” of Gai 3,167 into “*stipulando aut per traditionem accipiendo*” in Inst. 3,28,3, carelessly preserving the original disjunction<sup>65</sup>. Similarly, it seems much more likely that the original text of D. 6,1,41,1 would have referred to the *mancipatio* and that the compilers forgot to modify the original conjunction, than to assume that they would change “*et*” for “*vel*” without any reason.

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<sup>60</sup> D. 6,1,77 (Ulp. 17 *ed.*): “Quaedam mulier fundum non marito donavit per epistulam et eundem fundum ab eo conduxit: posse defendi in rem ei competere, quasi per ipsam adquisierit possessionem veluti per colonam. Proponebatur, quod etiam in eo agro qui donabatur fuisset, cum epistula emitteretur: quae res sufficiebat ad traditam possessionem, licet conductio non intervenisset”.

<sup>61</sup> D. 39,6,29 (Ulp. 17 *ed.*): “Si mortis causa res donata est et convaluit qui donavit, videndum, an habeat in rem actionem. Et si quidem quis sic donavit, ut, si mors contigisset, tunc haberet cui donatum est, sine dubio donator poterit rem vindicare: mortuo eo tunc is cui donatum est. Si vero sic, ut iam nunc haberet, redderet, si convaluisset vel de proelio vel peregre redisset, potest defendi in rem competere donatori, si quid horum contigisset, interim autem ei cui donatum est. Sed et si morte praeventus sit is cui donatum est, adhuc quis dabit in rem donatori”.

<sup>62</sup> Erman, *Beiträge zur Publiciana I* (1890), p. 273–274; Lenel, *EP* (1927), p. 188 n. 6.

<sup>63</sup> Miceli, *Rappresentanza* (2008), p. 185 n. 154.

<sup>64</sup> Angelini, *Il Procurator* (1971), p. 151; Sansón, *La transmisión* (1998), p. 43.

<sup>65</sup> Gai 3,167: “Communem servum pro dominica parte dominis acquirere certum est, excepto eo, quod uni nominatim stipulando aut mancipio accipiendo illi soli acquirit...”; Inst. 3,28,3: “Communem servum pro dominica parte dominis acquirere certum est, excepto eo, quod uni nominatim stipulando aut per traditionem accipiendo illi soli acquirit...”

The examination of these texts shows how difficult it is in most cases to determine whether a text dealing with the transfer of ownership by a non-owner was originally referred to formal ways of transferring ownership or not. The reason for this is that none of the texts in Justinian's compilation provide any explicit information on this point, since the compilers were ordered to suppress all references to the distinction between Quiritary and praetorian ownership<sup>66</sup>, as well as to the *res Mancipi* and *res nec Mancipi*<sup>67</sup>. It could be argued that some clues can be found regarding the original content of Justinianic texts. A starting point in this regard can be to observe whether the thing transferred is a *res Mancipi*. This element is, however, not decisive by itself to determine what mode of transferring ownership was used, especially since the *traditio* in this case would anyhow grant the *in bonis* protection to the acquirer. Much more helpful is to observe the procedural elements surrounding the transfer of ownership, which the compilers were not keen to suppress. For instance, if the acquirer is granted a *rei vindicatio* to recover what he received it is safe to assume that he obtained the *iustum dominium*, which in the case of the *res Mancipi* can only take place through formal ways of transferring ownership. Conversely, if in the same case the owner is only granted praetorian remedies – e.g. the *actio Publiciana*, the *exceptio rei venditae et traditae* – one may assume that something prevented the transfer of Quiritary ownership<sup>68</sup>. What the exact cause for this may be can only be determined by studying the remedies granted by the praetor. Another element which may grant clues as to the original mode of transferring ownership used is that some operations could only be concluded by formal acts. This is particularly the case with the *in iure cessio*, which was commonly used to perform a series of acts<sup>69</sup>. For example, incorporeal things could be transferred through *in iure cessio*<sup>70</sup>, and particularly the *hereditas* and the *tutela*. Moreover, the *emancipatio* and the *datio in adoptionem* could take place through the *in iure cessio*, while the usufruct and certain servitudes could also be granted by resorting to it. Roman law also developed the *manumissio vindicta*, a form of manumission which was modelled after the *in iure cessio*<sup>71</sup>. In this case, the manumission would take place through the intervention of a third person (*adsertor in libertatem*) who, with the agreement of the slave's master, would claim him to be free, which the praetor would confirm due to the lack of opposition of the master.

Apart from these indications, there are few technical expressions which can be generally used to determine the original mode of transferring ownership used, or whether the acquirer obtained Quiritary or bonitary ownership. For instance, the use of the expression '*in bonis*' will unequivocally show that the acquirer obtained

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<sup>66</sup> C. 7,25,1 (Justinian, 530–531).

<sup>67</sup> C. 7,31,4 (Justinian, 531).

<sup>68</sup> E.g. D. 6,2,14, "praetor emptorem tuebatur praetor".

<sup>69</sup> Devilla, *In iure cessio* (1962), p. 703.

<sup>70</sup> Gai 2,29–37; Tit. Ulp. 19,11.

<sup>71</sup> Wolf, *In iure cessio und manumissio* (2013), p. 390.

a praetorian protection<sup>72</sup>. Conversely, expressions such as ‘*meum esse*’ would make reference to the Quiritary ownership. Other terms, however, do not allow the interpreter to reach equivalent conclusions. For example, it has been claimed that the words ‘*dominium*’ or ‘*dominus*’ would have been used exclusively to refer to Quiritary ownership<sup>73</sup>, but the sources are by no means clear on this point, especially considering that several texts cover under the term ‘*dominium*’ both the *dominium ex iure Quiritium* and the bonitary ownership<sup>74</sup>.

The study of interpolations may contribute to distinguish whether a text was originally referred to formal ways of transferring ownership or to the *traditio*. In the previous chapters we have run into a number of cases where the non-owner appears in fact to have conveyed a *res Mancipi* simply through *traditio*. It was already shown that the *exceptio rei venditae et traditae* would be available to the acquirer of a *res Mancipi* who received it through *traditio* from a non-owner with *potestas alienandi*, whether the latter was acting *voluntate domini* – as can be seen in D. 21,3,1,2 and D. 21,3,1,5<sup>75</sup> – or as a legal guardian – as shown in D. 27,10,7,1<sup>76</sup>. In these cases, the acquirer is granted the *in bonis* protection, just as if the delivery had been performed by the owner of the thing himself. There are moreover other cases in which a *res Mancipi* is delivered by *traditio* and where, despite the lack of *potestas alienandi* of the transferee, the owner is protected in some other way by the praetor, as happens in D. 17,1,49 and D. 17,1,5,3-4<sup>77</sup>. Since the *traditio* of a *res Mancipi* by an authorized non-owner would have the same consequences for the praetor as if the delivery was performed by the owner himself, it is not strange that the acquirer would have been content with obtaining the *in bonis* protection instead of going through the trouble of performing the elaborate rituals of the *mancipatio* or *in iure cessio* to transfer ownership.

Despite the insight which the study of interpolations may provide, it may not always be clear whether a text originally dealt with a formal transfer of ownership by a non-owner, since there were other legal institutions which could fulfill an identical practical function. Particularly relevant at this point is the possibility to resort to the *fiducia*, an agreement concluded by the owner who transfers through

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<sup>72</sup> Ankum/van Gessel-de Roo/Pool, *In bonis* III (1990), p. 161.

<sup>73</sup> Sansón, *La transmisión* (1998), p. 123.

<sup>74</sup> Gai 2,40: “Sed postea diuisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere”; Gai 1,55: “Ceterum cum apud cives Romanos duplex sit dominium, nam vel in bonis vel ex iure Quiritium vel ex utroque iure cuiusque servus esse intellegitur”; C. 7,25,1 (Justinian, 530-531): “nullam esse differentiam patimur inter dominos, apud quos vel nudum ex iure quiritium vel tantummodo in bonis reperitur”. Moreover, the expressions *dominus* and *dominium* may be used to refer to provincial property, as shown in Gai 2,7 and D. 6,1,41,1 (Ulp. 17 *ed.*). On the significance of *dominium* see Burdese, *Lex commissoria* (1949), p. 168; Ankum, *Propriété bonitaire relatif* (1985), p. 131-132; Weimar, *Eigentumsübergang* (1993), p. 557.

<sup>75</sup> See Chapter 4, Section 3 above.

<sup>76</sup> See Chapter 3, Section 2 and Chapter 4, Section 6 above.

<sup>77</sup> See Chapter 4, Section 5 above.

*mancipatio* or *in iure cessio* with the acquirer, which would determine what the acquirer should do with the object he received. The agreement could have different objectives within the law of property, such as giving a security to the acquirer, who may alienate the object if an obligation is not fulfilled, in what is referred to by Gaius as the *fiducia cum creditore* (Gai 2,60). The acquirer could also be instructed to perform other acts, such as simply holding to the thing for a period of time, to retransfer ownership to another person, to manumit a slave, etc., which is known as the *fiducia cum amico*. Regarding the transfer of ownership by a non-owner, this implies that an owner who was willing to transfer ownership through another person could convey a *res Mancipi* in the context of the *fiducia* to a trusted person so that the latter could retransfer ownership by *mancipatio* or *in iure cessio* himself. Many of the applications of the *fiducia* were gradually replaced by the appearance of new *bonae fidei* contracts – such as the deposit, mandate, etc. – which allowed the owner to reach the same objectives without having to transfer ownership. Nonetheless, the *fiducia* continued to be used in some contexts even in post-classical law.

The interpolation of texts originally referred to the *fiducia* often makes it impossible to determine whether a text was originally referred to the transfer of ownership by a non-owner who received *fiduciae causa* or not<sup>78</sup>. This problem is not restricted to the *Corpus Iuris Civilis*, where the main challenge is the interpolation of the classical texts, but it also concerns other materials where it is not clear whether the non-owner received first *fiduciae causa* or not, as happens in the following letter of Cicero to Atticus:

Cicero, *Ad Atticum* 15,26,4: Octavam partem tuli luminarum medium ad strane meminere cui Caerellia videris Mancipio dare ad eam summam quae sub Praecone fuit maxima. Id opinor esse CCCLXXX.

The text is very corrupted, which is why several alternative reconstructions can be found of it. Despite this, the general meaning of the text is not essentially affected from a legal perspective<sup>79</sup>. In this passage Cicero asks to Atticus to transfer ownership through *mancipatio* over a share – an eighth part – of a house. In this form, the text appears to be an excellent example of a *mancipatio* by a non-owner. There is however no way to know whether Cicero transferred in the first place the thing *fiduciae causa* to Atticus, and therefore the text can be interpreted in one sense or the other. For example, Costa understands that Cicero had previously conveyed the land to Atticus *fiduciae causa* so that he could transfer

<sup>78</sup> On the efforts to determine whether texts dealing with the pledge were originally referred to the *fiducia* see Noordraven, *Die Fiduzia* (1999), p. 17–41; Dunand, *Le transfert fiduciaire* (2000), p. 82–84, 86–87.

<sup>79</sup> Corbino, *Forma librare* (1984), p. 2266–2267; Coppola Bisazza, *Dallo iussum domini* (2008), p. 290.

ownership over it himself<sup>80</sup>. This is refuted by Corbino, who thinks that the starting point of Costa are the doctrines of Mitteis regarding direct representation, leading him to offer a forced interpretation of the passage<sup>81</sup>. Ankum in turn claims that through the word *memineris* Cicero would be reminding Atticus about this previous *mancipatio*, assuming through a *petitio principii*, that Atticus could not have acted as an agent of Cicero to mancipate “because Roman law did not permit that”<sup>82</sup>.

The same problem is found in a text of Plautus within *Persia*, where a letter is brought to the pimp Dordalus by the slave Tosilus, who claims to have received it from a Persian friend offering him a beautiful slave woman for sale. The letter was given to Tosilus by a young Persian, who probably is the *mandatarius* or *procurator* of the Persian friend<sup>83</sup>. In the letter it is however indicated that the transfer of ownership – which would be concluded by the young Persian – will not take place through *mancipatio*, nor will a *repromissio secundum Mancipium* be given:

Plautus, *Persa* 11, 523-524: ac suo periculo is emat qui eam mercabitur:  
mancipio neque promittet neque quisquam dabit<sup>84</sup>.

Considering that there is no willingness to transfer ownership through *mancipatio*, one could assume that in normal circumstances the messenger – who is not the owner – would be able to perform it. It is however impossible to tell whether all of this assumes that ownership was previously transferred *fiduciae causa* to the bearer of the letter or not, and therefore no clear conclusions can be drawn from this text.

The problem of the coexistence of the *fiducia* with other legal institutions such as mandate and pledge sets an almost unsurmountable barrier to the interpreter when analysing cases where it is not clear whether one institution or the other is being used<sup>85</sup>. In order to avoid taking too many chances when approaching the sources, the cases where this confusion is more likely to take place will be avoided. This is particularly the case when the owner authorizes the transfer of

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<sup>80</sup> Costa, *Cicerone giureconsulto* (1927) I, p. 108 n.1.

<sup>81</sup> Corbino, *Legittimazione a mancipare* (1976), p. 71, n. 53. See moreover Corbino, *Forma librare* (1984), p. 2265-2267; Coppola Bisazza, *Dallo iussum domini* (2008), p. 290.

<sup>82</sup> Ankum, *Mancipatio by slaves* (1978), p. 15-16 n. 41.

<sup>83</sup> For a detailed description of this case see Ankum, *L'actio auctoritatis* (1979), p. 9-11.

<sup>84</sup> “He who buys her does it at his own risk: / no one will perform the *promissio secundum Mancipium* or deliver her through *mancipatio*”. This translation accepts Ankum’s opinion that the word *promittet* would refer to the *repromissio secundum Mancipium*. See on this point Ankum, *Repromissio e satisfatio* (1981), p. 760-762.

<sup>85</sup> See e.g. D. 13,7,8,1 (Pomp. 35 *Sab.*), where a pledge creditor transfers ownership over a number of slaves, which according to Lenel, *Paling.* (1889) II, col. 147 would originally refer to the *fiducia*, while Noordraven, *D. 13,7,6pr* (1980), p. 247-253 and Ankum, *Repromissio e satisfatio* (1981), p. 782 ff. consider that this title of the work of Pomponius would in fact deal with the pledge.

ownership through a person *sui iuris*<sup>86</sup> – where the *fiducia cum amico* could for instance be confused with a mandate – as well as in those situations where the transfer of ownership takes place in the context of a surety, in which case the *fiducia cum creditore* can be easily confused with the pledge<sup>87</sup>. The focus will instead be laid on those cases where there is no possible confusion between different institutions, namely when the alienation is performed by an *alieni iuris* acting on behalf of his father or master and the cases where ownership is transferred by a legal guardian, since in none of these cases will the non-owner have the thing *fiduciae causa*.

### 3. Mancipatio by a slave

Regarding the *mancipatio* by a non-owner, the case which has traditionally received more attention is that of the slave, since it seems to be the case where more evidence can be found on the subject. The starting point for disagreement since the 16<sup>th</sup> century has been the following text by Cicero:

Cicero, *Ad Atticum* 13,50,2: Vestorius ad me scripsit, ut iuberem mancipio dari servo suo pro mea parte Heterio cuidam fundum Brinnianum, ut ipse ei Puteolis recte mancipio dare posset. Eum servum, si tibi videbitur, ad me mittes. Opinor enim ad te etiam scripsisse Vestorium<sup>88</sup>.

The context of the text is the following<sup>89</sup>: Cicero had been instituted heir along with Atticus and other people by Brinnius, whose goods had been auctioned after his death by Vestorius, a banker at Puteoli. Among the auctioned goods was

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<sup>86</sup> On the *mancipatio* by a *procurator* see the opinions of Buckland, *Mancipatio by a slave* (1918), p. 378; Frese, *Procurator* (1926), p. 362 and 366; Burdese, *Lex commissoria* (1949), p. 168; Burdese, *Autorizzazione* (1950), p. 21; Kaser, *Pfandrecht I* (1976), p. 248-249; Ankum, *Mancipatio by slaves* (1978), p. 6; Ankum, *Mancipatio by slaves* (1984), p. 7. Regarding the possibility of concluding formal acts through a *nuntius* see Longo, *Nuntius* (1982), p. 514.

<sup>87</sup> On the possibility that a pledge creditor may mancipate see Mitteis, *Römisches Privatrecht* (1908), p. 190; Solazzi, *Acquisto del possesso* (1955 [1911]), p. 339; Burdese, *Lex commissoria* (1949), p. 168-171-173; Ankum, *Mancipatio by slaves* (1984), p. 7; Corbino, *Forma librare* (1984), p. 2262-63, n. 26; Weimar, *Eigentumsübergang* (1993), p. 566; Perani, *Pignus distrahere* (2014), p. 129-130.

<sup>88</sup> A translation of this text is offered by Ankum, *Mancipatio by slaves* (1984), p. 9: “Vestorius has written to me that I should arrange through his slave the mancipation through him (i.e. Vestorius) of my share in the Briannian farm to a certain Heterius, so that he himself can convey it to him in Puteoli in the legally prescribed form of the *mancipatio*”. Another interpretation is given by Corbino, *Forma librare* (1984), p. 2265: “Vestorio mi ha scritto affinché io ordini, tramite un suo schiavo e per la mia parte, che sia mancipato il fondo Brinniano ad un tale Etereio, dimodoché egli possa regolarmente *mancipare* a lui in Pozzuoli. Se tu credi, etc.”

<sup>89</sup> For further details see Ankum, *Mancipatio by slaves* (1978), p. 4; Corbino, *Forma librare* (1984), p. 2264-2265; Ankum, *Mancipatio by slaves* (1984), p. 8.

a piece of land, which Vestorius now had to deliver to Hetercius, the buyer of the *fundus* at the auction<sup>90</sup>. In order to transfer ownership, each of the coheirs must perform the *mancipatio* to Vestorius, who will then be able to transfer ownership to Hetercius. A slave had been sent around by Vestorius to each of the coheirs, although the exact purpose of this journey remains uncertain. Cicero asks Atticus, who was in Rome, to send the slave of Vestorius to him at Tusculum. The whole controversy around this text revolves around the significance of the presence of the slave at Tusculum regarding the possibility of a slave to transfer ownership through *mancipatio*, which is particularly difficult to elucidate due to the unclear role of the word “*iuberem*”, as well as the significance of “*servo suo*”. It was already shown above that since the 16<sup>th</sup> century scholars were divided between those who considered that ownership was transferred to Vestorius through the slave – who would therefore act as the *mancipio accipiens* – and those who considered that Cicero would be merely authorizing Vestorius through a slave to perform the *mancipatio*. This dispute was reedited at the beginning of the 20<sup>th</sup> century, since Mitteis<sup>91</sup> understands that Vestorius will become owner by the *mancipatio* performed by Cicero to his slave once he arrives to Tusculum, while Roby thinks that *iuberem* would indicate that Cicero would order one of his slaves to perform the *mancipatio*<sup>92</sup>, being later followed by Buckland<sup>93</sup>, while Corbino thinks that the *iussum* is directed to Vestorius through his own slave<sup>94</sup>. Considering the ambiguity of the text, most of the arguments to refute opposing views relied more on assumptions as to the most reasonable thing to be expected from the parties or simply on preconceptions regarding the possibility of performing formal acts through a non-owner. For instance, Mitteis considers that it is impossible for a free person to be authorized to transfer ownership through *mancipatio*. If that was indeed possible, Cicero would have simply given his authorization in a letter to Vestorius<sup>95</sup>, an idea which is also brought up by Ankum<sup>96</sup>. The latter author moreover considers that the text shows that someone could not authorize a slave to mancipate, because in that case Cicero would just have given a *iussum* through a letter to one of his slaves in Rome to perform the *mancipatio* to Vestorius’ slave visiting Atticus<sup>97</sup>. On the

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<sup>90</sup> Corbino, *Forma librare* (1984), p. 2264 n. 31 does not agree that Hetercius has already adjudicated the piece of land to himself, since if that was the case the heirs themselves should perform the *mancipatio* to him.

<sup>91</sup> Mitteis, *Manumissio vindicta* I (1900), p. 209-210.

<sup>92</sup> Roby, *Roman Private law* (1902) I, p. 432-433 n.1.

<sup>93</sup> Buckland, *Mancipatio by a slave* (1918), p. 373-375.

<sup>94</sup> Corbino, *Leggitimazione a mancipare* (1976), p. 65-69; Corbino, *Forma librare* (1984), p. 2264-66.

<sup>95</sup> Mitteis, *Manumissio vindicta* I (1900), p. 209; Mitteis, *Römisches Privatrecht* (1908), p. 208 n. 16.

<sup>96</sup> Ankum, *Mancipatio by slaves* (1978), p. 6; Ankum, *Mancipatio by slaves* (1984), p. 9.

<sup>97</sup> Ankum, *Mancipatio by slaves* (1978), p. 5-6; Ankum, *Mancipatio by slaves* (1984), p. 11.

other hand, the interpretation of Corbino<sup>98</sup> rests on the idea that there could not be a *mancipatio* at a distance which did not provide possession, and furthermore that shares could not be mancipated, so the purpose of the journey of Vestorius' slave would be not to acquire from the different owners through *mancipatio*, but rather to obtain the authorization of every coheir so that Vestorius could perform the *mancipatio*. Accordingly, Corbino considers that this text would prove that the authorization to mancipate could be given to a free person who did not have a general power of administration.

Concerning the facts of the case, the most convincing interpretation of the texts seems to be the one offered by Ankum on his second contribution on the subject<sup>99</sup>, according to which the role of the slave of Vestorius was to visit the different co-owners so that each of them would convey their shares through *mancipatio* to the slave, making Vestorius owner of the piece of land and thereby enabling him to mancipate it to the buyer Heterius. This interpretation has the advantage of relying on well-known institutions of Roman law, namely that slaves could acquire through *mancipatio* for their owners and that a non-owner could transfer through *mancipatio* by acquiring an object *fiduciae causa*. The interpretation of Corbino, on the other side, relies on several ideas which are by no means clear to modern scholarship, such as that one could not mancipate shares. Nonetheless, while Ankum's interpretation seems to be preferable, it is not possible to agree with the juristic conclusions he draws from it concerning the possibility of mancipating through a non-owner, especially since at many points too much is assumed. For instance, there is no reason for assuming that Cicero was concerned at all about sparing the slave of Vestorius from travelling from Rome to Tusculum, and therefore all the reasons of efficiency set forth by Mitteis and Ankum do not seem to be very compelling. It is further unknown whether the condition of *argentarius* held by Vestorius introduced any further complexities of which we are unaware, as Corbino and Ankum acknowledge themselves<sup>100</sup>. Moreover, the fact that Vestorius would prefer to acquire the thing through *mancipatio* by each owner instead of resorting to other imaginable ways – e.g. to receive an authorization by letter – can be seen as an example of the legal practice at the time, which does not imply that other ways of reaching the same result were completely excluded. Accordingly, concerning the significance of this text for the *mancipatio* by a non-owner, it seems preferable to subscribe to the views of authors such as Kaser and Watson, who refrain from drawing any conclusions from it<sup>101</sup>.

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<sup>98</sup> Corbino, *Legittimazione a mancipare* (1976), p. 65-69; Corbino, *Forma librare* (1984), p. 2264-66. His opinion is followed by Coppola Bisazza, *Dallo iussum domini* (2008), p. 287-289.

<sup>99</sup> Ankum, *Mancipatio by slaves* (1984), p. 10-11.

<sup>100</sup> Corbino, *Legittimazione a mancipare* (1976), p. 69-70 n. 51; Ankum, *Mancipatio by slaves* (1984), p. 10; Corbino, *Forma librare* (1984), p. 2266. Both authors wonder whether this condition itself would allow Vestorius to perform the *mancipatio a non domino*.

<sup>101</sup> Kaser, *Verfügungssakte* (1950), p. 66 n. 32; Watson, *Law of persons* (1967), p. 183-184.

Scholars are also keen to extract general conclusions from other texts referring to the *mancipatio*, as happens with the following fragments dealing with the right of usufruct:

FV 51: Adquiri nobis potest usufructus et per eos quos in potestate manu mancipiove habemus, sed non omnibus modis, sed legato, vel si heredibus illis institutis deducto usu fructo proprietas legetur: per in iure cessionem autem vel iudicio familiae erciscundae non potest; per mancipationem ita potest, ut nos proprietatem, quae illis mancipio data sit, deducto usu fructu remancipemus<sup>102</sup>.

Authors such as Mitteis and Ankum consider that the final part of this text would conclusively show that a slave could not transfer ownership through *mancipatio*, since although the slave is presented as acquiring ownership through *mancipatio*, it appears that the owner himself had to perform the *mancipatio* afterwards, deducting the usufruct from this alienation<sup>103</sup>. This interpretation is drawn from the use of “*illis*” in the case of the *mancipatio* and “*nos*” for the *remancipatio*, which would apparently indicate a change in the person performing the action. The argument is however not decisive since these terms seem to be a general proposition, where it would be unnecessary to point out that the same slave to whom the object was mancipated should remancipate, who would furthermore need a special authorization for this act<sup>104</sup>.

Ankum<sup>105</sup> proposes a similar argument extracted from the *formula Baetica*<sup>106</sup>, which contains a *mancipatio fiduciae causa* of a *fundus* and a slave. In the text, the creditor acquires these goods as real security through *mancipatio* by the slave

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<sup>102</sup> FV 51: “Usufruct can be acquired by us also through persons who are in our *potestas*; not by all methods, however, but by a legacy of the usufruct, or when these persons have been instituted as heirs and the ownership of a thing has been bequeathed to someone with deduction of the usufruct. It cannot be acquired by means of an *in iure cessio* made to the *subiecti* or by a sentence in a suit to divide an inheritance brought by or against them; it can be acquired by means of a *mancipatio* in this way, that we remancipate the ownership of the thing, which has been conveyed to them in the form of a *mancipatio*, and deduct the usufruct for us on that occasion”, translated by Ankum, *Mancipatio by slaves* (1978), p. 10,

<sup>103</sup> Mitteis, *Römisches Privatrecht* (1908), p. 209; Kaser, *Verfügungsakte* (1950), p. 66; Ankum, *Mancipatio by slaves* (1978), p. 10–11; p. 17 n. 63; Ankum, *Mancipatio by slaves* (1984), p. 16–17.

<sup>104</sup> This argument is brought forward by Buckland, *Mancipatio by a slave* (1918), p. 377 and Coppola Bisazza, *Dallo iussum domini* (2008), p. 111 n. 45. Less convincing is Corbino, *Leggittimazione a mancipare* (1976), p. 62, who considers that in this case the slave would be acting *ignorante domino*, and therefore could validly acquire rights, but not alienate them without the owner’s authorization. Such distinction does not follow from the text, as pointed out by Ankum, *Mancipatio by slaves* (1984), p. 16–17.

<sup>105</sup> Ankum, *Mancipatio by slaves* (1978), p. 11–12.

<sup>106</sup> FIRA (1968) III, p. 296–297.

Dama<sup>107</sup>, but when the consequences of non-payment by the debtor are described, only the creditor (Lucius Titius) is mentioned as the person entitled to alienate these objects<sup>108</sup>. The silence regarding the slave would prove once again, according to Ankum, that slaves would not be able to transfer ownership through *mancipatio*, since it would have otherwise been more practical to establish that the slave himself would perform the *mancipatio*. The text would therefore offer a remarkable similarity with FV 51, where it would have been also more practical that the slave himself transferred ownership through *mancipatio*. However, just as FV 51, the text is not conclusive, since the formula merely describes a general proposition, leaving open who will carry out the subsequent *mancipatio*. This is even more true concerning the *formula Baetica*, where the *mancipatio* will take place at a point in the future and may therefore be performed by Lucius Titius or by any other slave whom he sees fit for this.

More evidence is to be found in a text dealing with the *mancipatio* by a slave within the Digest:

D. 21,2,39,1 (Jul. 57 *dig.*): Si servus tuus emerit hominem et eundem vendiderit Titio eiusque nomine duplam promiserit et tu a venditore servi stipulatus fueris: si Titius servum petierit et ideo victus sit, quod servus tuus in tradendo sine voluntate tua proprietatem hominis transferre non potuisset, supererit Publiciana actio et propter hoc duplae stipulatio ei non committetur: quare venditor quoque tuus agentem te ex stipulatu poterit doli mali exceptione summovere. Alias autem si servus hominem emerit et duplam stipuletur, deinde eum vendiderit et ab emptore evictus fuerit: domino quidem adversus venditorem in solidum competit actio, emptori vero adversus dominum dumtaxat de peculio. Denuntiare vero de evictione emptor servo, non domino debet: ita

<sup>107</sup> FIRA (1968) III, p. 296: “Dama L. Titii ser(vus) fundum Baianum... (sestertio) n(ummo) I et hominem Midam (sestertio) n(ummo) I fidi fiducia causa mancipio accepit ab L. Baianio”, translated by Ankum, *Mancipatio by slaves* (1978), p. 11: “Dama, slave of L Titius has received the estate of Baian(i)us... for one sestertius and the slave Midas for one sestertius on the ground of fiducia in the form of mancipatio from L Baianus”.

<sup>108</sup> FIRA (1968) III, p. 297: “...si pecunia sua quaque die L. Titio h(eredi)ve eius data soluta non esset, tum uti eum fundum eaque mancipia, sive quae mancipia ex is «vellet» L. Titius h(eres)ve eius vellet, ubi et quo die vellet, pecunia praesenti venderet... mancipio pluris (sestertio) n(ummo) I invitus ne daret, neve satis secundum mancipium daret, neve ut in ea verba, quae in verba satis s(ecundum) m(ancipium) dari solet, repromitteret, neve simplam neve [duplam...]", translated by Ankum, *Mancipatio by slaves* (1978), p. 11-12: “If the money should not have been paid to L. Titius or his heir at the fixed date, that L. Titius could then sell for ready money his estate and these slaves or some slaves of these which L. Titius or his heir would want to sell, at the place and on the date he wished... and that he will not have to mancipate against his will for more than one *sestertius* and that he had not to give a *satisdatio secundum mancipium*, neither a promise in the form of a *stipulatio* with these words, which are generally inserted in a *satisdatio secundum mancipium*, nor to make a *stipulatio simplae* or *duplae* (for the case of eviction)”.

enim evicto homine utiliter de peculio agere poterit: sin autem servus decesserit, tunc domino denunciandum est<sup>109</sup>.

Two cases are described within this text. In the first part, a slave belonging to ‘you’ (*servus tuus*) bought another slave – whom we can name ‘Stichus’ to avoid confusion<sup>110</sup> – whom he subsequently sold to Titius. Titius then lost the possession over Stichus and he could not successfully recover him in court due to the fact that he was not made owner of him by your slave, who performed the *traditio* without your consent (*sine voluntate tua*). Despite this, the buyer will not be able to claim the responsibility arising from eviction, because he can still make use of the *actio Publiciana*, which shows moreover that the person who took Stichus from him was not his owner – otherwise the *Publiciana* would not be available against him. This in turn led Julian to hold that the owner of the slave who bought and sold Stichus without his consent would be defeated with an *exceptio doli* if he claimed responsibility from the original vendor. In the second case presented in the text (*Alias autem...*) the final buyer is actually evicted by the true owner, which allows him to bring an *actio ex stipulatu de peculio* against the owner of the slave who sold him Stichus. The owner of the slave will be able to bring against the original seller an action without the restrictions of the *actio de peculio*, i.e. *in solidum*.

The text is traditionally considered to be interpolated<sup>111</sup>. Mitteis<sup>112</sup> stressed the fact that an *actio Publiciana* is granted despite the lack of authorization to dispose on behalf of the owner, which would not agree with classical Roman law. Therefore, he considered that the words *sine voluntate tua* were interpolated, resulting in a rather precipitate insertion (*ziemlich kopflose Einschubung*). According to him, the original ground for the failure to transfer ownership would have read “*quod servus tuus in mancipio proprietatem transferre non potuisset*”. Mitteis seems to

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<sup>109</sup> D. 21,2,39,1: “Suppose that your slave has bought a slave, whom he sells to Titius, promising double the price in the event of eviction, while you have stipulated similarly from the vendor of the slave. If Titius were to claim the slave and be unsuccessful because your slave has not been able to transfer the ownership of the slave since he delivered it without your consent, the *actio Publiciana* remains, and so the stipulation for double will not become enforceable; hence also, your own vendor can defeat you with the *exceptio doli* if you sue him on the basis of the stipulation. But the situation is different if the slave has bought a slave and has made a stipulation for double, and subsequently sold the slave and it was evicted from the buyer; the owner of the slave [he who sold the other slave] will have action for the total amount against the seller, but the buyer will have action against the owner only to the extent of his *peculium*. The buyer must, however, give notice of the eviction to the slave, not to his master; for then, the eviction taking place, he can effectively sue to the extent of the *peculium*; should the slave now be dead, however, he can give notice to the master” (transl. Watson, modified).

<sup>110</sup> Ankum, *Mancipatio by slaves* (1984), p. 12.

<sup>111</sup> Levy/Rabel, *Ind. Itp.* (1931) II, col. 18.

<sup>112</sup> Mitteis, *Manumissio vindicta* I (1900), p. 208; Mitteis, *Manumissio vindicta* II (1904), p. 381; Mitteis, *Römisches Privatrecht* (1908), p. 209.

have relied on Lenel's Palingenesia<sup>113</sup> for claiming that the text dealt originally with the *mancipatio* and not with the *traditio*, since the text is located under the rubric "*De auctoritate*". The original location of the text has moreover been confirmed by subsequent studies, which concluded that it indeed referred to the *mancipatio*, specifically to the *actio auctoritatis*<sup>114</sup>. Therefore, the opinion that the text was interpolated was reaffirmed in the view of scholars who considered that the text would show that a slave could not perform the *mancipatio*<sup>115</sup>. Maybe the most representative author of this view is Ankum, who considers that the text would in fact be highly interpolated, firstly because the references to the *stipulatio duplae* would have been added – being unnecessary in the original text, where the responsibility for *auctoritas* derived directly from the *mancipatio* – and the indications to the *emptio*, *venditio* and *traditio* would originally correspond to the *mancipatio*. Moreover, the words "*sine voluntate tua*" would also have been added by Justinian, since the reference to the owner's *voluntas* would make no sense in the original text. The compilers would have inserted this element to replace the original reason for losing the *rei vindicatio*, which would have been deleted from the text: the impossibility for a slave to transfer ownership through *mancipatio*. Thus, according to Ankum the reason for the failed transfer of ownership in the original text would have been: "*quod servus tuus in mancipio dando proprietatem hominis transferre non potuisset*".

Other interpretations of the text have been brought forward. Buckland, Corbino and Coppola Bisazza<sup>116</sup> agree that the text originally dealt with a case of *mancipatio*, but since they think that it was possible for a slave to mancipate they consider the words "*sine voluntate tua*" as original<sup>117</sup>. Corbino however considers the final words of the first case (*quare venditor quoque tuus agentem te ex stipulatu poterit doli mali exceptione summovere*) to be incompatible with this solution, since the owner of the slave would have no ground to sue the original seller, which is why Corbino considers this to be a Justinianic addition to the original text.

Another reconstruction is proposed by Talamanca and Reduzzi Merola<sup>118</sup>, who consider that the text never dealt with a case of *mancipatio* by a slave in the first place, but rather with a *traditio*. According to this view, the outcome of the case would be basically the same which would follow from every delivery by

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<sup>113</sup> Lenel, *Paling.* (1889) I, col. 463-464

<sup>114</sup> Burdese, *Autorizzazione* (1950), p. 35 n. 21; Daube, *Utiliter agere* (1960), p. 110; Kaser, *Eviktionshaftung* (1970), p. 481-492; Buti, *Studi sulla capacità* (1976), p. 97; Ankum, *L'actio auctoritatis* (1979); Corbino, *Legittimazione a mancipare* (1976), p. 55-60.

<sup>115</sup> Burdese, *Autorizzazione* (1950), p. 35 n. 21; Kaser, *Verfügungsakte* (1950), p. 66-67; Ankum, *Mancipatio by slaves* (1978), p. 7-10; Ankum, *Mancipatio by slaves* (1984), p. 11-16; Ankum, *Éviction dans sous-aliénation* (2002), p. 231-235.

<sup>116</sup> Coppola Bisazza, *Dallo iussum domini* (2008), p. 103-110.

<sup>117</sup> Buckland, *Mancipatio by a slave* (1918), p. 375-376; Corbino, *Legittimazione a mancipare* (1976), p. 53-60.

<sup>118</sup> Talamanca, *Vendita* (1993), p. 405 n. 1043; Reduzzi Merola, *D. 21,2,39,1* (2004), p. 320-321.

*traditio* of a *res Mancipi*, namely that the acquirer would be able to regain the thing, in case he loses possession, through an *actio Publiciana*.

From the study of the transfer of ownership by a non-owner conducted so far, it appears that the best reconstruction of this text is to understand that it originally referred to the *mancipatio*, and that accordingly the references to the *traditio* and to the *stipulatio duplae* were altered in order to fit with the general rules regarding the transfer of ownership and eviction within the compilation. However, the ground for the failure in transferring ownership – the lack of *voluntas domini* – would not have been altered by the compilers, since both in the *traditio* and in the *mancipatio* by a non-owner it was necessary that the conveyance took place according to the intent of the owner. In other words, the activity of the compilers would have been limited to mechanical interpolations to update Julian's decision. The grounds for this claim will be developed in the following paragraphs.

The first point to be considered, against those who claim that the reference to the *voluntas domini* was an addition of the compilers, is the reason for preserving this text within the Digest. If we assume that both in the *traditio* and in the *mancipatio* it was possible for an authorized non-owner to transfer ownership, we can understand that the text was kept by the compilers because it agreed with the general rules regarding *traditio*. If, on the other hand, the ground for the decision in the first case was completely different, it is hard to see why the commissioners would have gone through the trouble of modifying an essential element within the text instead of simply leaving it out. If this text was completely alien to the new system, and its interpolation would result in Mitteis' "*kopflöse Einschlebung*", why would Justinian's commissaries have preserved it? Ankum suggests that the reason for this was that the compilers wanted to preserve the applications of the *rei vindicatio* of the second part of the text and they did not wish to eliminate the first part altogether<sup>119</sup>. This argument is however hardly convincing considering the freedom the compilers had to discard the material they read, as well as the fact that the general meaning of the second part of D. 21,2,39,1 does not suffer at all – at least in Justinianic terms – if the first part is discarded and we just begin reading the text from the words "*si servus hominem emerit...*". The same objection can be made to the reconstruction proposed by Talamanca and Reduzzi Merola, since one may assume that if the compilers faced a text where the solution was intimately linked with the fact that a formal way of transferring ownership was used, they would have rather left it out instead of assigning an entirely new meaning to it. If one examines the texts reviewed above which were originally referred to a *mancipatio*<sup>120</sup>, we can see that although the praetorian remedies reveal that they dealt originally with formal ways of transferring ownership, the general outcome of the case – i.e. who gets to keep the disputed object – still makes

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<sup>119</sup> Ankum, *Mancipatio by slaves* (1978), p. 9–10.

<sup>120</sup> See in particular Chapter 4, Sections 3 and 4 above.

sense and leads to a fair result in Justinianic law. Rewriting entirely the legal grounds for a decision seems on the other hand to go beyond the normal activities of the commission.

Another point in favour of considering that the legal basis for the decision was not altered is that this would explain better the way in which the events of the case take place. If there was indeed a prohibition to mancipate concerning slaves, it appears unthinkable that a slave would resort to this formal way of transferring ownership instead of the *traditio*, which would at least grant the acquirer an *in bonis* protection in case the owner consented. This general inconsistency puzzles Mitteis himself, who seems amazed at the fact that, despite the impossibility of slaves to perform the *mancipatio*, such transactions could nonetheless take place in commercial practice<sup>121</sup>. It would moreover also be unexplainable why the acquirer would accept to receive through *mancipatio* from a slave. One could only imagine that Titius would either be unaware of the fact that the transferor was a slave or that he did not know about the prohibition, which would imply that the text would gravitate around the problem of his *bona fides*. There is however no trace of any of these vital points, which would force us to assume that the modifications to the text were even deeper if the text indeed contained no reference to the owner's intent.

The text is also better understood under the legal grounds conveyed to us regarding the role of the *actio Publiciana*. Mitteis claimed that this action had no role to play if the conveyance did not take place *voluntate domini*<sup>122</sup>, which is in fact inaccurate<sup>123</sup> as shown by the analysis of D. 6,2,14 presented above<sup>124</sup>. The *Publiciana* would be especially justified in D. 21,2,39,1 if the acquirer had received the object in good faith and if the transferor did not have an *animus furandi*, since this would grant the acquirer a *possessio ad usucapionem*<sup>125</sup>. On the other hand, if ownership was not transferred because of the existence of a prohibition to dispose affecting the *mancipatio* by a slave, it would be most likely that the acquirer would not gain a *possessio ad usucapionem*. While this would not completely exclude the possibility of resorting to the *Publiciana*<sup>126</sup>, it is certainly more likely that this action was granted in the context of a *possessio ad usucapionem* than in a case of illegal alienation. Moreover, it is likely that in the eyes of Justinian's commissaries, this application of the *Publiciana* would also hold true for the *traditio*, and consequently it would not have been unfounded to leave the text in its current wording.

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<sup>121</sup> Mitteis, *Römisches Privatrecht* (1908), p. 209: "Interessant ist es zu sehen, dass solche Sklavenmanzipationen praktisch doch unternommen wurden".

<sup>122</sup> Mitteis, *Manumissio vindicta* II (1904), p. 381; Mitteis, *Römisches Privatrecht* (1908), p. 209.

<sup>123</sup> On the lack of ground to hold this see Buckland, *Mancipatio by a slave* (1918), p. 375.

<sup>124</sup> Chapter 4, Section 1 above.

<sup>125</sup> On the possibility to resorting to the *actio Publiciana* when the alienation is performed *a non domino*, see moreover Corbino, *Leggittimazione a mancipare* (1976), p. 58 n. 19.

<sup>126</sup> Apathy, *Publiciana ohne Ersitzungsbesitz* (1984), p. 749-758.

It is also worth noting that the way in which the *Publiciana* is used by the acquirer is hardly understandable if we assume with Talamanca and Reduzzi Merola that we are simply dealing with a *traditio* of a *res Mancipi*. In the first part of the text we are in fact told that the final acquirer, upon losing the thing, unsuccessfully tries to recover it, despite which he still has the *Publiciana* at his disposal. Virtually every interpreter of this text has understood that the acquirer first resorted to the *rei vindicatio*<sup>127</sup>, but that he was defeated because it was proven that he was not the owner. If Titius had obtained a *res Mancipi* through *traditio*, it is almost unconceivable that he would resort to the *rei vindicatio* instead of the *Publiciana*, in which case the only explanation would be that he was grossly ignorant of the proper legal remedy he could use. On the other hand, if the underlying problem was the lack of *voluntas domini*, the chain of events is readily understood, since Titius would believe to have gained the *iustum dominium* by the *mancipatio* of the slave, but in the course of the *rei vindicatio* it would be proven that he is not the real owner because he received from an unauthorized slave and therefore he would be defeated. In other words, the acquirer would only become aware that he was not made Quiritary owner after finding out in court that he received from someone without *potestas alienandi*. It is again worth noting that these developments would have also made sense in the eyes of the compilers, which is why they preserved the case.

At this point it is also relevant to analyse the attempt by the master of the slave who bought and sold Stichus to claim the *stipulatio duplae* from the original seller. Considering that Titius was not evicted, and that ownership was not transferred due to the lack of *potestas alienandi* of his slave, it is hard to see why the master of the slave would attempt to claim the responsibility arising from eviction from the original seller. It is in any case worth noting that the failed *rei vindicatio* of Titius certainly had some consequence with regard to the master of the slave ('you'), since it allowed him to sue the original seller. In the text we are simply told that the stipulation "will not become enforceable" (*ei non committetur*), which does not give any information concerning what will prevent it from being enforceable. When analysing what this implies, it should be borne in mind that: (1) the failure of the *rei vindicatio* certainly had an effect concerning the master of the slave; (2) the *stipulatio duplae* <*auctoritas*> bore no consequence against him on account of the existence of a praetorian remedy, namely the availability of the *actio Publiciana*. This would indicate that the lack of enforceability is related to the existence of a praetorian protection of the master of the slave, most probably a *denegatio actionis* or an *exceptio*. This contrast between the *ius civile* and *ius honorarium* would explain why the master of the slave could demand liability from the original seller and that this claim would not appear to be completely without ground, since only through an *exceptio doli* would the original seller avoid being

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<sup>127</sup> Buckland, *Mancipatio by a slave* (1918), p. 375; Corbino, *Legittimazione a mancipare* (1976), p. 53; Ankum, *Mancipatio by slaves* (1978), p. 7; Coppola Bisazza, *Dallo iussum domini* (2008), p. 103.

held responsible. In other words, the basic requirements to make the seller responsible would appear to have been met despite the fact that the final buyer was not evicted. The fact that this claim was valid according to the *ius civile* has troubled several authors<sup>128</sup>, and according to Corbino it would show that the text has an unsolvable inner contradiction<sup>129</sup>, leading him to regard it as interpolated. Kaser and Ankum had interpreted the text in the only way possible, i.e. that the *actio auctoritatis* would not be a *Regressklage*, and therefore it could be brought against the first seller even if the final buyer had not brought an action against him<sup>130</sup>. Accordingly, the circumstances described in the text would be sufficient to trigger the claim of responsibility based on the *actio auctoritatis*. The text would therefore show the contrast between the *ius civile* and the praetorian remedies, starting from the fact that the impossibility of the final buyer to bring an action against the slave's master would be based on the existence of a praetorian remedy – the *actio Publiciana* – which would in turn imply that the ground given by the *ius civile* to bring the *actio auctoritatis* against the original seller would stay firm, and only another praetorian remedy – the *exceptio doli* – would keep the original buyer from being unfairly defeated in trial.

The peculiar features of the *actio auctoritatis* affect in no way the interpretation which has been offered of the text so far. Corbino only sees a contradiction between accepting the *voluntas domini* as the ground for the failed transfer of ownership and the existence of a claim against the first vendor because he considers that this last element would indicate that ownership was not transferred in the first place. There is however no such contradiction in the text, since the ground for the master of the slave to sue the original vendor is rooted exclusively in the nature of the *actio auctoritatis*. There is accordingly no need to claim that ownership did not pass in the first place because the original seller was not the owner, as Ankum and Reduzzi Merola assume<sup>131</sup>, since the first case can be sufficiently understood if the underlying problem is exclusively the lack of authorization to mancipate the slave. The lack of ownership of the original vendor only plays a role in the second case of D. 21,2,39,1, and it is in fact the element which triggers a successful claim from the final acquirer – who is actually evicted, unlike the first case – against the master's slave, and from the latter against the first seller. It is moreover worth noting that the text in this way should have made sense to the compilers, which would explain why they kept it within the compilation. The only odd feature would be the fact that the master of the slave ('you') would be able to claim responsibility in the first case against

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<sup>128</sup> See e.g. Girard, *Actio auctoritatis* (1923), p. 224 n. 1; Daube, *Utiliter agere* (1960), p. 111 ff.

<sup>129</sup> Corbino, *Leggittimazione a mancipare* (1976), p. 55-56.

<sup>130</sup> Kaser, *Eviktionshaftung* (1970), p. 481 ff.; Ankum, *Mancipatio by slaves* (1978), p. 7 n. 48; Ankum, *L'actio auctoritatis* (1979), p. 31, 38-40; Ankum, *Repromissio e satisfactio* (1981), p. 776.

<sup>131</sup> Ankum, *Mancipatio by slaves* (1984), p. 14-15; Reduzzi Merola, *D. 21,2,39,1* (2004), p. 320.

the original seller, but this may be easily explained if the compilers assumed that Titius managed to hold the master of the slave liable in the first place if the availability of the *Publiciana* was not taken into account.

A final issue regarding D. 21,2,39,1 concerns the relationship between the two cases presented in this fragment. As was shown before, in the second case the buyer is evicted, and consequently Julian shows which actions will be available to the buyer against the master of the slave who sold him Stichus, and to the master of the slave against the original seller. Ankum claimed that this second case would confirm that the problem discussed is the prohibition to mancipate by a slave<sup>132</sup>. According to him, in this case the slave would have acquired ownership through a *mancipatio* and would have subsequently transferred ownership through *traditio*. In order to hold this, Ankum considers that the first reference to the *stipulatio duplae* would have been added by the compilers, but that the reference to the subsequent sale would be original, and would not refer to a *mancipatio*. Accordingly, he offers the following reconstruction: “*alias autem si servus hominem emerit [et duplam stipuletur] <et mancipio acceperit>, deinde eum vendiderit et ab emptore evictus fuerit: domino quidem adversus venditorem in solidum competebit actio, emptori vero adversus dominium dumtaxat de peculio*”<sup>133</sup>. The author claims therefore that the first part of D. 21,2,39,1 could not have been referred to the problem of the *voluntas domini*, since if that was the case this would have been mentioned in the second part.

However, the link between both cases as proposed by Ankum cannot be accepted. First of all, his reconstruction of the text is rather artificial from the moment that he selects which sections originally referred to a *mancipatio* and which to a *traditio*. Furthermore, he attempts to show that the underlying problem throughout the text was the prohibition to mancipate for a slave. It is clear that the real issue addressed in this text is to determine which *actiones* can be brought against the original seller and against the master of the slave. If this was not the case and the whole text was simply intended to show the different consequences of a *mancipatio* and a *traditio* performed by a slave, the reference to the original seller would be completely out of place. The contrast between the first and the second case would be to emphasize what would happen if the final buyer was actually evicted: in the first case, since he was not evicted and still had the *actio Publiciana*, he could not hold the master of the slave responsible for the eviction, and consequently the master of the slave could not successfully sue the original seller. In the second case, Julian expressly shows that the final buyer was evicted, and therefore presents the *actiones* which can be brought against the master of the slave and against the original seller.

The question of whether the slave acted with or without his master’s intent is completely irrelevant in the second case. Ankum wrongfully claims that the *actio*

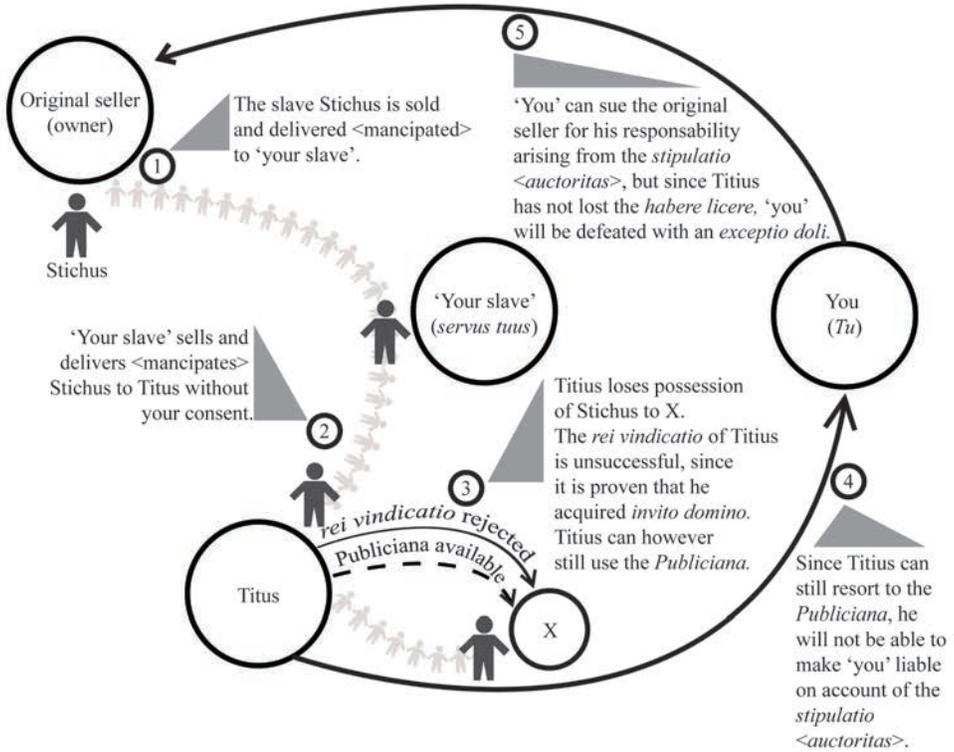
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<sup>132</sup> Ankum, *Mancipatio by slaves* (1978), p. 8-9; Ankum, *Mancipatio by slaves* (1984), p. 13.

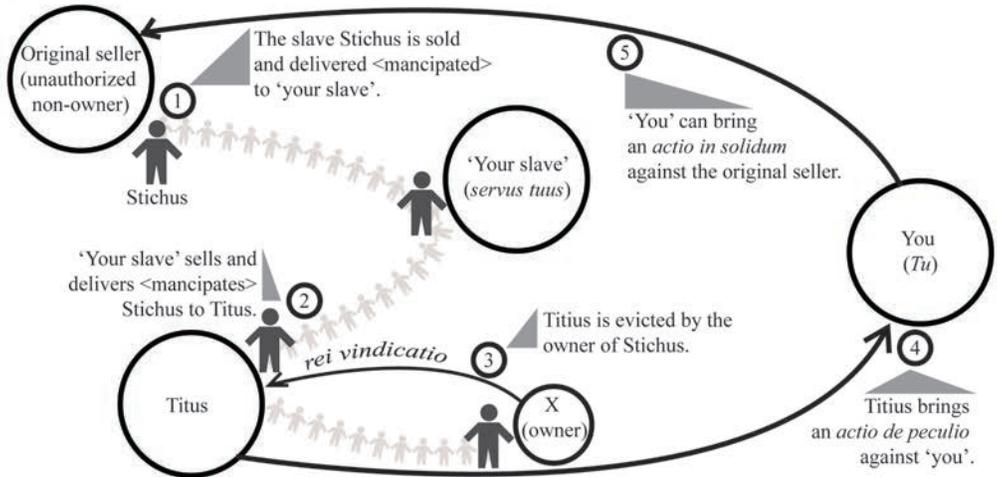
<sup>133</sup> Ankum, *Mancipatio by slaves* (1984), p. 12.

D. 21,2,39,1 (Jul. 57 dig.)

1) First case:



2) Second case:



*de peculio* against ‘you’ necessarily implies that the slave was authorized to sell on account of having the *libera administratio peculii*<sup>134</sup>, since the *concessio peculii* did not necessarily involve a *libera administratio*<sup>135</sup>. Moreover, the *actio de peculio* could be brought against the owner merely on account of the fact that a person *alieni iuris* conducted business within his *peculium*, regardless of the owner’s knowledge or authorization<sup>136</sup>. The central element within the case is rather that the final seller was evicted, which would show that the original seller was not the owner of the slave in the first place. This would also explain why the first part of the text only mentions, in the motivation of the decision, the fact that the slave performed the *mancipatio* without the owner’s intent, which seems so disturbing for Ankum<sup>137</sup>: the lack of the owner’s intention is not the central problem within the general picture. Julian’s main concern is to determine how and when could the responsibility for eviction be brought against the first and the second seller.

The evidence presented above shows that it is most likely that D. 21,2,39,1 originally referred to a *mancipatio* performed without the owner’s authorization than to a general prohibition to mancipate imposed on slaves<sup>138</sup>, granting thereby conclusive evidence concerning the possibility of slaves to perform the *mancipatio* and showing that the rules for the *potestas alienandi* in this case would be very similar to those governing the transfer of ownership by *traditio*<sup>139</sup>.

#### 4. *Mancipatio* by a *curator furiosi* or *tutor impuberis*

While scholars have intensely debated whether a slave could mancipate, there has been less discussion concerning the *mancipatio* by legal guardians. The reason for this is that there are several texts in the sources which show legal guardians as generally capable of validly transferring ownership over any of the owner’s assets, particularly in the case of the *curator furiosi*<sup>140</sup>. Nonetheless, the acceptance of a *mancipatio* by a non-owner seemed to go against the general notions regarding the evolution of direct representation which dominated Roman law scholarship since the 19<sup>th</sup> century. It is no wonder that in this context, the most comprehensive view on the subject would be provided by Mitteis, who denied that a *tutor* or a *curator* could mancipate. In the case of the *tutor*, Mitteis gathers various scattered texts which could be seen – if the interpolations he claims to identify indeed took

<sup>134</sup> See on this point Coppola Bisazza, *Dallo iussum domini* (2008), p. 110 n. 44.

<sup>135</sup> See Chapter 1, Section 4(b) above.

<sup>136</sup> See Gai 4,72a: “... Licet enim negotium ita gestum sit cum filio servove, ut neque voluntas neque consensus patris dominive intervenerit, si quid tamen ex ea re, quae cum illis gesta est, in rem patris dominive versum sit, quatenus in rem eius versum fuerit, eatenus datur actio...”

<sup>137</sup> Ankum, *Mancipatio by slaves* (1978), p. 9.

<sup>138</sup> Buckland, *Mancipatio by a slave* (1918), p. 377.

<sup>139</sup> Corbino, *Leggittimazione a mancipare* (1976), p. 70-71.

<sup>140</sup> See e.g. Gai 2,64; D. 40,1,13 (Pomp. 1 *ex Plautio*); D. 27,10,17 (Gai. 1 *de manumissionibus*); D. 47,2,57,4 (Jul. 22 *dig.*).

place – as showing a general prohibition to mancipate<sup>141</sup>. Regarding the *curator furiosi*, since not even the best goodwill could provide a similar evidence, Mitteis indicates that we would be facing an apparent exception to the general rule that no non-owner could mancipate, since in fact the *curator* would hold a quasi-dominical power (*quasi-dominikale Gewalt*) which would enable him to alienate the lunatic's property<sup>142</sup>.

The ideas of Mitteis regarding the powers by the *curator* were seen as satisfactory by most scholars<sup>143</sup>, despite the fact that they barely have any support in the sources<sup>144</sup>. It is in fact likely that scholars admitted this view because it preserved the traditional interpretation of the evolution of direct representation in pre-classical Roman law, but the lack of evidence on the subject has inevitably led some scholars such as Diliberto, who refutes the traditional ideas on several points, to accept that the *curator furiosi* transferred ownership as a non-owner<sup>145</sup>. It would therefore appear that no solid evidence stands in the way of accepting the *mancipatio* by a *curator furiosi*. However, after discarding that the *curator furiosi* would be owner of the administered goods, Diliberto himself claimed that he probably could not perform the *mancipatio* because he could not alienate *res Mancipi* on account of their importance and value<sup>146</sup>. This author presents no evidence to confirm such a statement, and he appears to be rather adventurous when claiming the existence of this prohibition to mancipate, considering that the doctrine before him agreed that the *curator furiosi* could mancipate, differing only on the ground on which he could do so. Therefore, it seems more faithful to the sources to simply admit that there is no positive evidence regarding the existence of a prohibition to mancipate, and that the *curator furiosi* did act as a non-owner when transferring ownership.

The idea of a 'quasi-dominical power' was also applied by scholars to other legal guardians, such as the *curator prodigi*<sup>147</sup> or the *tutor impuberum*<sup>148</sup>. This has led to a rather confusing approach regarding the *mancipatio* by a *tutor*, which was originally denied by Mitteis<sup>149</sup>, being later accepted by some authors under the

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<sup>141</sup> Mitteis, *Römisches Privatrecht* (1908), p. 209 n. 19.

<sup>142</sup> Mitteis, *Römisches Privatrecht* (1908), p. 210.

<sup>143</sup> See e.g. Kniep, *Gai Institutionum* (1912) II, p. 236-237; Siber, *Verwaltungsrecht* (1917), p. 83-84; Siber, *Römisches Recht* (1928) II, p. 413; Guarino, *Notazioni IV-V* (1949), p. 194-198; Burdese, *Lex commissoria* (1949), p. 168-169; Burdese, *Autorizzazione* (1950), p. 14-15; Rabel, *Grundzüge* (1955), p. 185; Longchamps, *Nemo plus iuris* (2015), p. 78.

<sup>144</sup> See Chapter 3, Section 4 above.

<sup>145</sup> Diliberto, *Cura furiosi* (1984), p. 88. See moreover Albanese, *Atti negoziali* (1982), p. 355.

<sup>146</sup> Diliberto, *Cura furiosi* (1984), p. 102.

<sup>147</sup> Guarino, *Notazioni IV-V* (1949), p. 194-198.

<sup>148</sup> Siber, *Verwaltungsrecht* (1917), p. 83; Arangio-Ruiz, *Erede e tutore* (1946 [1930]), p. 149-167; Levy-Bruhl, *La tutelle* (1948), p. 318-323. See for further literature Kaser, *Ehe und conventio* (1950), p. 91 n. 79.

<sup>149</sup> Mitteis, *Manumissio vindicta I* (1900), p. 209; Mitteis, *Römisches Privatrecht* (1908), p. 209 n. 17.

idea that the *tutor* acted as a *dominus*<sup>150</sup>, while others simply admitted that the *tutor* as such could mancipate<sup>151</sup>. Kübler, for instance, claimed that the *tutor* was not included among the cases mentioned in Gai 2,64 because all of the individuals mentioned in this text were *non domini*, while the *tutor* would actually act in the capacity of an owner<sup>152</sup>. This point has already been discussed above<sup>153</sup>, where it was shown that legal guardians should not be considered as having ownership over the administered goods. It is enough to point out here that the ideas of Mitteis concerning an impossibility to mancipate had few followers<sup>154</sup>, but an article of Bund<sup>155</sup> revived the controversy on this subject. This author acknowledges that there is no clear evidence on the point<sup>156</sup> and considers the arguments given against and in favour of the prohibition for the *tutor* to mancipate to be inconclusive<sup>157</sup>, regarding however the following text to be key in solving the controversy<sup>158</sup>:

D. 47,2,57,4 (Jul. 22 *dig.*): Qui tutelam gerit, transigere cum fure potest et, si in potestatem suam redegerit rem furtivam, desinit furtiva esse, quia tutor domini loco habetur. Sed et circa curatorem furiosi eadem dicenda sunt, qui adeo personam domini sustinet, ut etiam tradendo rem furiosi alienare existimetur. Condicere autem rem furtivam tutor et curator furiosi eorum nomine possunt<sup>159</sup>.

The text deals with the *reversio in potestatem* of stolen objects, which implies that they cannot longer be considered *res furtivae*. When the owner of the goods has an appointed legal guardian, this *reversio* takes place through the *tutor* or *curator*, since they are considered to act *loco domini*. According to Bund, the text shows

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<sup>150</sup> Burdese, *Lex commissoria* (1949), p. 169; Burdese, *Autorizzazione* (1950), p. 14-15; Weimar, *Eigentumsübergang* (1993), p. 551. Bund, *Veräußerungsbefugnis* (1962), p. 159 explicitly avoids going into this problem.

<sup>151</sup> Sachers, *Tutela* (1948), p. 1548.

<sup>152</sup> Kübler, *Vormundschaftliche Gewalt* (1939), p. 83.

<sup>153</sup> Chapter 3, Section 4 above.

<sup>154</sup> E.g. Siber, *Römisches Recht* (1928) II, p. 316. Among the recent scholarship see Guzmán, *DPR* (2013) I, p. 428.

<sup>155</sup> Bund, *Veräußerungsbefugnis* (1962), p. 157-164.

<sup>156</sup> Bund, *Veräußerungsbefugnis* (1962), p. 159-160: "Soweit ersichtlich, berichten die römischen Rechtsquellen nirgends eindeutig über eine Manzipation von Mündelsachen durch den Vormund".

<sup>157</sup> Bund, *Veräußerungsbefugnis* (1962), p. 163: "Eine Abwägung der geschilderten Gründe und Gegenstände mag den Autoren Recht geben, die die von Mitteis angeführten Gründe nicht für überzeugend, aber auch das Gegenteil nicht für erwiesen halten".

<sup>158</sup> Bund, *Veräußerungsbefugnis* (1962), p. 164.

<sup>159</sup> D. 47,2,57,4: "An administering *tutor* can make a *transactio* with the thief, and if he recovers the stolen thing into his control, it is no longer a stolen thing; for a *tutor* is in the position of an owner. The same must be said regarding the *curator* of a lunatic, who so far has the role of an owner that even by delivering a thing belonging to the lunatic he is deemed to alienate it. A *tutor* and the *curator* of a lunatic can also bring a *condictio* for stolen goods in the name of the *pupillus* or lunatic" (transl. Watson, modified).

that the *curator furiosi* has greater powers regarding the lunatic than the *tutor* has with regard to the ward, as the words ‘*adeo*’ and ‘*etiam*’ would show. In other words, Julian would be indicating that the *curator* can assume even greater powers than the *tutor* with regard to the administered goods. However, the text would oddly indicate that, while having greater powers than the *tutor*, the *curator* can perform the *traditio*, which would not actually imply having greater powers considering that the *tutor* can also transfer ownership through *traditio*. Following this idea, Bund considers that the only way to make sense of the text is to consider “*tradendo*” as interpolated, while the original text would have read “*mancipando*”, as the Index Interpolationum<sup>160</sup> shows following the indication of Lenel<sup>161</sup>. According to Bund this correction allows to properly understand the text in the sense that Julian would claim that the *curator furiosi* has even more powers than the *tutor* since he can even transfer ownership by *mancipatio*, which would indirectly show that the *tutor* did not have this power.

One can hardly share the enthusiasm of Bund regarding the significance of this text. Concerning the possibility of interpolations, there are no elements which can lead to a definitive answer on the subject, apart from the fact that Julian is clearly trying to make a statement of the kind “the *curator* has such powers that he can even...”. This statement would be more emphatic if referred to the *mancipatio*, but one can only guess here. Even if one were to accept this interpolation, it is by no means clear that Julian is using an argument *a maiore ad minus*, as Bund claims. On the contrary, after indicating that the *tutor* is regarded as acting *domini loco*, Julian points out that “the same must be said regarding the *curator* of a lunatic” (*Sed et circa curatorem furiosi eadem dicenda sunt*), putting both cases on an equal level. The subsequent consecutive clause “*adeo... ut etiam...*” cannot either be seen as emphasizing a difference with regard to the *tutor*<sup>162</sup>, but simply stresses that the *curator furiosi* is to such an extent regarded as acting *domini loco* that he can even transfer ownership, which is basically the most invasive act one can carry out regarding other person’s patrimony. That no fundamental difference between the *tutor* and the *curator* is implied at this point is also to be seen from the closing sentence of the text, which again sets both types of legal guardians on the same level when discussing the *condictio* of stolen goods.

The analysis of the sources certainly produces very little evidence concerning the existence of a prohibition to mancipate affecting the *tutor*, which may explain why most scholars prefer to offer an alternative legal basis for this alienation in order to avoid acknowledging a case of direct representation – namely by claiming that the *tutor* would actually be owner of the administered goods – than to defend the existence of a prohibition to dispose. There is in fact no support in the sources for the idea of a prohibition to mancipate affecting the legal

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<sup>160</sup> Levy, Rabel, *Ind. Itp.* (1935) III, col. 495.

<sup>161</sup> Lenel, *Paling.* (1889) I, p. 377 n. 1.

<sup>162</sup> Already Weimar, *Eigentumsübergang* (1993), p. 551-552 n. 3 has indicated that the text applies the same solution by way of analogy to both cases.

guardians, and in fact this notion even seems to contradict the evidence we have. This is particularly the case regarding the prohibition of the *oratio Severi*<sup>163</sup>, which aimed at restricting the alienations done by legal guardians over rustic or suburban properties – i.e. *res Mancipi* – and which to a great extent would have been superfluous if legal guardians were not allowed to resort to formal ways of transferring ownership in the first place, as pointed out by Kübler<sup>164</sup>. This author also points out that the wording of the *oratio* is very general, resorting to words such as “*distrahere*” and “*alienare*” (D. 27,9,1,1) which seem to cover any mode of transferring ownership<sup>165</sup>. It therefore seems that this was the first restriction of the kind regarding the alienation of land, and that before that time legal guardians faced no general restriction on the subject. Moreover, it would be almost inconceivable that legal guardians could not perform the *mancipatio* throughout the pre-classical and classical periods. This circumstance is stressed by Kübler when claiming that the *tutor* most certainly was able to mancipate in Roman law, because the buyer would not have settled for a mere bonitary ownership<sup>166</sup>. Bund discards this objection rather lightly by pointing out that it is not completely clear how relevant the *mancipatio* was during the Principate<sup>167</sup>, claiming moreover that the alienation of *res Mancipi* such as land would not normally be consistent with the diligent administration of the ward’s affairs<sup>168</sup>. None of these arguments are particularly convincing. First of all, it is undeniable that at some stage it must have been indeed unacceptable for the acquirer not to be made Quiritary owner, particularly before the praetorian remedies that granted the bonitary ownership to the acquirer were fully consolidated. Moreover, one could expect that the alienation of some *res Mancipi* could fall within a normal administration of the *tutor* – particularly regarding slaves and draft animals – and that even the alienation of goods such as immovable property could occasionally be unavoidable, as shown by the fact that they could be authorized in particular cases following the rules of the *oratio Severi*.

Next to the lack of evidence in the sources to support a prohibition to mancipate affecting legal guardians, it is worth pointing out that the original ground that modern scholars had in mind to hold that prohibition – namely the existence of a prohibition of direct representation – has gradually fallen out of the picture, similarly to what happened regarding the problem of the *mancipatio* by slaves. For instance, already Bund had left the problem of the ground of the prohibition outside the discussion, which is no minor void within his analysis of this subject. The discussion on the possibility of legal guardians to mancipate seems therefore to drag on even after the general idea which inspired a negative

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<sup>163</sup> D. 27,9,1pr-2 (Ulp. 35 ed.).

<sup>164</sup> Kübler, *Vormundschaftliche Gewalt* (1939), p. 83.

<sup>165</sup> Kübler, *Vormundschaftliche Gewalt* (1939), p. 83.

<sup>166</sup> Kübler, *Vormundschaftliche Gewalt* (1939), p. 83.

<sup>167</sup> Bund, *Veräußerungsbefugnis* (1962), p. 162-163.

<sup>168</sup> Bund, *Veräußerungsbefugnis* (1962), p. 163 n. 21.

answer has lost most of its strength. The same concerns those theories which hold that legal guardians would have some kind of ownership over the administered goods. It seems therefore convenient to discard these notions as remnants of the dogmatic ideas concerning the possibility of a non-owner to act as ‘direct representative’, which do not find a solid ground in the sources.

### 5. *In iure cessio* and *manumissio vindicta* by a non-owner

The problem of whether a non-owner may perform an *in iure cessio* has not been nearly as controversial as that of the *mancipatio* by a non-owner. The reason for this is that there is a clear rule which seems to govern this subject, namely the *regula iuris* “*Nemo alieno nomine lege agere potest*”<sup>169</sup> of D. 50,17,123pr (Ulp. 14 ed.), an idea which is also found in Gai 4,82. As shown above<sup>170</sup>, this text originally referred to the *legis actiones*, and since the *in iure cessio* was modelled after a *legis actio sacramento in rem* it would seem impossible for a non-owner to transfer ownership through this mechanism. The same can be said concerning the *manumissio vindicta*, considering that it was modelled after the *in iure cessio*. Accordingly, most scholars have assumed that the limitations of procedural representation in the *legis actiones* excluded the possibility that a non-owner may perform the *in iure cessio* or the *manumissio vindicta*<sup>171</sup>.

Despite the soundness of the explanation shared by most scholars, the sources offer conflicting evidence on the subject, particularly regarding the *manumissio vindicta*. It is in fact possible to find a significant number of texts in which a son-in-power manumits a slave through this mechanism by following the instruction of his father, among which one may list: D. 37,14,13; D. 38,2,22; D. 40,1,7; D. 40,1,16; D. 40,1,22; D. 40,2,4pr.; D. 40,2,10; D. 40,2,18,2; D. 40,2,22; D. 40,9,15,1; D. 49,17,6; PS 1,13a; C. 7,15,1,3. This would seem to indicate that, just as it happens in other cases of patrimonial loss, the owner directly loses his ownership over the slave if the non-owner acts *voluntate domini*. In the eyes of a scholar like Mitteis, however, accepting the validity of such texts would imply acknowledging a clear case of direct representation over an act of the *ius civile*, which was completely inadmissible within his general theory on the subject. This is why Mitteis dedicated two articles to analysing the different cases in which a son-in-power appeared performing the *manumissio vindicta*. In them, he claimed that every single one of these texts had undergone some form of interpolation or

<sup>169</sup> D. 50,17,123pr: “No one can legally act on behalf of another” (transl. Watson).

<sup>170</sup> Chapter 1, Section 1 above.

<sup>171</sup> Mühlenthal, *Cession* (1836), p. 42–43 n. 69; Mitteis, *Römisches Privatrecht* (1908), p. 208; Kaser, *Verfügungsakte* (1950), p. 67; Kaser, *RPR* (1971) I, p. 267 and 286; Hernanz, *Iussum* (1993), p. 72; Andrés Santos, *Subrogación real* (1997), p. 190. Regarding slaves in particular see: Buckland, *Slavery* (1908), p. 159; Devilla, *In iure cessio* (1962), p. 703; Corbino, *Leggittimazione a mancipare* (1976), p. 60 n. 21; p. 61; Ankum, *Mancipatio by slaves* (1978), p. 3

did not originally refer to the *manumissio vindicta*<sup>172</sup>. This reconstruction was not considered convincing by Buckland, who soon offered a refutation to it<sup>173</sup>. This author showed that in most cases the allegations of Mitteis had no ground and that there was moreover no evidence whatsoever to support the idea of an impossibility of the son-in-power to carry out the *manumissio vindicta*. Moreover, he considers that the sources are so consistent on this point that it is not possible to assume the existence of a systematic interpolation. Being aware of the fact that Mitteis is fighting the *manumissio vindicta* by a *filius* in order to exclude direct representation from Roman law, Buckland points out that one should not grant such significance to this problem. Instead, according to him, one should view this case as a mere exception based on the *favor libertatis*, allowing something which would normally be inadmissible<sup>174</sup>. According to Kaser this element played an important role, but he considers that a *filius* could perform the *manumissio vindicta* already in classical times because jurists no longer treated this institution as a *legis actio*, and therefore they allowed something which would be unconceivable in the ancient procedure<sup>175</sup>.

The conflicting cases are however not limited to the *manumissio vindicta* by a son-in-power. For instance, the above-quoted text of D. 27,10,17<sup>176</sup>, which discusses the attributions of the *curator furiosi*, was located according to Lenel's Palingenesia under the rubric "*Qui vindicta manumittere manumittique possint*"<sup>177</sup>. This text denies the possibility for the *curator furiosi* to perform the *manumissio (vindicta)*, for which a very specific ground is given, namely that it would fall outside his *administratio*. This shows that the impossibility mentioned in this case cannot be extended to any other non-owner. Moreover, the text as conveyed by Justinian discusses afterwards the validity of the *traditio* by the *curator*, but since the text originally discussed the *manumissio vindicta* Lenel conjectured that it initially made reference to the *in iure cessio*<sup>178</sup>. This would imply that the *curator* would be able to transfer ownership by *in iure cessio* when conducting the *administratio* of the lunatic's affairs. Mitteis considers this claim to be so uncertain that is not even

<sup>172</sup> Mitteis, *Manumissio vindicta* I (1900); Mitteis, *Manumissio vindicta* II (1904); Mitteis, *Römisches Privatrecht* (1908), p. 211 n. 23.

<sup>173</sup> Buckland, *Manumissio vindicta* (1903), p. 737-744; Buckland, *Slavery* (1908), p. 718-723.

<sup>174</sup> Buckland, *Slavery* (1908), p. 723: "I venture to suggest that Professor Mitteis in studying these texts is giving them an importance they do not deserve in relation to his general theory. He has shewn us how inadmissible the idea of representation in formal acts was to the classical lawyer. But the foregoing chapters shew that *favor libertatis* led to the doing of things, the acceptance of interpretations, and the laying down of rules, quite inadmissible in other branches of the law".

<sup>175</sup> Kaser, *Verfügungsakte* (1950), p. 78 ff.

<sup>176</sup> D. 27,10,17 (Gai. 1 *de manumissionibus*): "Curator furiosi nullo modo libertatem praestare potest, quod ea res ex administratione non est: nam in tradendo ita res furiosi alienat, si id ad administrationem negotiorum pertineat: et ideo si donandi causa alienet, neque traditio quicquam valebit, nisi ex magna utilitate furiosi hoc cognitione iudicis faciat". See Chapter 3, Section 2 above.

<sup>177</sup> Lenel, *Paling.* (1889) I, col. 250.

<sup>178</sup> Lenel, *Paling.* (1889) I, col. 250 n. 1 and 2.

worth discussing it, pointing out moreover that it should be borne in mind that the *curator furiosi* would have a ‘quasi-dominical power’<sup>179</sup>. This hasty and unfounded rejection of Lenel’s claim shows that Mitteis relies more on his own preconceptions regarding the evolution of direct representation in Roman law than in the sources, excluding at any rate the possibility to transfer ownership through formal acts.

There are other cases in which it seems likely that a non-owner may affect the position of the owner through an *in iure cessio*, which can be seen regarding the *in iure cessio servitutis*. This becomes clear when studying the 53<sup>rd</sup> book of Ulpian’s *ad Edictum*, where Lenel locates the following text under the rubric *De aqua*<sup>180</sup>:

D. 50,17,165 (Ulp. 53 *ed.*): Cum quis possit alienare, poterit et consentire alienationi. Cui autem donare non conceditur, probandum erit nec, si donationis causa consenserit, ratam eius voluntatem habendam<sup>181</sup>.

The text has been studied above, among the evidence that the transfer of ownership *voluntate domini* is put by Roman jurists on the same level as the transfer of ownership by the owner himself<sup>182</sup>. The original location of the fragment appears moreover to give an additional piece of information, namely that we are dealing with a formal act, which will be the *in iure cessio*<sup>183</sup> if the right to carry water is granted over urban property<sup>184</sup>. The text is moreover closely linked to other fragments located under this rubric, according to which the owner of the lands that will be affected by the servitude must give his consent (*voluntas*) when this right is granted<sup>185</sup>. Other rules are given on the subject within the same title, which agree with those that have been studied above concerning the *voluntas domini* for the transfer of ownership: if there are many co-

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<sup>179</sup> Mitteis, *Römisches Privatrecht* (1908), p. 211 n. 23. See on this notion Chapter 3, Section 4 and Chapter 5, Section 4 above.

<sup>180</sup> Lenel, *Paling.* (1889) II, col. 752.

<sup>181</sup> D. 50,17,165: “Anyone who can alienate can also consent to alienation. Anyone who is not allowed to give must prove his case, and if he grants it for the sake of giving, his intention is not to be regarded as valid” (transl. Watson).

<sup>182</sup> Chapter 2, Section 1(a) above.

<sup>183</sup> Lenel, *EP* (1927), p. 373 considers that this title dealt with the constitution through *in iure cessio* of the *servitus aquae ductus*.

<sup>184</sup> If the right is granted over rustic land the constitution may also take place through a *mancipatio*, as shown in Gai 2,29: “Sed iura praediorum urbanorum in iure cedi tantum possunt; rusticorum vero etiam mancipari possunt”.

<sup>185</sup> D. 39,3,8 (Ulp. 53 *ed.*): “In concedendo iure aquae ducendae non tantum eorum, in quorum loco aqua oritur, verum eorum etiam, ad quos eius aquae usus pertinet, voluntas exquiritur, id est eorum, quibus servitus aquae debebatur, nec immerito: cum enim minuitur ius eorum, consequens fuit exquiri, an consentiant. Et generaliter sive in corpore sive in iure loci, ubi aqua oritur, vel in ipsa aqua habeat quis ius, voluntatem eius esse spectandam placet”.

owners, all of them must grant their consent<sup>186</sup>; moreover, the consent of the owner can be granted before or after the right has been established<sup>187</sup>. Further reference to the edictal regulation is to be found in C. 3,34,4, which confirms that the praetorian edict did not allow this right to be granted without the consent of the affected persons<sup>188</sup>. Paul as well gives detailed information about the rules which must be followed regarding the *voluntas domini* when granting the right to carry water in D. 39,3,9pr-2, where there is little doubt that the original text referred to the *in iure cessio* considering that the text makes several references to the ‘*cessio*’<sup>189</sup>.

The interpretation of D. 50,17,165 is however challenged by the paligenetic observations of Johnston, who observes that Lenel often does not follow the order in which the compilers gathered the works of classical jurists as described by Bluhme and later by Krüger<sup>190</sup>. As one of these cases Johnston mentions D. 50,17,165, which according to the Bluhme-Krüger order should have belonged to an earlier subject, which is why the author considers that this fragment is best located under the topic of the *damnum infectum*<sup>191</sup>. In this context, the text would be referred to a case of transfer of ownership, and particularly to the prohibition to donate affecting the owner of the threatened building. While the author acknowledges that this reconstruction is far from certain, it is certainly plausible. It should however be pointed out that he discards too lightly the link between this fragment and the ones dealing with the constitution of a servitude by indicating that one cannot properly speak of *alienatio* in this context. One may in any case agree that both interpretations are plausible, but even if D. 50,17,165 did not specifically refer to formal ways of transferring ownership the relevance of the other texts dealing with the *voluntas domini* at the constitution of a right to carry water remains intact.

The significance of the *voluntas domini* is also to be found in other texts dealing with the constitution of servitudes involving formal acts, such as

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<sup>186</sup> D. 39,3,10pr (Ulp. 53 *ed.*): “Si autem plures sint eiusdem loci domini, unde aqua ducitur, omnium voluntatem esse sequendam non ambigitur: iniquum enim visum est voluntatem unius ex modica forte portiuncula domini praeiudicium sociis facere”.

<sup>187</sup> D. 39,3,10,1 (Ulp. 53 *ed.*): “An tamen subsequi voluntas possit, videamus. Et placet nihil interesse, utrum praecedat voluntas aquae ductionem an subsequatur, quia et posteriorem voluntatem praetor tueri debet”.

<sup>188</sup> C. 3,34,4 (Alexander, 223): “Aquam, quae in alieno loco oritur, sine voluntate eius, ad quem usus eiusdem aquae pertinet, praetoris edictum non permittit ducere”. See Lenel, *EP* (1927), p. 374.

<sup>189</sup> D. 39,3,9pr-2 (Paul 49 *ed.*): “In diem addicto praedio et emptoris et venditoris voluntas exquirenda est, ut, sive remanserit penes emptorem sive recesserit, certum sit voluntate domini factam aquae cessionem. (1) Ideo autem voluntas exigitur, ne dominus ignorans iniuriam accipiat: nullam enim potest videri iniuriam accipere, qui semel voluit. (2) Non autem solius eius, ad quem ius aquae pertinebit, voluntas exigitur in aquae cessione, sed etiam domini locorum, etsi dominus uti ea aqua non possit, quia recidere ius solidum ad eum potest”.

<sup>190</sup> Johnston, *Lenel’s Palingenesia* (1997), p. 58 ff.

<sup>191</sup> Johnston, *Lenel’s Palingenesia* (1997), p. 61-63.

D. 8,2,26<sup>192</sup>, D. 8,3,11<sup>193</sup> and D. 21,2,10<sup>194</sup>. In the last two texts the verb *cedere* is preserved, which strongly suggests that they originally dealt with a case of *in iure cessio*<sup>195</sup>.

Considering the cases in which a non-owner is reported as performing an *in iure cessio* or *manumissio vindicta* in the sources, it becomes imperative to re-examine the traditional grounds on which it has been claimed that only the owner could resort to this formal mode of alienation. If the only ground for this claim was the idea of a general prohibition of direct representation regarding formal acts, pointing out the weak support of this theory in the sources should be enough, but in this particular case the rule “*Nemo alieno nomine lege agere potest*” appears to be an unsurmountable obstacle due to the fact that procedural representation was not admitted in the *legis actiones*. In other words, as long as we consider the *in iure cessio* and the *manumissio vindicta* to be essentially a *legis actio sacramento in rem*, it does not seem possible to explain how a non-owner could appear in court transferring something which was not his own.

A solution to the contradicting evidence of the sources can be found in a recent study by Wolf dealing with the structure of the *in iure cessio* and the *manumissio vindicta*<sup>196</sup>. The author studies the idea according to which the *in iure cessio* was a ‘*nachgeformte Rechtsgeschäft*’, i.e. a legal act modelled after another one<sup>197</sup>. In the case of the *in iure cessio*, the legal act after which it would have been modelled is the *legis actio sacramento in rem*. According to him, the *in iure cessio* does draw some elements from the *legis actio sacramento in rem*, but its features are decisively determined by its role as a mode of transferring ownership, and not by the *legis actio* on which it is modelled. For Wolf, Roman jurists would have therefore borrowed only some bricks from the *legis actio* in order to build a mode for transferring ownership, which is why it would appear excessive to claim that the *in iure cessio* was actually ‘modelled’ after it<sup>198</sup>. In other words, the *in iure cessio*

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<sup>192</sup> D. 8,2,26 (Paul 15 *Sab.*): “In re communi nemo dominorum iure servitutis neque facere quicquam invito altero potest neque prohibere, quo minus alter faciat (nulli enim res sua servit)...”

<sup>193</sup> D. 8,3,11 (Celsus 27 *dig.*): “Per fundum, qui plurium est, ius mihi esse eundi agendi potest separatim cedi. Ergo subtili ratione non aliter meum fiet ius, quam si omnes cedant et novissima demum cessione superiores omnes confirmabuntur: benignius tamen dicetur et antequam novissimus cesserit, eos, qui antea cesserunt, vetare uti cesso iure non posse”.

<sup>194</sup> D. 21,2,10 (Celsus 27 *dig.*): “Si quis per fundum quem cum alio communem haberet, quasi solus dominus eius esset, ius eundi agendi mihi vendiderit et cesserit, tenebitur mihi evictionis nomine ceteris non cedentibus”.

<sup>195</sup> It should be noted that, despite the reference to a *cessio*, some authors consider D. 21,2,10 as referring to the *mancipatio*, since it would deal with the *actio de auctoritate*. See Lenel, *Paling.* (1889) I, col. 162; Peralta, *Evicción de servidumbres* (1996), p. 94-96.

<sup>196</sup> Wolf, *In iure cessio und manumissio* (2013), p. 375-391. Part of the study was also published in Italian in Wolf, *La in iure cessio* (2013), p. 1-12.

<sup>197</sup> The term was coined by Rabel, *Nachgeformte Rechtsgeschäfte* (1906-1907).

<sup>198</sup> Wolf, *In iure cessio und manumissio* (2013), p. 382: “Maßgebend für die Konstruktion der *in iure cessio* war nicht die Vorlage, der sie – was durchweg hervorgehoben wird –

would not be a ‘*nachgeformtes Rechtsgeschäft*’ or a ‘fictitious trial’, but would to a great extent have an autonomous legal nature. This idea had already been developed by Mitteis<sup>199</sup> and Lévy-Bruhl<sup>200</sup>, but Wolf takes their thoughts further. He stresses in particular some essential differences concerning the *legis actio sacramento in rem*, and particularly the absence of an oath, which would imply that the *in iure cessio* would revolve around the *addictio* of the magistrate, while in a real process the core of the controversy would be to determine who had sworn wrongfully. Other relevant differences are pointed out, such as the fact that in a normal *legis actio* each party would make their claims concerning the ownership of the disputed object and only then would the praetor intervene (Gai 4,16), while in the *in iure cessio* only the acquirer would do so, after which the magistrate would ask the transferor whether he wants to make a counter-vindication (Gai 2,21: “*praetor interrogat eum, qui cedit, an contra vindicet*”). These differences are in fact so relevant that even Kaser, who regarded the *in iure cessio* as a *nachgeformtes Rechtsgeschäft*, had to admit that it must have become independent from the *legis actio* at a very early stage<sup>201</sup>. Wolf considers these differences to be all the more relevant considering the rigid character of the *legis actio*, which would not allow the smallest change in the procedure – as shown in Gai 4,30 – which would show that we are not truly facing a legal process, not even in the form of a *confessio*. Accordingly, Wolf considers that the *in iure cessio* was not a spontaneous application of a *legis actio* for another end, but rather an artificial creation through the expert work of the *Pontifices* in pre-classical Roman law. Similar observations would moreover apply to the *manumissio vindicta*, which according to this author would borrow most elements from the *in iure cessio* – and not from the *vindicatio in libertatem* –, differing however in many points from it and particularly in the wording used by the *adsertor*<sup>202</sup>.

Some of the arguments offered by Wolf are more controversial than others, but he certainly does manage to offer a convincing picture on the legal nature of the *in iure cessio* and the *manumissio vindicta*, particularly considering that it accounts for the substantial differences between these rituals and the *legis actio sacramento in rem*. The essential differences could for instance explain why Gaius points out that the *in iure cessio* ‘is called a *legis actio*’ (Gai 2,24: *idque legis actio vocatur*) instead of simply declaring that it is in fact a *legis actio*. The idea of a fundamental difference between a legal act with regard to that on which it was modelled is moreover already to be found in the explanation of Kaser concerning the possibility of a son-in-power to perform the *manumissio vindicta*<sup>203</sup>. Wolf

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„nachgeformt“ wurde, sondern ihre gewollte Funktion eines Rechtsübertragungsgeschäfts; die *legis actio sacramento in rem* lieferte mit ihren Elementen nur die Bausteine”.

<sup>199</sup> Mitteis, *Römisches Privatrecht* (1908), p. 276–279.

<sup>200</sup> Lévy-Bruhl, *In iure cessio* (1934), p. 114–136. Regarding the *manumissio vindicta* see Lévy-Bruhl, *Affranchissement par vindicte* (1934), p. 56–76.

<sup>201</sup> Kaser, *Das altrömische Ius* (1949), p. 105.

<sup>202</sup> Wolf, *In iure cessio und manumissio* (2013), p. 384–391.

<sup>203</sup> Kaser, *Verfügungsakte* (1950), p. 78.

would therefore only claim that this difference was already clear since the creation of the *in iure cessio* and the *manumissio vindicta*. Whatever the case may be, it becomes clear that the rules governing these legal acts were not identical to those of the *legis actio sacramento in rem* in classical Roman law. This would explain why ownership could be transferred or the manumission could be performed by someone who would be completely inadequate to perform a *legis actio* according to the ancient rules of procedural representation, which could be seen as a proof for the ideas of Wolf that only the function given to these legal acts is truly decisive in order to determine their legal nature. It then becomes clear why Roman jurists had no problem in allowing the alienation to take place in these cases *voluntate domini*, as in many other cases of patrimonial loss produced by a non-owner.

The fact that the *in iure cessio* and the *manumissio vindicta* were not directly governed by the rules of the *legis actiones* does not imply that there were no boundaries whatsoever regarding the persons that could take part in them, some of which would relate to the structure of the pre-classical procedure, as can be seen in the following text:

Gai 2,96: In summa sciendum est his, qui in potestate manu mancipiove sunt, nihil in iure cedi posse; cum enim istarum personarum nihil suum esse possit, conveniens est scilicet, ut nihil suum esse in iure vindicare possint<sup>204</sup>.

When declaring that the *alieni iuris* cannot acquire anything through *in iure cessio*, Gaius gives as the reason for it that, since they have nothing of their own, they cannot vindicate anything as their own in court. This limitation is also to be found in the *Fragmenta Vaticana*<sup>205</sup>, and although the reason for it is absent here, it is clear that it relates to the impossibility to appear in court. Scholars have traditionally seen these texts as a confirmation that a non-owner could not perform solemn acts of alienation<sup>206</sup>, considering moreover that the reason for this limitation was the inability to appear in court affecting the *alieni iuris* under the *legis actiones*. While this latter statement is basically correct, a much more accurate explanation can be given when taking into account that the *in iure cessio* was not governed directly by the rules of procedure, but simply borrowed some elements of it. Following this idea, it is important to note that the prohibition

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<sup>204</sup> Gai 2,96: “Finally note that nothing can be assigned in court to those who are in our power, or in marital subordination or bondage to us. As they can own nothing, it of course follows that they can vindicate nothing as theirs in court” (transl. Gordon/Robinson).

<sup>205</sup> FV 51: “Adquiri nobis potest usufructus et per eos quos in potestate manu mancipiove habemus, sed non omnibus modis, sed legato, vel si heredibus illis institutis deductu fructu proprietatis legatur: per in iure cessionem autem vel iudicio familiae erciscundae non potest...”

<sup>206</sup> Mühlenbruch, *Cession* (1836), p. 42-43 n. 69; Mitteis, *Römisches Privatrecht* (1908), p. 211 n. 22.

refers to the acquisition and not the alienation through *in iure cessio*. Regarding the latter case, as shown above, we do have evidence that would indicate that a non-owner could in fact perform an *in iure cessio* in case of being authorized to do so, and that even a son-in-power could free a slave by resorting to the *manumissio vindicta* if authorized by the *pater*. What could explain these differences? The answer to this is readily found in the structure of these legal acts, where the acquirer or *adsertor* plays a much more active role than the person who transfers ownership or frees a slave. In fact, to transfer ownership through the *in iure cessio*, the transferor must simply appear in front of the magistrate and refrain from denying the claim of the other party. The acquirer, on the other hand, would have to utter the words “*hunc ego hominem ex iure quiritium meum esse aio*” (Gai 2,24) and make the vindication over the transferred object. Considering these very different roles, it is no wonder that Roman jurisprudence – particularly in earlier times – would have been unwilling to accept that someone who could by no means make such a claim – namely someone who owned nothing – could acquire ownership in this way. Moreover, the possibility of varying the words of the acquisition in a similar way as to that of the *mancipatio* (Gai 3,167) in order to mention the person on whose behalf the thing was acquired was completely excluded due to the fact that such an indication had no place in the *legis actiones*. This does not mean that the *in iure cessio* was governed by the rules on the subject, but simply that, at the time it was created, there was no such thing as procedural representation, and therefore jurists could not introduce the possibility to acquire on behalf of another person. The situation must have been entirely different in the case of the transferor, where jurists would have had no hesitation in allowing an authorized non-owner to take the role of the owner. As in many other situations, it must have been regarded as enough for the owner to consent to the act in order to make it valid according to the *ius civile*. There was moreover nothing in the structure of the *in iure cessio* which would object to this interpretation – on the contrary, it was perfectly suitable, considering that the non-owner actually had to appear in court as someone who had no right to claim the object, allowing the *addictio* of the magistrate to take place. The same conclusions are applicable *mutatis mutandis* to the structure of the *manumissio vindicta*, which would explain why it was possible for a son-in-power to perform it on behalf of his father.

## Chapter 6. Intellectual background and evolution of the *nemo plus* rule in Antiquity

To many contemporary scholars it may appear rather odd to leave the analysis of the *nemo plus* rule at the end of a study on the *potestas alienandi* in Roman law, considering that the idea that “no one can transfer to another a better right than he himself has” is normally held as the basic starting point for discussing whether a non-owner may transfer ownership. However, the significance of this rule in classical Roman law is often misunderstood, as it will be shown in this chapter, where it is claimed that the *nemo plus* rule in fact fulfilled a secondary role when approaching the transfer of ownership by a non-owner. Moreover, one can only understand the opinions of contemporary scholars on this *regula iuris* by framing them under the general discussion regarding the existence of direct representation in Roman law. It is traditionally argued that the said rule could only apply to formal ways of transferring ownership, where there was no room for direct representation. Having shown in the previous chapter that it was indeed possible for a non-owner to carry out formal acts for transferring ownership, it becomes necessary to revise what the real significance of the *nemo plus* rule was. In order to determine its original role in classical Antiquity, special attention will be paid to the use of this rule in literary sources, as well as the different ways in which jurists applied it. This examination will show that classical jurists did not approach the *nemo plus* rule as a fundamental truth which could not be controverted, and that only in the time of Justinian attempts would be made to explain it in a way which deprived it from any exceptions<sup>1</sup>.

### 1. Divergent views on the significance of the *nemo plus* rule

The *nemo plus* rule was laid down by Ulpian and included in the last title of the Digest, “On various rules of ancient law” (*De diversis regulis iuris antiqui*) in the following wording:

D. 50,17,54 (Ulp. 46 *ed.*): Nemo plus iuris ad alium transferre potest, quam ipse haberet<sup>2</sup>.

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<sup>1</sup> The views on this point have already been the subject of two previous contributions: Rodríguez Díez, *Eerherstel* (2014), p. 13–18; Rodríguez Díez, *Origen y evolución* (2015), p. 347–375.

<sup>2</sup> D. 50,17,54: “No one can transfer to another a better right than he himself has”.

The same idea is conveyed – again by Ulpian – with a similar wording in D. 41,1,20pr, where the rule is specifically referred to the transfer of ownership by *traditio*:

D. 41,1,20pr (Ulp. 29 *Sab.*): Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit nihil transfert<sup>3</sup>.

Traditionally this rule enjoyed such enormous prestige that even 20<sup>th</sup> century Roman law scholars would regard it as self-evident and free from exceptions. Hoetink, for instance, qualifies the rule as an “unavoidable and logical requirement”<sup>4</sup>, and Kaser excludes that this rule may have exceptions, granting it the same natural value as the sentence “one glass cannot pour into another one more water than it contains”<sup>5</sup>. Some authors even go beyond these general claims and grant the rule a large scope based on systematic considerations. This approach is for instance to be found in the large monographic study of Carlin, according to whom every case which appears to contradict the *nemo plus* rule is in fact only an apparent exception<sup>6</sup>. For instance, the delivery by a non-owner acting *voluntate domini* should be regarded as performed by the owner himself, just as that of a legal guardian, since he acts ‘*loco domini*’. This approach to the *nemo plus* rule is still influential among recent authors such as Longchamps, who recently defended

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<sup>3</sup> D. 41,1,20pr: “Delivery should not and cannot transfer to the transferee any better title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient” (Transl. Watson, modified).

<sup>4</sup> Hoetink, *Nemo plus iuris* (1935), p. 475: “... niet alleen eeuwenlang is beschouwd als de kernachtige formulering van het Romeinse denkkebeeld der eigendomsoverdracht, maar èn door het gezag dat het Romeinse recht genoot èn door het karakter van onweerlegbare vanzelfsprekendheid dat de formulering bezat, nog heden ten dage geldt als een onomkooembare, want logische, eis waaraan elk positief recht zich heeft te onderwerpen” (...[the rule of D. 50,17,54] not only has been considered for centuries as the concise formulation of the Roman notion of transfer of ownership but, through both the authority that Roman law enjoyed and the quality of irrefutable obviousness which that formulation contained, it applies still today as an unavoidable and logical requirement to which every positive law has to submit.)

<sup>5</sup> Kaser, *Ein Jahrhundert Interpolationenforschung* (1986 [1979]), p. 149 n. 6: “Ohne Ausnahme war anscheinend der Satz *nemo plus iuris transferre potest quam ipse habet* (Ulp. D. 50,17,54)... Wenn es stimmt, daß die genannte Regel so eng ausgelegt wurde, daß für Ausnahmen kein Raum blieb, erklärt sich dies am ehesten daraus, daß die Regel gleichsam ‘naturgesetzlich’ verstanden wurde wie der Satz, daß man aus einem vollen Glas in ein leeres nicht mehr hineingießen kann, als in jenem enthalten ist”.

<sup>6</sup> Carlin, *Niemand kann* (1882), p. 6: “Als folgerichtige Ausflüsse einer Regel, welche kraft logischer Notwendigkeit ausnahmslos ist, sind es diese drei Grundsätze auch: es können davon nur scheinbare Ausnahmen bestehen, in größerer oder geringerer Zahl...” Similarly Puchta, *Institutionen* (1842) II, p. 646; Bekker, *Pandektenrecht* (1886) I, p. 108 (§ 33).

the absolute validity of this rule by claiming that it only faced apparent exceptions, explaining how in each case the alienation in fact is regarded as performed by the owner himself<sup>7</sup>.

Despite the preeminent role traditionally granted to the *nemo plus* rule by scholars, others consider that its scope and significance have been exaggerated, and that classical jurists would have not awarded the rule such universal validity. The cornerstone of this critical approach consists in pointing out the original context in which Ulpian applies the rule, and it is therefore no coincidence that the first attempts to revise the scope of D. 50,17,54 came after the paligenetic analysis became possible following the works of Labitte<sup>8</sup> and Agustín<sup>9</sup>. The first attempt to approach the rule in its original context took place as early as 1568 in the writings of Jacobus Raevardus (1535–1568), who deduced from the original position of the text that it should have dealt with the patrimonial situation of women in Rome<sup>10</sup>. More fortunate was the opinion of Petrus Faber (c. 1540–1600) who considered that Ulpian had dealt in book 46<sup>th</sup> of the Commentary to the Edict with the *successio ab intestato*, and therefore this would have been the original context of D. 50,17,54<sup>11</sup>. A similar opinion is found in the writings of Jacques Godefroy (1587–1652), whose extensive commentary on the last title of the Digest was published posthumously in 1653. When dealing with D. 50,17,54, Godefroy makes the cunning observation that the text originally was located within the general topic of the *bonorum possessio*, specifically under the rubric *unde legitimi*<sup>12</sup>. He therefore declared that the rule would originally have stated that no one can transfer to his heir a greater right than he himself has<sup>13</sup>. Godefroy demonstrates his opinion mainly by enumerating similar rules, all of which are formulated in the context of the law of succession<sup>14</sup>.

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<sup>7</sup> Longchamps, *Nemo plus iuris* (2015), p. 78: “Exceptions to that rule with regard to derivative acquisition of ownership were only apparent. The academic discussion in Gaius’ *Institutes*, G 2 62–64, cannot be taken seriously”. Similarly, Zwolve, *Hoofdstukken Privaatrecht* (2006), p. 260 n. 70 considers that the cases of *transmissio voluntate domini* are only apparent exceptions to the *nemo plus* rule.

<sup>8</sup> Labitte, *Index legum omnium quae in Pandectis continentur* (Frankfurt 1724 [1557]), p. 152.

<sup>9</sup> Agustín, *De nominibus propriis του Πανδέκτου Florentini* (Tarragona 1579), col. 162.

<sup>10</sup> Raevardus, *De regulis iuris* (Antwerp 1568), p. 152–154.

<sup>11</sup> Petrus Faber, *Ad Titulum de diversis regulis iuris antiqui* (Cologne 1608), p. 249: “Pertinet vero proprie ad intestatorum successiones, de quibus loquebatur Ulpianus lib. 46. ad edictum, quod ab interpretibus animadversum non fuisse miror”.

<sup>12</sup> Godefroy, *De Diversis Regulis Iuris* (Geneva 1653), p. 242: “cujus species pertinent ad BONORVM POSSESSIONEM unde legitimi”.

<sup>13</sup> Godefroy, *De Diversis Regulis Iuris* (Geneva 1653), p. 242: “Ad alium, ait lex, v.g. ad haeredem: nemo scilic. plus iuris in haeredem transmittere potest, quam ipse habet vel haberet”, and later once more: “Nemo plus iuris ad haeredem transmittere potest, quam ipse haberet”.

<sup>14</sup> Godefroy, *De Diversis Regulis Iuris* (Geneva 1653), p. 242–243. Although Godefroy considers the rule to operate mainly in the context of the law of succession, he acknowledges that it can apply in other situations in which someone derives his right from someone else: “Est igitur haec regula proprie de aequo defuncti & haeredis iure. Potest

The paligenetic observations of Godefroy would be confirmed by the efforts of later scholars. More than two centuries later, Rudorff would still locate D. 50,17,54 under the rubric *Unde legitimi*<sup>15</sup> in his reconstruction of the *Edictum Perpetuum*, among the general analysis of the *bonorum possessio*, and Lenel would follow this order a few years later<sup>16</sup>. Lenel, however, introduced a different approach than that of Godefroy when noticing the context of the rule, and noted that the fragment may have originally dealt with a specific case of *in iure cessio hereditatis*<sup>17</sup>. The reason for this choice is by no means evident. As it has been noted, Godefroy considered that this rule would refer to the rights which are transferred from the deceased to his heir, but Lenel thought that it should refer to the *in iure cessio hereditatis* between the heir and a third party. While Lenel does not give reasons for his choice, one is drawn to think that it was motivated by the use of the word *transferre*, which could indicate a transfer of ownership, particularly compared to the verb *relinquere* used in D. 50,17,120, which expressly applies the rule to the law of succession.

Having the paligenetic analysis as a starting point, several scholars stressed during the 20<sup>th</sup> century that the *nemo plus* rule as presented in D. 50,17,54 and D. 41,1,20pr was the result of postclassical generalization and interpolation<sup>18</sup>. This opinion became particularly popular through the textual criticism of Schulz, who pointed out the inappropriate use of the subjunctive “haberet” instead of the indicative “habet”<sup>19</sup> in D. 50,17,54, which according to him would prove that the original wording had been altered by Justinian’s commissioners in order to formulate a rule through the generalization of a particular case, leaving behind them a trace of their clumsiness by not adapting the text adequately to the new context. Schulz accordingly reconstructs the text, stating that it would have been originally referred to the case in which an *heres legitimus* performs an *in iure cessio* without having acquired the inheritance by *aditio hereditatis*, and so the original wording would have been ‘*Heres non plus iuris ad alium transferre potest quam ipse haberet si hereditatem adisset*’<sup>20</sup>.

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tamen & haec regula produci seu porrigi ad alias quoque personas, quae ius suum ex alterius vel auctoris persona derivant” (p. 243).

<sup>15</sup> Rudorff, *Edicti perpetui* (1869), p. 149, § 160.

<sup>16</sup> Lenel, *Paling.* (1889) II, col. 722, nr. 1200.

<sup>17</sup> Lenel, *Paling.* (1889) II, col. 722, nr. 1200, n. 1: “Possunt haec ad iniurecessionem hereditatis referri”. This opinion was already present in the first edition of his *Edictum Perpetuum* (1883), p. 284, § 157 n. 6, and was upheld until the last edition (1927), p. 356, § 157 n. 2.

<sup>18</sup> See De Francisci, *Il trasferimento* (1924), p. 8–11, 149–152; Albertario, *Introduzione storica* (1935), p. 158; Jörs/Kunkel/Wenger (1949), p. 125 n. 4; Levy, *Law of Property* (1951), p. 176; Voci, *Modi di acquisto* (1952), p. 4–5 and 81; Gallo, *Studi sul trasferimento* (1955), p. 115–121; Schulz, *Classical Roman Law* (1951), p. 351–352; Spruit, *Nemo plus iuris* (1980–1981), p. 77–80; Álvarez, *Nemo plus iuris* (2006), p. 1–4.

<sup>19</sup> Schulz, *Classical Roman Law* (1951), p. 352.

<sup>20</sup> Schulz, *Classical Roman Law* (1951), p. 352. This reconstruction is accepted by Spruit, *Nemo plus iuris* (1980–1981), p. 79–80.

The observations concerning the validity of the rule were not limited to the textual criticism, since scholars determined that the activity of the compilers brought along significant dogmatic changes. Most authors consider the *nemo plus* rule to be contrary to classical Roman law due to the significant number of exceptions it would suffer, such as those mentioned in Gai 2,62-64<sup>21</sup>. Since the rule would be unacceptable in its general formulation in several cases – such as the *traditio* by a non-owner – scholars concluded that it originally must have referred to the *in iure cessio* which, according to the dominant opinion, could only be performed by the owner himself. The rule would therefore be truly applicable for the case of the *in iure cessio* – in this case, *hereditatis* – and not in the general formulation offered in the Digest.

The objections against D. 50,17,54 did not stop there, since it was further argued that this rule would introduce an anachronism when dealing with the transfer of ownership, since it would describe it as the ‘transfer of a right’. Such a notion, it has been argued, would be completely alien to classical Roman law, where property was not approached as a right which could be transferred itself<sup>22</sup>. This objection, however, has little ground, considering that the text originally would have referred to the *in iure cessio hereditatis*, and therefore the ‘*ius*’ which is transferred to is not ownership itself but the *hereditas* as a whole<sup>23</sup>. It should be noted in this context that the text uses the genitive singular ‘*iuris*’, and the sentence could accordingly be translated as “no one can transfer a better right” or “more of a right”, meaning the *hereditas*. The circumstance that the text is rendered in plural form by some translators<sup>24</sup> agrees with the general scope given to the text as a *regula iuris*, but departs significantly from its original meaning.

Another criticism on D. 50,17,54, this time from a methodological angle, came from Spruit, who stressed that the abstract terms in which the rule is presented are alien to classical legal reasoning, but are adequate to the Byzantine method, and therefore the commissioners would have developed an abstract rule from a decision which was meant to solve only one particular case<sup>25</sup>.

The text of D. 41,1,20pr was also target of similar criticism. It has been argued that this text was not the result of generalization, as would be the case of D. 50,17,54, but of downright interpolation. Already Lenel considered that the text originally referred to the *mancipatio* and not to the *traditio*, despite the fact that he located it under the rubric “*De mancipatione et traditione rei venditae*”<sup>26</sup>. His opinion may be explained by the fact that the second sentence deals with the

<sup>21</sup> Schulz, *Classical Roman Law* (1951), p. 352: “The rule *nemo plus iuris*, etc., is therefore obviously false. In fact the classical lawyers knew no such maxim, as Gai. 2. 62-4 clearly shows”. See also Albertario, *Introduzione storica* (1935), p. 158, and Spruit, *Nemo plus iuris* (1980-1981), p. 78.

<sup>22</sup> See on this point De Francisci, *Il trasferimento* (1924), p. 9-11, 149-150.

<sup>23</sup> D’Ors, *Concepto de ius* (1953), p. 286; D’Ors, *DPR* (2004), p. 228 n. 1.

<sup>24</sup> E.g. Watson, *Digest*: “No one can transfer greater rights...”.

<sup>25</sup> Spruit, *Nemo plus iuris* (1980-1981), p. 78.

<sup>26</sup> Lenel, *Paling.* (1889) II, col. 1122, nr. 2721.

conveyance of a *fundus*, which led other scholars to agree with Lenel, since in this case the *dominium ex iure Quiritium* could only be transferred through *mancipatio*<sup>27</sup>. Moreover, the argument concerning the accuracy of the *nemo plus* rule was also brought up regarding the text of D. 41,1,20pr: the *nemo plus* rule could only be truly used in the context of formal ways to transfer ownership, such as the *mancipatio* or the *in iure cessio*, in which only the owner himself could transfer ownership and could not do so through another person. Accordingly, several scholars consider that this evolution would be indicative of the corruption of a flawless rule through interpolation, since it would suffer exceptions in the case of *traditio* which were unknown in the original formulation<sup>28</sup>.

The two contrasting views on the validity of the *nemo plus* rule presented so far have nonetheless a common ground, which is the assumption that this rule was in itself completely valid. The only difference is that some scholars consider that it retained its validity even within Justinian's compilation, while others deem that the generalization and interpolation of classical texts by the compilers corrupted the value of a rule which was absolutely valid in classical jurisprudence. There is however another approach to this rule, according to which it never had an absolute validity. This opinion was brought forward by Buckland<sup>29</sup>, who refutes the views of Albertario by claiming that the existence of classical texts which allow the alienation by a non-owner are no obstacle to the validity of the *nemo plus* rule, especially since the *regulae iuris* would only seldom have absolute validity. Other authors favour this more moderate approach, such as von Lübtow, who despite following many of the ideas of Schulz considers that the *nemo plus* argument is merely a general rule which was never completely accurate<sup>30</sup>. Also Feenstra considers that this rule would have been at most used as an argument by classical jurists, and that its modest value becomes evident by the careful expression "*debet vel potest*" that Ulpian uses in D. 41,1,20pr<sup>31</sup>. Finally, Kupiszewski is keen to observe that the rule did not have an absolute validity, nor in classical nor in Justinianic law, in view of the exceptions it faces<sup>32</sup>.

Among the various views on the significance of the *nemo plus* rule, that of Schulz appears to be the most influential nowadays, since the majority of the authors dealing with this rule or with the transfer of ownership by a non-owner

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<sup>27</sup> De Francisci, *Il trasferimento* (1924), p. 8-11, 149-152; Gallo, *Studi sul trasferimento* (1955), p. 115-121; Spruit, *Nemo plus iuris* (1980-1981), p. 80 n. 4; Longchamps, *Nemo plus iuris* (2015), p. 75.

<sup>28</sup> Schulz, *Classical Roman Law* (1951), p. 352: "The whole text seems to be spurious. The author overlooked the cases in which a non-owner could transfer ownership".

<sup>29</sup> Buckland, *Interpolations* (1941), p. 1308-1309.

<sup>30</sup> Von Lübtow, *Hand wahre Hand* (1955), p. 145 n. 129: "Aber es handelt sich um eine Faustregel, die nie ganz exakt sein kann".

<sup>31</sup> Feenstra, *Romeinsrechtelijke grondslagen* (1994), p. 50.

<sup>32</sup> Kupiszewski's opinion is offered in translation by Longchamps, *Nemo plus iuris* (2015), p. 78 n. 63.

accept his reconstruction and some of the consequences derived from it<sup>33</sup>. Nonetheless, it is worth noting that many scholars regard this rule as a concise expression of the rules governing the transfer of ownership in Roman law, and therefore use it as a starting point to determine the outcome of the transfer of ownership by *traditio* as well<sup>34</sup>. This application of the rule does not agree with the opinion of Schulz, according to whom the *nemo plus* can only be seen as having absolute validity in the context of formal ways of transferring ownership, which shows that scholars tend to value it more as a starting point than as an absolute principle.

Considering the contrasting approaches to the significance of the *nemo plus* rule for Roman classical law, it is worth noting that there are certain issues which have been completely overlooked in the analysis of this rule and which will be explored in the following sections. The first issue which deserves attention is the existence in non-legal sources of other texts which convey the same idea behind the *nemo plus* rule, which is especially interesting because these references may provide additional clues regarding the significance granted to this idea in the intellectual context of Antiquity. The second point where there is much left to say regards the different forms that the rule adopts in classical jurisprudence, since there are numerous cases other than D. 41,1,20pr and D. 50,17,54 where the same underlying idea is applied in different contexts and with different significance. The lack of attention for these problems may be explained due to the absence of a comprehensive modern study on this rule in Roman law, since the last attempt to deal thoroughly with it was the monographic work of Carlin in 1882<sup>35</sup>, to which much can be added nowadays. Accordingly, by examining the application of the rule in literary sources and in different legal contexts an attempt will be made to throw more light on the scope and significance of the *nemo plus* rule in Roman law.

## 2. The *nemo plus* argument in literary sources

The *nemo plus* rule has clear ancestors in literary sources, which can be traced as far as the writings of Greek philosophers. Even when the different texts included below always highlight the basic notion according to which “no one can give/lose what he does not have” the validity awarded to this idea is not uniform among different authors, and therefore no technical term – maxim, topical argument, axiom, thesis, premise, rule, principle, etc. – can be ascribed to it in a comprehensive way. Nonetheless, since this idea is mostly used in argumentative

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<sup>33</sup> See e.g. among the authors who study the transfer of ownership by a non-owner, the opinions of Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 16; Sansón, *La transmisión* (1998), p. 7 n. 1.

<sup>34</sup> E.g. Potjewijd, *Beschikkingsbevoegdheid* (1998), p. 10; Lokin, *Prota* (2012), p. 109-110, 152-154; Guzman, *DPR* (2013) I, p. 633.

<sup>35</sup> Carlin, *Niemand kann* (1882), p. 18-42.

contexts, its different variations will be labeled, for the sake of simplicity, as the ‘*nemo plus* argument’, in order to distinguish it from the fixed ‘*nemo plus* rule’ of D. 50,17,54. This label has only an instrumental value, as can be seen by the fact that in no literary source does this argument begin with the words ‘*nemo plus*’.

The *nemo plus* argument appears already in Plato’s *Symposium*, in a text where the poet Agathon describes the attributes of the god Love:

Plato, *Symposium* 196d-e: In the first place let me say that the god is a skilful poet – in order that I too, like Eryximachus, may pay honour to my craft – and he is also able to make another person a poet too. At any rate, at his touch every man becomes a poet ‘though formerly unvisited by the Muse’. This we can properly take as evidence that Love is a skilful creator in virtually every form of artistic creation; for no one could give or teach another something which he does not possess or know himself (ἄ γάρ τις ἢ μὴ ἔχει ἢ μὴ οἶδεν, οὐτ’ ἂν ἐτέρῳ δοίη οὐτ’ ἂν ἄλλον διδάξειεν) (transl. Howatson)<sup>36</sup>.

This statement is part of the line of reasoning adopted by Agathon in his speech (194e-198a), since at the beginning he states that the other speakers in the dialogue have focused on the activity of the humans as they love, and that “no one has described the nature of him who has bestowed these good things” (194e) which according to him is the god Love. Agathon’s speech is therefore a eulogy to Love as a source of virtually every skill. The whole idea is quite confusing, and based largely on a word play<sup>37</sup>, in which Agathon says that Love is a skilful ποιητής, which can mean either ‘poet’ or ‘maker’, and since Love is a ποιητής he can ‘make’ other people a ‘poet’ or ‘maker’ too, which in turn means that every artistic skill was taught by Love, because otherwise he would not be able to bestow or teach this ability.

Scholars have highlighted the sloppiness of Agathon’s reasoning<sup>38</sup>, where the idea that “no one could give or teach...” alone can be the target of numerous objections. First of all, although the statements “no one can give something which he does not possess” and “no one can teach what he does not know”

<sup>36</sup> Plato, *Symposium* 196d-e: “καὶ πρῶτον μὲν, ἴν’ αὖ καὶ ἐγὼ τὴν ἡμετέραν τέχνην τιμήσω ὡσπερ Ἐρυξίμαχος τὴν αὐτοῦ, ποιητὴς ὁ θεὸς σοφὸς οὕτως ὥστε καὶ ἄλλον ποιῆσαι· πᾶς γοῦν ποιητὴς γίνεταί, “κἂν ἄμουσος ἢ τὸ πρῖν”, οὗ ἂν Ἔρως ἀψηται. ᾧ δὴ πρέπει ἡμᾶς μαρτυρίῳ χρῆσθαι, ὅτι ποιητὴς ὁ Ἔρως ἀγαθὸς ἐν κεφαλαίῳ πᾶσαν ποιῆσιν τὴν κατὰ μουσικὴν· ἄ γάρ τις ἢ μὴ ἔχει ἢ μὴ οἶδεν, οὐτ’ ἂν ἐτέρῳ δοίη οὐτ’ ἂν ἄλλον διδάξειεν”.

<sup>37</sup> Hunter, *Plato’s Symposium* (2004), p. 72.

<sup>38</sup> See Hunter, *Plato’s Symposium* (2004), p. 71: “... Agathon’s speech is marked... by many forms of word- and sound-play (puns, equivocations, antithesis, assonance, rhyme, and so on), which often take the place of, while simultaneously advertising the absence of, anything that could be described as ‘convincing argument’”. See p. 72-73 for the subtle word plays and the intricate structure of Agathon’s reasoning.

appear to have a similar validity, the physical element which makes the first sentence so compelling is absent in the second one. Agathon mixes in this sentence two different ideas, belonging to the material and intellectual worlds respectively, and while in the first case it is indeed impossible to obtain an object out of nowhere – that is, to have something that was not received – it is in fact possible to independently produce knowledge – that is, to know something which was not taught by someone else. This implies that one cannot derive *a contrario sensu* from this general idea that every knowledge and skill someone has was necessarily learnt from someone else, as implied by Agathon, as if nobody could acquire new knowledge by himself. Finally, it is difficult to grasp how Agathon concludes that all knowledge must be derived from Love, which implies stretching his starting point – that Love must be a skilled poet/creator – to an incomprehensible level.

Considering the shortcomings of Agathon's reasoning, it appears that the argument that "no one could give or teach another..." has limited validity in Plato's eyes. This becomes evident when reading the subsequent speech of Socrates, who implies that Agathon's speech was a demonstration of empty oratory rather than an assertion of the truth<sup>39</sup>. Socrates ironically declares that, apparently, he himself had no idea of how to make a eulogy, because he thought that it implied "only to speak the truth about the subject of the eulogy"<sup>40</sup>, and after a short exchange of opinions Agathon find himself compelled to acknowledge the superiority of the ideas of Socrates (201b). It is moreover noteworthy that Socrates declares that Agathon's speech reminded him of Gorgias, a sophist who features in other platonic dialogues. What exactly reminded Socrates of Gorgias in Agathon's speech is not entirely clear<sup>41</sup>, but for the purpose of this research it cannot be ignored that this reference may indicate among other elements the use of the *nemo plus* argument, which would therefore be a creation of sophistic philosophy, and perhaps of Gorgias himself. The mere reference to Gorgias in this text, while not providing conclusive evidence on the point, is to be taken into account to determine the origins of the argument, particularly considering that Plato would go to great lengths when imitating the style of sophistic reasoning<sup>42</sup>. In this particular case, Plato could be parodying the

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<sup>39</sup> Plato, *Symposium* 198b-199a: "The speech reminded me of Gorgias, so much so that I had the Gorgon experience as in Homer: I was afraid Agathon would conclude his speech by challenging mine with the eloquence of Gorgias, that brilliant orator, and – like the Gorgon – would turn me into stone, unable to utter a word. It was then I realised what a fool I had been in agreeing with you to take my turn and deliver a eulogy of Love, and in saying I was an expert on the subject of love, despite, as it turned out, knowing nothing about how to compose a eulogy of anything. For in my naivety I thought I had only to speak the truth about the subject of the eulogy". (transl. Howatson & Sheffield). See on this text Plato, *Symposium* (ed. Howatson & Sheffield), p. xiii and Hunter, *Plato's Symposium* (2004), p. 74-75.

<sup>40</sup> See Hunter, *Plato's Symposium* (2004), p. 36.

<sup>41</sup> Hunter, *Plato's Symposium* (2004), p. 74 discusses the point.

<sup>42</sup> Tindale, *Sophistic argument* (2010), p. 37-39.

use of a real sophistic argument, which Plato himself would refrain from using in other places of his dialogues.

The suspicions regarding the sophistic origin of the *nemo plus* argument find further support in the fact that Aristotle deals extensively with the argument in his *Sophistical Refutations* (*De Sophisticis Elenchis*) which are considered to be some sort of Appendix to his *Topics* (*Topica*)<sup>43</sup>. In the latter work Aristotle deals with dialectic reasoning (συλλογισμός διαλεκτικός), providing argumentation techniques which stem from “generally accepted opinions” (ένδοξα) (*Topica* I, 1, 100b18, transl. Forster), which are “those which commend themselves to all or to the majority or to the wise” (*Topica* I, 1, 100b22-24). The purpose of the *Topica* is to be used as a tool for argumentation, particularly in the context of the debates held in the method of *elenchus* (gr. έλεγχος), where one party would interrogate his adversary in order to extract contradictory statements and refute his position. This argumentative function implies that the tools given in the *Topica* are meant to reach only plausible conclusions, and not scientifically true ones. True scientific conclusions can only be reached through demonstrative reasoning (συλλογισμός απόδειξις), which “proceeds from premises which are true and primary or of such a kind that we have derived our original knowledge for them through premises which are primary and true” (*Topica* I, 1, 100a27-30). Aristotle dealt with demonstrative reasoning in a separate work, his *Analytica Posteriora*.

The *Sophistical Refutations* are closely related to the *Topica*, but in the former text Aristotle deals with eristic reasoning (συλλογισμός έριστικός), which consists either of using apparent generally accepted opinions (ένδοξα) or apparent reasoning that uses real or apparent ένδοξα<sup>44</sup>. Aristotle therefore sets out to explore a number of fallacies in argumentation, such as those which would be used by the sophists.

The *nemo plus* argument is referred to several times within the *Sophistical Refutations*, keeping in all versions a similar formula<sup>45</sup>, which is in turn very close to the one Plato uses<sup>46</sup> – leaving aside, of course, the references to ‘teach’ and ‘know’, which only make sense within the specific context of the platonic text. This shows that Aristotle deals with a well-known argument, already in use before his time and consolidated enough to have a relatively fixed formulation. Moreover, considering that neither Plato nor Aristotle make use of the argument

<sup>43</sup> See Schreiber, *Sophistical Refutations* (2003), p. 3.

<sup>44</sup> *Topica* I, 1, 100b23-101a4; *De Sophisticis Elenchis* 2, 165b7-8. For the general classification of the different kinds of reasoning in the *Topica* and the *Sophistical Refutations* see Schreiber, *Sophistical Refutations*, p. 1-4.

<sup>45</sup> *De Sophisticis Elenchis* 10, 171a9: “ο δέ, α μη έχου τις, δοῦναι”; 22, 178a38: “οτι δοίη αν τις ο μη έχει”; 22, 178b2: “ο μη τις έχει δοίη αν”; 22, 178b4: “οτι δοίη αν τις ο μη έχει”; 23, 179a22: “ο μη έχει, δοίη αν τις”.

<sup>46</sup> *Symposium* 196e: “α γάρ τις η μη έχει η μη οίδεν, ουτ’ αν έτέρω δοίη ουτ’ αν άλλον διδάξειεν”.

in other contexts, and that the Sophistical Refutations deal to a great extent with argumentation techniques of the sophists<sup>47</sup>, it appears most likely that the origin of the argument is to be found among the sophists.

The argument is found as a starting point for a series of fallacies in chapter 22 of the Sophistical Refutations, where Aristotle studies fallacies resulting from the ‘Form of the Expression’, which “are directly concerned with how words relate to things”<sup>48</sup>. In order to solve this kind of fallacies, Aristotle considers it necessary to have a good understanding of the different ‘categories’. The ‘categories’ in Aristotle are “the highest kinds of things that are nameable”<sup>49</sup>, which according to him would be ten in number: substance, quantity, quality, relative, place, time, position, state, activity and passivity<sup>50</sup>. According to Aristotle, “the accident, the *genus*, the property and the definition will always be in one of these categories; for all propositions made by means of these indicate either essence or quality or quantity or one of the other categories”<sup>51</sup>. An ambiguous use of words could therefore lead to the superposition of two categories and thereby to a fallacious reasoning, as Aristotle’s examples show. It is because of this that Schreiber suggest to label these fallacies as ‘Category mistakes’.

Aristotle first discusses what Schreiber calls fallacies due to ‘Confusion of Substance with Quantity’<sup>52</sup> (*De Sophisticis Elenchis* 22, 178a29–37). In Aristotle’s example the interrogator formulates the following question: “Has a man lost what he had and afterwards has not?”<sup>53</sup> (transl. Forster). If the person interrogated gives a positive answer, the interrogator could refute him by saying that a man who had ten dice and lost one would not lose something which he had before but no longer has, i.e. ten dice. This reasoning is fallacious by confusing the categories of substance and quantity, since this argument “confuses *what* someone lost with *how much* or *how many* someone lost, since things in both Categories can be signified by words in the same predicate position”<sup>54</sup>.

Aristotle continues with the dice example in a fallacy which Schreiber labels ‘Confusion of Substance with Relative’<sup>55</sup>. In the first example, the interrogator asks whether a man could give what he does not have<sup>56</sup>. If the person interrogated gives a negative answer, the interrogator could refute him by showing that a person who had ten dice can give one die, even when he has ten and not only one. The fallacy therefore induces to confusion by introducing in

<sup>47</sup> Schreiber, *Sophistical Refutations* (2003), p. 2.

<sup>48</sup> Schreiber, *Sophistical Refutations* (2003), p. 37.

<sup>49</sup> Schreiber, *Sophistical Refutations* (2003), p. 15.

<sup>50</sup> Aristotle, *Categories* 4, 1b25–27; *Topica* I, 9, 103b20–24.

<sup>51</sup> Aristotle, *Topica* I, 9, 103b24–27.

<sup>52</sup> Schreiber, *Sophistical Refutations* (2003), p. 39–40. This fallacy is found in *De Sophisticis Elenchis* 22, 178a29–37

<sup>53</sup> “εἰ ὁ τις ἔχων ὕστερον μὴ ἔχει ἀπέβαλεν”

<sup>54</sup> Schreiber, *Sophistical Refutations* (2003), p. 39.

<sup>55</sup> Schreiber, *Sophistical Refutations* (2003), p. 40.

<sup>56</sup> This fallacy is explained in *De Sophisticis Elenchis* 22, 178a37–b7.

the argument an element which does not belong to the category of substance, but to that of 'relative', which indicates the position of one thing in relation to another one: "For 'single unit' does not denote either a particular kind of thing or a quality or a quantity but a relation to something else, namely, dissociation from anything else" (178a38-b1, transl. Forster). A similar example is given by using the same initial question: if the interrogator asks whether a man can give what he does not have and receives a negative answer, then he could argue that a man can give something quickly even when he had not got it quickly, inferring from the acceptance of this latter statement by the interrogated person that a man could give what he did not have. Aristotle concludes that this is not a correct inference, "for 'giving quickly' does not denote giving a particular thing but giving in a particular manner, and a man could give something in a manner in which he did not get it" (178b4-6, transl. Forster).

Aristotle gives further examples of such kind of fallacies, such as "Could a man strike with a hand that he has not got or see with an eye that he has not got?"<sup>57</sup>, inducing a negative answer which could be refuted by stating that he could strike only with one hand or see only with one eye, having two of them. Another example would be to state: "what a man has, he has received" (22, 178b11), which could lead to the refutation that even when a person gave one vote, the second person may have ten, and not *only* one<sup>58</sup>. A further variation of the fallacy would be to state that "one can have what one has not received; for example, one can receive wine that is sound but have it in a sour condition if it has gone bad in the process of transfer". In all of these cases a confusion is introduced between *what* something is and *the manner* in which something is<sup>59</sup>. The interrogator induces the adversary to admit a statement without qualification, and afterwards takes advantage of the resulting ambiguity to reach a fallacious conclusion by introducing elements which do not belong to the substance of the object described.

Does all of the above imply that Aristotle considers the statement 'no one can give what he does not have' fallacious in itself? Not at all. The basic validity of the statement in the eyes of Aristotle becomes evident when, in Chapter 23, he gives a procedure to solve certain fallacies by appealing to its opposite, which in the case of fallacies due to the Form of the Expression would be "the Category opposed to the one assumed by the questioner"<sup>60</sup>. When dealing with the argument studied here, Aristotle writes:

*De Sophisticis Elenchis* 23, 179a22-24: 'Could one give what one has not got?' Surely not *what* he has not got but he could give it *in a*

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<sup>57</sup> This example is discussed in *De Sophisticis Elenchis* 22, 178b8-b17.

<sup>58</sup> Schreiber, *Sophistical Refutations* (2003), p. 41.

<sup>59</sup> Schreiber, *Sophistical Refutations* (2003), p. 41.

<sup>60</sup> Schreiber, *Sophistical Refutations* (2003), p. 213 n. 36.

*way which* he has not got it, for example, a single die by itself (transl. Forster).

The idea that ‘no one can give what he does not have’ is therefore a valid thesis, and the fallacy only appears when refuting it through the confusion of categories. What can accordingly be concluded about the validity of the *nemo plus* argument in Aristotle? As has been said before, eristic reasoning consists in “reasonings from apparent but not real *endoxa*, or apparent reasonings”<sup>61</sup>. Since in this case the thesis would be true, one can only conclude that we are facing an apparent reasoning. Moreover, considering that eristic reasoning in most cases is parasitic upon dialectical reasoning<sup>62</sup>, it would appear that the *nemo plus* argument is a valid *endoxon*.

The general validity of the argument contrasts, however, with the fact that it is not brought up elsewhere in the works of Aristotle, which seems to show caution regarding its general applicability. At this point one may add that there are problems related to the application of the *nemo plus* argument which are not directly addressed by Aristotle, and which are more evident in the faulty use of the argument within the writings of Plato. Most of the examples that Aristotle gives seem to be in fact rather harmless in normal argumentation, involving ambiguous language use when describing physical interactions, particularly when handing over various objects, which reduces the problems related to the application of the argument to very narrow cases that would not normally fool anyone. Plato, on the other hand, presents the argument in an analogy with teaching, and it is this analogous use which seems to be the central problem regarding the use of argument, since when discussing non-corporeal entities it is much easier to confuse whether someone ‘has’ something and how can he ‘give’ it. In such cases of analogous application the perfect correlation that takes place when discussing material objects between what is given and what is received can lose its strength. Aristotle’s distinctions between categories therefore remains useful, but they must be taken further, not only to discuss the delivery of physical objects but also to assess cases of analogous application, in which there seems to be a greater danger of confusing different categories.

Despite the complications surrounding the *nemo plus* argument, the seemingly self-evident nature of the argument, together with its broad potential for analogous application, would secure its repeated application throughout the ages. It is moreover worth noting that in Greek non-legal sources there are several similar, alternative versions, which may be regarded as variations of the *nemo plus* argument. Such variations bear witness to the versatility of the argument, contributing to its widespread application in different contexts. One of this variations named by Aristotle is the question “has a man lost what he had and

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<sup>61</sup> Aristotle, *De Sophisticis Elenchis* 2, 165b7-8.

<sup>62</sup> Schreiber, *Sophistical Refutations* (2003), p. 191-192 n. 8.

afterwards has not?” (εἰ ὁ τις ἔχων ὕστερον μὴ ἔχει ἀπέβαλεν, *Soph. El.* 22, 178b11). The existence of such variations is particularly interesting since other authors would make use of them, as happens with the so-called *ceratina* paradox, also known as the paradox of the horns (gr. κερατίνης) or The Horned One. This paradox is reported by Diogenes Laertius to be a creation of Eubulides<sup>63</sup>, who was a contemporary of Aristotle and disciple of Euclid of Megara. Another text of Diogenes Laertius conveys the content of this paradox:

Diogenes Laertius, *Lives and Opinions of Eminent Philosophers* 7,7,187:  
If you never lost something, you still have it; but you never lost  
horns, therefore you have horns (transl. Hicks, modified)<sup>64</sup>.

Since the basic proposition of the *ceratina* paradox is true but incomplete, the problem of the syllogism resides in the second proposition, through which a fallacious conclusion is reached through the assumption that the other party has horns<sup>65</sup>, a fact which the interrogated person may appear to have acknowledged when accepting the first proposition. The inclusion of this variation of the *nemo plus* argument in the paradox may have contributed to the preservation of this notion in later authors, since the *ceratina* paradox would become a commonplace in the following centuries. However, Eubulides and his work suffered a significant discredit in later ages<sup>66</sup>, which may have also drawn suspicion to the use of the argument in general<sup>67</sup>.

Another text which testifies to the influence and survival of variations of the *nemo plus* argument in the Greek world is to be found much later in the New Testament, where St. Paul writes in his First Epistle to the Corinthians “What do

<sup>63</sup> Diogenes Laertius, *Lives and Opinions of Eminent Philosophers* 2,10,108-109: τῆς δ' Εὐκλείδου διαδοχῆς ἐστὶ καὶ Εὐβουλίδης ὁ Μιλήσιος, ὃς καὶ πολλοὺς ἐν διαλεκτικῇ λόγους ἠρώτησε, τὸν τε ψευδόμενον καὶ τὸν διαλανθάνοντα καὶ Ἡλέκτραν καὶ ἐγκεκαλυμμένον καὶ σωρίτην καὶ κερατίνην καὶ φαλακρόν. περὶ τούτου φησὶ τις τῶν κωμικῶν: οὐριστικός δ' Εὐβουλίδης κερατίνας ἐρωτῶν καὶ ψευδαλαζόσιν λόγοις τοὺς ῥήτορας κυλίων ἀπὴλθ' ἔχων Δημοσθένους τὴν ῥωποπερπερήθραν. ἐφίκε γὰρ αὐτοῦ καὶ Δημοσθένης ἀκηκοῦναι καὶ ῥωβικώτερος ὢν παύσασθαι. ὁ δ' Εὐβουλίδης καὶ πρὸς Ἀριστοτέλην διεφέρετο, καὶ πολλὰ αὐτὸν διαβέβληκε (“To the school of Euclid belongs Eubulides of Miletus, the author of many dialectical arguments in an interrogatory form, namely, The Liar, The Disguised, Electra, The Veiled Figure, The Sorites, The Horned One, and The Bald Head. Of his it is said by one of the Comic poets: ‘Eubulides the Eristic, who propounded his quibbles about horns and confounded the orators with falsely pretentious arguments, is gone with all the braggadocio of a Demosthenes.’ Demosthenes was probably his pupil and thereby improved his faulty pronunciation of the letter R. Eubulides kept up a controversy with Aristotle and said much to discredit him” [transl. Hicks, modified]).

<sup>64</sup> “Ἐἴ τι οὐκ ἀπέβαλες, τοῦτ' ἔχεις· κέρατα δ' οὐκ ἀπέβαλες· κέρατ' ἄρ' ἔχεις”.

<sup>65</sup> Sorensen, *History of Paradox* (2003), p. 95.

<sup>66</sup> Sorensen, *History of Paradox* (2003), p. 88-89.

<sup>67</sup> See e.g. Seneca, *Epistulae* 45,8 and 49,8, where he uses this paradox as an example of the little benefit derived from the study of dialectics.

you have that you have not received?” (1 Cor 4:7: “τί δὲ ἔχεις ὃ οὐκ ἔλαβες;”)<sup>68</sup>. The wording in St. Paul offers a clear resemblance to Aristotle’s “what a man has, he has received” (“οἱ δὲ καὶ ὡς ὃ ἔχει ἔλαβεν”, *Soph. El.* 22, 178b11). Although it is no novelty that the writings of St. Paul contain several references to Greek commonplaces or literary sources<sup>69</sup>, this particular case rather seems to be an allusion to a well-known argument in the Greco-Roman world than a direct reference to Aristotle himself, and thus bears witness to the dissemination of this notion.

The *nemo plus* argument in the meantime had made its way into the Roman world, where proof of its application can be found in the works of Cicero. Just as in Plato, Aristotle and Eubulides, the argument has a rather shady position within Cicero’s production: it does not feature in general works such as his *Topica*, but it is instead used to favour his own arguments in a couple of speeches. The first references to the argument can be found in his third speech against the Agrarian Laws (63 BC) of Servilius Rullus. Here Cicero accuses Rullus of attempting to obtain through the law a legal title over lands which were confiscated in the context of Sulla’s proscriptions, and which Rullus and others occupied unlawfully, “in order to have what he does not have” (*ut ipse habeat quod non habet*)<sup>70</sup>. The *nemo plus* is not used here as an actual argument which conclusively proves a point, but rather as a word play which enhances his speech. An argumentative use of the *nemo plus* can be found a few years later in Cicero’s *Pro Flacco* (59 BC):

Cicero, *Pro Flacco* 56,4: Queritur gravis, locuples, ornata civitas, quod non retinet alienum; spoliata se dicit, quod id non habet quod eius non fuit<sup>71</sup>.

The context of this text is the following: Lucius Valerius Flaccus, a distinguished client of Cicero, is being prosecuted for his past activities as governor in Asia<sup>72</sup>. Among other misdeeds, Flaccus is accused by the city of Tralles of taking the money that a number of cities had deposited in it. As Alexander notes, Cicero’s

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<sup>68</sup> English transl. of the New American Standard Bible. Rendered in the Latin Vulgate as: “Quid autem habes quod non accepisti?” Similarly, St. John the Evangelist puts in the mouth of St. John the Baptist that “A man can receive nothing unless it has been given him from heaven” (transl. New American Standard Bible) (John 3:27: “οὐ δύναται ἄνθρωπος λαμβάνειν οὐδὲ ἐν ἑάν μὴ ἢ δεδομένον αὐτῷ ἐκ τοῦ οὐρανοῦ”) Rendered in the Latin Vulgate as: “Non potest homo accipere quicquam nisi fuerit ei datum de caelo”.

<sup>69</sup> See in particular Renchan, *Classical Greek Quotations* (1973), p. 17–45.

<sup>70</sup> Cicero, *De Lege Agraria* 3,13,7.

<sup>71</sup> “A responsible, wealthy, and magnificent city complains because it does not keep something that belongs to someone else; it says it has been robbed, because it does not have that which it did not own” (transl. Alexander).

<sup>72</sup> For a complete account on the case see Alexander, *Prosecution in the Ciceronian Era* (2002), p. 78–97.

arguments “are so weak as to give credence to the prosecution’s case”<sup>73</sup>. Among these arguments we find the attempt to ridicule the position of Tralles by arguing that it claims to have been robbed, even when what was taken was not its own. The use of the *nemo plus* argument in such a case shows the imperfections of its application within a legal context. A core issue of this imperfect use is the ambiguity regarding whether Tralles ‘had’ the money: as a depositary, on the one hand, the city did ‘have’ the money in a material sense, but on the other hand this also implies that it did not ‘have’ it as its owner. From a legal point of view, the sole fact that the city held the money in deposit would appear to be enough to grant it the active legal standing necessary to claim it back<sup>74</sup>, as follows clearly from the writings of later jurists. One may however not discard that this was not yet clear in the 1<sup>st</sup> century BC, which makes it difficult to determine what Cicero is precisely up to here. If Tralles had the active legal standing, Cicero would be attempting to distract the attention from the legal aspects of the trial by using the *nemo plus* argument in a way which only takes into account the verb ‘to have’ in the sense of ‘to own’. In this way he would manage to present the position of the prosecutor as preposterous, since the city would be claiming something which it never had. If this was the case, it would moreover be noteworthy that the first evidence of application of the argument in a legal context in Rome would be completely inaccurate from a legal perspective, serving exclusively the cause of rhetoric. However, if jurists would not grant active legal standing to a non-owner, Cicero would appear to be stressing the proper legal outcome through a topical argument. Accordingly, the exact significance granted to the argument within a legal context remains difficult to determine in this case.

The *nemo plus* argument appears to have consolidated itself in Rome in the course of the 1<sup>st</sup> century AD, where numerous references of its use in different contexts are to be found. Seneca in particular makes extensive use of the argument in his moral writings, specifically when discussing whether an evil man can give something good to the wise man. The contrast between these two prototypical types of men is a common feature in stoic moral philosophy, which is for a great part governed by the thought that evils and goods are opposites<sup>75</sup>. Seneca argues in his *De constantia sapientis* that, since the evil man has absolutely no goodness in him, he cannot bestow a good gift on the wise man, because “a man must have before he can give” (*habere enim prius debet quam dare*)<sup>76</sup>. This idea is again conveyed in Seneca’s treatise ‘On Benefits’ (*De beneficiis*), where it is

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<sup>73</sup> Alexander, *Prosecution Ciceronian era* (2002), p. 93.

<sup>74</sup> Alexander, *Prosecution Ciceronian era* (2002), p. 93, particularly n. 66.

<sup>75</sup> Seneca, *De beneficiis* 5,12,5: “mala bonaque dissentiunt nec in unum eunt”.

<sup>76</sup> Seneca, *De constantia sapientis* 8,1-2: “Et sapienti nihil deest quod accipere possit loco muneris, et malus nihil potest dignum tribuere sapiente; habere enim prius debet quam dare, nihil autem habet quod ad se transferri sapiens gavisurus sit. Non potest ergo quisquam aut nocere sapienti aut prodesse, quoniam divina nec iuari desiderant nec laedi possunt, sapiens autem vicinus proximusque dis consistit, excepta mortalitate similis deo”.

argued that no benefit can be given to an evil man, since he will turn any good he receives into something evil. At the end of his explanation on whether an evil man may receive something good, Seneca rounds up his argument by pointing out that the evil man cannot give a benefit, not only because he lacks the desire to do good<sup>77</sup>, but also because no one can give what he does not have (*quoniam nemo potest, quod non habet, dare*)<sup>78</sup>. The *nemo plus* argument therefore fulfils a clear role in Seneca's dual system of good and evil, being applied in a fully consistent way. Interesting from a legal perspective, moreover, is the fact that the formula "*nemo potest, quod non habet, dare*" already shows a remarkable resemblance to the variations the *nemo plus* argument would adopt in Roman jurisprudence.

The use of the argument in Seneca's moral philosophy has the interesting feature of shifting the application of the *nemo plus* outside the context of dialectic argumentation and rhetoric, as was the case in previous authors such as Plato, Aristotle and Cicero. Seneca, while making use of the *nemo plus* to enhance his ideas and to derive specific conclusions, has a distant attitude towards dialectics, and even shows contempt for the intellectual challenges surrounding the application of the *ceratina* paradox<sup>79</sup>. Accordingly, when using the *nemo plus* argument, Seneca appears to adapt a well-known argument to his own interests, pulling it out from the dialectical context where it was to be found traditionally.

The dissemination of the argument outside dialectics in the 1<sup>st</sup> century AD is also confirmed by a curious application of it by Pliny the Elder when describing a certain kind of fig tree that never ripens, but that makes other trees ripen, which according to him implies that this fig "bestows on another tree what it has not got itself" (*quod ipsa non habet alii tribuens*)<sup>80</sup>. Particularly noteworthy is that this idea is not used argumentatively, but simply to highlight a curious circumstance regarding a particular tree. This application is also interesting due to the fact that Pliny indicates that the tree *does* give what it does not have itself, thereby making reference to the *nemo plus* argument as a commonplace, without being interested in discussing the underlying problem – whether someone or something may give what he does not have. Finally, it should be observed that the formula used by Pliny also foreshadows the wording which would be adopted by Roman jurists, particularly through the words 'ipsa non habet'.

Another application of the *nemo plus* argument outside the field of dialectics can be found in the *Enchiridion* of Epictetus, who wonders: "who is able to give

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<sup>77</sup> Seneca presents in *De beneficiis* 4,11,2 a series of cases in which the evil man would give something, having however always the intention of receiving something in return.

<sup>78</sup> Seneca, *De beneficiis* 5,12,7: "Ergo nihil potest ad malos pervenire, quod prosit, immo nihil, quod non noceat. Quaecumque enim illis contigerunt, in naturam suam vertunt et extra speciosa profuturaque, si meliori darentur, illis pestifera sunt. Idea nec beneficium dare possunt, quoniam nemo potest, quod non habet, dare; hic bene faciendi voluntate caret".

<sup>79</sup> Seneca, *Epistulae* 45,8 and 49,8.

<sup>80</sup> Pliny the Elder, *Naturalis Historia* 15,79,4: "caprificus vocatur e silvestri genere ficus numquam maturescens, sed quod ipsa non habet alii tribuens, quoniam est naturalis causarum transitus aequae ut e putrescentibus gignatur aliquid".

another what he does not himself have?” (τίς δὲ δοῦναι δύναται ἑτέρῳ, ἂ μὴ ἔχει αὐτός;)<sup>81</sup>. The argument is however used in this context only in passing, while discussing a broader issue. Accordingly, unlike in Seneca’s writings, the *nemo plus* argument bears no particular value within the moral philosophy of Epictetus.

Despite the widespread use of the *nemo plus* argument in multiple contexts – even without fulfilling an argumentative function – its natural ground of application seems to have continued to be the dialectic argumentation and rhetoric, as the work of Quintilian shows:

Quintilian, *Institutio Oratoria* 5,10,66: Pecuniam credidisse te dicis; aut habuisti ipse aut ab aliquo accepisti aut invenisti aut surripuisti. Si neque domi habuisti neque ab aliquo accepisti et cetera, non credidisti (transl. Butler).<sup>82</sup>

Quintilian presents this argument when showing how division may serve for refutation. In this particular case it is significant that the division consists in mentioning all possible ways in which someone could acquire money which he would later lend, showing that if he did not acquire it in the first place he would not have been able to lend it. This is a clear application of the *nemo plus* argument variation “what a man has, he has received”. The acquaintance of Quintilian with this argument – or at least one of its variations – becomes manifest further in the text, where he introduces the statement “A man has not lost what he did not have” (*Quod quis non habuit, non perdidit*)<sup>83</sup>. This argument is presented, along with other less compelling ones<sup>84</sup>, as an example of arguments similar to those derived from necessary or probable consequences (*ex*

<sup>81</sup> Epictetus, *Enchiridion* 24,2: ἀλλὰ σοι οἱ φίλοι ἀβοήθητοι ἔσονται. τί λέγεις τὸ ἀβοήθητοι; οὐχ ἕξουσι παρὰ σοῦ κερμάτιον· οὐδὲ πολίτας Ῥωμαίων αὐτοὺς ποιήσεις. τίς οὖν σοι εἶπεν, ὅτι ταῦτα τῶν ἐφ’ ἡμῖν ἐστίν, οὐχὶ δὲ ἀλλότρια ἔργα; τίς δὲ δοῦναι δύναται ἑτέρῳ, ἂ μὴ ἔχει αὐτός; “κτησαί οὖν,” φησίν, “ἵνα ἡμεῖς ἔχωμεν”. (But your friends will be without assistance? What do you mean by being ‘without assistance’? They will not have paltry coin from you, and you will not make them Roman citizens. Well, who told you that these are some of the matters under our control, and not rather things which others do? And who is able to give another what he does not himself have? ‘Get money, then,’ says some friend, ‘in order that we too may have it’ [transl. Oldfather]).

<sup>82</sup> Quintilian, *Institutio Oratoria* 5,10,66: “You say that you lent him money. Either you possessed it yourself, received it from another, found it or stole it. If you did not possess it, receive it from another, find or steal it, you did not lend it to him” (transl. Butler).

<sup>83</sup> Quintilian, *Institutio Oratoria* 5,10,74.

<sup>84</sup> Quintilian, *Institutio Oratoria* 5,10,74: “Nec sunt his dissimilia ideoque huic loco subiicienda, com et ipsa naturaliter congruent: Quod quis non habuit, non perdidit; Quem quis amat, sciens non laedit; Quem quis heredem suum esse voluit, carum habuit, habet, habebit”. (Similar to these are the following arguments, which must therefore be classed under this same head, since it is to this that they naturally belong: ‘A man has not lost what he never had’: ‘A man does not wittingly injure him whom he loves’: ‘If one man has appointed another as his heir, he regarded, still regards and will continue to regard him with affection’ [transl. Butler]).

*consequentibus sive adiunctis*). Quintilian, however, gives these arguments a higher status, considering them undoubted (*indubitata*) and therefore having almost the force of ‘absolute indications’ (*paene signorum immutabilium*)<sup>85</sup>.

Quintilian offers the peculiarity of conferring this variation of the *nemo plus* argument a privileged position in terms of validity, going as far as qualifying it as ‘undoubted’. This contrasts with the use of the argument in Cicero’s *Pro Flacco*, where it receives an evidently fallacious application. This argument, however, does not appear to have an absolute validity in Quintilian, which is clear not only by the somewhat doubtful examples he mentions next to it, but also by the explicit reference to these arguments having ‘almost’ (*paene*) the same force of absolute indications. In any case, the inclusion of this argument in such an explicit way in the work of Quintilian shows that it was still used among the rhetoricians and dialecticians of the 1<sup>st</sup> century AD. Moreover, it should be borne in mind that the *ceratina* paradox continued to be discussed during the 1<sup>st</sup> and 2<sup>nd</sup> centuries AD, being mentioned in passing by Quintilian<sup>86</sup> and Lucian<sup>87</sup>, and extensively analysed by Gellius<sup>88</sup>, all of which shows the subsistence of one variation of the *nemo plus* argument among dialecticians.

The analysis of the literary sources shows that the *nemo plus* argument was in use in different contexts around the 2<sup>nd</sup> century AD, which is about the time its first traces are found in legal argumentation, as will be shown in the next section. The evolution presented up to this period shows the extra-legal origins of the argument in the field of dialectics, but the applications it received in Rome went far beyond this field, which prevented the *nemo plus* argument from having a uniform significance in the Roman world. Nonetheless, the argument retained a place in argumentative contexts and particularly within rhetoric, considering its use by Cicero and the fact that it was preserved in Quintilian’s repertoire. Accordingly, it can be regarded as a topical argument that can be applied in different contexts in order to demonstrate the truth of a statement. Besides this restricted role, the *nemo plus* argument assumes within the Roman world the form of a broad commonplace that could be brought up in various contexts, serving thus as a versatile reference point which at times appears to convey a proverbial truth – as used by Seneca and Epictetus – but at the same time could

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<sup>85</sup> Quintilian, *Institutio Oratoria* 5,10,74: “Sed cum sint indubitata, vim habent paene signorum immutabilium” (However, such arguments, being undoubted, have almost the force of absolute indications [transl. Butler]).

<sup>86</sup> Quintilian, *Institutio Oratoria* 1,10,5: “non quia *ceratinae* aut *crocodilinae* possint facere sapientem, sed quia illum ne in minimis quidem oporteat falli” (not that acquaintance with the so-called ‘horn’ or ‘crocodile’ problems can make a man wise, but because it is important that he should never trip even in the smallest trifles [transl. Butler]).

<sup>87</sup> Lucian, *Symposium* 23: ἵνα μὴ τῶν ἀπόρων εἶπω τι, κερατίναν ἢ σαρπείτην ἢ θερίζοντα λόγον (I shall not mention any of the fallacies like ‘the horns’, ‘the heap’, or ‘the mower’ [transl. Harmon]).

<sup>88</sup> Aulus Gellius, *Noctes Atticae* 16,2,8–13 and 18,2,9.

be openly contradicted – as Pliny the Elder does to emphasize the uniqueness of a particular tree.

The fact that the *nemo plus* argument constitutes a topical argument and a broad commonplace in Roman culture leaves open the question of its validity and significance, which may vary according to the context. This fact is nonetheless relevant to approach the argument in Roman jurisprudence, since it shows that the Romans would not identify a self-evident truth behind this idea that would place it above any suspicion. On the contrary, even among dialecticians the *nemo plus* argument appeared as a dangerous starting point due the fallacious forms of reasoning which could be derived from it. In fact, in a considerable number – if not the majority – of cases the application of the argument in non-legal sources involves some form of awkwardness or mistake. Moreover, as a commonplace it only enjoyed a very relative value, which even made it possible to state that one may give what one does not have in order to emphasize a particular idea. This evidence by itself enables us to shift the starting point that Roman law scholars have assumed so far, according to which the *nemo plus* argument by its very nature had to be free from exceptions. This seems to be in fact the underlying thought not only of those scholars who claim its flawless nature in the form conveyed by Justinian, but also of those who consider that the argument as presented in D. 50,17,54 cannot be accepted on account of the exceptions it could experience. As shown above, the argument did not present itself as self-evident and free from exceptions within Roman culture, being often applied in an incorrect way, which is why one may not assume beforehand that Roman jurists necessarily had to apply it in a way which would be systematically flawless.

A final point which must be borne in mind is that the condition of the *nemo plus* as a commonplace implies that it must have been fairly well-known among educated Romans, and therefore it does not seem possible to assert beforehand that Roman jurists would draw it exclusively from one specific source. One could speculate that, since the place of origin and most common application of the *nemo plus* argument resides in the study of dialectics, it would seem likely that this argument made its way into legal science through the writings of dialecticians and rhetoricians. Nonetheless, the argument was so widespread by the 2<sup>nd</sup> century AD that it appears to have acquired a certain proverbial value, which makes it difficult to determine *a priori* what would have been the main source of inspiration for jurists. The Roman legal sources must therefore be approached with an open mind regarding the value and significance of the *nemo plus* argument.

### 3. Development and significance of the *nemo plus* rule in classical Roman law

While the best-known formulations of the *nemo plus* rule in Roman law are those laid down in D. 50,17,54 (Ulp. 46 *ed.*) and D. 41,1,20pr (Ulp. 29 *Sab.*), there are numerous other texts which give account of this argument, the neglect of which has prevented scholars from adequately understanding the significance of the *nemo plus* rule. In fact, the earlier uses of the *nemo plus* argument within legal reasoning suggest that this commonplace gradually assumed a place of relevance within juristic writings. This offers a more nuanced view on the significance of the *nemo plus* rule. The first references to the argument in Roman law appear in fact around one century earlier than Ulpian's formula, in the writings of Javolenus:

D. 41,2,21pr (Jav. 7 *ex Cassio*): Interdum eius possessionem, cuius ipsi non habemus, alii tradere possumus, veluti cum is, qui pro herede rem possidebat, antequam dominus fieret, precario ab herede eam rogavit.<sup>89</sup>

Javolenus opens this passage by generally declaring that a man may sometimes confer a possession which he does not have himself, presenting as an example of this general statement the case of someone who possessed *pro herede*, and who begins to possess *precario* after requesting the object in these terms from the real heir, even when the latter never became possessor of the object<sup>90</sup>. As the first known application of the *nemo plus* argument among Roman jurists, the text offers the remarkable feature of using this commonplace as a mere reference point. In other words, Javolenus does not apply the *nemo plus* to describe a general rule or to derive a particular solution, but simply to point out the curious circumstance that sometimes one may confer a possession which the person who granted it did not have. This approach to the *nemo plus* would therefore resemble some of the most casual applications of this commonplace, such as the one made by Pliny when describing his wild fig trees. The non-argumentative use of the *nemo plus* by Javolenus would therefore prove that this commonplace had only a relative value since its first applications in Roman law.

Another early application of the argument, this time by Julian, is reported by Ulpian:

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<sup>89</sup> D. 41,2,21pr: "Sometimes a man can confer on another possession of a thing which he does not himself possess; this happens, for instance, when, before he has thereby acquired ownership, a person possessing as heir obtains a *precarium* of it from the actual heir" (transl. Watson).

<sup>90</sup> The case has been recently analysed in detail by Biavaschi, *Ricerche sul precarium* (2006), p. 117 ff.

D. 27,10,10pr (Ulp. 16 *ed.*): Julianus scribit eos, quibus per praetorem bonis interdictum est, nihil transferre posse ad aliquem, quia in bonis non habeant, cum eis deminutio sit interdicta<sup>91</sup>.

If the text truly reproduces Julian's opinion, then this jurist would have offered an application of the argument that foreshadows later developments, presenting in fact a similar wording to that used by D. 50,17,54 in the formula "*nihil transferre posse ad aliquem, quia in bonis non habeant*". This application of the *nemo plus* argument in the context of the praetorian prohibitions to dispose has the interesting feature of merely emphasizing a legal problem which is in itself relatively clear. In fact, the outcome remains the same if the whole argument is removed from the text, since the decisive element for the failure to transfer ownership is that the transferor is forbidden to alienate (*cum eis deminutio sit interdicta*). The argument is therefore used here as an element of persuasion which merely emphasizes that the person concerned cannot transfer ownership. The *nemo plus* appears therefore as a topical argument in favour of the given solution, rather than as a decisive element which determines the outcome of the case. It is moreover noteworthy that the argument is not used in a completely accurate way, since Julian goes too far when declaring that the transferor cannot transfer anything (*nihil*), which is a clear overstatement, considering that praetorian prohibitions only imply the inability to transfer the praetorian ownership, and that they do not prevent the transfer of the *dominium ex iure Quiritium*.

In the course of the 2<sup>nd</sup> century AD the references to the *nemo plus* argument in legal sources multiply, although it is often not clear whether Roman jurists have this argument in mind or are inadvertently conveying a similar notion. At this point, it is worth noting that countless legal decisions could be seen as applications of the *nemo plus* argument, but one should refrain from assuming that in all those cases jurists had this particular argument in mind, especially considering that these solutions could be simply inspired by common sense and rationality. Considering all of these cases to be applications of the *nemo plus* argument would not only assume a very principle-based thinking among Roman jurists, but would as well bring an excessive amount of evidence which may be unrelated to the problem, thereby making the analysis of the rule more vague. Accordingly, it seems advisable to favour a conservative approach, which limits the study of this problem to cases where the *nemo plus* argument – or a variation of it – is explicitly brought up within the decision.

Among the doubtful cases of application of the *nemo plus* argument, one may identify as early examples another text of Julian, in a case where a woman intercedes on behalf of someone else, and then is denied the *exceptio* based on the *Senatusconsultum Velleianum* on account of having received the complete amount

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<sup>91</sup> D. 27,10,10pr: "Julian wrote that those who were forbidden to deal with their goods by the praetor could not convey anything to anybody, because they have no goods since they are forbidden to alienate" (transl. Watson).

of the debt from the debtor – who for some reason did not pay directly to Titius, his creditor<sup>92</sup>. Julian justifies this solution by declaring “*neque enim eam periclitari, ne eam pecuniam perdat, cum iam eam habeat*” (for she is not in danger of losing that money since she already has it), which seems to evoke dialectical questions of the kind “do you, or do you not, have what you have not lost?” It is however by no means clear that Julian has the *nemo plus* argument in mind in this case. Another doubtful case of application can be seen in D. 30,73pr<sup>93</sup>, where Gaius discusses the terms of a will in which the testator orders his heir “to arrange that Lucius may have a hundred”. Gaius concludes that such terms imply that the heir must give one hundred to Lucius, since “nobody can arrange that I have a hundred unless he gives them to me” (*quia nemo facere potest, ut ego habeam centum, nisi mihi dederit*). The wording used in this solution and its somewhat logical nature may give the impression that a reference to the *nemo plus* argument is being made, but once again the text is not completely conclusive, and one cannot discard that Gaius had other considerations – e.g. of grammatical nature – in mind.

Leaving these cases aside, there is another text of Gaius in which scholars for centuries<sup>94</sup> have seen an application of the *nemo plus* argument:

D. 9,4,27,1 (Gai. 6 *ed. prov.*): Ex his quae diximus de servo qui alicui pignoris iure obligatus est deque statulibero et de eo cuius usus fructus alienus est, apparet eum, qui alienum servum in iure suum esse responderit, quamvis noxali iudicio teneantur, non tamen posse noxae deditioe ipso iure liberari, quia nullum ad actorem dominium transferre possunt, cum ipsi domini non sint. Certe tamen, si ex ea causa traditum postea dominus vindicet nec litis aestimationem offerat, poterit per exceptionem doli mali repelli<sup>95</sup>.

Gaius discusses in this text a case of noxal delivery performed over someone else’s slave, showing that ownership over the slave will not be transferred, but that the

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<sup>92</sup> D. 16,1,16pr (Jul. 4 *ad Urs. Ferocem*): “Si mulier contra senatus consultum Velleianum pro me intercessisset Titio egoque mulieri id solvissem et ab ea Titius eam pecuniam peteret, exceptio huius senatus consulti non est profutura mulieri: neque enim eam periclitari, ne eam pecuniam perdat, cum iam eam habeat”.

<sup>93</sup> D. 30,73pr (Gai. 3 *de legatis ad edictum praetoris*) “Si heres iussus sit facere, ut Lucius centum habeat, cogendus est heres centum dare, quia nemo facere potest, ut ego habeam centum, nisi mihi dederit”.

<sup>94</sup> See e.g. Grotius, *De iure belli ac pacis* (Aalen 1993), lib. 3, cap. 16, 1.

<sup>95</sup> D. 9,4,27,1: “From what we have said about a slave whom someone else holds as a pledge, or a *statuliber*, or a slave in whom someone else has a usufruct, it is clear that he who declares on oath that someone else’s slave is his, cannot as a matter of course be freed of liability by noxal surrender even though he is liable to a noxal action; because those who are not owners themselves cannot transfer ownership to the plaintiff. It is true, however, that if a slave is handed over in this way and his owner later brings a vindication but does not offer to pay damages as calculated, he can be met by the defence of fraud” (transl. Watson, modified).

acquirer will anyhow be protected with an *exceptio doli* if the owner exercises the *rei vindicatio* and does not want to pay the fine. What is interesting for the purpose of this study is the way in which Gaius gives his opinion: he does not simply declare that ownership will not be transferred by someone who is not the owner, but goes further to offer the general statement according to which “those who are not owners themselves cannot transfer ownership”. This idea is rather superficial from a technical point of view, since it adds nothing new to the basic fact that only the owner – or a duly authorized non-owner – can transfer ownership. Lenel even considers that this explanation cannot have been given in the original text of Gaius<sup>96</sup>. However, one can understand this reference as an element of persuasion which enhances the solution to the case. This application resembles in fact that of Julian quoted above (D. 27,10,10pr), with the *nemo plus* fulfilling an argumentative role which is however of no great moment from a technical perspective to determine the outcome of the case.

Another similar application of the *nemo plus* argument is found in the writings of Papinian:

D. 20,1,3,1 (Pap. 11 *resp.*): Per iniuriam victus apud iudicium rem quam petierat postea pignori obligavit: non plus habere creditor potest, quam habet qui pignus dedit. Ergo summovebitur rei iudicatae exceptione, tametsi maxime nullam propriam qui vicit actionem exercere possit: non enim quid ille non habuit, sed quid in ea re quae pignori data est debitor habuerit, considerandum est<sup>97</sup>.

Having wrongfully lost an action to claim an object belonging to him, the defeated owner mortgages the object he lost<sup>98</sup>. Since he was defeated in court, his ownership was not acknowledged, and therefore he could not validly mortgage the object<sup>99</sup>. Papinian expresses this circumstance through a clear application of the *nemo plus* argument, declaring that the pledge creditor cannot have more than what the debtor gave him. The comparison between what one party has and what the other gets, as well as the wording used, leave little room for doubt that Papinian is making use of the *nemo plus* argument. The fact that we are facing the application of a topical argument which is destined merely to enhance a solution is moreover confirmed by the rather unnecessary nature of the statement “*non*

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<sup>96</sup> Lenel, *Die Formeln* (1927), p. 14: “Diese Trivialität möchte auch ich dem Gaius nicht zutrauen; sie wird eine in den Text eingedrungene Glosse sein, deren Inhalt aber sachlich zutrifft”.

<sup>97</sup> D. 20,1,3,1: “One who wrongfully lost an action later mortgaged the property which he had claimed. The creditor can have no better right than the debtor. So he will be defeated by the plea of *res iudicata*, although the successful defendant can bring no action of his own. The point to consider is the right of the debtor who made the mortgage, not the lack of right of the successful defendant” (transl. Watson, modified).

<sup>98</sup> The text is studied in detail by Ankum, *Pap. D. 20.1.3* (1988), p. 1141-1143.

<sup>99</sup> Pugliese, *Ingiustizia della sentenza* (1962), p. 766.

*plus habere creditor potest, quam habet qui pignus dedit*”, which does not add any technical elements for the solution of the case. Finally, it is worth noting that the application of the argument by Papinian is not completely accurate, since it was in fact possible for an authorized non-owner to constitute a pledge over an object belonging to someone else<sup>100</sup>. This shows that the *nemo plus* is not applied here as a notion with an independent systematic value, but merely as an additional – and even dispensable – argument.

The *nemo plus* argument appears to have consolidated in legal circles around the time of Papinian, considering that it appears repeatedly in the works of two of his collaborators from the time he was *praefectus praetorio*, Paul and Ulpian. Paul formulates the argument in an almost identical way to that of his contemporary Ulpian, showing that even the wording used in this regard had to some extent become fixed among this generation of jurists:

D. 50,17,120 (Paul 12 *ed.*): *Nemo plus commodi heredi suo relinquit, quam ipse habuit*<sup>101</sup>.

The text shows an evident application of the *nemo plus* argument in the context of the law of succession, where it is used to determine the relationship between the condition of the deceased and that of the heir. That the argument appears again applied in a different context shows that its consolidation among jurists did not imply that it acquired a technical significance which would bind its application to a particular legal problem. Moreover, in another application of the argument, Paul shows its limited validity within legal reasoning:

D. 7,1,63 (Paul *libro singulari de iure singulari*): *Quod nostrum non est, transferemus ad alios: veluti si qui fundum habet, quamquam usum fructum non habeat, tamen usum fructum cedere potest*<sup>102</sup>.

Paul explains that the constitution of usufruct by the owner would imply transferring something which he does not have, namely the usufruct. Since the owner does have the *uti* and *frui* over his own goods, Paul’s assertion may appear to be little more than a word play, as Longchamps in fact regards it<sup>103</sup>. However, there are in fact other texts in which this and other *iura in re aliena* that the owner

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<sup>100</sup> See Chapter 1, Section 2(b) above.

<sup>101</sup> D. 50,17,120: “No one leaves a greater benefit to his heir than he himself had” (transl. Watson).

<sup>102</sup> D. 7,1,63: “We can transfer to others what we do not ourselves have; for example, if a man has an estate, then even although he does not have the usufruct, he can still grant a usufruct to another” (transl. Watson).

<sup>103</sup> Longchamps, *Nemo plus iuris* (2015), p. 79: “(...) the conclusion that we can transfer to another what is not our own is a play on words and constructions, an uncomplicated brainteaser without any substantive value”. For the view of the usufruct as a *pars domini* see Kaser, *RPR* (1971) I, p. 448 n. 8.

may appear to have are categorically distinguished from his ownership for practical reasons<sup>104</sup>. Paul is therefore addressing an important issue in this text, using the *nemo plus* as a reference point to convey his ideas. The application of the *nemo plus* in this context resembles that of Javolenus in D. 41,2,21pr, since it is used as a mere reference point and not in an argumentative way, which once again shows the relative and instrumental value of this notion among Roman jurists.

The argument as presented by Paul shows significant textual similarities with the applications which are found in Ulpian, who is the author who makes more references to it. There are once again doubtful cases, where it is not entirely clear whether the argument is being applied, as happens in D. 47,2,12pr, where Ulpian explains why the *actio furti* reverted to the owner in case a garment was stolen from an insolvent fuller, since the fuller's insolvency would prevent the owner from being compensated for his loss. In order to justify this solution, Ulpian declares that "*qui non habet quod perdat, eius periculo nihil est*" (he who has nothing to lose has nothing at risk)<sup>105</sup>. This last sentence is in the words of Du Plessis "rather cryptic"<sup>106</sup>, and it is indeed difficult to understand such statement if not as a reference to a commonplace similar to Quintilian's "*quod quis non habuit, non perdidit*"<sup>107</sup>, which would therefore enhance Ulpian's conclusion. The exact relation of this notion to the *nemo plus* argument, however, remains difficult to determine. Beyond any doubt, however, is the application of the *nemo plus* argument by Ulpian to the transfer of ownership by *traditio*:

D. 41,1,20pr-1 (Ulp. 29 *Sab.*): Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit nihil transfert. (1) Quotiens autem dominium transfertur, ad eum qui accipit tale transfertur, quale fuit apud eum qui tradit: si servus fuit fundus, cum servitutibus transit, si liber, uti fuit: et si forte servitutes debebantur fundo qui traditus est, cum iure servitutium debitarum transfertur. Si quis igitur fundum dixerit liberum, cum traderet, eum qui servus sit, nihil iuri servitutis

<sup>104</sup> See especially D. 45,1,56,1 (Jul. 52 *dig.*); D. 8,4,10 (Ulp. 10 *Sab.*); D. 7,6,5pr. (Ulp. 17 *ed.*). Regarding servitudes, D. 8,2,26 (Paul 15 *Sab.*) explicitly states: "nulli enim res sua servit". Buckland, *Text-book* (1963), p. 260.

<sup>105</sup> D. 47,2,12pr. (Ulp. 29 *Sab.*): "Itaque fullo, qui curanda poliendave vestimenta accipit, semper agit: praestare enim custodiam debet. Si autem solvendo non est, ad dominum actio redit: nam qui non habet quod perdat, eius periculo nihil est" (And so a fuller who accepts garments for cleaning and attention will always have the action because he is liable for their safekeeping. But if he should be insolvent, the action reverts to the owner; for he who has nothing to lose has nothing at risk [transl. Watson, modified]).

<sup>106</sup> Du Plessis, *Letting and hiring* (2012), p. 65.

<sup>107</sup> Quintilian, *Institutio Oratoria* 5,10,74: "A man has not lost what he did not have" (transl. Butler, modified).

fundi detrahit, verumtamen obligat se debebitque praestare quod dixit<sup>108</sup>.

This text is one of the best-known applications of the *nemo plus* argument, and for that same reason it has traditionally been targeted as an example of the inaccuracies which the compilers introduced by referring a flawless principle to the transfer of ownership by *traditio*. Such an idea, however, takes as a starting point the infallibility of the *nemo plus* argument, something which cannot be claimed by referring to the literary nor the legal sources reviewed so far. As a topical argument, the *nemo plus* is at most used to support a legal outcome, but nothing indicates that it would have in itself a specific normative value. Also here, Ulpian appears to resort to the *nemo plus* simply to enhance his general notions on the transfer of ownership, and particularly the fact that the position of the acquirer will be determined by that of the transferee. The caution of Ulpian when phrasing this text is moreover relevant to evaluate its significance, as can be seen in the words ‘debet vel potest’, which according to Feenstra show that this statement would be regarded by Roman jurists “as an ‘argument’ at most”, and that “very likely they were also conscious that this was not a problem of logic, but rather of belonging”<sup>109</sup>. It is nonetheless worth noting that the *nemo plus* argument is presented at the beginning of the text and formulated in abstract terms, departing thus from the secondary position which it has in the writings of previous jurists. This circumstance, however, does not seem to imply a higher level of validity of the rule, but most likely its consolidation and individualization among jurists. It is moreover difficult to determine whether this way of bringing up the argument was really exceptional, considering that other applications of the argument were taken from their original context in order to form *regulae* such as D. 50,17,54 and D. 50,17,120.

That the consolidation of the argument did not imply a change in its validity becomes evident by the modest role granted to it by Ulpian when bringing it up in another context, where he declares that it is no novelty that such statement

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<sup>108</sup> D. 41,1,20pr-1: “Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient. (1) Now whenever ownership is transferred, it passes to the transferee in the same case as it was with the transferor; if the land was subject to a servitude, it passes with the servitude; if it was unencumbered, it passes in that state; and if, perchance, there should be servitudes due to the land, it passes with the servitudes due. Hence if someone declared land to be unencumbered and when he conveyed it and it was in fact subject to a servitude, he would in no way affect the validity of the servitude; but he would place himself under an obligation and have to make reparation for his assertion” (transl. Watson).

<sup>109</sup> Feenstra, *Romeinsrechtelijke grondslagen* (1994), p. 50: “De Romeinse juristen hebben deze uitspraak hoogstens als een ‘argument’ gezien; zij waren er zich waarschijnlijk ook van bewust dat het geen kwestie van logica maar eerder van behoren is; vgl. de voorzichtige formulering van Ulpianus: ‘mag of kan’ [debet vel potest]”.

suffers exceptions, specifically regarding the transfer of ownership by a non-owner:

D. 41,1,46 (Ulp. 65 *ed.*): Non est novum, ut qui dominium non habeat, alii dominium praebeat: nam et creditor pignus vendendo causam dominii praestat, quam ipse non habuit<sup>110</sup>.

The text presents a clear application of the *nemo plus* argument, to which Ulpian has no problem to formulate some exceptions. This text was originally included in book 65<sup>th</sup> of Ulpian's Commentary to the Edict, which dealt with the *curatores*<sup>111</sup>, and therefore 'et' would indicate that the *creditor pignoris* is another exception to the general rule, next to the alienation performed by a *curator*. This shows that Ulpian was not willing to defend the universal validity of the argument as Aristotle would have done it, but instead was content with using it as a reference point which allowed exceptions to be made, just like Javolenus and Paul.

At this point one may confront the allegations of interpolation concerning D. 41,1,20pr, according to which this text would originally have referred to the *mancipatio*. The main point behind such an allegation is that only in the context of a *mancipatio* would the text be free from exceptions. However, such an interpretation fails to understand the role of the *nemo plus* argument in Roman jurisprudence, assuming – without further evidence than its apparent infallible value – that such a statement could not suffer exceptions. Such an interpretation not only neglects the evolution of the argument in the literary sources, which shows that we are facing a mere topical argument, but even omits the evidence of D. 41,1,46, where under the same title of the Digest Ulpian's opinion is recorded, acknowledging the limited scope of the argument. Moreover, even if the text did in fact refer originally to the *mancipatio*, it would nonetheless suffer several exceptions in which a non-owner could transfer ownership through *mancipatio*, as has been shown in Chapter 5 above. In any case, the possibility of interpolation in D. 41,1,20pr cannot be completely discarded. Lenel's motivation to refer this text to a case of *mancipatio* may be due to the fact that the text deals with the transfer of ownership over a *fundus italicus*. However, considering that Ulpian writes at the beginning of the 3<sup>rd</sup> century AD, when the praetorian remedies protecting the acquirer of a *res Mancipi* by *traditio* were fully developed, it is not unlikely that the problem of the particular mode to transfer ownership

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<sup>110</sup> D. 41,1,46: "There is no novelty in the fact that one who does not have ownership may yet confer ownership upon another; for also a creditor, in selling a pledge, gives title to an ownership which he did not himself have" (transl. Watson, modified).

<sup>111</sup> Lenel, *Paling.* (1889) II, col. 797 sets forth the rubric *De constituendo curator et administratione eius* under the general title *De curatore bonis dando* (Lenel, *EP* [1927], p. 434), and in col. 798 n. 1 relates the text of D. 41,1,46 to D. 42,7,2,1, which deals with the sale performed by a *curator*.

used by the parties may have, in the eyes of Ulpian, been irrelevant altogether to the outcome of this case. Only if it could be proven that the word *dominium* refers unequivocally to the *dominium ex iure Quiritium* should one conclude that the text referred to the *mancipatio*, but there is no conclusive evidence on this point<sup>112</sup>. Moreover, it is also possible that Lenel himself may have been influenced by the prevailing views of the second half of the 19<sup>th</sup> century, according to which traditional acts belonging to the *ius civile* could not be carried out by a ‘direct representative’. This dogmatic consideration may have well played a role in Lenel’s conjecture, making it therefore even more debatable<sup>113</sup>. According to this evidence, one cannot completely rule out the possibility of a mechanical interpolation in D. 41,1,20pr, but even if the text did in fact refer to the *mancipatio*, the significance and role of the *nemo plus* argument in it would not change at all, since the statement would still have exceptions.

Ulpian offers other applications of the *nemo plus* argument, all of which are recorded within Book 50 Title 17 as *regulae iuris*. One of the clearest applications takes place in the law of succession, where Ulpian sets the extent of the right of the legatee:

D. 50,17,160,2 (Ulp. 70 *ed.*): Absurdum est plus iuris habere eum, cui legatus sit fundus, quam heredem aut ipsum testatorem, si viveret.<sup>114</sup>

The text has a very similar wording to other applications of the *nemo plus* argument by Ulpian, with the additional value of being applied to yet another legal matter, namely the position of the legatee. The categorical terminology used (*absurdum est*) shows once again that the argument fulfils the task of enhancing a decision, but the fact that it comes from Ulpian also indicates that despite the emphatic language, the argument in itself has no universal systematic pretensions:

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<sup>112</sup> See Chapter 5, Section 1 above.

<sup>113</sup> Mitteis, *Römisches Privatrecht* (1908), p. 208 n. 13 claims the opposite, namely that the ideas expressed by Lenel, *EP* (1907), p. 184 n. 2 show that the author accepts the possibility of a *mancipatio* by a non-owner. Mitteis derives this conclusion from the mere fact that Lenel claims that different cases of transfer of ownership – among which two take place through a non-owner – should refer to provincial land, because the delivery appears to have taken place through *traditio*. Mitteis seems to read too much in between the lines on this point. On the other hand, Lenel explicitly suggested to Krüger and Mitteis that a *mancipatio* could not take place by a non-owner acting *voluntate domini*. See on this point Buckland, *Mancipatio by a slave* (1918), p. 375. It seems more likely that Lenel had not made up his mind completely at the time he was working on the *Palingenesia*, which is why different views can be found on the problem. For instance, according to Lenel, *Paling.* (1889) I, col. 250 n. 1 and 2 a *curator furiosus* could in fact perform the *in iure cessio* over the administered goods.

<sup>114</sup> D. 50,17,160,2: “It is absurd for someone to whom an estate has been bequeathed to have a better right than the heir or the testator himself if he is living” (transl. Watson).

in this particular context it is intimately related to the outcome of a case, but it may as well be contradicted in other contexts.

Up to this point three *regulae iuris* – D. 50,17,54; D. 50,17,120 and D. 50,17,160,2 – have been mentioned which convey in a clear way the *nemo plus* argument, but there are several others regarding which it is not entirely clear whether Roman jurists had this argument in mind:

D. 50,17,11 (Pomp. 5 *Sab.*): Id quod nostrum est sine facto nostro ad alium transferri non potest.<sup>115</sup>

D. 50,17,59 (Ulp. 3 *disputationum*): Heredem eiusdem potestatis iurisque esse, cuius fuit defunctus, constat.<sup>116</sup>

D. 50,17,62 (Jul. 6 *dig.*): Hereditas nihil aliud est, quam successio in universum ius quod defunctus habuerit.<sup>117</sup>

D. 50,17,83 (Pap. 2 *definitionum*): Non videtur rem amittere, quibus propria non fuit.<sup>118</sup>

D. 50,17,143 (Ulp. 62 *ed.*): Quod ipsis qui contraxerunt obstat, et successoribus eorum obstat.<sup>119</sup>

D. 50,17,156,2 (Ulp. 70 *ed.*): Cum quis in alii locum successerit, non est aequum ei nocere hoc, quod adversus eum non nocuit, in cuius locum successit.<sup>120</sup>

D. 50,17,175,1 (Paul 11 *ad Plautium*): Non debeo melioris condicionis esse, quam auctor meus, a quo ius in me transit.<sup>121</sup>

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<sup>115</sup> D. 50,17,11: “Something which is ours cannot be transferred to another without any action on our part” (transl. Watson).

<sup>116</sup> D. 50,17,59: “It is agreed that an heir has the same powers and rights as the deceased person” (transl. Watson).

<sup>117</sup> D. 50,17,62: “An inheritance is nothing other than the succession to every right possessed by the deceased person” (transl. Watson). This text has a finds a strong parallel in D. 50,16,24 (Gai. 6 *ed. prov.*).

<sup>118</sup> D. 50,17,83: “People are not regarded as losing something if it was not their property” (transl. Watson).

<sup>119</sup> D. 50,17,143: “Anything which stands in the way of those who contracted will stand in the way also of their successors” (transl. Watson).

<sup>120</sup> D. 50,17,156,2: “If someone has succeeded to the position of another, it is not right that he should be damaged by the fact that he was not responsible for any damage against the person to whose place he has succeeded” (transl. Watson).

<sup>121</sup> D. 50,17,175,1: “I must not be in a better position than my author from whom the right passes to me” (transl. Watson)

D. 50,17,177pr (Paul 14 *ed.*): Qui in ius dominiumve alterius succedit, iure eius uti debet.<sup>122</sup>

Most of these texts contrast the legal position of an individual by comparing it to that of his predecessor, presenting the position of the former – and often, more specifically, his *ius* – as the fundamental criterion to determine the situation of the latter. Accordingly, in substantial terms, all of these *regulae* would agree with the *nemo plus* argument. Some also appear to reproduce rhetorical notions, such as D. 50,17,83, which resembles Quintilian’s “*quod quis non habuit, non perdidit*”<sup>123</sup>. There are moreover other elements which could indicate a link with other applications of the *nemo plus* argument, such as the categorical language of some of them<sup>124</sup>, the broad formulation of the statements and the possibility of suffering exceptions<sup>125</sup>. Nonetheless, as already mentioned at the beginning of this section, it can be argued that countless decisions of Roman jurists do in fact agree in substantial terms with the *nemo plus* argument or resemble one of its variations, without necessarily having the argument in mind. The doubts on this point are especially justified considering that none of the *regulae* just presented actually convey the basic idea that ‘one cannot give/lose what one does not have’, unlike other texts presented so far<sup>126</sup>. Accordingly, the similarities between these various rules and the *nemo plus* argument cannot be regarded as conclusive evidence of the application of this argument in Roman jurisprudence.

There is of course another *regula* which conveys the *nemo plus* argument, and which was generalized into the *nemo plus* rule:

D. 50,17,54 (Ulp. 46 *ed.*): Nemo plus iuris ad alium transferre potest, quam ipse haberet<sup>127</sup>.

The original location of the text shows that Justinian’s *nemo plus* rule is a generalization of yet another practical application of the *nemo plus* argument. The main question is: what does this generalization imply regarding the original role of the argument? As shown in Section 1 above, several authors in the course of the 20<sup>th</sup> century claimed that it should have referred to the *in iure cessio hereditatis*,

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<sup>122</sup> D. 50,17,177pr: “Someone who succeeds into the legal position or right of property of another must accept his rights” (transl. Watson).

<sup>123</sup> Quintilian, *Institutio Oratoria* 5,10,74.

<sup>124</sup> D. 50,17,59: *constat*; D. 50,17,62: *nihil aliud est*.

<sup>125</sup> An illustration of the way in which such *regulae* could be plagued with exceptions can be seen in the study on D. 50,17,59 made by Wallinga, *Heredem eiusque potestatis* (2008), p. 99-116.

<sup>126</sup> See e.g. *nullum... transferre possunt, cum ipsi domini non sint* (D. 9,4,27,1); *non plus habere... potest, quam habet qui... dedit* (D. 20,1,3,1); *nemo plus... relinquit, quam ipse habuit* (D. 50,17,120); *nihil amplius transferre... potest ad eum qui accipit, quam est apud eum qui tradit* (D. 41,1,20pr); *qui dominium non habeat, alii dominium praebeat* (D. 41,1,46); *plus iuris habere eum... quam... ipsum testatorem* (D. 50,17,160,2).

<sup>127</sup> D. 50,17,54: “No one can transfer to another a better right than he has himself”.

presenting as the dogmatic ground for this that only then would the *regula* be free from exceptions, since the *in iure cessio* could only be performed by the owner himself. However, it was already shown in Chapter 5 above that the impossibility of a non-owner to perform an *in iure cessio* finds no strong support in the sources and stems from an outdated dogmatic reconstruction of the evolution of ‘direct representation’ in Roman law. Moreover, so far it has been stressed that the various applications of the *nemo plus* argument did in fact suffer all kinds of exceptions. The dogmatic ground for such a conjecture is therefore nonexistent. What then could explain Lenel’s own reconstruction, according to which the text should refer to an *in iure cessio hereditatis*? It should be borne in mind that before him, Godefroy had conjectured that the rule should have originally dealt with the relationship between the heir and the deceased, proposing that it should have read more or less as follows: “*nemo plus iuris ad haerodem transmittere potest, quam ipse habet*”<sup>128</sup>. Lenel may have chosen a reference to the *in iure cessio hereditatis* due to the fact that the rule has traditionally been applied in the context of the transfer of ownership – along with D. 41,1,20pr – and also by the use of the verb *transferre*, which can normally be identified in contexts of transfer of ownership. Both reasons would however be inconclusive, since the *nemo plus* argument was also applied in the context of the law of succession – particularly by Paul in D. 50,17,120, which uses an almost identical wording to that of D. 50,17,54 – and because *transferre* can also be used within the law of succession<sup>129</sup>. Lenel’s conjecture is therefore as plausible as that of Godefroy, and none of them affect the outline of the *nemo plus* argument as presented so far. Considering that it is almost impossible to establish with certainty the original context of D. 50,17,54, further reconstructions made on the assumption of any of the above hypotheses seem to go too far without enough evidence, such as Schulz’ theory that the text would refer to a case in which an *heres legitimus* performed the *in iure cessio hereditatis* without having acquired the inheritance by *aditio hereditatis*<sup>130</sup>. This is only one of countless possible reconstructions, and Schulz appears to be overconfident when extracting all of this information from the mere use of the imperfect subjunctive ‘haberet’ instead of the present indicative ‘habet’<sup>131</sup>.

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<sup>128</sup> Godefroy, *De Diversis Regulis Iuris* (Geneva 1653), p. 242: “*Ad alium ait lex, v.g. ad haerodem: nemo scilic. plus iuris in haerodem transmitter potest, quam ipse habet vel haberet*”, and later once more: “*Nemo plus iuris ad haerodem transmittere potest, quam ipse haberet*”.

<sup>129</sup> See Heumann/Seckel, *Handlexikon* (1926), s.v. *Transferre*, and particularly the applications of this verb in D. 5,2,6,2, D. 36,1,21, D. 36,2,4 and 5pr., Gai 2,286a. To this one may add the use of *transferre* in D. 50,17,11 (Pomp. 5 *Sab.*), which appears to refer generally to the transfer of ownership, but which originally referred to the *legatum per vindicationem*, as pointed out by Lenel, *Paling.* (1889) II, col. 94, nr. 437, n. 6.

<sup>130</sup> Schulz, *Classical Roman Law* (1951), p. 352.

<sup>131</sup> This is also the opinion of Longchamps, *Nemo plus iuris* (2015), p. 71 n. 31, who qualifies the reconstruction of Schulz as “doubtful”.

Now that we have a complete outline of the application of the *nemo plus* argument in Roman classical law, its significance for classical jurists becomes more clear. In most cases, the argument is applied to enhance a particular legal solution which is by itself relatively clear: a non-owner cannot transfer ownership, the heir cannot obtain more than what belonged to the deceased, the pledge creditor will have no right to the thing pledged if it did not belong to the debtor, etc. In none of these cases does the argument, from a strictly dogmatic perspective, play a decisive role determining the outcome of the case, but merely contributes to make it more convincing. Moreover, it is worth noting that the *nemo plus* argument is applied by these jurists to different problems, such as the prohibitions to dispose, the noxal surrender of a slave, the constitution of a pledge, etc., which shows that the argument did not acquire a technical meaning, remaining a topical argument that could be applied in various contexts. The use of the argument in different contexts was favoured by its very broad terms, since words such as *habere* and *dare* can be applied to various situations within the legal world<sup>132</sup>.

That Roman jurists did not attach a particular legal significance to the argument becomes moreover clear by the texts where it is only brought up as a reference point, in order to show that in fact one may give what one does not have, as can be seen in Javolenus (D. 41,2,21pr), Paul (D. 7,1,63) and Ulpian (D. 41,1,46)<sup>133</sup>. Accordingly, the analysis of the different applications of the arguments reveals that it does not constitute an overarching principle which could by itself determine the outcome of a problem. This, however, does not imply that the argument fulfils no systematic role whatsoever, since it seems to have been viewed by jurists as a general rule, a starting point for legal reasoning which can serve as a useful guideline in various contexts, but could at the same time be subject to exceptions and restrictions when needed. To understand this modest role it may be helpful to recall that, regarding the transfer of ownership by *traditio*, the general rule is that only the owner may validly transfer ownership<sup>134</sup>, a starting point which is in fact stressed in a number of cases through the *nemo plus* argument. Nonetheless, this general rule may suffer exceptions in which a non-owner has *potestas alienandi*, which also leads a jurist like Ulpian to openly admit that the *nemo plus* argument itself may have exceptions in the legal world.

Having previously studied the literary sources reproducing the argument, one may still wonder about the exact way in which the argument made its way into the legal world. As mentioned above<sup>135</sup>, the fact that the argument was broadly

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<sup>132</sup> See Heumann/Seckel, *Handlexikon* (1926), s.v. *Dare* (p. 120-121); *Habere* (p. 233-234).

<sup>133</sup> Similarly, the rule “*plus est in re quam in existimatione*” had no normative value and could in fact be reversed, as Ulpian does in D. 29,2,15 (Ulp. 7 *Sab.*) when claiming “*plus est in opinione quam in veritate*”. See Chapter 2, Section 6(b) above.

<sup>134</sup> Chapter 1, Section 3 above.

<sup>135</sup> Chapter 6, Section 2 *i.f.*

used as a commonplace prevents from narrowing down its origin to a particular source. Nonetheless, considering that in legal texts the *nemo plus* argument is mostly used as an element of persuasion, it would appear that it found its place within the legal world mainly through the influence of rhetoric. The fact that the argument serves mainly the purpose of emphasizing a particular legal outcome suggests that jurists may be adopting a notion which rhetoricians would brandish in order to favour the position they defended, but which had no decisive meaning in the legal sphere. This influence would however only account for the cases in which the argument is used as a valid starting point, since in those applications where it is brought up to prove the exact opposite – that someone may give what he does not have – it appears that jurists resort to this idea as a broad commonplace deprived of argumentative value, which can nonetheless graphically illustrate a particular legal problem.

The place which the *nemo plus* argument holds within Roman legal writings raises the question: why would jurists feel the need to resort to the argument in the first place? An answer to such question can be drawn from the relationship between law and rhetoric, which remains however a highly controversial point among modern scholars. When approaching this subject, it should in the first place be borne in mind that the outcome of different problems may not have been so evident for the jurists developing new solutions, and that accordingly certain elements of persuasion could have played a significant role<sup>136</sup>, something which may be hard to grasp for a modern jurist, who can rely on clear-cut dogmatic concepts. Accordingly, the idea that the *nemo plus* argument only emphasizes an already clear solution should be nuanced if the outcome was not as evident for the Roman jurists as it seems to us. However, the cases examined so far do appear to have relatively predictable outcomes according to classical Roman law, which could signal that there are other elements which make the use of topical arguments useful. One may think at this point especially of the fact that jurists may have often been drawn to present their solutions in a way as clear as possible, considering that the addressees of their opinions would not be trained in law, as it would normally be the case of the *iudex* himself. In this context, remarks which could be superficial from a technical perspective could have been decisive for the success of an opinion. This point may be illustrated by reference to the application of the argument by Papinian in D. 20,1,3,1. The outcome of the case represents no novelty from a legal perspective, but there are elements which could be regarded as repugnant for a rudimentary notion of justice, since the rightful owner was wrongfully defeated in the first place. It even seems possible that the reluctance to accept this unfair sentence leads the defeated owner to behave as if he enjoyed the same position as before, thereby pledging the object. Under these circumstances, a layman may be inclined to agree with

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<sup>136</sup> See on this point Backhaus, *In maiore minus* (1983), p. 184 and Winkel, *General principles* (1996), p. 104-105.

the rightful owner, allowing him to pledge what is regarded to belong to him, but the jurist will have no doubt: the rightful owner cannot any longer be regarded as such, since he was defeated in court. At this point, the statement “*non plus habere creditor potest, quam habet qui pignus dedit*” may be the key to breach the gap between jurists and laymen, making the outcome of the case as evident to the latter as it is to the former and discarding elements which are not legally relevant for the outcome of the case.

The *nemo plus* argument is particularly fit to be used for the sake of persuasion and emphasis due to its seemingly self-evident nature, conveying a very graphic mental image of a legal problem. Complex legal problems are instantly simplified by the reference to the more easily understandable world of material objects, where it is in fact impossible to conceive that someone may give what he does not have. Conversely, this mental image may play an equally useful role to stress that sometimes in the legal world someone may give what he does not have, thereby conveying a strict contrast with the material world. The relevance of the illustrative function of the *nemo plus* argument moreover becomes clear by comparing it to a similar argument drawn from the rhetorical writings and included within the Digest as a *regula iuris: in maiore minus inest*<sup>137</sup>. This argument was carefully studied by Backhaus<sup>138</sup>, who draws conclusions which help to elucidate the significance of the *nemo plus* argument. Just like this argument, *in maiore minus inest* is drawn by Roman jurists from the field of rhetoric<sup>139</sup> and it is applied in order to solve particular problems, having however a more decisive role in order to determine the outcome of a case. This does not imply that it acquires a fixed systematic value, since its application in different contexts implies that its significance varies from one case to another<sup>140</sup>. What is more appealing for the present research is that Backhaus considers that the application of this argument would aim to make the outcome of a case more evident and understandable<sup>141</sup>. According to this author, the argument *in maiore minus inest* has a particularly illustrative nature (*Bildhaftigkeit*) due to the reference to the interactions of physical objects, where it becomes especially clear that a smaller part of a larger object is contained within the latter. Jurists would therefore have adopted an argument which by itself cannot determine the outcome of a case, but which makes it more eloquent and convincing. Such observations are equally applicable to the *nemo plus* argument, which by itself only serves as an emphatic

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<sup>137</sup> D. 50,17,110pr (Paul. 6 ed.); D. 50,17,21 (Ulp. 27 Sab.).

<sup>138</sup> Backhaus, *In maiore minus* (1983), p. 136–184

<sup>139</sup> The argument *in maiore minus inest* can for instance be found in Cicero, *Topica* 3,11; 4,23; 18,68; Quintilian, *Institutio Oratoria* 5,10,87. On the origins of this argument see Backhaus, *In maiore minus* (1983), p. 140–142.

<sup>140</sup> One may at this point consider the application of this argument by Quintus Mucius Scaevola and Aquilius Gallus regarding legacies in D. 32,29,1 (Lab., 2 post. a Iav. Epit.), which would be discarded by later jurists. See on this case Backhaus, *In maiore minus* (1983), p. 169–172.

<sup>141</sup> Backhaus, *In maiore minus* (1983), p. 181–184.

starting point which conveys in a more eloquent way general rules of law, such as that only the owner may transfer ownership, adding an element of persuasion to the outcome through the reference to the world of material objects, where no one can deliver an object which he does not have. That the *nemo plus* argument fulfils a role of persuasion by means of its illustrative character would moreover explain why it is often conveyed alongside categorical expressions such as “*absurdum est*” (D. 50,17,160,2) despite the fact that jurists would not in fact bother to defend the flawless character of the argument.

While the way in which Roman jurists apply the *nemo plus* argument hints at an influence from rhetorical writings, it becomes clear at the same time that the works of Aristotle on dialectics were not taken into account to determine the scope of the argument. That the *nemo plus* argument serves the purpose of a starting point and not of an overarching principle can be explained through the complete neglect of the Aristotelian observations regarding the correct application of this argument. If Roman jurists would have been keen to preserve the purity of this notion, they could have introduced the necessary distinctions to show that in fact no one can give what he does not have. For example, if Ulpian had been concerned with preserving the validity of this argument in D. 41,1,46, he could have argued that the pledge creditor is no exception to the rule, since he will give what he materially has – i.e., the pledged object – and the ownership which the acquirer obtains is that of the debtor who gave the pledge. Roman jurists, however, did not bother themselves with these scholarly distinctions, being more interested in making use of the *nemo plus* argument as a commonplace that could help to illustrate a particular point. Aristotle’s advice is therefore neglected, and the application of the argument in classical jurisprudence shows how easily the *nemo plus* argument may lead to confusion when different ‘categories’ are mixed, which is particularly easy when that which is discussed are not physical objects but intellectual entities.

That Aristotle’s considerations play no role in determining the scope of the argument does not, however, imply that the study of non-legal sources is irrelevant on this point, since other developments outside the legal world provide us with an essential insight in the way in which jurists would have approached the argument, and particularly its position within rhetorical writings, as well as its gradual expansion as a broad commonplace with a varied significance. Moreover, the fact that some literary sources were neglected by Roman jurists offers further insight into the ongoing debate regarding the influence of the general intellectual climate in Antiquity on the developments of Roman jurisprudence<sup>142</sup>, showing in the particular case of the *nemo plus* argument that jurists were much more oriented to offering convincing arguments than to building dogmatic constructions based on elaborate philosophical considerations. It is however

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<sup>142</sup> See on this subject Nörr, *Der Jurist im Kreis* (1976), p. 57-90; Winkel, *Roman law in its intellectual context* (2015), p. 9-24.

worth noting that the contributions of Aristotle would not remain unnoticed by jurists, since they would have a decisive impact on the interpretation of the *nemo plus* argument among medieval scholars, as will be shown in Chapter 7.

The analysis of literary and legal sources containing the *nemo plus* argument provides us with a much more nuanced outlook regarding its significance for classical jurists. At the beginning of this chapter, three views regarding D. 50,17,54 were confronted, one in favour of an absolute validity of the rule contained in it, the other denouncing that it was rendered inaccurate through the activity of the compilers, and another one according to which it never was completely accurate to begin with. This last view seems to be the more adequate to describe the argument in classical jurisprudence, but it should be noted that the *nemo plus* argument is not always applied in the same way, and its exact significance can therefore only be described by resorting to several notions. Above all, the *nemo plus* is used as a topical argument by Roman jurists, relying on its apparent self-evident value and illustrative nature to make a legal outcome more convincing. When applied in this way, it usually serves to emphasize an idea which serves as a general rule in the legal world, such as that only the owner may transfer ownership. In this way, the argument is used mainly as a starting point for legal reasoning. In this emphatic and illustrative function, the argument is applied to different contexts, and does not fulfil in any of them a decisive role to determine the outcome of a case. In this sense, Roman jurists never approached the *nemo plus* as an overarching rule or a general principle which could by itself provide a legal solution, or that would systematically explain the various cases which would seemingly contradict it. A practical approach on the application of the rule remained therefore dominant in Roman law, which is why the *nemo plus* argument never fulfilled any systematic function other than to reaffirm what would be considered the general rule in different contexts. In this way, the argument could have exceptions, which is shown by the three texts in which jurists from different periods openly contradict the validity argument (D. 7,1,63, D. 41,1,46 and D. 41,2,20pr). The *nemo plus* is used in such contexts not so much as a topical argument, but rather as a commonplace, which through its illustrative nature may convey in an emphatic way the peculiarities of legal thinking as opposed to the physical reality. In such contexts, the almost proverbial value of this idea makes it a perfect tool to draw a reference point against which legal solutions can be contrasted. All of this excludes the main starting point of the traditional views on the argument, namely that the *nemo plus* should be free from exceptions. Modern scholars appear to be deceived by the seemingly self-evident character of the argument, as is particularly evident in Kaser's comparison to the glass of water. It is moreover interesting that their approach appears to be largely influenced by the traditional interpretation of the *ius commune* of D. 50,17,54, which will be studied in the following chapter<sup>143</sup>.

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<sup>143</sup> Chapter 7, Section 5 below.

#### 4. The *nemo plus* argument and the *traditio a non domino* in post-classical law

Classical sources show that jurists did not regard the *nemo plus* argument as an infallible principle which could fulfil a general systematic role when determining a particular legal outcome. It is however not evident that Justinianic law would approach this argument in the same way, considering that within the Digest it is conveyed as a *regula iuris*. The fact that the argument was abstracted from its context and presented on its own could suggest that a specific legal significance was granted to it in post-classical times, which calls for an overview of its applications after Paul and Ulpian.

It is first of all worth noting that the *nemo plus* argument did not crystalize into a fixed formula after Ulpian, since the argument is still found in later legal writings through a free wording and in different contexts. This can be seen in several constitutions, although in some cases it is rather dubious whether the *nemo plus* argument in particular is being applied, as happens with a constitution of the year 260 AD which declares through a general formula that no one can free someone else's slave as if he were his own<sup>144</sup>. A more evident application of the argument is found in three constitutions of the time of Diocletian:

C. 8,53(54),14 (Diocletian/Maximianus, 293): Si filius tuus res ad te pertinentes sponsae suae te non consentiente donavit, ad eam, quod non habuit, transferre non potuit<sup>145</sup>.

C. 4,26,10,1 (Diocletian/Maximianus, 294): Quod si non habentes liberam peculii administrationem rem dominicam eo ignorante distraxerunt, neque dominium, quod non habent, in alium transferre possunt neque condicionem eorum servilem scientibus possessionis iustum adferunt initium (...)<sup>146</sup>.

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<sup>144</sup> C. 7,10,4 (Valerian/Gallienus, 260) "(...) Nemo enim alienum servum, quamvis ut proprium manumittat, ad libertatem producere potest".

<sup>145</sup> C. 8,53(54),14: "If your son made a gift to his bride of objects belonging to you without your consent, he could not transfer to her what he did not have". I would like to thank Dr. Benet Salway for the interesting insights he provided me for the correct interpretation of this text.

<sup>146</sup> C. 4,26,10,1: "But if slaves who do not have free management of their *peculium* sell the master's property without his knowledge, they cannot transfer ownership which they do not have to another, not does such transfer give a lawful beginning of possession (so as to set the statute of limitation in motion) to those who know the servile condition of the seller (...)" (transl. Blume).

C. 4,51,6 (Diocletian/Maximianus, 294): *Nemo res ad te pertinentes non obligatas sibi nec ex officio vendendi potestatem habens distrahendo quicquam tibi nocere potuit*<sup>147</sup>.

The abstract formula “he could not transfer to her what he did not have” in the first text leaves no room for doubt concerning the application of the *nemo plus* argument. The same can be said about the application of the argument in C. 4,26,10,1, where “*neque dominium, quod non habent, in alium transferre possunt*” offers a considerable resemblance to other juristic formulations of the argument. The third text is more complex, since it introduces a large clause in which some exceptions to the general rule are given. This is all the more interesting, since the basic argument “*Nemo res ad te pertinentes... distrahendo quicquam tibi nocere potuit*” is confronted with some of the common exceptions which the *nemo plus* argument experiences in the legal world.

The three constitutions of Diocletian and Maximianus reproduced here not only show that the *nemo plus* argument had not acquired a fixed formula, but also that it continued to serve as a mere starting point or general rule for legal reasoning which faced exceptions. All three texts refer to the transfer of ownership by a non-owner, and in all of them it is clearly shown that, in certain cases, ownership can be transferred by a non-owner, as happens when the son is authorized by the mother (C. 8,53(54),14), when the slave has the *libera administratio peculii* or acts directly authorized by his master (C. 4,26,10,1) and when a non-owner in general acts *ex officio* or sells pledged goods (C. 4,51,6). In other words, the *nemo plus* argument simply conveys the general rule that normally the owner will transfer ownership, having no further systematic scope by the end of the 3<sup>rd</sup> century.

The argument can also be envisaged in a constitution of 379 AD dealing with heretics, which prohibits them to teach the faith since they do not have it, or to ordain ministers, since they are not such themselves<sup>148</sup>. This application is however more related to the theological use of the *nemo plus* argument, which will be studied below<sup>149</sup>. The *Pauli Sententiarum interpretatio*, composed in the 5<sup>th</sup> century, also makes use of the *nemo plus* argument in a rather uncommon context, namely the judicial deposit, where it is said that someone cannot judicially deposit (*sequestrare*) what he does not have (*quia non potest sequestrare, quod non habet*)<sup>150</sup>. These examples show that the field of application of the

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<sup>147</sup> C. 4,51,6: “No one can injure you by selling your property not pledged to him or over which he has no power of sale by reason of his office” (transl. Blume).

<sup>148</sup> C. 1,5,2pr (Gratian/Valentinian/Theodosius, 379): “Omnes vetitae legibus et divinis et imperialibus constitutionibus haereses perpetuo conquiescant et nemo ulterius conetur quae repperit profana praecepta vel docere vel discere: ne antistites eorundem audeant fidem insinuare, quam non habent, et ministros creare, quod non sunt...”

<sup>149</sup> Chapter 7, Section 1.

<sup>150</sup> PS Int. 5,36 ad § 1: “Quoties post auditam causam iudici possessor appellat, fructus possessionis, de qua agitur, dum secundae audientiae eventus in dubio est, merito

argument had not been limited to the law of succession or the transfer of ownership *inter vivos*, remaining free of any particular dogmatic significance.

The *nemo plus* argument remained in use right up to the time of Justinian, as the following constitution shows:

C. 6,43,3,2a (Justinian, 531): Nemo itaque ea, quae per legatum vel pure vel sub certo die relictæ sunt vel quae restitui aliis disposita sunt vel substitutione posita, secundum veterem dispositionem putet esse in posterum alienanda vel pignoris vel hypothecae titulo adsignanda vel mancipia manumittenda. Sed sciat, quod hoc quod alienum est non ei liceat utpote sui patrimonii existens alieno iuri applicare, quia satis absurdum est et inrationabile rem, quam in suis bonis pure non possidet, eam ad alios posse transferre vel hypothecae pignoris nomine obligare vel manumittere et alienam spem decipere<sup>151</sup>.

This application of the argument takes place in the context of the Justinianic reform which suppressed the different kinds of legacies, granting an *actio in rem* to a legatee or a beneficiary of a trust (C. 6,43,1,1). In accordance with this innovation, Justinian decrees that an heir may no longer dispose in any way of these goods, since they belong to someone else (*quod alienum est*). When explaining this decision, it is declared that it is absurd and irrational that property which a party does not own may be transferred to someone else or be alienated in any other way (*absurdum est et inrationabile rem, quam in suis bonis pure non possidet, eam ad alios posse transferre*). The contrast between what the heir has and what he may transfer shows a clear application of the *nemo plus* argument, and the emphatic *reductio ad absurdum* reminds us of other classical applications of the *nemo plus*, such as D. 50,17,160,2. Just as in other cases, the emphatic wording used does not imply by itself that the argument has an overarching or absolute validity, but simply that it emphasizes the general rule that only the owner may transfer ownership.

That the *nemo plus* argument was alive and well in Justinianic times becomes moreover clear when examining the Paraphrasis of Theophilus, where the argument is brought up when describing the requirements for the transfer of

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sequestrantur. Nam si petitor appellaverit, hoc ab eo non potest postulari, quia non potest sequestrare, quod non habet” (Girard/Senn, *Textes de Droit Romain* (1967), p. 407).

<sup>151</sup> C. 6,43,3,2a: “Therefore, let no one [heir] hereafter think that, according to the former law, he may alienate or pledge or mortgage property left as a legacy, either unconditionally or for a certain time, or property which he has been ordered to restore to others, or for which substitution in his place has been provided, or that he may manumit a slave in the same situation. But he must know that he may not make a grant of someone else’s property, as though it were his own, to another, because it is absurd and irrational that property which a party does not own unconditionally might be transferred, pledged, mortgaged, or manumitted by him, thus disappointing another’s hope” (transl. Blume, modified).

ownership by delivery. Among these requirements, Theophilus points out that the *tradens* must be the owner, a statement which he then emphasizes by resorting to the *nemo plus* argument:

Theoph. Par. 2,1,40: δεσπότην εἶναι τὸν TRADITEUONTA διὰ τοῦτο εἶπον, ἐπειδὴ ὁ μὴ ὢν δεσπότης οὐ δύναται μεταθεῖναι δεσποτείαν, ἦν οὐκ ἔχει<sup>152</sup>.

This reference to the argument in Theophilus' didactic paraphrase shows that it had remained as a useful starting point to describe the transfer of ownership by *traditio*, being still used as such at the time of Justinian to explain that a non-owner cannot convey ownership if he does not have it. The popularity of this argument in this context is moreover to be seen in the fact that Theophilus applies it again when discussing the acquisition by usucapion:

Theoph. Par. 2,6pr: ὅτι μὲν ἐάν τις τὸ οἰκειῶν μοι TRADITEUΣῃ πρᾶγμα μεταφέρει τὴν προσοῦσαν αὐτῷ δεσποτείαν, συνωμολόγηται. τί δὲ ὅτι ἀλλότριόν τις πρᾶγμα, οὗ οὐκ ἦν δεσπότης, ἔTRADITEUSE μοι; ἄρα μεταφέρει ἐνταῦθα τὴν δεσποτείαν; λέγομεν ὅτι οὐδαμῶς· πῶς γάρ, ἦν οὐκ εἶχεν; τί οὖν; μετήγαγεν ἐπ' ἐμέ αὐτὴν ἦν εἶχε νομὴν ἥτοι κατοχὴν<sup>153</sup>.

The *nemo plus* argument is once again used as a starting point to determine the outcome of the transfer of ownership by a non-owner, since we are told that normally the non-owner will not transfer ownership through the rhetorical question "For how could he pass it, when he had not got it?" (πῶς γάρ, ἦν οὐκ εἶχεν;). The argument is therefore presented once again as self-evident. It is moreover interesting that Theophilus attempts a further clarification concerning what was really given, stating that the non-owner only gave the possession (νομή) which he had. This distinction is noteworthy considering that it is an isolated case where a jurist attempts to give a further explanation of the scope of the *nemo plus* argument by showing that the non-owner only gives that what he has, i.e. his possession over the object.

The evidence presented so far shows that the *nemo plus* argument was still in use among jurists in the time of Justinian, and that it did not crystallize into a

<sup>152</sup> Theoph. Par. 2,1,40: "I have said that the deliverer must be owner because a non-owner cannot pass an ownership that he has not got" (transl. Murison).

<sup>153</sup> Theoph. Par. 2,6pr: "There is no question that, if a man delivers to me a thing that belongs to him, he passes his ownership in it. But how does the case stand if a man delivers to me a thing that he is not owner of? Does he, in this case, pass the ownership? The answer is: certainly not. For how could he pass it, when he had not got it? What then? He passed to me the possession or detention that he did have" (transl. Murison, Lokin et al., modified).

definitive formula after Ulpian, being applied still as an argument to address different problems. This, however, does not necessarily imply that the value of the argument remained unaltered, since there are traces of an evolution concerning the significance of the transfer of ownership by a non-owner in the time of Justinian which imply a change in the value which jurists were willing to grant the *nemo plus* rule. This evolution consists in regarding the delivery by a non-owner in certain cases as performed by the owner himself, and therefore not as an actual exception to the general rule according to which the owner may transfer ownership. The main indication of this evolution comes from a comparison between the systematization of the problem in the Institutes of Gaius and in the Institutes of Justinian, and particularly the fact that, while Gaius mentions in Gai 2,64 three cases in which a non-owner may transfer ownership – the *curator furiosi*, the *procurator* and the pledge creditor – Justinian only mentions the pledge creditor in the equivalent text of Inst. 2,8,1<sup>154</sup>. The absence of any reference to the alienation by a *procurator* can be explained from a systematic perspective, since the case is dealt with earlier, when describing the requirements to transfer ownership. Just as in Gai 2,20, Justinian declares in Inst. 2,1,40 that ownership is transferred when the *tradens* is the owner (*et a domino tradita alienatur*). But instead of waiting until the title “*Quibus alienare licet vel non*” to describe the cases of the *translatio* by a non-owner, the compilers reproduce – with minor changes – in Inst. 2,1,42–43<sup>155</sup> another text of Gaius, this time from his *Res cottidianae*, contained in the already mentioned text of D. 41,1,9,3–4. Particularly noteworthy is that within this systematic arrangement, Inst. 2,1,42 appears to indicate an equivalence between the alienation performed by the owner and by an authorized non-owner, which could explain the absence of the *procurator* among the exceptions of Inst. 2,8,1. Since it was laid down earlier within the Institutes of Justinian that the delivery by an authorized non-owner would amount to a delivery performed by the owner himself, the alienation by a *procurator* needed no further comment within the 2<sup>nd</sup> book of Justinian’s Institutes, and its treatment as an exception to the general rule in Inst. 2,8,1 would be out of place.

The tendency to attribute the alienation by a non-owner to the owner himself can also be seen in the way the law of Justinian deals with the alienation by a pledge creditor:

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<sup>154</sup> The case of the *pupillus* is also dealt with in Inst. 2,8,2, although it does not discuss the direct alienation by the *tutor* but rather the need for his authorization in various acts performed by the ward. It is accordingly no wonder that Theophilus in his paraphrase approaches this problem as a case where an owner cannot alienate, instead of focusing in the non-owner’s faculty to dispose, as can be seen in Theoph. Par. 2,8,2: Ἔστιν εὑρεῖν καὶ ἄλλον δεσπότην οὐ δυνάμενον ἐκποιεῖν τὰ οἰκεῖα πράγματα (There is to be found also another owner that cannot alienate his property [transl. Murison]).

<sup>155</sup> Inst. 2,1,42–43: “Nihil autem interest, utrum ipse dominus tradat alicui rem, an voluntate eius alius. (43) Qua ratione, si cui libera negotiorum administratio a domino permissa fuerit isque ex his negotiis rem vendiderit et tradiderit, facit eam accipientis”.

Inst. 2,8,1: Contra autem creditor pignus ex pactione, quamvis eius ea res non sit, alienare potest. Sed hoc forsitan ideo videtur fieri, quod voluntate debitoris intellegitur pignus alienare, qui ab initio contractus pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur. (...) <sup>156</sup>

As noted above, this is the only case presented under the title “*Quibus alienare licet vel non*” of the Institutes of Justinian where a non-owner can transfer ownership. Nonetheless, the text quickly offers an alternative explanation which seems to discard its exceptional character, declaring that in fact this can be seen as taking place due to the previous authorization by the owner. Although this explanation is taken almost word for word from the Institutes of Gaius<sup>157</sup>, the systematic arrangement of both works gives the text a very different meaning. Gaius, on the one hand, presents this case after that of the *procurator*, and therefore his reference to the *voluntas debitoris* appears simply to throw some light on the legal grounds on which this alienation takes place. On the other hand, this same explanation has a different effect in the Institutes of Justinian, due to the fact that the pledge creditor is presented as the only case where a non-owner may transfer ownership, and it appears to indicate that this is in fact no real exception to the general rule, since the alienation takes place *voluntate domini*. In other words, while Gai 2,62–64 narrows down the previous statement of Gai 2,20 according to which the *tradens* must be the owner, Inst. 2,8,1 seems to offer only an apparent exception to the rule that the *tradens* must be the owner, since the existence of the *voluntas domini* implies that the alienation by a pledge creditor can be set within the framework described Inst. 2,1,40–43.

The way in which the compilers approach the alienation by a non-owner appears to be ratified by the Paraphrase of Theophilus. First of all, it should be borne in mind that this author stresses the validity of the *nemo plus* argument within the transfer of ownership, and does not present any exceptions to it. Along with this fact, Theophilus stresses in various contexts that the *tradens* must be the owner<sup>158</sup>. The paraphrase to Inst. 2,1,42–43 is particularly illustrative on his views on the systematic arrangement of the *traditio* by a non-owner, being for

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<sup>156</sup> Inst. 2,8,1: “On the other side of the line, a creditor, under his contract, has power to alienate a pledge despite not being its owner. But here the explanation is perhaps that he alienates the pledge with the debtor’s authority, given by a term of the contract allowing the creditor the right to sell on failure to repay. (...)” (transl. Birks/McLeod).

<sup>157</sup> Compare Gai 2,64: “(...) Sed hoc forsitan ideo videatur fieri, quod voluntate debitoris intellegitur pignus alienari, qui olim pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur”.

<sup>158</sup> See for instance the opening sentence of Theop. Par 2,1,41: Ἄλλ' εἰ μὲν δεσπότης TRADITEΥΣῆ μοι τὸ οἰκεῖον πρᾶγμα ἀπὸ δωρεᾶς ἢ προικὸς ἢ ἄλλης οἰασθῆποτε αἰτίας, οἷον ἀπὸ PERMUTATIONOS, ἀναμφιβόλως μεταφέρει τὴν δεσποτείαν ἐπ' ἐμέ (If an owner delivers to me property of his own by way of gift or of dowry, or on any other title whatsoever, such as exchange, there is not a shadow of doubt but he passes me the ownership (transl. Murison, modified).

the greater part a literal translation of the original text, except for a final remark to Inst. 2,1,43 where Theophilus observes: “for he [i.e. the person authorized to administer] is deemed to do the act by consent of the owner” (Theoph. Par. 2,1,43 *i.f.*: δοκεῖ γὰρ κατὰ γνώμην τοῦ δεσπότου τοῦτο πράττειν [transl. Murison])). Through this clarification, Theophilus seems to regard the delivery by a non-owner as performed by the owner himself, and thereby avoids making an exception to the general rule as presented through the *nemo plus* argument, according to which only the owner can transfer ownership. In other words: since the transfer of ownership by an authorized non-owner is considered to stem directly from the owner’s will, it cannot at the same time be considered as an exception to the general rule that only the owner can transfer ownership.

That a delivery by an authorized non-owner amounts to a delivery performed by the owner himself in the eyes of Theophilus is also to be seen in his paraphrase to the title “*Quibus alienare licet vel non*”, and particularly in the author’s initial statement that “It is necessary to enumerate here paradoxical cases (παράδοξα θέματα) when an owner cannot alienate a thing that belongs to him, and when a non-owner can rightly alienate a thing that is not his own”<sup>159</sup>. That the cases described here are referred to as ‘paradoxical’ or ‘contrary to expectation’ reveals from the start a somewhat cautious approach to these irregular cases. That the general rule according to which the *tradens* must be the owner is not to be lightly discarded in the eyes of Theophilus becomes evident by the way in which he deals with the alienation by a pledge creditor, the only case of transfer of ownership by a non-owner presented in Inst. 2,8,1:

Theoph. Par. 2,8,1: Νῦν χρῆ λέγειν πότε ὁ μὴ ὦν δεσπότης δύναται ἐκποιεῖν. τοῦτο δὲ προβαίνει ὡς ἐπὶ τούτου τοῦ θέματος. ἔδανεισάμην παρὰ σοῦ ἑκατὸν νομίσματα. ἐνεχύρασά σοι τὸν ἐμὸν ἀγρόν, συμφωνήσας ὥστε σοι ἐξεῖναι ἐνιαυτοῦ παραδραμόντος κάμοῦ μὴ καταβαλόντος τὸ χρέος διαπιπράσκειν τὸ ἐνεχυρον. ἰδοὺ ἐνταῦθα ὁ creditor μὴ ὦν δεσπότης καλῶς ἐκποιεῖ. ἀλλ’ ἐάν τις ἐξετάσῃ τὸ ἀκριβές, οὐ γίνεται τι παράδοξον. δοκεῖ γὰρ ὁ debtor πιπράσκειν ὁ καὶ δεσπότης ὦν αὐτῷ τούτῳ ᾧ διὰ συμφώνου συγχωρεῖ τῷ creditor τὸ πιπράσκειν ἀγνωμοσύμης γινομένης περὶ τὴν τοῦ χρέους ἀπόδοσιν. (...) <sup>160</sup>

<sup>159</sup> Theoph. Par. 2,8pr: Ἀναγκαῖον ἐντεῦθεν ἐξαριθμῆσαι παράδοξα θέματα, πότε ὁ δεσπότης τὸ ἴδιον ἐκποιεῖν οὐ δύναται πρᾶγμα καὶ πότε ὁ μὴ ὦν δεσπότης ὀρθῶς ἐκποιεῖ τὸ μὴ οἰκεῖον.

<sup>160</sup> Theoph. Par. 2,8,1: “Now we must state when a non-owner can alienate. Take this case: I borrowed from you 100 *solidi*, mortgaging to you my land, on the terms that, on the lapse of a year, if I do not discharge the debt, you shall be at liberty to sell the pledge. Here, you see, is a case where the creditor, although not owner, is entitled to alienate. But if the matter be closely looked into, there is nothing paradoxical about it. For it is the debtor,

What is particularly striking about this text is that Theophilus discards that the alienation by the pledge creditor constitutes an exception to the general rule, declaring that there is nothing paradoxical about this case, since the owner “is regarded as selling from the very fact that by the terms of agreement he allows the creditor to sell, in case he should fail to discharge the debt”. From a systematic perspective the delivery is therefore considered as performed by the owner himself, which implies that the general rule according to which “the deliverer must be owner because a non-owner cannot pass an ownership that he has not got” (Theoph. Par. 2,1,40) does not have exceptions. Therefore, in the eyes of the compilers, the Institutes of Justinian present only one exception to the general rule, which turns out to be only an apparent exception.

The evidence presented so far shows that the compilers had a peculiar view on the systematization of the transfer of ownership by a non-owner, according to which the various cases in which this took place could be regarded as alienations performed by the owner himself. This appears to be the only relevant evolution which takes place in Justinianic law regarding the *traditio* by a non-owner, which has in any case a purely dogmatic and systematic value and bears no practical significance. This development is however directly relevant to determine the scope of the *nemo plus* argument within the law of property, since all of a sudden the exceptions to it have vanished, as can be clearly seen in the systematization of the *traditio* by a non-owner in Justinian’s Institutes.

The evolution described here is very subtle, and raises the question of whether traces of this development can be found in the works of classical jurists. Burdese, for instance, already thought he could identify a change in the approach to the transfer of ownership by a non-owner between the Institutes of Gaius and his *Res cottidianae*, since in the first text the *procurator* is presented as having an autonomous *potestas alienandi*, while in the second work reference is made to the *voluntas domini*<sup>161</sup>. There is however no evidence that the different emphasis on this point has any further implications, and the fact that the *procurator* is among the exceptions to the general rule indicates that Gaius did not regard the *traditio voluntate domini* as performed by the owner himself for systematic purposes. It appears therefore that the systematic arrangement offered in the Institutes of Justinian was a Byzantine development, which in turn raises the question of the driving force behind this change. The most likely explanation is that, as the

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who is also owner, that is regarded as selling from the very fact that by the terms of agreement he allows the creditor to sell, in case he should fail to discharge the debt” (transl. Murison).

<sup>161</sup> Burdese, *Potestas alienandi* (2009), p. 26: “...lo stesso Gaio, dopo aver riconosciuto nelle Istituzioni una posizione propria di *potestas alienandi* al *procurator* (ammesso che si tratti del *procurator omnium bonorum*, anche indipendentemente dall’essere egli fornito di mandato speciale ad alienare), avrebbe potuto, in D. 41,1,9,4, tratto dalle *res cottidianae*, riferire genericamente alla *voluntas domini* il fondamento delle alienazioni effettuate da detto *procurator* in base al permesso dominicale in quanto contenuto nei limiti di un più o meno ampio concetto di *libera administratio*...”.

Paraphrase of Theophilus shows, the *nemo plus* argument had consolidated as a starting point to determine the outcome of the transfer of ownership, and that at some point scholars must have become inclined to regard this idea not as a mere starting point, but to honour its self-evident nature by interpreting the cases traditionally considered as exceptional as covered by the general rule. The shift may have even taken place in an effortless way, since already classical jurists often equated – although in practical, not systematic terms – the delivery by a non-owner acting *voluntate domini* with that performed by the owner himself. This equation may even have been easier regarding the alienation by legal guardians, which has remained out of the discussion so far due to the silence of Justinian’s Institutes on this point. Despite this circumstance, the numerous references throughout the writings of Roman jurists where the legal guardian is regarded as alienating ‘*loco domini*’ may have proven enough for Byzantine jurists to regard the alienation as performed by the owner himself in this case as well, which would explain the absence of any reference to the *curator furiosi* in Inst. 2,8,1.

While the new approach to the transfer of ownership by a non-owner can be easily identified in the Institutes of Justinian and even more in the Paraphrase of Theophilus, the outlook is not so clear in other works of Justinian’s compilation. There are in fact some elements in the compilation which seem to indicate that this interpretation was still developing during the composition of the *Corpus Iuris*. Particularly relevant in this regard is the inclusion of D. 41,1,46 (Ulp. 65 *ed.*), which openly denies the absolute validity of the *nemo plus* argument regarding the transfer of ownership, mentioning in particular the alienation by a pledge creditor. The text is moreover located only a few lines away from D. 41,1,20pr (Ulp. 29 *Sab.*), where the argument is explicitly applied to the transfer of ownership by a non-owner. What does this tell us about the validity of the argument regarding the transfer of ownership in the eyes of the compilers? In the first place, that the alienation by a pledge creditor was the case which they found the more difficult to include under the general rule, since it is presented as an exception to the general rule not only in D. 41,1,46, but also in Inst. 2,8,1. Nonetheless, in a few years’ time this obstacle was overcome: while D. 41,1,46 presents the pledge creditor as a clear exception to the rule that the delivery must be performed by a non-owner, Inst. 2,8,1 challenges this view, and Theoph. Par. 2,8,1 shows that it is nothing but an apparent exception.

The inclusion of D. 41,1,46 within the compilation also shows that the compilers were not willing to acknowledge other cases than the pledge creditor as exceptions to the general rule. This can be seen by the original position of the text, corresponding to book 65<sup>th</sup> of Ulpian’s Commentary to the Edict, where he dealt with the *curatores*<sup>162</sup>, which implies that the *creditor pignoris* was mentioned

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<sup>162</sup> Lenel, *Paling.* (1889) II, col. 797 sets forth the rubric *De constituendo curator et administratione eius* under the general title *De curatore bonis dando* (Lenel, *EP* [1927], p. 434), and in col. 798 n. 1 relates the text of D. 41,1,46 to D. 42,7,2,1, which deals with the sale performed by a *curator*.

along with the *curator* when dealing with the alienation by a non-owner. That the compilers decided to omit the reference to the alienation by a legal guardian is consistent with the text of Inst. 2,8,1, where such a reference is equally absent, showing that in the eyes of the compilers the alienation should be regarded in this case as performed by the owner, and not as an exception to the general rule.

Having all of these elements in mind, it appears that in Justinianic law the *nemo plus* argument acquired a greater scope regarding the transfer of ownership by a non-owner. The argument itself appears in various contexts within the compilation, retaining in most cases the same features which it had in classical Roman law. However, regarding the transfer of ownership, the *nemo plus* became an overarching rule which in the eyes of the compilers had no room for exceptions, besides the case of the pledge creditor (D. 41,1,46) which was quickly covered by the general rule. Justinian's compilation is therefore a milestone in the evolution of the *nemo plus* argument, since the compilers were the first jurists to offer an interpretation which would free the rule from exceptions.

What does this evolution imply for the significance of the *nemo plus* rule as laid down in D. 50,17,54? The answer to this question depends largely on personal convictions of the compilers, which apparently experienced variations through the years. At the time of composition of the Digest, the compilers appear to admit at least one exception to this rule, namely the case of the pledge creditor, as shown in D. 41,1,46. This would imply that, by the time of composition of the rule in D. 50,17,54, it would be regarded as an almost flawless statement regarding the transfer of ownership. The subsequent treatment of the alienation by a pledge creditor in the Institutes of Justinian and in the Paraphrase of Theophilus shows that soon after, Byzantine jurists would not regard this case as exceptional anymore, and therefore the *nemo plus* rule would seem to be completely flawless. Accordingly, the *nemo plus* rule can be seen as having a specific systematic value in Justinianic law, which Byzantine jurists further refined after the promulgation of the Digest. The interpretations of modern scholars such as Carlin and Lonchamps appear therefore to be best suited to describe the significance of the *nemo plus* rule in Justinianic law.

It is worth noting at this point that the overarching scope of the *nemo plus* rule in Byzantine law should not be seen as stemming from the fact that it was laid down as a *regula iuris*, as some authors think<sup>163</sup>. The fact that a specific text was included in the last title of the Digest did not automatically grant it an absolute validity. What is more, scholars have emphasized the heterogeneous nature of the opinions collected into this title, where the different *regulae* offer an enormous diversity of degrees of validity or functions<sup>164</sup>. It should moreover be noted that

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<sup>163</sup> See e.g. Longchamps, *Nemo plus iuris* (2015), p. 78: "And because it was a *regula* (a rule), in accordance with the definition provided in D. 50 17 1, there were no exceptions to it. Thus Roman law fully respected the *nemo plus iuris* rule".

<sup>164</sup> See especially Stein, *Regulae iuris* (1966), p. 123.

scholars are still puzzled regarding what the compilers had in mind when making this title and which were their selection criteria<sup>165</sup>, particularly considering the countless texts which could have been included in D. 50,17 and which were, for some reason or another, left out of it<sup>166</sup>. We see in any case that the *regulae iuris* often serve as a mere starting point, and as such are plagued with exceptions. It is therefore not possible to grant the *nemo plus* rule a particular significance from the sole fact that it was made a *regula iuris*. The contextual information gathered so far regarding the transfer of ownership by a non-owner in Justinianic law would however indicate that the compilers granted the *nemo plus* argument a particular value when referred to the transfer of ownership, which is why one may suspect that this particular rule would have had an almost absolute validity when it was composed, becoming even more authoritative when the case of the pledge creditor was considered to abide by the general rule. This, still, does not imply that the overarching validity of the *nemo plus* rule stems from the fact that it was laid down as a *regula iuris* by Justinian, but merely that one can set this rule along those having a more absolute validity.

That the *nemo plus* rule of D. 50,17,54 did not acquire an absolute validity merely from its inclusion within the last title of the Digest becomes evident from the fact that the *nemo plus* argument was laid down in other *regulae* as well, where it appears to have retained the more modest role it had in classical Roman law. In other words, there is no general attempt to grant absolute validity to every application of the *nemo plus* argument. This can even be seen with some *regulae* which apply the *nemo plus* argument or similar arguments to the law of succession, as Wallinga has shown when dealing with D. 50,17,59. Accordingly, other *regulae iuris* which refer to the *nemo plus* argument – such as D. 50,17,120 and D. 50,17,160,2 – cannot be seen as having absolute validity for the sole fact of being located within the last title of the Digest. That the *nemo plus* argument remained largely a mere starting point with relative validity can be seen moreover from the fact that exceptions to it such as the ones in D. 41,2,21pr and D. 7,1,63 were preserved in the Digest, along with the already mentioned case of D. 41,1,46. This circumstance is relevant for the proper understanding of the evolution of the argument within the transfer of ownership, because it shows that the compilers were not led by the self-evident character of the argument or by philosophical considerations into granting it the broadest scope possible in every context. The evolution which took place in the context of the transfer of ownership appears therefore to be an isolated case in which what had long been

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<sup>165</sup> Stein, *Regulae iuris* (1966), p. 122: “The precise function of the last title of the Digest is not clear today and was probably not clear to the compilers themselves”.

<sup>166</sup> Pothier took upon himself to gather all the *regulae*-like statements he could find in the Corpus Iuris, producing an index with 906 rules (Stein, *Regulae iuris* [1966], p. 178-179). One could therefore inquire what led the compilers to be so conservative in their selection criteria.

used as a starting point was at some point understood as an overarching rule, while the general *nemo plus* argument retained limited validity in other contexts.

While no particular consequence regarding the validity of the *nemo plus* rule can be drawn from the sole fact of its inclusion within the last title of the Digest, it is nonetheless interesting to approach this rule as part of the larger problem of the *regulae iuris* in Justinianic law, especially considering that studies on the *regulae iuris* have traditionally granted very limited attention to the *nemo plus* rule as part of this larger problem. The *nemo plus* rule has in fact more background information than most other *regulae* to provide us with interesting clues to acquire further insight regarding the way in which D. 50,17 was composed. The general truth behind the argument must have been valued by the compilers<sup>167</sup>, being aware that it was a useful starting point for legal reasoning when dealing with the most diverse subjects, and could therefore be presented as a general guideline. This positive assessment of the argument must have led to its inclusion within D. 50,17, and not in one, but in multiple versions: D. 50,17,54, D. 50,17,120 and D. 50,17,160,2 are all applications of the same argument, having even close textual similarities. Moreover, the texts of D. 50,17,11, D. 50,17,59, D. 50,17,62, D. 50,17,143, D. 50,17,156,2, D. 50,17,175,1 and D. 50,17,177pr bear such a close substantive similarity to the rule as presented in D. 50,17,54 that one may wonder what new insight do they all provide to the more general formulation in the latter text, besides showing that this basic truth is validly applicable in varied contexts. Similar developments can also be found regarding other statements with an apparent self-evident value<sup>168</sup>, which seem to have captured the attention of the compilers, some of them having – just as the *nemo plus* argument – a clear origin in dialectics or rhetoric, as well as a limited validity within legal writings. One may recall the seemingly logical argument “*in maiore minor inest*” which Quintus Mucius Scaevola and Aquilius Gallus used to determine the scope of a legacy in a particular case (D. 32,29,1), which was however discarded by later jurisprudence and labelled by Horak as a “clumsy, pseudo-logical formalism”<sup>169</sup>. The argument nonetheless made its way into the last title of the Digest in D. 50,17,21 (Ulp. 27 *Sab.*)<sup>170</sup> and in a more abstract form into D. 50,17,110pr (Paul 6 *ed.*): “*In eo, quod plus sit, semper inest et minus*”<sup>171</sup>. Similar is the case of the maxim “*accessorium sequitur principale*” (the accessory follows the principal), which appears in use in D. 33,8,2<sup>172</sup> and

<sup>167</sup> Longchamps, *Nemo plus iuris* (2015), p. 73.

<sup>168</sup> Longchamps, *Nemo plus iuris* (2015), p. 69 observes: “This quotation is not the only one which, taken out of context, gives the impression of eloquence and timelessness”.

<sup>169</sup> Horak, *Rationes decidendi* (1969), p. 94-95.

<sup>170</sup> D. 50,17,21 (Ulp. 27 *Sab.*): “Non debet, cui plus licet, quod minus est non licere”.

<sup>171</sup> D. 50,17,110pr: “In any case, where there is a possibility of more, there is also a possibility of less” (transl. Watson).

<sup>172</sup> D. 33,8,2 (Gai. 18 *ed. prov.*): “Nam quae accessionum locum optinent, exstinguuntur, cum principales res preemptae fuerint”.

D. 34,2,19,13<sup>173</sup>, being later generalized in D. 50,17,129,1<sup>174</sup> and D. 50,17,178<sup>175</sup>.

Along with the fact that the compilers seem to have viewed the *nemo plus* argument as a general truth, it is also worth noting that the multiple references to this argument within the last title of the Digest seem to show that it held a relevant position in the legal thought and practice at the time the compilation was taking place. That the argument was still in use can be seen from the references in C. 6,43,3,2a as well as in the Paraphrase of Theophilus, which confirms Stein's view that the compilers chose the texts which still remained significant in their own time<sup>176</sup>. This shows in turn the practical function of D. 50,17, since a rule such as the *nemo plus* would be recognisable and useful for legal practitioners<sup>177</sup>.

Having shown that the *nemo plus* rule does not automatically obtain a particular validity from the sole fact of being included in the last title of the Digest, and that its overarching validity can only be seen through other developments in the time of Justinian, it is however worth noting that the generalization of this text into a rule does seem to provide an insight into the views of the compilers regarding the transfer of ownership by a non-owner. Accordingly, while the main indicator of the Byzantine systematization of the transfer of ownership by a non-owner is to be found in the arrangement of the subject in Inst. 2,1,40-43 and Inst. 2,8,1, the generalization of Ulpian's decision into a *regula iuris* in D. 50,17,54 can also be seen as part of this evolution. Considering that the *nemo plus* argument fulfilled a clear systematic function in the context of the transfer of ownership in the view of the compilers, the manipulation of the original classical text allows them to lay an emphasis which favours their own ideas. By generalizing a specific decision referred to the *hereditas*, the compilers did not carry out a substantial innovation. Nonetheless, this newfound *regula iuris* does seem to reflect the personal views of the compilers regarding the nature of the transfer of ownership by a non-owner, and particularly the fact that the alienation by a non-owner can be seen as performed

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<sup>173</sup> D. 34,2,19,13 (Ulp. 20 *Sab.*): "Perveniamus et ad gemmas inclusas argento auroque. Et ait Sabinus auro argentove cedere: ei enim cedit, cuius maior est species. Quod recte expressit: semper enim cum quaerimus, quid cui cedat, illud spectamus, quid cuius rei orandae causa adhibetur, ut accessio cedat principali. Cedent igitur gemmae, fialis vel lancibus inclusae, auro argentove".

<sup>174</sup> D. 50,17,129,1 (Paul 21 *ed.*): "Cum principalis causa non consistit, ne ea quidem quae sequuntur locum habent".

<sup>175</sup> D. 50,17,178 (Paul 15 *ad Plautium*): "Cum principalis causa non consistat, plerumque ne ea quidem, quae sequuntur, locum habent".

<sup>176</sup> Stein, *Regulae iuris* (1966), p. 122: "their purpose [of the compilers] was to include only such rules as were still valid in their day. The adjective *antiqui* in the rubric of the title, far from detracting from the validity of the rules, was intended to vouch for their authority as part of the traditional classical jurisprudence which Justinian wished to restore to its former glory".

<sup>177</sup> Stein, *Regulae iuris* (1966), p. 123.

by the owner himself. The case of the pledge creditor would initially be seen to fall outside this systematization, but it would soon after be brought under the general rule. Accordingly, while the original application of the *nemo plus* argument by Ulpian to the *hereditas* may have been nothing more than a reference to a useful starting point of limited validity, the generalization carried out by the compilers seems to reflect a particular systematic approach to the transfer of ownership by a non-owner by the compilers, which was completely absent in the thought of Ulpian. What was originally an argumentative tool which would support a legal outcome was, under the eyes of Byzantine jurists, an overarching rule reflecting a systematization of the transfer of ownership by a non-owner, and could as such have an intrinsic legal significance<sup>178</sup>.

There are other *regulae* in which the compilers appear to be more concerned with presenting their own views through the mouthpiece of classical jurisprudence than to reflect the ancient legal thought, being the following text particularly meaningful for the transfer of ownership by a non-owner:

D. 50,17,11 (Pomp. 5 *Sab.*): Id, quod nostrum est, sine facto nostro ad alium transferri non potest<sup>179</sup>.

Under its current formulation, this rule offers a rather vague statement, according to which the owner must do something in order that his property is transferred. But what is the problem being addressed here? The Palingenetic analysis sheds some light on the original meaning of this passage, showing that it originally dealt with the law of succession, particularly with the bequest, since Lenel locates the fragment under the rubric *De generis legatorum*<sup>180</sup>, indicating that it must have been referred to the *legatum per vindicationem*<sup>181</sup>. In such a context, this sentence would refer perhaps to the fact that the deceased had to be owner of the bequeathed goods in order to transfer ownership over them. Whatever the original meaning may be, the generalized version offered by the compilers does not aim at conveying the classical thought behind this text, but the compilers seem keen on making a point of their own through the text of Pomponius. The question therefore remains: what problem were the compilers addressing here? It does not seem likely that the *factum* mentioned refers to the *traditio*, as if they wanted to emphasize that a *iusta causa traditionis* is not enough, since a physical conveyance must follow. The terms of the text are far too vague to draw such a

<sup>178</sup> That the generalization of Ulpian's text was not without consequence is also observed by Longchamps, *Nemo plus iuris* (2015), p. 70-71: "Ulpian's short commentary *nemo plus iuris ad alium transferre potest, quam ipse haberet* acquired a general meaning when the compilers highlighted one sentence that merely defined the scope of transferred rights".

<sup>179</sup> D. 50,17,11: "Something which is ours cannot be transferred to another without any action on our part" (transl. Watson).

<sup>180</sup> Lenel, *Paling.* (1889) II, col. 94, nr. 437.

<sup>181</sup> Lenel, *Paling.* (1889) II, col. 94, nr. 437, n. 6: "Solae igitur eae res per vindicationem recte legantur, quae ipsius testatoris sunt".

specific dogmatic idea from them. One can instead take it in a more literal sense, as demanding that the owner must somehow participate in whatever act involving the alienation of his property. In the context of the transfer of ownership by *traditio*, this would involve that if another person carries out the delivery he will not be able to transfer ownership “*sine facto nostro*”, which in this particular case would consist in the owner’s authorization. Accordingly, the generalization of this text tells us more about the views of the compilers than about the original text of Pomponius, favouring the views of the compilers regarding the transfer of ownership, and particularly the idea that every transfer of ownership by a non-owner can be ultimately referred to the owner himself, who must do something to allow this operation to take place.

From the evidence examined so far, it can be said that Justinian did not corrupt a rule which was flawless under classical law, as scholars such as Schulz thought. The evolution was in fact quite the opposite: what was a mostly argumentative tool or a starting point in classical Roman law acquired in the time of Justinian a particular systematic and dogmatic scope which grants it an overarching validity. Byzantine jurists progressively expanded the scope of application of what was initially only a starting point, until it transformed into an overarching rule with absolute validity. This evolution, however, took place in an almost imperceptible way, since it consists exclusively of a change of emphasis on a purely systematic point which bears no practical consequences. That the compilers believed that every alienation by a non-owner could be traced back to the owner himself – thereby preserving the validity of the *nemo plus* rule – is mainly to be seen in the systematic arrangement of the subject in the Institutes of Justinian and in the Paraphrase of Theophilus, but a general outlook on the *Corpus Iuris Civilis* does not offer an unambiguous approach to the problem, particularly considering that statements such as D. 41,1,46 were included in the compilation. This can also be seen in the way the rule was understood since the Middle Ages, which will be studied in the following chapter, where it was by no means evident that the *nemo plus* rule had no exceptions. Only eventually did jurists claim that the rule had no exceptions, but Justinian’s systematization of this problem in his Institutes played only an incidental role in this evolution in the general context of the compilation. Accordingly, the interpretation of the *nemo plus* rule offered by authors such as Carlin and Longchamps does reflect the approach to the *nemo plus* rule of Byzantine jurists – not, however, of classical Roman law – but is largely tributary to later developments in the interpretation of D. 50,17,54, which will be reviewed in the following chapter.

## **Part 2**

**Transfer of ownership by a  
non-owner from the glossators  
to the DCFR**



## Chapter 7. Systematization and evolution of the *nemo plus* rule

As shown in the previous chapter, the *nemo plus* argument did not have a central position in the understanding of the transfer of ownership by a non-owner in classical Roman law, but it did acquire a specific systematic role within Justinian's compilation regarding the transfer of ownership. Moreover, the general and autonomous formulation of this argument into a *regula iuris* would favour its central position within the systematization of the transfer of ownership, especially when discussing whether the various cases of alienation by a non-owner were actual exceptions to the general rule. The different legal schools would not always award this rule the same validity, which in turn would influence the way in which the transfer of ownership by a non-owner was understood in general. This principle-based approach compels therefore to set in the first place the study of the *nemo plus* rule in order to understand how the transfer of ownership by a non-owner was approached during the *ius commune*, despite the modest significance which this rule had in classical Roman law.

### 1. The *nemo plus* argument in theology and Canon law

Before dealing with the reception and evolution of the *nemo plus* rule in legal scholarship, it should be borne in mind that the *nemo plus* argument continued its existence outside legal sources, and that the study of its evolution cannot be omitted within the present work, due to the way in which it would eventually influence its legal applications. In the previous chapter, it was shown that the *nemo plus* argument was a consolidated commonplace in the 2<sup>nd</sup> century AD, making its entrance into juristic writings around that time. The application of the argument was however not limited to the legal world after that period, being particularly significant among Christian writers. The argument appears to have been introduced into the writings of the early Church Fathers in the context of the rebaptism controversy which took place since the beginning of the 3<sup>rd</sup> century. Since already in the early Church there were divergent members who were labelled as heretics, a question soon arose concerning the validity of the sacraments granted by them, a problem which was particularly debated regarding the baptism – hence the name ‘rebaptism controversy’ – and the ordination of priests<sup>1</sup>. Tertullian (c. 160 – c. 225) was of the opinion that the sacraments conferred by heretics were not valid, and that they should accordingly be granted again by someone adhering to the true faith, idea which he supported through

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<sup>1</sup> On this controversy in the patristic period see Labrecque, *Rebaptism* (1972).

the application of the *nemo plus* argument by pointing out that since heretics did not have the one and proper baptism they could not grant it to someone else<sup>2</sup>. The doctrine of Tertullian would gain fertile ground in his native North Africa, since the argument is again found on numerous occasions in the writings of St. Cyprian of Carthage (c. 200–258 AD) which deal with the baptism of apostates and heretics, particularly in some of his Epistles<sup>3</sup> and in the synod organized by him in 256 AD<sup>4</sup>.

While the *nemo plus* argument was repeatedly applied by theologians in the context of the granting of sacraments by heretics, this was not the only application it received, and other more casual uses by authors such as Lactantius<sup>5</sup> (c. 250 – c. 325 AD) and Zeno of Verona<sup>6</sup> (c. 300 – c. 371 AD) show that it remained largely a topical argument or widespread commonplace which could be brought up in different contexts and with a varying significance. Later applications of the argument can also be found in Christian adaptations of Epictetus<sup>7</sup>, in John of Damascus<sup>8</sup> and in Isidore of Seville, who uses it when determining whether a monk may free a slave<sup>9</sup>. The various contexts and ways in which the *nemo plus* argument is applied makes it in turn impossible to determine a particular source from where theologians would have drawn the argument, although the argumentative role normally granted to it would lead to think particularly in the influence of rhetoric, especially considering the extended

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<sup>2</sup> Tertullian, *De Baptismo* 15,2: “Non debeo in illis cognoscere quod mihi est praeceptum, quia non idem deus est nobis et illis, nec unus Christus, id est idem: ergo nec baptismus unus, quia non idem. Quem cum rite non habeant sine dubio non habent, nec capit numerare quod non habetur: ita nec possunt accipere, quia non habent”.

<sup>3</sup> St. Cyprian of Carthage, *Epistula* 70,2,3: “Quis autem potest dare quod non habeat, aut quomodo potest spiritualia gerere qui ipse amiserit spiritum sanctum? Et idcirco baptizandus est et innovandus qui ad ecclesiam rudis venit, ut intus per sanctos sanctificetur, quia scriptum est: *sancti estote, quoniam et ego sanctus sum, dicit dominus...*”

<sup>4</sup> St. Cyprian of Carthage, *Sententiae episcoporum numero LXXXVII de haereticis baptizandis* C. 65: “Quintus ab Acbia dixit: Ille potest dare aliquid, qui aliquid habet. Haeretici autem quid possunt dare, quos constat nihil habere?” Other applications of the argument can be seen in *canones* 16, 33, 57, 70 and 76.

<sup>5</sup> Lactantius, *Divinae Institutiones* 1,15,28 makes use of the argument when discussing the deification of mortals in the pagan faith: “Quis enim tam demens, qui consensus et placito innumerabilium stultorum aperiri caelum mortuis arbitretur? Aut aliquem, quod ipse non habeat, dare alteri posse?”

<sup>6</sup> Zeno of Verona, *Tractatus* 1,3,15,7: “ut quod non habet perdat”; 2,3,6,10: “nec ulli dabit quod non habet”.

<sup>7</sup> [Nilus] Adaptation, c. 31a,10-11: “τίς δὲ δοῦναι δύνανται ἐτέρῳ ἢ μὴ ἔχει αὐτός;”; *Paraphrasis Christiana*, c. 31,10-11: “τίς δὲ δύνανται δοῦναι ἐτέρῳ ἢ μὴ ἔχει αὐτός;”; Vaticanus Graecus 2231, c. 31,10-11: “τίς δὲ δοῦναι δύνανται ἐτέρῳ ἢ μὴ ἔχει αὐτός;” See on these texts Boter, *The Encheiridion of Epictetus and its three Christian adaptations* (1999).

<sup>8</sup> John of Damascus, *Contra Manichaeos* 63,49: Πῶς οὖν, ὃ οὐκ ἔχει, δύνανται δοῦναι; (How then can one give what one does not have?)

<sup>9</sup> Isidore of Seville, *Regula monachorum*, C. 19: “Abbate vel monacho monasterii servum non licebit facere liberum: qui enim nihil proprium habet, libertatem rei alienae dare non debet. Nam sicut saeculi leges sanxerunt, non potest alienari possessio, nisi a proprio domino”.

knowledge of this discipline by authors such as Tertullian, Cyprian and particularly Lactantius, who was a professor of rhetoric<sup>10</sup>. It seems in turn rather unlikely that these applications of the argument would prove the acquaintance of theologians with juristic writings, as Ferrini thinks regarding Lactantius<sup>11</sup>, since jurists were only one among many disciplines making use of the argument. Accordingly, although modern scholars have shown the use of legal notions by some of these authors<sup>12</sup>, it appears more likely that Christian theology developed an independent tradition to that of legal writings concerning the application of the *nemo plus* argument. Interactions between both traditions may have taken place, as seen in the rather legal application of the argument by Isidore of Seville, but the scope given to the argument by theologians would be largely determined by the needs of their own discipline.

Despite the more casual applications just mentioned, the argument would mostly be used to discuss the validity of the sacraments conferred by heretics, apostates or other individuals with other questionable backgrounds. Such an application even made its way to the Code of Justinian through the above-mentioned constitution of the year 379 AD dealing with heretics, in which they were forbidden from teaching what they do not have or from ordaining ministers, since they were not ministers themselves (C. 1,5,2pr: “...ne antistites eorum audeant fidem insinuare, quam non habent, et ministros creare, quod non sunt...”). The argument is moreover found in a letter which for a long time was ascribed to Pope Damasus I<sup>13</sup> (c. 305-384 AD) – nowadays identified as a medieval forgery – in which the possibility that chorbishops – a clergyman inferior to the bishop<sup>14</sup> – may ordain bishops is discussed, stating that “by no means can they give what they do not have” (“quod non habent, dare nequaquam possunt”), an idea which he later develops extensively in order to deny them such power<sup>15</sup>. The argument is used in other contexts by authors such as Saint Ambrose<sup>16</sup> (c. 340-397), Ambrosiaster<sup>17</sup> (4<sup>th</sup> century AD), Pope Innocent I<sup>18</sup> (†

<sup>10</sup> On the life and career of Lactantius see Bowen/Garnsey, *Lactantius* (2004), p. 1-6.

<sup>11</sup> Ferrini, *Die juristischen Kenntnisse* (1894), p. 347, when commenting this text notes: “Anspielung auf eine bekannte Rechtsparömie”.

<sup>12</sup> Regarding Cyprian, see e.g. Mentxaka, *Notas jurídicas* (2014), p. 281-315.

<sup>13</sup> Jaffé-Löwenfeld, *Regesta Pontificum Romanorum* (1885) I, p. 37.

<sup>14</sup> See on this institution Müller, *Chorbischöfe* (2006), p. 77-94.

<sup>15</sup> Damasus I, *De Chorepiscopis*: “Nam benedictio, quam praedicti chorepiscopi ante suam prohibitionem, per manus impositionem dabant, magis nobis videtur vulnus inferre, quam salutem. Et illi qui pontificatus apicem non habebant, quomodo ea, quae non habebant, dare poterant? Quoniam nihil in dante erat, quod ille posset accipere. Aut quis hominum, licet et more humano loquamur, dare potest quod non habet? Praesertim cum pontifices non erant, ea quae solis pontificibus debentur, dare non poterant. (...) Nam quomodo honorem possit retinere qui ab illo acceperit, qui potestatem dare legitime non habuit, invenire non possum, cum ille, qui honorem pontificalem non habuit, pontificalia non potest iura tribuere...”

<sup>16</sup> Saint Ambrose, *De patriarchis* 10,45: “nemo potest donare quod non habet”.

<sup>17</sup> (Pseudo)Ambrose, *In Epistolam B. Pauli ad Timotheum Primam* 10,3,12: “neque enim fas erat aut licebat, ut inferior ordinaret majorem: nemo enim tribuit quod non accipit”.

417) and Pope Leo the Great<sup>19</sup> (c. 400–461), in order to deny the validity of the sacrament conferred or to extract analogous consequences, being also brought up in the Council of Constantinople of 691/692 AD<sup>20</sup> with an identical aim. These various opinions would decisively influence later medieval developments, and it is therefore no wonder to find both Damasus and Innocent quoted by Pope Urban II (c. 1042–1099) in an epistle issued between 1088 and 1089 AD<sup>21</sup>, in which he determines that Daimbert (Daibertus) should be re-ordained as a deacon before being ordained bishop, since he was made deacon by Negzelon, who was an heretic<sup>22</sup>. The ground given for the re-ordination is that Negzelon could not have given anything by the laying on of hands (“*quia nihil habuit, dare nil potuit ei cui manus imposuit*”), bringing up the authority of Innocent I on this point. Afterwards Urban refers to the opinion of Damasus I (“*Damasi etiam pape testimonio roborati*”), insisting on the same point, i.e. that he could not give if he had nothing (“*quoniam quidem ut prediximus, qui nihil habuit nil dare potuit*”). Urban II would deal with a similar case in an epistle issued in 1093, in which he determined that Poppo of Metz should be re-ordained deacon before being ordained bishop<sup>23</sup>. The ground for this decision is again the lack of the necessary

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<sup>18</sup> Innocent I, *Epistola ad Rufum et Eusebium ceterosque episcopos* 3: “Quomodo ei tribuetur, quod munditia ac puritas consuevit accipere? Sed contra asseritur eum, qui honorem amisit, honorem dare non posse: nec illum aliquid accepisse, quia nihil in dante erat, quod ille posset accipere, acquiescimus, et verum est certe, quia quod non habuit, dare non potuit”. A similar line of reasoning is used in his *Epistola XXIV Ad Alexandrum episcopum antiochenum* written in 415 AD (Jaffé-Löwenfeld, *Regesta Pontificium Romanorum* (1885) I, p. 47 nr. 310 [107])<sup>18</sup>, in which he denies that heretics may confer the baptism due to their departure from the Catholic faith.

<sup>19</sup> Leo I, *Epistola IX ad Dioscorum Alexandrinum Episcopum* (ed. Migne 1846), col. 625: “cum sine dubio de eodem fonte gratiae unus spiritus et discipuli fuerit magistri, nec aliud ordinatus tradere potuerit, quam quod ab ordinatore suscepit”.

<sup>20</sup> Council of Constantinople (691/692 AD), canon 26: εὐλογία γὰρ ἀγιασμοῦ μετάδοσις ἐστίν, ὃ δὲ τοῦτο μὴ ἔχων διὰ τὸ ἐκ τῆς ἀγνοίας παράπτωμα πῶς ἑτέρῳ μεταδώσει; (for the blessing is the giving of sanctification. But how can he impart this to another who does not possess it himself through a sin of ignorance? [transl. Percival, modified]) The canon is rendered in Latin in the following words: “benedictio enim sanctificationis impertio est, qui autem propter delictum ex ignorantia id non habet, quomodo alteri impertiet?”

<sup>21</sup> Jaffé-Löwenfeld, *Regesta Pontificium Romanorum* (1885) I, p. 661 nr. 5383 (4027); Kehr, *Italia Pontificia* (1908) III, p. 119 nr. 2 and p. 320 nr. 6. The case is extensively analysed by Kuttner, *Urban II and the Doctrine of Interpretation* (1972 [1980]), p. 56–85.

<sup>22</sup> The epistle is partly reproduced by Ivo of Chartres (c. 1040–1115) in his *Panormia* lib. 3, cap. 81, and also edited by Jaffé, *Monumenta Moguntina* (1866), p. 373 nr. 30. Another version with slight variations is found in the *Collectio Britannica*, which was studied by Ewald, *Papstbriefe Britischen Sammlung* (1880), p. 360–361, and edited by Löwenfeld, *Epistolae Pontificum Romanorum ineditae* (1885), p. 61–62. A recent edition of the letter as preserved in the *Collectio Britannica* is found in Kuttner, *Urban II and the Doctrine of Interpretation* (1972 [1980]), p. 60–61.

<sup>23</sup> Jaffé-Löwenfeld, *Regesta Pontificium Romanorum* (1885) I, p. 667 nr. 5442 (4062), also in *Patrologia Latina* (ed. Migne) 151, col. 705–706. This letter, less known than the previous one, is commented by Kuttner, *Urban II and the Doctrine of Interpretation* (1972 [1980]), p. 84–85.

status in the person who ordained him: “*Talis enim ordinator, cum nihil habuerit, nihil dare potuit*”.

While most Christian authors rely on the *nemo plus* argument – among other elements – to deny the faculty to confer a sacrament in the cases mentioned above, it is interesting that authors holding opposing views would elaborate an alternative interpretation of this argument without having to question its validity. This is particularly the case of Saint Augustine (354–430 AD), who contradicts the position of authors such as Tertullian and Cyprian, by declaring that there was no need to rebaptize heretics. When it comes to refute the *nemo plus* argument as used by previous authors, Augustine argues that it is God himself who gives the Holy Spirit, despite the wickedness of the person who administers the sacrament, and therefore the fact that a heretic may validly baptize does not contradict the *nemo plus* argument<sup>24</sup>. The interpretation given to the *nemo plus* argument by Augustine would not raise as many adherents as the opposite one, finding nonetheless a loyal follower in Thomas Aquinas (1225–1274 AD), who in his *Summa Theologiae* confronts the application of this argument when used to demonstrate that a non-baptized cannot baptize<sup>25</sup>, arguing that it is Christ who inwardly baptizes, while men only do it outwardly, and therefore the baptism is not of he who administers it, but from Christ<sup>26</sup>. This author also brings up this argument when discussing whether evil ministers could confer sacraments, refuting a positive answer<sup>27</sup> in an almost identical way as in the previous case: since Christ himself confers his grace through the minister, the grace would be given despite the wickedness of the minister, and therefore the *nemo plus* argument would not be contradicted<sup>28</sup>.

As can be seen from the contrasting views developed by Christian authors, the evolution of the *nemo plus* argument among theologians developed very particular features, not only because it was mostly used in one particular context – whether

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<sup>24</sup> Saint Augustine, *De Baptismo libri septem* 5,20,28: “Cum dare nemo possit quod non habet, quomodo dat homicida Spiritum Sanctum? Et tamen etiam intus ipse baptizat: Deus ergo dat etiam ipso baptizante Spiritum Sanctum”. Later in the text (*De Baptismo libri septem* 6,40,78) Augustine also refutes the argument as used in Cyprian, *Sententiae episcoporum numero LXXXVII De haereticis baptizandis*, C. 33.

<sup>25</sup> Thomas Aquinas, *Summa Theologica* 3,67,5: “nullus enim dat, quod non habet: sed non baptizatus non habet sacramentum baptismi; ergo non potest ipsum conferre”.

<sup>26</sup> Thomas Aquinas, *Summa Theologica* 3,67,5: “Ad primum ergo dicendum, quod homo baptizans adhibet tantummodo ministerium exterius; sed Christus est, qui interius baptizat, qui potest uti omnibus hominibus ad quodcumque voluerit: et ideo non baptizati possunt baptizare, quia, ut Nicolaus papa dicit, baptismus ‘non est illorum’, scilicet baptizantium, ‘sed eius’, scilicet Christi”.

<sup>27</sup> Thomas Aquinas, *Summa Theologiae* 3,64,4: “et etiam cum gratiam non habeant, non videtur quod gratiam conferre possint: quia nullus dat quod non habet; non ergo videtur, quod per malos sacramenta conferri possint”.

<sup>28</sup> Thomas Aquinas, *Summa Theologiae* 3,64,4: “Ad primum ergo dicendum, quod ministri Ecclesiae neque a peccatis mundant homines ad sacramenta accedentes, neque gratiam conferunt sua virtute; sed hoc facit Christus sua potestate per eos, sicut per quaedam instrumenta”.

sacraments could be validly conferred or not by specific individuals – but also because the validity of the argument itself was never questioned. Authors presenting opposing views on a particular subject would only debate on whether the *nemo plus* argument was properly applied, but no one dared to present his views as an exception to it. Accordingly, the argument features as an absolute truth among Christian writers, something quite unusual among the applications given to the argument in the Roman world and certainly very different from the approach favoured by classical Roman jurists.

The fact that theologians offer contrasting interpretations of the *nemo plus* argument without questioning its validity bears interesting consequences for the development of the argument in the legal sphere due to the way in which it was laid down in Canon law. Considering the great number of references to the argument in Christian writings, it is no wonder that the argument was extensively recorded in the *Decretum Gratiani*. For instance, the application of the *nemo plus* by Cyprian of Carthage is to be found in *Decretum Grat.* C. 24, q. 1, c. 31<sup>29</sup>, and that of St. Augustine in *Decretum Grat.* D. 4 de cons., c. 41<sup>30</sup>. Moreover, within *Decretum Grat.* C. 1, q. 7, which addresses the problem of whether those who abandon a heretical belief and return to the Catholic faith should retain their dignity, the above-quoted epistles of Urban II (1088-1089 AD) and of Pseudo-Damasus I are compiled into *Decretum Grat.* C. 1, q. 7, c. 24 and *Decretum Grat.* C. 1, q. 7, c. 25 respectively. Damasus' epistle is also found in *Decretum Grat.* C. 9, q. 1, c. 3, within a *causa* which deals with the ordinations performed by excommunicated members of the clergy. The epistles of Innocent I were also included in *Decretum Grat.* C. 1, q. 1, c. 73 and in *Decretum Grat.* C. 1, q. 1, c. 18. These latter texts are moreover combined in *Decretum Grat.* C. 1, q. 1, c. 17<sup>31</sup>, which is supplemented with a rubric which makes a clear reference to the *nemo plus* argument ("Those who do not have the completion of the Spirit cannot give it themselves"). Numerous other examples can be mentioned: *Decretum Grat.* C. 24, q. 1, c. 16 reproduces the opinion of Leo I, to whom

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<sup>29</sup> *Decretum Grat.* C. 24, q. 1, c. 31, § 4: "(...) manifestum est, nec remissionem peccatorum per eos dari posse, quos constat Spiritum sanctum non habere".

<sup>30</sup> *Decretum Grat.* D. 4 de cons., c. 41: "*Mali non sua potestate, sed Christi virtute baptisma ministrant. (...) cum dare nemo possit quod non habet, quomodo dat homicida Spiritum sanctum? et tamen intus etiam ipse baptizat. Deus ergo dat etiam ipso baptizante Spiritum sanctum...*" The opinions of St. Augustine regarding this subject are also reproduced in several canons within *Decretum Grat.* C. 1, q. 7, such as c. 29-39, 58 and 97, among others, although the *nemo plus* argument only comes into play in the latter text, § 8. See moreover the opinions of St. Augustine recorded in *Decretum Grat.* D. 4 de cons., c. 31, 32, 39 and 40.

<sup>31</sup> *Decretum Grat.* C. 1, q. 1, c. 17: "*Qui perfectionem Spiritus non habent, ipsam dare non possunt. Qui perfectionem Spiritus, quam acceperant, perdiderunt, non dare eius plenitudinem possunt, que maxime operatur in ordinationibus, quam per suam perfidiam perdiderunt. Et iterum: §. 1. Qui honorem non habuit, honorem dare non potuit, nec aliquid accepit ille, quia nichil erat in dante, sed dampnationem, quam habuit, per pravam manus inpositionem dedit*".

*Decretum Grat.* C. 1, q. 1, c. 1<sup>32</sup> is also ascribed, though corresponding in fact to a text of Humbert of Silva Candida against simony<sup>33</sup>; an epistle ascribed to Gregory I (Pope between 590-604 AD) included in *Decretum Grat.* C. 1, q. 1, c. 12 also applies the argument when discussing simony<sup>34</sup>; *Decretum Grat.* D. 28, c. 16 reproduces a canon of the Council of Constantinople of 691/692 AD containing this argument. Moreover, other texts record alternative versions of the argument, such as “*Nam quod non acceperunt non habent*” (*Decretum Grat.* C. 1, q. 1, c. 21). To all of these applications of the *nemo plus* argument in theological settings, one may add also some other uses of it which belong to private law, such as the inclusion of PS Int. 5,36 ad § 1 in *Decretum Grat.* C. 2, q. 6, c. 26<sup>35</sup>, referred to the judicial deposit and which made its way through the *Lex Romana Visigothorum*<sup>36</sup>. In this category one may also include Isidore of Seville’s application of the argument when discussing the manumission performed by a monk, recorded in *Decretum Grat.* D. 54, c. 22.

The extensive reception of the *nemo plus* argument in the *Decretum Gratiani* reflects not only to what extent theologians and canonists made use of the idea, but also the degree of validity which they granted it. Unlike classical Roman jurists, none of these authors are willing to formulate exceptions to the idea that no one can give what he does not have, but instead make use of it as a decisive truth which cannot be contradicted. This approach is especially interesting considering that the argument is often used to defend contradicting opinions, as happens particularly in cases where someone with a certain status – a heretic, a pagan, someone who is not a bishop, etc. – could confer a particular sacrament. Gratian records both the opinions of authors who use the argument in favour of the validity of the sacrament and of those who use it against it, being the latter group by far the largest and including quotations from Cyprian of Carthage, Pope Damasus I, Innocent I or Urban II. The opposite view is held within the *Decretum Gratiani* only by Augustine, although it should be noted that there are

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<sup>32</sup> *Decretum Grat.* C. 1, q. 1, c. 1: “Symoniaci gratiam non prestant, quam querunt vendere. Gratia si non gratis datur vel accipitur, gratia non est. Symoniaci autem non gratis accipiunt: igitur gratiam, que maxime in ecclesiasticis ordinibus operatur, non accipiunt. Si autem accipiunt, non habent; si autem non habent, neque gratis neque non gratis cuiquam dare possunt. Quid ergo dant? profecto quod habent? quid autem habent? Spiritum utique mandatii. Quomodo hoc probamus? quia si spiritus veritatis (testante ipsa veritate, de qua procedit) gratis accipitur, proculdubio spiritus mandatii esse convincitur, qui non gratis accipitur”.

<sup>33</sup> *Patrologia Latina* (ed. Migne) 143, col. 1017A-B.

<sup>34</sup> *Decretum Grat.* C. 1, q. 1, c. 12: “... Et cum in Christi corpore non sunt, quomodo Christi corpus tradere vel accipere possunt? Qui maledictus est quomodo benedicere potest?”

<sup>35</sup> *Decretum Grat.* C. 2, q. 6, c. 26: “Quociens post auditam causam iudicem possessor appellat, fructus possessionis, de qua agitur, dum sequendae audientiae euentus dubius est, merito sequestrantur. Nam si petitor appellauerit, ab eo hoc non potest postulari, quia non potest sequestrari quod non habet”.

<sup>36</sup> *Lex Romana Visigothorum* (ed. Hänel 1849), p. 442.

other authors who favour his view without applying the *nemo plus* argument<sup>37</sup>. The contradicting applications of the *nemo plus* argument compel Gratian to bring some harmony between them, as can be seen in *Decretum Grat.* C. 1, q. 1, c. 57, *if.*, which is introduced between texts of Leo I and Augustine<sup>38</sup>. Despite these contradicting applications, the fundamental validity of the argument was not questioned among theologians and canonists, who granted it a distinctive scope within Christian writings that departed significantly from that found in other disciplines.

## 2. Developments within medieval dialectics

The *nemo plus* argument not only acquired a prominent place among jurists and theologians, but remained relevant among dialecticians and philosophers as well. Especially significant in this regard is the translation of Aristotle's *Sophistical Refutations* into Latin by Boethius<sup>39</sup> (c. 480-525), which ensured that the *nemo plus* argument would be known and commented in the Middle Ages, as did later translations by James of Venice<sup>40</sup> (12<sup>th</sup> century AD) and William of Moerbeke<sup>41</sup> (c. 1215 – c. 1286).

Having access to the opinions of Aristotle regarding the *nemo plus* argument, medieval scholars developed at some point an interpretation which can be found in the following text, wrongly ascribed to Bede the Venerable (c. 672-735):

Pseudo-Bede, *Sententiae philosophicae collectae ex Aristotele atque Cicerone*<sup>42</sup>: Nihil dat quod non habet (1. Elench.): Scilicet quod non habet vel formaliter, vel virtualiter. Oportet enim ut alterutro modo habeat, siquidem dat. Potest autem bene fieri, ut aliquid agens det aliquid, quod tamen ipsum agens non habet formaliter, sicut sol facit ista inferiora calida formaliter, licet ipse sit tantum calidus virtualiter<sup>43</sup>.

<sup>37</sup> Such as the case of *Decretum Grat.* C. 1, q. 1, c. 59 and *Decretum Grat.* D. 4 *de cons.*, c. 23, which reproduce an opinion incorrectly ascribed to Isidore of Seville, admitting the validity of a sacrament performed by a pagan.

<sup>38</sup> *Decretum Grat.* C. 1, q. 1, c. 57, *if.*: "Gratian. Nemo in heresi vel scismate constitutus intelligentus est. Ceterum, si cum fidei integritate et animi puritate de manu hereticorum aliquis in forma ecclesiae baptisma acceperit, tunc inpletur illud Augustini [*Decretum Grat.* C. 1, q. 1, c. 30]: 'Per lapideum canalem aqua transit ad areolas.' Et iterum: 'Spiritualis virtus sacramenti, etc.'"

<sup>39</sup> Dod (ed.), *Aristoteles Latinus* VI 1, p. 5-60, particularly p. 23, line 11, p. 44, lines 20-27, p. 45, lines 4-8, and p. 46, lines 23-25.

<sup>40</sup> Dod (ed.), *Aristoteles Latinus* VI 2, p. 61-74.

<sup>41</sup> Dod (ed.), *Aristoteles Latinus* VI 3, p. 75-108, particularly p. 87, lines 10-11, p. 99, lines 26-31, p. 100-101, lines 41-42.

<sup>42</sup> *Patrologia Latina* (ed. Migne) 90, col. 1019C.

<sup>43</sup> Pseudo-Bede, *Sententiae philosophicae collectae ex Aristotele atque Cicerone*: "[One] gives nothing that [one] does not have (1. Elench.): This is certainly the case regarding what is neither held actually nor potentially. It is therefore necessary to have in one of both ways,

Who the real author of this text is remains a mystery. It was attributed to Bede in the 1563 Basel edition of his complete works, which is notorious for the amount of material wrongfully ascribed to this author<sup>44</sup>. Whoever the author may be, the text contains an explanation for the *nemo plus* argument which would become widespread among medieval scholars, namely that it is necessary to distinguish the way in which something is held from that in which it is given. The text resorts in this context to the notion ‘*formaliter*’ (actually, properly) which is opposed to ‘*virtualiter*’ (potentially)<sup>45</sup>. While the link of this reasoning with Aristotle is attested by the reference to the *Sophistical Refutations*, it is clear that the original Aristotelian notions are rendered in a simplified way by stressing the underlying guideline that always when something is given it must have been held in some way or another. In this particular text the validity of the argument is exemplified by stating that the sun can actually (*formaliter*) make earthy things warm, even when it is in itself only potentially (*virtualiter*) warm. This kind of colourful examples would spread among medieval scholars, as will be shown below.

As described in the previous section, the *nemo plus* argument was widely used by theologians and canonists, who granted it an absolute validity. It is therefore no wonder that medieval scholars were keen to adopt the innovations developed in the field of dialectics in order to explain how exactly something could be given despite the fact that it was not apparently held. Creative explanations were applied in the most diverse contexts, and while authors such as Albertus Magnus<sup>46</sup> (c. 1193–1280) were satisfied with generally claiming that that which was given must have been held in some particular way, most scholars developed elaborate distinctions depending on whether the thing was given or held *formaliter*, *materialiter*, *virtualiter*, *causaliter*, *exemplariter*, *eminenter* or in some other way. Such distinctions can be found, for instance, in the writings of Saint

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in order to give. It is possible that someone gives something which he does not actually have, just like the sun makes the earthy things warm even when it is itself only potentially warm”.

<sup>44</sup> Jones, *Beda's Pseudepigrapha* (1939), p. 14–18.

<sup>45</sup> The meaning of this and other medieval philosophical terms normally contrasted with ‘*formaliter*’ is discussed by Ferrater Mora, *Diccionario* (1979) II, s.v. *Formaliter* (p. 1275–1276): “...Se enuncia algo *formaliter* cuando se dice de un modo propio, de acuerdo con su significado preciso (...) Un término entendido *formaliter* es un término entendido como tal. (...) Se enuncia algo *virtualiter* cuando se hace referencia a la causa capaz de producirlo”. Another account – although referring specifically to the works of Thomas Aquinas – is offered by Deferrari, *Dictionary of St. Thomas Aquinas* (1960), s.v. *Formalis* (p. 414): “relating to the form of a thing, referring to the form of a thing, relating after the manner of form, formal, the opposite of *materialis*”; s.v. *Virtualis* (p. 1088–1089): “(1) pertaining to the power of a thing, coming from it, synonym of *potentialis*, (2) being according to the power or the might of the potentiality, the opposite of *actualis* and *habitualis*, synonym of *potentialis*, (3) virtuous...”

<sup>46</sup> Albertus Magnus, *Commentarius in II Sententiarum*, dist. 30, secunda via: “Si autem ita intelligatur, quod nihil dat id quod nullo modo habet...”

Bonaventure<sup>47</sup> (c. 1218–1274), Durandus of Saint-Porçain<sup>48</sup> (c. 1275–1334), Thomas of Strasbourg<sup>49</sup> († 1357), Adam of Wodeham<sup>50</sup> (c. 1295–1358) and William of Vaurouillon<sup>51</sup> (c. 1390–1463). Particularly noteworthy is the contribution of Thomas Aquinas (1225–1274), who not only resorts to the *nemo plus* argument in the context of the validity of sacraments as shown in the previous section, but also in the most diverse contexts<sup>52</sup>. This author makes use in one passage of the distinction of having something *formaliter*, *virtualiter*, etc.<sup>53</sup>, but in another text he uses the equivalent notions of having something *in actu* (in actuality) and *virtute* (potentially), and in this context he brings up the same example given in the *Sententiae philosophicae collectae ex Aristotele*, namely that the sun gives heat despite having it potentially<sup>54</sup>. This is however not the only case in which scholars resort to examples, since Thomas de Argentina also mentions that light may produce colours<sup>55</sup>, and in the context of the validity of sacraments he claims that a messenger can deliver a letter containing a benefit from the Pope or the Emperor despite not being himself able to grant such benefit<sup>56</sup>. These numerous applications show that in the course of the Middle Ages the *nemo plus* argument acquired a predominant role in the argumentation of theologians and

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<sup>47</sup> Saint Bonaventure, *Sententiarum*, liber I, dist. 8, pars 1, art. 2, quaestio 1: “Et ad illud quod obiicitur, nihil dat alteri quod non habet, dicendum quod triplex est aliquid habere, scilicet formaliter, exemplariter, causaliter et quolibet istorum modorum, quod habet dare potest”

<sup>48</sup> Durandus of Saint-Porçain, *Sententiarum*, liber IV, dist. 7, quaest. 4: “Non enim oportet quod illud quod dat alteri quod habetur a dante formaliter: sed sufficit quod habeat virtualiter. Et ideo non obstat ad collationem sacramenti quod conferens receperit simile sacramentum: sed sufficit quod habeat in virtute”.

<sup>49</sup> Thomas of Strasbourg, *Sententiarum*, liber IV, dist. 13, quaest.1: “Praeterea, nihil dat, quod non habet (...) Non oporteret ipsum formaliter esse intentionale, sed sufficeret ipsum virtualiter esse intentionale, quamvis esset formaliter quid reale”.

<sup>50</sup> Adam of Wodeham, *Sententiarum*, liber IV, quest. 3: “Ad argumentum in oppositum nemo dat quod non habet verum est quod non habet virtualiter nec formaliter paganus autem habet satis virtutem lavandi et preferendi verba sacramentalia (...)”

<sup>51</sup> William of Vaurouillon, *Sententiarum*, liber I, dist. 27: “(...) quia nihil potest dare quod non habet. Dico quod verum est quod non habet aut formaliter aut principative aut virtualiter aut alio modo: sed non oportet formaliter”.

<sup>52</sup> See e.g. Thomas Aquinas, *Summa Theologiae* 1,75,1, where he resorts to the argument when discussing the properties of the soul.

<sup>53</sup> Thomas Aquinas, *Quaestiones disputatae de peccato originali*, art. 6: “(...) axioma commune nemo dat quod non habet intelligitur quod non habet, vel formaliter, vel materialiter aut virtualiter”.

<sup>54</sup> Thomas Aquinas, *Quaestiones disputatae de spiritualibus creaturis*, art. 3: “16. Praeterea, nihil dat quod non habet. (...) Ad decimumsextum dicendum quod licet anima non habeat corporeitatem in actu, habet tamen virtute, sicut sol calorem”.

<sup>55</sup> Thomas of Strasbourg (de Argentina), *Sententiarum*, liber II, dist. 13, quaest. 1: “Praeterea, nihil dat, quod non habet; sed lumen dat coloribus esse intentionale in medio”.

<sup>56</sup> Thomas of Strasbourg, *Sententiarum*, liber IV, dist. 5, quaest. 1, art. 1: “Ad tertium dicendum, quod licet nullus possit dare, quod non habet, tamen aliquis potest facere ministerium ratione cuius alter recipit quod non habet ille, qui facit ministerium. Posset, n. [enim] aliquis mihi portare literam Papae vel Imperatoris, ratione cuius literae magnum recipere beneficium, licet illius literae transportator beneficium huiusmodi nec haberet, nec umquam habiturus esset”.

philosophers and, more importantly, that the absolute validity which the argument already had in the church fathers was strengthened by the developments in the field of dialectics. Among medieval authors therefore it became clear that always when something was given, it must have necessarily been held by the giver in some way or another, and there seemed to be no room for exceptions.

Apart from the technical and careful applications presented so far, it is worth noting that the *nemo plus* argument continued to be largely a commonplace with a certain proverbial value, as can be seen in the numerous proverbs and aphorisms making reference to it recorded in the *Proverbia sententiaeque latinitatis mediæ ac recentioris ævi*<sup>57</sup>. It is important to bear in mind this circumstance in order to avoid assuming that every reference to the argument implies that the author had D. 50,17,54 in mind. A lesson in this regard can be drawn from the application of the argument in Dante's (1256-1321) *De Monarchia*, who makes use of it when discussing the authority of the Pope and the Emperor, stating that a vicar is not equivalent to the man for whom he acts as a vicar, "since nobody can give what is not his own"<sup>58</sup>. This reference has led to controversy among modern scholars regarding whether Dante draws this idea from the Digest or from another source<sup>59</sup>. Kay, being aware of the use of the argument by Aristotle, Seneca and Thomas Aquinas, states that "[e]vidently by Dante's time the saying had become proverbial, since Aquinas cites it without attribution; hence it was most truly a commonplace"<sup>60</sup>. This opinion appears in fact to be the most reasonable, since it is in any case clear that law was only one of the disciplines in which the argument was applied, being in fact quite likely not the one in which the argument was most frequently employed. And while not every reference to the argument can be seen as inspired by legal sources, the extended application of the argument by medieval scholars raises the question of whether there was any further interaction among jurists and other disciplines, which will be dealt with in the following sections.

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<sup>57</sup> Schmidt, *Proverbia sententiaeque latinitatis mediæ ac recentioris ævi* (1982): II/7, 081: "Dare nemo potest, quod non habet"; II/8, 652l: "Nemo dare alteri, ipse quo caret, potest"; II/8, 652n1: "Nemo dat, quod non habet"; II/8, 38686: "Nemo plus dat quam habet"; II/8, 686c: "Nemo plus transferre in alium iuris quam ipse habet, potest"; II/8, 38686i: "Nemo potest, quod non habet, dare alteri"; II/9, 39863a3: "Quod non habes, a nemine eripi potest".

<sup>58</sup> Dante, *De Monarchia* 3,7,7: "Scimus etiam quod vicarius hominis non equivalent ei, quantum in hoc quod vicarius est, quia nemo potest dare quod suum non est".

<sup>59</sup> For a summary of the different opinions see Kay, *Roman law in Dante* (1997 [1990]), p. 267-268.

<sup>60</sup> Kay, *Roman law in Dante* (1997 [1990]), p. 267-268.

### 3. D. 50,17,54, a general rule plagued by exceptions

By the time the Bolognese glossators were busy with the study of Justinian's compilation, the *nemo plus* argument was consolidated among theologians, and the efforts of dialecticians offered a clear framework on how to apply this argument. Despite all of this, jurists initially seem to pay little attention to these developments, having their hands full with the enormous mass of texts which they attempted to tame into general and comprehensible notions. The *regulae iuris* and brocards played a significant role in the process of systematizing legal solutions, and accordingly great attention was paid to the title *De diversis regulis iuris antiqui*<sup>61</sup>. In this context, the glossators could only take the *nemo plus* rule as a general starting point around which they would gather similar and divergent cases as presented in the compilation<sup>62</sup>, and therefore the scope granted to this rule was essentially determined by its legal setting. This was to a certain extent an inevitable consequence of Justinian's abstraction of the rule, which now seemed to have an intrinsic value which the glossators had to determine by comparing it to the rest of the compilation. Accordingly, sophisticated dialectical or dogmatic distinctions would have to wait until jurists had figured out what they were dealing with.

The interest of the Glossators for the study of the *regulae iuris* can be seen in the fact that already the second generation of this school had produced a full commentary on D. 50,17 through the pen of Bulgarus, one of the *quattuor doctores*. Commenting on the *nemo plus* rule, Bulgarus stands in principle for its general validity, since the transferor will transfer ownership if he himself is owner, and if he is merely a possessor in good faith he will allow his successor to continue with this possession; moreover, if there is any encumbrance on the object, this will affect the right of the transferee as well<sup>63</sup>. Despite this general validity, Bulgarus identifies several exceptions, which he moreover introduces with a tone of obviousness by using the adverb *plane* (clearly): the *procurator* selling according to the owner's intent, the creditor (of the pledge property), the public auctioneer, as well as the imperial treasury or the emperor, may transfer ownership on various grounds, despite the fact that they do not own the object of the transaction<sup>64</sup>. What is particularly remarkable of this enumeration of exceptions is that they are presented in a loose way, without attempting to draw a common theory around them: the author feels confident enough to simply state that ownership in these cases is transferred "on various grounds" (*diversis*

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<sup>61</sup> Stein, *Regulae iuris* (1966), p. 132 ff.

<sup>62</sup> Feenstra, *Romeinsrechtelijke grondslagen* (1994), p. 50.

<sup>63</sup> Bulgarus, *De diversis regulis iuris* (ed. Beckhaus 1856), p. 49: "Qui enim dominus est, dominium transfert ad successorem rei vel iuris, qui bonae fidei possessor est, possessionis continuationem. Si quod onus rei imminabat apud auctorem, residuebit apud successorem".

<sup>64</sup> Bulgarus, *De diversis regulis iuris* (ed. Beckhaus 1856), p. 49: "Plane, ut supra diximus, procurator domini voluntate vendens, creditor ex pacto vel ex lege, publicus executor, fiscus, imperator diversis rationibus dominium transferunt, licet domini non sint".

*rationibus*), and he deliberately avoids entering the discussion concerning the ground for the transfer of ownership of the pledged property by naming both possible sources for this entitlement: the pact or the law (*ex pacto vel ex lege*).

It should be noted that Bulgarus introduces the exceptions to the *nemo plus* rule with the words “as we have said above” (*ut supra diximus*), which appears to point to his commentary to the *regula* of D. 50,17,11 (*Id quod nostrum est sine facto nostro ad alium transferri non potest*). When commenting this rule, Bulgarus determines what should be considered as “our act” (*factum nostrum*), declaring that the alienation through another with our authorization, such as a *procurator*, pledge creditor or public auctioneer should be considered as “our act”<sup>65</sup>. It is noteworthy that despite the fact that Bulgarus regards the transfer of ownership by a non-owner to be an act of the owner, he does not attempt to give a different interpretation of the *nemo plus* rule regarding the *traditio* by a non-owner, according to which the rule would suffer no exceptions since the delivery is seen as performed by the owner himself. Instead, Bulgarus plainly considers these cases to be exceptions to the general rule. Similar interpretations of the significance of the transfer of ownership were given by other medieval jurists<sup>66</sup>, but this had no immediate consequence for the interpretation of the *nemo plus* rule.

Bulgarus’ approach to the *nemo plus* rule as a general rule with numerous exceptions would set a trend for later scholars, who would collect a progressively higher number of exceptions under this rule. This trend is already clearly noticeable in Placentinus’ *Additiones* to Bulgarus’ commentary<sup>67</sup>, where he adds more exceptions to the rule, thus rendering the commentary to D. 50,17,54 into a large list of anomalous cases<sup>68</sup>. Interestingly enough, Placentinus draws exceptions not only from the transfer of ownership, as Bulgarus had before him, but adds examples related to the usucapion, the acquisition of servitudes

<sup>65</sup> Bulgarus, *De diversis regulis iuris* (ed. Beckhaus 1856), p. 12: “Factum nostrum intelligo, cum rem nostram nos ipsi distrahimus vel alius voluntate nostra ut procurator, creditor, exactor publicus, cuius factum nostrum est, ut pro evictione teneamur pretium reddituri emptori... Princeps tamen et fiscus si rem nostram ut suam distrahant, alienare intelliguntur”.

<sup>66</sup> See e.g. Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 126: “Fingitur enim per voluntatem domini quod res quasi ex eo et per manum suam ad detentorem pervenerit possessio et dominium”.

<sup>67</sup> The text was edited by Beckhaus alongside that of Bulgarus.

<sup>68</sup> Placentinus, *Additiones ad Bulgari commentarium*, p. 49: “Item in re sua quis aliis dare servitutem potest, licet eam non habeat ut supra de usu fr.1. Quod nostrum non est. [D. 7,1,63] Et bonae fidei possessor alii condicionem usu capiendi praestare potest, licet ipse forte, quia titulo caret, non possit usu capere, ut supra de diversis et tempr. praescr. [D. 44,3,?] Item patronus nocens, qui temere in ius impune vocari potest, ad filium innocentem hunc transmittit honorem, ut supra de in ius voc. l. Adoptivum § ult. [D. 2,4,8,2] Sed et posterior creditor, qui ipse nihil de vendendo pignore pepigerat, succedit in locum prioris, qui vendere poterat; ipse quoque uendere poterit. Saepe enim quis per alium habet, quod per se habere non potuit, ut supra Quae res pignor. l. Aristo. [D. 20,3,3] et Inst. de S.C. Velleiano”.

(D. 7,1,63), the summoning to court, among others. This progressive accumulation of exceptions would continue in the work of Bertram of Metz, whose commentary on the *nemo plus* rule is largely an expanded version of the opinions of Bugarus and Placentinus<sup>69</sup>.

An original approach to the *nemo plus* rule is to be found in the commentary on D. 50,17 attributed to Johannes Bassianus, who comments two cases considered as exceptions to the rule by the aforementioned authors, but which according to him fall under the general rule<sup>70</sup>. First of all, he deals with the alienation by the creditor of a pledge, which he considers to be a faculty which derives from the law and not from the creditor himself (*hoc procedit a potestate iuris propria, non creditoris*). It is clear that Bassianus does not approach this case as an exception, since he introduces it with ‘*nam*’ (‘for’), thereby explaining the content of the rule. Neither does Bassianus consider the application of the argument to the usufruct by Paul in D. 7,1,63 to be truly an exception to the rule (*nec tamen eo quoque casu plus iuris transfert quam ipse habet*). It is fascinating to observe at this point that the jurist draws an argument from the field of dialectics when explaining why this is no exception to the rule, since he points out that the owner in such a case would not be transferring more rights than those which he

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<sup>69</sup> Bertrandus Metensis, *De regulis iuris* (ed. Caprioli 1981), p. 79: “Successor rei est qui rem post alium possidet; successor iuris cui etiam servitus, ut tignorum <in> parietem immisio, confertur. Qui ergo rem ad alium transfert, si bona fide possidet, et illum bone fidei possessorem facit; si prescriptionem habuerit, et eam transfert in successorem. Similiter de usucapione et de onere. Set hec regula habet exceptionem, quia procurator meus, licet dominium rei mee non habeat, tamen meo consensu alii vendens eam, dominium transfert ad ipsum. Idem facit creditor ex pacto, ut cum dixi: « Si vadium meum in tali festo non redimo, vende illud ». Vel ex lege creditor dominium pignoris mei vendendo ad alium transfert, scilicet si michi obtulit ad redimendum et post tertiam oblationem per biennium expectaverit, tunc secure vendere potest. Idem facit publicus exactor, si abstulerit michi equum quia nolui tributum solvere, quia factum eius est factum meum, idest culpa mea. Idem potest fiscus, idest res publica, pro collecta quam non solvo. Idem potest et imperator, si putat agrum meum suum esse et dat alii; tamen habeo regressum contra imperatorem, ut tantum valens michi reddat. Hec regula habet etiam exceptiones, quia usumfructum rei mee quem ego non habeo, quia nemo habet in re propria usumfructum, possum in alium transferre; et similiter habitationem. Aliquando etiam aliquis transfert honorem in alium, quem ipse non habet. Verbi gratia, libertus potest nocentem patronum temere in ius vocare, set filium patroni innocentem nequaquam temere, idest venia non impetrata, in ius vocare potest. Hunc honorem habet filius ex successione, quem pater non habuit. Similiter, si aliquis confert ecclesie fundum qui debet stertoriam servitutem, ecclesia non prestabit eam. Si quis possedit rem immobilem v. annis bona fide et alius ab eo recepit bona fide et aliis v. annis possedit, priores v. anni cum sequentibus continuantur: et ita currit usucapio, vel ut melius dicatur prescriptio; et ita per auctorem, idest priorem possessorem, transfertur in successorem et utilitas et etiam onus vel tributum vel aliud quod prius imminebat possessioni”.

<sup>70</sup> Johannes Bassianus, *De regulis iuris* (ed. Caprioli 1983), p. 32: “Nam quod creditor pignoris dominium transfert, hoc procedit a potestate iuris propria, non creditoris: proprie igitur ipse id non potest. In re autem propria usumfructum quem non habet quis potest alii suo iure constitutere; nec tamen eo quoque casu plus iuris transfert quam ipse habet, set aliud quantum ad formam tantum”.

himself has, “*set alium quantum ad formam tantum*” – but something else only as to the way the thing is held. The key to understanding this text lies in the meaning given to ‘*forma*’, which in this context does not seem to agree with the dialectical idea of granting something ‘*formaliter*’, as the owner is not ‘merely’ giving something which he ‘actually’ has. Instead, the noun ‘*forma*’ is used here to point out “any mode, form, or state in which a thing may exist”<sup>71</sup>. Accordingly, even when the author does not make explicit reference to the distinction of having something ‘*formaliter*’ or ‘*virtualiter*’ it is clear that he is reaching out to dialectical distinctions in order to explain how it is possible for the owner to grant the usufruct without this implying an infringement of the *nemo plus* rule.

The innovative application of dialectical ideas of Bassianus to the interpretation of D. 50,17,54 was not an immediate success. This can be seen in the work of Azo, whose opinions on the *nemo plus* rule are to be found in his *Summa*. In his commentary on Inst. 2,8 (*Quibus alienare licet, vel non*) Azo collects all the cases in which a non-owner may transfer ownership – which he had previously brought up when discussing C. 4,51<sup>72</sup> – and points out that all these cases are contrary to the *regula iuris*, quoting on this point the *nemo plus* rule as laid down in D. 41,1,20pr<sup>73</sup>. Therefore, the glossators continued the main trend of piling up more and more exceptions on the *nemo plus* rule instead of trying to explain them in another way. Accursius would subscribe to this approach as well in his *Glossa Ordinaria*, collecting all the anomalous cases pointed out by his predecessors into one heavy gloss with nine exceptions<sup>74</sup>. Likewise, Odofredus

<sup>71</sup> *Oxford Latin Dictionary* (1968), p. 722, s.v. *forma*.

<sup>72</sup> Azo, *Summa Codicis* (Venice 1566), col. 431-432.

<sup>73</sup> Azo, *Summa Institutionum* (Venice 1566), col. 1077: “Et sunt haec notabilia, & contra regulam iuris civilis. Regulare est enim, ut traditio nihil amplius transferat ad eum, qui accipit, quam sit apud eum, qui tradit ut ff. de acquiren. rer. do. l. Traditio [D. 41,1,20pr]”.

<sup>74</sup> Accursius, gl. *Nemo plus ad D. 50,17,54*: “Si mihi fundum vendideris et tradideris: quod iuris habes, in me transfers, unde si tu dominus eras: et ego dominus ero, et si non dominus eras: nec ego, sed possessionem adipiscor. § Item si a te poterit advocari per hipotecariam: et a me poterit; si nomine fundi tenebaris solvere tributa: et ego, si hic fundus servitutem debebat, et ego servitutem debebo, ut supra de acqui. rer. do. l. Traditio [D. 41,1,20] et de act.empt. l. Ex empto in princip. [D. 19,1,11pr.] et C. de distract. pign. l. Si debitor [C. 8,27,12] et C. sine cen. vel reli. l. ii. et fina. [C. 4,47,2 + 4,47,3] et de l. traditio ibi, et Si servum, et cet. Haec autem regula in tu. & cu. fallit: ut C. de admin. tut. l. Fin. & l. Lex, in fin. [C. 5,37,28,5 + 5,37,22pr] <2.> Item in procuratore: ut Inst. de re. divi. §. Nihil [Inst. 2,1,42]. 3. Item in iudice: ut Inst. de offi. iud. § Si [Inst. 4,17,4]. <4.> Item in executore: ut supra de evict. l. Si pignora [D. 21,2,50] qui transferunt plus quam habent. Quod quare accidat: dic ut not. supra eo. l. Id quod nostrum [D. 50,17,11]. 5. Item in creditore fallit: ut Inst. qui. alie. licet vel non § i [Inst. 2,8,1]. 6. Item in usufruct. formali: ut supra de usuf. l. Quod nostrum [D. 7,1,63]. 7. Item qui propter malam fidem usucapere impeditur: si vendat alii bona fide accipienti, plus iuris transfert quam habeat: ut Inst. de usuca. § Quod autem [Inst. 2,6,7]. Sed responderi potest, quod emptor non a venditore, sed a se ius usucapiendi habet. 8. Item fallit in censitoribus & fluminibus: ut supra de aqui re. dom. l. ergo § Alluvio [D. 41,1,30,3]. 9. Item fallit in datione libertatis: quod dic ut Inst. de lib. §. Si [Inst. 1,5,3]”. Other lists with these exceptions are to be found in gl. *Qui tradit* to D. 41,1,20pr, gl. *Alienare potest* to Inst. 2,8,1 and gl. *Nemo* to C. 4,51,6.

presents us with numerous exceptions to the rule, while quoting mostly texts which are different from those used by Accursius<sup>75</sup>. The only divergent view within the interpretation of the *nemo plus* rule by Accursius is the way in which he deals with the case of the usufruct given by the owner, which he considers to be an exception to the rule, since he directs the reader to his gloss *Quod nostrum* to D. 7,1,63, which reads simply “*non formalem, sed causalem*”. Through this brief indication, Accursius shows that he does not consider it possible for someone to actually give what he does not have, but that this can happen causally, a distinction which corresponds directly with those in use among dialecticians at that time. Accursius seems to be following the footsteps of Bassianus at this point, but it is interesting to note that he is not willing to apply this kind of distinctions to other exceptions under the general rule.

The number of exceptions that the glossators piled around the rule could seem to affect its value, but in fact it makes it useful from a systematic perspective, being a kind of thumb rule around which several exceptional cases can be organized. In other words, while the number of exceptions shows that the rule had no universal validity, the fact that several similar exceptions could be gathered around it made it an important reference point in order to deal with the transfer of ownership by a non-owner. This may explain as well why a jurist like Accursius was not interested in applying ideas borrowed from dialectics to discard the existence of exceptions to the rule. The importance granted to the *nemo plus* rule is moreover to be seen in the fact that it to make its way into the Siete Partidas of Alfonso X<sup>76</sup>.

While it is understandable that legists would find it useful to gather exceptions around this general rule, it is on the other hand extremely curious that canonists would be influenced by this trend as well. As shown above<sup>77</sup>, theologians developed a parallel tradition when applying the *nemo plus* argument, a tradition which would lead to an abundant reception of this argument in Canon law as laid down in the *Decretum Gratiani*. Despite the existence of this tradition, canonists were decisively influenced in the approach to the *nemo plus* argument by the developments which took place among legists, which is no wonder considering that the first generations of jurists who studied the *Decretum Gratiani*

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<sup>75</sup> Odofredus, *Lectura super Digesto Novo* (Lyon 1552), f. 191vb: “Fallit in casibus, ubi creditor potest vendere pignus ex pacto, vel ex lege: ut supra de acqui. rer. domi. l. non est novum [D. 41,1,46]. Item fallit in procuratore, et tutore: ut supra de procur. l. qui procuratorem [D. 3,3,57] et supra pro emptore l. qui fundum [D. 41,4,7pr.]. Item fallit in executore: ut Insti. de offic. iud. § fina. [Inst. 4,17,7] Item fallit in fisco, et Augusta: ut C. de quadrienn. prescrip. l. bene a Zenone [C. 7,37,3]”. See also Odofredus, *Lectura super Codice* (Lyon 1552) I, f. 252v, dealing with C. 4,51,6.

<sup>76</sup> *Siete Partidas* 7,34,12: “*Como ninguno puede dar mas a otro, que ha el. E aun dixeron, que ningun ome non puede dar mas derecho a otro en alguna cosa, de aquello que le pertenesce en ella*” (*That no one can give more to another one, than what he has. And it was further said, that no man can give more right over a thing to another one, than what he has in it*).

<sup>77</sup> Chapter 7, Section 1 above.

were trained in Roman law. The influence of Roman law among canonists becomes evident by the formulation of the *nemo plus* argument in the *Liber Extra* (1234 AD), where the wording used to render it is much closer to the one of the Digest than to any of the formulas used by popes or church fathers. The first application is to be found in a decretal of Lucius III – Pope between 1181 and 1185 – which states that laymen can only transfer to clergymen a right which they have themselves: “*Quum enim laici non possint in alios nisi ius, quod habent, transferre...*”<sup>78</sup> (X 3,38,11 *i.f.*). In this particular case, it was decreed that clergymen could not obtain the *ius patronatus* from the donation of a layman, since the consent of the bishop was needed in order to obtain such a right. The *nemo plus* rule is used to justify this solution: since the laymen had no *ius patronatus*, they could not confer it to the clergymen. A second application of the argument can be found in a decretal of Innocent III – Pope from 1198 to 1216 – in which he deals with a problem of private law concerning a man who had the usufruct over a piece of land and gave it as a dowry to his future spouse, from whom the land was claimed back after her husband died. Under this circumstance it is clear that the wife could not acquire the land, an idea which is rendered through the *nemo plus* argument in a wording which again resembles greatly the rule of Ulpian: “*nullus plus iuris in alium transferre possit, quam eum constet habere*”<sup>79</sup>.

The influence of Roman law in the way the *nemo plus* argument was approached is not only to be seen in the wording used by jurists, but also in the general validity granted to this idea. Since theologians normally interpreted the argument in a way which had no exceptions, one could expect that canonists would have been particularly keen to resort to dialectical notions in order to avoid that the rule would have exceptions. Instead, they followed the trend imposed by legists in gathering exceptions around this general rule. In fact, some of the exceptions which canonists made to this rule were borrowed from texts of Roman law. While initially some authors only linked this argument with texts of

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<sup>78</sup> “Since laymen can only transfer to another a right which they have...”. The fragment is within the title *De iure patronatus*, and the full text reads: X 3,38,11: “*Idem [Lucius III] Abbatibus, Prioribus et Clericis per achiepiscopatum Eboracensem constitutis. Cura pastorali necessitate constringimur, et auctoritate iniuncti nobis officii provocamur, pro statu ecclesiarum vigili studio satagere, et, ne contra iuris ordinem alicui conferri valeant, attentiori sollicitudine providere. Inde est, quod universitati vestrae per apostolica scripta praecipiendo. Mandamus, quatenus ex donatione laicorum, nisi auctoritas dioecesani episcopi et consensus adsit, nullus vestrum aliquas sibi ecclesias vindicare praesumat, vel retinere taliter acquisitas, nisi legitima fuerit praescriptione munitus, aut dioecesani episcopi forte habuerit postea consensum. Quum enim laici non possint in alios nisi ius, quod habent, transferre, nos huiusmodi concessionem viribus carere decernimus, et irritas penitus esse censemus*”.

<sup>79</sup> X 4,20,6: “*...Nos autem consultationi tuae taliter respondemus, quod, quum regulariter nullus plus iuris in alium transferre possit, quam eum constet habere, vir, cui terra praedicto modo conceditur, non potest uxori relinquere quod ei non licuit, nisi quoad vixerit, possidere*”.

canon law<sup>80</sup>, already the *glossa ordinaria* on the *Decretum Gratiani* concluded by Bartholomaeus Brixiensis († 1258) gradually includes some references to Roman law. Some of the glosses of Brixiensis dealing with the *nemo plus* argument only deal with texts from canon law, such as the gloss *Dare* to *Decretum Grat. C. 1, q. 7, c. 24*<sup>81</sup>, which quotes X 3,38,11 in support of this argument and X 1,6,11<sup>82</sup> against it, the latter text dealing with the case of a bishop who has been elected but not yet ordained and who gives a mandate to his suffragan bishop to consecrate someone in his jurisdiction<sup>83</sup>. More interaction with Roman law is found in the gloss *Quomodo* to *Decretum Grat. C. 1, q. 1, c. 18*<sup>84</sup>, where Brixiensis not only quotes X 3,38,11 in favour of the argument and X 3,38,19<sup>85</sup> against it, but also brings D. 2,11,13 in favour, since in this text Julian declares that a slave cannot take a stipulation for another or make a promise himself, because he cannot be sued or sue himself. More appealing are the references to Roman law in the gloss *Possunt* to *Decretum Grat. C. 1, q. 1, c. 1*, where Johannes Teutonicus quotes *Decretum Grat. C. 1, q. 7, c. 24*, *Decretum Grat. D. 4 de cons., c. 41* and D. 50,17,54 in favour of the validity of the argument, while D. 41,1,46 and X 1,6,11 are brought against it, which leads Bartholomaeus Brixiensis to conclude that generally no one can give what is not his own, but that this rule fails in certain cases<sup>86</sup>. Other glosses confirm the tendency of gathering texts from Roman and canon law to confirm and contradict the general rule, such as the gloss *Romanus* to *Decretum Grat. D. 4 de cons., c. 23*<sup>87</sup>, where *Decretum Grat. D. 4 de cons., c. 41* is quoted to prove the general rule, which is then contradicted by

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<sup>80</sup> See e.g. Pascipoverus, *Concordia utriusque iuris* 1,5,2, who supports the validity *nemo plus* argument in the context of the sacraments conferred by heretics on *Decretum Grat. C. 1, q. 1, c. 18*; *C. 1, q. 7, c. 24*; *D. 28, c. 16*; *D. 4 de cons., c. 41*.

<sup>81</sup> Gl. *Dare* to *Decretum Grat. C. 1, q. 7, c. 24*: “Arg. qui nihil habet, nihil dare potest. Arg. contra extra de electio. suffraganeis 3 [X 1,6,11]. Item argu. quod pro non dato habetur quod datur ab eo, qui de iure dare non potest, ut extra de iure patro. quod autem. in fi. [X 3,38,11 in fine]”

<sup>82</sup> X 1,6,11: “Metropolitanus confirmatus, licet nondum receperit pallium, potest suum suffraganeum consecrari facere. Suffraganeis alicuius metropolitan, ad mandatum ipsius metropolitan, post confirmationem electionis suae, etiamsi pallium non receperit, licitum est aliquem electum, qui ad eius iurisdictionem pertinent, consecrare...”

<sup>83</sup> Other glosses follow the same tendency of quoting exclusively materials from canon law: the gloss *Plenitudinem* to *Decretum Grat. C. 1, q. 1, c. 17* quotes *Decretum Grat. C. 1, q. 1, c. 1* and *Decretum Grat. C. 1, q. 7, c. 24* in favour of the argument; the gloss *Accepisse* to *Decretum Grat. C. 1, q. 1, c. 18* quotes X 3,38,5 in favour – whose final phrase reads “pro non dato habetur, quod ab illo datur, qui non potest de iure donare” – and X 4,1,4, against it; the gloss *Nemo* to *Decretum Grat. D. 4 de cons., c. 41* quotes in favour of the argument *Decretum Grat. D. 62, c. 1*, *Decretum Grat. D. 28, c. 10*, *Decretum Grat. C. 2, q. 6, c. 26* and *Decretum Grat. C. 1, q. 1, c. 18*.

<sup>84</sup> Here Brixiensis quotes X 3,38,11.

<sup>85</sup> This text determines that a clergyman who was instituted by someone without the *ius patronatus* may retain his condition even if this circumstance is later established in trial.

<sup>86</sup> Gl. *Possunt* to *Decretum Grat. C. 1, q. 1, c. 1*, in fine: “Solutio generale est quod nemo de iure dare potest quod non habet. Fallit in certis casibus. B[artholomaeus Brixiensis]”.

<sup>87</sup> Another clear example of this is gl. *Proprium* to *Decretum Grat. D. 54, c. 22*.

Inst. 2,8,1 and D. 41,1,20pr. This in turn leads to the conclusion that by the authority of the law someone can exceptionally give what he does not have, while the general rule is that this is not possible, as shown in *Decretum Grat.* C. 1, q. 7, c. 24<sup>88</sup>.

The role of Roman law when approaching the argument is even stronger in the work of Bernardus Parmensis († 1266) – who concluded what would become the *glossa ordinaria* to the Liber Extra – in his gloss *Nisi ius* to X 3,38,11. Parmensis in fact makes use exclusively of texts taken from the *Corpus Iuris Civilis* in order to determine the validity of the argument, quoting in favour of it D. 50,17,54 and D. 41,1,20pr, while bringing against it D. 41,1,46, Inst. 2,8pr, D. 7,1,63, C. 8,27,6 and C. 8,27,7. This gloss declares towards the end that the general rule is true, and that its exceptions are due to particular circumstances, for the *ius patronatus* cannot indeed be conferred without the bishop's authorization<sup>89</sup>. Further interaction between Roman and canon law is moreover to be found in the gloss *Nullus plus iuris* to X 4,20,6, where the texts brought in favour of the *nemo plus* rule are *Decretum Grat.* C. 1, q. 7, c. 24, D. 50,17,54, D. 41,1,20pr, X 3,38,5 and X 3,38,11, while D. 7,1,63 and D. 41,1,46 are brought against it. The conclusion derived from these texts is again that the exceptions to the rule refer to isolated cases (*contraria casualia sunt*)<sup>90</sup>.

The *nemo plus* rule would acquire a fixed formula within canon law in the Liber Sextus (1298) of Boniface VIII. In the last title of this work, which deals with *De Regulis Iuris*, an adaptation of the rule of D. 50,17,54 is presented with the wording: “*Nemo potest plus iuris transferre in alium, quam sibi competere dinoscatur*” (Sextus, *De reg. jur.* 79)<sup>91</sup>. The most interesting variation to the *nemo plus* formula as shown in the Digest is the replacement of the general “*quam sibi haberet*” for an extremely cautious “*quam sibi competere dinoscatur*” – “which can be discerned to belong to him”. This innovation could be seen as related to the dialectical approach to this argument, where the key is actually to determine whether what is given can be seen as being held by the giver in some way. It is in any case difficult to determine whether these considerations played a relevant role, particularly considering that the first interpreters of the Liber Sextus continued the trend of previous authors by focusing on presenting the texts in the *Corpus Iuris Civilis* which bear witness to the rule or form exceptions to it.

<sup>88</sup> Gl. *Romanus* to *Decretum Grat.* D. 4 *de cons.*, c. 23, *if.*: “... iuris ergo auctoritate promittente potest quis in alium transferre quod non habuit. Et hoc casuale: illud vero regulare. q. 7 Daibertum [*Decretum Grat.* C. 1, q. 7, c. 24]”.

<sup>89</sup> Bernardus Parmensis, gl. *Nisi ius* ad X 3,38,11, *in fine*: “Sol. primum verum est, et ita contraria specialia sunt, nec etiam istud ius quod habent, scilicet ius patronatus, possunt conferre sine auctoritate episcopi, ut dixi supra eo. illud. [X 3,38,8] et infra eo. nullus”.

<sup>90</sup> Gl. *Nullus plus iuris* to X 4,20,6: ut. 1 q. 7. “Daibertum. ff. de reg. iur. nemo plus. ff. de acq. rerum. domi. traditio. et supra de iure pat. quod autem in fine et c. cura. Argumentum contrarium ff. de usufruct. quod nostrum non est. ff. de acquiren. re. romi. non est novum. Contraria casualia sunt”.

<sup>91</sup> “No one can transfer to another a greater right than that which can be discerned to belong to himself”.

This is in fact the approach of Dinus Mugellanus (c. 1253 – c. 1303) who in his commentary to this text deals with the rule almost exclusively from the perspective of the transfer of ownership, pointing out which rights would be obtained through *traditio*, and the numerous cases in which this rule would fail<sup>92</sup>. There is accordingly almost no innovation in his exposition regarding the views of the glossators, and Dinus even follows the views of Accursius when excluding the constitution of usufruct from the exceptions to the rule by considering that the owner had causally what he gives<sup>93</sup>.

More original is the interaction between Roman and canon law regarding the *nemo plus* rule in the work of Johannes Andreae (c. 1270-1348), who early in the 13<sup>th</sup> century wrote what would become the *glossa ordinaria* to the Liber Sextus. In his gloss *Nemo potest* to Sextus, *De reg. jur.* 79, Andreae states that the rule was drawn from D. 50,17,54<sup>94</sup>, which he quotes however in the abbreviated formula “*nemo dat quod non habet*”<sup>95</sup>. The author further presents a complete account of the texts in favour<sup>96</sup> and against<sup>97</sup> the validity of the *nemo plus* rule in Roman and canon law, which covers most of the references made by authors before him. Like other authors, Andreae concludes that the *nemo plus* serves as a general rule, and explains that the exceptions that affect it are due to particular considerations<sup>98</sup>. Andreae would again extensively comment the *nemo plus* rule in his *Mercuriales quaestiones super regulis iuris*<sup>99</sup>, but using a different approach. Following on the commentary of Dinus Mugellanus, Andreae presents exclusively texts from the *Corpus Iuris Civilis* when assessing the validity of the rule, although he later applies the rule to determine the lawfulness of a particular custom of the church of Modena, where clergymen were allowed to dispose of

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<sup>92</sup> Dinus Mugellanus, *De Regulis Juris* (Cologne 1617), p. 310: “Fallit autem haec regula in tutore, vel curatore. Item in procuratore, iudice, executore, creditore, in malae fidei venditore. Item in censitore. Item in flumine, in libertatis datione, et in Imperatore et Augusta”.

<sup>93</sup> Dinus Mugellanus, *De Regulis Juris* (Cologne 1617), p. 310: “Sed ibi non transfertur plus: sed per constitutionem variatur tantum species ususfr. quia penes me dominium erat causalis, et non erat species servitutis: penes eum cui constituitur, formalis, et erit species servitutis”.

<sup>94</sup> Gl. *Nemo potest* to Sextus, *De reg. jur.* 79: “Haec regula sumpta fuit ex l. ff. eo. tit. l. nemo plus [D. 50,17,54]”.

<sup>95</sup> Gl. *Nemo potest* to Sextus, *De reg. jur.* 79: “quod dicitur, nemo dat quod non habet”.

<sup>96</sup> Andreae presents as some of the texts where the rule is quoted or applied *Decretum Grat.* C. 1, q. 7, c. 24, X 4,20,6, D. 41,1,20pr and X 3,38,5.

<sup>97</sup> Against the validity of the rule Andreae quotes X 1,6,11 and *Decretum Grat.* D. 4 de cons., c. 31 – where St. Augustine assesses the validity of the baptism given by someone who is not baptized himself – as well as the texts of the *Corpus Iuris Civilis* regularly quoted by glossators such as C. 5,37,28, C. 5,37,22pr. (*tutores* and *curatores*), Inst. 2,1,42 (*procurator*), Inst. 4,17,4 (*iudex*), D. 21,2,50 (*executor*), D. 7,1,63 (*usufruct*), Inst. 2,6,7, Nov. 119,7 (good faith purchase to someone in bad faith), D. 41,1,30,3 (*alluvio*), etc.

<sup>98</sup> Gl. *Nemo potest* to Sextus, *De reg. jur.* 79: “... hoc est generale, illa sunt specialia: specialitatis rationem facile considerare poteris”.

<sup>99</sup> Johannes Andreae, *In titulum De regulis Iuris Commentarius* (Lyon 1551), f. 116-118.

certain objects *mortis causa*. Also Albericus de Rosate<sup>100</sup> (c. 1290 – c. 1360) followed closely the works of Dinus and Andreae, quoting both of them at the beginning of his commentary on D. 50,17,54. For the greater part of his commentary, Albericus discusses the case set forth by Andreae regarding the custom of Modena, a problem which in the meantime had been addressed in a decretal of Pope John XII<sup>101</sup>. Towards the end he quotes the usual cases in the *Corpus Iuris Civilis* where someone appears to be transferring what he does not have, which again shows the dependence on the previous models of Dinus Mugellanus and Johannes Andreae.

As shown by the analysis of the works of legists and canonists, most commentaries on the *nemo plus* rule – either on its Roman or its canonical version – until the 14<sup>th</sup> century focused on gathering texts in favour and against this rule. While the amount of exceptions that could be brought against the validity of the rule seem to undermine it, this methodology appears to be very convenient considering that it shows the scope of the rule by gathering the texts which are seen as related to it, thereby enabling to use this rule as a starting point for legal reasoning, particularly regarding the transfer of ownership. Apart from this practical aspect, the approach of jurists may have also been influenced by the fact that some texts within the Digest explicitly present exceptions to the *nemo plus* argument, including D. 7,1,63, D. 41,1,46 and D. 41,2,21. All of this may explain why jurists were not particularly keen to apply dialectical distinctions that could explain the exceptions to the rule in a way which would not contradict its validity. Only in isolated cases, such as that of the constitution of usufruct, did jurists apply such ideas, but there was no general systematic attempt to free the rule from exceptions by resorting to them. This approach would gradually change in the course of the 14<sup>th</sup> century, as will be shown in the following section.

#### 4. Gradual reinterpretation of the scope of the *nemo plus* rule

The first changes in the approach to the *nemo plus* argument through the influence of extra-legal notions took place when jurists discussed specific cases of application. As shown in the previous section, some of the glossators did not consider that the constitution of a usufruct by the owner was a real exception to the *nemo plus* rule, since the owner could be regarded as having the usufruct ‘causally’ and therefore he would actually have that what he gave. This opinion would also be upheld by later authors, such as Bartolus<sup>102</sup>, which shows its progressive consolidation.

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<sup>100</sup> Albericus de Rosate, *De regulis iuris* (Lyon 1543), f. 20vb–21rb.

<sup>101</sup> *Extravag. Joan.* XXII, 1,2.

<sup>102</sup> Bartolus de Saxoferrato, *In primam Digesti Novi partem Commentaria* (Turin 1574), f. 78ra: “In gl. in verb. qui tradit. ibi l. quod nostrum [D. 7,1,63]. Tu dicas quod ibi datur illud

Another case in which dialectical distinctions can be found with regard to the *nemo plus* argument concerns the discussion of the nature of manumission. This controversy revolves around Ulpian's concept of manumission as a "*datio libertatis*" in D. 1,1,4<sup>103</sup>, a text which is almost literally reproduced in Inst. 1,5pr<sup>104</sup>. We know from Accursius' gloss<sup>105</sup> that already Imerius discussed the use of '*datio*' in this text, and that he preferred to describe the manumission as a '*detectio*' or uncovering<sup>106</sup>. Besta edited two Imerian glosses in which this opinion is expressed<sup>107</sup>, and Torelli has drawn attention to a marginal gloss which he considers to be the original of Imerius or at least to be very close to it<sup>108</sup>. The opinion of Imerius concerning the nature of manumission is built around the description of slavery as an institution belonging to the *ius gentium*, not the *ius naturale*. According to this idea, the natural freedom is not 'bestowed' by the manumitter, but simply 'uncovered'. Imerius used the text of D. 41,1,7,7, which discusses the making of something with someone else's materials, to describe a beautiful analogy with the case – presented at the end of the text – in which someone threshes corn from another person's ears of corn<sup>109</sup>. In such a case,

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quod habetur: licet detur aliter quam habetur: quia habebat de usufructu causali, et dat formalem".

<sup>103</sup> D. 1,1,4 (Ulp. 1 *institutionum*): "Manumissiones quoque iuris gentium sunt. Est autem manumissio de manu missio, id est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, manumissus liberatur potestate. Quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi".

<sup>104</sup> Inst. 1,5pr.: "Libertini sunt qui ex iusta servitute manumissi sunt. Manumissio autem est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, et manumissus liberatur potestate. Quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, iure gentium tria genera hominum esse coeperunt, liberi et his contrarium servi et tertium genus libertini, qui desierant esse servi".

<sup>105</sup> Gl. *Datio* to Inst. 1,5pr.: "id est detectio, secundum Ir[nerius]. Sic ff. *de acqui. rer. do.* l. *adeo*. § *cum quis* [D. 41,1,7,7] *in si. ibi, cum enim grana*".

<sup>106</sup> See on this point Torelli, *Glosse d'Imerio* (1939), p. 251-252; Cortese, *La norma giuridica* (1962), p. 75-78; Weigand, *Naturrechtslehre* (1967), p. 75-78; Schrage, *Libertas* (1975), p. 72 ff.

<sup>107</sup> Besta, *L'opera d'Imerio* (1896) II, p. 3, gl. *Datio libertatis* to D. 1,1,4: "y. non ut aliud detur, sed ius quod in eo habetur ei restituitur"; gl. *Utpote* to D. 1,1,4: "Quamdiu quis liber est, liber effici non potest. Set amissa iure gentium, libertas dari ei potest. y."

<sup>108</sup> Torelli, *Glosse d'Imerio* (1939), p. 252: "Id est detectio libertatis; quamdiu enim aliquis in servitute est, libertas est inumbrata tegmine servitutis, sed per manumissionem detegitur". See also on this gloss Weigand, *Naturrechtslehre* (1967), p. 75.

<sup>109</sup> D. 41,1,7,7 (Gai. 2 *rer. cott.*) *if.*: "Videntur tamen mihi recte quidam dixisse non debere dubitari, quin alienis spicis excussum frumentum eius sit, cuius et spicae fuerunt: cum enim grana, quae spicis continentur, perfectam habeant suam speciem, qui excussit spicas, non novam speciem facit, sed eam quae est detegit".

nothing new is made, but simply something which lay hidden (the corn under the husk) is uncovered. In the case of manumission, according to Irnerius, the *manumissor* would be uncovering something which already existed, rather than creating something new, i.e. slavery would be removed rather than freedom granted.

The opinion of Irnerius was still upheld by Martinus Gosia and Bulgarus, but was controversial since the time of Placentinus<sup>110</sup>. The latter reproduces Irnerius' view, but does not subscribe to it, considering that the manumission consists in bestowing a freedom which no slave has<sup>111</sup>. At this point the *nemo plus* argument comes into play, since later authors explained the possibility of bestowing freedom on a slave in the following way: the slave would indeed be receiving a freedom which he did not enjoy before, even when the manumitter did not lose his own freedom, which would imply that the latter would give something which he did not have<sup>112</sup>. In other words, this line of thought considers that the *nemo plus* argument would be contradicted in the case of manumission. According to Odofredus<sup>113</sup>, this idea – which he qualifies as “childish” – would have been introduced by Johannes Bassianus and Azo, but another manuscript quoted by Torelli (Bamberg D. II. 6) gives the full responsibility to Azo<sup>114</sup>. Since the opinions of Bassianus on the subject do not present this idea<sup>115</sup>, and considering that Odofredus later in his gloss ascribes the idea specifically to Azo, it appears that the *nemo plus* argument was indeed introduced into this discussion

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<sup>110</sup> See Torelli, *Glosse d'Imerio* (1939), p. 252 n. 1; *Glosse di Bulgaro* (1959 [1942]), p. 104-105; Cortese, *La norma giuridica* (1962) I, p. 75-78; Weigand, *Naturrechtslehre* (1967), p. 75-76 and 280 (§ 477); Schrage, *Libertas* (1975), p. 76, 78, 81-84.

<sup>111</sup> Placentinus, *Summa Institutionum*, Mainz 1537, p. 6-7: “Est autem manumissio libertatis, qua meo iudicio omnis servus caret, datio; vel secundum alios detectio, nam et frumentum facere dicitur is, per quem excutitur”. The problem is discussed again incidentally in the context of Inst. 2,8 (p. 30).

<sup>112</sup> The reference to the *nemo plus* argument in this context seems out of place, but it may be explained in relation to D. 40,9,19 (Mod. 1 *regularum*), according to which a slave cannot free another slave: “Nulla competit libertas data ab eo, qui postea servus ipse pronuntiat est”.

<sup>113</sup> Odofredus, *Lectura super Digesto Veteri* (Lyon 1550), f. 7r: “Or signori, dominus Joannes et Azo formant hic duas pueriles opiniones. Et prima opinio puerilis est ista: hic dicitur quod ille qui manumittit dat libertatem. Ergo aut dat suam libertatem aut alienam: si dat suam libertatem, ergo ipse desiit esse liber: si dat alienam illam non potest dare: quia nemo plus iuris in alium potest transferre quam in se habeat: ut infra de acquir. re. domi. l. traditio [D. 41,1,20pr.] et infra si usus.pe. l. uti frui. [D. 7,6,5pr]”. Odofredus then expresses his preference for the opinion according to which the manumission is a mere *detectio* which reveals something which already existed, but afterwards admits that Azo's opinion – no mention of Bassianus is made here – can also be accepted: “Vel potest dici secundum Azonem quod ille qui manumittit dat libertatem quam non habet, sicut dicitur in usufructu, qui dat usufru. formalem alii quem non habet: ut infra De usufru., l. Quod nostrum [D. 7,1,63] et in creditore, ut Institu. Quibus alie. licet vel no. in prin. [Inst. 2,8pr.]” Regarding this text see Schrage, *Libertas* (1975), p. 90-91.

<sup>114</sup> Torelli, *Glosse d'Imerio* (1939), p. 252 n. 1.

<sup>115</sup> See Cortese, *La norma giuridica* (1962) I, p. 77 n. 103; *La norma giuridica* (1964) II, p. 404-405; Schrage, *Libertas* (1975), p. 83-85.

by him. Such ideas are in fact to be found in Azo's *Summa Institutionum*, as well as in his gloss on Inst. 1,5pr. In the first text, Azo deals with the definition of manumission not in the commentary to Inst. 1,5pr, but at the end of Inst. 1,2 (*De iure naturali, gentium et civili*). When discussing this subject<sup>116</sup>, Azo reproduces firstly the opinion according to which the manumission would be a '*detectio*', quoting D. 41,1,7,7. However, he then declares that the truth is that the manumitter grants him freedom, even when it is not his own. Azo then enounces this idea by declaring: "*Dat enim, quod non habet*" (For he gives, what he does not have). To close this line of thought, the texts of D. 7,1,63 and Inst. 2,8,1 are given as evidence that one may indeed give what one does not have. The same opinion is conveyed in a more succinct form in Azo's gloss to Inst. 2,8,1<sup>117</sup>.

Accursius would deal extensively with the problem of the definition of manumission in his gloss *Datio*<sup>118</sup> to D. 1,1,4. According to him, if the *manumissor* grants his own freedom, he would become a slave, and if he grants someone else's freedom he would be giving something what he does not have (*si alienam, quam non erit invenire: ergo quam non habet*). Accursius then presents both the opinions of Imerius and Azo – without quoting their names – indicating that the manumission can be regarded as a *detectio*, or that it can be said that he (the manumitter) gives what he does not have (*Vel dic dat quam non habet ille qui dat*). To support the latter view, he quotes the exact same texts that Azo had used: D. 7,1,63 and Inst. 2,8,1. The only authority quoted in this text is Placentinus. A

<sup>116</sup> Azo, *Summa Institutionum* (Venice 1566), col. 1050: "Manumissiones etiam iuris gentium sunt. Est autem manumissio datio libertatis id est detectio, ut dicunt quidam: quia libertas, quae est de iure naturali, non potuit auferri, licet fuerit offuscata per ius civile vel gentium. Iura enim naturalia sunt immutabilia ut infra. eodem. §. pe. et ff. de acqui. re. do. l. adeo. § cum quis. [D. 41,1,7,7] Vel dic vere dat libertatem ille, qui manumittit: licet non suam, sed (*alii*: vel) alienam. Dat enim, quod non habet: sicut in creditore, et in eo, qui constituit usumfructum in re sua, ut ff. de usus. l. quod nostrum. [D. 7,1,63] et infra quib. ali. li. in prin. [Inst. 2,8,1]" It should be noted that some editions of Azo's *Summa Institutionum* read 'vel' instead of 'sed' (Speyer 1482; Lyon 1533 f. 355vb), which alters the sense of the opinion. On the contradictory evidence regarding the ideas of Azo on this point see Schrage, *Libertas* (1975), p. 86–87.

<sup>117</sup> Azo, gl. *Datio* to Inst. 1,5pr. (ed. Caprioli et al. [1984]): "Idest detectio, ut D. de acquirendo rerum dominio (l.) adeo § cum quis, in fine [D. 41,1,7,7]. Vel secundum P(lacentinum) proprie ponitur: nam nullam libertatem servos habere dicit; et sic quis et id quod non habet <dat>, ut in usufructu, in creditore <pignoraticio>. Az."

<sup>118</sup> Accursius, gl. *Datio* to D. 1,1,4: "Sic ergo qui manumittit, dat libertatem: ergo suam vel alienam: si suam, ergo ipse postea non erit liber: si alienam, quam non erit invenire: ergo quam non habet. Praeterea cum omnes homines liberi nascantur iure naturali, ergo non dat ei libertatem, cum ille liber sit. His duabus rationibus, vel oppositionibus inductus expono *datio*, id est detectio. Nam cum manumitto servuum, detegitur libertas servi. Nam ipse semper liber est inspecto iure naturali. Sic qui excutit grana de spicis, non novam speciem facit: sed eam quae est, detegit: ut infra *de acqui. re. dom. l. adeo. §. cum quis* [D. 41,1,7,7]. Sic & infra *si servu. vin. l. sicuti. §. ii. in fin.* [D. 8,5,8] Vel dic dat quam non habet ille qui dat: ut in usufru. formali: ut infra *de usufru. l. quod nostrum.* [D. 7,1,63] & in creditore: ut *Instit. quib. alien. non licet. §. i.* [Inst. 2,8,1] secundum Placentinum". See on the ideas of Accursius Weigand, *Naturrechtslehre* (1967), p. 77–78; Schrage, *Libertas* (1975), p. 88–89.

more detailed account on the controversy is given by Accursius in his gloss *Datio*<sup>119</sup> to Inst. 1,5pr, where he quotes in the first place the opinion of Irnerius according to whom the manumission would be a *detectio*, and then brings up the idea – which he ascribes to Placentinus, Bassianus and Azo – according to which the manumitter would be giving the slave a freedom which the latter did not have before. Accursius declares that the latter idea could be refuted, since the manumitter either gave the slave his own freedom, thereby becoming a slave himself, or gave a freedom which he did not have, which would be absurd. However, he then declares that it can indeed be said that the manumitter gave what he did not have, which actually takes place in several cases (*Sed dic quod dat quam non habebat, et hoc plerumque contingit quod quis det quod non habet*). To support this statement, Accursius quotes Inst. 2,8,1 and D. 7,1,63.

Bartolus would apply the *nemo plus* argument in a similar way when commenting D. 1,1,4<sup>120</sup>, where he points out that the freedom given by the *manumissor* cannot be his own – otherwise he would lose his freedom and become a slave – nor someone else’s, since no one can give what he does not have: “*quia nemo dat quod non habet*”<sup>121</sup>. Bartolus would however not take the argument any further, and acknowledges that in some cases we may give what is not ours (*aliquando damus quod non est nostrum*) as happens in the case of the creditor to whom a pledge has been given<sup>122</sup>.

The great breakthrough in this topic would come in the works of Baldus. His contribution on this point owes much to theology and dialectics, which is no wonder considering the reputation of this jurist as a leading philosophical mind within the school of the commentators<sup>123</sup>. This inclination to resort to extralegal notions would bring about an innovative approach concerning the significance of the *nemo plus* argument in relation to the problem of the nature of manumission.

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<sup>119</sup> Accursius, gl. *Datio* to Inst. 1,5pr. (ed. Torelli [1935]): “Idest detectio, secundum Yrnerium, sic ff. De acquiren. rer. do., l. Adeo, § Cum quis [in fine §] [D. 41,1,7,7]; vel dic secundum Placentinum et Johannem et Azonem, quia dat libertatem quam prius ipse servus non habebat. Alias [idest si diceremus dari illam quam antea habebat] non diceretur dari, ut infra, De actionibus, § Sic itaque [Inst. 4,6,14]. Sed [opponitur] aut quam habebat qui dabat, et sic nulla remanet, cum non habeat nisi unam, aut quam non habebat quod est absurdum. Sed dic quod dat quam non habebat, et hoc plerumque contingit quod quis det quod non habet: ut supra, Quibus alienare licet vel non, § 1 [Inst. 2,8,1] et ff. De usufructu, Quod nostrum. [D. 7,1,63]. Ac.”

<sup>120</sup> Bartolus de Saxoferrato, *In primam Digesti Veteris partem Commentaria* (Turin 1574), f. 7rb.

<sup>121</sup> Bartolus de Saxoferrato, *In primam Digesti Veteris partem Commentaria* (Turin 1574), f. 7rb: “Aut ego manumissor do servo libertatem meam, & hoc est falsum, quia remanerem servus, aut alienam, & tunc peius: quia nemo dat quod non habet”.

<sup>122</sup> Bartolus de Saxoferrato, *In primam Digesti Veteris partem Commentaria* (Turin 1574), f. 7rb.: “Et non obstat quod glossa dicit, quia aliquando damus quod non est nostrum, ut in creditore, quando creditor de voluntate debitoris dat ut .i. fam. etc. l. rem pignori [D. 10,2,28]”.

<sup>123</sup> Horn, *Baldus philosophus* (1967), p. 104 ff.; Lange/Kriechbaum, *Die Kommentatoren* (2007), p. 758–765.

In his commentary on D. 1,1,4<sup>124</sup>, Baldus questions once again how someone can bestow freedom, and whether this would imply that he gives what he does not have<sup>125</sup>. Regarding the latter problem, Baldus proposes a dual distinction regarding the verb ‘to give’ which allows him to deal simultaneously with cases from Roman and canon law. On the one hand, ‘to give’ can be understood as ‘to confer’, and in this sense it is possible to give what one does not have as long as one has the ‘right to confer’ (*ius conferendi*). As an example of this, Baldus presents the case of a bishop, who does not own or possess the benefits he gives, but has the *ius conferendi*. On the other hand, ‘to give’ can mean ‘to transfer’, and in this sense Baldus declares that no one can give what he does not have under his power or what he does not own.

Even more interesting is the colourful commentary of Baldus on C. 6,57,5, where he elaborates on the nature of the manumission. Baldus declares that when freedom is given, it is actually formed in the freedman, since intellectual entities are stamped without resulting in a loss on the person who gives them, just like the emperor bestows legitimacy, and just like the sun forms in objects colours which it does not have itself<sup>126</sup>. Through such distinctions and examples – particularly that of the formation of colours – Baldus reaches to extra-legal notions in order to explain how someone may give what he does not seem have, thereby preserving the validity of the *nemo plus* argument. It is moreover worth noting that Baldus’ opinion brings an interpretation of the *nemo plus* rule which covers Roman and canon law. The link between both disciplines is so strong at this point that Baldus would quote D. 1,1,4 when discussing the faculties of bishops in his commentary to X 1,6,11<sup>127</sup>. This approach to the *nemo plus* rule would have a visible impact on later jurists, being reproduced almost word for word by Angelus Aretinus in his commentary to Inst. 1,5pr<sup>128</sup>.

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<sup>124</sup> Baldus de Ubaldis, *In primam Digesti Veteris partem Commentaria* (Venice 1577), f. 10vb: “...id est in iuris ratione: quia nemo dat, quod non habet (...) Tu dic, quod dare sumitur dupliciter. Primo modo pro conferre. Secundo modo pro transferre. Si accipitur primo modo, quis dat quod non habet. Nam episcopus dat beneficia: tamen non habet ea in proprietate, vel in possessione; sed sufficit quod habeat ius conferendi. Secundo modo, nemo concedit, quod non habet in potestate, vel proprietate. Et sic non ob. contrarium, vel dic, quod habere dicitur dupliciter, uno modo quo ad libertatem arbitrii: et hoc modo nemo dat, quod dare non potest. Alio modo quo ad ius formale ipsius rei; et tunc non valet argumentatio. Nam si emo a malefidei possessore, acquirō interdum conditionem prescribendi, quam ipse non habet, qui vendit”.

<sup>125</sup> Regarding the ideas of Baldus on manumission see Schrage, *Libertas* (1975), p. 96–97.

<sup>126</sup> Baldus de Ubaldis, *In sextum Codicis librum Commentaria* (Venice 1577), f. 193ra: “Et no. quod si do tibi libertatem, formo in te libertatem; nam intelligibiles formae imprimuntur, et tamen non minuuntur a proprio subiecto informante. Ita Imperator dat legitimitatem, id est format in subiecto hanc qualitatem, sicut Sol format quasdam qualitates in materia, quae non sunt in sole, ut colores. Et hoc est, quod gl. nesciunt proprie loqui in l. manumissiones, ff. de iusti. et iure. [D. 1,1,4]”

<sup>127</sup> Baldus de Ubaldis, *Super Decretalibus* (Lyon 1564), f. 56rb.

<sup>128</sup> Angelus Aretinus a Gambilionibus, *In quatuor Institutionum Iustiniani libros commentaria* (Venice 1574), f. 22va. It is however noteworthy that already at the beginning of the 16<sup>th</sup>

The discussions concerning the grant of a usufruct by the owner and the nature of manumission are the most significant cases where extra-legal notions were applied by jurists in order to explain the scope of the *nemo plus* argument. In other cases the application of such notions is only apparent. This is the case in the gloss of Accursius to C. 10,32,44, where the jurist observes that he who does not have learning cannot make another one a learned person<sup>129</sup>. Such references could appear to evoke the application of the *nemo plus* argument in Plato's *Symposium*, but it is in fact linked to the uses of the argument in Christian writings, as the references given by Accursius show<sup>130</sup>.

The way in which the *nemo plus* argument was applied to specific problems left the door open for a radical reinterpretation of the validity of the argument itself. At some point, jurists attempted determine the exact scope of the argument by applying considerations from other fields of knowledge, where the *nemo plus* argument was known as well. Particularly noteworthy in this regard is the fact that the argument is often conveyed in alternative forms by jurists, showing that they were familiar with it in other formulations of the kind "*nemo dat quod non habet*"<sup>131</sup>. The argument even appears to have acquired a certain proverbial value, as shown in the quotation of Bartolus of the words "*Mal da chi non ha*", inscribed in one of the bells of Saint Peter's Cathedral in Bologna<sup>132</sup>. The argument therefore subsisted with relative independence from its use by legists and canonists. It is therefore no wonder that jurists soon felt the need to apply the

century the discussion on the application of the *nemo plus* rule in the context of manumission was regarded as rather artificial, as it can be seen in the *Castigationes inter pandectas originales et communes codices* of Ludovico Bolognini (1446-1508) concerning D. 1,1,4, which are edited by Caprioli, *Indagini sul Bolognini* (1969), p. 340: "Est igitur manumissio liberatio a manu, idest a potestate domini: et sic manumittens non dat ei libertatem suam propriam: nam sic ipse efficeretur servus: nec etiam dat alienam, cum sua non sit: nec etiam dat quondam aliam libertatem separatam, prout dicebat glo(sa) et alii hic omnes post eam, 'et male et' etiam in dicto § primo Insti. de libertinis [Inst. 1,5pr], adducendo simile de usufructu formali et de creditore, etc." It is therefore no wonder that the discussion on the nature of the *nemo plus* rule did not continue to take place in the context of manumission.

<sup>129</sup> Accursius, gl. *Immunis* to C. 10,32,44: "Item not. non facit curialem, qui non est curialis: ad quod sup. de haeret. et Ma. l. ii. [C. 1,5,2] nec doctum facit, qui est indoctus: ut in Auth. de san. epis. in princ. coll. ix. [Nov. 123,1pr.]"

<sup>130</sup> Baldus, *In VII-XI Codicis libros Commentaria* (Venice 1577), f. 267va would later add: "No. hic gl. Quod malus Doctor non potest facere bonum scholarem".

<sup>131</sup> Several examples presented above bear witness to this, such as the use of the argument by Azo (*Summa Institutionum*, col. 1050: "Dat enim, quod non habet") or by Bartholomaeus Brixiensis (Gl. Gl. *Dare to Decretum Grat.* C. 1, q. 7, c. 24: "Arg[umentum]. qui nihil habet, nihil dare potest"). Similarly Johannes Andreae, Gl. *Nemo potest* to Sextus, *De reg. jur.* 79: "quod dicitur, nemo dat quod non habet".

<sup>132</sup> Bartolus de Saxoferrato, *In secundam Codicis partem Commentaria* (Turin 1574), f. 39ra (when commenting C. 6,37,15): "Mal da chi non ha, h[oc]. d[icit]. la campana de San Pedro". It remains mysterious to me why these last words are conveyed in Spanish. See moreover Baldus, *In sextum Codicis librum Commentaria* (Venice 1577), f. 130rb, who indicates, when commenting on the same text: "Nemo relinquit, quod non habet. h[oc] d[icit]. concor. supra. de don. ante nup. l. si ante. [C. 5,3,8]"

notions surrounding this argument when interpreting the *nemo plus* rule as found in Roman and canon law.

Also relevant for this process of reinterpretation is the fact that the findings made by legists were readily applied in the context of canon law and vice versa<sup>133</sup>. The interaction between legists and canonists would be decisive for the interpretation of the *nemo plus* rule in Roman sources due to the fact that canonists were the first ones to offer a more comprehensive reinterpretation of the *nemo plus* rule, which may be explained by the fact that it was less adequate for canon law to consider that the *nemo plus* rule was filled with exceptions than it was for Roman law. Paulus de Liazariis († 1356) in particular formulated an influential interpretation<sup>134</sup> which would be reproduced in the commentaries of authors such as Johannes de Imola<sup>135</sup> and Panormitanus<sup>136</sup>, becoming especially popular through the latter. This interpretation is based on the notions of potentiality and actuality, which are to be found in Aristotle and Thomas Aquinas. According to this new interpretation, the *nemo plus* argument only applies to those things which are not possessed either in actuality or in potentiality (*quod quis non habet in actu, nec in potentia*)<sup>137</sup>. Accordingly, one may be able to give even what is held only in potentiality. Panormitanus cites as examples of cases where one gives what he only has in potentiality, that electors can choose a bishop despite not being bishops themselves, and that cardinals may elect the Pope, without having such dignity themselves. This new interpretation is all the more interesting considering that the distinction between having something in actuality or in potentiality is equivalent to that of having something *formaliter* and *virtualiter*, which shows that, although through a different wording, the ideas of dialecticians make their way in order to determine the scope of the rule. This reinterpretation allows therefore to explain numerous cases which would appear to contradict the *nemo plus* argument as in fact agreeing with it.

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<sup>133</sup> The link between both disciplines regarding the approach to some *regulae iuris* is so strong that, for instance, Bartolus would rather refer the reader to the commentary of Dinus on the equivalent rule in the *Liber Sextus* instead of offering himself a commentary on D. 50,17,54: Bartolus de Saxoferrato, *In secundam Digesti Novi partem Commentaria* (Turin 1574), f. 252, lex 55: “Dic, ut no. per Dy. inc. nemo potest plus. extra eo. tit.lib.6”.

<sup>134</sup> That this idea was originally from Paulus de Liazariis is declared by Jason de Mayno, *In primam Digesti novi partem commentaria* (Lyon 1582), f. 8va *i.f.*, reproduced below, and Cagnolus, *Commentarii in titulum.ff. De Reg. Iur.* (Lyon 1559), f. 150r: “Abba. post Paul. de Eleaza. in cap. cura. de iur. patron. [X 3,38,11] ea propter cum dominus potentiam habeat...”.

<sup>135</sup> Johannes de Imola, *Commentaria in librum tertium Decretalium* (Venice 1500), f. 196va (commenting X 3,21,6).

<sup>136</sup> Panormitanus, *Commentaria in Tertium Decretalium Librum* (Venice 1591), f. 183rb (commenting X 3,38,11): “Dic quod id, quod quis non habet in actu, nec in potentia, non potest in alium transferre, sed id, quod habet in potentia, licet non habeat in actu, potest transferre. Exemplum in electoribus, qui non habent dignitatem Episcopalem, & tamen transferunt in electum, & in Cardinalibus, in Papam”.

<sup>137</sup> Panormitanus, *Commentaria in Tertium Decretalium Librum* (Venice 1591), f. 183rb.

The new interpretation of the *nemo plus* rule made the long list of exceptions traditionally grouped around it seem rather out of place, and already in the 15<sup>th</sup> century attempts are made to discard such exceptions. Guillaume Maynier (1420–1502) in his commentary to D. 50,17,54 declares, like most of his predecessors, that the rule has numerous exceptions<sup>138</sup>. However, the author strives to explain many of these cases in a way which does not contradict the *nemo plus* rule, often attempting to make previous jurists appear to be agreeing with his views. Accordingly, he explains that the *ratio* of the alienation by the *tutor* is that he acts as an owner (*vice domino*), just as the *ratio* of the alienation performed through a *procurator* is that it is regarded as performed by the principal (*per se alienasse videtur*)<sup>139</sup>, following Inst. 2,1,42. Maynier also discards explicitly that the pledge creditor constitutes an exception to the rule, since he is regarded as acting under his authorization and even as a *procurator*<sup>140</sup>. Following Bartolus<sup>141</sup>, he declares that neither would the constitution of the usufruct be an exception to the rule, since in such a case the owner does not actually (*formaliter*) have what he gives, but he does have it ‘causally’<sup>142</sup>. Maynier adds here that “he does give what he has, but not in the way he has it” (*bene dat quod habet, sed non qualiter habet*), a formula which clearly hints at dialectical distinctions and could even indicate an

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<sup>138</sup> Maynier, *De regulis iuris* (Lyon 1545), f. 69rb: “Fallit autem haec regula in multis iuribus, ut hic, et ibi notatur per glos. et Doctores”.

<sup>139</sup> Maynier, *De regulis iuris* (Lyon 1545), f. 69rb: “Primo [fallit] in lege, lex quae tutores. & l. fin. C. de admini. tut. [C. 5,37,22 + C. 5,37,28,5] Sed ratio est ibi, quia tutor vice domini est. l. interdum. § qui tutelam. ff. de furt. [D. 47,2,57,4]... Item in § nihil. Institu. de rerum divi. [Inst. 2,1,42] et ibi secundum gloss. ratio est, quia dominus constituendo procuratorem ad alienandum rem, per se alienasse videtur...” The *glossa ordinaria* declares indeed (gl. *Nihil* to Inst. 2,1,42) “Quod enim quis per alium facit, ipse facere videtur”, but does not grant this idea the same scope as Maynier regarding D. 50,17,54.

<sup>140</sup> Maynier, *De regulis iuris* (Lyon 1545), f. 69rb: “Fallit etiam in creditore. Insti. quibus alie. licet. § i. [Inst. 2,8,1] Dicit tamen Bar. quod ibi non est fallentia, quia quando creditor alienat, alienare videtur voluntate debitoris, qui obligatione consensit... Item creditor videtur vendere tanquam procurator debitoris”. Although Bartolus declares that “creditor videtur vendere tanquam procurator debitoris” (*In primam Digesti Novi partem Commentaria*, f. 78ra), he did consider this case to be an exception to the *nemo plus*, and therefore Maynier appears to be forcing the opinion of Bartolus to support his own views, just as he does with the *glossa ordinaria* regarding the case of the *procurator*.

<sup>141</sup> Bartolus de Saxoferrato, *In primam Digesti Novi partem Commentaria*, f. 78ra (commenting D. 41,1,20pr.)

<sup>142</sup> Maynier, *De regulis iuris* (Lyon 1545), f. 69rb–69va: “Item fallit secundum glos. in usufructu formali. l. id quod nostrum ff. de usus. [D. 7,1,63] sed secundum Doctores, illa non est proprie fallentia, quia ibi datur id, quod habetur, licet non detur eo modo quo habetur, sed aliter: quia ususfructus causalis habetur et datur formaliter... Ideo cum constituit usumfructum bene dat quod habet, sed non qualiter habet: nam habet causaliter, et constituit formaliter. Ita dicit Albe. secundum Iacob. de Rave. in dicta l. quod nostrum [D. 7,1,63]. Et Bartolus in l. traditio ff. de acquir. rerum do. [D. 41,1,20pr] simile notatur in l. manumissions ff. de iusti. et iure [D. 1,1,4]”.

Aristotelian influence<sup>143</sup>. Moreover, Maynier denies that the delivery by a possessor in bad faith – which allows the acquirer in good faith to eventually become owner through *praescriptio* – constitutes an exception to D. 50,17,54, since this consequence stems from a legal provision which looks after the position of the acquirer<sup>144</sup>. Through such an analysis, Maynier almost completely frees the *nemo plus* rule from exceptions, leaving as such only the case of the alienation by the judge and the case of *alluvio*.

Other authors would experiment with other formulas to explain the scope of the *nemo plus* argument, such as Jason del Mayno when commenting D. 29,2,6,5<sup>145</sup>. In this text, Jason deals with the cases in which someone who does not have a particular dignity or office confers it to someone else. He draws arguments in favour and against this possibility, having plenty of material from previous jurists to pick. Against this possibility, for example, he presents the commentary of Baldus on C. 10,32,44. In favour, firstly, the extensive opening commentary of Bartolus on C. 12,1 (*De Dignitatibus*)<sup>146</sup>, where it is discussed which individuals may confer specific dignities and whether they should themselves have such dignity. The decisive argument however is drawn from the commentary of Panormitanus to X 3,38,11, which satisfactorily explains how someone may appear to be giving something that he does not have, an argument which Jason reinforces with other texts from Roman and canon law<sup>147</sup>. Jason would apply this doctrine again when commenting D. 39,1,1,6, which deals with the *novi operis nuntiatio*. Bartolus had declared that this text assumes that the denouncing party was in possession, and quotes D. 41,1,20pr to support his view<sup>148</sup>. Jason argues that this rule only applies as long as one does not have the

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<sup>143</sup> The influence may well be indirect, but there seems to be a close connection with the idea “Aut non dedit quod non habuit, sed ut non habuit...” (*De Sophisticis Elenchis*, transl. Boethius, *Aristoteles Latinus* VI 2, p. 44).

<sup>144</sup> Maynier, *De regulis iuris* (Lyon 1545), f. 69va: “sed ibi proprie non est fallentia, quia illud non sequitur ex traditione, sed ex legis dispositione propter titulum et bonam fidem ipsius emptoris...”

<sup>145</sup> Jason de Mayno, *In primam Infortiati partem commentaria* (Lyon 1581), p. 57v–58v.

<sup>146</sup> Bartolus de Saxoferrato, *In tres Codicis libros Commentaria* (Turin 1574), f. 45v–48v, particularly f. 47vb. It should be noted that Bartolus does not himself introduce the *nemo plus* argument into this discussion.

<sup>147</sup> Jason de Mayno, *In primam Infortiati partem commentaria* (Lyon 1581), p. 58ra: “Ad hoc respondet do. Abb. in cap. cura in fin. de iure patro. [X 3,38,11] quod illud quod quis non habet in actu, nec in potentia, non potest in alium transferre: quia nemo dat quod non habet. l. traditio ff. de acquirere. re. do. [D. 41,1,20pr] et l. si universae C. de leg. [C. 6,37,15] et cap. quod autem. de iure patro. [X 3,38,5] et cap. Daybertum quaest. 7 [*Decretum Grat.* C. 1, q. 7, c. 24]. Sed illud quod quis habet in potentia, licet non habeat in actu, bene potest in alium transferre: ut in electoribus & Cardinalibus...”

<sup>148</sup> Bartolus de Saxoferrato, *In primam Digesti Novi partem Commentaria* (Turin 1574), f. 6va: “Op. de acqui. re. do. l. traditio. Sol[utio]. intellige si nuncios possidebat”.

thing actually, habitually or potentially, and quotes in favour of this view the doctrine of Paulus de Liazariis on X 3,38,11<sup>149</sup>.

The decisive step in the interpretation of the *nemo plus* rule by combining the approaches from Roman and canon law would be made by Philippus Decius (1454-1535), a disciple of Jason, in his commentary on the last title of the Digest<sup>150</sup>. This work was published for the first time in 1521 and became extremely popular, being printed 33 times between 1521 and 1608<sup>151</sup>. Decius opens his commentary to D. 50,17,54 by quoting a long list of authorities, both from Roman and from canon law, in which the rule is declared or applied, many of which refer to cases where someone carries out an act without having the necessary authority or dignity<sup>152</sup>. Afterwards, and with identical detail, Decius quotes the long list of exceptions which the rule suffers<sup>153</sup>. He then makes reference to the commentaries of Dinus and Bartolus, reproducing Baldus' opinion on the need to distinguish the meaning of 'dare', as well as the support of Angelus Aretinus for this view<sup>154</sup>. However, Decius cautiously confronts these views, declaring: "But nevertheless it may be concluded, that the rule is applied

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<sup>149</sup> Jason de Mayno, *In primam Digesti novi partem commentaria* (Lyon 1582), f. 8va i.f.: "... regula quae habet, quod quis non potest dare quod non habet l. traditio. infra. de acqui. rerum do. procedit quando quis no habet rem nec actu, nec habitu, nec potentia. Sed si uno ex istis modis habeam, possum transferre. doctr. est Pau. de Eleaza. in c. cura. de iurepat. modo dominus habet potentia ut in re sua possit pati servitutum imponi. ergo illud potuit transferre".

<sup>150</sup> The significance of Decius on this point allows discarding the claims of Stein, *Regulae iuris* (1966), p. 162, according to whom the commentary of Decius would be unoriginal with regard to his predecessors.

<sup>151</sup> Lange/Kriechbaum, *Die Kommentatoren* (2007), p. 880.

<sup>152</sup> Philippus Decius, *In tit. ff. de Regulis Iuris* (Lyon 1549), p. 224-225, where he mentions *Sextus* 5,12,79, D. 41,1,20pr, X 4,20,6, X 3,38,5, *Decretum Grat.* C. 1, q. 7, c. 24, *Decretum Grat.* D. 4 de cons., c. 41, C. 8,53,14, C. 9,47,2, C. 3,3,1, *Decretum Grat.* D. 62, c. 1, D. 1,16,4 and C. 6,37,15.

<sup>153</sup> Philippus Decius, *In tit. ff. de Regulis Iuris* (Lyon 1549), p. 225: "Et limitatur regula non habere locum in pluribus casibus: ut not. per glo. hic, & in dicta reg. nemo. & in l. traditio & in C.J. de suppl. negli. praela. Nam primo in creditore non habet locum, qui potest alienare rem debitoris: Instit. quibus alien. lic. in prin. [Inst. 2,8,1] & in l. non est novum. supra de acquiren. rer. domin. [D. 41,1,46] ubi dicitur: non est novum, quod qui dominium non habet, alii dominium praebeat, & exemplum ponit in creditore: & idem in tutote, & curatore, qui ex causa potest bona pupilli vel adulti alienare. l. lex quae tutores. l. fin. C. de administrat. tut. [C. 5,37,22 + C. 5,37,28,5] Idem in procuratore: §. nihil autem. Instit. de rer. divisio. [Inst. 2,1,42] Idem in iudice qui adiudicando rem alicui, dominium transfert quod ipse non habet. §. fin. instit. de offic. iudic. [Inst. 4,17,4] cum simil. ut per glos. hic, & in locis praeallega".

<sup>154</sup> Philippus Decius, *In tit. ff. de Regulis Iuris* (Lyon 1549), p. 225: "& in d. Regu. nemo. ubi Dyn. ad quem Bar. hic se remittit. Bald. vero in l. manumissions. [D. 1,1,4] circa fin. in versi item gloss. supra de iusti. & iure. declarando istam regulam, dicit quod dare sumitur dupliciter. Primo, pro conferre: secundo, pro transferre. Primo modo regula non procedit: quia episcopus confer beneficia in quibus non habet dominium neque possessionem: sed sufficit quod habeat ius conferendi. Secundo modo habet locum regula: quia quis transferre non potest quod non habet: & sequitur Angel. Areti. Insti. de libert. in prin. col. ii. [Inst. 1,5pr]

without distinction” (*Sed tamen concludi potest, quod regula indistincte procedat*)<sup>155</sup>. He then proceeds to study the cases mentioned before, showing that in fact the rule is not broken in any of them. Firstly, the alienation by the creditor of a pledged object would take place on behalf of the owner (*nomine domini*) and according to his authorization (*et de eius voluntate*), quoting Inst. 2,8,1 in favour of this view. An identical solution is given in the case of the *procurator*, *tutor* and *curator*, since they all act on behalf of the owner (*nomine domini faciunt*). In all of these cases, the owner himself is considered to transfer ownership (*Et sic a domino videtur dominium transferri*). In the case of the bishop and the judge, they can bestow due to their dignity (*ratione officii*) what they do not have, being regarded as having what they give through the interpretation of the law. Therefore, whether someone ‘has’ or not can be subject to interpretation. Decius then quotes the opinion of Panormitanus regarding X 3,38,11, showing how broadly the rule can be interpreted. Decius therefore becomes the first author to comment the *nemo plus* rule in a way which systematically presents it as flawless, explaining the cases which would appear to contradict the rule in accordance with it. Some medieval jurists had in fact claimed that the alienation by a non-owner should be regarded as performed by the owner himself, an idea which was firmly rooted in some texts, but this idea was never related to the scope of the *nemo plus* rule. However, once the general attitude concerning the validity of the rule changed, it was easy to reverse the interpretation of the rule and claim that in all of the cases of transfer of ownership by a non-owner there is no exception to the general rule.

Despite the fact that Decius presents his interpretation to D. 50,17,54 in a way which seeks support mainly in the texts of the *Corpus Iuris Civilis*, the study of previous jurists shows that the main driving force which led to his reinterpretation were the developments in the field of dialectics, which to a great extent became widespread among legists through the influence of canon law, where the existence of exceptions to the rule was less adequate than in Roman law. This shows the significance that non-legal disciplines had for the interpretation of the *nemo plus* rule<sup>156</sup>, and that the acquaintance of jurists with

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<sup>155</sup> Philippus Decius, *In tit. ff. de Regulis Iuris* (Lyon 1549), p. 225: “Sed tamen concludi potest, quod regula indistincte procedat: quia creditor qui habuit potestatem alienandi, illud facit nomine domini, & de eius voluntate, ex quo ita semel voluit & se obligavit: ut probatur in §.i. insti. quib. alien. lic. [Inst. 2,8,1] ibi voluntate debitoris intelligitur pignus alienare. Et idem in procuratore, tutore & curatore qui nomine domini faciunt. Et sic a domino videtur dominium transferri. In episcopo & iudice qui concedunt quod non habent, illud est ratione officii, & quo ad interpretationem iuris habere videntur. Et sic dicimus, quod quis non potest dare quod non habet, vere vel interpretative secundum iuris dispositionem. & Abb[as Panormitanus]. in capitu. curat. in fin. De iure patronat. [X 3,38,11] dicit, quod illud quod quis non habet in actu nec potentia, transferri non potest. Sed illud quod quis habet in potentia, licet non in actu, potest in alium transferri: ut patet in canonicis, qui eligunt episcopum: & cardinalibus, qui eligunt summum Pontificem”.

<sup>156</sup> For the general formation of medieval jurists, particularly regarding dialectics and philosophy, see Otte, *Dialektik und Jurisprudenz* (1971), p. 17-32; Gualazzini, *Trivium e Quadrivium* (1974), p. 17-42; Vervaart, *Studies over Nicolaas Everaerts* (1994), p. 37-62.

notions from the field of dialectics must at some point have made it inadequate to simply set a large list of exceptions to an argument which was approached by most authorities at the time as an infallible truth which could be adequately explained by making some basic distinctions.

### 5. Absolute validity of the *nemo plus* rule since the 16<sup>th</sup> century

The commentaries on the *nemo plus* rule after Decius offer a very different approach than that of most medieval jurists, following the new ideas of humanist scholarship. The long lists of exceptions disappeared from most commentaries<sup>157</sup>, being either drastically reduced to one or two specific cases or transformed into an enumeration of apparent exceptions. Already Johannes Ferrarius would present the numerous exceptions to the rule in the same way as Decius, i.e. explaining how in each case one may understand that the owner does give what he has<sup>158</sup>. Cagnolus<sup>159</sup> and Philippus Matthaëus<sup>160</sup> also explain in detail the different doctrinal opinions regarding the application of the rule, and whether someone may in fact give what he does not have. Even more detailed is the account of Peckius the Elder, who enumerates eleven exceptions to the rule only to carefully discard them one by one<sup>161</sup>. Donellus would make use of the new interpretation of the *nemo plus* rule to describe a general systematization regarding the transfer of ownership. He declares that the delivery can be made by the owner or by those who are considered to be the owner at the conveyance<sup>162</sup>, and explicitly discards that the *procurator*<sup>163</sup> or the pledge creditor<sup>164</sup> are exceptions to

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<sup>157</sup> Few authors would still consider that the rule faces numerous exceptions, such as Güntzel, *De regulis juris* (Leipzig 1657), p. 167-168; Müller, *Ad Tit. Dig. Ult. De Regulis Juris Antiqui* (Lepizig/Frankfurt 1685), p. 309-310.

<sup>158</sup> Ferrarius, *De regulis iuris* (Marburg 1536), 303-304.

<sup>159</sup> Cagnolus, *Commentarii in titulum ff. De Reg. Iur.* (Lyon 1559), f. 149v-150v.

<sup>160</sup> Philippus Matthaëus, *De diversis regulis juris antiqui* (Marburg 1607), p. 290-292.

<sup>161</sup> Peckius the Elder, *Ad regulas iuris canonici commentaria* (Helmstedt 1588), f. 366v-369r.

<sup>162</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 4, cap. 15, § 4 (I, col. 732): “Ante omnia eum quaerimus, qui possit transferre. In hoc genere sunt duo, dominus rei; & si quis est, qui in hac translatione pro domino habeatur”.

<sup>163</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 4, cap. 15, § 9 (I, col. 734): “... Non sunt hi quidem domini. Sed nihil interest, inquit Cajus, *utrum ipse dominus per se tradat alicui rem, an voluntate ejus alius*. d. L. qua ratione, §. *nihil autem* [D. 41,1,9,4]. Quo significatur, ab his rem transferri non tam ideo, quod domini potestate in eo utantur: quam quod videatur ipse dominus tradidisse per alium, cujus opera in ea re utitur”.

<sup>164</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 4, cap. 15, § 13 (I, col. 736-737): “Non pugnat hoc cum jure superiore, quo negavimus, quemquam plus juris in alium transferre, quam ipse habuit; *L. nemo plus iuris, D. de reg. jur.* [D. 50,17,54] et eum, qui dominium in fundo non habuit, ad eum, qui accipit, quidquam transferre. *L. traditio, D. de acq. rer. dom.* [D. 41,1,20pr] Quod enim creditor pignus alienat, facit hoc domini voluntate, §. *contra, Instit. quib. al. non lic.* [Inst. 2,8,1] quoniam pignus hac lege acceperat, ut vendere liceret, sive convenerit nominatim, ut liceret, sive non convenerit. Idque appellatio pignoris in se continet. d. L. 4. *D. de pign. act.* [D. 13,7,4]” It should be noted that the authorization to alienate is understood to be given in an either explicit or tacit way.

the rule, since here the owner himself is considered to perform the delivery. In such cases, as well as regarding legal guardians, the non-owner is seen as acting 'in place of the owner' (*domini loco*)<sup>165</sup>.

The interpreters would rely heavily on the text of Inst. 2,1,42 / D. 41,1,9,4 to equate the delivery by the owner himself and the delivery by an authorized non-owner, which would allow freeing the *nemo plus* rule from exceptions. The textual support for this view is not so evident in cases where the owner does not appear explicitly to be giving his authorization, and therefore such cases are often forced into the general systematization. Donellus considers that the pledge creditor did in fact authorize the alienation, and does not explain how exactly legal guardians act *domini loco*. A similar attitude is found in the very popular commentary on D. 50,17 of Bronchorst<sup>166</sup>, who declares that the delivery by an authorized non-owner is the same as that of the owner (*Quia perinde est, ac si ipsi fecissemus*). The same would explain the case of the pledge creditor, since he delivers on account of the authorization of the debtor (*ex pacto et concessione debitoris*). Bronchorst then introduces the rest of the cases dealt with by Decius in few words, explaining briefly that the *tutor* and *curator* are regarded as acting on behalf of the owner, and that the bishop confers dignities which he does not have on account of his office. A similar explanation of the subject is found in the work of Johan van den Sande<sup>167</sup>. The idea that the rule would face no exceptions would be upheld by later scholars, as can be seen in the work of Anaklet Reiffenstuel (1641-1703), who discarded any possible objection to the rule as presented in Sextus, *De reg. jur.* 79<sup>168</sup>. Also the commentary on D. 50,17,54 by Jean Baptiste Dantoine is almost exclusively dedicated to explaining in detail how all texts which would seem to present an exception to the rule can be explained in another way<sup>169</sup>. Moreover, a dissertation by Kaulfuss and Hommel on the

<sup>165</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 4, cap. 15, § 15 (I, col. 738).

<sup>166</sup> Bronchorst, *De Diversis Regulis Iuris* (Leiden 1624), p. 137: "Si tamen alicui speciale mandatum alienandi, aut libera universorum bonorum administratio a domino permessa sit, isque rem vendiderit et tradiderit, facit eam accipientis. Quia perinde est, ac si ipse fecissemus. §. *venditae*. (*alii: qua ratione*) *Instit. de rer. divis.*[Inst. 2,1,41(*i.p.*)/42] Idem est in creditore pignus alienante, transfert enim dominium, quod ipse non habet, sed hoc ex pacto et concessione debitoris facit, §. *contra*, *Instit. quib. alien. licet*. [Inst. 2,8,1] Idem de tutore et curatore dicitur, qui ex causa bona pupilli et minoris vendunt, *l. lex quae tutores* [C. 5,37,22] *et l. ult. C. de admin. tuto.* [C. 5,37,28,5] quia quidquid faciunt, nomine domini facere censentur. Judex etiam adjudicat alteri dominium rei, quod non habet, §. *ult. Inst. de off. jud.* [Inst. 4,17,4] et Episcopus confert beneficia, quae non sunt sua, sed hoc sit ratione officii. Publicus executor quoque, fiscus et Imperator dominum transferunt, quod non habent. §. *ult. Inst. de usucap. l. 2. C. de com. rer. alien. l. Lucius, 11, ff. de evict.*"

<sup>167</sup> Van den Sande (1568-1638), *De Diversis Regulis Juris antiqui* (Leiden 1652), p. 318-320.

<sup>168</sup> Reiffenstuel, *Tractatus de regulis juris* (Ingolstadt 1733), p. 189-190.

<sup>169</sup> Dantoine, *Les règles du droit civil, dans le même ordre, qu'elles sont disposées au dernier Titre du Digeste* (Brussels 1742), p. 176-177.

subject has as a starting point the rejection of any possible exception to the *nemo plus* rule<sup>170</sup>.

Despite these very categorical opinions regarding the absolute validity of the *nemo plus* rule, none of the authors just mentioned offers anything similar to the elaborate explanations of authors such as Philippus Decius. Maybe this lack of detail when dealing with the subject can be explained by the fact that, to a large extent, it must have been assumed by the beginning of the 17<sup>th</sup> century that the rule indeed contained none or few exceptions, considering its rational and self-explanatory nature, and therefore no further arguments were needed when defending its validity. In fact already Philippus Decius himself had relied more on the evidence he could find in the Justinianic compilation to defend the absolute validity of the rule than on the dialectical ideas which led to his interpretation. It is therefore no wonder that later scholars would dismiss the reference to dialectical notions altogether, as some kind of superfluous medieval reasoning which was of little moment from a legal perspective. The only exception to this trend is the commentary of Wissenbach (1607–1665), who makes use of dialectical distinctions when pointing out that no one can give what he does not have actually or virtually (*formaliter vel eminenter*)<sup>171</sup>.

Regarding the general influence of non-legal sources concerning the *nemo plus* argument, one could expect that the familiarity of humanist legal scholars with literary sources from classical Antiquity would bring further interactions with dialectics or rhetoric, but the fact is that the references made on this point have a minor role, merely reassuring the high status granted to the *nemo plus* rule. Peckius the Elder, for example, when commenting on Sextus, *De reg. jur.* 79, notes that the *nemo plus* is used by Plato in his Symposium<sup>172</sup>. Petrus Faber quotes Seneca in order to show the rationality of the rule<sup>173</sup>. Not many years later Grotius as well would quote the rule in the wording of Seneca (*De beneficiis* 5,12,7) in his *De iure praedae*<sup>174</sup>, and only in *De iure belli ac pacis* would he quote

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<sup>170</sup> Kaulfuss/Hommel, *Dissertationem de eo, quod ipse non habens alteri dare potest* (Leipzig 1712), p. 10–11.

<sup>171</sup> Wissenbach, *In extremum Pandectarum titulum de Diversis Regulis Juris antiqui* (Franeker 1661), p. 97: “Causa nihil potest dare effectui, quod ipsa non habeat formaliter vel eminenter. Axioma est Logicorum”.

<sup>172</sup> Peckius the Elder, *Ad regulas iuris canonici commentaria* (Helmstedt 1588), f. 365r.

<sup>173</sup> Petrus Faber, *Ad Titulum de diversis regulis iuris antiqui* (Cologne 1608), p. 249: “Naturalem intellectum habet haec regula, quoniam nemo potest (ut apud Senecam legimus) quod non habet, dare...”

<sup>174</sup> Grotius, *De iure praedae* (ed. Hamaker 1868), cap. 15 (p. 340): “Aut qui jus suum aut societati, aut alteri cuius transcribunt, siva aliud quidpiam recipient ejus rei loco, credenda sunt vendidisse, sive nihil volunt praetor gratiam, tamen negare non possunt pro suo habuisse, quod faciunt alienum. Nemo enim potest quod non habet dare”. (On the other hand, those persons who transfer a right either to an organized entity or to an individual, must be regarded as having sold that right, if they receive anything in exchange for it; or, even if they wish for no payment except gratitude, they still may not deny that they first considered as their own that which they are now converting into the property of another. For no one can give away what he does not possess [transl. Williams & Zeydel]).

Ulpian and Gaius before Seneca<sup>175</sup>. The use of Seneca – even replacing legal sources – may be seen as an attempt to show the rational character of the argument, and therefore reinforces the general view on the *nemo plus* in the 17<sup>th</sup> century. Later authors would also make sporadic references to literary sources. Schulting points out the use of the argument by Lactantius and in the Council of Carthage when discussing D. 50,17,54<sup>176</sup>, and Johann Philipp Datt (1654-1722) quotes Seneca and Lactantius when bringing up the argument in a legal context, without quoting – oddly enough – legal texts<sup>177</sup>. None of these references, however, appear to have introduced innovative considerations in the analysis of the *nemo plus* rule, but seem rather inspired by the learned desire to quote literary authorities or to reinforce the idea of rationality of the *nemo plus* rule. This leads to the curious conclusion that the *nemo plus* argument as used in literary sources was more influential among jurists in the Middle Ages than during and after the 16<sup>th</sup> century.

While most authors enthusiastically defended the absolute validity of the *nemo plus* rule, others were more cautious when considering its scope of application, granting at least one or two exceptions to it. Cuiacius, for instance, agrees with the general validity of the *nemo plus* rule, but he does consider that the case of the pledge creditor is a true exception to the rule<sup>178</sup>, which follows the very explicit declaration of Ulpian in D. 41,1,46. Petrus Faber also accepted as exceptions those texts in which Roman jurists acknowledge that the rule is broken, such as D. 41,1,46, D. 7,1,63 and D. 41,2,21<sup>179</sup>. Similar exceptions are found in the

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<sup>175</sup> Grotius, *De iure belli ac pacis* (Aalen 1993), lib. 3, cap. 16, 1 (p. 798): “At quae bello iniusto quaeruntur restituenda diximus, nec ab iis tantum qui ceperunt, sed et ab aliis ad quos res quoquo modo pervenit. Nemo enim plus iuris ad alium transferre potest quam ipse habuit, aiunt iuris Romani auctores, quod Seneca breviter explicat, *nemo potest quod non habet dare*”. (But things taken in an unjust war, I have already said, are to be restored, not only by the immediate captors, but by others also, who shall happen to be possessed of them on any account. For nobody can make over to another more right than he has himself, say the Roman jurists, which *Seneca* briefly explains: *No man can give what he does not have* [transl. Tuck, modified]). The notes to the text point out as legal sources D. 9,4,27,1 and D. 41,1,20pr.

<sup>176</sup> Schulting, *Notae ad titulos digestorum de verborum significatione et regulis iuris* (Leiden 1799), p. 154.

<sup>177</sup> Johann Philipp Datt, *De venditione liberorum diatriba* (Ulm 1700), p. 111.

<sup>178</sup> Cuiacius, *Ad diversos titulos Pandectarum* (Paris 1658), col. 740: “Quod tamen vitiatum quandoque: creditor enim distrahendo pignus dominium transfert quod non habet, *l. non est novum, sup. de adq. rer. dom.* [D. 41,1,46] non tantum ex conventionem, sed & contra conventionem debitor denuntiatio non reluente pignus.” On a later version of his commentary Cuiacius still considers this case as exceptional, but introduces the notion of a “tacit intent” when nothing was agreed which challenges this notion (col. 864): “Id tamen vitiatum nonnumquam. Nam creditor distrahendo pignus dominium transferre pignoris, quod non habet, *l. non est novum 46. de acquir. rer. dom.* [D. 41,1,46] Cuius rei rationem adfert Iustinianus, quia distrahit ex voluntate debitoris, atque nihil mirum, si transfertur dominium distrahente eo. Sed creditor potest pignus distrahere contra conventionem: scilicet debitore admonito non luente pignus. Verum hoc casu videtur distrahere ex tacita voluntate debitoris, cum debitor pignus non luat, quando ei denuntiatum est”.

<sup>179</sup> Petrus Faber, *Ad Titulum de diversis regulis iuris antiqui* (Cologne 1608), p. 253-254.

writings of Hubrecht van Giffen<sup>180</sup> (c. 1534-1604). This caution would be reflected in the general writings on the transfer of ownership by authors such as Vinnius<sup>181</sup> and Heineccius<sup>182</sup>, according to which not every case of *traditio* by a non-owner is considered as performed by the owner himself, as well as on the treatment of D. 50,17,54 specifically by authors such as De Ferrière<sup>183</sup>. Likewise, Pothier acknowledges that the alienation by the creditors of the debtor is an exception to the general rule, as D. 41,1,46 would illustrate<sup>184</sup>.

Despite the acknowledgement of certain exceptions to the rule by some authors, the general approach was dramatically different in the 16<sup>th</sup> century than that which had been upheld by authors like Accursius. An eloquent proof of this evolution can be found in the additions made to the gloss of Accursius in the 17<sup>th</sup> century. Indeed, next to the gloss *Datio* to Inst. 1,5pr, where it is said “and this happens often, that one gives what one does not have” (*& hoc plerunque contingit, quod quis dat quod non habet*), the Lyon edition of 1627 includes an addition which categorically refutes this idea by noting that jurists jointly disapprove of it, quoting moreover D. 41,1,20pr to support the general validity of the rule<sup>185</sup>.

Remarkable exceptions to this general evolution are the commentaries of Raevardus and Godefroy<sup>186</sup>, who were more concerned with locating the rule in its original context by resorting to the methods of the humanists than with determining which cases were exceptions to the rule and which were not<sup>187</sup>. Godefroy stresses that the rule dealt with the law of succession, and that accordingly it had nothing to do with the problem of who could transfer

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<sup>180</sup> Van Giffen, *Tractatus de diversis regulis juris antiqui* (Strasbourg 1607), p. 187.

<sup>181</sup> Vinnius, *In quatuor libros Institutionum imperialium commentarius academicus et forensis* (Amsterdam 1665), lib. II, tit. VIII (p. 252), considers that the alienation by a pledge creditor, by a *tutor* and by a *curator*, are exceptions to the general rule according to which only the owner may transfer ownership, but especially the latter two, since they do not derive their faculty from the owner, but from the law (*alienandi potestas non a domino, sed jure tributa est*).

<sup>182</sup> Heineccius, *Elementa juris civilis secundum ordinem Institutionum* (Venice 1764), §§ 467-468 (p. 165-166) considers as cases where a non-owner may validly transfer ownership the pledge creditor and the *tutor*.

<sup>183</sup> De Ferrière, *Ad titulum Digestorum de regulis juris antiqui commentarius* (Paris 1686), p. 251. The author is respectful of D. 41,1,46 and D. 7,1,63, declaring that the alienation by the pledge creditor and the constitution of usufruct by the owner are exceptions to the general rule. Similarly, an 18<sup>th</sup> century doctoral dissertation by Brouwer, *Disputatio juridica inauguralis de illis, quibus alienare licet, vel non* (Utrecht 1724), p. 12 ff., names the transfer of ownership by the pledge creditor as the main example of a valid alienation concluded by a non-owner, forming an exception to the *nemo plus* rule (p. 16).

<sup>184</sup> Pothier, *Traité du droit du domaine de propriété* (Paris/Orléans 1772), nr. 224 (p. 218-219).

<sup>185</sup> *Institutionum libri quatuor* (Lyon 1627), col. 31 “Hanc reprobant communiter Doctor. hic per regulam l. *traditio*. ff. de *acqu. re. dom.* [D. 41,1,20pr]”

<sup>186</sup> See Chapter 6, Section 1 above.

<sup>187</sup> Regarding Godefroy's approach to the *regulae iuris* see Stein, *Regulae iuris* (1966), p. 167-170.

ownership and on what ground<sup>188</sup>. Being completely ahead of his time and outside of the mainstream, such an opinion remained mostly ignored by his contemporaries<sup>189</sup>. Moreover, Godefroy's interpretation offers the significant practical disadvantage of depriving the *nemo plus* rule of any systematic value, leaving no general rule around which the different cases of alienation by a non-owner could be enumerated and explained. Since D. 50,17,54 had continued to fulfil this useful systematic function since the glossators, it must have appeared inconvenient to manage without it overnight. This explains why Petrus Faber, some years before Godefroy, while considering that the original context of D. 50,17,54 was the law of succession<sup>190</sup>, did not limit the application of the rule to this topic.

Two points should be noted regarding the general acceptance of exceptions to the *regulae iuris*. Firstly, the peculiar view of each jurist may be explained to a certain extent by their own views on the notion of *regulae iuris*. As Stein has shown, from the 16<sup>th</sup> century onwards some authors, such as Cuiacius, stressed the relative value of the *regulae*, which would only declare a general truth, while other authors approached them as general principles of law which the jurist could use for dialectic reasoning<sup>191</sup>. This may explain why authors such as Cuiacius and Pothier were more respectful of approaching the case of the pledge creditor as an actual exception to the *nemo plus* rule – just as D. 41,1,46 explicitly declares – while others were keen to prove that even in this case the rule suffered no real exception. Secondly, it must be observed that the discussion was only relevant from a systematic and dogmatic perspective, but no particular consequence was directly attached to it. This is why most authors do not go into much detail to explain what makes one case an exception to the rule and the other not, while others seem to be completely uninterested in the point.

In the case of the *nemo plus* rule, the discussion regarding the existence of exceptions to the rule would also be linked to the general authority and nature assigned to it. As shown above, up until the 15<sup>th</sup> century the rule was simply a

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<sup>188</sup> Godefroy, *De Diversis Regulis Iuris* (Geneva 1653), p. 244: “Haec cum ita sint, liquet una ferme litura expungenda esse, quaecunque ad hanc legem Interpretes commentantur. Neque enim id quaeritur, An quaelibet res, quae in iure defuncti iam fuit, ad haeredem transmitti possit. Rursum non quaeritur, An eodem semper jure, et cum sua causa, res a defuncto in haeredem transferatur. Multo minus quaeritur, An res quandoque a non domini, officii ratione, vel juris interpretatione, vel tacita expressave domini voluntate in alium transferri possit, quamquam neque illud proprie transferre est: Et in genere non quaeritur quis et quid alienare possit, verum quid juris TRANSFERRI transmitti ad alium possit. Quare apagesis mihi iam novem fallentias, quae ab Accursio ad hanc regulam cumulantur: quae ad hanc regulam seu ejus speciem minime pertinent”.

<sup>189</sup> The opinions of Godefroy are reproduced by other authors sharing the same approach to Roman sources, such as Schulting, *Notae ad titulos digestorum de verborum significatione et regulis juris* (Leiden 1799), p. 153-154.

<sup>190</sup> Petrus Faber, *Ad Titulum de diversis regulis iuris antiqui* (Cologne 1608), p. 249: “Pertinet vero proprie ad intestatorum successiones, de quibus loquebatur Ulpianus lib. 46. ad edictum, quod ab interpretibus animadversum non fuisse miror”.

<sup>191</sup> Stein, *Regulae iuris* (1966), p. 162-170.

useful starting point around which numerous exceptions could be grouped. After Decius, the *nemo plus* rule would normally be presented in a much more authoritative way, even as a self-evident principle, especially by those authors who did not admit exceptions to it. Ferrarius, for example, would paraphrase Plautus and declare that drawing more rights than those someone has is like asking for water from a pumice-stone<sup>192</sup>. Petrus Faber declares that this rule resides in the ‘natural intellect’<sup>193</sup>. Donellus would declare that the *nemo plus* rule stems directly from the *ratio naturalis*<sup>194</sup>, and he would be consistent with this high opinion by discarding every possible exception to the rule. The same applies to Bronchorst, who declares the rule to be founded upon natural equity<sup>195</sup>, while Wissenbach considers it to be logical<sup>196</sup>. Even when some later authors would admit the possibility of exceptions, the idea of the *nemo plus* rule as essentially rational, self-evident and equitable would become a commonplace, as may be seen in the writings of Güntzel<sup>197</sup>, Heineccius<sup>198</sup> and Pothier<sup>199</sup>. Moreover, the numerous texts reproducing the *nemo plus* argument within Roman sources would often be seen as a confirmation of the universal validity and rationality of the rule contained in D. 50,17,54<sup>200</sup>. Accordingly, the *nemo plus* rule appeared as

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<sup>192</sup> Ferrarius, *De regulis iuris* (Marburg 1536), p. 302: “Recte itaque quod cuius est, sine eius facto ad alium non debet transferri. Unde hoc saltem iuris ad alium traduxeris, quod ipse habes, ut citius e pumice aquam exegerit quis (ut cum Plauto loquar) quam ex te plus iuris”. The paraphrased text corresponds to Plautus, *Persa* 41-42; *Aulularia* 297.

<sup>193</sup> Petrus Faber, *Ad Titulum de diversis regulis iuris antiqui* (Cologne 1608), p. 249: “Naturalem intellectum habet haec regula...”

<sup>194</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 4, cap. 15, § 5 (I, col. 732): “Principio, si hic ex aliena persona res non geritur, eum, qui dat, dominum esse oportet. Si non est: ex sua persona dominium non transferet, qui ipse non habuit. Ut enim bene regula iuris in universum traditur, et ratio ipsa naturalis dictat, nemo plus iuris in alium transferre potest, quam ipse habet, L. *nemo plus iuris*, D. *de regul. jur.* [D. 50,17,54]”.

<sup>195</sup> Bronchorst, *De Diversis Regulis Iuris* (Leiden 1624), p. 135: “Quotidiana et usitata haec est regula, et ex naturali aequitate suam trahit originem. Natura enim non patitur, ut quis plus dare aut transferre possit, quam ipse habeat”.

<sup>196</sup> Wissenbach, *In extremum Pandectarum titulum de Diversis Regulis Iuris antiqui* (Franeker 1661), p. 97: “Axioma est Logikorum”.

<sup>197</sup> Güntzel, *De regulis iuris* (Leipzig 1657), p. 165: “Haec regula trahit originem suam ex naturali aequitate, siquidem natura non patitur, ut quis plus dare vel transferre possit, quam ipse habeat”.

<sup>198</sup> Heineccius, *Recitationes in elementa juris civilis* (Bratislava 1773), §§ 378-384 (p. 242) expresses that the *tradens* must be owner in eloquent terms, qualifying as an axiom: “Axioma est, *tradi res debet a domino*. Quum enim, quod quis non habet, alteri dare nequeat: quomodo, quaeso, aliquis transferat traditione dominium, quod ipse non habet?”

<sup>199</sup> Pothier, *Traité du droit du domaine de propriété* (Paris/Orléans 1772), nr. 219 (p. 213): “C’est un principe pris dans la nature des choses, que personne ne peut transférer à un autre plus de droit dans une chose qu’il n’y en a lui-même: Nemo plus iuris ad alium transferre potest quam ipse haberet. L. 54, ff. de reg. Jur. [D. 50,17,54]”

<sup>200</sup> See e.g. Philippus Matthaeus, *De diversis regulis iuris antiqui* (Marburg 1607), p. 289; Bronchorst, *De Diversis Regulis Iuris* (Leiden 1624), p. 135; Peckius the Elder, *Ad regulas iuris canonici commentaria* (Helmstedt 1588), 365v; Güntzel, *De regulis iuris* (Leipzig 1657), p. 166-167. Petrus Faber, *Ad Titulum de diversis regulis iuris antiqui* (Cologne 1608), p. 249:

the fundamental starting point to obtain a coherent legal outcome within the law of property<sup>201</sup>.

The idea of the intrinsic rationality and validity of the rule would resist the test of time and even be emphasised by later authors. Already in the 19<sup>th</sup> century García Goyena would still declare that “these rules [D. 50,17,54, and Siete Partidas 7,34,12] are so clear, so simple and of such evident equity, that any commentary about them would be superfluous”<sup>202</sup>. At this point it becomes clear why many Roman law scholars since the 19<sup>th</sup> century approached the *nemo plus* rule as absolutely valid from the start<sup>203</sup>. This interpretation is not derived directly from the sources of Roman law, being rather projected on them as a consequence of the long evolution which the rule had to undergo under the *ius commune*. The survival of an idea of infallibility among modern Roman law scholars shows to what extent they were influenced by the learned tradition developed around the rule. Interestingly enough, modern scholars became more concerned with proving the post-classical character of the rule than with revising the views that earlier jurists had built around Roman texts.

Finally, it is worth noting that the absolute validity granted to the *nemo plus* rule since the 16<sup>th</sup> century led jurists to apply it in an authoritative way in the most varied contexts, and not only within the law of property. Already before this time jurists had often applied this rule to various problems, as happened when discussing the nature of the manumission<sup>204</sup>. From the 16<sup>th</sup> century, the *nemo plus* is viewed more as an infallible truth than as a starting point for legal reasoning, and therefore it is applied in the most varied contexts as a decisive argument. Already the wide formula of Sextus, *De reg. jur.* 79 gave way for a wider application of the argument, and we find Adriaan Florensz – who would later become Pope Adrian VI – at the beginning of the 16<sup>th</sup> century applying the *nemo plus* rule to determine the faculties of judges<sup>205</sup>. Later in the 16<sup>th</sup> century we find Donellus making abundant use of the *nemo plus* rule in the most diverse

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“...cuius vis etiam per totum fere ius civile fusa est”; Kaulfuss & Hommel, *Dissertationem de eo, quod ipse non habens alteri dare potest* (Leipzig 1712), p. 7 and 10.

<sup>201</sup> See e.g. Voet, *Commentarius ad Pandectas* (Paris 1829), ad D. 19,4,2.

<sup>202</sup> García Goyena, *Reglas del derecho romano* (1841), p. 75: “Estas reglas son tan claras, tan sencillas y de tan notoria equidad, que todo comentario sobre ellas sería superfluo”.

<sup>203</sup> See Chapter 6, Section 1 above.

<sup>204</sup> See also D. 26,2,6,5, commented by Jason de Mayno, *In primam Infortiati partem commentaria* (Lyon 1581), f. 58r, where the *nemo plus* argument is applied to the acquisition of an inheritance, as well as C. 6,57,5, commented by Baldus de Ubaldis, *In sextum Codicis librum Commentaria* (Venice 1577), f. 193ra, where it is applied to discuss the condition of the illegitimate children of illustrious women.

<sup>205</sup> Adrian VI, *Questiones quotlibetice* (Leuven 1515), quaestio 6 articulus 3 (h) (f. 57): “Ex hominibus vero non potest ad hoc auctoritatem habere quum non possunt homines plus iuris transferre quam eis competere dinoscatur iuxta regulam nemo plus. de re. iu. li. sex. [Sextus, *De reg. jur.* 79]”. This text is studied by Chorus, *Het geweten van de strafrechter* (2014), p. 52, whom I thank for his kind indication regarding the use of the *nemo plus* rule by Adrian VI.

contexts, such as the faculties of the *princeps*<sup>206</sup>, manumission<sup>207</sup>, the acceptance of an inheritance<sup>208</sup>, the cession of rights<sup>209</sup>, the faculties of the judge<sup>210</sup>, to name just a few. Such a broad use agrees with Donellus' view on the rule as dictated by the *ratio naturalis*, which naturally grants it a broader scope of application than that of a mere general rule. Grotius would later make use of the *nemo plus* argument within his *De iure praedae*<sup>211</sup> and in *De iure belli ac pacis*<sup>212</sup>, dealing in both cases with the ownership of the prize of war. Since the idea according to which the *nemo plus* rule reproduced a basic rational truth continued to gain ground in the centuries to come, the application of the rule in the form of a principle would become common in legal scholarship<sup>213</sup>, an evolution which is still to be seen nowadays, as will be shown below.

## 6. *Nemo dat quod non habet* in the Common law

While in continental Europe the *nemo plus* argument was normally approached with regard to the *regulae iuris* of the Digest and the Liber Sextus, in Common law jurisdictions we often find this argument conveyed in an alternative way through the formula '*nemo dat quod non habet*'. Scholars often regard this rule – which we could name here the '*nemo dat* rule' – to exist from time immemorial, which immediately poses the question concerning whether jurists in this legal system experienced a different interplay between legal and literary sources, particularly since the formula '*nemo dat quod non habet*' bears a close resemblance to some of the formulations of the argument among dialecticians. Would this alternative formula imply that literary sources had a different impact in the Common law than in the Civil law? Which authority should be identified behind this rule? Despite the relevance of this point, little information is to be found concerning the origins and evolution of the *nemo dat* rule. Since the issue may throw some light on the dialogue between legal and literary sources, as well as on the fate of the *nemo plus* argument in legal writings, this small section is

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<sup>206</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 1, cap. 15, § 12 (I, col. 126).

<sup>207</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 2, cap. 13, § 2 (I, col. 262).

<sup>208</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 6, cap. 24, § 25 (II, col. 259).

<sup>209</sup> Donellus, *Commentarius de iure civili* (Rome 1828), lib. 8, cap. 19, § 32 (II, col. 882). This text insists moreover on the intrinsic rationality of the solution which agrees with this rule: "Quomodo igitur cedant creditores eas actiones, quas non habent? Id quidem neque natura, neque juris ratio, et regula concedit. *L. nemo plus. D. de reg. jur.* [D. 50,17,54]"

<sup>210</sup> Donellus, *Commentarii in selectos quosdam titulos Digestorum* (Macerata 1833), ad D. 42,1,13,1 and D. 45,1,72pr (II, col. 214 and 1239).

<sup>211</sup> Grotius, *De iure praedae* (ed. Hamaker 1868), cap. 15 (p. 340).

<sup>212</sup> Grotius, *De iure belli ac pacis* (Aalen 1993), lib. 3, cap. 16, 1 (p. 798).

<sup>213</sup> See other applications of the *nemo plus* argument outside its usual context in: Peckius the Elder, *Ad regulas iuris canonici commentaria* (Helmstedt 1588), f. 366r; Güntzel, *De regulis iuris* (Leipzig 1657), p. 166; Kaulfuss & Hommel, *Dissertationem de eo, quod ipse non habens alteri dare potest* (Leipzig 1712), p. 11-13.

dedicated to tackling the subject, despite the fact that the current work does not generally deal with the Common law.

The development of the *nemo dat* rule in the Common law offers completely different features to those of the *nemo plus* rule of the Civil law. Jurists in continental Europe would traditionally have a reference point in D. 50,17,54, a general rule around which different constructions were made. As shown above, already in the time of the glossators the rule fulfilled a significant systematic role, being a starting point for legal reasoning around which exceptional cases were organized. The Digest, however, did not occupy the same position of privilege in the Common law, and Ulpian's *nemo plus* rule did not become a reference point for legal systematization. Accordingly, one can only find sporadic references to the *nemo plus* argument in English legal sources. In the course of this research the oldest references which have been identified on the subject correspond to the works of Bracton, who makes use of the argument in several contexts, including the manumission<sup>214</sup>, the gift of a felon<sup>215</sup>, the gift over someone else's property<sup>216</sup>, the gift made to a bondsman<sup>217</sup>, the gift made by a bondsman under the *potestas* of his lord<sup>218</sup>, the *traditio*<sup>219</sup> and particular *exceptiones*<sup>220</sup>. Other texts in Bracton do

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<sup>214</sup> Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 28: "Sed dic vere quod libertatem dat qui manumittit, licet non suam sed alienam. Dat enim quod non habet, sicut videtur in creditore, qui usum fructum constituit in re non sua" (But say that he who manumits does properly give liberty, though he does not give his own but another's, for one may give what he does not have, as is apparent in the case of a creditor, who [may alienate a pledge though the thing is not his, and in that of one who] constitutes a usufruct in his property [transl. Thorne]). For the addition to the text see Kantorowicz, *Bractonian problems* (1941), p. 85-86.

<sup>215</sup> Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 100: "Nec succedit dominus capitalis ratione eschaetae nisi in universum ius quo dille habuit cui succedit, et unde cum ille qui dimisit non posset firmarium de iure eicere si feloniam non commisisset, pari ratione nec ille qui plus iuris non habet quam ille qui dimisit".

<sup>216</sup> Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 103: "Sed quid dicetur de eo qui nullam omnino seisinam habuit nec aliquam iuris scintillam? Si donationem fecerit de re quam alius tenet per se ipsum vel per alium nomine suo, non faciet rem accipientis cum ipse nihil teneat, quia non potest plus iuris ad alium transferre quam ipse haberet: nec plus valebit ista donatio quam valeret si aliquis transitum faciens per aliquod manerium, ab aliquo possessum, diceret socio suo viatori, *Do tibi tale manerium quod talis possidet*, quod nihil aliud esset dicere quam dare ei plenam pugnatum ex nihilo".

<sup>217</sup> Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 86: "Item esto quod servo facta sit donatio a domino, ut praedictum est, pro homagio et servitio et cum manumissione vel sine, vel per id quod tantundem valet ut praedictum est, et ille idem dominus alii dederit homagia et servitia eorum: quaero an talis illos eicere et disseisire possit cum non sit ibi factum suum nec feoffamentum. Et vero est quod non potest, non magis quam ille qui donationem fecit, quia cum loco eius succedat, non potest plus iuris clamare quam ille posset cui succedit..."

<sup>218</sup> Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 88: "De servitio autem restat quaerendum, et sic constat quod qui sub potestate alterius fuerit dare poterit. Sed qualiter hoc, cum ipse qui ab aliis possidetur nihil possidere possit? Ergo videtur quod nihil dare possit, quia non potest quis dare quod non habet, et nisi fuerit in possessione rei dandae. Respondeo, dare potest qui seisinam habuerit qualemcumque, et servus dare

not convey the argument itself, but use a language which shows that the author had the *nemo plus* in mind<sup>221</sup>. Some of these references have a close connection with Roman legal sources, and particularly the text dealing with the gift of someone else's property, which almost literally reproduces the *nemo plus* rule of D. 50,17,54 (*quia non potest plus iuris ad alium transferre quam ipse haberet*). The text dealing with *traditio* as well bears great resemblance to that of D. 41,1,20pr. Other texts make a freer use of the *nemo plus* argument, but it can still be traced back to continental law. The link is particularly clear in the text which describes the manumission, where the formula used to convey the argument (*Dat enim, quod non habet*) is identical to that of Azo<sup>222</sup>, and Bracton even uses the same examples when dealing with this matter: the pledge of the creditor and the usufruct given by the owner. Bracton therefore does not stick to one specific formula when quoting the *nemo plus* argument, and does not bother to quote the Roman texts from which some of its versions are taken. This would in turn lead to a disconnection between the argument and its original source (D. 50,17,54) among English jurists, which disguises the fact that continental law had a key role in the reception of the *nemo plus* argument in the Common law.

The significant role of Bracton in the development of the Common law inevitably led to the reproduction of the *nemo plus* argument in later works. Already the 13<sup>th</sup> century *Fleta seu commentarius juris Anglicani* applies the argument in the chapter *De Traditionibus et Usucapionibus*<sup>223</sup>, which closely follows the work of Bracton. At around the same time we find the argument in the *Britton* – a text also strongly influenced by Bracton – when dealing with gifts and deliveries<sup>224</sup>. The *nemo plus* argument, however, did not immediately find its place within the

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potest, et quandoque irritari poterit donatio et quandoque non, secundum rationem praemissam”.

<sup>219</sup> Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 126-127: “Item videndum quid transferat qui tradit. Et sciendum quod transfert ad eum qui accipit quod est apud eum qui tradit... et totum tradendo statim totum transfert ad donatarium. Si autem totum non habuerit, statim transfert id quod habet. ... Si autem omnino nihil habuerit qui tradit nec aliquam seisinam, ad eum qui accipit nihil transfert, quia dare et transferre non potest nec tradere id quod non habet”.

<sup>220</sup> Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1942) IV, p. 341: “Cum autem tenens visum habuerit vel quod tantundem valet, scire poterit utrum petenti respondere teneatur et ad breve suum vel non teneatur, secundum quod tenuerit totam rem nomine proprio vel alieno, vel nihil inde tenuerit vel non nisi eius partem, quia si totam non tenuerit amittere non potest quod non habet...”

<sup>221</sup> E.g. Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1940) III, p. 30: “Qui licet ius non habeat, tamen eo quod in possessione est, plus iuris haber propter seisinam quam ille qui est extra possessionem, qui nihil iuris habet, et eo maxime quia si ille qui ius habet nunquam petat, sic poterit terra semper remanere cum disseisitore vel intrusore”.

<sup>222</sup> Azo, *Summa Institutionum* (Venice 1566), col. 1050, quoted above.

<sup>223</sup> *Fleta seu commentarius juris Anglicani* (ed. Seldon 1685), p. 201 (lib. 3, cap. 15, § 8): “Nemo enim dare potest quod non habet...”

<sup>224</sup> *Britton* (ed. Nichols 1865) I, p. 268 (lib. 2, cap. 9, § 14): “... et serroit la resoun alouvable, pur ceo qe nul ne poit doner ceo qe il ne ad nient...” (And this reason would be allowable, inasmuch as no one can give that which he hath not... [transl. Nichols]).

Common law, and only isolated references to it can be found in the following centuries. For example, John Wycliffe<sup>225</sup> (c. 1331-1384) makes use of it within a legal context, and David Jenkins, writing in the 17<sup>th</sup> century, reports an old case in which the argument is applied<sup>226</sup>. The argument, however, is absent from the great works on legal maxims developed since the 16<sup>th</sup> century in England, such as Bacon's 'Maxims of Equity'. The argument played therefore only a discreet role in juristic writings. In the 17<sup>th</sup> century the *nemo plus* rule is applied in certain cases, but its use appears to be incidental, without relying on a particular doctrine around it<sup>227</sup>. The *nemo plus* rule of the Digest had in any case a wider circulation than the *nemo dat* rule, which is only recorded by Branch in 1753, who quotes Jenkins, using however a rather different wording<sup>228</sup>.

The *nemo plus* argument in general only acquired a systematic value after the 18<sup>th</sup> century, when it became progressively accepted across Europe that in some cases a transferee may acquire ownership over an asset obtained from an unauthorized non-owner. In England it was accepted that the transferee would become owner as long as he was in good faith and in an open market, and therefore Blackstone, when discussing the transfer of ownership by sale, presents the basic distinction on the topic: "... [I] shall consider their force and effect [of the contracts of sale and barter], in the first place where the vendor *hath* in himself, and secondly where he *hath not*, the property of the thing sold"<sup>229</sup>. This and other cases in which ownership was acquired from a non-owner appeared to be exceptional, and a general rule in the form of a maxim was lacking at the beginning of the 19<sup>th</sup> century in England. The delimitation of a general rule and its exceptions would become all the more urgent after the Factors Acts of 1823 and 1825 introduced the first statutory regulations according to which ownership could be transferred by a non-owner in particular cases<sup>230</sup>. Already in 1832 the *nemo plus* argument was rendered in vernacular by Lord Justice Bosanquet, in a case regarding the acquisition of chattels from a bailee in which it was declared that the latter could not confer a better title than that which he had<sup>231</sup>. Some of

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<sup>225</sup> Wycliffe, *De dominio civile* (London 1885), p. 27: "Iterum, nemo dat quod non habet, sed nec testes nec iudices civiles habent ius civilitatis ad bonum quod iudicant, ergo non dant ius illi pro quo iudicant... creatura non potest quidquam dare alteri nisi ipsum prius habuerit".

<sup>226</sup> Jenkins, *Eight centuries of law reports* (London 1885), p. 268 (sixth century, case 41, p. 250): "Jus alienum vendit, dat quod non habet".

<sup>227</sup> For example, the rule is mentioned by Gentleman of the Middle Temple, *The Grounds and Rudiments of Law and Equity* (1751), p. 223-224, where a handful of applications are recorded, giving the impression of a rather free and unsystematic application of the argument.

<sup>228</sup> E.g. Branch, *Principia Legis et Aequitatis* (1753 [1824]), p. 89: "Nemo dat qui non habet. Jenk. Cent. 250. – No one gives who possesses not".

<sup>229</sup> Blackstone, *Commentaries on the Laws of England* (Oxford 1775), book 2, ch. 3, p. 447.

<sup>230</sup> See on this subject Thomas, *Factors Acts* (2011), p. 151-187.

<sup>231</sup> *Shelley v Ford* (1832) 5 Car. & P. 313; 172 ER 991: "[The bailee] had only a limited interest in it; he, therefore, when he sold it, could give the defendant no better title than he

the first attempts to enunciate a general rule in Latin borrowed the *nemo plus* rule from the Civil law<sup>232</sup>, but eventually the more ‘autochthonous’ *nemo dat* rule prevailed in juristic writings and legal decisions<sup>233</sup>. By the end of the century the rule was completely consolidated, being laid down in the Sale of Goods Act 1893<sup>234</sup>, and appearing in the first edition of Black’s Law Dictionary in the Latin formula “*nemo dare potest quod non habet*”, which was presented as stemming from the *Fleta* or from the *Centuries of Jenkins*<sup>235</sup>.

This evolution shows that the *nemo dat* rule only acquired a significant place within the Common law when it was awarded a systematic value as a starting point around which various exceptions could be grouped. The *nemo dat* rule has in fact almost no substantive value in itself in the Common law, being barely commented upon and often presented as self-evident, while the main focus is laid on the exceptions it experiences. Accordingly, no attempt has been made to free the rule from its exceptions, since these make the rule meaningful. The rule has been laid down in the statutory provisions of several Common law countries which are in force even nowadays<sup>236</sup>, and where it still fulfils this significant systematic function, being moreover an intensely commented dogmatic topic<sup>237</sup>.

The evolution described here shows that the reception of the *nemo plus* argument within the Common law was directly affected by Continental legal scholarship, and mainly through the influence that Azo had on Bracton. Since this initial contact, however, there have not been significant influences between Common law and Civil law jurisdictions regarding the significance granted to

had got himself’. See on this decision Zwolve, *On attornment and assignment* (2014), p. 813–814.

<sup>232</sup> E.g. Kent, *Commentaries on American Law* (1848) II, § 324: “... the general principle applicable to the law of personal property throughout civilized Europe is, that *nemo plus juris in alium transferre potest quam ipse habet*. This is a maxim of the common and of the civil law...”. In England, Broom, *A selection of legal maxims* (1852), p. 303–305 (§§ 352–354) only presents the rule *non dat qui non habet* in his third edition, alongside the *nemo plus* rule and rather eclipsed by the latter.

<sup>233</sup> Among the legal decisions, particularly clear is *Whistler v. Forster* (1863) 14 CB (NS) 248, 257; 143 ER 441, 445 (Willes J): “The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet*”.

<sup>234</sup> Sale of Goods Act 1893 section 21(1): “Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had...”

<sup>235</sup> Black, *A law dictionary* (1891), p. 809: “*Nemo dare potest quod non habet*. No man can give that which he has not. *Fleta*, lib. 3, C. 15, § 8; *Nemo dat qui non habet*. He who hath not cannot give. *Jenk. Cent.* 250; *Broom, Max.* 499n; 6 C. B. (N.S.) 478”.

<sup>236</sup> E.g. in England, the Sale of Goods Act 1979 section 21(1): “Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had...” In the United States the UCC § 2–403(1): “A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased”.

<sup>237</sup> For a comparative approach to this subject see the recent dissertation of Thomas, *Rule nemo dat* (2009), as well as Zwolve, *Hoofdstukken Privaatrecht* (2006), p. 359 ff.

this argument, beside the attempts to use the *nemo plus* rule of the Digest in the 18<sup>th</sup> and 19<sup>th</sup> centuries as a general rule regarding the acquisition in good faith by a non-owner in England. The *nemo dat* rule eventually acquired a systematic value of its own, different from that which the *nemo plus* rule had in the continental *ius commune*. This becomes clear by the fact that the nature of the exceptions grouped around both rules was completely different: while most of the cases analysed under the *nemo plus* rule in Continental law – first as exceptions, then only as apparent exceptions – had to do with the transfer of ownership by an authorized non-owner, the exceptions grouped in the Common law around the *nemo dat* rule refer only to cases where an acquirer becomes owner due to exceptional circumstances despite having acquired from an unauthorized non-owner. Nonetheless, the *nemo plus* rule would acquire a similar significance in Civil law jurisdictions in the course of the 19<sup>th</sup> century, as will be shown in the following section.

## 7. Significance of the *nemo plus* rule in Civil law jurisdictions

### a. The *nemo plus* rule in the codifications

With the promulgation of modern civil codes, the *regulae iuris* lost most of their practical appeal, and therefore the literary genre of commenting the last title of the Digest disappeared in the course of the 19<sup>th</sup> century. This does not imply that the different *regulae* were instantly forgotten, and in the case of the *nemo plus* rule we even find examples of its reception in modern legislation through texts which adapt and translate Ulpian's rule. Examples of this reception can be found in the ABGB<sup>238</sup> (1811), the Dutch Mortgage Law of 1851<sup>239</sup>, the Chilean Civil Code<sup>240</sup> (1856) and the old Argentinian Civil Code<sup>241</sup> (1869).

Despite the cases in which the rule is formally laid down in modern legislations, the elaborate systematic structures built around D. 50,17,54 were

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<sup>238</sup> ABGB (1811) § 442: "... Überhaupt kann niemand einem anderen mehr Recht abtreten, als er selbst hat" (... In general no one can cede to another a greater right than he himself has).

<sup>239</sup> Hypotheekwet (1851), art. 109: "De overdrager draagt aan de verkrijger slechts de eigendom en de rechten over die hijzelf op het overgedragene bezat..." (The transferor gives the transferee only the ownership and the rights which he himself had on the delivered object...).

<sup>240</sup> Chilean Civil Code (1856), art. 682: "Si el tradente no es el verdadero dueño de la cosa que se entrega por él o a su nombre, no se adquieren por medio de la tradición otros derechos que los transmisibles del mismo tradente sobre la cosa entregada" (If the transferor is not the real owner of the thing delivered by himself or on behalf of him, the delivery does not grant other rights than those which he could transfer over the delivered object). This article is also found in the Civil Code of Ecuador (art. 698) and Colombia (art. 752).

<sup>241</sup> Argentinian Civil Code (1870) art. 3270: "Nadie puede transmitir a otro sobre un objeto, un derecho mejor o más extenso que el que gozaba..." (No one can transfer to another a better or greater right over an object than that which he enjoyed...).

forgotten in most jurisdictions. The *nemo plus* rule would continue to be used as an authoritative starting point for legal reasoning, but its systematic function concerning the transfer of ownership by a non-owner was generally abandoned. Since the new codes offered specific rules concerning the transfer of ownership by an authorized non-owner, it was no longer necessary to resort to the *nemo plus* rule in order to offer a systematization for the faculty to dispose. Occasionally scholars discuss, when dealing with the transfer of ownership by an authorized non-owner, whether these cases can be seen as an exception to the *nemo plus* rule or not<sup>242</sup>. However, most authors do not attempt to offer a systematization of this subject based on the *nemo plus* rule.

An interesting exception to the general fate of the *nemo plus* rule is to be seen in Chile, where the traditional systematic role of the *nemo plus* rule as free from exceptions made its way into the Civil Code (1856). According to Chilean scholars, in those cases where a non-owner transfers ownership, the delivery should be regarded as performed by the owner himself, which means that the *nemo plus* rule has no exceptions. The context for the reception of this notion was the intention of Andrés Bello, the author of the code, to lay down a system of transfer of ownership which would resemble more that of Roman and Castilian law than that of the French Civil Code. Bello had studied the writings of Vinnius and Heineccius, but when designing a system of transfer of ownership the strongest influence came from Pothier's *Traité du droit du domaine*, which Bello quotes on several occasions in the preliminary works on this topic<sup>243</sup>. In the final version of the Chilean Civil Code, art. 670 states that delivery (*tradición*) consists in the conveyance performed by the owner (*la entrega que el dueño hace*), and art. 671 governs the delivery performed by the owner or by someone else on behalf of him. Bello draws heavily on the ideas of Pothier when describing the delivery by a non-owner, making it clear that in all such cases the delivery must be regarded as performed by the owner himself. This regulation had a direct impact on the way interpreters approached the *nemo plus* rule. Luis Claro Solar (1857-1945), one of the most influential commentators of the Chilean Civil Code, would declare that the delivery could only transfer ownership if performed by the owner, an idea which he traces back to D. 50,17,54 and D. 41,1,20pr<sup>244</sup>. Claro Solar would then explain how every delivery performed by a non-owner should be understood as done by the owner himself, quoting D. 41,1,9,4 to support this notion<sup>245</sup>. The *nemo plus* therefore retained a systematic function

<sup>242</sup> See e.g. for Austria: Faber, *National Report Austria* (2008), p. 59. For the Netherlands: Pitlo, *Zakenrecht* (1965), p. 183; Groefsema, *Bevoegd beschikken* (1993), p. 32-34. For South Africa: Carey Miller, *The Acquisition* (1986), p. 120. Van Vliet, *Transfer of movables* (2000), p. 28 also approaches the rule in this way under a broad comparative perspective.

<sup>243</sup> E.g. Bello, *Código Civil* (1981) I, p. 457 (art. 670); p. 458 (art. 671); p. 459 (art. 674); p. 460 (art. 675); p. 461 (art. 676 and 677).

<sup>244</sup> Claro Solar, *Explicaciones* (1932) VII, p. 256-257.

<sup>245</sup> Claro Solar, *Explicaciones* (1932) VII, p. 257: "No es necesario, sin embargo, que sea el mismo propietario de la cosa quien efectúe la tradición; pues basta que otra persona lo haga

regarding the transfer of ownership by a non-owner in Chile, and its validity is generally upheld by scholars<sup>246</sup>. It should moreover be observed that similar rules governing the transfer of ownership by a non-owner are to be found in other Latin American jurisdictions which adopted the Civil Code of Andrés Bello or were influenced by it, as can be seen in the Civil Codes of Ecuador (art. 687), El Salvador (art. 652), Honduras (art. 698), Colombia (art. 741) and Uruguay (art. 769 and 775).

b. Acquisition in good faith as an exception to the rule

The loss of importance of the *nemo plus* rule was not only triggered by the fact that its systematic function was replaced in most jurisdictions when dealing with the transfer of ownership by an authorized owner, but also due to the consolidation of mechanisms which intended to safeguard legal certainty, and particularly the protection of the acquirer in good faith. This implied that in many cases an acquirer who received an object from an unauthorized non-owner would nonetheless become owner, thereby undermining the general validity of the *nemo plus* rule. The protection of the acquirer in good faith began to consolidate in Western Europe in the course of the Middle Ages through the influence of rules of Germanic law. Particularly important in this regard was the rule *Hand wahre Hand*, according to which the owner could not reclaim an object from a third person if the latter had received it from someone entrusted by the owner with the tenancy of it<sup>247</sup>. The consolidation of the protection of the acquirer in good faith must have been favoured by the long periods to acquire by usucapion or *praescriptio* – which could reach up to 40 years – since this could arise uncertainty as to the ownership of traded goods. It is therefore no wonder that the protection of the acquirer in good faith was still considered in the 19<sup>th</sup> century to favour legal certainty in commercial transactions, which is why various modern Civil Codes laid down provisions on this point regarding movable property. Particularly influential in this regard was the rule “*possession vaut titre*” of art. 2279 – now art. 2276 – of the French Civil Code<sup>248</sup>. Similar rules are found in later civil codes<sup>249</sup>, although the extent of the protection

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con su consentimiento o en su representación y a su nombre. *Nihil autem interest utrum ipse dominus per se tradat alicui rem, an voluntate ejus aliquis*”. Claro Solar applies this idea also to explain the cases in which a non-owner is not authorized by the owner, but acts as his legal representative (p. 258-260).

<sup>246</sup> See moreover Gaete, *La tradición* (1992), p. 67-69; Barrientos, *Tradicón* (2003), p. 68 ff.

<sup>247</sup> See Von Lübtow, *Hand wahre Hand* (1955), p. 177 ff.; Miquel, *Hand wahre Hand* (1979), p. 227-320.

<sup>248</sup> See on this rule Salomons, *Good Faith Acquisition* (2011), p. 1070-1071.

<sup>249</sup> See e.g. old Dutch BW (1838), art. 2014; old Argentinian Civil Code (1871), art. 3271; Spanish Civil Code (1889), art. 464; German Civil Code (1900), §§ 932 and 935; Italian Civil Code (1942), art. 1153; New Dutch BW (1992) art. 3:86. On the acquisition in good faith in modern codifications see Von Lübtow, *Hand wahre Hand* (1955), p. 194; Harke, *Vertrag und Eigentumsvererb* (2013), p. 86-93.

ultimately granted to the acquirer in good faith can vary significantly in each of them, depending on the conditions laid down for the protection of the acquirer.

The rules protecting the acquirer in good faith were soon regarded as the main exception to the *nemo plus* rule. Accordingly, this rule assumed in most Civil law jurisdictions a similar systematic role to that which the *nemo dat* rule had in the Common law, namely that of an empty general rule which serves as a contrast to the cases in which an acquirer would instantly acquire ownership, despite having acquired from an unauthorized non-owner. The scope of the rules protecting the subjective good faith of the acquirer will determine the practical significance of the *nemo plus* rule. For instance, Christian Baldus considers that the *nemo plus* rule is not admitted in the BGB on account of the provisions of § 932 regarding the acquisition in good faith<sup>250</sup>. Dutch legal scholars also emphasize that the main objection to the *nemo plus* rule is the acquisition of ownership by a good faith purchaser as prescribed in BW art. 3:86 and 3:88<sup>251</sup>. Similar claims are to be found in other jurisdictions, such as Argentina<sup>252</sup>, Austria<sup>253</sup>, Belgium<sup>254</sup>, Poland<sup>255</sup>, Spain<sup>256</sup> or Switzerland<sup>257</sup>. On the other hand, the *nemo plus* rule will have a broader scope of applications in those jurisdictions which grant a limited protection to the acquirer in good faith<sup>258</sup>. Accordingly, the development of the protection of the acquirer in good faith granted the *nemo plus* rule since the 19<sup>th</sup> century a completely different role to that which it enjoyed among the jurists of the *ius commune*, who hardly ever dealt with the acquisition in good faith in the context of this rule.

The protection of the acquirer in good faith has a decisive practical significance in order to determine whether the acquirer will become owner. Nonetheless, from a strictly dogmatic perspective, this problem is unrelated to the analysis of the legal grounds of the faculty to dispose of the non-owner. In fact, the problem of the protection of the acquirer in good faith only arises when the transferor did not have the *potestas alienandi*<sup>259</sup>. It is for this reason that the provisions protecting good faith have been brought up within the present

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<sup>250</sup> Baldus, *Iure gentium adquirere* (1998), p. 112-113.

<sup>251</sup> Asser/Mijnssen/De Haan, 3-I (1992), p. 188 (nr. 293); De Witte, *Nemo plus beginsel* (1993), p. 89-90; Fesevur, *Goederenrechtelijke colleges* (2005), p. 93; Lokin, *Prota* (2012), p. 110, 153-154; Snijders/Rank-Berenschot, *Goederenrecht* (2012), p. 304 (nr. 362).

<sup>252</sup> The old Argentinian Civil Code (1869), art. 3271 explicitly declares that the rules protecting the purchaser in good faith are an exception to the *nemo plus* rule as laid down in art. 3270. See on this provision Álvarez, *Nemo plus iuris* (2006), p. 6-10.

<sup>253</sup> Faber, *National Report Austria* (2008), p. 148.

<sup>254</sup> Jansen, *Nemo plus* (2009), p. 434-435.

<sup>255</sup> Longchamps, *Nemo plus iuris* (2015), p. 80-82.

<sup>256</sup> González/Soto, *National Report Spain* (2011), p. 634.

<sup>257</sup> Koller, *Nemo plus* (1990), p. 323-331; Steinauer, *Les droits réels* (2012) II, p. 310 (nr. 2105-2017).

<sup>258</sup> This is for instance the case of Scotland: Reid et al., *Law of property* (1996), p. 540 ff. (nr. 669 ff.); Carey Miller et al., *National Report Scotland* (2009), p. 317, 370-377, 416.

<sup>259</sup> See on this point Mengoni, *Gli acquisti* (1968), p. 9-11.

research simply to discuss the scope of the *nemo plus* rule, having no further significance. The *nemo plus* rule is one of the few points in which both subjects meet, since this rule was traditionally used by jurists of the *ius commune* as a reference point to approach the problem of the *potestas alienandi*, being however used nowadays mostly with regard to the protection of the good faith.

c. Modern significance of the *nemo plus* rule

While the *nemo plus* rule lost in most jurisdictions its systematic significance with regard to the transfer of ownership by a non-owner, it is worth noting that it nonetheless remained an authoritative starting point for legal reasoning regarding the cases where an unauthorized non-owner delivers an object, since normally the transferor will not be able to grant a better right than that which the principal has<sup>260</sup>. However, the exact significance of the rule in the context of the law of property is often controverted<sup>261</sup>, which is why the interpreter should be careful when deriving specific consequences directly from it.

While the basic area of application of the rule remains the transfer of ownership, the broad terms of the *nemo plus* have led to it being applied within the most varied contexts and even outside private law, including international law<sup>262</sup>, EU law<sup>263</sup>, constitutional law<sup>264</sup> or the intellectual property in the cyberspace<sup>265</sup>. Scholars usually rely on the allegedly logical and rational character of the rule to derive various legal consequences in different contexts, which is a heritage of the dominant approach to the rule up to the 18<sup>th</sup> century<sup>266</sup>.

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<sup>260</sup> See e.g. for Belgium: Jansen, *Nemo plus* (2009), p. 434-444. For Germany: Hellwig, *Wesen* (1901), p. 103. For the Netherlands: Hoetink, *Nemo plus iuris* (1935), p. 474-491; Meijers, *Toelichting* (1955) II, p. 378 (point 4); Asser/Mijnssen/De Haan, 3-I (1992), p. 187-188 (nr. 293); De Witte, *Nemo plus beginsel* (1993), p. 90 ff.; Potjewijd, *Bekrachtiging* (2002), p. 51; Salomons, *National Report the Netherlands* (2011), p. 15, 23; Pitlo/Reehuis/Heisterkamp, *Goederenrecht* (2012), nr. 95 and 141; Mollema, *Het beperkte recht* (2013), p. 193. For Poland: Longchamps, *Nemo plus iuris* (2015), p. 65. For Scotland: Reid et al., *Law of property* (1996), p. 540-541 (nr. 669). For South Africa: Carey Miller, *The Acquisition* (1986), p. 118. For Spain: Miquel, *Causa* (2009), p. 170. For Switzerland: Steinauer, *Les droits réels* (2012) II, p. 310 (nr. 2105). For a broad European perspective: Von Bar/Clive, *DCFR* (2010) V, p. 4431; Lurger/Faber, *PEL Acq. Own.* (2011), p. 459.

<sup>261</sup> See e.g. for the Netherlands: Sniijders/Rank-Berenschot, *Goederenrecht* (2012), p. 47 (nr. 66); Mollema, *Het beperkte recht* (2013), p. 131-133, 184-185, 215-216, 220-221.

<sup>262</sup> For the value of the *nemo plus* rule as a valuable principle of international law see Bos, *A methodology of international law* (1984), p. 5-6 and 73.

<sup>263</sup> De Visser, *Nemo plus* (2014), p. 443-451.

<sup>264</sup> Longchamps, *Nemo plus iuris* (2015), p. 65-66.

<sup>265</sup> See e.g. Franken, *Nemo plus...* (2001), p. 17-18.

<sup>266</sup> In the Netherlands see Hoetink, *Nemo plus iuris* (1935), p. 475 who considered that this rule “applies still today as an unavoidable and logical requirement to which every positive law has to submit” (nog heden ten dage geldt als een onomkooerbare, want logische, eis waaraan elk positief recht zich heeft te onderwerpen). Mengoni, *Gli acquisti* (1968), p. 3 would declare similarly: “...il principio «nemo plus iuris ad alium transferre potest quam ipse haberet», inteso come assioma logico, come applicazione del principio logico di non

However, such general claims should not be made lightly. As shown above, the application of the *nemo plus* argument in the legal world can lead to unacceptable conclusions, particularly due to the ambiguity of general terms such as ‘have’ and ‘give’. The usefulness of the *nemo plus* rule in modern legal science resides in its systematic role as a starting point for legal reasoning, the content of which varies in different jurisdictions. To separate the rule from its systematic context leaves nothing but a very general and fallible statement. Accordingly, the interpreter should not rely on a certain ‘inner reasonableness’ of the rule when seeking its application in innovative contexts, but rather grant a specific scope of application to the *nemo plus* rule depending on the peculiar characteristics of a specific legal field.

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contraddizione, e in quanto tale insuscettibile di eccezioni...”, quoting the monographic work of Carlin. This statement is however toned down later in p. 4-7.



## **Chapter 8. From *voluntas domini* to *contemplatio domini*: direct representation and *potestas alienandi***

The study of the evolution of the *nemo plus* rule in the previous chapter showed the significance which this aphorism had in the systematization of the transfer of ownership by a non-owner during the *ius commune* up to the 19<sup>th</sup> century. However, as shown in the last section, the systematic relevance of this rule regarding the problem of the *potestas alienandi* drastically decreased since the 19<sup>th</sup> century. At around the same time, the doctrine of direct representation gradually gained a key systematic position with regard to the transfer of ownership by a non-owner. As it will be shown in this chapter, the doctrine of direct representation originally fulfilled only a significant role within the law of obligations, but it gradually made its way into the law of property. Regarding the transfer of ownership in particular, scholars soon considered the doctrine of direct representation in itself as the legal basis to explain how a non-owner could dispose of an object of the principal. Accordingly, the *voluntas domini* gradually ceased to play a decisive role in most jurisdictions when determining the legal grounds for the transfer of ownership by a non-owner. The following pages describe the rising importance of the doctrine of direct representation with regard to the transfer of ownership. The outlook offered is by no means exhaustive, but merely attempts to depict some general trends which are to be found among various jurisdictions, in order to offer a critical insight into the convenience of resorting to the doctrine of direct representation as an immediate legal basis for the transfer of ownership. The final section of this chapter will be dedicated to determine whether the existence of different systems for transferring ownership has influenced the systematization of the transfer of ownership by a non-owner in general or the significance of direct representation in particular.

### **1. *Ius commune* and the legal grounds for the transfer of ownership by a non-owner until the 19<sup>th</sup> century**

#### a. Basic grounds for the *potestas alienandi* under the *ius commune*.

The basic notions concerning the transfer of ownership by a non-owner did not undergo radical changes until the 19<sup>th</sup> century. In the previous chapter it was shown that the scope granted to the *nemo plus* rule varied significantly in the course of time, but this remained almost exclusively a scholastic discussion. Concerning the legal grounds for the transfer of ownership by a non-owner, there were no radical innovations until the 19<sup>th</sup> century. This can be explained by the fact that the general guidelines concerning this subject follow quite

consistently the Roman sources: as long as a non-owner is authorized by the owner or by the law, ownership will be validly transferred.

The cases where the delivery was performed *voluntate domino* offered fewer problems to medieval scholars, since Roman sources were particularly clear when indicating that the delivery authorized by the owner would amount to a delivery performed by the owner himself. We find therefore numerous texts where the significance of the owner's authorization for the delivery is emphasized<sup>1</sup>. Some jurists even included the case of the *traditio voluntate domini* among other cases where the condition of the owner is made worse by another person acting with his consent<sup>2</sup>, an approach which stems directly from the sources. The distinctive features of the cases where the delivery takes place *voluntate domini* even led scholars to deal with them separately from those in which there is no such authorization<sup>3</sup>. It is particularly noteworthy that jurists did not distinguish different legal grounds concerning the transfer of ownership by a non-owner. There was for instance no general distinction made between the delivery performed *iussu domini* and that performed *voluntate domini*<sup>4</sup>, which some modern scholars identify in Roman sources<sup>5</sup>. No distinction either was made regarding whether the person authorized was a *sui iuris* or *alieni iuris*, which are often dealt with jointly by medieval jurists when discussing the transfer of ownership<sup>6</sup>.

While medieval scholars share a common general approach to the significance of the *voluntas domini* at the delivery, other aspects of the transfer of ownership by an authorized non-owner were more controversial. It was for instance discussed what the exact significance of the *libera administratio bonorum* was, as well as the scope of the powers of the *procurator*<sup>7</sup>. Despite such differences, the general

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<sup>1</sup> See e.g. Accursius, gl. *Nemo alieno* to D. 50,17,123pr; Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 124–130; Bernardus Parmensis, gl. *Consentire* to X 4,20,6; *Siete Partidas* 7,34,35 *i.f.*

<sup>2</sup> E.g. Accursius, gl. *Nihil* to Inst. 2,1,42: “Quod enim quis per alium facit, ipse facere videtur: ut ff. de vi, et vi ar l. i. § deiecisce [D. 43,16,1,12] et infra, de iniur. § non solum. [Inst. 4,4,11] et ff. de de iniur. l. item apud § fecisce [D. 47,10,15,8]”. See also gl. *Voluntate* to D. 41,1,9,4: “Quia qui per alium, & c. ut. et infra de vi et vi armata l. prima. § deiecisce [D. 43,16,1,12]...”.

<sup>3</sup> See e.g. the Azonian gl. to Inst. 2,8pr in Caprioli et al., *Glosse preaccursiane II* (2004), p. 168: “Dominia acquiruntur traditione, quam sequitur alienatio cum voluntas domini rata habenda est. Set quia quandoque et non dominus alienare potest et dominus non potest, idea hunc titulum hic ponit. Az.”

<sup>4</sup> See e.g. Accursius, gl. *Voluntate* to D. 39,5,9,2, where he distinguishes in general between *iussum* and *mandatum*, without making any particular distinction for the transfer of ownership. See moreover Odofredus, *Lectura super Digesto Novo* (Lyon 1552), f. 32va, when commenting D. 39,5,9,2.

<sup>5</sup> Chapter 2, Section 5 above.

<sup>6</sup> Azo, *Summa Codicis* (Venice 1566), col. 431: “Item ratione officii privati, ut procurator, filiusfamilias & servus”.

<sup>7</sup> Azo, *Summa Institutionum* (Venice 1566), col. 1071 and Accursius in gl. *Libera* to D. 41,1,9,4, gl. *Praestabit* to D. 6,1,41,1 and gl. *Libera* to Inst. 2,1,43 report a scholarly discussion involving Martinus Gosia, who distinguished between the *procurator totorum bonorum* and the *procurator universonum bonorum* regarding the transfer of ownership,

picture regarding the validity of the alienation *voluntate domini* is largely uniform among medieval scholars.

While it was perfectly clear that the *voluntas domini* was the legal basis for the transfer of ownership by a non-owner in a number of cases, there are other situations which were usually described negatively through the indication of the lack of such authorization<sup>8</sup>. On the borderline we find the pledge creditor, who was considered by most medieval scholars as a case where ownership was not transferred *voluntate domini*<sup>9</sup>. Decisive in this regard was the fact that Justinian both in D. 41,1,46 and in Inst. 2,8,1, presented the alienation by a pledge creditor as an exceptional figure, which led some jurists to distinguish it from regular cases where the delivery was authorized. Other scholars were less interested in making a clear distinction on the subject and left unsolved the problem of whether the delivery in this case should be considered to take place *ex pacto* or *ex lege*<sup>10</sup>. Along with the pledge creditor, scholars included other cases where the transfer of ownership could not be regarded as taking place *voluntate domini*. This was particularly the case regarding the alienation performed by legal guardians, but also problems regarding to the sphere of public law were dealt with along the regular situations where a non-owner would validly transfer ownership<sup>11</sup>. This was for instance the case regarding some public authorities, who under certain circumstances could confiscate and subsequently alienate private property. Also the judge would fall under this category, since he could adjudicate property which was not his own.

The 16<sup>th</sup> century brought along new developments from the perspective of the systematization of the transfer of ownership by a non-owner, offering a more abstract approach on the subject. Already from medieval times it was not unusual

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distinction which is not accepted by these authors. On the general faculties of the *procurator totorum bonorum* see the gloss to Inst. 2,1,43 in Caprioli et al., *Glosse preaccursiane II* (2004), p. 88.

<sup>8</sup> Azo, *Summa Institutionum* (Venice 1566), col. 1071: “Sed et per non dominum quandoque transfertur dominium, et etiam contra domini voluntatem: ut per tutorem, vel curatorem, et per iudicem et per quasi censitorem (ut per flumen) et per creditorem, et per principem”.

<sup>9</sup> Accursius, gl. *Voluntate* to D. 41,1,9,4: “...Item quandoque etiam sine voluntate domini, ut creditor...”

<sup>10</sup> Azo, *Summa Codicis* (Venice 1566), col. 431 considers that the pledge creditor transfers ownership “vel ex pacto, vel ex lege alienare potest”, while in *Summa Institutionum* (Venice 1566), col. 1071 he includes it among the cases where ownership is transferred “contra domini voluntatem”. In the Azonian gl. to Inst. 2,8pr edited by Caprioli et al., *Glosse preaccursiane II* (2004), p. 168 the alienation is moreover approached in this case as not taking place *voluntate domini*.

<sup>11</sup> Wilhelmus de Cabriano, *Casus Codicis* (ed. Wallinga 2005), p. 317, commenting C. 4,51,1: “Potest autem munitus esse vel publico iure vel privato: publico ut tutoris et executoris, privato ut mandatarii et creditoris...”; Azo, *Summa Codicis* (Venice 1566), col. 431: “Item iudicis ratione officii publici, et executores eorum. Item censitores, ut Insti. de offi. iud. § ult. [Inst. 4,17,7] & ff. de acquiren. re. domi. l. ergo. § alluvio [D. 41,1,30,3]”. See moreover Caprioli et al., *Glosse preaccursiane II* (2004), p. 169; Accursius, gl. *Nemo* and *Ex officio* to C. 4,51,6; *Siete Partidas* 5,5,51-53.

to find authors referring to the different cases of *potestas alienandi* by using a comprehensive wording: for instance, Accursius refers to the ‘*ius distrahendi*’<sup>12</sup>, and Philippus Decius discusses the *potestas alienandi* of the pledge creditor<sup>13</sup>. This latter expression is closely linked to the wording used in Inst. 2,8pr, and it is no wonder to find it in use by Donellus, who in his *Commentarii de iure civili*<sup>14</sup> describes among the requirements to transfer ownership that the transferor must have the *potestas rei transferendae*. Donellus would offer a more systematic arrangement of the different cases of *potestas rei transferendae* from that of his predecessors, having as a starting point that the delivery can be performed by the owner and by those who are held to be the owner at the conveyance<sup>15</sup>. Donellus explains that normally the owner will transfer ownership, quoting a number of texts to support this statement, and among them the *nemo plus* rule – both in D. 50,17,54 and D. 41,1,20 – which he considers to stem from the *ratio naturalis*<sup>16</sup>. Later he explains that not only the owner can transfer ownership, and that in some cases a non-owner acts as an owner, which he divides in two categories: some take the owner’s place because the owner wants so – and in this case he includes the *procurator* and the *creditor pignoris* – while others take his place by the virtue of law<sup>17</sup>. This basic distinction is in general terms adequate to describe the Roman sources, which is why it has been adopted in this work as well<sup>18</sup>. The author then stresses the importance of the owner’s authorization in order to explain the transfer of ownership by the *procurator*, quoting D. 41,1,9,4<sup>19</sup>. Afterwards, he briefly studies the problem of the *creditor pignoris*, whom he does not consider to constitute an exception to the *nemo plus* rule, since the creditor would transfer ownership following the owner’s intent, quoting Inst. 2,8,1 to

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<sup>12</sup> Accursius, gl. *Nemo* to C. 4,51,6: “Casus. Si ream meam tibi non obligatam, vel non habens ius distrahendi, puta ratione officii, distraxisti: mihi non praeiudicasti”.

<sup>13</sup> Philippus Decius, *In tit. ff. de Regulis Iuris* (Lyon 1549), p. 225.

<sup>14</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15 (I, col. 729 ff.).

<sup>15</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 4 (I, col. 732): “Ante omnia eum quaerimus, qui possit transferre. In hoc genere sunt duo, dominus rei; & si quis est, qui in hae translatione pro domino habeatur”.

<sup>16</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 5 (I, col. 732): “Principio, si hic ex aliena persona res non geritur, eum, qui dat, dominum esse oportet. Si non est: ex sua persona dominium non transferet, qui ipse non habuit. Ut enim bene regula iuris in universum traditur, & ratio ipsa naturalis dictat, nemo plus iuris in alium transferre potest, quam ipse habet, L. *nemo plus iuris*, D. *de regul. jur.* ...”.

<sup>17</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 8 (I, col. 733–734): “Sed non solius domini hoc jus est. Sunt in hac re, qui, cum domini non sint, nihilominus domini vice fungantur. Quorum duo sunt genera. Quidam domini loco sunt domini voluntante: quidam iure. Domini voluntante duo: procurator, & creditor in pignore”.

<sup>18</sup> Chapter 1, Section 4(a) above.

<sup>19</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 9 (I, col. 734): “... Non sunt hi quidem domini. Sed nihil interest, inquit Cajus, *utrum ipse dominus per se tradat alicui rem, an voluntate ejus alius*. D. L. qua ratione, §. *nihil autem*. Quo significatur, ab his rem transferri non tam ideo, quod domini potestate in eo utantur: quam quod videatur ipse dominus tradidisse per alium, cujus opera in ea re utitur”.

support this opinion<sup>20</sup>. Finally, Donellus deals with the cases in which the non-owner may transfer ownership by virtue of the law, mentioning the *tutores* and *curatores*, who according to him have the right to act on behalf of the owner (*pro domino* or *domini loco*)<sup>21</sup>.

The general approach to the ground of the faculty to dispose would endure few changes during the following centuries. We find for instance that several jurists use general expressions such as '*potestas alienandi*' to refer to the different cases where a non-owner may transfer ownership, as well as to the problem of whether the owner may transfer ownership himself<sup>22</sup>. This notion also finds different equivalents in vernacular languages<sup>23</sup>. More importantly, jurists would normally refer to the *voluntas domini* as the main ground for the transfer of ownership by a non-owner, which would occasionally be distinguished from those cases where the faculty to dispose stems from the law<sup>24</sup>. The only differences in this regard would consist in distinguishing exactly in which cases did the delivery take place *voluntate domini*, a point which was particularly controversial regarding the situation of the pledge creditor<sup>25</sup>.

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<sup>20</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 13 (I, col. 736): "Non pugnat hoc cum jure superiore, quo negavimus, quemquam plus juris in alium transferre, quam ipse habuit; *L. nemo plus iuris, D. de reg. jur. & eum, qui dominium in fundo non habuit, ad eum, qui accipit, quidquam transferre. L. traditio, D. de acq. rer. dom.* Quod enim creditor pignus alienat, facit hoc domini voluntate, §. *contra, Instit. quib. al. non lic.* quoniam pignus hac lege acceperat, ut vendere liceret, sive convenerit nominatim, ut liceret, sive non convenerit. Idque appellatio pignoris in se continet. *d. L. 4. D. de pign. act.*" It should be noted that again this authorization is understood to be given in an either explicit or tacit way.

<sup>21</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 14-15 (I, col. 737-738).

<sup>22</sup> E.g. Vinnius, *In quatuor libros Institutionum commentarius* (Amsterdam 1665), ad Inst. 2,8,1 (p. 252); Voet, *Commentarius ad Pandectas*, (Paris 1829), ad D. 41,1,35 (IV, p. 108).

<sup>23</sup> Similar expressions can be found in Roman-Dutch law: Grotius, *Inleidinge* (ed. Dovring et al. 1965), 2,5,3 (p. 62) refers to the "macht... om iet door levering te mogen vervremden" (the power to alienate something through delivery); Huber, *Heedendaegse Rechts-geleertheit* (Leeuwarden 1686), p. 148 (2.9.5) indicates as an independent requirement for the transfer of ownership the "macht om te vervremden" (the power to alienate). In Germany, Puchta, *Pandekten* (1848), p. 212 (§ 148) demands for the transfer of ownership the "Fähigkeit des Trandenten Eigenthum zu übertragen", quoting D. 41,1,20pr and D. 41,1,9,4.

<sup>24</sup> Grotius, *Inleidinge* (ed. Dovring et al. 1965), 2,5,15 (p. 64); Vinnius, *Jurisprudentiae contractae* (Rotterdam 1664), cap. 20 (p. 53); Vinnius, *In quatuor libros Institutionum commentarius* (Amsterdam 1665), ad Inst. 2,8,1 (p. 252); Van Leeuwen, *Het Rooms-Hollands-regt* (Amsterdam 1698), 2,7,5 (p. 126); Voet, *Commentarius ad Pandectas* (Paris 1829), ad D. 6,1,17 (I, p. 557) and D. 6,1,20 (p. 558); ad D. 41,1,35 (IV, p. 108-109); Pothier, *Traité du droit du domaine* (Paris/Orléans 1772), nr. 218-222 (p. 212-217).

<sup>25</sup> Among those authors who consider that the pledge creditor acts *voluntate domini* we find: Bronchorst, *De Diversis Regulis Iuris* (Leiden 1624), p. 137 (ad D. 50,17,54); Vinnius, *Jurisprudentiae contractae* (Rotterdam 1664), cap. 20 (p. 53); Pothier, *Traité du droit du domaine* (Paris/Orléans 1772), nr. 224 (p. 218-219) distinguishes the case of the pledge creditor who sells following the agreement of the debtor and the case where the alienation is carried out by the judge.

It is interesting to note at this point that the problem of the faculty to dispose was related to the general theory of subjective rights in the works of Vitoria (1535-1600), one of the main jurists behind the development of this concept. When discussing whether ownership falls under the notion of *ius*<sup>26</sup>, Vitoria claimed that the right to dispose can be separated from ownership, as happens when ownership is transferred by a *procurator*<sup>27</sup>. Suárez (1548-1617) would later offer other interesting considerations on this point, since he distinguished the right itself from the *voluntas* or *concessio domini*, by which an individual would be regarded as exercising the right of the owner<sup>28</sup>. While these constructions are interesting for the development of the theory of subjective rights, it is noteworthy that later scholars were not keen to adopt them when approaching the *potestas alienandi* as such. There was in fact little controversy regarding the general rules governing the transfer of ownership by a non-owner, which is why there was no need to resort to special theories in order to explain how an authorized non-owner could perform the *traditio*. Only towards the end of the 19<sup>th</sup> century would scholars face the need to resort to the notion of subjective rights, which was precisely due to the lack of clarity which they found regarding the legal basis for the faculty to dispose *nomine proprio*, as it will be shown below<sup>29</sup>.

b. Irrelevance of the *contemplatio domini* for the transfer of ownership until the 18<sup>th</sup> century.

The general notions regarding the ground of the *potestas alienandi* used by the jurists of the *ius commune* agree to a large extent with that of Roman jurists, considering that the *voluntas* of the owner was the element which attracted the most attention when determining whether a non-owner could transfer ownership or not. Next to the situations in which the *voluntas domini* was decisive, the authors of the *ius commune* would moreover deal with those cases where the authorization followed *ex lege*. The fact that the legal grounds for the

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<sup>26</sup> See on this point Avelino Folgado, *Derecho subjetivo* (1960), p. 229-230; Guzmán, *Derecho como facultad* (2009), p. 182-188.

<sup>27</sup> Molina, *De Iustitia et Iure* (Mainz 1659), Tract. 2, disp. 3, nr. 5 (I, p. 37): “Tertio, potest quis conferre procuratori suo, ut amico in bonum amici ius, tum ad utendum re sua omnibus modis, quibus ipse uti potest, tum etiam ad illam alienandum, et consumendum, retento sibi dominio, interim dum rem non consumit aut alienat: ergo ius ad utendum re aliqua, et ad illam alienandum, et consumendum, distinctum quid est a dominio, quod in eo praecise est positum, quod res sit sua simpliciter”.

<sup>28</sup> Suárez, *De statu religionis* (Lyon 1625), lib. 8, cap. 5, n. 12 (III, p. 400): “...longe enim diversum est habere proprium ius, quod est habere aliquale dominium, aut habere tantum licentiam a domino, quod revera nullum dominium est...” ; n. 29 (p. 405): “...Nam ius proprie dictum solum esse censemus illud, quod inest homini, tanquam proprium, quoque suo nomine operari potest (...)”. For the ideas of Suárez on this point see Avelino Folgado, *Derecho subjetivo* (1960), p. 230.

<sup>29</sup> Chapter 8, Section 4(a) below.

*potestas alienandi* at the time of the *ius commune* did not depart from the guidelines given by Roman jurists can be seen in the fact that the *contemplatio domini* played no decisive role to determine the transfer of ownership. As will be shown in the following sections, this element would become decisive in the course of the 19<sup>th</sup> century, when under the influence of the doctrine of direct representation the main element which jurists would take into account when considering the legal grounds for the transfer of ownership by a non-owner was whether the delivery took place on behalf of the owner or not. Before that time, the *contemplatio domini* played no decisive role in determining the legal grounds for the delivery by a non-owner. To act *nomine alieno* could be relevant in the context of the law of obligations<sup>30</sup> in order to determine the personal relationships which arise between the parties, where the distinction between a *procurator* and a *nuntius*<sup>31</sup> could be decisive. Some authors observe on the other hand that the gift performed *nomine alieno* will be regarded as done by the principal<sup>32</sup>, but this problem is not directly linked to the legal grounds of the delivery itself. It is moreover worth noting that jurists did not consider that there was a general prohibition to act on behalf of another person. This can be seen from the commentaries to the *regula iuris* of D. 50,17,123pr, where scholars ignored the literal terms of the prohibition “*nemo alieno nomine lege agere potest*” and simply understood that, under certain conditions, it was indeed possible for someone to act on behalf of another person, especially if the latter granted his consent<sup>33</sup>.

Regarding the *traditio* in particular, only incidentally do we find any reference to the *contemplatio domini* of the non-owner. It is for instance common to find such references regarding specific cases where it plays a relevant role for the *bona fides* of the acquirer<sup>34</sup>, just as it happens in classical Roman law. In some cases, the problem of the *contemplatio domini* at the delivery is either granted no particular relevance, or simply linked with that of the *voluntas domini*<sup>35</sup>. It is also occasionally pointed out that the non-owner could not act as if the thing was his own<sup>36</sup>, thereby referring to the objective limits which rule his acts rather than the

<sup>30</sup> Azo, *Brocardica* (Basel 1567), p. 498: “Quod facit quis alieno nomine, vel tanquam alius, ipse facere non videtur”; p. 500: “Potest quis agere tanquam alius, non tanquam ipse”.

<sup>31</sup> See e.g. Azo, *Summa Codicis* (Venice 1566), col. 430; Hänel, *Dissensiones dominorum* (1834), § 256 (p. 428-429).

<sup>32</sup> Bartolus de Saxoferrato, *In primam Digesti Novi partem Commentaria* (Turin 1574), ad D. 39,5,9,2 (f. 60vb).

<sup>33</sup> Accursius, gl. *Nemo alieno* to D. 50,17,123pr: “Nullus in rebus alienis administrandis, vel causis agendis ex lege, accipit potestatem, nisi domini consensus accesserit...” See also Odofredus, *Lectura super Digesto Novo* (Lyon 1552), ad D. 50,17,123pr (f. 200ra).

<sup>34</sup> See e.g. Odofredus, *Lectura super Digesto Novo* (Lyon 1552), f. 74rb, commenting D. 41,4,14; *Siete Partidas* 5,5,54; Bartolus de Saxoferrato, *In primam Digesti Novi partem Commentaria* (Turin 1574), f. 113va, commenting D. 41,4,14.

<sup>35</sup> Accursius, gl. *Suo nomine* to D. 46,3,17; Odofredus, *Lectura super Digesto Novo* (Lyon 1552), f. 32va, commenting D. 39,5,9,2; f. 198v.b, commenting D. 50,17,180.

<sup>36</sup> E.g. Donellus, *Commentarii de iure civili* (Macerata 1831), lib. 18, cap. 12, § 15 (V, col. 221): “Hactenus autem illis mandatum, et ex mandato hactenus eorum potestas est, ut ipsi agant, non ut vice sua alium dent”.

*contemplatio domini*. In other cases it is indicated that legal guardians<sup>37</sup> must act on behalf of the owner, an idea which is already to be found in texts of Roman law dealing with the administration of the *tutor* or *curator*<sup>38</sup>. This indication does not however seem to have far-reaching consequences. Pothier, for instance, mentions that legal guardians must act in the name of the owner (*en son nom*), but when dealing with the case analysed by Javolenus in D. 39,5,25 – where the non-owner makes a gift *nomine proprio* after being told to do it *nomine alieno* – he observes that the delivery did not transfer ownership because it was not performed in accordance with the owner's authorization<sup>39</sup>.

Despite the fact that the *contemplatio domini* only plays a secondary role for the transfer of ownership in the works of most authors, it is nonetheless worth noting that sometimes this element is granted a particular significance. For instance, Accursius considers that a gift performed *nomine proprio* would involve two gifts – one from the owner to the agent and another from the agent to the donee – while otherwise we would be facing one single gift<sup>40</sup>. The *contemplatio domini* at the delivery seems to play on the other hand a much more pervasive role in the work of Philippus Decius, who in his commentary to D. 50,17,54 presents different non-owners transferring ownership *nomine domini*<sup>41</sup>, even when he does not explain exactly what the significance of acting on behalf of the owner is. Similar indications are also to be found in other works<sup>42</sup>, but nowhere is a clear distinction made between the general significance of delivering *nomine alieno* and *nomine proprio*.

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<sup>37</sup> Pothier, *Traité du droit du domaine* (Paris/Orléans 1772), nr. 222 (p. 216).

<sup>38</sup> See Chapter 3, Section 2 above.

<sup>39</sup> Pothier, *Traité du droit du domaine* (Paris/Orléans 1772), nr. 223 (p. 217): “Javolenus décide que suivant la subtilité du Droit, elle ne l'a pas transférée ; la tradition n'ayant pas été faite par le propriétaire de la chose, puisqu'elle n'a pas été faite en mon nom, & que j'en étois le propriétaire, ni même du consentement du propriétaire ; car j'ai bien voulu qu'on la donnât, & qu'on en fit la tradition en mon nom ; mais je n'ai pas consenti à la tradition que vous faites en votre nom...” This was the traditional interpretation of the text, as shown in: Odofredus, *Lectura super Digesto Novo* (Lyon 1552), f. 34va; Bartolus de Saxoferrato, *In primam Digesti Novi partem Commentaria* (Turin 1574), f. 65v.

<sup>40</sup> Accursius, gl. *Nomine tuo* to D. 39,5,9,2: “hic tamen duae donationes sunt: superiori casu una: ut supra eod. l. ii. § cum vero [D. 39,5,2,2]”

<sup>41</sup> Philippus Decius, *In tit. ff. de Regulis Iuris* (Lyon 1549), p. 225: “...creditor qui habuit potestatem alienandi, illud facit nomine domini, & de eius voluntate... Et idem in procuratore, tutore & curatore qui nomine domini faciunt. Et sic a domino videtur dominium transferri”.

<sup>42</sup> Bracton, *De Legibus et Consuetudinibus Angliae* (ed. Woodbine 1922) II, p. 103: “Si donationem fecerit de re quam alius tenet per se ipsum vel per alium nomine suo, non faciet rem accipientis cum ipse nihil teneat, quia non potest plus iuris ad alium transferre quam ipse haberet...”. Also Brouwer, *Disputatio juridica inauguralis de illis, quibus alienare licet, vel non* (Utrecht 1724), p. 16, discussing the transfer of ownership by the pledge creditor: “Neque obstat, quod nemo potest plus iuris in alium transferre, quam ipse habet, l. 34 d. R.J. [D. 50,17,54]. Resp. haec regula verissima est quando quis agit suo proprio nomine, sed non obtinet, quando quis agit nomine alterius, veluti tanquam procurator, iam vero creditor vendens pignus, et quodammodo procurator debitoris, eiusque vices et personam sustinet”.

While jurists occasionally granted a particular significance to the *contemplatio domini* in the context of the *traditio*, it is worth noting that the progressive development of the doctrine of direct representation was initially completely unrelated to the problem of the transfer of ownership by a non-owner. As already indicated, the doctrine of direct representation began to fulfil a relevant role regarding the transfer of ownership by a non-owner only in the course of the 19<sup>th</sup> century. The situation was of course different regarding the law of obligations, where the doctrine of direct representation emerged in order to fill a void within Roman sources. As shown above, Roman law never developed a true doctrine of direct representation, which implies that the agent was personally bound to the third party regarding the agreements he concluded, and that only eventually could the principal be made responsible for the contract<sup>43</sup>. Since the rediscovery of the *Corpus Iuris*, an increasing need was felt in everyday commercial life to bind the principal directly when his agent concluded contracts on his behalf, which led to the acknowledgment of forms of direct representation. This evolution was seen as conflicting with the *alteri stipulari* rule, the significance of which was progressively questioned from the time of the Glossators and up to the 19<sup>th</sup> century<sup>44</sup>. Particularly relevant in this evolution was Grotius, who distinguished the problem of the contracts in favour of a third party and the problem of direct representation, and considered the latter to be valid by highlighting the importance of the will of the contracting parties in the formation of the contract<sup>45</sup>. Later authors would develop the main features of direct representation, namely that: (1) the agent directly binds the principal; (2) the agent must have acted in the name of the principal; (3) and the principal is not only an additional debtor but he is liable in place of the agent<sup>46</sup>.

Despite the increasingly elaborate doctrines allowing an agent to directly bind a principal, by the 18<sup>th</sup> century there was no doctrine of ‘direct representation’ as such, and in fact the terminology surrounding this point remained rather vague. Nonetheless, one may find elaborate accounts explaining exactly how a third person could validly conclude an agreement on behalf of someone else. Particularly detailed in this regard is the work of Pothier, who in his *Traité des obligations* dedicates considerable attention to the subject<sup>47</sup>. The author starts by claiming that the *alteri stipulari* rule only applies to those cases when someone acts on behalf of himself, which in fact deprives it from having any significance. This in turn implies that, whenever someone acts on behalf of another person, the

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<sup>43</sup> See Chapter 1, Section 1 above.

<sup>44</sup> For a general outlook on the evolution of direct representation since the glossators see Müller, *Die Entwicklung* (1969), p. 29 ff.; Zimmermann, *Law of Obligations* (1996), p. 41-45, 54-58.

<sup>45</sup> Grotius, *De Iure Belli ac Pacis* (Aalen 1993), lib. 2, cap. 11, § 18: “quia consensus potest et per ministrum interponi ac significari. Velle enim censeor quod in alterius voluntate posui, si et ille velit”.

<sup>46</sup> Zimmermann, *Law of Obligations* (1996), p. 56-57.

<sup>47</sup> Pothier, *Traité des obligations* (Paris 1861), nr. 74-84 (p. 42-45).

contract is in fact regarded as concluded by the person on whose behalf the agent acts<sup>48</sup>. He applies this doctrine to the contracts concluded by legal guardians such as *tutores* and *curatores*, but also those agreements concluded by a *procurateur* (*procurator*). Pothier then makes clear that the contract concluded by the representative will only bind the principal if the agent does not exceed the faculties bestowed upon him, unless the owner is willing to ratify the act<sup>49</sup>. He also points out that the *procurateur* must show the authorization granted by the principal to conclude the contract, which implies a protection for the contracting third party since no further agreements between the principal and the agent can be brought up in order to determine the scope of the faculties of the agent<sup>50</sup>. The other contracting party will for the same reason also be protected in case he did not know about the revocation of the authorization or the death of the principal<sup>51</sup>. Pothier moreover points out that the difference between the cases in which the agent concludes the contract in his own name and in the name of the principal is that in the latter case the principal is the party to the contract, while if the contract is concluded by an agent *nomine proprio* the principal can only be made liable through an *actio exercitoria* or *institoria*<sup>52</sup>. These rules are moreover applied to the partner who concludes a contract on behalf of the company and to the wife for the contracts concluded by her husband<sup>53</sup>. This detailed regulation shows that many of the features of the doctrine of direct representation had a clear outline already in the 18<sup>th</sup> century.

While the doctrine of direct representation expanded within the law of obligations, there was however no analogous development within property law. The analysis of the transfer of ownership by a non-owner in particular experienced almost no changes, since the *voluntas domini* continued to be regarded in most cases as the decisive element to determine whether ownership was transferred or not by the non-owner, along with the existence of legal provisions authorizing someone to transfer ownership over someone else's property. This is why Grotius, for instance, while contributing to the development of the doctrine of direct representation within the law of obligations, would in the context of the transfer of ownership simply require the

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<sup>48</sup> Pothier, *Traité des obligations* (Paris 1861), nr. 74 (p. 42): “Ce que nous avons dit jusqu'à présent, « que nous ne pouvions rien stipuler ni promettre que pour nous-mêmes, et non pour un autre », s'entend en ce sens que nous ne le pouvons, lorsque nous contractons en notre nom : mais nous pouvons prêter notre ministère à une autre personne afin de contracter pour elle, de stipuler et de promettre pour elle ; et, en ce cas, n'est pas proprement nous qui contractons, mais c'est cette personne qui contracte par notre ministère”.

<sup>49</sup> Pothier, *Traité des obligations* (Paris 1861), nr. 75-78 (p. 42-43).

<sup>50</sup> Pothier, *Traité des obligations* (Paris 1861), nr. 79 (p. 43).

<sup>51</sup> Pothier, *Traité des obligations* (Paris 1861), nr. 80-81 (p. 44).

<sup>52</sup> Pothier, *Traité des obligations* (Paris 1861), nr. 82 (p. 44-45).

<sup>53</sup> Pothier, *Traité des obligations* (Paris 1861), nr. 83-84 (p. 45).

authorization of the owner for the transfer of ownership by a non-owner<sup>54</sup>. The initial irrelevance of the doctrine of direct representation for the transfer of ownership can be explained by the fact that there were no general dogmatic objections against the delivery by a non-owner. Accordingly, the new doctrine was only needed to overcome the limitations imposed by Roman law in the context of the law of obligations, but had no role to fulfill in the context of the transfer of ownership by a non-owner.

c. *Iusta causa traditionis*, *animus transferendi* and *potestas alienandi* under the *ius commune*.

It has been shown above that the existence of a *voluntas domini* in the context of the *potestas alienandi* was compatible with the essentially causal transfer system of Roman law<sup>55</sup>. In other words, the decisive importance of the *iusta causa traditionis* for the transfer of ownership did not imply that any further intent of the owner was irrelevant, and in fact Roman jurists did require the authorization of the owner at the time of the delivery when it was performed by a non-owner. One may however wonder whether the jurists of the *ius commune* confused the problem of the intent at the *iusta causa traditionis* with the *voluntas domini* in the context of the *potestas alienandi*, or whether the analysis of the *animus transferendi domini* encompassed this latter problem. However, an analysis of the different opinions of medieval scholars does not suggest that their different approaches to the relevance of the *iusta causa traditionis* had any impact in the way they dealt with the *voluntas domini* at the delivery by a non-owner. Modern scholars have identified a significant number of opinions which could be labelled as ‘abstract’ or ‘causal’ among glossators and commentators, including whether a *causa putativa* may be enough to transfer ownership, or the significance of the agreement of the parties at the time of the delivery<sup>56</sup>. Despite the different views which can be identified on this point, it should be noted that such controversies had no direct impact on the significance or systematization of the *traditio voluntate domini*<sup>57</sup>. This continued to be a decisive element to determine the transfer of ownership by a non-owner, and was never systematized as a sub-topic of the *iusta causa traditionis* or the *animus transferendi domini*.

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<sup>54</sup> Grotius, *Inleidinge* (ed. Dovring et al. 1965), 2,5,15 (p. 64): “De levering mag geschieden door den eighenaer zelf of door sijne ghemachtigde”. The text is translated in the following way by Lee, *The jurisprudence* (1953) I, p. 99: “Delivery may be made by the owner or by his agent”. Concerning the transfer of ownership by a non-owner based on a legal provision, see Grotius, *Inleidinge* (ed. Dovring et al. 1965), 2,5,17-18 (p. 65).

<sup>55</sup> Chapter 2, Section 6(a) above.

<sup>56</sup> See Dondorp et al., *Levering* (1991), p. 31 ff.; Van Vliet, *Iusta causa traditionis* (2003), p. 342 ff.; Zwolve, *Hoofdstukken* (2006), p. 244-249; Miquel, *Causa* (2009), p. 69 ff. On the opinions of Bulgarus see moreover Wallinga, *Los casus codicis* (2005), p. 150, who sheds new light on the subject through the examination of the writings of Wilhelmus de Cabriano.

<sup>57</sup> See Chapter 8, Section 1(a) above.

From the 16<sup>th</sup> century onwards jurists were increasingly concerned with offering a more complete systematization regarding the requirements for the transfer of ownership. However, even in this context we see that jurists draw no direct link between the problem of the *iusta causa traditionis* and the *voluntas domini* which enables the non-owner to transfer ownership. Both problems are indeed neatly kept apart by Donellus in his *Commentarii de iure civili*<sup>58</sup>, who distinguishes that, in order to transfer ownership, the transferor must be able to transfer ownership (*potestas rei transferendae*), to have the intent to do so (*transferendi voluntas*) and to perform the delivery<sup>59</sup>. Moreover, when dealing with the *potestas alienandi*, Donellus mentions that a non-owner can transfer ownership if he acts *voluntate domini*<sup>60</sup>. Accordingly, even when some of the opinions of Donellus concerning the transfer of ownership by *traditio* have been considered to agree with an abstract transfer system<sup>61</sup> – inspiring in fact the views of Savigny – there does not seem to be any link between the evolving views on the *iusta causa traditionis* and the role of the *voluntas domini* at the delivery by a non-owner. Later authors would also keep both problems apart<sup>62</sup>. Particularly illustrative at this regard is Pothier, who lists as the requirements for the transfer ownership by delivery: (1) that the transferor is the owner, or is authorized by the owner; (2) that the transferor is not affected by a prohibition to dispose; (3) a title for the delivery, either real or putative; and (4) an agreement of the parties at the delivery<sup>63</sup>. This systematization shows that the problem of the authorization to dispose is not discussed under the analysis of the *iusta causa traditionis* – requirement nr. 3 – or the *animus transferendi domini* – requirement nr. 4 – but rather as part of the general problem of the faculty to dispose. Similar constructions are even to be found in the early 19<sup>th</sup> century. In the Netherlands,

<sup>58</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15 (I, col. 729 ff.).

<sup>59</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 3 (I, col. 731): “In dante tria necessaria ad transferendum. Primum, ut possit jure transferre: secundum, ut velit; tertium, ut quod potest, & vult, id ita transferat, quod fit traditione. Ita in summa in dante tria haec spectanda sunt, potestas rei transferendae; transferendi voluntas; &, quae ista perficit, traditio”.

<sup>60</sup> Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 8 (I, col. 742-744).

<sup>61</sup> Van Vliet, *Transfer of movables* (2000), p. 179-181. See in particular Donellus, *Commentarii de iure civili* (Rome 1828), lib. 4, cap. 15, § 9 (I, col. 733-734).

<sup>62</sup> See e.g. Grotius, *Inleidinge* (ed. Dovring et al. 1965), 2,5,2 and 2,5,15; Vinnius, *Jurisprudentiae contractae* (Rotterdam 1664), cap. 20 (p. 53); Huber, *Heedendaegse Rechtsgeleertheit* (Leeuwarden 1686), 2,9 (p. 147); Voet, *Commentarius ad Pandectas* (Paris 1829), ad D. 41,1,35 (IV, p. 108-109); Heineccius, *Elementa Iuris Civilis Secundum Ordinem Institutionum* (Venice 1764), §§ 380-384 (p. 137-139); Heineccius, *Elementa Juris Civilis secundum ordinem Pandectarum* (Utrecht 1772), §§ 192-195 (p. 156-157); Heineccius, *Recitationes in elementa juris civilis* (Bratislava 1773), §§ 379-384 (p. 241-243).

<sup>63</sup> Pothier, *Traité du droit du domaine* (Paris/Orléans 1772), nr. 218 (p. 212): “Il faut, 1°. que celui qui fait à quelqu’un la tradition d’une chose, en soit le propriétaire, ou la fasse du consentement du propriétaire. Il faut, 2°. Que ce propriétaire qui fait la tradition ou qui la consent, soit capable d’aliéner. 3°. Il faut que la tradition soit faite en vertu d’un titre vrai ou du moins putatif, de nature à transférer la propriété. 4°. Il faut enfin le consentement des parties...”

for instance, the 1807/1808 Draft Code for Holland by Van der Linden<sup>64</sup> established as the first requirement for the transfer of ownership by delivery “that it [the delivery] is performed by the owner of the asset, or by someone else with his authorization”<sup>65</sup>, an idea which was preserved with almost the exact same words in the adapted version of the French Civil Codes promulgated in the Netherlands in 1809<sup>66</sup>. Apart from this requirement, Van der Linden required separately for the transfer of ownership by delivery both a proper title and that the delivery was performed with the intent to transfer ownership<sup>67</sup>, requirements which made their way into the *Wetboek Napoleon* of 1809 (art. 589)<sup>68</sup>. This shows that the analysis of the authorization to dispose given by the owner was still approached independently from the *iusta causa traditionis* and the *animus transferendi dominii*.

## 2. Direct representation and *potestas alienandi* in German scholarship until the BGB

As shown in the previous chapter, the development of the doctrine of direct representation originally did not bring any direct consequences for the analysis of the transfer of ownership by a non-owner. There was no need to resort to such doctrine, since Roman law provided clear rules regarding the *potestas alienandi* of non-owners. Nonetheless, the historical reconstruction of the evolution of direct representation in Roman sources given by Mühlenbruch and Savigny<sup>69</sup> brought a radical change in this regard, due to the fact that they considered that the cases of transfer of ownership by a non-owner described in the sources were in fact cases of direct representation. This doctrine had important consequences for the study of Roman law, as shown in Part I of this work, but it was also decisive for the study of modern private law due to the fact that, from that time onwards, the

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<sup>64</sup> Among the recent literature on Joannes van der Linden and his Draft see Wallinga, *Joannes van der Linden* (2010), p. 563-568, who moreover studies the significance of this work for the subsequent *Wetboek Napoleon* of 1809 by analysing the provisions on the law of delict (p. 568-577).

<sup>65</sup> Van der Linden, *Ontwerp BW 1807/1808* (1967), p. 80, art. 23: “Om traditie of levering bestaanbaar te doen zijn, is het nodig: a. Dat zij gedaan worde door den Eigenaar van het Goed, of door een ander met zijne toestemming...” The article also requires (letter b) that the transferor must have the faculty to transfer ownership, which would therefore seem to make reference to the absence of prohibitions to dispose. Also in the context of pledge (p. 84, art. 4) the project refers to the authorization (*toestemming*) of the owner.

<sup>66</sup> *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* (1809), art. 589: “Om levering bestaanbaar te doen zijn, is het noodig: 1°. Dat zij gedaan worde door den eigenaar van het goed, of door een ander met zijne toestemming...”

<sup>67</sup> Van der Linden, *Ontwerp BW 1807/1808* (1967), p. 80, art. 23: “Om traditie of levering bestaanbaar te doen zijn, is het nodig: (...) c. Dat zij gedaan worde op grond van verkoop, of van eenigen anderen titel, die geschikt is om eigendom overtedragen. d. Dat zij gedaan worden met het blijkbaar oogmerk, den eigendom te doen overgaan”.

<sup>68</sup> See on this text Bergervoet, *Goederenrechtelijke overeenkomst* (2009), p. 37.

<sup>69</sup> See Chapter 1, Section 1 above.

transfer of ownership by a non-owner was approached under the theoretical framework of the doctrine of direct representation.

After the works of Mühlenbruch and Savigny, scholars vividly discussed the significance of *Stellvertretung* in the context of the transfer of ownership by a non-owner<sup>70</sup>. It is however noteworthy that no one objected the idea of resorting to this notion in the context of the law of property in the first place. This phenomenon may be explained due to the vague features which the notion of direct representation still had during part of the 19<sup>th</sup> century. For instance, the *contemplatio domini* was in fact not unanimously seen as a decisive element identify the existence of *Stellvertretung*, and in fact Exner considered that a non-owner who delivered or acquired as a *Stellvertreter* did not necessarily have to act *nomine alieno*<sup>71</sup>. Accordingly, for German scholars the term *Stellvertreter* must have seem simply the most adequate to describe the situation of a non-owner who delivers an object of the principal, without pretending to attach a very specific technical meaning to it.

Since the doctrine of direct representation became progressively elaborate, the authors who considered that direct representation necessarily involved the *contemplatio domini* soon felt the need to provide an equally clear dogmatic framework for those acts which were concluded by an agent who did not act on behalf of the principal. The problem was particularly complex regarding the cases in which a non-owner carried out *nomine proprio* a legal act which involved a patrimonial loss for the owner, as was the case regarding the transfer of ownership. To explain how ownership could be transferred when the non-owner acted *nomine proprio* – as happens in the sale by a commission agent – the notion of *Ermächtigung* (authorization) was developed. Jhering<sup>72</sup> is often credited with having offered a clear distinction between *Stellvertretung* and *Ermächtigung*<sup>73</sup>, but previous authors already had developed the basic points of this distinction<sup>74</sup>. Be it as it may, scholars found in these notions a dogmatic framework to explain a series of cases where an individual directly affected the legal sphere of another one without acting as his direct representative, and particularly the transfer of ownership by a non-owner *nomine proprio*<sup>75</sup>. It could therefore seem as if the German *Ermächtigung* was a revitalized version of the reference to the *voluntas domini* in Roman law<sup>76</sup>, but the great difference is that the *Ermächtigung* only governs cases of indirect representation, i.e. when the non-owner acts *nomine*

<sup>70</sup> See e.g. Jhering, *Mitwirkung I* (1857), p. 303 ff.; Von Scheurl, *Zur Verhandlung* (1858), p. 3 ff.; Exner, *Rechtserwerb durch Tradition* (1867), p. 125 ff.; Hellmann, *Stellvertretung* (1882), p. 111-112; Bekker, *Pandektenrecht* (1889) II, p. 212 note i (§ 106).

<sup>71</sup> Exner, *Rechtserwerb durch Tradition* (1867), p. 128; p. 135 n. 36; p. 139 n. 46.

<sup>72</sup> Jhering, *Mitwirkung II* (1858), p. 75 ff., 131 ff.

<sup>73</sup> E.g. Schlossmann, *Stellvertretung* (1900) I, p. 295 (§ 27).

<sup>74</sup> See e.g. Wächter, *Handbuch* (1842) II, p. 684-685 n. 2 (§ 89).

<sup>75</sup> Bekker, *Pandektenrecht* (1889) II, p. 210-219 (§ 106); Lenel, *Stellvertretung und Vollmacht* (1896), p. 9-13; Windscheid, *Pandektenrecht* (1900) I, p. 358-360 (§ 81).

<sup>76</sup> See e.g. Hellmann, *Stellvertretung* (1882), p. 111-112.

*proprio*. For alienations performed by a non-owner *nomine alieno*, the ground of the transfer of ownership in German scholarship was the doctrine of *Stellvertretung*. Accordingly, German scholars maintained a clear distinction between two different legal grounds for the transfer of ownership by a non-owner<sup>77</sup>: on the one hand, whenever the non-owner delivers *nomine alieno* – regardless of whether he was authorized to do so by the owner or by a legal provision – ownership would be transferred under the framework of the doctrine of direct representation (*Stellvertretung*); on the other hand, when the non-owner delivers *nomine proprio*, the more specific doctrine of *Ermächtigung* will serve as the legal basis for the transfer of ownership<sup>78</sup>. This systematization was however not always perfectly clear, and for instance Bekker dealt both with the delivery *nomine alieno* and *nomine proprio* under the general notion of *Ermächtigung*<sup>79</sup>.

The developments which took place in the 19<sup>th</sup> century made their way to the German BGB, which in §§ 164–181 laid down the rules concerning *Stellvertretung* and *Vollmacht*. The transfer of ownership by a non-owner delivering *nomine domini* was understood to fall within these provisions, which is why the commissioners of the code considered that a separate paragraph had to be laid down for the situations where the delivery took place *nomine proprio*, as was the case regarding the sale by commission agents<sup>80</sup>. This led to the insertion of § 185, which explicitly declares that a non-owner can validly transfer ownership if he performs the delivery with the consent of the owner<sup>81</sup>. Nothing is said in this provision concerning the *contemplatio domini*, but it has always been clear that this text only applies to the transfer of ownership which is performed *nomine proprio*, outside the boundaries of direct representation<sup>82</sup>. Since the promulgation of the BGB, German scholars have upheld the basic distinction between *Stellvertretung* in general – or *Vollmacht* in particular – and *Ermächtigung* as different grounds for the faculty to dispose of the non-owner, thereby preserving them as two different legal grounds for the transfer of ownership by a non-owner<sup>83</sup>. Nonetheless, there have been dissenting opinions. Bekker insisted in his

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<sup>77</sup> See e.g. Hellmann, *Stellvertretung* (1882), p. 111–112; Bekker, *Pandektenrecht* (1889) II, p. 53 (§ 91).

<sup>78</sup> An outlook on the evolution of the notion of is given by Finkenauer, §§ 182–185 (2003), p. 968–973.

<sup>79</sup> See on this concept Bekker, *Pandektenrecht* (1889) II, p. 211–212 (§ 106).

<sup>80</sup> Jakobs/Schubert, *Beratung AT II* (1984), p. 961 (§ 185): “Ertheile Jemand einem Anderen die Ermächtigung über sein – des Ersteren – Gut, nicht in seinem – des Ersteren – Namen, sondern im Namen des Anderen rechtlich zu verfügen, z. B. im Falle einer Verkaufskommission, so liege (...) ein Vollmachtsverhältniß nicht vor, und doch könne nicht zweifelhaft sein, daß einerseits die rechtliche Disposition des Anderen, die Veräußerung oder dingliche Vertrag (...) wirksam sein müsse...”

<sup>81</sup> BGB § 185 (1): “Eine Verfügung, die ein Nichtberechtigter über einen Gegenstand trifft, ist wirksam, wenn sie mit Einwilligung des Berechtigten erfolgt”.

<sup>82</sup> See in particular Siber, *Verfügungsgeschäfte* (1915), p. 10.

<sup>83</sup> Schlossmann, *Stellvertretung* (1900) I, § 27 (p. 294–304); Hellwig, *Wesen* (1901), p. 100 ff.; Rümelin, *Das Handeln* (1902), p. 153–154; Krückmann, *Beschränkter Rechtserwerb* (1908), p. 279 ff.; Von Tuhr, *Die unwiderprüfliche Vollmacht* (1908), p. 67; Siber, *Verfügungsgeschäfte*

idea of bringing the notion of *Vollmacht* under the general concept of *Ermächtigung* when approaching the transfer of ownership<sup>84</sup>, but this view found no subscribers. Other authors would instead bring the notions of *Stellvertretung* and *Ermächtigung* under the concept of *Einwilligung*<sup>85</sup>. These constructions had the advantage of offering a common set of rules for both problems, but most jurists were not interested in this goal, developing instead separate sets of rules for the most frequent forms of *Ermächtigung*<sup>86</sup>, among which the *Verfügungsermächtigung* (authorization to dispose) is arguably the most controversial.

### 3. Unequal impact of the doctrine of direct representation in property law

#### a. European impact.

The ideas of German scholarship concerning the main features of the doctrine of direct representation had a deep impact across Europe, since they offered a detailed approach to the legal relations arising between principal, agent and the third party, including the problem of the transfer of ownership by a non-owner acting on behalf of the owner. Under the German influence, it became suddenly clear that the transfer of ownership by a non-owner would fall under the doctrine of direct representation as long as the delivery took place in the name of the owner. This in turn meant that a special legal basis had to be identified for those cases of delivery by a non-owner acting *nomine proprio*. The German codifier laid down a particular provision – BGB § 185 (1) – to explain how ownership could be transferred, but most European jurisdictions lacked an analogous provision, which set scholars on the quest to find a clear legal basis to explain how ownership is transferred in such cases<sup>87</sup>. While it remains largely unclear up to this day what the exact rules for the transfer of ownership by an indirect representative are, most European scholars are in any case certain that there are two different legal grounds for the transfer of ownership by a non-owner depending on whether the alienation is concluded in the context of direct or indirect representation, thereby subscribing to the basic German distinction between *Stellvertretung* and *Ermächtigung*. This dogmatic framework is to be found

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(1915), p. 10; Ladwig, *Verfügung* (1916), p. 6–7; Ludewig, *Ermächtigung* (1922), p. 1 ff., 55–56; Siebert, *Treuhandverhältnis* (1933), p. 253–254; Müller-Freienfels, *Die Vertretung* (1955), p. 98–103; Raich, *Ermächtigung* (1962), p. 8–20; Thiele, *Zustimmungen* (1966), p. 146–156; Jahr, *Begriff des Eigentums* (1984), p. 70–71; Flume, *Das Rechtsgeschäft* (1992) II, p. 143, 903–904; Larenz/Wolf, *Allgemeiner Teil* (2004), p. 412–414 (§ 23); Bayreuther, §§ 182–185 (2015), § 185 nr. 2 and 21.

<sup>84</sup> Bekker, *Sprachliches und Sachliches* (1905), p. 8–9.

<sup>85</sup> Ladwig, *Verfügung* (1916), p. 6–7; Stoll, *Die Ermächtigung* (1935), p. 33.

<sup>86</sup> Finkenaier, §§ 182–185 (2003), p. 970.

<sup>87</sup> See on this point Chapter 8, Section 4 below.

not only among delivery-based systems – such as Austria<sup>88</sup>, the Netherlands<sup>89</sup>, Spain<sup>90</sup> or Switzerland<sup>91</sup> – but also in consensual transfer systems – such as Belgium<sup>92</sup>, France<sup>93</sup>, Italy<sup>94</sup> and Portugal<sup>95</sup>. The distinction between two different legal grounds for the transfer of ownership by a non-owner became therefore a common feature of European legal scholarship, and even made its way into the Draft Common Frame of Reference (DCFR). On the one hand, DCFR II. – 6:105 governs the cases in which the acts of the agent will directly affect the principal in the context of direct representation. On the other hand, DCFR VIII. – 2:101(1)(c) determines that ownership will be transferred if “the transferor has the right or authority to transfer the ownership”. While these provisions are not particularly expressive on their own of the distinction between *Stellvertretung* and *Ermächtigung* – quite like the BGB itself – the comments on the DCFR explicitly declare that the idea of “authority to transfer ownership” refers only to the delivery performed by an indirect representative, such as a commission agent, while the delivery on behalf of the owner would be governed by the rules on direct representation<sup>96</sup>. This explains why DCFR VIII. – 2:302 (2)<sup>97</sup> discusses, under the section of “Special Constellations”, the transfer of ownership by a non-owner acting as an indirect representative, providing thus a rule equivalent to that of BGB § 185 (1) so that it is perfectly clear that ownership can also be transferred in the context of indirect representation<sup>98</sup>.

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<sup>88</sup> Bydlinksi, *Der Inhalt* (1967), p. 356; Faber, *National Report Austria* (2008), p. 59–60, 115–117; Koziol/Bydlinksi/Bollenberger, *Kurzkommentar* (2010), p. 428

<sup>89</sup> Van Meer, *De eigendomsovergang* (1930); Hartkamp, *Het begrip leveringstitel* (1974), p. 395–397; Pitlo, *Het systeem* (1981), p. 216–219; Groefsema, *Bevoegd beschikken* (1993), p. 40–46; Meijer, *Middellijke vertegenwoordiging* (1999), p. 194–196; Van Vliet, *Transfer of movables* (2000), p. 155–156; Reehuis, *Levering* (2004), p. 69–70 (nr. 67); Bartels, *Titel van overdracht* (2004), p. 57–63, 117–120; Asser/Kortmann, 2-I (2004), p. 157–161 (nr. 135–136); Peter, *Levering* (2007), p. 95–96; Reehuis, *Overdracht* (2010), p. 26–28; Hijma/Olthof, *Compendium* (2011), nr. 145–148; Pitlo/Reehuis/Heisterkamp, *Goederenrecht* (2012), p. 113–115 (nr. 142) and 240–248 (nr. 298 ff); Asser/Bartels/van Mierlo, 3–4 (2013), p. 209–212 (nr. 234–235); Asser/Tjong Tjin Tai, 7–4 (2014), p. 217–218 (nr. 251).

<sup>90</sup> Diéguez, *Eficacia real* (2006); González/Soto, *National Report Spain* (2011), p. 588–590.

<sup>91</sup> Droin, *La représentation* (1956), p. 61–63; Van de Sandt, *L'acte de disposition* (2000), p. 173–174.

<sup>92</sup> Van Gerven, *Handels- en economisch recht 1.B* (1989), p. 492 (nr. 510) and 495 (nr. 518); Jansen, *Nemo plus* (2009), p. 440; Del Corral, *Leveringsplicht* (2013), p. 370–377.

<sup>93</sup> Guiho, *Actes de disposition* (1954), p. 3–4; Chashin-Ritaine, *National Report France* (2011), p. 84–85.

<sup>94</sup> Cariota Ferrara, *I negozi* (1936), p. 51–54; Carraro, *Il mandato* (1947), p. 16 ff., 149 ff.; Mengoni, *Gli acquisti* (1968), p. 5–6; Settesoldi, *Il mandato* (2000), p. 199–200.

<sup>95</sup> Pessoa Jorge, *O mandato* (1961), p. 276 ff., 379–380.

<sup>96</sup> Von Bar/Clive, *DCFR* (2010) I, p. 429; V, 4430–4431, 4754–4755; Lurger/Faber, *PEL Acq. Own.* (2011), p. 459, 814–815.

<sup>97</sup> DCFR VIII. – 2:302 (2): “Where an agent acting under a mandate for indirect representation within the meaning of IV. D. – 1:102 (Definitions) transfers goods on behalf of the principal to a third party, the third party directly acquires the ownership of the goods (representation for alienation)”.

<sup>98</sup> Von Bar/Clive, *DCFR* (2010) V, p. 4754–4755.

b. Latin American jurisdictions, and particularly Chile.

While the sharp distinction between rules governing the transfer of ownership in cases of direct and indirect representation became completely dominant in Europe, it is worth noting that other jurisdictions did not follow this path, due to the fact that they never approached direct representation as an immediate legal basis for the transfer of ownership by a non-owner. A first eloquent example in this regard is to be found in Latin American legal systems, particularly through the decisive influence of the Chilean Civil Code (1856). This codification, written by the Venezuelan Andrés Bello, is particularly interesting on this point due to the detailed regulations concerning the transfer of ownership, which attempted to lay down a transfer system which was faithful to Roman and Castilian law<sup>99</sup>. When it comes to the transfer of ownership by a non-owner, it is worth noting that while Bello does make a reference to the institution of direct representation, he did not present direct representation as the legal basis in itself for the transfer of ownership. The basic rules on the transfer of ownership by a non-owner were laid down in art. 671, which defines the transferor (*tradente*) as the person who transfers ownership over the object delivered by himself or in his name (*a su nombre*)<sup>100</sup>. The reference to the *contemplatio domini* could seem to indicate that this is a decisive element for the transfer of ownership by a non-owner. However, in art. 671(2) we are told that the non-owner can transfer ownership in the context of the contract of mandate or as a legal representative, while art. 671(3) explicitly applies this idea to the forced alienations concluded by a judge<sup>101</sup>. The doctrine of direct representation never appears on its own as a ground for the transfer of ownership, and in fact art. 671(4) simply indicates that the delivery done by an authorized agent in the context of a contract of mandate will be regarded as performed by the owner<sup>102</sup>. Considering that art. 2151 explicitly declared that the contract of mandate could be carried out in the name of the principal or not<sup>103</sup>, it becomes clear that the transfer of ownership by a non-owner will be regarded as performed by the owner whether the delivery is performed *nomine alieno* or *nomine proprio*. This explains why Bello did not simply leave the problem of the transfer of ownership by a non-owner to the general

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<sup>99</sup> See on this point Bello, *Código Civil* (1981) I, p. 455.

<sup>100</sup> Chilean Civil Code (1856), art. 671(1): “Se llama tradente la persona que por la tradición transfiere el dominio de la cosa entregada por el o a su nombre...”

<sup>101</sup> Chilean Civil Code (1856), art. 671: “(2) Pueden entregar y recibir a nombre del dueño sus mandatarios, o sus representantes legales. (3) En las ventas forzadas que se hacen por decreto judicial a petición de un acreedor, en pública subasta, la persona cuyo dominio se trasfiere es el tradente, y el juez su representante legal”.

<sup>102</sup> Chilean Civil Code (1856), art. 671(4): “La tradición hecha por o a un mandatario debidamente autorizado, se entiende hecha por o a el respectivo mandante”.

<sup>103</sup> Chilean Civil Code (1856), art. 2151: “El mandatario puede, en el ejercicio de su cargo, contratar a su propio nombre o al del mandante; si contrata a su propio nombre, no obliga respecto de terceros al mandante”.

rules on direct representation of art. 1448<sup>104</sup>, but instead laid down a particular article which governs the faculty to dispose within the general provisions for the transfer of ownership by delivery. This is a completely different systematic approach from that which the German BGB would later adopt, since in this code the rules on *Stellvertretung* and *Ermächtigung* are to be found within the *Allgemeiner Teil*, while the rules regarding the transfer of ownership of §§ 925 ff. are silent regarding the transfer of ownership by an authorized non-owner.

Since the doctrine of direct representation is not presented in the Chilean Civil Code as a ground for the transfer of ownership on its own, there is no need to identify a separate legal basis for the alienation concluded *nomine proprio* by a non-owner. This has spared scholars from the complications which this problem has raised in Europe. In fact, the interpreters of the code would emphasize the importance of the consent of the owner for the delivery by a non-owner, while the *contemplatio domini* appears only relevant for the delivery by legal representatives. This is why Claro Solar, one of the interpreters of the Code, would draw a direct link between art. 671 and D. 41,1,9,4, since in both cases the *voluntas domini* appears to be decisive to determine whether ownership is transferred<sup>105</sup>.

The ideas of Bello would have a decisive influence in different Latin American jurisdictions due to the impact of his Code, which was adopted by several other nations. Accordingly, the rules concerning the transfer of ownership by a non-owner are also to be found in the Civil Codes of Ecuador (art. 687), el Salvador (art. 652), Honduras (art. 698) and Colombia (art. 741). The Code of Bello also influenced other Civil Codes on this point, such as that of Uruguay (1868), which declares in art. 769 that the delivery must be performed by the owner or his representative (*por el dueño o su representante*), which could appear to grant a central role to the direct representation at the delivery by a non-owner. However, art. 775 (2) discusses the problem of the delivery which has not been made or consented by the owner (*no ha sido hecha o consentida por el verdadero dueño*), which shows that the consent of the owner is the decisive element to determine the transfer of ownership by a non-owner.

The influence of the Code of Bello in several Latin American jurisdictions has rendered unnecessary any distinction equivalent to that made by German scholars between *Stellvertretung* and *Ermächtigung*<sup>106</sup>. It is moreover worth noting that in some legal systems where the rules on the transfer of ownership by a non-owner

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<sup>104</sup> Chilean Civil Code (1856), art. 1448: “Lo que una persona ejecuta a nombre de otra, estando facultada por ella o por la ley para representarla, produce respecto del representado iguales efectos que si hubiese contratado él mismo”.

<sup>105</sup> Claro Solar, *Explicaciones* (1932) VII, p. 257: “No es necesario, sin embargo, que sea el mismo propietario de la cosa quien efectúe la tradición; pues basta que otra persona lo haga con su consentimiento o en su representación y a su nombre. *Nihil autem interest utrum ipse dominus per se tradat alicui rem, an voluntate ejus aliquis*”.

<sup>106</sup> Concerning the Latin American jurisdictions which adopted the French transfer system see Guzmán, *La tradición* (2015), p. 338-339.

were not so clearly laid down, scholars avoided in any case to introduce sharp distinctions based on the significance of the *contemplatio domini*. For instance, while the old Argentinian Civil Code (1869) prescribed in general terms that possession could only be transferred with the consent of the owner<sup>107</sup>, Argentinian scholars developed with independence to this rule the notion of legitimacy (*legitimación*) to discuss the transfer of ownership by a non-owner, covering in a uniform way the cases of both direct and indirect representation<sup>108</sup>. This notion made its way into the new Civil Code<sup>109</sup>, preventing future misunderstandings on the point. Other Latin American jurisdictions were however directly influenced by the developments in Europe. This was the case in Mexico, where scholars imported the discussion concerning the legal grounds for the transfer of ownership by an indirect representative under the idea that direct representation in itself is a legal basis for the transfer of ownership by a non-owner<sup>110</sup>.

The rules concerning the transfer of ownership by a non-owner in several Latin American jurisdictions show a different evolution to that experienced by European legal systems, since direct representation is not presented as a legal basis on its own for the transfer of ownership by a non-owner, and therefore there is no basic distinction on the point which corresponds to that of *Stellvertretung* and *Ermächtigung*.

c. Mixed jurisdictions.

Leaving aside the analysis of the transfer of ownership by a non-owner in Latin America, there are some mixed jurisdictions where direct representation is not approached on its own as a legal basis for the transfer of ownership by a non-owner. This is for instance the case of South Africa, where the basic distinctions of Roman-Dutch law have continued to play a central role regarding the transfer of ownership by a non-owner. Accordingly, the only decisive element to determine if ownership is transferred or not by a non-owner is whether he is authorized to do so by the owner or by a legal provision<sup>111</sup>. South African legal scholars have not been forced to identify an independent legal basis for the transfer of ownership *nomine alieno*, but have remained loyal to the basic guidelines of the *ius commune* regarding the *potestas alienandi*. Similarly, Scottish

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<sup>107</sup> Argentinian Civil Code (1869), art. 2381: “La posesión de las cosas muebles se toma únicamente por la tradición entre personas capaces, consintiendo el actual poseedor en la transmisión de la posesión”. See also art. 2382.

<sup>108</sup> López de Zavala, *Teoría* (1997), p. 250-251; Lorenzetti, *Tratado* (1999) II, p. 159-161.

<sup>109</sup> New Argentinian Civil Code (2014), art. 1892 (6): “Para que el título y el modo sean suficientes para adquirir un derecho real, sus otorgantes deben ser capaces y estar legitimados al efecto”.

<sup>110</sup> Barrera, *Representación voluntaria* (1967), p. 34-38; Salazar, *La venta* (2011), p. 261-262.

<sup>111</sup> Carey Miller, *The Acquisition* (1986), p. 118-120, 324; Badenhorst/Pienaar/Mostert, *Law of Property* (2006), p. 73.

authors have upheld that it is decisive for the transfer of ownership by an agent that he is authorized to do so<sup>112</sup>. Whether the agent discloses who the principal is does not feature as a decisive element to determine the legal grounds of the alienation, although it may be relevant for other purposes<sup>113</sup>. Accordingly, the case of the delivery performed *nomine alieno* has not led to any problems in Scottish private law<sup>114</sup>.

The fact that South African and Scottish scholars have not identified two different legal grounds for the transfer of ownership depending on the *contemplatio domini* is explained due to the influence of the Common law institution of agency<sup>115</sup>, where the doctrine of undisclosed agency leaves no room for a sharp distinction between direct and indirect representation. Such terms are in fact alien to the English legal system, where an agent acting *nomine proprio* may nonetheless directly bind the principal<sup>116</sup>. The main element to determine the consequences following from the acts of the agent is that he does not exceed the authority granted to him. This explains why mixed jurisdictions which have not adhered to the doctrine of direct representation – as modelled by German scholarship – have maintained the traditional reference to the authorization of the owner as the ground for the validity of the delivery by a non-owner. This in turn implies that, in the context of the transfer of ownership, the agent who acts *nomine proprio* is not a problematic and unsystematic figure. This seems to be the case in Louisiana as well<sup>117</sup>, where the doctrine of undisclosed agency has also been applied in matters of property law<sup>118</sup>. Accordingly, the uniform approach in mixed jurisdictions to different cases of agency, which focuses on the existence of authority rather than on the *contemplatio domini*, has spared jurists in these latitudes from the complications arising from the direct application of the doctrine of direct representation to the transfer of ownership by a non-owner.

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<sup>112</sup> Reid et al., *Law of property* (1996), p. 541-542 (nr. 670).

<sup>113</sup> Gloag/Candlish Henderson, *Law of Scotland* (1995), p. 367 (nr. 22.21), commenting the contracts concluded by someone openly acting as an agent but without disclosing who the principal is: “In the case of goods in the auction room he [the auctioneer] impliedly undertakes to deliver them, but not that the purchaser will obtain a good title”.

<sup>114</sup> Carey Miller et al., *National Report Scotland* (2009), p. 381-385.

<sup>115</sup> For the influence of the English law of agency in mixed jurisdictions see Verhagen/Macgregor, *Agency* (2012), p. 57-58. Concerning South Africa and Scotland, see Gloag/Candlish Henderson, *Law of Scotland* (1995), p. 364-368; Forte/van Niekerk, *Agency* (2004), p. 240-270; Macgregor, *Agency* (2006), p. 135-150; Carey Miller et al., *National Report Scotland* (2009), p. 383-384.

<sup>116</sup> Verhagen/Macgregor, *Agency* (2012), p. 54-57.

<sup>117</sup> Regarding the law of agency in Louisiana see North, *Qui facit* (1998), p. 279-326; Holmes/Symeonides, *Representation* (1999), p. 1087-1159.

<sup>118</sup> See North, *Qui facit* (1998), p. 296-297; Holmes/Symeonides, *Representation* (1999), p. 1139-1140, regarding a case of acquisition of property (*Sentell v. Richardson*).

#### 4. *Stellvertretung* and *Ermächtigung*: dogmatic and practical challenges

##### a. Indirect representation and the transfer of ownership, a modern enigma.

The distinction which became widespread in Europe between the cases of direct and indirect representation as two different legal grounds for the transfer of ownership by a non-owner brought along a series of dogmatic and practical problems which had not troubled the jurists until the 19<sup>th</sup> century. The main reason for this development is that, for the first time, the *contemplatio domini* appeared as a decisive element in order to distinguish two different legal grounds for the passing of ownership. This presented scholars the challenge of determining the rules governing each different group of cases. Regarding the transfer of ownership in the context of direct representation, the delivery *nomine alieno* seemed to fall quite naturally under the general rules developed during the 19<sup>th</sup> century for this legal institution. The situation was rather different regarding the delivery in the context of indirect representation, where there was no clear legal basis to explain how ownership could be transferred by a non-owner. The discussion soon focused around the problem of subjective rights, and particularly around the question of whether the faculty to transfer ownership – which could be exercised by the owner or by a non-owner – should be considered as part of the ownership which was transferred. A particularly famous explanation was offered in this point by Thon<sup>119</sup>, who claimed that the faculty to dispose was independent from the ownership which was transferred. According to this author, it was not possible to consider the faculty to dispose, which was an element that leads to the transfer of ownership, to be at the same time part of the right which is transferred. Thon illustrated this idea by claiming that if someone casts a stone, one cannot say that the stone gave the strength to cast it; instead, the faculty to throw it was in the agent, and not in the object which was thrown<sup>120</sup>. This construction would therefore explain how it was possible for someone different than the owner to exercise the faculty to dispose<sup>121</sup>.

It is worth recalling at this point that already Vitoria and Suárez had related the problem of the faculty to dispose with the notion of subjective rights, but that their ideas on the subject remained largely ignored by scholars dealing with the *potestas alienandi*<sup>122</sup>. There was in fact no practical need to resort to such constructions, considering that the rules governing the transfer of ownership by a non-owner were not a controverted subject during the 16<sup>th</sup> century. It is therefore eloquent that the relationship between both problems would surface again in the course of the 19<sup>th</sup> century, the reason being precisely the lack of clarity concerning the legal basis for the transfer of ownership by a non-owner

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<sup>119</sup> Thon, *Rechtsnorm* (1878), p. 325 ff.

<sup>120</sup> Thon, *Rechtsnorm* (1878), p. 328.

<sup>121</sup> Thon, *Rechtsnorm* (1878), p. 329-333.

<sup>122</sup> See Chapter 8, Section 1(a) above.

acting *nomine proprio*. In this context, resorting to the idea of subjective rights seemed to offer a basic legal framework to explain a group of cases which appeared to be otherwise difficult to systematize.

While jurists gradually provided a basic legal framework for the transfer of ownership by a non-owner outside the cases of direct representation through the discussion on the content of subjective rights, the German codifier considered that it was in any case necessary to lay down a specific rule governing such cases. Otherwise, it would appear that there was no legal basis for the transfer of ownership in cases such as that of commission agents. Other systems had no particular provision on the subject, which led scholars to question whether ownership could be transferred at all by a non-owner acting as an indirect representative. The question was of course particularly urgent in those legal systems where there was no specific provision on the subject, but even among German scholars the theoretical niceties regarding the *Verfügungsermächtigung* were far from clear. A similar problem took place in the Netherlands under the new BW, where the preparatory works clearly stated that a non-owner acting *nomine proprio* could transfer ownership<sup>123</sup>. Nonetheless, it remained unclear how exactly did the passing of ownership take place. In other words, even if in some jurisdictions it was perfectly clear that an authorized indirect representative could transfer ownership, this case remained a rather unsystematic exception to the general rules of direct representation which was difficult to explain. A proper theoretical framework had to be found for this problem, which led to an abundant literature across Europe dealing with the transfer of ownership by a non-owner acting *nomine proprio*<sup>124</sup>.

The discussion on the nature of the faculty to dispose has to a large extent a theoretical nature, featuring lengthy scholarly debates on the legal nature of the faculty to dispose and particularly its relation with the notion of subjective rights

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<sup>123</sup> Meijers, *Toelichting* (1954) I, p. 220, commenting art. 3.4.2.5.

<sup>124</sup> See for Austria, see: Bydlinksi, *Der Inhalt* (1967), p. 356. For Belgium: De Visscher, *Jus abutendi* (1913), p. 337-350; Van Gerven, *Handels- en economisch recht 1.B* (1989), p. 495 (nr. 518); Samoy, *Middellijke vertegenwoordiging* (2005), p. 322-329; Jansen, *Nemo plus* (2009), p. 443; Del Corral, *Leveringsplicht* (2013), p. 370-377. For France: Guiho, *Actes de disposition* (1954), p. 1-37; Lotti, *Droit de disposer* (1999). For Germany: Ludewig, *Ermächtigung* (1922), p. 74 ff.; Raape, *Zustimmung und Verfügung* (1923), p. 257-296; Doris, *Ermächtigung* (1974), p. 35 ff.; Börner, *Stellvertretung und Verfügung* (1984), p. 409-419; Flume, *Das Rechtsgeschäft* (1992) II, p. 901 ff. For Italy: Settesoldi, *Il mandato* (2000), p. 205-209. For the Netherlands: Van Meer, *De eigendomsvergang* (1930); Nève, *Hoe verkrijgt* (1974), p. 70-71; Groefsema, *Bevoegd beschikken* (1993), p. 17-57; Smits, *Opdracht* (1994), p. 494; Aertsen, *Lastgeving tot verkoop* (1997), p. 453-463; Meijer, *Middellijke vertegenwoordiging* (1999), p. 194-196; Van Vliet, *Transfer of movables* (2000), p. 155-156; Bartels, *Titel van overdracht* (2004), p. 57-63, 117-120; Peter, *Levering* (2007), p. 95-129. For Spain: Villavicencio, *Facultad de disposición* (1950), p. 1025-1056; Jordano, *Mandato para enajenar* (1951), p. 1458-1498; Diéguez, *Eficacia real* (2006). For Switzerland: Droin, *La représentation* (1956), p. 63-72.

and with the ownership of the object<sup>125</sup>. Most authors wonder in particular whether the non-owner can be regarded as exercising the faculty to dispose, or whether he is somehow exercising the right of the owner to dispose of his own property despite not being his direct representative. Despite the theoretical terms of such considerations, some aspects of this controversy bear very concrete practical consequences. Particularly relevant is that some scholars do not admit that a non-owner could directly transfer an object belonging to someone else when delivering *nomine alieno*, since this would go against several basic principles of private law. Accordingly, it is claimed that the only way in which ownership could be transferred in this case was if the non-owner had become owner of the delivered thing in the first place, even for one moment<sup>126</sup>. Under this conception, the owner would be regarded as providing ownership to the transferor so that the latter could carry out the delivery. Other scholars, on the other hand, claim that it is indeed possible for a non-owner to directly transfer ownership without becoming owner himself<sup>127</sup>. This substantive difference in the approach to the transfer of owner by a non-owner can of course lead to completely different outcomes when discussing a particular case. For instance, if the owner loses his faculty to dispose by death or any other reason after

<sup>125</sup> See for Belgium: De Visscher, *Jus abutendi* (1913), p. 337-350; Jansen, *Beschikkingsonbevoegdheid* (2009), p. 47 ff. For France: Lotti, *Droit de disposer* (1999), p. 166 ff.; Tosi, *Acte translatif* (2006), p. 189 ff. For Germany: Ludewig, *Ermächtigung* (1922), p. 31 ff.; Raape, *Zustimmung und Verfügung* (1923), p. 275-276; Jahr, *Begriff des Eigentums* (1984), p. 71 ff.; Larenz/Wolf, *Allgemeiner Teil* (2004), p. 412 (§ 23 number 38). For the Netherlands: Meijers, *De algemene begrippen* (1948), p. 85; Groefsema, *Bevoegd beschikken* (1993), p. 29-32; van der Grinten, *Lastgeving* (1993), p. 32 (nr. 28); Aertsen, *Lastgeving tot verkoop* (1997), p. 454; Potjewijd, *Bekrachtiging* (2002), p. 31-32; Asser/Kortmann, 2-I (2004), p. 159-160 (nr. 136); Peter, *Levering* (2007), p. 106 ff.; Mollema, *Het beperkte recht* (2013), p. 98, 131 ff. For Spain: Miquel, *Causa* (2009), p. 168-169. For Switzerland: Van de Sandt, *L'acte de disposition* (2000), p. 172-173.

<sup>126</sup> Van Meer, *De eigendomsovergang* (1930), p. 24-46; Carraro, *Il mandato* (1947), p. 67-108; Jordano, *Mandato para enajenar* (1951), p. 1458-1498; Mengoni, *Gli acquisti* (1968), p. 7-8; Van der Grinten, AA 22 (1973), p. 567-571; Kleijn, NJ 1974/346, p. 936-938; Nève, *Hoe verkrijgt* (1974), p. 70-71; Asser/Van der Grinten, 2-I (1990), p. 118-120 (n. 134-135); Foëx, *National Report Switzerland* (2011), p. 206-207. An account of the scholarship and legal decisions holding this view is offered by Gremmels, *Treuhand* (1936), p. 37 ff.; Diéguez, *Eficacia real* (2006), p. 41-46.

<sup>127</sup> Cariota Ferrara, *I negozi* (1936), p. 53-54; Asser/Scholten/Bregstein, 2-I (1959), p. 79; Pessoa Jorge, *O mandato* (1961), p. 320-357; Barrera, *Representación voluntaria* (1967), p. 35-36; Mengoni, *Gli acquisti* (1968), p. 7-10; Brahn, *Problemen* (1974), p. 20-21; Brahn, *De beschikkingsonbevoegdheid* (1974), p. 267-270; Zwisser, *Rond art. 1376 BW* (1984), p. 133-134; Van Gerven, *Handels- en economisch recht 1.B* (1989), p. 495 (nr. 518); Asser/Mijnssen/De Haan, 3-I (1992), p. 140-141 (nr. 227); Hofstetter, *Mandat* (1994), p. 193; Aertsen, *Lastgeving tot verkoop* (1997), p. 456-457; Dirix, *De rechtsverhouding* (2002), p. 100-101, 106; Asser/Kortmann, 2-I (2004), p. 158-160 (nr. 136); Diéguez, *Eficacia real* (2006), p. 46-47, 170-171; Peter, *Levering* (2007), p. 103 ff.; Faber, *National Report Austria* (2008), p. 118; Jansen, *Nemo plus* (2009), p. 444; Becker, *Vente aux enchères* (2011), p. 72-73, 117-118, 254; Pidlo/Reehuis/Heisterkamp, *Goederenrecht* (2012), p. 242-243 (nr. 300); Bayreuther, §§ 182-185 (2015), § 185 nr. 22.

authorizing the transfer of ownership, the delivery concluded by the transferor will have different consequences depending on the model which is chosen: if the transferor is regarded as a fiduciary owner, it would appear that he could validly transfer ownership, while in the opposite case his faculty to transfer would disappear along with that of the owner. Similar difficulties would also arise if it was the transferor himself who lost the power to dispose over his own assets due to death, bankruptcy or other cause<sup>128</sup>.

It may be argued that the problem discussed here is not statistically very relevant. After all, it will only come into discussion in those cases in which ownership is transferred by a non-owner who does not act on behalf of the owner, and only if there are no rules protecting the acquirer on account of his good faith. Nonetheless, this problem has been important enough to bring uncertainty regarding the rules governing the transfer of ownership in various everyday transactions. A remarkable example can be seen in a relatively recent decision of the Dutch Supreme Court concerning the so-called “Mesdag II” case<sup>129</sup>, where an art dealer acting *nomine proprio* sold a painting of artist Hendrik Mesdag for an inferior price to that authorized by its owner. Since this was a case of indirect representation, all the controversies regarding the legal grounds of the alienation were brought up during the trial, where it was ultimately decided by the *Hoge Raad* that the seller was not entitled to transfer ownership under these conditions, and therefore ownership had never been transferred. Despite this recent decision, much remained unsaid concerning the exact legal nature of such alienation, therefore leaving the room open for future misunderstandings on this point.

b. Convenience of excluding direct representation as a separate legal basis for the transfer of ownership by a non-owner.

While most European jurisdictions have struggled with identifying a clear legal basis for the transfer of ownership by a non-owner in the context of indirect representation, this problem is completely avoided in those jurisdictions where direct representation does not appear on its own to be a legal basis for the transfer of ownership, since in such systems the alienation *nomine proprio* does not appear

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<sup>128</sup> This problem led to the decision of the Dutch Supreme Court “Nationaal Grondbezit/Kamphuis”, 08-06-1973, NJ 1974/346, which led to some of the differences of opinion recorded in the previous notes. On the loss of the faculty to dispose of the owner or the transferor before the delivery see Asser/Mijnssen/De Haan, 3-I (1992), p. 188-189 (nr. 294); van Boom, *Bevoegd beschikken* (1994), p. 865-866; Hofstetter, *Mandat* (1994), p. 45-46; Aertsen, *Lastgeving tot verkoop* (1997), p. 458; Rodríguez Pinto, *La cláusula* (2000), p. 167-175; Potjewijd, *Bekrachtiging* (2002), p. 9; Barrientos, *Comentario* (2003), p. 273-278; Samoy, *Middellijke vertegenwoordiging* (2005), p. 329 ff.; Peter, *Levering* (2007), p. 98-99, 113-114; Foëx, *National Report Switzerland* (2011), p. 207; Pitlo/Reehuis/Heisterkamp, *Goederenrecht* (2012), p. 242-243 (nr. 300).

<sup>129</sup> *Hoge Raad* 14/01/2011, NJ 2012/88, commented by Wenting, *Beschikking* (2011), p. 315-319; Spath, *Derdenbescherming* (2011), p. 576-585.

as a systematically awkward case. This is for instance the case of South Africa, Scotland and Chile. It could therefore seem convenient to exclude the doctrine of direct representation from the analysis of the transfer of ownership in the first place. Indeed, the application of the doctrine of direct representation as an immediate legal basis for the transfer of ownership by a non-owner is a relatively recent development which is only based in a faulty approach to Roman sources, and from which there follow no advantages. As shown above<sup>130</sup>, the doctrine of direct representation was not applied to the transfer of ownership because there was any need for it, but rather on account of vague dogmatic standpoints concerning the historical evolution of direct representation. Before the 19<sup>th</sup> century, the *contemplatio domini* played no decisive role in determining the legal basis for the transfer of ownership by a non-owner, the attention being focused on the existence of an authorization by the owner or by legal provisions. Only the shift in the focus from the *voluntas domini* to the problem of the *contemplatio domini* led to the appearance of a group of cases which seemed awkward and difficult to systematize, due to the fact that they fell outside the limits of direct representation. Accordingly, the extension of the doctrine of direct representation to the problem of the transfer of ownership seems not only unnecessary in the first place, but it moreover leads to inconvenient results.

Perhaps one of the main problems of applying the rules of direct representation to the transfer of ownership is that it is often not clear whether the rules on direct representation should be applied or not, especially since determining whether the delivery is concluded on behalf of the principal can be blurry in the context of the transfer of ownership. Already regarding the general theory of direct representation there are a number of situations where it is intensely discussed whether we face a case of direct representation or not, and whether the agent can be seen as acting in the name of the principal<sup>131</sup>. This is particularly the case regarding those situations in which an agent acts as such but on behalf of an undisclosed principal<sup>132</sup>. In fact, from a comparative perspective one of the most controversial aspects surrounding the doctrine of direct representation has been the sharp distinction between the consequences following from cases of direct and indirect representation, considering that other legal systems do not grant such decisive significance to the fact of whether the principal is disclosed or not. This is the case in Common law systems, where the

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<sup>130</sup> Chapter 8, Section 3.

<sup>131</sup> See on this point Siber, *Verfügungsgeschäfte* (1915), p. 33; Flume, *Das Rechtsgeschäft* (1992) II, p. 761 ff.; Haak/Zwitser, *Opdracht* (2003), p. 68 ff.; Diéguez, *Eficacia real* (2006), p. 37, 59-64; Von Bar/Clive, *DCFR* (2010) I, p. 427; Becker, *Vente aux enchères* (2011), p. 89 ff.

<sup>132</sup> This problem is often approached through the doctrine of the '*Geschäft für den, den es angeht*'. Flume, *Das Rechtsgeschäft* (1992) II, p. 765 ff., analyses this problem in the context of the acquisition of property as well (p. 767-769). This kind of cases are also studied in the context of the transfer of ownership by Siber, *Verfügungsgeschäfte* (1915), p. 10; Peter, *Levering* (2007), p. 100-103; Becker, *Vente aux enchères* (2011), p. 97 ff., 118-119.

doctrine of undisclosed agency allows an agent who does not act on behalf of the principal to produce direct effects with regard to him<sup>133</sup>.

The reason why it is particularly difficult to distinguish between direct and indirect representation in the context of the delivery by a non-owner is that the *contemplatio domini* does not play in the transfer of ownership the role it has in the law of obligations, where it is decisive to determine which are the parties bound to the agreement. If a contract is concluded between two parties, most Civil law jurisdictions would not admit that one of them suddenly presents another individual, who had remained hidden until then, as party to the agreement. On the other hand, regarding the transfer of ownership, it is perfectly possible that a non-owner concludes a contract of sale, binding himself to its fulfilment, despite the fact that the object sold belongs to another person and the acquirer knows about it<sup>134</sup>. In fact, in most delivery-based systems a non-owner may validly conclude a sale over someone else's property. The awareness that the object sold does not belong to the seller will normally be a relevant piece of information for the other party, but it does not seem to justify a completely different legal basis for the alienation by a non-owner. This shows that the *contemplatio domini* only plays a truly decisive role in the context of the law of obligations, being a secondary element for the transfer of ownership<sup>135</sup>. It appears therefore that the intervention of the non-owner could be conceptually distinguished for the purpose of the law of obligations and the law of property: in the first case, it is decisive, in order to determine the party bound to the agreement, whether the agent acts on behalf of the owner or not, while regarding the transfer of ownership it is only relevant whether he has the faculty to dispose at the time of the delivery.

Several scholars in European jurisdictions have advocated for dogmatic constructions which may bridge the sharp distinctions between direct and indirect representation in the context of the transfer of ownership<sup>136</sup>. It has often been claimed that in the context of the law of property it is not decisive for the

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<sup>133</sup> For a broad comparative perspective on this point see Meijer, *Middellijke vertegenwoordiging* (1999), p. 80 ff.; North, *Qui facit* (1998), p. 282 ff.; Verhagen/Macgregor, *Agency* (2012), p. 53-62. It is worth noting that the rules on agency of the Unidroit Principles (art. 2.2.1) apply equally "whether the agent acts in its own name or in that of the principal". The same can be said about the Convention on Agency in the International Sale of Goods (1983), art. 1(4).

<sup>134</sup> Wieling, *Drittwirkungen* (1993), p. 245-246.

<sup>135</sup> Asser/Scholten/Bregstein, 2-I (1959), p. 79; Zwitser, *Rond art. 1376 BW* (1984), p. 111, 113, 116, 132-133; Zwitser, *De verspersoonlijking* (1992), p. 480-482; Haak/Zwitser, *Opdracht* (2003), p. 79; Peter, *Levering* (2007), p. 119. Flume, *Das Rechtsgeschäft* (1992) II, p. 768 shows that in German case law the acquisition of ownership in the context of the *Geschäft für den, den es angeht* is possible when it was indifferent to the person transferring ownership who the acquirer was.

<sup>136</sup> See e.g. Müller-Freienfels, *Die Vertretung* (1955), p. 100-103. At a more general level, Schlossmann, *Stellvertretung* (1900) I, p. 81 ff. has criticized the basic division between direct and indirect representation, explicitly mentioning the problem of the commission agent (I, p. 94; II, p. 322).

application of the doctrine of direct representation whether the agent acts on behalf of the owner or not, and therefore the non-owner who transfers *nomine proprio* should be nonetheless regarded to transfer ownership in the context of direct representation<sup>137</sup>. In the Netherlands, Zwitser has coined in this regard the notion of a ‘representation of the law of property’ (*zakenrechtelijke vertegenwoordiging*)<sup>138</sup>, a concept which is also found in France and Belgium under the label *représentation réelle*<sup>139</sup>. Other authors have attempted similar eclectic constructions which may bridge the traditional concepts in order to offer a more coherent outlook on the transfer of ownership by a non-owner. Also in the Netherlands, Pitlo claims that the commission agent is an indirect representative regarding the law of obligations, but a direct representative regarding the law of property<sup>140</sup>, while Beekhuis considers that the alienation in this case can be explained as a ‘tacit authorization’ (*stilzwijgende volmacht*) to conclude the real agreement with the third party<sup>141</sup>. Such ideas show the uneasy fit of the doctrine of direct representation in the context of the law of property and the subsequent attempt of scholars to overcome the odd consequences that follow from it. A different approach was taken in Germany by Dölle, who instead of bringing all cases under the framework of the doctrine of direct representation, recommends a third category besides that of direct and indirect representation, namely that of ‘neutral acts’ (*Neutrales Handeln*)<sup>142</sup>. This notion would apply to those cases of administration over a specific group of assets (*Sondervermögen*), regarding which the person of the owner does not have a decisive role to play. This would be for instance the case of the administrator of a bankrupt society or an inheritance. In such cases the decisive element is that the administration falls over the respective patrimony, and not who the person of the owner is. This is why Dölle indicated that this administration is not subject-related (*personsbezogen*) but rather object-related (*objektsbezogen*)<sup>143</sup>. This shows once more the inadequacy of attending to the *contemplatio domini* as a decisive element in the context of the transfer of ownership. Finally, it is worth noting that the Swiss legislator also moderated the traditional doctrines in the Swiss Code of Obligations, which grants the same

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<sup>137</sup> Asser/Scholten/Bregstein, 2-I (1959), p. 76, 79–80; Zwitser, *Rond art. 1376 BW* (1984), p. 111, 113, 132; Wieling, *Drittwirkungen* (1993), p. 245–246.

<sup>138</sup> Zwitser, *Rond art. 1376 BW* (1984), p. 113, 115; Zwitser, *De verspersoonlijking* (1992), p. 480–482; Haak/Zwitser, *Opdracht* (2003), p. 80–81. This notion was later adopted by Peter, *Levering* (2007), p. 110 ff.

<sup>139</sup> See for references Samoy, *Middellijke vertegenwoordiging* (2005), p. 324.

<sup>140</sup> Pitlo, *Het systeem* (1981), p. 219: “Verbintenisrechtelijk is B dus wel middellijk vertegenwoordiger, maar zakenrechtelijk is hij onmiddellijk vertegenwoordiger”.

<sup>141</sup> Asser/Beekhuis I (1985), p. 150 (nr. 243).

<sup>142</sup> Dölle, *Neutrales Handeln* (1951), p. 268–288. This theory is followed in Belgium by Van Gerven, *Een verwaarloosde vorm* (1964), p. 179 ff. Instead, Flume, *Das Rechtsgeschäft* (1992) II, p. 781 ff. considers that these cases should fall under the theory of direct representation.

<sup>143</sup> It is worth noting that Flume, *Das Rechtsgeschäft* (1992) II, p. 143, 904 describes the difference between *Stellvertretung* and *Ernächtigung* by considering that the former is *personenbezogen*, while the latter is *gegenstandsbezogen*.

consequences of direct representation to those acts concluded by an undisclosed agent when it is indifferent to the other party with whom is he concluding an agreement<sup>144</sup>.

It could be argued that by laying down some clear rules on the transfer of ownership by a non-owner *nomine proprio* most problems could be avoided. For example, the commentaries to the DCFR explicitly show that ownership can be transferred directly from the owner to the acquirer through the delivery of an indirect representative<sup>145</sup>. While the further clarity on this point may contribute to avoid some common practical problems, the existence of two different legal grounds for the transfer of ownership by a non-owner brings along other dogmatic and practical problems, which will be reviewed in the following pages.

The fact that the boundaries for the application of the rules of direct representation can be rather vague concerning the transfer of ownership is to be seen in the fact that it is usually not clear for scholars themselves which rules should govern particular cases. This becomes evident by the fact that scholars dealing with the alienations concluded by legal guardians, by the pledge or mortgage creditor, by the administrator of a bankrupt society or in the context of an auction, will commonly differ as to whether each of them should be approached as cases of *Stellvertretung* or *Ermächtigung*<sup>146</sup>. Choosing for one legal basis or the other is particularly arbitrary in these situations, especially since the problem of the *contemplatio domini* will often be of no significance<sup>147</sup>. In fact, Dölle's category of 'neutral acts' concerns mainly cases in which an individual has legal powers of administration, but where the element of the *contemplatio domini* plays no significant role. In his opinion, it is incorrect to frame cases such as that of the administrator of a bankrupt society either under the category of direct or

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<sup>144</sup> *Code civil suisse livre cinquième, Droit des obligations* (1912), art. 32(2): "Lorsque au moment de la conclusion du contrat le représentant ne s'est pas fait connaître comme tel, le représenté ne devient directement créancier ou débiteur que si celui avec lequel il contracte devait inférer des circonstances qu'il existait un rapport de représentation, ou s'il lui était indifférent de traiter avec l'un ou l'autre".

<sup>145</sup> Von Bar/Clive, *DCFR* (2010) V, p. 4757 ff.; Lurger/Faber, *PEL Acq. Own.* (2011), p. 819-820.

<sup>146</sup> See e.g. Oertmann, *Der Dinglichkeitsbegriff* (1892), p. 452; Hellwig, *Wesen* (1901), p. 99; Guiho, *Actes de disposition* (1954), p. 4; Mengoni, *Gli acquisti* (1968), p. 5 n. 5; Zwitser, *Rond art. 1376 BW* (1984), p. 114-115; Jahr, *Begriff des Eigentums* (1984), p. 70-71; Groefsema, *Bevoegd beschikken* (1993), p. 24-25, 28; Van Vliet, *Transfer of movables* (2000), p. 155; Van de Sandt, *L'acte de disposition* (2000), p. 174-175, 180; Potjewijd, *Bekrachtiging* (2002), p. 32; Haak/Zwitser, *Oprichting* (2003), p. 85-86; Asser/Kortmann, 2-I (2004), p. 158 (nr. 135); Bartels, *Titel van overdracht* (2004), p. 60 n. 140; Salomons, *National Report the Netherlands* (2011), p. 55; Foëx, *National Report Switzerland* (2011), p. 201; Asser/Bartels/van Mierlo, 3-4 (2013), p. 209 (nr. 234); Asser/Tjong Tjin Tai, 7-4 (2014), p. 218 (nr. 251). Concerning legal representatives, according to the commentaries to DCFR VIII. – 2:101(1)(c) in Von Bar/Clive, *DCFR* (2010) V, p. 4431 the transfer of ownership by someone who is authorized by the law will fall under the rules of book VIII, but the reason of this choice remaining however hidden.

<sup>147</sup> It is worth noting that in Louisiana legal representatives may either act on behalf of the principal or not. See Holmes/Symeonides, *Representation* (1999), p. 1100-1101.

indirect representation<sup>148</sup>. It could be claimed that in some of these cases it is not relevant to determine what the legal basis of the transfer of ownership is, particularly in those situations that have a detailed legal regulation, such as legal guardians. Nonetheless, this ambiguity leaves the door open for misunderstandings when resorting to general rules, which is why it is by all means convenient to have clarity regarding the legal grounds for the transfer of ownership.

The distinction between cases of direct and indirect representation – and consequently between the alienation in the context of *Stellvertretung* or *Ermächtigung* – is all the more problematic since there are two separate sets of rules governing the transfer of ownership in each of these cases. For instance, the BGB has separate provisions governing the ratification of legal acts for the case of *Stellvertretung* (§ 177) and *Einwilligung* (§ 184)<sup>149</sup>, an example which is followed by the new Dutch BW in arts. 3:69 and 3:58<sup>150</sup>. Moreover, it is unanimously agreed by Dutch scholars that the provisions protecting the acquirer in good faith in BW 3:86 will only apply for those cases where a non-owner acts on his own name, while the general rules on direct representation would govern those cases in which the purported agent does not have the authority he claims<sup>151</sup>. Such an interpretation inevitably exacerbates the differences in the rules governing direct and indirect representation in the context of the transfer of ownership. This kind of dual regulations is also to be found in the DCFR, which lays down different sets of rules for the protection of the contracting third party<sup>152</sup> and for the ratification of unauthorized acts<sup>153</sup>. The existence of two separate sets of rules can easily lead to inconvenient results, not only because of the blurry line dividing direct and indirect representation – especially in the context of the law of property – but also because there can be specific provisions which may only be prescribed for one of these forms of representation. It is worth noting at this point that the rules on direct representation are normally better defined than those on *Ermächtigung*. Scholars have attempted to remedy this situation by

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<sup>148</sup> Dölle, *Neutrales Handeln* (1951), p. 272–273. Similarly, some authors even approach such cases on their own: Reehuis, *Overdracht* (2010), p. 27–28; Pitlo/Reehuis/ Heisterkamp, *Goederenrecht* (2012), p. 115 (nr. 142).

<sup>149</sup> See on these provisions Finkenauer, *Rückwirkung der Genehmigung* (2003), p. 282–314.

<sup>150</sup> Potjewijd, *Bekrachtiging* (2002), p. 22–25; Zwolve, *Bekrachtiging* (2003), p. 30–32; Peter, *Levering* (2007), p. 173.

<sup>151</sup> See for the Netherlands Asser/Van der Grinten, 2-I (1990), nr. 17; Ernes, *Onbevoegde vertegenwoordiging* (2000), p. 162; Asser/Kortmann, 2-I (2004) nr. 13; Reehuis, *Overdracht* (2010), nr. 27; Snijders/Rank-Berenschot, *Goederenrecht* (2012), p. 304 (nr. 361); Pitlo/Reehuis/Heisterkamp, *Goederenrecht* (2012), nr. 161.

<sup>152</sup> DCFR II. – 6:107 governs the case of an individual who acts as a representative without having authority, while DCFR VIII. – 3:101 contains the rules regarding the protection of the acquirer in good faith.

<sup>153</sup> DCFR II. – 6:111 governs the ratification in the context of direct representation, while DCFR VIII. – 2:102 gives rules for the ratification in the context of the transfer of ownership.

discussing whether the rules governing the problem of direct representation can be applied by way of analogy to the cases of *Ermächtigung*<sup>154</sup>.

The examination of the comparative evidence shows that the existence of two different legal grounds for the transfer of ownership by a non-owner leads to a series of dogmatic and practical problems. This suggests that it would be more convenient to eliminate the sharp distinction between *Stellvertretung* and *Ermächtigung* as two different legal grounds for the transfer of ownership. The particular formula used to attain this result depends ultimately of the peculiar features of each legal system. For instance, one could exclude direct representation from the analysis of the transfer of ownership, or consider that the *contemplatio domini* does not play such a decisive role in the context of the transfer of ownership to determine the application of this institution. The scholar has much freedom at this point, especially considering the lack of clear statutory provisions governing this subject in the most Civil law jurisdictions.

c. Relevance of the *contemplatio domini* for the transfer of ownership by a non-owner.

The historical and comparative study offered above shows that the main reason why most Civil law systems have struggled with the transfer of ownership by a non-owner acting *nomine proprio* is because of the overarching validity granted to the doctrine of direct representation by German scholarship within the law of property. In the previous section it was argued that the *contemplatio domini* should not be approached as a decisive element to determine whether ownership is transferred by a non-owner, or at any rate to identify a different ground for the transfer of ownership. Despite all of this, the *contemplatio domini* should be taken into account for particular purposes in the context of the transfer of ownership by a non-owner. Particularly important in this regard is to consider whether the non-owner disclosed who the owner was in order to determine the good faith of the acquirer<sup>155</sup>. In fact, in certain contexts the transferee cannot be regarded to acquire in good faith if he does not inquire into the ownership of the thing acquired and the link between the owner and the transferor, which is particularly the case if he has a reason to doubt the faculty to dispose of the transferor. Otherwise the protection of the acquirer in good faith would have an excessive scope, since it would be enough in order to become owner to acquire from someone who claims to be authorized to dispose by an unidentified owner, even when he did not provide any information concerning the powers granted to him.

It could appear contradictory to expect that a person who acquires from an indirect agent should inquire into the link between the owner/principal and the

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<sup>154</sup> See on this point Jakobs/Schubert, *Beratung AT II* (1984), p. 961 (§ 185); Carraro, *Il mandato* (1947), p. 2-4; Finkenauer, §§ 182-185 (2003), p. 967-968; Diéguez, *Eficacia real* (2006), p. 190-195.

<sup>155</sup> This was also the case in Roman law, as seen in Chapter 2, Section 5 above.

transferor/agent, since precisely what distinguishes indirect representation is that the person of the owner is not disclosed. There is however no such contradiction. It is one thing not to disclose who the real owner is – a common feature in transactions involving works of art<sup>156</sup> – but it is a completely different one not to reveal the terms of the authorization of the owner, which is why the acquirer cannot be regarded to be in good faith if he does not inquire on the faculties of the transferor in case he has a reason to doubt<sup>157</sup>. The underlying idea, which is shared in many jurisdictions, is that the good faith of the acquirer is excluded not only if he knew that the transferor was not entitled to dispose, but also if he should have known it<sup>158</sup>. This criterion introduces a certain duty to inquire into the faculty to dispose of the transferor if there is room for doubt<sup>159</sup>. Having this general framework, it is however difficult to draw a clear dividing line between those cases in which this duty must be observed. For example, in the context of important transactions it will hardly ever be acceptable not to disclose the terms of the authorization of the owner<sup>160</sup>. In other words, in certain transactions it cannot be indifferent for the acquirer to know the powers of the transferor<sup>161</sup>. Moreover, there are a series of factual elements that are incompatible with the good faith of the acquirer, such as paying a price which was too low, or buying from a person who can hardly be regarded as being authorized to dispose over a particular object<sup>162</sup>.

The *contemplatio domini* is also relevant in the context of the transfer of ownership of goods which are inscribed in public registers, as happens with immovable property<sup>163</sup>. Modern scholars have discussed in particular whether it is

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<sup>156</sup> See Becker, *Vente aux enchères* (2011), p. 95.

<sup>157</sup> This is why the Dutch Supreme Court in the above-mentioned decision “Mesdag II” considered that the acquirer who should have doubted on the faculties of the transferor could not invoke the provisions protecting the acquirer in good faith. Lenel, *Stellvertretung und Vollmacht* (1896), p. 13 seems to go too far when claiming: “Der dritte Erwerber seinerseits hat kein berechtigtes Interesse daran, zu wissen, auf welchen Thatsachen die Dispositionsbefugnis seines Veräußerers beruht”.

<sup>158</sup> See e.g. Asser/Van der Grinten, 2-I (1990), nr. 114; Asser/Kortmann, 2-I (2004) nr. 118; Faber, *National Report Austria* (2008), p. 41-42; Carey Miller et al., *National Report Scotland* (2009), p. 423; Salomons, *National Report the Netherlands* (2011), p. 112-113; Foëx, *National Report Switzerland* (2011), p. 223-224; Pitlo/Reehuis/Heisterkamp, *Goederenrecht* (2012), p. 125-128 (nr. 153-154) ff.; Asser/Bartels/van Mierlo, 3-4 (2013), p. 401-402 (nr. 419-420).

<sup>159</sup> See on this point Tjittes/van Wechem, *Kroniek* (2011), p. 923. The content of the good faith in this context is also discussed by Jansen, *Nemo plus* (2009), p. 443-444.

<sup>160</sup> It is in view of this consideration that Swiss scholars limit the scope of application of the above-quoted art. 32(2) of the *Code des Obligations* to minor everyday transactions. See Becker, *Vente aux enchères* (2011), p. 93-95.

<sup>161</sup> Peter, *Levering* (2007), p. 102.

<sup>162</sup> Cfr. for the Netherlands Nève, *Hoe verkrijgt* (1974), p. 71. For Switzerland: Becker, *Vente aux enchères* (2011), p. 94.

<sup>163</sup> This problem is intensely discussed in the Netherlands. In favour of his possibility: Groefsema, *Bevoegd beschikken* (1993), p. 40; Smits, *Opdracht* (1994), p. 493-494; Bartels, *Titel van overdracht* (2004), p. 61-62. Against it van Boom, *Bevoegd beschikken* (1994),

compatible with the modern systems of registration to admit the transfer of ownership by an indirect representative, who will be a different individual than that on whose name the object is registered. The normal conclusion is to exclude this possibility on account of the serious blow which it would mean to the public registers.

The study of the content of the good faith of the acquirer and the transfer of ownership over registered goods shows that the *contemplatio domini* may play a role when approaching the transfer of ownership by a non-owner. However, the secondary importance of this element by no means justifies establishing separate legal grounds based on whether ownership is delivered on behalf of the owner or not.

## 5. The faculty to dispose in different systems of transfer of ownership

### a. Consensual transfer systems.

It has been shown above that the way in which the *iusta causa traditionis* and the *potestas alienandi* were approached until the 18<sup>th</sup> century shows no interaction between both elements when drawing a general systematization of the transfer of ownership<sup>164</sup>. Moreover, the analysis of modern legal systems indicates that the general distinction of two different legal grounds for the transfer of ownership in the case of direct and indirect representation made its way into different European legal systems, regardless of the particular system of transfer of ownership which they had. In other words, while the distinction was dogmatically developed in Germany, which has an abstract and delivery-based transfer system, other jurisdictions would adopt these guidelines despite having causal or consensual transfer systems. This raises the question concerning the significance of the existence of different transfer systems for the analysis of the faculty to dispose. The evolution presented so far could indicate that the existence of different transfer systems is irrelevant for the analysis of the transfer of ownership by a non-owner, considering that jurisdictions having different transfer systems approached direct representation as an immediate legal basis for the transfer of ownership by a non-owner. Accordingly, the central issue appears to be whether direct representation is directly applied to the law of property or not. There are however reasons to doubt this conclusion. There are in fact some jurisdictions where the doctrine of direct representation seems to be unavoidable when discussing the transfer of ownership by a non-owner. This is particularly the case in consensual transfer systems, where the agreement of the parties at the

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p. 865-866; Aertsen, *Lastgeving tot verkoop* (1997), p. 459-462; Meijer, *Middellijke vertegenwoordiging* (1999), p. 196-198. Concerning the problem of ratification see Potjewijd, *Bekrachtiging* (2002), p. 35-38. The problem is also discussed in other jurisdictions. See e.g. Pessoa Jorge, *O mandato* (1961), p. 367; Mengoni, *Gli acquisti* (1968), p. 8 n. 7.

<sup>164</sup> Chapter 8, Section 1(c) above.

contract is enough to transfer ownership. Merging into a single act the contract and the transfer of ownership brought along immediate consequences for the traditional structure of the transfer of ownership by a non-owner. Among these, one of the most significant was that the sale performed by a non-owner was declared invalid<sup>165</sup>. In traditional delivery-based systems it was acceptable to consider the sale of a *res aliena* as valid, since ownership would not be transferred at the moment of the delivery. Now that contract and transfer of ownership became identified, it did not seem possible to uphold such a distinction. Therefore, the problem of the validity of the contract and the faculty to dispose were brought together.

The intimate relation between the validity of the title and the faculty to dispose of the non-owner in consensual transfer systems implies that even at a conceptual level it may be too challenging to identify them as two different requirements for the transfer of ownership, since the lack of the faculty to dispose will instantly render the title void<sup>166</sup>. Within a consensual transfer system it is indeed accurate to say that a defect in the faculty to dispose of the non-owner will prevent the formation of a valid title for the transfer of ownership. It appears therefore that the consensual transfer system has inevitably a direct impact on the conceptual framework of the transfer of ownership by a non-owner.

While the intimate link between the validity of the *iusta causa* and the problem of *potestas alienandi* in consensual transfer systems explains the legal outcome of a delivery performed by an unauthorized non-owner, the legal grounds for the transfer of ownership by a non-owner are the same as those to be found in other jurisdictions. This can be seen from the fact that consensual transfer systems have also adhered to the basic distinction between the transfer of ownership in the context of direct and indirect representation. One could perhaps claim that the main peculiarity of consensual transfer systems is that the doctrine of direct representation is more intuitively linked to the transfer of ownership by a non-owner, since the conclusion of a binding contract by an agent would coincide with the passing of ownership. Nonetheless, the transfer of ownership can also take place directly – at least according to most scholars<sup>167</sup> – through an indirect representative, which shows that there is no inseparable link between direct representation and the transfer of ownership by a non-owner in

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<sup>165</sup> See e.g. *Code Civil* art. 1599: “La vente de la chose d’autrui est nulle : elle peut donner lieu à des dommages-intérêts lorsque l’acheteur a ignoré que la chose fût à autrui”. Fenet, *Travaux préparatoires* (1827), XIV, p. 14 reproduces the opinions of some of the jurists discussing the subject. Tronchet, for instance, declares that “il est ridicule de vendre la chose d’autrui”, and Berlier qualifies such sale as “indubitablement nulle”. Portalis would use equally categorical words to describe this circumstance (p. 118). See on the formation of this doctrine Petronio, *Vendita* (1991), p. 169-195.

<sup>166</sup> Nonetheless Jansen, *Beschikkingsonbevoegdheid* (2009), p. 43 considers that in the consensual transfer system a distinction should be made between the problem of the faculty to dispose and the validity of the title.

<sup>167</sup> See Chapter 8, Section 1 above.

consensual transfer systems. Accordingly, the structure of consensual transfer systems does not seem to have any fundamental impact on the legal grounds for the transfer of ownership by a non-owner.

b. Abstract transfer system and faculty to dispose in Germany.

It has been highlighted until now that Savigny brought about a decisive change when approaching the transfer of ownership by a non-owner, since he framed this situation under the doctrine of direct representation. One may at this point wonder whether the development by Savigny of an abstract transfer system had any relation with his approach to the problem of the *potestas alienandi*. For the abstract transfer system, the agreement at the moment of the delivery is decisive for the transfer of ownership. Since the agreement takes place at the delivery, while the *voluntas domini* at the delivery grants the non-owner the *potestas alienandi*, one may wonder whether both elements interacted or even merged within the new transfer system. Miquel has indeed claimed that there was a fundamental interaction between both problems, which is to be found in the very beginning of Savigny's *dinglicher Vertrag*. The ground for this assertion is that, by the time Savigny was developing his theories on the subject, large parts of the *Codex Veronensis* containing the Institutes of Gaius remained illegible. This meant that Savigny, when analysing the requirements to transfer ownership in Gai 2,20 as presented in Lachmann's edition of 1841<sup>168</sup>, could not read the final phrase "*si modo ego eius dominus sim*"<sup>169</sup>. According to Miquel, this omission would have led Savigny to relate the agreement at the *causa* in this text with the *voluntas domini* which is referred to by Gaius in D. 41,1,9,3<sup>170</sup>. This in turn would have led Savigny to conclude that the *iusta causa traditionis* was a mere indication of the intent of the parties, and what was really decisive was the agreement to transfer ownership at the delivery. However, according to the Miquel, such an interpretation would confuse two different problems, since D. 41,1,9,3 would not deal with the *iusta causa traditionis*, but rather with the *potestas alienandi*, as can be seen from the subsequent fragment (D. 41,1,9,4)<sup>171</sup>. Miquel thus claims that Savigny could not properly determine the significance of Gai 2,20 and D. 41,1,9,3 because he was not able to read the final phrase of the former text. If he had been able to do so, he would have realized that D. 41,1,9,3 dealt with a problem of *potestas alienandi*, and had nothing to do with the *iusta causa traditionis*.

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<sup>168</sup> Lachmann, *Gaii Institutionum* (1841), p. 60: "§ 20. Itaque si tibi vestem, vel aurum, vel argentum tradidero, sive ex venditionis causa, sive ex donationis, sive quavis alia ex causa, tua fit ea res si - - - - -"

<sup>169</sup> Miquel, *Savigny y el nacimiento* (2003), p. 5758.

<sup>170</sup> D. 41,1,9,3 (Gai. 2 *rer. cott.*): "Hae quoque res, quae traditione nostrae fiunt, iure gentium nobis adquiruntur: nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi".

<sup>171</sup> Miquel, *Savigny y el nacimiento* (2003), p. 5762-5763. This claim was previously made in Miquel, *Exceptio rei voluntate* (1988), p. 676.

Accordingly, Miquel considers that one can identify a confusion between the *iusta causa traditionis* and the *potestas alienandi* in the very origins of Savigny's *dinglicher Vertrag*.

While Miquel's analysis is very innovative, it is not entirely convincing. In the first place, he approaches the Roman delivery in a strictly 'causal' key, leading him to assume that D. 41,1,9,3 cannot possibly grant a general significance to the agreement at the delivery, but instead merely refers to the problem of the *potestas alienandi*. This text was already studied above<sup>172</sup>, where it was shown that it indeed does not indicate that the intent of the owner at the delivery is always relevant, but that it can nonetheless be meaningful in some contexts. One of the situations in which this intent is relevant is the *potestas alienandi*, where the *voluntas domini* at the time of the delivery enables the passing of ownership, as shown in D. 41,1,9,4. This is however not the only context where the *voluntas domini* can be relevant at the delivery, as Miquel assumes, which can be seen by reading the subsequent texts, where this *voluntas* is relevant to determine the effects of the *traditio ficta* (D. 41,1,9,5-6) and of the acquisition of ownership over abandoned and jettisoned objects (D. 41,1,9,7-8). Accordingly, while D. 41,1,9,3 should not be regarded as presenting an abstract transfer system contrary to that of Gai 2,20, one cannot limit it simply to the problem of the *potestas alienandi* of an authorized non-owner, which is one among various applications of the *voluntas domini* within the *traditio*. Savigny may well have granted a significance to this *voluntas* which contradicts the causal transfer system of classical Roman law, but this interpretation does not entail – as Miquel thinks – a confusion between the *iusta causa traditionis* and the *potestas alienandi*.

Another element which conspires against the claims of Miquel is that the German abstract transfer system does not confuse or merge the agreement at the delivery with the authorization of the owner to transfer ownership. If Savigny did in fact confuse the problem of the *iusta causa traditionis* and the *potestas alienandi*, one could in fact expect that the *dinglicher Vertrag* would at the same time absorb from a systematic perspective the authorization of the owner to transfer ownership, particularly since in both cases one would be dealing with the *voluntas domini*. However, Savigny never really confused both problems. When developing his ideas on the structure of the transfer of ownership, not once does he bring any reference to the *voluntas domini* at the *potestas alienandi* to support his conclusions<sup>173</sup>. This latter element is instead approached within his analysis of the *Stellvertretung*<sup>174</sup>, which shows that Savigny located the *voluntas domini* at the delivery by a non-owner under an entirely different conceptual framework. Miquel may accordingly be underestimating the German jurist when claiming that he confused the *iusta causa traditionis* and the *potestas alienandi*. The distinction between the problem of the agreement at the delivery and the authorization of

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<sup>172</sup> Chapter 2, Section 6(a).

<sup>173</sup> See Savigny, *Obligationenrecht* (1853) II, p. 254 ff.

<sup>174</sup> See Chapter 1, Section 1 and Chapter 8, Section 2 above.

the owner to deliver was moreover upheld among subsequent German scholarship, which is why the problem of the faculty to dispose is approached under the notions of *Stellvertretung* and *Ermächtigung* (§§ 161–181 and 185) and not under the notion of the *dinglicher Vertrag* (§§ 925 and 929). It seems therefore that there was no decisive interaction between the problems of the *iusta causa traditionis* and the *potestas alienandi* under the abstract transfer system<sup>175</sup>, mainly because the problem of the authorization to dispose was discussed under a different systematic framework than that of the real agreement.

While there is no fundamental influence of the abstract transfer system on the analysis of the legal basis for the transfer of ownership by a non-owner, it is worth noting that there is a certain interplay between both problems when analysing the physical delivery by a non-owner after the *dinglicher Vertrag* has been concluded. The problem in this situation is that it is often argued that the physical transfer of possession following the *dinglicher Vertrag* can be considered a legal act (*Rechtsgeschäft*) subject to the general rules of the *Allgemeiner Teil*, being rather a mere *Realakt* regarding which the will plays no decisive role<sup>176</sup>. This implies that if an agent only has to perform the physical delivery of possession, this act cannot be governed by the rules on direct representation, which has led German scholars to develop an independent concept for the transfer of possession through an agent, who is regarded in this situation to act as a *Besitzdiener*<sup>177</sup>. According to this notion, the *Besitzdiener* is not an actual possessor, but rather exercises the possession of the principal – the *Besitzherr* – and therefore when the delivery takes place the possession is regarded to pass directly from the principal to the acquirer. This has led to a rather awkward situation in which three different concepts have to be used to explain the delivery by a non-owner: *Stellvertretung* when ownership is transferred by a non-owner *nomine alieno*; *Ermächtigung* when ownership is transferred by a non-owner *nomine proprio*; finally, when possession is transferred by an agent, we would be dealing with a *Besitzdiener*. This additional distinction involves as well discussing which rules would govern the delivery by a *Besitzdiener*<sup>178</sup>. All of this shows that the discussion on whether a particular intent is involved at the delivery of possession – and therefore whether it may be qualified as a legal act or not – has borne direct consequences for a group of cases, leading to the creation of a particular notion to explain the delivery by a non-owner in this case. The intricate construction of the *Besitzdiener* has been criticized by Van Vliet, who considers that the conceptual difficulties on the point could be avoided if one

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<sup>175</sup> The only interplay at this point is a minor one, concerning the transfer of possession by the *Besitzdiener*, which will be reviewed below.

<sup>176</sup> See Wieling, *Sachenrecht* (2007), p. 53; McGuire, *National Report Germany* (2011), p. 56.

<sup>177</sup> See on this notion Flume, *Das Rechtsgeschäft* (1992) II, p. 750; Van Vliet, *Transfer of movables* (2000), p. 68–71; Witt, *Rechtsfigur des Besitzdieners* (2001), p. 165–201.

<sup>178</sup> See on this point Witt, *Rechtsfigur des Besitzdieners* (2001), p. 165–201.

acknowledges that the delivery itself is a legal act where the intent of the parties has a relevant role to play<sup>179</sup>.

The study of the German abstract transfer system shows that there is no fundamental confusion between the problem of the faculty to dispose and the real agreement. Savigny never considered that the authorization given to a non-owner in order to transfer ownership should be approached in the context of the *dinglicher Vertrag*. Both problems also found an independent theoretical framework in the BGB, where the *voluntas domini* is either approached as a problem of *Stellvertretung* or *Ermächtigung*. It would therefore appear that the decisive role of the *dinglicher Vertrag* for the transfer of ownership had no direct impact in the general systematization of the transfer of ownership by a non-owner. The only point where both problems interact concerns the case of the mere physical delivery by a non-owner, due to the fact that such situation is considered to fall outside the provisions governing legal acts, which is why the figure of the *Besitzdiener* had to be introduced in order to provide a legal basis to explain the transfer of ownership in such case.

c. *Animus transferendi dominii* and *voluntas domini* in causal delivery-based transfer systems.

The study of both Roman law and the *ius commune* has shown that the *voluntas domini* granted to the non-owner in order to perform the delivery has a place of its own in causal delivery-based transfer systems<sup>180</sup>. In other words, the significance of the *iusta causa traditionis* for the transfer of ownership does not exclude the fact that the authorization given by the owner at the time of the delivery has a role of its own in order to determine the faculty to dispose of the non-owner. In fact, the *voluntas domini* in the context of the *potestas alienandi* traditionally has experienced almost no interaction with the *animus transferendi dominii* which is sometimes required for the transfer of ownership. Nonetheless, scholars in causal delivery-based transfer systems since the 20<sup>th</sup> century have often discussed whether the agreement at the time of the delivery has any role to play for the transfer of ownership. This in turn poses the question of whether this controversy affected the significance of the authorization given by the owner for the transfer of ownership through another person.

In the course of the 20<sup>th</sup> century it was often disputed in causal delivery-based transfer systems whether a separate agreement or intent should take place at the delivery in order to transfer ownership. In jurisdictions where this element is laid down in legal provisions it is of course more common for scholars to identify this intent as an individual requirement for the transfer of ownership. For instance, most Chilean scholars claim that the delivery is a bilateral legal act for which the

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<sup>179</sup> Van Vliet, *Transfer of movables* (2000), p. 71.

<sup>180</sup> See Chapter 2, Section 6 and Chapter 8, Section 1(c) above.

consent of both parties is needed<sup>181</sup>, an idea which agrees with the very explicit significance given by the Civil Code to the agreement at the time of the delivery. In those causal transfer systems where the provisions regarding delivery were not so explicit the issue was largely debated, as was the case in the Netherlands<sup>182</sup>, Switzerland<sup>183</sup> and Austria<sup>184</sup>. While there are several authors in different jurisdictions who grant a certain place to the agreement at the delivery in the context of a causal transfer system<sup>185</sup>, others have opted for a more radical distinction between abstract and causal systems, according to which the agreement at the delivery can only play a role within an abstract and not within a causal transfer system<sup>186</sup>. The latter opinion shares the same basic approach to the transfer of ownership as that which is to be found among some Roman law scholars, who consider that the need for a *iusta causa traditionis* excludes that the *animus transferendi domini* can be truly relevant in classical Roman law<sup>187</sup>. In fact, some of the scholars who defend this point of view in Roman law have also brought it up when discussing the transfer of ownership in modern private law. This is for instance the case of Miquel, who considered that it was not possible to require in Spanish law at the same time a *iusta causa traditionis* and an intent or agreement at the delivery, and that doing so would be a futile attempt to reconcile two opposite views regarding the *iusta causa traditionis*<sup>188</sup>. Lokin also discarded the need for an agreement at the delivery in the Dutch causal system, claiming that this is an element which only had a proper place in an abstract

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<sup>181</sup> See e.g. Claro Solar, *Explicaciones* (1932) VII, p. 255 and 261; Gaete, *La tradición* (1992), p. 67; Rodríguez Pinto, *La cláusula* (2000), p. 174-175; Peñailillo, *Los Bienes* (2006), p. 209-210, 214 ff.

<sup>182</sup> See Van Vliet, *Transfer of movables* (2000), p. 133-141; Peter, *Levering* (2007), p. 19-33; Bergervoet, *Goederenrechtelijke overeenkomst* (2009), p. 37 ff.; Reehuis, *Overdracht* (2010), p. 50-52 (nr. 56); Salomons, *National Report the Netherlands* (2011), p. 79-81.

<sup>183</sup> Honsell, *Tradition und Zession* (2005), p. 352 ff.; Bergervoet, *Goederenrechtelijke overeenkomst* (2009), p. 52-55; Foëx, *National Report Switzerland* (2011), p. 186, 199-200; Steinauer, *Les droits réels* (2012) II, p. 309-310 (nr. 2014a).

<sup>184</sup> Bartels, *Zakelijke overeenkomst* (1999), p. 95-99; Faber, *National Report Austria* (2008), p. 60-61.

<sup>185</sup> Van Vliet, *Transfer of movables* (2000), p. 144-145, 205; Van de Sandt, *L'acte de disposition* (2000), p. 30-32 (nr. 106); Peter, *Levering* (2007), p. 30-33; Drobnig, *Transfer of Property* (2011), p. 1015-1016; Salomons, *National Report the Netherlands* (2011), p. 80-81; Steinauer, *Les droits réels* (2012) II, p. 309 (nr. 2013 ff.); Snijders/Rank-Berenschot, *Goederenrecht* (2012), p. 278-283 (nr. 325-328); Hijma/Olthof, *Compendium* (2014), nr. 115.

<sup>186</sup> Bydliński, *Eigentumsübertragung* (1973), p. 1027; Den Dulk, *Zakelijke overeenkomst* (1979), p. 18-19, 104; Huijgen, *Rechtszekerheid* (1997), p. 11; Bergervoet, *Goederenrechtelijke overeenkomst* (2009), p. 55-57; Reehuis, *Overdracht* (2010), p. 59-60; Pitlo/Reehuis/Heisterkamp, *Goederenrecht* (2012), p. 104-108 (nr. 131-134).

<sup>187</sup> Chapter 2, Section 6(a) above.

<sup>188</sup> [Miquel, foreword to] Sansón, *La transmisión* (1998), p. 2: "El malentendido es patente en los manuales y tratados de Derecho romano y de Derecho civil cuando señalan como requisitos de la tradición los siguientes: 1) entrega; 2) *iusta causa*; 3) concorde voluntad de las partes de transmitir y adquirir el dominio. Hay en ese tercer requisito un intento estéril de conciliar dos interpretaciones opuestas de la *iusta causa traditionis*".

causal system<sup>189</sup>. The problem is also discussed in Chile, where the Civil Code of 1856 laid down a causal system of delivery which at the same time demands in particular cases a certain intent or agreement of the parties at the delivery. According to Guzmán, demanding such an agreement at the delivery is a mistake, since it contradicts the causal system adopted by the Code<sup>190</sup>.

While the point remains controversial in most of the above-mentioned European jurisdictions, the drafters of the DCFR made no reference to an agreement between the parties at the moment of the transfer of ownership (DCFR VIII. – 2:101). This was a conscious decision of the drafters, as can be seen in the comments to the DCFR<sup>191</sup>, since it was considered that a real agreement at the delivery is a dispensable notion within a causal transfer system<sup>192</sup>.

Despite the controversy regarding the importance of the agreement at the time of the delivery in causal delivery-based transfer systems, it is worth noting that this problem had no decisive impact concerning the existence of an authorization which a non-owner must have at the time of the delivery. The main reason for this is that, traditionally, this authorization has not been studied under the problem of the agreement at the delivery, but rather under different dogmatic categories. In most Civil law systems this conceptual independence has been favoured by the introduction of the notions of *Stellvertretung* and *Ermächtigung* – or their local equivalents – which means that the problem of the authorization of the owner at the delivery is framed under the problem of direct – or indirect – representation, independently from the discussion on the real agreement at the delivery. On the other hand, in those systems where direct representation is not an immediate legal basis for the transfer of ownership, the authorization of the owner is normally approached within the general analysis of the faculty to dispose. All of this implies that the discussion concerning the existence and significance of the real agreement at the delivery has not led to the exclusion of the authorization to dispose of the owner at the delivery as a relevant element for the transfer of ownership by a non-owner. This can be seen

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<sup>189</sup> Lokin, *Traditio* (1971), p. 131-132. Bergervoet, *Goederenrechtelijke overeenkomst* (2009), p. 63 shares this view, claiming that the real agreement within the Dutch causal transfer system suffers from a “serious identify problem”, being truly necessary only in an abstract transfer system.

<sup>190</sup> Guzmán, *DPR* (2013) I, p. 649: “El Código Civil de Chile, de 1855, siguió al Derecho romano clásico rigurosamente, y exigió un ‘título adquisitivo del dominio’ que justifique la entrega, pero cometió el error, al definir la tradición, de incluir en ella una ‘intención de transferir’ y una ‘intención de adquirir’ (artículo 670), influido por Pothier, sin reparar en que así incurría en contradicción con el criterio causalista que paralelamente adoptaba”.

<sup>191</sup> Von Bar/Clive, *DCFR* (2010) V, p. 4384, 4417 ff.; Lurger/Faber, *PEL Acq. Own.* (2011), p. 444-452.

<sup>192</sup> Von Bar/Clive, *DCFR* (2010) V, p. 4417: “The concept of a real agreement is not logically indispensable. The underlying entitlement to transfer does not need an additional contract to become effective in property law...” Similarly Lurger/Faber, *PEL Acq. Own.* (2011), p. 445-446.

in the DCFR, where despite the irrelevance of the real agreement within the causal transfer system, DCFR VIII. – 2:101 (c) requires for the transfer of ownership that “the transferor has the right or authority to transfer the ownership”, the notion of authority being in this context linked in particular with that of *Ermächtigung*. Accordingly, even in a legal body which deliberately attempts to exclude the relevance of any agreement or intent at the delivery, the intent of the owner in the context of the transfer of ownership by a non-owner continues to play a relevant role.

Despite the fact that in most legal systems the discussion concerning the real agreement at the delivery has not been decisive to determine the significance of the authorization of the owner at the delivery concluded by a non-owner, it is worth noting that in some jurisdictions there has been a certain systematic interplay between both problems. At some point scholars realized that admitting an independent significance to the intent of the owner at the delivery could be related to the problem of the structure of the transfer of ownership by delivery and the role of the real agreement, leading to different constructions to explain this phenomenon. This has been the case in the Netherlands, where part of the scholars have been keen to approach the authorization granted by the owner to an indirect representative in order to deliver as part of a ‘compound title’ (*samengestelde titel*), which implies that the title of the delivery would actually be formed by two different agreements which intertwine: the authorization to deliver the object, given by the owner to the transferor, and the agreement concluded between transferor and the acquirer<sup>193</sup>. Accordingly, if any of these elements fail, the title for the transfer of ownership would be incomplete and ownership would not be transferred. Under this notion, the problem of the authorization at the delivery is therefore approached as part of the requirement of a title to dispose, and not as an independent authorization. This construction was enthusiastically received by some Dutch scholars, and Potjewijd even applies it to approach the transfer of ownership by a non-owner in Roman law<sup>194</sup>. Zwolve in particular claims that this construction is more adequate to the Dutch causal transfer system, where the German doctrine of *Ermächtigung* has no role to play considering that the delivery can only be regarded as an independent legal act in an abstract transfer system<sup>195</sup>. It seems however that the theory of the *samengestelde titel* is not the most suitable to approach the transfer of ownership by a non-owner in a causal delivery-based transfer system. The main dogmatic

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<sup>193</sup> Hartkamp, *Het begrip leveringstitel* (1974), p. 395–398; Zwisser, *Rond art. 1376 BW* (1984), p. 110–111; Groefsema, *Bevoegd beschikken* (1993), p. 40; Aertsen, *Lastgeving tot verkoop* (1997), p. 456; Potjewijd, *Bekrachtiging* (2002), p. 29–31; Peter, *Levering* (2007), p. 110 ff.; Salomons, *National Report the Netherlands* (2011), p. 84.

<sup>194</sup> See Chapter 2, Section 6(a) above.

<sup>195</sup> Zwolve, *Bekrachtiging* (2003), p. 16–17, 30–31, being followed on this point by Peter, *Levering* (2007), p. 111. Also Potjewijd, *Bekrachtiging* (2002), p. 33 claims that there is a fundamental difference at this point between the Dutch causal transfer system and the German abstract system, and that the ‘*samengestelde titel*’ only has a place in the former one.

objection against it is that it confuses the problem of *potestas alienandi* with that of the *iusta causa traditionis*, since it ultimately reduces the problem of the authorization to dispose to the requirement of the valid title. This confusion between the different requirements to transfer ownership is what leads Bartels to reject the idea of a *samengestelde titel* in the context of the transfer of ownership by an authorized non-owner<sup>196</sup>. This author stresses that Potjewijd is drawn to adopt this construction because he denies that the non-owner may properly confer the faculty to dispose to the non-owner, which inevitably leads to approach the problem under discussion as a problem of the title<sup>197</sup>. In the case of Zwolve, the driving force for subscribing to the *samengestelde titel* is to exclude the significance of an independent intent at the delivery, thereby avoiding what seems to be a German construction, under which the delivery would appear to be an independent legal act. The excessive zeal to eliminate what is perceived as an undue foreign influence leads however to exclude the *voluntas domini* as an independent element to determine the *potestas alienandi*, as if this authorization was incompatible with a causal transfer system.

Chile is another jurisdiction where there has been an interplay between the discussion on the real agreement and the authorization to transfer of ownership by a non-owner. As already mentioned, it is a widespread opinion among Chilean scholars that the delivery should be regarded as a bilateral legal act, which has led to assume that all the general rules which govern the validity of legal acts – particularly those concerning the agreement of the parties – should be applied to the delivery as well. In the context of the transfer of ownership by a non-owner, this has often led to judicial decisions declaring that the lack of consent of the owner at the delivery – e.g. in case he dies – would render the delivery ‘void’ (*nula absolutamente*) due to the fact that the consent of the parties is an essential element for the validity of any legal act<sup>198</sup>. Some scholars have frowned upon such a construction, which has been regarded as completely alien to the causal transfer system laid down in the Code<sup>199</sup>. It has been argued that this would involve a departure from the causal transfer system which the codifier tried to adopt based on classical Roman law, and that the whole idea of an agreement at the delivery would be a construction of German Pandectism which has no place in the Chilean Civil Code.

The criticism of Chilean scholars regarding the significance of the *voluntas domini* at the delivery by a non-owner is by no means accurate from a historical

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<sup>196</sup> Bartels, *Titel van overdracht* (2004), p. 118-119, 242-243. Hartkamp, *Samengestelde overdrachtstitel* (2004), nr. 3 *i.f.* subscribes to Bartels’ position on this point.

<sup>197</sup> Bartels, *Titel van overdracht* (2004), p. 119, commenting Potjewijd, *Bekrachtiging* (2002), p. 31-32.

<sup>198</sup> *Corte Suprema*, 13/07/1999, commented by Rodríguez Pinto, *La cláusula* (2000), p. 167-175; *Corte Suprema*, 25/01/2001, commented – along with the previous decision – by Barrientos, *Comentario* (2003), p. 273-278.

<sup>199</sup> Guzmán, *Contribución* (1992), p. 251-257; Barrientos, *Comentario* (2003), p. 273-278; Soza, *Tradición* (2003), p. 287-305; Guzmán, *Donaciones* (2005), p. 180-184.

perspective, considering that the *voluntas domini* played a role at the delivery already in Roman law and throughout the *ius commune*, and that it was this tradition which made its way into Bello's Civil Code. The outcome prescribed by Chilean courts – i.e. that ownership will not be transferred if there is no authorization at the time of the delivery – is therefore in agreement with the transfer system of Roman law and the *ius commune*. The only awkward thing about these decisions is that they claim that ownership would not be transferred because of the lack of an essential element for any legal act, namely the consent of the parties. This idea involves a direct application to the transfer of ownership of the rules governing legal acts in general. It could be argued that there is in principle nothing wrong with applying some of the rules governing legal acts to the transfer of ownership by delivery. Savigny did in fact bring the delivery under the general rules for the validity of agreements even before he approached it in an abstract way<sup>200</sup>, and later scholars would discuss the consequences of the delivery under the problem of the 'validity' of legal acts<sup>201</sup>. The Chilean Civil Code itself refers in different articles to the 'validity' (*validez*) of the delivery – e.g. art. 672-678 – and Guzmán agrees that the delivery itself can be affected by mistake, duress or fraud, just like any other legal act where the intent of the parties has a role to play<sup>202</sup>. There has been controversy in other jurisdictions as well as to the scope of application to the delivery of the general rules governing legal acts, especially regarding its validity<sup>203</sup>. The problem of the direct application of this general rules is that the outcome prescribed by them – namely the 'nullification' of the act – is rather out of place in the context of the transfer of ownership in delivery-based, where the lack of one of the requirements for the delivery will simply be that ownership is not transferred. This is particularly true considering that there is a factual element – the transfer of possession – which cannot simply be 'nullified'. It seems therefore more correct to understand that, in the context of the transfer of ownership by a non-owner, the absence of the *voluntas domini* does not render the delivery 'void', but merely prevents the transfer of ownership from taking place. In other words, it is not necessary to resort to general notions governing the consent in legal acts if there is a specific consequence linked to the lack of authorization of the owner at the delivery. Apart from this conceptual clarification, there is nothing essentially wrong with the decisions of Chilean courts concerning the legal outcome prescribed for the absence of authorization at the delivery.

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<sup>200</sup> Savigny, *System* (1840) III, nr. 141 (p. 315-316).

<sup>201</sup> See e.g. Windscheid, *Pandektenrecht* (1900) I, p. 358 (§ 81); McGuire, *National Report Germany* (2011), p. 92.

<sup>202</sup> Guzmán, *Contribución* (1992), p. 254.

<sup>203</sup> See e.g. Reid et al., *Law of property* (1996), p. 489-491 (nr. 614-617); Peter, *Levering* (2007), p. 20, 32; Miquel, *Causa* (2009), p. 165-166; Foëx, *National Report Switzerland* (2011), p. 200.

A final example of interaction between the real agreement at the delivery and the authorization to dispose can be found in Austria, where the notion of the *Besitzdiener* was adopted from German law<sup>204</sup>. The reason behind this innovation was the same as that given by German scholars, namely that the mere factual transfer of possession could not be regarded as a *Rechtsgeschäft*<sup>205</sup>, which is why the general rules regarding *Stellvertretung* – or *Ermächtigung* – could not be applied to it.

The study of the causal delivery-based transfer systems shows that there was no fundamental influence between the discussion on the significance of the real agreement and the significance given to authorization given by the owner for the transfer of ownership by a non-owner. The main reason for this is that this authorization traditionally has had a systematic framework of its own, which in most European jurisdictions is the doctrine of direct – and indirect – representation. Accordingly, while scholars in causal transfer systems often discard the general significance of the *animus transferendi domini* at the delivery, this controversy has had no general impact on the approach to the authorization given by the owner to the transfer of ownership. Nonetheless, there has been a certain interplay between both problems in some jurisdictions, which in some cases revolves around the question of whether the general provisions governing the legal act can be applied to the authorization given by the owner or to the delivery performed by the non-owner.

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<sup>204</sup> See Faber, *National Report Austria* (2008), p. 38-39, 81.

<sup>205</sup> See on this point Faber, *National Report Austria* (2008), p. 61.

## Concluding Remarks

The study of the transfer of ownership by a non-owner confronts the legal historian with the difficult task of distinguishing between what the sources tell us and what previous generations of scholars have claimed to see in the sources. This is particularly true regarding the process of systematization and abstraction of the sources of Roman law which took place during the 19<sup>th</sup> century, which has influenced the modern understanding of classical sources to such an extent that scholars often cannot manage without the conceptual structures left behind by the so-called Pandectists. Moreover, the familiarity with such structures for the modern scholar is all the greater considering that much of the conceptual background of Civil law jurisdictions stems from the work of this legal school. In this context, it becomes difficult to distinguish to what extent the use of anachronistic notions is acceptable to describe Roman sources. On the one hand, they may appear as convenient shortcuts that can bring under a common idea a number of different cases. On the other hand, these accurate notions may result utterly alien to Roman legal thought, thereby distorting the approach to the sources. This is indeed the consequence of analysing the problem of the *potestas alienandi* through the more general concept of 'direct representation', to which legal scholars have resorted since the 19<sup>th</sup> century in order to offer a common approach to the different cases in which the position of a principal is directly affected by the acts of another individual.

The concept of 'direct representation' is inadequate to approach Roman sources in general and the *potestas alienandi* in particular. One of the main problems surrounding this notion is that scholars have traditionally described the evolution of intermediation in Roman law through the vague idea of a primitive ban on direct representation. In this sense, a handful of texts have been regarded as part of a general ban which would have covered all legal relations, while the significant amount of texts according to which one person could perform acts which would directly affect another one have been approached as later developments, being mere exceptions to the primitive prohibition. Such an interpretation has moreover been favoured by the vague outline which scholars have given to the notion of 'direct representation' within Roman law, which makes it often unclear what was exactly forbidden in pre-classical law and what were the exceptions to the prohibition.

Instead of approaching the sources through a vague reconstruction involving a notion which the Romans never developed, it seems more convenient to identify some general trends regarding more specific groups of cases. It is for instance recurrent among Roman sources that an individual may perform acts which improve the position of another one without being authorized to do so, while acts which involve a patrimonial loss for another individual will need to be authorized by him. Under this latter group one may include in general those

cases where a non-owner transfers ownership over someone else's property, which is an act that in itself involves a patrimonial loss for the owner. Considering that this case shares a common feature with other cases of patrimonial loss performed by a non-owner, it is moreover possible to identify some common patterns with other problems, including the manumission or the pledge through a non-owner.

Despite the use in the sources of terms such as '*potestas alienandi*' or '*ius vendendi*' to describe the different cases in which a non-owner may transfer ownership, one should not approach this problem as an abstract requirement for the transfer of ownership. Instead, Roman jurists normally have as a starting point that the transfer of ownership must be performed by the owner himself, approaching those cases where a non-owner is able to do so as exceptions to the rule. This does not however imply that there were no common features among these 'exceptional' cases, since one may in fact identify two main legal grounds according to which ownership is transferred by a non-owner: the authorization by the owner (*voluntas domini*) and the existence of a legal provision authorizing someone different than the owner to transfer ownership. The *voluntas domini* will be the common criterion to determine whether ownership is transferred when the owner authorizes the delivery, without being decisive what particular relation linked the owner and the person following his instructions, who may be a *sui iuris* or an *alieni iuris*. The only case where the legal basis seems to be actually different concerns the delivery by a slave or son-in-power who has the *libera administratio peculii*, since the intent of the owner will play no role in this context. It is moreover worth pointing out that, while the effects of the transfer of ownership *voluntate domini* are sanctioned by the *ius civile* – granting Quiritary ownership to the acquirer – Roman jurists developed a rich case law in order to determine when the non-owner could be regarded as acting *voluntate domini*, deriving for instance particular consequences for the cases of death, revocation or ratification. The scope of the authorization was also brought under the attention of jurists, particularly when the owner granted very general faculties of administration and when the agent abused of a very broad faculty to dispose.

The other large group of cases where a non-owner could validly transfer ownership involves those individuals who were authorized by a legal provision to transfer ownership over someone else's assets. This was particularly the case of legal guardians, regarding whom we have the largest amount of information. While the *voluntas domini* played no role in the alienation, jurists developed an equally rich case law around the notion of *administratio*, which should govern the acts of the legal guardian, allowing him to grant Quiritary ownership to the acquirer as well.

The delivery by a non-owner which did not take place *voluntate domini* or *administrationis causa* would in principle fall under the notion of *furtum*, which would prevent the acquisition of ownership through usucapion by rendering the delivered thing a *res inhabilis* to that effect. Nonetheless, this prohibition did not

have such far-reaching consequences as is usually thought, due to the fact that the intention of the person performing the delivery was usually decisive to configure the theft. Also noteworthy is that, despite the use by Roman jurists of rather flexible and versatile notions to determine the validity of the transfer of ownership, the praetor usually had an active role in modifying the normal outcomes prescribed by the *ius civile*, leading to a rich case law which included among other remedies the *actio Publiciana*, the *exceptio rei venditae et traditae* and the *exceptio doli*.

The current work revisits some of the more widespread preconceptions regarding the *potestas alienandi* through a source-oriented analysis. It is for instance clear from the study of the classical sources that the possibility to transfer ownership by a non-owner was no innovation introduced by jurists as an exception to a primitive ban on direct representation, particularly considering that the transfer of ownership took place according to the *ius civile*. Scholars have attempted to bypass the evidence on this point by pointing out that in the case of the alienation carried out by legal guardians, these should be regarded as having ownership over the delivered goods. However, the evidence in favour of such a claim is almost non-existent, and at any rate it is clear that already at an early stage legal guardians would appear transferring ownership as non-owners of the delivered goods. It appears therefore that scholars have often been too keen to explain the sources in a way that makes them agree with the theory of the primitive ban on direct representation. This is also to be seen in the approach to formal modes of transferring ownership, which according to the traditional reconstruction of the evolution of direct representation could not be carried out by a non-owner on account of the fact that they were formal acts belonging to the *ius civile*. While the suppression by Justinian of these acts leaves little evidence on the subject, there is nonetheless compelling evidence regarding the case of the *mancipatio* by slaves and by legal guardians, which indicates that it was indeed possible, at least for these individuals, to transfer ownership in this way. Concerning the *in iure cessio*, the limitations concerning procedural representation do not seem to have affected this mode of transferring ownership. This was also the case of the *manumissio vindicta*, which explains the numerous references within the sources where a son-in-power frees a slave *voluntate patris*. The general rules governing the *potestas alienandi* regarding formal ways of transferring ownership appear therefore to have agreed to a large extent with those governing the *traditio*.

The sources also show that the *contemplatio domini* did not play a decisive role concerning the transfer of ownership by a non-owner. In any case, it is clear that Roman jurists did not draw a general distinction for the legal basis of the *potestas alienandi* between those cases where the non-owner acts *nomine alieno* and *nomine proprio*. This distinction could only play an incidental role, as happens when the *voluntas domini* involved that the delivery should take place *nomine alieno* or *nomine proprio*. The *contemplatio domini* could also be relevant when determining

the content of the good faith of the acquirer for the usucapion, since the transferor could have claimed to have been authorized by the owner. It remains therefore clear that there was no equivalent in the Roman sources between the modern distinctions concerning the delivery by a direct representative and by an indirect representative. Moreover, it is worth noting that there was no general obstacle in Roman law for a non-owner to deliver *nomine alieno*. Whether some of the features of Roman law can be subsumed under modern legal categories is completely irrelevant to determine the significance of such acts in Antiquity.

Another problem which has been revisited in the current work is the significance of the *voluntas domini* within the general structure of the transfer of ownership by *traditio*. This particular problem is not directly related to the development of direct representation in the sources, but rather with the consequences that scholars derive from the idea that the transfer of ownership by *traditio* in classical Roman law would have corresponded to a causal transfer system. While this notion is accurate to the extent that the *iusta causa traditionis* was indeed a requirement for the transfer of ownership, one should avoid assuming that there is no other intent which can play a relevant role for the delivery. Already the fact that the *voluntas domini* can play a decisive role to determine the consequences of a *traditio* by a non-owner shows that the intent of the owner is not altogether irrelevant at the moment of the delivery. The significance of the *voluntas domini* at the delivery is particularly visible in certain cases of *error in dominio*. Scholars should therefore refrain from seeking a strictly causal transfer system in Roman sources, particularly since the notions of a causal or abstract system of delivery are completely alien to the sources. The same observation can be made regarding most modern causal transfer systems, where jurists are often too keen to discard any significance of the intent at the delivery, since this is normally identified with an abstract transfer system. Despite such views, the authorization given by the owner at the delivery remains relevant in causal transfer systems, and therefore it should be acknowledged that some forms of intent or agreement at the delivery do play a role within these systems as well.

The analysis of both literary and legal sources also provides a fresh approach to the significance of the *nemo plus* rule. According to the traditional view, this rule would originally be only truly applicable to formal ways of transferring ownership, regarding which the ban on direct representation would prevent the intervention of a non-owner. Since it was proven in the course of the research that a non-owner could indeed perform the *mancipatio* or the *in iure cessio*, the rule had to be reassessed. It becomes clear in the first place, through the study of non-legal sources, that the general idea according to which 'no one can give what he does not have' was not regarded as an absolute truth. On the contrary, it had its origins within dialectics, where it was usually used within eristic reasoning, leading to a detailed analysis of it by Aristotle. The argument became a commonplace in the course of time, maintaining in any case a significant role among dialecticians and rhetoricians. Roman jurists adopted the argument, which

they applied to a wide range of situations, but without granting it a particular legal significance of its own. In some cases it is used as a conclusive argument to support a legal outcome, in which case the influence of rhetoric can be seen. In other situations, however, the *nemo plus* argument appears as a mere reference point, its validity even being openly contradicted. It becomes therefore clear that classical jurists did not identify in Ulpian's *nemo plus* rule a perfectly valid statement governing the transfer of ownership by a non-owner, but approached it instead merely as a valid starting point which could face several exceptions. Only in Justinianic times does it appear that the compilers granted this rule a certain systematic significance regarding the transfer of ownership by a non-owner, since they considered that in most cases the delivery should be regarded as performed by the owner himself.

While the *nemo plus* rule did not have in itself a relevant systematic function in classical Roman law regarding the transfer of ownership by a non-owner, it did play a key role in the way jurists since the time of the glossators approached the cases of *potestas alienandi*. This idea provided a basic thumb rule around which medieval jurists gathered exceptional cases where a non-owner could be seen as giving what was not his own. Initially, jurists simply approached the *nemo plus* as a general rule which was full of exceptions, but gradually this view was revised, due to the influence of the understanding of the rule developed in medieval dialectics. This new interpretation became dominant in the 16<sup>th</sup> century and remained so until the 19<sup>th</sup> century, during which period the delivery concluded by a non-owner with *potestas alienandi* was regarded as actually performed by the owner himself – and therefore not as an exception to the *nemo plus* rule. This systematic function disappeared from most jurisdictions in the course of the 19<sup>th</sup> century, and since then the *nemo plus* rule has remained mostly as a starting point for legal reasoning.

Despite the evolving significance granted to the *nemo plus* rule, the legal grounds according to which a non-owner could transfer ownership remained largely untouched. Scholars of the *ius commune* normally drew a distinction between those cases where the non-owner delivered *voluntate domini* and those where he was authorized by the law to transfer ownership, which can be seen as generally agreeing with the approach of Roman jurists. This changed dramatically in the course of the 19<sup>th</sup> century due to the developments which took place regarding the doctrine of direct representation. Initially, the new ideas on this point concerned almost exclusively the law of obligations, where the *alteri stipulari* rule had to be overcome. The expansion of the doctrine of direct representation into the law of property took a decisive step through the work of German scholarship, which developed a general reconstruction to explain the evolution of direct representation in historical perspective. According to this theory, Roman law initially banned all acts which could fall under this notion, including the celebration of contracts and the acquisition of ownership through an agent, as well as the transfer of ownership by a non-owner. This historical

model brought accordingly the problem of the *potestas alienandi* under the general problem of the 'direct representation', despite the fact that there was no actual need to apply this doctrine as a legal basis for the transfer of ownership by a non-owner, considering that until that time there was no obstacle in the sources against this form of intermediation.

The new approach towards the problem of the *potestas alienandi* influenced the way in which subsequent generations of legal scholars would view this problem in Roman law, introducing therefore a deeply anachronistic starting point to deal with the classical sources. The consequences were equally decisive for the analysis of the transfer of ownership by a non-owner in modern Private law, due to the fact that the legal grounds according to which ownership passed were dramatically modified. The traditional distinction between cases where the *potestas alienandi* followed either from the *voluntas domini* or from the law now became obsolete in most Civil law systems. Instead, the decisive element to determine whether ownership was transferred was the compliance with the requirements of direct representation. This in turn made it particularly troublesome in many jurisdictions to determine whether ownership could be transferred by a non-owner acting *nomine proprio*, since in that case he could not be regarded to act as a direct representative. This sharp distinction between the legal grounds of alienations performed *nomine proprio* and *nomine alieno* is largely unjustified if one considers that in the context of the transfer of ownership the *contemplatio domini* does not play such a decisive role as it does in the context of the law of obligations. It is therefore no wonder that already several scholars have attempted to abolish the practical consequences of this distinction and offer a common set of rules for both groups of cases.

The evolution of the transfer of ownership by a non-owner since the Middle ages shows that 19<sup>th</sup> century German scholarship signals a turning point which has dramatically influenced the way in which this problem is approached both by legal historians and by scholars dealing with modern private law. The views on this subject have proven all the more difficult to revise due to the fact that the systematic structure built under the notion of direct representation seemed equally valid to describe Roman sources and modern private law. This implies at the same time that Roman law scholars would not see anything fundamentally incorrect in the new systematization, while jurists dealing with the private law of Civil law jurisdictions would feel that direct representation was a legal basis for the transfer of ownership developed by Roman jurists. Despite this view, the truth is that the introduction of the idea of direct representation to describe the evolution of intermediation in Roman law has greatly distorted the analysis of classical sources, which is particularly clear in the context of the *potestas alienandi*. This is why the legal scholar is best advised to avoid deriving any consequences regarding the transfer of ownership by a non-owner from the traditional reconstructions concerning the evolution of direct representation in Roman law, and particularly the idea that pre-classical Roman law knew a general ban in this

## CONCLUDING REMARKS

regard. The awareness of the anachronisms which the notion of direct representation introduced into the study of Roman law is the only way to allow the scholar to attain a truly source-oriented approach the problem of the *potestas alienandi*.

Modern private law scholars are also warned against the temptation of relying uncritically on the notion of direct representation when approaching the problem of the transfer of ownership by a non-owner. Historic evidence shows that only in the last two centuries did this approach become dominant, and that before that time there were perfectly clear legal grounds for the transfer of ownership by a non-owner. The expansion of the doctrine of direct representation into the law of property took place due to the rather vague outline of this doctrine during part of the 19<sup>th</sup> century. It is moreover worth noting that even after that time, not every Civil law system grants the same significance to the doctrine of direct representation within property law. The awareness on this point is essential in order to avoid some of the most undesirable consequences that have followed from the immediate application of the doctrine of direct representation to determine the legal grounds of the faculty to dispose, which is particularly the case regarding the sharp distinction between the conveyances which take place *nomine alieno* and *nomine proprio*. This does not necessarily imply banning direct representation from the law of property. One may however wonder whether it is convenient to uphold the overarching significance of the rules of direct representation in property law, considering that a more elemental set of rules concerning the authorization of the owner in general could offer a more coherent outlook on the point. This claim is not intended merely as a plea for the return to dogmatic structures which are closer to those of Roman law, but rather as an attempt to eliminate inconsistencies which emerged from the defective approach to classical sources by those scholars who shaped private law as we know it nowadays.



## Summary

The present research offers a broad outlook on the transfer of ownership by a non-owner, based on the reassessment of some dogmatic starting points which have not been critically tested by previous scholarship. The key issue which runs through most of the study is the use of the notion of direct representation, which has traditionally been applied to describe the evolution of the transfer of ownership by a non-owner in Roman law, but also to offer a systematization on this subject in most European Civil law jurisdictions. This concept gained a central importance for the purpose of the present study in the 19<sup>th</sup> century, when German jurists framed the transfer of ownership by a non-owner under the doctrine of direct representation. At that time this notion had still a rather vague outline, and in some jurisdictions it was controversial whether it was possible for an agent to directly bind his principal by acting on his behalf. Roman law seemed contrary to a doctrine of direct representation, since it offered some general rules forbidding to stipulate on behalf of another person (*alteri stipulari nemo potest*) or to acquire through a person outside the family (*per extraneam personam nobis adquiri non posse*). Based on provisions such as these, German jurists offered a historical reconstruction of the evolution of direct representation, according to which Roman law would have originally held a general ban on direct representation that was only partially overcome in the course of time. In this context, the transfer of ownership by a non-owner was seen as one of the exceptions developed to this primitive prohibition. Savigny would develop these ideas and grant them a very practical angle by claiming that direct representation should be admitted without restrictions in modern law, since the provisions in Roman law forbidding direct representation would apply almost exclusively to primitive acts of the old *ius civile*. This reconstruction of the evolution of direct representation had a twofold effect for the understanding of the transfer of ownership by a non-owner. Regarding the study of Roman law, on the one hand, it was understood that the possibility for a non-owner to transfer ownership was only introduced at a later stage of development, as part of the progressive abandonment of the primitive prohibition on direct representation – a theory which found its greatest advocate in Ludwig Mitteis. Concerning modern private law, on the other hand, it implied framing the problem of the transfer of ownership by a non-owner under the doctrine of direct representation.

The first – and most extensive – part of the present study is dedicated to Roman law. Chapter 1 offers an outline of the development of the theory of a primitive prohibition on direct representation in Roman law, showing that there are no grounds to claim that such a prohibition would affect every legal act. This theory faces in fact a fundamental methodological objection, namely that it applies the modern notion of direct representation to describe ancient legal institutions, which ultimately offers a uniform approach over various problems

which were dealt with individually by classical jurists. Particularly regarding the transfer of ownership by a non-owner, the theory of a primitive ban on direct representation finds no clear support in the sources. Accordingly, an attempt is made to determine the conceptual guidelines which Roman jurists used when approaching the problem of the *potestas alienandi*, as well as the significance of the study of cases of patrimonial loss or gain performed by a third person. This analysis reveals that most forms of patrimonial loss carried out by a person different than the owner have comparable basic rules. Nonetheless, the differences between them justify approaching the transfer of ownership by a non-owner on its own. The cases in which someone obtains a patrimonial gain from the acts of another person, such as the acquisition of ownership or the payment of debts, are based on radically different principles, and therefore no analogies can be drawn between such problems and the transfer of ownership by a non-owner.

The study of some elemental texts dealing with the *potestas alienandi* shows that the basic starting point in Roman law is that ownership will be transferred as long as the owner performs the delivery. Roman jurists would, however, list a series of exceptional cases in which a non-owner could validly transfer ownership. In a first group of cases the owner's authorization (*voluntas domini*) is the basic element to determine whether ownership is transferred, as it happens in the transfer of ownership by a *procurator*. In a second group of cases the *potestas alienandi* is based on a legal provision which grants a non-owner the administration over someone else's assets. Jurists sometimes struggle to determine in particular cases whether the delivery should be seen as performed *voluntate domini*, as happens in the case of the pledge creditor.

Chapter 2 deals exclusively with the cases where the *voluntas domini* serves as the basis for the *potestas alienandi*, which form a vast and complex case law. Contrary to the general theories on the evolution of direct representation, the owner's authorization appears to have been relevant for the transfer of ownership by a non-owner already for the old *ius civile*. Accordingly, the acquirer could gain Quiritary ownership from an authorized non-owner. This does not imply that the owner's authorization is a static element; on the contrary, jurists would develop innovative interpretations regarding the exact significance of this *voluntas*. The role granted by Roman jurists to the owner's authorization has however been neglected by modern scholarship. This can be explained by the influence of the theories on direct representation in Roman law, which presented the transfer of ownership by a non-owner as a late innovation, as well as by the fact that modern scholars have often been suspicious of subjective elements involving a specific *affectus* or *voluntas*, particularly in the context of the *traditio*. The significance of the owner's authorization is to be seen in the solutions governing various problems, including the revocation of the authorization, the death of the owner or his ratification of an act concluded by someone else. The rules on theft also bear witness to the key role of this authorization, since the delivery concluded without it (*invito domino*) will be considered to be theftuous.

Nonetheless, it is essential for the theft to take place that the person performing the delivery positively knows that he is acting against the owner's intent.

The *voluntas domini* serves as the legal basis for the transfer of ownership in a significant number of cases, including those where there is no underlying contractual relationship between owner and transferor, as happens when the delivery is performed by an authorized slave or son-in-power. Accordingly, there is a considerable variety of terms used to indicate the owner's authorization. In most cases the compliance with the owner's instructions would be easily determined, but Roman jurists developed a number of rules to establish the content of this authorization when it was given in very broad terms. This offers a rich case law concerning the powers of the *procurator* and the limits imposed by the *bona fides*.

While Roman sources show the central position of the *voluntas domini* in the context of the *potestas alienandi*, modern scholars have often considered instead that the *contemplatio domini* was a key element to determine the legal grounds of the transfer of ownership. This view is to a large extent inspired by the application of the notion of direct representation to approach Roman sources. Moreover, the rules concerning the acquisition of ownership have been applied by way of analogy in order to make a distinction between the delivery in the name of the owner (*nomine domini*) and in the name of the transferor (*nomine proprio*). An analysis of the texts regarding the *traditio* by a non-owner shows, however, that the *contemplatio domini* was only relevant when discussing the good faith of the acquirer, and that it was not used to determine two different legal grounds for the *potestas alienandi* – as it is the case in modern private law.

The significance of a *voluntas domini* at the delivery does not conflict with the causal structure of the Roman system of transfer of ownership. Scholars have often been too zealous in offering a strictly causal model of transfer of ownership in Roman law, which would exclude any separate intent at the delivery from that given in the *iusta causa traditionis*. Nonetheless, the sources grant the *voluntas domini* at the delivery a significant role in various contexts, and particularly when discussing the *potestas alienandi*. This does not contradict the key role of the *iusta causa traditionis*, but simply implies that in certain cases the intent at the delivery will have decisive consequences for the transfer of ownership. Particularly relevant at this point is the problem of the mistake concerning the ownership over the delivered goods (*error in dominio*), which has often been considered irrelevant by modern scholars, since it would seem to contradict the causal structure of the *traditio* by attending to a particular intent at the delivery. Contrary to this belief, the sources show that Roman jurists progressively acknowledged the significance of such a mistake by attending to the importance of the *voluntas domini* at the delivery.

Chapter 3 studies the cases in which the *potestas alienandi* is based on a legal provision, and particularly the alienations performed by legal guardians. Such problems provide an extensive case law, which is however less complex and

elaborate than that regarding the *traditio voluntate domini*. The basic criterion is that the legal guardian will be able to transfer ownership as long as he complies with the legal provisions governing his administration. It is worth noting that the alienation must take place *administrationis causa*, i.e. consisting in an administration which serves the best interest of the owner.

The study of the transfer of ownership by legal guardians has been decisively influenced by the general theories on the evolution of direct representation in Roman law. Since most scholars claim that Roman law forbade direct representation at a primitive stage, it has often been assumed that legal guardians could only transfer bonitary ownership. Such an assertion has been supported by specific texts discussing praetorian defences protecting the acquirer who obtained an object from a legal guardian. Nonetheless, these defences refer specifically to the *traditio* of a *res Mancipi*, and the sources show that the delivery by a legal guardian will have the same consequences as that performed by the owner himself. Other scholars derived a different consequence from the theories on the evolution of direct representation, claiming that legal guardians could in fact transfer Quiritary ownership, but only because they would be considered owners themselves, at least at an early stage. Such a theory, however, finds little support in the sources, and can be better understood as an alternative explanation to a problem which, in the eyes of modern scholars, would resemble too much a case of direct representation to be admitted by the old *ius civile*.

Chapter 4 analyses the role of the praetorian defences granted in the context of the transfer of ownership by a non-owner. A broad analysis shows that, while the praetor granted various remedies to protect the position of the acquirer when the owner's authorization gave place to controversy – including the *actio Publiciana (rescissoria)*, the *exceptio "si non auctor meus ex voluntate tua vendidit"*, the *exceptio rei venditae et traditae* and the *exceptio doli* – they apply only to specific situations. The authorized non-owner performing the *traditio* would normally be able to transfer Quiritary ownership, and the praetor intervened only when the application of the rules following from the *ius civile* led to unfair results. There is accordingly no ground to hold that an authorized non-owner could only provide praetorian ownership – an assertion particularly widespread among those who regard the transfer of ownership by a non-owner as a later innovation.

Chapter 5 deals with the transfer of ownership by a non-owner through *mancipatio* and *in iure cessio*. Scholars have discussed for centuries whether the *mancipatio* could be performed by an authorized non-owner, but the debate was rekindled after it was claimed that the *actus legitimi* could not admit direct representation, since they belonged to the old *ius civile*. This study shows that there is only weak evidence for the existence of such a prohibition concerning these modes of transferring ownership, and that most authors who have held such an opinion have relied on the existence of a primitive prohibition of representation in Roman law. Concerning the *mancipatio*, the study focuses on the cases where the *fiducia* cannot be applied, since this institution would make it

difficult to determine whether the transfer of ownership took place by an authorized non-owner or by an actual owner *fiduciae causa*. Accordingly, the chapter focuses on the transfer of ownership by an authorized slave and by a legal guardian, regarding whom the sources strongly suggest the possibility of a valid *mancipatio*. Similarly, the archaic character of the *in iure cessio* does not seem to have stood in the way of a valid transfer of ownership by an authorized non-owner. In fact, the sources offer numerous cases in which a non-owner performs the *manumissio vindicta* – a form of manumission strongly related to the *in iure cessio*. This would suggest that the impossibility of procedural representation affecting the old *legis actiones* was not extended to the legal acts which were modelled after them. All of this shows that the formal modes of transferring ownership were not affected by any kind of prohibition on direct representation.

Chapter 6 focuses exclusively on the *nemo plus* rule, which is often approached as a fundamental guideline regarding the transfer of ownership by a non-owner. Scholars have claimed that a rule which excludes the validity of acts performed by a non-owner could only be referred to formal acts of the *ius civile*, since this would be a corollary of the prohibition on direct representation. According to this view, the rule could only have an absolute validity concerning formal modes of transferring ownership. This would not be the case regarding the *traditio*, where ownership could indeed be transferred by a non-owner. An analysis of the intellectual background of this rule reveals, however, a very different outlook, since Roman jurists do not seem to have been concerned in the first place with the absolute validity of this rule. The argument that “no one can give what he does not have” finds its origins in the field of dialectics, where it was presented as a typical statement which could lead to fallacious reasoning. Eventually the argument became a commonplace in Antiquity, and probably made its way into Roman law as a rhetorical *topos*. Roman jurists applied this idea in a rather loose way to different contexts, mainly to enhance a particular point, but never granted it an absolute validity or a dogmatic significance of its own. Regarding the transfer of ownership, it merely served as a broad general rule, but it did not exclude that a non-owner could transfer ownership. The rule was accordingly equally applicable to approach both formal and informal acts for transferring ownership. It becomes therefore clear that the scope of this rule was largely unrelated to the alleged primitive prohibition of direct representation. Only in the time of Justinian would jurists attempt to grant this rule a systematic significance of its own in the context of the transfer of ownership by a non-owner, by claiming that every transfer of ownership by a non-owner could be actually regarded as performed by the owner himself.

While the *nemo plus* rule had a modest systematic significance in classical Roman law, it occupied a key position among jurists since the 12<sup>th</sup> century when approaching the transfer of ownership by a non-owner. Accordingly, Chapter 7 analyses the reception of the *nemo plus* rule, thereby opening the second part of this research. This rule was originally approached by glossators and commentators

as a very general guideline, around which countless exceptions could be gathered. This circumstance by itself located the rule in the centre of the analysis of the transfer of ownership by a non-owner. This interpretation, however, did not agree with the approach given to the rule by theologians and dialecticians, who granted it an absolute validity. These views gradually made their way into legal writings, and by the 16<sup>th</sup> century jurists had explained every case which seemed to contradict the *nemo plus* rule as an apparent exception, thereby granting it an absolute validity. This interpretation would become dominant until the 19<sup>th</sup> century, serving as a main starting point to understand how the transfer of ownership by a non-owner would take place. With the promulgation of modern civil codes the rule lost its systematic significance regarding the transfer of ownership by an authorized non-owner in most Civil law jurisdictions. Since that time, the *nemo plus* rule has mainly served as the general starting point when discussing the acquisition of ownership by an acquirer in good faith, which is the same fate experienced by the *nemo dat* rule of the Common law.

Chapter 8 describes the drastic paradigm shift which the notion of direct representation introduced when discussing the transfer of ownership by a non-owner. This evolution shows that the historical reconstruction of the evolution of direct representation in Roman sources offered by German jurists in the 19<sup>th</sup> century not only was decisive for the analysis of the *potestas alienandi* in Roman law, but also brought along radical changes for modern private law. Until the 18<sup>th</sup> century, the transfer of ownership by a non-owner followed to a large extent the main guidelines offered by Roman law, and particularly that ownership could be validly transferred as long as the delivery was performed according to the authorization of the owner (*voluntate domini*) or a legal provision. In this context, the *contemplatio domini* played no decisive role in determining the legal grounds for the transfer of ownership. This may explain why the development of the doctrine of direct representation initially had no impact regarding the *potestas alienandi*: there was in fact no need to resort to a new theory in order to explain how a non-owner could transfer ownership. All of this changed when German jurists in the 19<sup>th</sup> century framed the transfer of ownership by a non-owner under the general problem of direct representation. This development was not triggered by practical considerations, since there was no controversy at that time regarding the possibility to transfer ownership through a non-owner. Instead, the problem of the transfer of ownership was brought under the doctrine of direct representation, following the general reconstruction of the evolution of direct representation in Roman sources.

The application of the doctrine of direct representation as a legal basis for the transfer of ownership by a non-owner became widespread among European Civil law jurisdictions. Since the *contemplatio domini* has been traditionally regarded as an essential element of the doctrine of direct representation, the transfer of ownership by a non-owner *nomine domini* had to be radically distinguished from the delivery *nomine proprio*, i.e. in the context of indirect representation. This left

scholars with the task of determining the legal basis for the transfer of ownership by a non-owner who delivered in his own name – a question which had never troubled jurists before the 19<sup>th</sup> century. Other jurisdictions, however, did not grant the *contemplatio domini* such a decisive significance when determining the legal basis for the transfer of ownership. This latter approach seems more convenient both from a dogmatic and from a practical perspective. The *contemplatio domini* only acquired a key relevance when the transfer of ownership by a non-owner was framed under the doctrine of direct representation through a historically inaccurate reconstruction of the evolution of Roman law. It was in this context that it was necessary to develop two different sets of rules depending on whether the delivery was performed in the name of the owner or not. Moreover, the boundaries between both cases are often unclear. The *contemplatio domini* should accordingly be taken into account in particular contexts – e.g. when approaching the good faith of the acquirer – but not to identify two completely different legal grounds for the transfer of ownership. Finally, it is worth noting that the application of the doctrine of direct representation to the transfer of ownership took place regardless of the existence of different transfer systems – causal or abstract, consensual or delivery-based – although the significance granted to the agreement at the delivery did play a role when approaching certain problems concerning the owner's consent to the transfer of ownership by a non-owner.



## Samenvatting<sup>1</sup>

Het hier gepresenteerde onderzoek biedt een algemeen overzicht van de eigendomsoverdracht door een niet-eigenaar gebaseerd op een nieuwe evaluatie van sommige dogmatische uitgangspunten, die niet kritisch tegen het licht gehouden zijn in eerder wetenschappelijk onderzoek. De belangrijkste notie hier is het gebruik van het begrip ‘directe vertegenwoordiging’ dat traditioneel wordt gebruikt bij de beschrijving van de evolutie van de eigendomsoverdracht door een niet-eigenaar in het Romeinse recht, maar ook een systematisch uitgangspunt is in de meeste op het Romeinse recht gebaseerde Europese rechtsstelsels. Dit concept verkreeg een centrale positie voor dit onderwerp in de 19<sup>e</sup> eeuw, toen Duitse juristen de eigendomsoverdracht door een niet-eigenaar uitsluitend bezagen vanuit het perspectief van de directe vertegenwoordiging. In die tijd was de notie van directe vertegenwoordiging nog tamelijk weinig omljnd en in sommige rechtsstelsels was het betwist of het mogelijk was voor de vertegenwoordiger om de opdrachtgever rechtstreeks te binden. Het Romeinse recht scheen tegen een dergelijke mogelijkheid te pleiten, omdat het een paar algemene regels bevat die de stipulatie ten behoeve van een ander verboden (*alteri stipulari nemo potest*) of de eigendomsverkrijging via iemand van buiten de familie onmogelijk verklaarde (*per extraneam personam nobis adquiri non posse*). Uitgaande van deze beginselen hebben Duitse juristen een historische reconstructie van de evolutie van directe vertegenwoordiging gepresenteerd, volgens welke in het Romeinse recht een verbod op directe vertegenwoordiging gold, dat slechts in de loop van de tijd werd gemitigeerd. In deze context werd de eigendomsoverdracht door een niet-eigenaar beschouwd als een van de uitzonderingen op dit oorspronkelijke verbod. Savigny zou deze ideeën ontwikkelen en een praktische betekenis geven door te beweren dat directe vertegenwoordiging zonder beperkingen in het moderne recht zou moeten worden toegelaten, omdat de bepalingen in het Romeinse recht die directe vertegenwoordiging verboden alleen betrekking zouden hebben gehad op de rechtshandelingen van het oude *ius civile*. Deze reconstructie van de evolutie van directe vertegenwoordiging had een dubbele werking bij het begrijpen van de eigendomsoverdracht door een niet-eigenaar. Enerzijds werd met betrekking tot de bestudering van het Romeinse recht de opvatting gemeengoed dat de mogelijkheid voor een niet-eigenaar om eigendom over te dragen pas in een later ontwikkelingsstadium werd geïntroduceerd, als onderdeel van het geleidelijk loslaten van het verbod op directe vertegenwoordiging – een theorie die het duidelijkst werd verwoord door Ludwig Mitteis. Anderzijds werd met betrekking tot het moderne recht de eigendomsoverdracht door een niet-eigenaar geheel gezien in het licht van de leer van de directe vertegenwoordiging.

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<sup>1</sup> Ik dank mijn *promotores* voor hun hulp bij het vervaardigen van deze Nederlandse vertaling.

Het eerste – en meest uitgebreide – deel van het hier gepresenteerde onderzoek gaat over het Romeinse recht. Hoofdstuk 1 biedt een overzicht van de ontwikkeling van de theorie van een oorspronkelijk verbod op directe vertegenwoordiging in het Romeinse recht, waaruit het duidelijk wordt dat er geen bewijs bestaat voor de bewering dat een dergelijk verbod iedere rechtshandeling zou betreffen. Deze leer werd geconfronteerd met een essentieel methodologisch bezwaar, namelijk dat ze gebruik maakt van de notie van directe vertegenwoordiging om oude juridische instellingen te beschrijven, wat uiteindelijk leidt tot een uniforme benadering van diverse problemen die door de klassieke juristen individueel benaderd werden. Vooral voor het geval van eigendomsoverdracht door een niet-eigenaar vindt de notie van een oorspronkelijk verbod op directe vertegenwoordiging geen steun in de bronnen. Daarom wordt een poging gedaan om te bepalen welke conceptuele richtlijnen wel door de Romeinse juristen gebruikt werden bij de benadering van de *potestas alienandi*, evenals het belang van de gevallen waarin de eigenaar verrijkt of verarmd wordt door de handelingen van een derde. Dit onderzoek toont aan dat de meeste gevallen waarin een eigenaar armer wordt door de handelingen van een derde vergelijkbare regels hebben. Niettemin rechtvaardigen de verschillen tussen de diverse gevallen een afzonderlijke benadering van de eigendomsoverdracht door een niet-eigenaar. De gevallen waarin iemand verrijkt wordt door de handelingen van een derde, zoals in het geval van eigendomsverkrijging of betaling van schulden, zijn gebaseerd op volledig afwijkende principes, en daarom kunnen er geen analogieën bestaan tussen zulke problemen en de eigendomsoverdracht door een niet-eigenaar.

De bestudering van sommige elementaire teksten over de *potestas alienandi* toont aan dat het uitgangspunt in het Romeinse recht is dat eigendom wordt overgedragen zolang de levering door de eigenaar verricht wordt. De Romeinse juristen zouden niettemin een aantal uitzonderlijke gevallen opsommen waarin een niet-eigenaar zou kunnen vervreemden. Voor een eerste groep van gevallen wordt de toestemming van de eigenaar (*voluntas domini*) het beslissende element om de eigendomsoverdracht te bepalen, zoals gebeurt bij de eigendomsoverdracht door een *procurator*. Bij een tweede groep van gevallen is de *potestas alienandi* gebaseerd op wetsbepalingen die het beheer van iemands vermogen aan een niet-eigenaar verlenen. Soms is het onduidelijk voor de juristen of de levering in een bepaalde geval gezien moet worden als gedaan *voluntate domini* of niet, zoals het gebeurt in het geval van de pandcrediteur.

Hoofdstuk 2 behandelt uitsluitend de gevallen waarin de *voluntas domini* de grondslag is voor de *potestas alienandi*, die een uitgebreide en gecompliceerde jurisprudentie vormen. In tegenstelling tot de algemene theorieën rond de ontwikkeling van directe vertegenwoordiging, blijkt de toestemming van de eigenaar beslissend te zijn geweest reeds voor het oude *ius civile*. Dientengevolge kon de verkrijger Quiritische eigendom verwerven van een bevoegde niet-eigenaar. Dit betekent niet dat de toestemming van de eigenaar een statische

notie is; integendeel, de juristen zouden vindingrijke interpretaties over het bereik van deze *voluntas* ontwikkelen. Toch hebben moderne auteurs de betekenis van de toestemming van de eigenaar in het Romeinse recht veronachtzaamd. Dit volgt waarschijnlijk uit de invloed van de ideeën rond de evolutie van directe vertegenwoordiging in het Romeinse recht, die de eigendomsoverdracht door een niet-eigenaar als een latere ontwikkeling voorstelden. Ook het wantrouwen van moderne auteurs rond subjectieve elementen zoals een bepaalde *affectus* of *voluntas*, vooral in het kader van de *traditio*, heeft waarschijnlijk een rol gespeeld. De betekenis van de toestemming van de eigenaar is te zien bij de oplossingen van verschillende problemen, zoals de herroeping van de toestemming, de dood van de eigenaar of de bekrachtiging van een handeling die door iemand anders was verricht. De regels rond diefstal tonen ook de centrale rol van deze toestemming, aangezien de ongeoorloofde levering (*invito domino*) wordt beschouwd als diefstal. Niettemin, diefstal kan alleen plaats vinden als de niet-eigenaar die de levering verricht met zekerheid wist dat hij handelde tegen de wil van de eigenaar.

De *voluntas domini* dient als de juridische grondslag voor de eigendomsoverdracht in verschillende gevallen, waaronder diegene waarin er geen onderliggende contractuele relatie bestaat tussen eigenaar en vervreemder, zoals gebeurt wanneer de levering wordt verricht door een geautoriseerde slaaf of zoon. Daarom bestond er een behoorlijke terminologische verscheidenheid die de toestemming van de eigenaar aanduidde. In de meeste gevallen is de gehoorzaamheid aan de voorschriften van de eigenaar makkelijk te bepalen, maar de Romeinse juristen hebben een aantal regels ontwikkeld om het bereik van de toestemming vast te stellen wanneer die in te ruime termen werd gegeven. Dit levert een rijke jurisprudentie op omtrent de bevoegdheden van de *procurator* en de beperkingen die uit de *bona fides* volgen.

Terwijl de Romeinse bronnen de centrale rol van de *voluntas domini* in het kader van de *potestas alienandi* vertonen, hebben de moderne auteurs dikwijls de *contemplatio domini* beschouwd als een beslissend element om de juridische grondslag van de eigendomsoverdracht te bepalen. Deze opvatting wordt grotendeels geïnspireerd door de toepassing van de notie van directe vertegenwoordiging in de benadering van de Romeinse bronnen. Bovendien, de regels omtrent de eigendomsverkrijging worden vaak analogisch toegepast om de levering namens de eigenaar (*nomine domini*) te onderscheiden van de levering op eigen naam (*nomine proprio*). Niettemin laat de bestudering van de teksten omtrent de *traditio* door een niet-eigenaar zien dat de *contemplatio domini* alleen van belang was voor het bepalen van de goede trouw van de verkrijger, en dat ze niet werd gebruikt om twee verschillende juridische grondslagen te onderscheiden voor de *potestas alienandi* – zoals wel het geval is in het moderne privaatrecht.

De betekenis van een *voluntas domini* bij de levering is niet tegenstrijdig met de causale structuur van het Romeinse stelsel van eigendomsoverdracht. De

meeste auteurs zijn vaak te streng geweest in de beschrijving van een strikt causaal stelsel van eigendomsoverdracht in het Romeinse recht, dat iedere onafhankelijke wil bij de levering naast de *iusta causa traditionis* zou uitsluiten. Daarentegen kennen de bronnen de *voluntas domini* bij de levering in verschillende contexten een belangrijke rol toe, met name bij de bespreking van de *potestas alienandi*. Dit is niet tegenstrijdig met de centrale rol van de *iusta causa traditionis*, maar het betekent alleen dat in sommige gevallen de wil bij de levering beslissende gevolgen zal hebben voor de eigendomsoverdracht. Van bijzonder belang op dit punt is het probleem van dwaling over de eigendom van de geleverde goederen (*error in dominio*), die door moderne auteurs vaak als irrelevant wordt beschouwd, aangezien het strijdig lijkt te zijn met de causale structuur van *traditio* om aandacht toe te trekken naar een bepaalde wil bij de levering. Desalniettemin laten de bronnen zien dat de Romeinse juristen het belang van zo een dwaling langzamerhand erkend hebben op basis van de betekenis van de *voluntas domini* bij de levering.

Hoofdstuk 3 handelt de gevallen waarin de *potestas alienandi* gebaseerd is op een wetsbepaling, en vooral de vervreemding door een wettelijke beheerder. Zulke gevallen leveren een rijke jurisprudentie op, hoewel die minder complex en uitvoerig is dan die welke betrekking heeft op de *traditio voluntate domini*. De fundamentele maatstaf is dat de wettelijke beheerder de eigendom zal kunnen vervreemden zolang hij zich houdt aan de wetsbepalingen die zijn bewind bepalen. Het is opmerkelijk dat de beschikking moet plaatsvinden *administrationis causa*, oftewel op een manier die het belang van de eigenaar bevordert.

De bestudering van de eigendomsoverdracht door een wettelijke beheerder is op een beslissende manier beïnvloed door de algemene theorieën over de ontwikkeling van directe vertegenwoordiging in het Romeinse recht. Aangezien de meeste auteurs beweren dat het Romeinse recht een oorspronkelijk verbod op directe vertegenwoordiging kende, wordt vaak aangenomen dat wettelijke beheerders alleen maar bonitarische eigendom konden verschaffen. Deze stelling wordt ondersteund door bepaalde teksten over de bescherming door de praetor in gevallen waarin een zaak van een wettelijke beheerder verkregen wordt. Niettemin is deze bescherming alleen van toepassing in het geval van de *traditio* van een *res Mancipi*, en de bronnen laten zien dat de levering door een wettelijke beheerder dezelfde gevolgen heeft als die welke door de eigenaar zelf wordt verricht. Andere auteurs hebben verschillende gevolgen uit de theorieën rond de ontwikkeling van directe vertegenwoordiging in het Romeinse recht afgeleid, namelijk dat wettelijke beheerders Quiritische eigendom wel konden overdragen, maar alleen omdat zijzelf als eigenaren beschouwd zouden moeten worden, althans in vroegere stadia. Een dergelijke theorie vindt niettemin weinig steun in de bronnen, en kan beter beschouwd worden als een alternatieve verklaring voor een probleem dat, in de ogen van moderne auteurs, te veel zou lijken op een geval van directe vertegenwoordiging om toegelaten te zijn door het oude *ius civile*.

Hoofdstuk 4 bestudeert de rol van de praetorische bescherming in het kader van de eigendomsoverdracht door een niet-eigenaar. Een breed onderzoek toont aan dat, terwijl de praetor verschillende rechtsmiddelen toekende om de positie van de verkrijger te beschermen wanneer de wil van de eigenaar omstreden was – waaronder de *actio Publiciana (rescissoria)*, de *exceptio “si non auctor meus ex voluntate tua vendidit”*, de *exceptio rei venditae et traditae* en de *exceptio doli* –, deze alleen in bepaalde omstandigheden worden toegepast. De geautoriseerde niet-eigenaar die de *traditio* verrichte zou normaal gesproken de Quiritische eigendom kunnen verschaffen, en de praetor zou alleen ingrijpen wanneer de regels van het *ius civile* tot onbillijke gevolgen leidden. Er is dus geen steun voor de bewering dat een geautoriseerde niet-eigenaar alleen praetorische eigendom kon verschaffen – een stelling die vooral verbreid is onder diegenen die de eigendomsoverdracht door een niet-eigenaar beschouwen als een latere ontwikkeling.

Hoofdstuk 5 behandelt de eigendomsoverdracht door een niet-eigenaar in gevallen van *mancipatio* en *in iure cessio*. Academici hebben eeuwenlang gesproken over de mogelijkheid dat een niet-eigenaar de *mancipatio* kon verrichten, maar de discussie werd aangewakkerd toen men beweerde dat de *actus legitimi* geen directe vertegenwoordiging konden toelaten, omdat ze behoorden tot het oude *ius civile*. Dit onderzoek laat zien dat er slechts zwak bewijs is voor het bestaan van een dergelijk verbod met betrekking tot deze wijzen van eigendomsverkrijging, en dat de meeste auteurs die deze opvatting hebben gehandhaafd zich baseren op het bestaan van een zeer oud verbod op directe vertegenwoordiging in het Romeinse recht. Wat de *mancipatio* betreft, dit onderzoek richt de aandacht op de gevallen waarin de *fiducia* niet kon worden toegepast, aangezien dat leerstuk het vaak moeilijk maakt te onderscheiden of de eigendomsoverdracht werd verricht door een geautoriseerde niet-eigenaar of door een echte eigenaar *fiduciae causa*. Dientengevolge concentreert zich dit hoofdstuk op de eigendomsoverdracht door een geautoriseerde slaaf of wettelijk beheerder, ten aanzien van wie de bronnen er sterk op duiden dat de *mancipatio* op rechtsgeldige wijze verricht kon worden. Op dezelfde wijze blijkt het archaische karakter van de *in iure cessio* geen belemmering te zijn geweest voor een geldige eigendomsoverdracht door een geautoriseerde niet-eigenaar. In feite laten de bronnen talrijke gevallen zien waarin een niet-eigenaar de *manumissio vindicta* – een wijze van vrijlating die nauw verwant is met de *in iure cessio* – verrichtte. Dit suggereert dat het verbod op procesvertegenwoordiging van de oude *legis actiones* zich niet uitstreckte naar de rechtshandelingen die naar hun gelijkenis werden gevormd. Dit alles toont aan dat de formele wijzen van eigendomsoverdracht niet door een vorm van verbod op directe vertegenwoordiging aangetast waren.

Hoofdstuk 6 wordt gewijd aan de *nemo plus* regel, die vaak wordt beschouwd als een fundamentele maatstaf met betrekking tot de eigendomsoverdracht door een niet-eigenaar. Academici beweren dat een regel die de geldigheid van handelingen door een niet-eigenaar uitsluit alleen kon verwijzen naar de formele handelingen van het *ius civile*, want dit zou een gevolg zijn van het verbod op

directe vertegenwoordiging. Volgens deze opvatting kon de regel alleen onvoorwaardelijk gelden met betrekking tot de formele wijzen van eigendoms-overdracht. Dit zou niet het geval van de *traditio* zijn, waarin eigendom inderdaad door een niet-eigenaar kon worden overgedragen. Niettemin onthult de bestudering van de intellectuele achtergrond van deze regel een heel andere visie, want Romeinse juristen lijken niet in de eerste plaats bezig te zijn geweest met de onvoorwaardelijke geldigheid van deze regel. Het argument dat “niemand kan geven wat hij niet heeft” vindt zijn oorsprong op het gebied van de dialectiek, waar het naar voren was gebracht als een typische stelling die naar misleidende redeneringen kon voeren. Uiteindelijk zou het argument een gemeenplaats worden in de Oudheid, en waarschijnlijk is het in het Romeinse recht als een retorische *topos* doorgedrongen. Romeinse juristen hebben dit idee op een losse manier in verschillende contexten gebruikt, vooral om steun te bieden voor een bepaald punt, maar ze hebben het nooit als onvoorwaardelijk geldig beschouwd of er een eigen dogmatische betekenis aan gegeven. Wat de eigendoms-overdracht betreft, dient het als een ruime algemene regel, maar het sloot niet uit dat een niet-eigenaar eigendom kon overdragen. De regel was derhalve evenzeer van toepassing voor formele én informele wijzen van eigendomsoverdracht. Het wordt dus duidelijk dat het toepassingsgebied van deze regel grotendeels onafhankelijk was van het zogenaamde verbod op directe vertegenwoordiging. Alleen in de tijd van Justinianus zouden de juristen aan deze regel een eigen systematische betekenis geven in het kader van de eigendomsoverdracht door een niet-eigenaar, door te beweren dat elke eigendomsoverdracht door een niet-eigenaar eigenlijk beschouwd kon worden als door de eigenaar zelf verricht.

Terwijl de *nemo plus* regel een bescheiden systematische betekenis had in het klassieke Romeinse recht, nam zij een centrale rol in onder juristen sinds de 12de eeuw in het kader van de eigendomsoverdracht door een niet-eigenaar. Daarom bestudeert hoofdstuk 7 de receptie van de *nemo plus* regel, waarmee het tweede deel van dit onderzoek wordt geopend. Deze regel werd oorspronkelijk door de Glossatoren en Commentatoren als een zeer ruime maatstaf beschouwd, waaronder men talloze uitzonderingen samen kon brengen. Deze omstandigheid bracht op zichzelf de regel naar het centrum van de bestudering van de eigendomsoverdracht door een niet-eigenaar. Deze uitleg was echter strijdig met de benadering van de regel door theologen en dialectici, die de regel als onvoorwaardelijk geldig beschouwden. Deze opvatting is langzamerhand in juridisch geschriften doorgedrongen, en tegen de 16de eeuw hadden de juristen elk geval dat tegenstrijdig bleek te zijn met de *nemo plus* regel als een schijnuitzondering uitgelegd, waardoor deze onvoorwaardelijke gelding kreeg. Deze interpretatie zou tot de 19de eeuw heersend blijven, en diende als een centraal uitgangspunt om te begrijpen hoe de eigendomsoverdracht door een niet-eigenaar plaatsvond. Met de afkondiging van de moderne burgerlijke wetboeken verloor de regel zijn systematische betekenis met betrekking tot de eigendomsoverdracht door een geautoriseerde niet-eigenaar in de meeste op het

Romeinse recht gebaseerde Europese rechtsstelsels. Sinds die tijd heeft de *nemo plus* regel vooral als een ruim uitgangspunt gediend voor de bestudering van de eigendomsverkrijging door iemand die te goeder trouw is. De *nemo dat* regel heeft in de *Common law* hetzelfde lot ondergaan.

Hoofdstuk 8 beschrijft de radicale paradigmaverschuiving die de notie van directe vertegenwoordiging meebracht voor de bestudering van de eigendomsoverdracht door een niet-eigenaar. Deze ontwikkeling toont aan dat de historische beschrijving van de evolutie van directe vertegenwoordiging in de Romeinse bronnen, die door de Duitse juristen in de 19de eeuw was ontwikkeld, niet alleen beslissend was voor de bestudering van de *potestas alienandi* in het Romeinse recht, maar ook radicale veranderingen voor het moderne privaatrecht mee bracht. Tot de 18de eeuw volgde de eigendomsoverdracht door een niet-eigenaar grotendeels de centrale richtlijnen die het Romeinse recht had aangeboden, en met name dat eigendom alleen verschaft kon worden op een geldige manier als de levering plaatsvond conform de toestemming van de eigenaar (*voluntate domini*) of volgens een wetsbepaling. In dit kader speelde de *contemplatio domini* geen beslissende rol om de juridische grondslag van de eigendomsoverdracht te bepalen. Dit zou verklaren waarom de ontwikkeling van de leer van directe vertegenwoordiging oorspronkelijk geen invloed had met betrekking tot de *potestas alienandi*: het was in feite niet nodig om een beroep op een nieuwe leer te doen om te verklaren hoe een niet-eigenaar eigendom kon vervreemden. Dit alles veranderde toen de Duitse juristen in de 19de eeuw de eigendomsoverdracht door een niet-eigenaar onder het algemene probleem van directe vertegenwoordiging plaatsten. Deze ontwikkeling was niet door praktische beschouwingen gedreven, aangezien er in die tijd geen polemiek was rond de mogelijkheid om eigendom door een niet-eigenaar over te laten dragen. In plaats daarvan werd het probleem van de eigendomsoverdracht door een niet-eigenaar onder de leer van directe vertegenwoordiging gebracht op basis van de beschrijving van de ontwikkeling van directe vertegenwoordiging in de Romeinse bronnen.

De toepassing van de leer van directe vertegenwoordiging als juridische grondslag van de eigendomsoverdracht door een niet-eigenaar werd tussen de op het Romeinse recht gebaseerde Europese rechtsstelsels verspreid. Aangezien dat de *contemplatio domini* traditioneel is aangenomen als een essentieel bestanddeel van de leer van directe vertegenwoordiging, moest de eigendomsoverdracht door een niet-eigenaar *nomine domini* onderscheiden worden van de levering *nomine proprio*, oftewel in het kader van indirecte vertegenwoordiging. Dit gaf academici de taak om te bepalen wat de juridische grondslag was voor de eigendomsoverdracht van een niet-eigenaar die op zijn eigen naam leverde – een kwestie die voor de 19de eeuw de juristen geen zorgen gebaard had. Andere jurisdicties gaven de *contemplatio domini* evenwel niet zo'n beslissende rol bij het bepalen van de juridische grondslag van de eigendomsoverdracht. Deze laatste benadering lijkt vanuit een dogmatische en een praktische perspectief meer geschikt te zijn. De

*contemplatio domini* kreeg pas een centrale betekenis toen de eigendomsoverdracht door een niet-eigenaar onder de leer van directe vertegenwoordiging werd gebracht door een historisch onnauwkeurige beschrijving van de ontwikkeling van het Romeinse recht. In dit kader werd het noodzakelijk om twee verschillende stelsels van regels te ontwikkelen, al naar gelang de levering wel of niet in de naam van de eigenaar verricht was. Bovendien zijn de grenzen tussen beide gevallen vaak onduidelijk. De *contemplatio domini* zou dus in bepaalde gevallen in acht genomen worden – bijvoorbeeld bij de bestudering van de goede trouw van de verkrijger – maar niet om twee verschillende juridische grondslagen voor de eigendomsoverdracht te bepalen. Ten slotte is het opmerkelijk dat de toepassing van de leer van directe vertegenwoordiging op de eigendomsoverdracht plaatsvond ongeacht het bestaan van verschillende stelsels van vervreemding – causale of abstracte, consensuele of leverings-gebaseerde – hoewel de betekenis die wordt verleend aan de toestemming bij de levering wel een rol speelde bij de benadering van sommige problemen rond de toestemming van de eigenaar om eigendom door een niet-eigenaar over te laten dragen.

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## Curriculum vitae

Javier Esteban Rodríguez Díez was born in Santiago de Chile on the 5<sup>th</sup> of November 1986. Son of Juan Miguel Rodríguez Etcheverry and Leonora Díez Voigt, he married Estefanía Carrasco Marambio after obtaining his law degree at the *Pontificia Universidad Católica de Chile*. Having worked as a lawyer between 2011 and 2012 at *Claro & Cia.*, he was awarded a scholarship from the Chilean government (CONICYT - *Becas Chile*) to pursue PhD studies in the Netherlands. From 2012 to 2016 he conducted his PhD research at the Erasmus University Rotterdam. Since March 2016 he has resumed his activity as a legal practitioner in Santiago and teaches Roman law at the *Pontificia Universidad Católica de Chile*.



# Portfolio

## Publications

- Origen y evolución de la regla 'nemo plus iuris'*, REHJ 37 (2015), p. 347-375.
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- Historical systematization of the traditio a non domino*, delivered at: 67e session de la Société Internationale Fernand de Visscher pour l'histoire des droits de l'antiquité. Salzburgo, 11/09/2013.