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Ownership Acquired in Good Faith

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Acquisition of property in good faith is recognized by Latvian law through numerous exceptions from the principle of causation. The law does not provide a clear-cut regulation. Case law has experienced several stages where the same law is applied differently in similar situations, and this has made the outcome of court rulings unpredictable. Attempts to solve the problem by amending existing law so far have been unsuccessful.

Keywords: adverse possession, corroboration, immovable, liability, owner, principle of causality.

Content

1. Acquisition In Good Faith as a Remedy for a Non-owner in Latvian Civil Law

The Civil Law[1] (CL) does not provide that a person, who has not objectively acquired ownership, should enjoy special protection due to the fact that he/she has acquired their right in good faith. This is apparent from Section 1053 of the CL, which addresses the issue of liability by a defendant in an ownership claim: "liability of a defendant to a plaintiff is diverse, having regard to whether the defendant is a possessor in good faith or in bad faith of the property".

[1] 28.01.1937. Civillikums [Civil Law, hereinafter – CL]. Available at http://likumi.lv/doc.php?id=225418 [last viewed 08.08.2017].

It follows that the CL in general denies the very probability that the defendant could retain the ownership of a property, which has been acquired contrary to the so-called "principle of causality".[2]

The acquirer in good faith may only count on decreasing of his/her liability "so that he or she are not liable only for his or her prior acts or failures to act"[3]. As soon as the acquirer in good faith finds out that in fact he/she did not acquire the property (for instance, a person to whom a non-owner has transferred the property), he or she must accept that ownership to such property cannot be kept.

This general principle, however, has numerous exceptions. They are spread all over the different chapters of CL. For instance:

> *"[I]f one spouse disposes of or pledges the movable property of the other spouse, the person who has received such shall be acknowledged as having acquired that property or pledge in good faith, if he or she did not know or ought not to have known that the property was that of the other spouse or of both spouses and that it had been disposed of or pledged contrary to the volition of the other spouse."*[4];
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> "*Where landowners in good faith utilise another person's materials for some structures on their own land, then, even though these become their property, they shall reimburse the former owner for the costs of the materials to the extent they have enriched themselves from them; but, if the landowner has utilised the materials in bad faith they shall reimburse all losses caused to the former owner.*"[5];
>
> "*Where landowners in good faith seed their land with the seeds of another person or plant their land with the plants of another person, thus depriving the earlier owners of their property*[6], *they shall compensate the latter for the value of the seeds or plants to the extent they have enriched themselves from them. However, if they have sown the seeds or planted the plants in bad faith, they shall compensate for all of the losses they have caused, in full.*"[7];
>
> "*If the joining of property to the property of another person has been done in good faith and carried out without artistic or skilled work, ownership of the property thereby created shall accrue to the person who has made it, provided that their own materials added thereto are manifestly more valuable than those of the other person. But at the choice of the owner of the materials, they shall be obliged to either return an equal amount of materials of the same kind and quality, or pay such price for these materials as was the highest regarding them at the time when the joining took place, and, in addition, to compensate the owner of the materials regarding losses occasioned to such owner.*"[8];
>
> "*If, through the artistic or skilful processing in good faith of the materials of another person, something new has been created, such that the materials used in the composition thereof have lost their former and acquired a new form, then, irrespective of whether the materials of the other person can or cannot*

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2 *Rudāns, S.* Nekustamā īpašuma labticīga iegūšana. *Jurista Vārds,* Nr. 22(425), 2006. gada 6. jūnijs.
3 Section 1053 of the CL.
4 Section 122 of the CL.
5 Section 971 of the CL.
6 Sections 973 and 976 of the CL.
7 Section 977 of the CL.
8 Section 983 of the CL.

be separated from it, such new thing shall, in all cases, become the property of the processor, but subject to the duty to provide compensation on the basis of Section 983 to the owner of such other person's materials."[9];

"*An ownership action may not be brought if the owner has, in good faith, entrusted a move-able property to another person, delivering it pursuant to a lending contract, bailment, pledge or otherwise, and such person has given possession thereof to some third person. In this case, there may be allowed only an action in personam against the person to whom the owner has entrusted his or her property, but not against a third person who is a possessor in good faith of the property.*"[10]

The above exceptions from the principle of causality are of different nature and significance. The cases, which can be brought, if somebody utilises another person's materials[11] or seed their land with the seeds of another person[12] must have happened extremely rarely, if at all: during the period of two decades after reinstatements of CL, the author of this article has never come across of a single case where the aforementioned norms should have been applied. The same should be referred to the processing of the materials of another person in good faith[13]. As an ownership claim is practiced almost exclusively in the area of immovable property, Section 1065 of the CL is also applied extremely rarely. Perhaps, more frequently one would come across Section 1066 that corresponds to the relevant sections in special laws regulating different transport contracts.

All but one[14] of the abovementioned exceptions clearly state that in a specific relevant situation a person who has acquired property in good faith can keep it, as long as she or he compensates the previous owner for the incurred losses. Only Section 122 of the CL does not provide a clear answer, and the situation can be solved in both ways – either the third person maintains the ownership rights acquired in good faith, or vice versa.

Implementation of acquisition in good faith in the family law, as well as of the exception mentioned above under Section 122 of the CL has its own controversial history.

Family law chapter was significantly rewritten before it was reinstated. Instead of separation of property rights by each spouse like it was in the initial version of CL back in 1938, where the joint property of spouses was regarded as exception rather than a norm, the opposite prevailed in the newly reinstated version of the family law chapter of CL.

This brand new part of CL went through different stages of interpretation by the courts. Such interpretations, in turn, left the impact, *inter alia*, upon how to interpret the land register data. At first, it was presumed that the one who was registered as the sole owner of the immovable property, must be regarded as such, unless the other spouse proves that in fact the property belongs either to this other spouse, or it is a joint property.[15]

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[9] Section 985 of the CL.
[10] Section 1065 of the CL.
[11] Section 971 of the CL.
[12] Section 977 of the CL.
[13] Section 983 and 985 of the CL.
[14] Section 122 of the CL.
[15] *Grūtups, A.* Latvijas Republikas Civillikuma komentāri. Īpašums. (927.–1129. p.). Rīga: Mans īpašums, 1996, 74. lpp.

Gradually, the opposite view took the upper hand. This new approach brought amendments to the CL:

> *"A spouse may assign his or her property or his or her share of the joint property of the spouses to be administered by the other spouse who shall preserve and protect such property with all of his or her resources. If the joint immovable property of the spouses is recorded in the Land Register in the name of one of the spouses, it is presumed that the other spouse has assigned his or her share in such property to be administered by him or her."*[16]

At that time, there was a wide range of publications reflecting rather polarized views between the two extremes: 1) presumption of joint ownership and 2) presumption of individual ownership by one spouse. The first one was based on the assumption that, notwithstanding what was recorded in the Land Register, – either the immovable property was registered in the Land Register as the ownership of one of the spouses or both, it must be regarded as a joint ownership anyway; [17] while the second view was based on a general principle that only such persons shall be recognised to be the owners of immovable property, as are registered in the Land Register as such owners.[18]

The first opinion manifests that the property shall be regarded as the joint property of both spouses (presumption of joint property by both spouses). The other theory claims that in such cases the court shall be guided by the assumption that the immovable property is owned by that person, who is recorded as the owner in the Land Register (presumption of ownership rights by one spouse). One of the supporting authors has also put forward a term "latent ownership rights".[19]

Thus, we can draw a conclusion that, on the one hand, there is no defence for the acquirer in good faith as a general clause in the CL, but on the other hand, there are quite a few specific clauses stating the contrary. Apart from those specific cases, there is only one way for the acquirers in good faith to have their acquisition become irreversible in the CL – through prescription.

> "*In order to acquire a property through prescription, it must be possessed in good faith, i.e., not knowing of impediments, which do not allow acquiring ownership of it.*"[20]

> "*In order to acquire ownership through prescription, it is not sufficient that a possessor acquires his or her possession in good faith, but it is also necessary that his or her good faith continue during the entire specified prescriptive period, and accordingly prescription is interrupted by bad faith appearing during such period.*"[21]

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[16] Section 93 of the CL with amendments of December 12, 2002 that came into force on January 1, 2003.

[17] *Višņakova, G.* Par laulāto likumiskajām mantiskajām attiecībām. *Jurista Vārds*, Nr. 29, 1999. gads.

[18] Section 994 of the CL; *Kalniņš, E.* Laulāto manta laulāto likumiskajās mantiskajās attiecībās. Grām.: Privāttiesību teorija un prakse. Rīga: TNA, 2005; *Briedis, E.* Par nekustamo īpašumu kā laulātā atsevišķo mantu. *Jurista Vārds*, Nr. 10(243), 12(245), 2002. gada 18. jūnijs.

[19] *Paļčikovska, M.* Laulāto likumiskās mantiskās attiecības un to risinājums. *Jurista Vārds*, Nr. 36(189), 2000. gada 21. novembris.

[20] Section 1013 of the CL.

[21] Section 1015 of the CL.

2. Acquisition in Good Faith as a Remedy for a Non-Owner in Case Law

Notwithstanding the above mentioned limitations for protection of the acquirer in good faith established by Latvian CL, the case law shows the opposite: the good faith acquirer should be protected unless specific obstacles preclude such protection. Somehow, this attitude still coexists with a significant number of court rulings insisting on the opposite.

Jurisdiction did not arrive at such conclusion without hesitation, nor is it a clear-cut solution for the problem. The court practice initially followed the view that "the true owner may claim both invalidation of the [...] alienation agreement and rectification of the wrong record of the property"[22] (i.e., the so-called "rectification claim"). Only after some time, this practice gradually changed, giving way to protection of the interests of the acquirer in good faith,[23] although it seems that this practice failed in working out definite criteria for separating cases, in which the preference must be given to the interests of the acquirer in good faith from those where no one can transfer more rights (to another) than possessed by themselves.

It seems that neither the first, nor the second alternative was actually understood or defined, although it was obvious from the very beginning that both of them – protection of property rights acquired in good faith and causality – are incompatible.

Although acquisition in good faith was quite frequently mentioned in court decisions of that period, there was no particular definition or strict criteria for what exactly made the court establish that the rights *in rem* had been acquired in good faith.

Sometimes, however, the courts attempted under Section 1 of the CL to subsume the acquisition in good faith and, in doing so, ignored the substantial difference between the good faith as objective standard of behaviour, as it is defined by the aforementioned Section 1 (which is remotely similar to the meaning of good faith in § 242 BGB[24] and the Swiss Civil Law, Section 1), and the good faith as subjective belief that the right *in rem* had passed to the acquirer although in fact it did not, i.e., the meaning that is similar to the one found in § 932 I BGB.[25]

Although Section 1 of the CL does not deal with good faith in subjective meaning at all (as it will be demonstrated in Chapters 3 and 4 of this article), the court practice has tried to impose this norm on several occasions, discharging claims by the title owner against the good faith acquirer. Legal grounds were formulated by the court rather characteristically: "according to the good faith principle a person may be denied of execution of the subjective rights or duties

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[22] *Grūtups, A. Kalniņš, E.* Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. Otrais papildinātais izdevums. Rīga: TNA, 2002, 222. lpp.

[23] *Rozenfelds, J.* Ownership Claim. *Journal of the University of Latvia* No. 6. Law. *Lazdiņš, J.* (Editor-in-Chief). Riga: University of Latvia Press, 2014, pp. 94–95.

[24] Bürgerliches Gesetzbuch [German Civil Code, hereinafter – BGB]. Available at https://www.gesetze-im-internet.de/englisch_bgb/ [last viewed 08.08.2017].

[25] Latvijas Republikas Augstākās tiesas Senāta 2005. gada 5. oktobra spriedums lietā Nr. SKC-625/2005. Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2005. Rīga: Tiesu namu aģentūra, 2006, 134.–138. lpp.

provided that the interests of the other party shall be regarded as more important pursuant to aim of the law and particular circumstances".[26]

Here a clear replacement of protection of a wrongly acquired property with the (wrongly understood) "objective" good faith can be observed. The case was not solved in favour of the claimant (the acquirer in good faith), because the person whose right was affected by such transaction (a spouse of the seller) enjoyed rights, which must have been protected, but admitted that the property right, although acquired by the claimant, should not be executed.

Latvian court practice must be regarded as wrong, due to protecting the acquirer in good faith through Section 1 of the CL. This has joined the long list of vague and inconsistent judgements, which have not solved the problem for protection of the acquirer of property in good faith.[27]

3. What Does Good Faith Actually Mean?

We see that so far sufficient attention has not been devoted to the meaning of the concept, let alone a uniform definition of good faith. To begin with, there are at least two different meanings of the same phrase "good faith".

> "*[O]ne thing is clear [...] good faith in the sense of Treu und Glauben must be distinguished from good faith in the sense of guter Glaube. The later notion (often dubbed subjective good faith) has to do with knowledge. Thus, a person to whom a non-owner has transferred property can still acquire ownership if he is "in good faith" (*§ 932 I *BGB); and he is not "in good faith" if he knows, or as a result of gross negligence does not know, that the piece of property does not belong to the transferor (*§ 932 II *BGB). "Objective" good faith (Treu und Glauben), on the other hand, constitutes a standard of conduct to which the behaviour of a party has to conform and by which it may be judged; and our present study is only concerned with good faith in this objective sense.*"[28]

It follows, that one must distinguish between "good faith" in its objective and subjective meaning. If we were to apply this distinction to the Latvian law and practice, we would inevitably find out that although no one has denied such dual meaning of the same wording, nevertheless, no serious efforts have been made to distinguish one from another. We can also establish that disproportionally more attention is devoted to "good faith" in the objective meaning in the legal doctrine, while in the case law the opposite can be observed, where the exercise of "good faith" in subjective meaning prevails. Latvian scientists have mainly reviewed objective rather than subjective meaning of the good faith, although it is not always possible to make a clear distinction between the two in Latvian law.

One must also keep in mind that such distinction plays a different role, if applied to the exercise of subjective rights in general (i.e., in objective sense) or if treated as

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[26] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2005. gada 9. februāra spriedums lietā Nr. SKC-75. Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2005. Rīga: Tiesu namu aģentūra, 2006, 175.–181. lpp.

[27] *Rozenfelds, J.* Reform of the Property Law Chapter of the Civil Law of Latvia: Problems and Solutions." Latvijas Universitātes 71. zinātniskās konferences rakstu krājums "Tiesību interpretācija un tiesību jaunrade". Rīga: LU Akadēmiskais apgāds, 2013, pp. 35–41.

[28] *Zimmermann, R., Whittaker, S.* Good faith in European Contract Law: Surveying the Legal Landscape. – Good Faith in European Contract Law. Cambridge Studies in International and Comparative Law. The Common Core of European Private Law. *Zimmermann R., Whittaker, S.* (eds.). New York: Cambridge University Press, 2008, p. 30.

a specific tool for protection of the acquirer in good faith (i.e., in subjective sense). The latter to a greater extent depends upon whether it is applied to movable or immovable property, whereas the former as a universal guide is applied to any kind of rights, notwithstanding their nature.

With this in mind, one can see the obvious difference between regulation of property rights in German and in Latvian legislation. The difference between the two systems does not allow jumping to a conclusion that what is feasible under the German law will also work under the Latvian law. German law treats movable property strictly separately from immovable property, which is not the case in Latvian law. Consequently, we must regard any attempt of borrowing something from German law with utmost caution. Due to the clear distinction between the transactions over movable and immovable property in German legislation, almost nothing of what was said above regarding the transfer of movable property[29] should be applied to transactions involving immovable property. The idea of good faith is not mentioned under Division 2 of the BGB at all ("General provisions on rights in land"). The sole instrument that guarantees that the rights *in rem* to the land have been acquired is not a good faith but statutory presumption[30]. One cannot find any reference to good faith in this part of BGB[31] as applied to acquisition of land. We can spot this term only when applied to "Accessories of the plot of land"[32].

We do not find anything like this in Latvian legislation regarding treatment of transfer of property rights by the CL[33]. Only few specific exceptions can be found on immovable property (mainly as additions to the ancient text of previous legislation during updating process of the CL, which we do not find in previous codification).

Whether "faith" is the right term for defining something that has to do with knowledge is another question. Faith and knowledge are tools which operate in different environment. If you know something, there is no space for faith, and vice versa. This leads us to the conclusion that only so-called good faith in objective sense is worth to be addressed by term "good faith", whereas the so-called "good faith" in subjective meaning, as it is used in § 932 of the BGB, is not. "Good faith" in the latter meaning could be better understood as "lack of knowledge" by the acquirer of certain facts which – should he know them – would be regarded as an obstacle towards acquiring property. However, lack of this knowledge paradoxically somehow removes this obstacle.

Then there is also a question of *onus probandi* – whether the acquirer must actively seek some facts that prove his lack of knowledge of certain facts or on the contrary – the acquirer must remain passive and wait for the other party to provide the relevant evidence. Probably, we must come to the conclusion that the latter is the case and the very attempt by the acquirer of property to try to actively prove that he was unaware of certain facts, which can overturn acquisition of his property right, as such can be used against the acquirer. The latter is in "catch twenty two" trap – if he does nothing, he cannot prove anything, if he does anything – the very attempt to prove that he "knew nothing" will be turned against him as a proof that he did know.

[29] § 932–934 of the BGB.
[30] § 891 of the BGB.
[31] § 873–902 of the BGB.
[32] § 926 of the BGB.
[33] Sections 930–1031 of the CL.

Nevertheless, the CL suggests that the acquirer in good faith is proactive. There is a specific regulation[34], which does allow the acquirer in good faith to make certain efforts and spending in order to corroborate his or her "good faith". More than that – to make this "faith" irreversible and permanent, this norm envisages that special procedure will do the trick. The one, who is interested in corroborating his or her "good faith" during acquisition of the property, can after his or her property rights are registered in the Land Register, make an application to the court in order to carry out specific procedure called Summoning Procedures Regarding Extinguishing of Rights.[35] Then "after the court has printed an announcement in the newspaper "Valdības Vēstnesis" that the persons with objections should come forward within six months' time. When it is clear that no objections have been brought forward during this period, a decision shall be taken to recognise the transaction as in effect and all subsequent contests against it shall be dismissed."

Consequently, the recipe for the "acquirer in good faith" is not to "lay low and keep silent". On the contrary – he or she can even improve upon their "good faith" by advertisement simultaneously taking a risk that this "good faith" will collapse in due course, i.e., if somebody will come forward within six months' period to contest this faith.[36]

This once again proves how inadequate is the term "good faith" in the given situation. Usually, we do not say about somebody who is totally unaware of some unwelcome consequences for him that due to his unawareness he is in "good faith". However, when the one who is asked, confirms that he is "in good health", he is confirming exactly that. This means that "good faith" is contrary to the main principles, on which legal liability is based – any wrongdoer's unawareness of the prohibition of the wrong he had committed will not be an excuse for him but for the "acquirer in good faith" it will achieve exactly that result.

But again, we must point out that the key which releases the "acquirer in good faith" from unwelcome consequences of the fact that he/she has acquired the property in a way which is contrary to the positive prohibition by the law, is the lack of knowledge about the existing obstacles which, provided that he/she knew them, would preclude him/her from acquiring the property.

This leads to the conclusion that "good faith" is neither faith but unawareness, and nor is it "subjective". Rather, it is the assumption that the person who acquired property in good faith did not know of something that would have precluded him from the same acquisition at the time when the acquisition took place.

The question arises – what is so important about somebody's ignorance that it is considered as an excuse for acquiring the property contrary to objective hurdles the acquirer was aware of?

Probably, the very fact that public interest in stability of legally acquired property rights prevails over the need to punish subjective mistakes! This conclusion causes a necessity to once more compare conclusions achieved sofar about the good faith in objective sense. After all, if the element of public interest could be found here, then

[34] Section 1481 of the CL.

[35] 14.10.1998. Civilprocesa likums [Civil Procedure Law]. Available at https://likumi.lv/doc.php?id=50500 [last viewed 08.08.2017]; Section 293–297 of the Civil Procedure Law.

[36] *Davidovičs, G.* Civilprocesa likuma komentāri. II daļa (29.–60[1].) nodaļa. Lietas par tiesību dzēšanu uzaicinājuma kārtībā. Sagatavojis autoru kolektīvs Prof. K. Torgāna zinātniskajā redakcijā. Rīga: TNA, 2012, 318.–330. lpp.

it is almost certain that there must be public interest in the exercise of rights in good faith in objective sense.

4. Exercise of Rights in Good Faith in Objective Sense (So-called General Clause of CL) As A Surrogate Protection of Acquisition in Good Faith

Contrary to good faith as one of the preconditions for protection of the acquirer in good faith as described above to be found in previous legislation and apparently borrowed from there,[37] there is a completely new clause in CL not to be found in previous legislation and regarded as "good faith principle" or "general clause" of CL. It was admitted that the very location of the good faith principle under the CL Section 1 in the very beginning of the CL testifies about the great importance of the good faith principle in executing civil law,[38] which is mainly understood as "prohibition clause for abuse of rights",[39] but also as a universal legal mechanism, through which the judge shall create a norm in a constructive way guided by the system and spirit of law instead of being a legislator himself.[40]

Section 1 of CL does not deal with good faith in subjective meaning altogether, because it was designed for a completely different purpose, which has nothing to do with protection of a person who has acquired property in good faith being unaware that his/her counterparty was not entitled to the property right and, knowingly or without any knowledge about this defect, had handed over it to the acquirer. Section 1 of CL does not deal with someone who is exercising rights which actually do not belong to him/her as is case with the acquirer of property in good faith where his/her title exists only in the acquirer's ill guided subjective beliefs. On the contrary, this Section precludes a person from using rights that definitely belong to him/her. The law precludes him/her from exercising those rights not because someone is in doubt about their existence but because this can lead to the abuse of rights.

One of the first authors, who has paid attention to the exercise of rights in good faith in objective sense (so called general clause of CL) was M. Krons, whose view was relatively new at the time he published his article. M. Krons has specially underlined that

> "*the Civil law has not taken over the provision under the Swiss Civil Law Section 1 about a judge's function to create new norms of law in case of a defect in law. It is exactly the other way round – the Civil law Section 4 provides that the provisions of this Law shall be interpreted firstly in accordance with their direct meaning; where necessary, they may also be interpreted in accordance with the structure, basis and purposes of this Law; and, finally, they may also be interpreted through analogy*".[41]

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[37] *Rozenfelds, J.* Reform of the Property Law Chapter of the Civil Law of Latvia: Problems and Solutions. Latvijas Universitātes 71. zinātniskās konferences rakstu krājums "Tiesību interpretācija un tiesību jaunrade". Rīga: LU Akadēmiskais apgāds, 2013, p. 30.

[38] *Balodis, K.* Labas ticības princips mūsdienu Latvijas civiltiesībās. *Jurista Vārds*, Nr. 24(257), 2002. gada 3. decembris, 14. lpp.; the similar opinion expressed also by another author M. Krons (*Krons, M.* Civīllikuma pirmais pants (Laba ticība kā tiesiskās rīcības kritērijs). Tieslietu Ministrijas Vēstnesis, 1937, 270. lpp.).

[39] *Sniedzīte, G.* Tiesību normu iztulkošana *praeter legem* (II). *Likums un Tiesības*, 7. sēj. Nr. 11(75), Novembris 2005, 356. lpp.

[40] *Krons, M.* Civillikuma pirmais pants. *Tieslietu ministrijas Vēstnesis,* Nr. 2, 1937, 242. lpp

[41] Ibid.

Thus, as pointed out by M. Krons, in case of defect in law the judge shall create a norm in a constructive way, guided by the system and spirit of law, instead of being a legislator himself. M. Krons writes:

> "*bearing in mind that the source for the Civil law Section 1 – Section 2 of Z.G.B. – does not contain a norm that would assign the judge with a right to create new law and that the respective Z.G.B. Article was not taken over into the Civil law, one shall come to conclusion that the CL Section 1 does not contain provision about the court's function to create new law. While the norm developed by the judge in a constructive way and based on the general reasoning of the law resulting from the CL Section 1 shall be coordinated with the "good faith" preconditions*".[42]

It follows from the above that the application of the good faith principle in circumstances when it comes into conflict with a clear and obvious precondition of a legal norm would not be possible. And why should it, if Section 1 of the CL is not about implementation of specific law by any institution like the court, but mainly about exercising of rights by an individual? Nevertheless, after re-establishing of the CL in 1992, discussion took up a completely new direction as if the intention of the law maker were to create a guide for establishing a new law beyond the existing one (*praeter legem).*

Several modern authors have expressed their opinion based on the good faith principle. Jānis Neimanis claims that *praeter legem* is applicable only when in some specific matter the silence of law does not touch upon a specific legislator's decision. It is possible that the legislator's intention was exactly to express by such silence that definite lawful consequences may not be referred to the problem situation. In such cases, a judge's *praeter legem* would be inadmissible revolt against the legislator, but the judge's ruling would be in conflict with the law. Application of such type of rights is called *contra legem*.[43] The author refers in this way to the judge's capacity to supplement the existing norm of law only in case when filling in of a defect is necessary. However, the quoted author does not refer to the CL Section 1 to be the grounds for such creativeness.

E. Kalniņš has expressed a more radical opinion in this matter, admitting a possibility to re-create existing regulation by the use of *praeter legem*. At the same time, E. Kalniņš argues that the pre-condition for *praeter legem* shall not only be a lawfully important situation of life having the law defect, but also a conclusion that the mentioned defect in law may not be filled in by analogy or in a way of teleological reduction.[44]

In the latter publication, E. Kalniņš, having analysed this method in detail with regard to the good faith principle under the CL Section 1, as well as by referring to the major part of the Senate's judgments, underlines the connection of this general clause with other norms and principles of law, as well as states that in order to solve a particular life situation, one shall always carry out concretization of the respective general clause. In cases, when the judge cannot find more or less typical precedents, he shall judge according to his conviction taking into account the existing criteria and grounding the judgment on such legal evaluations that sufficiently justify one or another legal solution.

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[42] *Krons, M.* Civillikuma pirmais pants. *Tieslietu ministrijas Vēstnesis,* Nr. 2, 1937, 242. lpp.

[43] *Neimanis, J.* Ievads tiesībās. Rīga : zv. adv. J. Neimanis, 2004, 144. lpp.

[44] *Kalniņš, E.* Tiesību tālākveidošana – juridiskās metodes pamati. Grām.: Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā: Rakstu krājums. Rīga: LU, 2003, 170. lpp.

At the same time, he also notes that the current Latvian court practice presents a very poor reference and comparative material that a judge could use to concretize the good faith or good virtues general clauses.[45]

G. Sniedzīte also has analysed the good faith general clause, establishing that this principle was incorporated in the CL from the respective Swiss Civil Law norm, besides, the author argues that the good faith clause in the international human rights documents may often be found under the title "prohibition clause for abuse of rights". It may be found, for example, under Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms and under Article 54 of the Second section of the EU Fundamental Rights Charter.[46]

Apart from the very complicated issue, whether Section 1 of CL must indeed be regarded as a guideline for judges (which is the dominant view reflected in above mentioned quotations), or is it simply a moral compass for the individuals (as it follows from the wording of Section 1 of the CL), we do not find any argument in favour of the good faith acquirer of property.

All we find on the subject only adds a new weight to the argument already pointed out under Chapter 2 of this article – that the exercise of a right by some individual "in good faith" has nothing to do with the protection of the acquirer of property in good faith – the only link between the two is the very term "good faith", and this, in turn, is misleading.

Nevertheless, it does not mean that although there is hardly any internal connection between the so-called good faith in objective and subjective meaning apart from the very term "good faith" (albeit misleading in the latter case), there would be no point in protecting the acquirer in good faith. Still, the problem has not been solved so far – there is no adequate answer in CL (nor is it in literature or in case law) as to why such interest should be protected and, if so, – what would be an adequate mechanism to ensure it?

5. General Description of Acquisition in Good Faith by Law

Description of the acquisition in good faith may be found in Family law chapter, Section 122 of the CL:

> *"the person who has received such shall be acknowledged as having acquired that property or pledge in good faith, if he or she did not know or ought not to have known that the property was that of the other spouse or of both spouses and that it had been disposed of or pledged contrary to the volition of the other spouse".*

One could wonder why this case is specific with relationship between a husband and a wife, and cannot be found as a part of standard regulation regarding any proprietor.

Reluctance by CL to establish protection for acquisition in good faith as a general principle has also resulted in practice. The case law has not worked out such protection to be a general principle, although sometimes in certain court decisions a wording "good faith" is used as a pretext for allowing the acquirer to retain the property, which otherwise should have been reverted to another person.

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[45] *Kalniņš, E.* Privāttiesību teorija un prakse. Rīga: TNA, 2005, 380. lpp.

[46] *Sniedzīte, G.* Tiesību normu iztulkošana *praeter legem* (II). *Likums un Tiesības*, 7. sēj. Nr. 11(75), Novembris 2005, 356. lpp.

The situation described above can be relevant not only with regard to movable but also immovable property. With respect to immovable property, there is a presumption that, notwithstanding whether only one of the spouses is entitled to the immovable property according to the land register, still, this property must be regarded as a joint property:

> *"[I]f the joint immovable property of the spouses is recorded in the Land Register in the name of one of the spouses, it is presumed that the other spouse has assigned his or her share in such property to be administered by him or her."*[47]

It is established by case law that this norm does not stipulate that "assigning" means handing over the property rights, but that such property is still jointly owned by both spouses. Record of such property in the Land Register in the name of only one of the spouses simply means that the property is entrusted by one spouse to another "for administration".

Such reading of CL is somewhat misleading, because it entirely ignores the principle that

> "*[O]nly such persons shall be recognised to be the owners of immovable property, as are registered in the Land Register as such owners.*"[48]

The relationship among different parts of the CL has always been a difficult issue for Latvian legal science, as well as practice. Having noticed that there is contradiction in regulation of joint property rights enjoyed by spouses,[49] on the one hand, and the rights of co-owners of the same object,[50] on the other hand, it was explained in literature by relation of the former norm towards the latter as the "special" towards the "general",[51] which actually does not explain anything. The author of this view did not bother to explain what is so "special" about Section 93 and why something, which is located at the very beginning of a national civil code, must be regarded as "special". Also – why all this could not be interpreted the other way round in other circumstances?[52]

So far, we have established that "good faith" in context of the acquirer of property in good faith may be anything but the "good faith".

We have also found that "good faith" as a general clause described in Section 1 of CL has nothing in common with "good faith" in context of the acquirer of property in good faith.

We have also noticed that almost all the attempts to use "good faith" as a tool for protection have turned out to be doomed to fail so far.

As to the general principle of acquisition of property in good faith, we have established, in turn, that it does not protect the acquirer against the claims brought by previous owner.[53] Apart from the abovementioned exceptions, good faith can

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47 Section 93 of the CL.
48 Section 994 of the CL.
49 Section 124 of the CL.
50 Section 1067 of the CL.
51 *Grūtups, A.* Latvijas Republikas civillikuma komentāri. Īpašums (927.–1129.p.) Rīga : Mans īpašums, 1996, 147.–148. lpp.
52 "Reversible presumption" – *Kalniņš, E.* Laulāto manta laulāto likumiskajās mantiskajās attiecībās. Rīga: TNA, 2010, 184.–190. lpp.
53 Section 1065 of the CL.

only serve as a protective shield for the acquirer in good faith to be one of the six preconditions for the acquisition of property through prescription.[54]

From this brief observation of law, we can conclude that apart from very specific exceptions,[55] acquisition of an object in good faith does not protect the acquirer from vindication.

6. Dual Meaning of "Faith" in CL

Acquisition of property rights in good faith is not the only understanding of "good faith" in subjective meaning to be found in CL. There is another usage of the term "faith", which may lead to further misunderstandings.

Possession is in good faith or it is in bad faith.[56] At the first sight, it is the same "good faith" in subjective sense that we are already familiar with. In fact, however, it is something different. So far, good faith in subjective sense was understood as something to do with knowledge about certain rights. Possession in good faith is about knowledge of facts. Acquisition of property rights in good faith and acquisition of just possession in good faith is not easy to distinguish. It can be observed that even in Latvian case law, the distinction between the two are sometimes blurred. Mixing these two meanings up may lead to far-reaching mistakes.

Distinction between the two meanings is difficult due to several reasons, also for the pure wording to be found in the CL.

> *"Possessors in good faith are those who are convinced that no other person has a greater right to possess the property than they, but possessors in bad faith are those who know that they do not have the right to possess the property or that some other person has greater right in this respect than they."*[57]

However, it is not about rights altogether. It is easy to miss the whole point if in interpreting this norm one overlooks what is already said about "legal or illegal" possession:

> "*possession acquired by force or in secret*[58] *from persons from whom an objection could be expected, is illegal.*"[59]

The distinction between the two meanings of good faith becomes more apparent, if one takes a closer look towards acquisition of property through prescription (adverse possession):

> "*In order to acquire ownership through prescription, it is not sufficient that a possessor acquires his or her possession in good faith, but it is also necessary that his or her good faith continues during the entire specified prescriptive period, and accordingly prescription is interrupted by bad faith appearing during such period.*"[60]

Here it must become clear that possession in good faith is something that lasts throughout the whole period of prescription, whereas acquisition of property in

[54] Sections 998–1031 of the CL.
[55] Section 122 and 1065 of the CL.
[56] Section 910 of the CL.
[57] Section 910 of the CL.
[58] Possession acquired in secret can also be translated as possession acquired by stealth.
[59] Section 909 of the CL.
[60] Section 1015 of the CL.

good faith is completed as soon as a person has acquired the property rights. This is the whole point. If acquisition in good faith contains something worth defending against the true owner, then it is different from the possession in good faith, which evaporates as soon as this crucial obstacle is found out in the way of acquiring property rights through prescription.

Strictly speaking, it must be added that CL is slightly inaccurate also in using the term "good faith" without distinction both in Chapter 2, Sub-chapter 4 (Forms of Possession) and in Sub-Chapter 3 of Part Three (Property Law), because the meanings used in those chapters are not compatible.

However, the difference between the meaning of possession in good faith, as applied to the defence of the possessor in good faith, when compared with the possession of good faith as a precondition for the acquisition of property through prescription is not such a significant mistake, as is the difference between the meaning of possession in good faith, as applied to the defence of the possessor in good faith, and the acquisition of property in good faith.

The difference between the two meanings becomes apparent, if we think about the acquisition of property rights as a momentary act compared with the possession as a lasting process. The former is completed as soon as property rights are acquired. The latter can last for an unlimited period of time. Acquisition of property rights is either performed in good faith once and forever, or it is not. Possession in good faith can turn into its opposite at any time. It is obvious from this comparison that the possession in good faith cannot be applied to the acquisition of property rights in good faith, because one cannot apply lasting condition to a momentary event.

Nevertheless, there is a case law, where courts confuse these things even after it was pointed out in legal literature that these two meanings of good faith are not interchangeable.[61] By using the test of "possession in good faith" as a criterion of whether property rights were acquired in good faith, the courts have deprived themselves of any firm criteria to distinguish between the cases where the property should remain with the acquirer in good faith[62] from those, where the property has to be reversed to the previous owner.[63]

Little attention has been paid to ambiguity of the abovementioned criteria, as well as to the fact that a wide range of case law where the above thesis is supported by the Supreme Court can be easily covered with equally impressive range of decisions stating the contrary, i.e., that good faith does not always count. It is even impossible to come to the conclusion that the case law has changed – it is still lingering.

The only difference between the situation today as compared with that of the previous decade, perhaps is that one can find more cases dealing with the issue of determining whether acquisition in good faith has taken place. However, these decisions co-exist with those, where arguments of the defendant over the issue of acquisition in good faith fall on deaf ears and are still approved by higher instances

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[61] *Rozenfelds, J.* Valdījuma teorijas [Possession Theories]. Latvijas Universitātes Zinātniskie raksti. 740. sējums. Prof. *Lazdiņš, J.* (Editor-in-Chief). Rīga: Latvijas Universitāte, 2008, 42.–60. lpp.

[62] "Par nekustamā īpašuma labticīga ieguvēja aizsardzības priekšnoteikumiem": Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2010. gada 12. maija spriedums lietā Nr. SKC-11/2010. *Jurista Vārds*, Nr. 39(634), 2010. gada 28. septembris.

[63] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2012. gada 1. februāra spriedums lietā Nr. SKC-10/2012. Available at: http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/hronologiska-seciba_1/2012-hronologiska-seciba/ [last viewed 02.05.2016].

as compatible with the "established case law", whatever it means. The Supreme Court has recently declared that particular court decisions must be reviewed on the grounds that by examining the ownership claims, the courts have refused to investigate, whether the defendant has acquired the property in good faith. The Supreme Court asserted that the case law has changed since 2005, and that in reviewing ownership claim the court was obliged to examine, whether the defendant had acquired property in good faith, even if it was acquired illegally. Unfortunately, by insisting that acquisition in good faith should be examined, the Court has nevertheless failed to put forward any strict criteria except registration of the immovable property and possession of the movables. This argument seems inadequate given that the purpose of an ownership claim is to overthrow and destroy the argument of a defendant that he or she is registered as an owner of the immovable property in the Land Register[64], or is in possession of the property at issue[65]. Thus, by claiming rightfully to review the case, the court has used circular reference as an argument to support its decision.[66]

A clear sign that there is something missing in the law regarding the argument of acquisition in good faith are the recent attempts to amend the CL.

7. Attempts to Implement "Subjective Good Faith" in Law as a Universal Principle

The radical solution proposed in the research initiated by the Ministry of Justice in 2008 intended to replace Section 996 of the CL with an absolutely new one:

> "*A third person, who through a legal transaction and in good faith relying on the Land Register records, acquires ownership rights to immovable property, shall also be protected, if the Land Register records do not correspond with the actual legal situation. The third person cannot in good faith acquire ownership rights to an illegally acquired immovable property.*
>
> *These provisions shall be respectively applied also to other acquisitions of ownership rights to immovable property in good faith*".[67]

The present proposal excludes an exception regarding immovable property acquired illegally – it is not because it would not be topical any longer in the opinion of the author of this proposal, but rather due to the fact that this part of the proposal was much criticised, besides – from totally different standpoints.

The main drawback of this proposal, however, was that it *per se* could not ensure uniformity in courts' interpretation of mutually colliding legal norms due to highly unclear wording of Section 1480.[68]

The proposed solution, which was supported by the good intention to follow German law as a raw model, ironically turns out to be very "un-German" in

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[64] Section 994 of the CL.

[65] Section 1044 of the CL.

[66] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2012. gada 18. aprīļa spriedums lietā Nr. SKC-136/2012. Latvijas Republikas Augstākās tiesas Senāta spriedumi un lēmumi 2012. Rīga: TNA, 2013, C, 55. lpp.

[67] *Kalniņš, E.* Pētījums par Civillikuma lietu tiesību daļas pirmās, otrās un trešās daļas modernizācijas nepieciešamību. Available at http://at.gov.lv/lv/resursi/petijumi/ [last viewed 29.04.2016].

[68] *Rozenfelds, J.* Reform of the Property Law Chapter of the Civil Law of Latvia: Problems and Solutions. Latvijas Universitātes 71. zinātniskās konferences rakstu krājums "Tiesību interpretācija un tiesību jaunrade". Rīga: LU Akadēmiskais apgāds, 2013, 43. lpp.

substance, given that there are at least two distinctive features of BGB, which we do not find in CL (let alone the main difference that CL is based on principle of causality, but BGB – on principle of abstraction). Firstly, CL makes no distinction between transfer of movable and immovable property, with a few exceptions like the abovementioned Section 1065 of the CL. Secondly, CL does not stipulate that the one who actually holds the object, must be presumed to be the owner. On the contrary – instead of presumption, the *onus* of proof lays on anyone who claims that he/she is a proprietor. Instead of presumption of rights, CL claims that one must prove not only that he or she has actually acquired such rights through a lawful procedure, but, furthermore, if a claimant alleges that he or she acquired the property through delivery or inheritance from another person, then he or she must also prove that his or her predecessor was the owner of it (Section 1060 of the CL), i.e., the so-called *probatio diabolica*[69] abandoned by other legislations centuries ago.

Conclusions

It is very unlikely that proposals regarding acquisition in good faith will turn into real amendments to the CL. Probably, it will never happen.

> *"As so often happens, the questions historians have asked have not been definitely resolved; but they do not seem quite as urgent any more as they once did, and people have begun to ask different questions or, perhaps, the same questions as before, but in a different form and with a different emphasis."*[70]

Looking back into the recent history of the preconditions for defence of the acquirer of property in good faith, one can notice at least three different stages: 1) undisputable dominance of ownership rights over acquisition in good faith; 2) indecision between the defence of the true owner and the acquirer of property in good faith; 3) admission that the acquirer of property in good faith must be always defended (albeit without working out strict criteria of good faith). While regulation of the issue by CL has remained unchanged, the case law has undergone a dramatic turn from one extreme to another. It remains to be seen, whether this trend will lead further towards more or less coherent and predictable case law in the near future.

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