Essays

Invalidity of Contracts and the Protection of Third Parties' Acquisitions of Land

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Abstract

Purchasers of land have a strong interest in becoming the fully vested owners of the land they intend to acquire. One of the risks a buyer potentially is exposed to stems from the legal relationship between the seller and the person from whom the seller previously bought the land. In this article, we examine the protection of purchasers in such scenarios in three jurisdictions: Italian law, Turkish law, and German law. The solutions adopted each represent the legal family to which they belong, and the findings of this comparative study therefore are not necessarily confined to said three jurisdictions. This article will however reveal that, under a surface of strong differences, it is possible to outline common trends and common objectives, and therefore that it is not at all inconceivable to hypothesize a harmonization's perspective in this field.

I. Introduction

Even in our times of a globally financialized and dematerialized economy, in an average citizen's life, the purchase of land is considered to be one of the most important transactions to enter into. The capital invested in the acquisition of land usually accounts for a substantial part of the entire funds earned in a person's lifetime. Similarly, the economic success of businesses often depends on immovable property deals. Even the last global great recession has originated in the USA in result of a crisis of immovable mortgages and a lack of certainty with regard to immovable transfers, a situation that, *inter alia*, has boosted the development of a title insurances market.

It goes without saying that purchasers therefore have a particularly vital interest in becoming the fully vested owners of the land they intend to acquire.

Indeed, one of the most important risks a buyer potentially is exposed to stems from the legal relationship between his seller and the person from whom the seller previously bought the land. Suppose A sells land to B who resells the land to C. In this scenario, we consider C the third party. Assuming there was

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some kind of legally relevant disruption in the relationship between A and B, the acquisition of ownership through B may be compromised. C's later acquisition, in turn, depends in principle on his seller's (B's) position as owner. Thus, C has reason to be concerned with the legal relationship between A and B. Of course, this is a simplified model. In practice, there could be a long sequence of transactions of the same property before C aspires to gain ownership from B. C's position would then be up to the validity of all links in the chain of transfers.

In consequence, C will be prompted to enquire the validity of all transferors' prior acquisitions if he wants to ensure the persistence of his acquisition. Such an undertaking will most likely turn out to be impossible or trigger prohibitively high transaction costs. It could therefore be argued that society as a whole has an interest in lowering the risk C is exposed to. The purchase of land is a desirable activity and all legal orders try to protect it.

In this article, we examine the protection of third-party transferees, such as C, under three legal orders that have been selected as relevant examples of the main options to be taken into account: Italian, Turkish, and German law. As the reports will show, the German system is the paradigm of a model centered on the land register and based on the strict separation between obligations and transfers of rights as well as on the principle of abstraction; the Turkish system represents a large scale application of a model, originally developed in Switzerland, that instead merges the principle of underlying causa with the principle of separation; the Italian system presents an interesting, and almost unique, combination of the proclaimed rule of transfer by mere consent, originally derived from the French experience, with other rules that instead give much more importance to the land registration, and, furthermore, a different system, derived from the Austrian one, still in force in some provinces. Thus, our three legal orders turn out to be highly representative of the diversity of the possible solutions adopted, outside and inside the EU, within the continental civil law tradition.[1]

These three jurisdictions have established fundamentally different requirements for the transfer of land with significant implications for third party purchasers. Such different assumptions in three European states *per se* provide an incentive

[1] After all, the civil law tradition was historically shaped precisely in the territories now belonging to these three jurisdictions. We could remember C. Beccaria, *Dei delitti e delle pene* (Livorno: Coltellini, 1764), 1, where the author ironically summarizes the history of the civil law tradition as follows: '*Alcuni avanzi di leggi di un antico popolo conquistatore fatte compilare da un principe che dodici secoli fa regnava in Costantinopoli, frammischiate poscia co' riti longobardi, ed involte in farraginosi volumi di privati ed oscuri interpreti, formano quella tradizione di opinioni che da una gran parte dell'Europa ha tuttavia il nome di leggi... Queste leggi, che sono uno scolo de' secoli i piú barbari...*' (translation: 'Some leftovers of the laws of an ancient people of conquerors (ie the Romans), collected by a prince who twelve centuries ago reigned in Constantinople (ie İstanbul), then mixed with the Longobards' (ie a Germanic people's) customs, and inserted in complicated volumes by private and unknown scholars, form that tradition of opinions that nevertheless in the greater part of Europe has the name of laws... Those laws that are a relic of the most barbarous centuries...').

for a closer comparative study. Moreover, the solutions adopted in Italian, Turkish, and German law each represent the legal family to which they belong, and the findings of this comparative study therefore are not necessarily confined to said three jurisdictions. This article will however reveal that, under a surface of strong differences, it is possible to outline common trends and common objectives, and therefore that it is not at all inconceivable to hypothesize a harmonization's perspective in this field.

II. Italian Law

1. Introduction and Historical Developments

The Italian law on property transfer is twofold: One rule is proclaimed as the general principle in the Civil Code, and a different rule concretely operates through many other provisions of the Code itself, and of other statutes. It is mainly due to historical reasons: That's why the present country report will need a longer introduction than the other two.

Until the 18th century, the Roman law tradition, and the Germanic customs mixed with it, had always followed the ancient idea that a sale contract does not transfer property, but just creates the obligation of the seller to perform another act, which will operate the planned transfer.[2] Depending on the value and on the social importance of the concerned goods, this second act could be a complex and public ritual, meant to inform the whole community about the transfer, or simply the delivery of the good itself to the buyer, an operation that anyway made evident to everyone its passage under the control of a different owner.[3] After all, this was a logical consequence of the doctrine of contract's privity: If the contractual agreement can create rights and duties only among the contracting parties, something else was needed in order to transfer property, a right which is defined as absolute (*erga omnes*), and so always involves also the position of third parties.

With the Enlightenment and the French Revolution, also contract law underwent strong transformations. The main objectives were to radically simplify the too complex rules inherited from the past and to center the new ones on the free expression of will by the contracting parties. Therefore, a new principle was imposed to our subject: Property is transferred by the simple meeting of the parties' consents,[4] ie by the mere stipulation of the sale contract (in Latin:

[2] About the Roman sale contracts see, also for further references, C. Argiroffi, *Causa e contratto nella prospettiva storico comparatistica* (Torino: Giappichelli, 2017).

[3] In Roman law the most important goods were land, slaves, cows and horses: They could be transferred only though the solemn ritual of *mancipatio*, whilst the other movable good could be transferred through the mere *traditio*, ie delivery.

[4] According to Art 1583 of Napoleon's *Code Civil* of 1804, the contract of sale '*est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé*' ('produces legal effects among the contracting parties, and so transfers ownership from

consensus parit proprietatem). The new rule had the beauty of pure ideas and the strength of revolutionary movements, so it suddenly became an untouchable dogma. Indeed, the French Civil Code retained some traditional rules hardly compatible with this principle, having regard to the less important property transfers,[5] but the new system turned out to be very problematic with regard to the most important ones, at that time and maybe also at our time: immovable properties' transfers.

In fact, under the pure rule of the mere consent, a buyer could never know if the seller had already sold the immovable to someone else with a previous contract and had always to fear that this previous buyer will appear and claim to be the true owner. In order to solve these problems, and so to increase mutual trust in real estate market, in the 19th century the French legislator introduced a mechanism of transcription, ie public registration, of contracts: the buyer was entitled to prevail against other buyers of the same immovable only if and when he registered his sale at the public registrar office, making it accessible to anyone, and so a prospective buyer could free himself of any fear by checking if someone else had previously registered the purchase of the concerned good.[6] The Civil Code principle of mere consent formally was not touched by this reform,[7] but in

the seller to the buyer, since the moment when the parties have agreed on the goods and on the price, even if the goods have not been delivered and the price has not been paid yet').

[5] Art 1141 of Napoleon's Code had maintained the old Germanic (Frankish) rule *en fait de meubles la possession vaut titre* and stated that: '*Si la chose qu'on s'est obligé de donner ou de livrer à deux personnes successivement, est purement mobilière, celle des deux qui en a été mise en possession réelle est préférée et en demeure propriétaire, encore que son titre soit postérieur en date, pourvu toutefois que la possession soit de bonne foi*' ('If someone consented to deliver the same mobile goods to two persons, the one who receives the delivery first prevails on the other, even if his contract has been agreed later, provided that he acquired the possession in good faith'). Therefore, with regard to movables the decisive moment is not consent but delivery.

[6] A first draft of the transcription's system had been introduced by the Law of 11th Brumaire VII (1 November 1798), but suddenly abrogated by the *Code Civil* of 1804. Then the transcription was definitely reintroduced by Napoleon III with the law of 23 March 1855, in order to help the safe development of mortgage credit in times of growing urbanization.

[7] The principle is still seemingly proclaimed by Art 1196 of the *Code Civil*, as reformed in 2016: '*Dans les contrats ayant pour objet l'aliénation de la propriété ou la cession d'un autre droit, le transfert s'opère lors de la conclusion du contrat*" ('With regard to contracts transferring ownership or other rights, the transfer takes place when the contract is concluded'), but Art 1198 suddenly specifies that: "*Lorsque deux acquéreurs successifs d'un même meuble corporel tiennent leur droit d'une même personne, celui qui a pris possession de ce meuble en premier est préféré, même si son droit est postérieur, à condition qu'il soit de bonne foi. Lorsque deux acquéreurs successifs de droits portant sur un même immeuble tiennent leur droit d'une même personne, celui qui a, le premier, publié son titre d'acquisition passé en la forme authentique au fichier immobilier est préféré, même si son droit est postérieur, à condition qu'il soit de bonne foi*' ('If the same mobile goods are acquired by two buyers from the same seller, the one who has received the delivery of the goods first prevails, even if his contract has been agreed later, provided that he acquired the possession in good faith. If the same immovable property is acquired by two buyers from the same seller, the one who has registered his acquisition first prevails, even if his contract has been agreed later, provided that he was in good faith'). See S.

substance the latter implied that the most important passage was public registration, and not private consent. In fact, as a consequence of the transcription's mechanism, the second buyer who registers as first prevails against the first buyer who registers as second.

The Italian Civil Codes inherited from the French one both the proclaimed principle of transfer by mere consent[8] and the concrete rule of transcription as the sole criterion to solve conflicts among different buyers from the same seller.[9] After the First World War, this quite contradictory system had to be compared with the different one that was in force in the new eastern provinces, taken from the dissolved Austrian-Hungarian Empire.[10] In the Austrian legal order, according to the Roman tradition, the sale contract creates only an obligation to transfer property with a second act. Therefore, the immovable is actually transferred only when a judge, to whom the interested party has to submit the sale contract, verifies that everything is fine and so modifies its ownership in the public cadaster.[11] It is evident that this system is in deep contrast with the transfer-by-mere-consent principle, but it looked like more efficient, and so the winners did not abolish it, rather they preserved such a mechanism in the new provinces,[12] with the aim to

Meucci, 'Doppia vendita immobiliare, opponibilità e buona fede nel riformato Code Civil' *Persona e Mercato*, I, 120 (2018).

[8] We refer to Art 1125 of the Civil Code of 1865, the first Civil Code of the newly unified Italy, which was in substance a translation of the French one.

[9] The ancient Italian States had developed some mechanisms comparable to the modern public registration of contracts, such as the Venetian '*notatorio*' entrusted to a magistrate called '*procuratore di San Marco*'. However, an actual transcription system has been introduced only in the 19th century by many Italian States, and then by Civil Code of 1865. See, also for further references, N. Coviello, *Della trascrizione* (Napoli-Torino: Marghieri UTET, 1924), I, 36 and V. Colorni, *Per la storia della pubblicità immobiliare e mobiliare* (Milano: Giuffrè, 1954), 233.

[10] In force of the Treaties of Saint-Germain-en-Laye (10 September 1919) and Rome (27 January 1924), Italy annexed the new Provinces of Bolzano, Trento, Gorizia, Trieste, Pola, Fiume and Zara, as well as other minor towns that were incorporated in the, already Italian, Provinces of Belluno, Brescia, Vicenza and Udine. However, after the Second World War, with the Treaty of Paris (10 February 1947), Italy had to cede to Yugoslavia the Provinces of Zara, Fiume and Pola, as well as parts of those of Trieste and Gorizia.

[11] The Austrian cadaster dates back to the reforms of Empress Maria Teresa in the 18th century, ironically realized with the crucial contribution of prominent Italian lawyers, such as Carl'Antonio Martini and Pompeo Neri.

[12] We refer to the Royal Decree of 28 March 1929 no 499. About this peculiar system of public registration, still in force in the former Austrian Provinces, see: G. Gabrielli and F. Tommaseo, *Commentario della legge tavolare = Kommentar zum Grundbuchsgesetz* (Milano: Giuffrè, 1999); M. Bassi, *Manuale di diritto tavolare* (Milano: Giuffrè, 2013); M. Cosulich and G. Rolla, *Il riconoscimento dei diritti storici negli ordinamenti costituzionali* (Napoli: Editoriale Scientifica, 2014); A. Nicolussi and G. Santucci, *Fiat intabulatio* (Napoli: Editoriale Scientifica, 2016); A. de Bertolini, 'Speciale Sistema Tavolare' *Il Foro Trentino*, II, 12 (2017); A. Nicolussi et al, *Luigi Mengoni. Scritti di diritto tavolare. Schriften zum Grundbuchsrecht* (Napoli: Jovene, 2018). Something similar happened, in the same Post-War period, in France after the annexation of Alsace and Lorraine, where the Law of 1 June 1924 has maintained, even if with important modifications, the German system of registration: see A. Ciatti Càimi, 'Premesse storiche a un'indagine sulla pubblicità immobiliare', in G. Conte and S. Landini eds, *Principi, regole,*

extend it to the rest of Italy, if and when a reliable cadaster would be available,[13] but this result is still far from being achieved.[14]

2. Acquisitions from the Owners, from the Non-Owners, and Related Remedies

In the rest of Italy, also the new Civil Code of 1942 confirmed the French twofold system, with the mere consent principle proclaimed as a general rule by the 4th Book of the Code,[15] but contradicted by the concrete rules governing immovable property transfer, centered on transcription, which is regulated in the 6th Book of the same Code (and indeed also by the other, old and new, rules governing any other kind of property transfer).[16] In fact, in accordance to the 6th

interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di Giovanni Furgiuele (Mantova: Universitas Studiorum, 2017), II, 468.

[13] Indeed, the possible introduction of an Austrian-like system of public registration was debated even before the War (see G. Venezian, 'Il disegno di legge Scialoja sulla trascrizione' *Rivista di diritto civile*, 509 (1910) and F. Ferrara, 'Il progetto Scialoja sulla trascrizione' *Rivista di diritto commerciale*, I, 46 (1910)), and it was actually introduced in Italian colonial law with regard to African territories where public registers had never existed before, or to former Turkish provinces where the last Ottoman officials had deliberately destroyed the registers rather than consign them to the colonialists. Therefore, in these contexts a reliable cadaster and the connected Austrian-like registration system were realized from scratch, without the problems posed by historical Italian cadasters in the metropolitan territory: See Royal Decree of 31 January 1909 no 378, for Eritrea (then reversed by Royal Decree of 7 February 1926 no 269, which instead introduced the transcription system); Royal Decree of 3 July 1921 no 1207, for Libya; Governmental Decree of 22 August 1925 no 46, for the Dodecanese. In the latter, the Austrian-like system has been maintained also after the Second World War, when the Islands passed to Greece in force of the Treaty of Paris (10 February 1947), while in the newly independent Eritrea it has been reintroduced, in a different socialist shape, with the Land Proclamation no 95 of 1997.

[14] Italian cadasters are important for tax purposes (see L. Einaudi, *La terra e l'imposta* (Torino: Einaudi, 1974)), but, in most cases, they provide data that are not reliable nor updated: Therefore, according to Art 950 of the Civil Code of 1942, cadaster has no probative value as for property rights in private litigations, and the civil judge has to take it into consideration only if he lacks of any other element to be evaluated. Nowadays, in force of the decreto legge 31 May 2010 no 78, public notaries have to ensure the conformity between the cadaster and the public register of transcription (see G. Petrelli, *Conformità catastale e pubblicità immobiliare* (Milano: Giuffrè, 2010)): If this new statute will be correctly implemented, maybe in the next decades it will be possible to reconsider a reform of the whole public registration system.

[15] According to Art 1376 of the Civil Code, property is transferred by consent (see G. Vettori, *Consenso traslativo e circolazione dei beni: analisi di un principio* (Milano: Giuffrè, 1995)) and, according to Art 1465, the risks pass on the buyer as soon as the contract is stipulated, even if the good has not been delivered to him (see F. Azzarri, *Res perit domino e diritto europeo: la frantumazione del dogma* (Torino: Giappichelli, 2014)).

[16] With regard to registered movables, ie cars, ships and planes, Art 2683 et seq of the Civil Code provide a transcription system that is very similar to the immovable properties' one. With regard to all other movables, according to Art 1155 of the Civil Code, the second buyer who receives in good faith the delivery of the goods prevails against the first buyer who has not received the delivery (see L. Mengoni, *Gli acquisti a non domino* (Milano: Giuffrè, 1975)), and in consumers' contracts the risks pass on the buyer only with the delivery of the goods (see M. Rizzuti, 'Comment to article 63', in V. Cuffaro ed, *Commentario al Codice del Consumo* (Milano: Giuffrè, 2015), 482-484). With regard to credit assignments, according to Art 1265 of the Civil Code, the

Book, the second buyer who registers his purchase as first, even if he is not in good faith, prevails against the first buyer who registers as second, provided that also the previous acquisition of the same immovable by the seller had been registered.[17]

According to the transfer-by-mere-consent principle, we had to consider the first buyer as owner and the dishonest seller as a non-owner, but the mentioned rules on transcription make possible the acquisition by the second buyer, who becomes the real owner. In fact, the first buyer has no remedies *in rem* nor he can erase the acquisition of the second one, but he can just claim damages under contractual liability against the seller. This set of rules explain also other aspects of the legal and practical structure of Italian real estate market.

First of all, that is why in Italy immovable property transfers are in the hands of public notaries. According to the 4th Book of the Code, a private signature is enough to constitute the consent that transfers immovable property, but, according to the 6th Book, only a notarial deed can be registered.[18] Moreover, according to case-law, it is a notary's duty, before the sale, to check at the public registrar office whether the prospective seller is still entitled to sell the concerned immovable or there are previous transcriptions of transfers to other buyers, as well as, after the sale, to rapidly register the new purchase, in order to avoid that other acquisitions can be registered in the meanwhile.[19] According to a recent

second assignor who has notified as first the assignment to the debtor prevails against the first assignor who notifies later (see P. Perlingieri, *Cessione dei crediti* (Bologna-Roma: Zanichelli, 1982)). With regard to rental contracts, according to Art 1380 of the Civil Code, the second tenant who receives as first the possession of the good prevails against the first tenant who has not received it (see U. Natoli, *Il conflitto dei diritti e l'art. 1380 del codice civile* (Milano: Giuffrè, 1950)). Quite similar rules are provided with regard to the transfers of stocks and company shares (see L. Furgiuele, *Trasferimento della partecipazione e legittimazione* (Milano: Giuffrè, 2013). For a general overview of these issues see F. Carnelutti, *Teoria generale della circolazione* (Padova: CEDAM, 1933) and G. Furgiuele, *La circolazione dei beni* (Milano: Giuffrè, 2009).

[17] We refer to Arts 2644 and 2650 of the Civil Code, which are the pillars of the immovable property transfers' regulation system provided by Art 2643 et seq. of the said Code: see S. Pugliatti, *La trascrizione* (Milano: Giuffrè, 1957); R. Nicolò, *La trascrizione* (Milano: Giuffrè, 1973); M. D'Orazi-Flavoni and L. Ferri, *Trascrizione immobiliare. Trascrizione mobiliare* (Bologna-Roma: Zanichelli, 1977); G. Sicchiero, *La trascrizione e l'intavolazione* (Torino: UTET, 1993); R. Messinetti, *La tutela della proprietà sacrificata: contributo allo studio delle circolazioni attributive legali* (Padova: CEDAM, 1999); E. Ferrante, *Consensualismo e trascrizione* (Padova: CEDAM, 2008); G. Petrelli, *L'evoluzione del principio di tassatività nella trascrizione immobiliare* (Napoli: Edizioni Scientifiche Italiane, 2009); G. Baralis, *La pubblicità immobiliare fra eccezionalità e specialità* (Padova: CEDAM, 2010); E. Gabrielli and F. Gazzoni, *Trattato della trascrizione* (Torino: UTET, 2012), I.

[18] According to Art 1350, in the 4th Book, an immovable property transfer contract is void if not concluded in writing, but any kind of writing is adequate for the purposes of this norm. On the other hand, according to Art 2657, in the 6th Book, an immovable property transfer contract can be registered only if a public notary, or a judge, has authenticated or drafted it.

[19] About the consequent notary's liabilities see, also for further references to the case-law, M. D'Auria and M. Rizzuti, 'La responsabilità civile dell'avvocato e del notaio' *Giurisprudenza Italiana*, 184-193 (2014). It's important to notice that the parties, and above all the buyer, have the interest to register the sale contract, but for the public notary its transcription is also a specific duty, according to Art 2671 of the Civil Code. However, even the most scrupulous notary

statute, the notary has also to receive in trust the price from the buyer, when the sale contract is signed, and then to give it to the seller, only if the transcription is completed without any problem.[20] So, notaries are the guarantors of the well-functioning of the whole mechanism of immovable property transfer.

The contracting parties are often used to define and fix privately their agreement first, and subsequently go to the notary. Therefore, the practice has developed and the Civil Code has recognized the so-called preliminary contract,[21] which does not transfer property but binds the parties to sign the notarial final contract, which will operate the transfer (but maybe it would be better to say, whose subsequent transcription will operate the transfer). However, further reforms have recently introduced the possibility to register also the preliminary contracts,[22] and so a new practice is developing: the parties agree a private pre-

cannot avoid that, after his last check of the registers and before the transcription of the act he drafted (this time interval can be reduced even to a few hours, but cannot be eliminated), another purchase is registered. Therefore, a legal scholar, Professor E. Lucchini Guastalla, has proposed to modify the law, giving to notaries the power to book in advance the successive transcription when checking the registers (see A. Busani, 'Vendita di immobili con rischi' *Il Sole 24 Ore*, 24 May 2009), but this proposal has never been accepted by the legislators.

[20] We refer to Art 1, para 142, of the legge 4 August 2017 no 124, that has modified Art 1, paras 63 et seq, of the legge 27 December 2013, no 147 (see G. Sicchiero and M.D. Stivanello-Gussoni, *Legge concorrenza e mercato: novità per i notai* (Montecatini Terme: Altalex, 2017)).

[21] In the French model, the preliminary contract did not exist, or rather it was already an ordinary sale contract transferring the property, because of the mere consent rule, endorsed by Art 1589 of the Code Civil: '*La promesse de vente vaut vente*'. Instead, the idea of *Vorvertrag*, ie pre-contract, as something different from the final sale was developed in the German legal order, where the mere consent rule has never been in force, then imported in the Italian legal practice and finally recognized by Arts 1351 and 2932 of the Civil Code of 1942. Sometimes the contracting parties anticipate, partially or totally, at the moment of preliminary contract also the payment of the price and/or the delivery of the goods. See L. Montesano, *Contratto preliminare e sentenza costitutiva* (Napoli: Jovene, 1953); M. Giorgianni, *Contratto preliminare, esecuzione in forma specifica, e forma del mandato* (Milano: Giuffrè, 1961); G. Gabrielli, *Il contratto preliminare* (Milano: Giuffrè, 1970); A. Chianale, *Obbligazioni di dare e trasferimento della proprietà* (Milano: Giuffrè, 1990); G. Palermo, *Contratto preliminare* (Padova: CEDAM, 1991); F. Gazzoni, *Il contratto preliminare* (Torino: Giappichelli, 1999); M. Mustari, *Il lungo viaggio verso la realità: dalla promessa di vendita al preliminare trascrivibile* (Milano: Giuffrè, 2007); R. Calvo, *Contratto preliminare* (Milano: Giuffrè, 2016); M. Farina, *Contrattazione preliminare e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2017).

[22] We make reference to Art 3 of the decreto legge 31 December 1996 no 669, that introduced in the Civil Code Art 2645-*bis* on preliminary contracts' transcription, that renders the registered preliminary contracts opposable to the subsequent buyers (see A.A. Carrabba, *La trascrizione del contratto preliminare* (Napoli: Edizioni Scientifiche Italiane, 1998); A. Luminoso and G. Palermo, *La trascrizione del contratto preliminare: regole e dogmi* (Padova: CEDAM, 1998)), and to Art 23 of the decreto legge 12 September 2014 no 132, regulating the transcription of 'rent to buy contract', a peculiar contract that mixes elements of preliminary sale contract, rental contract and option contract (see D. Poletti, 'L'accesso alla proprietà abitativa al tempo della crisi: i c.d. contratti rent to buy', in G. Alpa and E. Navarretta eds, *Crisi finanziaria e categorie civilistiche* (Milano: Giuffrè, 2015), 251; A.C. Nazzaro, 'Il rent to buy tra finanziamento e investimento' *Rivista di diritto bancario*, 5 (2015); C. Cicero and V. Caredda, *Rent to buy* (Napoli: Edizioni Scientifiche Italiane, 2016); R. Clarizia et al, *I nuovi contratti immobiliari: rent to buy e leasing abitativo* (Padova: CEDAM, 2017)). In general terms, to avail or not of the rules on preliminary contracts'

preliminary contract, then the notarial preliminary to be registered, and after that the final contract to be registered too.[23]

For the legal scholarship it is not so easy to deal with this complex situation. According to the traditional mainstream opinion still followed in the textbooks,[24] property is transferred by mere consent and transcription renders the transfer opposable to third parties. On the other hand, some scholars have critically remarked that this idea is self-contradictory because a non-opposable property is not real property, and, taking into consideration the legal order as a whole, they think that, notwithstanding the literal wording of the Code, property transfer is indeed the result of a long and complex process, in which consent is just a link in the chain and transcription is the decisive moment.[25]

3. The Protection of Third Parties in Chains of Acquisition

Having regard to the above-mentioned peculiar context, we can try to explain how Italian law has dealt with the protection of third parties in the specific hypothesis to which this paper is dedicated: A sells land to B who resells the land to C, but there is some kind of legally relevant disruption in the relationship between A and B.

Given the general characteristics of the Italian model, a reader will easily understand that, also from this point of view, the decisive moment will be transcription. But we have to specify that, in the Italian legal system, not only the immovable sale contracts but also the judicial requests having regard to these contracts have to be registered, otherwise they are not opposable to third parties. Therefore, what really matters is whether C's acquisition has been registered after or before the registration of the judicial demand contesting the

transcription is a free parties' choice, and often they prefer to continue to conclude preliminary contracts by private signature, in order to avoid the costs of notarial intervention and public registration, even if this choice is risky from the prospective buyer's point of view. But, pursuant to the new Code of Insolvency, approved on 10 January 2019 in accordance with Art 12 of the legge delega 19 October 2017 no 155, to draft preliminary contracts in notarial form, and so to register them, is mandatory when a property under construction is concerned.

[23] Corte di Cassazione 6 March 2015 no 4628, *Corriere giuridico*, 609 (2015) reversing the previous case-law, has stated that pre-preliminary contracts are fully valid.

[24] See, for instance, one of the most important Italian law handbooks: F. Gazzoni, *Manuale di diritto privato* (Napoli: Edizioni Scientifiche Italiane, 2011), 287.

[25] The seminal works on the general concept of legal process as a dynamic chain of acts are A.M. Sandulli, *Il procedimento amministrativo* (Milano: Giuffrè, 1940) and S. Romano, *Introduzione allo studio del procedimento giuridico nel diritto privato* (Milano: Giuffrè, 1961). About its applications to property transfer see: G. Furgiuele, 'Il contratto con effetti reali fra procedimento e fattispecie complessa: prime osservazioni' *Diritto privato*, 83 (1995); A. Vitucci, *La trascrizione nel procedimento traslativo* (Napoli: Edizioni Scientifiche Italiane, 2014); C. Mazzù, 'La compravendita immobiliare dall'atto al procedimento', available at www.consiglionazionaleforense.it (2014); R. Lenzi, 'La vendita come procedimento' *Rassegna di diritto civile*, 1359 (2015); S. Landini, 'Pubblicità immobiliare e procedimento', in G. Conte and S. Landini eds, *Principi, regole, interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di Giovanni Furgiuele* (Mantova: Universitas Studiorum, 2017), III, 83.

A-B contract's validity or effectiveness, submitted eg by A or by a further party. If C registers his purchase before the judicial claim is registered, he will retain the land; otherwise, if he registers it after the judicial claim's registration, he has bought the land at his own risk, knowing or having to know that the position of B was already contested, and is possible that he will lose it, provided that the judicial demand is upheld.

However, the Civil Code contains more specific provisions governing these issues, and different kinds of judicial demands are subject to different rules. In some cases, C will prevail if he registers his purchase before the judicial demand against A-B contract and he is in good faith, having no material knowledge about the disruption of A-B contract,[26] whilst in other cases only transcription matters and C will prevail, provided that he had registered before, even if he was not in good faith when he bought the land.[27]

The most complicated rules are those regarding the judicial demands for contractual nullity or annulment. Generally speaking, if the A-B sale contract is void, the property has never passed to B, whilst, if it is annulled by a judge at the request of A, the property, which was actually passed to B, will be returned back to A.[28] Thence, from a merely logical point of view, in case of nullity C could never acquire property from the non-owner B, while in case of annulment C would have to lose it when the ground of its acquisition is cancelled.[29]

But the transcription rules are different. With regard to the most part of annulment cases, if C has acquired in good faith the land from B for reward and has registered the purchase before the registration of A's judicial demand of annulment, he will retain the acquired immovable. Instead, with regard to nullity and to the peculiar case of annulment because of legal incapacity, C will prevail if he was in good faith, has registered his purchase before the registration of the judicial demand and, anyway, this demand has been registered at least five years after the registration of the A-B invalid contract.[30]

[26] Eg when A-B contract is contested, by A or by further parties, as sham or fraudulent against creditors, according to Art 2652 no 4 and no 5, of the Civil Code.

[27] Eg when A demands the termination of A-B contract, according to Art 2652 no 1, of the Civil Code.

[28] It is important to notice that, in the Italian legal system, in case of nullity the judge declares that a contract is void, and that it has always been void even before his intervention, whilst in case of annulment the judge is indispensable, because the parties have not the power to privately annul the contract (see I. Pagni, *Le azioni di impugnativa negoziale: contributo allo studio della tutela costitutiva* (Milano: Giuffrè, 1998)).

[29] These logical principles are respectively expressed by the Latin formulas '*Nemo plus iuris ad alium transferre potest quam ipse habet*' (*Digestum 50.17.54*, ie Ulpianus, *46 ad edictum*) and '*Resoluto iure dantis, resolvitur et ius accipientis*'. Of course, if and when A remains owner, he can claim his rights against C through *rei vindicatio* without time-limits, pursuant to Art 948 of the Civil Code.

[30] These rules are provided by Art 2652 no 6, of the Civil Code (see C. Pilia, *Circolazione giuridica e nullità* (Milano: Giuffrè, 2002)). Annulation for legal incapacity is, from any point of view, a case of annulment, but this norm treats it as it was a case of nullity because C could

Therefore, in case of nullity, after these five years C will acquire the property even if B is not, and has never been, the owner. Clearly this acquisition does not depend on the A-B contract, whose disruption could never be healed,[31] but only on the transcription mechanism: That is why Italian lawyers are used to call this hypothesis 'healing registration'.[32] Anyway, it is sure that in this case A loses his property but it is questionable whether he has at least a claim for professional negligence against the notary who drafted the B-C contract.[33]

III. Turkish Law

1. Introduction

In Turkish law, in cases where there is a legal disruption in chain of transfers, the principle of the protection of third parties aiming at acquisition of a property right is adopted under certain conditions. In consideration of the doctrinal framework of the Turkish Civil Code, one can well notice that this principle has a broader range in immovables than movables. Undoubtedly, when and under which requirements justified reliance of a third party is safeguarded is a matter of policy of law. In turn, it is the question of how the conflict of interests between the title holder and the third party shall be reconciled by the legal system. Under Turkish law, this conflict of interests has been resolved by the rule that the third party could acquire property right only if he acts in good faith. To put it differently, a purchaser, for example, is secured by virtue of his good faith reliance. This solution, at the same time, serves to maintain the security of transactions.

Under Turkish law, in order for property rights in both movables and

know about the legal incapacity of B at the time of the A-B contract just by checking the civil status public registers, and therefore in this case the law considers him as worthy of less protection than in all other annulment cases.

[31] The idea that nullity cannot be healed has been endorsed by Art 1423 of the Civil Code, but, as the said article recognizes and as modern legal scholarship has better highlighted, this principle is not without exceptions: see S. Polidori, 'Nullità relativa e potere di convalida' *Rassegna di diritto civile*, 931 (2003); S. Pagliantini, *Autonomia privata e divieto di convalida del contratto nullo* (Torino: Giappichelli, 2007); S. Monticelli, 'La recuperabilità del contratto nullo' *Notariato*, 174 (2009); G. Perlingieri, *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici* (Napoli: Edizioni Scientifiche Italiane, 2010); M. Rizzuti, *La sanabilità delle nullità contrattuali* (Napoli: Edizioni Scientifiche Italiane, 2015).

[32] Anyway, the so-called healing registration (in Italian: '*pubblicità sanante*') does not heal the A-B contract, which remains void and not binding towards A and B, but only the successive acquisition of C: see, also for further references, R. Calvo, 'Nullità, inefficacia e circolazione immobiliare' *Rivista Trimestrale di Diritto e Procedura Civile*, 995 (2013).

[33] See G. Baralis and G. Metitieri, 'Pubblicità sanante, leggi speciali e responsabilità notarile. Note tratte da un'esperienza professionale' *Rivista del Notariato*, 425 (1992); G. Casu, 'La c.d. pubblicità sanante. Riflessioni sulla sua operatività nell'attività del notaio' *Studi e materiali del Consiglio Nazionale del Notariato*, *Studio no 4227*, 446 (2003); L. Ballerini, 'Sistema tavolare e responsabilità del notaio per pubblicità di un atto già annullato o risolto' *La nuova giurisprudenza civile commentata*, 92-98 (2013); M. Bianca, 'La responsabilità del notaio e la pubblicità sanante' *Fondazione notariato* (2016), available at https://tinyurl.com/y52nrdmd (last visited 28 May 2019).

immovables to be acquired through legal transaction, two stages need to be fulfilled. In the literature, this rule is called as 'the principle of separation'. According to this, transferor and transferee, in the first place, conclude an obligatory transaction (eg contract of sale), and subsequently they proceed to a second stage, that is the disposal transaction,[34] whereby the property right is transferred or established as agreed.[35] Having said that, as to immovables, these two transactions must be realized before the Land Registry Office (*Tapu Dairesi*).[36] The land registry, consisting primarily of the main register, the journal, the plans and the documents, serves the purpose of publicity regarding the legal status of property rights in immovables (Art 997(2) TCC). The rules regulating the land registry and land registry offices are mainly found in the TCC, Land Registry Act (LRA) and Land Registry Regulation (LRR). Land registry is kept under the supervision and responsibility of public administration (Ministry of Public Works and Settlement) by the Land Registry Directorates (Art 1007 TCC, Arts 5 and 6 LRR).

According to Art 1024(2) TCC, the transfer of property rights in immovables is governed by the causal principle, namely the principle of underlying *causa*, meaning that the validity of any transfer is dependent on the validity of an underlying transaction (*causa*).[37] Hence, if there exists any ground rendering the obligatory contract invalid, then the disposal transaction becomes automatically invalid even if this transaction, in itself, does not suffer from any invalidity. At this point, considering our simplified example above (A-B-C), it should be stressed that where there is a legal disruption in the contract of sale between A and B, or conversely only the disposal transaction incurs invalidity, the decisive factor in C's acquisition of the property right in immovable is that whether C

[34] Disposal transaction in immovables is composed of two separate elements, which must be materialized consecutively, namely request for registration and registration. There is a lively debate among scholars regarding the legal nature of the request for registration. Whilst some suggest that this is characterized as real contract (*ayni sözleşme*), others argue that this is nothing more than a procedural transaction. Third view on this subject, which seems currently to be prevailing in the literature, is of the opinion that request for registration should not be looked upon as a contract, what is in question here is mere unilateral disposal transaction (for detailed information, see H. Rey, *Die Grundlagen des Sachenrechts und das Eigentum* (Bern: Stämpfli, 3rd ed, 2007), para 1486; K. Oğuzman et al, *Eşya Hukuku* (İstanbul: Filiz Kitabevi, 20th ed, 2017), para 849).

[35] M. Dural and S. Sarı, *Türk Özel Hukuku Cilt 1, Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri* (İstanbul: Filiz Kitabevi, 11th ed, 2016), para 1132.

[36] K. Oğuzman et al, n 34 above, para 1391; A.L. Sirmen, *Eşya Hukuku* (Ankara: Yetkin Yayınları, 5th ed, 2017), 312; W. Wiegand, *Basler Kommentar Zivilgesetzbuch II* (Basel: Helbing Lichtenhahn Verlag, 5th ed, 2015), Art 656, para 1; P. Hänseler and D. Hochstrasser, 'Real Estate in Switzerland', in N.P. Vogt ed, *Swiss Commercial Law Series* (Basel: Helbing & Lichtenhahn, 1996), V, 19. In the literature, this legal necessity is termed as 'principle of registration' (see H. Rey, n 34 above, para 308; W. Wiegand, ibid, Art 656, para 2; J. Schmid and B. Hürlimann-Kaup, *Sachenrecht* (Zürich: Schulthess, 4th ed, 2012), para 572).

[37] A.L. Sirmen, n 36 above, 117; H. Rey, n 34 above, para 353; W. Wiegand, n 36 above, preliminary remarks on Arts 641 et seq, para 67; R. Serozan, *Eşya Hukuku I* (İstanbul: Filiz Kitabevi, 3rd ed, 2014), para 1115; J. Schmid and B. Hürlimann-Kaup, n 36 above), para 75.

has acted in justified reliance on the respective record in the land registry.[38]

a) Acquisition from the Owner (The Healthy Case)

Despite the fact that Turkish property law adopts the principle of separation, both obligatory transaction (eg contract of sale) and disposal transaction are concluded at the land registry office. These transactions, however, serve different purposes. Whilst the obligatory contract produces only obligations under which the obligor promises to do, not to do or to give something, the disposal transaction itself serves as a performance, namely it is effected in order to fulfill the performance, and consequently the property right is transferred, altered or terminated.[39] As such, taking the contract of sale as an example again, for the contract to be valid, it must be drawn up in the form of official deed and signed by the parties before the land registry office (Art 21(1) LRR). That is, under Turkish law, the contract of sale of immovable property is subject to official form which is to be carried out only at the land registry office (Art 706(1) TCC). On the other hand, as the contract of sale *per se* does not give rise to a transfer, ownership over land is still vested on the seller (B). Subsequent to this phase, the land registry office registers the transfer of ownership in the name of the buyer (C) at the seller's written request for registration (Art 1013(1) TCC, Art 237(1) TCO).[40] In this sense, the act of registration (*tescil*) is of constitutive nature, meaning that so long as the registration is not yet completed, ownership cannot in principle be conveyed to the buyer.[41]

To be more precise, having regard to the registration process and formalities thereof, several requirements must be satisfied as follows: (i) that request for registration must be made by authorized person viz. the owner or his representative (Art 1013 TCC, Art 16 LRR), and (ii) that the person (the

[38] Since there is no explicit provision regarding which system (the principle of underlying *causa* or the principle of abstraction) movables are subject to, this matter is markedly debated in the literature. For relevant discussions and explanations, see K. Oğuzman et al, n 34 above, para 2592; R. Serozan, n 37 above, para 1115 et seq.

[39] I. Schwenzer, *Schweizerisches Obligationenrecht Allgemeiner Teil* (Bern: Stämpfli, 7th ed, 2016), para 3.31-3.33; M. Dural and S. Sarı, n 35 above, para 1131 et seq; H. Rey, n 34 above, para 348 et seq; W. Wiegand n 36 above, Art 656 para 4; K. Oğuzman and N. Barlas, *Medeni Hukuk - Giriş, Kaynaklar, Temel Kavramla* (İstanbul: Vedat Kitapçılık, 23rd ed, 2017), para 630, 631.

[40] K. Oğuzman et al, n 34 above, para 865; A.L. Sirmen, n 36 above,173 et seq; H. Rey, n 34 above, para 1326; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 499 et seq.

[41] Nonetheless, by virtue of certain circumstances set forth in Art 705(2) TCC, such as inheritance, court decision, enforcement, occupation, expropriation and so on, it is possible that the property right could be acquired without the need of registration. In that case, it is still useful and advisable for the acquirer to get his property right registered in land registry, because the present land registry does not reflect the actual legal status of the said immovable property, and thereby it may pose some risks, especially the risk to lose property right to the *bona fide* third party. The registration in this sense is, unlike above, of declaratory nature (see K. Oğuzman et al, n 34 above, para 1495; W. Wiegand, n 36 above, Art 656 para 11; A.L. Sirmen, n 36 above, 341; H. Rey, n 34 above, paras 1543, 1544; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 577; P. Hänseler and D. Hochstrasser, n 36 above, 19.

transferor) requesting for the registration must provide documents demonstrating that he has an authority to dispose of said immovable property and there is a concluded contract of sale (Art 1015 TCC, Arts 17 and 18 LRR).

In the light of what has been stated thus far, in order for the immovable property to be acquired, the contract between the owner B and the purchaser C must first meet the validity requirements. Moreover, the disposal transaction must also be completed in conformity with the validity requirements. What matters most at this point is that in order to transfer the ownership to C, as a rule, B (or his representative) must have the authority to dispose of the land, ie he must be the owner.

b) Acquisition from a Non-Owner

As we already pointed out, acquisition of ownership or any other property right over land is contingent on what the transferor, during the disposal transaction and registration, is authorized to dispose. In the ordinary sequence of events, a person appearing as an owner in the land registry has also this authority, yet this need not be the case for all. In some abnormal cases, the land registry does not mirror the actual legal status, and when such is the case, it is described as 'wrongful entry (record)' (Art 1024(2) TCC). This means that there is a discrepancy between the true owner (A) and the registered owner (B).[42] There may be a number of reasons for this. To illustrate, the contract of sale does not bear the validity requirements, or in the course of disposal transaction and registration, A lacks legal capacity, due to eg his mental illness, or has no authority to dispose. Likewise, despite the absence of any invalidity grounds, in cases where the property right is acquired without registration due to certain situations expressed in Art 705(2) TCC, such as inheritance, court decision, enforcement and others, the given land registry entry (record) becomes wrongful, that is to say, it does not mirror the actual legal status.[43]

With regard to invalidity of the underlying contract, which we primarily address as a central question in our article, there are two types of invalidity, depending on which requirement envisaged in the law is missing at the time of contract formation: voidness and voidability. According to Art 27(1) TCO, the former emerges when the contract is contrary to the mandatory provisions of law, morality, public order, personal rights, or its subject matter, at the time of conclusion, is impossible to fulfill. When such is the case, the contract is deemed void. The latter type of invalidity comes into existence within the scope of Arts 28, 30 et seq. TCO, and thus encapsulates the situations considered as unfair exploitation and defects of consent (mistake, fraud, duress, respectively). In

[42] K. Oğuzman et al, n 34 above, para 1077; A.L. Sirmen, n 36 above, 225; H. Rey, n 34 above, para 1527; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 584 et seq.

[43] A.L. Sirmen, n 36 above, 225, 341; J. Schmid and B. Hürlimann-Kaup, n 36 above, paras 577, 584.

such cases, the party suffering from defect of consent or unfair exploitation has the right to rescind the contract, and once the rescission is realized, the contract becomes retrospectively (*ex tunc*) void from the beginning.[44] It may be clear from these considerations that where the contract of sale is invalid because of either voidness or voidability, pursuant to the causal principle in immovables, the disposal transaction is automatically invalid, and no ownership over land passes to B. Since B is not owner, as a matter of course, he is not entitled to dispose of the land, and thus he cannot in principle transfer any property right to anyone. Notwithstanding this general rule, under certain circumstances indicated in Art 1023 TCC, the *bona fide* third party's (C's) justified reliance on the land registry is protected, and consequently C acquires the ownership over land. This outcome rests legally on the idea that the contents of the land registry are presumed to be accurate unless proven otherwise.[45] The fact that C has acted in good faith during the process of disposal transaction and registration repairs the absence of B's authority to dispose. Thus, the ownership of the land is conveyed to C.

c) The Owner's Claims Against an Unsuccessful Purchaser

It is established above that even if there is a legal disruption, and correspondingly the land registry is legally groundless (ie wrongful entry exists), the *bona fide* purchaser's reliance on the land registry prevails against the absence of the seller's authority to dispose. Under this heading, we will focus on what kind of remedies and rights the true owner (A) could exercise in case that the third party (C) fails to attain his aim to be true owner of the land, namely that he cannot acquire the ownership, but at the same time, he is recorded in the land registry as new owner. There are two possible reasons why C does not acquire the ownership: either C is not the *bona fide* purchaser or, even though he acts in good faith, his obligatory contract with B (the seller) and/or the disposal transaction is invalid. Both possibilities have something in common: that the true owner of the land and the registered owner of the land are different persons.

Under Turkish law, the owner (A) has two basic rights of action serving to protect ownership right from violations, which are provided in Art 683(2) TCC, namely: action for recovery of property (*rei vindicatio*) and negatory action (*actio*

[44] I. Schwenzer, n 39 above, para 39.23; B. Schmidlin, *Berner Kommentar zum schweizerischen Privatrecht, Obligationenrecht, Allgemeine Bestimmungen: Mängel des Vertragsabschlusses, Schweizerisches Zivilgesetzbuch, Art. 23-31 OR* (Bern: Stämpfli, 2013), Arts 23-24, para 379; N. Kocayusufpaşaoğlu et al*, Borçlar Hukuku Genel Bölüm, Birinci Cilt, Borçlar Hukukuna Giriş, Hukuki İşlem – Sözleşme* (İstanbul: Filiz Kitabevi, 6th ed, 2014), para 71; F. Eren, *Borçlar Hukuku Genel Hükümler* (Ankara: Yetkin, 22nd ed, 2017), 426; E. Kanışlı, *İsviçre-Türk Borçlar Hukukuna Göre Sözleşmenin Kurulmasında Yanılma* (İstanbul: On Iki Levha Yayıncılık, 2018), 562.

[45] A.L. Sirmen, n 36 above, 196; H. Rey, n 34 above, paras 1517, 1518; W. Wiegand, n 36 above, Art 973 para 31; J. Schmid and B. Hürlimann-Kaup, n 36, para 599 et seq; P. Hänseler and D. Hochstrasser, n 36 above, 18.

negatoria). With the former, the owner brings a claim for recovering property from any unlawful possessor in order to obtain direct possession. The latter action is brought before the court by the owner, who still holds the possession of the property, in an attempt to prevent or eliminate violations and unwarranted interventions towards ownership right.[46] In case the ownership right (or any other property rights) in immovable property is violated, pursuant to Art 1025 TCC the owner files a claim for correction of the wrongful entry, and thus the land registry not reflecting the real legal situation is rectified. This action, albeit debated, serves as a particular kind of *rei vindicatio*.[47] Since both actions are designed to protect rights in rem, they are not subject to any prescription.[48]

Turning to our example again, A, as a true owner, has a remedy to bring an action against C for correction of the wrongful entry.[49] In addition to this, A has a right to claim damages under the rules governing the legal relationship between the owner and the unlawful possessor according to Arts 993-995 TCC. As per these rules, the extent of liability incurred by C may vary as to whether he is the possessor in good faith or bad faith. Assume that the reason why C has not reached his aim to acquire the ownership of land is his possession in bad faith, C must compensate for any damage to the immovable property resulting from such unlawful possession and pay damages for any fruits which he obtained or neglected to obtain and any use of the immovable property. Conversely, C may demand only reimbursement for necessary expenditures he made.

2. The Protection of Third Parties in Chains of Acquisition

Where the land registry does not correspond to the real legal situation, that is to say, the entry regarding the immovable property in the land registry turns

[46] K. Oğuzman et al, n 34 above, para 1130 et seq; W. Wiegand, n 36 above, Art 641 para 42 et seq; A.L. Sirmen, n 36 above, 250 et seq; R. Serozan, n 37 above, para 823 et seq; H. Rey, n 34, para 2032 et seq; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 659.

[47] K. Oğuzman et al, n 34 above, para 1092; A.L. Sirmen, n 36 above, 251. At this juncture, it is worth noting that some authors argue that claim for correction of the wrongful entry and *rei vindicatio* have different functions, and thus the former should not be regarded as a special kind of the latter, rather it is qualified as a declaratory action (see H. Rey, n 34 above, para 2215a; W. Wiegand, n 36 above, Art 975 para 6; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 621).

[48] K. Oğuzman et al, n 34 above, paras 1135, 1147; W. Wiegand, n 36 above, Art 641, paras 54, 67; A.L. Sirmen, n 36 above, 253, 257; R. Serozan, n 37 above, paras 840, 857; H. Rey, n 34 above, para 2047; J. Schmid and B. Hürlimann-Kaup, n 36 above, paras 665, 681.

[49] Next to this basic remedy, during the legal proceedings, A, who asserts that he is a true owner, and thus has a property right in immovable property, may at the same time have recourse to the court for obtaining the 'provisional annotation' (*geçici tescil şerhi*) on the land registry in order to eliminate the possibility of *bona fide* third parties' acquisitions resulting from the wrongful entry at the land registry (Art 1011 TCC). After the court adjudicates that the annotation shall be recorded in the land registry, it is no longer possible for any third to plead good faith, in turn, to acquire property right. It is also worth mentioning here that the court decision on the provisional annotation serves also as an interim injunction (see A.L. Sirmen, n 36 above, 218-220; K. Oğuzman et al, n 34 above, para 925 et seq; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 487 et seq).

out to have been wrongfully made as a result of any legal disruption affecting either the obligatory contract or the disposal transaction, the protection for the *bona fide* third parties placing reliance on the legal appearance (*Rechtsschein*) is possible solely by virtue of Art 1023 TCC. In this respect, it should be mentioned that the acceptance of the principle of underlying *causa* (causal system) in immovables under Turkish law primarily favors the original owner's (A's) interests. Nevertheless, the protection of the stability of transactions, and more particularly the third parties relying on the legal appearance in good faith is ensured, provided that the purchase at the land registry is concluded in good faith. Pursuant to said provision, two requirements must cumulatively be satisfied for the protection of the *bona fide* third parties: (i) there must be a discrepancy between the land registry and the real legal situation, namely the wrongful entry with respect to the immovable property in question, and (ii) the third party seeking to acquire property right over land must be in good faith.[50]

At this juncture, special attention should be paid to the certain drawbacks of the wrongful entry which the true owner may suffer. First, the true owner, who is A in terms of our example, cannot make any contract or disposition regarding the property right over the land at the land registry because he is not recorded as owner there. Second, as per Art 712 TCC, if the person who is falsely recorded as owner in the land registry, who is B in our case, has possession in good faith of the land uninterruptedly and without any lawsuit for the correction of the wrongful entry for ten years, he may enjoy the possibility of the ten-year acquisitive prescription, and thus he can become the true owner. Third and most importantly, as we pointed out in this article, *bona fide* third parties (like C) who make legal transactions in relation to the land by relying on the land registry, which deviates the actual legal situation, are protected, in turn, they acquire the property right over the land (Art 1023 TCC).[51] This possibility is termed as the positive effect of registration in the literature.[52] On the other hand, it should be kept in mind that C's acquisition of the land is also dependent on the validity of both the obligatory contract and the disposal transaction between C and B.

Good faith encompasses the situations where the third party (C) seeking to acquire the property right over the land did not know and ought not to have known the actual legal situation, ie, that the transferor (B) was not the owner. Pursuant to the general provision regarding good faith, Art 3 TCC, in cases where the law attaches a legal effect to the requirement of good faith, there is a presumption that such good faith exists. Consequently, it is not for C to prove that he acted in good faith, on the contrary, the burden of proof rests on the one claiming that C

[50] K. Oğuzman et al, n 34 above, para 996 et seq; A.L. Sirmen n 36 above, 196 et seq; H. Rey, n 34 above, para 1527 et seq; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 584 et seq.

[51] K. Oğuzman et al, n 34 above, paras 1079-1082; A.L. Sirmen, n 36 above, 225.

[52] W. Wiegand, n 36 above, Art 973 para 13; A.L. Sirmen, n 36 above, 196; H. Rey, n 34 above, para 284; R. Serozan, n 37 above, para 241; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 579.

was not the *bona fide* purchaser.[53] For good faith to produce its acquisitive legal effects, it suffices that C acts in good faith only at the time when the land is recorded in his name in the land registry. So, the maxim '*mala fides superveniens non nocet*' (subsequent bad faith does not harm) comes into play here.[54] What is more, once C becomes the new owner through the good faith purchase, even if the persons aiming to acquire the ownership from C are in bad faith, meaning that they were aware of or should have been aware of the actual legal situation, this does not pose any obstacle for them to be successive owners in the chain of transfers.

IV. German Law

1. Introduction

The protection of legitimate expectations in the acquisition of rights is a fundamental principle deeply engrained in German private law. It can be traced down in various areas of private law, such as property, unjustified enrichment, assignment, and agency.[55] In German doctrine, the term *Verkehrsschutz* is employed to embrace the general argument in favour of the persistence of transactions. In particular, the acquisition of rights generally should not be compromised as a result of the legal relations between the transferor and the person from whom the transferor previously received the right.[56]

In the context of the acquisition of property rights in both movables and immovables, two legal devices are primarily employed to safeguard the transferee's interests in multi-party situations: The doctrine of separation and abstraction, which legally isolates the conveyance of ownership from the underlying contract of sale, and a broad concept of *bona fide* purchase. Both devices are usually justified as a basic necessity of commerce.[57] Without them, every transferee would

[53] A.L. Sirmen, n. 36 above, 200; P. Hänseler and D. Hochstrasser, n 36 above, 18; H. Rey, n 34 above, para 1529.

[54] K. Oğuzman et al, n 34 above, para 1006; A.L. Sirmen, n 36 above, 204; H. Rey, n 34 above, para 1530.

[55] See, from the perspective of a comparison of German law with English law, L. Rademacher, *Verkehrsschutz im englischen Privatrecht* (Tübingen: Mohr Siebeck, 2016), 1 et seq.

[56] C.W. Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (München: Beck, 1971), 3, 9 et seq, 28 et seq, 491 et seq; K. Larenz and C.W. Canaris, *Lehrbuch des Schuldrechts II: Besonderer Teil* (München: Beck, 13th ed, 1994), II, § 70 IV 5, 235 et seq, § 70 VI 1, 246 et seq; H. Westermann, 'Die Grundlagen des Gutglaubensschutzes' *Juristische Schulung*, 1, 7 et seq (1963); J. Hager, 'Der sachenrechtliche Verkehrsschutz als Muster der Lösung von Dreipersonenkonflikten', in C.W. Canaris et al eds, *50 Jahre Bundesgerichtshof. Festgabe aus der Wissenschaft* (München: Beck, 2000), I, 777 et seq.

[57] D. Leenen, 'Die Funktionsbedingungen von Verkehrssystemen in der Dogmatik des Privatrechts', in O. Behrends et al eds, *Rechtsdogmatik und praktische Vernunft: Symposium zum 80. Geburtstag von Franz Wieacker* (Göttingen: Vandenhoeck & Ruprecht, 1990), 108, 110 et seq, 115 et seq; L. Leuschner, 'Die Bedeutung von Allgemeinwohlinteressen bei der verfassungsrechtlichen Rechtfertigung privatrechtlicher Regelungen am Beispiel der §§ 932 ff. BGB' *Archiv für die civilistische Praxis*, 205, 228 (2005).

have to enquire the validity of his transferor's prior acquisition, which most likely will turn out to be impossible or trigger prohibitively high transaction costs.

Although the acquisition of property rights in both movables and immovable share concurrent structures, the transfer of immovable property additionally features the involvement of the land register (*Grundbuch*).[58] The rules governing the land register can be found outside the BGB (*Bürgerliches Gesetzbuch*, 1900) in the GBO (*Grundbuchordnung*, 1900) which deals with the register's organization and procedure.[59] The land register belongs to the court system in non-contentious matters (*Freiwillige Gerichtsbarkeit*) and is administered by local courts of first instance (*Amtsgerichte*), where the day-to-day business is operated by registrars (*Rechtspfleger*) under the supervision of judges.[60] Any change of title in respect of rights in land requires a public act of disclosure in the land register.

a) Acquisition from the Owner (the Healthy Case)

A characteristic feature of German law is the strict separation (*Trennungsprinzip*) between obligations and the transfer of rights (*Verfügungen*).[61] While an obligation is the obligee's right against the obligor to do or to refrain from doing something, only a contract *in rem* can actually transfer a right. When, eg, a contract of sale establishes the seller's duty to transfer ownership to the buyer, an additional contract *in rem* is required to perform the obligation. As long as the parties have only created obligations, ownership is still vested in the seller.

The contract *in rem* to transfer immovables is governed by §§ 873, 925 BGB. Parties have to reach an agreement that property is immediately conveyed from the transferor to the transferee (*Auflassung*). The conveyance must be declared in the presence of both parties before a competent agency, which in practice is a notary in the vast majority of cases. Furthermore, the new owner has to be recorded in the land register.

In principle, a conveyance pursuant to §§ 873, 925 BGB can occur only between the land's owner and the transferee. A non-owner does not have the legal capability to dispose of someone else's rights.

b) Acquisition from a Non-Owner

However, what was just said admittedly is only half the truth. German law

[58] S.J.H.M. van Erp and B. Akkermans eds, *Cases, Materials and Text on National, Supranational and International Property Law* (Oxford: Hart Publishing, 2012), 845.

[59] An English translation of the provisions of German law cited in this section can be found in the volume edited by S.J.H.M. van Erp, B. Akkermans, n 58 above, and, in the case of the BGB, online at https://tinyurl.com/yag2yf52 (last visited 28 May 2019).

[60] See §§ 1 et seq GBO.

[61] See generally from a comparative perspective S.J.H.M. van Erp, B. Akkermans, n 58 above, 823; B. Häcker, *Consequences of Impaired Consent Transfers* (Tübingen: Mohr Siebeck, 2009), 49.

allows for the *bona fide* purchase of land under § 892 BGB: In favour of a person seeking to acquire a right in land by a legal transaction, the contents of the land register are presumed to be correct, unless an objection to the accuracy is registered or the inaccuracy is known to the acquirer. The transferee is then treated as if he had entered into the transaction with the true owner. As the land register is endowed with the authority of a public body, its contents carry with themselves the appearance of accuracy.

The provision's first requirement, therefore, is that the land register misstates the proprietary rights in a specific piece of land. Such inaccuracies can have different reasons, eg the textbook example of human error on the part of a registrar or, more relevant within the present context of chains of acquisition, that a conveyance undetectably suffered from a defect rendering the transfer void. Suppose A was mentally ill and his condition was unrecognizable when he concluded a contract *in rem* with B, who is recorded in the land register as the new owner of a specific immovable. For A's lack of legal capacity, the property did not pass to B. A still is the owner. Nevertheless, the land register displays B as the land's owner. In such cases, the formal information given by the land register deviates from the actual legal situation. The land register is inaccurate.

If C seeks to become the new owner by way of a transaction with B, C cannot rely on §§ 873, 925 BGB alone, for these provisions put into effect the conveyance by an actual owner only. Yet, § 892 BGB may save the day for C if he acted *bona fide* in the transaction with B. Here, *bona fide* (or good faith) means that B did not possess actual knowledge of the land register's inaccuracy. In contrast to the *bona fide* purchase of movables (cf § 932(2) BGB), grossly negligent lack of knowledge of the transferor's absent ownership does not prevent the transferee's acquisition. The transferee is under no duty to enquire the information contained in the register.[62] Indeed, § 892 BGB does not require the transferee actually to inspect the land register at all and verify the transferor's registration.[63] However, C can only acquire ownership from the non-owner B if no objection to the accuracy of the register has been recorded.[64]

c) The Owner's Claims Against an Unsuccessful Purchaser

What kind of liability is someone exposed to when he unsuccessfully tried to obtain ownership? First of all, the owner has the right to demand vacation pursuant to § 985 BGB, the *rei vindicatio*, from any person who without sufficient entitlement occupies an immovable. Concurrent claims may arise for unlawful dispossession (§ 861 BGB), in unjustified enrichment (§ 812(1) BGB), and, in

[62] K.H. Gursky et al, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Berlin: De Gruyter, 2013), § 892 BGB, 140.

[63] K.H. Gursky, n 62 above, § 892 BGB, 7.

[64] Under §§ 899, 894 BGB the true owner can register an objection challenging the accuracy of the land register, typically on the basis of an interim injunction.

the case of fault, delict (§ 823 BGB). Additionally, the occupier may incur liability for damages and received emoluments under the complex rules of the owner-possessor relationship (§§ 987-993 BGB). Moreover, the person falsely registered as owner may be forced to approve of the correction of the land register under § 894 BGB.

Against claims for vacation, the person occupying an immovable can only defend himself by counter-claiming the reimbursement of certain expenditures incurred for the benefit of the immovable (§§ 994-1001 BGB). However, the occupant cannot invoke as a defence the price paid to the seller of the land *vis-à-vis* the owner.[65]

2. The Protection of Third Parties in Chains of Acquisition

The protection of third parties in chains of acquisition is twofold.

On the one hand, C in the exemplified chain of A-B-C has a vital interest that B was the owner of the land before C entered into the transaction with B. In this regard, C does not have to be concerned with the obligations between A and B. As pointed out before, only the contract *in rem* is relevant for the property to pass. Compared to a contract of sale, the contract *in rem* – merely having the content of the transfer of a specific piece of land from the transferor to the transferee – is much less complex and thus muss less prone to suffer from legally relevant defects.[66]

Moreover, the contract *in rem* is valid irrespective of the existence or validity of the underlying obligation – and *vice versa*. Therefore, an invalid contract of sale does not prevent the transfer of property through a valid contract *in rem*.[67] In turn, an invalid contract *in rem* leaves the contract of sale unharmed. This is referred to as the principle of abstraction (*Abstraktionsprinzip*) which – in typical BGB fashion – is not directly expressed in the code but was silently implied by the BGB's composers. The upshot is that all defects of the contract of sale between A and B cannot put C's acquisition of ownership in jeopardy. For C it is only important that no relevant defects affected the contract *in rem* between A and B.

On the other hand, C may acquire ownership even if B was a non-owner. This is a result of the application of the rules on *bona fide* acquisition of land according to § 892 BGB, requiring that B was (falsely) recorded in the land register as the owner and that C acted in good faith, meaning that he did not know of B's absent ownership.

[65] Bundesgerichtshof 3 November 1989, 109 *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 179, 182 (1989).

[66] A. Stadler, *Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion* (Tübingen: J.C.B. Mohr, 1996), 132.

[67] Yet, this picture would be incomplete without mentioning the legal consequence of the acquisition of ownership absent a valid underlying legal ground: The buyer will incur liability under the law of unjustified enrichment to return the acquired property right to the transferor (§ 812(1) sent. 1 BGB).

V. Comparative Remarks and Conclusions

Our country reports show how the three legal orders taken into consideration start from very different theoretical assumptions with regard to the concerned subject. Italian law, as the most part of Latin legal systems, seemingly endorses the Napoleonic principle that property is transferred by mere consent. On the contrary, Turkish and German law, in accordance with the Roman law tradition, both separate a first contract that creates an obligation to transfer and a second act that actually transfers property. But, as for the relations among these two acts, they are strongly different from each other: Turkish law, as Swiss and Austrian law, follows the principle of underlying *causa*, whilst the opposite abstraction's principle is one of the main cornerstones of German law which it shares with only very few other legal systems.

From this point of view, any attempt of harmonization may appear daunting. Perhaps a hypothetical discussion within a working group in order to choose between mere consent and separation, as well as between underlying *causa* and abstraction would sound ideological and unsolvable. However, if we look at the specific operational rules in each jurisdiction through the lens of the concept of 'functional equivalent', the picture changes and distances are reduced. In all the considered countries, a distinctly pursued objective of the rules on the transfer of ownership of land is to create legal certainty, to protect third parties, C in our example, and to free the immovable property transfers from the burden of prohibitively high transaction costs. To achieve this objective, in all the three legal orders the differently proclaimed principles are left apart and eventually a registration system becomes the decisive element: if C justifiably has relied on public registers, even a – theoretically impossible – acquisition from a non-owner becomes possible.

In Italian, Turkish, and German law the interests of third parties, such as C, are protected as long as the register does not display any contradiction against B's acquisition from A (see above, I.3, II.2, III.3). In fact, in all three jurisdictions, land registers are run by the respective State, ideally with an extraordinary degree of diligence and precision. In the vast majority of cases, the registered entries reflect the actual legal situation, and so the public may rely on the information provided. Therefore, in some cases, buyers of land are treated as if the seller was the owner even when in fact he is not, because of a disruption in the transfer between the seller and his seller. Yet, when doubts about the legal validity of the transaction between the seller and his seller were registered, too, the final buyer's acquisition of the land may be challenged.

This is also why the professionals who manage the access to the registration system, ie notaries and registrars, are so important in all the considered models. The Latin-type notariats of all EU Member States familiar with this institution cooperate within the Council of the Notariats of the European Union (CNUE), today represented by a French President and including both Germany and Italy

as members, as well as Turkey as observer. Moreover, the associations of public registrars do the same within the European Land Registry Association (ELRA), including Italy as member and Turkey as observer. These cooperations flourish, notwithstanding the different legal principles adopted in the respective countries.

Of course, there are many differences in the details of regulation, but they do not depend so much on the proclaimed general principles. And, of course, the aim of any harmonization process cannot be to eliminate all and every difference within the concerned legal systems. But it is possible to outline that, under the surface of different assumptions, reliance in the public registries as the decisive element for immovable property transfer is a common principle. Therefore, it could be quite useful to hypothesize a project of harmonization of the registries' regulation, in order to facilitate transnational acquisitions of land. The result could form a uniform basis for the protection of third parties.

On the other hand, a possible counter-argument could be that immovables' public registries are deeply connected with the control of a territory and so with a historically essential function of the State's sovereignty. Indeed, in the last decades, the EU has progressively harmonized private international and sometimes substantive law, in the fields of contractual and non-contractual obligations, as well as in family and successions matters, while immovable (as well as movable) property and public registration systems seemingly have remained outside this process. But nowadays many other matters, much more sensitive and rooted in history, such as eg monetary policy, external frontiers' control and the recognition of diverse family models have been Europeanized (at an EU and/or an ECHR level): Therefore, such a counter-argument does not seem like a very founded one.

Probably, even if a deliberate policy in this direction will not be implemented in the foreseeable future, the matter of immovable property transfer will anyway undergo a sort of harmonization as a collateral effect of other processes:[68] For instance, the very first ECJ decision concerning the Succession Regulation (Case C-218/16, *Kubicka*, Judgment of 12 October 2017) deals precisely with the transfer of immovables, rights *in rem* and their public registration. Yet a further analysis of such a development would be quite beyond the scope of the present contribution.

[68] With regard to the growing perspectives of harmonization in the field of property law, see S.J.H.M. van Erp and B. Akkermans, n 58 above, 1011; and E. Raemakers, *European Union Property Law. From Fragments to a System* (Cambridge: Intersentia, 2013). With more specific reference to a harmonization in the field of land registration systems, see L.M. Martínez Velencoso et al, *Transfer of Immovables in European Private Law* (Cambridge: Cambridge University Press, 2017), 12, where also the role that new technologies can play in this process is stressed.