Tamar Gardapkhadze
Professor at New Higher Education Institute – NEWUNI

Ia Kharazi
Associate Professor at Sokhumi State University and Invited Professor at Akaki Tsereteli State University

ON ISSUES ARISING FROM THE ACQUISITION OF PROPERTY SOLD BY AN UNAUTHORIZED PERSON TO A BONA FIDE PURCHASER (BASED ON AN ANALYSIS OF COURT PRACTICE)

Abstract

The problem discussed in this article has three extreme solutions: imposing all risks related to potential errors on the owner, imposing all risks on the buyer, and finally eliminating all risks through a registration system and record-keeping that makes all rights clear and verifiable.
The operation of the rule of limitation on vindication is connected to the existence of a series of circumstances: 1) the seller is acting in good faith, which implies the good faith of the seller concerning the owner's status. Regarding movable property, this means that the seller has possessed the item, while for immovable property, it implies their registration as the owner with the relevant authority; 2) there is a contract between the seller and the buyer aimed at transferring ownership rights; 3) the contract is for valuable consideration; 4) the item has been actually transferred to the buyer and is not excluded from circulation or restricted in circulation; 5) the item has been voluntarily relinquished by its rightful owner.
The idea that the buyer is obligated to verify the seller's rights is currently very relevant, especially concerning real estate, where ownership rights are transferred only after state registration. Generally, the state registration system for the transfer of rights to immovable property is established to ensure the transparency of all rights and ultimately to eliminate cases of limitation on vindication concerning immovable property. The registration procedure for real estate introduces a direct description of the owners, resulting in the loss of meaning for all presumptions that are currently contradicted by irrefutable evidence. The fact of registration in the public registry confirms the emergence of rights to property and guarantees the authenticity of those rights through confirmation by the state with a public act. According to the goals of the Civil Code, the registration act serves as public confirmation of the validity of rights arising from a civil transaction.
The article also discusses the theory of "the lesser evil," which posits that a decision made in favor of one party should bring as little harm as possible to the other party. In other words, the dispute is resolved in favor of the party with less chance of protecting their property interests at the expense of a bad-faith seller.

Keywords: Unauthorized person; authorized person; representative; loan agreement; mortgage; vindication; theory of the owner's liability; theory of the lesser evil.

In civil law, the acquisition of property from an unauthorized seller is a common issue. An unauthorized seller can be, for example, a thief or robber who has stolen someone else's property, or a person who has found a lost item and, under certain legal conditions, has not returned it to its rightful owner. Additionally,

an unauthorized seller can be someone in a contractual relationship with the owner that does not permit the sale of property, such as a tenant or lessee who sells property to others without the owner's permission, or a representative or business manager who sells property in violation of their authority.

An unauthorized person includes both unauthorized good-faith possessors, who initially lacked the right to possess the item or have lost that right and are obliged to return the item to the authorized party, and unauthorized bad-faith possessors, for whom the law is stricter {1}. A bad-faith possessor must return both the item and any benefits obtained from it, as well as any fruits of the item or right. The possessor is required to compensate for any benefits that were wrongfully obtained {2}.

An unauthorized person can include the parents of a minor who sell their child's property without following the legally established procedures, such as without the involvement of guardianship and custody authorities. These cases involve the sale of property conducted in violation of the rights of the presented owner or the legally established powers.

The practical handling of such cases has led to numerous disputes.

he Civil Chamber of the Supreme Court of Georgia made an important clarification regarding the fulfillment of obligations towards an unauthorized person. In a case brought by A against the respondents L.M. and M.N. in the Tbilisi City Court, A sought to annul an enforcement document issued by notary L.B. The factual circumstances indicated that a notarial deed on a loan and mortgage agreement was concluded between N.A. and L.M. with M.N. as an intermediary on April 30, 2012. Under this agreement, L.M., as the "mortgagor," provided N.A., as the "owner," with a loan of $55,000 for a period of two months at an interest rate of 4%. To secure the contractual obligations, N.A.'s registered real estate was encumbered by a mortgage. The parties agreed that the interest would be paid by the plaintiff to the intermediary M.N. Upon M's request, the notary issued an enforcement document specifying the amount of the enforceable obligation: the principal loan amount of $55,000 and a penalty of $1,800 as of August 1, 2013. According to the plaintiff, he had paid both the interest and the principal amount through the intermediary M.N.

Ultimately, the Supreme Court reviewed the case in cassation and clarified through Article 373 of the Civil Code that the examined norm pertains to the fulfillment of obligations towards an authorized person. However, for the proper interpretation of this norm, it should primarily be considered in conjunction with the specific norms governing the relationship between the parties. According to the second part of Article 373, the manner of fulfilling obligations relates to the performance of the loan obligation, and its validity must be established in accordance with the rules characteristic of loan relationships. Therefore, in this specific case, despite the loan and mortgage agreement being concluded through an intermediary, the debtor/borrower was still required to fulfill their obligation before the creditor/lender, as the contract did not contain any indication regarding the transfer of the principal amount to the intermediary, which was essential for determining the recipient of the performance.

As a rule, the debtor performs the obligation themselves, but the creditor may also accept performance from a third party who is not a participant in the given obligation relationship. Sometimes, the creditor does not care who fulfills the obligation—whether it is the debtor or a third party. What matters to them is receiving the appropriate satisfaction. The Cassation Chamber noted that the practical issue is not only who performs the obligation but also to whom the performance is directed. The Chamber further explained that under Article 373 of the Civil Code, the recipient of the obligation fulfillment includes not only the creditor but also legal or contractual representatives, and a person authorized to receive performance may also be determined by a court decision.

According to the Cassation Chamber, significant legal consequences arise from performing an obligation to an unauthorized person. If this does not occur with the creditor's consent, the debtor's performance will not be considered fulfilled, and the debtor will be held liable for non-fulfillment of the obligation. Furthermore, the debtor has the right to demand the return of what was performed to the unauthorized person, not on the basis of a regressive claim but based on unjust enrichment.

The Cassation Court dismissed L.M.'s appeal, thereby rejecting N.A.'s claim (Civil Code 976){3}.

The Supreme Court of Georgia made an important clarification regarding the acquisition of ownership rights for a vehicle as a movable item and the legal consequences of entering into a purchase agreement for an encumbered item {4}.

The facts of the case were as follows: D.G. purchased a vehicle from D.B., which he subsequently sold to G.D. The Revenue Service of Georgia confiscated the vehicle from G.D. on the grounds that it was registered in D.B.'s name, who had an outstanding debt to the Revenue Service. The Cassation Court explained that Article 186 of the Civil Code establishes the rules for the acquisition of movable property, stating that in order to transfer ownership, the owner must transfer the item to the acquirer based on a genuine right.

According to the second part of this article, the law exhaustively lists the cases in which the legal result of the transfer of ownership occurs when an item is considered transferred. Specifically, the following are deemed to constitute the transfer of the item:The direct handover of the item to the acquirer; The transfer of indirect possession through a contract, where the previous owner may remain in direct possession; The grant of the right to demand possession from a third party by the owner to the acquirer. The Cassation Court held that to determine the existence of a legal defect in the subject of the sale, it must be established whether D.B. was the owner of the movable item at the time the Revenue Service seized the vehicle. According to the decision of the Cassation Court, the answer to this question must be negative, as it is undisputed that D.B. transferred possession of the vehicle to D.G., who then transferred it to G.D.

It was also established that payment for the value of the item occurred, which clearly indicates that D.B. no longer had ownership rights over the item after transferring it to D.G., even though the item was still registered in D.B.'s name with the Ministry of Internal Affairs' service agency. The Cassation Court clarified that the grounds for the emergence of ownership rights are exhaustively established by the Civil Code, which differentiates between the legal regimes for acquiring ownership of movable and immovable pro{5}. The Cassation Court clarified that the case materials did not confirm that there was a claim from the Revenue Service regarding the item at the time of the sale agreement between D.B. and D.G., or at the time of G.D.'s purchase of the vehicle on July 21, 2009. Thus, the existence of a legal defect in the ownership of the item at the time of the sale agreement was not established.

According to the Cassation Court, Article 491 of the Civil Code affirms the buyer's right to request the termination of the contract due to a defect in the item. However, the law sets specific conditions for the realization of this right by one party to the sale agreement. As per this norm, the buyer may request the termination of the contract based on Article 352.

For the consequence of exiting the contract—mutual restitution between the parties—the claimant must indicate and prove the following: the respondent's breach of obligations arising from the bilateral contract and the fact that the creditor (the claimant) notified the debtor or established a deadline for performance (Civil Code Article 405.1). The application of Article 352, which defines the legal consequences of exiting the contract, is permissible only in conjunction with Article 405, which regulates the rules and mandatory conditions for exiting a contract.{6}.

The Necessity of Limiting Vindication

The problem discussed in the article presents three extreme solutions: 1. Imposing all risks of potential errors on the owner; 2. Imposing all risks on the buyer; and finally, 3. Eliminating all risks through a registration system and record-keeping, ensuring that all rights are clear and verifiable.

The application of the rule of limiting vindication is associated with the existence of a number of circumstances: Good Faith of the Buyer: This implies the good faith of the seller in relation to the status of ownership. In the case of movable property, this relates to the seller's possession of the item, while for immovable property, it refers to its registration as the owner's property with the relevant registration authority. Existence of a Contract: A contract must exist between the seller and the buyer that aims to transfer ownership rights. Consideration: The contract must involve consideration. Actual Transfer: The

buyer must have received the item, which is not removed from circulation or restricted in circulation. Voluntary Transfer: The item must have been transferred out of the possession of the legitimate owner willingly. These conditions are crucial in determining the validity of ownership transfers and the applicability of the vindication limitation rule {8}.

According to Article 187, Part I, Sentence I of the Civil Code of Georgia {9}: „The buyer becomes the owner of the item even if the seller was not the owner, provided the buyer is acting in good faith." This is directly related to the provision in the Code that establishes the presumption of ownership—meaning that the possessor of an item is presumed to be its owner (Article 158, Part I). Both of these provisions protect the interests of the good-faith buyer of movable property and facilitate the stability and simplicity of civil transactions. However, if the first sentence of Article 187, Part I were understood independently of its second part, then any invalid disposal due to the seller's lack of authority would be deemed legitimate, and a good-faith buyer would always acquire ownership. The function of the second part of this article is to clarify under what circumstances a good-faith buyer becomes the owner of the item and when this outcome does not occur. As a result of amendments made to the Civil Code on December 28, 2011, the first sentence of Part II of Article 187 was revised to state: „A good-faith buyer cannot become the owner of an item if the owner has lost it, if it was stolen from them, or if it left their possession against their will, or if the buyer received it without consideration."{10}.

The Supreme Court correctly interpreted Article 187 of the Civil Code and pointed out the following circumstance: if the item leaves the owner's possession without their consent, the new owner will be obliged to return the item to the original owner.

Q. Qochashvili rightly observes that: „This provision does not explicitly specify the conditions under which a good-faith purchaser acquires ownership of a movable item. However, these conditions are established in civil law doctrine, particularly when the item leaves the owner's possession with their consent, is acquired by a good-faith purchaser, and is purchased for consideration. Beyond the wording of the second part of this article, these are the logical circumstances that are implied. Therefore, it is appropriate for the person applying this norm to consider not only the literal provisions but also the actual reality beyond them."{11}. According to B. Zoidze's valid observation, Article 187 of the Civil Code is not entirely flawless and justifiably invites criticism in certain cases {12}. The issue is that if we solely rely on the content of this article, it creates the impression that a bona fide purchaser always retains ownership, regardless of from whom they acquired the property. The essential points are that the transferor is a non-owner, and the purchaser is acting in good faith. There is no mention of the identity of the non-owner transferor or how the property came into their possession. This can only be understood from the second part of Article 187. However, even here, the matter is not entirely clear. The concept of good faith is somewhat unsettled. Specifically, „a purchaser of movable property cannot be considered bona fide if the owner lost the property, it was stolen, or it left their possession against their will, or if the purchaser acquired it free of charge." This formulation suggests that acquiring property through these means can be not only non-bona fide („cannot be bona fide") but also bona fide. The content of this norm implies that the method of acquisition determines whether the purchase is bona fide or not, rather than the purchaser's attitude toward the property. Therefore, it would have been preferable if the norm focused on the acquisition of ownership {13}. A similar provision is found in Section 935 of the German Civil Code, which states that under Sections 932–934, ownership cannot be acquired if the property was stolen from the owner, the owner lost the property, or it otherwise left their possession against their will. In cases where the owner was only an indirect possessor, the same rule applies when the property leaves the possession of the immediate possessor. (2) These norms do not apply to money or bearer securities, nor to items whose alienation occurs through a public auction or an auction held pursuant to Section 979, paragraph 1a {14}.

According to the interpretation of Section 934 of the German Civil Code, the norm distinguishes between two cases. Specifically:

If the alienator is an indirect possessor, where indirect possession by another party is sufficient, a bona fide purchaser becomes the owner by acquiring the right to demand the transfer of possession through the intermediary relationship. The precondition for this is that the direct possessor, at the time the transaction is completed, still has the intention to possess the item on behalf of the indirect possessor, by acknowledging the transfer of the right to demand possession. By ceding the right to demand, the indirect possessor loses possession, and the purchaser acquires it (see § 870).

There is debate as to whether a bona fide purchase also occurs under the following circumstances: if a buyer with conditional ownership transfers the item, despite the continued existence of, say, W's conditional ownership, in accordance with §§ 929, 930, to secure third party G, who in turn transfers it to a fourth party, D. In the „grinding machine" case (BGH, 50,45), the German Federal Supreme Court agreed with D's bona fide acquisition of the item, in accordance with § 934 (thus leading to W's loss of ownership rights). While G could not acquire ownership due to the lack of transfer of possession from K (§ 933), G could still acquire the right to demand possession of the future entitlement actually owed to K. Since the right to demand future entitlement was transferred, there was no longer any reason to doubt the intermediary possession relationship between K and G (e.g., based on § 139), and G could transfer the right to demand possession from the intermediary relationship to D, who thus acquired ownership rights bona fide.

The outcome is peculiar, insofar as the second secured party, D, who benefitted from § 934, was further removed from the conditionally owned object than the first secured party, G, who could not acquire ownership under § 933. However, the Federal Supreme Court upheld this legally anticipated result, given that a valid legal basis for the distinction between § 933 and § 934 exists. Specifically, the law equates indirect possession with direct possession and considers it sufficient for bona fide acquisition that the alienator fully possesses their possession.

This precondition is only fulfilled in the case of § 934, but not in § 933, due to the lack of possession.

If the alienator is not an indirect possessor, then the bona fide purchaser becomes the owner when a third party transfers possession to them for the purpose of acknowledging the alienation, thereby establishing a new intermediary relationship of possession with the purchaser. This also applies according to judicial practice when the third party „plays a double game" by not only facilitating the purchaser's possession but also maintaining the legal relationship of possession with the original owner. For example, W transferred goods to K under conditional ownership and handed them over to the warehouse owner L for safekeeping. K, before fully paying the purchase price, acted as if he were the owner and transferred the goods by ceding his supposed right to demand possession to D in good faith. D then entered into an independent storage contract with L, but continued delivering goods to W.

According to the prevailing view, D acquires ownership under § 934, as D, by entering into a storage contract with L, becomes the sole indirect possessor. The opposing view, however, only recognizes the existence of additional indirect possession by W and D, since L always followed W's instructions. This, however, is insufficient for the second case of § 934, as W, from a legal standpoint regarding possession, is closer to the goods than D and thus deserves protection. Nonetheless, the doctrine of additional possession should be rejected. The fact that L continues to follow W's instructions does not change the situation that D, having acquired sole indirect possession, becomes the owner of the goods {15}.

The introduction of mandatory state registration of transactions has improved the situation, but it has not entirely resolved the issue. Registration does not provide guarantees against the invalidation of any transaction in a chain of transactions in the future. For example, the recognition of a power of attorney regarding the alienation of property, followed by its subsequent invalidation, means that the property was acquired from a person who had no right to alienate it, even though the transaction was registered by the state. The following example can be cited to illustrate this:

On May 11, 2018, Kh. M. filed a lawsuit with the Gori District Court against the defendants, the National Agency of Public Registry and the Shida Kartli Regional Office of the National Agency of Public

Registry, demanding the annulment of the registration made on June 16, 2003, concerning the systematic registration of a 1709 square meter agricultural land plot located in a village of Gori Municipality under the ownership of V. B. Kh. M. also sought to nullify the decision #... dated March 27, 2018, of the Shida Kartli Office of the National Agency of Public Registry regarding the suspension of the registration process, the decision #... dated April 27, 2018, concerning the termination of the registration process, and the decision of the National Agency of Public Registry dated May 8, 2018, which rejected the administrative appeal. The Public Registry appealed to the Court of Appeals, which rejected the appellant‘s claim and upheld the contested decision. The Court of Appeals fully endorsed the factual circumstances and legal assessment established by the lower court. Upon reviewing the contested ruling, examining the case materials, and verifying the admissibility of the cassation appeal, the Supreme Court deemed that the cassation appeal filed by the National Agency of Public Registry did not meet the requirements of Article 34, Paragraph 3 of the Administrative Procedure Code of Georgia. Therefore, the cassation appeal was not admitted for hearing on the grounds that there was no divergence from the established practice of the Court of Appeals. Moreover, there was no likelihood that the cassation appeal would result in a decision differing from previous rulings of the Supreme Court of Georgia on similar legal issues. The contested ruling of the Court of Appeals does not contradict the European Convention on Human Rights or the precedents set by the European Court of Human Rights. The Cassation Court concluded that the appellant failed to substantiate that the Court of Appeals had handled the case with significant violations of material or procedural law. The Cassation Court upheld the factual findings and legal conclusions of the appellate court, noting that the Court of Appeals had correctly resolved the dispute.

The case materials show that, by the Decree No. 7 of 09.02.2018 issued by the Commission for Recognition of Property Rights on Land Parcels within the Gori Municipality, Kh.M. was denied the recognition of ownership rights over a land parcel he had occupied without authorization. The denial was based on the fact that the land had already been registered through systematic registration in the name of another owner, specifically a 1,709 sq.m agricultural land parcel in a village in Gori Municipality, which had been registered under V.B.‘s name since June 16, 2003. Kh.M. subsequently appealed to the registration authority, seeking to annul the systematic registration in V.B.’s name, asserting that he had been in possession and use of the land for years. The National Agency of Public Registry’s Shida Kartli regional office suspended the registration process and eventually terminated it due to Kh.M.‘s failure to submit documentation supporting the annulment of the registration. Kh.M.‘s administrative complaint was also denied by the National Agency of Public Registry.

The Cassation Chamber noted that the document cited as proof of V.B.’s ownership was land tax list No. 232, which was not stored in the Public Registry. Moreover, case materials indicated that there were no records of V.B.‘s family in the village communal books from 1986–2007, or in land distribution records from 1992–2001, confirming property in V.B.’s name. Additionally, municipal and Ministry of Internal Affairs records did not verify V.B.’s or his family‘s residence in the village of the Gori Municipality.

The Cassation Court pointed out that Kh.M.‘s appeal to the registration authority for the annulment of V.B.’s registration essentially constituted a request for an administrative review of the legality of V.B.’s systematic registration. The Court emphasized that the registration authority has the power to review and verify the legitimacy of its registration decisions. However, in this case, the authority took a formalistic approach and unilaterally imposed on the applicant the responsibility to present documentation for the registration‘s annulment. This approach does not align with the core duties and responsibilities legally entrusted to the administrative body.

The fact that no ownership documentation exists for V.B.‘s land registration, and the exact location of the parcel could not be determined, underscores the necessity for the administrative authority to thoroughly investigate and examine the circumstances of the case. The Cassation Court noted that, given the circumstances and the fact that the Appellate Court did not satisfy the appeal filed by the National Agency of Public Registry, it was justified to award the costs of legal services incurred by Kh.M. against the

agency. The Court also found that the amount to be reimbursed was reasonable and fair. Consequently, the Cassation Court declared the cassation appeal of the National Agency of Public Registry inadmissible {16}.

In court practice, it is common for guardians to petition the court for the annulment of a power of attorney granted to a person for the sale of property owned by a ward, especially when the sale and purchase agreements have been declared invalid by the guardian who compiled them, in conjunction with a third party, regarding the eviction of individuals residing in that specific property. These petitions are justified by the fact that at the time of granting the power of attorney, as well as before and after, the guardian was a person with a mental illness who could not understand the significance of their actions and was unable to manage them. District courts have granted these petitions in full. In the above-mentioned specific case and all similar instances, we protect only the property owner, which means that the purchaser will have no compelling factors to substantiate the legitimacy of their acquisition. They demand proof of ownership of the property being sold from the seller, which does not provide the purchaser with any guarantees, as the seller may also be an unauthorized seller of the property. Consequently, the purchaser cannot be assured that they have become the legitimate owner of the property through a fully legal transaction, as there may always be an individual who has lost their ownership. Then, through a series of transactions, the property may end up in the hands of the purchaser. If the owner is under absolute protection, our purchaser will lose the property in this case, regardless of being a bona fide acquirer and having legally purchased it. Such an approach undermines the incentive to acquire any property, which naturally leads to a „stagnation of turnover."

Such a situation is clearly disadvantageous not only for the former but also for potential property owners, as the value of property is manifested precisely through its circulation. Moreover, the absence of a legal means of property distribution, such as circulation, will lead us to illegal, to put it bluntly, violent actions. Otherwise, we would have to replace circulation with the exchange of items that have been forcibly seized from each other—which is not only absurd but also catastrophic. Additionally, the state derives revenue during a developed circulation: the more advanced the circulation, the greater the income. A wealthy state can allocate resources to mitigate conflicts and address social issues in any society. Therefore, the development of circulation is beneficial, either directly or indirectly, for everyone: for property owners, for various segments of society, and for the state itself. Hence, it is essential to protect circulation through legal means.

In this regard, Erenburg noted: „Legal order almost never consistently ensures the interests of justice; on the contrary, legal order often prioritizes the interests of ensuring circulation. This finds explanation and justification even before the court of strict law in that even indirectly, the legal owner is interested in the enhancement of circulation."

Therefore, circulation requires protection through legal means. In the words of Erenburg, „Ensuring circulation means that beneficial changes to a person's tangible property should not be disrupted by unknown circumstances; thus, it is essential to protect the interests of the purchaser, regardless of the interests of the property owner. However, even in this case, problems remain unresolved. Any purchaser, upon becoming the owner of the property, is concerned about the security of their rights over that property. What motivation would a purchaser have to acquire an item if, upon becoming the owner, they could lose that item against their will, with the law protecting not them, but the new purchaser instead? Therefore, even the unconditional protection of the purchaser, who is concerned about the security of their acquisition from the moment of purchase, is seen as a purchaser who seeks to ensure that their property rights are not lost against their will. Furthermore, the same property owner may later be interested in obtaining the opportunity to sell the same item, thereby ensuring the security of the new owner's rights.

Good Faith as a Criterion for Limiting Vindication

This situation must be resolved through a compromise between the interests of the property owner and the good faith purchaser. The extreme points of thought—writes B.B. Cherepakhin—despite their

consistency, remain within the realm of pure theory and do not reflect the functioning of current law. The latter largely chooses an intermediate, compromise path that reflects the contradiction of the opposing interests—in this case, the interests of the original owner and the good faith purchaser against the unauthorized seller. If civil circulation operates and develops alongside this, and property rights exist at an acceptable level (albeit somewhat limited), then the compromise can be considered successful.

In contemporary Georgian civil law, the established compromise allows the owner to claim their property if it was acquired from a person without compensation who did not have the right to dispose of it. If the property was purchased, then the owner is entitled to demand it from the bad faith purchaser, while they may claim it from the good faith purchaser only in cases where the property has been lost by the owner or taken from someone to whom the owner had transferred possession, or otherwise exited possession against their will.

The compromise in civil law is established in Article 187 („Good Faith Purchaser"), which states that „the purchaser becomes the owner of the item even if the seller was not the owner of the item, provided that the purchaser is acting in good faith... The fact of good faith must exist prior to its transfer."

Therefore, only the good faith purchaser benefits from the demand for the protection of the owner's property. The good faith of the purchaser lies in their lack of knowledge and inability to know that the property owner did not have the right to dispose of it. The good faith of the purchaser implies their ignorance regarding the seller's lack of legal rights. If the purchaser became aware of the illegal disposal of the item by the seller, they would be deemed bad faith.

A purchaser is considered good faith when they „do not know and should not know of the illegality of their ownership" (more often than not regarding the seller, who transferred the item to them, not being authorized to sell it). Nevertheless, the formulation „and should not know" (knowledge and possible knowledge) is an extended concept. The phrase „could not have known" refers to passive actions on the part of the purchaser, who did not take any actions to ascertain the legality of the seller's authority. In contrast, the formulation „could not have known" suggests some active measures taken by the purchaser to determine whether the seller had the authority to dispose of the property in question. Opinions surrounding this issue vary.

Let us analyze the aforementioned norm. If there were only the phrase „I did not know," it would indicate the ignorance of the purchaser during a passive action, as this formulation does not compel the purchaser to act to ascertain the seller's rights. The phrase „I could not have known," however, implies more than mere passivity. Yet this phrase does not suggest any active actions either. If there were the phrase „I was unable to find out," it would compel the purchaser to take active measures to determine the seller's legal rights, but this would not be appropriate. It is believed that „the understanding of good faith requires a duty of inquiry regarding the seller's authority to dispose of the item." {17}. There are differing opinions on this matter. B.B. Cherepakhin criticizes such a position: „It is difficult to imagine civil circulation built on such strong suspicions by buyers as required by Binding. What position would sellers find themselves in if they were always obliged to provide exhaustive evidence of ownership for the items being sold?"

Thus, the currently applicable law does not compel the purchaser to take specific actions to clarify the seller's rights. However, the formulation „I could not have known" still requires a certain degree of caution from the purchaser during the transaction, as in certain circumstances, a purchaser may reasonably suspect that the seller lacks the rights to sell the item. For example, purchasing an item at an evidently low price from hand to hand.

There is another viewpoint, according to which the term „I could not have known" is interpreted more broadly. For instance, Article 932, paragraph 2 of the Civil Code demands that ignorance is not only due to gross negligence but also mere oversight. If we adopt this perspective, we require continuous caution and suspicion from the purchaser toward the seller, thereby adhering to the principles of our Civil Code and general good faith circulation. Only grossly negligent ignorance can be equated with knowledge of

the seller's lack of authority to dispose of the item. Civil circulation has long ceased to be socialist, but the general rule of good faith among participants in circulation remains relevant today.

In civil circulation, a purchaser's oversight cannot be equated with bad faith. The law cannot demand that participants in civil circulation meticulously inquire about the legal grounds upon which their contracting parties possess the items being sold.

Is the purchaser obligated to verify the owner?

Nevertheless, the viewpoint that a purchaser is obligated to check the seller's rights is currently quite relevant, especially concerning real estate, where ownership rights transfer only after state registration. In general, the system of state registration regarding the transfer of rights in real estate has been established to ensure the transparency of all rights in real estate and ultimately to exclude cases of vindication limitations concerning real property. The registration procedure for real estate provides a direct description of the owners, resulting in all presumptions that are currently countered by conclusive evidence losing their meaning. „The fact of registration in the public register confirms the emergence of rights to the property and guarantees the validity of the rights through state confirmation by public act." According to the objectives of the Civil Code, the act of registration serves as public confirmation of the authenticity of rights arising from a civil transaction {18}.

The Cassation Court clarifies that civil rights, whose existence is manifested solely through the public register, possess a special characteristic that becomes evident in their disposal. Thus, in cases of sale, encumbrance, or other dispositions, the rights of third parties are given significant importance, as the registration of such rights in the public register represents a solid guarantee for the emergence of legal relations. All of this underscores the importance of the public register; specifically, to clarify the concept of the public register, it is essential to accurately assess its purpose and function, what interests this institution serves, and consequently, what significance is attributed to the fact of registration in the register.

First and foremost, attention should be drawn to the purpose of the public register, which serves as a guarantor of civil circulation and protects the interests of participants in that circulation. Based on this principle, the objectively existing fact of registration in the public register safeguards the principles of trust and good faith in the disposal of rights registered therein, and its presumption of correctness applies to both the previous owner and the new purchaser's rights. In specific cases, this principle also protects the rights of the creditor (mortgagee) {19}.

So, does the presumption of good faith not apply to the seller of real estate, and is the purchaser obligated to verify their rights? The registration system, designed without considering the classical understanding of good faith, inherently excludes the possibility of acquiring someone else's property in good faith.

An example from judicial practice: In a decision by the Civil Chamber of the Tbilisi Court of Appeals on May 31, 2016, the appellate complaint was upheld, the challenged decision was annulled, and the buyer's claim was granted, resulting in the disputed real estate being reclaimed from the unlawful possession of the respondent. The court indicated that it was established in the case that the property rights to the disputed real estate were registered in the claimant's name, while the respondent was in possession of the property. Moreover, the respondent failed to present sufficient evidence to confirm the legitimacy of their possession of the disputed real estate owned by the claimant. Based on this, the factual composition necessary for satisfying the vindicatory claim was evident.

The Cassation Court did not accept the reasoning of the challenged decision and concluded that, in this case, the respondent was an unlawful possessor of the land plot, since, according to the evidence in the case, both the claimant's and the respondent's property rights were registered in the public register, each assigned a unique identification code (Articles 311-312 of the Civil Code). Thus, the three prerequisites for satisfying a vindicatory claim were not present (1. The claimant must be the owner of the item; 2. The respondent must

be the possessor of the item; 3. The respondent must not have the right to possess that item).

The Cassation Court considered it necessary to examine the letter from the National Agency of the Public Registry dated August 31, 2010, as it was essential to clarify the factual and legal basis for each party's claims to establish their legal status regarding the disputed land plot. Additionally, to assess and verify the legality of the respondent's possession of the disputed property, a thorough, complete, objective, and uniform judicial practice in civil cases was crucial. It was important to investigate the overlap of the registered land plots according to the data presented in the case materials from the public registry, which was indisputable, although it was not established whether the disputed plot was entirely or partially adjacent to another plot. In re-examining the case, the appellate court needed to investigate: 1. Whether the seller had ownership rights to the two land plots in 2009, and what data each of them contained; 2. Following this, the fact of the overlap between the claimant's and the respondent's land plots needed to be examined; 3. Additionally, it was necessary to determine when each owner's rights were registered and on what basis, specifically the document that established those rights {20}.

In practice, there are numerous cases concerning the purchase and sale contracts of buildings that have been unlawfully constructed, where the building is sold by individuals who have not paid the purchase price to the actual owners of the building, or have only partially paid it, and whose ownership rights have not been registered in the public registry. This often becomes the subject of court disputes. It is clear that third parties cannot acquire ownership rights over buildings in such cases, as the person who „purchased" the property from the true owner has neither paid the appropriate price nor registered the ownership right in the public registry. Consequently, in such specific cases, the court grants the claims of the real property owner, as the fact of entering into a non-genuine transaction exists. It is interesting to consider how the claimant would reclaim their property after the recognition of the non-genuine transaction. In many instances, the court's explanations do not address this. However, it is evident that the claim presented by the claimant, asking for the transaction to be deemed unlawful rather than a vindication claim, aimed to restore their property through restitution. This may have been due to the fear of a counterclaim from the buyer, as the claimant likely wanted to avoid raising suspicions about their good faith in reclaiming the building through vindication.

Here, it is clear that there is a confusion between a vindication claim and a claim for the effects of a non-genuine transaction, which is unacceptable: a claimant who is not considered a party to a non-genuine transaction cannot reclaim property through restitution, as, according to Article 167, the parties to a non-genuine transaction return to their original state. Therefore, the satisfaction of the claim and the recognition of the transaction as non-genuine are futile for the claimant, as they cannot reclaim their property through restitution; vindication is the only prospective option, provided the court recognizes the respondent as a bad faith purchaser. The prerequisites for this are present: in the reasoned part, the court substantiates the purchaser's obligation to verify the seller's rights before entering into the transaction, specifically checking the registration data; otherwise, it considers their actions negligent. Moreover, the court discusses not the law but the purchaser's obligation, which leads to the conclusion of bad faith.

It is suggested that such a position is based solely on the reasoning of lawyers and judicial practice and is not actually substantiated by objective law. Nevertheless, it is worth noting that the „fears" regarding the „caution and suspicion" of purchasers may become real due to such judicial decisions.

If we do not deny the possibility of more serious protection for the property owner against involuntary deprivation of property, it must be stated that this should happen in a fair manner, carried out by the legislator and not the judiciary. Practice should follow the law, not the other way around. This can be done in two ways: FIRST. We should codify the existing trend in practice by introducing a new paragraph in Article 302, Section 1, or include this paragraph as a new point in Article 302: ‚4. A bona fide acquirer of property cannot be recognized if, at the time of acquisition, the registration data reveals circumstances that prohibit its transfer.' SECOND. The acquirer should not be burdened with the obligation to verify the seller's rights to the property; instead, the state should ensure the more reliable protection of the owner,

for which mandatory registration of all contracts involving real estate should be introduced. Currently, mandatory registration is in place for the sale and purchase agreements of residential buildings, as well as for the sale and purchase agreements of enterprises, gift agreements for real estate, and other contracts involving real estate.

This can only be explained by the fact that the legislator considers these transactions to be particularly significant and imposes an obligation on registrars regarding these transactions in order to avoid further uncertainty. It is particularly noteworthy that state registrars are required to conduct an examination of the documents related to real estate (to carry out their expertise) to exclude the possibility of the acquirer acting in bad faith, as it is unreasonable to expect an ordinary participant in civil circulation to verify the seller‘s rights if a professional lawyer fails to do so. Therefore, having the contract registered with the justice authorities signifies the acquirer‘s good faith—this is a reliable way to confirm the acquirer‘s good faith.

Justified Protections for the Owner and the Good Faith Acquirer

Currently, all restrictions on the owner‘s claim for the recovery of property from the illegal possession of a good faith acquirer are based on the legal literature’s theory of “lesser evil.” The essence of the “lesser evil” theory is that a decision made in favor of one party should cause the other party as little “harm” as possible. In this context, the dispute is resolved in favor of the party that has a lesser chance of protecting its property interests at the expense of the bad faith seller. For example, if property is acquired from a person without payment, who did not have the right to sell it, then the acquirer will not incur financial loss by returning the property to the owner. Therefore, in this case, regardless of the acquirer’s good faith, the property is always returned to the owner.

The situation is different when the item is purchased for a price. Here, we draw from the so-called “owner‘s fault theory” as the basis for losing their rights. The fault lies in negligence or error in choosing the counterparty—specifically, a person to whom the owner entrusted their property. This individual, by violating the contract with the owner, proceeded to sell the property. Some legal scholars argue that if a person fails to ensure their rights and allows another to benefit from their property, they deserve to lose that right. Indeed, the owner personally chose their counterparty and is responsible for the risks associated with their actions, not the other party who fortuitously became the acquirer of someone else’s property.

The “lesser evil” theory assumes that the unauthorized seller violated their rights before the owner, and since the owner chose them, they are better acquainted with that individual than the acquirer. Consequently, the owner has a greater chance of obtaining compensation from the seller for the breach of duty than the acquirer does. Thus, if property is removed from the owner’s possession at their will (through a transfer of custody, pledge, lease, etc.) and is subsequently acquired by the acquirer without compensation, then the owner should be denied the right to vindicate the property. Some legal scholars maintain that „specifically, the owner does not have the right to reclaim an item that has been transferred under lease, loan, custody, etc., since in this case, the property has been removed from the owner‘s possession (factual control) at their will.“ In such cases, the owner should have exercised greater caution in selecting the person to whom they entrusted their property. At the same time, the owner usually knows

whom they have entrusted their property or (if the defendant does not possess the item) its value.

References:

Normative Acts; Literature: Decisions of the Supreme Court of Georgia

1. Civil Code of Georgia, Article 163, Section 1. matsne.gov.ge
2. Civil Code of Georgia, Article 164, Section 1. matsne.gov.ge/ka/document/view/31702?publication=129
3. Case No. as-570-541-2015. Old.supremecourt.ge/files/upload/file/pdf/n84-mnshvnelovani-ganmarteba.pdf
4. Case No. as-658-625-2014.
5. Compare Decision No. as-914-954-2011.
6. Case No. as-658-625-2014, December 5, 2014. https://old.supremecourt.ge/files/upload-file/pdf/n69-mnishvnelovani-ganmarteba.pdf.
7. Venkshtetern M., Fundamentals of Property Law, in: Key Problems of Civil and Commercial Law in Germany, Moscow, 2001, p. 170. Also cited: Qetevan Qochashvili, "On the Presumption of Ownership in Georgian Law" (Dissertation for Doctor of Law, Tbilisi, 2012), p. 124. press.tsu.ge ***http://press.tsu.ge/data/image_db_innova/Disertaciebi/qetevan_qochashvili.pdf.***
8. Rakhmilovich V.A., On the Ownership of Property Alienated by an Unauthorized Person to a Good-Faith Acquirer (Regarding the Acquisition of Rights from an Unauthorized Person), in: Problems of Modern Civil Law, ed. Litovkin V.N., Rakhmilovich V.A., Moscow, 2000, p. 132.
   Also cited: Qetevan Qochashvili, p. 125. ***http://press.tsu.ge/data/image_db_innova/Disertaciebi/qetevan_qochashvili.pdf.***
9. The first part of Article 187 logically connects to the provisions of Article 186, which addresses the transfer of ownership rights solely through valid ownership. Thus, this regulation ensures that only valid ownership rights can be transferred, and as such, an invalid transfer by the owner does not lead to the acquirer's rightful ownership. This principle is derived from the understanding that valid ownership must be substantiated. The same reasoning applies to ownership claims of legitimate owners. The interpretation of this norm requires that wrongful dispossession should not render a valid acquisition void. Commentary on Article 187 of the Civil Code; Author: Levan Totladze, p. 135. https://library.iliauni.edu.ge/wp-content/uploads/2021/06/44.-samoqalaqo-kodeqsis-komentari-tsigni-II-sanivtho-qonebrivi-samarthali.pdf.
10. Qochashvili, "On the Presumption of Ownership" (Dissertation, Tbilisi, 2012), p. 126.
11. Qochashvili, p. 126.
12. Sukhitashvili D., „On the Nature of Ownership," Journal „SamarTali," 1998.
13. Zoidze B., „Georgian Civil Code," Tbilisi, 2003, p. 151.
14. BGB (German Civil Code), second revised edition, Tbilisi, 2019. http://lawlibrary.info/ge/books/2019giz-ge_BGB_GE.pdf?fbclid=IwAR1VEHzEt8fhevfuCXKiH_gOCgTgU8LE_zNZDzpoJgIZ1dvBKuKBh093sw4
15. Kkropholeri Ian, Commentary on the German Civil Code, 13th revised edition, Tbilisi, 2014, pp. 714-715. http://www.library.court.ge/upload/giz2014-ge-BGB-Komm-Translation.pdf.
16. Case No. BS-416, October 22, 2020. supremecourt.ge/ka/fulcase/27578/0.
17. Karl Binding.
18. Commentary on the Civil Code, Vol. II, Tbilisi, 2018, p. 598.
19. Case No. as-307-633-07, October 10, 2007.
20. Case No. as-707-677-2016, September 23, 2016, pp. 35-36. (http://prg.supremecourt.ge/DETAILVIEWCIVIL.aspx .