

THE GOOD FAITH AND THE THEORY OF THE APPEARANCE IN THE LAW

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Then when the excusable individual error is united with the common error, the effects of the good faith are much more larger. We are here in the field of the theory of appearance. Then when the individual error is united with the common error, the good faith has not a limited effect in the sense to paralyze the action for recovering of property or that of annulling, but its effects go so far, that it covers totally the lack of the right itself through the final validation of the null document or a judicial situation. In the case of appearance, the good faith does not need to be doubled by other conditions, like the just title, because the just title is replaced through the common error, denominated in the judicial literature the collective good faith. The common error is the belief without any doubt which has been made by the majority of the people (of the members of the collectivity) that a certain person is the holder of a right, when in reality that person is not the holder of the respective right (right of property, right of claim, mandate, right of succession). If a third party of good faith concludes a document with the person who pretends and is known by everyone as being the holder of the right, the respective document is declared valid and opposite with success to the real holder. In this situation, the common error is the creator of a right(error communis facit ius).

Historical aspects

The adage *error communis facit ius*¹ has a long history on the course of which the theory of appearance has played a primordial role. The genesis of the theory of appearance must be searched in the Roman law, more exactly in a text from Digeste belonging to Ulpianus in which it is reported the case of a slave, Barbaries Philippus, who, after he had run away from his master, he succeeded to create not only the common appearance regarding the quality of a free man, but even to obtain the function of a praetorian. After that, being discovered his real condition of slave, it was put the issue of annulling or maintaining of those documents concluded in his quality of a praetorian. The adopted solution was that of regarding these documents as being valid, establishing that this is the most human, more equitable as possible (*hoc enim humanius est*). The cristalization of this idea in the famous adage *error communis facit ius* does not belong to Ulpian, but to Accursius, one of the glossists of the School from Bologna from Middle Age. Another glossist (Bartolus) concentrated the text of Ulpian in a similar adage: *error populi pro veritate habetur; ut hic et ius facit*²

Gradually the adage was used to validate the documents concluded by a person suspected to have created the common error that he had the official quality required by the law for the concluding of this document³.

¹ The jurisprudence didn't stop to enlarge the field of application of the adage "*error communis facit ius*" as a rule of matter of general interest. In this regard, Ph. Le Tourneau, *Repertoire civil, Dalloz, Bonne foi, 1995, p.4*. Both in the doctrine as in the judicial practice, the theory of the appearance constitutes an important field of the law, a factor of balance, of restoring of the equity of the solutions then when these meet the rigidity of the principles. To be seen C.M Craciunescu, *Applications of the theory of appearance in law*, Juridica no. 6/2000, p.209 and the next.; H. Mazeaud, *La maxime "error communis facit ius"*, Revue trimestrielle de droit civil, civ., 1924, p.929.

² To be seen V. Stoica, *Civil Law. The real mainly rights*, vol.II, publisher Humanitas, Buchaerst, p. 584-585

³ In 1593 The Parliament from Paris validated the document concluded by a notary before to be sworn in his investment issue that was not known in the community. In 1751, the Parliament from Flandra validated the instrumental procedure by an executor regarding which the public didn't know he didn't have this quality anymore. The Council of State, through the notification from 2nd July 1807 validated the excerpts from the registers of births, deaths and marriages,

The field of application of this adage was clearly enlarged at the moment when the French judicial practice stated that the person who acquired good faith from a successor who apparently elaborated for himself a false testament in his favor, will win against the real successor in the law suit started by the last one. So, in the case *De la Boussiniere* through the decision from 26 th January 1897, the French Court of Cassation stated that because it was established the common and invincible error, as well the good faith of the these persons , the alienations agreed by the apparent successor can not be cancelled by any action by the real owner⁴.

The correlation between the theory of appearance, the idea of appearance and the idea of good faith, respective of the principle of good faith

The idea of appearance and the concept of good faith do not overlap, but between them exists a correlation, because the applying in practice of the theory of appearance implies always the good will of that person who acquires a right from the apparent holder or from that one who has at the concluding of the document a civil state. The common and invincible error refers always to that person who acquired the right from the apparent holder or to the beneficiary of the document of civil state⁵.

The theory of appearance supposes always the good will of the person who acquired, but the good faith of him does not suppose always the theory of appearance too. Just because it was not cleared up sufficiently this correlation, sometimes was made the application of the theory of appearance in cases in which is efficient only the good faith, meaning only the false conviction of that who invokes the acquiring of a certain right, without being necessary such a conviction at the level of the community. Consequent to this confusion, it was ascertained that the theory of the appearance would be found again in the concepts of the apparent creditor too⁶ and that of apparent authorized agent⁷, although these are concepts with which it is operating in judicial situations in which it is applied the idea of good faith in the person of the debtor or of a third contractor, and in the idea of the common and invincible error⁸.

In the judicial literature, the author I. Deleanu⁹ noticed that the theory of appearance, of praetorian origin which had in the opinion of some people¹⁰, a strong “subsidiary” character for the situations in which the courts could not invoke another fundament for their solutions, the theory of appearance extended its application in all the fields of the Law.

This way, the theory was applied in “the case of an apparent creditor, of an apparent authorized agent, of an apparent successor, of the simulation, of the possession, of a fictional

issued not by the registrar but by his secretaries. In 1883 , through the decision of the Court of Cassation from 7 th August were declared valid the marriages concluded in front of a town councilor from Montrouge who had not the competence to conclude these documents. For these historical aspects, to be seen T. Ionascu, *The idea of appearance and its role in the Romanian civil law*, publisher Cursuire litografice, Bucharest, 1943, p-3-5

⁴ To be seen H. Capitant, F. Terre, Y. Lequette, *Les grandes arrest de la jurisprudence civile*, tome I, 11 e ed. Dalloz, Paris, 2000, speta 100, p.483-488.

⁵ V. Stoica, *Civil Law...*, vol.II, *read works.*, p.593

⁶ Regarding the concept of apparent creditor to be seen C. Barsan, “The direct (in nature) execution of the obligations” in C. Statescu, C. Barsan, *Treaty of civil law. General Theory of the obligations*, publisher Academy, Bucharest, 1981, p.312

⁷ Regarding the concept of apparent mandate to be seen F. Deak, *Treaty of civil law. Special contracts*, pub. Universal Juridic, Bucharest, 2001, p.315..

The apparent mandate was acknowledged on jurisprudencial way both in France (The French Court of Cassation, decision from 13 th December 1962, “Le Dalloz”, Jur., p.227, note by J. Calais- Aulloy), and in Belgium (to be seen the Belgian Court of Cassation, decision from 20 th June 1988, note by R. Kruithof, *La theorie de l'apparence dans un nouvelle phase*, “ Revue critique de jurisprudence belge”, 1991, p.51 and the next) the Courts of Cassation from the mentioned countries estimating that the authorized agent can be hired on basis of an apparent mandate, not only in the situations in which it was created in a negligent way the appearance by the mandatory, but in the absence of any negligence from the side of the last one, if the trust of the third person in the effects of the mandate is legitimate.

⁸ Regarding the correlation between error, with its multiple acceptions, and the concept of good faith to be seen I.D Romosan, *The hudicial effects of the error in the field of civil responsibility*, “The Law” no.12/1999, p.49-51.

⁹ I. Deleanu, *The judicial fictions*, pub. ALL Beck; Bucharest, 2006, p.323

¹⁰ A. Danis- Fatome, *Apparence et contrat*, LGDJ, Paris, 2004, no.836 and the next., quoted by I.Deleanu, *loc.cit. supra*

society, of the transfer of some nominative titles, of the clerks”, as well as in relation with “the apparent capacity, the apparent marriage, the apparent domicile, the apparent quality of trader, the apparent shareholder, the apparent society”¹¹ The author utters that the theory of appearance must not be associated to all the situations in which the law itself uses the term “apparent”. For instance the apparent servitudes mentioned in art. 622, paragraph 3 Civil Code and the apparent vices mentioned in the article 1353 Civil Code have no relation either with the theory of appearance or with the idea of appearance.

Making difference between the idea of appearance and the theory of appearance, was stated in the doctrine¹² that not only the appearance, to which the judicial consequences are attached, would be sufficient for the applying of the theory of appearance. Supplementary it is necessary that the person to be in a “legitimate error”, in which it could have been any reasonable person, in this situation, or a “common error”, invincible for any person¹³.

In some situations was made only the application of the idea of good faith, although it was the case to be made the application of the theory of appearance, of course, in the extent in which were met all the necessary conditions. Through several decisions of the former Supreme Court regarding the alienation of somebody’s else good, it was motivated the keeping of the good by a third acquiring person from a *non-dominus* through the application of the idea of good faith, even if in all the cases it was about a real estate¹⁴. Following an identical reasoning, the Supreme Court justified the acquiring of the right of location in the situation in which the tenant concluded the contract with the apparent landlord with the argument of protection of the good faith of the tenant¹⁵.

¹¹ idem, p.324

¹² idem, p.325

¹³ In consens with the adage of the glossists, *error communis facit ius*, the error must have been “common,” mass,” objective”, without being a rough one, what supposes the introducing of a subjective element in the assessment of the error. The “legitimate” error represents an individual error, a concrete one, without implicating the impossibility of dissipation of the appearances, what would exceed to the normal diligence. For some observations about the used concepts to be seen A. Danis- Fatome, read works, no.882 and the next.

¹⁴ The Supreme Court, the civil collegium, decision no. 1433/1957, in the *Collection of decisions of the Supreme Court of R.P.R F for the year 1957*, pub. Stiintifica, Bucharest, 1958, p.73; The Supreme Court, decision no. 467/1959, in I.Mihuta, *Repertoire of judicial practice in civil matter of the Supreme Court and of other judicial courts for the years 1952-1969*, pub. Stiintifica, Bucharest, 1970, p.210; The Supreme Court, civil section, decision no. 569/1983, in *Collection of the decisions of the Supreme Court for the year 1983*, pub. Stiintifica si Enciclopedica, Bucharest, 1984, p.44. The thesis that these solutions justify themselves in a sufficient way for the application of the good faith was shared in the doctrine too. In this sense to be seen T. Ionascu. E. Barasch, *The nullity of the civil judicial document*, in T. Ionascu, *Treaty of civil law, vol.I, general part*, pub. Academiei, Bucharest, 1967, p.350; G. Beileu, *Romanian civil law. Introduction in the Romanian civil law The issues of the Romanian civil law*, pub. VIII, pub. Universul Juridic, Bucharest, 2003, p.206-207. For a similar tendency in the French jurisprudence, to be seen J. Mestre, *Peut-on encore se fier a l'apparence dans la formation des contrats?*, “Revue trimestrielle de droit civil”, 1998, p.361 (comment to the decision of the Court of Cassation, commercial chamber, from 25 th November 1997). In the French jurisprudence was emphasized in a judicious way the necessity of analyzing the objective elements of the appearance as basis of the subjective elements of this. For the last opinion, to be seen J. Mestre, *L'apparence a sans doute encore de beaux jours devant elle...*, “Revue trimestrielle de droit civil”, 1998, p.361 (comment to the decision of the Court of Cassation, commercial chamber from 18 th November 1997).

¹⁵ To be seen the Supreme Court, civil section, decision no. 2479/1983, in the *Romanian magazine of law* no. 8/1984, p.62. In the French jurisprudence were delivered contradictory decisions regarding the validation of a tenancy contract of a agricultural land concluded by the tenant without the consent of the nude owner, although the French regulation in the matter imposes the existence if this consent. The justification of the adopted solution by the jurisprudence based sometimes on the idea of the apparent mandate, other times on the idea of apparent property in the extent in which existed a common and invincible error, the tenant being considered even the landlord. For the consulting of this jurisprudence, to be seen F. Zenati, *Devenir d'un bail rural consenti par l'usufruitier sans l'acord dun u-propretaire*, “Revue trimestrielle de droit civil”, 1990, p.522.

Obviously the doctrine¹⁶ retorted to such solutions, showing that the principle of good faith is not enough to justify the acquiring of the right of property or of another subjective civil right with patrimonial character from the apparent owner of a real estate. The solutions of the Supreme Court ignored the essential difference between the judicial regime of the immovable goods and that of the movable goods, only movable goods being possible to be acquired through the possession of good faith under the conditions of art. 1909 Civil Code. In the real estate matter is not possible the technical-judicial justification of the acquiring of the right of property from an apparent owner only through the application of the principle of good faith, but only in the extent in which are reunited all the elements of the appearance, inclusive the good faith of the third acquirer.¹⁷

The author I. Lula estimates that the principle of the protection of the good faith is associated with the theory of the appearance to justify the acquiring of the right from the apparent owner. The principles referring to the good faith and equity, must not be replaced, substituted, but completed, rounding off with the principle *error communis facit ius*¹⁸ The good faith can not ground, through itself, in the extent in which the law would not provide otherwise, an acquiring of rights, constituting a sufficient motive only for the validation of the effects of the exercising the rights.

In the case in which the consented purchase by the apparent owner would be based only on the principle of validity of the appearance in fact, principle within the good faith represents only a condition regarding the third acquirer, this would have as consequences the partial examination and the incomplete examination of the effects of the rule *error communis facit ius*. If it would be excluded the judicial principle of the good faith from the judicial basis of maintaining of the documents of alienation consented by the apparent owner, it would not exist any justification to examine the situation of *verus dominus* from the point of view of his interest, sometimes prevailing towards that of the third, to maintain the respective good. The solution estimates the same author is much more necessary than the concluded document by the apparent owner with the third acquirer is considered opposite to the real owner on the basis of the appearance, although the last one, not being part in the contract, should be able to invoke the principle of relativity of the civil judicial documents. As *verus dominus* has the quality of plaintiff in the litigation in which it will be established or not the validity of the appearance in fact, only the principle of good faith will be able to move the scales of equity with the occasion of the examination in the favor of his rights and interests in conflict with those of the third acquirer¹⁹.

The same author considers liable to criticism the idea according to which the principle of good faith could fundament the selling of the good of somebody's else only if, in the person of the buyer would be met the conditions of usucapion. If the good faith would be associated with the flowing of a period of time necessary for the usucapion, then the right of property of the acquirer would be generated by the acquisitive prescription, original way of acquiring of real rights and which justify alone the right of the third acquirer, without being necessary to be made any completion with a principle of fact or with another normative disposition²⁰.

It is noticed by the same author that, regarding the assertion according to which the principle of validity of the appearance in fact could explain alone both the maintaining of the purchase document of somebody's else good by a buyer of good faith, as well the cancellation of this

¹⁶ I. Lula, *Discussions regarding the good faith and the appearance in the law*, "The law" no. 4/1997, p.22-26. The author G. Boroi criticizes the extension of the application of the principle of good faith with two arguments. First he states the fact that the exceptions are of strict interpretations and they must have always a link on a law text. Secondly, after the coming into force of the Law no. 77/1996, the imperative provisions from this normative document would be infringed, what allows the introduction of the action in rectification in a term of three years. Nevertheless, this author sends to the situation of the apparent successor, for the application of the theory of the appearance (p.253, note 1), although there is no special legal text. The author considers that in this case too the acquirer from the apparent successor will benefit of the right of property over the estate only after the expiring of the term of three years for introduction of the action in rectification. In this sense to be seen G. Boroi, *Civil Law. General part. The persons*, pub. All Beck, Bucharest, 2002, p.249. Also to be seen D. Chirica, *Special contracts....*, read works., p.80

¹⁷ V. Stoica, read works., p.595

¹⁸ I. Lula, read works., p.23

¹⁹ Idem, p.24

²⁰ Ibidem

operation then when the object of convention was a common good sold just from one of the spouses, the basis to such assertions must contain too the principle of protection of the good faith. The principle of the protection of the good faith can not alone explain the difference between the judicial treatment and these hypothesis.

Regarding the selling of somebody's else good, the Romanian lawmaker did not reproduce the provisions of art. 1599 from the French Civil Code, which declares null such a judicial operation. Through renunciation to this normative provision it was left out the only judicial basis on which it could have been grounded the absolute nullity of the subsequent judicial document, in return it was left to the judicial practice the possibility that the solutioning of this matter to be solved with the help of the principles of law, because, if it is logical to be applied the principle *nemo plus iuris ad alium transferre potest quam ipse habet*, is also logical that, on basis of other principles of law, e.g. the principle of good faith, that of appearance in law and that of ensuring the dynamic security of the civil circuit, also through the reporting to the concrete circumstances of each case, to be possible, eventually to maintain the alienations made by the apparent owner.

In the case of selling of the common immovable good by a single spouse, without the consent of the other one, the judicial operation was expressly interdicted by the lawmaker. So, according to the provisions of art. 35 paragraph 2 from the Family Code neither of the spouses can alienate or indebt a land or a construction which is part of the common goods, if he does not have the express consent of the other spouse, what means that, if such a judicial operation took place, this is annulable. More than that, in the case of selling of such a common good, the annulment of the selling at request of the non participant spouse to the judicial document is obligatory even if the acquirer showed the proof he couldn't with all his efforts, and couldn't find out that the bought good was part of the community of goods²¹ The good or bad faith of the third acquirer will be relevant only if the restitution of the construction is not possible in reality and therefore it follows through currency equivalent, case in which the buyer of good faith will refund the value of replacing of the good, as well as the fruit.²² This reasoning is necessary and is much more plausible when the solution of the annulling of the purchase contract is destined to protect both the rights and interests of the non alienable spouse and the regime of the community of goods which is a unique, legal and compulsory regime. As consequence, even if the acquirer was in a situation of common and invincible error, the judicial document can not be saved from annulment, because it s about a derogatory regulation, meaning an exception from the abdication of the principles regarding the good faith, as consequence of the preponderance of other principles of law.

The same solution is imposed in the case in which the annulment of the judicial document concluded between the apparent owner and the acquirer third was motivated on the lack of the capacity or restraining of the capacity of exercise of the real owner. The principle of protection of the interests of the incapable prevail towards the principles referring on appearance in fact, to the good faith and equity, as well towards the interest of the dynamic security of the civil circuit.

A strong argument on basis of which it was considered that for the substantiation of the selling of the good he must not give up to the principle of good faith, can be deduced from the way in which, in the doctrine and jurisprudence was conceived the idea of appearance. From the exposed ones it comes out that the appearance was conceived in a wide sense, being included in the area of the apparent rights not only the rights which were really "apparent", "imaginary", without "any real basis", "inexistent", but also those real rights of real estate, which at the date of conclusion of the subsequent judicial document, were real, not affected by any modality, and the characteristic of apparent rights acquired ulterior, as a result of cancellation with retroactive character of the title or property of the alienator. If the acquired rights from the under acquirer with onerous title and of good faith from a *non dominus* must be validated, the more must be protected the rights which come from an owner, who, in the moment of the conclusion of the civil judicial document, was not

²¹ For instance the third built his good faith on an apparent title from which it results that immovable was acquired anterior to the marriage by the seller, and the other spouse was in objective impossibility to express his consent.

²² To be seen I. Albu, *The Family Law*, pub. Didactica si Pedagogica, Bucharest, 1975, p.157

the apparent holder, but later his real right of real estate was cancelled retroactive. The substantiation of these alienations on the principle of appearance, when the appearance itself was absent at the date of concluding of the judicial document of immovable property and the renunciation to the principle of good faith seems, excessive, incomplete and unilateral. To take into account the principle of good faith regarding the judicial basis of the maintaining of the alienation documents, is compulsory in the cases in which the reality was, ulterior the transformation of the right, transformed in appearance. Not to accept this substantiation on basis of the principle of the good faith, completed with the validity of the appearance in fact, means to ignore the fact that the appearance appeared atypical, posterior and retroactive²³.

The maintaining of the alienation documents of somebody's else good can be substantiated too from the perspective of the conception of the civil law regarding the nullity of the civil judicial document, but also through completion and association with the principle of good faith. In such cases it is produced only *resoluto iure dantis*, without being produced too the *resoluto ius accipientis*, because the effects towards the acquirer with onerous title are saved from annulling, for the reason that they were born on the ground of the principle of protection of the good faith and of a reality which only ulterior and retroactive was transformed in a simple appearance of fact²⁴.

The good faith of the acquirer, element of the concept of apparent property

The apparent property has two acceptances: on one hand, it designates the judicial situation of the apparent property, and on other hand, it designates the way of acquiring which legitimates the right of property in the patrimony of the third who contracted with the apparent owner.²⁵

The concept of apparent property is in tight relation with the matter of selling of the good of somebody else. Or at general level. Of the alienation with onerous title of somebody else's good. In the extent in which operates the apparent property, the acquirer third, although it concluded the judicial translational document of property with a *non-dominus*, can not be evicted by the initial owner. Also the concept of apparent property is in close relation with the matter of the apparent successor²⁶.

In the structure of the apparent property enter the following elements: the translational document with onerous title having as object the right of private property on an individual determined immovable, the useful possession of the transmitter at the moment of concluding the translational document and the title of the apparent owner (material elements of appearance), the common and invincible error regarding the quality of the owner of the transmitter (the psychological element of the appearance) and not the last the good faith of the acquirer. If the conditions of the apparent property are met, the effect will be the acquiring of the right over the transmitted good by the third under-acquirer, right of property opposable to all, including the real owner.

The acquiring effect of the apparent property is not grounded only on the intellectual reflex which the judicial situation of the transmitter creates in the conscience of the thirds under the form of a common and invincible error, but also the idea of good faith of the acquirer. The theory of appearance and its immediate application, the apparent property, includes the idea of good faith²⁷.

The good faith represents the wrong conviction of the acquirer that the transmitter is the veritable owner of the immovable. The objective conception regarding the good faith requests that the acquirer shall do all the necessary checkings regarding the quality of owner of the transmitter, first of all the checking of the registrations in the surveyor's register, including the documents which were the basis of these registrations. In the doctrine, the author I. Lula estimated not only that if the

²³ I. Lula, read work., p.26

²⁴ Ibidem

²⁵ V. Stoica, read works., p.596

²⁶ Idem, p.597

²⁷ Sometimes it was made the distinction without judicial utility between the wrong belief of the third and the individual error of the third. To be seen D. Gherasim, read works., p.213-214

third acquirer made all these checkings “ it will be possible to conclude that he was in objective impossibility to realize the apparent real character of the seller, because in this matter even the most little omissions represent a negligence *levissima* which exclude the invincibility and so remove the appearance of fact²⁸. The checkings must be estimated not only from the criteria of the good householder (*bonus pater familias*) , but regarding the criteria of the most exigent member of the community. If the transmitter didn't have the right of property recorded in the surveyor's register , the acquirer can not be considered of good faith. In consequence the good faith is grounded not only on the existence of the own title, but on the exigent examinations of the apparent title of the owner too. The buyer must examine critically and very carefully the title of property presented by the alienator, his identity card, because otherwise it could come in error. Then when the seller will invoke as title the prolonged possession in time and the fact that he is considered by the people to be the owner, it will be discussed compulsory the matter of doubt, and the doubt excludes the loyal conviction and, therefore, spoils the good faith, with the consequence of its removal. Only in this way to the title invoked by the seller will be attached the significance of a judicial act generator of presumption of property, being therefore constitutive on appearance and good faith²⁹.

In the judicial practice was told that the good faith of the buyer can be established only reported to the steps it had carried out previously the concluding of the contract to find out the judicial situation of the real estate and to remove so any ambiguity regarding the diligence which he put in the materialization of the possibility to find out if on the real estate were laid claims within a law suit in the Court or within another instituted legal procedure. The error regarding the quality of owner of the seller, must be common and invincible, impossible to be predicted and impossible to be removed, and the good faith of the under acquirer, must be without any negligence or imputable doubt³⁰

The presumption of good faith instituted through the article 1899, paragraph 2 Civil Code was extended regarding to the acquirer from the apparent owner too.

But, in order to function this presumption, the third acquirer must prove the existence of the proximity and connected fact³¹

On one side it would be sufficient that the third acquirer to prove the existence of the translational document of property, with particular and onerous title, to enjoy the good faith.

On the other side, taking into account that the registration in the surveyor's register is a necessary element which enter in the composition of the material part of the appearance, it could be taken into account the concept of good faith so as it is defined in art. 31, paragraph 2 from the Law no.7/1996. According to this legal provision “ the acquirer is considered of good faith if, at the date of registering the petition of registration of the right in his use, was not registered any action through which it is contested the content of the surveyor's register or if from the title of the transmitter and from the content of the surveyor's register does not come out any irregularity between this and the real judicial situation”. Therefore the proximity and connected fact which initiates the presumption of good faith of the acquirer registered in the surveyor's register contains not only the title of property but also the certified copy of the land register from which shall come out, that on the date of acquiring, was not registered any action through which it was contested the content of the surveyor's register and does not result any irregularity between the mentions in the land record and the real judicial situation³².

More, taking into account the complex criteria according to which it is appreciated the good faith, this proximity and connected fact is not reduced to the title obtained from the apparent owner, but it includes all the elements from the material side of the appearance. If these elements were proved, it

²⁸ I. Lula, read works., p.33

²⁹ idem

³⁰ The Highest Court of Cassation and Justice, civil and intellectual property department, decision no. 2894/2005, in N.E. Grigoras, *the good faith, jurisprudence, decisions of the European Court of Human Rights*, pub. Hamanagiu, Bucharest, 2007, p. 362

³¹ V. Stoica, read works., p.618

³² Ibidem

functions the presumption of good faith with legal character, as well as the simple presumption regarding the common and invincible error.

The third acquirer will have to, in each case, prove not only the existing of the title obtained from the apparent owner or of the mentioned elements in art. 31, paragraph 2 from the Law no. 7/1996, but also to prove the existence of all the other elements from the material side of the appearance, because the theory of appearance includes not only the idea of good faith, but also the idea of common and invincible error. Actually, the proof of the connected elements on ground of which function the presumption of good faith, as large the sphere of the last elements would be.

The Romanian lawmaker, through art. 45, paragraph 2 of the Law no. 10/2001(former art. 46 in the initial form of the law, before republication from September 2005) stated with value of principle that “ the judicial documents of alienation, including those made in the process of privatization , having as object real estates taken by the state, without valid title, are under the incidence of absolute nullity, except the case when the document was concluded with good faith”.

Rejecting the unconstitutional exceptions of the provisions of this article related to the provisions of art. 44, paragraph 1,2,3 from the re-examined Constitution of Romania, as well as from the first additional Protocol (art. 1) to the European Convention which grants the right to private property, the Constitutional Court stated³³ that the interest of the under acquirer of good faith must be preferred related to the interest of the real owner, as consequence of applying the principle of protection of the good faith and of the adage *error communis facit ius*.

According to another solution through which, also, were rejected the exceptions of unconstitutionality of the provisions of art. 45 paragraph 2 thesis 2 from the Law no. 10/2001 related to the provisions of art. 44 paragraph 1,2,3 from the Constitution, in a re- examined form, it was stated that, although the mentioned legal provisions validate the title of the acquirer third of good faith, they do not sanction the prevalence of this title too towards the title of the initial owner. Other said, the provisions of art. 45, paragraph 2 thesis 2 from the Law no.10/2001 do no settle the conflict of interests between the third acquirer of good faith and the real owner in the favor of the first, but creates only the premises of the confrontation of the two titles, it followed that the litigation between the two of them to establish the prevalence of one or another from the titles in discussion.

These interpretations were criticized in the special literature³⁴ , where it is emphasized regarding the first interpretation that, if the title of the acquirer third is absolute null, he can not benefit from the acquisition effect of the apparent property, as long at least the state is in the situation of a seller of bad faith, the title of the acquirer is absolute null. On the other hand, it is stated, as long it is about a good taken without title of state, the acquirer can not take advantage of good faith, because the legal presumption referring to this is overturned by the simple presumption resulted from the notoriety of the disputable situation of the immovable real estates from this category³⁵

Regarding the second interpretation, it was told that concerning the fact that the good faith of the both parties, or at least of that of the acquirer, even if it could exclude the absolute nullity, will not be able to remove the relative nullity of the respective document, conclusion which is grounded on the adages *nemo plus iuris ad alium transferre potest* and *nemo dat quod non habet*.

Being in agreement with the above told, we can not overlook the fact that, at least regarding the possibility of the under acquirer to know the judicial situation of a certain immovable real estate transferred in the property of the state in the period of reference of the law, and in consequence, its definition as being of good or bad faith will have to be circumscribed to a certain judicial operation, it is going to appreciate itself in *concreto*, for each situation in part, and no abstract or in general way.³⁶

³³ Decision no. 191/2002 and no. 186/2004, as well as Decision no. 424/2006.

³⁴ V. Stoica, read works., vol. II, p.642 and the next

³⁵ D. Chirica, The judicial regime of the revendication of the immovables taken by the state without title from the under acquirers who take advantage of their good faith at the date of buying in the Law no. 1/2002, p.65.

³⁶ In the same sens, I. Deleanu, The parties and the thirds. The relativity and opposability of the judicial effects, pub. Rosetti, Bucharest, 2002, p.165.

In the last period it is noticed an important contribution of the judicial practice to the development of the concept of good faith with the occasion of solutioning of the litigations related to the refunded properties through the ulterior laws of the year 1989, an important contribution having the European Court of Human Rights which imposed a new orientation of the national courts in compliance with the institutional values of the property in European Union.

In this sense, the Court states in the Case Paduraru vs. Romania³⁷ that it has either obligation to define the concept of “good faith” in the Romanian Law or that of analysing the good faith of the buyers in the case. The Court reminds that its single obligation, according to art.19 from the Convention, is to ensure the respecting of the engagements which come out from the Convention for the contracting parties. Especially the Court has no obligation to substitute itself to the internal Courts. The interpretation of the internal legislation devolves upon the national authorities and especial upon the courts.

The Court does not deny the complexity of the matters which the courts have to solve, but considers that this complexity was owed, at least partly, to *the absence of a clear and coherent definition of the good faith and of an uniform method of appreciating the task and of the object of its proof (s.n.)* To this is added the fluctuant definition of the concept of “title” of the state, very important to establish if the buyers had the opportunity to realize that the state was not the owner of the good at the moment of selling, as well the lack of precision too regarding the knowing of that person who should have fulfill the reasonable diligences in order to clarify the judicial situation of a real estate put for dale by the state. For the Court such unsolved matters by the noticed law courts with the action in revocation of the contracts of purchase, introduced by the plaintiff, reflects the general uncertainty which was over the definition and appreciation of the good faith in the internal right.

In the Case Strain and others vs. Romania, the Court considered that the selling by the state of somebody else’s good to thirds of good faith, even then when it is anterior to the confirmation in justice in a final way of the right of other’s property, corroborated with total lack of compensation, represents a depriving of contrary property art. 1 of the Protocol no.1.

In the Case Paduraru vs. Romania, the Court establishes that the state infringed the positive obligation to react on tome and coherently towards the matter of general interest, consisting in returning or selling of real estates entered in its possession in the virtue of the decrees of nationalization. It was appreciated that the general uncertainty created like this had consequences over the plaintiff, who has seen himself in the impossibility to reacquire wholly his good, although he had a final decision of condemning which obliged the state to return it.

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