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## **Evolution and concretization of the bona fide purchaser in civil law tradition**

**Abstract.** *The article aims to analyze evolution and concretization of the bona fide purchaser in the Civil law tradition. The research begins by overviewing the status of the bona fide purchaser in Roman law and its legal basis. The article then delves into the history of the issue to show how classical Roman law was modernized with the customs of Germanic tribes which led to the formation of Civil law. Finally, the article describes the further evolution of the concept of the bona fide purchaser in the legislation of countries in the Civil law tradition. The research is based on the works of German, English, French, US, and Russian lawyers who have dealt with issues of the bona fide purchaser. The study uses the method of historical comparison and system analysis to provide a deeper understanding of the concept of the bona fide purchaser in Civil law tradition. The results of the research can significantly deepen the theory of Civil law and are recommended for scholars and practitioners interested in the history and theory of law. The research based upon the method of historical comparison and system analysis. The results of the research allow distinguishing two types of bona fides that is used in the Civil law tradition: in objective and in subjective sense.*

**Keywords:** *Civil law, Bona Fide Purchaser, Roman law, Continental law, Legal tradition.*

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### **Introduction**

Before delving into the main topic of this article, it is necessary to establish some key terminology. The term «Civil law» refers to «Romano-Germanic» or «Continental» law, as it is commonly known among legal researchers. In the article, I'll use the term «Civil law» to refer to classical European Continental law. The Latin term «bona fide» is used in Roman law to describe the principle of good faith. In English, the term «bona fide purchaser» and «good faith purchaser» are used interchangeably to refer to the concept of a purchaser for value without notice.

The development of the legal institution of good faith is closely tied to the development of law and human civilization. Indications of the status of a bona fide purchaser can be found in the laws of Hammurabi, but there is

currently no universally accepted method of regulating this institution in the law. Both Civil law and common law have roots in Roman law, specifically in the institutions of property (proprietas and dominium) and vindication (rei vindicatio). From these roots, the concept of a bona fide purchaser was borrowed by Civil law doctrine in various forms.

Both legal systems are based on the principle of Roman law «nemo dat quod non habet», meaning that one cannot transfer more rights than they possess. In the context of the concept of a bona fide purchaser, this principle is of paramount importance. A bona fide purchaser cannot receive the owner's rights based on this principle because they acquired property from a person who did not have the right to dispose of it. Despite their common roots, different legal systems regulate the rules

surrounding bona fide purchasers in different ways.

Dari-Mattiacci and Guerriero have noted significant differences in the legal protections of titular owners versus bona fide purchasers across various legal systems [1, 543-574]. They have suggested several reasons for these differing approaches. The focus of this article, however, is the development of the doctrine of a bona fide purchaser within the Civil law tradition.

The author of the article aims to analyze the concept of a bona fide purchaser, its evolution, and further concretization within the Civil law tradition. First, we will overview the status of a bona fide purchaser in Roman law and its legal basis. Next, we will examine the history of the issue to show how classical Roman law was influenced by the customs of Germanic tribes, leading to the formation of Civil law. Finally, we will describe the further evolution of the concept of a bona fide purchaser in the legislation of countries within the Civil law tradition.

The theoretical basis of this research is that the obtained results can significantly deepen our understanding of the Civil law. The research will systematize the concept of a bona fide purchaser used in the Civil law tradition. This article is recommended for scholars and practitioners interested in the history and theory of law.

### **Methods**

This article is divided into two parts: an initial historical analysis of the evolution of the concept of a bona fide purchaser, followed by an overview of its concretization in legal doctrine of Civil law countries. The first part examines how the concept of a bona fide purchaser has changed throughout history, from the Roman law period to modern legal systems. The second part of the research focuses more on modern legislation in Civil law countries, highlighting issues related to the legal concretization of the concept of a bona fide purchaser. The research uses a method of historical comparison and system analysis.

The study is based on the works of German, English, French, American, and Russian legal scholars who have addressed issues related to a bona fide purchaser. In

particular, the research examines the writings of J.H. Merryman, S. Stein, P. Duhot, and A.I. Krasilnikov, among others. The research also draws from relevant legislation, case law, and legal commentary from countries within the Civil law tradition. The data collected from these sources is analyzed to identify trends and patterns in the development and concretization of the concept of a bona fide purchaser within Civil law.

### **Results**

When addressing the issue of protecting the rights of a bona fide purchaser, it is important to consider that any protection of these rights is, in fact, an exception to the principle of protection of property rights. Therefore, a balance must always be struck between protecting the rights of a bona fide purchaser and the interests of the titular owner. In determining the degree of good faith of the subject in property relations, it is necessary to take into account that the purchaser is not required to take exceptional measures to establish all the circumstances surrounding the acquisition of a property, only ordinary prudence is expected of them. This approach will significantly reduce errors in protecting the rights of a bona fide purchaser.

Furthermore, it is necessary to continue improving the system for registering rights to real estate, taking into account the experience of countries that use proprietary legal methods of protecting the rights of bona fide purchasers. If an entry in the state register of real estate guarantees the absolute right of the owner to the property, many issues related to determining property rights will be resolved.

Currently, post-Soviet legislation needs to be updated to meet the demands of modern civil circulation, through the systemic updating and development of contract law. In this regard, the principle of good faith should be more widely applied in legal practice and be normatively enshrined as an industry principle.

### **Discussion**

*1. The concretization of the concept of bona fide purchaser*

Roman law is characterized by a deep development of property rights which were

defended by real claims against the violator. According to scholars in Roman law there were more than 70 types of lawsuits, with 40 of them being the most important individual lawsuits. Each lawsuit was an independent legal figure, forming in conjunction with others a lawsuit system. This system was formed by providing new and new lawsuits.

As a way of protecting property rights in Roman law a vindication suit was used. The concept of vindication comes from the Latin word «*vim dicere*» (announcement of the use of force), that is the return of illegally seized property to the rightful owner. The emergence of this institution belongs to the ancient Roman legal system [2, 2]. And although the vindication suit does not call so everywhere its legal form is found in almost every state within civil law doctrine. For example, the German Civil Code does not contain the concept of vindication, however, it contains a similar mechanism for the return of property that is out of possession. Vindication suit has a non-contractual nature and protects the right of ownership as an absolute subjective right.

Initially, the essence of vindication in Roman law was reduced to the norm “*ubi rem meam invenio, ibi vindico*” which means “where I find my thing, there I take it”. Considering that we are talking about personal property only the thing owner could resort to vindication. It was assumed that the title owner could withdraw his thing from other people’s illegal possession even by the use of force.

Subsequently, a vindication claim appeared from the right of vindication, the purpose of which was to return the item to the possession of owner. At the same time the right to use *rei vindicatio*, or active legitimation, was held by any proprietor from whom possession of the thing was taken away [3, 5]. The owner of the disputed item had a passive legitimation or position of the defendant in a vindication suit.

The burden of proof on the vindication claim was called *onus probandi* and laid on the plaintiff who had to prove his right to own property based on the *jus gentium* (international Roman law) or on *jus civile* (national Roman law). And also plaintiff had to prove the fact of ownership of thing by the defendant. In a case when the defendant

denied the fact of possession of the thing and the plaintiff proved it the thing was awarded to the plaintiff.

If the parties agreed on a reconciliation decision, they could avoid the trial process. This happened in cases where the defendant regained possession of the disputed item for the claimant (owner). Also, the defendant could have avoided responsibility in cases where he called the person, on whose behalf he owned the subject. In this case this person acted as the defendant. Considering all the circumstances of the case the judge made the decision towards the party who could provide the credibility of his arguments. At the same time, the unfair defendant was obliged to return to the plaintiff not only the controversial thing itself but also the value of all the collected benefits. Novitskii notes that the owner had the right to claim compensation for the cost of maintaining things [4, 173].

At the same time, in Rome there wasn’t developed institution of judicial executors. If the defendant refused to voluntarily comply with the decision of the court he was declared obstinate. However, the plaintiff had to look for ways to reclaim his property by himself.

Another way to protect the rights of the owner was restitution. The restitution meant the return of the parties to original position that preceded transaction. The restitution was used by praetors to protect the rights of owners, but only in cases of fraud, coercion, excusable error, change of legal status, absence for a good reason and so on. When applying restitution, the transaction was declared invalid, and the parties returned to the state that preceded conclusion of transaction.

The ability to protect the bona fide purchaser of their rights to real estate from the claims of title owner was in mechanism of acquisitive prescription. The institutions also established the basic conditions for determination of acquisitive prescription, in particular continuity, good faith tenure, date expiration etc.

It was under Emperor Justinian that the largest codification of Roman law was drawn up, called *Corpus iuris civilis*. This work consisted of four parts: institutions, digests, the Code of Justinian, and novels. At the same time the digests included all the

significant works of Roman lawyers of past eras. Therefore, in modern jurisprudence the term Roman law usually means the collection of Justinian - *Corpus iuris civilis*, and in some cases, an earlier codification - the Code of Theodosius.

Thus, as a result, it can be noted that in Roman law of Justinian's time, the protection of the owner's rights was absolute, and the vindication was unlimited, which allowed the plaintiff to reclaim his property from a bona fide purchaser. The rights of a bona fide purchaser were not protected. The only exception to this was the establishment of a rule by Justinian according to which a bona fide purchaser could acquire ownership of the property only in the case when the alienator was emperor or empress.

So, in Justinian's law *culpa lata* (gross negligence) was considered as malice, thus only a participant of civil turnover in whose actions there was no gross negligence or malice could be recognized as *bona fide*.

Returning to an earlier period of time it can be noted that in classical Roman law protection of a bona fide purchaser took place only in relationship with institution of *dominium bonitarium*. Thus, an alternative to the vindication suit was Publicianum suit.

This lawsuit was introduced by the praetor Publician and was originally recorded as *edictum Publicianum*. This lawsuit was aimed at protecting the thing owner under *dominium bonitarium*, who received the right to claim the thing on the same grounds as if he were an owner under *jus Quiritium*. As noted by Z.M. Chernilovskii "Publician lawsuit created an owner under *jus Quiritium* due to the simple assumption that he had faithfully owned a thing under the legal limitation period" [5, 224]. In other words, the lawsuit ordered the judge to proceed from assumption that the thing owner owned it for a long time and if he was a Quiritium owner according to the time limit.

The Publician lawsuit was used only to protect the bona fide owner from the actions of third parties who did not have any rights to own the thing.

At the same time for application of this claim, it was necessary to have several facts. First, the bona fide purchaser had to own this thing, and then miss it. Secondly, he

should have a legal basis (*Justus titulus*), i.e. the facts that were necessary to recognize the prescription of possession. Thirdly, the ownership itself had to be conscientious, i.e. to possess bona fides and the owner himself was supposed to have no malice. And finally, *res habilis* – the prescription of ownership should be applicable to the thing. Such things included those possessions that were lost by the owner as a result of theft, forcible seizure, alienation by the *malae fidei* possessor (unfair owner), extortion.

If the interests of two bona fide purchasers were disputed, the one who received the thing directly from the title owner was considered more eligible. If both bona fide purchasers received the thing from the same person, the one who received the thing earlier was considered more eligible. And the actual owner of the thing, the one who had the thing in direct possession, was also considered as eligible.

The significant changes in development of institute for protection of the rights of a bona fide purchaser occurred with the fall of the Roman Empire and invasion of Germanic tribes which began to build their own kingdoms on its ruins. Realizing the superiority of Roman law, they borrowed it and as Merryman noticed «vulgarized» it [6, 8]. This tribes filled Roman law with their traditions and customs which later reborn into *jus commune*. It was at the junction of Roman and Germanic law that the Roman-Germanic system of law was formed in the Middle Ages.

It is in German customary law that the rules protecting the rights of a bona fide purchaser were established. The Latin expression "Hand muss Hand wahren" ("the hand must support the hand") came to replace the Latin expression "*ubi rem meam inveno, ibi vindico*".

The essence of this expression was to ensure that only things that came out of the owner's hands against his will (stolen, lost) can be searched (vindicated) from any third person. But the owner loses the things that were voluntarily entrusted by him and later transferred to the third parties.

Another principle of German customary law pointed to the expression "*wo man seinen Glauben gelassen hat, da muss man ihn suchen*",

which literally meant “ask the one to whom the property was entrusted”. Through this rule a bona fide purchaser in German customary law became the irrevocable owner and the former owner had only a claim for damages to the person to whom he transferred the property. This was due to the tradition of the property turnover that was born at that time.

In contrast, different situation was in France where Roman law, namely *Corpus iuris civilis* and the Code of Theodosius, played a much stronger role. At the same time, customary law – *jus commune*, was also practiced but did not receive the support of the royal lawyers [6, 9].

At the same time, the French themselves clearly distinguished the scope of Roman law – “written law” (*pays de droit écrit*), and customary law – “unwritten law” (*pays de droit coutumier*). Unlike Roman law customs were not officially recorded and could vary depending on the area where they were applied. Although from time to time private collections of customs were published by private lawyers, the content of such collections varied from place to place.

Initially, the barbaric law of the Franks restricted the vindication to the benefit of a bona fide purchaser. The generally accepted rule was an indication of “*mobilia non habent sequelam*” (movable things cannot be traced) in the late Middle Ages it was reborn in the French expression “*les meubles n’ont pas de suite*”. The meaning of this provision was that if the owner himself entrusted the movable thing to someone else’s possession, then he would lose the ability to subsequently demand it from a bona fide purchaser [7, 155]. This rule applied only to movable things since the institute of real estate had a different legal status and accordingly different norms of regulation.

The earliest set of German customary law is the “*Lex Salica*” a set of customs and laws of the Germanic tribe of the Franks, dating from the VI century. The peculiarity of this document is that it was the first time recorded attempt to consolidate mixed norms of Roman and German customary law. The researchers note that the law of Theodosius continued to be applied in the Roman territories conquered by the Franks but in the territories of the

Germanic tribes unwritten customary law applied. In case of a dispute between the Romans and the Germans the *Lex Salica* was applied [8, 113-134].

The real legal relations in *Lex Salica* were not detailed. Its characteristic feature is the lack of absolute protection of property rights, which characterized Roman law. The owner had the right to claim his thing only if it was dropped out of his possession against his will, was stolen, or forcibly removed. The exception was made for the search procedure, which was conducted during the first three days after the item was missing. During this period of time the titular owner had the right “to lay hands on his thing” wherever he found it. However, if the owner of the thing also claimed rights to it the thing was transferred to a third party, after which the titular owner was obliged to prove the right to own the disputed thing.

Similar rules can be found in other codes of German customary law for example, in the *lex Baiuvariorum* (Bavarian law) and in the *Leges Alamannorum* (Alamanian law).

Thus, the rights of the title owner in German law had significant restrictions, the right to absolute vindication extended only to the first three days from the moment of disappearance of the thing. The title owner could claim the thing only if it dropped out of his possession against his will. Finally, it was impossible to reclaim the property transferred to the church.

For a long time, the contradictions between the “written” and “unwritten” law did not allow to form a unified approach to regulation of institute of fair acquisition. Everything changed after the Great French Revolution and creation of the Napoleon Code of 1804. Under the orders of Napoleon an attempt was made to create a unified civil code that could reflect not only Roman law and customary law, but also church decrees (canon law), as well as royal ordinances and revolutionary law.

Innovations of revolutionary law touched upon the division of marital property, the secularization of acts of civil status, inheritance issues, the division of land, etc.

The Napoleonic Code demarcated the fair possession of movable and immovable things. Napoleon’s Code established the classic rule: the bona fide purchaser of a thing is considered

to be its owner if the possession is public and unequivocal. At the same time, the burden of proving unfair tenure fell on the shoulders of the person who challenged the right of ownership of the thing.

The Napoleon Code was popularized during the conquests of Napoleon and was widely spread in German lands, largely due to the fact that French customary law had similar roots to German customary law.

The modern civil code of Germany (BGB) was adopted in 1896 and relied for the most part on Roman law. Nevertheless, a significant part of the institutions was borrowed from German customary law. This also applies to the right of ownership. Towards the issue of the transfer of ownership of movable things BGB consolidated the old German rule: «*Hand muss Hand wahren*». It meant increased protection of the rights of a bona fide purchaser of a thing. The owner of the thing, who entrusted it to the seller, was deprived of the right to demand it from a bona fide purchaser.

But at the same time BGB has completely different approach to the issue of disposing of real estate (land plot). As C. Wolf points out, the concept of real estate is not legally defined in German law. In legal sense it is a special limited part of a person's land, which is recorded in the land register. Land registries, in turn, are in the introduction of local courts in Germany [9, 121].

Another generally accepted norm of the Civil law is the principle "*en fait de meubles, la possession vaut titre*" enshrined in the Code of Napoleon in article 2279 (possession of a movable thing is equal to the right of ownership to it). This principle allows the owner of a movable thing to protect his rights, as if he were the titular owner.

At the same time, despite the direct logical meaning inherent in this provision, the right of possession and ownership in French law is still differentiated. Thus, Article 2279 states that those who have lost a thing or from whom a thing was stolen can claim it back within three years, counting from the day of loss or theft, from the one in whose hands he will find it; but this person has a contrary claim against person from whom he received it [10]. Thus, the title owner has the right to claim the movable thing from a bona fide purchaser for

three years if the given thing was dropped from his possession against his will.

In English law, by virtue of its belonging to a different legal system, the development of ideas for protection of the rights of a bona fide purchaser occurred in a completely different way. From a historical perspective, the origins of good faith purchaser in English law can be found in development of the "open market" doctrine (market overt). The bottom line was that people who purchased goods on open city markets were protected from the claims of the owners of things [11, 225].

This doctrine significantly changed the general rule of *nemo dat quod non habet* (you can't transfer more rights than you have yourself) [12]. This rule did not allow the person who held the stolen item to sell it to another person, as he did not have legal ownership. However, the "open market" doctrine changed this rule, adding a significant exception.

With development of English law, the limitations of the "open market" doctrine became apparent, since the very tradition of open markets began to become a thing of the past. It was necessary to fundamentally change the existing tradition, for which the notion of "voidable title" was introduced.

Its essence was that the original acquirer of property on an insignificant transaction became the owner of an "voidable title" and his ownership could be challenged by the title owner. However, in the event that the title owner did not challenge the ownership or did not have time to challenge it, and the property was alienated to the bona fide purchaser, the "voidable title" became a full-fledged title.

This complex structure was developed mainly in American law and finally became entrenched in the Unified Sales Act of 1906.

As you noted the legal understanding of a fair acquisition varies considerably in different legal systems. In this regard, the importance of acquiring legal concretization of the concept of bona fide purchasing.

Despite the common roots of the concept of bona fide purchaser, its legal content in different legislations may vary significantly. The main idea behind the legal norms is the same, but the context of legal application are heavily depends on judicial interpretation and practice.

In the civil law tradition, there are two different understandings of bona fide principle. First approach is objective, it overviews the bona fide as a “good faith” a bedrock principle of law that is used in many legal relations. Second approach is subjective, it’s a specific condition of the person who acts in a good faith.

That is how the German legal doctrine traditionally interprets good faith in a subjective sense (*guter Glaube*) and in an objective sense (*Treu und Glaube*).

In German law the principle of good faith is established by paragraph 242 of the German Civil Code, according to which “*the debtor must fulfill the obligation in good faith, as is required by the customs of turnover*”. Note that the provisions of this norm apply not only to the law of obligations but all legal relations.

Good faith in an objective sense is described by modern authors as “*honesty, honest behavior, reasonable norms of business conduct, decency, ethical norms, the spirit of solidarity*” [13, 15] and so on.

In the subjective sense, good faith is understood as a specific, subjective state of a person, his compliance with certain criteria based on the moral ethical principle of good faith.

On this basis, it is fair to assert that in proprietary legal relations, good faith acts as a specific requirement for the behavior of a subject and differs significantly from a common understanding of good faith as a moral and ethical principle. That is, we can talk about two different notions of good faith: the principle of good faith and the good conduct of the subject of legal relations.

Back in the early 20th century Shershenevich pointed out that in the civil law possession was divided into legal and illegal, fair (in a good faith) and unfair (in a bad faith), fraudulent, violent, and unauthorized [14, 148].

At the same time, the division of possession into fair and unfair relies only on a subjective sign, on conviction of the owner that he owns the property legally, that is, on ignorance of the rights of third parties. This division, apparently, was borrowed by Russian civil law from German, and subsequently passed into Soviet, and then post-Soviet civil law.

In this regard, the key issue is to understand the legal nature of a bona fide purchaser. Is he the successor of the third-party owner (from whom he purchased the thing) or is he the legal owner who has right as the initial owner of the thing? Some German authors, for example von Schwerin, are inclined to the first option [15, 31].

The second approach is less popular, although it is possible to note its application in common law, for example, in the concept of voidable title. The main advantage of this legal framework was that the bona fide purchaser could transfer the property and enter into subsequent transactions for which a special term “voidable title” was introduced. Moreover, in case of a subsequent transfer of the title to a third party the voidable title transfers into a full title [16, 1057].

It should be noted that the modern understanding of the principle of good faith in the civil law tradition is directly borrowed from Roman law and in its etymological meaning represents a fusion of the words “good” and “faith”.

But at the same time in the legal content, the principle of good faith includes in addition to “good faith” also “good moral” and “customs of civil turnover”. These categories, despite their certain similarities, have different legal meaning. Thus, the customs of civil turnover encompass business relationships and good moral affect other aspects of life in society. Good moral represents a category of public perception of good, honesty, while a good faith is the limit of the individualistic beginning.

Thus, the purchaser in order to recognize him as bona fide purchaser is not obliged to take special measures to establish all the circumstances of acquisition of property by him. What is really required of him is the ordinary prudence and the absence of malicious intent.

Of course, quite controversial situations are possible when the behavior of a subject may indirectly indicate his bad faith. For example, the purchase of property at a deliberately low price suggests that the acquirer might have suspicions about the status of the acquired item. All the circumstances of such a case should be investigated by the court.

The issue can be caused by situation in which both parties behaved in good faith. What should be done by the court in this case? In fact, this issue has been discussed in the scientific community for a long time and is called the paradox of compensation. According to Schwartz and Scott in a situation like this is impossible to find a solution that could satisfy all parties [17, 1332]. In our opinion, this is the best description of this issue.

## *2. Issues of the legal status of bona fide purchaser in the legislation*

An analysis of the jurisprudence of most post-Soviet states indicates that the fundamental criteria in the determination of the good faith of the purchaser are lies on precisely the subjective ground, i.e. the categories “could know / could not know”.

Zarandia gives an interesting example from the judicial practice of Georgia. So, in one of the cases, the Court of Cassation questioned the integrity of the person, in view of the fact that he was a close neighbor of the apartment owner. Thus, he simply could not have been unaware of the shortcomings of the apartment next door. He could try to find out from a neighbor all the characteristics of the apartment. The Court of Cassation returned the said case to the Court of Appeal for further clarification of all the circumstances of the case. As we see, in the indicated case, the court concluded that the purchaser was obliged to find out all the circumstances connected with the apartment acquired from the neighbor. [19].

The phrase “did not know and could not know” can be interpreted in different ways, for example in Soviet civil law some authors assumed that even the mere negligence of the purchaser entails his dishonesty. And, on the contrary Ioffe has been suggested that dishonesty only occurs in cases of intentional acts [20, 81]. Based on the literal meaning of the phrase “did not know and should not have known” used in the texts of the civil codes of Russia, Kazakhstan and many other post-Soviet countries, it can be argued that this is precisely the ignorance of the purchaser the status of the person from whom he acquires the property. Accordingly, one should agree with the position of Ioffe that only the

intentional actions of the purchaser make him unscrupulous.

In our opinion, the mistake of the researchers is that many often confuse the objective and subjective understanding of good faith. For example, there may be a confusion of the concept of good faith purchase and the concept of reasonable prudence. Indeed, a bona fide purchaser must exercise “reasonable discretion”, however, this does not make the very concept of “bona fide purchaser” only evaluative.

Hanashevich proposed to share the bona fide acquisition by type of property, and in accordance with this to divide the burden of proof. So, in relation to real estate and certain categories of movable things (of particular value), the scientist suggested placing the burden of proof on the bona fide purchaser, in relation to other categories of movable things – on the title owner [21].

This proposal is quite logical for the legislation of the post-Soviet states, where the issue of special regulation of the transfer of the ownership rights of real estate is particularly acute and causes many problems with practical implementation. Nevertheless, it should be especially noted that in European countries in relation to real estate there is a system of state registration, which is the basis for the emergence of property rights. In most post-Soviet states, the cause of the right of ownership is a title document (transaction, contract of sale, etc.). This is the main cause of problems associated with the protection of the rights of a bona fide purchaser.

Since the state registration system in most of the post-Soviet countries, unlike the EU countries, does not guarantee absolute ownership, usually it is the documents of title become the subject of contesting the right to own real estate. And even if the purchaser of such disputed property is recognized as bona fide, he has very little chance of winning the lawsuit from the title co-owner. This practice has its pluses, as it guarantees absolute protection of the rights of the title owner, who may not worry that the property will be sold under a fictitious transaction and will pass to a third party through the state registration procedure. However, losses are borne by a bona fide acquirer who is also not immune from



fraud, even if he passes the state registration procedure. For example, in 2017, in Atyrau, Kazakhstan, the owners of 33 land plots found that they did not live on their own land, as the construction company, that purchased the land in 2007 claimed rights to the territory. Since the acquisition, the company has not used the land, which was used by scammers who forged documents and sold land. At the same time, transactions were executed and registered with state bodies [22, 1044].

These issues are relevant today in the Russian Federation as well. For example, according to the Materials of the General Prosecutor's Office of the Russian Federation in Perm, a verdict was issued in 2019 against a fraudulent group that committed illegal acts of re-registering property with the subsequent sale of bona fide purchasers. At the same time, the transactions went through the entire state registration procedure, which, however, did not become the basis for bona fide purchasers to acquire ownership. As a result, despite the record in Rosreestr, real estate was seized. The violated rights of bona fide purchasers were not compensated in any way, since the legislation does not even provide for the very possibility of compensating the costs of bona fide purchasers [23].

In this regard, the courts cautiously refer to good faith, relying only on the explicit actions of participants in civil matters. Such a practice does not always make it possible to adequately protect the rights of bona fide purchasers.

The issue also lies in the fact that the inclusion of information in the state register, although it is the basis for taking possession of the land is not a title document. The title documents in most legislations of the countries of the former USSR are contracts, court decisions, legal acts of executive bodies, etc. In case that a title document is declared invalid by a court, the relevant changes are also made to the state register.

At the same time, the principle of public reliability of the cadastral and mortgage registers applies in the civil legislation of European countries, which significantly increases the security of real estate transactions and protects the rights of bona fide purchasers. The content of public certainty can be defined as the principle that "third parties who

faithfully rely on the content of the register of real estate rights acquire rights even when the registration was made illegally". Nevertheless, as Chubarov rightly observes, "the principle of public reliability was not reflected in the Russian system of state registration of real estate rights" [24, 316].

We can only speculate on the causes of this phenomenon, but it is also obvious that the transition from a socialist form of legal regulation of market relations to a purely capitalist one cannot be realized in a short period of time. In the absence of a guarantee of the rights of bona fide purchasers relying on entries of the state register, not only the interests of bona fide purchasers themselves will be suffered, but also the stability of the entire civil turnover.

### Conclusion

The concept of bona fide purchasing of the property exists in both the Civil law and Common law systems. Nevertheless, its historical development differs on the basis of the legal system. It should be noted that the principle of good faith has also spread in the mixed type of legislation. This is especially true for former French colonies in North America, such as Louisiana [25].

The Roman law was based on the concept of absolute protection of property rights. The title owner could withdraw his thing from another person's illegal possession even by the use of force. The exception in protection of a bona fide purchaser can be considered as a public action lawsuit. It was aimed at protecting the bona fide owner of a thing, who was entitled to reclaim the thing on the same grounds as if he had been the title owner if he had owned the thing in good faith.

On the contrary German customary law proceeded from the idea of protecting the rights of a bona fide purchaser. The title owner was entrusted with obligation to reclaim his movable property only from the person to whom he entrusted this property. The owner had the right to claim his thing only if he dropped out of his possession against his will, in case if it was stolen, or forcibly removed.

The good faith is traditionally a key principle of the Civil law system, it can be considered as a moral and ethical principle of assessing the social relations of civil turnover

entities, or as a specific state of a person (the subjective side of behavior).

The good faith in an objective sense is described by modern authors as “honesty, honest behavior, reasonable norms of business conduct, decency, ethical norms, spirit of solidarity” etc. The good faith in a subjective sense implies a specific state and behavior of a person (“did not know and could not know”), it is in this context that it is used in the legislation of the Civil law countries.

Thus, in the Civil law the term «good faith» in its subjective sense acquires a very specific interpretation and can be separated from a common understanding of good faith as a moral and ethical category.

This interpretation of the principle of good faith can be used in the process of future reforms of the legislation of the civil law countries. The results of the presented study are also closely related to other studies in this field. Currently the value of the principle of good faith is growing not only in the civil law but also in the common law countries. All this indicates the need for further study of the principle.

In conclusion, this article has provided a comprehensive analysis of the evolution and concretization of the concept of the bona fide purchaser in the Civil law tradition. The research has shown that the concept of the bona fide purchaser is rooted in Roman law and is an important principle in both Civil law and Common law systems. The study has also highlighted how classical Roman law was modernized with the customs of Germanic tribes which led to the formation of Civil law and how the concept of the bona fide purchaser has evolved in the legislation of countries in the Civil law tradition. The results of the research have significantly deepened the understanding of the concept of the bona fide purchaser in Civil law tradition. The article is recommended for scholars and practitioners interested in the history and theory of law. It is important to note that the legal aspects of the legislation of different states in protection of the rights of titular owner versus the bona fide purchaser are different. Therefore, it is essential to study and understand the evolution of the concept of the bona fide purchaser in different legal systems.

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**Азаматтық-құқықтық дәстүрдегі адал сатып алушының эволюциясы және  
нақтылануы**

**Аңдатпа.** Мақалада өркениеттік дәстүрдегі адал сатып алушы ұғымының эволюциясы мен нақтылануын талдау міндеті қойылған. Зерттеу Рим құқығындағы адал сатып алушының мәртебесін және оның құқықтық негіздерін шолудан басталады. Содан кейін мақалада классикалық Рим құқығының герман тайпаларының әдет-ғұрыптарымен қалай модернизацияланғанын көрсету үшін мәселенің тарихы тереңдей түседі, бұл азаматтық құқықтың қалыптасуына әкелді. Соңында, мақалада өркениеттік дәстүр елдерінің заңнамасындағы адал сатып алушы ұғымының одан әрі эволюциясы сипатталған. Зерттеу адал сатып алушы мәселелерімен айналысатын неміс, ағылшын, француз, американдық және ресейлік заңгерлердің жұмыстарына негізделген. Зерттеу өркениеттік дәстүрдегі адал сатып алушы ұғымын тереңірек түсіну үшін тарихи салыстыру және жүйелік талдау әдісін қолданады. Зерттеу нәтижелері азаматтық құқық теориясын едәуір тереңдетуге мүмкіндік береді және құқық тарихы мен теориясына қызығушылық танытқан ғалымдар мен практиктерге ұсынылады. Зерттеу тарихи салыстыру және жүйелік талдау әдісіне негізделген. Зерттеу нәтижелері өркениеттік дәстүрде қолданылатын адалдықтың екі түрін ажыратуға мүмкіндік береді: объективті және субъективті мағынада.

**Түйін сөздер:** азаматтық құқық, адал сатып алушы, Рим құқығы, континенттік құқық, құқықтық дәстүр.

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### **Эволюция и конкретизация добросовестного покупателя в гражданско-правовой традиции**

**Аннотация.** В статье ставится задача проанализировать эволюцию и конкретизацию понятия добросовестного приобретателя в цивилистической традиции. Исследование начинается с обзора статуса добросовестного приобретателя в римском праве и его правовых основ. Затем в статье углубляется история вопроса, чтобы показать, как классическое римское право модернизировалось с обычаями германских племен, что привело к формированию гражданского права. Наконец, в статье описывается дальнейшая эволюция понятия добросовестного приобретателя в законодательстве стран цивилистической традиции. Исследование основано на работах немецких, английских, французских, американских и российских юристов, занимавшихся вопросами добросовестного приобретателя. В исследовании используется метод исторического сопоставления и системного анализа для более глубокого понимания понятия добросовестного приобретателя в цивилистической традиции. Результаты исследования позволяют значительно углубить теорию гражданского права и рекомендуются ученым и практикам, интересующимся историей и теорией права. Исследование основано на методе исторического сопоставления и системного анализа. Результаты исследования позволяют выделить два вида добросовестности, употребляемых в цивилистической традиции: в объективном и субъективном смысле.

**Ключевые слова:** гражданское право, добросовестный приобретатель, римское право, континентальное право, правовая традиция.

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