

THE EXECUTION OF FINAL JUDGMENTS AND VESTED RIGHTS

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*The European Court of Human Rights [hereinafter Eur. Ct. H.R.] renders declaratory judgments with which it determines that a violation of a right guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter ECHR] has occurred. A problem arises when the Eur. Ct. H.R. exceeds its remit and examines a *questio facti* or *questio juris* which falls outside the scope of the facts put forward by the parties. This usually takes place in cases in which applicants complain of the failure to enforce *res judicata* judicial decisions. Because of the excessive length of procedures before the Eur. Ct. H.R. it may occur that, during the period, a third person becomes vested with some property right in assets that is subject to execution by the Defendant State. In such types of cases it is not unusual for the Eur. Ct. H.R. to declare that i) the enforcement is either no longer possible, or ii) it would disproportionately interfere with the rights of third parties.*

This article considers the clash between the right to have a final judgment fully executed and the right to have vested rights protected. It demonstrates that the Eur. Ct. H.R. has a duty to examine, under all circumstances, whether there has been a violation of Art. 6, even if it had simultaneously determined a violation of Art. 1 of Protocol No. 1. One cannot find the ground in the ECHR's protection system which would empower the Eur. Ct. H.R. to sacrifice the guaranteed right of an individual to have a final judgment fully executed for the benefit of any third party.

Key words: enforcement of a final judicial decision; violation of Art. 6(1) ECHR; vested rights; deprivation of an acquired property position.

1. Introduction

1.1. The Protection of Judgment Claims under the System of ECHR

It is well known that the Eur. Ct. H.R. has repeatedly stated reiterates that the execution of a final judgment¹ given by any national court must be regarded as an integral part of the trial for the purposes of Art. 6(1) ECHR.² Moreover, a final judgment rendered within the realm of national law represents 'possession' in the sense of Art. 1 of 1st Additional Protocol to the ECHR.³

In principle, any failure or delay in execution of *res judicata* judgments or arbitral awards, for whatever reason, is attributable to the State party to the ECHR.^{4,5} Non-execution of a final judicial decision violates both the right to a fair trial as enshrined in Art. 6(1) of the ECHR and the right to peaceful enjoyment of possession as provided in Art. 1 of 1st Additional Protocol to the ECHR.

1.2. The Interference of the State in the Enforcement Proceedings

Because of the excessive length of the procedure before the Eur. Ct. H.R., it may happen that during that time the circumstances change in the national legal order of the Defendant State which bears responsibility for non-enforcement of a final judicial decision. This may mean that execution becomes impossible. In addition, a third person could either *bona* or *mala fidae* acquire a property right in assets subject to the execution. In such a case, further execution of the initial enforcement proceedings may interfere with the rights of third parties.

The consequences of the changed circumstances in the national legal order may be that the rights of a successful applicant in the proceedings terminated before the Eur. Ct. H.R. become impractical or even illusory. In other words, the Eur. Ct. H.R.

¹ The right to have a judgment enforced ensues from the *res judicata* principle which pertains to the realm of the right of access to a court. See among many authorities the case of *Ryabykh v. Russia*, 2003-XI Eur. Ct. H.R. ¶¶ 51, 52.

² See explicitly among others the case of *Hornsby v. Greece*, ¶ 40, no. 18357/91 (Eur. Ct. H.R., March 19, 1997). Recently the case of *Velimirović v. Montenegro*, ¶ 40, no. 20979/07 (Eur. Ct. H.R., Oct. 2, 2012); the case of *Pelipenko v. Russia*, ¶ 49, no. 69037/10 (Eur. Ct. H.R., Oct. 2, 2012).

³ See among many authorities the case of *Stran Greek Refineries and Stratis Andreadis v. Greece*, ¶ 59, no. 13427/87 (Eur. Ct. H.R., Dec. 9, 1994); the case of *Prodan v. Moldova*, ¶ 59, no. 49806/99 (Eur. Ct. H.R., May 18, 2004). More recently the case of *Adamović v. Serbia*, ¶ 40, no. 41703/06 (Eur. Ct. H.R., Oct. 2, 2012).

⁴ See for more details Ulrich Karpenstein & Franz C. Mayer, EMRK – Konvention zum Schutz der Menschenrechte und Grundfreiheiten: Kommentar, no. 96 ff. (Art. 6) (C.H. Beck 2012); Jens Mayer-Ladewig, EMRK – Europäische Menschenrechtskonvention: Handkommentar, no. 19 (Art. 1 of I Add. Protocol) (3rd ed., Nomos 2011); David Harris et al. Law of the European Convention on Human Rights 656 (3rd ed., Oxford University Press 2009).

⁵ Exceptions from the principle are to be found only in cases relating to execution of final judgments in some East-European countries. Delay in execution may be justified only in particular circumstances. However, the delay must not be as such to impair the very essence of the right. See among others the case of *Burdov v. Russia*, ¶ 35, no. 59498/00 (Eur. Ct. H.R., May 7, 2002).

may be reluctant to prevent the effects of changed circumstances on assets subject to enforcement by laying down interim measures in property cases.

The interference of the Defendant State in the enforcement proceedings takes place in different ways, especially in the 'transition' countries of Eastern Europe. Thus, it may happen that property rights in assets which are subject to execution in favour of the applicant are transferred to a third person in various proceedings, such as privatization, or restructuring. Moreover, the State may grant a third person some kind of user license, such as a building or an operating one.

These rights in assets, subject to execution and granted by a State represent, in principle, vested rights.⁶ However, they are also constitutionally protected as property rights.⁷ Although the meaning of 'vested rights' is ambiguous in legal theory,⁸ in principle, a person has a vested right to an asset which cannot be taken away by any third party, even though one may not yet possess the asset. When the right, interest, or title to the present or future possession of a legal estate can be transferred to any other party, it is termed a vested interest. The concept can arise in any number of contexts.⁹ In real estate, to vest is to create an entitlement to a privilege or a right.

In the USA and other countries of a similar legal tradition, the vested rights doctrine refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time the application is submitted.¹⁰ The doctrine was originally applied by the State Supreme Court and was done so in a different manner from the way it is applied in the majority of States, where it is invoked only when substantial development has occurred in reliance on an issued permit.¹¹ The rationale for the courts rejecting the majority approach and applying the doctrine following an application for a permit is to provide certainty and predictability in land use regulations.¹² In contrast to European legal orders, the vested rights doctrine in the USA is, according to the courts, based on 'constitutional principles of fairness and

⁶ About the meaning see among others Arthur Meier-Hayoz, IV/1 Berner Kommentar zum schweizerischen Privatrecht, no. 447 (Stämpfli 1961); Alfred Kölz, *Intertemporales Verwaltungsrecht*, 102/2(2) Zeitschrift für schweizerisches Recht 178 (1983).

⁷ Alfred Kölz, *Das wohlverworbene Recht – immer noch ein aktuelles Grundrecht?*, 1978 Schweizer Juristenzeitung 66; Kathrin Klett, *Verfassungsrechtlicher Schutz wohlverworbener Rechte bei Rechtsänderungen, anhand der bundesgerichtlichen Rechtsprechung* 10 ff. (Stämpfli 1984).

⁸ See further Horst Müller, *Der Grundsatz des wohlverworbene Rechts im internationalen Privatrecht. Geschichte und Kritik* 224 ff. (Friedrichsen, de Gruyter & Co 1935); Werner R. Wichser, *Der Begriff des wohlverworbene Rechts im internationalen Privatrecht* 1 ff. (Polygraphischer Verlag 1955).

⁹ *W.M.M. Properties, Inc. v. Cobb County*, 255 Ga. 436 (1986); *Banks County v. Chambers of Georgia, Inc.*, 264 Ga. 421 (1994).

¹⁰ *Noble Manor v. Pierce County*, 133 Wn.2d 269, 275 (1997).

¹¹ See *Hull v. Hunt*, 53 Wn.2d 125, 128–30 (1958).

¹² *West Main Assocs. Inc. v. City of Bellevue*, 106 Wn.2d 47, 51 (1986).

due process, acknowledging that development rights are valuable and protected property interests.¹³

2. The Proceedings Conducted before the Eur. Ct. H.R. and the Limitation of the Court's Authority

The task of the Eur. Ct. H.R. encompasses the determination of facts and relevant provisions of municipal law of the Defendant State which may have generated a violation of rights guaranteed by the Convention.¹⁴ According to the principle of subsidiarity¹⁵ and the so-called fourth instance doctrine,¹⁶ the Eur. Ct. H.R. is not empowered to examine the impugned judicial act on its merits. Quite to the contrary, in its declaratory judgment the Eur. Ct. H.R. only determines that a violation has occurred and declares the Defendant State responsible for such a violation.

Although the Eur. Ct. H.R. is not bound by the finding of facts at national level,¹⁷ applicants' submissions to the Eur. Ct. H.R. must rely on the facts which gave rise to an alleged violation of the rights guaranteed and which are already established by national courts. The Eur. Ct. H.R. examines these facts only for the purpose of establishing whether the impugned national judicial act complies with the ECHR. The Eur. Ct. H.R. is not entitled to deal with errors of fact or law allegedly committed by national authorities unless municipal adjudicatory bodies have decided on the merits in an arbitrary fashion.¹⁸

However, the problem arises when the Eur. Ct. H.R. exceeds its task and examines a *questio facti* or *questio juris* which falls outside the scope of both the facts put forward by the parties in their submissions to the Eur. Ct. H.R. and the facts and questions of law already judged by national adjudicatory bodies.

Such examples of fact finding made by the Eur. Ct. H.R. may be found in cases relating to the violation of Art. 6(1) of ECHR in which applicants complain of the failure to enforce *res judicata* judicial decisions. For instance, when the Eur. Ct. H.R.

¹³ *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 891 (1999).

¹⁴ Arg. ad Art. 45(2) of ECHR; Rule 47(1)(d) and (g) of the Rules of Eur. Ct. H.R. as of Sept. 1, 2012; Rule 74(1), especially items f) ff.

¹⁵ See about the meaning instead all Andreas Follesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law* (Jean Monnet Working Paper 12/11), in *Global Governance as Public Authority: Structures Contestation and Normative Change* (2011 Jean Monnet Working Papers), available at <<http://www.jeanmonnetprogram.org/papers/11/documents/JMWP12Follesdal.pdf>> (accessed Aug. 2, 2014); Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* 227 ff. (Martinus Nijhoff 2009).

¹⁶ See further about the meaning instead all David Harris et al., *supra* n. 4, at 14, 15.

¹⁷ In this sense explicitly David Harris et al., *supra* n. 4, at 14 as regards the applicability of Art. 3.

¹⁸ See, e.g., the case of *Kin-Stib and Majkić v. Serbia*, ¶ 97, no. 12312/05 (Eur. Ct. H.R., Apr. 20, 2010) and the case of *Khrabrova v. Russia*, ¶ 37, no. 18498/04 (Eur. Ct. H.R., Oct. 2, 2012). Explicitly the case of *Adamsons v. Latvia*, ¶ 118, no. 3669/03 (Eur. Ct. H.R., June 24, 2008); the case of *Nejdet Şahin and Perihan Şahin v. Turkey*, ¶ 50, no. 13279/05 (Eur. Ct. H.R., Oct. 20, 2011).

found that the violation had occurred but amended its decision by determining that: (i) the enforcement is either no longer possible,¹⁹ or (ii) it would disproportionately interfere with the rights of third parties.²⁰

The first part of the judgment is exclusively based on facts which had either been provided by the parties in the proceedings before the Eur. Ct. H.R. or on facts already determined by municipal courts. However, the second part of the judgment is exclusively based on facts and questions of law which the Eur. Ct. H.R. established *proprio motu*.

Through such a reasoning of the Eur. Ct. H.R., the successful applicant can take the small satisfaction that his case has been declared admissible and well-founded. As a result of the fact finding carried out by the Eur. Ct. H.R. and interpretation of municipal law as well, the successful applicant is left without any legal remedy which may effectively provide redress for the violation of rights guaranteed by the ECHR about which it has already complained in its application to the Eur. Ct. H.R..

In fact, if the Eur. Ct. H.R. in cases of non-enforcement of final judicial decisions examines and establishes that the non-compliance with the ECHR's norms generated both the violation of the right to fair trial and the right to peaceful enjoyment of property, then the successful applicant would be put in a radically better procedural position. In such a case, the Eur. Ct. H.R. would order the Defendant State to execute the final judicial decision by any appropriate means.²¹

3. Is There a Duty of the Eur. Ct. H.R. to Examine Violations of Art. 1 of 1st Additional Protocol to the ECHR and Art. 6(1) of the ECHR Separately?

3.1. Ordre public Character of the Right to a Fair Hearing

In some cases the Eur. Ct. H.R. did not find it necessary to examine separately the issue of whether the failure to enforce a final judicial decision also violated Art. 6(1) of the ECHR.²² In other cases the Eur. Ct. H.R. took quite the opposite view.²³

¹⁹ See, e.g., the case of *Volnykh v. Russia*, ¶ 14, no. 10856/03 (Eur. Ct. H.R., Dec. 17, 2009), impossibility of enforcement due to the fact the flat was not built at all.

²⁰ Explicitly the case of *Kin-Stib and Majkić v. Serbia*, *supra* n. 18, at ¶ 86.

²¹ See, e.g., the case of *Burdov v. Russia (No. 2)*, no. 33509/04 (Eur. Ct. H.R., Jan. 15, 2009) (items 6 and 7 of dispositive of the Judgment); the case of *Zubko and others v. Ukraine*, nos. 3955/04, 5622/04, 8538/04 and 11418/04 (Eur. Ct. H.R., Apr. 26, 2006) (item 5 of dispositive of the Judgment); the case of *Rašković and Milunović v. Serbia*, nos. 1789/07 and 28058/07 (Eur. Ct. H.R., May 31, 2011) (item 5 of dispositive of the Judgment); the case of *EVT Company v. Serbia*, no. 3102/05 (Eur. Ct. H.R., June 21, 2007) (item 3a) of dispositive of the Judgment).

²² Examples were taken only in cases in which the Court found the Republic of Serbia responsible for either delay or full non-enforcement of final judicial decisions. See, e.g., the case of *Kin-Stib and Majkić v. Serbia*, *supra* n. 18, at ¶ 86; the case of *Ilić v. Serbia*, ¶ 95, no. 30132/04 (Eur. Ct. H.R., Oct. 9, 2007).

²³ The case of *EVT Company v. Serbia*, *supra* n. 21, at ¶¶ 54, 60; the case of *Rašković and Milunović v. Serbia*, *supra* n. 21, at ¶¶ 73, 79.

However, the Eur. Ct. H.R. has until now determined no firm criteria which could serve as guidelines for both the theory and the practice as to the cases in which the non-enforcement of a final judicial decision would be examined as an issue pertaining to the scope and ambit of both norms allegedly violated. Quite to the contrary, the practice of the Eur. Ct. H.R. is ambiguous when not also arbitrary.²⁴

However, if one supposes that there is a hierarchy of rights set out in the ECHR,²⁵ then the Eur. Ct. H.R. should, consequently, primarily examine the failure of enforcement of the final judicial decision from the angle of Art. 6(1) of the Eur. Ct. H.R..

The corpus of rights to a fair hearing, as enshrined in Art. 6(1) of the Eur. Ct. H.R., is, in fact, derived from the higher principle of the rule of law being the fundamental principle of human rights, as already stressed in the Preamble to the ECHR.²⁶ The rule of law principle serves both for the foundation and the maintenance of a democratic society.

The overriding effects of the rule of law principle and its importance for the safeguarding of a democratic society were recognised by the juridical organs in Strasbourg²⁷ in the early stages of the life of the ECHR. The determination of the extent of this principle has been carried out through the identification of its inherent components necessary for achievement of the legal order based on the rule of law. Therefore, the corpus of human rights embodied in Art. 6 of the ECHR, such as the right to a proper administration of justice,²⁸ the right to a fair trial,²⁹ the right to be

²⁴ Mayer-Ladewig, *supra* n. 4, at no. 43 (Introduction).

²⁵ See in this sense Robin C.A. White & Clare Ovey, Jacobs, White, & Ovey: *The European Convention on Human Rights* 8 ff. (5th ed., Oxford University Press 2010); Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights*, 12(5) *European Journal of International Law* 921 ff. (2001).

²⁶ See sect. 4 of the Preamble of the ECHR.

²⁷ See the case of *Golder v. The United Kingdom*, ¶ 34, no. 4451/70 (Eur. Ct. H.R., Febr. 21, 1975); the case of *Klass and others v. Germany*, ¶ 55, no. 5029/71 (Eur. Ct. H.R., Sept. 6, 1978) ('One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble of the Convention . . .'); the case of *Hornsby v. Greece*, *supra* n. 2, at ¶ 40; the case of *Kostovski v. The Netherlands*, ¶ 34, no. 11454/85 (Eur. Ct. H.R., Nov. 20, 1989) ('. . . in a society governed by the rule of law the interference with, or more accurately the frustration of, the course of justice (from this situation) cannot be possibly accepted'). See also the case of *Brogan and others v. The United Kingdom*, ¶ 58, nos. 11209/84, 11234/84, 11266/84, 11386/85 (Eur. Ct. H.R., Nov. 29, 1988) ('Judicial control is implied by the rule of law, "one of fundamental principles of a democratic society . . .").

²⁸ See the case of *Windisch v. Austria*, ¶ 30, no. 12489/86 (Eur. Ct. H.R., Sept. 27, 1990) ('The right to a fair administration of justice holds so prominent place in a democratic society that it cannot be sacrificed') (with reference to the case of *Kostovski v. The Netherlands*, *supra* n. 27, at ¶ 44); the case of *Kraska v. Switzerland*, no. 13942/88 (Eur. Ct. H.R., Apr. 19, 1993) (joint dissenting opinion of Judges Ryssdal, Palm and Pekannen, ¶ 2: 'The Court has in many occasions stressed the importance of appearance in the administration of justice . . .'). See also the case of *Delcourt v. Belgium*, ¶ 25, no. 2689/65 (Eur. Ct. H.R., Jan. 17, 1970) ('In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purposes of that provision').

²⁹ The case of *Gautrin and others v. France*, ¶ 42, nos. 21257/93, 21258/93, 21259/93, 21260/93 (Eur. Ct. H.R., May 20, 1998) ('By rendering the administration of justice transparent, publicity contributes to the

tried by an independent and impartial tribunal,³⁰ the right to adversarial proceedings³¹ and even a right derived from Art. 6(1), *i.e.* the right of access to a court,³² was seen as the predominant factor in a democratic society. Thus, it has the status of a norm forming part of the public order of the Council of Europe.

In contrast, the Eur. Ct. H.R. has never made the provision which guarantees the peaceful enjoyment of property a matter of public order. Hence, taking into account the *ordre public* character of Art. 6(1) of the ECHR, the Eur. Ct. H.R. has the duty to examine, under any circumstances, whether there has been a violation of Art. 6, even if it had simultaneously determined a violation of Art. 1 of 1st Additional Protocol. Article 6(1) serves, in fact, both for the foundation and the maintenance of an objective legal order based on the rule of law.

It remains to be concluded that the principle of the rule of law requires that the Eur. Ct. H.R. examines whether there has been a violation of Art. 6(1) of the ECHR, even if it had found, prior thereto, a violation of Art. 1 of 1st Additional Protocol. Otherwise, the right to a fair hearing would be deprived of the status of a norm pertaining to the Convention's *ordre public* corpus.

In an overwhelming majority of cases, the Eur. Ct. H.R. had indeed examined whether there had been a violation of Art. 6(1) of the ECHR, in spite of the fact that it had previously found that there had been a violation of Art. 1 of 1st Additional

achievement of the aim of Article 6.1, namely "fair trial," a guarantee of which is one of the fundamental principle in any democratic society . . .'); the case of *F.C.B. v. Italy*, ¶ 35, no. 12151/86 (Eur. Ct. H.R., Aug. 28, 1991) ('. . . having regard to the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention') (with reference to the case of *Colozza v. Italy*, ¶ 32, no. 9024/80); the case of *Moreira de Azevedo v. Portugal*, ¶ 66, no. 11296/84 (Eur. Ct. H.R., Oct. 23, 1990) ('In the Court's opinion, the right to a fair trial holds so prominent place in a democratic society that there cannot be justification for interpreting Article 6 § 1 of the Convention restrictively'); the case of *Jan-Åke Andersson v. Sweden*, ¶ 24, no. 11274/85 (Eur. Ct. H.R., Oct. 29, 1991) ('. . . the right to a fair and public trial . . . is one of the fundamental principles of each democratic society . . .'). See also the case of *Deweere v. Belgium*, ¶ 44, no. 6903/75 (Eur. Ct. H.R., Febr. 27, 1980) ('. . . the prominent place held in a democratic society by the right to a fair trial . . .'). See further in that sense the case of *Campbell and Fell v. The United Kingdom*, ¶ 69, nos. 7819/77 and 7878/77 (Eur. Ct. H.R., June 28 1984).

³⁰ The case of *Gregory v. The United Kingdom*, ¶ 43, no. 22299/93 (Eur. Ct. H.R., Febr. 25, 1997) ('The Court notes at the outset that it is of fundamental importance in a democratic society that the courts confidence in the public . . . it has constantly stressed that a tribunal must be impartial . . .') (with reference to the case of *Pullar v. The United Kingdom*, ¶ 30, no. 22399/93 (Eur. Ct. H.R., June 10, 1996). See also in that sense the case of *Ferrantelli and Santangelo v. Italy*, ¶ 58, no. 19874/92 (Eur. Ct. H.R., Aug. 7, 1996).

³¹ See explicitly the case of *Nideröst-Huber v. Switzerland*, ¶ 30, no. 18990/91 (Eur. Ct. H.R., Febr. 18, 1997) ('. . . the Court attaches great importance to that objective, which does not, however, justify disregarding such a fundamental principle as the right to adversarial proceedings').

³² See the case of *F.E. v. France*, ¶ 46, no. 38212/97 (Eur. Ct. H.R., Oct. 30, 1998) ('The degree of access afforded by the national legislation must be also sufficient to secure individual's "right to court," having regard to the principle of the rule of law in a democratic society. For the right to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his right'); the case of *Deweere v. Belgium*, supra n. 29, at ¶ 49 ('Nevertheless, in a democratic society too great importance attaches to the "right to a court"').

Protocol.³³ In these cases, the Eur. Ct. H.R. regularly reiterated that the execution of final judgments given by any national court must be regarded as an integral part of the trial for the purposes of Art. 6.

3.1.1. *Some Reasons Given by the Eur. Ct. H.R. for Treating the Violations Separately*

Every violation of the rights enshrined in Art. 6(1) of the ECHR may contribute either to a complete failure or to an unjustified and intolerable delay in execution. For instance, in the case of *Kesyan v. Russia*,³⁴ the Eur. Ct. H.R. stressed that an unreasonably long delay in the enforcement of a binding judgment may breach the ECHR. To determine whether the enforcement proceedings had lasted an excessive amount of time, the Eur. Ct. H.R. relied on its usual, firmly established criteria. In this regard, the Eur. Ct. H.R. stated that the continuing non-enforcement of the judgments in the applicant's favour for seven or eight years could hardly be justified in any circumstances. Consequently, it found that there had been a violation of Art. 6(1) of the ECHR and Art. 1 of 1st Additional Protocol.

It seems that the Eur. Ct. H.R. determined the lowest threshold for State responsibility ensuing from a failure of, or delay in, the execution of final municipal judgments in the case of *Bushati and others v. Albania*.³⁵ In that case the Eur. Ct. H.R. stated expressly that the right of 'access to a court' does not impose an obligation on a State to execute every judgment of a civil character without having regard to the particular circumstances of the case. On the contrary, the State's responsibility for the enforcement of a judgment against a private person extends no further than the involvement of State bodies in the enforcement procedures. If the debtor is a private person, the State has to act diligently in order to assist a creditor in the execution of a judgment.³⁶

With regard to such an approach, the Eur. Ct. H.R. considered that its only task was to examine whether the measures taken by the authorities were adequate and sufficient.³⁷ In fact, one may suppose that the Eur. Ct. H.R. examines the violation of Art. 6(1) of the ECHR only in cases in which the Defendant State omitted to fulfill its positive obligation to meet the requirements set forth in Art. 6(1) of the ECHR.

³³ See, e.g., the case of *Svetlana Naumenko v. Ukraine*, ¶¶ 87, 194, no. 41984/98 (Eur. Ct. H.R., Nov. 9, 1994); the case of *Immobiliare Saffi v. Italy*, no. 22774/93 (Eur. Ct. H.R., July 28, 1999); the case of *Burdov v. Russia*, *supra* n. 5, at ¶¶ 34–35, 81; the case of *Assanidze v. Georgia*, ¶ 81, no. 71503/01 (Eur. Ct. H.R., Apr. 8, 2004); the case of *Jasiūnienė v. Lithuania*, ¶ 27, no. 41510/98 (Eur. Ct. H.R., March 6, 2003); the case of *Prodan v. Moldova*, *supra* n. 3, at ¶¶ 56, 61.

³⁴ *Kesyan v. Russia*, ¶¶ 59 ff., no. 36496/02 (Eur. Ct. H.R., Oct. 19, 2006).

³⁵ *Bushati and others v. Albania*, ¶¶ 80 ff., no. 6397/04 (Eur. Ct. H.R., Febr. 14, 2012).

³⁶ In that sense also the case of *Fociac v. Romania*, ¶ 70, no. 2577/02 (Eur. Ct. H.R., Febr. 3, 2005).

³⁷ See *mutatis mutandis* the case of *Yershova v. Russia*, ¶¶ 67 ff., no. 1387/04 (Eur. Ct. H.R., Apr. 8, 2010); the case of *Margushin v. Russia*, ¶¶ 31 ff., no. 11989/03 (Eur. Ct. H.R., Apr. 1, 2010).

3.1.2. *The Impossibility of the Enforcement of Judicial Decisions*

Since States parties to the ECHR bear positive obligations to organize their judicial systems to be effective both in law and practice,³⁸ no State can be exonerated from its responsibility for failure to provide an adequate and sufficient means for the execution of final judicial decisions.

The Eur. Ct. H.R. has repeated on many occasions when faced with violations of both Art. 6(1) of the ECHR and Art. 1 of 1st Additional Protocol to the ECHR,³⁹ that the State has an obligation to organize a system of enforcement of judgments that is effective both in law and in practice and that ensures their enforcement without undue delay. If the Respondent State failed to conduct the enforcement proceedings effectively, then the Respondent State had impaired the essence of the applicant's 'right to a court.'

However, in spite of such firm practice and the existence of the objective responsibility of States for non-enforcement of *res judicata* judgments, the Eur. Ct. H.R. sometimes puts emphasis on the expression 'the execution is not possible or the decision is not enforceable.'

The first case containing such wording appears to be the case of *Tacea v. Romania*,⁴⁰ where the Eur. Ct. H.R. used the phrase, 'even if the decision would have been non-enforceable.' In the case of *Kin-Stib and Majkić v. Serbia*⁴¹ the Eur. Ct. H.R. went even further and stated in its judgment that 'the enforcement . . . would no longer be possible.' It is not necessary to relate the circumstances of each case in detail because they have no impact on the possibility of the execution of final judgment being rendered in favour of the applicants. In fact, execution (retaking of the possession of a separate part of an immovable) is still possible, since the immovable involved is still present and intact.

It seems that the Eur. Ct. H.R., by examining the possibility of the enforcement of final judicial decisions, considerably exceeds its remit as regards fact-finding and the application of the substantial law which governs the national enforcement proceedings. As will be demonstrated, the final result is to deprive applicants of their right guaranteed under Art. 6 (1) of the ECHR.

The term 'non-possibility of execution of final judicial decision' used by the Eur. Ct. H.R. is unknown to any legal system.⁴² In principle, execution proceedings terminate

³⁸ See instead all Jochen A. Frowein & Wolfgang Peukert, *Europäische Menschenrechtskonvention: EMRK-Kommentar*, no. 15 (Art. 1) (3rd ed., Engel 2009); David Harris et al, *supra* n. 4, at 18.

³⁹ See, e.g., the case of *EVT Company v. Serbia*, *supra* n. 21, at ¶¶ 52 ff.; the case of *Adamović v. Serbia*, *supra* n. 3, at ¶ 39; the case of *Igor Kolyada v. Russia*, ¶ 25, no. 19097/04 (Eur. Ct. H.R., Dec. 18, 2008).

⁴⁰ *Tacea v. Romania*, ¶¶ 27, 39, no. 746/02 (Eur. Ct. H.R., Sept. 29, 2005).

⁴¹ *Kin-Stib and Majkić v. Serbia*, *supra* n. 18, at ¶ 86.

⁴² The only case in which Eur. Ct. H.R. found that the enforcement was not possible was the above cited case of *Volnykh v. Russia*, *supra* n. 19, at ¶ 14.

at the point at which and under the condition that all the creditor's claims have been duly satisfied.⁴³ Otherwise, the proceedings could only be terminated where the object on which execution should be carried out had ceased to exist due to its destruction, or due to the death of the creditor, the cessation of the claim, *etc.*⁴⁴

The arbitrarily construed formula 'the enforcement would no longer be possible' justifies in reality the Eur. Ct. H.R.'s attitude according to which there is no necessity to examine whether there has been a violation of the right to a fair hearing. Otherwise, if the Eur. Ct. H.R. examined the compliance of the conduct of national judicial authorities with the requirements laid down in Art. 6(1) of the ECHR, the Eur. Ct. H.R. would order the Respondent State to perform a full execution of any final judgment by using any appropriate means.⁴⁵ In fact, in enforcement cases the Eur. Ct. H.R. has always ordered the Respondent State to ensure, by appropriate means, the full execution of the municipal final judgments within three months from the date on which the judgment becomes final.

Hence, by introducing the term 'impossibility of enforcement' unknown to any national legal system, the Eur. Ct. H.R. itself impairs the corpus of the right to a fair trial as guaranteed in Art. 6(1) of the ECHR. It is superfluous to emphasize that the right to a court is deprived of any meaning if the Eur. Ct. H.R. honours the alleged non-possibility of enforcement of final judicial decisions. Such an attitude runs counter to the objective responsibility of States for the fulfillment of their positive obligations according to the ECHR's practice.

4. The Clash of the Right to Have a Final Judicial Decision Enforced with Vested Rights

4.1. Voluntary Assignment of Claims

A decisive problem of the execution of final judicial decisions may arise if the debtor of the national enforcement proceedings has alienated or encumbered the object subject to enforcement to a third person while the proceedings were still pending before the Eur. Ct. H.R. In such a case the Eur. Ct. H.R. may find that the enforcement 'would disproportionately interfere with the rights of third parties.'

⁴³ See especially for countries with Anglo-Saxon legal tradition Jürgen Bunge, *Zivilprozess und Zwangsvollstreckung in England und Schottland: Eine Gesamtdarstellung mit internationalem Zivilprozessrecht, einem Glossar und einer Bibliographie* 214 ff. (Duncker & Humblot 2005).

⁴⁴ See instead all Matthias Neumayr & Bettina Nunner-Krautgasser, *Executionsrecht* 141 ff. (3rd ed., Manz 2011); Zöllner *Zivilprozessordnung: Kommentar*, no. 1 (§ 775) (28th ed., Otto Schmidt 2010); Art. 68 of Serbian Law on Enforcement as of 2011.

⁴⁵ See, e.g., the case of *EVT Company v. Serbia*, Judgment of 21.06. 2007, § 54; the case of *R. Kačapor and others v. Serbia*, ¶ 120, nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06, 3046/06 (Eur. Ct. H.R., Jan. 15, 2008); the case of *Crnisanin and others v. Serbia*, ¶ 134, nos. 35835/05, 43548/05, 43569/05, 36986/06 (Eur. Ct. H.R., Jan. 13, 2009); the case of *Grisevic and others v. Serbia*, ¶ 69, nos. 16909/06, 38989/06, 39235/06 (Eur. Ct. H.R., July 21, 2009).

In the legal systems of all civilized nations the conduct of enforcement proceedings does not, in principle, affect third persons. Their proprietary situation should not be either ameliorated or worsened. In contrast, individual successors in title may be put in a different position in the enforcement proceedings, depending on their *bona* or *mala fidae* behaviour. For instance, if the Plaintiff or Defendant assigns his claim or sells the object which is the subject of dispute in the civil proceedings, then the *res judicata* effects of the judgment encompass *ratione personae* both the assignee and the new owner to whom the title has been transferred.⁴⁶ The same is to be applied in the enforcement proceedings provided that the debtor assigned assets adjudicated to the creditor. The assignee is an individual successor in title of the debtor and has to sustain the execution of assets adjudicated to the creditor.

The only exemption from the principle referred to above relates to the acquisition of property *a non domino*. Third parties are only protected in such a type of case. Assets acquired *a non domino* (*bona fidae*) cannot be subject to enforcement proceedings conducted in favour of the creditor.⁴⁷

4.2. Vested Right to Assets Subject to Execution

4.2.1. The Powers of the Court

The formula used by the Eur. Ct. H.R., *i.e.* 'the enforcement would disproportionately interfere with the rights of third parties,' gives rise to two crucial questions. First, whether the Eur. Ct. H.R., by relying thereon, goes beyond the limits of its procedural authority, that is, beyond the *limine litis*. Second, whether the Eur. Ct. H.R. acts in such a case as the fourth-appellate instance; if so, it would contravene its primary task as determined in the ECHR.

The first question is to be answered in the affirmative. If the Eur. Ct. H.R. finds that there has been a violation of Art. 1(1) of 1st Additional Protocol, it has to stay within the *limine litis*, that is, within the borderlines of submissions put forward by the parties to the proceedings. In other words, neither the applicant nor the Defendant State invites the Eur. Ct. H.R. to judge on the interference of execution with the right of third parties which is, by the way, a matter of substantive national law.

When the Eur. Ct. H.R. widely exceeds the *limine litis*, then it goes even further to the merits of the case and usurps the jurisdiction of national courts by resolving substantive issues. When the Eur. Ct. H.R. states that 'the enforcement would disproportionately interfere with the rights of third parties,' one must suppose

⁴⁶ See in that sense instead many Walter H. Rechberger & Daphne A. Simotta, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren*, no. 890 (8th ed., Manz 2010); Leo Rosenberg et al. *Zivilprozessrecht* 887 (17th ed., C.H. Beck 2010).

⁴⁷ See among many Leo Rosenberg et al., *supra* n. 46, at 937; Walther J. Habscheid, *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht. Ein Lehrbuch seiner Grundlagen* 287 (2nd ed., Helbing & Lichtenhahn 1990); Walter H. Rechberger & Daphne A. Simotta, *supra* n. 46, at no. 890.

that the Eur. Ct. H.R. implicitly resolved, prior thereto, the question as to whether a property right of a third person was acquired in accordance with the relevant applicable law.

Regardless of the fact that the category of vested rights is highly debatable in the field of conflict of laws,⁴⁸ the Eur. Ct. H.R. must have primarily determined the law which governs the acquisition of a property right with a view to examining the contents of that law in order to establish whether a right has been validly vested or not.

All these issues widely exceed the power of the Eur. Ct. H.R. as foreseen in the ECHR.

Deprivation of the right to have a final judicial act fully executed. The question at stake is whether a third party who has been vested with some property right over the assets being subject to execution be placed on an equal footing with the acquirer *a non domino*. Property rights over assets may be granted by a Defendant State in the compulsory privatization proceedings whereby either the State or a third party may act either *bona* or *mala fidae*.

In such a case, one should resolve the issue as to whether the Eur. Ct. H.R. is empowered to sacrifice the protected property right of a successful applicant protected under Art. 1 of 1st Additional Protocol in favour of a third party, especially when the property right has been vested *mala fidae*.

In principle, the Eur. Ct. H.R. may tolerate limitations on property rights in so far as it is allowed by the provisions of Art. 1 of 1st Additional Protocol.⁴⁹ No property right may be subject to limitations without an examination of the criteria laid down in sect. 2 of the above provision.

The meaning and ambit of Art. 1 of 1st Additional Protocol to the ECHR. It is well known that Art. 1 of 1st Additional Protocol consists of three rules: the first rule enounces the principle of peaceful enjoyment of property; the second covers deprivation of possessions and subjects it to certain conditions; the third recognizes that States are entitled, *inter alia*, to control the use of property in accordance with general interests.⁵⁰

Interference with the right to property must first satisfy the requirement of legality. This requirement includes, *inter alia*, that the domestic law must pursue

⁴⁸ Walter W. Cook, *Logical and Legal Bases of the Conflict of Laws*, 33 Yale L.J. 457 ff. (1924); Antoine Pillet, *La théorie générale des droits acquis*, in 8 Recueil des cours 489–538 (Académie de droit international de La Haye 1925); Horatia Muir-Watt, *Quelques remarques sur la théorie anglo-américaine des droits acquis*, 1984 Revue critique de droit international privé 425–55.

⁴⁹ See instead all Eva Reininghaus, *Eingriffe in das Eigentumsrecht nach Artikel 1 des Zusatzprotokolls zur EMRK. Eingriffe in das Recht auf Achtung des Eigentums und ihre Zulässigkeitsvoraussetzungen* 39 ff. (with further references) (Berliner Wissenschafts-Verlag 2002).

⁵⁰ See among many other authorities the case of *Sporrong & Lönnroth v. Sweden*, ¶ 61, nos. 7151/75 and 7152/75 (Eur. Ct. H.R., Sept. 23, 1982); the case of *The Holy Monasteries v. Greece*, ¶ 56, nos. 13092/87 and 13984/88 (Eur. Ct. H.R., Dec. 9, 1994).

'the legitimate aim in the general interest.' In a case in which the Eur. Ct. H.R. refrains from execution of a final judgment in order to protect the interests of third parties, the interference would be shown to be lawful either if the municipal law provides for 'non-possibility of enforcement of final judicial decisions' or mandates that final judicial decisions should not be executed for the reason of 'non-interference with the rights of third parties.' There is no law in the world which contains such provisions.

Besides, lawful interference implies proportionality. It might be argued that the principle of proportionality acquired the status of a general principle in the ECHR's system.⁵¹ In this sense, one may say that the notion of 'fair balance' pervades the whole of Art. 1 of 1st Additional Protocol. The concept serves to define the scope of limitations on the right to peaceful enjoyment of property.⁵²

A measure interfering with the peaceful enjoyment of property must be necessary in a democratic society and must be directed toward the achievement of a legitimate aim. It must strike a fair balance between the needs of the general interests of the community and the requirements of the individual's property rights. Such a balance will not be struck if the individual property owner is made to bear 'an individual and excessive burden.'⁵³

Thus, if the Eur. Ct. H.R. fails to examine whether the conditions set out in Art. 1(2) of 1st Additional Protocol are met and instead relies on no grounds based on the formula 'the enforcement . . . would disproportionately interfere with the right of third parties,' the Eur. Ct. H.R. deprives a *de facto* applicant of its property rights embodied in the final judgment.⁵⁴

In fact, the Eur. Ct. H.R. must ascertain whether the non-execution of a final judgment rendered in favour of the applicant amounts to *de facto* deprivation of the Applicant's property rights. Such a deprivation may be permitted only if it meets the following requirements:⁵⁵

- 1) the measure providing for the deprivation is in accordance with the conditions provided for by national law (*quod non*);
- 2) the general principles of international law are respected;
- 3) it is in the public interest; and
- 4) there is a fair balance between the public interest and individual rights.

⁵¹ See further Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in *The European System for the Protection of Human Rights* 146 (Ronald St.J. Macdonald et al., eds.) (Martinus Nijhoff Publishers 1993); Reininghaus, *supra* n. 49, at 159. See however Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7(3) *Int'l J. of Constitutional Law*, 3, 8 (2009).

⁵² The case of *Sporrong & Loenroth v. Sweden*, *supra* n. 50, at ¶¶ 69–74.

⁵³ Requirement set forth already in the case of *Sporrong & Loenroth v. Sweden*, *supra* n. 50, at ¶ 73; the case of *James and others v. The United Kingdom*, ¶ 50, no. 8793/79 (Eur. Ct. H.R., Febr. 21, 1986).

⁵⁴ See in that sense the case of *Sporrong & Loenroth v. Sweden*, *supra* n. 50, at ¶ 63.

⁵⁵ See further Reininghaus, *supra* n. 49, at 118–20.

A deprivation of property rights which would seek to protect the vested rights of third parties is not seen as justified at all in Art. 1(2) of 1st Additional Protocol. Moreover, an abandonment of execution of final judicial decisions for the reason of protecting the rights of third parties is unknown to any legal order in the world. Such a deprivation would be illegal inasmuch as both the Defendant State and the acquirer acted *mala fidae*, i.e. in case the rights over assets subject to enforcement were vested by disregarding the proceedings which were already pending before the Eur. Ct. H.R.

As a result, the attitude according to which 'the enforcement . . . would disproportionately interfere with the rights of third parties' completely distorts the meaning of Art. 1 of 1st Additional Protocol to the ECHR. The cited provision allows a deprivation which would be in the public interest. In contrast thereto, the Eur. Ct. H.R. honours the deprivation which is in the interest of *mala fidae* third parties.

One of the principal flaws of the Eur. Ct. H.R. is its disharmonized practice.⁵⁶ The rule of law principle does not imply '*égalité en fait*,' but requires '*égalité en droit*,' that is, the equal treatment of identical situations.⁵⁷ Under the present circumstances no applicant may rely on predictable and stable case-law solutions when it invokes a violation of its right to property embodied in a final judicial decision.

For instance, in the case of *Vlahović v. Serbia*⁵⁸ the enforcement was sought against the debtor whose assets had also been privatized. The Eur. Ct. H.R. found that the lack of enforcement of a judgment had as its consequence a violation of both Art. 6(1) of the ECHR and Art. 1 of 1st Additional Protocol.

In this regard, the Eur. Ct. H.R. stated that:

78. . . . the Court finds that the Serbian authorities have failed to take all necessary measures in order to enforce the judgment . . . There has, accordingly, been a violation of Article 6 § 1 of the Convention.

81. The Court reiterates that the failure of the State to enforce the final judgment rendered in favor of the applicant . . . constitutes an interference with his right to the peaceful enjoyment of possession, as provided in the first sentence of the first paragraph of Article 1 of Protocol No. 1 . . .

82. For the reasons set out above in respect of Article 6, the Court considers that the said interference was not justified in the specific circumstances of the present case (see *R. Kačapor and others v. Serbia*, cited above, §§ 117–120) . . . There has, accordingly, been a separate violation of Article 1 of Protocol No. 1.

⁵⁶ Cf. instead all Mayer-Ladewig, *supra* n. 4, no. 49 ff. (Introduction). In contrast thereto, non consistent and coherent practice of national judicial authorities represents a violation of Art. 6(1) of the ECHR. See among others the case of *Živić v. Serbia*, ¶ 46 (with further references), no. 37204/08 (Eur. Ct. H.R., Sept. 2011).

⁵⁷ Theodor Maunz & Günter Dürig, *Grundgesetz: Kommentar*, no. 140 (Art. 3) (65th ed., C.H. Beck 2012).

⁵⁸ *Vlahović v. Serbia*, no. 42619/04, (Eur. Ct. H.R., Dec. 16, 2008).

4.2.2. Conclusion regarding the Distorted Meaning of Art. 1 of Protocol No. 1

By introducing the idea according to which 'the enforcement ... disproportionately interferes with the rights of third parties' the Eur. Ct. H.R. completely misinterprets and distorts the meaning of Art. 1 of 1st Additional Protocol. The final consequence is the deprivation of applicants' property rights embodied in a final judicial decision.

When the Eur. Ct. H.R. examines beyond *limine litis*, whether the enforcement of final judicial decisions interferes with the rights of third parties, it departs from its firmly established practice according to which the effective exercise of rights guaranteed by Art. 1 of 1st Additional Protocol requires positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and the effective enjoyment of his possession.⁵⁹

Fulfilling the positive obligations within the ECHR's system for protection of human rights means, *inter alia*, that States have a duty to undertake any necessary legislative measures which would be suitable for the effective enjoyment of the rights and liberties guaranteed.⁶⁰

If preference is given to rights vested in third parties, it appears superfluous for the Eur. Ct. H.R. to examine which positive obligations the Defendant State had to fulfill in order to ensure the effective enjoyment of the applicant's property rights. Moreover, the wording 'the enforcement would disproportionately interfere with the right of third parties' on the basis of which the Eur. Ct. H.R. gives preference to the rights vested in third parties to the detriment of applicants makes the meaning of Art. 1 of 1st Additional Protocol pointless. In addition, it destroys the very substance of the applicants' right to the peaceful enjoyment of their property.

5. Conclusion

In some recent cases relating to the execution of final national judicial decisions the Eur. Ct. H.R. stated that enforcement was either not possible or that it interfered disproportionately with the rights of third parties. The principal reason for such an attitude relies on factual grounds. In other words, the assets subject to enforcement were vested by the Defendant State in third parties in accordance with the applicable municipal law.

In such a type of case, the Eur. Ct. H.R. has found that there has been a violation of the applicant's right to the peaceful enjoyment of property, since the applicant was deprived of the right to have his judgment claim satisfied. On the other hand, however, the Eur. Ct. H.R. has refrained from examining whether a failure of full

⁵⁹ See in this sense the case of *Öneryıldız v. Turkey*, ¶ 134, no. 48939/99, Eur. Ct. H.R., Nov. 30, 2004).

⁶⁰ See *mutatis mutandis* the case of *Bijelić v. Serbia and Montenegro*, ¶ 82, no. 11890/05 (Eur. Ct. H.R., Apr. 28, 2009).

enforcement of a final judicial decision contravenes the right to a fair hearing. Such restraint has fatal consequences for the applicant and amounts to *de facto* deprivation of his right to have the final judgment fully enforced.

Such unsound reasoning by the Eur. Ct. H.R. is based on grave procedural and substantive errors of juridical thinking. First, in a case of non-enforcement of final judicial decisions the Eur. Ct. H.R. must examine whether there has been a violation of Art. 6(1) of the ECHR, even though it had already found that a violation of the applicant's right to peaceful enjoyment of property had taken place. If it proceeds in such a way, the Eur. Ct. H.R. must order the Defendant State to execute the final judicial decision by any appropriate means.

This duty of the Eur. Ct. H.R. is based on respect for the hierarchy of norms inside the ECHR's protection system and the *ordre public* character of Art. 6(1) of the ECHR. In contrast to the right to a fair hearing, the Eur. Ct. H.R. has never treated the provision which guarantees the peaceful enjoyment of property as being a matter of public policy.

The Eur. Ct. H.R. must, in principle, remain within its remit and should not judge beyond *limine litis*. By determining that the enforcement is either not possible or that it jeopardizes disproportionately the rights of third parties, the Eur. Ct. H.R. considerably exceeds its remit as determined by the parties to the proceedings in their submissions.

In fact, the term 'non-possibility of execution of final judicial decision' used by the Eur. Ct. H.R. is unknown to any legal system. By introducing such wording, the Eur. Ct. H.R. destroys the objective responsibility of States for the fulfillment of their positive obligations. Finally, when the Eur. Ct. H.R. examines whether the enforcement is possible or impossible or whether it interferes with the rights of third parties, it acts *de facto* as a fourth-appellate instance.

From the point of view of substantive law, the Eur. Ct. H.R. resolves a dispute on its merits when it finds that 'the enforcement would disproportionately interfere with the rights of third parties.' One must, in other words, suppose that the Eur. Ct. H.R. implicitly resolved, as a preliminary matter, the question of whether a property right of a third person was acquired in accordance with the relevant applicable law.

The deprivation of property rights which aims at protecting the vested rights of third parties cannot be seen as being justified at all under Art. 1(2) of 1st Additional Protocol. Moreover, an abandonment of the execution of final judicial decisions for the reason of protecting the rights of third parties is unknown to any legal order in the world.

Such a deprivation would be illegal inasmuch as both the Defendant State and the acquirer acted *mala fidae*, i.e. in case the rights over assets subject to enforcement were vested by disregarding the proceedings which were already pending before the Eur. Ct. H.R. The ECHR's protection system does not empower the Eur. Ct. H.R. to sacrifice the guaranteed right of an individual to have a final judgment fully executed for the benefit of any third party, especially when the property right has been vested *mala fidae*.

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