On the prohibition of the agreement of forfeiture, the simulated sale for the purpose of guarantee and the trust agreement

1. – The decision of the Divisions sitting together textually confirms the previous one of the same bench, 1611/89 (1). The case decided is linear and does not offer any specificities of fact, which allows some reservations on the unequivocity and amplitude of the dictum, as Mariconda problematically suggested on the previous one (2).

The Divisions sitting together confirm here the recent orientation initiated by Court of Cassation 3800/83 and by others that followed (3) and supersede the isolated *revirement* of 8385/86 (4). They also conclude a

---

From « Il Foro italiano », 1990, p. 205 ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

The above annotates the following decision:

COURT OF CASSATION, All Divisions sitting together, 21.4.1989, no. 1907: President Brancaccio, Reporting Judge Meriggiola, Public Prosecutior E. Amatucci: Castiglione vs.. Leotta: « Both the sales for the purpose of guarantee in which the commodity is transferred in definitive property of the creditor in the case of failure to return the sum borrowed, but also sales in which the commodity is immediately transferred but with the determination clause in the hypothesis in which the vendor, by a certain date. returns to the purchaser the agreed amount are null because they are prohibited by art. 2744 Civil Code (with regard to the case in which the purchaser is the creditor and the amount has been previously paid by way of a loan). In the sales for the purpose of a guarantee, this arises due to the contract. as the transfer of the property find an objective justification in the purpose of the guarantee and the payment of the money does not represent payment of the price, but the performance of a loan, The transfer of the commodity does not reinstate the attribution to the purchaser, but the constitution of a position of unequally temporary guarantee despite appearances. The temporary nature represents a revealing element of the cause of guarantee and therefore of the diversity between the typical cause of contract and causal determination of the parties. The sale, legal in itself and not purely formal, takes on the figure of a contract in fraud of a statute (article 1344 Civil Code) ».

(1) In *Foro it.*, 1989, I, p. 1428, with sticky notes by V. MARICONDA and F. REAL MONTE.

(2) In *Foro it.*, 1989, I, p. 1429.

(3) In Foro it., 1984, I, p. 212, with note by MACARIO; in *Giur. it.*, 1984, I, 1, p. 1648. with note by DANUSSO; in *Giust. civ.*, 1983, I, p. 2953, with note by AZZARITI; in *Nuova giur. civ.*, 1985, I, p. 97, with note by Rocco,, This orientation has been confirmed by Court of Cassation 7271/83, *Foro it.*, 1984, I, p. 426; 3784/87, id., Rep. 1988, under *Patto commissorio*, no. 4; 46/88 id., 1988, I, p. 387.

(4) In *Foro it.*, 1987, I, p. 799.

lengthy dispute in that they deem compulsory the extensive interpretation of article 2744 Civil Code because it is not an exceptional rule but, on the contrary, expresses « a principle common to many institutions ».

The pronouncement has, in the case under examination, particular regard for the provisions of forfeiture which appear with regard to the so-called « occult » guarantees, as are sales for the purpose of guarantee. It confirms, unequivocally that the prohibition of the agreement of forfeiture includes both the sale for the purpose of guarantee, under suspensive condition, and those under the resolutive condition (such as sales with agreements of redemption, sale and return).

The diversity of the two contractual hypotheses as well as of the respective conditions, is justly deemed more apparent than real. In the first case, the sale (and the purchase) becomes final on the failure to return the loan; in the other, the purchase (and the sale) becomes final on the failure to return the price of redemption (which is none other than the same amount that was borrowed).

The Divisions sitting together are accurate when they underline that the two hypotheses are « expressions of the same reality ».

Their common fact is represented by their function of guaranteeing the credit until its reimbursement, which will occur alternatively with the *solutio* or with the foreseen final transfer of the commodity under guarantee.

The pronouncement correctly states that the two hypotheses are « dominated by the primary intention of guarantee » and that in both « the purpose pursued is not different ». Starting off from this preamble, the Court underlines that in these cases there is « an aware divergence between the practical purpose of guarantee, desired by the parties, and the typical cause of the sale » and this, as such, is to be deemed simulated, Here we have a correct and pertinent answer to the lengthy debate if the sale under resolutive condition (for the purpose of guarantee) is to be considered simulated (and the simulation is therefore to be deemed admissible) or whether it is real and of the fiduciary type.

If, by chance, one were to remain anchored to the contrary profile of a trust agreement, in any case the pronouncements *in obiter* of the decision would impose radically new conclusions, with regard to the very way of understanding it. Browsing through the motivation part of the decision under examination, what appear shaken from the foundations, and to be deemed utterly inadmissible is the Romanistic pattern of the trust *cum creditore*, accepted to date (5).

---

(5) G. Messina, *Negozi fiduciari*, in *Scritti giuridici*, Milan, 1948, pp. 1-32. 52-101. 105-120; C. Grassetti, in *Riv. dir. comm.*, 1936, I, p. 345; N. Lipari, *Il negozio fiduciario*, Milan, 1964, pp. 334 ff.; R. Nitti, *Negozio fiduciario*, entry in *Novissimo digesto*, Turin, 1965, XI, p. 202; V. M. Rimarchi, *Negozio fiduciario*, entry in *Enciclopedia del diritto*, Milan, 1978, XXVIII,

This concerns the part of the decision which qualifies the transfer as « causal and not abstract ». The « cause » has been – as stated – correctly identified in « the internal agreement of guarantee, desired by the parties » and not in the *fiduciae causa*, abstractedly considered, which induced devaluing the internal agreement to a simple motive (6). The ownership, the transfer of which is surmised, is here understood as « temporary » and not « full and final » as always maintained previously. In any case, an agreement of the trust type is deemed, by the Divisions sitting together, totally illegal and null, from the point of view of the fraud in statute pursuant to article 1344 Civil Code (7).

2. – let us begin to see, more perspicaciously, the phenomenon that is contemplated by the prohibition of the agreement of forfeiture.

The agreement of forfeiture can be defined as the « agreement with which the debtor allocates the definitive ownership of a commodity under guarantee to his creditor, to satisfy by compensation (in all or in part) his debt, in the event of his non-fulfilment, without any estimate of its value, on the basis of those at the time ». It can concern a debt that is taken on simultaneously with the signature (*in continenti*) or has been taken on previously (*ex intervallo*). This often recurs in the hypothesis in which the debt, which arose previously, is extended (8).

The agreement of forfeiture necessarily concerns, as stated, the asset stood in guarantee of the credit, and not any other asset of the debtor's capital. Forfeiture, in legal literature, therefore has an accessory nature compared to the constraint of guarantee and, in conclusion, the agreement from which it has arisen. This appears evident in the case in which the asset forms the object of lien, mortgage or waiver of the use of real estate (so-called visible guarantees). The conceptual distinction is, on the other hand, much less perceptible in the so-called « secret » guarantees, such as sale for the purpose of guarantee, considered by this decision (9).

It has to be said, in this respect, that in general, « the sale for the purpose of guarantee » is not evident, and all the more so the forfeiture measure is kept secret. The apparent agreement is usually represented by the

---

p. 32; G. Pugliese, in *Giur. Cass. Civ.*, 1945, II, p. 156; as well as *id.*, 1946, I, p. 87 and in *Riv. dir. civ.*, 1955, II, p. 1064. In the sense of German trust, A. De Martini, in *Giur. it.*, 1946, 1, 1, p. 321; U. Carnevali, in *Dizionario del diritto privato*, Milan, 1980, pp. 455 ff. and bibliography quoted therein. Critically, in general: S. Pugliatti, in *Riv. trim. dir. e proc. civ.*, 1950, pp. 298 ff.; M. Bianca, *Il divieto di patto commissorio*, Milan, 1957, p. 298.

(6) Grassetti, *op. cit.*, pp. 348, 353, 358-362, 363.372, 375-377.

(7) In this sense, also G. Pugliese in Giur. Cass. civ., 1946, I, pp. 87 ff.

(8) M. Bianca, in *Foro pad.*, 1958, I, p. 457, as well as *id.*, 1961, I, p. 49, and in *Riv. dir. civ.*, 1987, II, pp. 117 ff. (see also *Il divieto cit.*, pp. 79 ff).

(9) Amongst the many, Bianca, *op. ult. cit.*, pp. 114 ff.

pure and simple sale of an asset, from the debtor to the creditor. It will be the picture of the concrete circumstances in which the sale is placed, and thus the internal agreements made and the documentation of the parties that will reveal that the pure and simple sale has the nature of a simulation and the related forfeiture. This recurs clearly where the parties consider the debt subsequently alive with respect to the sale and the hypothetic compensation with the presumed price, and also calculate the further interest.

The distinction between a guarantee agreement and a forfeiture is, however, admissible in theory, in legal literature, in the hypothesis of a secret guarantee, where two agreements in a single context and not only one agreement are surmised.

The illegal nature (and not simply nullity) of the forfeiture entails the widest freedom of evidence, both oral and presumptive, between the parties, pursuant to article 1417 Civil Code. The matter concerns, as shown by this decision, both the stipulations of forfeitures under a suspensive condition, and that under a resolutive condition. In particular, it can be considered that the sale with an agreement of redemption has a nature of simulation and that under it there is a mortgage with an agreement of forfeiture. The fundamental characteristics of the forfeiture are represented:

A) by the fact that the asset destined to satisfy the debt is the one under guarantee (and not any asset of the debtor's property);

B) by the fact that the transfer takes place without any guarantee of a just evaluation of the asset, with regard to the time when it definitely becomes part of the creditor's property (10);

C) lastly, by the fact that the creditor does not purchase the asset concurrently with other possible purchasers (as theoretically takes place even in sales by auction).

These circumstances outline the danger that the creditor can be enriched to the detriment of the debtor and justify the social interest. It is also understandable why the so-called agreement of guarantee (with the connected evaluation of the asset) (11) has always been considered legal and lastly, how the so-called agreement of forfeiture is deemed null, with a compulsory effect and its conclusive epilogue (12).

3. – Let us now go on to consider the problem of principle concerning which interpretation is to be deemed preferable; this problem has been solved by the decision as favourable for the extensive interpretation.

---

(10) The intervention by Gianquinto, in the session of 4th July 1940 on articles 690 and 691 of the preliminary draft of the Civil Code is significant in this sense.

(11) U. CARNEVALI, *Patto commissorio*, entry in *Enciclopedia del diritto*, Milan, 1982, XXXII, pp. 501, ff; BIANCA, op. cit., pp. 177 ff.

(12) Amongst the many: BIANCA, op. cit., pp. 177 ff.

The question is raised, under the previous Code, with regard to the extension of the prohibition of the agreement of forfeiture from the lien to the mortgage (which was not included). The dominant legal literature (13) and the older case law of the regional courts of cassation (14) were inclined towards the extensive interpretation. The Supreme Court, after the decision of the Divisions sitting together of 28th July 1923 (15), and Brugi (16), maintained, on the contrary, the restrictive side, on the basis of the claimed exceptional nature and the prohibition of the analogy inferable from article 4 of the general provisions of the time. This dispute arose again with the new code (which extended the prohibition to the mortgage and the agreement *ex intervallo*) with regard to sales for the purpose of guarantee. The restrictive theory. accepted by less recent case law, extended the prohibition to include the sale for the purpose of guarantee under a suspensive condition, but excluded it in the case of that under a resolutive condition (17). The new orientation followed on the decision of legitimacy 3800/83 and the dominant legal literature (18) declared they were, in principle, favourable to the extensive interpretation.

Now the Divisions sitting together put an end to the dispute on this point, stating, in no uncertain terms, that the literal interpretation must be totally rejected and has no grounds.

The motivation appears totally correct. The restrictive orientation, which was mentioned, is contradictory. The restrictive interpretation could have made sense if the prohibition had been limited to the hypothesis of the lien, mortgage and the waiver of the use of real estate, in accordance with articles 1963 and 2744 Civil Code. What appears incoherent is the opinion that extends the prohibition to the unforeseen case of the sale for the purpose of guarantee, under a suspensive condition (thus practising an extensive interpretation) whilst it recurs to the restrictive interpretation to exclude that under the resolutive condition.

---

(13) G.P. CHIRONI, in *Riv. dir. comm.*., 1917, II, p. 708; E. ALBERTARIO, id., 1924, II, p. 233; E. BETTI. id., 1931. II, p. 688.

(14) Amongst the many: Cassation of Rome, 15th May 1914, Foro it., Rep. 1914, under *Mutuo*, no. 3; Cassation of Naples, 23rd February 1991, *id., Rep*. 1911, under cit. no. 6.

(15) In *Foro it.*, 1923, I, p. 935, and in *Riv. dir. comm*., 1924, II, 233, with note by ALBERTARIO.

(16) In *Riv. dir. comm*., 1929, II, p. 46.

(17) Amongst the many: Court of Cassation 6005/82, *Foro it.*, Rep. 1982, under *Patto commissorio*, no. 3; 2584/80, *id.*, Rep. 1980, entry *cit.*, no. 2; 1390/73, *id.*, Rep. 1973, entry *Vendita*, no. 80.

(18) F. CARNELUTTI, in *Riv. dir. proc.*, 1946, II, p. 156; BIANCA, *op. loc. cit.*, G. STOLFI, in *Foro pad.*, 1957, I, p. 767; DAL MAZZO, in *Riv. dir. comm.*, 1957, I, p. 80; ANDRIOLI, in *Commentario Scialoja-Branca*, Bologna-Tome, 1955, under art. 2744; and in general the commentators of Cassation 3800/83, cit.

Here we are judging by two totally different and unjustified standards. The Divisions sitting together continue to identify the *ratio* of the prohibition of the dual requirement to protect the economically weaker party against the possibility of a « moral coercion of the creditor » and on the other to protect the expectation with *par condicio* of the other creditors (19). This wording has not been considered completely satisfactory by some authors in the past (20). In actual fact, the admissibility of the agreement of guarantee shows that our legal system is concerned, in a less relative sense, with protecting, here, the *par condicio* (21). The investigation of the *ratio* must be examined in further detail. In particular, there is the problem of identifying that *ratio*, the last consequences of which are not solved in negating the freedom of the debtor and the creditor to give and receive something other than what is due, in accordance with article 1197 Civil Code, and is, on the contrary, reconcilable with this rule. Here it is a question of understanding the differential relationship between *cession in solutum*, valid in itself, and agreement of forfeiture, which, on the contrary, is invalid.

The matter deserves further attention.

It has been observed above that the forfeiture transfer only concerns the destination, to satisfy the credit, of that asset which is bound to its guarantee and not any other asset of the creditor's property. In the case under examination, the condition bound by the asset effectively limits the possibility of transferring it to third parties, at a higher price, because they are mistrustful and disincentivated from taking part in the purchase, so that this asset appears from the start destined to have, as inevitable purchaser and « at his conditions » only the creditor.

Our legal system, in these conditions, is concerned with preserving for the debtor, until the time when he has the asset (possibly even in favour of the creditor) the opportunities and possibilities to realizing that asset in an alternative way fro the third parties interested in the purchase, Our legislator does not exclude that the debtor can transfer that same asset, under art. 1197, to the creditor, but prohibits it from being used in this sense in advance or that it is transferred to the same, even as a possibility, because this would be equivalent to depriving him of contractual freedom. Freedom here is understood in the concrete meaning of making alternative choices and not in an abstract way.

---

(19) F. Carnelutti, in *Riv. dir. comm.*, 1916, II, pp. 887 ff.

(20) It has correctly been observed that, for the purposes of the agreement of forfeiture, the fact that the value of the asset is greater than the loan and that concretely the creditor is advantaged to the detriment of the debtor, who could have recourse to remedy under article 1448 Civil Code, is insignificant.

(21) The agreement of guarantee legitimises the preferential satisfaction of the individual creditor to the detriment of the *par condicio.*

The *ratio* of the prohibition can, in short, be formulated as follows: the transfer of the asset under guarantee to the creditor must be an unequivocal expression of free will and the debtor must not be deprived until the last of the possibilities to sell this asset to third parties, The creditor can become a transferee in general terms exclusively on the basis of an evaluation.

The motivation of our Divisions sitting together, in this regard, is all the more perspicacious and accurate where it justifies the legislative protection with the need to avoid the owner-debtor being « deprived on the freedom to negotiate ». In this sense, the prohibition confirms and oversees contractual freedom and the ownership of the asset.

The motivation of the Divisions sitting together also appears perspicacious where it deems the principle « common to many institutions ». In general, in our system the transfer that disregards the evaluation of the asset is not favoured. Thus, article 2798 Civil Code contemplates the assignment of the asset in lien to the creditor exclusively « according to the evaluation to be made with expertise and according to the current price, if the commodity has a market price ».

Thus, in the enforcement, the assignment of the seized asset is admitted only after the first auction has not been attended and always at a minimum value bound to the basic price of the sale, although the new auction will be held at any offer (articles 506, 538, section 2, 536, section 2, Code of Civil Procedure). Similarly the assignment of real estate is contemplated only after the negative result of the sale and at a price bound to that of the evaluation (articles 588 and 589 Civil Code). The provisions of the discipline of the transfer of assets to creditors are in the same direction. It is surmised, in Italy, only as a *pro solvendo* transfer and not *pro soluto*, where the creditors are the holders of powers of administration and liquidation (articles 1977-89 Civil Code) with the control of the debtor, who is entitled in any case to any residue (articles 1982-83 Civil Code). The right to expropriate transferred assets continues to belong to the other previous creditors, To conclude, at this point, it will be understood that our legal system prohibits any agreement or document with which the asset, the object of guarantee for the possible satisfaction of the creditor, is destined because it intends to protect the residual freedom of the owner-debtor to dispose of the asset. It will also be noticed how the circumstance that this measure is subordinate to a suspensive condition rather than to a resolutive condition is irrelevant.

4. – In the context described above, it must be recognized that the sale for the purpose of guarantee configures an excessively significant hypothesis of the prohibited agreement of forfeiture. Indeed, it removes the asset from the disposing power of the owner-debtor, transforming it into a sort of

non-technical lien of the creditor and at the same time allocates it in advance to satisfy his credit reasons. In this regard, it is of little importance that the measure is subordinate to a suspensive or resolutive condition. From a certain point of view, this latter hypothesis has more reason to be prohibited, because here the residual freedom of the debtor to dispose of the asset is still less than the other and the asset is « immediately » considered the property of the creditor and destined to satisfy his credit. In this order of ideas, it is of little importance – as stated at the beginning – that the forfeiture transfer is surmised in literature as a trust agreement, « trust *cum creditor* » instead of as a prohibited unnamed contract. No justification of validity of an agreement, which is however illegal under article 1344 Civil Code, can be inferred from any qualification as trust (understood in the Romanistic meaning rather than in the Germanic meaning and vice versa) (22). In this sense, there is no virtue in the research if the sale with an agreement of redemption, for the purpose of guarantee, actually masks a forfeiture which is prohibited under a suspensive condition (23). Both hypotheses are prohibited. Moreover, they have in common the « absence of a price », the « purpose of guarantee », whilst the definitive ownership is acquired by the creditor only following the failure to return the amount paid previously.

The Divisions sitting together rightly state that in this type of agreement, « the payment does not represent payment of the price but the enforcement of a loan. whilst the transfer of the asset id the deed of incorporation of an undeniably temporary guarantee that may evolve, depending on whether the debtor fulfils or does not return the sum received. »

From another point of view, the decisions of the Supreme Court offer the interpreter a clear diagnostic element to distinguish the forfeiture under the resolutive condition, prohibited by the law, from the sale with agreement of redemption. in itself legal and valid under article 1500 ff. Civil Code. Here it is a question of seeing whether the sale with the agreement of redemption had, or not, a purpose of guarantee, because in this case the agreement must be concluded as having a forfeiture nature and therefore its consequent unlawfulness.

3. – It is now fitting to offer a contribution with a detailed examination of the complex problems that have developed around the sale with the purpose of guarantee in the past.

The fact that this agreement, which is however qualified in literature, has been considered by our Divisions sitting together in any case as unlawful and null, takes away practically all the value from the dispute. What im-

(22) PUGLIESE, in *Giul. Cass. civ.*, 1946, II, p. 87 ff.
(23) BIANCA, in *Foro pad.*, 1958, I, p. 456.

portance can the different theoretical classification of an agreement, which is in any case unlawful, have?

However, let us see, for the sake of completeness, what is involved. The sale with the purpose of guarantee can be realized through the use of a simulated agreement of sale in order to realize, in the immediate future, a function of guarantee and therefore in the event of non-fulfilment, a definitive transfer.

Let's start to see the importance to be given to this expression « guarantee ». First of all, it must be excluded that the creditor has, from this « guarantee » a pre-emptive right with regard to the other creditors, who will continued to be able to act with enforcement on that asset, according to their right and pre-emption. That is, the creditor does not have any real right of guarantee or pre-emption, in the common meaning with regard to third parties. In itself, this guarantee does not even attribute to the creditor the power of transferring the asset, let alone satisfying his credit, except under a specific authority, with an obligation of statement of account (24). The pre-emption that the creditor may enjoy with regard to third parties is merely factual, within the limit in which they will exchange the apparent ownership for real and will abstain from attacking him *in executivis*. This depends to a great extent – as noted at the time (25) – by the secrecy of the parties with regard to this appearance. In this sense it is correct to speak of « secret guarantee ».

The guarantee contemplated in our case, in favour of the creditor, essentially addresses the debtor-owner: the intention is to prevent him from disposing of the asset, thus removing it from the right of lien (in a non-technical sense) of each creditor on each asset of the debtor, that is a general guarantee correlated with the unlimited responsibility as per article 2740 Civil Code, The aim is to remove the asset from the power of the owner-debtor to dispose to the detriment of the creditor or at least to make its realization extremely difficult.

The term « guarantee, as was observed at the time (26), is used here in the meaning of « guarantee in an economic or pre-juridical meaning » or more properly as a « precautionary measure ».

It appears to hypothesize an anomalous form of attachment of assets, rather than judicial, in pursuance of articles 1798 ff. Civil Code (27). This agreement is not to be deemed, in itself, prohibited, so far as it is restricted to foreseeing the rise of the cautionary constraint and does not also con-

---

(24) The absence of the obligation of a statement of account would transform it into an agreement of forfeiture.

(25) BIANCA, *Il divieto*, cit., pp. 114 ff, 243 ff.

(26) PUGLIATTI, *op. cit.*, pp. 306 ff.

(27) NICOLETTI in *Giust. civ.*, 1969, I, p. 1226; Court of Cassation 3252/57, *Foro it., Rep.* 1957, under *Sequestro*, no. 79.

template the transfer of the ownership of the asset to the creditor, in which the forfeiture is materialized.

This agreement appears, however, admissible in our legal system, because it does not contemplate the custody by the creditor, but only by a third party under article 1798 Civil Code.

The enactment of a bond of guarantee of this kind (in the sense of cautionary) can be achieved in the abstract through taking the asset out of the debtor's name and putting it into the creditor's name. This is the case of the use of the Germanic trust (28), coordinated with authority also in the interest of the creditor and therefore irrevocable pursuant to article 1723, section 2, Civil Code, or more generally with an accord of retention in the broadest sense (29).

The transfer of the name only (or formal ownership) of the asset from the debtor to the creditor with regard to third parties is admitted in our legal system, limitedly to securities, company shares and credit instruments by the laws of 23rd November 1939, no. 1966 and 13th April 1987 no. 148 on trust companies. In this case, the economic or substantial ownership (30) remains with the debtor. The transfer of the mere formal legitimization from the debtor to the creditor of the securities referred to above can serve a pure and simple function of guarantee. In this case, in itself, it does not come under the prohibition of the agreement of forfeiture, because its use is limited to this function of guarantee and does not extend to the transfer of the economic or substantial ownership of the asset.

If, on the contrary, this latter possibility, were to occur, there will be a very different hypothesis, and that is, a registration by way of guarantee, and the definitive transfer, i.e. an agreement of forfeiture. With regard to the securities mentioned above, this will occur not when the transfer is simply made in the shareholders' book, but when the full ownership is transferred (and also the economic ownership) by means of a contract note from the debtor to the creditor and satisfying the credit. This agreement forms a prohibited agreement of forfeiture, no different from any other hypothesis of sale with the purpose of guarantee which we will now discuss.

6. – What cannot be enacted in our legal system is the trust registration, for the purpose of guarantee, of real property from the debtor to the creditor.

---

(28) This is possible in the case of trust registrations of company shares.

(29) BETTI, *op. cit.*, p. 705, mentions a standard retention in general. It is deemed illegal out of adversity to the agreement of forfeiture, in my opinion erroneously, by W. D'AVANZO, *Ritenzione*, entry in the *Novissimo digesto*, Turin, 1969, XVI, pp. 68, 172 ff.

(30) CARNEVALI, *op. loc. cit.*, CARIOTA-FERRARA. I negozi fiduciari, Padua, 1933, p. 85. The distinction is usual in Germanic and Swiss case law, where the agreement is subject to the rules of authority and where the trust accounts are not shown in the balance sheet.

This cannot, with all the more reason, occur through an agreement that makes a trust *cum* creditor, in the Romanistic sense (31).

To say the least, these trust transfers cannot be registered on the real property because they lie outside the *numerus clausus* of the hypotheses as per article 2643 Civil Code (32) and those identifiably due to an analogous effect on the basis of article 2645 Civil Code (33).

Both, as they cannot be registered, cannot take the real property out of the name of the owner-debtor and put it in the name of the creditor. They cannot absolve a function of guarantee, even in the precautionary sense as shown above.

Even less so can they be registered in their essence as dissimulated agreements, In the past, the sale under resolutive condition (with agreement of redemption, and sale back) for the purpose of guarantee was considered as a case of trust transfer of the Romanistic type. From this point of view, the accent has been placed on the exuberance of the means with respect to the purpose, on the fact that it would be real and true and not possible to be simulated, which would give rise to an unnamed contract for an abstract cause (*fiducae causa*) where the internal agreement would represent a simple reason, essentially without importance (34). This qualification in legal literature is not, in my opinion, acceptable and the Romanistic trust itself does not appear admissible in our legal system.

The matter discussed above, moreover, is resolved in a petition of principle, where part of the unproven preambles would show that it is a sale with an agreement of effective redemption and not simulated and that it would be valid because it would produce a Romanistic trust, admissible in our legal system.

In actual fact, the opinion that simulation is contrary to the sale with the agreement of redemption is to be rejected, because any agreement can be simulated (35). Here, we have to investigate, in other terms, whether the

---

(31) Research has not revealed any trace of registrations in property registered of trust agreements or decisions in this respect. The decisions theoretically favourable to their admissibility do not go so far as to support their transcription.

(32) In this sense, amongst the many, PUGLIATTI, *op. cit.*, pp. 302 ff.

(33) G. MARICONDA, *La trascrizione*, in *Trattato* edited by RESCIGNO, 19, Turin, 1986, pp. 100 ff.

(34) In this sense and for the admissibility of the trust agreement, with the characteristics shown, in our legal system: Court of Cassation 5663/88 Foro it., 1989, I, p. 101; 56'/85, id., Rep. 1987, under *Contratto in genere*, no. 295; 6423/84, id., Rep. 1985; under *Simulazione civile*, no. 8, For the specific enforcement of the *pactum fiduciae* if Court of Cassation. all Divisions sitting together, 6478/84, id., 1985, I, p. 2325. with note by MAZZIA, We do not agree with this orientation which does not have any legislative support and – in my opinion – superseded by the decision under review.

(35) The opposite error is incurred when the lease-back is deemed to be equivalent to the agreement of forfeiture. Here, the evaluation of the purchased asset, the professional type carried

parties in their mutual relations have not wanted to buy or sell, but only to be guaranteed. An agreement between two parties, moreover, cannot lead to a real interposition, but only to a fictitious one. Clearly, it has to be excluded that a simulated agreement can produce the same effects that would derive from the same, if it were real and true. The opinion that places it in the context of a Romanistic type of trust reaches this contradictory result. However, we have to admit, with coherence, that the simulated vendor can claim the asset, his creditors can expropriate it, his possible bankruptcy assets can acquire it under pain of fraudulent bankruptcy (articles 216, section 1, no. 1 and section 3, Bankruptcy Law).

The decision of our Divisions sitting together shows that they are in this order of ideas in the part of the motivation in which it is observed that in the sale with an agreement of redemption, for the purposes of guarantee, there is an aware divergence between the primary intention of the parties and the typical cause of the sale (36). This is tantamount to stating its simulated nature.

The most valuable innovation of this decision – in my opinion – in precisely there where it liquidates the Romanistic trust in its characterizing aspects. This is in those parts which consider the transfer of the asset as causal and not abstract (or *fiduciae causa*) and the internal agreement between the parties as the cause of the agreement and not its simple reason (37). The other part also assumes importance where it is excluded that there can be a definitive transfer here of the full ownership, of the type similar to that Romanistic *mancipatio*, whilst at the most, and on the contrary, that of a temporary ownership can be surmised (38). The only trust admissible in our legal system, limitedly to the cases in which it is allowed, and with definite exclusion of real property, is in definitive that concerning formal ownership (i.e. the trust of the Germanic type).

---

out by the leasing company, the absence of a *causa credendi* do not authorize the generalization of such a conclusion. This does not exclude that there may be, with regard to specific circumstances, an agreement of forfeiture.

(36) For this poitn of view: E. BETTI, *Teoria generale del negozio giuridico*, Turin, 1943, pp. 248 ff.

(37) The trust agreement, admitted by the Swiss legal system, has been deemed causal (*causa mandati*) by the Swiss Federal Court, with the decision of 13th July 1973, which annulled that of 21st September 1971 of the Court of Lugano on the Bankruptcy proceedings of the Banca Vallugano and superseded the opposing orientation favourable to abstraction. Recently, article 30 of Legislative Decree no. 69 of 2nd March 1989, passed into Law no. 151 of 27th April 1989 was introduced in Italy, which subjects to taxation by the grantor the trust properties, registered in the name of others. This represents the last additional argument against the Romanistic trust.

(38) On temporary ownership, M. ALLARA, *La proprietà temporanea*, in *Il circolo giuridico*, 1930, pp. 69 ff.; U. NATALI, *La proprietà*, Milan, 1962, pp. 145-154; PELOSI, *La proprietà risolubile*, Milan, 1975.

7. – After this digression, let us return to the sale for the purpose of guarantee of real property.

As the property has to be taken out of the name of the owner-debtor and put in the name of the creditor, it is inevitable to have recourse to an apparent agreement that can be registered, the most usual form of which is the simulated sale. However, because it is simulated, it is destined not to produce, in theory, any effect of transfer and this the ownership remains with the seller and the creditor does not become the owner.

The simulation and the consequent absence of effects nevertheless require time to be consecrated by a final judgement; in the meantime, the owner-debtor has « his hands tied » and is not free to dispose of the asset to third parties. This situation comes into the context of the *ratio* which is at the basis of the prohibition of the agreement of forfeiture.

In addition to the precautionary situation of mere fact, for there to be an agreement of forfeiture, the parties also have to agree on a possible definitive transfer of the asset to the creditor for the satisfaction of his credit. This transfer is virtually included in the sale for the purpose of guarantee and the disposal, although possible, of the asset to the creditor must be presumed until proven otherwise. The sale « therefore masks a forfeiture » which can be proven under article 1417 Civil Code, It is in fact pre-arranged with regard to the compensation with credit, guaranteed by the cautionary registration and not to the exchange of the asset for a price. From this point of view as well, the sale, in its effective part, is apparent and dissimulates an agreement of forfeiture. What certainly cannot be hypothesized, in our case, is an indirect agreement, because it would use a simulated agreement, as a means, in view of a further purpose (39).

Drawing a conclusion, at this point, cannot fail to state that the agreement masked as a sale for the purpose of guarantee, whether subordinate to suspensive or resolutive condition, in its unitary physiognomy (i.e. absorbing the function of guarantee and of satisfying the credit) is made up of the agreement of forfeiture as per the case in point prohibited by article 2744 Civil Code and according to the *ratio* identified above.

Reference to the above is made in:

L. Barbieri, *Codice civile commentato*, Giuffrè, 1991, p. 237, p. 247 (where he disagrees with my theory of the inapplicability of trust agreements to real property); C.M. Bianca, *La vendita e la permuta*, Turin 1993, I, p. 686. note 15; G. Gitti, *Diritto del patto commissiorio ecc.*, in *Riv. trim. dir. e proc. civ.*, 1993, I, p. 461, note 9.

---

(39) The in direct agreement presupposes that the agreement-means is real and not simulated.