



What Previous Contract?: The Promise Agreement and Its Ability to Challenge the ‘Precario’ Action

¿Qué contrato previo?:

El contrato de promesa y su aptitud para enervar la acción de precario

IÑIGO DE LA MAZA GAZMURI*

BORIS LOAYZA MOSQUEIRA**

Abstract

Despite its modest appearance, paragraph 2 of article 2195 of the Civil Code has been an infallible source of conflict. What interests us in this study is the existence of a promise agreement as a defense of the occupant in the face of a “precario” action. The problem is the existence of two incompatible ideas or theories in the case law. Our objective is to show these ideas and propose a solution.

Keywords: *precario, promise agreement, protection of property.*

Resumen

A pesar de su modesta apariencia, el inciso 2° del artículo 2195 del Código Civil ha sido una infalible fuente de conflictos. El que nos interesa en este trabajo es la existencia de un contrato de promesa como defensa del ocupante frente a la acción de precario. El problema que se suscita es la presencia de dos líneas jurisprudenciales incompatibles. Nuestros objetivos consisten en mostrar dichas líneas y proponer una solución.

Palabras clave: *precario, contrato de promesa, tutela del dominio.*

I. INTRODUCTION

It has been ruled that the existence of any contract that justifies material possession by the defending party, allows the “precario” action to be challenged by virtue of the

* Universidad Diego Portales, Santiago, Chile (inigo.delamaza@udp.cl). ORCID: <https://orcid.org/0000-0001-6239-2837>. Article received on August 3rd, 2022 and accepted for publication on November 2nd, 2022. Translated by Beatriz Larraín. This study is part of the FONDECYT Regular Grant No. 1220844, entitled "Passive legitimation without prior contract, by ignorance and mere tolerance of the owner: towards the best version of the decisions of the Supreme Court in the case of the action of “precario”, of which Iñigo de la Maza is the main researcher.

** Universidad Diego Portales, Santiago, Chile (boris.loayza@mail.udp.cl). ORCID: <https://orcid.org/0000-0002-8903-3620>.

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provisions of paragraph 2 of article 2195 of the Civil Code (hereinafter, CC). It has also been ruled that only those contracts that, according to the general rules, impose on the owner the obligation to tolerate material possession by the defendant, are apt for challenging the action of “precario”. Considered individually, both decisions may be right or wrong. What cannot happen is that both are, simultaneously, correct.

Therefore, if the Court rules both ways at the same time, it has a problem and, along with it, we all have a problem also.

The first objective of this study is to show that this is precisely the situation. Most likely, the Supreme Court’s sustained practice of handing down contradictory judgments has caused a certain cynicism in this regard, as if it were a trivial thing that, in certain cases, incompatible decisions are consistently handed down. It is not. It is a practice that needs to be modified. The first step in that direction is to demonstrate the problem.¹

The second objective of this paper is to defend the correctness of one of these two theories expounded in the case law. We will therefore try to show that, notwithstanding the fact that the “precario” constitutes a jurisprudential creation, that creation must be contained in two different senses. The first of these is a certain consistency with other areas of law, specifically in this case, contract law and property law. Secondly, we must avoid what, with a certain semantic generosity, may be labelled “performative contradiction”, that is, that its praxis contradicts the reason for its creation. Thus, if the action of “precario” seeks to protect property from the supposed interstices left by the theory of registered possession, it seems contradictory to establish limits to prevent that without any justification.

The order of this article is as follows. First, the topic is introduced through its identification by another author. Secondly, it reveals the two different ideas contained in the case law of the Supreme Court and the decisions considered are identified. Thirdly, judgments are presented that instantiate the first theory or idea. Fourth, attention is paid to the decisions that account for the second theory or idea. Fifth, we give our opinion regarding how these types of cases should be adjudicated.

II. NOTHING AT ALL?

In a suggestive text on the “precario” contained in paragraph 2 of article 2195 of the Civil Code, and referring to a decision of the Supreme Court that adjudicates a case in which the title wielded by the bearer of the object was a promise agreement, Fernando Atria points out the following:²

Whoever holds real estate with a sale promise seems to have nothing at all: nothing, because the promise of sale is not a transferring title; nothing, because it would not give the right to such property even if it was a transferring title while there was no registration; nothing because it is a contract that at best would give

¹ The “precario”, as you will see, is a conspicuous example; the interruption of the statute of limitations is another. On the latter, See: *Pérez with Express de Santiago Uno S.A.* (2022), *Vargas with Marmolejo* (2016), *Postel and another with Candia and another* (2022), *National Consumer Service with Distribuidora de Industrias Nacionales S.A.* (2022). The first two understand that the statute of limitations is interrupted by the presentation of the lawsuit; the other two state that interruption occurs with notification.

² *Araya with Salazar* (2004).

the contracting parties reciprocal actions, but not an action against the successor of the promising seller who regularly bought and acquired his property by *traditio*.³

The first “nothing” is undoubtedly correct. As far as we know, no one has yet claimed that a contract of promise of sale of real estate is a transferring title. There are good reasons why no one has: the type of “to do” obligation that a promise contract involves, like the one in this case, falls on a transferring title (the sale). Therefore, recognizing the promise agreement as having this characteristic would produce something like a legally untenable pleonasm.

The second “nothing” is debatable. Atria points out that even if it were a transferring title, it would not give the owner the right to the property until the registration. There is a certain ambiguity here regarding the question of in the face of whom would there not be any property rights. Apparently, it is not with respect to third parties, since the third “nothing” refers to them.⁴ If the argument is that it does not give property rights with regards to the legitimate owner, it is wrong. It is true, naturally – under the terms of Article 1444 of the CC - the promise contract does not confer property rights, but, accidentally, of course it may. After all, by virtue of their private autonomy, the parties can accommodate contractual types by adding content not configured previously by the legislator.⁵

What the mere holder will not have while there is no registration is possession,⁶ but he will be the holder of credits against the true owner by virtue of which he may have the property.

Finally, with respect to the third “nothing”, this may be explained because he who presents a “precario” action is not the promising seller, but a third party who is a successor in his property. In this case, the promise agreement does not reach this third party with its effects. This, as will be seen, is correct, although on many occasions the Supreme Court has understood it differently.

Atria believes that, in this case, the Supreme Court made the correct decision by accepting the “precario” action (and, therefore, rejecting the argument of the squatter who justified his holding with the promise agreement), but took the wrong path in reaching said decision. The error, in Atria's opinion, is that the argument on which the Court's judgment rests is that the plaintiff was not a party to the promise contract, so we must understand that if he had been, the “precario” action would have been rejected.⁷ For Atria, then, the Court's argument is meaningless, since it is not enough to be a party to the contract, but rather it requires that it impose an obligation, which is, to tolerate the use of the thing being held.⁸

³ ATRIA (2017), p. 80.

⁴ If it is with regards to third parties, he might be right, but only in a scenario where the title was a transferring title, and it is not.

⁵ A clear demonstration of this is found in the article 1887 of the CC.

⁶ PEÑAILILLO (2019), pp. 1010-1016.

⁷ ATRIA (2017), p. 80.

⁸ ATRIA (2017), p. 81. He argues that “The argument, as seen, is entirely meaningless. The requirement of article 2195 (with regards to the “precario”) is not that the defendant have no contract with any person in

This turns out to be perfectly consistent with our system. From the logic of the law of contracts (it is not necessary to resort to property law), in this case, the promise agreement perfectly justifies possession of the thing by the mere holder against the owner who entered into the promise agreement, but not against the new owner (successor in the property of the promising seller) who, as we have seen, is not reached by its effects.

To support this conclusion, it is necessary to return to the question of the second "nothing" and remember that, naturally, the promise agreement does not oblige to deliver the object. However, the parties may agree to its delivery, by virtue of which the holding of the promising buyer is protected against the promising seller/owner under the form of the "effects of contracts".⁹ However, such a situation does not concern the new owner, who is a third party to the promise agreement.

By virtue of the promise agreement – and as long as it is in force – the promising buyer does not occupy the object without prior contract, but, precisely, by virtue of one that he signed with the owner. This contract, however, does not reach the third party who is the successor in the property rights.

Thus, the “prior contract” referred to in paragraph 2 of article 2195 is one that must impose on the owner the obligation to tolerate use of the object.¹⁰

III. THE TWO DECISIONS (AND THE OTHERS)

In Atria’s study, and with respect to the issue dealt with in the previous section, two cases are cited. In the first of these cases, dated March 8, 2005,¹¹ the action of “precario” is rejected, considering that the owner’s predecessor had sold the house to his children. Therefore, the requirement that tenure of the property be without prior contract and due to ignorance or mere tolerance of the owner would not be met.

In the second decision, dated May 18, 2004,¹² however, the reason given by the Supreme Court for upholding the “precario” action is that, although a promise contract existed, the plaintiff was not a party to it.

In our opinion, these two decisions are instances of opposing case law through which the Supreme Court has expressed itself inconsistently regarding “precario”.

According to the first line of cases, or theories, it is sufficient that there be any contract that serves, in the abstract – that is, not necessarily with respect to the owner, according to the general rules – to justify tenure. According to the second line or theory of cases, it is not

relation to the thing, but that he not be bound to the plaintiff by a contract imposing on him the obligation to tolerate the use of said thing. The fact that the defendant has a contract with a third party that is unenforceable with regards to the current owner, cannot, obviously, justify the rejection of the “precario” action".

⁹ See cases: *Bustamante with Soto* (2013), *Inostroza with Meyer* (2013), *Leiva with Hernández* (2020), *Income and Investments Ainoha Limited with Sociedad Maderera Forestal e Industrial Curanco Limited* (2016), *Osses Díaz with Zúñiga Ávila* (2015), *Vergara with General* (2016). In a similar sense RAMOS (1997), p. 12; LARROUCAU & ROSTION (2013), p. 74.

¹⁰ ATRIA (2017), p. 81.

¹¹ *Zúñiga Godoy and others with Villavicencio Mondaca* (2005).

¹² *Araya with Salazar* (2004).

sufficient that there is a contract in the abstract, but it is necessary that, in particular, that contract limits, according to the general rules, the right of ownership of the person exercising the action by imposing on him tolerance of material possession by the defendant.

Before presenting and examining both lines or theories developed in the case-law, some comments seem appropriate.

In the first place, as doctrine has suggested, the “precario” action of article 2195 paragraph 2° is a judicial creation.¹³ Therefore, to consider its situation it seems essential to pay attention to the judgments of the Supreme Court. The detail, however, is that, as we will see, when we pay attention to these cases we will discover that they not only reach different conclusions, but irreconcilable ones.

In this way, even though it is necessary to consider the rulings of the Supreme Court, in doing so we discover that they establish two incompatible meanings for paragraph 2 of article 2195 when the legal precedent invoked by the occupant is a promise agreement. It is for this reason that an attempt to rationalize the figure must also be made in order to evaluate the correctness or incorrectness of the decisions.

In second place, this study refers to one of the arguments through which, with some frequency, attempts are made to undermine the “precario” action: the existence of a contract that justifies the material holding by the defendant. It is not the only argument, although a very frequent one.¹⁴

In the third place, taking into account that one of the two objectives of this study is to show the existence of two different lines of case law with regards to “precario”, it is important to give some background regarding the judgments taken into account.

We considered a set of 437 Supreme Court rulings that, between 2005 and 2022, dealt with “precario” actions.¹⁵ Of these, 344 refer to the problem of legitimacy of the defendant to hold the property, that is, the requirement that the occupant's possession not have a “prior contract” and “through ignorance or mere tolerance”.

From reading these decisions, it is possible to distinguish two large groups of justifications by which the defendant seeks to legitimize occupation of the property: extra-patrimonial and patrimonial. Among the former, marriage, de facto relationships and kinship ties stand out.

¹³ SELMAN (2018), p. 342; ROSTION (2013), p. 193; DOMINGUEZ (1992), p. 211.

¹⁴ An examination of the decisions handed down shows that the problem of legitimacy is, at least quantitatively, the most important one. Thus, from a group of 437 judgments handed down by the Supreme Court, in 344 of them, the legitimacy of the defendant was discussed. In this same sense, ORREGO (2016), p. 334.

¹⁵ Between 2005 and 2022 1203 rulings can be found whose central conflict is the “precario” of paragraph 2 of article 2195. However, not all of them refer to substantive issues, the vast majority is limited to solving procedural issues, such as, manifest lack of foundation of the appeal or the impossibility of modifying the facts established by the lower courts. Such cases were not considered for the purposes of this study. Thus, the search was carried out on the website of the Judiciary, later corroborated with the “Jurisprudential Search Engine of the Supreme Court”, available at: <https://juris.pjud.cl/busqueda>.

Regarding the second group, we find cases in which the defendant alleges the existence of a certain real right to the property (usufruct, use or habitation or easement) or the existence of a certain contract.

This second situation – the existence of a contract – is the most frequent one. We found 189 cases. The contracts mostly used were: lease (57 cases), promise agreement (47 cases), sale (38 cases), loan (24 cases), assignment of rights (11 cases). However, the employment, mandate, exchange, donation, transaction, mediage and supply contract were also invoked.

Finally, in this study, as we have pointed out, we will focus on the promise agreement, because in addition to being one of the contracts that is most frequently invoked by the defendants, it is where, in our opinion, the two theories in the case law mentioned may be seen more clearly. The lease and sale have other angles that will be the subject of a future study.

IV. THE THEORIES IN CASE-LAW

As noted, the most relevant problem – at least quantitatively – presented by the “precario” of paragraph 2 of article 2195 CC is the legitimacy of the defendant. In other words, what the Supreme Court seeks to answer is a semantic question: what do the expressions "without prior contract" and "by ignorance or mere tolerance of the owner" mean?

It is in this context that the two ideas or theories of the case law which we have mentioned are presented, since, in a way, both seek to give meaning to the expression "without prior contract" and "by ignorance or mere tolerance of the owner", albeit in an incompatible way.

4.1 Any Contract: The First Theory in Case Law

We will call this first theory “immanent” or “abstract”.

The reason for this is that the way in which meaning is given to the expressions "without prior contract" and "by ignorance or mere tolerance of the owner" of paragraph 2 of article 2195, arises from the same concepts, as if the terms had a meaning of their own, decontextualized from the general rules, both from contract and property law, that is, it works by abstracting from them.

Indeed, if one pays attention to the decisions, one may discover that, for this theory, the existence of a contract is sufficient, that is, any contract that serves, in the abstract – that is, not necessarily with respect to the owner, according to the general rules – to justify possession of the property. In other words, it would be sufficient for the defendant to invoke the existence of a contract, even if the person seeking to recover the property is not affected by its effects or has not participated in it, to counter the action of “precario”. There would thus be an immanent meaning of the expressions which, as we have said, functions in disregard of the general rules.

We found 18 decisions that use this theory. The cases they decide have structural similarities. In all of them the situation may be described as follows: the plaintiff is the

registered possessor (if not owner) who does not materially hold the property. The defendant, on the other hand, is occupying the property, and does not dispute the plaintiff's right in rem of ownership, but alleges the existence of a promise agreement to justify occupation.

The first case which expounds this idea is dated September 9, 2009.¹⁶ In it, the plaintiff, who is the owner of the property presents a "precario" action against the defendant, who alleges the existence of a promise agreement entered into with the previous owner.

The Supreme Court, hearing the appeal for cassation filed against the judgment of the lower court, who rejected the "precario" claim, held the following:

5°.- That in the judgment in question, the lower court judges have concluded that it has been proven that the plaintiff owns the property which is materially occupied by the defendant. The latter has also demonstrated the existence of a title, consisting of a promise agreement signed with the previous owner of the property, which justifies possession and is apt for releasing the defendant from being in a "precario" situation;

6°.- That, in accordance with the aforementioned, it is observed that the sentencers, when rejecting the claim of "precario", have made a correct application of the regulations pertaining to the case in question, since the "precario" supposes a total disconnection of the defendant with the property he occupies, which does not happen in this case, for having entered into a promise agreement with the previous owner.

A second example can be found in the judgment dated June 1, 2016.¹⁷ In brief, the facts are as follows: on December 17, 1984, the plaintiff, owner of the property, entered into a promise of sale agreement with the defendant's aunt, who paid the agreed upon price completely. Then, the promising buyer died and it is her nephew who, due to kinship and with her consent, continued to occupy the property which is the object of the trial.

The lower court rejected the action of "precario", arguing that the defendant did not occupy the property by mere ignorance or tolerance of the owner, as the latter knew of the existence of the sale promise agreement, which he entered into with a third party.

In this regard, the Supreme Court held:

Fifth: That article 2195 of the Civil Code, in its second paragraph, states that the "precario" is configured without prior contract and by ignorance or mere tolerance of the owner, which implies the copulative concurrence of the absence of a title on the one hand, and tolerance or ignorance on the other. In turn, the title authorized to enervate the action of "precario" must refer to the possession of the property, which happens in the present case, since the contract signed by

¹⁶ *Pizarro with Ale* (2009). In the same sense: *Kings with Espinoza* (2015), *Income and Investments Ainoha Limited with Sociedad Maderera Forestal e Industrial Curanco Limited* (2016), *Bustos with Quiroz* (2020), *Navarro with Barrera* (2020), *Oria with Guajardo* (2017).

¹⁷ *Bezemer with Paisil* (2016). In a similar sense: *Espinoza with Jorquera* (2020). For ORREGO (2016), p. 350, instead in a case like this "the promise agreement is effective against the plaintiff, since he was a party to it, even when the defendant and current holder of the property, in turn, has not been a party to it".

the plaintiff with Ms. (...), who is related to the defendant, justifies the possession of the property, concluding in the existence of a fair title.

A third example of this trend can be found in the decision dated March 3, 2020.¹⁸ In it, the plaintiff, owner of the property by virtue of a sales contract entered into with the previous owner of the property dated April 5, 2018, files a “precario” action against the defendant, who, in turn, entered into a promise of sale agreement with the previous owner, dated November 29, 2000.

The Supreme Court noted:

Fourth: That, in the same sense, we must recall, as this Court has repeatedly pointed out, that the legal figure of the “precario” is strictly a question of fact, and that the legal consequence that the law provides, may be challenged in case the holder proves the existence of a serious or apparently serious justification for occupying the property object of litigation which works in his favor, whether it links the current owner with the occupant or the latter with the thing, even if it is apparently not owned by him. By virtue of this, it is possible to maintain that the title referred to in paragraph 2 of article 2195 aforementioned, allows for a certain legal situation that rules out that occupation is simply suffered or supported by its current owner, and not one that is originated in him or that complies with the rituality applicable and therefore is sufficient to destroy the argument that the origin of the occupation of the thing is based on a factual situation exclusively supported by the owner who demands to recover it (this is maintained in the judgments issued in processes number 8.054-17, 11.720-17, 34.172-17, 37.898-17 and 10.323-17 of this Court).

Consequently, having it been established that the defendant occupies the property by virtue of a promise agreement entered into with the person who sold the property to the plaintiff and that he began possession authorized by the contract itself, we must necessarily conclude that possession of the property that is the object of the trial is nor due to mere tolerance, but is provided with justification by reason of those acts that, as per the above, are sufficient to conclude that one is not in the presence of a “precario”.

A fourth example is found in the decision dated September 4, 2014,¹⁹ case in which the promise agreement invoked was signed in 2002, by the previous owner of the property and not by the plaintiff. The Supreme Court noted the following:

Third: That from the words of the action by which the appeal under study is filed, we may conclude that the appellant considers that the trial judges contravened article 2195 paragraph 2 of the Civil Code, according to which, the “precario” consists of the possession of foreign property, without prior contract and by ignorance or mere tolerance of the owner. However, the plaintiff does not assume in the appeal, that in the present case the lower court established on the merits

¹⁸ *Rivera with Soto* (2020). In a similar sense: *Limited Urban Window with Cabrera Riffo* (2019), *Torres with Lagos* (2020), *Gutierrez and others with Zurita* (2017).

¹⁹ *Moreira with Jara* (2014). In a similar sense: *Fiedler with Vea* (2009), *Vergara with General* (2016).

that, despite having proven the plaintiff's property and the defendant's occupation, the existence of an enforceable title against the plaintiff was verified – the existence of the promise of sale agreement signed by her predecessor and the defendant, by virtue of which occupation of the property whose restitution is requested began. In view of the foregoing, it is clear that in this case the requirements of the decision-making rule alleged to have been infringed are not met, since the defendant's possession does not have its origin in mere ignorance or tolerance of the plaintiff, but rather, in a contractual relationship that, regardless of its legal scope, allowed him to begin to occupy the property that is the object of the trial, which is incompatible with the factual situation in which the “precario” consists. In this context, the alleged infringement of the other legal norms denounced is also unfounded, since the alleged legal contraventions rest on the same fact that has been proven, that is, that the occupation of the defendant is legitimized by a prior contractual link”.

A final example is found in the judgment dated November 28, 2019.²⁰ The facts are as follows: the plaintiffs are registered owners of real estate, which they acquired by *traditio*, by virtue of a sale contract signed in 2016 with the previous owner. The latter, on May 26, 1982, entered into a promise agreement with the defendant's father, by which he promised to sell the property, agreeing on a price of \$500,000, which was paid in full. Then, the promising buyer went on to occupy the property, authorizing his son to occupy it as well.

Faced with this situation, the Supreme Court held:

Fifth: That we must remember, as this Court has repeatedly pointed out, that the legal figure of “precario” is strictly a question of fact, and that the legal consequences that the law provides for is challenged in the event that the holder proves that he has some justification in his favor to occupy the object of litigation, justification which must be serious or apparently serious, whether it links the current owner with the occupant or the latter with the property, even if it is apparently foreign. By virtue of this, it is possible to maintain that the title referred to in paragraph 2 of article 2195 of the aforementioned code corresponds to one that allows verification of the presence of a certain legal situation that rules out that occupation of the property is simply suffered or borne by its current owner, and which does not come from him or that it is one that complies with the ritual that is applicable and is therefore sufficient to prove that the origin of the occupation is based on a factual situation exclusively borne by the owner who demands to recover it (this is maintained in the judgments issued in cases number 8.054-17, 11.720-17, 34.172-17, 37.898-17 and 42.625-2017).

(...)

Seventh: That, consequently, it is necessary to elucidate the meaning and scope of the expression 'without prior contract'. We may point out that although the law defines what a contract is in article 1438 of the Civil Code as the 'act by which a party is obliged with another to give, do, or not do something', in the species it must be given a broader meaning, and must be understood as 'title', that is, a legal antecedent to which the law recognizes the virtue of justifying the occupation.

²⁰ *Pino and other with Parada* (2019). In a similar sense: *Bravo with Manzo* (2017), *Olivares and others with Lagos* (2018).

Eighth: That, in accordance with the aforementioned, we may conclude that the title referred to in the sixth paragraph of the decision, is sufficient to reject the “precario”, since it is an institution intended to regulate purely factual situations and, consequently, is not the way to obtain restitution of the property.

The cases cited in connection with this first line theory of case law show that, in the opinion of the Court, a promise agreement, even if the person exercising the “precario” action has not participated in it or, according to the general rules, cannot be reached by its effects,²¹ would suffice to undermine the “precario” action, leaving the owner without defense.

4.2 Not Just Any Contract: The Second Line or Theory of Case Law

The second line will be called, “reflexive” or “concrete”, since, unlike the “immanent” one, the sense of the expressions “without prior contract” and “by ignorance or mere tolerance of the owner” should not be sought in the same concepts, but outside of them. In other words, the meaning of the terms is sought elsewhere: reflexively, in the general rules of contract and property law. That is why the analysis must look to, in the light of the rules on ownership and contracts, the particularities of the antecedent presented by the holder, hence its concrete character.

In this way, this line of case law seeks to give meaning to the expressions of paragraph 2 of article 2195 of the CC through a contextual interpretation of the general rules, reflecting the meaning of these. Thus, the existence of a contract in abstract is not enough, but it is necessary that the contract particularly limits, according to the general rules, the right of ownership – *ex* article 582 of the CC – of whom exercises the “precario” action, imposing on him the obligation to tolerate the use that the defendant makes of the property.

In this same sense we find 25 cases.

Again, it is worth bearing in mind the same as above, that is, that the structure of all the cases is very similar.

A first example may be found in the judgment dated November 12, 2009.²² The plaintiff proved ownership of the property but the defendant failed to prove that her tenure was covered by a contract, since the promise agreement invoked by her –entered into with the brother of the plaintiff’s spouse, for which \$ 1,000,000 was paid – was declared resolved in a different trial. Accordingly, the Supreme Court noted:

Sixth: (...) That it follows from the foregoing that an inherent element of the “precario” is that it is a simple factual situation, that is, the absolute and total absence of any legal link between the owner and the holder of the thing, a possession merely suffered, allowed, tolerated or ignored, without foundation, support or legally relevant title. Consequently, the object sought with the action

²¹ An exception could be the decision of 1 June 2016 cited above, in which the defendant is the nephew of the person who had signed the promise agreement on his property. However, the decision does not indicate that he is an heir.

²² *Lavoz with Lara* (2009). In a similar sense: *Estay with Becerra* (2009), *Illanes with Arellano* (2014).

of “precario”, that is, the restitution or return of a movable or immovable object, finds its justification in the absolute lack of legal link between the one who has or occupies the property and its owner or between the former and the property itself;

Seventh: That the title wielded by the defendants to justify their occupation is a private contract of promise of sale signed on February 20, 2007, between Ms. Romina Elisabett Llanquimán Lara and Mr. Emilio Ortiz Muñoz, who acts as 'unofficial agent and by impediment of his brother' Arturo Ortiz Muñoz, contract that was declared resolved by sentence dated July 29, 2008, which was initiated by a lawsuit presented by Mr. Ricardo Morales Guarda, lawyer, representing Ms. Romina Elisabett Llanquimán Lara, which ultimately led the judges to conclude that the plaintiff, registered owner of the property, was not forced to tolerate said occupation. Therefore, the absence of a link between the applicant and the defendants is indisputable.

A second case is found in the decision dated March 17, 2011.²³ The facts are as follows: the plaintiff owned real estate that was the object of the trial, which is occupied by the defendant. Both signed, on June 23, 1994, a promise of sale agreement, stipulating that material delivery of the property would be made on the day on which the respective mortgage loan was taken and 75% of the value of the property was paid. The final contract was never signed.

For its part, the Supreme Court stated:

Ninth: That on the basis of the facts described in the second point of this sentence, the appeal judges confirmed the judgment of first instance, which decided to accept the “precario” action, based on the fact that, on the one hand, the plaintiff's property of the land which was the object of litigation was proven, as well as its occupation by the defendant.

Finally, it was established that the defendant occupies the property by mere tolerance of the plaintiff, even though he invoked a title that would enable him to occupy the property, a promise agreement of sale signed between the parties on June 23, 1994. The trial judge established that if delivery to the promising buyer of the property which is the object of the promised contract took place, it was subject to the event that the promised contract would be signed once the condition had been verified or the agreed term had arrived, which does not constitute a permanent title of tenure and does not authorize him to remain in it forever, since the modalities of the promise contract signed by the parties were not fulfilled.

A third example emerges from the decision dated March 25, 2013.²⁴ In this case, the plaintiffs own the property that is the object of the trial; the defendant occupies it, after signing, on December 7, 2006, a promise agreement with the previous owner of the real

²³ *Thompson with Melo* (2011). In a similar sense: *Inmobiliaria Geosalt S.A with Valenzuela Vallejos* (2015), *Inmobiliaria Valle La Dehesa S.A. with Moreno Pizarro* (2015), *Mejía with Servicios Hoteleros* (2016), *Rojas with Muñoz* (2016), *Transito with Carrion* (2017).

²⁴ *Bustamante with Soto* (2013). In a similar sense: *Alfaro with Nahuelcura* (2007), *Inostroza with Meyer* (2013), *Readerch with Umaña* (2009), *Bank of Chile with Garrido Araya* (2009), *Inmobiliaria Guayquirai S.A. with Tacchini Villalobos* (2010), *Díaz with Ferrada* (2013).

estate, who authorized them to occupy the property. Finally, there was no contract of any kind between the parties to the dispute.

The Supreme Court held:

Tenth: That with regard to the promise of sale agreement, whose qualification justly attracts the objection of nullity by the appellant, there is no doubt that it is an appropriate title with the necessary force to challenge the “precario” action when it comes from the current owner and plaintiff, who, in his capacity as promising seller and, consequently, under a 'prior contract', voluntarily handed over the property to the promising buyer and current occupant.

However, the situation is different when the promise of sale emanates from the previous owner of the property since, in this case, this instrument, considered as such, does not constitute sufficient title that can be invoked with respect to the current owner, precisely because of the relative effect of contracts, which prevents making them enforceable against those who are not parties to them. What is at issue has full binding effect on the parties and does not extend to third parties, it is *res inter alias* for the acquirer. In other words, this title per se is not opposable to the registered owner of the property, that is, it does not concern him, not because it does not emanate from him, but because it does not bind the owner, in such a way that he is not obligated to tolerate occupation and, therefore, the law protects him in his right to rescue possession of the property, in order to fully exercise the attributes that he recognizes to property. Such a contract, by its nature, is not capable of conferring on the promising purchaser the material possession of the thing promised, since it only imposes on the contracting parties the obligation to grant the promised contract, that is to say, it allows actions to be presented against those who concurred with their will to its signature, which is obviously alien to the plaintiff and, therefore does not establish any contractual relationship between the parties to a dispute such as that in the present case;

Eleventh: How different is the situation that occurs when the promising seller, even a predecessor of the current owner, has proceeded to or authorized provisional delivery, either verbally or through a contractual clause contemplated in the respective preparatory contract, so that the promising buyer has the promised property, in which case the promise of sale does not constitute the true basis of possession, but that authorization or voluntary delivery given by the promising seller, which confers the title of mere possession to the occupant. Given the hypothesis described, the “precario” action must be rejected.

A fourth case is found in the case dated April 16, 2015.²⁵ In this case, the defendant invoked a promise contract signed on July 12, 1993 with the predecessor in ownership of the property, by which the property was delivered to the defendant, who, in turn, paid a significant part of the price. For its part, it was established that the applicant is the registered owner of the property, which it acquired by a sale in 2013 with a third party who, in turn, acquired it from the promising seller.

²⁵ *Osses Díaz with Zúñiga Ávila* (2015). In a similar sense: *Sanguinetti with Van Dyck* (2015), *Toledo with Cortés* (2016), *Macaya with Valeria* (2016), *Ramírez with Arangua* (2017), *Inversiones Herbage Clan Spa with Muñoz Romero* (2017), *Cornejo with Moya* (2015), *Velarde and Tobar with Neculhueque and Urzúa* (2022).

The Supreme Court, hearing an appeal in cassation filed against the judgment of the Court of Appeals of San Miguel, which confirmed the judgment of the trial court that rejected the legal action, indicated the following:

Ninth: That, in accordance with this reflection, we may conclude that the title consisting of a sale promise agreement entered into between one of the predecessors in the property and the current occupant is opposable to the owner of the property, even though we may consider that it only generates personal rights between the promising seller and the promising buyer, in this specific case, delivery of the property has occurred and the aforementioned promise contract was registered in the relevant registry prior to the sale contract signed by the applicant. In this context, the plaintiff is in the legal position of respecting the tenure that derives from the title invoked, not only because an ancestor in the domain contributed to the generation of the title, but also because occupation of the defendant was known to her, which makes inconcurrent the necessary condition that must be linked to the absence of title, that is, ignorance or mere tolerance of the owner.

Finally, a fifth example is found in judgment dated January 3, 2020.²⁶ The facts are, in summary, as follows: the plaintiff is the registered owner of real estate at issue, which she acquired by *traditio*, by virtue of adjudication, on 29 November, 1998. The defendant, for his part, currently occupies the property. On February 25, 2002, both entered into a contract of promise of sale, stipulating, on that occasion, that the property would be delivered to the promising buyer on March 15, 2002.

The Supreme Court stated:

Sixth: That, as stated, it was considered proven as a fact that the defendant occupies the property claimed since March 15, 2002, by virtue of a promise agreement of sale entered into with the plaintiff with respect to the real estate that is the object of the trial, so that entering into the property was the consequence of a legal link with its owner.

Seventh: In this way, we may conclude that possession or occupation of the property by the defendant does not derive from 'a permissive attitude, of compromise, acquiescence or condescension of the plaintiff, but from a previous contractual relationship, a title that, in the opinion of this Court, and because the "precario" is a question of fact, is sufficient to justify occupation, since in the merely factual realm he occupies the property not by ignorance or by mere tolerance of the current owner, but with a legally relevant cause, so that the presuppositions of the aforementioned article 2195 of the Civil Code are not configured, in such a way that the "precario" action is not a suitable action to claim restitution of the property.

The decisions we have presented show that, the Court occasionally has understood that not just any contract suffices, but that one which imposes on the owner, according to the general rules, a duty to tolerate possession carried out by the defendant.

²⁶ *Leiva with Hernández* (2020).

V. FROM MERE FACTICITY TO RELATIONS OF HARMONIOUS COEXISTENCE

A look at the cases considered and those simply mentioned in this study shows that, frequently, the courts characterize the “precario” of paragraph 2 of article 2195 as a strictly factual issue²⁷ or a strictly factual situation.²⁸ In our opinion, this is an unfortunate way of characterizing it.

It is unfortunate because it seems to indicate that any precedent that can be qualified as legal is sufficient to enervate the “precario” action. We believe that this is not the case, since even if there is something more than mere facticity, that is, even if there is or was some legal precedent that, at some point, justified the material possession of the occupant at the time when the court hears the “precario” case, it must require certain qualifications of that antecedent.

First of all, its validity.²⁹ In the case of other defenses – notably marriage – the characterization of “precario” as a strictly factual situation has sometimes led the Supreme Court to consider that a marriage dissolved by a final divorce decree or death of one of the spouses is sufficient to undermine the “precario” action.³⁰ Our search for the promise agreement yielded no judgments to this effect. On the contrary, on all occasions that the promise contract has lost its effectiveness, the Court has considered that its invocation is not sufficient to challenge the “precario” action.

Thus, for example, the judgment dated July 9, 2015.³¹ In this case, it was established that the plaintiff owned the property claimed for restitution, which is being occupied by the defendant by virtue of a promise of sale signed with the previous owner. However, in an arbitral trial the impossibility of fulfilling the promise was declared, so that the contract was considered ineffective. Faced with this situation, the Supreme Court stated:

4°.- With the factual background, the judges considered on the merits that the title invoked had lost effectiveness, ceasing to be opposable to the plaintiff, which led them to accept the action;

5°.- The violation of the law which has been invoked revolves around the effectiveness of the alleged title to justify occupation of the property, which according to the challenger discards the mere tolerance on which the claim is based, all the more so if we consider that the plaintiff had knowledge of the defendant’s presence;

6°.- The second paragraph of article 2195 of the Civil Code requires for the “precario” action the absence of legal justification of the occupation, so that it

²⁷ *Reyes con Espinoza* (2015), *Inmobiliaria e Inversiones Ainoha Limited with Sociedad Maderera Forestal e Industrial Curanco Limited* (2016), *Bravo with Manzo* (2017), *Gutierrez and others with Zúrita* (2017).

²⁸ *Inmobiliaria Geosalt S.A with Valenzuela Vallejos* (2015), *Lavoz with Lara* (2009), *Illanes with Arellano* (2014), *Vergara with General* (2016).

²⁹ RAMOS (1987), pp. 14-15. In a case where a mandate contract is invoked, *ROSTION* (2013), p. 63.

³⁰ In the case of divorce the case *Lincopi with Reyes may be consulted* (2017). With regards to the death of one of the spouses: *García with Sepúlveda* (2017).

³¹ *Inversiones el Proyecto Ltda. with Bosco Masjuan* (2016). In a similar sense: *Thompson with Melo* (2011), *Lavoz with Lara* (2009).

responds only to the ignorance or mere tolerance of the owner, which implies the copulative concurrence of the absence of title, on the one hand, and tolerance or ignorance, on the other.

This requires a title enabled to challenge the action, which in the species does not happen, given the merit of the aforementioned final judgment.

Here is a first qualification. The situation need not be strictly *de facto*. It may be that the occupant, originally, occupied the property by virtue of a legal precedent that legitimized it, the effectiveness of which has been lost. The reason should be perfectly obvious: once the antecedent loses effectiveness, occupation is only explained by ignorance or tolerance of the owner.

The second qualification assumes that, at the time when the “precario” action is exercised, there is a legal precedent (the promise contract), which has not lost its effectiveness. But that is not enough. It is necessary that, according to the general rules, by virtue of this precedent, the owner must tolerate occupation.³²

To further develop this idea, it should be borne in mind that the difference between the two lines of jurisprudence that have been identified consists in the reason why the owner must tolerate occupation or, at least, does not have the “precario” action to put an end to it.

On certain occasions that discussion has been raised in terms of whether or not the contract (in this case, the promise) is enforceable against the owner. It is probably not the best way of putting it.³³

Understanding enforceability as the ability – in this case, of a promise contract – to assert itself before third parties,³⁴ by definition, each judgment of the Supreme Court that considers the promise contract as a sufficient precedent to challenge the “precario” action, does so because it considers that it is enforceable before the true owner. It would be a contradiction in terms to affirm that the promise contract cannot be enforced against the owner and, at the same time, decide that it is sufficient to challenge the “precario” action. In fact, as we have already seen, the Court has ruled that the contract must be enforceable against the owner and ruled that a contract concluded with a predecessor in the owner's property is opposable.³⁵

In this way, what divides the two theories of case law is not that one (the reflex one) requires that the promise contract be enforceable before the current owner and the other (the immanent) considers otherwise. The division is generated with regards to what determines said enforceability.

³² ATRIA (2017), 81.

³³ HALABI and SAFFIRIO (1996), pp. 71-75; ROSTION (2013), pp. 36-44; RAMOS (1987), pp. 12-13; LARROUCAU and ROSTION (2013), pp. 78-79; ORREGO (2016), pp. 342-345; DE LA MAZA (2010), pp. 179-182; MAYOR (2016), p. 305.

³⁴ VIDAL (2006), pp. 63-65; DOMINGUEZ (2020), pp. 415-418.

³⁵ *Moreira with Jara* (2014).

Our hypothesis is as follows: for the theory that we have called “immanent” or “abstract”, such enforceability is justified exclusively in a decontextualized interpretation of the text of paragraph 2 of article 2195. For the line qualified as “reflexive” or “concrete”, on the other hand, it is justified in an interpretation of the precept in harmony with the rules of contract and property law.

Indeed, as far as the first is concerned, why must we understand that a promise contract can be enforced against a third party – in this case, the owner – to his detriment?

To answer this question, it is useful to consider an opinion expressed by López and Elorriaga who, following Domínguez, point out that contracts are enforceable against third parties insofar as: “(...) no one may ignore the contract entered into by others, nor can he prevent, deprive, or dispute the parties’ rights and obligations arising from the contract”.³⁶ It is true, there is a “radius of repercussion”³⁷ that reaches third parties in terms that they cannot ignore the contract. With the owner, however, it is not a question of enforceability, but of relative effects of the contract. It is by virtue of the contract – of article 1545 of the CC – that the owner must respect the occupation of the property. The question that arises in the type of cases that are the object of this study, is that the quality of contractor and owner, who at one time were the same person, are dissociated. The person bringing the action of “precario” did not participate in the contract. The party presenting the action of precario is, at the same time, the owner of the thing and a third party with respect to the contract. As may be seen, the peculiarity of these cases is that the contract intends to assert itself against the owner.

What allows this to happen? Certainly not a rule that explicitly allows it, such as article 1124 of the French Civil Code.³⁸ Nor, at least in any of the judgments that have been considered for this study, is the opposability of the promise contract justified in a case of civil fraud.³⁹ And then? In those cases in which the “immanent theory” has been applied, the Court deduces the enforceability of the “precario” from paragraph 2 of Article 2195 itself.

In our opinion, this is a mistake. Elsewhere, one of us has explained why that interpretation is not correct.⁴⁰ Here we are interested in recalling a general argument and adding one more relating to the particular situation of the promise contract.

As far as the argument of a general nature is concerned, what the doctrine often considers is that the action of “precario” is one of a real nature whose objective is to fill a gap

³⁶ LÓPEZ & ELORRIAGA (2017), p. 393.

³⁷ LÓPEZ & ELORRIAGA (2017), p. 393.

³⁸ Article 1.124 (3) of the French Civil Code states: "A contract concluded in breach of a unilateral promise with a third party who knows of its existence, shall be void." Translation available in: http://www.justice.gouv.fr/art_pix/Projet_reforme_contrats_2015_ESPAGNOL.pdf

³⁹ While it was not possible to find decisions regarding civil fraud in relation to the promise agreement, it was possible to find decisions regarding marriage, particularly the minority votes of the decisions *Roa with Daille* (2020) and *Sáez with Oñate* (2019).

⁴⁰ DE LA MAZA (2022).

in the protection of property by virtue of the theory of registered possession.⁴¹ If one accepts a certain reading of article 915 that has gained acceptance among authors,⁴² the fact is that one of the most frequent assumptions is the presence of a contract in which the owner has not participated. If things are interpreted according to the immanent theory, then the judicial creation is rather powerless to fulfill the objective that justifies its creation. There is, therefore, what, with some generosity, might be called a “performative contradiction”.

As regards the more specific argument of the promise contract, the appeal of the immanent theory is that it protects the position of the promising buyer, an issue that appears particularly attractive when the price has been paid. However, like most benefits, it has a cost, which is paid by the owner who, in this case, lacks an action to request restitution of the thing. In the case of registered property, it does not have an action to claim,⁴³ nor, as understood by the majority doctrine, the action of article 915.⁴⁴ The question, then, is: why protect the contractor to the detriment of the owner? Of course, the opposite question may be asked, but in that case, the answer comes from the fact that the owner has a right over the property, without regards to a certain person; it is the form of real rights that answers the question of why the owner should be protected.⁴⁵

In those cases grouped under the name “immanent”, there is a decontextualized reading of the general rules, particularly, at this point, of property law. To understand that any contract – of promise – is sufficient to justify the possession of the defendant would violate the owner’s property rights *ex* article 582 of the CC, since it is his legal position that should prevail, unless there is a sufficiently powerful justification. And this justification is not found by recurring to the terms of paragraph 2 of article 2195, that is, it is not found in the mere existence of a promise contract, but in a contract that generates an obligation for the owner: to tolerate the use that the defendant has for the object.

This, of course, does not mean that the owner should always be protected. To understand why, it will be useful to return to articles 1.124 of the French Civil Code and civil fraud.

With regards to article 1124, its third paragraph provides that a contract entered in violation of the promise contract with a third party who knew of its existence is void. With

⁴¹ ATRIA (2017), p. 59; HALABI & SAFFIRIO (1996), p. 1; SELMAN (2018), p. 342; LARROUCAU & ROSTION (2013), p. 43; DOMÍNGUEZ (2005), p. 345.

⁴² BARRIENTOS (2005), pp. 221-249; SELMAN (2011), pp. 63-65.

⁴³ PEÑAILILLO (2019), pp. 1455-1456; MEJIAS (2018), p. 51.

⁴⁴ SELMAN (2011), pp. 60-62; PAREDES (2015), pp. 406-412.

⁴⁵ The same idea may be extracted from the case *Núñez with Soto* (2016) regarding the dissolution of the conjugal partnership between the spouses: “The situation that the “precario” seeks to regulate is one in which, as in this case, the right of ownership on the one hand and mere tenure on the other are opposed, and the question that the second paragraph of the aforementioned article seeks to answer is which one should prevail? The answer arising from the correct interpretation of the article is that the owner must prevail, unless property possession is justified. But not justified in the abstract, since this would limit the protection of property in terms that are not inconsistent with the national legal order, but in concrete terms, that is, with respect to the holder of the property rights. In this way, it is absolutely evident that the legal precedent that is regarded as proof of mere possession must be opposable to the true owner, since, when this happens, it is perfectly understood why his right of ownership is limited.

regards to civil fraud, Domínguez Águila considers as a frequent situation that in which to breach a promise contract the thing is sold to a third party.⁴⁶ He also considers that in the case of a fraudulent acquisition (in which the buyer has been an accomplice of the promising seller) said acquisition must be unenforceable with respect to the promising buyer.⁴⁷

What this teaches us is that the protection of property does not necessarily imply neglecting the protection of the promising buyer, but, unlike the way in which the immanent theory understands it, it must be done in a qualified manner, in terms that it may coexist harmoniously with the rules on contract and property law. This harmonious coexistence, which is what may underlie the justification of the reflex theory, requires taking both the limits of contract and the limits of property seriously.

Thus, as a general rule, the promise contract in which the person bringing the "precario" action has not participated should not hinder the restitution sought through that action. The owner has a right to his property, and that right cannot be opposed by personal rights in the creation of which he has not participated or otherwise accepted. However, and even in the absence of an express rule, this kind of unenforceability of the contract concluded in fraud seems widely accepted.⁴⁸

VI. CONCLUSION

As we anticipated in the introduction, the objectives of this study are twofold. The first consisted of showing the existence of two contradictory jurisprudential theories with respect to the promise contract as a legal precedent to justify occupation in the case of "precario" actions.

We believe we have demonstrated the existence of, on the one hand, a set of decisions that consider that the presence of a promise contract, even if, according to the general rules, it does not impose on the owner the obligation to tolerate the use of the thing by the defendant, that is, it is not enforceable against him, has been considered sufficient precedent to counter the "precario" action. On the other hand, there is another set of judgments that limit the promise agreement as a precedent justifying the occupation to those that, according to the general rules, impose on the owner the obligation to tolerate, with respect to the material possession of the defendant, that is, they are enforceable against him.

The second objective was to propose a certain rationalization that would put this state of affairs in order. What we proposed was that the idea that the "precario" is a purely factual situation should be abandoned. And that, as regards to situations where occupation is justified under a promise agreement, two qualifications must be made. The first is that the contract must remain in force. The second is that this contract must impose on the owner the obligation to tolerate the occupation made by the defendant, that is, it must be enforceable against the owner according to the general rules. The theory that we have called "immanent" is wrong to consider that this enforceability may be extracted from paragraph 2 of article

⁴⁶ DOMÍNGUEZ (1991), p. 18.

⁴⁷ DOMÍNGUEZ (1991), p. 32; DE LA MAZA (2019).

⁴⁸ LÓPEZ & ELORRIAGA (2017), p. 400.

2195. There is no precedent that allows us to estimate it in this way and, on the other hand, there are powerful reasons of coherence to not consider it in that way.

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