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ON THEORIES ABOUT ALIENATION OF JUS IN REM IN THE CIVIL CODE OF JAPAN

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I

The problem which I intend to deal with in this article is how the theories about the transfer of jus in rem are designed as regulating the dealings of real property in the Civil Code of Japan.

There is no doubt that our Civil Code has been drafted under the strong influence of the Code Napoleon and the First Draft of German Civil Code except the part for Status, and also it is well-known that the influence has covered all the divisions of the law of real property which will be usually thought as being strictly under the traditional conditions depending on the historical foundation.* But it is not the province of this article to explain that causes i.e. the social, economic and political elements for the formation of the Civil Code of Japan — especially such the cause as the request promoting the organization of the capitalistic economic system with a distinctive character after the Restoration of Japan.

Now, the Civil Code of Japan, Article 176 provides as following in regard to the transfer of jus in rem: "the acquisition of jus in rem and its alienation shall be valid merely by the expression of the intention of the parties," and besides Article 177 and 178 provide as following: "the acquisition the forfeiture or the shift of jus in rem upon real property shall not be set up against third persons until they have been registered in accordance with the provisions of the Code of Registration," and "the transfer of jus in rem upon Chattels personal shall not be set up against third persons until they have been delivered."

These have just the same appearance as that of Code Napoleon. Thus, Art. 176 adove-mentioned seems to be correspondent with Art. 711, 1138

* See, e.g. Koschaker; *Europa und das Römische Recht*, 2. Aufl. 1953. S. 131ff.

etc. in the Code Napoleon, and has the same appearance as if it provided the transfer of *jus in rem* should become operative merely by the expression of the obligatory intention which would be originally intending to produce the obligatory effect under the law of obligations without any external indication — “Willenstheorie” — and it seems to me that Art. 177 or 178 is correspondent with Loi 23 mars 1855 or Art. 1141, Code Napoleon.*

But, in our judicial world there is a dispute about “the expression of the intention” provided in Art. 176 above-mentioned. That is: whether “the expression of the intention” should be appreciated as meaning the expression of the intention intending to produce the objective effect under the law of real property or to produce the obligatory effect under the law of obligations. Of course there are several transactions (“dingliche Geschäft”) of which merely the former (“dingliche Willenserklärung”) is thought as its essential element without any relation to the latter (“obligatorische Willenserklärung”) e.g. the giving of earnest-money and the delivery of loan for consumption. And if there is no particular agreement between the parties to make the transfer of the ownership (or *jus in rem*) rely upon the transaction to transfer the ownership (or *jus in rem*) in the bargain of a specific property, there arises a problem whether there arises the effect of the transfer of the ownership (or *jus in rem*) merely by the existence of a obligatory transaction of which the expression of the intention originally intending to produce only the obligatory effect under the law of obligations according to the bargain is thought as the essential element. That is, in other words, whether to recognize the distinctive quality of the objective transaction (“dingliche Geschäft”)** in such a case.

II

[A] The constructive structure of the decisions and the influential theory seems to require only the causal contract but the objective expression of

* this section provides the good faith of the second transferee as the requisite. And now it is almost appreciated as to Art. 2279, but formerly there was pretty many theories that asserted the delivery of personal property as the requisite for the transfer of the estate. (Aubry et Rau; Cours de Droit Civil Français. 6. édit. 1935. t. II p. 78. n. 7.)

** “Dingliche Geschäft” as the conceptual construction on our civil law is different from that of the German Civil Code, see post. p. 29, 31 and the following.

the intention ("dingliche Willenserklärung"). And their foundation is as following: our Civil Code is based on the principle of "Willenstheorie" like the Code Napoleon; and when the provisions of our Civil Code are construed and applied, it is rational to find the criterion for practical construction in the same manner as the Code Napoleon. And then they think; the provision of Art. 176 of our Civil Code only make it clear that it shall be supposed that when a person has acted with the purpose to transfer jus in rem, in principle he shall have the intention intending to produce the effect of the transfer of jus in rem.

[B] The other school recognizes the distinctive quality of the objective transaction ("dingliche Geschäft") and its foundation seems to be as following.

(i) One bases on the foundation that the obligatory transaction must be distinguished from the objective transaction as to the concept of the legal requisite ("rechtlicher Tatbestand"). According to this theory, the transfer of jus in rem must arise only as the effect of the expression of the intention intending to transfer itself, because the expression of the intention to effect the transfer of jus in rem must be distinguished from the expression of the intention to produce a relation of obligation between the parties, as far as the structure of our Civil Code is based on the modern distinction between jus in rem ("Sachenrecht") and jus in personam ("Obligationenrecht"). And it is not sensible as a commentation to find the existence of the expression of the objective intention in such a transaction like the obligatory transaction even if ultimately it would be supposed as its own purpose to effect the transfer of jus in rem.

(ii) One is tried to comment from the relation to other provisions and the systemes of our Civil Code. The following matters are its foundations.

(a) Exceptio non adimpleti contractus. As to the mutual relation of performance dueing to the relativity of the bilateral contract, Art. 533 provides that the vendor shall be able to refuse to perform his obligation until the money has been payed. If the ownership was transfered to the purchaser at the same time when the contract has been concluded, such a defence as above-mentioned becomes to be meaningless because the purchaser should be able to possess the object by rei vindicatio. For instance, there

is not such provisions in the Code Napoleon and it maintains impartiality between parties of the bilateral contract by making use of lien instead of that defence.* Accordingly some of this school that comments Art. 176 samely as the Code Napoleon think : the case of the bilateral contract make an exception.

(b) The validity of the bargain of the thing belonging to other. No provision in our Civil Code makes the bargain of the thing belonging to other invalid in contrast with the Code Napoleon, Art. 1599** but rather recognizes the validity of it in Art. 560. Accordingly the bargain in our Civil Code produces merely a relation of obligation and it can not be commented as the covenant to transfer the ownership (*la convention translatife de la propriété*).

(c) The system of unjust enrichment (Art. 703-708). It is the premise of this system that the causal and obligatory transaction is distinguished from the transfer of *jus in rem* and they arise from the distinct transactions both. Especially the provision of Art. 705: "if a person pays for a liability with notice of no-existence of the liability when it has been paid, he shall not able to claim the restitution of it" can not be appreciated if the ownership of what has been paid has transfered to the other party without reference to the existence of the obligatory contract.

(d) The gift not by the instrument. Art. 550 provides "the gift not by the instrument shall be able to be set aside by the party except the part which has been performed". This provision becomes nearly meaningless in connection with the restrictive provision of it if the ownership of the specific property should have been transfered merely by the agreement of gift.

(e) One bases on the actual circumstances of the daily dealings. The problem whether the obligatory agreement (*obligatorischer Vertrag*) which intends ultimately to transfer *jus in rem* should be constructed as containing the expression of the intention to transfer *jus in rem* is to be settled by the actual and timehonoured circumstances of our dealings but merely

* The Code Napoleon, Art. 1612, 1613

** The theories is different each other as to the commentation of this provision: some of them comment it void as to purchaser and other comment it as dissolution.

by the conceptual structure as to the contents and the effects of the expression of the intention. Now usually the ownership does not transfer by entering into a contract which is only a agreement even if the object is specific. Because the problem when the ownership transfer to the purchaser by what transaction is almost decided by the time and the conditions as to the delivery of the object (or the vacating of land or house) by the vendor or as to the payment of the price by the purchaser in our real life. For instance, our usual customs of the transfer of real property is that the purchaser meet with the vendor and pays to him the price at the same time when its alienation has registered.

[C] It seems to be comprehensible as following in respect to (i) and (ii), (c) in what is stated in B as the foundation of the latter theory.

(α) Our Civil Code is systematized by two elemental concepts — jus in rem and jus in personam — like the German Civil Code. Thus, there the expression of the objective intention (*dingliche Willenserklärung*) is distinct from the expression of the obligatory intention (*obligatorische Willenserklärung*). For, the both is different in respect to the effective requisite etc. in the legal requisite (*rechtlicher Tatbestand*), for instance, it is necessary for the expression of the objective intention (*dingliche Willenserklärung*) that the object is real and specific and the person who expresses the intention has *jus disponendi*. However it is not essential but only convenient and necessary to make distinction between the two concepts — “*dingliche Willenserklärung*” and “*obligatorische Willenserklärung*”, because it is not necessary to have such formal requisites* to make the former effective as provided in the German Civil Code for “*dingliche Geschäft*” that is stated in the explanation of our Civil Code. Originally the both — jus in rem and jus in personam — are merely a ideal existence as a ideal imagery for a thought (“*une chose immatérielle, une relation idéale*”). And it is not necessary to be analysed into the expression of the objective intention (*dingliche Willenserklärung*) and the expression of the obligatory intention (*obligatorische Willenserklärung*) and be thought separately for a actual expression of intention if it intends to produce the effect to transfer jus in rem in addition

* It is the registration (“*Eintragung in das Grundbuch*”) for real property and the delivery (“*Übergeben*”) for chattels personal, with a agreement (“*Einigung*”) to transfer jus in rem.

to the effect to create a relation of obligation. And so, the expression of the objective intention is not necessarily made independently and separately from the expression of the obligatory intention. That is, the former can be included by the latter.

(β) It is not necessarily the premise for the principle of unjust enrichment that the objective transaction (*dingliche Geschäft*) should be distinguished from the obligatory transaction (*obligatorische Geschäft*), but the principle intends to regulate enrichment if it was unjust in the point of the legal order. Thus, nevertheless the civil law of France is without regard to the distinctive quality of the objective transaction, the Code Napoleon provides not merely as to administration and money paid under mistake in the chapter of "des quasicontrats" (Art. 1371-1381), but also there is a general theory that is called "enrichissement sans cause" and its theory has borrowed from "actio de in rem verso." So, the latter and the theory on "payment de l'indu" are in uniformity each other with the idea of "enrichissement injuste". There, the system of money paid under mistake is called only a application of the theory of "causa". To explain in detail, the Code Napoleon, Art. 1235 provides that the existence of the obligation should be the requisite for any money paid and any money paid without the existence of the obligation should be restituted as it is to be void. Accordingly, we can understand, in the case claiming to retribute money paid under mistake, the ownership of what is paid is in the hand of claimer. And there is no doubt that this theory should be applicable to the case in which the contract is void as it misses "cause" or has "fausse causa" or "causa illicite",* or which is set aside for some reasons. If we may consider as afore-said, it may be just to say that the system of unjust enrichment can not take as its own premise the distinction of the objective transaction and the obligatory transaction. It may be merely a literalism to comment that the special types of unjust enrichment which is provided in Art. 705 above-mentioned and following to Art. 708 of our Civil Code take the premise that the ownership of what pay is once transfered to the other party.

* The Code Napoleon, Art. 1108, 1131, 1133.

III

How can we dissolve the dispute above-mentioned? The explanation stated in II [C] (α) above-mentioned is merely a description that theoretically it is able to produce the both effects to create a relation of obligation and to transfer jus in rem for one transaction, but it does not dissolve the problem whether "the expression of the intention" provided in Art. 176 of our Civil Code means the expression of the obligatory intention (obligatorische Willenserklärung) or the expression of the objective intention (dingliche Willenserklärung). Now "Willenstheorie" as to the transfer of jus in rem that is adopted in the Code Napoleon means that the effect shall be produced by only the parties' expression of the intention without any external indication and the transaction to transfer jus in rem shall be included in the relation of obligation as a mere conduct. On the other hand, the formalism that is adopted in the German Civil Code is a theory to suppose that the effect to transfer jus in rem should be produced by a settled and external indication with the expression of the intention and the transaction to transfer jus in rem should be distinguished as a genuine transaction from the relation of obligation. Will be just to conclude that the transaction to deal jus in rem in our Civil Code is included in the relation of obligation merely from the foundation that the provision of Art. 176 of our Civil Code originate in "Willenstheorie" of the Code Napoleon? It will be necessary to consider upon the following two points for the finding of the meaning of Art. 176 and the constructive structure of "the expression of the intention" provided in it.

(i) As any provision of the civil code relates closely to other provisions and performs its operation as a part of the code that is unified systematically, the characteristic of any provision which is a part of the unified code can not be realized without respect to its relation to the structure of the code. In this meaning, the characteristic of our Civil Code seems to be similar to rather that of the German Civil Code than the French, because the legal structure of bargain (Art. 555 and the following) that relates closely to the law regulating the dealings of property is supposed to create merely a relation of obligation to transfer the property as the validity of the bar-

gain of the property belonging to others that has mentioned in II [B] (ii) (b), and it will be proper to say so in the legal structure of above II [B] (ii) (a) and (d). Therefore, we may suppose that there is other characteristic in Art. 176 of our Civil Code than the historical background of "Willenstheorie" as to the transfer of jus in rem in the French Civil Code in which Art. 176 originated. In other words, we may suppose that Art. 176 of our Civil Code does not mean that the transaction to transfer jus in rem should be included in that of obligation but that the acquisition and the transfer of jus in rem should be effective by the expression of the intention intending to transfer jus in rem without respect to such a settled and external formality as the transaction to transfer. Moreover we may suppose that it has originally belonged to the idea of the natural law that has asserted the absoluteness of the personal intention and which will be found in the French Civil Code.

How may we deal the case in which it is not clear when the expression of the objective intention (dingliche Willenserklärung) has been done, if the expression of the intention in Art. 176 should be explained substantially as the expression of the objective intention? And this is a powerful foundation of the opposite opinions that conclude "dingliche Geschäft" as a needless concept.

(ii) The problem, about the expression of the intention provided in Art. 176, when the effect tranfering jus in rem should be supposed to be produced by the expression of the objective intention, in the case of bargain of a specific property in which there is not the article to depend on the transaction to transfer for the alienation of jus in rem, is reduced to the problem when the expression of the intention intending to produce the effect to transfer jus in rem should be supposed to be taken from the explanation of the parties' intention, except the cases in which the expression of the objective intention intending to transfer jus in rem is clearly distinguishable. And there is no doubt that the explanation of the parties' intention relates to the customs in our actual dealings, in other words, the intentions of the general society. Now, there are many studies upon our old customs in the actual dealings. According to them, there were the external indications for the transfer of the ownership according to the

variety of the property; for instance, the seal of an office, the seal of relative or partner, the seal of Shoya,* or the recognition of an office for the bargains of cultivated fields or forests, and the licence of the town hall for the bargains of houses or building lands, and the delivery etc. for the bargains of chattels personal. And the ownerships were able to be transferred validly only by such external indications. At the present day still, it is sixty years since the enforcement of our Civil Code, the articles of the bill of sale that is made in the bargain of land or house usually only intend to produce the relation of the obligation respecting the transfer. And it seems to be the intention of the general public that ownership will not transfer usually until such an external indication as the delivery of the property, the payment of the price or the registration appear. The payment and reception of the price will be the circumstances to presume that the vendor think he can not deal with the property at his option because he receives the money and the purchaser think himself the ownership should become into his hand because he pays the money. It is a principle that the expression of the intention intending to produce the effect to transfer jus in rem is taken with such conducts taking the external indications as the payment of the price, the delivery of the documents for registration and the delivery of the property etc. — but, of course, the manner is not fixed. And it is rare that “dingliche Geschäft” above-mentioned is done together with the bargain. Thus, for such transaction is not fixed in a formality as that in the German Civil Code but itself an independent existence, we can say the transfer of jus in rem “shall be valid merely by the expression of the intention of the parties”. The above-mentioned will be in the intention of Art. 176 from the first.

IV

By such explanation of the transaction depending on the social and economic structure of the dealings as above-mentioned, the gap between the

* It was a terminal organ in the governmental system of the Shogunate and engaged in the general administration of village e.g. the allotment and the exaction of land-tax, the census registration and the supervision of public-moral etc.

norm for justice and the norm for conduct will become to be supplid and the living law will appear with the compulsory power by the courts of justice.

Then, such "dingliche Geschäft" that explanatorily we organize as above-mentioned has not necessarily such fixed formality as the registration or the delivery in the German Civil Code.

Therefore, there arise following complicated problems between the parties and third persons in relation to the principle of the publicity of jus in rem ("Publizitätsprinzip").

While "dingliche Geschäft" in which merely the expression of the objective intention (dingliche Willenserklärung) is supposed to be its element produced the effect to acquire or transfer jus in rem, the acquisition of jus in rem shall not be set up against third persons until it has been registered in the case of the real property or delivered in the case of chattels personal, by the provision of Art. 177 and 178. In other words, while by the provision of Art. 176 the effect to transfer jus in rem between parties reflects in the relation to third persons, the transfer of jus in rem shall not be set up against the particular third persons without the requisite for setting up against them. For instance, suppose a case in which the purchaser of a real property paid the money and therefore there was the expression of the objective intention between the parties but the vendor sold the same property to a third person until the first purchaser had been registered. In such double conveyance, there are two valid legal relations of the dealings of jus in rem. But one of them should be denied because each of them should be the obstruction for the existence or the realization of the dealings to each other. Logically it must be of necessity that "third persons" in Art. 177 or 178 mean the person who is in the limits restricted by the intentions of the provisions and do'nt mean every third persons except the parties and their representatives, because Art. 177 and 178 are the restrictive provisions of Art. 176. Accordingly the tort-feasor is not among "third persons". And the decisions and the influential theories assert that "third persons" mean the third person who is in a valid relation of the dealing as to the same property, but in the more strict sense, he seems to be the person who acquires the objective directing power on

the same real property (or chattels personal) by a valid relation of dealings as to it and claims its effect himself. But then, there remains the questions how the ownership of the property which has been transferred can be transferred again from the former owner to a third person, and what the sentence of "shall not be set up" means. As to this problems, there are various views as following.

In a case in which there was a objective transaction between A and B and again jus in rem of the property was transferred from A to C until B has taken the requisite for setting up;

(i) In the relations between the parties or against third persons, A does not become to be deprived of his right wholly and B does not become to be entitled to his right absolutely until B has taken the requisite for setting up his right.

(ii) The transfer of jus in rem between A and B is throughly effective in the relations between the parties or against third persons, but its effect is overthrown by the denial of C ("Anfechtungsrecht") — the assertion of a fact by C that is not consistent with the transfer of jus in rem between A and B.

(iii) The transfer of jus in rem between A and B produces the perfect effect without the requisite for setting up but is void so far as against the interest of third persons.

According to the first theory, there remains the doubts how we may suppose the exclusive quality of jus in rem or B can exercise the claim originated from jus in rem ("dinglicher Anspruch") against a tort-feasor because both of A and B is supposed to be the owner of the imperfect jus in rem in this theory. Moreover, this theory is not consistent with the import of Art. 176 at the point that the registration or the delivery is not merely the requisite for setting up but endowed with the efficacy to convert a imperfect jus in rem into a perfect jus in rem, because it supposes that a imperfect jus in rem become a perfect jus in rem when the requisite for setting up is taken. According to the second theory, it results in that it excludes C from his own recognition of the transfer of jus in rem between A and B. Thus, according to the third theory, it will be proper to suppose that the effect of the transfer of jus in rem between A

and B is voidable as to the third person C who can assert its inefficiency, because Art. 177 and 178 are the restrictive provisions of Art. 176. Of course, C may recognize the effect of the transfer of *jus in rem* between A and B, because the concept of the word "voidable" is based on the consideration that the third person should be kept from a certain disadvantage. When the effect is recognized by C, the effect of the transfer of *jus in rem* between A and B becomes to be valid, while C becomes to be deprived of his right as to the property and merely can claim against A under the obligatory relation. Even if we consider it as above-mentioned, it seems to me that there remains the doubt opposite to the standpoint of the modern law which draws a sharp line between *jus in rem* and *jus in personam*, that when *jus in rem* which is originally the absolute right has not the requisite for setting up become a relative right which is voidable as far as against a certain third person.*

V

The theories as to the transfer of *jus in rem* in the Civil Code of Japan have been considered briefly in above-mentioned. And we can observe that there arise the gap between the actual transfer of *jus in rem* and the principle of publicity of *jus in rem* ("Publizitätsprinzip") that is intending to maintain third persons or the security of the dealings, because the objective transaction (*dingliche Geschäft*) is supposed to be take by only the expression of the objective intention (*dingliche Willenserklärung*) as its element but it is not connected with fixed formality. Hereafter, it will be necessary for us to have the inclination legislating the registration or the delivery not as the requisite for setting up but as the requisite for coming into existence. And there are various injurious effects dueing to the registration that has not the public effect ("öffentlicher Glaube") but the presumptive effect in our country, but this problem is not treated in this article. Still, the publicity of the transfer is cracked in chattles real because *constitutum possessorium* is admitted as to the delivery of chattels personal, but it does not come into question because the

* For example, Colin et Capitant; *Cours élémentaire de Droit Civil Français*. 4.éd. 1923. t. I p. 974. etc.

the security of the dealings is maintained by the admission of acquisition de bonne foi. But, I must add to the distinctive quality of the objective transaction that the recognition of it does not mean to decide its effectiveness regardless of the prior obligatory transaction (obligatorische Geschäft). In other words, whether the objective transaction is effected by the flaws in the causal relation as void or voidable is another problem. And this problem whether the effect of the objective transaction is subjected to the effect of the prior obligatory transaction will be published at the early opportunity. I hear that there is the provision in s. 100 of the Property Law of New York that provides that the ownership of the personal property transfer at the same time when the bargain is concluded if it is specific*, but I don't know how it is constructed theoretically by the jurists. I intend to study it in future.

* Claude Léwy; *The Code and Property* (The Code Napoleon and the Common-Law World. 1956. edited by Bernard Schwartz. p. 175)