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EXECUTION BY LEGAL FICTION OF DECLARATION OF INTENTION

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I

The Civil Code of Japan and the Code of Civil Procedure of Japan prescribe in their own fashion the method to enforce the obligation to make some declaration of intention (for example, an offer of contract, an acceptance thereof, an application for registration, etc.).

Art. 414 II of the Civil Code of Japan. "If, where the nature of an obligation does not admit of specific performance, the subject of the obligation is an act, the obligee may apply to the Court to cause it to be done by a third person at the expence of the obligor; however, with regard to an obligation having a juristic act for its subject, a decision of the Court may be substituted for a declaration of intention by the obligor." (Cited from the text in English, compiled by Attorney-General's Office of Japan).

Art. 736. of the Code of Civil Procedure of Japan. "If the debtor is ordered by judgement to admit the existence of a relation of right or to make some other expression of intention, such admission or expression of intention is deemed to have been made upon the judgement becoming final and conclusive. If the admission or the expression of intention is to be dependent on some counter performance, such effect is produced when in accordance with the provisions of Arts. 518 and 520 an executory exemplification has been issued." (Cited from the text in English, compiled by Liaison Section, General Secretariat, Supreme Court of Japan.)

As a rule, if a obligor is ordered by judgement to make some declaration of intention, such declaration of intention is deemed to have

been made upon the judgement becoming final and conclusive. In this case, no such actual acts of execution are not made as seizure, realization or distribution common in the case of the execution against other debts or obligations. What is the reason for such a specific way of execution? A common opinion is as follows: The very interest of a obligee in the claim for some declaration of intention consists not so much in the actual performance itself of a declaration by the obligor as in the legal effect to be produced thereby, so, it is sufficient to realize the obligee's right, if by any provisions of law the same legal effect can only be produced as if the obligor actually made a declaration of intention. But, can such a fiction alone be enough to complete the execution? In other words, can it be possible that a declaration of intention by a legal fiction should function precisely in the same way as a real declaration by the obligor? To examine this problem is the purpose of my treatise.

II

In solving the problem, first of all, we ought to make clear the contents of the judgement by which the obligor is ordered to make some declaration of intention.

There have been two opposing theories about the essence of this judgement, the one having been called "decretive judgement theory" (die Verurteilungsurteilstheorie) and the other, "constitutive judgement theory" (die Gestaltungsurteilstheorie)—the former having a general currency at present in our country as well as in Germany.

The latter has been advocated especially by Kipp and Langheineken. They say as follows*: The essence of a decretive judgement consists, it is true, in its order for performance stated in formal adjudication of the judgement. But this order is, so far as a judgement ordering to make some declaration of intention is concerned, little more than a pure formality; the law itself not only hardly expects to find this order obeyed by the obligor, but also even makes it quite impossible for him

* Kipp, Die Verurteilung zur Abgabe von Willenserklärungen und zu Rechtshandlungen. Festgabe der Kieler Juristenfakultät zu Rudolf von Jherings fünfzigjährige Doktorjubiläum. (1892) S. 71 ff. Langheineken, Der Urteilsanspruch. Ein Beitrag zur Lehre vom Klagrecht. (1899) S. 252 ff.

to obey it, for, on the one hand, before the judgement has become irrevocable, an obligation to make some declaration of intention cannot be enforced by law, and on the other, upon the judgement having become final and conclusive, a legal situation in which the obligation has been performed is produced without any acts of the obligor and therefore after that there is no room for performance. Hence this conclusion; the only one content of the judgement is an order that everything shall be dealt with in much the same way as if the obligor actually made a declaration of intention, so a judgement ordering to make some declaration of intention is a constitutive judgement.

I should like to think, following "decretive judgement theory", that a judgement ordering to make some declaration of intention is in itself, like other judgement ordering performance essentially a decretive judgement which has the special effect that the way of its execution is extremely shortened by a legal fiction.

I also can't help admitting that the legal effect of a fictitious declaration of intention can be produced automatically, as it were, without any application by the obligee for a execution on the judgement having become final and conclusive, besides can be set up not only against the parties but also against all people, and that therefore a judgement ordering to make the declaration of intention looks in appearance very much like a constitutive judgement. But it is evident that this theory can be in no sense consistent with the latter part of Art. 736 of the Code of Civil Procedure of Japan, according to which, in case an declaration of intention is to be dependent on some counter performance is made, the time when a declaration of intention is produced by a fiction is after the judgement has become final and conclusive. Further, that claim for some declaration of intention which constitutes the subject-matter of the procedure is not a claim for constitution but a common claim for performance. Consequently, we must think that a judgement ordering to make some declaration of intention is nothing but a decretive judgement and that the legal fiction employed only has to do with the effect of the judgement.

Furthermore, I am glad to say that the historical development of the institution favors our view as well. It was Art. 70 of the Code of Execution of Sachsen (1838) that adopted for the first time the way of the execution by legal fiction against the obligation to make some declaration of intention. And before this Code there was no difference between the way of the execution against the obligation to make some declaration of intention and that of the execution against other obligations to do an act. Besides, according to Art. 70 of the Code of Execution of Sachsen, the obligor is to be ordered by judgement to make some declaration of intention within the "Paritionsfrist" determined in the judgement; the obligor is to be warned by judgement that he may be deemed to have made some declaration of intention in case he neglects to make it actually within this definite periode of time. In other words, according to these provisions, the legal fiction is not employed until the obligor still neglects to perform his obligation within socalled "Paritionsfrist" after the judgement has become final and conclusive. The Code of Civil Procedure of Germany which took over this way of execution abolished, however, the "Paritionsfrist" system and brought about the shortening of the process of execution. According to Art. 894 of this Code, a declaration of intention is deemed to have been made upon the judgement becoming final and conclusive. And the Civil Code of Japan and the Code of Civil Procedure of Japan follow this example. "Constitutive judgement theory" takes the accidental effect of a judgement for its essential element by confounding fiction in the effect of judgement with that in its content.

III.

At any rate, the declaration of intention produced by a legal fiction must have much the same content as that which the obligor had obliged himself, and was ordered by judgement, to make. But we ought to be fully aware that the contents of these two declarations of intention are not always absolutely the same.

In general, when regarded as a psychological process, a declaration of intention includes three elements; (1) an intention to get a certain

legal effect ("effect-intention"), (2) an intention to express "effect-intention" ("expression-intention"), (3) an act worth being considered an expression of intention ("expression-act"). What sort of elements is required for an act to be considered an expression of intention is dependent on concrete situations. But with regard to a declaration of intention to be made to another person, there must be, in addition to an act of expression, at least an act of dispatch which makes it possible for the declaration of intention to reach the other party or to be understood by him—an act capable of making him understand the declared intention without any addition of further causal acts. Consequently, when a declaration of intention ordered by judgement is to be made to another person, legal fiction extends over the act of dispatching it to him. But the act by fiction of dispatching a declaration is in substance by no means the same as that made actually by the obligor, for the former has in fact no such ability to make the declared intention reach the other party as the latter has, because the time when the declaration of intention is deemed by legal fiction to have been made is when the judgement has become final and conclusive and thereafter there is no opportunity of the service or notice of the judgement.

This difference between a fictitious declaration of intention and an actual one is far from negligible. For according to the provisions of Art. 97 of Civil Code of Japan a declaration of intention made *inter absentes* shall not be effective, as a rule, until the time when notice thereof has reached the other party. Consequently, a declaration of intention incapable of reaching the other party can produce no substantive legal effect, even if it is a fictitious one. But such imperfectness of legal fiction is, in general, no obstacle to the attainment of the object for which the execution is made. In case, as is most common, the person to whom a declaration of intention is to be made, is the plaintiff himself in the procedure where the judgement ordering to make it is to be made, a fictitious declaration of intention comes into existence from the beginning within the reach of its notice, that is to say, in the objective situation where the other party can be, judging from social sense, naturally thought to be able to understand it, and so it can

almost compare with a declaration of intention made *inter presentes*. In this case, therefore, the fictitious declaration of intention can reach the other party and produce the substantive legal effect the instant the judgement became final and conclusive. But this is not the case when the declaration of intention is to be made to a third person taking no part in the procedure. Here the above-mentioned imperfectness of legal fiction will not remain unhidden.

Formerly a theory that denied the application of the way of execution by fiction to the obligation to make a declaration of intention to a third person (excluding government offices) was overwhelmingly predominant. The reason was as follows*: If a declaration of intention were brought about in a fictitious way by the judgement ordering to make it to a third person, the latter is obliged to have his legal relation to the obligor changed by the effect of an action between others without being given any chance of taking part therein, or without even knowing the existence thereof—a situation which is obviously unreasonable and unfair to the third person, too.

This argument was directed towards the very above-stated imperfectness attaching to legal fiction.

If we admit that the way of execution by means of legal fiction is not applied to the obligation to make a declaration of intention to a third person, there would remain nothing but a way of indirect compulsion. The latter is, however, far more round-about than the former, and besides imposes an unnecessary burden and pressure on both the obligee and obligor. Further we must give great consideration to the fact that the very provisions of law do not restrict the scope of the persons to whom a declaration of intention is to be made. This is the reason why in Japan as well as in Germany both the doctrines and the court decisions have come to approve the application of the way of execution by way of legal fiction to the obligation to make a declaration of intention to a third person.

* Kohler, *Ungehorsam und Vollstreckung im Civilprozess*. (1893) *Archiv für civilistische Praxis*. Bd. 80. S. 196 ff. Kipp, *a.a.O.* S. 81 ff.

IV

I think this is an appropriate consequence. But how is it possible to cover the imperfectness of legal fiction and to attain the object for which the execution is made? In this respect two ways of thinking are in opposition to each other. The one thinks that there must be resort to a supplementary execution, and the other, that the obligee himself ought to take steps actually to make the fictitious declaration of intention reach to the third person in the extra-executive process of pursuing his interest—the latter being a prevailing opinion. The former was recently put forth by Dilcher for the first time. He says as follows*: In the execution against the obligation to make a declaration of intention to a third person the executable claim is not satisfied and the execution is not closed, until the fictitious declaration of intention has reached the third person therefore this act of making the fictitious declaration of intention reach a third person is an act of execution made in the process of execution and as there are no provisions in ZPO regarding to this act, some supplement by legal interpretation is required; in regard to the process in which the fictitious declaration of intention reaches a third person, we ought to think that, by analogical application of the provisions for the case where a declaration of intention is to be dependent on the counter performance by the obligee (the latter part of Art. 894 of ZPO; the latter part of Art. 736 of the Code of Civil Procedure of Japan), the court of the suit in the first instance is an executive organ and that the obligee must apply the court for the service of an exemplification or copy of the judgement ordering to make the declaration of intention to the third person when it has become final and conclusive, unless he himself is willing to serve or present it to the third person as an assistant organ of the execution; and thus since this process of the service or presentation is the executive one, it is a requisite for the judgement to be furnished with an executory exemplification.

* Dilcher, Die Vollstreckung der Abgabe einer Willenserklärung. Zeitschrift für Zivilprozess, Bd. 67. S. 225 ff.

The present writer prefer the consequence of the prevailing opinion above mentioned, thinking that it is sufficient for the obligee to be given an opportunity of his actual serving or presenting an exemplification or copy of the judgement to the third person in the extra-executive process pursuing his interest. We ought to frankly admit that there are no provisions for the execution against the obligation to make some declaration of intention to get the fictitious declaration of intention to reach a third person anywhere in our existing law. What matters is only whether it is possible or not to attain the object for which the execution was made. Admitting that an executable claim is not satisfied so long as the fictitious declaration of intention does not reach the third person, still the object for which the execution was made can be said to have been as attained. For in this case the obligee finds himself in a legal position in which he can satisfy his claim whenever he likes by his own actual act to get the fictitious declaration of intention to reach the third person. It is naturally allowed as a technique of legislation to bring the process of execution to a close at this stage and leave the rest to the obligee pursuing his interest extra-executively.

Hence the conclusion: Although the fictitious declaration of intention has not much the same content as that made actually by the obligee has and especially in regard to the obligation to make some declaration of intention to a third person the way of execution by means of legal fiction is far from perfect, all this is no particular obstacle to the satisfaction of an executable claim constituting the subject-matter of the execution and the imperfectness of the way of execution is fully made up for by its rapidity and certainty.