THE CONCEPTION OF *WERTPAPIERE* (VALUABLE INSTRUMENTS) IN THE CONTINENTAL LAW

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In the Anglo-American Law, we can find the conception of Negotiable Instruments. It is, as the late Judge Willis, K. C. defined, "one the property in which is acquired by any one who takes it *bona fide*, and for value, notwithstanding any defect of title in the person from whom he took it; from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument". In the Continental Law, the conception of *Wertpapiere* (Valuable Instruments) is often very common particularly in Germany and Japan. This conception does not coincide with that of Negotiable Instruments, though alike in character. We shall in the followings consider the conception of *Wertpapiere* in the German and Japanese Law.

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In Japan as well as in Germany, the words *Wertpapiere* appear everywhere in various Codes (Code of Commerce, Civil Code, Code of Civil Procedure, etc.), but they are not used as the same conception in every places, nor defined decisively in any provision. In Japan, however, we find a provision establishing the limit of *Wertpapiere* in the Securities Transaction Act, which has been enacted in post-war following the Blue Sky Laws in U.S.A., but this is available only when that Act is applied and consequently not always available in the whole *Wertpapiere*. In Japan and Germany, the establishment of the conception of *Wertpapiere* and its limit are disputed diversely being left wholly to scholars' theories.

In legal phenomena, we see such one as papers or documents which represent titles are frequently used. Here it should be noted before hand of course that we are concerned only with the private

law, according to the distinction between the public and private law, which is commonly recognized in the Continental Law. Upon consideration of such documents, we see, first, that the documents are only used as instruments giving evidence of titles, that is, as what has meaning only in the procedure. These documents are called *schlichte Beweisurkunden* (simple proofs). But secondly, we shall see the documents which have a further meaning—a meaning concerning to the exercise of titles represented therein. Such documents, or part of them, are called *Wertpapiere*. To get the conception of *Wertpapiere*, we must research into the common nature of these documents. But, none the less, it remains being disputed how they are understood. In *Endemanns Handbuch des Deutschen Handels-, See- und Wechselrects, 1882* (vol. II. p. 147), Heinrich Brunner, the German scholar who seems to have first considered *Wertpapiere* in general, defined *Wertpapiere* as: "Documents representing titles—private rights, the exercise of which is conditioned by holding the documents". This definition, unaltered in essence, is still used in Germany and Japan, though its expression or contents are somewhat altered. In Japan, *Wertpariere* are commonly defined as: "Documents, which represent titles, and which are necessary to establish, transfer or exercise the titles". But this conception can not always be said as what catches the nature of *Wertpapiere*, and is not complete enough to be a basis of a system of the law of *Wertpapiere*. Therefore, it is disputed diversely what the nature of *Wertpapiere* is and how the conception that express its nature clearly is to be obtained. Followings are the consideration of one of such disputes.

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Next to Burnner Ernst Jacobi, in Germany also, tried to consider *Wertpapiere* in its whole field. He wrote about *Wertpapiere* in *die Wertpapiere im Bürgerlichen Recht des Deutschen Reichs, 1901*, and in *das Wertpapier als Legitimationsmittel, 1905*. And moreover in the part of *Wertpapier* in *Ehrenbergs Handbuch des gesamten Handelsrechts* (vol. IV 1), *1917* which forms in quality the second edition of the book of 1901, he argued the same problem more minutely and comprehensively. After that he published *Grundriss des Rechts der*

Wertpapiere, which is the outline of the above writings, the 1st edition in 1921, the 3rd edition in 1928. Here we shall have a general observation of Jacobi's *Wertpapier*-conception, mostly relying on his own opinion in the above writing of 1917 and his treatise *Zum Wertpapierbegriff* inserted in *Zeitschrift für das gesamte Handels-und Konkursrecht*, vol. 85, *1921* which is preceded to *Grundriss*. His argument, however, is not always adopted by German and Japanese writers, but seems to indicate a way to the understanding of the nature of *Wertpapiere*.

Jacobi establishes as a temporary conception of *Wertpapiere* the following proposition: "*Wertpapiere* are documents which represent titles and the possession of which is necessary to exercise the titles". This definition is based upon a common mark in the phenomena of *Wertpapiere* which is chiefly found in various Codes in respect of the civil law, commercial law and civil procedure, following Brunner's definition. But Jacobi, further, researches into the ground of this proposition. In this way only, according to him, we can investigate into the ground, meaning and result of the phenomena of *Wertpapiere* and get the better understanding of the limit of *Wertpapiere*.

Being based upon this temporary conception, Jacobi researches into the ground of the phenomena that the possession of documents is necessary to the exercise of titles. Doing so, he tries to consider each class of *Wertpapiere* according to the usual classification of *Wertpapiere*. The classification is as follows. *Wertpapiere* are classified into three; *Rektapapiere* or *schlichte Namenspapiere* (instruments payable to a specified one), *Orderpapiere* (instruments payable to order) and *Inhaberpapiere* (instruments payable to bearer), depending upon the owners of titles. In the first, only those who are named are entitled; in the second, the named or their order are entitled; in the third, the bearer are entitled. When those who acquire documents can more or less rely on the description of the documents, these documents are called *Papiere öffentlichen Glaubens* (bona-fiedes instrments) or *Skripturpapiere* (script-instruments). All *Inhaberpapiere* are *Papiere öffentlichen Glaubens*. Some of *Orderpapiere* belong to *Papiere öffentlichen Glaubens*, and others not; the formers are called *die technische Orderpapiere* or *die technisch indossablen Papiere* (instruments technically payable to order), the latters are called

die einfache Orderpapiere or *die einfach indossablen Papiere* (instruments simply payable to order). As to each of them, particularly to *Korporationspapiere* (instruments of corporate membership), Jacobi considers what significance the necessity of the possession of documents in the excercise of titles has. That is to say, he considers, in each of them; how and whom the possession of documents is useful.

First he considers on *Inhaberpapiere, e.g.* bonds to bearer. As the German Civil Code contains the rules about *Inhaberschuldverschreibungen* (bonds to bearer) and the principal rules of them are recognized as proper to the whole *Inhaberpapiere*, Jacobi, first of all, begins to consider on the provisions of this Code. Who, then, are entitled to titles represented in the cocuments? If we analyse the provisions of the Code, it is clear that those who are entitled in order to dispose of the documents are entitled to titles. The title of the disposal of the documents arises from the property or from others (*e.g.* right of pledge) as well. And so we find a parallel between *Recht am Papier* (right to the instrument) and *Recht auf dem Papier* (right in the instrument). If I explain in full, it may be said that the complete right to the title represented in the document corresponds, as a matter of fact, to the property to the document, and the limited right to the title, to the limited right to the document. In this way the truly entitled to *Inhaberpapiere* is decided. But *Inhaberpapiere* give the possessors of documents a *Schein*—representation as if they were truly entitled. According to the provision of the German Civil Code, drawyers of *Inhaberschuldverschreibungen* may be discharged even if they repay to possessors who are not entitled to the disposal of the documents. Therefore this representation given to possessors is in favour of debtors. Moreover this representation is in favour of creditors. The creditors must prove only the possession of documents, but if debtors claim that the creditors are not entitled, they must prove it. This explanation is different from the general rules about the evidence in Germany, and is based upon the historical development and upon the fact of impossibility of asking the holders the process of getting the documents. The reason of that impossibility is that the holders are often changeable. Finally, the representation is in favour of the third parties who take the documents. In the German Law (as well as in the Japanese), *Inhaberpapiere* are treated as movables, and

bona-fide transferees of them may acquire the titles to the documents as well as to the movables. The reason of it is said usually that transferors are given by the possession of documents such a representation as if they were truly entitled, and that *bona-fide* transferees can rely on the representation. Thus *Inhaberpapiere* give its possessors such representation as if they are the truly entitled not only for the sake of debtors but also of creditors and even of the third parties who take the documents. So in *Inhaberpapiere*, debtors need not examine whether possessors of them are truly entitled or not, and creditors need not positively claim and prove that they themselves are truly entitled, and moreover *bona-fide* transferees are highly protected (in the German Law they are protected more highly than in those of movables). In this way Jacobi says that *Inhaberpapiere* satisfy the needs of rapid transactions having such character.

Next, Jacobi considers *die technische Orderpapiere*. In the German Law, the followings belong to them: bills of exchange, cheques, promissory notes, share certificates, *kaufmännische Anweisungen* (mercantile orders), bills of lading, warehouse warrants etc. (only when they are payable to order). What has most complete regulations are bills of exchange (Bills of Exchange Act), and others follow the example of them. Therefore Jacobi selects the bills of exchange as a fixed subject of study. In Germany, when Jacobi was engaged in writing, the German Bills of Exchange Law (*Deutsche Wechselordnung*) was being enacted, and so the legal states were at that time somewhat different from those of the present when the Bills of Exchange Act (*Wechselgesetz*) of 1933 that is based on the International Conference at the Geneva is enacted, but at that time already there existed the Uniform Regulation of Bills of Exchange Law of 1912 that is based on the Hague Conference—this was once the foundation of the original paper of the Geneva Conference—. Therefore Jacobi keeps on his argument by referring this Regulation. According to him, the owner of the bills of exchange or the man who is entitled to the disposal of them is he who have titles represented in bills of exchange. This fact was plain according to the German Bills of Exchange Law, and the same thing is seen in the Uniform Regulation of 1912 (and may be so in the Act of 1933). Thus in *der technischen Orderpapiere*, the question who are entitled is answered as rightly as in *Inhaberpapiere*, *i.e.* we see a parallel

between *Recht am Papier* and *Recht auf dem Papier*. And bills of exchange and other *technische Orderpapiere*, however, give possessors of them such a representation as if they are entitled. But here that which affords such a representation is, differing from the case of *Inhaberpapiere*, the indorsement and possession of documents. And the representation given in this way is useful, first in favour of debtors—debtors are discharged by repayment to those who are given such a representation as if they are entitled by the indosement and possession of documents, though not entitled correctly—, secondly in favour of creditors—crediors may claim on the indorsement and possession of documents only and need not claim and prove further—, and finally in favour of *bona-fide* transferees— they, so far as they take the documents believing the statement in the documents, become entitled even if the transferors have not been entitled. Thus the same thing may be said in *Inhaberpapiere* and in *die technische Orderpapiere*.

Next, Jacobi consideres *die einfache Orderpapiere* and *Rektapapiere*. As the examples of *die einfache Orderpapiere*, Jacobi gives overdue bills of exchange, overdue promissory notes, overdue cheques, *Reichsbankanteilscheine* (the German Center Bank Share Certificates) and other voluntarily issued *Orderpapiere* which are not *technisch*; and as the examples of *Rektapapiere* he gives the followings: bills of exchange, promissory notes and cheques which contain words prohibiting transfer, share certificates which is prohibited to transfer by charter (in Japan now these prohibits are not admitted), *Hypothekenbriefe* (hypothecary notes), orders, bills of lading and warehouse warrants, each three of which are not payable to order, and *Namenspapiere* issued voluntarily. In *der einfache Orderpapiere* the entitled is those who are named to be entitled or the holders of the documents who hold them through the good will of the named, and in *Rektapapiere* it is those who are named in the documents. In the former titles are transfered by the indorsement and in the latter by the assignment. And in both of them, according to the German Law, those who acquire titles is the owners of the documents. Yet these documents do not give the possessors of them the same representation as that of *Inhaberpapiere* or *die technische Orderpapiere*. Namely, in them, debtors are discharged only by repayment to true creditors, and creditors must, in order to exercise

their titles, claim and prove that they acquire titles truly and validly, and *bona-fide* transferees are not admitted. But, according to Jacobi, these documents have the meaning as will be stated below. Generally in the case of the assignment of obligations, as provided in the German Civil Code, debtors must pay only in exchange for assignments issued by assignors, but they must pay without assignments when the notice of assignment was reported from assignors to debtors in writing, and in this case debtors, being repayed to assignors, may be discharged even when the assignment is not done or when it is invalid. In *Wertpapiere*, the possession of documents is necessary to exercise titles. This means that, when creditors wish to exercise titles, debtors may demand of creditors to show at once all facts concerning to their qualification, and that, therefore, debtors need not have regard for the information of assignment given them before then. It is in this point that *die einfache Orderpapiere* and *Rektapapiere* have the significance. Namely, though these documents do not give possessors of them such a representation as if its possessors are entitled, yet they give such a representation as if its possessors did not assign titles even if they had already assigned, *i.e.* the representation as if its possessors are still entitled. Therefore, in these documents, debtors are discharged by repaying to assignors, who possess still the documents even when they know of the assignment, while they are not discharged by repaying to assignors who do not possess the documents even when they do not know of the assignment. Thus here these documents give also the representation as if its possessors are entitled, though to less extent than in *Inhaberpapiere* and in *der technischen Orderpapieren*. Further, according to Jacobi's opinion, the tendency seen at present actually is historically such as the delivery of documents is necessary to the assignment of titles represented in the documents. Therefore it may be generally recognized, except of few example (e.g. *Kuxscheine* [share certificates of mining corporations]), that these documents have its significance at assigment. And the above stated characters of these documents, also, are useful in the decision of the entitled and are necessary for the commercial transactions.

Further Jacobi treats of *Korporationspapiere*. The most significant examples which he gives are share certificates. In order to decide who the entitled is and to see in what connection the exercise

of titles and the possession of decuments are linked, the above stated principle is suitable only after the problem whether the documents are *Orderpapiere* or *Rektapapiere* is resolved. But it is remarkable that the register qualifies members against the corporation. The documents are the only qualification for the registration. Thus *Korporationspapiere* are the *Vorlegitimation*—fore-qualification to acquire the qualification against the corpopation. And the rules about *Orderpapiere* or *Rektapapiere* apply to them.

In this way Jacobi finds, in *Wertpapiere*, that the necessity of the possession of documents is based upon that which the possession of documents gives the representation or qualification—*Legitimation*—as if possessors of the documents are entitled. This qualification—representation—of right is said to be founded on the theory of *Rechtsschein* (representation of rights), which is said to be peculier to the German Law and to be similar to the rule of *estoppel by representation* in the Anglo-American Law. Each group of *Wertpapiere*, however, gives the representation in various ways. But every *Wertpapiere* have a common nature in giving such a representation as if possessors of them are entitled on which debtors may rely. In order that the *Wertpapiere* has its proper merit, however, the possession of documents must be necessary to the exercise of titles reprented in them. Therefore it is essential for *Wertpapiere* that, when the possession of documents are demanded in order to exercise titles, those who wish to exercise titles must show the instruments true to type of the qualification, and that, in regard to the points in which the instruments of qualification are concerned, debtors need not examine the titles themselves at their own risk. Further, in the *Wertpapiere* in more strict sence, the possession of documents must be the necessary and the sole instrument of the exercise of titles. Therefore, it may be said that, when such representation which is given through the possession of documents is useful only in favour of debtors, the documents are *Wertpapiere*. When debtors are discharged by repayment to the possessors of documents, those who wish to exercise titles must show the documents, but the documents are the instruments of qualification only in favour of debtors, that is to say, when, in assigning titles represented in the documents, debtors are discharged by repayment to possessors of documents, and when assignees must show the documents in order to exercise titles, though debtors are discharged even

by repayment to assignors so far as they have no knowledge of the assignment, the documents are no more the sole instruments of qualification of the exercise of titles, and consequently, strictly saying, must be excluded from the limit of *Wertpapiere*. As synthesis of the above stated, Jocobi gives the following proposition as the conclusive conception of *Wertpapiere*: "*Wertpapiere* are documents which represent who are entitled with the following effects that (1) debtors may be so far as therein under their directions in all dealings with creditors, therefore their all dealings with those represented in the documents are effective to those entitled truly, and that (2) creditors can claim titles represented in the documents only by showing the qualification through the documents (or their substitudes) or, if not, can claim only in exchange for a perfect security, and finally that (3) debtors cannot claim against assignees the dealings with assignors, when they are done after the assignment and the delivery of documents, even if creditors have no knowledge of the assignment."

According to Jacobi's definition, strictly speaking, the documents which give to the representation as if possessors are entitled only in favour of debtors are not *Wertpapiere*, for they are not the sole instrument of qualification. But even these documents have the nature that is in common with *Wertpapiere* in the point that it gives the representation as if the possessors are entitled, but they are different from *schlichte Beweisurkunden*. And, according to this essential explanation, some of rules about *Wertpapiere* may also apply to these documents. Jacobi, in this way, says that even these documents may be named as *Wertpapiere*, though, commonly, these documents are called *Legitimationspapiere* or *Legitimationsmittel* (documents or instrumens of qualification) being distinguished from *Wertpapiere*.

According to Jacobi the nature of *Wertpapiere* is to give the representation as if the possessors of them are entitled. Such a conclusions as this, however, seems to be not wholly recognized by other scholars in Japan as well as in Germany. Yet here he applies in the study of *Wertpapiere* the method the necessity of which has been called out all the time since the age of Jhering in the Continental Jurisprudence, *i. e.* the method to approaching the basis on the provisions which is applied in the society. This is probably the normal way of the study of Continental Jurisprudence. Jacobi's method of finding the coception of *Wertpapiere* is that of defining the conception

on the basis of provisions, *i.e.* the legal or external common mark of the phenomina of *Wertpapiere*. This is the same method as Brunner's and his successors'. But Jacobi, further, tries to approach the inner basis of this external mark.

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Against such attitudes, there is an other attitude which is took to define *Wertpapiere* on the basis of the economic purpose of the documents, *i.e.* the negotiability—the protection of *bona-fide* transferees. According to this view, the qualification to be the entitled is not always the essential mark of *Wertpapiere*. Particularly documents of qualification, are useful only in favour of debtors—*Legitimationspapiere*—are not said as a sort of *Wertpapiere*. Scholars who have such views criticize that the attitude of Brunner, Jacobi and of the like is too formal. Against this criticism, Jacobi argues that such a establishment of the conception of *Wertpapiere* on the basis of their economic purpose is that is done *a priori*, and his own theory is, correct, as trying to establish the conception on the basis of positive provisions of law. According to Jacobi, what economic purposes these documents have and how these documents attain such purposes is learned first by such a study of the basis of the phenomena as possessions of documents are necessary to the exercise of titles represented in them and the law pursues such economic purposes in all *Wertpapiere* by giving the qualification as if the possessors are entitled.

Karl Wieland, one of the writers who lay stress on the economic purpose—negotiability—of *Wertpapiere*, doubts on Jacobi's theory as follows. First, is it essential to say the representation in favour of debtors though it is not peculiar to *Wertpapiere*? Secondly, are *Wertpapiere* able to be considered from a standard principle by laying more stress on the interest of debtors or that of creditors? Finally, does it not show his unreliable view that, on the one hand, he defines *Wertpapiere* as the instruments of qualification, and on the other hand, he has regard for the function of *Wertpapiere* to secure the negotiability of titles so as seen in his argument about *Rektapapiere*? To this criticism, Jacobi answers: of the first question, the representation as if the possessors are entitled which is useful in favour of debtors is the condition which is precedent to other functions of

Wertpapiere, being unseparated from the nature of *Wertpapiere*; of the second, there is no particular question if the interests of each parties are not promoted by the various means, but by the identical means, the interest becomes the standard principle; of the third, the ordinary phenomena of practice is considered, disregarding the establishment of the conception.

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Of the conception of *Wertpapiere*, scholars' opinions are not yet coincided. Between the above-mentioned two attitudes, I think, the former that is based on the inner principles of rules of law is rather disirable than the latter is based on the basis of economic purposes. But Jacobi's conclusion seems to be not always undoubtful. There seems to be a room for reexamination whether the nature of *Wertpapiere* is found in the representation as if the possessors are entitled or not. And, even if we agree with the opinion of Jacobi, it is the question what important position the *Rechtsscheintheorie* that is the theoritical basis of Jacobi's view occupies in the Modern Civil Law in which legal effects are founded on the will of parties. Further, strictly speaking, Jacobi's argument on *Rektapapiere* leaves us much questionable problems.

Recently in Japan, an attempt to define *Wertpapiere* from the point of their economic purpose, that is, from the point of negotiability is seen frequently. The definition that is similar to that of Negotiable Instruments in Anglo-American Law is inclined to be given by critics and scholars, and it seems to me that the conception of Negotiable Instruments often stimulates the critics and scholars who have such views. The critics who want to emphasize in the extreme the negotiability of *Wertpapiere* wish to treat not only *Legitimationspapiere* but also *Rektapapiere* as being quite distinguished from *Weripapier*. But it is the question whether or not such conclusion is agreeable with the whole system of the Japanese Civil Law and how the simirality between *Wertpapiere* and *Legitimationspapiere* is to be explained.

In this way, in Japan as well as in Germany, Brunner's definition of *Wertpapiere* is generally still used unaltered in its essence. And *Wertpapier* and *Legitimationspapiere* are usually distinguished each other.. Concretely speaking, bills of exchange, cheques, promissory

notes, debentures, public loans, share certificates, bills of lading, warehouse warrants or the like are generally called *Wertpapiere*, and tickets of railways or car etc. are, though diversely disputed, generally called *Wertpapiere*. On the contrary, luggage tickets, bank deposit notes, insurance policies etc. are usually said to be *Legitimationspapiere*. Yet it is often difficult to decide whether certain document is *Wertpapier* or *Legitimationspapiere*—particularly when it is a document not provided in statutes but used among merchants—.

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The conception of *Wertpapiere* in the Continental Law seems to have much more substance than that of Negotiable Instruments, though definitions done by critics or scholars who put stress on the negotiability of *Wertpapiere* might be, at least superficially, nearer of the latter. Further, Negotiable Instruments and *Wertpapiere* are respectively based on the law of contracts in the Anglo-American Law and on the law of obligations in the Continental Law, and moreover each law has important difference one another. Therefore it is not admitted to explain carelessly about the similarity of the both documents. This is clear, as I considered at the beginning of this short study, from the definition given by the late Judge Willis, K. C., for, in that definition, we can see his regard for "consideration" which is generally not seen in the Continental Law. Moreover, it may be said that the easy comparative observation of the various practical functions of various documents in several countries, *i. e.* England, U.S.A., Germany and Japan, is impossible.

But, in the Continental Law, bills of exchange, promissory notes and cheques are called *vollkommende Wertpapiere* (complete valuable instruments) as the model of *Wertpapiere*. In the Anglo-American Law also they are considered as the original Negotiable Instruments. It is worthly to study comparatively *Wertpapiere*, *Legitimationspapiere*, *schlichte Beweisurkunde* in the Continental Law and Negotiable Instruments, Quasi Negotiable Instruments, Not-negotiable Instruments in the Anglo-American Law. Such study seem very interest as an explanation of the functions of "papers" in the lagel world.