

Discussion on the Antinomy Principle of Real Right

From the Perspective of the Absolute Nature of Real Right and Good Faith Acquisition

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Abstract—The concept of real right is characterized by its absolute nature, which is also the general characteristic of the real right law as an institutional system. The absolute nature of real right has no traditional gene of Rome law, and is profoundly influenced by Kant's science of right in the concept of law. The real right conceived by Kant has influenced the concept of real right law, which always put the real right into the frame of legal relation. In traditional civil law system, the absolute nature of real right is one of its fundamental characteristics. However, for the overall transaction security and efficiency considerations, it establishes a good faith acquisition system with the protection of third party. How to solve the antinomy of the two is the focus of the problem.

Keywords—the absolute nature of real right; good faith acquisition; the principle of public announcement and public trust

I. KANT'S DEFINITION OF "REAL RIGHT" AND THE ABSOLUTE NATURE OF REAL RIGHT

A. The concept of Real Right

Rome law divides the private right into two categories, real right and creditor's right. The real right is the right to property. The creditor's right is the right to human. Kant is deeply influenced by the Rome law. In his famous work "Introduction to the Metaphysics of the Law", he has made original analysis on the distinction of "human rights" and "property right" with will philosophy as a starting point. According to the objects of rights, he divided private right into property right, personal right and human right with the nature of real right. The first two have the unity with real right and creditor's right in Roman law, while the human right with the nature of real right is the well-pleasing creation of Kant. It distinguished the formal definition of real right from real definition, and pointed out the absolute nature of real right.

Real right is a kind of right to control. In other words, it is the right to control certain object. Creditor's right is a kind of right to claim, namely a right to claim someone to be responsible for certain action. It is generally believed that the property right is the right to fight against others and to control a particular object. In Rome law, the real right is often defined as "a kind of right against all the people to control it" [1]. Kant believes that this definition is correct, but there are still loopholes. It does not reveal the nature of real right. The real definition of real right is: "the right in a thing for the private to use one thing, which is shared by the concerned person and all other people originally or derivably" [2]. Only in accordance

with this condition, can other persons be excluded from the private use of the substance. The first half of this definition is the general law definition of the property right, and the latter half of it profoundly pointed out the possible conditions of the existence of real right - that is, the human civilization community [3]. The "joint possession" is not a form of possession in the general civil law, but represents the state of a human civilization community [4]. Real right and all rights can only exist in a community, and in the relationship among people. When the free will of each person wants to control "external objects", the property right is needed to define the control scope of each person. The meaning of "real right" not only refers to the "right" in a thing, but also the basic principle of relevant laws related to "mine or yours". Then, the nature of the legal relationship of real rights is to adjust the relationship between human and things or to adjust the relationship among people? The relation of will represented by real right is by no means the relationship between human and things but the relationship among people. In other words, the real right holder and others are in a state of joint possession [5].

B. The Absolute Nature of Real Right

The nature of real right mainly determines that: the right holder can directly control the subject matter and enjoy its benefit. It is an absolute right. It is a kind of exclusive right and an inviolable right. As Kant said, a right in a thing refers to the right of a private to use a thing. In theory, it is called as the absolute nature or exclusive nature of real right. In other words, the real right refers to the right of holder who can directly control subject matter and enjoy the benefit. The holder of real right can resist any person other than himself/herself to use the object. That is to say, all other people have the obligation of inaction. They shouldn't interfere the real right holder to enjoy the satisfactory state of subject matter. If someone interferes, the real right holder can relieve according to the claim of real right and recover him/her right to enjoy the satisfactory state of subject matter. The absolute nature of real right means that any person other than right subject should bear the obligation of admitting and respecting real right. The exclusive nature of real right is a typical reflection of the absolute nature of real right. Therefore, the absolute nature and exclusive nature commonly reflect the absolute spirit of real right⁶. The absolute nature and exclusive nature of real right are important attributes of real right, and important characteristics that distinguishes the real right from creditor's right. The absolute nature and exclusive nature of real right determine that the effect of real right is stronger than the effect of creditor's right.

II. THE PROTECTION OF THIRD PARTY – GOOD FAITH ACQUISITION

For exclusive and absolute nature of real right, most people have the concept that “right holder can fight against all other people, and all other people have the obligation of non-interference or non-infringement” [7]. The third party is defined as “anyone or anybody in addition to right holder”⁸. But in complex transaction, it is necessary to protect the right of real right holders and the rights of others, which refers the protection of third party and the rights of others.

In real right law, the protection of third party starts from the angle of third party on the basis of absolute nature of real right. The enjoyment of the right is bound to produce impact on others, so the real right is needed to be publicized. The third party should be protected on account of trust on public announcement. Therefore, the protection of third party is very important in real right law. Starting from the protection of third party, the third party with real meaning refers to any interested person with the party concerned in legal relationship. Among them, the most important is the good faith acquisition system.

A. *The Good Faith Acquisition System and the Regulations of Current Law*

Good faith acquisition, also known as bona fide possession, refers to gaining the property right legally under the conditions that the assignee acquire the property in good faith after the possessor of property who is not entitled to dispose of the property transferred the property to a third party. The owner of the original property shouldn't ask the assignee to return the property, but the owner can ask the assignor to compensate for the loss, just as the provision⁹ of article 106 in Real Right Law. The good faith acquisition system is originated from the principle of “hand by hand” in Germanic law; meanwhile it has absorbed the good faith conditions of acquisitive prescription¹⁰. The good faith acquisition system protects the concerned party's reasonable reliance on the public announcement form of the change of real right. It balances the interest between original real right holder and good faith assignee, and finally tends to protect the interest of good faith assignee. It reflects the outcome evaluation of the static safety on the property right and the dynamic security on the property transaction, and in essence it is purposed to protect the transaction security and guarantee the fast and convenient transaction furthest. This is an inevitable choice to the rapid development of modern social market economy and the urgent need of the protection of transaction security. There are a lot of discussions on the legitimacy basis of good faith acquisition system. According to Bauer's view, “only the thought based on protection of legal act, method and transaction, can make the good faith principle obtain a satisfactory legitimacy basis¹¹ to a certain extent.

Article 106 of Real Right law has clearly defined the good faith acquisition system. “In case a person unauthorized to dispose realty or chattel alienates the realty or chattel to an assignee, the owner is entitled to recover the realty or chattel. The assignee shall obtain the ownership of the realty or chattel if meeting all of the following conditions, unless it is otherwise prescribed by law: (1) to accept the realty or chattel in good

faith; (2) to purchase the realty or chattel at a reasonable price; and (3) in case registration is required by law, the alienated realty or chattel shall have been registered, while in case registration is not required, the delivery thereof shall have been accomplished.” This article first has defined that the good faith acquisition system is applicable to the realty and chattel. Secondly it had defined the constitution elements of the good faith acquisition: good faith, reasonable price and public announcement of the change of property right.

III. THE ORIGIN OF THE ANTIMONY¹² BETWEEN THE ABSOLUTENESS OF REAL RIGHT AND THE BONA FIDE ACQUISITION

Real right has the characteristics of absoluteness and exclusiveness. The realization of the right will affect the interests of third party. The protection of third party is the focus of the real right law. In short, the conclusion of the contract is to change the real right. The change of real right will affect the interests of the third party, so the change of real right is the direct reason to protect the third party and it shall be regulated by the real right law. Therefore, the regulated subject of real right law not only includes “static order” – the control order on the object in static economic relationship, and dynamic transaction security. Transaction security includes both the guarantee of transaction security of real right acquisition party and the third party. For the former, it guarantees that the real right holder could gain and enjoy the real right by establishing perfect rules for the change of real right. For the latter, it determines and protects normal economic order by establishing a variety of objective and fair systems. Good faith acquisition system is a typical representative of the protection of the third party.

The current Real Right Law is under the market economy. Its core mission is to guarantee the transaction security of the third party and transaction order. Currently the real right systems of different countries are also different. France and Japan advocate changing the real right according to the will of the party concerned, and they ignore to protect the interests of the third party and are lack of protection on transaction security. ¹³Germany has established the real estate registration and chattel possession and payment system, which treat the idea of the party concerned and protect the third according to the objective good faith standard. This method is not only in line with the theory of law, but also is easy to be operated in judicial practice. ¹⁴At same time, Taiwan also takes similar methods. Article 43 of its land law endows land registration absolute effect, so as to protect transaction security. The absolute effect in this land law is only for the protection of registered third party in good faith¹⁵.

On the basis of absolute nature and exclusive nature, the enjoyment and exercise of the real right will affect the interests of third party, so the protection of the third party becomes the normal behavior in the norms of real right law. According to the specific circumstances of the protection of the third party, the situation of the protection of third party occurs mostly when legal real right is inconsistent with actual real right¹⁶. Above all, the protection of transaction security has become the focus of real right law. The good faith acquisition system, as a typical system to protect transaction security, has been

stipulated in laws of different countries in order to fight against the absolute nature of real right.

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IV. SOLUTIONS TO THE ANTINOMY PROBLEM – THE PUBLIC ANNOUNCEMENT AND PUBLIC TRUST PRINCIPLE OF REAL RIGHT

According to the public announcement principle of real right, the change of real right shall be displayed in an objective way in order to obtain social recognition and legal protection. General means of public announcement are registration for real estate and payment for chattel. In real estate registration, there often occurs the inconsistency of registered real right holder and actual real right holder and the inconformity of registered real rights and actual real rights due to the reason of the party concerned or other reasons. And there is inconsistency between possession representation and actual real right of chattel. It is essential to determine the control order of the object objectively and correctly if there is contradiction between legal real rights and actual real rights [17].

Legal real right should be protected first. First of all legal rights are based on the principle of real right publicity. The principle of real right publicity reflects the protection of transaction security¹⁸, so that the protection on legal real rights is in line with the main purpose of legislation. At same time, it adheres to the principle of public announcement and has the foundation of public trust. So, the interests of the third party and trade security can be guaranteed. However, the actual real rights can be protected on conditions that they are not against the principle of real right publicity. For example, it can be established on system of “objection defense registration” and “correction registration”. Moreover, some rights still have the nature of real right in real life, but they are not recognized in the legislation, so we should take measures to protect them. In addition, some real rights are not announced publicly due to the reasons of the party concerned. They can only exist as actual real rights. If we only ask original real right holder to return original thing and rights in the thing, it will violate the public announcement principle of real right and obstruct justice in transactions [19].

It is worth noting that the rights that third person in good faith gained from the person with no right are scoped. The system is closely related with the public announcement principle of real right, so that the gained rights should be proved to be correct according to the principle of public announcement.

V. CONCLUSION

In short, the combination of the public announcement principle of real right and the judgment of objective good faith could protect the interests of the third party in good faith and entire transaction order.

- [1] Kant thought the real right refers to the right against all other people to take possession of the property. This principle comes from the meaning of "real right" in Rome law. (Germany) Quoted from Kant's Law Metaphysics Principle - the Science of Rights, translated by Shen Shuping, proofread by Lin Rongyuan, Commercial Printing Shop, the first edition in 1991.
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- [12] Antinomies, a philosophical concept proposed by German Philosopher Kant, refer to contradictory phenomena of two theories or doctrines on same object or problem. They are established respectively, but they are self-contradictory and conflict with each other.
- [13] Article 1385 of French Civil Code, Article 175, 176 and 177 of Japanese Civil Code.
- [14] Article 891 of German Civil Code stipulates that: “(1) in land register book, certain right is registered for the interest of certain person. And then the person is inferred to enjoy the right. (2) in the land register book, the registered right is cancelled, and then this right is inferred to be non-existence”. Translated and annotated by Chen Weizuo, German Civil Code. Law Press, the third edition in 2010.
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