

## A COMPARATIVE STUDY OF THE TRANSFER OF PROPERTY RIGHTS IN JAPANESE CIVIL LAW (1)

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### I. *The Law of Property and Real Property Rights*

#### 1. Overview

There is considerable diversity among the systems and laws of property rights around the world,<sup>1</sup> and the tendency in each country to adhere to traditional systems is sometimes very strong. This is in marked contrast to the situation in the law of obligations, where there is a trend towards the unification of systems and laws, as can be seen, for example, in the *Uniform Law of the International Sale of Goods*, 1964, The Hague and *UN Convention on Contracts for the International Sale of Goods*, 1980, Vienna.

Even the most fundamental systems in the law of property differ between countries, such as *numerus clausus* (infra 2) or the manner of acquiring property (II, III). Indeed, the former has been recognized in most Continental legal systems since the eighteenth century, but was not apparent in traditional English law even in the nineteenth century. The modern estate system was first created under the *Law of Property Act 1925*.

Real estate has traditionally been a most important repository of national wealth in every country, especially prior to the Industrial Revolution.<sup>2</sup> It has often been afforded great protection and been subject to strong restrictions. Real property rights commonly affect not only the parties to a contract, but also third parties. As a result, the many types of interest in real estate sometimes prejudice the stability and simplicity of transactions and make harmonization of real property and contractual rights difficult. Many kinds of interest in real estate under the *ancien régime* were abolished by modern legislation following the French Revolution on the grounds that they represented a kind of feudal privilege or hindered freedom. This became the model for the modern Continental law of real property rights.

While freedom of contract is recognized as a matter of course from the effect of the respective obligations, there is still much scope for restriction in the law of real property rights.

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<sup>1</sup> There have been many comparative studies of the law of obligations, but relatively few in the area of real property rights. Vgl. Zweigert-Kötz, *Einführung in die Rechtsvergleichung*, 1996 (only contract, unjust enrichment and tort); Schwenzler, *Rechtsvergleichung*, 1996, S.305ff.

Cf. The English translation of the Civil Code used here is based mainly on *The Civil Code of Japan, under Authorization of the Ministry of Justice & The Codes of Translation Committee*, 1988.

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<sup>2</sup> With respect to the traditional Japanese law of real property, see *Minji kanrei ruishu* [Civil Customs in Tokugawa Japan] 1878, ch. 2 (1969 ed., p.200); Wigmore, *Law and Justice in Tokugawa Japan*, Part V, VI (A~G), Property. (1971~1981).

The *Pandects* system certainly played a major role in abolishing many obsolete types of real estate.

In addition to this, there are many kinds of real property rights which are not recognized or differ from those in other countries. This is because many rights have developed from traditional usage over a period of many years, such as rights to use others' land (*Youeki-bukken*; surface rights (*superficies*) [*chijouken*], perpetual leases [*eikosakuken*] and easements [*chiekiken*]) or to use land as security for loans (*Tanpo-bukken*; the right of retention [*ryuchiken*], preferential rights [*sakidori-tokken*], pledges [*shichiken*] and mortgages (hypothecations) [*teitouken*]). It is often difficult to find the same or equivalent institutions in other countries.<sup>3</sup>

## 2. Numerus clausus

(1) (a) No real property rights, other than those provided for in the Civil Code or other laws, may be created (Article 175, Japanese Civil Code=JBGB). The categories of real property rights are thus greatly restricted in Japanese civil law. This derives from the traditional Continental way of statutorily categorizing real property rights. A real property right is an absolute right which can be asserted against any third person. Statute law requires that the limits and existence of the right be clear. There are a few exceptions to this principle, such as *onsenken*<sup>4</sup> and *jouto tanpo*.

The first Civil Code in Japan (1890) also defined this principle. This definition was clearer than the existing JBGB in that provided an exhaustive list of all real property rights in Article I-2 as follows:

“Les droits réels, s'exerçant directement sur les choses et opposables à tous, sont principaux ou accessoires. Les droits réels principaux sont:

- 1 La propriété, pleine ou démembrée;
- 2 L'usufruit, l'usage et l'habitation;
- 3 Les droits de bail, d'emphytéose et de superficie;
- 4 Le droit de possession.

[Ces droits sont l'objet de la I<sup>er</sup> Partie du présent Livre.

Les servitudes foncières, accessoires du droit de propriété, sont aussi traitées dans le présent Livre.]

Les droits réels accessoires, [formant la garantie des créances] sont;

<sup>3</sup> In the area of property law (*Sachenrecht*), the German Civil Code (BGB) provides for *Erbbaurecht* (deleted), *Grunddienstbarkeiten* (Art. 1018), *Nießbrauch* (Art. 1030), *Persönliche Dienstbarkeiten* (Art. 1090), *Vorkaufsrecht* (Art. 1094), *Reallasten* (Art. 1105), *Hypothek* (Art. 1113), *Grundschild* (Art. 1191), *Rentenschuld* (Art. 1199) and *Pfandrecht* (Art. 1204) and the French *Code Civil* provides for *nantissement* (Art. 2071), *gage* (Art. 2073), *antichrèse* (Art. 2085), *privilège* (Art. 2092) and *hypothèque* (Art. 2114).

Property rights (*Eigentum* (Art. 903 BGB), *propriété* (Art. 544 CC)) and rights of possession (*Besitz* (Art. 854 BGB), *possession* (Art. 2228 CC)) are common, but the contents are not necessarily the same.

<sup>4</sup> *Onsen-ken* is a customary right in a hot spring area and has greater value than property in a forest. *Jouto tanpo* is another customary right of surety similar to a mortgage. It secures the rights of a creditor by means of a property right over the debtor's real property or chattels during the period of obligation.

The statutory surety on real estate is *teitouken* [*Hypotek*], by which the creditor obtains no property, but rather a limited right to sell the debtor's land compulsorily in the event of the latter's non-performance and thus receive the sale price in lieu of performance.

- 1 La servitude,
- 2 Le droit de rétention,
- 3 Le gage,
- 4 L'antichrèse,
- 5 Le privilège,
- 6 L'hypothèque.

[Ces droits sont l'objet du Livre IVe.]”

A list of real property rights was also provided in the first Civil Code. The principal rights (*droit réels principaux*) are ownership, possession and other rights forming the right to use the land of others (*youeki bukken*). The secondary real property rights (*droit réels accessoires*) are guarantees of credit (*tanpo bukken*). This article gave birth to the current Article 175.<sup>5</sup>

(b) There are similar provisions in some foreign Civil Codes, such as the Austrian Civil Code (ABGB; *Allgemeines Bürgerliches Gesetzbuch*, 1814). Article 307 defines real property rights and rights of obligation<sup>6</sup> Article 308 restricts the kinds of real property rights.

Article 307: Rechte, welche einer Person über eine Sache ohne Rücksicht auf gewisse Personen zustehen, werden dingliche Rechte genannt. Rechts, welche zu einer Sache nur gegen gewisse Personen unmittelbar aus einem Gesetze, oder aus einer verbindlichen Handlung entstehen, heißen persönliche Sachenrechte.

Article 308: *Dingliche Sachenrechte sind das Recht des Besitzes, des Eigentumes, des Pfandes, der Dienstbarkeit und des Erbrechtes.*

(c) The German Civil Code (BGB; *Bürgerliches Gesetzbuch*, 1900) has no corresponding provision to Article 175 of the JBGB. Article 137 (*Rechtsgeschäftliches Veräußerungsverbot*) of the BGB, however, provides that the right of an owner to transfer property can be restricted only by contractual rights and not by real property ones. Thus, if A promised B that he would not transfer the property to any person, but in fact transferred it to C, then B's remedy is restricted.

The breach of such promise of restriction renders A liable to pay damages, but does not affect the validity of the transfer of property from A to C.<sup>7</sup> Article 137: Die Befugnis zur

<sup>5</sup> This article was drafted by Hozumi in the Second Drafting Committee established in 1888. Cf. *Houtenchousakai (HC)*, *Minpou giji sokkikoku* (The Second Drafting Committee, *The Stenographic Records of Committee of the Civil Code*) vol.2, p.252 (original Article 176=current Article 175).

The distinction between principal and secondary rights (*droit réels principaux ou accessoires*) stems from the French Civil Code (Art. 543: On peut avoir sur les biens, ou un droit de propriété, ou un simple droit de jouissance, ou seulement des services fonciers à prétendre). Cf. Netherlands Civil Code (1838), Art. 584.

Boissonade published a commentary on the drafting of the first Civil Code (*Kyu-minpou*): *Projet de Code civil pour l'Empire du Japon, accompagné d'un commentaire*, t.1-5, 1882-89 (rep. 1983). Especially t.2, p.177 (Art. 370), p.209.

<sup>6</sup> There are similar provisions in other countries. Cf. *Vaud*. Art. 344; *Graubünden* Art. 176; *Montenegro Property Code*, Art. 15. I have discovered that the Japanese drafters also referred to the *Louisiana Civil Code*, Art. 479.

<sup>7</sup> The meaning is clearer in the first draft of the BGB (Entwurf I), Art. 796: Die Befugniß desjenigen, welchem das Eigentum oder ein anderes Recht an einer Sache zusteht, über sein Recht zu verfügen, kann nicht durch Rechtsgeschäft mit Wirkung gegen Dritte ausgeschlossen oder beschränkt werden, soweit nicht das Gesetz ein Anderes bestimmt.

This was succeeded by the second draft of the BGB (Entwurf II), Art. 102a: Die Befugniß zur Verfügung über ein veräußerliches Recht kann nicht durch Rechtsgeschäft ausgeschlossen oder beschränkt werden. Die Wirksamkeit einer Verpflichtung, über ein solches Recht nicht zu verfügen, wird durch Vorschrift nicht berührt. Vgl. Motive 42f. Protokolle 500f.

Verfügung über ein veräußerliches Recht kann nicht durch Rechtsgeschäft ausgeschlossen oder beschränkt werden. Die Wirksamkeit einer Verpflichtung, über ein solches Recht nicht zu verfügen, wird durch diese Vorschrift nicht berührt.

A kind of real property right which restricts transfers is not a property right in civil law and is prohibited as a violation of the non-discretionary provision (*zwingendes Recht*) to create such a right. Article 91 of the JBGB provides that only an intention which differs from any provisions of laws or ordinances which are not concerned with public policy (discretionary provisions) prevail in a juristic act.

It should always be possible to transfer a property right. Statute provides not only the list of real property rights, but also the contents of each right. For example, the right of property is provided in Article 206 of the JBGB. An owner has the right, subject to limitations by law and ordinances, freely to use, take profits from, and dispose of the thing owned.<sup>8</sup> It is impossible to change the contents of the right. Cf. French Code Civil, Article 537(1): Les particuliers ont la libre disposition des biens qui leur appartiennent, sous les modifications établies par les lois. Article 544: La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements. Article 903 BGB: Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen.

It is only natural that property rights be subject to limitation by law and ordinances (Article 206). Subject to such limitations, the ownership of land extends both above and below its surface (Article 207. vgl. Article 905 BGB). This of course means an extension of land ownership.

(2) By contrast, a claim or right of obligation may have as its subject something the value of which cannot be estimated in money (Article 399).<sup>9</sup> The subject of the claim is not restricted to real property rights. The subject may be either real property or chattels. The right of obligation is a relative right which cannot be asserted against any third party, and has effect only between the parties to the contract. It is not necessary that the limit or existence be as clear as statute law requires. A contract binds only the parties and the parties are free to alter the contents (rights of obligation and Freedom of Contract).

### 3. The Property System in Japan

(1) The modern Japanese property system was established in 1873-81. The innovations in land law developed from the process of modernization of land tax law (*chiso-kaisei*). As soon as the newly-established government deprived the feudal Tokugawa Government of central power in 1868 (the Meiji Era), it rejected the feudal land system and attempted to modernize it. Modernization of land ownership and the land tax system were very important to the government because land tax (*chiso*) was virtually the only source of government revenue at the time.

<sup>8</sup> Article 206 provides not only the definition, but also the principle of absoluteness of property rights.

<sup>9</sup> Hozumi drafted this provision. Cf. HC, Stenogramm vol.7, p.59 (original Article 397=current Article 399). This was provided in the first Civil Code I-Arts 293, 323-1, II-Art. 266. Cf. Code Civil Art. 1101, 1126; ABGB Art. 859, 860; The Netherlands CC. Art. 1269, 1270; former Italian CC Art. 1097; Spanish CC. Art. 1088; E I Art. 206; BGB Art. 305; E II Art. 205; ALR I 2 Art. 123; Sachsen.BGB Art. 662.

For this reason, it was necessary (i) to recognize a freedom to sell real property, which had been formally prohibited by the Tokugawa Government, (ii) to establish a modern regime of real property, and (iii) to give landowners new certification of their interests in such property (*chiken*). After preparation by the Treasury in the Okubo administration, the freedom to sell land was declared in February 1872. The same year, certification of property (*chiken*) was issued in relation to all private land. The certification was, however, not negotiable in practice as it was intended to be a kind of legal security.<sup>10</sup> After the enactment of *Land Registration Act (Fudousan-touki-hou)* in 1899, the *chiken* system was replaced by the current system of registration. There is no certification (*chiken*) of land now.

On 28 July 1873, the *Chiso-kaisei-hou (Dajoukan Proclamation, No.272 of 1873)* was promulgated and applied a new tax to land. The annual tax rate was calculated at the rate of 3 per cent of the value of each plot of land and abolished the custom of exemption from taxation in years of poor harvests which had prevailed under the Tokugawa system (*remissio mercedis*). The tax rate was relatively high because the law aimed to maintain substantially the same national revenue flow as the Tokugawa system.

The modern Japanese property regime was established as a by-product of modernization of the tax system. I can see many irrational points coming from the purpose of taxation, especially heavy taxation (infra (2) is also one of these phenomena). In 1877, the tax rate was reduced to 2.5 per cent after large-scale riots in some districts against the new tax law of 1876.

(2) The relationship between land and buildings stems from the Japanese tradition.

(a) In most Western countries, land and any building affixed to that land form one estate. The interest in a building constructed on land is absorbed by that property. In Japan, however, the land and any building on it are treated as separate estates in the law of property. A building is an independent immovable property. Thus, there are separate registration systems for land and buildings.

This stems from the Japanese tradition at the time of the enactment of the Japanese Civil Code.<sup>11</sup> The first Japanese Civil Code also followed this tradition. A building was independent immovable property. I Article 8. *Sont immeubles par nature*; 1° Les fonds de terre, les chaussées, terrasses et autres parties du sol; (2°~7° abridged). 8° Les édifices ou bâtiments fixés ou appuyés au sol, par quelque personne que ce soit, quelque soit leur emploi ou leur destination, et lors même qu'ils devraient être démolis dans un temps fixé, sauf l'exception portée audit article 12.

Cf. French Civil Code Article 518: Les fonds de terre et les bâtiments sont immeubles par leur nature.

German BGB §94 (1): *Zu den wesentlichen Bestandteilen eines Grundstücks* gehören die mit dem Grund und Boden fest verbundenen Sachen, insbesondere Gebäude, sowie die Erzeugnisse des Grundstücks, solange sie mit dem Boden zusammenhängen. Samen wird mit dem Aussäen, eine Pflanze wird mit dem Einpflanzen wesentlicher Bestandteil des Grundstücks.

<sup>10</sup> There are many texts on the reform of the land system. For a brief discussion, see Ikuyo, *Fudousan touki hou* (Land Registration Act), 1994, p.6.

<sup>11</sup> Since traditional Japanese buildings were small and made of wood, it was relatively easy to remove them in parts. Sometimes they were treated as movable property rather than immovable.

On *remissio mercedis*, cf. Ono, Comparative Study of *remissio mercedis*, in *Hantai kyufuron no tenkai*, 1996, p.232. (in Japanese).

By contrast, in German law, buildings and products from the land which are affixed to the land are a fundamental constituent of such land (*wesentliche Bestandteile*).<sup>12</sup>

(b) It sometimes seems irrational that land and buildings on it should belong to different owners, for a building cannot continue to exist without land. Indeed, the reality in most cases in Japan is that both estates belong to the same person.

There are, nevertheless, a few cases where a building comes to belong to another person. This may result especially from the compulsory sale of land or a building on it. The Civil Code therefore has a provision on statutory *superficie* (*houtei chijouken*), Article 388: If, where the land and the building thereon belong to one person, either the land or the building only has been mortgaged, the mortgagor is deemed to have created a *superficie* for the benefit of the purchaser at official auction; in such case, however, the rent shall be determined by the Court on the application of the party concerned.<sup>13</sup>

(c) Another problem stems from the system of treating buildings as independent estates: Where A acquires a right to use land by lease (*chinshakukun*) on the land of B and builds a house on it and B later sells the land to C, A cannot assert his lease rights against C because they are only effective against the other party to the contract, B (lease broken by sale; *Kauf bricht Miete*). C can demand removal of the house. If the house belonged, as in other countries, to B and was sold with the land to C, then it would belong to C and A could demand unjust enrichment to the extent of the value of the house from C in lieu of the house itself.

The Japanese Civil Code provides in Article 605: The lease of an immovable, if registered, shall be effective even as against persons who subsequently acquire real property rights in such immovable. This provision aims to protect A from such a sale between B and C.

In practice, however, the registration of leases is rare. Landowners dislike and reject any registration pursuant to Article 605. After the enactment of the Civil Code, a new law was enacted in 1909. Article 1 of the *Act Concerning Protection of Buildings on Leased Land* (*Tatemono-hogo-hou*, 1909) provides: Even when not registered, a lease of a land shall, *when the land lessee has a registered building*, thereafter be effective against any person who acquired a real property right in the land. In this case, the land lessee need not register the leased land, only his own building.

This law enables a tenant, A, to enforce his lease against the new owner of the land, C, by registering the house alone. A cannot register his lease in the land register without the consent of the landowner, but can register his ownership in the housing register of his own volition. In relation to leases on housing, the following law enables the lessee A to enforce his rights under the lease against a new house owner merely by delivery of the building.

Article 1(1) of the *Rented Housing Act* (*Shakuya-hou*, 1921) provides: Even when not registered, a lease of a building shall, *when there has been delivery of the building*, thereafter be effective against any person who acquired a real right in the building. In this case, the building lessee need not have registration of the leased building, only delivery.<sup>14</sup>

The new *Rented Land and Housing Leases Act* (*Shakuchi-shakuya-hou*, 1991) succeeds these articles in Articles 10 and 31.

<sup>12</sup> The Swiss Civil Code (SZG) of 1907 follows this system. Cf. Arts 655 and 667.

<sup>13</sup> Many problems result from a system treating land and any buildings on it as independent interests. Cf. Ono, *Houjaku kenkyu*, no.36, p.69, note 12.

<sup>14</sup> On the *Act Concerning Protection of Buildings on Leased Land and Rented Housing Act*, cf. Yoshimi, "On the Protection of the Tenants in Japan", *Hitotsubashi Journal of Law and Politics*, vol.1, p.54 (1960) (in English).

## II. *The Transfer of Interests in Property*

### 1. Consensualism (*Konsensprinzip, Ishi-shugi*) or Formalism (*Traditionsprinzip, Keishiki-shugi*)

(1) In modern Continental law, there are two ways of acquiring property, consensualism (*Konsensprinzip*) and formalism (*Traditionsprinzip*).

The Japanese Civil Code adopts the first approach: The creation and transfer of rights in real property take effect *by a mere declaration of intention* by the parties (Article 176). This system derives from the French Civil Code (Articles 711 and 1138). Property is acquired as a result of the contractual obligation and no formal element is required to transfer the property.

Article 711: La propriété des biens s'acquiert et se transmet par succession, par donation entre vifs ou testamentaire, et par l'effet des obligations.

Article 1138: L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes.

Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite, à moins que le débiteur ne soit en demeure de la livrer; auquel cas la chose reste aux risques de ce dernier.

Under the system of consensualism, no element other than the intention (*consens*) of the parties need exist to transfer a property. Neither delivery nor registration of the interest is required. The property transfers as a result of the intention of the parties.<sup>15</sup>

(2) Contrary to consensualism, the transfer of property is effective only after either delivery or registration of the interest under the system of formalism (*Traditionsprinzip*). The German BGB requires these elements in Articles 873, 925 and 929. Not only is the intention (*consens*) of the parties to transfer property (*Einigung*) necessary to transfer the interest in real estate, but also the recording of the information in the register (Article 873(1)). With respect to chattels, the intention of transfer and delivery of the object are necessary to transfer the interest in the property (Article 929).

Article 873: (1) Zur Übertragung des Eigentums an einem Grundstücke, zur Belastung eines Grundstücks mit einem Rechte sowie zur Übertragung oder Belastung eines solchen Rechtes ist *die Einigung des Berechtigten und des anderen Teils* über den Eintritt der Rechtsänderung und *die Eintragung der Rechtsänderung in das Grundbuch* erforderlich, soweit nicht das Gesetz ein aderes vorschreibt.

(2) Vor der Eintragung sind die Beteiligten an die Einigung nur gebunden, wenn die Erklärungen notariell beurkundet oder vor dem Grundbuchamt abgegeben oder bei diesem eingereicht sind oder wenn der Berechtigte dem anderen Teile eine den Vorschriften der Grundbuchordnung entsprechende Eintragungsbewilligung ausgehändigt hat.

Article 929 (*Einigung und Übergabe*): Zur Übertragung des Eigentums an einer beweglichen Sache ist erforderlich, daß der Eigentümer *die Sache dem Erwerber übergibt* und beide darüber *einig sind*, daß das Eigentum übergehen soll. Ist der Erwerber im Besitze der Sache, so genügt die Einigung über den Übergang des Eigentums.

<sup>15</sup> There are some other laws of consensualism, such as the former Italian Civil Code (1865), Art. 1125 and the Belgian Draft Civil Code, Art. 1088.

In Japanese law, formalism can be seen only in some rare cases, e.g. pledges. Article 344 provides that a pledge shall become *effective upon the delivery* to the obligee of the thing pledged.

(3) Under consensualism, a property is transferred before it is delivered or the transfer is made public in the land register. These private transfers, however, sometimes present an obstacle to open and clear transactions. For example, where A has sold his land to B without registering the transfer, the land will appear still to be owned by A, enabling A to sell the same land again to C. C, however, cannot gain any property rights with respect to the land since A no longer owned the land and thus could not transfer any rights, and C may suffer great damage as a result. We may call this a case of double sale or acquisition.

Another example would be where B secured a mortgage over A's land without registering that interest. The land would appear free of such encumbrance. A could mortgage the same land to C, and it is quite possible that C could obtain a valid mortgage over that land. However, C's rights would be inferior to B's, causing C to suffer great damage. We may call this a case of double mortgaging.

The Japanese Civil Code requires registration of the transfer of real estate or delivery of chattels in order to avoid such damage to C. This is the requirement of publicity (*kouji, publicité, Publizitätprinzip*). It is difficult both to recognize the absolute effect of a private transaction between A and B and give absolute effect against a third person automatically. With respect to real property, the acquisition or loss of, or any alteration to, a real property right over an immovable cannot be asserted against a third party until it has been registered in accordance with the provisions of law concerning registration of property (Article 177).<sup>16</sup> The assignment of a real property right in a chattel cannot be enforced against a third party until the chattel has been delivered (Article 178).<sup>17</sup>

The effect of registration or delivery is called *taikou-ryoku (opposabilité)*. The principle that an earlier property right is given precedence over a subsequent one is modified by the *opposabilité*. By reason of the publicity, a person who obtains the *taikou-youken* by either delivery or registration is placed in a superior position to a person who has not. (Only one owner is registered.) Between two persons who obtain the *taikou-youken* equally, the person first in time is given precedence. For instance, a distinction is drawn between first and second mortgages. The time range can be found in the register.

In the case of double acquisition, B can assert his acquisition of the property right against A, the party to the contract of sale, without registration of the transfer or delivery. This is a private contractual relationship. Neither registration of transfer nor delivery is necessary to complete the sale under the contract between A and B (*seiritsu-youken*), but they are necessary in order to enforce property rights against a third party (*taikou-youken*). Without registration, B cannot assert his acquisition of the property against C, a third party unrelated to the contract of sale between A and B.

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<sup>16</sup> Regarding the process of enactment of Article 177, see HC, Stenogramm vol.2, p.263. Cf. French Civil Code, Art. 1140, Law of 23 March 1855 Arts 1-4; ABGB Art. 431; The Netherlands Civil Code Art. 671; Vaud (Swiss) Art. 808; Spanish Civil Code Art. 606; Belgian Draft Art. 1089, German E I Art. 868; Bayern E. III 1 Arts 56, 366 and 415.

<sup>17</sup> Article 178 (Ib.- real right over movable). Cf. HC, Stenogramm vol.2, p.269 (on article 178). French Civil Code, Art. 1141; ABGB Art. 426; The Netherlands Civil Code Art. 667; Italian Civil Code Art. 1126; SZG Arts 199 and 200; Montenegro Art. 65; Belgian Draft Art. 1090; Bayern E. III 1 Art. 93.

(4) On the one hand, formalism by delivery (*Traditionsprinzip*) makes clear the existence of the property. On the other, consensualism (*Konsensprinzip*) recognizes a relative reversion in relation to parties to the contract or third parties. The latter is sometimes convenient in free transactions.

I can find other examples of formalism demanding delivery or registration in many Civil Codes, such as the Swiss Civil Code (Schweiz ZGB; *Zivilgesetzbuch*), Articles 656, 714, 731, 746, 783 and 799. The Japanese drafters of the Civil Code also referred to some Codes: the Austrian Civil Code (ABGB, 1814), Articles 425 and 426; the former Civil Code of The Netherlands (1838), Articles 639 and 1271; Spanish Civil Code (1888), Articles 1094 and 1096; the first draft of German Civil Code (1888), Articles 868, 874, 983, 1023, 1147 and 1208; Prussian Local Law (ALR; *Allgemeines Landrecht für die Preussischen Staaten*, 1783), I §7 Article 1; Civil Code of Saxony (1865), Article 353; and the draft Civil Code of Bavaria (1860/64), 3 Article 93.

Article 176 (as it was originally) was drafted mainly by Nobushige Hozumi.<sup>18</sup>

## 2. Comparative Study — *dinglicher Vertrag*

(1) In French civil law, property transfers as a result of the obligation (*par l'effet des obligation*, Article 711). Only the intention of the parties to the contract to sell and buy is necessary to transfer property rights. No special agreement to transfer property other than the intention to execute a contract of sale is required. By contrast, in property transfers in German civil law only as the result of a special agreement (abstract real agreement) to transfer real property with a kind of legal ceremony, *Auflassung*. The simple agreement of a sales contract is not sufficient. *Auflassung* is a special agreement intended to transfer real property and is accepted by officials at the land registry (Article 925). It is a kind of ceremony of declaration in an office or court. Since 1953, both officials at the land registry and public notaries can accept and recognize the *Auflassung* (Article 925(1)).<sup>19</sup>

The differences between the French and German systems exist not only in the formalism of delivery or registration, but also in the dual agreements of the parties.

Unlike a contractual agreement, no condition or term can be added to an *Auflassung*. It must be unconditional because the transfer and location of the real property should be simple and clear. An abstract real agreement (*Auflassung*) subject to conditions is void (Article 925(2)).

Article 925 (*Auflassung*): (1) Die zur Übertragung des Eigentums an einem Grundstück nach §873 erforderliche *Einigung des Veräußerers und des Erwerbers (Auflassung)* muß bei gleichzeitiger Anwesenheit beider Teile vor einer zuständigen Stelle erklärt werden. [neuegf. 1953; Zur Entgegennahme der *Auflassung* ist, unbeschadet der Zuständigkeit weiterer Stellen, jeder Notar zuständig. Eine *Auflassung* kann auch in einem gerichtlichen Vergleich oder in einem rechtskräftig bestätigten Insolvenzplan erklärt werden]. (2) Eine *Auflassung*, die unter einer Bedingung oder einer Zeitbestimmung erfolgt, ist unwirksam.

Also, the movable property transfers only by the effect of a special agreement to transfer

<sup>18</sup> HC, Stenogramm vol.2, p.259 (original article 176=current article 177). Cf. I-Arts 296 and 331 of the first Civil Code.

<sup>19</sup> Ono, *Senmonka no sekinin* (Professional Liability), 2000, p.161 (especially on notary=*Notar und Anwaltsnotar* (in Japanese)).

the property, *Einigung* and delivery (*Übergabe*) (Article 929): Zur Übertragung des Eigentums an einer beweglichen Sache ist erforderlich, daß der Eigentümer die Sache dem Erwerber übergibt und beide darüber einig sind, daß das Eigentum übergehen soll. Ist der Erwerber im Besitze der Sache, so genügt *die Einigung über den Übergang des Eigentums*.

This agreement is an abstract real agreement (*dinglicher Vertrag*) to transfer movable property.<sup>20</sup>

(2) The German BGB regime is characteristic not only in its requirement of abstract real agreement (*dinglicher Vertrag*; d.v.), but also in the separation theory (*Trennungsprinzip*). The property transfers not by the causal agreement of a sales contract, but rather as a result of the abstract real agreement (d.v.). Thus, a hindering of the causal agreement does not result in a voiding of the transfer of property. The property remains in the hands of the purchaser on the basis of the abstract real agreement (d.v.). This separation of causal and abstract real agreement (*Trennungsprinzip*) contributes to stabilization of the position of the purchaser. The real agreement can avoid contractual defects, such as fraud, duress or mistake. Abstract real agreements (d.v.) relating to real property especially are submitted to officials at the registry.

Even if the property was delivered under the contract of sale with defect, the purchaser of the object still remains the owner. The seller cannot demand its return by *vindicatio* on the basis of his returned property right. He can at most demand the value as *condictio*. *Trennungsprinzip* contributes to the stability of transactions, as is the case with bills (*Wechselgeschäft*). The possessor of a bill can demand the sum of the bill, even the causal contract, e.g. where a loan of money has become void.

(3) (a) There is another way of transferring property, namely the *titulus et modus adquirendi* theory in Austrian law. German law combines the formalism (*Traditionsprinzip*) and necessity of abstract real agreement (d.v.) in the separation theory (*Trennungsprinzip*). Austrian and Swiss law admit the formalism, but not the necessity of abstract real agreement (d.v.). Only a causal agreement is required for the agreement of sale. No distinction is drawn between causal and abstract real agreements (d.v.).

This system can also be found in Dutch law, and derives from the medieval common law (*Gemeines Recht*). Indeed, the natural law theory of the seventeenth century in The Netherlands (e.g. Grotius) emphasized the consensualism of transfer of property. That was adopted in French natural law (*ancien droit français*), and ultimately in the French *Code Civil* (in Articles 711 and 1138), but was not adopted in the Dutch Civil Code of 1838.

(b) The Austrian ABGB also adopts this theory of *titulus et modus adquirendi* (Article 380 ABGB): Ohne Titel und ohne rechtliche Erwerbungsart kann kein Eigentum erlangt werden. *Titulus* (*Titel, Kausalgeschäft*) means the causal agreement in a contract of sale. Not only the causal agreement, but also the *modus* (manner of transfer) is necessary to transfer property in chattels. Under Article 426, delivery is necessary (chattels): Bewegliche Sachen

<sup>20</sup> In Roman law, a transfer of property depended on formal prerequisites. At first it was realized by a kind of ceremony, *mancipatio*, comprising a declaration of the parties and a ceremony by balance, then by a ceremony in court, *cessio in jure*. Finally, the prerequisite became the manner of delivery, *traditio*. *Cessio in jure* was a ceremony by a judge. Property transferred as a result of a reconciliation in court. This appears to be something akin to the abstract real agreement, *Auflassung*. Gradually these ceremonial ways of acquisition became inconvenient and were symbolized. Consensualism is the final product of such symbolization and abridgement. Cf. Ono, *Kikenfutan no kenkyu* (Theory of Risk and the Rescission of Contracts), 1995, p.303 (first published in 1981, in Japanese).

können in der Regel nur durch körperliche Übergabe von Hand zu Hand an einen andern übertragen werden. With respect to real property, formal registration is necessary. Article 431: Zur Übertragung des Eigentumes unbeweglicher Sachen muß das Erwerbungs geschäft in die dazu bestimmten öffentlichen Bücher eingetragen werden. Diese Eintragung nennt man Einverleibung (Intabulation).

(c) The situation is the same in Swiss law. The property transfers as a result of the causal agreement and *modus*, i.e. formalism. With respect to chattels, Article 199 Schweiz OR (1881) provided that delivery is necessary: Soll infolge eines Vertrages Eigentum an beweglichen Sachen übertragen werden, so ist Besitzübergabe erforderlich. Article 200: Die Übergabe erfolgt: 1. durch Aushändigung der Sache an den Erwerber: 2. durch Übertragung solcher Mittel an den Erwerber, welche ihm die ausschliessliche Verfügung über die Sache gewähren.<sup>21</sup>

After the enactment of the Swiss ZGB (Zivil Gesetzbuch, Civil Code 1907), it was replaced by Article 714(1) Schweiz. ZGB: Zur Übertragung des Farniseigentums bedarf es des Überganges des Besitzes auf den Erwerber. Article 714(2) provides for acquisitions in good faith (Article 192 JBGB). In relation to real property, Article 656(1) ZGB provides that registration is necessary to transfer property: Zum Erwerb des Grundeigentums bedarf es der Eintragung in das Grundbuch.

### III. *Issues of Transfer of Property in Japanese Law*

#### 1. The Separation Theory (*Trennungsprinzip*) and the Time of Transfer of Property

(1) The original system of the Japanese civil law is consensualism (*Konsensprinzip*, *Ishi-shugi*). As in French law, property transfers as a result of simple obligations. There exists no distinction between causal agreements on contracts of sale and abstract real agreements (*dinglicher Vertrag*; d.v.). This is the principle in the law of real property. There is no need to satisfy other formal elements such as delivery or registration. The transfer of property occurs at the time of conclusion of the contract of sale. Japanese courts constantly take this approach.<sup>22</sup>

It is, however, not possible to transfer property at the time of the conclusion of the contract of sale if there is some obstacle to the transfer of property, e.g. when the object of the sale belongs to another person or is not a specific thing. It is impossible for a non-owner to transfer property and a purchaser cannot obtain a proprietary interest without specification. A non-specified thing becomes a specified one only when the seller or purchaser specifies one object from among other similar things (*genus*, Article 401(2)).

(2) In the 1920s, a new theory came to prevail, namely, the Japanese separation theory (*Trennungsprinzip*). As I have written in other articles in this series (no.24, p.31 and no.30, p.14), the 1920s were a turning point in legal theory. The old French interpretation of private

<sup>21</sup> With respect to Swiss law (article 199 of SOR 1881)), vgl. Hafner, *Das Schweizerische Obligationenrecht (1881)*, 1896, S.85ff.

<sup>22</sup> Further details may be found in various Japanese texts on property law, such as Funabashi, *Bukken hou* [Property Law], 1960, p.75 and Wagatsuma, *Minpou kougi* II [Property Law, revised by Ariizumi], 1983, p.56. This theory was revived in 1921 by Suehiro, *Bukken hou*, 1921, p.77. Wagatsuma, *Minpou kougi* II, 1952, p.50.

law generally diminished and German doctrine gained favour.

According to the German model, many academic doctrines argued this separation theory.<sup>23</sup> There is, however, a significant difference between the Japanese and German laws of real property. Japanese law requires neither abstract real agreement nor delivery or registration in order to transfer property. There is no process to confirm the abstract real agreement (*Auflassung*).

The key provision is Article 176: The creation and transfer of real property rights take effect by a mere declaration of intention by the parties. In this provision it is not clear whether the declaration of intention includes an abstract real agreement (d.v.) to transfer property or not. Originally, there was no doubt that it meant a causal agreement to conclude a contract of sale (*par l'effet des obligation*, Article 711 Code Civil), as is the case in French law. The new separation theory maintained that the intention of Article 176 included the abstract real agreement (d.v.).

Not only did the theory change the condition of intention, but it also altered the requirement of delivery. According to the theory, when there is no abstract real agreement (d.v.), there is no transfer of property either. An abstract real agreement can only be found after some formal deeds are realized, such as delivery, registration or payment of the sale price. This theory introduced a kind of formalism as a consequence of the interpretation of the declaration of intention (*Traditionsprinzip*).

Nor does the requirement of delivery or registration have the same function as it does in German law. It is not the only method of transferring property, and only a symbol or example of the abstract real agreement (d.v.).<sup>24</sup> Payment of the sale price also represents the abstract real agreement. There is neither an abstract real agreement (d.v.) nor independent process to ascertain the abstract real agreement (*Auflassung*) as a system of law. They are mostly included in the process dependent on the transaction of sale. Thus, it is impossible to introduce the rigid separation theory (*Trennungsprinzip*) because when the causal agreement ceases to have effect by reason of fraud or violence (Article 96), the abstract real agreement must also be void.

(3) The separation theory played a role in amending the original interpretation of consensualism. Also, according to Japanese tradition, it is not rational that the property transfers prior to delivery or payment of the sale price.<sup>25</sup> Of course there was no distinction between causal and abstract real agreements, but formal conditions were always required. According to this tradition, the theory can amend the standardized time of transfer of property, for instance, changing it from the time of conclusion of the contract to the time of delivery or registration.

In some respects, the separation theory introduces characteristics of foreign theory, but in other ways, returns to the traditional point. In many practical cases, it is also in conformity with the intention of the parties to a contract.

Consequently, the theory to some extent approached a kind of *titulus modus* theory as is found in the ABGB.

<sup>23</sup> Cf. Ishizaka, *Minpou kenkyu* I, 1919, p.325; Nakajima, *Minpou shakugi* II, 1927, p.32; Hatoyama, *Nihon saikenhou souron*, 1925, p.339 at note 3. Many opinions followed this theory.

<sup>24</sup> Ssekawa, *Bukken hou*, 1956, pp.59 and 72. Cf. Oho, *Bukken hou*, 1966, pp.48 and 62.

<sup>25</sup> Cf. *Minji kanrei ruishu*, op. cit. (at note 2), ch. 3 (Sale of immovable and movable property), pp.234 and 239. Boissonade sometimes criticized this custom in his writings.

Indeed, it is said that judicial precedents strongly favour consensualism. Nevertheless, it is, in many cases, also justified by other reasons. In one case, the Supreme Court (20 June 1958 Minshu (SCD) vol.12, no.10, p.1585) referred to the transfer of property without any element other than intention. In fact, the purchaser had paid a mere 60 per cent of the sale price.<sup>26</sup> Recently, it appears difficult to find a transfer of property where no price has been paid, the object was not delivered or no registration of transfer was made.

(4) Also in Japan, absolute real agreement is necessary to assume a mortgage. A casual agreement to assume an obligation (loan contract) and abstract real agreement (mortgage) are rigidly separated. It is only natural that no mortgage exists on a loan contract.

## 2. Further Considerations

(1) Recently, there has been a theory to the effect that it is unnecessary to ascertain the time of transfer of property in order to resolve disputes. That is because any legal conflict regarding property has, at the same time, other specific issues, such as the demand of payment of the price or fruit or the burden of risk, which are the problems associated with Articles 555, 575 and 534. According to this theory, the effort to find the location of property is too abstract and does not contribute to the resolution of any concrete disputes. For example, in conflicts between the parties to a sale, the legal position is settled by interpretation of the contract. Other external conflicts between the purchaser or seller and their creditors are settled by registration (*taikou-youken, opposabilité*).<sup>27</sup>

Of course, many opinions oppose this theory on the ground that there is still some interest in ascertaining the time of transfer of property in order to settle conflicts, e.g. Article 717 or in the case of a sale under reservation of property.

(2) It seems that either mere consensualism or the theory of an abstract real agreement (d.v.) is not sufficient to consider the problem of transfers of property. Under the Japanese Civil Code, it is difficult to recognize formalism (*Traditionsprinzip*) on account of the Code's structure. It requires neither delivery nor registration in order to transfer property. At the same time, it is difficult to recognize absolute consensualism. In Japan, it is sometimes in conflict with the intention of the parties to a contract. As a result of the character of the transaction or as an interpretation of the contract, it is sometimes necessary to recognize that the property transfers some time after the conclusion of the contract. It depends on the diversity of contract and does not necessarily require a standardized time of delivery or registration.

It is not clear whether Article 176 requires an abstract real agreement (d.v.) to transfer property or not. When a person denies this, the result is clear. The only solution is that the property transfers from the seller to the purchaser at the time of conclusion of contract. Mere consensualism is not sufficient for our traditional transactions, especially with respect to real property. Thus, it is necessary to require an abstract real agreement (d.v.) in addition to a

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<sup>26</sup> This was a case ascertaining the property of a purchaser in exchange for payment of the left price. In order to resolve the case, however, it was not necessary to establish that the purchaser could demand registration according to the contract without paying the outstanding balance. Abstract affirmation of property was not useful in resolving the case. Consensualism in this precedent was *obiter dicta* and not *ratio decidendi*.

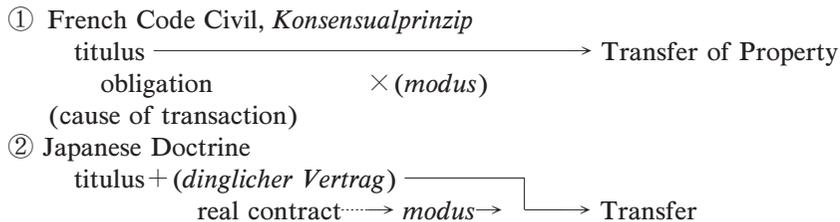
<sup>27</sup> Cf. Suzuki, *Shoyuken no iten no jiki* [The Time of Transfer of Property in the Sale of a Specific Thing], *Keiyakuhou taikei* II, 1962, p.85.

causal agreement in order to find the time of transfer of property after the conclusion of the contract. In our legal system there is, however, no additional process to ascertain the abstract real agreement (d.v.) as *Auflassung*. In many cases, there is both a causal agreement and abstract real agreement at the same time. There are, however, some cases in which property does not transfer without payment of the price, delivery or registration in accordance with the intention of the parties. The intention of the parties is the paramount standard.

(3) It is important to note that Japanese law does not recognize acquisition in good faith (*koushin-ryoku*, *Gutgläubiger Erwerb*, *comparatio bona fide*) with respect to real property, but does in relation to chattels (Article 192, supra 3 (3)). This corresponds to French law (Article 2279: *En fait de meubles, la possession vaut titre*). The German Civil Code recognizes this theory in Articles 932, 955 and 957. Article 932 recognizes acquisition in good faith from a non-owner (*Gutgläubiger Erwerb vom Nichtberechtigten*). A purchaser who knew or was negligent in not knowing cannot obtain a property right since he was not acting in good faith: 932 (2). Article 892 of the BGB recognizes the accuracy of the register. It is a provision for acquisition of real property in good faith (infra IV 2).

In German law, registration of property is necessary to transfer the property (formalism) in the course of a sale from A to B. Even when the effect of the contract of sale has been substantially lost due to avoidance of it, C can obtain property from B, the non-owner, after the avoidance of the contract. The same applies to cases of double sales. Even when the seller, A, is no longer owner, he can still transfer the property to C, the second purchaser, as long as A still retains the registration as owner<sup>28</sup> (*Koushin-ryoku*, *Gutgläubiger Erwerb*).<sup>29</sup>

#### Short Comparison of the Systems of Transfer of Property



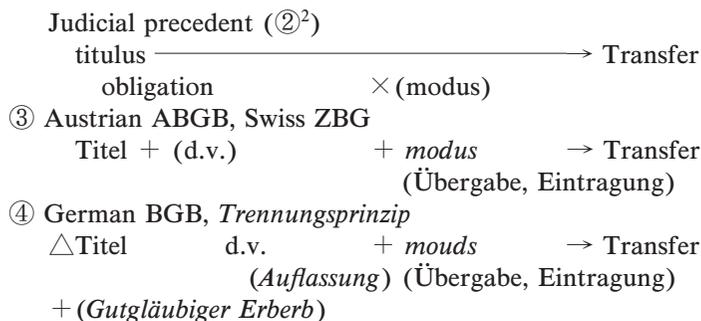
<sup>28</sup> There is also a provision protecting possessors in good faith (Article 955 BGB, which corresponds to our Article 189). (1) Wer eine Sache im Eigenbesitz hat, erwirbt das Eigentum an den Erzeugnissen und sonstigen zu den Früchten der Sache gehörenden Bestandteilen, unbeschadet der Vorschriften der §§956, 957, mit der Trennung. Der Erwerb ist ausgeschlossen, wenn der Eigenbesitzer nicht zum Eigenbesitz oder ein anderer vermöge eines Rechts an der Sache zum Fruchtbezug berechtigt ist und der Eigenbesitzer bei dem Erwerb des Eigenbesitzes nicht in gutem Glauben ist oder vor der Trennung den Rechtsmangel erfährt.

(2) Dem Eigenbesitzer steht derjenige gleich, welcher die Sache zum Zwecke der Ausübung eines Nutzungsrechts an ihr besitzt.

(3) Auf den Eigenbesitz und den ihm gleichgestellten Besitz findet die Vorschrift des §940 Abs. 2 entsprechende Anwendung.

BGB §957; Die Vorschriften des §956 finden auch dann Anwendung, wenn derjenige, welcher die Aneignung einem anderen gestattet, hierzu nicht berechtigt ist, es sei denn, das der andere, falls ihm der Besitz der Sache überlassen wird, bei der Überlassung, anderenfalls bei der Ergreifung des Besitzes der Erzeugnisse oder der sonstigen Bestandteile nicht in gutem Glauben ist oder vor der Trennung den Rechtsmangel erfährt.

<sup>29</sup> With respect to acquisition in good faith (*koushin-ryoku*, *Gutgläubiger Erwerb*, *comparatio bona fide*), cf. infra. III 4 and IV 2.



### 3. Academic Problems Regarding the Relationship Between Articles 176 and 177

There are many opinions regarding the relationship between Articles 176 and 177. They can be divided into two or three categories. In any event, the consensualism in Article 176 is affected by the registration (*opposabilité; taikou-youken-shugi*) under Article 177.

(1) One opinion assumes that the effect of Article 176 is to transfer property immediately from A, the seller, to B, the purchaser. This opinion is mainly devoted to consensualism. After the conclusion of a contract of sale, A immediately ceases to be owner of the object. This opinion, however, faces the difficulty of explaining why the third person, C, can obtain property from this non-owner of the object. There is no acquisition in good faith (*koushin-ryoku, Gutgläubiger Erwerb*) with respect to real property in Japanese law.

One way of solving this problem is to explain that C can deny the transfer of the property from A to B under Article 177. When C denies the transfer, the property returns to A and A can then transfer it to C (*Hininken-setsu, Denial theory*).<sup>30</sup> It is, however, difficult to say that there should be a “denial” by C to prevent the transfer from A to B. There commonly exists no denial, but merely a contract and delivery to C.

The second explanation is that the mere delivery to C means a kind of denial since it cannot be inconsistent with delivery to A. Alternatively, a mere insistence by C, which is not inconsistent with the delivery from A to B, is sufficient.

(2) One opinion assumes more than Article 177 and does not recognize that the effect of Article 176 is to transfer the property immediately and completely from A, the seller, to B, the purchaser. This opinion is devoted to anti-consensualism. It assumes that the property remains with A, or at least transfers conditionally. Immediate transfer under Article 176 is precluded by Article 177. Without registration, the property does not necessarily transfer to B. When something (quasi-property) remains with A in relation to a third party, then C can obtain it (*Fukanzen-bukken-setsu, Quasi-property theory*). This opinion, however, faces the difficulty that it necessitates the concept of a kind of incomplete property. This is contrary to Article 175 (*numerus clausus*) and the simplicity of property rights.

One way of explaining this is that the property right transfers from A to B (i.e. only

<sup>30</sup> There are many academic opinions, which sometimes belong to impracticable theories. Details are given in Funabashi, op. cit., p.141; Wagatsuma, op. cit., p.143. *Hininken setsu*, Nakajima, op. cit., p.66; Funabashi, op. cit. (at note 22), p.143, p.146. The legal precedents belong to this theory (Taishin'in, 14 November 1918, Minroku vol.24, p.2178 etc.

between the parties to the contract), but remains with A in relation to the third party.

The second way explains that the property remains with A (no transfer), but in the absence of registration, B can only demand that A transfer the property as a result of their contract and not as an effect of the law of real property (*Saikenteki-kouryoku-setsu*, Contract theory).<sup>31</sup> This opinion substantially denies the transfer of property from A to B under Article 176. As a result, Article 176 loses its effect in relation to Article 177 because without registration, the immediate transfer of property is not recognized under Article 176.

(3) The third opinion derives from an entirely different line of thought. The basis of this opinion is the effect of acquisition in good faith (*Gutgläubiger Erwerb*, *koushinryoku-setsu*, Apparent theory). Acquisition in good faith is provided for in Article 192 of the Japanese Civil Code: If a person has peaceably and openly commenced to possess a movable, acting bona fide and without negligence, he shall immediately acquire the right which he purports to exercise over such movable.

Article 192 is a special provision intended to give purchasers of chattels who act in good faith stability in entering into such transactions since such persons may sometimes purchase things from non-owners who are in possession as a result of having rented, found, stole, or otherwise gained custody of the object. The possessor in fact has no property right, but nevertheless appears to be the legitimate owner. According to the principles of Japanese law, the non-owner cannot transfer title in the property to another person. As an exception, the article enables a purchaser in good faith to obtain property from a non-owner, the seller. That is an effect of acquisition in good faith (*koushin-ryoku*).<sup>32</sup>

Contrary to German law, Japanese civil law does not recognize acquisition in good faith with respect to real property. The drafters were of the opinion that neither Article 177 nor Article 192 recognize that. The third opinion presents a new theory of acquisition in good faith under Article 177. As with the first opinion (*supra* (a)), they acknowledge that the effect of Article 176 is to transfer property immediately from A, the seller, to B, the purchaser. This opinion is also devoted to consensualism. Upon the conclusion of the contract of sale, A immediately ceases to own the object. This opinion attempts to overcome the difficulty that the second purchaser, C, can obtain property from the non-owner, A. They consider it the result of acquisition in good faith (*koushin-ryoku*). In their opinion, the effect of Article 177 is to enable C to acquire real property in good faith.

This opinion is extremely problematic, and conflicts with the understanding of the drafters and the limits on acquisition in good faith. The system under the Japanese Civil Code is also inconsistent with this opinion. Article 177 provides for the effect of *taikou-ryoku* (*opposabilité* on real property and Article 178 provides for its effect on chattels. Only one provision, Article 192, deals with the effect of *koushin-ryoku* (acquisition in good faith) on chattels.

(4) The fourth opinion does not attempt to explain the consistency of the two articles, and

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<sup>31</sup> *Saikenteki kouryoku setsu*, cf. Azuma, *Hougaku kenku* (Tokyo shoudai, vol.2) p.230; Kawashima, *Minpou* 1, 1960, p.141. *Fukanzen-bukken-setsu*, Wagatsuma, op. cit., p.94.

<sup>32</sup> The apparent theory (*Gutgläubiger Erwerb*, *koushin-ryoku*), cf. Shinozuka, *Ronsou minpougaku* I, 1970, p.24; Handa, M., “*Fudousan no niju jouto e no hitotsu no apurouchi*”, *Hokudai* vol.14, no.4, p.38 (1966). The apparent theory plays a significant role in Japanese legal theory (cf. Ono, “Strict Liability in Japanese Tort Law”, in vol.28 of this series, p.13, 2000) and protects the third person in reliance (*Gaikan riron*, *Rechtsschein*).

depends mainly on the history of the articles.<sup>33</sup> Article 176 comes from the original French Civil Code of 1804 and consensualism. Article 177 comes from the amendment of 1855 and *opposabilité*.

For about fifty years, the French Civil Code did not have a general provision corresponding to our Article 177. At the beginning of the nineteenth century, consensualism ruled (*Willensdogma*). Without a provision like Article 177, the purchaser is sometimes faced with the danger of losing his property because the seller has no property right to transfer. The purchaser could not rely upon the apparent status of the seller because that possession did not guarantee his property right. There was always a danger that the seller had already transferred his right to the first purchaser, i.e. a case of double acquisition.

When there is a mortgage which is not registered and publicized, then a purchaser, C, of real property is faced with the danger that he will be deprived of the object by an unknown creditor, B. This is because the creditor, B, can demand a public sale of the real property as mortgagee. The purchaser, C, has to deliver his real property in order to meet such a demand. Also, there is the danger that the creditor, B, may secure a mortgage on real property when there is another unregistered mortgage. The first unknown creditor, A, can argue that his rights be given precedence in performance over those of the second creditor, B.

The 1855 Act, corresponding to our Article 177, amended the original *Code Civil* to protect such second purchasers or creditors. The inconsistency of the provisions is a question not of logic, but rather of history. Article 177 was intended to provide additional protection for purchasers who (mostly) acted in good faith in double acquisition cases.

According to the history of the *Code Civil*, it seems difficult to give adequate reasons to harmonize two articles. It is not a problem of natural science to harmonize these articles. The legal allocation of property is not necessarily the same as the existence of a thing.<sup>34</sup>

(5) The first provision in the course of the enactment of the Japanese Civil Code followed one by Boissonade's Project (Article I-370). This provision was based on the French provision in the 1855 Act (*Sur la ranscription en matière hypothécaire*, 23 mars 1855).<sup>35</sup> The Act was relatively new law at the time.

Article 1, Sont transcrité bureau des hypotèques de la situation des biens:

1. Tout acte entre-vifs, translatif de propriété immobilière ou de droits réels susceptibles d'hypothèque:
2. Tout acte portant renonciation à ces mêmes droits:
3. Tout jugement qui déclare l'existence d'une convention verbale de la nature cidessus exprimée:
4. Tout jugement d'adjudication, autre que celui rendu sur licitation au profit d'un cohéritier ou d'un copartageant.

Article 941 *Code Civil*, Le défaut de *publication* [*transcription*] pourra être opposé par toutes personnes ayant intérêt, excepté toutefois celles qui sont chargées de faire faire la

<sup>33</sup> Cf. Hoshino, *Minpou gairon* II, 1976, p.40.

<sup>34</sup> Vgl. Kipp (1862-31), *Über Doppelwirkungen im Recht, insbesondere über die Konkurrenz von Nichtigkeit und Anfechtbarkeit*; in *Festschrift der Berliner Juristischen Fakultät für Ferdinand von Martitz zum fünfzigjährigen Doktorjubiläum am 24. Juli 1911*, S.211ff. Legal concepts are not the same as concepts in natural science.

<sup>35</sup> Boissonade referred to *Loi fr.du 23 mars 1855, Art. 3* (*loi belge, loi 16 déc. 1851*) and the former Italian Civil Code, Art. 1942. Boissonade, *op. cit.*, (t.2) p.177 (Art. 370), p.209 (n°205) et s. (n°209, p.213; n°212, p.217).

*publication [transcription]*, ou leurs ayants cause, et le donateur. (Décr.4 jan.1955, art.30; Ord. no 59-71 du 7 jan.1959, art.25).<sup>36</sup>

#### 4. Some Practical Problems Relating to the Transfer of Property

Four main problems relating to the transfer of property are disputed in legal interpretation.

(1) The first problem is the scope of “*a real right over an immovable*” in Article 177. There are some real property rights which cannot be recorded on the register, even if such rights are created or altered. First of all, there are houses which are not registered. Houses should be registered on their completion, but some owners may fail to do in order to avoid taxes.<sup>37</sup>

Secondly, there are some real property rights which cannot be registered and need not be registered, such as the right of possession (Article 180) and right of retention (Article 295). They are real property rights which are created merely by possession and have nothing to do with registration. General preferential rights (Article 306 etc. *Ippan sakidori tokken*) also have nothing to do with registration since they are formed *ipso jure* and extend over the whole property of the obligor.

*Iriaiken (commonage)* is also a real property right which can be asserted against a third party without registration (Article 263 or 294). Taishin'in, the former Supreme Court (prior to 1947), accepted this theory in its decision of 29 November 1921 (*Minji-hanketsuroku* vol.27, p.2045).

Thirdly, it is often the case that claims are rights between creditors and obligors and there is no chance to register them. In exceptional cases, there are claims that can be asserted against third parties by registration. Article 605 provides that the lease of an immovable, if registered, shall be effective even against persons who subsequently acquire real rights in such immovable. Economically, a right of a lease on real property is like a surface right (*superficie*, Article 265). The distinction exists only in its theoretical character, e.g. the former is a claim from the law of contract and the latter is a real property right.

After the enactment of the Japanese Civil Code, claims relating to leases of real property were strengthened for the protection of tenants. As a result of these additional provisions (*infra.*, I 3 (2) c; *Tatemono-hogo-hou [Act Concerning Protection of Buildings on Leased Land, 1909]*, *Shakuchi-hou [Rented Land Act, 1922]*, *Shakuya-hou [Rented Housing Act 1921]*, *Shakuchi-shakuya-hou [Rented Land and Housing Leases Act, 1991]* Arts 10 and 31), the lease of a house, if the object is delivered, shall be effective even as against persons who subsequently acquire real rights in such house.<sup>38</sup>

Sometimes the *Taikou-youken (oppsabilité)* is not a registration, but rather a possession, even though the object is not movable (as in Article 178). The general principle that registration is required for the assertion of real property rights against a third party (Article 177) is changed completely. The same applies to agricultural land by virtue of the *Agricultural Land Act (Nouchi-hou, 1952)*, which requires delivery for the assertion of land leases for

<sup>36</sup> Cf. Art. 1071 Code civil; Art. 1, loi 16 déc. 1851 of Belgium.

<sup>37</sup> We can find many legal disputes caused by such failure to register buildings. (*infra* IV 1).

<sup>38</sup> Yoshimi, *op. cit.* (at note 14).

agriculture (Article 18).

(2) (a) The second problem is the range of “the acquisition or loss of, or any alteration” in Article 177. According to Article 176, the transfer of real property rights takes effect by a mere declaration of intention by the parties. The article considers here only real property rights which were transferred by the declaration of intention. If Article 177 is interpreted in the same way, then the real property right requiring registration means only an alteration by the intention of the parties. As a result, a real property right which was altered for other reasons does not need to be registered, e.g a succession which occurs *ipso jure* by the fact that a person died.

In German law, registration of a transfer is required only for alterations by the intention of the parties. The doctrine in Japan prior to 1908 also adopted this approach (*Seigen-setsu*, theory limiting the scope of the alteration of Article 177).<sup>39</sup>

(b) A judicial precedent from 15 December 1908 (Taishin'in, *Minji-hanketsuroku* vol.14, p.1301) takes a different approach (*Museigen-setsu*, theory not limiting the scope of the alteration of Article 177). It recognized that registration is also necessary in cases of succession. There was the institution of *inkyō* (legal retirement from judicial life founded on Japanese tradition) at the time (under the Civil Code prior to 1947). A would reach the position of *inkyō* and retire from judicial life, allowing his successor B to take over his estate. Before the transfer from A to B was registered, C might receive the same estate from A, in a kind of double acquisition. If Article 177 required registration only for alterations by intention, then the acquisition of the estate by B by succession (an alteration without intention) could be asserted against C without registration. The Court also applied Article 177 to this sort of case. The judgment clearly declared that Article 177 demands registration even for the alteration of property rights without intention.<sup>40</sup> Thus, Article 177 demands registration for this kind of transfer of property.

(c) The institution of *inkyō* was abolished as part of the amendments to the Civil Code in 1947. There are, however, some other judgments in which registration has been required to assert rights against third parties in cases of alteration without intention. One such case is the judgment on joint succession (*kyōdou-souzoku*). On 26 January 1971, the Supreme Court (Supreme Court Decision = SCD, Civil Cases, *Minji-hanreishu*, vol.25, no.1, p.90) held that registration is necessary for the assertion of acquisition of property in joint succession cases. In that particular case, there were eleven successors and A's share was one-third of the property in dispute. Under Japanese inheritance laws, where there are two or more successors, the property succeeded to is owned by them jointly prior to the partition (Article 898). The joint successors effected the partition of the estate by agreeing to an adjustment of their statutory shares so that A received a reduced share of one-seventh. The partition of the estate was not registered, and after seven years A's creditor, B, had the property compulsorily attached according to her statutory share (one-third). The other joint successors denied B's application.

The high court accepted B's application, and the Supreme Court affirmed that decision.

<sup>39</sup> *Seigen-setsu*, which limits the scope of the meaning of Article 177 (alteration only by agreement), corresponds to German theory. In German law, registration is necessary to give effect to a transfer of property, but only where the transfer is by intention. Cf. Taishin'in, 11 December 1905, *Minroku* vol.11, p.1736 etc.

<sup>40</sup> Many academic doctrines after this precedent have followed the *Museigen-setsu*. Cf. Funabashi, op. cit. (at note 22), pp.154 and 159.

Partition takes effect retrospectively (Article 909: Partition of the estate shall be effective retroactively as from the time of the opening of the succession; however, any of the rights of third persons shall not be prejudiced thereby). Retroactivity is not without limitation. The alteration of statutory shares cannot be asserted against a third party until it has been registered.

(d) On the other hand, the effect of a renunciation of succession (Article 938) can be asserted against a third party without registration (Supreme Court Decision, 20 January 1967, SCD vol.21, no.1, p.16). That is because the person who has renounced succession is deemed not to have been a successor *ab initio*. The retroactivity is *ipso jure* and without limitation. There are also other cases in which a joint successor can assert his statutory share without registration (Supreme Court Decision, 22 February 1963, SCD vol.17, no.1, p.235).

(e) Other alterations without the intention of the parties and not related to inheritance can be added to these cases. Registration is necessary, for example, in the case of cancellations of sales contracts (against a third person after cancellation of a contract, Taishin'in, 30 September 1942, TCD vol.21, 911; but registration is not necessary against a third person prior to cancellation; Taishin'in, 20 February 1929, TCD vol.8, p.59), or in the case of prescriptions (against a third person after the accomplishment of the prescription, Supreme Court Decision, 28 August 1958, SCD vol.12, no.12, p.1936; but registration is not necessary against a third person prior to the accomplishment of the prescription, Taishin'in, 2 March 1918, TCD (1st series) vol.24, p.423). The details are complex and beyond the scope of this paper.<sup>41</sup>

(3) (a) The third problem is the scope of "against a third person" in Article 177. In that provision, it seems that no alteration can be asserted against a third party in the absence of registration. Prior to 1908, the ruling theory in doctrine and judicial precedents was that there was no limitation on the third party (*Museigen-setsu*, theory which does not limit the scope of the third person, Taishin'in, 6 December 1907, (TCD (1st series) vol.13, p.174).<sup>42</sup> This corresponds to the situation in German law where any alteration is effective only with registration (formalism).

(b) On 15 December 1908, Taishin'in (TCD (1st series) vol.14, p.1276) held that there was a limit on the scope of the third party (*Seigen-setsu*). In that case, B insisted that ownership in a building had passed from A to him, while C contended that he himself had constructed the building. Neither B nor C were registered as owner. The high court denied B's claim on the ground that B could not assert his claim against C without registration. Taishin'in, however, abrogated the high court decision on the grounds that C had no reasonable interest to assert the non-existence of registration (*Touki no kenketsu wo shucho-usuru seitou no riei wo yusuru mono*).

Hence, B could assert his acquisition against C without registration. In this case, a new theory was established whereby a person who asserted property rights against a third party needed to have a reasonable interest to assert the non-existence of registration of the latter. In

<sup>41</sup> There are many Japanese articles on the relationship between acquisitive transcription and registration. Cf. Funabashi, op. cit. (at note 22), p.168.

<sup>42</sup> *Museigen-setsu*, which does not limit the scope of the third person in Article 177 corresponds to German theory. In German law, any person who wants his property should have registration because it is not *taikou-youken* (*opposabilité*, the effect of transfer occurs by Article 176, Article 177 provides the effect only to the third party), but an effective requisite of transfer of property. Cf. Taishin'in, 27 February 1907, Minroku vol.13, p.188 etc.

other words, an alteration of property rights can be asserted without registration against a person who has no reasonable interest. Many academic opinions have since followed these precedents.<sup>43</sup>

(c) Article 4 of the *Land Registration Act (Fudousan-touki-hou)* provides that a person who hindered the application of the registration of another by fraud or violence cannot assert against him that the latter is without registration. And Article 5 provides that any person who owes a duty to apply for the registration of another's interest cannot assert against him that the latter is without registration.

These articles assume that such persons who are a kind of tortfeasor or owe a duty towards others cannot be a "third person" for the purposes of Article 177 of the Civil Code. Any alteration can be asserted against such persons without registration. It is clear that tortfeasors other than those who have committed fraud or violence cannot assert the non-existence of registration either.

For example, B, who obtained a building from A, could claim damages without registration against C, who damaged the building (Taishin'in, 21 February 1927, Shinbun no.2680, p.8). The same B could demand delivery of the building without registration against C, who unlawfully possesses the building (Supreme Court Decision, 19 December 1950, SCD vol.4, no.12, p.660). In these cases, acquisition can be asserted without registration against tortfeasors or unlawful possessors.

(d) In the case of leases, however, acquisition of property cannot be asserted against the lessee without registration. If A leased his building to C and B obtained the building from A without registration, B could not assert his rights against C without registration (Taishin'in, 9 May 1932, TCD vol.12, p.1123; Supreme Court Decision, 19 March 1974, SCD vol.28, no.2, p.325). In these cases, C is not an unlawful possessor and has a legitimate interest in knowing who the true owner and lessor is.

(e) There is a fundamental problem with the meaning of "third person". Article 177 provides that registration is necessary to assert property rights against a third person. According to the main meaning of Article 177, it is necessary to protect only third parties who obtained property in good faith. For instance, in a case of double acquisition, C, the person who obtained property in bad faith from the seller, A, should know that he cannot obtain property from A, who had already sold it to B. It is probably better to understand Article 177 as providing that an acquisition in good faith cannot be asserted against a third party without registration. In other words, the acquisition can be asserted against a third party who acted in bad faith. *Koushin-ryoku-setsu (Rechtsschein, Apparent theory)* recognizes the same result to exclude protection of a person who acquired property in bad faith.

The ruling opinion denies this interpretation.<sup>44</sup> Article 177 does not exclude a person in bad faith. There are, however, two ways to amend this result.

One way is to exclude a person who has acted in extremely bad faith (*haishinteki akuisha*). There have been some cases where the court has allowed alterations to be asserted without registration against persons who acted against proper public policy or good morals (cf. Article 90), e.g. Supreme Court Decision, 27 April 1961, SCD vol.15, no.4, p.901; Supreme

<sup>43</sup> Many academic doctrines after this precedent have followed the *Seigen-setsu*. Cf. Funabashi, op. cit. (at note 22), p.176.

<sup>44</sup> The ruling opinion is not based on the apparent theory (*Koushin ryoku setsu*). Cf. Wagatsuma, op. cit. (at note 22), p.56, p.162.

Court Decision, 2 August 1968, SCD vol.22, no.1571; Supreme Court Decision, 15 November 1968, SCD vol.22, no.12, p.2671 etc. The requirement of registration in Article 177 was substantially restricted in these cases.

The second way is to attempt to exclude a person who has acted in bad faith from the protection of Article 177. Recently, this approach has gathered many adherents, but there have been no rulings on this matter yet. It should be noted here that the first Civil Code and the Project by Boissonade provided the same restriction.

(4) The fourth problem is the meaning of “it has been *registered* in accordance with the provisions of law concerning registration of property” in Article 177. There are problems with registrations made or cancelled unlawfully. The register itself may even be stolen or forfeited by *force majeure* (*höhere Gewalt*). When the register is lost after A has sold his property to B and the transfer has been properly registered, C might buy the same estate in good faith. In such a case, both B and C would have good reason to believe in the truth of the registration of their interests. Indeed, many difficult problems would arise from the loss of such registration, but I unfortunately have no room to elaborate further here.<sup>45</sup>

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<sup>45</sup> A detailed discussion of this theme is beyond the scope of this paper. In short, when registration is lost by *force majeure*, such as by fire or fault by an official at the registry, B’s registration will be superior to C’s. The lost registration is deemed to continue (Taishin’in, 7 July 1923, TCD vol.2, p.448; Supreme Court Decision, 24 July 1959, SCD vol.13, no.8, p.1196). There is some scope for claiming damages against the state.

By contrast, when the registration is lost by B’s representative, B cannot assert his rights against C due to the non-existence of registration (Taishin’in, 29 June 1940, TCD vol.19, p.118; Supreme Court Decision, 1 September 1967, SCD vol.21, no.7, p.1755). Likewise, when an official registers B’s property at the wrong address, B cannot assert his rights against C because there is no registration by B at the correct address (Taishin’in, 15 April 1918, TCD (1st series) vol.24, p.690).