

Re-interpretation of Abstraction Principle of Real Right Act

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Abstract: Under the current legal system of real right in China, according to the theory of Abstractness and relativization of Abstractness, there may not be a situation where creditor's right act is invalid and real right act is effective, then the theory of Abstractness has no basis for existence. So some scholars believe that relativization of theory of Abstractness is the negation of the theory of real right act. Fundamentally, the real right agreement (Einigung) should be totally different from the creditor's right agreement (Konsensus). It only includes the creation, alteration and abandonment of the real right, not the content of payment consideration. The effect of the real right action is not affected by the effect of the creditor's right action, but by the effect of its own constituent elements, so it is not the relativism of Abstractness, but the performance of absolute Abstractness. In practice, there are a large number of cases in which creditor's rights act is invalid while real rights act is valid.

1. Introduction

The Abstraction of the real right act has a great impact on the interests of the parties and the third party, especially for the parties concerned. Its status has been reduced from the real right claimant (the right to restore the real right) to the creditor's right claimant (the right to claim unjust enrichment)[1]. At the same time, although the theory of Abstractness and the system of bona fide acquisition are different in nature and cannot be substituted for each other, they share the same purpose, and as far as the protection of transaction security is concerned, the system of bona fide acquisition is enough. Therefore, some scholars advocate that we should break through the Abstractness of the act of real right and make the relativity of the act of real right causeless. In some countries that adopt the theory of juristic act of real right, the juristic act of real right, which should have no cause for creditor's rights, is annihilated together with the juristic act of creditor's rights. In short, it can be summed up into three theories: One is The principle of the common defect (Fehleridentität), that is, defects in causal acts will also impair the effectiveness of real right acts. Second, The Principle of Conditional Relevance (Bedingungs Zusammenhang), That is to say, the validity of the act of real right can be conditioned, and the validity of the act of creditor's rights can be regarded as the condition of the validity of the act of real right[2]. For example, A and B agree that if B is admitted to university, A will give B a watch. In order to encourage B, A transfers the ownership of the watch to B on the night before the examination, and agrees that A retains the right of rescission. At this time, there will be a transfer of ownership with conditions of rescission. If B is admitted to the University successfully, he will acquire the ownership of the watch. If B is not admitted to the university, the ownership will be released and B cannot acquire the ownership of the watch. Third, The Principle of Integration of Legal Acts. For example, Article 139 of the German Civil Code stipulates that when a part of a legal act is invalid, all of it is invalid, but if it can be determined that the invalid part is removed, the legal act can still be established[3]. The theory of the integration of legal acts holds that the act of real right and the act of creditor's rights constitute the "whole", and the invalidity of the act of creditor's rights leads to the invalidity of the act of real right. However, the general theory holds that the principle of the common defect and conditional relevance are sufficient to solve the problems caused by the theory of Abstractness in practice, and there are few cases have adopted the third in German judicial practice.

For the breakthrough of Abstraction principle, this paper agrees with the first theory, but differs from the traditional point of view: the situation of invalid real right act of creditor's rights is not a

breakthrough of Abstraction principle, but a reflection of Absolute Abstractness. The following three theories will be reviewed separately. First of all, the principle of integration of legal acts undermines the independence of the act of real right. Logically speaking, the term "act of real right" is to recognize the independence of the act of real right and to distinguish the act of real right as an independent legal act from the act of creditor's rights. How can an independent legal act be integrated with another independent legal act? The independence of the act of real right is the basis of the Abstraction principle, and to destroy the independence of the act of real right is to destroy the foundation of the theory of the act of real right. In addition, the German Civil Code has a proviso on the integration of legal acts, that is, if the invalid part is removed, the other parts are still valid. And the above-mentioned provisions are the general provisions of legal acts, Abstraction principle is a special part of the protection of transaction security. Therefore, Abstraction principle should take precedence over the principle of integration of legal acts. So, even if the act of creditor's rights and the act of real rights are regarded as a whole, Abstraction principle should be applied first. Secondly, the principle of conditional relevance blurs the boundaries between creditor's rights and property rights. In the case of conditional gift mentioned above, whether B can acquire the ownership of the watch depends not so much on the validity of the contract of creditor's rights given by A and B, but rather on whether A exercises the right of rescission of the act of real right of the gift. It is not so much that the effect of the act of real right depends on the effect of the act of creditor's rights, but rather that the act of real right itself is a conditional act. Finally, this paper agrees with the principle of the common defect. As mentioned before, the act of real right is a kind of legal act. Like the act of creditor's rights, it should have such elements as subject, expression of intention and content. If there are flaws in a certain element of the act of creditor's rights and it still exists in the implementation of the act of real right, it can also affect the effectiveness of the act of real right. In other words, it is not the act of creditor's rights that affects the effectiveness of the act of real right, but the defects continues until the act of real right is implemented. In fact, the act of real right is affected by its own defects rather than by the act of creditor's rights. Therefore, it is not a breakthrough in the Abstraction principle, but an embodiment of the absolute Abstraction principle.

According to the traditional interpretation of the principle of the common defect, under the current legislative system of China, it is impossible for the act of creditor's rights to be invalid and the act of real rights to be effective, and the theory of the act of real rights will lose its foundation for application in China. For example, A has an antique watch, but A knows nothing about it and submits it to B for appraisal. B cheats A for a high profit by saying that the watch is an ordinary watch and agrees with A to buy the watch at 1000 yuan and complete delivery. After that, A knows that the watch is a high-priced antique watch, and cancels the transaction with B. According to the principle of common defects, the agreement of real rights between A and B is the same as that of creditor's rights, that is, A and B buy and sell the watch with 1000 yuan. So when the creditor's Rights Act is flawed, the real rights act also has flaws. In this case, when A cancels the transaction, the creditor's Rights Act between A and B, the real rights act of A disposing of the watch and B disposing of the price money is invalid. Such a view do not really distinguish creditor's rights from real rights. Real rights are still affected by creditor's rights. It is impossible for creditor's rights to be invalid and real rights to be effective in real life. There is no basis for the theory of real rights and is no necessary to discuss it.

In this regard, this paper proposes that there should be a distinction between the expression of will of real right and that of creditor's right. The expression of will of real right is simpler and more pure than that of creditor's right. In addition, there are differences not only between the expression of will of real right and that of creditor's right, but also between the two expressions of will of real right. Here we can play a little imagination. In the preceding example, the agreement of creditor's rights between A and B may be expressed as "A sells the watch to B at the price of 1000 yuan", and the agreement of real right of A transfers the ownership of the watch may be expressed as "A transfers the ownership of the watch to B". At this time, it does not involve the issue of payment consideration, but simply transfers the ownership of the watch. And the real right agreement of B transferring the ownership of the price may be expressed as "B transfers the ownership of the 1000

yuan to A". At this time, it does not involve the issue of the watch, but simply transfers the ownership of the price. The purpose of this distinction is to completely separate the act of real right from the act of creditor's rights, so as to make the legal relationship clearer. In real life, there may be situations where the act of creditor's rights is invalid and the act of real right is effective.

2. Lack of Capacity for Civil Conduct

Civil subject's capacity for civil conduct is an essential factor for legal act to take effect, lack of subject's civil capacity will lead to invalidity or indefinite validity of legal act. Real right acts are also legal acts. The provisions on the validity of legal acts in the General Principles of Civil Law also apply to real right acts. Therefore, the capacity of civil subjects must affect the validity of real right acts. Here take the sale as an example: A and B agreed to sell a watch from A to B and complete the delivery. There are the following three situations: First, both buyers and sellers lack the capacity to act. If both of them are persons without civil capacity in the preceding example, their creditor's right agreement is invalid, the creditor's right action is invalid, the real right agreement of A to deliver the watch is invalid, the real right agreement of B to pay the price is invalid, and both of the real right acts are invalid. Second, the seller lacks the ability to act. In the preceding example if A is a person with no capacity and B is a person with full capacity for civil conduct, then the agreement of creditor's rights reached by A and B to buy and sell the watch is invalid, the action of creditor's rights is invalid, and the agreement of property rights delivered by A to B is invalid, the act of property rights is invalid, but the act of property rights paid by B to A is not necessarily invalid. As mentioned before, the expression of real right intention should be more pure than that of creditor's right intention. The expression of B's intention to pay the price to A should not contain the other party's obligation, but only a simple expression of transferring ownership. This situation is similar to that of gift. Let's visualize the agreement of property rights between B and A. B said to A, "I'll give you the money." A said, "OK". This does not reflect the content of A's obligation. The act of B paying the price to A belongs to the act of purely gaining legal interests for A. Before the entry into force of China's General Principles of Civil Law, according to Article 6 of the Opinions of the Supreme Court on Several Questions Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China, the act was effective. However, according to Article 144 of the General Principles of Civil Law, legal acts performed by persons without civil capacity are invalid (as in the German Civil Code), negating the validity of acts in which persons without civil capacity obtain only legal interests. In this case, B's behavior of paying the price is also invalid. If A is not a person without capacity for civil conduct, but a person with limited capacity for civil conduct, the situation changes again. The creditor's right act of buying and selling the watch reached by A and B is invalid, the real right act of A delivering the watch is invalid, and the real right act of B delivering the price to A is valid. Third, the buyer lacks the ability to act. This situation is the same as that in which the seller lacks the capacity to act. If A is a person with full capacity for civil conduct and B is a person without capacity for civil conduct, the creditor's Rights Act is invalid and the two real rights acts is invalid. If A is a person with full capacity for civil conduct and B is a person with limited capacity for civil conduct, the creditor's Rights Act is invalid, the real rights act of A to pay watches is valid, the real rights act of B to pay the price is invalid. It is worth noting that if the civil subject is a person with limited capacity for civil conduct, and the act of creditor's rights and the act of real right are both valid after the capacity correction or the legal agent's approval, there is no problem of the Abstraction of the act of real right.

We can conclude that when the creditor's Rights Act is ineffective or uncertain due to the lack of capacity of the civil subject, the effectiveness of the real right act is determined by whether the civil subject has capacity when implementing Real Right Act.

3. The Untrue Expression of Intention

Legal acts with untrue declaration of intention are usually invalid or revocable. The expression of intention is the core element of the legal act. It is the same as the lack of capacity. If the untrue

expression of intention continues to the implementation of the real right act, the effectiveness of the real right act will be affected naturally. This paper tries to divide into three kinds of common situations in which the expression of intention is untrue.

First, False expression of intention. The legal act of false declaration of will is usually invalid. This paper tries to illustrate the validity relationship between the creditor's right act and the real right act in this case by giving examples: A is B's mother. In order to avoid the high inheritance tax in the future, A and B agreed to sell a house of A to B at a very low price and completed the transfer. The agreement between A and B to buy and sell the house is not based on their real intentions. The creditor's right is invalid. It is the same as the case of lack of capacity. The real right meaning of transferring the ownership of the house to B should not include not only the content of payment consideration, but also the meaning of donation. It is only the agreement of transferring ownership. As long as the agreement between A and B on "A transferring the ownership of the house to B" is a true expression of intention, the real right act of A transferring the ownership of the house shall be valid. Similarly, if B also pays the price to A, and the intention of transferring the ownership of the price is true, the real right act of transferring the ownership of the price should be valid. However, if the meaning of "transfer of ownership" is not the true intention of both parties, the act of real right should also be invalid.

Second, the expression of intention is wrong. The act of misrepresentation of intention is usually a revocable legal act. An example is given to illustrate the validity relationship between creditor's right act and real right act in this case: B mistakenly thinks that a watch is an antique watch and buys it from A and delivers it. At this time, the intention of B to purchase the subject from A is revocable because of the misunderstanding of the subject matter, and the creditor's rights between A and B are revocable legal acts. A transfers the ownership of the watch to B's real right agreement, because of the misunderstanding of the subject matter, can also be revoked. (Let's have a little more imagination, the real right agreement is: A says to B "I will transfer the ownership of the watch to you", B understands that "A transfers the ownership of the antique watch to himself" and makes a promise.) Therefore, the transfer of ownership of the watch to B by A is also a revocable legal act. However, it is an effective legal act for B to transfer the ownership of the price to A. Because there is no mistake in the understanding of the agreement that "B transfers the ownership of the quantity price to A". And this agreement should not include payment consideration, simply transfer ownership. Therefore, the transfer the ownership of the price is an effective legal act.

Third, fraud and coercion. Legal acts committed by fraud or coercion are usually revocable legal acts. Similarly, An example is given to illustrate: A sells an ordinary watch as an antique watch to B at a high price and delivers it. In this case, the agreement of creditor's rights between A and B to buy and sell the watch can be revoked because of A's fraud. This creditor's Rights Act is a revocable legal act. The real right agreement of A to B is due to the inconsistency of the recognition of the subject matter between A and B, and B misunderstanding of the watch is due to A's fraud. (The real right agreement of A is "A transfers the ownership of the watch to B", while the real right agreement of B is "A transfers the ownership of the antique watch to B"). So, the real right agreement can also be revoked, and the act of delivering the watch by A is also revocable legal act. However, the real right act of B paying the price to A is an effective legal act. Because there was no mistake in their understanding that B should pay a certain amount of money to A, therefore, the real right intention of B to pay the price to A is valid, and the real right act is valid legal act.

We can conclude that when the act of creditor's rights is invalid or revoked because of false representation, misrepresentation, fraud, coercion, etc. The validity of the act of real right is determined by whether the declaration of intention of setting or transferring real right is true or not by the civil subject when exercising.

4. Illegality or Violation of Public Order and Good Customs

Illegality or violation of public order and good customs are usually invalid legal acts. Here are examples for illustrating: A and B agree to sell A's guns which Trading is prohibited in China to B and complete delivery. At this time, the agreement between A and B on the creditor's rights to buy

and sell firearms is invalid because the subject matter is prohibited from circulation and the act of buying and selling firearms is illegal. A's agreement to transfer the ownership of the gun to B is also invalid because the subject matter is prohibited from circulation and the real right act is illegal. However, the agreement of B to transfer the ownership of the price to A is true and effective (the agreement of real right is to pay money, and the subject matter is also money, which is not illegal, and the intention is true). The transfer of ownership of the price is valid. Here is another example, according to the provisions of Article 248 of the German Civil Code, The agreement that the renewable interest on the expired interest is agreed in advance is invalid. A and B still make the agreement of renewable interest on the expired interest and complete delivery. The agreement of creditor's rights between A and B is invalid due to violation of the law, the act of creditor's rights is invalid. However, the real right agreement that B pays the interest to A is only that B pays a certain amount of money to A, and should not include the meaning of "the amount is the renewable interest ". That is to say, The act of real right is only a simple act of payment, so it is effective. In this case, the act of creditor's rights is invalid, and there is no justified reason for A to acquire the ownership of the money, it shall be dealt with unjust enrichment. Furthermore, in accordance with the provisions of Article 52 of the Contract Law of China, contracts with illegal purposes covered up in legal form are invalid. In order to avoid the high real estate transaction tax, A and B agreed in the contract that A would sell a house with a real value of 2 million yuan to B for 1 million yuan. then, A transferred the house to B, and B actually paid 2 million yuan to A. The agreement between A and B to buy and sell the house at a price lower than the value of the house in order to avoid the property transaction tax is invalid because of violation of the compulsory provisions of the law. However, the real right agreement of A transferring the ownership of the house to B is true and effective, and does not violate the compulsory provisions of law, and the real right act is valid. The real right agreement of B transferring 2 million yuan to A is also true and effective, and does not violate the compulsory provisions of law, and the real right act is also valid. In this case, we can also Abstract the creditor's right behavior of the transaction according to the real performance behavior of A and B, that is, A and B agree to buy and sell the house for 2 million yuan. According to the real creditor's right contract, they need make up the tax.

We can conclude that When the act of creditor's rights is invalid because of violation of law or public order and good custom, the effect of the act of real right is determined by whether the act of real right is illegal or against public order and good custom, and because the expression of intention of the act of real right only includes the content of establishing or transferring real right, this situation can only occur when the subject matter is prohibited from circulation.

5. Establishment or Transfer of Other Real Rights

The establishment or transfer of other real rights is the same as the establishment or transfer of ownership. When the act of creditor's rights is invalid or revoked due to the lack of the subject's capacity or the untruthful or illegal expression of intention or the violation of public order and good customs, the validity of the act of real right is determined by whether the civil subject has the corresponding capacity to act when carrying out the act of real right, whether the declaration of intention of setting or transferring the real right is true when the civil subject carries out the act of real right, and whether the act of real right itself is illegal or violates public order and good customs. For example, in order to evade the compulsory execution of its creditor B, A conspired with C to establish a mortgage on a house of A. Article 117 of the German Civil Code stipulates that it is invalid to express false intention by conspiring with others. According to this provision, in the preceding example, the agreement of creditor's rights in the mortgage contract between A and C is invalid. The validity of the real right agreement created by the mortgage is determined by whether or not the mortgage is a false declaration of intention. It not about whether A is trying to evade the enforcement of creditor B. If there is no intention of setting mortgage between A and C, the real right agreement of setting mortgage is invalid. If the mortgage is created out of the true intention of A and C, whether it is to evade the enforcement of creditor B or not, the real right agreement of establishing mortgage right is effective. However, the special provisions of the law shall be

followed by other provisions. such as article 154 of China's General Principles of Civil Law stipulates that civil legal acts that are malicious collusion between the perpetrator and the counterpart and damage the legitimate rights and interests of others are null and void. According to this provision, in the preceding example, the creditor's right act of signing a mortgage contract between A and B is invalid, and the real right act of setting up the mortgage right is invalid because it damages the legitimate rights and interests of others.

In summary, this paper holds that the act of real right should be completely distinguished from the act of creditor's rights. The act of real right takes the change of gain and loss of real right as its direct content or purpose. The biggest difference between the act of real right and the act of creditor's rights lies in the difference of the content of expression of intention. The expression of intention of the act of real right only includes the content of creation, alteration and elimination of real right, and should not include payment consideration. There are essential differences between the act of real right and the act of creditor's rights. They are legal acts independent of each other. Because they are completely separated and independent, the effect of the real right act will not be affected by the effect of the creditor's right act--This is the Abstraction of the act of real right. Meanwhile, The validity of the act of real right is affected by the validity of its constituent elements, such as whether the subject has civil capacity, whether the expression of will is true or not, and whether the content is legitimate, etc. If the above elements are flawed when the civil subject conducts the act of real right, they will inevitably affect the effectiveness of the act of real right. then, there may be a situation where both the real right act and the creditor's right act are invalid. But this is not to deny or relativize the Abstract theory of the act of real right. It is the result of completely separating the act of real right from the act of creditor's rights, which is more pure Abstraction principle.

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