

deportation, was too severe a penalty for the objection to the fingerprint registration. Considering the difference between the two statutes in nature and purpose, to refuse permission of reentry to those who have not met an obsolete requirement of the Alien Registration Law leads to the arbitrary discretion of the Minister of Justice. Such a refusal was suspected to violate the due process of law and constitute an abuse of authority as retaliation by the government.

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3. Law of Property and Obligations

1. Supreme Court 2nd P.B., July 17, 1998

Abe v. Credit Association of Hyogo and Daiichi-Kangyo Bank
52 (5) MINSHŪ 1296, 1650 HANREI JIHŌ 77, 983 HANREI TAIMUZU
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When an unauthorized agency succeeded a principal after his refusing to confirm, the unauthorized act is invalid.

References:

Civil Code, arts. 113, 117, 896.

Facts:

Owing to brain damage, A lost his mental capacity. His son B borrowed money from Cs (defendants, *kōso* appellants, *jōkoku* appellants). Without authority, B gave Cs a property right on A's real estate (*Teitō-ken*, hypothec: real and proprietary security to take money back by public auction if the debt had been paid at the proper time). Cs' right was registered with a public office. Afterwards B died. His wife D and a son and daughters Es (plaintiff, *kōso* defendant, *jōkoku* defendant) succeeded him. A was judged by a Family Court to be incapable of any legal acts. D became A's guardian. D claimed as A's agency to

annul the registration of Cs' right to A's estate, because B was not authorized by A to give C such a property right at all. After the process began, A died. Es succeeded to A's estate and her position of plaintiff.

The courts of the first and second instance (Kōbe District Court and Osaka High Court) dismissed Es' claim. The courts found that the position of principal and unauthorized agency became one since Es succeeded B and then A. So, under the Good Faith Performance Rule (Civil Code, art. 1 para. 2), Es should be regarded as principal and unable to refuse the confirmation of B's unauthorized act. After all B's act became valid naturally when Es succeeded A. Es appealed, asserting that B's act was invalid because the principal A had already refused to confirm the act through his agency D before A's death.

Opinion:

Reversed.

When a principal refused to confirm an unauthorized act, the act does not become valid even if an unauthorized agency succeeded a principal afterwards. An unauthorized act comes into effect against a principal, only if he confirmed it (Civil Code, art. 113 para. 1). So even a principle may not make an unauthorized act valid, when he has once refused to confirm. Even if an unauthorized agency succeeded a principal after the principal's refusing to confirm, this has no influence on the legal effect of refusing. It results from this understanding that the legal effect of an unauthorized act would depend on whether that act was done before or after principal's refusing to confirm when an unauthorized agency succeeds a principal. But the difference in effect is inevitable. An unauthorized agency who succeeded a principal may apply the principal's refusal, because this is not opposed to the Good Faith Performance Rule.

In this case, it should be considered as A's refusal to confirm B's unauthorized giving of security that A claimed Cs to annul the registration of security. By this refusal, B's act comes definitely into no effect against A as principal. The legal effect of A's refusal would not be influenced from Es' *ex post* succession to A. Therefore the succession does not make B's unauthorized act valid. As far as the qualified facts

are concerned, Es' asserting to apply A's refusal is also not regarded as opposed to the Good Faith Performance Rule.

Editorial Note:

Succession means to take over all the rights and duties of a dead relative (Civil Code, art. 896). Whether succession comes to make an unauthorized act valid or not, is one of the most controversial issues in Japanese agency law. In the leading case (Supreme Court 2nd P.B., June 18, 1965, 19(4) MINSHŪ 986) where an unauthorized agency succeeded a principal, the Supreme Court found that the position of principal and unauthorized agency would have become one since the latter succeeded the former, which made the unauthorized act definitely valid. In this decision, the precedent is modified to a degree. That is to say, an unauthorized act may be not valid at all when a principal refused to confirm the act in his lifetime. Applying a principal's refusal, the unauthorized agency who succeeded the principal may deny the legal effect of the unauthorized act.

In this case, owing to incapacity, principal A could have not refused to confirm himself. Guardian D refused within the competence of A's agency. The Supreme Court did not yet consider whether D, who is also unauthorized B's wife, refused to confirm or not.

It is not B but his successors Es who claim the invalidity of the unauthorized act. However the Supreme Court identifies an unauthorized agency and his successors. Es' claim is acknowledged, that is because principal A refused to confirm through his agency D.

2. Supreme Court G.B., November 11, 1999

People's Livelihood Credit Association v. Seki

53 (8) MINSHŪ 1899, 1695 HANREI JIHŌ 40, 1019 HANREI

TAIMUZU 78

A creditor who has a real security right (*Teitō-ken*, hypothec) may claim to exclude an illegal possessor from a charged estate on behalf of the owner, and to restore the estate to the creditor himself.

Reference:

Civil Code, arts. 369, 423.

Facts:

Public credit association A (plaintiff, *kōso* defendant, *jōkoku* defendant) lent B thirty millions yen, and B's estate was offered to be charged with real security. B got behind with his payment of debt. A claimed to enforce the security, and a public auction began. Now C (defendant, *kōso* appellant, *jōkoku* appellant) possessed B's estate after it had been charged. A claimed a right to exclude C on behalf of B, asserting that no one offered to purchase the estate because of C's possession. Besides A claimed also to restore the estate to himself. Against A's claim, C pleaded that C subleased the estate from D who had leased from B.

The courts of first and second instance (Nagoya District Court and Nagoya High Court) acknowledged A's claim: By lack of evidence showing the existence of a lease between B and D, C has no right to possess B's estate. Generally speaking, trades of real estate have been depressed in recent years. Purchasers are still more apt to avoid estates possessed by a third party. In this case as well, it is no use for A to take back money as much as lent to B from the proceeds of the public auction to which A has a preferential right, because no one appears to purchase B's estate. Hence A may claim C to vacate the estate on behalf of the owner B, securing credit to B. C appealed.

Opinion:*Appeal dismissed.*

The owner of the estate is obligated to maintain it when charged with real security, for the maintenance prevents others from infringing the creditor's security right. It is feared that illegal possession by a third party will bring down the price of auctioned estate and, in some cases, keep auction participants from knocking down the estate. As a result, a creditor can not find preferential satisfaction from the payment of debt, although he has a real security right to the estate. So the creditor may claim the estate owner to improve the undesirable situation of the estate and to maintain it appropriately. To secure the efficiency of this claim, the creditor ought to be admitted also to claim a right to exclude an illegal possessor from the estate in place of the

owner. This could result from the idea of Article 423 of Civil Code, which admits a creditor to claim a debtor's right under certain circumstances.

In this case as well, since C's illegal possession of B's estate obstructs auction under the normal proceedings, A cannot be satisfied with exercising his real security right to the estate. As far as A's right is infringed, A may claim C to vacate the estate B and deliver it to A on behalf of the owner B.

Editorial Note:

A creditor who has a preferential right to secure payment (*Teitōken*, hypothec) may demand that the estate should be auctioned and have his credit satisfied from the proceeds of the auction. Unlike Anglo-American mortgages, ownership as well as possession of the property remain with the person who made the estate charged with real security (Civil Code, art. 369). Real rights to use real estate, which have arisen from a lease after a real security right was registered, will be extinguished once the security is enforced. However, short-term leases, for example a lease of less than five years for land and three years for building, remain valid against the purchaser of an auctioned estate (Civil Code, art. 395). This rule is originally intended to protect the right to use real estate, yet in practice is often abused. When wicked lenders or Japanese Mafia rent and possess the estate, which has been charged with real security, the price will probably fall and, as the case may be, no one would appear to acquire it. Those who possess maliciously the estate acquire it for themselves at an unjust price, or demand compensation for evacuation from the person who acquired it through an appropriate auction. As far as the possession is unreasonable in this sense, it should be said that the preferential right to secure payment is infringed.

The point is whether the creditor may take back the charged estate from such unreasonable possession or not to secure payment of debt. So far, the Supreme Court has not admitted the creditor to a claim to exclude a possessor from the estate, for a real security right means not the right to possess but the right to secure payment preferentially (for example, Supreme Court 2nd P.B., March 22, 1991, 45(3)

MINSHŪ 268). In this case, the precedent is altered to acknowledge the creditor's claim because of an abuse of the rule for a short-term lease.

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4. Family Law

1. Supreme Court 2nd P. B., August 31, 1998

Kono v. Kono

51 (4) KASAI GEPPŌ 33, 1655 HANREI JIHŌ 112, 986 HANREI
TAIMUZU 160

When a child was born about nine months after the day on which the father and mother came to separate, it is illegal for the husband to bring against the child an action to confirm the absence of parenthood, rather than an action for the denial of legitimacy.

Reference:

Civil Code, arts. 772, 775

Facts:

X (husband, plaintiff) and A (wife) were married in 1987. Y (the daughter of X and A, defendant) was born on July 27, 1989. X and A broke up soon after they married and they haven't had sexual intercourse since around February, 1988. Finally, they separated on October 12, 1988. On November 22, 1988, however, they had sexual intercourse once. X was told by A on December 20, 1988 that A had conceived.

In June 1989, A made an application for mediation to the family court and X and A effected agreements that X and A will separate for the time being, X has to pay 70,000 yen per month to A as costs to