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SUMMARY OF ARTICLES

PROMOTER'S LIABILITIES IN CASE OF FAILURE OF INCORPORATION (pp. 1 - 63)

—Reconsideration of promoter's legal position—

Yoshimichi HIRAIDE
Asst. Prof. of Commercial Law
The University of Hokkaido
Faculty of Law

CHAPTER II. LEGAL NATURE OF *CORPORATION COMING INTO EXISTENCE*

(Continued from the last number)

II. Corporation (Verein) and Partnership (BGB Gesellschaft)

In order to judge a legal nature of a certain association, whether a corporation (Verein) or a partnership (BGB Gesellschaft), it is necessary to examine specifically the way how it is legally organized with its members and their contributions. Although two concepts of Verein and Gesellschaft are theoretically opposing each other, existing associations are not always typical Verein nor Gesellschaft. Therefore, we have to clarify the differences of content between these two concepts of Verein and Gesellschaft as ideal type.

Generally speaking, a Verein is different from a Gesellschaft in being organized as a unitary whole (einheitliches Ganze) which is independent from its members, in other words, organized as a corporate entity. Particularly, there are several differences among others as follows.

In the case of Gesellschaft, its members are unlimitedly liable for its obligations, because Gesellschaft's property is not quite separated from its members' personal properties. In the case of Verein, on the contrary, its members are liable limitedly only to the extent of their amount of subscription, because Verein's property is completely separated and independent from its members' personal

properties.

In the case of Gesellschaft, all of its assets and liabilities belong to all of its members themselves directly and every member has his own share of them. He also has executive power of its activities, unless he waives it by a partnership contract (Gesellschaftsvertrag). In the case of Verein, however, every member does not have such a direct share as in Gesellschaft. All of Verein's assets and liabilities belong to a Verein itself and member's share is nothing but a membership as a constituent of Verein, the owner. He has no executive power either, and he is only entitled to participate in its resolution through voting at a members' meeting.

In the case of Gesellschaft, each member unites with others mutually by contractual relationship, but in the case of Verein, indirectly through Verein's membership. In the former, every legal relation exists only among members and not between a Gesellschaft itself and its members, but in the latter, not among members directly but only between a Verein itself and its members.

In the case of Gesellschaft, its activities are done in the name of all of its members, while in the case of Verein, in the name of Verein itself by its organ.

These differences between a Gesellschaft and a Verein about modes of member's liability and share, forms of union and activity, are caused by that a Gesellschaft itself has no ability to be a party of legal relation but a Verein has this kind of legal ability even if it has no legal personality.

III. Verein and legal personality

A legal ability of an association can be disregarded by a state when it has no legal personality. In this case, however, it is impossible to organize an association as Verein, since a Verein presupposes its own legal ability. Therefore, only a Gesellschaft and a Verein with legal personality can be recognized to exist, and a Verein without legal personality is obliged to be constructed as Gesellschaft by a legal fiction, disregarding the members' intention of organizing a Verein even though without legal personality. But in Japan, such a Verein without legal personality is recognized to exist by the positive law. It concludes in that the positive law of

Japan recognizes a legal ability of a Verein without legal personality. But this does not deny the difference between a legal ability of a Verein with and without legal personality.

When an organ of a Verein makes a contract with a third party in its name within his authority, it is bound by the contract, irrespective as to whether it has a legal personality or not. Since its members are not liable unlimitedly for the contract, however, its financial scale should be published in order to admit a result that only the Verein, in other words, only its assets should be liable for the contract. If not, the third party would be endangered and the safety of transactions could not be maintained. Therefore, in the case of Verein with legal personality, where such a result is admitted, it is required to publish its financial scale through registration. But in the case of Verein without legal personality, since it is not registered and its financial scale is not published, the representative who makes a contract for it, should be liable for the contract personally and unlimitedly besides the Verein itself.

Thus, it is the main effect, in private law, of being authorized as a legal person by a state, that the imperfectness of legal ability of a Verein in its activities is authorized as perfect to the effect of exempting the liability of its representative.

IV. Nature of *corporation coming into existence*

A corporation is born through registration but is not created out of nothing only by registration all of a sudden. An association which is the entity of a corporation to be born, must have been organized before the registration. This association is a *corporation coming into existence.* It is created by promoters through making a charter, or articles of incorporation, and subscribing for shares in part, and then it grows up in the process of incorporation. After its organization is completed, it acquires a legal personality to become a corporation through its registration. During this stage, its legal activities are done in its name by its promoters, and there is no legal relations directly among subscribers for shares. Its assets and liabilities do not belong directly to subscribers for shares and they have no executive power. They are not liable for its obligations to its creditors. Thus, it is identical with a new born cor-

poration in the nature of association. It is not Gesellschaft but a Verein without legal personality.

Since the legal existence of *corporation coming into existence* as Verein without legal personality is recognized by the positive law, it has legal ability, even though not perfect, and all rights and obligations, which are caused by transactions done by its promoters within their authority in its name, belong directly to itself. These rights and obligations naturally belong to a new born corporation, because a *corporation coming into existence* and a new born corporation are the same association in the different stage.

CHAPTER III. DUALISM OF PROMOTER'S LEGAL POSITION

I. Promoter's legal position

A *corporation coming into existence* is organized as a Verein, and subscribers for shares can only participate in its resolution through voting at organization meeting but have no executive power. Its activities which are necessary to develope it into a complete corporation, are executed by promoters. Thus, a promoter is an executive organ of a *corporation coming into existence*. When a promoter, as a promoter of a corporation, makes a contract with a third party, he does it as an executive organ and in the name of *corporation coming into existence*, and the contract within his authority has an effect on it.

Along with this position of executive organ, a promoter has another position of member of promoters' Gesellschaft. This is a BGB Gesellschaft which exists among promoters as creator of a new corporation, that is, as promoter of a new enterprise, and is a different association from a *corporation coming into existence*. Its purpose is to create a new corporation.

A *corporation coming into existence* is not only without legal personality but also its organization as Verein is not yet completed, especially in the early stage, although it is completed right before its registration. During the process of incorporation, the scale of a corporation to be born is not published and it is not definite whether a *corporation coming into existence* can grow up to the scale of the original plan and, furthermore, not definite whether it can be

incorporated. In the early stage, it can not be decided by its members autonomously what to do and how to do, but is decided by a promoters' Gesellschaft, until an organization meeting is held and directors are elected by its members and its organization is completed. Thus, a promoters' Gesellschaft is a different association from a *corporation coming into existence*, but is closely related with it.

II. Business transaction

When business transactions are done by a promoter as executive organ of a *corporation coming into existence* within his authority, it acquires rights and obligations, which are caused by these transactions, directly to the third parties, and these rights and obligations are not the promoter's. But he is liable for its obligations against its creditors as a representative who engages in such transactions for a Verein without legal personality according to the general principle. A *corporation coming into existence* is, however, not only without legal personality but also incomplete as Verein and is in its growing process. It is backed up by a promoters' Gesellschaft, and the transactions done by a promoter as its executive organ, are managed, on the other hand, as business activities of a promoters' Gesellschaft for all of its members. Therefore, not only the promoter who engages directly in the transactions, but the promoters' Gesellschaft, that is, all promoters should be liable for the obligations of the *corporation coming into existence.*

III. Subscription for share

A subscription for shares by a promoter as original member of a *corporation coming into existence* (Übernehmer) is a legal act to create a *corporation coming into existence* together with other subscriptions by other promoters, and a subscription by a subscriber (Zeichnung) is a legal act to become a member of it which is already created by promoters, and to develope it into a completed corporation. Both kinds of legal acts are *sui generis* in the law of association.

Together with this nature, however, a subscription by a subscriber (Zeichnung) has the other nature of contract to undertake a cre-

ation of new corporation. The business of a promoters' Gesellschaft is to organize a new corporation and, in the case of "founding by subscribers" (Sukzessiv- oder Stufengründung), a promoters' Gesellschaft raises funds from subscribers for shares (Zeichner) and organizes a new corporation by these funds with its members' own funds for its members' benefit. Although promoters (Übernehmer) and subscribers (Zeichner) as members of a *corporation coming into existence*, have the common interest, the interest of a promoters' Gesellschaft and of subscribers for shares are, on the other hand, opposed to each other in its nature. The Gesellschaft undertakes to organize the same corporation as is described in a form of subscription for shares at the risk of the Gesellschaft and solicit subscriptions under the condition that the Gesellschaft, when it fails to organize the corporation, should meet the charge of all expenses of incorporation in order that the expenses should not be at charge of subscribers and that the full amount of payment for shares should be refunded to them. A subscriber makes an offer to subscribe for shares under this condition in response to the solicitation, and the Gesellschaft accepts the offer by assigning shares to him, even if not expressly. A subscription for shares should be constructed as this kind of contract.

CHAPTER IV. PROMOTER'S LIABILITIES IN CASE OF FAILURE OF INCORPORATION

I. Failure of incorporation

Since the purpose of a *corporation coming into existence* is to become a corporation and to engage in its business, it can not attain its purpose and can not be justified to continue to exist when it fails to be incorporated. But it is an association with legal ability, though without legal personality, and rights and obligations which are caused by transactions with third parties done by its promoters as its executive organ, belong directly to itself and the consideration paid for shares by subscribers is its own property. Thus, it has existed and engaged in its activities as an association which has its own rights and obligations. Therefore, we should not construct that its existence is denied retroactively and its rights and obligations belong personally to its promoters themselves, but that it is dissolved,

when it fails to be incorporated.

In this case, its members (Übernehmer u. Zeichner) should bear the risk of the enterprise as members of joint enterprise and its creditors should have priority to be paid from its property, because they would become shareholders and participate in benefits of the corporation if it could be incorporated. Therefore, when it is dissolved, a promoter, who has been its executive organ, should become its liquidator and perform its obligations to its creditors, exercise its rights and then distribute the remainder to its members. It is possible that the members can not receive the full amount of payment for shares as divident of the remainder.

II. Liabilities to creditors of a *corporation coming into existence*

The Commercial Code § 194, I, provides two kinds of promoter's liabilities to creditors of a *corporation coming into existence* and to subscribers for shares (Zeichner) in case that it fails to be incorporated.

The nature of promoter's liability to its creditor is surety for its obligation to perform it jointly and severally with it, the surety which should be given to a creditor in order to protect him by a promoter who transacts with him for a Verein without legal personality, irrespective of that it might afterwards obtain a legal personality. Therefore, a promoter should be liable not only when it fails to be incorporated, but also during the process of incorporation and after it succeeds to be in corporated, in spite of that the provision itself concerns to the first case.

According to the provision, not only the promoter who engages in the transaction but all promoters should be liable. It is because of that a *corporation coming into existence* in not only without legal personality but also its organization as Verein is not yet completed and the liability of its representative is of its promoters' Gesellschaft. Therefore, all promoters should be liable even if some of them oppose the transaction so far as it is decided by majority of the Gesellschaft. This provision is significant, because it provides expressly that all promoters should be liable jointly and severally in order to strengthen the protection of creditor, while the Civil Code § 675 provides for the liability of member of Gesellschaft as

divided.

In the case of usual Verein without legal personality, its representative is not liable when its member transacts as a third party with it, because this liability is based upon that its financial scale is not published. In the case of *corporation coming into existence*, however, a promoter should be liable even when its member (Zeichner) transacts as a third party with it, because its organization is not yet completed even as Verein without legal personality and it is in its growing process.

III. Liabilities to subscribers for shares

This liability to a subscriber for shares is based upon such a contract between him and a promoters' Gesellschaft that the Gesellschaft undertakes to organize such a corporation as is stated in a form of subscription for shares. Therefore, the Gesellschaft is liable to pay back the full amount of payment for shares to him, when it fails to do it. Consequently, it should naturally meet the charge of all expenses of incorporation as is provided by the Commercial Code § 194, II. Thus, a subscriber is entitled to receive a dividend of the remainder from the *corporation coming into existence* and also to be paid back by the Gesellschaft the full amount of payment for shares. If the Gesellschaft pays the full amount to a subscriber, it is entitled to receive his dividend in subrogation.

According to the nature of this liability, the Gesellschaft is not liable, if the failure of the incorporation is caused only by subscribers, for instance, when they pass a resolution to give up the incorporation unduly at the organization meeting. Therefore, when the Gesellschaft is not liable, or when it can not pay the full amount because of its financial disability as a matter of fact, a subscriber receives only a dividend of the remainded which is less than the amount of payment for shares and he is obliged to bear the risk of organizing a new corporation.

Since this liability to a subscriber for shares is of a promoters' Gesellschaft, all promoters should be liable. The Commercial Code § 194, I, is significant also in this case, because it provides expressly that all of them should be liable jointly and severally.

When a subscriber for shares revokes his subscription, because

an organization meeting is not through by the date stated in the form of subscription for shares (the Commercial Code § 175, II, (11)), all promoters are liable to him in the same way as in the case of failure of incorporation.

L' EVOLUTION DE LA NOTION FONDAMENTALE DU DROIT ADMINISTRATIF FRANÇAIS (II)

Par Akira KAMIYA
Prof. adjoint (Droit administratif)
Faculté de Droit,
Université de Hokkaido

Cette partie de la thèse traite en effet l'époque à partir de 1852 et à travers la première grande partie de la IIIe République : l'époque où la juridiction administrative a vu ses assises institutionnelles bien fondées à peu près à la manière d'aujourd'hui. Elle présente une description détaillée des réformes alors achevées, et examine la théorie représentative de l'époque, celle de E. Laferrière.

C'est dans cette époque que le fameux principe de "la justice déléguée" est définitivement adopté, et que celui de distribution des compétences entre les juridictions administrative et judiciaire est aussi nettement dégagé par les décisions rendues par le Tribunal des Conflits restauré en 1872. Ce dernier principe, renonçant l'ancien critère de "l'Etat débiteur", proclame que la-dite distribution ne peut être réglée que par la loi relative à la séparation des pouvoirs. Le Conseil d'Etat décide, en conséquence, d'abandonner la théorie du "ministre-juge" reconnue légitime jusqu'alors (l'arrêt Cadot, 1889).

La théorie du droit administratif français aux dernières décades du 19e siècle est dominée, me semble-t-il, par la doctrine de Laferrière qui est fondée, d'ailleurs, sur la notion de distinction de l'acte d'autorité d'avec celui de gestion. Cette doctrine meriterait d'être remarquée notamment dans cinq points suivants :

1° La notion formelle et organique de l'acte d'administration, cette notion traditionnelle depuis la Révolution, est complètement abandonnée.

2° En revanche, est établie une nouvelle notion matérielle de l'acte d'administration, c'est-à-dire la notion de distinction selon sa nature.

3° La doctrine, cependant, n'a pu faire aller sa logique jusqu'au bout. A l'acte d'autorité, le seul acte d'administration proprement dit et considéré sous l'empire de juridiction administrative, se joint

les actes d'administration reconnus comme tels par la loi mais dont la nature ne revête difficilement l'élément d'autorité.

4° La doctrine, affirmant malgré tout l'existence de l'acte d'administration propre, fournit la base pour la formation ultérieure de la théorie de l'acte administratif.

5° La théorie de l'acte administratif à cette époque ne se trouve qu'au stade d'amorce, ambigu et confondu.

MATRIMONIAL PROPERTY LAW OF ENGLAND (I)

Kimiko ASAMI
Asst. of Comparative Law
The University of Hokkaido
Faculty of Law

In order to realize the principle of legal equality between sexes, the regime of separation of property was adopted by the Japanese Civil Code in the form of the statutory matrimonial property regime (ss. 760–762, especially s. 762). It had never been doubted that the regime of separation of property was the natural results of the principle of equality between sexes, and only this regime could realize the principle of equality between sexes. But, recently we have had two decisions of the Supreme Court, concerning the statutory regime. In one case, the disputed point was whether the property in wife's name was substantially her separate property or not. In the other case, the issue was whether the statutory regime could realize the principle of legal equality between sexes or not. Especially, the latter case suggested us the necessity to find out the proper legal way to recognize the wife's work in running the home, for, under the regime of separation of property, her work could not be valued without partiality.

Furthermore, indeed our divorce law provides the system of Zaisan Bunyo (s. 786), enabling one spouse to participate in the property which belongs to other spouse at the dissolution of marriage, but the nature of this system hasn't clarified well. It seems to me that it is necessary to reconsider the interrelation among the principle of equality between sexes, the regime of separation of property and the system of Zaisan Bunyo in our law.

I had a chance to study many judicial decisions on family assets and the deserted wife's right in matrimonial home in England (The Hokkaido Law Review, Vol. 10, May 1960). Since then, I have been interested in the origin of the principle of separation of property and the reason why this principle must be mitigated by

many judicial decisions after the war.

The present paper deals with matrimonial property law of England, especially with its historical background and its development. I hope the materials and suggestions contained within it will make a contribution to our problem: What kind of property should be involved in the separate property? Can the regime of separation of property apply to the real family life without any trouble? What is the proper standard of the power of discretion when the court exercises it under the system of Zaisan Bunyo?

In the 1st chapter, the state of common law before the enactment of a series of Married Women's Property Acts is explained because injustice in common law induced the legislative reform. Then, the process of formation of judicial decisions in equity is dealt with, because the statutes were based on equity.

In the 2nd chapter, the social background of the enactment is surveyed, and outline of J. S. Mill's "The Subjection of Women" is summarized. Then, the Married Women's Property Act, 1870, Married Women's Property Act (1870) Amendment Act, 1874 and Married Women's Property Act, 1882 are described. From these observations, we can understand the background of the statutes, contents of the statutes as well as their limits.

ADELSHERRSCHAFT UND KÖNIGSFREIHEIT IM FRÜHMITTELALTER (II) (S. 179-214)

Takeshi ISHIKAWA
a. o. Professor (Rechtsgeschichte)
Rechtswissenschaftliche Fakultät
der Universität Hokkaido

III. Adelsherrschaft, Stammesherzogtümer und Heerkönigtum bei der Stammesbildung.
1. Prolog—Die Entstehung der deutschen Stämme.
2. Adelsherrschaft und Stammesherzogtümer.
   i) Das fränkische Königtum bei der Errichtung der älteren Stammesherzogtümer.
   ii) Adelsherrschaft bei den deutschen Stämmen vor deren Eingliederung in das fränkische Reich.
   iii) Adelsherrschaft bei den Franken vor der Feststellung des fränkischen Königtums.
3. Heerkönigtum.
   i) Dessen Begriff und verfasungsgeschichtliche Stellung.
   ii) Konnte das (germanische) Heerkönigtum allein das Prinzip der Königsfreiheit oder den einheitlichen Stand der Freien (=Königsfreien) hervorbringen?

IV. Wergeldbestimmungen der Volksrechte—Vollfreien und Königsfreien.
1. Problemstellung—Ausbildungsprozeß der Auffassung von Th. Mayer.
   i) Th. Mayers Auffassung in unserem Text.
   ii) Sein Ausgangspunkt in: „Königtum und Gemeinfreihit im frühen Mittelalter."
   iii) Entwicklung oder Schiebung seiner Auffassung in: „Die Königsfreien und der Staat des frühen Mittelalters".

(Fortsetzung auf dem nächsten Heft)

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