

Solution of the Problems in Small Property Right house based on the Sublation of “Conclusive Sales” in the System of Pawn

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Abstract: In China's current land system, rural construction land transfer is strictly limited, but the problems of small property house are still exist despite long-term ban. Based on the “pawn” in China's traditional civil law, this paper sublate “Conclusive Sales” in the system of Dian under the condition that China's ownership basis won't be shaken. The problems of small property right house are expected to be solved through measures such like lengthening period and “selling to others” with the qualities of acquisition and storage.

Keywords: Pawning right; Conclusive Sales; Fluidity Contract; Small Property House

1. Introduction

1.1. Long Lasting Small Property Right House need to be Brought into the Orbit of Ruling by Law

According to China's "Land Management Law" and "Property Law", free transfer of rural collective construction land is clearly banned. The article 63 of "Land Management Law" stipulates that "rural collective construction land shall not be sold, transferred or leased for non-agricultural construction." The article 43 of "Property Law" stipulates that "The State shall implement special protection to cultivated land, and strictly limit the transfer of land for agriculture to land for construction and control construction land. Collective land shall not be collected violating the statutory power limit and procedures." China has the strictest administrative regulations for the collective land, so the collective construction land is mainly limited in the construction of homestead, the township enterprise and local public facilities. Collective land is not allowed to be directly engaged in business development.[1]

In recent years, the huge profits of business development make "small property house" into primary market developed by real estate breaking laws. [1] Disguised small property houses such as "rent consignment", "canopy house", "agricultural eco-house" are emerging in an endless stream. Small property house is illegal construction, and the problem caused by it is the transfer violating laws. So, Chinese have to solve the long-standing problem, putting "transfer violating laws" into the legal track by the reconstruction of legal system.

1.2. Pawn should be Made Use of but “Conclusive sales” is Inadvisable

With the acceleration of urbanization process, the flow of urban residents has become increasingly frequent. A legal approach for farmers in cities should be provided to ensure their source of funds for houses in city and the legitimate rights and interests, which they can retreat to when they can't make a living in cities. This is undoubtedly necessary for social stability. In this situation, the concept “private contracts as laws and decrees” [1] in Chinese traditional legal culture make the pawning right “sale facts” back into the transfer of rural house. People can make full use of Idle houses in rural areas after the setting of pawning right. The pawnor needn't consider the issues of repair, management fees and rent collection, which obviously can better satisfy people's needs compared with the leasing system.

Of course, the object of traditional pawning right is land ownership and housing ownership, but after new China was founded, land is of "public ownership", making the foundation of land transaction change completely. Fortunately, after the reform and opening up, transfer of use right of land and residence base provides further possibilities to the setting of homestead pawning right. But the problem in traditional pawning right system is how small property right house realize “conclusive sales” without the legal use right of homestead.

In 2010, the civil code for China's Taiwan region was revised and affirmed “pawning right” again in the eighth chapter. According to the code, “dianees get the pawning

right if the pawnor doesn't redeem it at original price before deadline." (Article 923). With unclear deadline, donees get the pawning right if the pawnor doesn't redeem it after 30 years. (Article 924)." The rule that pawning right is belonged to donees when pawnor doesn't redeem it in time [8] is according to "regarding as conclusive sales" in traditional habit of pawning right. Therefore once "live-sale" is set in small property right house, "conclusive sales" will change the housing ownership and the use right of homestead the house on when the pawnor doesn't redeem the pawn right before deadline, which is undoubtedly contrary to related regulations of China's law. To solve the problem of the transfer of small property right house, it is important to sublate conclusive sales.

2. Concept and Characters of Conclusive Sales

2.1. In Conclusive Sales, Pawning Right Disappears when Donees get the Pawning Right

The special "conclusive sales" in China's pawn is regarded as "the core of the pawning right system". "Pawnor has the right of redemption on deadline while donees can get the pawning right if the pawnor doesn't redeem it." [9] Because of conclusive sales, pawning right disappears when donees get the pawning right.

2.2. Conclusive Sales Eliminate the Separation of Eminent Domain in Facts and Legal Ownership

Because conclusive sales is a part of pawn system, its character should be explored from the overall pawn system. From the point of financing guarantee function, pawn system can be explained like this: The debtor should deliver certain property to creditor as guaranty in money lending. The debtor can get back the guaranty after having repaid debts in redemption period, otherwise guaranty or priority compensation will belong to the creditor. Pawning right we refer to today, of course, is a kind of independent principal real right without attaching to the principal creditor's right. But dependence of principal debt needn't be considered from the point of "conclusive sales". This is quite similar to mortgage of goods in flow. "The contract should be concluded in the process of mortgage setting, and mortgage will belong to the mortgagee if debt can't be paid off in amortization period. This agreement is called mortgage of goods in flow by scholars." [10]

As a special agreement in legal relation of real right for security, mortgage of goods in flow has three characters: Firstly, it only applies to voluntary real right for security on condition that both parties agree. Secondly, its main content is the change of mortgage or hostage ownership. [11] Mortgage will belong to the mortgagee if debt can't be paid off in amortization period. Thirdly, there is

time constraint during the concluding of mortgage of goods in flow. The parties shall express the willingness to contract make a declaration of the parties to make a contract while setting real right for security between of the setting and the deadline of amortization period [12]. Above all, "conclusive sales" and mortgage of goods in flow is very similar in final attribution. The only difference between them is that pawn right means greater alienation for pawnor in pawn right, including possession, use, revenue of the pawn. [13]

2.3. The Ban of Mortgage of Goods in Flow is for the Protection of Pawnor's Legitimate Interests

Mortgage of goods in flow is banned in both "security law" and "the property law". The article 40 of "security law" stipulates that "When a mortgage contract is entered into, the mortgagee and mortgagor should not reach a appointment that the pawn right is owned by creditor if the mortgagee is unpaid after the deadline. The article 66 stipulates that" The pledger and the pledgee should not reach a appointment that hostage right is owned by pledgee if the pledger is unpaid after the deadline."

This is because that most lawmakers in China take the potential risk of mortgage of goods in flow into account when making laws. Just like Emperor Constantine, worried about creditor's abuse of *lex commissoria*, he banned it and tried to maintain the fairness and justice of laws by writing the ban of mortgage of goods in flow into the law. There are generally for three reasons:

(1) For the protection of the legitimate interests rights of the debtors or the guarantors

Some scholars think "For their respective status in legal relationship, creditors usually rely on the wealth of rich, consider themselves to be the good; and the debtors are often in predicament of urgent circumstances, make demands on someone and bear the double debts of morality and law. Therefore, creditors often take advantage of the debtors as embarrassment, by the name of freedom of contract urging the debtors make liquid contracts with them, but the reality is rap and rend." [11]

(2) For the protection of the legitimate interests rights of other creditors

As Professor Wang said "The assurance is not directly owned by hypothec person, but through auction or selling off in the market to change the price. Then the hypothec person get first payments, other creditors are paid surplus value. If outcome security right is owned by hypothec person, other creditors will lose their chance. [16]

(3) Reveal the legal attribute of the value of real rights for security rights

Some scholars think the basis of real rights for security is the exchange value of things, real rights for security is a kind of changing price right. [17] Change of ownership is not a real goal for security purpose, and allowing liquid contract can distort the essence of real rights for security,

result in real for security and other rights confusion in principle and properties. [18]

Although vadium mortuum's complete sale and liquid contract have obvious difference, but dealing with the problem created by complete sale of small property right is of great concern. It still needs us to conduct a comprehensive and careful discussion.

3. The Provisions in Modern Civil Legislation about the "Conclusive Sales "

3.1. "Conclusive Sales " System Gradually Formed in the Feudal Period

China's feudal society lasted for 2000 years, and the development of pawn in China went through "its start in Han Dynasty, its foundation in Southern and Northern Dynasties, its development in Tang Dynasty, its foothold in North and South Song Dynasties, its flourish in Ming and Qing Dynasties, its decline in the late Qing Dynasty and its revival in contemporary reform." [19]

The first peak of the development of the pawn industry in china is from Sui and Tang Dynasties to the song and Yuan Dynasties. During this period, pawn evolved into a kind of industry, which showed commercial performance in business field. In the field of the civil law, the practice of property mortgage borrowing as a guarantee is also a case to follow. [20] As essence, "conclusive sales " system is still viable after thousands of years.

In the Ming and Qing Dynasties , the mortgage of land and real estate is further refined as the relationship between mortgage and pledge became literal . Yongzheng eight years (1730) conclude a regulation that "a conclusive sales contract without indicating the redemption is not allowed to be redeemed. If the sign "conclusive sales " can't be find in the contract, the goods can be redeemed. If the seller does not have the ability to redeem, another "conclusive sales " contract should be signed. If buyers do not want to change the price, the goods will be redeemed in the original price. [21]

In the eighteenth year of emperor Qianlong (1753), Zhejiang provincial judges with DE discussion punishments Tongde's proposal was took into the case: "When people buy property, if the property was pawned, transaction should be marked with the word 'redemption'. In property selling contract, words such as "no redemption" and "never redeem" should be included. Before the eighteenth year of emperor Qianlong statute, pawn and sell unknown property, if within thirty years, there is mark "no redemption" on the contract, excise redemption, respectively. If it exceeds 30 years, even if there is mark "no redemption" on the contract, it should not be redeemed if there is no "redemption" mark either. If there is anyone who do not obey the regulation, heavy punishment should apply.

As can be seen, never sell system is deeply rooted in our country. With "no redemption with no deficiency payment" "no redemption with deficiency payment" two forms, it has established its status as one of the common laws.

3.2. "Conclusive Sales" Regulations in the Modern Civil Legislation

(1) During the period of the republic of China, legislation did not limit the process mode of dead pawn .

During the period of the republic of China for approval was the attitude of the effectiveness of the pawn. The Pawnbroking management rules enacted in 1945, did not limit the process mode of dead pawn , Combination of pawn laws provinces during the period of the republic of China, in Private pawn, the effectiveness of behavior about agreed by the parties through the transfer of the implementation for Real rights security, The legislation's laissez-faire adopt adjustment mode, in other words ,kept a positive attitude about the provisions for conclusive sales. [22]

A feature of the period of the republic of China legislation was that , with the changing of the whole national economy, the limitation on the liquid contract degree also changed accordingly, especially in the republic of China in the late due to factors such as war-torn serious financial status, Social and economic order disorder, Causing the enacted law must be prohibitive provisions on liquid contracts in order to prevent the owner devour usury bankrupt property. Despite the civil code made a prohibitive provisions of liquid contract ,Folk still widely concluded agreement about the "conclusive sales ". According to the 1930s (as relative economic boom) literature: Farmers in Hubei area used to agreement "Mortgage debt, with land mortgage, houses mortgage, goods mortgage and clothes mortgage, must be doomed to fixed number of the year, if did not return overtime ,to make for the mortgage." [23]

And in the north region, the similar guarantee implementation was in common," Refers to the borrowing of the contract, sign, land ownership transfer, namely must delay, delay is not allowed two. No extension, to the prescribed time limit, it is necessary to principal and interest repaid, otherwise, refers to land owned by the creditor, with historical records." [24]

(2) The legislation about law power's made on historical after the founding of the People's Republic of China After the founding of new China, the provisions of the civil legislation for liquid contract limited to "Security law" promulgated in 1995, could be divided into two phases. "Security law" contract prior to the implementation of the liquid has been widely applied in the civil law of our country. Of "The People's Construction Bank of China's Loan Contract Guarantee Measure" promulgated

in 1987s stipulated in Article 12:” Borrowing units unable to repay loans, China construction bank has the right to deal with it as a loan in accordance with the provisions of the law and loan contract guarantee of the mortgaged property, and from the mortgaged property or sell off the mortgaged property priority repay loan principal and interest.” The rules and regulations issued by the coastal provinces at the same time, also made the subject matter of ownership transfer rule as one of the ways in which the mortgagee shall punish pawn[25].

Although the property right law power has not been justified, law power made as a traditional real right system in China, has already rooted in practice, it has its own vitality, which naturally includes the regulations of historical records.

4. The Legal and Practical Significance of the Low Power Historical Records Regulations

In an attempt to explore the significance of the existence of historical system, we have to return to liquid contract issues. Liquid contract in our country has a profound historical origin and realistic foundation, is in the judicial activities continuously explore and perfect a system, instead of liquid ban on contract with the color of import, not consistent with our tradition. [26]Although the “Property Law” for the liquid prohibitive provisions of the contract, the theory and reality basis behind the ban is not very full.” As consumer borrowing social relations is the management of the borrowing of social relations, the debtor is often in a more superior position” [27]. In today's civil and commercial activities, protecting the lawful rights and interests of creditors has become the important of fair value, In order to maintain the law's freedom, efficiency, fair value, liquid of the release of contract is imperative. Similarly, the existence of historical system also has the following positive significance.

4.1. Maintain the Freedom Value of Civil Law

Design pawning in the form of contract. The freedom of contract plays the core function in the whole private law region. As the German researchers said, the most distinct character of private law is to advocate the individual autonomy and the right for individual development. The freedom of contract is an important component and expression of behaviour freedom. It works as a flexible civil communication method. It prones to adapt to the development and change of the society through self-adjustment and update. Meanwhile, contract freedom is an essential peculiarity of market freedom[28].

Different from the subject right in public law, which origins from the authorization by the law, the subject right in private law origins from the inherent civil right ability as a natural person. When the party in private behaviour possesses the related capacity for act and the expression

of will is true, the public law cannot plunder the freedom of such action if the party does not break the public order and good custom[29].

4.2. To Maintain the Efficiency Value of Civil Law

In the relationship of the pawning right, pledgers are not allowed to repurchase after the deadline or the legal period, which is called “conclusive sales”. So people who have the pawning right can gain the ownership of goods. From the point of view of the financing guarantee function, “conclusive sales” is established to make the guarantee procedure of the real right, in order to protect the interests of private law subject.

The property law in our country realizes security real rights for security rights holders. Two types of procedures are stipulated for "private" and "public" respectively. The private procedures manifest as the set of discount agreement or the agreement on selling or auctioning; while the public procedures manifest as the security rights holder's right on requesting the court for auction or selling the subject matter when the agreement cannot be achieved by the parties. The cost on the realization of right would be increased invisibly if the action or selling are conducted by the court when it is applied according to the agreement or the agreement cannot be achieved. The parties not only have to negotiate on the price, place and procedure of the auction or selling off, but also may need to take the responsibility of organization and host of the whole procedure. The security rights can only be achieved when procedures including “sealing up or detaining the subject matter by the court—publishing the public notice of auction—organizing the auction—publicity procedure of the property—delivery and compensation for the auction money” are finished even though the auction procedure are conducted by the court according to the executive routine.

In other words, it is diseconomy and inefficiency to adopt the auction or selling method for private subject that it is against the efficiency value of law.

4.3. On the Fair Value of the Commodity Exchange in Civil Law

In modern commodity economy society, the unprecedented prosperity of commodity economy makes the rapid integration of large sums of money become the norm. The position of the creditor and the debtor is more reversed, The huge financing scale and the long repayment period, which greatly increases the risk of the creditors. For the creditor, the change of market conditions, the deterioration of the debtor's credit status and poor management led to bankruptcy, have caused great damage to their own interests.[30] In this context, on the one hand, Sell system can urge the pawner schedule to redeem pawn, on the other hand, in the pawner unable to

redeem to lower the cost of the program, strengthen the protection of the interests of the pawning right.

For the pawnor, "DO NOT SELL" can significantly increase the optional range of trading object due to the intensifying of market competition. The selling part can make the contract with the most favorable opposite part via filtration.[31] Whereas "SEEDING SUBSIDY" can achieve the maximization of its own benefit. This is exactly the expression of fair value of the law.

5. The Sublation of "Conclusive Sales and the Solution of Problems in Small Property Right House

"Pawn right in law" has become an effective way to solve problems in terms of land circulation problems related to small property right house. To build law of small property right house in accordance with pawn right relationship, on the one hand, can promote the effective use of its real estate of the farmers; on the other hand, can guarantee the housing needs of "buyers".

5.1. The Biggest Advantage of Pawn Right is "the reality of the buy and sell without Buying and Selling in the Name"

Some scholars believe that now pawn right system actually the traditional "sell in a flexible way" system. In form, the sale of land ownership changes into the sale of land use right. The result is "no ownership in the name", but there is "a reality of the ownership". [32] Specifically, the ownership of the house still belongs to the pledgor in line with the current land system; the person who has the pawning right enjoy usufructuary right for housing, make dwellers housed, and also meet his own needs to possess, utilize, profit from the property, which makes the best use of everything; More importantly, the exercise of foreclosure, also safeguard the rights and interests of farmers, urging them to take back property, prevent them in distress situation from losing land and property (refers to the land use right).[33]

5.2. The Final Right of Disposing of Legal Collective Economic Organizations Change from "Conclusive Sales" to "Sell in a Flexible Way"

Milson once described in his "history of the common law" a special view with the spark of thought, "the rights in common law are always relative, and in the case of a lawsuit, it can be determined that the party who has a more full right is always in a certain case." So for our current land ownership and the protection of farmer rights, "conclusive sales" regulation in pawning right system need to be sublated. If "conclusive sales" regulation is completely implemented, it will undoubtedly break through the existing land system, shake the basis of China's land ownership. Therefore, it is necessary to re-

design the system to find legal solutions of the problem in small property right house. In other words, "conclusive sales" must be not "conclusive"[34].

In history, of the land sale relationship China's traditional society, whether in "sell in a flexible way" or "conclusive sales", the seller was in a situation of "keeping in touch after sale" or "a little touch after the sale" "in a long time". They are often entangled with land ownership. [35] The so-called "conclusive sales" did not show the characteristic of modern trading relationship that "I give you money, you give me product. Then all is finished.". [36] It is undoubtedly an effective way to protect farmers' rights and interests, which can provide reference for the redesign of the system to solve the problem of small property right house.

It should be considered that the repurchase period can be extended on the basis of keep foreclosure, achieved through paying the corresponding price to person who owns the ownership. The redemption period in Taiwan "civil law" is divided into "agreed pawning period" and "not agreed pawning period".

If there is a deadline in pawn right, it should be redeemed in two years after the deadline (Article 923), It is also applicable when the period is less than 15 years. If the period is more than thirty years, it is necessary to be redeemed within two years after the expiration of the 30 years, according to the provisions of article 912 to shorten the 30 years. If there is not a deadline in pawn right, it can be redeemed anytime in 30 years after the sale. (Article 924)[37-38]

Therefore, in the system redesign, our country may consider appropriate extension. Under both sides consensus, by paying reasonable price, we can extend the deadline of the redemption, in order to maximize the time during which ownership belongs to the same party.

(3) Purchasing and storage of rural real estate should be allowed

At the end of the pawn period, if the pledgor has not sold the property or cannot find a proper buyer, the person who has the pawning right does not redeem or pay the corresponding price to extend repurchase period, and the collective economic organizations delay in exercise the power of collection, the person who has the pawning right based on lien is protected by law if he still wants keep the property for usage and profit.

During the pawn period, he is also allowed to transfer the ownership of the property to other civil subjects who meet the purchasing conditions, like other members of the collective economic organizations. The amount of money earned is the amount to pay the pawn price. But if the pledgor does not sell or redeem at the end of pawn duration, nor does he pay extra price to extend the period of repurchase, the person who has the pawning right can ask collective economic organizations to pay pawn price to take the property and eliminate pawn right. Of course,

to ensure the form of land ownership, the rural collective economic organizations also have responsibility to supervise such pawning process, which requires them to complete the registration on all the properties to be pawned. After the expiry of the redemption, once they find properties still at the hand of people rather than collective organizations, given that we have already had the so-called “collective land collection and storage system”, [1], it can be dealt with according to the law: as long as pay timely pawning price, collective land purchase and storage agency can enjoy replacement as the original owner of collective economic organizations, exercise the right of foreclosure, take the property, and eliminate the pawn right.

If the original person who has the pawn right wants to continue the pawn, the collective economic organization can enter a new contract as one party subject, namely the holder of the property with him. The land purchase and storage agency, here as the principal part of the eligibility, is similar to the legal status of previous “collective economic organizations” which granted rural homestead-land-use-right. As long as the law defines the related contents one of the legal responsibility of land purchase and storage agency, we can ensure smooth transition of public rural land system in our country through the system design.

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