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THE PRINCIPLE "SUPERFICIES SOLO CEDIT" IN CZECH LAW

The origins of the contradiction between res immobiles and res mobiles were found in the Justinian law for the first time[1]. Although the term "immovables" was not used originally in the Roman law, the basic difference between the things that can be moved and the other things that were affixed to the land was well known, terms "land, building"[2] were used for immovables contrary to "other things"[3].

The fact that the expressions for a piece of land or a ground were in the Roman law a substitute for any immovables is not accidental. In the Roman law, there was a basic principle used – all immovables that were affixed to the land became the part of it. This means that the possessor/owner of the land owned also all the planting on his land and all the buildings standing on his land even if they were not built from his material. His property continued even in the case that these affixed things were separated (e. g. if the tree was removed). The term "land" was thus equal to the term "immovables" or "real estate". This principle has been expressed by the Latin sentence: "superficies solo cedit", which means that "the surface steps back from the substance (ground)" [4], meaning here that "the building is a part of the land".[5] Although there were also the exceptions to this principle in the Roman law, its applicability was general and it was brought to the codifications made in the 19th century. With respect to the length of my paper, I will focus only on the development of this principle in the last century and merely on the legal regulation valid on the

1 E. g. I 2, 6pr., see M. Bartošek, Encyklopedie římského práva. Praha 1981, p. 277, 278.

2 Terms such as: soli, fundus, praedia, ager or aedes – mean land, ground. For more terms see M. Bartošek, Encyklopedie římského práva. Praha 1981.

3 The Law of XII Tabulas describes the different time essential to acquire the right of ownership by prescription in case of the land /fundus/ and in the case of other things /ceterae res/. Gaius designates these other things by the term mobilia – this means movable thing, i.e. movables., J. Vážný, Vlastnictví a práva věcná. Brno 1937, p. 12,13.

4 "...id, qoud in solo nostro ab aliquo aedificatus est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit." /Gai 2, 73/, "Semper superficiem solo cedere." /Ulp., D 43, 17, 3,7/.

5 The question of the ownership to the material was solved differently. The important is that it was a theoretical question because the Law of XII Tabulas bans destroying the building with intend to take back the building material. The owner of the land had to pay damages to the owner of the material. J. Vážný, Vlastnictví a práva věcná, Brno 1937, p. 58.

territory of the Czech Republic at present[6]. The practical application of this principle is the most obvious from the relationship – "land and building".

The regulation in Section 297 ABGB enacted this principle for the Austrian law and since the formation of the independent Czechoslovakia in 1918 also for the Czechoslovakian law. The things that were established on the land with an intention to stay there permanently, e. g. houses and other buildings, became a part of the real estate[7]. This didn't happen only in case of the temporary, volatile purpose of the real estate. According to this regulation, the building was not a stand-alone thing, it was a part of the land and the owner of the land was also the owner of the real estate, no matter who was the developer of it. There was only one exception in the provision of Section 418 ABGB, the third sentence. This describes the situation when the developer can be the owner of the building, even if he is not the owner of the land. It could happen only in the case when an honest developer (a developer who supposed that the building was being built on his piece of land) built on the land of another person, in fact, and this person, a real owner of the land, knew about it and despite this he didn't prohibit/stop the construction of the building immediately.

In the epoch after the year 1948, when the communist regime was established in the Czechoslovakian Republic, the whole legal system of principles regulating the institution of ownership was changed. There was no real individual ownership, the character of the ownership was based on "The Declaration" ("Prohlášení"), in The Constitution of 9th May (The Constitutional Act No. 150/1948 Sb.)[8]. The private ownership was considered to be a terminating form. There was a new ownership of the means of production that should be used not for the "accumulation of the possession" but for the satisfying of the immediate needs of individuals[9]. The planned collectivization, establishment of agricultural cooperatives and also a construction of new buildings/houses came into a confrontation with the basic jural principle "superficies solo cedit". According the principle mentioned above, the new buildings built on the private land would be in the ownership of the owner of the land. This was not acceptable for the new regime (if the owner would not be

6 To find the details in the question of the legal regulation in the Slovak state see Novohradský, V. Opustienie zásady „Superficies solo cedit" a jeho dosledky, "Právny obzor" 1951, no. 4, p. 346, etc. To the reception of the Roman Law in general, see O. Horák, Problematika recepce a občanské zákoníky. In: Vývoj právních kodifikací. Brno 2004, p. 150-164. To the Roman Law sources of the modern private law (to the concepts of "things") briefly (bibliography ibidem) see O. Horák, N. Štachová, Dědičné lóže a dělené spoluvlastnictví. in: Res - věci v římském právu, Olomouc 2008, just being printed.

7 "Rovněž tak patří k nemovitým věcem ty, které byly na zemi a půdě zřízeny s tím úmyslem, aby tam trvale zůstaly, jako: domy a jiné budovy se vzduchovým prostorem v kolmé čáře nad nimi; rovněž: nejen vše, co do země je zapuštěno, ve zdi upevněno, přinýtováno a přibito, jako: kotle na vaření piva, na pálení kořalky a zazděné skříně, nýbrž i takové věci, které jsou určeny, aby se jich při nějakém celku stále upotřebovalo: např. u studní okovy, provazy, řetězy, hasicí nářadí a podobně." Section 297 ABGB, cited from ASPI.

8 "Hospodaření v našem státě slouží lidu a je vedeno tak, aby vzrůstal blahobyt, aby nebylo hospodářských krizí a aby národní důchod byl spravedlivě rozdělován.", cited from ASPI.

9 Compare with V. Knapp, Vlastnictví v naší společnosti, "Právník" 1949, p. 303, etc.

the state but private persons)[10]. This was the reason why the communist regime had to remove the principle from the Czechoslovakian law. Therefore the Civil Code – Act no. 141/1950 Sb. in the second sentence of Section 2 said that the land and the building standing there are two different, separate things[11].

It is quite strange that contemporary jural literature found fundamentals of the change of this principle also in the Roman law,[12] in the term „superficies"[13]. Superficies is an easement to property of another and de facto by its extension, it substituted the ownership. On the other hand, we can say that this was not an exception to the principle "superficies solo cedit", when the right of building was terminated, the property was automatically given back to the original owner. The term "right of building" was also known in the Austrian rule of law and in the Czechoslovakian rule of law before the World War II[14]. But the legal regulation of the right to build was according the new Czechoslovakian Civil Code (Section 159 of the Act No. 141/1950 Sb.) rather different. Firstly, the real estates built according to this right of building did not pass to the owner of the land even not later[15]. The influence of the "communist law" caused that the right to building could be created by the law, by the decision of an administrative authority or by a contract – this had to be a written contract with the consent of the District People's Committee. Moreover, the socialistic organizations, which permanently used the land of other owners, could build on the land without the need of the right of building (Section 158 of the Act. No. 141/1950 Sb.). It might be useful to mention that the term "right of building" was not related only to construction of the building, either overground or underground but it was also possible to establish the right even for a better utilization of the land (i. e. garden, yard…)[16].

In 1964, a new codification of the civil law occurred by the Act. No. 40/1964 Sb[17]. The need of this codification was aroused by the fact that a new constitution was issued in 1960. It was politically justified by the statement that the development of socialism was boisterously quick and that it was necessary for the law to develop quickly as well[18]. Differently from the previous law regulation, the principle of "superficies solo cedit" was not disconfirmed explicitly but it was only inferred from the grammatical interpretation of the term "real estate" (Section 119 (2) of the Act.

10 V. Novohradský, Opustienie zásady "Superficies solo cedit" a jeho dosledky, "Právny obzor" 1951, no. 4 p. 348.
11 The law came into force on 1.1.1951, it is described as „střední občanský zákoník" – "the Middle Civil Code". For the text with the explanatory note see Občanský zákoník, Praha 1950.
12 V. Novohradský, Opustienie zásady "Superficies solo cedit" a jeho dosledky, "Právny obzor" 1951, no. 4, p. 346.
13 M. Bartošek, Encyklopedie římského práva. Praha 1981 p. 304.
14 In the period between the two world wars, the right of building was obeyed to the Act No. 86/1912 Sb. and later by the Act No. 88/1947 Sb. V. Novohradský, Opustienie zásady "Superficies solo cedit" a jeho dosledky, "Právny obzor" 1951, no. 4., p. 347.
15 http://pravniradce.ihned.cz/c4-10078260-18556070-F00000_d-vlastnictvi-pozemku-a-stavby ,12. 12. 2007.
16 V. Novohradský, Opustienie zásady „Superficies solo cedit" a jeho dosledky, „Právny obzor" 1951, no. 4, p. 347.
17 This Civil Code was distincly amended in the 1990s and it has been in force until these days.
18 V. Knapp, Proměny času. Vzpomínky nestora české právní vědy, Praha 1998, p. 123.

No. 40/1964 Sb). The explicit refusal of this principle returned into the Civil Code in 1992 (Section 120 (2))[19]. The new Civil Code also cancelled the term "right of building", which was substituted by so called "private use of property" (Section 198 of the Act No. 40/1964 Sb.)[20]. Since 1992, the private use of property has been changed to the owners' right.

By the denial of the Roman law principle, a lot of problems occurred arising mainly from the fact what can be considered to be a separate building. In the judgment of the Constitutional Court of 24th May 1994 sp. Zn. P1. Ús 16/93, provision of Section 120 (2), it is explained in such a way that the building is not a part of the land in case that it is a separate real estate, or if it is a chattel building without any purpose of a physical bonding to the land and if it is possible to detach it without any devaluating of the land. The judicature of the courts was very casuistical, mainly in the restitution cases in the 1990s – they arbitrated the cases of tennis courts, supporting walls, pools, ameliorative mechanisms, ponds, etc[21].

There were also resolved the issues of car parking places and tertiary roads. The Supreme Court has decided that "a car park represented by the land whose surface has been hardened in order to enable parking of cars is not a construction/building from the viewpoint of the civil-law relations"[22]. Neither the roads are considered to be separate buildings but just a kind of adjustment of the land and the owner of the road can not be different from the owner of the land[23]. But a quite different situation can occur in case of a well, for example[24]. There also appears a disputable issue since a building can be considered to be an object of civil relationships. According to the established praxis of the Supreme Court, it occurs since the moment when the first overground floor obtains its evident and unchangeable dispositional order[25].

The issues written above are just some of the reasons for returning to the principle of "superficies solo cedit"[26] in the prepared novelization of the Civil Code (Section 424 of the prepared Civil Code). But there appears another question if

19 It became by a novelization No. 509/1991 Sb., in force from 1st January 1992.

20 This law was used to enable people to build a house, weekend house, garage or a garden in the lands, for this purpose the law was established. The buildings then were in their personal possession.

21 V. Vlk, Vlastnictví pozemní komunikace vs. vlastnictví pozemku. Conference paper "Real Estate Market", Autumn 2005. http://www.stavebni-forum.cz/detail.php?id=5655, 28.11.2007.

22 The decision of the Supreme Court of 26th October 1999, sp. Zn. 2 Cdon 1414/97.

23 Such a conception is expressed, i. e. in the decission of the Supreme Court of the Czech Republic of 10th July 2004, sp. Zn. 22 Cdo 314/2004, published in the Soudní rozhledy magazíne 2005, No. 1, quotation according to V. Vlk, Vlastnictví pozemní komunikace vs. vlastnictví pozemku, Conference paper "Real Estate Market", Autumn 2005. http://www.stavebni-forum.cz/detail.php?id=5655, 28.11.2008.

24 P. Dostalík, Součást věci a příslušenství v soukromém právu římském a moderním. Conference paper "Naděje právní vědy", Býkov 2007, just being printed.

25 P. Baudiš, Zápis nových staveb do katastru nemovitostí, "Právní rozhledy" 2004, no. 6, p. 224-227.

26 Návrh občanského zákoníku, p. 80, http://portal.justice.cz/ms/ms.aspx?j=33&o=23&k=381&d=40461, 28.11.2008.

a hasty introduction of this principle will not cause again chaos in the proprietary relationships[27] related to the long period of no usage of it.

27 Petr Dostalík proposes it to be enacted temporarily so that it is not possible to dispose of the building if the disposal of the land has not been made at the same time. A duality of owners will be superseded by the long term application of it and the principle of “superfcies solo cedit“ would be established more easily. P. Dostalík, Součást věci a příslušenství v soukromém právu římském a moderním. Conference paper “Naděje právní vědy“, Býkov 2007, just being printed.

Streszczenie

Opracowanie poświęcone jest zagadnieniu zasady „superficies solo cedit". Ta klasyczna zasada prawa cywilnego obecna była w czeskim ustawodawstwie przedwojennym. Niestety, na skutek zmian społeczno–politycznych początku lat pięćdziesiątych, od zasady tej odstąpiono. Jej ponowne wprowadzenie przygotowywane jest w związku ze zbliżającą się kodyfikacją prawa cywilnego.