and terms of the donatio mortis causa contract, because when the charge has already been fulfilled it is not reasonable to sacrifice the interest of the donee, for the simple reason that the final intention of the donor should be respected.

A donatio mortis causa is a contract and its agreement should be respected basically and should not be broken lightly. Moreover, it is against the principle of good faith to allow arbitrary revocation and change of mind without restriction when the donee has already fulfilled the charge in the donatio mortis causa subject to charge.

The current decision should be highly evaluated in that it denied the revocation of a donatio mortis causa as a matter of principle in which the charge has already been fulfilled, partly from the standpoint of the adjustment of interests between the parties concerned and partly in consideration of the facts relating to the background on which the donatio mortis causa between relatives are based.

By MASAYUKI TANAMURA

4. Law of Civil Procedure and Bankruptcy

There were several important cases in the year under review concerning civil execution and insolvency proceedings. In particular, interesting cases are found in the field of insolvency laws. One case each from the fields of straight bankruptcy and corporate reorganization are introduced here.

1. **Relationship between an objection lodged on the day of the investigation of claims against the claim filed by a creditor in bankruptcy who had neither an enforceable instrument nor a final judgment, and the effect of an interruption of the statute of limitations involving the filing of such a claim for**

bankrupt.

Decision by the Second Bench of the Supreme Court on Jan. 29, 1982. Case No. (*o*) of 1980. A case requesting the confirmation of a claim in bankruptcy. 36 *Minshū* 105.

[Reference: Civil Code §152, Bankruptcy Act § 240(1)]

[Facts]

A stock corporation, A, which was not involved in the current case, had a compulsory composition (*Kyōsei-Wagi*) in its bankruptcy case cancelled on Sept. 13, 1971, and the bankruptcy proceedings for A continued with Y (defendant, *Koso* appellant, and *Jokoku* appellee) as a trustee in bankruptcy.

B, who was not involved in the current case, had bills and checks drawn by A, and filed them as a claim for bankrupt with the bankruptcy court on Oct. 5, 1971. On the day of the investigation of claims held on Apr. 27, 1972, the trustees, Y and other creditors, lodged an objection against it and, as a result, the filed claim in question was not confirmed in bankruptcy proceedings. B did not bring an action for confirmation of the claim, however, and assigned the filed claim to X (plaintiff, *Koso* appellee and *Jokoku* appellant) on Sept. 8, 1975.

On the same day, X brought the action for confirmation of the claim against Y et al.

At dispute was the relationship between the effect of the interruption of the statute of limitations by virtue of the filing of the claim in bankruptcy and the objection to the filed claim on the day of the investigation of claims. Y et al. insisted that the period of limitation had already expired because three years had passed since the date of maturity of the bills in question, and six months had passed since the date of maturity of the checks on the day the action was brought.

On the other hand, X insisted that the limitation period had been interrupted with the filing of the claim in bankruptcy, and that its effect continued until completion of the bankruptcy proceedings was decreed. Y et al., however, rebutted that the coming into existence of the effect of the interruption of the

running of the period of limitation was prevented by the objection on the day of the investigation of claims.

In the first instance, the opinion of X was acknowledged, but in the second instance it was ruled that the effect of the filing of the claim in bankruptcy was substantially lost when the objection was lodged against the filed claim on the day of the investigation of claims, and that there was no interruption of the running of the period of limitation. Dissatisfied with the decision, X filed a *Jokoku* appeal.

[Opinions of the Court]

Reversed and remanded. Participation in bankruptcy proceedings is virtually the exercise of the rights of a creditor in bankruptcy, and that the effect of an interruption of the running of the period of limitation acknowledged in Article 152 of the Civil Code should be maintained as long as the exercise of the rights as mentioned above is continued. Should the trustee in bankruptcy or other creditors lodge an objection against the filed claim of a creditor who does not have an enforceable instrument or a final judgment, the creditor who filed the claim must either bring an action for confirmation of the claim against the person who raised the objection or resume the pending suit on the day of the adjudication of bankruptcy.

Unless the filing of such an action or resumption of a suit is proven to the trustee in bankruptcy within two weeks from the day of the public notice of distribution, the creditor shall be excluded from the distribution (Bankruptcy Act §261).

However, in case the filing of the said action or resumption of the suit is proven within a term of preclusion concenring the latter distribution, priority is recognized about the amount that is due in the former distribution (Bankruptcy Act §270).

With regard to disputed claims, the court shall decide if the creditor in question can be allowed to exercise his voting right or decide what amount of claim the creditor can make in case he is allowed to exercise his voting right (Bankruptcy Act §182 (2)).

Thus viewed, the creditor in bankruptcy who does not have an enforceable instrument or a final judgment can be interpreted as exercising his right as a creditor in bankruptcy through participation in the bankruptcy proceedings by filing a claim for bankrupt. Even if the trustee or other creditors file an objection on the day of the investigation of claims, the said creditor in bankruptcy still continues to exercise his rights, and the objection in question is no more effective than preventing confirmaion of the existence and the amount of the claim, and in no way influences the effect of the interruption of the running of the period of limitation for filing the claim.

[Comment]

If the creditor watns to get dividend through participation in the bankruptcy proceedings, he must file a claim against bankrupt as a claim in bankruptcy with the bankruptcy court (Bankruptcy Act §228) and at the same time must go through the procedure of examination of the filed claim on the day of the investigation of claims.

If, on the day of the investigation of claims, there is no objection against it, the existence and the amount of the claim is deemed final and conclusive (§240 (1)). So a creditor can receive a certain dividend in bankruptcy proceedings.

If, however, any objection is raised against a particular filed claim, either by the trustee or the other creditors, the claim cannot be confirmed in the bankruptcy proceedings. The disputed claim shall be determined through action for confirmation of the claim, which can be brought by the creditor against the person who raised the objection.

Civil Code Article 152 recognizes the effect of the interruption of the running of the period of limitation as "participation in the bankruptcy proceedings" on one hand, but lists, on the other, two cases when the effect of the interruption does not eventuate even if there is participation in the bankruptcy proceedings, that is, when a creditor cancels his claim or when the claim is turned down or refused.

There is little doubt that the filing of a claim in bankruptcy corresponds to what is called "participation in the bankruptcy proceedings." "Cancelling by the creditor" is understood to mean that the creditor, after filing a claim, withdraws it. There are no problems about this aspect. What is problematical in terms of interpretation is what is meant by "refusal of a claim." For instance, if the "claim" is interpreted as the filing of the claim in bankruptcy, "refusal" is understood to mean that as the filing was unlawful, the bankruptcy court dismissed it.

On this score, the current decision has taken the stand that the "claim" should be interpreted as a "filed claim" and that "dismissal" occurs when the claim in bankruptcy is not confirmed because of the objection on the day of the investigation of claims.

Many academic theories are ambiguous about this problem and few of them attempt to probe into the matter thoroughly.

The Supreme Court, for the first time, made a judgment on this problem which remains rather unclarified in academic theories. The decision can be an important reference not only in the case of participation in the bankruptcy proceedings, but in the case of participation in the composition proceedings or corporate reorganization proceedings.

As already stated, an objection on the day of the investigation of claims alone does not determine the invalidity of a filed claim. Accordingly, it is rather unreasonable to conclude that simply because an objection is raised the effect of the interruption of limitation period is lost.

In this regard, the Supreme Court's conclusion that the objection of the trustee or the other creditors does not correspond to "refusal of a claim," as provided for in Article 152 of the Civil Code, should be considered appropriate. The current decision, however, did not go far enough to point out what constitutes "refusal of a claim." Problems needing theoretical clarification thus remain unsolved. Expectations are placed on the future development of academic theories on this issue.

2. A case in which a company's debt, in a contract, became

due after the stock corporation was given an injuction prohibiting payment under Article 39 of the Corporate Reorganization Act, and cancellation of the contract for reasons of statutory delay in performance, and the effect of a special agreement that called for the cancellation of the sales contract on the ground that certain facts occurred causing the stock corporation, the buyer in the contract, to file a petition for corporate reorganization.

Decision by the Third Petty Bench of the Supreme Court on Mar. 30, 1982. Case No. (*o*) 319 of 1978. A case involving a demand for delivery of some machinery. 36 *Minshū* 484.

[Reference: Corporate Reorganization Act §§1, 39, 62; Civil Code §§540, 541]

[Facts]

X (plaintiff, *Koso* appellant, *Jokoku* appellant) sold and delivered the machinery in question (a crane truck) to Company A. The sales contract concluded between them contained the following terms:

1) payment shall be made in 29 installments, 2) the title of the machinery shall be retained by X until the payments have been completed, 3) until transfer of the title is made, X shall lend the said machinery to Co. A free of charge, and 4) should certain events occur that might cause the dishonoring of a bill or filing of a petition of bankruptcy or corporate reorganization, X may cancel the contract without informing A.

However, the company filed a petition for corporate reorganization on Apr. 8, 1975, before completing its payments, and an injunction prohibiting payment on all debts, arising from factors prior to the filing of the petition, excluding salaries and utility charges, was issued on Apr. 14 the same year. As the effect of the said injunction, X was refused payment for a bill due on April 30. Thereupon X, on the basis of Clause (4) of the agreement informed A of its intention to cancel the sales contract.

Then, on July 3, a decree for proceeding with the corporate reorganization (*Kōseitetsuzuki-kaishi-kettei*) was adjudicated on A.

X then demanded the trustee Y (defendant, *Koso* appellee and *Jokoku* appellee) that the machinery in question be delivered on the basis of the title as part of the right of reclamation (*tori-modoshi-ken*).

X lost in both the first and second instances. The court in the first instance ruled that with regard to the cancellation based on the dishonored bill, the refusal to pay the bill did not constitute statutory delay in performance, since the injunction prohibiting payment had already been granted and that with regard to the special agreement specifying the petition of corporate reorganization as the cause of cancellation, such an agreement was null and void because it would protect the special creditor in a case where corporate reorganization proceedings were initiated.

In the second instance, the court maintained that since the injunction prohibiting payment only prohibited voluntary payment by the company but did not exempt the company from statutory delay in performance, the cancellation based on the special agreement was effective as a matter of formality. However, it stated that since the cancellation in question purported to realize the practical security interest, that is, retention of the title, X could not insist on the right of reclamation based on the cancellation after the decree for proceeding with the corporate reorganization, aside from the period prior to the issuance of the decree.

Dissatisfied, X filed a *Jokoku* appeal.

[Opinions of the Court]

When a seller delivers goods to a buyer upon concluding a pledge to retain the title to the object in the hands of the seller until the payments are completed in the sale of movables, the seller can generally reclaim the object by cancelling the sales contract on the ground of nonfulfillment of the payment of a debt by the buyer.

As in the current case, however, if an injunction prohibiting payment was granted to the company which had filed a petition for corporate reorganization under Article 39 of the Corporate Reorganization Act, the company shall be bound not to pay its

debts.

It is thus reasonable to interpret that even if the period of payment was due later, the creditor cannot cancel the contract for reasons of statutory delay in performance on the part of the company.

Moreover, the special agreement to the effect that the sales contract could be cancelled should something occur in the company (the buyer), such as cause for filing a petition for corporate reorganization, is considered detrimental to the tenor and purposes of corporate reorganization proceedings which are designed to maintain and rehabilitate the enterprise while adjusting the interest of its creditors, stockholders and other parties concerned. So, it must be stated that its effect cannot be acknowledged.

[Comment]

In the transaction based on retention of the title, a cancellation clause, as in the current case, is generally laid down upon concluding a contract. Concerning the propriety of the cancellation of a contract for reason of statutory delay in performance after an injunction prohibiting payment, and the effect of the cancellation clause for reasons such as the filing of a petition for bankruptcy or corporate reorganizaiton, the Supreme Court in its decision denied both, which is bound to affect greatly business practices in the future.

In this connection, it is appropriate to look into current academic theories about the question of whether a contract can be cancelled for reason of nonfulfillment or statutory delay in performance by the debtor when the payment period is due for the debt in the contract following the grant of an injunction prohibiting payment.

It is generally held in academic circles that the injunction is effective only in prohibiting voluntary payments by a debtor, but does not prohibit the exercise of the right on the part of the creditor, and that if there is statutory delay in performance following the injunction the creditor can cancel the contract.

On the other hand, there has been a persistent opinion that

since the purpose of this injunction is to help maintain and rehabilitate enterprises while according equal treatment to their creditors in the meantime, it is not justified for certain creditors to reclaim the object by cancelling the contract for reason of statutory delay in performance, notwithstanding such injunction.

At present, most academic theories support this view on the ground that since an injunction was granted the debtor cannot be taken to task for statutory delay in performance. The decision led to the current trend of such theories.

It was academic theory that took the initiative in dealing with the question about the effect of the special agreement that the filing of a petition of bankruptcy or for corporate reorganization gave rise to the right of cancellation or was the cause of automatic cancellation.

A special agreement of this kind takes the stand that certain facts arising in the course of initiating bankruptcy or corporate reorganization proceedings establishes the right of cancellation, but if the cancellation is acknowledged, the properties that ought to constitute the bankrupt's estate or the estate of a corporation under reorganizaiton proceedings for the benefit of all creditors, would virtually be taken over by specific creditors in advance, and in this regard, it should be considered null and void in relation to bankruptcy or corporate reorganization proceedings.

Such interpretation is supported by many opinions. There has even been a decision made in the lower court on the basis of such understanding. (Decision by the Tokyo District Court on Dec. 25, 1980. 1003 *Hanrei Jihō* 123). The current decision by the Supreme Court virtually recognizes the conclusion and reasoning by this lower court decision.

The conclusion of the current decision was, in itself, in line with academic theories that have been strongly voiced, but the fact that it was established as a precedent by the Supreme Court will have significant meaning in practice.

There are still many problems needing future study because the court decision found the special agreement of this kind null and void without presenting any detailed reasons. For instance,

there is the problem of whether or not the tenor of the current decision can be applied to special agreements of this kind accompanying contract patterns other than transactions based on retention of title. It is presumed that the intention of the Supreme Court was probably to apply the tenor of the current decision to other contract patterns, and if the effect of the special agreement of this kind is to be denied likewise, the current decision will have all the more influence on actual business practices.

Another problem is whether such restriction on the right of cancellation will put creditors at a grave disadvantage. Detailed studies are necessary on this question.

By Prof. KOICHI SAKURAI
NORIYUKI HONMA

5. Criminal Law and Procedure

a. Criminal Law

1. A Judge's conduct in reading and examining the identification file of a person unrelated to the case in his charge was adjudged as corresponding to an abuse of power.

Decision by the Second Petty Bench of the Supreme Court on Jan. 28, 1982. Case No. (*a*) 461 of 1975. Case of public official's abuse of power. 36 *Keishū* 1.

[Facts]

The defendant was an assistant judge of the Hachioji chapter of the Tokyo District Court at the time when the incident occurred. He visited Abashiri Prison on July 24, 1971, and met with the warden producing his name card on which his title "Judge of the Tokyo District Court" was written and asked to peruse the identi-