4. Law of Civil Procedure and Bankruptcy

In the field of laws of civil procedure, civil execution and insolvency there were many important decisions as usual. Among those, the following two decisions are described: the Tokyo High Court decision in 1985 concerning the scope of the effect of intervention for assistance based on notice to a third party and the Supreme Court decision in 1986 concerning the amendment of an action from an action for performance to an action for confirmation of a claim in bankruptcy in *jokoku* appellate instance.

1. The scope of the effect of intervention based on notice to a third party.

Decision by the Eighth Civil Division of the Tokyo High Court on June 25, 1985. Case No. (*ne*) 1293 of 1979. *Koso* appellate case of claim for compensation. 1160 *Hanrei Jihō* 93; 566 *Hanrei Taimuzu* 152.

[Reference: Code of Civil Procedure, §§ 78 and 70.]

[Facts]

X_1 and X_2 (plaintiffs, *koso* appellants) — X_1 is a person who caused a traffic accident and X_2 is an insurance company — were sued for damages in another case (hereinafter called the former suit) by the bereaved of the victim of the traffic accident. In the former case, X_1 et al., alleging that the death of the victim had been caused by the medical malpractice of a doctor of the hospital Y (defendants, *koso* respondents) after the accident concerned, gave notice of action to Y. Thereupon, Y intervened to assist the bereaved, the plaintiff of the former suit and the adversary of X_1 et al. The court handling the former suit recognized that the death of the victim had been caused by the concurrence of the traffic accident and the medical malpractice and X_1 et al. lost the former suit. Then the judgment in the former suit became final and conclusive.

So, X_1 et al. brought an action to claim compensation against Y anew.The court of first instance, holding that there was not sufficient evidence to find a medical malpractice of Y, dismissed the action. Dissatisfied, X_1 et al. lodged a *koso* appeal. This is the current case. In the current case X_1 et al., opposing the findings of the original court, alleged that, since the concurrence of the traffic accident and the medical malpractice had been recognized by the irrevocable judgment in the former suit, Y who had been the notified in the former suit, given the effect of intervention for assistance under the Code of Civil Procedure, §§ 78 and 70, could not assert in the current case that there had been no medical malpractice at that time; that, even if the preceding allegation might not be admitted, it could have been supposed from the circumstances of the former suit that another action would arise between Y and X_1 et al. eventually and therefore, unless the binding force of the judgment in the former suit on Y might be admitted, it was likely to be the result that the only one side of the parties would lose the suit twofold; and that, since the activities of Y had been the basis of the judgment in the former suit and the procedural rights of Y had been guaranteed sufficiently, it should be found that the binding force of the judgment in the former suit might reach Y.

[Opinions of the Court]

Koso appeal dismissed.

The effect of intervention (sankateki kōryoku) of a judgment brought about by notice to a third party (soshō kokuchi) may be interpreted as being produced between the notifier and the notified concerning the finding of the facts or legal relations which come to be the premise of the judgment. Certainly, the medical malpractice of a doctor, an employee of the *koso* respondents, was recognized in the judgment in the former suit. However, despite this, since the court handling the former suit held that the doctor and the person who was to be blamed for having caused the traffic accident concerned might be liable for all the damages respectively as persons who caused the joint tort

as a result, though the tort was not caused in unison, the finding of whether the medical malpractice was made or not is, in the end, only obiter dictum of the judgment concerned. Accordingly, it is impossible to recognize the effect of intervention of the judgment of the former suit as to whether the medical malpractice was made or not, on the basis of notice to a third party.

Further, apart from the effect of intervention based on notice to a third party, it is necessary to examine whether the effect of intervention based on intervention for assistance (hojo sanka) may extend to the current suit or not. As to this issue as well, it will be found that the effect of intervention concerning the finding of whether the medical malpractice was made or not shall be denied for the same reason as mentioned above concerning the effect of intervention based on notice to a third party. Additionally, the effect of intervention may be regarded in general as a matter of the joint sharing of responsibility for losing the suit by the intervener and the intervenee. Accordingly, from this point of view, the effect of intervention concerning the finding mentioned above must also be denied.

[Comment]

The current decision ruled on the binding force of a judgment which extended to the notified based on notice to a third party, that is, on the scope of the effect of intervention.

Essentially, the effect of intervention implies the binding force of a judgment made in an action involving intervention for assistance on the intervener for assistance. It means that an intervener for assistance, concerning the matters which the intervener was able to assert and prove fully or might have been able to do so as such an intervener, can not contend against the judgment of the action involving his intervention for assistance in another action where the said intervener becomes a party (Code of Civil Procedure, §70).

In addition, the effect of intervention may reach the notified by the mere receipt of notice to a third party without actually intervening to assist a party. That is, where the notified had some

interests which qualified him to intervene for assistance, even if the notified did not actually intervene in the suit concerned, the notified shall be treated the same as if he had intervened when he could have intervened to assist a party (Code of Civil Procedure, §78).

With regard to the effect of notice to a third party, the generally accepted theory seems to have insisted that the effect of intervention might extend to the notified on the assumption that the notified should intervene to assist the notifier, in other words, that the notifier and the notified should stand on the same side and co-operate with each other in the action. And this view was in harmony with the theory concerning the effect of intervention in the case of actually intervening to assist a party that the effect of intervention of a judgment should arise only between the intervener and the intervenee.

However, the decision by the Sendai High Court on Jan. 28, 1980 (33 *Kōsai Minshū* 1), which was introduced in this Bulletin, vol. 2, tossed a new question into such theoretical circumstances (*cf.* Waseda Bulletin of Comparative Law, vol. 2, 1982, p. 135). The decision recognized that, in a case where the notified had intervened to assist the adversary of the notifier, the effect of intervention based on notice to a third party might extend to the notified even if the interests of the notified and the notifier were opposed to each other. This decision is thought to be a response to the recent influential theory that, in case of the intervention for assistance, the binding force of a judgment may arise between the intervener for assistance and the adversary. And, starting from this decision, the problem on the scope of the effect of notice to a third party had been debated.

Under such circumstances, the current decision held that the effect of intervention based on notice to a third party should be recognized between the notifier and the notified concerning the finding of the facts or legal relations which came to be the premise of the judgment and, considering that the finding of whether the medical malpractice had been made or not in the former suit was only obiter dictum, denied the effect of inter-

vention on this point of issue.

Further, apart from the effect of notice to a third party, it came into question in the current case whether or not Y, having intervened to assist the adversary of X_1 et al. in the former suit and having been found guilty of the medical malpractice, was to be bound by the finding of the former suit as a result of the effect of the intervention for assistance. But the current decision also denied the binding force of the judgment of the former suit for the same reason as it denied the effect of intervention based on notice to a third party, i.e. that the finding of the medical malpractice was only obiter dictum of the judgment concerned.

Dissatisfied with the current decision, X_1 et al. lodged a *jokoku* appeal. The first decision of the Supreme Court on the scope of the effect of notice to a third party is now expected.

2. Bankruptcy of the debtor and amendment of the action from an action for performance to an action for confirmation of the claim in bankruptcy in *jokoku* appellate instance.

Decision by the Second Petty Bench of the Supreme Court on Apr. 11, 1986. Case No. (*o*) 272 of 1982. A case claiming money for transportation. 40 *Minshū* 558.

[Reference: Code of Civil Procedure, §232; Bankruptcy Act, §§244(1) and 246(1).]

[Facts]

On June 27, 1979, X (plaintiff, *koso* appellant, *jokoku* appellant) was assigned the claim for transportation in the sum of ¥5,110,288 (hereinafter called Claim C_1) of A Co. to Y Co. (defendants, *koso* respondents; the bankrupt) which was to be paid by July 31 of the same year. A Co. gave notice of the said assignment to Y Co. on around June 28, 1979. X received payment of ¥2,663,395 of Claim C_1 from Y Co. on July 6, 1979.

Meanwhile, B, based on his claim to A Co., gained an order of provisional attachment concerning the sum of ¥2,151,151 (hereinafter called Claim C_2) of the said Claim C_1 of A Co. to Y Co. on Aug. 15, 1979, and an order of garnishment and col-

lection on Nov. 1 of the same year. Each order was served on Y Co. at that time.

Since Y Co. received the service of the order of garnishment and collection, and payment was demanded many times by an attorney, the representative of B, who was entitled to collect the debt concerned as a result of the order, Y, feeling that there was no error in the award of the court, paid the sum of the said Claim C_2 to the attorney, the representative of B, observing the order concerned on Nov. 21 of the same year.

Under such circumstances, X brought an action claiming the payment of ¥2,446,893, the remainder of the said Claim C_1, and damages for delay in performance of it (hereinafter called Claim C_3) against Y.

The court of first instance admitted part of the said Claim C_3 of X, that is, the sum of ¥295,742 and damages for delay in performance of it, and dismissed the rest. Further, the *koso* appellate court dismissed the *koso* appeal of X on the claim lost in first instance.

Thus, X lodged a *jokoku* appeal alleging that the decision of the *koso* appellate court was illegal in that the court made a mistake of interpretation and application of the Civil Code, §§467(2) and 478, and so forth.

However, on Feb. 17, 1984, after the conclusion of the oral proceedings (main hearing) in *koso* appellate instance, Y had been adjudged bankrupt and Y_1 (*jokoku* respondent) had been appointed to be a trustee in bankruptcy. In the bankruptcy proceedings of Y, X filed the said Claim C_3 as a claim in bankruptcy with the bankruptcy court, and Y_1 raised an objection to part of the filed Claim C_3, that is, the sum of money equal to the said Claim C_2 and the damages for delay in performance of it.

Thereupon, X sought to amend the action in *jokoku* appellate instance where the oral proceedings were held, and he demanded a judgment of the confirmation of the claim in bankruptcy in the sum of ¥2,604,130, that is, the part of the said Claim C_3 which had been lost in the lower instances and was objected to by Y_1 in the bankruptcy proceedings of Y. Y_1 agreed

to the amendment of the action.

The Supreme Court permitted the amendment of the action holding as follows, and allowed the new claim of X.

[Opinions of the Court]

If a debtor, while an action for performance based on a claim for money against the debtor is pending in *jokoku* appellate instance, is adjudged bankrupt and the trustee in bankruptcy raises an objection to the said claim which has been filed as a claim in bankruptcy and succeeds to the proceedings of the said pending action, it is reasonable to construe that the plaintiff of the pending suit concerned may amend the action from an action for performance based on the said claim to an action for confirmation of the claim in bankruptcy.

[Comment]

The amendment of an action shall be permitted only before the conclusion of the oral proceedings (Code of Civil Procedure, §232(1)). And the generally accepted theory insists that the amendment of an action cannot be permitted in *jokoku* appellate instance even if the oral proceedings are held. The reason is that *jokoku* appellate instance is an instance where the decision is to be made only on legal problems and not on findings.

In the current case it came into question whether the amendment of an action would be allowed in *jokoku* appellate instance or not.

An action for confirmation of a claim in bankruptcy, if another action based on the claim concerned has already been pending between the creditor and the bankrupt at the time of the adjudication of bankruptcy, is open to the pending suit in the light of procedural economy. For example, referring to an action for confirmation of a claim in bankruptcy concerning a claim without any judgment or other instrument entitling the creditor to obtain execution, if another action concerning the claim objected to in the bankruptcy proceedings has already been pending between the creditor and the bankrupt at the time of

the adjudication of bankruptcy, the creditor must file a petition for succession to the proceedings of the pending action against the person who raised the objection to the filed claim (Bankruptcy Act, §246(1)) as the pending suit is stayed by the effect of the adjudication of bankruptcy (Code of Civil Procedure, §214). And in such a case the creditor must amend the action in order to fit the gist of the claim of the pending suit to the action for confirmation of a claim in bankruptcy (Bankruptcy Act, §247).

Thus, if an action for performance based on a claim for money against a debtor is pending in the trial of fact, when the debtor is adjudged bankrupt and the trustee in bankruptcy raises an objection to the claim which has been filed as a claim in bankruptcy and succeeds to the said pending suit, the creditor who is the plaintiff of the pending suit may without question amend the action for performance based on the claim concerned to an action for confirmation of a claim in bankruptcy (Bankruptcy Act, §§244(1) and 246(1)). In the current case it came into question whether or not such amendment of an action might be allowed in the event that the debtor, the defendant of the pending suit, was adjudged bankrupt while such action for performance was pending in *jokoku* appellate instance.

With regard to this issue, there had been a scholarly theory which insisted that such amendment of an action as in the current case should be allowed exceptionally even in *jokoku* appellate instance, though in principle it accepted the view of the generally accepted theory that the amendment of an action should not be allowed in *jokoku* appellate instance even if the oral proceedings were held. And recently some opinions following this theory appeared.

Under such theoretical circumstances, the current decision held that if a defendant was adjudged bankrupt while an action for performance was pending in *jokoku* appellate instance and the trustee in bankruptcy succeeded to the pending suit, the plaintiff might amend the action for performance to an action for confirmation of a claim in bankruptcy. This is the first decision

of the Supreme Court on this issue.

In a peculiar case like the current case it seems beyond all question to allow an amendment of an action even in *jokoku* appellate instance. Rather, to reverse the original judgment and remand the case would only make the legal procedure very troublesome. In this context, the current decision may be regarded as an appropriate judgment which dealt reasonably with the case in a manner fit for the actual conditions of the case.

By Prof. TETSUO KATO
NORIYUKI HONMA

5. Criminal Law and Procedure

a. Criminal Law

1. A case in which it was disputed whether or not execution of the death penalty was barred at the expiration of the period of limitation when a person who had been convicted of robbery and homicide and sentenced to death had been confined for thirty years after the conviction and sentence without the execution of the death penalty.

Decision by the First Petty Bench of the Supreme Court on July 19, 1985. Case No. (*ku*) 256 of 1985. A case of petition for habeas corpus. 1158 *Hanrei Jihō* 28.

[Reference: Criminal Code, Arts. 11 and 32.]

[Facts]

The applicant for the petition for habeas corpus in question was Mr. Hirasawa. He had been sentenced to death for the crime of robbery and homicide by mass poisoning (so-called Teigin case) which had occurred at the Shinano-machi Branch of the Teikoku Bank in January 1948. Mr. Hirasawa had been impris-