and therefore it differs from a conventional suit or a counterclaim, both of which require independent decisions in themselves; (2) the defensive measures of defendants will be substantially limited, if a set-off defense is excluded by reason of conflict with the prohibition of dual actions; and (3) it is possible for courts to avoid inconsistent adjudications by adequate direction.

Another influential theory opposing what is mentioned above, holding the same view as the judicial opinions, accepts the application of the dual actions principle to the set-off defense.

Indeed, as the prevailing theory points out, it is true that defendants must be assured for the right of using freely a set-off defense as their own defensive measure. But, as the current decision indicates, the possibilities cannot be overlooked that inconsistent adjudications or inefficiency may arise if such set-offs are allowed. These questions need further study concerning whether we should assure defendants the freedom of defense in spite of all the disadvantages mentioned above, and also whether there is any other settlement that can guarantee freedom and avoid the troublesome problems at the same time.

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2. A case concerning the judicial proceeding of discharge and the right of access to courts.

Ruling by the Third Petty Bench of the Supreme Court on February 21, 1991. Case No. (*ku*) 127 of 1991. A *kokoku* appeal against the granting of discharge. 1285 *Kinyū hōmu Jihō* 21; 866 *Kinyū Syōji Hanrei* 26.

[Reference: Bankruptcy Act, Articles 366-4(1) and 366-8; Constitution of Japan, Articles 29 and 32.]

[Facts]

The bankrupt, X (*kokoku* respondent), filed an application for discharge. In opposition to this, X's creditor, Y (*kokoku* appellant), filed an objection to the discharge. Later, the bankruptcy court grant-

ed a ruling of discharge. Y filed an immediate-*kokoku* appeal, claiming that there were grounds for denying this discharge. In the original ruling, the court dismissed Y's claim. Y filed a special-*kokoku* appeal with the Supreme Court.

Y claimed the following: the current Bankruptcy Act provides only that a discharge may not be granted or refused without a hearing against the bankrupt (Article 366-4(1)), or, when a creditor files an objection, without a hearing against the bankrupt and the objecting creditor (Article 366-8). In the trials of first and second instance, Y did not have a chance to prove by testimony. The judicial proceeding of discharge, however, deprives many creditors of their claims to a bankrupt's estate and causes great disadvantage to them. Furthermore, criminal acts relative to the bankruptcy can not be actually proved without the testimony of interested persons. Therefore, with regard to the judicial proceeding of discharge, the above-mentioned provisions, which do not give the creditors or the interested person a chance to prove by testimony and other means, are unconstitutional under Article 32 of the Constitution, which guarantees the right of access to the court.

[Opinions of the Court]

Kokoku appeal dismissed.

The legal system of discharge in the Bankrupty Act aims at providing a bankrupt with a fresh start and, as a privilege for an honest bankrupt, releases him from all debts which could not be repaid from a bankruptcy estate in bankruptcy proceeding, except certain debts. The judicial proceeding of discharge is not a judicial proceeding for the purely contentious case that intends to establish substantive rights and duties claimed by the parties, but is essentially a judicial proceeding for non-contentious cases. Therefore, although the judicial proceeding of discharge is not conducted by way of an adversary system in a public trial, the supra provisions of the Bankruptcy Act are not unconstitutional under Article 32 of the Constitution. Furthermore, this conclusion is clarified by the spirit of precedents of the Supreme Court (Ruling by the Grand Bench of the Supreme Court on June 30, 1965. 19 *Minshū* 1089; on May 2, 1966. 20 *Minshū* 360;

on June 24, 1970. 24 *Minshū* 610).

[Comment]

A discharge is defined as the release of a bankrupt from all debts which could not be repaid in bankruptcy proceeding. The legal device of discharge in Japan has been employed since 1952 as a result of influence from American law.

In the first place, whether or not a discharge itself is unconstitutional under Article 29 of the Constitution becomes a subject of discussion. Article 29 guarantees property rights to the people. At one time, the legal system of discharge was attacked as unconstitutional based on the contention that it deprived the people of their right to fair compensation (see Constitution, Article 29(3)). The Supreme Court held that discharge was not unconstitutional, saying that the debtor's minimum right to live in a society had to be protected by the state, and thus that the provisions of discharge were recognized as a necessary and reasonable restriction over the creditors' right in order to maintain public welfare (December 13, 1961. 15 *Minshū* 2803). Most academic theories support the opinion of the Supreme Court.

Second, as Y argued in the case, whether or not the provisions of the discharge proceeding, particularly Articles 366-4(1) and 366-8 of the Bankruptcy Act, are unconstitutional under Article 32 of the Constitution becomes a subject of discussion. Article 32 guarantees the people the right of access to the courts. In other words, whether or not the judicial proceeding of discharge duly guarantees creditors the procedural due process becomes the main issue of this subject. This is the case in which the Supreme Court made a decision on this subject.

So far, most judicial opinions (e.g. three rulings by the Supreme Court quoted in the Opinions of the Court) and a majority of academic theories have dealt with the unconstitutionality of some judicial proceedings under the so-called "dichotomy theory." According to this theory, if a judicial proceeding establishes the substantive rights and duties of the parties, it is to be used for purely contentious cases. The judicial proceeding by an adversary system, an oral argument

and a decision (see Article 82 of the Constitution) had to be guaranteed. On the other hand, if a judicial proceeding merely takes the contents of the rights and duties into consideration, it is a proceeding for non-contentious cases. Therefore, the judicial proceeding is beyond the scope of Article 82 of the Constitution. In this case the Supreme Court maintained this theory even as regards the judicial proceeding of discharge, and interpreted it essentially as a judicial proceeding for non-contentious cases in accordance with the purpose of the legal system of discharge. Furthermore, the Supreme Court cited some precedents concerning the other type of judicial proceeding, and held that, although the provisions of the judicial proceeding of discharge did not guarantee an adversary system in a public trial, they were not unconstitutional under Article 32 of the Constitution.

However, if the dichotomy theory is applied, we feel that it is undoubtedly unreasonable. For according to this theory all judicial proceedings except those for purely contentious cases are beyond the scope of the constitutional guarantee. A new theory claims that the character of each type of case has to be analyzed in view of the familiarity with an adversary system, the wide discretion of courts, the necessity of brevity and speed, and other factors, and then that the procedural due process must be decided in accordance with each type of case.

In my opinion, the method of resolution under the new theory is reasonable. In conclusion, however, the provisions of the judicial proceeding of discharge in the Bankruptcy Act are not unconstitutional, as in the case of the dichotomy theory. The focus of the new theory is the probability that the procedural due process for bankruptcy creditors will be infringed by the wide discretion of courts or the necessity of brevity and speed. Certainly, the judicial proceeding of discharge gives rise to disputes between a bankrupt and many creditors concerning the granting or refusing of discharge. Therefore, there is a high probability of infringement of the rights of creditors. But, in practice, the parties have already guaranteed the procedual due process. For the bankruptcy court interprets the meaning of a hearing in the widest sense, and sometimes grants or refuses a discharge

with a hearing similar to an oral argument depending on the circumstances.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which the reasonableness of a defensive act, which is a requirement of self-defense, was approved according to the subjectivity of the actor.

Decision by the Fourteenth Criminal Division of the Osaka District Court on April 24, 1991. Case No. (*wa*) 3360 of 1990. A case of injury. 763 *Hanrei Taimuzu* 284.

[Reference: Criminal Code, Articles 36(1) and 204.]

[Facts]

The accused had a quarrel with a woman in an eating place and the woman left. A short while later, the woman returned to the place with her *de facto* husband. The husband stepped to the accused, grasped and pulled him by the collar, verbally abusing him. The accused, trying to free himself, struck the man around the right shoulder with a fish-slicing knife which happened to be near by. The husband received an incision in the right shoulder which required 31 days' treatment.

The accused, during this act, was not conscious that the object he held was a fish-slicing knife.