tlement of the various kinds of dispute over disqualification from succession. Nevertheless each case should be judged individually in accordance with the aim of Article 891 (5).

From now on, an accumulation of such cases is necessary for the courts to decide on the proper view for adjudicating them.

4. Law of Civil Procedure and Bankruptcy

1. A stockholder cannot have standing to be sued for a declaratory judgment of the nonexistence of placement of new shares.

Decision by the Third Petty Bench of the Supreme Court on January 28, 1997. Case No. (0)316 of 1993. A *jōkoku* appeal claiming declaration of the nonexistence, or nullity, of placement of new shares of stock. 51 *Minshū* 40; 1592 *Hanrei Jihō* 129; 931 *Hanrei Taimuzu* 179.

[Reference: Commercial Law, Article 280.15; Code of Civil Procedure, Article 45.]

[Facts]

A, a stock corporation which deals fruits and vegetables, was incorporated in 1966. A is a family corporation and had a capital of twelve million yen in 1971, that is to say, had issued twelve hundred shares. Later, A issued twelve hundred new shares in 1974 and twenty-four hundred in 1983. A had each issuance registered.

X (plaintiff, *kōso* appellant, *jōkoku* respondent) has been A's representative director since its incorporation. Owning two hundred and seventy shares, X was the largest shareholder before new shares were placed in 1974, while Y (defendant, *kōso* respondent, *jōkoku* appellant), X's nephew, possessed two hundred shares. When A issued twelve hundred new shares in 1974, X and Y subscribed to six hundred and one hundred of them respectively. As a result, Y became A's largest shareholder. Furthermore, in 1983's placement of twenty-four hundred new shares, X subscribed to nine hundred and Y to none,

which means that X again became the largest shareholder.

Two lawsuits were filed about the placement of those new shares. First, X sued Y for declaratory judgment of the nonexistence of placement of new shares in 1974. Secondly, Y sued A for declaratory judgment of the nullity of issuance of new shares in 1983 under the Commercial Law, Article 280.15. The latter action is called a "*shinkabu hakkō mukō no uttae*". The case discussed here is the former one.

The Kanazawa District Court dismissed X's claim. The court stated that it could not find the nonexistence of placement of new shares in 1974, since no remarkably serious, substantial or procedural infirmity existed (see the decision by the Kanazawa District Court on February 8, 1995). X filed a *kosō* appeal.

On the contrary, the Kanazawa Branch of the Nagoya High Court reversed the original decision and permitted X's claim. The court held that there was a remarkably serious, substatial and procedural infirmity in the process of placement of the new shares in 1974, and therefore that the placement did not exist (see the decision by the Kanazawa Branch of Nagoya High Court on October 26, 1996).

Y filed a *jōkoku* appeal.

[Opinion of the Court]

Reversed.

The Commercial Law does not provide for an action for declaratory judgment concerning the nonexistence of placement of new shares of stock. In a certain case, however, such an action may be permissible following an action for declaratory judgment of the nullity of placement of new shares (*shinkabu hakkō mukō no uttae*). As for an action for declaratory judgment of the nonexistence of placement of new shares, several problems arise compared to an action for declaratory judgment of the nullity of placement of new shares; for example, is there any statute of limitations for the action or who has the standing to sue? It is difficult to solve those problems, but, at least, the Court believes that it is a corporation that should be a defendant in the action, just as in an action for the declaration of the nullity of placement of new shares.

In this case, however, X sued not A, but Y, who as a shareholder

subscribed to some new shares. Therefore, the Court concluded that this action itself was unlawful.

Thus, the Court decided to reverse the original judgment in favor of X and to dismiss X's claim.

Concurring opinions by Justice Kabe and Justice Chigusa

The Commercial Law provides for a six-month-statute of limitations in an action for declaratory judgment of the nullity of placement of new shares, based on a standpoint of legal stability. Considering the fact that we, by following the action, allow an action for declaratory judgment of the nonexistence of placement of new shares without any provisions, we must say that it is not allowable to let the latter action be brought at any time regardless of statute of limitations. On the other hand, even after a six-month-statute of limitations has passed, one may need to bring the action as a basis of, for example, an action for the declaration of the nonexistence of rights as a shareholder.

We find from what was mentioned above that further discussion is necessary about how far the provisions in the Commercial Law for an action for declaratory judgment of the nullity of placement of new shares may be applied to an action for declaratory judgment of the nonexistence of placement of new shares. We will not discuss it here, but will watch future developments.

[Comment]

The Court in this case points out several problems of a declarative action concerning the nonexistence of placement of new shares. Here, I will take up four problems which are regarded as of special importance, and consider them in order.

The first problem is whether it is permissible or not to file an action to request a court to declare the nonexistence of placement of new shares. The point is that the Commercial Law provides for an action for declaratory judgment of the nullity of placement of new shares (Commercial Law, Article 280.15 ff.), while it does not provide for an action for declaratory judgment of the nonexistence of placement of new shares.

Every Commercial Law textbook that refers to this problem permits such an action.

No precedents have held so far that such an action is unlawful. However, this does not mean that any cases held clearly what the procedural requisites are or to what extent a decision has an effect in an action. There have been no irrevocable judgment either that declare the nonexistence of placement of new shares. (*See*, for example, decisions of the Fukuoka High Court of October 12, 1955, 8 *Kōminshū* 535, and of the Tokyo High Court of August 21, 1986, 1208 *Hanrei Jihō* 123).

The Court in this case held that "the action may be permissible following an action for declaratory judgment of the nullity of placement of new shares", which means that, although the Court uses the word "may", it does not regard such an action as unlawful. Thus, we can infer that this is the first Supreme Court's judgment allowing such an action to some extent, in spite of its complete denial.

The second problem is, based on the view of permitting such an action, what kind of circumstances should exist as a basis for the action. That is to say, when can we say that the placement of new shares does not exist?

The Court did not discuss substantial conditions concerning this problem. We may suppose, however, that, since the Court held that the action was allowed "when the substance of the placement of new shares was missing", it denied the criterion of the "existence of remarkably serious, substantial or procedural infirmity" used by the court of first instance and the court below.

The third problem concerns the nature of the action. In other words, is the action a kind of special action provided for by the Commercial Law just like an action for the declaration of the nullity of placement of new shares is, or is it only one of the general actions for a declaratory judgment? Neither theories nor cases have clearly stated what they think about this problem.

The Court in this case held that "it is necessary to settle the nonexistence of placement of new shares by an irrevocable judgment with a public effect in the action, as it is in an action for the declaration of the nullity of placement of new shares". Judging from the fact that a judgment declaring the nonexistence of placement of new shares is given a public effect, we can say that the Court thinks of such an action, which it held "may be permissible", as a special action under

the Commercial Law. Moreover, the Court did not say anything about the interests of pronouncing a declaratory judgment when it dismissed X's claim. All those facts considered, we may admit that the Court never regards this action as a general one, but only as a special action under the Commercial Law with a public effect on a judgment.

The fourth problem is, based on thoughts mentioned above, how far we should follow, as a basis of the action, the procedural requisites for an action for the declaration of the nullity of placement of new shares, such as statute of limitations, plaintiff and defendant qualification and so on. No theories and cases have given answers to this problem yet.

The Commercial Law provides for the procedural requisites of an action for the declaration of the nullity of placement of new shares. According to the Law, the statute of limitations is "within six months from the date of placement" (Article 280.15 (1)), and only shareholders, directors or inspectors are granted the plaintiff qualification (Article 280.15 (2)). The defendant qualification is not provided for in the Law, for it stands to reason that only corporations should be given the defendant qualification as long as declaraory judgments have public effects. No scholars will differ on the conclusion.

As for the plaintiff and defendant qualification, we should apply the same standards as in an action for the declaration of the nullity of placement of new shares. No objection would occur on this point.

On the contrary, opinions would be divided on the statute of limitations. Some may think that the same term of six months is naturally adopted to an action for the declaration of the nonexixtence of placement of new shares. Others may refuse to set a statute of limitations in such an action. They say that, since nothing can make placement which does not exist happen even after the expiration of the statute of limitations, it is illogical to establish such limitations. The fact that there are no special provisions makes this problem more difficult.

The Court in this case presented the question of statute of limitations, but did not give it an answer, for this case was unlawful anyway because X did not sue A, a corporation. The supplementary opinions by Justice Kabe and Justice Chigusa do not adapt the view which refuses to establish a statute of limitations. The Court's decision in this

case made clear what would be problematic and important.

2. A creditor can collect freely on a promissory note, in which he has the right of retention based on the Commercial Law, after the declaration of bankruptcy against a debtor and to allot the money collected to his loan.

Decision by the Osaka High Court on March 25, 1997. Case No. (ne)707 of 1995. A *kōso* appeal claiming restitution of unjust enrichment. 1020 *Kinyū Shōji Hanrei* 36; 1486 *Kinyū Hōmu Jijō* 90.

[Reference: Bankruptcy Act, Articles 93, 92, 95 and 204.]

[Facts]

A, a bankrupt company, negotiated a promissory note for one million yen at face value (hereinafter described as the promissory note at issue) to bank Y (plaintiff, *kōso* appellant) on July 29, 1996 and commissioned Y to collect it. On September 21, A got a loan of ten million yen from Y (hereinafter described as the loan at issue) in exchange for issuing a promissory note for the same amount, under a written contract for accounts with banks (hereinafter called the "Written Contract") which A had signed on July 11, 1988. According to the Written Contract, Article 4 (3), A and Y agreed that "Y has the right to collect or dispose of collateral at its option, at a time and at a price which seem generally appropriate, without necessarily going through the means provided for by law, and then allot the money acquired to its loan regardless of the leagal order. If the loan is not repaid in full by the means mentioned above, A will immediately repay the balance". According to the Written Contract, Article 4 (4), A and Y also agrees that "if A fails to meet its obligations to Y, Y has the right to callect or dispose of all the personal property, notes and other valuable papers of A that Y possesses. Article 4 (3) is applied here".

A was declared bankrupt on December 24, 1996, and X (plaintiff, *kōso* respondent) was appointed as the trustee in bankruptcy. On January 21, 1997, X demanded that Y return the promissory note at issue, claiming that the commission contract applicable to it was naturally terminated by the declaration of bankruptcy of A, or that X dissolved the contract on the date of the declaration. Y, however, denied

this request.

Y collected the promissory note at issue on its due date of January 31 and received money. Y then alloted the money to some part of the loan at issue.

X sued Y for restitution of the money in the amount of the promissory note at issue. X's claim was that Y had acquired it as unjust enrichment.

Neither X nor Y disputed the fact that Y had the right of retention based on the application of the Commercial Law, Article 521 to the promissory note at issue. The following two issues were argued and decided in this case:

The First Issuue is:

The Bankruptcy Act, Article 93 (1) provides that "the right of retention based on the Commercial Law is conclusively presumed to be a special lien". Does this mean that the right of retention loses validity and is transformed into a pure lien, or that the right of retention additionally acquires the nature of a lien without losing its original validity?

The Second Issue is:

As long as the right of retention based on the Commercial Law has the nature of a special lien, it becomes a special unaffected right, called "*Betsujyo-ken*", in the bankruptcy process (Bankruptcy Act, Article 92). In this case, Y collected on the promissory note at issue without a compulsory sale, which falls under the "disposal of collateral by optional means not provided for under law (see Bankruptcy Act, Article 204 (1))". The question is whether there is a legal basis for permitting such disposal. Is it found in the Written Contract, Article 4 (3), or in Article 4 (4)?

The court of first instance upheld X's claim.

With respect to the first issue, the Kyoto District Court held that the right of retention had lost validity at the time of the declaration of bankruptcy.

With respect to the second issue, the same court held that Written Contract, Article 4 (4) does not establish any consensual security interest, that Y's right to collect or dispose of the promissory note at issue under the clause depends upon the commission from A, and that, since

the commission came to an end with the declaration of bankruptcy, Y's above-mentioned right also lapsed. The Court did not refer to the Written Contract, Article 4 (3).

Y filed a *kōso* appeal.

[Opinion of the Court]

The original judgment was reversed and the *kōso* appeal dismissed.

Opinion concerning the First Issue

As long as we interpret the Bankruptcy Act, Article 93 literally, we find that it is unrelated to the validity of the right of retention based on the Commercial Law in the bankruptcy process. Therefore, when we decide whether or not the right of retention loses validity on bankruptcy, we have to consider the legislative history of the Bankruptcy Act, relation to other relevant laws, propriety of a conclusion, and so on.

A creditor who had the right to retention based on the Commercial Law still can file a compulsory sale as a creditor having a special lien in the bankruptcy process, even though the validity of the right of retention itself lapses. Thus, he or she does not lose the preferential status protected by the Bankruptcy Act. We interpret the Bankruptcy Act, Article 93 as such that it basically makes the right of retention invalid, but on the other hand, as far as the right of retention based on the Commercial Law is concerned, it guarantees a creditor the right to file a compulsory sale based on a special lien although his preference falls behind creditors with other special liens. According to the above interpretation, we may conclude that the right of retention based on the Commercial Law loses its original validity when a debtor is declared bankrupt.

Opinion concerning the Second Issue

(a) The Written Contract, Article 4 (4) as a basis

See the judgment by the court of first instance mentioned above.

(b) The Written Contract, Article 4 (3) as a basis

A security intrest in this article is not limited to what is concensual, but includes a statutory intrest. We cannot find any reason to deny the application of this article when a bank has a security intrest granted by law. Therefore, we understand that Y was given the right

of optional disposal under the Bankruptcy Act, Article 204 (1) and, as the basis for exercising this right, also given the right to possess the promissory note at issue. We hold that Y can assert the existence of this article against X, a trustee in bankruptcy, because the Bankruptcy Act, Article 204 (1) acknowledges that Y may collect or dispose of collateral in an optional way according to the Written Contract, Article 4 (3), because we hold that collateral usually can be sold at a higher price by means of optional disposal than by means prescribed by law, and because ultimately such disposal is beneficial to the bankruptcy estate as well.

At the same time, we have to admit that a creditor who has only a preferential right in receiving allocation in payment based on a special lien will be treated too well in consequence of the thinking mentioned above. Nevertheless, we support the conclusion that a bank can dispose of a note in an optional way, not only because it enables a creditor commissioned to collect a note to use it as actual collateral, but also because it contributes to smooth financial transactions.

[Comment]

With respect to the first issue, the court in this case clearly held that the right of retention based on the Commercial Law lost validity in the bankruptcy process.

Scholars have expressed three views on this problem. The first view states that the holder of the right of retention based on the Commercial Law keeps its original right and the right also acquires the nature of a lien. The second view states that the right is transformed into a pure lien and its validity as a right of retention itself lapses. The third view states that the right changes into a lien without losing its original right to retain, therefore a creditor having the right to retain, using it as a defense, can deny a request from a trustee in bankruptcy to transfer collateral, in order to exercise the special unaffected right effectively.

I agree with the second view, and think that the first and third views are going too far, because the fact that a creditor keeps the right to retain in addition to the preferential right based on lien is not in accord with the fact that the right of retention based on the Civil Code

lapses completely according to the Bankruptcy Act, Article 93 (2). I agree with the decision the court made in this case.

The next problem is whether or not a creditor has to transfer collateral to a trustee in bankruptcy as the result of losing the right to retain it. The three views mentioned above all assume the creditor's duty to make the transfer. I wonder if we can think in a different way.

The collateral which Y had in this case was a promissory note. A lien on a promissory note can be thought of as one kind of lien on personal property. It is said that a creditor who has a security interest like a lien on collateral must have a requisite for opposing a third party in order to assert his right against a trustee in bankruptcy. The requisite for opposing a third party to a lien on a promissory note is "possession". In this case, Y possessed the promissory note at issue, and therefore had the requisite for opposing a third party. Thus, one may conclude that Y does not necessarily have to return the note to X only because the right of retention based on the Commerecial Law was transformed into a lien.

With respect to the second issue, the court in this case held that Y's "right of optional disposal" provided for in the Bankruptcy Act, Article 204 (1) is grounded on the Written Contract, Article 4 (3). Theories differ on this point. There exist four theories: the first acknowledges the right based on Article 4 (3); the second based on Article 4 (4); the third denies the right for the reason that Article 4 (3) is applied only to consensual security intrests and not to statutory ones; and the fourth denies the right for the reason that the right to collect or dispose of collateral provided for in Article 4 (4) is based on the commission from the debtor and it lapses when he goes bankrupt.

I agree with the conclusion that the right of optional disposal is affirmed based on Article 4 (3). A more difficult problem is whether a creditor can oppose a trustee in bankruptcy by asserting the existence of Article 4 (3). The court stated with respect to this problem that a creditor can oppose a trustee in bankruptcy because it is anticipated that the collateral usually could be sold at a higher price by means of optional disposal than by means prescribed by law and such disposal is ultimately beneficial to the bankruptcy estate as well. It seems that the court failed to show enough reasons. It should have added more rea-

sons as "cognizance of the Written Contract" to reinforce the right of optional desposal.

Prof. TETSUO KATO
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5. Criminal Law and Procedure

1. A case holding that a defendant who kidnapped and killed four little girls during the period of approximately a year could not plead the insanity defense, and imposing the death sentence on him.

Decision by the Second Criminal Division of the Tokyo District Court on April 14, 1997. Case No. consolidated (wa) 155, 166, 170, 182 of 1989. A case of kidnapping, homicide, abandonment of a corpse, damage of a corpse, abduction for the purpose of performing an obscene act, indecent act by compulsion, 1609 Hanrei Jiho 3; 952 Hanrei Taimuzu 75.

[Reference: Criminal Code, Article 39.]

[Facts]

The defendant, X, kidnapped and killed four little girls, who were at that time from four to seven years old, between August, 1988 and June, 1989 , over the period of approximately one year. He damaged and abandoned three of the corpses. In the course of his criminal acts, he burned the ashes of the victims and delivered them to their families, sent letters stating his guilt, etc.. He was arrested based on indecent act by compulsion with a little girl who was six years old at that time. At trial, the major issues were his intent and the insanity defense. Psychiatric examinations were conducted on him a total of four times during the criminal investigation and trial.