tion of various laws relating to it and that this will influence extremely our social lives in general. Therefore, to resolve this issue, we have to identify the problems from a broader point of view and deliberate the degree of the influence on our social lives and the ideal state of future society. The issue of rectifying the statement of sex in the family-register should also be included and resolved as a part of this tasks, concluding with some form of legislation."

We may see this case as a case where the court takes a cautious attitude with regard to legal treatment for GID in the transitional period. However, as mentioned in this case, because it is clear that there are individuals suffering from GID, we have to enact legislation regarding GID as soon as possible.

5. Law of Civil Procedure and Bankruptcy

Supreme Court Second P.B. March 27, 1998
Kitazawa v. Akabane Concrete
Case No. (*o*) 1681 of 1996. 972 HANREI TAIMUZU 147

Reference:

Commercial Code, Article 257 (3); Code of Civil Procedure Article 40.

Facts:

The case asked for the rejection of an action nothing that this action, which aims at the removal of a director, is a peculiar required joint litigation which should make both the company and the director concerned the common defendant, and because X had not made A the defendant and had only made Y company the defendant, based on Commercial Code, Art. 257, para. 3, the litigation is unlawful. Based on the opinion that the action of removal of a director is a peculiar required joint litigation which should make both the director and the company concerned a common defendant, it was held making that

only the company the defendant was unlawful, and both the first and second trial dismissed the litigation.

Opinion:

Appeal dismissed.

Since the action was brought under the Commercial Code, Art. 257, para. 3, determined that the removal of a director is an action aiming at the dissolution of the legal relationship between the company and the director, and it is understood that both the company and the director, which are the parties concerned in commercial law, should be the defendants. Considered substantially, the contents at dispute in this action are whether there was any serious fact of malconduct or breaking a statute, or articles of association concerning the execution of directors duties. Therefore, it is possible to give the company and the director concerned the qualification of parties concerned from the viewpoint of protecting the director. The action of removal of a director can be understood as a peculiar required joint litigation, which should make both the company and the director defendants, and the decision of the court below, which judged the action of the removal of director to which only the company was submitted as a defendant, unlawful can be considered correct.

Opinion:

According to the Commercial Code, Art. 257, the director may be removed by a the special resolution of a general meeting of shareholders at any time. When a malconduct with regard to the execution, at the director's duties was done by a director, but the removal of the director is rejected by a general meeting of shareholders, the stockholder who satisfies fixed requirements can being an action for the removal of the director to a court. Concerning the qualification to be a defendant of an action for removal of a director there are ① the director and company view, ② the company view, and ③ the director view from the time of legislation. About the qualification of the defendant of an action for the removal of a director, the judicial precedent concerning the defendants of an action for the removal of a director took the director and the company view [the decision of Tokyo High Court on

May 16, 1979. 946 HANREI JIHO 107]. In academic society, although ① the director and the company view is the main opinion, there are many who support ② the company view and ③ the director view.

The director and the company view (①) make the main basis for an action for the removal of a director an action which asks for a dissolution between the company and the director. The company view (②) presupposes that the action has the character that a minority shareholder is trying to correct the rejection of the removal of a director by a judgment. Therefore, since the action of removal of a director is an action of the form which asks a company for the deprivation of a status as a directorial organization, it is sufficient only for the company to be made the defendant. And they take the view that it is sufficient for a lawsuit according to the action of a general-meeting-of-shareholders cancellation of the resolution if the company alone is made the defendant. Since the director view (③) aims at remaking the status of the director as an organization, the action of removal of a director presupposes that the director who receives the effect of the judgment directly should become the defendant.

The decision by the Second Petty Bench of the Supreme Court has shown clearly that it attaches considerable, and the Supreme Court has adopted the director and the company view (①) for the first time. The first reason is that the action of removal of a director is an action aiming at a dissolution on the basis of company law between the company and the director. The second reason is that admitting the director's qualification as the party concerned with the company is also impotant from the viewpoint of the procedural protection of the director in consideration of the contents which are in dispute in an action for the removal of a director.

It can be said that the decision of the Supreme Court has given a conclusion to the problem of the qualification of an defendant of an action for the removal of a director practically and this has great sigunificance.

Supreme Court 3rd P.B. April 14, 1998
Takagakigumi v. Katsura Kogyo
Case No. (*o*) 2137 of 1994. 973 HANREI TAIMUZU 145

Joint debtor, who acquired the right of indemnity by liquidation after decision to start the composition procedure, can offset against a composition obligor's claim in the limit of a creditor's composition claim acquired by liquidation.

Reference:

Commercial Code, Article 511 (1); Bankruptcy Code, Article 24, 26, 104(4), and 326; Civil Code, Article 442, 501, and 675; Composition Code, Article 5, 45, and 57.

Facts:

X and Y, both of which are construction firms, formed a joint venture and were by receiving the orders for each investing 1/2 of capital carrying out construction for the purpose of the contract of specific construction work, but X seceded from the joint venture halfway, and motioned for a composition procedure. Then, a composition approval decision for a composition claim which gone exemption to the contents in part was decided infarous of X. Just before X seceded from the joint venture, when Y received a contract price corresponding to the construction output till then, from the client an intention to pay 1/2 to X was agreed. X claimed the payment of the sum from Y based on the agreement. Y motioned an objection to the formation of agreement and insisted that it be offset with the claim against X which was acquired for having repaid the debt of the joint venture as a preliminary protest. The decision of the court below accepted the formation of the liquidation agreement of X's claim. And the decision of the court below admitted that Y was, and received the protest of the offset of Y, and the claim was acquired. However, the decision was passed that the offset based on the claim acquired by liquidation after Y knew that the composition procedure of X had not been accepted (Composition Code, Art. 5; Bankruptcy Code, Art. 104, No. 4). Y filed an appeal to the Supreme Court.

Opinion:

Reversed and Remanded.

When a claim against a composition obligor is acquired after the party who undertakes a debt to a composition obligor knew of the motion to start a composition, offsetting each other with a right claim is not allowed in principle. However, when it is situation based on a cause that had arisen before the party which acquire the right of contribution knows of the motion to start a composition, each other can be offset with a claim (Composition Code, Art. 5; Bankruptcy Code, Art. 104, No. 4). When a debt is repaid to a creditor after other joint debtors know the motion to start a composition, when one of the joint debtors has motioned for a start to composition, after the joint liability relation occurred, as for acquisition of right of contribution by liquidation, it may be understood as being based on a cause that has arisen before knowing of the motion to start a composition. Because, even if the joint liability relation which forms the claim before the motion for a start to a composition has already occurred and offset by the right of contribution is accepted, the fairness between composition creditors is not injured. Moreover, it is not contrary to the meaning of the law forbidding a claim to be offset by the claim acquired after knowing of a motion to start composition (Composition Code, Art. 5; Bankruptcy Code, Art. 104, No. 4). When approval of a decision for composition is decided about one of joint sureties, other joint the sureties who acquired the right of contribution to the joint surety by liquidation after the decision to start composition can use the right of contribution in the limit of the creditor's composition claim, only when the creditor receives liquidation of the total amount. This will not change the contribution relation between joint debtors. Therefore, the joint debtors who have acquired the right of indemnity to joint debtors by liquidation after a decision to start composition can be remarked to the time when the creditor received liquidation of the total amount, and can use the right of contribution in the limit of a creditor's composition claim acquired by liquidation. And setting off against a composition obligor's claim based on the right of contribution is also included in the use of the right of contribution.

Editorial Note:

In principle, Composition Code, Art. 5 and Bankruptcy Code, Art. 104, No. 4 have forbidden offsetting by the composition claim which knew and acquired a motion to start composition. Offsetting is permitted exceptionally when it is produced before the time of the acquisition of a composition claim, knowing of a motion to start a composition. The act which acquires and offsets the composition claim to which the actual value fell when the composition obligor lapsed into a crisis state abuses the security-function of offsetting, and it is not allowed to injure the substantial equality between the composition creditors. However, when it is based on a cause that has arisen before acquisition of a composition claim and the motion to start a composition, there is nothing wrong about the improper use of the right to offset, and rather it is necessary to protect the expectation for the already produced offset. The joint liability relation occurred before the motion to start composition, and when right of indemnity is acquired by liquidation after other joint debtors knew that one joint debtors did the composition start motion, it is thought that it should be understood similarly. It was indicated that a decision could use a judicial precedent in the limiting a creditor's composition claim which is restricted to when the creditor received the liquidation of the total amount and when the joint surety composition approval decision was decided per person, and is acquired by liquidation subrogation (Supreme Court Second P.B., January 20, 1995. 874 HANREI TAIMUZU 132). Also, in the claim for a contribution relation between joint debtors, it is thought that it is the same as the case of joint liability on a surety claim for contribution and the legal relation of subrogation arises by liquidation, and it should be understood similarly in the case of the use of the right of indemnity in composition procedure. Naturally offsetting is also included in the use of the right of indemnity. Bankruptcy Code, Art. 104, No. 3 and Composition Code, Art. 5 have forbidden extensively offsetting by a composition claim acquired after a decision to start composition. However, the meaning of this regulation is to forbid the acquiring and offsetting of the composition claim to which the price fell. Therefore, it is understood as not being forbidden till offsetting each other

at a just price after the change brought about by the composition conditions. This decision is the first Supreme Court decision an the legal relation for a composition procedure constituted during a joint venture, and is considered to have many points which will be consulted for the right of offsetting in the legal relation and composition procedure of a joint venture.

Supreme Court Second P.B., April 16, 1999
Kasasen Shiguma Shinyo v. Hokkaido Esutā
Case No. (*kyo*) 8. 1006 HANREI TAIMUZU 143

Reference:

Civil Code Article 367; Bankruptcy Code Article 132.

A pledgor aiming at a claim cannot state bankruptcy to the obligor based on the claim concerned, as long as there is a pledgee consent.

Facts:

X has a claim against Y. In order to secure all the debts to be paid to A bank now and in the future, X set up the right of pledge to this claim. To this claim, Y receives postponement of liquidation from A bank, and is carrying out a fixed amount division payment every month. X the motions for a decision to make Y a bankrupt in the creditor's qualification. The lower court denied X's right to a bankruptcy motion on the grounds that the right of pledge is set as this claim. The lower court passed and implemented a decision for the following reason. A pledgor cannot change the contents of a right disadvantageous to disposal or the pledgee of a pledging claim. However, when there is no possibility of injuring a pledgee's profits, and there is a special situation not contrary to the pledgee's intentions, the authority to make the disposal or change is accepted within the limit of requiring for a pledgor to preserve of a pledging claim. It is clear that the purpose of the motion for bankruptcy based on a pledging claim lies in collection. The pledgee who has the authority of disposal can determine whether to collect a pledging claim by bankruptcy proceedings or to carry it out by other proceedings. Therefore, the motion for bankruptcy based on the pledging claim by the pledgor is not allowed to dispose

or change of a pledging claim, as long as there is no special situation as mentioned above. In this case, it cannot be said that there is a special situation. X complained against this decision.

Opinion:

Appeal dismissed.

When a claim is made into the purpose of a right of pledge, a pledgor cannot claim bankruptcy to the obligor, unless there is a special situation or a pledgee consent. This is because the pledgor cannot exact this but has the right of collection chiefly in principle about the claim which is made for the purpose of a right of pledge (Civil Code Art. 367). An obligator can claim for debtor only by bankruptcy proceedings (Bankruptcy Code Art. 16). Furthermore, it is because it is what it becomes the cause of a dismissal of a company, and a pledgee brings about the situation of it becoming impossible to usually motion the fulfillment about the claim which has not been collected by the dividend by bankruptcy proceedings, and has a the serious influence the use of a pledgee right of collection, as in this example, when the obligor of a claim is an incorporated company.

Editorial Note:

The point of issue in this case is whether the pledgee can carry out a motion for the bankruptcy of the pledgor based on the creditor status. In form, even when a pledgor does a garnishee's motion in bankruptcy, there is no change from a pledgor being a creditor according to the Bankruptcy Code Art. 132, para. 1. However, if the claim is a real property right which governs the exchange worth of a claim directly, exclusively within the limits for the purpose of security, a pledgee can exact a claim now in the name of direct self, and, on the other hand, the pledgor is understood not to be able to do an act which brings a result which injures the rights of pledge, such as a change in the contents of a right disadvantageous to a pledgee (Civil Code Art. 367). In addition, a pledgor is a creditor of a pledging claim, and, since an interest is not lost after the use of a pledging claim, in order to protect the pledgor's profits, in the range which does not injure the pledgee's profits, carrying out this exercise should be allowed. For

example, it is considered that bringing a lawsuit of for claim check for the interruption of the prescription of a pledging claim is allowed. The problem of whether a pledgor can state the bankruptcy of a garnishee based on a claim which has the purpose of a right of pledge in this case can also be seen to as being a part of the problem of how far to permit a pledgor the exercise in relation to the protection of the profits of a pledgee. This decision judges for the first time a problem which has hardly been discussed recently, which is whether the pledgor of a pledge which has been made into a right of pledge can state the bankruptcy of an obligor, and it can be said that this conclusion should be observed both theoretically and practically.

Supreme Court Second P.B., November 12, 1999
Fuji Bank v. Maeda
1017 HANREI TAIMUZU 102

The request for a managerial decision on a loan drawn up in a bank corresponds to the document specified in the Code of Civil Procedure, Art. 220, No. 4c, a document which is solely for the sake of the use of the holder of such a document, as long as no special circumstances arise.

Reference:

Code of Civil Procedure, Article 220–4c.

Facts:

X motioned for a subpoena duces tecum a request for a managerial decision on a loan for Y in order to prove the contents of the request for a decision. A managerial decision is a document which is solely for the sake of the use of the holder of such a document, (to Civil Procedure Code, Art. 220, No. 4c), but X insisted that it was not set as the object of a subpoena duces tecum. The court below accepted the duty to present the document, because it is the fundamental official document of an organism, to be set as an object for the inspection of the Prime Minister based on the bank act, and that a bank submits as a proof, for the request for a managerial decision and a loan of a bank,

citing the reasons of a given by Y in complaining of the judgment of the court below.

Opinion:

Reversed.

The loan request for managerial decision of a bank is a document drawn up to aid the smooth and appropriate arrival at a decision about a loan issue inside a bank, and so the duty to create are not imposed by the statute, and being created as part of the examination of the rights and wrongs of a loan it is anticipated that evaluations and opinions would be indicated. Therefore, it should be understood that a request for a managerial decision on a loan includes a document for the use of the possessor of a document chiefly as a thing with a possibility that it is created in order to present the use inside a bank chiefly. Thus trouble will be caused for the expatriation of the free opinions inside a bank if the document which was not planned to be shown outside is, and the free arrival at a decision in a bank may be checked, as long as no special circumstances arise. Therefore, duty to present the document based on Code of Civil Procedure Art. 220, No. 4c cannot be accepted.

Editorial Note:

This decision is the first decision in which the Supreme Court indicated a decision about the per subpoena duces tecum under the permission complaint system after the enforcement of the new Code of Civil Procedure, and about the duty to present of the request for managerial decision on a loan of a bank, on which the views and examples of decisions in a trial by a lower court were divided. Code of Civil Procedure Art. 220, No. 4c is the regulation which accepted general duty to present document, and has defined the document which may be refused as testimony and for the same reason the the document which may not be set as the object of a subpoena duces tecum and the document for the use of the originator alone. Concerning the legislative meaning of the document for person use which is not set as the object of a subpoena duces tecum, even when a duty to present should be assumed about such a document, the legal person in charge has the

possibility of barring the free activity of the owner of the document, supposing that there is a possibility that the possessor of a document may suffer a remarkable disadvantage. However, in lower courts and among commentators, it had been discussed that whether a loan request for a managerial decision about a loan could be set as the object of a subpoena duces tecum. The judgment of the Supreme Court concerning the such a situation was awaited. And the decision indicated the following. The request for a managerial decision on a loan is a document which concerns not only the contents of the loan but also the profit of the a bank, the trust situation of the other party to a loan, and the consulted document is an examination expressing the opinion of the person in charge concerning the evaluation and the hoped for loan. The judgement showed that the consulted document is, when circumstances arise. The document with which a request for a managerial decision on a loan is drawn up in order to arrive smoothly and appropriately at a decision inside the bank, not the duty imposed by the statute. This judgment indicates that evaluations and opinions are also expected considering the character of the document being created for the examination of the rights and wrongs of a loan. Therefore, the request for a managerial decision on a loan was drawn up for the present use of internal staff, and is a document which was not planned to be shown outside, and if shown, this judgment would have the possibility of checking the arrival at the decision. It remains a future subject whether a request for a managerial decision on a loan can be said to be a special situation, although the judgment showed clearly that it corresponds to a document for personal use as long as there are no special circumstances, in-house documents other than requests for a managerial decision on a loan constitute such documents. It is thought that this decision is a very important decision which has solved some problems involving subpoena duces tecum, and that its influence on trials and financial business will also be large.

Supreme Court First P.B. March 10, 2000
Nishigaki v. NTT
Case No. (*kyo*) 20. 1027 HANREI TAIMUZU 103

"Technical or professional secrets (Code of Civil Procedure, Art. 197, para. 1, No. 3)" means secrets that, if revealed um lead to a decrease in make activities difficult, and have a seriously influence on an occupation, making its.

Reference:

Code of Civil Procedure, Article 197 (1) 3, 220–4, 221, and 223 (4).

Facts:

This case was a case where the X, who purchased and used the telephone equipment, claimed that the telephone equipment had the defect that telephone calls often become impossible, and motioned for reparations based on default on an obligation to the defendant. Y claimed that the telephone equipment did not have a defect. The lower court accepted the opinion of Y and rejected the claim of X. X filed an appeal and X motioned for subpoena duces tecum in the review by an appellate court on an appeal. The document which is the object of the motion of subpoena duces tecum is the circuit diagram and signal flow figure of the telephone equipment. The lower court dismissed the motion for this subpoena duces tecum, noting that Y did not have a duty to present the document, since the document corresponded to the document specified in the Code of Civil Procedure, Art. 220, No. 4b and 4c. X complained that the document in this case was not a document the revealing of which would lead the maker of the telephone equipment to suffer a disadvantage and so is not set as the object of a subpoena duces tecum by being announced officially.

Opinion:

Reversed and remanded.

"Technical or professional secrets (Code of Civil Procedure, Art. 197, para. 1, No. 3)" indicate that, if revealed would had to a

decrease in social value of the technology, make activity difficult, seriously influence the occupation and make execution difficult henceforth. In this case, indicating that, although Y claimed that, if a document is released, the maker of the telephone machine would receive a remarkable disadvantage, Y does not assert the concrete contents of an informational kind, the character, or the disadvantage, though the technical information which the maker of the telephone apparatus has in a document is indicated, and so has not authorized the lower court concretely, either. Therefore, this does not necessarily correspond to the document indicated in"Technical or professional secrets (Code of Civil Procedure, Art. 197, para. 1, No. 3)" merely by the facttrator technical information in a document has been indicated. A document which is drawn up mainly for internal use, where external release is not planned, and, if revealed, will infringe on individual privacy or there is a possibility that a very serious disadvantage for the possessor side may arise, as long as there are no special circumstances, corresponds to "a document which is solely for the sake of the use of the holder of such document (Code of Civil Procedure, Art. 220. No. 4c.)" (Supreme Court Second P.B., November 12, 1999. Fuji Bank co. v. Maeda, 1017 HANREI TAIMUZU 102.). Since a document is drawn up without plans to reveal it externally at all, the lower court judged that it corresponds to "a document which is solely for the sake of the use of the holder of such document (Code of Civil Procedure, Art. 220, No. 4c.)", and has not judged concretely about whether there is any possibility that a very serious disadvantage for the possessor side may arise, in light of the concrete contents.

Editorial Note:

In this case "Technical or professional secrets (Code of Civil Procedure, Art. 197, para. 1, No. 3)" means secrets that, if it is revealed, will lead to a decrease in social value of the technology make activities difficult, seriously influence an occupation, and make difficult execution henceforth. Moreover, since the lower court had not authorized the concrete contents of the disadvantage which Y would receive by submitting a document, it was presupposed that it was illegal. Quoting a Supreme Court judicial precedent concerning the meaning of "a

document which is solely for the sake of the use of the holder of such document (Code of Civil Procedure, Art. 220, No. 4c.)" (Supreme Court Second P.B., November 12, 1999. Fuji Bank Co. v. Maeda, 1017 HANREI TAIMUZU 102.), the lower court had judged concretely about whether there is any possibility that a very serious disadvantage for the possessor side may arise by the indication of a document, and presupposed that it is illegal. It was indicated that it was not enough, as stated in many judicial precedents and interpretations of the meaning of "Technical or professional secrets (Old Code of Civil Procedure, Art. 281, para. 1, No. 3)", that the secret holder carrying out secret treatment subjectively. According to the decision by a lower court and the interpretation that, if mad public, the social value which the technology has will decrease, a technical secret means that the activity depending on the technology will become difficult. Concerning an occupation secret, if made public, it will indicate something that has a serious influence on an occupation and make it impossible or difficult. The decision was passed by the Supreme Court standing on fundamentally the same understanding the conventional view and judicial precedents for this judgment for the first time. It can be said that the influence of this decision in which the Supreme Court has judged the procedure for an "order to produce a document (Code of Civil Procedure, Art. 223)" for the first time, will be large.

Supreme Court Second P.B., April 28, 2000

Maruyama v. Bank of Tokyo-Mitsubishi

Case No. (*kyo*) 40 of 2000. 1035 HANREI TAIMUZU 108

The other party should indicate his intention of making a disclaimer concerning a right of exclusive preference with regard to property abandoned from a bankrupt's property.

Reference:

Bankruptcy Code Article 96, 196(12), and 277.

Facts:

A received a declaration of bankruptcy and the trustee in the bankruptcy was assigned to Y. X has a mortgage on a building of A

company's possession. Although the trustee in the bankruptcy, Y, tried to sell the building, X clarified its intention to abandon the right of exclusive preference to the trustee in the bankruptcy, Y, on this occasion, if the sale was realized. Since the attempt at a sale failed, the trustee in the bankruptcy, Y, abandoned the building from the bankrut's property in response to the permission of a bankruptcy court. When the document and the dividend were received in the last dividend by X, the trustee in the bankruptcy, Y, urged X to perform the abandonment procedure for the right of exclusive preference. X indicated with the document his intention to abandon the right of exclusive preference to the trustee Y. The trustee in the bankruptcy, Y, judged that the declaration of intention of X was invalid, and created a dividend table by the contents which did not add X to the dividend (Bankruptcy Code Art. 264; Art. 263, para. 3). The lower court explained as follows and ordered the rehabilitation of the dividend table. As for the other party to whom the right of exclusive preference aiming at a property abandoned from the bankrut's property, should indicate his intention of abandonment, it is important to understand that it is being a bankrupt in principle. However, when a bankrupt is an incorporated company, in order for the person with the right of exclusive preference to indicate, it is necessary to receive the election of a liquidator and a predetermined procedure may be made within the deadline for the statutory exclusion. In this case, since X is carrying out the declaration of intention which abandons the right of exclusive preference to the trustee in the bankruptcy, Y, within the deadline for the statutory exclusion, it is too strict to eliminate X from the dividend for the reason of having not indicated one's intention of abandonment of right of exclusive preference to a company which has been declared bankrupt. Y complained.

Opinion:

Reversed.

When a specific property is abandoned from a bankrut's property, concerning the management and disposal of the property, the trustee's authority is extinguished and the bankrupt's authority revitalizes it. The other party to whom the person with right of exclusive preference for a property should indicate his intention of abandonment in this

case has no choice but to understand. There is no difference even if the bankrupt is an incorporated company.

Editorial Note:

The point of issue in this case is in the other party indicating his intention of the abandonment of right of exclusive preference after abandoning from a bankrupt's property. Bankruptcy law determined that the abandonment intention of the right to a trustee in a bankruptcy about the abandonment of the right of exclusive preference, in which the right of exclusive preference person receives a dividend by the last dividend and which is demanded as a premise, should be displayed. However, compared with the structure of a bankruptcy law, it is clear that this regulation is concerns the right of exclusive preference aiming at a property belonging to a bankrupt's property (Bankruptcy Code Art. 92; Art. 96). It is necessary to differentiate and consider the abandonment of the right of exclusive preference aiming at the abandoned property from a bankrupt's property. The other party of a declaration of intention of abandonment of right of exclusive preference in such a case is nobody else but the bankruptcy. The judicial precedent shows that making a declaration of intention of abandonment of a mortgage general to the owner should be in the time of mortgage immovables (Supreme Court First P.B., January 16, 1969. 232 HANREI TAIMUZU 102). Since the trustee has the authority to perform management and disposal of the property belonging to a bankrut's property, if the judicial precedent is followed, then a declaration of intention of abandonment of the right of exclusive preference aiming at a property being carried out to the trustee in a bankruptcy will be natural, and Bankruptcy Code Art. 277 will be understood as having clarified this. Therefore, since the property which is the purpose of a right of exclusive preference was abandoned from the bankrut's property, after the management of the trustee in the bankruptcy to this property and the authority of disposal are extinguished, the basis on which the trustee in bankruptcy receives a declaration of intention of abandonment of the right of exclusive preference is lost, and is understood as what should be indicate as the right of exclusive preference to the bankrupt who recovered the authority of management and disposal of property. As

mentioned above, it is hard to deny that in corporation bankruptcy, the procedure of abandonment of the right of exclusive preference aiming at a future property will become a complicated thing, compared with the past if a specific property is abandoned from a bankrut's property. Based on this determination, much more consideration and many more devices are expected.

Supreme Court Third P.B., March 27, 1998
NPI Tsū LLC v. Shindewaya
Case No. (*kyo*) 22 of 2001996. 1055 HANREI TAIMUZU 106

An execution court cannot issue a delivered order To what occupies auction immovables by the right of lease which can oppose the mortgagee of priority ranking, in order to collateralize this person's debt, except for the case where an auction or decision making based on the mortgage set as immovables is carried out.

Reference:

Civil Execution Code Articles 83 and 188.

Facts:

Y had rented the building from the owner. Then the preferential mortgage, which made A an obligor, was set for building, and, in order that Y might collateralize debt to its customer B, the guarantee, was received from A, and the subordination-mortgage, which makes B a rightful claimant in a building, was set up. This building was auctioned off, based on the preferential mortgage which made A an obligor, and, after X having knocked down and paid the price, X stated the delivered order to Y as the other party. In addition, the right of lease of Y can oppose the purchaser in this auction procedure. The lower court judged as follows and canceled the delivered order. Even if it is the right of lease which can oppose a preferential mortgage, when a setup of the mortgage to which the right of a lease makes oneself an obligor is received and a mortgage debt is in a state of default on an obligation, although the person is set as the object of a delivered order irrespective of whether the mortgage concerned is performed, in this case,

there is no default on an obligation in Y, and, in such a case, it does not correspond.

Opinion:

Appeal dismissed.

As for an execution court, it is important to understand that the delivered order can not to be issued except for the case where a setup of a mortgage is received to those who occupy immovables by the right of lease, which can oppose those who have a preferential mortgage, in order that this occupant might collateralize a claim for immovables, and a decision to start an auction is made as an execution of a mortgage. Since asserting the right of lease breaks the principle of faith rule when there is a situation in which immovables should be considered as security of debt, it is not allowed and liquidation of this debt should be carried out by the failure of the debt from the sale price of the mortgage immovables by those who occupy the immovables from the right of lease which can oppose those who have a preferential mortgage. It is because the profits of the owner who made the sale of mortgage immovables difficult, which was made to produce the fall in a sale price, and security will be injured to assert the right of lease. Therefore, Y cannot oppose this based on the right of a lease to the purchaser immovables. When the decision to start an auction is made as the execution of a mortgage, it can be said that the fact of default on an obligation corresponds to when the right of a lease also in executive proceedings is not allowed, since it is clear on the record of an incident (Civil Execution Code Art. 83). However, when a decision to start an auction as the execution of a mortgage is not made on the record of an execution incident, it cannot be said that the fact of default on an obligation is obvious, but it can be said that occupancy is based on the right of lease which can oppose the purchaser. In this case, although according to the record of the execution incident, a setup of a mortgage was received in order that the building might be occupied and the other party might collateralize a debt in this building by the right of lease to which the other party gives priority over a preferential mortgage, a decision to start auction based on this mortgage was not made.

Editorial Note:

As business and theory has accepted, it becomes the other party of a delivered order that an obligor continues using a thing for immovables being sold off by default on an obligation, and an owner losing ownership and occupancy when a mortgage obligor's own mortgage who is a tenant is carried out, as long as there are no special circumstances, since good faith rule has been broken remarkably. That is, an obligor shows that he does not vacate from the building though the mortgage will be performed in the future, and, except for the situation that the mortgagee also lent to the obligor, taking it into calculation, an execution court can issue a delivered order to the tenant who is an obligor (Civil Execution Code Art. 83). On the other hand, concerning the right of lease which is made before a setup of the mortgage is performed, if an obligor is in a state of default on an obligation, execution of the mortgage set up itself will be attained. If the purchaser after it broke impartially by the relation to the purchaser opposed, you should assert the right of lease which causes a deterioration of the collateral value of immovables which obtained the profits of finance by other mortgages being performed previously by chance. However, it is a question whether it breaks the good faith rule when the debt will be in a delinquent state and the occupancy continues. If immovables must be handed over, even if oneself is not default on an obligation, even if the obligor who is a tenant does not have the responsibility for a default on an obligation to himself, he will be ready to lose occupancy and will take out a loan. However, when a mortgage is sets up, it is not thought that there is such an intention. Therefore, except for the special situation that leaving a building is shown to exist in order not to decrease a collateral value when the mortgage obligor of the mortgage which is not performed make settlement of a mortgage and the mortgage which the owner has set up among the persons concerned is performed, as for a delivered order, it is justly not issued.

Okayama Branch of Hiroshima High Court, February 8, 2001

Nihon Kaijo Hoken v. Matsui

Case No. (*ne*) 70 of 2000. 1614 KINYU HOMU 62.

Even though conditions have been met by the cancellation of a

trustee in a bankruptcy after a declaration of bankruptcy, when the insurance company has paid the debt with a condition precedent, since the insurance company has a rational expectation about offsets, each other can be offset.

Reference:

Bankruptcy Code Articles 99 and 104.

Facts:

A received a declaration of bankruptcy and the trustee in the bankruptcy was assigned to X. A made several savings insurance contracts with Y, X asked Y for the return of the maturity repayment, based on the savings insurance contracts for the due date, and the return of the cash surrender value. Y offset the right of claim for damages and delinquent charge which Y has to A, and paid. X claimed that, because the rational offset was not expected, the offset was not respected, which is recited from the objection by the bankruptcy proceedings (Bankruptcy Code Art. 104). Since it was not just when carrying out from the character of the contract of a damage insurance contract, the lower court accepted offset. In this decision, the court admitted Y's offset, and cancelled the decision of the lower court and reversed X's claim.

Opinion:

Reversed

The offset which a person with a claim-in-bankruptcy caries is prescribed in the bankruptcy law so that way cannot offset each other when a person with a claim-in-bankruptcy pays a debt to a bankrut's property after a declaration of bankruptcy (Bankruptcy Code Art. 104). However, in the case of a claim which has a determined term, and the conditions, the claim about a future claim, it is specified by the bankruptcy law that offset is possible (Bankruptcy Code Art. 99). This meaning is in the point of respecting the rational expectation for the offset of a person with a claim-in-bankruptcy. Therefore, the offset will be allowed, if the person has the rational expectation about the offset at the time of the declaration of bankruptcy and the person is carrying

it out, when a term comes after a declaration of bankruptcy, and the precedent conditions are met.

Editorial Note:

Although the bankruptcy law demanded the situation offset the claim in bankruptcy at the time of a declaration of bankruptcy in principle, and has restricted the offset from the standpoint of an equal distribution among persons with a claim-in-bankruptcy, it respected the security-function of the right of offset and has defined the extension of the right of bankruptcy offset for the protection of a person with a claim-in-bankruptcy (Bankruptcy Code Art. 99; Art. 104). However, when the claim-in-bankruptcy person pays at the time of a declaration of bankruptcy, concerning whether the regulation to offset is forbidden when conditions are met after a declaration of bankruptcy about a debt with precedent conditions opposed to each other (Bankruptcy Code Art. 104), the positive view is in conflict with the negative view. When the debt in which the creditor of an incorporated company determined conditions before the start of arrangements the company, in the example where an arrangement is paid and conditions are met after the start of an arrangement, the judicial precedent paid the debt after arrangement, presupposed that offset is forbidden, and took the negative view. This judgment thinks the rational expectation about an offset of the maturity repayment and cash surrender value, based on savings insurance having the character of resemblance to a deposit, and the insurance company's offset as important, and has taken the positive theory, and will become a reference for bankruptcy business.