Civil Rehabilitation procedure was judged. This judgment has judged the effect of release to be effective in consideration of the difference in the handling of lien in the Corporate Reorganization Law and the Civil Rehabilitation process. This view is very rational and does not become disadvantageous to a Rehabilitation obligor, therefore, this judgment will be legal business.

6. Criminal Law and Procedure

Supreme Court 1st P.B., July 1, 2002
Seki v. Japan
56 KEISHU 265

Act of arranging deals in stolen goods, etc. in which the victim of the theft of the particular goods is a party, constitutes a crime of arranging deals in stolen goods, etc. provided by article 256, paragraph 2 of the Penal Code (hereinafter *KEIHO*).

Reference:

KEIHO, Art. 256, para. 2.

Facts:

A company (hereinafter A) became a victim of theft concerning 181 promissory notes (the total value of which was 780 million yen). The defendant, Hideaki Seki (hereinafter X), together with an accomplice, Masayuki Hiyama, (hereinafter Y) was asked by an unknown man to arrange a deal between that man and another company (hereinafter B) which was a subsidiary of A, to sell 131 (the total value of which was approximately 550 million yen) of the 181 promissory notes originally stolen from A. X and Y knowingly (aware of the fact that these notes were those stolen from A) arranged a deal to sell the notes to B at the estimated price of 82.2 million yen.

When X and Y were charged with arranging deals in stolen

goods, etc. in violation of article 256, paragraph 2 of *KEIHO*, X and Y argued that, since these acts consequently functioned to return the stolen property to the victim (the original owner of that property), they do not constitute a crime as provided in that particular provision. However, Toyama District Court convicted X and Y of violating that provision. X and Y filed a *Koso* appeal. Nagoya High Court, Kanazawa Branch, vacated the judgment below on reasons concerning sentencing, but again convicted X and Y of the same crime and imposed a reduced sentence upon both of them. Thereafter, X filed a *Jokoku* appeal in the Supreme Court.

Decision:

Jokoku appeal dismissed. The Court held *ex officio*:

The act of arranging a deal in stolen goods, etc., even if one party of that deal was the original victim of the theft, etc. concerning those particular goods, constitutes an act of "arranging a deal in" stolen goods, etc. provided in article 256, paragraph 2 of *KEIHO*, because such an act renders the due recovery of those goods by the victim difficult, and because there is danger that such an act would encourage the commission of theft, etc.

Editorial Note:

Article 256 of *KEIHO* deals with crimes concerning property obtained through a crime against property, such as stolen goods (hereinafter "stolen goods, etc."). Paragraph 1 of article 256 provides that a "person who receives" stolen goods, etc. "shall be punished with imprisonment with forced labor for not more than three years." Paragraph 2 of the same provides that a "person who transports, receives for deposit, purchases or arranges a deal in" stolen goods, etc. "shall be punished with imprisonment with forced labor for not more than ten years and a fine of not more than 500,000 yen". This case involves the latter provision. The defendant in this case was held to have arranged a deal in stolen goods, etc.

Is a man punishable as "purchasing stolen goods" (cf: art. 256, para. 2) when he makes a deal with someone possessing a certain property that was originally stripped from him through a crime against

property, and buys it back? Is a man punishable for arranging such a deal between the victim of the original crime against property and the one in possession of that particular property? The Court answered the latter question in this case.

Three major theories have been posed as to the legal character of the crimes concerning stolen goods, etc. The first of these argues that such a crime renders the exercise of the right of original owners of such stolen goods, etc. (victims of theft, etc.) in pursuing (demanding return of) those goods. The second theory is that the illegal condition of property is retained by such crimes. The third theory focuses on the categorical distinction between paragraph 1 and paragraph 2 of article 256 of *KEIHO*. It argues that while the crime embodied in paragraph 1 is deemed to be a crime of deriving benefit from another crime, the crime provided in paragraph 2 should be considered as a crime of facilitating the disposition of stolen goods, etc., which generally has the indirect effect of encouraging the original commission of theft, etc., and therefore may be characterized as a type of accessory after the fact. The first theory and the second theory resemble the two sides of a coin. What the victim sees as a right to pursue his property means a retention of the illegal condition when viewed from the standpoint of the criminal purchasing, arranging deals in, etc. that property. The recent trend in this respect follows the theory that combines the first two theories and seasons them with the third.

As in this case, when the arrangement is made for the original owner (the victim) to buy his/her property back, the property actually returns to the original owner. (In this case, B is not exactly the victim of the theft of promissory notes. However, since B is a subsidiary of A, the actual victim, B too may be treated as a victim in a practical sense.) It is questionable whether the exercise of the right to pursuit is rendered here difficult. However, it was held in Inoue v. Japan (Sup. Ct., 1st P. B., July 10, 1952, 6 KEISHU 876) that the transportation of stolen goods to the victim, under the condition that the victim buy back the goods for a large sum of money, was punishable through article 256, paragraph 2. The decision focused on the difficulties of "due" recovery of the stolen goods instead of a mere recovery of such property. It extended the notion of the right of pursuit thereby. According to this extended version of the theory of the right to pursuit, the holding in the present case that the act rendered

"the due recovery of those goods by the victim difficult" should be read as following the rules set by the Court's precedents. However, extending the notion of the right to pursuit as requiring the "due recovery" has been strongly criticized. Requiring the "dueness" of the recovery implies that, not only the original owner's right to pursuit, but also the following factors come into play. Namely, the loss of property caused anew (such as money paid to buy the property back), or damage to the public interest caused by the ignorance of due process which should have been employed for recovering the property. This seems to go far beyond the scope of the "right to pursuit".

On the other hand, the character of an act as a type of accessory after the fact functions as an aggravating factor that renders the authorized punishment in paragraph 2 of article 256 much harsher than that of paragraph 1 thereof. Interpreted otherwise, the victim would be punishable as well, when he/she buys the stolen property back, since he/she thereby indirectly encourages the original commission of the crime of property. As far as paragraph 2 of article 256 is concerned, the character of a certain act as a type of accessory after the fact, alone, does not function to render that act punishable.

In order for a certain act to constitute the crime provided in article 256, paragraph 2, therefore, it is necessary that the exercise of the right to pursuit is rendered difficult by such an act, and that the act be characterized as an accessory after the fact. The court held in this case that not only the act of X "renders the due recovery of those goods by the victim difficult", but also "there is danger that such an act would encourage the commission of theft, etc." The act of arranging a deal in stolen goods, etc., no matter who is involved in the deal, encourages the commission of a crime against property, and is characterized as a type of accessory after the fact. On the other hand, the original owner's right to pursuit, in its traditional sense, is not directly infringed by the arrangement of such a deal, since he/she actually recovers the property in question. It should be required that at least some element — for example, the dealer might imply that the deal would be made somewhere else if the victim does not respond swiftly — that endangers the exercise of the right to pursuit.

Supreme Court 1st P.B., October 4, 2002

Park v. Japan

56 KEISHU 507

Entering the guest room of a hotel with the warrant to search and seize, using a master key borrowed from the hotel manager, without first presenting the warrant to the guest occupying that room, does not violate article 222, paragraph 1, article 111, paragraph 1, and article 110 of the Code of Criminal Procedure (hereinafter *KEISOHO*).

Reference:

KEISOHO, Art. 110; Art. 111, para. 1; Art. 222, para. 1.

Facts:

The defendant, T.(L.) Park (hereinafter X), suspected of possessing and/or taking stimulants in violation of the Stimulants Control Law (*KAKUSEIZAI-TORISHIMARIHO*, hereinafter *KT*), was staying at a hotel in Kyoto. Police officers, aware of X's previous criminal record for violations of *KT*, anticipated that there was a danger of X's destroying evidence in the instant that he recognized them. Accordingly, they asked the hotel manager for cooperation, showing him the warrant to search X's room and seize stimulants and other materials related to the alleged violation. Police officers first tried to have X himself open the door to his room by disguising themselves as hotel staff and pretending that X's linen needed to be changed. Since X refused to open the door, the police borrowed the master key from the hotel manager. The police entered X's room without notice, using the master key. After the necessary measures were taken to prevent X from destroying any evidence related to the alleged violation, the police presented the warrant to X, searched the room, and seized stimulants, syringes, etc. in his possession. X was later charged with the possession and the taking of stimulants in violation of *KT*.

Since the Kyoto District Court convicted X on the alleged violation, X filed a *Koso* appeal, arguing that the particular procedure taken by the police in executing the warrant for search and seizure violated articles 222, 111 and 110 of *KEISOHO*, and that evidence gained through that

search and seizure should be suppressed. The Osaka High Court affirmed the judgment below, and X filed a *Jokoku* appeal in the Supreme Court.

Decision:

Jokoku appeal dismissed. The Court held *ex officio*:

Under the circumstances of this case, including the fact that there was a danger that X, having a previous criminal record for violations of *KT*, would, in a short period of time, destroy or hide the stimulants to be seized, the entering of the police officers into the guest room of a hotel with, but prior to presenting, the warrant to search and seize, using a master key to open the locked door, was necessary to secure the effectiveness of search and seizure, and was performed appropriately, in accordance with common sense, and was therefore permissible as provided in article 222, paragraph 1 and article 111, paragraph 1 of *KEISOHO*. On the other hand, since the presentation of the warrant provided in article 222, paragraph 1 and article 110 of the same, is required to guarantee the fairness of procedure and to prevent undue infringement on the rights of persons on whom the search/seizure is exacted, the warrant, as a rule, should be presented prior to the commencement of its execution. However, under the circumstances of this case, presenting the warrant soon after the commencement of the execution and entering of the room did not offend the spirit of these provisions, was inevitable in order to secure the effectiveness of the particular search and seizure, and therefore, was not in violation of these provisions.

Editorial Note:

Paragraph 1 of article 111 of *KEISOHO* — as applied to the stage of investigation through paragraph 1 of article 222 of the same — provides: "In the execution of a warrant for seizure or for search, locks may be removed, seals may be opened, or any other necessary measures may be taken. The same shall apply to the seizure or search effected in trial". It is provided here that the police or other authorities for investigation may utilize any measure as long as it is desperately needed for the execution of the warrant for search or for seizure, and as long as it is performed in a socially appropriate manner, causing minimum infringement upon the rights of persons on whom the execution is exacted. In other

words, a measure is permissible as a "necessary measure" provided in article 111, paragraph 1, if, and only if, viewed from the point of achieving the goals of executing the warrant for search/seizure, a particular measure is "desperately needed" and "socially appropriate", and if it causes only a minimum infringement of the rights of persons on whom the execution is exacted.

Article 110 of *KEISOHO* — as applied to the stage of investigation through paragraph 1 of article 222 of the same — provides: "A warrant of seizure or of search shall be presented to the person against whom the measure is exacted". Generally, this is not conceived to be a requirement of article 35 of the Constitution of Japan (hereinafter *KENPO*) which provides the general requirement of a warrant for investigation authorities in performing coercive measures such as search, seizure, inspection, etc. However, the law intended to provide notice as to the basis and the extent of the warrant to persons on whom the warrant is exacted, in order to secure the fairness of procedure, and to provide chances for objection, etc. so as to minimize the infringement of the privacy and other interests/rights of citizens on whom the warrant is exacted. Accordingly, as a general rule, the warrant should be presented prior to the commencement of its execution (hereinafter "the rule of prior presentation"). A general rule, however, has exceptions.

The issue in this case, which the Court answered *ex officio* was: whether the particular execution of the warrant to search a particular guest room of a hotel and seize certain evidence, where the police officers unlocked and entered that room without notice, using the master key borrowed from the hotel manager, and before the presentation of the warrant, was in violation of article 222, paragraph 1, article 111, paragraph 1, and article 110. Analyzed more closely, the issue is twofold. The first issue is whether the measure taken to execute the warrant in this case may be characterized as a "necessary measure" as provided in article 111, paragraph 1. If it is characterized as such, it constitutes a part of the execution procedure, and necessitates the resolution of another issue: whether it violates the rule of prior presentation. In other words, is there an exception to this particular rule? If there is, does this case fall into the category of one of such exceptions?

The Court held that the measure taken in the case at hand was

"permissible as provided in article 222, paragraph 1 and article 111, paragraph 1 of *KEISOHO*" because, under the circumstances that "there was a danger that X, having a previous criminal record for violations of *KT*, would, in a short period of time, destroy or hide the stimulants to be seized", the unlocking of the door using the master key and entering the room without notice and without first presenting the warrant, was "necessary to secure the effectiveness of search and seizure", and "was performed appropriately, in accordance with common sense".

This holding could be read as indicating that ① under the circumstances of this case, including the danger of destruction of evidence, etc., the demand for securing "the effectiveness of the search and seizure" necessitates the use of such a measure, and ② compared to other measures taken when entering a room, for example, breaking the lock or the knob of the door, breaking the door or a window, etc., the measure of unlocking of the door using a master key is socially much more appropriate and much less in violation of the rights of the persons on whom the measure is exacted, and therefore, ③ the particular measure employed in this case is permissible as a type of "necessary measure" as provided in article 111, paragraph 1 of *KEISOHO*.

The Court also held that the requirement of presentation of the warrant to persons on whom the search or seizure is exacted, as provided in article 110 (and as applied to this case through article 222, paragraph 1), was intended to "guarantee the fairness of procedure and to prevent undue infringement of the rights of persons on whom the search/seizure is exacted", and therefore, that "the warrant, as a rule, should be presented prior to the commencement of its execution". On the other hand, it also held that the execution of the warrant was permissible under the circumstances of this case, since the presentation of the warrant "soon after the commencement of the execution and entering of the room" did not "offend the spirit of this provision" and was "inevitable in order to secure the effectiveness of the particular search and seizure".

This holding could be read as indicating, as a general matter, that the demand for securing "the effectiveness of the search and seizure" could justify an exception to the rule of prior presentation and that, in those cases, nonetheless, the spirit of the rule must be duly respected. And in accordance with the circumstances of this case, it could be read

as holding that ① under circumstances, including the fact that there was danger that the object to be seized might be destroyed or hidden in a short period of time, the prior presentation of the warrant could have diminished the effectiveness of, or even invalidated the whole search and seizure, and that ② in light of the fact that the warrant was presented "soon after" the entering of the room, the two aims of the rule of prior presentation are not, at least totally, waived thereby.

The significance of this decision lies in the fact that the Supreme Court, in announcing this decision, declared for the first time that the unlocking and the entering of a room using a master key is permissible under some circumstances, even if it was done without notice and without the presentation of the warrant in advance. Since the decision was mainly based on the prevailing view, this conclusion, at least, is predicted to find consensus among many.

However, one argument might be made in criticizing this decision. Whenever search or seizure as to the violation of *KT* or any other drug controlling statute is concerned, especially when the suspect has a previous criminal record of the same sort, the danger is always present that he/she would destroy or hide stimulants or other prohibited drugs in the instant that he/she recognized the execution of the warrant. If this decision is read to mean that the use of a master key to enter the room without notice and presentation of the warrant would be permissible whenever the suspected violation concerns the possession of stimulants or some other prohibited drugs, and when the suspect has a previous criminal record as to the same sort of violation, it could lead to an introduction of a type of "blanket exception" rule. It should be emphasized that the scope of this decision should be read as limited to the actual factual setting of this case.

In this case, police officers also tried to have X himself open the door to his room by disguising themselves as hotel staff and pretending as if X's linen needed to be changed. This is a type of "fraudulent" measure that may be questioned as violating *KEISOHO*. Since X refused to open the door, it did not work, and the issue of utilizing such a "fraudulent" measure did not come into play at all in this decision. Although there is a High Court decision holding that it is permissible for a police officer to disguise himself as a home delivery man to trick the suspect into opening the door (Park v. Japan, 47 KOKEISHU 1, Osaka High Ct., April 20, 1991),

no decision has been handed down by the Supreme Court as of yet. This issue needs to be resolved in the near future as well.

7. Commercial Law

Tokyo District Court, July 18, 2002
Shinsei Bank v. Horie
1105 HANREI TAIMUZU 194

The court recognized that when the former directors of Choki Shinyo bank (hereinafter "Bank A") lent money to EIE international credit bank (hereinafter "EIE"), they paid attention to their duty not to take too much risk. Therefore, the claim of the plaintiffs was dismissed.

Reference:

Commercial Code, Arts. 254, para. 3 & 266.1. no.5.

Facts:

On April 27th, 1990, Shinsei bank (plaintiff, X, which was Choki Shinyo Bank in those days) lent 6 billion yen to EIE. On July 27th of the same year, X postponed the term of the payment. After that, EIE went into bankruptcy, and X could not collect any money at all. X claimed that directors of Bank A (defendants, Ys) should compensate for the amount of the damage, because Ys breached their duties of care in the way they had failed to pay enough attention to their business in terms of the financing and the postponement.

Therefore, the issue of this case is ① whether Ys breached their duties of care or not in deciding the lending, and ② whether they carefully decided the postponement of the term of the payment.

Opinion:

Claim dismissed on the merit.

(1) ① Bank A had been dealing with EIE as a main bank for