and even abandonment to the bankrupt estate.

This judgment admits in principle arbitrary payment to a bankruptcy claim by a bankrupt person out of his after-acquired assets and exempted assets, but says that the freeness should be decided strictly. In the future, it will become problematical in practice on which case free payment is admitted.

## 6. Criminal Law and Procedure

**X v. Japan**
Supreme Court 1st P.B.,May 16,2006
Case No.(a) 1348 of 2006
60 Keishu 5

**Summary:**

Decision ruling that in the case where the defendant produced and possessed a magnetic optical disc that falls under the categories of child pornography and of obscenities, as a backup disk for the production of compact discs for sale, such acts of the defendant were found to have been committed for the purpose of selling child pornography as prescribed in Article 7, para.2 of the Act for Punishing Acts Related to Child Prostitution and Child Pornography and for Protecting Children (prior to the revision by Act No. 106 of 2004) and for the "purpose of sale" as prescribed in the second sentence of Article 175 of the Penal Code.

**Reference:**

*Act for Punishing Acts Related to Child Prostitution and Child Pornography and for Protecting Children* (prior to the revision by Act No. 106 of 2004) Article 7, para.2
*Penal Code* Article 175

**Facts:**

In the case where the defendant produced a magnetic optical disc that falls under the categories of child pornography and of obscenities, as

a backup disk for the production of compact discs for sale, by storing and keeping the data of pictures of a posture of a child on the discs, and possessed it, such acts of the defendant can be deemed to have been committed "for the purpose of committing any of the acts mentioned in the preceding paragraph" as prescribed in Article 7, para.2 of the Act for Punishing Acts Related to Child Prostitution and Child Pornography and for Protecting Children (prior to the revision by Act No. 106 of 2004), even though the defendant intended to process the data before producing compact discs for sale, by blurring parts of the pictures to conceal the child's eyes. More specifically, it can be concluded that the disc was produced and possessed for the purpose of selling child pornography for the purpose of the said Act, and it also can be deemed to be committed for the "purpose of sale" as prescribed in the second sentence of Article 175 of the Penal Code.

**Opinion:**

Decision of the Third Petty Bench, dismissed.

Among the reasons for appeal to the court of the last resort argued by the counsel, OKUMURA Toru, the one alleging violation of the Constitution lacks a premise because the seized magnetic optical disc cannot be deemed to be belonging to any person other than the criminal, the one alleging violation of a judicial precedent is irrelevant in this case because the cited judicial precedent addresses a different type of fact, and the rest are nothing more than claims of violation of laws and regulations, errors in fact-finding, or abolition of the punishment after the original judgment was made, and none of these arguments can be regarded as a reason for appeal to the court of the last resort under Article 405 of the Code of Criminal Procedure.

After considering the arguments, however, we decided to make judgment ex officio regarding whether or not the defendant's acts of making and possessing the magnetic optical disc could and should be deemed to constitute statutory crimes.

1. According to the original judgment and the findings and the records of the judgment of the first instance, which were affirmed by the former, the following facts can be recognized with regard to the crime mentioned above:

(1) The defendant stored and kept the data of pictures of poses of a child, which he himself had taken by using a digital camera, on the hard disk of a personal computer, further stored and kept such data on a magnetic optical disc, and possessed the magnetic optical disc. The magnetic optical disc on which the picture data was stored and kept (hereinafter referred to as the "Magnetic Optical Disc") is considered to fall under the category of child pornography prescribed in Article 2, para.3 of the Act for Punishing Acts Related to Child Prostitution and Child Pornography and for Protecting Children (prior to the revision by Act No. 106 of 2004; hereinafter referred to as the "Act"), and also to fall under the category of obscenities prescribed in Article 175 of the Penal Code.

(2) Next, we focus on for what purpose the defendant made and possessed the Magnetic Optical Disc. The defendant intended to sell compact discs on which the picture data was stored, by first, blurring parts of the pictures stored on the hard disk of the personal computer to conceal the child's eyes and reducing the file size, and second, stored and kept the processed data on the hard disk, and then, stored such data on compact discs without modification. The defendant made and possessed the Magnetic Optical Disc for the purpose of using it as a backup disk of the original unprocessed data as a precaution against the processed data stored on the hard disk being destroyed for any reason, making the production of compact discs for sale impossible.

2. As explained above, although the defendant did not intend to sell the Magnetic Optical Disc itself, the defendant made and possessed it as a substitute for the hard disk, with the objective of, if necessary, using the picture data stored on the Magnetic Optical Disc to produce the data to be stored on compact discs for sale, storing it on compact discs for sales, and selling these compact discs. Upon such occasion, the defendant intended to store the data on compact discs for sale without modification, except for processing the data only by blurring parts of the pictures to conceal the child's eyes and reducing the file size. Consequently, it can be concluded that the act of making and possessing the Magnetic Optical Disc can be deemed to have been committed "for the purpose of committing any of the acts mentioned in the preceding paragraph" as prescribed in Article 7, para.2 of the Act. More specifically, it can be concluded that it was made and possessed for the purpose of selling child pornography. Also, the act

of possessing the Magnetic Optical Disc can be deemed to have been committed "for the purpose of sale" as prescribed in the second sentenced of Article 175 of the Penal Code. The determination of the court of the second instance that affirmed these purposes is justifiable.

Therefore, according to Article 414 and Article 386, para.1, item 3 of the Code of Criminal Procedure, the decision was rendered in the form of the main text by the unanimous consent of the Justices.

**Editorial Note:**

The defendant possessed a magnetic optical disc that falls under the categories of child pornography and of obscenities, exclusively as the backup disk for the production of compact discs, not for sale. Whether the affirmation of the sale purpose is possible even if the object of possession is not that of sale is a big problem. This has been discussed in the following way; whether the act of possessing master tapes for the purpose of selling copied tapes is applicable to the act of possessing for purpose of sale. Some Courts have said yes. But this case is not true, because in the case of possessing master tapes, the content of the master tapes is the same with that of the copied ones, while in this case the content of the backup disk is different from that of the disk for sale, in that there are some blurring parts of the pictures to conceal the child's eyes.

According to some courts' views, possessing obscene objects for the purpose of copying and selling them, even if the act is like possessing the objects for sale, is the same as possessing the objects for sale because there is some danger of circulating the obscene objects in this situation.

But the commonly accepted opinions are opposed to the logic of these courts' theory. There are two main reasons for it. One is that possessing the objects for selling can be regarded as a kind of prepared selling, but possessing the objects not for no-selling is the so-called "preparation of a prepared sale", leading to unjust punishment. The other one is that the fact that objects of selling are not still produced cannot be ignored.

Considering in detail at this time, does Penal Code Article 175 punish exclusively possessing for the purpose of selling, not simply possessing? In case of simple possession, there is a little danger of circulating obscene objects, while in the case of possessing for the purpose of selling, there is

much danger of circulating obscene objects.

This point considered, it is natural that there is no difference between the contents of possessing and those of selling, that is, identity sameness is required. But even if the contents for selling are different from those for back-up, because the latter can be made into those for sale easily and circulated in public soon, it can be concluded that the strict identity is not requested.

In addition, if the obscene disc for back-up applies to the one for sale, it can be the object of confiscation.

**X v. Japan**

Supreme Court 1st P.B.,October 24,2006

Case No.(a) 1414 of 2006

60 KEISHU 8

**Summary:**

Decision concerning whether or not there is a need to quash the judgment of the first instance under Article 397, para.1 of the Code of Criminal Procedure by reason of the change in the statutory punishment for the crime of larceny under the Act for Partial Revision of the Penal Code and the Code of Criminal Procedure(Act No. 36 of 2006).

**Reference:**

Article 6, Article 10, and Article 235 of the Penal Code; Article 235 of the Penal Code(prior to the revision by Act No. 36 of 2006); Article 383, item 2 and Article 397, para.1 of the Code of Criminal Procedure

**Facts:**

The change in the statutory punishment for the crime of larceny under the Act for Partial Revision of the Penal Code and the Code of Criminal Procedure(Act No. 36 of 2006) cannot be deemed to be a change in punishment because of which the judgment should be quashed under Article 397, para.1 of the Code of Criminal Procedure, if it is obvious, in light of the circumstances of the crime of larceny, whether or not the judgment of the first instance found any other crime, and the content of such

other crime, that there is no room to reconsider the sentence given by the judgment of the first instance by reason of the said revision.

**Opinion:**

The appeal to the court of the last resort is dismissed.

Among the reasons for appeal to the court of the last resort argued by the counsel, MAKI Yukio, the reason alleging violation of the Constitution is in effect nothing more than a claim of violation of law or regulations, and the rest are claims of errors in fact-finding, and none of these arguments can be regarded as a reason for appeal to the court of the last resort under Article 405 of the Code of Criminal Procedure.

After considering the arguments, however, we decided to make judgment ex officio as follows:

1. According to the judgment of the first instance affirmed by the original judgment, in this case, the accused is charged with seven cases of larceny and two cases of attempted rape (intrusion upon residence is involved in six of the seven cases of larceny and one of the two cases of attempted rape).

2. By the Act for Partial Revision of the Penal Code and the Code of Criminal Procedure (Act No. 36 of 2006), the statutory punishment for the crime of larceny has been changed from "imprisonment with work for not more than ten years" to "imprisonment with work for not more than ten years or a fine of not more than 500,000 yen." The said Act came into force as of May 28, 2006, after the judgment of the first instance of this case had been rendered and before the original judgment was rendered. This Act does not provide for any transitional measures regarding the revised provision mentioned above. This suggests that with regard to the crime of larceny among the crimes charged, there had been a "change in punishment" prescribed in Article 383, item 2 of the Code of Criminal Procedure prior to the rendering of the original judgment. Article 397, para.1 of the said Code provides that the judgment of the first instance shall be quashed if there exists any of the reasons prescribed in Article 383 of the same Code.

However, the said revision did not change the length of the term of imprisonment with work to be imposed for larceny, and only added an optional punishment, i.e. a fine of not more than 500,000 yen. The purport

of the revision was considered to provide for a monetary penalty as an optional punishment for the crime of larceny, for which only imprisonment with work had been available as a statutory punishment, with the aim to impose an appropriate punishment for relatively minor larceny cases. The revision cannot be construed to be intended to widely affect the handling of cases in which imprisonment with work had generally been imposed. Taking into consideration such contents and purport of the said revision, if it is obvious, in light of the circumstances of the crime of larceny, whether or not the judgment of the first instance found any other crime for which there was no change in punishment, and the content of such other crimes, that there is no room to reconsider the sentence given by the judgment of the first instance by reason of the said revision, it is appropriate to construe that the revision cannot be deemed to be a "change in punishment" because of which the judgment should be quashed under Article 397, para.1 of the Code of Criminal Procedure, and therefore there is no need to quash the judgment of the first instance.

3. Consequently, in this case, there is obviously no room to reconsider the sentence given by the judgment of the first instance, and there is no need to quash the judgment of the first instance. The judgment of the court of the second instance, which did not quash the judgment of the first instance, while determining that there was a change in punishment as prescribed in Article 383, item 2 of the Code of Criminal Procedure, can be accepted as being appropriate in its conclusion.

Therefore, according to Article 414 and Article 386, para.1, item 3, and the proviso of Article 181, para.1 of the Code of Criminal Procedure, the decision has been rendered in the form of the main text by the unanimous consent of the Justices.

**Editorial Note:**

In this judgment, the biggest issue is the interpretation of Article 383, item 2; a change in punishment.

This term can be regarded as a change in punishment deserving dismissal. In addition, Article 383, item 2 of the Code of Criminal Procedure of a change in punishment is looked upon as the relative ground of dismissal, like Article 380.

In this judgment, the change in punishment is safely said to be not

appropriate to dismissal, when all the situations are considered.

Thus, this judgment is a just one.

# 7. Commercial Law

**Duskin's Stockholders Representative Suit**
Osaka High Court, June 9, 2006
Case No. (*ne*) 568 of 2005
1214 HANREI TAIMUZU 115

**Summary:**

The Court found that the directors in the food company who later recognized the fact that the commodities which were not permitted to be used under the law which is called "*Syokuhin-eisei-hou*" had been sold had a duty to disclose that fact.

**Reference:**

Commercial Code Articles 267
Civil Code Articles 416, para1.

**Facts:**

Duskin, Inc. ("Duskin"), using the trade name of "mister Donut", sold the foods (which are called "Dai-Nikuman"), which included the additive of "TBHQ" (which was not permitted to be used under the law of sanitation of the foods in Japan). Duskin sold 13,140,000 "Dai-Nikuman" from about May, 2000 to December 20, 2000. On December 8, 2000, Z (who traded with Duskin) indicated that "Dai-Nikuman" included "TBHQ". Director A and director B, however, decided to continue to sell the stocks of "Dai-Nikuman", in spite of the recognition that they contained "TBHQ". Director B also paid Z ¥63,000,000 not to publish the fact that "Dai-Nikuman" included "TBHQ". On May 15, 2002, Duskin published that fact. The mass media reported that Duskin continued to sell the foods which included the additive that is not permitted to be used in Japan, hid that fact, and paid the hush money. As compensation for the reduction in