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judgedate

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1963.12.05

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caseid

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1962(O)953

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reporter

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Minshu Vol. 17, No. 12

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casetitle

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Judgment regarding a method of determination of similarity of trademarks when one trademark generates more than one term of address or concept

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casename

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Case to seek revocation of a trial decision

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caseresult

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Judgment of the First Petty Bench, dismissed

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court_second

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Tokyo High Court, Judgment of April 24, 1962

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summary_judge

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1. In the case that one trademark generates more than one term of address or concept, even if one term of address or concept cannot be said to be identical or similar to a term of address or concept of another person's trademark, if another term of address or concept is similar to that of another person's trademark, it is appropriate to construe the two

trademarks as similar.
2. Under the facts stated in the judgment, since a trademark that designates soap as its designated goods and that is composed of the union of a figure of a small harp called a lyra and the word "Takarazuka (in kanji)" generates the term of address or concept of simple Takarazuka mark in addition to the term of address or concept of Lyratakarazuka mark, such trademark should be acknowledged as being similar to the trademark of "Takarazuka (in kanji)," which also designates soap as its designated goods.

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references

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Article 2, paragraph (1), item (ix) of the former Trademark Act (Act No. 99 of 1921)

Article 2 (1) Trademarks set forth in the following items cannot be registered.
(ix) Trademark that is identical with, or similar to, another person's registered trademark and that is used for identical or similar goods;

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maintext

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The final appeal is dismissed.
The cost of the final appeal shall be borne by the appellant of final appeal.

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reason

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Item I of the reasons for final appeal filed by the counsel for the final appeal
The argument of the counsel for the final appeal alleges that the judgment in prior instance, which extracted only the word "Takarazuka (in kanji)" from the composition of the applied trademark in this case and compared the word to the cited trademark of "Takarazuka (in kanji)," and then determined that the applied trademark is similar to the cited trademark in terms of their terms of address and concepts, is contrary to the rule for determination of similarity of trademarks and the rule of thumb.
As mentioned in the argument of the counsel for the final appeal, since a trademark is devised to be distinguished from another person's trademark by its entire composition, it is not allowed to extract part of the composition of a trademark and compare only such part to another person's trademark in order to determine the similarity of the trademark itself. However, according to the rule of thumb, in real trading, where simplicity and promptness are valued, if component parts of a trademark are not acknowledged to be

so indivisibly united that to separate such parts before observing them is construed as an unnatural conduct in trading, the trademark is not always necessarily addressed and conceived by a name for its entire composition, but often addressed and conceived simply by part of the name, and more than one term of address or concept may be generated from one trademark (see Judgment of the Second Petty Bench of the Supreme Court of June 23, 1961, Minshu Vol. 15, No. 6, at 1689). Therefore, in such case, even if one term of address or concept is not identical or similar to a term of address or concept of another person's trademark, if another term of address or concept is similar to that of another person's trademark, it is appropriate to construe the two trademarks as similar.

This Court will examine this case from the above point of view. The applied trademark designates Class IV soap as its designated goods and is composed of the union of the figure of a small harp called a lyra, which is said to have been used in ancient Greece, and the word "Takarazuka (in kanji)," and to the union, the words "Lyratakarazuka (in katakana)" and "LYRATAKARAZUKA (in English)" are attached. Therefore, it is apparent that this trademark generates a term of address or concept of Lyratakarazuka mark, and it can be sufficiently inferred that this was the appellant company's purpose of producing the applied trademark. However, according to facts that became final and binding in the judgment in prior instance, the fact that the above figure is a small harp in ancient Greece and bears the name of lyra is not widely known to general people who are involved in the trading of soap, which is the designated goods of the applied trademark, but on the other hand, Takarazuka has a definitive meaning and is familiar to general people, and the word "Takarazuka (in kanji)" is placed in the almost center of the applied trademark in a normal letter type so that it would be fairly easy to read and stand out in order to attract people's attention. In light of such fact, the judgment in prior instance found that since the above figure of a lyra and the above word "Takarazuka (in kanji)" are not so indivisibly united that to separate the two parts before observing them is construed as unnatural conduct in trading, the applied trademark generates not infrequently a term of address or concept of simple Takarazuka mark in addition to a term of address or concept of Lyratakarazuka mark, and determined that the applied trademark is similar to the cited trademark of "Takarazuka (in kanji)," which also designates Class IV soap as its designated goods, in terms of their terms of address and concepts. Such judgment in prior instance is legitimate and does not contain the illegality alleged by the argument of the counsel for the final appeal. Just for information, the judicial precedent cited in the argument of the counsel for the final appeal is irrelevant to this case because this case addresses a different type of facts.

Therefore, the argument of the counsel for the final appeal has no grounds and cannot

be accepted.

Item II of the reasons for final appeal filed by the counsel for the final appeal

The point of the argument of the counsel for the final appeal is that, in short, the judgment in prior instance ignored an admission made in court and conducted fact finding in contradiction to the admission, and therefore the aforementioned fact finding in the judgment in prior instance contravenes a rule of thumb and a judicial precedent and contains illegality of making a mistake in construction of the Article 2, paragraph (1), item (ix) of the former Trademark Act (Act No. 99 of 1921).

However, according to records, it is apparent that the appellee denies that the fact that the figure of a lyra in the applied trademark has been used for years as an emblem of Takarazuka Revue and the fact that Takarazuka Revue is operated by the appellant company is generally known. Therefore, even though the fact that the figure of a lyra is generally known as a symbol of music and is familiar to general people is a fact not disputed between the parties of this case, the fact finding in the judgment in prior instance, which found that it cannot be acknowledged that the figure of a lyra and Takarazuka are necessarily linked together as one concept, does not mean that the judgment in prior instance ignored an admission made in court as alleged by the argument of the counsel for the final appeal. Furthermore, the documentary evidence referred to in the argument of the counsel for the final appeal is certified copies of a judgment and a trial decision rendered with regard to an application for registration of a trademark that is not the applied trademark. Therefore, even though the judgment in prior instance did not use the content of such documentary evidence as information for making a decision in determining the similarity of the applied trademark and the above cited trademark, this does not mean that the judgment in prior instance contravenes the judicial precedent cited in the argument of the counsel for the final appeal. Other points of the argument are also nothing more than allegations of illegality referred to in the argument of the counsel for the final appeal based on original views of the counsel for the final appeal that are different from those of the judgment in prior instance.

Therefore, the judgment in prior instance does not contain illegality referred to in the argument of the counsel for the final appeal, and all points of the argument have no grounds and should inevitably be rejected.

Accordingly, pursuant to Article 401, Article 95, and Article 89 of the Code of Civil Procedure, the judgment has been rendered as set forth in the main text by the unanimous consent of the justices.

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presiding

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Justice OSABE Kingo

Justice IRIE Toshio

Justice SHIMOIIZAKA Masuo

Justice SAITO Kitaro

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note_other

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(This translation is provisional and subject to revision.)