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6. Commercial Law

Of the decisions in the year under review, the following four cases are listed herewith. The second and third cases cannot be understood without taking into account the traditional Japanese social background, whereas the first and fourth cases show the trend of interpretations in the study of Japan's commerical law.

1. A case in which a person who was authorized to carry on business in the principal's name did not do so; the legitimacy of an analogical application of Article 23 of the Commercial Law to the transactions of bills and notes.

Decision by the Third Petty Bench, the Supreme Court, on July 15, 1980. 982 *Hanrei Jihō* 145.

[Fact]

Company Y (defendant, appellee, *Jokoku* appellant) authorized B, a representative director (an executive or managing director) of Company A, to carry on business using the name of Y. However, A did not carry on business in the name of Y but only issued promissary notes in the name of Y in connection with its business by opening a current account with Bank C under the name of Y. Representative D of Company X (plaintiff, appellant, *Jokoku* appellee) discounted for B a note issued in the name of Y and endorsed by B. X could not get B to settle the note and therefore, demanded that Y clear the note.

[Opinions of the Court]

Y authorized B to use the name of Y. B carried on business

within the scope permitted by Y to use Y's name and issued promissory notes in the name of Y for purposes of that business. Moreover, X discounted the note from B upon confirming that notes issued in the name of Y had so far been settled without any trouble in the current account opened between the Bank C and B in the name of Y. In this regard, the decision in the court below which recognized the obligation of Y to cash the note for X by employing an analogical application of Article 23 of the Commercial Law is correct.

[Comment]

In case a certain person N carries on business by using the name of M, the third party transacting with N may be led to believe that the proprietor is M, not N. If M is well known and enjoys greater trust, the misconception of the third party is all the more greater. Article 23 of the Commercial Law protects innocent third parties on the condition that M authorizes N to use the name of M, and that N carries on business using the name of M. Accordingly, the basic legal principle of Article 23 lies in the estoppel or the protection of the third party's trust of appearance.

Although B in the current case was permitted to use the name of Y, he did not carry on business in the name of Y. That B was engaged in bank and bill and note transactions in the name of Y does not correspond to the business under Article 23 of the Commercial Law. So, the current case cannot be called a typical case that can be applied to Article 23 of the Commercial Law. But, it must be noted that X acquired the note issued by Y placing confidence in the name of Y and that Y had actually permitted B to use its name. Herein lies the reason that the Supreme Court in the current case and the court below analogically applied Article 23 of the Commercial Law.

The current decision is significant in that it has settled one of the disputes centering on Article 23 of the Commercial Law.

2. A case in which liability for damages based on Article 266–3 of the Commercial Code was denied.

Decision by the First Civil Affairs Department, the Nagoya High Court, on Sept. 20, 1979. 951 *Hanrei Jihō* 111.

[Fact]

Y_1, representative director (executive or managing director) of Company A, had left all the business concerning the company in the hands of B and did not participate in the management at all. B was also a director of Company C with which A had major transactions.

When C became bankrupt, A failing to obtain performance for its credit against C also became bankrupt as a result. Creditor X (plaintiff, appellant) of A then could not have his obligation fulfilled. On the basis of Article 266–3 of the Commercial Code, X filed a claim for damages against Y_1's successor Y (defendant, appellee) following the death of Y_1.

In the first instance court, X's claim was dismissed on the ground that there is no reasonable causal relation between the failure in duty that Y_1 had left the management of Company A in the hands of B and the bankruptcy of A resulting from the insolvency of the obligation to C due to the latter's bankruptcy. Thereupon, X filed an appeal.

[Opinions of the Court]

Appeal dismissed.

To file a claim for damages based on Article 266–3 of the Commercial Code, there must be a reasonable causal relation among the failure in duty of a representative director, the company's bankruptcy and the third party's damages. When the representative director left the entire management in the hands of somebody else, there ought to be a reasonable causal relation among the failure in duty arising from malicious intent or gross error committed by the person who was entrusted with the company management, the company's bankruptcy and the damage incurred by the third party.

In the current case, it cannot be said that Y had neglected his duties by malicious intent or any gross error. Accordingly, there is no reasonable causal relation between Company A's bankruptcy

and the failure in duties resulting from Y_1's violation of his duty to superintend B.

[Comment]

In the light of the actual management situation of small and medium-sized companies which consist the overwhelming majority of total companies in Japan, the damages inflicted upon creditors by poor management cannot be indemnified by meager company assets. There have been such policy considerations in expanded interpretations of the obligations of a company director to third parties by Article 266–3 of the Commercial Code which has been pushed through by past decisions and academic theories.

On this score, the current decision seems to have applied a brake to the interpretation of the said article which is apt to be expanded without limit, although the current case was unique in that a company became bankrupt as a result of the bankruptcy of another company with whom it had transactions. Although this is worthy of attention, there may arise disputes in interpretation concerning the requirement of a reasonable cause-and-effect relationship between the failure in duties and the outbreak of damage.

3. The limit of remuneration of a representative director of a small and medium enterprises cooperative association who concurrently held the post of an employee.

Decision by the Second Petty Bench, the Supreme Court, on July 18, 1980. 977 *Hanrei Jihō* 115.

[Fact]

The remuneration of the chairman of a cooperative association X (plaintiff, appellee, *Jokoku* appellee) established by the Medium and Small Enterprises, Etc. Cooperative Association Act, has been fixed by a resolution made at the general meeting of the association every year. However, Chairman Y (defendant, appellant, *Jokoku* appellant) of X, during the last two years of his tenure of office, had received remunerations exceeding the limited amount fixed at the general meetings.

Following the resignation of Y as chairman, X demanded that

Y pay back the excess amount. Y insisted that he had concurrently held the post of Director-General of the Secretariat of the Association following the resignation of former Director-General A and executed the work in place of A and that the amount allegedly overpaid corresponded to the salary of an employee accruing from the concurrent post and execution as proxy for the director-general of the secretariat. In the first and second instance courts, X's claim was allowed. Then, Y made a *Jokoku* appeal.

[Opinions of the Court]

Jokoku appeal dismissed.

It is reasonable to interpret that even when the representative director had engaged himself in work corresponding to that of an employee of the said association, the association cannot be permitted to pay remuneration to the representative director exceeding the amount fixed by the general meeting regardless of its pretext, unless there are specific circumstances.

[Comment]

In the Medium and Small Enterprises, Etc., Cooperative Association Act, there is no regulation like Article 269 of the Commercial Code restricting the remuneration of directors. When the decision on the remuneration of directors is left in the hands of the board of directors there is the danger of "arranging the matter for their own convenience or back-scratching." In the current case, X had left the matter of deciding the remuneration of the chairman in the hands of the general meeting in place of the board of directors, because it can be said that X had aimed at preventing "the arrangement of matters to suit their own cause" by a decision of the board of directors. As such, the question concerning the remuneration of Chairman Y comes into the same category as Article 269 of the Commercial Code. As a result of consequence of the fact that the current decision denied the payment of salary for the concurrently-held post of an employee exceeding the remuneration for the chairman fixed by the general meeting, the decision in the current case can be referred to the issues of a similar kind relating

to Article 269 of the Commercial Code.

It must be noted, however, that the generally accepted view and decisions have regarded the salaries of ordinary directors holding concurrently posts of employees as outside the restrictions on remuneration stipulated in Article 269 of the Commercial Law. In this regard, a question may arise as to the position the current decision occupies.

On the other hand, it is evidently disparate from the case of an ordinary director holding the post of an employee in that the representative director in the current case had concurrently held the post of an employee. Thus, the current decision will not affect in any way the position of preceeding decisions that the payment for the concurrent post of an employee held by an ordinary director does not, as a matter of principle, correspond to the remuneration mentioned in Article 269 of the Commercial Code.

4. Special agreement on the postponement of payment between the holder of a promissory note and its endorser and the starting point of reckoning of extinctive limitation.

Decision by the Second Petty Bench, the Supreme Court, on May 30, 1980. 34 *Minshū*.521.

[Fact]

Y, (defendant, appellee, *Jokoku* appellant), president of Company A, had endorsed and handed promissory notes issued by his company to Company B whose president was B (plaintiff, appellant, *Jokoku* appellee). X then acquired the notes endorsed by Company B. The notes were made for partial payment to Company B having designed a shop for A.

Although the maturity dates were different, the amount of each note was same. Shortly before the maturity date of the first note, X was asked by Y to postpone the presentation period by four months to which he agreed. He also approved of the postponement of other notes. After the expiration of the period of grace, X presented Y the note for payment. However, Y refused to pay insisting that X had lost his recourse right against Y and that the

right on the note had expired by the limitation. X then brought the action to court.

X's claim was dismissed in the first instance court, but the second instance allowed his claim on the same ground as that of the Supreme Court.

[Opinions of the Court]

Jokoku appeal dismissed.

When a special agreement is made between the holder of a promissory note and the endorser concerning a postponement of the obligation of the endorser of a note, the holder cannot exercise his right on the note against the endorser during the period of grace.

The holder can only exercise his right on the note (recourse right) following the expiration of the grace period. Accordingly, it ought to be interpreted that the extinctive limitation on the right on the note of the holder against the endorser begins from the time when the grace period expires.

[Comment]

According to the Act of Bills and Notes (§ § 70 (2), 77 (8)), action by the holder against the endorser is not permitted after one year from the date of maturity. In this regard, X in the current case had lost his recourse right against Y because of the extinctive limitation.

But, since there was a special agreement on a grace period of payment between X and Y, (incidentally, such specific agreement outside the bill and note is effective), it is only natural that X could not exercise his right against Y. As a matter of fact, that the said right can be exercised is a logical premise of the procedure of extinctive limitation (Civil Law § 166 para. 1). The legality of the extinctive limitation lies in the fact that the right was left unexercised notwithstanding that it could have been exercised.

The existence of a grace period of payment, as in the current case, indicates the lack of a logical premise of extinctive limitation and relevant legal grounds. In this sense, the conclusion and opinions of the Supreme Court are at once just and fair. Prevailing

views have also been calling for such a conclusion.

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7. Labor Law

Listed here are some of the outstanding cases indicative of the social and economic situation in recent years. Firstly, there was a case involving the relation between the actual social situation, that is, the extensive existence of enterprises aided by the dispatch of workers, and the prohibition of labor supply projects by the Employment Security Act. Secondly, there was a case in which a decision concerning the discrimination of both sexes (on the age limit system, pay raises and promotion) was made in favor of "equalization." Another case concerned the working conditions of public officials including the propriety of the age limit system. There were also many cases involving dismissal, the relocation of office posts, transfers, and punitive measures. Some of the major decisions in those instances are introduced here.

1. A case involving the Yamaguchi Broadcasting System in which a lockout set up against a strike for a limit number of hours was judged unlawful and the claim for wages was allowed.

Decision by the Second Petty Bench, the Supreme Court, on Apr. 11, 1980. (Case No. [*o*] 541 of 1976. *Jokoku* appeal dismissed. Claim for wages allowed. 34 *Minshū* 330.)

[Fact]

X et al. (*Jokoku* appellees) were employees of the company Y (*Jokoku* appellant) and had organized a labor union in Y. They resorted to limited strikes and other strikes by designated union members several times from Mar. 15, 1967, through May 5, in pro-