withdrawn or waivered, both are the same as the expression of intention to have the original adjudication become final. The difference in address is just a matter of procedural difference.

Moreover, the train of thought, as in the current decision, is in agreement with the spirit of the law to make much of the intention of the accused himself rather than the judgment of the defense counsel.

Incidentally a special *Kōkoku* appeal was lodged against the current decision, but the Second Bench of the Supreme Court dismissed it (decision on Mar. 25, 1982. 1045 *Hanrei Jihō* 140).

[Reference: Code of Criminal Procedure §§355, 356, 359, and 419; Criminal Procedure Rules §§ 223, 223-2, and 224]

By Prof. TAKEHIKO SONE
KATSUYOSHI KATO
TOSHIMASA NAKAZORA

6. Commercial Law

1. A case in which "justifiable reason" was recognized in removing a director from office.

Decision by the Third Petty Bench of the Supreme Court on Jan. 21, 1981. 1037 *Hanrei Jihō* 129.

[Facts]

X (plaintiff, Koso appellant and Jokoku appellant) was a representative director of Stock Corporation Y (defendants, Koso appellees and Jokoku appellees) and a shareholder with 4,350 shares of the total 8,000 shares already issued by the corporation. Becoming ill, his condition worsened, he decided to recuperate and retired from regular corporate business. X then transferred all his shares to another director of the corporation, who already had 2,350 shares, and at the same time changed his position as representative director with A on Sept. 21, 1977.

Later, on Oct. 31 the same year, A convened an extraordinary

general meeting of shareholders and, in an attempt to reshuffle the personnel setup on the management, removed X from his position of director.

Contending that Corporation Y had no justifiable reason to remove him, X filed a suit against the corporation to recover damages. As his claim in the original court was dismissed, X filed a Jokoku appeal with the Supreme Court.

[Opinions of the Court]

The appeal dismissed.

In the light of the factual relationship established by the original court, the decision of the original court that Corporation Y cannot be said to have no justifiable reason for removing X from office can be recognized as reasonable.

[Comment]

According to Article 257 (1), (2) of the Commercial Code, a director may be removed from office at any time during his term by adoption of a special resolution at a general meeting of shareholders. However, a director who has been removed from office before the expiration of his term without justifiable reason is entitled to recover damages from the corporation.

The principle of freedom in removing a director from office, recognized by law as above, is designed to ensure the function of general shareholders meetings to supervise directors of stock corporations in which ownership and management are separated. On the other hand, in order to prevent the position of a director from becoming inordinately unstable, it is provided that the removal of a director from office requires the adoption of a special resolution at a general shareholders meeting, and that should such removal be without justifiable reason, the director in question is entitled to recover damages from the corporation. Hence, it is necessary to take into consideration the balance between the interests of the shareholders and the interests of the directors, with regard to the justifiable reason for removing the director.

In Japan there are opinions based on American law that the

term of office of a director should be reduced to one year, and, by interpreting "justifiable reason" narrowly, a general shareholders meeting should not be permitted to remove a director from office unless he has violated laws or the articles of incorporation significantly or acted fraudulently.

However, as an interpretation of the Article 256 of the Commercial Code which recognizes a two-year term of office for directors, the justifiable reason for removing a director from office is interpreted broadly, not limited to illegal or unjust acts.

The current decision followed such a prevailing doctrine in that it recognized a justifiable reason for the removal of X from office, i.e. he was unable to take part in management physically, although he was not involved in any illegal or unjust act. The decision can be supported as reasonable.

Since the question of interpreting the basis of "justifiable reason" for removing a director has not been discussed either in judicial precedents or academic circles, the current Supreme Court decision, as it dealt with the issue for the first time, should be considered having great significance.

2. Liability of a nominal representative director and a nominal director of a limited liability company (*Yūgen-Gaisha*) to a third party.

Decision by the Third Civil Division of the Tokyo High Court on Mar. 31, 1982. 1048 *Hanrei Jihō* 145.

[Facts]

Y1 (defendant and appellee) formed a limited liablity company A specializing in sales and repairs of automobiles, etc. and became representative director of the company in 1950. In 1970, Y1 left the management of the company in the hands of his eldest son B for reason of old age, thus becoming a nominal representative director dealing with only a very small portion of the company management.

On the other hand, Y2 (defendant and appellee) had been one of the directors of the company since its formation at the request

of Y1, but he had had nothing to do with the company's business for 27 years since then.

Company A's business decreased from about 1963 and began suffering excessive liabilities on a large scale. X1 and X2 (both plaintiffs and appellants) sold automobiles to Company A from about 1975 through 1976 and both had claims for credit sales against A. The company went into bankruptcy in December, 1976, and X1 and X2 were unable to recover their claims.

Then X1 and X2, on the basis of Article 30-3 (1) of the Limited Liability Company Act, filed a suit for damages tantamount to the sales amount.

In the first instance, their claims were dismissed, but the current decision altered the judgment of the original court and recognized the claim against Y1 while dismissing the claim against Y2 as in the case of the original court decision.

[Opinions of the Court]

Altered the original judgment in part and appeal in part dismissed.

(1) The duty of a representative director of a limited liability comany is to have all the business affairs reported to him and, if necessary, he must direct and supervise subordinates to see that all company business is conducted properly. Hence, even if he has assumed the post of a representative director in name only as a result of the internal situation of the company, his duties as above shall remain unchanged.

Although Y1 transferred the real power of managing the company to B, he is still partly involved in the company business and, moreover, B is his own son. Hence, it is presumed that he was in a position to learn that Company A was on the verge of bankruptcy. Even if he did not know this, he could have known it if the business affairs of Company A as a whole had been reported to him.

When the company was about to make a new purchase deal involving cars which would likely to make it insolvent, Y1 should have prevented it, but he simply left everything to the arbitrary decision and execution of B. In this regard,Y1 should be regarded as

having failed to fulfil his duty as a representative director by committing the grave error of negligence.
(2) The ordinary director (director without representative power) of a limited liability company whose articles of incorporation provide no board of directors should be considered having general responsibility to supervise the execution of business as a whole by the representative director, and see to it that such business is properly executed.

For some 27 years since he assumed the post of a director of Company A nominally, Y2 has never been asked to come to the office nor has he received any business reports. He himself has never asked for business report, either. He has not made any capital investment in the company nor has he ever received remuneration as a director. He has remained unconcerned about the management of Company A and he was not in a position to exercise any influence over Company A.

Under such circumstances, it was difficult to call on Y2 to fulfil his duties as a director. Hence, it cannot be said that at the time of Company A's purchase of automobiles he had committed an intentional act or a serious error in carrying out his duties as a director.

[Comment]

Article 266-3 of the Commercial Code provides that if a director of stock corporations is guilty of malice or of gross negligence in respect to the execution of his duties, all shall be jointly and severally liable to third persons also. Article 30-3 (1) of the Limited Liability Company Act provides for the same liability to third persons with regard to directors of limited liability company.

There are many financially weak, small-scale companies in this country. As a result, when they broke, the chances are very slim for creditors to recover their losses from the assets of the bankrupt companies.

In this regard, cases where company creditors call company directors to account on the basis of Article 266-3 of the Commercial Code or Article 30-3 of the Limited Liability Company Act have

been increasing in recent years. The current case is one of them.

Past precedents recognized the responsibility of a nominal director to a third party out of consideration for the need to protect the third party transacting business with a small-scale company. However, lower court rulings denying the responsibility of a nominal director have been on the increase.

The recent trend is that while recognizing, as a matter of theory, the supervisory obligation of an ordinary director to the execution of affairs by a representative director, the responsibility of the nominal ordinary director, who is a director only as a matter of formality, is denied in consideration of his position in the company and the circumstances which led to his assumption of the directorship.

In the current case, judgment on the liability of a nominal director to a third party is made on the basis of whether or not the director in question was capable of exerting influence on the execution of the company business in reality. The decision, in this sense, should be considered very important in that it exhibits the standard of judgment on the liability of a nominal director to a third party.

3. Abuse of the right and claim for payment of a bill after the cause, which led to the endorsement, disappeared.

Decision by the Third Petty Bench of the Supreme Court, on July 20, 1982. 1053 *Hanrei Jihō* 168.

[Facts]

Company Y1 (defendant, *Koso* appellee and *Jokoku* appellee) concluded a contract with Company A to purchase some real estate. In order to make a down payment, Company Y1 drew up a promissory note, and representative Y2 (defendant, *Koso* appellee and *Jokoku* appelee) of Company Y1 became a payee and applied his signature in the first endorsement column as a token of guarantee and gave it to Company A.

Company A then purchased construction material from Company B and in order to pay for it Company A transferred the

note in question, endorsing Business Manager X (plaintiff, *Kose* appellant and *Jokoku* appellant) of Company B as an endorsee. The construction material deal between A and B was later settled with other notes, and the causal relationship of the endorsement of the note in question existing between Company A and X thus disappeared.

Accordingly, X ought to have returned the note to Company A, but instead of returning it, X filed an action demanding that Y1 and Y2 honor the note. X's claim was dismissed both in the first and second instances.

[Opinions of the Court]

The appeal dismissed.

When a person who receives an endorsed promissary note in order to ensure credit and becomes its holder, then demands payment of the note from the drawer instead of returning it to the endorser, despite the fact that the causal relationship of the endorsement has disappeared, it is tantamount to an abuse of rights, unless there are special circumstances and the drawer can refuse payment of the note to the holder.

[Comment]

There are three conflicting doctrines on settling such cases in which an endorsee, who should return the note to the endorser upon demise of the causal relationship of the endorsed note transferred to him, instead demands that the drawer pay the note.

According to the formerly generally accepted doctrine as well as earlier precedents, it was interpreted that even after the demise of the causal relationship of endorsement, the status of a holder who once effectively became the possessor of the rights concerning the note would not be affected whatsoever by the demise of such relationship and, accordingly, the drawer cannot refuse the claim of the holder.

However, the act of exercising the rights instead of returning the note, which should have been returned following the demise of the causal relationship, runs counter to the spirit of justice.

Besides, even if the holder receives payment from the drawer, he should immediately return it to the endorser as unfairly acquired profit, so it is somewhat clearcut not to recognize the claim of the holder.

Therefore, the dominant doctrine at present denies such exercise of the right by regarding it as an abuse of the right, while at the same time, recognizing the holder of the note as possessor of the rights to the note even after the demise of the causal relationship of endorsement, on the premise of the non-causative nature of the act of handling notes as seen in the formerly generally accepted doctrine. The courts now follow such majority view.

On the contrary, the other doctrine denies the non-causative nature of the act of transferring the rights to the note, interpreting that once the causal relationship of the endorsement disappears, the rights to the note shall be returned to the endorseer, and that the holder becomes the one having no rights and that the drawer can refuse payment to the holder. But, there has been much criticism against such a doctrine in that it denies the non-causative nature of the act of transferring the rights. The current decision which followed the majority view is significant as having confirmed the standpoint of precedents.

4. Claim for the payment of a note with non-continual endorsement and suspension of limitation.

Decision by the First Petty Bench of the Supreme Court on Apr. 1, 1982. 1046 *Hanrei Jihō* 124.

[Facts]

Company X (plaintiff, *Koso* appellee and *Jokoku* appellee) filed an action on Apr. 19, 1978 demanding that Company Y (defendant, *Koso* appellant, and *Jokoku* appellant) make a payment for four promissory notes issued by Y. The payment date for the notes was Apr. 20, 1975. A was described as the payee and the first endorser and the column for the first endorsee as blank. Y was described as the second endorser.

In the column of the second endorsee of two of the four notes

the name of B was entered, and the column of the second endorsee in the remaining two notes was left blank. But, as of June 15, 1978 after the current action was filed, the description in the column of the second endorser and the column of the second endorsee in the two notes were erased. The promissory notes were to expire after a lapse of three years i.e. as of Apr. 20, 1978, but when X filed an action, the column of the second endorser was not erased and, as a result, the notes lacked a continuation of endorsement. As a result, X could not be assumed as being the possessor of the rights on the strength of the continuation of the endorsement alone. But, X proved the virtual transfer of the rights with regard to the part which lacked the continuation of the endorsement.

In the first and second instances, it was judged that the suspension of the limitation was effective on the ground that X was the rightful possessor of the notes at the time X filed the action. Dissastisfied, Y filed a *Jokoku* appeal.

[Opinions of the Court]

The appeal dismissed.

Even if a note holder does not have formal qualifications for lack of continuation of endorsement, he can exercise his rights relating to the note if his substantial rights are proved. Accordingly, the filing of an action claiming the payment on the basis of such notes shall not be considered imperfect as the exercise of the rights by the holder of such rights, and therefore the progress of the limitation for the said note shall be suspended.

[Comment]

The holder of a note with continual endorsements is presumed to be the one having the rights in the note by Article 16 (1) of the Bills and Notes Act.

However, scholars interpret with one accord that the holder of a note lacking a continuation of endorsement can also exercise his rights on the note by proving his substantial rights.

With regard to the scope of the substantial rights to be proved, some scholars are of the opinion that the holder must substantially

prove all the processes of the transfer which led to his possession of such rights. The majority view, however, interprets that the holder can exercise his rights only if he can substantially prove the transfer of rights as to the discontinued part of the endorsement. Precedents have usually followed such a view.

Although the current decision has also followed the standpoint of the majority view as well as precedents, it is significant in that it has for the first time admitted that the holder of a note which lacks a continuation of endorsement can suspend the limitation if he proves his substantial rights.

By Prof. TAKAYASU OKUSHIMA
KYOICHI TORIYAMA

7. Labor Law

Taken up here are three decisions by the petty benches of the Supreme Court as representative cases involving labor matters in 1982, namely, (1) the case involving Konohama station of the Nippon Telegraph & Telephone Public Corporation (NTT) over restrictions on the right to designate the period in which annual vacation with pay can be taken, (2) the Hotel Okura case over the validity of disciplinary action taken by the employer against the so-called "ribbon" struggle tactics whereby members of the union wear a small ribbon bearing their demands and slogans, and (3) the case involving the Tokyo Metropolitan Government's Construction Bureau over the validity of cancelling the decision to employ a local public servant.

1. NTT Konahama station case.

Decision by the First Petty Bench of the Supreme Court. Case No. (*o*) 53 of 1983. A demand for payment of wages during the annual vacation. *Jokoku* appeal dismissed. (The workers, *Jokoku*