be true: Whether the crime of "giving" is formed or not must also be examined to judge whether the crime of "delivery" is formed or not, because the responsibility of the accused for the crime of "delivery" cannot be pursued if the crime of "giving" is found to have been committed.

In fact, this point has been repeatedly disputed in inferior courts. The decision in this case, however, regarding the binding effect of the count as important, judged that the scope of a trial should be limited by the scope of the count. In this case, the procedural examination of law was given a priority over the substantive examination of law, a significant point.

[Reference: The Public Offices Election Act §221 (1) (i) and (v); The Code of Criminal Procedure §§247, 248, 312, and 378 (iii)]

By Prof. Minoru Nomura
Katsuyoshi Kato

6. Commercial Law

1. Conditions precedent to the nullification of amendments of the articles of incorporation of a limited liability company (*Yūgen-Gaisha*).

Decision by the First Petty Bench of the Supreme Court on Mar. 23, 1984. 1111 *Hanrei Jihō* 139, 524 *Hanrei Taimuzu* 197, 694 *Kinyū Shōji Hanrei* 3.

[Facts]

X1 and X2 (plaintiffs, *koso* appellants, *jokoku* appellants) were the founders of A Company, and were substantially responsible for its day to day operations. The company fell into a bad

financial state in July 1975, and B, not a party to this action, was asked to rehabilitate the company. Thereafter, B, X1, and X2 held negotiations and agreed that all shareholders but X1 and X2 should give up their interests in the company, that changes be made to the management of the company, that B be elected repesentative director, and that the company name be changed to Y Limited Liability Company (Yugen Gaisha) (defendants, *koso* appellees, *jokoku* appellees).

In September 1979, B accused X1 and X2 of window dressing of the company's financial statements and accounts, and almost simultaneously the company became dormant. On the 21st of the same month, X1, X2 and others founded C Company in which X1 became the representative director and X2 a director. C Company was floated taking advantage of Y Company and its facilities; Y Company brought a trespass action to try title to these facilities. X1 and X2 then brought the present action, alleging that special meetings of the shareholders of A Company held on November 10 and December 15, 1975, had been irregular and illegal; accordingly, the resolutions made at the meetings to amend the articles of incorporation of that company was null and void; and that the election of the new directors and the change of the company name due to the amendments should also be declared null and void.

The trial court dismissed the case holding that the special shareholders' meetings had been regular and *de jure*, and thus entered judgment for the defendants. The court of appeal was, in substance, of the same opinion.

X1 and X2 appealed further.

[Opinions of the Court]

Jokoku appeal dismissed.

If any doubt arises as to the regularity or legality of the procedures used to amend the articles of incorporation, it becomes necessary to decide whether the proper procedures have been observed. The shareholders' decision alone is not adequate to

effect an amendment. Any shareholder has standing to apply for a declaration setting aside the shareholders' resolution as null and void. However, the shareholders meeting held on November 10, 1975, was properly called and the number of attendant shareholders constituted a quoram; the resolution of amendments was regular and lawful. Therefore, X1 and X2 had no cause of action and their case should be dismissed.

[Comment]

By precedents this sort of action is available only when the relevant amendments have been registered. However, the broader view is that an action should not be limited to cases where the registration of the amendments has been effected, but should be allowed where any ostensible resolution was made and thus the validity of such amendments are ostensibly open to litigation. This Supreme Court decision made it clear that any shareholder could seek a declaration that a shareholders' resolution was null and void, as provided in the Article 41 of the Limited Liability Company Act and Article 252 of the Commercial Code, if incomplete amendments of the articles of incorporation were produced.

2. Remuneration of directors who concurrently hold the posts of employee and of director.

Decision by the 8th Civil Division of the Tokyo High Court on June 26, 1984. 1122 *Hanrei Jihō* 160, 537 *Hanrei Taimuzu* 229, 705 *Kinyū Shōji Hanrei* 10.

[Facts]

The 97th annual meeting of Y Company (defendants, *koso* appellees) resolved to increase directors' remuneration, though in exclusion of any salaries they might receive as employees. X (plaintiff, *koso* appellant), a shareholder of Y Company, brought an action for nullification of the above-mentioned resolution. His application was dismissed at first instance. He appealed. He

alleged that the practice of not separately fixing the remuneration of directors and that of employees where one person occupied these two positions at the same time violated Article 269 of the Commercial Code, and that to exclude the amount received in the form of an employee's salary from the amount received as a director's remuneration was in breach of the same provision.

[Opinions of the Court]

Koso appeal dismissed.

When fixing the directors' remuneration by a shareholders' resolution, it is lawful in the light of Article 269 of the Commercial Code to leave to the board's discretion the actual amount of the remuneration to be paid to each director. The shareholders are not required to decide the exact amount of remuneration for each director. The same line of reasoning is applied to the fixing of remuneration of directors who are at the same time employees of the company, if the system of paying the directors with wages they receive as employees has been established in the corporation.

[Comment]

Article 269 of the Commercial Code provides "The amount of remuneration to be received by the directors shall be fixed by a resolution of a general meeting of shareholders unless it has been fixed by the articles of incorporation." This was designed to prevent directors from voting themselves high salaries.

Most generally accepted views and judicial decisions hold that it is possible to exclude the employees' wages received by the director/employee from the directors' compensation when the latter is dealt with by the shareholders in a general meeting. Other observers of the corporate scene disagree, feeling that the shareholders resolution should deal with both the employees' wages and the directors' compensation of the person who occupies both positions at the same time. Otherwise, a position where the greater the wage, the lower the director's fee will pre-

vail, thus defeating the law. The present prevailing view may well be a compromise of the two views stated above: if a person receives compensation as a director and a salary as an employee, this should be disclosed at the shareholders meeting. The decision in the present case is in accord with such reasoning.

3. Injunction appointing an acting representative director and the representative directors of a corporation.

Decision by the Second Petty Bench of the Supreme Court on Sept. 28, 1984. 38 *Minshū* 1121, 1142 *Hanrei Jihō* 136, 548 *Hanrei Taimuzu* 138.

[Facts]

In Sept. 1979, A, the representative director of Y Company (defendants, *koso* respondents, *jokoku* respondents), retained X (plaintiff, *koso* appellant, *jokoku* appellant), a lawyer, to represent Y Company in an action in the Tokyo District Court for nullification of a shareholders resolution. However, on December 10 of the same year, the Tokyo District Court enjoined A from performing his duties and appointed B representative director in A's stead. On October 25, 1980, B dismissed X.

This case was brought by X to set aside the dismissal. X alleged that A, and not B, had authority to carry out the action, and accordingly the dismissal was null and void.

The court at first instance rejected X's claim, holding that an acting representative director had stepped into the shoes of the representative director who had been enjoined from performing his duties, and could exercise the power of appointing and dismissing lawyers. X appealed unsuccessfully. Then X sought a *jokoku* appeal, alleging that the injunction should not affect his action, and that an acting director did not have the right to take legal action, a right under which the appointment and dismissal of lawyers took place.

[Opinions of the Court]

Jokoku appeal dismissed.

Orders to enjoin the execution of director's duties and to appoint acting directors are termed injunctions creating a temporary power. Accordingly, when a representative director is enjoined from performing his duties, the acting representative director who may be appointed in his stead has full powers within the corporation, unless otherwise ordered. Therefore, it is not the enjoined director but the acting representative director who is empowered to represent the company and sue or be sued in all courts and participate in all actions.

[Comment]

Who should represent a company after an order enjoining a director from executing his duties and appointing acting directors had long been a controversial issue. The Supreme Court declared for the first time that only the acting director had the power to represent the company.

In the past, some lower courts were of the contrary opinion. However, the order to enjoin a representative director from executing his powers is very significant in that the acting representative director assumes all the powers to operate the corporation, including the power to sue and be sued in all courts, replacing the representative director's powers even though temporarily. Therefore, the person to represent the corporation in any legal action is not the representative director who is the subject of such an enjoining order, but the acting representative director. This is important here, as only the corporation can be sued in an action for nullification of a directors' appointment, and a representative director has standing in the action, though he must act in the best interests of the corporation, and not to benefit himself. Thus, the representative director enjoined from acting in that capacity cannot represent the corporation in such an action, for to do so could only be for the purpose of acting

in his own interests.

By Prof. Takayasu Okushima
Prof. Yoichi Nagahama
Hiroshi Haruta
Hideaki Otsuka

7. Labor Law

The following seven cases are cited as important judicial decisions in 1984. Among them, (3) and (7) are regarded as especially important and are introduced herein with brief comments.

(1) Fuse Driving School case where the civil liability of a parent company that dissolved one of its subsidiary companies and discharged all its employees on account of union activities in the subsidiary company was disputed. Decision by the Osaka High Court on March 30, 1984. (Cases Nos. (*ne*) 1557 and 1563 of 1982.) 1122 *Hanrei Jihō* 164.
(2) The Brother Industries, Ltd. case where the validity of dismissal (refusal of regular employment) due to poor results during the trial employment period was disputed. Decision by the Nagoya District Court on March 23, 1984. (Case No. (*yo*) 1092 of 1975.) 435 *Rōhan* 64.
(3) Shizunai Post Office case where the legality of disciplinary punishments (warnings and cautions) imposed on postal workers (national public officials) because of their refusal to work overtime was disputed. Decision by the Second Petty Bench of the Supreme Court on March 27, 1984. (Case No. (*gyo tsu*) 74 of 1979.) 430 *Rōhan* 69.
(4) The Japan Airlines Co., Ltd. case where the legality of dis-