gave a valuable warning against easily recognizing an exception to the rule of hearsay evidence by making much of the accused's right to confront witnesses. A further increase in cases similar to this case is expected. Therefore, it may be said that the current decision will give important guidelines for dealing with such cases.

By Prof. MINORU NOMURA
KATSUYOSHI KATO

6. Commercial Law

1. The liability of parent corporation's directors for damages incurred through a wholly owned subsidiary's acquisition of the parent corporation's shares (the so-called "Mitsui Mining Co." case).

Decision by the Eighth Civil Division of the Tokyo District Court on May 29, 1986. Case No. (*wa*) 10993 of 1978. 1194 *Hanrei Jihō* 33; 746 *Kinyū Shōji Hanrei* 28; 1078 *Shōji Hōmu* 43.

[Reference: Commercial Code, Articles 210 and 266.3.]

[Facts]

The corporation A, operating primarily coal mines and quarries, had suffered depression since about 1955 because the coal industry had been on the decline, and had not been able to declare dividends since March 1958. Under these circumstances, the corporation A tried to get rid of its dependence on the coal industry, diversify its operations and develop into a comprehensive natural-resources company.

The corporation A and several other corporations of the so-called Mitsui group had already organized a cement corporation B, with the capital of 750,000,000 yen, and the corporation A held 28.6% of the corporation B's issued shares. Under coal industry regulations, the corporation A was forced to assign its coal mining department to another subsidiary of the same group. The corporation A, which had lost its main business department, groped for a substitute business and began to study a merger with the cement corporation B, in light of the successful integration of a cement business by a competing corporation of the same business. Then the management of the corporation A began to negotiate with other corporations holding B's shares about the merger in 1975. In those days the corporation A's business was sluggish but its financial status was not so bad that it could keep going without a merger with the corporation B. Moreover, the corporation A could not expect a great promotion of its business through the merger.

C, not the party of this suit, began acquiring large amounts of shares of the corporation A from about 1972. His holdings reached 25.8% in November 1975 and he became the lead shareholder. The proposed merger was doubtful to get the majority of votes if C was against it, but Y_1 (president/director of the corporation A, defendant) successfully persuaded him to agree with the merger. However, after that C changed his mind and declared that he stood against the merger plan, because this merger would reduce his holding ratio.

On December 3, 1975, Y_1 called the managing committee composed of managing directors $Y_2 \sim Y_5$ (defendants), and a director Y_6 (defendant) who had taken charge of the negotiation with C. Considering the process of the negotiation and so on, they decided to ask a corporation D, a wholly owned subsidiary of the corporation A, to buy all of C's shares at the temporary price of 500 yen per share to be conclusively determined between C and the corporation D (the then market price of the corporation A's share was between 380 yen and 400 yen), and then to sell off all these shares to other corporations of the Mitsui group, resulting in a loss, the difference between purchase price and sales price, to the corporation D.

There was a bylaw of the corporation D that all the business policies should be previously approved by the corporation A, and its executives were from the corporation A, so the corporation D could not afford to disobey decisions of the corporation A. Thus, the corporation D bought 15,500,000 shares from C at the price of 8,215,000,000 yen (530 yen per share), and soon after sold off all these shares to other corporations of the Mitsui group at the price of 4,663,400,000 yen under the mediation of the corporation A. In the end, the corporation D suffered the loss of 3,551,600,000 yen, the difference between purchase price and sales price, in its assets.

The special shareholders' meeting of the corporation A was held on February 27, 1977, where the merger plan was approved, and the corporation B was merged with the corporation A on May 1, 1977.

Afterwards, X (plaintiff), who acquired 1,000 shares of the corporation A in March 1978, filed a derivative suit against $Y_1 \sim Y_6$ and the corporation A's other directors for damages of 100,000,000 yen on December 8, 1978, asserting that the corporation D's acquisition of the corporation A's shares came under Article 210 of the Commercial Code which prohibited a corporation's acquisition of its own shares, and had caused the loss of 3,551,600,000 yen to the assets of the corporation A.

[Opinions of the Court]

The Court ordered $Y_1 \sim Y_6$ to pay the damages deciding as follows:

(1) Formally it was the corporation D not the corporation A itself that acquired these shares, but actually it seems reasonable to regard the corporation A as the party to this contract because the same ill effects as might have arisen from the corporation A's acquisition of its own shares arose in this case. Therefore, the acquisition of these shares by the corporation D and a similar acquisition by the corporation A can be viewed in the same light.

(2) Various ill effects arise from a corporation's acquisition of its own shares. For example, such an acquisition results in the refund of paid-in capital which may cause capital impairment and

damage creditors of a corporation, and also there are possibilities of this acquisition being used as a method of purchasing and keeping control by management. In such cases, it is very difficult to recover damages. Thus, Article 210 comprehensively prohibits such an acquisition with the view of general prevention except in some cases which are enumerated in this Article. The reason for enacting Article 210 was therefore only technical and, needless to say, this acquisition is permissible unless such ill effects arise. Further, under the circumstances that some shareholder of a corporation tries to buy a controlling share with the intention of seeking selfish profit (for example, in order to force the corporation to make a disadvantageous contract, or to steal a secret of the corporation), thereby presenting the urgent danger of causing serious damage to interested parties such as other shareholders, creditors, employees and customers of the corporation as well as its management, the court considers permissible, in the light of the holding ratio and the damage to the corporation by this acquisition, the corporation's acquisition of its own shares which is used as a necessary countermeasure to hinder that shareholder's ambition and to avoid serious damage, even if above-mentioned ill effects arise.

In this case, the corporation A was under the necessity of stopping its decline and reviving its business by diversifying its operations, and the merger with the corporation B was a useful method for that purpose. The corporation A found no difficulty in this merger with the consent of C who had bought up and held a large block of A's shares, and was going ahead with this plan. But since C changed his mind just before the exchange of the merger plan and declared that he stood against this merger, the corporation A hastily tried in vain to persuade him to agree with the merger. In the end, the corporation A could not help buying its own shares from C because the management of the corporation A determined that it was the only possible time for the merger. In such a situation, one cannot always reproach the management for having made its business judgment only to defend its own interests, particularly since this merger, accomplished by the acquisition of the corporation's own shares based on this judgment, helped to stabilize and recover A's business. Certainly that was the case, but we cannot thereby necessarily conclude that there was reasonable and sufficient reason to permit this acquisition in spite of the obvious prohibition. For the corporation A was not in such a critical situation that it could not have kept going without the merger, nor was it such that it was falling into bankruptcy on account of C's self-interested action, but only that A could not have carried out the merger according to its original plan without the special resolution provided by Article 343 if C, who held 25.8% of A's shares, had been against this merger unexpectedly. If this merger had not been achieved, the corporation A might have been damaged somewhat, but the management of A should have observed the law and persuaded C, or it should have put off the merger plan without forcing this merger. In this case, easily permitting the corporation's acquisition of its own shares would help the realization of C's unfair intention (selling controlling shares at a high price outside of the market), and might make such unfair tendencies prevalent. In addition, the acquired shares were no less than 26% of all the issued shares, and it is undeniable that the corporation A suffered pecuniary damage of 3,551,600,000 yen. While it is certain that this acquisition partly contributed to the recovery of A's good business, and that the corporation A disposed of the shares immediately, those are not sufficient reasons to tolerate the above-mentioned ill effect. Taking into account all the facts above, the court may not conclude that the corporation A's acquisition of its own shares in this case was permissible in light of Article 210.

(3) Y_1 asserts that the damages pointed out by plaintiff arose not from the corporation A's acquisition of its own shares but from the resale of those shares at the reduced price.

However, it is not necessary that damages arise simultaneously from the acquisition. Moreover, this court considers damages within adequate causality of the corporation A's acquisition of its own shares to be those from the acquisition itself.

In this case, the reduction of the corporation D's assets was predictable both subjectively and objectively at the moment of acquisition, so there was a reasonable causation between the acquisition and the damages from this reduction in assets.

[Comment]

This is the first case in which the court applied Article 210 of the Commercial Code to a subsidiary's acquisition of its parent corporation's shares and found the directors of the parent corporation liable for damages. This case comprises a lot of legal problems and we can not examine all of them. Basically it seems to be sufficient to notice two of the problems.

First, in *obiter dictum* the Court admitted a unique exception to the prohibition of the corporation's acquisition of its own shares. Article 210 was established mainly for the following four reasons: ① An acquisition with the corporation's capital results in an illegal refund of paid-in capital which may cause capital impairment, and even if the shares are acquired with other assets of the corporation, the deterioration of the condition of the assets may bring about a serious slump in stock prices. ② The corporation's arbitrary purchase of shares from a certain shareholder may break the principle of equal treatment of shareholders. ③ Because voting rights of shares acquired by the corporation itself are suspended, the management can easily get the majority to confirm their control of corporation. Therefore, fairness of control can not be secured. ④ Because insider-trading and manipulation through the artificial inflation of stock prices may be done easily, fairness in the stock market is impaired.

Enacted for such technical reasons, Article 210 had been interpreted not to be applied to the case which did not cause above-mentioned ill effects aside from the exceptions enumerated in Items 1 to 4 of the Article. In this case, the Court, taking a step forward, decided that even if these ill effects arose, the corporation's acquisition of its own shares would be permitted when being used as a countermeasure to a shareholder's bull corner which might be disadvantageous to other shareholders, creditors or employees of the corporation. The Court assumed a case in which the corporation's defensive cornering of its own shares (so-called "*bōsen-gai*") was done for the sake of other shareholders at large. However, mainly because under the Japanese legal system which prohibits a corporation's acquisition of its own shares comprehensively from the standpoint of general deterrence it is useless to decide whether the "*bōsen-gai*" is done for the sake of shareholders at large or for the management's self-protection in the individual case, the interpretation of this Court is generally unaccepted.

Secondly, this case is characteristic in that the subsidiary's damages were identified with the parent's damages, and not the subsidiary's directors who acquired the parent corporation's shares but the parent's directors were judged to be liable. The Court seems to have stressed the fact that the subsidiary in this case was wholly (100%) owned by its parent corporation. By the amendment in 1981, Article 211.2 was inserted in the Commercial Code and thereby a subsidiary's acquisition of its parent's shares has come to be considered a corporation's acquisition of its own shares. Even before the insertion of the new article, most scholars interpreted Article 210 in that same way. However, though from the viewpoint of prohibition the subsidiary's acquisition may be identified with the corporation's acquisition of its own shares, from the viewpoint of damage it is questionable to consider the damages suffered by the subsidiary, which has an independent corporate entity, to be the damages of its parent corporation.

2. True amount of a promissory note on which the face amounts, " 壱百円 " and "¥1,000,000", are duplicated.

Decision by the First Petty Bench of the Supreme Court on July 10, 1986. Case No. (*o*) 1175 of 1982. 40 *Minshū* 925; 1206 *Hanrei Jihō* 3; 618 *Hanrei Taimuzu* 34.

[Reference: Article 6 of the Bills and Notes Act.]

[Facts]

X (plaintiff, *koso* appellant and *jokoku* respondent) acquired the promissory note made by the corporation Y (defendants, *koso* respondents and *jokoku* appellants), on which one face amount of Chinese characters " 壱百円 " (which means one hundred yen) was indicated in the writing space for face amount and the other of numerals "¥1,000,000" was indicated on the right side of the writing space. X demanded payment from Y of 1,000,000 yen, but Y asserted that the face amount of this note was 100 yen and refused to pay.

The court of first instance (Decision by the Gifu District Court on Dec. 10. 1981), based on Article 77 of the Bills and Notes Act, applied Article 6 (1) of the Act to this case, and decided that the face amount of the note was 100 yen. However, the court of second instance (Decision by the Nagoya High Court on July 29, 1982) found that since " 壱百円 " were not letters but figures of Chinese character Article 6 should not be applied, that experientially a note with face amount of 100 yen should not be thought to exist in the light of the value of currency at the time of its making, and that apparently just the Chinese character of "万" (which means ten thousand) was missing between " 壱百 " and "円" — namely that the face amount in Chinese characters was clearly an error made in writing the face amount in numerals — and so decided that the face amount of this note was 1,000,000 yen.

Y, dissatisfied with the decision by the court of second instance, filed a *jokoku* appeal with the Supreme Court.

[Opinions of the Court]

Jokoku appeal allowed. Original decision reversed and the Supreme Court rendered its own judgment.

(1) In this case " 壱百円 " should be considered to be the indication "with the face amount in letters" mentioned by Article 6 (1) of the Bills and Notes Act. In this Article, more importance is attached to letters than numerals because the former is written

more carefully and is less alterable than the latter. The indication of "壱百円" is a way of writing corresponding to such priority of letters. Moreover, unless we considered this indication to be letters, illogically the indication "in letters" mentioned by Article 6 would not exist because the indication in *Kana* (Japanese syllabary) is not realistic at all.

(2) In this case, it is reasonable to apply Article 6 (1) and decide that the face amount is 100 yen. This Article is a compulsory provision the purposes of which are to prevent bills and notes from being nullified when the face amounts which should be most simple and clear are duplicated and are different from each other, and to secure the safety and quickness of negotiation of bills and notes by defining in law the treatment of these duplicated indications. So by adopting the indication in letters, Article 6 submits these duplicated face amounts to the formal and uniform treatment in order to give bills and notes clarity, and the underlying rights and obligations are to be dealt with without particular rules of bills and notes. However, the court of second instance decided that, because the note of only 100 yen was hardly to be drawn considering the value of currency in those days and because the revenue stamp put on this note was 100 yen, the face amount in letters was experientially an apparent error in writing the face amount in numerals of 1,000,000 yen. This conclusion would oblige holders of bills and notes to judge such errors, but the criteria required for such judgment are so ambiguous that the safety and quickness demanded for negotiation of bills and notes would be impaired and business relations might come to be confused.

[Comment]

Applying Article 6 (1) of the Bills and Notes Act, the Supreme Court, unlike the court of second instance, interpreted "壱百円" as the indication in letters mentioned by this Article. If we considered it to be numerals like the court of second instance, just as impractically we might suppose the indication in *kana* to be that of letters. The interpretation of the face amount in

Chinese characters as that of letters is undisputed in academic theories.

With such an assumption, Article 6 (1) should in principle be applied to this case. The supporting position for the Supreme Court in applying this Article asserts that legal relations on bills and notes should be subject to the formal and uniform treatment because of the compulsiveness of this Article, and that so long as the lowest face amount is not provided by law we should not judge the low face amount to be an error in writing experientially because the low-priced note is hard to negotiate in business practice. On the other hand, someone like Judge Taniguchi in this decision regards this case as an exception to Article 6 (1), asserting that this Article does not enforce the priority of letters if the indication in letters is apparently and easily found an error or is a ridiculous and impossible amount, and that in this case unless the principle of external interpretation were amended experientially, the payer might unfairly be allowed to refuse to pay, which might hinder the negotiation of bills and notes.

By Prof. TAKAYASU OKUSHIMA
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7. Labor Law

1. Employer's order that a transferred worker should return.

Decision by the Second Petty Bench of the Supreme Court on Apr. 5, 1985. Case No. (*o*) 856 of 1981. 39 *Minshū* 675.

[Facts]

X (*jokoku* appellant) was an employee of Y_1 (*jokoku* respondent). Y_1 and A had established Y_2 (*jokoku* respondents) jointly. X had been transferred from Y_1 to Y_2 without changing