

the name of crime and the applicable statutory provision to be mentioned in order to obtain a guilty judgment. However, when the question of consolidated crimes arises, as in the current case, with only one name of crime (murder) and its applicable statutory provision mentioned in the indictment, there is enough room for us to consider that the fact of arrest and confinement was described as nothing more than events leading to the murder, and not as the subject of the trial. The reason why the system of counts was employed in the present Code of Criminal Procedure was to avoid such surprise findings as create prejudices to the defense of the accused; and mentioning the name of crime and the applicable statutory provision also serves to accomplish this goal. Thus, there has been strong criticism that the Court's judgment in this case that the fact of arrest and confinement was also the subject of the trial was an unreasonable interpretation of the indictment, which ran counter to the spirit of the system of counts, and the Court's judgment also deviated from precedent.

Prof. MINORU NOMURA  
KATSUYOSHI KATO

## 6. Commercial Law

**Who has shareholder status as against a corporation in cases where a person acquires transfer-restricted shares (i.e., shares whose transfer requires the approval of the board of directors) by auction, but the acquisition has not been approved yet by the board of directors?**

Decision by the Third Petty Bench of the Supreme Court on March 15, 1988. Case No. (o) 965 of 1986. A claim for confirmation of shareholder status, etc. 794 *Kinyū Shōji Hanrei* 3; 1273 *Hanrei Jihō* 124; 665 *Hanrei Taimuzu* 144.

[Reference: Commercial Code, Articles 204(1), 204.2(1) and 204.5.]

**[Facts]**

X (plaintiff, *koso* appellant, *jokoku* appellant) was a shareholder holding 13,082 shares in Y Corporation (defendants, *koso* respondents, *jokoku* respondents). A (not a party to this action) successfully bid for the shares at a district court auction, and received the share certificates. Y's articles of incorporation provide that the board of directors must approve any transfer of shares. As A has not yet applied to receive Y's approval for A's acquisition of X's shares as provided for by Article 204.5 of the Commercial Code, X remains a shareholder of record. But Y has disputed X's status as a shareholder in it, and since the June 23, 1980 general meeting Y has refused to allow X to exercise X's shareholder rights. Therefore, X brought an action to have the court confirm X's shareholder status, and to prohibit Y from obstructing X's exercise of shareholder rights.

The court of first instance (Decision by the Kyoto District Court on January 31, 1986) dismissed X's claim. It held that in cases where the articles of incorporation provide that a transfer of shares requires the approval of the board of directors, if a person acquires the shares by auction, until that person applies for the corporation's approval of the acquisition, the share acquisition by auction is not effective as against the corporation, but is valid between the parties to the transfer. Thus, the corporation is not obligated to treat the successful bidder (such as A) as a shareholder, and at the same time the previous shareholder (such as X) may not assert shareholder rights insisting that the acquisition by auction should be invalid because it is contrary to the share transfer restriction. X filed a *koso* appeal. Upholding the decision by the court of first instance, the *koso* appellate court (Decision by the Osaka High Court on May 30, 1986) dismissed the *koso* appeal. X filed a *jokoku* appeal from that decision.

**[Opinions of the Court]**

*Jokoku* appeal allowed.

In cases where under the proviso of Article 204(1) of the Com-

mercial Code a corporation provides by its articles of incorporation that the board of directors must approve any transfer of shares, a share transfer done without the board's approval should be interpreted to be valid as between the parties to the transfer but ineffective as against the corporation (Decision by the Second Petty Bench of the Supreme Court on June 15, 1973; Case No. (o) 91 of 1972; 27 *Minshū* 700). Therefore, the corporation should treat the transferor as a shareholder, and accordingly he has shareholder status as against the corporation. In light of the fact that the Commercial Code does not specifically provide for the effect of a share transfer done by auction and, furthermore, in the light of the *mens legislatoris* of the proviso of Article 204(1) of the Code that, for the purpose of protecting the corporation's interests, tries to prevent any person who is not agreeable to the corporation from becoming a shareholder, there is no substantial reason to make a different interpretation between the effect of above-mentioned transfer (i.e., transfer by auction) and that of a voluntary transfer. Therefore, the effect of the transfer by auction should be interpreted as explained above.

**[Comment]**

The Commercial Code, Article 204.5, provides, "In the case where the approval of the board of directors is needed for transferring the shares, the person who has acquired the shares due to auction or public sale may, by a written document stating the class and number of the shares, request the company to designate a person who will buy the shares in the event that the company does not approve the acquisition." The issue in this case is whether the previous shareholder, as a transferor, still has the status of a shareholder as against a corporation if the person who acquired the transfer-restricted shares has not yet applied to have the corporation approve their acquisition in pursuance of the provision. Besides this problem, there has also been the problem of what status the previous shareholder, i.e., a transferor, has as against a corporation if the voluntary transfer of the transfer-restricted shares was done without the board's approval, which has rarely been discussed so far. Therefore, this decision would seem to be of great significance as the first Supreme Court decision

dealing with these problems.

Regarding the effect of a voluntary transfer of transfer-restricted shares done without the board of directors' approval, the majority theory and the case law (the above-mentioned decision by the Supreme Court on June 15, 1973) are that such transfer is ineffective as against the corporation, but effective as between the parties to the transfer (the Relative Ineffectiveness Theory). On the other hand, the minority theory is that such transfer is ineffective as between the parties as well (the Absolute Ineffectiveness Theory). Nowadays, however, regardless of which of the two theories is adopted, in the case of auction everybody agrees with the interpretation that a person who acquires the transfer-restricted shares can acquire them validly before receiving the board of directors' approval, except as against the corporation.

Thus, it is important how to understand the significance of this relative ineffectiveness. This decision of the Supreme Court indicates an understanding different from that of both the court of first instance and the *koso* appellate court. We must consider this point in light of the nature of the share transfer restriction employed by the existing law. Because the share transfer restriction system under the existing law is not a real transfer restriction, but is set up in such a way that any shareholder can recover his invested capital in any case, regardless of whether he can transfer his shares to whomever he likes, the nature of this system can be viewed principally as conferring on a corporation the right to choose shareholders in the form of a purchaser-designation right. In this sense, the board of directors' approval may be interpreted to be, so to speak, a condition precedent for the transfer of shares on record. Therefore, even under the Relative Ineffectiveness Theory, unless and until the board approves the transfer, the previous shareholder as a transferor has the shareholder status, and thus the corporation must treat him as a shareholder.

Considering the above-mentioned discussion, this decision certainly reached the right conclusion. However, given that the decisions by the court of first instance and the *koso* appellate court in this case, though based on the Relative Ineffectiveness Theory, con-

cluded that the previous shareholder may not assert shareholder rights against the corporation, it seems that there is no denying the fact that this Supreme Court decision insufficiently demonstrated the meaning of relative ineffectiveness.

**Prof. TAKAYASU OKUSHIMA**  
**NOBUO NAKAMURA**

## **7 . Labor Law**

### **1. Alteration of work rules for the calculation of severance allowance.**

Decision by the Third Petty Bench of the Supreme Court on February 16, 1988. Case No.(o) 104 of 1985. 42 *Minshū* 60.

#### **[Facts]**

X<sub>1</sub>, X<sub>2</sub> and X<sub>3</sub> (plaintiffs, *koso* appellants, *jokoku* respondents) had been employees of A (an agricultural cooperative association). X<sub>1</sub>, X<sub>2</sub> and X<sub>3</sub> became employees of Y (defendants, *koso* respondents, *jokoku* appellants) when A and six other agricultural cooperative associations merged and formed Y. Several years after the merger, X<sub>1</sub>, X<sub>2</sub> and X<sub>3</sub> retired at Y's mandatory retirement age.

At the time of the merger, Y made work rules to cover all of the diverse working conditions of the seven agricultural cooperative associations. Of the seven associations, A had provided the highest level of severance allowance; Y's work rules, however, fixed a level lower than what A's level had been. Thus for A's former employees, the work rules for calculating severance allowance were changed to their detriment. Although special measures were taken to mitigate the disadvantages suffered by A's former employees, the level of severance allowance was lowered from 64 months' amount of basic pay to 55.55 months' amount for X<sub>1</sub>, from 55 months' amount to