may be safely said that promotion of legislative studies in terms of the requirements, procedures, etc. that can meet the nature of eavesdropping will be a theme in the future.

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6. Commercial Law

1. A case concerning standing to sue regarding an action for nullifying a merger by the co-successors of shares without any appointment of the exercising person and its notification.

Decision by the Third Petty Bench of the Supreme Court on February 19, 1991. Case No. 1059 (*o*) of 1989. A case concerning an action for nullifying a merger between joint stock companies. 1389 *Hanrei Jihō* 140, 761 *Hanrei Taimuzu* 154, 876 *Kinyū Shōji Hanrei* 3, 1297 *Kinyū Hōmu Jihō* 29.

[Reference: the Commercial Code, Articles 203(2) and 415.]

[Facts]

X, the plaintiff (*koso* appellant, *jokoku* appellant), and the others are co-successors of the shares of Y company (the defendant, *koso* respondent and *jokoku* respondent), which had been held by A, a founder of the business of Y. This company had concluded a agreement for merger with B. The later company was absorbed into the former. X brought an action for nullifying this merger (see Article 415 of the Commercial Code) on the grounds that the agreement for merger had never been approved by the general meetings of the two companies.

Y is a joint-stock company (*kabushiki-kaisha*) which issued a total

of 10,000 shares, of which 40 percent (4,000 shares) were held by A. In addition, A also held 5,040 shares of B company, 63 percent of the total number of shares issued (8,000).

On February 23, 1985, A died, and the shares of these two companies passed to four successors who accordingly became co-owners of these shares. Article 203(2) of the Commercial Code provides: "Where a share belongs to two or more persons in common, such co-owners shall appoint one from among them who is to exercise the rights of a sharehoder." Regardless of this provision, they never appointed anyone to exercise such rights, because these co-successors were undertaking proceedings of conciliation for effecting a partition of the estate.

Under these circumstances, the directors of Y and B proceeded with the merger, and made an agreement that after the amalgamation of the two companies, Y would continue to exist, while B would be dissolved. On October 1, 1986, registration of alteration in consequence of the merger was carried out.

X claimed that neither the resolution by the shareholders' meeting held by Y, which approved the agreement for merger, nor the report to the meeting concerning the merger between Y and B exists. Y made a plea that X did not have standing to bring an action to nullify the merger because the partition of the estate among the successors was yet in progress and the successors had not yet appointed a person to exercise their rights nor made notification to the company.

Both the court of first instance and the court of second instance rejected the X's claim, and thus, X made a *jokoku* appeal.

[Opinions of the Court]

Original decision reversed and remanded.

When co-successors happen to become co-owners of shares by succession, it is required, in accordance with the Commercial Code, Article 203(2), that they should appoint a successor "to exercise the rights of a shareholder", make notification of this to the company, and that their rights as shareholders must be exercised only by this appointed successor (see Decision by the First Petty Bench of the

Supreme Court on January 22, 1970, Case No. 867 (*o*) of 1967, 24 *Minshū* 1). Accordingly, in the case that co-successors bring an action for nullifying a merger in accordance with Article 415 of the Commercial Code, establishing the title as the co-owners of the shares, it is appropriate to interpret that they have no standing to bring an action when the successor has not been appointed to exercise the rights, nor notified such appointment to the company, except in cases with special circumstances.

When, as in this case, the merger has been registered assuming the existence of a resolution by the shareholders' meeting approving the agreement for merger, if the shares co-owned by the co-successors correspond to a majority of the total number of issued shares of one or both companies of the merger, such special circumstances, however, even if these co-successors who own in common the shares have never appointed a person to exercise the rights, nor notified such appointment to the company. Accordingly, it is proper to interpret that these co-successors have standing to bring an action for nullifying a merger by reason of the non-existence of such resolution by the shareholders' meeting.

[Comment]

As Article 898 of the Civil Code provides that "In cases there exist two or more successors the property succeeded to is in their co-ownership", the shares of this company owned by the successors (plaintiff) in this litigation, are the object of co-ownership. On the other hand, Article 203(2) of the Commercial Code provides that "Where a share belongs to two or more persons in common, such co-owners shall appoint one from among them who is to exercise the rights of a shareholder". In the case of co-succession of shares, these are not naturally divided, but, until the partition comes to an end, these are co-owned by the successors in proportion to their distribution (see Decision by the First Petty Bench of the Supreme Court on January 22, 1970, 24 *Minshū* 1; Third Petty Bench on October 8, 1977, 31 *Minshū* 847). Thus, these co-successors must appoint someone among them to exercise the rights of shareholder, submit a notice of this representation, and register on the list of shareholders.

They may exercise their rights only in the name of this representative.

When such appointment and notice is not carried out, co-owners cannot exercise any claim to dividends, voting rights, or any other rights of shareholders. In this litigation, the plaintiff claims nullification of a merger. However, there are statutory limitations concerning persons entitled to bring an action for nullification of a merger; Article 415 of the Commercial Code provides that "An action for nullifying the amalgamation may only be brought by a shareholder, director, liquidator, administrator in bankruptcy of each of the companies or by a creditor who has disapproved of the amalgamation". The plaintiff does not request the affirmation of non-existence of a resolution of a shareholders' meeting, but he demands nullification of the merger on the premise that no resolution which approves the agreement for merger exists. Though the plaintiff is a shareholder of one of the companies in the meaning of Article 415 of the Commercial Code, as long as the action for nullifying the merger is one of the rights of shareholders, the decisions of the lower courts denying the standing to sue of the plaintiff without the required appointment and notification are proper.

Some opposing opinions are found in doctrinal argument. Article 252 of the Civil Code provides that "Except in the case mentioned in the preceding Article all matters relating to the administration of the thing jointly owned shall be determined by a majority in the value of the co-owners; however each co-owner is entitled to do any act of preservation." It may be considered that an action for nullifying a merger itself should be deemed as such an "act of preservation". This opinion concludes that the plaintiff in this case might be granted standing to bring an action.

In the current case the Third Petty Bench justified this conclusion under the principle of good faith (Article 1(2) of Civil Code). The defendant insists on the validity of the merger. If the plaintiff has no standing to bring a suit because of the lack of appointment and notification required by Article 203 of the Commercial Code, the resolution of the shareholders' meeting which approved the agreement for merger may be invalid. Although this kind of resolution presumes the fulfilment of the conditions of Article 343 of the Com-

mercial Code. ("The resolutions shall be adopted by two-thirds or more of the votes of the shareholders present who hold shares representing more than one-half of the total number of the issued shares"), 40 percent of the shareholders of Y Company and 63 percent of the shareholders of A Company have never appointed a representative to exercise voting rights. Accordingly, the defendant himself recognizes the defect of the merger.

2. The extinctive prescription of the claims to demand of restitution of unjust enrichment issued from an insurance payment paid by the insurer without liability.

Decision by the Second Petty Bench of the Supreme Court on April 26, 1991, Case No. 1232 (*o*) of 1989. A case requesting the refund of an insurance payment. 1389 *Hanrei Jihō* 145, 761 Hanrei Taimuzu 149.

[Reference: Commercial Code, Article 522; Civil Code, Article 703.]

[Facts]

X, an insurance company (plaintiff, *koso* appellant, *jokoku* appellant), issued a insurance policy on June 28, 1977 to insure a vessel owned by A, a trading company. Under this insurance contract, X was the insurer, A the insured; the insurable value, maximum insured amount and insured amount were all set at 70 million yen.

On June 18, 1973, the insured vessel had been sold by Y, another trading company (defendant, *koso* respondent, *jokoku* respondent), to A. On approximately June 28, 1977, for security of payment of 6.47 millon yen, the purchase price, A and Y concluded a pledging contract, the object of which was the claim on the amount insured of A against X, and X gave consent to this pledging contract, with Y becoming the pledgee.

On September 15, 1977, the insured vessel was lost in a foundering accident, and therefore, on December 27, 1977, the insurer X paid the amount insured to the pledgee Y in exchange for a receipt which stated a promise as follows; "If it is brought to light afterwards that the insurer is not liable to pay, Y will bear all liability

and all insurance payments will be refunded."

Six years later, it was exposed that the accident had been purposely caused by a director of the insured in conspiracy with the master of the ship in order to fraudulently acquire the insured payment. On September 7, 1983, they were arrested, and on July 19, 1984, were judged guilty.

Since under these conditions the insurer is not bound to make indemnification against any loss (Articles 641 and 829 of the Commercial Code), on September 4, 1986, the insurer sued the pledgee, who received the amount insured without title.

The demand of the plaintiff was the restitution of unjust enrichment that had been issued by the payment of the amount insured without liability. The defendant made a plea that this claim was extinguished by the five year prescription under Article 522 of the Commercial Code, insisting that the 10 year prescription of Article 167 of the Civil Code should not be applied to this kind of claim.

Article 522 of the Commercial Code prescribes as follows: "Except as otherwise provided for in this Code, a claim which has arisen out of a commercial transaction shall be extinguished by prescription if it is not exercised within five years. However, if a shorter period for prescription is provided for by other laws or ordinances, such provision shall apply," and Article 167 of the Civil Code states as follows: "A claim shall lapse if it is not enforced for ten years."

The court of first instance rejected the claim of the plaintiff stating as follows; the right to demand unjust enrichment does not arise from juristic acts, however, both the insurance payment and the claim of restitution by reason of unjust enrichment has a common commercial transaction as a fundamental legal relationship, and this payment and refund together shall require the rapid resolution just as the two sides of a coin. Therefore, Article 522 of the Commercial Code shall be applied to obligations arising from commercial transactions as well as the claim to refund the unjust enrichment as a result of the invalid commercial transaction. Accordingly, the claim of the plaintiff has been extinguished by the five year prescription.

The court of second instance supported the judgment of first instance and rejected the *koso* appeal by the plaintiff on similar rea-

sons of the decision by the court of first instance.

Thus, the *koso* appellant, X, made a *jokoku* appeal.

[Opinions of the Court]

The Court allowed the *Jokoku* appeal.

When the court intends to apply Article 522 to a certain obligation, this obligation should have arisen from a commercial transaction. Indeed the right to demand restitution by reason of unjust enrichment in this litigation is a demand, the purpose of which is the refund of the insurance payment, that had been performed from insurer to pledgee in accordance with that policy and pledge creating contract, but this obligation is created by legal provisions, since the cause of payment had been extinct as a result of the legal immunity of the insurer. This case, therefore, should not have any reasonable necessity of consideration about the rapid resolution of commercial transaction relationships.

[Comment]

The plaintiff invoked a promise accepted by the defendant, written on the receipt on December 28, 1977, stating, "If it is brought to light afterwards that the insurer is not liable to pay, Y will bear all liability and all insurance payments will be refunded."

This promise constitutes performance of payment with a reservation. The promise was made to avoid application of Article 705 of the Civil Code which provides that, "If a person, who has effected an act of performance purporting thereby to discharge an obligation, was aware at the time that no such obligation existed, he cannot demand the return of the subject-matter of such act of performance."

On the other hand, the insured vessel, which was lost in an accident on September 15, 1977, and therefore the insurer paid the amount insured as stated above. But seven years later, in 1984, it was learned that the accident had been purposely caused by the insured in order to fraudulently acquire insurance payment, and under this condition the insurer is exempt from the obligation to pay by Articles 641 and 829 of the Commercial Code. The former states "The insurer is not bound to make indemnification against any loss

arising from the nature of or defects in the subject-matter of the insurance, from its wear and tear or from the bad faith or gross negligence of the person effecting the insurance or of the insured," and the latter provides that "The insurer is not bound to make indemnification against the following losses and expenses: (1) Any loss arising from the nature of or defects in the subject-matter of the insurance, from its wear and tear or from the bad faith or gross negligence of the person effecting the insurance or of the insured . . . ." Thus the insurer sued the pledgee-accipiens to recover the paid amount.

The lower courts explained the right to demand restitution of unjust enrichment on the occasion of an invalid commercial transaction as "the two sides of a coin" with this invalid operation. But this concept was not accepted by the Supreme Court. To be sure, Article 522 of the Commercial Code prescribes only about "a claim which has arisen out of a commercial transaction."

The decision of the court of appeal invoked a case of the Supreme Court, a decision by the Third Petty Bench on November 1, 1960, that relates to a claim to recover the former state (or original position) founded on the rescission of contract (Article 545 of the Civil Code "If one of the parties has exercised his right of rescission, the other party is bound to restore the former to his original position; however, the rights of third persons shall not be prejudiced thereby."), and therefore the court of appeal stated that the claim to demand restitution of unjust enrichment in this case may be extinguished by the same period of extinctive prescription which must be applied to the claim for restoration of Article 545 of the Civil Code because these two claims have the same nature.

However, the rescission of contract is the result of the execution of a right to rescission. The claim to restore the former state is a right which shall be issued as a result of transformation of legal relationship by the declaration of rescissory intention, while the claim to recover unjust enrichment is a right which shall be issued by the legal provision when the legal relationships as cause of performance (ex. *causa solvendi, causa donandi, causa credendi*) have been inexistent or invalid. These two claims are different. Therefore, Article

522 of the Commercial Code should not be applied to the latter, but only to the former. The logic of the inferior courts is not persuasive.

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7. Labor Law

Effect of Work Rules on Overtime Work and Worker's Obligation

Decision by the First Petty Bench of the Supreme Court on November 28, 1991. Case No. (*o*) 840 of 1986, 45 *Minshū* 1270.

[Facts]

X (plaintiff, *koso* respondent, *jokoku* appellant) was an exployee who worked at a factory of Y (defendant, *koso* appellant, *jokoku* respondent). One day, although Y ordered X to work overtime, X refused the overtime work.

Both the work rules of Y and an collective agreement concluded between Y and A (a trade union, which X was a member of) provided that Y may prolong the daily working hours beyond 8 hours according to the overtime agreement when business operations require.

The overtime agreement provided that Y may prolong normal working hours in the following cases: (1) work to ensure delivery on the appointed date; (2) calculation of wages to be paid soon, inventory, audit, payment and related work; (3) pipelaying or wiring work, which should be done outside the operating hours; (4) pressing work for changes location, installment and repair of equipment; (5) work required to achieve the production target; (6) unavoidable overtime work by reason of its nature; (7) work similar to afore-