4. Law of Civil Procedure and Bankruptcy

1. A case in which it was held that the invalid service of a complaint is recognized as a cause of retrial.

Decision by the First Petty Bench of the Supreme Court on September 10, 1992. Case No. (*o*) 589 of 1991. A *jōkoku* appeal requesting retrial of a default judgment. 46 *Minshū* 553; 1437 *Hanrei Jihō* 56; 800 *Hanrei Taimuzu* 106.

[Reference: Code of Civil Procedure, Articles 171(1) and 420(1).]

[Facts]

A, the wife of X (plaintiff, *kōso* respondent, *jōkoku* appellant), purchased some luxury goods with X's credit card. Afterward, the issuer of this credit card, Y (defendant, *kōso* appellant, *jōkoku* respondent), sued X for advance payment (the prior action). A complaint and a summons to the first session of oral proceedings were delivered to B, X's daughter who lived in the same residence as X. But B did not turn them over to X. All subsequent documents relating to the proceedings were delivered to A. A, however, did not turn these documents over to X. Thus, it was without X's knowledge that a judgment was pronounced in favor of Y, and the judgment became irrevocable (a default judgment).

Later, X learned of this irrevocable judgment. X claimed that there was a cause of retrial as prescribed in the Code of Civil Procedure (hereinafter referred to as CCP), Article 420(1)(iii), as the service of the complaint was invalid, and requested a retrial. The court of first instance granted the retrial action by X, set aside the irrevocable judgment of the prior action, and dismissed Y's claim.

Y filed a *kōso* appeal. The *kōso* Appellate Court set aside the judgment of the court of first instance and rejected the retrial action by X on the following grounds: the substituted service delivered to B was invalid, because B, who was seven years old at the time, could not be recognized as having "sufficient intelligence to understand that a service was being made" (CCP, Article 171(1)). But,

with regard to the substituted services delivered to A, especially the service of an exemplification of judgment, there was no reason to consider them invalid. So when the exemplification of judgment was delivered to A, X was (fictionally) regarded as having learned of all errors in the services and as having come to be able to file a *kōso* appeal based on these errors. However, X did not file a *kōso* appeal. Therefore, a cause of retrial could not be recognized (proviso of the CCP, Article 420(1)).

X filed a *jōkoku* appeal.

[Opnions of the Court]

Original decision reversed and remanded.

The decision was based on the premise that the substituted service delivered to B is invalid and the substituted services delivered to A are valid.

(1) There is no reason to treat differently a case in which a complaint was not served validly and a judgment was pronounced without having given the defendant an opportunity to participate in the action and a case in which a person who acted as if he were a representative of a party did not actually have the power of representation. Therefore, it is reasonable to interpret the law to mean that in the instant case there is a cause of retrial prescribed by the CCP, Article 420(1)(iii).

(2) Even though an exemplification of judgment was served validly to the defendant and he did not file a *kōso* appeal, since he could not actually learn of the causes of retrial, the proviso of Article 420(1) can not be applied.

[Comment]

Previously, Article 420(1) of the CCP has generally been understood as enumerating the only ten causes of retrial. But, recently, there are strong opinions that, since the causes for retrial prescribed by Article 420(1) stand on the grounds of gross procedural errors, when there are procedural errors as serious as these causes, analogous or corresponding application of Article 420(1) should be recognized. It seems that the Supreme Court also subscribes to this way

of thinking.

Article 420(1)(iii) states that a retrial may be admitted "when there is no power of legal representation, power of procedural representation, or authorization necessary for a representative to perform certain procedural acts." This cause stands on the grounds that an opportunity for participating in action was not secured by a party. Thus, the next question concerns what kinds of defects of an opportunity for participating are to be regarded as procedural errors as serious as this cause.

The service of documents related to proceedings is indispensable to secure an opportunity for the parties to participate in an action. The validity of service is the most important aspect of due process. Therefore, proceedings in which all services to a party were invalid, needless to say, fail in due process, and it is natural that a judgment pronounced under these circumstances may be set aside through retrial (see the decision by the Takamatsu High Court on May 28, 1953, 6 *Kōminshū* 238).

In this case, however, only the service of the complaint and the first summons were invalid. According to the opinion of the Supreme Court, so long as the service of a complaint is invalid, retrial may be admitted, and the valid services of the other documents need not be taken into consideration. The meaning of the decision by the Supreme Court can be understood as follows: not only providing an opportunity for the defendant to learn of an action through the service of documents necessary, but also providing an opportunity for the defendant to understand the details of the action so as to be able to refute the plaintiff's claim is also indispensable to secure an opportunity for him to participate in the action.

It is doubtful that the Supreme Court treats provision of an opportunity to participate in an action entirely in relation to the validity of the service. In this case, supposing a complaint had been served by means of a service by public notice or a substituted service delivered to A, retrial would not have been admitted.

With regard to the validity of service by public notice and substituted service, delivery to the person to be served is not necessary in all cases. If delivery of certain types of documents relating to

proceedings, particularly a complaint is not made, the proceedings cannot be commended or advanced, or a judgment does not become irrevocable. However, if actual delivery to the person to be served were always required, the opposing party would be deprived of the opportunity to protect his rights. The system of service secures an opportunity for participating on the one hand, and an opportunity for protection of rights on the other. However, like the hypothetical case mentioned above, there are cases in which a valid service is not consistent with providing an opportunity for participation. In such cases, analogous or corresponding application of the cause of retrial prescribed by Article 420(1)(iii) should be recognized. But when there are reasons to impose the responsibility upon the person to be served, retrial may not be admitted. This is because the provision of an opportunity for participation is premised on the duty of a citizen to positively cooperate with judicial proceedings in a responsible manner. The case of a substituted service is not excluded. Therefore, only when the service was not actually delivered to the party in question and he did not know this, and there is no reason to impose responsibility upon him, e.g. a person whose *de facto* interests were in conflict with those of the person to be served received the documents and later disposed of them, can it be said that although the substituted service is valid, an opportunity for participation was not secured by the party.

Furthermore, according to the opinion of the Supreme Court, even though the service of an exemplification of judgment was valid, when the person to be served could not actually learn of this, the proviso of Article 420(1) of the CCP can not be applied. This proviso provides that if a party could claim procedural error by means of both appeal and retrial, he should file an appeal. However, as in this case, when a party cannot actually learn of the cause of appeal, it is natural that he cannot file an appeal. Therefore, in this situation, it is to be commended that the Supreme Court required actual provision of an opportunity for participation.

2. A case in which it was disputed whether a suretyship which a bankrupt had made for the benefit of others without reward may be avoidable under Article 72(5) of the Bankruptcy Act.

Decision by the Eleventh Civil Division of the Tokyo High Court on June 29, 1992. Case No.(*ne*) 3210 of 1990. A *kōso* appeal requesting confirmation of a bankruptcy claim. 1429 *Hanrei Jihō* 59; 1348 *Kinyū Hōmu Jijō* 34.

[Reference: Bankruptcy Act, Article 72(5).]

[Facts]

C and D (C's wife), managers of A Corporation, had wholly stood surety for the existing and future obligations of A Corporation to B Credit Association with regard to a credit transaction between A Corporation and B Credit Association (suretyship ①). In June, 1988, when A Corporation received a loan of 4 million yen from B Credit Association, X Credit Assurance Society (plaintiff, *kōso* appellant) stood surety for the loan in accordance with a request by A Corporation (suretyship ②). At that time, C and D stood surety for X Credit Assurance Society's future acquiring exoneration claim against A Corporation. (This suretyship is at issue in this case, and hereinafter referred to as "the suretyship.")

Afterwards, A Corporation did not pay back the loan, so X Credit Assurance Society subrogated to B Credit Association. In November, 1988, C and D were adjudged bankrupt, and Y (defendant, *kōso* respondent) was appointed as a trustee in bankruptcy. X Credit Assurance Society filed a bankruptcy claim based on the suretyship. But on the day for investigation of claims, Y raised an objection to X's claim, asserting that the suretyship came under Article 72(5) of the Bankruptcy Act and so he (Y) would avoid it. In response to this objection, X Credit Assurance Society brought an action requesting confirmation of the claim.

The court of first instance dismissed X's claim holding as follows: C and D did not receive any reward for the suretyship, nor did they have any legal obligation to be sureties. Therefore, the suretyship falls within the scope of "gratuitous act" of Article 72(5) of the Bankruptcy Act, and so the trustee in bankruptcy can avoid

this suretyship (see the decision by the Tokyo District Court on August 2, 1990).

X filed a *kōso* appeal.

[Opinions of the Court]

Original (Tokyo District Court) decision repealed.

In general, it is construed that suretyship or hypothecation, mortgage, etc. voluntarily made by a bankrupt for the benefit of others, even if it directly motivates a creditor to accomodate a loan to a original debtor, falls within the scope of "gratuitous act" of Article 72(5) of the Bankruptcy Act, unless the bankrupt receives economic benefit for it (decision by the Second Petty Bench of the Supreme Court on July 3, 1987, Case No.(*o*) 734 of 1983, 41 *Minshū* 1068; decision by the Second Petty Bench of the Supreme Court on July 10, 1987, Case No.(*o*) 735 of 1983, 151 *Saibanshū Minji* 369). In this context, the assertion of the *kōso* respondent is reasonable in a general way. However, according to the purport of the right of avoidance, it is also natural that acts which are to be avoided under Article 72(5) of the Bankruptcy Act should be limited to those that decrease bankrupt's estate and do harm to other bankruptcy creditors (so-called "requirement of harmfulness").

Applying the above-mentioned general theory to the current case, C and D had wholly stood surety for the credit transaction obligation of A Corporation to B Credit Association, and as a result of this, C and D were obligated to subrogate the loan to B Credit Association regardless of the suretyship at issue. Therefore, it is not true that C and D bore more burden because of the suretyship. If it had not been for the suretyship at issue in this case, as a legal effect of the subrogation, X Credit Assurance Society could lawfully and naturally exercise B Credit Association's claim against A Corporation, including the claim against C and D (sureties) based on the original comprehensive suretyship ①, to the extent of exoneration. Therefore, it is reasonable to conclude that the suretyship at issue made by C and D did not cause any loss to bankruptcy creditors or the bankrupt's estate.

As mentioned above, the bankrupt's estate did not sustain any

loss by the suretyship at issue, and it is not permissible to avoid the suretyship under Article 72(5) of the Bankruptcy Act, since the suretyship does not satisfy the "requirement of harmfulness".

[Comment]

In certain cases specified by statute, transfers of asset which have been performed by a bankrupt before adjudication of bankruptcy within a certain period may be avoided for the benefit of the bankrupt's estate by the trustee (the right of avoidance: Bankruptcy Act, Articles 72–86). In the case of preference, this applies only to transfers taking place 30 days or less prior to filing of the petition or prior to suspension of payments at the longest (Bankruptcy Act, Articles 72(2)–(4)), while in the case of gratuitous act, e.g. gift, the critical period is extended to six months prior to the filing or prior to the suspension, and furthermore, neither fraudulent intent of the bankrupt nor notice of the transferee is required (this type of avoidance, i.e. avoidance against gratuitous act under Article 72(5) of the Bankruptcy Act, is hereinafter referred to as "gratuitous avoidance"). This is because gratuitous acts are very likely to cause losses to bankruptcy creditors and there is little necessity to consider the interest of the transferee.

In the current case, it was disputed whether a suretyship which a bankrupt had made for the benefit of others without reward may be avoidable under Article 72(5) of the Bankruptcy Act. With regard to this issue, there has long been disagreement among academic theories. The formerly accepted theory denied the application of gratuitous avoidance to suretyship, based on the following reasons: Indeed, a surety bears obligations arising from suretyship, but at the same time he acquires future exoneration. Since this exoneration is considered a "quid pro quo," suretyship is onerous and does not fall within the scope of "gratuitous act" of Article 72(5) of the Bankruptcy Act. Recently, however, in opposition to this, a theory which permits the application of gratuitous avoidance to suretyship has prevailed. This theory is that a future exoneration cannot be considered a "quid pro quo" for suretyship, and that whether a suretyship is gratuitous or onerous should be judged according to the

criterion of whether a bankrupt receives something as a "quid pro quo," and so, even if the suretyship is onerous for a beneficiary (creditor), as long as a bankrupt receives no benefit, it corresponds to a gratuitous act as provided for in Article 72(5).

On the other hand, the Great Court of Judicature and the Supreme Court (quoted in the Opinions of the Court) have affirmed the application of gratuitous avoidance to suretyship, holding that a guaranty (suretyship) voluntarily made by a bankrupt for the benefit of others, even if it directly motivates a creditor to accomodate a loan to the original debtor, falls within the scope of "gratuitous act" of Article 72(5) unless the bankrupt receives economic benefit for it (decision by the Second Petty Bench of the Supreme Court on July 3, 1987; see decision by the Great Court of Judicature on August 10, 1936, 15 *Minshū* 1680). This view is consistent with the above-mentioned prevailing theory. Also, a majority of lower court decisions have held the same view and decided whether a suretyship is gratuitous or onerous in the light of the existence of economic benefit received by bankrupt (see decision by the Urawa District Court on February 26, 1955, 6 *Kaminshū* 358; decision by the Tokyo High Court on June 14, 1962, 134 *Hanrei Taimuzu* 55; decision by the Tokyo High Court on March 18, 1981, 446 *Hanrei Taimuzu* 111; decision by the Nagoya High Court on July 18, 1985, 729 *Kinyū Shōji Hanrei* 20; decision by the Tokyo District Court on April 23, 1986, 1224 *Hanrei Jihō* 127).

Despite this stream of precedents and academic theories, the current decision denied application of gratuitous avoidance to a suretyship, and thereon received much attention. However it must be noted that the current decision was not to deny the application of gratuitous avoidance to suretyships as a general rule. It was because the suretyship at issue in this case did not satisfy the "requirement of harmfulness" that the current decision did not permit Y (trustee in bankruptcy) to avoid the suretyship. In this case, there was another suretyship (suretyship ①) made by C and D, which wholly covered A Corporation's obligation arising from the credit transaction between A Corporation and B Credit Association. So, even if it had not been for the suretyship at issue, C and D would have been ob-

ligated to pay A Corporation's loan based on suretyship ①. Therefore, the suretyship did not cause any loss to the bankrupt's estate and bankruptcy creditors; that is, the suretyship did not satisfy the "requirement of harmfulness," and thereby the current decision denied the application of gratuitous avoidance to the suretyship at issue.

In sum, the current decision, while affirming the application of gratuitous avoidance to suretyship as a rule, denies the application in cases that bankruptcy creditors sustain no damage by the suretyship. It is primarily because gratuitous acts decrease the bankrupt's estate and are harmful to bankruptcy creditors that these acts may be avoided. In the current case, since there had been another suretyship covering the same obligation, the suretyship at issue was harmless for the bankrupt's estate and bankruptcy creditors. Consequently, the current decision, which denied the application of gratuitous avoidance to such suretyship by reason of lack of the " requirement of harmfulness," seems to be reasonable. This type of dual suretyship is often seen in practice, so the current decision is noteworthy on financial practice.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which a plea of excessive self-defense applied to one of two co-principals but not the other.

Decision by the Second Petty Bench of the Supreme Court on June 5, 1992 Case No. (*a*) 788 of 1992. A case involving defendants charged with murder, violation of the Immigration-Control and Refu-