(or female) child', or other terms of status were entered in the space concerning lineal relationship with the head of household on a register of residence. On the other hand, in the case of an illegitimate child who had been acknowledged by his/her father, he/she should have been described simply as 'the child' in the space. After the revision, such a distinction was abolished and 'the child' is the only way of description. From March, 1 1995 onward, a register of residence with the new style will be issued. On the family register (*Koseki*), the distinction in form between a legitimate child and an illegitimate remains ('the eldest male (or female) child' indicate a legitimate child, but, 'male' and 'female' for an illegitimate child). The family register is not likely to be reformed for a while.

As mentioned above, from 1993 to 1994, the issues on the discrimination between legitimate children and illegitimate children were suddenly highlighted and there is a huge movement for equalization. While it seems to be impossible to stop the move, in some academic opinions it is claimed that the discussion on these issues in Japan has not been sufficient and the matter needs to be considered more coolly and deliberately.

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4. Law of Civil Procedure and Bankruptcy

1. A collusive action conducted by a representative director of a stock corporation and the cause of retrial provided in the Code of Civil Procedure, Article 420(1)(iii).

Decision by the First Petty Bench of the Supreme Court on September 9, 1993. Case No. (*o*)1765 of 1991. A *jōkoku* appeal requesting retrial as to a claim of a payment in advance. 47 *Minshū* 4939; 1481 *Hanrei Jihō* 136; 835 *Hanrei Taimuzu* 271.

[Reference: Code of Civil Procedure, Article 420(1)(iii).]

[Facts]

In April 1987, Y (defendant, *kōso* respondent, *jōkoku* appellant) sued X (plaintiff, *kōso* appellant, *jōkoku* respondent) for the return of an advance payment (the prior action). A, who was a representative director of X at the time, appeared in court on the date of the first session of oral proceedings, and made a statement of cognizance. As a result, on June 16, 1987, a judgment in favor of Y was pronounced. X did not file a *kōso* appeal, and the judgment became irrevocable on July 4, 1987.

There had been an internal dispute between A and the other directors of X before the prior action. On October 9, 1987, a representative director nisi of X was appointed by the court. Later, on January 29, 1988, B, A's second son, took up the post of representative director of X and requested the retrial.

The following are the claims made by X in this case: the prior action aimed at having Y win the case and collect money from X, and the debt owed by X was a fictitious one which A made in collusion with Y. X insisted that A did not have the right to represent X in the relationship to Y, for Y was an accomplice of A, who himself had Y sue X only for his own interest. In the prior action, X was thus not represented by a genuine representative and so there is a ground for a retrial according to Article 420(1)(iii) of the Code of Civil Procedure (CCP).

The court of first instance, the Tokyo District Court, dismissed X's request for the following reasons: it is not recognized that there were objective circumstances under which A's representative right was made questionable. If the existence of a credit was confessed, the court can no longer deny the credit. Under the present legal system, there is no interpretation that a representative loses his representative right because his real motives are unlawful and that a retrial is expected for a procedural action conducted with an illegal motive.

X filed a *kōso* appeal, citing the judgment of the Supreme Court on September 5, 1963 (17 *Minshū* 909). X claimed the following: for a representative to conduct procedural actions within his right for his own interests or those of a third person establishes a ground for

a retrial based on Article 420(1)(iii) of the CCP, by analogy with the case of an unauthorized representative where the principal is able to require a retrial, if the adverse party knew or should have known the intention of the representative.

The Tokyo High Court, approving X's claim, reversed and remanded the original decision. The court stated: it is an abuse of power that a representative director conducts a legal action in favor of himself and therefore the action is not invalid. However, the spirit of the judgment of the Supreme Court cited by X above can be applied to procedural actions. When a representative director conducts a procedural action as a representative of a corporation for his own interests, it can be said that there is a ground for a retrial based on Article 420(1)(iii) of the CCP if an adverse party knew or should have known the real will of the representative director, for it is possible to think that the representative director does not have any right as to the suit, which is equivalent to a lack of necessary representative power (see the decision of the Tokyo High Court on July 17, 1991, 1415 *Hanrei Jihō* 103).

Y filed a *jōkoku* appeal, claiming that, as the nature of procedural actions is different from that of the manifestation of intention in private law, it is wrong to apply a theory concerning private law to procedural actions, and that therefore there was an error in applying the law in the judgment by the Tokyo High Court which found a lack of a representative power.

[Opinions of the Court]

The decision of the Tokyo High Court was reversed.

When one conducting procedural actions as a representative of a stock corporation had a representative right, there can be no interpretation that there is a ground for a retrial based on Article 420(1)(iii), even though the representative acted for the purpose of gaining interests for himself or a third person, regardless of whether the adverse party knew or should have known the real intention of the representative. For a representative director of a stock corporation has the right to conduct all judicial and extra-judicial acts relating to the business of the corporation (Commercial Code, Articles

261(3) and 78(1)), and this representative power is not influenced by the will of the representative director or the knowledge of his will by an adverse party.

[Comment]

This is the first judgment by the Supreme Court on the validity of a retrial in the case of a collusive action by a representative director. It has long been discussed whether a request for a retrial by a third party can be permitted when both parties were in collusion with each other and made a suit for the purpose of damaging the third party. The former Law of Civil Procedure before the amendment in 1926 had a provision which permitted a retrial by a third party who was damaged by a collusive action in the form of a petition for restoration (the former Law of Civil Procedure, Article 483(1)). Legislators, however, in the process of the amendment, did not make a provision approving a retrial on the ground of a collusive action, for they thought that a third person could avoid a collusive action beforehand by intervention according to Article 71 of the CCP. It is said that the legislators were to blame on this point. We need to be aware that the third party concerned in this problem was one who was independent of the parties to a collusive action and the fact that a collusive action by a representative of a corporation was not assumed. But a corporation can still be thought of as a third party in relation to a representative director conducting a procedural action which falls within the special misappropriation of Article 486 of the Commercial Code (see the decision of the Great Court of Judicature on September 21, 1940, 19 *Minshū* 1644), so, in this sense, a collusive action by a representative director can be considered as grounds for a retrial in the case of a collusive action. Before this case no decision had been made by any lower court, and besides the judgments made by the court of first instance and that of second instance in this case were completely opposite. We have long waited for the Supreme Court to pronounce its decision on this matter.

First, the judgment of the Tokyo High Court (the court below) will be examined. The court found conclusively that A lacked the representative power to represent X in this case, and held that X's

request for a retrial was well established by Article 420(1)(iii). The theoretical path the court took was to apply the thinking presented in the decisions of the Supreme Court (the decisions of the Supreme Court on September 5, 1963, 17 *Minshū* 909; of the Supreme Court on July 6, 1967, 67 *Kinyū Shōji Hanrei* 16) to procedural actions. The thinking which was established by two decisions of the Supreme Court was as follows: when a representative director of a stock corporation exercises his representative power for the interests of a thrid party, which is an abuse of power, the act itself is valid as an act of the corporation itself as far as conducting the act is within his representative power. However, the proviso of Article 93 of the Civil Code is analogically applied as an exception in the case of a third party's knowing the real intention of the representative director, and the act by the representative becomes invalid, as against the interests of the corporation. It may be said, however, that the conclusion of the court was inappropriate, for it is theoretically difficult to derive a lack of a representative power by applying Article 93 of the Civil Code analogically to procedural actions by a representative director.

The next problem is whether or not the procedural action by A in this case can be regarded as an act of conflict of interest. It is true that A's acting in the suit as a representative of X against the claim of a return of an advance payment is within his representative power judging formally from appearances. However, according to X's claim, the substance of A's act is nothing but an embezzlement of X's money by using Y as a dummy. The provision says that it is an act of conflict of interest for a corporation to guarantee a debt of its representative director (Article 265(1) of the Commercial Code). As compared with this provision, the procedural actions in this case would damage a corporation more directly. In spite of this fact, is it possible to say that interests no longer conflict if a suit is brought? The suit in which the observance of the duty of loyalty by a representative director cannot be expected from the beginning may be equivalent to an act of conflict of interest. Precedents are that an act of conflict of interest without an approval by a board of directors is invalid between the corporation and the representative director, but the corporation cannot insist on the nullity of such an act to a third

person who is ignorant of the lack of an approval by the board and is not at fault in being so ignorant (see decisions of the Supreme Court on December 25, 1968, 22 *Minshū* 3511; of the Supreme Court on October 13, 1971, 25 *Minshū* 900). Almost all the theories agree to these decisions. This line of thought aiming at the protection of a person in good faith can be applied to a procedural action by a representative director. It is true that decisions consistently deny an application of the theory of an apparent agency to a procedural action, but what is in question in applying this theory is which should be protected from the point of view of fairness between the parties, one who trusted an external appearance or one who more or less participated in creating that appearance. As the fairness between the parties is a value which should be secured in an action, it should be permitted to apply the theory of an apparent agency to procedural action. Therefore, in this case, the Supreme Court should have approved X's request of a retrial based on Article 420(1)(iii) of the CCP if X proved a collusion between A and Y.

A retrial is a system which gives relief from an irrevocable judgment to a party who participated in a specified action but was not secured for the opportunity of claiming and defending his substantive rights. The grounds for a retrial enumerated in Article 420(1) of the CCP are thought to be limited, and the interpretation that only the meaning of the ground in subparagraph three is apt to be analogized or stretched is due to the fact that, according to the purpose of the system, it is easier to approve a retrial because of a lack of the guarantee of a procedural due process than because of a lack of representative power. For example, a recent decision of the Supreme Court held that a request for a retrial was permitted against an irrevocable judgment which was pronounced without a valid service of process (see the decision of the Supreme Court on September 10, 1992, 46 *Minshū* 553). Therefore, it may seem strange for the Supreme Court in this case not to have approved X's request for a retrial based on Article 420(1)(iii), as it is difficult to think that X was given enough guarantee of a procedural due process in the prior action.

2. A case in which it was held that the avoiding power based on the Bankruptcy Act, Article 72(i) cannot be exercised against debt payment by a loan if the loan concerned was made for the payment of a specified debt.

Decision by the Second Petty Bench of the Supreme Court on January 25, 1993. Case No. (*o*) 1062 of 1989. A *jōkoku* appeal claiming an exercise of the avoiding power. 47 *Minshū* 344; 1449 *Hanrei Jihō* 91; 809 *Hanrei Taimuzu* 116.

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

[Facts]

X (plaintiff, *kōso* appellant, *jōkoku* appellant), a trustee in bankruptcy, made the claim against Y (defendant, *kōso* respondent, *jōkoku* respondent) that the former could avoid the payment made by A, a bankrupt, before being pronounced bankrupt and that the latter should return the money received through this payment. The facts may be summerized as follows.

A, a securities company, was pronounced bankrupt at ten in the morning, July 12, 1982 and X was appointed trustee in bankruptcy. Y was a corporation which had been incorporated by contributions from the Japaense National Railways, the municipality of Kyoto and others, and whose business purposes were to construct and to manage public underground passages, shops and so forth in front of Kyoto Station.

On April 1, 1980, A made a contract for the sale of government bonds with its customer Y on condition that, first of all, A was granted funds for the purchase by Y and bought government bonds to the value of ¥526,200,000 for Y, and later Y resold those bonds to A at a price of ¥539,844,800. The due date for paying for the resold bonds was set at June 30, 1980, but it was agreed that this could be brought forward to any time when A should have the funds available to buy back the bonds. This was the way A came to be indebted.

A's business condition, however, had become desperate at this period, its total debts being 969 million yen. Therefore, it was obvious that A could never pay Y for the resold bonds. B, the Japan Securities Dealers Association, and C, the Kyoto Stock Exchange,

which regarded the protection of investors as important, decided that they would make available special financing to A to allow A to pay Y. On April 10, 1980, A, B and C reached an agreement such that B loaned A money so that A could pay the debt to Y and that C would manage the receipts and expenses concerning the loan money.

Two days later, on April 12, the persons in charge of this contract at B, C, A and Y gathered at the Kyoto branch of D bank, where Y had its bank account. There, the person from C drew a check for 500 million yen, and the one from A, receiving the check, immediately transfered 500 million yen to Y's bank account. Therefore, it may be safe to conclude that it was completely impossible for A to divert the check for any other purpose or for any other creditor to attach the check and have his claims satisfied. Besides, B and C would not have loaned money to A without the promise that A would use the loan only for the payment to Y. And, as regards interest rate, the condition of the loan made by B and C was not regarded as heavier than that of the original debt to Y.

X exercised his avoiding power against A's payment to Y, making the claim that such a payment was a voidable fraudulent transfer (see Article 72(i) of the Bankruptcy Act), and claimed the return of the paid money. Both the court of first instance and the court below dismissed X's claim stating that, though payments made by loans could be, in principle, objects of the avoiding power based on Article 72(i) of the Bankruptcy Act, there were special reasons as to the payment in this case which denied an exercise of the avoiding power (see the decisions by the Kyoto District Court on March 29, 1988, and by the Osaka High Court on April 27, 1989). An auxiliary intervenor supporting X filed a *jōkoku* appeal.

[Opinions of the Court]

Jōkoku appeal dismissed.

In this case, comparing the situation prior to the payment with that after the payment, neither the positive property of the bankrupt decreased, nor the negative increased. And it is recognized that there was no opportunity for the bankrupt to divert the loan made by the creditors in this case to other purposes or that other creditors

could attach the loan and make it impossible for the bankrupt to pay the debt. Such loan was arranged strictly for the payment of a specified debt, and, if the bankrupt had had an intention of using the loan for other purposes, the lenders in this case would not have provided finance. That is, if the loan had been supposed to be part of the common property for all the creditors of A, it could not have belonged to the bankrupt. Considering the above points, it is concluded that it is not harmful to the bankruptcy creditors that the bankrupt paid a specified debt by the new loan and, thus, that the payment is not a voidable fraudulent transfer under Article 72(i) of the Bankruptcy Act.

[Comment]

There had been opposing opinions among decisions since the period of the Great Court of Judicature concerning the problem of whether payments by loans could be avoided by trustees in bankruptcy or not, and the same situation was observed in legal theories. The judgment in this case is the first Supreme Court decision dealing with this problem, and therefore may be of great significance both theoretically and practically.

In considering the problem mentioned above, it must be noticed that, while X claimed that the payment made by A to Y was a fraudulent transfer under Article 72(i) of the Bankruptcy Act, it is the avoiding power against preferences under Article 72(ii) of the Act that has been claimed and judged in former cases. In line with those cases, legal theories also considered the validity of exercising the avoiding power generally with preferences in mind. It is disputable whether or not one should distinguish fraudulent transfers and preferences in thinking of the validity of exercising the avoiding power against a payment by a loan. But before considering this point, it may be helpful to look over cases and theories as to the avoiding power against a payment by a loan.

The first case which judged the validity of exercising avoiding power against a payment by a loan was the judgment of the Great Court of Judicature on April 26, 1933 (12 *Minshū* 753). The Court in that case denied the avoiding power against the payment as a prefer-

ence, stating that the condition of the original debt and that of the new loan were not different. In a similar case, on the other hand, the Great Court of Judicature affirmed the exercise of the avoiding power (see decision of the Great Court of Judicature on September 3, 1935, 14 *Minshū* 1412). In the latter case the Court held that a payment was naturally regarded as harmful to bankruptcy creditors if the payment was made by a bankrupt himself, regardless of whether the bankrupt used a loan for the payment. This ruling was also accepted in the judgment of the Great Court of Judicature on May 5, 1940 (4580 *Shinbun* 12). As a result, the judgment of 1935 became a precedent. All cases during the postwar period were decided by lower courts and, until the judgment of the court below in the present case, all approved the exercise of the avoiding power against a payment by a loan as a preference (see decisions of the Osaka High Court on May 28, 1962, 311 *Hanrei Jihō* 17; of the Yokohama District Court on December 25, 1963, 365 *Kinyū Hōmu Jijō* 7; of the Osaka High Court on February 20, 1986, 1202 *Hanrei Jihō* 55).

Theories are, broadly speaking, divided into two. One is that a payment by a loan can be a voidable preference, and the other is that the avoiding power against a payment by a loan can be denied if certain conditions are satisfied (the former theory hereinafter referred to as the positive theory and the latter the limited negative theory). The following are the most important theoretical grounds of the two theories, which are at the same time the most serious conflicts between the two: according to the positive theory, borrowing money for a payment and paying a debt with that money are two separate and independent actions and, as the common property for bankruptcy creditors increases by borrowing and then decreases by paying, a payment by a loan can be regarded as harmful to bankruptcy creditors. On the other hand, according to the limited negative theory, the two actions of borrowing money and paying a debt with it together form in fact, only one action and if certain conditions are satisfied, neither an increase nor a decrease of common property occurs through borrowing and paying and, therefore, bankruptcy creditors cannot be hurt by a payment by a loan.

It seems that the Supreme Court in this case pointed out in the

opinions of the Court three reasons for denying an exercise of the avoiding power against a payment by a loan. The first is that the condition of the new debt (the loan) is not heavier than that of the original debt. The second is that the bankrupt and the lenders had reached an agreement that the loan should be used for the payment of a specific debt and that it is inconceivable that the lenders would have made the loan without such an agreement. The third is that there was no possibility for the bankrupt to divert the loan to other purposes or for other creditors to attach the loan. The way of analysing the reasons mentioned above differs from one scholar to another. I shall take up two different theories, which provide us with useful indices for considering this case.

In the first theory these three reasons are regarded as useful in building up the general grounds for denying the avoiding power, even though these reasons themselves cannot be thought of as general grounds. To begin with, as to the problem of whether the avoiding power against fraudulent transfers should be distinguished from that against preferences, in considering the validity of exercising the avoiding power against a payment by a loan, such a distinction is thought to be of little significance in this theory, for it is assumed that justifiable payments can be seen not only as voidable preferences but also as voidable fraudulent transfers (this opinion is firmly established in cases; see decisions of the Great Court of Judicature on December 21, 1932, 11 *Minshū* 2266; of the Great Court of Judicature on September 28, 1940, 19 *Minshū* 1897; of the Supreme Court on May 2, 1967, 21 *Minshū* 859) and a payment by a loan as in this case is a justifiable one. In one sense this line of thinking is also a version of the limited negative theory in that exercising the avoiding power against a payment by a loan can be denied if certain conditions are satisfied. The conclusion of this theory is as follows: the first and the second reasons which the Court provided in this case can be general grounds for denying the avoiding power against a payment by a loan. The third reason is not regarded as a general ground because, even if there are chances that a bankrupt diverts a loan to other purposes and that other creditors attach a loan, neither a decrease of a common property for bankruptcy creditors nor a violation of the

fairness among bankruptcy creditors occur if a payment to an original debt is successfully completed.

The second theory, in contrast, distinguishes conditions for the avoiding power against fraudulent transfers from those against preferences and therefore considers that a different consideration is required according to the type of the avoiding power. The three reasons which the Court provided in this case are, according to this theory, not grounds for denying the fraudulency of the actions concerned but relate to the fraudulent will of a bankrupt which is one of the prerequisites for avoiding a justifiable payment.

As mentioned above, there are different opinions about the theoretical structure which the Court demonstrated in this case. However, these opinions do not differ as to the conclusion of supporting the judgment of the Court. Finally, it is doubtful that we may think that the judgment of the Great Court of Judicature in 1935 about the avoiding power against a payment by a loan as a preference has been overruled by this case.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which it was accepted that mistaken excessive self-defense existed but the mitigation or remission of punishment was not allowed.

Decision by the First Criminal Division of the Tokyo District Court on January 11, 1993. Case No. (*gō-wa*) 105 of 1991. A case of homicide and violation of the Law Controlling Possession, etc. of Fire-Arms and Swords). 1462 *Hanrei Jihō* 159.

[Reference: Criminal Code, Articles 36 and 199.]