

above-cited 1968 precedent, has now made it clear that the contents of the court's duties to act may depend upon the concrete circumstances of each individual case.

However, the exact standard of judicial behavior which must be applied is still unclear. Therefore the development of further judicial decisions on these points should be expected.

[Reference: Code of Criminal Procedure §312, Rules of Criminal Procedure §208]

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## 6. Commercial Law

### 1. Liability for damages caused by a person who was permitted to use another person's name as his own trade name.

Decision by the Third Petty Bench of the Supreme Court on Jan. 25, 1983. 1072 *Hanrei Jihō* 144, 669 *Kinyū Shōji Hanrei* 3, 1030 *Kinyū Hōmu Jijo* 45.

#### *[Facts]*

Y<sub>1</sub> (defendant, *koso* appellant and *jokoku* appellant), who conducts business under the name of Y<sub>2</sub> forwarding corporation (defendant, *koso* appellant and *jokoku* appellant), received 100 tires from a tire selling company X (plaintiff, *koso* appellee and *jokoku* appellee). At the time of receipt of the tires, Y<sub>1</sub> represented that the tires would be used by Y<sub>2</sub>. Later, negligent actions by Y<sub>1</sub> concerning the tires caused damages of about 2.4 million yen to X.

X filed a suit for damages against Y<sub>2</sub> on the basis of Article

23 of the Commercial Code, as well as against Y1. As the claim against Y1 and Y2 was recognized in the courts of first and second instance, Y1 and Y2 filed a *jokoku* appeal with the Supreme Court, asserting specifically that the decision of the court of second instance erred in finding Y2 liable on the basis of Article 23 of the Commercial Code.

#### *[Opinions of the Court]*

*Jokoku* appeal dismissed.

Article 23 of the Commercial Code is designed to protect a third party who has entered into transactions with a person permitted to use another person's name, where the third party believes that such other person is the real proprietor of the business because of such use of the name. Therefore, it is reasonable to consider that the liability for damages caused by a tort of a person permitted to use another's name is included in "any obligation arising out of a transaction" under this article, as long as the tortfeasor's act carries with it the appearance of another's transaction.

#### *[Comment]*

According to Article 23 of the Commercial Code, "A person who has permitted another person to carry on business using the first person's surname, full name or trade name, shall be bound, jointly and severally with such other person, to effect performance of any obligation arising out of a transaction between that other person and any third person who has entered into the transaction in the belief that the first person is the proprietor of the business."

With respect to liabilities involved with so-called *Naitagashi* (i.e. one person's permission for others to engage in business under his name), Article 23 is designed to protect an innocent third party when he has traded with a firm in the belief that the proprietor of the business is the person whose name is being used as the firm's trade name. Therefore, liability under this article

seems to be limited to this particular type of transactions, and liability for general damages caused by the tort of a person permitted to use another's name is otherwise thought to be excluded from the scope of this article.

However, most scholars suggest that this article also applies to cases where liability for damages was caused by a tort related to covered transactions, as in the case of fraudulent transactions. Following this majority view, the current decision recognized the application of Article 23 of the Commercial Code to liability for damages caused by "torts with the appearance of another's transaction." It thus held that a person who had permitted someone else to engage in business under the former's name was liable for damages caused by torts which had the appearance of being part of the former person's transaction.

## **2. Qualification for actions demanding nullification of a shareholders' resolution approving corporate financial statements.**

Decision by the Third Petty Bench of the Supreme Court on June 7, 1983. 1082 *Hanrei Jihō* 9, 675 *Kinyū Shōji Hanrei* 3, 500 *Hanrei Taimuzu* 111.

### **[Facts]**

When Y Corporation (defendant, *koso* appellant and *jokoku* appellant) held its 42nd ordinary general meeting of shareholders on Nov. 28, 1970, 1400 shareholders sought to attend. Some 300 of them were not permitted to enter the meeting place, however. Despite this, Y Corporation opened the meeting and adopted a resolution only about four minutes later, ignoring an amendment proposed by a shareholder, in the midst of great uproar.

Therefore, the group X (plaintiff, *koso* appellee and *jokoku* appellee), shareholders of Y Corporation, filed an action demanding nullification of the resolution passed in the meeting. In the courts of first and second instance, the requested nullification of the resolution was granted.

**[Opinions of the Court]**

*Jokoku* appeal dismissed.

Even if the financial statements of subsequent years were approved while the suit was pending, an action for nullification of the shareholders' resolution approving the financial statements of the past year cannot be dismissed, unless a special fact such as valid subsequent approval of the financial statements of the past year is proved.

**[Comment]**

This action was filed by shareholders belonging to the Movement of One-Share-Holders, whose goal was to pursue the indemnification from the corporation for injury caused to many people through water pollution (so-called *Minamata-byo*).

In this case, it was disputed whether an action to nullify the shareholders' resolution that had approved the financial statements could be maintained, even though the financial statements of subsequent years had been approved. The Supreme Court recognized that any shareholder was qualified to maintain an action under such circumstances. It further held that since the resolution approving the financial statements would be nullified retrospectively, and in consequence the financial statements of that year would become legally unofficial, the statements should be approved again.

In accord with this decision, the same financial statements at issue were approved at the ordinary meeting of Y Corporation on June 29, 1983.

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