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ON THE CAPACITY OF A COMPANY IN JAPANESE LAWS

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I. The Points in Dispute between Two Opposing Views

While the majority of the doctrines in our country recognizes that the capacity of a company is limited by its objects (the affirmative view), the opposing views came to be advocated in the past fifty years and have been supported by influential scholars (the negative views).[1] The bases of these two oppsing views may be summerized as in the following.

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1) S. Tanaka, *Kaisha-hō Kenkyu*, p. 139; K. Nishihara, *Kaisha-hō*, p. 21; K. Ōsumi, *Kaisha-hō Ron*, vol. 1, p. 27; T. Ōmori, *Kaisha-hō Kōgi*, p. 16; E. Hattori, *Kaisha-hō Genri*, p. 9; K. Ueyanagi, "Kaisha no Nōryoku," *Kabushiki-gaisha-hō Kōza*, vol. 1, p. 94.

(1) The Affirmative Views

In the first place, the objects of a company provided for in the memorandum of association are the core of the unity of its members and it is, therefore, quite natural that the capacity of a company should be limited by its objects. This can also generally applied to a corporation, for it will be defined as an organization under which the members unite and to which laws confer the capacity to act in its own name. It is not yet the case that Japanese laws confer capacities, without discrimination, upon any socially existing bodies. This is the reason why it is required that the objects of a company should be a matter of necessary statement in the memorandum of association (Commercial Law; Arts. 63, 148, 166 par. 1; Limited Company Law: Art. 6).

In the second place, the limitation of the capacity of a company is useful for the adjustment of the interests of the members contributing to it and those of the creditors dealing with it. The objects of a company, because of not only being mentioned in the memorandum of association but also being publicly announced through registration, serve on the one hand as a standard for the determination to contribute of those who intend to become its members and on the other as a guide-post for a third party in dealing with it.

In the third place, the affirmative views rest on the provisions of laws. First, although primarily applicable to a non-profit corporation, Article 43 of the Civil Code provides that a corporation should enjoy the capacity only within the limits of its objects. From the nature of a corporation this provision must be considered to be applicable by analogy to a company, in spite of the fact that the Commericial Code lacks a provision which allows to apply Article 43 of the Civil Code. Second, Article 72 of the Commercial Code provides that the consent of all the members shall be required for an act beyond the limits of the objects of a company with unlimited liabilities. This provision is regarded as being based upon the assumption that the capacity of a company is to be limited by its objects. In other words, although it is clear that its capacity is limited by its objects, the Commercial Code especially includes this provision in view of the unlimited liability of an unlimited partnership. Its *raison d'être* is to avoid the intricacy necessitated by a certain extraordinary act beyond its objects: the alteration of the memorandum of association through the consent of all the members, translation of the action after its registration and again the re-alteration of the memorandum of association and its re-registration.

In the fourth place, according to the explanation of the authors of the Civil Code, Article 43 is said to have its source in the principle of *ultra vires* of the English Law.

Then, they illustrated it with reference of the forgery of a share-certificate. Thus it will rightly be presumed that the original intention of the authors was to provide this article as a common theory on a corporation applicable not only to a non-profit corporation but also to a company in general.

(2) The Negative Views

In the first place, the thesis that the capacity of a coporation is limited by its objects is not a natural consequence followed from the nature of a corporation but only a matter of legislative policy. For instance, the countries of the so-called continental legal systems adopt the principle that a corporation enjoys unlimited capacity and even in England where the principle of limited capacity prevails the principle of *ultra vires* has not been applicable to the corporations incorporated by the Charter of the King. In our country, too, it was not recognized before the enactment of the Civil Code that the capacity was to be limited by the objects of a company. Therefore, although it is natural that a company should be incorporated with definite objects, they are nothing but its ultimate goals. Once incorporated and able to act as a member of the society, a company must be treated just as a natural person of general capacity so as to give full scope to its functions.

In the second place, in view of protecting the interests of a creditor, it is more desirable not to limit the capacity within the objects and it is as well compatible with such ideas of the Commercial Code as the maintenance of safety and promptitude in commercial transactions. Today, when the activities of a company could be extended to in many directions and cover a wide area, the adoption of the affirmative views would only give a company an excuse for avoiding liabilities and thus impair to a great extent the safety of transactions. In such a case the interests of a third party in transaction must be more seriously considered than those of the members of a company as creditors. The latter's interests will be protected if they are admitted to claim for damages caused by the action of the organ of a company in violation of the memorandum of association (Commercial Code: Art. 266) or to ask for its injunction. On the other hand, the interests of the other party of transaction could be protected by recognizing as effective the action beyond the objects of a company.

In the third place, the negative views rely on the provisions of laws. As to a non-profit corporation the approval of the competent authorities is required to be given to the objects at the time of its incorporation but also to their subsequent changes (Civil Code: Arts. 34, 38, par. 2), for, the preservation of the objects is the public

demand. On the contrary, no such requirement is made to a company and while the Commercial Code expressly provides to apply Article 44, par. 1 and Article 54 of the Civil Code, there is no provision in the Commercial Code which allows the application of Article 43 of the Civil Code. The intent of Article 72 of the Commercial Code is considered not to extend externally the capacity of a company but to provide internally for the procedures on the matters of great concern to a company. In other words, this provision intends merely to require the consent of all the members of a company with unlimited liabilities, inasmuch as its activity beyond its objects affects their vital interests. This will be presumed from the fact that the provision is placed in the section concerning the internal relations of a company.

In the fourth place, there is no corresponding provision to Article 43 of the Civil Code in the German Civil Code which was referred to at the time of the enactment of our Civil Code and Article 43 is, therefore, originally Japanese. A look at the present law-making practices in the world makes it possible to understand that the principle of the unlimited capacity of a company has gradually been prevailing. Thus, Article 43 of the Civil Code must be considered as only applicable to a non-profit corporation.

II. The Trend of Judicial Precedents

1) The Meaning of "Within the Limits of the Objects"

There are a great number of cases on this matter and they remain consistent in understanding that the capacity of a company is limited by its objects provided for in its memorandum of association. It is understood, however, that the scope of the capacity derived from the specified objects has gradually been widely construed.

For ten years after the enactment of the new Commercial Code in 1899 the capacity of a company has been construed to be within the narrow limits to the effect that a company could carry on the only business partaining to the objects expressly stated in its memorandum of association. Thus, as for a bank, for instance, the assurance of a documentary bill or that of a bill was to be beyond its objects and the bank was not to be liable for them. But such framing by means of the mechanical interpretation of words did not then even meet the needs of the economic world and thus impaired the safety of transactions. Thus, in 1908, a decision was given to the effect that even as for a company whose object was not to borrow money for the maintenance of its business such an act of the company was considered to be done in pursuing its objects

and therefore within the limits of its objects. Then in 1911 appeared a decision that the acceptance of liability on the part of a bank through the statement in a check of guarantee of its payment was to be included in the objects of the bank by means of a fiction that such an act fell within the matters concerning deposit or loaning. These two precedents were the manifestation of the device to meet the requirement of the economic world. Availing these opportunities the time was getting ripe for the reflection and modification of the view in favor of interpreting mechanically the objects provided for in the memorandum of association.

The way to this tendency was opened by the decisions of the lower courts in larger cities and it is observed to influence gradually the decisions of *Daishin-in* (the former Spreme Court). For example, Tokyo District Court gave a decision in 1911 that in the case of a corporation whose object was to purchase horses the drawing of a bill for that purpose could not be regarded to be beyond its object. Osaka District Court at the same time gave a decision that so long as it was necessary for its business the giving of a promissory note was included in the objects of a company even though such an act was not mentioned in the memorandum of association. It was the decision of *Daishin-in* of December 15, 1912 that marked a turning-point in the existing theories of precedents. The reasoning of the decision is as follows: "The memorandum of association of a company which includes a fundamental agreement on the kind of business it pursues as its objects and on its management is usually to lay down only general principles and not enter into details by avoiding verbosity and aiming at brevity. Therefore, in determining, by the memorandum of association, the nature and scope of the business which a company pursues it is impossible to do so only by referring to the original significance of the language correctly mentioned in the memorandum of association. On the contrary, the matters capable of being deduced or inferred from the statement of the memorandum could well be considered, though not concretely stated in it, as being included in the statement. Therefore, it is considered not only that the matters capable of being regarded as included in the objects mentioned in the memorandum of association should, even if not mentioned in it in the corresponding words to the matters, constitute part of the objects of a company, but also that the matters necessary to achieve its objects should, though not stated in its memorandum, be regarded as incident to the business within the limits of the objects of the company."

This view had been followed by subsequent judicial decisions and helped clearly establish the theory of precedents that "a company possesses the capacity both on the matters within the scope of its objects determined by the memorandum of association

and on the matters necessary to pursue the matters mentioned as its objects." The above-mentioned view has since then been handed down today as the fundamental position to be taken by the Supreme Court and other lower courts. The existing theory of precedents could therefore be summerized as follows. "A company possesses the capacity to carry on not only the matters within its objects specified by the memorandum of association but also the matters, even though not directly belonging to the scope of its objects stated in the memorandum, necessary to carry on the business mentioned as its objects. The scope of the objects provided for in the memorandum of association should not narrowly be interpreted by sticking to its language but should be interpreted to include the matters capable of being deduced or inferred from the statement."

2) Judgement on whether an Act is "Within the Limits of the Objects"

In judging whether a particular act is necessary or not to carry on the business as an object of a company the views expressed in precedents were undergone a serious change as the result of the decision of February 7, 1938 as a turning-point. It is therefore necessary to look briefly at the trend on this matter by dividing it into two terms.

(A) The Former Term.[2] This period covers up until 1937. During this period the precedents took an attitude that in judging whether a particular act was necessary or not to carry on the business prescribed as the object of a company "there was no legal criterion and it was the matter of fact to be judged by comparing and analyzing both the act concerned and the object of a company provided for in its memorandum of association," and that therefore there was no other way than to determine it concretely according to each case by considering the nature of the business said to be its object and all the other circumstances. What makes a problem concerning this matter is who assumes the burden of proof. Article 503, par. 2 of the Commercial Code of our country provides that "the act of a marchant is presumed to be done for the benefit of his own business." *Daishin-in* considered at the begining that the burden of proof should be imposed on the part of those who asserted that the act concerned was not for the business, in other words, was beyond the objects of the company." But in 1914 *Daishin-in* changed its own attitude and decided that "the provision saying that the act of a marchant shall be presumed to be done for the benefit of his own busi-

2) K. Ōsumi, "Kaisha no kenri-nōryoku no Han-i," *Sōgō Hanrei Sōsho, Shō-hō* (3) p. 17 ff.

ness should, in the case of a company, be applied after an act in dispute was determined to be necessary for the pursuit of the business as one of its objects or to be within the capacity of the company. It was also decided that such a provision should not therefore be applied to determine whether such an act was necessary for the pursuit of the objects of a company." As the result, the burden of proof was to be assumed on the part of the claimant maintaining that an act concerned was necessary to carry on the business prescribed as one of the objects of a company. As for the means of proof, however, it was considered sufficient, in many cases, to establish the facts responsible for the act done; for instance, the act was for the sake of financing a company or was in accordance with the existing business practice.

In spite of this decision of *Daishin-in*, however, the subsequent decisions, mainly concerning a bill, were repeatedly made at lower courts to the effect that since such an act of a company was necessary at least to carry on the business as one of the objects of a company and should be presumed to be within the limits of the objects the fact against it had to be proved by its claimant. The *raison d'être* of this phenomenon was that unless the extent of the capacity of a company was construed as widely as possible the requirement of the economic world at that time could not be satisfied. Then, *Daishin-in* too, reversed itself and restored to its original view. It says, "In case that a railway company intends to improve its financial conditions by means of carrying on at the same time the coal-mining business, the latter must be considered to be necessary act to carry on the business prescribed as one of the objects of the company. Therefore, unless under special circumstances, such combining of the management of the businesses is to be presumed to aim at the improvement of its financial conditions." It declares in other occasion, too, "Since it is expressly provided that an act of a merchant shall be presumed to be for the benefit of his own business such an act that a company as a merchant received draft and endorses for transfer is naturally to be presumed, unless there is no counterevidence, to be within the limits of the objects of the business of a company."

Such had been the fundamental opinion of the precedents until 1937. The following examples are to show what kind of concrete acts were considered to be necessary acts to carry on the business prescribed as an object of a company: (i) draft or acceptance of a bill by a company; (ii) endorsement by a company whose objects is to make and sell woolen goods in order to relieve its customers from bankruptcy and to continue its business relations; (iii) acceptance by a banker of a bill which was drawn by others; (iv) lending money to others by a transport company; (v) that a fabric-selling company

is to be a guarantee for a fabric-manufacturing company as its customer as to buying in the materials for processing; (vi) acceptance of a debt by a company for its sister company; (vii) acceptance by a company of a debt of others; (viii) entering into an agreement by a company with its stockholders as to the inspection of books and documents; (ix) making a contract by a company to entrust the management of its business to others; (x) financing by means of entering *mujin* (a mutual loan association) by a company whose object is to sell fertilizer and grain; (xi) manufacturing of machinary by a machine-selling company; (xii) in case of a situation under which exportation is impossible or disadvantageous, disposing at home domestic goods purchased by a company whose object is to export and import foreign and domestic goods; (xiii) gurantee-ing by a parent company as to the debentures issue of a subsidiary company; (xiv) selling by a coal-mining and -selling company of its sole colliery.

(B) The Latter Term.[3] In the case that a representative of a company whose objects were warehousing, transportation and other general business incidental thereto purchased heavy oil under the name of the company but actually for his personal benefit, *Daishinin* decided on February 2, 1938 as follows. "The act of purchasing heavy oil can be considred in appearance as an act necessary to carry on the above-mentioned business as the objects of the company and therefore should be regarded as being within the limits of the objects of the company. Even though the representative purchased heavy oil by the intention of attributing the profit to himself through its resale, the act cannot be, for this reason alone, beyond the objects of the company and be invalid."

The decision apparently discarded its former position based on the method of subjective judgement and on the contrary adopted that of objective judgement. It purported to charge a company with duty so long as an act done by its representative was considered from its objective nature to be within the limits of the objects of the company. It was the epoch-making decision and its purport was followed and developped by the decision of the Supreme Court of February 15, 1952. It declared, "Even if not included in the objects themselves stated in the memorandum of association, the act necessary to pursue the objects are to be construed as being within the limits of the objects. The decision whether the act is necessary or not for the pursuit of the objects should be made not on the basis of whether the act in question is actually necessary for the objects mentioned in the memorandum of association but on the basis of whe-

3) *ibid.*, p. 26 ff.

ther it can be objectively and obstractly necessary judging from the statement of the memorandum of association. Because the question of the actual necessity of the act is entirely one of the internal affaires of the company and is beyond the knowledge of a third party. Because, therefore, the safety of transactions cannot be maintained if a third party could deal with the company only after investigating such circumstances." Furthermore, the Supreme Court decided on December 28, 1963 that when (i) manufacturing of general wooden goods, (ii) manufacturing of shipping goods and (iii) investment on the related business and carrying on all the businesses incidental to the other objects are provided for as the objects of the company, joint or several guarantee made on the debt of the others in the contract of lease of land is to be within the limits of the objects of the company. It declared, however, "Making joint and several guarantee is construed, in case that there is no particular counterevidence, as an act necessary for the pursuit of the objects." Thus, here, excessively wide interpretation is adopted.

As the result, the following acts came to be recognized as within the limits of the objects of a company: (i) that a company whose objects are extraction and trade of minerals carries on the business as a broker by gathering and selling various articles when it has no income owing to the business depression; (ii) that a company whose main objects are warehousing and lease of buildings carries on the trade of socks at the time of the business depression.

Although the precedents consider these acts as necessary for the pursuit of the objects of the companies concerned, it is difficult to recognize these acts as being within the limits of the objects even if judging from the objective and abstract standpoint. In recognizing these acts the decisions of the courts based their reasoning on the concrete circumstances that the companies in the time of depression took the temporary measures for obtaining necessary funds.

III. Analysis of the Negative Views

The rise of the negative views in our country as an influential doctrine originated from its theorization by Professor Seiji Tanaka. Its important significance was to point out that the existing affirmative views, which were adopted by the majority of scholars and precedents, construed the objects of a company too much literally and that such

4) See M. Takashima, "Kaisha no Nōryoku no Mokuteki ni yoru Seigen" *Minshōhō-zasshi*, vol. 42, p. 519 ff.

an interpretation considerably impaired the safety of transactions and failed to comply with the actual conditions of the economic world. This course of development is considered to be a matter of course in view of the fact that the adherence to the affirmative views has come to be less profitable owing to the actual circumstances that, on the contrary to the memoranda of association under the Anglo-American laws in which more individual and concrete matters are mentioned, the matters stated in the memoranda of association of many of our companies are rather of abstract and comprehensive nature. What is the strongest ground of the affirmative views and is considered the strongest criticism against the negative views is that under the provisions of laws in force matters concerning the objects of a company are not only to be provided for in the memorandum of association but also to be made public as matters of registration. It is refuted, however, that at this point the affirmative view is not always contradictory to the negative views if such requirements are considered to have the only significance of notifying the objects of a company to the other party of the transactions. Furthermore, it is asserted that even under German laws which adopt the principle of unlimited capacity the objects of a company are also the matters to be registered and that our system of registration is not given any absolute effect of notification to the public.

However, in view of the fact that our Civil Code has a particular provision of Article 43, the negative views may be summarized as in the following three ways. In the first place, as the most conclusive assertion of the negative views there can be cited the theory that nothing of the capacity of a company or of the power of representation of its representative director can be limited within the objects of the company provided for in the memorandum of association. This view stands on the same position as the popular view in Germany. In the second place, there is an assertion that the objects mentioned in the memorandum of association do not restrict the capacity of a company but the power of representation of the representative organ but that such restriction does not have effect against a *bona-fide* third party. According to this view it is concluded that since the *raison d'être* of the negative views is to protect a *bona-fide* third party in dealing with a company it is sufficient to protect him and not necessary to protect a *mala-fide* third party who knows already that a particular act is beyond the objects stated in the memorandum of association. In theory there seems to be a view that while a company itself possesses the capacity of general nature the registration of its objects is to restrict internally the power of representation of its representative organ. However, since Article 261, par. 3 of our Commercial Code provides to apply Article 54 of the Civil Code, this view cannot be considered to be sound according to the laws in

force and is not at all supported. In the third place, there is a view, while standing on the nagative views and yet different from the above-mentioned two views, that the capacity of a company cannot be limited within the objects stated in the memorandum of association but that the activity of a company is limited, as a common nature to all the companies, by the purpose of making profit. The Commerical Code, too, provides that a company is a corporation for making profit (Commercial Code, Art. 52.).

The first view may be said to be based upon two assumptions: first, that Article 43 of the Civil Code is the provision applicable only to a non-profit corporation and cannot be, as it is, applied to companies; second, that the registration of the objects of a company is only for the sake of letting the other party of the transactions know them. According to this view, however, it cannot but be understood that the statement of the objects in the memorandum of association and the registration of the objects, which are common both to non-profit corporations and to companies, have two different meanings to both of them, because, for the former, they mean the limitation upon the capacity and, for the latter, they only mean the duty of the directors toward their company. Such a construction seems therefore unreasonable in the light of the existing provisions of laws. In this respect, since the German Civil Code which adopts the principle of unilmited capacity provides that, while necessary for a company to provide its objects in the memorandum of association and to register them, it is not necessary for a nonprofit corporation to register its objects (German Civil Code, Art. 64), such a registration is conceivable only as regards a company. Under Japanese laws, however, since the common provision as to the effect of the registration of the objects is to be applied to a non-profit corporation as having effect agaist a third party and, since, as for a company, the registration of the objects is, apart from the other matters of registration, to have only the effect of notifying its contents to the persons who see them by chance, such a provision can be said to bring about only a contradictory consequence. Therefore such view will be regarded as unpersuadable.

The second view admits the largest limitation among the negative views. First of all, the following criticisms may be given on this view. Despite that, in case of construing that the objects of a company stated in the memorandum of association place a limit upon the power of representation of the representative organ, it is desirable that the standard of such limitation should individually and concretely be set up, it is rather unsuitable to set such an abstract standard as the objects of a company and this will easily bring about disputes for nothing. Moreover, although as for the regist-

ration of the objects this view recognizes the legal effect of the registration, in case that the representative organ acts beyond the objects of a company, such an act, according to the effect of the commercial registration in general, ought to be null and void and be effective *prima facie* against every third party (Commercial Code, Art. 12). On the contrary, according to this view, such an act cannot be effective against a *bonafide* third party. It seems, therefore, that more convincing explanation is needed for the interpretation of the laws in force. Further, if this view asserts that the effect of the registration of the objects is different from that of the other commercial registrations, then the reason for this must be presented just as in the first view.

The third view asserts that the objects of a company may be limited by the purpose of making profit common to all kinds of companies. However, the scope of the purpose of making profit is unclear. The affirmative view, adopting extremely loose interpretation, recognizes at present not only that even transactions not directly connected with the objects or business of a company are acts done within its capacity if they are of the nature of profitmaking, but also recognizes that a company can even make contributions to such public purposes as educational and charitable works. The adoption of the third view is, therefore, not profitable and if so, the question will remain only that of superiority or inferiority of theorization. Although it is clear that a company is originally a corporation whose object is profit-making and that the Commercial Code so provides, this view which, by strongly maintaining the idea of profit-making, recognizes contributions as purely public purposes not directly connected with the business of a company cannot but make obscure the meaning of profit-making.

IV. Conclusions

From the above-traced general trends of judicial precedents and legal theories of our country the present situation will be understood that the precedents and the majority of theories take the affirmative attitudes toward the limitation of the objects of a company and that a few but influential theories adopt the negative attitudes. In tracing back the development of these views it may be said that although both the precedents and the theories originally adopted the affirmative attitudes, the negative views assume greater prominence in order to maintain the safety of transactions and to meet the requirements of the economic world, because the precedents interpreted the words of the memorandum of association too formally and narrowly when deciding the limit

of the objects of a company. And there is no doubt that the negative views have been influenced by German laws. In the construction of laws, however, it must not be overlooked that there is fundamental difference in some important points regarding this matter between German and Japanese laws.

In the German Civil Code even regarding non-profit corporations, the objects provided for in the memorandum of association is not considered to limit the capacity of a company and therefore the same is true as for corporations in general. Instead, it is provided that limitation can be placed upon the power of representation of a director as a representative of a corporation by stating it in the memorandum of association to the effect that it can be effective against a third party (German Civil Code, Art. 26). At the same time it is provided that such limitation on the power of representation should be registered (German Civil Code, Art. 64). In the German Law, therefore, the objects mentioned in the memorandum of association limits neither the capacity of a corporation nor, as a matter of course, the power of representation of a director of a corporation, but has only a significance of being able to limit the power. In this respect fundamentally different is the Japanese Law which provides that as for non-profit corporations the objects stated in the memorandum of association shall limit the capacity of a corporation. It is difficult, therefore, that the interpretation under the German Law should also be valid under the Japanese Law.

The next question is on the relation between Article 43 of our Civil Code and a company. There is no doubt that this article is the provision originally concerned to non-profit corporations. The different interpretations arise from the very point whether or not this article is applicable to or applicable by analogy to a company as a profit-making corporation. First of all, it may be useful to see that in what consideration it came to be enacted. "Since a corporation is incorporated by the State and laws and exists for the achievement of a certain purpose, its capacity exists only within the limits of the provisions of laws and its objects, and it does not legally exist beyond the limit ... Although since middle ages the fiction of a corporation had been unduely expanded and a corporation had been considered to enjoy the capacity equivalent to a natural person, in modern times no one came to oppose that a corporation had only the limited capacity and that its capacity was limited by the objects of its incorporation. It is a matter of course, therefore, that an act of a corporation beyond the objects of its incorporation should be invalid." In view of the fact that, especially in England and the United States, many cases on the matter are in actual dispute, it is said that Article 43 was provided in our country so as to make the matter legally clear. Al-

though there is no doubt that this article concerns non-profit corporations, in the explanations of its authors, theories and precedents regarding *ultra vires* in the Anglo-American laws are cited and the examples of a company or in particular those of the problems of the extent of the objects of a company as regards "forgery of a share-certificate" are cited.[5] Even though these are the considerations of the authors and theoretically serve only as material for legal interpretation, it can be presumed that they considered this article not only as applicable to non-profit corporations but rather as the expression of the theory on a corporation in general.

At the same time, according to the explanation of the authors, as for the question of the limitation upon the power of representation of a director as a representative of a corporation, if this limitation is registered and becomes effective against a third party, the corporation comes to be effectively protected but a third party is neglected to that extent. In other words, a third party has to ascertain a register whenever he deals with a corporation. In actual transactions however, unless they are done on a large scale, no one would take the trouble to look at it and the Civil Code does not recognize such an institution which limits the power of representation of a representative and thus enables it to be effective against a third party (Civil Code, Art. 54). In this respect, while German Civil Code provides that such limitation as to be effective against a third party may be placed upon the power of representation of a director and that this limitation shall be a matter of registration (German Civil Code, Arts. 26, 64), German Company Code provides that the limitation of the power of representation of a director is not effective against a third party (Art. 74, par. 2). This has become the basis of the principle of unlimited capacity that the objects stated in the memorandum of association of a company should not be even interpreted to limit the power of representation of a director. In this respect the legal system of Japan makes no difference between the Civil Code and the Company Law. Thus the construction of the Civil Code is that the objects mentioned in the memorandum of association is a condition of the existence of a corporation and is therefore a matter to be considered as the limitation upon the capacity by a third party in dealing with a corporation and that the public announcement by the registration of its incorporation aims on one hand to regulate the relations with the protection of a third party while on the other the limitation of the power of representation of a director is not effective against a *bona-fide* third party, thus safeguarding transactions.

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5) See T. Ishii, "Kaisha no Kenri-nōryoku" *Hōgaku Kyōkai Zasshi,* vo.l 76, p. 171 ff.

There is almost no opposition to the above-mentioned construction of the provisions of the Civil Code (There are a few views that even the objects of a non-profit corporation do not limit the capacity of a corporation but only limit its competence to act). Considering the relations between Article 43 of the Civil Code and a company, the Commercial Code does not apply Article 43 but Article 54. Thus the precedents and theories based on the negative views did not show the reason why Article 43 of the Civil Code should apply or apply by analogy to a company except that the article is naturally applicable to a corporation. So long as the Commercial Code does not include the provision which allows to apply the Article 43 to a company, it must be of good reason that there arises the negative view as a sound interpretation in the relations of companies in which the safety of transactions is the utmost requirement. It may be admitted, however, that the adoption of the negative views under the present legal system would bring with it a number of above-mentioned difficulties and that the views do not have enough persuasiveness. It can be said, therefore, that the affirmative views are the most appropriate as an interpretation of the existing laws.

However, in dealing with a company acting as a center of economic transactions, the interest of the stockholders and the creditors of a company and the safety of transactions are to be constantly maintained in the interpretation as three important factors to be substantially coordinated. So long as the Commercial Code does not expressly provide for the affirmative view, the problem cannot help but be solved substantially. In the light of the practice in our country the case is that in deciding the objects of a company it is often mentioned that a company can carry on the other business accompanying or relating to the objects expressly provided for. In considering whether a particular act is within the limits of the objects of a company, only a few precedents called in question a concrete act in relation to the objects stated in the memorandum of association and the majority of the precedents showed that a particular act was of the nature to be generally recognized as that of a company as a profit-making corporation. This trend has been more and more expanding. The above facts show that the problem is of almost no actual consequences. In this respect, however, the circumstances will be said to be quite different.

In our country at present the only important problem in this respect is whether a company can make a contribution to a political party (the case was disallowed at the first trial and is pending at the appeal instance). But except that, there is almost no case in which an act of transactions is considered to be beyond the objects of a company. Rather, the protection of the investing public affected by the bankruptcy of a company

must be called in question.

As to the former question, the majority of theories of our country assert that a company can make an appropriate contribution to such a body unrelated to its objects or to profit-making as charitable organizations. Their basis is, apart suddenly from the problem of the capacity of a company, that living as a social entity a company as such can have appropriate relations with other entities just as a natural person does.[6] But not only under the negative views but also under the affirmative views such an argument leaves much doubt. It is difficult to understand the argument that while standing on the affirmative views a charitable contribution has nothing to do with the objects of a company or at least with those of profit-making. Setting aside the purely negative view, it also seems contradictory to assert, while regarding an act to be limited by the common object of profit-making, that a contribution of a public nature is immune to limitation. Although a contribution to a political party is a gratuitous act and is therefore not different from a contribution for public purposes, the above view denies the former while admitting the latter. Under the present circumstances[7] in which there is no law provided for the prohibition of a political contribution but a law regulating the procedure of such contribution on the assumption that the former law is non-existent. It seems, however, to be of no use from the viewpoint of the Commercial Code to differenciate these two kinds of contributions. Actually, however, there are some companies which became bankrupt owing to their excessive contributions to political parties. Such is the problem of vital importance regarding the present question. It must not be a proper interpretation of the Commercial Code to admit the risk that the investing public should be impaired by the bankruptcy through a gratuitous contribution of a company whose objects is to make profit. In my opnion, whatever kind a company may be, its contribution unrelated to profit-making is beyond its capacity and such an act will not be allowed except by means of enactment. Although it must be admitted that the negative views originally intended to safeguard transactions and that a third party in transaction will be transferred into the position of a creditor of a company by recognizing as effective the act beyond its objects, there may be the case in which a credit of the same creditor will be lost as the result that the company makes an excessive contribution to a political party, which is an act beyond

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6) J. Matsumoto, "Ēri-gaisha no Jizen-jigyo ni taisuru Kifu," *Shō-hō Kaishaku no Shomondai*, p. 141 ff. Y. Tomiyama, "Kabushiki-gaisha no nasu Kenkin (s)" *Minshō-hō Zasshi*, vol. 47, No. 5, pp. 36 ff.

7) The law concerning the Regulation of Political Funds and Expenditures, Art. 22, etc.

its objects, and thus becomes bankrupt. If the negative views admit such danger as unavoidable, their significance will be lost. Since there is natural limitation upon the solution of the problem through interpretation, it will be necessary to await new enactment and to consider carefully various interests.

In our country, with the great revision of the Commercial Code in 1950 as a momentum, the right of management of a company has been transferred largely to the board of directors, the possession of stocks and management have been separated and the general meeting has now only the limited right on the matters concerning fundamental constitution of a company. And as the result of the popularization of investment there increases the number of stockholders who are indifferent with the management of a company. As an interpretation of the Commercial Code the protection of such public investors must fully be considered. If such a case occurs that a stockholder, on the contrary to his belief of having invested in a steel company, suffers from the bankruptcy of the company which had actually been carrying on the whaling industry, how can the interest of such a stockholder be protected? The same thing can be said about the creditors of a company. They have no doubt less opportunities to take part in the alteration of the memorandum of association and the like than the stockholders.

Considering these points any attempt of new enterprises or transactions beyond the objects of a company must begin after the alteration of the memorandum of association since its alteration can be effected only through as pecial resolution. Then, a stockholder who is against the new enterprise can oppose by means of the resolution of the general meeting or can be given the opportunity to resign. By the same reason the necessity to protect more effectively the position of creditors has been increasing.

It is of utmost difficulty to interprete the provisions so as to harmonize the safety of transactions, the interests of stockholders, and those of the creditors of a company. This must be a serious and theoretical problem throughout the world. If it is admitted that a corporation or a legal person is to be brought into being only through the State and laws, the problem of the capacity of a corporation cannot but be solved by means of enactment. It will be of great significance to find out through international cooperation what device will bring about better solution for the problem. I should like to pay attention to the next revision of the English Company Law and also to the attitude on the solution of this problem in the United States.