"improper control of education" was again adopted. However, many scholars and teachers have remained critical of such judgment.

[Reference]

Article 10 of the Fundamentals of Education Act [educational administration] stipulates that education shall not be subject to improper control, but it shall be directly responsible to the whole people.

By Prof. HIDETAKE SATO
MASANORI OKADA

2. Law of Property and Obligations

Effect on the prescription period of the consolidation of farm land under the Land Improvement Act.

Decision by the Second Petty Bench, Supreme Court, Sept. 7, 1979. (Case No. (*o*), 24 of 1979. Claim to register land transfer. Dismissed. 33 *Minshū* 640)

[Reference: Civil Code §162, Land Improvement Act §§102, 106]

[Opinions of the Court]

"When an acquisition or loss of farm land occurs in accordance with the Agricultural Land Improvement Act, the land to be acquired by a specific owner and that to be lost are not the same in nature. Since the Act guarantees the equality of the two areas of land (Article 102) and that the ownership of the two areas as well as related rights are treated as similar to those of the same (Article 106), if the independent possession of the two areas of land has been continued at the time and before and after the consolidation to the agricultural land in question, it is

reasonable to interpret that prescription period can be counted throughout the period of possessing the two areas of land.

"With regard to acquisition by prescription concerning real estate ownership, when the prescription is completed after the registration of ownership by a third party, one can stand against the said third party with the acquisition of ownership by prescription without registrator..."

[Comment]

The focal point of the issue was whether or not one can count the period of possessing the old land and that of the new land together when the consolidation is conducted in accordance with the Agricultural Land Improvement Act on the land which gave rise to the question of prescription. The court ruled in the affirmative. The current decision was quite new in that the issue had never been disputed in the past.

Whether or not collective movables whose components are floating can be the subject of a mortgage.

Decision by the First Petty Bench, the Supreme Court, on Feb. 15, 1979. (Case No. (*o*) 925 of 1978. The case demanding the transfer of something. Dismissed. 33 *Minshū* 51.)

[Reference: Civil Code §424]

[Opinions of the Court]

"It is reasonable to interpret that a collective movables whose components are floating can be the subject of a mortgage as an collective item, in case its scope is specified by some means such as designating its type, location and quantitative scale."

[Comment]

The Supreme Court for the first time clarified its attitude to acknowledge the collective concept in connection with a collective movables as the subject of a mortgage. At the same time, the court made it clear that even a collective movables whose components are floating can become the subject of mortgage if the

requirements for being specific can be met. In this connection, the current decision is very important, and high expectations are placed on the accumulation of cases in the future in respect of what circumstances the requirements for being specific can be met.

Restitutio in integrum of the land prejudiced by an act of making land with hypothec a mortgage.

Decision by the First Petty Bench, the Supreme Court, on Jan. 25, 1979. (Case No. (*o*) 809 of 1978. Case in demand for the avoidance of the act of prejudice, restitutio of unjust benefits and compensation. Dismissed. 33 *Minshū* 12.)

[Reference: Civil Code §424]

[Opinions of the Court]

"In a case where a contract of mortgage on land with hypothec is found, in its entirety, to be an act of prejudice and the person holding the mortgage is an obligee other than the hypothecary obligee in question, and the sum obtained by deduction of the sum of the hypothec claim on the mortgage from the price of the land is smaller than the sum of the claim, which is the basis of the right to avoid the act of prejudice, the mortgage contract as a whole should be avoided and the claim for restitutio in integrum of the land itself should be acknowledged."

[Comment]

The court in its decision found that the act of transferring land with maximal hypothec, as it is, to an obligee other than the maximal hypothecary obligee corresponds to an act of prejudice. Subjected to the question at that time were the scope of the formation of an act of prejudice, the scope of avoidance, and the methods of recovering the property in question. It was recognized that the contract of mortgage on land as a whole should be avoided and that the land itself should be recovered to its original state.

In case the property was transferred by an act of prejudice, the

property in question should be taken back so that the general property of the obligor can be restored to its original state. Importance was also attached to the spirit of the system, on the right to avoid the act of prejudice by contending that so long as the recovery of the reduced property is possible it should be admitted.

Counter set-off by an assigned obligee.

Decision by the Third Petty Bench, the Supreme Court, July 10, 1979. (Case No. (*o*) 547 of 1978. Claim for the payment of a promissory note. Reversed and remanded. 33 *Minshū* 533)

[Reference: Civil Code § § 505, 506]

[Opinions of the Court]

"Adequate conditions for set-off should exist when a declaration of intention for a set-off is made. However, even if such conditions existed, if the claim of other party was cancelled due to the performance of an obligation, the performance in accord and satisfaction, and a novation prior to the declaration of intention, the set-off cannot be permitted. (Article 508 of the Civil Code provides for such an exception.) When a claim is attached and if the garnishee has a counter claim against an obligor, the garnishee can set off his counter claim as a positive claim with the obligation under garnishment as a passive claim, even after attachment and regardless of the time of the performance of the counter claim and the claim attached, on the ground that the conditions for such a set-off are warranted. However, until such time as a garnishee makes a declaration of intention for a set-off, there is no reason why the assigned obligee should be discouraged from setting off the claim entrusted him by the assignment order as a positive claim, with the claim he owes to a garnishee as a passive claim."

[Comment]

In this current decision, the declaration of intention for a

set-off by the assigned obligee precedes that of a garnishee. However, when adequate conditions for a set-off between the assigned obligee and garnishee arise after adequate conditions for a set-off between an obligor and a garnishee have arisen, it was disputed which one should take precedence, the set-off of the assigned obligee or that of the garnishee.

With regard to the relation between the attachment and the set-off, it is generally accepted that a garnishee can set off his counter claim as a positive claim with the attached claim as a passive one regardless of the time for performance of obligation and if the conditions for a set-off become adequate and even if the claim was attached, so long as his counter claim was not acquired after attachment. (Decision by the Grand Bench, the Supreme Court, on June 24, 1970. 24 *Minshū* 587.)

However, it is highly questionable whether such a view can be pushed through should the third party happen to be an assigned obligee. It is worth noticing that the current decision acknowledged that the ability of an assigned obligee for a set-off should not necessarily be excluded, that the priority of a set-off should be decided in favor of whoever makes the declaration of intention first, in a case where the declaration of intention is made by both the assigned obligee and the garnishee, and that the set-off by the assigned obligee may take precedence at times. Thus the court applied some restrictions to the aforementioned concept and this should warrant attention.

Retinitis suffered by an extremely small premature baby and the liabilities of a physician.

Decision by the Third Petty Bench, the Supreme Court, on Nov. 13, 1979. (Case No. (*o*) 915 of 1977.) Action for damages. 952 *Hanrei Jihō* 49. Dismissed.)

[Reference: Civil Code §§709, 715]

[Opinions of the Court]

"The doctor in question conducted preventive treatment for his premature baby patient virtually in line with generally

accepted clinical knowledge and academic views. With the method matching medical standards at that time, it cannot be admitted that he adopted extraordinary or untried treatment for the patient. He cannot be said to have conducted treatment beyond the discretion of a child specialist.

"Hence, he cannot be considered as having been negligent in the supervision of the oxygen supply obtained for the patient. Moreover, he cannot be considered as having been negligent even if he could not foresee the outbreak of the current symptom resulting from the supply of oxygen, and even though he failed to have an eye doctor conduct a regular eyeground test on the patient."

[Comment]

The current decision was the first of its kind, among various medical accidents, ever given by the Supreme Court on retinitis suffered by a premature baby. Similar lawsuits now being tried at courts across the country in considerable number will be affected greatly by the current decision. The decision, in fact, poses a very important problem as to what sort of precautional obligation standards should be set in determining fault.

Case of SMON disease outbreak and resultant responsibility. Decision by the fourth civil division, the Kyoto District Court, on July 20, 1979. Allowed in part. (Case No. (*wa*) 354 of 1978 and four other cases. 950 *Hanrei Jihō* 87.)

[Reference: Civil Code §§709, 715]

[Opinions of the Court]

"According to epidemiological research and survey, high correlation has been recognized between the dosage of quinoform medicines and the outbreak of SMON disease, and that there is some relation between the amount and reaction. It was also made clear that there is no inconsistency in terming it quinoform poisoning according to the pathological view of SMON. Hence, it can be determined that SMON was caused by dosages of qui-

noform medicines while the Inoue virus theory cannot be adopted in this case.

"The pharmaceutical companies which manufactured and sold quinoform were in a position to foresee the possibility, on the strength of various documents and reports since 1935, that quinoform was liable to cause SMON symptoms. Nevertheless, they continued manufacturing and selling it, thus committing faults, and they are liable for damages.

"The state should also be held responsible on the following grounds: Although the state is duty-bound to ensure the safety of medicines to protect public health and lives the Welfare Ministry, while in a position to foresee through existing documents the true quality of quinoform and its poisonous effect on nerves, failed to check it, and permitted and approved the manufacture and import of various medicines containing quinoform as its major ingredient, and that even after the dangerous nature of quinoform was proven it should have immediately cancelled its permission and approval but it did not take any steps to cancel it until September, 1970 when an administrative measure was introduced. Incidentally, the responsibility of the state is similar to the vicarious responsibility of an employer provided for in Civil Code Article 715 or a joint and several obligation."

[Comment]

This is one of the lawsuits on SMON, which developed into a grave social problem resulting from the use of agricultural chemicals and medicines during the period of high economic growth. The current decision made it clear that the dosage of quinoform was the cause of SMON disease, while holding both the state and pharmaceutical companies responsible for the outcome. While the current decision is worthy of note together with a series of decisions at lower courts, attention is now being focussed on what judgment the higher courts will make on this problem.

The right to command a view, so to speak, can be the subject of legal protection.

Decision by the Yokosuka Chapter, Yokohama District Court, on Feburuary 26, 1979. Allowed in part. (Case No. (*wa*) 175 of 1972. 917 *Hanrei Jihō* 23)

[Reference: Civil Code §709]

[Opinions of the Court]

"The right to enjoy a view can be the subject of legal protection on the following ground: When the requirements such as 1) that there is a fine view worth viewing and capable of according a sense of aesthetic satisfaction, 2) that the value of the place in question depends on the view, and 3) that maintenance of the view from the place in question harmonizes with the utilization of the land in the neighborhood, the right to enjoy a view can be considered a kind of living benefit that can be obtained by residing on the property owned by the residents, and it should not be infringed upon without sufficient cause.

The demand for the removal of the structure infringing upon the right to command a view can be admitted only when it goes beyond the limit of tolerance of the person whose view was obstructed.

[Comment]

The current decision made it clear that the right to command a view is a kind of benefit resulting from the residence. It is also worthy of attention in that the right to command a view, which had hitherto been argued abstractly, was legally defined while listing requirements to make it the subject of legal protection.

By Prof. TERUAKI TAYAMA
KAZUO FUJIMURA