3. Family Law

The propriety of minor children's claim for solatium against the non-marital partner of either of the parents.

(a) Tokyo Case – The action for solatium in the Supreme Court, Second Petty Bench, March 30, 1979. Decision: Dismissed in part, reversed and remanded in part. (Case No. (*o*) 328 of 1976. 33 *Minshū* 303.)

(b) Osaka Case – The action for solatium in the Supreme Court, Second Petty Bench, March 30, 1979. Decision: Dismissed in part, reversed and remanded in part. (Case No. (*o*) 1267 of 1978. 922 *Hanrei Jihō* 8;383 *Hanrei Taimuzu* 51.)

[Issues]

(a) Whether or not the behavior of an unmarried woman who establishes sexual relations and lives together with a man who has a wife and minor children constitutes a tort against the children in question.

(b) Whether or not the behavior of a man who establishes sexual relations and lives together with a woman who has a husband and minor children constitutes a tort against the children in question.

(a) Tokyo Case

[Facts]

The wife (plaintiff, appellee, *Jokoku* appellant) is married and has three female children (also plaintiffs, appellees, *Jokoku* appellants). Her husband became acquainted with another woman, a bar maid (defendant, appellant, *Jokoku* appellee). The woman kept company with him and gave birth to a baby girl, knowing that he had a wife and three children. Upon discovering the affair, the wife accused him of infidelity. The husband, whose affection for his wife was virtually nonexistent at the time, went his ways and began living with the other woman in question.

(The children were then aged 19, nine and three). He has been living with the woman to date. The woman has been bringing up her child born out of her relations with him. She has neither asked him to help her with money nor has she ever received living expenses from him throughout the period which led to her cohabitation with him or after.

In the present case, the wife and three children have sought damages from the woman for mental agony and loss of consortium resulting allegedly from the wrongful act of the woman. The action was brought for infringement of the wife's right to ask her husband being faithful and infringement of the interests of the children such as custody, education and affection which they claimed they could otherwise have enjoyed by living together with their father.

All the claims of the appellants were admitted *in toto* at the first instance (the Tokyo District Court). The Tokyo High Court in the second instance dismissed all the claims, however, on the grounds (1) that the woman had committed no wrong since the physical relations between the husband and the woman were the natural consequence of their affection for each other and that cohabitation cannot be considered as being coerced at the said woman's urging, and (2) that the husband should be held solely responsible for his immoral behavior leading to his failure to provide his children with due care and upbringing, and that the woman could not be taken to task directly for the husband's failure to extend care and upbringing to his children. The wife *et al.* appealed to the Supreme Court.

[Opinions of the Court]

The Supreme Court reversed and remanded the Osaka High Court's judgment concerning the portion relating to the claim of the wife to the lower court while, at the same time, dismissing that part of the "*Jokoku*" appeal lodged by the children.

(As to the Wife's Claim)

"Inasmuch as there exists malicious intention or negligence on the part of the third party who has come to engage in physical

relations with either of a married couple, the third party is obligated to compensate the mental suffering of the other spouse since the third party has infringed upon the right of the spouse to be faithful either as husband or wife, and the act in question should be considered as a wrongful one. This, however, has nothing to do with whether or not the third party has seduced or their relations were the natural outcome of their affection for each other."

(As to the Children's Claim)

"Although the children could not receive paternal affection, care and education in their daily life as another woman had established physical relations with their father, and had come to live together with the man who had deserted his family, it is reasonable to interpret, as long as there are no special circumstances such as positive intention on the part of the woman to prevent him from providing the children with paternal care, etc., that the woman's act does not constitute a wrong against the minor children. In all probability, whether or not a father cherishes, nurtures and educates his children has nothing to do with his cohabitation with another woman. This can be done of his own free will if he wants. It must be pointed out that even though the children could not enjoy their father's affection, care and education, and they had been disadvantaged as a consequence, there is no causal relation between the children's disadvantage and the act of the said woman."

Vis-à-vis this opinion of the Court, there was a concurring opinion (omitted here) and a dissenting opinion of Motobayashi J. The gist of the dissenting opinion is as follows:

"It is believed normal that children are disadvantaged as a result of a man not extending custody and education to his minor children after cohabiting with another woman, deserting his wife and children. In this regard, as long as the woman does not refuse cohabitation, the disadvantages of the children is caused by the act of cohabitation. It goes without saying that when the father cohabits with another woman, the children will be

deprived of the affection they would have received from him everyday. Thus, the causation between cohabitation with the woman in question and the disadvantages the children suffer resulting from their inability to enjoy their father's affection cannot be deemed too remote."

Moreover, the rights of the children, including their interests of family life, affection, education, and custody, must be protected by the law of tort. And he concluded as follows: "When the minor children were unable to enjoy their father's affection, custody and education resulting from his cohabitation with a woman leaving the children behind, the woman must be held responsible for the minor children for her wrongful act as long as there exists intention or negligence on the part of the woman."

(b) Osaka Case

[Facts]

A mother of three male children (plaintiffs, appellants, *Jokoku* appellees) had been corresponding and exchanging telephone calls in camera with a man who was her childhood friend. When the man was transferred to his Mexico position, she followed him to Mexico and had illicit relations with him. Even after she returned to Japan, she had secret meetings with him whenever the latter returned. In spite of the protestations of her husband who had learned of the affair, she went to Mexico where she has been living with him ever since. (At the time of her cohabitation, the children were aged 19, 15 and 10). Thereupon, the husband and children filed an action for solatium against the man (Civil Code § 709).

The Osaka District Court in its first instance allowed the claim of the husband while dismissing the claim of the children. In the second trial at the Osaka High Court it was allowed that the case also constituted a wrong against the children on the grounds of an infringement of the mental interests of the infant children to enjoy a quiet and happy family life, in addition to an infringement of the actual custody of the minors. The man then appealed to the Supreme Court.

[Opinions of the Court]

The part of the decision of the court below that allowed the claim of the children was reversed and remanded, while the appeal of the man against the husband was dismissed. The judgement of the court below was also found justifiable in holding the man responsible for wrongful act against the husband. With regard to the children, the decision was similar to the case of the Tokyo Case, contending that the case made no difference whether the cohabitation took place at home or abroad. Concurring and dissenting opinions: same as those in the Tokyo Case in effect.

[Comment on the Judgements in Both Cases]

It has been traditionally held by judicial decisions and academic theories that the third party who has committed adultery with one of the married couple constitutes a wrong in relation to the other spouse, and the present decisions have confirmed it. They are also important in that the Supreme Court, for the first time, ruled on the claim of minor children for damages against the party of cohabitation with one of their parents.

Decisions of the first instance have been split. So are academic theories. It seems that those allowing the claim interpreted the conduct of the cohabitee as an infringement on the interests of the minor children regarding the latter's personality and enjoyment of affection, while those dismissing the claim hold it as an infringement on the right to custody and education. On this score, the opinion of the Supreme Court is not necessarily clear, dealing with it somewhat as a question of causation.

The validity of a holographic will dated "an auspicious day, July, 1966."

Decision in the Supreme Court, the First Petty Bench, May 31, 1979: Dismissed. (Case No. [*o*] 83 of 1979. 33 *Minshū* 445.)

[Issues]

The holographic will dated "an auspicious day, July, 1966"

is null and void for the lack of the "date" described in the Civil Code § 968 (1).

[Facts]

A man who made out a holographic will died in an accident. As a result, one of the cosuccessors, the deceased's legitimate daughter Y (defendant, appellant, *Jokoku* appellant) asked the Tokyo Family Court to probate the will with which she had been entrusted. The will in question was dated "*Kichi-nichi* (an auspicious day), July, 1966," instead of specifying a calendar day as the date when it was drawn up. (*Kichi-nichi* in Japanese means an auspicious day on which to do or plan something.) Thereupon, one of the other cosuccessors, an illegitimate daughter X (plaintiff, appellee, *Jokoku* appellee) brought an action for nullity of the will maintaining that the will with only "month and year" was null and void because it lacked a complete date. Y then argued that any attempt to nullify a will for the simply and single reason of nonspecification of a calendar date runs counter to the purpose of the testamentary system, designed to reflect as much as possible the intention of the testator on the occasion of succession.

The first instance, accepting the assertion of X, ruled that the holographic will in question was void. It was also held at the second instance that the will was void for lack of a specific date stating that: "it must be interpreted that under the present Civil Code, dating in one's own handwriting is compulsory as a matter of law in order to make clear the intent of the testator and to avoid subsequent dispute and confusion. In the light of the purposes of the Civil Code, the valid holographic will requires a specific date on the face of the testamentary document itself."

Dissatisfied with the ruling, Y appealed to the Supreme Court. (In lodging the *Jokoku* appeal, Y emphasized that as long as it did not run counter to the purpose of the formality necessary for the testamentary system, the will should be interpreted as flexibly as possible, and that the intention of the deceased who drew up the will should be honored.)

[Opinions of the Court]

"In order to make out a holographic will, the testator shall write with his own hand the whole text, the date, and full name, and shall affix his seal thereto, according to the Civil Code § 968 (1). The date in question should be described as that illustrating the specific calendar day. In this regard, when the date of the document is described as "an auspicious day, July, 1966, it cannot be considered as indicating a specific calendar day, and it is believed proper to interpret such a holographic will as void for lack of entry of a date in the document." The Supreme Court holding such a view dismissed the case by unanimous decision of the five justices.

[Comment]

In the judical decisions so far delivered by the lower courts, there was a similar case in which a holographic will dated "*Kichi-nichi*, September, 1954," was found null and void. (See the order of the Takamatsu High Court, June 10, 1965, 17 *Kasai Geppō* No. 11, p. 103.)

There are precedents in the Great Court of Judicature and the Supreme Court in which a holographic will was ruled void for lack of a date, notwithstanding the description of the year and the month. (The Great Court of Judicature judgment of June 1, 1926, 22 *Minroku* 1131; the Supreme Court judgment of Nov. 29, 1977, 30 *Kasai Geppō*, No. 4, p. 100.) In this respect the current judgment can be considered as having been based on prior judicial decisions.

In academic circles, the majority view holds that the will is void not only for lack of a date but for the entry of such as "*Kichi-nichi*," which does not indicate a specific day. They contend that under the Civil Code, the date in handwriting is required to establish the time of the drawing of the will, adding that the date plays an extremely important role in determining the capacity of the testator, the scope of selecting the forms, and which will come last in the case of the existence of two or more wills.

On the other hand, it must be noted that there are influential minority views. These views, like the assertion voiced in the

current *Jokoku* appeal, hold that as long as the will does not run counter to the purpose of the formality of the testamentary system, it should be interpreted flexibly. They also maintain that when there is no specific reason for clarifying the date for the drawing of the will and the entry of the month and the year alone is sufficient, the will in question should be considered effective despite the lack of a date, for instance, as in this case in which the testamentary capacity of the deceased was confirmed and there existed only one will.

In short, the core of the problem is to what extent the strict formality prescribed in the Civil Code § 960 and thereafter to secure the true intent of the testator can be eased in the way of interpretation. In this sense, the current judgment needs to be further considered in connection with the testamentary system as a whole.

Articles 13 and 14 of the Constitution and the provision that the legal relationship of father and illegitimate child comes into existence with acknowledgement of paternity.

Dicision of the Supreme Court, the First Petty Bench, June 21, 1979: Dismissed. (Case No. [*o*] 149 of 1979. 933 *Hanrei Jihō* 60.)

[Issues]

The provision in the Civil Code that the legal relationship of a father and his illegitimate child is effected with acknowledgement of paternity does not violate Articles 13 and 14 of the Constitution.

[Facts]

The mother of a child (plaintiff, appellant, and *Jokoku* appellant) established sexual relationship with the father and lived with him for about two years. In the meantime, she became pregnant and gave birth to a child. The father became missing before acknowledging paternity of the child. Recently, it was learned that the missing father had died some nine years ago.

Thereupon, the child brought an action to determine the existence of the father and child relationship against the public procurator (defendant, appellee and *Jokoku* appellee).

The trial court dismissed the action on the following grounds: (1) Since the legal relationship between a father and his illegitimate child must be established either by the father's acknowledgement or through an action for acknowledgement, the present action calling for determination of the existence of the father and child relationship should not be maintained. (2) Even if the present case is interpreted as an action for acknowledgement, the action should not be maintained because more than three years have lapsed since the death of the father as stipulated in the proviso to the Civil Code § 787. (3) Supposing that the present action is maintained, there is no evidence to establish the existence of the father and child relationship in this case.

The court of the second instance also dismissed the child's claim and affirmed the judgment of the first instance, on the ground that even though there existed natural parentage, the legal relationship of the father and his illegitimate child cannot be established without an acknowledgement. Thereupon the child appealed to the Supreme Court contending that the judgment of the second instance was in contravention of Article 13, which stipulates respect as individuals and the pursuit of happiness and Article 14, which guarantees equal protection under the law.

[Opinions of the Court]

"What system should be introduced to establish the legal father-child relationship between the father and the illegitimate child is a matter of legislation. As provided by the Civil Code, the legal father-child relationship between the father and an illegitimate child can be established only with the acknowledgement. Hence this is a perfectly rational system from the viewpoint of maintaining the legal certainty of family relationships, and does not violate Article 13 of the Constitution. Nor does it run counter to Article 14 of the Constitution since the said provision is applied equally to all illegitimate children." The

Supreme Court dismissed the *Jokoku* appeal with the unanimity of all four justices.

[Comment]

It is generally observed in Japan that a legal father-child relationship between a father and an illegitimate child does not come into existence unless acknowledged by the father. There are two ways of obtaining acknowledgement: voluntary acknowledgement (Civil Code § 781) in which the father gives notification of acknowledgement and compulsory acknowledgement or action for acknowledgement (Civil Code § 787) in which the child brings an action in failure of obtaining voluntary acknowledgement of the father. Compulsory acknowledgement is made by the finding of the court in favor of the existence of the father-child relationship claimed by the child's side.

In the present case, the illegitimate child was not acknowledged by his father voluntarily. Moreover, the child could not establish the father-child relationship by means of the action for acknowledgement with the expiration of the three-year limitation period following the death of the father (Civil Code § 787, proviso). Such being the situation, the child had recourse to bring an action to determine the existence of the father-child relationship as the only possible alternative.

Can there be no means of relief for such a child in question? As stated in the reasons for the *Jokoku* appeal, there existed special circumstances which prevented the child from resorting to the ordinary acknowledgement despite the existence of a natural father-child relationship (for instance, the limitation of actions for acknowledgement expired because of the missing father or failure on the part of the mother as its legal representative).

Over the cases involving the constitutionality of the limitation of actions for bringing an action for acknowledgement (Civil Code § 787, proviso), the Supreme Court has so far declared that the provision in question is constitutional. In other words, how to make the conditions for filing an action for acknowledgement is a "matter of legislation", and the three-year limitation

following the death of the father is justifiable from the standpoint of maintaining the "legal certainty inherent in a family relationship" and it does not violate Article 13 of the Constitution. Moreover, the limitation of actions for acknowledgement does not violate Article 14 of the Constitution, as it limits the effective period of the right equally and uniformly for all persons entitled, and is not discriminatory in any way. (Decision by the Supreme Court, the Grand Bench, July 20, 1955, 9 *Minshū 1122.)*

Besides, the Supreme Court holds that even a child whose father-child relationship is indisputable, born out of a *Naien* relationship (marriage-like union), is required to obtain voluntary acknowledgement of the father or bring an action for acknowledgement if the child seeks to establish a legal father-child relationship (the decision of the Supreme Court, the First Petty Bench, January 21, 1954, 8 *Minshū* 87), and that the proviso to Article 787 is applicable as a matter of course to the child born out of a *Naien* relationship (the decision of the Supreme Court, the First Petty Bench, Nov. 27, 1969, 23 *Minshū* 2290). It is also generally held in academic circles that the bringing of the action after the lapse of a lengthy period of time following the death of the father, may give rise to a good deal of ambiguities in the factual background, and that action as such is not advisable from the standpoints of related evidence and legal certainty of family relationship.

On the other hand, it must be pointed out that there is much criticism against the said provision of the limitation of actions. Even if there exists a *de facto* father-child relationship, the child cannot claim a legal father-child relationship forever, if three years have passed without his knowledge about the death of the father. (This can be taken to mean that the child whose father is alive can bring an action for acknowledgement at any time.) Under the existing provision, there occurs a marked inequality between an illegitimate child whose father is alive and one whose father is dead. In this regard, the opinion is gaining strength that the proviso to Article 787 of the Civil Code should be deleted, and that the limitation of actions should be revised as a certain given period "after the birth of the child." Another influential

opinion is that the proviso should not be applied at least to the child whose father-child relationship is known certainly, such as that born out of a *Naien* relationship.

Under the prevailing judicial decisions and academic views, the present judgment reconfirmed the position taken so far by the decisions of the Supreme Court. The rationality as illustrated here in support of constitutionality is too formalistic to be persuasive. At any rate, the discussion on the issue will be continued in terms of extending substantial protection to illegitimates.

By MASAYUKI TANAMURA

4. Law of Civil Procedure and Bankruptcy

1. Acquisition of sublease after adjudication and Article 54 (1) of the Bankruptcy Act 1922.

Decision by the First Petty Bench, the Supreme Court, on Jan. 25, 1979. (Case No. [*o*] 622 of 1978. The case of a claim for rent and restitution of land and building. 33 *Minshū* 1.)

[Reference: Civil Code § 612, Bankruptcy Act § 54 (1)]

[Opinions of the Court]

"When a lease, which can be enforced, exists on real estate owned by a bankrupt at the time of adjudication, even though the said real estate was subleased after adjudication, the acquisition of the sublease by the sublessee cannot correspond to the acquisition of the right not based on legal action of the bankrupt as provided for in Article 54 (1) of the Bankruptcy Act, as long as there occurs no specific situation such as disapearance or reduction of the exchange value as a result of the sublease."