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."

[Comment]

The current decision is very important for the following two reasons. Firstly, it was the first decision which referred to Article 54 (1) of the Bankruptcy Act and the acquisition of sublease. Prior to the present decision, there had been no precedent concernning the question mentioned above nor had it ever been argued in academic circles. In this regard, the current decision is very significant in that it will have an effect on academic theories as well as practice as a new precedent in fields to be covered by Article 54 (1) of the Bankruptcy Act. Secondly, there is a question of the status of a lessee in connection with the bankruptcy of a lessor as a prerequisite to the issue under trial. In other words, it is a question of the application of Article 59 of the Bankruptcy Act in case of the bankruptcy of a lessor. In the existing law, there is no written provision dealing with the lease contract in the case of bankruptcy of the lessor. So, the question is whether or not to apply, on the basis of the general principle, the provision in Article 59 of the Bankruptcy Act concerning rescission of a bilateral contract, the performance of which is not completed. On this point, concerning at least the lease of immovables, the majority view is in favor of recognizing the continuation of the lease and the denial of the right to rescind by a trustee in bankruptcy from the standpont of protecting the lessee. Until the current decision, there had been no supreme court precedent on this issue. The present decision, of course, did not deal directly with the question above, but judging from the whole context it is interpreted that the court took it for granted that the trustee has no right to rescind. The current decision is significant as a precedent concerning the advisability of application of Article 59 of the Bankruptcy Act in the case of bankruptcy of a lessor.

2. Acquisition of ownership by a successful bidder and a case in which proceedings were completed for a compulsory sale of immovables by official auction based on a deed by a notary public containing substantial causes to make it null and

void.

Decision by the First Petty Bench, the Supreme Court on Feb. 22, 1979. (The case of a claim for registration of transfer of title to property. 33 *Minshū* 790.)

[Reference: Code of Civil Procedure § 559 (1) (iii), 686]

[Opinions of the Court]

"In the auction proceedings in which the notarial deed was drawn up in accordance with the representation by the obligor or his deputy to accept the execution and commission for drawing up, even if there were reasons in the relation of rights and obligations displayed in the notary deed to make it substantially null and void and the compulsory auction completed without relief measures described in the Civil Execution Act such as a motion of objection, the effect of the acquisition of ownership of the items sold by auction to the successful bidder cannot be reversed."

[Comment]

It seems that precedents have been in the affirmative as to the question whether or not the acquisition of ownership by a successful bidder can be denied by overturning the effect of the successful bidding even after the auction proceedings were completed in cases where there were faults making the legally effective title of debt substantially null and void. The current decision has virtually changed existing precedents. The present decision, in this sense, is also significant in that it has set a new precedent in the Civil Execution Act.

3. The effect of an assignment order, which the person who caused damage received on the injured party's right of claim for damages, with his right of claim for the injured party as the right of claim for execution.

Decision by the First Petty Bench, the Supreme Court, on March 8, 1979. (Case No. (*o*) 970 of 1978. Counterclaim for the payment of a debt and promissory note. 33 *Minshū* 187.)

[Reference: Civil Code § 509 and Code of Civil Procedure

§ 601]

[Opinions of the Court]

"In the light of the spirit of Article 509 of the Civil Code aimed at compensating the party injured by torts to recover actual damages in lieu of the payment at its face value and preventing a recurrence of the torts, the action of the person who caused the damage going beyond the scope of the provision cannot be permitted, and the relevant assignment order is not effective in cases where the former received an assignment order by attaching the injured party's right to recover damages with his claim against the injured party as the claim for execution, and barred the said claim by merger."

[Comment]

It is generally believed possible to obtain an assignment order by attaching the claim for damages against unlawful acts. The question is that Civil Code Article 509 provides that where the obligation has arisen from a tort the obligor cannot avail himself of a set-off against the obligee. In such a case, it is questionable whether it is possible to create an effect tantamount to escaping the prohibition of the set-off by obtaining an assignment order on the claim arising from a tort. The present decision was the first of its kind ever issued by the Supreme Court on this score. The prevailing view in academic circles on cases like this is almost similar to the current decision.

4. The scope of hearing and judgment in the *Jokoku* appeal in cases where the defendant alone filed a *Jokoku* appeal from the decision of the appellate court, which dismissed the principal claim while allowing a supplementary claim.

Decision by the Second Petty Bench, the Supreme Court, on March 16, 1979. (Case No. (*o*) 49 of 1976. Claim for the payment of money transferred to another's account on the basis of a contract for the third party. 33 *Minshū* 270.)

[Reference: Code of Civil Procedure § § 385, 396, 402 and

405]

[Opinions of the Court]

"In this case where the defendant alone filed a *Jokoku* appeal whereas the plaintiff did not file a *Jokoku* appeal nor an incidental *Jokoku* appeal from the judgment in the appellate court which dismissed the principal claim but allowed the supplementary claim, the priority of the judgment in the court below concerning the principal claim cannot be the subject of a hearing in a *Jokoku* appeal. When there is ground for a *Jokoku* appeal by the defendant, the court should dismiss only that part of the original judgment concerning the supplementary claim."

(There are supplementary as well as dissenting opinions).

[Comment]

With regard to the question of the scope of the judgment in appellate courts in a combined action including a supplementary claim, there have been no precedents nor have academic circles discussed it at length. The current decision, in this connection, was the first Supreme Court precedent on the problem. It appears, however, that prevailing academic theories are opposed to the majority view of the current decision. In order words, they maintain that whereas one of the parties filed an appeal against the judgment as a whole, which partly dismissed and partly allowed in the combined action including a supplementary claim, the appellate courts can conduct a hearing and pass judgment on the whole of the judgment in the court below and should not be limited to the scope to be covered by the motion of the objection.

5. The change in the actual situation concerning the claim to be maintained such as disappearance of the object of the claim to be maintained after the execution of a satisfactory preliminary injunction, so to speak, and the trial on the merits.

Decision by the Third Petty Bench, the Supreme Court, on April 17, 1979. (Case No. (*o*) 937 of 1976. The case of a claim for restitution of a building. 33 *Minshū* 366.)

[Reference: Code of Civil Procedure § 760]

[Opinions of the Court]

"Even if the execution itself of a so-called satisfactory preliminary injunction creates a situation similar to the one in which the claim to be maintained is realized, it is nothing more than a preliminary state of affairs and that no consideration should be given in the hearing on the merits. However, where the actual state of affairs undergoes a change concerning the claim to be maintained due to the disappearance of the object of the claim to be maintained and others, the court entertaining the action on the merits should take it into account in the hearing on the merits, unless there is such a special situation that the change in question can be regarded as substantially part of the contents of the execution of the said preliminary injunction."

[Comment]

The current case was concerned with the basic problem of preliminary injunction, that is, what influence the new situation caused by the disappearance of the claim to be maintained, such as the disappearance of the object following the execution of the preliminary injunction, might have on the hearing on the merits. On this score there have been conflicting views both in academic theories and judicial precedents. The present decision, in this connection, clarified the attitude of the Supreme Court toward this issue.

6. The scope of discretion described in the Code of Civil Procedure concerning so-called discretional removal.

Decision by the 11th Civil Division, the Osaka High Court, on Feb. 28, 1979. (Case involving an immediate exception to a removal decision. 923 *Hanrei-Jihō* 89.)

[Reference: Code of Civil Procedure § 31]

[Opinions of the Court]

"In making a judgment on whether or not it is necessary to avoid 'considerable damage,' one of the requirements provided

for in Article 31 of the Code of Civil Procedure on the discretional removal, it is necessary to take into consideration not only the disadvantage of the defendants but the disadvantage the plaintiff may suffer as a result of the transfer of the case. Viewed from this point, the court must make an ample study of the ability of the parties concerned to continue the suit in making a decision on the necessity of a removal."

[Comment]

It has been widely recognized that consideration should be extended to the possible disadvantage of the defendant as well as the plaintiff in passing judgment whether or not it is necessary to "avoid considerable damage or delay in regard to a suit over which the court has jurisdiction." There have been many precedents concerning the discretional removal, but the current decision is worthy of note in that it emphasized the need to pay attention to the capacity for litigation of the parties concerned as the test of judgment of such discretion.

7. Concerning the claim on money an obligor obtained by resale of the object of the preferential right to a third party prior to adjudication, can the person who has a preferential right attach the object of such right of subrogation by his preferential right against the trustee in bankruptcy after such adjudication?

a. Decision by the Fifth Civil Division, the Osaka High Court, on July 27, 1979. Positive. (Case No. (*ra*) 348 of 1979. A case of an exception to the decision in which an application for an attachment order for the claim for subrogation by the preferential right on the sale of goods was turned down. 398 *Hanrei Taimuzu* 110. 946 *Hanrei Jiho* 57. 909 *Kinyū Hōmu Jijyō* 44. NBL No. 197, p. 19.)

b. Decision by the Second Civil Division, the Osaka High Court, on July 31, 1979. Negative. (Case No. (*ra*) 242 of 1979. A case of an immediate exception to the decision in which an application for an attachment order for the claim was turned down. 398 *Hanrei Taimuzu* 112. 910 *Kinyū-Hōmu-Jijyō,* 46. 590 *Kinyū-*

Shōji-Hanrei 10.)

[Reference: Civil Code § § 303, 304, and 311 (1) (vi), Bankruptcy Act § § 92 and 95]

[Opinions of the Court]

a. "Since the effect of the adjudication is produced rather abstractly for the purpose of liquidation, it does not accompany a realistic act of execution whatsoever, nor does it affect the right of a creditor any more than being of abstract nature. Hence, it does not prohibit a garnishee from making payment to the trustee in bankruptcy nor prohibit him from satisfying a claim. When a person who has a preferential right wants to exercise his subrogative right, there must be an attachment as stated in the proviso to the Civil Code § 304 (1). This means that there just be an actual act of attachment, that is, a provisional attachment proceeding in the individual execution. An abstract act such as adjudication is not sufficient."

b. "All the property of a bankrupt constitutes the bankruptcy estate at the time of adjudication. Even if one obtains a right to the property belonging to a bankruptcy estate and is equipped with requirements for contest, he cannot set up against a bankruptcy estate or the trustee in bankruptcy. Hence, unless the person who has a preferential right attaches the claim on money due from accounts which the bankrupt (an obligor) holds against a garnishee, he cannot insist on the exercise of his right of exclusive preference against the bankruptcy estate or the trustee by virtue of his right of subrogation."

[Comment]

Usually there is little trouble with regard to the preferential right on the sale of goods when the economic-conditions of an obligor are in a normal state. However, in an extraordinary situation such as bankruptcy of the obligor, the person who has a preferential right attempts to exercise his subrogation right in haste, thus giving rise to the problems described above. These problems have not been the subject of argument in academic circles nor have

there been any precedents. Recently precedents directly dealing with such problems have emerged one after the other. In the current cases of **a** and **b**, although the divisions handling the cases were different, completely opposite decisions were given at the same court and almost at the same time. In this regard, this question has attracted attention in the quarters concerned. It is also worth taking special note of the future trends of the issue in both academic theory and judicial precedent.

8. The refusal to testify by a newspaper reporter about his news source and "professional secrets" provided for in the Code of Civil Procedure § 281 (1) (iii).

Decision by the Fourth Division, the Sapporo High Court, on Aug. 31, 1979. (Case No. (*ra*) 20 of 1979. A case of exception to the decision on refusal to testify. 394 *Hanrei Taimuzu* 47 937 *Hanrei Jihō* 16.)

[Reference: Constitution § 21, Code of Civil Procedure § § 28 (1) (iii), 283]

[Opinions of the Court]

"Accurate information in newspaper reporting can be supplied by an information only when there exists an assurance of mutual trust between the informant and the newspaperman that the news source shall never be disclosed. If a newspaper reporter has to disclose his news source in the newspaper in which freedom of speech should be maintained, it would become extremely difficult or even impossible for the informant to supply accurate information with peace of mind. Hence, it is interpreted that the news source of newspaperman belongs to 'professional secrets' provided for in the Code of Civil Procedure § 281 (1) (iii). At the same time, it cannot be denied that the right to refuse to testify concerning a news source on the ground of 'professional secrets' may be restrained in connection with the call for a fair and just trial in a civil action. The extent of the said restraint should be decided by the comparison and balance between the benefit ac-

cruing from the maintenance of the secrecy of the news source and that from the realization of a fair trial."

[Comment]

This is the first case concerning whether or not a newspaper reporter can refuse to testify for the sake of maintaining the secret of his news source when summoned for questioning as a witness. On this score an argument is under way in academic circles on whether or not the "professional secrets" in the Code of Civil Procedure § 281 (1) (iii), include the news source of a reporter. In modern society, the question of the news source of newspaper reporters and refusal to testify has increasingly gained importance. The fact that an opinion in favor of refusal to testify in a civil action was offered in the current decision will have an important bearing in the future as the first such legal precedent.

By Asst. Prof. TETSUO KATO
NORIYUKI HONMA

5. Criminal Law and Procedure

a. Criminal Law

1. Minamata disease originating in a child en ventre sa mère, and the crime of inflicting injury or causing death by negligence in the performance of work.

Decision at the second criminal division, the Kumamoto District Court, March 22, 1979. (Case No. (*wa*) 164 of 1976, Charges of inflicting injury or causing death by negligence in the performance of work. 931 *Hanrei Jihō* 6.)

–The decision in the first instance dealing with the criminal charge concerning the Minamata disease in Kumamoto–

[Reference: Criminal Code § 211, first half]