The court in the current decision ruled that the nuisance due to the noise and vibration was not slight and that there were diversified patterns of damage. It also admitted that the mental disorder of the plaintiffs was extremely painful, but refused to recognize any physical damage on the ground that it would be difficult to establish clearly the cause and effect between the noise and vibration and bodily disorders.

Although the court virtually recognized the claim of the plaintiffs for solatia concerning the past, it dismissed their demand for injunction of such environmental pollution and solatia for the future.

The current decision recognized personal rights as the basis for injunction while denying environmental rights. In measuring the interests between the personal rights of the plaintiffs and the public nature of the Shinkansen, the court thought much of the effect on the public nature of the Shinkansen if a slowdown of speed was ordered. Herein arises the question again on what should be meant by public nature.

By Prof. TERUAKI TAYAMA
KAZUO FUJIMURA

## 3. Family Law

### Action for the denial of legitimacy and provisions of the Civil Code on the limitation of actions and Articles 13 and 14 Para. 1 of the Constitution

Decision by the First Petty Bench, the Supreme Court, Mar. 27, 1980. Dismissed. (Case No. (*o*) 1331 of 1979. 32 *Kasai Geppō* No. 8, pp. 66, 970 *Hanrei Jihō* 151, and 419 *Hanrei Taimuzu* 86.)

*[Facts]*

X (plaintiff, appellant, *Jokoku* appellant) married Y (defendant,

appellee and *Jokoku* appellee). The eldest son Z (defendant, appellee, *Jokoku* appellee) was born to X and Y in May, 1966 and notification to that effect was made.

In 1978, more than 10 years after the birth of Z, X filed an action for determining the nonexistence of the father-child relationship between X and Z contending that Z was involved in a complicated affair with a man at the time when Z was conceived by Y, that Z did not resemble Y in many respects such as facial appearance, physical constitution, character and conduct, interest and taste, and that Z very much resembled the man with whom Y had amorous relations.

In the first instance, the Kofu district court ruled that since the current case was an action against a child subject to the presumption of legitimacy (Civil Code § 772) it should be handled as an action of denial of legitimacy (Civil Code § 775), not as an action for determining the nonexistence of a father-child relationship. Holding that the current action should not be maintained since the action was brought before the court one year after the time when the husband became aware of the child's birth (Civil Code § 777), even if the case was interpreted as an action of denial, the court dismissed the claim of X. Then, X lodged a *Koso* appeal, but the Tokyo High Court in the second instance affirmed the judgment of the first instance on the same ground.

Thereupon X appealed to the Supreme Court contending as follows: the existence or nonexistence of a parent-child relationship should be judged on the basis of natural blood ties and in conformity with the truth. But there are strict requirements concerning denial of legitimacy as provided for in the Civil Code (§§ 774 and 778) that a denial of legitimacy must be made by a special method such as an action of denial of legitimacy, that the period to bring action is limited to a short period of one year, and that the qualification to bring action is restricted to the specified scope of persons. Such strict requirements run counter to Articles 13 and 14 Para. 1 of the Constitution providing for individual dignity and equal protection under the law.

*[Opinions of the Court]*

What legal procedure should be taken by the husband who wants to deny the legitimacy of a child who is subject to the presumption of legitimacy by Article 772 of the Civil Code is a "matter of legislation." The requirements provided for in Articles 774, 775 and 777 of the Civil Code that denial of legitimacy of a child must be made exclusively by an action of denial and that the period to bring action should be restricted to one year is a "fully rational system from the viewpoint of maintaining the legal certainty of family relationships." In this regard, those requirements do not violate Articles 13 and 14 of the Constitution.

*[Comment]*

The current judgment is worthy of attention in that the Supreme Court for the first time discussed the constitutionality of the system of the action for denial of legitimacy.

The Supreme Court made it clear that Articles 13 and 14 of the Constitution are not violated by the provisions in the Civil Code that an action of denial of legitimacy must be brought to deny the legitimacy of a child who is subject to the presumption of legitimacy and that the said action must be lodged within one year.

The two Supreme Court judgments quoted in the current decision both concern an action for acknowledgment (Civil Code § 787). (A. Decision by the Supreme Court, July 20, 1955. 9 *Minshū* 1122, and B. Decision by the Supreme Court, June 21, 1979. 933 *Hanrei Jihō* 60.) In the first and second instances, both cases concerning the action for acknowledgment or that for determining the existence of a father-child relationship filed by the child after more than three years following their father's death were dismissed as unlawful. (See proviso of the Civil Code § 787.) Dissatisfied, the children who were not legitimate brought *Jokoku* appeals contending that the restrictions provided for in the Civil Code (§§ 779 and after) concerning the establishment of a legal relationship between the father and an illegitimate child run counter to Article 13 of the Constitution (regard for individual dignity and the pursuit of happiness) and Article 14 (equality under the

law).

With regard to Case A, the Supreme Court held that how to decide on the requirements concerning the action for acknowledgment is a "matter of legislation" and that the limitation period of three years after the death of the father provided by the Civil Code (§ 787 proviso) is reasonable from "the viewpoint of maintaining the legal certainty of the family relationship" and does not violate Article 13 of the Constitution at all. It also held that the proviso of Civil Code Article 787 does not run counter to Article 14 of the Constitution since it is applied uniformly to anyone who wants to bring an action of acknowledgment.

With regard to Case B, the Supreme Court held that what system should be adopted to establish a legal parent-child relationship between the father and his illegitimate child is a matter of legislation and that the provision in Article 779 and after of the Civil Code, to the effect that the relationship between the father and illegitimate child comes into being only by acknowledgment, is a "fully rational system from the standpoint of maintaining the legal certainty of the family relationship" and does not run counter to Article 13 of the Constitution nor does it violate Article 14 of the Constitution, since the said provision is applicable equally to all illegitimate children.

In the two decisions quoted above, the children who are not legitimate insisted on the unconstitutionality of the procedures for determination of a legal relationship between a father and his illegitimate child as prescribed in the Civil Code, but in the current case, the father and husband side questioned the constitutionality of the strict procedures for denial of legitimacy of a child.

With regard to the relationship between a father and his legitimate child, however, the Civil Code presumes a child conceived by a wife during marriage to be the child of the husband (Civil Code § 772). As a matter of principle, only the husband who becomes aware of the birth of the child can rebut this presumption by bringing an action of denial of legitimacy within one year from the time when he became aware of the child's birth (Civil Code § § 774, 775 and 777). In addition, if the husband recognizes that the

child is legitimate after his birth, he loses the right of denial (Civil Code § 776).

The Civil Code, by establishing the presumption of legitimacy, provides that it can be rebutted only under strict requirements because it is designed to promote the stability of family relationships and maintain "peace within the family" by determining, as soon as possible, the father-child relationship which is difficult to prove. Such is the generally accepted view.

However, as a matter of legislative discussion there has been some criticism that the one-year period to bring an action of denial of legitimacy is too short and that the qualification of the person to bring the action should be extended to the wife and the child instead of restricting it to the husband alone in order to expand the ways of determining the truth surrounding the parent-child blood ties.

Despite academic arguments as such, the Supreme Court employed a formalistic logic as in the case of the afore-mentioned decisions and adjudged as constitutional the system to bring an action of denial of legitimacy. It must be stated in this connection that the current decision lacks minute enquiry as to whether or not the provisions of the existing Civil Code are truly befitting to realize the spirit of every article of the Constitution and whether or not they are rational. Criticism concerning the current case is centered on this point and attention is focussed on how the Supreme Court will cope with it in the future.

**Validity of a will by a notarial document in the presence of a blind person as witness.**

Decision by the First Petty Bench, the Supreme Court, on Dec. 4, 1980. *Jokoku* appeal dismissed. (Case No. (*o*) 558 of 1977. 989 *Hanrei Jihō* 3, 431 *Hanrei Taimuzu* 46.)

*[Facts]*

The decedent and testator A (father of $Y_1$ and $Y_2$) died on June 30, 1967, and his heirs, eldest daughter $Y_1$ and second eldest daughter $Y_2$ (defendants, appellees and *Jokoku* appellants) completed the registration of transfer of ownership and the registration

of preservation of the real estate owned by A on the basis of succession the following year.

However, it became known that on Mar. 10, 1967, three months before his death, A had a will drawn up by a notarial document in the presence of a blind person $X_1$ (nephew of A) and his wife $X_2$ as witnesses. In the will, A left all his estate by will to B (nephew of $X_2$) and appointed $X_1$ executor of the will. Thereupon, $X_1$ brought an action calling for cancellation of the registrations by $Y_1$ and $Y_2$. $Y_1$ and $Y_2$ defended their case that the will by a notarial document in question was void on the following grounds: 1) A was lacking in testamentary capacity because he was sick at the time of making his will, 2) Although $X_1$ and $X_2$ were present as witnesses, $X_1$ being blind was virtually disqualified as a witness, and, further more, 3) $X_1$ happened to be there at the request of a notary public and did not fulfil the actual role as a witness. In the meantime, the executor of the will, $X_1$, died while the case was pending in the first instance, and $X_2$ was newly appointed as executor, thus succeeding to the current action.

The Himeji Branch of the Kobe District Court in the first instance ruled the will null and void accepting the contention 3) of $Y_1$ and $Y_2$ that $X_1$ was not well enough aware of his role as a witness at the time when the will was prepared. Contrary to the judgment in the first instance, the Osaka High Court in the second instance interpreted the said will as effective, noting that "$X_1$ was not wanting in his awareness as a witness and that he could be acknowledged as having fulfilled his role fully." $Y_1$ and $Y_2$ lodged a *Jokoku* appeal repeating their contention that the said will prepared in the presence of $X_1$ was void because a blind person is disqualified as a witness to the will by a notarial document.

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

*(Majority Opinion)*

"According to the Civil Code Article 969 item 1, two or more witnesses must be present to make a will by a notarial document, but a blind person cannot be considered a disqualified person listed in Article 974 of the Civil Code as a witness to a will. Moreover, it

is difficult to find due ground on the contention that only the fact that a blind person is deficient in his eyesight leads to his inability to fulfil his role as a witness. In this regard, he cannot be considered a virtually disqualified person either lacking in aptitude as a witness to a will by a notarial document."

The presence of witnesses in preparing a will by a notarial document is required to prevent in advance future disputes surrounding the will by securing the true intention of the testator and having the witnesses confirm the following points: 1) whether there is no mistake as to the identity of the testator; 2) whether the testator has orally conveyed the contents of his will to the notary public on the basis of his own true intention and being of sound mind; and 3) whether the notary public has noted down exactly what the testator has orally stated.

In general, it is quite evident that a blind person whose eyesight alone is troubled cannot be considered incapable of confirming the points mentioned above in 1) and 2). As to the confirmation of the accuracy of the writing by the notary public, it is enough for him to compare what the testator has orally stated with what the notary public has read. It is not necessary to compare both by taking a look at what the notary public has written down by his own eyes. In this sense, a blind person, although his eyesight is troubled, cannot be termed as disqualified both actually and legally as a witness to a notarial document.

*(Minority Opinion)*

The law requires the involvement of witnesses in the execution of a will by a notarial document on the following grounds: 1) to have the accuracy of the writing of a notary public determined by witnesses, 2) to prevent any wrongdoing through the vigilance of the witnesses, and 3) to secure the reliability of a notarial document by producing the formality that the will by a notarial document is drawn up rightly by the involvement of witnesses.

Unlike the majority opinion, point 1) should be interpreted as requiring the witness to confirm by his own eyes directly whether or not the written contents by the notary public is in accord with the oral contents of the testator. Accordingly, since a blind person

cannot fulfil his role duly concerning the will by a notarial document, he should be regarded as disqualified.

*[Comment]*

The point at issue in the current case was the capability of a blind person being a witness to a will by a notarial document (Civil Code § 969). Since there has been virtually no precedent on the qualification of a blind person as a witness to a will by a notarial document, the current judgment by the Supreme Court, the first of its kind on the problem, has an extremely important implication. The fact that the judgment was made by a slight margin of 3 to 2 indicates the difficult nature of the issue.

The presence of the witness to a will, other than a holographic will, is required by law (Civil Code § § 969, 970, and 976 to 979). The witness is a person who testifies that the will was drawn up genuinely, but the Civil Code deleted from the witness list as disqualified those persons inappropriate to testify the genuine execution of a will.

The Civil Code described the following as disqualified: minors, a person adjudged incompetent or quasi-incompetent, a presumptive successor, a testamentary donee, and their spouses and lineal relatives by blood, and the spouse of the notary, the relatives thereof up to the fourth degree of relationship as well as the clerks and servants thereof (Civil Code § 974).

In addition, it is widely recognized that a mentally disordered person who has not been adjudicated to be an incompetent person, for instance, is considered a "virtually disqualified person." It is also a generally accepted academic theory to include a blind person in this category mainly because the blind cannot judge whether or not the writing of the will is correct.

On the other hand, there is a persistent view, although a minority, to recognize the qualification of a blind person as a witness. This theory is based on two valued judgments that the strict formality of a will should be eased and that the scope of "virtually disqualified persons" which includes physically handicapped persons should be limited as much as possible.

The current judgment should be highly evaluated in that in supporting the above minority theory it confirmed in general the qualification of a blind person as a witness to the will by a notarial document. Whether or not the blind person is disqualified as a witness depends on concrete independent judgment to what extent he can carry out his responsibility as a witness. It is not proper to deprive a blind person of his qualification as a witness indiscriminately.

As the majority opinion in the current case pointed out, only when it is actually impossible for him to discharge his duty as a witness because of his eyesight trouble, can the will be adjudged void on the ground of lack of formality. In this sense, it is difficult to approve of the minority opinion in the current case that regards all blind persons as being disqualified virtually by attaching too much importance to the ability of vigilance of a witness.

**A case in which it was ruled that the right to receive a retirement allowance by reason of death does not belong to an estate of inheritance but is the inherent right of the surviving members of the deceased woman's family who are the recipients.**

Decision by the First Petty Bench, the Supreme Court, on Nov. 27, 1980. Dismissed. (Case No. (*o*) 1298 of 1979. 34 *Minshū* 815.)

***[Facts]***

Deceased woman A had been employed by a special corporation Y (defendant, appellant, *Jokoku* appellee) which was established for the purpose of carrying out enterprises to promote Japanese trade in an allround and efficient manner.

When A died in February, 1975, it was not clear whether she had an heir. So, the estate of inheritance came to be treated as a juristic person, to be called X (plaintiff, appellee, *Jokoku* appellant). However, Corporation Y had its own rules concerning the retirement allowances of its employees by reason of death. According to its rules, in the case of retirement by reason of death the bereaved family is to receive the retirement allowances, and the scope and order of the bereaved family members as recipients are

to be based on standards equal to Article 11 of the Retirement Allowance Act concerning government officials.

Thereupon, contending that since a retirement allowance by reason of death has the nature of a deferred payment of wages, and that the said allowance belongs to the estate of inheritance of A, X brought an action demanding that Y should pay A's retirement allowance due to death.

In the first instance, the Osaka District Court acknowledged X's claim on the ground that the retirement allowance by reason of death in the current case constituted the estate of inheritance. On the other hand, the Osaka High Court dismissed X's claim ruling that a retirement allowance by reason of death is the inherent right of the bereaved family members who are the recipients and that the allowance does not belong to the estate of inheritance. In this regard, X made a *Jokoku* appeal.

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

According to Y's "Regulations Concerning Retirement Allowance of Employees," the first in order to receive the retirement allowance by reason of death is the legal spouse or de facto spouse of the deceased. When there is a spouse, the children do not receive the allowance. Even among lineal blood-relatives, parents who are closer in the degree of relationship have priority over grandchildren. The children are treated equally, whether they be legitimate or not. With regard to natural parents and adoptive parents, adoptive relatives are given preference over relatives by blood. The difference in the order is due to whether one had maintained his or her living on the income of the deceased.

In short, the regulation had decided on the scope and order of the recipients in a manner markedly different from the principle of deciding on the order of successors provided for in the Civil Code. So, the regulation aims to guarantee the living of the bereaved family who mainly depended on the income of the employee, and decided on the recipient from a standpoint different from the Civil Code. In that case, the bereaved family who are the recipients are understood to receive the retirement allowance

by death as inherent rights under the regulation, not as successors. Such being the case, the right to receive the retirement allowance by reason of death does not belong to the estate of inheritance.

*[Comment]*

In Japan it is a general rule that employees upon retiring receive a lump-sum grant such as a retirement allowance, retirement pay and a retirement compensation from the employers. In particular, the retirement allowance which gives rise to the right to receive upon termination of the labor contract due to the death of the employee himself is called a retirement allowance by reason of death.

The qualifications for the recipients of the retirement allowance by death are decided generally by work regulations, trade agreements, laws, etc. and they are often different from the scope and order of successors prescribed by the Civil Code. As a result, problems have arisen over retirement allowances by death and the scope of the inheritance, especially as to whether a successor who has not become a recipient can insist upon his right to a retirement allowance by death or whether or not the employer should pay the retirement pay by death to whoever claims it. In the current case, it was contested whether a juristic person of the inheritance estate can claim the retirement allowance by death in the absence of the bereaved family who are the recipients.

There have been two concepts on whether the claim for the payment of a retirement allowance by death constitutes an estate of inheritance. One of the two concepts on the affirmative side is based on an interpretation that the retirement pay is part of the estate of inheritance and that it should be handled as such in accordance with the principles of the Civil Code governing the law of succession. It maintains that even if the scope and order of the recipients prescribed by statutes, work regulations, etc. are different from those of the successor in the Civil Code, they have merely decided on the representatives of the recipients and that since a retirement allowance by death has the nature of a deferred payment of wages, the claim seems to have come into being for an

employee when he was working.

Criticisms are strongly against such a view on the ground that it pays no heed to the original intent as well as consideration for the retirement regulation in deciding on the recipients, such as attaching importance to the protection of the de facto spouse and regard for the actual dependency, and that it lacks rationality.

Another view is that the right to a retirement allowance by death is the inherent right of the bereaved family who are the recipients and that it cannot be the subject of succession. This is, at present, a majority view and prevalent in court judgment. [Reference on the judgments of lower courts: Decision by the Tokyo High Court, Jan. 27, 1965, 16 *Kaminshū* 105; Decision by the Tokyo District Court, Feb. 26, 1970, 248 *Hanrei Taimuzu* 260; Decision by the Osaka High Court, Sept. 28, 1979, 30 *Rominshu* 933 (decision by the court below in the current case); Decision by the Tottori District Court, Mar. 27, 1980, 31 *Gyōshū* 727.]

This view is based on the contention that since most of the regulations concerning the recipients of retirement allowances by death are aimed at protecting the livelihood of the bereaved family, the qualifications of the recipients do not have to be in accord with the successors in the Civil Code, and that the qualifications of the recipients can be established freely and independently of the succession since the establishment of such a retirement allowance system between labor and management is basically left to the autonomous discretion of labor and management.

Even in this theory, however, there is a possibility of giving rise to inequality between the recipient who is also a successor and other successors. Against such a background, a compromising theory has come to gain momentum in an attempt to maintain equality among successors, interpreting that a retirement allowance by death corresponds to the benefit of receiving a gift as prescribed in Article 903 of the Civil Code. (*Shinpan* by the Kobe Family Court, Oct. 9, 1968, 21 *Kasai Geppō* No. 2, p. 175; Order by the Okayama Branch of the Hiroshima High Court on Oct. 3, 1973, 26 *Kasai Geppō* No. 3, p. 43.)

Under such circumstances, the Supreme Court for the first

time clarified its stand, ruling that "the right to receive a retirement allowance by reason of death does not belong to the estate of inheritance, and that it cannot become the subject of succession by other successors as the estate of inheritance if there is no bereaved family. The significance of the current decision can be found in the ruling mentioned above.

Whether or not a retirement allowance by death should be succeeded should not be decided uniformly but judged separately in the light of the regulations, payment practices and payment purposes concerning death allowances. (Decision by the Tokyo District Court, Feb. 11, 1963, 14 *Kaminshū* No. 12, p. 249).

The primary function of the death retirement allowance in the current case is designed to maintain the stability of the livelihood of the bereaved family of the employee, and the death retirement allowance payment system of the special corporation was established from a standpoint different from the principles of the law of succession. In this connection, if the allowance is shared by other successors as the estate of inheritance in the absence of the recipients prescribed in the retirement allowance regulation, it is likely to deviate from the true purpose of the retirement allowance by death. Accordingly, the conclusion in the current decision was very just.

By MASAYUKI TANAMURA

## 4. Law of Civil Procedure and Bankruptcy

There were more than 200 decisions handed down in the field of civil procedure law in the year under review. Some of the outstanding features of those decisions are included in the following.

In the first place, there were many decisions concerning orders for the filing of documents, testifying to one of the marked trends in recent years. Paralleling the diversification of disputes, the