The court ruled that it is permissible to maintain the lawfulness of the step taken. Academic circles, commenting on the decision, held that the replacement of the reason for such rectification should be based on the interest of the taxpayers.

By Prof. HIDETAKE SATO
HIROSHI KOBAYASHI

2. Law of Property and Obligations

1. Requirement of an exclusively-owned portion in the Act for Comparted-Ownership, etc. of Building.

Decision by the First Petty Bench, the Supreme Court, on June 18, 1981. Case No. (*o*) 1373 of 1978. A claim requesting the cancellation of the registration of building ownership. *Jokoku* appeal dismissed. 35 *Minshū* 798. 1009 *Hanrei Jihō* 58.

[Facts]

X et al. who bought the flats of a subdivision condominium, called *Manshon* in Japanese, called on Y who effected the registration of his comparted-ownership of a garage and a storehouse located within the said condominium to cancel the above registration on the ground that the garage and the storehouse in question did not meet the requirements of an exclusively-owned portion as prescribed in Article 1 of the Act for Comparted-Ownership, etc. of Building (Ch. 69 of 1962) and therefore they could not be objects of comparted-ownership.

[Opinions of the Court]

***Jokoku* appeal dismissed. (Claim dismissed)**

1. To be an exclusively-owned portion as prescribed in Articles 1 and 2 of the Act for Comparted-Ownership, etc. of Building, it is sufficient if the portion is separated from other parts to an extent

that allows independent physical control by the component parts of the building, such as party walls and stories, and if its limits are clear-cut. It does not have to be completely separated from all of its surroundings.

2. Even though the facilities for common use by other comparted owners, such as piping and wiring for electricity, gas, air-conditioning and meters, are installed in a certain section of the portion, the requirements for the exclusively-owned portion are not hampered if these common facilities constitute only a small part of the said portion and do not damage its structural independence and independent use.

3. In the light of 1 and 2, the garage and storehouse in the current case satisfies the requirements for an exclusively-owned portion.

[Comment]

As the construction of *Manshon*-style apartment houses has been on the increase, disputes are also increasing at a rapid clip on whether a portion of a *Manshon*-style apartment house can be the object of comparted-ownership coming under an exclusively owned portion (Articles 1 and 2 of the Act for Comparted-Ownership, etc. of a Building) or whether it cannot be the object of comparted-ownership coming under the common-use portion (Article 3).

In this regard, the current decision by the Supreme Court was the first of its kind on this problem. As requirements for an exclusively-owned portion, (1) structural independence and (2) independent use have been usually listed, and the current decision having followed existing views should be considered pertinent.

Prudence, however, must be exercized in applying the criteria for judgment, as in the current cases, to the portion of a building installed with facilities for common use.

2. A case in which the analogical application of Article 395 Civil Code (protection of short-term leases) was denied concerning the hypothecation of provisional registration.

Decision by the Second Petty Bench, the Supreme Court, on July 17, 1981. Case No. (*o*) 225 of 1979. A claim for transfer of registration of land and building ownership. *Jokoku* appeal dismissed. 35 *Minshū* 950.

[Facts]

X promised with B the transfer of the real estate owned by B as payment in substitution (Article 482 Civil Code) for the payment of A's debt making A's non-fulfilment the condition precedent (Article 127 paragraph 1 the Code), and X effected the provisional registration.

In the meantime, Y acquired a short-term lease to the same real estate owned by B (and he also effected provisional registration after X's provisional registration of the claim right of transfer as performance in substitution.)

Later when A went into bankruptcy, X, contending that the above condition precedent was fulfilled, sought the consent of Y to the registration on the basis of his own provisional registration and demanded the transfer of the real estate. Y then insisted upon the protection of the short-term lease (Article 602 Civil Code) by analogical application of (Article 395 Civil Code).

[Opinions of the Court]

1. Such effect of the protection of the ranking of registered rights which is admitted for provisional registration means that any interested party concerned who emerges later after the provisional registration cannot counter, with his own right, the claim for transfer and the claim for consent of a definitive registration based on a provisional registration. And there is no restriction of this effect.
2. The Act Concerning Provisionally Registered Security Contracts does not expressly state the analogical application of Article 395 Civil Code, and the denial of such application is in compliance with the aim of the Act.
3. As a consequence, Y cannot receive the protection of Article 395 Civil Code.

[Comment]

Of such promises of payment in substitute or contracts of payment in substitute with a condition precedent, which are established for the purpose of putting up monetary credits as security by transfering the ownership, etc. of debtors, that provisionally registered is called a provisionally registered security. Any dealings in this instance are regulated by the Act Concerning Provisionally Registered Security Contracts (Ch. 7, 1978).

On the other hand, Article 395 Civil Code stipulates that a lease not exceeding the period mentioned in Article 602 (within three years in the case of buildings) can be set up against the hypothecary obligee, even where it was registered after the registration of the hypothec.

In the current case, it was disputed whether or not Article 395 Civil Code is applied analogically to a provisionally registered security. It is worthy of note that the Supreme Court, for the first time, handed down a negative judgment.

3. An Osaka International Airport public hazard case.

Decision by the Grand Bench of the Supreme Court on Dec. 16, 1981. Case No. (*o*) 395 of 1976. Demand calling for the suspension of night flights at the Osaka International Airport. *Jokoku* appeal dismissed. 1025 *Hanrei Jihō* 39.

[Facts]

The residents (X et al.) living in the neighborhood of the Osaka International Airport demanded of Y (the State) (1) that compensation for damage in the past be paid, (2) that compensation for damage in the future be paid, and (3) that nightly flights to and from the airport be suspended, on the ground that they have suffered physical and mental damage as well as *damage to their livelihood* from noise, vibration and exhaust gas emitted by the aircraft landing at and taking off from the airport. (As for the demand covering the third point, see Decisions in Administrative Law).

[Opinions of the Court]

1) Article 2, Item 1, of the Act Concerning State Liability for

Compensation can be applied not only to such cases in which there is a danger of causing damage due to physical defects or incompleteness of the physical facilities themselves that make up the installation, but also to cases in which there is a danger of causing damage or loss in connection with the mode and degree of usage when such an installation is used in line with its purpose. The Act is also applicable to the danger inflicted upon the third party other than the users of the installation. For the reason above, the court allowed the claim of X et al. with some exemption for compensation due to damage in the past (1).

2) With regard to the right to claim compensation for loss due to the tort in the future (2), even if the same kind of action is expected to continue in the future (such as the landing and taking-off of aircraft), it is impossible to hypothesize primarily and exactly the amount of compensation as well as the establishment of such a claim.

In concrete terms, in case it is believed reasonable for a creditor to prove requirements at a time such a right to claim is established, this right lacks rationality as the right to claim in an action for future payment. Thus viewed, the judgment of the lower court was dismissed.

[Comment]

In resolving public hazard problems, efforts must be made to promote not only the relief of the sufferers but the prevention of the outbreak of such public hazards. There is the order of the cessation of an act in question as a legal means to prevent such outbreaks.

In this regard, the decision in the current case ought to be made an issue in that the prohibition of night flights (from 22 until 7 o'clock) allowed in the first and second instances was reversed and dismissed.

There remains a question concerning the judgment on point (2). Under the circumstances, as the continuation of the tort is believed a certainty, the lower court allowed the claim by making a conservative evaluation of the amount of damage. Even then,

the court in the current case dismissed the claim and such can be termed as too rigid.

By Prof. TERUAKI TAYAMA
NAOYA SUZUKI

3. Family Law

1. Validity of the adoption in contravention of provisions on joint adoption by husband and wife.

Decision by the Second Petty Bench of the Supreme Court, on Apr. 24. *Jokoku* appeal dismissed. (Case No. (*o*) 1133 of 1980. 442 *Hanrei Taimuzu* 97. 1003 *Hanrei Jihō* 94.)

[Facts]

A man A married his wife X in 1936 (plaintiff, appellee and *Jokoku* appellee) and lived with her and her child (his step child) until 1974 when he separated from X and lived with a couple Y_1 and Y_2 (defendants, appellants and *Jokoku* appellants). As he had already given his resources (a housing lot and stocks) to X and her step-child as a gift, A wanted to adopt Y_1 et al. to help them acquire his agricultural land as a means of appreciation.

In compliance with the intention of A, Y_1 submitted to the city office a notification to make A an adoptive parent and Y_1 and Y_2 adoptees, and another notification to make A an adoptive parent and a couple Y_3 (man) and Y_4 (wife), who was born to Y_1 and Y_2, as adoptees. The two notifications were not accepted, however for lack of a signature and X's seals.

On Aug. 5, 1975, Y_1 submitted the two notifications mentioned above by writing in X's name and affixing her seals without her consent and they were accepted by the city office. A month-and-a-half later, A died, thereupon X filed suit against Y_1 and Y_2 as well as Y_3 and Y_4 contending that the adoptions in the current