33.)

Another precedent was a decision made by the Supreme Court on Mar. 17, 1972, on a case concerning the will of a person in imminent danger of death in which the wording "leave an estate" was corrected as "leave a will" without going through the formal methods of correction. The Supreme Court held that if it is a correction of simple errors in writing, any defect in the correction procedure shall not affect the validity of the will.

Most academic theories support the two precedents, and the current decision is just an extension of such a trend.

3. With regard to the correction of a apparent error, as in the current case, if the intention of the testator can be confirmed in the absence of such strict forms prescribed by the Civil Code, the will as a whole should not be termed void on the ground of such a slight breach of formality. It depends on the accumulation of such cases in the future, however, as to what extent "de facto insertions and alterations" should be permitted to maintain the validity of a will.

By MASAYUKI TANAMURA

4. Law of Civil Procedure and Bankruptcy

The trend of decisions in the year under review relating to laws of civil procedure and bankruptcy remained more or less stabilized as a whole, and there seemed to be no striking changes in those decisions.

There were, however, important decisions and introduced herewith are some of them, representing the fields of civil procedure, civil execution and bankruptcy.

1 A case in which the procedure of a court of appeal which handed down a decision without reopening the hearing was judged

illegal.

Decision by the First Petty Bench, the Supreme Court on Sept. 24, 1981. Case No. (*o*) 266 of 1980. A case demanding for the registration of cancellation concerning land ownership transfer registration. 35 *Minshū* 1088.

[Reference: Code of Civil Procedure § 133]

[Facts]

On the ground that his adopted son X committed an act of representation without authority (representation non fondee), A filed an action with the court through his attorney at law demanding that the ownership transfer registration, etc. made for Y on real estate in the possession of A be cancelled.

In the first instance, the decision was made in favor of A, and Y, dissatisfied with the decision, lodged an appeal with the high court. While the trial on the *Koso* appeal was under way, A died on July 15, 1979, but the process of the suit was not stayed as there was an attorney and the trial itself went ahead with A as the party concerned without taking the procedure concerning the succession of the lawsuit.

The appellate court concluded the hearing on the day of the final argument on Oct. 30, the same year and designated Dec. 25 as the day of handing down the decision.

Later, learning of the death of A, Y submitted to the appellate court a document requesting a reopening of the oral hearing on Nov. 7, and again on Nov. 14 he submitted a document requesting a reopening of the hearing with a copy of the family register attached to it testifying to the death of A. At the same time, X submitted a plea to the effect that he would be responsible for his own acts as well as the acts of his subagent now that he had succeeded to all the rights and obligations of A as a result of the latter's death.

The court of appeal, however, dismissed Y's appeal on questions of fact and law on the basis of evidence without reopening the oral hearing.

Thereupon, contending that the standing of the party and the rights involved were considerably different between the case of the

deceased and that of the successor, and that therefore the request for reopening the hearing ought to be accepted, Y filed a *Jokoku* appeal.

[Opinions of the Court]

Whether or not a hearing that was once concluded should be reopened is a matter of the exclusive authority of the court concerned. The parties concerned cannot request the court, as a matter of right, to reopen the hearing. The discretion on the part of the court, however, cannot be regarded as absolutely unlimited.

The court should reopen the hearing in case there is a special reason to give the parties a chance to submit further means of offense and defense, and reopening the hearing concurs evidently with what is required by due process in civil procedure. It was declared unlawful to make a judgment without doing so, and the case was reversed and remanded.

[Comment]

With regard to the request of the parties concerned for reopening the hearing, the generally accepted view is that the request of the parties concerned has no specific legal meaning, while emphasizing the power of the court to conduct proceedings and that the need for reopening a hearing is left up to the discretion of the court. In other words, the same view contends that the request for reopening has no more significance than to give the court a chance for consideration, but that the court does not have to respond to it or may utterly disregard it.

Against such a background, the Supreme Court in its decision made it clear for the first time that if upon studying the reason for the partie's request, it is found that reopening is necessary to realize due process in civil procedure, the court has the responsibility pertaining to its work to reopen the hearing, while at the same time holding the existing view as a prerequisite that the decision to allow the reopening is part of the exclusive authority of the court.

In the current case, the lower court ruled against Y without reopening the hearing and, thereby, without giving Y a chance to

submit any further means of offense and defense.

The Supreme Court found it evidently running counter to what is required by due process in civil procedure, and as unlawful in contravention of the procedure for the reopening of a hearing.

The current decision is quite significant in that the court, notwithstanding the fact that precedents and generally accepted view hold the court's discretion on the reopening of a hearing absolutely unlimited, made it clear that there is a certain limit to the exercise of such authority when viewed from the standpoint of guaranteeing the procedural right of the parties concerned.

As to the standard of judgment on whether or not to reopen a hearing, the current decision introduced the concept of "due process in civil procedure." The contents of it developed by the court can be summed up as follows: –

The party concerned could not submit any means of offense and defense that might likely affect the outcome of the judgment, for causes out of his control, prior to the closing of the hearing by the lower court. If the judgment becomes non-appealable without being given a chance to submit the means of offense and defense, the party is barred from submitting in any following action the said means of offense and defense by virtue of the res judicata of the court decision (the effect of excluding further litigation). In such a case, the court should reopen the hearing and the step taken by the lower court in making the judgment without reopening is to be considered unlawful.

Such is the opinion of the Supreme Court. On one hand it expanded the possibility of reopening a hearing to guarantee the procedural right of the parties concerned, and on the other hand it seemed to have taken special care by attaching such strict requirements as "for any cause out of his control of the party concerned" so that a request for reopening a hearing would not be filed freely for the purpose of delaying the proceedings under the pretext of guaranteeing procedural rights.

It is also pointed out that in practice, requests for reopening a hearing have often been submitted by the parties concerned and that such requests have been accepted rather generously. If the rea-

son for requesting a reopening or whether or not to reopen a hearing has always been examined in practice, in the light of continuing a suit without hindrance, the decision will not affect current practices very much, but if it has not been the practice the decision will exert quite a lot of influence on judicial proceedings.

2. **A case in which a motion against execution was directly filed with an appellate division and the necessity for its transfer.**

Case (a):

Decision by the Second Civil Department, the Tokyo High Court, on Feb. 17, 1981. Case No. (*ra*) 23 of 1981. A motion against the execution in a case of non-specific performance. 998 *Hanrei Jihō* 70. 628 *Kinyū Shōji Hanrei* 34.

Case (b):

Decision by the First Civil Department, the Tokyo High Court, on May 25, 1981. Case No. (*ra*) 295 of 1981. A case involving a complaint against the execution of a decision which permitted the sale of real estate. 1006 *Hanrei Jihō* 54. 969 *Kinyū Hōmu Jihō* 46. 628 *Kinyū Shōji Hanrei* 36.

[Reference: Civil Execution Act § 10. Code of Civil Procedure § 30]

[Fact]

According to Article 10, Paragraph 2, of the Civil Execution Act, anyone wishing to lodge a complaint against execution must file a bill of complaint with the court rendering the decision (the original court), but in the case of (a) and (b) the bills of complaint were filed directly with the appellate division, rather than with the original court, which had handed down the decisions. In the case of (b) the bill was simply mailed to the division.

[Opinions of the Court]

Case (a):

Complaint dismissed.

It should be interpreted that when a bill of complaint against execution is filed directly with the appellate division, the transfer

of the bill to the original court should not be permitted through request, by inference of Article 30, Paragraph 1, of the Code of Civil Procedure.

If such a transfer were admitted, it might give rise to a situation where a complaint is filed for the purpose of delaying the case and, as a result, the legislative purpose of Article 10 of the Civil Execution Act would be circumvented and the original court and parties concerned would find it difficult to know the unappealability of the original judgment and its time, thus threatening to undermine legal stability.

Thus viewed, the complaint in the current case should be dismissed as unlawful.

Case (b):

Transferred.

If a bill of complaint against execution is filed with the appellate division within the legally fixed period of time, the appellate division should transfer the case to the court rendering the decision (hereinafter called the original court).

Should the appellate division dismiss the complaint, as in the current case, as being unlawful, those who filed the complaint with the appellate division may, in most cases, lose the chance to file any complaint for the same reason again lawfully, since the period for filing a complaint is set at just one week. It is believed unreasonable to let the party filing the complaint be at a disadvantage on account of procedural error in that he filed the bill with the court which originally had jurisdiction over the complaint.

If the transfer were permitted as above, the unappealability of the original judgment would not be known to the original court, and the next procedure to follow upon the unappealability of the judgment affirming the complaint would be delayed, compared with a bill of complaint filed with the original court.

But, since the period for filing a complaint is set at such a short period as one week, and it does not necessarily require a long time to transfer the case, and there is a way, if necessary, to enquire the appellate division whether or not such a bill filed, the interpreta-

tion calling for a transfer of the case cannot be considered as greatly running counter to the intent and purpose which the Civil Execution Act, in Article 10, strives to attain.

[Comment]

Article 10, Paragraph 2, of the Civil Execution Act provides that the bill of complaint should be submitted to the original court within the strict statutory limitation of one week from the day the pronouncement of the judgment was received.

The current example concerns how to handle a case when the bill of complaint against execution is filed directly with the appellate division instead of the original court. Since the Civil Execution Act was put into effect, there have been two conflicting decisions, one calling for dismissal of the complaint as unlawful and the other calling for the transfer of the complaint to the original court.

Case (a) was the first decision of its kind concerning this issue and favored the stand of dismissal, while case (b) which followed case (a) was also the first decision of its kind favoring transfer.

Since then, some decisions have adopted the "dismissal" stand after the fashion of case (a) while others following the example of case (b) have favored transferring the case, so there has been no consistency in precedents. Even in academic circle, opinions are varied as to which of the two, "dismissal" or "transfer," should be adopted.

Those favoring "dismissal" say as follows:

(1) The Civil Execution Act establishes a new system of filing a complaint, in terms of execution complaint, and provides that such a complaint should be made by way of the original court, because it strives to ensure speedy execution by eliminating any abuse of complaints for the purpose of delaying proceedings, as was seen under the old law. If it is interpreted that the bill of complaint lodged directly with the appellate division ought to be transferred to the original court, it might give rise to an abuse of complaints, thus running counter to the purport of the law.

(2) If the transfer is allowed, the original court and parties concern-

ed might find it difficult to know whether or not judgment has become non-appealable, even after the passage of the prescribed period for the complaint, and legal stability is likely to be undermined.

On the other, those in favor of a transfer contend as follows:

(1) Since the period for filing a complaint is limited to only one week, a person desiring to file such a complaint would find it practically impossible in many cases to file a complaint again, if it is once rejected. He has only committed a excusable error, in that he has filed the bill of complaint with the appellate division, which ordinarily has jurisdiction concerning the complaint, thus, it is not reasonable to let him suffer such disadvantage.

(2) It is well established that the case should be transferred to the original court in the case of a *Jokoku* appeal or the special complaint (Code of Civil Procedure § 397 (1) and § 419-3) which has to be filed with the original court as in the case of a complaint against execution.

(3) The inconvenience, such as difficulty in realizing whether the decision of the original court has become final and absolute, can be removed by enquiring of the appellate division.

In our opinion, the disadvantage incurred upon a person who was rejected a complaint would be very serious, and it is highly unfair to dismiss indiscriminately complaints filed by those who have no intention of abuse, although it would be different if there were an apparent intent of abuse.

In short, the biggest problem of the party concerned is the present situation, that the handling of a case is entirely different depending upon which court or civil department of that court, for that matter, will take charge of the case.

Since the current case is a decree case (Entscheidungssache), there is no means to unify these conflicting precedents under existing law in this country. As the Civil Execution Act provides for the procedure of execution, which exerts extremely serious influence on the parties concerned, it is absolutely necessary to unify the interpretations. On this score, high expectations are placed

on future efforts in legal precedents and academic theories.

3. The territoriality principle and the authority in Japan of the trustee in bankruptcy in a foreign country.

Decision by the First Civil Department of the Tokyo High Court, on Jan. 30, 1981. Case No. (*ra*) 934 of 1980. A case of complaint against the decision to cancel the execution of a provisional attachment. 438 *Hanrei Taimuzu* 147. 994 *Hanrei Jihō* 53. 619 *Kinyū Shōji Hanrei* 22.

[Reference: Bankruptcy Act § 3 (2), Code of Civil Procedure §§ 741, 743, and Old Code § 754 (Civil Execution Act § 179)]

[Facts]

Company A (representative: B) is a "société anonyme" (joint stock corporation) established in accordance with Swiss law and has its head office in Geneva, Switzerland. On Oct. 26, 1979, the company was adjudicated bankrupt and Y was appointed trustee in bankruptcy.

A Japanese company X (joint stock company), in an attempt to secure its obligations (amounting to ¥1,500,000) against its obligor Company A, requested the Tokyo District Court on Dec. 10, 1979, that a provisional attachment order be issued on the trade mark right registered with the Patent Agency in Japan under the name of A. Upon receiving the decree for a provisional attachment, the Japanese company exercised its right on Dec. 11.

Thereupon the trustee Y, upon depositing the amount to release the provisional attachment (¥ 1.5 million) entered in the said decree, requested the cancellation of the execution by provisional attachment on June 26, 1980 and received the decree ordering its cancellation on June 30. X then filed an immediate complaint against the decree.

X contended as follows: According to Japanese Bankruptcy Act Article 3, Paragraph 2, the effect of bankruptcy adjudged in a foreign country shall not be extended to the assets located in Japan. Since the trade make right in question of Company A is an asset in Japan, the effect of the bankruptcy adjudicated in Switzer-

land cannot be extended to the trade mark in question and, as a consequence, trustee Y who assumed his post in Switzerland has no power to manage and dispose of the asset in Japan, and that he is not qualified to call for the cancellation of the execution by provisional attachment on it.

[Opinions of the Court]

Article 3, Paragraph 2, of Japanese Bankruptcy Act only provides that bankruptcy adjudged in a foreign country shall not be effective with respect to properties existing in Japan, and does not demand more than that. Therefore, when the law of the country concerned, in which bankruptcy is adjudicated, recognizes the power of the trustee to manage and dispose of all properties, including those abroad, in possession of a bankrupt company it should be interpreted that the trustee shall be allowed to exercise the power which the bankrupt company has on the property in Japan according to the laws of this country.

In the current case, the property located in this country shall consist of the bankrupt company's estate in accordance with Articles 197 and 240 of Schweizerisches Bundesgesetz über Schuldbetreibung und Konkurs.

Thus, Y has the power to manage the disposal of the property, and therefore has the power to seek cancellation of the execution of provisional attachment.

The complaint dismissed.

[Comment]

The legislative principle that provides for the international effect of adjudication of bankruptcy is divided into the territoriality principle and the universality principle, the former contending that adjudication of bankruptcy is effective only on those properties located in the country concerned, and the latter holding that its effect includes the property in a foreign country.

Japanese Bankruptcy Act, in Article 3, adopts the territoriality principle. According to generally accepted views, the article in

question, regarded as taking the most extreme stance on the territoriality principle, is interpreted, so far, that 1) the effect of bankruptcy at home can be applied only to those properties of an obligor located at home and, therefore, the properties abroad do not constitute the bankrupt estate, and that the power of the trustee to manage and dispose of the estates's properties is not applicable to such properties, and that 2) a bankruptcy abroad does not affect property in Japan where a creditor resides, the creditor can realize execution with regard to such properties, and that the authority of the trustee in a foreign country cannot be applied thus far.

In recent years, however, there has been an attempt in academic circle to modify such generally accepted interpretation on the ground that the interpretation as such is not compatible with the actual situation surrounding businesses, in the light of Japan's progress in the international economy, and that there is a possibility of inconvenience resulting.

The decision in the current case, that if the law of the foreign country concerned on the effect of bankruptcy provides that the authority of the trustee is applicable to properties existing in Japan, notwithstanding the provision of Article 3 of Japanese Bankruptcy Act, the said trustee can exercise, on behalf of a bankrupt entity, the power which the latter has on the property in accordance with Japanese law. This coincides with the recent trend in academic theories moving toward a modification of the connotations of the territoriality principle based on the generally accepted interpretation so far.

The decision, in this connection, is extremely worthy of attention as it is probably the first precedent of its kind on this issue as such. The purport of the current decision should naturally be regarded as applicable to the effect of corporate reorganization proceedings (see Corporate Reorganization Act § 4 (2)) and composition proceedings (see Composition Act § 11 (1)) originating in a foreign country. The decision in the current case is very significant today in that it has become quite frequently the case for corporations, etc. to have, apart from their business offices, etc., their own

properties abroad.

By Assoc. Prof. TETSUO KATO
NORIYUKI HONMA

5. Criminal Law and Procedure

a. Criminal Law

1. A case in which the use of someone else's car for several hours without the latter's consent was construed as an act of theft.

Decision by the Second Petty Bench, the Supreme Court, on Oct. 30, 1980. Case No. (*a*) 1081 of 1980. Charges of committing theft and violating the Road Traffic Act. 34 *Keishū* 357.

[Reference: Criminal Code §235]

[Opinions of the Court]

The defendant drove off a passenger car belonging to someone else from the parking lot of a gas station in Hiroshima without the latter's consent during the early hours of the morning. The defendant at the time intended to keep the car for several hours and actually drove it around the city for a little over four hours.

His action corresponds to the crime of theft because he had the intention of dishonestly depriving another of his car, even though the defendant intended to return it where it was originally parked.

[Comment]

The current case concerns the temporary use of goods belonging to someone else without consent. In Japan there are two academic theories concerning the crime of theft.

The first is that the crime of theft can be established when one appropriates property belonging to another and keeps it in his own possession, while the second theory is that the crime of theft cannot be established by merely obtaining possession, but that