the judgment made by the Supreme Court, however. It is questionable that the court stated that even if the discharge of waste water by Y went beyond the generally accepted "certain limit" and constituted an unlawful act, the responsible enterprises (Y) shall not be forced to bear the total expenses needed for getting rid of the resultant pollution.

The Supreme Court ruled that even if environmental pollution was caused by an unlawful act of a private enterprise, and even if the inadequate administrative policies of the local entity were responsible partly for the cause of the pollution, the local entity could cover the cost of rectifying the pollution, within its own discretion.

Concerning the loss the public entity suffered due to the unlawful act of an enterprise, there is some portion which can be borne by the discretion of the public entity and it is not proper to claim in a citizens' suit for compensation of that portion against the enterprise. On this score, it must be criticized that although the current decision has opened the way to recover damages from a private enterprise in the proceedings of a citizens' suit, the responsibility of enterprises for causing pollution has somewhat diminished.

By Prof. KATSUICHI UCHIDA
NAOYA SUZUKI

3. Family Law

1. The commencement of the limitation period for an action for acknowledgment after the death of a father.

Decision by the Second Petty Bench of the Supreme Court on Mar. 19. *Jokoku* appeal reversed and remanded. The case of a claim for acknowledgment. Case No. (*o*) 1072 of 1980. 36 *Minshū* 432. 1038 *Hanrei Jihō* 282. 468 *Hanrei Taimuzu* 91.

[Facts]

Woman A (mother of X) and man B (father of X) had entered into a de facto marriage (*Naien*) relations and began living together from about March, 1974. Because in 1975 A was found to be conceiving a child, both A and B performed a wedding ceremony. And then they signed and sealed a form of marriage notification, but failed to submit it to the authorities concerned.

Early in November 1975, B left home and became missing. Giving birth to X (plaintiff, *Koso* respondent and *Jokoku* appellant) on Feb. 10, she submitted the marriage notification which had been in her safekeeping and the notification of the birth of X to the City Office which were accepted by the authorities.

With the understanding of B's relatives, A filed a notification of divorce and at the same time entered X in her family register in May, 1976. With the receipt of a police report from B's parental home in early December, 1978, however, it was confirmed that B had already died in November, 1975. Thereupon the family register was rectified on the basis of the decree of the leave of a rectification of family registration on the ground that the aforementioned notifications of marriage, birth and divorce were null and void, and that the legal father-child relationship between the late B and X had become non-existent.

In May, 1979, A as legal representative of X filed an action for acknowledgment against the public procurator Y (defendant, appellant, *Jokoku* respondent).

In the first instance, the Kyoto District Court allowed X's claim stating that "the legislative intent of the proviso to Civil Code Article 787 is designed to protect the interest of the claimant to an acknowledgment, and to keep harmony with social interest to remove the legal instability resulting from the long unstable state of the relationship."

The court said that in the current case it was harsh upon the plaintiff to compel him to observe it, and that in case legal certainty is not marred by not applying it to the current case, the proviso to the said article shall not be applied.

On the other hand, in the second instance, the Osaka High

Court dismissed the claim of X on the ground that: Even if the death of the father had been made known after the lapse of three years from the time when the father died, and even if the relatives of the father were desirous of such acknowledgment, in addition to the fact that the paternity was indisputable, an exception to the limitation period to file an action for acknowledgment shall not be permitted. The court then dismissed the claim of X. X then filed a *Jokoku* appeal.

[Opinions of the Court]

"In the light of the aforementioned facts, the fact about B's death was made known to A et al. after a lapse of three years and one month from the date of his death. In the meantime, X acquired the status of a legitimate child born between the couple B and A in the family register.

"Hence it can be said unavoidable for X or A not to file an action for acknowledgment within three years from the date of B's death. Moreover, even if the action for acknowledgment could be filed, it was not possible to realize its purpose. Under such circumstances, it ought to be considered too harsh upon the claimant to an acknowledgment not to permit the latter to file a claim on the ground that the period for filing such an action, as prescribed in the proviso to Civil Code Article 787, had already passed.

"In the light that the purpose of the law in providing a limitation period lies in maintaining a balanced adjustment between the legal certainty of family relationship and protection of the interest of the claimant to an acknowledgment, and in the absence of special circumstances to the contrary in connection with the aforementioned facts, it shall be permitted to compute the limitation period from early December in 1978 when B's death had become evident objectively."

[Comment]

1. According to the proviso to Civil Code Article 787, an action for acknowledgment cannot be brought "after a lapse of three

years from the time when the father or mother died." Then, is it not possible to file an action for acknowledgment, even if there are special circumstances about the lapse of the period, that the fact about the death of the missing father became known after a lapse of more than three years from the time he died? Or shall the proviso to Article 787 be applied, without exception, to a child of a de facto marriage whose paternity is certain?

The current decision ruled that when a child, conceived during a de facto marriage, files an action for acknowledgment after a lapse of three years following his father's death, he can file an action, as the case may be, three years from "the date when his father's death became evident objectively."

The current decision is epochal in that it has modified and relaxed the hitherto strict approach shown in past cases. One may say that at the root of the current decision lies the basic principle that "such right should not be taken away without having the opportunity to exercise it."

2. Incidentally, decisions concerning this problem have so far been passive. In the first place, in an action in which the limitation of an action for acknowledgment was in dispute as to whether it would run counter to Article 13 of the Constitution (the right to the pursuit of happiness) and Article 14 (equal protection under the law), the Supreme Court ruled that how to provide the requirements for bringing an action for acknowledgment is "a matter of legislation," that the three-year limitation following the death of the father is "reasonable from the standpoint of maintaining the legal certainty inherent in a family relationship," and that it limits the period of the right to bring an action equally and uniformly for all persons entitled, and is not discriminatory in any way."

Therefore, the Supreme Court judged that the proviso to Article 787 of the Civil Code was constitutional. (The Supreme Court decision, July 20, 1955, 9 *Minshū* 1122. The Supreme Court decision, June 21, 1979, 933 *Hanrei Jihō* 60).

Secondly, with regard to a child born out of a de facto marriage, the Supreme Court ruled that paternity must be determined

by an action for acknowledgment in the absence of a voluntary acknowledgment by the father (the Supreme Court decision, Jan. 21, 1954, 8 *Minshū* 87), and repeatedly stated that the proviso to Civil Code Article 787, designed to "keep the legal stability of the family relationship from being damaged," shall be applied even to a child whose father-child relationship is indisputable (Supreme Court decision, Nov. 27, 1969, 23 *Minshū* 2290; Supreme Court decision on Dec. 23, 1980, 992 *Hanrei Jihō* 47).

Many an academic theory, however, has long been critical about such attitudes of the court decisions and the provision restricting the period for filing an action.

Opinions have become stronger in recent years that with regard to the child of a *Naien* relationship subject to the factual presumption of paternity, the action for acknowledgment after a lapse of three years following the death of the father should be allowed without application of the proviso to Article 787.

3. Against such a backdrop, the current decision expanded the scope of protection for the claimant to an acknowledgment by deftly manipulating the commencement of the limitation period from "the date of the father's death" to "the date when the father's death became evident objectively," while maintaining the judicial precedents that the proviso to Civil Code Article 787 shall be applied even to a child born out of a de facto marriage.

It must be remembered, however, that "the date when the father's death became evident objectively" is not "the date when the claimant learned about the father's death." (Supreme Court decision, Nov. 16, 1982. 1065 *Hanrei Jihō* 136).

2. The validity of divorce by agreement, as an expedient of receiving livelihood protection benefits.

Decision by the Second Petty Bench, the Supreme Court, Mar. 26, 1982. *Jokoku* appeal dismissed. Case No. *(o)* 1197 of 1981. An action for declaration of the nullity of a divorce. 1041 *Hanrei Jiho* 66.

[Facts]

A woman X (wife, plaintiff, appellant, *Jokoku* appellant) and a man A were a legally married couple and had been living on the Livelihood Protection Benefits which A received during his recuperation from illness and the earnings of X.

When questioned about the earnings of X by an official of the welfare section, A answered that he and X had gone separate ways because he was told that his Livelihood Protection Benefits amounting to ¥44,000 would have X's monthly earnings of ¥20,000 deducted. Later, the official told A that he would be punished if he received the Livelihood Protection Benefits unlawfully without reporting the earnings of X and without filing a notification of divorce.

Thereupon, X and A upon consulting with each other filed a notification of divorce by agreement as an expedient to continue receiving the same amount of Livelihood Protection Benefits as before and avoid repaying the Livelihood Protection Benefits which A had unjustly received.

Even after that, X and A had maintained de facto marriage relationship. When A died in September, 1973, X paid A's debts and held a Buddhist service taking custody of A's remains.

About six years after the death of A, X filed an action against public procurator Y as defendant calling for a declaration of the nullity of the divorce in question, contending that the divorce by agreement mentioned above was null and void for lack of intention of divorce.

The Sapporo District Court in the first instance dismissed X's claim. The Sapporo High Court in the second instance also dismissed her claim. (Decision by the Sapporo High Court, on Aug. 27, 1980. 1034 *Henrei Jihō* 98).

The high court in the second instance said: "X and A filed a notification of divorce on the basis of their agreement on the intentions to dissolve the legal marriage as an expedient to avoid repaying the Livelihood Protection Benefits, which they had unjustly received and continued receiving. In this regard, it should be stated that there was an intention of divorce between them and even if there were such circumstances as recognized above the

divorce in the current case cannot be termed void for lack of intention to legally dissolve the marriage."

Dissatisfied with the decision, the woman X filed a *Jokoku* appeal maintaining that even if there were the intention to give notification of divorce, there was no intention to dissolve the marital relationship.

[Opinions of the Court]

"According to the facts legally found by the court in the second instance, the notification of divorce in the present case was given on the basis of an accord of intentions to dissolve a de jure marriage relationship, and the judgment of the court in the second instance that the divorce in the current case shall not be termed void can be acknowledged just in the light of its instructions and there is nothing unlawful about the opinions in the process."

[Comment]

1. Husband and wife may effect divorce by agreement (Civil Code Article 763). Accordingly, to make the divorce by agreement effective, there ought to be the meeting of the intentions of divorce between the parties as substantive requirements besides the notification of divorce in accordance with the provisions of the Family Registration Act (Civil Code Article 764).

Needless to say, a divorce by agreement is void in the absence of the meeting of the intentions of divorce. Can it be said that man and wife had the intentions of divorce when they had no substantive intention to dissolve the marriage, and that they had filed the notification of divorce by agreement as a means to realize some other ends? This is the problem of the validity of a simulated divorce by agreement, so to speak.

In the current case, the sham divorce by agreement as an expedient to receive the Livelihood Protection Benefits was ruled effective, merely reconfirming the stance taken by past decisions. But, this is one of the important problems related to the introductory problems of the Family Law on how to establish the relationship between the intention and notification of a family

act-in-law such as marriage and adoption.

The current decision in this regard has provided us with another interesting case in probing into the problem as such.

2. In the light of the theories on family relationships and intentions, there has been a basic divergence of views on how to interpret intention of divorce.

One of them is the substantive intention theory which interprets the intention, in connection with its effect on the family relationship, as creating the substantive fact of family life. Since this theory holds divorce intention as intention to really dissolve the marital living arrangement, a simulated divorce, in which the parties concerned have no intention of changing the habitual fact of family life despite their intention to file the divorce notification for form's sake, becomes null and void.

Secondly, there is a formalistic intention theory which regards intention concerning its effect on the family relationship as one intended to give the notification the effect of creating or terminating the family relationship. According to this theory, it is sufficient for the parties to have the intention of filing the legal notification of divorce, and they are not required to have the intention of ceasing their actual relationship as husband and wife. This theory recognizes a sham divorce as effective.

A third theory distinguishes the formative act-in-law to create a family such as marriage and adoption from a dissolutive act-in-law to dissolve a family relationship, such as divorce or dissolution of adoptive relationship. In the former, intention to establish the state of family life is necessary, whereas in the latter case intention to file the notification is necessary to dissolve the legal family relationship. Accordingly, the third theory also regards the sham divorce as effective.

3. In one case in which a husband gave his assets to his wife as a gift and then procured a sham divorce from her in an attempt to prevent their eldest son from squandering the property, such divorce was ruled null and void from the standpoint of the substantive intention theory. (Decision by the *Daishin-in*, pre-war Supreme Court, on Feb. 25, 1921. 1 *Minshū* 69).

Later, however, the formalistic intention theory has come to gain momentum. A divorce by agreement aimed at escaping compulsory execution by a creditor was also ruled effective on the ground that "there was an intention to terminate the legal relationship of husband and wife for the present." (Decision by the *Daishin-in*, on Feb. 3, 1941. 20 *Minshū* 70).

With regard to the divorce by agreement, which was made in an attempt to give the status of head of the family to her husband under the old law, the Supreme Court in its decision ruled that when there is "an agreement of intention to dissolve the legal relationship of husband and wife," it cannot be considered that they have no intention to divorce, thus recognizing as effective the divorce for form's sake which has brought about no change in their actual life as husband and wife. (Decision by the Supreme Court, on Nov. 28, 1963. 17 *Minshū* 1469).

Court decisions have requested the presence of substantive intentions as a matter of principle with regard to marriage and adoption, (decision by the Supreme Court, Oct. 31, 1969. 23 *Minshū* 894), but have taken a position close to the third theory with regard to divorce calling for the presence of intention to file notification.

4. Although the position shown above is not altogether free from criticism, that no consideration is paid whatsoever as to the actual state of family life, it is supported by many as a realistic interpretation since living arrangements following the dissolution of marriage are manifold, and the actual relationship as husband and wife can be protected to a certain extent by the principles of protecting *Naien* (de facto marriages).

The current decision is indicative of the prevailing trend of judicial precedents, but is distinctive in that divorce by agreement aimed at covering the illegal receipt of social security benefits was judged effective. At any rate, the state can no longer remain indifferent to such practice of unlawfully capitalizing on a notification of divorce.

In cases where the achievement of the purposes intended by such notification must be positively prevented, it may become

necessary to term it as void against public policy and good morals (Civil Code Article 90) or to let them restore their legal marriage for lack of intention to divorce.

3. **The relationship between donationes mortis causa subject to charge and provisions relating to the revocation of wills.**

Reversed and remanded. Decision by the Second Petty Bench, the Supreme Court, on Apr. 30, 1982. Case No. *(o)* 487 of 1981. Claim for confirmation of the nullity of a will. 36 *Minshū* 763. 1042 *Hanrei Jihō* 96. 470 *Hanrei Taimuzu* 116.

[Facts]

A man A (father of X) concluded a donatio mortis causa contract with his eldest son X (plaintiff, appellant, and *Jokoku* appellant) on May 3, 1960 to the effect that "(1) while he works for Company B he shall donate to A a sum of ¥3,000 or more every months and half of his twice-a-year periodical bonuses and that (2) in case X meets such obligations A shall bequeath his assets to X upon his death."

Upon concluding the said contract, X performed the charge in accordance with the terms of the contract until he retired from the Company B on Mar. 31, 1979.

His father A died on Aug. 10, 1979. Notwithstanding the donatio mortis causa contract he had concluded with X, A in two holographic wills dated November, 1974, and September, 1977, had bequeathed the real property belonging to his estates to his second eldest son Y_1 and second eldest daughter Y_2 (defendants, *Koso* respondents and *Jokoku* respondents) and, at the same time, appointed attorney Y_3 as the executor of the will.

Thereupon, X filed an action claiming nullity of the will on the ground that the two holographic wills were invalid being a breach of formality, and that he had acquired the right to all the estates on the basis of the donatio mortis causa contract he had concluded with A.

Both the Toyama District Court in the first instance and the Kanazawa chapter of the Nagoya High Court in the second instance

dismissed X's claim, ruling that the provisions for revocation of a will should be applied correspondingly to the donatio mortis causa as in the current case, and that when the donor made a testamentary will which ran counter to the donatio mortis causa, the donatio mortis causa which was made earlier would be regarded as having being revoked.

X then filed a *Jokoku* appeal.

[Opinions of the Court]

"When the donee, on the basis of the donatio mortis causa subject to charge which called for the performance of the charge during the donor's lifetime, carried out all or virtually all of the charge in accordance with the terms of the contract, it is not reasonable to sacrifice the interest of the donee by way of strictly respecting the final intention of the donor, and that it does not stand to reason to apply mutatis mutandis (Civil Code Articles 1022 and 1023) concerning the revocation of the will, unless there are unavoidable circumstances which call for cancellation of all or part of the donatio mortis causa subject to charge, in the light of the motives of concluding the said contract, the relative relationship of the value of the charge and that of the property donated, the family relationship among the interested parties concerned with the contract, and other living arrangements."

[Comment]

1. The provisions relating to the testamentary will apply mutatis mutandis to donationes mortis causa (Civil Code Article 554). This is because donationes mortis causa define the disposition of property which becomes effective following the death of a donor and has so much in common with the testamentary will. But, donationes mortis causa are contracts and are not required strict formality as in a will. On the other hand, a testamentary will is a unilateral act-in-law and must observe strict formality.

Since there are no specific provisions concerning the application mutatis mutandis in the Civil Code, there have been

arguments centering on whether or not the provision on the revocation of a will (Civil Code Article 1022 et seqq.) should be applied mutatis mutandis to a donatio mortis causa contract.

In the current decision, it was ruled that in cases where the charge in the donationes mortis causa subject to charge is performed while the donor is alive, the provisions concerning the revocation of a will shall not be applied unless there are special circumstances.

The decision is very significant in that the Supreme Court for the first time indicated that there are cases in which the provisions concerning the revocation of a will shall not be applied mutatis mutandis to a donatio mortis causa contract.

2. There have been sharp conflicts of views in decisions and academic theories on the application mutatis mutandis to the provisions concerning the revocation of a will to a donatio mortis causa. Many decisions have so far affirmed that the provisions concerning the revocation of a will can be applied mutatis mutandis, excluding the part concerning its formality. (Decision by the *Daishin-in*, Nov. 15, 1931, 11 *Hōgaku* 616; decision by the Supreme Court on May 25, 1972, 26 *Minshū* 805; decision by the Hiroshima District Court on Feb. 20, 1974, 752 *Hanrei Jihō* 70; decision by the Tokyo District Court on Aug. 30, 1979, 951 *Hanrei Jihō* 87, etc.)

Their contention was that the final intention of a person must be respected, as in the case of a testamentary will, in regard to the disposition of property following the death of the donor.

On the other hand, among the lower court decisions was a case in which the court, while acknowledging the application mutatis mutandis as a matter of principle, denied it in effect in consideration of the background which led to the conclusion of the donatio mortis causa contract, the intention of the donor and the unjustifiability of permitting the bequest to be revoked after death. (Decision by the Tokyo High Court on Oct. 14, 1981, 1024 *Hanrei Jihō* 57)

Still other decisions made by the lower court took a negative stance, that with regard to a donatio mortis causa subject to charge,

a donatio mortis causa shall not be revoked by a subsequent will when the charge has already been fulfilled from the standpoint of protecting the expected rights of the donee. (Decision by the Tokyo High Court on Jan. 25, 1969, 20 *Kaminshū* 24; decision by the Tokyo High Court on Dec. 20, 1979, 409 *Hanrei Taimuzu* 91)

Similar confrontations are noted in academic theories. The affirmative theory insists on free revocation of a donatio mortis causa on the grounds that the final intention of a person regarding the disposition of his property following death, and the fact that Roman Law recognized donationes mortis causa, are revocable at will.

The negative theory denies revocation of a donatio mortis causa contending that as long as the donatio mortis causa is a contract, the expectations of the donees based on agreement must be protected, and that particularly in the case of a gift subject to charge, its binding force is stronger than that of a testamentary will as a unilateral act-in-law. If the application mutatis mutandis to the provisions concerning the revocation of a will should be allowed, a written donatio mortis causa would also become revocable at will and the position of the donee would become weaker than in the case of an ordinary gift (see Civil Code Article 550). Such is the contention of the negative theory denying revocation of a donatio mortis causa.

In recent years, it has generally been the case to make gifts against the background of the special relationship between the donor and the donee. Opinions are also gaining momentum that the advisability of the mutatis mutandis application of the provisions concerning the revocation of a will should not be discussed uniformly in disregard of the substantial relationship and background on which such gifts are based.

3. Under such circumstances, the current court decision followed the influential academic theory and decisions in the lower courts in recent years, and held that the revocation of donationes mortis causa subject to charge should not be revoked as a matter of principle, unless there are special circumstances including the motives

and terms of the donatio mortis causa contract, because when the charge has already been fulfilled it is not reasonable to sacrifice the interest of the donee, for the simple reason that the final intention of the donor should be respected.

A donatio mortis causa is a contract and its agreement should be respected basically and should not be broken lightly. Moreover, it is against the principle of good faith to allow arbitrary revocation and change of mind without restriction when the donee has already fulfilled the charge in the donatio mortis causa subject to charge.

The current decision should be highly evaluated in that it denied the revocation of a donatio mortis causa as a matter of principle in which the charge has already been fulfilled, partly from the standpoint of the adjustment of interests between the parties concerned and partly in consideration of the facts relating to the background on which the donatio mortis causa between relatives are based.

By MASAYUKI TANAMURA

4. Law of Civil Procedure and Bankruptcy

There were several important cases in the year under review concerning civil execution and insolvency proceedings. In particular, interesting cases are found in the field of insolvency laws. One case each from the fields of straight bankruptcy and corporate reorganization are introduced here.

1. **Relationship between an objection lodged on the day of the investigation of claims against the claim filed by a creditor in bankruptcy who had neither an enforceable instrument nor a final judgment, and the effect of an interruption of the statute of limitations involving the filing of such a claim for**