scholars suggest that we should carefully consider whether we should deprive the father of his right to withhold his consent to the adoption.

In **2.**(2), the court found that the proposed adoptee did not need care because the proposed adoptee had been reared by the adoptive father and natural mother. Unlike the case of **1.**, which is the typical case of special adoption, i.e., that of a deserted child, in the case in which a step-parent wants to adopt a step-child at the time of application, it is inferred that there are many cases in which either natural parent has reared the child by cooperating with the remarried spouse; surely it is hard to say that there is the required condition that it is difficult or inappropriate for the parents to care for the proposed adoptee (Civil Code, Article 817.7). On the other hand, it is true that the Civil Code recognizes one spouse adopting the legitimate child of the other spouse (Civil Code, Article 817.3). In order to know which application to adopt a step-child will be allowed, future reported cases will attract our attention. Indeed, so far as the case **2.**(2) is concerned, the dismissal is proper because it does not seem that the termination of the relationship of the grandparents and child falls under "the special condition" which serves "the best interest of the child."

Prof. TAEKO MIKI
KYOKO GOTO

4. Law of Civil Procedure and Bankruptcy

For the year under review, this paper will focus on two decisions in the fields of civil procedure and bankruptcy: the Supreme Court decision regarding the criteria for judging the filing of vexatious action; and the ruling of the Fuji Branch of the Shizuoka District Court on whether a debtor who was adjudged bankrupt and simultaneously granted a ruling for discontinuance of bankruptcy may, after the rul-

ing becomes irrevocable, file a second bankruptcy petition based on the same obligation in order to file a petition for discharge.

1. A case regarding the criteria for judging the filing of vexatious actions.

Decision by the Third Petty Bench of the Supreme Court on January 26, 1988. Case No. (*o*) 122 of 1985. A *jokoku* appeal claiming damages. 42 *Minshū* 1.

[Facts]

This case arose out of a former case in which Y had unsuccessfully sued X. In the present case, X (plaintiff, *koso* appellant, *jokoku* respondent) sued Y (defendant, *koso* respondent, *jokoku* appellant) for damages; X claimed Y's bringing of the former suit should be deemed a tortious act.

The facts of the former suit are very complicated. Corporation A (not a party to this suit) was adjudged bankrupt. A's trustee in bankruptcy gave to B (not a party to this suit) the right to sell certain land that A had owned. The land was entered in the public registry as having an area of 18, 376 *tsubo*. For the purpose of resale, Y bought the land in August 1973 through B for ¥105,000,000. On September 29, 1973, B concluded a contract with Construction Company C (not a party to this suit) to resell the land. The reason why B, not Y, concluded the contract with C was that the land had been provisionally registered in B's name regarding the transfer of its ownership; after giving consideration to his relationship with A's trustee in bankruptcy, B insisted that the resale of the land take place in B's name. B and C provisionally fixed the contract price at ¥105,000,000, but they also agreed to have a survey done to reflect the actual land area, and use a rate of ¥5,713 per *tsubo* to adjust the price. The resale price was set the same as for Y's original acquisition price because Y expected that the actual area of the land (as would be shown by the survey) would be 3,000 to 5,000 *tsubo* larger than the area (18,376 *tsubo*) listed in the public registry.

In October 1973, C requested X, a land and house investigator (and a brother-in-law of C's representative), to survey the land. Only

B and C's representative were present at the survey site. Therefore, X initially refused to do the survey. X insisted that because the owner of the adjoining land was not present to confirm the boundary between C's land and the adjoining land, it was not possible to carry out the survey. B, however, insisted that the survey map would be used only as information for a transaction, and wanted X to do the survey using the following method: for the present, B would indicate to X the boundaries of the area to be surveyed; after completing the survey, the area of the neighbor's land as listed in the public registry would be subtracted; later B would confirm the actual boundary of the neighbor's land. Using the stations that B indicated to him, X calculated the area at 15,191 *tsubo*.

Y had received information that B and C intended to have the land area measured smaller than the actual area, and then split between them the profit that they would earn; therefore, Y doubted the results of X's survey. Y requested another investigator to survey the land, and the result of this (second) survey indicated that the area was 720 *tsubo* larger than X's survey had indicated. Y then requested payment from C for the difference between the two surveys. C, however, refused to pay on the basis that X's survey results controlled the matter. Acting on the basis that it had in fact been Y who had requested X to carry out the survey, Y requested ¥5,000,000 damages from X. X, however, insisted that it had been C, not Y, who had requested the survey, and refused to pay.

Y sued X for ¥5,445,000 in damages resulting from X's survey, which Y alleged to be false.

The court of first instance dismissed Y's claim, holding that it was not Y but C who had requested X to do the survey. Y did file a *koso* appeal but later withdrew it. Thus, the court's decision became irrevocable on September 14, 1982.

On the basis of the former suit, X filed the current action. X sued Y for ¥2,000,000 damages (¥800,000 for lawyer's fees and ¥1,200,000 in compensation) claiming that Y's former suit was vexatious. X stated the following. C (not Y) had requested the survey. Even if the survey results were inaccurate, it was due to the fact that B, whom Y had entrusted with reselling the land, had improperly

indicated the stations to be used to survey the land; X did not make a false survey. X had repeatedly explained these facts to Y before Y filed the former action; therefore, Y brought the action despite the fact that he knew, or had reason to know, that he had no legal basis for bringing the action.

The court of first instance dismissed X's claim holding as follows. The court had doubts about whether B and C had made X improperly calculate the area of the land and caused damage to Y. It was clear, however, that it was primarily Y who had requested X to survey the land; therefore, when Y appeared X should have performed his duties as a land and house investigator and done a proper survey. Therefore, X had no reason to claim that Y had no legal basis to bring the (former) action. (See the decision by the Shizuoka District Court on March 23, 1984.) X filed a *koso* appeal.

The *koso* appellate court held that it was C who had requested X to survey the land and, therefore, it naturally followed that Y would lose the case. Furthermore, before Y filed his suit he should have confirmed with X: who had requested that the survey map be drawn up; and on the basis of what instructions did X do the survey. If Y had done so, Y would have known that he had no legal basis to claim damages from X; therefore, Y's bringing of the former action constituted a tortious act against X. The *koso* appellate court allowed the lawyer's fees. However, it did not go so far as to separately allow for the compensation that X had claimed for emotional distress. (See the decision by the Tokyo High Court on October 29, 1984.) Y filed a *jokoku* appeal.

Y argued the following: Looking at the facts, it is clear that it was primarily Y who had requested X to do the survey. Therefore, it is difficult to understand the *koso* appellate court's reasoning that Y should have confirmed with X the circumstances surrounding X doing the survey. Furthermore, the Constitution, Article 32, guarantees plaintiffs a right of access to the courts and, therefore, the courts should be very careful in deciding that the bringing of an action constitutes a tortious act; it is not acceptable to say that bringing a lawsuit constitutes a tortious act simply because the plaintiff loses the case.

[Opinions of the Court]

Jokoku appeal allowed.

In the civil justice, where an irrevocable judgment is rendered and the plaintiff has lost, it is reasonable for a court to decide that the suit constitutes a tortious act only when the bringing of the action can be viewed as having been remarkably unreasonable in light of the meaning and purpose of the system of justice, such as where the legal rights, relations, etc. that the plaintiff asserted in his suit had no factual or legal basis whatsoever and, furthermore, the plaintiff brought the action even though he knew or reasonably should have known this fact. However, ready access to the system of justice would be severely obstructed if we required a plaintiff to make an in-depth investigation and examination of the factual and legal grounds for the rights, etc. that he is asserting. This result would be regrettable.

[Comment]

In the past, there were many cases in which the defendant won a suit and then, claiming that the suit constituted a tortious act, sued the plaintiff for damages. The main reason why this occurred is that lawyers' fees are not included in the costs of the suit. That is, Japan has not adopted the principle of mandatory legal representation and, therefore, lawyers' fees are not considered to be part of the costs of the suit. Thus, even if the defendant wins the case, he must pay his own lawyer's fees. In a case in which the plaintiff had no legal basis for brining the suit, the (winning) defendant may file a second suit asserting that the former suit constituted a tortious act for which the defendant (the plaintiff in the second suit) should receive the lawyer's fees that he had to pay to respond to the former suit.

So far, both judicial opinions and academic theories have acknowledged that such claims are legitimate. Before World War II, the Grand Court of Judicature held in its decision of November 2, 1943 (22 *Dai-han Minshū* 1179) that when the plaintiff's suit was adjudged to be against public policy and, thus, constituted a tortious act, the defendant might claim compensation for the lawyer's

fees that he had to pay in defending the original action.

The problem is under what circumstances one can decide that bringing an action constitutes a tortious act. Until now there was no Supreme Court decision on this point, and the lower court precedents were not always consistent.

The current decision holds that the bringing of an action constitutes a tortious act "only when the bringing of the action can be viewed as having been remarkably unreasonable in light of the meaning and purpose of the system of justice." As illustrative and concrete criteria, the Court stated the situation where "the legal rights, relations, etc. that the plaintiff asserted in his suit had no factual or legal basis whatsoever," and "the plaintiff brought the action even though he knew or reasonably should have known this fact."

2. May a debtor who was adjudged bankrupt and simultaneously granted a ruling for discontinuance of bankruptcy file a second petition in bankruptcy based on the same obligation after the ruling became irrevocable?

Ruling by the Fuji Branch of the Shizuoka District Court on April 22, 1988. Case No. (*hu*) 3 of 1988. A petition for bankruptcy. 682 *Hanrei Taimuzu* 234; 1288 *Hanrei Jihō* 135.

[Reference: Bankruptcy Act, Articles 132, 145, and 366.2.]

[Facts]

On October 19, 1981, X filed a voluntary petition for bankruptcy with the bankruptcy court based on the claim that (a) he was the surety for debts of ¥115,039,102 that were owed to the Fuji Credit Association and four other creditors and (b) he had become insolvent (Case No. (*hu*) 1 of 1981). On November 5, 1981, recognizing that X was not only insolvent but, moreover, that X's bankrupt estate did not even have enough money to cover the costs of the bankruptcy proceedings, the court adjudged X bankrupt and simultaneously granted a ruling for discontinuance of bankruptcy. On November 29, 1981, the decision became irrevocable.

On March 16, 1988, X filed a second petition for bankruptcy with the bankruptcy court based on the same obligation that had

been the subject of the 1981 petition. This is the present case. The reason for this second petition is not that X newly assumed debts after being adjudged bankrupt, or that assets which should be considered to be part of X's estate were newly discovered. Rather the reason is that following the adjudication on November 5, 1981, X never filed a petition for discharge and, thus, never received from the court a restoration of his legal status. Thus, X stated that his reason for this second petition was that after being adjudged bankrupt again, X wanted to file a petition for discharge within the statutory period set by the Bankruptcy Act (Article 366.2(1)) and be discharged from his obligations.

[Opinions of the Court]

Petition rejected.

Once the bankruptcy court's ruling for discontinuance of bankruptcy becomes irrevocable, the bankruptcy proceedings are conclusively finished; the law should be interpreted to allow a bankruptcy creditor to exercise his rights regarding his claim independently of the bankruptcy proceedings; thus, a bankruptcy creditor may not file a second petition based on the same claim. (See the decision by the Grand Court of Judicature on July 31, 1933; 7 *Saibanrei-Minji* 199.) Furthermore, it is reasonable to interpret the law to mean that a debtor also may not file a second petition in bankruptcy based on the same debt.

[Comment]

Where it is clear from the start that there are causes of bankruptcy and the bankrupt estate is not sufficient to pay the costs of the bankruptcy proceedings, the bankruptcy court shall not continue further with the proceedings but shall adjudge the debtor bankrupt and simultaneously grant a ruling for discontinuance of bankruptcy (Bankruptcy Act, Article 145). Accordingly, the debtor shall be adjudged bankrupt, but without any further proceedings, the bankruptcy proceedings shall end when the court simultaneously grants the ruling for discontinuance.

According to the present Bankruptcy Act, discharge proceedings

do not start until the bankrupt files a petition for discharge with the bankruptcy court within the term fixed by the Act (Article 366.2(1)). Where the court adjudges the debtor bankrupt and simultaneously grants a ruling for discontinuance of bankruptcy, the debtor has one month after the ruling becomes irrevocable within which to file a petition for discharge (the latter part of Article 366.2(1)).

In the present case, the debtor did not file a petition for discharge within the one month statutory period. This time the debtor filed a voluntary petition for bankruptcy with the bankruptcy court based on the same debt in order to be adjudged bankrupt again and file a petition for discharge within the statutory period. In response, the bankruptcy court held that once the (prior) discontinuance became irrevocable, the debtor can no longer file a bankruptcy petition with the court based on the same debt; and that if the one month statutory period has passed, the debtor should have tried to file a supplementary petition for discharge (Article 366.2(5)). The court then rejected X's petition.

Certainly, if the statutory period has elapsed, the bankrupt should attempt to file a supplementary petition for discharge, as was pointed out in the current ruling. However, it seems to be insufficient to allow this as the only method to correct the bankrupt's default. Apart from the situation where the bankrupt abuses the right to petition for bankruptcy, it would seem to be necessary to give the bankrupt a second chance to be adjudged bankrupt in certain cases. This is so specifically where a debtor who had been adjudged bankrupt tried unsuccessfully to pay off his debts using his available assets or using assets gained after having been adjudged bankrupt. In this sense, there seems to be room to disagree with the court's conclusion in this case. Furthermore, it seems to be necessary to review, from a legislative viewpoint, the current law's procedures regarding discharge petitions.

Prof. TETSUO KATO
NORIYUKI HONMA