but whether his negligence comes under gross negligence or not is not clear, so the court shall examine further details and decide the case.

Prof. KATSUICHI UCHIDA

3. Family Law

Two cases regarding the acceptability of a fingermark impressed upon a holographic will as an affixed seal for the will to be effective.

1. A case in which it was held that a fingermark impressed upon a holographic will was acceptable as an affixed seal for the will to be effective (hereinafter referred to as Case 1).

Decision by the First Petty Bench of the Supreme Court on February 16, 1989. Case No. (*o*) 1137 of 1987. A case calling for the affirmation of the nullity of a will. 43 *Minshū* 45.

[Reference: Civil Code, Article 968(1).]

[Facts]

A woman drew up her holographic will and impressed her thumbmark upon it on January 30, 1974, and she passed away on December 27, 1981. By this will, the testator intended to leave all her estate to her youngest daughter (Y_1, defendant, *koso* respondent, *jokoku* respondent). Had it not been for this will, three sons and three daughters of the testator would have been co-successors to the estate. One of the sons (X, plaintiff, *koso* appellant, *jokoku* appellant) brought an action against the other brothers and sisters ($Y_1 \sim Y_5$) for the affirmation of the nullity of the will, asserting that the will in question had only the testator's fingermark in place of her seal and, therefore, the will should be declared to be null and void.

The testator and her husband (Y_1's father) had lived with Y_1 and Y_1's husband for about two years since Y_1's marriage. Although thereafter Y_1 and her husband lived apart from her parents, Y_1 visited the testator to take care of her four days a week or so after the testator's husband died on September 18, 1973. In March 1974, Y_1 and her husband began to live with the testator again. In the same month, the testator was diagnosed as being afflicted with encephalomalacia. However, the testator did not seem to be incapable of consciousness and judgment, because she had received a house rent and given an appropriate receipt for herself in late January of the same year. From long ago, she used to tell Y_1 that she would leave all her property to Y_1. Y_1 found the will at stake in September 1980 and kept it thereafter. About that time, X applied to a family court for the testator to be judicially adjudged incompetent and the court's declaration to that effect became conclusive on March 6, 1981.

X claimed that the will in question should be declared to be null and void because ① it did not reflect the testator's intent and ② the will did not have the testator's seal stamped on it even if it might be regarded as reflecting the testator's intent. The court of first instance (Tokyo District Court) and the appellate court (Tokyo High Court), holding that the will was effective, rejected X's claim. X lodged a *jokoku* appeal to the Supreme Court.

[Opinions of the Court]

Jokoku appeal dismissed.

In order to make a will by a holographic document, the testator shall write with his own hand the whole text, the date and his full name and shall affix his seal thereto (Civil Code, Article 968(1)). It is reasonably understood that this requirement of affixment is sufficiently satisfied if the testator impresses his fingermark (which is not confined to his thumbmark) upon his holographic will as a substitute for his affixed seal.

Article 968(1) of the Civil Code, which requires a testator's sealing as well as his own handwriting as the formalities of a will by a holographic document, may be seen as purporting not only to ascer-

tain the testator's identity and true intent by forcing him to handwrite the whole text of the document but also to secure the completion of the document in light of our legal sense and practices in which one who draws up an important document should complete it by subscribing one's full name and affixing one's seal to the document. In the case of a holographic will, however, the testator's true intent may well be secured even if his fingermark is assumed to be acceptable as his affixed seal, because he writes with his own hand the whole text, the date and his full name. Where a document is not required to have a registered seal affixed to it, a fingermark serves to authenticate the document in view of our legal sense and practices in which the fingermark may be regarded as having the same value as the stamped seal. If strict observance of the testamentary formalities were emphasized more than necessary, the testator's true intent might not be fulfilled.

Usually, once a testator dies, his disputed fingermark impressed upon his will cannot be proved to be genuine merely by a comparison of impressions of his seal, because there remain no fingermarks to be compared with the disputed fingermark. However, as there is no restriction on the seals to be affixed to holographic wills, there could be some cases where even a stamped seal cannot be ascertained to be the testator's own only by a comparison of prints of his seals; in these cases, often such a proof is given by some other available means. Therefore, the fact that there remain no comparable impressions does not prevent this Court from making the aforementioned decision.

2. Another case in which it was held that a fingermark impressed upon a holographic will was acceptable as an affixed seal for the will to be effective (hereinafter referred to as Case 2).

Decision by the Second Petty Bench of the Supreme Court on June 23, 1989. Case No. (*o*) 1180 of 1987. A case calling for the affirmation of the authenticity of a will. 1318 *Hanrei Jihō* 47.

[Reference: Civil Code, Article 968(1).]

[Facts]

A man had four children by his previous marriage ($Y_1 \sim Y_4$, defendants, *koso* respondents, *jokoku* appellants)and had his second wife (X_1, plaintiff, *koso* appellant, *jokoku* respondent) and two children by her (X_2, X_3). He drew up a testamentary document on March 22, 1968. Its contents were: ① that Y_1 shall succeed to the headship of the family and the testator's estate; ② that the proceeds from the farm that the testator distributed to X_1 *inter vivos* shall go to X_1, and that if X_1 plans to sell the land, X_1 shall consult with Y_1 before X_1 effects the sale; ③ that X_1 shall gratuitously convey to Y_1 a piece of land that the house is fronted with; ④ that, in return, Y_1 shall live with X_1 and support her with parent-child affectin as long as she lives; ⑤ that all the testator's children shall be faithful to this will so as not to disgrace their family, and that all of them shall live in harmony helping one another. On that will, there was under the testator's signature a marking which could be recognized as the testator's fingermark (though it was not clear which finger of the testator the mark was impressed by).

$X_1 \sim X_3$ asserted that the will should be declared to be null and void because the testator did not affix his seal to it. The court of first instance (Nagaoka Branch of the Niigata District Court) held that the will was valid because an affixed seal could be not only a thumbmark but also fingermarks (and, furthermore, it could be a toe's if a testator had no hands). On the contrary, the appellate court (Tokyo High Court) decided that the will was null and void, holding that a fingermark was inappropriate as a seal because it could not be proved to be genuine owing to the facts that there was generally no practice to preserve one's fingermark and, furthermore, a testator had been dead when the authenticity of his will was contested at law. Dissatisfied with this decision, $Y_1 \sim Y_4$ appealed to the Supreme Court.

[Opinions of the Court]

Original (Tokyo High Court) decision reversed and remanded.

The requirement of affixing a seal to a holographic will is suffi-

ciently satisfied if the testator impresses his fingermark (which is not confined to his thumbmark) upon the will as a substitute for his affixed seal. (The Supreme Court decision on February 16, 1989, introduced above as Case 1 was followed.) Whether a fingermark was impressed by a testator himself does not necessarily entail a proof by a comparison with what has been ascertained to be the fingermark impressed by the testator himself; it may well be inferable from, for example, testimonial evidence, the style or appearance of a testamentary document, and circumstances surrounding the making and the keeping of a will.

In this regard, the original decision was mistaken in its interpretation of the relevant rules; it failed to fully examine whether the impression by the testator himself of his fingermark could be inferable from testimonial evidence, the style or appearance of the testamentary document, and circumstances surrounding the making and the keeping of the will.

[Dissenting Opinion]

The opinion of Judge Kagawa which Judge Shimatani agreed to was as follows:

I cannot concur with the opinion of the Court in which it was held that the affixed seal required by Article 968(1) of the Civil Code included a fingermark. I consider that this appeal should be rejected for the following reasons:

(1) The Civil Code, by its Articles 960, 968(1) and (2), requires the strict testamentary formalities to be observed in order to secure the prudence, authenticity and reliability for a will. In our practical sense, one who carefully draws up an important document should affix one's seal to it; in this case, an affixed seal means a seal stamped on a document. Therefore, it accords with our national practical sense to consider that an affixed seal for a testamentary document should also be a stamped seal.

(2) Article 981 of the Civil Code provides that if, in the cases of a will made by an isolated person afflicted with a contagious disease or a person on board a ship, there is a person who is unable to affix a seal, persons required to be present or witnesses shall make

an additional entry of the fact. If the seal included the fingermark, no *raison d'être* for this article could be found.

(3) Some people think that the fingermark may be acceptable because the seal comprises the private seal as well as the registered seal. However, apart from special cases, our national sense usually requires us to complete a document by stamping a non-registered private seal on it. Regarding the fingermark as acceptable as the private seal would be thinking light of the Civil Code requirement of an affixed seal.

(4) If anything like a registration system for fingermarks were established by a public agency, the fingermark would be more convenient and functionally useful than the registered seal. However, as we do not have such a system, the problem is how to prove the authenticity of a fingermark after a holder of the fingermark (a testator) dies. Verification of the seal will be comparatively easy, but verification of the fingermark will never be easy. Practically speaking, it is apprehended that many disputes will arise out of the recognition of a fingermark as an effective affixed seal.

(5) The Civil Code requires of us our adherence to the strict testamentary formalities, because these formalities contribute to the making of a will with circumspective and clear-cut manners so that very few disputes may arise from the validity or invalidity of the will. In other words, in the legislative policy of the Civil Code, it is assumed that if one makes a will in accordance with the formalities provided for by the Civil Code, circumspection, authenticity and reliability are generally guaranteed to the will; on the contrary, any will in nonconformity with those formalities is indiscriminately regarded as null and void regardless of whether it substantially reflects the testator's true intent.

Therefore, it may be safely said that the understanding offered by the majority opinion of this Court to the effect that the affixed seal comprises the fingermark is absolutely unacceptable in view of the relevant texts of the law and is substantially equal to an act of law-making. Neither interpretative nor strategic merits may be found in such an understanding.

[Comment]

In 1989, we had three Supreme Court decisions in which it was held that a fingermark a testator impresses on his holographic will is acceptable as his affixed seal. The first decision introduced here as Case 1 is significant as a leading case. The second decision given by the Third Petty Bench of the Supreme Court on June 20, 1989 (*see* 1318 *Hanrei Jihō* 47) was not introduced here as it merely followed Case 1. The third decision introduced here as Case 2 was a 3-to-2 judgment which included a detailed dissenting opinion that some might think is very powerful. A survey of these three decisions may reveal our practices which have been persistently observed in drawing up important documents as well as the recent trend toward the elimination or mitigation of the formalities of a handwriting will.

A holographic will is very simple in its form; a testator (who must be fifteen years old or over) may make his holographic will if he writes with his own hand the whole text, the date and his full name and affixes his seal to it. However, there are generally two requirements for the interpretation of a will. One is that whether a holographic will reflects the testator's true intent must be carefully judged as the will may be drawn up anywhere without any witness. The other is that the will reflecting the testator's true intent should be declared to be valid even if it is defective in its form as that intent should be respected. It may be safely said that the Supreme Court came to a conclusion that the will was valid giving weight to the latter requirement in the two decisions introduced here. In other words, the Court came to that conclusion by mitigating the formalities of the will. At the first glance, this seems to be inconsistent with precedents in which courts have been adamant about the date of a will (*see* 1 Waseda Bulletin of Comparative Law 68). However, as the date is a very important factor in deciding which will of a testator has priority, it does not seem to be dealt with in the same way as the seal.

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