tiffs asserted that the different forms of registration between a legitimate child and an illegitimate child violates Articles 13 and 14 of the Constitution. However, the Tokyo District Court rejected this assertion. In the decision, one reason given is that the form of registration is based on the viewpoint that protection of the interests of the family formed by a legal marriage should first be taken into consideration, and that that basis is reasonable. The other reason given is that this form of registration in the section concerning the relationship to the head of a household has proper grounds as long as the Civil Code classifies children by legitimacy.

In these two decisions, discrimination against illegitimate children was not held to be unconstitutional. Certainly, it is doubtful whether there is a consensus of the Japanese people that such discrimination must be abolished. The fact that the revision of the relevant provision was shelved after various kinds of arguments at the time of the civil law reform of 1980 may have been considered in these two decisions. However, it seems that the courts should have given a detailed judgment by clarifying, at least, the standard of constitutional scrutiny of such discrimination.

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## 4. Law of Civil Procedure and Bankruptcy

For the year under review, this paper will focus on two Supreme Court decisions in the fields of Law of Civil Procedure and Bankruptcy: a Supreme Court decision on whether the prohibition of dual actions may be applied to a set-off defense asserting a claim which is the subject matter of another pending action; and a Supreme Court

ruling regarding the judicial proceeding of discharge and the right of access to courts.

**1. May the prohibition of dual actions be applied to a set-off defense asserting a claim which is the subject matter of another pending action?**

Decision by the Third Petty Bench of the Supreme Court on December 17, 1991. Case No. (*o*) 1385 of 1987. A *jokoku* appeal claiming payments based on a contract. 45 *Minshū* 1435.

[Reference: Code of Civil Procedure, Articles 199(2) and 231.]

***[Facts]***

X (plaintiff, *koso* respondent, *jokoku* respondent) contracted with Y (defendant, *koso* appellant, *jokoku* appellant), a manufacturer of sporting goods, for the right to import materials and export products for Y as Y's agent. This case concerns litigation in which X sued Y for a claim arising from this continuous trade contract between X and Y. Two actions are involved in this case.

Case I: X, based on this contract, brought an action against Y for payment of 2,070,000 yen for imported materials. In the first instance, the court allowed X's claim (Tokyo District Court decision on February 25, 1983). Y then filed a *koso* appeal, and the case came to the First Civil Division of the Tokyo High Court.

Case II: On the other hand, Y sued X for payment of 12,840,000 yen based on their contract, and the second instance came to the First Civil Division of the Tokyo High Court, the same court as case I. This, however, was not related to case I.

The Tokyo High Court decided to consolidate the oral proceedings of case I with case II, and both cases were examined together. After the joinder, Y pleaded a set-off in defense against X's claim, which X sued for in case I, asserting Y's claim, which is the subject matter of case II. Afterward, however, case I and case II were again separated by order of the court.

The court of second instance dismissed Y's appeal in case I (the current case), holding that set-off defense submitted by Y is unlawful, for the purpose of the Code of Civil Procedure (CCP) Article

231—the prohibition of dual actions—must be applied to the set-off defense asserting such a claim as a subject matter of another pending action (Tokyo High Court decision on June 29, 1987).

Y submitted a *jokoku* appeal.

***[Opinions of the Court]***

*Jokoku* appeal dismissed.

It is reasonable to conclude that it is not allowable to plead a set-off defense asserting a claim which is the subject matter of another pending action (see Case No. 1406 (*o*) of 1983, decision by the Third Petty Bench of the Supreme Court on March 15, 1988. 42 *Minshū* 170). The prohibition of dual actions, provided in Article 231 of the CCP, serves the purposes of avoiding wastefulness resulting from dual actions and the inconsistency of *res judicata* effect. These purposes hold true not only for the case in which dual actions are pending on the same claim, but also for the case in which a set-off defense is pleaded by asserting a claim that is the subject matter of another pending action. This is mainly because of the following two reasons: (1) a decision on the validity or invalidity of a claim asserted in set-off has *res judicata* effect in respect of the amount claimed by the set-off (Article 199(2) of the CCP); and (2) it is also required in the case of a set-off defense to avoid legal uncertainty caused by contradictory judgments, but, theoretically and practically speaking, this is difficult to achieve.

The above principle should not be altered even when the set-off defense is first pleaded at the stage of the second instance and two actions are joined.

***[Comment]***

I. The pendency of an action bars the assertion of another claim in another court on the same subject matter between the same parties (Article 231 of the CCP: the prohibition of dual actions). The purposes of this principle are said to be the following: (1) to avoid a burden on defendants, who would be forced to perform dual actions on the same subject matter; (2) to avoid the wastefulness resulting from dual actions; and (3) to avoid inconsistent adjudication on

the same subject matter.

Concerning the prohibition of dual actions, the question arises of whether it is permissible or not to plead a set-off defense asserting a claim which is the subject matter of another pending action. Once such a set-off defense is pleaded, it is possible that inefficiency will arise or inconsistent decisions will occur, as an adjudication upon the validity or invalidity of the claim asserted in the set-off has *res judicata* effect (Article 199(2) of the CCP). Another question is whether or not it is permissible to bring an action for the same claim as is already asserted in a set-off defense in a previous action.

The case we are dealing with here is about the former question, and the Supreme Court has concluded that there is a prohibition against dual actions.

II. Previously, precedents mainly took the position that asserting a claim in a set-off defense which was already claimed in another pending action was against the dual actions principle (see the decisions by the Tokyo District Court on February 27, 1957, the Osaka High Court on May 19, 1958, the Fukuoka High Court on September 30, 1986). The Supreme Court also came to the same conclusion in the decision on March 15, 1988 (cited in the current opinions of the court; however, because of the particular nature of this case, it is controversial whether this Supreme Court decision included the general application of the dual actions principle to a set-off defense).

The current Supreme Court decision followed these precedents on the grounds that it is necessary to avoid the possibility of inconsistent adjudication regarding the validity or invalidity of the claim asserted through a set-off defense, which the Supreme Court particularly evaluates. The important point is that the Supreme Court developed the above mentioned precedents and made it clear that the prohibition of dual actions is also generally applied to the set-off defense asserting the claim of another pending action.

III. There is, on the other hand, considerable disagreement among academic circles on this issue and, as opposed to the judicial opinions, the prevailing theory acknowledges that such set-off defense is not in violation of the dual actions principle. The main bases of this theory are as follows: (1) a set-off is a mere defensive measure,

and therefore it differs from a conventional suit or a counterclaim, both of which require independent decisions in themselves; (2) the defensive measures of defendants will be substantially limited, if a set-off defense is excluded by reason of conflict with the prohibition of dual actions; and (3) it is possible for courts to avoid inconsistent adjudications by adequate direction.

Another influential theory opposing what is mentioned above, holding the same view as the judicial opinions, accepts the application of the dual actions principle to the set-off defense.

Indeed, as the prevailing theory points out, it is true that defendants must be assured for the right of using freely a set-off defense as their own defensive measure. But, as the current decision indicates, the possibilities cannot be overlooked that inconsistent adjudications or inefficiency may arise if such set-offs are allowed. These questions need further study concerning whether we should assure defendants the freedom of defense in spite of all the disadvantages mentioned above, and also whether there is any other settlement that can guarantee freedom and avoid the troublesome problems at the same time.

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## 2. A case concerning the judicial proceeding of discharge and the right of access to courts.

Ruling by the Third Petty Bench of the Supreme Court on February 21, 1991. Case No. (*ku*) 127 of 1991. A *kokoku* appeal against the granting of discharge. 1285 *Kinyū hōmu Jihō* 21; 866 *Kinyū Syōji Hanrei* 26.

[Reference: Bankruptcy Act, Articles 366-4(1) and 366-8; Constitution of Japan, Articles 29 and 32.]

### *[Facts]*

The bankrupt, X (*kokoku* respondent), filed an application for discharge. In opposition to this, X's creditor, Y (*kokoku* appellant), filed an objection to the discharge. Later, the bankruptcy court grant-