[Comment]

Although illegitimate children whose paternity has been acknowledged by the biological father or court have the right of succession, they have only one half of the share in succession of legitimate children under Article 900(iv) of the Civil Code.

This regulation means that the sin of the parents is passed on to their children. Even if discrimination in statutory share of succession will continue, it is doubtful that the discrimination can restrain the procreation and birth of illegitimate children.

Moreover, the regulation is contrary to the spirit of the international treaties that Japan has ratified, such as UN Agreement B 24(1) and Article 2(2) of the Convention on the Rights of Children.

Accordingly, the constitutionality of this provision is suspect, and illegitimate children should have the same share in an estate as legitimate children. Now, in the tentative draft of the Family Law in the Civil Code Reform, the Legislative Council of the Civil Law Division proposes to repeal this statutory discrimination. In addition, the international trend promotes the abolition of this kind of discrimination. Such discrimination against illegitimate children cannot be continued.

Prof. MASAYUKI TANAMURA

4. Law of Civil Procedure and Bankruptcy

1. Prescriptive acquisition of a piece of a lot which is close to the whole boundary and standing in an action for boundary confirmation.

Decision by the Third Petty Bench of the Supreme Court on March 7, 1995, Case No. (*o*) 1728 of 1989. A *jōkoku* appeal requesting retrial of a default judgment. 49 *Minshū* 919; 885 *Hanrei Taimuzu* 156; 1540 *Hanrei Jihō* 32.

[Reference: Civil Code, Article 162; Code of Civil Procedure, Article 45; Code of Civil Procedure, Part 2, Chapter 1 Action.]

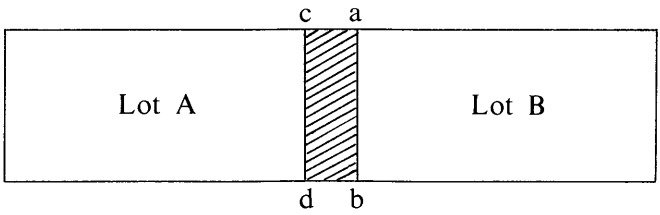
[Facts]

X (Plaintiff, *kōso* appellant, *jōkoku* respondent), who owned Lot A, instituted a lawsuit for boundary confirmation against Y (defendant, *kōso* respondent, *jōkoku* appellant) who owned Lot B close to Lot A by registration, asking for confirmation that the boundary of Lot A and Lot B is a line, a-b.

Y had constructed a building on the lot surrounded by points a-b-c-d on June 30, 1973. Thereafter, Y possessed that piece of lot. Y claimed that the boundary is the line c-d, and he claimed prescription of the lot bounded by a-b-c-d even if the boundary is the line a-b.

The court of first instance permitted X's action but also permitted Y's prescriptive acquisition. As a result, the court declared that the main action by X is an action for confirmation of a boundary inside the lot owned by Y, then dismissed the action.

The *kōso* Appellate Court set aside the judgment of the court of first instance and found that the boundary is the line a-b. The reasons are as follows; (1) The propriety of the prescriptive claim is unrelated to the confirmation of boundary because the aim of the



action for boundary confirmation is not for confirmation of the range of the land's ownership; (2) in an action for boundary confirmation between owners of lots which are close to each other, even if one owner acquired a piece of a lot close to the boundary of the other's lot by prescription, neither owner loses standing. Y filed a *jōkoku* appeal claiming that the judgment of the *kōso* Appellate Court was

erroneous with respect to deciding standing in an action for boundary confirmation.

[Opinions of the Court]

Appeal dismissed.

In an action for boundary confirmation, even if the owner of Lot B acquired a whole piece of Lot A, which is close to the boundary, by prescription, the respective owners of Lot A and Lot B remain owners of each lot for which the boundary is disputed, therefore they do not lose standing to file an action for boundary confirmation. Additionally, when the owner of adjoining land acquires a piece of the other's land by prescription, he needs to register it to defend against a third party. So, when the area of the land which was acquired is decided after the boundary confirmation, and in order to subdivide a lot acquired by prescription on the basis of registration, it is necessary to confirm the boundary of the two lots.

[Comment]

Today's common view and the precedent on the nature of the action for boundary confirmation assert that it is an action to confirm nonlitigiously the boundary between two parcels of land, that is the boundary of each lot. When one party acquires by prescription a piece of the lot owned by the other, the degree of the party's ownership changes, however, the boundary of the lot does not change unless it is registered. When prescriptive acquisition occurs, the ownership of the party who has acquired a lot does not actually reach the boundary of the other lot, so there is an argument about the existence of standing. In order to insist on standing, the parties must be the owners of adjoining land which is close to the boundary.

One view asserts that an action for boundary confirmation is to be dismissed because standing does not exist (the negative view). The other view insists that boundary confirmation must be decided on the merits because standing does exist, therefore the existence of prescriptive acquisition is irrelevant (the positive view). The lower court decisions are divided. The Supreme Court decision of 1983 declared that it favors the positive view. Until then, the negative view

was preferred. After that decision, the positive view came to predominate, but because the decision was based on the fact that a piece of a lot was close to a piece of boundary which was acquired by prescription, there remained a question of whether this decision is also to be adopted when a piece of a lot close to the whole boundary is acquired.

In its 1995 decision, the Supreme Court apparently adopted the view that standing is not lost even if a piece of a lot close to the whole boundary is acquired by prescription. The basis for this negative view was that a party has no benefit from boundary confirmation of a lot when his ownership does not actually reach the boundary of the lot. Therefore, it can be said that this negative view justifies an action for boundary confirmation from the point of view that it resolves the dispute about the degree of the parties' ownership, though this view recognizes that it is not an action for confirmation of the degree of the parties' ownership.

On the other hand, the bases for this positive view are as follows; (1) Even if the prescription occurs, each lot is still adjoined under public law, and undeniably there is a boundary. So it is possible to discover or establish it, and that is exactly the aim of the action for boundary confirmation in today's common view. In that case, the parties have to be the people who have the greatest interest in the boundary of the lot. Actually, the owners by registration must be the parties. (2) In order to decide whether the prescription exists or not, first of all, it is necessary to confirm the boundary. Therefore, when the boundary of the lot is obvious, to dismiss the action for the reason that there is not standing is contrary to procedural economy. And (3) it is necessary to register to defend against a third party the change of a property right by prescription. To register a subdivision of a lot, the boundary of the lot must be clear.

It can be said that this Supreme Court decision and also the decision of 1983 are mainly based on the third positive view above. The practical usefulness of the third view resulted in the predominance of the positive view in today's common view, however as the theory of the common view is that an action for boundary confirmation is one for confirmation of the boundary under public law, opinion

(1) is the most consistent and it still seems to be a very important opinion.

2. The nature of the outstanding lease-rent claim when a corporate reorganization proceeding has commenced on the user of the finance lease contract by the full pay-out method.

Decision by the Second Petty Bench of the Supreme Court on April 14, 1995. Case No. (*o*) 155 of 1991. A *jōkoku* appeal requesting retrial of a default judgment. 49 *Minshū* 1063; 880 *Hanrei Taimuzu* 148; 1553 *Hanrei Jihō* 116; 1425 *Kinū Hōmu Jijyō* 6; 973 *Kinyū Shōji Hanrei* 3.

[Reference: Civil Code, Article 601; Code of Corporate Reorganization, Articles 102, 103 and 208.]

[Facts]

Leasing company X (plaintiff, *kōso* appellant, *jōkoku* appellant) entered into a lease contract with A in November 1981. The object was transferred to A from X and A has used it. The lease term was 60 months, the rent was paid in monthly installments, and the calculation of the rent was down by the full pay-out method. In August 1983, A filed a motion for the commencement of a corporate reorganization proceeding. Then measures for preservation of payment were taken, and the commencement of the reorganization proceeding was ordered. Y (defendant, *kōso* respondent, *jōkoku* respondent) was appointed as the trustee in reorganization.

A did not pay the rent after the motion was filed, so after the order for the commencement of reorganization proceedings, X protested making rent payments to Y and indicated the intention to move for dissolution of this lease contract. X claimed payment of the outstanding rent and delinquency charges. Additionally, X made a claim for return of the object because of the dissolution of the lease and for payment of the stipulated damages.

The court of first instance dismissed X's claim for return of the object, holding as follows; The Code of Corporate Reorganization, Article 103 (hereinafter Article 103) does not apply to this lease, so the dissolution of the contract is invalid. The Court dismissed X's

claim for payment of rent also, because the outstanding rent claim is a reorganization claim, so could not receive payment except through reorganization proceedings.

The *kōso* Appellate Court affirmed the judgment of the court of first instance that Article 103 does not apply to this lease contract, so the claim for outstanding rent is a reorganization claim. However, it accepted the claim for return of the object because of the expiration of the lease term, and held that the claim for a delinquency charge after the expiration of the term of the lease caused a default of the obligation to pay the trustee in reorganization. It decided that the claim is that of common benefit, based on the Code of Corporate Reorganization, Article 208(5). X filed a *jōkoku* appeal.

[Opinions of the Court]

Appeal dismissed.

In a contract for a finance lease by the full pay-out method, when the user to whom the object had been transferred receives a notice of commencement of reorganization proceedings, the outstanding rent claim becomes a reorganization claim. Therefore, it can be said that the leasing company cannot claim the rent except through reorganization proceedings. The reasons are as follows; as the finance lease contract created through this method actually gives financial convenience to users, the debt for the rent arises in that amount the moment the contract is concluded. So, the use of the lease object each month and the monthly payment of the rent do not have a quid pro quo relationship. Therefore, the claim for the outstanding rent at the time of notice of the commencement of the reorganization proceedings should be said to be a cause of action on a property right which arises based on a cause that occurred before the commencement of the reorganization proceedings under the Code of Corporate Reorganization, Article 102. Article 103 refers to a case in which each execution of the debt based on a mutual relationship between the parties of a bilateral contract is not concluded. Therefore, in the contract for a finance lease by the full pay-out method in the case such as this when the lease object has already been transferred, that rule

is not applicable. After all, the outstanding rent claim cannot be said to be a claim of common benefit under Article 208 (7), and there is no reason by which this claim can be said to be for a common benefit.

[Comment]

There has been a heated argument about the consequences of a finance lease contract when reorganization proceedings for the user are commenced and how to treat the outstanding rent claim. The affirmative opinion on the applicability of Article 103 (the theory of common benefit claim) and the negative opinion about the applicability of Article 103 (the theory of reorganization claim or reorganization security rights) are opposed and there is a great deal of argument.

The affirmative view is as follows; (1) As the lessor has an obligation to allow the user to use the object even after the transfer of the lease object, there exist executory obligations between the two parties, and those obligations have a relation of quid pro quo, so that there is a mutual relationship between rent and utilization rights. (2) Even if the lease term has expired, the transfer of the property to the user is not planned, and rent must be paid for further use. (3) If Article 103 is not applied, the rent claim just becomes a reorganization claim, but it results in unfairly protecting the user company which is reorganized at the expense of the lessor company. In addition, even if the leasing object is not used by the reorganized company, the trustee cannot dissolve the contract. Therefore, it is a disadvantage for the reorganized company.

On the other hand, the negative opinion argues that ① legally, a lease contract is a form of hire, but actually it has a nature of a financial deal, ② at the moment that the object is transferred, the lessor has executed the obligation, so the lessor has no executory obligation. Even if the lessor has an obligation for permission to use the object, it is not a relation of quid pro quo, ③ a lease contract is actually a financial deal. In substance, a lease object is mortgaged. Therefore, to balance title retention and so on, in the reorganization proceedings it is enough to treat it as reorganization of security

rights.

According to the affirmative opinion, the trustee in reorganization can choose between the claim for the execution of lease contract and dissolution. When execution is claimed, the rent claim after the order for the commencement of reorganization becomes a common benefit claim (Article 208 (7)). According to the negative opinion, the user can continue to use the object until the expiration of the lease term. In addition, the lessor can exercise the entire rent claim as a reorganization claim or a reorganization security right.

The contract for a finance lease has aspects of hire and also of a financial deal. With respect to this case, there are two opinions based on which aspect of the legal nature of finance lease contract is emphasized. In many precedents, that claim has been treated by emphasizing the factors of a financial deal to be its actual nature. This decision of the Court is the first one by the Supreme Court which is based on the negative opinion that these precedents have depended on, and it will have an important influence on the treatment of finance lease contracts in reorganization proceedings from now on.

As a further problem, we can suggest how a finance lease contract should be treated when it is not by the full pay-out method or for an operating lease contract.

Prof. TETSUO KATO
Assist. JUNKO SHIBATA

5. Criminal Law and Procedure

a. Criminal Law

The New Requirements for Allowing the Practice of Active Euthanasia by Doctors

Decision by the Third Criminal Division of the Yokohama District Court on March 28, 1995. Case No. (*wa*) 1172 of 1994. A Case