and a revision of statutes. Since facilities like golf courses are developed through the artificial modification of the shape of the land, it is impossible to deny the fact that a major disaster could occur in the future. Therefore, the Supreme Court found that the necessity to take measures against such a disaster is foreseeable.

According to this oppinion of the Supreme Court, companies managing golf courses have to bear the risk resulting from the change of circumstances after forming the membership contract in almost all cases in which golf courses have been developed artificially. In this case Y, who manages this golf course at present, has to wholly bear the cost for the renovation. However it is problematic if such a result isn't unfair, that is to say, against the Good Faith Performance Rule. In contrast to the Supreme Court, the High Court had considered not only the existence of the foreseeability but also the degree. It is feared that the scope of the Changed Circumstances Rule is limited unreasonably by considering the existence of the foreseeability only in the abstract.

TAKAHIRO FUJITA

3. Family Law

1.

Decision by the First Petty Bench of the Supreme Court, April 10, 1997 Case No, (*o*) 1993. 51 *Minshū* 1972, 958 *Hanrei Taimuzu* 158, 1620 *Hanrei Jihō* 78.

[Reference: Civil Code, Articles 766, 711, Law of Procedure in Actions relating to Personal Status Article 15]

[Facts]

X (wife, plaintiff) and Y (husband, defendant) were married in 1988. A (the daughter of X and Y) was born in 1989.

X learned that Y ran a restaurant with Y's family. X and Y lived with Y's family and X had to work together with Y in the restaurant when they married.

X and Y continued to live with Y's family in the second year of marriage, but X could not feel friendly toward Y's family, because of intervention from Y's family and for economic reasons. Then X became nervous. X wanted to live apart from Y's family. But Y did not grant her request, for Y's family was opposed and the family budget didn't permit it. X returned to her parents' home several times.

Finally X ran away from home with A, not telling Y, in April, 1992. Two and a half years passed after the separation. X didn't have the infant to continue to be married to Y, but Y wanted X to return with A. Y gave no money for living expense to X and A after the separation.

X sued for divorce from Y. At the same time, X demanded that Y pay child support after separation.

In September 1994, the Tokyo District Court granted the divorce and ordered Y to pay 60,000 yen per month to X and A as child support from April 1992 (when they began the separation) to the month when A reaches the age of majority. Y refused to pay child support for the period from separation until divorce.

When Y appealed to the Tokyo High Court, the court dismissed X's claim. Finally, X appealed to the Supreme Court.

[Opinion of the Court]

Appeal dismissed.

When the party who cares for the child for himself or herself sued for the payment of child support for the period from separation until divorce, the court can order it by application of Articles 771 and 766 of the Civil Code and Article 5 of the Law of Procedure in Actions relating to Personal Status. Article 766, section 1 provides necessary details about custody after the parents get divorced and cannot exercise their parental power jointly. Not only after the divorce but also before the divorce when the parents live separately and cannot care for their child jointly, the terms of custody should be provided. It contributes to the parties' convenience and the child's welfare that the court can resolve the sharing of child support in a divorce suit.

[Comments]

This case is a suit for divorce from the husband by the wife, who separated and took care of dependent child by herself.

The issue in the Supreme Court it whether a parent can sue for payment of child support for the period from separation until divorce as well as child support after divorce, based on the suit for divorce. Furthermore, in this case, the distribution of property and spousal support were not sought by the plaintiff.

In a suit for distribution of property and spousal support, the court can settle all the expenses of married life.

There was one similar precedent in the past.

The court can order the husband to pay child support to the wife who takes custody of the child. 43 *Minshū* 1763 Dec. 11 (1989).

However, in this judicial precedent, it was not the object of judgment to pay child support after separation until divorce like this case.

Therefore, this problem was left unsettled.

On the other hand, at present, a divorce suits are in the jurisdiction of both with respect to the District Court and the Family Court. Therefore, this system has problems the complexity of jurisdiction and inconvenience of parties.

Article 15 of the Law of Procedure in Actions relating to Personal Status was provided in consideration of economy of procedure and for convenience of the parties. This article provides that parties can request a proceeding judgment on the trial issue of custody of a child that originally belonged in Family Court in a suit for divorce. In the instant case, it was decided that child support for the period after separation until divorce falls under in Article 15 of the Law of Procedure in Actions relating to Personal Status.

In this way, the decision in the instant case made it possible to settle the issues related to divorce in one proceeding in the District Court. This decision is important because it enlarges the scope of settlement in one proceeding, but only within the framework of the present system. This case could be a case law.

2. When a successor destroyed or concealed a will of the testator without the purpose of making an unjust profit on succession, he or she is not disqualified as a successor.

Decision by the Third Petty Bench of the Supreme Court, January 28, 1997. Case No. (*o*) 804. 51 *Minshū* 184, 49 *Kasai Geppō* 24, 1594 *Hanrei Jihō* 53.

[Reference: Civil Code, Article 891 (5)]

[Facts]

Y1 ran a company (B). A was Y1's father, lived with Y1, and supported the company. When B company was deep in debt of about 200 million yen, A offered to sell A's land to Y2 company to clear off the debt. Also, A wrote a will by holographic document stating that he would give B the takings of the sale, that B should use the money for the payment of the debt, and that Y1's brothers and sisters (Xs) should cooperate with Y1 in this matter. A handed the will to Y1. A signed the contract of the sale and received 200 million yen. But before the registration of the transfer of the land, he died.

After A's death, Y1 discussed with Xs about the estate. Xs asked Y1 to show A's will, but Y1 had lost it. Finally, they made two agreements of partition that Y1 would succeed almost all the estate.

Xs filed a suit seeking for the declaration that Y1 was disqualified as a successor, that the agreement of partition of the estate was invalid, and that the sale to Y2 was also invalid. They asserted that A's will and the contract was forged or fraudulently obtained by Y1, or that Y1 willfully destroyed or concealed the will.

On September 8, 1992, the Utsunomiya District Court dismissed Xs' claim. The court found that the will and the contract were genuine and that Y1 did not willfully destroyed or concealed the will, and concluded that Y1 was not disqualified. Xs appealed to the Tokyo High Court, and the court dismissed the appeal. Xs appealed to the Supreme Court, asserting that any destruction or concealment by a successor of a will per se would trigger his or her disqualification.

[Opinion of the Court]

Appeal dismissed.

When a successor destroyed or concealed a will of the testator without a purpose of making an unjust profit on succession, he or she is not disqualified as a successor under Article 891 (5). The aim of the Article is to impose a civil sanction of disqualification on the successor who has unduly interfered in making and effecting the testator's will. *See*, Decision of the Second Bench of the Supreme Court, April 3, 1981, 35 *Minshū* 431. When a person destroyed or concealed a will without a purpose of unjust profit on succession, he or her did not unduly interfered in effecting the will. So it is incompatible with the aim of the Article to impose him or her a strict sanction of disqualification.

[Comments]

In the Article 891 (5) of the Civil Code, the issue is whether or not a motive or purpose that obtains an unjust profit on succession is necessary as a requirement for the disqualification for succession. It is the problem of so-called double intent.

In a case in which the successor destroys or conceals the will without the purpose of making an unjust profit on Inheritance, this decision concluded s/he does not fall under the disqualification from succession provided in Article 891 (5).

Unjust profit regarding succession is not restricted to obtaining profit for oneself. For example, if a second wife destroys or conceals a will in order to give an improper profit to her child, her conduct falls under the disqualification from succession.

Article 891 (5) however, does not require a purpose to obtain an unjust profit on succession, unlike Article 891 (1). Article 891 (1) applies to a case in which a successor murders an testator.)

Therefore, there are two opposing theories. One theory agrees with this decision. On the other hand, it determines the disqualification from succession strictly, in case the action of the successor affectively prevents the intent of the testator. Decisions in the inferior courts are divided, too.

One procedure used to resolve such cases is that a joint successor who is dissatisfied try to discuss the partition of estate once again. However, there are various kinds of disputes about in heritance. The principles of this decision are truly necessary for the reasonable set-

tlement of the various kinds of dispute over disqualification from succession. Nevertheless each case should be judged individually in accordance with the aim of Article 891 (5).

From now on, an accumulation of such cases is necessary for the courts to decide on the proper view for adjudicating them.

4. Law of Civil Procedure and Bankruptcy

1. A stockholder cannot have standing to be sued for a declaratory judgment of the nonexistence of placement of new shares.

Decision by the Third Petty Bench of the Supreme Court on January 28, 1997. Case No. (0)316 of 1993. A *jōkoku* appeal claiming declaration of the nonexistence, or nullity, of placement of new shares of stock. 51 *Minshū* 40; 1592 *Hanrei Jihō* 129; 931 *Hanrei Taimuzu* 179.

[Reference: Commercial Law, Article 280.15; Code of Civil Procedure, Article 45.]

[Facts]

A, a stock corporation which deals fruits and vegetables, was incorporated in 1966. A is a family corporation and had a capital of twelve million yen in 1971, that is to say, had issued twelve hundred shares. Later, A issued twelve hundred new shares in 1974 and twenty-four hundred in 1983. A had each issuance registered.

X (plaintiff, *kōso* appellant, *jōkoku* respondent) has been A's representative director since its incorporation. Owning two hundred and seventy shares, X was the largest shareholder before new shares were placed in 1974, while Y (defendant, *kōso* respondent, *jōkoku* appellant), X's nephew, possessed two hundred shares. When A issued twelve hundred new shares in 1974, X and Y subscribed to six hundred and one hundred of them respectively. As a result, Y became A's largest shareholder. Furthermore, in 1983's placement of twenty-four hundred new shares, X subscribed to nine hundred and Y to none,