

administrative act stereotype besides that, because the Supreme Court made the judgment process to the conclusion of the original court a law violation, but maintained the judgment in the original court as a conclusion.

However, even though such as not touching a change in the Administrative Litigation Law in a charge, this judgment is a precedent by which an ambiguity is left in the contents.

3. Law of Property and Obligations

Xs v. Meiwa Estate Company Limited etc.

Supreme Court 1st P.B., March 30, 2006

Case No. (*jyu*) 364 of 2005

60(3) MINSHU 948; 1931 HANREI-JIHO 3, 1209 HANREI-TAIMUZU 85

Judgment concerning whether or not the interest in enjoying the benefit of a good scenic view deserves legal protection

Reference:

Civil Code, Art. 709

Facts:

In the area surrounding the Daigaku-Dori Street in Kunitachi City in Tokyo, self-regulations in order to keep a good scenic view have been carried out by the endeavor of the residents since the prewar period. In the place on the Daigaku-Dori Street, including the estate that is at issue in this case, especially people are not allowed to construct a building higher than the ginkgoes in Daigaku-Dori Street (higher than 20 m). A land developer, Y planned to build a fourteen-storied condominium on the estate, and got a building permit. Up to starting the construction, Y was requested by the municipal authorities and the residents to alter the plan, but ignored these requests. And Y forced the construction. Kunitachi City had laid down a municipal bylaw in order to stop the construction, but a court decided that the bylaw did not apply to the construction. So the resi-

dents brought an action for damages and a removal of the part of the condominium which was higher than 20 m, pleading that their rights to good scenic view or interests in a good scenic view had been infringed.

The first trial court (Tokyo District Court) decided that Y infringed on X's property, so awarded the damages and the removal of a part of the condominium. On the other hand, the original court (Tokyo High Court) dismissed X's claim, regarding the interests in a good scenic view as not being worth legal protection. Xs filed a *jokoku* appeal.

Opinion:

The original decision was kept, and the claim was dismissed.

(1) The interest of people who live in the areas near a good scenic view in enjoying the benefit of the scenic view is worth legal protection.

(2) In order that a conduct falls into an illegal infringement for the interest in enjoying the benefit of a good scenic view, it is at least required that the infringement is inadequate for a conduct socially permitted in the point of the way or the extent of the infringement, such as violating criminal laws or administrative laws or constituting a breach of public policy or abuse of right.

(3) In this case, (a) the height limit by the Ordinance shall not apply to the building; (b) it is difficult to find that the appearance of the building spoils the harmony with the surrounding scenic view; and, (c) no circumstances can be found where the construction of the building violates criminal laws or administrative laws of that time or constitutes a breach of public policy (*kôjo-ryôzoku*) or abuse of right (*kenri-ran'yô*). Under these circumstances, the construction of the building cannot be deemed to be inadequate for a conduct socially permitted in the point of the way, and to infringe the interest of people who live in the areas around the good scenic view in enjoying the benefit of the scenic view.

Editorial Note:

Because of the recent growth in the height of buildings and the rush of new condominiums, the deterioration of the living environment becomes a social issue, and this case attracted social attention, for it is a dispute that has arisen in a famous living town.

This decision has the meaning that the scenic interest is admitted as

an interest that is worth being protected by the tort law. Traditionally, what was a protecting interest in damages or injunction in the case of an injury to a scenic interest was disputed, and various views were developed; the view that the property of the residents was injured as in the decision of Tokyo District Court, the view that a right to the environment was injured, the view that a regional order was breached, and so on, have been offered.

Furthermore the decision held the above formula concerning the case where the injury to the scenic interest is regarded as illegal. But the formula seems to give weight to a regulation by the authority that was given at the time of starting to build, in the end. Actually the decision examines only the existence of an administrative regulation in deciding the illegality of Y's behavior in this case. In the understanding of this decision, circumstances that are regarded as a breach of public policy or abuse of right may be very rare cases. As many scholars point out, however, for the protection of a scenic interest it is important to consider the actual use in the area. Especially where there are arrangements or usages for a protection of certain interest in the region, in the decision on illegality, these circumstances must be considered. For not making Y illegal, although there were these circumstances in this case, it must be necessary to give enough reason. For instance, the decision should have sent back the case to the original court, for it had been enough to examine the fact for establishing an illegal injury to the scenic interest.

Moreover, the decision held only the existence of damages against Y, not an injunction. The court probably thinks that there is no illegality in an injunction as a matter of course, as far as there is even no illegality for damages. The problem remains of cases where an injunction against an injury to a scenic interest is given.

*** * * Corrigenda to vol. 25 * * ***

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Wrong:

Case No. (*jyu*) 482 of 2005

58 (8) MINSHU 2225; 1883 HANREI-JIHO, 62;

1172 HANREI-TAIMUZU 135

Correct:

Case No. (*jyu*) 965 of 2004

59 (6) MINSHU 1783; 1906 HANREI-JIHO, 3;
1188 HANREI-TAIMUZU 213

4. Family Law

X v. Y (Prosecutor)

Supreme Court 2nd P.B., September 4, 2006

Case No. (*jyu*) 1748 of 2004

60 (7) MINSHU 2563; 1952 HANREI-JIHO 36;

1227 HANREI-TAIMUZU 120

Summary:

The question of the legal parentage of a child posthumously conceived by *in vitro* fertilization using the cryopreserved sperm of the child's father should be settled through legislation dealing with the question—providing whether or not legal parentage between such a child and the deceased father could be established, and if established, who are eligible and what kind of legal effects arise, after contemplating various elements such as (a) the problem of bioethics arising from using the sperm of a deceased individual; (b) the interests of the child born in this way; (c) what those who are concerned feel by establishing legal parentage of such a child; (d) the public's attitude toward such a problem.

Under the current situation which lacks such legislation, we could not establish the legal parentage of a child posthumously conceived by *in vitro* fertilization using the cryopreserved sperm of the child's father.

Reference:

Civil Code Art. 787

Facts:

A (husband) and B (wife) got married in 1997. A had suffered from chronic myelogenous leukemia before his marriage, and decided to undergo bone marrow transplant after their marriage. They also began infertility treatment, but it did not succeed. In 1998, for fear of the