judiciary should make an unconstitutional judgment in order to protect the rights of the vulnerable. In that sense, I sustain the conclusion of this judgment. It is, however, logically hard to draw the conclusion on the premise that the clause in question and the provision of mutatis mutandis application are held to be constitutional; especially in a claim for abatement of a gift or testamentary gift, in the nature of the institution of the legally reserved portion, it is also hard to interpret the terms. I would say that the judge already had a desired conclusion of equalization between a child born in and out of wedlock; he seems to have construed the clause in question and the provision of mutatis mutandis application without ample consideration of the general structure of the part of relatives and succession. The next judgment is noted in the final appellate instance.

4. Law of Civil Procedure and Bankruptcy

Xs v. Ys
Supreme Court 3rd P. B., April 13, 2010
Case No. (ju) 1216 of 2009
12 Saiji 1505

Summary:

The plaintiffs (Xs) insisted that the defendant (Ys) gained the Supreme Court judgement by fraud at the last suit, and claimed damages. But the Supreme Court dismissed the appeal, because the evidence that the parties presented was basically the same as the last suit, and just changed the valuation of the evidence at this time.

Reference:

Art.709 of Civil Law
Art.338 of Civil Procedure Act

Facts:

1. At the last suit

Ys have bought the real estate (the land and the house). But Ys said,

though the land has a building restriction, Xs explained nothing about it to Ys. That is the reason why Ys sue Xs for damages. And Ys won the suit.

2. At this time

Xs insisted that Ys gained the judgment by fraud at the last suit, and claimed damages.

First, the Nagoya District Court held that Xs were given the opportunity to dispute at the last suit and filing this case is an abuse of right (dismissal with prejudice).

Next, the Nagoya High Court adjudged that the action of Y1 at the last suit was "getting the judgment by fraud", and allowed Xs's claim.

But, the Supreme Court vacated this Nagoya High Court's judgment, and adjudged by itself.

Opinion:

As a general rule, a court cannot hold a judgment that is inconsistent with a final and conclusive judgment, due to an infringement of legal stability.

However, in the case that (a) one party has an intention that infringes on the other party's right, and (b) disturbs taking part in a suit by omission or commission, or (c) cheats a court by making a false statement and giving false evidence, there is an exception. Because these cases have a particular reason called "Tokubetsu-no-Jijou" that goes clearly against justice.

In this case, the evidence that the Nagoya High Court adopted is basically similar to it at the last suit. It is different from the valuation of the evidence at this time. Also there is no particular reason that it goes clearly against justice.

Therefore the Supreme Court followed the general rule and vacated the Nagoya High Court's judgment.

Editorial Note:

A final and conclusive judgment has a kind of binding force called "Kihan-ryoku (Die Rechtskraft)". It means a court cannot make a judgment against a binding force of this.

That is the reason why, as a general rule, people say that a court cannot hold a judgment that is inconsistent with a final and conclusive judg-

ment, due to an infringement of legal stability. And we need to have a retrial, not sue for damages as torts.

However, you can see some exceptions in the case that (a) one party has an intention that infringes on the other party's right, and (b) disturbs taking part in a suit by omission or commission, or (c) cheats a court by making a false statement and giving false evidence. Because this is just to "get a judgment by fraud". This doctrine was made by Supreme Court 3rd P. B., July 8, 1969 Case No. (O) 906 of 1968, 23 (8) MINSHU1407 and Supreme Court 1st P. B., September 10, 1998 Case No. (O) 1211 and 1212 of 1993, 189 SAISHU-MIN 743.

In this case, the Supreme Court also refers to "the binding force of a final and conclusive judgment" called "Kihan-ryoku". But I think this case is not related to this binding force ("Kihan-ryoku"). And I guess the Supreme Court is sending the message that it is cautious about bringing the matter up again. At this time, the case that Xs filed was indeed "bringing a matter up again".

5. Criminal Law and Procedure

Hosono v. Japan
Supreme Court 1st P.B., May 31, 2010
Case No. (a) 1462 of 2007
1508 SAIBANSHO JIHO 3

Summary:

A case in which the Supreme Court acknowledged the certified public accountant (CPA) who belongs to the auditing firm which had entered into an audit contract with a company, as a co-principal along with a representative director and others in this company, in the submission of misstated half-yearly report and securities report.

Reference:

Securities and Exchange Act, Article 197, Paragraph 1, Item 1, and Article 198, Item 6 (currently, Financial Instruments and Exchange Act,