357)

Hence, the Supreme Court explicitly held that both 1) and 2) do not deny the existence of the intention to illegally deprive. In the current case, the decision followed the attitude of the Supreme Court as such. However, even if such a way of thinking is admitted, it is not proper to affirm the establishment of the crime of theft and robbery by recognizing the existence of an intention to illegally deprive in a case where the value of the thing in question was not consumed by temporary use. The existence of the intention as above should be recognized only when the consumption of the value can be presumed in one way or another.

When the current case is viewed from such an angle, it must be stated that the consumption of the value of a classified material occurs not by mere recopying it but only by offering it to a rival company. Accordingly, the recognition of the intention to illegally deprive in the current case should be based on the purpose to leak the secret of an enterprise.

On the other hand, there is room for further study whether or not such a purpose can immediately be linked with the "intention to use and dispose of the thing just like its owner." Moreover, there should have been an explanation how the action to make a copy at his own expense differs intrinsically from the action to read and make a note of it (which is considered legal).

[Reference: Criminal Code § 235]

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b. Law of Criminal Procedure

1. Legality of Car Checks.

Decision by the Third Petty Bench, the Supreme Court, on

Sept. 22, 1980. Case No. (*a*) 1717 of 1978. Charges of violation of the road traffic act. 34 *Keishū* 272.

[Opinions of the Court]

It is lawful for the police to conduct car checks at such places where there might occur many traffic offenses for the purpose of preventing traffic violations and arresting offenders as part of the traffic controls. This is done by halting briefly cars that pass through the checkpoints and asking the drivers necessary questions. Checks must be conducted in a manner requesting voluntary cooperation of the parties concerned and must not unreasonably restrict the freedom of users of vehicles.

[Comment]

The decision in the current case affirmed the legality of car checks within a certain limit, finding its legal basis in Article 2 of the Police Act.

With regard to the legality of car checks, there have been two confronting views, one based on Article 2 of the Police Act and the other on Article 2 of the Act Concerning Execution of Duties by Police. At any rate, the permissible limit to car checks is a matter requiring practical study. In this sense, the limit prescribed in the current decision that "checks must be conducted in a manner which does not unreasonably restrict the freedom of users of vehicles" gives rise to certain questions.

On this score, the U.S. Federal Supreme Court decision on Delaware v. Prouse, 440 U.S. 648 (1979) can be considered helpful. The decision, while guaranteeing the protection of privacy of those driving cars, ruled that the halting of a car which is free from reasonable suspicion of a traffic offense or other crime is not in accord with the rationality standards of the Fourth Amendment.

In short, it is believed necessary to take various references into account from an overall standpoint in dealing with reasonable standards for car checks.

[Reference: Police Act § 2 and Act Concerning Execution of Duties by Police § 2]

2. Legality of compulsorily drawing off of urine.

Decision by the First Petty Bench, the Supreme Court, on Oct. 23, 1980. Case No. (*a*) 429. Charges of violation of the Stimulant Drugs Control Act. 34 *Keishū* 300.

[Opinions of the Court]

To forcibly draw off urine from a suspect who refuses to offer his urine voluntarily constitutes an act of trespassing on his body. The method of drawing off urine by inserting a catheter in the urethra invites relatively little danger so long as it is conducted properly by a doctor. It is also likely that the mental damage inflicted upon the suspect will be similar, at times, to that which one suffers during a physical examination. Hence, there is no reason why the compulsory drawing off of urine should not be permitted as a "forcible measure in the course of investigation."

When it is considered truly unavoidable in the course of a criminal investigation in the light of various circumstances, such as the importance of the case, the existence of suspicion, the gravity of the evidence and the necessity of obtaining it, and the lack of alternative means, it is permitted to carry it out as a last measure through proper legal procedure (warrant for search and seizure).

[Comment]

The view that the compulsory drawing off of urine can be permitted out of the necessity for investigation has been dominant in the practical conduct of duty. However, the theoretical aspect of the question remains unsettled. The current decision is worthy of note in that it has given a clear-cut answer to the theoretical problem.

To begin with, the decision ruled that the forcible drawing off of urine can be permitted as a last resort if such is recognized as truly necessary for criminal investigation. The standard of judgment in that case was listed with examples, but there still remains room for further study on individual cases.

Secondly, the decision declared that a warrant for search and

seizure is necessary to carry out the compulsory drawing off of urine. Hitherto, it has been disputed what kind of warrant should be employed in such investigation, but with the current decision it became clear as a matter of practicality.

But, opinions are divided in academic circles, one theory favoring a warrant for examination of the body, another favoring permission for taking measures calling for expert testimony, and still others supporting a combination of the two theories. The current decision calls for academic argument on this score.

[Reference: Code of Criminal Procedure § 218-5]

3. The permissible limit of abuse of public prosecution.

Decision by the First Petty Bench, the Supreme Court, on Dec. 17, 1980. Case No. (*a*) 1353. Charges of injury. 34 *Keishū* 672.

[Opinions of the Court]

Although it cannot be denied that there could be cases in which the deviation of a prosecuting attorney from his discretionary authority could make the institution of a public prosecution null and void, it is only in extreme cases that such public prosecution would constitute an ex-officio crime.

[Comment]

In the current decision, the Supreme Court for the first time admitted that a public prosecution could be made null and void theoretically by the abuse of the right to institute a public prosecution by the prosecuting attorney. It is, however, questionable in that it was limited to an extreme case in which the institution of a public prosecution itself constituted an ex-officio crime. For instance, there could be cases in which punishable illegality does not obviously exist or cases in which the deviation from discretionary authority is extreme, but what this means is not necessarily clear. This should be considered an important question in the future.

[Reference: Code of Criminal Procedure § 248]

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6. Commercial Law

Of the decisions in the year under review, the following four cases are listed herewith. The second and third cases cannot be understood without taking into account the traditional Japanese social background, whereas the first and fourth cases show the trend of interpretations in the study of Japan's commerical law.

1. A case in which a person who was authorized to carry on business in the principal's name did not do so; the legitimacy of an analogical application of Article 23 of the Commercial Law to the transactions of bills and notes.

Decision by the Third Petty Bench, the Supreme Court, on July 15, 1980. 982 *Hanrei Jihō* 145.

[Fact]

Company Y (defendant, appellee, *Jokoku* appellant) authorized B, a representative director (an executive or managing director) of Company A, to carry on business using the name of Y. However, A did not carry on business in the name of Y but only issued promissary notes in the name of Y in connection with its business by opening a current account with Bank C under the name of Y. Representative D of Company X (plaintiff, appellant, *Jokoku* appellee) discounted for B a note issued in the name of Y and endorsed by B. X could not get B to settle the note and therefore, demanded that Y clear the note.

[Opinions of the Court]

Y authorized B to use the name of Y. B carried on business