properties abroad.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which the use of someone else's car for several hours without the latter's consent was construed as an act of theft.

Decision by the Second Petty Bench, the Supreme Court, on Oct. 30, 1980. Case No. (*a*) 1081 of 1980. Charges of committing theft and violating the Road Traffic Act. 34 *Keishū* 357.

[Reference: Criminal Code §235]

[Opinions of the Court]

The defendant drove off a passenger car belonging to someone else from the parking lot of a gas station in Hiroshima without the latter's consent during the early hours of the morning. The defendant at the time intended to keep the car for several hours and actually drove it around the city for a little over four hours.

His action corresponds to the crime of theft because he had the intention of dishonestly depriving another of his car, even though the defendant intended to return it where it was originally parked.

[Comment]

The current case concerns the temporary use of goods belonging to someone else without consent. In Japan there are two academic theories concerning the crime of theft.

The first is that the crime of theft can be established when one appropriates property belonging to another and keeps it in his own possession, while the second theory is that the crime of theft cannot be established by merely obtaining possession, but that

there must be an intention of dishonestly depriving another of his goods. Hitherto, the first theory contended that temporary use without consent corresponds to the crime of theft, while the second theory held that temporary use without consent does not correspond to the crime of theft.

At present, however, both theories agree in that certain cases of temporary use without consent should be subject to punishment. The only difference between them is in what scope temporary use without consent should be made punishable.

As a prerequisite to punish a person for temporary use without consent according to the second theory, there arises the question: under what conditions the intention of dishonestly depriving another of his goods can be found. The current case concerns precisely this problem.

Decisions in the past have basically supported the second theory. The intention of dishonestly depriving another of his goods as shown in those decisions comprise: 1) the intention to exclude the person entitled and 2) the intention to use and dispose of the thing in another's ownership as his own in accordance with the economic use of the thing. (Decision by the former Supreme Court "Daishin-in," May 21, 1915. 21 *Keiroku* 663.)

In this connection, the earlier decisions contended that the "intention of temporary use" cannot be called an intention of dishonestly depriving another of his goods for lack of the requirements of 1). See, for instance, the decision by the former Supreme Court "Daishin-in" on Feb. 4, 1920, 26 *Keiroku* 26.

In a later decision, temporary use without consent with the intention of leaving a car to its fate was judged as a crime of theft. (Decision by the Supreme Court, on July 13, 1951. 5 *Keishū* 1437.)

The decision in question recognized the requirement of 1) in the intention of abandoning the car, while saying that the intention of 2) does not mean the intention to keep the economic interest of the thing for ever.

In the trend of the decisions as shown above, the current decision judged temporary use of a thing with the intention of

returning it as an act of theft, thus expanding the scope of punishing "temporary use without consent." In recognizing the intention of dishonestly depriving another of his goods, the current decision should be interpreted as having given more importance to the requirements of 2) rather than to those of 1).

2. A case in which the defendant was found guilty of embezzlement of lost articles, for having caught and sold the cultured carp that escaped into a large lake from the retaining nets of a fish cultivator.

Decision by the Third Petty Bench, the Supreme Court, on Feb. 20, 1981. Case No. (*a*) 2285 of 1979. Charges of committing the crime of embezzlement of lost articles, and the crime of buying stolen goods knowingly. 35 *Keishū* 15.

[Reference: Criminal Code §254]

[Opinions of the Court]

The defendant had been engaged in set net fishing in the east waterway of Lake Hachiro in Akita Prefecture. When colored carp and golden carp escaped from the retaining net of a carp cultivator in the same waterway and drifted into some of his set nets, he caught and sold them.

At that time, the defendant was well aware of the fact that the carp had escaped from the net of a nearby carp cultivator. Though it would be extremely difficult for the breeder to recapture the carp that fled into such a vast lake as Lake Hachiro, this does not mean that the carp in question cannot be the object of protection from the crime of embezzlement of lost articles.

Since the defendant took possession of the carp knowing that they were raised by another, the defendant is guilty of the crime of embezzlement of lost articles. Accordingly, the original decision to this effect should be deemed proper.

[Comment]

Article 254 of the Japanese Criminal Code provides for the punishment of embezzling the "property of another person who

no longer has possession thereof." The controversy in the current case was whether the carp that fled into a vast lake can be considered the "property of another person who no longer has possession thereof."

The following two requirements are needed for the carp in question to be called the "property of another person who no longer has possession thereof." 1) The carp are no longer in the possession of their owner. 2) The carp can still be called the property of another person.

The current decision made no mention about the requirements of 1), but the carp in question have a special nature concerning the meaning of possession as they are extremely mobile and have no homing habit. In this regard, how to deal with the requirements of 1) was one of the problems.

Incidentally, the Supreme Court in its decision handed down on July 16, 1957 (11 *Keishū* 1829) made the following judgment: "Even if an animal of mobility went outside the domain of physical control of the owner, if the animal has the habit of returning to the owner, the owner can be recognized as having possession thereof."

On the basis of this judgment, the current decision seems to have taken the requirements of 1) as the natural prerequisite on the ground that the carp have no homing habit.

As the basis of the judgment of the requirements of 2), the decisions used the following three points: **a)** Whether or not the owner had the intention of abandoning ownership. **b)** Whether or not the thing was in a state of being controlled. And **c)** whether or not the thing had the nature of being specific as the subject of ownership. The current decision adopted these judgment standards.

When these standards are applied to this case, the recognition of **b)** and **c)** becomes a question on account of the special nature of the carp in question. Thus in the current decision, judgment was made on those points as follows:

On **b)**: Even if it were impossible for the owner to recover the loose carp, if somebody else engaged in fishing captured the carp,

it should be considered possible for the owner to recover them. Accordingly, the carp in question are still in a state of being controlled.

On **c**): Considering the proximity in terms of time and place as well as the low possibility of the natural inhabitation of such colored carp, the carp in this case can be specified as cultured carp.

In this sense, the current decision followed past judicial precedents. In that a judgment was made on such special things as carp, the current decision added a new case to past precedents.

3. A case in which it was debated whether or not the act of publishing in a monthly the private life of Daisaku Ikeda, then chairman of the religious corporation Soka Gakkai, as a means to criticize the Soka Gakkai constituted the crime of libel and slander.

Decision by the First Petty Bench, the Supreme Court, on Apr. 16, 1981. Case No. (*a*) 273 of 1980. Charges against libel and slander. 35 *Keishū* 84.

[Reference: Criminal Code §§230 and 230-2]

[Opinions of the Court]

(1) The behavior of a private person in private life can sometimes correspond to "facts having relation to the public interest" described in Paragraph 1, Article 230-2 of the Criminal Code in reference to criticism and evaluation of his social activities. This can be determined by the nature of the social activities in which he is engaged and his influence on society.

(2) In the current case, an article written and carried in the magazine by the defendant was aimed at criticizing the doctrines of the religious corporation "Soka Gakkai," which has a large number of followers, and what Soka Gakkai were. In reference to his criticism, the defendant alleged certain facts including the extremely disorderly relationship of the then Chairman Daisaku Ikeda of the Soka Gakkai with women.

According to records, the chairman is virtually an absolute leader, someone who must practice doctrines in person, someone

in a position where his words and deeds, whether in public or private, exert serious influence on the followers.

Moreover, with the backing of his religious position, he has exerted not a little influence on society in general through direct and indirect political activities.

With these facts as a prerequisite, it must be said that the behavior of the chairman et al. allegedly corresponds to the "facts having relation to the public interest" in Paragraph 1, Article 230-2 of the Criminal Code.

(3) Whether or not they correspond to the "facts having relation to the public interest" should be judged objectively by the content and nature of the alleged facts.

The way the expressions were used and the scope and degree of factual survey at the time of the allegation concern recognition of whether or not there "existed the purpose of promoting the welfare of the public," and have nothing to do with whether they correspond to the "facts having relation to the public interest."

[Comment]

Article 230 of the Criminal Code generally punishes the act of injuring a person's reputation. On the other hand, Article 230-2 admits that the act shall not be punished in case the act of injuring the reputation of another satisfied the following requirements: a) Alleged facts should be "facts having relation to the public interest," b) allegations must purportedly promote the welfare of the public, and c) alleged facts must be proved to be true.

Moreover, Article 230-2 expressly states that even if the alleged fact concerns private conduct, it can be regarded as "fact having relation to the public interest" in the following cases: when it is a fact concerning a criminal act committed by a person who has not yet been prosecuted, (Paragraph 2), and when the fact concerns a public servant or a candidate for elective public office," (Paragraph 3).

However, it has so far been left in the hands of interpretation whether, such as in the present case, facts concerning the conduct of a private person in private life can be considered "facts having

relation to the public interest."

In the current decision the Supreme Court for the first time made a judgment on this very point, and it is quite worthy of attention. In other words, it is significant in that (i) it expressly stated that the conduct of a person's private life can be "fact having relation to the public interest" under a specific requirement [Opinions of the Court (1) and (2)] and (ii) that it has presented such standard of judgment for that purpose [Opinions of the Court (3)].

With regard to the problem of (i), academic theories have so far interpreted it as follows: "Facts having relation to the public interest" mean facts having relation to the interest of the whole of society. Society in this sense does not have to be society as a whole like the state or local public entities but can be one section of the society. Accordingly, whether or not the allegation has relation to the public interest should be determined in connection with the scope of the social domain in which the allegation in question was publicly disclosed.

Even if the person is a private person, he conducts himself in regular social activities in the social domain within the scope of the allegation and exerts serious influence on the said society through such social activities. In that case, it becomes necessary to judge and criticize the propriety of the social activity conducted by that private person in order to promote the development of the said society.

In this connection, the conduct of a private person in his private life can be described as "fact having relation to the public interest" so long as it can become the reference material of judgment and criticism of the social activity of the said private person. The current decision can be said to have adopted such an academic theory.

With regard to point (ii), the leading academic theory and lower court decisions (for instance, a decision by the Tokyo High Court on Feb. 21, 1953, 6 *Kōkeishū* 367) listed the following standards: The alleged facts should concern the interest of society as a whole, public disclosure of the alleged facts is necessary in the public interest, and public disclosure of the alleged facts can be confined

to necessary limits.

But, the current decision apparently rejected such standards, because it believed that allegations of facts having relation to the public interest of society as a whole are useful for the promotion of public welfare.

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b. Law of Criminal Procedure

1. Stop and Search and Exclusionary Rule.

Decision by the Second Criminal Department, the Osaka High Court, on Jan. 23, 1981. Case No. (*u*) 1043 of 1979. Charges of violation of the Stimulant Drug Control Act. 998 *Hanrei Jihō* 126.

[Fact]

An investigator, while conducting an investigation of a robbery, happened on the defendant and stopped and questioned him on suspicion of theft. Upon searching him, the investigator discovered stimulant drugs in his clothing.

The defendant was indicted for unlawful possession of stimulant drugs.

[Opinion of the Court]

Since the defendant was suspected of theft and evidence of theft (coins stolen from a game machine) was under their noses, further search for stolen goods shall not be allowed.

At that time, there was no probability of the defendant carrying a dangerous weapon with him nor the necessity and urgency of searching him. The act of reaching into his pocket and taking out the contents evidently overstepped the bounds of the purpose,