there is the problem of whether or not the tenor of the current decision can be applied to special agreements of this kind accompanying contract patterns other than transactions based on retention of title. It is presumed that the intention of the Supreme Court was probably to apply the tenor of the current decision to other contract patterns, and if the effect of the special agreement of this kind is to be denied likewise, the current decision will have all the more influence on actual business practices.

Another problem is whether such restriction on the right of cancellation will put creditors at a grave disadvantage. Detailed studies are necessary on this question.

By Prof. KOICHI SAKURAI
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5. Criminal Law and Procedure

a. Criminal Law

1. A Judge's conduct in reading and examining the identification file of a person unrelated to the case in his charge was adjudged as corresponding to an abuse of power.

Decision by the Second Petty Bench of the Supreme Court on Jan. 28, 1982. Case No. (*a*) 461 of 1975. Case of public official's abuse of power. 36 *Keishū* 1.

[Facts]

The defendant was an assistant judge of the Hachioji chapter of the Tokyo District Court at the time when the incident occurred. He visited Abashiri Prison on July 24, 1971, and met with the warden producing his name card on which his title "Judge of the Tokyo District Court" was written and asked to peruse the identi-

fication file of Kenji Miyamoto (then Chairman of the Japan Communist party) who had not connection with the case in his charge.

With the permission of the warden, he read the file and photographed it.

On July 29th, the accused called up the chief of general affairs of the prison and asked him over the phone to mail him a copy of part of the file in question. He had it mailed to his own home.

[Opinions of the Court]

1. What is called "an abuse of power" in Article 193 of the Criminal Code means a substantially and concretely unlawful or unjust act conducted by a public official under the pretext of executing his power over matters which belong to the power in general invested in the public official. This power in general is not necessarily accompanied by legally compelling power.

With regard to the abuse of power, if it is excessive enough to cause a person to perform an act he is not bound to perform or obstruct a person from exercising an entitled right, it can be termed as part of the power in general in the contest of Article 193.

2. A judge sought to peruse an identification file, requested delivery of a copy, and had the prison warden et al. comply with his requests pretending he was performing an investigatory act for a justifiable purpose, despite the fact that he had no justifiable purposes such as an investigation or research that would help him in his legal studies by providing professional references, therefore it must be concluded that he had abused his power and caused them to perform an act they were not bound to perform.

[Comment]

Articles 193 through 196 of the Criminal Code stipulate the punishment for abuse of power by persons working in public services.

Article 193, for instance, states that "a public official, who abuses his power and causes a person to perform an act he is not bound to perform or obstruct a person from exercising an entitled

right, shall be punished." To effect a crime as defined in Article 193, it is necessary that the act in question belongs, as a matter of form, to the power in general of the public official in question.

Both academic theories and judicial precedents agree on this score, but it is difficult to say that the standard of judging in concrete cases whether or not the act in question belongs to the power in general of the person concerned has been made clear in past deliberations. And this was the central issue in the current decision.

In working out standards of firm judgment there are two points at issue. 1) Is it required that the power in general of a public official should be accompanied by legal compelling power? 2) To recognize this power, is it necessary for laws to have directly authorizing provisions?

On the first point, the current decision takes the stand that such is not necessary. (See "Opinions of the Court 1").

Generally accepted views have so far claimed that such is necessary, but in recent years a theory denying such necessity has come to gain strength. This theory is based on the contention i) that Article 193 merely states...if a public official "abuses his power" and, accordingly, it does not limit the "power" to something having a compelling force as far as the text of the law goes, ii) that Article 193 protects two kinds of *rechtsgut* (protected interests) namely, the national, protected interests to be represented by the integrity of official duties (operation of the state) and individual, protected interests to cover the freedom of the behavior of the other party in the execution of such duties.

Viewed from this point, the scope of effecting the crime in the current case would be extremely restricted if based on the generally accepted theory, and it is rather insufficient in terms of *rechtsgut* this Article protects. The current decision seems to have depended on this leading theory.

On the second point, too, the current decision has taken the stand of denying any necessity. (See "Opinions of the Court 2"). In other words, there is a "special relationship between judges and prisons" as is evident simply by the fact that the judge is given the power to make inspection tours of prisons. In this connection, the

current decision ruled that the conduct of a judge in requesting the prison warden et al. to let him peruse materials belongs to the power in general of the judge. This judgment was derived from the following basic standpoints:

Importance should be given to protecting the freedom of the people as defined in Article 193. Therefore, what is important in the current case is not "whether or not there is a basis for invoking the power of public official towards the people" but what requirements are necessary to control any unjust behavior by public official.

If the protected interests in Article 193 are interpreted as the "integrity of official duties" like the generally accepted view, then it is considered as taking a stand affirming necessity on this score.

[Reference: Criminal Code § 193]

2. Rejection of call for a collective bargaining session by management does not constitute an "imminent and unjust violation" as covered by the Criminal Code, Article 36 (1).

Decision by the Second Petty Bench on May 26, 1982. Case No. (*a*) 1131 of 1981. A case of violation of the law concerning punishment for acts of violence, etc. and trespass of the accused into a building. 36 *Keishū* 609.

[Facts]

The defendant was working for the Nagasaki Broadcasting Station of the Nihon Hoso Kyokai (Japan Broadcasting Corporation), called NHK for short, and was chairman of the Kyushu local chapter of the Japan Broadcasting Workers Union.

He demanded that the director of the Nagasaki Broadcasting Station to open a collective bargaining session in an attempt to seek a clear explanation of the reason for serving him a disciplinary action because of violence and injuries which occurred in connection with his union activities and also the reason for relocating and transferring him to the NHK's education bureau in Tokyo. The director rejected his request.

The defendant, together with other union members, attempted

to enter the director's room to demand a collective bargaining session. They smashed the glass partition between the lobby and the conference room next to the director's room and entered the conference room. They then rammed a long desk more than ten times against a wooden door leading to the director's room, breaking the door as well as the desk.

In the first instance, the court judged that the behavior of the defendant was unlawful deviating from the means legally permissible as union activities.

In the lower court, the defense counsel maintained that the demand of the defendant and other union members for a collective bargaining session was reasonable and that their demand was based on urgent necessity. Therefore, the defense counsel said, the refusal of the director constituted an imminent and unjust violation of the right to collective bargaining or the right to organize, adding that their behavior should be considered as self-defense, for the defense of these rights.

The lower court made the following judgment against this contention: "As the director of the Nagasaki Broadcasting Station had no authority to deal with matters which the defendant and other union members wanted to discuss in a collective bargaining session and in which he is incompetent to enter into a collective bargaining session, the attitude he had taken cannot be considered as infringing upon the union's right to collective bargaining and the right to organize. Therefore, there is no room for arguing on the effectiveness of self-defense concerning the behavior of the defendant.

[Opinions of the Court]

As there existed only an "omission" on the part of the employer not to comply with the proposal for a collective bargaining session, it cannot be said there was an "imminent and unjust violation." Therefore, regardless of whether or not the director was competent to enter into a collective bargaining session, there is no room to regard the act of the defendant in the current case as an act of self-defense.

[Comment]

Article 36 (1) of the Criminal Code states clearly that an act satisfying specified requirements shall not be punishable as an act of self-defense. According to this article, an act of self-defense is constituted under the following two requirements: 1) there must be an imminent and unjust violation, and 2) the act in question is done in order to defend the rights of oneself or another person.

The current decision centered on the interpretation of the requirement 1) for self-defense.

Incidentally, generally accepted views take the stand that "violation" in the Criminal Code, Article 36 (1), includes "omission." They insist as follows: 1) "violation" means actual damage and danger to one's rights. 2) As long as an act causes actual damage and danger to one's rights even if by "omission," it should be interpreted as a "violation." There is ample reason for the contention of these views, since the essense of self-defense includes an aspect of protecting one's rights from attack without reason. In other words, it is viewed that the importance of the "violation" concept in Article 36 (1) is placed on the result arising from the act, not the act itself.

As a matter of fact, there is no gainsaying the point in academic theories that a violation due to omission that may constitute a crime falls within the purview of the violation in Article 36 (1).

On the following point, academic theories are varied. The question is whether the nature of the violation can be denied regarding such unlawful omissions as the unlawful act in the Civil Code (e.g. the failure of performance) or the unlawful act in labor laws (e.g. rejecting a request for a collective bargaining session).

On this score, some academic theories maintain that "the failure of performance should be settled by civil proceedings and there should not be any exercise of actual force as a means of redress, and so it cannot be considered a violation as stated in the Criminal Code, Article 36 (1)."

This stand leads to an interpretation that the omission on the part of the employer, that is, rejecting a call for a collective bargaining session, does not correspond to the "violation" as a requirement

for self-defense, irrespective of whether it constitutes an unlawful act in labor laws.

The current dicision, it seems, has followed this theory, on the ground that it does not exclude omission in general from the "violation" of Article 36 (1), but excludes omission that is unlawful in terms of civil affairs and labor laws. Such contention, however, is likely to be subjected to criticism because it differs from the generally accepted view that the "unjust" part of the "unjust violation" means unlawfulness in terms of law as a whole.

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b. Law of Criminal Procedure

1. A case in which the imposition of a duty upon a foreigner, who had entered Japan illegally, to register as an alien was in dispute as to whether or not it infringed upon his right to remain silent.

Decision by the Third Petty Bench of the Supreme Court on Mar. 30, 1982. Case No. (*a*) 1122 of 1980. Charges of violating the Alien Registration Act. 36 *Keishū* 478.

[Opinions of the Court]

If a foreigner, who has entered Japan illegally, is punished for failing to abide by the law imposed upon him to register as an alien within a definite period of time (Alien Registration Act, Articles 3(1) and 18(1)) it cannot be considered that he is compelled to "testify against himself" as safeguarded in the Constitution, Article 38(1).

However, a violation of the Constitution may be construed if it has been the practice not to accept such applications on the ground that such applicants have failed to write the true facts about their