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

illegal entry in a written statement and also an explanatory statement submitted in the place of a passport. In the current case, however, such was not the case.

[Comment]

If Articles 3(1) and 18(1) of the Alien Registration Act are applied uniformly to illegal entrants, it gives rise to the suspicion that their right to remain silent has been violated. This is because the illegal entrant is compelled by penalty to submit a statement likely to lead to the discovery of the crime of illegal entry (Immigration Control Order, Articles 3 and 70(1).

On this point, the Supreme Court (decision by the Grand Bench on Dec. 26, 1956, 10 *Keishū* 1679) ruled that even if the old Alien Registration Order, Article 4(1), corresponding to the present Alien Registration Act, Article 3(1), is applied to an illegal entry, it does not mean that the illegal entrant is compelled to testify about the facts of his illegal entry.

The present Alien Registration Act is different from the old one in that a foreigner applying for entry is obligated to show his passport. Hence, an illegal entrant without a passport will suffer a further disadvantage. In the current case, this problem was taken up again.

According to the judicial precedents recently established by the Supreme Court (for instance, a decision by the Grand Bench on Nov. 22, 1972, 26 *Keishū* 554), whether or not the imposition of a duty to make a statement in accordance with administrative regulations infringes upon the right to remain silent is determined by the following two standards of judgment:

(i) Whether or not the procedure to request a statement leads to the collection of information aimed at pursuing criminal responsibility; and

(ii) Whether or not such procedure can be considered necessary and reasonable in achieving administrative purposes.

In accordance with these standards, the Supreme Court, in its decision by the Second Bench on Nov. 26, 1981 (35 *Keishū* 896), ruled that the regulations in this case were constitutional. In the

current decision, too, the same conclusion was made.

However, it has been in part practice to have the true facts about the illegal entry entered in a written statement and also an explanatory statement submitted in place of a passport. The latter part of the current decision can be interpreted as having indicated that such practice cannot be considered necessary and reasonable in achieving administrative purposes and that it gives rise to the suspicion that the Constitution is being violated. (See supplementary opinion of the current decision.)

Incidentally, many theories interpret that "the facts which are adverse to the interests of the accused" include not only the "facts that provide a direct basis for one's criminal responsibility" but "facts which are the key to the discovery of facts constituting the offense."

In this connection, the application of the provisions relating to the current case to illegal entrants runs counter to the Constitution when viewed from such a standpoint.

[Reference: Alien Registration Act (Act prior to revision by Ch. 64, 1980) §§3(1) and 18(1); Alien Registration Act Enforcement Regulations §2(1); Constitution §38(1)]

2. A case in which the effect of an action for withdrawal of an appeal was disputed when the accused presented a written motion for waiver of appeal without knowing that his defense counsel had already filed a motion for appeal.

Decision by the Criminal Department of the Tokyo High Court on Mar. 8, 1982. Case No. (*ku*) 37 of 1982. A *Kōkoku* appeal made against a decision that the proceedings had been terminated by the withdrawal of the appeal. 35 *Kōkeishū* 40.

[Opinions of the Court]

Both the waiver and withdrawal of an appeal have the same purpose of not requiring retrial in the appellate court but having the original adjudication become final.

Whichever method is chosen is decided by just a formal standard, namely, whether or not the motion for an appeal has already

been presented. Accordingly, in case the written motion for the waiver of an appeal, aimed at having the original adjudication become final, is tendered by the accused after the presentation of the motion for an appeal by the defense counsel, the effect of the withdrawal of appeal shall be admitted regardless of whether the accused is aware that the motion for an appeal has already been presented.

[Comment]

The accused has an individual right of appeal (Code of Criminal Procedure, Article 351) and may waive or withdraw an appeal (Article 359). On the other hand, the defense counsel in the original instance may lodge an appeal on behalf of the accused (Article 355), but this shall not be taken against the clearly expressed intention of the accused (Article 356). But, the defense counsel can lodge an appeal in his name and effectively without confirming the intention of the accused, so long as there is no expression of intention by the accused.

As a result, it may happen that after defense counsel lodges an appeal effectively, as in the current case, the accused may present a written motion for the waiver of appeal with no knowledge about it.

The waiver of an appeal is an act addressed to the original court before lodging an appeal so as to have the original adjudication become final, but the withdrawal of an appeal is addressed to the appellate court after lodging an appeal. (Criminal Procedure Rules, Articles 223 and 223-2(1)). Both are an important procedural act by which the chance for a retrial in the appellate court is lost, and must be tendered in writing in order to guard against the rash act. (Code of Criminal Procedure, Article 360-3 and Rule of Criminal Procedure, Article 224).

If we are to attach importance to these matters, it is logical that the accused who does not have an intention to file an appeal should withdraw the appeal anew on the premise that the motion of appeal by the defense counsel is valid.

But, when viewed out of practical considerations, whether it is

withdrawn or waivered, both are the same as the expression of intention to have the original adjudication become final. The difference in address is just a matter of procedural difference.

Moreover, the train of thought, as in the current decision, is in agreement with the spirit of the law to make much of the intention of the accused himself rather than the judgment of the defense counsel.

Incidentally a special *Kōkoku* appeal was lodged against the current decision, but the Second Bench of the Supreme Court dismissed it (decision on Mar. 25, 1982. 1045 *Hanrei Jihō* 140).

[Reference: Code of Criminal Procedure §§355, 356, 359, and 419; Criminal Procedure Rules §§ 223, 223-2, and 224]

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6. Commercial Law

1. A case in which "justifiable reason" was recognized in removing a director from office.

Decision by the Third Petty Bench of the Supreme Court on Jan. 21, 1981. 1037 *Hanrei Jihō* 129.

[Facts]

X (plaintiff, Koso appellant and Jokoku appellant) was a representative director of Stock Corporation Y (defendants, Koso appellees and Jokoku appellees) and a shareholder with 4,350 shares of the total 8,000 shares already issued by the corporation. Becoming ill, his condition worsened, he decided to recuperate and retired from regular corporate business. X then transferred all his shares to another director of the corporation, who already had 2,350 shares, and at the same time changed his position as representative director with A on Sept. 21, 1977.

Later, on Oct. 31 the same year, A convened an extraordinary