

the adjudication of bankruptcy against the obligor, and if exercise of the subrogative right were not admitted, it would be meaningless that the preferential right on the sale of goods is provided as a statutory lien without public notice and a right of preferential satisfaction of secured creditor in bankruptcy.

On the other hand, the opposite opinion represented by the majority of the lower courts seems to consider that the unsecured creditors should be protected from unexpected damage which may arise out of the lack of the public notice on the said preferential right.

Certainly, the desirability of the preferential right on the sale of goods is questionable because of a lack of public notice. But since such right is provided as a statutory lien in the Civil Code and also as a right of preferential satisfaction of secured creditors in the Bankruptcy Act, it is submitted that the conclusion of the Supreme Court in the current case is reasonable. Above all, the seller of such goods as cannot be registered and as are intended for resale from the beginning has no effective means of securing his money in Japan. Accordingly, the current decision is very significant for the protection of such seller of goods in such circumstances as a debtor's bankruptcy.

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## **5. Criminal Law and Procedure**

### **a. Criminal Law**

- 1. A case in which a judgment of the Supreme Court was given on “imminent and unjust violation” as an element for self-defense.**

Decision by the Second Petty Bench of the Supreme Court on January 30, 1984. Case No. (a) 648 of 1982. Case of murder and violation of the Firearms and Swords Control Act. 38 *Keishū* 185.

**[Facts]**

The accused (a male) and H (the victim, a male) were living in the worker's dormitory of a dockyard in Tokushima City, both working as welders. They were on bad terms because of opposing opinions about their work. On the evening of May 24, 1975, the two quarreled with each other in a wine shop near their dormitory. At that time, the accused received a blow to the face from H which broke his front teeth. The accused remained agitated, and after arriving back at the dormitory waited for H to return, intending to make him apologize. When H arrived back at the dormitory, the accused went to the hall with a wooden sword in his hand and barbers' scissors in the back-pocket of his trousers and told H to apologize. This only resulted in a recurrence of the quarrel. O, who came to the hall on hearing the quarrel, tried to stop the quarrel and persuaded the accused to give up the wooden sword and talk calmly with H. The accused took his advice. After putting the sword down, the accused then descended some stairs which led to the front yard of the dormitory. (He intended to talk there.) H picked up the wooden sword suddenly, ran after the accused with it in his hand, and used it to hit the accused who had by then reached the front yard. H struck the accused on the head, ankle, etc. Although the accused was at first avoiding the blows, he turned, producing the scissors from his pocket and thrust them into H's heart, killing him.

He was prosecuted for murder and violation of Article 22 of the Firearms and Swords Control Act.

At first instance, the court judged the accused not guilty for the reason that his conduct constituted a defensible act. However, the court of appeal reversed this, denying that the accused's acts were justifiable for the reasons set out below, and sentenced

the accused to a prison term of 6 years. The court held that in this case there was not an “immediate danger,” a requisite part of the defense that the act was justifiable, for the reasons that (1) this case was a so-called “quarrel” case and the accused had been in such a situation that he could have expected H’s attack; and (2) the accused had actually expected to quarrel with H and had intended to attack H with the scissors if attacked by H.

### *[Opinions of the Court]*

The conduct of the accused was an act exceeding the limits of defense.

#### *[Reason 1]*

It can be considered that the accused could not have expected H’s attack with the wooden sword for the two reasons described hereinafter, therefore H’s attack can be considered an “immediate danger.”

(1) It is reasonable to consider that the accused had intended to talk with H when he went down the stairs after abandoning the wooden sword and that he had considered that H would respond to the talk, for if the accused had anticipated a quarrel, he would not have abandoned the wooden sword. This reasoning is re-enforced by the fact that the accused knew that H was skilled at Karate.

(2) The accused did not immediately defend himself with the scissors but instead ran from place to place to avoid the attack. And even after he produced the scissors, at first he merely threatened H by waving them at him. Therefore, it could not be said that the accused’s original intention was to attack H with the scissors.

#### *[Reason 2]*

Considering the kind, size, etc. of the weapon, H’s attack with the wooden sword endangered the life and body of the accused. The accused ran from place to place and threatened H with the scissors before finally stabbing H. The stabbing was caused, at least in part, by H’s continued attacks. Therefore, it

could be said that the stabbing was done in self-defense. However, the counterattack continued even after the H's attack had been weakened by the wooden sword breaking and that the accused continued until he finally killed H. It can be said that when this point was reached the act could no longer be regarded as self-defense.

*[Comment]*

Article 36 of the Criminal Code stipulates that an unavoidable act done in protection of one's rights or those of another person against immediate danger is not punishable. Moreover, according to generally accepted views and precedents, it is said that the following three conditions must be satisfied for establishment of self-defense: (1) presence of imminent danger (an illegal attack must be immediate in terms of time and place), (2) the conduct must be based on an intention to protect one's own rights or the rights of another person (the presence of an intention to defend), and (3) the degree of the counterattack must be balanced with that of the initial attack. Requisites (1) and (3) are termed objective conditions for a defense and (2) is termed a subjective condition. Because the judgment on requisites (1) and (2) is important in this decision, a detailed explanation of these will be given.

(i) It was held in relation to the condition (1) (presence of imminent danger) that the fact that the accused had not expected to be attacked by H and had not intended to launch an assault indicated the nature of the violation. In other words, this decision clearly stated that expectation of physical danger and an absence of intention to assault could be regarded as two bases upon which it could be found that the danger was immediate. Precedents had identified an imminent danger solely based on the urgent nature of the violation in terms of time and place regardless of subjective circumstances such as an expectation of violation or the presence of an intention to protect someone. (In particular, refer to the judgment of the Supreme Court, November 16, 1972 (25 *Keishū* 996).) However, the judgment of the Sup-

reme Court on July 21, 1977 (31 *Keishū* 747) changed this. The Court handed down the following judgment on defense: “(a) The urgent nature for the violation required by Article 36 of the Criminal Code does not impose a duty on the actor to avoid an expected attack. Therefore, the urgent nature of the violation is not immediately denied for the mere reason that the violation was expected. (b) However, in the view of the spirit of Article 36 which requires an imminent danger, if the actor faces the violation with an intention of positively assaulting the opponent as well as having no intention of avoiding the expected violation, the danger or violation is not regarded as imminent.” This decision followed the judgment of 1977 precisely. Therefore, it can be said that the fact that the urgent nature of violation is denied by the presence of an intention to assault has become an established precedent. However, it must be borne in mind that such a precedent is open to strong criticism based on an apprehension that the judgment as to the presence or absence of an intention to assault is apt to be arbitrary and therefore the range of the defense will be unjustly limited. Thus, many scholars contend that the urgent nature must be judged solely on objective circumstances.

(ii) Precedents and theories accept the following view as to the intention to defend: The presence of an intention to defend is not immediately cancelled by the mere presence of an intention to assault. Therefore, it becomes a problem whether the whole act can be judged to be based on the intention to defend in spite of the presence of the intention to assault.

[Reference: Articles 36 and 199 of the Criminal Code]

**2. A case in which a person with serious anorexia nervosa who had shoplifted various items of food was judged to be not guilty by reason of irresponsibility.**

Decision by the First Criminal Division of the Osaka High Court on March 27, 1984. Case No. (u) 13 of 1983. Case of theft. 1116 *Hanrei Jihō* 140.

*[Facts]*

The accused stole 46 items of food (valued at 18,056 yen) from a supermarket in Neyagawa city on March 19, 1982 ("the first offense"). Further she stole 33 items of food (valued at 11,036 yen) from a supermarket in Osaka city on June 5, 1982 ("the second offense"). She had stolen 36 items of food (valued at 11,835 yen) from a supermarket in Kadoma city on October 10, 1981 and was sentenced to a prison term of 10 months, which was suspended for 2 years. The first offense was committed 2 months after this decision and the second offense was committed a month after the prosecution for the first offense was instituted.

The judgment at first instance was as follows: (1) Abnormalities can be recognized in that the accused repeated similar offenses under circumstances where normal people would refrain from committing fresh offenses and that the stolen articles were limited to large volumes of food. (2) According to the expert evidence, she had been suffering from a neurosis named "anorexia nervosa" when she committed the offense, and the offense in this case was committed to satisfy her abnormal appetite caused by this neurosis. (3) Considering the kind of the offense, her attitude during interrogations and at the court, and the contents of her testimony, however, it is difficult to say that she was irresponsible for the offenses due to the above neurosis. This should be considered a case of diminished responsibility.

*[Opinions of the Court]*

According to the evidence presented by an expert selected by the Court, the following facts were ascertained: (1) The accused had been suffering from anorexia nervosa since the age of 16 (she was 35 years old at the time of the trial). She had been showing symptoms of abnormally excessive eating and vomiting since 1971, a sign that the disease had been serious. (2) According to psychiatry, stealing of food as well as abnormal attitudes to eating is an impulsive action in the case of patients suffering from

serious anorexia nervosa. According to the expert evidence, therefore, it can be considered that although she had the capacity to discern right from wrong, she lacked the capacity to act in accordance with that discernment as far as eating was concerned. Therefore, she was not responsible for the thefts.

*[Comment]*

The Criminal Code of Japan contains a provision regarding responsibility in Article 39: “(1) Acts of persons of unsound mind are not punishable. (2) Punishment shall be mitigated for acts of weak-minded persons.” According to precedents and generally accepted views, a person is not responsible for his acts only when the following two requisites are satisfied: (1) there is some mental impediment and (2) either the capacity for discerning right from wrong or the capacity to act according to a discernment as to what is right and what is wrong is lost.

The first noteworthy point of the decision presently under discussion is that serious anorexia nervosa was judged for the first time a mental impediment and thus a possible basis for a defense of irresponsibility. Article 39 of the Criminal Code does not mention “mental impediments.” Therefore, to what extent a “mental impediment” must, in terms of psychiatric discernment, exist for the defense of irresponsibility to be available is still unclear. We must await further judgments.

Secondly, the Court recognized the accused’s lack of responsibility by reason of the absence of “capacity to act according to her own discernment.” Psychiatrists have maintained that the presence or absence of this kind of ability cannot be judged practically. Precedents had adopted a strict criterion for the judgment of responsibility because of a lack of measures of security to Japan. Judgments had pointed to a trend of recognizing the existence of responsibility if the capacity for discerning right from wrong was present. Even though the offense in this case was a minor one, the decision can be valued for the reason that it judged the responsibility of a person wholly from the point of

pure responsibility, that is, it decided whether the actor actually could be blamed or not.

[Reference: Articles 39 and 235 of the Criminal Code]

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## **b. Law of Criminal Procedure**

### **1. A case in which the legality of continuous interrogation of a suspect making him stay at lodgings near the police station for four nights was tested.**

Decision by the Second Petty Bench of the Supreme Court on February 29, 1984. Case No.(a) 301 of 1982. Case of murder. 38 *Keishū* 479.

#### **[Facts]**

The accused was tried for murder. The admissibility as evidence and the probative value of his confession made during investigations were disputed at the trial.

The interrogation of the accused was made in the following manner: Because the police's suspicion of the accused was confirmed in the initial stages of investigation, he was asked to go to the police station. After acceding to this request, the accused confessed to the crime, and asked to be provided with some accommodation for that night so that he could continue his confession in greater detail on the following day. He was made to stay near the police station guarded by several investigators. The suspect was interrogated at the police station all the next day. Even after that the suspect did not want to go home. So he was made to stay in a hotel near the police station and was placed under surveillance by several investigators. The same thing occurred on the third and fourth days. A record of interview was made