objects of punishment and legal benefits (Rechtsgut), and the common features of the methods of offence.

In reference to ②, the current decision recognized the application of the crime of unauthorized possession of a narcotic to the case in spite of the objective possession of a stimulant drug by the accused. Then, another problem arose questioning which provision should apply to the confiscation of the seized stimulant drug, the provision of confiscation from the Narcotics Control Act (Art. 68) or the provision of confiscation from the Stimulant Drug Control Act (Art. 41.6). In other words, it becomes a question whether it is possible to apply the provision for the confiscation of narcotics to stimulant drugs in the case of confiscation based on the Narcotics Control Act. Furthermore, in the case of confiscation based on the Stimulant Drug Control Act, another question arises whether the confiscation is possible on the basis of the said Act although the crime is not of that Act.

On this point, the current decision recognized confiscation based on the Stimulant Drug Control Act, emphasizing the character of the confiscation of the drugs as dispositioning. If the current decision had emphasized that the confiscation was a kind of punishment, it would have recognized the confiscation in accordance with the Narcotics Control Act.

By Prof. MINORU NOMURA
TOSHIMASA NAKAZORA

b. Law of Criminal Procedure

1. A case in which it was disputed whether or not a proceeding of taking a urine sample from a criminal suspect without a warrant was legal and whether or not to recognize the evidentiary competency in the document of urinalysis by an expert witness.

Decision by the Second Petty Bench of the Supreme Court on April 25, 1985. Case No. (*a*) 427 of 1985. A case of violation of the Stimulant Drug Control Act. 1194 *Hanrei Jihō* 45.

[Reference: Constitution of Japan, Arts. 31 and 35; Code of Criminal Procedure, Arts. 1, 218 (1) and 221.]

[Facts]

The accused was prosecuted on the charge of using a stimulant drug and the document of urinalysis by an expert witness was submitted in evidence at a public trial.

The proceeding to obtain the urine sample in question had been conducted as follows: The investigating officials visited the home of the accused based on the information that he was using a stimulant drug, and they entered his home without his consent and asked him to accompany them to the police station though he was in bed. The accused mistook them for collectors from a money lender because they did not disclose their identity and errand and agreed to their request. While being asked to explain the facts involved at the police station, the accused requested them to release him for another engagement but they did not permit it. As a result, the accused admitted to personal use of a stimulant drug. When they asked him to produce the urine, he agreed and they seized it and sent it for an expert opinion. During that time, the accused asked again to leave but they did not permit it and kept him in custody. Then, due to the result of the urinalysis, they requested the issuance of an arrest warrant from the court and arrested the accused.

[Opinions of the Court]

(1) In judging the legality of the proceeding of obtaining the urine sample in question, it should be fully considered whether or not there were illegal actions in a series of proceedings such as entry into the home of the accused, accompanying him to the police station, and keeping him in custody there. If it is answered in the affirmative, the degree of their illegality should also be examined in full. On the other hand, even if the proceeding of

obtaining the urine sample is judged illegal, it does not mean that the evidentiary competency of the document of the urinalysis by an expert witness will be immediately denied. That is to say, the evidentiary competency of the document should be denied so far as the degree of illegality in the proceeding of obtaining the urine sample is so serious that it is tantamount to ignoring the principle of the requirement of a warrant and an affirmation of the evidentiary competency of the document in question is seen as unreasonable in order to deter illegal investigations in the future (Ref. Decision by the First Petty Bench of the Supreme Court on Sept. 7, 1978, 32 *Keishū* 1672).

(2) Due to the existence of some illegal actions which exceeded the boundaries of investigation based on voluntary measures in the series of the proceedings prior to the proceeding of obtaining the urine sample in question, such as the entry into the accused's bedroom without any consent, his accompaniment to the police station without his consent and the refusal of the accused's requests to leave, the proceeding of obtaining the urine sample following them should be found illegal. However, in this case, it cannot be said that the degree of illegality in the proceeding of obtaining the sample in question was that great in light of the fact that the investigating officials entered the accused's house by calling out at the porch, that there was no compulsory speech or behavior with regard to the custody at the police station, and that no compulsion was used for the proceeding of obtaining the sample, and it cannot be said that admitting the document of the urinalysis by an expert witness in evidence is unreasonable with respect to the deterrence of illegal investigations. Therefore, the evidentiary competency of the document in question should not be denied. (Ref. the dissenting opinion of Judge Shimatani.)

[Comment]

The significance of the current decision lies in the following two points: (1) it referred to the influence of the illegality in the proceedings preceding the proceedings to obtain evidence on a

determination of the suitability of the latter proceedings; and (2) it referred to the competency of the illegally-obtained evidence based on the concrete case.

(1) It had not been exhaustively discussed in precedents whether or not illegal actions in the proceedings prior to the proceedings to obtain evidence had influence on the legality of the latter proceedings themselves and, if they had influence, how they influenced. The views on this question might be divided into various opinions ranging from the view that the preceding proceedings and the following proceedings were separate and the illegality of the preceding proceedings did not influence in principle a determination of the suitability of the following proceedings, to the view that the following proceedings should be judged illegal when they were closely related to the preceding proceedings. On this point, the current decision recognized that the illegality of the preceding proceedings influenced the determination of the suitability of the following proceedings to obtain evidence. In other words, the current decision concluded that, in judging the legality of the proceedings to obtain evidence, the court should in some cases consider whether or not there were illegal actions in the preceding proceedings, and the degree of their illegality if there were such illegal actions. This is the first decision that the Supreme Court has made as a general opinion and has an important significance from this point of view. It may be said that the current decision is especially noteworthy in that it found the proceeding of obtaining the urine sample illegal in a concrete judgment. However, it is not yet clear in which cases this method of judgment should be used. Further discussion expanding on this point of view is expected.

(2) The next problem is that of the competency of illegally-obtained evidence. On this point, there have been some decisions of the lower courts based on actual cases since the above-mentioned decision by the First Petty Bench of the Supreme Court on Sept. 7, 1978, expressed the fundamental view. However, the current decision is the first since the aforementioned decision by the Supreme Court in judging the question based on an actual

case.

The question is whether or not the concrete conclusion of the current decision is appropriate. It is surely effective only to declare the illegality of the proceedings to obtain evidence in order to deter illegal investigations in the future. However, all illegal investigations such as in this case possess possibilities of being easily repeated in the future. There is a room to find that the proceeding of obtaining the urine sample in question contains serious illegalities. Standing on these points of view, not a few academic theories have criticized that the current decision affirming the document by an expert witness as having the evidentiary competency is questionable. The dissenting opinion by Judge Shimatani, in finding serious illegalities in the proceeding of obtaining the urine sample in question, require serious consideration from the point of view that the entry into the accused's house without his consent was clearly violative of the provisions of Article 35 of the Constitution which guarantee the right to be secure in one's home against entries. This opinion may be said to be worth listening to as one of the discerning views on this question.

2. A case in which it was disputed whether or not recognizing records of statement as having the evidentiary competency as an exception to the rule of hearsay evidence violated the accused's right to confront witnesses when persons other than the accused had been repatriated by immigration control authorities after they had given statements in the presence of a public prosecutor, and thus could not testify at a public trial.

Decision by the Fifth Criminal Division of the Osaka High Court on March 19, 1985. Case No. (*u*) 12 of 1985. A case of violation of the Prostitution Control Act. 562 *Hanrei Taimuzu* 197.

[Reference: the former part of Article 321 (1) (ii) of the Code of Criminal Procedure.]

[Facts]

The accused in question was prosecuted for managing a house of prostitution by employing three women from Taiwan as prostitutes. Meanwhile, these three women gave statements admitting the offence under the interrogation of a public prosecutor, and were repatriated to Taipei compulsorily by immigration control authorities after their records of statement to that effect were drawn up.

In the court of first instance, while the prosecutor requested an examination of the records of statement in question, defence counsel did not consent to that request. However, the court convicted the accused while adopting and examining the records of statement in question as evidence which the court recognized came under the provision of the former part of Art. 321 (1) (ii) of the Code of Criminal Procedure. The accused lodged a *koso* appeal asserting that the records in question had no evidentiary competency. The grounds of the appeal were that recognizing the evidentiary competency in the records of statement despite the deprivation of the opportunity for cross-examination by the accused as the result of the compulsory repatriation of the three women by the government agency was violative of the provision of the former part of Art. 37 (2) of the Constitution which guarantees the accused's right to confront witnesses.

[Opinions of the Court]

(1) In light of the fact that the former part of Art. 321 (1) (ii) of the Code of Criminal Procedure provides an exception to the guarantee of the accused's right to confront witnesses on the basis of the former part of Art. 37 (2) of the Constitution, it must be judged carefully, as a matter of course, whether or not the requisite of "impracticability of testimony" as in the said provision of the Code of Criminal Procedure is fulfilled. Therefore, it is not permissible to find the requisite of "impracticability of testimony" to be fulfilled in every case in so far as the persons who have given statements are staying outside of Japan without

questioning the reason why they have come to stay outside.

(2) In the case of the immigration control authorities deporting illegal entrants on the basis of their authority in accordance with legal proceedings, the requisite of "impracticability of testimony" is, in principle, fulfilled when the prosecution trying every means cannot make them appear on the date either for the preparation for public trial or for the public trial itself.

However, it is not possible to say that the requisite of "impracticability of testimony" is fulfilled if (a) the investigating officials acted intentionally to advance the date for the deportation of the persons who had given statements for the purpose of violating the accused's right to confront the witnesses and (b) the immigration control authority deported such especially important persons who could have easily been detained in Japan through the discretion of the immigration control authority as the result of the investigating officials' negligence in failing to take the appropriate measures which were required *ex-officio*.

[Comment]

The provision of the former part of Art. 321 (1) (ii) of the Code of Criminal Procedure recognizes the evidentiary competency in the record of statement of the person other than the accused, who stated in the presence of a public prosecutor, in case he cannot testify on the date either for the preparation for public trial or for the public trial itself due to his being outside of Japan. This is an exception to the rule of hearsay evidence (Code of Criminal Procedure, Art. 320 (1)) which denies in principle the evidentiary competency of such a document. The point in this case was whether or not the view was right that an exception to the rule of hearsay evidence should be denied even in the case in which the persons who had given statements were unable to testify at public trial due to their staying outside of Japan so far as the responsibility for such a situation was that of the prosecution which requested examination of the records of their statements, and that otherwise it would infringe the accused's right of confrontation with witnesses. Incidentally, it

was not disputed in this case that there was absolutely no way to make the three women presently staying outside of Japan appear at the public trial.

On the assumption that the person who has given statement is unable to testify at public trial due to his being outside of Japan such as in this case, the first question is the reason for his being outside of Japan. Some precedents took no notice of this matter. However, academic theories in general, assuming a critical attitude toward this perspective, asserted that the evidentiary competency of records of statement should be denied because it violated the accused's right to confront witnesses in the case of either the intentional deportation of the person who had given statement or the intentional advancement of the date for the deportation by the prosecution. It may be safely said that the current decision followed this general trend of academic theories.

The next question is whether or not the case in which the accused's right to confront witnesses is violated by the negligence of the prosecution should be treated as same as a case of intentional violation of that right. The prosecution's mere knowledge of the departure of the person who has given statement from the country surely would not violate the accused's right to confront witnesses. However, if the prosecution did not take any measure for making such a person who was an especially important witness appear at public trial when he might have been made to appear despite knowing of his departure from the country, conscious and advertent negligence (*dolus eventualis*) in violation of the accused's right to confront witnesses could be presumed. But, it is extremely difficult to prove it. Accordingly, the current decision rejected the exception to the rule of hearsay evidence, finding the violation of the accused's right to confront witnesses by the negligence of the prosecution on the facts of this case and thinking of this violation as being same as that in an intentional case. This raised a new problem to which precedents and academic theories had not referred and it is worthy of great attention.

Briefly, the current decision is greatly significant in that it

gave a valuable warning against easily recognizing an exception to the rule of hearsay evidence by making much of the accused's right to confront witnesses. A further increase in cases similar to this case is expected. Therefore, it may be said that the current decision will give important guidelines for dealing with such cases.

By Prof. MINORU NOMURA
KATSUYOSHI KATO

6. Commercial Law

1. The liability of parent corporation's directors for damages incurred through a wholly owned subsidiary's acquisition of the parent corporation's shares (the so-called "Mitsui Mining Co." case).

Decision by the Eighth Civil Division of the Tokyo District Court on May 29, 1986. Case No. (*wa*) 10993 of 1978. 1194 *Hanrei Jihō* 33; 746 *Kinyū Shōji Hanrei* 28; 1078 *Shōji Hōmu* 43.

[Reference: Commercial Code, Articles 210 and 266.3.]

[Facts]

The corporation A, operating primarily coal mines and quarries, had suffered depression since about 1955 because the coal industry had been on the decline, and had not been able to declare dividends since March 1958. Under these circumstances, the corporation A tried to get rid of its dependence on the coal industry, diversify its operations and develop into a comprehensive natural-resources company.

The corporation A and several other corporations of the so-called Mitsui group had already organized a cement corporation B, with the capital of 750,000,000 yen, and the corporation A