As regards precedents, there was no Supreme Court decision relating to this matter until now, and the opinions of lower courts were divided (See 5 Waseda Bulletin of Comparative Law 66). The decision of the court of first instance in this case under review is "case (b)" which was reported in Vol. 5 of this bulletin. And the decision of the *koso* appellate court in this case was given by the same judge who had acted in "case (a)" of Vol. 5 of this bulletin, applying essentially the same reasoning (See 5 Waseda Bulletin of Comparative Law 66).

The Supreme Court decision under review basically seems to be founded on the currently prevailing theory.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which the act of obstructing a ballot for the draft of a regulation at a committee meeting of the prefectural assembly was held to come under the Criminal Code, Article 234.

Decision by the First Petty Bench of the Supreme Court on March 12, 1987. Case No. (*a*) 627 of 1984. A case of trespass and the obstruction of business by force. 41 *Keishū* 140.

[Reference: Criminal Code, Articles 95 and 234.]

[Facts]

In order to promote the retirement of officials who are over a certain age, the Niigata Prefectural Government proposed to the prefectural assembly a partial amendment of "the Regulation for

the Retirement Allowance of the Prefectural Officials."

The accused in this case held the position of secretary-general in the local officials' union of Niigata Prefecture. He intended to prevent the vote on the draft amendment of this regulation which was to be submitted to the assembly. Thereupon, he conspired with 200 members of the local officials' union and together they trespassed on the committee meeting room where the vote for the draft amendment of the regulation was being held.

The trespassers hissed loudly at the members of the prefectural assembly who were at the meeting, made noise by slapping the plastic name stands of the assembly members on the tables, etc. Moreover, after the assembly members ran out from the meeting room, the union members locked the door from the inside and stacked desks and tables, setting up a barricade. As a result, the committee meeting could not be held.

[Opinions of the Court]

In this case, the business which the accused obstructed was the vote for the draft amendment of the regulation at the assembly of the committee of the general affairs and education. This kind of business does not involve an exercise of coercive power. In other words, this business is not authoritative official business. Therefore, the business of adopting a regulation comes within the scope of "business" in terms of the crime of obstruction of business by force as found in the Criminal Code.

[Comment]

In Japan, the Criminal Code prescribes the crime of obstructing official business in Article 95, and the crime of obstructing business in Articles 233 and 234. The crime of obstructing official business is confined to criminal actions involving violence and threat as a means. On the contrary, in terms of Article 234 "force" means an exercise of some power to obstruct. This encompasses a wider range of actions than those actions involving violence and threat.

Therefore, in a case where official business is obstructed by an action other than violence and threat, this poses a question as to how

that action should be judged. In other words, the problem is whether this kind of action should be punished by Article 234, instead of Article 95, or whether it should be punished at all.

Furthermore, in relation to this problem, for example, where official business is obstructed by violence and threat, which articles of the Criminal Code should be applied, i.e. whether only Article 95 and/or Article 234, would become an issue.

In the current case under review, it was exactly this question which became a point of contention. In order to resolve this issue, it is necessary to study and define the term "business" prescribed in Article 234 and discuss whether it includes "official business." Both in theory and in judicial decisions, this has been a point of controversy.

At present, there are four theories as follows:

(A) Official business is all included in "business" as stipulated in Article 234. Therefore official business is protected by the provisions of both Articles 95 and 234.

(B) No official business is included in "business." This theory states that official business is protected by only Article 95.

(C) Of official business, only non-authoritative official business is included in "business." Thus, non-authoritative official business is protected by both Articles 95 and 234; and authoritative official business is protected by only Article 95.

(D) Non-authoritative official business is protected exclusively by Article 234, and authoritative official business is protected exclusively by Article 95.

This decision clearly indicated that non-authoritative official business is included in "business" of Article 234, but did not go any further. However, the Supreme Court basically accepts Theory C. (See the decision by the Grand Bench of the Supreme Court on November 30, 1966. 20 *Keishū* 1076.)

Then where is the proper basis of Theory C found? One of the bases of the theory is as follows:

First of all, there are two kinds of official business: authoritative and non-authoritative. The difference between authoritative and non-authoritative official business is prescribed as such that authoritative official business has a certain degree of inherent, self-executing

power vis-à-vis official duties while non-authoritative official business is similar to the economic and social activities of an individual person, i.e. without inherent, self-executing power.

Therefore, we are led to the conclusion that it is sufficient to protect authoritative official business only when it is obstructed by means of violence and threat. Moreover, we are led to the conclusion that Article 234 should protect non-authoritative official business just as it protects private business activities.

The second basis for the theory is found in the idea that public officials of a democratic society are servants of the public, and the performance of their official duties serves the public interests; consequently, it is necessary to protect non-authoritative official business more than ordinary business activities.

Even if the reasons posed by the Supreme Court and scholarly opinions supporting Theory C are convincing, the standard for distinguishing authoritative official business from non-authoritative official business is not clear. Therefore, concerning the standard, we must wait to see many more judicial decisions on this issue.

2. A case in which it was disputed whether or not the defendant counterfeiter had been conscious of the illegality of his act of preparing a counterfeit 100 yen note.

Decision by the First Petty Bench of the Supreme Court on July 16, 1987. Case No. (*a*) 457 of 1985. A case of violation of the Monetary and Securities Counterfeit Control Act. 1215 *Hanrei Jihō* 137.

[Reference: Criminal Code, Article 38 (3).]

[Facts]

Defendant A prepared service coupons, which resembled the 100 yen note issued by the Bank of Japan, for the purpose of advertising his own restaurant. Before commencing the preparation of the service coupons, A went to the police station in his town for advice on the coupons. The policeman showed A the text of the Monetary and Securities Counterfeit Control Act and told A that it was illegal to prepare the counterfeit currency; also, he advised A to prepare service coupons that were bigger in size than the 100 yen note, or

to print "sample" on the coupons, etc.

However, the policeman's attitude in giving advice to A was so amicable that A believed that his advice would not be considered absolute, and, thus, A would not be punished even if he prepared the service coupons as initially planned. In fact, A printed the service coupons without following the policeman's final advice. After he printed the service coupons, A gave one of the coupons to the policeman but, at that time, the policeman did not warn A of any possible violation of law.

Defendant B also prepared the same kind of service coupons, believing what A had told him, i.e., that a policeman said that it would be no problem to prepare such service coupons and, moreover, when A distributed the coupons to the policemen at the police station, none of the policemen indicated that there might be problems.

[Opinions of the Court]

Even if the defendants in this case were not conscious of the illegality of their act, according to the finding of facts there is no reasonable cause for lack of consciousness. Therefore, there is no problem with the conclusion that the defendants are guilty in this case, even though it would be necessary to prove the possibility that they were conscious of the illegality of their act in order to convict them of having committed an intentional crime.

[Comment]

The scholarly theory in Japan requires one's consciousness, or the possibility of his consciousness, of the illegality of his act as one of the subjective requirements for the constitution of an intentional crime. On the other hand, the Supreme Court has consistently adopted the view that, as the subjective requirement for the constitution of an intentional crime, it is sufficient if the criminal recognizes and admits the facts of the crime; it is not essential that the criminal be conscious of the illegality of his act. That is, the Supreme Court has adopted the approach that if the criminal has criminal responsibility (Schuldfähigkeit), it is natural for him to think that his behavior is not permissible, through his recognition of the facts which consti-

tute his criminal act.

However, it may be said that there is a situation where a violator of the administrative law does not have any special knowledge of the law and regulations, and therefore he does not feel that he has violated the law. Thus, from the viewpoint of the principle of responsibility (Schuldprinzip), we think it no good to hold that if the criminal recognizes the facts which constitute his criminal act, there is always his consciousness (or the possibility of his consciousness).

In this connection, lower court decisions have taken the position of denying intentional crimes when there is a reasonable cause for the criminal to genuinely lack consciousness of the illegality of his act. Also, lower court decisions have allowed for the existence of a "reasonable cause" only when there have been references to the administrative agencies and similar social institutions.

If this decision was based on the above-mentioned view of the judgment of the Supreme Court, there was no need to talk about the "nonexistence of a reasonable cause." The fact that this decision did refer to this point causes a conjecture that, in the near future, there may be a change in the viewpoint of the Supreme Court concerning mistakes of illegality.

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b. Law of Criminal Procedure

1. A case in which it was disputed whether or not it was illegal to use as the data for an arrest warrant of the accused the written statement of any person other than him which lacked voluntariness or was obtained by illegal interrogation.

Decision by the Fifteenth Criminal Division of the Tokyo District Court on March 24, 1987. Case No. (*wa*) 112 of 1986. A case of attempted murder. 1233 *Hanrei Jihō* 155.