ligated to pay A Corporation's loan based on suretyship ①. Therefore, the suretyship did not cause any loss to the bankrupt's estate and bankruptcy creditors; that is, the suretyship did not satisfy the "requirement of harmfulness," and thereby the current decision denied the application of gratuitous avoidance to the suretyship at issue.

In sum, the current decision, while affirming the application of gratuitous avoidance to suretyship as a rule, denies the application in cases that bankruptcy creditors sustain no damage by the suretyship. It is primarily because gratuitous acts decrease the bankrupt's estate and are harmful to bankruptcy creditors that these acts may be avoided. In the current case, since there had been another suretyship covering the same obligation, the suretyship at issue was harmless for the bankrupt's estate and bankruptcy creditors. Consequently, the current decision, which denied the application of gratuitous avoidance to such suretyship by reason of lack of the " requirement of harmfulness," seems to be reasonable. This type of dual suretyship is often seen in practice, so the current decision is noteworthy on financial practice.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which a plea of excessive self-defense applied to one of two co-principals but not the other.

Decision by the Second Petty Bench of the Supreme Court on June 5, 1992 Case No. (*a*) 788 of 1992. A case involving defendants charged with murder, violation of the Immigration-Control and Refu-

gee Recognition Act, and violation of the Alien Registration Law. 46 *Keishū* 254.
[Reference: Criminal Code, Articles 36(2), 60 and 199.]

[Facts]

The defendant was talking on the telephone with his girlfriend, who was then working at a pub, when M, the owner of the pub, verbally abused the defendant and hung up the telephone. The defendant, enraged, gave a kitchen knite to F, a friend, and the two went together to the pub. On the way, the defendant said to F, "If it comes to a fight, use the knife." Upon arriving at the pub, F entered while the defendant waited outside.

Although F himself had no intention of committing any acts of violence, when he entered the pub M violently and suddenly attacked him. Fearing for his life, F took out the knife to defend himself, and, believing that killing M was unavoidable, repeatedly stabbed M in the chest until M died.

[Opinions of the Court]

Jōkoku appeal dismissed.

In the case of a crime committed by two or more persons, the question of whether a plea of excessive self-defense is to be admitted should be decided separately for each of the principals.

The actions of F, who killed the victim in conspiracy with the defendant, constitute excessive self-defense. On the other hand, however, the defendant was expecting an attack from the victim and told F to be ready to counterattack. Therefore, as far as the defendant had the intent to commit an assault, there was a lack of imminent danger, and his actions do not constitute excessive self-defense.

[Comment]

1. The present case is the first Supreme Court decision concerning the determination of whether excessive self-defense is constituted by the actions of two or more co-principals. The Court declared that the question of excessive self-defense should be judged independently with regard to each of the principals (adoption of individual

judgments) and that, even if excessive self-defense is admitted in the case of one of the principals, this does not have an effect on the determination regarding the other principals. The method of adopting individual judgments was adopted by the Supreme Court based on the following points. First, a conspiracy is formed not only when all the co-principals take part in at least one aspect of the act, but also when at least one of the co-principals performs the act (the affirmative conspiracy theory). In the present case, the act of conspiracy by the defendant was disputed. Second, when the actor performs his actions with the positive intent to commit assault expecting an attack from another, the existence of imminent danger, a requirement common to both legitimate and excessive self-defense, is not recognized (Supreme Court decision of July 21, 1977, 31 *Keishū* 747). According to this view, the positive will to commit assault, a subjective element, is incorporated within the requirement of imminent danger, and as a result, the judgment of the existence of imminent danger is relative depending on the person involved. When there exists a legal property of co-principalship between a number of actors, however, it may also come into question whether such personal relativity in the judgment concerning the existence of imminent danger should be consistently considered in relation to this legal property of co-conspiracy. The method of individual judgment, adopted by the court in the current decision, can be thought to affirm this problem, although the decision did not clarify the reasoning for adopting the method of individual judgment. In this connection, then, I will discuss what can be considered to be a logical basis of the view that the existence of excessive self-defense should be judged individually for each of the co-principals.

2. Two problems arise in considering how the existence of excessive self-defense should be judged concerning each of the co-principals: (1) the legal nature of excessive self-defense; and (2) the legal nature of co-principalship.

Excessive Self-Defense

Commutation or exemption of punishment in cases of excessive self-defense is recognized in Article 36(2) of the Criminal Code, but the grounds for this are problematic. The viewpoints of judicial prece-

dents are not always clear, and academic theory is divided among the following theories: (1) the theory that seeks a reduction in responsibility only; (2) the theory that seeks a reduction on illegality only; and (3) the theory that seeks a reduction on both responsibility and illegality. The first theory is predominant.

Among the precedents of the former Supreme Court (the Great Court of Judicature) there is a case in which it was determined that the incapacity of one co-principal to be responsible does not affect the responsibility of the other co-principal (decision of November 7, 1913, 19 *Keiroku* 1140). If this view is generalized, one may say that whether and how one co-principal is responsible does not affect whether and how the other is. Thus, considering this precedent from the first theory concerning the grounds for commutation or exemption of punishment, it will be concluded that an act of excessive self-defense by one co-principal does not affect the responsibility of the other co-principal. Therefore, whether or not excessive self-defense is constituted should be judged individually for each of the co-principals.

Co-Principalship

A co-principal must have the nature of both a "principal" and "accomplice," but it comes into question which aspect should be more greatly stressed in characterizing the act of co-principalship.

(1) If the aspect of "accomplice" is more greatly stressed, it will form a structure of taking co-principalship in parallel with the narrow sense of complicity (provocation/accessory). Thus, one can say that the theory of ground for punishment for complicity (the theory of *Akzessorietät*), which is usually discussed in the narrow sense of complicity, is also applicable to co-principalship.

Within the theory of the grounds for punishment for complicity, there is a significant division of opinions as to whether the illegality of the accomplice can be recognized independently from the illegality of the principal. While according to a viewpoint that denies this problem (*modifizierte Verursachungs-theorie*), illegality interacts jointly and severally between the principal and accomplice, according to a viewpoint that affirms it (*reine Verursachungs-theories*) illegality acts separately between the principle and accomplice. If this

division of opinions is taken in parallel in the case of co-principalship, it can be said that the constitution of excessive self-defense in cases of co-principalship should be judged jointly and severally if, according to the views that seek a reduction in illegality (theories (2) and (3) mentioned above), the standpoint is taken that denies the problem of independent recognition of the illegality of the accomplice as consistently help as grounds for reduction of excessive punishment in cases of excessive self-defense. In contrast to this, in cases that the standpoint which affirms the problem is taken, the constitution of excessive self-defense by each of the co-principals will be judged individually even if the view of recognizing a reduction in illegality is taken in regard to the grounds for commutation or exemption of punishment.

(2) If the standpoint of stressing the aspect of "principal" in co-principalship is taken, the theories concerning the grounds for punishment or *Akzessorietät*, which is problematic in the narrow sense of complicity, does not apply to co-principalship. The factors of illegality and responsibility should be considered separately as to each of the parties involved if the co-principal is interpreted as a type of principal and the co-principals have commited a crime with one party utilizing the illegality of the other and incorporating the other's act into his own act. Therefore, no matter which view be taken from this standpoint in regard to the grounds for commutation or exemption of punishment in cases of excessive self-defense, the constitution of excessive self-defense by each of the principals should be judged individually.

3. As mentioned above, the Court in the present case decided, pursuant to the method of individual judgment, whether excessive self-defense existed with regard to each of the co-principals, and the requirement for the existence of excessive self-defense which became the object of the individual judgments was the "imminence" of danger. This "imminence," however, is a requirement of both excessive self-defense and legitimate self-defense. Therefore, in accordance with this decision in cases that the actions of one co-principal constitute legitimate self-defense, this requirement will be judged individually for each co-principal, and this may give rise to relativity

in judgments concerning legitimate self-defense in cases involving co-principals.

2. A case in which the use of force in a form utilizing the acts of the victim was regarded to constitute the crime of forcible obstruction of business.

Decision by the Second Petty Bench of the Supreme Court on November 27, 1992. Case No. (*a*) 267. A case involving an accused charged with the crime of forcible obstruction of business. 46 *Keishū* 623.

[Reference: Criminal Code, Article 234; Minor Offenses Law, Article 1 (xxxi).]

[Facts]

The accused, a fire station employee, had long had difficulties with his superior, the fire chief, and was disaffected with him in many ways. The accused attempted to obstruct the fire chief in conspiracy with one of the accused's subordinates. He had the subordinate sneak into the chief's room and place dog feces into a pocket of the chief's working uniform and a red-dyed cat carcass into a drawer of the chief's desk. The following morning the chief found them and felt so unpleasant, disgusted and terrified that he could not perform his business scheduled for that day.

[Opinions of the Court]

The accused, by placing a cat carcass in a location such that the victim might easily come in contact with it while performing his daily duties created a situation on which the victim would be potentially frightened. This series of facts takes the form of utilizing the routine work of the victim in exercising a force that can influence the victims's will. The acts of the accused, therefore, are equivalent to a case in which "force was used" as mentioned in Article 234 of the Criminal Code.

[Comment]

1. The crime of obstruction of business by force under Article

234 of the Criminal Code requires that one obstruct another's business by "force." Thus, in the current case, the problem is whether the accused's harassment—placing dog feces and a cat carcass in the victim's uniform pocket and desk drawer, respectively, in expectation that the victim would find them, can be regarded as "force" or not.

2. In precedent cases, the word "force" has been interpreted as "an effective power that controls another's intent" (the former Supreme Court (the Great Court of Judicature) decision of February 3, 1910, 16 *Keiroku* 147) or as "an effective power that is strong enough to control the victim's free intent" (Supreme Court decision of January 30, 1953, 7 *Keishū* 128). These interpretations basically include an understanding that the benefit and protection of the law against the crime of obstruction of business by force should be regarded as the freedom of business activity or the freedom of intentional activity. These precedents also held that, as a requirement for the existence of this crime, the act which has the possibility to control another's intent must have been conducted "against the free will of the victim," thus causing or threatening obstruction of the victim's business. That is to say, it has been held that significance should be placed on the actor's approach to the business performer's intent as the content of force, and "straightforwardness" is required as the form of the use of that force. For example, the constitution of the crime of forcible obstruction of business has been recognized in those cases in which one causes violence or menace to another engaged in business or threatens the other in business straightwardly to that person (pattern A).

The precedents also took the following step: the use of an effective power that constrains another's intent as a natural result of a certain act is sufficient to constitute this crime, and it is not always necessary that the act be conducted directly against a person who is currently engaged in business (Supreme Court decision of February 21, 1957, *Keishū* 877). From this, the constitution of the crime of forcible obstruction of business came to be widely affirmed even in cases in which there is a real act of damage performed against the victim so as to destroy or render useless an item necessary for

the victim to perform his or her business, or robbing the victim of such an item or continuous forcible possession of it (pattern B). In such cases straightforwardness is no longer required in the exercise of force. The logic behind this thinking is not always clear, but, in the first place, if an event such as the physical destruction of an item necessary for business performance should occur, it may always be a natural requirement the business performed discover and recognize the matter in question as far as the item destroyed is a necessary article for the business performer to perform his or her business. In the second place, it seems that such physical destruction is regarded as being able to constrain business performer's intent. Certainly, this way of thinking is not an attempt to completely reject the continuity of the conventional concept of "force." The precedents, however, do not always give in-depth consideration as to whether or not the matter discovered and recognized by the business performed is sufficient enough to constrain his or her intent. Here, the significance of "approach to another's intent" has already lost its substance. Therefore, it might be said as far as there exists a fact of "resulting obstruction of business" caused by physical destruction of a thing necessary for business performance, the crime of forcible obstruction of business is recognized and the scope of its construction is extended accordingly. If this way of thinking is adhered to it is almost impossible to define the scope of the constitution of this crime. It will also thereby be difficult to distinguish the "force" of this crime from the "deceptive scheme" of the crime of obstruction of business by deceptive scheme (Article 233 of the Criminal Code). Furthermore, the benefit and protection of the law against this crime can be said to have changed from the "freedom" of business activity to "smooth performance of business." In the past, therefore, attention in academic circles was focused on the point of how the scope of punishment could be defined in "pattern B" mentioned above under which straightforwardness is not regarded as necessary.

3. In the current case, the accused *et al* placed dog feces into a pocket of the victim's working uniform and a cat carcass in the drawer of his desk, and the victim, who was a performer of business, discovered them the following morning. Certainly, the act of the accused

cannot be said to fall under "pattern B" for the following reasons: first, an item necessary for performance of business can not be deemed to have been physically destroyed or made useless; second, from an objective point of view, the fact that dog feces and a cat carcass were placed in the pocket of the fire chief's working uniform and the drrawer of his desk, respectively, cannot be regarded as having made it difficult for him to perform his business; third, the accused *et al* stated that they attempted to obstruct the victim's business by making him feel unpleasant, disgusted and terrified. The acts of the accused, therefore, can be said to fall under the pattern in which threats are used.

The act of the accused *et al*, however, amounted to no more than sneaking into their superior's office to place the items mentioned above, and can be considered to be lacking in straightforwardness. In general, the straightforwardness of an act is deemed to mean: (1) the manner of conducting an act directly against a certain person or, (2) the manner of bringing a certain person into a condition in which the existence and situation of that act is clear to that person; the act itself of the accused cannot be said to be applicable to either case. In this respect, it has common features with "pattern B." The act in question, therefore, although falling under the pattern of a threat, lacks in "straightforwardness" in the strict sense of the word. The current decision is the first made with regard to whether or not this kind of act should constitute the crime of forcible obstruction of business.

The Court, considering comprehensively the act of the accused *et al* found that the crime of forcible obstruction of business was constituted because they employed an effective power such as to be able to constrain the victim's intent in the form of utilizing the victim's daily actions. It was taken into consideration that the cat carcass and so on were placed in "such places that they could be expected to be touched by the victim when he performed his business." The reason such a point was used as a basis for the judgment may have come from the thinking that, in the pattern of making threats without straightforwardness, the discovery and recognition by the victim cannot always be a natural requisite, contrary to "pattern B," in which

items necessary for business are physically destroyed, and therefore, that it is necessary to judge whether or not considerations should include the victim's act in the current case. Such comprehensive considerations may also be thought to be appropriate in that they grasp the sense of the act as a social fact. It is feared, however, that the scope of punishment will expand in the same way as in "pattern B" if straightforwardness in the strict sense of the word becomes redundant in cases of obstruction of business by threats and less importance is placed on the substance of the "approach to the others intent" in the act itself. The current decision does not refer to the point of how certainly the victim's act must be expected so that comprehensive considerations can be given to the accused's act as a form of utilizing the victim's act. Logically, therefore, this leaves a point for future discussion. Also, in connection with this point, there may be room left for discussion with regard to the time when the act was undertaken as far as this type of act is concerned.

4. Article 1(xxxi) of the Minor Offenses Law punishes the act of obstructing another's business by mischief and so on. Generally, this is deemed to apply to cases in which one employs an illegal means with a force not powerful enough to constrain another's intent. It is not, however, always easy to distinguish between the "force" of the crime of forcible obstruction of business and the "mischief" of Article 1 of the Minor Offenses Law. While the accused *et al* stated, as the grounds for their *jōkoku* appeal, that their acts would violate no more than the Minor Offenses Law, the current decision seems to have considered the acts in question transcending an act of "mischief" that would violate only the Minor Offenses Law and constituting the crime of forcible obstruction of business. In the literature concerning this case there is some dispute concerning this point. It might be said, therefore, that clarification of the criteria to distinguish one from the other through an accumulation of future cases is desirable.

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