fairness among bankruptcy creditors occur if a payment to an original debt is successfully completed.

The second theory, in contrast, distinguishes conditions for the avoiding power against fraudulent transfers from those against preferences and therefore considers that a different consideration is required according to the type of the avoiding power. The three reasons which the Court provided in this case are, according to this theory, not grounds for denying the fraudulency of the actions concerned but relate to the fraudulent will of a bankrupt which is one of the prerequisites for avoiding a justifiable payment.

As mentioned above, there are different opinions about the theoretical structure which the Court demonstrated in this case. However, these opinions do not differ as to the conclusion of supporting the judgment of the Court. Finally, it is doubtful that we may think that the judgment of the Great Court of Judicature in 1935 about the avoiding power against a payment by a loan as a preference has been overruled by this case.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which it was accepted that mistaken excessive self-defense existed but the mitigation or remission of punishment was not allowed.

Decision by the First Criminal Division of the Tokyo District Court on January 11, 1993. Case No. (*gō-wa*) 105 of 1991. A case of homicide and violation of the Law Controlling Possession, etc. of Fire-Arms and Swords). 1462 *Hanrei Jihō* 159.

[Reference: Criminal Code, Articles 36 and 199.]

[Facts]

The accused had a quarrel with the victim but became temporarily reconciled with him. Later, the accused, accompanied by another man, visited the victim. When the victim was talking with the accused's companion, the accused started to pass behind the victim, who was then himself moving a step back to turn around. As the accused misunderstood that the victim intended to strike him, he stabbed the victim to death with a kitchen knife.

[Opinions of the Court]

The accused is found guilty. (Later, this sentence became final and conclusive.)

The accused mistakenly believed an empty-handed attack by the victim. Nevertheless, the accused stabbed the victim with a kitchen knife with considerable force with the definite intent to kill. The act was certainly done as a defense against an imminent and unjust attack as mistakenly assumed by the accused. This act, however, remarkably exceeded the scope of reasonableness of self-defense. In addition, as the accused himself also fully perceived the meaning of his own act and there was no mistake in his perception, *mens rea* cannot be negated. His act constitutes mistaken excessive self-defense. However, in the above-mentioned circumstances, the mitigation or remission of punishment according to Article 36 (2) of the Criminal Code cannot be allowed.

[Comment]

1. In this case, it was affirmed that the accused's act constitutes mistaken excessive self-defense. Mistaken excessive self-defense is affirmed when the following two conditions are satisfied; ① although there was objectively no imminent and unjust attack, the actor wrongly assumed that the attack existed and acted to defend himself, and; ② even if the mistakenly assumed attack had actually existed, the defensive act would have exceeded the scope of necessity or reasonableness. In this case, with regard to condition ①, the aspect of mistaken self-defense can be found in the fact that the ac-

tor mistakenly assumed an imminent and unjust attack. With regard to ②, the aspect of excessive self-defense can be found in the fact that the defensive act exceeded the scope of necessity or reasonableness. Then, the first issue is whether *mens rea* can be negated in a case of mistaken excessive self-defense as well as in a case of mistaken self-defense. And, the second issue is whether the mitigation or remission of punishment can be allowed in a case of mistaken excessive self-defense as well as in a case of excessive self-defense.

2. In regard to mistaken self-defense, there are two opposing theories. One understands mistaken self-defense as a mistake of illegality, and the other understands it as a mistake of fact. The former view is that the consciousness of illegality is lacking in the case of mistaken self-defense. There is an influential theory, which is based on this view, that the consciousness of illegality is not regarded as a factor of *mens rea*, and that the culpability can be negated only when there is no possibility of consciousness of illegality. This theory is called *strenge Schuldtheorie*. According to it, mistaken self-defense does not preclude *mens rea*. And further, the same conclusion will apply to mistaken excessive self-defense, which is an extended form of mistaken self-defense.

On the other hand, in the prevailing theory the core of mistaken self-defense is regarded as a mistake of fact. According to this theory, *mens rea* is negated in the case of mistaken self-defense because the perception of the fact which is the prerequisite for illegality is lacking. In the precedents, this view has been basically taken. However, even if this view is taken, the issue whether *mens rea* can be negated in the case of mistaken excessive self-defense has been theoretically disputed. There are three theories on this. The first theory insists that mistaken excessive self-defense is a sort of mistaken self-defense, which precludes *mens rea*. According to this theory, *mens rea* is always negated in the case of mistaken excessive self-defense and only room for crime of negligence is left. In the second theory, only when the defensive act has necessity and reasonableness can *mens rea* be negated as mistaken self-defense. According to this, as mistaken excessive self-defense lacks necessity or reasonableness, *mens rea* cannot be negated and it would always constitute the intentional

crime. The third one distinguishes the two cases. That is, in the case of mistaken excessive self-defense, if the actor does not perceive the fact that the defensive act is excessive, *mens rea* can be negated. On the other hand, if the actor perceives the fact, *mens rea* cannot be negated.

In the precedents, intentional crime would be constituted in all the cases of mistaken excessive self-defense. It was because the previous cases were ones in which the actor had perceived the facts that the defensive act had been excessive. Most of the precedents do not necessarily show on which view they were founded. That is, it has not been made clear whether the second or the third view has been accepted in reaching the conclusion. In the present case, based on the fact that the accused himself fully perceived the meaning of his own act and there was no mistake in it, it was held that *mens rea* could not be negated. In order to judge whether *mens rea* should be precluded, it presupposed the judgement as to whether the actor had perceived the fact of excessiveness of his act. Therefore, this decision is one of few cases in which the third theory was accepted.

3. In Article 36 (2) of the Criminal Code it is provided that discretionary mitigation or remission of punishment may be allowed in the case of excessive self-defense. Thus, the next issue is whether the mitigation or remission of punishment may be allowed in the case of mistaken excessive self-defense by applying Article 36 (2) plainly or *mutatis mutandis*. Here it is necessary to consider how the grounds for the mitigation or remission of punishment in the case of excessive self-defense can be understood. As to this point, the three views are theoretically antagonistic. In the first view, the mitigation or remission of punishment in the case of excessive self-defense is grounded on the diminution of culpability. In the second one the ground is the diminution of illegality. In the third one it is both the diminution of culpability and the diminution of illegality.

The first view lays stress on the actor's unusual state of mind at the time of the act of excessive self-defense, for example, horror or dismay, etc. It follows that there is a possibility that the actor could fall into such a state of mind even in the case of mistaken excessive self-defense where there is no objective circumstance that con-

stitutes an imminent and unjust attack, as well as in the case of excessive self-defense, because such an unusual state of mind would occur irrespective of objective circumstances. Therefore, if this view is taken, it is accepted to apply Article 36 (2) of the Criminal Code plainly or *mutatis mutandis* even in the case of mistaken excessive self-defense.

The second view attaches importance to the fact that in the case of excessive self-defense, an objective circumstance, an imminent and unjust attack, exists and that the defensive act by the actor is done against the imminent and unjust attack on the occasion of excessive self-defense. In this view these points are the grounds on which illegality may be diminished. In the case of mistaken excessive self-defense, the objective circumstance, the imminent and unjust attack, does not exist. In this view the mitigation or remission of punishment according to Article 36 (2) of the Criminal Code cannot be allowed.

The third view can be devided into the two approaches. Basically, one attaches importance to the diminution of illegality, and the other to the diminution of culpability. And moreover, the crucial points are, particularly, ① the equilibrium of punishment between mistaken self-defense and mistaken excessive self-defense and, ② the validity of the general grounds which mitigate or bar culpability (*Zumutbarkeit*; fair expectability) as distinct from the solution under Article 36 (2).

4. In the view that the mitigation or remission of punishment may be allowed in the case of mistaken excessive self-defense, it matters in what case the mitigation or remission of punishment can be allowed. In an influential theory, if negligence exists in the perception of the objective circumstance of self-defense, i.e. that there would be the imminent and unjust attack, the mitigation or remission of punishment should be limited to maintain the equilibrium of punishment between mistaken self-defense and mistaken excessive self-defense.

In Japan, the mitigation or remission of punishment has been allowed in all the precedents but one when mistaken excessive self-defense is found to be constituted. The following gives the back-

ground. Judging from the precedents in Japan, the courts have rarely found excessive self-defense to be constituted because of the strict test of imminence. As a consequence, the defensive acts in most cases have been found to be mistaken excessive self-defense. On the other hand, the courts, for the purpose of equity, have allowed the mitigation or remission of punishment in the case of mistaken excessive self-defense. However, the criterion for the mitigation or remission in the case of mistaken excessive self-defense has not always been made clear. Judging from the precedents the following factors are taken into account when the courts allow the mitigation or remission of punishment in the cases of mistaken excessive self-defense: ① whether there is the victim's eccentric behavior or his fault; ② the extent of deviance from necessity or reasonableness of the act of self-defense; ③ whether the misconception of the imminent and unjust attack is reasonable, etc.

In the present decision the following are pointed out as the reasons why the mitigation or remission of punishment can not be allowed; ① there was the accused's definite intent to kill; ② the accused's defensive act remarkably exceeded the scope of reasonableness of self-defense because he stabbed the victim with a kitchen knife although he only anticipated an empty-handed attack by the victim. Furthermore, the court did not find that the accused had fallen into an unusual state of mind, such as horror or dismay. This decision is also one of few cases in which it was held that there was mistaken excessive self-defense but where the mitigation or remission of punishment was denied.

2. A case in which it was held that execution of documents with the title of a lawyer would constitute the crimes of forgery of private documents when there was an advocate whose surname and forename were the same as those of the accused.

Decision by the First Petty Bench of the Supreme Court on October 5, 1993. Case No. (*a*) 135 of 1993. A case of forgery of private documents with signature and uttering forged private documents. 47-8 *Keishū* 7.

[Reference: Criminal Code, Articles 159 (1) and 161 (1).]

[Facts]

The accused, who lived in Osaka, had the same surname and forename as those of A who was a lawyer and member of the Second Tokyo Bar Association. The accused, taking advantage of his name being the same as A's, pretended to be a lawyer and acceded to F's request for an investigation concerning real estate. The accused drew up documents under the title of a lawyer and uttered them to F. The documents that the accused drew up contained the following: ① a document titled "On the demand for the lawyer's fee"; ② a written request for transfer; ③ a bill for payment; ④ a report on the course of the investigation and the findings; and ⑤ a receipt. On each document, there attached such statements as "Lawyer A, member of the Second Tokyo Bar Association" or "Lawyer A, from A Law Firm, Osaka Branch". On documents ③, ④ and ⑤, the accused's own address and telephone number were written.

The trial court and the appellate court held that the accused's acts would constitute the crimes of forgery of private documents and uttering forged private documents. Against the decision, the accused made a *jōkoku* appeal to the Supreme Court.

[Opinions of the Court]

Jōkoku appeal dismissed.

The accused, taking advantage of having the same surname and forename as those of A who was a member of the Second Tokyo Bar Association, pretended to be lawyer A, and drew up the documents in the name of "lawyer A". Certainly, the indicated name itself was the same as the accused's. However, the documents in this case arranged the styles and contents as though they had been executed by a qualified lawyer in regard to a lawyer's business. Therefore, in this case, the nominal person on the documents was lawyer A who was a member of the Second Tokyo Bar Association, not the accused who had no qualification as lawyer. The accused made a discrepancy in the personal identity between the nominal person deed and the person who drew up the documents and pretended the personal identity between the nominal person and the executor of the

documents. Accordingly, the accused's acts would constitute the crimes of forgery of private documents with signature and uttering forged private documents.

[Comment]

1. It has been thought that the legally protected interest of the crime of forgery of a document is public credence in the document. Documents play so essential a role in modern life that the Criminal Code aims to protect public credence in them and maintain a safe social life based on documents. Accordingly, in Japan, the crime of forgery of a document is considered to be not a sort of property crime as in Anglo-American laws, but it is thought to be a crime against the legally protected interest of society. It is sufficient to constitute the crime of forgery of a document if the danger of the loss of public credence in the document is brought about. It is not necessary to cause damages to the property, etc. of an acceptor or a nominal person. Therefore, the crime of forgery of a document has been considered to be a sort of *abstraktes Gefährdungsdelikt.*

In regard to official documents, three types of forgery crimes are stipulated: (1) the crime of forgery of an official document (Article 155 of the Criminal Code); (2) the crime of drafting a false official document (Article 156) and the crime of an untrue entry in the original of an officially authenticated instrument, etc. (Article 157); and (3) the crime of uttering a forged official document, etc. (Article 158). In regard to private documents, three types are stipulated: (1) the crime of forgery of a private document (Article 159); (2) the crime of drafting a false medical certificate, etc. (Article 160); and (3) the crime of uttering a forged private document, etc. (Article 161). In addition, the provision on abuse of an electro-magnetic record (Article 161-2) was newly prescribed in 1987.

2. In this case, it was disputed whether the crimes of forgery of private documents would be recognized or not. Forgery of a private document means drawing up a private document, assuming another's name, by a person who has no authority for doing so. Accordingly, the essence of forgery of a private document exists in pretending the personal identity between the nominal person and the

executor. This view has been taken in the precedents (the decision by the Supreme Court on February 17, 1984, 38-3 *Keishū* 336). In this case, it is clear that the person who drew up the documents was the accused. Then, the point at issue is whether the accused himself is still the nominal person where he drew up the documents with the title of another person who has the same surname and forename as the accused's; if he is, therefore, whether it might be seen that the personal identity between the nominal person and the executor cannot be doubted.

In academic opinions, it is said that whether the personal identity between the nominal person and the executor can be recognized should be decided synthetically by examining the objective factors and the intent of the actor as well as the signs written on the documents. Objective factors which should be considered are: (1) the information other than the content of the document, for example, the nature of the document (especially its use and function), and the scope of the document's circulation; (2) the information on the document, for example, statements about addresses, telephone numbers, birth dates, positions held, etc.; and (3) the objective circumstances concerning the actor, etc. The point at issue is which factor should be given importance in order to identify the nominal person.

3. It is necessary to pay attention to the decision by the Supreme Court on February 17, 1984 (38-3 *Keishū* 336). The case was as follows. The accused had used the fictious name "B" for about 25 years since he illegally entered the country. Therefore, the name "B" had been passed as the indication of the accused to a considerable extent. In such a circumstance the accused drew up an application for a reentry permit in the name of B. The Supreme Court, finding that it would constitute the crime of forgery of a private document, held as follows. That is, "according to the nature of the application for a reentry permit, the person who was recognizable from the name "B" written on the document was B who had been legally allowed to stay in Japan, not the accused who had entered the country illegally and had no qualification for residence." In this judgment the nature of the document was squarely discussed. The Supreme Court made it clear that the nature of the document (its use and function)

plays an important role in the identification and distinction of the nominal person. The underlying reason seems to be that an application for a reentry permit has the function of immigration control and its prerequisite is that the person who makes the application has a legally permitted qualification of residence. When a person who has no legal qualification for residence intends to make an application for a reentry permit, it would be necessary for him/her to create another personality who has a qualification for residence. Then, according to the nature of the application for a reentry permit, the personality which was identified from the written name B would be concluded to be B who had a legal qualification for residence and the personality different from the accused's.

The documents in this case were drawn up in regard to the investigation of real estate. This sort of document does not necessarily need to be drawn up by a person who has the qualification of a lawyer. Therefore, it is difficult to conclude that it would constitute the crime of forgery of a document as based on the nature of the document (the use and function of the document) as the above-mentioned decision. This decision, then, regards it important that the documents in this case had "the styles and contents as though they had been executed by a qualified lawyer in regard to a lawyer's business".

4. However, some questions have been raised against this decision. Firstly, "to pretend the personal identity between the nominal person and the executor" means pretending not the identity of each personality's nature, but of the personal existence. To assume to be qualified does not necessarily mean pretending the identity of the personal existence. Secondly, in order to identify the nominal person, all the information written on the document can and should be used. In this case, on documents ③, ④ and ⑤, the accused's own address and telephone number were written. Such statements indicate the personal identity of the accused himself. Thirdly, the extent to which the documents would be circulated and the possibility of the circulation must be discussed. In documents ① and ②, there was no statement about address and telephone number, but the representation as member of the Second Tokyo Bar Association was made. Such statements about his post and the group of which he was a mem-

ber can be applied to identification, as well as his address, because they indicate his whereabouts. However, the question as to who is the nominal person should be judged relatively in the relation to the person who would receive the documents. It must not be fixed simply based on the documents. For F who received the documents in reality, the person whom he had originally known as A was nobody but the accused. Accordingly, for F, the nominal person would be A. On the other hand, if a third party had received the documents, there would have been a possibility that he/she might have regarded the nominal person as lawyer A living in Tokyo from the statements "member of the Second Tokyo Bar Association". Accordingly, in the relation to the third party, it may be concluded that it would constitute the crimes of forgery of private documents. However, documents ① and ② were originally significant only for a limited range of people including the client F. Certainly, it cannot be said that it would be utterly impossible for a third party to identify the personality different from the accused as the nominal person. But it is certain that such a possibility would be very weak because the very possibility that the documents would be circulated was also weak. In this case, it seems that the illegality which deserves punishment for the crime of forgery of a document has not yet been realized.

This is the first decision to conclude that, when another person who had the same surname and forename exists, the act of drawing up documents with the title of that person would constitute the crimes of forgery of private documents. However, the fundamental problem is to be discussed in regard to the criterion for the identification of the nominal person.

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b. Law of Criminal Procedure

1. A case in which it was disputed whether or not a suspect was allowed to select a special defense counsel.

Decision by the Third Petty Bench of the Supreme Court on Oc-