b. Law of Criminal Procedure

1. A case addressing the issue of whether or not a public trial without attendance of defense counsel in a criminal prosecution under law requiring representation by him/her is exceptionally permissible.

Decision by the Second Petty Bench of the Supreme Court on March 27, 1995. Case No. (*a*) 946 of 1993. A case of violation of the Law concerning Punishment of Physical Violence and Other Crimes, and trespassing upon a dwelling. 49 *Keishū* 525.

[Reference: Code of Criminal Procedure, Article 289(1).]

[Facts]

The accused, A, did repeatedly not appear in court on the scheduled day of trial from the midterm of the trial. As A demanded that the court-appointed defense counsel should no longer appear at the trial and that the court should dismiss the defense counsel, he resigned. Thereafter, the first instance court conducted the trial while A and defense counsel were not present in court and determined that A was guilty. In opposition to the first instance court's view, the *kōso* appellate court quashed the original judgment, holding that the trial was illegal, and remanded the case to the first instance court. The accused, however, acted in the same manner as at the first trial, and blocked the court-appointed defense counsel's appearance, using violence against the defense counsel and threatening him. As a result, the trial could repeatedly not go on. The court again concluded a trial without A's and defense counsel's presence and pronounced A guilty.

When the *kōso* appellate court dismissed the *kōso* appeal and held that the trial were legal, the accused filed a motion for *jōkoku* appeal.

[Opinions of the Court]

In a case requiring attendance of defense counsel, it should be understood that Article 289(1) of the Code of Criminal Procedure need not be applied exceptionally on the day of trial under the following conditions: (1) the court had tried to secure the appearance

of the accused in court on the day of trial, (2) the accused, barring the defense counsel from appearing in court on that day, brought about the situation making a trial with the defense counsel's attendance impossible, and, moreover, (3) it would be extremely difficult to resolve such a situation. The reason why Article 289(1) cannot be applied is that, in such a case, the accused would be no longer protected by the mandatory defense counsel system, and even if the defense counsel were appointed, his/her effective defense could not be expected. Moreover, such a situation was not originally anticipated in the Code of Criminal Procedure, which aims not only to protect the accused's interest in being defended, but also to achieve proper and speedy trials.

Accordingly, the second trial in the first instance court after the remand, at which the trial was concluded without the accused's and defense counsel's presence and the accused was found guilty, was not illegal. (*Jōkoku* appeal dismissed).

[Comment]

1. The Japanese Code of Criminal Procedure, enacted under the great influence of Anglo-American law after WWII, basically applies the adversary system as its procedural structure. Accordingly, at trial, proceedings are conducted in a way as to provide equal opportunities for both the prosecutor and the defendant. However, in practice, it is extremely difficult for the accused, who should be one of the parties, to have a full understanding of the procedural rights and to participate on an equal basis with the prosecutor. Accordingly, in order to achieve a proceeding involving two parties, it is necessary for the accused to be assisted by a defense counsel, who should be an expert lawyer equal in skill to the prosecutor.

Based on the view stated above, the Constitution of Japan ensures the right to have defense counsel, and, for an accused who is unable to secure counsel by his or her own efforts, provides the right to request representation by an appointed defense counsel (Article 37(3) of the Japanese Constitution). According to that provision, the Code of Criminal Procedure provides that an accused can at any time hire defense counsel at his or her own expense and that the court

shall appoint defense counsel for the accused upon request when the accused cannot hire defense counsel by him-/herself because of poverty or another reason. Furthermore, even if there is no demand by the accused, in the event that the accused's ability to secure defense seems to be substantially inferior, the court may appoint defense counsel upon its own authority (Articles 37 and 290 of the Code of Criminal Procedure). In addition, the Code of Criminal Procedure prescribes that in cases involving a serious offense, the public trial shall not begin without defense counsel (Article 289(1) of the Code of Criminal Procedure), and, in such cases, if the counsel does not appear or has not yet been appointed, the presiding judge shall appoint defense counsel upon his/her own authority. This is called "the mandatory defense system". The former Code of Criminal Procedure, which adopted the inquisitorial system, also applied this system. This can be traced back to the Continental-European legal tradition with respect to the fact that it compels an accused to be represented by defense counsel with no regard to the accused's intention. The present Code of Criminal Procedure has, however, broadly expanded the scope of the mandatory defense case. Therefore, it has been understood that it would contribute to strengthening of the procedural structure of the adversary system.

Incidentally, though the defense counsel's appearance in court is generally not a prerequisite for beginning the trial, it is not permissible in a mandatory defense case to hold a trial on the scheduled day without defense counsel. In the instant case, it was disputed whether there should be an exception to the rule and, thus, to permit the trial to proceed without the defense counsel's attendance.

2. With regard to this problem, formerly, it had generally been understood that an exception should not be allowed because Article 289(1) of the Code of Criminal Procedure does not provide for an exception. In a case called "disorder in court case" that arose out of student's unrest, however, the accused was ordered to leave the court because of having disturbed the order in court, and the defense counsel left the court without permission against the court's order as a protest or was ordered to leave the court for the maintenance of the order in court. Therefore, mainly from the perspec-

tive of judges and prosecutors, basing their views on various grounds, the prevailing view has been that, it may be allowed in exceptional circumstances to proceed with the trial without the attendance of defense counsel. Among the decisions by the lower courts, there were some which conditionally allowed an exception. Also, academic opinions that support such an exception are on the increase.

This decision is the first one by the Supreme Court which permitted the exception to the provision of mandatory defense counsel. The Opinions of the Court in (1) to (3) above stated the conditions for allowing an exception to the application of Article 289(1) of the Code of Criminal Procedure. In brief, a defense counsel's simple non-attendance is not sufficient to allow for an exception. This means that it should be restricted to a case in which trial with defense counsel's attendance could not go on owing to causes for which the accused was responsible, and so it was extremely difficult to resolve such a situation, though the court had made a full effort to secure the defense counsel's appearance in court. Next, the Opinions of the Court made its theoretical standpoint clear that Article 289(1) provides for an exception. This was because each of the former views about it had been problematic. The Court stated its substantial reasons as follows: if the three conditions mentioned above were fulfilled, the accused does not need to be protected by the mandatory defense system. Even if defense counsel were appointed, his or her effective performance could not be expected. Originally, such a circumstance had not been expected in the Code of Criminal Procedure. This is a view that acknowledges a certain internal restriction within the reasonable interpretation of law.

Certainly, when defense counsel does not appear in court and when this may be attributed to causes for which the accused is responsible, there is room for interpretation that it might be an abuse of the defensive right of the accused, and the accused should lose the right to be protected. Also, if things come to be in such a situation, it would be extremely difficult or impossible to conduct trial properly and to have the fair exercise of the state powers of punishment, and it cannot be denied that the benefit derived from performing a speedy trial might be remarkably damaged. Among academic writers, how-

ever, it has been determined that defense counsel is indispensable in criminal procedure and that it might be destructive of the criminal proceedings' basic structure if the trial were to proceed without defense counsel. Accordingly, major academic opinions have supported the view that, so long as specific legislation has not been enacted, it should not be permissible to allow trial to continue when defensive counsel does not appear in court even if the accused is responsible for counsel's absence.

Of course, this decision also adopted the view that, as a matter of course, a trial with no attendance of defense counsel, whenever possible, should be avoided, and, even if it might be permitted, it should be applied only for in an extreme case. However, this decision by the Supreme Court has a serious implications, and will, hereafter, have a significant effect on court practices.

2. A case in which it was disputed whether or not the written statement that upon request recorded the testimony given by a witness under a grant of immunity be admitted as evidance. (The Lockheed scandal and acts by Marubeni Corporation).

Decision by the Grand Bench of the Supreme Court on February 22, 1995. Case No. (*a*) 1351 of 1987. A case involving three counts: (1) violation of the Foreign Exchange and Foreign Trade Control Law, (2) giving a bribe and (3) violation of the Law concerning Oath, Testimony, etc. of Witnesses before the Diet. 45 *Keishū* 1.

[Reference: Code of Criminal Procedure, Articles 1, 146, 226, 248 and 317; Constitution of Japan, Article 38(1).]

[Facts]

The accused, A (at that time president of Marubeni Corporation), had been promoting an airplane manufactured by Lockheed Corporation (in the U.S.A.) to All Nippon Airways Co., Ltd. (ANA). In conspiracy with B, who was at that time president of Lockheed Corp., and others, A promised the former Japanese Prime Minister, X, a cash bribe. Specifically, A and his accomplices asked X to give the former Minister of Transportation administrative guidance that recommended selecting and purchasing an airplane manufactured by

Lockheed Corp. and to appeal directly to ANA to buy it. They also promised to give him five hundred million yen in cash as a bribe if he succeeded. After that, when ANA had decided to buy the airplane, A and others gave X five hundred million yen in cash as a bribe based on their promise.

After the facts of this case were discovered in the U.S.A., the papers related to it were sent to Japan by the Americans. Because the Japanese Authorities did, however, not consider them sufficient to bring a charge, the Japanese prosecutors decided to interrogate B and others (Americans), who were executives of Lockheed Corp., and requested a Japanese judge to examine them as witnesses (Article 226 of the Code of Criminal Procedure). In response to it, the Japanese judge requested that an American court which had jurisdiction examine the witnesses through international judicial assistance. At that time, he attached a declaration of non-prosecution issued in the name of the Japanese Prosecutor-General saying that the witnesses would be immune from prosecution even if it were found that they had violated Japanese laws. However, when B and others refused to give testimony, the American court asked the Japanese Supreme Court for further assurance. The Japanese Prosecutor-General issued a second declaration of non-prosecution and the Supreme Court stated that the contents of it would be upheld. Then, both declarations were sent to the American competent court. Consequently, the examination of the witnesses proceeded smoothly and the written statements recording B's and others' testimony were made. After they were sent to Japan, these depositions of the witnesses became important evidence in the investigation and prosecution of the case.

At the first instance trial, these depositions of the witnesses were admitted as evidence. After A and the others were found guilty and their *kōso* appeal was dismissed, they filed a motion for *jōkoku* appeal. They pointed out as one of the reasons that the decision by the *kōso* appellate court recognized the admissibility of the written statements in error.

[Opinions of the Court]

1. If a person who is an accomplice of an accused exercises the right to refuse to give testimony (Article 146 of the Code of Criminal Procedure) under the privilege against self-incrimination (Article 38(1) of the Constitution of Japan), a statement which would be necessary to prove the accused's cirminal act may not be obtained from him/her. The immunity is a system intended to deal with such circumstances. It is a system which compels some persons who are e.g. accomplices to an accused to testify by providing immunity from criminal prosecution and, thus, eliminating their privilege against self-incrimination. It admits as evidence the testimony that may prove the accused's guilt. In the U.S.A., where the examination of the witnesses in this case was taken, the immunity system is applied under certain conditions and proceedings, and is an established part of the legal system.

(1) In light of the criminal procedure articles in the Constitution of Japan, it is difficult to say that the Japanese Constitution refuses the introduction of the immunity system; (2) while this system functions as described above, it would also be the system which affects directly the interest of a person who may be involved in a crime and which will have an effect upon important matters in criminal procedure. Accordingly, whether to apply it or not should be decided after full deliberation upon its necessity, its propriety in ensuring fair procedures, the degree of its fitness to the national sense of law, and so on. Moreover, if the system is applied, its requirements, proceedings and effects should be expressly stipulated in the text. (3) However, because the Japanese Code of Criminal Procedure has no express provisions with regard to witness immunity, one could come to the conclusion that the system may not be applied.

2. "Findings of fact shall be made on the basis of the evidence" (Article 317 of the Code of Criminal Procedure). To add to it, the admissibility of the evidence should be determined in the light of provisions related to it, and the overall spirit of the Code of Criminal Procedure, that is, "to make the facts of the case clear as well as to apply and enforce properly and speedily the punitive laws and ord-

ers with respect to criminal cases, while taking into full consideration the maintenance of the public welfare and the guarantee of the fundamental human rights of an individual" (Article 1). As stated above, it should be understood that the Japanese Code of Criminal Procedure has not adopted the immunity system, and, therefore, a statement obtained under immunity from criminal prosecution is not recognized as evidence for fact finding. Accordingly, there was a mistake in the original decision, in which the evidentiary competence of the depositions of witnesses in this case was affirmed. (See Judge Ohno's Concurring Opinion, which states, "The procedure used in the examination of the witnesses in this case may not be regarded as providing illegally obtained evidence. As the Opinions of the Court pointed out, however, if the competence of these written statements is affirmed, the use of the immunity system might come to be recognized without an express provision of law. Also, it would be against the spirit of the Code of Criminal Procedure if these written depositions are allowed as evidence when it had been clear from the outset that the accused's right to examine a witness (Article 37(2) of the Constitution of Japan) could not be secured".)

3. In this case, however, even if these written statements were not admissible as evidence, the facts relevant to criminal activities can easily be identified by other evidence which the trial court's decision approved by the appellate court had enumerated. Therefore, this mistake will not affect the appellate court's decision. (*Jōkoku* appeal dismissed.)

[Comment]

1. The issue in this case was the admissibility as evidence of the written statement of the witnesses in which the testimony was obtained by granting them immunity from criminal prosecution. In the instant case, to obtain statements from Americans who had refused to give testimony, a declaration of non-prosecution by the Japanese Prosecutor-General which actually had the effect of granting immunity from prosecution under Japanese law and a statement by the Japanese Supreme Court that affirmed the former were issued. Based on them, the examination of the witnesses was taken and the writ-

ten statements of them were made before the American court. Consequently, the legality of the immunity system must be first of all discussed.

It cannot be said that a system is necessarily illegal because of the lack of express provisions. For example, in Japan, the system for discovery of evidence has been put into practice based on certain conditions and proceedings which were recognized in some decisions, although there is no express provision in the Code of Criminal Procedure. However, such cases are examples in which their use is advantageous to an accused. The immunity system, on the contrary, may disadvantageously affect the accused. This has also a character of "bargaining", that is, to obtain the statement in return for the immunity. Therefore, it is till now a prevailing view that the immunity system be illegal without a legal provision. But there were cases in which the compulsion of statements in return for non-prosecution was held to be legal, including the decisions of the trial and appellate courts in the instant case. The decision of the Supreme Court, however, holding it to be illegal, overruled the previous decisions. In this decision, the Supreme Court, considering substantially the declaration of non-prosecution to be the immunity, held that the immunity system to be illegal, because the Japanese Code of Criminal Procedure has not adopted this system, for which there should be express provisions. This means that prosecutors who have the power of suspending a case (Article 248 of the Code of Criminal Procedure) do not have authority to offer immunity from prosecution. As the decision in this case pointed out, the immunity system is "the system which affects directly the interest of a person who may be involved in a crime and will have an effect upon important matters in criminal procedure". Therefore, it may be very difficult to regard the Code of Criminal Procedure as recognizing the immunity system and leaving its conditions, etc., only to the practice even if there is no express provision about it. Many academic opinions have supported this view.

The decision in the instant case, however, held that the introduction of the immunity system would not be problematic in light of the Japanese Constitution. Accordingly, with this decision as a

catalyst, it would be important to discuss whether or not to introduce this system, and, if it is applied, its practical procedures, and so on.

2. The next problem is whether the written statements of the witnesses in this case had evidentiary competence or not. In the Opinions of the Court, the written statements in this case were denied the admissibility from the point of view that, in Japan, where the immunity system has not been adopted, a statement obtained by means of a grant of immunity from criminal prosecution should not be recognized as evidence for fact-finding. In particular, it should be noted that the Opinions of the Court negated its admissibility, not by applying the express provisions about evidentiary competence in the Code of Criminal Procedure or the exclusionary rule concerning illegally obtained evidence, but by invoking the general provisions of the Code of Criminal Procedure, for example, Articles 317 and 1.

As long as the Code of Criminal Procedure does not adopt the immunity system, it is natural that the evidentiary competence of a statement obtained by granting immunity will not be provided for in an express provision. Furthermore, the examination of the witnesses in this case was conducted through international judicial assistance. In this process, the statements were obtained by applying the immunity system that exists in the U.S.A., the other party. In consideration of these circumstances, the Opinions of the Court did not determine the entire examining procedure to be illegal, nor determine the written statement obtained under immunity to be "evidence obtained by illegal investigation", which was so far regarded as the object of the exclusionary rule. Rather, it can be understood that the Opinions of the Court recognized the new type that negates evidentiary competence in light of the intent of the Code of Criminal Procedure, in addition to some express provisions in the Code of Criminal Procedure or the exclusionary rule.

Some academic opinions, indeed, have stated that the written statements in this case should be subject to the exclusionary rule for illegally obtained evidence as well because they were obtained through the illegal act of the prosecutor who originally had no authority to grant immunity from criminal prosecution (but it should not be excluded from evidence because there was no gross illegality in the proce-

dure). Also, some critics have pointed out that the admissibility of these written statements was eventually negated only for the formal reason that the immunity system has not been adopted. (In this sense, Judge Ohno's Concurring Opinion should be noted, as he pointed out that it had been clear from the outset that the accused's right to examine a witness could not be assured.) Therefore, with regard to the issue in this case, further discussion should be expected in the light of the spirit of the Constitution, the Code of Criminal Procedure.

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6. Commercial Law

Validity of the agreement that stocks obtained through an employee stock ownership plan at par value would be transferred at par value upon employees' retirement.

Decision by the Third Petty Bench of the Supreme Court on April 25, 1995. Case No. (*ō*) 1332 of 1991. A case, concerning stock issuance claim. 175 *Saibanshū* (*Minji*) 91.

[Reference: Commercial Code, Article 204 (1); Civil Code, Article 90.]

[Facts]

Company Y (defendant, appellee, final appelle, Fanshi Tsuda Kabushiki Kaisha), whose articles of incorporation restrict the transfer of stocks, introduced the employee stock ownership plan (hereinafter ESOP) in 1968 in order to help employees' asset planning and to enhance employee's loyalty to the company. The former employees of Company Y, Xs, including X1 (plaintiff, appellant, final appellant, Motoki Chiba) acquired Company Y's stock at par value, understanding the purpose and substance of the ESOP during the period from