

**Editorial Note:**

This decision has an important significance in the respect that the Supreme Court has made the decision for the first time that the suit for confirmation that one co-heir does not have the position of heir must be sued in the form of the so-called inherent necessary joint litigation (*Koyuhitsuyouteki-kyodososho*).

According to this decision, when co-heirs sue for confirmation in the litigation proceeding that another co-heir does not have the position of heir, all the co-heirs, except for him, must file the suit as joint plaintiffs.

About the suit for confirmation of the inheritance, this suit has been decided to be legitimate by the Supreme Court 1st P.B., March 13, 1986 (40(2) MINSHU 389), and to be the inherent necessary joint litigation by the Supreme Court 3rd P.B., March 28, 1989 (40(2) MINSHU 389).

Although this decision doesn't judge directly whether the suit is legitimate, it can be estimated that the Supreme Court decided this suit to be the inherent necessary joint litigation on the assumption of its legitimacy.

## **6. Criminal Law and Procedure**

### **X and Y v. Japan**

Supreme Court 1st P.B., March 22, 2004

Case No. (a) 1625 of 2004

58 (3) KEISHU 187; 1856 HANREI JIHO 158; 1148 HANREI TAIMUZU 185

### **Summary:**

The defendant X and Y, intending to murder X's husband (hereinafter Z) by executing two actions, actually murdered Z as a result of the two actions. The court recognized that the commencement of the commission of the crime and the intention had existed at the time of the first act.

**Reference:**

Penal Code, Articles 38 (1), 43, 199, 203.

**Facts:**

The defendant X, who planned to murder her husband Z and receive a payment of Z's life insurance, requested the execution of the murder of Z of the defendant Y. Y, who accepted X's request, in cooperation with three other accomplices, made a detailed plan. According to the plan they made, the three accomplices caused their car to collide with Z's car and invited Z into their car pretending to offer a private settlement. Then, they made Z unconscious with chloroform (hereinafter the first act). After Y had come, those four persons carried the unconscious Z into the driver's seat of Z's car and caused the car to fall into the sea (hereinafter the second act). Later Z was found dead but it remained unknown whether Z had died because of the suffocation caused by seawater or because of the difficulty in breathing, the cardiac arrest, the suffocation, the shock, or the functional disorder of the lungs which had been caused by the intake of chloroform. In short, Z was murdered either by the first act or the second act.

The court of the first instance (Sendai District Court) convicted X and Y of murder as co-principals. The defendants appealed against it for the reason that the first act for making Z unconscious was not to be regarded as the act of committing murder nor had they had the intention of murder at the time of the first act.

The court of appeals (Sendai High Court) affirmed the original judgment refusing the reason of *koso* appeal and the defendants filed a *jokoku* appeal.

**Opinion:**

*Jokoku appeal dismissed.*

1. Existence of the commencement of the commission of the crime:

“With regard to the three perpetrators’ murder plan that they make Z unconscious with chloroform and taking advantage of the state they take Z to a port, where they throw X into the sea, the first act was indispensable for putting the second act into practice securely and

easily. It can be admitted that if the first act was successfully done, there was no particular circumstance which could be a hindrance to the accomplishment of the rest of the murder plan. There was proximity of time and space between the first act and the second act. Considering the above, as the first act is an act which is close to the second act and an obvious objective risk of leading to murder can be recognized when the three perpetrators began the first act, it is reasonable to accept the existence of the commencement of the commission of murder at the time of the first act.”

## 2. Existence of the intention:

“As the three perpetrators attained their aim by commencing a series of murder acts which consist of making Z unconscious with chloroform and throwing Z into the sea together with Z’s car, they were not lacking in the intention of murder even if Z was already dead by the first act before the second act contrary to their recognition.”

## Editorial Note:

The peculiarity of this case lies in what is called *hayasugita kousei-youken no jitsugen* which means the too early realization of the crime-constituting condition. In this case, though the victim may have been murdered by the first act, the doers didn’t recognize the risk of the realization of the result which the first act had, and they thought the second act was also necessary. Then can the first act which seems to constitute only a “preparation” of murder be the act of committing murder? Concerning the time of the first act that, because of an error of causality, was not performed with the recognition of the risk, can the intention be affirmed?

## 1. The commencement of the commission of the crime.

### (1) Doctrine:

A doctrine according to which the commencement of the commission of the crime exists at the time of an act which is described in the Penal Code (*Keiho*) as a crime-constituting condition was abandoned so that today’s dominant doctrine views the commencement of the commission of the crime more concretely. Inside this doctrine, some advocate deciding the commencement of the commission of the crime by the start of the act which causes the actual risk of the crime-constituting

result, others by the occurrence of a concrete risk against legal interest. Furthermore, it is debated whether subjective elements should be taken into consideration, and to what extent, if those subjective elements are taken into consideration, they should be so; do they include the plan of the crime?

(2) Judicial precedent:

In judicial precedents in the past we find two criteria for fixing the time of the commencement of the commission of the crime; one of which is the act close to the act which falls under the crime-constituting condition (*X v. Japan*, 13 KEISHU 1473, *Taisin-in*, October 19, 1934), the other of which is the objective risk leading to the occurrence of the result (*X v. Japan*, 24(7) KEISHU 585, Supreme Court, July 28, 1970).

In this case, the Court seems, following those judicial precedents' two criteria — the closeness and the objective risk — to have determined its attitude that the plan of the crime should be taken into account and found that the commencement of the commission of murder existed at the time of the first act, by enumerating these three reasons; (a) The first act was indispensable for putting the second act into practice securely and easily. (b) If the first act was successfully done, there was no particular circumstance which could be a hindrance to the accomplishment of the rest of the murder plan. (c) There was proximity of time and space between the first act and the second act.

2. The intention.

The issue here is whether the error of causality negates the intention or not. Judging from a case (*X v. Japan*, 32(5) KEISHU 1068, Supreme Court, July 28, 1978), the judicial precedent seems to always affirm the intention when one, facing a norm, dares to commit a crime which is banned by the norm.

But it should be questioned whether just facing a norm is sufficient for justification of the existence of the intention, however essential the error is. In addition there are scholarly themes that divide a series of acts into parts and consider each part individually.

**X v. Japan**

Supreme Court 1st P.B., July 12, 2004

Case No. (a) 1815 of 2003

58 KEISHU 5, 333; 1869 HANREI JIHO 133; 1162 HANREI TAIMUZU 137

**Summary:**

1. In the course of investigating a criminal case with no direct victim, such as a drug crime, if it is difficult to reveal a crime only by using ordinary investigation methods, an undercover operation targeting a person who is suspected of having the intention to commit a crime if an opportunity occurs shall be allowable as an investigation without compulsory measures under Article 197 (1) of the Code of Criminal Procedure.
2. The undercover operation in question targeting the person who was suspected of attempting to provide cannabis for profit is legitimate even though the drug control officer, in the operation, arranged the place for the deal and offered to buy cannabis, thereby inducing the person to bring cannabis to the place of the deal.

**References:**

Code of Criminal Procedure, Article 197 (1).

**Facts:**

According to the findings and record in the judgment of the second instance and in the judgment of the first instance, which is accepted by the former, the process of the investigation in this case was as follows.

The defendant is a national of the Islamic Republic of Iran who was previously convicted in Japan of crimes such as importing opium for profit and possessing cannabis for profit and sentenced to imprisonment with labor for six years, etc. Having served his sentence for these crimes at the Osaka Prison, the defendant was deported to Iran, but on December 30, 1999, he entered Japan illegally using a forged passport.

The collaborator in the investigation became acquainted with the defendant while serving his sentence in the Osaka Prison. The collaborator had a grudge against the defendant because the collaborator's brother was arrested and imprisoned in Thailand for transporting cannabis resin at the request of the defendant. The collaborator asked the Kinki

Regional Narcotic Control Office, twice in 1999, to arrest the defendant upon smuggling drugs into Japan.

On about February 26, 2000, the defendant requested the collaborator by telephone to find someone who would buy cannabis resin, and the collaborator answered that he would be able to find someone in Osaka. Until the defendant telephoned to make this request, the collaborator had made no offer to sell cannabis resin to the defendant. On February 28, the collaborator informed the Kinki Regional Narcotic Control Office of the content of the defendant's call. Despite the information provided by the collaborator, however, the Office could not identify the defendant's residence, places where the defendant usually frequented, places where the defendant concealed cannabis resin, etc. Because of the difficulty in collecting evidence by other investigation methods to arrest the defendant, the Office decided to conduct an undercover operation. On February 29, the drug control officer at the Office and the collaborator arranged a plan in which the collaborator would introduce the drug control officer as a buyer to the defendant at a hotel near Shin-Osaka Station on March 1. The collaborator told the defendant to meet the buyer at the hotel, in which a room was reserved for this operation.

On March 1, the drug control officer met with the defendant at the hotel room on the introduction of the collaborator and asked the defendant what he had for sale. The defendant answered that he did not have anything for sale there at that time but he would be able to sell cannabis resin in Tokyo. The drug control officer refused to go to Tokyo himself but offered to buy 2kg of cannabis resin if the defendant could bring it to Osaka. They reached an agreement that the defendant would go back to Tokyo and bring cannabis resin to the hotel room on the following day and then they would make a deal anew. On this occasion, the drug control officer offered to pay for the defendant's travel expenses between Tokyo and Osaka, but the defendant refused this offer and said that he would bear the expense by himself because it was his business expense.

On March 2, when the defendant came back from Tokyo and brought about 2kg of cannabis resin into the hotel room, having another person carry it, he was subjected to search by the drug control officer with a warrant of search and seizure and arrested in *flagrante delicto*.

**Opinion:**

*The jokoku appeal shall be dismissed.*

It is obvious that the undercover operation was conducted for the investigation. An undercover operation is defined as an operation in which the investigating authorities or persons who are requested by the authorities to collaborate in the investigation induce a suspect to commit a crime, while concealing their status or intention, with the aim of arresting the suspect in flagrante delicto upon finding the suspect actually committing the crime as induced. At least in the course of investigating a criminal case with no direct victim, such as a drug crime, if it is difficult to reveal a crime only by using ordinary investigation methods, an undercover operation targeting a person who is suspected of having the intention to commit a crime if an opportunity occurs should be regarded as allowable as an investigation without compulsory measures under Article 197 (1) of the Code of Criminal Procedure.

In this case, as mentioned above, the drug control officer could not identify, despite the information provided by the collaborator, the defendant's residence, places where the defendant concealed cannabis resin, etc. and had difficulty in collecting evidence by other investigation methods to arrest the defendant. On the other hand, the defendant had already been attempting to sell cannabis resin for profit and looking for a buyer. Under such circumstances, even though the drug control officer arranged a place for the deal and offered to buy 2kg of cannabis resin from the defendant, thereby inducing the defendant to bring cannabis resin into the place of the deal, such a method should be regarded as a legitimate undercover operation.

**Editorial Note:**

Generally speaking, in Japan undercover investigation is thought of as legitimate like the theory of entrapment defense in the United States. But all the undercover investigations are legitimate. Concretely speaking, according to commonly-accepted opinions, the type of undercover investigation giving chances to commit a crime to offenders is legitimate, while the type of investigation causing criminal intent is not legitimate.

Undercover investigation is said to be a non-compulsory investiga-

tion because it does not oppress the intent of a suspicious person.

Proofs acquired by illegal undercover investigation are said to be excluded.

According to the explanations below, it is thought that this judgment follows the traditional one and reconfirms the legality of undercover operation.

## 7. Commercial Law

### **X v. Kouno Tea & Foods**

Osaka High Court, February 12, 2004

Case No. (*ne*) 2199 of 2003

1190 KINYU-SHOJI HANREI 38

#### **Summary:**

The court held that though there is an internal rule regarding retirement payments, directors do not have a right to claim compensation unless the amount of compensation has been determined in the articles of incorporation or by a resolution of a shareholders' meeting. Therefore, the claim of the plaintiff was dismissed.

#### **Reference:**

Commercial Code, Articles 266-3 (1) and 269 (1).

#### **Facts:**

K.K. Kouno Tea & Foods (hereinafter "Company K"), whose amount of capital was 62,322,500 yen, sales were over 520,000,000 yen, and numbers of employees were 130, was the company which restricted the transfer of shares and which a representative director Y (defendant, appellant) and his family owned most of the shares (around 90%).

On March 22, 1992, Company K provided a rule about compensation and retirement payment (hereinafter "the rule"). The rule said that the retirement payments of directors were "the amount of compensation of