

## THE ADMINISTRATION OF JUSTICE IN JAPAN.

### III. THE CODES AS A WORKABLE SYSTEM OF LAW.

If no Western nation had ever transformed its laws, if each people had developed its indigenous customs into a peculiar and unique body of law, if no importations from abroad had ever been employed to systematize or to replace the home product, the spectacle of the undertaking in which Japan has been engaged for twenty years might be thought a strange one. The hostile critic might have free play for his evil prognostications and might enjoyably spend his sarcasms on the doctrinaire process of transplanting and regrafting foreign customs. But, as it happens, there exist few nations of the West, outside the Anglo-American group, which are in a position to throw the first stone of the sort or have the inclination to begin such criticism. They are themselves too vulnerable, nay, they even see no wrong in such a process of transformation, and they uphold it. As England has never in eight hundred years felt the foot of an armed invader, so she has never in that period acknowledged a faith in any laws but her own. But it is a fact that in almost every other nation of Europe and America (except the United States) the accepted law of the land is not wholly an indigenous one, but has been borrowed from the Roman civil law by a people whose customs required more or less adaptation to it. This statement is not as yet true of Russia and the Scandinavian nations; but the fondness for German scientific speculation is growing daily in those countries and has made especial headway in the great northern peninsula; and if the advocates of German legal science have their way, as is not unlikely, we shall there see a much greater and more important work accomplished than that in which Japan is now engaged. Nor does our statement apply to Italy, the home of Roman law, though even here Austrian law has in part given way to French law; nor to some portions of what was formerly Turkey in Europe.

But if we look elsewhere, we shall see the Western world

almost covered by two great streams of legislation, which have taken their rise largely within the present century,—the one from a French source, the other from a German. The former rose earlier and has spread farther; the latter is even yet acquiring its full force. Many countries had the French Code imposed upon them by Napoleon, and some of these have never given up the system then received—Belgium, Baden, the Rhine provinces, Poland (in Russia), Geneva, and a few others. Poland has indeed suffered another change of laws and has come under Russian and Austrian codes. Austria herself, for nearly a century, has had a code, more or less kin to the civil law, which prevails in districts having such widely distinct individualities as Bohemia, Galicia, Dalmatia, and the Tyrol. Germany for nearly four hundred years has been slowly putting on the garb of the civil law, until its legal system now bears the same outward resemblance to the indigenous Germanic law that the Japanese Houses of Parliament do to the *yashiki* of Prince Shimadzu. The Goths of Spain long ago felt the yoke of the Roman law, and for centuries kept the Roman breviary of Alaric, under another name, until the Roman law had shaped their whole system. Servia in 1844 enacted a code modelled on the Austrian. Roumania, in remodelling her laws in 1864, made a code reproducing exactly the order of the French Code and agreeing with it in substance. Greece is founding new code-efforts on the French and Italian models. Scarcely a state in South America has not in its code manufacture felt in part the French influence—notably Brazil and Bolivia. In the Orient the dependencies and protectorates of France, Spain, and Great Britain are daily mixing the leaven of European law—as yet more or less separate and intact, because personal status almost always determines the law by which each person is governed, but before long to permeate the lands which its importers govern. There is, in fact, a world-movement of law, slow and imperceptible, like that of a glacier, but gradually covering and enfolding all the countries lying in its path. It is an illustration of the inevitable, the vigorous and coherent prevailing over the weak and formless. In some instances the indigenous law is entirely

displaced ; in others it is absorbed ; in still others it merely receives scientific form and statement.

We see, then, that the work of Japan is but a drop in the sea, a foot-path in the midst of highways, a single shot in the cannonade of centuries. This is not depreciating the importance of the work for Japan itself ; for such a task seldom comes more than once in a nation's lifetime, and for each nation it has a right to be considered as epoch-making. But the remembrance that there is in progress a whole world-movement allows us to look with greater calmness on its manifestation in any particular quarter and to judge it more intelligently.

In every country the circumstances leading to the importation of laws have varied somewhat. In every country, too, the same problem, among others, has come up, with more or less urgency,—the adaptation of the new codes to the conditions of the country. And in every case, again, the same question has had to be met by the advocates of the new laws, viz.: How far are they in harmony with existing practices? This, of course, is by no means the whole of the problem. The new rule may directly contradict the old one, and yet be decidedly preferable. Or the new rule may fill a gap which the growing complexities of commerce have left open in the old. Or there may be a conflict of custom, which will justify the legislator in stepping in and settling it as he thinks best. Certainly, where the forms of commerce have changed, or where moral standards have progressed, the law should advance also ; and this element of the problem is one of the most important as well as one of the most difficult. But for a greater or less part of the legal system this question will still be the decisive one : Do the new laws substantially conflict with the existing rules as understood and upheld by the people? After eliminating all these considerations of reform, there will be large portions of the law where the mere fact of a conflict must be regarded as an argument against the code. Not that this need determine the fate of such laws or parts of the code, for other motives may be of higher consequence than a discrepancy of law and custom. But, at least so far as

such a consideration goes in the scale, it will then weigh against the new laws.

The material for the examination of this question has recently come to hand, in the shape of four volumes, published by the Asiatic Society of Japan, under the editorship of the writer of this paper. These form Parts I., II., III., and V. of a series (ultimately to contain eight volumes), entitled "Materials for the Study of Private Law in Old Japan." They are partly the records of customary law obtained in 1877-8 by the Government through a commission appointed in connection with the preparation of the codes; partly a collection of the decisions of the courts of the old régime, and partly a summary of commercial institutions and customs, made by the editor from the investigations of Japanese scholars. Of the many topics that suggest themselves for comparison between the new codes and the old legal notions, only two or three can here be taken up. The first shall be Ownership; the second, Sale; the third, Real Suretyship; and the last, Commercial Paper.

Of the preliminary provisions of Book II., "Property," it is needless to say that there are no comparisons to make. If Japanese scholars had been less gentlemen and more men of the people, if they had not stunted their minds with the dry nourishment of the Chinese annalists, and had not acquired a scholarly snobbery which unfitted them for true science, they would doubtless have created a legal literature, as Europe did. They would have formulated general legal conceptions and differentiated rights and obligations. But, as it is, there is not a law text-book to be found (if we except the tedious commentaries on the antiquated codes of the last millennium,—commentaries which rival the Glossaries of the European Middle ages in long-drawn-out pedantry); and a legal definition is something that is turned up only by the greatest chance, like a sovereign under a wayside stone. There was never any scientific, scarcely even any literary, treatment of the law; and hence we have nothing to compare to the preliminary propositions of the new code. But one thing at least is worth noticing. Art. 30 of Book II. declares the right of

property to be a natural right to use, enjoy, and dispose of a thing within the limits of the law. Now this right of property may never have been given a definition in Old Japan, but at least it *existed*. This is worth while insisting upon, for it is an idea not uncommon among foreigners that Old Japan was a feudalism in which no rights of the common people were recognized and respected. This is not true,—no truer than it was of England under the Tudors. Many an English farmer in those days saw his corn ruthlessly ruined by the noble hunters who followed the fox; and, seeing, bore it in impotent anger. Many a poor wretch writhed under the arbitrary dealing, miscalled justice, of judges like Jeffreys. Many a rich Jew saw his money disappear forever into the hands of the prince who wanted what he pleasantly chose to call a loan. Many a man spent years in Newgate dens at the false suit of some oppressive aristocrat whom he had offended. But the farmer was none the less an owner of property; English justice was no less a national fact; and the action of debt was no less a foundation stone of civil procedure. Whatever may have been in Japan the chicanery of this or that *daikwan*, or the insolence of a drunken *samurai*, law reigned and right existed under the Tokugawa Shoguns. The merchant could and did sue the *samurai* when he pleased,—a privilege which did not exist in Sweden, for instance, until the reforms of Struensee in the last century. The feudal lord could not and did not take away the farmer's land as he pleased. It is Rémusat, if we are not mistaken, who says that custom is in Oriental countries a greater tyrant than the so-called despot himself. People forget that in feudal Japan, as in mediæval England, the constitution was set deep in a strong foundation of custom; and the force of tradition and opinion was the sufficient sanction of property rights. Take for proof the statements of the Collection of Customs on this power of the lord to deprive the farmer of his land. There was no fief in which the administration was more strict or the tax burdens more heavy than that of Sendai (Rikuzen *kuni*). Yet there we find it recorded: "The owner of realty can do as he pleases with it, except that he may not sell it in per-

petuity. *His ownership is inviolable*, unless it is confiscated for crime or taken for public purposes," both being recognized processes of English law. Furthermore, "the latter occurs when the feudal officer needs the land for a special purpose or when a reservoir or storage for public use has to be constructed on the land. An order is issued for the taking, and other land is given by way of recompense; but if there is no other land that can be so given, the owner of the plot taken must suffer the loss, and cannot even claim the price." This right of compensation was thus an incomplete one in this fief. But it may be worth remembering that even to-day the constitutions of at least three of the United States permit the taking of land for public purposes without compensation, and that this has been done by the Legislature of at least one State. In Uzen *kuni*, again, "the person so entered [in the register] as owner has a perfect title, and may sell, pledge, or otherwise dispose of the property. His ownership is inviolable, except in case of confiscation for crime by order of the feudal lord. . . . When saltpetre is discovered in a lot of residence-land, the feudal lord has the exclusive right of mining it; but compensation will be paid to the owner for any injury inflicted thereby." In Idzumo *kuni*, it is related, "[land] may be sold, mortgaged, or otherwise disposed of at pleasure, provided taxes are not in arrear. No one can under any circumstances be deprived of his property against his will." These statements are no less than could be made in any European country. If these extracts were not enough to indicate the general conception of land proprietorship, the almost universal prevalence of the land-registry system would point unmistakably to the regularity and security of proprietary rights, and the constant employment of the terms *ji-nushi* (land-owner) and *ie-nushi* (house-owner) would indicate the nature of the popular conception.

We think complacently in some of our Western countries (unfortunately England is here able to show anything but complacency) of the advance that has been made in the present century in the registration of proprietary and hypothecary titles to realty, especially in Continental Europe. Perhaps it

would not be safe to say that Japan has preceded all Europe in the establishment of a registry system ; for we do not yet know whether before the time of Iyeyasu (1600) the Japanese registry system was well organized. But certainly there is no civilized state in which the system has been more thoroughly in force in all dealings with land for a longer time than in Japan. In England the Saxon shire-register disappeared under the Norman régime, and the Domesday Book was a passing effort at publicity which was not persisted in. Germany, since the early middle ages, had no registry system (except in a few commercial towns like Hamburg, Lubeck, and Bremen) until the Prussian hypothecary-registration law of 1783, and the general registration of land-titles is a matter of the present century. In France, transfers of ownership were not registered (since the feudal system of the Middle Ages) till the Revolution ; the spirit of the Roman law having everywhere been unfavorable to this expedient. There is no nation among whose people the idea of land-registration has become so deeply instilled as one of the elements of rights in land as in Japan. The absence of a registry is simply unthinkable to the ordinary Japanese, and his mind turns to the registry as the proper accompaniment of all land-transfers, as naturally as the passenger taking the railway turns first to the ticket-office. The Japanese student smiles when he hears that England has no registry system, and it is practically impossible to get him to consider seriously the many complications arising under Anglo-American law for lack of it. For him it is a matter of pure speculation, a reasoning about the unreal.

We come now to Sales. A sale, says Art. 25 of the Code, is complete upon an agreement being reached by the parties. For immovables (realty), however, a registration is necessary at the land registry office. This, as has already been stated, is quite in harmony with an almost universal custom of Old Japan. Registration in some form or another seems to have been usual in all transfers of realty ; and even in case of horses and other personalty the feudal lords frequently required the recording of transfers. When one considers what a large

place the transaction of sale occupies among those dealing with land, one realizes how important the fact of this harmony of code and custom is in this particular relation. Imagine the state into which all England would be thrown to-day if a law of compulsory registration of land sales were imposed, and we can understand what it means to assert that the new Code is opposed to the customs of the people, and what it means to show that, on the contrary, the new Code, in so broad and radical a feature as this, finds itself in entire accord with the immemorial habits of the nation. It may be noted here that while the fees for registration are in America customarily paid (we believe) by the seller, the Japanese (and the French) custom has been (according to the Collection of Customs) for the buyer to undertake these. The Code (Art. 34) leaves it to the agreement of the parties; but in the absence of agreement divides the expense equally between them. In America the registration fee is fixed according to the number of documents; in Old Japan it was a percentage (*buichukin*) of the price paid, with various presents and feasts to the officials in addition. Under the Code the fee is regulated by the assessed value of the plot transferred. In the West the last method is impossible; but in this country it is quite feasible, more just, and far more effective than the practice in Old Japan, which was always liable (as the Collection of Customs mentions) to evasion by the parties.

In the articles dealing with earnest-money we find a coincidence of custom between Rome and Japan which is not merely interesting but even startling. Long ago, even before Justinian's codification, the rule of Roman law was that, where earnest-money (*arra*) was given, the buyer, on withdrawing, forfeited the sum; the seller, on refusing to deliver, must restore double the earnest. This provision came down the ages and found a place in the Code of Napoleon. It gives one almost an uncanny feeling, in looking over these records of Japanese customs, taken down from the lips of men who had never heard of Rome or the French Code and had even (in most instances) never seen a foreigner, to find a dozen passages indicating that the identical rule of Roman law

obtained in Old Japan. In Suruga *kuni*, for instance: "If the buyer repudiates a contract of sale, he loses the earnest-money; this they call 'losing the earnest.' If the seller repudiates, he must pay back double the amount of the earnest; this they call 'returning double the earnest.'" The name is sometimes "clinch-money" (*sashi-kin*), sometimes "contract-money" (*yakujo-kin*); but the rule is always the same. Doubtless we may persuade ourselves that it was natural enough to hit upon the same expedient even in communities so widely sundered. But this is not the first instance we have cited of a peculiar coincidence in ideas between Japanese and French traditional rules; and we cannot refrain from calling attention again to the greater facilities which French law has offered in the task of giving scientific form to the legal principles established among the Japanese people.

The incidence of the risk of an article sold is, perhaps, one of the most important questions in the transaction of sale, and of course depends usually upon where the title to the article is at the time of loss. For a century the law of England and America has been that the title passes immediately on striking the bargain, unless special conditions are imposed. The old Roman law was that the title could not pass until delivery, a notion, perhaps, usual in a less advanced state of law, though the risk passed immediately to the buyer. The French law has gradually got away from this requirement towards the Anglo-American position (though in the new German Draft Code the policy of requiring delivery has prevailed); and by the Japanese Code (Book II., Art. 331, Book III., Art. 25) the title ordinarily passes at the time of the bargain and without delivery. Hence follows the rule of the Code (Book II., Art. 335) that the article (when specified) is from the time of the bargain at the risk of the buyer, where no condition has been imposed and where the seller has not specially undertaken the risk. The question is—How does this accord with existing Japanese notions? Here, as might be expected, we find a variation of custom. There are eight passages referring to the point in the records of customs. In four the risk is placed on the seller; in three on the buyer; and in one other

it is determined in a peculiar manner, viz., according to the point reached on the journey by the vessel bearing the goods. Where the seller bears the risk, much must be allowed for the possibility that the parties conceived the sale as conditional, and therefore not yet consummated (as would often be the case where earnest-money is given), and thus even under the Code the risk would be on the seller. What the general belief is among Japanese vendors and purchasers as to the incidence of the risk can thus not be clearly ascertained from these records of customs. In either case the prevailing custom in some sections will have to be sacrificed, and the legislators in making their choice of principles have put themselves in line with the general trend of modern French and English practice. We fancy that Japan will in this respect, at least, be no worse off than Germany would be under her new Draft Code, after rejecting the prevailing rule of buyer's risk and throwing the risk on the seller.

The chief obligations of the seller, according to the Code, are (1) to deliver, (2) to guarantee title, and (3) to warrant the absence of defects; and of the buyer, to pay at the time and place agreed. In the Collection of Customs we read that "in sales of personalty the seller must deliver the article, and must also guarantee its genuineness; the buyer must pay at the time and place agreed on." As to the first obligation, the general custom in Japan was, as we might expect, to place it on the seller, as in the Code. This is the sense of the half dozen passages touching on the point; though of course the parties might have agreed to the contrary. The second obligation, the guarantee of title, is not spoken of in the Collection of Customs. But we know that a covenant against eviction was long ago used in Japanese deeds of land, and there will be nothing new in the principle here given legal sanction. The Collection of Customs, however, mentions several times what corresponds to the English covenant against disturbance by the grantor or those claiming under him; it reads, "neither I nor my descendants may hereafter raise objection to this transfer." But this guarantee seems not to be required by the Code.

There is a third implied obligation on the seller, dealt with in the Code (Art. 94) among the causes for rescinding the sale. This is the warranty of freedom from radical defects. The sale is avoidable for non-apparent defects, irreparable and unknown to the buyer, if they affect substantially the usefulness or value of the article to the buyer. This general idea appears clearly in the Collection of Customs, though not so accurately defined as in the Code. In Settsu *kuni*, "payment may be refused where the realty or personalty is of a different nature from that contracted for, or where the quantity is different." (Deficiency of quantity is governed by Arts. 48-53 of the Code.) In Idzumo *kuni*, "when an article turns out to be not as contracted for, the buyer may refuse to take it, without forfeiting his earnest-money." "Not as contracted for" is the rendering of "*gan* (spurious)—*zo* (make)." Again, as indicated in the Code, "where the article is bought, and delivery taken, and cash paid down at the time, the buyer cannot complain that the article is not as contracted for, because it is due to his own short-sightedness." This is the traditional English doctrine of *caveat emptor*. Others of the less usual forms of sale found sanctioned and regulated in the Code are also testified to in the Collection of Customs. Take, for example, sale by auction. This is the proceeding prescribed in Art. 104, in case the owners of an indivisible thing cannot agree upon a division or sale. Now, in the first place, the auction was one of the commonest institutions of Old Japan. Under the form of a "secret-ticket sale" (that is with written bids) it was used in all parts and among all classes. Furthermore, it was used, among other purposes, in the very instance prescribed by the Code, as we learn in two or three passages. In Kaga *kuni*, "where a house or an article made with money contributed by a number of persons is to be sold, ordinary auction or secret-ticket sale is employed." In Shinano *kuni*, "where there is to be a sale of something which belongs to several persons in common, secret-ticket auction is employed." In Sagami *kuni*, "When . . . forest timber, which is the common property of a village, is to be sold, the sale is held by auction." Here, then, it is perfectly clear that the people will find their traditional pro-

cedure fall in exactly with that prescribed by the Code. Moreover, the auction sale is stated to have been employed for disposing of the effects of a bankrupt or of one whose property had been confiscated for crime; and from this it is but a slight transition to the auction sale on an execution by a bailiff, as employed in modern law. The whole idea of using sale by auction wherever conflicting interests are concerned and securities are needed for impartiality and fairness, was evidently familiar in Old Japan.

Another point which must be noticed is the elaborate provisions in the Code (Arts. 84-93) concerning the right of re-purchase reserved by the seller. These correspond to a practice little known in Anglo-American communities, but very common in a state of society like that prevailing in Japan and surviving even yet in Europe; it finds a recognition in the French Code, and even in the new Draft German Code under the heading *Wiederkaufsrecht* or option of re-purchase. The Code has given full recognition to this custom. A limit has been placed, however, upon the time for which this privilege can continue. In old custom this period was often indefinite or even perpetual; sometimes it was as short as two years. The Code fixes it at five years for realty, and two years for personalty. The conflict of custom requires that some uniform rule should be adopted.

The pledge of realty is something quite uncommon in modern Europe and America, and the chapter on this subject in the Code is unique in works of the kind. In Roman law its commonest form was known as *antichresis*, in which the creditor took possession of the land and appropriated the profits in reduction of interest. In Japan the entire profits were taken in lieu of interest. The usual transaction was for the creditor to lease the land back to the debtor as tenant (*jikkasaku*). For these pledges the Code declares (Art. 119) that there shall be a writing, and that unless registered the transaction shall not be valid as against third parties. The requirement of a writing was universal in Old Japan, and that of registration was also, so far as appears, without exception.

The document constituting the pledge, says Art. 120, " must

contain, in addition to a precise description of the realty, the amount of the claim and the interest." Certainly the people of this country will not be put out of countenance by the new-fangled notions, for this, for instance, is what a deed of pledge customarily contained in Shinano *kuni*: "A recital that the description of the plot by area, grade of soil, and name, agrees with that contained in the land register; a recital that a specified sum of money has been borrowed for a specified term of years; a stipulation that the property may be redeemed on the expiration of the term by paying the amount of the debt; and a stipulation that all taxes and charges shall be paid by the creditor during the term. If the description of the piece of land takes up more than one page, it is put on a separate paper, which is also attested by the village officers and is duly referred to in the principal instrument." And what terrors can the Code have for a community accustomed to the following process, which obtained in Echigo *kuni* for the registration of hypothecs: "The instrument is countersealed by the debtor's company and transmitted with a petition to the ward representative; the latter searches the register to see whether a prior mortgage exists, enters in the register of the ward assembly the debtor's name, the amount borrowed, the term, and the interest, certifies by inscription the genuineness of the instrument, and hands it to the elder, who examines, endorses, and seals it?"

The Code prescribes unconditionally (Art. 125) that the creditor "shall pay the taxes and other annual imposts." The Tokugawa rule was equally plain and insistent, and was directed against all the various forms of evasion of this just principle. "Any provision that, while the pledgee shall cultivate the land and take the profits, the pledgor shall nevertheless pay the taxes and render the local services; or that the pledgor who attorns as tenant of the pledgee shall render the local services; or that the pledgor shall attorn as tenant of the pledged land and shall pay and render taxes and services . . . is unlawful." The Code perpetuates (Art. 126) the old rule that the creditor is (in the absence of special contract) to take the profits of the property, if it is cultivated or forest land, in

lieu of interest, thus taking the risk of good or bad crops. In hypothecs, on the contrary (where the debtor keeps possession), the creditor of course gets only the interest on his loan. The Tokugawa Courts enforced this rule strictly, and where, for some reasons, a pledge of realty proved invalid, they treated it as a hypothec and reduced the rental due from the tenant-debtor to the rate of legal interest.

*(To be continued.)*