THE ADMINISTRATION OF JUSTICE IN JAPAN.

II. The Present Codes.

The rule prescribed for the Japanese judges in the decision of cases is to consider first the statute law, if any applies; second, whatever custom may be brought to their knowledge; third, natural equity. For twenty years past a system of Codes, based on Western legislation, has been in preparation. Ever since the drafts of the Codes were published, some four years ago, they have been constantly studied and the public has been prepared for their final enactment. All have now been enacted, but the Civil Code does not go into operation until January 1, 1896. These Codes we must now briefly notice.

The Codes of Crimes and Criminal Procedure were made by M. G. Boissonade, an eminent French jurist. M. Boissonade is seventy-one years old, and until 1873 was for twenty years an instructor in the Paris Faculté de Droit. He has for twenty years past been in the Japanese service as legal adviser to the Government and professor in the Imperial University. The Criminal Codes were begun by him in 1874 and completed in 1879. After passing through the hands of a commission they went into force in January, 1881. The Civil Code was begun by him in 1879, finished in 1889, and promulgated in 1890, to take effect January 1, 1893, but that date suffered a postponement to the one above-mentioned.

The Code of Civil Procedure was prepared by Dr. Raesler, published in draft form in 1886, and promulgated in 1890, taking effect January 1, 1891. The Commercial Code was begun in the early part of the last decade by the same jurist, and was at first promulgated with the Code of Civil Procedure, to take effect at the same time; but a subsequent postponement was made, and now a portion only has gone into effect, the rest being likely to go into effect at an early date. The Law of Organization of Courts was prepared by H. Otto Rudarff, the son of an eminent German jurist of the last generation, and went into force November 1, 1890.

The Codes of Crimes and of Criminal Procedure are now undergoing revision, and it would be improper to attempt any specific criticism on their provisions. A brief summary only will be given. The Code contains 430 articles, divided into four books: I., General provisions; II., Crimes and Delicts against the general welfare; III., Crimes and Delicts against the person and property of individuals; IV., Contraventions. We may notice here the leading classes of offences and the leading penalties.*

It is useless to mention the numerous crimes and offences against the general welfare and against individuals, which are found in the codes of all countries, and of which the enumeration in the Japanese Code is very thorough. For example we find—apart from the principal crimes and offences—the fraudulent exercise of rights by persons who have forfeited them; destruction of or damage to thoroughfares; violation of a dwelling-house; employment of deceit or force to obstruct the sale of rice or other alimentary produce of general and indispensable use, whether at public auction or in industrial or agricultural works; employment of deceit or force against masters or workmen with the object of appreciating or depreciating wages; participation in suicide by instigation or assistance rendered; abandonment of children, the aged, the sick or the infirm; abuse of confidence in all its forms; embezzlement of goods belonging to the accused himself but seized by public authority; destruction of sluices or dykes, and so forth.

The opium evil is struck at from all quarters. "Whoever shall make, introduce, or offer for sale, in Japan, opium intended for smoking, shall be condemned to hard labor for a term;" minor confinement awaits him "who shall make, introduce or offer for sale instruments or apparatus for smoking opium." The same penalty is awarded to any one who shall provide a place for indulging in smoking and shall have derived personal profit therefrom, or any one who shall have

*This account of the Criminal Codes is abridged from a careful article by Professor G. A. Van Hamel, of the University of Amsterdam, in the "Revue de droit international et de legislation comparée" for 1882.

incited another to make use of opium. Lastly, any individual who shall smoke it shall be punished with imprisonment with hard labor for from two to three years, and any one who shall merely be found to be the possessor or depository of opium for smoking or implements for smoking it, incurs imprisonment for from one month to one year.

Other offences against the public health are fully covered. In the same chapter, Section II., "on the adulteration of public waters," that is to say of potable waters, "so as to render their use impossible or hurtful to the health," punishes this offence with imprisonment and fine, and, in case of sickness or death resulting, with the penalties proclaimed for wilful blows and wounds followed by like results. By Section IV., "on breaches of the regulations for dangerous or unhealthy industries," the exploitation of these industries should conform to the necessary authorization and prescribed rules, under pain of fines of some magnitude; and if sickness, homicide, or personal injury ensues from the breach, the penalties applicable to homicide and corporal injury through imprudence are enforced. The same system is followed in Section V., in the case of the sale of drinks or food hurtful to health, and the sale of venomous or poisonous objects without regard to the special regulations, and in Section VI., in the case "of illegal practice of medicine."

The dreaded cholera is aimed at in another chapter, dealing with "Infractions of sanitary regulations," that is to say those regulations which, in times of epidemics or epizootics are adjusted to prevent the development of the evil by communication, or to forbid temporarily the ingress of persons or merchandise from a district presumably infected with an epidemic disease (quarantine). The latter infraction is punished with simple imprisonment from one month to one year, and a fine, with augmentation in one degree for the captain of the ship infringing the prohibition or allowing it to be infringed by other persons.

We may here remark as a curiosity the contravention, punished with one day's detention or from ten sen to one yen fine, of those who have themselves tattooed or make a business of tattooage.

Generally speaking, one is struck by the relative lightness of the penalties awarded to these diverse offences, many of which constitute injuries to the most sacred rights, especially if we compare them with European Codes. We can note, it is true, an exception to this rule—imprisonment with hard labor for from one month to six months, with a fine of from five to fifty yen, pronounced "against all persons found in the act of playing games of chance;" against "those who may knowingly furnish a site for players;" and against "those who may organize a lottery to derive therefrom a personal profit."

Death occupies the first place among the *Principal Penalties of Crimes*. It is executed in the English manner, by hanging; and further, according to the English system, adopted at the present day in Germany, the execution takes place in the interior of a prison in presence of persons designated. The number of crimes for which the pain of death is awarded is not excessive. It follows high treason only in cases of attacks achieved or attempted upon the person of the Emperor, Empress, Empress-dowager, or Prince Imperial, heir presumptive to the throne; attacks consummated (not merely attempted) upon the person of a member of the Imperial family; participation as instigator or commander-in-chief in civil war or armed insurrection whose object is to overthrow the Government of the country; and—for Japanese subjects—bearing arms against the nation or its allies, and rendering direct assistance to an enemy. Next come, as in many other legislations, assassination; actual poisoning, that is to say, murder by means of poison; murder preceded or accompanied by acts of barbarity; murder having for its aim to prepare or facilitate another crime or misdeed contemplated by its author or to aid in his impunity; parricide in the sense of the French Code—murder of any *ascendant;* wilful incendiarism of inhabited structures, ships, boats, or railway carriages containing travellers. There are other capital offences not, perhaps, always considered as meriting the extreme penalty of the law; they are burning of edifices, houses, shops, ships or vessels by persons assembled in seditious bands, the penalty attaching alike to the direct authors of the crimes and the chiefs and

ring-leaders of the bands in question, if having had cognizance of these acts they have not prevented them; throwing a train off the rails, or ship-wreck caused wilfully and with culpable intent, if the death of a person ensues; false witness against an individual who has been condemned to death and executed, if the false witness is convicted of having had the intention of bringing about the capital condemnation; the act of him who has wilfully caused to sink or founder any ship or vessel containing people, if the death of a man ensues therefrom; and even robbery with violence if homicide is a result.

The infraction provided for by Articles 363 and 364 deserves to be particularly noticed, because these Articles, like many others, bear witness to the great value that Japanese legislation attaches to family ties, especially in the ancestral line. The pain of death is pronounced upon every unjust and wilful act of a descendant, resulting in the death of an ancestor; blows and wounds, sequestration, threats, abandonment, privation of sufficient nourishment and other attentions necessary to health, or even defamation.

The principal penalties for crime are, next to the pain of death, for common crimes:—*Penal Servitude*, employment upon "works determined by the regulations," for men, in an island, for women and girls, in a prison situated in the interior of the country, whether *for life* or *for a term*—from twelve to fifteen years; next, *Confinement*, in a prison situated in the interior of the country, where the convicts are subject to labor determined by the regulations, whether in *major* confinement, from nine to eleven years, or *minor* confinement, from six to eight years. *Political* criminal penalties are, below the death forfeit:—*Deportation*, that is to say transportation to an island, where the convicts are kept in a special prison without being obliged to work, or after a certain time, on the decision of the Government, outside the prison in an allotted portion of the island. This is for *life* or *a term*—sixteen to twenty years. Next, *Detention* in a special prison situated in the interior of the country, also without enforced labor, either *major* detention from nine to eleven years, or *minor* detention from six to eight years. We have here, in short, the penalties, and dis-

tinctions of penalties, that are found in many European legislations, and Japan has been able to choose more easily than Occidental States, in consequence of the quantity of islets which belong to her.

The principal penalties for misdemeanor are:—*Imprisonment* in a House of Correction, whether with enforced labor, *major* imprisonment, or without work, *minor* imprisonment,—two penalties whose maximum and minimum are determined by law, for each breach, between eleven days and five years; and Correctional *Fine*.—The penalties for Contraventions (*contraventions*) are *Detention* (*Arrêts*) in a House of Detention without enforced labor, and simple police *Fine*. Fines which are not paid within a certain period may be converted into simple imprisonment or detention.

The Code of Criminal Procedure is founded very closely upon that of France—a model which can hardly be considered as advanced as the Codes of some other nations of Europe. In many features, however, Japan has gone beyond her model. The Code recognizes provisional liberty in all cases, as the French Code has done since the modificative law of the 4th of July, 1865. It specifies the cases in which there may be decreed an "order to produce" (respectively a warrant to arrest and a warrant to detain):—"if the person summoned has no fixed residence; if the judge fears that he may take flight or cause the disappearance of the proofs existing in his possession; if he (the judge) fears that he may put into execution attempts or criminal threats." It prescribes that "the preliminary judge must not use, to obtain from the accused the proof of his guilt, either threats or false allegations;" and that the accused may "obtain a copy of the instrument containing his own declarations;" that the preliminary judge "will summon to appear before him every person who has been designated to him as a witness by the Public Minister, by the prosecutor, or the accused." In all cases "where the persons designated to be summoned are numerous either on the side of the prosecution or on that of the defence, the judge may confine himself to calling, in the first instance, for each side the five persons, in correctional matters, and the ten in

criminal cases, who have been first suggested to him or whom he deems the best informed." Let us not forget, lastly, the little detail of Article 152, providing that, "in every prison where accused persons are confined, a copy of the two Criminal Codes shall be held at their disposal," always without commentaries or commentators; that is to say that, according to Article 150, an advocate can only speak to his imprisoned client in the presence of an officer.

As to the procedure before Jurisdictions of Judgment, and as for the means of appeal, the Code has sanctioned without reserve the great principles of publicity, prompt process, oral pleading and appeal, which must always remain the principles which have become inseparable from civilization. Conformably to the rule generally received upon the continent of Europe, public action is directed by the Public Ministry, represented by Government Agents in the case of the police courts, and Procurators-General in the case of the other courts, whose functions are: "to search out offences; to require, at the hands of the judges, reports of examinations and the application of the law to offences charged; to cause to be executed the orders and decisions of Justice; to defend before Justice the interests of Society."

"In fine," says M. Van Hamel, "the Japanese Code is in no respect inferior to the French Code of Criminal Procedure in its present form. Yet more, it is superior to its model as well in some fundamental provisions as in its form, order, system of provisions, and precision of terminology."

We take up now the judicial system.* The Law of Organization of Courts has 144 articles and falls into four parts. The first treats of Courts and Public Prosecutors, and is in five chapters. 1. General provisions; 2. District Courts; 3. Provincial Courts; 4. Superior Courts; 5. Supreme Courts. The second treats of the Officers of Courts and Public Prosecutors' officers, embracing: 1. Preparation and other requisites;

*This account of the Organization of Courts and the Code of Civil Procedure is abridged from an article by H. Otto Rudarff, the author of the former, in the "Mittheil de Deutschen Gesellschaft Ostasiens," 1891, Heft 41.

2. Judges; 3. Public Prosecutors; 4. Clerks of Courts; 5. Bailiffs; 6. Attendants. The third part treats of the transaction of judicial business: 1. Sessions; 2. Language; 3. Consultation and Delivery of Decisions; 4. Rules and Orders; 5. Calendar and Holidays; 6. Mutuai Assistance. The fourth part treats of the administration and supervision of the different branches.

I.—The ordinary courts, exercising jurisdiction in all matters not specially excepted as above, are as follows:

1. Ku-Saibansho (District Courts).
2. Chiho-Saibansho (Provincial Courts).
3. Koso-In (Superior Courts).
4. Daishin-In (Supreme Courts).

With the exception of the first these are all Courts of Session, the requisite numbers being in the Provincial Courts three members, in the Superior Courts five and sometimes seven, in the Supreme Court seven.

Each Sessional Court is to have several divisions for Civil and Criminal business. In these as in the District Courts (which are provided with several single judges) a division of business and an order of substitution is to be arranged, unless it is left to the option of those concerned.

The jurisdiction of the ordinary courts, in regard to the classes of cases cognizable by each, is built up in regular order from the District Court as a basis.

I. *District Courts.* 1. These take charge of civil cases involving claims to the amount of 100 yen, and of other cases (without reference to the amount claimed) in which an exact knowledge of location is required or which must, as far as possible, be decided in a particular locality, such as suits involving rents, boundaries, possession, and a few other matters of minor importance. They have cognizance also of suits on contracts of employment, for terms of not more than one year, of suits between travellers or guests and innkeepers or carriers concerning fares, charges, and baggage. It will be seen, on comparing the two classes of cases, that the District Court, as heretofore, in Japan and as in our country, has no jurisdiction over suits involving the title to property. 2. These

courts have also the oversight of guardianships, the management of the local ship and land registry offices, the charge of the register of traders, and finally the registry of such patents, trade-marks, and samples as are registered in the Patent Office, a function whose importance can be proved after it has been practically exercised. 3. They have jurisdiction also of criminal cases, not an original jurisdiction, for the summary treatment of these is reserved for the police, and takes precedence of that of these courts.

II. On the foundation of the forgoing jurisdiction is built up that of the Sessional Courts.

The Provincial Courts are the next courts of higher instance from the District Courts, that is, they entertain appeals from the decisions of the latter. 1. They have original jurisdiction of all civil cases other than those already enumerated, except suits against members of the Imperial Family; and also of all other criminal cases, except treason and capital crimes and accusations against members of the Imperial Family punishable by imprisonment. 2. These courts have exclusive jurisdiction of bankruptcy matters, as under the former law, and as under the Code Napoleon.

III. The *Koso-In* or Superior Courts come next. The law recognizes only one appeal, and of the decision on this appeal only one review. Objections to judicial decrees other than judgments are regulated by the Codes of Procedure and by special laws. The plan throughout is that the Superior Court shall be a Court of First Appeal for cases of which the Provincial Courts have original jurisdiction and a Court of Review for cases of which the latter have appellate jurisdiction. Neither civil nor criminal cases coming from the District Courts can be taken to the Supreme Court. The Superior Court has in addition jurisdiction over suits against members of the Imperial Family.

IV. 1. The Supreme Court is a court of review (final appeal) for all except District Court cases and a few special classes, and is the final court of redress. The interpretations of law announced by it are binding on all lower courts.

2. The Supreme Court is, however, after the pattern of the

German Imperial Court, a court of original and exclusive jurisdiction for treason and capital crimes.

After the Restoration, the modern office of Public Procurator was adopted for criminal cases, and now, by the Code of Civil Procedure, the assistance of this officer is required, as in France, in certain civil cases. The Law of Organization of Courts provides that in each court there shall be one or more Public Prosecutors. They shall institute prosecutions in criminal cases, cause them to be carried out, bring public suits, and see that the penalties imposed by courts are executed. They are empowered to express their opinions in civil cases, as already said; and to exercise such supervision over the administrative business of the courts as falls by law to their duty as guardians of the public interest.

In each court is a clerk's office for the discharge of all clerical duties. For serving summons and execution, bailiffs are attached to each court.

Before appointment to the position of Justice or Public Prosecutor two legal examinations must be passed. They are competitive, a choice however being reserved among those standing highest. These requirements observed, the candidate is placed on the eligible list; there is, however, no certainty of his ultimate selection. But should he be nominated, he must be employed as soon as a vacancy occurs. As yet he is only a supernumerary, and can be employed only in the District and Provincial Courts; in the latter only one Supernumerary Justice can be present in a Session. The appointment from the eligible list is made by the Emperor, but the actual employment in a specific position (except in the case of Presidents of Superior Courts and Chiefs of Divisions in the Supreme Court) is given by the Minister of Justice.

Graduates of the Imperial University are exempt from the first examination. Any one who has been for three years Professor or Advocate is qualified for admission to the higher positions without further examination or preparation.

Up to the present time the position of judges has been such that they could be removed at any time, and their salary

lowered or taken away; nor could they have any claim to a pension. All of these circumstances contributed to injure the position of judges and the interpretation of the law. The aim of the new law is above all things to make the judge independent, at every turn, not only of the Government but also of the public. This is the object of the provisions forbidding judges to hold any other public office, or even to take any public part in politics. Nor can they without their consent be transferred to any other office, or to another court, or be removed, or suspended, or have their salary reduced except by way of disciplinary or penal punishment. A law as to disciplinary punishments for judges was published August 20, 1890. The penalties provided for are reprimand, reduction of salary, transfer, provisional suspension, dismissal.

Judges are guaranteed a pension, and they cannot be retired against their will except by resolution of a Superior or Supreme Court on the ground of mental or physical incapacity.

The third part of the law occupies itself with provisions touching the Sessions of Court, the language to be used, Rules of Order for Courts, etc. The language is of course to be Japanese; but for the benefit of those unacquainted with the vernacular an interpreting department is provided, and when all concerned are acquainted with a particular foreign language the President may permit the proceedings to be carried on in this language. The court year coincides with the civil year. Vacation lasts from July 11th to September 11th. The holidays provided in the draft from Christmas to January 6th were struck out.

The Code of Civil Procedure is founded directly upon the German Code and differs from it only in minor particulars. Among the chief changes may be noted the full adoption of proof by rational methods (not the formal party-oath) and the securing of evidence by examination on the part of the judge and also (practically) a cross-examination by the opponent.

Moreover, the Japanese law does not provide for compulsory attendance, but it provides that the non-appearance of a party shall be taken against him. The court has the right to take the allegations of the opposite party as proved.

The German Code of Civil Procedure is divided into ten books: I. General provisions as to Judges, Parties, Proceedings; II. Proceedings in Lower Courts; III. Appeals, Reviews, Objections to Rulings; IV. Reopening of Proceedings; V. Documents and Suits on Negotiable Instruments; VI. Suits relating to Marriage and Guardianship; VII. Demands; VIII. Execution; IX. Public Summons; X. Arbitration. Out of these ten books, eight have been made, the sixth being omitted entirely and its topics being relegated to the still unpublished first book of the Civil Code, while the seventh book is placed in the second in the part relating to proceedings before District Courts.

The Commercial Code also follows the German rules with fair closeness. It has three books in all. The contents are as follows:

Book I. (Arts. 3–823), Commerce in General.

1. Commercial Matters and Merchants; 2. Commercial Registry; 3. Commercial Houses; 4. Commercial Books; 5. Agents and Employees; 6. Commercial Associations; 7. Commercial Contracts (including stipulated penalties, powers of attorney, prescription, running accounts, pledge, liens, etc.); 8. Agents, Brokers, Factors, and Carriers; 9. Sales; 10. Credit; 11. Insurance; 12. Negotiable Instruments.

Book II. (Arts. 824–977) Maritime Commerce.

1. Ships; 2. Ship-owners; 3. Ship's Creditors; 4. Masters and Seamen; 5. Contract of Affreightment; 6. Average; 7. Bottomry; 8. Insurance; 9. Prescription.

Book III. (Arts. 978–1064) Bankruptcy.

1. Adjudication of Bankruptcy; 2. Consequences of Bankruptcy; 3. Exempt Property; 4. Sequestration of Effects of Bankrupt; 5. Collection of Assets; 6. Proof of Claims; 7. Determination of Dividends; 8. Payment of Claims; 9. Criminal Bankruptcy; 10. Personal Consequences of Bankruptcy; 11. Postponement of Payment.

In regard to the provisions as to Commercial Associations, it is to be noted that the law recognizes partnerships (*Kollectivgesellschaften*), limited partnerships (*Kommanditgesellschaften*),

joint-stock companies (*Aktiengesellschaften*), and the ordinary case of association in a venture on joint account. Silent partners cannot exceed seven in number; a joint-stock company must have at least seven members and requires Government authorization. Shares must be of a minimum face value ranging from 20 to 50 yen.

The Civil Code, the most bulky of all these products of two decades' legislative activity, is in five books: I. Persons; II. Property; III. Acquisition of Property; IV. Suretyship, Real and Personal; V. Proof.

Book I. (which is preceded by a statute regulating the Application of Laws—including our "Conflict of Laws") is divided thus into chapters: I. Exercise of Private Rights; II. Nationality; III. Relationship; IV. Marriage (Conditions, Formalities, Proof, etc.); V. Divorce; VI. Parent and Child; VII. Adoption; VIII. Dissolution of Adoptive Relationship; IX. Parental Power; X. Guardianship; XI. Emancipation; XII. Interdiction (guardianship of incapables); XIII. Family Membership; XIV. Domicile; XV. Absence; XVI. Registration.

To note even cursorily the special features of this book would be to expound all the peculiar and interesting features of Japanese family life, similar as they are in many respects to Continental custom, but radically different from Anglo-Saxon individualism.

Book II. is thus arranged: Part I. Rights to Things. Chapters: I. Ownership; II. Usufruct, Common, and "Habitation;" III. Lease, Emphytensis, and Superficies; IV. Possession; V. Real Servitudes. Part II. Rights *in Personam* and Obligations. Chapters: I. "Cause;" II. Agreements; III. Effects of Obligations; IV. Warranties; V. Extinction of Obligations.

Book III. is the longest. Chapters: I. Occupation; II. Accession; III. Sale; IV. Exchange; V. Composition; VI. Partnership; VII. Aleatory Contracts; VIII. Loans for Consumption; Perpetual Annuities; IX. Loans for Use; X. Deposit; XI. Agency; XII. Hiring of Services; XIII. Succession; XIV. Donation and Legacy; XV. Marriage.

Here, again, under "Succession," we meet with provisions peculiar to the family system of the country.

Book IV. is in two parts. Part I. Personal Suretyship. Chapters: I. Guaranty; II. Solidarity; III. Indivisibility. Part II. Real Suretyship. Chapters: I. Lien; II. Pledge of Movables; III. Pledge of Immovables; IV. Preferred Claims; V. Hypothec.

Book V. deals with Proof. Chapters: I. Personal Experience of the Court (including Views of Places and Experts); II. Direct Evidence (including Writings, Admissions, Notarial Recognizances, Testimony, etc.); III. Indirect Evidence (dealing solely with Presumptions.)

In this book comes also, as Part II., the treatment of Prescription.

Of the doctrines of the Code little can be said here, and that little will be reserved for the next division of our subject. The Civil Code is an embodiment of the latest results of modern French jurisprudence, rather than an imitation of the Code Civil. The text is clearly and accurately phrased, and the *motif* is carefully and minutely elaborated. If the whole work differs essentially in style from that with which we naturally compare it, the Draft German Code and its *motif*, the difference is to the advantage of Japan. The principle of the German authors seems to have been to generalize as widely as possible, to express no detail where it could be gathered by implication from some existing principle, and to contrive a statement of law, complicated perhaps, but invulnerable at every point; while the *motif* assumes a general acquaintance with legal science, and sets forth merely what is necessary by way of justification. The new Japanese Code, on the other hand, gives expression to every salient feature of the subject, even though it may be deducible from something already laid down, and does not hesitate to repeat a principle in every place where it may have an application; while the *motif* confessedly begins at the beginning of things for the benefit of students who have not access to European legal literature.

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