

THE CIVIL CODE OF JAPAN COMPARED WITH THE FRENCH CIVIL CODE.

By KAZUO HATAYAMA, LL.D.

William L. Storrs, Lecturer in the Yale Law School, 1901-2.

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IV.

BOOK I.—GENERAL PROVISIONS.

Capacity.—The French Code fixes the age of majority at twenty-one for both sexes (Art. 388). The Japanese Code fixes it at twenty. In Japan in feudal times the Samurai was expected to render military service at fifteen. According to the conscription laws which are now in force the duty of every subject to render military service commences at the age of twenty. It will thus be seen that the framers of the Japanese Code simply followed the existing law.

The French Code recognizes a middle status between minors and persons of full majority, which may be called emancipated minority (Book I, tit. X, ch. III). Such emancipation may take place by the marriage of minors or by the declaration of the father or in the absence of the father, the declaration of the mother, in favour of minors who have reached the age of fifteen. In the German Code majority is fixed at twenty, but minors who have reached the age of eighteen may be declared to be of full capacity by decree of court. These exceptions are founded on necessity and in some shape are found in the legislation of nearly all countries. Japan has chosen to leave it to the discretion of minors' legal representatives, to authorize minors to administer their own property or to transact business without any interference on the part of the courts (Arts. 5, 6). The legal representatives may define the sphere of action permitted to the minors, and they may withdraw the authorization after granting it, if they believe that the franchise works harm to the minors. We have, in my opinion, selected a plan which on the one hand is simple and on the other meets all requirements.

According to Art. 224 of the French Code, an authorization of the court is necessary for the wife of a minor to enter into contract or to sue in a court of law. In this case, too, we have dispensed with the interference of the courts. Our Code provides, in Art. 18, that a minor husband may, with the consent of the legal representatives, give validity to the acts of his wife.

Art. 1307 of the French Code, provides that a mere declaration by a minor, of his majority, does not prevent him from avoiding acts done under such declaration. On the other hand Art. 20 of the Japanese Code, is to the effect that if a person without legal capacity uses fraud for the purpose of causing it to be believed that he has such capacity, he is estopped from pleading his incapacity in avoidance of acts thus performed by him. The term "a person without legal capacity" is used in order to include persons other than minors.

Domicile.—The principal place where a person lives is regarded as his domicile (Art. 21). This is the definition of the Japanese Code and in effect is the same as the French, viz., the domicile of every Frenchman, in regard to the exercise of his rights, is at the place where he has his principal establishment. The German Civil Code defines the domicile as the place where a person *always* lives,

As to the question whether a person can have several domiciles at the same time the jurisprudence of different countries indicates considerable dissimilarity. The German Civil Code expressly states that a person may have several domiciles at the same time. It is clear from the definition of domicile above cited that the Japanese Code takes the contrary view, for no person can have more than one principal place of living. Still this does not prevent a person from acquiring a special domicile for a specific purpose. The French Code presumes that a person retains his domicile until he acquires a new one. In the Japanese Code, where a person has given up his old domicile and has not yet acquired a new one, the place of residence is to be regarded as his domicile.

Disappearance.—In regard to persons who are absent or have disappeared, the French Code, in Art. 112 and in subsequent articles, divides absence into three periods and makes different provisions for each period. In the first period, or period of *presumptive absence*, the chief aim of the law is to protect the interests of the absentee. In the second period, or the period of *declared absence*, the same object is had in view, but the interests of the interested parties are also taken into consideration and would be successors are placed in possession of property left by the absentee. In the third period such possession becomes ownership. However, there is no legal presump-

tion of death even in the third period. It will be observed that in the French Code, as soon as a person leaves his domicile or residence and his whereabouts becomes unknown, he comes under the operation of the law relating to absentees. In this we have not followed the French law. The Japanese Code provides for the protection of property of persons who have disappeared, but after the lapse of a certain period, on the application of an interested party, the Court makes what is called an *adjudication of disappearance*, which is equivalent to a declaration of the death of the missing person, and has all the legal consequences of actual death, not only in regard to his property, but also his personal relations.

Artificial or Juridical Persons.—There is no mention of juridical persons or corporations in the French Civil Code, although there are provisions in the Commercial Code for the incorporation of commercial bodies. Nevertheless modern society has recognized the necessity of corporate organizations for purposes other than those that are purely commercial. The Japanese Civil Code devotes Arts. 33, 34 to this subject. Two kinds of juridical persons are recognized, viz., association (*Shadan*), and trusts (*Zaidan*). The objects for which these corporations may be formed are defined in Arts. 34 and 35. If formed for religious worship or teaching, for charity, for education, for art or for any purposes beneficial to the public, and the object of which is not to make a profit out of the conduct of their business, they come into existence in virtue of permission of the competent authorities. But if formed for the purposes of profit, they are obliged to comply with the conditions prescribed for the creation of commercial companies.

Things.—The Roman juriconsults divided things into corporeal and incorporeal. By corporeal things they meant: 1st, Things strictly so called, that is external tangible objects, not persons. 2nd, Persons considered as subjects of rights and duties. 3rd, Acts and forbearances considered as objects of rights and duties. Incorporeal things consisted of rights and duties themselves, e. g. *jus hereditatis*, *jus servitutis*, *obligationes quoquo modo contractae*. This classification is followed in the French Code and to a certain extent finds recognition in the English common law. But no practical advantages flow from this division. On the contrary, by thus bracketing together the subjects of rights and rights themselves, by thus bringing under the same head things which belong wholly to different species, a confusion of ideas becomes unavoidable and the logical distinction of rights *in rem* and rights *in personam* is obscured. The Japanese Civil Code adopts the simple and original meaning of the

term "things" and applies it exclusively to material objects (Art. 85).

Expression of Intention.—In the French Code, the principles relating to expression of intention are treated under the heading of agreements (*consentement*). But correctly speaking the question of the expression of intention is not limited to agreements. It has an equally important relation to unilateral and other legal acts, and therefore in the Japanese Code it is placed in Book I, where legal principles common to all legal acts are enunciated. The French Code provides that contracts founded on error are voidable, but does not make them void *ab initio*, and it also enumerates cases in which such contracts can be avoided. The provision of the point in the German Code is to the effect that in cases where, if there had been no error, there would have been no expression of intention, such expression is void *ab initio*. The enumeration of cases in the French Code may not be sufficient to meet all contingencies likely to arise under varying circumstances, while to decide by the consideration of subjective reasons, as in the German Code, would unnecessarily increase litigation. The Japanese Civil Code provides that if in an expression of intention, a mistake in the essential elements of legal acts is made the expression is void, thus dispensing with the enumeration and the subjective consideration of the state of mind of the parties.

Regarding an expression of intention made to a person in another place, the question when it begins to produce a legal effect is an important but difficult one. On this point the opinions of jurists differ and there is a lack of uniformity in legislative precedents. No special provision on the subject exists in the French Code. The Japanese Code adopts as a general principle the rule that an expression of intention made to a person at a distance takes effect from the time that notice reaches him (Art. 97), but exception is made in the case of contracts between persons living in different places. In such cases contracts are concluded when notice of acceptance is despatched. On theoretical grounds the general principle is to be recommended, but in practice, and especially in business matters, it would be more convenient and more conducive to the interests of the parties to have their rights and duties determined with as little delay as possible. Besides, the speed and certainty of modern means of communication leave little danger as to the miscarriage of notices of acceptance.

Agents.—The French Code treats agency and mandates under the same head in Book III, Tit. 13. But agency is created not by contract alone. In many cases it is the result of the operation of

law. The Japanese Code is right in placing general provisions relating to agency in Book I, and giving a special place to mandates as a species of contract, in Book III. As to the effect of the cessation of an agent's powers with respect to third persons, Art. 112 of the Japanese Code provides that the extinction of the right of representation cannot be set up against a third person acting in good faith; but this does not apply if the third person is ignorant of the fact by reason of his own negligence. This is materially the same as the provisions of the French Code. The German Code goes further and declares that a third person must be notified of the fact of such extinction in order that it may be set up against him (Art. 170, 171, 172). It may be questioned whether the German Code does not go too far in its endeavor to protect the rights of third persons.

Acts that are void and voidable.—According to Art. 1304 of the French Code the decree of a court is essential to nullify or to rescind a contract. Regarding acts which are void it is provided in the Japanese Code that acts void in themselves do not acquire validity by ratification, but if a party to an act ratifies it knowing its invalidity, such ratification is regarded as the performance of a fresh act. As to the manner of rescinding a voidable act, the Japanese Code, like the German Code, has adopted a simpler course by providing, in Art. 123, that in cases where the other party to a voidable act is specified, rescission is effected by an expression of intention made to him.

Conditions.—The time when the enjoyment of a right is to begin or to end may be made to depend on events. The French Code provides that such an event must in fact be a future and an uncertain one. According to the Japanese Code an event may be made a condition, the happening of which is uncertain to the parties. But it is not necessary that it should be a future event because from one point of view nothing in this world is precarious. Everything may be said to have its predestined end. But, subjectively considered, to human eyes many things are uncertain, and consequently there is no reason why such events should not be made conditions for beginning or ending the enjoyment of rights. Art. 131 provides that "when the condition has already happened at the time of the legal act, the latter is unconditionally valid if the condition is precedent, and is void if the condition is subsequent," thus showing that the condition need not necessarily be a future event.

As to the effect of the fulfilment of the condition, Art. 1179, of the French Code, enacts "*la condition accomplie a un effet rétroactif au jour auquel l'engagement a été contracté, si le créancier est mort avant l'accomplissement de la condition, ses droits passent à son*

héritier." According to the German Code the condition does not relate back to the date of the contract (Art. 158). The opinions of jurists on this point differ. The Japanese Code provides as a general principle that an act subject to a condition precedent takes effect from the time of the happening of the condition and does not relate back to the date of the contract. But where there is an express agreement to the contrary, legal effect is given to such an agreement (Art. 127). It is a fundamental principle of jurisprudence that laws have no retroactive effect; and so with reference to legal acts it is ordinarily wise to confine their effect to the future; for by giving them a retroactive effect not only complicated questions may arise between the parties, but the rights of third persons may be disturbed.

Prescription.—The French Code treats of prescription in Book III as a mode of acquiring ownership and the German Code places extinctive prescription in Book I (General Rules), and acquisitive prescription in Book III (Rights *in Rem*). Prescription does not relate to ownership alone, neither does acquisitive prescription have exclusive reference to rights *in rem*. Consequently neither the French nor the German arrangement seems to be satisfactory. As to the nature of prescription there are two ways of viewing it. It may be considered as the presumption of law in regard to the acquisition of rights or extinction of duties, in fact, as a principle of the law of evidence; or it may be considered as a title for the acquisition of rights and a cause for the extinction of duties. The Japanese Code has adopted the latter theory and enacts that the possession of a thing with an intention of owning it for a certain period creates a title of ownership, and the non-user of a right for a certain period extinguishes the right.

The *raison d'être* of prescription is that property should be entrusted to the persons who take good care of it and who are likely to make improvements upon it, to the indirect benefit of the nation, and should not be left to persons who do not make profitable use of it. It seems reasonable therefore that prescription should be made a title for acquiring ownership and a cause for losing it, rather than that it should be treated as a mere matter of evidence. As to movables, by Art. 2279, of the French Code, the principle "*possession vaut titre*" is recognized. The same principle is recognized in the Japanese Code, but not on the ground of prescription. The provision on the subject is found in Art. 192, wherein the right to exercise the right of ownership is treated as a consequence of peaceable possession in good faith. Time being an essential element in the theory

of prescription, it does not seem logical to say that a title over a movable is acquired at the same time with the act of possession, on the theory of prescription. In respect to rights *in personam* the French Code does not recognize acquisitive prescription, but there is no reason why it should be confined to rights *in rem* and the Japanese Code has wisely made it applicable to rights *in personam* as well as to rights *in rem*.

V.

BOOK II. RIGHTS IN REM.

Different kinds of Rights in Rem.—Rights *in rem* recognized by the Japanese Civil Code are nine in number. They are: Possession; Ownership; Superficies; Emphyteusis; Easements or Servitudes; Liens; Preferential Rights; Pledges, and Mortgages. In the French Civil Code, Possessions and Liens are not considered as rights *in rem*, nor does it recognize Superficies or Emphyteusis. On the other hand Usufruct, Use and Habitation occupy important places. Usufruct is defined to be a right to enjoy the property belonging to another, in the same manner as the owner, without consuming the substance itself. It may be created by law or the will of the parties, and may have relation to any kind of property, either movable or immovable. Use is a species of usufruct, the right to enjoy it being restricted to oneself and one's own family. Habitation or the right of residence is a species of use exercised in respect of a house (Arts. 578, 625, 631, 633). Hence use and habitation are rights which can not be sublet or assigned. These rights are created in France for the benefits of women. A daughter is about to marry: her father desires to give her dowry. Should he give her money she may readily spend it; should he give her absolute ownership of land or building she may be induced to sell it. A husband desires to provide for his wife after his death; the same reason obtains here, supplemented by the consideration that he may not care to pass his property entirely to his wife's kin. By creating usufruct in favor of a daughter or a widow, provision is made for her and at the same time the rights of the heirs are not impaired. It is necessary to make this species of right a right *in rem*. Otherwise if the property affected should pass to third persons, the right in question would not be available against such third persons, and the wife might consequently be deprived of her portion or the widow might be left penniless. By making it a right *in rem*, that is, making it good against all the world, the main object is secured, regardless of all

changes in actual ownership. On economical grounds, however, the advantage of such a right is to be questioned; for the person who is in the enjoyment of such a right, considering that the property over which the right is established must sooner or later revert to the owner, would naturally be slow to make any permanent improvements. On the contrary he might not hesitate to extract a maximum of profit with a minimum of thought for the permanent interest of the property. Again, an owner who is not in the present enjoyment of his property will not incur expenses the benefit of which may or may not accrue to himself. Thus nature which ought to be made to contribute its full measure to the wants of man, is only half utilized and the result is not only individually uneconomical to the parties concerned, but injurious to society of which they are components. It is undesirable, therefore, that such a right should be created if the desired object may be attained by other method, and there are such methods by which provisions can be made for persons in the situations above referred to. Annuities may be granted or rights *in personam* secured by mortgage may be given. It is not absolutely necessary to resort to so questionable a system as Usufruct, Use or Habitation. Many countries have done without it. The people governed by Anglo-American jurisprudence are not aware of it. They have attained the desired result by laws relating to trust,—a creature of equity peculiar to that jurisprudence. Hence Usufruct, Use and Habitation of the French Code, which were also found in the Japanese Code of 1890 form no part of the Code we are now considering.

General Provisions relating to Rights in Rem.—For the creation of rights *in rem* the Roman law made it a condition that certain prescribed forms should be complied with, so in the English law deeds were necessary in order to establish certain rights. The German Code (Arts. 873, 929) also requires compliance with prescribed forms for the creation of rights *in rem*. The French Code (Art. 1583), treating of sale, provides that the sale is complete between the parties as soon as there is an agreement as to the thing and the price. The history of jurisprudence shows a marked distinction between ancient and modern practice in the fact that formerly there was a strict adherence to forms while the present tendency is in the direction of simplification. A glance at the old English common law practice and the present code practice will show the truth of this statement. The Japanese Civil Code (Art. 176) boldly enunciates the principle that the creation and transfer of rights *in rem* derive their validity solely from the expression of

intention of the parties. Articles 177 and 178 make registration, in case of immovables and delivery in case of movables, essential in order to make the right available against third persons. It is to be observed that this requirement,—registration or delivery—is absolutely essential, or in other words, that in order to set up a right *in rem* against third persons, registration or delivery, as the case may be, must have been actually effected. It is no answer to say that the third person had knowledge of the transaction.

Right of Possession.—The French Code treats of possession under the heading of Prescription. The Japanese Code gives it a special place as a species of rights *in rem*. Possession, apart from being a footing for the establishment of other important rights, is in itself a right worthy of the protection of law. According to Roman law and the codes based upon that system, possession is defined to be the holding of a thing with an intention to acquire the ownership thereof. This definition is clearly too narrow, since the detention of a thing by a pledge or the holding of a thing under a contract of letting and hiring for instance, would equally be possession, although lacking the intention on the part of the possessor to acquire ownership. Yet such possession ought to be an object of the law's solicitude. The Japanese Code uses these words: "The right of possession is acquired by holding a thing with intention of doing so on one's own behalf." Thus possessory right is extended to all cases where a person holds a thing for his own benefit, irrespective of the question whether he has an intention to hold it as an owner or not.

The French definition of possession (Art. 2228) may be rendered thus: "Possession is the detention or enjoyment, of a thing or a right, which we hold or exercise ourselves or by another who holds or exercises it in our name." To call the exercise of a right, a possession betrays laxity of expression inconsistent with good legislation. We have confined the term "possession" to a right over a thing and, as I have said before, the word thing is limited to its ordinary signification; it therefore became necessary to introduce into the Japanese Code a separate section entitled Quasi-Possession, where in it is enacted that the provisions of the chapter relating to Right of Possession shall extend to cases where a person exercises rights over property with the intention of doing so on his own behalf. By this means all the provisions relating to the possession of a thing are extended to the exercise of rights over property. In the earlier Roman law the principle of quasi-possession was applied only to the exercise of the right of servitude. Later it was extended

not only to the exercise of all property right, but also to rights arising out of family relations and even of religion. Similarly in the French Code the application of this principle is not limited to property rights, but rights arising out of personal status may be made the subject of this right (French Code, Arts. 195, 196, 322). The extended application of this species of right to rights other than property rights, has been condemned by modern jurists. For instance, the doctrine of quasi-possession as applied to the right of a husband would be derogatory to modern notions of good morals and public order. Accordingly in the Japanese Code, as has already been remarked, the principle is made applicable only to the property rights.

Rights over Animals not Domestic.—With reference to the right of animals not domestic, the French Code contains a peculiar provision. In the 2d section of the chapter treating of Accession in respect of immovables, there appears a clause to the following effect: "Pigeons, rabbits and fish, which betake themselves to cots, warrens and ponds owned by another person, belong to such other person provided no fraud or artifice had been employed to entice them." Without stopping to enquire why pigeons and rabbits have been selected in preference to other birds and quadrupeds, it is difficult to conceive how the principle of accession can logically be made to apply such cases. The theory of accession is that where two or more things are united in such a manner that they can not be separated, or that separation would cause deterioration, depreciation or unreasonable expense, the ownership of the whole should devolve on the person who owned one of the things before the union was effected. Pigeons, rabbits and fish may be easily separated without any damage either to themselves or to their cots, warrens or ponds, and consequently there does not seem to be any good reason why the law should step in and deprive the former owners of their proprietary rights. The Japanese Code prescribes the effect of possession of non-domestic animals in the following terms: "A person who possesses an animal other than a domestic animal, which was formerly kept by another acquires the rights he exercises over it, if in the beginning of his possession he acted in good faith, and if within one month from the date of its escape he receives no demand from its former keeper." It will thus be seen that in this instance, according to Japanese law, the acquisition of rights is based on the fact of possession.

Possessory and Petitory Actions.—A possessory action is an action based on the mere fact of possession, while a petitory action is a suit

founded on the legal right of possession independently of the fact of possession. Upon the question whether the two actions should be concurrently allowed, the legislative precedents differ and the French and Japanese enactments on the point are diametrically opposed to each other. Article 202 of the Japanese Code provides that possessory and petitory actions do not preclude each other and that a possessory action cannot be decided upon grounds giving rise to a petitory action. The French law bearing on the subject is found in Articles 25, 26 and 27 of the Code of Civil Procedure. It is there provided that possessory and petitory actions can not be brought together, that the plaintiff in a petitory action can not be plaintiff in a possessory action, and that the defendant in a possessory action can not bring a petitory suit until after the termination of the possessory action. According to the Japanese Code, possessory and petitory actions are considered quite independent of each other. An action for the recovery of possession may be based on the mere ground of possession or on grounds other than the fact of possession. Thus the action may be the same while the grounds are different. Even a thief may, under circumstances, claim the right of possession. Consequently the right of possession may be considered, and ought to be protected, independently of the right of ownership, or of any lesser right of a thing.

Ownership.—According to Article 544 of the French Code, ownership is defined to be the right to enjoy and dispose of property, in the most absolute manner, provided the laws and regulations are not violated thereby. The sufficiency of this definition of ownership is questionable, for ownership may exist without the right of enjoyment. The Japanese Code, without attempting to define ownership, simply states what an owner can do. The chapter on this subject is divided into three sections, viz.: Limits of ownership; Acquisition of ownership, and Joint ownership. The first section opens with the proposition that an owner has, within the limits prescribed by law, the right freely to use, profit by, and deal with the thing he owns. It next declares that the right of ownership of land subject to the restrictions imposed by law, extends to what is above and below the rule: "*si utere tuo ut alienum non laedas.*" This section also deals with the question of the right to use the land of a neighboring owner, e. g., Article 210 declares that when a piece of land is surrounded by another piece of land so as to prevent access to the public highway, the owner of the former land is entitled to an outlet over the surrounding land, and Article 214 enacts that the owner of land must

not interfere with the natural flow of water from adjoining land. These rights are styled in the French law, servitudes created by law, and they are dealt with under the heading of servitudes. The French Code contains no separate section relating to limits of ownership, consequently it was necessary to describe these rights as servitudes created by law and to class them with those created by the consent of the parties.

The Japanese and French Codes similarly provide that when several movable things belonging to different persons are so united that they can not be separated without injury, the whole or composite thing belongs to the owner of the principal movable. The French Code, however, lays down minute criteria for determining which is the principal and which the accessory thing. The thing for whose use, ornament or complement, another thing has been united to it is, according to the French law, to be regarded as the principal thing. If these criteria are wanting, then the more valuable is to be regarded as the principal; if the values are equal, then the larger in size is to be considered. The framers of the Japanese Code, deeming the question of principal and accessory to be one of fact, thought it would be unwise to enter too much into details. Accordingly Japanese law leaves the solution of the question entirely to the discretion of judges who, it is presumed, are best able to do substantial justice in each case, and when it is impossible to determine which is the principal and which the accessory, the composite thing is held in joint ownership.

Superficies and Emphyteusis.—A superficies is one who has the right to use the land of another person for the purpose of owning thereon buildings, or bamboos and trees. This is the definition of the Japanese Civil Code. It is a right to use the land of another, and its object is limited to the ownership of buildings, or bamboos and trees. Bamboos and trees (*chikuboku* in Japanese) is a peculiar expression used to denote grasses, bushes, bamboos and trees, that is, all kinds of plants found in Japanese gardening. This species of right is created for residential purposes. For agricultural purposes, a similar right under the name of emphyteusis is established. There is no special provision in the French Code concerning superficies, and French jurists differ widely as to the nature of the right. Some maintain that it is ownership while others try to explain it as possession, that is, ownership of buildings, etc., or the possession of land. Both are wrong, for the ownership of land usually carries with it the ownership of whatever is attached to the land, and to recognize two sets of ownership on the same piece of land would not only be illogical, but might create unnecessary complications.

To treat it as mere possession would not satisfactorily protect the right of the superficiary. The Japanese Code, therefore, has given a special place to this right, which with emphyteusis, is the broadest right that exists as regards land next to ownership.

The definition of emphyteusis is found in Article 270 of the Japanese Code. It runs thus: "An emphyteuticary is one who possesses the right on payment of rent as a farmer to cultivate the land of another person, or to rear upon it horses and cattle." Emphyteusis differs from superficies in the fact that it confers the right to cultivate the land or to rear upon it horses and cattle and entails the payment of rent. It also differs from superficies in regard to the length of time for which it may be created. There is a special provision in Article 278 on this point to the effect that the duration of the right of emphyteusis shall be from twenty to fifty years. If a right of emphyteusis is created for a longer period than fifty years it must be reduced to that limit. There is no such provision with reference to superficies. The compensation for emphyteusis cannot be paid once for all at the time of the creation of the right, for the word rent means annual rent. This is simply the recognition of a Japanese custom which prevailed for hundreds of years previous to the codification. As to duration, however, the Code has departed from the custom, for formerly a sort of perpetual lease could be created which was interminable without the consent of the lessee, nor could the rent thereof be altered without his assent. In the French Code no such right *in rem* is recognized. The corresponding provisions may be found in the Third Book, under the heading *Du contrat de louage*, or the contract of letting, where the letting of land and houses is treated in connection with the letting of personal property and the hiring of work and labor. In spite of the fact that the framers of the Japanese Code tried to avoid the creation of rights *in rem* wherever it was possible, this species of right is given an important place as a right *in rem*. The reason is obvious: Japan has been from time immemorial an agricultural country. The land has been the chief source of revenue. Hence there were minute customs regarding the dispositions which might be made of land, among which a right very nearly corresponding to emphyteusis occupied an important place. The Code simply adopted the custom with necessary modifications.

Easements or Servitudes.—The French Code defines servitude from the standpoint of duty and says that a servitude is a charge imposed upon land for the use and benefit of land belonging to a different owner. The Japanese Code defines it from the standpoint of right. Article 280 reads thus: "A person in whom a right of

easement is vested has the right to make use of the land of another person for the benefit of his own land in accordance with the object specified in the act creating the right." The land for the benefit of which other land is used, is usually called dominant tenement and the latter is styled servient tenement. Hence the mistaken notion arises that there is a relation of right and duty between two pieces of land, that a right is vested in the dominant tenement and the corresponding duty is imposed on the servient tenement. It is well enough to speak thus figuratively for the purpose of explanation, but we must not be led to draw the false conclusion that a right can be vested in a thing and a duty may be imposed upon a thing. The above definition presupposes that an easement is created by the act of the parties. The Japanese law differs from the French on this point, as has been indicated before, for a large number of rights which are treated as limits of ownership, in the former, are classed in the latter with servitudes, both as created by the act of the parties and by the operation of law. But this should not be interpreted to mean that such a right can not be acquired by prescription, for the rules relating to acquisitive and extinctive prescription, being placed among the General Provisions are applicable to all classes of rights, unless a special and express exception is stated. Not only is no such exception made in this case, but special provisions are inserted in Article 289 and the subsequent articles for the application of the general rules of prescription.

The German Civil Code recognizes another kind of servitude which may be styled personal servitude, that is, a right vested in a person irrespective of his own land, to make use of the land of another. This is not found in the Japanese Code, the reason being that the creation of a right *in rem* over a thing owned by another person ought to be avoided when it is possible, and because there was no urgent reason for the establishment of such a right irrespective of the ownership of land.

Liens.—Four kinds of rights *in rem* remain to be noticed. They are Liens, Preferential Rights, Pledges and Mortgages. All these differ from the rights treated of before, in the fact that they may be called secondary rights for securing rights *in personam*.

The Japanese Code devotes a chapter to liens. It defines a lien in the following terms: "If a person who has the possession of a thing which belongs to another has a claim against the owner arising out of the thing in question, he may detain the thing until his claim is satisfied. But this rule does not apply to cases where the time for satisfaction has not yet arrived." "The provisions of the preceding clause shall not be applied to cases where possession had its

origin in an unlawful act." The Code then proceeds to determine what a person may, and may not do, in respect of the thing over which he has the right of lien, and ends by providing for its extinction. In the French Code this subject is not included under an independent heading, but provisions relating to it are scattered here and there as occasion or necessity arises; e. g., Article 867, where right of lien is given to the one of several co-heirs, who has incurred expenses in respect of the property inherited; Articles 1612, 1613, 1673, where rules are specified for rights of lien arising out of sales. If the main object of codification is to simplify and systematize the various rules of law, I need not dwell on the advantage of the Japanese Code as regards this matter.

Preferential Rights.—No provisions for preferential rights are found in the German Civil Code. But they are made the subject-matter of the law of bankruptcy, the reason given being that the question of preferential rights arises only when the debtor is insolvent and that therefore, they ought not be provided for in the substantive law. If this reasoning is correct, then the rules relating to pledges and mortgages ought also to be excluded from the Civil Code, for so long as a debtor can satisfy the claims of all his creditors, no questions will be raised regarding the securities for his debts.

According to the Japanese Code, preferential rights are either general or special. A general preferential right covers all the property of the debtor, while a special preferential right holds good only with reference to a particular piece of property. A person in whose favor an obligation exists, based upon any of the following grounds has a preferential right in all the property of the debtor: 1. Expenses for the common benefit, that is, the expenses incurred for the common benefit of the creditors in regard to the preservation, liquidation or distribution of the debtor's property; 2. Funeral expenses; 3. Wages of employees; 4. Supplies of the necessaries of life.

Special preferential rights are rights that can be exercised in relation to special pieces of property, whether movables or immovables. A person in whose favor an obligation exists, based on one of the following grounds, has a preferential right as regards particular movables belonging to the debtor: 1. Hiring of an immovable; 2. Lodging in an inn; 3. Transportation of travelers or goods; 4. Official misconduct by public officers; 5. Preservation of movables; 6. Sale of movables; 7. Supply of seeds, young plants and manure; 8. Agricultural or industrial services.

Special preferential rights in immovables are given when an obligation exists based on one of the following grounds: 1. Preservation of an immovable; 2. Work done upon an immovable; 3. Sale of an immovable.

The French Code provides for the protection of whatever expenses may be incurred in the last illness and also for the protection of those who supplied the purchase money of immovables, by giving a preferential right over movables in the former and over immovables in the latter case. I do not see the necessity of increasing the list of preferential rights by the inclusion of these cases. Preferential rights are special rights conferred on particular creditors to satisfy their claims in full, without any consideration whether the remainder would or would not be sufficient to meet the demands of general creditors. Such right ought to be conferred sparingly.

A preferential right is to be exercised over the thing in respect of which the right exists. It so happens sometimes that the thing is destroyed, but something else remains in its stead. A house may be burned down and a right may arise therefrom to receive the insurance money. Without special provision the preferential right will not be extended to such a case. Such provision is made in Article 304 of the Japanese Code, wherein it is stated that a preferential right may be exercised against money or other things which the debtor is to receive by reason of the sale, letting or loss of the subject of the right or damage to it, but the holder of the preferential right must make a judicial seizure of such money or thing before it is paid or delivered. These provisions are necessary to give full effect to preferential rights, but they are absent from the French and the German laws.

In case of conflict between a general preferential right and a special preferential right over the same thing, the French law gives precedence to the former (Article 2105). On this point the Japanese Code makes the contrary provision. Article 329 may be rendered thus: "If a general preferential right conflicts with a special preferential right the latter takes precedence; but the preferential right on account of expenses for the common benefit takes precedence as against all creditors who are benefited thereby." The right of a creditor who has a special preferential right is limited to a particular thing, while the right of a creditor with a general preferential right extends to all the property of the debtor; therefore, if, like the French law, precedence should be given to the latter, it is possible that the former might be entirely deprived of protection. This would nullify the reason for which such special protection is given. The Japanese

Code is in accordance with the *raison d'être* of special preferential rights.

Pledge.—Pledge, or *Shichiken* of the Japanese Code, corresponds to *nantissement* of the French Code. It is a class of security in which the possession of the thing given for security is transferred to the pledgee. It may be created in respect of movables, immovables, and rights over property. In the last case the delivery of deed or other evidence of proprietary rights takes place.

Mortgage.—Mortgage, or *Tei-to-ken* of the Japanese Code, corresponds to *Hypothèques* of the French Code. The French Code defines it to be a real right over immovables appropriated to the payment of an obligation (Article 2114). The provision of the Japanese Code may be rendered as follows: "A mortgagee has in respect of the immovable given to him as security by the debtor or a third person, without possession being transferred, the right to receive payment of his claim in advance of other creditors." It will be seen that neither the French nor the Japanese law gives the mortgagee the right to foreclose, but only gives him power to sell the property and receive payment of the obligation out of the proceeds.

In the French law "*hypothèques*" are of three classes: *hypothèques légales*; *hypothèques judiciaires*; and *hypothèques conventionnelles*. The rights of a married woman over the immovables of her husband as security for the management of her property, and the similar rights of a ward over the immovables of the guardian come under the denomination of legal hypothecation. In these cases the security is created by the operation of law. Judicial hypothecation is created by process before a court of law, e. g., by an attachment of property. Conventional hypothecations are created by act of the parties. The Japanese Code only recognizes the last species. For the protection of married women and wards, the Japanese Code gives power to the married woman and family council respectively, to demand from the husband or the guardian as the case may be, sufficient security which need not necessarily be in the form of immovables. It is also doubtful whether a preference over other creditors should be given to a creditor whose right was not originally secured, simply because he was quick in levying an attachment upon the property of the debtor. At least, that was the view of the framers of the Japanese Code and hence judicial hypothecation is not recognized by our law.

[Remainder to appear in June issue.]