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

By KAZUO HATOYAMA, LL.D.
William L. Storrs, Lecturer in the Yale Law School, 1901-2.

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VI.

RIGHTS IN PERSONAM.

General Provisions.—Whether the subject of an obligation should be capable of being estimated in money is a moot question. The French Code seems to have been based on the theory that it should be capable of being so estimated. The Japanese Code of 1890 was also based on the same doctrine and many European systems of jurisprudence adhere to the same principle. The present Japanese Code makes a new departure and provides in Article 399, that the subject of an obligation may be something not capable of being estimated in money. One of the reasons for maintaining that the subject of an obligation should be capable of appraisement in money is that, taking the contrary view, there would be a confusion of legal ideas with moral and social obligations. When the conceptions of moral and social obligations are so far advanced as to become common and general, they are taken up by legislators and coördinated with legal obligations. It is impossible to draw a scientific line of demarcation between legal obligations on the one hand and moral or social obligations on the other, by inquiring whether the subject thereof can be estimated in money or not. The advance of civilization has necessitated the recognition of obligations the subject of which can not be reduced to a monetary equivalent, and that necessity increases with the progress of time. The rights and duties arising out of family relationship, for instance, have certainly no money value, or perhaps it is more accurate to say that they can not be expressed in dollars and cents. The Japanese rule on this subject, placed as it is, in the General Provisions is applicable to all rights in personam, whether they spring from contract or any other facts or conditions recognized by law.

The effect of an obligation.—When a party to an obligation fails to perform or to accept performance of the obligation in time, he is said to be *in mora,* to use the expression of the Roman law, and heavier duties are imposed upon parties in that condition. The Japanese Code provides, in this connection, that if a certain time is designated for the performance of the obligation, the debtor is *in mora* from such time; if a time which is uncertain has been designated for the performance of the obligation, the debtor is *in mora* after he has notice that such time has arrived; that if no time has been designated for the performance of the obligation, the debtor is *in mora* after a demand for performance has been made upon him (Article 412). Thus, according to the Japanese Code in the first case, the mere arrival of time places the debtor *in mora,* without any action on the part of the creditor. The French law on the other hand makes an express agreement on the subject between the parties necessary. The Japanese law, like the German, has recognized the principle that time itself is notice to the debtor. According to the French Code the creditor is never placed *in mora,* but the Japanese Code provides that if the creditor refuses to accept the performance of the obligation, he is *in mora* from the time a tender of performance is made to him. No explanation is required why a creditor who refuses to accept the performance of an obligation should be placed in the same category with a debtor who neglects to perform it. The offer of performance does not extinguish the obligation, but the creditor who refuses to accept performance is answerable for any damages occasioned thereby to the debtor.

Where the nature of an obligation is such as not to admit of compulsory performance, no demand for specific performance can be made. The French and Japanese Codes on this point are identical, but the reasons for the rule are different. The framers and expounders of the French Code say that if a demand for specific performance should be allowed on such cases, it would restrain the personal liberty of the debtor. Hence the wording of the French law runs: "All obligations to do or not to do resolve themselves in damages, in case of non-execution on the part of the obligee." This, however, is hardly logical, for all obligations, in so far as they constitute the rights of the creditor, are restraints on the freedom of the debtor. The view taken by the framers of the Japanese Code was that the creditor, on the one hand, is entitled to the benefit of full performance of the obligation so far as such performance is possible and that the debtor, on the other hand, rests under the correlative duty to make, to the same extent, a like full performance

of the same according to the original intentions. Accordingly, the provisions of the Japanese Code on the subject are as follows: "If the debtor fails to perform his obligation voluntarily, the creditor may apply to the court for compulsory performance, except where the nature of the obligation does not admit of it. If the subject of the obligation is the doing of an act, the creditor may apply to the court to have it done by a third person at the debtor's expense; but if the subject of the obligation is the doing of a legal act, the decree of the court stands in the place of an expression of intention by the debtor. As to an obligation whose subject is the forbearance from an act, the creditor may apply to the court to have such acts as have been done undone, and proper measures taken for the future. These provisions do not affect the right to claim damages."

The clear intention of the law is that the creditor shall be protected to the fullest extent, and as nearly as possible according to the original intention of the parties. The provision allowing an application to the court to have the obligation performed by a third person at the expense of the debtor is a new conception, which finds its first expression, it is believed, in the Japanese Code.

Joint Obligations.—Joint obligations, or *obligations solidaires,* are, in the French Code, divided into "*solidarité*" between the creditors, and "*solidarité*" on the part of the debtors. The latter corresponds to joint and several liability. When each one of the several creditors can demand the performance of an obligation and the performance made to one of them frees the debtor as against all, even where the benefit thereof is capable of division, the obligation is said to be *solidaire* between all creditors. It is at the choice of the debtor to make performance to any of the creditors, unless he is prevented from doing so by the prosecution of one or more other creditors. These provisions are entirely omitted from the Japanese Code, not because they are considered harmful, nor with an intention of prohibiting the creation of such an obligation, but because as a matter of practice there is little occasion for it, and in case such an occasion should arise, it can be met by other methods recognized by law. Concerning joint obligations in respect of debtors, the Japanese Code provides that where several persons are liable for a joint obligation, the creditor may demand performance of the whole obligation, or only a part of it, either from one of the debtors, or at the same time or successively from all the debtors; that the existence of a reason for the invalidity or rescission of a legal act as to one of the joint debtors, does not impair the validity of the obligation

as to the other debtors; that a demand for performance made to one joint debtor has effect against all the debtors, and that if a novation is effected between one of the joint debtors and the creditor, the latter's claim is extinguished as to all the joint debtors. Neither in the French nor the Japanese Code are joint obligations ever presumed. They can only be brought into existence in virtue of express provisions contained in the act creating the obligations (Japanese Code, Article 427; French Code, Articles 1197, 1202).

In case one of the joint debtors having a claim against the creditor, establishes a set-off, the creditor's claim is extinguished for the benefit of all. Respecting the question whether the other joint debtors ought to be allowed to raise the plea of set-off when the joint debtor having the claim does not do so, the Japanese Code provides that such plea may be so raised in so far as such debtor's share of the joint obligation is concerned. The French law expressly prohibits such a plea. Article 1294 is explicit on the subject. It declares that a joint debtor can not plead as a set-off that which the creditor owes to his co-debtor. The German law on the subject is the same (Article 422). Theoretically speaking, the Japanese law is opposed to the principle that in the case of a joint obligation, each debtor is liable for the performance of the whole obligation and that the plea of set-off can only be raised by the debtor who has a claim against the creditor. But on the practical grounds of convenience there are reasons for preferring the Japanese rule. To say that a joint debtor is liable for the performance of the whole obligation only determines his relation to the creditor. As between the debtors it is enough if he performs his share of the obligation, and when he performs the obligation beyond his share, to that extent he performs an obligation belonging to another, for which the right to demand contribution exists. Now under the French law, if the demand for performance be made by the creditor upon a joint debtor having no claim to plead in set-off, the latter would have to perform the whole obligation and look to his co-debtor for his share of the obligation, while such co-debtor would in turn have his remedy against the creditor in the form of an independent claim. If in such cases the obligations were not voluntarily performed, there would result according to the French rule, three sets of action, while by the Japanese law the multiplicity of litigation is avoided.

In case a joint debtor has obtained from the creditor release from the joint lability, and one or more of the remaining joint debtors have not the means to perform, the question arises who is

to bear the portion which the insolvent debtor is bound to pay. On this point the French law provides (Article 1215), that the portion of the obligation which would have been borne by the insolvent debtor is to be contributed by the solvent debtors *and the debtor who has been released.* The Japanese Code, on the other hand, declares in Article 445, that if a joint debtor has obtained release from the joint liability, and one of the remaining joint debtors is without sufficient means to repay his share of the obligation, the *creditor* bears the share which the debtor who has been released from liability would have borne, in respect of that portion of the joint obligation which the insolvent debtor is unable to pay. It is plain that the responsibility of other joint debtors can not be increased by any transaction between one joint debtor and the creditor; hence the portion of the obligation of the insolvent debtor ought not to be charged to the remaining debtors. It is also clear that the creditor, in giving release to a joint debtor, intended to discharge him from all liability in respect of the obligation. If such a debtor should be required to contribute his share after his release, even in case there were insolvent debtors, the effect of the release would not be complete. By making the creditor bear the burden, the rights of the remaining debtors are not infringed, and the debtor who has obtained release is entirely freed from obligation, and the creditor has no grounds for complaint, because it was he who granted the release.

Suretyship.—Suretyship is a contract by which a person binds himself to perform an obligation in case the principal debtor does not perform it. The obligation is usually created at the same time as the principal obligation and with the knowledge and consent of the principal debtor. But it may be created at a different time and without the knowledge or consent of the principal debtor. It being an accessory contract to secure the performance of the principal obligation it naturally follows the condition of the principal obligation, if for any reason such principal obligation is at any time extinguished. In certain cases, however, it was thought necessary to make exceptions. Article 2012 of the French Code states as a general rule that suretyship can only be made upon a valid obligation, and in the second clause of the same article, it is provided that where an obligation may be invalidated for reasons purely *personal* to the debtor, such an obligation may form the subject of the contract of suretyship and there is given as an example the obligations entered into by minors. If, therefore, a minor on reaching majority, cancels an obligation entered into during minority, the contract of suretyship remains in force. In such cases, the French jurists hold that

although there is no legal obligation to be secured by suretyship, yet there is a moral or natural obligation of the minor. The Japanese law bearing on the subject is stated as follows: "If a surety guarantees an obligation which may be rescinded on the ground of legal incapacity, knowing of the existence of such incapacity at the time he agreed to guarantee the obligation, he is presumed in the event of its non-performance or rescission to have entered into an independent and identical obligation." It will be observed that a person, who with knowledge of the existence of grounds for rescission guarantees an undertaking of a minor, is considered to have incurred two different sets of obligations, one strictly and purely an obligation of suretyship which lapses with the extinction of the principal obligation, and the other an independent obligation on condition precedent which comes into force with the rescission or non-performance of the principal obligation.

Assignment of rights in personam.—According to Anglo-American jurisprudence rights *in personam* are not, as a general rule, assignable. These rights are mostly created by contract. They are the result of the exercise of free-will and bind the parties and ought to bind the parties only. If assignment is allowed to the creditor as a right the debtor might be obliged to perform his obligation to a different and unknown creditor. The debtor might have had a claim to set-off as against the former creditor, which he would not be able to set up against the new creditor. Therefore, if the interest of the debtors is alone consulted, it will be better not to allow the assignment of rights *in personam.* But the demands of modern civilization, accompanied by the development of credit has required and made it expedient to relax the rule and even by Anglo-American jurisprudence certain rights *in personam* have, for a long time, been assignable without the special consent of the debtor. The Japanese Code, in consonance with the principle recognized in the systems of continental Europe, has adopted the doctrine, that as a general rule, rights *in personam* are assignable. Article 466 provides that rights *in personam* may be assigned, provided always that they are of a nature which admits of assignment. Obligations that consist in the payment of money are of such nature that they can be performed by any person, and in these cases the rights are assignable under the Japanese law, but rights which arise out of personal relations, such as parents and children, are not assignable. The second clause of the same article declares that the provisions of the preceding clause do not apply if the parties have expressed a contrary intention, but that such expression of intention can not be set up against

a third person acting in good faith. If, therefore, the debtor desires to protect himself against the possibility of being obliged to perform his obligation to a new or strange creditor, he has only to express such an intention in the instrument creating the obligation. The assignment of the obligation being accompanied by the delivery of the instrument to the new creditor, the latter would not be able to plead ignorance. A further protection for the debtor is found in Article 467, where it is provided that the assignment of a right *in personam* in which the creditor is specified by name can not be set up against the debtor, or a third person, unless the assignor has notified the debtor of the assignment, or the latter has given his consent thereto. Upon this point, according to the French law, the notice to the debtor may be given either by the assignor or the assignee, but as against persons other than the debtor, the notice must be given by the assignee (Articles 1690, 1691). This provision is open to criticism for under it, it is possible for a person to whom an assignment has not really been made, to pretend the contrary, and thus to practice a fraud on the debtor or other third persons. Certainty would be secured if the law should provide that the notice must be given jointly by the assignor and assignee, but that would be at the cost of delay. Hence the Japanese Code, as well as the German Code, simply provides that it is sufficient if the notice of the assignment is given by assignor only.

Performance.—Consistently with the principle adopted in respect of the assignment of rights *in personam*, the Japanese Code enacts that performance of an obligation may be made by any third person, unless its nature does not admit of it, or the parties concerned have expressed a contrary intention. It is further enacted that a person who has no interest in the performance, can not make performance against the will of the debtor (Article 474).

Article 480 provides that a person who produces a receipt is deemed to have authority to receive performance. No similar provision is found in the French Code or in any of the codes promulgated previous to the Japanese Code. It is not, however, a new departure in Japan. It is in accord with the custom which formerly obtained and the Code has simply made it a legal presumption. It is to be recommended for the reason that it simplifies the manner of performance. The German Code has also adopted the same rule (Article 370).

As to the place where the performance is to be made in absence of express contract,—whether at the domicile of the creditor or that of the debtor, or the domicile of the debtor at the time the obligation

was created, laws of various countries differ. The French law provides (Article 1247), that where the obligation consists in the delivery of specified goods the performance is to be made at the place where the goods were at the time the obligation was created, and in all other cases, at the place of the domicile of the debtor. Where the delivery of a specific thing is the object of an obligation, the Japanese law on the subject follows the French law, but in all other cases the domicile of the creditor is declared to be the place of performance (Article 484). Such was the law in Japan before the Code was adopted, and we saw no necessity for altering it. The provisions of the German law on the subject are the same as the French (German Code, Articles 269, 270). There is room for doubt whether a person making performance may require as a right, a receipt or the surrender of documents evidencing the obligation where there are such documents. There is no provision on the subject in the French Code. The Japanese (Articles 486, 487) and German (Articles 368, 371) Codes contain provisions expressly giving the person making performance of an obligation the right to require a receipt or the surrender of the documents as the case may be.

In certain cases a debtor may be released from his liability by depositing the object of the obligation. The French Code confines it to the case where the creditor refuses to accept performance (Article 1257). The Japanese Code adds two more cases: first, where the creditor is unable to accept performance, and second, where the person performing, without fault on his part, can not ascertain who is the creditor. It is possible that the creditor may not be able to receive performance by reason of illness or absence when the obligation becomes due, or his rights may be attached by his creditors and thus he would be unable to receive performance. It is also possible that several creditors may contend for the performance of the same obligation, or the right might be assigned, and thus the debtor would be unable to determine to what person the obligation should be performed. In these cases it is just that the debtor should be allowed to exempt himself from further liability by depositing the thing forming the subject of the obligation. If, however, the thing forming the subject of performance is not suitable for deposit, or if it is perishable or liable to injury, or if the keeping would be unreasonably expensive, it is provided that the person performing may, with the permission of the court, sell it at auction and deposit the proceeds (Article 497).

In certain cases a person who performs on behalf of a debtor is subrogated to the right of the creditor, that is, he takes the place of the creditor *vis-à-vis* the debtor. The Japanese Code provides that the consent of the creditor at the time of performance is essential to subrogation, and also that a person who has a rightful interest in the performance of an obligation is subrogated by operation of law (Articles 499, 500). One of the debtors of an indivisible or a joint obligation, or the purchaser of an object which has been pledged or mortgaged, etc., would come under this provision. The French Code separates subrogation into legal and conventional, and in respect of the latter, it provides that subrogation may take place by the consent of the debtor. This hardly seems just, for by subrogation, the person performing on behalf of the debtor steps into the position of the creditor and exercises whatever rights the creditor might have had against the debtor. It would, therefore, appear to be more reasonable to require that the creditor's rather than the debtor's consent should be obtained.

Set-off.—Where parties have incurred toward each other obligations of the same kind, set-off has in various systems of jurisprudence been recognized as a proper means of discharging the reciprocal obligations. In some countries set-off can only be pleaded in defense to an action. In others the discharge of an obligation is effected by operation of law when the conditions necessary to the set-off are fulfilled even without the knowledge of the parties. The French Code has adopted this latter principle (Article 1290). The Japanese Code provides that a set-off takes place by means of an expression of intention made by one party to the other (Article 506). Set-off is a right given to a person, under certain circumstances, as a mode of discharging his obligation. As it is a right, it does not require the consent of the other party. But to provide, as does the French law, that it takes place merely by operation of law even without the knowledge of the parties, would be an undue interference with the private affairs of individuals; while to say, that it can only be pleaded in defense, unnecessarily limits the usefulness of this simple method of discharging an obligation. The Japanese Code pays due deference to the will of the parties by making set-off dependent upon an expression of intention, not confining it to a plea in defense to an action. This is in harmony with the latest legislative precedents as shown by the Saxon and Swiss Codes.

Contracts.—In the French law the term "Contract" is only applied to an agreement by which rights *in personam* are created. Agreements by which rights *in personam* are transferred, altered or

extinguished, or by which rights *in rem* are created, etc., are styled "*Conventions.*" There seems to be no reason or necessity for the distinctions. In the Japanese Code the term "*Keiyaku,*" or contract, is employed to denote any agreement whose object is to produce a legal effect within the province of private, as opposed to public, law. Hence it includes all agreements by which rights *in rem* as well as rights *in personam* are created, altered, transferred or extinguished.

The French law considers the existence of a "cause" as an essential element in the formation of a contract (Articles 1130, 1131). But the "cause" of the French law is not the same as the "consideration," which is an essential element in forming a valid contract in contemplation of Anglo-American jurisprudence. What a consideration ought to be is very clearly settled in the latter; but to ascertain what a "cause" should be in the French law is a more difficult task. Besides in practice, no importance seems to be attached to the question of the "cause." This is probably due to the provision of Article 1132, where it is declared that a contract is none the less valid, even though the cause is not expressed.

The Japanese Code has dispensed with these legal requirements and nothing like the rules which obtain in America and England concerning the consideration of a contract, or in France respecting "cause," are found in it. It is difficult to conceive why the expression or the want of expression of an acknowledgment of the receipt of a nominal sum of money, for instance, should be considered so important as to make the validity of an obligation dependent upon such expression.

Advertisements.—In Article 529 and the three subsequent articles of the Japanese Code are laid down the rules to be applied in cases where proposals are made by advertisements. It is provided that a person who advertises that he will give a fixed remuneration to whoever performs a certain act, is bound to give such remuneration to any person who performs the act. The advertiser is permitted to cancel the advertisement so long as the act specified is not completed, following in this respect the same means that were used for advertising. Explicit rules for application in cases where there are several persons who perform the act in question are also laid down. At the time the French Code was elaborated, the organs for appealing to the public were not developed as they have been in recent years, and of course no provisions of this kind were then found necessary. But having in view the peculiar circumstances attendant upon proposals made in this manner and the frequency of cases in which this

mode is resorted to, it was found necessary that special provisions on the subject should be introduced into the Code.

Effect of a Contract.—When a specified thing is the subject-matter of a bilateral contract, if the thing is damaged or lost from a cause not attributable to the debtor the question arises, upon whom are to fall the consequences. Is the debtor to bear the damage or loss? Is he bound to refund the purchase money if already paid, or if not paid, is he deprived of the right to demand payment? It would seem at first sight that since the delivery of the specified thing and the payment of money are originally so closely related to each other, the impossibility of delivery should release the creditor from the obligation of making payment. But this is an erroneous conception; for when a bilateral contract is once concluded it is resolvable into two sets of obligations. In the example given, one of the parties would be bound to make the delivery of the specified thing, while the other would be bound to make payment and the duty of each may be considered as an independent obligation, and there is no reason why the debtor should suffer loss occasioned by causes for which he is not responsible. The question may also be considered from another point of view. As soon as the contract is made in a case like the one above referred to, the ownership of the specified thing is transferred from one party to the other, and therefore, if it is damaged or lost, the injury should fall on the owner. Conversely, if the price of the thing should rise after the conclusion of the contract, the party who is bound to make delivery would not be entitled to demand on that account the payment of any more money than was called for by the original contract. The profit would accrue to the other party. This is the view taken by both the French and Japanese Codes, although the German Code has adopted the contrary principle and makes the debtor bear the consequences of the loss or injury.

The French Code lays down the general rule that a person can only bind himself in his own name and for his own benefit (Article 1119), and that the effect of a contract is limited to the parties to the contract (Article 1165). This is the natural result of the principle that the object of an obligation must be capable of being estimated in money, that is, an obligation must result in a benefit to the creditor. Consequently where an agreement is so made as to confer a benefit on a third person, not a party to the contract, such an agreement would not create an obligation under the French law. The requirements of modern society demand the recognition of the contrary principle; namely, that an agreement entered into for the

benefit of a third person should be enforceable. The contract of life-insurance is a very good illustration. The contract is entered into between the insurance company and a living person, but the obligation on the part of the insurer is to be performed to a third person upon the death of the insured. The Japanese Code provides that if a party to a contract has agreed to make a prestation to a third person, the latter has the right to claim such prestation directly from the former, and that in such case the right of the third person comes into existence at the time when he expresses to the debtor his intention to take the benefit of the contract. The German Code goes still further, and provides that the obligation is at once created between the debtor and the third person without any expression of intention on the part of the third party to take the benefit of the contract. Even a benefit can not be forced on another, and therefore the German Code provides further that in case the third person expresses an intention that he does not desire to take the benefit of the contract, then the obligation is deemed not to have been created *ab initio*.

Rescission of a Contract.—With respect to the mode of rescinding a contract the Japanese Code provides that if by virtue of the contract itself, or of a provision of law, one of the parties has the right to rescind it, this is effected by means of an expression of intention made to the other party (Article 540). The French Code, on the other hand, enacts that rescission must be made by an application to the court (Article 1134). A legal proceeding always means a certain amount of delay and expense. The Japanese has adopted the simpler method.

Both the French and German Codes make donation a formal contract, that is, to say, it must be evidenced by certain documents prescribed by law. The reason usually assigned is the necessity to prevent persons from hasty acts. It is a relic of that false assumption which formerly assigned to legislators a greater measure of wisdom than was possessed by the people. Such a restriction is not only inconvenient, but it often prevents persons from exercising their intention. According to the Japanese Code, donation takes effect when one of the parties expresses his intention of giving property of his own to the other party without consideration, and the other party accepts the gift. But a gift not expressed in writing can be rescinded by either party, except so far as performance has already been made.

Sale.—The definition of sale is found in Article 555 of the Japanese Code. It is there stated that a sale is effected when one of the

parties agrees to transfer a property right to the other party and the latter agrees to pay him a price therefor. When the property of another person is made the subject of a sale, the French law expressly states that there exists no sale, but gives the purchaser the right to demand damages if he was ignorant of the fact. The Japanese Code has adopted the contrary principle. Article 560 reads: "If a right of another person is made the subject of a sale, the seller is bound to acquire such right and transfer it to the buyer." If the effect of a sale is to transfer the ownership itself, then as a logical consequence the sale of a thing over which the seller has no ownership must be regarded as null and void, but by Japanese law a sale of this kind only creates an obligation to transfer the ownership, but does not transfer it. Therefore the sale of a right belonging to another need not necessarily be considered as null and void, but the intention of the parties is carried out by compelling the seller to obtain such a right and transfer it to the buyer.

The French and German Codes recognize the contract of repurchase as to movables (French Code, Article 1659; German Code, Article 497). It is defined to be a contract by which the seller reserves to himself the right to retake the thing sold, by restoring the purchase money with interest, and incidental expenses incurred by the buyer. The Japanese Code simply limits this species of contract to immovables, for in respect of immovables the contract may be registered and notice thereby given to third persons of its existence, but, no method, by which such notice can be given, exists in regard to movables. The ownership of a movable is transferred by mere delivery of the thing, and therefore, if the purchaser should transfer it to a third person the original seller's right of repurchase would not bind the new purchaser. Hence even if this contract were recognized by law it would be impossible to secure the inforcement thereof, accordingly it was omitted from the present Japanese Code. On the subject of the sale of immovables the French law contains a peculiar provision to the effect that the seller may rescind the contract within two years, if the price obtained for it is found to be so low that his loss amounts to over seven-twelfths of the actual value. The absurdity of such a provision need not be commented on. In these days perfect freedom is given to sellers and buyers to sell and buy at whatever prices they may agree upon. I need hardly add that nothing of the kind finds a place in the Japanese Code.

Hiring and Letting.—Hiring and letting is the *locatio conductio rerum* of the Roman law. It is effected when one of the parties

agrees to allow the other party to use and take the profits of a thing, and the other party agrees to pay rent for it. Either a movable or an inmovable may be made the subject of hiring and letting. Whether the right thus created should be regarded as a right *in rem* or a right *in personam* has been the subject of conflicting opinions among jurists. The Japanese Code treats it as a right *in personam*, but in respect of immovables, if the contract is registered, it is good against third persons (Article 605). Upon the question whether the hirer can sublet or assign the subject of the contract, the French Code provides that he may do so unless expressly prohibited by the terms of the contract. The rule adopted in the Japanese Code, on the contrary, is that a hirer may not, without the consent of the lessor, assign his right to another person or sublet the thing hired (Article 612). There may be special considerations which induce the lessor to let a thing to one person, but the same considerations would not apply to other and perhaps unknown parties. It would be unjust to impose on the person letting, such a party without his consent.

With respect to the hiring of services, a contract can only be entered into for a fixed period or for a determinate work. This is the rule of the French law. Therefore a contract of this kind for life would be illegal. The rule is intended to prevent anything resembling slavery. No such prohibition appears in the Japanese Code, but the same object is attained by the provision that if the duration of the contract of hiring is for more than five years or for the lifetime of one of the parties, or of a third person, either party may at any time after the expiration of five years rescind the contract, but as to apprentices in a commercial or industrial business, such term is ten years (Article 626). During long periods of time, wages are apt to fluctuate and it would be contrary to public policy and economy, that parties to a service contract should continue to be bound by an agreement which is at variance with the times. At the same time the liberty of people in disposing of their services by contract should be recognized. Japanese law gives as much scope to the freedom of contract as is compatible with public welfare.

Association.—Association, or *société,* is defined in the French Code to be a contract by which two or more persons agree to bring certain things together with a view to share the profit. Profit is therefore the object of the contract. This, however, unnecessarily limits the usefulness of the contract. There are cases when parties may desire to enter into this kind of contract with objects other than gain. Accordingly, in the Japanese as well as the German

Codes, nothing is said regarding the object of association, and the contract of association is defined to be simply a contract in which several parties agree to contribute money, or other things, and engage in a joint undertaking.

Amicable Arrangement.—When parties agree to settle their disputes by making mutual concessions, such agreements are called amicable arrangement. Concerning the effect of this kind of contract, the French law prescribes that it has the authority of a final judgment. The logical consequence of this is that if a thing, the ownership of which is disputed between two parties, is determined by amicable arrangement to belong to one of them, the party thus taking the thing is deemed to have been the real owner from the beginning. The ownership is not considered to be conferred on him by the arrangement. This presumption may in some cases prove injurious, for if the title to a thing should be attacked by a third person, it could only be defended by opposing the rights of one of the parties, whereas by opposing the rights of both parties the attack might be successfully resisted. The Japanese Code does not place amicable arrangement on the same footing as a final judgment, but merely states that, if by an amicable arrangement, it is settled that one of the parties possesses, or that the other party does not possess, the right which was the subject of the dispute, and conclusive proof is afterward produced that this right did not previously belong to the party first mentioned, or that it did belong to the other party, such right will be regarded as having, by the arrangement in question, been either transferred to the first mentioned party, or extinguished.

Management of business.—The term *"jimu-kwanri,"* or the management of business, is applied to cases where one person assumes the management of another person's affairs without being bound or authorized to do so. The rights and duties arising out of such relations are considered in the French Code under the head of quasi-contracts. In the Roman law they were treated as illegal acts. The French law does not go so far as the Roman law, but it looks on such a person with a suspicious eye, and if he obtains for himself any benefit by the management, he is obliged to restore it as an improper profit. But later legislative precedents give this relation a distinct heading and treat it on the same footing as a contract or other obligation. The management of another person's affairs is now deemed to be undertaken with good intentions to protect the interests of the principal. No harm is meant to the principal, nor is it based on any benefit which might accrue to the manager. In a

word there is no taint about the matter. It would not, therefore, be reasonable to treat it as an illegal act, nor is it necessary to look upon it with suspicion. The Japanese Code has adopted this view, and so far as the peculiar circumstances admit, applies to it the rules relating to agency.

Delicts, or Wrongful Acts.—Delicts, or wrongful acts, are the "torts" of Anglo-American jurisprudence. The French law on the subject is contained in the five articles, 1382-1386. The student of comparative legislation is struck by the paucity of rules in the French law relating to delicts, and the large mass of law on the subject of "torts" in the common law system. This is not the proper place to examine the various causes that have led to this difference. But one characteristic of the Anglo-American people may be mentioned which has exercised great influence in the development of the exact and detailed principles in regard to torts. I refer to the right loving nature or instinct of the race. The Japanese law on the subject is comprised in sixteen articles, and the provisions are quite comprehensive. Article 709 states that a person who intentionally or negligently violates another's right is bound to make compensation for the damage arising therefrom. The next article prescribes that whether the case be one of injury to the person, liberty or reputation of another, or to his rights of property, the person who, under the provisions of the preceding article, has rendered himself liable for damages, must also give compensation for injury other than to rights of property. Regarding the liability of minors or of persons of unsound mind or their guardians; of employers for the wrongful acts of their employees; of persons who employ contractors; of the possessors of animals, etc., minute provisions are made. Two peculiar features, however, may be mentioned: First, where a person is killed by the wrongful act of another, the right is given to the parents, to the husband or wife and to the children of the person killed to demand compensation for damage, even though no property right of theirs has been violated. Second, in regard to contributory negligence of the injured person, it is provided that if the injured person is himself in fault, the court may take that fact into consideration in determining the measure of damages. Thus the existence of contributory negligence is simply made a factor in estimating the amount of damages.

The remaining books of the Japanese Civil Code concern Family Relations and Succession, and for reasons which have already been explained, do not come within the scope of the present review. My task is, therefore, completed. I fear I have not always succeeded

in making my meaning entirely clear, and I am conscious of having failed to present my observations in the most pleasing form; for these and other short-comings I must crave indulgence since I have been obliged to speak in a foreign tongue.

I have attempted to show, that while the framers of the Japanese Code were guided in their labors by a spirit of wise and prudent eclecticism, they were not, in any case, mere copyists, for in many instances they introduced new legal conceptions, and in all instances they endeavored to make the law responsive to the requirements of the country, qualifying theory by a thoughtful regard for practical considerations. But, in any event, if I have, in the language of Lord Coke, been able to "move the diligent student to doubt," and consequently to inquire what the law and the reason of the law are, I shall deem my efforts abundantly rewarded.

Kazuo Hatoyama.