ON *EMPHYTEUSIS* (*EIKOSAKU*: 永小作) IN EARLY MEIJI

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Introduction

There are several provisions for the *emphyteusis* in the Japanese Civil Code of 1896 which came into force from 1898. Some of them are follows[1]:

> Art. 270 An *emphyteuta* has a right to carry on agriculture or cattle raising on the land of another on payment of a rent.
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> Art. 272 An *emphyteuta* may assign his right, or may let the land for the purpose of agriculture or cattle raising within the during of his right; unless that has been forbidden by the act of creation of the right.
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> Art. 277 If there is any custom different from the provisions of the preceding six articles, such custom is to govern.

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1) Cited from Ludwig Löhnholm, Civil Code of Japan, 1898, Tokyo.

> Art. 278 The duration of an emphyteusis is from twenty to fifty years. If it is created for a longer period than fifty years, it is reduced to fifty years.
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> An emphyteusis may be renewed, but not for more than fifty years from the time of renewal.
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> If the period of duration has not been fixed in the act of creation, it is, except so far as there is a different special custom, to be thirty years.

The Japanese Civil Code is a daughter law of the French and German Civil Codes as I mentioned elsewhere.[1] These mother laws, however, have no provisions for *emphyteusis*.[2] The mother laws have not the provisions, but the daughter law has them. The insertion of the provisions for *emphyteusis* into the Japanese Civil Code might be explained by the fact that powerful customs of it governd in Japan. I shall consider those customs and some relevant decisions of the Supreme Court (*Daishin-in*; 大審院) in this paper.

I Customs of *Emphyteusis* in the Edo Era and the Early Meiji

In the Edo Era (1603–1867), there were many forms of the lease of land. It was the typical form of the lease that the landowner (*Jinushi*; 地主) has both the right to charge a certain portion of the produced rice (*Nengu-mai*; 年貢米) and the right to withdraw at any time, the lease to take back the land. Professor D. F. Henderson referes to "A Lease of Rice Land with Water Supply (*Mizuire*; 水入) for One Crop" in *Echigo* (越後) as an example of the leases of land. In lease documents submitted by the cropper (*Kosaku-nin*; 小作人) to the landowner there was such a sentence as the following:

> "We will not claim a single grain (*hito-tsubu*; 一粒) from the fixed rice rental (*sadame-mai*; 定米). Futhermore, if you decide at your

1) *On Historical Conditions of the Japanese Civil Codification*, Osaka University Law Review, No. 15 (1967). cf. NODA Yoshiyuki, Introduction to Japanese Law, 1976, Tokyo p. 41 f.

2) For example, in France, the Rural Code of 1955 provided for 'louage exphytéctique' (art. 937–950) but the Civil Code not.

discretion to take back the rice field, we will transfer possession at any time without fail.[1]"

In a word the landowner occupies the dominant position to the cropper. It is this form of the lease of land that was typically seen. There were, however, many forms divergent froms as well.

The Ministry of Justice—established in 1871, soon after the Meiji Restoration—investigated civil customs all over Japan and published a book on them in 1877 and 1880. This was translated by Professor John Henry Wigmore's *Law and Justice in Tokugawa Japan* being Materials for the History of Japanese Law and Justice under the Tokugawa Shogunate, 1603–1867.[2] This book tells us that the cropper has powerful customary rights against the landowner, which I call "long cropping right" or "*emphyteusis*". According to this book 47 cases out of 89 cases of the rice land report the custom that the landowner has a superior right to the cropper just like the above mentioned case in *Echigo*. But, 42 cases point to the custom of "long cropping right" or "*emphyteusis*". Furthermore, these 42 cases might be divided into three forms:
1) *emphyteusis* by the reclamation of wasteland of other, 2) *emphyteusis* obtained through the cultivation of other's land over 10 years, 3) other forms. I shall introduce some of 1) and 2) from translations of Professor Wigmore's book with my supplement comments.

1 *Emphyteusis* by Reclamation of Other's Wasteland (*Kaikon-Eikosaku*; 開墾永小作).

1) *Yatabe Gun, Settsu* (摂津八部郡, now in *Hyogo* Prefecture). Where the rent is fixed without regard to the goodness or badness of the season, the landlord usually lends for a long period and a written instrument is given. This is called "long croppring" (*Eikosaku*: 永小作). The same term is used also where wasteland

1) Dan Fenne HENDERSON, *Village Contracts in Tokugawa Japan*, 1975, Univ. of Washington Press, pp.73–75.

2) Published in Tokyo, 1941–1943. Newly edited in Tokyo, 1967–1969. Prof. Wigmore said "materials from 1603 to 1867," but those materials showed Japanese legal lives in the early Meiji, as well.

(*Arechi*; 荒地) has been reclaimed enough to grow crop; and the cropper in this case may transfer his shares (*Kabu*; 株) of the membership in a village to another person, without the consent of the landlord.[1)]

2) *Atsumi Gun, Mikawa* (三河渥美郡, now in *Aichi* Prefecture). A cropper who reclaims and cultivates wasteland is called "long cropper"; and the sale of his right of cultivation is at his own disposal, the landlord having no right to control it.[2)]

3) *Izawa Gun, Rikuchu* (陸中胆沢郡, now in *Iwate* Prefecture). One who has reclaimed wasteland becomes in fact a "long cropper," for he cannot be evicted at the landlord's pleasure.[3)]

4) *Aimi Gun, Hôki* (伯耆会見郡, now in *Tottori* Prefecture). The landlord cannot easily resume possession where the tenant changed sandy land into good land (which they call "grass-starting" — *Shibabiraki*; 芝開), and his family continued the cultivation over three generations; in such a case the cropper is entitled to privilege of buying the land at a price four-tenths lower than that at which it is offered to others.[4)]

These four examples show "long cropping right" or "*emphyteusis*" rose from the reclamation of wasteland. It is inferred that many cases as these undoubtedly existed in other districts and continued to the early Meiji. But, in that period, the right of ownership was established by several acts. The *emphyteusis* conflicted with this novel right, and the legal status of the long cropper became a important legal issue. I shall examine this issue in the next section. Before it, it might be helpful to describe another form of *emphyteusis*.

2. *Emphyteusis* by Cultivation of Other's Land over Ten Years (*Nintei-Eikosaku*; 認定永小作)

In the Edo era, it is of no doubt that there were the institutions of

1) John Henry WIGMORE, *Law and Justice in Tokugawa Japan*, Part II, New Edition, 1967, Tokyo, p.47.
2) ibid. p.49.
3) ibid. pp.54–55.
4) ibid. p.63.

emphyteusis formed through cultivation of other's land over ten years. The *Jikata Hanrei Roku* (地方凡例録)[1] reports as follows: the *emphyteusis* (*Eikosaku*) signified that the landowner who let the cropper to cultivate his land during several decades by no rule as to the term of cropping could neighter retake the land without reasonable cause and nor to let it out again to another person.[2] Such customary practice continued to the early Meiji. "Law and Justice in Tokugawa Japan" confirms that. We find that *emphyteusis* came into force by over ten year's cultivation, at least. I take out some examples from Professor Wigmore's book with my supplementary remarks.

1) *Fuchi Gun, Tôtômi* (遠江敷知郡, now in *Shizuoka* Prefecture). An instrument is drawn up in cropping contracts; sometimes the tenant is charged with payment of taxes and village burdens. There is no fixed custom as to the length of the term; but after ten years elapse the expression "long cropping" is used, and the landlord cannot recover his possession of his land, except the case of non-payment of rent.[3]

2) *Fukatsu Gun, Bingo* (備後深津郡, now in *Okayama* Prefecture). One who cultivated for more than fifteen years is called a "long cropper" and the landlord cannot evict without trouble.[4]

3) *Tosa Gun and Takaoka Gun, Tosa* (土佐　土佐郡・高岡郡, now in *Kôchi* Prefecture). — The "original land"[5] is forbidden selling, but the same purpose is attained through long leases. The lease is called a "nineteen-crops [lease], and the term of the lease is twenty years. A deed is given to guarantee the return of the land at the end of the term. The cropper is to offer the landowner a rent termed "extra produce" (*Kajishi*; 加地子), and is to pay the taxes and other expenses. He has thereby the right to sublet to others to obtain a profit without the consent of the landowner. The latter is called

1) Compiled by *ÔISHI Hisatake* 1794 (*Kansei*; 寛政 6).
2) The *Jikata Hanrei Roku*, revised by Prof. *ÔISHI Shinzaburo*, vol. I, 1969, Tokyo, pp.215–6.
3) J. H. Wigmore, op. cit. pp.49–50.
4) ibid. pp.64–65.
5) *Hon-den* (本田). Prof. Wigmore's note about it is the land brought into cultivation and registered before the *Yamauchi* family acceded (about 1620). ibid. p.67.

"under-owner" (*Sokochimochi*; 底地持) and the former "upper-owner" (*Uwachimochi*; 上地持).[1]

Among these three cases, I find at least three problems. First, the term of using of other's land is of three kinds i.e. ten, fifteen and twenty years. Second, in the case of *emphyteusis*, the cropper is charged with payment of land taxes and village burdens. I shall consider this problem in the next section. Third, the right of the cropper is so powerful that landowner cannot evict his land, and that the cropper can sublet his right of cultivation to others. Especially, in *Tosa*, the right of cropper was called "upper-ownership". But, this right had to compete with the right of ownership. It became a important problem in the early Meiji, and I shall examine it soon.

II Land Tax Revision Act (*Chiso-Kaisei-Jôrei*; 地租改正条例, 1873) and the Supreme Court Decisions on *Emphyteusis* in *Tosa* (1879–1880) before Civil Code.

At the beginning, I mention two acts regulating landownership. One is the Landownership Certificate Regulation of 1872 (*Chiken-Watashikata-Kisoku*; 地券渡方規則), and the other is the Land Tax Revision Act of 1873 (*Chiso-Kaisei-Jôrei*; 地租改正条例). The former provides that the holder of that certificate of landownership (*Chiken*; 地券) is supposed to carry the all-embracing legal power on land (Art. 6). The latter act provides that landowner is charged with payment of land taxes (3 percent of the land value). "In former days the direct producers, irrespective of whether they were tenants or independent cultivators, were the tax-payers, but now only the *landowner*, where independent producer or absentee landlord, paid the land tax."[2] Mr. Norman explains why the Meiji leaders adopted this land tax revision. "In a country still agricultural and lacking tariff autonomy it was natural that the very considerable burden of military expenditures as well as of capital outlay for model industries and the

1) J. H. Wigmore, op. cit. p.67.

2) *Origins of the Modern Japanese State*, selected writings of F. H. Norman edited by J. W. Dower, 1975, New York, pp.248–249.

maintenance of a large body of bureaucrats should be made dependent on the land tax, and it was important that this revenue should not fluctuate, ... Some one legally identifiable as the owner has to be responsible for the tax on every acre of land regardless of who works it."[1] Then, under the new grovernment the burden of payment shifted from producer to landholder, and the double ownership in *Tosa* i.e. "under-ownership" and "upper-ownership" was to be denied. The direct producers were confronted with losing their rights on the land, e.g. *emphyteusis*, though they were exempted from the burden of land tax. The conflicts between the direct producer and the landowner frequently broke out after the enactment of two acts, they appealed to the courts to settle the problems. I refer to some cases on "under-owner" or landowner and "upper-owner" or long cropper in *Tosa*. In *Tosa*, the legal actions broke out when the rate of taxation was reduced to 2.5 percent in 1877 by the Imperial edict. Up to this time, the upper-owner, the long cropper or the direct producer maintained powerful rights on land e.g. to permanently cultivate and to sublet to others, while he is charged with payment of land taxes and village burdens. On there grounds he argued that he had such rights in return of his payment of land taxes and that the interests of the reduction of land tax in 1877 should be payed back to him.

The Supreme Court judged the case on 17th November, 1879. — "The interests of the reduction should be equally payed back to the both parties.

This court said that the Imperial edict of the reduction of land tax derived from the mercy of the Emperor and the mercy of reduction should be shared by both of the landowner and the tenant. This decision clearly shows that the Supreme Court justices could not justifiably deny the powerful status of "long cropper".

The same Supreme Court, however, denied the powerful status of "long cropper" in the next year (the decision of 8th November, 1880). The court said "the interests of reduction of land tax should be payed back only to the landowner," — because, "the landowner is charged with the payment of the land tax, so the effect of the edict of 1877 is concerned not with the

1) E. H. Norman, op. cit. p.249.

tenant but only with the landowner. Although the tenancy was characterized as a permanent tenancy or a *emphyteusis*, that is not differentiated from the ordinary tenancy."

This decision denied the powerful customary rights of the "*upper-owner*" (*Uwachimochi*) which had exercised for long time in *Tosa*, and it also stood at the very turning point that ownership was taking place of the "long cropper".

III One Case since 1880

In the former section, I noticed two Supreme Court decisions on the permanent tenancy in *Tosa* and pointed out that the second decision denied the powerful rights of the "upper-owner" or "long cropper". But we can find some decisions contrary to it among the cases of the Supreme Court. Here, I take one example, decision on 12th, November, 1884.

There was a prevailing custom on *emphyteusis* through the reclamation of wasteland in *Higo* and *Aso* (肥後, 阿蘇 ; now, in *Kumamoto* Prefecture). It was called "*Shamenbiraki* (赦免開). This custom, entitled the cropper who reclaimed and cultivated a feudal warrior's wasteland to acquire to the right of permanent cultivation. He could transfer his right to another person without the consent of warrior. And this custom continued into the early Meiji. The conflict occured when the descendant of the warrior or the landlord wished to transfer the right of ownership to another. For, he thought that the right of ownership included the right of using. Croppers were afraid of losing their guaranteed rights.

For this case, the *Nagasaki* High Court judged that croppers had the *emphyteusis* on their reclaimed farm. Then, the descendant of warrior appealed to the Supreme Court. The Supreme Court upheld the decision of the *Nagasaki* High Court in 1884, and recognized the custom on *emphyteusis*. This decision, apparently, was repugnant to the decisions of 1879–1880. We confirmed two incompatible kinds of decisions in the early Meiji.

IV Conclusion

The decision of the Supreme Court in 1884 recognized the custom on *emphyteusis*, but there were also repugnant decisions in 1879–1880 as I mentioned in the II section. I infer that there were dominant tendencies to deny the custom of the long crop or the permanent tenancy in the practice of the courts in the early Meiji. Such tendencies were heavily influenced by the Landownership Cerfificate Regulation of 1872 and the Land Tax Revision Act of 1873. Both acts represented the will of the Japanese legislator to provide the institution of absolute and complete landownership. There were, indeed, forceful movements against such legislative policy. But the principle was firmly established that the ownership is superior to the using right (long crop or *emphyteusis*).

I cited four provisions on *emphyteusis* of the Japanese Civil Code of 1898 in Introduction. Art. 278 regulates the duration of an *emphyteusis* is from twenty to fifty years. It denies a long crop or permanent tenancy. But there is no provision for *emphyteusis* in the French Civil Code and the German Civil Code, at all. This fact forces us to examine the process of condification of the Japanese Civil Code in the middle Meiji. My another paper will discuss this problem.