

THE JAPANESE
LEGAL SYSTEM

CASES, CODES, AND COMMENTARY

CURTIS J. MILHAUPT

J. MARK RAMSEYER

MARK D. WEST

FOUNDATION PRESS

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PREFACE

A recent National Geographic survey found that 42% of young Americans couldn't locate Japan on a map. We suspect that law students have better geography skills, but we think that even those who don't would benefit from an introduction to Japanese law. We could elaborate (as others have) for volumes, but we'd prefer to avoid a deep inquiry here into the justifications for comparative law. Suffice it to say that an exploration of Japanese law helps place legal rules and institutions in broader context, a context that includes economics, society, and politics. By way of comparison it helps expose the economic assumptions, political bargains, and social settings that animate the U.S. legal system. In this book, we explore that interplay between law and the larger context in which it operates and evolves, using Japan as our focal point.

Two of us have produced other collections of readings on Japanese law in the past. For this volume, we have borrowed in part from that material because some of the readings are now standard. But we have added much that is new and otherwise inaccessible to most non-Japanese students, particularly English translations of Japanese case law. We recognize that the book is a bit long, but we have included only material that at least one of us, and usually all three of us, enjoys and finds pedagogically useful.

We have not tried to advance a particular research method or approach. In truth, it would have been difficult for us to do so, because we often (cheerfully) disagree on matters of approach or conclusions to draw from a given set of facts. We have designed this material to play to the intellectual diversity of the classroom.

As an extensive compilation of readings and translations, this book represents the work of many scholars. We are grateful to Mr. Yukio Yanagida, Prof. Hidetaka Aizawa and Ms. Yukino Nakashima for assistance in contacting copyright holders, and thank all those who granted permission to reprint their work here. Our former students have helped us in numerous ways, including critiquing readings in earlier collections and translating cases for this book.

At bottom, we created this book because we find the material fascinating—even fun—and we hope that you will, too.

CURTIS J. MILHAUPT
J. MARK RAMSEYER
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CHAPTER 1

INTRODUCTION

We begin by detailing an early eighteenth-century suit and presenting a medieval comic play, both of which illustrate how the indigenous legal system apparently worked. We then provide an overview of two formative periods of Japanese legal history—Tokugawa (1600–1868) and Meiji (1868–1912). The two periods reflect in turn the development of an indigenous legal tradition, and the importation of western legal systems. We conclude by presenting contrasting perspectives on the civil law tradition, one of several legal traditions that shape modern Japanese law. One perspective emphasizes the differences between the civil and common law systems; the other stresses that these differences may be more formal or procedural than substantive.

A. THE HISTORICAL CONTEXT

Dan Fenno Henderson, *Nuinosuke v. Chübē:* *Conciliation in Tokugawa Civil Trials*

in Dan Fenno Henderson, 1 *Conciliation and Japanese Law: Tokugawa and Modern*, 127–62 (1965).*

Facts of the Case

... At the time of suit (1808), Nuinosuke, the plaintiff, was a twenty-eight-year-old “farmer” with an assessed productive capacity of twenty-five *koku* [of rice] and supporting a household of fifteen persons including servants. [One *koku* of rice was enough to feed one person for one year.] Besides his farming he engaged in commercial fishing. He was thus a young and prosperous “farmer,” and as will appear later, he was also a shrewd, if somewhat complicated, businessman. His land holdings were in Hebara village, Ishimi district of Kazusa province. Hebara was about twenty-two miles from Edo (near present-day Chiba) in the fief of Ōoka Suzen-no-kami, a small hereditary *daimyō* of twenty thousand *koku*.

Chübē, the defendant, was a tea house operator in Sakai-chō, the theater district in the city of Edo. According to the plaintiff’s petition, at the behest of the defendant, in the sixth month of 1807 the plaintiff bought

* From Dan Fenno Henderson, 1 *Conciliation and Japanese Law: Tokugawa and Modern*, 127–62 (Seattle: University of Washington Press, 1965). © 1965, University of Washington Press. Reprinted by permission of the publisher.

nineteen shares in the tea house guild of Sakai-chō and one residence building from the defendant and paid him fifty *ryō* [one *ryō* roughly equaled one *koku*, although the price of rice fluctuated substantially] of gold in cash. He left the property in the possession of the defendant, but he received a deed and a promise that the defendant would deliver the property to the plaintiff on request.

The following fall the plaintiff requested delivery and the defendant refused to perform. While they were arguing over the matter, the plaintiff learned that the seal of the defendant's houseowner, Mataemon, on the deed given to the plaintiff had been forged. According to the law of conveyancing of the Tokugawa period, a deed was invalid without the seal of the grantor's headman and houseowner, and forgery was punishable by Decapitation (*shizai*). Therefore, lacking alternatives this petition is humbly submitted. Please in your gracious benevolence summon the opponent, Chūbē, and in your abundant kindness conduct a thorough examination. If in accordance with the deed which the plaintiff holds, the transfer of both the shares and house to the plaintiff were ordered as soon as possible, [the plaintiff] would be grateful and respectfully happy. But in stating his answer orally, the defendant discloses several facts that indicate that Nuinosuke may have been a bit of a pleasure seeker, and that the transaction may have been a loan secured by the property conveyed, and that the defendant's daughter added a bit of incentive and color to the transaction. These facts were not clearly determined, because they became irrelevant to dispose of the case.

The defendant, Chūbē, alleged that Nuinosuke was enamored of his daughter, Michi, and that through the arrangements of the go-between, Buzaemon, he relinquished his daughter to Nuinosuke. To cover the expense of wedding preparations, he borrowed fifty *ryō* from the plaintiff. Since Nuinosuke and Chūbē were to become father-in-law and son-in-law, Buzaemon suggested that a note was unnecessary. Although they discussed whether Chūbē should deliver a mortgage deed, actually when the money was transferred, Chūbē wrote the deed in the form of a conveyance. Chūbē claimed that he objected to affixing his seal to a deed of conveyance, but after assurances that it was safe in a business relationship with the man who was to marry his daughter, he did seal the conveyance and forged the houseowner's seal on it. Chūbē did not deny that he had forged his houseowner's seal.

Nuinosuke always claimed that the transaction was a sale and that he did not know that his wife was Chūbē's daughter, but rather thought that she was the daughter of Hachibē, a houseowner of Torihatago-chō. These things seem difficult to believe, but Nuinosuke agreed with Chūbē at the time that the go-between was Buzaemon, and from remarks of the court, it seems that Hachibē was simply retaining Michi (the plaintiff's wife-to-be), as a servant, and that actually Chūbē was her real father. There is some question whether Michi was Nuinosuke's mistress rather than his wife. But leaving that aside, the plaintiff was apparently suing his father-in-law on what was probably a loan secured by a forged conveyance of the borrower's

business shares, and perhaps the consideration of extending the credit was one daughter, Michi. Since Chūbē admitted to the loan and forged deed and Nuinosuke soon agreed to accept repayment of the money transfer of the property, the exact nature of the transaction became immaterial to the conciliation settlement which followed, although it could have been quite material to the legal procedures which would have been followed, had the case gone to judgment. The long drawn-out proceeding was concerned almost entirely with the problems of when and how Chūbē should pay. . . .

Initiation of the Suit

The Request to Submit the Petition (sashidashi negai): To begin the second stage in the Tokugawa dispute-settlement process, the litigant must proceed to a Shogunate court. The diary of Nuinosuke opens with his departure for Edo on the eighth day of the second month of 1808.

Upon arrival in Edo, it was customary for litigants to take up lodging at suit inns approved for out-of-town litigants by the Shogunate. Most of them were located in the section of Edo called Bakurō-chō. Between the eighth and eleventh, we can assume that Nuinosuke was getting to Edo, settling in the suit inn of Ōtsukaya Buzaemon, explaining his case to the suit innkeeper, learning the procedures from the innkeeper, and preparing to file his petition. These innkeepers served some of the function of lawyers by assisting the litigants in the preparation of their case and showing them the procedures, which the innkeepers had learned by experience with many other cases. Since lawyers were otherwise prohibited in court, this role of the publicly franchised litigant's inn was important to trial in Edo.

In a suit involving diversity of jurisdictions, it was necessary to get the official with primary jurisdiction (here the *daimyō*, Ōoka) to submit his approval of the petition. The *daimyō*'s approval was only obtainable if the plaintiff had first obtained the approval of his village headman. The *daimyō*'s approval was obtained by a request from the plaintiff bearing the headman's approval. If the petition were approved by the *daimyō* office, the *daimyō* sent an official to court with the plaintiff to request permission to file suit.

Thus, on the fourteenth of the second month, Nuinosuke went to the *daimyō*'s Lower Residence (*shimo yashiki*), which was the Office of Local Affairs (*jikata oyakusho*) for the fief of his *daimyō*, Ōoka. He requested the *daimyō*'s office to approve submission of his petition. As mentioned above, he had to present an application approved and sealed by his village officials, Accompanying Petitioner (*sashizoenin*), to show that he had been through the first stage of local conciliation. Although the text of his request to submit his petition is not given, apparently Nuinosuke failed to comply with this important prerequisite and did not include the name of the local official on his request. He was informed of the deficiency of his request on the fifteenth and resubmitted it on the sixteenth, after entering the name of a man, Heihachi, as substitute for the Group Chief (*kumigashira*). On the twenty-first he went to the upper residence of the *daimyō*, located at Iidamachi, and was granted an interview with Takagi, who, according to