THE REVOLT OF THE SILK MERCHANTS.

The foregoing title has been suggested by the perusal of a book about the law of Sale of Goods as applied to the silk trade.[1]

The book is remarkable in several respects. In the first place, it is written by a learned Japanese,[2] under the direction of M. Edouard Lambert, professor of Comparative Law in the University of Lyons, and in strict collaboration with M. Auguste Dargent, the head of one of the principal silk importing houses of Lyons, as well as with M. Lambert himself, who, as he states in his preface, *a souvent tenu la plume* in the writing of the book.

I pause merely to draw especial attention to this somewhat novel feature of a book about a commercial branch of the law, that a merchant should have collaborated with lawyers in writing it. Perhaps some of us lawyers who write law books might derive some profit from collaboration with "laymen," and perhaps some of our legal propositions would not appear so reasonable, or be so glibly and complacently stated, if, sentence by sentence, what we wrote had to be justified in the eyes of the merchant for whose service the law is presumably intended.

It is not remarkable that M. Lambert should have helped to write a book about law. The remarkable thing is that he should find time to write wholly or in part, or even supervise the production of, so long a series of books. Not to mention a formidable number of books written by him and separately published, and a series of studies in oriental law as well as a series entitled "Collection Internationale des Juristes Populaires," published under his direction, the book under review occupies volumes 18, 19 and 20 of the *Bibliothèque de l'Institut de Droit Comparé de Lyon*, published under the direction of M. Lambert and his colleagues, in the course of the last eight years; and the publication of volume 24 of the series is now announced.

[1] *Le Droit Corporatif International de la Vente de Soies: les contrats-types américains et la codification lyonnaise dans leurs rapports avec les usages des autres places, par Masaichiro Ishizaki, avec une préface de Edouard Lambert.* Paris, 1928.

[2] The author is described on the title page as *Hogakushi de l'Université Impériale de Tokio, Docteur en Droit de l'Université de Lyon, Diplomé de l'Institut des Hautes Etudes Internationales (Université de Paris).*

Outside of the Anglo-American legal dominions, I am not aware of the existence of any detailed and intensive studies of the methods and results of English and American case-law strictly comparable with those published in this series. They relate for the most part to "industrial" law, including the law affecting organized Labour both in England and in the United States. The object, if I am not mistaken, is to compare judge-made Anglo-American law with French or Latin *jurisprudence*, with the idea that from the comparison of two great systems of law there may emerge the elements of, or the material for, a super-common law or international private law.

Mr. Ishizaki and his collaborators conceived the idea of enlarging the field of the Institute's investigations by selecting for special study the law of sale of goods as applied to a particular trade of cosmopolitan character. That is to say, they proposed to study the principles of the common law and the civil law respectively, not merely in the texts of decided cases in one country or another, but in what they expected would be the more precise and concrete applications of those principles in a given trade. They selected as primary examples the usages of the silk merchants of New York and Lyons respectively, each of these cities being the centre of one of the small number of great silk markets of the world, one of these two selected markets being within the territory of the common law and the other within the territory of the civil law.

The result was interesting to the point of tending to disturb a lawyer's self-satisfied equanimity with regard to the existing law. The investigators started with the intention of studying the common law and the civil law as embodied or reflected in the local usages of the two markets in question, and as compared with the usages of other markets, but the supposed objects of study eluded those who sought to study them. It was found that the silk merchants of New York and other places, and to a smaller extent, those of Lyons, were pursuing their own ways without regard to the laws of sale of goods of their respective countries, and the real object of study, it appeared, was a new body of rules substantially different from those of any existing system of law and enforced independently of the ordinary courts.

In the New York market the silk merchants attain this result by means of a standard or type form of contract, prepared by the Silk Association of America and executed by the parties. This form of contract contains an essential term, namely, that all the

conditions of the rules of the Association (*Raw Silk Rules* and *Thrown Silk Rules*) are expressly incorporated as if they were written into the contract. This involves in effect a second essential term, expressed in the rules, that the parties confer upon the arbitration tribunals of the Association jurisdiction to decide, without appeal, disputes arising out of the contract, and these tribunals are not to be bound by judicial decisions or restricted by legal technicalities, but are to decide disputes in such a way as to administer substantial justice.

In some other silk markets there is no prescribed form of standard contract, but escape from the system of strict law is effected by appropriate provisions in the local code of rules governing the trade. At Lyons, for example, the code of usages begins with a declaration that sales made by the silk merchants of Lyons are governed by the present codification, and that when seller and buyer have not made any stipulation contrary to the usages therein contained, they are deemed to have accepted them and to have contracted in accordance with their terms.

Thus by the triple operation of a code of usages, a standard contract express or implied making the code applicable, and a submission to arbitration, without appeal, the silk merchants in most of the great silk markets of the world have put aside, as unsuited to the conditions of their trade, the rules of law which lawyers are apt to regard as the last word in the administration of justice.

The investigators, who had set out on a search for a sort of super-common law of commercial rules, found instead a new kind of international private law of the silk trade, and they were obliged to abandon their original objective, indicated by the sub-title of their book (*les contrats-type américains et la codification lyonnaise dans leurs rapports avec les usages des autres places*), and make the new law the chief object of their study, as indicated by the main title (*Le Droit Corporatif International de la Vente de Soies*).

It would take more space than the editor would allow me to make a detailed comparison of the "law" of the silk trade and the law embodied in the Sale of Goods Act, but some salient features of the former should be at least mentioned.

In the first place the contract is invariably evidenced or confirmed in writing, whether in a standard form of contract, or in a contract in the form in customary use by a given house of business, or in notes delivered by a broker to the parties.

In the second place, the contract thus evidenced or confirmed is not necessarily fixed or complete *in uno tractu temporis*. It being impracticable to discover or verify the essential qualities or classification of the goods by a mere external inspection, the goods are not considered as irrevocably sold and bought until they have been subsequently subjected to certain tests as to dryness, weight and condition in other respects. It is only rarely that a contract results instantaneously in the creation and definition of the obligations of the parties or in the passing of the property in the goods. The subject matter is usually unascertained goods described generically or goods which, though specific, are agreed to be sold with reference to their generic qualities or their particular classification. Hence the pronounced tendency to postpone until some time after the making of the contract the precise definition of the obligations of the parties and the passing of the property, and hence divergence from the ordinary law of sale of goods much of which is appropriate rather to the sale of individual chattels, specific and susceptible of inspection, than to the more complicated situation arising from the sales usual in the silk trade.

But it is especially in the case of default or delay, and the remedies applicable in such case, that we perceive in the law of the silk merchants the tendency to postpone until some time subsequent to the making of the contract the precise definition of the obligations of the parties. In the ordinary law of sale of goods the obligations of the parties are usually defined exactly by the terms or nature of the contract, or by general rules of law applicable so far as the parties have not expressed themselves, and when a dispute arises the court must decide which of the two parties is technically in default, and then, without regard to the possible hardships of the result, must, as a general rule, order him to pay a sum of money by way of compensation to the other party. It is true that in estimating the damages the court may within narrow limits consider mitigating circumstances, but there the latitude ends. In the law of the silk merchants on the other hand a wide discretionary power is left to the arbitration tribunal to take into account the whole situation as it appears when the dispute arises, and to do substantial justice according to the circumstances as they then exist without regard to what, from a strictly legal point of view, would be the rights of the parties judged solely by the terms of the contract originally made them. So we find provisions for allowances and rebates and, when performance becomes impossible according to the original terms, for substitutionary performance.

With regard to the risk of loss, which according to the ordinary law of sale of goods goes hand in hand with the property in the goods (*res perit domino*) unless the parties have indicated an intention to the contrary, the silk merchants adopt as a general rule that the risk passes to the buyer, not when the property passes, but when delivery is made. If, however, an f.o.b. contract, or, as is more frequently the case, a c.i.f. contract, is made, the special terms of the contract may modify the general rule. Cases of impossibility of performance arising from events happening after the making of the contract are recognized as causes of discharge, and made more certain by an enumeration of the kinds of events which may operate as a discharge, and as in the case of what used in English law to be called discharge by impossibility of performance, but which is now called discharge by implied condition, commercial or economic impossibility or frustration has taken the place of physical impossibility.

It is not to be assumed from the foregoing that the codes of usages applicable to all the great silk markets are uniform on the several matters mentioned. Mr. Ishizaki gives in his third volume the codes adopted at New York, Lyons, Zurich, Milan, Turin, Yokohama, Canton and Shanghai, and analyzes them systematically in the preceding two volumes. The codes differ in matters of detail, and some matters are provided for in some codes and not in others. The general summary given above is therefore not literally applicable in every respect to all the places mentioned. Lyons is in a class by itself because its code of usages derogates from the law of the land less than most of the other codes.

It is true that there is nothing to prevent the parties to any contract of sale of goods from incorporating in their contract any or all of the special features of the law of the silk merchants above mentioned, but the significant thing is that the silk merchants have chosen to reject many of the fundamental general rules of the ordinary law of sale of goods and to replace them by others, so that the normal body of rules applicable to transactions in the silk trade is substantially different from the normal body of rules applicable to ordinary contracts of sale.

Even English judges have sometimes had occasion to draw attention to the fact that various rules of the Sale of Goods Act were primarily drafted in relation to the sale and delivery of goods on land, and can be applied, for example, to c.i.f. contracts only *mutatis mutandis* (*Manbre Saccharine Co.* v. *Corn Products Co.*).[3]

[3] [1919] 1 K.B. 198, at p. 203.

Similarly, and to a larger extent, it would appear that some of the fundamental general rules of the Sale of Goods Act were drafted primarily in relation to domestic sales of individual chattels, or were primarily a codification of rules which were developed in relation to such sales, and are inappropriate as general rules in relation to transactions customary in the silk trade.

The study of the law of the silk trade and of the conclusions to be drawn from that study are of course only a particular phase of a larger question, which cannot be further pursued here, namely, to what extent our present law, which grew up and, notwithstanding the supposed flexibility of the common law, became substantially stereotyped in an earlier age and in very different industrial conditions, is suitable to modern conditions, or is serving its real economic purpose. In other words, the question arises whether it is time for some "reorientation" of our study of the law in the direction of studying it as a *social* science, and therefore as an *international* or *cosmopolitan* science.[4]

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[4] M. Lambert has some interesting observations on this subject in his latest book: *L'Enseignement du droit comme Science Sociale et comme Science Internationale,* (Paris, 1928), which is in fact an introduction to volume 23 of the *Bibliothèque de l'Institut Comparé de Lyon,* entitled *L'Enseignement du Droit en France et aux Etats-Unis, par Robert Valeur.*