The Law of Contract in China under the T'ang and Sung Dynasties [1]

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A contract, interpreted in the light of developed Western systems (whether derived from Roman law or the English common law), is an agreement between two or more parties which the law makes enforceable provided certain conditions are met. Sometimes the mere agreement is made enforceable as in the case of the Roman consensual contracts, sometimes the law requires an element apart from the mere agreement such as consideration (the English comman law), transfer of property (the Roman real contracts) or an oral or written formality (the Roman verbal and literal contracts). In all cases, however, the law has envolved a separate branch concerned with actionable agreements, whatever the precise conditions for actionability, and has provided a systematic exposition of the formation of contract, the rights and duties of the parties and remedies for breach. Even in a less developed stage when the element of agreement may not have assumed its later dominant and unifying role, the law may have recognized and regulated particular transactions thus conferring upon them independent legal status, as in the case of the early *stipulatio* and *mutuum*.

Chinese law in the period under consideration can be said neither to have developed a distinct branch which can be labelled 'contract', that is, one predicated upon the legal re-

(1) The T'ang dynasty lasted from 618 to 907 and the Sung from 960 tot 1279.

cognition of 'agreement', nor to have worked out a comprehensive set of rules determining the conditions under which agreements became actionable. Indeed it is even difficult to know the extent to which particular transactions were accorded separate legal recognition and regulated, as it were, in their own right rather than as part of a policy of securing good order or an attempt to find a common-sense solution to a practical problem. The official law, comprised in the main of the code (*lü*) and statutes (*ling*) (2), paid little attention to what a modern lawyer would term contracts. It introduced rules only in a limited number of special areas such as the making of contracts by officials with those under their jurisdiction, the extent to which creditors might resort to self-help, the disposition of 'family property' and the sale of slaves and animals in the official markets. On the whole the state intervened to protect its interest in securing good order and in the maintenance of family unity.

For most purposes the state and its magistrates paid no attention to agreements entered into by private individuals. They were left to buy and sell, incur debts, pledge or lease property as they pleased without direct regulation of these transactions by the state, subject to the limits already mentioned. Agreements rarely appear to have come before the courts and where they did the court confined itself to an interpretation of any relevant statutory provision and its underlying policy or to the prevention of fraud. It did not work out a technical jurisprudence governing the enforceability of agreements as such or even of particular classes of agreement.

Since there was no class of legal experts from whom ordinary people could obtain advice, agreements tended to be short and simple, expressed in non-technical language readily understood by the parties. Yet it seems clear that, despite the absence of lawyers, there were persons within the community who gave advice to those proposing to enter into some transaction. The documents which have been preserved recording, for example,

(2) Imperial decrees (especially important under the Sung) also counted as official law.

sales of land, slaves or animals exhibit a certain uniformity in their arrangement and wording. This shows that precedents were relied upon and suggests the existence of persons with knowledge of the appropriate wording.

Hence in considering the T'ang and Sung law of contract one is essentially examining on the one hand the statutory rules and on the other the terms of documents from this period recording sales, loans, leases and pledges. To the information gained from these sources one may add descriptions of the plight of debtors expressed in non-legal sources and a few cases coming before the official courts contained in casebooks produced under the Sung dynasty. These various sources merit a brief description. The statutory rules are obtained from the dynastic codes (*lü*), statutes promulgated by the government or imperial edicts. The T'ang code itself was first promulgated in 624 A.D., an authoritative commentary added in 653 A.D. and the final revised version of the code and commentary was issued in 737 A.D. (3). The Sung code was promulgated by the first emperor of the dynasty in 963 A.D. It reproduces the T'ang code but contains some extra material including rules relating to contract (4). Statutes contained administrative regulations often relating to particular localities and did not provide for the infliction of punishments (5). Edicts were rules on particular matters specifically issued by the emperor often in response to a memorial which might itself be cited instead of the edict as the authoritative source. Actual contracts written on paper from the time of the T'ang and Sung have been discovered in border regions of China, principally Tun-huang (6). They represent only the practice of a small and remote area and hence generalizations drawn

(3) For further details see W. JOHNSON, *The T'ang Code* I (1979), Introduction; G. MACCORMACK, *The T'ang Code. Early Chinese Law*, Ir. Jur. (1983).

(4) For further details see J.D. LANGLOIS, Jr., *'Living Law' in Sung and Yuan Jurisprudence, Harvard Journal of Asiatic Studies* 41 (1981), 169.

(5) See D. TWITCHETT, *The Fragment of the T'ang Ordinances of the Department of Waterways discovered at Tun-Huang, Asia Major* 6 (1957), 28f.

(6) See L. GILES, *Six Centuries at Tunhuang* (1944).

from them have to be treated with caution, especially as it is reasonably clear that legal practices varied in different parts of China (7). The remaining sources (the writing of the T'ang statesman Han Yü and two case books from the Sung dynasty) are more fully described below. When I refer in this paper to 'contract' or 'the law of contract' I mean such transactions and the rules relating to them which would be considered contracts in Western law. As I have said the Chinese perspective of the T'ang and Sung period is different from the Western.

THE LAW IN THEORY

I. The T'ang Code

The code has specific provisions on, or otherwise refers to, the following classes of transaction that can be considered as contracts: loans of money or goods, sale, exchange, pledge, hire and deposit. In addition there are references to 'contract' in general and to guarantors. A varied terminology is employed for the designation of these transactions. Contract in general is designated by *chi* (8), *ch'ao ch'uan* (9) and *yüeh* (10). *Chi* and *yüeh* appear to express written contracts. The term for guarantor is *pao* (11). Several expressions are used for borrowing, lending or debt: *tai* (lending or borrowing) (12), *chieh* (lending or borrowing) (13), *chia ching* (borrowing) (14) and *fu chai* (debt) (15). The

(7) J. GERNET, *La vente en Chine d'après les contrats de Touen-Houang ix^e-x^e siècles*), *T'oung Pao* XLV (1957), 279 suggests with respect to sale that certain contractual forms were observed throughout China of the T'ang and Sung period. Cf. also the remarks of A.F.P. HULSEWÉ, *'Contracts' of the Han Period*, in *Il diritto in Cina*, ed. L. LANCIOTTI (1978), 33.

(8) Book 11, article 10; book 26, article 34 (commentary).

(9) Book 25, article 8.

(10) Book 26, article 10 and cfr book 13, article 12.

(11) Book 4, article 7.vii and cfr book 25, article 25.

(12) Book 11, article 10; book 15, article 17.

(13) Book 11, articles 10, 11; book 15, articles 13, 18.

(14) Book 15, article 16.

(15) Book 11, article 10; book 26, articles 10, 11.

word for pledge is *chih* (16). For sale or purchase there is *ku* (17), *mai* (18), *mai* (sale) (19) and *ti* (purchase of grain) (20). Exchange is designated by *mou* (21) or *i* (22), deposit by *chi* (23) and hire by *ku* (24), *ch'ien* (25) or *ch'iu* (26).

This variation in terminology is worth noting because it suggests that the transactions designated with different terms were themselves recognized as being distinct. A transaction of loan, for example, was differentiated from one of hire and a transaction of deposit from one of pledge. This does not mean that they were recognized as distinct categories of legally enforceable agreements, nor even that the individually denominated transactions were recognized as separate legal institutions in the sense that there were rules of law defining the circumstances under which each was constituted and the consequent rights and duties of the parties. All that the difference in terminology necessarily reflects is recognition that the transactions were factually different, having different objectives and entailing different consequences. Furthermore a difference in terminology in some cases may be deceptive. There is doubt whether at least people in general would have drawn a rigorous distinction between sale/purchase and exchange although these transactions are marked by different terms (27).

With respect to borrowing or lending the code is concerned

(16) Book 26, article 12.
(17) Book 11, article 10.
(18) Book 11, article 10.
(19) Book 11, article 10; book 12, article 14; book 13, article 3; book 20, articles 6, 8, 9. The character for sale (*mai*) is written differently from the character for purchase (*mai*).
(20) Book 15, article 26.
(21) Book 13, article 3.
(22) Book 20, article 4.
(23) Book 26, article 9. The character for deposit (*chi*) is written differently from that for contract/document (*chi*).
(24) Book 15, article 12.i. The character for hire (*ku*) is written differently from that for sale or purchase (*ku*).
(25) Book 15, article 12.i.
(26) Book 15, article 23.
(27) See further below.

principally with loans made by or to officials and with the imposition of punishments for such loans as are held to be incompatible with the holding of office. Book 11, article 10 states that officials who borrow (*tai*) property from persons within the area of their jurisdiction are liable on account of *tsang*. This means that the official is to be beaten or sent to penal servitude, the severity of the punishment depending upon the value of the goods borrowed ([28]). If the property borrowed is not restored within 100 days the offence falls into a more serious category (that of accepting property from persons within the area of jurisdiction), and there is an increase of punishment if force has been used. The commentary to the article contemplates that the property will be restored to the lender (by providing that even in the event of an amnesty which exempts the official from punishment the property is still to be restored), but no remedy is given him by which he can compel restitution. The code looks only at the illegal act of the official and not at the 'rights' of the other party to the contract. According to the commentary there is no offence if the goods have been restored before the matter has come to light. The legislators do not consider the possibility that the contract itself might be void or voidable.

Part ii of the article deals with officials who buy from, or sell to, persons under their jurisdiction ([29]), and part iii with cases in which there is a written contract under which property remains due (arising from such transactions) ([30]). At the conclusion of part iii comes a further provision on borrowing. Officials who borrow (*chieh*) clothing, utensils, trinkets or the like and fail to restore them within thirty days are made liable on account of *tsang* with a maximum penalty of one year penal servitude. In the case of minor articles of the kind described no offence is constituted by the mere borrowing. Here it is the failure to repay within

(28) For the privileges open to officials by which the actual suffering of these penalties might be avoided see the literature cited at note 3. For further details on *tsang* see G. MacCormack, *The Concept of Tsang in the T'ang Code*, forthcoming in R.I.D.A. (1986).

(29) See below.

(30) See also below.

a certain time that first attracts a penalty. From the context one has to supply the fact that the official borrows from persons under his jurisdiction. The commentary, after stating the penalty for the offence, adds that the articles borrowed are to be restored to their owners, but again does not confer a means of recovery or a remedy on the owner. It does not seem that failure to restore would have constituted theft. Nor is it clear that, where the borrower was an official, the creditor, the person entitled to the property, was permitted to exercise self-help and seize from the official property equivalent in value to that borrowed (31).

Book 11, article 11 deals *inter alia* with the borrowing (*chieh*) by supervisory officials of slaves, cattle, horses, camels, mules, donkeys, carts, boats, mills, houses, shops and the like from persons under their jurisdiction. In such a case the value of the use of the property or the rent is to be calculated (32). The offence committed by the supervisory official is defined as the acceptance of that amount within the area of his jurisdiction. The final part of the article allows for certain exceptions such as borrowing on account of family marriage or death.

Several articles deal with the borrowing by officials of property owned by the government. Book 15, article 13 concerns the case where the various kinds of property detailed in book 11, article 11 are owned by the government. If a supervisory or custodial official borrows for his private use any of these items or lends them to another he is to receive a beating of fifty blows with the light stick and may in addition (depending on the calculation of the value of the use or the rent) have committed the offence of accepting property within the area of jurisdiction. Increased penalties apply where the official borrows government donkeys or horses used in the postal and courier service. The term in this article for both borrow and lend is *chieh* (33).

Book 15, articles 17 and 18 continue the theme of article 13.

(31) For self-help in cases of debt see below.

(32) The commentary to the article lays down how this is to be done.

(33) The person to whom such property is lent appears to be subject only to the beating prescribed as the minimum penalty for the offence; he cannot have committed the offence of accepting property within the area of jurisdiction, confined to supervisory officials.

According to article 17 if a supervisory or custodial official borrows (*tai*) for his own use or lends (*tai*) to others property owned by the government and there is no written record of the transaction the offence of theft is committed. If there is a written record the offence is treated as though it were theft (34). Article 18 puts the same situation except that the word for borrow and lend is *chieh* not *tai* and the penalties are much lighter. The act of borrowing or lending to another is punished with a beating of 50 blows with the light stick and if the goods are not returned within ten days a further penalty in proportion to their value is incurred (35). The commentary describes the property in question as clothing, curtains, mats, utensils, trinkets and the like.

Two problems are raised by these articles. First, how are articles 17 and 18 of book 15 to be distinguished, and second, what is the relationship between these two articles and the other articles dealing with borrowing by officials. As to the first problem Deloustal's suggestion is that the difference can be explained through the use of the terms *tai* and *chieh*. He takes *tai* to refer to 'prêts de choses susceptibles de rapporter un intérêt ou un bénéfice quelconque, comme l'argent, les grains, les animaux' and *chieh* to refer to 'prêts d'objets qui ne sont pas de rapport, tels que vêtements, meubles etc.' (36). The difference in the penalties established by the two articles, together with the kinds of property enumerated in the commentary to article 18 suggest that *tai* may be referring to a more important kind of property than *chieh* (37), but whether the distinction is exactly that stated by Deloustal is doubtful. Book 15, article 13 and commentary which deal with slaves, animals and other produce bearing or interest yielding property use the term *chieh* and not *tai* (38).

(34) For the distinction see the article cited note 28.

(35) The penalty technically is « liability on account of *tsang* with a decrease of two degrees ».

(36) R. DELOUSTAL, *La Justice dans l'Ancien Annam*, *Bulletin de l'École Française d'Extrême Orient*, 13 (1913), 20 n 3.

(37) Cfr also the terms *tai* and *chieh* in book 11, article 10 above.

(38) See also book 11, article 11 above.

In considering the relationship between these various provisions on borrowing by officials one can detect a certain parallelism between those which refer to private property and those which refer to property owned by the government. Thus book 11, article 10 puts two cases where private property is borrowed, the one designated by *tai* and the other by *chieh*. *Tai* is not defined but *chieh* is defined as 'the borrowing of clothing, trinkets, utensils and the like'. The implication is that *tai* covers all other kind of property. However article 11 of the same book establishes a special rule for certain classes of property (slaves, animals, carts and so on) where there is an element of value of use or rent to be calculated. But the word for borrow in this article is *chieh* and not *tai*. Exactly the same contrasts occur in the articles dealing with the borrowing of property owned by the government. Book 15, articles 17 and 18 echo the distinctions between *tai* and *chieh* of book 11, article 10 and article 13 of the same book corresponds to book 11, article 11. The main difference between the case where private property is borrowed and that where property owned by the government is borrowed is that the penalties for the later are more severe.

Other provisions dealing with contracts by officials concern sale and hire. Book 11, article 10.ii deals with the case in which an official trades with persons under his jurisdiction. The profit he makes on a transaction (sale or purchase) is to be calculated and falls within the offence of soliciting property within the area of jurisdiction ([39]). Part iii of the same article considers the case where a written contract (*chi*) has been drawn up providing for the payment of property by a certain date. If the debt (*fu chai*) so contracted is not discharged within fifty days of the stipulated time the offence of accepting property within the area of jurisdiction is committed ([40]). The commentary explains that this refers to contracts made in the course of trading between the

(39) If force has been used to induce the transaction the offence is the more serious one of subverting the law.

(40) According to the commentary the case of failure to pay within the period of fifty days is dealt with by the ordinary rule on failure to repay a debt (see below).

official and a person under his jurisdiction. One notes the difference between the case where a profit is made on a sale or purchase and the case where the official does not pay what is due under a contract. The latter is treated as accepting property within the area of jurisdiction, the former as soliciting property within the area of jurisdiction which is punished one degree more severely (41).

Book 15, article 23 prohibits supervisory officials from hiring within the area of their jurisdiction persons to convey the taxes of the area to the capital. The term for hire (*chiu*) is different from that used in the other articles referring to hire. Officials who disobey are liable on account of *tsang* with respect to the profit which they have made. It is not entirely clear what this profit is. Possibly they are able to hire more cheaply within the area of their jurisdiction and might keep the difference between what they paid and what they would have had to pay if they had hired outside the jurisdiction.

The remaining provisions in the code touching on contracts relate to transactions entered into by ordinary persons. Book 15, article 16 deals with a special kind of borrowing. Persons may request the loan (*chia ching*) of property owned by the government such as tents or cushions necessary for the conduct of special ceremonies. Here the borrowing is permissible and the offence is constituted by the failure to return the articles within a certain time, the maximum penalty being a beating of 80 blows with the heavy stick. If the articles are not returned and, further, put to private use by the borrower the penalty is increased up to a maximum of penal servitude for one year (42).

Two articles deal with the general problem of debt. Book 26, article 10 provides that in all cases of debt (*fu chai*) where the written contract (*chi*) is disregarded and what is owed is not paid by the due time there is to be a penalty the severity of which

(41) Book 11, article 8.

(42) Part ii of the article deals with the case where the objects have been lost; if the borrower acknowledges this and reimburses the value there is no offence; if the matter is disclosed by others the case is treated in terms of theft.

depends upon the value of the property due and the length of time there has been default. The penalty ranges from beating with the light or heavy stick to penal servitude. This article has a wide scope. It covers the case of any contract (loan, hire, sale, pledge) under which property is owed. It is not restricted to specific cases of borrowing. Furthermore its provisions only seem to apply where there is a written contract specifying what is owed. Purely verbal arrangements would not attract the penalties provided for default. Nothing is said of a right of the creditor to be repaid nor is any remedy to compel repayment given to him. The concluding words of the article appear to require the court to order repayment of the debt, and the commentary contemplates the possibility that the court might direct a postponement in order to give the debtor further time to collect what is due.

The succeeding article (26.11) by implication permits the creditor a limited privilege of self-help. If a creditor does not inform the appropriate court of the debt due to him but instead seizes from the debtor property in excess of the debt he is liable on account of *tsang* to the extent of the excess. There are two points to note here. First the primary obligation of the creditor, where the debtor is in default, is to notify the court. Presumably the court then summons the debtor in order to determine what punishment is due as well as to see if any further delay should be accorded. But it does not seem that the court will directly help the debtor by official distraint on the debtor's goods. Second, if the creditor, instead of notifying the court, helps himself to the debtor's property and takes no more than the value of the debt he commits no offence. Presumably in this case the debt is deemed to be discharged and the debtor himself is exempt from punishment (even though in default at the time of the seizure of his property by the creditor). If the creditor takes too much the same consequences follow with the addition that he now himself commits an offence for which the court will impose a punishment. Possibly the court would also order the return of the excess to the debtor but the latter's remedy to recover this remains unclear.

Indirectly, therefore, the code does supply a creditor with an

effective remedy for the recovery of a debt. Although he cannot make use of the court personnel to obtain property from a debtor he can exert considerable pressure in order to obtain repayment. Should the debtor have property he is likely to pay rather than face the infliction of the penalty provided by the code for default. Even if he personally has no property, relatives may contribute to save him from a court appearance. The court will not take cognizance of the debt unless it receives an application from the creditor. He is in a position to use the threat of applying to the court as a bargaining counter with the debtor.

Some interesting information on hire is given incidentally in an article primarily concerned with the imposition of liability for death or injury caused by a domestic animal or dog (book 15, article 12). The second part of this article establishes an exception for the case where someone has been hired to cure a sick animal and is killed or injured. Two kinds of hire are distinguished. The first, designated by the term *ku,* involves payment of a fee to the person hired ([43]). In this case no liability attaches to the owner if the person hired is killed or wounded. The second kind, designated by the term *ch'ien,* is gratuitous. In this case the owner of the animal is liable for death or injury according to the law of *kuo shih* ([44]) ; he is required to pay a sum of money to the victim or his relatives. The reason for the difference in the treatment of the owner's liability seems to lie in the presence or absence of payment. If payment is made the person undertaking the cure is assumed to bear the risk of injury. The provision is interesting because it appears to evidence recognition of a distinction between a non-gratuitous and a gratuitous hiring of services.

Book 26, article 9 deals with deposit. One who receives on

(43) See the commentary to 12.i.

(44) A killing or injury is *kuo shih* where it is the result of an accident. In such a case the person responsible may redeem himself from the normal punishment for killing or injury by making a payment (the amount of which is prescribed by the law) to the victim or his family. See further G. MacCormack, *Mental States as Criteria of Liability in the T'ang Code,* R.I.D.A. (1984), 41 f.

deposit or trust (*chi*) another person's property is liable on account of *tsang* (with a decrease in penalty of one degree) if he uses or disposes of it. Furthermore if he falsely states that an animal entrusted to him has died or an object been lost he is liable under the offence of obtaining property by fraud and deceit (with a decrease in penalty of one degree). A question and answer in the commentary to the article raise the point : what is the position where an animal has in fact died or an article genuinely been lost? Is the depositee in this case liable for the value, although he committed no offence? The answer distinguishes between the case where an animal has died and the case where an object has been lost. For the latter it cites as the appropriate analogy the article in the code on the loss of property owned by the government or a private person under which the person who loses it is liable to make restitution of the value unless the loss has been occasioned by forcible theft ([45]). Hence in the present instance the depositee is required to make restitution of the value of the lost article unless it has been taken from him by force. For the former case the relevant analogy is supplied by a statute dealing with the herding or stabling of animals. If the death was 'reasonable' no compensation needs to be paid, if it is not 'reasonable' the 'decreased value' of the animal is to be paid ([46]). 'Decreased value' is elsewhere defined to mean the difference between the value of the animal when alive and its value when dead ([47]). 'Reasonable' is not explained but presumably refers to the exercise of proper care in looking after the animal.

A reference to pledge occurs in the context of the offence of making a free person into a slave ([48]). The situation contemplated by the article and the commentary seems to be one in which a debtor either gives himself as a pledge (*chih*) to the creditor as security for the debt or gives a young relative as pledge ([49]). In

(45) Book 27, article 26.
(46) For this statute see the commentary to book 15, articles 1.3.
(47) See the commentary to book 15, article 8.i.
(48) Book 26, article 12.
(49) The wording of the article literally refers to the using of a free

both cases the offence committed is that of selling oneself into slavery with a decrease in penalty of three degrees. If the creditor knows the true status of the person given as pledge he is also held to have committed the same offence with a further reduction of the penalty by one degree. Furthermore in this case the value of the labour obtained from the pledge is to be calculated and set off against the debt.

Although there is recognition in the code of distinct transactions which may be termed hire, deposit and pledge, it would be difficult to conclude that there is recognition of these transactions as separate contracts each with its own particular incidents. The code does not operate with a general model of contract. Therefore one cannot say that the transactions of hire, deposit and pledge are regarded as particular contracts which conform to the general model. The code does lay down specific rules which are to apply in the case of particular transactions. Thus it determines, in a given case, the circumstances under which the person hiring is liable for injury suffered by the person hired, or those under which a person receiving a deposit is liable for the loss of the object. It regulates also the consequences of a particular case of pledge. But in none of these cases is the code working out or establishing rules applicable to transactions considered as contracts. It is not, for example, spelling out the consequences of agreements made between two persons. Nor is it even establishing the incidents of specific legal institutions whether regarded as agreements or not. It is attempting to solve commonly found problems by determining the conditions under which a penalty is to be incurred.

Most of the provisions of the code that touch on contract concern sale. These may be divided into two groups, those concerned with the sale of land and those regulating the sale of goods in the markets. The theory underlying the provisions on

man as a pledge. LIN translates: « Wer freie Menschen als Schuldknechte für eine Schuld verwendet, wird entsprechend dem Delikt des Menschenhandeln (jedoch) um drei Grad niedriger bestraft » (LIN Pen-Tien, *Vergeiselung und dingliche Sicherungsrechte im Chinesischen traditionellen Privatrecht* (thesis, 1976), 84).

the sale of land is that all land belongs to the state (the emperor) and is allocated to individuals in various categories. In principle it is inalienable but certain exceptions are permitted ([50]). Consequently the code itself is principally concerned with establishing the penalties for unlawful sales of land, whereas the land statutes regulated in detail the conditions governing the sale of land in the few cases for which it was authorized. Thus book 12, article 14 provides that those who sell (*mai*) 'personal share' land ([51]) are to receive a beating the severity of which depends upon the amount sold. The land is to revert to the original owner and the price is forfeit to the state. Thus the seller is punished by the beating and the buyer penalized by loss of the price. The commentary enumerates the cases in which land may be sold. These are: 'in the case of lands held in perpetuity ([52]) where the family is poor and it is sold to defray funeral expenses, or in the case of personal share land, where it is sold to provide the cost of a homestead, or a mill or a store of something of like sort, or where one was removing from a restricted to a broad locality ([53]) one is allowed to sell according to the statutes' ([54]). Other exceptions are the cases of land donated by the emperor and land in perpetuity held by officials of a certain rank ([55]). Book 13, article 3 provides an increased penalty where a person wrongfully claims private or public land and purports to sell (*mai*) or exchange (*mou*) ([56]) it ([57]).

Where a sale of land was permitted certain formalities had to be completed. A statute of 737 A.D. requires the parties to notify the appropriate authority so that the land may be transferred to

(50) For the details see D. TWITCHETT, *Financial Administration under the T'ang Dynasty*, 2nd ed. (1970), 1ff esp. 4-5.

(51) This is land allocated to individuals which in theory reverted to the state when the occupier reached the age of 60 (TWITCHETT, *op. cit.*, 4).

(52) This is land allocated to individuals to be inherited by their heirs.

(53) For the meaning of this see TWITCHETT, *op. cit.*, par. e.

(54) Translated by TWITCHETT, *op. cit.*, 136.

(55) See also articles 15, 20 of the Land Statutes, TWITCHETT, *op. cit.*, 129.

(56) Here sale and exchange are given separate linguistic recognition. Another provision (book 20, article 4) also describes exchange as *mou i*. This deals with the exchange of private for official property.

(57) See TWITCHETT, *op. cit.*, 138.

the household register of the purchaser. If the authorities are not informed the sale in effect is void. The land reverts to the seller and the purchaser forfeits the price ([58]). It does not appear that any penalty is imposed on the seller. Hence the real obligation to see that the authorities were informed rested on the purchaser as he was the only party to suffer a loss in the event of a failure to comply with the regulations ([59]).

Another article from a statute of 737 imposes further restrictions on dispositions concerning land, but its exact meaning has been interpreted differently. According to Twitchett it enacted that 'persons may not rent out or mortgage lands' ([60]) but von Senger's version has 'vom Staat zugeteiltes Land darf nicht unter Vorbehalt des Rückkaufsrechts verkauft (*t'ieh ling*) oder verpfändet werden' ([61]). In view of the fact that the letting out of land to tenants appears to have been common ([62]) von Senger's interpretation of *t'ieh ling* as 'sale with an option of repurchase' is to be preferred. If this prohibition is infringed the transaction is again to be void, the land is returned to the original owner but the 'purchaser' forfeits what he has paid. Where sale of land is permissible, then sale with option of repurchase and pledge are also permissible. Further the article provides that where the landholder is required by his employment to be away from the land and there is no one in his family able to cultivate it he may sell (with the option of repurchase) or pledge ([63]).

(58) Article 17 of the Land Statutes (TWITCHETT, *op. cit.*, 129; H. VON SENGER, *Chinesische Bodeninstitutionen im Taiho-Verwaltungskodex* (1983), 78) and cfr also the commentary to book 13, article 3 of the code where it is said that the seller retains the standing crops (TWITCHETT, *op. cit.*, 138).

(59) The requirement of registration may also have applied to pledge.

(60) Article 20 (TWITCHETT, *op. cit.*, 130).

(61) *Op. cit.*, 79.

(62) Cfr TWITCHETT, *op. cit.*, 196, 241f.

(63) The text of this article has not been available to me, so that I have been unable to identify the exact technical expressions used. *T'ieh ling* may correspond to *tien* or *tien mai* (where delivery of possession is given) and the expressions translated as « pledge » to *i tang* (when the land is pledged but the creditor does not obtain possession until default). See further below.

One can see that the legislature in establishing the conditions under which the sale or pledge of land might lawfully occur was not interested in the agreements to sell or pledge as such. Its intervention was directed at ensuring the maintenance of a particular system of land tenure under which the land obtained by individuals from the state was in principle to be inalienable. This system of tenure was linked to a financial policy under which taxes and labour service were to be rendered in return for the land. It was important for the state to know who was responsible at any given time for the taxes or service; hence the need to insist on registration where land was sold.

The second group of provisions (supplemented again by various statutes) on the sale of goods, particularly in the markets, represents the most detailed treatment to be found in the code of any aspect of the law of contract. What one has is a number of rules regulating the conditions under which trade may be carried out in the markets (64). Apart from prohibiting the use of incorrect and unauthorized weights and measures and requiring the officials in charge of the markets to fix just prices and prevent unfair trading practices (65) the code contained important rules on the quality of the goods sold and on the procedure for the sale of important commodities like slaves and animals. Book 26, article 30 imposes penalties on the seller of 'utensils and such things as hempen or silk cloth which was fragile, not made of the appropriate materials, was short in length or narrow in width' (66). It makes no difference whether the seller is himself the manufacturer or a merchant dealing in articles made by someone else. The officials in charge of the market incur the same penalty if they know the circumstances and a penalty two degrees less if they do not. The commentary provides that such objects as are fragile or not made of proper material are to be

(64) These were the markets established by the government in capital cities and major towns. See generally D. TWITCHETT, *The T'ang Market System*, *Asia Major* XII (1966), 202.

(65) The relevant articles and statutes are translated by TWITCHETT, *op. cit.*, 243ff.

(66) TWITCHETT, *op. cit.*, 244.

confiscated by the government, while those which are too short or narrow are to be returned to the owner. Presumably this difference in the fate of the defective object reflects the fact that the use of improper materials was more serious than the supply of an object properly made but of deficient size. Nothing is said of the position of the buyer. In view of the express statement in the rules of the sale of land concerning forfeiture of the price, one has to assume that, in the absence of such a statement, the buyer was entitled to recover his price, though it does not appear how he was to do this.

For the sale of slaves or animals in the market special formalities have to be observed. Book 26 article 34 provides:

> In all cases of the purchase of male or female slaves, horses, cattle, camels, mules and donkeys, if within three days of the payment of the price a market certificate (*shih-ch'üan*) is not drawn up, the purchaser will be liable to a beating of thirty strokes, and the vendor to one degree less.
>
> If within three days of the drawing up of the certificate it should prove that there was some long-standing weakness or sickness, it is permissible to cancel the sale. But if anyone should attempt to cancel a sale without there being any such sickness, so as to cheat the other party, the sale shall be held to be legal, and the offender will be liable to a beating of forty strokes.
>
> If after the sale is completed the market office (*shih-ssu*) does not issue the certificate at the correct time, the officers responsible will be liable to a beating of thirty strokes for a delay of one day, the punishment to be increased by one degree for each further delay of one day, the maximum penalty being a flogging of 100 blows ([67]).

The commentary makes it clear that the power of rescission exists where the buyer first discovers the existence of the 'long-standing weakness or sickness' after the certificate of purchase (the written contract) has been drawn up. It does not

(67) TWITCHETT, *op. cit.*, 246.

seem to have been relevant whether the seller had knowledge of the disease or not. An enigmatic phrase at the end of the commentary appears to mean that the code does not affect contracts (*chi*) established outside the markets. Such contracts may establish any length of time they wish for the exercise of a power of rescission by the buyer ([68]).

What was the object of the code in legislating on the sale of goods in the markets? Gernet in his discussion of the provision on slaves and animals remarks:

> Encore cette législation s'est-elle bornée sans doute à consacrer des règles coutumières: son objet essentiel est d'assurer le contrôle des transactions et l'ordre public, non pas de protéger les droits des parties. Mais on est sur le chemin d'un droit civil: l'originalité principale de cette législation est de porter une attention particulière à la garantie contre les vices, non seulement dans les ventes d'esclaves, mais aussi dans les ventes d'animaux ([69]).

One wonders whether one should press too far the distinction between 'controlling transactions in the interests of public order' and 'protecting the rights of the parties'. Undoubtedly the legislation dealing with transactions in the markets as a whole was designed to ensure the orderly conduct of proceedings in them, especially the vast markets of the two capitals. At the same time the rules on the qualities of the goods sold and the presence of disease in slaves or animals do show a concern for the position of the buyer. It is not difficult to detect in them a desire to protect the buyer against sharp practice on the part of the seller. There appears to be here an element that can be described as 'protection of the rights of the buyer' ([70]).

(68) Cfr GERNET, *T'oung Pao* XLV (1957), 306ff. He translates: « Il n'est pas question, dans les lois, de contrats privés. On ne se conforme pas aux termes convenus dans les actes privés ». See also the discussion of the particular contracts in the section « The Law in Practice » below.

(69) *Op. cit.*, 307.

(70) An interesting parallel to the T'ang legislation is furnished by the edict of the *aediles* on the sale of slaves and animals in the Roman market.

The documents in which a transaction is recorded are separately considered by the code in the context of public and private documents in general. It establishes penalties for unauthorized additions to or deletions from documents. Book 25, article 13 punishes as theft the falsification of public or private documents with the aim of obtaining property. As examples of private documents the commentary cites a general class called *wen ch'uan* which appears to include documents by which one acknowledges that one owes property or by which one undertakes to pay out property (*shou ling ch'uan fu ch'ao t'ieh*). Under these heads would fall documents evidencing a loan, or acknowledging receipt of another's property and documents used in sale under which the price is to be paid in the future ([71]). The code does not single out written agreements for special treatment, nor is it dealing with the law of contract as such. It simply includes them in provisions concerned with the whole class of documents, official and private.

The code recognizes the existence of guarantors (*pao*) in the contract of sale but unfortunately says nothing about the circumstances under which they become liable. The context is that of the effect of an amnesty. Where an amnesty is proclaimed and those who have committed the offences to which it relates do not confess within one hundred days they are not to have the benefits of the amnesty. However the relevant article (book 4, article 7.vii) makes an exception in the case of guarantors. They are not to be liable according to the terms of the amnesty whether or not they confess within the required period. The commentary merely says that sales and purchases have guarantors ([72]). Gernet has suggested that a possible application of the article would be a case in which a guarantor guaranteed a sale in which the goods sold had been stolen. If there is an amnesty the seller is exempt from liability for theft provided he confesses

(71) The commentary to book 25, article 8 which deals generally with the falsification of documents (not specifically in order to obtain property) mentions *ch'ao shang* which appear to be documents employed in trade.

(72) JOHNSON, *T'ang Code* I, 195.

within the period of 100 days, but the guarantor is immune irrespective of confession ([73]). What is not clear is the normal extent of the guarantor's liability. Is he liable equally for theft with the seller, or only where the seller cannot be found? Probably the latter was the case subject to the mitigation introduced by the article on the effect of amnesties. Although the commentary only mentions sales and purchases the same rule would have applied to guarantors under other contracts such as loan or pledge ([74]).

II. The Sung Code

Further statutory material is contained in the penal code of the Sung dynasty promulgated in 963 A.D. (*Sung hsing t'ung*). This code in fact is a reproduction of the T'ang code with occasional supplements. It is these supplements which are important in the present context. They consist of imperial decrees or statutes issued after the final promulgation of the T'ang code in 737 A.D., some indeed going back to the T'ang period itself. The relevant material is inserted in the Sung code at two places: after book 13, article 5 (dealing mainly with the sale or pledge of 'family property') and after book 26, article 11 (dealing with the problem of debt). Although the general purport of the decrees quoted is clear there are some problems in obtaining an exact understanding of their terms. I consider first those regulating the pledge or sale of property.

A miscellaneous statute from the year 737 A.D. ([75]) prohibits junior members of a family, where its head is available ([76]), on

(73) *Op. cit.*, 334f.

(74) Book 25, article 25 deals with the liability of guarantors in the context of various offences but says nothing of guarantors under contracts. See further below at notes 154, 155 and cfr the remarks of Niida Noboru, cited note 160, 3f.

(75) See Lin (cited above note 49), 142. Although the statute was issued in the same year as the final revision of the T'ang code, it was not incorporated in the latter.

(76) This is defined as being in a place not further than 300 *li* (three *li* make one mile) away and not separated by a barrier.

their own authority from pledging (*chih chu*) slaves, domestic animals, land, houses or other property or from selling (*mai*) land or houses ([77]). According to a strict construction of these words junior members are not prohibited from selling property other than land and houses. But one must admit that it is difficult to see why a distinction should have been drawn between one class of property which it is permitted to sell and one which it was not, granted that property in neither case could be pledged ([78]).

The statute continues by requiring those selling or pledging such property (as has already been described) ([79]) to obtain from the appropriate public authority a certificate authorising the transaction. If this certificate is not obtained the sale or pledge is to be void ([80]), the property to be returned to the original owner and the price to be forfeit to the government. Nothing is said as to the conditions under which the certificate will be granted. From the context it appears that one factor of concern to the public authorities was the question whether junior members in wishing to dispose of family property were acting properly in the absence of the family head ([81]). But even where the head was himself conducting the transaction the certificate of official approval was still necessary. Hence the authorities may have been concerned not just with the problem of juniors acting on their own initiative but with other matters affecting family well-being such as the extent to which the head was acting with

(77) See GERNET's interpretation, *op. cit.*, 302f. LIN (*op. cit.*, 142) translates as though the junior members were forbidden to sell or pledge the various classes of property. Strictly, GERNET's interpretation is justified because the Chinese text is broken by the insertion of a note between the phrase « or from selling land and houses » and the next section dealing with the requirement of a certificate.

(78) See also the rendering by S. SHIGA, *Family Property and the Law of Inheritance in Traditional China*, in *Chinese Family Law and Social Change*, ed. D.C. BUXBAUM (1978), 129 which simply omits the awkward phrase « land and houses ».

(79) On LIN's interpretation of the text only land and houses are meant.

(80) The text does not use this expression.

(81) Cfr also the rule, cited below, on the offering of property to be sold or pledged to successive classes of persons.

the consent of other senior family members. The fact that the person purporting to alienate the property suffers no loss whereas the person purporting to acquire it loses his money suggests that it was mainly in the latter's interest to see that the formalities were observed. Why should the law have placed the purchaser or pledge-creditor in a less advantageous position than the seller or pledge-debtor? Possibly the reason was to discourage unscrupulous persons from taking advantage of junior members in the absence of the family head.

This statute is followed in the text of the *Sung hsing T'ung* by the words of a memorial to the throne (which must be taken as having been approved) again on the subject of sale and pledge. The operative words differ from that used in the statute. Instead of *chih chü* (pledge) and *mai* (sell) one has *tien mai* and instead of a description of the various kinds of property one has the general phrase *wu yeh*. *Tien mai* is interpreted by Gernet as expressing two distinct transactions, a sale with an option of repurchase (*tien*) and an ordinary sale (*mai*) (82). On the other hand Lin takes the whole phrase *tien mai* in the sense of pledge (83). Further, in the later law *tien mai* appears to have designated a sale subject to repurchase (84). I have followed Lin in taking *tien mai* as expressing primarily the alienation of land by way of pledge (85), but have assumed it would also include within its sphere of reference ordinary sale. The phrase *wu yeh* is translated by Gernet as 'biens patrimoniaux' (86). Where it occurs in another passage Lin renders it as 'Grundstück' (87). Although at the end of the memorial and in a decree of 963

(82) *Op. cit.*, 303 (vente à réméré and vente définitive).

(83) *Op. cit.*, 153, 154 translating a further memorial (below) containing the phrase *tien mai*. TWITCHETT, *Financial Administration*, glossary, takes the phrase as meaning mortgage.

(84) S. VAN DER SPRENKEL, *Legal Institutions in Manchu* (1966), 106.

(85) LIN himself, however, in translating a Sung edict (below) renders the phrase on one occasion as « verpfänden oder verkaufen » (*op. cit.*, 152).

(86) *Op. cit.*, 303.

(87) *Op. cit.*, 156 (see below). I.R. BURNS, *Private Law in Traditional China*, unpublished Oxford University D. Phil. thesis (1972), 52 translates the phrase as « immoveable property ».

A.D. (88) the phrase *wu yeh* is used in conjunction with a separate phrase meaning 'land and houses' it seems as though one has to take it as expressing the same notion and not as referring to an extra or wider class of property.

There is another more significant linguistic problem. The memorial in form says 'in case of transferring land by way of pledge (*tien mai wu yeh*) or of *chih-ming chih-chü*'. Gernet translates the phrase *chih-ming chih-chü* as 'il arrive que le nom du vendeur soit seulement indiqué' (89) but Lin has 'Alle Verträge über die Bestellung von Pfandrechten — sei es von Besitzpfandrechten, sei es von besitzlosen Pfandrechten (*Chih-ming chih-chü*) ...' and states that one of the expressions used in T'ang and Sung times for 'das besitzlose Pfandrecht an Grundstücken' was *chih-ming chih-chü* (90). Lin's interpretation seems to fit the structure of the memorial better than Gernet's and I have followed it. Accordingly one has here recognition of two kinds of pledge, that in which the creditor acquires possession of the property pledged at the time the loan is made and that in which he acquires possession only in the event of default (91).

The memorial specifies further formalities necessary for the pledging (with or without immediate delivery of possesion) and *a fortiori* for the sale of land or houses. The seller (debtor) must sign the contract (*chi*) in the presence of the buyer (creditor) or his representative. For this purpose the seller is the head of the family. If he is unable to be present no transaction is possible. The only exceptions admitted are where he is outside China or kept by war from being present. In these cases the public authorities may be asked to look into the merits of a proposed transaction and, if they approve, to grant a certificate authorizing it to proceed. If junior members of the family deceive the family head and on their own authority pledge and convey (*tien mai*) or

(88) This is considered below.

(89) *Op. cit.*, 303.

(90) *Op. cit.*, 196. BURNS (thesis cited note 87, 52) renders the phrase « make a hypothecation ».

(91) I am not certain that the second case was confined to land.

pledge without delivery of possession (*chîh chü i tang*) (92) such property, forging the signature of the family head, they together with their intermediaries or guarantors (93) are to receive a heavy punishment. The property and the money are to be restored to their respective owners. If the juniors have already spent what they have received, it cannot be recovered from the family head (94).

These rules appear to differ in important particulars from those established by the miscellaneous statute of 737 A.D. The circumstances under which junior members can act without the family head are far more restricted; the certificate of the public authorities seems to be necessary only where the family head does not himself conduct the transaction; and in the event of a transaction which does not comply with the rules, as where a junior member has forged the signature of the family head, the price is not forfeit to the government but, where possible, is to be returned to the purchaser (creditor). In so far as the memorial can be assumed to be later than the miscellaneous statute its provisions must be taken to supplant those of the latter where there is a conflict.

Next there is a decree from the year 963 A.D. on the redemption of property which has been pledged. The terminology is somewhat different from that found so far. The words used to describe the transaction with which the decree deals are *tien* and *i tang* both taken by Lin to mean 'pledge' (95). It is not certain, however, that both had exactly the same sense. *Tien* may have the same meaning as *tien mai* and refer to a case of pledge where the property is 'sold' to the creditor with immediate delivery of possession. *I tang* appears to be another way of designating the pledging of land or houses where possession is not delivered to the creditor (96). Where property has been

(92) GERNET (*op. cit.*, 303) translates *i tang* by « donner ... en dépôt », but see further below.

(93) See GERNET, *op. cit.*, 303 and note 2 on these.

(94) See also for this memorial BURNS, *op. cit.*, 52.

(95) *Op. cit.*, 152.

(96) See BURNS, *op. cit.*, 312ff.

pledged (either *tien* or *i tang*) and the time for repayment has passed, even though the principal debtor has died, it is still to be possible for his heirs to repay the debt and redeem the property pledged, provided the original agreement (*chi*) is still in existence. This seems to be straightforward.

The decree goes on to provide that if a period of more than thirty years has passed and either no contract (*chi*) can be produced or that which is produced is unclear, redemption is not to be permitted. The person holding the property is to be free himself to pledge it by way of sale (*tien mai*) ([97]). The interpretation of this section of the decree presents difficulty. On the wording it seems as though two conditions have to be satisfied before the right to redeem is lost: lapse of a period of thirty years and the absence of a clear contract (*chi*). However, taken in conjunction with the first part of the decree which allows redemption beyond the agreed time provided the contract still exists, the condition that thirty years should have elapsed appears redundant. All that is relevant at any time is whether a clear contract can be produced. Consequently one may ask whether the second part of the decree should be read as though it were stating alternative rather than cumulative conditions. On this interpretation the right to redeem is lost either if a period of thirty years has elapsed or if no clear contract can be produced. Other evidence, however, suggests that lapse of this period of thirty years extinguished the claim not absolutely, but only where the claimant could not produce clear evidence ([98]). Hence it is better to accept that the decree enacted that the right to redeem was not lost unless, after the lapse of thirty years, no clear contract could be produced.

Finally there is a memorial which sums up the law of *tien mai* as determined in a series of T'ang edicts commencing in 811 A.D. The first part of the memorial deals with boundary

(97) Presumably he might also sell it outright. LIN, in fact, translates *tien mai* here as « verpfänden oder verkaufen » (*op. cit.*, 152).

(98) LIN (*op. cit.*, 152) quotes a decree of 1014 which also appears to stipulate both lapse of 30 years and absence of a clear contract as conditions for the loss of the right to redeem. See also below at note 110.

disputes which arise where the original family heads (and witnesses) to a particular transaction have died leaving young and weak heirs and the contracts (*chi shu*) are not clear. In such a case no claim is to be allowed beyond a period of twenty years unless the claimant has been living elsewhere [99]. It is not clear whether the twenty year period stipulated in this memorial is intended to replace the thirty year period of the decree of 963 for cases of redemption of pledged property or whether it is limited to cases arising from boundary disputes.

Secondly the memorial places certain restrictions upon the class of persons with whom property (land or houses) might be pledged or sold. A family head proposing a transaction of *tien mai* or *i tang* must first offer the property to his agnatic relatives; if they are unwilling to accept at a reasonable price it is to be offered to neighbours, and only if they are unwilling may it be offered to other persons [100]. One can see a connection between the first and second parts of the memorial in that boundary disputes might well arise from transactions of pledge involving relatives or neighbours.

Thirdly the memorial deals with fraudulent cases of repeated pledging (*i tang*) of land and houses (*wu yeh*). The original owner, intermediaries, neighbours or others who have signed the contract (*chi*) are liable on the ground of theft to the extent of their personal profit. The money is to be returned to those who have been deceived. If the owner of the property cannot pay all that is due those who have signed, intermediaries, guarantors or neighbours, are collectively liable for the deficiency. The property is to be restored to the person who first was entitled under a contract of *i tang* [101]. The situation contemplated by repeated cases of *i tang* at first sight appears to be that in which the same piece of land is successively pledged to different persons each believing that he was alone in acquiring a claim, the pledgor in all cases retaining possession. Yet there are diffi-

(99) See LIN, *op. cit.*, 153.

(100) LIN, *op. cit.*, 154; BURNS, *op. cit.*, 305.

(101) LIN, *op. cit.*, 156. I owe the interpretation which I give of « repeated pledging » to Dr. I.R. BURNS (personal communication).

culties with this interpretation. The memorial states that the land is to be restored to the person first entitled under *i tang*, implying that delivery of possession was contemplated by the initial transaction. Further there is evidence from the Sung and later periods showing that where the parties intended a pledge under which possession was to pass to the creditor it might happen that the debtor before surrendering possession repledged to another. Hence in the present memorial *i tang* appears to be used in a sense which embraces *tien mai*. It is still possible, of course, that the rules established for this case would have applied also to a case of pure *i tang* where no delivery of possession was intended prior to default.

At this point may be considered a memorial from the year 822 inserted in the Sung code in the section following book 26, article 11 dealing with the law of debt. The memorial is concerned with problems arising from the borrowing of public funds but touches on the practice of giving security without delivery of possession. It is not entirely easy to interpret. The problem which the memorial attempts to resolve is the following. A grandfather's or father's property (land and houses) has been divided among his sons and grandsons. A long time afterwards when they are living apart these descendents (or some of them) wrongly borrow public money on the security of the original property. The meaning seems to be that the public authorities are made to believe that the property offered as security (although there is no delivery of possession) belongs to the borrowers ([102]). When the debt falls due they are able to pay nothing. A formal complaint is then brought before the court and they

(102) I am not entirely sure of the meaning of the text. Literally it states: « they (sons and grandsons) wrongly borrow public money offering as security the old property ». LIN translates: « Sie haben von der öffentlichen Behörde durch Belastung ihres Anteils Geld geliehen mit der Begründung daß die Sachen ihr Eigentum seien » (*op. cit.*, 187). But it is difficult to see how the debtors have acted wrongly if they merely borrow on the strength of property which legitimately belongs to them. BURNS has « juniors living apart ... wrongly raise government money by hypothecating (*chih*) old (that is ancestral, not self-acquired) property » (*op. cit.*, 313).

claim that the property has never been divided (the point, apparently, being that they in consequence have no realizable claim on it). For this kind of situation the remedy requested in the memorial is that the persons who acted as guarantors for the loan should between them make good the amount due, that both the persons who made false statements concerning the property and the guarantors should receive a beating and that if, under the original division, a debtor had obtained land this was to be put towards repayment of the debt.

It does not appear clearly from the memorial whether the 'contract of pledge' was merely verbal or put into writing. The probability is that a document was drawn up but an oral agreement may have sufficed, provided that is could subsequently be proved by means of witnesses. One notes that the memorial contemplates the making of an application to the court. On this basis Lin remarks: 'Die Vollstreckung des besitzlosen Pfandrechts erfolgte durch ein amtliches Beschlagnahmeverfahren' ([103]). As will be seen there is evidence to suggest that the competence of the court to entertain applications concerning property which had been pledged was not confined to cases in which there had been no delivery of possession ([104]).

Some general remarks may be made on the material of the Sung code so far considered. Despite the fact that the code reproduces the articles of the T'ang code prohibiting, except under special circumstances, the sale of land allocated by the state to families, it is clear that this no longer in the tenth century (and almost certainly earlier) represented the law. The various statutes and decrees inserted in the Sung code all appear to assume that the head of the household may freely sell or pledge any of the 'family property' including land. The statute of 737 appears to require a certificate from a public authority for every case in which land, houses, slaves or domestic animals are sold. It is just possible that at this time the law prohibiting sale of land was still technically in force in the sense that a certifi-

(103) *Op. cit.*, 187.

(104) See below in the discussion of the recorded cases.

cate would have been refused unless a proposed sale fell within one of the permitted exceptions. Later decrees, however, appear to have dispensed with the requirement of a public certificate except where junior members wished to sell or pledge in the absence of the family head. Certainly no hint of a restriction on sale similar to that contained in the T'ang code is found in the later legislation (the Sung code itself apart).

Broadly speaking the Sung material attempts to deal with three main problems: alienation of family property by junior members without the authorization of the head of the household, redemption of pledged property after expiry of the contractual time limit, and the fraudulent repledging of property. Why should the government have intervened in these areas? Undoubtedly part of the reason, as one can see from explicit statements in some of the memorials ([105]), was the desire to prevent or minimize vexatious and inconclusive litigation, with the threat of public disorder. At the same time there appears a very clear and consistent policy of keeping family property within the family. The restrictions placed on alienation by junior members, the generous provision for redemption and the instruction to offer property first to agnatic relatives all evidence this policy. Concern with obvious fraud made possible by successive pledging of the same property may again stem from a desire to prevent litigation and social unrest; equally it may reflect a desire to prevent exploitation of individuals who have no means of knowing whether property offered to them has already been pledged or not.

The material inserted in the Sung code after book 26, article 11 is concerned largely with the problem of debt. First there is cited the miscellaneous statute of 737, part of whose provisions has already been considered (in relation to junior members without authority disposing of family property). A further section of the statute deals with the lending (*ch'u chü*) of (movable) property by official or private persons. This excludes the

(105) For example, that on the problem caused by an ancient division of family property with subsequent fraudulent borrowing of public money (above).

jurisdiction of the court where there is a private agreement (*chi*) setting out the terms of the loan provided that certain conditions are fulfilled. What this seems to mean is that the court won't interfere with the terms of a contract of loan if these conditions are met. The conditions are: the interest stipulated in the contract should not exceed 6 % per month and the total interest recoverable should not exceed the amount of the capital ([106]), the creditor should not in satisfaction of the debt seize from the debtor property not authorized by the contract, and the debt which the creditor seeks to enforce (by the seizure of property) should be that from which in fact the overdue interest arises ([107]). If the debtor has insufficient assets ([108]) he himself or male members of his family are to enter the service of the creditor and work for him. Neither the exact nature of this relationship nor the mechanism by which it was enforced is specified. Where property has been received as security for a debt the creditor is not allowed on his own authority (without the consent of the owner) to sell it. If the unpaid interest came to exceed the amount of the capital and the debtor still could not repay the debt the creditor might approach the relevant public authority ([109]) for permission to sell the pledged property. Where this was granted any surplus obtained on the sale was to be returned to the debtor.

A decree of the T'ang dynasty promulgated in 824 is reproduced. This recited the problem arising from unclear written contracts (*chi*) and provided that where a claim arising from a debt (*fu chai*) more than thirty years old is made the court is

(106) The actual interest stipulated as lawful seems to have varied from time to time. A statute of the Board of Finance is cited immediately after the miscellaneous statute, providing that the maximum interest should be 4 % per month for private loans and 5 % for public loans. See also Lien-shang YANG, *Money and Credit in China* (1952), 95 par. 10. 14.

(107) See GERNET, *op. cit.*, 299f.

(108) According to GERNET the phrase used for assets, *chia tzu*, means moveable property and livestock only, not land (*op. cit.* 334 n. 2). If this is correct one can perhaps discern a policy of the legislator directed to keeping land within the family. See also the discussion of the particular contracts below.

(109) *Shih ssu*, translated by LIN (*op. cit.*, 117) as 'Wirtschaftamt'.

not to entertain it where none of the original guarantors (*pao*) can be produced and there is no clear written record of the transaction (*chi shu*) ([110]). Two important consequences flow from this rule. If the period between the making of the claim and the constitution of the debt is less than thirty years the court will have jurisdiction even though the guarantors are not available and no clear written evidence can be produced. On the other hand if the period is over thirty years the court will not have jurisdiction unless either the guarantors are available or a clear record of the transaction can be produced. Hence the thirty year period does not extinguish the claim (as would be the case under rules of negative prescription in Western legal systems); it merely places an obstacle in the way of a claimant.

What is of particular interest in this material is the careful regulation of the consequences of debt. One has to understand 'debt' in a wide sense as covering not just the standard case in which A borrows money (or other goods) from B but also other transactions under which one party became indebted to the other (for example the purchaser for the price under a contract of sale and the hirer for the fee under a contract of hire). The law is concerned with a fair and reasonable adjustment of the respective duties of creditor and debtor. Thus the creditor is entitled to the services of his debtor (or male members of his household) if the latter's assets are insufficient to meet the debt. On the one hand the debtor is protected in that he is able to keep the most important item of family property, the land and house ([111]), and on the other the creditor is protected in that he is enabled to recover the value of the debt from the labour of the debtor or his family ([112]). Where property has been pledged as security for the debt its disposition by the creditor is regulated by the law. He may not sell it on his own authority and, where he is permitted to sell, he must pay to the debtor the difference between what

(110) See GERNET, *op. cit.*, 344.

(111) This is on the assumption that it has not voluntarily been pledged to the creditor. In practice a debtor might find it difficult to raise a loan unless he was prepared to pledge his land.

(112) Clearly this facility in practice was abused. See below.

he received and the amount of the debt. Finally persons are protected from vexatious claims alleged to arise from long-forgotten transactions where no clear evidence of their existence can be produced.

THE LAW IN PRACTICE

The rules stated in the previous section represent the law in theory, that is, the law laid down by the central government to determine the conditions under which transactions (which I have termed contracts) might be made or enforced. But how far were these rules observed in practice? Before one considers the specific evidence, there are three general observations that should be made. The period from the beginning of the T'ang (618) to the end of the Sung (1279) is six centuries. It is inconceivable that there should not have been local variations in the practice of transactions over this period and highly unlikely that the sparse statutory rules would have been enforced everywhere throughout the empire from the time of their introduction until their repeal or replacement. In one particular and notorious case, that of the prohibition of the sale of land granted by the state to individuals, it is known that from at least the rebellion of An Lu-shan in the middle of the 8th century the statutory rules of the T'ang code were ignored. Nevertheless they reappear in the Sung code as though they still represented the law. It is also known that for most of the period, debtors were in a worse position than that contemplated in the statutory rules. Interest rates in fact charged were higher than those permitted by the code. Peasant debtors unable to repay their debts passed together with their families into the permanent service of the great landowners ([113]).

Fortunately, two studies by Western sinologists have greatly facilitated investigation of the actual practices adopted in the

(113) Cfr E. Balazs, *Chinese Civilization and Bureaucracy*, ed. A.F. Wright and tr. H.M. Wright (1964), 117ff.

case of sale. These are J. Gernet's *La vente en Chine d'après les contrats de Touen-houang (ix^e-x^e siècles)* (114) and H. von Senger's *Kaufverträge im traditionellen China* (115). Both not only contain the texts and translations of a number of documents from the late T'ang and early Sung period but also valuable discussions of the theoretical issues raised by the documents. The present study owes much to these accounts, especially to that of Gernet. Before the main issues are considered, a preliminary point of terminology may be made. All the documents use the language of purchase and sale (the characters for sale and purchase are each romanized as *mai*) with the exception of one which provides for the exchange of pieces of ground. Here the phrase *hui po* appears as the operative term (116). However, it would probably be a mistake to interpret the documents as evidencing a clear conceptual distinction between the transactions of sale and exchange. Those expressed in the language of purchase and sale are concerned with the exchange of one commodity for another. Certainly the commodities of grain and silk or cloth appear regularly to have the function of a « price » but this fact is not a strong basis for holding that the participants would have recognized a clear distinction between sale and exchange (117).

The first issue to be considered is the relation between the law in theory as represented by the codified rules and the law in practice as represented by the documents of the 9th and 10th centuries. One has to bear in mind that the documents come from a remote part of the empire, a border area in which rules laid down by the central government may not have been given full effect (118). Of the ten documents recorded by Gernet, four concern the sale or exchange of land. None indicates that there existed any rule under which the sale of land was prohibited and only one refers to the fact that the public authority had approved the ex-

(114) *T'oung Pao* XLV (1957), 295.

(115) Published in 1970.

(116) GERNET, *op. cit.*, 385; VON SENGER, *op. cit.*, 86.

(117) Cfr the remarks of VON SENGER, *op. cit.*, 67f and esp. 112 and n. 10 in contrast to those of GERNET, *op. cit.*, 308.

(118) See above at note 6.

change ([119]). The fact that the other three documents disposing of land do not say that the public authority has approved or provided for registration of the transaction does not prove that neither of these acts occurred. Yet it is a distinct possibility that sales of land were completed without the intervention of the public authority. An echo of the requirement that the parties to a contract of sale or pledge meet face to face when the document is signed is found in four documents ranging in date from 741 A.D. to 991 A.D. These specify that the parties have met face to face and resolved on the terms of the contract ([120]).

The provisions in the T'ang and Sung codes on rescission and defective goods apply only to sales concluded in the officially controlled markets. The contracts recorded in the documents under discussion do not appear to have been made in such markets. Hence, one would not expect the statutory provisions to govern the transactions. Although there is no hint in the documents of the kind of liability for the supply of defective goods established by the codes, there are formulae which may have been introduced under the influence of the codified rules on rescission. A contract of 991 for the sale of a slave-woman in return for silk states: « d'après les règlements officiels (*ko*), on n'est pas autorisé à se dédire » ([121]). A similar formula occurs in a contract of 956 where land is sold for grain and silk: « conformément à la loi (*fa*), elles ne pourront se dédire » ([122]). Other contracts contain a clause

(119) GERNET, *op. cit.*, 382: 'est intervenue une décision de l'administration autorisant l'échange de ces terres afin que chaque partie y trouve avantage'. The terms provide for 'transcription sur les registres de l'administration' (383). This is an exchange conducted by heads of families, not junior members. Cfr also VON SENGER, *op. cit.*, 87, 88.

(120) There is a difference in the formulation of the relevant clause. The earliest document (741) has « Les deux parties se faisant face, on a tracé le dessin des doigts pour servir de marque » (GERNET, 357; VON SENGER, 105). The other three, all from the latter part of the tenth century, contain a formula to the effect that the parties have met face to face and have reached the decision recorded in the document (GERNET, 365, 370, 377; VON SENGER, 109, 99, 94).

(121) GERNET, 365; VON SENGER, 109. Another contract of 976 has the same formula (GERNET, 377; VON SENGER, 94).

(122) GERNET, 370; VON SENGER, 99.

prohibiting rescission ([123]), but do not refer to a source outside the contract itself. Those which do (all from the early Sung period) may reflect knowledge of the codified rules and acceptance that these have influenced ordinary practice. The contract for the sale of the slave-woman (but not those dealing with the sale of animals) allows the buyer to rescind the contract if the slave within ten days is found to have a disease ([124]). Although the period is longer than that prescribed by the codes (three days), the possibility of rescission may have been introduced here on the model of the rule applied by the codes to the official markets ([125]).

The second main issue is the analysis of the documents themselves. Several points arise for consideration. First, there is the question of what may be called the source of the obligation. This is a question which is raised in the modern literature. One has to be careful that one does not transpose a manner of regarding contractual obligation to a context in which it has no application. Discussion of the source of obligation is very much the province of professional lawyers. No such class existed in T'ang or Sung China, and one cannot conceive that the actual parties or the experienced men of affairs who advised them were interested in or even raised the question of source of obligation. Consequently, one is more concerned with the identification of actual practices which may, in an inarticulate way, have been regarded as necessary for the completion of a transaction than the discovery of specific rules defining the circumstances under which the parties incur an obligation. Bearing this factor in

(123) See below.

(124) GERNET, 365; VON SENGER, 110.

(125) GERNET (stressing the difference between the case of the slave woman and that of animals) argues that a clause permitting rescission on the ground of a disease in an animal would not have been needed because transactions (outside the official markets) would have been between neighbours already sufficiently well acquainted with each other's animals (323). But the same argument would apply to the sales of slaves that took place outside the markets. Hence, one cannot tell why in this particular contract a clause permitting rescission on the ground of disease was inserted.

mind, one may consider three possible « sources » : writing, the actual delivery of property and the agreement of the parties.

With respect to writing two points are clear. It is unlikely that in practice a transaction involving the sale or exchange of valuable property (land, slaves, cattle) would not have been written, each party obtaining a copy of the document, since the contract usually contained conditions that were to obtain in the future after the physical exchange of commodity and price had been completed. This fact is evidenced by the second point, namely that the document generally concludes with the observation that it has been drawn up as proof for fear of the possibility of bad faith ([126]). One is, therefore, inclined to conclude that the parties merely regarded writing as a useful means for providing evidence of the terms of the agreement and did not deem it to be a necessary condition for the incurring of an obligation. A passage cited by Gernet from the official history of the Sui dynasty (581-618 A.D.) distinguished between written and unwritten sales from the point of view of the tax payable. Documents are said to be used for all sales of slaves, horses, oxen, land and houses ([127]). This statement probably reflects a standard practice; it cannot be interpreted as a rule requiring writing as a condition of obligation. Gernet has suggested that, following an earlier belief in the magical-religious efficacy of writing as a means of communication with the powers of the other world, in T'ang and Sung times people believed that to obtain a writing from another gave the recipient « power » over the giver. Hence in a contract the source of one party's obligation is the writing which he gives to the other ([128]). However, as others have observed ([129]), there is not sufficient evidence to establish the existence of such a belief in the « power » of the written contract.

The other possible sources of obligation (delivery of property and agreement) may be considered together. The issue can be

(126) Nine of the ten documents given by GERNET contain such a clause.
(127) GERNET, 310.
(128) *Op. cit.*, 335ff, esp. 339f.
(129) VON SENGER, 118 ; HULSEWÉ, cited above note 7, 35.

put in this way: to what extent do the documents reflect a principle of real obligation, that is, of obligation derived from the receipt of property, or alternatively a principle of consensual obligation, that is, of obligation flowing from the agreement of the parties (130). The most significant fact which bears on this issue is the recitation frequently found in the documents that the physical exchange of commodity and price has been completed. This recitation is found even where it is untrue. Thus, in a contract for the purchase of an ox for a piece of satin (131) which recites that « ce bœuf et ce prix ont été échangés aujourd'hui même » but subsequently adds a provision for the payment of interest on the satin, the addition makes it clear that the satin was not in fact handed over at the time the ox was received (132). In other documents, provision is made for the payment of the price at a date after receipt of the commodity and no statement of simultaneous exchange of price and commodity is found (133).

Again, one has to understand these statements more in terms of practice than of legal theory. In most cases, what was contemplated was a transaction in which the price was handed over when possession was taken of the object bought. The document simply records what in fact had occurred. This is a perfectly natural state of affairs. There would be no need for a document recording the terms of the transaction until it had actually been brought to fruition. It would be unlikely that the parties would want to record the terms of a transaction still in an executory stage. Certainly they would have had no notion of enforceable obligations flowing from a mere agreement. This is a notion almost certainly due to a conception of obligation refined by legal experts, perhaps working on the basis of commercial prac-

(130) Cfr the discussion of this question by GERNET, 308ff, esp. 316 where he concludes: « Le versement du prix apparaît donc moins comme un paiement de la chose que comme un moyen nécessaire à la création de l'obligation » ; VON SENGER, 117ff.

(131) The date is uncertain. The contract may be from the year 837, 897 or 957.

(132) GERNET, 353 ; VON SENGER, 105.

(133) GERNET, 361 (VON SENGER, 107), 379 (VON SENGER, 91).

tice. On the other hand, a contemplated transaction could be said to be brought to fruition where the seller was ready to deliver against an agreement by the purchaser to pay the price at a later date. Hence, this type of arrangement becomes accepted in practice and recorded in documents. Too much significance probably should not be attached to the fact that in such a case the document might still use the formula appropriate to the usual case and recite that simultaneous exchange of commodity and price had taken place. The parties would just be employing a commonly used form of words without attaching any particular meaning to them. In general, one can conclude that the parties did not contemplate obligations arising just from their agreement; obligations arose once property had been transferred, either both commodity and price or commodity alone. But it would be taking too legalistic and theoretical an approach to say that contracting parties of the T'ang and Sung period adopted a principle of real as opposed to consensual obligation. The abstraction of the thought expressed in this contrast would have been foreign to them.

One factor which was clearly regarded by the parties as influencing the incidence of obligation was their respective status. It was not status in the normally understood sense of social position that was primarily meant, although it was relevant, but status in the sense of the contractual position occupied by the parties. One initiated the transaction, that is, he was the one who wanted to sell or buy something. His status, as that in effect of suppliant, was lower than that of the other party. Accordingly, in principle it was the person who initiated the transaction who was primarily regarded as incurring an obligation. An exception was made where the social status of the person initiating the transaction was higher than that of the other party ([134]). These points may be illustrated by the following contracts. A document of 803 recites that a nun, having no resources of grain and being in debt, sells her cow to the purchaser for a particular quantity of grain. Although a clause

(134) See the discussion by GERNET, 324ff; VON SENGER, 122ff.

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(134) See the discussion by GERNET, 324ff; VON SENGER, 122ff.

prohibiting recission applies to both parties, it is only the nun who is said to incur any further liability, that is the obligation to replace the sold cow, should it prove to have been stolen, with another of excellent quality. It is only the nun, her guarantors and a witness who actually sign the contract ([135]). By contrast, in another document ([136]) it is the purchaser who takes the initiative in the purchase of an ox for a price in silk. In this case, the seller gives no undertaking to replace the animal should it prove to be stolen and the document is signed only by the purchaser, his son and a witness ([137]).

With two exceptions, the other documents exhibit the same pattern, that is, where the seller takes the initiative he supplies an undertaking to replace the commodity sold should it prove to be stolen or subject to claims by third parties, and where the purchaser takes the initiative no such undertaking is given. A striking example is that of the contract for the exchange of land in which it is only the party soliciting the exchange who gives an undertaking to replace should the land be reclaimed from the transferee by a third party ([138]).

The two exceptions are a contract between a Buddhist monastery and a barbarian (741) in which the monastery solicits the purchase of a bull and yet the seller gives an undertaking to compensate should the bull be stolen ([139]), and a contract (from 896 or 956) between two military officials for the purchase of a house in which the seller gives an undertaking to replace even though he was not the party who initiated the transaction ([140]). The anomaly in the case of the Buddhist monastery is probably to be explained by the discrepancy in the social position of the parties. The monastery was sufficiently superior in standing for it to be able to impose its own terms, and may have been particularly interested in securing an undertaking to replace since

(135) GERNET, 349; VON SENGER, 101.
(136) See note 131 above.
(137) GERNET, 353; VON SENGER, 103.
(138) GERNET, 382f; VON SENGER, 87f.
(139) GERNET, 357; VON SENGER, 105.
(140) GERNET, 372; VON SENGER, 97.

it was dealing with a possibly untrustworthy barbarian. No such explanation is possible for the case of the contract between the military officials. One notes that it is relatively late, and it may reflect a tendency to introduce an undertaking to replace in all cases of sale irrespective of which party initiated the transaction ([141]).

The two standard terms found in the documents are the undertaking to replace and an undertaking not to rescind. The contract for the sale of a slave also contains a clause permitting rescission should the slave turn out to have a disease ([142]). The interesting feature of the undertaking to replace (apart from the point about status already considered) is that it gives rise not to an obligation to pay damages but to an obligation to supply property of an equal quality. The contract between the Buddhist monastery and the barbarian simply says that the latter should provide compensation should the bull be stolen. But almost certainly what was meant was the supply of an equivalent bull. The conditions which bring into operation the undertaking to replace vary according to the nature of the property. In the case of animals, the event guarded against is theft ([143]), in the case of slaves it is the claiming of the slave by relatives of the seller ([144]), and in the case of land and houses it is the claiming of the property by relatives of the seller ([145]) or occasionally even by others ([146]). The formulation of the clauses shows that the main problem to be guarded against in the case of an animal is the possibility that it had been stolen, and in the case of slaves, land or houses the possibility that all relevant members of the family

(141) See GERNET, 375f. He also suggests that the seller in this case, since he did not solicit the sale and did not sign the contract, may not in fact have been bound by the undertaking.

(142) See above.

(143) GERNET, 349 (VON SENGER, 101), 357 (VON SENGER, 105).

(144) GERNET, 364f; VON SENGER, 109.

(145) GERNET, 370 (VON SENGER, 99), 373 (VON SENGER, 97), 377 (VON SENGER, 93).

(146) GERNET, 370 (VON SENGER, 99), referring to elder or younger brothers of the seller or other relatives; GERNET, 383 (VON SENGER, 88), specifying just « anyone » without mentioning relatives.

selling had not consented to the sale (especially where their consent was not evidenced by adhesion to the contract).

Most of the contracts contain clauses which prohibit either party from withdrawing and impose a penalty on the one who first wishes to withdraw. In most cases, it is payable to the other party, but in two it is payable to a public authority (147) and in one the party rescinding is punished in addition with a beating (148). The absence of the clause in two documents shows that it was not a necessary part of a contract, unless one assumes that it would have been implied if not expressly stated. However, the probability is that in the absence of the clause either party was allowed to « repent » and undo the transaction even after the contract had been drawn up and the commodity and price mutually exchanged (149). Where the clause was inserted, it was still open to either party to withdraw, but if he did, he incurred a penalty. The wording of the clauses makes it clear that the penalty is incurred only where one wishes to withdraw without the consent of the other.

A remarkable feature of the clause (from a Western point of view) is that it applies to a time after the execution of the contract, that is, it contemplates that a party might « repent » and withdraw even after the commodity sold and the price have respectively been delivered. This seems to reflect a practice in which buyers or sellers did not accept that execution of their agreement necessarily finalised the matter. Either might have second thoughts and ask for his goods or his price back and one has to suppose that this was an acceptable form of behaviour. What is uncertain is the period of time during which such « seconds thoughts » would have been tolerated. One suspects that it would only have been a relatively short period of time after completion of the contract, that is, the signing of the document and exchange of price and commodity, that a party would have been permitted in practice to repent and « undo » the transaction.

(147) GERNET, 373 (VON SENGER, 97), 383f (VON SENGER, 88).
(148) GERNET, 384; VON SENGER, 88.
(149) Cfr the remarks of GERNET, 149.

The signatories of a document are the person who initiated the transaction and is primarily bound by it, members of his family, guarantors and witnesses. Not all documents are signed by all these classes of persons. Whereas all documents appear to have had witnesses, not all had guarantors or co-sellers or co-purchasers. Where there was a co-seller or co-purchaser, it seems not to have been usual to have a guarantor in addition since the other party was already furnished with more than one individual against whom he might have recourse ([150]). Sometimes relatives of a party appear as guarantors ([151]), sometimes as co-sellers or co-purchasers ([152]). In two documents the guarantor is mentioned in the text of the agreement. One states that if the object sold, here a bull, should prove to be stolen the seller and the guarantor are to furnish compensation ([153]), the other that if the person liable under the undertaking to replace is absent at the time of eviction, the guarantors are to furnish compensation in his place ([154]). This no doubt represents the normal practice and is in accord with a rule stated in the Sung code ([155]).

Nothing is said in the documents of the role of witnesses. One might imagine that they could be called upon in the event of a dispute to testify to the facts of the transaction. Yet it has been argued that this was not their role. Gernet states: « Leur présence au moment de l'échange et les signatures qu'ils apposent ont pour objet de conférer à l'acte la solennité qui lui est nécessaire et de le pourvoir d'autorité: cette présence symbolise celle du groupe social auquel appartiennent les contractants » ([156]). It may be that the witnesses to some extent were held to be representatives of the community, signifying the latter's knowledge and acceptance of the transaction. But can an evidentiary role

(150) Cfr GERNET, 369.
(151) GERNET, 384; VON SENGER, 89.
(152) GERNET, 353 (VON SENGER, 103); GERNET, 365 (VON SENGER, 110).
(153) GERNET, 357; VON SENGER, 105.
(154) GERNET, 384; VON SENGER, 88.
(155) See above.
(156) *Op. cit.*, 343 (likewise VON SENGER, 126, but *contra* for the Han period, HULSEWÉ, *op. cit.*, 26f.

be excluded altogether? For the moment the question must remain open ([157]).

One important problem which receives no mention in the documents is the means of enforceability. There is no reference, for example, to the fact that an appeal might be made to the local magistrate. One might indeed conclude that the enforceability of contracts was a matter altogether outside the jurisdiction of the official courts except in so far as the making or the enforcing of the contract involved a specific offence punished by the code ([158]). There is some evidence from the Sung period that the courts might hear a variety of claims involving contracts ([159]). Yet by and large enforcement of the terms of the contract seems to have been a matter for the parties themselves. Self-help might be necessary in at least the following situations: (i) at the time the document is signed the goods sold are delivered but the price or part of it is not paid, (ii) either party wishes to rescind, (iii) the party who first rescinds thereby incurs a fine payable to the other, (iv) the goods sold turn out to be stolen or the land or slave sold is claimed by a third person, the seller thereby incurring an obligation to replace.

In the absence of agreement between the parties, self-help might prove to be difficult. Thus, a party wishing to rescind might easily return goods to the other party or give up possession of land or house, but might not so easily be able to regain the property he had initially delivered. Again it might not be easy for a seller to obtain the particular items promised as price or for a party entitled to a fine under a rescission clause to obtain the particular property due. Or what course did a party adopt who wished to enforce an obligation to replace where he had lost the property sold to a third party with a better claim? In a number of cases, it might have been possible for a party to seize from the other property roughly equivalent in value to the amount of his claim. For this purpose, « party » would include any co-seller or co-buyer. Where this was not possible and there

(157) See further below.
(158) See above.
(159) See below.

was a guarantor a levy might be made on the latter's property. If so, the question arises whether the guarantor was entitled to recoup himself in some way from the principal party. If, as seems in most cases to have been probable, the guarantor was a relative of the principal party, the answer perhaps was that he was recognized as having no formal claim: it was a matter for family adjustment. But on the evidence as yet unavailable no definite answer can be given.

There remains the question of personal liability of a party or guarantor with insufficient assets to make good the other's claim. Some kind of personal servitude (as was possible in the case of ordinary debts) was probably practised. The principal party if available (or even a member of his family), otherwise the guarantor, might have been liable to seizure by the party with the claim. Either he might be made to provide labour to the value of the claim or kept as means of exerting pressure on his relatives to pay. The fact of seizure (whether it is the debtor's property or his person which is seized) raises the issue of the respective strengths of the parties. If the one with the claim comes from a family considerably weaker than that of his opponent, his claim will be ineffective. The question of the relative strengths of the parties is bound up with the question of the degree of kinship support each could muster, and this in turn may have depended upon a general consensus as to the « rightness » or otherwise of the claim. Hence a number of factors have a bearing upon the effectiveness with which a claim might be realized.

Contracts other than sale have been less extensively studied by Western scholars, but one has available a reasonable amount of material on loan, and a limited amount on hire and pledge. This should not be taken as an exhaustive list of the variety of transactions known in T'ang and Sung times. Certainly other kinds existed as can be seen from the catalogues of documents which have been made ([160]), but they have not yet received adequate

(160) Cfr L. GILES, *Descriptive Catalogue of the Chinese Manuscripts from Tunhuang in the British Museum* (1957); Niida NOBORU, *Toso*

treatment by Western sinologists. As a specimen of a contract of loan one may take that most frequently reproduced in the sources. This is a document dated 25th August 782 recording a loan of 1,000 cash from the monk Ch'ien-ying of Hu-Kuo Monastery to the soldier Ma Ling-chuang. The borrower undertakes to pay interest at the rate of 10 % per month, principal and interest to be repayable on demand. Should the borrower not be able to repay the lender is authorized to seize his moveable property, in particular cattle, to the value of the debt. The borrower, his mother and younger sister have « signed » the contract by their finger marks ([161]). One notes that the interest is higher than that specified in the law ([162]), and that the contract defines the remedy of the lender should the borrower default. Another contract of 786 for a loan of money specifies that if the debtor is insolvent, recourse may be had against the guarantor, whose name is appended to the document together with that of the lender and borrower ([163]). A guarantor seems to have been used when no other person was associated with the borrower in the loan. Another T'ang document records a loan of so much barley to be repaid by the end of the month; if not, interest at the rate of a tenth of the barley per month is to be paid. Should the debt not be repaid, the lender is authorized to take the borrower's property to the value of the debt. The contract specifies that if the principal debtor is absent, his wife and son are to repay (and by implication permits recourse against their property in the event of default). There may in addition have been a clause excluding land from the creditor's power of distraint. The names at the end of the document are those of the lender, the borrower, his wife and sons (co-borrowers) and two witnesses ([164]). Finally, one may

horitsu bunsho no kenkyu (The Critical Study of Legal Documents of the T'ang and Sung Eras), 2nd. ed. (1967), 2ff (English summary).

(161) See GILES, *Six Centuries at Tunhuang*, 35, *Descriptive Catalogue*, N° 7529; YANG, *Money and Credit in China*, 92f; A. STEIN, *Ancient Khotan* I (1907), 526f (giving a translation and notes by E. CHAVANNES).

(162) See above.

(163) STEIN, *Ancient Khotan* I, 525.

(164) The contract is preserved in a fragmentary form. See H. MASPERO, *Les documents chinois de la troisième expédition de Sir Aurel Stein*

note that not all contracts, in particular loans of commodities like grain, provided for the payment of interest ([165]).

The most instructive of the contracts of hire or lease is a document of 690 recording a lease of 5 *mou* ([166]) of land at so much wheat per *mou*. The document states that the « price » of 3 *mou* has been delivered and that the remainder of the wheat due is to be paid before the sixth month. If it is not paid by that date for every one bushel still due, two are to be paid. Thus the lessor is protected by the imposition of a heavy fine should the lessee default in payment of the rent ([167]). On the other hand, the lessee is also protected. Should he not acquire possession of the land by sowing time, the lessor is to pay a fine of 2 *sheng* ([168]) for every bushel of the price ([169]). The interesting point is that the contract is made before the main act which it contemplates (delivery of possession of the land) takes place. All that has been done is payment of part of the « price ». No doubt this would have been regarded as essential, that is, that no contract would have been made where neither the land was delivered nor the « price » paid, but one seems to be coming close to the purely executory contract. The only other versions of contracts of hire which I have seen record briefly the hire of a labourer's services in return for a suit of clothes and a pair of shoes ([170]) and the hire of a donkey ([171]). But no further details of the terms of the transaction are available.

en Asie Centrale (1953), 150 (document 313). MASPERO, wrongly I think, treats the witnesses as guarantors. YANG suggests that witnesses like guarantors might be liable if the principal debtor was unavailable (*op. cit.*, 93 par. 10.7) but I have seen no evidence for this proposition.

(165) See GILES, *Six Centuries*, 35, *Catalogue*, N° 7531; STEIN, *Ancient* KHOTAN I, 529 (No. 10); T.S. WHELAN, *The Pawnshop in China* (1979), 5f (and his observations on the circumstances under which interest might or might not be charged).

(166) One *mou* is approximately one sixth of an acre.

(167) If this is considered as interest, it far exceeds the legal limit.

(168) One *sheng* is equal to one pint.

(169) MASPERO, *Documents chinois*, 151 (No. 314).

(170) 924 A.D. GILES, *Six Centuries*, 36, *Catalogue*, No. 7522.

(171) GILES, *Catalogue*, No. 7525.

With respect to pledge, there is sometimes a difficulty in distinguishing pledge from sale. Thus, a contract of 991 provides for the sale of a slave-girl as settlement for a debt of silk. However, since the contract provides that the silk is still due and is to be repaid within six months, it seems that the slave girl in reality acts as security and perhaps also is a means of providing interest on the debt (through the use of her services by the lender). The contract includes a clause familiar from contracts of sale to the effect that either party who rescinds is to forfeit (to the other) a piece of silk and two sheep ([172]). On the other hand, a clear illustration of pledge is provided by a contract from the latter part of the eighth century (unfortunately preserved in a fragmentary form). This states that a woman, being in need of money, pledges a series of articles with the lender. The important part is that stipulating the creditor's remedy. If the debt is not repaid, the articles will be confiscated and the creditor is to have a power of sale ([173]). What is not clear is whether the parties contemplated that the creditor might keep the articles without selling them, or, if they were sold, whether he might keep the entire proceeds or only such amount as was equivalent to the debt ([174]).

Apart from the codes and documents recording actual contracts, there are other sources that yield useful information. Although no case-book from the T'ang period survives, some were put together in the Sung period. Of these, the *T'ang-yin-pi-shih* (completed in 1211) has been edited and translated by R.H. van Gulik under the title « Parallel Cases from Under the Pear Tree » ([175]). It records a number of decisions by magistrates and prefects mainly from the Sung, but some going back to the T'ang. A few of the cases concern contracts. Although they are meant more to illustrate the ingenuity of the judge in detecting

(172) GILES, *Six Centuries*, 36, *Catalogue*, No. 7521. Cfr also the « mortgage » of land noted by GILES, *Catalogue*, No. 7547 (very few details being given).

(173) STEIN, *Ancient Khotan* I, 527f (No. 6) ; LIN, *op. cit.*, 116f.

(174) Cfr the statutory provision above.

(175) Published in 1956.

the truth than to explore the law, they do offer a few interesting insights into the operation of the law.

From the latter part of the 9th century (late T'ang) comes a case illustrating the law of pledge ([176]). One farmer mortgaged the deeds of his farm to a neighbour in return for a cash sum. After he had repaid what seems to have been the greater part ([177]) (undertaking to pay the balance the following day) the creditor denied the existence of an agreement (thus proposing to keep both title deeds and the cash already received). In the absence of either a written agreement or witnesses, the debtor was unable to establish the truth until a wise magistrate found a means of getting the creditor to acknowledge that he had received from the debtor cash to redeem his deeds. This case shows that it was possible for oral contracts of pledge involving large amounts of property to be made between persons without recourse to documents. No doubt in fact this was common practice among friends, relatives and neighbours. More important, perhaps, is the point that a mortgage of land might be effected through the deposit of the « title-deeds » with the creditor, the debtor retaining possession of the land ([178]). This again must have been common practice since it allowed the debtor to continue to farm the land and use the proceeds of the harvest to repay the debt.

The other cases concern attempts by persons to acquire the land of a neighbour or relative by means of a forged document ([179]). The most instructive of these turns on an unsuccessful attempt by someone to buy land from his elderly neighbour ([180]). The former forged a deed (presumably of sale) and on the neighbour's death took possession of his land and expelled his young son. The latter for twenty years sought redress by legal means without success. Eventually a new prefect discovered the truth in part by re-

(176) Van Gulik, *op. cit.*, 178 (67B).

(177) *Op. cit.*, 180, note to case.

(178) It is not entirely clear what these deeds were; they may have included a document recording a sale to the creditor or acknowledging that he was owner.

(179) Van Gulik, *op. cit.*, 120 (31A), 121 (31B), 125 (34A), 142 (45B).

(180) Van Gulik, *op. cit.*, 125 (34A).

minding the defendant that if a contract had genuinely been drawn up, the neighbours would have been asked to witness it; they would still be alive and could be summoned to give evidence. In the end the defendant confessed. The compiler of the case-book adds a note to the effect that the ancient rule required the completion of a deed in the presence of neighbours, but that this valuable practice had been discontinued in recent years by the authorities. There is here an important piece of evidence that witnesses might be called upon to testify to the making of a contract. Precisely where it was alleged that a document was forged their testimony would be necessary. Hence, the view expressed by Gernet and von Senger ([181]) that witnesses were merely necessary for the formal validity of the document and the transaction requires to be qualified.

A general question that emerges from these reports of cases is the ground of the court's jurisdiction in matters of contract. Since so little is said in the reports about the law, one finds no statement by the court of the formal complaint or issue presented to it. Was it possible for any party aggrieved by the conduct of another to seek the assistance of the court? It is not certain that this was the position ([182]). The cases recorded all arose from the commission of a punishable offence, either the forgery of a document or the obtaining of property by deceit. Hence, the position may have been that the court would not take jurisdiction in a case of contract unless there was an allegation that one of the parties had committed an offence or broken a statutory rule ([183]). It is interesting to compare the cases in the *T'ang-yin-pi-shih* with those collected in another Sung case-book, the *Ming-kung Shu-pan Ch'ing-ming chi* (« Collection of Famous Judicial Decisions ») which records decisions given in legal cases by eminent officials of the end of the Southern Sung dynasty (early 13th century) ([184]). These cases are very different from the

(181) See above.

(182) Cfr the restrictive statutory rules above.

(183) Though, as has been seen, statutory limits on interest rates seem to have been ignored.

(184) See the thesis of I.R. Burns (cited above note 87) iif, lff;

earlier cases collected in the other work. They show full legal argument and illustrate a wide range of circumstances in which disputes involving « family property » might be adjudicated by the courts. In particular, there are cases on complicated issues arising from the pledging and sub-pledging of land which show, *inter alia,* that persons who wished to redeem property alleged to be pledged might approach the court and seek a judgment in their favour ([185]). The court appears to have entertained the claim even though no public interest or legally punishable offence was involved. What one cannot determine is whether the courts would have exercised jurisdiction so freely two centuries or so earlier.

Another source with relevant material is the essays of the great T'ang statesman and writer Han Yü (768-824). These contain passages on the plight of debtors and the means by which they may be relieved. One memorial to the emperor is in fact devoted to this question. Han Yü explains that in his term as prefect of Yuanchow (a relatively small district) he had discovered 731 free men and women who, in contravention of the law, had been given as pledges for debt and virtually enslaved by their creditors. The law in question is that reproduced above prohibiting the giving of a free person into slavery as a pledge. The condition of such debtors was indistinguishable from that of a slave. They were beaten and made to work by their creditors until they died. Han Yü states that in accordance with the law he had the value of the service provided by the debtors assessed and freed them. This may mean that where the value of the debtor's labour was deemed to equal the amount of the debt he was freed. Han Yü calls upon the emperor to instruct officials throughout the empire to secure the release of enslaved debtors ([186]).

P. Ebrey, *Conception of the Family in the Sung Dynasty, Journal of Asian Studies* XLIII (1984), 233.

(185) Burns, *op. cit.*, 290ff.

(186) There is a text and translation of this memorial in Shih Shun Liu, *Chinese Classical Prose. The Eight Masters of the T'ang-Sung Period* (1979), 52f and a translation in Lin, *op. cit.*, 85.

A similar account is given in the inscription composed by Han Yü for the tomb of a fellow official, Liu Tzu-hou, who was prefect of Linchow in the early part of the 9th century. A local custom was the taking of men and women as security for debt. If the debt was not redeemed in time and the interest came to equal the capital, the surety was forfeit and became a slave of the creditor. Liu, when prefect, sought to rectify the situation by allowing the very poor to discharge their debt by means of their labour. Their creditors were to keep a written record of their services and release them as soon as the value of the labour equalled the amount of the debt. This rule was applied in other prefectures with the result that nearly 1,000 sureties were released by the end of the year (187). There is an implication here that common practice was for a debtor at the time of incurring the debt to agree (probably in writing) that should he not be able to redeem, the creditor was to have a right to the services either of himself or of some member of his family.

To some extent the law, as has been seen (188), permitted creditors to seek satisfaction of debts by means of the labour of the debtor or members of his family. But what seems to have happened is that this provision was abused. Once a debtor fell into the power of a creditor he was unable to escape, no matter how much labour he supplied. In effect, his position became indistinguishable from that of a slave, as Han Yü observes in his memorial. It was this virtual enslaving of debtors under which they lost any hope of freedom that officials such as Han Yü and Liu Tzu-hou sought to prevent. Whether their intervention produced more than a local and temporary amelioration is doubtful (189).

(187) Liu, *op. cit.*, 92f; Lin, *op. cit.*, 86.

(188) See above.

(189) I would like to thank Dr. I.R. Burns for help on a number of points.