Moratorium in Japanese Medieval Law

Nishimura, Yasuhiro
Faculty of Law, Doshisha University : Professor

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ARTICLE

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Yasuhiro Nishimura**

Chapters

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Also, I must appreciate a help in translating into English for my paper by Professor Masayuki Tamaruya, Dr. Shuichi Takahashi and Assistant Professor Kengo Itamochi. All errors remain the author's responsibility. At the same time, I can not thank Professor Kasai and Professor Emi Matsumoto too much for their longstanding friendship. Also, I would like to thank to Kyoto Prefectural Library and Archives, and Minoh City Office.

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** Dr. Yasuhiro Nishimura, Professor of Japanese Legal History in the Faculty of Law at Doshisha University, Kyoto, Japan. This essay is a piece of work sponsored by JSPS Grants-in Aid for Scientific Research [Type of C] 2016 "A legal historical study on the relationship between evidence and decision in the trial procedure in Medieval Japan".

1　Introduction

'*Kennaiki*', Diary of Tokifusa Madenokōji, who was a courtnoble of the early *Muromachi* period [in the middle of 15th century], tells us the outbursts in Kyoto of *Tokusei-Ikki* (*徳政一揆*), a form of demonstrational actions requesting *Tokusei*, namely debt cancellation: "In 1297, the *Kamakura Shogunate* issued *Tokuseirei*, a debt cancellation order. Its cause is said to be a comet appeared in the same year [Source: Article for the 3rd day of the intercalary 9th month the first year of *Kakitsu* (1441) under the old lunar calendar]."

In those days the comet has an implication of politically and socially inauspicious sign and people requested their rulers to relieve them by enacting a benevolent rule (*徳政*). Imperial court of the emperor soon had a discussion and made a decision to grant *tokusei*. The impact of comet was even greater for *Kamakura* politics. For comets often preceded powerful politicians' death.

This presentation focuses on *Einin-no-Tokuseirei*, a debt cancellation order that was issued in the fifth year of *Einin* [1297]. It was one of several *Tokuseirei*, debt cancellation orders. In this presentation, I will first provide a general introduction of *Tokuseirei* and particularly *Einin-no-Tokuseirei*. I will then re-assess its significance in Japanese legal history. This is part of an attempt to investigate the development of the credit economy in Japanese Medieval law.

2　*Tokuseirei:* Debt Cancelation Benevolent Rule

The term of *Tokusei* derives from Chinese Confucianist thought and it represents political doctrine where the sovereign shall rule virtuously through the benevolent rule. In essence, it reflects the idea of a correlation between heaven and man. The emperor shall administer wisely and rule benevolently, and disaster and warfare were believed to occur when the emperor lacks virtue.

Thus in such a situation, he was expected to restore the trust of the people by dispensing *Tokusei*, that is, by dispensing benevolent rule.

3 Scholorship on *Tokuseirei*

Historians have not given much credit to the debt cancellation through the *Tokuseirei* in the *Einin* era.

According to the conventional understanding, the *Kamakura Shogunate* issued the *Einin-no-Tokusirei* in an attempt to provide a rescue to their retainers at the expense of those non-retainers, namely, common people, peasants, merchants and traders. And this shows *Kamakura Shogunate's* inability as a ruler and its sign of decline.

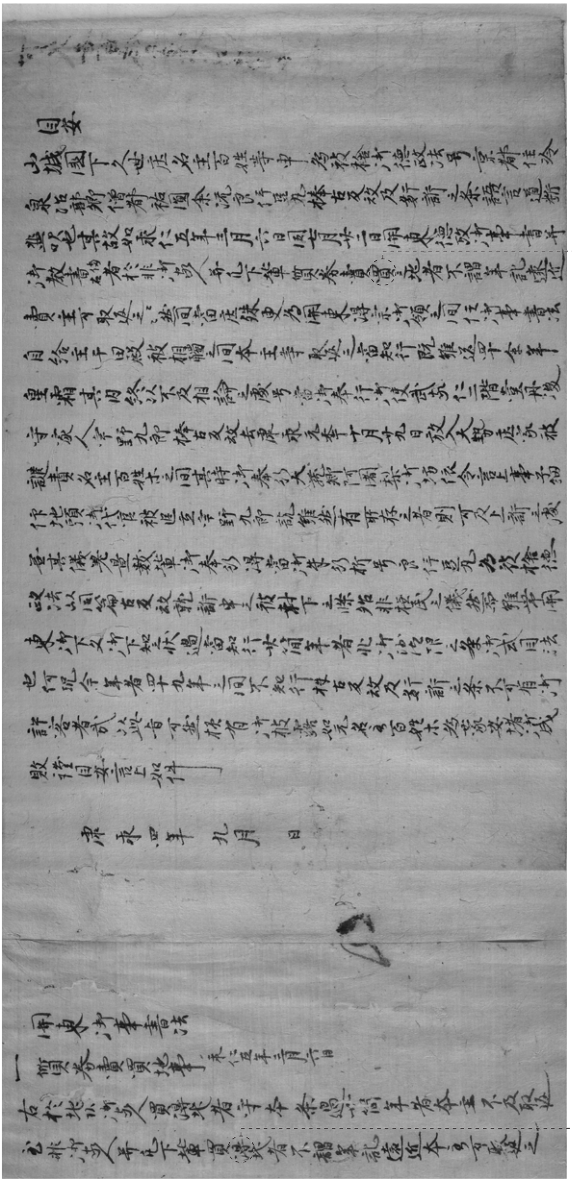
However, recent scholars have been emphasizing that *Einin-no-Tokuseirei* was meant to maintain the retainership as the foundation of the *Shogunate* rule by prohibiting retainers from pledging or selling their properties.

During Japanese Middle Ages, *Kamakura* period, the right of the original landowner was believed to remain deep underneath the land. It was on this belief that the *Einin-no-Tokuseirei* allowed the retainers to re-posses without any compensation for the land that had been pledged or sold.

4 Historical Evidence

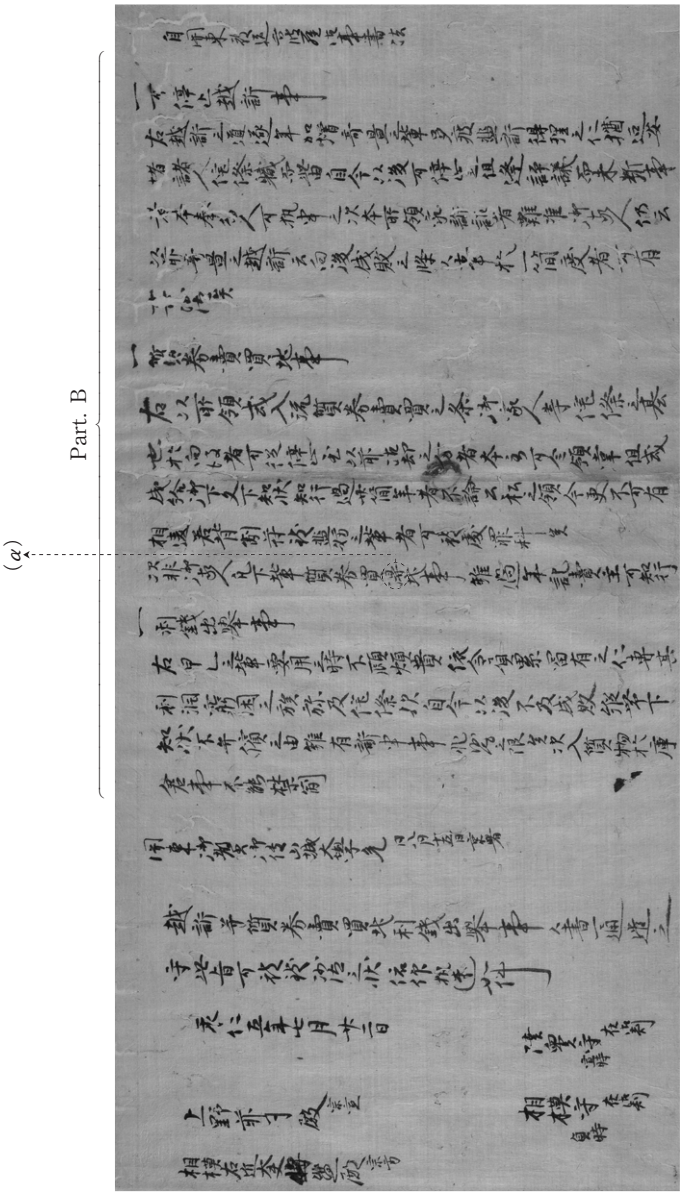
Einin-no-Tokuseirei cannot be found in any historical documentation officially compiled by the *Shogunate* (*Azuma-kagami*) or any of the statutory compilation (*addition of shikimoku*). Fortunately a copy of *Einin-no-Tokuseirei* has been discovered from voluminous collection of old documents preserved in one of the major temples in Kyoto (*Toji-Temple*) (【Fig. 1】). It was part of an attachment to an answer submitted to certain litigation under the jurisdiction of *Toji-Temple*.

Part. A



(α)

(β)



【Fig. 1】 Statement of the peasants in *Shimo-Kuze-no-sho in Yamashiro Province* written in date unknown, 9th month of 4th year of *Kōei* [1345] (*Kyō-hako* no.48 of "*Toji-Hyakugo-Monjo WEB*)

the connecting point of the first paper and the second paper ↓

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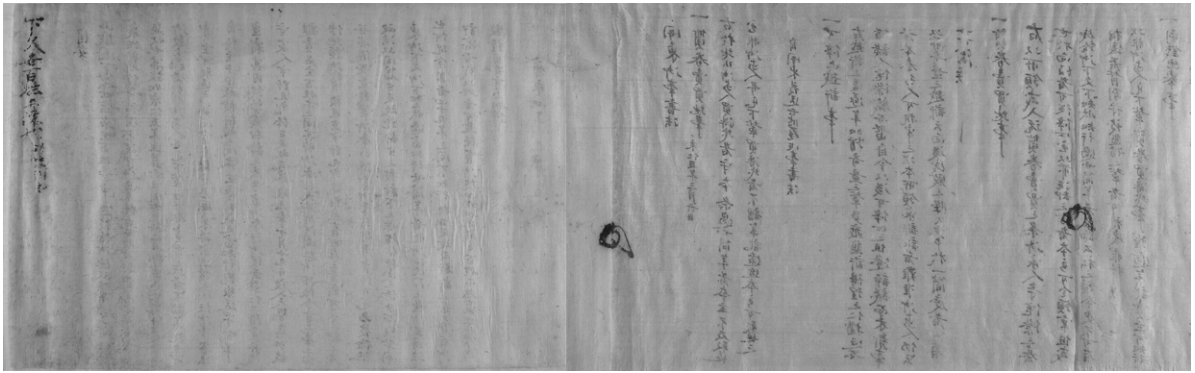


【Fig. 1 The reverse side of the paper】 Endorsement (guaranteed with the Kaō〔written seal mark〕of the magistrate in charge of the case)

In their answer, the defendant peasants alleged as follows. The land that the plaintiff requested was a part of the manorial land, which was owned by *Tokuso* (*得宗*), the head of the direct line of the ruling *Hojo* clan. During the *Kamakura* period, the land was managed by a lady, who was given a pre-fixed profit from *Tokuso*.

The peasants of the manor received from that lady a document referring to the *Einin-no-Tokuseirei*, and repossessed a large tract of land that had been sold or pledged. Nearly fifty years had passed since the repossession without any incident that would disturb their possession. However, very recently, the one who is allegedly a successor to the previous purchaser initiated proceedings at *Toji-Temple* requesting the return of the land that had been purchased before the *Tokuseirei*. The deed of sale, the defendant alleged, had been rendered invalid by the *Einin-no-Tokuseirei*.

The defendant's legal argument was that the plaintiff's claim was frivolous because they had lawfully repossessed the previously sold land as the owner on the basis of *Einin-no-Tokuseirei* in 1297. Furthermore, nearly fifty years had passed since the repossession and thus the requirement of statute of limitation of 20 years had clearly been satisfied. With the statute of limitation, the plaintiff is not entitled to assert their right as the creditor.

5 Provisions of *Einin-no-Tokuseirei*

The *Einin-no-Tokuseirei* as found in the attachment consists of two parts which we call Part A and Part B. Part A is the *Tokuseirei* as issued in the third month of the fifth year of *Einin* in *Kanto*, Eastern area of Japan, including *Kamakura*. Part A is rather brief. Part B is the *Tokuseirei*, issued four months after Part A, as delivered to *Rokuhara* in Kyoto, an administrative and judicial agency over the Western area. Part B is relatively detailed but not inconsistent with the legislative purpose of the Part A.

Part A provides as follows:

If a retainer purchases a land from another retainer or non-retainer, and 20 years statute of limitation has run, then the seller, i.e. the debtor cannot repossess from the buyer, i.e. creditor. If a non-retainer or common people purchases a land from a retainer, the retainer-seller, i.e. the debtor can repossess the land regardless of the statute of limitation.

Part B provides as follows:

Regarding the land pledged or sold by a retainer, (1) the retainers have impoverished themselves by leaving the pledged land unredeemed or by selling their land, and therefore such conduct shall be prohibited. (2) Those properties that have not been redeemed and have been sold can be repossessed by the retainer, original owner. (3) However, if the retainer-creditor purchased the land and obtained a letter of recognition of ownership by the *Shogunate*, or 20 years statutory limitation has passed, the said land cannot be redeemed by the original owner and the status quo shall not be disturbed. (4) One who obstructs the present owner's possession in violation of the above provisions shall be subject to penalty. (5) Even if non-retainers or common people maintain the ownership of the land that was obtained by way of foreclosure or sale for more than statutory 20 years, the retainer-seller can repossess such property.

6 Inquiries of *Einin-no-Tokuseirei*

As already mentioned, conventional understanding was that *Einin-no-Tokuseirei* of 1297 was unwisely issued in disregard of socially accepted common sense. The chief basis of this understanding was that the statute issued next year, 1298, was intended to abolish parts of *Einin-no-Tokuseirei* that were unpopular among the people. It was because *Einin-no-Tokuseirei* was a bad law unacceptable to society that the *Shogunate* was forced to retract.

However, the revision of 1298 simply legitimized those sales and pledges by

retainer that were prohibited under the *Tokuseirei*. The main provision of *Einin-no-Tokuseirei* that allowed the repossession of the sold or pledged land without compensation was never repealed but rather reconfirmed. This last point has been neglected by the conventional understanding. In other words, *Einin-no-Tokuseirei* was not abolished due to any failure.

Then, why did the *Einin-no-Tokuseirei* prohibit the sale and pledge of land ? The *Kamakura Shogunate* had since Foundational Statute of the first year of *Joei* [1232] called *Goseibai-shikimoku*, imposed the restriction on sale, pledge, donation, or inheritance, so that retainers would not be dissipated. The restriction was sometimes very strict and on some other occasions less so, and sometimes severe penalty was imposed. It was within this context that *Einin-no-Tokuseirei* prohibited sale and pledge of land not by accident. At the same time, the *Shogunate* was sensitive to the transfer of the lands among retainers, and intent to strengthen his control over the retainers. Thus, since *Einin-no-Tokuseirei* allowed the repossession of the sold land by the seller-retainer without compensation, the *Kamakura Shogunate* may have been compelled to prohibit the sale itself.

When each of *Einin-no-Tokuseirei's* individual provisions is examined, one can understand that there is corresponding legislation that precedes them. In addition, the *Kamakura Shogunate* whose chief source of power lies on the retainer system, had to operate with the hands of the closed group of retainers, and protect those retainers' lands, and therefore, was necessarily forced to take such measures.

7 Social Impact

Based on the above mentioned, we can analyze the 14th century peasants' argument and their reference to *Einin-no-Tokuseirei*. In their answer, peasants argued against the plaintiff's claim by quoting part of *Einin-no-Tokuseirei*,

which is quoted full in the attachment. The quotation in the answer runs as follows: "If a non-retainer or common people comes to own a land through purchase or pledge from a retainer, regardless of the statutory 20 years' continuous ownership as provided in Foundational Statute of 1232 (*Goseibai-shikimoku*), the seller can repossess the same land." This is a genuine and accurate quote from the relevant part of any *Tokuseirei*. At the same time, if one carefully compares the quote with the corresponding part of the attachment, there is one curious difference. In the original *Einin-no-Tokuseirei*, the purchaser who could repossess the land that was pledged or sold to a non-retainer or common people was a retainer. By contrast, the quote in the answer implies that the one who could repossess the land is the non-retainer or common people, as a consequence of the change of language from purchase ((α) in【Fig. 1】) to sale ((β) in【Fig. 1】). In this sense, the defendant had slightly changed the original language of the *Einin-no-Tokuseirei*.

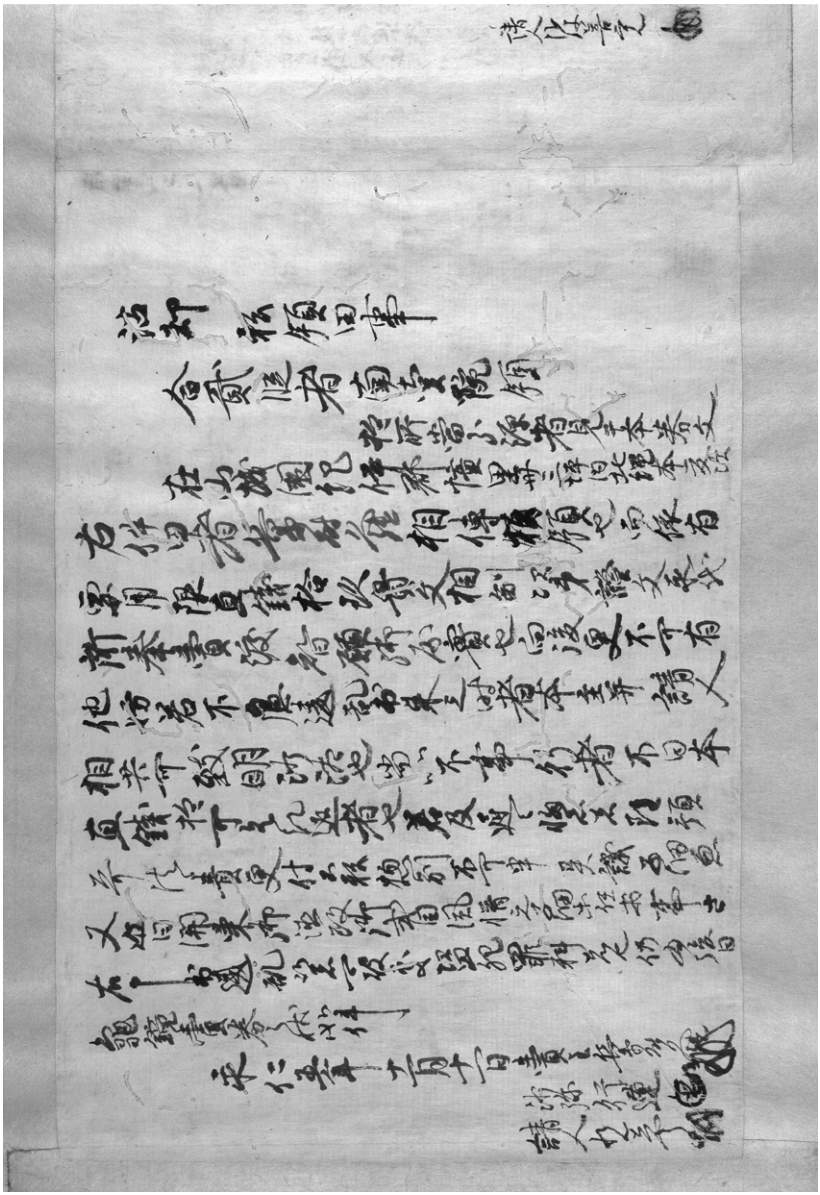
In the original *Einin-no-Tokuseirei*, the seller who can repossess the land had to be a retainer, regardless of whether the purchaser was retainer or non-retainer or common people. As opposed to the retainers of the *Kamakura* period, non-retainers were not in the position to benefit from the *Einin-no-Tokuseirei*. Nevertheless, the peasants in the *Kamakura* period had cleverly requested the application of the *Einin-no-Tokuseirei*, and had taken back their land that had previously sold to the other party. Nearly fifty years later, in the mid-14th century, the defendant peasants in this case sought to justify the return of the land by quoting the *Einin-no-Tokuseirei* and slightly changing the language in a way that is convenient for them. This is an indication that after the issue of *Einin-no-Tokuseirei*, the spirit of the order was accepted quickly, and by much wider group of people than was intended.

At the same time, following *Einin-no-Tokuseirei*, non-retainer purchasers of land is now subject to a new legal risk, that is to say if a new *Tokuseirei* is to issue in the future, purchaser must return the land that he has already bought for

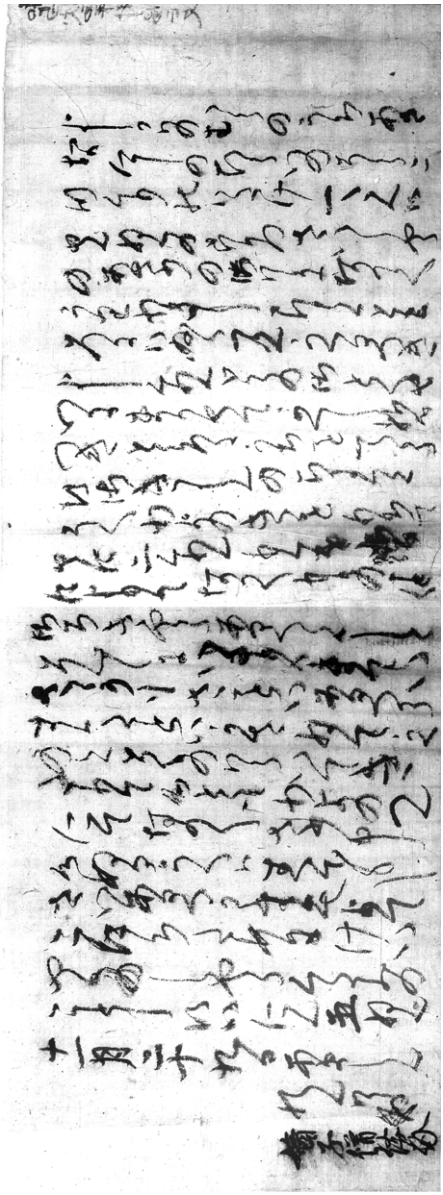
a price. In general, a purchaser over land will pay the price of the land and the land will be transferred to the purchaser, and at the same time, a deed of sale written by the seller will be handed over to the purchaser to prove the transfer of the title to the same land (【Fig. 2】). In order to avoid the risk of *Tokusirei*, purchasers introduced a new device to the deed of sale. It is a provision inserted by the seller in the deed of sale known as warranty against *Tokuseirei*, which in principle provides that the seller shall renounce the benefit of a *Tokuseirei* that is expected to issue after the completion of the sale.

Another device to avoid the effects of *Tokuseirei* was "*uri-kishin*" which can be literally translated as sale and donation. It is a transaction where the purchaser would donate a land, that was transferred from the seller, to a third party, which was typically religious institution. Therefore, "*uri-kishin*" whose legal meaning was donation to temples and shrines in the end, was symbolized as religious act, by which a land transferred to either of them could not be taken back again. This also means that donation was not subject to the right to take back title to property (*Kuikaeshi*), which was great traditional law of the Medieval period of Japan. In fact, there has been the case where a seller requested the purchaser the return of the land that was donated to a temple by way of sale and donation. Although, the seller in this case, was not subject to *Einin-no-Tokuseirei*, he presumably tried to exercise the right to repossess the land in question as provided in the *Tokuseirei*.

As already mentioned above, it was commonly believed that a land donated by a secular person to a religious institution such as temple, shrine or priest, cannot be taken back by common people. The seller whose land was donated to a religious institution (*Katsuohji-Temple*) would receive a certain settlement money from the purchaser (【Fig. 3】). But, whether the settlement money was equivalent to the purchase price or not, cannot be ascertained. In this way the sellers and purchasers avoided a great confusion that would result from *Tokuseirei* and settle any dispute amicably.



【Fig. 2】 Deed of sale of the right over land of a peasant *Kumada Hisatsugu*, written in 11th day, 12th month of 5th year of *Einin* [1297] *(Ré-hako* no.20 of "*Toji-Hyakugo-Documents*", from *Toji-Hyakugo-Monjo WEB*)



【Fig. 3】 Deed of compromise of Ama Shinrenbo [*Buddist name of the woman*], written in 29th day, 12th month of 5th year of *Einin* [1297](reprinted from the two pieces of photos on pp. 246-247 of *Minoh-shi-shi shiryo-hen I*)

8 The notion of ''Return of the land to the original owner'' and the emergent of Private law

In the Middle Ages in Japan, it was believed that the original owner can repossess those lands without compensation that he pledged or sold and *Einin-no-Tokuseirei* provided further support for this belief. From this, historians have deduced that people at the time had a mystical notion that the land and the original owner is inherently one and indivisible, and the notion of permanent sale was widely accepted. That belief is "A property is bound to return to the original owner."

However, since historians discovered practice of sale of land in the 14th to 15th century, this traditional view has been questioned. First, although the formality of the sale of land remains uncertain until the mid-15th century, the sale of land itself has taken place. After the lawful permanent sale, the land cannot be bought back and the buyback is only possible in case of pledge. Secondly, during the Middle Ages, the chief component of property rights was the right to share the profit and this right is subject to sale, pledge or donation. Thirdly, the legal nature of sale and pledge is rather similar to each other, and the difference is the amount of money that was lent. Therefore, such unusual circumstances as *Tokuseirei* will temporarily resolve these differences, and make it possible for the debtor to repossess the land that was subject to such transaction.

As is pointed out, in this argument, an important question arises whether legally significant distinction can be made between sale and pledge. Historians disagree on this point. On the one hand, there is a view that simply assumes the distinction between the sale and the pledge. On the other hand, another view emphasizes that the pledge is the dominant form of transaction, and the sale gradually emerged from the pledge. In more practical perspectives, permanent sale is the form of transaction where the purchasers' right is strongest among

various forms of sale and typical price for the deed of sale is seven to ten years of the yield from the land. As for the pledge, in comparison with the sale, the period of loan is shorter, the amount of money that is lent is much smaller and, in most societies in the provinces, the deed of pledge was usually not issued. There, members of the community would trust each other and made loans on that basis.

However, as the provincial societies become overburdened by economic difficulties in the 15th century, such forms of loan on the basis of trust became unsustainable. By then, the nature of pledge through which people would have made loans of limited amount changed and the debtor would have to issue a deed of sale even though the amount of loan rather small. That is because the debtor has formally sold to the creditor the land subject to pledge, and therefore, when the debtor failed to pay back, the creditor quickly possess the land as his own. Under such circumstances, people increasingly became dependent on those lenders who lend at high rate. This resulted in the situation where people increasingly demanded *Tokuseirei*.

Einin-no-Tokuseirei, which the *Kamakura Shogunate* issued, led to a clearer distinction between the sale and pledge. The distinction was ambiguous as when the pledge and the contract of the land with the agreement of buyback was not clearly differentiated, and the *Einin-no-Tokuseirei* clarified the difference by assuring the legal effect of the sale by retainers. Although *Einin-no-Tokuseirei* was not intended to return the land to the original owner, it can be understood within the process of the formalization of the sales in the Middle ages. Japanese society in the tumultuous years since the late 13th century was searching for the acceptable notion of credit within its legal framework. It was through this process that the Private law gradually began to take its own shape.

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