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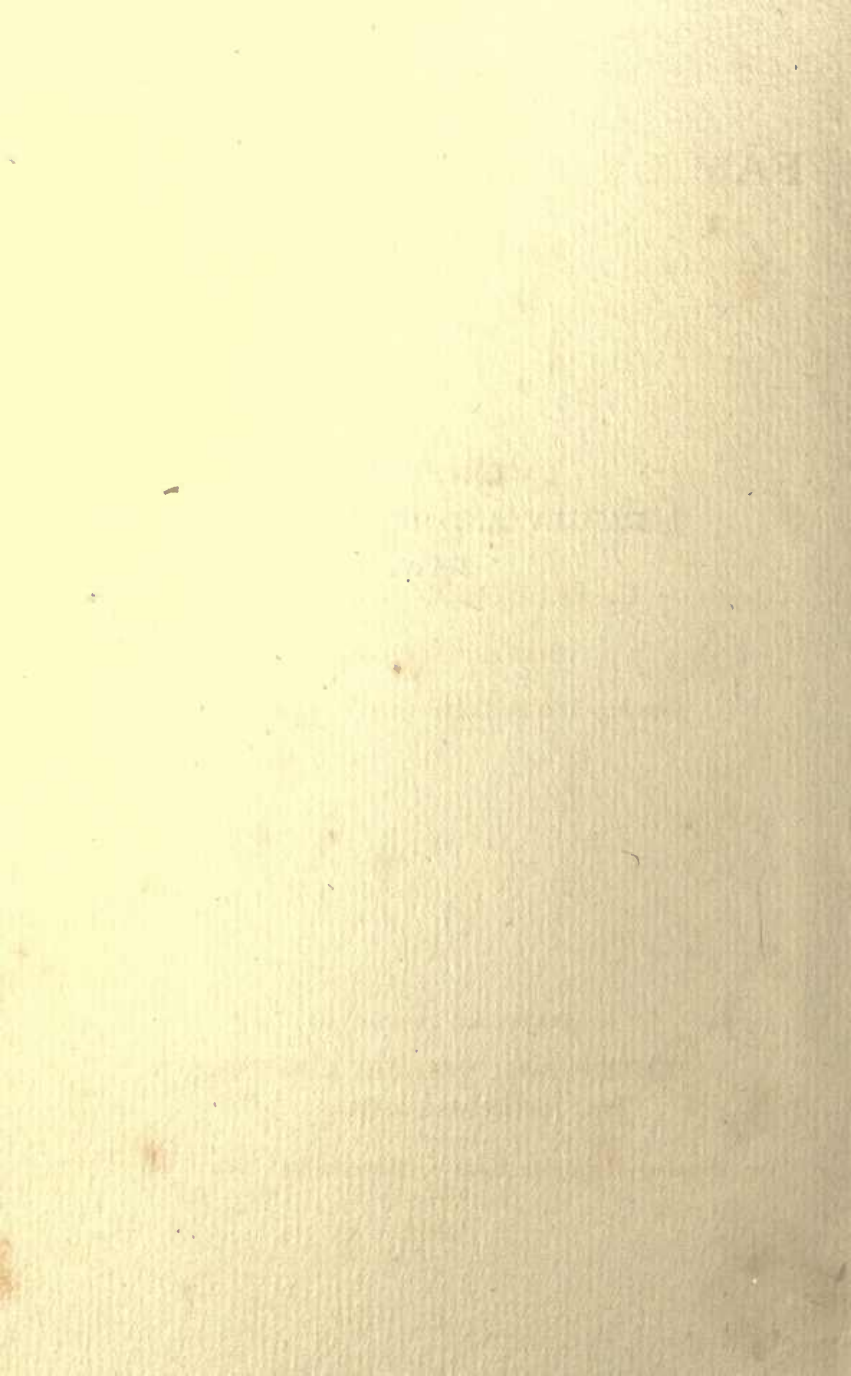


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**CHINESE  
FAMILY AND COMMERCIAL  
LAW.**



# CHINESE FAMILY AND COMMERCIAL LAW

BY

G. JAMIESON, M.A., C.M.G.

BARRISTER-AT-LAW.

Formerly H.B.M. Consul-General at Shanghai.

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## PREFACE

Many years ago I commenced a series of translations from those Sections of the General Code of Laws which though criminal in form dealt in the main with matters which in Western systems of jurisprudence are classed as civil. The translations were printed in the then existing *China Review* (Vol. VIII and subsequent) and I had some hope of being able to reproduce them in book form as a Manual of Chinese Civil Law. The work was laid aside partly by reason of other more pressing duties, but mainly from the difficulty for want of data of giving any satisfactory account of Chinese Mercantile law. The Code gave no assistance under this head, and the various collections of decided cases which I consulted, did not help much. Details of crime and punishment were abundant in every possible variety, but of Commercial law not a word was said.

In truth the conception of civil as distinguished from criminal proceedings is entirely absent in Chinese legislation. Every wrongful act, whether it be stealing a purse, or not paying a debt, or laying claim to property which turn out to belong to another, is classed in the same category and entails a penalty. There is an all comprehensive Section of the Code which makes it a criminal offence to "do what you ought not to do." Under this every suit becomes technically a criminal matter, because either the plaintiff or defendant is wrong, and being in the wrong he is liable at least to the penalty for doing something which he ought not to do if not something worse. In awarding the penalty the civil rights are sometimes incidentally declared, but in the vast majority of cases the punishment to be inflicted is the chief or only object, and the civil right is left to be inferred.

It was therefore hopeless to attempt to construct a system of mercantile law from the books. Inquiries among those who might be expected to know as to what were the principles which guided Chinese Courts in cases, for instance of partnership, bankruptcy and so forth, elicited the reply that every case was decided on its merits, and there was no general rule; or that it was a matter of custom in particular places or of the particular guild to which the trader belonged. Banking law depended on the rules adopted by the Banker's guild, or on the traditional customs preserved by that body,



and so of the others. The Courts it was said might refer difficult questions to the guilds for their opinion or decision, otherwise they acted on their own notions of what was equitable in the particular case.

There is now, however, one quarter from which considerable light has been thrown on Chinese mercantile law, more especially in recent years and that is the tribunal at Shanghai known as the Mixed Court. That Court is presided over by a Chinese Magistrate assisted by an Assessor from one of the Foreign Consulates. It was formed originally for the decision of suits in which the defendants were Chinese and the plaintiffs Foreigners, hence the name Mixed Court. It has now, however, for a long time exercised jurisdiction in cases in which both parties are Chinese, and the law which it administers is Chinese law. The Court has from the first under the guidance of the Assessors drawn a distinction between criminal and purely civil cases. A record of the more important civil cases has been preserved in the pages of the *North China Herald*. Having had access to a complete file of this paper I have drawn on it for a Chapter on Commercial law and by this means I have been able to complete, in some measure, the work I had originally intended.

I am also indebted to occasional papers in the *China Review* and in the *Journal of the North China Branch of the Royal Asiatic Society* by various writers, Professor Parker in particular, the well-known authority on China. I have also made reference to cases quoted in Mr. Alabaster's book entitled *Notes and Commentaries on Chinese Criminal Law*, published in 1899.

China is going through a period of transition and a recasting of her laws and judicial procedure is occupying the attention of her jurists. Already the Criminal Code has been revised and it is understood that a Civil Code is in course of preparation. The time therefore may not be inopportune to present this pioneer treatise on Civil Law as it now prevails. To the men engaged on such work and especially to the young law students who will be the future pleaders and judges of the Courts in China I venture to dedicate this book.

43 ONSLOW SQUARE, LONDON,

October 1919.



## CHAPTER I.

### INTRODUCTORY

My object in the following pages is to give an account of the law of China governing the social life of the people :—the Family organisation, the rules of Succession and Inheritance, the Marriage laws, the Ownership of lands and conditions of tenure, Village or local administration and so forth. In the last Chapter I have attempted to include some details of Chinese Commercial law as drawn from the experience of the Mixed Court tribunal at Shanghai.

The basis of the work is a translation of selected sections from the *Ta Ching Lü Li* or General Code of Laws of the Chinese Empire. These Laws are grouped into six main Divisions, corresponding to the six Boards which under the Manchu Dynasty superintended the affairs of the Empire, viz., The Board of Civil Office, the Board of Rites and Ceremonies, the Board of War, the Board of Punishments, the Board of Revenue, etc. It is the last-named Division styled the *Hu Pu* that contains the sections which I have selected for treatment.

The term Board of Revenue is, however, a bad rendering of the words *Hu Pu*. The word *Hu* is properly rendered families or households. The *Hu Pu* is the Board which deals with families in their corporate capacity. Revenue originally derived mainly from land tax payable by the family as a unit, is naturally one of the subjects included in the Division, but it comprises also all matters in which the family as an individual unit is the predominant feature. And as the ownership of property is always associated with the family rather than the individual, it comprises the law of property so far as there is any legislation on the subject. This Division, in fact, though it occupies a comparatively small space in the Code, yet covers roughly speaking, the whole ground devoted to Civil as opposed to Criminal matters in Western

systems of Jurisprudence. But though the matter is Civil this Division in form is Criminal just as much as the other Divisions. There is no Civil Code in China and there has never been one.

It may here be remarked in regard to the Code generally, that since the inauguration of the Republic, the portions dealing with criminal procedure and the punishment of crimes has been abrogated and replaced by a new criminal Code. Other parts dealing with the Manchu organisation and the voluminous ceremonial, fiscal and trade regulations have long fallen into desuetude and will doubtless in no long time be swept away altogether.

But while much of the Code may be regarded as merely of antiquarian interest, it is different with that part of it which deals with Family Law, inasmuch as its basis rests on immemorial custom and its rules have grown out of the primitive instincts and religion of the people. The foundation of Chinese society is the Family, and the religion is Ancestral Worship. Ancestral Worship is not a thing which the community as a whole can join in; it is private to each individual family, meaning by family all those who can trace through male descent to a common Ancestor, however numerous, and however remotely related. It is remarked by Sir Henry Maine (*Ancient Law*, p. 126) that archaic law "is full in all its provinces of the clearest indications that society in primitive times was not what it is assumed to be at present, a collection of individuals. In fact and in view of the men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the family, of a modern society the individual."

This observation is to a great extent a correct description of Chinese society to-day. The family is the unit. The Father or senior male ascendant has control over his sons, his grandsons and their wives as well as over hired servants and slaves. Municipal law does not greatly concern itself with what takes place within the domestic forum or family group; the head has certain discretionary

powers, and unless these powers are grossly abused it will not interfere. In the Father is vested all the family property, and he alone can dispose of it. At his death his eldest son takes his place and the family goes on as before. It may continue so undivided for several generations and is still deemed a single unit. But the Father or Head is also the high priest. He alone is capable of conducting the ancestral worship, whether in the ancestral hall or at the tombs of the ancestors. If irregularly performed by any disqualified person the spirits of the departed will not be appeased, and calamity will fall on the living. If, on the other hand, the sacrifices are duly performed at the stated periods by a qualified descendant, with the customary offerings and oblations, not only will the comfort and happiness of the spirits be secured, but they in turn will extend their protecting care over their surviving posterity. This belief, modern scepticism apart, is still held by the vast majority of the Chinese race.

It is from this imperious necessity that the law of succession has arisen. Son succeeds Father in regular order, because he alone is capable of performing this all-important duty. Failing sons a legitimate heir is adopted, because it is of paramount importance that the line should not be allowed to die out, leaving no one to attend to the family *sacra*. It may be assumed that this was the common or customary law of the land long before the written or statute law made its appearance. Statute law, in this as in many other instances, merely endorsed what already was the rule, and contented itself with forbidding any deviation from it. An illustration of this is seen in the opening sentence of the translation of Section 78 of the Code in Chapter II:—"Whoever appoints his son successor to the family contrary to law shall be liable to 80 strokes." It does not define, as one would expect, what the law is. That is understood. It is the customary law which has prevailed from time immemorial and which everyone is presumed to know.

Hence it follows that whatever changes may be introduced into other parts of the Code, the law of succession



and inheritance and the marriage law, which is of a kindred nature, are likely to maintain their permanence for a long time to come. No change in the law can be made effective which is not in conformity with the genius of the people or which violates their religious instincts.

It will be seen from the pages that follow that there is an extraordinary resemblance between Chinese Family law as it exists to-day and that system of jurisprudence which Sir H. Maine found to exist in all primitive communities of Indo-European stock, and which goes by the name of the Patriarchal System. The best known type is the ancient Roman Law anterior to the period of the Twelve Tables, the chief characteristic of which is the *Patria Potestas*, or unlimited power of the Head of the family over all the members. Regarding this Sir H. Maine writes (*Ancient Law*, p. 138) "The parent has over his children the *jus vitæ necisque*, the power of life and death, and *à fortiori* of uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them."

But though the resemblance is striking the analogy is not perfect and it may be worth while to trace the differences. In the first place the conception of the family group in Roman and Chinese law is the same. It comprises all those who can trace their descent from any common Ancestor exclusively through males. This group is termed in Latin *Agnati*, and in Chinese the *Tsung*.<sup>1</sup> Roman Law admits the adoption of strangers in blood into the group; Chinese Law does not admit strangers. In both cases married daughters and their descendants are excluded, and for the same reason, viz., that on marriage they fall under the dominium of their husband's family, and cannot be subject to two jurisdic-

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<sup>1</sup> 宗



tions. Unmarried daughters in both have a right to maintenance, but are incapable of becoming heirs to the headship of the family, or of inheriting family property. In regard to the power of the father (*Patria Potestas*) there is a considerable difference. Roman Law emphasises the dominium of the father, which implies duty and obedience on the part of the son. Chinese Law looks at it from the opposite point of view; it emphasises the duty and obedience, which implies power on the part of the father to enforce it. There is no word in Chinese which corresponds to *Patria Potestas*. The bond which unites father and son is *Hsiao*<sup>1</sup>, filial duty or submission, often translated filial piety, though piety is not the appropriate term. It is the respectful submission to the will of the father, which is assumed to arise naturally out of the relationship. For any breach of this filial duty the father has unlimited power of punishment, and even if he should cause his son's death from mere caprice the penalty will be but nominal. Further this deference or duty of submission on the part of the son extends not merely to the father, but to all seniors in the agnatic group;—to paternal uncles, grand uncles and even to elder brothers, and each of these in turn has minor powers of correction, varying with the nearness or remoteness of the relationship.

In regard to property, the rules of devolution in both cases are identical so far as regards direct descendants. On failure of direct heirs Roman Law permitted the adoption of strangers. Chinese Law only permits the adoption of agnates from a collateral branch of the family. Failing adoption, the property in Roman Law went to the *Gentiles*, that is to the gens or clan to which the deceased belonged. In Chinese law if a sonless father fails to adopt, the Elders of the house, that is the senior agnates, will adopt one for him, or in event of their failing to agree, the Magistrate, on being appealed to by any claimant, will direct who is to be adopted and that person will

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<sup>1</sup> 孝

inherit the whole of the property. If no one has been nor can be adopted, in other words if there are no male claimants of the agnatic kindred, then and in that case only the property may be divided among the daughters.

The contrast between the two races, however, is best seen in the development which this primitive type of law has undergone in each. Roman Law at an early period began to throw off the trammels or rigidity of the system, particularly in permitting the power of bequeathing by Will, which was first granted by the Twelve Tables. China, except in minor concessions to natural affection, has never moved out of the old groove. She presents us to-day with the living type of law which prevailed in Western communities more than 2,000 years ago. Or as Professor Parker aptly puts it (*China Review*, Vol. VIII, p. 69) "With Chinese law we are carried back to a position whence we can survey, so to speak, a living past, and converse with fossil men."

For this permanence or immobility of Chinese institutions several causes may be assigned. The Romans came early into contact with other types of civilization, such as the Greek, Phœnician, etc., and from a study of foreign customs the Roman lawyers evolved a theory of *jus gentium* or law of nature, which in the hands of the Prætors (the Equity judges of those days) rapidly toned down the asperities and rigidity of the common law. China has had no such advantage. Until recent years China came into contact with no civilization superior or any way equal to her own. The long isolation and her ignorance of the rise and progress of Western nations led her, not unnaturally, to the conclusion that everything outside her own borders was barbarous, and she would have disdained to copy, or even to admit that there was anything fit to copy, from the customs of other nations.

But the most potent agent in forming Chinese law and maintaining its permanence is ancestral worship. Rome also had originally a sort of ancestral worship in the household gods,—the *Lares* and *Penates*,—but the sacrificial duties attached thereto were gradually transferred

from the private to the public forum and vested in the College of Pontiffs, which levied a tax on successions for the upkeep. In China there has been no such transfer nor has any transfer been possible. There has been no State Church responsible for the maintenance of religion in the community as a whole. Isolated cases are to be found where a family, threatened with extinction through failure of male heirs, have made a grant of land to a Buddhist or Taoist Monastery on condition that the Priests shall see to the care of the ancestral graves and offer the customary prayers. But this is at best only a makeshift, and only emphasises the stringency of the general rule. The duty of High Priest still devolves on the head of the family for the time being, and due provision must be made for a qualified successor in event of his death. So long as this imperious necessity exists, it is difficult to see how any great change in the law of succession can be brought about.

Another factor which has contributed to the immobility of Chinese legal institutions is the fact that there has never been in the country a class of professional lawyers, nor schools or colleges where the study of law has been systematically pursued. Rome on the other hand was richly endowed with men of this class. Eminent jurists lectured in the forum or in private schools to students, and their opinions on cases submitted by clients were carefully preserved and published from time to time under the title of *Responsa Prudentum*,—the opinions of those learned in the law. These *Responsa* were one of the main sources from which the later Roman Law under the Emperors drew its inspiration, and under the influence of which it attained the logical consistency and symmetry of the final Justinian legislation. China has had no such assistance. The only body of men who are supposed to have a special knowledge of law are the legal secretaries *Shih-ye*, who are usually attached to the superior provincial courts. The Judge himself, burdened with multifarious executive duties, is not supposed to have any particular knowledge of law and does not profess to have



any. These secretaries are his private employees and their function is simply to guide him through the mazes and intricacies of the criminal law and enable him to evade the penalties which a wrong judgment would entail. If he should unhappily go wrong and impose a sentence of banishment in the 3rd degree when the Code prescribes the 1st, or decapitation when the Code says strangulation, the Court of Appeal, better advised, in correcting the judgment, will at the same time order that he lose so many steps of merit, or perhaps recommend that he be removed to an inferior post. That is the sole function of the law secretaries, and what they are paid for,—to keep their master straight. They take no note of legal principles and the last thing they would advise is to create a precedent or aught else but to follow the beaten track.

Many other analogies might be drawn between the old Roman Law and Chinese institutions, not merely from the law of successions but also the marriage law. A remarkable parallel has also been shown to exist between the Court Ceremonial of the Chinese Emperors and that in vogue at the Court of the Persian Monarchs as described in the Book of Esther. This similarity of Institutions in East and West would seem to suggest a time when the two races, now so far apart, were in inter-communion, or else that each derived them from a common origin. If that was so, the point of contact has long been lost in the mists of antiquity, neither present day History nor Philology give any countenance to the suggestion.

In the Chapters that follow I have given in the first place a translation of those sections of the Code which bear on the particular subject. Then follows a commentary in which I endeavour to set out more clearly than can be gathered from the text the general principles that underlie the written law, supplemented by some details drawn from customary law. The discussion does not pretend to be exhaustive, but I trust it will be found of some value as far as it goes.

The Edition of the Code from which the translations are taken was published in 1877 and purports to contain all the latest revisions up to that date. No later edition appears to have been issued. The Code was originally compiled by order of the Emperor Shun Chih, the first of the Manchu Dynasty who caused the Lü<sup>1</sup> of the preceding Dynasty, the Ming, to be translated into Manchu and with some additions, to be published as the laws of the new Empire. It would thus appear that of the two parts of which the Code is built up, the first the Lü was the already existing law of the land which was taken over bodily by the conquerors, and the second Li<sup>2</sup> or supplementary laws were the new rules which they thought fit to impose. The Lü which are divided into 436 headings or sections stand as the fundamental framework and are never revised or altered. Each section therefore consists of two parts, the first the Lü, generally in one clause, the second the Li, in two, three or more, sometimes as many as 30 or 40 clauses, representing successive legislation on the particular subject. When a new law was passed it did not appear as an additional section but had to find a place under one of the existing sections as an additional Li in that particular category. It will be seen therefore that the Li which form more than half of the bulk of the work are also the most important, inasmuch as they comprise all recent legislation. Nevertheless no translation of the Li as a whole, so far as I am aware, has ever been attempted. Sir G. Stanton's celebrated work published in 1810 comprises with a few exceptions only the Lü. So far as the Translations of the Li in the following pages go they may be said to break new ground.

Up to the close of the Dynasty the sole source of law was the will of the Emperor usually expressed in the form of a Rescript, appended to a Memorial from one or other of the principal Boards, requesting or suggesting a ruling either on some special case or on a matter of general

importance. If the matter was general the Decree was promulgated by circular letter to all the provincial Authorities, who in turn issued proclamations in their respective jurisdictions, enjoining obedience and with words of warning of the consequences of neglect. When the time for the revision of the Code came round, these Decrees were incorporated in their proper place among the Li and so became part of the penal statute law.

This method was adhered to up to the time of the Boxer outbreak in 1900. This date may be taken as the period when Foreign influences really began to tell on Chinese politics and legislation. The party of progress and reform had previously been active and their pressure induced the reform Decrees of the Emperor Kwangsu in 1898, which however were nipped in the bud by the *coup d'état*, which restored the Empress Dowager to power. But when things had quieted down after the Boxer rebellion, the Empress Dowager began to yield to the influence of the time and issued a series of Decrees which mark a new departure in Chinese legislation. The form is still the same, the Imperial will is still the source of law, but the matter is different; it is no longer penal but purely civil. The Decrees were mainly constitutional, foreshadowing the summoning of a Parliament and creating Provincial Assemblies as a training ground. They extended also to commercial matters, such as establishing Chambers of Commerce for the encouragement of trade; Registration of Companies; Mining and Railway Regulations; Currency laws, etc.

Time unfortunately was not granted to see the effect of this new legislation. The Revolution came and swept away the whole fabric of Imperial authority, and it is doubtful how far these regulations have now any validity.

Under the Republic the legislative power vests in the two Houses of Parliament and the President. So far not much has been done in the way of direct legislation, but the ground is being prepared in various ways. China has now what she never had before, a group of young law students who are familiar with European legal procedure



and who are engaged in selecting and adapting such parts of Western Codes as will fit in with Chinese institutions. Already as above stated a new Code of Criminal law has been promulgated and it is understood that a Civil Code is in course of preparation. Reforms have also been introduced in judicial procedure, in theory at least, but in a slow moving country like China it takes time to see them carried into practice. One reform long overdue has yet to be made, namely the separation of Executive from Judicial functions, and what is still more important, the independance of the judges. China cannot at once supply a bench of trained lawyers, but that is of less importance than that the judges, such as they are, should be entirely free from political influence, and that they should not be liable to dismissal because the Government or some powerful members of it have taken offence at some particular decision.

Perhaps the only Court in China which is entirely free from political pressure is the so-called Mixed Court at Shanghai. This tribunal has risen from small beginnings to an important position, more especially since the revolution, an event which enabled it to a great extent to shake itself free from the control of the local Executive Authorities. Originally instituted as a Court for the decision of suits between Foreigners and Chinese in which the latter were defendants, it has now been given or has assumed jurisdiction in all matters arising among the large native population residing within the Settlements. The important element in the Court is the presence of Foreign Assessors, originally introduced to watch the interest of their co-national, the plaintiff, but who now take part in the hearing and decision of all Civil Cases. Under the guidance of the Assessors, and more particularly of several learned British Assessors, the Court has in recent years attained a standing and dignity which should be an excellent example to all Chinese Courts.

The Court suffers from one defect and that is that there is no Superior Court of Appeal. Originally the Taotai as the highest authority at Shanghai with the

Consul of the nationality concerned as Assessor formed a Court of Appeal, and there was in theory an appeal over to the old Tsung-li Yamen and the Minister at Peking. But this Appeal Court never was of any value and no one wishes to see it restored. The real difficulty is that there is hardly to be found as yet among Chinese, men with sufficient judicial qualifications and experience to form a competent Court of Appeal. As a temporary expedient one might suggest that a Judge of the British Supreme Court at Shanghai be added to the existing bench of the Mixed Court to form a Court of rehearing when a case could be re-argued and an opportunity be given to amend or confirm the original decision.

The judgments of the Mixed Court are now forming a system of Chinese Commercial Law which never existed before, except in unwritten tradition and customs. It is the only tribunal whose decisions are recorded and available for future reference. With this object in view I have endeavoured to extract from the pages of the *North China Herald* a sort of abstract or digest of cases heard and determined in the Court during the past 30 years or so. These will be found so far as I have been able to give them definite shape in an Appendix. Unfortunately only a small number of the cases coming before the Court have been reported at all, and of those that are reported the notice in many instances is so brief and meagre that no satisfactory conclusion can be arrived at. This is especially so in purely Chinese suits where no foreign interest was involved, and where the Assessors originally took no part. This is to be regretted as such cases would have been the most interesting from the point of view of Chinese law. Latterly the Assessors have taken part in all cases, and since legal practitioners have been admitted to plead in purely Chinese cases, the reports have been fuller and the points at issue more clearly defined.

It is much to be desired that the Court itself or the Bar should arrange to have an officially revised report published in all important cases as a record for future reference.

## CHAPTER II.

### LAW OF SUCCESSION AND INHERITANCE

CODE. SECTION 78. TRANSLATION

#### *Appointing a Successor to the Family.*

Lŭ.

Whoever appoints his son Successor to the Family contrary to law shall be liable to be punished with 80 blows. If the principal wife is over 50 years of age, and has no son, it shall be lawful to appoint the eldest son by a concubine, but the eldest must be appointed under a like penalty, and in either case a wrong appointment shall be corrected.

When one has adopted and brought up a child of the same kindred (宗) as his son, he himself having no son, and the natural parents of the child having another son, such child may not desert his adoptive parents. If he does, he shall be liable to be punished with 100 blows and shall be sent back under their control. But if the adopting parents have a son born to them, and the natural parents have no other son and are desirous of taking their child back again, they may do so.

Anyone adopting and bringing up a child of a different surname, thereby confounding Families and kindred, and any one giving his son to be Successor to a Family of a different surname, shall be liable to be punished with 60 blows, and the child shall revert to his proper kindred.

A foundling child under three years of age, although of a different surname, may be taken in and brought up and may receive the name of the adopting parents, but shall not be entitled to the succession on failure of natural-born children.

If in appointing a Successor, although from the same kindred, the order of seniors and juniors in the generations of the family is broken through, the person so appointing shall be liable to a similar penalty, and the legal successor shall be appointed.

Anyone rearing up a free child as a slave, shall be punished with 100 blows, and the child shall be restored to freedom.

LI.

1.—When any person is without male children of his own, one of the same kindred of the next generation may be appointed to continue



the succession, beginning with his nephews as being descended from the nearest common ancestor, and then taking collaterals, one, two and three degrees further removed in order, according to the table of the five degrees of mourning. If all these fail, one of the kindred still further removed may be chosen, and finally any one of the same family name. If, after a successor has thus been appointed, a son should be born, the family patrimony shall be equally divided between them.

2.—A widow left without a son and not remarrying shall be entitled to her husband's share of the family property, and it shall rest with the elders of the Family to select the proper relative, and appoint him to the succession; but in the event of her remarrying, all the property and her marriage outfit shall remain in the family of her deceased husband.

3.—If a successor after being thus appointed cannot harmonize with his adoptive parents, the latter are at liberty to complain to the authorities, and to appoint in his stead some worthy individual for whom they have an affection, but who must, however, be from the proper class as regards the generations of the family. The kindred cannot insist upon their choosing the next in order, and the officials are not to listen to any complaint against them on that account. If natural affection exists between an *i-tze* (義子), *i.e.* son by informal adoption, *lit.* courtesy child or son-in-law, and the adopting parents, they may mutually assist and support each other, and the legal successor or his parents must not scheme to expel them from the family. Such adopted son or son-in-law shall also be entitled to some share in the division of the property, and may, if the family is poor and without natural-born sons, sell the patrimony for their common support.

4.—An adopted son (義子) of a different surname is at liberty, if he chooses, to return to his proper family, but in that case he may not take with him any share of property he may have got from the adoptive family. An adopted foundling under 3 years of age, who may by law assume the name of his adoptor, shall also be entitled to a certain share, but he cannot in any case be successor to the family. In either case, no means may be used to compel adopted children to return to their original families, and if they pretend to do so fraudulently in hope of gain, they shall be punished according to law.

5.—In appointing a successor to a childless family, if there have been ground of aversion and dislike between the legal successor and the adopting parents, the latter are at liberty to select, according to their liking, any worthy individual of the proper class and any attempt by force or threats to secure the property, on the part of members of the kindred, resulting in law suits, shall be punished by the authorities, and the original choice shall be confirmed.

Under the following circumstances a son dying in the lifetime of his father without male child shall be entitled to have a successor appointed; if married, and if the widow refuses a second marriage; if merely betrothed though not married and the girl remain unmarried as a daughter to her betrothed's parents; if the son has been separately established although the widow does not remain single; and last, if the son though unmarried has died in military service—in all these cases a successor to the son may be appointed. If among the kindred there is no one of the proper class to appoint, and the father has no other son, a successor to the father may be appointed, and when a grandson is born he shall continue the line of such deceased son. Generally speaking, a son dying young and unmarried can have no successor appointed, but if such son is an only son, and there is no one of the proper class to be appointed successor to the father, a successor may be appointed to the son. If the person, who may thus be appointed, is himself an only son and only one degree removed from the direct line, he may, if both parties desire it, and all the kindred consent in writing, be appointed to succeed to both families.

6.—As quarrels about the succession often result in loss of life, any one who, grasping after the property, plots to succeed, and all his aidors and abettors shall be debarred from the succession, and it shall rest with the elders of the family to nominate the successor.

7.—In the case of Bannermen, while the attempt to put forward an adopted son of a different family name as the legal heir to hereditary official rank is punishable, as by statute provided, with banishment for life to a distant frontier, the adoption, in cases where there is no hereditary rank, of the son or younger brother of an ordinary citizen, or of the son or grandson of a domestic slave as successor to the family, is punishable with one hundred blows and banishment for three years, because such adoption would introduce confusion into the Banner Registers. The above punishment may be inflicted as well upon the person giving in adoption as on the adoptor himself.

If by such fraudulent means an illegal issue of pay and rations has been procured, no matter whether the adopted child is the son of another Bannerman of a different name, or the son of an ordinary citizen or of a domestic slave, the case shall be treated as larceny of an amount equal to the total value obtained. The offender shall also be required to refund the amounts so overdrawn, and on his failure the particular *Ts'an ling* and *Tse ling* in charge at the time of issue shall be held responsible for the deficiency. The officers through whose carelessness the irregularity occurred shall be reported to the Board for a penalty.

## SECTION 87.

*Division of Family.*

Lü.

During the lifetime of grandparents or parents, the sons or grandsons are not allowed to set up separate establishments and register them as such, nor to divide the family property, under a penalty of one hundred blows, but the parents or grandparents must be the complainants. Also during the legal period of mourning for father or mother no division may take place, under a penalty of eighty blows; but in this case the nearest senior relations must be the complainants; and if the division has taken place in accordance with the last will of the father or mother, no action will lie.

Li.

1.—The full penalty of the above law is incurred if the sons separate and divide the property, though they do not register themselves. If, however, the parents permit the division, there is no objection to its being done.

## SECTION 88.

*Division of Family Property.*

Lü.

If any of the junior members of a family living under the same roof appropriate without leave of the seniors any part of the family property, he shall be liable to punishment at the rate of twenty blows for every ten taels value so appropriated, and one degree more for every additional ten, not exceeding one hundred blows in all. If the elders living under the same roof, in dividing family property, divide it unfairly, they shall be liable to a similar punishment.

Li.

1.—As regards children in general, hereditary official rank descends only to the eldest son and his descendants born in lawful wedlock, but all family property moveable or immoveable must be divided equally between all male children whether born of the principal wife or of a concubine or domestic slave. Also male children born of illicit intercourse shall be entitled to a half-share, or to an equal share in event of a successor having been adopted through default of other children. If no legal successor is in existence, then such illegitimate son shall be entitled to succeed and receive the whole patrimony.<sup>1</sup>

<sup>1</sup> By illegitimate children is meant children by a woman not forming part of his father's household and living outside (*wai chia*). But to give them any rights the paternity must have been recognised by the father and he must have made himself responsible for their up-bringing.



2.—In the event of a family becoming extinct for want of legal successors, the daughters shall be entitled to the property, and if there are no daughters the property shall be forfeited to Government.

COMMENTARY.

The above is all that the Code contains, by way of direct legislation at least, on this subject, and as the reader will perceive much is left to be supplied from other sources. Section 78 treats exclusively of the succession to the family, while the other two Sections discuss the division of the patrimony among direct descendants. As a general rule, the person entitled to succeed to the family on failure of direct heirs is also entitled to the whole of the property, but to this there are several exceptions, and it will be convenient to consider the two cases separately.

I.—With regard to succession to the family, the first point to be noted is that females, and all persons claiming through females, are entirely excluded. The Kindred (宗) *Tsung*, from among whom the choice must be made, are all those descended from a common ancestor, who bear the same family name; that is, who can trace their descent continuously through males. If starting from any given ancestor we go through all the several branches of the posterity, stopping whenever we come to the name of a female, and striking out all below, the remainder will be the *Tsung*. The origin of the distinction is apparent when we consider that a woman in marrying leaves her father's family once for all, and becomes part and parcel of her husband's family; her children of course take their father's name and belong to the *Tsung* of which he forms part, and to this alone they are capable of succeeding. The *Tsung* correspond precisely to the group known as the *Agnates* of the Civil Law, except that they do not include adopted strangers by blood—a practice which the Chinese Law does not sanction.

Excluding then all females, and their descendants, we have next to consider who among the kindred are entitled to succeed, and the order in which they are to be taken.

The first class is of course the sons and other direct descendants. Here there is no difficulty; the eldest son and his line born in lawful matrimony succeed as a matter of course by virtue of their birthright, and it does not seem that the father has any power of selecting other than the eldest. Failing sons by the principal wife, sons by concubines are entitled in order of their birth. This right of succession however gives no additional claim to the patrimony, which, as we shall presently see, is equally divided among all the sons, but only to the custody of the Ancestral Tablets and other insignia of the family existence. It also confers a general power of control over the younger brothers, especially in all family matters akin to that exercised by the Father.

The second class comprises all brother's son's,—nephews, that is, of the person in want of a successor. The general rule to be observed in making a choice is that you must select from the generation immediately below you, beginning with those that are nearest and proceeding in order in the collateral line to those more remote. The individual to be adopted must hold in the family genealogy the same position, relative to any common ancestor, after as before adoption. Thus, supposing the place to be filled is that of grandson of a certain ancestor, only grandsons can be chosen; if there are no grandsons, we must begin a step further back and look among great grandsons of the prior ancestor. The idea may be grasped more easily if we revert for a moment to the composition of a primitive family group. When no division of property was made, when the family held together as a community during many generations, it would be natural and easy to classify all members according to relative degrees of descent. Thus, all sons of the founder would be one class, all grandsons another class, all great grandsons a third, and so on—a broad and distinct line would be drawn between one generation and another. We can then see how it would naturally arise that when one of the grandsons, for instance, had no child, one of the next generation, that is one of the great grandchildren, should be selected, and

it would seem contrary to the order of nature that a member of a generation either above or below that grade should be selected.

Whatever the origin may have been, the rule is well established that there must be no break nor overlapping in the continuity of the generations of a family's existence, and therefore, in default of male issue, brother's sons succeed in preference either to brothers themselves or to brother's grandsons. As between themselves the members of this class succeed in a certain order which is epigrammatically expressed in the following popular maxim:—

長房無子次房長子

次房無子長房次子

—Which we may translate, "[Among brothers] if the eldest has no son, the eldest son of the second brother [succeeds], if a younger has no son, the second son of the elder [succeeds]." The eldest son of the eldest brother must of course continue his own family line, as being the senior branch, and as he cannot, except under special circumstances, unite the two lines in his own person, he is not eligible. But the second, third, etc., son, who would otherwise found a new branch line of his own, is moved up to continue the already existing line of his uncle. If the line of the eldest brother fails, he is entitled to call upon any of the younger brothers' sons to quit their original branch, and become a member of his.<sup>1</sup> The individual thus transferred or adopted ceases to belong to his original branch just as much as if he were dead, and takes the place of a natural-born son to his adopted father.

The above maxim, however, is not an absolute rule, nor does it appear to express a custom of such force as to prevail against the will of the adoptor. If it were otherwise, the whole system of succession would be one perpetual entail, which could not be broken through,—a state of things that would hardly be tolerable. How far how-

<sup>1</sup> It would seem, however, that when a younger brother has only one son, that son is not eligible. See case of *Li Lung-chien*, Appendix I, page 132.



ever the wish of the adoptor has preference over the claims of nearness of kin is a difficult question, on which I cannot find any precise rule. Generally it would seem that he cannot pass over a whole class to choose from a more remote, but as between the members of the same class, who are equal in point of nearness, it rests with the adoptor to say whom he will choose.

The Code, however, in two cases expressly gives leave to pass over the next in order, and to choose a "worthier" apparently from any class of the kindred, provided it is of the proper generation. The two exceptions mentioned are, first, when there has been bad blood between the parties before adoption, and second, when after adoption the adopted son fails to conform to the wishes of his new relations. In the latter case on petition to the Authorities, the offending party can be formally expelled, and he and his descendants are for ever debarred from the succession.<sup>1</sup> In both cases the law makes a concession to natural affection, which indeed it is prone to do so far as compatible with the main object, viz., the continuance of the line. It seems therefore that the choice is more unfettered than at first sight would seem to be the case. If the father has failed to adopt in his lifetime, the duty falls on the senior Agnates (族長) to select a proper successor, but the Widow would seem to have a considerable voice in the selection. As she is to stand as Mother to the adopted son it may be said that any choice must have her approval at least. In the latter case, that is when the senior agnates and the widow select, the claims of the next of kin are given more weight than they would have as against the wishes of the father. Their claims are not absolute, but good cause must be shown against the strictly legal heir if he is to be passed over.

It may be remarked that such an important event as transferring a member from one branch to another is never made except with the cognizance of the whole family. No mere private nomination would be effectual. The thing must be done in public and accompanied with

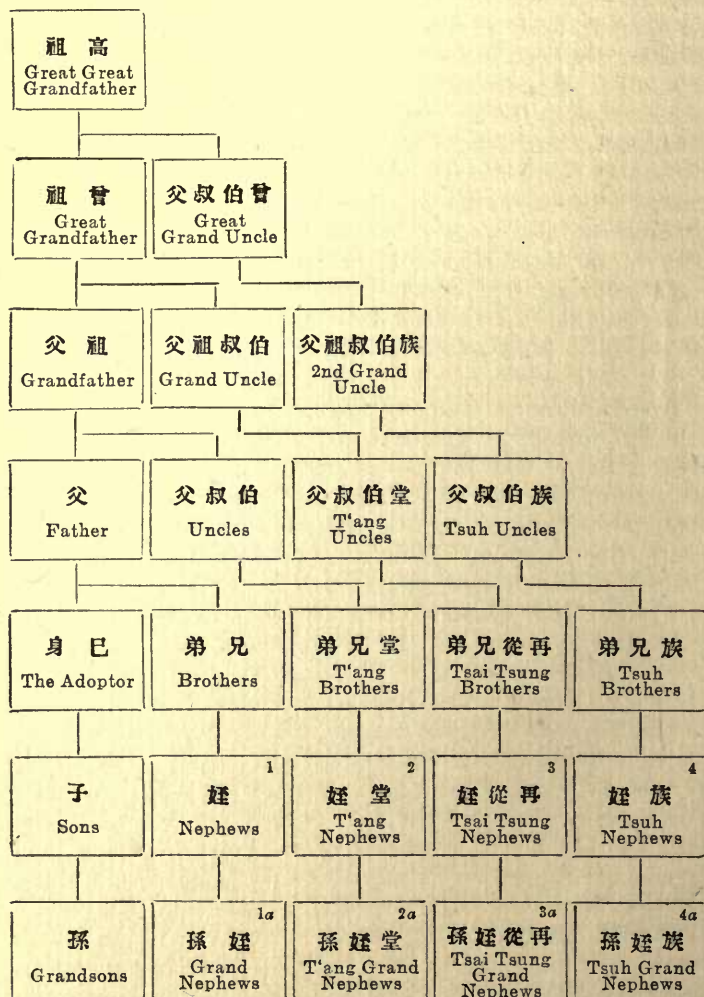
<sup>1</sup> Vide case of *Li Lung-chien*, Appendix I, page 132.

all the ceremonies customary in important family events. In particular the newly adopted member must make obeisance before the ancestral tablets of the adopting family in token of his admission, a ceremony without which no change in the family life would be effectual.

A son once formally adopted passes out of the control of his original family and loses his right of inheritance or his share in that family property. Conversely he acquires the rights of a natural born son in his adopted family and cannot afterwards be expelled except by a judicial proceeding and for good cause shown. If, however, after adoption a son should be born in the adopting family, he loses his right of precedence, and becomes one of the junior members. In that case and failing direct heirs in his original family he may be transferred back and so acquire his original rights. But he cannot in any case inherit in more than one of the families.

Following the rule above stated, the class next in order, after all the nephews have been exhausted, is that comprising the sons of fathers' first cousins, not counting those that trace through females, who, as we said, are in every case excluded. These as between themselves are entitled to the same degree of preference as the members of the previous class. Thereafter follow two classes of collaterals in order still farther removed, whom we can only designate as sons of second and third cousins respectively. The Chinese have a convenient form of nomenclature for each of these classes, which expresses at once the generation in the family and the degree of nearness to the speaker. Thus the first are *chih* (姪) nephews simply or nephews of the first degree, the second *T'ang chih* (堂姪) *T'ang* nephews or nephews of the second degree, the third *Tsai Ts'ung chih* (再從姪) *Tsai Ts'ung* nephews or nephews of the third degree, and the fourth *Tsuh chih* (族姪) *Tsuh* nephews or nephews of the fourth degree. In the same way the individuals of the generation above are all called brothers and those of the generation below are all grand-nephews. A glance at the following table will make this classification more intelligible.

TABLE OF THE TSUNG 宗 SHOWING THE ORDER IN WHICH  
THE CLASSES OF KINDRED SUCCEED.



After direct descendants, the classes entitled to the succession are those marked 1, 1a; 2, 2a; and so on.



Should all these classes fail, the Code gives leave to appoint any of the kindred further removed still, and finally any one of the same family name.<sup>1</sup> More than this, however, is not given. We nowhere find the right of free adoption independently of the claims of kin. And not only that, but even the claims of blood-relationship through the mother are disregarded. The successor to the family must be able to show that he has sprung from the same ancestor, however remotely, or else it must be supposable from his bearing the same family name that he was so sprung, and that too entirely through agnate relationship. If no person satisfying these conditions can be provided, the family line must perforce come to an end.

It will be observed that the rule we have stated provides only for members of the next generation, and takes no note of those further below in direct descent. For instance, failing direct issue, brothers' sons succeed. Suppose however the brothers' sons are all dead, but there are brothers' grandsons who might be chosen; are they to be passed over in favour of remote collaterals of the previous generation?

At first sight it would appear to be so, but several of the reported cases establish the rule which permits a posthumous adoption to be made so as to bring in a brother's grandson as successor. A case in point is quoted in the notes to the Code where a man having no sons of his own, and there being none of the next generation alive entitled to succeed, had adopted in accordance with the rule one of the same family name but no relation. It appeared, however, that there were grand nephews alive, and the Court of Appeal decreed that the deceased nephew, father of the grand nephews, who had he been alive would have been entitled to succeed, should be posthumously adopted, thus making his son, a grand nephew, the true successor. A similar case will be found in Appendix I, page 132.<sup>2</sup> From the reported cases one gathers that the Courts are inclined to allow more weight

<sup>1</sup> Case of *Li Sze*, Appendix I, page 131.

<sup>2</sup> Case of *Li Lung-chien*.

to the claims of relationship than the strict law admits, and even to allow interference by relations on the mother's side which the statute law ignores.

A son dying young and unmarried as a rule drops out of the genealogy altogether. He has no tablet in the ancestral hall and consequently no successor can be appointed. An exception, however, is made for untimely death on the field of battle. In such case a successor can be appointed and the son deceased takes his place among the ancestors. Another exception to the general rule is the case of two brothers dying leaving only one son between them. In such case with the consent of the Elders in writing the son may be appointed to succeed to both families. But the two lines must not be fused; the two households remain distinct, and he must have a separate wife in each or more properly a wife in one, the first married, and a concubine in the other.<sup>1</sup> The grandsons born in each succeed to the line and patrimony of that particular house and no other.

So much as regards the maintenance of the family line, to which I may add that though not specially emphasised in the code the underlying motive for these rules is the perpetuation of the ancestral worship. Every family has its own particular sacra, consisting of the ancestral tablets, usually arranged with that of the founder of the house in the centre, and those of the four immediately preceding generations set right and left on either side. The duty and capability of rightly conducting the services are co-extensive with the right to the succession and generally to the inheritance of the family property.

II.—Next as to the mode in which the family property is divided. This consists not only of all ancestral inherited property and the accumulations made by the head of the family, but also of all property acquired by the sons. Prior to division, the family is an undivided whole, holding all things in common. The father is nominal owner, but each of the sons has an expectant interest in his share,

<sup>1</sup> See Wade's Documentary Series, *Han Wen Ch'i*, paper No. 71. Edict of Chia Ch'ing.

of which he cannot be deprived. The earnings of every member are brought into a common fund, and no one has a right to compel a partition or to withdraw from the society until it is dissolved by mutual consent or by the natural demise of the head. The division of the property is therefore an important event. It corresponds to the *Emancipatio* of the Roman law. The sons become *sui juris*, and thereupon a new set of rights comes into existence. Prior to division a deceased son's estate reverts to the common fund, after division it devolves on his sons or adopted successor according to the general law. No distinction is made between land and any other kind of property. To come within the scope of this general rule, however, it must be understood that the sons have, as a matter of fact, held together up to the time of a division. A partial dissolution often occurs when one son leaves the family for an official position or for purposes of trade in a different part of the country. He is held to be "separately established," and his earnings would not fall into the common fund for distribution. Whether he would share or not would depend upon the arrangement at the time of his separation.<sup>1</sup>

The persons entitled to the family property, as thus defined, are—

(1.)—All sons and their male descendants, whether born of the principal wife or of a concubine. These divide the whole of the estate equally between themselves, grandsons getting a father's share. Daughters are not entitled to any share. If they are already married they have left the family for good, and of course have no further claim; but a certain sum, as agreed upon in each particular case, is set apart before division for the marriage expenses of those still unmarried. As regards other things these latter form part of the household of the eldest son, who on that account not unfrequently gets a somewhat larger share.

No special provision is made for the widow as such, but she is amply cared for. If she is also the mother of

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<sup>1</sup> Vide case of *Yeh Ching-chong* for family arrangements of this nature. Appendix II, page 147.



the family she can refuse to consent to a division of the estate, in which case she has the practical control of the whole inheritance, and if she is widow of a son dying before division, she is entitled to the custody and management of her husband's share in trust for her sons or the adopted successor. In this particular, custom is all-powerful. On the death of a father the legal estate so to speak rests in the sons, but equity in the shape of custom forbids their dealing with it without the sanction of the mother. So long as the family estate was undivided, the sons would be tenants in common and would all be bound to join in a transfer of any portion, but even then, to give validity to the transaction, the mother must also be a party. By the terms of Section 88 none of the junior members of a family may appropriate any portion of the general estate to his own use without the consent of the seniors. The term which I have translated seniors 尊長 is explained to mean "the Father or Grandfather class" and "the elder brother class." It is doubtful if this includes the "mother class." If it does she might be said to have a joint legal estate with her sons, but at any rate public opinion is so strong on this point that a son who would attempt to sell the patrimony against the will of his mother would be so scouted by Chinese Society that most probably no purchaser would venture to take a transfer at his hands.

This prominent position of the mother is one of the peculiarities of Chinese law not to be met with in other archaic systems, and is no doubt another fruit of the custom of ancestral worship. In the Roman law the mother, after her husband's decease, fell under the guardianship of her eldest son, but here it is not fitting that one, who after her death is to be worshipped as a divinity, should while alive be subject to those that will thus do her homage.

The father has no power to depart materially from the above scheme of distribution. Special circumstances may entitle him to allow one son a somewhat larger or smaller share, but generally speaking neither by will nor by gift

*inter vivos* can he deprive any son of an equal or at least a substantial share. There is no such thing as disinheriting one son in favour of the others, much less any power to grant over to a stranger. It is said that in extreme cases, when a son is utterly incorrigible, the father may denounce him to the authorities, and solemnly expel him from the family in presence of the assembled kindred in the Ancestral Hall, but short of this extreme measure there is no means of cutting him off without his fair share.

(2.)—The successor adopted by the Father or appointed by the Elders in default of direct issue is, as a rule, entitled to the whole of the property. As he undertakes the duties of an only son he acquires the corresponding advantages. There is, however, one important exception, namely, that pointed out in *Li* 3 of Section 78. Besides the adoption which we have hitherto spoken of, and which is true adoption in the proper sense of the word, there is an informal adoption very commonly practised, which carries with it none of the legal incidents of true adoption—that is to say, it does not place the subject of it on the footing of a natural-born son, nor give him any of the rights arising out of that position.

The name given by the Chinese to a child adopted in this manner is *i-tze* (義子) meaning child by courtesy, and the right is usually exercised in favour of relations by consanguinity on the female side, *i.e.* through a mother, sister, or daughter. Such relations are not within the agnatic group and are incapable of being legally adopted as family successor. The tie is not binding and may be dissolved by will, but if it continues up to the death of the adoptor the child, if a male, will become entitled to some share on division of the family property. How much is not stated, the amount is presumably left to the adoptor or the Elders of the family to be settled proportionately to the regard entertained towards the recipient. On principle, however, it would probably be less than half, except in cases where there is no heir of the agnatic kindred. In these there is no one to contest the right and as the *i-tze* is

in possession he would naturally succeed to the whole, including the family sacra.

The only other exception is in favour of a particular kind of son-in-law. When a person has no male children, but has daughters, it is not uncommon (招婿 *Chao-hsü*) to invite a son-in-law or one about to become a son-in-law to leave his Father's family, and become a member of his Father-in-law's. This is a *quasi* adoption, which does not entitle him to change his name, nor to become the Family successor, but which entitles him to share equally with the latter in the family patrimony.

This, however, is about the only concession which the law makes to the wishes of a person in regard to the devolution of his property after his death. Though he may sell or mortgage his estate during his lifetime, yet the moment his life interest ceases that of the proper kindred comes in. He cannot indulge his affection or generosity to the benefit of strangers at their expense. The property in every case, whether acquired or inherited, is family property, and it must remain as such. It can only go to persons who are either members of the family by birth or adoption or who are at least *quasi* members of the family by the informal adoption spoken of. A man cannot in fact in any case divert his property away from the strict line of devolution of which he himself forms one link—the only way in which he can indulge his wishes is in a choice of whom he will introduce. The property never *goes* to the heir; the heir must *come* to the property. The line may divide and branch off below him, and in that case the property will divide too, but if the line continues single the property descends entire. So strict is this rule that the exception above noted is really only half an exception. The stranger by informal adoption, though he cannot succeed nor change his name, yet must cast in his lot so to speak with the new family if he will take a share in the family property. He cannot wait until his share accrues, and then take it away with him to his original family. If he *will* go back, he must leave all he got behind him. It need not, however, apparently debar him



from accepting a share in the division of his natural Father's estate, provided he will wait till that event takes place. What is meant is that the share from his adoptive Father must not fall into the general estate of his natural Father for redistribution.

It is a logical consequence from the above situation, though not mentioned in the Code, that the successor to the Family takes all the liabilities as well as all the rights of his predecessor. *Fu chai tze hwan* 父債子還 "A son pays his father's debts," is a maxim of universal application in China. It means that the Family successor, whether natural-born or adopted, stands precisely in the shoes of the deceased. The succession is a succession to an undivided whole—to the "*Universitas juris*" of the Roman Law, in fact—to a bundle of rights and duties, or as it has been aptly put, to the legal clothing of the person succeeded. The successor must take the one along with the other or leave both. This opens out a different side of the question, viz., the obligation on the legal heir to take up and continue the succession. No rule appears to be laid down but it may be said generally that while natural-born sons are jointly and severally liable under all circumstances, it does not appear that any of the kindred, not already adopted, can be compelled against his will or at least against the will of his parents to undertake an insolvent succession.

There appears to be practically no limit to the extent to which a man may dispose of or squander his property during his lifetime.<sup>1</sup> In this there is a logical inconsistency. In the Roman Law, where, as here, the head of a family was considered as forming in some sort, with those under him, an undivided unity owning the property in common, the next of kin could, by imposing a *curator*, restrain a prodigal or spendthrift from wasting his patrimony. I am inclined to think that here too there must originally have been something of the kind, although it has now fallen into desuetude. Among other reasons

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<sup>1</sup> Alabaster Case 5, page 535.

may be mentioned this, that in deeds for the sale of land the seller often recites that he does so because he is "in want of means." In many cases that have come under my observation this statement was a mere fiction, and in any case it would not now affect the right to alienate. If at some former period a man could only sell when actually obliged to by want, the introduction of the words becomes most pertinent, and it is easy to understand, from analogies in our own Law, that the form may have been maintained long after the reason vanished. That this was so is further borne out by the language of the latter part of *Li* 3, Section 78, where it is said that an adopted son (義子), that is a son by informal adoption, may, if the family is poor, sell the patrimony for the common support of himself and his adopted parents. The consent of the parents would of course be required in any case, but apparently that consent would not be enough except upon the plea of necessity. There is not, however, now any such restriction.

(3.)—If the male line becomes extinct and no successor has been, nor can be appointed, the daughters, or persons claiming in their right, are next entitled to divide the property. In default of daughters the nearest females of the kindred are entitled, though in what precise order is not stated, presumably the analogy of male succession would be followed, but the forfeiture to the State (which is the next and final step in the process) is perhaps never insisted upon as against relations of any kind whether by consanguinity or affinity, provided at least that they will undertake out of the income of the estate to defray the expenses of the "worshipping, and sweeping" at the tombs of the extinct family.

It is unnecessary to say expressly, after the above general statement of the principles of succession, that the power of devising or bequeathing by *Will* does not exist.<sup>1</sup> The term indeed is not unknown, but when used it relates exclusively to minor details regarding the mode of

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<sup>1</sup> *Alabaster Case* 3, page 580 and *Mixed Court cases* page 142.

division, which the Father would have had power to arrange during his lifetime, or to moral exhortations and admonitions for the guidance of his children and posterity. No particular rule exists as to the form in which those last Instructions should be couched. They may either be written or delivered verbally to the family present, but no attempt to vary the normal mode of devolution would be effectual except in so far as filial respect might induce the sons to carry out their father's wishes.

To those acquainted with the history of Ancient Law this absence of the power of Testation will not appear wonderful. The Will in the modern sense of the term—that is, a secret document absolutely controlling the devolution of a deceased's estate, irrespective of the claims of even the nearest of kin—is a thing of comparatively recent growth. It is nowhere to be found among the spontaneous customs that arise among primitive mankind, but is on the contrary the outgrowth of the Civil Law as interpreted and elaborated by successive generations of professional lawyers. The claims of Family are at first always paramount, and it is only as a race or nation develops that the free power of bequeathing gradually comes into play. If we had found testamentary succession to exist in China, it would have shown an elasticity and power of self-development far beyond anything which we have reason from other evidences to suppose the country possesses.



## CHAPTER III.

### MARRIAGE LAWS.

CODE. SECTION 101. TRANSLATION.

#### *Marriage in General.*

LÜ.

Every contract of marriage must be made with the free consent of the two families interested, and if either the intended husband or wife is deformed or affected with an incurable disease, or is aged, or a minor, or the offspring of a concubine, or a formally adopted child of the same kindred or one informally adopted of a different name, such facts must be fully communicated to the other side. If both parties are still agreeable then a formal contract is to be drawn up through the go-betweens and the betrothal is completed by the marriage presents.

If, after the contract has been entered into, either with the assistance of go-betweens or not, the family of the wife should refuse to proceed with the ceremony without good reason, that is, unless they can allege that they were not informed of the fact of the future husband being deformed, etc., the principal contracting the marriage on behalf of such family shall be liable to 50 blows and the marriage must be completed as agreed. Though no formal contract may have been drawn up, the acceptance of the marriage presents shall be sufficient evidence of the contract.

If after betrothal the girl is engaged by her family to some third party, the principal of her family shall be liable to 70 blows, and if not only engaged but actually married, the principal shall be liable to 80 blows, and such marriage may be annulled at the option of the first intended, who may, if he chooses, claim his bride.<sup>1</sup> If he does not so choose, he may recover his marriage present and the marriage shall stand good. If the family of such third party were aware of the former betrothal the principal contracting shall be punishable equally with that of the bride's family, and the marriage presents shall be forfeited, if not, they shall be entitled to receive back the presents.

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<sup>1</sup> This may be done even after a child is born. See case of *Wang Wan-chun*, Appendix I, page 133.

In the same way the family of the husband cannot after betrothal withdraw from the contract, but the marriage must be completed as agreed, and if any subsequent contract of marriage were made between him and another family, it shall not be binding upon such other family, but the marriage presents cannot be reclaimed.<sup>1</sup>

If after betrothal either party is guilty of theft or criminal intercourse, the contract shall not be binding on the other party.

If the family of the bride should wilfully mislead the husband's family, as for example, if while intending to give away a daughter who had some deformity or ailment they should introduce a sister as the future wife, the representative of the family contracting the marriage shall be liable to 80 blows, and the marriage presents shall be recoverable. If the deception is practised by the family of the bridegroom, the contractor of the marriage shall be punishable one degree more severely, and the presents cannot be recovered. If the marriage is not completed when the deception is discovered, the innocent party may claim the individual whom they were first given to understand was betrothed, unless such individual should be already married or engaged;—if the marriage is completed, before the deception is discovered it may be annulled.

If after betrothal and payment of the engagement money the husband carries off the bride by force before the time agreed upon, or if after the time agreed upon the bride's family decline to carry out the ceremony, the representative of the family offending shall be liable to 50 blows.

If when one of the sons of a family is away from home, either on official duty or for purposes of trade the seniors of the house as his grandparents or parents, or paternal uncle or aunt or elder brother, have contracted a marriage for him in his absence, he shall be bound to carry out such contract, notwithstanding that he may himself have entered into another contract. But if he has actually got married when abroad, such marriage shall stand good, and the contract entered into by his parents, etc., shall be avoided.<sup>2</sup>

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<sup>1</sup>納聘財 generally called euphoniously 財禮 marriage presents. This is an essential part of every engagement, and the amount is not left to the goodwill of the parties as the term "present" would suggest but is exactly stipulated for by the negotiators of the marriage. Though the Chinese will not hear of its being called "price," it is exactly tantamount to the purchase money in a contract of sale, and is no doubt a survival of the time when the transaction was one of ordinary bargain. Actual money always constitutes a substantial part of the "presents" and of course is paid by the bridegroom's family to the bride's.

<sup>2</sup>In case separate contracts are made by Parents and grandparents, each being ignorant of the other's proceedings, the rule is that the one having priority in point of time shall prevail.

## LI.

1.—In all cases the Grandparents or the Parents shall be deemed to be the principals in a contract of marriage; if these are dead the nearest relation shall be deemed the principal. A widow re-married shall be principal in the marriage of daughters by her first husband if she has kept them with her. If after betrothal either of the parties dies, the marriage presents shall not be recoverable.

2.—The practice of betrothing unborn children, by cutting off the lapel of a coat, is declared illegal.

3.—When the intention of the parties is that the future husband shall go and live at the house of the bride's family as son-in-law, a contract shall be drawn up by the go-betweens, and shall expressly stipulate that this is done in order that the young couple may take care of the old people, or else state that it is for a definite period.<sup>1</sup> It cannot be done when the future husband is an only son; and, moreover, in cases where it is done the proper heir from the kindred shall be appointed as successor to the family and to be responsible for the ancestral sacrifices. The family property shall be equally divided between the heir and such son-in-law. In cases where the parents die without having appointed an heir the seniors of the kindred shall appoint one according to law.

4.—If the bride's family repent of the contract and betroth the girl to another, the proper course is to complain to the authorities, who will order her to be given to the one she was first engaged to. If the family of the latter carry her off by force instead, they shall be punishable two degrees less than in ordinary cases, and if after complaint and award the bride's family connive at her being carried

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<sup>1</sup> This form of marriage known as 招婿 is one of the few cases where the claims of natural affection are regarded. It is admitted to be irregular, but is defended on the ground that it is for the purpose of 養老 taking care of the old people. Ordinarily a Chinese bride is expected to transfer her affections and devotion to the parents of her husband. She mourns for them when dead the full period of 3 years, while for her own parents she only mourns one year. But in this case she is held not to have left her family, and her duties to her parents remain unchanged after her marriage. Her husband, however, cannot become heir to the family, who must be sought for among the proper kindred according to the general rule. It is interesting to note that the object in appointing the heir from the kindred is here expressly stated to be in order that he may undertake the sacrifices—meaning the spring and autumn sacrifices at the Tombs and in the Ancestral Hall. The stranger by blood is legally disqualified from performing these acts, whatever his affection for the deceased may have been. (See the *Tso Ch'uan*, Legge's *Classics*, Vol. V, p. 157, and the *Analects*, Book II, p. 24).

The objection to an only son putting himself in this position is of course that the situation is incompatible with his duties to his own family. He must attend to his own Parents while alive, and it is absolutely incumbent on him to take up the succession after their death.



away by stealth by the second engaged, they shall be punishable, as for ordinary theft, with 100 blows and 3 years banishment.

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SECTION 102.

*Hiring out Wife or Daughter.*

LÜ.

If any person hires out for money, his wife, concubine or daughter to be wife or concubine to another man, he shall be liable to a penalty of 80 blows. If he falsely gives out that his wife or concubine is his sister, and marries her to another man, he shall be liable to 100 blows, and the wife or concubine to 80. If the person who receives in marriage such wife or concubine is aware of the fact, he shall be liable to the same penalty, and the parties shall be separated, an unmarried daughter going back to her relations, and the wife or concubine to her father's kindred. If he was not aware he shall not be liable to any penalty, and may recover back his presents, but the parties must in any case be separated.

LI.

1.—If any one sells his daughter, or his sister or his wife or concubine to be wife, or concubine to another, thereby sacrificing the woman's good name for the sake of gain and afterwards by fraudulent pretexts recovers possession he shall be punished under the general law against obtaining money under false pretences. If any one be guilty of engaging a band of desperadoes and carrying off any woman or article of property while being conveyed on the public highway, the principal in such affair shall be condemned to capital punishment, and the accessories to banishment with military servitude. If the go-betweens are parties to such acts of violence they shall be equally punishable, but if only guilty of being privy to the imposition of passing off a wife as a sister they shall be punishable one degree less than is prescribed for the principal in such offence.

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SECTION 103.

*The Position of Wife and Concubine.*

A wife cannot be degraded to the position of a concubine, nor can a concubine be raised to the position of wife so long as the wife is alive, under a penalty of 100 or 90 blows respectively. If any one marries a wife a second time while the first wife is alive, he shall be liable to 90 blows, and the parties shall be separated.

## SECTION 105.

*Marriage during the Legal Period of Mourning.*

## LÜ.

If any son or daughter during the period of mourning for a parent, or any widow (wife or concubine) during the period of mourning for a husband, marries or is given in marriage, the party offending shall be liable to 100 blows. If such son, daughter, or widow marries or is given away as a concubine, the penalty shall be reduced two degrees.

If a widow, holding rank in virtue of the office of her deceased husband, remarries even after expiry of the period of mourning, such marriage shall be null and void, and besides being deprived of her rank shall be liable to the above penalty. The principal contracting marriage with such widow of rank shall, if aware of the facts, be punishable 5 degrees less, and the marriage present shall be forfeited to Government. If not aware, the marriage present may be recovered back, but in any case the parties must be separated. If any one when in mourning for a grandparent, or for a paternal uncle or aunt, or elder brother or sister, marries or is given in marriage as a wife, the parties shall be liable to 80 blows, but the marriage shall be valid. The marriage of a concubine within the same period shall not entail any penalty.

If any one during the period of mourning for parents, husband or husband's parents acts the part of principal in the marriage of another person, legal in itself, he or she shall be liable to 80 blows.

If after the expiry of the period of mourning the parents or grandparents or the husband's parents or grandparents put pressure on any widow—whether wife or concubine—to marry again, they shall be punishable with 80 blows, and if the marriage is not completed the widow shall be entitled to remain single in the family of her deceased husband, the marriage presents being returned. If the marriage has been completed, she shall remain with her second husband, but the marriage presents shall be forfeited to Government. If the persons forcing on such re-marriage are relations within the second, third, etc., degree of mourning, they shall be punishable one degree more severely for each step further removed.

## LI.

If a widow is willing to enter into a second marriage the parents of her late husband shall have the right of negotiating the marriage, and shall be entitled to receive the marriage presents. If among her late husband's family there are none legally qualified to act as principals in her marriage then her mother's family shall be deemed principals, and shall be entitled to the marriage presents. In either case if the family

not having the legal right interfere forcibly, and carry off the lady, they shall be liable to 80 blows.

If any widow is forced to marry against her will, the principals contracting such marriage shall be punished according to degree of relationship—viz., if her own or her late husband's parents or grandparents, 80 blows; if senior relations for whom she would be bound to wear mourning in the second degree, 70 blows and banishment for a year and a half; if senior relations in the third or lower degrees, 80 blows and banishment for two years; if junior relations within the second degree, 100 blows and banishment for 3 years; if junior relations in the third or lower degrees, 90 blows and banishment for two years and a half. If the principal on the other side was aware of the fact that violence was being used, he shall be punished 3 degrees more severely than in ordinary cases of forcible marriage—viz., 80 blows. If the violence was not carried to the extreme limit of compelling the women to submit to the husband, the punishment shall be one degree less, and she shall be at liberty to remain single or to cohabit with the husband as she pleases, but the marriage presents shall be forfeited to Government.

If a widow is driven to commit suicide by the attempts of her relations to compel her to re-marry, no matter whether successful or not, such relations shall be punished as follows—if her own or her husband's Parents or Grandparents, 100 blows and 3 years' banishment; if seniors within the second degree of mourning, 100 blows and perpetual banishment to a distance of 2,000 *li*; if seniors within the third, fourth and fifth degrees, 100 blows and perpetual banishment to a distance of 2,500 or 3,000 *li*; if juniors in the fifth degree, banishment to a distant frontier with military servitude; if juniors in the third or fourth degrees, banishment with military servitude to the extreme frontier; and lastly, if juniors within the second degree of mourning, death by strangulation after the autumn assizes. The principal contracting the marriage on the other side, and persons abetting the forcible carrying off, which led to the suicide, shall, if aware of the facts, be deemed accessories, and punished one degree less severely than the woman's own relations.

If a woman thus married against her will nevertheless consents to live with her husband, and afterwards for some other reason commits suicide, the relations shall not be punished under this law but under the general rule against forcible marriage.

If a woman having no relatives who can contract a marriage on her behalf is compelled by a suitor to accept marriage presents, and thereafter commits suicide, such suitor shall be liable to banishment to a near frontier with military servitude, and shall be required to defray



the funeral expenses. If the woman was carried off by force, and in so doing things were stolen or injury was done to life or limb, the persons concerned shall be liable to a punishment more severe than in ordinary cases of violent abduction.

#### SECTION 107.

If any marriage takes place between persons of the same surname, the principals negotiating the marriage on either side shall be liable to 60 blows and the marriage shall be null and void. The woman shall return to her family and the marriage presents shall be forfeited to Government.<sup>1</sup>

#### SECTION 108.

*Persons related by consanguinity cannot intermarry with the generation above or below.*

Any marriage between blood relations through the mother, who are within any of the degrees of mourning, or who are not of the same generation, as also marriage with a sister by same mother though different father, or the daughter of a wife by a former husband, shall be deemed incestuous. Thus marriage is forbidden with the children of uncle or aunt of one's father or mother, or with a maternal aunt or maternal aunt's cousins, with maternal grand-aunts, with mother's cousins one or two degrees removed, with children of sisters or of cousins, with sisters of one's son-in-law, or with sisters of a daughter-in-law or grand daughter-in-law. With all the above, though outside the degrees of mourning, yet being of different generations, you are forbidden to intermarry, under a penalty of 100 blows.<sup>2</sup>

<sup>1</sup> Where, however, by a marriage of this kind the relations of husband and wife have *de facto* been constituted, the parties must accept all the consequences resulting therefrom as if the union were legal. Thus, where a man having a wife of the same surname caused her death by a wound, it was held that he was punishable as for killing his wife and not as for killing a stranger. So it was said if, on the other hand, she had killed her husband's parents she would have been liable to the severer penalty, and could not shelter herself under the plea that she was no wife. Notes to Code and see Section 117, Li 4 (p. 43).

<sup>2</sup> This chapter is not easy to translate clearly owing to the want of expression in our language for the various relationships, and I am not sure that I have given them all correctly.

The rule which the Chinese legislators have been labouring to lay down with so much multiplicity of detail may I think be put very simply.

I.—Relations by consanguinity :—(a) All Agnates 本宗 that is, persons bearing the same surname are forbidden to intermarry; (b) Cognates cannot marry any one of the generation above or below, but may marry any one of the same generation not being an agnate (originally first cousins were forbidden to marry, as being within the fifth 總麻 degree of mourning, but that was relaxed).

II.—Affinity.—Here there is no general rule. The exceptions are mentioned by name. I cannot marry my step-daughter's daughter, nor my son-in-law's sister, nor the sisters of my son's or grandson's wife. Otherwise affinity is no impediment.

A man cannot marry the children of his aunt on the father's side, or of his uncle or aunt on the mother's side, because though of the same generation they are within the fifth degree of mourning (now repealed).

In all the above cases a marriage shall be void and the woman shall return to her father's family. The marriage presents shall be forfeited to Government.

#### LI.

In general all criminal intercourse between blood relations of different generations, or who are for other reasons forbidden to intermarry shall be punished strictly according to the law applicable to the particular relationship. Where, however, there is any doubt about the case or where the law seems unusually severe, or where the relationship is very remote and when there has been no gross breach of propriety the court trying the case shall have some discretionary power in the decision it proposes to submit to the Throne. In the interest of the people it is permitted to marry with the children of a paternal aunt or of a maternal uncle or aunt.

2. Criminal intercourse or marriage between children of a first husband and children of a second shall be dealt with as if between children of the same mother but different father.

#### SECTION 109.

##### *Marriage with Widows of Relations.*

Marriage between agnates though not within the degrees of mourning, and marriage with the widow of an agnate is forbidden under the penalty of 100 blows. If one marries the widow of an agnate within the fifth degree of mourning or the widow of a maternal uncle or sister's son, the penalty shall be 60 blows and one year's banishment, and for marrying the widow of an agnatic relation still nearer, the penalty shall be increased from three years' banishment to strangulation or beheading—all such marriages to be deemed incestuous. If, however, such widow had been divorced, or in the interim had re-married into another family, the penalty shall be reduced to 80 blows.

If one takes his father's or grandfather's concubine or his paternal uncle's wife the penalty shall be death by beheading, no matter whether the woman had been divorced or re-married or not, and if one takes the widow of his elder or younger brother, whether divorced, re-married or not, the penalty shall be death by strangulation.

In the above cases if the widow was originally a concubine, not a wife, the penalty shall be reduced two degrees, except in the case of a father's or grandfather's concubine.

Marriage with an aunt or with a niece or sister, or any other relation who is within any of the degrees of mourning and belongs to the agnatic group, is incestuous and void, and the parties shall be punished as provided, whether by death or a minor penalty.

## LI.

1. The penalty for taking the concubine of a deceased paternal uncle or of a brother is a degree less than for marrying the widow—viz., perpetual banishment for 3,000 *li*.

2. When the punishment for incestuous marriages is less than death it shall be strictly carried out, and in the case of brothers marrying deceased brother's widows which involves the death penalty, when such marriage was preceded by criminal intercourse, the sentence of death shall be forthwith carried into effect on both; but in capital offences of this nature which really were committed by simple country people in ignorance of the law, provided that the marriage was entered into with the knowledge of the kindred and the Ti-pao, the sentence of death, which must be passed on both, shall be sent on for the autumn revision with a true statement of the whole circumstances for consideration. The Ti-pao and kindred shall be liable to 80 blows for not having prevented the marriage. If the parents were the persons who arranged such marriage, than at the autumn revision the circumstances shall be considered and the capital sentence commuted for some other penalty.

## SECTION 113.

No officer of Government can marry a professed singing girl either as wife or concubine. If he does, he shall be liable to 60 blows, and the girl shall be sent to her family and not back to her profession. The marriage presents shall be forfeited to Government. The heir to any officer possessing hereditary rank is liable to the like penalty if he marries one of that class and he shall, on coming to the succession, lose a grade.

## SECTION 114.

Any Buddhist or Taoist Priest who marries either a wife or concubine shall be liable to 80 blows, and shall be required to quit the priesthood. The contractor of the marriage on behalf of the girl shall be equally punishable, and the parties shall be separated, the marriage presents being forfeited to Government. If the Superior of the Monastery is aware of such marriage he shall be punishable to same extent. If any such Priest get a relation or servant to ask for a woman in marriage, and then takes possession of her himself, it shall be deemed a case of ordinary criminal intercourse, but punishable



two degrees more severely in his case as being a Priest. The woman shall be sent back to her friends and the marriage present forfeited to Government.

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SECTION 115.

*Marriages of free persons and slaves void.*

Any Master of a Family who marries his slave to the daughter of a free man shall be liable to 80 blows, and the latter or the principal contracting on behalf of the girl, if aware of the condition of the husband, shall be punishable one degree less. If the slave himself contracted the marriage he shall be liable to same penalty, and the master, if assenting, to a penalty two degrees less. If in order to bring about a marriage a free person is entered on the registers as a slave, or a slave is represented to be a free person, and the parties are so married, the party guilty of misrepresentation shall be liable to 100 blows in the first case and 90 in the second. In all the above cases the marriage shall be void, and the parties returned to their original condition.

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SECTION 116.

*Divorce.*

Whoever puts away his wife, except for any of the seven ordinary reasons, or for breach of the marital relations be liable to 80 blows. The seven ordinary reasons which justify a divorce are barrenness, wanton conduct, neglect of husband's parents, talkativeness, theft, envy, and inveterate infirmity. On the other hand, there are three reasons which nullify the foregoing—if the wife has kept the three years mourning [for either of Husband's parents], if the family having been once poor are now rich, or if the woman has not her old home to go to—in any of these cases if a man puts away his wife he shall be liable to 70 blows and shall be obliged to receive her back. If the woman has been guilty of a crime involving a breach of the marital relationship which by law requires a divorce, the husband is bound to send her away under a penalty of 80 blows. If both parties agree to separate owing to incompatibility of temper it may be done. If the wife runs away without the consent of the husband he may take her and sell her as wife to another man, and if she runs away and marries another man she shall be liable to death by strangulation. If a woman having been deserted by her husband, absconds and gets married to another man before the expiry of 3 years, without first obtaining the sanction of the local magistrate, she shall be liable to 100 blows. The above rules shall also apply to the case of concubines—the penalty in

each case being reduced 2 degrees. But to constitute a second marriage it is necessary there should have been a principal to contract on behalf of the woman, go-betweens and marriage present, otherwise it is simply a case of adultery, and the husband may take back his wife and sell her.

## LI.

1.—There are three principles of Justice which prevent a woman being hastily put away. In cases of adultery, however, they are inoperative.

2.—If the bridegroom neglects to proceed with the marriage for 5 years after the period fixed, or if he leaves his home and is not heard of for three years, the woman on application to the magistrate shall be entitled to a certificate enabling her to marry another person, and she shall not be obliged to return the first marriage presents.

## SECTION 117.

*In Illegal Marriages the Punishment falls upon the  
Principals contracting on either side.*

In all marriages contrary to law, where the principal negotiating the contract is either a paternal grandfather or grandmother, father or mother, paternal uncle or aunt, elder brother or elder sister, or maternal grandfather or grandmother, the penalty, whatever it may be, shall fall upon such principal contractor and not upon the parties themselves. If the principal contracting is a more distant relation then if the illegality originated with him, he shall be punished as the chief offender, and the parties themselves as accessories, otherwise he shall be deemed the accessory. Accessories to be punishable in every case one degree less than the chief offender, and in capital cases the relations, even when deemed principals, are to have the penalty reduced one degree.

In no case can any penalty be inflicted on a young girl who is thus leaving her home for the first time, nor on a son under 20 years of age, nor on either if constrained by the authority of their Parents, etc., but the father or other relation contracting the marriage shall alone be responsible.

When the illegal marriage is not consummated the penalty shall be reduced 5 degrees, thus death by strangulation shall be reduced to banishment for a year and a half.

Go-betweens who are aware of the illegality shall be punishable one degree less than the principals.

Offenders against the marriage laws shall be entitled to the benefit of a general act of amnesty, but where the marriage is declared void by law the parties must be separated, such act notwithstanding.

Marriage presents made with a knowledge of the illegality shall in general be forfeited to Government, otherwise they shall be recoverable.

#### LI.

1.—Any of the literate or common people who neglects to find a husband for his female slaves thus condemning them to a solitary life shall be liable to 80 blows, which may be commuted to the statutory fine in the case of the former.

2.—In Fokien and Formosa it is forbidden to intermarry with the savages; all such marriages shall be void, and the persons contracting them shall be liable to 100 blows. If the marriage is with one of the family of a native administrator, or with one of the intermediary linguist class, the penalty shall be 90 blows. The local magistrate, if consenting to such marriages, shall be liable to censure. Persons who have already married native wives and had children by them need not be proceeded against, provided they settle down quietly as citizens. But if they keep on going backwards and forward among the savages, they shall be liable to 80 blows.

3.—The unshaved Miaotze within the jurisdiction of the Hunan Provincial Authorities may contract marriages with the common people, but all such marriages must be evidenced by go-betweens and a written contract, and moreover require the sanction of the local magistrate, so that cases of criminal intercourse and the kidnapping of girls for sale may be searched out and punished according to the common laws. Traders and strangers who are not domiciled in the district cannot marry with these natives, nor can any citizen intermarry with natives who have not a settled habitation. If illegal unions are formed, and disturbances with the natives occur, the parties shall be punished as provided by law, and the local authorities shall be liable to censure. Marriages with the Miaotze, known as the Marsh and Cave tribes, are also allowed.

4.—When a marriage which is illegal, and therefore avoidable, was preceded by acts of criminal intercourse between the parties, or if there had been an illicit union, or if the husband had knowingly purchased another man's wife (not legally divorced), then in any subsequent proceedings, as for offences by the wife against the husband or the husband's relations, the parties shall be dealt with as if there were no marriage, notwithstanding that there may have been both go-betweens and a written contract. But if the illegality consisted in the fact that the parties were of the same surname, or were cognates



of different generations, or that one was free and the other a slave, or that the marriage was contracted during the period of mourning or during the lifetime of a former wife (有妻更娶), or that the woman was really the wife of another man but sold by him, then in any subsequent criminal proceedings, although such marriage is voidable by law, yet if it was properly made by go-betweens and if [in the last two cases] one of the parties was ignorant of the true facts, the parties shall be dealt with as if the marriage was good.<sup>1</sup>

5.—If the daughter of any Manchu family before having passed the selection (for the Emperor's Harem) is promised in marriage to a Chinaman, the head of the family shall be liable to 100 blows, if after having passed the selection, or if being one who is exempted, she is promised, the penalty shall be 40 blows. The Chinaman betrothing her shall be equally punishable.

### COMMENTARY.

Marriage in China is a civil contract, not between the man and woman, but between the Heads of the two families, reckoned according to the rule of agnatic succession. The consent of the bridegroom or bride is not required nor even asked; acquiescence is implied from the parental authority. It requires no registration or celebration by any public authority, civil or religious.

The ordinary requirements to constitute a valid marriage are:—

1. Employment of go-betweens who settle verbally the contract between the two families.

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<sup>1</sup> This is a clause which modifies very considerably the numerous restraints detailed in the previous chapters. It is not so clear as one would wish, nor is it easy to make out the precise effect, but the general purport seems to be to draw a broad line between void and voidable marriages. Comparing the text and notes together we may make out the following as the state of the case:—All unions of unclean origin, or which are described as incestuous, and all unions irregularly contracted without go-betweens or exchange of written evidence, are *ipso facto* void. The relationship of husband and wife was never constituted at all; the children are bastards, and cannot succeed. But in regard to unions which but for the legal impedimenta would be good we must make a distinction. An innocent party could of course set aside such a marriage. But suppose both agree to live and continue to live as man and wife, does the union entail the consequences of a legitimate marriage? As to one set of effects it does certainly; viz. as regards offences by, or against, other members of the husband's family. In all these cases the parties shall be considered man and wife. It is difficult therefore to see why it should not be held good in what Chinese law would call the lighter matter of legitimacy of children and succession to the property. As a matter of fact some of these impedimenta are habitually disregarded by the lower classes, as marriage of persons of same surname and during the period of mourning without consequence, and if some why not all? At any rate, it opens up a wide door for irregularities and permits the pleading of customary law against the express words of the statute.

2. Exchanging red cards giving the date of birth of each of the couple, and usually drawing up a formal contract of betrothal.
3. Sending and receiving of the wedding presents.  
(These three constitute a formal betrothal which carries legal consequences, *e.g.* specific performance may be enforced).
4. Bringing home the bride with red chair and music.
5. Obeisance by the pair to the bridegroom's parents, and in better class families kneeling to the ancestral tablets.

It will be seen that each of these steps corresponds in some measure to the requirements of our own marriage law. The go-betweens are the witnesses; the red cards are evidence of identity, necessary because the parties to be married have never yet seen each other; the red chair and music give the publicity; and the obeisance to parents is the religious ceremony, where the bride herself now gives her consent and the marriage is complete.

But though in all respectable families all these formalities are strictly observed, it is submitted that only two or at most three are really essential, *viz.*,—betrothal as evidenced by the go-betweens or by written contract, the receipt by the bride's family of the presents which is the consideration, and the handing over of the woman as wife. The only question in any subsequent dispute would be,—was it the intention of the parties to constitute the relationship of Husband and Wife, and was the woman given and accepted as wife.

These formal ceremonies apply only to the first or principal wife. For a second wife no ceremony is required at all, it is purely a matter of bargain and sale;<sup>1</sup> red chair and music are not required nor even allowed. The term second wife, indeed, is a misnomer. The Chinese do not

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<sup>1</sup> By Imperial Edict of February 1910 purchase of concubines was forbidden. Concubinage was not abolished but it was ordered that such unions should be arranged by go-betweens. Probably the effect has been nil. Vide Mixed Court case page 153.

call her *Ch'i*, wife at all, but *Ch'ieh*, concubine. There can only be one *Ch'i* at the time. In event of the death of the wife a concubine may be raised to that rank, but a *Ch'i* can never be made a *Ch'ieh*.

#### BETROTHAL; PARTIES TO.

The parties who can contract a valid marriage are in order :—

1. Parents and Paternal Grand Parents, in equal degree.
2. Uncles by Fathers side and their wives.
3. Paternal Aunts.
4. Elder Brothers and Elder Sisters.
5. Maternal Grand Parents.
6. In the case of slaves, the Master of the house.

To this there are, however, one or two exceptions. (a) When the bridegroom, being over 20, is himself the head of the house, *i.e.* when there are no senior agnates, he may contract his own marriage. (b) When the son of the family is absent on official duty or for purposes of trade, it seems he may legally marry without his parents consent. A mere betrothal, however, is not sufficient, the marriage must actually be completed. Thus it would seem that Chinamen in Europe may, if not already married, contract a valid marriage according to the *lex loci*. If already married the European wife's position would be merely that of a *Ch'ieh*, concubine, but her children would be legitimate in China. A woman whether maid or widow can never contract her own marriage, except perhaps in those cases where she has abandoned her family and is earning her own livelihood and so be deemed *sui juris*.

#### BETROTHAL, EFFECTS OF.

When the betrothal is complete as evidenced by written contract and by receipt of the marriage presents, either party can compel the other side to fulfil the engage-



ment. Neither of the intended spouses can enter into a new valid contract. If the bride's family in disregard of the contract should marry her to another, the first intended bridegroom may at his option claim his wife and the other marriage will be null and void. If he does not so choose the other marriage will stand good, but he may recover back his marriage presents. If the bridegroom's family enter into a new betrothal, it is optional for the bride's family to have it cancelled, but if he has actually married the second girl, the marriage must stand. In that case the bride's family have no redress, but they keep the marriage presents. There is no suggestion of an action for damages for breach of promise.

In event of the death of the intended husband before completion of the marriage, it is optional for the intended bride to enter the deceased's family as his widow, in which case she will have all the rights and privileges which she would have had if the intended husband had lived and the marriage had been completed. A formal betrothal seems to constitute a *bonâ fide* relationship between the intended husband and wife. For the time being, at least she has come within the agnatic bond, and cannot, even in the event of the death of the intended husband, marry any other member of the family, *e.g.* a brother of the deceased. Such a marriage would be deemed incestuous and void.<sup>1</sup>

Betrothal may be made at any age of either party, but a child *in ventre de sa mère* cannot be betrothed. Not infrequently a girl of tender years is betrothed and passes at once into the family of her intended for her future upbringing and education, in which case no further ceremonies seem to be required for completion of the marriage. Should the intended husband die before maturity she will remain in the family as his widow, and in due course a son will be given her in adoption, and she will have the custody of her son's share in the division of the family property.

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<sup>1</sup> See case of *Su Ta-ko*, Appendix I, page 135.

## DISSOLUTION OF BETROTHAL.

In general the death of either the intended husband or wife puts an end to the contract. The marriage presents are not returned. Misrepresentation of material facts touching the status or physical condition of the intended will enable the innocent party to terminate the contract. If the fault is on the part of the bride's family the marriage presents can be reclaimed. Conviction for a crime or moral turpitude will also give a right to cry off.

Neglect or refusal on the part of the intended husband for five years or his unexplained absence for three years enables the bride's family to terminate the contract, but it seems they must obtain a certificate from the local Magistrate before the lady can be engaged to another. This seems to be the only case where the intervention of the civil courts is required in matrimonial matters.

## DISABILITIES TO MARRIAGE.

Legal impediments to marriage may arise from

- I. Consanguinity or
- II. Affinity.

As to the first, consanguinity, the impedimenta nearly all spring out of the conception of an undivided family living together in common as explained in the Chapter on Succession. All members of this group trace their descent from a common ancestor exclusively through males and are termed agnates. Between any two of these marriage is absolutely forbidden. By a fiction of law the family is conceived to have an indefinite extension, and to include any person bearing the same family name, thus indicating a possible descent from a common ancestor. Hence the first general rule,—marriage is forbidden between persons of the same family name.

A larger group of blood relationship is all who can trace descent from a common ancestor of either Father or Mother. This group in Roman law was termed cognates. As between cognates the general rule is you cannot marry

any one of the generation above or below yourself but you may marry any one of the same generation, reckoning from any common ancestor. Originally there was the further limitation that the parties must not be within any of the five degrees of mourning, but this may now be ignored. It operated only to prevent the marriage of first cousins, but this was expressly allowed by Li 1 of Section 108 "in the interest of the people" as far as regards the children of a paternal Aunt or of a Maternal Uncle or Aunt. Children of a paternal Uncle are of course within the Agnatic group and marriage with these is still forbidden.

The interdict of marrying with one of the generation above or below may seem somewhat far-fetched, but it probably is due to the notion that in the gradations of the family the parties do not stand on a footing of equality, that one is to the other *in loco parentis* or as guardian and ward. The idea is that there is a want of harmony, or as Roman law would put it *propter inelegantiam*.

## II. Impediments from Affinity.

As a general rule marriage does not create any relationship between the husband and his wife's family. The exceptions to this are those cases where the wife's relations are brought under the husband's control, such as the daughter of a wife by a former husband or a sister by same mother but different father. For a similar reason I cannot marry my son's wife's sister, because that would be to put her in the position of mother to her own sister. Outside the exceptions named, affinity is no impediment. It would seem therefore that a man can marry his deceased wife's sister. But the woman is in a different case. A widow cannot marry her deceased husband's brother under the severest penalties. Such a marriage is deemed highly incestuous, and the reason I think is readily found. By marriage the woman is brought within the agnatic group and stands, relatively to all the others, in the position of a daughter of the house. This bond is not at all dissolved by the death of her husband, and consequently she is



absolutely forbidden to intermarry with any of the agnatic group just as much as if she had been a natural born daughter. Even divorce, which as will be seen afterwards, dissolves the bond for many purposes, does not so operate here though in some of the cases it mitigates the penalty. All such marriages are *ipso facto* void and the penalty falls equally on the man and woman.

#### IMPEDIMENTS ON OTHER GROUNDS.

Marriage is forbidden in a number of other cases, but though a breach renders the parties liable to a penalty, the marriage itself is not necessarily void in every case, but only voidable.

Buddhist and Taoist Priests cannot contract a valid marriage. They are regarded as *civiliter mortuus*, and incapable of exercising civil rights. It appears, however, they can always unfrock themselves, and return to the laity, after which, presumably, the impediment would not apply.

The widow of an Officer holding a patent of nobility from the Emperor cannot re-marry. Such a marriage is void.

Officials on active service cannot marry into a family within their jurisdiction. This is forbidden on grounds of public policy.

Marriage during the period of mourning for parents, grandparents and other senior agnates is punishable, but the marriage if otherwise regular stands good. The same is the case if the parent is in prison awaiting sentence for a crime.

Intermarriage with savages of the border tribes is generally forbidden, but there are some exceptions. The motive for this restraint is probably political.

It may be remarked here that a law passed in the Chia-Ch'ing period (Section 117 *Li* 4) very considerably modifies several of the restrictions above set out. A question seems to have arisen as to the precise position of a woman introduced into the family in disregard of the

law when she was accused of an offence against other members of the family. If the charge against her, for instance, was that of insulting and striking her supposed mother-in-law, it made all the difference in the world whether she was a wife or not. If she was a wife the penalty was strangulation. If she was not a wife the case was one of assault between equals, involving a nominal penalty of 100 blows or so, redeemable by a small fine. The rule laid down appears to draw a distinction between marriages which are void *ab initio* by reason of an incestuous or unclean origin, and other marriages which are bad only because of the legal impedimenta, such as that the parties were of the same surname, or, being cognates, were of a different generation, or that the marriage was contracted during the period of mourning, or during the lifetime of a former wife, etc. In these cases it was held that the relationship of husband and wife had in effect been constituted and the case should be determined accordingly. It would seem therefore that all the civil consequences of a valid marriage should follow, such as the legitimacy of children, rights of inheritance, adoption, etc.

#### MARRIAGE, EFFECTS OF.

(a) As to person of wife. By marriage a wife leaves her father's family for good and passes into that of her husband. All the personal rights which the father had over his daughter are transferred to the husband, or more properly to the husband's parents. She owes to them all the submission and obedience of a daughter, and they can enforce it to any extent. The law gives her no protection against ill treatment, and even if chastisement is carried so far as to cause death the penalty will be but nominal. The only sort of protectors she has would be her mother's family, if they are influential enough, but even then it would not be by process of law but by threatening personal retaliation. It is only when by process of time she has sons of her own, natural or adopted, that her position

becomes important. As mother she can in turn demand from those below her the submission and obedience which she formerly had to render.

(b) As to property. A newly married wife usually brings with her a considerable outfit or paraphernalia, at least among the well-to-do classes, but further than that she has no expectation of inheritance from her father's estate. He may of course make her presents during his lifetime, but all she brings or receives vests in her husband's family. She cannot dispose of it or leave it by will; in short she has no separate estate and is incapable of having any.

There are, however, two exceptions to this rule, though it is surmised they rarely occur in practice. The first is when the line of her father's family becomes extinct through failure of heirs, natural or adopted. This will not happen merely because the father, having no sons of his own, fails to adopt in his lifetime. If there are surviving him any persons capable of succeeding according to the agnatic rule of succession, they or the one of them first entitled will claim the succession, and the seniors interested or the Magistrate will see that he is adopted. But while the failure of the father to adopt an agnate during his lifetime can be remedied after his death, his failure to adopt a non-agnate, which he might have done cannot be remedied, and the line perforce becomes extinct. In that case the daughter, if there is only one will inherit, or if there are several they will take in equal shares.

The only other exception is that where the marriage contract provides that instead of the wife joining her husband's family, the husband shall join the wife's family. This can only be done in cases where daughters only are born and no sons. The son-in-law in such case being of a different surname cannot be successor to the family, but he will inherit, in right of his wife, half of the family property, the other half going to the adopted right heir.



DIVORCE.

As marriages are contracted without the intervention of the civil authorities, so divorce can be brought about in the same way. In the simplest case mere incompatibility of temper with mutual consent is sufficient reason for a divorce, provided, however that the parties can be restored to the *status quo ante*, which would imply that the woman's parents were willing to take her back. The seven well-known reasons which are held to justify the putting away of a wife are qualified by the three reasons that forbid it. The chief of these is that she has kept the three years mourning for either of her husband's parents. This is the highest act of filial duty, and presumably adds a religious sanction to the agnatic bond which identifies her as a member of her husband's family. The other two reasons indicate a change in material circumstances of the two families which make a return to the *status quo ante* impossible.

But for serious crime such as adultery or striking and wounding husband's parents, or absconding from her home, these reasons are inoperative, and divorce is not only permissible but imperative. The husband apparently has the option of either handing her over to justice or of selling her. In parts where there is a scarcity of women a sale can be usually effected even in these modern days, and it is considered a cheap way of getting a wife by the poorer classes. It does not appear clear, however, what the status of the woman would be in the purchaser's family. The power of the husband to sell seems undoubted, but on the other hand marriage by the mere purchase of a divorced woman without other ceremonies seems to be classed among those of unclean origin and therefore not legally recognised as valid. Something seems to turn on the question of whether the second husband had or had not knowledge of the facts. If he had, this would imply collusion, and then the marriage would be invalid; if he had not, and the marriage was otherwise regular, it would be held good. But it is only among the poorer classes that

a transaction of this kind is possible, and the law often winks at acts done under the stress of poverty, which would not be tolerated in respectable families. It may indeed be said that in many cases there is one law for the rich and another for the poor. In times of famine and distress the sale of wives, who have given no cause for divorce, is common enough, and no question asked.

The wife has no rights of divorce against her husband. Marital infidelity on his part, within or without the household, is not a matter of which the law takes cognizance. Harsh treatment even to the extent of beating or wounding gives her no right of appeal to the law for protection or separation, much less is it a ground for divorce. The only case in which a wife can get a divorce or what is tantamount to it, the right to re-marry, is when she has been deserted by her husband (Section 116). In such case she may file a complaint with the local Magistrate, who it would seem has a discretionary power to grant a permit to re-marry. A re-marriage without such permit is void if less than three years have elapsed from the time of desertion, but after three years she would seem to be at liberty to marry at her discretion. But the re-marriage must be carried out with all the formalities of sponsors and go-betweens, which implies that it must have the consent of the seniors of her husband's family, if any, or failing them, of her mother's family. If carried out clandestinely it will be void, and in event of the husband turning up again he may reclaim her and dispose of her as in a case of common adultery.

It is probable, however, that to come within this rule, the husband must not merely have deserted his wife but left her destitute. If provision has been made for her maintenance in the husband's family it is unlikely that any such privilege would be granted to her, however long the absence might be, unless indeed his death was thereby to be presumed.

In general divorce puts an end to all relationship between the wife and her late husband's family. Henceforth in all civil and criminal proceedings they are deemed

entire strangers, with this exception, however, that she cannot under any circumstances re-marry into her husband's family. A divorced wife, of course, can never have a claim to the custody of her children. These are part and parcel of her ex-husband's family and must remain there. In the eye of the law she ceases to be related even to her own children. If for instance her son were afterwards to assault his mother, the case would be treated criminally as an affray between equals, not as between mother and child, and would involve only the minor penalty.<sup>1</sup>

#### RE-MARRIAGE OF WIDOWS.

A widow differs from an unmarried daughter in this that she cannot be forced to enter on a second marriage without her consent. If she gives her consent her late husband's senior agnates are the negotiators of the marriage and are entitled to receive the marriage presents, or failing them her own proper parents can be the principals. Custom and propriety, however, usually prompt a widow to refuse a second marriage, and it is considered particularly meritorious on the part of a young widow to continue to live a chaste life, devoting herself to the care of her late husband's parents. On the other hand self interest and the hope of getting back some of the money which had been paid for her in the first instance will prompt the surviving brothers or uncles to induce her by force or fraud to bestow herself elsewhere. Hence, no doubt the number of severe enactments against practices of this sort.

If, however, a widow consents to re-marry she may do so, but she must go empty-handed. Any property she may have brought with her originally remains in the family. Sons which she may have born of course remain in the family, but it seems she may take with her daughters of tender age if she so desires.<sup>2</sup>

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<sup>1</sup> *Vide* Alabaster, p. 186.

<sup>2</sup> But see Mixed Court cases page 150.



## CHAPTER IV.

### VILLAGE ORGANISATION.

#### SECTION 75. TRANSLATION.

##### *Registration of Families and Individuals.*

##### LÜ.

The Head of every Family which is not duly enrolled on the public Registers shall be liable, if the family possesses land and is thereby bound to contribute to the public taxes and State services, to a penalty of 100 blows, or if not possessing land to a penalty of 80 blows. In either case the Family shall be enrolled as chargeable for State services either in proportion to its holding or its numbers as the case may be.

The Head of a Family who registers, as members of his own, strangers who belong to or constitute a distinct Family, shall be liable to one or other of the above penalties according as such stranger Family does or does not possess land chargeable with public burdens, and the Register shall be corrected. If such outsiders are relations of his Family, but living in separate establishments the penalty shall be reduced two degrees. Agnatic relations such as uncles, cousins and nephews who have never separated from the original stock, as also an adopted son-in-law, shall all count as members of one Family.

Any person in the public service of the Government need not register his Family as his name, being on the official list, and his services, being rendered to the State, are sufficient to satisfy the requirements of the law; but he must register the individual members of his Family, under the general rules.

[Penalty for not registering individual members if males and over 16 years of age].

The Head-borough (里長 or 保長) shall be held responsible for seeing that there is no omission of either Families or individuals within his village, under a penalty varying with the numbers omitted but not exceeding 100 blows for Families and 50 blows for individuals.

[Liability of District Magistrate and Yamen clerks for omission].

##### LI.

1.—The authorities of each Province in revising the Census Rolls shall ascertain carefully the increase of Population and shall draw up a Return for submission to the Throne to be called "Register of the

increase of Population." The Land Tax, however, shall continue to be levied according to the Rolls of the 50th year of K'anghi, which shall be fixed as the normal amount, and no further levy shall be demanded in respect of the increase of population. But if in any part of a province the population and the returns of the Land Tax should fall below the normal figure, the deficiency shall be made good by the other parts of the province where there is an increase.

If in reporting the increase of population a false return is made, or if there is any illegal assessment in the levy of the land tax or if the drawing up of the Returns is made an occasion of extortion, the Governor General, Governor, etc., shall report the guilty parties for the legal penalty.

2.—[Deals with Banner Corps—obsolete].

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#### SECTION 76.

*Each Family to be registered as belonging to some definite class.*

*Status.*

LÜ.

Every Family on being originally reported for registration shall be registered as belonging to some definite class, whether it be the military or common civilian class, or that of Government Couriers, Artificers, Physicians, Soothsayers, Labourers, Strolling Players, etc., etc., and the members of each Family shall be liable to State services according to such class or profession and no other, any fraudulent substitution of one class for another whereby the individual's liability to the public services is lessened, as when a military employment is represented as a civil one, or when a skilled artizan passes himself off as one of the common people, he shall be liable to a punishment of 80 blows, and the Magistrate who culpably allows such evasion and confusion in the public registers shall be similarly liable.

Whoever falsely represents himself as belonging to some particular garrison or to the army generally and thereby evades all public service whatever, shall be liable to 100 blows and to banishment for military servitude on a distant frontier.

LI.

1.—If any officer or soldier stationed at any of the garrisons, or any skilled artizan purchases land from the common people, he shall be required to pay the usual taxes and be liable for the customary State

services attaching to such holding. If he fails in such duties and the Head-borough of the village is thereby brought under the obligation of making good the deficiency, he shall be liable to be punished according to the nature of the offence, whether it be fraudulent concealment of the purchase or a mortgage-sale without possession. If, however, the offence is no more than a mere neglecting to pay at the proper time, without any fraudulent concealment, it shall be treated according to the law provided for such cases.

2.—No slave purchased by a Bannerman under an unstamped Deed prior to the 13th year of Yung-ching (1735) shall be entitled to redeem his freedom, and if he runs away a warrant may be issued for his apprehension, but any slave purchased under an unstamped Deed after the first year of Kien-lung (1736) shall be entitled to redeem himself and any member of his family, except in cases where the purchaser has after purchase procured a wife for his slave and given them a separate dwelling-house.

If a woman is betrothed to a man who afterwards is sold as a slave, her Family may refuse to carry out the contract.

3.—If any Bannerman is willing to allow a slave to redeem his freedom as a reward for diligent service rendered by him and his ancestors for several generations, he may do so, and the matter being put on record at the head-quarters of the Banner, and at the Board of Revenue, the person shall revert as an ordinary citizen to the District where the records show him to have had his original settlement. The sons and grandsons of the old master may not bring a plaint against such freedman to compel him to return to slavery.

NOTE.—[Here follow a number of enactments relating to slaves belonging to Bannermen, and stipulating under what circumstances they may recover their freedom. The excuse for introducing the subject here is that this is a Section dealing with status. It begins by saying every family must be registered as belonging to some definite class of citizens, and such registration determines the status of the individuals. It then goes on to consider the methods by which that status can be modified or changed. A change from slavery to freedom is a change of status. It would seem that in the early years of the Manchu Dynasty a considerable portion of the population round the Capital was in a state of servitude, either as domestic slaves in the families of the Manchu nobles or as serfs *adstricti glebæ*, cultivating on behalf of their masters, the



lands assigned to the heads of the Princely houses or to the maintenance of particular Banner Corps. Some of them were probably hereditary Manchu bondsmen, but the greater part seem to have been of Chinese origin, though how reduced to this menial condition does not appear. They may have been partly condemned prisoners of war, but some at least were originally free citizens, sold by their parents or guardians for a money consideration.

Slavery in China has everywhere been of a mitigated character, and the condition of these Manchu serfs or slaves probably differed but little from that of the labouring population, except as to freedom of movement. As they were allowed to purchase their freedom, it seems to follow that they were capable of acquiring and owning property the result of their labours, else the privilege would have been a mockery. The agricultural serfs no doubt in time became a sort of tenant farmers, paying a fixed proportion of the farm produce to the landlords, and retaining the balance for their own use.

The rules by which these slaves or serfs were enabled to change their condition and regain their freedom are tediously prolix, and it is not worth while to give a full translation, especially as the matter is not now of any practical importance, but the following points may be noted.

Domestic slaves may be emancipated at the will of their master, or if they have a record of three generations of meritorious service they are entitled to purchase their freedom.

Slaves bought after the 1st year of Kien-Lung (1736) and not enrolled as followers of a banner corps may redeem themselves.

Slaves bought after the 1st year of Kien-Lung, though enrolled as followers, may redeem themselves if they have three generations of meritorious service to their credit, but only with the consent of their owners and the superior officers.

Generally such freedmen when duly enrolled became ordinary citizens, but were restricted in their occupations

to agricultural pursuits. It was not till after the 3rd generation that their descendants became entitled to full rights of citizenship, including the right to enter the state service through the public examinations.

This section contains also several clauses enabling the Manchus themselves to change their status and become enrolled as *min* (民) ordinary citizens. At first the Manchus were a purely military caste, debarred from following the ordinary occupations of agriculture or commerce, and justiciable only before their own military tribunals. Intermarriage was interdicted with Chinese families or at least discountenanced. These restrictions were gradually relaxed. An early law permitted officers in any of the Provincial garrisons to acquire land, subject to paying the usual taxes, and becoming liable for the state services attached to such holding. An act passed in the 19th year of Chia Ching (1814) is to the following effect].

11.—Any member of the Banner Force, whether Manchu or Chinese, wishing to take up his residence in any of the Provinces, must make application to that effect at the head-quarters of his Banner, and must also petition the High Provincial Authorities, who shall direct the district Magistrate of the locality selected to enroll him in some tithing as one of the common people. The High Provincial Authorities shall report the fact to the Banner Authorities, and once a year shall send to the Throne a return of all such settlers, who shall be required to behave as peaceful and industrious subjects. All civil and criminal actions affecting these shall be cognizable by the local authorities in conjunction with the Manchu civil commissary where there is one in the place. If there is no civil commissary, then the local authority shall have jurisdiction alone in all minor offences entailing only the punishment of the cangue or bamboo, which punishments, however, shall first be reported by the sitting Magistrate to his immediate Superior, with whose sanction they may be carried into effect. In all cases entailing the punishment of banishment or any higher grade, the offender shall be sent on by the local authority to his Superior, who shall in turn forward him with a report to the Board, so that he may be handed over to the Ts'an-ling (Lieut.-General) of his Banner to be finally dealt with. Manchus and Mongols, who settled near the capital, shall be treated in all criminal matters like ordinary Bannermen. (Amended Chia Ching 19th year 1814).

[Finally in the 5th year of Tao-Kwang (1825) another act was passed as follows].

25.—Any member of the Manchu or Mongol Banner Force who wishes to obtain leave of absence to go to another district, must apply through his *Tso-ling* to the *Ts'an-ling*, who will make an entry in his books and will issue a permit to leave, after which the applicant shall be at liberty to engage in outside business. If being thus absent for some years, the party is desirous of being enrolled on the civil Register, he must make application to the local authorities, who will cause the enrollment to be made, after which he shall in all criminal matters be amenable to the ordinary tribunals of Justice.

NOTE.—[This enabled any member of the Manchu or Mongol force to change his status at will. The assimilation of the two races which had been going on for some time was now complete, except for those actually on military service. As a military organization the Manchu force has long been effete. Remnants of the Provincial garrisons, in a degraded and poverty stricken condition, continued to exist in several towns up to the time of the revolution (1911) when they were wiped out, in some cases as at Si-An-Fu in blood and massacre, by the uprising of the people].

#### SECTION 77.

*Against Building Buddhist and Taoist Temples and joining the priesthood without license.<sup>1</sup>*

LÜ.

The number of Buddhist and Taoist Temples now existing shall be held to be the fixed number, and no new Temples shall henceforth be

<sup>1</sup> The preceding sections having fixed the liability of every man for public State services arising out of his citizenship, this defines the conditions under which he may withdraw himself from that liability by joining the Priesthood. A Priest is said to have *ch'u chia* 出家 left his Family: he has put himself outside the pale of the Family organization and may be regarded as *civilitur mortuus*. He cannot contract a legal marriage (see Section 114); he is therefore incapable of being Successor to a Family, for he cannot continue the Family line, and therefore incapable also of inheriting property. Even when guilty of an offence he must be divested of his sacred character, *hwan su* 還俗 Lit. "revert to the vulgar" before he can be proceeded against. On the other hand Priests are freed from all the ordinary obligations towards the State,—they have neither public rights nor public duties. The only duty of an ordinary citizen for which they still remain liable is the private duty of mourning for Parents and performing the usual sacrificial rites at the tombs. [Continued on next page].



built without authority, nor additions made to those already existing, under a penalty of 100 blows. Priests and Nuns found in such newly-built Temples shall also be punished, the former by banishment for military servitude, after being divested of the priestly character, and the latter by being made Government slaves. The land and buildings shall also be forfeited to Government.

All persons who shave their heads and enter the priesthood, or cause any junior member of their family to do so, without first obtaining a license,<sup>1</sup> shall be punished with 80 blows. The Heads and Stewards of Monasteries, who take on themselves to issue such licenses, shall be liable to the same penalty, and the persons illegally admitted shall be replaced in the class of ordinary citizens and be liable to all the public duties attaching to their condition.

#### LI.

1.—No person shall be permitted to join the priesthood who is over the age of sixteen, nor any one from a family where the sons and younger brothers are fewer than three in number.<sup>2</sup> The head of any family offending in either of these respects shall be liable to one month's cangue, and the superiors and stewards of the monastery shall if cognizant be deprived of their offices and replaced among the class of ordinary citizens.

2.—[Priests guilty of an offence to be unfrocked<sup>3</sup>].

3.—If any of the common people is desirous of erecting a Temple for worship, a petition must be sent in to the High Authorities of the Province, who will lay the matter before the Throne, and await the Imperial Sanction. Persons presuming to erect a Temple without this Sanction are to be punished as for disobedience to an Imperial Decree.

4.—Priests, being required, as they are at present, to provide food and lodging for their novices, shall not be permitted to receive an

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The Commentator is somewhat severe in his remarks on this chapter. He says "the Priests are a useless lot. Though they may hold calmness and purity to be their chief object, they are perverse in this world, they do not plough nor spin, but sit quietly enjoying themselves, having no public duties to perform. They are excitable people who are little on their guard, and therefore they are not allowed to take pupils till they have reached the age of 40, and even then to have only two or three. Every individual added to this useless class is one taken away from the number of the 'Emperor's servants.'"

<sup>1</sup> This license (度牒) is to be procured from the Board of Ceremonies.

<sup>2</sup> The object is doubtless to provide against the possibility of the person being required to take up the succession to the Family. There must be left at least two to provide for this contingency.

<sup>3</sup> A priest formally unfrocked or expelled from his order resumes his original name and status. In case of escape from banishment he can thus be traced and identified. The commentator says:—"Priests and nuns guilty of the smallest offence should be expelled, only those who have led reverent and obedient lives without ever offending are to be 'cremated'" (方許焚修).

indiscriminate number of these latter. Priests over 40 years of age may take one pupil, who may be replaced by another in event of death. If the Priest is not 40 years of age when he receives a pupil, or if he receives more than one pupil, he shall be liable to 50 blows, and if the pupil is convicted of criminal intercourse, theft or other grave crime, he shall be sent back to his parents.

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## SECTION 83.

*Election of Village Headmen.*

LÜ.

In every District 100 Families shall elect one Head-borough (or Hundred man (*Li chang* and ten Tithing men *Chia shou*, who shall be charged for the year with the collection of the revenue and the arranging of other public matters. Any person who without warrant assumes the title of *Chu-pao*, *Li-chang*, *Pao-chang* or other title of authority, and takes advantage of that to exact levies from the people, shall be liable to 100 blows and banishment for two years. The elders from among whom the above elections are to be made, must be men of mature years and known merit, belonging to the locality, as approved by the majority, and no one who has held office, or been employed as a Yamen underling, or who has been convicted of any offence, shall be eligible. A breach of this law shall entail a punishment of 60 blows upon the offender, who shall also be deposed from his office, and any official sanctioning such illegal election shall be liable to 40 blows, and in case of bribery to such severer penalty as the law against bribery for an illegal purpose may entail.

LI.

1.—In every District the Registers for the assessment of the land tax and other public burdens shall be drawn up so that each shall contain 110 families, forming one *Li* or hundred. Excluding the ten men who are the Elders or tithing men, the remaining 100 Families shall be subdivided into 100 *chia* or Tithings, each Tithing consisting of 10 Families. One Tithing man shall be responsible for the State services required of each Tithing during the year, and the *Li-chang* or Hundred man shall have a general control of all public matters within the Hundred. In a city, these divisions are called *Fang* or wards, in the suburbs, *Hsiang* and in the country, *Li*. The Tithing men change offices every year, ten years completing the circuit, so that

each man in turn has the control of the more numerous and less numerous districts. There shall be one Register (冊) kept for every Hundred, and at the head of each Register there shall be a map, and appended thereto there shall be a list of all who are exempted from State service, and consequently not included in the 110 Families, by reason of their being lone widowers, widows, childless or orphans without relatives to help to support them, which list is called the "odd list." A copy of the Register when completed shall be sent to the Board of Revenue, one to the Provincial Treasurer, and one shall be deposited in the Prefect's and District Magistrate's office.

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SECTION 84.

*Evasion of Liability to Public Service.*

LÜ.

The Head of a Household who with his family withdraws to an adjoining District for the purpose of escaping the State services for which he is liable shall be subject to the penalty of 100 blows, and shall be compelled to return to his duty. The Head-borough, the Proctor (提調) and the local officials, if conniving at his evasion, shall be subject to the same penalty, as shall also any of the people in the adjoining District who aid in concealing him. The Head-borough of such adjoining district shall be required, if the fact comes to his knowledge, to send him back. Also the Magistrate of his own District shall communicate officially with the Magistrate of the other District, who thereupon shall be required to have the absentee sent back, in each case under a penalty of 60 blows.

Any workman who during the time he is employed in any public service, and any State servant by profession, who at any time shall absent himself from his work, shall be liable to a punishment of ten blows for one day's absence and one degree more for every five days' additional absence, not exceeding fifty blows in all. The Proctor and District Magistrate shall, if conniving at such absence, be liable to the same penalty, and in case of bribery to any severer penalty which the law against bribery for an illegal object may sanction.

LI.

1.—In places where the population have fled from their homes on account of war or famine, the officials, as soon as peace and plenty have been restored, shall invite the Refugees to return to their lands and



render again the accustomed services. When they have been absent a long time or have fled to distant parts, the local officials shall make out a list of those who have disappeared showing their names, place of residence, sex, occupation, etc., as well as the quantity of arable land left and the amount of land tax payable in respect thereof, and stating also what tax-payers are still remaining in the district. This list shall be circulated throughout the country, and the several High Provincial officials shall issue orders for all such absentees to return to their homes. All parties returning and taking up their family patrimonies, and consenting to enrollment, shall receive from the authorities a certificate and shall be registered and entered as liable for the State services.

Persons who do not come forward, or who coming forward, do not report their families in full or who abscond again and conceal their Families in another place, shall each be liable to 100 blows.

2.—[Landless people to be grouped and put under control].

3.—[Quitting the jurisdiction to evade public service. Penalties for].

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#### SECTION 89.

##### *Relief of the Aged and Destitute.*

##### LÜ.

All aged and infirm persons and orphans, who are in destitute circumstances and have no relations to support them, are entitled to be maintained by the local officials. Neglect of this duty will entail a penalty of 60 blows, and the withholding or short issue of clothes and rice which ought to be supplied for this purpose will be treated as embezzlement of government funds by an officer in charge.

##### LI.

1.—[Requires Almshouses to be established in every Hsien for relief of the poor].

2.—Old persons of 90 and upwards shall at all times be the subject of inquiry on the part of the local officials.<sup>1</sup> Should they be childless

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<sup>1</sup> Several instances are given in the notes to this chapter of honours and grants to old people for no other reason than simply that they had lived to attain a great age. Thus in the first year of Kien-lung the case was reported of a man named 湯雲山 T'ang Yun-shan, from Province of Hupeh, who was then 130 years old, and it was ordered by Imperial decree that he should receive, over and above the ordinary bounty of Taels 120, a further sum of Ten Taels and one roll of silk. Ten years later the man was still alive, being then 140, and on that occasion he received a further grant of 50 Taels and five rolls of silk.

[Continued on next page].

or should their descendants be in destitute circumstances and unable to support them, the District Magistrate shall relieve their wants and report the case to the High Provincial Authorities, who will in turn report to the Throne for His Majesty's information. A grant of money shall also be made from the public funds as a mark of the Imperial benevolence.

3.—[Provision for destitute convicts].

4.—Each of the five divisions of the capital shall provide a refuge for poor and sick vagrants, the expenses of which for repairs, clothes, food and medicines shall be defrayed by a grant of 100 Taels per annum for each out of the Public Treasury. If this sum is insufficient application may be made for more, and if there is a surplus it is to be carried forward to the following year. The censors of the five divisions as presidents and the civil officers of the various wards shall have charge of this matter, any fraudulent issue of supplies shall render the parties liable to be handed over to the Board for punishment according to law.

5.—Vagrants<sup>1</sup> and paupers found near their original settlement shall be sent back there for relief, but those found over 1,000 *li* from their native place may be relieved on the spot; such expenditure to be included in the officers' account of disbursements for the year.

6.—In times of great famine, when the famished people set out to beg in other provinces, the several Governors, etc., should take proper means to collect and relieve the refugees; when the famine is over they should be sent back again.

## COMMENTARY.

The first Section in the foregoing Translations, which is also that with which the division of *Hu Lü* 戶律 opens, enacts that every member of every Family shall be

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There appear to be some general rules for granting these distinctions. If two brothers or husband and wife live to the age of 100 they are entitled to an honorary epithet, and may erect a monumental portal, for which an Imperial Grant of Taels 30 is made. If one lives to 110 he is entitled to a double grant of money for the purpose of erecting a memorial. If he lives to 120 he is entitled to treble allowance, and so on. Special cases are always to be reported to the Throne 禮部則例.

The theory on which these rewards are granted is doubtless that longevity is the recognition by Heaven of some special virtue on the part of the person himself or his ancestors—which virtue being thus signalled is deemed worthy of further recognition by the Representative of Heaven upon earth.

<sup>1</sup>Sturdy beggars are not to be allowed to go about asking alms. The Tithing man and the "Head of the Beggars" are under strict orders to put down that sort of thing. Order of the Board in 12th year of Kien-Lung.

registered in some *Tsih* 籍, and the following chapter enacts that the *Tsih* of every family must be fixed, definite. *Tsih* is the Record of population kept in the District Magistrate's Yamen, where the names, professions, etc., of every Family are or ought to be found. Every subject ought to appear as belonging to some one *Pao*, of some one *Hsien* or district, which may be called his settlement, and once registered he can only with difficulty change his settlement, for Chinese policy strongly sets its face against anything of the nature of *liu* 流 wandering. However far he may travel, or however long he may stay away, he is always referred to and identified in all official papers as a man of that district. It is as a member of his own particular community that his taxes and other public duties are assessed on the one hand, and that on the other he is entitled to relief in times of famine from government funds.

The Chinese system of registering Families and Individuals may seem to the European reader tediously minute and unimportant, nevertheless it lies at the basis of their civil organisation and some acquaintance with it is necessary to a just comprehension of many of their judicial customs.

Starting from the fact that the population is an aggregation of Families, these families are next grouped together first into *Chia* 甲 and then into *Pao* 保 or *Li* 里 ten families nominally, but not necessarily, forming a *chia* and 10 *chia* forming a *Pao*. These are the theoretical numbers, in practice of course arithmetical accuracy cannot be asked for. Indeed, the *chia* in many places is lost sight of, and the *Li* or *Pao*, for sometimes the one term and sometimes the other is used, is the only group between the family on the one hand and the *Hsien* or territorial district on the other. Other terms are used besides the above in different Provinces, but the thing indicated is the same.

Each group whether *Chia* or *Pao* must elect one of its members to serve as Headman and the election must be reported to the District Magistrate for approval, who does



not appear, however, to have more than a veto in the matter. The period of service seems usually to be one year, though of course the same man may be re-elected for successive years. According to the strict letter of the law the ten heads of the *Chia* in a *Pao* should change places every year, each one thus completing the circuit of the ten *chia* in ten years, but this seems quite neglected.

In the words of the *Hwei Tien*<sup>1</sup>—"the scholars and people shall elect to this office men of probity, education and property. The local officials shall not require them to undertake any other public service, so that they be solely responsible for this duty. If any of the under-mentioned offences are committed within the Tithing, the Tithing man shall be specially responsible for making the necessary inquiries and reporting the fact, viz :—theft, corrupt teaching, gambling, hiding and absconding from justice, kidnapping, coining, establishing a secret society, and so on. He shall also be required to report all suspicious characters arriving within his bounds, and see that the necessary alterations are made from time to time in the Register of Individuals in each Family. If constables from a neighbouring jurisdiction come in pursuit of offenders in virtue of a warrant, he shall assist in arresting, but if any of the Yamen constables wrongfully arrest an innocent man, he may lay the facts before the district Magistrate for investigation."

This greatly condensed summary shows the multifarious nature of the duties of the *Pao-chang* or *Chia-chang*, for the names may be considered synonymous as regards their functions. He is at once the peace officer and the Tribune of the people—a terror to evil doers and the spokesman on behalf of the oppressed. But he is further responsible to the District Magistrate for the due collection of the Revenue, and this is practically the most important duty that devolves upon him in modern times. He must make himself locally acquainted with the lands held by each proprietor, and see that each bears his due

<sup>1</sup>會典 Chüan 134 Sec. 保甲.

proportion of the public burdens. He is either paid a fixed salary levied by the people themselves, or he receives considerable perquisites in the shape of fees on land transfers and for drafting deeds, petitions, etc.

But the value of the *chia* and *pao* system in a political point of view is that the members of each group are mutually responsible for the good conduct of one another. There are various enactments where the members of the Tithing are specially declared to be punishable if they neglect to give notice of certain offences, but apart from that, the idea is continually cropping up in the expression *kan chieh* 甘結. Whenever any individual wishes to do anything out of the ordinary he must produce a *kan chieh*. This *kan chieh* is nothing more nor less than the *frank-pledge* of our Anglo-Saxon forefathers. It is simply a document where the neighbours voluntarily, freely, frankly (*kan*) pledge or bind (*chieh*) themselves by their personal knowledge, for the respectability of the individual and his good faith, or whatever else it may be in the particular transaction. In regard to the law of Frank-pledge, Hallam (*Middle Ages*, Chap. VIII, Part 1) says "The members of a Tithing were no more than perpetual bail for one another. The greatest security for the public order (say the laws ascribed to the Confessor) is that every man shall bind himself to one of those societies which the English in general call freeborgs, and the people of Yorkshire ten men's tale. This consisted in the responsibility of ten men, each for the other, throughout the kingdom, so that if one of the ten committed any fault the nine should produce him in justice. . . . The obligation of the Tithing was that of permanent bail, responsible, but only indirectly, for the good behaviour of their members." Compare with this the language of the Chinese authorities. "The system of the *pao* and *chia* has been established in order that the members may mutually make inquiry and know one another, to the end that traitors and evil doers may be put down and thieving and robbery repressed" (Chia-ching 16th year Decree, *Hwei Tien*, Chap. 134, p. 9); and again Sacred Edict 15th Maxim "Knit together

the *pao* and *chia* in order to suppress robbery. . . . A register book is prepared in order that there may be mutual inquiry in respect to who are coming, going or residing. If things are lost out of one family, the other nine are involved. . . . When evening comes, inquire is there any strange person in such a man's house? If there be any strangers without particular business or any of doubtful character who can give no good account of themselves, let them be instantly informed against, and on no account suffered to remain in the *chia*."

The obligation to denounce bad characters is put in the clearest terms, and conversely the duty of pledging and binding one's self on behalf of the good is equally enjoined by custom if not by written law. A respectable man, if asked for evidence of character, will produce at once a *kan chieh*, the Frankpledge of his neighbours in the same *pao* or *chia*.

Tithing is an old English word which exactly translates *Chia* (甲). Sir Ed. Creasy (*History of England*, Vol. I, Chap. 6) says "The Ceorl was a member of a tithing; that is to say he and his neighbours of the same rank were enrolled in a little community, originally but not always consisting of the heads of ten families, each member of which was surety to the State for the good conduct of all the rest. They chose among themselves their Headman, their decenary or Tithing man who was the peace officer of the district. Also under his presidency they exercised a salutary jurisdiction over members of their own body about local disputes of small value but frequent occurrence. A number of tithings grouped together made up the Hundred,—a combination for local self-government very general among all the Germanic and Scandinavian nations."

It is certainly very remarkable to find the exact counterpart of the Anglo-saxon Tithing and Hundred in the *Chia* and *Pao* of the Chinese. But the analogy does not go far. In the Teutonic race the Hundred developed into a court of justice, presided over by its own ealdor, alderman (a word which is the precise equivalent of the



Chinese *chang* (長) Elder, *Pao-chang* (保長) Elder of the *Pao*) and under his leadership had the right of appearing and taking part in the discussions of the shiremote, if not in the highest assembly of the nation; whereas in China it barely moved from the original groove, and even lost its usefulness as a guarantee of mutual security.

The system still survives but in a greatly modified form. The *Chia* or tithing has disappeared but the *Pao* or Hundred remains. It is no longer, however, an association of families for mutual security, but a territorial division of the District or Hsien for purposes of land registration and for collection of the land tax. Two or more villages are usually grouped together and these elect a Headman or in some places several Headmen, now known by various names as *Pao-chang*, Elder of the *Pao*, *Hsiang-chang*, Elder of the village or *Ti-pao*, Land officer. The election is for no definite time and the office tends to become a monopoly. The functions of these village headmen have been described by Dr. Arthur Smith in his interesting book *Village Life in China*. They are the connecting link between the District Magistrate on the one hand, whose multifarious duties tie him to his post, and the peasantry on the other. It is through them or with their assistance that the land tax is collected, which implies a personal knowledge of the ownership of the numerous small parcels of land held by the village community. They are also the agents for organising the *Corvée*, or State services when an official call is made for such purposes. The main object for which registration of families is required is that the state may know to what extent each is liable. Families owning land are required to contribute, if money is needed, in proportion to their holdings, and every individual over the age of 16 is required to give personal service. In olden times this was a serious burden, especially in those parts adjoining main routes where high officials were wont to travel. Carts, mules and porters had to be provided for all persons traveling on government service, besides entertainment for them and their retinues. To some extent these levies are

still made, but the principal calls in modern times are on works of urgency, such as the repair of embankments of rivers and canals, when threatened with floods or in event of a breach. Whatever the call may be, it falls on the village headmen to organise the labour and apportion the work in proportion to the means of each family.

The headmen also exercise a general supervision in matters affecting the community as a whole such as the regulation of fairs, markets or the village festivals. As the Government has made no provision for local administration, it is left to the people to take any steps they please for the public benefit. In ordinary times little or nothing is done, it is only when some emergency occurs, such as the repairing of a broken down bridge or the rebuilding of a ruined temple, or perhaps a threatened raid by bandits that they are roused to action. The headmen then call a public meeting to settle what should be done and how the expense is to be met, after which it devolves on them to carry out the work. We have here all the germs of local self government, but the defect is that the whole thing is voluntary, and consequently nothing is done except under the stimulus of extreme necessity. Roads, sanitation, water supply, lighting, etc., are left to take care of themselves, because it is nobody's business in particular to attend to them. But all that is needed is compulsory powers to levy a rate for works of general utility, in particular for the maintenance of roads, waterways and for drainage. The Government as at present constituted does none of these things, but the village administration with its popularly elected representatives, is well constituted to undertake such duties, if only armed with the necessary authority. Co-operation of the kind is well understood among the Chinese, and they are not averse to finding the money when the results are visibly manifested in improved conditions.

Another useful function which the village headmen perform is that of settling disputes between private individuals or families, but here again the weak point is that they have no judicial authority, and can only act as con-

ciliators or peacemakers. The only court of first instance is that of the Hsien or Magistrate of the District. A Hsien is comparable to a large English County, and the court is quite inaccessible to the mass of country villagers, both on account of the distance and the difficulty of presenting their complaints when they get there. Justice should be brought nearer to their doors, and it is suggested that this might be done by making the headmen Justices of the Peace with power to hold a court petty sessions, say once a month for a group of villages or alternately in each village. Much trouble might thus be avoided and even clan fights between villages, if a private wrong could be investigated and determined on the spot, instead of allowing it, as unhappily is too often the case, to rankle and grow into a feud in which redress is sought by force of arms. The pages of Dr. Smith's book quoted above show many instances of such lamentable occurrences.

Practically the whole of the rural population of China live in villages, being drawn together by a sense of mutual security. Isolated farm houses are seldom if ever to be found. The villages are of all sizes from a hamlet of a dozen houses to a fair sized town of four or five thousand inhabitants. The main and for most of them the only industry is agriculture. The inhabitants own the surrounding fields but always as individual proprietors. The community is not a village community in the sense of owning their fields in common, such as prevails in certain parts of India. Occasionally a village may have been founded by a wealthy family which became possessed of a considerable tract of arable land, and for a time the bulk of the inhabitants may bear the same family name, say *Wang*. The village will then become known for all time as the Wang Family Village. But in process of time, by division and subdivision among male heirs, the land gets parcelled out into small individual holdings, which in turn get sold or transferred and a mixed population ensues.

One object which the legislator would seem to have had in view in framing the foregoing rules is to prevent the accumulation of lands in the hands of powerful



families, as for instance by accepting fictitious conveyances, or by illicit assumption of the office of Headborough, that is Tax Collector. There may have been a tendency at one time when political troubles were prevalent, for small proprietors to seek the protection of powerful neighbours by conveying their lands in trust and taking a re-grant as tenants, in which case they would escape the taxes and calls for services for which they would otherwise be liable. With a weak executive the wealthy proprietor on the other hand would be able to ignore the official calls and set the Yamen officials at defiance, with the result that in great part the taxes would be uncollectable.

But such a danger if it ever existed has long passed away. A landed aristocracy has never been able to maintain itself in China mainly it would seem by the levelling influence of the law of succession, under which the splitting up of family properties sooner or later becomes inevitable. Modern Chinese villages live their life uninfluenced by aristocratic surroundings. They form a pure democracy and are free to hold meetings and form associations for any purpose so long as they do not come up against the Criminal Law. One of the principal objects of the village combination is security against predatory bands of highway robbers. For this object most villages of any size build a mud wall or rampart, and place gates at the points of entrance and exit. The repair and upkeep of the wall and gates is a charge on the community under the control of the headmen.

But as regards the collection of the land taxes, while the Central Government, by the system of individual registration, have evaded the creation of a class of middlemen, like the Zemindar class in India, it has fallen a victim to its own weakness by its inability to ensure correct return from its own officials. Notwithstanding numerous enactments requiring all revenue officers under severe penalties to keep and make accurate returns of all their receipts and expenditure, it is notorious that for centuries this has never been done. As a makeshift each collecting area is

assessed at a minimum amount, which the responsible officer is bound to produce. At the same time he is nominally enjoined to report any surplus he may collect over and above the stipulated amount, but this is universally disregarded. The result is that every District Magistrate is constituted a Revenue Farmer, and the surplus, for there always is some surplus, becomes his official perquisite.

The fault lies in the weakness of the Government and not in the machinery of collection. Reform will no doubt come some day, and when it does come the reformer will find in the *Pao* and *Chia* system a ready made foundation on which to build. If the holding of every family is registered in the *Pao* in which the land is situated, as it is supposed to be, then the records of the District Yamen should show a complete list of all taxpayers and the sums payable by each. As a matter of fact it is believed that little or no land escapes taxation altogether, and the method of collection is simple. Tax receipts are issued from the District Magistrate's office to the subordinate officials charged with this duty who with the aid of the several *Pao-chang* or Headmen collect the money and hand over the receipts in exchange. The system seems complete enough and it is not here that leakage occurs. It needs a staff of trustworthy Inspectors to trace the returns from stage to stage up to the Provincial Treasury, and from that to the Central Government, and that has been the paramount difficulty.

## CHAPTER V

### LAND TENURE AND TAXATION.

#### SECTION 90. TRANSLATION.

##### *Fraudulent Evasion of the Land Tax.*

Lü.

Whoever fraudulently evades payment of the land tax by neglecting to enroll his Family on the Tithing Register, and to enter his land upon the District Land-Roll, shall be liable to a penalty not exceeding 100 blows. The land shall be forfeited to Government and the owner shall be required to make good all arrears according to the number of *mow*, the rate, and the length of time during which he evaded payment.<sup>1</sup>

Whoever, having his land once entered on the District Land-Roll, procures any part of it to be placed in a lower class than that to which it originally belonged, by altering the original divisions and subdivisions of the lots, and thereby obtains a reduction of the yearly land tax; and whoever fictitiously conveys his land in trust to a person exempted from personal State service<sup>2</sup> or who has just completed his services, and thereby himself obtains exemption from the services due in respect of the land, shall in each case be punishable as for fraudulent concealment. In the latter case the Trustee shall be equally punishable, and in both the necessary correction shall be made, and the owners shall be bound to render their proper quota of State services.

The Tithing-man neglecting to give information of the evasion shall, if cognizant, be equally punishable.

People who are returning to their homes after a famine may take up as much of their old lands as they can manage to cultivate, and the quantity should be reported to the authorities for entry so as to ascertain the amount of land tax for which each is liable.<sup>3</sup> Persons

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<sup>1</sup> Among the voluminous notes to this chapter we are told that the test of forfeiture is registration or non-registration. Land once recorded as cultivated cannot evade payment altogether. It may be got into a wrong category by misrepresentation, but in that case "as the total amount of tax leviable is a constant quantity, if one part pays less another part must pay more," and it is only a question of adjustment 改正.

<sup>2</sup> As for instance one of the 紳衿 *literati* class; Vide Section 80, Li 3 and 4.

<sup>3</sup> By Rescript to a Memorial dated the 51st year of Kien Lung, showing that in certain districts the people had during a time of famine been obliged to sell their land at three-tenths of its ordinary value to wealthy purchasers from neighbouring Provinces, it was ordered that all such lands should be redeemable by the sellers within 3 years on tender of the original price, whatever the terms of the sale may have been, and even when the land had passed into the hands of third parties for value.



who take up more than they can cultivate, and allow it to remain waste shall be punishable in proportion to the amount of waste not exceeding 80 blows, and the land shall be forfeited to government. Those families who have hands enough to cultivate more than their own lands may apply to the Authorities for a grant of a portion of the adjoining waste lands.

LI.

1.—If the Bailiff of lands acquired by purchase (i.e. not by Imperial Grant) belonging to any Member of the Imperial Family, openly refuse to pay the taxes and other dues, such Bailiff shall be punishable by the local officials under the law affecting Government officers who conceal the amount of their taxable land. Any member of the kindred who sanctions such refusal shall be dealt with by the Imperial clan court, and the amount due shall be made good. If the local official pass over such refusal without reporting it, he shall be liable to censure at the instance of the High Provincial Authorities.

2.—Any person who procures the taxes legally payable in respect of his own land to be apportioned upon the lands of others, shall be punishable as for misappropriation of that amount. The land shall be forfeited to government and the guilty party shall be required to pay up the amount evaded.

3.—In cases where lands have been fictitiously conveyed to another person as Trustee with a view to evasion of public burdens; such Trustee may escape the penalty by himself volunteering information of the fact.

4.—If in any one hundred 里, there is a mislevy of the land tax to the extent of two hundred piculs, the clerk responsible for the collection shall be liable to the punishment of military servitude on a near frontier.

5.—When the time for collecting the land tax comes round, the Magistrate shall have triplicate slips prepared beforehand, containing the names of every tax-payer arranged in Hundreds and Tithings, and the amount payable by each. One set of these slips is intended for receipts to be issued to the tax-payers, another set is for the use of the person charged with the collection in each Hundred, and the third is to be deposited in the Magistrate's office in order to check the returns. As each payment is made the slip is filled up and given to the payer as receipt. The slips still remaining would show at once the persons that had not paid, who should be proceeded against by the Authorities. If there appeared to be any discrepancy between the slips and the amount actually received, the fact would show some malpractice on the part of the clerks, and the matter should then be strictly inquired into and the parties punished.

## SECTION 91. TRANSLATION.

*Inspection of Lands in Times of Distress.*

Lü.

Whenever any part of the country is suffering from a general calamity, caused either by floods, drought, frost, hail, or locusts, to such an extent as to entitle the owners to an abatement or total remission of the land tax, the local officials on being informed of the fact shall immediately take the matter in hand, and proceed to make an inspection and at the same time report to their superior officers.<sup>1</sup> The latter on receiving the information shall depute a special official to make a further inspection. Penalty for neglect in either case to be 80 blows. If the officials whose duty it is to make the first and further inspection respectively, do not proceed in person to the districts affected, or if though actually present, instead of vigorously and carefully ascertaining the truth for themselves, they carelessly depend upon the reports of the Tithing men and Headboroughs who may purposely represent mature crops as blasted or *vice versa* and the area entitled to abatement is thus made to appear either greater or less than it actually is and thereby the Government is hoodwinked or else an injury is inflicted upon the people, such negligent officials shall be punished with 100 blows, deprived of their rank and suspended from employment. If the land-tax has actually been levied upon such an erroneous basis, then the officers concerned shall be further punished as for embezzlement of the amount involved, that is to say of the amount levied in excess or under-levied as the case may be. The Tithing men and Headboroughs shall be liable to the same penalty. In cases where an official has accepted a bribe for making a false return, he shall be punished under the statute against bribery for an illegal purpose.

If the erroneous return of the extent of the area under distress is merely accidental, the official shall be punished in proportion to the magnitude of the error but not exceeding 80 blows, and the offence being in his public capacity he shall not be deprived of his rank or employment.

If any private individual falsely reports his lands to be suffering from a calamity by representing really productive plots as being

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<sup>1</sup> It does not appear that there is any absolute rule as to the amount of loss which gives a right to claim a remission. Each case is considered by itself, and theoretically it is all a matter of free favour on the part of the Emperor. There are numerous cases on record within recent years where a remission has been granted, but perhaps it may be said that the distress in each case was so great as to render collection impossible.

unproductive, he shall be liable to a penalty not exceeding 100 blows, and the land shall be forfeited to Government. He shall also be liable to make good any abatement of taxes which he may thus have fraudulently obtained.

# LI.

1.—Whenever a famine occurs in any part of the Empire the Officials of the place shall at once open the granaries and issue relief to the people. Afterwards they are to memorialize the Throne for instruction as to remission of the taxes and further relief.

2-4.—[Further measures to be taken].

5.—If locusts appear in any part of the country, the Officials of all ranks both civil and military shall proceed with a number of hands to the spot and personally superintend the operation of catching and destroying them, which must be thoroughly carried out. Labourers employed for this purpose to be paid some wages to purchase food, and expenditure thus incurred may be charged in the Officer's accounts with the Provincial Government. If successful the High Provincial Authorities will report the case for an appropriate honorary reward. But if the insects are allowed, through dilatoriness on the part of the officials, to injure the crops, an inquiry must be set on foot in order to ascertain in what place they originated and what places they spread to, and the negligent local officials shall be handed over to the Board for the proper penalty. The High Provincial Authorities will also be liable to censure.<sup>1</sup>

6-9.—[Remission of land-tax on account of famine—rules for].

10.—No taxes shall be levied upon newly-cultivated lands until after the expiry of 6 years in the case of alluvial fields and 10 years for dry fields. After that date the lands must be re-surveyed and classed by a deputy from the Provincial Government. If on such survey it appears that any portion of the land has been washed away by water or inundated, or is utterly rocky and barren, no entry shall be made on the tax-paying registers in respect of such portion. Disregard of this

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<sup>1</sup> The notes to this section contain a set of regulations published in the 23rd year of Kien Lung for the guidance of the people in dealing with a plague of locusts. One clause prescribes the method of driving them, while yet in the immature state, into a trench, and then setting fire to them or burying them. Another directs the authorities to fix a scale of payment by weight for those caught by private individuals. It is stated that the nature of the locust is to move towards the sun—so that in the morning they move eastwards, at noon southwards, etc. In all measures for destroying them this principle must be kept in view, else confusion will be the result. Leather thongs are recommended as the best thing to kill them with.



to be punishable as for carelessness in inspecting lands suffering from famine.<sup>1</sup>

11-13.—[Remission of taxes in event of partial failure of crops].

14.—Districts adjacent to the sea or to lakes and rivers being liable to sudden inundations, if any such happens, the local Authorities shall on the one hand report to their Superiors and on the other proceed to the spot, and after making themselves thoroughly acquainted with the nature of the disaster, shall devise such instant measures of relief as the law requires.

15.—When lands by the side of rivers or on alluvial islands fall in and are washed away by the current, the Proprietor is bound to report the fact to the local Authorities in order that the damage may be surveyed and an entry made on the land Register. Likewise, whenever an accretion of new land is formed by the action of the water, the fact shall also be reported and a survey made, and an allotment shall be made out of such new land sufficient to make up for the previous loss, but the Proprietor of the adjacent land shall not be permitted to take lawless possession of more than he may have previously lost, nor shall any allotment at all be made to him out of the accretion unless he have previously reported his loss. In respect of Proprietors on the other side of the river who have suffered loss through the action of the current, and have duly lodged their claims, an allotment shall be made to these out of the surplus of newly-formed lands, and if there be not enough to satisfy them all, those who have first lodged their claims shall take precedence. If there is still land over after all claimants have been indemnified, it may be allotted under official deeds to any poor cultivators at the discretion of the officials. As heretofore all such grants must be reported by the officials making them, and at the general quinquennial survey a further inspection shall be made, and an

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<sup>1</sup> The 戸部則例 contain the following additional regulations regarding the allotment of waste lands. Any person resident or not may apply for an allotment of public waste lands. On any such application, the Magistrate will survey the plot in question, and then issue notices stating the proposed allotment and warning all persons who may have any claim to the ground to enter an appearance within 5 months. If no appearance is entered, he then proceeds to make the allotment, granting an official Deed in proof, and after the usual delay the taxes are payable. If the grantee fails to bring the land under cultivation in a reasonable time, the Deed may be cancelled, and the land again becomes public property. Should there happen to be old graves upon the land thus allotted, the ground round about must be left untouched for a distance of 40 feet, no interference to be permitted with water-ways, Government barrier stations and the like.

amended land roll sent to the Board so as to determine what lands shall be struck off or placed upon the tax-paying register.<sup>1</sup>

When land is reported as being washed away in one district and thrown up again in another adjoining district, an officer shall be deputed to meet the two territorial Magistrates, and they shall, after examination into the special circumstances of the case, proceed to make some equitable allotment.

If new lands have been taken possession of in a high-handed way, the wrong-doer shall be punished under the statute against wrongfully cultivating Government lands, and the land itself shall be forfeited to Government. If the local officials through carelessness allot newly-formed lands to parties not entitled thereto, they shall be liable to censure as for carelessness in examining famine-suffering lands.

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#### SECTION 93.

##### *Fraudulent Sale of Lands or Houses.*

Lü.

Whoever fraudulently sells Land or Houses the property of another person, or exchanges worthless land of his own for the good land of another, or wilfully lays claim to another person's land and buildings, or in executing a Deed for the sale or mortgage of Land or Houses

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<sup>1</sup> The law regarding accretions has an important bearing on the question of water frontage on tidal rivers where there is a tendency to silt up. According to the rule here laid down a proprietor has no absolute right to new land which may grow up by the gradual action of the water adjoining his old—mother-and-child-land as the Chinese put it—unless he can show that he has previously lost a corresponding amount. If, for instance, a person owning land higher up the stream could show that part of his land had been washed away, he would be entitled, so to speak, to follow it and come in between the other and the water. New land is theoretically public property, subject to the equitable claims of the adjoining owners. *Ceteris paribus* the contiguous owner is to be preferred, and he may lodge his claim while the new land is still in the condition known as 水影 or 白坦—a bank partly or wholly covered with water (Rescript of Chia Ch'ing, quoted in Notes).

The rule, however, purely contemplates an agricultural state of affairs where land is valuable only for growing crops. In the case of navigable rivers, where land is mainly valuable as affording access to the water, a different principle would necessarily come into consideration.

The Rescript of Chia Ch'ing is as follows:—

"When new land is formed by accretion connected with the adjacent bank in the nature of mother-and-child, the owner of the adjacent land, if he has previously reported a loss by washing away may lodge his claim while the land is partly submerged and it will be put on record. Afterwards when reeds grow up, enough of the new land will be allotted to him to make up for his loss (apparently without payment). If there is any war, the public will be invited to *sheng-ko* the land and undertake the cultivation. If it is not mother-and-child land no preliminary claims can be lodged."

inserts a fictitious price, or encroaches upon and appropriates lands or houses belonging to his neighbour, shall be liable to a penalty not exceeding 80 blows and two years' banishment. If the lands and houses so sold or appropriated are Government property, the penalty shall be two degrees more.

Whoever by force takes possession of either public or private hill grounds (as hunting grounds, burying grounds, etc.), lakes or ponds, tea gardens, reed grounds or furnaces for smelting gold, silver, copper, tin or iron, shall be liable, irrespective of the quantity of the land, to a penalty of 100 blows and perpetual banishment to a distance of 3,000 *li*.

Whoever conveys by way of gift to an Officer of Government, or to a person of power and influence, land the ownership of which is matter of litigation, or which is wholly the property of another person, and whoever receives any such gift, shall be liable to a penalty of 100 blows and banishment for 3 years.<sup>1</sup>

When land has thus been fraudulently sold or conveyed by gift, all rents and profits arising thereout while in the wrongdoer's hands, as well as interest upon the price where money has passed, shall be paid over to the rightful owner.

If High Officers of Government are guilty of such malpractices, the Throne must be memorialized for a special Decree.

#### LI.

1. If any one under colour of a sale or mortgage conveys by deed of gift to any Prince of the Imperial Family or to an Officer of Government or to a Family of rank and influence land of one or other of the following classes, viz. land the title to which is matter of litigation, or land which the transferor had already sold to a third party, or any land which has been (newly) put on the tax Register, or if land the property of any temple is thus given away by the Priests, lastly if old family burying-grounds are thus conveyed

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<sup>1</sup> The object of this proceeding would be to obtain the favour and protection of some influential person and so harass and annoy an opponent. Great injustice was often done in rural places in this way. The wealthy family is perhaps that of some high officer of State whose eldest son has inherited hereditary rank or whose brothers shelter themselves under his powerful name, or a wealthy merchant may have purchased rank higher than that of the local officials. In such cases the latter are powerless,—their summonses and orders are disregarded, they cannot arrest the person of any member of such privileged classes, and the Yamen runners would be kicked out if they tried to seize any of his property. There is of course a means of bringing them to book by an appeal to a sufficiently high court, but even then bribery would probably be resorted to, and few persons would have the courage or means to press a case against an influential opponent so far. The fact that it was deemed necessary to insert in the code a law of this kind is a confession of the incompetency of the courts of justice. If they could be relied upon in every case, it mattered not what presents one man might give to another.



by the younger generations, the persons so conveying shall be liable to banishment for military servitude on a distant frontier and the land shall be restored to the rightful owner. The head of the family thus receiving the gift and the bailiff of the lands shall be reported for investigation and punishment.

All the waste lands in Chihli and all the other provinces shall be free to the public to reclaim and cultivate to the full extent of their means, and after the usual period of exemption shall be placed on the tax Register. But any attempt to get possession of land by encroachment or force or under colour of a gift shall be punished as provided for in the above law.

2.—Any one who takes forcible possession of *t'un* lands (that is, lands which have been allotted to military colonists) to the extent of 50 *mow* or upwards shall, besides being required to pay arrears of taxes, be liable to banishment for military servitude to a near frontier. The owners of *t'un* lands who sell or mortgage them to the extent of 50 *mow* as well as the purchaser or mortgagee, shall, the taxes being unpaid, be each liable to a similar penalty. If the quantity is less than 50 *mow* and if the taxes are duly paid, or if the land was taken possession of on account of its lying waste or if under these circumstances it is sold or mortgaged, the offender shall be dealt with under the law relating to Government lands.

3.—The opening and working of coal mines, stone quarries and lime kilns in the western hills being adjacent to the Capital is prohibited. If any officials or heads of wealthy families do so, they shall be liable to a month's cangue and to banishment for military servitude to a near frontier, but in the case of officials in the employ of Government, a report must first be made to the Throne.

4.—The civil and military officials in command of any frontier may issue orders prohibiting the cutting of trees in any particular locality<sup>1</sup> which requires to be protected, and any person disregarding such prohibitions shall be liable, if he has appropriated the trees, etc., cut down, to banishment for military servitude in the marshy districts of Yunnan, etc., or, if he has not derived any pecuniary advantage, to

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<sup>1</sup> Generally speaking it is open to any one to cut down wood on the hills and other unoccupied ground. The exception here proves the rule. The places which would require protection are old burying grounds, sacred groves, places affecting the *Fung Shui*, Imperial hunting-grounds, etc. Except when so forbidden any one may cut timber and sell it. All hill ground and land not allotted for cultivation is public property, and whatever it produces naturally may be appropriated by the first comer. The consequence of this rule is that the whole country within reach of populous districts is almost entirely denuded of trees. This is more especially noticeable in the northern provinces where firewood is in demand during the winter months. It is not uncommon at that season to see gangs of men cutting down and even rooting up every vestige of tree and shrub over whole tracts of country.

a penalty of 100 blows and 3 years' banishment. If the officials themselves participate in such offences they shall be deprived of their rank and punished under the law relating to embezzlement by an officer in charge. If the guards at barrier stations knowingly permit timber thus unlawfully procured to pass, they shall be liable under the law for wilful non-arrest of an offender. The Superior Officer and the local civil officials shall be reported to their several Boards for the appropriate penalty.

5.—When surveying the arable land in a province the practice of restraining new cultivators from reporting their holding is abolished.

6.—If lands which have been set apart for maintaining ancestral sacrifices are alienated by the descendants of the family interested to the extent of 50 *mow* or upwards, they shall be punishable as for selling a family burying ground, viz., with banishment for military servitude to a distant frontier. If the lands are less than 50 *mow* in extent or if lands dedicated to charitable uses (義田) are sold, the punishment shall be the same as for fraudulently selling Government land. The sale of buildings long used as ancestral temples is also forbidden under a penalty not exceeding 3 years' banishment. In each case the purchaser, if cognisant of the illegal nature of the transaction, shall be equally punishable. The land or buildings shall be returned to the custody of the elder of the clan and the purchase money shall be forfeited to Government. Provided, however, that in each case there must be distinct evidence, either of a public or private nature, to establish the fact of the land having been duly dedicated for ancestral or charitable uses as the case may be, such as an inscription on a stone tablet, a formal report to the authorities or a public document drawn up by the whole of the kindred. Any complaint laid without such proof in order to raise strife shall be punishable as a malicious accusation.

7.—If the domestic slaves and land bailiffs who are left in charge of lands in Shengking while their masters are absent at the Capital, fraudulently sell such lands, they shall be punishable in the same way as persons who alienate lands left for ancestral sacrifices. If of less than 50 *mow* in extent or if buildings belonging to their masters are sold, the case shall be treated as if the property belonged to Government. The purchaser and negotiator of the sale shall if cognisant be equally punishable, the property shall be returned to the rightful owner and the price paid shall be forfeited to Government. If a groundless charge of this nature is made in order to cause strife, the false accuser shall be punished.

8.—In all cases of litigation respecting the ownership of hill burying grounds, the possession of a duly stamped Title Deed shall be

sufficient proof when the property has been acquired within recent years, but when the origin of the land in dispute dates long back the ownership must be established by a reference to the old Yamen Registers and the annual tax receipts which must tally with the actual description of the land. If they do not tally, or if no stamped tax receipts are forthcoming, then the bare production of old deeds, or of stone tablet, family genealogies and that sort of thing shall not be conclusive proof. Persons laying groundless charges of encroachment shall be punished according to the usual law.

9.—The lands belonging to the hereditary chiefs of native tribes cannot be alienated. If any sale or mortgage of such is attempted the purchase money shall be forfeited to Government, and the purchaser shall be dealt with as for fraudulent purchase of land to which the seller has no title. If the native chieftains themselves sell their land or otherwise are guilty of high-handed acts they as well as the superintending Imperial Officer shall be handed over to the proper Board for a penalty.

10.—There is no objection to people who own hill land letting the same out for cultivation to squatters of the same locality, but where hills lands are owned in common by several persons, if one of them unknown to the others invites people from another district to come and build their booths and break up the land for cultivation, he shall be liable to the same penalty as for selling land dedicated for the support of ancestral sacrifices, viz., banishment with military servitude. The renter under such circumstances shall be liable as for wrongfully breaking up the public threshing floors, drill grounds, etc. In offences of this nature the punishment shall fall on the elder of the family concerned and not on his sons or younger brothers, but the senior of the clan and the controller of the ancestral temple shall also be liable for punishment if they overlook the wrongful act. Each shall be liable to a severer punishment if the bringing in of such people leads to quarrels and robbery or murder.

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#### SECTION 95.

#### *Mortgage and Sale of Lands and Buildings.*<sup>1</sup>

Lü.

All mortgages and sales of lands or buildings made otherwise than by means of deed on which the legal duty has been paid shall render the party conveying liable to a penalty of 50 blows, and half

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<sup>1</sup> In Staunton's Translation this chapter is called the Law of Mortgages. That is not a correct description of it. It is primarily the law of transfer,—the law which regulates the mode of alienation, being the second of the conditions of common tenure which is discussed in the commentary. To

[Note continued on next page].



the purchase money shall be forfeited to Government. If the transfer is not duly recorded at the office of the District Magistrate the purchaser shall be liable to a penalty not exceeding 100 blows and the land shall be confiscated.

If any person having already sold or mortgaged his land or buildings fraudulently does so again to a third party he shall be punished as for theft of the amount of the purchase money, which shall be returned to the second purchaser, and the land shall remain the property of the first purchaser. But if such second purchaser and the middleman were aware of the illegality of the transaction they shall be punishable equally with the seller and the purchase money shall be forfeited to Government.

All mortgages of lands, houses, gardens, plantations, mills, etc., shall be redeemable at the expiration of the period stated, upon tender of the original price. A mortgagee who refuses to deliver up possession shall be liable to a penalty of 40 blows, and also shall be bound to account to the true owner for all profits accruing out of the mortgaged property subsequent to that date. If, however, the mortgagor cannot at the proper date find the means of redeeming his property this clause shall not apply.

#### LI.

1.—No action shall be brought in respect to the division of family property after a lapse of 5 years or upwards from the date of such division, nor earlier if the several members of the family have signed a deed of partition. Similarly, if the seller of land has once formally executed a deed of sale, he cannot afterwards redeem.

2.—[Members of Banner force purchasing land in the provinces, how dealt with—obsolete].

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convey a good Title the first requisite is a 稅契, that is a Deed which on the face of it shows a receipt for the Government duty of 3 per cent., and the purchaser or mortgagee must further see that his name is entered on the District land roll as liable for the annual taxes and other calls incident to the land. The Commentary to the Code explains that the punishment for neglect of the former, that is non-payment of duty, is light, because it only affects the 官, whereas that for the latter is heavy, because it affects the people 民, meaning probably that if one owner escapes payment of his land-tax the others would have to make it good. In practice, however, both these conditions are often evaded. In some parts of China the province of Shansi in particular, what are called white Deeds, that is Deeds which do not bear the red seal of the officials, pass current as giving a good title, and in selling land it is often part of the bargain that the seller shall continue to pay the taxes. It would be a question of course how far local custom could be relied upon to uphold such informal sales.

典 典 *lien*, generally translated mortgage, is more like a sale than the transaction we call a mortgage. The money advanced is always nearly if not quite up to the real cost, the mortgagee enters on possession and takes all the rents and profits. No interest is stipulated for. It only differs from an absolute sale in that the mortgagee is bound on receipt of the original price to reconvey. So long as he remains in possession he is clothed with all the rights and duties of an ordinary land-owner.

3.—When a Deed of Transfer shows on the face of it an absolute sale and does not contain the words "further payment to be made," the property cannot be redeemed, but wherever a Deed does not show an absolute sale or wherever it contains a clause expressly providing for redemption after so many years, the seller shall be at liberty to redeem. If he be unable, then the middlemen who negotiated the first transaction shall determine what further sum the buyer should pay, and thereupon the seller shall execute an absolute Bill of Sale. If, on the other hand, the purchaser declines to pay such further sum, he may dispose of the property to any third party and recoup himself the original advance. Any person who after an absolute sale brings an action either asking for an additional payment or claiming a right to redeem, and any one who endeavours to reduce the payment for which he is liable by alleging that the property should first have been offered to the prior owners or to the kinsmen or neighbours of the seller,<sup>1</sup> shall be liable to the penalty for an unlawful act. So no one can claim to redeem his property till after expiration of the period named.

4.—When confiscated lands or criminal slaves are purchased by members of the Banner corps they may be paid for either in ready money or by a set-off of salary accruing to the purchaser, and a title of ownership will be issued from the Headquarters of the Banner after a certificate has been received from the Board of Revenue showing the receipt of the money.

5.—Bannermen who are in the grain transport service are not permitted to mortgage the lands allotted for their support. If any one does so he will, besides being punished as for selling Government lands, be expelled from this service and the lands will be given to his successor. The mortgagee will be liable to the same penalty and the mortgage advance shall be forfeited to Government. There is no objection to their letting their lands to Chinese at an annual rent, provided that those who serve for the year only receive no more than the current year's rent. If any such annual incumbents give leases for a term of years, receiving the rent in advance, they as well as

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<sup>1</sup> This seems to confirm the statement, for which however I cannot find any direct authority, that formerly a man could only sell his land when obliged to for his own support, and that then he was obliged to offer it first to the original seller next to his own kinsfolk and lastly to the adjoining land-owners. It was only in the event of all these declining to buy that he could sell to a stranger. In the case of old family property the kinsmen in order of nearness would have the option of purchasing. The prevailing theory probably was that the land was in pawn to the present occupier,—the family of the prior holders still retaining a qualified interest in it. Compare with this the 4th Chapter of Ruth, where Boaz, wishing to purchase Naomi's land, first gave the refusal of it to "the kinsman who was nearer" than he: the latter was willing to buy the land, but finding it coupled with the obligation to take Ruth also, the widow of the legal heir, declined the honour, and Boaz took both.

the lessees shall be punished two degrees less than for selling Government land.

6.—If lands in any of the provinces which have been allotted to any corps of grain transport men are sold or mortgaged to the common people they must be redeemed. If Yamen employees appropriate to their own uses the produce of lands which ought to go to the maintenance of grain junks under the plea that their clan are the controllers of the service, they shall be liable as for misappropriation of land tax, and if grain transport men fraudulently claim common tenure lands they shall be dismissed from the service. Officials who connive at such illegal claims or neglect to punish such cases shall be liable to censure.

7.—Hereafter, in all Transfers of land among the common people if the transaction is meant as a mortgage the deed shall contain a clause providing for redemption, or if an absolute sale it shall expressly say that the land cannot be redeemed. By the law passed in the 18th year of Kien Lung no deed of mortgage-sale executed within 30 years prior to that date should be deemed final unless it bore on its face the words "absolute sale," and the seller could within that period exercise his right of redemption or of claiming a further payment, but all deeds of an older date, unless they expressly contained a proviso for redemption, should be deemed as conveying an absolute right to the land.

8.—All fees received as duty upon land transfers shall be entered by the District Magistrates in a separate account. On presentation of the Deed for the payment of duty, which should be done by the purchaser himself, the Magistrate shall attach to it an "annex" bearing the seal of the Provincial Treasurer and return it as the certificate of Title.<sup>1</sup>

<sup>1</sup> The following is a specimen of a native deed of transfer for land in the Province of Kiangsi, with the official annex (契尾 *lit.* Deed tail) attached, which illustrates some of the points here mentioned:—

"A sale in perpetuity of a shop, houses and land. The Seller, Chen Shih-yen, and his three younger Brothers, being the owners of a certain plot of land with houses thereon which was purchased by their father and left to them by him, being in need of money, are willing to sell the same, and their relations 親方 after being duly requested having declined to purchase, they have now agreed through the intervention of middlemen to sell in perpetuity to Kwei Shih-chih all that plot of land [description] for the sum of 300 Taels, which sum they hereby acknowledge to have received in hand, the wine money on signature and cost of offerings to the gods in token of divestiture being included. From the date of this sale the purchaser shall have entire liberty to repair, build, let or himself live in the houses. This is a genuine sale for money now received, both parties acting of their own free will; it is no pretence, nor a set-off against an old debt. There will be no claim hereafter of additional purchase money on the one hand, nor of a right of redemption on the other. This and the old deeds, five in number, are now delivered to the purchaser and will be evidence of Title to his sons and grandsons for ever."

Signed by [Middlemen, 6 in number].

„ [Sellers, 4 Brothers].

[Note continued on next page].



Any Magistrate who does not issue such annex or who appropriates the duties to his own use, shall be denounced and punished according to Law, and his superiors, whether conniving or merely careless, shall be liable to censure.

9.—Temporary mortgages of land or houses made by way of pledge are not liable to duty, but on every sale whether expressed as final or not the regulation duty must be paid. If a mortgage is first made and a sale afterwards, duty will only be leviable upon the amount of the latter.<sup>1</sup>

*Official annex or Deed-tail :—*

"The Provincial Treasurer of Kiangsi under instructions from the Board hereby notifies the form of the annexes to be issued by him through the several district Magistrates to land holders. They shall be numbered consecutively and shall consist of two halves—the first shall as usual contain the name of the proprietor, the area or number of houses and the price paid, and in the blank spaces in the latter over which the seal of the Provincial Treasury has been impressed the duty leviable according to the price stated in the deed shall be inserted in large characters. The proprietor shall be requested to examine it, and thereupon in his presence the two halves shall be divided. The former shall be issued to the Proprietor as his Title and the latter shall be transmitted with the quarterly Registers to the Provincial Treasury. The examination by Magistrate and Treasurer formerly required is hereafter dispensed with. Such being the instructions received from the Board, the Treasurer has had forms printed and numbered and is now directing that they be sent to the several Magistrates so as to be filled up and issued as the occasion arises. Purchasers who do not apply for the annex and pay the duty shall be punished as by law provided and the purchase money forfeited, and Magistrates who use a seal or form other than hereby provided shall be denounced and punished.—Particulars :—

"The proprietor Kwei Shih-chih of [ ] Hsien [ ] tu [ ]  
t'u [ ] chia has bought from Chen Shih-yen of [ ] tu [ ]  
t'u [ ] chia, land and houses situated in [ ] viz. acres [ ]  
houses [ ]. The price of the land is 300 Taels, and in accordance with  
the law he has now paid duty at 3 per cent., viz. nine Taels.

"This deed-annex No. 14,447 is issued to Kwei Shih-chih.—Tao Kwang, 12, 5, 16."

<sup>1</sup> The language of this section will seem somewhat inconsistent with that of the principal law at the head of this section. It indicates a certain change in the law, but at the same time there is a difference in the phraseology in the original. The word *tien* 典 is used in both, but in the first it is coupled with 賣 and in the latter with 當—a difference which might be represented by "mortgage-sale" and "mortgage pledge." In the latter there is a distinct intention to redeem at no distant date, and the subject matter may or may not actually change hands, in the former the right of redemption is merely preserved as a possibility and may never be exercised at all, and the property invariably changes hands. It is probable indeed that in old times the original and only kind of transfer was that known as 典 which we have throughout translated "mortgage," but which differs from an actual sale only in that it leaves the seller the right of getting his land back when he wished or was able to redeem it. This right might apparently be exercised after any length of time, and the presumption that it was capable of being exercised in every case would account for the custom (referred to above) of first offering land for sale to the former owner. In the case of old family lands the right, supposing it to exist, would accrue as an undivided interest to the several descendants of the first taker, and hence, when any member wished to sell his share, the others must first get the option of redeeming, and only on their declining would he be at liberty to alienate to strangers. Whether this arose from positive enactment, or from a notion that the immovable nature of land precluded the possibility of its being sold as a chattel, or whether it was from a natural unwillingness on the part of owners to divest themselves entirely of their old possession,

[Note continued on next page].

## COMMENTARY.

The preceding Chapter dealt mainly with the registration of land and the liabilities which the State attaches to its ownership. The present treats of sales and transfers. It may, however, be convenient here, before discussing these, to take a general view of Land Tenure in China.

## LAND TENURE.

The authorities who have discussed the subject are generally agreed that historically speaking the ownership of land has always vested in the Crown and not in private houses or individuals. They cite in support an old quotation from the *She King* which declares that all the land in the Empire belongs to the Sovereign and all the people within its borders are his servants. This however is no more than to say that the Sovereignty in China has always been autocratic. The Will of the Emperor was law, whether as regards the land or the services of the people. His ownership was rather that of Trustee for the general mass of the people, and was distinct from that of the Imperial Palaces, parks and hunting grounds which were properly the private domain of the Crown. There is no trace, at least in historic times, of feudal ownership nor of the granting of Lordships over tracts of country as a condition of feudal services. On the other hand it is nowhere claimed that there is anything in the nature of allodial tenure, that is absolute freehold tenure exempt from taxes and services to the Crown.

When the Manchu Dynasty came to the throne they made no change in respect to land holding, and with the exception of grants to Manchu Princes and Chieftains, to be noticed below, the peasantry were confirmed in their

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I do not know—probably all three causes were at work; at any rate the concurrent testimony of a number of facts goes to show that it was only with extreme reluctance, so to speak, that the law sanctioned a final separation between a man and his land.

Such a right of redemption, indefinite in point of time, must have given rise to much confusion and litigation, and it was doubtless to put an end to such doubt that Li 7 was passed prescribing a term of 30 years as the period which would bar the right of redemption unless expressly stipulated for.

possessions, subject to the customary dues and taxes. All the arable land in China is held in minute subdivision directly from the Crown, under titles granted by the local authorities. Waste and hill lands that have never been cultivated are the property of the Crown or State, as well as those reserved for public uses, such as roads and the beds of tidal rivers up to high water mark. The Crown is also the final reversioner of all arable lands which for any reason have become tenantless, as from failure of heirs, or from being abandoned on account of famine, civil wars, etc.

On the same principle the State or Crown is the owner of all underground minerals. The title deeds issued to the cultivator give him the right to the superficies merely. They give him no right to go below the surface and extract mineral ores, coal, etc., and of course he cannot give to others a right which he himself does not possess. Mining can only be carried on under licence from the Crown, and subject to payment of the prescribed royalties. No royalty can be claimed by the owner of the soil, the most he is entitled to is compensation for disturbance if he is called up for surrender.

When once an Official Deed has been issued the owner is free to sell or dispose of his land as he wishes without interference on the part of the Government. The land tax is in general moderately light, amounting on an average to one twentieth or so of the gross produce. It is not on the better soils anything like a full rent, and owners who do not farm their own lands can always let them at a rent which leaves something considerable over after paying the Government's demands.

## TWO KINDS OF TENURE,—

### (1) MILITARY, (2) COMMON.

#### I.—*Military.*

Before going on to describe the ordinary tenure, I shall first notice the exception I have referred to as applying to certain lands in the northern provinces,



adjacent to the Court which were held by grantees of the Crown on what may be called a strictly military tenure.

After the conquest of China by the Manchu Dynasty (1644) the Conqueror made large grants of the confiscated lands in Chihli and elsewhere to his followers. The Princes of the Blood, the victorious Generals and some of the Banner Corps in their corporate capacity were thus endowed. A Decree of the first year of the Emperor Shun Chih reads as follows:—"Our Dynasty being now established on a lasting basis, We have ascertained that near our Capital there are large tracts of unoccupied lands which belonged either to the Emperor of the Ming Dynasty or to the nobility and officers who have fallen in the late wars, and We order that the same be administered by our Boards in the following manner. In the first place should any of the former owners or their descendants appear to claim their lands, let a fair return be made to them according to their numbers; thereafter all the unclaimed lands shall be divided among the princes and brave statesmen and soldiers who have followed us from the East. These same princes, etc., having no place to settle down in, there is no alternative but to make these grants not for profit but as a place for them to dwell in. Let the several villages and districts therefore be divided, some for Manchus, some for Chinese, with definite boundaries, so that there may be no collision hereafter. To the several princes commanding, and to each civil officer of the rank of Pu Yuen, President or Vice-President of a Board, now on the spot, let a grant of a Park (園) be made and let further grants be made to the others as they arrive after due consultation."

What the size of a "Park" was is not quite clear, but the lands granted to the Yellow Banner Corps seem to have amounted to nearly 400,000 English acres.

The grants were to the first takers and their heirs and successors without power of alienation. No rent was reserved to the Crown, and the condition, implied if not expressed, was the military service which the grantees were in any case bound to render to the sovereign when

required. In a few cases the old population was entirely cleared out to make room for the new comers, that is, for the serfs, camp-followers and free peasantry, if any, who had followed in the wake of the conquering army; but in most cases the old population was probably retained as being necessary for the cultivation of the soil. The new owners, whose military service required their presence elsewhere, do not appear to have in any case settled down on their properties. They occupied, and still continue to occupy, so far as they exist at all, the position of mere rent receivers, the collection of the rents and the management of the estates being delegated to agents known as *chwangt'ou* or *t'ouchung*, who are recognised for that purpose as quasi Government officials.

The rule against alienation was gradually relaxed. Manchus have for a number of years been permitted to sell their lands to Chinamen, and a considerable proportion of the original grants seem to have changed hands. Lands so sold fall under the common tenure, and with the lapse of the Manchu organisation it is probable that this form of tenure will disappear altogether. As late, however, as 1888 the tenure was still prevalent in some parts of the Metropolitan province. A memorial from the Viceroy of that date represented the deplorable condition of the peasantry who had been rack-rented by their Manchu landlords to an extent which barely left them the means of subsistence.

In passing I may notice a sort of quasi military tenure, which historically has some interest and which may still exist, in name at least, in some parts of China. The lands under this tenure are known as *t'un* (屯田) or military colonies. They were granted originally to certain clans or families, disbanded soldiers, — either Manchus or Chinese, in consideration of their performing certain specified duties, *e.g.* guarding a frontier or more generally furnishing annually so many boats and men for the grain transport service between the Yangtze provinces and Peking. In return for these services they had the privilege of cultivating certain areas, not indeed free of

land tax altogether, but at a less rate than what the common people paid. The land was declared inalienable outside the families affected to the particular service, otherwise it in no respect differed from the common tenure. The grain transport service has long been abandoned and the distinction between lands of this class and those of the ordinary tenure has practically disappeared.

II.—*The common tenure.*

Practically all the land in China is now held on this tenure. The only exceptions are certain tracts of pasture land in Mongolia and Manchuria the nominal ownership of which seems to vest in native Princes and Chieftains, and the lands of the Miaotze and other border tribes in the extreme west. The incidence or conditions attaching to the common tenure are three :—

- 1.—Payment of land tax.
- 2.—Supplying of statute labour (*Corvée*) as demanded by the authorities.
- 3.—Registration and payment of a fee or fine on alienation.

(1).—The Land Tax.

At the beginning of the Manchu Dynasty a poll tax (*ting yin*) was levied on all adult males, but by a series of decrees during the reign of Kang Hi (1662-1723) it was incorporated with the land tax, which was henceforth and still is called by the generic name of *ti-ting-yin*,—land and poll tax. About the same time the amount of the combined tax was fixed once and for all. A decree of the year 1711 declared that the land tax should be levied in all time coming according to the Rolls of that year, and that no extra levy should be made in respect to any increase of population. The effect of this Decree which has been much discussed, would appear to be no more than this, that in respect to all the lands then under cultivation, and therefore then paying taxes, the rate should not be increased merely because the population had increased. It did not amount to a pledge on the part of the Government to ask no more from each province or from each district than such province or district was



then paying. It probably did pledge to the individual land owner that his tax once fixed should not be raised,—a promise, however, which has been but imperfectly observed. For the time it was intended as a land settlement, but only affecting lands then under cultivation. No tax was payable on waste lands, it is doubtful indeed if waste lands that have never been under cultivation are capable of being privately owned at all. At all events no tax was payable on such waste. It was only as new lands were taken up and brought under cultivation that they became, as they still become, liable to be assessed for taxation according to the custom of the province. The gross amount of the land tax varies with the prosperity of the country, but for any particular locality, when it has once been fixed it cannot constitutionally be raised.

This, however, has not prevented the local officials from tacking on small extras under various designations such as allowance for difference of scale, transmission fee, collector's fee and so on. There is another method by which the local officials, who are really Farmers of the tax, are able, while retaining the tax at the nominal amount, to levy from the peasant double or treble the proper sum. In all rice growing provinces the tax, according to the title deeds, is payable wholly or partly in kind, that is to say so many pecks or bushels per mow. The grain transport service being now abolished, payment is required in local currency. The Magistrate fixes by an annual proclamation the rate at which the commutation is to be made, and usually takes care to fix it at a rate well above the price of grain in the market. If not fixed in grain the tax is nominally payable in silver, but here again payment is usually required in the currency of the country, that is in copper cash. The rate of exchange is fixed in the same way as for grain. When the market rate may be, say, 1,600 copper cash per tael the Magistrate's proclamation will announce that for the year taxes will be received at the rate of 3,000 or 4,000 cash for each tael payable. Abuses of this sort will continue till China has established a uniform system of currency throughout the land.

If any serious calamity should overtake his district, such as to destroy the crops or throw the land out of cultivation, the Magistrate is bound to report the facts, and a remission of the taxes, temporary or permanent according to the circumstances, is obtained. There are numerous regulations in the statute book intended to secure that the people shall get the full benefit of any such remission. In the case of landlord and tenant, while the former gets the benefit of a remission of tax, he is enjoined to grant to his tenant a corresponding abatement of rent. Conversely, when a district has become prosperous and new lands are brought under cultivation, the Magistrate is bound under various penalties to report the improvement so that the Government may reap the benefit. The customary proceeding is to send special survey officers from the Head Revenue Office of the Province, who inspect the ground and fix the remission or the new taxes as the case may be. To encourage cultivation new lands for the first time placed on the tax paying register are exempted from payment for the first six or ten years, according to the fertility of the soil.

(2). The *Corvée* or statute labour.

The working of this system has already been discussed in the previous chapter under the head of Village administration. It does not now appear to be a heavy burden in any part of the country, and the services required are, in part at least, usually paid for in cash. The tendency has been for some time to commute these irregular services for an additional levy on the land tax.

(3).—Payment of a fee and registration on alienation.

Under this head a short account will be given of—

(a).—Transfers of land by sale.

(b).—Transfers by mortgage.

(c).—Succession and Inheritance.

(d).—Acquisition of waste lands.

(a).—Transfers by sale.

The invariable method of transferring land is by deed-poll made by the seller and subscribed by him and the Middlemen. It usually recites that the seller being in

want of money, and having first offered the land to his kinsmen, who decline to buy, has arranged through the middlemen to sell it to so-and-so for such a price. It then goes on to say that the purchase money having been paid in full, the vendor sells out and out the land situated in the nth Tu of the rth Pao of such-and-such a Hsien (describing boundaries) to the Purchaser who is thenceforth to be the sole Proprietor, and may at his discretion pull down the buildings and erect others without interference from the Vendor, etc. A statement of the amount of the taxes payable, and whether in grain or in money is usually added. The names of the Vendor and Middlemen are written in full by the copyist, and underneath each subscribes his own private mark and affixes his seal. The Purchaser does not sign. The signatures of the Middlemen, who are usually friends or neighbours of the Vendor are not understood as guaranteeing the title, but they do guarantee that the Vendor is what he represents himself to be, and that the transaction is made in good faith. Their employment if not absolutely necessary to make a valid sale, is extremely desirable as a guarantee against fraud, and no prudent purchaser would take a transfer unless so guaranteed. Their presence also ensures a certain publicity to the transaction, which enables objections to be raised in time, if objections there be. As many as eight or ten are sometimes employed, never less than two. They sometimes receive a small commission on the sale, but more commonly are entertained at a feast the expenses of which are provided for in the bill of sale.

Another indispensable party to the transaction is the village Tipao or Headman, whose seal must be attached to the Deed of Sale before it can be registered at the office of the District Magistrate, which is the next step in the transaction. The onus of registration is thrown on the Purchaser. The process is termed *Kwo-ko* (過割), lit. "passing the cutting off," meaning the transference of the tax liability of the old owner to the new; or as some say the cutting off the slip showing the tax liability from the old



deed and pasting it on to the new. If this transaction is neglected the land is liable to confiscation, which would seem to indicate that a mere sale is not sufficient to give a valid title until it is confirmed by the local authorities representing the Crown as the ultimate landowner.

If the deed is in order registration is obtained as of course on payment of a fee which is nominally 3 per cent. on the amount of the purchase money, but which in reality amounts to 5 or 6 per cent., including the customary extras for meltagé, yamen fees, etc. To avoid this heavy tax it is common, perhaps universal, to understate the price in the Deed of Sale, or the Seller will execute two deeds, one showing the real price and the other stating half the sum. The latter goes to the Magistrate to be stamped, the other is retained by the Purchaser as a receipt for his money. When the Deed is received back from the Magistrate's office it has gummed on to it what is termed a "tail" or annex, being an official endorsement of the transaction, setting out the names of the seller and purchaser, the Hundred and Tithing (Pao, Chia, or Tu) in which the land is situated, and the amount of land tax for which the new proprietor is liable. The Deed thus returned bearing the impression in red of the Magistrate's official seal is popularly known as a Red Deed and is the highest form of title obtainable. In some places persistent evasion of registration has given currency to unstamped deeds known as "White Deeds" but they are always to be looked on with suspicion. These appear to be particularly common in the Province of Shansi, where for some reason the normal system of registration does not seem to have been enforced. A Memorial from one of the Governors under the old Dynasty complained of the utter confusion that prevailed in the matter of taxation and said it was common to find taxpayers who owned no land, and landowners who paid no taxes.

The acquisition of land by Foreigners at the open Ports is effected in the same way as that above described, except that the native vendor does not sell the land but leases it in perpetuity, and that registration is effected

through the Consulate of the Purchaser (or Lessee rather) at the proper office of the local authorities, which at Shanghai is the Taotai. Instead, however, of merely stamping the Deed of Lease and returning it to the Purchaser, the Taotai retains in his office the deed of lease and the old title deeds, if any, and issues a fresh Deed under his seal, in which he recites the names of the native Vendor and the Foreign Purchaser or Lessee, and declares that he agrees to and confirms the lease in perpetuity. As the Taotai retains the old title deeds, the new deed, generally called a Taotai's Deed, is in effect though not in name a fresh grant, and once issued it is conclusive. No question of flaw in the title of the native vendor is permitted to be raised. The authorities of course are at liberty to institute all proper inquiries, and to satisfy themselves that the vendor's title is good and that there is no legal impediment to alienation, but when once passed no further question can be raised.

(b).—Transfers by way of mortgage.

A form of transfer which in former times was much in vogue and which is still practised, is a kind of mortgage known as *tien* (典). The effect of it is that the land changes hands in consideration of a sum of money paid down, but the original owner is entitled at any time, or after a stated period, to recover his land on repayment of the money. No interest is payable on the one hand and no account of rents and profits is required on the other. The use of the land is simply exchanged for the use of the money, but, contrary to the usual terms of a mortgage, it is the land that is lent and not the money which latter cannot be demanded back. Unless the old owner comes forward to redeem, the new occupant becomes absolute owner without further process.

This form of transfer by way of mortgage, or as it is sometimes called mortgage-sale, *tien mai* (典買) would appear to have been the original, and perhaps in early times, the sole form. The final alienation of land,

especially of old family land, though not absolutely forbidden, was considered so improbable that the presumption was always against it. Even when the word "sale" (買) was used, and not the word "mortgage" (典) there was still the right of redemption, unless the deed bore otherwise on the face of it the words "absolute sale," (Section 95, Li 3). The land indeed was not in theory deemed to be strictly the personal property of the owner or occupier for the time being, but rather the heritage of the family or tribe generally, of which the occupant was a member. Subject to his life-interest, they had all a more or less qualified interest in the reversion, and on his death it was bound to come to one or other of them, with further reversionary rights over. The theory, however, was not carried so far as to forbid the actual occupant from dealing with it at all. If very hard pressed he might raise money on his land, but in doing so he was bound so far as possible to have regard to the family rights, either by giving his kinsmen the first option of purchase, or by reserving to them the right of redemption. This right indefinite in point of time, must have given rise to much inconvenience and uncertainty of title, and it was probably to remedy this that a law was passed in the 18th year of Kien Lung which directed that in future in all transfers, if the transaction was meant by way of mortgage, the deed should expressly reserve the right of redemption, or if meant as a sale it should state that there was no such right. (Section 95, Li 7). At the same time it was directed that in the case of all transfers made within 30 years of that date there should be a right of redemption unless the deed expressly showed an absolute sale, and in case of deeds older than 30 years there should be no right of redemption unless the contrary was expressly stated. The law of Kien Lung on the face of it applies only to deeds in existence at that date, but it may be assumed that it was intended to apply to future transfers, and that the rule now stands that the right of redemption must be exercised within 30 years from the date of the transfer, unless a specified date is mentioned in the deed itself.



The commercial spirit of modern times has relaxed the rule against alienation in favour of free trade in land and of individual as against family ownership, but many traces of it remain, and it still influences the action of the authorities. To this is due the recital, which is still found in modern deeds of sale, but which is usually a pure fiction, namely that the kinsmen of the seller had been first invited to buy the land and had refused. To this also is due the setting aside of deeds of sale of which there are numerous instances on record, when the sale was made under pressure of circumstances and for a small consideration. For instance, during the famine in Shantung in 1874 certain speculators who had bought land at a cheap rate were compelled on the return of the original owners to yield them up their old land on a bare refund of the purchase money, the terms of the deeds notwithstanding. One consequence of this well-meant action was, it was stated, that in the subsequent and more severe famine in Shansi owners could not sell their land at all, even to save themselves from starvation. Capitalists knowing or fearing that such sales would again be declared invalid declined to risk their money.

A temporary mortgage of land as security for money lent and to be repaid at a short date stands on a different footing. The expression used for this is *tien tang* (典當) mortgage pledge and not mortgage sale. The property does not change hands and the transaction does not require registration, as the other form does, and no fee is payable. The old title deeds are deposited along with a memorandum embodying the terms of the loan, and in event of failure to redeem at the proper time the authorities will decree a sale or foreclosure. A mortgage of this nature without possession is a doubtful form of security, as the holder not being the registered owner of the land cannot realise it without the assistance of the authorities, and in event of there being other creditors it is doubtful if he could make it available for his own exclusive benefit. On the other hand if the sum realised by the sale, assuming that the mortgagee has got his decree of sale, is in-

sufficient to liquidate the debt, it is doubtful if he can sue the mortgagor for the balance. The land and the money would probably be counted as equivalents,—if he has taken the one he cannot claim for the other. There is an inveterate tendency in Chinese law to compromise anything that has the appearance of a hard case. “Let each bear half the loss” always commends itself to the Chinese mind as a most equitable way of settling all differences.

(c).—Transfer by succession and inheritance.

The universal rule all over China with regard to succession is that on a man's death all his real property, as well as personal, is equally divided among all his male children, whether born of the proper wife or of a concubine. If there are no male children he may adopt a son from among his agnatic kindred in a certain well defined order which I have described in the chapter on Successions, and such adopted son will succeed to the whole. It is only on complete failure of heirs, natural or adopted, that daughters will succeed to the property. This succession vests by operation of law, and requires no ratification from the authorities, nor is any fine or succession duty payable. The theory still prevails that the land is the property of the family and not that of the deceased occupier; the continuity of the family is not disturbed by his death, it is merely a change in the headship that has occurred, the real ownership remains the same. The sons (if there are more than one) become joint owners of the land and may either continue to hold in common or divide as they may agree. Until division no sale can be made unless all join in the deed of transfer and the mother, if alive, is also a necessary party. No re-registration is required so long as the sons continue to live in common and this may go on for several generations. On division, however, an adjustment of the land register must be made. On application, each of the sons may have his own particular lot registered as a *tih hu* (的戶) or sub-family of the original registration. On small properties there comes a point beyond which further subdivision is no longer possible. Hence comes the difficulty so often experienced in getting a

transfer of small pieces of ground. On the occasion of a sale a score or more of cousins and relatives may turn up all claiming to be interested in the land, and the consent of all of them may be required to give a valid title.

(d).—Acquisition of waste lands.

All unoccupied lands, whether originally waste or formerly cultivated but abandoned through famine, civil war, or otherwise, are deemed to be public property and vest in the State. But such land may be turned into private property by the simple expedient of taking possession and bringing it under cultivation. The first comer is at liberty to make application to the District Magistrate and unless upon proclamation the old owners are ready to come forward and undertake the cultivation, the applicant will after a certain delay get a title deed which is good against the world. No payment by way of purchase money is demanded, the officials being only anxious to have cultivation for the sake of the tax, but the new owner must actually bring his allotment under cultivation, else he is liable to be ousted in favour of another who can. Mere speculators who took up lands with a view to reselling at a profit would receive no support. The land is for the benefit of the community at large, and an owner who does nothing is liable to be displaced in favour of one who will turn it to some account. Even mere squatters who have once been allowed to obtain a foothold upon a piece of waste ground are dealt with very tenderly. An owner who can show the best possible title has great difficulty in getting them removed, and at best he would probably have to pay the costs of removal.

The waste and hilly ground adjoining villages appears in many cases to be subject to rights of common, which the villagers enjoy for the purpose of cutting wood and undergrowth for fuel. Such hill ground is of little value in central China for cattle rearing purposes, but there is a constant demand in the towns and villages for firewood, and the cutting and bringing to market of this article affords employment, especially in winter, for a considerable section of the country people. Generally speaking anyone



can cut wood on waste ground anywhere. There are no enclosure Acts, and no Lords of the Manor to hamper the free liberty of the subject in this respect. But certain villages have by custom appropriated to themselves the exclusive right of cutting the growth on waste lands in the neighbourhood,—a right which by reason of propinquity of situation and facility of access has a certain commercial value.

New land formed by accretion of alluvial deposit in the shifting beds of rivers or tidal creeks is also deemed government property but a different principle prevails in regard to its allotment. The first right accrues to a riparian proprietor who can show that part of his land has been washed away by the action of the current. In such case he is entitled, so to speak, to follow his land and to be indemnified out of the new formation, without payment, to the extent of his loss but no more. If there is a surplus over after satisfying all such claimants, the officials may allot it at their discretion, or if the land is valuable they may offer it for sale to the highest bidder. The process by which riverine accretions and waste land generally is converted to private ownership is termed *Chi-ko* (起科) or *Sheng-ko* (陞科) lit. "raising to the rank" of tax paying land. Ordinarily such land has no commercial value and the anxiety of the officials is to get people to come forward and take up the land. It is otherwise, however, in the neighbourhood of flourishing cities, where every bit of land has its value as for instance at Shanghai. The waste lands there were chiefly foreshore accretions and the dried up beds of tidal creeks. For these keen competition arose and the officials demanded and were able to obtain high prices. As the competition became known and it was realised that there was money in the business, the Nanking Authorities established a special office to control the issue of such titles, which was known as the *Sheng-ko* office. Presumably the move was prompted by certain unemployed officials who hoped to secure some part of the profits for themselves. Ordinarily the right to dispose of public lands devolves by Chinese

law on the District Magistrates or the local land bureau, and the establishment of such an office was an irregular interference with their proper functions. In view, however, of the general control which the Provincial Treasurer exercises in all fiscal matters, it cannot be said to have been illegal, and had the officials confined themselves to their proper duties no complaint would probably have been made.

But the Sheng-ko office soon earned for itself an unsavoury notoriety by issuing papers purporting to give a title to foreshore accretions, regardless of the prior right of the adjacent owners and even to land unconnected with water frontage and legitimately owned by natives. It seems to have been a practice, when a piece of land was being transferred from a native vendor to a foreign purchaser, for one of these so-called land grabbers to come forward with a spurious title obtained, on speculation possibly, from the Sheng-ko office and claim to block the transfer unless his price was paid. Several cases of the kind will be found in the Appendix in which the practice was severely denounced. It was reported that when the malpractices of the Sheng-ko officials came to light they were called upon by their superiors to render accounts and had to disgorge the greater part of their illicit gains. The office seems afterwards to have been closed or at least is now conducted on proper lines. The result of the cases is that the rule is now well established that land renters can have accretions tacked on to their deeds by the process of sheng-ko on paying a reasonable assessed value.

#### LOST TITLE DEEDS.

The ordinary title deed is a conveyance from the previous owner with the official endorsement and red seal (*Shui-chi* 稅契). If this should be lost or destroyed by fire it cannot be replaced, as the vendor in many cases could not probably be found, or if known could not be compelled to give a fresh conveyance. In such cases the District Magistrate will issue a certificate of title in brief

form, termed a *Yu-tan* or *Fang-tan*. During the Taiping troubles when the greater part of the agricultural population lost their lives or fled from their homes, the old titles for the most part disappeared. The returning refugees and new comers, as they resumed cultivation received such certificates of title, and round Shanghai the *Fang-tan* seems to be the usual form of title.

#### LEASES TO TENANTS.

Although the larger proportion of the arable land of China is owned by the actual cultivators, there are still numerous landowners who prefer to lease their land to tenant farmers at a yearly rental. These are to be found in every province but seem to be more prevalent in the northern half of the Empire. In the south especially in the province of Kwangtung, clan-ownership is not uncommon, the clan of course being an exaggerated form of the undivided family.

Land is not sought after as a means to territorial aggrandisement but as a safe investment and usually by City capitalists or by wealthy official families. The return on such investments is as a rule very modest—from 3% to 5% it is said, which is much less than the ordinary mercantile rate of interest. The holdings are never very large, seldom as much as 1,000 acres and usually very much less, and no sumptuous mansions are ever erected as an ostentatious display of wealth. The family residence of such landlords usually takes the form of an agglomeration of small dwellings, meant to accommodate the several branches of an undivided family. A portion more or less is retained as a home farm, the balance is leased in small divisions of one to three English acres to the neighbouring families. The leases are for a term of years but more commonly at will, and the rent is almost invariably on the *metàyer* system, that is to say a certain proportion of the principal crop. In mid and south China this crop is rice and in the north wheat, barley or millet. On the best rice growing lands the landlord's proportion is as much as a



half, but on the poorer lands it may be one-third or less. If payable in silver, which is sometimes arranged, the amount is regulated by the average selling price of grain. The landlord pays all the Government taxes as being the registered owner but the tenants may be required to supply labour for the *Corvée* when such is demanded. In times of distress when the land taxes are remitted the landlord is enjoined, but not compelled, to give his tenants the benefit of three-tenths of the remission. This was probably meant to apply more particularly to cases where the rent is paid in silver. When paid in kind the landlord and tenant share more equally in good and bad years. Besides the principal crop nearly all lands produce subsidiary crops, all of these are retained by the tenant for his own benefit. In mid China the same ground will produce a wheat crop in spring or early summer, and a rice crop in the autumn. In south China two or even three crops of rice can be grown, or alternatively, peas, beans, and other green crops.

The principal crop is usually threshed out on the village threshing floor immediately after harvest. The landlord's agent takes care to be present to superintend the operation and see the grain measured. When the process is finished he takes possession of his share, and the rent for the year is thereby settled. Arrears of rent are thereby avoided, and ejectment for non-payment is practically unknown. The landlord's proportion, though a matter of contract, is chiefly determined by custom. Whatever share has been established in the locality for the particular class of land, that he may claim but no more, and he would profit but little by attempting to change his tenants.

The tenant provides all the farm implements and cattle, as also farm buildings if any. Isolated steadings, however, are rare, the tenant preferring to house himself in the adjacent village at his own expense. If he has erected buildings or made other improvements he may remove them on determination of his lease. He has also the right to all growing crops or to compensation from an incoming tenant if taken over.

An interesting series of papers on the condition of the rural population of China was published in the *Journal of the China Branch of the Royal Asiatic Society*, Vol. XXIII (1888), which gives details from various provinces of the size, productivity, etc., of the average agricultural holdings. It was there stated by one of the writers, all of whom spoke from personal experience, that in some parts of south China a single acre of land (*i.e.* 6 Chinese mow) will maintain a family of six persons in tolerable comfort. That implies a possible population living on agriculture alone of 3,840 per square mile !

#### TENANT RIGHT.

If it is said that in some parts of Kiangsu a double ownership in land is recognised, viz., the owner of the soil and the owner of the surface. The former is the ordinary registered proprietor who is responsible for the taxes. In leasing to a tenant it seems to have been customary to demand from the latter a deposit by way of guarantee of a sum equal to 3 years' rent. This deposit gives the tenant a permanent interest in the land of which he cannot be deprived so long as he does not demand back his deposit. He thus acquires a sort of tenant right or ownership of the surface which he can assign or sub-let (*C.B.R.A.S. Journal* cited above Vol. XXIII).

The validity of this form of tenure, however, must rest solely on local custom. The statute law does not recognise such right.

## CHAPTER VI

### COMMERCIAL LAW.

#### SECTION 149. TRANSLATION.

##### *Legal Rate of Interest.*

LÜ.

The interest on borrowed money or on loans made by Pawnbrokers on goods pledged shall not exceed 3 per cent. per month, and arrears of interest cannot be recovered to an amount exceeding the principal. Officials are not allowed to lend out money to persons within their jurisdiction, even at the legal rate of interest, and if they have exacted a higher rate they shall be liable to an additional penalty as for misappropriation of the like amount. Interest paid in excess of the legal maximum may in either case be recovered.

If debts are not paid at the stipulated period the defaulter is liable according to the amount to a penalty not exceeding 100 strokes, and shall still be required to repay the money. If the creditor instead of applying to the Court proceeds to seize the cattle or property of the debtor he shall be liable to 80 strokes, but if he has not seized more in value than the amount due for principal and interest, he may redeem the penalty by the corresponding fine. If he seizes more in value than is due, the surplus shall be deemed malversation and will subject him to the corresponding penalty up to 100 blows and 3 years' banishment. He shall also be required to refund the amount misappropriated.

If the creditor compounds for the debt by accepting the debtors wife, concubine, son or daughter he shall be liable to 60 blows, and one degree more if criminal intercourse follows. If the creditor seizes either of them by violence the penalty is increased 100 blows and 1½ years banishment and if wife or daughter is forcibly violated the penalty is strangulation. The wife or daughter is to be restored to her friends and the debt is cancelled.

NOTE.—The rules that follow are of no practical value and are not worth translating, but I give a short précis.

LI.

1.—Expectant Officials cannot borrow money to be repaid when they receive a substantive appointment. Penalty for borrower and lender.

2.—Claims for debt must be brought before the court of first instance, and not any higher tribunal.



3.—In the Manchu Force men's rations cannot be pledged for debt.

4.—Officials lending money within their jurisdiction to be punishable as for private trading. Borrower to be liable to half penalty.

5.—Lending or borrowing from border tribes is forbidden.

6.—If excessive interest is exacted by discounting a bill for money lent, the offender to be punished and the money forfeited to government.

7.—Forbids lending money and acts of extortion among the aborigines of Hainan under pain of death.

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#### SECTION 150.

##### *Embezzlement of trust property.*

#### LÜ.

Whoever being entrusted with the goods or live stock belonging to another unlawfully appropriates the same to his own use shall be liable to a penalty not exceeding 90 blows and 2½ years banishment. If he falsely alleges that the animals are dead or that the articles are lost, he shall be liable to 100 blows and 3 years banishment, and in each case the property shall be restored to the true owner. Should loss, however, occur through accident by fire or water, or should the things be stolen or should the animals die from natural causes, the bailee shall not be responsible. He must, however, produce satisfactory evidence that such is the case. Any person so entrusted with property who afterwards refuses to acknowledge his position shall be deemed guilty of fraud, and if he in turn entrusts the property to another who makes away with it, each shall be deemed guilty of theft of an amount equal to the value of the property.

#### LI.

1.—If one relation misappropriates the property of another which he holds in trust, the penalty varies with the degree of relationship. If the defaulter is a senior related within the third or nearer degree of consanguinity, and therefore one against whom the junior cannot bring a plaint, being bound to screen his faults, he shall not be subject to any penalty but the articles must be restored. If the offender is a senior related in a more remote degree he shall be punishable 1, 2 or 3 degrees less severely than for a non-relation according to the nearness of relationship.

2.—If articles pledged with a Pawnbroker are destroyed by fire originating in his own premises, he shall be bound to indemnify the

owner for the full value of the articles which shall be deemed to be double the amount for which they are pawned. If the fire originated outside, the amount for which the Pawnbroker is liable shall be eight-tenths of the value estimated in the same way, less whatever is due for interest. In case of articles in bulk, such as rice, wheat, or raw cotton which cannot be pledged for more than one year, the Pawnbroker shall be liable for only three-tenths of the original value, and if the fire originated outside the original value shall be reduced one-fifth, and three-tenths of such reduced value shall be paid, but nothing shall in these cases be deducted for interest.

If articles entrusted to a dyer are destroyed by fire, the owner of the dyeshop shall forthwith hand to the local authorities a list of all the articles lost, and the latter shall fix a value according to which the former shall indemnify the owners to the extent of one-half or three-tenths according as the fire originated inside or outside of the establishment. Articles saved from a fire shall both in the case of the pawnbroker and dyeshop be redeemed or recovered in the usual way. If the shopkeeper or any of his assistants take the opportunity during a fire to appropriate articles to their own use they shall be punished as for larceny of a like amount, and if a fire really originating on the premises is made out to be due to an outbreak on the neighbouring property, whereby the indemnity legally payable would be reduced, the party gaining by such reduction shall be punishable as an accessory to larceny of a like amount. If the shopkeeper or his assistants set fire to the premises to cover a previous misappropriation of their customers' property the case shall be treated as setting on fire in order to commit larceny.

3.—Whenever property of any kind pledged in a pawnshop is stolen the owner of the shop shall be required to indemnify the owner of the property to the extent of one tael more for every tael advanced, but if the robbery was committed by force of arms he shall only be required to pay half a tael more for every tael advanced, in each case deducting what may be due for interest. Should the articles stolen be afterwards recovered, they shall be deemed the property of the pawnshop and cannot be redeemed. Similarly if things entrusted to a dyeshop are lost by larceny or violent robbery the owner of the shop shall be liable to refund to the owner of the goods half in the first case and three-tenths in the second case of the amount which the local authority shall deem to be the true value of the goods, payment to be made within three months. Should the stolen goods be afterwards recovered, they shall be deemed to be the property of the original owner, but he must first refund to the dyeshop whatever sum he may have received as indemnity plus the charge if any for dyeing.

## SECTION 151.

*Lost property.*

LÜ.

The finder of lost property must within five days hand it over to the nearest official. If the article found proves to be Government property the finder shall have no claim on it, but if it is private property a notice will be published requiring the owner to come forward and claim it, in which case the finder shall be entitled to half its value as a reward. If no one appears to claim the property within 30 days the finder shall be entitled to the whole. If the finder neglects to hand over the articles so found within the 5 days he shall in no case be entitled to a reward, and may be proceeded against as for larceny. If an owner afterwards appears he may claim one half and the other half goes to Government, if no one appears the whole belongs to the Government.

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## SECTION 152.

*Markets. Licenced Brokers.*

LÜ.

In every town and market village Hongs authorised to act as brokers in the various branches of trade and at shipping ports a Port Master shall be selected by the officials from among the men of substance and shall receive a seal and a register book, in which they shall enter the names, addresses, etc., of merchants that arrive from other parts, and submit the same once a month for the inspection of the officials. Persons who presume to act in the above capacities without authority shall be liable to 60 blows, and all fees and commissions which they may have collected shall be forfeited to Government.

LI.

1.—Every Innkeeper shall be bound to keep a register of all persons arriving at his inn entering their names, residences, etc., and the dates of their arrival and departure, and shall once a month attend with it,—in Peking at the office of the gendarmerie, and in the Provinces at the office of the District Magistrate, for the purpose of submitting it for examination. The property of a person dying at an Inn, unattended by any of his relations, shall be taken charge of by the officials, and notices will be issued calling for the parents, children, etc., of deceased



to come forward and prove their claims. If no claimants appear within one year the property shall belong to Government.

2.—Forbids the Wu Tso (corpse examiners) to monopolise the hiring of bearers at funerals.

3.—In Peking, brokers' licences must be renewed every five years. Unprincipled traders who form combinations and pretend to have monopolies as general licenced merchants and thereby are able to compel traders to deal with them, or who wrongfully detain the money and goods of their customers, shall on conviction be liable to banishment with military servitude. Officials in collusion with such monopolists shall be denounced and punished.

4.—In Peking the ordinary shopkeepers who do not require licences cannot combine to monopolise the trade within certain areas so as to exclude new comers or compel them to pay for the privilege, under a penalty of 3 months' cangue and 100 blows. The same rule shall be applied to dealers in wines and such classes of goods and also to the carriers and cart owners.

5.—Contractors for the supply of boats at the barriers and other places must not combine to form monopolies and prevent the free hire of boats for transportation or transhipment of goods, thus causing trouble and loss to the merchants, under a penalty of one month's cangue.

6.—Petty officials employed in Yamens who disguise their identity by change of name and engage in business as licenced brokers, shall be dismissed from office and be liable to 100 strokes. If they are guilty of swindling merchants or unlawfully detaining their goods they shall be liable to penal servitude. The superior officials who by laxity or connivance permit such practices shall be denounced for the proper penalty.

## COMMENTARY.

The foregoing are the only enactments in the Code that have any bearing on Civil or Commercial Law. In dealing with such cases the Magistrates' Courts are guided by the light of reason, or by their own notion of equity between man and man, or by local custom. The decision of civil suits is among the minor duties of a District Magistrate. His main business is to punish crime, to collect the revenue and to keep the peace generally. Indeed it may be said that the adjudication of civil and commercial cases is an incidental rather than a special part of his official

duties. No machinery is by law provided to carry out his decrees, and consequently he not unfrequently requires bonds from the litigants that they will accept and be bound by his decision. The order is always *in personam* not *in rem*. He cannot order the sheriff to seize and sell a debtor's goods in satisfaction of a debt. If an unsuccessful litigant refuses to conform to his orders, the only thing that he can do is to lay hold of the recalcitrant and lock him up till he pays.

*Simple Debts.* It is very seldom that a claim for simple indebtedness is brought before the Courts. It is a matter of honour that debts should be liquidated periodically, especially at the New Year. Local pressure is always brought to bear on a recalcitrant at such times. A creditor will force himself on the debtor's family and refuse to quit the premises till his debt is paid, or if he has the physical power he may seize any of the debtor's goods and chattels within his reach.<sup>1</sup> If the law does not actually encourage this mode of procedure it does little to discourage it, by providing that if he does not seize more in value than is due for principal and interest he shall be only liable to a minor penalty redeemable by a nominal fine.

In commercial cases the Guilds play an important part in the adjustments of claims and their aid is often invoked by the officials. Guilds are societies for mutual support, and consist either of all members of the same trade in a town or of all merchants of a distant province or city carrying on business in the same town. Each Guild issues rules and regulations by which all members are bound, prescribing the method of conducting business as for instance, length of credit to be given, responsibility of buyer and seller in case of damage by fire or water, period of free storage, mode of packing, quality of goods and so forth. Breach of the rules is punished by a fine of greater or less amount according to the gravity of the offence, and usually the proceeds of the fine are spent on

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<sup>1</sup> For an illustration of this see case of the Chu Pai-mu. Appendix I, page 140.

a feast or a theatrical entertainment at which the culprit plays the host. In this way harmony is restored. If the offending party is impenitent and refuses to pay the fine the Guild has a still more potent weapon in its armoury. He is expelled from the Guild and a general boycott is ordered against him, a proceeding which leads directly to his commercial ruin.

As between members of the same Guild the Heads of the Guild will always be ready to act as arbitrators in the settlement of disputes, and many claims are so adjusted. They have no power to enforce their awards except by such coercion as is employed in case of a breach of regulation. That, however, is usually sufficient to stop further litigation. In case a member has a claim against an outsider or against a member of another Guild, the Heads, if satisfied of its justice, will lend their weight in support of the claim, either by giving pecuniary help in prosecuting the case before the Courts, or in negotiating with the other side for a friendly settlement. In the printed regulations of the Guilds the importance of honesty and fair dealing is usually inculcated and it is impressed on members that the value of a man's word is of more account than a thousand taels of silver.

#### CONTRACTS. LAW OF EVIDENCE.

In a few cases contracts to be valid must be evidenced by a written document. Of these the principal are,—Sale of land or Houses, Sale of a slave or child, Leases for a term of years, Security bonds, Mortgage of immoveables, Assignment of choses in action, and so forth. But as a general rule Native Courts freely admit parol evidence and even hearsay or second hand evidence without demur. In the early days of the Mixed Court that tribunal under the guidance of Mr. Davenport, Assessor, endeavoured to lay down the rule, following the English Statute of Frauds, that no contract would be enforced unless it was supported by a written memorandum signed by the defendant, or unless there was part payment, or payment



of earnest money to bind the bargain. But the rule does not seem to have been uniformly adhered to. It is well known that large contracts are entered into without any memo in writing or at most with a simple book entry on one side. A rigid adherence to the rule would probably have worked injustice, or at least would not have been in conformity with the custom of trade. Nevertheless the rule might well be recommended to traders, especially in contracts the performance of which extends over a period of months or years.

#### CONTRACTS VOID ON GROUNDS OF PUBLIC POLICY.

The few cases mentioned in the Code as being unenforceable are of no practical importance, being mainly those restraining Officials and Yamen employees from unfair dealings with persons under their jurisdiction. Contracts for immoral purposes, *e.g.* sale of girls, are not only void but punishable, though this is largely evaded in practice. Usurious contracts above the legal rate of interest are also void, but as the rate is very liberal, *viz.* 36% per annum, cases of this nature do not appear to be frequent. It may also be noted that arrears of interest beyond the amount of the principal are not recoverable.

#### GUARANTEE BONDS USUALLY CALLED SECURITY CHOPS.

This class of contract requires more than a passing notice, by reason of the large part they have played and continue to play, in commercial circles at Shanghai and other Ports. As long ago as 1868 Mr. Medhurst, then Consul at Hankow, called the attention of Merchants to the difficulties that were constantly being experienced in enforcing these obligations. He pointed out that the Chinese themselves often regarded these "chops" as in the nature of certificates of character or recommendations for a place or appointment, and warned Merchants not to place too much reliance on them, but rather seek some better form of security. Mr. Medhurst's circular was afterwards, by instruction of Sir Rutherford Alcock, then

H.M. Minister at Peking, published in Shanghai as an official notification.

The Shanghai Chamber of Commerce thereupon addressed a letter of protest to the Minister. They said "The system of guarantee, of which the Security Chop is one development, is so interwoven with the whole Chinese mode of doing business that if a doubt is thrown on the validity of such documents the gravest inconvenience may arise in almost every mercantile transaction, and a blow struck at the trading relations between Foreigners and Natives. Security Chops have always been recognised at Shanghai and Canton, whatever may be the case at Hankow. This has only to be insisted upon," and they deprecated the notification as rather suggesting to Chinese Officials that "they may with impunity allow Foreigners to be defrauded."

Sir Rutherford replied in one of his lengthy despatches, pointing out that it was better for them to face the situation than to shut their eyes to the possible risks until loss supervened. He had taken trouble to ascertain from the Tsung-li-yamen how far these security chops were to be deemed valid and enforceable in Chinese law and he appended the Yamen's replies as follows:—

Prince Kung to H.B.M. Minister :

"On 9th of May the Prince received a despatch from Y.E. to the following effect. 'In all western nations the principle that a bond legally drawn up and duly executed, and containing nothing contrary to law is binding and means what is plainly stated. It is important that I should be informed what is the law of China in this respect.'

"Among Chinese the word 'security chop' is not known, and conditions of suretyship are not identical. The surety may be, as the witness of the guarantee bond, merely a referee in case of subsequent dispute between the parties, or as an active intermediary between parties not previously acquainted, may in express terms guarantee indemnity in case of failure of the terms of an obligation. In either case there would be a signed agreement. In

cases of reclamation against a guarantor the judge would first ascertain the precise terms of the obligation. If the responsibility of repayment is plainly indicated in the instrument, then the surety must in event of the death or absconding of the debtor, make good the amount. An ordinary security would not carry such a condition with it."

Note from H.E. Wensiang in reply to a further inquiry about security chops :

"I beg to state in reply to your note that in cases of reclamation against a surety guaranteeing indemnity, the client is always pressed first for the sum guaranteed ; the client too can press on this ground his own debtor for amounts due to him. Should the client die or be without assets, then the surety must make good the amount of the bond. But irrespective of the solvency or insolvency of the client, the surety can only be held clear when the terms of his obligation have been fully discharged."

So matters stood till the year 1886 when the case of *Sassoons v. Fan Teh-sheng* (Vide Mixed Court Cases, page 169) was appealed to Peking. In that case as will be seen the Taotai's Court held that the defendant was not liable on his guarantee bond, on the ground that he had only undertaken to *She-li* (涉理), i.e. to be concerned in adjusting or regulating, but the bond contained no words expressly undertaking to pay money. The Tsung-li-yamen upheld the Taotai's decision and directed that in future if it was intended by the parties that the guarantor should be personally responsible for the debts or defalcations of his principal, the deed or security chop should contain express words to that effect, and that it was not enough to say in general terms that he guaranteed (*pao*) him. A notification to that effect was issued by the British Consul at Shanghai on 25th March, 1886. I regret that I am unable to give the terms of the notification, but the following quotation from the judgment of Mr. Mansfield in the subsequent case of *Hongkong and Shanghai Bank v. Yuen Yuen-chang* (*North China Herald*, 31st March, 1891) seems to contain the essential point. In that case,



which was also an action on a guarantee, Mr. Mansfield at the close of the case said he wished to call attention to the opinion of the Tsung-li-yamen as published in the above notification, *viz* :—

“When a third party comes in and takes on himself the onus of guaranteeing the positive repayment of a loan at a future date and distinctly undertakes in the event of any infringement of the conditions made to repay the money himself, the words *tai huan pao jen* (代還保人) security responsible for repayment on behalf of his principal, should be written in the document.”

The rule thus laid down is not without substantial justice, because the word *pao* which is usually employed to express the idea of guarantee is capable of different meanings. It depends on what is guaranteed, which may be either the man or the money. In the former case the party entering on the obligation guarantees that his principal is in truth what he represents himself to be, that he is a man of such and such standing, or that his previous history is what he says. In that case the guarantor is liable in damages for deceit, if any, but no further. In the other case, if his principal is entering on a position of trust, or is obtaining an advance of money; it may mean that he will be answerable for his future good conduct, and for the fulfilment of his contracts. In that case he is bound to make good any loss that the other party to the contract may have sustained. The rule therefore means that if the word *pao* (guarantee) alone is used it will be construed in the former sense; in other words the guarantee will be construed strictly against the obligee and in favour of the guarantor, who will not be called upon to perform more than he has expressly undertaken to perform.

It is important therefore that guarantee bonds should be carefully drawn so as to express exactly what the thing guaranteed is, and the extent of the liability. This of course is no hardship; if the party offering himself as surety for another does not like the bond he may refuse to sign. If he does sign he cannot complain afterwards

if he is held strictly to his written word. It would appear that there has been much less litigation over security bonds in recent years than formerly,—possibly through their now being more carefully drawn.

#### NATIVE BANK ORDERS.

These instruments are the ordinary means of discharging local debts of any considerable amount. The Customer of a Native Bank does not draw his own cheque in European fashion, but sends to the bank and obtains from them the bank's own note or order for any particular sum he may require. The bank fills in the amount and the time payable, whether on demand or more commonly 5 or 10 days after date. No payee is named but the person to whom it is issued and on whose account it is drawn is entered on a counterfoil. The bank is supposed to satisfy itself that the person to whom the note is issued has sufficient assets or credit to meet it, but once issued, and in the hands of the public, the bank itself is liable to any *bonâ fide* holder for value. It would be no answer to such a holder to say that the person to whom the note was originally issued had since withdrawn his funds or become bankrupt.

Several cases dealing with the negotiability of native bank orders will be found in the Appendix, and the law seems well settled. They are negotiable by simple transfer, and in that respect are similar to an English bank note. If a note is clean on its face the issuing bank will not be allowed to prove that it was in fact issued subject to conditions. If a note is lost or stolen, payment may be stopped by a notice to the issuing bank, and in that case the holder presenting the note will be required to prove that he received it innocently for value in the usual course of business. But if he can substantiate that point the note must be paid. It seems at one time to have been a prevalent notion that the receiver of an order should send it to the issuing bank to have it re-chopped by way of verification, but by a recent judgment (National Bank of

China *v.* Gay Dah Bank) it was declared that this proceeding was neither usual nor necessary.<sup>1</sup>

#### PARTNERSHIPS.

The Code is silent as to the liability of Partners in a trading concern, but the general principles that seem to be followed, as gathered from various authorities are as follows :—

In event of bankruptcy when all the partners have been taking a share in the conduct of the business and are known to the public, each will be liable for a share of the debts proportionate to his share in the total capital. If, for instance A, B and C are partners A holding one-sixth of the capital, B holding two-sixths and C three-sixths, then A is liable for one-sixth of the debts and no more, whether B and C are able to pay up their shares or not, and so for each of the others.

A Chinese partnership, however, usually consists of two or three Managers and one or more Capitalists who have put money into the business but who take no share in the management. In such cases the managing partners who are known to the public, are always held primarily responsible, and in case of reckless trading or malfeasance they will be liable for the whole of the debts, irrespective of their shares. It is only in event of their failure to make good the debts of the firm that recourse can be had to the silent partners, and even then it is not always certain that the latter can be made responsible. A partner, who has merely invested money in the firm, but who has not held himself out to the public as a responsible member, can only with difficulty be made liable to the creditors, even though in prosperous years he has been drawing his share in the profits. He will of course lose his capital, and cannot appear as a creditor of the firm in competition with the ordinary creditors, but he stands on a different footing from that of the ostensible partners whose mis-

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<sup>1</sup> By a recent judgment of the Mixed Court it was held that a foreign instrument of exchange, if negotiable by the law of the country of origin, is also to be held to be negotiable by Chinese law. Appendix p. 159.



management has brought about the catastrophe. There seems to be no rigid rule, and as these cases usually end in a compromise, the silent partner or partners, if men of means will be expected to contribute something towards the winding up.

When a bankrupt trader absconds, which not unfrequently happens, the creditors may raid the premises and carry off whatever they can lay hands on, on the principle of first come first served. To prevent this it is usual for the authorities, as soon as notice is given, to seal up the premises by pasting official strips of paper across the doors. This suspends proceedings until the defaulting debtor can be arrested. All Chinese suits being *in personam*, nothing can be done until the defaulter or defaulters are before the Court. The proceedings then in most cases take the form of negotiation rather than judicial process. The debtor's friends and relatives, if he has any, will rally round him and endeavour to strike a bargain. The creditors will stand out for as much as they can possibly get, and a man of means will be expected to pay more than a poor man though the liability may be equal. A compromise of some sort will be reached sooner or later, and the Court will then give a judicial decree confirming the arrangement arrived at and the case will be closed. Then, but not till then, the debtor will be released from custody.

Debts due to the Government take precedence of all private claims. In the case of an official defaulter, not merely all his personal property, but the property of the family of which he is a member is confiscated.

#### PRINCIPAL AND AGENT. BROKERS.

The general principle seems well established that the principal is liable for the acts of his agent duly authorised and acting within the scope of his authority. If the agent exceeds his authority he alone is liable, even if he purports to be acting for another. If the agent contracts in his own name for an undisclosed principal he is himself primarily liable, though in the event of his failure there

might be a remedy over against the true principal if he should afterwards be discovered.

The class of dealers known as brokers, who play an important part in Foreign trade, come within this category. They are usually men who speak English and are familiar with foreign merchants and foreign methods of trade. They act as middlemen between the foreign buyer, say of silk, and the native merchant who is the real owner, but who prefers to remain in the background. Formerly the great bulk of the trade, both in buying and selling, passed through their hands, though it may not be the case now to the same extent.

Usually these men though termed brokers, are really treated as principals on both sides. The native vendor on the one hand entrusts his goods to the broker and looks to him for the price. The foreign merchant on the other hand looks to the broker to deliver the goods, and payment to him is a good payment to the concerned whoever they may be.

A difficult question may however arise in event of the failure of a broker who is known to be buyer for a particular foreign firm or is otherwise intimately connected with it. A native vendor failing to get paid by the broker may seek to follow his goods in the hands of the foreign firm and claim payment on the ground of a direct contractual relationship. An instance of this sort was the well-known case of the silk guild versus Jardine, Matheson & Company tried in the Supreme Court at Shanghai before Sir Edmund Hornby in 1867. Jardine, Matheson & Company had bought some 200 bales of silk from a prominent broker and banker named Chu Quai. The firm had long had dealings with Chu Quai, both in buying and selling, and financial settlements were made periodically through his bank, the Ne-wo bank, located apparently on the firm's premises. On taking accounts after the silk transaction, it was found that Chu Quai was largely indebted to the firm, and consequently there was nothing due to him in respect to the silk. In fact both he and the bank were insolvent.

It turned out that the 200 bales of silk were really the property of certain merchants in the City, members of the silk guild, and had been entrusted to Chu Quai to sell as broker. The silk men not being paid followed the usual course and had Chu Quai arrested and taken into the city for examination, when it transpired that the silk had been sold and delivered to Jardine, Matheson & Company. According to their story Chu Quai declared that he was unable to pay for the silk because Jardine, Matheson & Company had not paid him.

Thereupon the silk guild took up the case and brought an action to recover the price of the silk. The case was settled out of court before any decision was given, but it is interesting on account of the evidence given showing that it was the custom of the trade from the native point of view to treat the broker as principal. One witness, Atlee, testified that he himself had sold silk as a broker to a foreign firm which failed, and had been compelled by the city authorities to pay the owners in full, although he had not received a penny from the foreign firm, on the ground that he had been entrusted with the sale of the goods.

A similar case arose at Tientsin in 1885. The Compradore of Messrs. Sassoon & Company whose place of business was in the foreign settlement, had opened a hong in the native city, where he carried on an extensive business on his own account, as well as an agency of the firm. His signboard bore the name in Chinese of the Sassoon firm and he used for business purposes a seal engraved with the name "Sassoon foreign hong" in Chinese. He also acted as Compradore to another foreign firm Collins & Company and a signboard with their name in Chinese was also displayed on the premises.

The Compradore failed owing considerable sums to native merchants with whom he had been in the habit of doing business. One of the Creditors who had a claim in respect to a parcel of gold not paid for but which had passed into the hands of the Sassoon firm through the Compradore, brought an action in the Tientsin Consular



Court for the unpaid balance of purchase money, alleging that the firm were the real purchasers and therefore liable for the debt, the Compradore being merely their agent. As evidence they produced the contract note bearing the seal "Sassoon foreign hong." The defence was that the Compradore carried on a business of his own apart from his duties as compradore, that they never authorised and had no knowledge of the use of the seal, that they had bought the gold from him as a principal and paid for it in the usual course of business and therefore were not liable.

The case was heard before the Consul and two assessors and judgment was given against Sassoons, the two assessors strongly dissenting for reasons based on the custom of trade which they set out at considerable length. On appeal to the Supreme Court at Shanghai the judgment of the lower court was confirmed, but on a further appeal to the Privy Council the judgment was reversed and entered in favour of Sassoons. Considerable stress was laid by the Privy Council on the fact that, though the contract note stipulated that payment was to be made in three weeks, it was not till after three months and after accepting from the compradore in part payment some goods which admittedly were not Sassoon's property, that any demand was made on the latter firm. On these and other grounds the Privy Council held that by the custom of trade it was clear that the native vendor of the gold gave credit solely to the compradore and that he must be regarded as principal on the transaction.

The general result to be deduced from the cases would appear to be that when the broker contracts in his own name for an undisclosed principal he is himself deemed to be the principal in the transaction, and consequently payment to him is good payment and full discharge to the buyer. Similarly as between the broker and the native vendor, say of silk or tea, he is the principal to them, and they would ordinarily at least, have no recourse against the foreign purchaser. But it would be otherwise if the broker confined himself to what is his proper rôle, viz. bringing the two principals together and merely settling

the terms of the contract. In that case he should drop out and leave them to settle. Even then, however, as we have seen Chinese law does not hold him quite free in event of trouble arising afterwards from the failure of one of the parties.

This liability of the broker or middleman is probably a survival of the old Chinese law still to be found in the Code (*vide ante* Section 152) which required that all dealings between outside merchants and natives in the principal markets should be done through licenced brokers. These licenced brokers had to be chosen with official approval from among the local men of standing, they had to see that a fair price was fixed as between buyer and seller, and they were responsible for the clearances and the payment of the money. They were allowed to charge a commission the amount of which is not stated, but any illicit profit over and above the customary charges was deemed a theft and to be punished accordingly. Delays in settling up accounts and so causing embarrassment to stranger traders was also a penal offence entailing so many strokes of the bamboo, or it might be banishment if the amount was large.

These rules gave rise to the co-hongs in the early days of Canton trade. The co-hongs were the licenced brokers who alone had the privilege of buying and selling with foreign merchants. The system was abolished by the treaty of 1843 in all the open ports and it seems now to be universally disregarded. The idea, however, that a middleman is somehow responsible for the contracts which he has been the means of bringing about still survives, but it may be assumed that as legal ideas become more definite it will disappear. Throughout Chinese law a man's responsibilities are largely governed by *status*, that is the condition of life in which he was born or in which he has voluntarily placed himself. The march of events throughout the world has been to replace status by contract, and China cannot but follow the same path. The responsibility of a middleman has been implied from his position, but in future the question will be more fre-

quently asked whether or not he has expressly contracted a responsibility, and if not he will be discharged.

MODERN LEGISLATION.

The uncertainty as to the liability of Partners has been to some extent remedied by a series of Regulations issued under Imperial Edict in 1904, providing for the registration of co-partnerships and joint stock companies. By one of these it is provided that two or more persons may combine their capital for business purposes on a limited liability basis, by entering into a joint contract, setting out the share of each, the nature of the business and other particulars. The deed of partnership must be registered with the Bureau of Commerce at Peking, and the word "Limited" must appear on the signboard, and on the common seal as well as on all business documents. On compliance with these conditions and in the absence of fraudulent dealing, the partners, in event of bankruptcy will be exempt from all liability, the partnership assets alone being available to meet the debts of the firm. Old established shops and firms may secure the same privileges by registering in a similar manner, but all unregistered partnerships are subject to the old laws.

The same Edict contains provisions for the registration of Joint Stock Companies which may be either limited or unlimited. "A Joint Stock Company limited is an association of seven or more persons who combine their capital to carry on some business and make a clear statement of the amount of their capital and that this shall be considered the limit of their liabilities" (Art. 13)<sup>1</sup>

The organizers of the Company must set out certain particulars in their prospectus to the public, *inter alia*, "Whether or not they obtain any extra profit or have been promised such advantage by others" and "what sort of financial agreements with others have been entered into beforehand." After the capital has been subscribed, a

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<sup>1</sup> *Recent Chinese Legislation*: Translated by E. T. Williams, Shanghai Mercury, Ltd., 1904.



meeting of the subscribers is to be held and a committee appointed to certify that all the conditions have been complied with and that the prospects are satisfactory. Upon presentation of these particulars registration is obtained at the Board of Commerce, after which share certificates may be issued and business begin.

Art. 29 of the Regulations reads :—

“Should a Joint Stock Company Limited meet with losses and fail in business and examination show that there has been no concealment of assets or other evil practices with intent to defraud, only the face value of the shares fully paid up may be seized and together with the real estate of the company, which shall be sold and turned into money, applied to the payment of the debts. No further demand can be made upon the shareholders.”

Art. 32. “Should the Company whose liabilities are unlimited or any shop fail in business, payment of their debts may be required of the shareholders in the company or the proprietors of the shop, and real estate held in the names of such individuals may be seized and sold to satisfy the claims.”

It is doubtful whether this last clause is merely declaratory of the existing law, or whether it imposes a new liability on partners and shareholders in unlimited companies. Construed literally it would seem to mean that such partners and shareholders are henceforth to be held jointly and severally liable for the whole debts of the concern irrespective of the proportions of capital held by each. This would be an entirely new departure, and alien to that which has hitherto prevailed. The enactment is of a quasi penal nature, and according to the usual interpretation it ought to be construed strictly in favour of the persons charged. It may therefore perhaps be assumed that no new liability is intended and that with regard to unregistered partnerships the old law is still in force.

HONGKONG ORDINANCE No. 53 OF 1911.

Chinese Merchants in Hongkong had long complained that the British Law of Partnership was unduly harsh in

making every partner responsible for the whole debts of the firm, however small his interest in the concern might be. This, it was alleged had given rise to a practice of concealing the true names of the responsible parties by means of fictitious partnership deeds and other devices to evade liability, whereby, in event of bankruptcy, creditors were defrauded of their just rights. It was probably to meet this complaint that Ordinance No. 53 of 1911 was passed. The Ordinance is entitled an Act "to provide for the registration of Chinese Partnerships and to enable partners therein to register and thereby to limit their liability."

Provision is therein made for the registration of a co-partnership and for the registration of the individuals composing it in their true names in prescribed form. It is then declared that "The liability of a registered partner in a registered firm is limited to such proportion of the debts of the registered partnership as his interest therein bears to the total interest of all the partners, registered and unregistered." The liability of an unregistered partner in a registered partnership is unlimited.

A firm or family group (termed a T'ong) may be registered in a registered partnership as one individual member and its liability is similarly limited.

Shareholders termed Hung Ku (紅股, i.e. Red Certificate holders) are exempted from all liability. A Hung Ku shareholder is defined as being one who shares with the partners in the surplus profits after interest on capital has been paid.

It will be seen that the Peking enactment differs from the Hongkong Ordinance in that it only requires the registration of the partnership and not that of the individual partners. Also in event of bankruptcy it only makes partnership assets available for payment of debts, whereas the Hongkong Ordinance besides making partnership assets in the hands of any partner available, makes each registered partner responsible for his *pro rata* share, and further makes each unregistered partner, (i.e. secret partner who has concealed his name) liable without limit.

How far the Peking enactment which was passed under the Manchu Government is recognised by the Republican régime is perhaps doubtful, as no case seems to have arisen so far, but it is suggested that the Hong-kong Ordinance is a much better exposition of actual Chinese custom and practice than the Peking rule, and it seems much more equitable. The latter was admittedly a tentative measure "for the encouragement of trade," but in practice it might possibly have the very opposite effect. Credit is the soul of trade, but traders it may be assumed will be chary of giving credit to a partnership, knowing that only partnership assets, which may be nil, are available for payment of debts. It would also seem to give encouragement to wild speculation and reckless trading, if partners know that so long as no positive fraud is proved against them, they can escape with impunity the consequences of their acts.

It may be assumed that these considerations will be taken into account in the drawing up of the new Civil Code which it is understood is in course of preparation.



## APPENDIX I

The following cases are translated from the voluminous work entitled *Hsing An Hui Lan*,—a general view of criminal cases. This is the work on which Mr. Alabaster's book *Notes and Commentaries on Chinese Criminal Law* is mainly founded. As Mr. Alabaster has pointed out these cases very rarely throw any light on civil rights. The sole object which the Courts whether of first instance or of appeal have in view is to ascertain whether the punishment fits the crime in accordance with the rules laid down in the Code. Incidentally, however, the decision does sometimes show by inference what the civil rights are. It is for this purpose that the following cases are here introduced. A few cases of a similar nature, but drawn from a different source will be found in Mr. Alabaster's book, page 575 *et seq.*

### CASE OF LI SZE.—ADOPTION.

*Validity of adoption when the person adopted is of the same surname but no relation.*

*Li Sze* had been convicted of manslaughter and sentenced to banishment 流, an appeal was made on his behalf for a remission of the penalty on the ground that he was an only son, and the support of an aged parent. The prisoner's father had long been dead and his mother remarried, but from tender years he had been adopted by the widow of one *Li Shwang-hwai*, and it was she whose declining years now required the services of her adopted son. The question was, whether the adoption was legal or not, and if so whether he was entitled to the benefit of the rule in favour of a son on whom his parents are dependent, (Sec. 18).

Inquiry established the fact that among the kindred of the deceased *Li Shwang-hwai*, there were none capable of undertaking his succession, and as the prisoner had stood in the position of adopted son for forty years it was evident that the adoption was originally made in good faith; it was held therefore that the relation was legally constituted.

As to the second point, the terms of the Rule are (Lü-li Section 18, Li 10) that an only son whose parents are over seventy years of age, convicted of an offence which would not

exclude him from the benefit of an Act of Grace, may commute the penalty for a money payment, and so be allowed to remain with his parents in order to support them and attend to the family sacrifices. An adopted son shall also be entitled to the benefit of the rule, if it appears that there is no other member of the kindred that can legally be adopted in his stead.

On these grounds it was held by the Board that the prisoner was entitled to commute his sentence.

#### CASE OF LI LUNG-CHIEN.

*A member of the Family once formally expelled from the succession can never succeed.*

This case was tried by an Imperial Commissioner from the Board of Punishment. The facts were as follows. *Li Hui-pai*, a farmer, had both a wife and a concubine, but not having a son by either he adopted in his old age as heir, the second son of his elder brother, a young man named *Yu-chen*. *Yu-chen*, however, turning out a lazy, careless, fellow, *Li Hui-pai* fearing that he would squander all the property laid a complaint before the Magistrate and had him formally expelled, after which he adopted *Li Sze-yeh*, the fourth son of a friend who bore the same surname as himself *Li 李*, but who was no relation. *Li Sze-yeh* was a studious youth and having succeeded in obtaining his first degree, his adoptive Father became very fond of him. Unfortunately the two wives could not agree about him. The first wife was jealous of his affection for the second, and after the death of old *Li Hui-pai* she brought a law suit to have him deprived of the succession, on the ground that being no relation his appointment as heir was illegal, and endeavoured to have *Lung-chien*, a son of the above-named *Yu-chen*,—that is a grandson of *Li Hui-pai*'s elder brother—appointed to the succession as adopted grandson.

It was held that both *Li Sze-yeh* and *Lung-chien* were disqualified for the succession, the former on the ground that he did not belong to the kindred, and the latter on the ground that his Father had already been debarred for misconduct, a disability which extended to all his descendants, and it was ordered that both should give up whatever of family property they had got possession of. On inquiry being made to ascertain who was the proper heir it was found that besides

*Yu-chen* there were three of the "nephew" class in existence, but in each case the individual in question was an only son and therefore could not be adopted. But there had been another nephew who died leaving a son named *Yuan-liang* to whom this objection did not apply, and it was decided that the deceased should posthumously be adopted as son, and his son *Yuan-liang* be appointed to the succession and be heir to all the family property as grandson.

#### CASE OF WANG WAN-CHUN.

*After formal betrothal a woman cannot marry another man.  
If she does, such marriage can be set aside even after  
the birth of children.*

*Wang Yün* had formally betrothed his son *Wang Tu-erh* to a daughter of *Chü Chüan-ching's*. In 1818 the son, *Tu-erh*, went away on business to Hami, but sent back letters the following year. Nine years afterwards the son being still absent the mother of the girl laid a plaint before the magistrate, which by law she was entitled to do, (Code, Section 116, Li 2), alleging desertion and praying for a certificate to enable her to enter into a second engagement. This was granted, and a month afterwards the girl was married to one *Wang Wan-chun*. *Wang Yün*, the Father of the first betrothed, appealed the case to the Prefect, and that official held the marriage to be void and ordered the woman to be given up, so as to complete the first engagement, but as she was now said to be pregnant he directed the surrender to be delayed till after the birth of the child. *Wang Wan-chun*, in his turn, then appealed to the Governor of the province, pleading that a son having now been born and nursed for some months, it would be cruelty to separate mother and child, and the Governor feeling the difficulty of the situation and fearing that if a separation were insisted upon the woman might do something desperate, applied to the Board for instructions.

The Board ruled that the marriage was void and that the woman must be given up to the husband to whom she was first engaged. They say "the absence of *Wang Tu-erh* did not amount to desertion inasmuch as it was known where he was, and if the girl's family were anxious to have the marriage completed, he could have been called back at any time by a letter from his father. They were wrong in bringing a plaint before



the Magistrate and he was wrong in sanctioning a second engagement. Moreover, the haste with which the second engagement and subsequent marriage were carried out shows that there was some preconcerted arrangement, and there is some show of reason in the allegation of the man *Wang Yün* that *Wang Wan-chun* had "knowingly bought his daughter-in-law." Touching what the Governor said about the necessity of consulting the girl's feelings lest she should do something that would lead to serious consequences, the Board adds that this need not be taken into consideration, as from the readiness with which she consented to a new betrothal, it is not to be supposed that she will now object to doing the right thing. As far as the Board can make out from the dates given, the girl could not have been *enceinte* at the time when the Prefect's decision, which is now upheld, was given, and if that had been promptly carried out, the complication of the child would not have arisen. There is evidence of collusion between the Magistrate and the man *Wang Wan-chun*, and this must be further inquired into and a penalty inflicted in each case.

#### CASE OF JEN TUNG-HSIN.

*Re-marriage of a Widow before the expiration of the period of mourning of her husband.—Marriage held valid.*

A man named *Yang Chang-chun* belonging to Peking had gone to Canton in the train of an official and there died. As the family were poor and as deceased had left no children it was arranged by the mother of the widow, in consultation with the mother of deceased, that the widow should return to her old home and be re-married. This was done and she was forthwith married to a man named *Jen Tung-hsin*. A brother of the deceased, who had never been satisfied as to the circumstances of the death, laid a plaint against the widow on the ground of the premature re-marriage—and the Provincial Courts held that the marriage having taken place before the expiry of the legal period of mourning for the first husband, was contrary to law and void, and decreed that the parties should be separated. Against this decree the husband *Jen Tung-hsin* appealed. The Board reversed the decision on the ground that, though in accordance with the letter of the law, yet considering that this second marriage was arranged by the woman's mother, that the husband was in ignorance

of the fact of her being a widow in mourning, and that there was no prior illicit intercourse between the parties, it would be doing violence to the woman's feelings if she were now compelled to change her condition a third time. Moreover, it would be unreasonable to remove her from the husband's family who were innocent parties, for the benefit of the family of her mother who was the person really to blame in the transaction. The Board further adds that in cases where a man had sold his wife through extreme poverty as wife to another man, they have upheld such unions under the particular circumstances, notwithstanding that they are forbidden in the code, and on the same principle *Jen Tung-hsin* may keep his wife.

#### CASE OF K'UNG CHAO-SHIH.

*Husband's imprisonment does not put an end to Marriage Contract.*

Prisoner's husband had been convicted and sentenced to banishment. During his absence prisoner being very poor conceived the idea of getting herself remarried. For this purpose she begged a friend to go and get her aunt to consent to the plan, which consent was procured, so between them they concocted the story that her former husband had in reality been executed, and ultimately succeeded in arranging that she should be taken by a man named *Tsai Ching-ming* as his concubine. The aunt however did not appear as sponsor in the ceremony. The same woman was later on violently carried off by two men *K'ung Chao-shih* and another not in custody, and in this way she was brought before the Courts. The Magistrate held that the husband's enforced absence did not annul the marriage, that the second marriage was void and the woman was simply a common adultress liable to the penalty of the bamboo or the cangue. The man *K'ung Chao-shih* was liable to perpetual banishment as accomplice in a case of forcible abduction, and these sentences were confirmed by the higher Courts.

#### CASE OF SU TA-KO.

*Marriage with a Woman who has been Betrothed to one's Brother illegal and void.*

*Su Tsung-teh* betrothed his niece *Su Ta-ko* with due formalities to one *Liu Pa*. Before the marriage was com-

pleted *Liu Pa* absconded and was never afterwards heard of again. After a lapse of eight years *Su Tsung-teh*, fearing lest his niece should lose her chance of matrimony, engaged her to a brother of the first intended,—another brother *Liu Mei* acting as negotiator on his side. This engagement was afterwards carried out and the marriage completed. On the case coming before the authorities [it does not appear on whose complaint, for the first betrothed *Liu Pa* never reappeared] it was held that the marriage was illegal, and that the parties must be separated. The negotiators on both sides were sentenced to banishment. This decision was upheld on reference to the Supreme Authorities at Peking, on the principle that a formal betrothal was sufficient to constitute the relationship of man and wife between the parties, and inasmuch as no one can marry the widow or divorced wife of a brother or other relation within the degrees of mourning, so neither can he marry one who has legally put herself in the position of a wife. It would have been quite competent for *Su Tsung-teh*, after application to the authorities, grounded on the undue absence of the intended husband, to have married his niece to a stranger, but under no circumstances could she have been married to one of that family. As the case was novel and there was no precedent to be found like it, it was directed that a circular of instructions should be sent to all the provincial authorities enclosing a copy of the Decision for their guidance.

NOTE.—This case is interesting as showing what importance from a legal point of view attaches to the betrothal in the marriage ceremonies. Once duly betrothed with the aid of go-betweens and the consent of guardians, the parties are as good as married. There is no possible method by which either can get off if the other chooses to claim his or her rights; no matter how circumstances may have changed or what length of time may have elapsed, either can always claim that the contract be completed, provided of course that the plaintiff himself or herself has done nothing in the *interim* to justify the other in crying off. Except by mutual consent the contract cannot be broken, the Courts must decree specific performance. Even a subsequent marriage will be set aside although the other party to that was ignorant of the prior engagement. It would follow that the numerous ceremonies subsequent to betrothal which are generally practised at a Chinese marriage are all superfluous as far as giving



validity is concerned, and that the only two things necessary to a complete marriage are a contract between the heads of the two families and the actual transfer or rendition of the woman.

#### CASE OF WEI SZE-YUNG.

*Control that may be exercised by a Master in the Marriage of his Slaves.*

In the course of a trial for manslaughter, the following facts came to light. *Wei Sze-yung* had a slave named *Wei ah Kang*. He had never been bought, but had voluntarily placed himself in that position 投身爲奴 and for a long time, the relation of master and slave had existed between them. The slave had a daughter-in-law, a widow, also named *Wei* (same surname) who however did not live in the same household and who had never 投身服役, "submitted herself for service." This woman had been sold by the master, *Wei Sze-yung*, to one *Wei ah K'wei* to be his concubine, but as the woman's period of mourning for her first husband had not expired her transfer was delayed. Meantime *Wei ah K'wei*, her purchaser, had gone abroad on business, and *Wei ah Kang*, her father-in-law, became desirous of disposing of her in marriage. *Wei Sze-yung* thereupon told him that he had already disposed of her to *Wei ah K'wei*, and ordered him to wait until *Wei ah K'wei* should return, when the ceremony would be completed. *Wei ah K'wei's* return however being long delayed, *Wei ah Kang* went and sold the woman to *Wei ah T'u* as a concubine. When *Wei ah K'wei* returned he found her living with *Wei ah T'u*, and thereupon he went and demanded back his money from *Wei Sze-yung*. The latter instead of complying managed to get hold of the person of the woman, detained her by violence, and sent her, in pursuance of his contract, to *Wei ah K'wei* by whom she was received as a concubine. There then ensued a free fight for the possession of the woman between the partizans of *Wei ah K'wei* and *Wei ah T'u*, in the course of which one man lost his life.

In the decision the first point determined is that the relation of master and slave existed between *Wei Sze-yung* and *Wei ah Kang*, though no deed of sale existed, and no price had ever been paid. Next, that *Wei Sze-yung* was not guilty at all events of the offence known as 恃強搶奪, carrying off the woman by violence without shadow of right.

As there was no law to be found to meet the precise case it was ultimately settled by analogy. The Code declares (Section 275, Li 16) that slaves and hired servants who take and sell the wives and daughters of their masters shall be treated as sons under power 卑幼, who compel the sale in marriage of any of their Senior Relations in the second degree. On this analogy a master who by *force majeure* sells the daughter-in-law of his slave as a concubine ought to be punished as a paterfamilias who, for the sake of the price, forcibly sells one of his juniors within the second, third or fourth degree (Section 112, Li 4), that is to say with banishment for life (流); and this sentence was accordingly confirmed upon *Wei Sze-yung*.

NOTE.—It is disappointing to find that nothing is said in the final decision as to the disposal of the woman who was the real object of controversy. But the inference is, that the second purchaser had the better claim. The woman was the widow of the son of a slave. It is doubtful if she herself and her deceased husband were in the slave class or not. In the first part of the decision it is implied they were not, as it is expressly said they lived apart and had never made submission of their services, but in the second they are treated as if they fell under the category of "Slaves and hired servants." The main point however is whether a slave can exercise the ordinary rights over his own family against the will of his master, and the answer here given is he can. Both the slave and his master had pretended to dispose of the woman in marriage. The two purchasers had come to blows over it, and the master who had nothing to do with the fight was found in the wrong. The inference therefore is that the slave was the proper person to negotiate the sale. At the same time it is expressly stated that the woman did not stand to the master in the relation of a mere stranger; though she was not his slave she was under the power of one who was his slave, and the master would appear to have the same right of control that he might exercise over the more distant members of his own family, such as nephews and nieces whose own parents were still alive.

It is worth while to note that very little distinction is drawn in Chinese law between slaves and hired servants in criminal matters. A master can inflict corporal chastisement upon either for misbehaviour to almost any extent he pleases short of causing death without being answerable for

it, but wilful homicide in either case entails a penalty less than that for killing a free man. Neither can bring an accusation in a court of law against their master—a disability, however, which they share with sons under power. Each has the same rights and liabilities as the other in kind, only differing in degree. For petty offences a slave may be sentenced to ordinary banishment like a free citizen, so that in the eye of the law he cannot be considered the chattel of the master, else a sentence of banishment would in reality be to punish the master and benefit the slave. Slaves and all other menials form a distinct class or caste, with only this difference between them, that the former are involuntary and permanent members of it, while the latter are voluntary and temporary. But so long as the contract of service lasts the subjection of the hired servant to the master differs but little from that of the bought slave. Both are 賤 *Tsien*, mean or servile, as opposed to 良 *Liang*, the respectable or free citizen, and that status regulates their rights and duties through all the relations of life. Both are subject to the authority of the paterfamilias and in a qualified degree to the authority of all the senior members of the household in the same way that sons and younger brothers are subject, and this analogy is pursued in fixing the penalty for offences by or against their masters.

#### CASE OF KWO SHIH-NA.

*Case of a man who in order to obtain possession of some family property threatened to force his younger Brother's widow to remarry, in consequence of which she committed suicide.*

The prisoner *Kwo Shih-na* was the (堂) *t'ang* Elder Brother (see Table of relationships) of *Kwo Shih-lou*, who had died long ago leaving a widow and a young son. He left also some nine *mow* of land and some houses which the widow was in possession of. Her young son and only child having died she, with the assent of her mother's family, got a nephew by the mother's side (a son of her brother's) to come over and live with her—a young lad named *Fu Ko-liang*. *Kwo Shih-na* being hard up and wishing to get possession of the property left by his brother, went one evening along with another relation of the family to visit the widow, and told her he wished her to remarry. She cried



and swore and *Kwo Shih-na* lost his temper and said "he would find a master and they would force her to marry," whereupon she cried and stormed all the more until the neighbours came in and persuaded the visitors to go away. After they had gone she said to her nephew with tears that having kept her widowhood for so long, she would rather die than remarry, and although she retired to rest pacified, that same night she put an end to her existence. The provincial court held that this case differed from that actually using violence to compel remarriage, inasmuch as the woman had only been frightened with empty words. The penalty for compelling a remarriage of a widow in the degree of relationship in which they stood to each other is strangulation after the usual term of imprisonment, and under the circumstances this was mitigated to banishment for life (流). This sentence, though at first queried by the Board, was afterwards upheld and confirmed.

NOTE.—This case is typical of a large class of cases which are constantly to be met with in Chinese Criminal Law. Some one threatens to do something and the other in a fit of rage and grief commits suicide. The former is held responsible for the consequences, though the threat may have been a vain one or never intended to be carried out. In cases between relations the rule no doubt acts as a check upon the large powers vested in the paterfamilias.

#### CASE OF CHU PAI-MU.

(Translated from the *Po An Hsin Pien*, Vol. 17.)

Report by the Viceroy of Hukwang of the trial of the prisoner *Chu Pai-mu* charged with causing the death of his elder brother by pressure and intimidation. At the trial the following facts were elicited:—*Chu Pai-chun* and *Chu Pai-mu* were brothers living apart, the family property having been divided. *Pai-mu* the younger brother being hard up sold to *Pai-chun* the elder 40 *shih* of rice land for Tls. 95. The money was paid and possession given. The following year he also sold a small bamboo plantation for a sum of Tls. 7.50. In payment of this the elder brother handed over a water buffalo valued at Tls. 6.70, and the balance of 80 cents was to be made up by the delivery of one bushel two pecks of paddy. The paddy was not delivered though *Pai-mu* sent several times to ask for it. The latter now began to think that he had sold the land too cheap and

demanded Tls. 5 extra, besides the paddy, all of which *Pai-chun* refused. *Pai-mu* then got the middlemen who had arranged the sale of the land to go and expostulate with the obdurate brother but all with no success. *Pai-mu* next sent his wife (*tso-so*) "to sit and dun" and to make a row if the money was not paid. While there she knocked her head against a beam and came home and complained that she had been assaulted and beaten. Some of the neighbours then intervened to keep the peace, and it was promised that in a few days a proper settlement would be made. Several days passed however and nothing being done, prisoner again took his wife to *Pai-chun's* house "*tso-so*" to sit and dun, and while there she smashed a lot of crockery-ware but still with no result. Next day prisoner got together three of his wife's relations and proposed that they should go in a body and demand a settlement. The others, however, persuaded him to stay at home and they would go and see what they could do. Accordingly they went and after a free fight took possession of the place, hauled out some fish from the fish pond, fried and ate them and drank several bottles of wine. Next day prisoner's wife (who apparently had remained on the premises all this time) was taken ill. *Pai-mu* the prisoner went to see her, and was begged by the family to take her home and nurse her, but he refused and left her on their hands. By this time *Pai-chun* the elder brother was driven to distraction by the continued row in his house and taking an opportunity one evening he slipped out to an empty field and hanged himself.

The case was then reported to the Magistrate who had all the parties arrested, and on examination the foregoing facts were established. The sentence proposed by the provincial Courts was strangulation in the case of the prisoner *Pai-mu*, being that prescribed by the code for causing the death of a senior relation, but reduced one degree to banishment for life. The wife as an accessory was to receive 100 strokes and 3 years' banishment, which being a woman she could redeem by a fine. The wife's relations were to receive 80 strokes for doing what they ought not to have done. The Court of appeal refused to allow the commutation to banishment in the case of the man and directed that strangulation after the usual delay be recorded, otherwise the sentences were confirmed. No reference is made to the original cause of the dispute.

## APPENDIX II.

### MIXED COURT CASES.

The following cases are compiled from the contemporary reports as they appear in the *North China Herald*. None of these reports appear to have been officially revised, and being in many cases very brief, it is difficult to make sure that the facts are always fully stated. Some of the decisions, especially in the later cases, may be regarded as carrying authoritative weight and will be valuable as precedents, but the same cannot be said of all the earlier cases, which however are set down as a record of what actually happened. It is matter of regret that so few of the purely native cases of which there must have been many, are recorded, because a better exposition of Chinese law proper might have been expected in these than in mixed cases, where an evident bias in favour of the Chinese defendant is not infrequently to be found. It is only right however to say that the decisions of recent years show a marked improvement in this respect, and the present tone of impartiality in the Court leaves little to be desired. The Court has been fortunate for a considerable period in being assisted by very competent British Assessors, to whose influence some at least of the improvement may be considered due. It would seem desirable for the sake of continuity and in view of the importance of the post that the appointment should be made as far as possible a permanent one.

### FAMILY LAW.

*N. C. Herald*, Jan. 3 and Nov. 14, 1900.

ALGAR v CHENG CHIH CHI.

*Trust disposition by Father in favour of one son. Rights of Creditors on Family property.*

This is an important case on family law which occupied the attention of the Courts over a long period and was only finally settled by a judgment in H.M. Supreme Court.

The facts appear to be as follows:—

*Feng Chu Chi* (since deceased) had two sons, the elder of whom having predeceased him, he adopted *Feng Hung-show* (an agnate apparently) as son to his deceased son and therefore grandson. Being desirous of benefiting the adopted



grandson and mistrusting the surviving younger son, he conveyed a lot of land of considerable value to a foreign firm, D. D. & Co., in trust, and at the same time made a will or trust disposition by which he directed the Trustees to hold the land in trust for the grandson until he attained the age of 30 years and thereafter as he might direct. It does not appear what provision, if any, was made for the younger son, but his Mother, wife of the deceased testator was still alive, and presumably the family continued to live in common, receiving the rents from the trust property. The son a spendthrift had contrived to incur large debts on the credit of his supposed inheritance from his Father. As the creditors became pressing, the son, the grandson and the widow contracted through an intermediary to sell the land to Algar for Tls. 58,000, and Tls. 5,000 bargain money was paid. Finding presumably some difficulty in getting the trustees to transfer the property, the grandson being then only 16 years of age, they or some of them sold the land over again to a Chinaman, *Cheng Chih-chi* for Tls. 41,000, and the whole of the price was apparently paid over. Algar then brought his suit to compel the parties to transfer the property to him on which he was prepared to pay over the balance of the purchase money. *Cheng Chih-chi* entered an appearance, claiming the property as his on the ground of a completed sale.

The judgment of the Mixed Court was that the sale to Algar, having priority in point of time should stand, but that the purchase money Tls. 58,000 should be divided; Tls. 30,000 to be paid over to D. H. & Co., the trustees in satisfaction of the trust, and Tls. 28,000 to be divided *pro rata* among the son's creditors. The claim of the second purchaser was disallowed, and he was directed to file his claim for a refund of whatever he had paid as purchase money along with the other creditors of the son, but with no preference.

*Cheng Chih-chi*, the second purchaser, appealed to the Taotai's Court and the case was reheard. The Taotai's judgment was that neither the sale to Algar nor that to *Cheng Chih-chi* should stand, as being in contravention of the Father's will, that the money paid in both cases should be refunded, or in case that could not be done that interest on the sums paid by the would-be purchasers should be a charge on the trust property in the hands of the trustees.

NOTE.—The Taotai's decision is extremely disappointing and indeed illogical. The Father's will was either good or bad, and this was the first point to be determined. If it was good, the whole of the trust fund was the property of the grandson, and there was no reason whatever why his property should be charged with interest on money which went to pay the debts of the younger son. If it was bad, then the trust was void as being *ultra vires*, and the trust fund became undivided family property. In that case the creditors had a right to call for a division, and to be paid out of the half share that would fall to the son their debtor.

The judgment of the lower court on the other hand was quite reasonably in accord with the principles of family law which we have found to prevail, *viz.* that a parent cannot by will or gift dispossess one son in favour of another, but each must have an equal or at least a substantial share. Further a parent cannot by will tie up his property so as to prevent a sale for family necessities. It is not stated on what principle the proceeds of the sale were to be divided on the slightly unequal proportions of 28 and 30, but presumably the grandson as representing the senior branch of the family, and therefore responsible for the family sacra was given the larger share, a course which is usually adopted. It is submitted that so far as this case may form a precedent, the judgment of the lower Court will be followed, rather than that of the Court of Appeal, which indeed is of no value at all, inasmuch as it lays down no general principle which can be applied to future cases.

The sequel to this case may be noted here though the proceedings took place in another Court.

The Trustees, Messrs. D. H. & Co., were evidently put in a somewhat embarrassing situation by the Taotai's decision which varied the trusts, but which was incompetent for want of jurisdiction to make an effective order which would be binding on them, and they applied to H.M. Supreme Court for directions. An interim order was made directing them to repay out of the rents to Algar the sum he had paid as bargain money and several other sums, but to stand possessed of the corpus in the meantime.

Thereupon *Cheng Chih-chi* (now termed *Ching Jack-kee*) filed a petition in the Supreme Court praying for an order to sell the property and that the trustees be directed to satisfy his claim out of the proceeds. The case came before Mr.

Justice Bourne who had been the Assessor in the original case and therefore was familiar with the facts. The case though brought in the British Court was really a case between two Chinese, the Trustees the nominal Defendants being nowise interested in the result. The Judgment consequently was based on Chinese law and was to the following effect:—

Ordered that the property, estimated to produce Tls. 80,000 be sold, and that one half, not exceeding Tls. 41,000 be paid to *Ching Jack-kee* in satisfaction of his claim, that the son should execute a deed of partition of the family property (*fen chia*) and release the other moiety from all further claim, that the balance should be invested in securities for the benefit of the grandson till he attained the age of 30, and otherwise to follow the trusts of the will.

*N. C. Herald*, Jan. 18, 1913 and subsequent dates.

ZIH LI-KUNG *v* ZIH YUE-YUE AND OTHERS.

*Undivided Family Estate.*

This was a cross suit between members of the family of one *Zih Chin-fu*, who had been for many years Compradore of the Hongkong and Shanghai Bank, for an account of earnings and for a division of the family property.

*Zih Chin-fu* deceased left a Widow and five sons and a fortune of some Tls. 800,000. By his Will made in English he directed that his Estate should remain under the management and control of the Widow and the five sons as an undivided whole, but any three of the sons and the Widow if surviving should have general powers of administration. The Estate was to be finally divisible into six parts, one for each of the sons, and the sixth for sacrificial or charity purposes, his intentions regarding which he said his sons were well aware of.

*Zih Li-kung* the eldest son succeeded his father in the office of Compradore to the Bank under an agreement which stipulated that a portion of the undivided family property consisting of title deeds to land and shares in public companies should be transferred into the name of the Bank as security for losses which the Bank might sustain through misfeasance of himself or his subordinates. In return it was arranged between him and the rest of the family that one



half of his earnings as Compradore should be paid over to the family fund, the other half being his own.

In 1911 the family or some of the members being in difficulties, a loan of Tls. 50,000 was obtained from the Bank partly on the securities already held as the general guarantee of the Compradore, and partly on the deposit of some fresh securities. Meantime the elder brother had ceased paying any part of his earnings into the family fund. Friction then ensued; the other brothers apparently had lost confidence in the elder, and feared that the family property deposited with the Bank as security was being wasted or dissipated.

This suit was then brought in the Mixed Court for a partition of the property. Each side called on the other to render account of all dealings with family Estate, and to bring into Court such portions of the property as each might have in possession. The difficulty as regards the elder brother was that he could not obtain release of that portion of the Estate which was deposited with the Bank without resigning the office of Compradore, a step which he was naturally reluctant to take, and which some of the others were probably equally reluctant to force on him, the post being in fact a valuable family asset. The Court recognising the difficulty advised that an effort should be made to settle the matter by friendly arbitration and adjourned the case *sine die* to see what could be done.

Three of the younger brothers then brought an action in the British Court against the Bank claiming a refund of the family securities, and an injunction against further charging them. The case came on before Mr. Bourne, Assistant Judge, who held that the Plaintiffs were barred by their own act in sur-pledging the securities for the loan of Tls. 50,000 and that until that was paid off they had no case. But he was of opinion that the family as a whole being guarantors of the elder brother, the three junior sons had sufficient interest to give notice to the Bank to terminate their liability, provided that this was done in pursuance of the scheme for a division of the family Estate generally. If they wished to bring their relations with their elder brother to an end they must take steps to divide.

On a rehearing before the full Court the Judge decided against the three plaintiffs on the short ground that they had no authority to represent the undivided family. The clause in the Will of deceased gave only general powers of adminis-

tration and was inoperative in a suit of this nature. If the undivided family were properly before him he would deal with the points raised as against the Bank, at present he would express no opinion.

July 19, 1913.

The parties then again had recourse to the Mixed Court, but no final decision is recorded. It was stated on behalf of the elder brother that he was taking steps to replace the family securities lodged with the Bank by others from his friends, and the further settlement of the case was probably left to friendly arbitration.

*N. C. Herald*, Nov. 22, 1913; July 4, 1914.

CHEN YUH-TSAI *v* SHU TE KUNGSZE.

*Suit for foreclosure and sale. Undivided family property mortgaged for debt. Until division no individual member can be deemed possessed of any particular portion.*

*Yeh Ching-chong*, a prosperous merchant, who died in 1899, made a Will in English by which he directed that his estate and his various business establishments should be carried on as an undivided whole for the benefit of his seven sons, and he named three of them as ordinary managers. The rents and profits of the business were to be divided annually;—three-tenths to go to a capital account for re-investment, and the remaining seven-tenths to be divided equally among the seven sons for their individual use. After acquired property by any one son to belong to that son and not to go into the general fund. The whole to be governed by Chinese law and custom, and he invoked the penalty of impiety on any son who refused to carry out his wishes.

A large part of the property consisted of land in the settlement, the title deeds of which were registered in the names of Messrs. McNeill and Jones who were thus the legal owners. The family held the title deeds and a declaration of trust by McNeill and Jones. The family in its corporate capacity had a common seal or Chop, and was known in its business capacity as the *Shu Te Kungsze*. In its social aspect the family was termed the *Shu Te Tang*. In the commercial crisis of 1911 the family had got heavily involved and was under the necessity of raising a large loan. The eldest of the seven sons meantime had died leaving three sons. These

three grandsons being unwilling to join, claimed and obtained their Father's share and released the rest of the property from any further claim. The six remaining sons then borrowed from the Plaintiff *Chen Yih-tsai*, representing a syndicate of native banks, the sum of Tls. 530,000 on the security of the lots of land standing in the names of Messrs. McNeill and Jones. The title deeds were handed over and an assignment made of the declaration of trust, and they undertook if required to execute a legal mortgage.

The legal mortgage was never executed. Default was made in payment of either principal or interest over a long period and suit was then brought for a decree of foreclosure and sale. Messrs. McNeill and Jones the legal owners were joined with *Chen Yih-tsai* the equitable owner as co-plaintiffs. At the hearing no defence was made by defendants on the merits, but four of the family appeared by Counsel, who held watching briefs on the plea that their clients were foreign subjects and therefore not amenable to the jurisdiction of the court. Two of them claimed Portuguese nationality on the ground of being born at Macao, and the other two claimed Japanese nationality on the ground apparently of naturalization. The Court brushed aside these pleas and entered judgment for the Plaintiffs.

The Portuguese and Japanese Consuls then addressed letters to the British Consul-General (Mr. Grant Jones, the British Assessor having been the Assessor in the case), protesting against any order being drawn up affecting the property of their alleged nationals without their concurrence. In consequence of this intervention the formal order for foreclosure and sale was not drawn up.

The case was then transferred to the British Supreme Court, *Chen Yih-tsai* the equitable owner being Plaintiff and Messrs. McNeill and Jones the legal owners being nominal Defendants. On a review of the facts the Court had no hesitation in giving judgment in favour of Plaintiff. The Defendants the legal owners were instructed to take steps for a sale of the properties subject to the approval of the Court, to pay what was due to the Plaintiff for principal and interest and to stand possessed of the balance in trust for the undivided family.

The interest of this case lies not so much in the question at issue, which indeed was a matter of simple contract, as in the lucid exposition in the judgments of both Courts of



Chinese law as applied to undivided family estates and the rights of individual members in event of a conflict of jurisdiction.

Mr. Grant Jones, in delivering a lengthy considered judgment of the Mixed Court, said:—

“In the interest of the whole community, Chinese and Foreign, for the prevention of fraud and for the security of property, we must lay down the broad principle that a concern of whatever nature it may be, functioning in China under a Chinese hong name, exercising its functions by means of a Chinese Chop dealing with property situated in China, and holding itself out to be a Chinese concern must be treated as such, whatever its component parts may be, and as amenable to this jurisdiction.”

In the British Supreme Court Mr. Justice Bourne in delivering judgment said:—

“It is contended that some of the six brothers who constitute the family having become Portuguese or Japanese subjects, orders against them can only be made by the Portuguese and Japanese Courts respectively. This would be so if it were sought to touch the persons or several property of these sons. But no persons and no several property are here in question. These lots of land were the property of an undivided Chinese family by which they have been mortgaged to Chinese in the Chinese language and by Chinese law and custom. Now an undivided family is a conception well understood in the legal history of the West, and it is an existing institution to-day all over India and China. ‘According to the notion of a joint undivided Hindu family no member, while it remains undivided, can predicate of the joint property that he, the individual member, has a certain definite share’. (per Lord Westbury). That is precisely the case here, as a perusal of *Yeh's Will* proves. With all respect to the Portuguese and Japanese Authorities I affirm that till there has been a partition there is nothing in these lands on which their Courts have jurisdiction to operate. The only Court competent to try the question—Who is entitled to the land? is this Court, because the legal estate is by registration vested in British subjects. When in such cases this Court is doubtful which of several Chinese claimants is by Chinese law entitled to the beneficial interest, our practice has been to refer that question to the appropriate Chinese Court, and to adopt in a proper case its finding.

That question in this case has already been determined by the Mixed Court and clearly determined with perfect justice: Unless therefore the mortgage debt is at once paid it seems to be the proper duty of this Court to approve a sale."

N. C. Herald, June 17, 1867.

#### CASES IN FAMILY LAW.

*Widow returning to her parents cannot take with her the children of the marriage without the consent of family of her late husband.*

Defendant a woman from one of the northern provinces had married a Cantonese and they had been residing for some years in Canton. The husband died leaving only a small amount of property. The Widow finding her surroundings in Canton uncongenial decided to return to her parents or kinsfolk in the North. She settled up affairs and taking with her the two children of the marriage, a boy and girl, ages three and five, had got as far as Shanghai, when she was arrested at the suit of her late husband's family who demanded back the children and the property. Being brought before the Mixed Court she offered to give up all the property but pleaded hard to be allowed to keep the children. The Magistrate *Chen*, said he deeply sympathised with her but he had no option in the matter. Chinese Law he said required that the children should be given back to the husband's family and he must so order, but he would direct that they pay her a solatium of \$50.

NOTE.—The sequel is not stated but presumably the unfortunate woman would elect to return with her children and remain in the family, which is what Chinese etiquette would expect her to do.

January 23, 1873.

#### SALE OF A GIRL.

Plaintiff had purchased a girl from her parents for \$105. The girl afterwards rejoined her parents or was enticed away. The Mother and girl were arrested and brought before the Mixed Court, the Father having absconded. The Court ordered that the money should be refunded but that until that was done the girl was to be handed over to the Purchaser as security.

NOTE.—The selling of children was made illegal by a Decree of the late Dynasty dated February 1910. It was, however, permitted to hire them out for a definite period not exceeding 25 years.

February 11, 1910.

YANG YUNG-SZE *v* Woo MAI-CHI.

This is a peculiar case in family law. No report is made of the hearing of the case in the Mixed Court, the parties all being Chinese, and the facts are gathered from the judgment of the Magistrate.

A lady who had at one time been the wife of the Plaintiff died possessed of considerable property, and the suit was brought for an injunction to prevent the defendant, who was a younger brother of deceased, from carrying out the funeral obsequies, and from intermeddling with her estate. The brother's claim rested on the alleged adoption by the deceased lady of one of his sons, in which case the adopted son would have been chief mourner. The deceased however had a natural born son, but not apparently by the ex-husband, and therefore illegitimate; she had also left behind some sort of a Will though in what terms is not stated.

On the evidence, the Court held that the relationship of husband and wife between the plaintiff and the deceased did not exist. This implies that she was a divorced wife. Held also that Chinese Law does not recognize the adoption by an elder sister of the son of her brother. Consequently neither the plaintiff nor the defendant had the right to conduct the funeral obsequies, but that this devolved by natural law on the deceased's son, who was directed to see the ceremonies carried out with due propriety. As to the Estate of deceased which was considerable, it was directed that it should be divided in specified shares between the natural born son, the brother and a charity. This division seems to have been, in some measure at least, in pursuance of the Will of deceased.

NOTE.—The case is peculiar inasmuch as it is one for which no provision is made in the Code. Chinese law does not contemplate the possibility of a woman dying possessed of property and not belonging to some one family. A divorced wife either is sold in marriage, or remarries, or reverts to her father's family. It is probable that deceased was in this last category, and therefore her brother as next



of kin on the father's side would seem to have the best claim to inherit her property. The Magistrate seems to be right in holding that she could not adopt her brother's child, not however, because he was her brother, but because being a *femme sole* she could not adopt anybody. The object of adoption is to continue the family line in the male descent, and so secure the continuance of the ancestral worship. But a woman with no husband has no place in any ancestral hall, and is therefore incapable of adopting. She is *finis familie*, the last of the line and can have no successor.

A widow has her proper place in her husband's ancestral hall, and therefore can adopt or join in adopting, not to herself, but to her late husband. It is uncertain what rights Chinese law would give to the illegitimate son of a divorced woman. The illegitimate son of a husband, that is a son by a woman not forming part of his household, would succeed failing other heirs, but no similar provision is made in the case of the woman. The Magistrate's decision is avowedly based on natural law with a strong leaning to give effect to the wishes of the deceased in regard to the disposal of her property.

It may be noted that though a *femme sole* cannot adopt a legal heir, there seems no reason why she should not have an *l-tze*, courtesy child, male or female, that is a child by quasi-adoption (*vide*, page 27). Chinese law recognises that such a child may have some share in the family property when adopted by the male head, and inferentially the same right might accrue to one adopted by a *femme sole*.

June 24, 1911.

#### FRAUDULENT MARRIAGE DISSOLVED.

The Mother of a girl complained that the defendant had by misrepresentation induced her to enter into a contract for a marriage between his son and her daughter, concealing the fact that his son was already married. The marriage was carried out with the customary ceremonies, and it was not till some time afterwards that she discovered that the son already had a wife, and consequently her daughter was only a No. 1 concubine, a position which she would not allow her to occupy.

The Court ordered that the girl should be restored to her Mother and the marriage contract torn up. Plaintiff it was stated did not press for any further penalty.

NOTE.—Presumably the defendants would have been liable to 90 strokes of the bamboo under Section 103 of the Code, but that seems the only penalty that could have been imposed. The Mother would have no remedy in damages, but she would of course retain the marriage presents.

June 14, 1913.

CASE OF WANG CHEN-SHIH.

*Concubine absconding from her home.*

Wang Chen-shih, a concubine and mother of two children had been arrested and brought before the Court charged with desertion by her husband, who stated that he had purchased her from her parents for the sum of \$1,000. Accused's defence was that she had been beaten and ill-used by her husband and her life was unhappy. It was also argued on her behalf that as the new Criminal Code provided no penalty for desertion by a concubine it was no longer an offence, and that in effect concubinage had been abolished.

The Court ruled that though no penalty is provided in the new Code, that does not delete an important feature of Chinese family life handed down from centuries, and that the old Code is still in force on this point. The status of concubinage had not been abrogated by any legislative authority. Accordingly it was ordered that the woman must return to her home and conform to Chinese family life.

NATIVE BANK ORDERS.

N. C. Herald, March 5, 1874.

OVERBECK & Co. v HENG-YIK BANK AND ANOTHER.

*Stolen Bank Orders in hands of an innocent holder for value.  
Custom of trade.*

Plaintiffs being holders of five native bank orders handed them to their Compradore to be chopped by the paying banks. The Compradore in dereliction of his duty discounted two of them with the defendant banks, and embezzled the proceeds, afterwards absconding. Suit brought in the Mixed Court against the discounting houses for rendition of the notes. Defendants pleaded that they received the notes in the usual course of business and without notice that they were stolen. Interim order made by the Mixed Court

stopping payment of the notes and to await further order. Defendants being dissatisfied appealed to the Taotai's Court who ordered that the amount of the notes should be brought into Court. This decision was communicated to the parties by the Mixed Court Magistrate who apparently suggested to them that they had better try and settle it among themselves, whereupon the Plaintiffs and the two Defendants agreed that each should lose one-third and so the suit was withdrawn.

The Bankers Guild being misinformed, and assuming that the settlement was in pursuance of an order of Court, addressed a letter to the Chamber of Commerce protesting against this supposed decision. They wrote "Orders are issued at sight or at several days up to ten and at maturity we pay in full to bearer. The order only is recognised, not the holder. This is the universal custom. This judgment completely undermines the previously accepted law in regard to bank orders. *Heng-yik* and *Looling* had received the orders in the ordinary course of business, and that they should be compelled to lose one-third of the amount is contrary to the universal practice and unjust."

The Chamber of Commerce replied that having made inquiries, they found that the compromise was a voluntary arrangement and not by reason of any order of Court, consequently no precedent had been set which interfered with the established custom of trade, and they trusted that things would go on as before.

*N. C. Herald*, October 17, 1911.

#### WATTIE *v* TAI CHIA-PAO & THREE NATIVE BANKS.

*If native bank order is unconditional on the face of it no evidence is admissible to show that it was in fact issued subject to conditions.*

Defendant, *Tai Chia-pao*, had at the request of certain native banks negotiated a loan with the China Mutual Insurance Company for Tls. 500,000. He signed a Promissory Note in his own name for the amount and handed to the Company as security 10 native bank orders of Tls. 50,000 each and certain title deeds as security. A financial crisis supervened and the banks were unable to meet their obligations. Negotiations followed; some of the banks paid or



compromised and part of the title deeds deposited as security were returned, but apparently without the knowledge or consent of *Tai Chia-pao*, the original negotiator. This left outstanding a sum of Tls. 270,000 or thereabouts, and the orders of the three defendant banks to the extent of Tls. 300,000 were unpaid.

This action was then brought by Mr. Wattie, as assignee of the China Mutual Co., against *Tai Chia-pao* on his promissory note and the three defendant banks on their unpaid orders.

The defendant banks pleaded:

1.—That they gave the orders by way of collateral security or guarantee for the repayment of five lacs advanced by the China Mutual to *Tai Chia-pao*; the principal security being a number of title deeds for land. The orders were given by *Tai Chia-pao* to the Company by way of collateral security only.

2.—That as guarantors or sureties as aforesaid they were entitled to the benefit of the principal security, viz. the title deeds. Defendant banks have been wrongfully deprived of the said benefit, and plaintiff is not entitled to have recourse to said bank orders as claimed by him.

After a hearing which extended over several days the Court gave an interim judgment against the defendant banks in the following terms.

“The question is whether a Chinese bank which has issued a bank order, can, apart from cases specified in the regulations of the Bankers Guild (providing for certain contingencies as loss destruction by fire or water and theft), legally refuse to pay its order unconditionally, according to the tenour, and be allowed to call evidence to show that the order was in fact issued subject to conditions.”

(After describing the usual forms of these orders the Judgment continues).

“A Bank order, in either of these forms, has long been regarded by the custom of Merchants in Shanghai as a negotiable instrument. No evidence we think can be admitted to qualify the terms of the instrument so issued. But we are also of opinion that if on the face of the order there are words which expressly state or which can reasonably be construed as implying that it is issued subject to conditions, then the holder takes it subject to the right of the issuing bank to show what is the meaning of the words

so written, and whether any conditions do in fact attach to the instrument."

The case against *Tai Chia-pao* (whose hong name was *Pao Kong*) was then proceeded with. This defendant pleaded that he was merely the agent of the banks in negotiating the loan, that he had not in point of fact received any part of the proceeds of the loan for himself, but had paid the whole over to the banks, that in signing the promissory note he understood it was merely a memo of the deposit of the securities on which the loan was made, and that he never intended to make himself personally responsible.

The Court held that by signing the promissory note which was in unqualified terms he was estopped from pleading that he was agent and must be treated as principal. At the same time if he was to be treated as principal he must be regarded as mortgagor of the title deeds which he had deposited as security and some of which the Plaintiffs had parted with. The latter therefore must be prepared to hand him back the identical deeds which he had deposited before they could call upon him to pay what might be found due on the promissory note.

A sequel to the above case is briefly reported in the *North China Herald* of March 9, 1912, under the heading *Wattie v. Pao Kong*. It seems that the defendant banks or some of them were in liquidation and two shareholders were summoned to pay their share of the banks' debts. No judgment is reported but it appears each was held liable for that proportion of the banks' debts which their share in the capital bore to the whole capital of the bank.

April 18, 1898.

NATIONAL BANK OF CHINA v GAY DAH BANK.

*Native Bank Orders.*

Plaintiffs were holders for value of Native Bank orders issued by defendants for Tls. 40,000, payment of which had been refused.

Defendants pleaded that the Orders were issued to the Compradore of the National Bank as accommodation notes merely, or as they put it that the Compradore had borrowed the note for his own particular use, that he had failed to

place them in funds to meet the notes when presented, and that they had cancelled the notes accordingly and published a notice to that effect in the native press. They further alleged that by custom the Plaintiffs before accepting the orders should have sent them to the issuing Bank for verification, in which case they would have learned that they were worthless; and lastly they claimed to set off a debt due to them from the Compradore greater than the amount of the orders.

At the hearing the defendants were called upon to produce the counterfoil of the order book and the entry therein showed that the orders had in fact been issued to the National Bank.

Judgment was given against the defendants. The Magistrate in delivering judgment said:

"When a native bank issues notes and passes them into open circulation through the medium of an outside party, everyone relies on the credit and standing of the bank of issue. Should a holder of a note happen to lose it he can report to the bank of issue and have it cancelled, but there is no such rule as a bank of issue extinguishing its liability at its own pleasure by a notice in the public press."

"The *Gay Dah* bank further contends that they lent out these orders to *Sze Sen-hsien* (Compradore) for his own particular use and that afterwards as *Sze* did not lodge assets to meet these orders the bank could not of course honour them. Now the mercantile community makes a distinction in respect to bank orders, namely bank cheques and notes. Cheques are orders drawn by parties outside on the bank against funds lodged with the bank, and if the drawer of the cheque has no assets the bank can refuse to pay. But if a Bank itself issues notes then the bank of issue is required to have money in hand for issuing (meeting) the notes and having issued it ought to pay in terms of the note. The bank however is free to see that the note tallies with the counterfoil, and has been regularly come by, in the hands of the holder . . . Such bank notes take the place of hard cash, much the same as Foreign bank notes, and a bank note lent to a man differs in no respect from hard cash lent to a man."

"If the Compradore owes the *Gay Dah* bank as alleged, the latter must sue him separately. They cannot plead a set off as against the National Bank."



The Assessor (Mr. J. Scott) concurred, adding:

Among Chinese Merchants and Bankers such notes are spoken of and treated as "payable to bearer on demand" and this is clearly borne out by the evidence of defendants' own witnesses. They acknowledge that in respect to such bank orders all that it was necessary for a holder to do was to satisfy himself that the "chop" on the note was that of some bank of standing; it was not usual or necessary to present the note to the issuing bank for verification.

*N. C. Herald*, Nov. 21, 1900 and January 23, 1901.

CARL BOCK *v* TEH SIN-SZE.

*Promissory Note to Bearer is not a negotiable instrument.*

Plaintiff sued for payment of three Promissory Notes value Tls. 10,000 drawn by defendant and payable to bearer, which he alleged he had acquired for value in the course of business.

The defence was that the notes were the property of the Tung Sung Bank now in liquidation, that in the course of litigation between the drawer and that Bank they had been deposited in the Hsien's Yamen as evidence in the case, that they were now ten years old, and that it was incumbent on the Plaintiff to show how and from whom he had acquired them.

To this Plaintiff replied that the notes being payable to bearer were negotiable by the custom of trade, and he was not obliged to prove from whom they were received. Possession was *prima facie* evidence, unless fraud were alleged, in which case he would be prepared to meet it.

This was a rehearing of a case decided by a former Taotai who apparently had given a decision against the plaintiff. No fresh evidence seems to have been taken.

The Taotai's judgment was to the effect that as the notes did not bear the chop of any bank or shop, it could not be contended that the notes only are to be recognised and not the person to whom they were issued, that there was no evidence of privity of contract between the drawer and the present plaintiff, that the notes were ten years old and were now worthless, being merely evidence of previous indebtedness of the drawer. Judgment was therefore entered in favour of defendant.

NOTE.—This decision seems to imply that a Promissory Note, not being issued by a bank or recognised cash shop, is not in Chinese law a negotiable instrument, or at least is not so *primâ facie*.

N. C. Herald, August 21, 1915.

INTERNATIONAL EXPORT CO., v HOPE BROS. (*Hu Shao-tang*).

*Stolen cheque issued by a British Firm and received by Defendant a native Company for value. Held that it must be treated as a negotiable instrument, though no evidence was adduced to show that by native law or custom it had been so treated.*

The defendant company though bearing a foreign name was a native company carrying on a jeweller's business in Shanghai. A stranger came to their shop and purchased a quantity of jewellery. He tendered in payment a cheque drawn by Plaintiffs (a British Firm in Chinkiang) in favour of "Zung Lee & Sons or Bearer," and bearing the endorsement Zung Lee & Sons which afterwards turned out to be a forgery. Defendants sent the cheque with their pay-in book to the Hongkong and Shanghai Bank on which it was drawn, and having satisfied themselves that the cheque had been duly paid to credit of their account, they permitted the stranger to take his purchases, and gave him the balance by a cheque on their own account amounting to some 5,000 odd taels, which was promptly cashed.

The Plaintiff company meantime having ascertained that their cheque, which had been entrusted to one of their own employees to post, had in fact been stolen, and having learned that it had been cashed by Defendants, demanded repayment from them of the full amount, which was refused.

This action was then entered in the Mixed Court for repayment of the amount of the cheque.

The arguments at the hearing are not reported, but apparently the Plaintiffs' case was that a foreign cheque is not by Chinese law or custom a negotiable instrument, and that defendants had acquired no right or title to the money; or alternatively that the cheque had been received under circumstances which should have given rise to a reasonable suspicion that it had been stolen and therefore the defendants were not *bonâ fide* holders for value. Defendants' case was

that they were *bonâ fide* holders for value in the usual course of business, and that the cheque was negotiable.

The Court (Mr. Grant Jones, Assessor), held on the analogy of several English cases that a foreign cheque negotiable in the country of origin might be negotiable here if custom and usage were proved. No such evidence had been adduced and he doubted if any such custom existed. But if he were to hold that an instrument negotiable by English law was not negotiable by Chinese law, there would by reason of extraterritoriality, be a want of reciprocity between the two Courts, so that on the same facts a party to the suit might win in the one court and lose in the other. For instance, assuming the present defendants to be *bonâ fide* holders for value, if payment of the cheque had been stopped at the bank they could have sued the drawers in the British Court and were bound to win. If on the other hand the cheque having been paid, they were sued in the Mixed Court and non-negotiability were pleaded, they were bound to lose. He was constrained therefore to lay down the rule "that natives of this country dealing with a foreign instrument do so subject to all the incidents that attach to it in the country of its origin."

Defendants would therefore have a good title if they were in truth *bonâ fide* holders for value. But on an examination of the facts as shown by the evidence, the Court held that they had received the cheque under such suspicious circumstances as ought to have put them on inquiry, which they could have easily done, and therefore they were not *bonâ fide* holders. Judgment was therefore entered for Plaintiffs.

N. C. Herald, March 13, 1891.

HONGKONG & SHANGHAI BANK *v* YUEN YUAN-CHONG AND  
YUEN TAI BANK, TING HWA BANK GUARANTORS.

*Security chop on Bill of Exchange cancelled by taking and releasing a higher form of security. Mistake in telegram. Custom of trade.*

The Hongkong and Shanghai Bank advanced a sum of money to the firm of Yuen Yuan-chong and received in exchange that firm's draft on their branch in Kobe. The draft bore the chop of the Yuen Tai and Ting Hwa Banks



as sureties. The draft was accepted by the drawees in Kobe, but was not paid at maturity. The Bank, not being satisfied with the security of the chops on the draft, called upon the two native guaranteeing banks for better security. The latter being themselves covered by the deposit of godown orders and title deeds, the property of the drawer, handed to the Foreign Bank money orders on themselves for the full amount of the draft. Later on, a telegram was received by the Foreign Bank from its Kobe branch, which was decoded to mean that the draft had been paid, and thereupon the Foreign Bank handed back to the two native guaranteeing banks their money orders uncashed. The latter in turn assuming that their liability was at an end, released the godown orders and title deeds deposited by the drawer. It subsequently turned out that by a mistake in the Kobe telegram (how the mistake happened does not appear), it had been misread, and that as a matter of fact the draft had not been paid.

Suit was then brought against the drawer of the Bill and the two native banks as endorsers. The argument for the Foreign Bank was that notwithstanding the taking and surrendering of additional security, the endorsers remained liable by reason of having affixed their security chop on the original bill. The Defendant banks did not deny that they would have been liable for their endorsement on the original bill, but argued that by taking the second and higher form of security, the Foreign Bank had released them from the original liability, and specially that the Bank by surrendering the higher security, and informing them that the bill had been paid, had induced them to give up the security which they themselves held from the drawer.

Rejoinder by the Bank that by the custom of the trade the native banks should have known that their liability was not at an end until the discharged draft was returned and the security chops cancelled. The Bank had no knowledge of, and were not concerned with, the relations between the guaranteeing banks and the drawer of the bill.

After hearing expert evidence on the custom of the trade, the Court held (Mansfield, Assessor, concurring) that the Bank had failed to prove that there was a universal custom to return bills to the endorser for cancellation of the chops, though it was sometimes done. Judgment therefore in favour of the guaranteeing banks. The drawer of the bill

had no defence, and he was ordered to remain in custody till the bill was paid.

*N. C. Herald*, January 2, 1915.

BANK OF COMMUNICATIONS *v* WOO FOONG SUNG BANK  
AND ANOTHER.

*Loan on a pledge of shares guaranteed by defendant bank.  
Extension of time without consent of guarantor re-  
lieves him of liability.*

One *Zih Te-hui* had obtained an overdraft from the Defendant bank to the extent of Tls. 45,000 on a pledge of 240 shares of the Ta Ching bank. *Zih* being unable to pay off his overdraft authorised the Defendant bank to borrow the amount from the Plaintiff bank, and to mortgage the 240 Ta Ching shares as security, which they did, and at the same time guaranteed that *Zih* the real borrower would repay the loan at a given date. The loan was not repaid and the Plaintiffs took no steps to enforce the guarantee, nor apparently made any effort to come to an arrangement with the guaranteeing bank for an extension of time for payment. The shares in the Ta Ching bank held as security were then worth Tls. 200 each, more than sufficient to cover the loan. After a lapse of some five years the Ta Ching bank went into liquidation and the shares fell in value to Tls. 100 at which figure they were paid off, realising only Tls. 24,000 against the loan of Tls. 45,000.

This suit was then brought against the guaranteeing bank (now itself in liquidation) and its Manager *Loo Sao-tong* for the balance of the loan.

The Court held that the Plaintiffs having slept on their rights for so long and not having the express consent of the guaranteeing bank to an extension of time, were now debarred from enforcing the guarantee. Judgment therefore for Defendants.

September 12, 1898.

THE MERCANTILE COLLECTING AGENCY *v* WAI KWAN-CHI.

*Assignment of debts void.*

Defendant was indebted to one *Wong Fung-yuan* in a sum of Tls. 1,900 and *Wong* having difficulty in getting the debt paid had assigned the debt to plaintiff for Tls. 900.

The latter brought the suit for the full amount. Held that such an assignment between a Chinese and a foreigner was void and not enforceable in the Court.

The Magistrate in giving judgment said:—

“On examining the Chinese law as to debts I find no statute permitting the institution of claims in this fashion by persons buying claims. It is true that when necessary to settle his debts, a man may transfer to his creditors what claims he may have on others, but the business of buying claims at a discount in order to make a profit in their collection is not recognised, and this Court can give no countenance to the practice.”

March 31, 1904.

#### BANKRUPTCY CASES.

GUERRIER *v* WANG TSO-MING AND OTHERS.

##### *Partnership Bankruptcy. Liability of Partners.*

*Kiang Lan-ting* and three others had formed a Syndicate or Partnership for dealing in shares. The partnership had failed to meet its engagements and Plaintiff had been appointed by the Court Trustee of the bankrupt Estate of *Kiang Lan-ting*. Suit was brought by him against the three other partners for their contributions towards the debts of the concern in proportion to their shares in the capital. The total debts appear to have amounted to Tls. 243,800, and as one of the defendants, *Chang Liu-ching*, held one share out of 10, or one-tenth of the whole, the claim against him was put at Tls. 24,380. Another defendant held a half share or one twentieth of the whole and the claim against him was put at Tls. 12,190. Various defences were raised disclaiming liability, but no objections were made as to the principle on which the contributions were claimed.

The case was adjourned and no further report appears, but it seems from the foregoing that the principle of the extent of the liability of partners is well recognised.

August 26, 1904.

IN RE CHEN DA AND SIN DAH.

##### *Equal division of partnership assets among all Creditors.*

This case is imperfectly reported but it appears the Defendants Bank had failed and the President of the Bankers Guild had been appointed Trustee in the bankruptcy.



On the motion of certain creditors who were not satisfied with his manner of winding up the Estate, the Trustee was ordered to file an account of his intromissions and pay the balance of moneys in his hands into Court for equal distribution among all proved Creditors.

September 2, 1904.

WONG CHI-TUAN *v* CHANG LAI-SUNG.

This was an action for debt against Defendant and two guarantors. The facts are not stated but apparently judgment had been given against the principal defendant, and the case against the guarantors been ordered to stand over until the former had been arrested and brought before the Court.

At a subsequent hearing the Court ordered that as all efforts to arrest the debtor had failed, the two guarantors must at once make good the deficit Tls. 6,500, each being liable for one-half. The form of the guarantee note unfortunately is not given.

November 20, 1909.

IN THE TAOTAI'S COURT ON APPEAL CHEN CHING-SUN APPELLANT *v* THE PULP AND PAPER MILL Co., PLAINTIFFS AND RESPONDENTS.

The hearing in the Lower Court is not reported, but apparently the original Defendants had contracted to purchase from the Paper Mill Co. a quantity of paper at so much per month, the present Appellant having been guarantor. Defendants became bankrupt, and on taking accounts it was found they were indebted to the Paper Mill Co. in a sum of over Tls. 9,000. Action was brought to recover this amount, the Appellant having been joined as co-defendant in his capacity of guarantor.

The only question before the Court seems to have been as to the extent of the guarantor's liability. His plea was that he had contracted with the Plaintiff's Shroff, who he alleged for that purpose was their agent, that his liability should be limited to Tls. 3,000, or he had been misled into believing that it was so limited. The guarantee note apparently was in English but unfortunately the terms were not stated. The Lower Court, however, disbelieved his story and gave judgment against all three Defendants.

On appeal the Taotai without further hearing of evidence confirmed the decision of the Lower Court.

N. C. Herald, May 26, 1871.

TRAUTMAN & Co. v WOO TZE-CHU.

*Parol contract for charter of a steamer.*

Defendant a rice merchant expected to get a large government contract to ship rice to Tientsin, and through a broker approached Plaintiffs with a view to securing freight. As the result of several interviews Plaintiffs acted on a verbal request and chartered a steamer then lying at Yokohama for the purpose. Delays followed, and apparently defendant was given the opportunity of cancelling the charter, but, according to Plaintiffs' evidence, he or his broker, kept assuring them that the government contract would certainly be signed and nothing was done. Ultimately, however, the expected government contract fell through, and defendant repudiated his liability. Action was then brought to recover damages sustained through charter of the steamer. The Court dismissed the action on the ground that there was no written contract. Mr. Davenport, Assessor, said "It is a rule of law descending from high antiquity that no civil action shall be brought unless the Plaintiffs can produce in support of their claim an agreement in writing signed by the party to be charged or his agent, or unless there has been part payment or some overt act as proof (*p'ing chū*)."

A similar case is reported under date August 19, 1867—Gore Booth v Wang Sun-kwan,—where the Defendant was charged with breach of contract. The Taotai is reported to have said—"Chinese custom requires that to make a contract valid it must be supported by payment of earnest money or by signature of a written agreement."

N. C. Herald, November 15, 1870.

GLOVER, DOW & Co. v TAI YUEN-SUN (a tea hong), and TANG WEN-HSIEN (broker).

*Liability for business debts. Liability of middleman.*

Glover, Dow & Co. had advanced money against a consignment of teas to be shipped to London and sold on account of the first Defendant. The transaction resulted in

a loss of Tls. 1,486, and action was brought against the hong and the broker or middleman to recover the amount. The loss was not denied, but the representative of the Tai Yuen-sung hong, one *Liu Ko-shao* pleaded that the transaction had been entered into by and on account of a former proprietor of the hong, now deceased, and that therefore he, *Liu*, was not liable. The Court held that as he was now carrying on the business of the hong under the old licence, he must be taken as responsible for the debts of the firm. As regards the second defendant, the Court said that as he had been the middleman in the transaction, "it was incumbent on him to help to settle the affair," and it was ordered that both defendants be imprisoned until they gave sufficient security for payment of the debt.

NOTE.—It does not appear that the second defendant had signed any guarantee note.

March 8, 1871.

CHAPMAN, KING & Co. v TUCK SING.

*Security cannot be sued until all remedies against his principal have been exhausted.*

Defendant was guarantor of the Compradore of the Hongkew Wharves, the latter having obtained the post on his recommendation. It having been discovered that there was some shortage of coals and other stores for which the Compradore was responsible, a suit was brought by the Plaintiffs, Managers of the Wharfs, against the Defendant as guarantor, and also apparently against his principal, for the amount of the deficit. The former was discharged from the suit, the Assessor, Mr. Davenport, stating "it is laid down by authorities on Chinese Law that the client shall always be pressed in the first instance, and the surety only be called upon to make good the terms of the bond in cases where the client is dead or proved to be without assets."

*N. C. Herald*, June 6, 1874.

CARTER & Co. v CHANG KEE.

*Broker as Guarantor. Custom of Trade.*

Chang Kee a silk broker negotiated with Carter & Co. for an advance of £2,000 equal Tls. 6,575 to be used for the purchase of silk in the interior. The silk to be delivered



to Carter & Co. within two months to the full value of the advance. If the money was not repaid the silk was to be shipped to London by Carter & Co. and sold for account of the concerned. All risks of exchange and market to be for the parties interested and Carter & Co. to have a 10% margin. A contract note embodying these terms was brought to Carter & Co. purporting to be signed by one Yuen Kee as principal and signed by Chang Kee as guarantor. On realisation in London the silk showed a heavy deficit over and above the margin, and suit was brought in the Mixed Court to recover the balance.

The hearing in the Lower Court is not reported but judgment was given against both defendants.

Chang Kee as guarantor appealed and the case was reheard before the Taotai and Mr. Medhurst.

Carter & Co.'s case was that following the custom of the Port they had negotiated with Chang Kee as principal and did not know Yuen Kee in the matter at all. The silk brokers were all well-known in the trade, and it was to them that credit always was given. The so-called principal might be a man of straw and though his name appeared in the contract note no attention was paid to it. It was Chang Kee who received the money and they looked to him for repayment.

Evidence was led at considerable length to show that by the custom of the trade the silk broker was the man relied on for fulfilment of the contract.

Chang Kee's case was that he was guarantor merely, and moreover all that he guaranteed was that the money should be used for the purchase of silk and that silk to the value required should be delivered to Carter & Co. within the stipulated time, all of which had actually been done. He contended therefore that his liability was at an end, and he further alleged that Carter & Co. on receiving the silk had actually returned to him the contract note with his guarantee attached, thus showing that Carter & Co. relied solely on their margin to cover possible loss in London.

(The return of the contract note seems to have been admitted by Carter & Co. as only a copy was produced at the hearing).

NOTE.—Judgment was reserved and I am unable to find what it was, but presumably it was against Carter & Co. The case is given on account of the argument that the

guarantee though purporting to cover the whole contract, really only applied to the first half of it.

*N. C. Herald*, April 26, 1873.

TATE & HAWES *v* CHUN KEE.

*Pledge of Tea. Duty of Bailee. Custom of Trade.*

Chun Kee a tea broker applied to Tate & Hawes for a loan of Tls. 2,000 on security of certain teas. Tate & Hawes arranged with a Bank to lend the amount, Chun Kee signing a promissory note to the Bank which Tate & Hawes endorsed and the teas were put into the custody of Tate & Hawes. Some little time after Chun Kee informed Tate & Hawes that he had contracted to sell the tea to Messrs. Weston & Co. and asked them to arrange for the delivery. Tate & Hawes delivered the tea to Weston & Co. taking in exchange their guarantee to hold the proceeds to the order of the Bank against Chun Kee's promissory note. Weston & Co. failed and their guarantee became valueless. Tate & Hawes being liable to the Bank as endorsers of the note paid the bank and sued Chun Kee for the amount of the loan.

The hearing in the Lower Court is not reported but judgment was given for Chun Kee. The Plaintiffs then appealed to the Taotai who remitted the case to the Heads of the Tea Guild requesting them to consider the facts and report their opinion.

The Tea Guild reported that by the custom of the market when goods were put into the custody of a foreign hong against an advance that hong was responsible for the delivery. Although the tea had been sold to Weston & Co. it was optional for Tate & Hawes to part with them, and they need not have done so unless cash was paid. In taking the guarantee of Weston & Co. they must be held to have given credit to them and thereby relieved Chun Kee of his liability on the promissory note. Chun Kee had lost his tea and could not be called on to pay as well.

The Taotai adopted the Guild's report and gave judgment for Chun Kee. Mr. Medhurst in a separate judgment strongly protested. From a subsequent note it appears the case was appealed to Peking with no better success.

NOTE.—If this case is correctly reported it seems bad law. If Tate & Hawes being bailees had parted with the tea without authority they would properly have been held res-

possible. But they had Chun Kee's express authority to deliver, they were his agents for the purpose and he was bound by their acts.

May 15, 1885.

D. SASSOON & SONS *v* CHEN YEN-TANG AND FAN TEH-SHENG  
GUARANTOR.

*Liability of Guarantor.*

The first defendant had been Compradore to plaintiffs for a number of years, and second defendant was guarantor. The action was brought to recover a sum of Tls. 12,600 which was admittedly due by the Compradore, but which he was apparently unable to pay, and the only point of interest in the case was as to the liability of the surety to make good the amount.

The hearing in the Lower Court is not reported, but judgment was given against both defendants. On appeal before the Taotai and Mr. Consul Hughes the former held that as the security deed contained no express words undertaking to repay the money, but only required him to *li-she* (理涉) "to be concerned in the adjustment" he could not be held liable to make good the deficit "There were no words indicating the payment of money." The Taotai further found in favour of a counter-claim which had not been raised at all in the Lower Court to an amount sufficient to set off the Plaintiffs claim, and on these grounds he gave judgment in favour of both Defendants. Mr. Hughes in a separate finding of some length held that Plaintiffs were entitled to succeed on both claims.

The case was then appealed to Peking and the Taotai's decision was confirmed. This appeal is to be noted for the important pronouncement by the Tsung-li-yamen which is referred to in the previous chapter page 119, *viz.*,—that when a guarantee bond is relied on to secure payment of money for the debts or defaults of another, it must contain the words *tai-huan* (代還) or *tai p'ei* (代賠) "to repay on behalf of" or other express words indicating a clear undertaking on the part of the guarantor to make good the deficit from his own monies. This seems to be still the rule.



NOTE.—Some interesting correspondence took place between the Taotai and the Consul regarding this case, after the decision in the Lower Court had been given and before the appeal was made. (*North China Herald*, July 11, 1884). The judgment of the Lower Court as stated above was in favour of Sassoons but evidently some delay or difficulty was experienced in getting it executed. The correspondence is interesting as showing the attitude of the Chinese in questions of this nature. The Taotai wrote to Mr. Hughes:—“To look to *Fan Teh-sheng* for payment of *Chen's* debts on the strength of his guarantee, and to proceed to sue him for it would be going too far. *Fan* became surety for *Chen Yin-tang* as his friend, and as the bond contained the words *li-she* he must come forward and settle up the affair, but I do not think it fair to order him to pay the whole of *Chen's* debts. I think Messrs. Sassoons should be requested to be generous enough to remit the 6,000 odd taels of the claim. The other Tls. 6,000 *Chen* will be ordered to pay immediately, and if he is unable *Fan* will have to find the money for him.”

Messrs. Sassoons demurred to this proposition. They had got judgment for the full amount, and they did not see why they should be contented with the half. This was communicated to the Taotai who replied at great length, expatiating on the hardship to *Fan* that he should be put to so great loss all for a matter of friendship, and again urged the absence of the words *tai huan* or *tai p'ei* in the document. The Taotai was informed that he must either enforce the judgment or the case would go on appeal to the highest authorities. This course was followed with the result that Sassoons lost the whole, but a valuable precedent was created. (See *Ante*, p. 119).

In Chinese practice a middleman and even an ordinary witness is always liable to be called upon to clear up difficulties arising out of the contract and from their point of view a *pao jen* or guarantor is only middleman writ large. Hence the inconsistency in many of the Mixed Court decisions, where in some he is made to pay in whole or in part, and in others he is let off. This variability does not consort with the clear cut decisions of a British Court, where principle is the important matter and hardship is not taken into account. On the other hand Judgments of English Courts probably often appear harsh to the Chinese who

love a compromise and think it always a fair and reasonable mode of terminating a dispute, forgetting that it is better that law should be certain and that the public should have a fixed guide in their future dealings.

October 10, 1900.

CHINA FLOUR MILL Co. v WANG HUI-HO.

*Liability of an agent for an undisclosed principal.*

This was a suit for non-fulfilment of a written contract. Defendant pleaded that the contract which was for the purchase of a quantity of flour, was really made for and on behalf of a Tientsin merchant for whom he was acting as agent, and that he had told the plaintiffs so at the time. This the plaintiffs denied. The contract on being produced showed that defendant had signed it in his own name, no mention being made of agency.

The Court held that he must be deemed the principal, but in consideration of the fact that the contract stated that the flour was to be shipped to Tientsin, and that such shipment was interfered with by the Boxer outbreak, some allowance should be made for the difficulties he had experienced.

Remitted to see if the parties could come to some arrangement.

JARDINE, MATHESON & Co. v Woo SHING-CHONG.

*Verbal contract held binding. Brokers liability.*

Plaintiffs had contracted through a broker to purchase 60 bales of waste silk. Defendant was introduced by the broker as the actual vendor and gave his verbal assent, but no contract note was drawn up beyond an entry in a book kept by Plaintiffs for the purpose. A small portion of the silk had been delivered, but the price having risen, defendant refused to supply the balance, though it was stated he had been selling and delivering to other parties.

Defendant was ordered to deliver the goods forthwith, or in default to pay Tls. 1,128 as damages for breach of contract. The broker was ordered to see the terms carried out or otherwise to arrange with plaintiffs.

## LAND CASES.

N. C. Herald, September 5, 1900.

HOGG v CHU FEI-FU AND OTHERS.

*Validity of Taotai's Deed.*

*Adverse possession for over 30 years.*

Plaintiff was assignee of a Taotai's Deed for Lot No. 764 in the Settlement issued in 1864, but neither he nor his predecessors in title had ever been in possession. In 1870 the Commercial Bank in liquidation, being then the holder of the title for value, entered a suit for ejectment against the original vendors, and obtained a judgment ordering the vendors to give up possession on being paid Tls. 1,800 balance of purchase money and a further sum of Tls. 1,800 as costs of removal of houses. These sums apparently were never paid and the vendors or their successors remained in possession. The present suit was brought to obtain possession of the Lot. Plaintiff produced the Taotai's Deed which was admitted to be in order, and receipts for the Government ground rent, and pleaded that he had made repeated tender of the Tls. 3,600 as ordered by the judgment of 1870 but Defendants had declined to accept the money or to give up possession. Defendants pleaded 1. That Plaintiff never having completed the purchase the land never vested in him and 2. That uninterrupted adverse possession since 1864 barred his claim.

The Court held that the Taotai's Deed was not barred by lapse of time and therefore the legal ownership of the land vested in the plaintiff. At the same time, as the value of the land had enormously increased since 1870 it would be inequitable that he should have possession on payment of the same sum as was deemed sufficient in that year. It was therefore directed that the land be resurveyed and valued, and if the parties were unable to agree on a price to be paid, either should be at liberty to apply to the Court for further directions.

The Assessor Mr. (now Sir F.) Bourne delivered a separate judgment in which he made important observations on the nature of the Deeds issued by the Taotai to Land Renters in the Shanghai Settlement. If, he said, the plaintiff's title had been based on an ordinary bill of sale he



must have failed, on the principle *vigilantibus non dormientibus leges subveniunt*. Though he did not find in Chinese law any definite limit of time laid down applicable to cases of this kind, yet it was in the interest of every state *utsit finis litium*. But the Taotai Deeds were on a different footing. "This deed is in no sense a conveyance as known to English Law, that is, an assurance from a vendor to a vendee. It is rather a deed of grant, in the nature of English Letters Patent, signed by the Taotai as Agent of the Chinese Government and countersigned by the Consul,—a public administrative act based on the treaties. The Taotai 'arranges and agrees' to the sale,—he cancels the native title and gives by this deed a right *in rem* to the land. If that be so, this Court is not competent to annul a Taotai's Deed. That can only be done by the Taotai and Consul acting in concert, and would only be done in cases of fraud, mistake and such like."

*N. C. Herald*, September 26, 1900.

MAJOR BROS. *v* CHU YU-CHI.

This was a suit for an injunction on the Defendant to abstain from interfering with their right to the issue of a Taotai's Deed for certain foreshore accretions.

Plaintiffs' case was that they were owners of a lot of land on the Soochow Creek on which they had erected smelting works. In 1882 considerable accretions had grown up on the foreshore, and they employed the Defendant, a land broker, to obtain for them the necessary Sheng-ko papers, it not being then customary for foreigners to apply in their own names. The papers were obtained and handed to them by Defendant and they paid the purchase money. Two years afterwards they obtained a bill of sale, not from *Chu Yu-chi*, but from a Hong of which he was a partner, and which they considered the same thing. They took no further steps till recently when the land having become more valuable they applied for the issue of a Taotai's deed. Thereupon the Defendant who had meantime become bankrupt, entered a caveat against the issue of a deed, and this suit was brought to compel him to relinquish his claim.

In reply to the Plaintiffs' case the Defendant alleged that the Sheng-ko papers were taken out in his own name and paid for by his own money, that they had been stolen

from him and by the fraud of a partner sold to the Plaintiffs, and that he had never parted with possession of the property.

The case occupied many days in hearing and the issues were extremely involved, but ultimately the Court decided by a written judgment delivered by Mr. Bourne, Assessor, that defendant's story was not to be credited, and that Plaintiffs were entitled to the rights to the foreshore of their property.

September 12, 1900.

ATKINSON & DALLAS *v* CHING HUNG-NAN.

*Sheng-ko Land Case.*

Plaintiffs had purchased a small piece of land at Sinza, not water accretion, and had applied for the issue of a Taotai's deed. Defendant had entered a caveat, alleging that the land was his property, having been acquired by him by purchase from the Sheng-ko office.

Plaintiffs then filed this suit asking for an order against the Defendant requiring him to withdraw his claim or prove his title.

At the hearing of the case the Plaintiffs produced a bill of sale by the native vendors, the usual Fang-tan and tax receipts for several previous years. Evidence was also led to show that the land had been in the possession of the vendor's family for a long period. Defendant produced receipts from the Sheng-ko office showing that he had paid value for the land. It was also alleged on his behalf but not proved that the land had been confiscated at some previous period and thereby became Government property.

The Court found that the Defendant had no claim whatever to the land. The Magistrate and Assessor concurred in declaring that the whole proceeding was a pure swindle on the part of some of the Sheng-ko officials, and considered that the Defendant had a good claim against them for compensation or for return of his money.

October 24, 1900.

ATKINSON & DALLAS *v* CHUNG NAN-CHAO.

*Sheng-ko Land Case.*

This was a case similar to the preceding.

Plaintiffs had contracted to purchase a piece of land and produced a bill of sale with the usual Fang-tan, etc., but on

applying for a Taotai's deed found it blocked by Defendant who claimed ownership on the strength of papers taken out from the Sheng-ko office.

The Court found that Defendant had no right whatever to the land. His Sheng-ko papers, he was told were a mere fraud, and he was warned against further interference with legitimate titles.

Plaintiffs' Counsel stated at the hearing that it had become a common practice for men like the Defendant to produce a paper title and use it as a means of levying blackmail by threatening litigation. These land grabbers counted on the timidity of property owners who might be induced to buy off their spurious claims rather than face an expensive litigation.

*N. C. Herald*, December 12, 1900.

RIVA *v* KINGSMILL.

*Sheng-ko Land Case.*

In Arbitration, before Consul General Goodnow.

A contest appears to have arisen as to which of two native vendors had the better title to a foreshore accretion. One of the parties relied on the usual papers issued from the Sheng-ko office, the other, the Sung Family, were owners of the land adjacent to the accretion, and claimed the right to Sheng-ko the land though they had never done so. The title of the Sung family apparently rested on uninterrupted possession for upwards of 40 years, but they do not seem to have had a Fang-tan or other evidence of title. They had, however, on two occasions paid certain sums demanded by the Sheng-ko office.

The case was referred to the determination and award of Mr. Goodnow who, in the course of his decision, said:—

In most countries adverse possession does not give a good title as against the Government. Chinese law is not clear, although it was deemed necessary to issue a proclamation after the Taiping rebellion that adverse possession of lands accruing to government through failure of heirs of the previous possessors should not be held to give a good title. This implies that ordinarily long possession would give some title unless specially legislated against.

The Consular Body at Shanghai agreed some four years ago that parties holding accreted lands, or in front of whose property new land had been formed, were entitled to



Sheng-ko such land at a price of Tls. 450 per mow. This in several specific cases has been agreed to by the Chinese Authorities. Consequently the *Sung* family have the prior right to Sheng-ko this land, regardless of the question whether or no adverse possession gives a good title.

(The Editor of the paper adds a note to say that this decision will largely tend to stop the persecution and actual robbery to which native land owners have been subjected by the Sheng-ko office.)

*Note on adverse possession.*—No mention is made in the award of an important element in the case, viz., whether or no the *Sung* family had been paying taxes on their land. If they had, the mere absence of a Fang-tan or other evidence of title would not be a serious flaw, because that could have been remedied at any time on payment of a small fine for neglect. But if they had originally been mere squatters and had never reported the land for cultivation, and never paid taxes, it is submitted that adverse possession however long, would not, in Chinese law, have given them a good title as against the Government. Mr. Goodnow states that on two occasions they had paid what the Sheng-ko office demanded, but does not say for what. It could not however have been for taxes, as the Sheng-ko office is not a tax collector. The Sheng-ko office though irregular as ousting the jurisdiction of the local officials, is yet a Government office for the purpose of Sheng-ko, i.e. "raising (non-taxpaying land) to the rank" of taxpaying, in other words of selling or converting public or government lands to private ownership. The payments made to the Sheng-ko office must therefore have been for the purpose of acquiring some new land, and if this applied to the accretions they would *pro tanto* have acquired an absolute title. The Sheng-ko office could not sell that portion over again nor deprive them of the use of it. But if the *Sung* family had no title other than long possession and no tax papers, the Sheng-ko office might, in strict law, have entered on possession of the whole of their original estate in the name of the Government, and their right to fore-shore accretions would of course be gone. Presumably however their title was somehow stronger than would appear from Mr. Goodnow's award.

It may be remarked that though the right of the Government to confiscate lands for non-registration or for non-payment of taxes is undoubted, it seems to be but very rarely

exercised. Probably the worst that would happen would be that the defaulters would have to make good the arrears of taxes with a fine for the default. It is only in the case of Government Officials who have embezzled funds or failed to account for the tax collections that confiscation is strictly enforced. In such cases not merely the property of the defaulter, but that of his whole family, lands included, is seized and sold to the highest bidder.

*Adverse possession as between private owners.*—I am unable to find that there is any definite rule as to the length of uninterrupted possession which will of itself give a good title or bar an action by an adverse claimant. In the case of family property which has been divided by arrangement no action can be brought by one member against another to upset the arrangement after a lapse of five years (Code, Section 95, *Li* 1). In the case of a mortgage-sale by a deed which on its face is not declared to be absolute or irrevocable a term of 30 years is prescribed as the limit within which an action must be brought to redeem, otherwise the sale is absolute. Neither of these rules, however, would seem to apply to ordinary cases of disputed ownership, but it may be presumed on general principles that if uninterrupted possession plus the regular payment of taxes for a comparatively short period say 10 or 15 years could be shown, it would require the very strongest evidence of a better title to maintain an action against the actual occupier. Even if the claimant should succeed in proving his case he would almost certainly be required to pay compensation to the occupier for disturbance, on the ground that the latter had been doing his duty to the State by cultivating the land and paying the taxes, whereas the former had been sleeping on his rights and doing nothing. The presumption seems to be always in favour of the tax payer, and Section 93, *Li* 8 makes it a punishable matter to stir up litigation merely on the strength of old deeds and family records without the evidence of tax receipts.

*N. C. Herald*, May 8, 1900.

CAIRNEY v YIH HUNG-TAI.

*Landlord and Tenant. Right to distrain for rent.*

Defendant was landlord of premises which the tenant had vacated by absconding leaving arrears of rent unpaid.

Defendant on re-entering on possession of the premises found a quantity of cement stored there valued at \$250, which he impounded as security for the unpaid rent. It turned out that the cement was not the property of the absconding tenant but belonged to the plaintiff, who brought the suit for recovery of his property.

The Court held that the landlord had by Chinese law the right to distrain on the cement as having been stored on the premises, and that the Plaintiff must pay \$48 (presumably the amount of the rent arrears though it is not so stated) before he could recover possession. Judgment accordingly.

*N. C. Herald*, October 31, 1890.

### COMPANY LAW.

#### BANK OF CHINA *v* CHINESE SHAREHOLDERS.

The Defendants were shareholders in the Bank of China and Japan in which there was an uncalled liability on the shares. The bank had required as a condition of placing them on the register as shareholders, that they should sign an undertaking to pay calls on the shares if made and to be bound by all the conditions of English Law in the same way as English Shareholders; and the undertaking was given. The Bank went into liquidation and calls were made which the Defendants refused to pay. The case came on for hearing before the Taotai's Court, the British Consul-General being Assessor. Counsel for the Bank pressed the Taotai to declare in the first place whether the undertaking which the Defendants had given was valid or not in Chinese Law. The Taotai refused until he had heard the whole case on both sides. The hearing lasted several days and a considered judgment was delivered by the Taotai alone. It is not reported whether the Assessor acquiesced or not. By his judgment the Taotai found that inasmuch as the Treaties had not provided for Chinese holding shares in Foreign Companies the undertaking by the defendants was not enforceable in a Chinese Court. He also held that there was no provision in Chinese law for compelling shareholders in a company to pay extra money on their shares. He therefore found in favour of Defendants.

NOTE.—The latter part of the judgment is in consonance with the general trend of Chinese partnership law, but it is



difficult to see on what grounds the first part can be supported. The Treaties do not make the holding of shares by Chinese in a Foreign Company illegal, nor do they declare that such an undertaking as the Defendants had entered into shall be deemed invalid.

The case however cannot now be quoted as a precedent. A remedy was provided by Art. 4 of the Mackay Treaty of September 5, 1902, whereby Chinese shareholders in an English Company were placed on the same footing as to liability as British shareholders, without any special agreement to that effect, and reciprocally British shareholders in a Chinese Company are to have the same rights and liabilities as Chinese shareholders.



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