Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895

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Introduction

THIS paper is designed to accomplish three somewhat diverse objectives. First, I will introduce some of the most significant material in existence relating to Ch'ing law and administration, namely, the Tanshui-Hsinchu Archives, and use these materials to explore some concepts of Chinese law during Ch'ing times and to examine some of our theories of modern legal institutions. I expect to illustrate, thereby, that we have barely begun our study of Chinese law of the Ch'ing period—in particular the study of law in action at the trial level, where the formal judiciary had its most immediate impact upon the populace. Second, I hope to show that even the best of contemporary scholarship overestimates the harshness of Ch'ing law, overestimates the significance of criminal law, and underestimates the role of civil law. Finally, I will illustrate that traditional legal institutions in China cannot be clearly differentiated from modern institutions on the basis of lack of rational procedures. While the modern judicial process, e.g., the common law, has generally been rationalized to a greater degree than Ch'ing law, the significant difference between local level Chinese institutions of the Ch'ing period and modern legal institution lies, nevertheless, primarily in the accessibility and the effective tools of control of modern legal systems and not in their more rational procedures.

The Tanshui-Hsinchu Archives

The Tanshui-Hsinchu Archives are the original documents from the files of Tanshui subprefecture and Hsinchu district magistrates during the years 1789 to 1895. The original Tanshui subprefecture was divided on several occasions as population increased in Taiwan (Chart I). For example, in 1810 Tanshui subprefecture was divided into Tanshui subprefect and Ke-ma-lan subprefect. In 1875, Tanshui subprefect was again divided into Chilung, Tanshui, and Hsinchu districts. The previous archival records of the Tanshui subprefect remained with the Hsinchu Yamen, and thus the archives contain both Tanshui and Hsinchu material. There are a total of 1164 files in the archive. Each file contains from one to several-hundred documents. Generally speaking, each individual file in the archive relating to a legal case is concerned with a single case. However, the conception of a single case in Ch'ing times differed somewhat from present notions so that, for example, there might be several suits concerning an already subdivided plot of land between unrelated parties in a single file.

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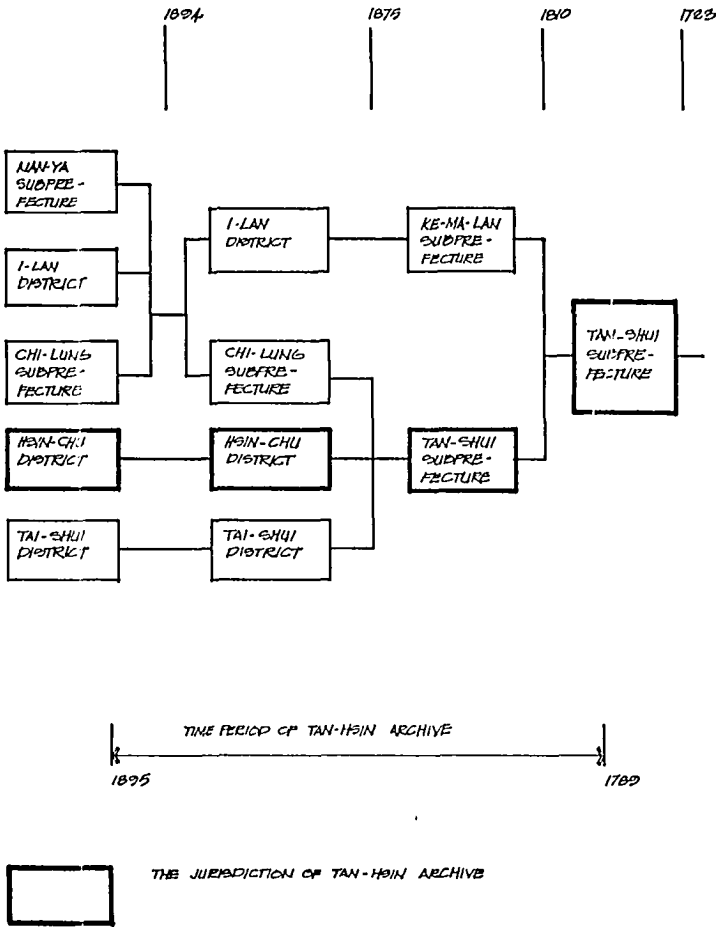
CHART I—THE CHANGE OF JURISDICTION OF TAN-HSIN ARCHIVE IN THE CH'ING DYNASTY



The archive was preserved by the Japanese when they occupied Taiwan in 1895. It was first sent to the Second Trial Level Court (later called the High Court) which thereafter sent it to Imperial Taipei University for research purposes.[1] At the end of World War II, the archive found its way to Taiwan National University.

The archive has been divided into three sections, i.e., Administrative, Civil, and Criminal, in part on the basis of the labels found on the external covers[2] and/or internal documents. Where these were lacking, the material was divided on the basis of concepts of Ch'ing and contemporary law. In some cases the division is arbitrary, but generally speaking, it comports with contemporary notions of the distinctions between

[1] See T'ai Yen-hui, "Ch'ing tai Tanshui-Hsinchu tang-an cheng-li hsu-shuo," *Taipei wen-wu*, 3 *chi*, 4 *chüan*, p. 15 ff. (Publ. by Taipei Shih Wenhsien wei-yuan-hui).

[2] While no cases were actually labeled civil, there were cases labeled criminal, as shall be illustrated.

civil, criminal, and administrative law as modified by Ch'ing concepts, which shall be discussed below.

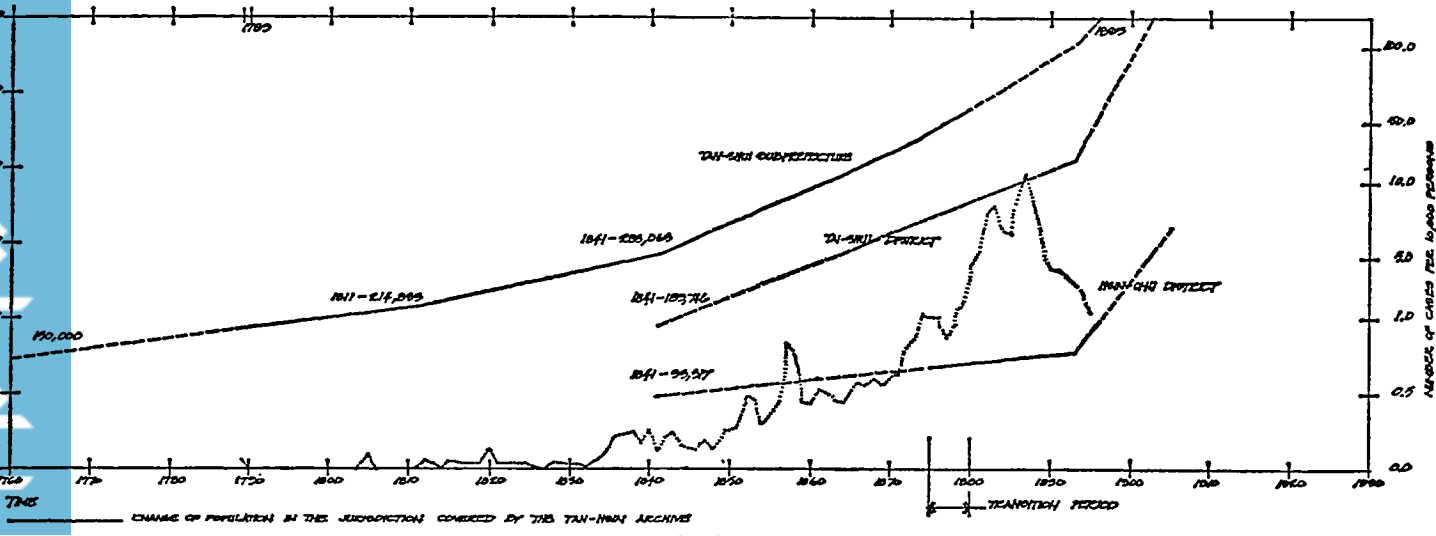
The archive generally contains the original documents of the parties, yamen, or superior tribunal. The original plea as well as the magistrate's rescript can be found therein. Furthermore, we can find drafts (*nei-kao*) of documents made by the magistrate's assistants as well as the magistrate's corrections or alterations of such documents and his note of approval (*hsing*) or lack of approval of the draft. Copies of documentary evidence, summaries of testimony, warrants, judicial orders, decisions, reports of runners, and other assistants are all contained in the files. Generally speaking, the documents are in order as to time period within a given case. Orders from superior tribunals regarding appeals, for example, can also be found in the files of cases having such transactions.

The archive thus permits us to view each case from its initial plea to its final transaction in great detail. Unfortunately, we do not know what proportion of all cases that took place in the jurisdictions covered by the archive are contained therein. We have no reason to assume that the archive represents a distorted proportion of all cases coming before the magistrates during that period, nor do we have sufficient evidence to be sure that the archive contains all or even a large portion of all transactions before the magistrate. After a thorough examination of the archive over a period of years, our assumption is that it probably contains a representative proportion of the cases the magistrate handled, since there is some correlation between political stability and size of population under the courts jurisdiction and the number of cases occurring (see Figure I). There is also a reasonable correlation between the types of cases in each yearly period.

While the Japanese made some use of the Tanshui-Hsinchu Archive for research purposes, the actual serious preparation of the archive for research and research thereon was initiated by Professor Tai Yen-hui; he began the outlining and indexing the materials contained in it. Thereafter, at my instance and with the help of, in part, grants from the Fulbright Foundation, the Far Eastern Department of the University of Washington, and the Social Science Research Council, more intensive work was inaugurated. Aside from Professor Tai and myself, Judge Ch'eng Pi-lien then of the district court in Taipei and Professor K'e Fang-chih of National Taiwan University assisted in preparing the archive for research purposes, as well as in undertaking substantive research projects relating to the archive. In the 1967–1968 academic year, because of the foresight of the director of the Asian Law Program of the University of Washington, Professor Dan Fenno Henderson, as well as that of the then acting director of the Far Eastern Institute, Professor Helmut Wilhelm, a joint program was initiated to continue the work of the Tanshui-Hsinchu Archive Project.

The archive was to be indexed, selected documents were to be published in Chinese, and major substantive research projects were to be undertaken. In the 1968–1969 academic year, Professor Tai was brought to the University of Washington Law School as a visiting professor and Professor K'e and Judge Ch'eng were brought to the Law School as faculty members. All of us undertook to complete manuscripts relating to specific topics for which the archive provided an essential source. These manuscripts have largely been completed and will be published in the future by the University of Washington Press. This paper is a small extract from my own manuscript.

FIGURE I—NUMBER OF CASES TO POPULATION IN THE JURISDICTIONAL AREA COVERED BY TAN-HSIN ARCHIVE IN THE CH'ING DYNASTY



Some Aspects of Civil Procedure at the Trial Level in Ch'ing Law[3]

Recent interest in Chinese law has resulted in a rapid proliferation of courses and research projects[4] in the United States and elsewhere.[5] Unlike some fields that grow rapidly, however, substantial contributions to teaching and scholarship have resulted from this recent intensive institutional commitment to the field. Thus, for example, the best book on Chinese law of the Ch'ing Dynasty (1644–1911) ever written in a Western language[6] has recently been published by Harvard University Press as a result of the joint endeavors of a renowned sinologist, Derk Bodde, and an eminent legal scholar, Clarence Morris. This book, *Law in Imperial China*,[7] gives us an excellent view of the judiciary, the penal system, and the cases and concepts of Chinese law, particularly when viewed from the highest judicial levels. Thus the work follows in the tradition of much sinological endeavor and legal scholarship in the United States. The former discipline, when concerned with institutions at all, has tended to concentrate upon higher level institutions and looked to the imperial court and court histories as a primary means of explaining China. Chinese scholars had a similar predisposition which came from their own tradition of scholarship. Much American legal scholarship has also concentrated upon appeals cases, particularly those of the highest level tribunals.

The Bodde and Morris treatise deals primarily with case materials of higher level tribunals and places little emphasis upon actual legal practice and the impact of Ch'ing legal institutions upon the people. When discussing the actual workings of the legal institutions, they have relied in part upon nineteenth century missionaries and British diplomats[8] undoubtedly by and large one of the more myopic groups

[3] This section of the paper was initially presented to the Modern Chinese History Project Colloquium of the University of Washington on November 7, 1968. The paper was then circulated.

[4] See XII *Newsletter, Association of Asian Studies*, (1966) no. 1, p. 26 and later reports by David C. Buxbaum.

[5] Courses have been taught for some time at Tokyo University. Research projects exist at Koln University, Royal University of Stockholm, University of Sheikei and the University of London, as well as in Tokyo.

[6] It is also one of the best in any language. The Japanese, who have done the best research on Chinese law (better in fact than much Chinese scholarship that has been burdened by internal and external wars and the felt need for emphasis upon science), have not written extensively on Ch'ing institutions. Some of the best Japanese work in the field has been done by Shuzo Shiga of Tokyo University. See for example, *Chūgoku Kazokuhō no Genri* (Tokyo, 1967); and *Chūgoku Kazokuron* (Tokyo, 1950) as well as shorter articles more specifically dealing with Ch'ing materials. The best scholarship on Ch'ing legal institutions has been done by Tai Yen-hui.

[7] Subtitle: *Exemplified by 190 Ch'ing Dynasty Cases (translated from the Hsing-an hui-lan) with Historical, Social, and Juidical Commentaries* (Cambridge, Mass., 1967).

[8] See for example, Bodde and Morris, pp. 104–112. They refer to Harry S. Parkes, British diplomat of the mid-nineteenth century, D. J. MacGowan, American missionary of the same period and T. T. Meadows, British consul of that era. Cf. Joseph Needham and Wang Ling, II *Science and Civilization in China* (Cambridge University Press, 1956) p. 525–526 note f. Europeans who entered China in the 15th and 16th century had a far more sophisticated view of the actual workings of the Chinese legal system than their 19th century brothers. It should, of course, be born in mind that China changed in the 19th century as did the mentality of her visitors. See also Bunger, K. "The Punishment of Lunatics and Negligents According to Classical Chinese Law," 9 *Studia Serica* (1950) and Needham p. 526 fn. a, which notes the way 19th century sinologists were misled by incorrect translations into thinking Chinese legal practice regarding negligents, lunatics and invalids was much crueler than it was in fact. The burden of increased population, the intrusion of the West and the collapse of the dynasty all led to a rather tumultuous and relatively chaotic and difficult situation in China which affected the workings of legal institutions as it did other institutions during the later part of the Ch'ing period. Nevertheless, Western distortions of Chinese law cannot be explained other than by cultural myopia.

of men who have transmitted distortions of Western culture to the Chinese and Chinese culture to the West.

The results of the Bodde and Morris endeavors, impressive and essential though they are, fail to give us any insight into the importance of customary law[9] in Chinese substantive law. In addition, they give us a distorted view of the actual workings of the positive law[10] and legal institutions. For example, Professor Morris states in the concluding paragraph of the book:

> Any entanglement with the Chinese imperial penal system was a personal disaster. The long periods of imprisonment awaiting appeals, the venal cruelty of jailors and wardens, the interference with normal family life and the involvement of the accused person's relatives added up to a terrifying experience—even when the final punishment was lenient. So the system operated legalistically, so to speak. It tended to terrify the public into good behavior rather than to redress disharmony.[11]

Furthermore, the treatise by Bodde and Morris describes ". . . the written law of pre-modern China . . ." as being ". . . overwhelmingly penal in emphasis . . . ."[12] This ". . . means that matters of a civil nature were either ignored by it entirely (for example, contracts),[13] or were given only limited treatment within its penal format (for example, property rights, inheritance, marriage)."[14] "What really concerned the law . . . were all the acts of moral or ritual impropriety or of criminal violence . . . ."[15] "For these reasons, the official law always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals."[16]

Bodde and Morris suggest that one of the "important features of imperial judicial procedure . . ." was ". . . the conception (nowhere explicitly stated but everywhere implied in the treatment of defendants) that a suspect must be guilty unless and until he is proven innocent . . . ."[17]

"In general, although the sources do not say so explicitly, there seems to have been little procedural difference, at least on the lower levels, between the handling of criminal and civil cases. Indeed, the law failed to distinguish clearly between the two categories, generally approaching them both from a penal point of view. Nonetheless, a pragmatic distinction was made by local magistrates between civil suits . . . as against criminal cases . . . , the latter, especially if serious, would, unlike the former, be investigated and tried irrespective of whether or not one individual lodged a legal complaint against another."[18]

[9] See for example David C. Buxbaum, "Some Aspects of Substantive Family Law and Social Change in Rural China (1896–1967): With a Case Study of a North Taiwan Village" (Ph.D. Dissertation, U. of Washington, 1968); David C. Buxbaum, *Family Law and Customary Law in Asia: A Contemporary Legal Perspective* (Hague, 1968) (ed.) "Introduction," pp. xv–xli; David C. Buxbaum, "Chinese Family Law in a Common Law Setting: A Note on the Institutional Environment and the Substantive Family Law of the Chinese in Malaysia and Singapore," *Journal of Asian Studies*, xxv/4 (Aug. 1966) 621–644.

[10] By customary law I mean the unwritten law. Positive law refers to the written cases and codes.

[11] Bodde and Morris *op. cit.*, note 7 at p. 542.

[12] *Ibid.*, p. 4.

[13] Which were not in fact ignored by the written law. The contract to marry is dealt with for example in the section of Marriage of the *Ta-Ch'ing lü-li*. The uxorious contract is also dealt with in the code as are many other facets of contract.

[14] Bodde and Morris, *op. cit.*, note, 7, p. 4.

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*, p. 28.

[18] *Ibid.*, p. 118. The text goes on, however, to indicate that the distinction between civil and criminal cases was more than ". . . a pragmatic distinction . . . made by local magistrates." For

The above characterization of the Ch'ing legal system is not a novel one—in fact, it is sufficiently common to raise questions of its accuracy. This paper will in part address itself to some of the important questions raised by the above description of Ch'ing law, namely,

1. Did the Ch'ing code or law recognize a difference between civil and criminal cases?

2. Did the law courts handle civil cases?

3. Were civil cases approached from a penal point of view?

4. Were suspects regarded as guilty until proven innocent?

5. Was any entanglement with the Chinese imperial penal system a personal disaster?

6. Did the system tend to terrify the public rather than redress disharmony?

7. Did the law always operate from the state upon the individual, rather than directly between individuals?

1. *Differences Between Civil and Criminal Cases in Ch'ing Law*

Previous writers, including Boode and Morris, despite their somewhat contrary thesis (see note 18), have realized that "civil"[19] cases have received special treatment in the Ch'ing code.[20] The code itself has special provisions with regard to different types of cases.

A. *Limits as to Handling of Certain Types of "Civil" Cases*

Ch'ing law clearly provides that certain types of litigation will cease during periods when farmers are very busy.[21] The period when litigation was to cease was from the first day of the fourth lunar month to the thirtieth day of the seventh month of the lunar calendar.

> Aside from rebellion (*fan-p'an*), murder, robbery (*tao*), corruption (*t'an*), bribery (*tsang*) and other serious breaches of law, including deceptive misuse of customers' goods by sales outlets, which should be investigated to see if there is definite evidence and, if so, all of which should be handled as usual, all civil litigation (*min-sung*), i.e., the remaining minor matters of household, marriage and real property (*hu, hun, t'ien-t'u*), should not be received [during the farmers' busy period]. From the first day of the eighth month [of the lunar calendar] cases can be heard and decisions rendered.

example it notes (at p. 119) that ". . . civil suits . . . regarded as less urgent—[were not heard] during the period of greatest agricultural activity, namely, from the fourth through the seventh lunar months." Furthermore, the text notes that the financial commissioner (*pu-cheng shih*) handled civil cases at the provincial level and there were rarely appeals from him up to Peking. See also Bodde and Morris text 559–560 and Shuzo Shiga "Shinchō Jidai no Keiji Saiban," *Hōseishi Gakukai Hen* (Tokyo, 1960) at p. 235.

[19] Generally speaking, the Western concept of crime is similar to the traditional Chinese concept, i.e., "A wrong considered of a public character because it possesses elements of evil which effect the public as a whole and not merely the person whose rights of property or person have been invaded." James A. Ballentine, *The Self-Pronouncing Law Dictionary*, 2d. ed. (N.Y., 1948) pp. 203–204. What the Chinese considered "a wrong of a public character" in Ch'ing times was somewhat broader and different than contemporary Western concepts, but nontheless the similarities are striking.

[20] Shuzo Shiga, *op. cit.*, note 18 at p. 235.

[21] *Ta-Ch'ing hui-tien*, Kuang Hsu 20th Year, *chüan* 56 (Taipei reprint). p. 590. The general provision is: *Nung-mang tse-t'ing-sung*, "If farmers are busy then litigation will cease."

If an official investigation (*ch'a-k'an*) of matters of water conservancy, boundaries, etc. of a present litigous dispute [indicates] that if there is a little delay in handling it, it will certainly hinder the affairs of farmers, then the *chou* or *hsien* [magistrates] are ordered to go to the locality themselves and conduct a trial and render a decision and quickly conclude [the matter]. One should not issue a warrant for arrest and have them brought to the city or have them wait [and thus] harm the farmers. . . .[22]

It is also impermissable to use any excuse to cease litigation. If one arbitrarily delays [litigation], the governor (*hsün*) [or] circuit (*tao*) having jurisdiction is ordered to strictly report the matter and punishment and impeachment will be meted out according to the facts.[23]

From this section of the statutes, we see that civil litigation is described in part as matters of household, marriage, and realty. In fact, however, the terms used here are not restrictive but rather seem to refer to specific sections of the *lü-li*, i.e., the code. Thus the term *hu*, household, refers to the section of the code entitled *hu-lü*[24] which includes matters of registration of the population, inheritance, taxation, desertion, mishandling of family property, etc. The term *t'ien-t'u*[25] deals with sale of land, land tax, mortgages, etc. The term *hun* refers to the section of the code entitled *hun-yin*,[26] marriage, which includes, aside from marriage, related problems of consanguinity, divorce, and marriage between those of the same surname. Those three sections of the code follow each other in sequence commencing with household matters and then to realty and marriage. Thus fairly substantial portions of what we would normally term civil law matters are involved. It should be noted, however, that within the code itself these sections contain numerous criminal provisions.[27]

B. *Jurisdictional and Appeal Limitations*

Two officials who operated below the governors and dealt with legal matters were the *pu-cheng shih* (also known as *Fan Szu*) and the *an-ch'a shih* (also known as *Nieh Szu*). The *pu-cheng shih*, or financial commissioner, generally handled appeals of civil matters, particularly those concerned with money, crops, etc., while the *an-ch'a shih*, or judicial commissioner, generally handled criminal cases[28] at the provincial level.[29] This jurisdictional separation, however, was not strictly adhered

[22] *Ibid.* The section continues to state that "all accusations which do not injure agricultural affairs, should be handled as usual."

[23] *Ibid.*

[24] See II *Ta-Ch'ing lü-li hui-t'ung hsin-pien* (reprinted, Taipei, 1964), *chüan* 7, pp. 833 ff., hereafter referred to as *Lü-li*. See also George Thomas Staunton, *Ta Tsing Leu Lee; Being the Fundamental Law and a Selection From the Supplementary Statutes of the Penal Code of China* (London, 1810), reprinted Taipei, 1966, for a partial translation of the Chia-ching Code of 1805 at pp. 79 ff. (hereafter referred to as Staunton).

[25] *Lü-li, op. cit.*, note 24, *chüan* 8, pp. 931 ff.; Staunton *op. cit.*, note 24, pp. 94 ff.

[26] *Lü-li, op. cit.*, note 24, *chüan* 9, pp. 1007 ff.; Staunton *op. cit.*, note 24, pp. 107 ff.

[27] There are also numerous provisions that are not criminal in nature, e.g., see Staunton *op. cit.*, note 24 at p. 107, where he states that if, after full disclosure of the background of the parties to be wed, there is a decision to proceed, then the "contracting parties . . . shall . . . draw up the marriage articles, and determine the amount of the marriage presents." Thus, the code gives some recognition to the marriage form, but does not provide criminal penalty for failure to follow this regulation. This distinction between cases of *hu, hun, t'ien-t'u* and other cases goes back some time in Chinese law. See for example, *Kansai Daigaku Hōgaku Ronshū* (March, 1968) pp. 430 ff.

[28] See Shuzo Shiga *op. cit.*, note 19 at p. 235.

[29] See *Hui-tien shih-li, op. cit.*, note 21, *chüan* 2 at pp. 5365–5369 for notes on the financial and judicial commissioners.

to.[80] Nevertheless, for most purposes, the highest court of appeal for civil cases[81] was the financial commissioner.[82] Therefore, civil cases generally never reached the highest courts and thus could not be found in the usual compilation of cases.[83] This of course has influenced scholarly conceptions of the existence of civil cases and explains why many scholars underestimate the importance of civil litigation in the formal legal system of the Ch'ing dynasty. In fact, jurisdiction over civil cases resided primarily in the districts (*hsien*) and departments (*chou*) and only to a lesser extent in the prefect or circuit.[84] Final judgment could be rendered in cases amounting to punishment no greater than bambooing, at the lowest level courts, i.e., district or department yamen and civil cases generally terminated there. There was no automatic review of civil cases although appeal could be had. On the other hand, the magistrate was punishable if he refused to receive civil cases. Civil litigation existed, but appeals to highest level tribunals remained rare.

C. *Procedures in the Courts of First Instance*

Since almost all civil cases were decided at the district or department level, we may look at some of the procedures there to see if there was recognition of the differences between civil and criminal cases. In the first place, a special file called criminal file (*hsing-chuan*)[85] was employed. Secondly, certain runners and clerks tended to specialize in special types of cases such as criminal cases. Finally, on each official form provided, for presenting a plea, certain instructions were printed on the extreme left side covering rules of evidence and procedure. For example, one form from 1879 had a special provision regarding evidentiary requirements for certain types of cases. Matters of realty, marriage and debts, i.e., a modified version of the *hu, hun, t'ien-t'u* distinction, were all listed in one provision, with appropriate evidence needed before a case could be received.[86] Thus, even the original plea, needed to initiate any kind of case, generally differentiated between what we may term civil and criminal cases.

In outline, the procedure in courts of first instance required a complaint by the litigant to the court. Jerome A. Cohen has written that "also in cases that today would be denominated as 'civil,' the first thing that the magistrate had to do on receipt of a complaint was to determine by means of interrogation whether to accept or reject it."[87] This is inaccurate. The determination of whether or not to

[80] See Shuzo Shiga, *op. cit.*, note 19 at p. 249.

[81] See Tai Yen-hui and Ts'ai Chang-lin, *Taiwan sheng-t'ung chih-kao, chüan* 3, 1 *ts'e*, p. 29. Tai notes that the financial commissioner and judicial commissioner jointly heard complicated civil cases from 1786 until 1835 when the legal provision for this procedure was eliminated. Tai states that despite the change in the law, matters continued in the same general manner thereafter regarding the handling of complicated civil cases.

[82] Some scholars have asserted that the Board of Households, Hu Pu, was the highest court of appeal in civil cases (See for example Rinji Taiwan Kyūkan Chōsa-kai, *Shinkoku Gyōseihō* (Taikoku, 1911), Vol. 5, p. 84), however Shiga *op. cit.*, note 18, disputes this. He notes that the Board of Households had jurisdiction over disputes between bannermen and civilians and thus had a very special jurisdiction.

[83] See Tai, *op. cit.*, note 31 at p. 21 and *Hui-tien shih-li, chüan* 685.

[84] See Bodde and Morris, *op. cit.*, note 7 at p. 115. See 19 *Hui-tien shih-li, op. cit.*, note 21, *chüan* 816, p. 15329 ff.

[85] This information can be found in the Tan-shui Hsinchu archives. Where possible I will refer to specific case numbers. See for example Case No. 35401 (1881).

[86] For a case involving real property, contractual evidence of rights thereto was necessary before the court would receive the case.

[87] Jerome Alan Cohen, "Chinese Mediation on the Eve of Modernization," 54 *California Law Review*, 1201 (1966) at p. 1211. Also published in the *Journal of Asian and African Studies*, Vol. II, nos. 1–2, 1967.

initiate action on the basis of the complaint was generally made not with interrogation but rather on the basis of the plea itself. There was no real question of acceptance because the magistrate was required to, and generally accepted all pleas, but he did not act upon all of them. The rescript, which was something less than an "official opinion" as Cohen suggests[38] but rather an opinion of an official, i.e., an analysis of the complaint, was written in the space provided at the end of the complaint or other pleading.

The scrivener (*tai-shu*) could fill out the complaint form or the plaintiff could do so himself. The elderly, those with official degrees or positions, youth, and women had to have litigation agents present their complaints. They could, however, appear in court to testify. There was a fee to be paid on presentation of the complaint.

Once the rescript had been written, one copy was posted on the bulletin board of the yamen. If the magistrate indicated he thought the complaint frivolous, then the plaintiff might, and often did, prepare a new complaint, responding in part to the magistrate's reservations.

If the magistrate decided to take action, he might send runners, who were divided into groups according to their speciality, to investigate the matter. He would equip them with a warrant (*p'iao*) giving them official authorization to investigate and, at times, to arrest or to notify parties and witnesses to appear for trial. Once the parties and witnesses were brought to court or the investigation was complete, the runner would notify the magistrate, who would generally conduct an immediate trial.

The open trial was conducted with much pomp and circumstance. A summary of the testimony of the parties was made, and the magistrate's interim order or decision (*t'ang-yü*) was then written with the vermillion brush. If the parties agreed to be bound by the decision, they wrote a bond of willingness (*kan-chieh*); if not they might appeal. One of the ways criminal cases may be differentiated from civil cases at this point in the proceedings is by the nature of the decision. If criminal punishment were forthcoming, then we could, at least from hindsight, regard the case as criminal in nature. If on the other hand, the court decreed specific performance of a contract, damages, reformation of a deed, etc. we might assume such cases were civil.

2. *Did the Courts in Fact Handle Civil Cases?*

While the law differentiated to some extent between civil and criminal cases and while it was punishable not to receive a civil plea, it is possible that through discouragement of litigation and fear of the judiciary, a situation could arise where very few civil cases ever reached the courts. In fact, civil cases seemed to have reached the courts reasonably frequently.

Most of the documents in the Tanshui-Hsinchu Archive are from the Kuang-hsü (1875–1895) period, although there are many from the T'ung-chih period (1862–1874). Based on a still imprecise but useful division of cases which have dates on them, 555 files concern administrative matters, 218 concern civil matters, and 361 files are related to criminal matters. Thus, 19.2 percent of all cases were civil and 31.9 percent were criminal for the entire period covered by the archive (Table I).

[38] *Ibid.*

TABLE I—NUMBER OF CASES PER YEAR

	Administration			Civil Law			Criminal Law			
		Percent			Percent			Percent		
Year	No. of cases	A	B	No. of cases	A	B	No. of cases	A	B	TOTAL
1789	1	0.18	100							1
⋮										
1805	1	0.18	50	1	0.46	50				2
⋮										
1812							1	0.28	100	1
1813										
1814										
1815	1	0.18	100							1
1816										
1817										
1818										
1819										
1820	1	0.18	100							1
1821										
1822										
1923										
1824										
1825										
1826										
1827										
1828	1	0.18	100							1
1829										
1830										
1831										
1832										
1833										
1834	1	0.18	100							1
1835	1	0.18	100							1
1836	3	0.54	100							3
1837	1	0.18	100							1
1838	2	0.36	100							2
1839	1	0.18	100							1
1840	3	0.54	100							3
1841										
1842	3	0.54	100							3
1843	2	0.36	100							2
1844										
1845				1	0.46	100				1
1846										
1847	3	0.54	100							3
1848	1	0.18	100							1
1849	2	0.36	66.7				1	0.28	33.3	3
1850	2	0.36	40	2	0.92	40	1	0.28	20	5
1851	3	0.54	75	1	0.46	25				4
1852	4	0.72	40	3	1.38	30	3	0.83	30	10
1853	2	0.36	50				2	0.55	50	4
1854	2	0.36	100							2
1855	4	0.72	66.7				2	0.55	33.3	6
1856	3	0.54	50	2	0.92	33.3	1	0.28	16.7	6
1857	15	2.70	68.2	2	0.92	9.1	5	1.38	22.7	22
1858	2	0.36	33.3	2	0.92	33.5	2	0.55	33.4	6
1859	1	0.18	33.3				2	0.55	66.7	3
1860	1	0.18	33.3	2	0.92	66.7				3
1861	10	1.80	100							10
1862	5	0.90	71.4				2	0.55	28.6	7
1863	3	0.54	75				1	0.28	25	4

TABLE I (*Continued*)

Year	Administration			Civil Law			Criminal Law			TOTAL
	No. of cases	Percent A	Percent B	No. of cases	Percent A	Percent B	No. of cases	Percent A	Percent B	
1864	3	0.54	75				1	0.28	25	4
1865	3	0.54	37.5	2	0.92	25	3	0.83	37.5	8
1866	9	1.62	90				1	0.28	10	10
1867	4	0.72	80				1	0.28	20	5
1868	7	1.26	63.6	3	1.38	27.3	1	0.28	9.1	11
1869				1	0.46	25	3	0.83	75	4
1870	6	1.08	50	3	1.38	25	3	0.83	25	12
1871	5	0.90	35.7	1	0.46	7.2	8	2.22	57.1	14
1872	6	1.08	35.3	4	1.83	23.5	7	1.94	41.2	17
1873	9	1.62	52.9	5	2.29	29.4	3	0.83	17.6	17
1874	14	2.52	45.2	5	2.29	16.1	12	3.32	38.7	31
1875	2	0.36	11.1	8	3.67	44.4	8	2.22	44.5	18
1876	9	1.62	36	6	2.75	24	10	2.77	40	25
1877	2	0.36	13.3	8	3.67	53.4	5	1.38	33.3	15
1878	14	2.52	38.9	15	6.88	41.5	7	1.94	19.4	36
1879	34	6.14	52.6	10	4.58	17.5	13	3.60	22.9	57
1880	12	2.16	48	6	2.75	24	7	1.94	28	25
1881	17	3.07	40.5	9	4.13	21.4	16	4.43	38.1	42
1882	31	5.58	42.5	17	7.80	23.3	25	6.93	34.2	73
1883	38	6.85	61.3	5	2.29	8.1	19	5.26	30.6	62
1884	19	3.43	46.3	8	3.67	19.5	14	3.88	34.2	41
1885	20	3.61	36.4	7	3.21	12.7	28	7.75	50.9	55
1886	47	8.47	51.1	14	6.41	15.2	31	8.59	33.7	92
1887	55	9.91	43.3	24	11.01	18.9	48	13.30	37.8	127
1888	33	5.94	61.1	13	5.96	24.1	8	2.22	14.8	54
1889	20	3.61	54.1	9	4.13	24.3	8	2.22	21.6	37
1890	18	3.25	62.1	5	2.29	17.2	6	1.65	20.7	29
1891	13	2.34	44.8	7	3.21	24.1	9	2.50	31.1	29
1892	7	1.26	31.8	2	0.92	9.1	13	3.60	59.1	22
1893	1	0.18	5.5	3	1.38	16.7	14	3.88	77.8	18
1894	8	1.44	50	2	0.92	12.5	6	1.65	37.5	16
1895	4	0.72	100							4
TOTAL	555	100	48.9	218	100	19.2	361	100	31.9	1134

A: Percent of cases in this category.
B: Percent of cases in each year.

For the thirteen years between 1879 and 1897, when the cases are most abundant in the archive, civil matters account for over 20 percent of the cases in six years, while in 1883 and 1885 they account for only 8.1 and 12.7 percent of the cases, respectively. In the remaining five years during this period, they never account for less than 15.2 percent of all cases. Since the ratio of civil to criminal and administrative cases remains roughly the same during the period when the data are richest, we have some evidence that this may reflect a real sample of all cases that appeared before the magistrate.

Within the portion of the archive concerned with civil cases, there are matters relating to missing persons, marriage, divorce, adoption, guardianship, failure to pay rent, lending of money, trespass to land, boundary disputes, financial disputes, water rights, sale of goods, mortgages, pledges (*tien*), security transactions, lending of chattels, contracts, bankruptcy, etc. These are types of civil litigation one would expect to find in any district court file. Each file might contain numerous cases relating to, for example, one piece of land. Particularly in transactions concerning land, and there are 23 files relating to pledges and mortgages (*tien* and *t'ai*), a single file

often contains many cases (from a Western point of view). Thus, in fact, the number of civil cases may be inadequately represented by the above figures. At any rate, there is no doubt that civil cases occurred, and not infrequently.

Were these civil cases only those of the most extreme nature? Did they only occur when the normal means of reconciling disputes broke down? The answer to the second question is generally yes—litigation only took place when the normal means of dispute settlement, aside from litigation, broke down. This is true in almost all societies. Generally, less formal means of dispute settlement, including self-help, conciliation, and arbitration, are first attempted before resorting to formal tribunals. Litigation in courts tends to be expensive for the litigant (witness attorney and court costs in the United States today) and troublesome. Nevertheless, there was civil litigation and in answer to the first question above, it occurred in very normal cases and not just in cases of an extreme nature. We will illustrate by the example of the following case.

Case number 23306 (Appendix: I), which occurred in 1878, involved a dispute over a debt secured by a mortgage. In that case, a woman whose husband was deceased came to court to attempt to obtain payment on a loan. The loan was secured by a deed which she possessed and she had rights to the rent for payment of principle and interest. The plaintiff claimed that the land was inundated with water for many years and now that the water had subsided and the land was soon to be cultivated again, she demanded the rights to the rents or, in the alternative, full payment of the original loan. The defendant denied the debt. A trial was held, testimony taken and the court decided in favor of the plaintiff, permitting her to collect the rents on the property until such time as the debt was paid. When the debt was paid, the deed was to be returned to the defendant.

Thus, this ordinary civil case with no criminal overtones or penal sanctions, involving two parties who, in fact, litigated the matter, is processed in ways similar to that of a civil court in continental Europe. The judge's role in continental Europe is generally a more active one than that of the judge in a common law and particularly American jurisdiction. Interestingly, the decision was based in part upon customary law—something that Bodde and Morris fail to recognize the importance of in Chinese law.

The cases summarized in the appendices are meant to be illustrative of a civil case, criminal case, quasi-civil case, quasi-criminal case, and administrative case, thereby representative of the spectrum of litigation one finds in the Tan-Hsin Archive and in any jurisdiction.

By way of contrast to case 23306, case No. 35401 (Appendix: II) is designated as part of the criminal file. Criminal punishment was meted out in that case including putting on the cangue and beating with the light bamboo. The defendants, although brought to court by a private complaint, were handed over to the Black Clothed Police Lictor and apparently incarcerated. Whereas in the civil case, No. 23306 (Appendix: I), the magistrate attempted to have the runner conciliate the dispute and a trial was not held for more than a month and a half, in the criminal case trial was held within two days of the filing of the complaint. Thus there are differences in form, process, and punishment between civil and criminal cases.

3. *Were Civil Cases Handled as Penal Matters?*

In view of the above regulations, and case material, we can state that the following

assertion by Jerome A. Cohen needs modification: "During the Ch'ing dynasty Chinese law did not generally distinguish between civil and criminal litigation but basically employed the same procedure in all cases."[30] Furthermore, we can see that cases we may designate as civil were not handled with penal punishment. In fact, as illustrated by cases 21204 (Appendix: III) and 35303 (Appendix: IV), a civil case with criminal overtones and a criminal case, respectively, criminal cases were at times handled as if they were civil cases. In case 35303 (Appendix: IV), conciliation of an accusation of adultery, a criminal offense, was permitted by the magistrate. In fact, even case No. 21204 (Appendix: III) raises questions of breach of penal regulations, if the facts alleged in the initial complaint are true.[40] However, the plaintiff does not quite accuse the defendant of a crime, because although he alleges that the girl, Ts'ai Ah-pan,[41] was already married once and thereafter remarried, he never produces her husband and only comes up with the purported go-between of the first marriage after the magistrate had cancelled the case. The magistrate was willing, after being pressed, to send a runner to investigate matters, but the runner, at least according to his report, did not find a first husband. Thus, the case apparently was one where the girl, for some reason dissatisfied with her adopted home, returned to her natal home and was married therefrom. The magistrate's refusal to handle this case is surprising and does not fit the pattern of cases I have read. Nevertheless, it, together with many other civil cases, is illustrative of the fact that people were not afraid to become involved in lawsuits and that seemingly poor people came to court. A man with no sons, who was not able to adopt a male and had trouble conciliating a dispute of this nature was probably poor and without status or influence in the community.

Two more theories are shattered by the cases in the Appendix. One suggested by Sybille van der Sprenkel states: "Lastly the unavoidable consequences of a legal case once started was punishment for at least one person."[42] Aside from the large number of civil cases which involve no punishment, many minor criminal cases did not result in punishment. The second theory authored by Jerome A. Cohen states: "Ordinarily only major crimes were reported to the county magistrate. . . ."[43] In fact, civil disputes and minor crimes were often reported to the magistrate.

A. *Were Delays So Extensive as to Eliminate the Usefulness of Civil Litigation to the Injured Parties?*

The magistrate had limited periods of time in which to handle cases without suffering administrative sanctions. Nevertheless, he generally had a large area and population under his control.[44] The pressure to handle criminal cases quickly was

[30] Cohen, *op. cit.*, note 37, at p. 1206, 1207 fn. 28. Cohen noted that there were some ". . . modifications for handling types of cases that would today be classified as civil. . . ."

[40] See Staunton, *op. cit.*, note 24 at p. 107 for the regulations that would result in a beating of 80 blows and forfeiture of the marriage presents to the government. If the first husband so desired, he could retain the girl in question.

[41] Certain names used in Taiwan have Hokkien or Hakka sounds, but not necessarily mandarin equivalents.

[42] Sybille van der Sprenkel, *Legal Institutions in Manchu China,* (London, 1962) at p. 69.

[43] Jerome Alan Cohen, *The Criminal Process in the People's Republic of China,* (Cambridge, Mass., 1968) at p. 5.

[44] See Hsiao Kung-chuan, *Rural China: Imperial Control in the Nineteenth Century* (Seattle, 1960) at p. 5, ". . . There was on the average one magistrate for 100,000 inhabitants (calculated on the basis of 1749 official figures) or 250,000 (1819 official figures)."

great because of the consequences which might arise from failing to do so. Since serious criminal cases involved automatic review or appeal, the magistrate's duty and self-interest was clear.[45] As for civil matters, which generally never left his jurisdiction, the situation was less clear and the magistrate's self-interest not so obvious. Nevertheless, if we examine Table II and look first at civil cases from the first complaint to the final document in the file, and if it will be remembered that several files contained more than one case, the situation is not as extreme as one would believe. Thus, more than half of the files, i.e., 125 files or 58.5 percent, were completed in a year and almost 80 percent were completed in two years. Considering present court calendars in the United States, the speed of handling cases was remarkable—particularly in view of the problems of communication that existed in this pre-modern society. Just as remarkably, 80.8 percent of the criminal cases in the archive were completed within one year. Thus authors who find that "delay was inherent in a system which allowed so much opportunity for revision . . ."[46] are imprecise at best.

TABLE II—NUMBER OF CASES AND DURATION

	Administration		Civil Law		Criminal Law		Total and Average	
Duration	No. of cases	Percent	No. of cases	Percent	No. of cases	Percent	No. of cases	Percent
1 day–15 days	90	19.3	8	4.0	51	17.0	149	15.4
16 days–1 mo.	60	12.9	10	5.0	31	10.5	101	10.5
1 mo.–3 mos.	85	18.3	22	10.5	60	20.5	167	17.2
3 mos.–6 mos.	49	10.1	37	16.0	59	20.1	145	14.5
6 mos.–1 year	49	10.1	48	23.0	37	12.7	134	13.9
1 year–5 years	104	22.3	67	33.0	38	13.0	209	21.7
5 yrs.–10 yrs.	18	3.9	11	5.5	13	4.4	42	4.4
10 yrs.–15 yrs.	6	1.4	4	2.0	3	1.0	13	1.3
15 yrs.–25 yrs.	6	1.4	1	0.5	1	0.4	8	0.8
Over 25 years	1	0.3	1	0.5	1	0.4	3	0.3
TOTAL	468	100	209	100	294	100	971	100

Nevertheless, there were cases which seemed to proceed at inordinate length, particularly when the Chinese bureaucracy was deeply involved in the transaction, as (Case No. 24301, Appendix: V) illustrates. That case, lasting more than eight years, involved an attempt to surrender a pawnshop license and to avoid future taxation. It is complicated by the numerous bureaucrats involved and by the owner's attempt to change his mind. Nevertheless, such cases are exceptions rather than the rule. The case further illustrates that not all litigation was initiated as a result of a complaint of private parties. Here the grain attendant initiated the action.

4. *Were the Accused Considered Guilty Until Proven Innocent in Criminal Cases?*

Case No. 35401 (Appendix: II) is clearly a criminal case which is rapidly expedited. The magistrate decided the case fairly on the evidence. No presumptions

[45] In fact, however, because magistrates remained in office for a short period of time, they could avoid the penalties involved for delay in prosecuting criminal cases.

[46] Van der Sprenkel, *op. cit.*, note 42 at p. 70. Of course, if we refer to the problems of appeal of serious criminal matters then there were undoubtedly delays in Ch'ing judicial procedures.

seem to adhere to that case or to any of the other cases with regard to the accused. The presumption of guilt is not found in the cases and would be unlikely in any event, since most cases, even criminal ones, arose only on the basis of the pleas of a private individual.

If we look at Case No. 24301 (Appendix: V) above, where a pawnshop failed to pay its tax, we can see that the magistrate's suspicions are aroused as a result of the initial report. This case, clearly administrative in nature, was initiated at the instance of the grain attendant and not a private party, and thus perhaps we can say that if a case came to the magistrate through official or semiofficial channels, he might be more likely to presume negative facts about the accused. This would not be surprising, since the magistrate often had to rely on some of these agencies for investigation of facts. In any event, the presumption of guilt in ordinary civil or criminal cases does not seem to exist, Bodde and Morris to the contrary notwithstanding.

5, 6. *Was Any Entanglement with the Legal System a Personal Disaster and Did It Tend to Terrify the Public?*

The answer to the above question is that by and large the system was neither a personal disaster nor did it terrify the public. Of course, it could terrify the public and harsh things happened. There was, undoubtedly, cruelty and injustice in the system, but the system at the local level was not nearly as terrifying as one would expect on the basis of prior writings on the subject.[47] While inefficiency was built into the system because of the weakness of pre-modern institutions and the inherent problems of Ch'ing autocracy,[48] nevertheless, after reading prior descriptions of law in Ch'ing China, what is surprising is how well the legal institutions seem to have worked at the lowest level of institutional judicial activity. This is not to suggest, however, that the institutions did not have serious deficiencies, but merely they were not necessarily the ones we have been led to believe. The case relating to the pawnshop tax illustrates some of the bureaucratic problems involved in handling what one would expect to be a routine administrative matter. Furthermore, as in the penal institutions of contemporary Arkansas, and most states for that matter, there was cruelty and brutality. Similarly, venality did raise its ugly head among clerks and runners as well as higher officials, as it does among U.S. senators, state judges, bailiffs, wardens, jail guards, and even potential Supreme Court judges.

That the cruelty and brutality were of such disproportionate significance as to differentiate the whole system from Western law courts seems false. Furthermore, the populace was not terrorized and did indeed come to the law courts. In fact, in Table IIIA we see that in civil cases the plaintiffs came to court and repeatedly pressed the magistrate to take action. Thus the plaintiffs pressed the magistrate on the average of 3.1 times per case, while the magistrate took action by issuing a warrant only 1.6 times per civil case. In criminal cases, because of the legal threats, the magistrate re-

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[47] Not only Bodde and Morris but also Jerome A. Cohen have discussed the harshness of litigation in Ch'ing times. For example, Cohen notes: "In addition to being inordinately expensive, time consuming and unpredictable in outcome, resort to the magistrate often proved to be a degrading and harsh experience." Jerome A. Cohen, *op. cit.*, note 37 at p. 1214.

[48] For which see Hsiao *op. cit.*, at note 44, particularly pp. 501–518.

TABLE IIIA—CIVIL LAW: NUMBER AND TYPES OF IMPETUS

Type impetus	Number of times	Civil Law (1) Personnel Affairs	(2) Real Property	(3) Debts	(4) Commercial Transaction	TOTAL
	1	1	22	8		31
	2	1	20	4	1	26
	3	2	10	6		18
PLEA	4	3	10	7		20
	5	1	10	3		14
	6	1	7	1		9
	7		4	1		5
	8 and over		24	5		29
	1		29	17	1	47
	2		23	7		30
	3		13	5	1	19
WARRANT	4	2	9	1		12
	5		2			2
	6	1	1	2		4
	7		1			1
	8 and over		8	2		10

PLEA: Avg. 3.1/case 152/224 = 67.8%.
WARRANT: Avg. 1.6/case 125/224 = 55.8%.

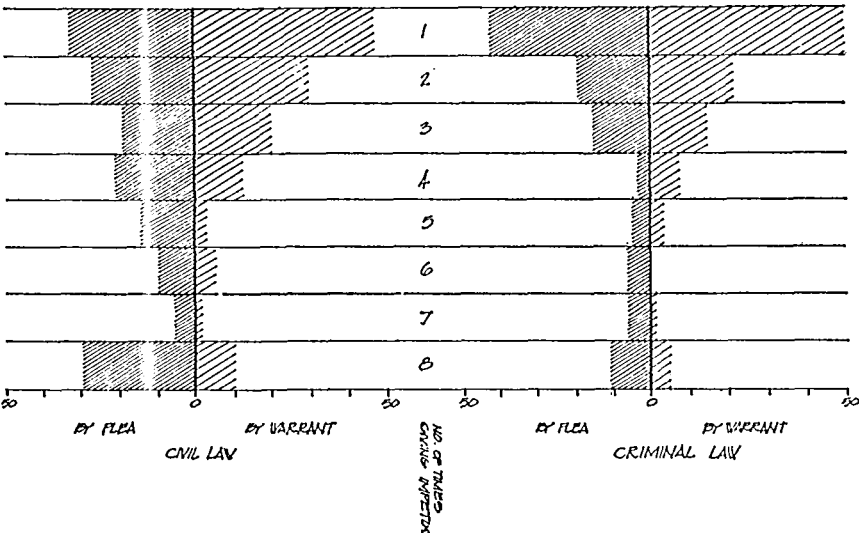
TABLE IIIB—CRIMINAL LAW: NUMBER AND TYPES OF IMPETUS

Type of impetus	Number of times	Criminal Law (1) General Affairs	(2) Offense Against the Person	(3) Offense Against Property	(4) Public Order	(5) Offense Against Morals	TOTAL
	1		14	20	1	6	41
	2		5	9		5	19
	3		3	6	1	5	15
PLEA	4		1	2			3
	5		1	3			4
	6		2	4			6
	7		2	2	1	1	6
	8 and over		3	5	2	1	11
	1		11	32	2	5	50
	2		9	7		6	22
	3	1	2	8	1	2	14
WARRANT	4		2	4		1	7
	5		2			1	3
	6						
	7				1		1
	8 and over		1	3	1		5

PLEA: Avg. 1.4/case 1. 105/365 = 28.7% 2. 105/245 = 42.8%.
WARRANT: Avg. 1.0/case 1. 102/365 = 27.9% 2. 102/245 = 41.6%.

quired less pressing. Thus, pleas average 1.4 per case, while action by initiation of warrant average 1 per case. Litigants came several times and pressed the magistrate to take action. This hardly indicates terror or fear. Certainly the populace would not have behaved this way if they feared the judiciary.

CHART II—BAR GRAPH ILLUSTRATING TABLE III (A AND B)



Modern Legal Institutions and Chinese Law

Various scholars have attempted to differentiate modern legal institutions from pre-modern institutions. Perhaps the most renowned scholar in this field was Max Weber.

Weber's analysis can help us in differentiating varied types of legal systems.[49] Basically, Weber differentiated three types of justice: Kadi, empirical, and rational. Rational justice has clearly conceived general principles, and rationally debatable reasons lie behind each decision based on those general principles. Weber differentiates formal, rational lawmaking from substantive, rational lawmaking. "Law . . . is 'formal' to the extent that, in both substantive and procedural matters, only unambiguous general characteristics of the case are taken into account."[50] The legally relevant facts, Weber notes, may be perceived by the senses or disclosed through logical analysis, applying definite fixed legal concepts to determine the meaning thereof. "Only that abstract method which employs the logical interpretation of meaning allows the execution of the specifically systematic task, i.e., the collection and rationalization by logical means of all the several rules recognized as legally valid into an internally consistent complex of abstract legal principles."[51] Weber, of course, considered the continental European codes the epitome of rational development of legal institutions. He has been criticized for this. Nevertheless, if we accept his analysis, Chinese law of the Ch'ing period does not fare badly. There was a fairly comprehensive code—in part logically designed—and cases were generally

[49] I have previously discussed this matter in "Introduction," *Family Law and Customary Law in Asia: A Contemporary Legal Perspective*. (Hague, 1968), ed. David C. Buxbaum, pp. XV–XLI; in particular see XV–XXIV.

[50] *Max Weber on Law in Economy and Society*, ed. Max Rheinstein and translated by Max Rheinstein and Edward Shils, (N. Y., 1967) at p. 63.

[51] *Ibid.*

decided on the basis of the principles in the code as applied to the particular abstract fact situation.

If we look at other contemporary notions of modern legal systems,[52] we may find that Chinese law of the Ch'ing period similarly fits the "modern" categorization fairly well: it had a regular hierarchial court system; it was organized bureaucratically; it was basically rational and amendable. Whether or not it was run by professionals is a question the legal literature has yet to adequately examine. Nevertheless, there were professionals in the system—in particular the legal secretaries—and the magistrate was probably much better versed in the law than previous scholars have assumed. He handled law cases too often not to develop some familiarity with the provisions of the code and procedure. The system was political, in the sense that the state enjoyed "a monopoly over disputes within its cognizance . . ." but, of course, it did not always choose to exercise this monopoly.

The clear distinction between legislative, judicial, and executive functions, characteristic of many modern institutions, is difficult to analyze because of the paucity of research thus far. Nevertheless, on the one hand there were more distinctions between legal and administrative functions of the magistrate than has been assumed and, on the other, such distinctions may not be characteristic or essential to the development of a modern legal system.

As for the legal rules, they were in theory, as are all contemporary rules, "uniform and unvarying in their application" and the incidence of the rules was largely territorial. Differences, in what Marc Galanter terms intrinsic kind or quality, did exist in Chinese law as in modern law. There was ascribed status in Chinese law, although ultimately, in theory at least, the gentry were subject to most of the same rules as the commoner. Generally speaking, status has become more important in modern law, as Roscoe Pound has shown, and lack of status distinction is not characteristic of modern law. The norms of Ch'ing law were universalistic in much the same sense that those of the common law are. Rights and obligations were apportioned as a result of transactions, but status was important.

While this preliminary, abbreviated analysis of Chinese law and comparison with modern law is not sufficiently elaborate to clearly differentiate the systems, it would seem that many, if indeed not most, of the attributes of modern law can be found in Chinese law of the period under discussion. There was a carefully constructed court system, hierarchically organized for purposes of systematic appeal and review. There was an elaborate code, large collections of cases, different classifications of cases, fixed methods to amend the code and establish new legal precedents, some professionals, rules of procedure and evidence, and testimony of the parties and witnesses in open court. There were even lawyers in each area, although they were maligned and did not receive the same type of professional training as our present graduates. It should be recalled that many lawyers in the United States today have come through the clerkship system without university or even law school training. Our present educational requirements for obtaining membership in the bar in the United States are of fairly recent origin. Lawyers are also maligned in the United States.

Special plea forms and other documents existed in the Ch'ing period. There

[52] Marc Galanter, "The Modernization of Law," Weiner, pp. 153–156. *Modernization,* (Basic Books, 1966) ed. Myron

was careful recording of the processing of each document and of cases. Files and reports were made to superior tribunals; special provisions for the juvenile, aged, infirm, and women were made; and magistrates were rotated and not permitted to remain in their home areas. Also, professional coroners were used in criminal cases. There was much rationality in the system.

What then are some of the fundamental differences between modern legal institutions and those of the Ch'ing period at the local level? In the first place, the machinery lacked efficiency. Communications were limited, as they were elsewhere in pre-modern societies, and this weakened the system. The magistrate's jurisdiction was large, but his power was weaker than that of a contemporary judge. If a warrant was issued, it might take days before the runner served it, and by that time the defendant could easily have slipped away.

Distance from the court affected one's ability to litigate much more severely than it does today. Thus, for example, as we see in Chart III (A and B) the further the plaintiff was from the court, the less likely it was that he could prosecute his case. This was even true in criminal matters, although to a lesser extent than in civil cases. While 60 percent of the civil cases, where the plaintiff resided in the city containing the court, were litigated to result, only 20 percent of those in which the plaintiff resided 71 to 80 *li* from the city were litigated until the matter was determined. Therefore, poor communications made the system extremely inefficient.

It was also difficult at times to force the runners to perform their tasks of serving warrants, collecting evidence, etc. The runners were on occasion beaten or threatened with beatings. When beating actually took place, it did not appear to improve the efficiency of the system. A smaller percent (Table IV) of civil cases were brought to decision where runners were beaten than where they were not. Runners were probably beaten when, in fact, there was no way they could serve process on the parties or obtain the evidence sought. In criminal cases, beating the runner was only somewhat more effective. Thus the control mechanism, in part because of bad communications, did not function as efficiently as in a modern system, so that both defendants and runners were not subject to the same control as persons having similar status would be today.

The system also depended in large part on the initiative of the parties to activate it. Failure to press the magistrate did more to terminate civil cases than any other single factor as Table V indicates. Even in criminal cases, almost thirty percent were terminated because of failure of the plaintiff to push the magistrate.

Conciliation terminated cases in both the civil and criminal field to a larger extent than it could in a contemporary legal system. While out of court settlements are undoubtedly a very significant proportion of all civil cases noted for trial, in criminal cases today the results of deals with the prosecuting officer generally involve pleading guilty to a lesser offense rather than the dropping of all charges. The legal formality of the criminal process is probably greater in most modern systems than it was in Ch'ing China.

Thus the initiative of the parties played a substantial role in activating the system and maintaining it through to termination. This may have been due to the lack of professionalization (e.g., a prosecuting attorney's office) as well as the fact that an inefficient system could not afford to encourage litigation. On the other hand, parties with initiative found the courts available if litigation was a necessary or desirable recourse.

CHART IIIA—CORRELATION OF DISTANCE FROM COURT WITH ABILITY TO LITIGATE, CIVIL LAW

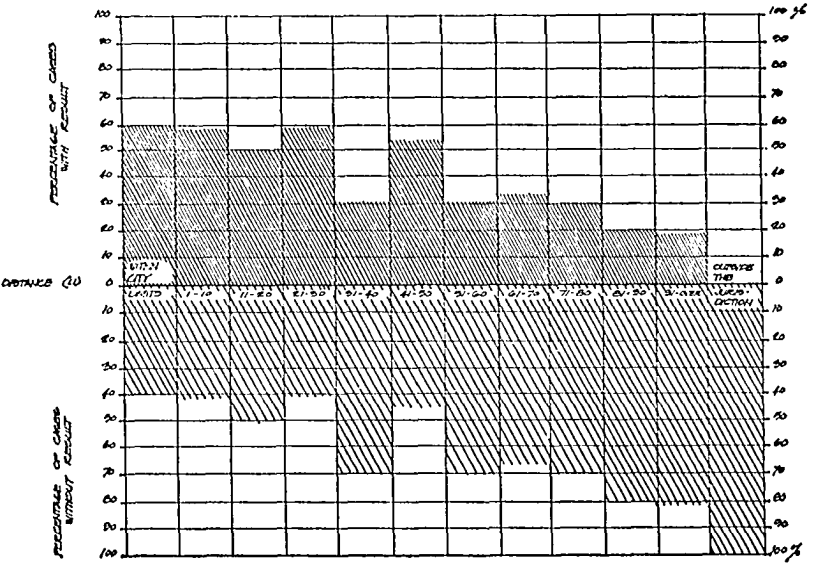
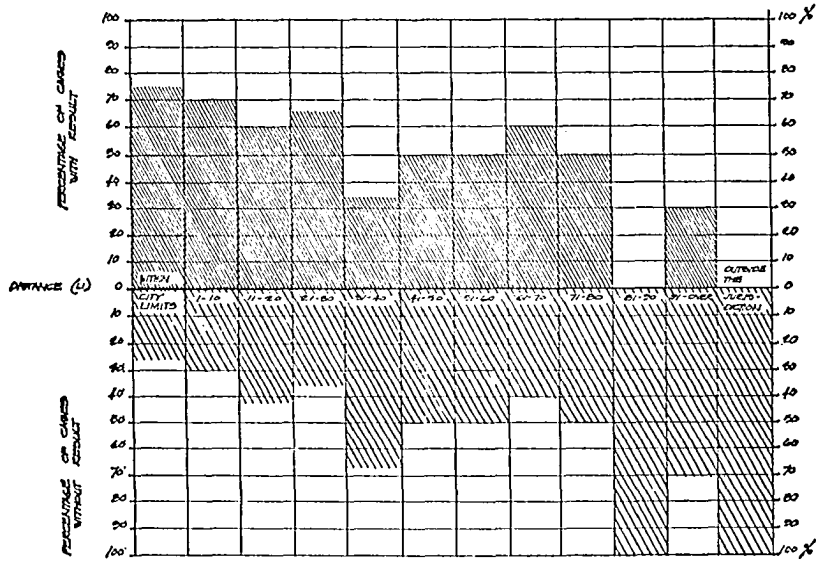


CHART IIIB—CORRELATION OF DISTANCE FROM COURT WITH ABILITY TO LITIGATE, CRIMINAL LAW



One of the more striking differences between traditional and modern legal systems, when looking at Chinese law, involved matters of inefficiency, stemming from the lack of communication and inefficient control in a pre-modern state. Only a small part of the difference lies in the distinction between the rationality of the two systems.

TABLE IV—DIFFICULTY OF RUNNERS IN PERFORMING THEIR TASKS

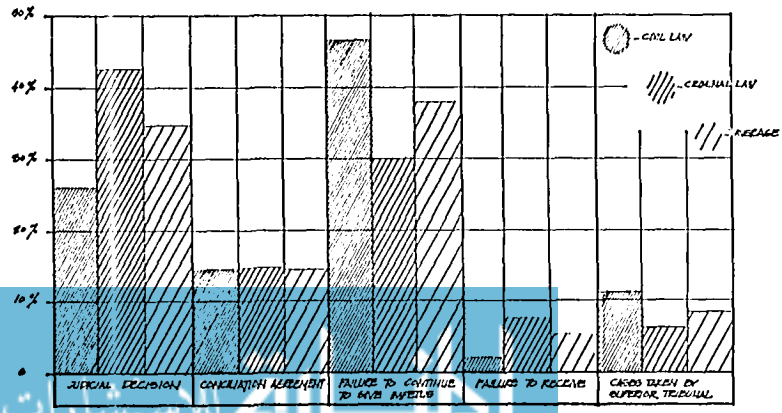
Items of Comparison	Civil Law		Criminal Law	
	A	B	A	B
Percent of cases with result (e.g., judicial decision, conciliation agreement)	73	47	44	54
C	6.0	3.1	4.1	1.4
D	1.3	1.6	2.6	1.0

A: Ordinary cases.
B: Cases in which the runners were beaten.
C: Average number of times per case of giving impetus by plea.
D: Average number of times per case of giving impetus by warrant.

TABLE V—DEPENDENCE OF THE SYSTEM UPON THE INITIATIVE OF THE PARTIES

Types of terminating cases	Civil Law		Criminal Law		Total	
	No. of cases	Percent	No. of cases	Percent	No. of cases	Percent
Judicial decision	53	26.0	97	42.4	150	34.6
Conciliation agreement	30	14.7	34	14.8	64	14.8
Failure to continue to give impetus	95	46.5	68	29.7	163	37.6
Failure to receive	4	2.0	17	7.4	21	4.9
Case taken by superior tribunal	22	10.8	13	5.7	35	8.1
TOTAL	204	100	229	100	433	100

CHART IV—BAR GRAPH ILLUSTRATING TABLE V



Conclusion

In 1966 Jerome A. Cohen reviewed Albert P. Blaustein's compilation and editing of Chinese Communist Legal documents.[53] He noted: "Historical perspective, knowledge of the role played by law in traditional China and during the Republican era is, of course, one of the principal prerequisites to undertaking contemporary developments."[54] He also noted the difficulties of the Chinese language,[55] and the need to examine the discrepancy between the law in the books and the law in action. Indeed, the difficulties of research in the field of Chinese law are imposing. They are complicated by the difficulties in correctly analyzing legal terms, law people, and institutions. For example, terms of opprobrium, for law specialists, e.g., pettifogger, shyster, legalist, etc., cut across cultural boundaries. Hostility to those who know and manipulate the law is not unnatural, but one cannot presume, therefore, that the populace will not avail itself of the legal institutions.

Cohen also noted the need to avoid ethnocentrism and extreme relativism. Yet many of our concepts of traditional Chinese law in action are based on reports by those ethnocentric 19th century diplomatic, religious, and commercial Westerners who felt they were spreading civilization to barbarians by bringing them Western goods, politics, law, and religion. In fact, much Western research on traditional Chinese law and unresearched conclusions are merely reaffirmations of the slogans of our brethren of that period and their compatriots, the pro-Western antidynasty Chinese.

I have identified several fallacies that require reexamination. One cannot understand traditional Chinese law unless one objectively and in detail examines the codes, cases, notes of officials, local histories, archival files and interviews individuals who participated in the system. As Cohen noted, a thorough grounding in traditional Chinese law is necessary before one can have a true understanding of contemporary Chinese law. The study of traditional Chinese law for the Ch'ing period has only begun.

APPENDIX

I: *Civil Case*

Case No. 23306 (1878): A civil case relating to mortgaging of land in order to guarantee payment of a loan.

The plaintiff, a woman, lent money to a Mr. Lin, who gave her a deed to guarantee the debt, thereby creating a mortgage. The debtor is now dead and the plaintiff went to his tenant to obtain rent, as interest on her loan. The tenants and a relative of the debtor refused to pay the rent. In the magistrate's rescript to the complaint the magistrate noted that despite the fact that this land was inundated by water, nonetheless, the money and interest on the debt should be repaid. The magistrate sent a runner to check the facts and asked that the original mortgage contract be brought to court.

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[53] Jerome A. Cohen, Review of *Fundamental Legal Documents of Communist China* (N.J., 1962); *Yale Law Journal*, Vol. 72, p. 838 (1966).

[54] *Ibid.*, p. 839.

[55] *Ibid.*, p. 838, 839

The runner attempted to conciliate the dispute but was unable to do so, thus the parties were brought to court for trial. In his decision the magistrate noted that despite the fact that land was inundated by water for a period of time, the water has receded and the land has been reclaimed by the tenant, although it is still not yet cultivatable as rice land. He noticed that custom (*su li*) holds that three years after reclaimation of land, rent is once again due and payable. He, therefore, ordered the debtors' heir to give all rentals to the plaintiff, three years after reclamation of the land. He also held that the mortgage may be redeemed upon lump sum payment of the outstanding balance. The magistrate requested and received bonds from all parties manifesting their willingness to abide by his decision.

II: *Criminal Case*

Case No. 35401 (1881): Criminal file. The plaintiff accused the defendant of inducing his daughter-in-law to run away. He caught them and turned them over to the runner to have them tried.

The plaintiff, a seventy-three year old man, accuses the defendant of inducing his daughter-in-law, by use of deception, to run away with him. The plaintiff's son, his daughter-in-law's husband, is deceased. The defendant, from a different province, had come to live in the neighbourhood as a bachelor and worked in a neighbour's house, helping to make clothing. The plaintiff caught the parties and turned them over to the authorities.

The defendant defends his action at the trial by claiming that he wanted to marry the plaintiff's daughter-in-law and reside matrilocally at the plaintiff's home. He claims a go-between handled the arrangements but that no contract had been drawn up.

The magistrate decided in favor of the defendant. The daughter-in-law was punished, by being slapped in the face and handed over to her father-in-law to be returned home, and the magistrate indicated that if she did not obey instructions her father-in-law may report to him and he would punish her. The defendant was beaten with the light bamboo and put in a cangue for one month and thereafter released.

III: *Quasi-Civil Case*

Case No. 21204 (1886): The plaintiff accused the defendant of fraudulently arranging a second marriage for his adopted daughter.

The plaintiff relates that he had adopted the defendant's daughter, as a *t'ung yang-hsi*. Her natal home was the defendant's household. In the first months of this year, the defendant asked that she return to visit with them. The plaintiff asked that she limit her stay but she did not return. The plaintiff further alleged that the defendant married her to someone else despite the fact that she had already been betrothed.

The plaintiff pointed out that he had no son and he had adopted the young lady as a *miao-hsi* in order to marry her to a Mr. Wang, matrilocally. Thus, they could ensure their posterity. Now he would have no one to perform the sacrifices.

The magistrate ordered the plaintiff to invite the go-between, who originally handled the adoption, to reason with the girls natural parents. He did not regard this as a matter for litigation.

The plaintiff returned with another complaint, alleging that he did what the magistrate commanded, but there was no result. He requested the magistrate to arrest the defendant. The magistrate, thereafter, sent a runner to investigate the facts. The defendant filed an answer in which he denied that he had ever given his daughter out for adoption. He said that if there was such an adoption there would have to be a go-between and a contract and neither one of these had been brought to court. The plaintiff returned once again to the magistrate with another plea, but the magistrate then claimed that the plaintiff had taken a personal dispute and used it to make a false accusation. The magistrate said he should punish the plaintiff but he would generously allow him to cancel the case. This, despite the fact that the runner had found that the defendant had indeed allowed the plaintiff to adopt his daughter, but thereafter betrothed his girl to another family. When the plaintiff returned once again with another plea indicating that he found the go-between who can give evidence, as to the facts, the magistrate in his rescript noted that he has cancelled the case. He said this case should be negotiated and not litigated.

IV: *Quasi-Criminal Case*

Case No. 35303 (1887): The plaintiff accused the defendant of having intercourse with his, the plaintiff's wife.

The plaintiff accused the defendant of going to his house while he was away and having intercourse with his wife. He claims he caught the accused and his own wife and cut off their queues. The magistrate noted in his rescript that if what the plaintiff said was true then the defendant certainly violated the law. He sent the runner to investigate the matter. He also asked that the queues be sent to court for examination.

Thereafter, a village elder and a scholar (*sheng yuan*) reported to the magistrate that they had conciliated this matter and obtained a bond from the parties. They, therefore, asked the magistrate to cancel the case. The conciliators note that the two parties were friends and have common relatives by marriage. They have been neighbors for some time. The conciliators indicated they could not stand by and watch this dispute accelerate and end badly and therefore want to conciliate the matter.

They claim that through fear and a desire to prevent adultery the plaintiff had cut off the braid of the defendant. They advised and ordered the parties to offer each other betelnuts in a face to face meeting, and to be mutually harmonous thereafter. The parties were willing to follow the instructions of the conciliators, however, since a complaint has been brought to court, conciliators do not dare to handle matters lightly. Therefore they have obtained preparation of two bonds of accord and asked that the magistrate please cancel the case.

The magistrate permitted cancellation of the case.

V: *Administrative Case*

Case No. 24301 (1880): The bankruptcy of a pawnshop and cancellation of a license to do business.

This case began on the tenth month of the fifth day of 1880 and did not end until the third month of 1889. This case was started by a report from the grain attendant to the magistrate of Hsinchu district who noted that a pawnshop went bankrupt last year and is now unable to pay its pawnshop tax. The magistrate wondered why this bankruptcy was not reported at an earlier date, since it existed last year, and decided to send a runner to check the reports and see if tax payment had been made regularly in the past. The magistrate thereafter indicated that if taxes for the year 1880 (the order was issued in 1881) were not paid now, then the license of the pawnshop should be revoked. Furthermore, he indicated that if the shop does not wish to pay its tax, then he wants a bond indicating their willingness to cancel their license and copies of bonds from neighbors attesting to the facts as well as the license of the pawnshop, so that he may report to his superiors.

The pawnshop paid its tax for the year 1880; at the same time it submitted its bond, and those of its neighbors on the immediate left and right, attesting to the facts. The magistrate reported to the prefect in Taipei. He noted that this pawnshop had been granted license no. 28, since the time of the Ch'ien Lung emperor, by the financial commissioner. The annual tax was five ounces of silver. Because of bad circumstances, the shop's business had ceased and it could not continue to pay the tax. The magistrate sent his own bond verifying the facts, as well as the pawnshop license to the prefect. The prefect, in his rescript, noted that according to the law relating to taxing a pawnshop, the tax should cease when the license is returned and cancelled. Since the pawnshop turned in its license in 1881 it still must pay the tax for the year 1881 in the required amount. Therefore, he asked the magistrate to order the pawnshop to pay such tax. The district magistrate ordered the grain attendant to collect the tax from the pawnshop for the year 1881 and the tax was paid.

The magistrate then reported to the prefect that the tax had been paid, but the prefect inquired as to why the five ounces of silver were not included in the report. The magistrate then sent the prefect the five ounces of silver. Thereafter, the Taipei prefect sent another request to the district magistrate saying that although he received the pawnshop tax for 1881 he did not receive the local water tax of one-tenth of an ounce of silver. In the second month of 1882, the district magistrate obtained the one-tenth of an ounce of silver for payment of the supplemental water tax. The prefect then reported to his superiors. He later received a dispatch from the financial commissioner, who pointed out that certain procedures necessary to complete the cancellation of this license had not been undertaken. All the outstanding accounts of the pawnshop must be cleared up and this must be investigated by the magistrate and bonds by members of the same lineage as that of the pawnshop owner must be secured, to accomplish this cancellation.

The date of dispatch from the prefect to the magistrate requiring fulfillment of the regulations was 1885. In 1886 the runner, sent by the magistrate to investigate, reported that all the accounts of the pawnshop had not yet been cleared up. Certain pawned merchandise was yet to be redeemed.

Shortly thereafter, the pawnshop itself petitioned the magistrate and inquired as to whether they could reobtain their old license. The magistrate indicated that they could not continue to operate. In the last month of 1886 the runner reported that all the accounts of the pawnshop had been cleared up and bonds from their lineage had been obtained. The magistrate requested, in his rescript, that the pawnshop tax for 1882 be obtained.

There was an order from the financial commissioner that came down in 1887, holding that the pawnshop may avoid pawnshop taxes from 1885 on, and requesting payment of taxes for the remaining prior years. In 1887 a receipt was given by the district magistrate to the pawnshop owner for payment of its taxes, including, interestingly enough, the taxes for 1886. Finally, in 1889 a bond was prepared by the pawnshop owner attesting to the fact that all his accounts were settled and that he had, since 1880, ceased to do business.