Translational Encounter of Chinese and Western Law
— George Jamieson's English Translation of Qing Family Law and Its Influence in Hong Kong

LIU, Rui

A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy in Translation

The Chinese University of Hong Kong
August 2019

Thesis Assessment Committee

Professor KWONG Oi Yee (Chair)

Professor James George ST ANDRE (Thesis Supervisor)

Professor WONG Wang Chi (Committee Member)

Professor CARROLL John (External Examiner)

Abstract

Based on a textual and historical investigation into George Jamieson's English translation of Chinese family law in the Qing Code, this research explores the fascinating encounter between Chinese and Western law in it and its long-lasting influence on the Hong Kong courts. By incorporating Roman and English law into his translation and commentary, Jamieson's work created a comparative legal world where they co-existed and interacted with Qing family law.

Focusing on how this occurred, the thesis first reconstructs the historical context in which the translation was made and further initiates an in-depth micro-level observation of how the Western legal concepts found a niche in Qing law. With Said's Orientalist discourse that highlights East and West distinction as a point of reference, the thesis discovers Jamieson's complicated and even conflicting conceptualization of Chinese law, in which he presented both convergence and divergence between Chinese and Western law. While the latter was exploited as a mirror to refract the fatal problems in the former, the two also intertwined in such a way that facilitated a more equal dialogue. Not only passing through legal cultural borders, the translator also managed to travel back and forth in time by juxtaposing the then living Qing law with ancient law and early anthropological studies.

Beyond this textual study the thesis explores the reception of Jamieson's translational work in the actual judicial context of Hong Kong. With a view to understanding its operation in the courts, the thesis probes the inner working of translation and paratexts, as well as the variety of external factors that interacted with his work, including English law, expert witnesses, as well as the changes in the Chinese community. The part Jamieson's translation eventually played in the courts in return refracts the outcome of these manifold interactions. Interestingly, Jamieson's

translation of Qing family law, starting with the imperial encounter of Chinese and Western law, also received such an encounter in Hong Kong. The thesis thus not only fills a gap in the translation history of Qing law, but also sheds light on an untold chapter of Jamieson's translation in Hong Kong's judicial history.

論文摘要

本論文以乔治・哲美森所譯《大清律例》中的家庭法為研究對象，旨在揭示中西法律在其翻譯中的邂逅以及譯本對香港法庭的深刻影響。哲美森通過引入羅馬法與英國法，營造了一個與中國傳統家庭法共生、互動以及比較的空間。著眼於其發生過程，論文首先重構了翻譯生成的歷史場景，繼而通過細緻深入的文本考察，探索西方法律概念如何在清律中尋得合適位置。借助薩義德關於中西差異的東方學話語為參照系，論文發掘了哲美森對清律複雜甚至矛盾的理解方式，呈現了其眼中互通與分歧並存的中西法律關係。在其筆下，西方法律時而成為映照清律缺點的“照妖鏡”，時而又與清律緊密交織、平等對話。譯者不僅跨越了法律的文化邊界，更通過將清代法律與古代法以及人類學並置，實現了過往與現實的穿梭。文本分析之外，論文更擴展至此譯本在香港司法語境中的接受情況，既探索翻譯與副文本的內部作用，亦考察譯本與英國法、專家證人以及華人群體等多重法庭角色和因素的互動，以期揭示其在法庭的實際運作。譯本在法庭的最終效力正是這多重角力的結果。本研究不僅填補了清律英譯史上的一項空白，亦窺見哲美森譯本在香港司法史中鮮為人知的一個篇章。

Acknowledgements

Upon completion of this thesis, I feel obliged to express my sincere thanks to those who have helped me along my three-year journey of PhD studies. I own my deepest gratitude to my supervisor Professor James St. André for his patient guidance, insightful vision and enlightening instructions. Along the way, he taught me how to narrow down my research scope, pushed me to make interesting discoveries, and carefully modified my drafts. I remember sending him my very first chapter, feeling unsure of myself. What he gave me, however, was heartening encouragement. Reading those pages that were full of his corrections, I not only saw his academic rigour, but also the unstinting support he extended to me. It is he who guided me to the right path of research and convinced me of my academic potential. The thesis would not have been the shape it is now without his generous help and perspicacity.

In addition, my sincere appreciation is extended to my committee members, Professor Wong Wang Chi, Professor John Carroll and Professor Kwong Oi Yee. Ever since I came to CUHK, Professor Wong has always been so kind to me and provided me with many opportunities to explore the historical approach to translation studies, from the summer school in Wuhan to the Young Researchers' Conference in Changsha and to the workshop on sinology and translation this summer. He taught me the importance of digging into first-hand archives in historical translation studies and showed me the path for good scholarship. While giving me suggestions for my work, he also inspired my enthusiasm for academic studies, for which I have always been so grateful. My special thanks also go to Professor Carroll, who illuminated me with his extensive and deep understanding of imperialism and pushed me to make greater contributions in the area. I am also thankful to Professor Kwong who led me to consider how the language problems in translation further conditioned the judicial

processes in Hong Kong.

During this journey to accomplish my thesis, I have received kindness and inspirations from many professors. Professor Huang Ko-wu pushed me to look deeper into my topic and find solid evidence for Jamieson's influence in Hong Kong. He also kindly introduced me to his research assistant Zhao Rourou, who took a number of valuable pictures of the first-hand materials I needed, for which I was very thankful. Professor Ye Jia encouraged me to observe the lively interaction among the contributors in *The China Review.* And Professor Wei Ling-chia has shown me the amazing aspects in sinological studies. I am also most thankful to professors in the Faculty of Law, who ushered me into a fascinating world of law and helped me lay a solid ground for an in-depth legal analysis in my thesis. I am grateful for their sharing and illuminating advice.

When I explored the archives in London, I was very fortunate to meet Professor Carol G. S. Tan of SOAS who kindly offered valuable advice for my research on "wills" in Hong Kong. And I also hope to express my gratitude to the expert witness I mentioned in my thesis. Although he did not live in London, he was most kind enough to meet me when he happened to come to the city. As an experienced expert whose name I read so many times in the Hong Kong judgements, his enthusiastic talk brought me back to the Hong Kong courts where those cases were tried. He not only greatly deepened my understanding of the operation of Chinese law in Hong Kong, but also convinced me the importance of Jamieson's work in the courts.

When exploring the precious archives and first-hand materials, I was offered kind assistance and cooperation by archivists and staff at the Middle Temple Library and Archive, SOAS Library, The National Archives, Public Records Office of Hong Kong, Cambridge University Library, Institute of Advanced Legal Studies Library, Library and Archives of Lincoln's Inn, Inner Temple Library, LSE Library and British Library.

My special thanks go to them. I also hope to express my gratitude for Professor Hon-ching Lee and the committee members of Hop-Wai Sponsorship, who financially supported my trip to London. The generosity and kindness Professor Lee extended to me boosted my academic enthusiasm to probe deep into the archives and accomplish some interesting findings.

During the three-year journey, I have been very fortunate to have many good friends, with whose company, the journey was no longer lonely. I also sincerely thank the department staff Rosaline, Andy, Venus and Eric who provided the support and convenience I needed for my study.

Last but not least, I would like to thank my mother, my father and my sister for their unconditional love and unwavering faith in me. Because of them, I could follow my heart and pursue my dreams.

Table of Contents

Chapter One Introduction

1.1 Encounter of Chinese and Western Law in Jamieson's Translation

This thesis focuses on George Jamieson's (1843-1920) translation of Qing family law, first published in *The China Review or, Notes and Queries on the Far East* (1872-1901), a Hong Kong-based journal, then republished as a book in 1921 entitled *Chinese Family and Commercial Law*. The work marks a milestone in Western understanding of Chinese law, initiating comparative legal studies and dialogue with early British anthropologists. In the publisher's golden jubilee year, it was listed as one of its most significant and best-selling books.[1] His translation and interpretation of Chinese law not only profoundly influenced his contemporaries,[2] but also serves as a reference in many modern books on traditional Chinese law.[3] Beyond this, it served in the Hong Kong Court for almost a century, greatly shaping the way Qing law is understood there.

The overarching topic that governs the whole thesis is the encounter of Chinese

---

[1] The Golden Jubilee Year of Kelly & Walsh, Limited., *The North-China Herald and Supreme Court & Consular Gazette*, July 14, 1924.

[2] E. J. Eitel, "The Law of Testamentary Succession as Popularly Understood and Applied in China," *The China Review* 15, no. 3 (1886): 151-153; P. G. Von Möllendorff, *The Family Law of the Chinese* (Shanghai: Kelly & Walsh, Limited, 1896), 1, 5, 11, 14, 22, 52; T. R. Jernigan, *China in Law and Commerce* (London: Macmillan & Co., Ltd., 1905),116, 140; Robert Bryan, *An Outline of Chinese Civil Law* (Shanghai: The Commercial Law Press, Limited, 1925), 17, 30, 31; Frank Rawlinson, "The Social Heart of China," *The Chinese Recorder* 57, no. 7 (1926): 511; Ernest A. Ebblewhite, "British and Foreign Guilds," *The Sunday Times*, March 31, 1935; Marc van der Valk, An Outline of Modern Chinese Family Law (Peking: Henri Vetch, 1939), 14, 17, 18.

[3] Derk Bodde and Clarence Morris, *Law in Imperial China* (Philadelphia: University of Pennsylvania Press, 1967), 157, 574; William C. Jones, trans., *The Great Qing Code* (Oxford: Clarendon Press, 1994), 6; Su Yigong 蘇亦工, *Zhongfa xiyong: Zhongguo chuantong falü ji xiguan zai xianggang* 中法西用—中國傳統法律及習慣在香港 (Chinese Law Applied by Westerners – Traditional Chinese Law and Custom in Hong Kong),（Beijing: Social Sciences Academic Press 社會科學文獻出版社, 2002），257, 273, 331, 332, 338; Liang Linxia, *Delivering Justice in Qing China* (Oxford: Oxford University Press, 2007), 106, 128, 137, 143; Teemu Ruskola, *Legal Orientalism: China, the United States and Modern Law* (Cambridge and London: Harvard University Press, 2013), 80, 85, 264, 268.
Philip C. C. Huang considered Jamieson's work on Chinese family law as "the best of the early studies." Philip C. C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford: Stanford University Press, 2001), 17.

and Western law in Jamieson's translation, which will be explored from different angles. First of all, the thesis explores the factors that served as catalyst for Jamieson's translation, which leads to their manifold encounter in different imperial scenarios. By a careful study of the translated text, it then considers how oriental and occidental law met. What happened in their encounter? What was produced? Particularly, what new light did his work shed on the relationship between Chinese and Western law? This research offers a micro-level observation of how the very distinct legal concepts and rules interacted with each other in Jamieson's translational work, uncovering the potential shared ground as well as remarkable differences of Qing and Western law. While doing this, the thesis is careful to avoid vague generalization through an in-depth analysis of the East-West legal dialogue, which assumed different forms in different parts of Jamieson's translation.

In the last part, the exploration will move beyond the textual level and look into its reception in the Hong Kong judicial system, which has been constructed based on English law, with limited scope for Chinese law and custom. The application of Jamieson's translation in the Hong Kong courts offers a lively encounter of English and Chinese law shot through with colonial implications. While the common law context has gradually reshaped and eroded the application of Jamieson's translation in Hong Kong cases, this research hopes to recognize Jamieson's contribution towards perpetuating the life of traditional Chinese law by proffering much needed knowledge and clarifying opaque issues, thereby enlivening the less known Qing law amid the English construct and professionals. Intriguingly, Jamieson's translation, produced out of an imperial context, has to some extent been used to resist the sweeping intrusion of English law.

1.2 Literature Review

The primary material this thesis relies on is Jamieson's partial translation of Qing law published between 1879 and 1881 based on the *Great Qing Code* (《大清律例》Daqing lüli) of the third year of Guang Xu (光緒) (1877).[4] His translation primarily deals with inheritance, marriage, land tenure, taxation and some commercial issues, which after revision, reappeared as *Chinese Family and Commercial Law.*[5] In the new edition, he further supplemented it with an introductory chapter and two appendices. One appendix is his translation of Qing cases taken from *Compilation of Criminal Cases* (《刑案匯覽》Xing'an huilan), first published in *The China Review* in 1882,[6] closely following Jamieson's rendition of marriage law. The cases he selected were all concerned with Chinese inheritance and marriage, as a continuance of his exploration of Qing family law. The other appendix collected cases from the Shanghai International Mixed Court, taken by Jamieson from the *North-China Herald* (1850-1941), an English paper in Shanghai. As the focus of this thesis is on Qing family law, it also incorporates into the study Jamieson's writing on adoption and wills printed in *The China Review*,[7] which are key to understanding his translation and interpretation

---

[4] G. Jamieson, "Translations from The Lü-Li, or General Code of Laws: I.," *The China Review* 8, no. 1 (1879): 1-18; G. Jamieson, "Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: II. Inheritance and Succession," *The China Review* 8, no. 4 (1880): 193-205; G. Jamieson, "Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: III. Registration and Taxation," *The China Review* 8, no. 5 (1880): 259-276; G. Jamieson, "Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: IV. Registration and Taxation—(continued)," *The China Review* 8, no. 6 (1880): 357-363; G. Jamieson, "Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: V. Land Tenure and Taxation," *The China Review* 9, no. 3 (1880): 129-136; G. Jamieson, "Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: VI.," *The China Review* 9, no. 6 (1881): 343-350; G. Jamieson, "Translations from the General Code of Laws of the Chinese Empire: VII Marriage Laws," *The China Review* 10, no. 2 (1881): 77-100.
Jamieson mentioned the edition of the Qing Code he used, see Jamieson, "Translations from the Lü-Li: I.," 1.

[5] G. Jamieson, *Chinese Family and Commercial Law* (Shanghai: Kelly and Walsh, Limited, 1921), 9.
The book was reprinted by Vetch and Lee Limited in Hong Kong in 1970, with supplementation of Jamieson's obituary and two book reviews.

[6] G. Jamieson, "Cases in Chinese Criminal Law," *The China Review* 10, no. 6 (1882): 357-365.

[7] G. Jamieson, "The History of Adoption and Its Relation to Modern Wills," The *China Review* 18, no. 3 (1889): 137-146.

of the concept of "will" in China.

Moreover, first-hand archival material that facilitates a better understanding of the translator is also given due attention. Born in Scotland in 1843, Jamieson joined the British consular service right after graduating from Aberdeen University in 1864.[8] Since then, he had been serving in various parts of China, including Beijing, Shanghai, Taiwan, Pagoda Island, Fuzhou (福州), Yantai (煙台) and Jiujiang (九江).[9] For his dedicated service, he was made a Companion of the Order of St. Michael and St. George in 1897 and when he retired in 1899, he was already the Consul-General in Shanghai.[10] As his life was inextricably associated with British consular service, the archives of the British Foreign Office contain much information about him. Therefore, the thesis makes an extensive exploration into these first-hand archive material now held by the National Archives, particularly Jamieson's correspondence with his superiors and Chinese officials as well as his consular reports, which offer valuable clues regarding his imperial enterprise and his translation.[11]

Moreover, Jamieson was called to the Bar in the Middle Temple in 1880. Thus archives documenting his legal education there, including the lecture attendance books, examination papers and regulations as well as his scores in exams are all explored so as to reconstruct his legal background and understand the legal climate when he fused English and Roman law into his translation of Qing family law. After Jamieson retired from the British consular service, he joined the China Association, an organization dedicated to furthering British commercial interests in China, and assumed important

[8] Mr G. Jamieson, C. M. G., *Aberdeen Press & Journal*, January 4, 1921.
[9] Pinyin is generally used in this thesis for names of Chinese people and places. But in places where Jamieson used Wade-Giles system, the thesis will follow Jamieson's usage consistently to avoid confusion.
[10] For Jamieson's life experience, see Obituary — Mr. Geo. Jamieson (1843-1920), *The London and China Telegraph*, January 3, 1921.
[11] The thesis primarily uses FO 17: Foreign Office: Political and Other Departments: General Correspondence before 1906 China; FO 228: Foreign Office: Consulates and Legation, China: General Correspondences, Series I: 1843-1930; FO 656: Foreign Office: Supreme Court, Shanghai, China: General Correspondence; and FO 233: Northern Department and Foreign Office: Consulates and Legation, China: Miscellaneous Papers and Reports, The National Archives, Kew.

posts until his death.[12] As the China Association archives record Jamieson's last years when China turned into a Republic, the thesis uncovers many of his opinions about the new polity and the reform that had been launched from his Annual Reports and from the Meetings of the Association.

Regarding the reception of his work in the Hong Kong judicial system, the thesis makes use of the first-hand court judgements and probate profiles to probe into the inner working of his translation in actual judicial scenes. Despite the importance of Jamieson's translation, until now there has been no comprehensive study devoted to it. More studies concentrate on George Thomas Staunton's (1781-1859) work published in 1810,[13] which was the first English translation of the *Great Qing Code*.[14] Among the few academic studies that concerned Jamieson's rendition, Wang Guoqiang's (王國強) book pointed out the contribution *The China Review* made to sinological studies, in which Jamieson was considered as an important scholar in researching Chinese

[12] Jamieson was member of General Committee in China Association from 1899 to 1907; he acted as Vice-Chairman from 1907 to 1911 until he was promoted to the position of Chairman in 1911. Three years later in 1914, he became the President, which he held until he passed away in 1920. See the Annual Reports from 1899 to 1921, CHAS/A/03—CHAS/A/07, China Association Archive, SOAS University of London Library.

[13] James St. André, "'But Do They Have a Notion of Justice?' Staunton's 1810 Translation of the Great Qing Code," *The Translator* 10, no. 1 (2004): 1-31; Glenn Timmermans, "Sir George Thomas Staunton and the Translation of the Qing Legal Code," *Chinese Cross Currents* 2, no. 1 (2005): 26-57; You Boqing 游博清, and Huang Yinong 黃一農, "Tianchao yu yuanren: Xiao Sidangdong yu zhongying guanxi (1793-1840)" 天朝與遠人—小斯當東與中英關係 (1793-1840) (Heavenly Dynasty and Men from Afar: George Thomas Staunton and Anglo-Chinese Relations: 1793-1840). *Zhongyang Yanjiuyuan jindaishi yanjiusuo jikan* 中央研究院近代史研究所集刊 (Bulletin of the Institute of Modern History, Academia Sinica), no. 69 (2010): 1-40; S. P. Ong, "Jurisdictional Politics in Canton and the First English Translation of the Qing Penal Code," *Journal of the Royal Asiatic Society* 20, no. 2 (2010): 141-165; Li Chen, *Chinese Law in Imperial Eyes* (New York: Columbia University Press, 2016); Uganda Sze-pui Kwan 關詩珮, *Yizhe yu xuezhe: Xianggang yu Daying diguo zhongwen zhishi jiangou* 譯者與學者：香港與大英帝國中文知識建構 (Translators and Scholars: Chinese Knowledge Construction by the British Empire and Hong Kong), (Oxford: Oxford University Press, 2017), 49-50; Qu Wensheng 屈文生, and Wan Li 萬立, "Zhongguo fengjian fadian de yingyi yu yingyi dongji yanjiu" 中國封建法典的英譯與英譯動機研究 (What has Motivated English Translation of the Codes of Pre-modern Chinese Dynasties). *Zhongguo fanyi* 中國翻譯(Chinese Translators Journal), no. 1 (2019): 51-59,190.

[14] It was not until 1994 that William C. Jones brought to the world a contemporary English translation. See Jones, *The Great Qing Code*.

law.[15] As his study covered the whole journal and its relation with Western sinology, Jamieson's translation did not receive much attention. Later, Li Xiuqing (李秀清) also mentioned Jamieson's work in two papers introducing the Western perception of Chinese law in *The China Review*.[16] But since these were mainly introduction of the legal writings in *The China Review* in their entirety, there was no detailed investigation of Jamieson and his translation.

Regarding the reception of Jamieson's work, Su Yigong (蘇亦工) noticed its influence in the legal realm of Hong Kong.[17] Carol G. S. Tan also mentioned its being cited in the Hong Kong Probate Registry.[18] But as Jamieson was not their focus, they did not initiate any systematic investigation on the role of Jamieson's translation in the courts, nor did they note the challenges his translation brought to the court. At the same time, many more studies on Chinese law and custom in Hong Kong applied Jamieson's work directly as Qing law,[19] showing the latter's influence among the legal academia

---

[15] Wang Guoqiang 王國強, *Zhongguo pinglun (1872-1901) yu xifang hanxue*《中國評論》(1872-1901)與西方漢學 (The China Review (1872-1901) and Western Sinology), (Shanghai: Shanghai Century Publishing Group 上海世紀出版集團, 2010): 104-105.

[16] Li Xiuqing 李秀清, "Zhongguo Pinglun yu shijiu shiji mo xifang ren yanzhong de zhongguo sifa" 中國評論與十九世紀末西方人眼中的中國司法 (*The China Review* and the Administration of Chinese Law in the Western Eyes in the Late Nineteenth Century). *Zhongwai faxue* 中外法學 (*Peking University Law Journal*) 29, no.1 (2017): 268-279; Li Xiuqing 李秀清, "Zhongguo Pinglun zhong de zhongguo falü ji qi yanjiu jiazhi" 中國評論中的中國法律及其研究價值 (Chinese Law in The *China Review* and Why We Study It). *Bijiaofa yanjiu* 比較法研究 (Journal of Comparative Law), no. 2 (2017): 126-138.

[17] Su Yigong 蘇亦工, "Ling yichong shijiao: Jindai yilai yingmei dui zhongguo falü wenhua chuantong de yanjiu" 另一重視角—近代以來英美對中國法律文化傳統的研究 (How Westerns Looked at the Legal Tradition of China from Another Perspective). *Huan qiu falü Pinglun* 環球法律評論 (Global Law Review), no. 1 (2003): 80-81; Su Yigong 蘇亦工, "Xianggang huaren yizhu de faxian ji qi tese" 香港華人遺囑的發現及其特色 (Wills Made by the Chinese in Hong Kong: The Discovery and Their Features). *Zhongguo shehui kexue* 中國社會科學 (Social Sciences in China), no. 4 (2002): 111; Su Yigong 蘇亦工, "Xianggang Zhongguo shi hunyin fazhi de bianqian" 香港中國式婚姻法制的變遷 (The Changes of Traditional Chinese Marriage in Hong Kong). *Bijiaofa yanjiu* 比較法研究 *Journal of Comparative Law*, no. 3 (2002): 10-12.

[18] Carol G. S. Tan, "Chinese Wills under the Laws of Hong Kong," *Hong Kong Law Journal* 29 (1999): 114-115.

[19] Committee on Chinese Law and Custom, appointed by the Governor of Hong Kong, *Chinese Law and Custom in Hong Kong* (Hong Kong: The Government Printer, 1953); E. S. Haydon, "The Choice of Chinese Customary Law in Hong Kong," *The International and Comparative Law Journal* 11, no. 1 (1962): 231-250; D. J. Lewis, "A Requiem for Chinese Customary Law in Hong Kong," *The International and Comparative Law Quarterly* 32, no. 2 (1983): 337-379; Leonard

in Hong Kong. But they took it for granted, rather than treating it as a research object.

Therefore, there is still a large gap in understanding Jamieson's translation. The task of this thesis is to probe into the ways Jamieson crossed the borders of divergent legal cultures and brought about their encounter through his work. In order to achieve a better understanding of this encounter, it is first necessary to understand Jamieson the translator and the imperial enterprise he staunchly safeguarded.

1.3 The Translator and the Colonial Enterprise He Defended

Jamieson's diplomatic career lasted more than three decades and invested him with the inherent task of upholding and furthering British imperial interests in China. During his early consular years serving as Acting-Consul in Yantai, he spared no efforts to facilitate British business in China. In 1877, he received a letter from a British firm, reporting the problem in the sale of a mining pump to a Chinese coal mine, which was prohibited by local authorities because the purchaser had not obtained a license in advance.[20] Jamieson immediately wrote to the Taotai, helping the company settle the trouble.[21] In Jiujiang when the trade showed "no new feature or no tendency for development," he could not help feeling disappointed, displaying his particular regard for British trade in China.[22]

Later when serving as a consul in Shanghai, he dealt with many Sino-British commercial cases, in which he more actively aided British firms to safeguard their interests. In Jardine & Matheson's application to import cotton spinning machines, which was refused by Qing authorities for fear of jeopardizing "the livelihood of

---

Pegg, *Family Law in Hong Kong*, 2nd ed. (Singapore: Butterworths, 1986); Belinda Wong Sheung-yu, "Chinese Customary Law – An examination of Tsos and Family Tongs," *Hong Kong Law Journal* 20, no. 1 (1990): 13-30; Edwin Haydon, "Chinese Customary Law in Hong Kong's New Territories: Some Legal Premises," *Journal of the Hong Kong Branch of the Royal Asiatic Society* 35 (1995): 1-41.

[20] Ferguson to G. Jamieson, July 18, 1877, 30-44, FO 228/588.

[21] G. Jamieson to Chang Tao-tai, July 21, 1877, 50; Chang Tao-tai to Jamieson, July 22, 1877, 51, FO 228/588.

[22] Intelligent Report by Jamieson, March 10, 1885, 10, FO 228/799.

Chinese", Jamieson repeatedly wrote to the Taotai in protest.[23] Meanwhile, upon the Chinese authorities' imposition of new taxes on foreign opium, he also lodged a protest against this decision, eventually forcing the Chinese to give up extra taxes on wholesale dealers.[24] Moreover, he helped British merchants in Wuhu (蕪湖) gain permits to export rice,[25] whole-heartedly serving British commercial interests.

Jamieson kept a close relation with the China Association during his consular years, and often participated in their meetings. In a general meeting of the Shanghai Branch of the Association, he was very outspoken in his stance, claiming that "we are all in the same boat working for one common object, the furtherance of British trade. Your prosperity is what we aim at; your success is our success."[26] He further encouraged merchants to strive for their own interests:

> You know more exactly what is wanted, and then again you can speak out when we may be obliged to keep silence. Your function as an Association is to make known your wants and wishes; to be the mouthpiece of this great commercial community, and in this respect we work on parallel lines – not clashing but mutually aiding one another.[27]

He positioned his consular work in parallel lines with British merchants, doing different jobs but aiming for the same goal, which was "the furtherance of British trade."[28] To achieve this goal, Jamieson helped to make merchants' wants known by sending their petition and suggestions to British Minister in Peking and make their

[23] G. Jamieson to Sir Nicholas Roderick O'Conor, the Minister in Peking, December 7, 1894, 320-323, FO 228/1162.
[24] N. R. O'Conor to G. Jamieson, September 4, 1895, 75; G. Jamieson to N. R. O'Coner, September 23, 1895, 528-529, FO 228/1198.
[25] G. Jamieson to N. R. O'Conor, September 6, 1895, 471-472, FO 228/1198.
[26] The China Association, *The North-China Herald and Supreme Court & Consular Gazette*, January 31, 1896.
[27] Ibid.
[28] Ibid.

voices heard in the Foreign Office.[29]

What most disclosed Jamieson's imperial ambition was during the Sino-Japanese War of 1894-1895, when the Governor of Nanjing asked him for protection through Timothy Richard (1845-1919), the influential Baptist missionary in China. Although Jamieson was well aware that the British government would by no means involve itself in the war, he still used this chance to push the Governor to give up as many Chinese interests as possible, including substantial concessions on Chinese railways and mining, opening new ports, and consultation with the English on Chinese reforms.[30] In his report to Nicholas Roderick O'Conor (1843-1908), the Minister in Peking, Jamieson contrived a quasi-alliance plan that could make the future treaty between China and Japan satisfy Great Britain's desire.[31] He believed the quasi-alliance between China and Britain would give the British "the greatest hold over the whole policy of China" which would "be of great service" to Britain when a European war broke out.[32]

This staunch protection of British interests lasted through his whole life. After retiring from the British consular service, he actively participated in the work of the China Association. Jamieson and some of his colleagues attempted to initiate a reform within the Association, proposing that it should "extend its scope" and "increase its membership, with the object of educating public opinion and of assisting the Government to form and pursue a clear and consistent line of policy in the Far East."[33] During this time, he also published an article in the *Quarterly Review*, advocating this cause. According to his analysis, the existing Government policy towards China was "a policy of generally letting things drift" meaning "the best thing to do is to do

[29] G. Jamieson to N. R. O'Conor, March 30, 1895, 161; G. Jamieson to N. R. O'Conor, April 16, 1895, 181; G. Jamieson to William Nelthorpe Beauclerk, December 14, 1895, 568, FO 228/1198.
[30] G. Jamieson to N. R. O'Conor, February 21, 1895, 138-141, FO 228/1198.
[31] Ibid.
[32] Ibid., 139-140.
[33] 1900-1901 Annual Report, March 31, 1901, xv, CHAS/A/03.

nothing."[34] He saw it as a "fatal mistake" which would lead British interests in China to be "undermined and frittered away":[35]

> We give way here and give way there because the thing is not worth fighting about, and we shall wake up some day to find our political influence in China has gone, that it has been supplanted by that of a rival Power, and that it can only be recovered at the cost of war.[36]

In order to maintain British influence in China and further British trade and commerce, he campaigned for an active policy of interference. Although the reform was voted down by its members for fear of altering the Association's character and jeopardizing its relation with the Foreign Office, Jamieson's ambition in securing and further expanding British interests is vividly displayed.

Later, when serving as Chairman in the China Association, he supported the extension of the Foreign Settlement in Shanghai and refused to include the Chinese in its governance. After the fall of the Qing in 1912 and on the birth of a Republican government, Jamieson wrote to the Foreign Office, suggesting that the boundary between the Settlement and Chinese district should be considered as "a condition precedent to recognition of the Republic,"[37] revealing that the protection of British interests in China was always his first priority.

In China's attempt to immediately extinguish the opium trade in the early twentieth century, Jamieson, following the Association's consistent attitude of disregarding moral aspects of the question, protested to Chinese authorities against the

---

[34] G. Jamieson, "British Interests in China," *The Quarterly Review* 191, no. 381 (1900): 7.
[35] Ibid., 19.
[36] Ibid.
[37] 1912-1913 Annual Report, March 29, 1913, xii, CHAS/A/06; G. Jamieson, Chairman of the China Association to Foreign Office, May 24, 1912, 2, CHAS/MCP/17.

attempt.[38] With the massive British opium interests in mind, he opposed China's immediate prohibition and supported progressive reduction on condition that Chinese native opium cultivation should first be completely suppressed.[39] A gradual reduction would prepare British dealers to minimize their losses. Meanwhile the condition set for native production shows his apprehension that the Chinese native opium dealers might seize the chance to push British dealers out.

Later he endeavoured to win jurisdiction in the Shanghai settlement. Since the downfall of the Qing, the Shanghai Mixed Court had been "under the control of the Consular Body and the Municipal Council."[40] Favouring this new management, Jamieson remarked "that it never before was so well managed nor so efficient as it is now,"[41] during which many reforms were implemented, including "the presence of a Foreign Assessor in all civil cases, even between Chinese, the appointment of a Foreign Registrar and the control of prisons by the Municipal Police."[42] Facing the Chinese demand to restore its jurisdiction, Jamieson encouraged the foreign community there to make a bargain to retain the existing reforms:

> Although it may be conceded that the right to appoint Magistrates vests in the Chinese authorities, yet the Executive in the Settlements is in fact the Foreign Police, and we may safely assume that the reforms introduced during the interregnum will be fully maintained.[43]

With clear knowledge of Chinese legitimate authority over the Mixed Court, Jamieson

[38] 1910-1911 Annual Report, March 2, 1910, xvii, CHAS/A/06.
[39] 1910-1911 Annual Report, March 2, 1910, xvii-xviii, CHAS/A/06; 1911-1912 Annual Report, March 14, 1912, xi, CHAS/A/06; G. Jamieson to Foreign Office on June 16, 1912, 4, CHAS/MCP/17.
[40] 1913-1914 Annul Report, March 13, 1914, xvi, CHAS/A/06.
[41] Ibid.
[42] Ibid.
[43] Ibid.

still strove to seize its jurisdiction, so as to preserve existing judicial interests they had gained and expand foreign power on these matters. His dedication is also revealed in his proposition to establish a Court of Appeal under the control of British judges. He pointed out that the Mixed Court suffered from the defect of lacking a Court of Appeal. Thus he advanced a temporary scheme "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."[44] According to this plan, the jurisdiction of appeal would be transferred to the hands of the British.

Meanwhile, he was always alert to foreign competition. At the appeal of British firms, which had been given promise to tender works at the British Legation in Peking and later found another semi-German company was providing the service,[45] Jamieson wrote to the Foreign Office on April 17, 1913, asking for an explanation and expressing his deep dissatisfaction:

> It seems strange that a department of the British Government should apparently have gone out of its way to allot a contract to a firm which is at least semi-German, while ignoring claims which deserved consideration on grounds of nationality and priority of tender.[46]

Here he became a spokesman of British merchants whose interests were damaged by foreign companies. His emphasis on nationality reveals his acute awareness of foreign competition. Particularly, in the exploitation of mineral wealth in China, he believed British firms lagged behind continental competitors. He proposed that the country should attract more Chinese students to learn mining techniques, who after returning to China would then be more likely to import British machinery and cooperate with

[44] Jamieson, *Chinese Family and Commercial Law*, 11-12.
[45] 1913-1914 Annual Report, March 13, 1914, xvii, CHAS/A/06.
[46] G. Jamieson to Foreign Office, April 17, 1913, CHAS/A/06.

British firms.[47] As the demand for "mining machinery, electric light and power plant, waterworks plant" was increasing in the interior, he further suggested that the merchants should dispatch "a technical agent on the spot" rather than waiting for orders to find them.[48] These strategies show that he had given the increasingly intense competition careful thought and was prepared to cope with it.

Jamieson himself was deeply involved in mining exploitation in Honan, serving as Agent General during the early 1900s in the Peking Syndicate. He was engaged in a long negotiation on a railway contract with Sheng Xuanhuai (盛宣懷 1844-1916), the famous Chinese entrepreneur, in which Jamieson revealed his ambition. Not limiting himself to the negotiation of railway, he was also interested in Sheng's proposition to "purchase out and out of all the interests of the Syndicate in the Honan and Shansi iron and coal mines."[49] In a conversation with Wu Tingfang (伍廷芳 1842-1922) of the Foreign Board, he replied that "an arrangement of the kind was not impossible, provided the terms were satisfactory."[50] This grand proposal, as a matter of fact, was not within the original plan, which only concerned "conversion of the Syndicate's railway into a Government line."[51] Combining this with Jamieson's support for reform in the China Association, it can be observed that he thought far and dreamt big, striving to secure British interests as much as possible.

Before retiring from this work and leaving China, he was still striving to secure the exclusive rights to coal mining in the district.[52] Several days before his departure, he paid a visit to the Governor and the Taotai, discussing the matter though failing to

---

[47] G. Jamieson to the Secretary of the British Engineers Association, January 8, 1913, 1-2, CHAS/MCP/17.
[48] 1912-1913 Annual Report, March 29, 1913, x, CHAS/A/06.
[49] Sir E. Satow to the Marquess of Lansdowne, November 19, 1904, FO 228/1516.
As some FO documents are unpaged, like this one, the thesis does not quote page numbers in these cases.
[50] Sir E. Satow to the Marquess of Lansdowne, November 19, 1904, FO 228/1516.
[51] Ibid. But Earnest Satow, the Minister in Peking, did not approve the new plan as it would take much longer for the two sides to negotiate.
[52] G. Jamieson to Sir Ernest Satow, August 30, 1905, FO 228/2470.

settle it.[53] Jamieson hoped to pay another visit to the Governor before going back to Britain, but this did not happen since the latter was said to be unwell, and was unable to meet him. Under these circumstances, Jamieson wrote him a letter, in which he stressed the Syndicate's sole right to work mines in the district.[54]

As reflected, Jamieson was fighting for the company's interest until the last moment of his service. His concern with and protection of British interests was the foothold he never changed throughout his whole life. As described by a friend in a letter, he was "an ardent Imperialist,"[55] although that term had begun to have negative connotations for a growing number of people.[56] His imperial stance accounts for his concern over the judicial problems encountered by the Hong Kong court and the difficulties English merchants met in the war-ridden Republic of China, constituting one of the impetuses for him to translate the Qing Code and republish it, which will be discussed in chapter two. Moreover, this sincere concern also makes possible Jamieson's manipulation of diverse approaches to translation and interpretation. Through an extensive exploration of the Foreign Office archives, the imperial colour that existed in his background, which is not readily detectable, is promoted to the foreground, by which an important underlying motive for his translation is unearthed and his complex translation performance could be comprehended.

1.4 Theoretical Framework

Since Orientalism was first proposed by Edward Said, it is widely "understood that power is not sustained only through the naked use of force, but also through a discourse of difference between the colonizer and colonized peoples."[57] This discourse of

---

[53] G. Jamieson to Sir Earnest Satow, December 7, 1905, FO 228/2470.
[54] Ibid.
[55] Jardine & Matheson to Jamieson, June 11, 1913, 320, Manuscripts/MS JM/J1/6/1, Jardine Matheson Archive, Cambridge University Library.
[56] Richard Koebner and Helmut Dan Schmidt, *Imperialism: The Story and Significance of a Political Word, 1840 -1960* (Cambridge: Cambridge University Press, 1965), 221-249.
[57] Carol G. S. Tan, "How a 'Lawless' China Made Modern America: An Epic Told in Orientalism,"

difference refers to Said's definition of Orientalism as "a style of thought based upon an ontological and epistemological distinction made between 'the Orient' and (most of the time) 'the Occident.'"[58] In *Legal Orientalism*, Teemu Ruskola applies Said's Orientalism to his study of Euro-American representations of Chinese law, and reveals the global circulation of the Orientalist discourse of East-West legal distinction regarding lawless China and lawful West.[59] His reviewer, Carol G. S. Tan, further confirms the relevance of Said's ideas to the "conditions of semi-colonialism" like that of China which was never "formally colonized" by Western powers.[60]

Tan comments that Occidental study of Oriental laws is "inseparable from colonialism because colonialism provided the access to the observational sites."[61] Also applying Said, she believes that the resulting fruits "emerged not from a position of neutrality but from the particular ideologies of colonialism and from the unequal relationship between the observer and the observed."[62] It is "a relationship of power, of domination, of varying degrees of a complex hegemony" in Said's own words.[63] He holds that "ideas, cultures, and histories cannot seriously be understood or studied without their force, or more precisely their configurations of power, also being studied."[64]

These ideas on power relation and Orientalist construction of local law shed light on the present research on Jamieson's translation and interpretation of Qing law in the late nineteenth and early twentieth century. As a staunch defender of British interests who lived most of his life when the British empire was in its prime, Jamieson did not make the translation in an egalitarian zone either, but in an obvious imbalance of power

review of *Legal Orientalism: China, the United States and Modern Law*, by Teemu Ruskola, *Harvard Law Review* 128, no. 6 (2015): 1680.

[58] Edward W. Said, *Orientalism* (New York: Pantheon Books, 1978), 2.

[59] Ruskola, *Legal Orientalism*.

[60] Tan, "How a 'Lawless' China Made Modern America," 1680-1681.

[61] Ibid., 1681.

[62] Ibid.

[63] Said, *Orientalism*, 5.

[64] Ibid.

between China and the West. As this thesis partly aims to explore the relation of Chinese and Western law constructed by him amid this milieu, the Orientalist discourse of "distinction made between 'the Orient' and (most of the time) 'the Occident" serves as an ideal point of reference.[65] By clarifying whether Jamieson highlighted the distinction between Chinese and Western law, the thesis finds a vantage point to observe Jamieson's diverse translation performance in the overall colonial context.[66]

However, Said overemphasizes the "internal consistency" in "the history of Orientalism"[67] with which Li Chen, when situating the discussion in the Sino-Western context, takes issue. According to Chen, the Western concept of Chinese culture, including Chinese law, had begun to take shape before Europeans assumed dominance in China; therefore "this discourse was internally fractured and incoherent."[68] In researching Jamieson's translation of Qing family law, this study pays special attention to such incoherence. It does not attempt to annihilate the possible ambivalence and tension within the translator so as to forge an image that Jamieson had a consistent way of addressing the relation between Chinese and Western law. Instead, the research admits the potential struggle and contradiction in him.

Even though Jamieson was an undoubted imperialist devoted to safeguarding British interests, the study does not presuppose that he would definitely follow the Orientalist discourse of highlighting the difference between Western and Chinese law, which was "made to look primitive by the standards of European laws."[69] Based on an in-depth study of the translated texts, the thesis attaches special regard to the dynamics of Jamieson's relation to the Orientalist discourse of East and West

---

[65] Ibid., 2.
[66] Although China represents only one part of the Orient, which denotes "an entity of the European imagination that extends from Morocco in North Africa to Japan on the eastern edge of Asia," China represents "a historically and politically important case." Ruskola, *Legal Orientalism*, 5.
[67] Said, *Orientalism*, 22.
[68] Chen, *Chinese Law in Imperial Eyes*, 9.
[69] Tan, "How a 'Lawless' China Made Modern America," 1681.

distinction. This dynamic perspective continues into the reception of Jamieson's translation in the colonial and post-colonial Hong Kong courts, in which the focus is still on its interaction with the colonizers' law, rather than a fixed pattern of relationship.

With colonialism as a key word running through the production and reception of Jamieson's translation of Qing family law, the thesis incorporates various approaches.[70] On the one hand, it initiates a comprehensive and in-depth analysis of texts to reconstruct the process when Chinese and Western law encountered one another and the fruits that encounter produced. On the other hand, it goes beyond textual study and applies a historical approach to explore how the various incentives in the historical context prompted Jamieson's translation, how the legal climate and important figures during his time influenced his understanding of law as well as what type of audience he hoped to address. The last part of reception study reaches into the actual judicial context of Hong Kong, in which various court participants and socio-cultural factors are surveyed so as to understand their mutual influence and power interplay.

[70] The thesis draws on the concepts of Orientalism, colonialism, and imperialism in different parts. It adopts the Orientalist discourse of East-West distinction as a reference when analysing the relationship between Chinese and Western law in Jamieson's translation. Meanwhile colonialism is generally used when power imbalance is involved. It is also frequently used in the reception of Jamieson's work in Hong Kong, which is a colonial and post-colonial setting, involving the interaction between native and colonizer's law. Imperialism appears more often in investigating the factors that motivated Jamieson's translation, especially his defence of the commercial interests of the British empire and his judicial experience in Shanghai which was not totally colonized by Britain.
While applying them in different sections, the thesis fully recognizes their close relationship, in which the demarcation among them is not so clearly drawn. Said's Orientalism is a subset of post-colonial theories, which applies not only to formal colonies, but also to those where an imbalance of power is involved but which are never formally colonized. Imperialism is also an overarching term in the sense that it encompasses all parts that involve interests of the empire, including colonies or former colonies. Power relation is the theme that runs throughout all of them. As their governing ground constantly overlap, the distinction made in the thesis is not a rigid one. They are flexibly used to accommodate to the complexity of Jamieson's translation and the context with which it interacted.

1.5 Structure of the Thesis

Aside from the introduction and conclusion, the thesis is composed of five main chapters, numbered two – six, which will be given a brief introduction below.

Chapter two primarily addresses the underlying motives for Jamieson's translation. It demonstrates that Jamieson, in a variety of chances and scenarios, was exposed to the imperial encounter of Chinese and Western law. This includes not only his judicial position in the Shanghai Mixed Court and his legal education, but also the function of media in bringing to the fore the judicial problems in Hong Kong and enabling dialogue among its audience. Then the Republic of China, in its making of a new civil code, was again faced with encounter among different legal cultures. With British interests as his starting point, these became the catalyst in prompting Jamieson's translation.

The next three chapters are dedicated to a detailed investigation into the encounter of Chinese and Western law at the micro-textual level. Chapter three primarily addresses Jamieson's translation and interpretation of the concept of "will" as well as widow's inheritance right, probing into the role of Western law in his conceptualization of Chinese law so as to map his relation to the Orientalist discourse that highlights the East-West distinction. Chapter four and five respectively research Jamieson's completely different commentary following his translation of marriage law in *The China Review* version and the 1921 version. The central concern of these two chapters is the divergent contextualization of Qing marriage law, and the difference it made to Jamieson's position in the larger imperial context.

The sixth chapter will look beyond the textual level into the reception of Jamieson's translation in the actual judicial context of Hong Kong. It will examine the variety of factors that interacted with it, including English law, expert witnesses, as well as changes in the Chinese community. The eventual part Jamieson's translation

plays in the court in return refracts the outcome of these manifold interactions. Interestingly, Jamieson's translation of Qing family law, starting with the imperial encounter of Chinese and Western law, also received such an encounter in Hong Kong.

Chapter Two Imperial Causes that Influenced Jamieson's Translation

Aiming to understand Jamieson's motives for translating the *Great Qing Code* and factors that influenced him, this chapter attempts to answer the following questions: why did he retranslate the Qing Code? Why did he publish it in *The China Review*? Why between 1879 to 1881? And why did he revise and reissue it in Republican China? While unveiling the answers, it also hopes to reconstruct the translator's personal experience with both English and Chinese law via his judicial positions, journal discussion and legal education, penetrating into the imperial context that made all these possible.

2.1 A Retranslation: Jamieson's Mixed Court Experience and Dissatisfaction with Staunton's Translation

2.1.1 Revisiting the Relationship between Lü and Li

Before Jamieson initiated his translation of the *Great Qing Code*, George Staunton's translation had already established itself in the West, being "widely lauded as an epoch-making breakthrough in Western knowledge of not just Chinese law but also Chinese civilization."[1] With such a highly esteemed translation already existing in the West, an inevitable question is why Jamieson attempted to make another one. The answer to this rests in Jamieson's dissatisfaction with Staunton's work in that the latter failed to translate the most important part of the Code as Jamieson saw it: the Li (例). In his own words,

> in Staunton's Translation of the Code, the Lü [律](with a few exceptions given in the Appendix) is the only part translated. No translation of the Li, so far as I am

[1] Chen, *Chinese Law in Imperial Eyes*, 69.

> aware, has yet been attempted. No apology is therefore needed to the readers of the Review for the following extracts.[2]

A sense of competition could be felt from these words. Jamieson while evincing his confidence in the face of this acclaimed predecessor, also deliberately stood on the opposite of Staunton by distinguishing their different attitudes to Li, so that the advantage of his own translation could be manifested. Staunton indeed left most of the Li untranslated. In his eyes, Li merely constituted the "Supplementary Law" which was "the modification, extensions, restrictions of the Fundamental Laws [Lü]."[3] The different names he conferred on them had already shown a hierarchy of importance, which is further verified in his preface to the translation:

> A faithful version of the Fundamental Laws of the Penal Code of China might, with the addition of some supplementary matter, not only prove interesting as far as regards its immediate subject, but likewise afford a more compendious and satisfactory illustration, than any other Chinese work that could have been reflected, of the peculiar system and constitution of the Government, the principles of its internal policy, its connection with the national habits and character, and its influence upon the general state and condition of the people in that country.[4]

Staunton's focus was obviously on Lü while Li only occupied a very small space as "supplementary matter" in the appendix,[5] together with translations of Imperial Edicts,

---

[2] Jamieson, "Translations from the Lü-Li: I," 2.
[3] George Thomas Staunton, *Ta Tsing Leu Lee; being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China* (1810; repr., Taipei: Ch'eng-wen Publishing Co., 1966), xxx.
[4] Ibid., i.
[5] In the area of family law which was Jamieson's focus, Staunton only partially translated three of the total seven Li under the section "appointing a successor contrary to the law" (立嫡子違法).

notes of the translator and so on. A combination of these, with Lü in the centre, was considered as a genuine reflection of the working principles of Chinese government and embodiments of the Chinese character and spirit.[6] However, more than half a century later, Jamieson's views of the position of Lü and Li greatly diverged from Staunton's:

> The *Li*, which form about three-fourths of the bulk of the whole are also by far the most important of the two parts. As compared with the Lü, indeed, they may be said to bear to them the same relation as the legislation in England of the last fifty years does to the charters of the early Norman Kings.[7]

The last five decades (from the 1830s) was a time when a "wave of systematic reform hit the English legal system,"[8] leading to the new legislation Jamieson mentioned. The reform was "largely inspired by the ideas of Jeremy Bentham [1748-1832],"[9] an influential English legal theorist and philosopher, "and it aimed to make the law simpler and more rational, by eliminating antiquarian relics which had served their purpose and could no longer be justified."[10] By drawing a parallel between Li and British legislation, Jamieson observed the relevance of Li in actual administration of justice while Lü, similar to the laws made by early Norman Kings seven centuries previously, were too outdated to be of any pragmatic value.

---

[6] According to Li Chen's observation, "his [Staunton's] objective was partly to decode Chinese culture, not create a reliable means of governance." Chen, *Chinese Law in Imperial Eyes*, 104. However, he also pointed to the correlation between Staunton's translation of the Qing Code and his engagement in Anglo-Sino legal disputes. Ibid, 79-86. Regarding the pragmatic side of Staunton's translation, also see Ong, "Jurisdictional Politics in Canton," 141-165; Timmermans, "Staunton and the Qing Legal Code," 33-46.

[7] Jamieson, "Translations from the Lü-Li: I," 2.

[8] J. H. Baker, *An Introduction to English Legal History*, 3rd ed. (London: Butterworths, 1990), 246.

[9] Peter G. Stein, "Maine and Legal Education," in *The Victorian Achievement of Sir Henry Maine*, ed. Alan Diamond, 195 (Cambridge: Cambridge University, 1991).

[10] Ibid.

The parallel is due to the constant renewal of Li, in comparison to the immutability of Lü. Jamieson pointed out a decree issued by Emperor Qianlong (乾隆 1711-1799) that the Code in the future was to be amended every five years.[11] Meanwhile he was also aware that "the revision applies only to the Li" while the Lü were "never changed."[12] In absorbing new Li into their proper place, the old ones were "amended or expurgated so that the whole may harmonize."[13] Through this process, the Li was assured of constant updating. At the same time the Lü was "never touched at all."[14] "Whenever inconsistencies occur," Jamieson declared, "the old law must give way to the new,"[15] thereby pushing the immutable Lü to a peripheral position. It is in this sense of immutability that Jamieson believed that Lü "has long ceased to have any value except as antiquarian curiosities of literature"[16] while Li was of most relevance to judicial practice.

Though the Lü indeed did not go through alterations since being settled in the fifth year of Qianlong (1740),[17] Jamieson underestimated it when he delegated it to "antiquarian curiosities of literature."[18] Lü in Chinese legal culture signified authority. When first ascending the throne, the Qing emperor had an urgent need to justify his reign by being in line with ancient sages. The Lü, partly inherited from the Ming dynasty, was kept as close as possible to the "Confucian ideology" so as to make use of this "central symbol," upon which the entire empire was founded.[19] Thus, even if

[11] Jamieson, "Translations from the Lü-Li: I," 2.
[12] Ibid., 1.
[13] Ibid., 2.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Tian Tao 田濤, and Zheng Qin 鄭秦, "Dianjiao shuoming" 點教說明(Explanations of Punctuation and Proofreading), in *Daqing lüli* 大清律例 (The Great Qing Code), 6 (Beijing: The Law Press 法律出版社, 1999).
[18] Jamieson, "Translations from the Lü-Li: I," 2.
[19] Huang Jingjia 黃靜嘉, "Xue zhu du li cunyi chongkan ben xu" 薛著《讀例存疑》重刊本序 (Preface to the Typeset Edition of Xue's Concentration on Doubtful Matters in the Perusal of the Sub-statutes), in *Du li cunyi chongkan ben* 讀例存疑重刊本 (A Typeset Edition of Concentration on Doubtful Matters in the Perusal of the Sub-statutes), vol.1, by Xue Yunsheng 薛允升, 4 (Taipei: Cheng Wen Publishing Co., LTD. 成文出版社, 1970).

Lü forfeited its practical value, its role as a symbol of Confucianism still rested in the centre of authority, which could not be reduced to mere archaic literature.[20] His underestimation of Lü once again evinced his practical attitude towards Chinese law and his stress on the progress of the law.

While acknowledging Li's changing nature, Jamieson also detected that such an advance was not without limits. He made it very clear that "the Lü stand as the fundamental or primary framework into which all subsequent enactments are interwoven,"[21] meaning "when a new law is passed, it does not appear as a new chapter to the Code, but is placed under one or other of the already existing headings as an additional Li in that particular category."[22] The immutable structure of Lü had essentially circumscribed the possible changes that could be effected in Li, refracting the unchangeableness amid changes. On the one hand, when new Li as revision was

---

[20] Jamieson's underestimation of Lü and emphasis on Li in fact touched upon the important question concerning the relation between Lü and Li. This question is still under dispute. Many eminent scholars were on the same side with Jamieson, advocating Li's predominance over Lü. Ch'ü T'ung-tsu (瞿同祖) quoted a resolution in the 44th year of Qianglong (1779), which said that "since Li existed, it should be applied, instead of using Lü" (既有定例，则用例不用律), therefore he believed Li should be given preference to Lü, which was an important feature of the Qing law. Ch'ü T'ung-tsu 瞿同祖, "Qinglü de jicheng he bianhua" 清律的繼承和變化 (Traditions and Changes of the Qing Law), in *Ch'ü T'ung-tsu's faxue lunzhu ji* 瞿同祖法學論著集 (Collection of Ch'ü T'ung-tsu's Legal Theses), 423 (Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 1998). For similar ideas on the flexibility of Li and Li's practical value in actual administration of justice, also see Pu Jian 蒲堅, *Zhongguo fazhi shi* 中國法制史 (Chinese Legal History), (Beijing: Guang Ming Daily Publishing House 光明日報出版社, 1987), 202; Zhang Jinfan 張晋藩, *Jianming zhongguo fazhi shi* 簡明中國法制史(A Brief Version of Chinese Legal History), (Beijing: Publishing House of People's Public Security University of China 中國公安大學出出版社, 1991), 242; Huang, "Xue zhu du li cunyi chongkan ben xu," 4-5.
However, Su Yigong expressed his dissatisfaction with the above ideas. He believed Li's preference over Lü was never the mainstream in the Qing Dynasty. To prove his point, he categorized their relationships into two types according to the areas they regulated. In the case that they governed similar social relations, Li could indeed supplant and even exclude Lü, but the number of these cases were small. In most cases, the governing spheres of Lü and Li did not overlap, meaning they each regulated their respective areas without being supplanted by each other, in which sense, the Li was supplementary to Lü. The central point for Su is that contradictions between them do not occur in most cases. Only in limited occasions could Li supplant Lü. Su Yigong 蘇亦工, *Ming qing lüdian yu tiaoli* 明清律典與條例(Statutes and Sub-statutes in the Ming and Qing Codes), (Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 1999), 237-246.

[21] Jamieson, "Translations from the Lü-Li: I," 1.

[22] Ibid.

added, it pushed the entire Code forward. On the other hand, by situating every revision in an immutable framework, the advance could hardly bring any fundamental alteration to the existing legal system.[23]

Amid this tension, what Jamieson valued was precisely the variation, however limited, in the massive immutableness. He believed the changing Li deserved more attention than they had received in Staunton's translation, especially Li's adaptability to cope with judicial cases. This attitude towards the relation between Lü and Li was the underlying factor that stimulated his dissatisfaction with Staunton's translation.

As a matter of fact, Staunton had also perceived that Lü was not modified through successive editions.[24] Meanwhile Li was "revised every fifth year, and subjected to such alterations as the wisdom of government determine[d] to be expedient."[25] Nevertheless, unlike Jamieson, he did not see the immutability of Lü as a drawback, nor the advance of Li as an advantage. The fact that he left Li largely untranslated demonstrates the unchangeable Lü more fulfilled his wish to present for the West "the national habits and character" of the Chinese.[26] As Li Chen analysed, "the underlying assumption was that the national spirit had been reified into the allegedly fixed and original fundamental laws of that vast and ancient empire."[27] In this sense, Jamieson's dissatisfaction with Staunton's translation is understandable, as the two men approached the Qing Code with distinct attitudes towards the Lü-li relation.

2.1.2 Close Contact with Chinese law in the Shanghai International Mixed Court

Jamieson's very practical attitude towards Chinese law, his regard for the constantly changing Li and even dissatisfaction with Staunton's translation were inextricably

[23] After all, the motive for creating Li was not to initiate a complete change in the law, but to serve as expediency, compensating for the immutable Lü so as to accommodate to the changing circumstances. Hunag Jingjia, "Xue zhu du li cunyi chongkan ben xu," 4.
[24] Staunton, *Ta Tsing Leu Lee*, xxix-xxx.
[25] Ibid., xxx.
[26] Ibid., i.
[27] Chen, *Chinese Law in Imperial Eyes*, 104.

linked with his service as an English assessor in the Shanghai International Mixed Court in 1873,[28] during which he had direct contact with Chinese law. According to regulations of the Mixed Court, which tried cases "between Chinese residents in the Settlements" as well as suits "which may be brought by foreigners against Chinese,"[29] the laws applied in principle were "the laws of China."[30] It further prescribed that

> in every cause which affects the interests of foreigners so that they are necessary parties to the case, the Consul is authorized to sit with the Deputy, or commission a foreign official to do so. In cases in which all parties are Chinese, the Deputy shall be at liberty to hear and determine without interference from any foreign Consul.[31]

By authorizing foreign consuls to participate in trials where Chinese law applied, the regulation records the foreign erosion of Chinese jurisdiction in the imperial context. The Deputy in this regulation referred to a mandarin under the title of "T'ung-chih"

---

[28] Luo Hui-Min and Helen Bryant, *British Diplomatic and Consular Establishments in China: 1793-1949*, vol.2, *Consular Establishments 1843-1949* (Taipei: SMC Publishing INC., 1988), 353.

[29] Project of Regulations for the New Mixed Court, FO 233/96; also see A.M. Kotenev, *Shanghai: Its Mixed Court and Council* (Taipei: Ch'eng Wen Publishing Company, 1968), 67-68.

[30] Project of Regulations for the New Mixed Court, FO 233/96; also see Kotenev, *Shanghai: Its Mixed Court and Council*, 68.

This was in line with the Treaty of Tientsin (《天津條約》), which stated that "regarding the punishment of English criminal, the English Government will enact the laws necessary to attain that end, and the Consul will be empowered to put them in force; and regarding the punishment of Chinese criminals these will be tried and punished by their own laws." Similar articles also existed in treaties between the Qing government and other European powers. Kotenev, *Shanghai: Its Mixed Court and Council*, 49-50.

When the Mixed Tribunal first started on 1st May, 1864, its jurisdiction was limited to criminal cases, but "in October of 1864 the jurisdiction of the Court was extended to civil cases." Ibid., 53-55.

In actual practice, the law used in Shanghai International Mixed Court was no longer a pure Chinese law. Foreign assessors introduced into it "the main principles of European jurisprudence, like publicity, pleadings of the parties, and decision on the weight of evidence"; but on the other hand, at this court where Chinese law legitimately ruled, "the application of foreign principles was a very delicate thing. It easily might have given rise to further exaggerated rumours regarding the proceedings in the Mixed Court, which once almost caused the closing of this institution." Ibid., 63.

[31] Project of Regulations for the New Mixed Court, FO 233/96; also see Kotenev, *Shanghai: Its Mixed Court and Council*, 68.

(同知 Tongzhi), a rank inferior to that of "Taotai" (道台 Daotai).[32] While the Deputy should be the presiding judge, the foreign consul or official, who was called assessor, also performed an active part in the trial, greatly shaping the eventual decisions.

As an English assessor in the mixed court, it was Jamieson's job to supervise cases involving foreigners, particularly British subjects; in practice, he also sat on pure Chinese cases, although it was not his duty to do so.[33] It was this experience that gave him his initial understanding of Qing law and Chinese judicature. In September 24, 1873, a case concerning only Chinese was heard before Mr. Chen, the Chinese Magistrate, together with Jamieson, in which the "Chinese endeavoured to adjust civil claims by forcible appropriation of property."[34] The decision is particularly interesting, because eventually the two parties were asked to "adjust it among themselves,"[35] which was a typical way for Chinese officials to deal with "petty" civil cases.[36] The report did not show what part the English assessor played in this case, but this kind of close experience of witnessing Chinese cases being adjudicated by Chinese officials in a Chinese manner became his initial encounter with the Chinese legal system.

In some cases, Jamieson actively participated in the investigation. The case tried before Mr. Chen and Jamieson later pertains to a certain Mr. Yeo's charge against three Chinese who allowed "their ponies to stray into and damage his garden."[37] Jamieson

---

[32] Project of Regulations for the New Mixed Court, FO 233/96; also see A.M. Kotenev, *Shanghai: Its Mixed Court and Council*, 67.

[33] This showed the vagueness of the position of assessor: "it was long a subject of dispute whether they [assessors] were to act as watchers or as co-judges." Manley O. Hudson, "The Rendition of the International Mixed Court at Shanghai," *The American Journal of International Law* 21, no. 3 (1927): 456. It is observed that "the Assessors also many a time prevent injustice being done to a native, where the case is purely of native concern." W. Macfarlane, *Sketches in the Foreign Settlements and Native City of Shanghai* (Shanghai: Mercury, 1881), 9.

[34] Mixed Court, *The North-China Herald and Supreme Court & Consular Gazette*, September 27, 1873.

[35] Ibid.

[36] Philip Huang analysed "the third realm of justice" in which the court facilitated the mediation and settlement of the disputes. See Philp C. C. Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996), 110-137.

[37] Mixed Court, *The North-China Herald and Supreme Court & Consular Gazette*, September 27, 1873.

then went to investigate what exact damage was done before asking the Chinese to pay for it.[38] The case shows his close involvement in Chinese cases instead of being merely a detached observer. Since the cases concerned the interests of the Chinese, it provided him with a valuable chance to learn about Qing law.

As many mixed cases involved both Chinese and foreign interests, the Chinese law, "suited to the conditions of ordinary Chinese life" would not necessarily work in the Mixed Court.[39] So different were Western and Chinese views of defining and dealing with offences that negotiations were often needed between the foreign assessor and the Chinese magistrate in order that agreement could be reached and "justice shall be done impartially to both parties."[40] In such a judicially negotiable circumstance, some knowledge of Chinese law was almost imperative for an assessor.

This happened in the case *J. Sharp (W. Lowe & Co.) v Yuet Sung & Co.* tried before Mr. Chen and Jamieson. The case involved the legitimacy of a customary practice that every tin of kerosene oil was 5% short. Due to the deficiency, the defendant refused to proceed with the contract and purchase the product as originally agreed. Jamieson as a student of English common law, put great emphasis on custom, considering that

> [although] every tin that has been imported has been, generally speaking, deficient in about the same quantity, that is, about 5%. Nobody seems to have suspected the short measure, or thought it was worth their while to ascertain whether it was so or not, but the tins passed from hand to hand in the market as worth so much a piece and being originally invoiced at 5 galls., the amount was always taken as being the true quality. I think, therefore, that it has been a **universal custom** to buy and sell by the tin and not by the gallon, and that the

[38] Ibid.
[39] The Mixed Court Reports by Dr. Yates, Mr. Haas & Mr. Alabaster to the Consular Body, April 1875, 166, FO 233/96.
[40] Project of Regulations for the New Mixed Court, FO 233/96; also see Kotenev, *Shanghai: Its Mixed Court and Council*, 68.

> defendant has been offered **fair marketable tins** containing the **usual quantity**. The contract states so many tins, containing so many gallons, but reading this by the light of **custom**, I think the real contract was for ordinary tins, and the number of gallons was not of essence of the contract.[41] (Bold added for emphasis)

Here it must be mentioned that when this case was heard and decided by Jamieson in 1873, he had just come back from England after receiving his legal education in the Inner Temple.[42] He had already kept eight terms,[43] attended prescribed lectures and passed the Michaelmas Term General Examination held on October 30, 31 and November 1 in 1872.[44] This meant that he had essentially qualified as an English barrister by the time he sat on the Mixed Court, although he had not yet been called to the Bar.[45] Based on this legal background, it was understandable that Jamieson gave such attention to custom. A number of eminent English jurists have clarified the significance of custom for the common law. Edward Coke (1552-1634) "describes custom as 'one of the main triangles of the laws of England.'"[46] Sir William Blackstone (1723-1780), one of the most well-known and influential English jurists, whose *Commentaries on the Laws of England* was listed as a reference book in Jamieson's examination,[47] once proposed a famous definition of English common law by distinguishing it into three kinds:

---

[41] Mixed Court, *The North-China Herald and Supreme Court & Consular Gazette*, November 13, 1873.
[42] George Jamieson with his newly wedded wife, Mrs. Jamieson arrived in Shanghai through Hong Kong on September 20, 1873. Passengers, *The North-China Herald and Supreme Court & Consular Gazette*, September 20, 1873.
[43] George Jamieson to Foreign Office, May 28, 1873, 105-106, FO 17/665.
[44] Michaelmas Term, 1872, General Examination of Students of the Inns of Court held at Lincoln's Inn Hall, on the 30th and 31st October, and 1st November, 1872, Assorted Legal Education Papers Including Reports, Schemes and Correspondence – 1846 onwards, The Middle Temple Archive, London.
[45] The reason for this will be discussed in detail in section 2.4 on Jamieson's legal education.
[46] C. K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964), 72.
[47] General Examination: Michaelmas Term, 1872, 2, Assorted Legal Education Papers.

> 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction.[48]

Obviously, custom was given due recognition by Blackstone as an important constituent of English common law, which attached great significance to usages already accepted by and circulating among people. Trained in this tradition, Jamieson in this case, though admitting that every tin was deficient by about 5% of the agreed amount, held that the short amount was generally recognized in usual market transactions.

Mr. Chen, however, did not acknowledge the legitimacy of such a usage. He held that "a reduction of some Tls. 300 should be made on the contract for the deficiency, calculated at 5 per cent."[49] "After some discussion as to how parties should stand," it was Jamieson who made a concession and the final court order deducted the 312.5 taels from the plaintiff's claimed amount.[50] Although it was impossible to know the details of the negotiation, an understanding of Chinese law on the part of the assessor would definitely be necessary and would greatly facilitate the process.

Considering that Jamieson had just returned from a two-year period of legal study, with English law freshly and systematically learned, the conflict between the Chinese and English law in cases of this type must have been more acutely felt, giving him a stronger impetus to delve into the Qing Code and understand a very different legal system from his own. Meanwhile the various cases he tried in the International Mixed

---

[48] William Blackstone, *Commentaries on the Laws of England in Four Books*, (1765; repr. Philadelphia: Rees Welsh & Company, 1915), 1: 67-68.
[49] Mixed Court, *The North-China Herald and Supreme Court & Consular Gazette*, November 13, 1873.
[50] Ibid.

Court, along with his discussion with Chinese judges, further gave him a valuable opportunity to learn and apply Qing law in actual judicial practice. His interaction with readers in *The China Review* later indicated that he had familiarized himself with or at least had some knowledge of the Code before contributing to *The China Review*.

In a reply to an enquiry on the validity of Chinese marriages, published in the *China Review* in 1876, he adeptly referred to the Qing Code to support his argument. His self-assurance in harnessing the Code suggests his familiarity with it rather than a new attempt to learn it, as in the following claims: "it is **almost needless to say** that no sort of marriage certificate is to be found";[51] "polygamy is **undoubtedly** a legalized institution. The ***Lü-li*** continually mentions wives and concubines **in the same breath in all enactments** touching marriage."[52] The use of "almost needless to say", "undoubtedly" and his general tone demonstrate a highly confident attitude. Meanwhile, the wording of "in the same breath in all enactments"[53] shows his conversance with all clauses on marriage as stipulated in the Code. Such intimate knowledge is also revealed in another reply to an enquiry on Chinese wills in 1876, which even the editor had to admit "apparently emanated from the pen of a writer accustomed to deal with legal questions."[54] All these suggest that his knowledge of the Qing Code had been gathered before these contributions, which was highly likely traced back to the actual judicial needs in the Mixed Court.

Moreover, his Mixed Court experience fostered in him a very pragmatic attitude towards Chinese law. His emphasis on Li and dissatisfaction with Staunton's translation also arose from it. As the only English translation of the Qing Code at the time, it had been used by the Mixed Court since its founding years, long before Jamieson joined it. In a Mixed Court memorandum offering guidance for commercial

[51] G. Jamieson, "Validity of Chinese Marriages," *The China Review* 5, no. 3 (1876): 204. Bold added for emphasis.
[52] Ibid., 205. Bold added for emphasis.
[53] Ibid.
[54] Editor, Note to "Chinese Wills," by G. Jamieson, *The China Review* 4, no. 6 (1876): 400.

cases written in 1867 by Chaloner Alabaster (1838-1898), a senior consulate official, the first part was Staunton's translation "which professes to regulate the interchange of commodities and money."[55] But it was also in this occasion that Alabaster expressed his dissatisfaction with it, "the admirable translation of Sir George Staunton containing the fundamental Laws only and being now more or less out of date."[56] As early as 1867, translation of mere Lü was perceived by Alabaster as outdated, incapable of coping with cases before the Mixed Court. This remark was further repeated in *Notes and Commentaries of the Chinese Criminal Law*, a work published in 1899 by Earnest Alabaster, his nephew, based on his uncle's past research. On the first page of his preface, he echoed his uncle's opinion, claiming that Staunton's "laborious work at its very publication was quite out of date."[57]

As a senior colleague in the Shanghai Consulate and the first English assessor in the Mixed Court,[58] Alabaster's view very likely influenced new assessors like Jamieson. In 1873 when Jamieson started to serve on the Mixed Court, he had just been promoted to be First Class Assistant in Shanghai Consulate while Alabaster had been a vice-consul for four years (1869-1873) and served on the Mixed Court for nine years (1864-1873). As a matter of fact, Alabaster moulded the initial steps of the new-born court:

> The earlier period of the functioning of the new tribunal was characterized by the untiring efforts of Mr. Chaloner Alabaster, … to fill the gap in its constitution, and his exceptional personality pre-determined the whole course of the development of this new civic enterprise.[59]

---

[55] Mixed Court Papers No. III, iii-iv, FO 233/96.
[56] Ibid., iv.
[57] Earnest Alabaster, *Notes and Commentaries of the Chinese Criminal Law* (London: LUZAC & Co., 1899), v.
[58] Kotenev, *Shanghai: Its Mixed Court and Council*, 52.
[59] Ibid.

Facing difficulties in addressing commercial cases, he proffered guidance by completing a memorandum which not only comprised Staunton's translation, but also collected a number of decisions made in the Mixed Court and Trade Customs "agreed on by the various guilds for the guidance of their members,"[60] which proved most valuable since the Qing Code was specifically lacking in this aspect. Moreover, he continued to exercise his influence on the long-term working scheme of the Court. In 1875, Alabaster together with assessors from the United States and Austria-Hungary handed Mixed Court reports to the Consular Body, in which they discussed the court's current problems and proposed suggestions for its future improvements.[61]

As such a prominent figure in the development of the Mixed Court, Alabaster very likely influenced Jamieson's opinion towards Staunton's translation. Moreover, with Jamieson's own experience in the Mixed Court where there was a practical need to make decisions and protect British imperial interests from being damaged in actual cases, the absence of Li in Staunton's rendition must have been more acutely felt, which further prompted him to turn to the original Code and make a new translation. Thus, his confidence when presenting his translation of Li to *The China Review* readers and his emphasis on its practicality was the outcome of his experience in the Mixed Court, embodying not only his own voice, but also that of his predecessor. Behind these voices was his much deeper concern with British imperial enterprise in China.

This experience had indeed left an indelible impression on him and had a long-lasting influence. Years later, cases tried in the Mixed Court became an important source for his further research into Chinese law. In 1919, when he wrote a preface for his book, he repeatedly mentioned the Mixed Court, whose many civil cases were recorded in *The North-China Herald*. He professed that he had an "access to a

[60] Mixed Court Papers No. III, iv, FO 233/96.
[61] The Mixed Court Reports by Dr. Yates, Mr. Haas & Mr. Alabaster to the Consular Body, April 1875, 164, FO 233/96.

complete file of this paper,"[62] only regretting that

> only a small number of cases coming before the Court have been reported at all, and of those that are reported the notice in 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.[63]

His sincere regret revealed his in-depth understanding of the value of the Mixed Court cases, an understanding derived from his own experience there. He lamented the meagreness and briefness of the cases reported, which could hardly do them justice. His personal experience told him that if those cases had been more properly preserved and recorded, important conclusions and legal principles could be drawn from them, shedding more light on his research. This is especially true of those pure Chinese cases tried by Chinese judges, imprinted with Chinese legal mentality, which are an invaluable source for studying traditional Chinese law.

Viewed in the long run, this Mixed Court experience marked a milestone in his translation and study of the Qing Code, from which he got his practical attitude, his dissatisfaction with Staunton and his special regard for Li. Years later, when he had finished his translation of Li and prepared to revisit this area, he again returned to the Mixed Court, which was where he had started.

2.2 *The China Review*: An impetus for Translating Marriage Law

[62] Jamieson, *Chinese Family and Commercial Law*, ii.
[63] Ibid., 12.

2.2.1 Notes and Queries: An Ideal Platform for Reader Discussion

After exploring the factors that prompted Jamieson to retranslate the *Great Qing Code*, this section will investigate the reason he published his translation in *The China Review*. While answering this question, it hopes to prove that the journal itself, or to be more precise, the discussion platform provided by this journal, constitutes a further impetus for his translation. Growing out of its predecessor *Notes and Queries on China and Japan*,[64] *The China Review* maintained the original section of "Notes and Queries,"[65] successfully turning it into a popular space of interaction among readers, allowing them to propose questions regarding China and further inviting answers from its readers. The section hopes to prove that it is those queries and discussions on Chinese law that partially activated Jamieson's desire to respond to them through his translation.

According to Wang Guoqiang's research, *The China Review* shared the circulation route with *Notes and Queries on China and Japan*, spreading from China's treaty ports to Southeast Asia, to big cities in Britain and North America such as London and San Francisco.[66] Moreover, since Kelly & Walsh was one of the major agencies of *The China Review*, its distribution certainly made use of the former's branches[67] in "Shanghai, Hong Kong, Tientsin, Yokohama, Singapore" which were seen by Leo Ou-fan Lee (李歐梵 Li Oufan) as bearing the clear "imprint of British colonialism."[68] Based in Hong Kong, *The China Review* exercised influence far beyond it. The major cities and treaty ports covered in its circulation routes were where foreigners aggregated and where the journal's readers existed.

As accurate reader information from more than a century ago is very hard to obtain,

---

[64] As to the relationship between these two journals, see Wang, *Zhongguo pinglun*, 33-38.
[65] Ibid., 41.
[66] Ibid., 49-50.
[67] Ibid., 50.
[68] Leo Ou-fan Lee, *Shanghai Modern: The Flowering of a New Urban Culture in China, 1930-1945* (Cambridge: Harvard University Press, 1999), 315.

a calculation of its contributors should roughly show the composition of its readers, at least which kinds of people were more likely to be interested in this journal. After all, contributors here were also readers. Among them, close to 30% were diplomats, 27% missionaries, 17% customs clerks and 10% Hong Kong government officials,[69] demonstrating clearly that most contributors had a very close connection with Chinese affairs and Chinese people. Thus questions concerning China were easily produced among this group of people. Coming primarily from Britain (63%), America (15%) and Germany (12%),[70] their interest in China embodied an encounter of Chinese and Western culture through the journal. Moreover, as more than half of the contributors were involved in imperial enterprise, some of their questions proposed through *The China Review* were inevitably tinted with an imperial hue, as shown by Eitel's enquiry on "will" discussed later.

Its "Notes and Queries" furnished them with an ideal platform to communicate the problems they encountered in China and draw responses from their fellow readers. Unlike the main section of regular articles which was devoted to professional Chinese studies, setting a relatively high standard for publication, "Notes and Queries" did not pose such an obstacle for interested readers. It created a zone for free discussion and for seemingly trivial or layman enquiries, which more reflects the confusion experienced by foreigners in their daily encounters with Chinese affairs. Moreover, these questions built a bridge between the two different sections of the journal, leading to more serious articles being published in the main section. Last but not least, this form of communication was less limited by time and space, constructing a reader connection that was not circumscribed by geographic distance, enabling readers from various places in China or abroad to contribute their opinions on a topic proposed by one reader.

[69] Wang, *Zhongguo pinglun*, 52-53.
[70] Ibid., 53.

Usually the enquirer would directly address his or her question to other readers, "I would feel greatly obliged if any of the numerous readers of the *China Review* would inform me …"[71] "can any of the readers of the *China Review* refer me to …"[72] The ways these questions were proposed demonstrates that their enquirers had other readers in their mind as respondents. In reply to these questions, respondents were very explicit in their answer, stating that this was a reply to an enquiry on a certain point, such as "in reply to the call for information as to …"[73] "in reply to the query of …, the following remarks may help to put the matter in a sufficiently clear light,"[74] showing that readers voluntarily formed a space of dialogue, intellectually assisting each other through *The China Review*.

Editors facilitated this interaction by pinpointing the volume and page number in which the original questions appeared. If the discussion had continued for several issues, they would list publication information of all previous discussion. For instance, in an enquiry with regard to Chinese wills, the discussion continued in three issues of volume IV, on pages 268, 331 and 399, all of which were listed by the editor in the next article on this topic.[75] This information not only reminded readers of the existing discussion and built a more informed communication, but also attracted more to join it so as to better solve the problem. These concerted efforts fostered a highly intellectually charged and multi-laterally reciprocal reader community, whose lively interaction encouraged Jamieson's translation of Chinese marriage law as will be shown in the following.

2.2.2 Discussion and Reader Interest: Origin for Translating Marriage Law

After proving that a platform of dialogue existed in "Notes and Queries" among

[71] I. M., "Chinese Marriage Law," *The China Review* 5, no.1 (1876): 72.
[72] E. J. Eitel, "Chinese Wills," *The China Review* 4, no.4 (1876): 268.
[73] P. "Chinese Wills," *The China Review* 4, no. 5 (1876): 331.
[74] Jamieson, "Validity of Chinese Marriages," 204.
[75] C. T. Gardner, "Chinese Wills," *The China Review* 5, no.1 (1876): 69.

readers of *The China Review*, the following part argues that Jamieson's translation of marriage law, which is one major focus of the thesis, had an origin in an earlier discussion taking place in the journal. The discussion displays an interesting encounter of Chinese and Western legal culture Jamieson witnessed and participated in.

In 1875, the first enquiry on Chinese marriage law appeared in "Notes and Queries", asking whether there was a "register of marriage kept in China" and further "how are such matters proved in case of dispute?"[76] With no immediate response received, very soon another reader broached basically the same question, asking readers "if there is such a thing as a marriage certificate in China, or any other means of proving the validity of a marriage, also if polygamy or concubinage is a legalized institution in China."[77] These questions, starting from a Western perspective, evinced a curiosity about Chinese matrimony.

One issue later, the enquirer received Jamieson's response. To the first question, his answer was "neither the State nor any of the forms of religion pretend to have any control over the manner of the celebration of marriage, and consequently they can give no certificates of legalization."[78] The answer, starting from Western marriage which is mostly controlled by religion or the State, points out its difference from the Chinese counterpart, demonstrating the initial encounter of Chinese and Western marriage law in *The China Review*.

Subsequently, he approached the second question regarding validity of a marriage and its proof. After listing "a crowd of ceremonies … such as employment of go-betweens, interchange of red-cards, sending presents, selecting of lucky days, bringing the bride home, worship of ancestors," he asked "at what stage is the marriage complete? … in other words, what are the essentials to a valid marriage in China?" To these questions, he concluded there existed three conditions to fulfil a valid marriage,

[76] L. J. C. "Marriage Registries," *The China Review* 3, no. 4 (1875): 255.
[77] M. "Chinese Marriage Law," 72.
[78] Jamieson, "Validity of Chinese Marriages," 204.

i.e. "consent of the parents or of senior male representatives" of the two families, "the acceptance of the 'marriage presents' by the family of the bride" and "the formal transfer or bringing home of the bride." If all three conditions were satisfied, the marriage was valid. Any disputes regarding it should be "proved in no other way than that by which ordinary matters of fact are proved, namely by the testimony of competent witnesses."[79] The above three conditions were the vital elements against which a disputed marriage was measured.

As to the third question concerning polygamy and concubinage, Jamieson, by drawing on the Code, gave a very confident answer, "polygamy is undoubtedly a legalized institution. The *Lü-li* continually mentions wives and concubines in the same breath in all enactments touching marriage."[80] The answer satisfied the curiosity of the enquirer who was not sure whether polygamy, which is mostly banned in the West, was legal in Qing China. Both the question and Jamieson's answer display a double vision into both Chinese and Western law.

Although all the questions were answered by Jamieson, discussion on Chinese marriage did not cease there, but continued its vitality in *The China Review*. Immediately following Jamieson's explanation on the validity of Chinese marriage, another contributor elucidated in detail the whole process of Chinese marriage, fixing on the various ceremonies, such as "pa tsz" (八字 bazi) or "baptismal register" exchange of presents, three kotows, "raising the veil", and drinking two cups of wine as a symbol of "indissoluble union."[81] Edward Harper Parker's (1849-1926) "Comparative Chinese Family Law" was the most comprehensive and in-depth one among these investigations, giving a detailed explanation of various marriage ceremonies and also their connection with ancient law.[82] The continual appearance of

[79] Ibid. As all direct quotations in this paragraph are taken from this source, footnote is only given at the end of the last quotation to avoid excessive annotation.
[80] Ibid., 205.
[81] X. Y. Z. "Chinese Marriages," *The China Review* 6, no.1 (1877): 64-66.
[82] E. H. Parker, "Comparative Chinese Family Law," *The China Review* 8, no. 2 (1879): 67-107.

new articles on Chinese marriage shaped into a lively interaction among their contributors, attesting to their persisting interest and existence of unresolved questions in this area.

Although Jamieson's contact with the Qing Code had started in his Mixed Court years, it was limited to the Shanghai settlement at that time. The lively discussion in *The China Review*, however, created for his knowledge of the Qing Code a much wider relevance, convincing him that new contributions on marriage law would find an interested audience here, thus giving him an impetus to revisit and refresh his knowledge of the Qing Code, making a translation of it and later putting his translation in *The China Review*. His repeated reference to E. H. Parker's "Comparative Chinese Family Law" in this translation reveals that he had never extricated himself from this lively discussion, always keeping an eye on the newly emerged articles in the area, so as to find connections with others and a niche for his own.[83] As a matter of fact, his translation and commentary, to a large extent, was an expanded version of his above short reply, targeted at similar issues.

Long after *The China Review* itself ceased publication, Jamieson in his 1921 book still responded to the issue regarding whether Chinese marriage needed to have an official registration and obtain a certificate, to which he replied, "it requires no registration or celebration by any public authority, civil or religious,"[84] reflecting the long-lasting influence the questions in *The China Review* left on him. Regarding the impediments to marriage which he stated in the short reply that "no valid marriage can take place at all, as for instance between relations in any degree and even between persons of the same family name,"[85] he had their corresponding translations made including "marriage between persons of the same surname" (同姓為婚 Tongxing

[83] See Jamieson, "Translations from the General Code: Marriage Laws," 77, 83, 92.
[84] Jamieson, *Chinese Family and Commercial Law*, 44.
[85] Jamieson, "Validity of Chinese Marriages," 204.

weihun),[86] "marriage between seniority and juniority of relations" (尊卑為婚 Zunbei weihun),[87] and "marriage with widows of relations" (娶親屬妻妾 Qu qinshu qiqie).[88]

Similarly, regarding validity of marriage, not only did he refer to the three key steps in the short reply, he had also taken into account the circumstance when there was a breach or an attempt to betroth the girl or boy to some third party, claiming that "any such attempted marriage would be promptly set aside."[89] Corresponding clauses were later translated in the statute of "Marriage in General" (男女婚姻 Nannü hunyin)[90] and detailed explanation was offered as to how such a breach of marriage promise was addressed.[91]

These correspondences once more prove the profound impact those small queries and free discussion in *The China Review* exercised on him and his later translations, prompting him to respond to them even years later. This encounter of Chinese law with a Western audience, which Jamieson witnessed and in which he played a part, constitutes an important reason that he later published his translation of marriage law in *The China Review*. In the next section on Jamieson's translation of inheritance law, not only the role of *The China Review* will again be shown, but a more interesting actor will also emerge: Hong Kong.

2.3 Hong Kong Enquiry on Chinese Wills Through *The China Review*: Motives for Translating Inheritance Law

2.3.1 Motive One: Absence of Authority in Reader Discussion

This section argues that Jamieson's translation of Chinese inheritance law partly arose

[86] Jamieson, "Translations from the General Code: Marriage Laws," 82.
[87] Ibid., 82-83.
[88] Ibid., 83-84.
[89] Jamieson, "Validity of Chinese Marriages," 204.
[90] Jamieson, "Translations from the General Code: Marriage Laws," 77.
[91] Jamieson, *Chinese Family and Commercial Law*, 47.

from an actual colonial problem in Hong Kong, exposed through *The China Review*, whose geo-advantage gave Jamieson another reason to have his translation published there. In the early years when Hong Kong was ceded to Great Britain, the colonial government encountered numerous difficulties in its administration and exercise of the law among the Chinese.[92] One major trouble was lack of knowledge of Chinese law in the English courts.[93]

Until the repeal in 1971 through a series of legislation, Qing family law played a significant role in the Hong Kong courts. But since judges were trained in the English legal system and knew little or nothing about Chinese law, it was imperative that Chinese law could be obtained through external sources. For this reason, Staunton's translation served the Hong Kong courts since the very early years of the Colony.[94] But this work was not a panacea for all problems. The judges were still ignorant on many issues, among which was the Chinese will problem, a problem closely associated with Jamieson's translation of Chinese inheritance law.

In 1876, Ernest John Eitel (1838-1908),[95] a protestant missionary, first raised the questions of Chinese wills in "Notes and Queries" of *The China Review*. Though a missionary, he worked closely with the Hong Kong government. Beginning in 1875, "he supervised government officer's progress in Cantonese training,"[96] meanwhile

---

[92] For Hong Kong's judicial and legislative history in the 19th century, see James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, 2 vols. (1898; repr. Hong Kong: Vetch and Lee Limited, 1971).

[93] As to the applicability of Chinese law in Hong Kong, the first legal basis was Elliot's Proclamations of 1841 which stipulated that Chinese should be governed by the laws of China. The second basis was section 5 of the Supreme Court Ordinance 1873. These two legal bases will be elaborated in full length in chapter six.

[94] According to John Francis Davis (1795-1890), the second Governor of Hong Kong (1844-1848), Staunton's translation "always lay before the judge when Chinese were concerned." See John Francis Davis, *Chinese Miscellanies: A Collection of Essays and Notes* (London: John Murray, 1865), 51.

[95] Eitel was originally German, but in 1880, "he was naturalized to be a British national." Wong Man Kong, "Christian Missions, Chinese Culture, and Colonial Administration: A Study of the Activities of James Legge and Ernest John Eitel in Nineteenth Century Hong Kong" (Doctoral Thesis, The Chinese University of Hong Kong, 1996), 244. The major events of Eitel's life are summarized in an appendix to the thesis. Ibid., 236-248.

[96] Ibid., 242.

serving as "a member of the Board of Examiners which examined officials who were drawing monthly allowance from the government to learn the Chinese language."[97] He was thus naturally familiar with happenings in Hong Kong administration. The will enquiry was made on behalf of Sir John Smale (1805-1882),[98] the Chief Justice of Hong Kong at the time, who was puzzled by the "Chinese practice in the matter of wills,"[99] especially whether "a will having but one subscribing witness is valid."[100] Through the platform provided by the journal, Eitel urgently called for contributions that could provide some clues, including any "Chinese work dealing with the subject of wills," "some authority showing how wills should be executed and attested" or at least "the custom on the subject in the Canton Province."[101]

His enquiry immediately caught the attention of readers and contributors, who ignited a succession of discussions. In the next issue, a contributor referred the matter to a Chinese who made a statement to the effect that if the witness was closely related to the testator, then one witness was sufficient while in the case of cousins or neighbours, "there must be more than one, and the more the better."[102] But immediately after this reply, a rebuttal article by George Jamieson was published in the next issue. Jamieson frankly pointed out the misunderstanding both on the part of Eitel and the previous respondent, who had presupposed that Chinese have testamentary freedom as Englishmen did. For them, the only problem was the formality. According to Jamieson, a Chinese will, unlike an English one, had no power in disposing of the deceased's property:

---

[97] Ibid. In 1877, he "resigned from the Board of Examiners." Ibid., 243.
[98] He served as Chief Justice of Hong Kong from 1866 and retired in 1881. He and Eitel used to express different opinions on the existence of female domestic servitude in Hong Kong in the late 1870s. The former regarded it as a form of slavery while the latter did not. For the whole discussion, see E. J Eitel, *Europe in China: The History of Hong Kong from the Beginnings to the Year 1882* (London: Luzac & Company; Hong Kong: Kelly & Walsh, Ld, 1895), 546-548.
[99] Eitel, "Chinese Wills," 268.
[100] Ibid.
[101] Ibid.
[102] P. "Chinese Wills," 332.

> All property belongs, not to an individual, but the family of which he happens to be a member, and after his death it goes by law either to his male children in equal shares, or failing them, to collaterals in a certain definite and well known order.[103]

Thus a Chinese will could not possibly change the above prescribed mode of devolution. Moreover, different from an English will, it was rarely secret, "and consequently no doubt could be thrown on its genuineness," making it "a matter of small importance whether it is witnessed or not."[104] Obviously, the misunderstanding pointed out by Jamieson was not confined to Eitel and the other contributor, but extended to the Hong Kong Court, as that was the place from which the question first originated.

When the Chief Justice, through Eitel, forwarded the question on Chinese wills, they had already evinced an English legal mentality in dealing with the subject. Because at the initial stage, they were only concerned with formality, that was whether one subscribing witness was valid under Chinese law. They were obviously thinking along the line of English wills which necessitated at least two witnesses. Aside from the formality, they did not pose other difficulties and acted rather comfortable with the concept of Chinese wills, as if they could perform the same function as that of English wills as long as the number of witnesses were ascertained, which is why Jamieson said "there seems to be some misunderstanding."[105] He perceived the fatal problem in this encounter of Chinese and Western inheritance law, in which the latter masked what the Chinese concept of "will" originally was. Detecting this, he was dedicated to clarifying its limited power in disposing property.

But as shown by later discussions, Jamieson's answer did not succeed in clearing

[103] G. Jamieson, "Chinese Wills," *The China Review* 4, no.6 (1876): 399.
[104] Ibid., 400.
[105] Ibid., 399.

the mist surrounding the term, as revealed in the attitude of the editor,[106] who was not totally convinced by Jamieson's reply and further invited more contributions. He believed "Chinese law and usage with regard to wills are differently interpreted in different parts of China."[107] Although a contributor lent strength to Jamieson and lauded it as "perfectly correct" and claimed that what Jamieson said "holds good of the whole empire,"[108] the editor still managed to justify his doubts by bringing into the scene an official statement concerning the law and usage of wills in Canton. He explained that his belief arose from the discrepancies between this official statement and Jamieson's view.[109]

Although the discussion went on afterwards, no substantial progress was made and certainly no consensus was reached. The continual interaction existing among readers revolving around Chinese wills displays their interest in the topic. But the long absence of a uniform opinion also discloses a knowledge gap among them. Each contributor responded from their own observation or experience and the absence of

---

[106] It is likely that the editor was Eitel himself. According to Wong Man Kong's research, it was unascertained when Eitel took over *The China Review* as editor-in-chief from N. B. Dennys, the first editor, he was only certain that "by 1878 Eitel was the editorship of the *China Review*." Wong Man Kong 黄文江, "Xianggang yu zhongxi wenhua jiaoliu: Ou deli yu zhongguo pinglun" 香港與中西文化交流－歐德理 (E. J. Eitel) 與中國評論 (*China Review*) (Hong Kong and Sino-Western Cultural Interaction: Ernest John Eitel and the *China Review*), in *Gang'ao yu jindai zhongguo xueshu yantaohui lunwenji* 港澳與近代中國學術研討會論文集(*Colloquium Collection on Hong Kong, Macau and Modern China*), ed. Gang'ao yu jindai zhongguo xueshu yantaohui lunwenji bianji weiyuanhui 港澳與近代中國學術研討會論文集編輯委員會 (Council of Colloquium Collection on Hong Kong, Macau and Modern China), 127 (Taipei: Academia Historica 国史馆，2000).
This was a rather cautious estimate because the author had noticed that Dennys completely ceased his work in *The China Review* when he departed for Singapore in 1877. And even before that Dennys had also assumed many other duties which perhaps "drove him away from carrying on the editorship before 1877." Ibid. Therefore, Wang Guoqiang believed Eitel assumed the role earlier in 1876. A potent evidence was that Eitel's name first appeared as an editor on the flyleaf of the fifth volume which was in 1876. Wang, *Zhongguo pinglun*, 41-44.
With a conservative estimate, 1876 was likely the year Eitel was more engaged in *The China Review* and gradually took over from Dennys the role of editor. Moreover, considering that it was he who proposed the questions and that he had showed his long concern with the question as evidenced by his article "The Law of Testamentary Succession as Popularly Understood and Applied in China," the editor responding to this question was indeed likely to be Eitel.

[107] Editor, Note to "Chinese Wills," by G. Jamieson, *The China Review* 4, no. 6 (1876): 400.

[108] Gardner, "Chinese Wills," *The China Review* 5, no. 1 (1876): 69.

[109] Editor, Note to "Chinese Wills," by G. Jamieson, *The China Review* 5, no. 1 (1876): 69.

authoritative source rendered it hard for anyone to win unanimous support from others.

Among them, Chaloner Alabaster published his translation of Chinese cases on inheritance law which he believed "may be of general interest,"[110] displaying his knowledge of previous discussions on Chinese wills as well as the confidence that his translations would arouse interest among readers. Despite his conclusion that a will conflicting with the law of equal share should be set aside,[111] which was similar to Jamieson's claim, the question had not been materially solved. After his translation, there was still a contributor claiming that "the father can, if he chooses, dispose of his property as absolutely as of the lives of his children. Thus he may, by will, name one son, or even a daughter, or even a stranger as his devisee,"[112] which infinitely enlarged the power of the father, obviously contravening Alabaster's above conclusion.

It seems that, although Alabaster translated leading Chinese cases, his conclusion was mainly based on inference from case decisions without a commonly recognized source to back up the validity of his statement. As a matter of fact, this characterized most of the articles on this topic so far, in which personal opinion, in the absence of authoritative and original Chinese text, was the norm. It was this reader atmosphere imbued with interest but wanting in authoritative information that gave Jamieson the impetus to bring about his translation of inheritance law in *The China Review*, and redress Western misunderstanding in the testamentary power of the Chinese, so as to settle the question once and for all.

2.3.2 Motive Two: Jamieson's Regard for Hong Kong's Judicial Problem

Moreover, the topic was closely associated with practical colonial issues in Hong Kong, which Jamieson, as a staunch defender of British imperial interests, would not leave unattended when he could easily offer a hand through the platform provided by *The*

[110] Chaloner Alabaster, "The Law of Inheritance," *The China Review* 5, no.3 (1876): 191.
[111] Ibid., 194.
[112] X. Y. Z. "Inheritance and 'Patria Potestas' in China," *The China Review* 5, no.6 (1877): 407.

Chinese Review.

As a matter of fact, seen from the identity of readers who contributed their opinions to this question, an English imperial inclination clearly manifested itself. First of all, the question was proposed by Eitel, who was closely associated with the colonial Hong Kong government. Then it was answered by Jamieson, Britain's diplomat in China. The other major contributors, Christopher Thomas Gardner (1842-1914) and Chaloner Alabaster, also served in British consular service, and were colleagues of Jamieson. Gardner joined the service in China in 1861,[113] three years earlier than Jamieson. When Jamieson was posted to Shanghai in 1866, Gardner had already been working there for at least two years.[114] Thus when Gardner expressed his support for Jamieson's opinion on Chinese wills, he was not supporting a stranger reader, but a consular colleague with whom he used to have daily contact.

The same was true for Chaloner Alabaster, who joined the consular service even earlier, in 1855,[115] a senior for both Jamieson and Gardner in the Shanghai Consulate. It is observed that aside from personal and working relations, they had built a public connection through *The China Review*, evincing a shared interest in Hong Kong's judicial enquiry on Chinese wills. To some extent, this was a natural product of their career. As British diplomats in China, their major responsibility was to protect British subjects and further British interests, within which a deep concern over British imperial enterprise was fostered. Therefore, when seeing Britain's only colony in China encounter trouble, they collectively offered a hand by conveying their observations during their consular and court experiences, tinting their discussion in *The China Review* with a colonial hue. Jamieson's later translation can be seen as a strengthened and extended version of this colonial mentality.

Moreover, Jamieson was not a total stranger to judicial circumstances in Hong

[113] Luo and Bryant, *British Diplomatic and Consular Establishments in China*, 614.
[114] Ibid., 349.
[115] Ibid., 605.

Kong. The British Supreme Court for China and Japan, on which he served, kept very close communication and cooperation with Hong Kong authorities. It happened that an English offender tried in Shanghai was sent to Hong Kong to serve the sentence; faced with a petition for reduction of terms by the prisoner, Hong Kong authorities also needed to refer the matter to the Supreme Court in Shanghai for more information regarding the prisoner.[116] The Hong Kong government also communicated to the Chief Justice in Shanghai on judicial matters of common interest, such as the escape of criminals.[117] Since they had kept very close correspondence, Jamieson, once serving as Acting Law Secretary in the Supreme Court (1869-1870), actually had official means to acquire information from Hong Kong, aside from the public route of *The China Review*.

In addition, though never serving there, Jamieson had been to Hong Kong many times. Every time he went back to England on furlough or returned to China, he had to take ships in Hong Kong as a transit port,[118] which gave him close experience to get in touch with this British colony in China. Thus, for Jamieson, Hong Kong was not an intangible existence, but a place with which he had many official and personal contacts and which made it more likely for him to offer a hand when he could.

Jamieson's regard for Hong Kong can also be proved by his later support and subscription to Hong Kong education during the early days of the University of Hong Kong (HKU). On June 11, 1913 when he served as Chairman of the China Association, a letter was sent to Jamieson from Jardine & Matheson, introducing to him and his

---

[116] Government House of Hong Kong to Chief Justice of H. M.'s Supreme Court for China and Japan, May 8th, 1890, enclosed with petition from the prisoner named Thomas Hore, May 5th, 1890, FO 656/38.

[117] Acting Colonial Secretary of Hong Kong to Chief Justice of Supreme Court in Shanghai, June 15th, 1898, FO 656/38. It concerned the escape of Richard Gamble who according to the Letter might return to Shanghai.

[118] Passengers, *The North-China Herald and Supreme Court & Consular Gazette*, September 20, 1873. This is further corroborated by Jamieson's petition for a refund of passage allowance from Hong Kong to Southampton, in which a letter dated May 17, 1879 was enclosed from the steamer company. See Jamieson to Foreign Office, July 8, 1879, 260-262, FO 17/817.

organization a HKU professor:

> This will serve to introduce to you professor Middleton Smith, Professor of Engineering in the Hong Kong University, who has come home on a special mission authorized by the Council for the purpose of obtaining in England assistance to the University, and especially to the Engineering Faculty thereof, by donation of money or otherwise.
>
> I understand from Professor Smith that he has no letters of introduction to the China Association, and knowing you to be an **ardent Imperialist**, and also strong on the question of education, I venture to give him this line of introduction and to request for him your best offices.[119] (Bold added for emphasis)

The letter discloses a remarkable appraisal given to him by his friend, that is he was "an ardent Imperialist," which seemed well-known among his acquaintances and which was why this letter was written to him. As "an ardent Imperialist," Jamieson was expected to offer help to the university. As a matter of fact, prior to receiving this letter, Jamieson had already been informed of the news. At the China Association's annual meeting held on April 29, 1913, he encouraged generous support from its members to HKU, saying that "I hope for all of you, if there is anything we can do to that end we shall be glad to do it."[120] Besides calling on others to offer help, Jamieson himself contributed ten pounds a year for five years,[121] showing his support with actions for the educational enterprise in Hong Kong.

Moreover, in the annual report for the year 1913-1914 written by Jamieson, he also made a special mention of the University, "the progress made by Hong Kong

[119] Jardine & Matheson to Jamieson on June 11th, 1913, 320, Manuscripts/MS JM/J1/6/1, Jardine Matheson Archive, University of Cambridge.
[120] Annual Meeting, April 29, 1913, 5, CHAS/A/06.
[121] Proceedings of China Association, undated, 34, CHAS/A/06.

University during the year has been remarkable and must give cause for no little satisfaction to the Colony and to the Council,"[122] showing his concern with the University's development. Moreover, he was also selected as a "representative to serve on its Home Consulting Committee" at the invitation of the Council of Hong Kong University.[123]

This event attests to Jamieson's consistent regard and support for the only British colony in China. With such an imperial responsibility, the unsettled Hong Kong enquiry on Chinese wills proposed through the platform of *The China Review* became the catalyst for his translation of Qing inheritance law.

2.3.3 Textual Evidence for the Above Motives

To settle the enquiry once for all, Jamieson did not randomly translate Chinese texts, but chose the *Great Qing Code*, the statute that carried most authority throughout the empire. Moreover, he showed particular obsession with the currency of the Code, opening his work with a statement that the Code he used "was published only two years ago (1877)" and therefore may "fairly be taken as giving the actually existing Laws of China."[124] The authority of a legal text not only lay in its nature, but also in its reflection of the updating of the law as Jamieson saw it.

As a participant who actually contributed to the discussion, Jamieson was well aware of the crux of the present problem in its lack of authoritative source information. As the law was forever changing, only the newest statute could represent the valid law, offering effective solutions for the colonial Hong Kong court, meanwhile acquiring the commonly recognized authority, which was what was needed amidst the differing voices in *The China Review*. These attempts manifest the strong impetus Jamieson

[122] 1913-1914 Annual Report, March 13, 1914, xix, CHAS/A/06.
[123] 1913-1914 Annual Report, March 13, 1914, xix; China Association to Registrar, Hong Kong University, December 17, 1913, 59, CHAS/A/06.
[124] Jamieson, "Translations from the Lü-Li: I," 1.

received from the audiences' too subjective discussion and from Hong Kong's judicial problem.

The impetus is also demonstrated in his direct response to them through his lengthy note, where Jamieson more than once referred to China's absence of wills in the English sense, stating that "the father has no power to depart materially from the above scheme of distribution. … There is no such thing as disinheriting one son in favour of the others, much less any power to grant over to a stranger," [125] corresponding with his short reply in the "Note and Queries" that "he has no power to alter in any material degree the mode of devolution after his death."[126]

It has to be noticed that this time his statement was derived after a complete translation of the inheritance law in the Qing Code. The fact that the translator found nothing resembling a will in the English legal sense and that anyone who violated the legal manner of succession would face severe punishments are the most authoritative arguments for it. With strong support from the Qing Code, this statement can be seen as an expanded and reinforced version of his original reply.

Similarly, with his translation as proof, Jamieson further addressed the formalities of wills in the conclusion, which was the initial enquiry of the Hong Kong court, explicating that

> 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.[127]

This answer responded to Hong Kong's concern by revealing that its concern was

[125] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.
[126] Jamieson, "Chinese Wills," 399.
[127] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 204-205.

almost totally off the point. Because different from English law, formality was never the problem in Chinese wills. More prominently, he concluded his whole translation and annotation of the Chinese inheritance law with an answer to the power of wills in China:

> 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. The term indeed is not unknown, but when used it relates exclusively to minor details regarding the mode of 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.[128]

Although the whole translation and notes touches upon a number of issues, including the principle of partitioning patrimony among sons, the legal rule for choosing an heir in absence of sons and unmarried daughter's inheritance rights, Jamieson ended it by returning to the original point where it all started. His final conclusion once again substantiates his earnest attempt to dispel the mist surrounding readers and clear up Hong Kong colonizers' misunderstanding. In light of this, the choice of *The China Review* for publication was understandable. The geo-advantage of the journal based in Hong Kong, with interested readers, was the ideal place that could bring the value of his translation into full play.

2.4 Jamieson's Legal Education: Perfect Timing for Translating the Qing Law

After settling Jamieson's translation motives and why he had his translation published in *The China Review*, there is another question remaining unanswered, which is, why

[128] Ibid., 204.

he made and published his translation between 1879 and 1881. The answer to this question is closely associated with the time when he received his legal education, which is an important chapter in his imperial consular life. Due to extraterritoriality British empire acquired in China,[129] their consuls along China's treaty ports also acted as judges in consular courts, dealing with pure English cases and cases where an Englishman was the defendant. Therefore a qualification in English law was considered necessary and important. Jamieson in his letter to the Foreign Office also mentioned "the importance which has always been attached to qualification of this nature by Sir E. Hornby, H. M.'s Chief Judge at Shanghai as well as by H. M.'s Minister."[130] The aims of a formal legal education were two-fold:

> (a.) To qualify themselves in the special branches of Law which would be useful to them in their Consular Duties,

---

[129] The British first gained extraterritorial rights in China through "General Regulations of Trade" (《五口通商章程》) which was included in the The Treaty of Bogue (《虎門條約》) in 1843. Pär Karistoffer Cassel, *Grounds of Judgement: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2011), 51-53; Wang Xin 王欣, "Lun yingguo zaihua zhiwaifaquan de jianli" 論英國在華治外法權的建立 (The Establishment of British Extraterritoriality in China), *Lan tai shijie* 蘭台世界(Lantai World), no. 19 (2014): 99-100; Li Guanru 李冠儒, "Wanqing shiqi lieqiang zaihua zhiwaifaquan wenti yanjiu"晚晴時期列強在華治外法權問題研究(Study on the Problem of Extraterritoriality in China by Foreign Powers during the Period of Late Qing), (Doctoral Thesis, Tsinghua University, 2016), 24-30.
Later in the Treaty of Tientsin, "the British formalized their extraterritorial rights by including in Articles 15 and 16 of the treaty provisions for the handling of civil and criminal cases." Douglas Clark, *Gunboat Justice: British and American Law Courts in China and Japan (1842-1943)*, vol. 1, *White Man, White Law, White Gun* (Hong Kong: Earnshaw Books Ltd, 2015), 29.
In discussing British extraterritoriality in China, there exists some confusion in the concepts of extraterritoriality and consular jurisdiction. The former is a reciprocal product between two countries based on mutual respect for each other's sovereignty, exempting mainly the head of a state, diplomats and those who enjoy diplomatic privileges from being governed by the native law. Meanwhile, the latter meant that the foreign consuls have jurisdiction over their own nationals in another country, encroaching on that country's jurisdictional rights. Foreign powers in China used the former to conceal their true intention for the unjust consular jurisdiction. Zhao Xiaogeng 趙曉耕, "Shixi zhiwaifaquan yu lingshi caipanquan" 試析治外法權與領事裁判權 (An Analysis of Extraterritoriality and Consular Jurisdiction), *Zhengzhou daxue xuebao shehui kexue ban*, 鄭州大學學報(哲学社会科学版) (Journal of Zhengzhou University, Philosophy and Social Science Edition) 38, no. 5 (2005): 70-74; Zhao Fen 趙芬, "Lun lingshi caipanquan yu zhiwaifaquan de qubie" 論領事裁判權與治外法權的區別 (The Distinction between Consular Jurisdiction and Extraterritoriality), (Master's Thesis, Soochow University, 2014).

[130] George Jamieson to Foreign Office, June 12, 1872,173, FO 17/641.

(b.) To be ultimately called to the Bar.[131]

Usually the education was carried out and completed during their furlough to England. Jamieson's translation of the *Great Qing Code*, which started from 1879, was intricately related to his returning to England which was also in 1879, with a view to be called to the Bar. A glance at his life experience shows that his education in Law lasted almost a decade, starting from November, 1871 when he was admitted to the Inner Temple, until he was finally called to the Bar on June 9, 1880.[132] During the years between, he changed Inns and was admitted to the Middle Temple on June 20, 1873.[133] Questions then arise: why did he wait until 1880 to be called to the Bar? What did he do during the 1879-1881 furlough? Why did he change Inns? What did he do during his 1871-1873 furlough? Answers to these questions will provide an insight into the correlation between the timing of his translation and his education, from which his experience of learning law could be reconstructed and all his encounter with Chinese and Western law could be connected.

2.4.1 Jamieson's First Attempt for the Bar

As noted above, Jamieson was admitted to the Inner Temple in 1871, when he was on a twelvemonth furlough to England.[134] During this time, he devoted most of his time

---

[131] Regulations respecting the Training and Examination in Law of Assistants in the Consular Service of China and Japan, and Siam, during their residence on furlough in England, 243, FO 228/996.

[132] Obituary — Mr. Geo. Jamieson (1843-1920), *The London and China Telegraph*, January 3, 1921.

[133] The Honourable Society of the Middle Temple: Members' Ledgers, vol.6, 1870-1891, 1382, Digitalized Records, The Middle Temple Archive, London (hereafter Members' Ledgers).

[134] The exact date for his leave of absence is not ascertained, but according to a letter from Jamieson to the Foreign Office dated June 12, 1872, in which he stated his twelvemonth leave of absence will expire in September, it can be safely inferred that he returned in September, 1871. See George Jamieson to Foreign Office, June 12, 1872, 173, FO 17/641.
This is further corroborated by another letter to Foreign Office dated October 2, 1871, in which he asked for the remaining salary due to him. As shown on the address, at the time he was already in London. See Jamieson to Foreign Office, October 2, 1871, 93, FO 17/598.

to studying law, as disclosed in his letter dated June 12, 1872 to the Foreign Office:

> As the twelvemonth leave of absence granted me by Her Majesty's Minister in China will expire in September, I would respectfully request an extension of the term for eight or nine months longer. My reason for making this application is partly on private grounds, but chiefly this – that I have enlisted as a student at the Inner Temple with a view of better qualifying myself for the performance of official duties in China and the earliest period at which according to the rules of the Inns of court, I can complete my studies and be called to the Bar is in the Trinity Term next year (about 5 June). I can truly assure your Lordship that with the exception of six weeks my whole time since arrived in England has been devoted to the object …[135]

In this letter, Jamieson was petitioning to extend his leave on the ground of his on-going legal education and an objective to be called to the Bar. According to the official regulation, "the usual furlough of one year after five years' service will be extended to two years in the case of any Assistant who may, on this ground, apply for such extension."[136] But they must

> satisfy the Secretary of State that they are duly keeping their terms at an Inn of Court, and that they are prosecuting with due diligence the course of reading prescribed for students for the Bar by the Council of Legal Education. To this end they will be required to produce to the authorities of the Foreign Office certificates of attendance upon the lectures provided by this Council. They will

[135] George Jamieson to Foreign Office on June 12, 1872, 173, FO 17/641.
[136] Regulations respecting the Training and Examination in Law of Assistants in the Consular Service of China and Japan, and Siam, during their residence on furlough in England, 243, FO 228/996.

> also be required to undergo, at the earliest period permitted by the Regulations of the Inns of Court (viz., after four terms), the examination in Roman Civil Law necessary for a call to the Bar. Any assistant who fails to transmit to the Foreign Office a certificate of his having passed his examination before the expiration of the first eighteen months of his furlough, will be liable to have the residue of his leave cancelled.[137]

The regulation on the one hand shows Foreign Office's support for consuls in pursuit of a legal qualification, but it also set very strict requirements. Precisely due to the requirement of reporting progress of legal studies, Jamieson wrote the letter above, offering this research a chance to glimpse into his education in London. Obviously, he attached great importance to studies of law as according to his own report, he devoted most of his time during the furlough to this object. He understood clearly that knowledge and qualification in law would be of great service to his consular duties in China. According to his plan, he would sit examinations during this furlough and be called to the Bar in June the following year.

His legal studies as he described, had indeed proceeded steadily. One piece of evidence is the Lecture Attendance Books which the author of this thesis found in the Middle Temple Archive,[138] according to which Jamieson had attended the course of Jurisprudence Civil & International Law from Michaelmas Term 1871 to Hilary Term 1872,[139] showing that Jamieson had almost immediately devoted to the learning of law after returning to England.[140] Although no more such records on Jamieson were

---

[137] Ibid.

[138] Inner Temple did not keep this document. During Jamieson's time, lectures were attended by students from the Four Inns together, so this document found in the Middle Temple recorded the attendance of students by all Four Inns, which was why Jamieson could be found.

[139] Index to Register: Lectures & Classes on Jurisprudence Civil & International Law 1869 to 1877, Lecture Attendance Books, The Middle Temple Archive, London.
As it was almost a century and a half ago, only very few lecture books were left, thus only this record was found.

[140] Michaelmas Term basically covers the period from October to December, and Hilary Term

kept, this evidence itself can prove that during his time in the Inner Temple, he did listen to lectures, which was not only necessary for his progress in law but also an important requirement in order to be called to the Bar. According to the Consolidated Regulation, students should attend "during one whole year the Lectures and Private Classes of two of the Readers,"[141] which means Jamieson needed to listen to a number of courses in order to be called to the Bar.

Further evidence is the certificate issued by a professor of the Inner Temple who verified the progress of Jamieson's studies. On granting of his extended leave, the Foreign Office in accordance with regulations asked for certificates from the Inn that could show his progress, so as to exempt him from reduction of salary during the extended leave.[142] In reply, Jamieson enclosed such a certificate from a professor, which he believed "will be sufficient to exempt him from the regulation."[143] The certificate issued on September 13, 1872 read as follows, "I hereby certify that Mr. G. Jamieson attended my class during Trinity Term,[144] that he was a diplomat student and has made fair progress in his studies."[145]

Incorporating his attendance records, Jamieson had attended courses from Michaelmas Term 1871 to Trinity Term 1872, basically from November 1871 to June 1872, which was indeed as he said "my whole time since arrived in England has been devoted to the object."[146] He hoped with this devotion, he would be able to be called to the Bar in the next year, but according to the actual time of his Call, this was not the case.

---

covers the period from January to April.

[141] Consolidated Regulations of the Several Societies of Lincoln's Inns, The Middle Temple, The Inner Temple, and Gray's Inn, (Hereafter Described as the Four Inns of Court,) as to the Admission of Students, the Mode of Keeping Terms, the Calling of Students to the Bar, the Granting Certificates to Practice under the Bar, and Legal Education, Michaelmas Term, 1869, 2. Assorted Legal Education Papers.

[142] Foreign Office to George Jamieson, June 21, 1872, 175, FO 17/641.

[143] George Jamieson to Foreign Office, October 15, 1872, 177, FO 17/641.

[144] Trinity Term covers the period from June to July.

[145] Certificate on September 13, 1872, 179, FO 17/641.

[146] George Jamieson to Foreign Office on June 12, 1872, 173, FO 17/641.

On May 28, 1873 when it was approaching the date for his call to the Bar, Jamieson sent a letter to the Foreign Office, stating that

> during my leave of absence, I have been keeping terms at the Inner Temple with a view of being called to the Bar before returning to my duties in China, and in furtherance of the object I obtained an extension of leave up to June of the present year. I have now kept eight terms and am making application to the Benchers to dispense with the four remaining terms which they have a customary power to do, but I understand this is a great reluctance on their part to do so unless under very special circumstances. Mr. Mowat, also of H. M.'s consular service [in] China was called to the Bar in June last year by Lincoln's Inn under precisely similar circumstances as myself and I understand the he was favoured with a letter or certificate from the Foreign office to the Benchers setting out the impossibility of his remaining longer in England and the desirability of his having this recognized status before returning to his duties in China. My object in mailing this application is respectfully to ask if a similar favour might be extended to me, and I would venture to hope that my case may not be considered as less deserving than his. I have passed the necessary Examinations and otherwise qualified in every way, except merely in the matter of time.[147]

This letter was the core to understand why Jamieson was not called to the Bar in 1873 as he previously planned. As demonstrated, he had already kept eight terms, with only four terms unfinished, for which he had no time since he would be back to his consular duties soon. Therefore, "with a view of being called to the Bar,"[148] Jamieson, following Mr. Robert Anderson Mowat's (1843-1925) example, applied to the Foreign

[147] George Jamieson to Foreign Office, May 28, 1873, 105, FO 17/665.
[148] Ibid.

Office for a letter of certificate so that the Benchers of the Inner Temple could dispense with the four terms. And as he mentioned, he had "passed the necessary Examinations," referring to the General Examination of Students of the Inns of Court held on the October 30 and 31, November 1, in Michaelmas Term 1872.[149] This was six months earlier than the prescribed deadline of the Foreign Office, testifying to the good work he had done. Thus he considered himself "qualified in every way" while the four terms unfinished were only a matter of time.[150] Although his plan was supported by the Foreign Office, which issued a certificate to the Benchers of Inner Temple,[151] the request for exemption was turned down.[152] As only the first five students with highest scores were allowed to be dispensed with terms,[153] Jamieson, who ranked ninth among all competitors,[154] thus was not called to the Bar.

Eight days after receiving the rejection letter, he was admitted to the Middle Temple. This prompt change of Inn was highly likely connected with the refusal he encountered in the Inner Temple. In the Members' Ledgers of Middle Temple, there was a record stating that he had "8 terms kept at the Inner Temple,"[155] so he only needed to finish the remaining four terms in the Middle Temple. But as he could not further prolong his leave of absence, he soon returned to consular duties, arriving in Shanghai through Hong Kong on September 20, 1873.[156] He had to serve at least another five years before he could return to England to continue his studies.

Although Jamieson was not called to the Bar during this furlough, he had

---

[149] Michaelmas Term, 1872, General Examination of Students of the Inns of Court held at Lincoln's Inn Hall, on the 30th and 31st October, and 1st November, 1872, Assorted Legal Education Papers.
[150] George Jamieson to Foreign Office on May 28, 1873, 105, FO 17/665.
[151] See Foreign Office to George Jamieson, June 3, 1873, 93, FO 17/665.
[152] See Foreign Office to George Jamieson, June 12, 1873, 100, FO 17/665.
[153] General Examination, Michaelmas Term, 1872, 1, Assorted Legal Education Papers.
[154] Examinations Performance Records 1861-1957, Council of Legal Education Archive, A. CLE 11/2 1871-1878 No 2, p.14, IALS Archives, Institute of Advanced Legal Studies, London.
[155] Members' Ledgers, 1382.
[156] Passengers, *The North-China Herald and Supreme Court & Consular Gazette*, September 20, 1873.

completed lectures, private classes, attended eight terms, and further passed the General Examination, which meant he was in fact substantially qualified as a barrister. With this background in English law, immediately after he came back from London he was posted to be an assessor in the Shanghai International Mixed Court, where he acquired first-hand experience in understanding and applying Qing law. This encounter with Chinese law gave him the first opportunity to reflect upon the two different legal systems. Later, enquiries in *The China Review* regarding Chinese marriage and inheritance law further convinced him of the wide readership on this subject and the importance of Qing law in English imperial enterprise, especially in Hong Kong colonial administration.

It was with this experience that Jamieson went on his next furlough to complete the four terms he had left unfinished. The importance of understanding his last leave is shown here, in that the previous experience provided him with an opportunity to continue studying English law in the Middle Temple, right after he had direct contact with Qing law. His entire encounter with the two legal systems could be seen through this return, first English law in Inner Temple, then Chinese law in Shanghai and in *The China Review*, English law again in Middle Temple. The to-and-fro experience between the two legal systems made each of their characteristics more acutely felt and similarities and differences more obvious. Thus, this return to the Middle Temple became another chance for the encounter of Chinese and English law in him, and for him to seriously reflect upon them in a legal environment.

2.4.2 Jamieson's Second Attempt for the Bar

Jamieson's correspondence with the Foreign Office during his last furlough reveals his devotion and the great efforts he dedicated to studying law, which he regarded as an important part of his imperial consular life. His translation of the Qing Code, as an

extension of this part of his life and an extension of his interest in law, just started around the time when he resumed his legal studies and prepared for the Call. The first part of Jamieson's translation was published in July 1879,[157] the first issue of the eighth volume after he had returned to England in May. The exact date for his return could not be ascertained, but according to his application for extension of leave, stating that the furlough would expire in May 1880,[158] it can be surmised that he returned in May 1879 as the usual furlong was for a year. This is further corroborated by his letter to the Foreign Office applying for refund of the passage allowance, to which a letter from the steamer company is attached.[159] According to their statement on May 17, 1879, Mr. and Mrs. Jamieson with two young children between three and ten years old and a native servant took the steamer from Hong Kong to Southampton, costing 1193 dollars.[160] So they returned basically around May.

Although it cannot be sure whether he completed and submitted his first translation to *The China Review* before leaving Shanghai, when in Hong Kong or after returning to England, what was certain was that he did his first translation in 1879. In the introduction to his first translation, Jamieson clearly laid bare this fact that "the edition of the Code from which the following translation are taken was published only two years ago (1877),"[161] revealing that he was talking from the standpoint of two years later, which was 1879. The time for his first translation coincides with the time when he was about to extricate himself from the consular duties and preparing himself for legal studies or had just done so.

Here it has to be noticed that his translation was made and submitted intermittently, instead of all being submitted at one time. The first evidence was that they were published intermittently, without regular pattern, sometimes with one, sometimes with

[157] Jamieson, "Translations from the Lü-Li: I."
[158] George Jamieson to Foreign Office, February, 17, 1880, 453, FO 17/841.
[159] George Jamieson to Foreign Office, July 8, 1879, 260-262, FO 17/817.
[160] The enclosed letter from the steamer company, May 17, 1879, 262, FO 17/817.
[161] Jamieson, "Translations from the Lü-Li: I" *The China Review* 8, no.1 (1879): 1.

two or three issues in between, proving to some extent that it was not an editorial attempt to divide a whole contribution into several issues, in which case, a more regular publication schedule would be expected. Another potent evidence was that his translation of marriage law made comments on E. H. Parker's *Comparative Chinese Family Law*, which was published in the second issue of the eighth volume, while his first submission was published in the first issue of the eighth volume, thus excluding the possibility that they were submitted all together to *The China Review* at one time.

After his first translation, Jamieson's productivity erupted while he was in the Middle Temple. His second translation on inheritance law was published in January 1880 in the fourth issue of the eighth volume,[162] precisely when he was keeping Hilary Term there.[163] His successive two translations on taxation were respectively published in March and May 1880,[164] when he was in Hilary and Easter Term.[165] Although the focus of this thesis is not on taxation law, they still prove that it was when he resumed his legal studies in the Middle Temple that his enthusiasm for Chinese law erupted.

This eruption of productivity in Chinese law was closely associated with his keeping terms for Call, which created an ideal legal atmosphere but without the burden of intensive legal training, which he had already completed during the last furlough. First of all, it can be sure that he was still looking forward to be called to the Bar, for which he spent a large part of his furlough in the Middle Temple. As shown on the Members' Ledger, Jamieson diligently kept four terms from Michaelmas Term 1879 to Hilary Term, Easter Term and Trinity Term 1880, until he was finally called to the Bar.[166] It can be seen that the qualification as an English barrister became an unfinished enterprise for him, which he was determined to accomplish in this return to

---

[162] G. Jamieson, "Translations from the Lü-Li: Inheritance and Succession."
[163] Members' Ledgers, 1382.
[164] Jamieson, "Translations from the Lü-Li: III Registration and Taxation"; Jamieson, "Translations from the Lü-Li: IV Registration and Taxation."
[165] Members' Ledgers, 1382.
Easter Terms covers the period from April to May.
[166] Members' Ledgers, 1382.

England. In his letter to Foreign Office asking for extension of leave, he clearly expressed this objective:

> I have the honour to apply for six month extension of the leave of absence granted me by Her Majesty's Minister in China. My present leave will expire in May and I am desirous of being able to finish the course of legal study which I communicated during my last furlough.[167]

The letter disclosed the purpose for this extension, which was to complete the legal study that he left unfinished during the last furlough, showing that after six years' lapse, he had never abandoned it. Instead it had become one of his primary objectives which he was propelled to accomplish during this leave. Besides, the Foreign Office was still waiting for his progress:

> In reply to your letter … in which you apply for extended leave of absence from your post, I am directed by Lord Granville to acquaint you that, before acceding to the application in question, His lordship would wish to be furnished with some evidence as to the progress made by you in your legal studies.[168]

Although the letter was sent just after Jamieson was called to the Bar, it still reveals the attitude held by the Foreign Office towards consul's legal studies, which is that their support was not without condition. They needed to see the progress he had made, especially considering that Jamieson's legal education had lasted almost a decade. Therefore, aside from personal ambition, he was obligated to finish the remaining four terms this time. Law study became his major concern during this time, which provided

[167] George Jamieson to Foreign Office, February 17, 1880, 453, FO 17/841.
[168] Foreign Office to George Jamieson, June 17, 1880, FO 17/839.

the legal context for his translation.

Moreover, when keeping terms "by dining in the halls of their respective Societies any three days in each Term,"[169] he had ample chance to get in touch and communicate with legal academics and fellow students, which constituted an important part of English legal education. Fully immersed in this legal atmosphere, his interest in the Qing Code fostered previously in China was rekindled, propelling him to put his interest into words. In this context surrounded by members of the Inn, Jamieson's reference to *Ancient Law* to explain features of Chinese law could also be understood, since its author Henry James Sumner Maine (1822-1888) was a Bencher of the Middle Temple.[170]

After he was called to the Bar, three more translations were respectively published in November 1880,[171] May and September 1881.[172] Aside from the environment that aroused his keen interest in Qing law, another factor that facilitated Jamieson's translation work during this furlough was the ample spare time free from consular duties. According to his report to Thomas Wade (1818-1895), the Minister, Jamieson did not return to China until April and assumed charge of the Consulate at Jiujiang on April 18, 1881,[173] although he received this promotion a year previously.[174] In the meantime, he had asked twice for extension of his leave of absence. In addition to the above mentioned letter on February 17, 1880 in which he asked for six months' extension from 1880 May,[175] he applied for another three months on August 13, 1880

[169] Consolidated Regulations of the Several Societies of Lincoln's Inns, The Middle Temple, The Inner Temple, and Gray's Inn, (Hereafter Described as the Four Inns of Court,) as to the Admission of Students, the Mode of Keeping Terms, the Calling of Students to the Bar, the Granting Certificates to Practice under the Bar, and Legal Education, Michaelmas Term, 1869, 2, Assorted Legal Education Papers.
[170] A detailed discussion on the connection between Jamieson and Maine's book will be discussed in the next chapter.
[171] Jamieson, "Translations from the Lü-Li: V Land Tenure and Taxation."
[172] Jamieson, "Translations from the Lü-Li: VI"; Jamieson, "Translations from the General Code: Marriage Laws."
[173] George Jamieson to Thomas Francis Wade, April 18, 1881, 162, FO 228/972.
[174] Foreign Office to George Jamieson, March 31, 1880, FO 17/839.
[175] George Jamieson to Foreign Office, February 17, 1880, 453, FO 17/841.

due to his "complaint brought on by residence in a hot climate,"[176] which was soon approved.[177]

This long leave from May 1879 to April 1881, approaching to two years, offered Jamieson a valuable chance freed from official work. Moreover, unlike the last furlough in which he was busily occupied in keeping terms, attending lectures, private classes and preparing for the General Examination, which was an intensive learning experience, this time he only had four terms to keep, which essentially left him much time for his own. It was during this period that he implemented the big task of translating the Qing Code and immersed himself in legal research as he liked without being too heavily burdened by other pressures.

Therefore, the timing of Jamieson's translation was a combined product of his previous interest in Qing law and the special opportunity offered by this furlough. Embarking upon the journey from a desire to be called to the Bar, he diligently kept the remaining four terms in the Middle Temple, immersed in a legal atmosphere but without the burden of examinations. This proved an ideal chance for his studies of Chinese law. His interest in the Qing Code ignited by his experience in the Mixed Court and the lively discussions in *The China Review*, was once more lighted in the Middle Temple. This mixed encounter with Chinese and Western law paved the way for his comparative legal studies, which will be discussed in the next chapter.

2.5 Motives for Reproduction in Republican China

In the previous sections, the thesis has primarily focused on causes behind Jamieson's translations of the *Great Qing Code* and his publication of them in *The China Review.* Four decades later, these translations were reproduced by Kelly & Walsh in 1921 as a book under the title of *Chinese Family and Commercial Law*. As the Qing dynasty had

[176] George Jamieson to Foreign Office, August 13, 1880, FO 17/839.
[177] Foreign Office to George Jamieson, August 19, 1880, FO 17/839.

long been replaced by the Republic of China by this time, under what circumstances did he republish his translations of the Qing law? What was his purpose in reproducing them? This section will explore a number of factors that convinced Jamieson of the value of his translations in a new era and further impelled him to reissue them.

In the preface, he pointed out the function he hoped his work would perform under the new judicial circumstances:

> 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 the 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.[178]

These words were written in October 1919, seven years after the Republic of China had been established. As he mentioned, it was the time a new Civil Code was being prepared. Since the downfall of the Qing government, its "Bureau for the Revision and Compilation of Laws [修訂法律館 Xingding Falü guan] continued essentially intact in the early Republic"[179] despite various changes of names and adjustment of its administrative attachment.[180] The remarkable event in 1918 was that it experienced another reshuffle and restored its original name.[181] Furthermore, in 1919 at the Paris

[178] Jamieson, *Chinese Family and Commercial Law*, ii.
[179] Huang, *Code, Custom, and Legal Practice*, 49-50.
[180] Ibid., 50.
[181] Huang, *Code, Custom, and Legal Practice* 50; Li Xiandong 李顯東，*Cong daqing lüli dao minguo minfadian de zhuanxing* 從《大清律例》到《民國民法典》的轉型 (The Transition from Da Qing Lü Li to the Civil Code of the Republic of China), (Beijing: Press of People's Public Security University of China 中國人民公安大學出版社，2003), 200；Li Chao 李超, "Zhongguo guyou minfa ziyuan dui jindai minshi lifa de yingxiang" 中國固有民法資源對近代民事立法的

Peace Conference, the Chinese delegation called for an end to extraterritoriality enjoyed by Western countries. These events set the tone for subsequent enactments in China.

At the time, two major legal sources presented themselves before the Chinese law-makers: traditional Chinese law, embodied by the Qing Code, and imported foreign law. Tension inevitably arose between the two choices. As early as in the Legal Reform in late Qing, reformers split into the School of Legal Principle (法理派 Fali pai) represented by Shen Jiaben (沈家本 1840-1913) and the School of Ethics and Rites (禮教派 Lijiao pai) represented by Zhang Zhidong (張之洞 1837-1909) and Lao Naixuan (勞乃宣 1843-1921). The former advocated absorption of Western law in making the new Criminal Code while the latter asserted the doctrine that the law must be in line with actual circumstances of the people and with Confucian rites and tenets that had held sway in Chinese societies for thousands of years.[182]

After six drafts and rounds of discussion,[183] the *New Criminal Code of the Great Qing*（《大清新刑律》Daqing xin xinglü）was finally promulgated in 1910.[184] After some minor modification, it was accepted by the Republican government as the official criminal law. During 1914 and 1915, it experienced the first major revision at Yuan Shikai's (袁世凱) suggestion, from which emerged the *Amendment of Criminal Code*

影響 (The Influences of Native Legal Resources on Modern Civil Legislation), in *Zhongguo falü jindaihua lunji* 中國法律近代化論集 (Thesis Collection on Legal Modernization in China), ed. Zhang Sheng 張生, 159 (Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 2002).

[182] For discussion on their conflicts and concession, see Huang Yuansheng 黃源盛, "Wanqing minguo jishou waiguo fa zhong lunchang tiaokuan de bian yu bubian" 晚清民國繼受外國法中倫常條款的變與不變 (The Modification and Preservation of Clauses Relating to Order of Seniority in Absorbing Foreign Law during Late Qing and Republican China), in *Zhonghua faxi yu rujia sixiang* 中華法系與儒家思想(Chinese Legal System and Confucian Ideology), ed. Gao Mingshi 高明士, 51-56 (Taipei: National Taiwan University Press 台大出版中心, 2014); Li Guilian 李貴連，*Shenjiaben zhuan* 沈家本傳 (Biography of Shen Jiaben), (Beijing: Law Press 法律出版社, 2000), 300-356; Huang Yuansheng 黃源盛，*Falü jishou yu jindai zhongguofa* 法律繼受與近代中國法 (Legal Transplantation and Modern Chinese Law), (Taipei: Huang Ruoqiao Publishing 黃若喬出版, 2007), 199-283.

[183] Li, *Shen Jiaben Zhuan*, 284.

[184] Ibid., 356.

(《修正刑法草案》Xiuzheng Xingfa cao'an).[185] This Amendment to some extent restored the prominent position of Confucian rites in law.[186] Very soon in 1918, another revision was launched and the *Second Amendment of Criminal Code* (《刑法第二次修正案》 Xingfa di er ci xiuzheng an) was completed in 1919, which was what Jamieson meant by "already the Criminal Code has been revised."[187] This Amendment absorbed more Western principles,[188] and was considered as a victory of the School of Legal Principle.[189] These amendments vividly refracted a trial of strength between traditional and foreign laws.

Meanwhile, the *Criminal Code of the Great Qing Currently in Use*（《大清現行刑律》Daqing xianxing xinglü）was promulgated in 1910.[190] Despite the title, this Code was a revised version of the original Qing Code, comprising a substantial portion of civil law which "remained the official law of the Republic until 1929-30"[191] except those parts that went against the Republican polity. Moreover, provisions relating to family law such as marriage and succession law, were preserved intact with only very minor revisions.[192] The continuing force of this code reflected Republicans' emphasis on traditional Chinese law in civil areas. But on the other hand, the legislating efforts towards a new civil Code by absorbing most advanced foreign laws never ceased in China's Republican years.[193]

It was in this complex milieu that Jamieson harboured the hope of dedicating the

---

[185] Zhang Jinfan 張晉藩, *Zhongguo fazhi shi* 中國法制史 (China's Legal History), (Beijing: The Commercial Press 商務印書館, 2010), 478.
[186] Zhang, *Zhongguo fazhi shi*, 478; Lin Duan 林端, *Rujia lunli* yu falü wenhua 儒家倫理與法律文化 (Confucian Ethics and Legal Culture), (Beijing: Press of China University of Political Science and Law 中國政法大學出版, 2002), 75.
[187] Jamieson, *Chinese Family and Commercial Law*, ii.
[188] Zhang, *Zhongguo fazhi shi*, 479.
[189] Lin, *Rujia lunli*, 75.
[190] Zhang, *Zhongguo fazhi shi*, 451.
[191] Huang, *Code, Custom, and Legal Practice*, 18.
[192] Ibid, 29.
[193] For the whole history of enacting civil code in late Qing and Republican China, see Zhang Sheng 張生, *Zhongguo jindai minfa fadianhua yanjiu* 中國近代民法法典化研究 A Study on Civil Codification in Modern China, (Beijing: Press of China University of Political Science and Law 中國政法大學, 2004); Li, *Cong daqing lüli*.

work to lawmakers, the creators of the new Civil Code, and law students, the future legal professionals who would be making use of the Code. He evinced confidence in his work as a "pioneer treatise." The point is: facing competition from foreign law, what gave Jamieson the confidence that the makers of a new Code and future jurists would still be drawn to the law of a bygone dynasty? A more in-depth question is: what made him believe that the Qing Code still had significance in Republican China?

A pragmatic answer to these questions lay in the judicial reality when Jamieson reproduced his translation. As has been discussed above, the civil parts of the *Criminal Code of the Great Qing Currently in Use* remained in force as "'civil portions in effect' [民事有效部分]"[194] until the Kuomintang issued the Civil Code of the Republic of China from 1929 to 1930. Although legislators in the late Qing had finished the *Draft Civil Code of the Great Qing* (《大清民律草案》Daqing minlü cao'an) in 1911, it was never issued due to the immediate fall of the Qing dynasty and was further vetoed in the senate resolution on April 3, 1912.[195] The Republicans stipulated the continual applicability of the *Criminal Code of the Great Qing Currently in Use*. In the subsequent year, the Chinese Supreme Court (大理院 Da li yuan) further prescribed that civil cases should first apply this Code. Only when there were no corresponding clauses could cases be decided according to civil customs and then legal doctrines,[196] placing the Code on the top of the hierarchy of legal basis in judicial decisions. Thus, before Jamieson passed away in 1920, what he witnessed was a Republican China that demonstrated regard for traditional Chinese law instead of totally abolishing it. Under these circumstances, it is little wonder that he displayed such confidence in his translation, believing that it would still be germane to a new era and that legislators

[194] Huang, *Code, Custom, and Legal Practice*, 18.
[195] Li, "Zhongguo guyou minfa ziyuan," 155.
[196] Li Weidong 李衛東, *Minchu minfa zhong de minshi xiguan yu xiguanfa* 民初民法中的民事習慣與習慣法(Customs and Customary Law in Civil Laws of the Early Republican China) (Beijing: China Social Sciences Press 中國社會科學出版社, 2005), 94.

would still be interested in it.

2.5.1 Family Law Rooted in Immemorial Custom and Religion

However, besides this practical answer, there were deeper reasons that made Jamieson believe in the value of the Code even in the Republican era. The first reason was his perception that Chinese family law pervaded deeply into the minds of the people, rooted in the time-honoured customs and religion:

> While much of the Code may be regarded as merely of antiquarian interest, it is different from with that part of it which deals with Family Law, inasmuch as its basis rests on the **immemorial custom** and its rules have grown out of the **primitive instincts and religion** of the people.[197] (Bold added for emphasis)

Obviously the value of the Code did not extend to its entirety. For most parts of it, Jamieson's remark was "merely of antiquarian interest,"[198] suggesting they were too old to be of any practical value in modern times. It was only in family law that he thought differently due to its foundation in "immemorial custom" and "primitive instincts and religion."[199] This idea was presented more fully in inheritance law. As he commented, Chinese practices such as "son succeeds Father in regular order" and "failing sons a legitimate heir is adopted"[200] were

> 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

[197] Jamieson, *Chinese Family and Commercial Law*, 2.
[198] Ibid.
[199] Ibid.
[200] Ibid., 3.

deviation from it.[201]

Jamieson believed Chinese inheritance law derived its source from immemorial usage long before the written law appeared. He further gave an illustration with the clause that "whoever appoints his son successor contrary to law shall be liable to 80 strokes.'"[202] Jamieson remarked that "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."[203]

As discussed in section 2.1, Jamieson's perception of the source of law from custom could be traced to his training in English common law. Students educated in this tradition do not believe that the law "is primarily artificial creation of expert minds" but "strike[s] deep into the soil of national ideas and institutions."[204] This is particularly true of family law: "the operation of pure social custom is apparent in many branches of our [English] law, and nowhere more clearly than in our family law."[205] Indeed, many parts of English family law were directly derived from their custom such as monogamy, the practice that "a wife takes her husband's name" and "parental authority."[206] As "fundamental principles" in English law "for the most part are not to be found in any express formulation, but are assumed to be inherent in our [English] social arrangements,"[207] Jamieson asserted that the undefined Chinese inheritance law also lay in customs which "everyone is supposed to know."[208]

He further traced family law to ancestral worship, which he believed was greatly stressed by Chinese people: "if irregularly performed by any disqualified person the

[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Allen, *Law in the Making*, 71.
[205] Ibid., 74
[206] Ibid., 74-75.
[207] Ibid., 73.
[208] Jamieson, *Chinese Family and Commercial Law*, 3.

spirits of the departed will not be appeased, and calamity will fall on the living."[209] Thus he remarked, as long as the necessity of performing sacrifices exists, "it is difficult to see how any great change in the law of succession can be brought."[210] Ancestral worship, in his eyes, became a key factor of preventing dramatic changes in traditional inheritance law. This is also true of Chinese marriage law, which "has always been considered by the Chinese as the most solemn and important act of life" and from which "spring the future generation whose first duty is to maintain the family sacrifices."[211] Jamieson confidently pronounced:

> Whatever changes may be introduced into other parts of the Code, the law of succession and inheritance and the marriage law, which is of 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.[212]

With these words, Jamieson not only asserted the close connection between custom, religion and law which empowered the Qing family in Republican China, but had also suggested that the bottom of Chinese society did not go through fundamental changes despite a dramatic alteration in polity, which will be discussed in the following section.

2.5.2 No Fundamental Changes After 1911

Certainly, if revolution and the establishment of a modern government meant corresponding changes among Chinese masses such as ridding themselves of the practice of ancestral worship, Chinese family law stood a great chance of alteration,

---

209 Ibid.
210 Ibid., 7.
211 Jamieson, "Translations from the General Code: Marriage Laws," 96.
212 Jamieson, *Chinese Family and Commercial Law*, 3-4.

too. However, this was not so according to Jamieson's observation. First of all, he did not believe that the 1911 revolution which overthrew the Manchu reign was deeply founded. Rather than arising from the majority of the Chinese, it more arose from the conflicts between the central and provincial governments.

Due to his service in the China Association and responsibility to safeguard British commercial interests in China, Jamieson kept a keen eye on China's political situation, acutely aware of the dramatic changes undergone in Chinese politics in 1911 and 1912. He remarked that "within the short space of four months the Court, the Prince Regent, and the whole paraphernalia of Manchu officialdom would be swept aside" by an uprising.[213] But he did not believe in the story given by the Revolutionary party who campaigned that

> the uprising is **a revolt of the whole nation** against an alien domination, which for nearly 300 years has oppressed and plundered the people, which has stifled all progress and which seeks, even now, to keep the masses in a state of abject submission.[214] (Bold added for emphasis)

He commented that "if this were true the explanation would be very simple and the work of reconstruction much easier than it is likely to be."[215] As he detected, the foundation for overthrowing the Qing dynasty and building the Republic was not as solid as the Revolutionaries claimed. According to his observation, the flaw of "the revolt of whole nation" story was obvious:

> There is no evidence to show that the thinking part of the nation, the literati, the gentry, and the commercial classes are or were disloyal, or had any desire to

[213] 1911-1912 Annual Report, March 14, 1912, v, CHAS/A/06.
[214] Ibid.
[215] Ibid.

> exchange the Monarchy for a Republic. Still less is it true of the masses of the toiling people, who indeed have no opinion or understanding of the subject.[216]

His remark covers nearly all classes of Chinese people, from the upper class of gentry and literati who showed no desire to overthrow the existing reign to the bottom toiling masses who did not even have the slightest knowledge of the whole subject. He thus cast serious doubt on the foundation of the Republic which had not won support from the majority of the Chinese. Instead of embracing a drastic change, they continued the life that had been continued for thousands of years. The most potent evidence was found in the Chinese family, which according to him was still the unit of Chinese society, different from modern Western societies, which were composed of individuals. He drew on Henry Maine's famous *Ancient Law* as a benchmark for evaluating Republican China in its early years:

> 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.'[217]

Jamieson believed Maine's "observation is to a great extent a correct description of Chinese society to-day" and the foundation of the present Chinese society is still family.[218] As a matter of fact, as early as when he published his translation in *The China Review* in 1880, he had already quoted this statement from Maine, believing it

[216] Ibid.
[217] Jamieson, *Chinese Family and Commercial Law*, 2.
[218] Ibid.

told the truth of Chinese society then. By quoting from him again, Jamieson asserted the validity and relevance of his remarks in current Republican China, believing the basic structure of Chinese society remained pretty much the same then as in the Qing dynasty. This reveals Jamieson's reflection upon the status quo of the country which was not altered by a new Republic polity.

Another fundamental feature of ancient society was the "Patriarchal System" in which Jamieson found "an extraordinary resemblance between Chinese Family law as it exists to-day and that system of jurisprudence … in all primitive communities of Indo-European stock."[219] With the Roman *Patria Potestas* as a measure, he again quoted from Maine's *Ancient Law* to extract the features of this institution:

> The parent [father] has over his children the *jus viæ 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 transfer them to another family by adoption; and he can sell them."[220]

Against this understanding, the position of the father in Republican Chinese families was strikingly analogous, although his power may not be as unlimited as in ancient Rome:

> 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 of family group.[221]

[219] Ibid, 4.
[220] Ibid.
[221] Ibid, 2.

Similar to the patriarchal system which maintained its predominance in Republican China, the institution of ancestral worship also continued to play its role. Jamieson believed that "modern scepticism apart," it "is still held by the vast majority of the Chinese race."[222] As illustrated above, Republican Chinese society did not alter its foundation in Jamieson's eyes. Whether seen from the unit of society, patriarchal power or religion, traditional thinking and institutions maintained their strong hold. A change of polity did not necessarily mean corresponding changes in the way people lived.

For Jamieson, the key cause for the fall of Qing was the long-standing tension between central and provincial governments, in which the populace played very little role. He vividly described the "growing feeling of discontent among leading provincials and a dissatisfaction with the Central governing authorities":[223]

> The Central Government has made a mess of things. It has led the country into foreign wars, in which we have invariably been defeated; we have lost territory, we have lost money, and, worst of all, we have lost face. China is no longer the glorious country of our forefathers; … We have become the bond slaves of foreign nations, and in no time the country will be partitioned out among them as one divides a melon. All this is the fault of the Central Government.[224]

This description shows Jamieson's intimate understanding of the thinking part of China, including their pride in their ancient civilization, their current situation of misery, their repeated loss of face in front of foreigners and their great dissatisfaction with the Central Government. This information came from his long-term attention paid to the native press, as he claimed "sentiments such as these have found free expression

[222] Ibid., 3.
[223] 1911-1912 Annual Report, March 14, 1912, vi, CHAS/A/06.
[224] Ibid.

in the native press during the last five years."[225] As chairman of the China Association who had constant dealings with loan and construction of railways in China, he revealed more inside stories of the revolt, which was initiated by dissatisfied high officials of the Southern Provinces rather than by the whole nation:

> The present trouble began in a trial of strength between the Central Government and the Provinces over Railway Loans. A sort of a preliminary skirmish had taken place in regard to the Shanghai-Hangchow-Ningpo Railway.[226]

In the skirmish, provinces of Jiangsu and Zhejiang resisted using foreign loans and insisted on using their own money. Although eventually they had this demand realized, a bigger battle arose over the Huguang (湖廣) loan which was "contracted to finance the trunk lines from Hankow to Szechuen and from Hankow to Canton respectively."[227] Originally, "charters had been granted by the Central Government to local companies," to construct their own lines.[228] But because of the slow progress and lost funds in these provinces, the central government, at the suggestion of Sheng Xuanhuai, the then Minister of Posts and Communications, decided to "cancel these provincial charters" and retrieve the right of construction into their own hands, "using foreign loan funds for the purpose."[229]

The change aroused immediate protest, because it deprived them of their long expected profits "by building and operating railways on their own account."[230] Moreover, there was "no assurance that the money subscribed would be refunded."[231] Remonstration successively poured in. Sichuan (四川) even resorted to violent

[225] Ibid.
[226] Ibid.
[227] Ibid., vii.
[228] Ibid.
[229] Ibid.
[230] Ibid.
[231] Ibid.

measures, resulting in the murder of its Viceroy in the Civil War. An anti-loan league was subsequently formed. Jamieson remarked curiously that the league "set up images of the late Emperor Kwang Hsu for the admiration of the people, contrasting him with the Prince Regent, who was represented as the author of the foreign loan policy."[232] This demonstrates that although they were extremely dissatisfied with the central government, they were not anti-Qing during this time. He held that these sentiments in themselves "did not necessarily lead to rebellion but rather to a reformation by evolution."[233] However, "side by side with this feeling of discontent,"[234] the revolutionaries were hatching a more extreme plan:

> They were carrying on an active propaganda against the Dynasty, and when, finally, the military outbreak occurred at Wuchang to the cry of 'down with Manchus,' the feeling explains the extraordinary phenomena of whole provinces throwing off their allegiance and declaring their independence by the mere hoisting of a flag.[235]

Jamieson believed it was the combination of revolutionaries and tension between central and provincial governments that led to the ultimate fall of the Qing, stating that "had either of these events happened by itself the consequences would probably have been less serious. The military revolt would almost certainly have been put down."[236]

This detailed delineation of the cause of the uprising shows Jamieson's intimate knowledge of railway construction and loans in China, which was gained from his experience with the Chinese. When he worked in Shanghai, he had already been very

---

[232] Ibid.
[233] Ibid., vi.
[234] Ibid.
[235] Ibid.
[236] Ibid., vii.

concerned with foreign loans and the construction of railways.[237] Later when working in the Peking Syndicate as Agent General, he was directly involved in coal mining and railway building.[238] Moreover, his service in the China Association enabled him to have a comprehensive view of these affairs all over the country. He disclosed that "members of the [China] Association are familiar with the interminable squabbles and disputes" over these matters.[239]

The above account shows that the 1911 revolution in Jamieson's eyes arose from the inner conflicts among upper classes, which were further agitated by ardent revolutionaries. It was more of a coincidence than a campaign aggregating national support, wanting a solid foundation in the populace. Thus, the change of polity did not fundamentally alter the life of the ordinary Chinese family. As discussed above, the significant role of family, patriarchal authority and ancestral worship, which had been long held by the Chinese race, still prevailed in Chinese families. This furnished Jamieson with another reason to advocate the continuing role of Qing family law.

2.5.3 An Advocate of Gradual Reform with Respect for Tradition

Besides the above factors, his revulsion at drastic change and advocacy of gradual reform also contributed to his decision to republish the translation, through which we will also glimpse into Jamieson's view of the relation between foreign and native Chinese law.

As early as 1903, in the sixteenth annual general meeting of the Shanghai members of the Society for the Diffusion of Christian and General Knowledge among the Chinese, Jamieson clearly voiced his opposition to a violent revolution by encouraging the Society to speak out that

---

[237] G. Jamieson to Nicholas Roderick O'Conor, February 21, 1895, 138-141, FO 228/1198; G. Jamieson to N. R. O'Conor, September 2, 1895, 462-463, FO 228/1198; G. Jamieson to Sir Claude Maxwell MacDonald, December 29, 1897, 332-333, FO 228/1256.

[238] Materials in this respect are of a large number, see FO 228/1516, FO 228/2470, FO 228/2473.

[239] 1911-1912 Annual Report, March 14, 1912, vii, CHAS/A/06.

> they were no advocates for rebellion and anarchy which indeed was the worst possible calamity that could fall on this unhappy country, bad alike for the people and for foreigners. They wished to show them a better way. …Reform must recognize that fact and seek to build up **from below** not by violent change from above. The watchword should be educational enlightenment; accepting all **existing** political institutions they should seek to **better them**, **not to abolish them** till the country was ready for the change.[240] (Bold added for emphasis)

This statement shows Jamieson's objection to radical changes which would lead to chaos and was considered by him as the worst catastrophe, perfectly representing his advocacy of a gradual reform that maintained its link with tradition. His ideal plan for China's future was to make gradual modifications based on the country's existing institutions, rather than eradicating them suddenly and replacing them with a totally different set. This mode of viewing reform is clearly reflected in his observation of the Chinese political situation.

After the first session of the National Assembly (資政院 Zizheng yuan)[241] at the end of the Qing dynasty, he expressed his criticism of the body's rush for a dramatic change which has weakened the prestige of the current reign.[242] He said that "in its **eagerness** to get rid of long-standing abuses it runs the danger of pulling down the whole constitutional fabric before it has formulated a plan for rebuilding,"[243] showing that earlier before the downfall of the Qing, he had been acutely aware of the potential

---

[240] The S. D. C. K.: Annual General Meeting. *The North-China Herald and Supreme Court & Consular Gazette*, December 11, 1903.

[241] As part of the Constitutional Reform in late Qing, it was officially established in 1910. For more information, see Yao Guangzu 姚光祖，"Qingmo zizhengyuan zhi yanjiu" 清末資政院之研究 (Study on National Assembly in Late Qing), (Master's Thesis, National Taiwan University, 1977).

[242] 1910-1911 Annual Report, March 2, 1910, viii, CHAS/A/06.

[243] Ibid. Bold added for emphasis.

aftermath arising from the National Assembly's haste for reform. He particularly conveyed his serious anxiety about the collapse of the existing constitution, especially when the country had no idea as to how to build a new one.

When the Manchu reign was eventually overthrown and a new plan was urgently needed, Jamieson did not choose to sever ties with China's monarchical tradition. He entertained grave doubts as to "whether it is possible to draw up a workable scheme for the order and good government of China as a republic,"[244] stating that

> the work of construction has been made infinitely more difficult than it would have been if the Nanking revolutionaries has had accepted the 19 Articles [憲法重大信條十九條 Xianfa zhongda xintiao shijiu tiao] drafted by the National Assembly establishing a constitutional monarchy.[245]

The so-called "19 Articles" was "the basis of a new constitution" drafted in the late Qing which stipulated that "the Manchu Sovereignty was to be retained, but the Manchu Princes excluded from office, and with a Cabinet responsible to a Parliament."[246] Obviously, Jamieson was more inclined for a constitutional monarchy which maintained its time-honoured monarchical tradition rather than a downright change to Republic. He further commented that

> [The Constitutional Monarchy] gave all the guarantees that the most ardent reformer could have desired, and it may be said with certainty that they would have been accepted by the great bulk of the nation as permanent settlement. They

[244] 1911-1912 Annual Report, March 14, 1912, viii, CHAS/A/06.
[245] Ibid. Promulgated on November 3, 1911 amidst the 1911 Revolution, the "19 Articles" became the first constitutional document that followed the English style of Constitutional Monarchy. Bian Xiuquan 卞修全, "Zizhengyuan yu qingmo de zhixian huodong" 資政院與清末的制憲活動 (National Assembly and Constitutional Reform in Late Qing), *Nankai Xuebao* 南開學報(Nankai Journal), no. 4(2000): 10-14.
[246] 1911-1912 Annual Report, March 14, 1912, viii, CHAS/A/06.

> would have preserved the **continuity** of the Government and given a solid **foundation** on which reforms could have been built up. Now, the organic basis of the republic has to be laid, and after that a workable scheme of government among the constituent provinces has to be evolved.[247] (Bold added for emphasis)

According to Jamieson's judgement of the existing situation, maintenance of the existing monarchy with a reshuffle of government was the best plan that would both satisfy the reformer and win support from the majority of the nation. Overthrowing all as the revolutionaries did now, would mean starting from scratch which was less practical and much more difficult. It was a big scheme that China was not prepared for. Jamieson's diverging attitudes towards republic and constitutional monarchy again reveals his support for gradual reform that maintained the continuity of tradition rather than a total break from it.

This idea increasingly strengthened itself as he witnessed prevalent anarchy and turmoil under a Republican Government. Subsequent events led him to see that China's abrupt shift to a Republic had brought neither order nor peaceful development, only strife among various parties in the governing class and lawlessness among the ordinary people. Faced with the normal course of British trade being disrupted in these circumstances, he was more and more convinced that a drastic reform alienated from China's traditions brought no good to either the Chinese or British merchants.

In the early Republican years, Jamieson first saw ceaseless party struggles. He was especially dissatisfied with the "noisy agitators" towards which he confessed he had "no great sympathy."[248] They were "imperilling the infant Republic because they think they know better and have not their share in its management."[249] These noisy agitators referred to the various parties split from the National Council. In Jamieson's

[247] Ibid.
[248] Annual Meeting, April 29, 1913, 4, CHAS/A/06.
[249] Ibid.

annual report for the year 1913-1914, he pointed out that although the parties all claimed to strive for peace and unity, they differed in their way to achieve it.[250] Thus, "each party considered their own nominees to be best qualified for Cabinet rank; in other words, it became a scramble for the spoils of Office."[251] The succeeding campaign of opposing Yuan Shikai further led to civil war and more fighting in Jiangxi, Nanjing and Shanghai.[252]

Moreover, the strife and turmoil in the upper class further pushed a large part of the nation into anarchy and disorder, as perceived by Jamieson. "By the dissolution of the Imperial Government," ruffianism "has been let loose on the country, and is working its will on a defenceless peasantry unchecked and unpunished."[253] Not only did he not believe in the revolutionary's ability to restore the country to peace, he considered the "ill-assorted masses of troops that the rebellion has gathered around Nanking" itself was a "menace to the peace of the country,"[254] because "there is reason to think that a good deal of the ruffianism has been admitted into their ranks."[255] He gave two examples of ex-convicts who used to be robbers and then became officers of the revolutionary army. He thus said "if the commanding officers are of that type one may judge what the rank and file are like."[256]

Under these circumstances, he more than once conveyed his hope for peace and order on behalf of British merchants. After all, British imperial interests in China were his first priority. In the China Association's annual meeting in 1912, he asked, "when are the things in China going to settle down and allow trade to resume its normal course?"[257] Obviously, only with order and peace being restored could British

[250] 1913-1914 Annual Report, March 13, 1914, viii, CHAS/A/06.
[251] Ibid.
[252] Ibid., ix-x.
[253] Annual Meeting, April 24, 1912, 3, CHAS/A/06.
[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] Ibid.

merchants continue and enlarge their trade in China. In the subsequent year, he disclosed a similar wish, "what we really want is relief from the troubles that at present exist in China, and I take it you will then have a good time."[258] Jamieson's great stress on peace and order displays his strong regard for British imperial enterprise in China.

With this pressing need to weed out rampant lawlessness and restore trade with China, he expressed his appreciation of the old-fashioned Mandarin in the Qing, "who, bigoted as he often was, yet understood the people, and could keep order."[259] Jamieson's sympathy with these people were expressed when he wanted to present a stark contrast with his opinions towards the "noisy agitators." The former represented "the real China" together with "the honest merchants and bankers, with the toiling classes."[260] They were able to keep its people in order, because they had a deep understanding of Chinese people, traditions and current Chinese lives. The latter, however, attempted to make a clean break with their traditions and to reform China thoroughly, which only led the whole country to anarchy. As Jamieson remarked, "one cannot but deprecate the haste to run before they have learned to walk."[261]

This chaos made Jamieson see more clearly that a dramatic change from Monarchy into Republic contravened China's tradition and existing condition. He stated clearly that "stress of circumstances has forced China into a form of Government to which neither her traditions, her law, nor her customs give any sanction."[262] The ordeal Republican China experienced due to this choice, particularly the damage it had done to the British trade in China, further convinced him that reform in China should give ample consideration to the existing situation and maintain its continuity with tradition.

With an understanding of Jamieson's support of gradual reform with full respect

[258] Annual Meeting, April 29, 1913, 5, CHAS/A/06.
[259] Ibid., 4.
[260] Ibid.
[261] 1910-1911 Annual Report, March 2, 1910, ix, CHAS/A/06.
[262] Annual Meeting, April 29, 1913, 4, CHAS/A/06.

for tradition, the third reason for Jamieson's belief in the significance of Qing family law in Republican China could be found. Faced with the Chinese preparation of a new civil code, Jamieson would certainly not support a thorough transplantation of foreign law that severed China's link with its legal traditions, particularly given the anarchy he witnessed and the damages British merchants suffered. This experience made him pay full respect to traditional Chinese law consecrated in the Qing code. When appreciating the virtue of introducing foreign law, he was also very cautious:

> 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**.[263]
> (Bold added for emphasis)

The first impression of this statement was that Jamieson saw the incorporation of Western law into the Chinese legal system as an advantage the country now enjoyed. But a closer look shows that in the process of asserting its significance, he was very careful in choosing his diction by using "selecting" and "adapting" and "fit in with Chinese institutions."[264] While he did not oppose importing foreign law, the introduction was not unconditional. It needed a process of "selecting" and "adapting," only absorbing "such parts of Western Codes as will fit with Chinese institutions."[265] In other words, the existing Chinese institutions were the foundation and the foreign law had to trim itself to accommodate to it. As a great deal of traditional Chinese institutions were concentrated in the clauses of the Qing Code, it certainly deserved an important place in Republican China, particularly in the making of the new civil code.

In summary, the significance of the Qing family law in Republican China as

[263] Jamieson, *Chinese Family and Commercial Law*, 10-11.
[264] Ibid., 11.
[265] Ibid.

Jamieson saw it was manifold. First, it was deep rooted in the age-old custom and religion which could not be uprooted within a short period time. Furthermore, the 1911 Revolution and establishment of the Republic had not altered the foundation of the country in which family was still the unit of society. Moreover, patriarchal system and ancestral worship still prevailed in the country, further excluding the possibility of invalidating the relevant clauses.

The above two causes certainly did not mean that Chinese law was destined to be immutable. Jamieson gave serious consideration to introducing foreign law and bringing changes to existing Chinese law. However, in the process, he attached substantial weight to tradition as reflected in his advocacy of a constitutional monarchy. After witnessing chaos and bloodshed in Republican China, from which British imperial interests also suffered, this idea was more and more enhanced, convincing him of the importance of existing institutions in this nation. Thus, when the Chinese were drafting a new civil code, he still believed in traditional Chinese law, which was the foundation for change and to which the imported foreign law must adapt. The latter was meant to better the existing law rather than become an absolute substitute for it. As he summarized, "young China has been taught that it cannot force the pace, and old China realizes that it must keep moving."[266] It was the combination of the above three factors that made Jamieson assert the value of Qing family law in Republican years and confidently reproduce his translation.

2.6 Conclusion

This chapter has explored the factors that acted as catalysts for Jamieson's translation. While settling the questions regarding his motive for retranslation, site and timing for publication as well as the reproduction in Republican China in a number of settings

[266] 1913-1914 Annual Report, March 13, 1914, xiii, CHAS/A/06.

where Chinese and Western law encountered each other, it also unfolds the English imperial context in which Jamieson's translation is embedded. His Mixed Court experience as an assessor and formal legal training in London were largely products of British extraterritoriality and judicial privileges in China. Moreover, British consuls' collective interest in Hong Kong judicial enquiry also disclosed an underlying regard for British colonial enterprise in China. This mentality did not lose its momentum in Republican period. Behind Jamieson's cautious attitude towards China's reform and respect for the nation's tradition was his concern over British commercial interests, against which background Jamieson reproduced his translation of Qing family law. Interestingly, a work born out of British imperialism supported the growth of native Chinese law. An understanding of the imperial intricacies with which Jamieson's translation intertwined paves the way for subsequent observation of the encounter of Chinese and Western law in his work.

Chapter Three Reflection upon Chinese Inheritance Law Through Comparison with Western Law

In translating and interpreting Qing inheritance law, Jamieson did not confine himself to the Chinese legal realm in which the original text was situated. Instead, he looked overseas to the West and travelled back and forth between the Oriental and Occidental legal systems. Not only did his work cross the geographical and cultural borders, it also transcended thousands of years of temporal gap to bring about a conversation with ancient Roman law. In the process of reflecting upon Chinese inheritance law through comparison with Western legal concepts, Jamieson staged the incoherence and complexities in his understanding of their relationship, in which East-West distinction and convergence coexisted. The interesting encounter of Chinese, English and Roman law will be the focus of this chapter.

3.1 Absence of "Will" in China: A Comparison with Roman Law

As the previous chapter revealed, there was dissent in the nineteenth century regarding Chinese wills. The question, as a fact, remains an outstanding one even until today. Some scholars hold that testamentary succession has long existed in China, exercising power over that of intestate succession.[1] They draw evidence from a variety of sources. First of all, terms referring to some sort of instruction left by the deceased such as *yiming* (遺命), *yixun* (遺訓), *yiyan* (遺言), *yiling* (遺令) had been known to the

[1] Zhang Jinfan 張晉藩, *Zhongguo gudai falü zhidu* 中國古代法律制度 (Ancient Chinese Law), (Beijing: Chinese Broadcasting and Television Press, 中國廣播電視出版社, 1992), 846; Cheng Weirong 程維榮, *Zhongguo jicheng zhidu shi* 中國繼承制度史(History of Chinese Inheritance Law), (Shanghai: Orient Publishing Centre 東方出版中心, 2006), 289-295; Zhang Zhiren 張智仁, "Shenme shi yizhu? Woguo gudai dui dingli yizhu youhe guiding?" 什麼是遺囑？我國古代対訂立遺囑有何規定？(What is Will? What Regulations were there in Ancient China Concerning Wills?), in *Zhongguo gudai falü sanbai ti* 中國古代法律三百題 (Three Hundred Questions on Ancient Chinese Law), ed. Chen Pengsheng 陳鵬生, 402 (Shanghai: Shanghai Classics Publishing House 上海古籍出版社, 1991).

Chinese very early on.[2] As a formal legal concept, *yizhu* (遺囑) first appeared in the Tang law, which stipulated that only when the family was extinct without male successor was the head of the family allowed to dispose of the property by *yizhu*.[3] This practice was adopted by the law of the Song dynasty.[4] Moreover, many cases of wills were found recognized by magistrates in archival research in successive dynasties, including the Qing, which enabled them to come to the conclusion that Chinese exercised a testamentary power larger than that of intestate succession.

On the other hand, some scholars put more emphasis on different features in different dynasties. They have pointed out that the clauses that legally recognized wills in the extreme circumstance of an extinct household disappeared after the Song,[5] and were nowhere to be found in the Qing Code. They are thus very cautious in recognizing the role of wills in Qing inheritance law. Moreover, many researchers believe that there was no freely exercised testamentary power in traditional Chinese societies that could go against the principles of the code.[6] The supreme importance of family connected by blood relation, performance of ancestor worship and lack of personal property made it impossible for Chinese to have testamentary freedom that could disregard the legitimate claims of kindred.[7] Therefore, the opinion that Qing China developed a testamentary power over that of the intestate succession as in the West is

---

[2] Zhang, *Zhongguo gudai falü zhidu*, 270； Cheng, *Zhongguo jicheng zhidu shi*, 288; Zhang, "Shenme shi yizhu?" 401.
[3] Zhang, "Shenme shi yizhu?" 402.
[4] Cheng, *Zhongguo jicheng zhidu shi*, 289.
[5] Wei Daoming 魏道明, "Zhongguo gudai jicheng zhidu zhiyi" 中國古代遺囑繼承制度質疑 (Did Ancient China had Testamentary Succession as an Institution?), *Lishi yanjiu* 歷史研究 (Historical Research), no. 6 (2000): 161; Su, *Zhongfa xiyong*, 306; Ye Xiaoxin 葉孝信, *Zhongguo minfa shi* 中國民法史 (The History of Chinese Civil Law) (Shanghai: Shanghai People's Publishing House 上海人民出版社, 1993), 436.
[6] Hao Hongbin 郝洪斌, *Minguo shiqi jicheng zhidu de yanjin* 民國時期繼承制度的演進 (Evolution of Inheritance Law in Republican China), (Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 2014), 47; David Wakefield, *Fenjia: Household Division and Inheritance in Qing and Republican China* (Honolulu: University of Hawai'i Press, 1998), 33; Wei, "Zhongguo gudai jicheng zhidu zhiyi," 156-165.
[7] Wei, "Zhongguo gudai jicheng zhidu zhiyi," 156-162.

fundamentally repudiated here.

Due to the complexity and the unsettled nature of this question, it is almost impossible to know the actual status of wills in Qing China and Jamieson's distance from it. Rather, it is more important to restore the historical context of Jamieson's claims and understand how he measured, conceptualized and accounted for China's lack of a testamentary concept in the Western sense as well as by what means he justified his claims. This research will open a new chapter in the Western understanding of traditional Chinese law.

3.1.1 Translation as a Measurement

Section 2.3 dealt in detail with enquiries in Hong Kong regarding the key concept of will in Qing law. When further reflecting on the whole process of the enquiry and discussion, it is found that this concept in its English sense was a preconception entertained by most contributors involved in this dispute, whether they at first were only concerned with technicalities and presupposed that China had wills with similar legal import as in English law or whether, like Jamieson, they dismissed such a fantasy. Both groups of people had a modern English will as a criterion in their minds. It is "a secret document **absolutely** controlling the devolution of a deceased's estate, **irrespective of** the claims of even the nearest of kin."[8] This conception of English will which can disregard the claims of kin points to one of its most important characteristics, that is its "unlimited power of disposition … over all a man's proprietary rights which survive him, excepting only estates tail."[9] Indeed, "neither

[8] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 205. Bold added for emphasis.
In Jamieson's two versions, the parts of inheritance law had few changes. Therefore, the focus here in not on comparison but how the work was produced by restoring the initial context that made this happen. As his idea remained consistent between the two versions, the thesis also incorporates newly added parts of the 1921 version as additional evidence, which are primarily in the introductory chapter.

[9] W. M. Geldart, *Elements of English Law* (London: Williams & Norgate, 1911), 164. In understanding the legal concepts, the thesis uses law books that were published during Jamieson's

husband, wife, nor child have now rights of succession which may not be defeated by will."[10] This close to absolute dispositional power was what Jamieson emphasized and was the standard with which he measured Chinese law.

But while Jamieson did not believe in China's enjoyment of wills in the English sense, he had to prove himself. As discussed previously, his opinion did not hold sway among the differing voices in *The China Review*. Thus he needed a convincing mechanism to persuade his audience that he was right, which he found in translation. But the translation process is different from the commonly understood translational order, which is normally understood as a process that starts from a source text or concept and ends with a target text or concept. In this case, Jamieson already had the English legal concept in mind, with which he made a full translation of inheritance law in the Qing Code.

Two possibilities existed. One was that the translator, with the English concept of will as a benchmark, could find a term in the Code that bore similar legal import and power, which could then be translated into the pre-existing English term "will". The other was that no such term could be found in the original Qing Code, in which case no translation could be made and "will" would thus be absent in the English target text. It is seen that a process of matching is added in the usual process of translation. Only when the matching was successful could a translation process be smoothly completed, whereas if the matching failed and no source concept existed in the Code, translation would immediately cease and no corresponding target concept would be found in his translation. Thus, for the readers, the ultimate translation result was in fact a measurement of whether wills in the English sense existed in Qing China.

But through Jamieson's translational search, no such term existed in the Qing

---

times. But as many key concepts and principles in English law did not undergo material changes, the thesis also quotes modern law books when needed, on the basis that they keep in line with those earlier books, but give a clearer explanation.

[10] Ibid.

Code, which led to an English translation devoid of the term "will". Based on this translation result, Jamieson confidently pronounced that "the power of devising or bequeathing by *Will* does not exist" in China.[11] But at the same time, he was well aware that the Chinese were not strangers to "I-chuh (遺囑)" which he called "last instructions."[12] But he believed they were only used to give "moral exhortations and admonitions" and deal with minor details,[13] carrying different meanings and functions from those in England. Thus, according to Jamieson, what was unknown for the Chinese was not "last instructions," but the English sense of wills which had almost unlimited testamentary power. In this sense, the translation is destined to be a failure. Jamieson used the translation result as a measurement to attest to his point that wills did not exist in China. Hereafter Chinese "I-chuh" will be referred to as "last instructions" and the term "will" specifically point to the legal instrument that developed in the West.

This way of reasoning is supported by De Groot's construction of legal translation in which the difficulty in translating legal texts "is not primarily determined by linguistic differences, but by the extent of affinity of the legal system in question."[14] In other words, the more different the legal systems are, the more difficult the translation will be. To apply it to this case, it is observed that the vast divergence between traditional Chinese law and English law posed the primary hindrance to translation, and even made it impossible in some cases. While Jamieson was certainly unaware of this theory, his reasoning was in fact similar, only reversing the cause and effect. The impossibility of translation was the observable phenomenon, from which a conclusion that the two legal systems had different attitudes towards the concept of "will" was reached.

---

[11] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 204.
[12] Jamieson, "Chinese Wills," 400.
[13] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 204.
[14] Gérard-René de Groot, "The Point of View of a Comparative Lawyer," *Les Cahiers de droit* 28, no. 4 (1987): 798.

Facing the absence of will in the original Qing Code and subsequent failure in translation, Jamieson, however, did not cease there but made a further attempt to explain its absence in light of the development of ancient law:

> To those acquainted with the history of Ancient Law this absence of the power of Testation will not appear wonderful. … It is nowhere to be found among the spontaneous customs that arise among the 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 first always paramount, and it is only as a race or nation develops that the free power of bequeathing gradually comes into play. The rise and progress of this, characterized by **Sir Henry Maine** (*Ancient Law*, p 194) as the institution which next to the contract has exercised the greatest influence in transforming human society, but is much beyond the scope of these notes. We only mention it to show that the facts bear out what was *primâ facie* to be anticipated. 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 possess.[15] (Bold added for emphasis)

This statement shows that Jamieson no longer lingered over the dead end of translation. Extracting himself from the conclusion that Qing China had no concept of "will" in the English legal sense, he was empowered to confront Chinese law with a comparison with Roman law in order to account for the absence. With his explanation, Jamieson more convincingly responded to the Hong Kong enquiry, so that audiences would no longer see it as a peculiar phenomenon and could more easily accept his answer. More

[15] Jamieson, "Translations from the Lü-li: Inheritance and Succession," 205.

importantly, this statement is no longer a circumscribed treatment of the concept itself, but extended to an analysis of the entire Chinese legal system by drawing on the successful story of Roman Civil law. It bore fruit that discloses more deep-going problems between them and sheds considerable light on Western understanding of Chinese inheritance law. In return, this serious study also accounts for the lack of source text and failure of translation. Either way, it deserves a most careful examination.

3.1.2 Roman Law and Henry Maine's *Ancient Law*

Roman Civil law and Henry Maine's *Ancient Law* figure prominently in Jamieson's explanation. The former, as a contrast to China, was presented as a successful model that developed the concept of "will" and the latter gave a detailed delineation of its history. To understand their appearance in his account for China's absence of this concept, the legal climate at the time must be restored, which is characterised by a revival of Roman law in the latter half of the 19th century. Maine's *Ancient Law* exercised immense influence during this period.

As mentioned in section 2.1, beginning in the 1830s, there arose in Britain a legal movement, aiming to "make English law more scientific" by ridding it of outdated parts.[16] This movement resulted in great dissatisfaction with the legal education then. "In 1846, the House of Commons set up a Select Committee to review the state of legal education" meanwhile receiving information from Germany, France and other "comparable countries abroad."[17] The Report of this committee gravely deplored the lack of materials for scientific study of the law and absence of such a class as "the Legalists or Jurists of the Continent, men who … are enabled to apply themselves exclusively to Law as to a science."[18] The committee was especially impressed with

[16] Stein, "Maine and Legal Education," 195.
[17] Ibid.
[18] ibid., 196.

legal education in Germany, offering their students courses on "the history and principles of the law,"[19] which was particularly lacking in Britain because law was seen more as a practice rather than a science.

It is in this atmosphere that Roman Law began to assume its significance. In order to cure the problems in English legal education, the Middle Temple began to appoint a Reader on Jurisprudence and the Civil Law.[20] The first Reader, George Long (1800-1879), in his inaugural address, proclaimed that "Roman law, by reason of its universality, approaches nearer to a system of general jurisprudence than other."[21] Although "the appointment lapsed" due to "sparse attendance,"[22] efforts to revive Roman Law did not cease. In 1851, the Council of Legal Education was established, which promoted a new Readership in Jurisprudence and Civil Law to be appointed in the Middle Temple. The position was taken by Henry Maine in 1852,[23] whose lectures attracted many excellent students who later became distinguished professors, lawyers, judges and politicians.[24] Later, more voices supported the study of Roman law, among which was the voice of Maine who in 1856, published his seminal article entitled "Roman Law and Legal Education," where he convincingly advocated that Roman law be incorporated into the English legal curriculum. According to him,

> it was not so much a knowledge of its particular rules but rather an understanding of its concepts and its ways of thinking that was essential for the new generation of educated lawyers, who he hoped would drag English law into the modern

[19] Ibid.
[20] Ibid., 197-198.
[21] George Long, *Two Course Delivered in Middle Temple Hall* (1847; repr., Philadelphia: Little, 1848), 7, quoted in Stein, "Maine and Legal Education," 198.
[22] Stein, "Maine and Legal Education," 198.
[23] J. Bruce Williamson, *The Middle Temple Bench Book: Being A Register of Benchers of the Middle Temple*, 2nd ed. (London: Chancery Lane Press, 1937), 240.
[24] Raymond Cocks, "Who Attended the Lectures of Sir Henry Maine: And Does it Matter," in *Learning the Law: Teaching and the Transmission of Law in England 1150-1900*, ed. Jonathan A. Bush and Alain and Wijffels, 383-396 (London: The Hambledon Press, 1999).

world.[25]

Due to these supporting voices as well as efforts of the Council of Legal Education and Royal Commission (1854),[26] Roman law gradually revived in the English system of legal education. In 1872, examinations were made compulsory for Bar students,[27] including the test of "Roman Civil Law."[28] Moreover, in order to encourage students to study Jurisprudence and Roman Civil Law, studentships were established as rewards.[29] Thus when Jamieson received his legal education in the Inner Temple, Roman law had just been revived and established its foothold in the English legal education. From 1871 to 1872, he attended the course of Jurisprudence Civil & International Law,[30] and took an examination in it in the Michaelmas Term 1872.[31] Because of this training and educational experience, Jamieson, though a common law barrister, had ample understanding and knowledge of Roman civil law, laying a foundation for his reflection of Chinese legal phenomenon through it.

Aside from this general training, Jamieson made a special mention of Maine and his *Ancient Law* which included an elaborate discussion of Roman law in testation, property, contract, delict and crime. As will be shown later in Jamieson's analysis of China's absence of the concept of "will", he relied heavily on Maine, which was understandable given the significance and popularity of this book during the time, not

---

[25] Stein, "Maine and Legal Education," 204.
[26] Ibid., 198-199.
[27] Ibid, 199.
[28] Consolidated Regulations of the Several Societies of Lincoln's Inns, The Middle Temple, The Inner Temple, and Gray's Inn, (Hereafter Described as the Four Inns of Court,) as to the Admission of Students, the Mode of Keeping Terms, the Education and Examination of Students, the Calling of Students to the Bar, and the Taking out of Certificates to Practice under the Bar, Michaelmas Term, 1872, 6, Assorted Legal Education Papers.
[29] Ibid.
[30] Index to Register: Lectures & Classes on Jurisprudence Civil & International Law 1869 to 1877, Lecture Attendance Books, The Middle Temple Archive, London.
[31] Examinations Performance Records 1861-1957, Council of Legal Education Archive, A. CLE 11/2 1871-1878 No 2, p.14, IALS Archives, Institute of Advanced Legal Studies, London; also see General Examination: Michaelmas Term, 1872, 3, Assorted Legal Education Papers.

to mention their shared connection with the Middle Temple.

Maine's *Ancient Law* was first published in 1861 and was frequently reprinted.[32] "Widely used in the law schools of America and Europe,"[33] the book was "favourably compared with the works of Blackstone, Bentham and Austin as a fitting tradition to the great books written by British legalists."[34] It is appraised by Maine's contemporaries as "a book which, for more than twenty years, has profoundly influenced the whole teaching of Jurisprudence in our country."[35] Not only was it extremely influential among students of law, lawyers and historians who "viewed it with the same sort of enthusiasm as natural scientists had received Darwin's *Origin of Species*,"[36] it was also popular among general readers and was said to be "the only legal best seller of that, or perhaps any other century."[37] The success of this book even "enabled Maine to become a legal member to the Viceroy's Indian Council,"[38] a post which he filled from 1862 to 1869.[39] Given the esteem the book received among legal professionals and the prevalent application of the book in legal education, Jamieson, as a law student of the Inner Temple who was required to take classes in Roman law and pass an examination in it, very likely had already known this classic on ancient Roman law during his furlough from 1871 to 1873.

When he returned to London to finish his remaining four terms, he and Maine were then connected by the Middle Temple. The latter's association with the Inn had

---

[32] In the nineteenth century alone, it had fourteen editions. See George Feaver, *From Status to Contract: A Biography of Sir Henry Maine 1822-1888* (London: Longmans, Green and Co Ltd, 1969), 334.
[33] Feaver, *From Status to Contract*, 128.
[34] Ibid.
[35] Donald McLennan, ed., *The Patriarchal Theory: Based on the Papers of the Late John Ferguson McLennan* (London: Macmillan And Co., 1885), x-xi.
[36] Feaver, *From Status to Contract*, 43.
[37] A. W. B. Simpson, "Contract: The Twitching Corpse," review of *Anson's Law of Contract*, by A. G. Guests; *The Rise and Fall of Freedom of Contract*, by P. S. Atiyah; *The Law of Contract*, by G. H. Treitel, *Oxford Journal of Legal Studies* 1, no. 2 (1981), 268.
[38] David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge: Cambridge University Press, 2013), 120.
[39] Williamson, *The Middle Temple Bench Book*, 240.

long begun when he was appointed as Reader in Roman Law and Jurisprudence to the Inns of Court. Around this time, he had started preparing drafts for the later famous *Ancient Law*, some of which were delivered in the Middle Temple.[40] It is argued that his ideas in *Ancient Law* were developed during these lectures[41] and even derived from his audience.[42] The book thus became a brilliant chapter in the history of the Inn. The year 1873, when Jamieson was admitted to the Middle Temple, was also the year when Maine became its Bencher,[43] one of the most eminent and admirable positions of the Inn, whose influence on a young student like Jamieson was easily understandable. When keeping the remaining four terms from 1879 to 1880 and dining with fellow students and legal academics in the Middle Temple, he had more chances to familiarize himself with this classic, and to use it to analyse Qing law.

Maine's *Ancient Law* as his theoretical support, greatly facilitated Jamieson's explanation for China's absence of the concept of "will". But while clarifying that his special reference to Maine and Roman civil law was closely associated with the legal climate and education of the day, the fundamental questions revolving around the growth of the Civil law in his explanation were still unresolved. How did wills actually develop in the Roman Civil law? What factors facilitated this process, and how were these relevant to "successive generations of professional lawyers"[44]? Answers to these questions will be the key to understand why China failed to develop the concept so we can trace to the root the absence of the term in Jamieson's translation of Qing inheritance law.

3.1.3 Impetus for the Development of "Will": Declining Ancestor Worship

Though Jamieson did not elaborate in detail the development of will in Roman Civil

[40] Feaver, *From Status to Contract*, 41.
[41] Cocks, "Who Attended the Lectures of Sir Henry Maine," 384.
[42] Ibid., 390.
[43] Williamson, *The Middle Temple Bench Book*, 240.
[44] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 205.

law in his translation, it is fully discussed in another article under the title of "The History of Adoption and its Relation to Modern Wills," also published in *The China Review*, originally a speech delivered at the English Law School in Tokyo. Closely following Maine's reasoning, Jamieson, with an eye on China's failure, reflected on the successful story of Roman law in which testamentary succession developed into an important institution of the day.

In Maine's formulation, an important motive for the rise of testamentary succession was the conflict between law and natural affection in ancient Rome. The society at that time was founded on the unit of the family, which, according to one of his most famous speculations, constituted the distinct feature of early society from that of the modern society, which is composed of individuals.[45] Family members were then counted through agnates, those who could trace their blood exclusively through males to a common ancestor.[46] While excluding emancipated natural sons, ancient Roman family could curiously absorb strangers into it through adoption.[47] As Maine explained, this was because agnation was not based on "marriage of Father and Mother", but on "authority of the Father,"[48] or Patria Potestas, to use its Roman name. In truth, this term defined the Roman concept of kinship. He explained that

> where the Potestas begins, Kinship begins; and therefore adoptive relatives are among the kindred. Where the potestas ends, Kinship ends; so that a son emancipated by his father loses all rights of Agnation."[49]

---

[45] Henry Maine, *Ancient Law* (1861; repr., London: J. M. Dent & Sons Ltd, 1917), 74.
[46] Ibid., 86-87.
[47] Ibid., 87. Although perceiving the great resemblance between Chinese Tsung (宗) and Roman agnation, Jamieson was also aware of their differences: "Roman Law admits the adoption of strangers in blood into the group; Chinese Law does not admit strangers." Jamieson, *Chinese Family and Commercial Law*, 4.
[48] Maine, *Ancient Law*, 88.
[49] Ibid.

As intestate law only granted inheritance rights to those who were counted as agnatic kin, *emancipated* sons completely lost such rights.[50] Failing direct issue, the nearest agnates succeeded. If there were no such kin, "the *Gentiles*, or the entire body of Roman citizens bearing the same name with the deceased" would inherit.[51] In line with this order, the property had a risk of flowing out of the family and devolving on those whom the deceased barely knew, while his own emancipated children were left "without provision."[52] As the emancipated sons were among the Father's most beloved, this was obviously a disaster for the deceased.

Emancipation was initially implemented through a triple-sale, which meant that "the son should be free after having been three times sold by his father,"[53] which was originally meant to punish the father's abuse of his rights.[54] It then became an effective device for the termination of the patriarchal power. The father "made a pretended sale of the son three times to a friend; after each sale the friend would set him free, and after the third he was free by virtue of the Twelve Tables rule."[55] Maine observed that

> even before the publication of the Twelve Tables it had been turned, by the ingenuity of the jurisconsults, into an expedient for destroying the parental authority wherever the father desired that it should cease.[56]

Thus, Emancipation was deliberately employed by the father to release his sons and more often than not, such an "enfranchisement from the father's power was a

[50] Ibid., 130.
[51] Ibid.
[52] Ibid.
[53] Ibid., 83.
[54] H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1972), 89.
[55] Peter Stein, *Roman law in European History* (Cambridge: Cambridge University, 1999), 7.
[56] Maine, *Ancient Law*, 83.

demonstration, rather than a severance, of affection — a mark of grace and favour accorded to the best-loved and most esteemed of the children."[57] Not surprisingly, if such beloved and honoured sons were deprived of the rights to inherit his father's possession, antipathy against intestacy would naturally arise.[58]

This was where the conflicts between law and natural affection became insurmountable. While the former recognized Patria Potestas's rigorous power in defining kinship, excluding emancipated son, natural affection attempted to deconstruct such a notion of kinship, embrace a more natural one, so that the beloved emancipated sons could legally succeed. Their collision reflected ancient Romans' changing perception of family. Maine consequently regarded "Roman horror of Intestacy as a monument of a very early conflict between ancient law and slowly changing ancient sentiment on the subject of the Family."[59] In due course, the original understanding of kinship reckoned through agnation within the patriarchal power submitted to a more natural understanding of kinship.[60] In a word, it is the fundamental disparity between the legal notion of relationship and a natural one that gave rise to testamentary succession in Roman law according to Maine.

Jamieson, in his elaboration of the origin and popularity of testamentary succession in ancient Rome, followed many of Maine's points. First, he accepted the argument on the conflict between law and natural inclination:

> The grievance under such a system is that the persons who inherit are not necessarily those whom the father most wishes to benefit. There is a conflict between natural affection and legal duty, and the question was how to find a remedy.[61]

---

[57] Ibid., 131.
[58] Ibid.
[59] Ibid.
[60] Ibid., vii.
[61] Jamieson, "The History of Adoption and its Relation to Modern Wills," 144.

But he also departed from Maine when introducing a comparison with China, by changing the original focus:

> The grievance was no doubt felt more acutely in early Roman society than it is in China, and this for two reasons. First owing to the rule which excluded emancipated sons from the succession – a rule evidently owing to the fact that the sentiment to which I ascribe the origin of adoption, namely the necessity of finding a successor to perform the sacrificial rites of the family, had in Rome become greatly weakened. The religious functions which originally devolved on the head of each family were gradually abandoned to the care of a special college. In China, the original sentiment still survives in all its strength, and seems sufficient to reconcile the rules of succession with the dictates of natural affection.[62]

From the above observation, it could be perceived that Jamieson adopted Maine's formulation of emancipated sons, seeing the exclusion of them from succession as the source of collision between law and natural affection. But within such conflict, his focus is no longer on Romans' changing notion of kinship, but "sacrificial rites of the family."[63] As the Romans no longer deemed such worship of household gods significant and entrusted it to a special institution, the necessity to secure sons in order to perform such rites diminished, giving rise to "the rule which excluded emancipated sons from the succession."[64] This was apparently not in line with Maine's reasoning which ascribed such a rule to the legal definition of kinship. Jamieson supplanted Maine's original argument with the weakening role of family sacrificial rites, which

[62] Ibid.
[63] Ibid.
[64] Ibid.

became the fundamental reason for the growth of wills in Roman Civil Law.

In comparison with the Roman development above, Jamieson positioned Qing China as its opposite, since ancestor worship in China was still in full strength. On the one hand, the importance of properly offering sacrifices to ancestors in China prevented the country from devising such a rule of excluding emancipated natural sons from succession. The Chinese rules of inheritance basically followed people's natural affection, thus evading such tension as occurred in ancient Roman societies.

On the other hand, the supreme importance of ancestor worship made an inviolate succession order particularly significant, since the volition to exclude a proper heir and appoint someone else would easily disrupt the sanctioned order, bringing an unqualified successor, and even endangering the proper performance of ancestral sacrifices. Under this risk, the personal wish would not be insisted upon and the desire to fulfil it was largely toned down. Therefore, ancestral sacrifices effectively reconciled natural sentiment and the law in China as claimed by Jamieson, in which there did not arise those strong needs to devise wills. In this way, Jamieson indicated that the flourishing ancestor worship was the primary hindrance to the development of testamentary succession in China.

Through a comparison with the growth of wills in Roman law and its failure to emerge in China, Jamieson placed the role of ancestor worship in the centre of his argument: the diminishing necessity to perform ancestral rites in ancient Roman society agitated the conflicts between law and natural inclination, inviting the device of wills to remedy it; while the fully operating ancestor worship in China effectively reconciled similar conflicts, thereby stifling the rise of the will. In this way, a causal link was made between wills and performance of family rites. In countries where ancestor worship was still in full force, wills were absent while in places where ancestor worship lost its predominance, wills arose.

Moreover, he incorporated a third element to further enrich his formulation — adoption, which was an institution arising from and sustained by the family sacrifices:

> This [Chinese adoption] I consider to be the first and earliest form of adoption in any country – the first step in the course of development I am tracing. It was prompted by the necessity of finding – not an heir to the property, but the most suitable person, according to primitive ideas, to continue the line and undertake the family sacrifices.[65]

Using Chinese law of adoption as an exemplary of the earliest form of adoption in human history, he detected the connection between origin of adoption and conduction of family sacrifices. In fact, as early as when he translated Chinese inheritance law from the Qing Code, he had already concluded with conviction that "there can be no doubt that the custom of worshipping ancestors, which seems to be as old as China itself, has been one of the main agents in giving the law of succession the shape it has assumed,"[66] a succession law which is characterized by its meticulous and even complicated rules of adoption. "This theory of the origin of adoption is further borne out by a consideration of the circumstances of those countries where adoption has never been practised"[67] such as the Jews whose religion was "monotheistic … in the hands of a special class," thus they had "no family *sacra* to be provided for," and consequently there was no need to devise adoption and a family was allowed to go extinct.[68]

With Chinese phenomenon as a major example, further supported by evidence from Judaism, Jamieson came to the conclusion that "wherever the religion of the

[65] Ibid., 141.
[66] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 201.
[67] Jamieson, "The History of Adoption and its Relation to Modern Wills," 141.
[68] Ibid.

country recognizes deities of the household or hearth, or what the Romans termed *sacra privata*, there you find adoption."[69] Connecting with his elaboration of ancestor worship and wills, it is discovered that both adoption and wills were connected with the performance of ancestral rites, though the effects of their connections are converse: where such performance was in full strength, adoption was recognized, as in Chinese law; where such performance declined, wills arose and gained popularity, exemplified by Roman law. The two societies were positioned at the opposite ends of the power of ancestor worship.

As a matter of fact, Jamieson's identification of the interacting relations among will, adoption and ancestor worship was also inspired by Maine's *Ancient Law* although the argument there was a different one. Maine did not regard ancestor worship and wills as mutually incompatible in earlier times, instead, he highlighted the significance of proper maintenance of family *sacra* not only to adoption but also to wills, stating that

> no adoption was allowed to take place without due provision for the sacra of the family from which the adoptive son was transferred, and no Testament was allowed to distribute an Inheritance without a strict apportionment of the expenses of these ceremonies among the different co-heirs.[70]

Both adoption and wills "threaten[ed] a distortion of the ordinary course of Family,"[71] which was why "the exercise of either of them could call up a peculiar solicitude for the performance of the *sacra*."[72] However, this part of Maine's formulation was completely absent in Jamieson's elaboration. He only stressed the incompatibility

[69] Ibid.
[70] Maine, *Ancient Law*, 113.
[71] Ibid., 114.
[72] Ibid.

between family *sacra* and wills, turning a completely blind eye to their close relation. It is the following part that described the different historical development of ancestor worship among Hindus and Romans that was drawn on by Jamieson:

> Among the Hindoos, the religious element in law has acquired a complete predominance. Family sacrifices have become the keystone of all the Law of Persons and much of the Law of Things. … With the Romans, on the contrary, the legal obligation and the religious duty have ceased to be blended. The necessity of solemnizing the sacra forms no part of the theory of civil law, but they are under the separate jurisdiction of the College of Pontiffs.[73]

According to Maine, Hindus and Romans totally diverged in their later attitudes towards family *sacra*. The former permitted it to dominate the entire Hindu law while the latter ceased its obsession with it and separated it from their legal system. He further claimed that there was no place for wills in Hindu law because the place had been taken by adoption.[74] Then he made his famous statement connecting Romans with the invention of wills, "to the Romans belongs pre-eminently the credit of inventing the Will, the institution which, next to the Contract, has exercised the greatest influence in transforming human society."[75] Although he cautioned readers against mistaking the concept of "will" at this stage with a modern one which acquired new functions and characteristics,[76] the achievement of the Romans in devising it was marvellous enough.

The juxtaposition of Romans' declining status of family *sacra* with their invention of wills and of the Hindu's ubiquitous and all-powerful family *sacra* with its institution

[73] Ibid., 113-114.
[74] Ibid., 114.
[75] Ibid.
[76] Ibid.

of adoption was precisely the model paralleled by Jamieson through his observation of Chinese legal phenomenon. He ignored Maine's elaboration on the cordial relation between family *sacra* and will, selectively applying those parts where he found resemblances in China. Jamieson's "outgrowth of the Civil Law" was precisely constructed through a comparative legal study, closely following Maine's comparative jurisprudence in *Ancient Law*.

Without doubt, *Ancient Law* was a masterpiece marking the beginning of historical legal scholarship in Britain, importing the "central characteristics" of the German historical school[77] headed by Friedrich Carl von Savigny (1779-1861). Meanwhile it was also a book that developed comparative jurisprudence[78] "mirroring contemporary comparative philology." [79] "By using the term 'comparative jurisprudence' to describe his method," Maine indicated that he would conduct a comparative examination of legal systems, "just as comparative philologists had been examining 'with surprising results' the history of language in different societies at different stages of development."[80] He believed that the European legal past could be constructed "by comparative consideration of the institutions of other Aryan peoples,"[81] especially the Indians.

It must be noticed that his use of Indian institutions was based on a belief that the Aryan cultural area, including Europe and India, shared a common origin as revealed by comparative philology in detecting affinity of languages.[82] Therefore he could

---

[77] Rabban, *Law's History*, 115.

[78] A historical legal study cannot after all be completely separated from comparative law, they overlap in many ways. See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, vol. 1, *The Framework*, 2nd ed., trans. Tony Weir (Oxford: Clarendon Press, 1987), 8-10.

[79] John W. Cairns, "Development of Comparative Law in Great Britain," in *The Oxford Handbook of Comparative Law*, ed. Mathias Beimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 135.

[80] Rabban, *Law's History*, 123.

[81] Cairns, "Development of Comparative Law in Great Britain," 135.

[82] In his later work, he was more careful in believing that "people speaking similar languages shared a common racial descent." Rabban, *Law's History*, 137. But this did not weaken his belief that Indians and Europeans were of the same stock.

reconstruct ancient legal history in the West based on the Indian present which maintained many primitive usages and institutions nowhere to be found among modern European societies.[83] He opposed John Ferguson McLennan's[84] (1827-1881) indiscriminate use of data from primitive tribes all over the world, for he believed without a common origin, research on these people could not reflect upon the European past, but were merely wild speculations.[85] Maine himself was extremely cautious in using materials beyond Indo-Europeans stock.[86] It can be seen that his comparative method was fundamentally based on sources from the Aryan circle only.[87]

While following Maine's comparative jurisprudence, Jamieson extended the comparative method to a larger context, analysing the law of the Chinese, who were obviously not of the Aryan race. By exploring the Qing Code, he saw the stark contrast between Qing law and Roman law was largely a parallel to the contrast existing between Hindu law and Roman law. Not only were the above two sets of contrasting attitudes towards family *sacra* alarming, the resemblances between Chinese and Hindus in allowing *sacra* to dominate their law were also illuminating, from which Jamieson detected the potential relationship between ancestor worship and the development of the concept of "will", which was possibly why he diverted his focus from Maine's changing conception of kinship and deliberately ignored their compatibility in the earlier period. It was through this comparative legal vision that Jamieson reflected upon China's absence of the concept of "will".

Jamieson's elaboration of the differences between Roman and Chinese legal systems in the development of the concept of "will" fitted in well with the Orientalist

---

[83] Rabban, *Law's History*, 131.
[84] McLennan was the author of *Primitive Marriage*, which will be discussed in detail in the next chapter.
[85] J. W. Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge: Cambridge University Press, 1968), 161-162.
[86] Ibid.
[87] In his later works, he also explored "early Teutonic and Irish law," this, nevertheless, did not reach beyond this circle. Rabban, *Law's History*, 138.

discourse of East-West distinction. It enriched the imperial knowledge reservoir of comparative jurisprudence. Meanwhile the parallel between Hindu and Chinese society attested to the possibility of constructing the European past by using material beyond Aryan race. As Jamieson claimed, "she [China] presents us to-day with the living type of law which prevailed in Western communities more than 2000 years ago," [88] not only manifesting their different position in the ladder of cultural advancement, but also their temporal distance.

3.1.4 "Will" in the Shape of Conveyance and Declining Ancestor worship

Aside from the internal impetus that precipitated the emergence and development of wills, Jamieson also described in detail its development from an early shape of conveyance, following Maine's theory but also supplementing it with fruits of comparative jurisprudence. According to Maine, the Roman plebeian will to which modern will was traced had "its descent from the *mancipium*, or ancient Roman conveyance."[89] A testator, through a formal conveyance ceremony transferred the entire familia to the *familiæ emptor*, the buyer of the Family, including "all the rights he enjoyed over and through the family; his property, his slaves, and all his ancestral privileges, together, on the other hand, with all his duties and obligations."[90] In line with this, Jamieson also described the process as "a formal conveyance, known in Latin as mancipium" which "operated to vest in the purchaser all the legal rights and liabilities of the transferor."[91]

---

[88] Jamieson, *Chinese Family and Commercial Law*, 6.

[89] Maine, *Ancient Law*, 120.
As a matter of fact, there also existed a patrician testament, which however is not the prototype for modern wills, and which is thus given less emphasis by Maine. For patrician testament, see Maine, *Ancient Law*, 116-118. For the same reason, Jamieson did not elaborate on the patrician will either: "there was indeed another and contemporaneous form – the patrician will, but for historical purposes that has no interest." Jamieson, "The History of Adoption and its Relation to Modern Wills," 144.

[90] Ibid., 120-121.

[91] Jamieson, "The History of Adoption and its Relation to Modern Wills," 144.

Further following Maine's characterization of "five witnesses," "the Libripens who brought with him a pair of scales to weigh the uncoined copper money of ancient Rome," and "payment of a price by striking the scales with a piece of money,"[92] Jamieson described the proceeding of the ceremony in a very similar way, revealing the influence Maine exercised on him:

> The mancipium, or conveyance, was always a public act made in the presence of witnesses. … **Five witnesses** were required, besides a quasi public personage known as the 'balance bearer,' who actually **brought balance and weights** to weigh the imaginary purchase money. A form of words was gone through, by which the transferor divested himself of his estate, the purchaser accepted and **struck the scales** with a piece of brass symbolical of paying, and the transaction was complete.[93] (Bold added for emphasis)

While closely following Maine's elaboration of the conveyance ceremony, Jamieson also enriched it with products from his comparative studies of Roman and Chinese law. According to Maine, the purchaser of the family in the above conveyance ceremony, was at first always the "Heir himself,"[94] who thus knew his future position from the very beginning. But at a later stage, the purchaser could be occupied by "some unconcerned person,"[95] who under the requirements of the testator later paid the legacy to the true heir. Secrecy was guaranteed in this way since the heir could be kept from knowledge of it until the death of the testator. Later, conveyance lapsed into "a pure form."[96] Jamieson also analysed this process; but he added an important element which was missing in Maine's formulation:

---

[92] Maine, *Ancient Law*, 120.
[93] Jamieson, "The History of Adoption and its Relation to Modern Wills," 144-145.
[94] Maine, *Ancient Law*, 120.
[95] Ibid., 125.
[96] Ibid.

> By this time in Roman history the heir or successor to the family had long ceased to have any religious functions to perform in connection with his succession. **In India and in China**, the original theory still survives in full force, viz., that the heir is constituted for the **express purpose of continuing the sacred rites**, and the property is given him to enable him properly to perform this duty. But in Rome this motive had ceased to exist. The only thing then, which a testator really wished to effect, was distribution of his property in the event of his death. Accordingly the first part of the will, that is the conveyance, became a mere form. **Any indifferent person** was named as the purchaser of the family, and he never took any farther concern in it. At the same time the second part was committed to writing and was not published till the death of the testator.[97] (Bold added for emphasis)

Maine in his book did not explicate the reason for the changing identity of the purchaser from heir to an unconcerned person; this work was done by Jamieson. The reason he gave was that the weakening religious rites in Roman society relieved the purchaser of such duty, making the identity of the purchaser no longer important. Thus an "indifferent person" could also play this role which led testament to become a secret institution. This reasoning was made by comparing with Indian and Chinese societies, whose ancestor worship was in full force. As a matter of fact, there was not much comparability in this case as neither India nor China had invented conveyance as the early form of will. An ideal control group should be one which were stuck with heir as the purchaser due to pressing need to perform ancestral sacrifices.

His reference to India and China's fully prospering religious rites shows the

[97] Jamieson, "The History of Adoption and its Relation to Modern Wills," 145.

prominent position of ancestor worship in the development of the concept of "will". The relation among family *sacra*, will and adoption was the most remarkable fruit he drew from his comparative legal studies of Roman and Chinese law, inspired and corroborated by further comparison of Roman and Indian law. Due to the significance of declining ancestor worship in the development of wills, Jamieson also attributed the changing identity of the purchaser to it, from which secrecy was acquired and a more advanced shape of will emerged. More importantly, while Jamieson hoped to shed light on China's failure to invent wills through "the outgrowth of the Civil Law,"[98] the fruit of his comparative studies in return influenced his conception of the development of wills in Roman civil law itself. In other words, the translator allowed his concern with China to affect his starting point of comparison.

3.1.5 Legal Fiction in Advancing the Concept of "Will"

In the development of the concept of "will", two instrumentalities were highlighted by Jamieson — legal fiction and equity. They were highly valued as two significant contrivances not only for advancement of "will", but also for that of the law as a whole. However, not every civilization was fortunate enough to have access to them. He considered that once the law was coded, its development could be easily arrested.[99] Although customs might change, code could not change accordingly due to people's reverence and lack of mechanism to initiate the change.[100] Many civilizations stagnated on account of this, such as China, whose law was never empowered to achieve essential improvements during successive dynasties, while others, exemplified by Roman and English law found their way out by contriving legal fiction and equity.[101]

---

[98] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 205.
[99] Jamieson, "The History of Adoption and its Relation to Modern Wills," 138.
[100] Ibid.
[101] Ibid., 138-139.

Jamieson's negative attitude towards codification was borrowed from Maine, who saw it as a watershed in human legal history, from which the distinction between static and progressive societies began to surface.[102] Unfortunately, most societies lapsed into the first category:

> Much of the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record. … here and there a primitive code, pretending to a supernatural origin, has been greatly extended, and distorted into the most surprising forms, by the perversity of sacerdotal commentators.[103]

As analysed by Maine, most societies languished in their superficially complete and perfect code which was solemnized into some sacred creation, untouchable by later generations. Examples given by him for this type of societies were India and China, which though differing in stages of development, served similar functions in illustrating that "instead of the civilization expanding the law, the law has limited the civilization."[104] For this reason, codification was by no means a blessing for these societies.

It was only in a very small portion of civilizations that continuing progress followed a code. After all, "stationary condition of the human race is the rule, the progressive the exception,"[105] perfectly summarizing Maine's dichotomous view of human societies. Those in the latter category managed to narrow its gulf with the more advanced social reality.[106] The agencies that brought them in harmony, as summarized

[102] Maine, *Ancient Law*, 13.
[103] Ibid., 14.
[104] Ibid.
[105] Ibid.
[106] Ibid., 15.

by Maine were "Legal Fictions, Equity, and Legislation."[107] In line with this, Jamieson elaborated the first two in his accounting for China's absence of wills, regarding them as effective instrumentalities in the growth of the Civil law.

First, he closely followed Maine's definition of legal fiction which was much wider in sense than the usual meaning English lawyers were used to at the time and also more extensive than the Roman "fictio."[108] Maine's legal fiction signifies "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."[109] Jamieson interpreted it in a similar way, "when the law won't suit the facts, the facts are made to suit the law. Something is alleged to be a fact which is not, but the Courts do not allow it to be questioned,"[110] meaning when the wording of the law is not in line with actual practice, the latter is allowed by the Court to acquire a different interpretation to suit the former. In this way, although the law has been changed essentially, its letter could remain unchanged, corresponding to a double function of legal fiction in "transforming a system of laws and concealing the transformation"[111] as theorized by Maine.

In the previous section, it has been briefly mentioned that the conveyance ceremony was reduced to a pure form. Jamieson described the process that such formality was dispensed with by Roman Prætors with the assistance of legal fiction:

> The Judges assumed that the form had been complied with and an heir or 'purchaser' validly constituted, whenever the document giving the legacies bore the seals of seven witnesses, that is to say of the seven persons who were required

[107] Ibid.
[108] "Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse." Maine, *Ancient Law*, 15.
[109] Maine, *Ancient Law*, 16.
[110] Jamieson, "The History of Adoption and its Relation to Modern Wills," 139.
[111] Maine, *Ancient Law*, 18.

to assist at the old mancipium or conveyance.[112]

While the conveyance ceremony had been omitted, the judges still regarded it properly gone through so as to suit the law which was not changed in wording. By using legal fiction, the "will" rid itself of cumbersome formalities, advancing itself to a next stage, which only required a written document, attested by seven witnesses, more approaching to a modern will. It could be seen that legal fiction was highly valued by Jamieson as a remedial agent to effect legal improvements[113] and bring law in harmony with social needs.

As a matter of fact, Jeremy Bentham, the leading English jurist anterior to Maine, had also discussed legal fiction. But his attitude towards it was more negative than positive, more of ridicule than of praise, which was criticized by Maine as "ignorance of their peculiar office in the historical development of law."[114] Maine gave legal fictions a full recognition as "invaluable expedients for overcoming the rigidity of law,"[115] facilitating the improvement of the law meanwhile sparing the "superstitious disrelish for change which is always present."[116] Without them, he claimed, "it is difficult to understand how society would ever have escaped from its swaddling clothes, and taken its first steps towards civilization."[117] He further cautioned readers against Bentham's ahistorical judgement.[118] These words obviously worked for Jamieson, who enthusiastically embraced Maine's praise of legal fiction in the development of "will".

However, Jamieson was selective in his embrace of Maine's ideas. He toned down the inevitable failure of legal fiction in modern society, which constituted an important

[112] Jamieson, "The History of Adoption and its Relation to Modern Wills," 145.
[113] Ibid., 139.
[114] Maine, *Ancient Law*, 16.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.

point in Maine's theorization. Maine claimed that "they have had their day, but it has long since gone by."[119] It was no longer necessary to effect ameliorations of the law through "so rude a device as legal fiction."[120] He even considered legal fictions as "the greatest obstacles to symmetrical classifications,"[121] which should be swiped out.[122] It can be seen that Maine's attitudes towards fiction was historical. He acknowledged its significance in the history of the law but dismissed its future role in a modern society.

While Jamieson acknowledged that "both [equity and legal fiction] are quite indefensible from a modern point of view,"[123] yet he reserved more compliments for legal fictions to which "Roman law and English law both owe much of their progress,"[124] and which effected "changes of vast importance … to the benefit of the whole community."[125] He further justified their existence, stating that

> when amendments in the written law could not be procured, without calling for any express alteration, and so creating alarm and opposition on the part of the timid and interested, the desired improvement was quietly affected.[126]

While realizing legal fiction was untenable from a modern perspective, Jamieson tended to stress the value and advantage it brought for a legal system, evading Maine's negative conclusion for it. This more or less overrated comment on legal fiction emphasizes that this instrument was not out of date, but still had a potential role to play in China. Moreover, by highlighting the achievement of legal fiction, particularly in

---

[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid., 17.
[123] Jamieson, "The History of Adoption and its Relation to Modern Wills," 139.
[124] Ibid.
[125] Ibid., 145.
[126] Ibid.

facilitating the advance of wills, he could reflect upon why the instrument of "will" was absent in China.

This is not due to China's total lack of legal fiction. Both Maine and Jamieson expressly assigned adoption as a type of legal fiction. Maine considered the fiction of adoption allowed "the family tie to be artificially created,"[127] based on which Jamieson wrote that "if there are no sons, then some one must be got who will feign himself to be a son."[128] Therefore, "adoption is a sort of legal fiction" too.[129] As China was the perfect model of adoption, it reveals that the nation was indeed blessed with this instrument for legal improvement. This instrument, however, was displaced and was unable to be used in developing wills, which was one of the reasons why this concept was absent in Qing China. But having access to this important instrument for ameliorating the law, China's gulf with the West was somehow narrowed a bit, showing the potential for its future change. This is remarkably different from Jamieson's previous stance, which only perceived their distinct attitudes towards ancestor worship, thus projecting a different voice from the Orientalist discourse of difference.

3.1.6 Roman Equity Clothed with English Conscience

The other device that prompted the development of wills in Roman law was equity, which Jamieson donned with English conscience. Roman equity in Maine's formulation started from the *Jus Gentium*, meaning Law of Nations. As Roman Civil law applied only to Roman citizens, the large body of foreigners who came to Rome for protection or commerce were not only without legal protection but also unsupervised.[130] As a measure of policing them and advancing trade, the Romans

[127] Maine, *Ancient Law*, 16.
[128] Jamieson, "The History of Adoption and its Relation to Modern Wills," 140.
[129] Ibid., 139.
[130] Maine, *Ancient Law*, 27-28.

extended their jurisdiction in cases concerning foreigners.[131] The principles Roman lawyers applied to those cases were formed by choosing those laws that were commonly recognized by Rome and other old immigrant communities.[132] Their "common ingredients" formed into *Jus Gentium*.[133]

Compared with pure Roman Civil law, *Jus Gentium* did not acquire much esteem at first.[134] It was not until the diffusion and popularization of the Greek conception of the Law of Nature or *Jus Naturale*, that people began to realize that these two laws were actually one.[135] The initial meaning of Nature in Greek "signified the physical world regarded as the result of some primordial element or law" to which the moral aspect was added until it encompassed not merely the physical world, but also "the thoughts, observances, and aspirations of mankind."[136] Greek philosophers held that the purpose of human life was to live in accordance with the principles of nature, "which nothing but self-denial and self-command would enable the aspirant to observe."[137] This became the tenet of Stoic philosophy and after the subjugation of Greece by Rome it "made instantaneous progress in Roman society,"[138] particularly among Roman lawyers.

After the word nature was popularly disseminated among the Romans, their lawyers gradually came to believe "that the old Jus Gentium was in fact the lost code of Nature."[139] Moreover, when the Prætor framed "an Edictal jurisprudence on the principles of the Jus Gentium," he was actually restoring that type of law.[140] The way they equalled each other was precisely through equity in its original sense of

[131] Ibid., 28.
[132] Ibid., 29.
[133] Ibid.
[134] Ibid., 30.
[135] Ibid., 30-31.
[136] Ibid., 31.
[137] Ibid., 32.
[138] Ibid.
[139] Ibid., 33.
[140] Ibid.

"levelling," which showed itself in *Jus Gentium* when the demarcations, distinctions and irregularities were constantly removed.[141] This also characterised the state of Nature which is simple, symmetrical, and intelligible.[142] Thus, Roman equity closely linked *Jus Gentium* with *Jus Naturale*, signifying a primitive state of natural order when everything was simple, stripped of later complications and boundaries. As a devoted student of Maine, Jamieson was familiar with the history of Roman equity:

> The Romans came early into contact with other types of civilization, such as the Greek, Phoenician, 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.[143]

While recognizing Roman equity's close relation with "jus gentium" and "law of nature," Jamieson explained the development of wills from a totally different perspective of equity. In the section 3.1.4, it has been discussed that the purchaser of the family was no longer a legatee in the conveyance ceremony, but could be any indifferent person. Since the heir himself need not be informed immediately, secrecy could thus be acquired in testament. But how could the testator ensure that the unconcerned purchaser would distribute the property in line with his directions? Jamieson analysed it with Praetor's equity, in which he completely followed the equity in the English sense without touching the original Roman sense at all. He claimed that

> the Judges in Rome in those days, the Praetors, to whom most of the improvements in Roman law is due, introduced another principle with the

[141] Ibid., 34-35.
[142] Ibid., 33.
[143] Jamieson, *Chinese Family and Commercial Law*, 6.

> application of which you, as students of **English law**, are familiar, viz., the doctrine of equity. They held that, as the so-called purchaser of the family gave nothing for it, he could not **in conscience** demand to be absolute owner for his own benefit, and therefore, though he took the legal estate, he took it subject to the conditions which the transferor might have imposed – in other words, he took it subject to paying the legacies.[144] (Bold added for emphasis)

In the above statement, although he was explicating how Roman equity assisted the transformation of the purchaser from heir to an indifferent person, his explanation started from an English notion of equity. When mentioning English law, he seemed to suggest the two were no different. His use of conscience is especially revealing for this is a hallmark word in English equity. Trained in the Inner and Middle Temple as an English barrister, Jamieson certainly was not a stranger to this concept. As showing below, his understanding of Roman equity was no different from his perception of English equity:

> The whole of the English system of equity, prior to the time when legislature began to touch it, was judge-made law. And this was not merely an addition to the common law, but was often in direct contradiction to it – the justification for that being, that the plaintiff or defendant, as the case might be, was not morally or **in conscience** entitled to the rights the common law gave him, and therefore, concluded the judge, he should not have them.[145] (Bold added for emphasis)

The repeated "conscience" in Jamieson's explanation, was developed at a time when "law and morality were not yet clearly distinguished"[146] and when people could not

[144] Jamieson, "The History of Adoption and its Relation to Modern Wills," 144.
[145] Ibid., 139.
[146] Geldart, *Elements of English Law*, 38.

get relief in Common law courts. Since it was seen that "the King's justice was not exhausted in the powers conferred on his courts" and "a reserve of justice remained with the King," these people began to "petition the King and his Council for redress."[147] These petitions were dealt with by the Chancellor, which in the early times was usually "an ecclesiastic, commonly a bishop, … a good judge of questions of morality or 'conscience.' He is commonly spoken of as the keeper of the King's conscience."[148] The "mere application of moral sense" developed into "definite rules" of equity.[149] The history of English equity shows that it is deeply rooted in morality and conscience.

Therefore, when Jamieson applied the concept of "conscience" to prevent the unconcerned purchaser to become an absolute owner, he actually clothed Roman equity with the spirit of English equity. The ease with which he picked up the latter when discussing the former also suggests that two were no different in his eyes. According to his construction, equity in the English sense of conscience converged with Maine's elaboration of *Jus Gentium* (Law of Nations) and *Jus Naturale* (Law of Nature), representing universally recognized principles of fairness.

China had access to equity in this sense, which took the form of custom.[150] But it was insufficient for wills to develop in China, because Roman wills were advanced to the next stage in the court trial, through conscious efforts of Roman judges, indicating the important role played by legal professionals and a formal legal system in this process. In contrast to Roman and English equity, which was developed by Praetors and Chancellors into a formally recognized legal system, amorphous equity in China had by no means grown into a formal system. China's lack in this aspect constituted another factor that impeded the development of wills in China.

---

147 Ibid.
148 Ibid., 40.
149 Ibid., 43.
150 This will be discussed in detail in section 3.2

But even so, the addition of English equity as a comparison with China was by no means insignificant in this case. From the very beginning, Jamieson had been contemplating China's absence of the concept of "will" through Roman Civil law, a law from thousands of years ago, implying that Chinese law, in a temporal sense, was equivalent to an ancient residue in which "considerable traces of Archaic Law" could be found.[151] Correspondingly, the Chinese nation was also an ancient one, a mirror reflecting the living past, strongly echoing the colonial discourse that distanced China from the modern West. But Chinese law was immediately dragged from a bygone past to a recent present since English law was added in the scene. As the operating law of the British empire, it is imbued with modern vitality, symbolizing a modern legal system. With it as a comparison, Chinese law was elevated to be in the same scene with a modern law, comparable with it though unfavourably. By narrowing their temporal difference, Jamieson displays his shifting perception of Chinese law.

3.1.7 Credit Went to the Lawyer

In Jamieson's formulation, wills were "the outgrowth of the Civil Law as interpreted and elaborated by successive generations of professional lawyers."[152] According to this opinion, lawyers were inextricably involved in the development of wills. Also referred to as jurists by Jamieson, they were a group of people who "systematically pursued" "the study of law."[153] "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*,"[154] meaning "'answers of the learned in the law'" as Maine explained.[155] Indeed, these jurists could represent and defend their clients in return for remuneration in the later

[151] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 193.
[152] Ibid., 205.
[153] Jamieson, *Chinese Family and Commercial Law*, 7.
[154] Ibid.
[155] Maine, *Ancient Law*, 20.

development of the law.[156] Meanwhile, the praetor, who had actual judicial power, "was also a jurisconsult himself, or a person entirely in the hands of advisers who were jurisconsults, and it is probable that every Roman lawyer waited impatiently for the time when he could fill or control the great judiciary magistracy."[157] Roman lawyers had played the multi-roles of teaching and studying law, compiling their studies, representing clients, and serving as judges when they were promoted to this position.

According to Jamieson, this group of legal professionals played an eminent and constructive role in the development of will. First, they were indispensable in the creation of the above discussed equity, which "is one of the devices by which gradual improvements are introduced by the lawyers and judges while the written law remains the same."[158] Then, legal fiction "which has worked hand in hand with equity"[159] is also used by praetors who assumed that conveyance ceremony had been observed which in fact was dispensed with, from which grew the "Praetorian will."[160] Thus, the true agents behind the development of "will" were in fact the jurists and praetors who ingeniously invented and made use of equity and legal fiction.

This emphasis on the role of jurists was also drawn from Maine, who described in *Ancient Law* that it was under the innovation of the praetor that the "emblematic ceremony" in testament was removed.[161] Moreover, he believed that the advancement of the entire legal system was also indebted to the work of the jurists:[162]

> By adjusting the law to the states of fact which actually presented themselves and by speculating on its possible application to others which might occur, by

[156] Xu Jiali 徐家力, and Wu Yunhao 吳運浩, *Zhongguo lüshi zhidu shi* 中國律師制度史(The History of Chinese Lawyers), (Beijing: Press of China University of Political Science and Law 中國政法出版社, 2000), 18.
[157] Maine, *Ancient Law*, 37.
[158] Jamieson, "The History of Adoption and its Relation to Modern Wills," 139.
[159] Ibid.
[160] Ibid., 145.
[161] Maine, *Ancient Law*, 123.
[162] Ibid., 24.

> introducing principles of interpretation derived from the exegesis of other written documents which fell under their observation, they [jurisconsults] educed a vast variety of canons which had never been dreamed of by the compilers of the Twelve Tables and which were in truth rarely or never to be found there.[163]

In Maine's stance, the jurists accumulated a great wealth of legal principles through their interpretation, annotation and adjustment,[164] which essentially promoted the development of the law. This elaboration of great achievement accomplished by Roman jurists in the entire legal system was also absorbed by Jamieson. He regarded *Responsa Prudentum* as "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."[165] With this conception, Jamieson began to reflect upon the fundamental differences between Chinese and Roman law, which in his eyes started in a similar way but branched off on remarkably different routes later:

> Both began with almost identically the same social organization, but while the one made the most rapid progress, the other has remained stationary to this day. The Roman lawyers built up the most marvellous system of jurisprudence the world has ever seen – a system that has given birth to nearly all the Law of modern Europe. In China, on the other hand, where public advocates are not tolerated, the Law is in a state of extreme confusion, and its administration a reproach to the age. National progress is under these circumstances impossible."[166]

---

[163] Ibid., 20.
[164] Ibid., 20-24.
[165] Jamieson, *Chinese Family and Commercial Law*, 7.
[166] Jamieson, "The History of Adoption and its Relation to Modern Wills," 139.

For the success of Roman law, Jamieson almost gave all the credit to the Roman lawyers, who in his eyes established the most splendid legal system. He even proclaimed that "it was precisely in those countries which could boast of a body of trained lawyers that the greatest progress was made,"[167] establishing a direct link with lawyers and the progress of law. China, according to Jamieson, was its opposite, possessing neither "a class of professional lawyers, nor schools or colleges where the study of law has been systematically pursued."[168] This lack impeded the essential improvement and achievement of the entire legal system, which even negatively affected the whole nation's progress, echoing Maine's assertion that "instead of the civilization expanding the law, the law has limited the civilization."[169] Without this important class of lawyers, naturally, it was impossible to develop the modern instrument of wills in China.

Jamieson's observation of Chinese intolerance of lawyers was probably drawn from his judicial experience in Qing China, where indeed no native lawyers in the Western sense publicly appeared in a purely Chinese Court. But this does not mean traditional Chinese society was completely devoid of a similar group of people. Since the Western Zhou dynasty (西周 Xizhou 1046 BC - 771 BC), there had appeared the precursors of *Song-shi* (訟師), a type of law practitioners which officially took shape as a class in the Spring and Autumn Period (春秋 Chunqiu 770 BC - 476 BC).[170] After a long period of development, they had matured in the Ming and Qing dynasties.[171] They provided a variety of services including writing legal documents

---

[167] Ibid.
[168] Jamieson, *Chinese Family and Commercial Law*, 7.
[169] Maine, *Ancient Law*, 14.
[170] Dang Jiangzhou 黨江舟, *Zhongguo songshi wenhua: gudai lüshi xianxiang jiedu* 中國訟師文化－古代律師現象解讀 (Chinese Culture of Song-shi – Interpreting Ancient Lawyers), (Beijing: Peking University Press 北京大學出版社, 2005), 20-33.
[171] Dang, *Zhongguo songshi wenhua*, 64-73; Qiu Pengsheng 邱澎生, "Yi fa wei ming: songshi yu muyou dui mingqing falü zhixu de chongji" 以法為名：訟師與幕友對明清法律秩序的衝擊 (In the Name of the Law: The Impact of Song-shi and Mu-you on Legal Order in Ming and Qing China), *Zhongxi falü chuantong* 中西法律傳統 (Legal Tradition in the West and China), no. 00

for litigating parties, offering consultation, mediating between two sides, and even bribing the officials.[172] These legal services to some extent resembled those provided by Western lawyers.

However, they were essentially different. These Chinese legal practitioners had never acquired official recognition. Dynasty after dynasty, they were prohibited by the national Codes, which reached its peak in the Qing.[173] The Great Qing Code listed detailed penalties for *Song-shi* and their activities under the section of "instigating litigation" (教唆詞訟 Jiaosuo cisong).[174] Moreover, in the official depictions, they were despised as litigation scoundrels (訟棍 Songgun) who were selfish, cunning and dishonest, meddling in other people's business, stirring up enmity and even fabricating cases for their own profit,[175] and thus unworthy of respect. Their position in traditional Chinese society was not only embarrassing but also illegal, unlike the high social status and esteem of Western lawyers. The unfriendly environment propelled Chinese *Song-shi* to carry on their work in a clandestine and low-profile way.

Jamieson's perception of Chinese intolerance of lawyers points to this phenomenon. The absence of "a class of professional lawyers" mentioned by Jamieson does not necessarily indicate his unawareness of the existence of *Song-shi*. Rather, it more indicates China did not have lawyers in the Western sense. Throughout he held the benchmark of Western legal profession to evaluate China, where indeed no such

---

(2008): 255.

[172] Dang, *Zhongguo songshi wenhua*, 91-141.

[173] Dang, *Zhongguo songshi wenhua*, 200-202; Lin Qian 林乾, "Songshi dui fa zhixu de chongji yu qingchao yanzhi songshi lifa" 訟師對法秩序的衝擊與清朝嚴治訟師立法 (The Impact of Song-shi on Legal Order and the Legislations against Song-shi in Qing Dynasty), *Qingshi yanjiu* 清史研究(Studies in Qing History), no. 3 (2005): 1-12.

[174] For the penalties, see Yao Yuxiang 姚雨薌, and Hu Yangshan 胡仰山, *Daqing lüli huitong xinzuan* 大清律例會通新纂 (The New Compilation of Da Qing Lü-li), (1873；repr., Taipei: Wenhai Press 文海出版社, 1964), 4: 3025-3034.

[175] Wu Qi 吳琦, and Du Weixia 杜維霞, "Songshi yu songgun: mingqing songshi de shehui xingxiang tanxi"訟師與訟棍：明清訟師的社會形象探析 (Song-shi and Litigation Scoundrel: Analysis of The Social Image of Song-shi in Ming and Qing Dynasties), *Xuexi yu tansuo* 學習與探索(Study and Exploration), no. 7 (2013): 146-147; Ch'ü T'ung-tsu, *Law and Society in Traditional China* (Paris: Mouton, 1965), 285.

equivalent existed. He mentioned that China had no "schools or colleges where the study of law has been systematically pursued,"[176] which is again a Western measure. This type of law schools was an important establishment in Western legal culture in which lawyers received systematic training. The Middle Temple and Inner Temple where Jamieson received his own legal education were such institutions, long enjoying prestige. Together with Gray's Inn and Lincoln's Inn, they formed the Inns of Court, which were a professional association for English barristers. Whereas in China, teaching and learning of this trade was conducted underground, either through self-teaching private books written by experienced *Song-shi*, or apprenticeship under a master.[177] Neither were comparable to the formal legal establishment and professional quest of law in the West.

Chinese intolerance of lawyers was deeply rooted in the Confucian ideal that there should be no lawsuits. As Confucius had claimed, "In hearing litigations, I am like any other body. What is necessary, is to cause the people to have no litigations."[178] (聽訟，吾猶人也。必也使無訟乎!)[179] This ideal profoundly influenced Chinese magistrates, who were also reluctant to see people litigating in their courts. Most of them, educated in Confucianism, would prefer to see people resolve their conflicts through moral teaching,[180] and maintain a harmonious relation with each other. Section 2.1 has discussed a case personally witnessed by Jamieson, in which the Chinese judge dismissed the litigating sides to work things out through self-mediation.[181] The Confucian aversion to litigation deeply influenced Chinese attitudes towards *Song-shi*, who could never publicly develop their profession as in the West.

---

[176] Jamieson, *Chinese Family and Commercial Law*, 7.
[177] Dang, *Zhongguo songshi wenhua*, 249.
[178] James Legge, trans., *The Chinese Classics*, vol. 1, *Confucian Analects, The Great Learning, and The Doctrine of the Mean* (London: Trübner & Cp., 1861), 121.
[179] Yang Bojun 楊伯峻, *Lunyu yizhu* 論語譯注(Annotations to the Analects), (Hong Kong: Chung Hwa Book Co. 中華書局, 2011), 262-263.
[180] Dang, *Zhongguo songshi wenhua*, 209-211.
[181] Mixed Court, *The North-China Herald and Supreme Court & Consular Gazette*, September 27, 1873.

Compared to the much repressed *Song-shi*, Jamieson specially analysed a more recognized occupation in China,[182] that is *Shi-ye* (師爺), or secretaries to officials. They were the group "who are supposed to have a special knowledge of law."[183] Their position was closely connected with the whole Chinese official and administration system as Jamieson analysed it:

> 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 judgement would entail. If he should unhappily go wrong …, the Court of Appeal, better advised, in correcting the judgement, 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.[184]

Indeed, trained in Confucianism, local officials in the Qing more often than not were not experts in law;[185] thus there was a common need, whether among lower county officials or higher provincial officials, of *Shi-ye* to assist them in trying cases.[186] As grave cases pertaining to penalties up to banishment in the Ming and Qing would have to be submitted to higher levels of judges for re-examination,[187] officials who made

[182] Qiu, "Yi fa wei ming," 246.
[183] Jamieson, *Chinese Family and Commercial Law*, 7.
[184] Ibid., 7-8.
[185] Guo Jian 郭建, *Gudai faguan mianmian guan* 古代法官面面觀 (Diverse Glimpses into Ancient Judges), (Shanghai: Shanghai Classics Publishing House 上海古籍出版社,1993), 92.
[186] Qiu, "Yi fa wei ming," 266.
[187] Ibid., 234-235.

wrong judgements would face different levels of punishments,[188] as pointed out by Jamieson. This set the tone for the nature of *Shi-ye*, namely to help his employer evade mistakes in adjudication. Here Jamieson detected the essential difference between Roman jurist and Chinese *Shi-ye*. While the former was preoccupied with interpreting the law, adapting it to social reality and offering opinions on cases, thereby promoting Roman law to grow, the latter was only concerned with guiding his master safely through the superior re-examinations, caring nothing about adducing legal principles or advancing the law.

To return to the original point of the development of wills, Jamieson, through recognizing Roman lawyers' achievements in advancing wills and the entire civil law, reflected upon China's absence of wills. With the measure of Western legal profession, he penetrated into China's intolerance of lawyers, lack of law schools, especially the profession of *Shi-ye*, who possessed legal knowledge but could hardly compare to the Roman jurists. Amid this climate, development of wills was certainly not possible, nor was national progress.

Starting from the absence of a source concept in China and the subsequent absence of target concept of "will" in translation, Jamieson developed the dead end of a translation process into a serious legal study. Translation, in this case, became the measurement of whether China had wills. The impossibility to build an equivalence in language empowered the translator to reflect upon the two legal systems in a profound way, unveiling an illuminating chapter in Western understanding of Qing law.

With a comparative method, the reasons for the success of Roman Law, including diminishing ancestor worship, invention and application of legal fiction and equity, as well as a wealth of lawyers who ingenuously made all development possible, vividly mirror the reasons for China's failure. The nation's ancestor worship in full force,

[188] Ibid., 235-239.

displaced legal fiction, absence of equity as a formal system and professional lawyers explain its inevitable failure to develop wills and account for the impossibility to build an equivalence through translation. The central role of Roman law in mirroring China's failure echoes Said's assertion that "Orientalism responded more to the culture that produced it than to its putative object."[189]

In his comparative studies, ancestor worship was the most important fruit he derived from the relationship of Roman and Chinese law, which paralleled Henry Maine's elaboration of Roman and Hindu law. This fruit, in return, changed the original way Roman law was conceptualized by Maine. On the other hand, the juxtaposition of Roman and Chinese law reveals the latter's inferiority, showing that contemporary Qing law was merely comparable with the relics of ancient Western law, and even worse, compared unfavourably. The understanding was largely in line with the Orientalist discourse of East-West distinction, whether culturally or temporally. It was only through the English clothing of Roman equity that Jamieson led Chinese law to a modern stage. The following section would follow this line, investigating how the translator conceptualized Qing law by means of modern English law.

3.2 Understanding Qing Widow "Inheritance Rights" through English Legal Concepts

With an in-depth analysis of Jamieson's translation and commentary, this section will mainly explore how he wielded English legal concepts to facilitate his understanding of the ambiguous relationship between Qing widows and sons in inheriting property, thereby establishing a common ground between the two legal systems and potentially disrupting the Orientalist discourse of East-West distinction. The vitality of modern English law also acted to make traditional Chinese law more contemporary, rather than

[189] Said, *Orientalism*, 22.

languishing as a mere inferior counterpart of Roman law.

3.2.1 Conflicts Between Widow and Adopted Son in Inheritance

The Qing clause that gives rise to potentially conflicting interests between a widow and adopted son in inheriting property is the starting point of this section. The original text is the following one:

> 婦人亡夫無子守志者，合承夫分，須憑族長擇昭穆相當之人繼嗣。其改嫁者，夫家財產及原有妝奩，並聽前夫之家為主。[190]

Jamieson's translation of the clause is as follows:

> A widow left without a son and not remarrying shall be entitled to her husband's share of 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 revert to the family of her deceased husband.[191]

As demonstrated above, Jamieson translated "合承夫分" into "entitled to her husband's share of family property"[192] indicating that the Qing widow had a proprietary right to her husband's property. But a problem immediately arises from this translation. Since the latter half of the law prescribes that the widow had an obligation to appoint a proper heir for her late husband through consultation with

---

[190] *Daqing lüli huiji bianlan* 大清律例彙輯便覽 (A Collection of the Great Qing Code), (Beijing: 善成堂 Shan Cheng Tang, 1877), 8: 29. The author adds punctuation in Qing clauses appearing in this thesis.

[191] Jamieson, "Translations from the Lü-Li: Inheritance and Succession,"195.

[192] Ibid.

family seniors, which Jamieson had translated, did he mean the adopted son succeeded to nothing regarding the property? This was not likely to be so.

In his note, Jamieson made it very clear that "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."[193] Meanwhile, he explicitly claimed that "the widow takes nothing in her own right,"[194] revealing she could not be an absolute owner. But if so, what did he mean by "entitled to her husband's share of property"? Here, of course the clause points to a sonless widow. But it also prescribes a son should be adopted into the family, projecting a family where there was a widowed mother and adopted son. Under the circumstances, there are potential conflicting interests in inheriting the property. So what is their relationship in this respect? To what extent and in what way did the widow own the property?

3.2.2 Ambiguous Meaning of the Clause

As a matter of fact, there has not been a consensus on the meaning of the clause. Xue Yunsheng (薛允升 1820-1901), a well-known legal scholar in the late Qing, interpreted the law as this: "if the widow remains faithful to her late husband, the estate shall go to her; if she remarries, she cannot claim the estate" (守志則家業歸之，改嫁則否).[195] By this, he seemed more inclined to regard the widow as the owner of the property as long as she remained faithful and did not remarry. But he did not clarify the adopted son's right in this respect. His interpretation, in fact, was not clearer than the clause itself.

Contemporary interpretations diverge. One side holds that the clause means the

[193] Ibid., 202-203.
[194] Jamieson, "The History of Adoption and Its Relation to Modern Wills," 142.
[195] Xue Yunsheng 薛允升, *Duli cunyi chongkan ben* 讀例存疑重刊本 (A Typeset Edition of Concentration on Doubtful Matters in the Perusal of the Sub-statutes), (Taipei: Cheng Wen Publishing Co., LTD. 成文出版社, 1970), 2: 247. Translation made by the author of the thesis.

widow owns her husband's share of the property. According to Xing Tie (邢鐵), a sonless widow was an undoubted heir to her husband's property.[196] Based on Qing cases and sale deeds, he believes even a widow with sons was still the actual successor to and manager of the property. He terms her right as "succession and custody" (繼管 jiguan). [197] Only after she died could her sons inherit; thus the property was inherited from the mother rather from his late father.[198] Such a view is echoed by Zheng Quanhong (鄭全紅), holding that a sonless widow choosing not to remarry had the right to succeed to her late husband's property.[199] A Feng (阿風) also ascertains that the names of sonless widows appeared on many family division documents in the Qing, suggesting that she acquired the share of property that originally belonged to her husband.[200]

But many other scholars believe that the clause meant the mother only exercised management right rather than ownership. Ch'ü T'ung-tsu (瞿同祖 Qu Tongzu) denies the wife's right to inherit her late husband's property. He wrote that "a wife owned no property, … the family property descended directly to her son or adopted heir after her husband's death. If her son was not yet grown, she could manage the property on his behalf until he reached maturity".[201] Shiga Shūzō (滋賀秀三) also believes that she held the property for the heir.[202] A similar view was also expressed by Kathryn

---

[196] Xing Tie 邢鐵, *Jiachan jicheng shi lun* 家產繼承史論 (History of Family Property Inheritance), (Kunming 昆明: 雲南大學出版社 Yunnan University Press, 2000), 66.
[197] Ibid., 63-66.
[198] Ibid., 66.
[199] Zheng Quanhong 鄭全紅, *Minguo shiqi nüzi caichan jichengquan bianqian yanjiu: chuantong xiang xiandai de shanbian* 民國時期女子財產繼承權變遷研究－傳統向現代的嬗變(Changes in Women's Inheritance Rights in Republican China: An Evolution from Tradition to Modernity), (Beijing: Law Press 法律出版社, 2013), 31.
[200] A Feng 阿風, *Mingqing shiqi huizhou funü zai tudi maimai zhong de quanli yu diwei* 明清時期徽州婦女在土地買賣中的權力與地位 (The Status and Power of Women in Land Transactions in Huizhou in Ming and Qing Dynasties) (Beijing: Social Sciences Academic Press 社會科學文獻出版社, 2009), 61.
[201] Ch'ü, *Law and Society in Traditional China*, 104.
[202] Shiga Shūzō 滋賀秀三, *Zhongguo jiazu fa yuanli* 中國家族法原理 (Principles of Chinese Family Law), trans. Zhang Jianguo 张建國, and Li Li 李力 (Beijing: Law Press 法律出版社, 2002), 339.

Bernhard who claims that this law

> explicitly linked a widow's receipt of her husband's property to her adoption of an heir … She could no longer inherit her husband's property but was merely to receive it to hold in trust for her husband's heir, one that she herself was now legally obligated to adopt.[203]

The widow thus "was relegated to a custodial role."[204] Further, Lu Jingyi (盧靜儀), based on her research of cases decided by the Chinese Supreme Court (大理院 Da li yuan 1912-1928)[205] in the early Republican period whose civil law retained many parts of the Qing law, including the clause under examination, echoes the above views. The Court's interpretation of "合承夫分" is as following:

> If a sonless widow remained chaste and loyal to her late husband, and a family heir has not yet been adopted, she is entitled to the custody of her husband's share of property, but she was not the successor to it. (夫亡無子，尚未立嗣，守志寡婦承受並代管其夫應繼之分，但並非為遺產承繼人。)[206]

In the process of trying cases, the Supreme Court reiterated the widow's status as a

---

[203] Kathryn Bernhardt, *Women and Property in China, 960-1949* (Stanford: Stanford University Press, 1999), 62-63.

[204] Ibid., 48. The difference between Bernhardt and Shiga Shūzō was that the latter held that this rule lasted from the Song to the Qing, while Bernhardt paid more attention to its changing nature, arguing that such a rule only started from the Ming dynasty. Ibid., 47-48.

[205] Dali Yuan (大理院) was established in the late Qing and was maintained by the Peking Government as the Chinese Supreme Court, exercising the power of interpreting the law. Zhang, *Zhongguo fazhi shi*, 481-482.

[206] Lu Jingyi 盧靜儀, *Qingmo minchu jiachan zhidu de yanbian: Cong fenjia xichan dao yichan jicheng* 清末民初家產制度的演變－從分家析產到遺產繼承 (The Changes of the Institution of Family Property in Late Qing and Early Republican China: From Family Division to Inheritance), (Taipei: Angle Publishing 元照出版有限公司, 2012), 163. Translation made by the author of the thesis.

manager rather than an actual heir.[207] If the heir was a minor, the widow could manage the property until he had come of age.[208] As to disposition, whatever the age of the son, the widow has to be a part of any disposition for it to take effect.[209]

The two sides show that the original meaning of "合承夫分" was ambiguous, leaving much room for interpretation. Against such a background, the important question is not whether Jamieson's translation was in line with the original law, but what his translation of the clause meant, how Jamieson tried to pin down its meaning, and, most importantly, the relation between the widow and adopted son in inheriting family property. In the process, how did he incorporate elements of English law to facilitate his understanding and analysis? In what ways were English legal concepts changed to suit Chinese legal reality?

3.2.3 Widow as Trustee: Application of English Legal Concepts

Among the puzzles revolving around Jamieson's translation of the clause, the potential conflicts between widow and adopted heir in inheriting the property must be first addressed. In regard to this question, the following note provides clues:

> 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.[210] (Bold added for emphasis)

In this note, he defined widow's right to that of her sons' with a typical English legal term "trust," which refers to "a unique way of owning property under which assets are held by a trustee for the benefit of another person, or for certain purposes, in

[207] Ibid., 162-163.
[208] Ibid., 163.
[209] Ibid., 156.
[210] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.

accordance with special equitable obligations."[211] The trust is different from absolute ownership, in which the owner is "entitled to the exclusive and unrestricted right to possess, use, and otherwise enjoy the asset for his *own* benefit."[212] By introducing the English concept of trust, Jamieson, however, separated the rights of the widowed mother and the sons over the property. According to his statement, the widow played the part of trustee, entitled to custody and management of the property, while her sons or adopted successor were beneficiaries. In this way, the tension between them are resolved. Continuing this, he introduced another English legal concept, stating that

> no special provision is made for the widow as such, but she is amply cared for. … 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 [sons'] dealing with it [property] without the sanction of the mother.[213] (Bold added for emphasis)

Originally, Qing China did not have the separation of legal and equitable title, which were respectively recognized by common law and equity in English law. This statement, however, pointed out that equity in China rested in Chinese custom, in relation to the English common law which naturally corresponded to the Chinese Code. Why he made such a parallel will be analysed in the next part. Here the thesis follows Jamieson's reasoning, so as to observe how he used equity to construe a widowed mother's rights over the property.

In this case, the mother, as a trustee, was protected by equity. In other words, equity, wielding its important instrument of trust, assisted the trustee, which was by no means the way English equity works. It usually assigns those unprotected by common law the position of beneficiary whose interests are recognized and protected by equity.

---

[211] Gary Watt, *Trusts & Equity* (Oxford: Oxford University Press, 2012), 18.
[212] Ibid.
[213] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.

The questions then arise: why did Jamieson not follow English law in applying equity and trust? Why did he not allot widow the part of beneficiary, in which way, equity could assist her according to the usual English manner?

A brief answer for these questions is that this could not be done because Jamieson emphasized the convergence of the trustee's role and Chinese widowed mother's role in custody and management. While in English law "the duties of a trustee may be indefinitely varied by the terms of the instrument which creates the trust,"[214] one important category of his/her duty is custody and management,[215] which coincides with the authority of the widowed mother in disposing with family property. Jamieson claimed that the mother "can refuse to consent to a division of the estate, in which case she has the practical control of the whole inheritance."[216] For any transaction to take effect, she must be a party,[217] because

> public opinion is so strong on this point that a son who would attempt to sell the patrimony against the will of the mother would be scouted by Chinese society that most probably no purchaser would venture to take a transfer at his hands.[218]

It was this emphasis on the mother's role in administering the family property that led him to allot her the part of trustee. If she was assigned the position of beneficiary, it would result in a substantial loss of the management and administration right on her part, obviously running counter to Jamieson's stress on the important role played by the widowed mother in the Chinese family.[219] Therefore, he changed the way English

---

[214] Geldart, *Elements of English Law*, 152.
[215] Ibid.
[216] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.
[217] Ibid.
[218] Ibid.
[219] Jamieson's conceptualization has the side effect of failing to encompass her right to maintenance, although he was well aware that "she was amply cared for." See Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.

equity and trust function so as to accommodate to this role. In the meantime, the sons or adopted successor, as beneficiaries, assumed the "legal estate,"[220] which was a total reverse of the usual English arrangement.

Against this understanding, his translation of "合承夫分" into "entitled to her husband's share of family property"[221] begins to be understandable. As the latter half of the clause had made an obligation for the widow, through consulting with family seniors, to appoint an heir in succession to her late husband, the sonless status was not a permanent state. As the law intended it, eventually a proper heir would be in place, together with the widow, constituting a family with mother and adopted son. Living under the same household, their situation would be one that Jamieson discussed in the note: the widow is "entitled to the custody and management of her husband's share in trust for her sons or the adopted successor,"[222] in this case for the adopted successor. Following this line of reasoning, his translation of "合承夫分" into "entitled into her husband's share of family property"[223] in fact meant she was the equitable owner, holding the property in trust for the future adopted son, who was the beneficiary and legal owner. In this way, Jamieson separated the equitable and legal title of the family property, distributing them respectively to the widowed mother and adopted heir.

Facilitating his understanding of Chinese law, English legal concepts enabled him to verbalize a more detailed explanation to complement his literal but ambiguous translation and fix the vagueness of the original clause, thereby easing potential conflicts between widowed mother and adopted son over family property. Moreover, his conceptualization of Chinese legal phenomenon with English legal concepts elevated Qing law onto a modern scene, narrowing the temporal distance between the Orient and the Occident and projecting a different position to his discussion of wills.

---

[220] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.
[221] Ibid., 195.
[222] Ibid., 202.
[223] Ibid., 195.

The mutual accommodation between the two legal systems further reveals a more egalitarian perspective in the immense power imbalance between Chinese and Western legal culture.

3.2.4 Convergence of Equity and Chinese Custom

As discussed, widow's right in management and disposition of family property was protected by "equity in the shape of custom." The existence of equity in his interpretation of Chinese law was no surprise, since equity, aside from being a legal system, also represented universal justice and fundamental principles of fairness. But as to why he found equity in custom and drew a parallel between the two, a more comprehensive investigation is needed, especially regarding how he saw the function of Chinese custom, and the common ground it shared with the role of English equity.

As has already been analysed in section 2.1 and 2.5, the special position of custom in Jamieson's learning of English law made him pay special regard to custom in translation and research of Chinese law. He pointed out that many clauses before being absorbed into the law were custom.[224] There were also customs which were never not codified but effectively governed people's behaviour. He believed custom was a more flexible instrument than the code, quicker to respond to changes among the populace. While the code, deficient in instruments of change and looked upon "with superstitious reverence,"[225] languished, "manners and customs changed,"[226] governing people's lives in a way different from the code, filling the gap that was unmentioned there and in a way ameliorating the rigidity of the Code. In one instance discussed by Jamieson, the Qing Code nullified marriages that went against the strict conditions for marriage. The populace, especially the lower classes, however, formed their own manners and

[224] Jamieson, *Chinese Family and Commercial Law*, 3.
[225] Jamieson, "The History of Adoption and its Relation to Modern Wills," 138.
[226] Ibid., 139.

customs that habitually relaxed such provisions and were later absorbed by the law.[227] This case vividly demonstrates that Chinese customs mitigated the severity of the codified law in people's actual practices as Jamieson perceived it.

This feature precisely coincides with the role of equity in improving and softening the law as has been discussed in the development of wills. Adopting Maine's elaboration, Jamieson very much emphasized equity as an important instrument for effecting changes, as he said "equity is one of the devices by which gradual improvements are introduced by the lawyers and judges, while the written law is the same" whether in Roman or English law.[228] According to his elaboration, equity toned down "the asperities and rigidity of the common law."[229] Due to their convergence in bettering and softening the law, Jamieson believed that Chinese custom played a similar role to that of equity and believed that China had its own equity, which was not formally institutionalized, but took the shape of custom.

The present case concerning women very likely reinforced such a notion, because both Chinese custom and English equity extended their protection to women who were legally vulnerable in both societies. As revealed in the clause under discussion, the Qing Code only mentioned sonless widows when the heir had not yet been adopted, nowhere stating that family property could go to widowed mothers who lived with their sons. Likewise, the statute against "separation of household and property" (別籍異財 Bieji yicai)[230] merely gave the mother the right to prevent separation but nothing more. Jamieson in fact had a very clear perception of the inadequate protection the Code proffered to the mother, as shown in his translation and explication of the clause against "junior members appropriating family property" (卑幼私擅用財 Beiyou sishan yongcai):

---

[227] Jamieson, "Translations from the General Code: Marriage Laws," 82.
[228] Jamieson, "The History of Adoption and its Relation to Modern Wills," 139.
[229] Jamieson, *Chinese Family and Commercial Law*, 6.
[230] For the original clause, see *Daqing lüli huiji bianlan*, 8: 53-54. Jamieson also translated them, see Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 196-197.

> 凡同居卑幼，不由**尊長**，私擅用本家財物者，十兩，笞二十，每十兩加一等，罪止杖一百。若同居尊長應分家財不均平者，罪亦如之。[231]
>
> 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.[232] (Bold added for emphasis)

The theme of this clause, as he saw it, was that "none of the junior members of family may appropriate any portion of the general estate to his own use without the consent of the seniors,"[233] suggesting seniors' (尊長 zunzhang) right in managing the property. But who were included in the seniors? Did it include the widowed mother? He particularly made an analysis of his translation of "尊長" as "seniors" which "is explained to mean 'the Father or Grandfather class' and 'the elder brother class.'"[234] Jamieson's explanation was in fact drawn from the commentaries to the original Code which said that "Grandfather and father are seniors in relation to son and grandson who are juniors; elder brothers are seniors in relation to younger brothers who are juniors." (父輩曰尊而祖輩同，子輩曰卑而孫輩同，兄輩曰長弟輩曰幼.)[235]

When encountering key concepts, Jamieson, in his translation, inclined to settle with a term with a general meaning, then made a more in-depth elucidation in his note. As the original Chinese commentary did not mention mothers, he said "it is doubtful

---

[231] *Daqing lüli huiji bianlan*, 8: 54.
[232] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 197.
[233] Ibid., 202.
[234] Ibid.
[235] *Daqing lüli huiji bianlan*, 8: 54. Translation made by the author of the thesis.

if this includes the 'mother class,'" [236] detecting that the mother's right in administration of property was to a great extent disregarded by the Code. In the note, he expressly claimed that "no special provision is made for the widow."[237] Therefore, in his eyes, the Code did not offer much protection to the widowed mother's trustee role, which had to be remedied by "equity in the shape of custom."[238]

Similar to the Qing Code, which failed to offer protection for widowed mothers, English common law suffered a similar defect regarding married woman's property rights. William Blackstone wrote that

> by marriage, the husband and wife are one person in law; that is, the very being, or legal existence of a woman is suspended during marriage, or at least incorporated and consolidated into that of the husband, under which wing, protection and cover she performs everything.[239]

Under the status of coverture, the property right of an English married woman was much eroded. By common law, she could not possess any property of her own, nor dispose of it or "make a will without the concurrence of her husband."[240] Even her own profits by her own separate trade belonged to her husband.[241] But the late nineteenth century was a time when protest was levelled at such unequal treatment of women. In 1870, the Married Women's Property Act was passed, which recognized married woman's earnings, "certain inherited property" and "registered investments" as her separate property.[242] This Act was also one of Jamieson's reference materials

---

[236] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.
[237] Ibid.
[238] Ibid.
[239] Blackstone, *Commentaries on the Laws of England in Four Books*, 1: 442.
[240] Joan Perkin, *Women and Marriage in Nineteenth-Century England* (London: Routledge, 1989), 17.
[241] Ibid., 16-17.
[242] Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto and Buffalo: University of Toronto Press, 1983), 179-181.

for his 1872 Michaelmas Term General Examination;[243] therefore, he knew well married woman's original position in the common law and the change brought by this Act.

However, once issued, this Act was immediately attacked for its inadequate protection offered for married women.[244] It barely satisfied feminists wishing for equal treatment in marriage and married women's financial independence as a feme sole.[245] To say nothing else, the act had by no means extended its protection to all property, but only protected the limited kinds above mentioned.[246] Because the Act needed to be studied for his examination, Jamieson was aware of its restriction and that a large portion of married woman's property could only be protected by equity through trust. After all, before this Act, trust was the most important way a married woman could maintain her own separate property:

> It was open to any father, or any friend, or relative of a married woman, who wished to give her property, to safeguard her rights by the creation of a trust or other means, which agreements and trusts should be enforced by the court of Equity.[247]

Through trust, a married woman's lost rights were much revived. "Every kind of property, including estates in fee simple, and chattels personal, may be subject to a trust for the wife's separate use, which will be supported by Equity."[248] Further, she

---

[243] General Examination, Michaelmas Term, 1872, 2, Assorted Legal Education Papers.
[244] Holcombe, *Wives and Property*, 179-183.
[245] Holcombe, *Wives and Property*, 184; Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England*, *1850-1895* (Princeton: Princeton University Press, 1989), 68.
[246] It was not until the Married Women's Property Act of 1882 was passed that this circumstance was fundamentally changed. The Act recognized all her property as her own separate property and her right to act as an "independent legal personage." Shanley, *Feminism, Marriage, and the Law in Victorian England*, 103, 115-124; Holcombe, *Wives and Property*, 201-205.
[247] Perkin, *Women and Marriage*, 16.
[248] Ibid.

may dispose of her property, make a will and own the profits of her own separate trade by equity.[249] So equity, by enforcing trust, primarily assured "to married woman of property which was denied to them under Common Law."[250]

This was largely in line with the way Chinese customs protected the widow's right in administering and disposing of property. As Jamieson himself noted, "in this particular, custom is all-powerful" while the Code gave "no special provision."[251] This resemblance between Chinese custom and English equity in defending woman's right in property very likely reinforced Jamieson's conception that Chinese customs filled the shoes of English equity, playing a similar role in protecting those vulnerable under the national Code.

By stating "equity in the shape of custom,"[252] Jamieson highlighted the common ground between Chinese and Western law, and further indicated that the Chinese legal system possessed a flexible manner of self-modification and improvement, capable of compensating for the shortcomings in the Code. This case presents a stark contrast to his discussion of the development of wills in which China's lack of equity as an institutionalized legal system became a factor that impeded the nation's progress, revealing the tension in Jamieson's understanding of Chinese law and the thin line between East-West distinction and common ground.

3.2.5 Ancestor Worship Led to Mother's Prominent Position?

In Jamieson's view, the power of the widowed mother in actual control of family assets was unusually great and her position in Chinese family was unusually high. He claimed that "this prominent position of the mother is one of the peculiarities of Chinese law not to be met with in other archaic systems."[253] He again juxtaposed

[249] Ibid., 17.
[250] Ibid., 16.
[251] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.
[252] Ibid.
[253] Ibid.

Chinese law with ancient systems, revealing a journey back and forth between modern and ancient law, and the temporal complexities in Jamieson's own perception of Chinese law. On some level, he still deemed Qing law as archaic remains. Thus, he compared this peculiar phenomenon with Roman law: "in the Roman law the mother, after her husband's decease, fell under the guardianship of her eldest son.[254]

Indeed, "Roman woman who were *sui iuris* and had reached puberty were subject to guardianship (*tutela mulierum*)."[255] If she was married with *manus*, after the decease of the husband, the likely choice of guardian would be "her husband's brother, or even her own son."[256] In Qing China, women were also subject to the authority of her father, then her husband, analogous to the status of women in ancient Rome, but on the decease of her husband, she gained much power in managing the family,[257] which was not found in the Roman law.

Their difference propelled Jamieson to propose an answer for the peculiar phenomenon, which he again found in ancestor worship. He believed her "prominent positon" was

> no doubt another fruit of the custom of ancestral worship…. 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.[258]

---

[254] Ibid.

[255] Paul du Plessis, *Borkowski's Text Book on Roman Law*, 4th edition (Oxford: Oxford University Press), 142.

[256] Jane F. Gardner, *Women in Roman Law and Society* (London: Routledge, 1987),14.

[257] Although in China there was a doctrine called "三从", three submissions, i.e. submission to one's father before marriage, submission to one's husband after marriage, and submission to one's son on decease of husband. The last one is rarely true because the major transition from wife to mother after the decease of husband largely elevated the status of woman. Faced with the supreme doctrine of filial piety, total submission to one's son was unrealistic. See A Feng, *Mingqing shiqi Huizhou funv zai tudi maimai zhong de quanli yu diwei*, 12-13; Ye, *Zhongguo minfa shi*, 560; Gao Shiyu 高世瑜, "Shuo sancong: Zhongguo chuantong shehui funü jiating diwei manyi" 說"三從"－中國傳統社會婦女家庭地位漫議 (Three Submssions: Women's Status in Traditional Chinese Families), *Guangmin ribao* 光明日報(Guang Ming Daily), November 20, 1995.

[258] Jamieson, "Translations from the Lü-Li: Inheritance and Succession Law," 202.

According to this statement, it was her divinity after death that empowered her while alive. He believed "this high position is given her in deference to the rules of ancestral worship, which place father and mother on an equal footing as objects of reverence."[259] In traditional China, the ethical bonding between parents and children was through filial piety (孝 xiao), in which the proper sacrifice to parents after their death was without doubt an important facet. But it was not the only reason for mother's prominent position in China. *The Book of Rites*（《禮記》Liji）explained the duties of a filial son in the following way:

> In three ways is a filial son's service of his parents shown: — while they are alive, by nourishing them; when they are dead, by all the rites of mourning; and when the mourning is over by sacrificing to them. In his nourishing them we see his natural obedience; in his funeral rites we see his sorrow; in his sacrifices we see his reverence and observance of the (proper) seasons. In these three ways we see the practice of a filial son.[260] (是故，孝子之事親也，有三道焉：生則養，沒則喪，喪畢則祭。養則觀其順也，喪則觀其哀也，祭則觀其敬而時也。盡此三道者，孝子之行也。[261])

Aside from mourning and sacrifice, filial piety encompassed provision for parents when they were alive. "A filial son, in nourishing his aged, (seeks to) make their hearts

---

[259] Jamieson, "The History of Adoption and Its Relation to Modern Wills," 142.
[260] James Legge, trans. *The Sacred Books of China: The Texts of Confucianism, Part IV: The Lî Kî, XI-XLVI*, The Sacred Books of the East 28, ed. F. Max Müller (Oxford: The Clarendon Press, 1885), 237-238.
[261] Yang Tianyu 楊天宇, comp., *Liji yizhu* 禮記譯注 (Annotations for the Books of Rites), (Shanghai: Shanghai Classics Publishing House 上海古籍出版社, 1997) 2: 828. Translation made by the author of the thesis.

glad, and not to go against their wishes"[262] (孝子之養老也，樂其心，不違其志[263]). This Confucian doctrine made it an obligation for the children to obey their parents, which explains from a different angle why sons must seek their widowed mother's approval in any disposition of the family property. Aside from being a future divinity, she was also entitled to filial submission when alive. While not mentioning this aspect of filial piety in accounting for the mother's high position in the family, Jamieson was not a stranger to filial obedience. In comparing Roman *Patria Potestas* with the father's authority in China, he commented that

> Roman law emphasizes the dominium of the father, which implies duty and obedience on the part of the son. Chinese look at it from the opposite point of view; it emphasizes 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 with son is Hsiao, 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. … 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.[264]

The statement shows that not only did Jamieson understand filial submission, he also had an acute perception of its link with the father's authority in China. By comparing

[262] James Legge, trans. *The Sacred Books of China: The Texts of Confucianism, Part III: The Lî Kî, I-X*, The Sacred Books of the East 27, ed. F. Max Müller (Oxford: The Clarendon Press, 1885), 467.
[263] Yang, *Liji yizhu*, 1: 474. Translation made by the author of the thesis.
[264] Jamieson, *Chinese Family and Commercial Law*, 5.

it with Roman *Patria Potestas*, he perceived a reverse process in China. The former was a bottom-up process in which sons' filial obedience gave rise to the father's power. The latter, however, was a top-down process, in which sons' submission flowed from the father's supreme power. As the topic revolves around the Patriarch, Jamieson limited filial submission as a duty to the father and agnatic male seniors, not mentioning the mother's position here. But in other parts, he was aware that sons must also exercise filial submission to their mother, as he claimed that "she is entitled to the implicit obedience of all sons whether natural or adopted."[265] If Jamieson continued along a similar line of reasoning, he would come to the conclusion that the widowed mother's power in managing family assets also found its source in this submission. But the fact is, he attributed her prominent position entirely to her divine status after death, failing to mention sons' original filial duty to obey her when she was alive.

Why this was so lay in his use of comparative legal methods. In the section on wills, Jamieson initiated a comparison between Roman and Chinese law, a parallel to the relation between Roman and Hindu law elaborated by Maine, from which he drew the conclusion that the flourishing of ancestor worship was largely the reason for the failure of China and India to develop wills, while its decline in ancient Rome facilitated will's growth. As the most important fruit of this comparative jurisprudence study, ancestor worship extended its role to other parts of the law and became the underlying agent for the entire Chinese succession law. As he stated "it is from this imperious necessity [of ancestral sacrifice] that the law of succession has arisen."[266] As the mother's right to manage family property was discussed in the part of Qing inheritance law, it was naturally connected with this supremely important sacrificial practice.

Comparing her to the Roman widowed mother who was under the tutorship of her own son, Jamieson seemed to suggest that where ancestor worship thrived, the

[265] Jamieson, "The History of Adoption and Its Relation to Modern Wills," 142.
[266] Jamieson, *Chinese Family and Commercial Law*, 3.

mother's position was elevated; where ancestor worship diminished, the mother's position fell. The curious thing is that this time Jamieson did not follow his usual route to comment on which legal culture was superior, merely considering the esteem and authority the Chinese mother received as "one of the peculiarities of Chinese law."[267]

Moreover, the progressive facet of Chinese customary law, which gave women a more liberating role, was obscured by its being rooted in ancestor worship, which was deemed by him as the reason for China's inability to develop a more advanced law, the embodiment of stagnancy and primitiveness. With the merit of Chinese custom being compromised in this way, his understanding accorded with the Oriental discourse that the Orient was backward compared to its Occidental counterpart.

3.3 Conclusion

In translating and studying Qing inheritance law, Jamieson resorted to a comparative legal framework encompassing Roman, English and Hindu law, which facilitated and shaped his understanding of an established oriental legal system in the nineteenth century. In different locations, he shifted his focus of comparison, resulting in a complex configuration of Qing law in the ancient and modern world. In his exploration of the inability to find an equivalent to the Western concept of "will" in the Qing Code through translation, Roman law as the successful model illuminated his explanation for China's failure. His analysis touched upon more deep-going differences between the two legal systems, echoing the Orientalist distinction between East and West. The temporal dimension of Roman law also dragged contemporary Qing law back to a long-gone past.

But in translating the widow's right of managing and administering family property, his borrowing and adaptation of English legal concepts led Qing law to the

[267] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 202.

modern arena, not only narrowing the East-West temporal distance but also solving the conflicting interests between widowed mother and adopted son over family property. His parallel of Chinese custom to equity suggests Qing law's flexibility and potential for self-modification. But it also incurred the unintended effects of calling into question the Orientalist discourse of East-West difference and even secretly disrupted Jamieson's attempt to explain for Hong Kong authorities China's lack of "will" based on this difference. Similarly, the discourse of convergence in the inheritance rights of Qing widows also encountered competing voices from the Orientalist discourse of distinction. As they oriented at differing aspects of Qing law, they inevitably clashed in Jamieson's work.

Even within the discourse of convergence, there was subtle shift. In understanding the underlying agents for mother's prominent position in Chinese families, Jamieson again resorted to ancestor worship, forfeiting the chance to demonstrate an advanced facet of Chinese law. Travelling to and fro between ancient Roman and modern English law, he staged the incoherence and complexities within his understanding of Chinese law.

Chapter Four *The China Review* Version of Marriage Law: An Anthropological Exploration

Jamieson's two translations of marriage law in 1881 and 1921 are distinguished by two completely different commentaries. In the former, there were two lengthy notes revolving around family name and the rule against intermarriage between persons of the same family name. The latter, however, was more like a textbook of marriage law explicating item by item the making, breaching and dissolution of marriage. Each responded to Jamieson's immediate readers, as well as to his own judgement of what China needed, based on his long experience in the country. Inspired by Gérard Genette's study of paratexts,[1] the present chapter hopes to examine how Jamieson's commentary in *The China Review* initiated dialogue with British anthropology, thereby contextualizing his translation of marriage law in an exploration of primitive institutions and losing its link with Western legal systems.

4.1 An Examination of Early British Anthropology

Jamieson's translation of Qing marriage law originally touched upon a diversity of aspects in the establishment, operation and dissolving of marital relations. The two notes appending to his translation, however, exclusively focused on the following regulation against "marriage between persons of the same family name" (同姓為婚 Tongxing weihun):

凡同姓為婚者，主婚與男女，各杖六十，離異，婦女歸宗，彩禮入官。[2]

[1] Gérard Genette, *Paratexts: Thresholds of Interpretation*, trans. Jane E. Lewin (Cambridge: Cambridge University Press, 1997).

[2] *Daqing lüli huiji bianlan*, 10: 25. The smaller characters such as "主婚與男女" signify canonized commentaries, which are always embedded within Lü and Li in the Qing Code. See St. André, "But Do They Have a Notion of Justice?" 14-15. The thesis retains the smaller word size to be consistent with the original Chinese text.

> 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 women shall return to her family and the marriage presents shall be forfeited to Government.[3]

The underlying cause for this prohibition was addressed in detail in the second note. In order to lay a foundation for it, Jamieson first explored the "origins of family names" in the first one. Both notes trace the law back to the primal times of the Chinese race. Jamieson thus situated his translation in the framework of budding anthropological studies in Britain, commencing a dialogue with early anthropologists in the late nineteenth century.

In this thesis "anthropology" does not refer to a fully established academic discipline, since during this period anthropology was still "in its formative years"[4] although scholars agree that "anthropological ideas came into being much earlier."[5] The so-called anthropologists during this time were still "part-time" and "armchair" anthropologists. "Part-time" refers to the fact that most early anthropologists were also involved in other occupations, which was true of those being discussed in this thesis. Henry Maine encompassed the role of legal historian, government official in India and university professor. Sir John Lubbock (1834-1913) was famous for being a politician and banker. John Ferguson McLennan used to be an editor and practiced law. Anthropology had not yet developed into a profession which itself alone could support a gentleman's living. Meanwhile, their generation's practice was later called "armchair anthropology" because they did not do on-site fieldwork but relied on information and

---

[3] Jamieson, "Translations from the General Code: Marriage Laws," 82.
[4] Efram Sera-Shriar, "What is Armchair Anthropology? Observational Practices in 19th- Century British Human Sciences," *History of the Human Sciences* 27, no.2 (2014): 28.
[5] Alan Barnard, *History and Theory in Anthropology* (Cambridge: Cambridge University Press, 2000), 15. For the earlier history, see Thomas Hylland Eriksen and Finn Sivert Nielsen, *A History of Anthropology* (London & Sterling: Pluto Press), 1-15.

data gathered by those who travelled abroad, such as missionaries, seamen, diplomats and explorers.[6] Fieldwork was still considered "as dangerous, dirty and unfit for gentlemen."[7] Precisely because of this observational method, Jamieson's translation and understanding of Chinese marriage law could be absorbed by British anthropologists far away, participating in an important dispute in theorizing primitive human institutions.

On the other hand, it has to be noted that in the nineteenth century anthropology "emerged as a distinct branch of scholarship"[8] and experienced the most remarkable progress. The rise of other subjects, including "archaeology, geology, paleontology, philology, comparative anatomy and morphology, and comparative mythology provide[d] the stimulus for defining a science of the early history of man, society, and culture."[9] Jamieson's translation of Chinese marriage law was integrated in British anthropologists' theories under the increasing interest in human development and need of data worldwide.

This anthropological exploration was further facilitated by imperial expedition, as exemplified by Jamieson's work on China. Moreover, the relation between anthropology and imperialism to some extent distinguished it from sociology. As a matter of fact, the demarcations between the two "were not sharply drawn" in the nineteenth century,[10] but there was a gradual trend that anthropology was devoted to studying primitive societies, institutions and cultures, while sociology put more emphasis on "complex societies, especially European."[11] The underlying reasoning was that while "anthropology grew from imperialism, sociology was a product of the

---

[6] Lewis H. Morgan (1818-1881), the American anthropologist was a famous exception. He was deeply involved with the American Indians whom he studied.
[7] Sera-Shriar, "What is Armchair Anthropology?" 29.
[8] Barnard, *History and Theory in Anthropology*, 15.
[9] Fred W. Voget, *A History of Ethnology* (New York: Holt, Rinehart and Winston, 1975), 115.
[10] Ibid., 139.
[11] Ibid., 143.

changing class relations brought about by industrialization in Europe itself."[12] While "all the founding fathers of sociology" on the Continent were discussing "the meaning of 'modernity,'" leading anthropologists mainly based in Britain and the United States were preoccupied with "'pre-modern' conditions."[13]

In tracing the early history of Chinese surnames, Jamieson, like British anthropologists, was curious about the "condition of affairs" among the earliest Chinese, "how the race gradually emerged from barbarism"[14] and "what successive stages of development were gone through."[15] These concerns echoed the fundamental questions held by pioneering British anthropologists who hoped to clarify the mysteries surrounding primitive mankind and culture. Although Jamieson could not ascertain the particulars in the process, he studied the legendary history in which the Chinese learned fishing, domesticating animals, and practicing marriage from Fu-xi (伏羲).[16] Later, Shen-nong (神農) taught people how to sow grains and apply medicine.[17] He believed this process, though of a legendary nature, "indicates a gradual advance from savagery to comparative civilization" and "some process of evolution working under natural laws,"[18] corresponding to the underlying evolutionary presumption held by most British anthropologists at the time.

The whole period from as early as the 18th century to the late 19th century "was characterized by an overriding interest in tracing the history of mankind according to natural law."[19] Before Darwin's theory of evolution was proposed in 1859 with the publication of *On the Origin of Species*, the idea of process had already pervaded the intellectual field, where there was a general belief in the development of human society

[12] Eriksen and Nielsen, *A History of Anthropology*, 17.
[13] Ibid.
[14] Jamieson, "Translations from the General Code of Laws: Marriage Laws," 89.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Voget, *A History of Ethnology*, 41.

in an ascending order.[20] Thus, "evolutionist thinking in anthropology predates Darwin" to some extent.[21] But Darwinian evolutionary theory brought a more dynamic model in natural sciences which also profoundly influenced social scientists.[22] Although Jamieson held that Chinese society at its latter stage had stagnated, he did believe it had in its early history experienced an upward process following "natural laws," placing early Chinese history in an evolutionary model. This puts him in line with most British anthropologists in the 19th century, who adopted the evolutionary thinking.

4.2 Anthropological Prelude: Matriarchal Versus Patriarchal Society

4.2.1 Legendary China as a Matriarchal Society

Jamieson, in reflecting on the Chinese origin of family names in the first note, relied on contemporary anthropological theories to account for it, responding to the long-held anthropological dispute as to whether human society bore a maternal or paternal origin. He first mapped the history of family names of early emperors, from Fu-xi to Yao (堯), conceding that in these cases "the name of the mother is always given but not that of the father,"[23] suggesting that the earliest family names were traced through the mother's side. Moreover, their conception was "generally ascribed to supernatural means,"[24] under the influence of a "flash of lightning" or dragon.[25] Jamieson believed this indicated

> either polyandry, or at least a state of things in which paternity was uncertain, and we have the case of a half brother by the mother's side succeeding to the

[20] Ibid., 42.
[21] Barnard, *History and Theory in Anthropology*, 29.
[22] Voget, *A History of Ethnology*, 42.
[23] Jamieson, "Translations from the General Code: Marriage Laws," 90.
[24] Ibid.
[25] Ibid., 89-90.

inheritance, which possibly refers to succession through females.[26]

This understanding corresponded to McLennan's matriarchal theory characterized by polyandry and kinship recognized through the female line. McLennan was a figure with whom Jamieson was familiar. Jamieson's second note explicitly discussed primitive marriages theorized by McLennan, John Lubbock and Herbert Spencer (1820-1903). In his *Primitive Marriage*, McLennan described the early state of human development where there was no such institution as marriage. Sexual intercourse among savages was promiscuous, resulting in a natural circumstance where the father was unknown.[27] Consequently, kinship was traced through females, as was the early form of succession. As time passed, promiscuity was replaced by polyandry, which was seen as a modified form of promiscuity in which a more stable group resembling the family began to take shape, representing an advance in human history,[28] although the definite identity of the father was still unascertainable. Jamieson obviously adopted McLennan's theory on polyandry and uncertain fatherhood in delineating the earliest Chinese society.

McLennan proposed a matriarchal origin of early human society, contrary to Maine's patriarchal theory as illustrated in his famous *Ancient Law*. According to Maine, the primitive family was headed by the father who enjoyed supreme power over his dependents, including his wife, children, naturally born or adopted, servants and slaves. Based on Roman history, the key term in his treatise was *Patria Potestas*, which received wide recognition. But with McLennan's matriarchal theory being set forth in *Primitive Marriage*, the formerly patriarchal views were severely upset. McLennan brought forward evidence inconsistent with Maine's finding and proposed

[26] Ibid. 90
[27] John F. McLennan, *Primitive Marriage: An Inquiry into the Origin of the Form of Capture in Marriage Ceremonies* (1865; repr., New York: Routledge/Thoemmes Press, 1998), 64-71.
[28] Ibid., 70.

a divergent structure of primitive state in which female kinship predated male kinship, marking the emergence of the matriarchal school.

But the dispute continued. Maine did not accept the matriarchal theory. In his *Early Law and Custom*, he dismissed the primary foundation of the matriarchal theory, which was the promiscuous condition of human beings. For Maine, such condition was not conceivable due to people's natural sexual jealousy and the fatal consequences of infertility.[29] He further conjectured that matriarchal society could be a variation that appeared after patriarchal society due to various causes.[30] Neither side succumbed to their theoretical opponents. After McLennan passed away, his brother Donald McLennan, published *The Patriarchal Theory* based on his papers, continuing to level criticism on Maine's patriarchal ideas.

In this controversy, Jamieson apparently drew on McLennan's theory in understanding the matriarchal phenomenon he discovered in legendary China. His delineation of the family name history reveals that in its earliest era, Chinese society experienced a matriarchal stage where there was indeed "a state of promiscuity,"[31] echoing strongly McLennan's elaboration of primitive society.

4.2.2 A Transition from Matriarchal to Patriarchal Society

In comparison, Jamieson's devotion to Maine was primarily manifest in his understanding of Chinese society after the early legendary period, which was a patriarchal one in line with Maine's theorization in *Ancient Law*. Between them, Jamieson described a transition from matriarchal to patriarchal state:

> The full recognition of relationship through the Father, and the establishment of

[29] Henry Maine, *Dissertations on Early Law and Custom* (New York: Henry Holt and Company, 1883), 204-209.
[30] Ibid., 209-210.
[31] Jamieson, "Translations from the General Code: Marriage Laws," 91.

> the agnatic group of kindred were doubtless gradual processes, the completion of which seems to be indicated in the legislation of Yao.[32]

The transition rested in the following lines eulogizing the emperor Yao, "以親九族，平章百姓，協和萬邦，黎民於變," drawn from Shoo King (《尚书》Shangshu). James Legge (1815-1897) in *The Chinese Classics* translated the above into

> …[Yao] hence proceeded to the love of the nine classes of his kindred … He also regulated and polished the people of his domain … Finally, he united and harmonized the myriad States of the empire; and lo! The black-haired people were transformed."[33]

Jamieson, while referring to Legge, gave a completely different interpretation. He considered the whole text as

> evidently indicative of what Yao did to introduce order and regularity where before there had only been confusion. He [Yao] begins with the individuals of one's kindred 親 and makes of them the 九族, a well-known term meaning the agnatic group extending four generations above and four generations below, with all the collaterals for five degrees.[34]

In Legge's translation of "以親九族", what Yao did was to love his nine classes of kindred, indicating that this kindred relation already existed and he only brought concord among them. But Jamieson did not believe such an agnatic system existed

---

[32] Ibid., 90.
[33] James Legge, trans., *The Chinese Classics*, vol.3, *The Shoo King* (London: Trübner & Co., 1865), 17.
[34] Jamieson, "Translations from the General Code: Marriage Laws," 90-91.

before Yao. The earlier period was occupied by "confusion," "a state of promiscuity more or less modified" through the institution of polyandry.[35] Since the father's identity was unknown, kinship was recognized through the mother's line. It was Yao who introduced the concept of "九族" (jiuzu; agnatic group) among the Chinese people, thereby replacing the confusing state where one's father was unascertainable, and establishing the agnatic kindred, which was the "order and regularity" meant by him. Jamieson saw "以親九族" as marking a new chapter of forming agnation, a transition from matriarchal to patriarchal society.

Moreover, in the translation of "平章百姓," Jamieson had a different view concerning the meaning of "百姓" (baixing) due to his anthropological concerns. Legge in his note explicated clearly that this phrase was "restricted in signification" because "the hundred surnames" meant "various officers" (百姓=百官 baiguan).[36] Despite this, taking into account the context of the entire Shoo King, where "百姓" "occurs some 14 times," Legge believed the phrase should not be restricted to those who bore family names, but meant extensively "the people" (民 min).[37]

Jamieson, however, put special emphasis on surnames. Instead of dismissing the idea that the hundred surnames meant various officers, Jamieson selectively used the first part of Legge's explanation to support his view that hundred surnames did not necessarily indicate "the whole body of the people,"[38] and limited it to a discussion of family names. During that stage of Chinese development, Jamieson claimed he was certain that "the lower orders had not 姓 [family name]," only "the Chief or official families of the nation" "got to the dignity of a surname."[39] With a different focus on the meaning of "百姓," the two men also diverged in their opinion concerning "平章百姓." Legge believed Yao improved the people and brought regulation among them.

[35] Ibid., 91.
[36] Legge, *The Shoo King*, 17.
[37] Ibid.
[38] Jamieson, "Translations from the General Code: Marriage Laws," 91.
[39] Ibid.

Jamieson, on the other hand, with his anthropological concern with family names, translated it into "he [Yao] groups the individual families into clans or gentes, each with a common surname,"[40] highlighting the process in which agnatic family groups with a common surname took shape. In the latter half of the text "協和萬邦，黎民於變," Jamieson follows Legge's translation, rendering it as "he unites and 'harmonizes the myriad states, and the black-haired people are transformed.'"[41]

This whole text for Jamieson was much more than a eulogy dedicated to the honourable deeds of Yao. Jamieson claimed that it "consisted of a change from a state of promiscuity more or less modified to one which admitted of certainty of paternity and the formation of family groups."[42] Situating it in the anthropological studies, it was taken by him as an indication of the great transformation of Chinese society from a confusing state where kinship was recognized through females to a patriarchal state. The early history of Chinese family names was embedded in this process. The transformation suggested that family names reckoned through maternity were replaced by ones counted through paternity. For Jamieson, China had been transformed into a patriarchal society as early as in Yao's time. This progress corresponded to the assertion made by McLennan in *Primitive Marriage*:

> As civilization advanced, the system of kinship through females only was succeeded by a system which acknowledged kinship through males also; and which in most cases passed into a system which acknowledged kinship through males only.[43]

Relying on anthropological theories, Jamieson attempted to trace the origin of Chinese

[40] Ibid. Gentes was the plural form of gens, meaning Roman clans.
[41] Ibid.
[42] Ibid.
[43] McLennan, *Primitive Marriage*, 93-94.

family names and understand early Chinese society, which influenced the way he interpreted the Chinese Confucian classics. In return, the texts, through his retranslation and reinterpretation, also lent strength to the matriarchal theory proposed by McLennan, illustrating with Chinese evidence the transition from matriarchal to patriarchal society. Although the foregoing Chinese history was to a large extent legendary, Jamieson was convinced that "there is some groundwork of fact underlying the traditions,"[44] justifying the authenticity of the early progress of Chinese society and fitting it with McLennan's theorization of primitive mankind.

He further indicated the way surnames started to be used after the legendary period.[45] During the Zhou Dynasty (1046 BC – 256 BC) and the Spring and Autumn Period, more clans acquired their own family names, which were closely associated with an agnatic kindred system. When the king conferred a surname on the virtuous, he chose the latter's grandfather's designation,[46] suggesting a male delineation. When a family name was assumed by oneself, it was also a process reckoned through the male line:

> The son of a deceased ruler was styled 公子 or a duke's son, his son again 公孫 or duke's grandson. But in the next descent the son took as a matter of course the designation of his grandfather, or his honorary title, or the name of his office or of his city, and made it his one clan name.[47]

The process of gaining one's surname through one's father and grandfather reveals an agnatic family relation. Consequently, bearing a common surname was a strong indication of agnatic kinship in early times although it was not conclusive evidence.[48]

---

[44] Jamieson, "Translations from the General Code: Marriage Laws," 91.
[45] Ibid.
[46] Ibid., 92.
[47] Ibid.
[48] Jamieson was aware that as early as the Spring and Autumn period, "the same name was in use

Knitting the origin of Chinese family names and its connection with kinship system into anthropological studies, this article unveils a transition of Chinese family names from being counted through female kinship into being reckoned through agnatic kinship, paving the way and marking a prelude to a more elaborate anthropological study centring around the statute against marriage between persons of the same surname.

4.3 Anthropological Study of the Clause against Marriage between Persons of the Same Surname

4.3.1 Testing Early Anthropological Theories with Chinese Exogamy

Jamieson situated his translation and interpretation of the clause against intermarriage between persons of the same surname in the rein of exogamy, a distinct anthropological term that had been discussed in detail by McLennan, Lubbock, Spencer and others.[49] The first three were central figures in Jamieson's anthropological concern with this statute. In their theories, they saw the repulsion against marriage between people of the same family name as a clear marker of the anthropological phenomenon of exogamy. McLennan's research of various peoples shows that family name could serve as a test of whether people were kin or not, based on which they contrived the rule that

---

in different States by families of independent origin" and therefore "the possession of a common surname was not conclusive evidence of a common ancestry." Ibid., 92-93.
As a matter of fact, with the further development, surname was more and more untenable as evidence of the common stock due to royally conferring of surnames, changing of surnames to evade foes as well as non-Hans acquiring Han family names. Gu Yuan 顧元, "Ganfen jiaqu ji qi falü shijian: guojia yu shehui eryuan jiegou xia de guize zhi zhi" "乾分嫁娶" 及其法律實踐 — 國家與社會二元結構下的規則之治 (The Law Against Marriage Between Relations and Judicial Practices: The Dichotomous Government by the Nation and Society), *Zhengfa luntan* 政法論壇 (Tribune of Political Science and Law) 31, vol. 5 (2013): 74; Chen Yongsheng 陳永生, "Tongxing buhun de lishi tantao" "同姓不婚"的歷史探討 (A Historical Discussion of the Rule Against Marriage Between Persons of the Same Surname), *Shehui kexuejia* 社會科學家(Social Scientist), no. 5 (1987): 58-59.

[49] Jamieson, "Translations from the General Code: Marriage Laws," 93.

those of the same surname could not intermarry.[50] Lubbock's exploration of Australian aborigines shows a similar phenomenon.[51] Spencer also connected this rule to the anthropological study of exogamy.[52] Based on these anthropological theories and the potential agnatic relationship behind family names, Jamieson placed his translation of the statute in the discussion of exogamy practiced among primitive mankind.

Despite their consensus, the three anthropologists contrived different theories concerning the origin of exogamy. Before giving his own insight into the cause of the Qing exogamous rule, Jamieson analysed these different theories, in order to test "whether any of these theories will fit in with the facts as we know them in China."[53] He first studied McLennan's theory that the origin of exogamy lay in bride capture:

> the scarcity of food induced the practice of female infanticide, and that, a state of hostility being the normal condition of primitive tribes, men could only procure wives by stealing them from their neighbours.[54]

Jamieson's reference to "female infanticide" touched upon a key word in McLennan's formulation, which was the reason for the lack of women in primitive tribes that "forced them to prey upon one another for wives."[55] In line with this reasoning, the necessity of procuring women outside one's own tribe gave rise to the usage of exogamy. Accordingly, Jamieson concluded that "what was at first a necessity became a custom, and in time it was considered improper, because unusual to marry a woman

[50] McLennan, *Primitive Marriage*, 45,47.
[51] John Lubbock, *The Origin of Civilization and the Primitive Condition of Men* (1870; repr., Cambridge: Cambridge Press, 2014), 95.
[52] Herbert Spencer, *Principles of Sociology* (1876; repr., London & Edinburgh: Williams and Norgate, 1885), 1: 614-616.
[53] Jamieson, "Translations from the General Code: Marriage Laws," 94.
[54] Ibid., 93.
[55] McLennan, *Primitive Marriage*, 58.

of one's own group."[56] However, this was only a part of McLennan's theory; in other parts of his book, the proposition was reversed:

> If it can be shown, firstly, that exogamous tribes exist, or have existed; and secondly, that in rude times the relations of separate tribes were uniformly, or almost uniformly, hostile, we have found a set of circumstances in which men could get wives only by capturing them.[57]

The cause and effect in this inference were obviously the reverse of the former one: exogamy and tribal hostility gave rise to wife-capture. This inference was then "amply established"[58] through three chapters of evidence accumulated by McLennan. He was convinced that the tribal groups "organized on the principle of exogamy … were the germs of the native population."[59] This latter formulation was opposed by Lubbock who believed that "exogamy arose from marriage by capture" and not the other way around.[60] The reason that exogamy became popular, according to him, was because "capture, and capture alone, could give a man the right to monopolize a woman,"[61] which was a unique possession since at that time everything else was shared among tribal members.

Compared to Jamieson and Lubbock, Spencer saw both sides of McLennan's argument which were conflicting in his eyes: on the one hand, McLennan saw the earliest tribes as exogamous, from which arose the wife-capture, but "he elsewhere speaks of wife-capture as caused by scarcity of women within the tribe,"[62] and attributes exogamous practices to this necessity. Spencer believed the latter theory was

---

[56] Jamieson, "Translations from the General Code: Marriage Laws," 93.
[57] McLennan, *Primitive Marriage*, 24.
[58] Ibid., 57.
[59] Ibid., 49.
[60] Lubbock, *The Origin of Civilization*, 72
[61] Ibid.
[62] Spencer, *Principles of Sociology*, 615.

more tenable,[63] although there was still a fatal flaw in it. It is seen that anthropologists saw different facets of McLennan's contradicting theories. As Jamieson's motive was to trace the origin of the Chinese statute against marriage between persons of the same surname, he was more inclined to regard exogamy as the effect and then test whether the cause of women abduction complied with Chinese phenomenon. Moreover, anthropologists often dissented from each other's theories in accounting for primitive mankind, prompting them to come up with their own. Jamieson also joined these ranks with his observation of Chinese law, but before doing that, he weighed different theories by reading anthropologists' comments on each other.

The fatal flaw Spencer pointed out was reproduced by Jamieson, "this theory if carried out among a cluster of tribes must logically lead to the total destruction of female children."[64] According to Spencer, if it were true that McLennan's theory applied to all humans at a certain phase of their development, it would indicate "that a number of adjacent tribes, usually belonging to the same variety of man in the same stage of progress were simultaneously thus led to rob one another."[65] If all tribes were all deficient in women, the scarcity of women could hardly be remedied: "what one tribe got another lost."[66] The consequence would be a decrease in population overall. The weaker tribes would be deprived of all women and end in extinction; meanwhile the strongest one was eventually left alone with no more tribes to rob.[67] The result was a dead-end. Moreover, as exogamy gradually took shape among tribe clusters, a more insuperable problem arose:

> If in each of the exogamous tribes forming the supposed cluster, the men are forbidden to marry women of their own tribe, … the implication is that each tribe

[63] Ibid., 616.
[64] Jamieson, "Translations from the General Code: Marriage Laws," 94.
[65] Spencer, *Principles of Sociology*, 618.
[66] Ibid.
[67] Ibid.

> knowingly rears wives for neighbouring tribes.[68]

Why would they do so? The inevitable result was that all tribes would "cease to rear female infants,"[69] leading to "the total destruction of female children" in Jamieson's own words.[70] Due to these fatal faults, Jamieson then presented Spencer's alternative theory concerning exogamy so as to test its strength in the face of Chinese phenomenon. In his delineation, Spencer accepted "McLennan's postulate that primitive groups of men are habitually hostile,"[71] and held that "plunder being the natural result of victory, the women of the vanquished would naturally be carried off as trophies, and kept as proofs of prowess."[72] This delineation followed closely Spencer's own words, such as "trophies" "vanquished" and "proofs of prowess," which were all taken directly from Spencer's *Principles of Sociology*.[73] In his conclusion, he directly quoted Spencer:

> Among the warriors the most honoured are those whose bravery is best shown by achievements; the possession of a wife taken in war becomes a badge of social distinction. … an increasing ambition to get foreign wives will therefore arise, and as the number of those without them decreases, the brand of disgrace attaching to them will become more decided, until in the most warlike tribes it becomes an imperative requirement that a wife shall be obtained from another tribe, if not in open war then by private abduction.[74]

---

[68] Ibid., 619.
[69] Ibid.
[70] Jamieson, "Translations from the General Code: Marriage Laws," 94.
[71] Ibid.
[72] Ibid.
[73] Spencer, *Principles of Sociology*, 620.
[74] Jamieson, "Translations from the General Code: Marriage Laws," 94; Spencer, *Principles of Sociology*, 620-621.

This was how exogamy became a powerful rule among primitive mankind under Spencer's formulation. He replaced McLennan's scarcity of women with the warrior's sense of pride to account for the popularity of wife-capture from other tribes. This process also brought a concomitant result of endogamy among those peaceful or militarily weak tribes because female abduction would only provoke revenge on themselves. In order to evade such hostile confrontation, "marriage within the tribe would become not only habitual, but there would arise a prejudice, and eventually a law, against taking wives from other tribes."[75] By distinguishing the primitive tribes according to their differing combat effectiveness, Spencer accounted for exogamy and endogamy in the same process.

The time and effort Jamieson spent on these theories were not wasted, because only after giving a comprehensive analysis could he proceed to reflect upon these theories and see if they could explain the Chinese phenomenon. According to Jamieson, the primary postulates of tribal hostility and wife abduction elaborated in the theories of McLennan and Spencer did not exist in China. First of all, the Chinese "were not a combatant race living on war and glorying in it."[76] Instead, they "grew and prospered by the arts of peace."[77] The border and internal wars were considered by Jamieson as "the exception not the rule."[78] He illustrated this point with the Chinese heroes who were esteemed, not for their prowess, but for their introduction of "the arts of civilized life" and refinement of "the manners of the age."[79] Fu-xi was known for teaching people "the art of hunting, fishing and pasturage" as well as of making clothes, cooking and even marriage laws;[80] Huang-di (黃帝) was remembered for instructing people to "make utensils of wood, boats, and wheeled carriages" and directing "his ministers to

[75] Jamieson, "Translations from the General Code: Marriage Laws," 94.
[76] Ibid., 95.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.

construct musical instruments, make a calendar, figures for calculation";[81] likewise, Yao and Shun were respected "for their private and domestic virtues, … for the gentle and beneficent rule which they bore over their people."[82]

This description of China echoed Spencer's formulation of industrial society in contrast to militant society. The former was characterized by its "peaceful labour" and "energies spent in production" while the latter by its "predatory activities" and "energies spent in destruction."[83] Spencer held that societies advanced from militant to industrial types. Jamieson's identification of the Chinese as a peaceful race devoted to a civilized lifestyle suggested that they were superior to the "savages" described by early anthropologists, although they were still used as evidence to furnish the theories concerning primitive mankind.

As "unity and harmony is the rule of existence" among the Chinese,[84] the primal state of intertribal hostility underpinning McLennan's and Spencer's theories of exogamy was missing, without which, violent abduction of other tribes' women was apparently inadmissible. As expected, Jamieson commented, there was no trace of wife-capture or similar ceremonies found in China.[85] These words directly spurned McLennan's confident assertion that where there was exogamy, there was abduction of brides or similar ceremonies.[86] Moreover, Spencer's reasoning would only lead to the conclusion that China should exercise endogamy since it was for most of the time in a peaceful state. While there was some sense in it,[87] it failed to explain the origin of the Chinese rule against marriage between persons of the same surname.

---

[81] Ibid.
[82] Ibid.
[83] Spencer, *Principles of Sociology*, 675.
[84] Jamieson, "Translations from the General Code: Marriage Laws," 95.
[85] Ibid.
[86] McLennan, *Primitive Marriage*, 57.
[87] China's endogamy will be discussed in section 4.4.

4.3.2 Jamieson's Own Theory on the Origin of Chinese Exogamy

As none of the above anthropological theories shed reasonable light on Chinese exogamy, Jamieson cast doubt on their universal applicability and decided to find some other means to account for it; in his own words, "we must therefore look for some other explanation for the phenomenon."[88] This, he found in "a primitive antipathy to marriages between kinsfolk fostered and extended by the practice of ancestral worship." [89] Two keywords in his formulation are: "primitive antipathy" and "ancestral worship."

First of all, Jamieson believed that "one of the first instincts of primitive man on emerging from barbarism would be to forbid marriages with one's own nearest relations."[90] The inspiration of this primitive instinct was very likely drawn from McLennan's *Primitive Marriage*, in which he acknowledged "the primitive instinct" "against marriage between members of the same stock."[91] But McLennan's theory also introduced a point that "men must be originally have been free of any prejudice against marriage with relations" when the concept of blood-relation had not yet made itself acutely felt among the most primitive people.[92]

A closer look at Jamieson's statement shows that his so-called "primitive antipathy" occurred after the primitive man emerged from barbarism, after the concept of "kinsfolk" had been developed,[93] similar to the points of McLennan. He further justified it by stating that if people had absolutely no feeling about it, marriage with close kin would most likely be frequent, "they being the persons with whom one is most in contact."[94] But on the contrary, he saw that as soon as kinship was recognized

---

[88] Jamieson, "Translations from the General Code: Marriage Laws," 95.
[89] Ibid.
[90] Ibid.
[91] McLennan, *Primitive Marriage*, 49
[92] Ibid., 58, 60.
[93] Jamieson, "Translations from the General Code: Marriage Laws," 95.
[94] Ibid., 95.

among mankind, unions with one's closest relations were disallowed,[95] showing the power of the primal human antipathy to marriage with relations.

To this antipathy, Jamieson added the force of ancestor worship, under which the prohibition of marriage extended to those who bore the same family name. He claimed that in China, holy matrimony was "the root and origin" of future generations whose most important duty was to offer sacrifices to the family ancestors.[96] If the union was unholy or tainted, disaster would fall upon the family:

> The ancestors will not enjoy the sacrifices offered them; that will re-act upon the living, the unappeased manes will have their revenge, and the total extinction of the line may be the consequence.[97]

"In order to be on the safe side," the supreme importance of properly maintaining ancestral sacrifices naturally extended the primal instinct against marriage with near kinsfolk to more distant relations.[98] Since sharing a common family name was a strong indication of kinship as Jamieson's previous note showed, "it would naturally come to be adopted as the test of consanguinity within which there ought to be no inter-marriages."[99] Such was Jamieson's understanding of the role played by ancestor worship in validating the prejudice against marriage between persons of the same surname. Here ancestor worship was not only placed in comparative law studies by Jamieson, but also in anthropology.

In fact, religion from the very beginning had occupied an important place in anthropological study of peoples around the globe. McLennan addressed animal and

---

[95] Ibid., 95-96.
[96] Ibid., 96.
[97] Ibid.
[98] Ibid.
[99] Ibid.

plant worship and used the term "totem."[100] Lubbock devoted three chapters to a discussion of religion in *The Origin of Civilization and the Primitive Condition of Man*, in which he pointed out that ancestor worship was popular among many peoples.[101] Spencer specifically dwelled on ancestor worship and saw it prevailing in the Nile valley and Far East.[102] He elaborated the solemn provision of oblations and the "feeding the spirits" exercised by the Chinese, similar to that observed by Teutons and Celts,[103] showing the lingering power of ancestral worship even among the civilized societies.[104] The departed ancestors were transformed into divinities, invested with the supreme power;[105] thus they must be propitiated.[106] Edward Burnett Tylor (1832-1917), another famous British anthropologist, noticed that the Chinese, whose "dominant religion" was ancestor-worship, believed in the supreme power of the ancestral spirits, "who reward virtue and punish vice."[107] He defined the spiritual being through his theory of animism:

> Spiritual beings are held to affect or control the events of the material world, and man's life here and hereafter; and it being considered that they hold intercourse with men, and receive pleasure or displeasure from human actions, the belief in their existence leads naturally, and it might almost be said inevitably, sooner or later to active reverence and propitiation.[108]

---

[100] John F. McLennan, "Tree and Serpent Worship," *Cornhill Magazine* 19 (1869): 626-640; John F. McLennan, "The Worship of Animals and Plants, Part I," *The Fortnightly Review* 6 (October 1869): 407-427; John F. McLennan, "The Worship of Animals and Plants, Part II," *The Fortnightly Review* 6 (November 1869): 562-582; John F. McLennan, "The Worship of Animals and Plants, Part III," *The Fortnightly Review* 7 (February 1870): 194-216.
[101] Lubbock, *The Origin of Civilization*, 348-350.
[102] Spencer, *Principles of Sociology*, 283.
[103] Ibid., 297.
[104] Ibid., 295.
[105] Ibid., 286.
[106] Ibid., 294-295.
[107] Edward Burnett Tylor, *Religion in Primitive Culture* (1871; repr. Gloucester: Peter Smith, 1970), 2: 204.
[108] Ibid.,10-11.

These functions of spiritual beings were in line with Jamieson's description of the deceased ancestors who exercised similar power of conversing with living men and influencing their lives either in a positive or negative way. It was precisely due to these functions that prohibition of marriage was extended to people of the same surname so as to make sure that absolutely no vice tainted the holy matrimony, from which a qualified heir would be produced to propitiate the spirits of the ancestors, who in return could extend their blessing to the descendants. It is seen that Jamieson's emphasis on ancestor worship not only derived from his comparative law research, but also from his exploration of anthropological theories. Influenced by their analysis of ancestor worship, it was only natural that it became an important concept in his anthropological study of the origin of Chinese exogamy. Jamieson, though not accepting the theories of McLennan and Spencer to account for it, had absorbed anthropological elements of primitive aversion to marriage with close relations and ancestor worship, enabling him to explain the origin of exogamy in China in his own way.

4.3.3 Unfinished Investigation of Codification and Confucianism

As to the transformation of the earliest exogamous practices into a hard rule, Jamieson indicated the possible role of Confucianism, which "look[ed] back with reverence to the times of the Chow period."[109] He briefly discussed the increasingly stringent attitudes of the Confucian school with two instances. He first retranslated a portion of the *Analects* concerning Duke Chao (昭公 Zhao gong) of Loo (魯 Lu) marrying "a daughter of the Duke of Wu [吳]."[110] As the ruling houses of the two states were branches of Chow, therefore they bore the same surname of Ji (姬). Their inter-marriage is in obvious contradiction with the rites of Chow, which prohibited marriage

[109] Jamieson, "Translations from the General Code: Marriage Laws," 99.
[110] Ibid., 98.

of people of the same family name. After this occurred, Confucius was asked about the case. The original text is as following:

> 陳司敗問昭公知禮乎，孔子曰：知禮。孔子退，揖巫馬期而進之，曰：吾聞君子不黨，**君子亦黨乎**？君取於吳，為同姓，謂之吳孟子。君而知禮，孰不知禮？巫馬期以告。子曰：丘也幸，苟有過，人必知之。[111]

There following is Jamieson's translation:

> Confucius himself is questioned about the matter, "Did Duke Chao know propriety? And he answered roundly he knew propriety." But Confucius having retired, the questioner turns to Wu Ma Ke and says, I have heard that the superior man is not a partisan. **Is it possible your master, out of favour for a prince of his own State, will pass over a thing like this**? Chao married a daughter of the house of Wu of the same surname as himself and called her the elder lady Tsze of Wu. If he knew propriety who does not know it? Woo Ma Ke reported these remarks, and the Master said, "I am fortunate; If I have any errors, people are sure to know them."[112] (Bold added for emphasis)

Jamieson's translation was primarily based on James Legge's rendering of the *Analects* in the first volume of *The Chinese Classics*. Jamieson kept intact many of his sentences such as "I have heard that the superior man is not a partisan" and "I am fortunate; If I have any errors, people are sure to know them."[113] But he made a remarkable alteration in translating "君子亦黨乎" which was rendered by Legge as "may the

[111] Yang, *Lunyu yizhu*, 155.
[112] Jamieson, "Translations from the General Code: Marriage Laws," 98.
[113] Legge, *Confucian Analects*, 69.
This was little wonder since Jamieson had in a number of places quoted from Legge's *The Chinese Classics*. See Jamieson, "Translations from the General Code: Marriage Laws," 90-93, 96-98.

superior man be a partisan also?"[114] Legge did not specify that the one who was biased was Confucius himself although it could be inferred from the context.[115] Jamieson, however, particularly highlighted this by directly stating "your master" and "pass over" as well as pointing out that it was "out of favour for a prince of his own State."[116]

Jamieson believed "Confucius was not over candid as to his own opinion" in this case,[117] because as a man conversant with Chow rites, it was impossible that he did not know that Duke Chao's act contravened the proper way of marriage. Not to mention that he had expressly confessed his error. The fact that Confucius easily passed over the case not only showed his bias for the duke; more importantly, it revealed that he did not regard it as a serious violation of propriety. Jamieson remarked that "he [Confucius] did not think it anything very reprehensible, else he would have spoken out."[118] These words revealed Jamieson's motive for making a different translation from Legge's, that is he hoped to prove that during this period the Confucian school had not yet formed a very strict prohibition against marriage with one of the same surname.

Starting from this, Jamieson was able to show that Confucianism in its later development was more and more rigorous in disapproving marriage between people of the same surname. He remarked that in another book entitled *Dialogue with Confucius* (《孔子家語》Kongzi jiayu),[119] which was compiled some centuries later during the Period of the Three Kingdoms (三国 Sanguo 220 AD-280 AD), "he

---

[114] Legge, *Confucian Analects*, 69.
[115] Legge in his notes revealed that Confucius was attempting to "hide any failings that his own sovereign might have had." Legge, *Confucian Analects*, 69. Therefore, Legge actually knew Confucius was biased on this point; he just did not manifest it in his translation as Jamieson did.
[116] Jamieson, "Translations from the General Code: Marriage Laws," 98.
[117] Ibid.
[118] Ibid.
[119] Comparing to the *Analects*, the book was less known. For a long time, it had been regarded as a fake book. But new archaeological findings proved that it was not so. See Pan Shuren 潘樹仁, *Kongzi jiayu* 孔子家語(Dialogue with Confucius), (Hong Kong: Chung Hwa Book Co. 中華書局, 2013): 1-3.

[Confucius] was made to express himself very differently."[120] Confronting a similar case regarding marriage with one who bore the same family name, Confucius claimed: "the same surname implies a common descendent, … even after a hundred generations they may not intermarry,"[121] displaying a radically different attitude. This alteration was obviously made with the changing Confucian school, which took the violation of the rule more seriously.

Here Jamieson realized the ethical facet of this marital prohibition, especially the role of Chow rites advocated by Confucianism, which was indeed the primary cause that can be evidentially traced in Chinese written history.[122] Moreover, the increasingly strict Confucian attitude, Jamieson suggested, was probably instrumental in converting the prohibition against marriage between those of the same surname from "a general custom" into "an absolute rule."[123]

However, his analysis abruptly stopped after this inference. As to when and how Confucian impropriety "found its way into the statute book" and "was thus converted into illegality,"[124] he made no research, although this would have been a most legitimate topic in studying the Qing statute. An exploration into the process of this prohibition being first incorporated into the Tang Code, and being maintained in successive dynasties until the Qing[125] would no doubt bear fruitful results. His inattention towards the latter development of the rule was divergent from his meticulousness in exploring anthropological theories to account for the origin of

---

[120] Jamieson, "Translations from the General Code: Marriage Laws," 98.
[121] Ibid.
[122] Gu, "Ganfen jiaqu," 72-73; Chen, "Tongxing buhun de lishi tantao," 61.
[123] Jamieson, "Translations from the General Code: Marriage Laws," 99.
[124] Ibid.
[125] Wu Shuling 吳淑玲, "Cong tongxing buhun tan luanlun jinji: shixi zhongguo shehui guanyu luanlun jinji de xiangzhengxing guize" 從"同姓不婚"談亂倫禁忌 — 試析中國社會關於亂倫禁忌的象徵性規則 (From the Rule Against Marriage Between Persons of the Same Surname to Incest Taboo: The Symbolic Rules of Incest Taboo in Chinese Society), (Master's Thesis, Sichuan University, 2006), 36-41; Huo Dan 霍丹, "Zhongguo gudai dui xingming de falü guizhi yanjiu"中國古代對姓名的法律規制探究 (Rules and Laws Concerning Name in Ancient China), (Master's Thesis, Soochow University, 2012), 4-5.

Chinese exogamy.

This underexplored area by Jamieson demonstrates that his focus did not rest there, but rather in an anthropological investigation on the origin of the statute, to which he devoted most of his effort, as had been demonstrated in the previous sections. Therefore, even though Jamieson was well aware of the important topic, his anthropological concern prevented him from doing an in-depth and extensive research on this aspect. All he did was present the above Confucian views and make an inference without elaborating when and how these views were codified.

4.4 Jamieson's Influence on Early Anthropology

In Jamieson's contact with early anthropological findings, he proved himself more than a passive recipient. Not only did he reflect upon existing theories and seek novel ways to account for the specific Chinese legal phenomenon, he also contributed to British anthropology through his translation and observation of the Qing law and furnished it with evidence from far-away China. This was especially manifested in his definition of Chinese exogamy and a rethinking of the relation between endogamy and exogamy.

First of all, he saw Chinese exogamy in a "modified or internal form,"[126] inspired by McLennan and Spencer, who believed that as time went by, women born within the tribe gradually replaced actually abducted women as eligible wives, as long as they bore differing surnames, suggesting foreign blood.[127] This they called modified or internal exogamy. As Chinese exogamy occurred within the country in a peaceful way, Jamieson also called it modified or internal exogamy. He further claimed:

> Externally they are endogamous, – they refuse marriage with any surrounding

[126] Jamieson, "Translations from the General Code: Marriage Laws," 94.
[127] Ibid.

> tribe; internally they are exogamous, – they refuse marriage with any one whose surname shows him to be of the same stock.[128]

Here it is discovered that Jamieson's idea of Chinese marriage was both endogamous and exogamous. The endogamous practice referred to the rules that forbade marriage between certain different nationalities (民族 minzu) in China. Among Jamieson's translation of the Qing marriage law, there were clauses expressly prohibiting intermarriage between Han people and the native aborigines:

> 福建臺灣地方民人不得與番人結婚，違者離異，民人照違制律杖一百，土官通事減一等，各杖九十，該地方官如有知情故縱，題參交部議處。[129]
>
> 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.[130]

Taiwan was originally occupied by aborigine groups who kept their lifestyles and customs distinct from the Han (漢). In the Qing, a large number of Han people moved there for land cultivation, under which circumstance, this clause was incorporated into the Qing Code in the 5th year of Qianlong's Reign (1740).[131] As a matter of fact, policies on marriage between different nationalities varied from dynasty to dynasty in China. For instance, such marriages were generally allowed in the Tang dynasty. But

---

[128] Ibid.
[129] *Daqing lüli huiji bianlan*, 10: 57.
[130] Jamieson, "Translations from the General Code: Marriage Laws," 88.
[131] Jin Mei 金眉, "Lun qingdai hunyin jiating falü de tezhi" 論清代婚姻家庭法律的特質(The Characteristics of Qing Marriage and Family Laws), *Faxue* 法學(Legal Science), no. 10 (2007), 77.

in the Qing, the government's attitude was not so generous and changed according to different circumstances, as manifested in the rules on marriage between the Han people and the Manchus. During Shunzhi's (順治) time, such marriage was allowed and even encouraged;[132] but when it came to Daoguang's (道光) reign, a sub-statute was made to forbid such marriages,[133] which was translated by Jamieson：

> 八旂、內務府三旂人，如將未經挑選之女許字民人者，將主婚之人照違制律杖一百，將已挑選及例不入選之女許字民人者，照違令律，笞四十，其聘娶之民人亦一體科罪。[134]
>
> 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.[135]

During the late Qing these prohibitions were again relaxed through the emperor's edicts.[136] Although Jamieson took the endogamous prohibition for granted, ignoring its many variations in different historical periods, his claim was not groundless. It had his translations of the two clauses above as supporting evidence, which was in line with key features of endogamy.[137] His translation of the Qing Code is seen influencing

---

[132] Qiu Tang 邱唐, "Qi min buhun? Qingdai zuqun tonghun de falü guifan shijian yu yishi" 旗民不婚？— 清代族群通婚的法律規範、實踐與意識 (No Marriage Between the Manchus and the Hans – The Legal Rules, Practice and Consciousness of Qing Intertribal Marriage), *Qinghua faxue* 清華法學 (Tsinghua University Law Journal), no. 1 (2016): 192-193 (herafter Qu Tang, "Qi min buhun?")

[133] Ibid, 195.

[134] *Daqing lüli huiji bianlan*, 10: 58-59.

[135] Jamieson, "Translations from the General Code: Marriage Laws," 88.

[136] Qu Tang, "Qi min buhun?" 196-197.

[137] Admittedly, these clauses were not strictly in line with endogamy because they only excluded certain nationalities in marriage, but still allowed others (such as marriage between the Manchus and Mongolians), while endogamy in its strictest sense referred to a marriage that was completely inner tribal excluding other tribes. Despite this, the key features of the clauses were in line with

his judgement and categorization of Chinese marriage through anthropological theories.

This description of Chinese marriage law reveals that while Jamieson agreed with them in that "internal exogamy" meant marriage with someone of different blood in the tribe, he placed an outer limit on it and restricted marriage beyond a tribal circle, which showed its endogamous side. He described China as an agnatic society in which exogamous and endogamous requirements co-existed, suggesting the two were not exclusive but could simultaneously work together, regulating marriage on different levels. Because of his identification of Chinese society as both exogamous and endogamous, his understanding was cited and adopted by Henry Maine.

In *Early Law and Custom*, Maine entertained grave doubt as to whether "the terms 'exogamy' and 'endogamy' can be directly opposed to one another."[138] He questioned whether there was any society "which [wa]s not at the same time 'exogamous' and 'endogamous.'"[139] The reason that he proposed this doubt was because "the outer limit within which a man must marry has been overlooked through the interest excited by the long unnoticed exogamous prohibition."[140] According to him, this interest in exogamy was undoubtedly started by McLennan who coined the terms exogamy and endogamy and was the pioneer in observing the prevalence of exogamous inhibitions among barbarous groups.[141] As his main target of opposition, McLennan's theories indeed suffered from the many drawbacks pointed out by Maine. In McLennan's description of the relation between woman capture and exogamy and its gradual transformation into internal exogamy, which took up the most space, he did not place any endogamous limit on the internal prohibitions. He is seen devoting most of his

endogamy, only allowing marriage within a circle but rejecting those that outside it. This circle was sometimes larger than nationality, but still based on it. Thus, the clauses were still forceful evidence of endogamy.

[138] Maine, *Early Law and Custom*, 222.

[139] Ibid.

[140] Ibid., 223.

[141] Ibid., 222.

attention to exogamy. But a generalization would not do him justice as the problem was not absolute. There were still complexities and intricacies inside his theory. An exploration of them would in turn lead to a more in-depth understanding of Maine's criticisms.

Following the stage of internal exogamy, McLennan had described a centripetal process towards endogamy, during which there existed a state where both limits existed. He claimed "that a local tribe, having reached this stage [of internal exogamy] and grown proud through success in war, might decline intermarriage with other local tribes,"[142] which put an endogamous limit on marriages of this tribe. Meanwhile the inner exogamous limit within the tribe still existed, inhibiting marriages between people of the same stocks, showing that McLennan had recognized co-existence of exogamy and endogamy.

However, he was inclined to think that this type of society was mainly matriarchal, which became heterogeneous through practicing exogamy, whether the external or internal form.[143] But as soon as kinship became agnatic, the tribe members, who were "already restricted to marriages among themselves," would "feign themselves to be all descended from a common ancestor," thus becoming downright endogamous.[144] He concluded, "the system of kinship through males tended to rear up homogeneous groups."[145] McLennan believed this was the way that exogamy passed into endogamy. Although he noticed a stage in this process, which was characterized by both limits, he regarded it as a society which counted kinship through females. Maine did not expressly point out this problem, but he apparently did not agree with McLennan, as revealed by his own findings and quotation of Jamieson, which all referred to the co-existence of endogamous and exogamous limits in agnatic societies.

---

[142] McLennan, *Primitive Marriage*, 62.
[143] Ibid., 93, 101.
[144] Ibid., 102.
[145] Ibid., 99.

Moreover, McLennan's matriarchal society with the double limits was merely transitional as he believed the matriarchal family system would be ultimately replaced by a patriarchal one.[146] And once this was done, it would be dominated by endogamy only. Therefore, the co-existence of endogamy and exogamy was not permanent in McLennan's formulation. Most of the time the society was either an exogamous one or endogamous one. In this sense, it was justifiable for Maine to have the impression that McLennan saw the two limits as opposed to each other. Overall, although Maine's criticism of McLennan's theories suffered from generalization, they were true to the extent that McLennan indeed attached most importance to exogamy with just a very brief discussion of the double limits which were merely transitional and applied to matriarchal societies only.

It is in order to rectify this understanding in anthropological studies and unveil the much ignored endogamous limit that Maine particularly valued the evidence offered by Jamieson, who expressly pointed out the long-term co-existence of both exogamy and endogamy in agnatic China. But, before that, he first presented his own findings in Roman and Hindu societies. While Roman law invalidates any marriage within a certain consanguine circle, it also prohibited

> marriage of a Roman citizen with a woman who was not herself a Roman citizen, or who did not belong to a community having the much-valued and always expressly conferred privilege of *connubium* with Rome.[147]

Roman society was thus shown practicing both exogamy and endogamy. Likewise, a Hindu could not marry a woman of "the same gotra," who was supposed to have a common ancestor, but he could not marry outside his own caste either, which is another

[146] Ibid., 93-94.
[147] Maine, *Early law and Custom*, 223.

case of coexistence of inner and outer limit.[148] Obviously, these were the two societies with which he was most familiar. As his re-investigation of the subject was mainly based on them, he was rather cautious as to whether he could draw similar conclusions from other societies. He confessed that he did "not pretend that the point is proved by the evidence respecting the great number of savage or barbarous tribes which have been shown to have extended 'exogamy.'"[149]

It is clearly seen that the furtherance of his argument was hindered by lack of evidence from other peoples. This was where Jamieson's translation and observation of Chinese law came to his aid. Maine said though he himself was "not a professed inquirer," he discovered Jamieson, "one of a group of earnest inquirers, who were investigating Chinese social phenomena on the spot."[150] The reason for this commendation was because he observed much had been discussed concerning the Chinese refusal to marry someone of the same family name. It was Jamieson who, through his field work, pointed out the other side of the coin.[151] He proceeded to quote Jamieson's following claim:

> Externally they are endogamous, – they refuse marriage with any surrounding tribe; internally they are exogamous, – they refuse marriage with any one whose surname shows him to be of the same stock.[152]

Jamieson's observation, as a potent evidence of the co-existence of endogamy and exogamy, responded to Maine's call for more attention to be paid to endogamy and forcefully strengthened his argument that an outer limit of endogamy existed aside

[148] Ibid.
[149] Ibid.
[150] Ibid., 224.
[151] Ibid., 223-224.
[152] Maine, *Early law and Custom*, 224; Jamieson, "Translations from the General Code: Marriage Laws," 94.

from the exogamous prohibition. It filled the gap that Maine left due to lack of evidence regarding other peoples. With evidence from Chinese, who did not belong to the Aryan race, he further extended the applicability of his argument to a much wider context. His praise of Jamieson as an "earnest inquirer" revealed the great faith he placed in Jamieson, whose on-site investigation lent him credibility.

Starting from his reading and research of British anthropological theories, to his reflection upon them and testing them with Chinese law and phenomenon, Jamieson ultimately presented his own understanding of Chinese exogamy which was in return absorbed by British anthropologists in their making and renewing of theories. His translation of marriage law, especially research on the statute against marriage of persons of the same surname, completed a whole interacting circle with British anthropology. In this process, Jamieson was shown to be more than just a recipient, but also a contributor to nineteenth-century armchair anthropology.

On the other hand, this interaction with British anthropology, which was dedicated to reconstructing the early condition of human life, placed Chinese law in the realm of primitive institutions. As Edward Harper Parker once commented, "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."[153] Being further incorporated into Maine's theory as evidence from "the great number of savage or barbarous tribes,"[154] Jamieson's dialogue with primitive men was put in the world arena, which reinforced the Orientalist discourse that distinguished the civilized West from the "primitive" East.

4.5 Pioneer Influence, Reader Interest and Jamieson's Anthropological Studies

The reason that Jamieson situated his translation and understanding of the Qing law in an anthropological vein can be traced to the pioneer contributors on Chinese marriage

[153] Parker, "Comparative Chinese Family Law," 69.
[154] Maine, *Early Law and Custom*, 223.

law, who showed an intense interest in anthropological studies. These contributors were also the persons with whom he hoped to engage in dialogue, i.e. his target audience. Their double role exercised a long-lasting impact on Jamieson's translation and interpretation of Chinese marriage law.

4.5.1 Interactive Network among Möllendorff, Parker and Jamieson

The key pioneers in this area were Paul Georg von Möllendorff (1847-1901) and Edward Harper Parker, who together with Jamieson formed a lively interaction in their anthropological concern. Parker was a well-known English sinologist who long served in the British consulates in China and after retirement occupied professorships in Liverpool and Manchester. He published extensively on Chinese matters. Möllendorff was a German diplomat and sinologist. He successively joined the German customs and consular office, having served both in China and Korea. Both of them were involved in the imperial enterprise in China, tinting their interaction with Jamieson with an imperial hue. Moreover, like Jamieson, they were long-term residents in China, possessed good mastery of Chinese language and were conversant with Chinese matters. Both of them were eminent contributors to the study of Chinese marriage law prior to Jamieson's translation.

In the first footnote to his translation of Qing marriage law, Jamieson referred to their works, namely, Parker's "Comparative Chinese Family Law" and Möllendorff's "The Family Law of the Chinese." But he believed there was still a vacuum awaiting to be filled in mapping Chinese marriage law, which was "the *ipsissima verba* of the Chinese themselves."[155] Thus he professed "no apology for presenting … the translation of this section," without which an investigation into this area could not be complete.[156] He perceived the relation between the previous works and his translation,

[155] Jamieson, "Translations from the General Code: Marriage Laws," 77.
[156] Ibid.

which were mutually complementary and together completed the whole picture. Moreover, the former became the annotation for the latter as Jamieson claimed: "the thoroughness and general accuracy of Mr. Parker's paper enable me to dispense with many notes which would otherwise have been desirable."[157] In other words, Parker's work in many parts had served the function of Jamieson's notes, supplementary to his translation.

Aside from these, there was a closer relationship between these three contributions. In 1878, Möllendorff read an article on Chinese family law before the North-China Branch of the Royal Asiatic Society at Shanghai.[158] Following this, the essay was published in the *Journal of North China Branch of the Royal Asiatic Society*[159] in 1879 entitled "The Family Law of the Chinese, and Its Comparative Relations with That of Other Nations."[160] According to the author, he was especially indebted to Parker "for the valuable notes" on his subject.[161]

Subsequently, Parker published his "Comparative Chinese Family Law" in *The China Review*, which was largely a review of Möllendorff's work and started with a commendation. The first sentence was that Möllendoff "has done good service in introducing the thin end of the wedge into a mass of interesting material, hitherto left almost entirely untouched" and he was lauded as a pioneer "in the field of Chinese

---

[157] Ibid.

[158] Möllendorff, *The Family Law of the Chinese*, 1.
The communication of the Society usually took the form of meetings, in which members of the Society or those interested read and discussed their papers. Only those papers that had successfully passed a voting procedure were allowed to be published in its official journal. See Wang Yi 王毅, *Huangjia yazhou wenhui bei zhongguo zhihui yanjiu* 皇家亞洲文會北中國支會研究(A Study of the North China Branch of the Royal Asiatic Society) (Shanghai: Shanghai Bookstore Publishing House 上海書店出版社, 2005), 79.

[159] From 1882 to 1905, the Society changed its name into "The China Branch of the Royal Asiatic Society", and its journal began to be known under the name of "*Journal of the China Branch of the Royal Asiatic Society*." In 1906, it changed its name back. Wang, *Huangjia yazhou wenhui*, 82-83..

[160] P. G. von Möllendorff, "The Family Law of the Chinese, and Its Comparative Relations with That of Other Nations," *Journal of the North China Branch of the Royal Asiatic Society* 13 (1879): 99-121.

[161] Ibid., 99.

Family Jurisprudence."[162] Parker commented on Möllendorff's investigation of many topics, such as the importance of marriage,[163] the position of wives,[164] and adoption in China.[165] Two years after that, Jamieson presented his translation of Qing marriage law, absorbing elements from and reflecting on many points from the previous works. He re-investigated the prohibition against marriage with affinities discussed by Möllendorff, the relation between family name and the state name elaborated by Parker.[166]

What was more interesting was that the remarks of Parker and Jamieson, in return, flowed back into Möllendorff in his republication of the work. As a revision of the previous one, the newly entitled "The Family Law of the Chinese" was republished in the *Journal of the Asiatic Society* in 1895[167] and separately published by Kelly and Walsh in 1896 as a book. In his preface, he acknowledged his debt to Parker and Jamieson. The former provided him with "a number of suggestions and observations" while the latter's work was the principal source for his knowledge of the Great Qing Code.[168] With this additional information, he believed it "desirable to republish the old essay, with the necessary alterations and additions."[169] For instance, he made corrections in places where Jamieson pointed out errors. Jamieson believed Möllendorff's description of Chinese relationships needs "considerable overhauling" because he put cousins and nieces in the category of affinity.[170] In the new version, Möllendorff rectified this according to Jamieson's suggestions.

This whole process of interaction among Möllendorff, Parker and Jamieson

---

[162] Parker, "Comparative Chinese Family Law," 67.
[163] Ibid., 73.
[164] Ibid., 77.
[165] Ibid., 89-91.
[166] Jamieson, "Translations from the General Code: Marriage Laws," 82-83, 92.
[167] P. G. von Möllendorff, "The Family Law of the Chinese," *Journal of The China Branch of the Royal Asiatic Society* 27 (1895): 131-189.
[168] Möllendorff, *The Family Law of the Chinese*, 1.
[169] Ibid.
[170] Jamieson, "Translations from the General Code: Marriage Laws," 83.

revealed a close-nit network of mutual influence which constituted the context for Jamieson's concern with anthropology. For Jamieson, Möllendorff and Parker were at once his pioneer researchers and potential readers. They exerted their influence as precursors but were also the people he hoped to communicate with. As to how the network was formed, their personal relations could not be ignored, as Parker and Jamieson were acquaintances. In the second edition to Parker's *A Thousand Years of the Tartars*, Parker mentioned that after he "left China for good in 1894," the first edition of 1895 was finalized in the hands of "Mr. George Jamieson, then Acting Chief Judge at Shanghai" who "kindly corrected the printer's proofs and saw to the publication there."[171] This showed that they maintained a good personal relationship, which prompted attention to each other's work. Moreover, Möllendorff and Parker were also friends as disclosed by the former when acknowledging the latter's help.[172]

Aside from personal relations, their interaction was primarily made possible through *The China Review* and *the Journal of the Asiatic Society*. Jamieson, Parker and Möllendorff[173] were contributors to both of them. All of them were members of the Asiatic Society.[174] As a matter of fact, the two journals in many respects were very much alike, including their interest in Chinese matters and relatively in-depth research. Thus there was an overlap in the composition of contributors and readers, as exemplified in their cases. The two journals served as important platforms for them to present their investigations and invite opinions, enabling them to respond to each other's works. Moreover, respectively situated in Hong Kong and Shanghai, both journals had smooth circulation routes, relying on Kelly & Walsh as their major sale

---

[171] E. H. Parker, *A Thousand Years of the Tartars* (Shanghai: Kelly & Walsh, Limited, 1895; New York: Routledge, 1996), ix. Citations are to the Routledge edition.
[172] Möllendorff, "The Family Law of the Chinese, and Its Comparative Relations with That of Other Nations," 100.
[173] Möllendorff published long articles as well as small notes in *The China Review*. Wang, *Zhongguo pinglun*, 443.
[174] Wang, *Huangjia yazhou wenhui*, 293, 331, 343.

agent,[175] which made them accessible for interested audiences along China's treaty ports. All these factors facilitated the formation of an interactive network among the three key figures.

4.5.2 Anthropology in the Interactive Network

It was within this interactive context that Jamieson's anthropological enthusiasm was fostered. Prior to Jamieson, both Möllendorff and Parker had evinced a strong interest in anthropology and partly situated their discussion in anthropological studies. In Möllendorff's original version in 1879, the author stated that some sentences were taken directly from McLennan's anthropological work.[176] In understanding the Chinese prohibition of marriage between those of the same surname, he referred to McLennan's discussion of similar practices among the Indians and American Indians,[177] revealing the anthropological significance of this practice. Projecting a receptive attitude to anthropological observation, Möllendorff placed the Chinese taboo in an anthropological line delineated by McLennan.

This inclination was more manifest in Parker's "Comparative Chinese Family Law," in which he extensively quoted McLennan, Lubbock, Maine and Spencer and tested their strength in a Chinese legal setting. For instance, McLennan's connecting together of polygamy with a military spirit was judged to be untenable in China.[178] The rule against marriage between those of the same surname was also included in an exogamous framework as delineated by McLennan and Lubbock. He dismissed McLennan's ideas that the Manchu tartars were endogamous but asserted that "no Manchu can marry a woman of his own surname."[179] Moreover, he connected the

[175] For the circulation of the *Journal of the Asiatic Society*, see Wang, *Huangjia yazhou wenhui*, 82-83; for the circulation of *The China Review*, see Wang, *Zhongguo pinglun*, 49-50.
[176] Möllendorff, "The Family Law of the Chinese, and Its Comparative Relations with That of Other Nations," 99.
[177] Ibid., 104.
[178] Parker, "Comparative Chinese Family Law," 74.
[179] Ibid., 81.

keyword of "female capture" in anthropological theories with the etymologic origin of the Chinese word "娶" (qu; marry), which can be traced to "取" (qu; take).[180] This latter word was said to refer to "a custom, still practiced, of taking the left ears, *êrh*, [耳], of the captives to present to the general,"[181] seeming to suggest that Chinese marriage had a possible relation with capture. However, he also admitted that a closer investigation was still needed.[182] His excursus gave a more precise and comprehensive idea of his opinion in this area.

Parker's excursus, entitled "Marriage relations", first elaborated the theories of Maine, McLennan, Lubbock and Spencer; he confessed that he preferred Spencer's as "the most natural, consistent, and logical."[183] But as to the origin of exogamy and the existence of many other marital customs in China, Parker claimed that knowledge relating to them was still lacking, as no close examination had been made into early Chinese history.[184] But he was convinced that this was a "rich mine open to the exploration of those who have ample leisure" and further suggested the means by which their examination was most likely to succeed.[185] This secret of success was that researchers should "bear in mind the view of the distinguished authorities quoted, and hold their theories as landmarks around which stray facts may cluster."[186]

Parker's anthropological concern provided many hints to understand Jamieson's subsequent investigation. What Parker suggested was exactly what Jamieson did, showing Parker's profound influence on Jamieson. It was due to Parker's suggestion that Jamieson gave a detailed analysis of the authoritative anthropological theories and tried to cluster the Chinese legal facts around them. Furthermore, he explored the origin of Chinese exogamy, which Parker regretted was unknown. His anthropological

[180] Ibid., 77.
[181] Ibid.
[182] Ibid.
[183] Ibid., 99.
[184] Ibid., 100.
[185] Ibid.
[186] Ibid., 99.

discussion of the rule against intermarriage between people of the same surname largely followed the line of Möllendorff and Parker. Although not everything fitted these anthropological theories, these pioneers set the tone for an anthropological research of Jamieson's translation and interpretation of Qing marriage law. Meanwhile, it must be remembered that these pioneer authors were also his target readers, whose research gap he hoped to fill and with whom he hoped to communicate. Their interest, to a great extent, determined the direction of his investigation.

Jamieson and Parker's work in return reached Möllendorff in his new version. It is shown that in his 1896 version, Möllendorff continued and even reinforced this anthropological interest. The Chinese prohibition of marriage between those of the same surname was more expressly interpreted as excluding "endogamic marriage," using McLennan's anthropological coinage.[187] Based on his observation "in the prefectural city of T'ing-chou (汀州府 Tingzhou fu), in the province of Fukien," Möllendorff further pointed out that Fukienese polyandry arose from extreme poverty, rather than from scarcity of women as McLennan claimed.[188] He further supplemented it with Maine's refutation of the theory on early promiscuous condition in *Early Law and Custom*.[189]

It is observed that the anthropological interest in Chinese marriage was fostered and reinforced in the interactive network, amid which Jamieson put his translation of Chinese marriage law under the rubric of anthropology, the fruits of which in return had potential influence on others in this network.

4.5.3 Anthropological Discussion of Levirate: An Epitome of Mutual Influence

The interactive discussion on the question of levirate perfectly epitomized the process of Jamieson being influenced by Parker and in return producing fruits that affected

[187] Möllendorff, *The Family Law of the Chinese*, 15.
[188] Ibid., 38.
[189] Ibid., 9.

Möllendorff. In Jamieson's translation of "Marriage with Widows of Relations," he had a footnote stating that "in view of this severe penalty it is scarcely possible that the Levirate can be practiced in any part of China, as Mr. Parker says he has been informed."[190] Obviously, this annotation was a response to Parker's idea of levirate. Parker, informed by his Chinese acquaintances, suggested the practice of levirate in China:

> One very respectable native authority informs us that a custom exists among the Hakkas of a younger brother taking over the widow of his elder brother when the latter has died shortly after his marriage, and even after he has had children.[191]

But this proposition was rejected by one of Parker's Hakka friends, who claimed that his people were adherents of "the 'Principles of Chou' like all the Chinese."[192] Facing this dispute, Parker did not reveal his support for either side but suggested "the possibility of such connections actually existing" was interesting because levirate was an important step in the development of early marriage in McLennan's theories.[193] This showed that his interest in levirate was associated with the anthropological studies of primitive marriage by McLennan. Later he cited his Manchu friend, who said that levirate was practiced among the Muslims in Peking.[194] By citing native informants, Parker was more inclined to believe levirate was practiced among Chinese, at least in some parts of China, and particularly among the non-Han, who did not strictly adhere to Confucian doctrines. He then associated levirate potentially existing in China with McLennan's following statement: "the obligation which in the Code of Menu [*sic*] is recognized as imposed on brothers in turn to marry the widow of a brother

[190] Jamieson, "Translations from the General Code: Marriage Laws," 83.
[191] Parker, "Comparative Chinese Family Law," 79.
[192] Ibid.
[193] Ibid.
[194] Ibid.

deceased."[195] This sentence was directly quoted from McLennan,[196] touching upon an important point in his theories. He held that levirate practiced by Indians proved the existence of polyandry in earlier times.

Emerging from promiscuity, polyandry was seen as an advancement practiced among many peoples. McLennan classified polyandry into two types: the ruder type which was called the Nair polyandry, in which "the husbands are usually not brothers – usually not relatives"[197] and the less rude type which was called Tibetan polyandry in which "the husbands were all of one blood, … were brothers."[198] The transition from the ruder type to the less rude was an important advance, as the woman was no longer a member of her mother's family, but passed into the family of the brother husbands'.[199] Reaching this step, the certainty of the father's blood was ascertained, though not the certainty of the father. Thus, her children "would become the heirs of the husband's family"[200] and the bonding between the husbands and children was consolidated.

McLennan believed an important proof for the existence of polyandry was the codification of levirate in the Institutes of Manu as well as in the Hebrew law, which maintained many key features of polyandry. Among the Tibetan polyandrous people, "the elder brother in a group of brother-husbands was accounted to be, in a special sense, the father of all the children,"[201] which was a prevailing fiction. Indian and Hebrew levirate to a great extent corresponded to this: it was the duty of the younger brother to marry the widow of his deceased elder brother who left no issue,[202] with the purpose to raise the children born in levirate, who were, however, accounted to be

---

[195] Ibid.
[196] McLennan, *Primitive Marriage*, 88.
[197] Ibid., 74-76.
[198] Ibid., 77-78.
[199] Ibid., 78.
[200] Ibid.
[201] J. F. McLennan, "The Levirate and Polyandry," *The Fortnightly Review* 21 (1877): 695.
[202] Ibid.

"children of the dead brother."[203] With their similarity in accepting the fictional identity of the children and having no antipathy against brothers marrying the widow of a brother, levirate was considered as a vestigial form of polyandry.[204]

With the prevalence of Tibetan polyandry being corroborated in the more ancient India, he further inferred that "the Levirate, wherever found, is a remainder of Thibetan polyandry."[205] According to McLennan's theory, there was a chronological order of marriage types in its development: first Nair polyandry arose, which was then replaced by Tibetan polyandry; after it also died out, it left levirate, which imposed "the obligation to marry in turn the widow of a brother deceased."[206] With levirate gradually dying out, the family progressed to the form "to which we are accustomed."[207]

Obviously, levirate in McLennan's formulation constituted an important step in human marriage. Due to its importance in anthropological theories and its extensive presence among various cultures, researchers in Chinese law in the nineteenth century also showed great interest in it. Jamieson's response to Parker on this question was made precisely in this context. Parker's indication of levirate existing in China, of its importance in the development of early marriage as well as the esteem of anthropological theories he held in studying Chinese law showed his anthropological interest in Chinese levirate. Inspired by this and intending to respond to this, Jamieson also commented on this question. But unlike Parker, who relied on native informants, Jamieson's major information source was his translation of "marriage with widows of relations" (娶亲属妻妾 Qu qinshu qiqie):

---

[203] Ibid., 700.
[204] Ibid., 698.
[205] Ibid., 699.
[206] John Ferguson McLennan, *Studies in Ancient History Comprising a Reprint of Primitive Marriage* (London: Bernard Quaritch, 1876), 238.
[207] Ibid., 239.

若兄亡收嫂、弟亡收弟婦者，不問被出改嫁俱坐，各絞。[208]

If one takes the widow of his elder or younger brother, whether divorced, remarried or not, the penalty shall be death by strangulation.[209]

Based on this translation, which prescribed severe penalties for the offenders, Jamieson was convinced that levirate was an impossibility among the Chinese.[210] His refutation of levirate existing in any part of the Chinese empire not only dismissed Parker's findings but also voiced a different opinion from McLennan's proposition of Tibetan polyandry, which was based upon Samuel Turner's (1759-1902) *An Account of an Embassy to the Court of the Teshoo Lama in Tibet; Containing A Narrative of a Journey Through Bootan, and Part of Tibet* (1800).[211]

Serving in the East Indian Company, Turner was dispatched to Tibet on a mission to consolidate good relations with Tibet in 1783.[212] The book was a record of this experience. The relation between McLennan and Turner was the relation between an armchair anthropologist and an on-site explorer. While in Tibet, Turner witnessed a "strange" practice of polyandry, in which "one female, associate[d] her fate and fortune with all of the brothers of a family."[213] Founded on this on-site observation, McLennan made his theorization of Tibetan polyandry. But Jamieson's sole focus was

---

[208] *Daqing lüli huiji bianlan*, 10: 29-30.
[209] Jamieson, "Translations from the General Code: Marriage Laws," 83.
[210] Ibid.
[211] McLennan, *Primitive Marriage*, 78.
[212] Samuel Turner, *An Account of an Embassy to the Court of the Teshoo Lama in Tibet; Containing A Narrative of a Journey Through Bootan, and Part of Tibet* (London: W. Bulmer and Co., 1800), xvii.
[213] Ibid., 348.
Contemporary researchers have reached consensus that there did exist polyandry in Tibet during late Qing and Republican times. See Li Liang 李亮, "Zangzu hunyin lishi shanbian ji qi zouxiang zhanwang" 藏族婚姻習慣法歷史嬗變及其走向展望 (History and Prospects of Tibetan Customary Marriage Law), *Guizhou minzu yanjiu* 貴州民族研究(Guizhou Ethnic Studies) 35, no. 10 (2014): 29-32; He Yimin 何一民, and Zhao Shuliang 趙淑亮, "Qingdai minguo shiqi xizang diqu duozhong hunyin jiating xingtai lunxi" 清代民國時期西藏地區多種婚姻家庭型態論析 (Analysis of the Family Forms of Tibetan Residents from the Qing Dynasty to the Republic of China), *Guizhou minzu yanjiu* 貴州民族研究 (Guizhou Ethnic Studies) 35, no. 8 (2014): 189-193.

on the marriage law of the Qing Code, without paying due attention to the separate regulations governing Tibet,[214] nor the distinct marriage customs there, leading him to reach a different conclusion in his anthropological study of levirate in China.

The discussion above on levirate reappeared in Möllendorff's 1896 version of *The Family Law of the Chinese*. On the one hand, it cited the statute that "whoever marries his brother's widow is strangled,"[215] suggesting the impossibility to practice levirate in China, in line with Jamieson. On the other hand, it also referred to Parker's assertion about its existence among the Muslims in Peking, as well as an article in *The China Review* which alleged its existence in Jiangxi, Hubei and Sichuan.[216] After comparing the two sides, Möllendorff inclined to hold that levirate is generally forbidden in China. As to the local custom mentioned by other authors, he confessed that he found no trace of it and "it can never be of the same importance with the Chinese as with other people."[217] This "other people" pointed to Indians, Persians, Koreans, Caucasians, Gallas in East Africa, and the Jews,[218] showing the prevalence of levirate and its importance in anthropological studies. Summarizing the investigations anterior to his revision, Möllendorff in fact continued their anthropological concern of levirate.

The whole discussion of levirate exhibited the interactive network among Jamieson, Parker and Möllendorff. Inspired by the pioneer work of Parker and harbouring an intention to correct him, Jamieson placed his translation of marriages with widows of relatives under the anthropological rubric of levirate, not only

---

[214] With regard to the governance of the border minorities, the Qing Dynasty established an institution named "The Court Governing the Barbarians" (理番院) with separate statutes called "Statutes Governing the Barbarians"(理番院則例). Aside from these, Qing had also made specific legal documents governing the Tibet. Liu Guang'an 劉廣安, *Qingdai minzu lifa yanjiu* 清代民族立法研究 (Legislation Governing the Minorities in the Qing Dynasty) (Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 1993), 10-14, 37-39, 41-72; Zhang Jinfan 張晉藩, *Qingchao fazhi shi* 清朝法制史(Legal History of the Qing Dynasty), (Beijing: Law Press 法律出版社, 1993), 542-543.

[215] Möllendorff, *The Family Law of the Chinese*, 17.

[216] Anonymous, "Levirate in China," *The China Review* 10, no. 1 (1881): 71.

[217] Möllendorff, *The Family Law of the Chinese*, 17.

[218] Ibid.

expressing different opinions from Parker on the Chinese levirate question, but also producing a distinct opinion from McLennan, though his new idea suffered from its own limitation. In this sense, translation provided the source data for Jamieson's anthropological research. Their ideas were then incorporated into Möllendorff's new version as a summary and continuance of the previous anthropological discussion. The whole process vividly demonstrates that it was within this interactive network, shot through with pioneer influence and reader interest in anthropology, that a similar interest was fostered in Jamieson and applied in his translation of Qing marriage law.

4.6 Conclusion

To sum up, Jamieson, by an effective use of his commentary, systematically situated his entire translation of Qing marriage law in an anthropological framework. With a focus on his translation of the clause against marriage between persons of the same surname, he explored the nature of Chinese family name in relation to the kinship system and discovered the nation's transition from a matriarchal society into a patriarchal one. Family names thereupon became strong indications of agnatic kinship, marking a prelude to an in-depth anthropological discovery of the clause in the vein of exogamy. This term further led Jamieson to reflect upon existing anthropological theories, which were trapped in the circle of tribal hostility and wife capture. Based on his on-site observation of China, he formulated his own theory that more suited Chinese history and reality.

With his translation as the data source, Jamieson further placed an endogamous outer limit upon exogamy, which was absorbed by Maine to strengthen his argument that the two were not oppositional in agnatic societies. Here, the fruits of Jamieson's translation and research of Chinese marriage law were seen entering into the larger map of British anthropology, used to reconstruct the life and society of primitive

mankind. With this, a colonial equivalence between Qing law and primitive institutions was created, strongly suggesting the stagnancy and backwardness of Chinese law. The meeting of Qing law with anthropology, rather than with English law, further indicates that its niche was in primeval culture rather than in modern legal culture, an opinion strongly echoing the Orientalist discourse that highlighted an East-West distinction. In this sense, Jamieson could be considered as an orientalist, but not necessarily an absolute one. As shown in his new version of marriage law in the next chapter, this discourse of difference was disrupted by his shift of focus.

Chapter Five 1921 Version of Marriage Law: A Dialogue with Modern English Law

In comparison with Jamieson's *China Review* version, where he situated the commentary of Chinese marriage law in an anthropological framework, Jamieson reshuffled the commentary in the 1921 version, importing English legal concepts and connecting them into a map that signposted features of Chinese marriage law. Rather than an anthropological interest in primitive mankind, the new version suggests the common ground between traditional Chinese and modern English marriage law, suggesting the possibility of modernizing the former while maintaining continuity with its traditions. This chapter focuses on the role of Jamieson's 1921 paratext in re-contextualizing the law, situating it in a different milieu and enabling a different understanding.

This is not to say that the translator experienced a dramatic shift in his understanding of Qing law. As early as in The *China Review* version, Jamieson had already resorted to the concept of contract in translating Chinese marriage law.[1] In his translation of a Qing case, he also used the English legal term "specific performance,"[2] indicating that he had perceived the similarities between the two legal systems during the nineteenth century. Moreover, his use of the Roman and English law in translating and interpreting the concept of "will" and widow's inheritance rights further demonstrated that Jamieson had detected both the ancient residues and modern possibility in Qing law. It is just that in translating marriage law, he made the contrast particularly distinct, focusing on two aspects in two versions, prompted by their different contexts and readers.

In the late nineteenth century, Jamieson formed an interactive network with

[1] Jamieson, "Translations from the General Code: Marriage Laws," 77-79.
[2] Jamieson, "Cases in Chinese Criminal Law," 362.

Möllendorff and Parker, in which his interest in anthropology was fostered and strengthened, but in the early twentieth century, his audience was totally different. As has been discussed in chapter two, at this time China was recasting her civil law. Therefore, he targeted his republication at the "men engaged on such work" and "the young law students who will be the future pleaders and judges of the Courts in China."[3]

Facing the new context and audience, Jamieson replaced the old commentary with a completely new one, making it resemble a textbook of Chinese marriage law, analysing item by item the nature of betrothal, its effects, marriage procedures and its dissolution.[4] It was an orderly re-organization of his preceding translations for those who were in the process of making a new Civil Code. As witnessed by Jamieson, Republican China had experienced a great ordeal since it had broken with its traditions and embraced a complete new polity, in which British trade also suffered. This part of history made Jamieson increasingly cautious towards abrupt change and increasingly convinced of the value of tradition in reform. His respect for tradition persisted when he saw China was recasting her laws. With an intention to enlighten Chinese law-makers with the value of Qing marriage law in their creation of a modern one, Jamieson in his republication paid special attention to the parts where English and Chinese law converged, demonstrating to the lawmakers that traditional Chinese family law was more than just ancient residue. It possessed characteristics of modern English law and thus could serve as the foundation for the new civil law.

This chapter will explore how Jamieson re-oriented his translation and interpretation towards modern English law, what English legal concepts he wielded, why he used them, and how they moulded his understanding of Chinese law. But while revealing for the Chinese lawmakers the advanced facets of traditional Chinese marriage law in this process, Jamieson's packaging Chinese with English law also

[3] Jamieson, *Chinese Family and Commercial Law*, ii.
[4] Ibid., 44-55.

exposed his belief in the superiority of the latter, which was the measure against which Chinese law was judged. Such tension in fact ran through the process when Chinese law encountered Western law.

5.1 Chinese Betrothal as English Contract

To begin with, although the concept of contract had already appeared in Jamieson's translation of *The China Review* version, it was not fully manifested or explicated due to Jamieson's intensive anthropological enthusiasm at the time. The new commentary with recurrent discussion of contract, however, re-contextualized his translation, highlighting the concept and providing various clues to understand it. The following was his renditions of this concept:

> Instance 1:
>
> 凡男女**定婚**之初,若或有殘廢、或疾病、老、幼、庶出、過房同宗、乞養異姓者，務要兩家明白通知，**各從所願**，不願即止，**願者**同媒妁寫立**婚書**，**依禮聘嫁**。[5]
>
> 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 surname, such facts must be fully communicated to the other side. If both sides are still **agreeable** then **a formal contract** is to be drawn up through the go-betweens and the betrothal is completed by **marriage presents.**[6] (Bold added for emphasis)

[5] *Daqing lüli huiji bianlan*, 10: 2.
[6] Jamieson, *Chinese Family and Commercial Law*, 32.

This first instance, which summarized nearly all the key features of Chinese engagement, provided for it the most important definition. Within it, Jamieson translated both betrothal (定婚 dinghun) and the engagement document (婚書 hunshu), that is the written form of betrothal, into contract. Aside from these, the original Code had provisions where there was no such equivalent Chinese wording, but which undoubtedly implied the existence of betrothal and engagement documents. In these parts, Jamieson also supplemented his translation with the concept of contract:

Instance 2:

…男家**悔**而再聘者，罪亦如之，仍令娶前女，後聘聽其別嫁。[7]

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 marriage of contract were made between him and another family, it shall not be binding upon such other family.[8] (Bold added for emphasis)

Instance 3:

若卑幼或仕宦或買賣在外，其祖父母、父母及伯叔父母、姑、兄姊自卑幼出外之後為**定婚**，而卑幼不知，自娶妻已成婚者，仍舊為婚。尊長所定之女，聽其別嫁。未成婚者，**從尊長所定**。**自定**者，從其別嫁。違者，杖八十，仍改正。[9]

If when any of the sons of a family is away from home, either on official duty or for purposes of trade the seniors of the house such 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

[7] *Daqing lüli huiji bianlan*, 10: 3.
[8] Jamieson, *Chinese Family and Commercial Law*, 33.
[9] *Daqing lüli huiji bianlan*, 10: 4.

got married when abroad, such marriage shall stand good, and the contract entered into by his parents, & c., shall be avoided.[10] (Bold added for emphasis)

In the second instance, what the boy's family regretted (男家悔) was the previous betrothal. In the third instance, what the seniors arranged (從尊長所定) was the engagement for the son or grandson in distance places. Likewise, what he arranged for himself (自定) was also an engagement. These places in the original texts were all supplemented with the concept of contract in Jamieson's translation. Moreover, he translated "為定婚" as "contracted a marriage for him,"[11] in which the verb form of contract was used. A summary of these translations demonstrates that Jamieson conceived the establishment of the Chinese betrothal as making a contract, which was similar to Staunton's translation in these places and perhaps was partly influenced by him.[12] But Jamieson created an interpretative web through his commentary that Staunton's version lacked.

First of all, this usage was followed throughout Jamieson's new commentary, as in "employment of go-betweens who settle verbally the contract between the two families," and "contract his own marriage"[13] which all pointed to the Chinese engagement. Aside from the function of echoing the translation, the commentary also offered clues to understand Jamieson's choice of contract to render betrothal.

In the first instance, by translating "各從所願" and "願者" into "free consent" and "agreeable," Jamieson spotted that the betrothal was based on mutual agreement, which responded to the first key element in English contract. "Sometimes referred to as the *consensus ad idem* ('meeting of minds')," [14] agreement primarily consists of

[10] Jamieson, *Chinese Family and Commercial Law*, 33.
[11] Ibid.
[12] See Staunton, Ta Tsing Leu Lee, 107-109.
[13] Ibid., 44-46.
[14] Stephen Hall, *Law of Contract in Hong Kong: Cases and Commentary*, 3rd ed. (Hong Kong: LexisNexis, 2011), 87.

offer and acceptance.[15] Offer refers to the proposal that one makes to another "to make a promise to him, asking in return for the doing of some act, or the making of a counter-promise."[16] "If the offer is accepted it is converted into a binding promise."[17] Although these two elements were not clearly distinguished in translating the above statutes, Jamieson in his commentary had indicated this process. He described the "employment of go-betweens who settle verbally the contract between the two families,"[18] which included the proposal of marriage by one family and acceptance by the other. He was thus aware that offer and acceptance had been completed through "mutual consent."

In English law, such an agreement is also a must in a contract to marry: "to constitute such a contract there must be an agreement between a man and a woman, by which they mutually promise to marry one another."[19] This contract, in the eyes of English law, was a binding one and was essentially no different from other contracts, therefore, "most of the rules of law which apply to contracts generally are also applicable to contracts to marry."[20] The positioning of promise of marriage in English law facilitated Jamieson's conception of Chinese betrothal as a contract. At the same time, he particularly pointed out in the commentary the differences between the two legal systems in acquiring mutual consent. In English law, it was between the would-be bride and would-be bridegroom; in China, however, "the consent of the bridegroom or bride is not required nor even asked."[21] Instead, it relied on agreement between "the Heads of the two families."[22] Jamieson in his new commentary was careful to show the delicate differences between English and Chinese marriage amid their similarities, detecting the Chinese variations within the English concept of contract to

[15] Geldart, *Elements of English Law*, 182.
[16] Ibid., 182-83.
[17] Ibid., 183.
[18] Jamieson, *Chinese Family and Commercial Law*, 44.
[19] Maud I. Crofts, *Women Under English Law* (London: The National Council of Women of Great Britain, 1925), 15.
[20] Ibid.
[21] Jamieson, *Chinese Family and Commercial Law*, 44.
[22] Ibid.

marry.

Aside from mutual consent, Jamieson in the 1921 commentary also perceived consideration in the Chinese betrothal, which was another essential requirement for making a binding common law contract. It is "the price of bargain"[23] and is legally understood in this way: "an act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."[24] According to Jamieson, the marriage presents received "by the bride's family" was the consideration.[25] In this contract, the bridegroom's family was promised a bride, in return for which, the bride's family gained the marriage presents or engagement money. He was very careful to point out that "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"[26] The pecuniary precision of engagement money provided the certainty of terms and contractual intention required for a binding English contract. It was "exactly tantamount to the purchase money in a contract of sale."[27] He saw it as the price for which the promise of the bride's family was purchased, further strengthening his conviction of its contractual nature.

His identification of marriage presents with consideration, based on the common ground analysed above, further shaped his understanding of the status of marriage presents in the Chinese betrothal. First, it must be noticed that consideration was an essential element in the common law contract: "an agreement is generally

---

[23] Hall, *Law of Contract in Hong Kong*, 199.
[24] Frederick Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England*, 7th ed. (London: Stevens and Sons, Limited, 1902), 168. This definition was further approved by the House of Lords in *Dunlop* v *Selfridge* [1915]. See Emily Finch and Stefan Fafinski, *Contract Law* (Edinburgh: Pearson Education Limited, 2015), 37.
[25] Jamieson, *Chinese Family and Commercial Law*, 45.
[26] Ibid., 33.
[27] Ibid.

unenforceable as a contract if it lacks consideration."[28] This was very different from the civil law contract. A comparison between them would render the status of consideration in English law particularly manifest. In the common law system,

> a person to whom a promise is made (the promisee) has to give some consideration in order to render the otherwise gratuitous promise made in their favour into a legally binding contractual agreement.[29]

On the other hand,

> in civil law systems, it is usually enough that the parties have reached an agreement accompanied by an intention to be legally bound. The giving of something valuable in exchange for the promise is often useful in proving intention to be legally bound, but the intention can be established without it. In most civil law systems, therefore, consideration is entirely ancillary to intention.[30]

The subordinate position of consideration in the civil law contract projected a stark contrast to the importance it assumed in common law contract. Due to his adherence to the common law understanding, marriage present, as a counterpart of consideration, was particularly highlighted in the first instance of Jamieson's translation, which was the leading provision of Chinese betrothal. In *The China Review* version, "依禮聘嫁" was still translated as "the betrothal shall be made according to the customary rites."[31] But in his 1921 version, it was rendered as "the betrothal is completed by marriage presents."[32] The initial version regarded *li* (禮) as rites and made the translation

[28] Hall, *Law of Contract in Hong Kong*, 199.
[29] Finch and Fafinski, *Contract Law*, 36.
[30] Hall, *Law of Contract in Hong Kong*, 199.
[31] Jamieson, "Translations from the General Code: Marriage Laws," 77.
[32] Jamieson, *Chinese Family and Commercial Law*, 32.

accordingly while in the later modified version, the translator saw *li* as marriage presents (彩禮).

As a matter of fact, marriage rites and presents were not discrete concepts, the former with its complex marital rituals encompassed the latter, which had a much narrower meaning. Jamieson had an acute understanding of the complicated betrothal procedures stipulated by rites. He described them in detail in the commentary: first the employment of go-betweens who approached the girl's family and reached an informal settlement, which corresponded to the Chinese *nacai* (納彩); the next step is exchanging the date of birth of the boy and girl, which corresponded to *wenming* (問名); then sending and receiving presents, which was the custom of *nazheng* (納征).[33] These presents responded to their Chinese name of *caili*. Although Jamieson had a complete understanding of the complexities of Chinese engagement if performed in accordance with the customary rites, he narrowed his conception of *li* and focused merely on *caili*, a much more restricted concept in marriage rites.

The change of mind was precisely prompted by his emphasis on consideration to comprehend marriage presents, which should be significant in the Chinese contract to marry in line with the requirements of the English law. Therefore, he changed the original translation of "依禮聘嫁," in which consideration was missing, into "the betrothal is completed by marriage presents," [34] rendering consideration an indispensable concluding step in betrothal.

The importance of marriage presents was also manifest when Jamieson described step by step the betrothal procedures, in which he made it very clear that only after engagement gifts were sent and received was a betrothal finalized and began to take on "legal consequences." [35] Through Jamieson's translation and interpretation, marriage presents acquired a similar status in Chinese betrothal as that of consideration

[33] Ibid., 44-45.
[34] Ibid., 32.
[35] Ibid., 45.

under English contract. Jamieson's common law position was seen greatly shaping his understanding of Qing law.

With the new commentary re-orientated towards understanding Chinese law with English legal concepts, echoing, explaining and re-shaping his translation, Jamieson demonstrated that Chinese betrothal encompassed the key ingredients required by an English contract. This facet was at first obscured by his anthropological enthusiasm in the late nineteenth century, and only revived four decades later in the new version. Based on the East-West common ground, it suggests the possibility of modernizing Chinese law without having to make a total break with its traditions, thereby potentially undermining the Orientalist construction of distinction.

Moreover, Jamieson's connection of Chinese betrothal to contract in fact had touched upon a very important legal topic in the West concerning the nature of marriage. In the Western tradition, marriage was much more than a contract privately and voluntarily made between a man and a woman. It was also considered "as a natural, social, and spiritual association that served the essential private and public goods in a community."[36] Its spiritual facet considered "marriage as a sacramental or covenantal association" under "religious sanction";[37] the social facet saw it as a social union, subject to the regulations of the community and the state;[38] the natural facet regarded marriage as a creation under the "natural laws of reason, conscience, and the Bible."[39] Although in one sense they were mutually complementary with each stressing a different perspective, they were also involved in a competing relation, struggling for "ultimate authority over the form and function of marriage — claims by the church, by the state, by family members, and by God and nature."[40] Therefore, marriage as

[36] John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2nd ed. (Louisville: Westminster John Knox Press, 2012), 291.
[37] Ibid., 2.
[38] Ibid.
[39] Ibid.
[40] Ibid.

contract was by no means the only interpretation in the West.

But as time went on, the contractual perspective gradually gained prominence. With the advent of the Reformation, Protestants dismissed "celebration of marriage as a sacrament," which "conferred no sanctifying grace.[41] Enlightenment philosophers made additional moves. Before 1850 their key move was "to remove the religious dimension of marriage as necessary"[42] and after 1850, it was "to remove the necessary natural and social dimensions of marriage."[43] In this way, enlightenment philosophers "liberated the institution of marriage", rendering it a private and voluntary contract of the civil nature.[44] Adumbrated in the eighteenth century and "elaborated in the nineteenth century", this "Enlightenment contractarian model of marriage" was "implemented legally in the twentieth century."[45]

The time that Jamieson linked part of Chinese marriage law with contract was just when the contractarian perception of marriage had been fully proposed and discussed by Western philosophers. It fitted with the trend in Western countries, which were on their way to ridding themselves of the spiritual, social and natural understanding of marriage and marching towards a contractual model.

Concrete reforms had already been introduced into English marriage law by this time. Firstly, the common law courts had assumed primary jurisdiction over marriage, divorce and other marital matters, in replacement of the church courts which had claim to govern these matters before the Matrimonial Causes Act of 1857.[46] Placing marriage in secular courts, this legislation was a milestone in the journey towards a civil contract. Moreover, this Act, by simplifying the procedure of divorce, also granted more sanction to the wish of the innocent party to end the marriage,

[41] Ibid., 6.
[42] Ibid., 305.
[43] Ibid., 306.
[44] Ibid.
[45] Ibid., 10.
[46] Ibid., 310.

"authoriz[ing] private suits for divorce on proof of cause, with a subsequent right to marry for the innocent party."[47] It made marital relations similar to contractual relations in being dissolvable through simpler and quicker legal processes.[48]

Considering Jamieson's purpose to dedicate this work to the makers of the Chinese civil law, this accordance seemed more than just a coincidence. Jamieson's detailed discussion of contract in the commentary and corresponding translation suggest that Qing marriage law had its own contractarian foundation, possessing the possibility to forge ahead in the same direction as English marriage law, without having to sever with its traditions. This added strength to his argument that traditional Chinese family law had its value in the new Republican society.

Furthermore, considering Jamieson's familiarity with Maine's *Ancient Law,* this advance towards contract revealed a conscious exploitation of Maine's famous thesis that "the movement of progressive societies has hitherto been a movement from Status to Contract."[49] As contract was higher on the ladder of social development towards which a progressive society was marching, Jamieson's identification of Chinese betrothal with contract indicated that China was also going through this process and had accrued some fruits, at least having established a contractarian basis in parts of marriage law. Correspondingly, Qing people were not all bound by the various forms

---

[47] Ibid. Although the cause of adultery must be shown in this type of divorce which was not yet based on his or her will, it "did provide a passable road to relief and a fresh start" to the innocent party who wished to extricate himself or herself from such a hopeless relationship. Ibid.

[48] After all, before the Act of 1857, "no court had the power to grant a decree of divorce terminating a valid marriage. The ecclesiastical courts had jurisdiction to annul marriages; and they also had jurisdiction to grant decrees of divorce *a mensa et thoro* (which relieved the parties of the duty to cohabit but did not permit either party to remarry)." For anyone who wished to remarry, the only way was to obtain "a private Act of Parliament" which was extremely complicated, expensive and time-consuming, requiring such petitioner to first acquire "a divorce *a mensa et thoro* from the ecclesiastical court, and a judgement awarding damages for adultery from the common law courts," or furnish "good reason for failing to do so," then go through a series of Parliament procedures. See S. M. Cretney and J. M. Masson, *Principles of Family Law*, 5th ed. (London: Sweet & Maxwell, 1990), 83.
In comparison, the Act of 1857 granted easier means for those locked in failed marriages who wished to get out of it and embrace a new start.

[49] Maine, *Ancient Law*, 100.

of status featured by their fixed rights and obligations. They were also entitled by the law to exercise their volition to establish new relations, from which privately made rights and duties were produced. This further attested to the applicability of traditional Chinese law in Republican China, which possessed the ability of recasting itself towards a contractarian model.

5.2 The Consequence of Breaching a Chinese Betrothal: Specific Performance

Aside from using contract to translate betrothal, Jamieson's use of English legal concepts also extended to the circumstance when such betrothal was endangered by a breach. In the commentary, he established the legality of a formally concluded betrothal and claimed that "specific performance may be enforced."[50] This legal term refers to "an equitable remedy that compels the party in breach to perform his part of the contract."[51]

In English law, when a breach of contract occurred, a more common way to compensate for the party suffering from the breach was through damages, which "are a financial remedy,"[52] and usually "will be of such amount as to place him, so far as money can do it, in the same position as if the contract had been performed."[53] In contrast to "the default remedy" of damages,[54] the order of specific performance is quite rare. "It is inherently discretionary," and only awarded in exceptional cases, in which the harm could not be compensated through the sole means of damages and "it would be inappropriate to leave that aspect of the harm unremedied."[55] Its awarding further depends on the types of the contract.[56] If the specific performance raises

[50] Jamieson, *Chinese Family and Commercial Law*, 45.
[51] Finch and Fafinski, *Contract Law*, 200.
[52] Ibid., 188.
[53] Geldart, *Elements of English Law*, 199
[54] T. T. Arvind, *Contract Law* (Oxford: Oxford University Press, 2017), 471.
[55] Ibid., 507-508.
[56] Finch and Fafinski, *Contract Law*, 200.

oppression or interferes with personal liberty, it would not be ordered.[57]

The question is why Jamieson particularly mentioned the enforcement of specific performance when discussing the legal consequences of a betrothal contract. The answer rests in the following clauses and cases, which show that specific performance was precisely in line with an important remedy that Chinese law conferred on the injured party in a breach of contract:

> Instance 4:
>
> 若許嫁女已報婚書，及有私約，謂先已知夫身殘疾、老幼、庶養之類，而輒悔者，女家主婚人笞五十，**其女歸本夫**。雖無婚書，但曾受聘財者，亦是。[58]
>
> 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 present shall be sufficient evidence of the contract.[59] (Bold added for emphasis)

In the clause above, Jamieson translated "其女歸本夫" into "the marriage must be completed as agreed,"[60] showing that he had detected that once betrothal was made, even if the girl's family regretted it or changed their mind, they still need to observe it and proceed with the marriage as promised, in line with the requirements of specific performance. The following clause further proscribed that even if they contracted the

[57] Arvind, *Contract Law*, 508.
[58] *Daqing lüli huiji bianlan*, 10: 2-3.
[59] Jamieson, *Chinese Family and Commercial Law*, 32.
[60] Ibid.

girl to someone else, or even if the marriage had been completed, the first intended husband still reserved the right to ask for the girl back and require the marriage to be completed as originally contracted:

> Instance 5:
>
> 若再許他人，未成婚者，女家主婚人杖七十；已成婚者，杖八十。…… **女歸前夫**。…… 男家悔而再聘者，**罪亦如之，仍令娶前女**，後聘聽其別嫁。[61]
>
> If after the 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 eighty blows, and such marriage shall be annulled at the option of the first intended, who may, if he so chooses, **claim his bride**. … 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.[62] (Bold added for emphasis)

By rendering "女歸前夫" (the woman is returned to the first husband) into "claim his bride,"[63] Jamieson changed the neutral and objective standpoint in the source text, viewing the matter from the perspective of the first betrothed husband and stressing that he was entitled to his bride and had the right to require the marriage completed as the original betrothal had agreed. The remedy was similar if the breach occurred in the intended husband's family. Here Jamieson altered the original text of "男家悔而再聘者，罪亦如之" (in the case that the man's family changes its mind and makes a subsequent betrothal, the penalty is the same), in which the emphasis was on the

[61] *Daqing lüli huiji bianlan*, 10: 3.
[62] Jamieson, *Chinese Family and Commercial Law*, 32-33.
[63] Ibid., 32.

penalty for the breach into "the family of the husband cannot after betrothal withdraw from the contract,"[64] in which the focus was on the contract that must be carried out. The next translation of "仍令娶前女" into "the marriage must be completed as agreed"[65] further reinforced this. These translations revealed that Jamieson's stress was on the Chinese recognition of the remedy to have the betrothal contract honoured. As specific performance in English law similarly requires the party in breach to fulfil his promise in the contract, he detected its convergence with the provisions above.

Aside from the statutes, his translation of a Qing case further reinforced this perception. In the case, a girl named Su Ta-ko was formally betrothed to Liu Pa who absconded and was missing for eight years.[66] Subsequently the girl's uncle married her to the brother of Liu Pa.[67] This marriage, however, was held to be illegal and the court decided that they should be separated.[68] Jamieson explained that since Chinese law had a provision against marrying the widow of a deceased brother, a boy could not marry the girl who had been betrothed to his brother either, because "a formal betrothal was sufficient to constitute the relationship of man and wife between the parties."[69] The girl now was "in the position of a wife" to Liu Pa.[70] He found this case particularly interesting as it showed the importance the Chinese law attached to betrothal. Once it was formally settled, the relation of husband and wife was constituted, thus

> there is no possible method by which either can get off if the other chooses to claim his or her rights; ... Except by mutual consent the contract cannot be broken,

[64] Ibid., 33.
[65] Ibid.
[66] Ibid., 135-136.
[67] Ibid., 136.
[68] Ibid.
[69] Ibid.
[70] Ibid.

the Courts must decree **specific performance**.[71] (Bold added for emphasis)

In this remark, Jamieson pointed out that what Chinese court ordered when one party unilaterally regretted or withdrew the betrothal was in fact specific performance, requiring that party to fulfil the original promise in the contract, echoing Jamieson's rendition of the previous clauses. Although the revelation had probably been made when he first published these translations in *The China Review* in the late nineteenth century, his occupation with anthropology at the time did not spare him the chance to address it in detail. It was only after he began to target the translation at lawmakers and students of law in China that he adopted the term of specific performance to re-contextualize the law in the commentary, situating it in the vein of English law and explicating the Chinese remedy in accordance with specific performance: "either party can compel the other side to fulfil the engagement."[72]

However, his use of the English term had the side effect of projecting a contrast between Chinese and English marriage law from a different angle. As specific performance and damages were recognized ways of remedies coexisting in English law, Jamieson's use of specific performance put Chinese way of remedy into this system. But in this same context of breach of contract to marry, English law awarded damages instead of specific performance. As the contract largely involved personal liberty, the English court would by no means issue an order of specific performance in its breach. Damages as a default way of compensation was the only remedy for the injured party in the early twentieth century.[73] They "are not a fixed amount, and are in the discretion of the jury."[74] Once the court had proved injury, the amount awarded "might include exemplary or punitive damages,"[75] which "may far exceed the

[71] Ibid.
[72] Ibid., 46-47.
[73] Crofts, *Women Under English law*, 15.
[74] Ibid., 16.
[75] Olive M. Stone, *Family Law* (London and Basingstoke: The MacMillan Press Ltd., 1977), 23.

pecuniary loss", and is given to compensate "for injured feelings."[76] As a contrast, the remedy of specific performance granted by Qing law was absent from the English contract to marry.

Overall, Jamieson's use of specific performance was based on the common ground it shared with the Chinese way of remedy when facing a breach of betrothal contract. It placed the Chinese remedy in the corresponding English system, suggesting the potentialities of the former marching towards the latter. Such packaging, however, by enabling the two particularly comparable, also made their differences manifest. When facing the same scenario of a breach of contract to marry, the remedy of specific performance granted by the Qing law was not found in the English law, which instead awarded damages for the injured parties.

5.3 When a Party Lied in Betrothal: Misrepresentation

While recognizing the remedy of specific performance granted by the Qing Code, Jamieson did not fail to notice one important exception to this rule, claiming in the commentary that "misrepresentation of material facts touching the status or physical condition of the intended will enable the innocent party to terminate the contract."[77] Misrepresentation was an important English contractual concept, referring to untrue or misleading statements that one party has made to another before the contract is concluded.[78] If it concerns some material facts and "contributes to the other party's decision to enter into the contract, it is said to have *induced* the contract,"[79] which would make the misrepresentation actionable.[80] In such a circumstance, "the standard

---

The Action for damages for Breach of Promise of Marriage existed in England until it was abolished in 1970 by the Law Reform Act. See Stone, *Family Law*, 23.

[76] Geldart, *Elements of English Law*, 200.

[77] Jamieson, *Chinese Family and Commercial Law*, 48.

[78] Arvind, *Contract Law*, 307.

[79] Ibid.

[80] Ibid., 316.

remedy" was to have the contract avoided or cancelled.[81]

Jamieson's use of the English term of misrepresentation when introducing possibilities to terminate the betrothal according to Chinese law seemed to suggest some common ground between the two. In order to clarify what it is, it is necessary to first understand what the "facts touching the status or physical condition of the intended" refer to.[82] The answer to this question is found in Jamieson's following translation:

> Instance 6:
>
> 若或有殘廢、或疾病、老、幼、庶出、過房同宗、乞養異姓者，務要兩家明白通知。[83]
>
> 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 surname, such facts must be fully communicated to the other side.[84]

Obviously, the facts concerning the physical condition of the intended refer to whether the intended boy or girl was deformed or seriously ill, meanwhile the facts in regard to his or her status refers to whether the intended was born by a wife or concubine, naturally born or adopted, whether of a different surname. If false statements about these conditions were conveyed to the other side, it would amount to misrepresentation.[85] Moreover, Jamieson particularly mentioned "material facts" in

---

[81] Arvind, *Contract Law*, 317; Geldart, *Elements of English Law*, 190. The other remedy was damages when the induced party suffered from "loss caused by the misrepresentation." See Arvind, *Contract Law*, 317.

[82] Jamieson, *Chinese Family and Commercial Law*, 48.

[83] *Daqing lüli huiji bianlan*, 10: 2.

[84] Jamieson, *Chinese Family and Commercial Law*, 32.

[85] Even silence on these facts also amounted to misrepresentation in this case. Although the English principle was "silence is not misrepresentation," there are exceptions. One of them is that if duties are imposed by the law, then disclosure would be misrepresentation. Arvind, *Contract*

the misrepresentation. The word "material" had its particular meaning in English legal understanding of misrepresentation, which is understood to "induce the contract."[86] "It does not have to be the decisive factor" nor the sole factor in inducing the contract;[87] but it must play a real part in the party's decision "to enter into the contract."[88] Only such a misrepresentation concerning material facts was actionable[89] and could entitle the injured party to rescind the contract.

First of all, misleading information on the aspects of the health condition and status of the intended boy or girl could indeed induce the contract in the context of making the betrothal in China. The fact that the Qing Code required all such information to be fully disclosed between the two families has shown their importance in the decision of the Chinese families to enter into a betrothal. A healthy boy or girl of the right age born by a wife would certainly make a better choice than a deformed or ill person who was born by a concubine or adopted from other families. The note to the original Code further explained this:

> A disabled was not a normal person and an old person or a minor was not of the appropriate marriage age, they were thus not wanted by people. Moreover, children born by concubines and servant girls, or those adopted from another family of the same kindred, or foster sons of a different family name, though different from disability and age problems, were still unfavourably different from sons born by a wife. (殘疾則非完人，老幼則年不相稱，但非人情所願。庶出則妾婢所生子也，過繼則本宗別房子也，乞養則異姓義子也，雖與殘疾老幼

Law, 309-310.
As the Qing Code had expressly required the information on the health condition and status of the intended girl or boy to be mutually communicated, thus silence on these facts was still misrepresentation, in line with the circumstance that disclosure could be misrepresentation according to English law.

[86] Arvind, *Contract Law*, 316.
[87] Ibid.
[88] Ibid.
[89] Ibid.

不同，終與嫡子親子有異。)[90]

As the intended boy or girl who possessed these conditions would make it less likely for the other family to enter into the contract, circumstances occurred that untrue statements in this regard were made to conceal the disadvantaged conditions. If indeed successfully inducing the other party to enter into the engagement, these untrue statements would be "misrepresentation of material facts,"[91] as shown in the fourth instance of translation, which will be briefly reproduced here for convenience:

> 若許嫁女已報婚書，及有私約，**謂先已知夫身殘疾、老幼、庶養之類**。而輒悔者，女家主婚人笞五十；其女歸本夫。[92]
>
> 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**.[93] (Bold added for emphasis)

In translating the clause, Jamieson highlighted the fact that only when the family changed their mind "without good reason,"[94] which was a diction missing in the original, would they be penalized and the contract continued in force. In order words, if they could provide good reason, they would be allowed to "refuse to proceed with

[90] *Daqing lüli huiji bianlan*, 10: 4. Translation made by the author.
[91] Jamieson, *Chinese Family and Commercial Law*, 48.
[92] *Daqing lüli huiji bianlan*, 10: 2-3.
[93] Jamieson, *Chinese Family and Commercial Law*, 32.
[94] Ibid.

the ceremony."[95] Such reason referred to "夫身殘疾、老幼、庶養之類." The original text "謂先已知夫身殘疾、老幼、庶養之類" (provided that they had been informed that the husband was disabled, too old or too young, or he was born by a concubine) stated that the girl's family knew the exceptional condition of the intended husband, which disqualified them from changing their mind. Jamieson, however, translated it into "unless they can allege that they were not informed of the fact of the future husband being deformed, etc."[96] By using "unless" and changing knowledge of the information into lack of knowledge, he proposed the circumstance that such information was not disclosed to them by the other party or untrue statements were conveyed, which conditioned their decision to enter into the betrothal and led to their regret later. The translational change and supplementation revealed his perception that the untrue statement or disclosure in this case was in line with misrepresentation of a material nature. With this "good reason", they were allowed to withdraw from the betrothal and terminate all relevant marriage ceremonies. The cancellation of the betrothal contract allowed by the Qing law also complied with the remedy of recision awarded by English courts in actionable misrepresentation.

It was precisely based on the common ground between this clause and the English actionable misrepresentation with similar remedy that Jamieson used the English legal term misrepresentation in his commentary on Chinese law and particularly emphasized "material facts." However, the attention he paid to this English concept and its resemblance to Chinese law obscured another possible remedy that was granted by the Qing Code:

Instance 7:

若為婚而女家**妄冒**者，主婚人杖八十，謂如女殘疾，卻令姐妹相見，後卻以殘疾女

[95] Ibid.
[96] Ibid.

成婚之類，追還彩禮。男家**妄冒**者，加一等，謂如與親男定婚，卻與義男成婚。又如男有殘疾，卻令弟兄妄冒相見，後卻以殘疾男成婚之類。不追彩禮。未成婚者，**仍依原定。**所妄冒相見之無疾兄弟姊妹及親生之子為婚，如妄冒相見男女已聘許他人，或已經配有家室者，不在仍依原定之限。[97]

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 practiced 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.[98]

This clause again vividly illustrated the circumstance that false statement of the conditions of the intended boy or girl could induce the other family to enter into a betrothal, which would make an actionable misrepresentation. Moreover, since the contracting family deliberately introduced another daughter or son to conceal the deformity or illness, as revealed by the word "妄冒" (wilfully mislead or deception), it could be more accurately classified as fraudulent misrepresentation according to English law. Fraudulent misrepresentation is not only untrue, "but is known to be so to the person who makes it, or is made by him recklessly without knowing or caring whether it be true or false."[99] Under fraudulent misrepresentation, the primary remedy the Code provided was "仍依原定," which was translated as "the innocent party may

[97] *Daqing lüli huiji bianlan*, 10: 3-4.
[98] Jamieson, *Chinese Family and Commercial Law*, 33.
[99] Geldart, *Elements of English Law*, 191.

claim the individual whom they were first given to understand was betrothed."[100] This showed that Jamieson was aware of this very different remedy which was not found in the remedies of misrepresentation in the English law. But in his commentary of the misrepresentation of the material facts, he had completely omitted this remedy, merely focusing on termination of the contract.

Originally, Jamieson's use of the English term "misrepresentation" was based on his perception of the similarities shown by the Qing Code, particularly exemplified in the fourth instance of translation. However, with the focus on their common ground, the remedy for misrepresentation that did not have its counterpart in English law was downplayed. This was more manifest when Jamieson took the whole process of marriage into consideration, in which his emphasis on the convergence between Chinese and English marriage law led him to miss many unique facets that Chinese law possessed.

5.4 The Lost Facets of Chinese Marriage amid its Common Ground with English Marriage

Jamieson's use of English legal concepts was extended to the whole process of Chinese marriage. While underlining the potentialities of the latter advancing towards the former through their resemblances, Jamieson also displayed his superiority in conceiving English law as the measure and model. Such packaging moreover restricted a more in-depth understanding of the many facets of Chinese marriage, which occurred in his summary of the entire marriage process. After the three engagement procedures described above, Jamieson proceeded to present the latter two steps: "bringing home the bride with red chair and music" and "obeisance by the pair to the bridegroom's parents, and … to the ancestral tablets."[101] With this, he summarized the whole

[100] Jamieson, *Chinese Family and Commercial Law*, 33.
[101] Ibid., 45.

marriage procedure, openly revealing the English benchmark he has been holding throughout his translation and commentary of Chinese marriage law:

> 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.[102]

Jamieson was seen matching the procedure of Chinese marriage law with its counterpart in English marriage step by step and item by item. He unequivocally exposed the requirements of English marriage law as his measure in understanding Chinese marriage, which will be analysed in the following parts. In Jamieson's time, English marriage could be celebrated according to "the rites of the Church of England," "the usages of the Society of Friends ('Quakers')" "the usages of the Jews" or "such form and ceremony as the parties may see fit to adopt" provided the marital parties made the proper declaration.[103] While Jews and Quakers were allowed to celebrate their marriages according to their own rules,[104] witnesses were normally required in the first and last types of marriage.[105]

In line with this English rule, Jamieson perceived that the go-betweens played a similar role in China.[106] This was largely true, as Qing judges did see go-betweens as witnesses of the betrothal when other evidence was missing.[107] Jamieson's reading of

---

[102] Ibid.
[103] Edward Jenks, ed., *A Digest of English Civil Law* (London: Butterworth & Co., 1916), 4: 1155-1156.
[104] Crofts, *Women Under English Law*, 20.
[105] Jenks, *A Digest of English Civil Law*, 1157.
[106] Jamieson, *Chinese Family and Commercial Law*, 45.
[107] Liang, *Delivering Justice in Qing China*, 197.

Chinese go-betweens as English witnesses demonstrated their similarities in the two marriage laws, although it ran the risk of downplaying the other important tasks shouldered by go-betweens. Their role ran throughout the whole process from proposal to completion of marriage. After the verbal settlement of the matter which Jamieson mentioned, the go-between then participated in the exchange of red cards for fortune telling, communicated the amount of the engagement money and the date of marriage between the two families, and finally joined the actual marriage ceremony.[108] Jamieson's identification of the go-betweens with witnesses, had to a large extent, simplified the various functions they performed in the Chinese marriage, obscuring those that did not have counterparts in English marriage.

The next step of changing red cards was interpreted by Jamieson as ascertaining identity. As English marriage demands consent from the two marital parties, knowledge of identity was usually presumed. Starting from here, Jamieson commented that the would-be bride and would-be bride-groom in Qing China had never personally met, which was mostly true as the marriage rituals were conducted between the two family heads through go-betweens. According to him, the exchanging of red cards became the marital parties' way to know to each other.

This understanding, however, had its problems. Firstly of all, the red cards with the Chinese name of *gengtie* (庚帖) was mainly exchanged between the two families. Aside from the names of the boy and the girl, they could also include birth date and region of the marital parties, names of three generations of ancestors, marriage principal and so on.[109] Amongst these, the most important part was the birth information of the boy and girl, which was accurately documented in the red card,

[108] Fang Chuan 方川, *Meishuo shi* 媒妁史(History of Go-betweens), (Nanning 南寧: Guangxi Nationalities Publishing House 廣西民族出版社; Shanghai: Shanghai Arts Publishing House 上海文藝出版社, 2000), 143-150.

[109] Liu Wei 劉薇, "Qingdai hunli zhong de gengtie" 清代婚禮中的庚帖 (Gengtie in the Qing Marriage), *Duhui yizong* 都會遺蹤 (Cultural Heritages of Cities), no. 3 (2013): 13-14.

including the year, month, day and hour.[110] Collectively, this information was called eight characters (八字 bazi) because each of the four pieces of information was expressed by one Heavenly Stem (天干 tiangan) and one Earthly Branch (地支 dizhi). The most important function of the red cards was to measure whether the fortune of the boy and that of the girl fitted with each other through computations involving these eight characters.[111] As it heralded whether the proposed union would prosper, Chinese people attached great importance to it.[112] Though Jamieson was aware of the date information on the red cards,[113] he did not penetrate into these "secrets" behind it. With English law as his starting point, which did not have similar beliefs and practices of matching eight characters, it was easier for him to further neglect this facet. Thus, he missed the most significant function of the Chinese red cards, seeing it merely as evidence of identity.

Subsequently, Chinese use of red chair and music was interpreted as publicity, which was indeed a key requirement in marriages celebrated according to the rites of the Church of England. It was called publication of Banns (i.e. notice of the intended marriage). "Within three months before the celebration of such marriage," such notice is "given audibly upon three Sundays during morning service, (or if there is no morning service, during evening service)" in the churches of the parties' parishes respectively.[114] As to marriages not celebrated according to the rites of the Church of England, Superintendent Registrar's certificate was also acquired at least three months before celebration.[115] Before the registrar granted such a certificate, publicity was also required, "the notice must be exhibited in his office for public inspection for 21 days."[116] The purpose for publicizing the marriage was to make known the intended

[110] Ibid.
[111] Ibid., 14.
[112] Ibid., 14-15.
[113] Jamieson, *Chinese Family and Commercial Law*, 45.
[114] Jenks, *A digest of English Civil Law*, 1158
[115] Ibid., 1159.
[116] Crofts, *Women Under English Law*, 20.

marriage so that interested parties, particularly parents and guardians, had the chance to propose objections.[117]

It can be seen that publicity constituted an important stage in English marriage, in which provision of false information concerning the parities in the banns with intention and knowledge on the part of the parties could essentially invalidate the marriage.[118] It not only played the role of disseminating the information of the intended marriage, but also invited objection so that possible illegality could be detected. The red chair and music in China indeed played the role of making known the marriage among the community members, but it did not perform the latter function in which others could express objection. More importantly, by focusing on the convergence between Chinese and English marriage in publicity, Jamieson also missed the important element of merriment in the music.

It had long been disputed as to whether marriage should be celebrated with jubilant music. *The Book of Rites* wrote that

> at the marriage ceremony, they did not employ music,— having reference to the feeling of solitariness and darkness (natural to the separation from parents). Music expresses the energy of the bright and expanding influence.[119] (婚禮不用樂，幽陰之義也。樂，陽氣也。[120])

> the family that has married a daughter away, does not extinguish its candles for three nights, thinking of the separation that has taken place. The family that has received the (new) wife for three days has no music; thinking her bridegroom is now in the place of his parents.[121]（嫁女之家三夜不熄燭，思相離也；取婦之

[117] Ibid., 19-20.
[118] Ibid., 19.
[119] Legge, *The Lî Kî, I-X*, 442.
[120] Yang, *Liji yizhu*, 1: 440
[121] Legge, *The Lî Kî, I-X*, 322.

家三日不舉樂，思嗣親也。[122]）

Both ancient and modern scholars have proposed explanations for not using music in marriage ceremonies.[123] Although prohibitions against music and other joyous ceremonies were also expressed in the later dynasties, such rituals, were by no means observed among either the higher or lower classes.[124] The Xuan Emperor of the Han dynasty (漢宣帝 Han xuan di) even issued edicts criticizing such harsh and oppressive ritual prohibitions and permitting the use of music in weddings.[125] The above analysis shows that music was throughout deemed as a jubilant element of a wedding, whether seen from its prohibition or the relaxation thereof. Due to the prevalence of the joyous wedding ceremonies among the populace, it was not strange that Jamieson observed music in Qing China. But with the English law as a standard to comprehend Chinese marriage, he put more emphasis on their common ground in giving notice to the community, running the risk of taking on monitoring features in English publicity, a feature missing in the Chinese red chair and music. More importantly, he neglected the element of merriment that did not correspond to English law.

In Jamieson's understanding, the last step of obeisance to parents-in-law accorded with "the religious ceremony" in English marriage. Although it was transiting towards civil contract, it had not completely dispensed with its religious aspect.[126] If a

[122] Yang, *Liji yizhu*, 1:312.

[123] Zhang Xiaoyu 張小雨, and Gao Xiaoqiang 高小強, "Lun hunyi buyong yue" 論"昏禮不用樂"(On 'No Music in Wedding), *Leshan shifan xueyuan xuebao* 樂山師範學院學報(Journal of Leshan Normal University) 32, no. 11 (2017): 135-137; Yang Hua 楊華, "Yuzi xielao: zhongguo gudai hunli shang" "與子偕老"：中國古代的婚禮（上）〉(Grow Old with You: Ancient Chinese Wedding, Part I) *Wuhan wenshi ziliao* 武漢文史資料 (Wuhan Cultural and Historical Data), no. 11 (2017): 53.

[124] Zhang and Gao, "Lun hunli buyong yue" 135, 138; Yang, "Yuzi xielao: shang," 53.
Other scholars proposed that this ritual was not observed in the Zhou either, using the *Book of Poetry* (《詩經》) as evidence. See Tushi 塗石, "Gudai hunli buhe buyong yue bian" '古代婚禮不賀、不用樂'辨 (On No Felicitations and Music in Ancient Chinese Wedding), *Xueshu luntan* 學術論壇(Academic Forum), no. 1 (1986): 85-86.

[125] Yang, "Yuzi xielao: shang," 53.

[126] The Marriage Act 1836 recognized the civil marriage with a secular formality. But marriage

marriage was celebrated in accordance with the rites of the Church of England, it "must be celebrated by, and in the presence of, a minister in Holy Orders of the Church of England."[127] Quaker and Jewish marriages were also celebrated according to their religious rules.[128] Since the Marriage Act 1898, marriages in compliance with a non-Anglican religion could also be celebrated in the presence of an authorized person, "usually a minister of the religious group concerned" "without the presence of the Registrar."[129] As English marriage was clothed with a religious tenor, Jamieson saw "the obeisance to parents" and "kneeling to the ancestral tablets" corresponding to it, "where the bride now gives her consent."[130] This perception, however, was only partly true.

After being brought to her husband's house and conducting the ceremony of drinking from the same cup (合巹 hejin), she was officially the wife to her husband. But the marriage ceremony did not end here. She must go through a formal ceremony of obeisance to her parents-in-law and their ancestors, officially reporting to the latter that a new member had been introduced into the family.[131] Only after this was the marriage complete and she was finally accepted into the family. A bride who did not go through this step would be refused burial in the family burial ground.[132] It is clearly seen that the religious element in ancestor worship was only one side in the obeisance

---

according to religious ceremony was still important in Jamieson's time.

[127] Jenks, *A Digest of English Civil Law*, 1156-1157.

[128] Crofts, *Women under English Law*, 20.

[129] Cretney and Mason, *Principles of Family Law*, 19.

[130] Jamieson, *Chinese Family and Commercial Law*, 45.

[131] Yang, "Yuzi xielao: shang," 51-52; Yang Hua 楊華, "Yuzi xielao: Zhongguo gudai de hunli xia" "與子偕老"：中國古代的婚禮（下） (Grow Old with You: Ancient Chinese Wedding, Part II), *Wuhan wenshi ziliao* 武漢文史資料 (Wuhan Cultural and Historical Data), no. 12 (2017): 49；Zhen Jinzhong 甄進忠, "Zhonggo gudai hunli qianlun" 中國古代婚禮淺論(On Ancient Chinese Wedding), *Zhongzhou daxue xuebao* 中州大學學報(Journal of Zhongzhou University) 22, no. 2 (2005): 35.

[132] Yang, "Yuzi xielao: shang" 52; Zhen, "Zhongguo gudai hunli qianlun," 35. It was drawn from the Book of Rites which says that "(Her coffin) should not be removed to the ancestral temple, nor should (her tablet) be placed next to that of her mother in law. …—showing that she had not become an established wife." (不遷於祖，不祔於皇姑……示未成婦也). Legge, *The Lî Kî, I-X*, 322.

ceremony. It also involved a social element in the sense that the bride, after going through the ceremony, was officially accepted by the agnatic community. Moreover, the ceremony also stressed the Confucian doctrine of filial piety and a proper hierarchy. These were all lost in Jamieson's remark which were made from the perspective of English marriage, in which the bride gave her consent in the presence of a religious minister. Arif Dirlik once remarked:

> The question of representation raised in Said's *Orientalism* is not the correctness or erroneousness of orientalist representation, but the metonymic reductionism that led to the portrayal of these societies in terms of some cultural trait or other, that homogenized differences within individual societies, and froze them in history.[133]

Jamieson's portrayal of Qing marriage procedures here precisely embodied this Orientalist style of metonymic reductionism. His case further reveals that Occidental measurement, i.e. English marriage requirements and features, play an important role in facilitating the reduction process. While the reduction accentuated the potential of Qing law to evolve into modern law by making it in line with the Western yardstick, it also impeded the translator's appreciation of a fuller and more colourful picture of Chinese marriage law, making it difficult for him to spot those aspects that were absent in English marriage. The various roles of the go-betweens, the most important function of the red cards for fortune telling, the merriment of the music as well as the multiple facets of the obeisance ceremony were all obscured amid the resemblances between English and Chinese marriage. This analysis shows that even the projection of the sameness between the Occident and the Orient also ran the risk of reducing the

[133] Arif Dirlik, "Chinese History and the Question of Orientalism," *History and Theory* 35, no. 4 (1996): 111.

heterogeneous aspects of the latter, falling into another trap of Orientalism.

5.5 When "離異" Differed from Divorce: Void and Voidable Marriage in Qing China

It has been observed in the above sections that Jamieson used English legal concepts to conceive of various aspects of Chinese marriage law. Coming to the last part concerning its dissolution, Jamieson continued to introduce concepts not found in Qing law, but that were important in English law. An interesting phenomenon in his translation was that "離異" (liyi) was not translated as "divorce". Instead he repeatedly resorted to a different category, as shown in the following translations:

> Instance 8 on "marriage between persons of the same surname" (同姓為婚):
>
> 凡同姓為婚者，主婚與男女，各杖六十，**離異**，婦女歸宗，彩禮入官。[134]
>
> "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."[135]

> Instance 9 on "marriage between consanguineous relations of different generations" (尊卑為婚):
>
> 並**離異**，婦女歸宗彩禮入官。[136]
>
> "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."[137]

[134] *Daqing lüli huiji bianlan*, 10: 25.
[135] Jamieson, *Chinese Family and Commercial Law*, 38.
[136] *Daqing lüli huiji bianlan*, 10: 28.
[137] Jamieson, *Chinese Family and Commercial Law*, 39.

Instance 10 on "marriage between free persons and slaves" (良賤為婚姻):

各**離異**改正。[138]

In all the above cases the marriage shall be **void**, and the parties returned to their original condition.[139] (Bold added for emphasis)

In the translations above, Jamieson uniformly used the term "void" to render "離異", which was perhaps partly influenced by Staunton's similar rendition in these places.[140] The consistency in the three instances, to a great extent, excludes the possibility of accident and requires a reasonable answer. In order to do that, the thesis will first examine Jamieson's following translation of Li which offers various clues but is absent in Staunton's version:

Instance 11:

凡嫁娶違律**應行離異**者，與其夫及其夫之親屬有犯，如係先姦後娶，或私自苟合，或知情買休，雖有媒妁婚書，**均依凡人科斷**。若止係同姓及尊卑良賤為婚，或居喪嫁娶，或有妻更娶，或將妻嫁賣，娶者果不知情，實係明媒正娶者，雖律**應離異**，有犯仍**按服制定擬**。[141]

"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

[138] *Daqing lüli huiji bianlan*, 10: 47.
[139] Jamieson, *Chinese Family and Commercial Law*, 41.
[140] Staunton, Ta Tsing Leu Lee, 114, 115, 119.
[141] *Daqing lüli huiji bianlan*, 10: 58.

> 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**."[142]

Here Jamieson provided another translation of "離異" which is "avoidable" and "voidable." Incorporating the previous use of "void," an inevitable question will be why Jamieson chose these words instead of divorce. Both "void marriage" and "voidable marriage" were important concepts in English law. They were different from divorce in the sense that the latter "acknowledges the existence of a valid marriage" that is not defective.[143] It is dissolved by death or divorce.[144] In comparison, "a void marriage is not really a marriage at all in that it never came into existence" due to a defect of a fundamental nature.[145] Last but not least, a voidable marriage is different from both of them in that it is valid "unless and until it is annulled."[146]

The last is a concept that emerged later than the former two. "Until the Reformation, a marriage was valid or void."[147] As divorce was extremely difficult, time-consuming and expensive before the Matrimonial Causes Act 1857, it was generally unavailable to the public.[148] Against this background, a degree of nullity became the only method of bringing an intolerable union to an end. Therefore, lawyers

---

142 Jamieson, *Chinese Family and Commercial Law*, 43-44.
143 The Law Commission, *Family Law Report on Nullity of Marriage*, no. 33 (1970), para 3.
144 Ibid.
145 Ibid.
146 Ibid.
147 Cretney and Masson, *Principles of Family Law*, 31.
148 Ibid.

contrived various means to find defects in marriage, thereby extending the grounds upon which "decrees of nullity could be obtained."[149] As this gave rise to uncertainty of marital relation, illegitimacy of children and property disputes, the common law began to intervene after the Reformation, disallowing the Church courts to directly annul marriage on some grounds "after the death of either parties."[150] This practice gave rise to voidable marriage that could be annulled due to certain flaws, but only during the time that both parties were alive and until eventual annulment, the marriage was regarded as valid in every respect.[151]

In Jamieson's commentary to the eleventh instance of translation above, he remarked that "the general purport [of the clause] seems to draw a broad line between void and voidable marriage,"[152] evincing his identification of clause with these two English concepts, which was consolidated in his further commentary. Corresponding to his translation of "先姦後娶，或私自苟合，或知情買休" in the first half of the clause, Jamieson believed

> all unions of unclean origin, or which are described 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.[153]

The clarification that "the relationship of husband and wife was never constituted at all"[154] has perfectly summarized the tenet of void marriage in English law, which was not valid *ab initio*. The reason that Jamieson identified the first half of the clause with

[149] Ibid.
[150] Ibid., 31-32. But the ecclesiastical courts had the jurisdiction to release decrees of nullity until the 1857 Act.
[151] Stone, *Family Law*, 38.
[152] Jamieson, *Chinese Family and Commercial Law*, 44.
[153] Ibid.
[154] Ibid.

this "void marriage" was found in his translation of "依凡人科斷" which provided the evidence for his perception of their common ground. The original wording made manifest that in marriages infected with the above problems, a wife who had offended her husband or husband's relations should be treated as a person of no relation to them and be punished accordingly. This is curious that a wife should be treated as a stranger to the family, suggesting that in marriages with such flaws, the relation between man and wife was not really constituted, which coincided with the characteristics of void marriage in England law.

This was exactly what Jamieson stressed in his translation. By rendering "依凡人科斷" into "the parties should be dealt with as if there were no marriage,"[155] Jamieson diverted the original focus of the clause, which was the offender's identity and relationship to her husband's family, to an emphasis on the nature of the marriage as null, proving clearly that he had seen the common ground between marriage in the first half of the clause and void marriage in English law. This was why this type of marriage was expressly identified as void.

Likewise, Jamieson saw the latter half of the clause as voidable marriage, which was on the other side of the line. In the commentary, he suggested that "in regard to unions which but for the legal impedimenta would be good we must make a distinction,"[156] with the impedimenta corresponding to his translation of "同姓及尊卑良賤為婚，或居喪嫁娶，或有妻更娶，或將妻嫁賣." He continued that in such marriages, the "innocent party could of course set aside such a marriage";[157] but if both hoped to "continue to live as man and wife," and in the duration of the union, the wife offended the husband or his family, it would involve the consequences of a valid marital relation despite the impedimenta.[158] This demonstrated his identification of

[155] Ibid., 43.
[156] Ibid., 44.
[157] Ibid.
[158] Ibid.

the second half of the clause with voidable marriage, which until annulment and the parties be separated, would remain in force with the consequences of a valid marriage.

Similarly, the reason for this identification could be found in his translation of "按服制定擬" into "the parties shall be dealt with as if the marriage was good."[159] While the original clause attached more importance to the position of the woman as wife in the mourning system and the consequent penalties, Jamieson's translation highlighted the fact that the marriage was still valid despite the impedimenta, which apparently was not a direct rendition of the original, but an inference from the wife's position in the family. By translating the subtext, Jamieson revealed his perception of the convergence between marriage in the latter half of the clause and English voidable marriage, both of which suffered from certain defects in the start, but was good during their existence until they were officially annulled. This was why he identified this type of marriage with voidable marriage in English marriage law.

An understanding of his identification with void and voidable marriage offers more insights into his two translations of "應行離異" and "應離異" in the clause of instance 11, respectively "avoidable" and "voidable," bringing us back to the initial inquiry of why Jamison did not use the term "divorce" to translate "離異." The discussion above revealed the common ground between this clause and void and voidable marriage, which revolved around marital validity when the union had flaws and legal impedimenta from the very start. In comparison, divorce only applies to a validly made marriage. It was the problems that arose along the way, such as adultery, that put an end to it. As they referred to very different problems, he would naturally not regard "divorce" as a proper translation here. Due to the convergence between the latter half of the clause and voidable marriage, Jamieson selected "voidable" to translate "應離異," corresponding to his understanding and maintaining consistency

[159] Ibid.

with the way this type of marriage was treated.

Although the first half of the clause referred to void marriage, it was not appropriate to translate "應行離異" as "void" because, as the fatal flaws had not yet been proposed, it would be illogical to state at the very start that the marriage was void. It was only after the fatal problems had been clarified that Jamieson judged that the marriage was not good *ab initio*. Therefore, "應行離異" should not be translated into a word indicating definite consequences. On the other hand, the same translation with "應離異" into "voidable" was not ideal either, as it would easily cause confusion with the actual voidable marriage in the latter half of the clause, and contradict his interpretation of this part as void marriage. It was under these circumstances that he shifted it to "avoidable." The two different translations Jamieson made was more than for a change of diction to enrich the text but a decision founded on his distinction of void and voidable marriage.

Returning to the beginning of this section in the instances 8, 9 and 10, it is seen "離異" in these clauses were translated into "void." As with instance 11, clauses here all addressed impedimenta to marriage from the very outset instead of problems that arose during a valid marriage; therefore they certainly fell into the category of void and voidable marriage. In the process of understanding why "void" was selected over "voidable" in them, it is found that under the same circumstances of marriage between persons of the same surname, between consanguineous relation of different generations as well as between free persons and slaves, "離異" was rendered as "voidable" in instance 11.

The reason for this difference was that Jamieson had drawn a timeline among different clauses. According to him, the clause in instance 11 was developed later than the former ones, "which modifies considerably the numerous restraints detailed in the

previous chapters."[160] Before this clause was added, the Qing Code did not distinguish defective marriage into two kinds; they were uniformly treated as invalid, in line with void marriage in English law. Thus, "void" was adopted in the instances 8, 9 and 10. It was from clause 11 that there appeared a type of marriage, which though suffering from the same defections as in instances 8, 9 and 10, were regarded as valid before being annulled. The new conception made it in line with English voidable marriage, therefore "voidable" was imported into his translation for the first time.

Surrounding Jamieson's translation of "離異" above was his new commentary, which provided an interpretive web that lent more strength to it. First of all, the commentary reinforced the distinction between divorce and the category of void and voidable marriage by discussing them separately in his commentary. With a section devoted solely to divorce, he arranged two sections discussing disabilities and impedimenta to marriage.[161] This separation made their existence parallel and mutually compatible, respectively governing valid marriage that could be ended through divorce and flawed marriage whose initial validity was impeached.

Moreover, he reasserted the differentiation between void and voidable marriages appearing in instance 11. By pinpointing that this clause was "passed in the Chia-Ch'ing period [1796-1820]," [162] which "modifies several of the restrictions above set out," [163] Jamieson made the timeline of void and voidable marriage more manifest. Under this, his early translation of "離異" into "void" and later into "voidable" could be more clearly delineated and easily understood. Aside from this, Jamieson reiterated the different grounds for them, those "which are void ab initio by reason of an incestuous or unclean origin" and those "which are bad only because of the legal

[160] Ibid.
[161] Ibid., 48-50, 53-55.
[162] Ibid., 50. Jamieson was right. The Li was adopted in the 13th year of Chia-Ch'ing's (嘉慶) reign. See Xue, *Duli cunyi chongkan ben*, 2: 314.
[163] Jamieson, *Chinese Family and Commerical Law*, 50.

impedimenta, such as that the parties were of the same surname."[164]

Corresponding to this, Jamieson discussed the two very distinct penalties given to the wife when she offended his husband or his relations. In the latter case, the punishment was "strangulation" while in the former, it was "a normal penalty of 100 blows or so, redeemable by a small fine."[165] The remarkable differences in punishments showed the importance of proposing the concepts of void and voidable marriage and distinguishing them correctly in the Chinese context. By contextualizing these easily confused concepts within his commentary, Jamieson was able to distinctly clarify the meaning of divorce, void and voidable marriage in Chinese law, systematizing them and making his use of them more understandable in his translation.

5.6 Conclusion

To take a broader view, the two very different commentaries in the two versions played a significant role in contextualizing Chinese marriage law. Unlike the anthropological framework in *The China Review* version, Jamieson's commentary of the 1921 version re-contextualized Chinese marriage law within the modern English legal system, enabling a completely different understanding from the previous one. With a focus on the parallel between Chinese and English law, Jamieson drew on a number of English legal concepts to translate, interpret, and even re-clothe the former, proving for Chinese lawmakers the applicability of Qing marriage law in Republican China as well as its potential for advancing towards modern law.

What he was doing was exactly what he advocated in recasting Chinese law: that China should use traditional law as a foundation, meanwhile introducing compatible

[164] Ibid., 51.
[165] Ibid. This touched upon an important facet of Chinese law in that penalties were given according to different relations between the offender and victim. When they were family members, the law adjusted their punishments based on "familism" and made "distinctions between seniority and juniority among family members, and between nearness and remoteness," in line with Confucian doctrines. See Ch'ü, *Law and Society in Traditional China*, 278.

Western law for future development. In this way, the national needs for tradition and reform were both satisfied. His work seemed like a model for Chinese law makers. However, his emphasis on their common ground also led to obscuring the special facets of Chinese law and was at the potential danger of reducing it to some inferior counterpart of English law. And the English packaging, by positioning both in the same legal axis, could even render their differences more manifest.

Aside from re-contextualization, the commentary also enabled Jamieson to connect his application of English concepts, including contract, consideration, specific performance, misrepresentation as well as void and voidable marriage into a whole. Starting from making the betrothal, to the breach and recision of it, to the whole procedure of marriage ceremony, and to void and voidable marriage, Jamieson drew in the commentary a relatively complete map of Chinese marriage law with English legal concepts signposting its key features. It echoed, supported and explained his translation, providing a fostering context and reinforcing his advocacy of Qing law as the legal basis for legal reform.

Behind this advocacy was his deeper concern for the British trade, which had suffered severely from the national chaos when revolutionaries intractably decided to have a clean break with their traditions and embrace the Republic. Having witnessed the damage this drastic change caused to British imperial interests, Jamieson attempted to convince Chinese law makers of the value of their existing legal tradition so as to help British merchants evade another possible catastrophe arising from dramatic reform. The means he resorted to was to unfold in front of Chinese eyes the common ground between Chinese and English law, thereby demonstrating to them the advanced facets and immense potential of their existing law. Therefore, China's making of a new civil code become Jamieson's opportunity to influence China's future route and make it consistent with and at the service of British imperial enterprise.

In this case, Said's claim to Orientalism based upon the distinction between the East and the West, which may serve well in the context of the Middle East, is not so helpful. Because as demonstrated by Jamieson's translation and interpretation of Qing marriage law in the 1921 version, the discourse of convergence between the Occident and the Orient could also be deployed by the former to understand, restructure and dominate the latter, which was indeed Orientalism of a different kind. For a semi-colonized nation like China, which though forfeiting a part of her sovereignty, had never been formally colonized by Western powers and still retained a portion of authority, an affirmation of the value of their existing tradition sometimes proved a more effective way for her to evade drastic reform and attendant massive anarchy, therefore better serving British trade and imperial interests.

Nicholas Thomas once remarked that "constructions of indigenous peoples shifted" in the region of Oceania,[166] which made Said's identification of colonial discourse as "enduring and internally consistent" not so valid.[167] Jamieson's respective employment of the discourse of divergence and convergence in interpreting Qing marriage law in the two versions demonstrated similar shift. This case further reveals that the alteration in constructing the native can be motivated by the differing audience the Western author hoped to address, the historical moment wherein he was placed and the purpose he hoped to achieve.

[166] Nicholas Thomas, *In Oceania: Visions, Artifacts, Histories* (Durham and London: Duke University Press, 1997), 17
[167] Ibid., 134.

Chapter Six Operation of Jamieson's Translation in the Hong Kong Courts

Though targeted at law-makers and law students in Republican China, Jamieson's republication of his translation of Qing family law in 1921 did not find its way into the actual making of civil law and the judicial process. Its fruits, interestingly, were borne in Hong Kong. From the first case that made use of it in 1925,[1] it has been functioning in the Hong Kong Court for almost a century. Even today, Jamieson's *Chinese Family and Commercial Law* is still used in New Territories cases relating to land rights. As the Hong Kong legal system was primarily based on English law, with judges, lawyers and legal professionals all trained in it, the use of Jamieson's translation in the courts vividly projects a translational encounter of Chinese and English law.

As the major purpose of this study is to understand the actual way Jamieson's work operates in the court and the factors that condition its working, it will launch an in-depth analysis of the court judgements. The research attempts to answer the following questions: how the relationship between Jamieson's translation and commentary are approached in the courts; how his work helps the courts fill the knowledge gap of Qing family law and facilitate the trial; as well as how it interacts with multiple factors, particularly with English law. In the process of addressing these questions, its role of shaping the court's understanding of Qing law is also revealed.

6.1 The Advantage and Value of Jamieson's Translation in Hong Kong Courts

Before exploring the functioning of Jamieson's translation, it is necessary to obtain a contour of the Chinese law and custom operating in Hong Kong's judicial system. Until the legislative reform in 1971, the familial sphere of the Chinese, including marriage, divorce, succession and adoption was primarily governed by Chinese law and custom. Even after 1971, it was still maintained in the New Territories in matters

[1] Re *Chak Chiu Hang, Deceased* [1911-1925] HKC 324.

concerning land rights.[2] Its existence as a living body of law poses great challenges for Hong Kong's judiciary, which operates in the framework of English law and suffers from lack of knowledge of Chinese law and custom.

Scholars in the area have expressed their differing opinions on the concept of "Chinese law and custom" operating in Hong Kong.[3] It is now generally accepted that it refers to "traditional Ch'ing law, subject to such modifications as have occurred in Hong Kong since 1843, [the year that Hong Kong obtained its local legislature] through a process of socio-cultural change or judicial interpretation of that law."[4] This definition recognizes the fluidity of Chinese law in Hong Kong, instead of ossifying it at a particular date. It denotes both customary law and the Great Qing Code to the exclusion of the penalties in the latter. As the courts stress the Code's explanation of Chinese legal terms,[5] "elucidations on points of customary law,"[6] and civil regulations, Jamieson's *Chinese Family and Commercial Law*, as a translation and interpretation of it, has been used in the courts. The legal professionals in Hong Kong trained in English law without adequate understanding of Chinese law further facilitated this process.

From 1921 to April 2019, the number of judgements that made use of Jamieson's work in the courts was twenty-six, taking up about eleven percent among the 237 cases that touched upon Qing law during this period.[7] Among these decisions, his work was

---

[2] The legal basis will be discussed in detail in section 6.2
[3] See Lewis, "A Requiem," 356-357; Su, *Zhongfa xiyong*, 138-143.
[4] Lewis, "A Requiem," 357.
[5] Su, *Zhongfa xiyong*, 147.
[6] Lewis, "A Requiem," 357.
[7] The number 237 is derived through a thorough research of all the cases in Lexis Advance® Hong Kong, a relatively complete database of existing cases that could be found in Hong Kong from the earliest times to the present. The author first used a number of keywords that can signal the appearance of Qing law, so as to find all the potentially relevant judgements. These keywords and the number of cases found are "Qing Code" (17), "Qing law" (14), "Ching Code" (5), "Ching law" (12), "Tsing Code" (6), "Tsing law" (26), "Da Qing Lu Li" (5), "Da Qing Lü Li" (5), "Ta Tsing Leu Lee" (2), "Ta Tsing Lu Li" (5), "imperial law" (2), "imperial code" (3), "Chinese law and custom" (147) "Chinese customary law" (167) "Chinese law" (366). The total number of cases was 782, among which much of their coverage overlapped, which had to deducted. It also occurred that one same judgement appeared twice in the database which also needed to be deducted from the

cited to address a diversity of issues concerning Chinese family law in Hong Kong, including traditional Chinese marriage, posthumous adoption, quasi-adoption, division of family property, wills, and the rights of daughters and illegitimate sons in succession.

Moreover, these simple statistics do not represent all the cases that actually made use of Jamieson's translation. Prior to the court trial, expert witnesses on both sides need to hand in their reports to the judges, explicating in detail the parts of Qing law that would be relevant to the case. According to an experienced and esteemed expert whose evidence was widely recognized by the Hong Kong court, Jamieson's *Chinese Family and Commercial Law* is frequently quoted in experts' reports.[8] This meant that Jamieson could exercise his influence on the court through these reports. But as these materials are not open to the public and are not found in the database, the thesis does not consider them and can only note in passing that the role of Jamieson's translation is even wider than can be documented without recourse to confidential information. Furthermore, many cases that made use of Jamieson's translation set important precedents, which were quoted by later cases without needing to quote Jamieson, further concealing his influence.[9] Therefore, the above number and percentage only embodies a fraction of the use and influence of Jamieson's translation in the courts.

Prior to Jamieson's work, Staunton's translation had already served in the courts

---

overall number. Moreover, in searching the last category of "Chinese law", the results comprised a large number of cases that applied the 1931 Civil Code of the Republic of China, and the law of the PRC, which all needed to be excluded. After a comprehensive comparison among these 782 cases, it is found that they actually contain 247 different cases concerning Qing law. Deleting ten cases that occurred before 1921, the number was 237.

[8] Interview with an expert witness, June 28, 2018.
This expert held that Jamieson was "perceptive and clear in his explanations" which "makes things easier" in the court. Although it also faces challenges as the thesis has discussed, he believed "its usefulness is that it is generally reliable." Expert witness, email message to author, July 4, 2018.

[9] For instance, one important case that drew on Jamieson's translation in this thesis is *Liu Ying Lan v. Liu Tung Yiu and Another* (2003). This case was referred to by 8 succeeding cases. Among them was the *Tang Kap Wing Tso with Liu Chuen Mui as Manager v. Tang Leuk Tso with Tang Wing Hong & Ors* (2011), which referred to paragraph 18 of the *Liu Ying Lan* case as its evidence for the meaning of Chinese succession. Although Jamieson's name was not mentioned in this later case, paragraph 18 actually heavily relied on his evidence, in which there were two translations and three commentaries by him. The way this later case used precedent vividly showed how Jamieson contributed to it without being acknowledged by its judgement. Therefore, existing judgements that mentioned his name by no means represented the totality of his influence.

as reference.[10] Before analysing the way Jamieson's translation operates in the courts and the factors with which it interacts, it is necessary to first address its relationship with Staunton's first English rendition of the Code, through which the advantage of the former can be detected.

At the early stage, the language barrier between the English colonizers and Chinese colonized was still a primary hindrance to reading the original, facilitating the reception of Staunton's rendition.[11] It, in return, helped make known the importance of the Qing Code for the courts, thus paving the way for Jamieson's translation. However, since *Chinese Family and Commercial Law* found its way into the Hong Kong courts in 1925, the status of Staunton's work in the courts was threatened, being no longer the only translation of the Qing Code available for them to consult. In the later years, it was to a great extent replaced by Jamieson's work. In comparison to the twenty-six cases applying the latter, with the latest one occurring in 2019, the number of judgements that made use of Staunton's translation from 1925 to April 2019 was four,[12] with the latest one occurring in 1999, demonstrating that Staunton's translation was overshadowed by Jamieson's in the Hong Kong court.

---

[10] Davis, *Chinese Miscellanies*, 51.
Staunton, who was informed by Davis of the application of his translation in Hong Kong, also put it in his memoir. See George Staunton, *Memoirs of the Chief Incidents of the Public Life of Sir George Thomas Staunton* (London: L. Booth, 1856), 46.

[11] Scholars have discussed the lack of translators and interpreters in the early stage of the Colony. See Chen Yaqing 陳雅晴, "Zaoqi gangying zhimin zhengfu huaren yiyuan yanjiu (1843-1900)" 早期港英殖民政府華人譯員研究（1843-1900）(A Study on the Native Chinese Interpreters in the Early Colonial Hong Kong Government (1843-1900)), (Master's Thesis, The Chinese University of Hong Kong, 2015); Uganda Sze-pui Kwan 關詩珮, "Fanyi yu zhimin guanzhi: zaoqi xianggangshi shang de shuangmian yizhe gao he'er" 翻譯與殖民管治：早期香港史上的雙面譯者高和爾（1816-1875）(Translation and Colonial Rule: Daniel Richard Cardwell (1816-1875), the Duplicitous Translator in Early Hong Kong History), *Xiandai zhongwen wenxuebao* 現代中文文學學報 (Journal of Modern Literature in Chinese) 10, no. 2, (2011), 174-194; Uganda Sze-pui Kwan 關詩珮, "Fanyi yu zhimin guanzhi: Xianggang dengjishu de chengli ji shouren zong dengjiguan feilun," 翻譯與殖民管治：香港登記署的成立及首任總登記官費倫 (Translation and Colonial Rule: The Establishment of Hong Kong Registry and the First Registrar General, Samuel Turner Fearon), *Zhongguo wenhua yanjiusuo xuebao* 中國文化研究所學報 (Journal of Chinese Studies), no. 54 (2012): 97-124.

[12] Among these cases, one was tried in 1925, when Jamieson's translation had not yet established a foothold in the Hong Kong courts. As to the other three, they also made use of Jamieson's work in addition to Staunton's.

With a view to revealing the multifaceted reasons why Staunton's translation in more and more familial cases was overshadowed by Jamieson's, the following discussion will probe into the how Jamieson's translation was used and emphasized in actual cases and how it filled the knowledge gap in them. Perhaps the single most important reason for its success was his translation of Li. If based on Staunton's translation alone, Hong Kong Court would only gain access to Lü, which was far from enough to address complicated cases. It was Jamieson, by recognizing the importance of Li and further making a translation of them, who made Li available to the courts, promoting their visibility and facilitating the court's use of them.[13] Their existence made the parts of Qing law that were most up to date and flexible accessible to the courts. Among the cases that consulted Jamieson's book, half of them, including the latest ones, exploited his translation of Li to support their arguments and even win their cases.

In *Liu Ying Lan v. Liu Tung Yiu* (2002), the judge commended Jamieson's book as a "classic" and "groundbreaking work,"[14] revealing the esteem it received in the court. Perceiving that it included both Lü and Li, the court reproduced Jamieson's analysis on the relationship between them:

> 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

[13] There were no cases showing that William Jones' translation of Lü found its way into the Hong Kong Courts. He did not translate Li either.

[14] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 21 and 22.
Page number is used when available; when not available, paragraph number is used.

work are the most important, inasmuch as they comprise all recent legislation.[15]

Citing this statement from Jamieson, the court revealed its understanding of the importance of Li. The central clause under discussion in this case was precisely a Li, around which the court conducted a comprehensive survey, which will be shown in later sections. Similarly, in *Mok Hing Chung v. Wong Kong Yiu* (2014) which applied the section "appointing a successor contrary to the law" (立嫡子違法 Li dizi weifa), the judge was well aware that "the section comprises two parts, namely the Lu and the Li."[16] After listing the original Chinese texts of Li, the court adduced and accepted Jamieson's translation as their working translation, showing the trust the courts still placed in it almost 100 years after its publication.

Moreover, Jamieson's translation of Li had substantially shaped how cases were decided, a function that could not be performed by Staunton's rendition. In *De Wong Au Edith v. Kho Sin Tek Henry* (2004), Jamieson's translation of the third Li under section "appointing a successor contrary to the law," was applied to express the view that the position of foster son was not a guarantee that he would inherit the family patrimony:

> 若義男、女婿為所後之親喜悅者，聽其**相為依倚**，不許繼子並本生父母用計逼逐，**仍酌分給財產**。若無子之人家貧，聽其賣產自贍。[17]
>
> If **natural affection** exists between an adopted son or son-in-law and the adopting parents, they may **mutually assist and support each other**, and the legal successor to the family may not devise means to separate them. **Such adopted son or son-in-law shall also be entitled to some share in the division of the**

[15] Jamieson, *Chinese Family and Commercial Law*, 9; also see *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 21.
[16] *Mok Hing Chung v. Wong Kong Yiu* [2014] HKCU 1572, para. 45.
[17] *Daqing lüli huiji bianlan*, 8: 30.

> **property**, and may, if the Family is poor and without natural-born sons, sell the patrimony for their common support.[18] (Bold added for emphasis)

As Jamieson's "such adopted son or son-in-law"[19] entitled to some share of property refers to he who cared for and was cared for by his foster parents, the court recognized these as pre-conditions for his inheritance, stating that "there needs to be natural affection and mutual assistance and support before such adopted son is entitled to some share in the division of the property."[20] Obviously, Jamieson's translation of the original clause was completely accepted by the court. The judge then applied the criterion to the defendant, who had shown no such affection or mutual assistance. Based on this, the defendant's claim to inheritance was partly undermined.

This emphasis on the Li was primarily propelled by practical need in each individual case. In *Tang Chun Kit v. Tang Lo Ping* (2004), which concerned the right of illegitimate sons, Jamieson's translation of the first Li in the section "junior members appropriating family property" (卑幼私擅用財 Beiyou sishan yongcai) was quoted by the expert:

> 嫡、庶子男，除有官廕襲，先儘嫡長子孫，其分析家財、田產不問妻妾婢生，止以子數均分。**姦生之子，依子量與半分**。如無別子，立應繼之人為嗣，與姦生子均分。無應繼之人，方許承繼全分。[21]
>
> 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 movable or immovable 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**

[18] Jamieson, *Chinese Family and Commercial Law*, 14.
[19] Ibid.
[20] *De Wong Au Edith v. Kho Sin Tek Henry* [2004] HKCU 323, para. 76.
[21] *Daqing lüli huiji bianlan*, 8: 55; *Tang Chun Kit (A Minor) & Anor v. Tang Lo Ping* [2004] 4 HKC 492, 498.

> **of illicit or adulterous intercourse** shall be entitled to **half a 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 son born in adultery shall be entitled to succeed and receive the whole patrimony.[22]

Being the only clause pertaining to the inheritance right of sons born out of wedlock, the above Li provided useful information for this case involving an illegitimate son, which "fell into the category of '姦生之子.'"[23] Based on this, the expert claimed that this son should "get half shares only."[24] The choice between applying Lü or Li in court rested in whichever was best suited to the case. In the above two cases, the Li imported elements that the Lü did not cover and shed light on points untouched by the Lü, accounting for why Jamieson's translation was more often cited by the court. In stark contrast, Staunton's version left Li untranslated, naturally resulting in diminishing application in Hong Kong.

Another advantage enjoyed by Jamieson's translation was "a most valuable commentary of the provisions in the Qing Code" as one court decision put it.[25] About three fourths of the cases that made use of *Chinese Family and Commercial Law* made use of the commentary in it. Jamieson himself had made a manifest effort to justify it, stating that "the undeniable importance of the subject, and the meagreness of detail in the original seem a sufficient justification for the somewhat Lengthy Note which I have appended."[26] The shortcoming of bare translation of the code as analysed by Jamieson was fully revealed in the Hong Kong courts. Real life cases intertwine manifold complexities, involving interests of various parties, making the meagreness

---

[22] Jamieson, *Chinese Family and Commercial Law*, 16; *Tang Chun Kit (A Minor) & Anor v. Tang Lo Ping* [2004] 4 HKC 492, 498.
[23] *Tang Chun Kit (A Minor) & Anor v. Tang Lo Ping* [2004] 4 HKC 492, 498.
[24] Ibid.
[25] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 22.
[26] G. Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 194.

of detail in the Code particularly striking. By expounding and clarifying the law, Jamieson's commentary compensated for many untouched and ambiguous points in the Qing Code, shaping the final decisions in many cases.

In *Yau Tin Sung v. Yau Wan Loi* (1983), one of the problems concerned the power of the widow in selecting an heir for her deceased husband, which was unmentioned by the Code. The judge quoted from Jamieson's commentary that "'as she is to stand as mother to the adopted son it may be said that any choice must have her approval at least."[27] Although other evidence attempted to invest the widow with a greater share of power in this matter as having "the first right to nominate an adopted heir,"[28] the judge was very cautious and reluctant to come to such a definite conclusion on the scope of the widow's rights. Following Jamieson, who "put it no higher than that 'the widow would seem to have a considerable voice in the selection,'"[29] the judge did not grant the first right to the widow concerned, merely stating that she did have a say in this case and appointment of an heir should not be settled without her.[30]

This case revealed the weight the judge attached to Jamieson's commentary, which became his primary measure of what Chinese law was against competing claims from other sources. This commentary supplemented the original Qing Code, which only pointed out the power of the elders in selecting an adoptee and remained silent on the widow's right. The value of the supplementation was manifest in this case. Similarly, in *Liu Ying Lan v Liu Tung Yiu and Another* (2002), the court evaluated whether the first defendant could succeed to his uncle based on Jamieson's commentary:

> 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. … He cannot in

[27] Jamieson, *Chinese Family and Commercial Law*, 20; *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 657.
[28] *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 657.
[29] Ibid.
[30] Ibid.

any case inherit in more than one of the families.[31]

Accepting this, the judge in the Court of First Instance claimed that "no son should inherit property in more than one family."[32] As the first defendant had already succeeded to his own father and was not the only son left by his father and uncle, the exceptional circumstance of *kim tiu* (兼祧 jian tiao, succession to two branches and worship of two ancestral tablets) did not occur.[33] In the appeal of this case, the judge further laid bare that "in a Kim Tiu situation the two male lines have to remain distinct and the descendants in each household succeed to the line and patrimony of that particular house and no other."[34] This was also borrowed from Jamieson's commentary which stated that "the two household remain distinct … the grandson born in each succeed to the line and patrimony of that particular house and no other."[35] Under this understanding, if the first defendant succeeded to his uncle through the institution of *kim tiu*, the two lines would be fused, further disqualifying him from being a properly adopted person. This case displayed the authority Jamieson's commentary enjoyed in the courts, which substantially undermined the interests of the first defendant in this case.

Jamieson, with a focus on family law,[36] "set out more clearly than can be gathered from the text the general principles that underlie the written law,"[37] furnishing Hong Kong courts with the information it needed but which was unavailable in the Code. This was another reason for its success. In comparison, Staunton was devoted to making a full translation of all the Lü rather than giving family law any special

[31] Jamieson, *Chinese Family and Commercial Law*, 21.
[32] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 94.
[33] In the case of *kim tiu*, pinyin is not used so as to remain consistent with the court's Romanization and avoid confusion.
[34] *Liu Ying Lan v. Liu Tung Yiu and Another* [2003] HKCU 156, para. 48.
[35] Jamieson, *Chinese Family and Commercial Law*, 24.
[36] His another focus was on commercial law, which was not within the scope of this thesis.
[37] Jamieson, *Chinese Family and Commercial Law*, 8.

attention by supplementing it with additional information through paratexts. The blank thus left in it further aggravated the declining status posed by the deficiency of Li.

Aside from the Li and Jamieson's commentary, the courts also made good use of his translation of Qing cases translated from *Compilation of Criminal Cases*. In *Hau King Wai Keith and Ors v. Hau Tak Cheung and Ors* (2017), HSC's succession to HMS was disputed because the former was not the latter's nephew, but grandnephew,[38] and the Qing Code did not allow a person from the wrong generation to be adopted by his kin.[39] Faced with this situation, the court referred to Jamieson's translation of a Qing case, where similar problems had arisen. An action was brought to the court concerning appointment of an heir for the deceased who had no natural sons. The Qing magistrate decided that neither a person of a different kindred nor an expelled adoptee was a qualified successor. After a thorough investigation,

> it was found that all the living nephews of the Deceased could not be adopted as they were the only son of their respective family. Eventually the Court appointed the son of another nephew who was dead to the succession and be heir to all the family property as grandson, and it was also decided that the deceased nephew should posthumously be adopted as son of the Deceased.[40]

Through this case the Hong Kong judge perceived that the generation problem could be overcome by "ordering posthumously the adoption of a dead person as the adopted

[38] HSC and HMS are abbreviations for the interested party's names.
[39] The original Qing text and Jamieson's translation were as follows:
若立嗣，雖係同宗，而尊卑失序者，罪亦如之。其子亦歸宗。改立應繼之人。*Daqing lüli huiji bianlan*, 8: 28.
"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." Jamieson, *Chinese Family and Commercial Law*, 13.
[40] *Hau King Wai Keith and Ors v. Hau Tak Cheung and Ors* [2017] HKCU 3180, para. 137.

son of the Deceased."[41] Based on this understanding, the judge established that HSC, the grandnephew, was adopted "to be the son of the deceased son of HMS,"[42] thereby overcoming the generation gap without disrupting the family order. As HSC was adopted out of his original family, he was not entitled to succeed his own father's line nor entitled to inherit his property.[43]

Compared to the Code, Jamieson's translation of Qing cases provided more flexible and convenient means of addressing the complexities of cases, which was thus emphasized by the courts. Jamieson's full translation of family law, including both Lü and Li, with an addition of detailed commentary and translation of selected Qing cases in this aspect, account for why Staunton's version was overshadowed in the courts. Wanting in these aspects, his work could no longer suffice to provide information needed in the courts which were faced with increasingly complex Chinese legal issues. In the process of clarifying the advantage of Jamieson's work, this section reveals its important role in shaping the court's understanding of Qing family law, and helping solve many tricky problems that could not find answers in the original Code. It enjoyed such high esteem in the courts that even after competent court interpreters could provide translation of the Qing clauses ad hoc for the Court, or when the judges were Hong Kong Chinese,[44] Jamieson's translation was still presented in the courts. In these cases, it has become the authority in interpreting Qing law in Hong Kong. The persisting application of it by the courts down to this day proves its value.

This value is shown in comparison with expert witnesses, who are invited to the court to prove what the relevant Chinese law is, a role similar to that played by Jamieson's translation. In *Lui Yuk Ping v. Chow To* (1962), the judge acutely pointed

---

[41] Ibid.
[42] Ibid., para. 138.
[43] Ibid., para. 145.
[44] This is very clearly demonstrated in the *Liu Ying Lan v Liu Tung Yiu and Another* (2002), where the presiding judge was a Hong Kong Chinese and court interpreters also provided translation of the relevant clauses in it. Even so, Jamieson's translation was not evaded by the court.

out the drawback of adducing expert witnesses:

> Here in Hong Kong, or anywhere else, there is obviously nobody now living who has had any **practical experience** of the Chinese law of 1843, and there must be comparatively few who have had **practical experience** of it immediately prior to the *Revolution* of 1911, yet the practice prevails in our courts of calling as witness learned 'experts' in such law; it may well be that such practice originated in by-gone days when lawyers experienced in Chinese law of 1843 were available, at all events it obviously has not stopped when, in the course of time, they ceased to become available.[45] (Bold added for emphasis)

As the foundation of Chinese law and custom in Hong Kong still lay in Qing law, the court obviously attached great importance to it as seen from its dissatisfaction with the experts. The present judge believed the court's invitation of experts originated when people with experience in Qing law existed in the past. It continued into the present day, even though such people were nowhere to be found. This incisive perception directly pointed to the crucial drawback of expert witnesses: their lack of practical experience of Qing law. Similar opinions were echoed in various cases and by legal scholars. In *Yau Tin Sung v. Yau Wan Loi*, the judge also had reservations towards experts witnesses because their opinions were based solely on their scholarship rather than any direct experience.[46] Wesley-Smith, a well-known scholar in the area, voiced a similar opinion: "most expert 'witness' cannot attest from direct experience to what actually happens but are scholars learned in the small corpus of literature on Chinese law and custom."[47]

---

[45] *Lui Yuk Ping v. Chow To* [1962] HKLR 515, 516.
[46] *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 659.
[47] Peter Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong: Hong Kong University Press, 1994), 216.

All of these demonstrate that what the court lacked was direct experience of Qing law, which was what Jamieson provided. It can be said that the experts' disadvantage was precisely Jamieson's advantage. The title page of *Chinese Family and Commercial Law* emphasized that Jamieson was formerly the Consul-General at Shanghai, disclosing his career association with Qing China. The reprint version published in Hong Kong in 1970 by Vetch and Lee gave a more detailed biographical notice of Jamieson in the flyleaf, with his obituary in the appendix, in which his consular and judicial experience in China was more clearly delineated. These show the court that what was lacking in the expert witnesses was compensated by Jamieson. His judicial experience during the Qing dynasty was also proposed in the court and he was considered to be a man of "considerable experience in the administration of Chinese law under the Ch'ing dynasty."[48] Such expertise lent him authority in the courts that could not be replaced by experts.

Living most of his life in late Qing China and having close contact with Chinese people, Jamieson indeed recorded his on-site observations and personal experience of the then living Qing Code through his translation and commentary. As he disclosed, an important source of his commentary was "statements supplied by various educated natives in different parts of the Empire."[49] His work as an English diplomat in China furnished him such opportunities. Before first publishing his translation of the Qing Code in 1879, Jamieson had already worked in Beijing, Shanghai, Taiwan, Fuzhou, Pagoda Island and Yantai, ranging from the north of China to the East and South China, which was indeed "different parts of the Empire."[50]

The nature of his consular work kept him in close contact with Chinese people, particularly officials, giving him ample opportunity to become acquainted with "various educated natives." When he served as Acting Consul in Chefoo in 1877, the

[48] *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 166.
[49] G. Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 194.
[50] Ibid.

issue of fixing the boundary of the foreign settlement in Yantai kept him in close correspondence with the Taotai.[51] Then the difficulty of selling mining pumps encountered by a British firm due to opposition of local officials led to another succession of correspondences,[52] showing that Jamieson's position as an English consul kept him in constant contact with educated Chinese officials.[53]

On the other hand, his job also demanded him to observe the lower classes and to have prompt knowledge of native happenings. At the time when he was in Yantai, the Northern Provinces of China, including Shandong, experienced unprecedented drought, leading to serious famine. The Baptist missionary Timothy Richard was then in Shandong helping to alleviate the distress. Jamieson kept in close contact with him, from which he derived first-hand information on the actual state of affairs.[54] In his quarterly intelligence report, Jamieson even gave an extract of Timothy Richard's report of the famine, illustrating the extent to which the local Chinese were suffering.[55] The correspondence demonstrates that the nature of his work kept him sensitive to the life ordinary Chinese were leading.

With his understanding of Chinese officials, Jamieson also advised Rev. Richard "to cooperate with the mandarins as far as consistent with his main object, and to avoid getting into collision with them at all costs."[56] He even participated, along with the local community, in transmitting the funds collected by a committee of Chinese

[51] Chang Tao-Tai to Acting Consul Jamieson, April 10, 1877, 83-85; Acting Consul Jamieson to Chang Tao-tai, April 14, 1877, 87-88; Chang Tao-tai to Acting Consul Jamieson, April 18, 1877, 89-90; Acting Consul Jamieson to Chang Tao-tai, April 24, 1877, 91-93; Chang Tao-tai of Chefoo to Acting Consul Jamieson, April 29, 1877, 95-98, FO 228/588.

[52] Jamieson to Chang Tao-tai, July 21, 1877, 50; Chang Tao-tai to Jamieson, July 22, 1877, 51, FO 228/588.

[53] As he gained higher positions in China Consular Service, he had chances to meet more high rank officials, such as the Viceroy of Nanking. See Jamieson to Sir Nicholas Roderick O'Conor, the Minister in Peking, February 21, 1895, 138-140, FO 228/1198. It recorded that the Viceroy of Nanking sent letter Jamieson, asking for help against Japan.

[54] Report on the Famine in Shantung on April 10, 1877, 136-141, FO 228/588; Quarterly Intelligence Report, August 12, 1876, 327-331, FO 228/575.

[55] Quarterly Intelligence Report, February 17, 1877, 196-204, FO 228/588

[56] Report on the Famine in Shantung, April 10, 1877, 140, FO 228/588.

intellectual men in Shanghai.[57] Therefore, Jamieson's consular service made him more than just a neutral observer of the Chinese. His later career shows that he had kept his observation of the ordinary Chinese throughout his life. When he was in Jiujiang from 1881-1886, he was very attentive to native feelings towards foreigners,[58] and native secret societies that prevailed among lower classes.[59] Later in Shanghai, he kept an eye on the native press so as to know current opinions.[60]

Jamieson's work enabled him to observe various classes of Chinese people in different parts of China, from whom he derived information on Chinese happenings and ordinary Chinese life, rendering him especially capable of giving a detailed explanation of the law and custom governing Chinese life. Moreover, Jamieson's experience as an assessor in the Shanghai Mixed Court furnished him with precious opportunities of actually applying the law in adjudication. Thus, what he provided for the court was much more than just knowledge transmission from Chinese into English, but an observation of the Qing Code operating in its time, which could not be substituted by modern interpreters.

In this sense, Jamieson's work helped perpetuate the life of traditional Chinese law when a lack of reliable sources and difficulty in acquiring such information would only speed its demise. Being applied in the English legal construct of Hong Kong, *Chinese Family and Commercial Law* furnished it with the much needed knowledge of Chinese law so that the complex legal problems arising from Chinese family life could be addressed.

6.2 Legal Basis of Jamieson's Translation and Erosion from English Law

An inevitable question arising from the use of Jamieson's translation in the Hong Kong

[57] Ibid., 136-140.
[58] Intelligence Report on April 6, 1884 in Kiukiang, 7-14, FO 228/755.
[59] Intelligence Report, June 16, 1884 in Kiukiang, 16-24, FO 228/755.
[60] Jamieson to the Minister in Peking, January 12, 1895, 108-110. Enclosed was a report of local newspapers regarding the defense of Shanghai and Yangtze, FO 228/1198.

court was its legal basis. Why could the age-old Qing law still function in the modern metropolis of Hong Kong? Focusing on the legal authorities and ordinances that provided the legal premise for the use of Jamieson's translation in Hong Kong's judicial system, this section will also observe the role of English law in it, especially its influence on the applicability of Jamieson's translation. As his *Chinese Family Law and Commercial Law* constituted an important part in the entire repertoire of Chinese law and custom in Hong Kong, their destiny was closely connected together.

The legal basis may be addressed in two stages.[61] Before the new legislations of 1971 and 1972, Chinese issues falling into familial categories, such as marriage, taking of concubines, divorce, adoption, and succession were all governed by Chinese law and custom. After the legal reform of family law, however, legislation bearing English legal values and norms fundamentally replaced traditional Chinese law, which was only maintained in the New Territories until changes occurred in 1994. Thus, the two stages had different legal grounds for applying Jamieson's translation, in which English law was never lost from sight. In some cases, it has become the battleground between English and traditional Chinese law as to which should be applied, which was closely associated with statutory interpretation, greatly conditioning the application of Jamieson's translation.

6.2.1 Prior to Legislation in the 1970s: Erosion Through Statutory Interpretation

The first authority in this respect was Elliot's Proclamations. The first Proclamation was issued on February 1, 1841 under the name of James John Gordon Bremer (1786-

[61] The Basic Law assured that "the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." Basic Law, HKeL, https://www.elegislation.gov.hk/hk/A101!en@1997-07-01T00:00:00 (accessed April 3, 2019), art. 8.
Therefore, the year of 1997 did not materially alter the application of Chinese law and custom in Hong Kong and it will not be used as a watershed.

1850), Commander-in-Chief and Charles Elliot (1801-1875), the Chief Superintendent of Trade and Plenipotentiary in China, declaring that

> the inhabitants are hereby promised protection, in Her Majesty's gracious name, against all enemies whatever; and they are further **secured in the free exercise of their religious rights, ceremonies, and social customs,** and in the enjoyment of their lawful private property and interests. They will be governed, pending Her Majesty's further pleasure, **according to the laws, customs, and usages of the Chinese (every description of torture excepted) by the elders of villages,** subject to the control of a British magistrate …[62] (Bold added for emphasis)

The second Proclamation was issued the next day by Elliot alone:

> And I hereby declare and proclaim, that pending Her Majesty's further pleasure, **the natives of the island of Hong Kong, and all natives of China thereto resorting, shall be governed according to the laws and customs of China, every description of torture excepted.**
>
> And I do further declare and proclaim, that pending Her Majesty's further pleasure, all British subject and foreigners residing in or resorting to, the island of Hong Kong, shall enjoy full security and protection, **according to the principles and practices of British law** …[63] (Bold added for emphasis)

The two Proclamations were the first authority that enshrined Chinese law and custom in Hong Kong. The next statute that established their legal ground was section 3 of the Supreme Court Ordinance 1844, which became section 5 of the Supreme Court

[62] Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, vol. 1, 5-6.
[63] Ibid., 4-5.

Ordinance 1873:

> Such of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force within the Colony, **except so far as the said laws shall be inapplicable to the local circumstances of the Colony or of its inhabitants,** and except so far as they have been modified by the laws passed by the said legislature.[64] (Bold added for emphasis)

Although this statute did not explicitly assert the validity of Chinese law, it left the possibility open when laws of England should be inapplicable to Hong Kong. Whether in Elliot's Proclamation or later Ordinances, it is seen that English law had been imported into Hong Kong. During the subsequent development, English law formed an interesting interactive relationship with Chinese law and custom, competing for primacy in governing the Chinese. The result of the competition largely conditioned the applicability of Jamieson's translation in the Court.

While the above proclamations and ordinances provided the potential legal basis for Jamieson's translation, their meaning was not always transparent and their concrete legal effect had to be affirmed through interpretation of the courts, which had profound influence on its application. In some cases, Jamieson's translation was inoperative, not because the courts doubted its correctness, but because the potential legal ground for its applicability was eroded by English law through statutory interpretation.

In *Tse Moon Sak v. Tse Hung & Ors* (1969), the Chinese testator made a will in English which was in full compliance with the demanding requirements of English law. One important question facing the Court was whether the validity of the will depended

[64] The Supreme Court Ordinance, Cap. 4, LHK 1950ed., s 5.

on English or Chinese law. This choice made a big difference regarding the effect of the will, conditioning whether the testator's wish could be granted, since English law invested the testator with testamentary freedom while Chinese law did not. The counsel for the plaintiff held that this will should be governed by Chinese law[65] and the expert witness testified that Chinese people did not enjoy testamentary freedom under Chinese usage with Jamieson's *Chinese Family and Commercial Law* (pages 30 and 31) as important evidence.[66] These pages specifically discussed the limited testamentary capacity under Chinese law. On the other hand, the counsels for the defendants argued that English law should apply when the will under question complied with English law.[67]

As a man "of considerable practical experience in the administration of Chinese law under the Ch'ing dynasty,"[68] Jamieson's view lent great strength to the expert's view. While the judges did not doubt its correctness,[69] it was ultimately considered inapplicable after going through a series of interpretations by the Court. The judges dismissed Elliot's Proclamations as merely of temporary force since "a dual system of law operating within the territory over so wide a field would have created great difficulties."[70] This interpretation was partly similar and partly different from the judicial meaning of the Proclamations in *Ho Tsz Tsun v. Ho Au Shi and Others* (1915),[71] which was the first case that addressed them. In this case, the court also recognized the dual system established in the Proclamations,[72] in which one law was prepared "for the British and other European foreigners and another law for the Chinese inhabitants."[73] But unlike the *Tse Moon Sak* case, it did not regard the dual system as

---

65 *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 172-175.
66 Ibid., 165, 166.
67 Ibid., 176.
68 Ibid., 166.
69 Ibid., 165, 166.
70 Ibid., 189, 190.
71 *Ho Tsz Tsun v. Ho Au Shi and Others* [1915] 10 HKLR 69.
72 Lewis, "A Requiem," 349.
73 D. M. Emrys Evans, "Common Law in a Chinese Setting – The Kernel or the Nut," *Hong Kong*

of temporary nature. D. J. Lewis, a legal scholar in this area, supported this interpretation, stating that it "was not intended to be a temporary administrative convenience." [74] Rather, it accorded with "usual British approach to colonial administration."[75]

In the *Re Chak Chiu Hang, Deceased* (1925), however, it was held that "the Proclamations only reserved Chinese law to the extent that subsequent enactments of the Legislative Council had not replaced it."[76] The *Tse Moon Sak* case basically followed this reasoning, interpreting the Proclamations as being of merely interim regime, which were subsequently replaced by "presumably more carefully considered, enactments,"[77] i.e. section 5 of the 1873 Ordinance. This interpretation of Elliot's Proclamations greatly circumscribed the use of Jamieson's translation in this case by undermining the dual system in which English and Chinese law coexisted equally in Hong Kong's judicial system, each responsible for governing different peoples.

By making use of the 1873 Ordinance, the position of the two legal systems had changed in this case. The key question in understanding the ordinance was under what circumstances would English law be inapplicable to Chinese inhabitants. In *Ho Tsz Tsun*, this ordinance was interpreted in the following way:

> All situations in which English law purported to govern the local circumstances of the Chinese inhabitants on a matter previously governed by Chinese customary law such English law would be 'inapplicable.'[78]

This understanding was obviously in line with the Proclamation, sticking to the dual

Law Journal 1, no. 1 (1971): 14.
[74] Lewis, "A Requiem," 350.
[75] Ibid.
[76] Anne S. Y. Cheung, "The Paradox of the Hong Kong Colonialism: Inclusion as Exclusion," *Canadian Journal of Law and Society* 11, no. 2 (1996): 71.
[77] *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 190.
[78] Lewis, "A Requiem," 352.

system. However, the Strickland Report[79] in 1953 proposed a divergent interpretation, which profoundly influenced ensuing cases, including the present one. It derived from a Singapore case decided by the Privy Council a test of "injustice or oppression," which was the only circumstance that would render English law inapplicable.[80] In other words, English law generally prevailed except when it caused injustice or oppression. The judge in the present *Tse Moon Sak* believed it to be apposite in the case of Hong Kong,[81] whereby the English law become the predominant legal regime while traditional Chinese law was downgraded to a peripheral position.

By relegating Elliot's Proclamations to an interim regime, and interpreting section 5 of 1873 Ordinance with the "injustice or oppression" test, judges in the present case had successfully reconfigured English and Chinese law, with the former winning the primacy in application. Under their interpretations, Jamieson's translation of the Qing Code, representing Chinese law, could only be applied when English law had been proved incurring "injustice or oppression." As in this case, the judges reached a unanimous opinion that no such problems were caused,[82] English law therefore applied in this case,[83] legally conferring the Chinese testator with testamentary freedom and granting his wishes in the will.

The above analysis shows that Elliot's Proclamations and the 1873 Ordinance were the primary threshold for Jamieson's translation to function in judicial scenes

---

[79] This report was the outcome of an investigation on Chinese law and custom operating in Hong Kong by a committee appointed by the Governor in 1948. The chairman of the committee was George Strickland, Solicitor General, thus it was commonly referred to as Strickland Report. After it was published under the title of *Chinese Law and Custom in Hong Kong* in 1953, it exerted far-reaching influence on statutory interpretation and legislative reform in the area. Su Yigong 蘇亦工, "Bubian er bian: shi de lin baogao yu xianggang huaren xiguan quanli zhi xingfei" 不變而變－史德林報告與香港華人習慣權利之興廢(Changes and Immutableness: Strickland Report and the Rise and Fall of the Customary Rights of Hong Kong Chinese), *Qinghua faxue* 清華法學 (Tsinghua Law Review) 2, no. 5 (2008): 5-19.

[80] Committee, *Chinese Law and Custom in Hong Kong*, 5, 82-83.

[81] *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 193.

[82] As for the detailed discussion concerning how it was reached, see section 6.5.

[83] *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 191-192, 197-198.

before the reform of 1971.[84] While they provided the potential legal ground for its use, the effect of the statutes and Proclamations on it was not always definitive before being established through a series of statutory interpretations. Different interpretations led to different positions of Chinese law. Through years of legal development in Hong Kong, the presumed dual legal system established in Elliot's Proclamations was gradually and silently replaced by a new legal structure with English law being universal and dominant,[85] eroding the original legal basis of Jamieson's translation. Its precarious position not only reflected that of Chinese law and custom in Hong Kong's judicial system, but also revealed that the actual function of Jamieson's translation was closely connected with the courts' interpretation and the space it left for Chinese law in general. Its role in actual cases involved complicated judicial factors that were far beyond the control of the translation itself.

6.2.2 After Legislation in the 1970s: Erosion Through Legislation and Resistance of Jamieson's Work

This space was drastically diminished when the new legislation regarding family law, including the Marriage Reform Ordinance, the Legitimacy Ordinance, the Adoption Ordinance, the Intestates' Estate Ordinance, and the Probate and Administration Ordinance were promulgated in 1971 and 1972 after the government had conducted a series of studies. As these new enactments supplanted traditional Chinese usages with "English legal norms, and socio-cultural values," they officially "tolled the demise of Chinese customary law as a living element,"[86] and gave the most violent blow to

[84] In 1966, the application of English Law Ordinance replaced section 5 of 1873 Ordinance. This new ordinance also stated that "the common law and the rules of equity shall be inforce in Hong Kong – (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants." See Application of English Law Ordinance, Cap. 88, LHK 1987ed., s 3(1). It further reinforced the "diminishing status of Chinese law and custom." Cheung, "The Paradox," 72.
As this new Ordinance was issued after the testator died, it did not concern this case and thus was not discussed in detail.

[85] Lewis, "A Requiem," 351-352.

[86] Ibid., 347.

Jamieson's translation in Hong Kong's judicial system. Not only did the sphere for its application substantially shrink, its future was also endangered.

Regardless of the new legislation, once land matters in the New Territories were concerned, Chinese law and custom still prevailed. This was due to the unique characteristics of the area when it was leased from China. Distinct from the rest of Hong Kong, "the New Territories was composed of farmland,"[87] which was the primary source of inhabitants' agricultural livelihood. Living in closely-knit villages, they "had strong ties to the clan system,"[88] in which Chinese law and custom provided primary governing tenets. By virtue of their attachment to land which "was the unmistakable social symbol of wealth and stability,"[89] when the New Territories were leased to Britain in 1898, Sir Henry A. Blake, the Hong Kong Governor then expressly proclaimed that the residents' interests in land should not be interfered with.[90] Subsequently, section 11 of the New Territories Land Ordinance 1905 recognized Chinese customary law as applicable in land matters,[91] which was maintained in section 25 of the New Territories Regulation Ordinance 1910.[92] Later, section 13 of New Territories Ordinance (NTO) continued this regulation:

> In any proceedings in the High Court or the District Court in relation to land in the New Territories, the Court shall have power to recognize and enforce any Chinese custom or customary right affecting such land.[93]

---

87 Cheung, "The Paradox," 74.
88 Ibid.
89 Susanna Wong Nga-yin, "The Law of Intestate Succession to Land in the New Territories, Hong Kong – Where 'East and West Simply Do Not Meet,'" *Hong Kong Student Law Review* 3 (1997): 54.
90 Haydon, "Chinese Customary Law in Hong Kong's New Territories," 2.
91 New Territories Land Ordinance, No. 3 of 1905, *The Hong Kong Government Gazette* (July 7, 1905), s 11.
92 New Territories Regulation Ordinance, No. 34 of 1910, LHK 1937 ed., s 25.
93 New Territories Ordinance, Cap. 97, LHK 1984 ed., s 13.

Later in *Tang Kai-chung v. Tang Chik-shang* (1970), the enforcement of Chinese custom and customary right was interpreted as mandatory.[94] This interpretation has since then become the authority "on the proper construction of section 13,"[95] applicable to both indigenous and non-indigenous inhabitants,[96] in matters concerning "land in the New Territories, to the exclusion of any English or Hong Kong law that might otherwise be relevant."[97] The NTO and the interpretation for it became the legal ground for Jamieson's translation in New Territories cases concerning land.

At the same time, it must be noted that the Great Qing Code as a codified law was not directly recognized by the NTO, which merely authorized the enforcement of Chinese custom or customary right. The Hong Kong courts, however, did not always make a very clear distinction between Code and customary law, with the former still being a very important source of Chinese law. Legal scholars have discussed this phenomenon,[98] among whom Peter Wesley-Smith proposed that both the Hong Kong government and the courts had ingeniously "exploited their distinction by selecting either 'law' or 'custom'" to serve their political purpose.[99] It is just that the courts have managed to do this in a more surreptitious fashion.[100] The New Territories cases discussed in this paper did not demarcate a clear line between them, directly using Jamieson's translation after the above legal basis was presented.

But in 1994 a dramatic change occurred in the law relating to succession to land in the New Territories. While traditional Chinese customary law recognized a male-only succession right, it was deemed inappropriate to apply it to non-rural land in the

---

[94] *Tang Kai-chung and Another v. Tang Chik-Shang and Others* [1970] HKLR 276, 287.
[95] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 13.
[96] Jennifer Van Dale, "Chinese Custom in the New Territories: Non-indigenous Women's Right to Inherit Land," *Hong Kong Student Law Review* 1 (1994): 113.
[97] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 13.
[98] Wesley-Smith, *The Sources of Hong Kong Law*, 213-216; Henry McAleavy, "Chinese Law in Hong Kong: The Choice of Sources," in *Changing Law in Developing Countries*, ed. James Norman Dalrymple Anderson, 262 (London: George Allen and Unwin, 1963); Su, *Zhongfa xiyong*, 143-151.
[99] Wesley-Smith, *The Sources of Hong Kong Law*, 215.
[100] Ibid.

New Territories, where "the non-indigenous owners of such properties would have taken equal succession rights for men and women for granted."[101] In order to redress the problem, a reform was in preparation; but most members of the Legislative Council were dissatisfied with sexual equality being only extended to non-rural land, they planned to extend it to rural land as well.[102] Amidst heated public discussion, Ms. Christine Loh (陸恭蕙 Lu Gonghui), a member of the Legislative Council, proposed to extend the original plan to include rural land, which was passed on June 22, 1994.[103] From the next day, this New Territories Land (Exemption) Ordinance came into effect, exempting all land in the New Territories from Part II of the NTO, including the section 13 regarding enforcing traditional Chinese customary law[104] and section 17 regarding registration of successor.

While prospectively changing land succession law in the New Territories, there was still a transitional provision which stated that "if no grant of probate or administration of the estate of the Deceased is made by the Court of First Instance within 3 months after the death of that person," then the Secretary for Home Affairs could still "exercise the powers conferred on him under section 17 of the New Territories Ordinance (Cap 97) in respect of any person who may be entitled to that rural land in succession to the Deceased person";[105] and in proceedings concerning such matters, the Court still had power to "recognize and enforce any Chinese custom or customary right affecting that rural land."[106] Due to these transitional provisions, Jamieson's translation could still be used when no probate or administration was granted within a certain period of time.

The case *Liu Ying Lan v. Liu Tung Yiu and Another* was tried in this context,

---

[101] Wong, "The Law of Intestate Succession to Land in the New Territories," 75.
[102] Ibid., 76.
[103] Su, *Zhongfa xiyong*, 382.
[104] Wong, "The Law of Intestate Succession to Land in the New Territories," 82.
[105] New Territories Land (Exemption) Ordinance, Cap. 452, HKeL, https://www.elegislation.gov.hk/hk/cap452 (accessed on April 3, 2019), s 12.
[106] Ibid.

presenting the erosion power of legislation but also displaying the resistance of Jamieson's work. Although the trial was in 2002 and 2003, the owner of the estate had passed away in 1943, long before the 1994 Ordinance. Thus succession to his estate was still governed by Chinese law under section 13. The estate comprised a piece of land in Sheung Shui (上水 Shang shui), "on which a brick house has been erected."[107] The deceased had only two daughters, having failed to adopt a son during his lifetime. Nor did his widow, who passed away in 1987, adopt anyone. Thus, the question as to who was entitled to the estate was in the centre of the dispute between one of his daughters (plaintiff) and a nephew of the deceased (first defendant).

In this case, the newly enacted Adoption Ordinance 1972, as part of the family law reform, played a prominent role. However, as the two decisions in the Court of First Instance and Court of Appeal showed, the legal effect of the ordinance was not absolutely certain, but subject to statutory interpretation, which made a big difference to the applicability of Chinese law in the two decisions. In the process, Chinese law, through Jamieson's translation and interpretation, also resisted the potential erosion of this new enactment.

In the Court of First Instance, the nephew, although never adopted during the lifetime of the deceased and his widow, claimed he was "eligible to be posthumously adopted by the elders" under regulation 88(2) of the Qing Code.[108] In order to verify the institution of posthumous adoption, the judge referred to Jamieson's translation and commentaries for support. His translation of the second Li in "appointing a successor contrary to the law" (立嫡子違法) was reproduced by the Court:

> A widow left without a son and not remarrying shall be entitled to her husband's

[107] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 4.
[108] Ibid., para. 90.
The content of this regulation and the court's discussion of it will be presented in detail in section 6.3.

> share of the family property, and it shall rest with the elders of the Family to select the proper relative, and appoint him to succession; but in the event of her remarrying, all the property and her marriage outfit shall remain in the family of her deceased husband.[109](婦人亡夫無子守志者，合承夫分，須憑族長擇昭穆相當之人繼嗣。其改嫁者，夫家財產及原有妝奩，並聽前夫之家為主。[110])

This translation helped the judge ascertain that "posthumous adoption for a deceased person, at least during the lifetime of the widow"[111] was sanctioned by Qing law. With the assistance of experts and precedents, the court went further and acknowledged that posthumous adoption after the widow passed away was also possible.[112] He went on to analyse the underlying rationale for such an institution by quoting a number of large paragraphs from Jamieson. As the citations were rather long, only the essential points are reproduced here:

> 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 all those who can trace through male descent to a common Ancestor, however, numerous, and however remotely related. …
>
> The Family is the 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**

[109] Jamieson, *Chinese Family and Commercial Law*, 14; *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 38.
[110] *Daqing lüli huiji bianlan*, 8: 29. The court did not provide the original Chinese text, it is provided by the author.
[111] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 46
[112] Ibid., para. 48.

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. …

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**. …

Roman Law admits the adoption of strangers in blood into the group; Chinese Law does not admit strangers. …

Chinese Law only permits the adoption of agnates from a collateral branch of the family. …

If the Father has failed to adopt in his lifetime, the duty falls on the senior Agnates to select a proper successor, but the Widow would seem to have a considerable voice in the selection. …

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. …

Though not specifically emphasized 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 generation 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. …[113] (Bold added for emphasis)

The court's lengthy quotation from Jamieson established the importance of continuing the male line and conducting ancestral worship in Chinese families, which constituted the primary motive for the device of posthumous adoption. Under this formulation, if other requirements were met, the nephew in this case stood a chance of being posthumously adopted, thereby inheriting the land in dispute eventually. However, there was still one more issue that needed to be addressed before reaching this step, which was the Adoption Ordinance 1972.

As has been discussed, an array of new legislations in 1971 had substantially replaced Chinese law and custom in the field of family law. But the legislature at that time "deliberately left undisturbed the provisions in the Adoption Ordinance [1956] relating to the preservation of Chines customary adoption,"[114] which reads that "nothing in this Ordinance shall affect any adoption undertaken or to be undertaken under Chinese law and custom."[115] Thus, posthumous adoption could still exercise its role under it. This remained unchanged until the Adoption Ordinance 1972 was promulgated, which claimed that "after the 31st December 1972, an adoption in Hong Kong may be affected only in accordance with this Ordinance,"[116] that is "only an unmarried person under the age of 21 may be adopted."[117] While it did not prohibit a widow from adopting an heir for her late husband, the posthumous adoption after her death was not provided for by the new Ordinance.[118]

The influence of this ordinance on the nephew, who was neither unmarried nor

[113] Ibid., para. 49.
[114] Ibid., para. 76.
[115] Ibid.
[116] Adoption Ordinance, Cap. 290, LHK 1987 ed., s 25 (1).
[117] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 78.
[118] Ibid.

under 21,[119] was potentially immense. It contained the possibility of completely changing the validity of posthumous adoption in Hong Kong, prohibiting the nephew from being adopted into the deceased family even though there was no problem with the reasoning of posthumous adoption as analysed by Jamieson. The key point here was whether this was the intention of the Ordinance. As a matter of fact, the Court of First Instance and the Court of Appeal diverged in interpreting this enactment.

According to the judge in the Court of First Instance, he believed the Adoption Ordinance 1972 only dealt with "adoption of an unmarried infant,"[120] and did "not apply to any adoption of an adult,"[121] therefore, it did not "legislate on, outlaw or invalidate any Chinese customary adoption of an adult."[122] Accordingly, the nephew in this case still had the chance to be posthumously adopted to continue the male line and conduct ancestor worship, as supported by Jamieson's commentary, without being disturbed by this ordinance.

The reasons for his interpretation were three-fold. First of all, the famous Strickland Report "recommended the preservation of Chinese customary adoption (including posthumous adoption),"[123] which influenced the 1956 Adoption Ordinance. As the prototype of the new 1972 Ordinance, it only addressed adoption of infants and "never meant to affect the continued operation of customary law, amongst other things, the posthumous adoption of adults."[124] Secondly, he believed whether or not the nephew was the proper person to be posthumously adopted was a question falling within the category of Chinese law.[125] Thus, in his eyes, "the fact that he cannot be

[119] The age limit was changed to 18 since an amendment to the Ordinance in 1997. Adoption Ordinance, Cap. 290, HKeL, https://www.elegislation.gov.hk/hk/cap290 (accessed April 3, 2019), s 1.
[120] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 84.
[121] Ibid.
[122] Ibid., para. 85.
[123] Ibid., para. 86.
[124] Ibid., para. 87.
[125] Ibid., para. 91.

lawfully adopted under Hong Kong law is neither here nor there."[126]

Most importantly, through citing Jamieson's rationale for Chinese customary adoption, the judge perceived its fundamental difference with the adoption in the 1972 Ordinance, which "focused on the welfare of the adopted infant as its primary consideration."[127] On the other hand, adoption under traditional Chinese law and custom was primarily devised for the continuance of male line and performance of ancestral worship, which had been expressly clarified by Jamieson's commentary. Due to their fundamental divergence in motives, the judge believed that the new ordinance was designed merely to deal with adoption of children and "never intended to apply to adult adoption,"[128] which was a parallel system separately governed by Chinese law. In this discussion, Jamieson's commentary was seen participating in the judge's interpretation of the Ordinance by helping him detect the divergence of traditional Chinese adoption from their Western counterpart, preventing posthumous adoption from being excluded in Hong Kong, thereby resisting against English law's legislative erosion.

Through the court's interpretation of the Adoption Ordinance 1972 above, the nephew in this case was invested with the chance of being posthumously adopted by the deceased, though he ultimately failed, for he had already succeeded his own father's line and therefore could not be adopted by the deceased. The daughter of the deceased, however, did not win the case either. Because with posthumous adoption still applicable, the judge claimed that he could not rule out the possibility that among the pool of eligible male kindred, there might be some other candidates willing to be posthumously adopted by the deceased.[129] With such an understanding, he could not grant the land to the plaintiff either. Eventually the judge made a limited declaration

[126] Ibid.
[127] Ibid., para. 88.
[128] Ibid.
[129] Ibid., para. 102.

that the first defendant was "not entitled to the succeed to the subject property";[130] and "the plaintiff's claim for a general declaration of entitlement to succession to the subject property" was rejected.[131] It was "incumbent upon the Secretary [for Home Affairs] to inform the elders in the clan" and reach a conclusion "on whether there is still any person who should succeed."[132]

Seen from this case, the judge's interpretation of the Adoption Ordinance 1972 substantially shaped his final decision. With posthumous adoption still a living element in Hong Kong, the judge oriented towards a potential posthumous adoption in the future when the first defendant failed it, thus eliminating the chance of the daughter's inheritance. Dissatisfied with this decision, both plaintiff and first defendant appealed. In the Court of Appeal, the meaning and effect of Adoption Ordinance 1972 faced a turning point, with the status of posthumous adoption supported by Jamieson's commentary being fundamentally changed.

Contrary to the opinion that Adoption Ordinance 1972 had no impact on posthumous adoption, the judges in the Court of Appeal held that it "clearly preclude[d] posthumous adoption from being carried out in Hong Kong from 1973 onwards."[133] The reasons supporting the previous conclusions were assailed here. First, they believed that the recommendations in the Strickland Reported were not entirely adopted by the 1956 Adoption Ordinance, which "regulated all forms of adoption, including posthumous adoption," and "expressly preserved adoption under Chinese law."[134] However, the amendments in 1972 deleted provisions relating to such preservation, which could only mean that "the legislature no longer wished to continue with the preservation."[135] If situating the change in the larger context of the legislative

[130] Ibid., para. 133.
[131] Ibid., para. 134.
[132] Ibid., para. 111.
[133] *Liu Ying Lan v. Liu Tung Yiu and Another* [2003] HKCU 156, para. 49.
[134] Ibid., para. 55.
[135] Ibid., para. 49.

reform to abolish Chinese law and custom, the intention was more manifest.

After reasoning from the legislative history and the wording of the 1972 Ordinance, the judges then turned to attack the previous contention that whether the first defendant was an eligible person to be posthumously adopted should be solved within Chinese law. They referred to a variety of sources, proving that Hong Kong authorities had accepted that Chinese law and custom in Hong Kong was "subject to *any diminution of its application consequent upon enactments subsequently passed in Hong Kong* or the United Kingdom, and further subject to any changes in such customs or their interpretation as may since have become established.'"[136] This statement clarified the effects of subsequent Hong Kong legislation on Chinese law and custom, supported by an array of decisions.[137] Consequently, the 1972 Adoption Ordinance impeded the application of Chinese posthumous adoption. The judges in the Appeal held that

> those male members of the Liu family who are qualified under the kindred order of succession simply can no longer succeed because it is no longer possible to have a legally recognized posthumous adoption.[138]

With posthumous adoption being made inapplicable, the support rendered by Jamieson's translation and detailed elaboration of the rationale also became fruitless. Eventually, the property of the deceased went to his daughters. With this decision becoming a binding precedent, the invalidating effects of 1972 Ordinance on posthumous adoption were recognized by subsequent decisions, as shown in the next section. They excluded the very possibility of posthumously adopting a nephew and the rationale proffered by Jamieson was not mentioned. It is clearly observed that the

[136] Ibid., para. 58. The italics were added by the original judgement.
[137] Ibid., para. 59-63.
[138] Ibid., para.67.

living space of Jamieson's translation in the Hong Kong courts was considerably squeezed by this reinterpretation of the Adoption Ordinance 1972, refracting the precarious position of traditional Chinese law and custom in general in Hong Kong's judicial system.

To sum up, this section clarifies the legal basis of Jamieson's translation of the Qing family law in the Hong Kong courts, meanwhile probing into the intricacies of interpreting the law, which conditioned the potential role of Jamieson's work. Glimpsing into the operation of Elliot's Proclamations, Supreme Court Ordinance 1873 as well as the Adoption Ordinance 1972, it is observed that their meanings were not always certain, but contained different possibilities through different interpretations by the courts. Correspondingly, the erosion effected by English legal norms and values through legislation on Chinese law and custom was not absolute, as shown by the resistance of Jamieson's translation in the Court of First Instance of the *Liu Ying Lan* case. However, the decision from the Appeal which eventually eradicated posthumous adoption further reveals the delicate position of Jamieson's translation in the Hong Kong courts and that its applicability was closely associated with the legal basis, which was the initial threshold for its application and was being eroded.

6.3 Jamieson's Translation and Paratexts in the Eyes of the Court

After establishing the legal basis, this section will explore how the textual relations within Jamieson's translation were viewed in the courts. As illustrated in the previous sections, Jamieson's paratexts were applied in the courts to complement his translation. However, this effect did not apply to all cases. A rough conclusion could easily conceal the intricacies in the court's reception of Jamieson's work. Thus this section will probe into the inner operation of Jamieson's translation and paratexts in the courts by analysing the decision making process and the underlying reasoning in the judgements.

The case of *Liu Ying Lan v. Liu Tung Yiu and Another* (2002) and the succeeding decisions influenced by it provide ideal examples in this regard, enabling the thesis to examine questions such as how the translation and paratexts were read and approached and whether the latter indeed enhanced reading as was intended by Jamieson.

6.3.1 Court's Neglect of the Relation Between Translation and Paratexts

In the *Liu Ying Lan* case, both parties and the judge put their attention on the 2nd Li under the 88th Lü entitled "junior members appropriating family property," (卑幼私擅用財)[139] and on Jamieson's translation:

> 戶絕財產，果無同宗**應繼之人**，所有**親女**承受。無**女**者，聽地方官**詳明上司，酌撥充公**。[140]
>
> 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 the Government**.[141] (Bold added for emphasis)

Presenting the above in court, the judge discussed term by term Jamieson's translation of the clause, revealing the way that the Hong Kong court viewed his translation and paratexts. He first expressed his doubts as to whether Jamieson's translation of "應繼之人" (yingji zhi ren) into "legal successors" was correct because expert witnesses disagreed here with Jamieson. In the judge's eyes, this translation "would seem to suggest that this refers to a particular title or office held by a person," which meant the heir in this context.[142] The experts, however, held the opinion that

---

[139] Hereafter it is called regulation 88(2).
[140] *Daqing lüli huiji bianlan*, 8: 55; *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 23.
[141] Jamieson, *Chinese Family and Commercial Law*, 17; *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 24.
[142] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 50.

> the phrase simply means a willing male person within the same kindred or lineage who satisfies the legal requirements for adoption as the son of the sonless male. In other words, he is a legally eligible adoptee within the same kindred or lineage. He is not yet the adopted son. He is not yet the heir.[143]

The meaning of "應繼之人" obviously became the contested ground between Jamieson's translation and the expert evidence, which was not simply semantics really because the meaning of "應繼之人" did matter in this case. If the phrase indeed only referred to an heir, which the family in this case had not yet appointed, then the property would go directly to the daughters. If "應繼之人" referred to a legally eligible and willing candidate for adoption as the experts advocated, it meant only if there were indeed no such candidates could the daughters inherit. According to this latter understanding, when the extinction occurred in a family, the lineage elders should first posthumously adopt an heir among the eligible candidates to continue the line of the deceased and inherit the estate.[144] Under this circumstance, the court must first discuss whether the defendant as a nephew of the deceased, was a proper candidate. Even if he was not suitable, other nephews could still claim to be an heir. Only when such candidates were exhausted could the daughter inherit. In other words, the candidates had priority over daughters. Precisely because the meaning of the phrase directly influenced to whom the property should go, the court was extraordinarily particular about Jamieson's translation of it.

Facing the dilemma posed by Jamieson's translation and expert evidence, the judge went all the way back to the original Code to seek other parts that made use of

[143] Ibid.

[144] This whole discussion occurred in the Court of First Instance, prior to the discussion of Adoption Ordinance. At this stage, whether there was posthumous adoption still had a significant influence on the interests of the two parties. It was until the later Court of Appeal that posthumous adoption was finally dismissed.

the phrase, trying to decode its actual meaning in this way. In "若立嗣，雖係同宗，而尊卑失序者，罪亦如之, 其子亦歸宗, 改立**應繼之人**,"[145] the Court saw "應繼之人" here could mean both appointed heir and candidate; while in "無子立嗣，若**應繼之人**平日先有嫌隙，則於昭穆相當親族內擇賢擇愛，聽從其便,"[146] the phrase was more inclined to indicate "the person with the best claim to be adopted";[147] the most definite conclusion was drawn by the judge from "姦生之子，依子量與半分, 如無別子，立**應繼之人**為嗣，與姦生子均分,"[148] in which case he believed it was beyond doubt that "應繼之人" referred to candidates, while a different term "嗣" indicated heir.[149] After a thorough analysis, he accepted the experts' opinion and decided to

> avoid using the term 'legal successor' as this might create the misunderstanding or confusion that this phrase refers to a titleholder or an appointed person, i.e. the heir/adopted son.[150]

---

[145] *Daqing lüli huiji bianlan*, 8: 28. Bold added for emphasis.
Jamieson's translation:
If in appointing a Successor, although from the same kindred, the order of seniors and juniors in the generations of the family is broken, the person so appointing shall be liable to a similar penalty, and the legal successor shall be appointed. Jamieson, *Chinese Family and Commercial Law*, 13.
The court gave the number of the three quoted clauses so that the author could know which clauses it referred to. In the first two, it did not place the original in the judgements, and in the third it did. The court did not provide translation for the three Chinese clauses; they are provided by the author in the footnote for the reference of readers.

[146] *Daqing lüli huiji bianlan*, 8: 30-31. Bold added for emphasis.
Jamieson's translation:
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 next generation from among the near relatives. Jamieson, *Chinese Family and Commercial Law*, 14.

[147] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 51.

[148] *Daqing lüli huiji bianlan*, 8: 55. Bold added for emphasis.
Jamieson's translation:
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. Jamieson, *Chinese Family and Commercial Law*, 16.

[149] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 51. The interpretations of the three clauses were all drawn from judgement of this case.

[150] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 52.

His conclusion was that "the phrase only refers to the best candidate for appointment as heir by adoption."[151] Admittedly, "legal successor" was a confusing term, seeming to suggest more of a titleholder than a candidate in its literal meaning. This ambiguity continued in other translations as well. In the three clauses discussed by the judge, "應繼之人" was translated into "legal successor" or "successor," not making a distinction between candidate and adopted heir. Jamieson's not so accurate legal translation posed challenges for the Hong Kong Court, which required accuracy in defining the legal terms.

However, translation itself was not the sum total of his contribution in *Chinese Family and Commercial Law*, which incorporated lengthy paratexts to enrich and clarify the translation. Had the complementary effects of the paratext to this translation been noticed, the dilemma faced by the court could have been avoided and the efforts to prove its actual meaning of "應繼之人" could have been saved. According to Jamieson commentary, he did not intend his translation of the clause to exclude possible candidates. He made a clear point that "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."[152]

By using "has been, nor can be appointed,"[153] Jamieson was actually in line with expert witnesses in that only after the successor could not be appointed could daughters inherit. In other words, he believed that the Chinese would try all means to appoint a successor among the qualified candidates before conferring the property to the daughter. In this sense, the "want of legal successor" in his translation did not only refer to the circumstance that there was no adopted heir, but also to the situation that there was no one who could be adopted. The literal meaning of the not so accurate translation obscured Jamieson's approval of posthumous adoption. He again expressed

[151] Ibid.
[152] Jamieson, *Chinese Family and Commercial Law*, 30. Bold added for emphasis.
[153] Ibid.

this idea in the commentary appended to marriage law, in which he remarked that the extinction of a household

> 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.[154]

The statement demonstrated that he had seen that even after the death of the sonless father, the family elders and official could still choose a proper heir "from any persons capable of succeeding"[155] and arrange for a posthumous adoption. Moreover, in his general introduction, he also claimed that

> 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.[156] (Bold added for emphasis)

This unequivocally showed that only when the "male claimants of the agnatic kindred" were exhausted, were daughters entitled to the property. Here, the "has been nor can be adopted" remained consistent with "has been, nor can be appointed" above, revealing "應繼之人" in his eyes consistently meant those male claimants, which was what Jamieson actually meant by "legal successor." Only when viewed in alliance with his paratext could these meanings surface and be understood.

---

[154] Ibid., 52.
[155] Ibid.
[156] Ibid., 6.

But it was not an easy task to achieve. Jamieson's commentary did not take the form of footnotes scattered here and there. He had a greater ambition to conduct a systematic investigation of inheritance law. Thus, aside from one footnote in this part, his commentary was grouped separately, appearing at the end of the entire translation. As an independent text of its own, it had its own structure and logical order. While this arrangement enabled Jamieson to initiate a systematic and thorough research without being bound by the translation, the corresponding relation with the translation was, however, lessened. Although many parts of it echoed the translation, clarifying and serving as a complement to it, the clues were not straightforward but required careful examination to be detected.[157]

The problem caused by this arrangement was visualized through the court's detailed discussion of "應繼之人." As a special reader, the Hong Kong court's focus in this analysis was merely on Jamieson's translation, which was taken literally without being considered in conjunction with the paratexts. Therefore, it misunderstood Jamieson's connotation of his translation, opposing it to expert witnesses' opinion. Had the court perceived the commentary's function in clarifying the translation, it would have known there was no disagreement between the experts and Jamieson. The dilemma faced by the judge could have been avoided.

The case revealed the challenge Jamieson's translation posed for the court, which was not always a self-sufficient entity and required paratexts for its clarification. Not perceiving the relation between the two could easily cause trouble for the court, which had to try other means to decode the meaning of the Qing law, in order to make a decision between Jamieson's translation and the expert evidence as analysed in this case. But the court's reluctance to directly dismiss the former and adopt the latter, and

[157] This was not easy to accomplish because mere notice of paratexts was far from enough. Jamieson in fact quoted some of the paratexts that I mentioned above. However, it was placed as the rationale of posthumous adoption. The Court did not connect them with Jamieson's translation of "應繼之人," nor note their close relation, thus missing Jamieson's true intention.

the efforts that it went through in return testified the importance it attached to Jamieson's translation in interpreting the Qing Code.

6.3.2 Paratext's Redress of Translation in Court

But it is not always the case that the court ignored the paratext's function in clarifying Jamieson's translation. There were also successful examples, as in his translation of "無女者，聽地方官詳明上司，酌撥充公." According to Xue Yunsheng, the entire clause 88 (2) was based on the Ming law, which was revised in the fifth year of Qianlong's reign (1740).[158] The original Ming clause was "when there is indeed no one in the same lineage that can succeed, due to which the household becomes extinct, daughters should inherit the family property; in absence of daughters, the property should go to the government" (戶絕財產果無同宗應繼者，所有親女承分。無女者入官).[159] The modified Qing version added words like "the local Magistrate will report in detail to his superiors" (聽地方官詳明上司) and "discretionary" (酌撥), displaying a cautious attitude on the part of the Qing government when confiscating the property of an extinct household.

It was no longer a necessity that was bound to happen as in the Ming, but needed a thorough investigation and careful deliberation. The reason for the change was that the Qing government had distinguished disposal of property in an extinct household from confiscation of property due to crime, relaxing the strict confiscation system which only applied to criminals.[160] Xue Yunsheng also commented that "since both the foster son and son-in-law were entitled to inherit under section of 'appointing an heir contrary to law,' government confiscation seems not possible" (義男、女婿均準

[158] Xue, *Duli cunyi chongkan ben*, 2: 260.
[159] Huang Zhangjian 黃彰健, ed., *Mingdai lüli huibian xiace* 明代律例匯編(下冊)(*Collection of Laws in the Ming Dynasty* Part II), (Taipei: Jinghua Press 精華印書館股份有限公司, 1979), 477. Translation made by the author.
[160] Wu Kunxiu 吳坤修, *Daqing lüli genyuan* 大清律例根原(Sources of the Great Qing Code), (Shanghai: Shanghai Dictionary Press 上海辭書出版社, 2012), 2: 422.

承受家產，見立嫡子違法門。酌撥充公，似乎難行).[161] This meant as long as family members came to claim the property in an extinct household, even if they were not blood relations, the requests were usually granted, making confiscation even more improbable.

Kathryn Bernhardt has also researched this issue. She held that such amendment made "confiscation no longer compulsory, but merely something that local officials should consider, depending on circumstances."[162] Moreover, she perceived a more fundamental transformation through this revision：

> That was the imperial state's recognition of private ownership of land. Although in theory all land in the realm continued to belong to the emperor, in practice the state came to recognize, and through its laws to protect, private ownership. And its claim on extinct household property changed accordingly. … The state's retreat from its claim on juehu property became complete in the eighteenth century with its relinquishment of the right of confiscation, except as part of the penalty for crimes committed.[163]

Despite the importance of the change, Jamieson omitted the phrases that the Qing law added, including "聽地方官詳明上司" and "酌撥". His translation, instead, is a clear-cut one: "if there are no daughters the property shall be forfeited to the Government." [164] This translation resulted in a complete loss of the Qing government's cautious attitude, making the intended discretionary power an absolute one in forfeiting property of an extinct household, without any possibility for further

[161] Xue, *Duli cunyi chongkan ben*, 2: 260. Translation made by the author.
[162] Bernhardt, *Women and Property in China*, 41.
[163] Ibid.
[164] Jamieson, *Chinese Family and Commercial Law*, 17.

deliberation. His translation made the law revert back to the one in force during the Ming.

However, his inaccurate translation did not necessarily indicate an inaccurate understanding, as in the previous case of "應繼之人." Compared to his translation, his commentary revealed a more liberal stance on the confiscation issue:

> 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.[165]

This made clear that Jamieson was not unaware of the true intention of the clause, which did not mean to make the confiscation compulsory. Although this commentary could be regarded as a complement to the translation, the diverging attitude manifest in them was still apparent. Yet the judge in the case of *Liu Ying Lan* was not misled by Jamieson's translation. He claimed that

> it was never the intention of the imperial government to forfeit the property of private individuals pursuant to regulation 88(2), … Jamieson (p. 30) recorded no case of government forfeiture.[166]

The judge, who had placed Jamieson's translation of regulation 88(2) in court and conducted an acute analysis of it, obviously did not adopt the absolute assertion in the translation. Instead, the fact that Jamieson had recorded no such cases in the

[165] Ibid., 30.
[166] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 74.

commentary had become his evidence, proving that confiscation was never the intention of the state. The page number 30 was where Jamieson voiced his liberal opinion on this point. It was shown in this instance that the judge had indeed noticed the paratext and its role in redressing and relaxing the determined attitude of confiscation in his translation.

Moreover, he also detected the discretion through the lines of the original text as revealed by a succeeding case tried by him,[167] in which he remarked the code "provides for a discretion whether to forfeit (酌撥充公)."[168] As the judge spotted the discretionary confiscation through the words of the original Code, he would naturally incline toward Jamieson's commentary, which was closer to the actual meaning of the clause than the translation. The case was then tried based on Jamieson's commentary without being troubled by its seemingly conflicting relationship to the translation.

This case was the first one that expressed an opinion on government confiscation, which in turn conditioned cases adjudicated later, since Stare Decisis or the doctrine of judicial precedent operates in Hong Kong.[169] As an important precedent, the same judge referred to it in addressing a competition from the government in *Official Administrator v. The Luk Hoi Tong Co Ltd* (2005). Before doing so, he first clarified the difference between the two cases. In the former case,

> it was a competition between the deceased's daughters and the nephew, who was never adopted into the family of the deceased. Here, there is no such competition between a daughter and a nephew. If anything, it is a (potential) competition between the nephew and the government.[170]

---

[167] *Official Administrator v. The Luk Hoi Tong Co Ltd & Anor* [2005] 3 HKC 615, 641.
[168] Ibid.
[169] Clement Shum, *General Principles of Hong Kong Law*, 3rd ed. (Hong Kong: Addison Wesley Longman China Limited, 1998), 29-31; Ian Dobinson and Derek Roebuck, *Introduction to Law in the Hong Kong SAR*, 2nd ed. (Hong Kong: Sweet & Maxwell Asia, 2001), 106-111.
[170] *Official Administrator v. The Luk Hoi Tong Co Ltd & Anor* [2005] 3 HKC 615, 641.

The primary dispute in this case was between the two nephews of the deceased, neither of whom had been adopted by the deceased, nor could be adopted posthumously after the new Adoption Ordinance 1972 came into effect from January 1, 1973, as had been discussed in the Appeal of the *Liu Ying Lan* case. In that case, daughters were entitled to the estate. However, in the present case, the deceased had no children at all, leading to the possibility that the property would be claimed by the government in line with the clause 88(2). By distinguishing it from the previous case, the judge clarified that the crux of this dispute was between the nephews and the government. Faced with this, he continued to adopt the attitude of Jamieson in his commentary, as he did in the case of *Liu Ying Lan*:

> As has been pointed out by Jamieson, *Chinese Family and Commercial Law*, 30, the forfeiture of the estate to the government is perhaps never insisted upon as against relations of any kind.[171]

He again mentioned page 30, which was where Jamieson's commentary was placed. The latter half of the sentence was directly quoted from there. In contrast, Jamieson's translation on this point was not even mentioned. In line with his assertion in the *Liu Ying Lan* case, the judge decided that the property should be succeeded by the nephews instead of being forfeited to the government.[172] It is seen that the paratexts' function of redressing translation in the precedent case was substantially adopted in this one. With the influence of these precedents, the authority of Jamieson's paratext on the issue of confiscation continued to accrue through later cases.

[171] Ibid.
[172] Ibid.

In the case of *Tsang Yuet Mui* (2014), where the court faced the same potential competition between the nephew of the deceased and the government regarding the property of an extinct household, the judge quoted the full analysis of the above case, including its citations from Jamieson's commentary.[173] The judge summarized that "the reality is no different from the situation observed by the learned judge in *Luk Hoi Tung Co Ltd* above."[174] Following the precedent decision, the judge in this case also adopted Jamieson's commentary and held that the nephew was entitled to the property.[175]

In the further case of *Wong Yuk Wah* (2017), there was also competing interest between the Government and a nephew who had not yet been adopted. As the deceased had no children, and there was no possibility of posthumous adoption due to the influence of Adoption Ordinance 1972, his household had become extinct. Thus the court claimed, "under the Article 88(2) of the Qing Code literally, the intestate estate of Wong Tak [the deceased] could go to the government."[176] The counsel for the nephew, however, proved otherwise by referring to the three cases discussed above. He first quoted the *Liu Ying Lan* case, the part where the judge applied Jamieson's commentary (page 30) to explain that state forfeiting was never the intention of the Qing government.[177] Then he presented the analysis of *Luk Hoi Tung Co Ltd* which conferred the property on the two nephews based on Jamieson's commentary.[178] Subsequently the *Tsang Yuet Mui* case was also cited to illustrate the same point.[179] After going through "all the authorities and the evidence of this case", the court

[173] *Tsang Yuet Mui, in her Capacity as the Personal Representative of the Estate of Tang Yip Sang, Also Known as Tang Ip Sang, Deceased v. Wan On, in his Capacity as the Personal Representative of the Estate of Tang Yung & Anor* [2014] HKCU 2228, para. 51.
[174] Ibid., para 52.
[175] Ibid., para 53.
[176] *Wong Yuk Wah, in his Personal Capacity as the Personal Representative of the Estate of Wong Chiu, Deceased v. The personal Representative of the Estate of Wong Tak, Deceased* [2017] HKCU 59, para. 21.
[177] Ibid., para. 22-24.
[178] Ibid., para. 26.
[179] Ibid., para. 27.

accepted the counsel's submission that the estate of the extinct household should go to his nephew.[180]

The authorities without doubt referred to precedent cases, which could hardly be ignored with the English legal principle of Stare Decisis operating in the Hong Kong judicial system. It is through the force of the precedent that the paratext's redress of Jamieson's translation as recognized in the *Liu Ying Lan v. Liu Tung Yiu and Another* was held throughout the decisions later. In other words, the whole succession of cases confirmed the authority of Jamieson's paratext relating to state confiscation, overshadowing his translation, which was uniformly omitted in them. In this way, the court evaded the potential trouble that could be brought by the tension between translation and paratext on this problem.

6.3.3 Conflict between Translation and Paratexts in Court

However, things did not always go so smoothly in the court, especially when the previous and later judges had diverging opinions, as occurred in Jamieson's translation of "親女" (qin nü) and "無女" (wu nü) and his commentary on them. When he first published it in *The China Review* in 1880, they were translated as "the nearest female [relations]" and "no female [relations]."[181] His note was in line with his translation, stating that "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."[182]

But when it came to the 1921 version of which the Hong Kong court made use, he had revised his translation of "女" (nü) to read "daughters," while the original commentary remained intact. We cannot know for certain whether Jamieson was simply careless and forgot to amend the commentary, or whether he felt that, in the

[180] Ibid., para. 35.
[181] Jamieson, "Translations from the Lü-Li: Inheritance and Succession," 197.
[182] Ibid., 204.

absence of daughters, other female relatives were also eligible. However, we can investigate how the courts dealt with this inconsistency in actual trial.

In addressing what "女" meant, the judge in the *Liu Ying Lan* case first consulted *Ngai Chung Shi v. Ngai Yee Mui* (1927), in which he found the conclusion that "if there were no natural daughters, any surviving female relatives of the last deceased male member of the family could inherit."[183] Obviously, this precedent case extended the meaning of "女" beyond daughters, in line with Jamieson's commentary. However, the judge in *Liu Ying Lan* viewed the matter differently. He explicitly claimed that

> in this regard, I would simply note that the regulation says if there is no '女', which in the context should be translated and understood, in my view, as 'daughter' (rather than female — a translation or understanding which would support the argument that female relatives other than daughters may succeed in the absence of daughters), the property may be forfeited to the government.[184]

Although he said he was "not concerned with translation but proper construction of the regulation,"[185] translation as a matter of fact did represent a type of construction in this case. The translation of "女" variously as "daughter" or "female" presented completely different interpretations of the clause. The judge in the present case obviously adopted Jamieson's translation "daughter," dismissing "female" which would enlarge the group that could inherit the extinct household property.

Notwithstanding this opinion, he eventually decided not to "express any definite view on it,"[186] revealing his trouble in making a choice between the two. The reason he gave was precisely the obstacle posed by Jamieson's commentary which was used

[183] *Liu Ying Lan v. Liu Tung Yiu and Another* [2002] HKCU 568, para. 54.
[184] Ibid.
[185] Ibid.
[186] Ibid.

by the precedent: "the understanding of the Court in Ngai Chung Shi (that in the absence of daughters female relatives may inherit) has the support of Jamieson in a passage (at p. 30)."[187]

In the special circumstances of the court, the inconsistency between Jamieson's translation and commentary was substantially visualized with judges standing on different sides, from which they developed diverging opinions as to what the proper construction of "女" was. While the present judge advocated Jamieson's translation, he had meanwhile perceived that the judge in the early case was supported by Jamieson's commentary. This conflict troubled him, causing him to refrain from expressing any definite opinion regarding it, revealing the challenge that Jamieson's translation posed for the Hong Kong courts.

The difficulty in reaching a definitive conclusion again disclosed the mutual reciprocal relation between the precedent cases and Jamieson's interpretation. On the one hand, the latter could serve as evidence to assist the judge to try cases; on the other hand, once its validity was established in a preceding case, any later judge would be reluctant to challenge it, even though he maintained reservation towards it. Through the precedents, the legitimacy of Jamieson's interpretation of Qing law was consolidated.

Though failing to come to a definite conclusion in this case, the courts eventually settled the issue through other means. In the cases of *Luk Hoi Tong Co Ltd*, *Tsang Yuet Mui* and *Wong Yuk Wah* discussed above, no female relations other than the daughter came to claim the extinct household property; it was the nephews who were involved in the dispute. Without considering these female relations' right, the Court directly went on to weigh whether the property should go to the nephews or to the government, from which a rule was gradually made that the property of an extinct household

[187] Ibid.

without daughters should be conferred on nephews. No part was played by other female relations in this process. Thus, the tension between Jamieson's translation and commentary revealed in the actual judicial scenes was not necessarily resolved between themselves, but through the actual circumstances of cases that were brought to the Court, which were external factors beyond the text.

6.4 Interaction of Jamieson's Translation with External Factors

When functioning in the Hong Kong judicial system, Jamieson's translation of Qing family law inevitably interacted with external factors, which to a great extent conditioned how his translation was used. These include expert witnesses, changing practices in the Chinese community of Hong Kong, as well as English legal concepts and principles.

The previous parts have touched upon the role of expert witnesses, which will be discussed in detail here. Due to the lack of knowledge in Hong Kong regarding what Chinese law and custom was, it had become a routine practice to adduce expert evidence in the court when relevant knowledge of Chinese law was needed.[188] Clearly, its role to some extent coincided with that of Jamieson. An investigation into their relationship in the courts will not only shed some light on the way Jamieson's translation was used, but also its advantages and disadvantages in comparison with experts.

In many cases, it was through the expert that Jamieson's translation was quoted

[188] Wesley-Smith, *The Sources of Hong Kong Law*, 216; Lewis, "A Requiem," 357; Cheung, "The Paradox," 73; Stephen Selby, "Everything You Wanted to Know about Chinese Customary Law (but were Afraid to Ask)," *Hong Kong Law Journal* 21, no. 1 (1991): 53.
Although this practice treated Chinese law as if it were foreign law, it has been used and acknowledged by a succession of cases. In *Tse Moon Sak v. Tse Hung & Ors*, the judge claimed that "there has long been a practice in Hong Kong of taking evidence on such law, a practice endorsed in a number of judicial decisions, and although this practice may be regarded as a departure from the procedure normally followed in English courts, I think it must now be regarded as an established modification based on local circumstances though it should not be taken to supplant the court's right to inform itself by other means." *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 179.

and introduced into the court, whose authority in return lent strength to the validity of experts' evidence. In *Mok Hing Chung v. Wong Kwong Yiu* (2014), which involved the distribution of the estate of two spinster sisters, the defendant (WKY) claimed he was adopted by one of the sisters (WYL) to continue the male line of WYL's father.[189] However, experts for both sides agreed that

> the appointment of a male successor could not actually have been achieved through the adoption of WKY by WYL. This is because as a single woman WYL did not have the capacity to make a full adoption for the appointment of a successor.[190]

This shared idea was derived from the experts' unanimous reference to Jamieson's commentary on a Mixed Court case appended in *Chinese Family and Commercial Law*, which was then fully reproduced in the court:

> The object of adoption is to continue the family line in the male descent, and to secure the continuance of the ancestral worship. But a woman with no husband has no place in any ancestral hall, is therefore incapable of adopting. She is *finis familiæ*, the last of the line and can have no successor.[191]

By quoting Jamieson, the experts clarified the underlying reasoning for rejecting WYL's formal adoption of WKY. As a single woman had no proper position in the ancestral hall, the experts denied she had any such capability. Jamieson in this case was the actual informant of Qing law. Despite this, he did not repudiate a single

[189] *MoK Hing Chung v. Wong Kwong Yiu* [2014] HKCU 1572, para. 66.
[190] Ibid., para. 88
[191] Jamieson, *Chinese Family and Commercial Law*, 152; *MoK Hing Chung v. Wong Kwong Yiu* [2014] HKCU 1572, para. 89.

woman's right to adopt an *i-tze* (義子 yizi) or foster son, which the judge noticed and cited:

> It may be noted that though a *femme sole* cannot adopt a legal heir, there seems no reason why she should not have an i-tze, courtesy child, male or female, that is a child by quasi-adoption.[192]

Based on this and their mutual regard for each other as mother and son, WKY was regarded as an *i-tze* of WYL, which was accepted by all experts.[193] The case was then tried based on this consensus. It has to be noted that the evidence used by the court this time was not directly derived from Jamieson's translation of the Qing Code. As a matter of fact, the Code did not make any provisions regarding adoption by single woman. It was Jamieson, by incorporating cases in the Shanghai Mixed Court, who filled in the lacuna left by the Code. Through assistance from experts, who extracted these easily ignored paratexts and presented them to the court, the astute observations of Jamieson in the case was seen and granted by the court, which imported new materials for the knowledge repertoire of Hong Kong courts.

Thus, the important role of Jamieson's paratexts in this case was partly credited to the experts, prompting the judge to further make use of it and establish the defendant's position as an *i-tze*. On the other hand, a substantial part of experts' opinions was derived from Jamieson's *Chinese Family and Commercial Law*, which became their source of learning Chinese law. The value of Jamieson's translation in the court further lent strength to the expert's opinions. Their alliance in the court made a forceful argument, to which the judge attached great importance. It effectively shaped the court's judgement regarding the status of the defendant.

---

[192] Jamieson, *Chinese Family and Commercial Law*, 152; *MoK Hing Chung v. Wong Kwong Yiu* [2014] HKCU 1572, para. 90.
[193] *MoK Hing Chung v. Wong Kwong Yiu* [2014] HKCU 1572, para. 100.

However, the relation between the expert witnesses and Jamieson's work varied according to different cases, demonstrating the complexity of how Jamieson's work actually functioned in the court. In *Yau Tin Sung v. Yau Wan Loi* (1983), Jamieson's paratexts and expert witnesses clashed on many points, leaving the judge to decide which to adopt. First of all, the judge in this case evinced reservations towards expert evidence. He had no problem that the two expert witnesses in this case were "both recognized Chinese experts", it was just "their views were exclusively founded on their learning rather than their personal experience."[194] So he claimed that "I accept their respective evidence only in so far as it is not inconsistent with such state of the Tsing law and custom relevant to this case as I have held to be operative."[195]

These words revealed that this court was very cautious in accepting opinions from expert witnesses. The question was: how did the court know what Qing law and custom was? A primary source of such knowledge came from Jamieson's translation and commentary of the Qing Code, with his direct experience of the Qing legal system, as discussed earlier. His translation and interpretation became the benchmark against which that expert evidence was gauged.

In this case, the deceased (YTO) had three sons, YKH, YKP, YKY, who had all passed away. Among them only YKY had a natural son, who was the plaintiff. He claimed that he was not only a successor to his own father, but also successor to his two deceased uncles who had left no male issue.[196] On the other hand, the defendant alleged that he was the adopted son of YKH, and that both YKP and YKY were adopted out of the YTO's family.[197] Thus the plaintiff, as the son of YKY, was no longer entitled to his grandfather's property. The court recognized that "these alleged adoptions were the bone of contention,"[198] and conducted an in-depth investigation of

194 *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 659.
195 Ibid.
196 Ibid., 650.
197 Ibid., 648.
198 Ibid., 649.

them.

In the investigation, the court first touched upon the concept of *kim tiu*, which refers to a man's responsibility for ancestral worship of two family lines, that "of his deceased uncle in addition to that of his natural father."[199] Regarding the validity of a *kim tiu* adoption, the judge accepted Jamieson's emphasis "on the importance of a public ceremony."[200] He quoted Jamieson's commentary on page 20 of *Chinese Family and Commercial Law* that the adoptee must be transferred to the new home "with the cognizance of the whole family" and that he must "make obeisance before the ancestral tablets of the adopting family in token of his admission."[201] Without such a ceremony, "no change in the family life would be effectual."[202] With Jamieson's statement as a primary basis, supported by other sources, the judge dismissed one of the experts' opinion that the adoption "could arise automatically without any more ado upon the death of all the brothers leaving only one son."[203]

This understanding profoundly influenced the interests of all the parties. First of all, evidence was lacking concerning the adoption ceremony of YKP and YKY.[204] This became a most important reason for the judge's satisfaction that neither were adopted out of the YTO's family. He said "in absence of any allegation or evidence of a public ceremony, there could have been no valid adoption."[205] With this decision, the plaintiff's right in his grandfather's estate was largely restored; at the very least he was entitled to his father's one-third share. At the same time, the defendant failed to establish that the ceremony for his own adoption into the YKH's family had indeed

---

[199] Ibid., 653.
[200] Ibid.
[201] Jamieson, *Chinese Family and Commercial Law*, 20-21; *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 653.
[202] Jamieson, *Chinese Family and Commercial Law*, 21; *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 653.
[203] *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 653, 654.
[204] Ibid., 659-661.
[205] Ibid., 661.

occurred.[206] Based on this and other evidence, his alleged adoption was rejected by the court.[207] Moreover, the plaintiff's claim that "he automatically became a kim tiu son of his deceased's uncle"[208] was also dismissed because without a proper adoption ceremony, the court did not recognize the plaintiff as successor to his two uncles.[209]

The court then addressed the question on how to select a proper successor. It first quoted the first Li of section 78, entitled "appointing a successor contrary to the law", translated by Jamieson:

> 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 maybe chosen, and finally any one of the same family name.[210] (無子者，許令同宗昭穆相當之姪承繼，先儘同父周親，次及大功、小功、緦麻。如俱無，方許擇立遠房及同姓為嗣。[211])

The translation laid down the order of appointing an heir from the son of the adoptee's brother to more remote relations. Based on this, the judge concluded the general rule of the choice: "the closer relative was to be preferred."[212] By making use of Jamieson's translation and commentary, he further summarized the two exceptions that could allow a proper candidate to be justifiably dismissed, "namely 'bad blood' before

---

[206] Ibid., 661-664.
[207] Ibid., 664.
[208] Ibid., 650.
[209] Ibid., 666.
[210] Jamieson, Chinese Family and Commercial Law, 14; *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 654.
[211] *Daqing lüli huiji bianlan*, 8: 29. The court did not provide the original Chinese text, it is provided by the author.
[212] *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 654.

adoption or misconduct after adoption, p. 14."[213] Page 14 was the place where Jamieson's translation concerning these two exceptions were placed:

> 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.[214] (無子立嗣，若應繼之人平日先有嫌隙，則於昭穆相當親族內擇賢擇愛，聽從其便。[215])

> 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.[216] (無子立嗣，除依律外，若繼子不得於所後之親，聽其告官別立，其或擇立賢能及所親愛者。若於昭穆倫序不失，不許宗族指以次序告爭，並官司受理。[217])

The first translation refers to bad blood before adoption and the second illustrates inharmonious relationship after adoption, which were the only two causes that the law allowed for rejecting a legitimate candidate or successor. Aside from these two, the rule of closeness in choosing an heir was upheld by Jamieson. However, one expert believed otherwise, relegating this rule to an insignificant position, arguing that

---

213 Ibid.
214 Jamieson, *Chinese Family and Commercial Law*, 14.
215 *Daqing lüli huiji bianlan*, 8: 30-31.
216 Jamieson, *Chinese Family and Commercial Law*, 14.
217 *Daqing lüli huiji bianlan*, 8: 30.

> when a person sharing a common ancestor was five degrees collaterally removed by marriage or eight degrees collaterally removed by blood, any relative including one of a different surname could be selected for adoption.[218]

The judge cast serious doubt over this expert opinion and considered it really absurd that the "orderly choice by closeness of relationship" could be grossly violated without legitimate cause "in favour of groups of more remote relatives."[219] Moreover, his opinion of choosing a person of different family name was in obvious conflict with Jamieson's following translation:

> 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.[220] (其乞養異姓義子以亂宗族者，杖六十。若以子與異姓人為嗣者，罪同。其子歸宗。[221])

This translation expressly prohibited adoption of someone of a different surname, creating a contradiction with the expert's opinion, which he could not explain to the judge's satisfaction. Primarily based on Jamieson's translations above, the judge eventually rejected the expert's preference for more distant relations. He concluded that there was no "such a custom for relaxing the permissible degrees in adoption" and "the proper generation consideration must, in the Tsing period, be generally observed and could not be disregarded without cause."[222] With this, the court recognized the plaintiff as the "closest relation of the proper generation most eligible for a *kim tiu*

[218] *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 654.
[219] Ibid.
[220] Jamieson, *Chinese Family and Commercial Law*, 13.
[221] *Daqing lüli huiji bianlan*, 8: 27-28.
[222] *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 656.

adoption,"[223] although whether this could be done still relied on the decision of the surviving widow of one uncle and the family council.

The above analysis shows that Jamieson's translation and commentary of Qing family law served as a reliable source from which the court derived Chinese law and custom, against which the expert evidence was measured. As in the above instances, the latter was often dismissed for not being in line with the former, revealing the former's priority and authority over the latter in this case. However, such a hierarchical order was not definite, especially when changing Chinese practices came into the scene, as in defining *kim tiu* marriage (兼祧婚 jian tiao hun) in this case.

The *kim tiu* marriage was a special marriage form designed to continue two family lines, one of his father's and the other of his uncle's. It was a device to protect the two lines from dying out when there was only one son born in the two branches. The question facing the court was whether it was an obligation or just a privilege to marry two wives in this type of marriage in Hong Kong. The court first referred to Jamieson's commentary which stated that a *kim tiu* son "must have a separate wife in each [household] or more properly a wife in one, the first married, and a concubine in the other."[224]

However, the expert witness held that it was no longer an obligation to marry a wife for each branch,[225] an opinion supported by more recent research. According to the court, Dr. Vermier Y. Chiu (趙冰 Zhao Bing) was more inclined to hold that "it was merely a privilege for a kim tiu son to marry one wife for each branch";[226] this view was also accepted by Mr. McAleavy as accurate.[227] Weighing evidence from Jamieson, who was classified as an early author by the court, and expert evidence and

[223] Ibid., 665. Italics is added by the author of the thesis.
[224] Jamieson, *Chinese Family and Commercial Law*, 24; *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 658.
[225] *Yau Tin Sung v. Yau Wan Loi* [1983] 2 HKC 647, 659.
[226] Ibid., 657.
[227] Ibid., 657, 658.

"recent publications", the judge accepted the latter, regarding that it is merely a privilege rather than a duty "for a *kim tiu* son to marry more than one wife."[228] His reason was that "the Tsing law and custom as applied to Hong Kong is forever changing."[229]

Obviously, the judge accepted that the original Qing law prevailing in Hong Kong had been modified through social and cultural change. Based on this, Jamieson's elaboration of two wives as a must in *kim tiu* marriage failed to be adopted in the present case. This was certainly not because it was wrong. On the contrary, it correctly represented the original Qing law and custom, to which the judge had not the slightest objection. The real reason was that with changing times, the original Qing law and customs exercised by Chinese community in Hong Kong have also changed, with which the court was in tune. So the judge eventually adopted the opinion of the experts and recent publications, which took these changing factors into account.

This case showed that the relationship between experts and Jamieson regarding Chinese law and custom was not stationary. While in many cases they mutually supported and benefited from each other, they were sometimes in conflict with each other. In the court, experts represented a force that was capable of absorbing changes occurring in Hong Kong. Jamieson's translation, once published in 1921, remained fixed, and thus sometimes was inconsistent with present-day Chinese life in Hong Kong. It was due to this inconsistency that Jamieson's translation was overshadowed by the expert's opinions on the point of *kim tiu* marriage.

The above case touched upon changing norms in Chinese family life, reflecting the "effects of urbanization and modernization of the economy on family relations."[230] This change was also reflected in the court's acceptance of English legal concepts

[228] Ibid., 659.
[229] Ibid.
[230] Evans, "Common Law in a Chinese Setting," 24; Susanna Wong also discussed the changes commodity economy brought to the Chinese community. See Wong, "The Law of Intestate Succession to Land in the New Territories," 77.

prevailing in Hong Kong, which altered the working landscape of Jamieson's translation of Chinese legal concepts in the judicial system. In *Kan Fat-tat Also Known as Kan Fat v. Kan Yin-Tat Also Known as Kan Tat* (1987), the plaintiff was the younger brother of the defendant, both residing in the New Territories. One of their disputes concerned the owner of the business of Kan Tat, which was started by the elder brother in 1933. According to the plaintiff, who based his claims on Chinese customary law, the business was family property.[231] From the standpoint of the judge, this was a concept "clearly inconsistent with English way relating to individual ownership."[232] Therefore, faced with this unfamiliar concept, the judge referred to Jamieson's explanation and quoted the following large paragraph:

> Next as to the mode in which 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, 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,

[231] *Kan Fat-tat Also Known as Kan Fat v. Kan Yin-Tat Also Known as Kan Tat* [1987] HKLR 516, 521.
[232] Ibid., 528.

> 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 earning 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.[233] (Bold added for emphasis)

According to this statement, as long as the family was undivided, earnings of each member would still belong to the greater family. Jamieson had offered for the court a diverging notion of property, based on which the judge has astutely realized that if it was "still applicable to Hong Kong today it can have very wide implications."[234] At least, it would profoundly influence the present case, indicating that the plaintiff had an equal share in the defendant's business. Therefore, the judge asked with great circumspection "was family property ever part of Hong Kong, if so, has it ceased to be so"[235] ? He did not evince distrust with the correctness of Jamieson's statement, rather he was concerned with whether it was still applicable in Hong Kong.

In order to answer this question, the judge first referred to the precedent case of *Tse Moon Sak v. Tse Hung & Ors* which has been discussed in section 6.2, where the following opinion was expressed:

> Testamentary capacity in accordance with English law has been assumed and acted upon by many Chinese members of the community for **a long time past**, just as **individual rather than family ownership** has been widely accepted

[233] Jamieson, *Chinese Family and Commercial Law*, 24-25; *Kan Fat-tat Also Known as Kan Fat v. Kan Yin-Tat Also Known as Kan Tat* [1987] HKLR 516, 528.
[234] *Kan Fat-tat Also Known as Kan Fat v. Kan Yin-Tat Also Known as Kan Tat* [1987] HKLR 516, 529.
[235] Ibid.

> amongst all sections of the community.[236] (Bold added for emphasis)

Analysing the meaning of "a long time past" in this case, the present judge believed it indicated "for as long as one could remember."[237] Based on this and the opinions on family property in the precedent, the judge in this case claimed, by the time the New Territories was leased to Britain in 1898, "family property was no longer part of the law of Hong Kong and therefore it was not imported into the New Territories by the Proclamation."[238] The Proclamation referred to the Governor's Proclamation on April 8, 1899:

> That from the said 17th April, 1899, all laws and ordinances, which shall at such date be force in the Colony of Hong Kong, shall take effect in the (New Territories) and shall remain in force therein until the same shall have been altered or amended by Her Majesty or by the Governor of Hong Kong, by and with the advice or consent of the legislative council.[239]

As the business under question did not concern land, it was not governed by the New Territories Ordinance, but by the laws in force in Hong Kong in 1899, in which there was no place for the concept of family property. Consequently, this concept could not apply to the New Territories either. In other words, by 1899, the English legal concept of individual property "was part of the law of Hong Kong, which was made applicable to the New Territories by the Proclamation."[240] He further added a timeline into this, averring that "my conviction is that this is so, grows stronger the further one gets away

---

[236] *Kan Fat-tat Also Known as Kan Fat v. Kan Yin-Tat Also Known as Kan Tat* [1987] HKLR 516, 529; *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 191.
[237] *Kan Fat-tat Also Known as Kan Fat v. Kan Yin-Tat Also Known as Kan Tat* [1987] HKLR 516, 529.
[238] Ibid., 530.
[239] Ibid., 523.
[240] Ibid., 530.

from 1843, from a probability in 1899 to a virtual certainty in the 1930s, to certainty today."[241]

The timeline drawn by the judge clearly displayed that over time, the English legal concept of individual ownership became increasingly entrenched in the Chinese community of Hong Kong. At the same time, the notion of family property was gradually buried in history. Naturally, there was no injustice or oppression caused in applying English law, and the English notion of individual property became the governing one in this case.

From this analysis, it was revealed that the role of Jamieson's work in the court did not rely solely on its authenticity, but also on its relationship with existing practices of Hong Kong Chinese and the corresponding role of its English counterpart. Jamieson's commentary on Chinese family property, although being recognized as correct, and helping the judge clarify what family property was, still could not become the governing notion, because the concept of English individual property was said to have been accepted by the Chinese community in Hong Kong. The English legal concept, in alliance with the changing times, restricted the scope of the use of Jamieson's translation in the Court.

In the succeeding cases, it was shown that the erosion of family property in Hong Kong courts further conditioned the applicability of other Chinese legal concepts as elaborated by Jamieson. In *Lai Hay On v. Commissioner of Rating and Valuation & Anor* (2010), the court considered the question concerning whether the *inter vivos* gift from the father to the son was gained through *fenjia* (分家 household division). In order to grasp the Chinese concept of *fenjia*, Jamieson's translation of "division of household and family property" (別籍異財 Bieji yicai) concerning family property was referred to:

[241] Ibid.

Lü

During the lifetime of grand-parents 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.[242] (凡祖父母、父母在，子孫別立戶籍分異財產者，杖一百。須祖父母、父母親告乃坐。若居父母喪，而兄弟別立戶籍分異財產者，杖八十。須期親以上尊長告乃坐。若奉遺命，不在此律。[243])

Li

The full penalty of the above law is incurred if the sons separate and divide the property, though they do no register themselves. If, however, the parents permit the division, there is no objection to its being done.[244] (祖父母、父母在者，子孫不許分財異居。此謂分財異居，尚未別立戶籍者，有犯亦坐滿杖。其父母許令分析者，聽。[245]) (Bold added for emphasis)

Besides this translation, the long commentary on family property cited in the previous *Kan Fat-Tat* case was also quoted here, enabling the judge to perceive the connection between household division and family property, proclaiming that "it was fundamental

[242] Jamieson, *Chinese Family and Commercial Law*, 16; *Lay Hay On v. Commissioner of Rating and Valudation & Anor* [2010] HKCU 739, para. 56.
[243] *Daqing lüli huiji bianlan*, 8: 53. The court did not provide the original Chinese text, it is provided by the author.
[244] Jamieson, *Chinese Family and Commercial Law*, 16; *Lay Hay On v. Commissioner of Rating and Valudation & Anor* [2010] HKCU 739, para. 56.
[245] *Daqing lüli huiji bianlan*, 8: 54. The original Chinese text is provided by the author.

to the concept of Fenjia that the property to be divided was family property."[246] But as the applicability of family property had already been undermined in the *Kan Fat-Tat* case, the Chinese concept of *fenjia*, which relied on it, also lost its basis in the court. Thus, the inapplicability of one concept elaborated by Jamieson had a series of knock-on effects, leading to the inapplicability of more Chinese legal concepts in Hong Kong. This rule was again quoted and accepted by a succeeding case *Wong Tat Shun v. Tang Shiu Man* (2013).[247]

However, English law did not always play the role of undermining Jamieson's translation; in some cases, use of English legal principles facilitated its application. In E*state of Ching Chi Yuen Deceased* (1973), applicants for the Letters of Administration of the deceased's estate were the elder brothers of the deceased. At court, expert and counsel on Qing law and customs testified that since the deceased died a bachelor, the applicants were persons entitled to apply.[248] The judge, however, referred the expert and counsel to a statement made by Jamieson in *Chinese Family and Commercial Law*:

> 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.[249]

This paragraph clearly suggests that nephews instead of brothers ought to be the legal successors, which was acknowledged by the counsel as "a correct statement of the

[246] *Lay Hay On v. Commissioner of Rating and Valudation & Anor* [2010] HKCU 739, para. 59.
[247] *Wong Tat Shun v. Tang Shiu Man* [2013] HKCU 2477.
[248] *Estate of Ching Chi Yuen Deceased* [1973] HKEC 254, para. 1.
[249] Jamieson, *Chinese Family and Commercial Law*, 19; *Estate of Ching Chi Yuen Deceased* [1973] HKEC 254, para. 2.

law."[250] However, he also proposed a precedent rule that Chinese law applied to the distribution of the estate and "English law should govern the procedure for applying for a grant,"[251] indicating that successors were not necessarily administrators. While admitting this, the registrar of the Supreme Court questioned whether the principle was applicable here, averring that "I do not think that a person's entitlement to apply for a grant could possibly be described as simply a procedural matter."[252] Instead he proposed an established English principle that "the right to the administration of the effects of an intestate followed the right to the property in them, or as it was shortly put, that the grant ought to follow the interest."[253]

This English principle repudiated the idea that grant could be completely separate from interest.[254] Following this, the judge was satisfied that "the interests of the nephews cannot be simply disregarded."[255] Based on the principle set out by Jamieson that "wherever possible property should pass down from one generation to another," this application by elder brothers was eventually dismissed.[256]

It is seen that the successful application of Jamieson's statement here was made possible with the assistance of the English legal principle that "grant ought to follow the interest."[257] Without it, the former could not have played such an important role, nor shaped the final judgement. Therefore, the influence of English law on Jamieson's translation of Qing family law was not always negative and their relationship was not always competitive. It could also serve as an aid, facilitating the court's adoption of Jamieson's translation and interpretation.

---

[250] *Estate of Ching Chi Yuen Deceased* [1973] HKEC 254, para. 2.
[251] Ibid., para. 1.
[252] Ibid.
[253] Ibid.
[254] Scholars have also pointed out that grant of administration completely in line with an English order "totally altered the balance of interests under the customary law." Evans, "Common Law in a Chinese Setting," 24. This was echoed in another article. See Cheung, "The Paradox," 74.
[255] *Estate of Ching Chi Yuen Deceased* [1973] HKEC 254, para. 2.
[256] Ibid.
[257] Ibid., para. 1.

From the above analysis, it is observed that the function of Jamieson's translation in Hong Kong was closely interrelated with the external factors surrounding it. On the one hand, the expert witnesses made use of Jamieson's translation and brought it to the court's attention, through which both their authority were strengthened. On the other hand, when in conflict, Jamieson's translation could serve as a measure to gauge the correctness of the expert evidence. But by incorporating recent developments in the Chinese community of Hong Kong, experts' opinions could also win favour. The new changes were recognized by the court in its understanding of the unique Chinese legal concepts, which were sometimes replaced by their English counterparts. With the knock-on effect of relevant Chinese concepts being effected, the living space of Jamieson's translation was further eroded. But this was by no means the only role of English law. In some cases, it could also assist Jamieson in playing a bigger role in shaping the court's judgement.

6.5 A Case Study: Reception of Jamieson's Commentary on Wills in Hong Kong

The above discussion has demonstrated that the function of Jamieson's translation of Qing family law in the Hong Kong courts was subject to a variety of factors, among which English law formed an interesting interaction with traditional Chinese law. This section will continue this topic by conducting a case study of the reception of Jamieson's commentary on traditional Chinese wills in Hong Kong, seeing both the success and failure in its reception. The factors that impeded its reception will be specifically explored, from which a routine probate practice based on an English legal mentality was perceived.

First of all, before Chinese testamentary freedom and the issue of Chinese wills were settled in *Tse Moon Sak v. Tse Hung & Ors* in 1969, Jamieson's view on Chinese wills expressed in *Chinese Family and Commercial Law* had already been perceived

by the Probate Registrars, shaping the way wills were addressed there. In a few applications, the Registrar, quoting Jamieson, cast doubt over whether Chinese people enjoyed testamentary freedom under traditional Chinese law.

In a will made in 1963, the deceased directed that his sister "shall take over and receive all his money and properties"[258] although he had a natural grown son. Jamieson's opinions went as far as to change the way registrars perceived the validity of this will. The correspondence of the registrars suggested that the testator disliked his son very much, thus the son could only receive some money at the discretion of the deceased's sister. Facing this will, the Deputy Registrar expressly voiced his hesitation: "I am in some doubt as to whether the will is valid according to Chinese law and custom"[259] and quoted Jamieson:

> Had the estate been larger or if the petitioner was not wholly dependent on the deceased, I do not think he could have validly barred his son from inheriting his estate as according to the law of Chinese custom a father **cannot disinherit his son** except in **extreme cases**. See Jamieson, page 26, 27.[260] (Bold added for emphasis)

The pages mentioned are the ones that Jamieson most directly expressed that the testator had no power to deviate from the legal mode of distribution:

> Neither by will nor by gift *inter vivos* can he deprive any son of an equal share 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.[261]

---

[258] HKRS (Hong Kong Record Series) No. 96, D-S (Deposit and Serial) No. 1-9868, Public Records Office of Hong Kong. Hereafter cited as HKRS No. 96, D-S No. 1-9868.
[259] Ibid.
[260] Ibid.
[261] Jamieson, *Chinese Family and Commercial Law*, 26-27.

The "extreme cases" that the Deputy Registrar referred to were also taken from Jamieson, who laid down that

> it is said 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.[262]

As the present case was far short of this extreme measure, the Deputy Registrar cast serious doubt on the disinheritance of the son. Despite this, he made a concession to it on the grounds that the deceased's sister was a spinster and totally dependent on the deceased. Correcting his misunderstanding concerning her status, the next letter said "the Deceased's sister is a married woman and not a dependent on the deceased."[263] Based on this, more accurate advice was asked as to whether "the Will is invalid and the deceased's son should apply after having cleared off his mother (presumably to have died)," to which the Deputy Registrar replied that the son should apply.[264] The memo to the Deputy Registrar recorded the ultimate result regarding the assessment of the will:

> As indicated in the correspondence within, you have directed that the deceased's will in Chinese invalid according to the law of Chinese custom, with the result that the deceased's son should apply for L.A.[265]

[262] Ibid., 27.
[263] HKRS No. 96, D-S No. 1-9868.
[264] Ibid.
[265] Ibid.

In this case, Jamieson's views on Chinese testamentary capacity had indeed moulded the views of the Probate Registrar, empowering him to question the validity of the will which departed from Jamieson's assertions, shaping his probate practice and transforming the deceased's estate into an intestate estate. Ultimately the deceased's sister was deprived of the right as executrix and his son successfully applied for administration. However, such reflection upon Chinese testamentary freedom was merely occasional. As remarked by Carol G. S. Tan, who investigated Chinese wills in Hong Kong from the early 20th century to 1963, "by and large the Registry did not seem troubled by the question of whether Chinese testators had absolute testamentary freedom."[266] Moreover, it "was not usually in a position to know if a rightful heir had been excluded";[267] and even if they indeed knew, the Probate was still admitted in many cases.

In a will made in 1955, the testator excluded her eldest son who was being criticized as "an obstinate and undutiful son," and appointed her second son as her executor to administer as well as inherit all her estate.[268] The testator further added that her eldest son had "no right to interfere."[269] "Probate was granted without any investigation into whether the testator was entitled to do this,"[270] effectively investing Chinese people with testamentary freedom.

Furthermore, in the above application 9868, the Deputy Registrar had initially intended to make concessions to admit to it on the grounds that the estate was small or the sister was a spinster and a dependent on the deceased. It was only because these requirements were not met that he adhered to Chinese law, revealing that the Registrar

[266] Tan, "Chinese Wills under the Laws of Hong Kong," 114. The author is indebted to Professor Carol Tan for her pioneering work, which led the author to important probate files, particularly HKRS No. 96, D-S No. 1-9868, HKRS No. 96, D-S No. 1-10238, and HKRS No. 96, D-S No. 1-7708.
[267] Tan, "Chinese Wills under the Laws of Hong Kong," 114.
[268] HKRS No. 96, D-S No. 1-10238.
[269] Ibid.
[270] Tan, "Chinese Wills under the Laws of Hong Kong," 115.

was subject to a complex of factors and adherence to Jamieson was merely discretionary, even if he knew Jamieson was right. The questions are, how was it likely that there was still leeway for concession when the Probate Registrar had apparently noticed Jamieson's commentary, through which he had acknowledged that the Chinese did not have absolute testamentary freedom? Why did Jamieson's translational work fail to fundamentally alter the probate practice? The thesis does not profess to unveil all the factors contributing to it, but it will explore one of the most important factors that impeded its reception and application among the Registrars.

It first traces back to the early probate history of Chinese wills in the nineteenth century, through which it argues that the English legal understanding had shaped the probate practice from the very first Chinese will. Before the 1969 case first settled the nature of Chinese wills and addressed the issue of Chinese testamentary freedom, a time-honoured probate routine had already been formed, which was recognized both by the Chinese community and the Hong Kong judicial authorities. The practice accrued a force that was so overwhelming that it could hardly be weakened even when Jamieson's translation of the Qing Code revealed a complete lack of testamentary freedom.

The Chinese wills made in the nineteenth century found in the old Naval Dock Yard[271] were not accompanied by files documenting the probate process. Thus it is hard to know on what legal grounds Chinese wills were admitted to probate in the early colonial history of Hong Kong. The English Wills Act 1837 was imported into Hong Kong through the Supreme Court Ordinance 1844,[272] but there was no statutory interpretation as to whether this Act was applicable to Chinese and Chinese wills. The subsequent Chinese Wills Validation Ordinance 1856 merely relaxed the stringent

[271] Carl T. Smith, *A Sense of History: Studies in the Social and Urban History of Hong Kong* (Hong Kong: Hong Kong Educational Publishing Co., 1995), 3.
[272] Tan, "Chinese Wills under the Laws of Hong Kong," 107.

formality requirement of English wills to adapt to Chinese usage;[273] it did not clearly provide the extent to which Chinese people were allowed to enjoy testamentary disposition. While there were Elliot's Proclamations, section 3 of Supreme Court Ordinance 1844 and section 5 of Supreme Court Ordinance 1873, there were no cases expressly deciding whether the issues of Chinese wills and Chinese testamentary capacity should be governed by English or Chinese law. The matter was settled only in 1969 in *Tse Moon Sak v. Tse Hung & Ors*.

Facing the legal state which was not without confusion and lack of files on the probate process, the thesis will focus on wills themselves, through which it hopes to observe with what legal mentality Chinese wills were addressed and to what extent Chinese testamentary capacity was recognized by the Registrars. Based on this, the failure of Jamieson's translation in influencing the probate practice could be understood.

In the first Chinese will submitted to the Supreme Court in 1850, the testator left his entire estate to his younger brother without mentioning any of his sons.[274] This devolution was only valid in China in the extreme circumstance when his household became extinct with no possible male candidate to continue his line and no daughters existing. Although no such extreme situation was referred to in the will, probate was still granted. In another will, the testator left his entire estate to her daughter.[275] But this could hardly happen in Chinese families, since daughters were not entitled to the father's estate except in an extinct household, which the Chinese would attempt every means to avoid. Despite lack of such information, probate was granted in 1876. These wills revealed that this kind of abnormal devolution did not need an extinct household as a justification for it to be allowed.

More curiously, a will made in 1874 bequeathed all property of the testator to his

[273] Ibid.
[274] HKRS No. 144, D & S No. 4/30.
[275] HKRS No. 144, D & S No. 4/327.

"beloved relative Leung Choong."[276] Following this, the testator claimed that other people had no claim to his property.[277] A researcher of this will once cast doubt upon it, since the testator left "his estate to someone of a different surname whose precise relationship to the testator was not stated in the will."[278] The doubt was well-founded, as traditional Chinese law did not allow anyone of a different surname to inherit; in all circumstances it should be someone within the patriarchal lineage, or at least of the same surname. It was only in the extreme circumstances where there was no heir to appoint and no daughter existing, that the property might have a chance to go to a foster son who might be of a different surname. Although neither their relation nor the rare circumstances were mentioned in the will, it was granted. A similar will was admitted to probate in 1876 in which it also failed to mention the precise relationship between the testator and the legatee.[279]

By relaxing the check on relation, the Registrars in the nineteenth century bestowed a substantially larger testamentary capacity upon the Chinese, who could choose a daughter, a brother, or even a person with a different surname as their heir without being constrained by their obligation to select a son or nephew. The probate practice in the nineteenth century suggested that Chinese wills were mostly understood from the viewpoint of English law, which gave the testators freedom to choose almost whoever they wanted to be their successors, rather than from a Chinese legal perception, in which the mode of the devolution could not materially diverge from the intestate succession.

This English legal mentality had manifested itself since the very first Chinese will was probated. By the time Eitel referred the issue to *The China Review*, a number of wills deviating from Chinese law had already been admitted to probate. Jamieson's

[276] HKRS No. 144, D & S No. 4/279.
[277] Ibid.
[278] Smith, *A Sense of History*, 4.
[279] HKRS No. 144, D & S No. 4/323.

clarification of the limited testamentary power of the Chinese in his translation of inheritance law published in *The China Review* did not change this. In Eitel's "The Law of Testamentary Succession as Popularly Understood and Applied in China" in 1886 in this journal, he disclosed that such probate practice continued to exist in Hong Kong:

> It may happen in Hong Kong sometimes that a testator, knowing or expecting his son to be or to become sooner or later insolvent, making a will disinheriting his son and devolving the property concerned upon the testator's grandson. … the creditors of a Chinese bankrupt, wishing to lay hold of his family property, are confronted with the declaration that the bankrupt has been disinherited under his late father's will and testament, and that this document has been actually proved in the Probate Court of Hong Kong.[280]

The probate practice was obviously shaped by an English legal understanding, as fathers under traditional Chinese law could not normally disinherit any of his sons, as discussed above. In this article, Eitel fully accepted the opinion expressed by Jamieson that a will, in the Chinese sense,

> does not attempt to interfere with the course of devolution fixed by the provisions of the statute law but confine itself to the arrangement of minor details within the limits of those provisions.[281]

As to disinheritance, he also lent strength to Jamieson's argument, claiming that "by the law of China no testator can, by testamentary disposition, disinherit his son."[282]

[280] Eitel, "The Law of Testamentary Succession," 153.
[281] Ibid., 151.
[282] Ibid., 152.

While Jamieson profoundly influenced Eitel's view on Chinese testamentary capacity, neither of their claims found their way into probate practice in the nineteenth century. This was likely because in 1880, Eitel began to be involved in the "Hayllar-Hennessy" scandal,[283] in which he "suffered a lot from the disgrace of being a scapegoat."[284] The scandal cost him his position as the Chinese Secretary to Governor Hennessy (1877-1883) as well as his future in the Hong Kong civil service.[285] In 1884, he "resumed the pastorate to Union Church."[286] Perhaps due to this reason, he could no longer directly exert influence on the Hong Kong authorities, without which, the impact of journal articles and translation was understandably limited. Perhaps they did not even capture the attention of registrars in the first place. Even if they were noticed, it was hardly possible that the registrars would give up their routine way of probate just for them.

After Jamieson had defined wills in the Chinese sense through his translation of the Qing Code, which was supported by Eitel, Chinese wills in obvious contradiction with Qing law continued to be admitted to probate in the late nineteenth century and early twentieth century. In one will the testator bequeathed all his estate to his mother[287] and in another, the property was all left to the deceased's father.[288] Although upward succession was extremely abnormal in China, probate was granted in these cases in 1880. Some wills violated the equal share principle among sons and left all property to the preferred sons, failing to provide for others. In two wills made

[283] It was "at first about a romance between Lady Hennessy and Thomas Childe Hayllar [1835-1918], a brilliant barrister." This was without doubt "an insult to Hennessy," who "instructed Eitel to release some papers which later became a source of rumors against Hayllar's misconduct. Hayllar sued Eitel for slander. At this moment, Hennessy, rather commented that Eitel was holding a ''somewhat garrulous disposition.' Under the circumstances, Eitel resigned from his secretarial duties." See Wong, "Christian Missions," 220.
[284] Wong, "Christian Missions," 52.
[285] Ibid., 23.
[286] Ibid., 52.
[287] HKRS No. 144, D & S No. 4/410.
[288] HKRS No. 144, D & S No. 4/416.

respectively in 1882 and 1891, the father left all to his eldest son[289] and in another made in 1883, the testator left his business to his third son while the other five sons were left unattended.[290] Their successful probate shows that fathers in Hong Kong had more freedom to dispose of their property according to their own wishes without being restrained by principle of equal share.

In one will, the father left his two daughters house and land, which were to be divided equally between them, an arrangement similar to that which he made for his adopted son, who also inherited house and land.[291] This could not be allowed under traditional Chinese law, in which only unmarried daughters were given dowry and married daughters took nothing. This probated will in 1891 shows that the adopted successor-takes-all principle was substantially undermined, with natural affection for one's natural children being granted by authorities. In another will probated in 1901, the testator left his entire estate to his wife, giving her full right to "retain and make use of or to dispose of them,"[292] although the widow under Qing law could hardly enjoy such a high degree of autonomy. A similar will was admitted to probate in 1920, which invested the wife with the power to dispose of the property the way she liked, not allowing disputes from the sons nor the daughter.[293]

These wills demonstrate that the probate practice based on English understanding, through more than half a century's accumulation, had formed into an entrenched routine by the time Jamieson's *Chinese Family and Commercial Law* was published in 1921. By following English law and granting probate to those Chinese wills, it conferred on Chinese people testamentary freedom not enjoyed by them under Chinese law. As the routine practice had been substantially fixed, Registrars could follow the trodden track without need of Jamieson's instruction. Even if they noticed Jamieson's

[289] HKRS No. 144, D & S No. 4/472; HKRS No. 144, D & S No. 4/830.
[290] HKRS No. 144, D & S No. 4/482.
[291] HKRS No. 144, D & S No. 4/807
[292] HKRS No. 144, D & S No. 4/1392.
[293] HKRS No. 144, D & S No. 4/3404.

translation, application was only discretionary and deviation from it was certainly allowed as long as the latter complied with the probate routine.

Moreover, their probate practice founded on English law had become so powerful that when there were attempts to understand Chinese wills under Chinese law, doubts were nevertheless raised. In one application, when the Deputy Registrar demanded all next of kin of the deceased be provided in 1959, the Registrar claimed that "as a normal course, we do not ask for particulars of a deceased's next of kin in the event of an executor having been named in his Will."[294] Therefore, he asked "the purpose of requiring the information as to all next of kin of the deceased."[295] Clearly, they knew their usual practice and were alert to those attempts that might disrupt it. While the information of all next of kin should be vital to assess whether Chinese law was obeyed, a century's disregard had made it an abnormity to ask for it. Starting from the first will, the Probate Registrar, did not require to know all the potential heirs. Until the mid-20th century, this English way of dealing with Chinese wills had developed into a such a powerful convention that any deviation would cause reluctance and doubts.

As Jamieson had proposed an idea of Chinese wills distinct from normal probate practice in Hong Kong, it would naturally encounter resistance from the established convention, even though his opinion had been widely accepted among legal scholars in this area,[296] before the issue was addressed in adjudication. Partly adducing Jamieson's book as a reference, Edwin Haydon remarked that disposition of property through wills in the English sense was not known among the Chinese.[297] The authoritative Strickland Report, which exerted far-reaching influence on Chinese law and custom in Hong Kong, expressly adduced Jamieson's *Chinese Family and Commercial Law* "to outline the basis of Chinese family law and the law of

[294] HKRS No. 96, D-S No. 1-7708.
[295] Ibid.
[296] Su, *Zhongfa xiyong*, 332.
[297] Edwin Haydon, "Chinese Customary Law in Hong Kong's New Territories," 24, 39.

succession."[298] Regarding Chinese wills, Jamieson stated that "neither by will nor by gift *inter vivos*" could the father materially "vary the normal mode of devolution"[299] and the concept of will in Chinese "relates exclusively to minor details."[300] Based on this, the Report claimed that "it must be noted that in strict Chinese law the father could not by deed or will alter the succession, but in practice he could give verbal or written instructions in matters of detail."[301]

It showed that Jamison's idea on Chinese wills was very influential among the top scholars in this area, projecting a stark contrast with its destiny among the Probate Registrars. As a matter of fact, not only did Jamieson's translation fail to fundamentally influence their practice, the court's decision also had to succumb to it as demonstrated in *Tse Moon Sak v Tse Hung & Ors*, the first case that addressed the question of Chinese testamentary capacity in court.

This case has been explored in section 6.2 on the legal basis, which perceived the intrusion from English law upon Jamieson's evidence when the court decided that English law should prevail except when injustice or oppression were raised. In that discussion, that section presented the conclusion reached by the judges that no such problems were caused. It will be the focus of this section to explain how such a conclusion was reached. The most important argument they forwarded was that Chinese people have been invested by Registrars with testamentary freedom according to English law for such a long time that it was too late to change it. One judge stated that it was the "understanding of the profession, and of the court in both its Probate and its Chancery jurisdiction"[302] that Chinese testators "have power of making testamentary dispositions."[303] Thus he concluded explicitly:

---

298 Committee, *Chinese Law and Custom in Hong Kong*, 14.
299 Jamieson, *Chinese Family and Commercial Law*, 26-27, 31.
300 Ibid., 30.
301 Committee, *Chinese Law and Custom in Hong Kong*, 17.
302 *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 196.
303 Ibid.

> In my opinion, it is far too late in the day to hold that the testamentary powers of Chinese testators to whom or to whose property Hong Kong law applies remain as they were or are supposed to have been under Chinese customs or usages. The position appears to me to have become sufficiently established.[304]

The judge did not doubt the meaning of Chinese wills under Chinese custom and usage. What he emphasized was that English legal understanding of Chinese testamentary freedom had been recognized by the legal profession and probate judges for too long. Thus an alteration of the legal basis was too late. He succumbed to it even though he was well aware that the expert witness was right and Jamieson's opinion on Chinese wills was correct. This concession proved the authority of the probate practice, which after over a century's accrual had become so established that even the judge could not dismiss it. The Chief Justice expressed a similar opinion:

> Anyone discharging the functions of a probate judge in Hong Kong can be only too well aware that testamentary capacity in accordance with English law has been assumed and acted upon by many Chinese members of the community for a long time past.[305]

This argument referred to the exercise of English testamentary capacity on the part of the Chinese, which was in fact also closely related to probate practice. As discussed above, Chinese wills conflicting with Chinese testamentary capacity began to be admitted to probate from the very first Chinese will, a practice continuing into the late nineteenth century and further into the middle of the twentieth century. The successful

[304] Ibid., 197.
[305] Ibid., 191.

admission to probate of those Chinese wills that blatantly excluded legitimate heirs or substantially violated the equal share principle, not only had an accumulative effective on the court, but also on the Chinese community. They were informed that they could have their wishes in the will granted by the authorities, even though these wishes potentially went against traditional Chinese usage. This encouraged more Hong Kong Chinese to utilize English law to attain their wishes.[306] In the context of English law, Chinese original ways of dealing with wills were essentially changed, with a mutual agreement reached between the Registrars and the Chinese community after over a century's interaction.

Based on this mutual consensus, the court decided that there was no injustice or oppression arising from applying English law in the issue of Chinese wills.[307] It is eventually held that "the testator had full testamentary power according to English law." [308] This decision made in the High Court of Hong Kong substantially undermined the application of Jamieson's statement on Chinese wills in future cases.

The fact that even the High Court could not reinstate the role of traditional Chinese law in governing Chinese wills reveals the overwhelming power of probate practice. Considering the view proposed in Jamieson's work was so different from probate convention and the reluctance of the court to change its routine, it was no wonder his opinions could not essentially alter routine probate practice although they were generally accepted by scholars, expert witnesses and the court as correct. Underlying the power of the routine was the reasoning that "it is often more important that the law should be certain, than that it should be perfect."[309] "The evil of upsetting what every

---

[306] This is accompanied by the changing circumstances of the Chinese community in Hong Kong, where "many Chinese began to acquire personal property that could be easily transferred, and to use last wills for disposition of property." Anton Cooray, "Asian Customary Laws through Western Eyes: A Comparison of Sri Lankan and Hong Kong Colonial Experiences," in *Law, Society and the State: Essays in Modern Legal History*, ed. Louis A. Knafla and Susan W. S. Binnie, 168 (Toronto: Toronto University Press, 1995).

[307] *Tse Moon Sak v. Tse Hung & Ors* [1946-1972] HKC 160, 192, 197.

[308] Ibid., 197.

[309] Geldart, *Elements of English Law*, 16.

one has treated as established is greater than the evil of allowing a mistaken rule to stand."[310] The court followed this reasoning in weighing between Chinese wills under Chinese law and the established probate practice. So did the Probate Registrars, who considered application of Jamieson's work as merely discretionary, rather than allowing its different interpretation of Chinese will to upset the certainty and reliability of their practice. The long established probate practice governed by English law was observed playing a pivotal role in impeding the reception of Jamieson's translation in probate.

6.6 Conclusion

The analysis in the above sections reveals the influence Jamieson's *Chinese Family and Commercial Law* exercised on the Hong Kong courts, with his translation of Lü and Li, as well as his commentary and translation of Qing cases all being extensively applied. Perpetuating the life of Chinese law and custom in an English legal system, they represent an authoritative interpretation shaped by the translator's direct contact with the living Qing law, which cannot be easily supplanted by modern expositors. While clarifying the legal basis for Jamieson's translation in Hong Kong courts, the thesis has also noticed and conducted an investigation on the constant erosion from English law and resistance of Jamieson's translation through statutory interpretation. Its fate in the Hong Kong courts reflects that of the entire Chinese law and custom.

Subsequently, the thesis examines how the courts viewed the textual relation between Jamieson's translation and paraxtext. It shows that their mutual complementarity was not always grasped by the courts. In some cases, their inconsistent claims became the reason that the court was troubled. Aside from internal relations, the thesis also explores external interaction between Jamieson's translation

[310] Ibid.

and a number of court factors, which proved to be double-edging swords for the former in Hong Kong. In the last section, the reception of Jamieson's commentary on Chinese wills, especially the limited testamentary freedom is researched. Although it had its impact upon Registrars, a more extensive application was impeded by an English understanding prevalent among them.

By focusing on the reception of Jamieson's translation in the courts, including its value, legal basis, internal and external interaction, this study sheds light on an important but largely ignored chapter of Hong Kong's judicial history, recognizing the important contribution Jamieson's translation made in perpetuating the life of Chinese law and making it a functioning part in a legal system dominated by English law. Moreover, it has uncovered the complicated factors that conditioned the reception of Jamieson's translation by presenting its interesting interaction with judges, expert witnesses, English legal principles, as well as the Chinese community.

Chapter Seven Conclusion

Through an in-depth examination of Jamieson's translation of Qing family law and its reception in the Hong Kong courts, this thesis has explored the encounter of Chinese and Western law in a diversity of settings shot through with colonial implications, covering Jamieson's motives, his translated text and its influence.

Silhouetted against Jamieson's involvement in British imperial enterprise as a consular officer in China, the thesis first studies a number of occasions where he personally experienced the encounter of Chinese and Western law. Largely a product of British extraterritoriality in China, his position as a foreign assessor in the Shanghai Mixed Court offered him an early chance to approach and even apply Qing law, during which he was exposed to its immense difference from the English legal tradition in which he was trained. The subsequent discussions of Chinese law in *The China Review* as well as the Hong Kong judicial dilemma further reveal for him the Western audience's concern with as well as ignorance in this respect. It is amid these imperial encounters with Chinese law that he fostered his interest in it and translated it in his second attempt for the Bar, which itself was another encounter of Chinese and English law occurring in him.

Such a start to some extent betokens the incorporation of Western legal concepts into his translation of Chinese law. With an in-depth examination of the process and approaches Jamieson converted pure Chinese law into a middle ground where Chinese and Western law co-existed, the whole picture was found culturally and temporally chequered, with different parts of Jamieson's translation bearing different fruits.

In Jamieson's investigation of the Chinese concept of "will," the failure of translation became his way to prove that no such concept in the English legal sense ever existed in Qing China. Further placing the notion back into its genesis in Roman Civil law, he reflected upon why China failed to do the same through a comparison

with it and found a number of factors, including the ancestral worship in full force, lack and displacement of legal instruments such as equity and legal fiction, as well as a want of lawyers. The chapter shows that the encounter of Chinese and Western law did not occur on equal ground. Instead, the latter served as his benchmark to measure the former, the result of which was a fiasco for Qing inheritance law, aligning with the Orientalist discourse that highlighted the backwardness of the Orient, in comparison to the advanced Occident.

In return, his concern over the Chinese failure also changed Henry Maine's original idea on Roman law. Through this mutual influence, a comparative approach to law is observed. Imbued with implications drawn from Roman law, Jamieson's translation was no longer pure Chinese law, but a border zone that straddled two sides and cast light on both. Extending beyond the Aryan race, he contributed to comparative jurisprudence with his own efforts.

While the "will" question highlights the difference between Chinese and Western law, Jamieson's translation of "inheritance rights" of Qing widows demonstrates more resemblances by embedding English legal concepts into it. In this way, he not only resolved the conflicting interests between her and the adopted son, but also created a hybrid that was neither English nor Chinese law. Both were transformed in this process. Chinese custom, which was the equivalent of English equity, was introduced to assist the Qing widow by placing her in the position of a trustee, although English equity usually assigns those legally vulnerable the position of beneficiary. Moreover, the distinction between equity and common law was originally absent in Chinese. Altering both to fit with each other, this part reveals a more egalitarian perspective, exploring deep into their common ground, in contradiction to the Orientalist discourse of the East-West distinction.

Furthermore, Jamieson's paratexts, especially his commentaries, serve an

important role in contextualizing his translation of Chinese marriage law, thus projecting divergent visions in *The China Review* and the 1921 version. In the former, Jamieson did not arrange Chinese marriage to meet with its English counterpart, but with the budding field of British anthropology. This diversion into studying primitive men had an inextricable association with the influence of Jamieson's pioneering peers, who were also his readers. Amid this small circle of anthropological enthusiasts, Jamieson initiated a dialogue with British anthropologists across the world, participating in their discussion on a number of prominent topics, particularly the matriarchal versus patriarchal society, and exogamy versus endogamy.

His discovery that the earliest Chinese society experienced a matriarchal stage can be regarded as an extension of the heated debate between patriarchal and matriarchal supporters. As existing theories on exogamy failed to explain Chinese legal phenomenon, he proposed a new one that pushed anthropological studies out of its cycle of tribal antagonism and female abduction. Moreover, Jamieson's view on the coexistence of exogamous and endogamous marriage was absorbed into British anthropological theory, which used it to rectify popular opinion that the two could not achieve long-term compatibility. With his translation of Chinese marriage law, Jamieson not only extended the testing field of anthropological theories, but also contributed his own thoughts. On the other hand, however, this encounter with anthropology instead of with English marriage law deepened the Orientalist discourse that Chinese law was primitive compared with the Western modern legal system.

This stance was fundamentally changed when it came to the 1921 version, in which he replaced his original dialogue with anthropology by a new one with English law. This was accomplished when Republican China was making a new civil code amid the encounter of traditional Chinese law with imported Western law. By introducing English legal concepts and packaging Chinese marriage concepts,

procedures and regulations with them, Jamieson highlighted their common ground, suggesting the advanced features Qing law enjoyed and its potential towards becoming modern law. He demonstrated for Chinese law makers how to balance the relation between traditional Chinese law and imported Western law. Although this incurred the side effect of metonymically simplifying Chinese law and obscuring some unique Chinese features, it produced a middle zone where both English and Chinese law co-existed and shed light on each other, contradicting the Orientalist discourse that highlighted their difference.

When Jamieson wove Western law into his translation and interpretation of the Qing Code, he adopted subtly different approaches. In the "will" question, English and Roman law served more as benchmarks to measure Chinese law and refract its inner problems, while in the question of widow's inheritance rights, English law merged into Qing law to solve ambiguities, during which both were transformed. The latter projected a more equal perspective. The way Jamieson approached the 1921 version of marriage law was similar to the way he approached widow's inheritance rights, but English and Chinese law did not converge to that extent. The boundary between them and the function of English law as a measurement could still be seen despite their common ground. Even when Chinese marriage law did not meet with its English counterpart in *The China Review* version, it still indicates a potential relationship, in which the former seemed to fail to live up to the standards of the latter. Their difference also mirrors a temporal fracture in Jamieson's work, in which he travelled back and forth between the modern present and primitive past.

What distinguishes this thesis most from other academic research on the translation of the Qing Code is that it goes beyond a textual study and explores in depth the function of Jamieson's work in real life judicial context, where it is joined by a diversity of court participants and socio-cultural factors. A major difficulty in the

reception studies of translation research is a lack of reliable evidence from the readership that can shed light on their reading process and record their real-time response. This information easily slips away under researchers' eyes, making it difficult to evaluate many tricky but important questions, such as how the translation and paratexts actually work for a reader and whether the latter indeed enhances reading as speculated. The Hong Kong judgements, by revealing the decision-making process and the reasoning behind it, offer this research a valuable opportunity to glimpse into the actual operation of Jamieson's translation in the Hong Kong court, particularly its interaction with English law, which constitutes the foundation of the Hong Kong legal system.

Starting from its legal basis, Jamieson's work has been competing with English law for primacy in governing Chinese family matters. This continues up into the intricacies of cases when deciding whether Chinese legal concepts or English ones should prevail. On the one hand, English legal principle has intriguingly promoted the application of Chinese legal concepts. On the other hand, it has increasingly eroded the application ground of Jamieson's work, although the latter also initiated resistance through the voice of legal professionals. The eventual role Jamieson's work plays in the court trial vividly reflects the outcome of their encounter. In this process, expert witnesses are also active court participants, presenting a lively interaction with Jamieson's work, through which their respective value could be observed.

The above analysis demonstrates that Jamieson's translation and interpretation of Qing family law presents a complex picture in relation to the Orientalist discourse of the East-West distinction, which is the point of reference in this thesis. On the question of "will" and marriage law in *The China Review*, Jamieson aligned with the Orientalist discourse by highlighting the East-West legal difference and diminishing their comparability. Yet in widow's inheritance right and marriage law of the 1921 version,

Jamieson came into conflict with this discourse by paralleling Chinese with English law and even fusing the latter into the former. Strictly applying Said's understanding of Orientalism underpinned by East-West distinction, Jamieson, who projected not only the discourse of divergence, but also its competing discourse of convergence, could only be regarded as half an orientalist.

Meanwhile, the analysis in the thesis shows that the discourse of convergence between the Occident and the Orient could not only disrupt the Orientalist discourse of difference, but could also be manipulated to exert influence over the Orient and serve the British imperial enterprise, which was Orientalism of a different kind. As in the case of the 1921 version of marriage law, Jamieson, by accentuating the convergence of Chinese law with English law which was the measurement, attempted to assume authority over and to mould China's making of its new civil code in favour of British interests. His different attitude here from his earlier version of marriage law in *The China Review* demonstrated Jamieson's altering construction of Chinese law in response to his differing audiences, purposes and the distinct historical moments in which he lived.

Although Said claimed the internal coherence in the Orientalist history,[1] with the Middle East and Islam as his major research objects, the variation in Jamieson's understanding of Chinese law from projecting its difference from Western law to demonstrating their similarity, in fact unveils a fractured picture, with each discourse empowering Western domination at different historical moments. It shows a more complicated history of Orientalism in China, and contributes to those attempts to disrupt the internal consistency in Said's history of Orientalism from a new perspective.

More interestingly, this work born in a colonial context imbued with tension has gradually come to represent Chinese law in the colonial and post-colonial Hong Kong

[1] Said, *Orientalism*, 22.

courts. While the erosion caused by English law is occurring or has already occurred in some areas which have made the position of Chinese law particularly vulnerable, Jamieson's work, with its irreplaceable value and constant interaction with external factors, has managed to maintain a foothold in the dominant English legal framework of Hong Kong. It has been and continued to be employed by Chinese parties, experts and judges to make Chinese laws known and Chinese voices heard in the court, thereby to some extent resisting against the intrusion from the former colonizers' law.

This research on Jamieson's translation casts light on an important but long ignored chapter of Western understanding of Chinese law. It not only reveals the intricacies in the encounter of Chinese and Western law occurring in Jamieson's translation, but also its interaction with early British anthropology and contribution to comparative jurisprudence. In addition, it unearths the unexpected but significant role of his work in the metropolis of Hong Kong. The thesis thus fills a gap in both the translation history of Qing law and Hong Kong's judicial history.

Finally, there are several aspects await future investigation. First of all, Jamieson's translation and understanding of Chinese commercial law is a promising area worthy of careful study. Completed by heavy reliance on cases tried in the Shanghai Mixed Court, it presents a more complicated relationship between Chinese and Western law. Moreover, a comparative study of translations of the Qing Code by Staunton, Jamieson and Jones, which were produced in different historical periods with distinct motives, is bound to bear valuable fruit, although it would be an enormous project. These and other avenues of research into the English translation of the Qing law await further exploration.

Bibliography

Archival Material

China Association Archive, SOAS University of London Library.

Examinations Performance Records 1861-1957. Council of Legal Education Archive. A. CLE 11/2 1871-1878 No 2. IALS Archives. Institute of Advanced Legal Studies. London.

Foreign Office: Consulates and Legation, China: General Correspondence, Series I (FO 228). The National Archives. Kew.

Foreign Office: Political and Other Departments: General Correspondence before 1906, China (FO 17). The National Archives. Kew.

Foreign Office: Supreme Court, Shanghai, China: General Correspondence (FO 656). The National Archives. Kew.

Hong Kong Record Series 96. Public Records Office of Hong Kong.

Hong Kong Record Series 144. Public Records Office of Hong Kong.

Jardine & Matheson to Jamieson, June 11, 1913. Manuscripts/MS JM/J1/6/1. Jardine Matheson Archive. Cambridge University Library.

Legal Education Papers. The Middle Temple Archive. London.

Northern Department and Foreign Office: Consulates and Legation, China: Miscellaneous Papers and Reports (FO 233). The National Archives. Kew.

Hong Kong Cases

De Wong Au Edith v. Kho Sin Tek Henry [2004] HKCU 323.

Estate of Ching Chi Yuen Deceased [1973] HKEC 254.

Hau King Wai Keith and Ors v. Hau Tak Cheung and Ors [2017] HKCU 3180.

Ho Tsz Tsun v Ho Au Shi and Others [1915] 10 HKLR 69.

Kan Fat-tat Also Known as Kan Fat v. Kan Yin-Tat Also Known as Kan Tat [1987] HKLR 516.

Lay Hay On v. Commissioner of Rating and Valudation & Anor [2010] HKCU 739.

Liu Ying Lan v. Liu Tung Yiu and Another [2002] HKCU 568.

Liu Ying Lan v. Liu Tung Yiu and Another [2003] HKCU 156.

Lui Yuk Ping v. Chow To [1962] HKLR 515.

Mok Hing Chung v. Wong Kong Yiu [2014] HKCU 1572.

Official Administrator v. The Luk Hoi Tong Co Ltd & Anor [2005] 3 HKC 615.

Re *Chak Chiu Hang, Deceased* [1911-1925] HKC 324.

Tang Chun Kit (A Minor) & Anor v. Tang Lo Ping [2004] 4 HKC 492.

Tang Kai-chung and Another v. Tang Chik-Shang and Others [1970] HKLR 276.

Tang Kap Wing Tso with Liu Chuen Mui as Manager v. Tang Leuk Tso with Tang Wing Hong & Ors [2011] HKCU 1285.

Tsang Yuet Mui, in her Capacity as the Personal Representative of the Estate of Tang Yip Sang, Also Known as Tang Ip Sang, Deceased v. Wan On, in his Capacity as the Personal Representative of the Estate of Tang Yung & Anor [2014] HKCU 2228.

Tse Moon Sak v. Tse Hung & Ors [1946-1972] HKC 160.

Wong Tat Shun v. Tang Shiu Man [2013] HKCU 2477.

Wong Yuk Wah, in his Personal Capacity as the Personal Representative of the Estate of Wong Chiu, Deceased v. The personal Representative of the Estate of Wong Tak, Deceased [2017] HKCU 59.

Yau Tin Sung v. Yau Wan Loi [1983] 2 HKC 647.

Other Works

A Feng 阿風. *Mingqing shiqi huizhou funü zai tudi maimai zhong de quanli yu diwei*

明清時期徽州婦女在土地買賣中的權力與地位 (The Status and Power of Women in Land Transactions in Huizhou in Ming and Qing Dynasties). Beijing: Social Sciences Academic Press 社會科學文獻出版社, 2009.

Aberdeen Press & Journal, "Mr G. Jamieson, C. M. G.," January 4, 1921.

Alabaster, Chaloner. "The Law of Inheritance." *The China Review* 5, no.3 (1876): 191-195.

Alabaster, Earnest. *Notes and Commentaries of the Chinese Criminal Law*. London: LUZAC & Co., 1899.

Allen, C. K. *Law in the Making*. 7th ed. Oxford: Clarendon Press, 1964.

Anonymous. "Levirate in China." *The China Review* 10, no. 1 (1881): 71.

Arvind, T. T. *Contract Law*. Oxford: Oxford University Press, 2017.

Baker, J. H. *An Introduction to English Legal History*. 3rd ed. London: Butterworths, 1990.

Barnard, Alan. *History and Theory in Anthropology.* Cambridge: Cambridge University Press, 2000.

Bernhardt, Kathryn. *Women and Property in China, 960-1949*. Stanford: Stanford University Press, 1999.

Bian, Xiuquan 卞修全. "Zizhengyuan yu qingmo de zhixian huodong" 資政院與清末的制憲活動 (National Assembly and Constitutional Reform in Late Qing). *Nankai Xuebao* 南開學報(Nankai Journal), no. 4 (2000): 10-14.

Blackstone, William. *Commentaries on the Laws of England in Four Books*. Vol. 1. 1765. Reprint, Philadelphia: Rees Welsh & Company 1915.

Bodde, Derk, and Clarence Morris. *Law in Imperial China.* Philadelphia: University of Pennsylvania Press, 1967.

Bryan, Robert. *An Outline of Chinese Civil Law.* Shanghai: The Commercial Law Press, Limited, 1925.

Burrow, J. W. *Evolution and Society: A Study in Victorian Social Theory*. Cambridge: Cambridge University Press, 1968.

C., L. J. "Marriage Registries." *The China Review* 3, no. 4 (1875): 255.

Cairns, John W. "Development of Comparative Law in Great Britain." In *The Oxford Handbook of Comparative Law*, edited by Mathias Beimann and Reinhard Zimmermann, 131-173. Oxford: Oxford University Press, 2006.

Cassel, Pär Karistoffer. *Grounds of Judgement: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. Oxford: Oxford University Press, 2011.

Ch'ü, T'ung-tsu. *Law and Society in Traditional China*. Paris: Mouton, 1965.

———. "Qinglü de jicheng he bianhua" 清律的繼承和變化 (Traditions and Changes of the Qing Law). In *Ch'ü T'ung-tsu's faxue lunzhu ji* 瞿同祖法學論著集 (Collection of Ch'ü T'ung-tsu's Legal Theses), 417-433. Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 1998.

Chen, Li. *Chinese Law in Imperial Eyes*. New York: Columbia University Press, 2016.

Chen, Yaqing 陳雅晴. "Zaoqi gangying zhimin zhengfu huaren yiyuan yanjiu (1843-1900)" 早期港英殖民政府華人譯員研究（1843-1900）(A Study on the Native Chinese Interpreters in the Early Colonial Hong Kong Government (1843-1900)). Master's Thesis, The Chinese University of Hong Kong, 2015.

Chen, Yongsheng 陳永生. "Tongxing buhun de lishi tantao" "同姓不婚"的歷史探討 (A Historical Discussion of the Rule Against Marriage Between Persons of the Same Surname). *Shehui kexuejia* 社會科學家(Social Scientist), no. 5 (1987): 56-63.

Cheng, Weirong 程維榮. *Zhongguo jicheng zhidu shi* 中國繼承制度史(History of Chinese Inheritance Law). Shanghai: Orient Publishing Centre 東方出版中心, 2006.

Cheung, Anne S. Y. "The Paradox of the Hong Kong Colonialism: Inclusion as

Exclusion." *Canadian Journal of Law and Society* 11, no. 2 (1996): 62-85.

Clark, Douglas. *Gunboat Justice: British and American Law Courts in China and Japan (1842-1943)*. Vol. 1, *White Man, White Law, White Gun.* Hong Kong: Earnshaw Books Ltd, 2015.

Cocks, Raymond. "Who Attended the Lectures of Sir Henry Maine: And Does it Matter." In *Learning the Law: Teaching and the Transmission of Law in England 1150-1900*, edited by Jonathan A. Bush and Alain and Wijffels, 383-396. London: The Hambledon Press, 1999.

Committee on Chinese Law and Custom, appointed by the Governor of Hong Kong. *Chinese Law and Custom in Hong Kong.* Hong Kong: The Government Printer, 1953.

Cooray, Anton. "Asian Customary Laws through Western Eyes: A Comparison of Sri Lankan and Hong Kong Colonial Experiences." In *Law, Society and the State: Essays in Modern Legal History*, edited by Louis A. Knafla and Susan W. S. Binnie, 145-177. Toronto: Toronto University Press, 1995.

Cretney, S. M., and J. M. Masson. *Principles of Family Law*. 5th ed. London: Sweet & Maxwell, 1990.

Crofts, Maud I. *Women Under English Law*. London: The National Council of Women of Great Britain, 1925.

Dang, Jiangzhou 黨江舟. *Zhongguo songshi wenhua: gudai lüshi xianxiang jiedu* 中國訟師文化－古代律師現象解讀 (Chinese Culture of Song-shi – Interpreting Ancient Lawyers). Beijing: Peking University Press 北京大學出版社, 2005.

Daqing lüli huiji bianlan 大清律例彙輯便覽 (A Collection of the Great Qing Code). Beijing: Shan Cheng Tang 善成堂, 1877.

Davis, John Francis. *Chinese Miscellanies: A Collection of Essays and Notes.* London: John Murray, 1865.

De Groot, Gérard-René. "The Point of View of a Comparative Lawyer." *Les Cahiers de droit* 28, no. 4 (1987): 793-812.

Dirlik, Arif. "Chinese History and the Question of Orientalism." *History and Theory* 35, no. 4 (1996): 96-118.

Dobinson, Ian, and Derek Roebuck. *Introduction to Law in the Hong Kong SAR*. 2nd ed. Hong Kong: Sweet & Maxwell Asia, 2001.

Ebblewhite, Ernest A. "British and Foreign Guilds." *The Sunday Times*, March 31, 1935.

Editor. Note to "Chinese Wills," by G. Jamieson. *The China Review* 4, no. 6 (1876): 400.

Editor. Note to "Chinese Wills," by G. Jamieson. *The China Review* 5, no.1 (1876): 69.

Eitel, E. J. "Chinese Wills." *The China Review* 4, no. 4 (1876): 268.

———. *Europe in China: The History of Hong Kong from the Beginnings to the Year 1882*. London: Luzac & Company / Hong Kong: Kelly & Walsh, Ld., 1895.

———. "The Law of Testamentary Succession as Popularly Understood and Applied in China." *The China Review* 15, no. 3 (1886): 150-155.

Eriksen, Thomas Hylland, and Finn Sivert Nielsen. *A History of Anthropology*. London & Sterling: Pluto Press.

Evans, D. M. Emrys. "Common Law in a Chinese Setting – The Kernel or the Nut." *Hong Kong Law Journal* 1, no. 1 (1971): 9-32.

Fang, Chuan 方川. *Meishuo shi* 媒妁史 (History of Go-betweens). Nanning 南寧: Guangxi Nationalities Publishing House 廣西民族出版社; Shanghai: Shanghai Arts Publishing House 上海文藝出版社, 2000.

Feaver, George *From Status to Contract: A Biography of Sir Henry Maine 1822-1888*. London: Longmans, Green and Co Ltd, 1969.

Finch, Emily, and Stefan Fafinski. *Contract Law*. Edinburgh: Pearson Education Limited, 2015.

Gao, Shiyu 高世瑜. "Shuo sancong: Zhongguo chuantong shehui funü jiating diwei manyi" 說"三從"－中國傳統社會婦女家庭地位漫議" (Three Submssions: Women's Status in Traditional Chinese Families). *Guangmin ribao* 光明日報 (Guang Ming Daily), November 20, 1995.

Gardner, C. T. "Chinese Wills." *The China Review* 5, no.1 (1876): 69.

Gardner, Jane F. *Women in Roman Law and Society*. London: Routledge, 1987.

Geldart, W. M. *Elements of English Law*. London: Williams & Norgate, 1911.

Genette, Gérard. *Paratexts: Thresholds of Interpretation*. Translated by Jane E. Lewin. Cambridge: Cambridge University Press, 1997.

Gu, Yuan 顧元. "Ganfen jiaqu ji qi falü shijian: guojia yu shehui eryuan jiegou xia de guize zhi zhi" "乾分嫁娶"及其法律實踐 — 國家與社會二元結構下的規則之治 (The Law Against Marriage Between Relations and Judicial Practices: The Dichotomous Government by the Nation and Society). *Zhengfa luntan* 政法論壇 (Tribune of Political Science and Law) 31, vol. 5 (2013): 69-86.

Guo, Jian 郭建. *Gudai faguan mianmian guan* 古代法官面面觀 (Diverse Glimpses into Ancient Judges). Shanghai: Shanghai Classics Publishing House 上海古籍出版社,1993.

Hall, Stephen. *Law of Contract in Hong Kong: Cases and Commentary*. 3rd ed. Hong Kong: LexisNexis, 2011, 87.

Hao, Hongbin 郝洪斌. *Minguo shiqi jicheng zhidu de yanjin* 民國時期繼承制度的演進(Evolution of Inheritance Law in Republican China). Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 2014.

Haydon, Edwin. "Chinese Customary Law in Hong Kong's New Territories: Some Legal Premises." *Journal of the Hong Kong Branch of the Royal Asiatic Society*

35, (1995): 1-41.

———. “The Choice of Chinese Customary Law in Hong Kong.” *The International and Comparative Law Journal* 11, no. 1 (1962): 231-250.

He, Yimin 何一民, and Zhao Shuliang 趙淑亮, “Qingdai minguo shiqi xizang diqu duozhong hunyin jiating xingtai lunxi” 清代民國時期西藏地區多種婚姻家庭型態論析 (Analysis of the Family Forms of Tibetan Residents from the Qing Dynasty to the Republic of China), *Guizhou minzu yanjiu* 貴州民族研究 (Guizhou Ethnic Studies) 35, no. 8 (2014): 189-193.

Holcombe, Lee. *Wives and Property: Reform of the Married Women’s Property Law in Nineteenth-Century England.* Toronto and Buffalo: University of Toronto Press, 1983.

Huang, Jingjia 黃靜嘉. “Xue zhu du li cunyi chongkan ben xu” 薛著《讀例存疑》重刊本序 (Preface to the Typeset Edition of Xue’s Concentration on Doubtful Matters in the Perusal of the Sub-statutes). In *Du li cunyi chongkan ben* 讀例存疑重刊本 (A Typeset Edition of Concentration on Doubtful Matters in the Perusal of the Sub-statutes), Vol. 1, by Xue Yunsheng 薛允升, 3-10. Taipei: Cheng Wen Publishing Co., LTD. 成文出版社, 1970.

Huang, Philp C. C. *Civil Justice in China: Representation and Practice in the Qing.* Stanford: Stanford University Press, 1996.

———. *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*. Stanford: Stanford University Press, 2001.

Huang, Yuansheng 黃源盛. *Falü jishou yu jindai zhongguofa* 法律繼受與近代中國法 (Legal Transplantation and Modern Chinese Law). Taipei: Huang Ruoqiao Publishing 黃若喬出版, 2007.

———. “Wanqing minguo jishou waiguo fa zhong lunchang tiaokuan de bian yu bubian” 晚清民國繼受外國法中倫常條款的變與不變 (The Modification and

Preservation of Clauses Relating to Order of Seniority in Absorbing Foreign Law during Late Qing and Republican China). In *Zhonghua faxi yu rujia sixiang* 中華法系與儒家思想(Chinese Legal System and Confucian Ideology), edited by Gao Mingshi 高明士, 51-63. Taipei: National Taiwan University Press 台大出版中心, 2014.

Huang, Zhangjian 黃彰健, ed. *Mingdai lüli huibian xiace* 明代律例匯編(下冊)(*Collection of Laws in the Ming Dynasty* Part II). Taipei: Jinghua Press 精華印書館股份有限公司, 1979.

Hudson, Manley O. "The Rendition of the International Mixed Court at Shanghai." *The American Journal of International Law* 21, no. 3 (1927): 451-471.

Huo, Dan 霍丹. "Zhongguo gudai dui xingming de falü guizhi yanjiu"中國古代對姓名的法律規制探究 (Rules and Laws Concerning Name in Ancient China). Master's Thesis, Soochow University, 2012.

Jamieson, George. "British Interests in China." *The Quarterly Review* 191, no. 381 (1900): 1-29.

———. "Cases in Chinese Criminal Law." *The China Review* 10, no. 6 (1882): 357-365.

———. *Chinese Family and Commercial Law*. Shanghai: Kelly and Walsh, Limited, 1921.

———. "Chinese Wills," *The China Review* 4, no.6 (1876): 399-400.

———. "The History of Adoption and Its Relation to Modern Wills." *The China Review* 18, no. 3 (1889): 137-146.

———. "Translations from the General Code of Laws of the Chinese Empire: VII Marriage Laws." *The China Review* 10, no. 2 (1881): 77-100.

———. "Translations from the Lü-Li, or General Code of Laws: I." *The China Review* 8, no. 1 (1879): 1-18.

———. “Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: II. Inheritance and Succession.” *The China Review* 8, no. 4 (1880): 193-205.

———. “Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: III. Registration and Taxation.” *The China Review* 8, no. 5 (1880): 259-276.

———. “Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: IV. Registration and Taxation—(continued).” *The China Review* 8, no. 6 (1880): 357-363.

———. “Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: V. Land Tenure and Taxation.” *The China Review* 9, no. 3 (1880): 129-136.

———. “Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: VI.” *The China Review* 9, no. 6 (1881): 343-350.

———. “Validity of Chinese Marriage.” *The China Review* 5, no. 3 (1876): 204-205.

Jenks, Edward, ed. *A Digest of English Civil Law*. Vol 4. London: Butterworth & Co., 1916.

Jernigan, T. R. *China in Law and Commerce*. London: Macmillan & Co., Ltd., 1905.

Jin, Mei 金眉. “Lun qingdai hunyin jiating falü de tezhi” 論清代婚姻家庭法律的特質(The Characteristics of Qing Marriage and Family Laws). *Faxue* 法學(Legal Science), no. 10 (2007), 67-78.

Jolowicz, H. F., and Barry Nicholas. *Historical Introduction to the Study of Roman Law.* Cambridge: Cambridge University Press, 1972.

Jones, William C., trans. *The Great Qing Code.* With the assistance of Tianquan Cheng and Yongling Jiang. Oxford: Clarendon Press, 1994.

Koebner, Richard, and Helmut Dan Schmidt. *Imperialism: The Story and Significance of a Political Word, 1840 -1960.* Cambridge: Cambridge University Press, 1965.

Kotenev, A.M. *Shanghai: Its Mixed Court and Council.* Taipei: Ch’eng Wen Publishing Company, 1968.

Kwan, Uganda Sze-pui 關詩珮. “Fanyi yu zhimin guanzhi: Xianggang dengjishu de chengli ji shouren zong dengjiguan feilun” 翻譯與殖民管治：香港登記署的成立及首任總登記官費倫 (Translation and Colonial Rule: The Establishment of Hong Kong Registry and the First Registrar General, Samuel Turner Fearon). *Zhongguo wenhua yanjiusuo xuebao* 中國文化研究所學報(Journal of Chinese Studies), no. 54 (2012): 97-124.

———. “Fanyi yu zhimin guanzhi: zaoqi xianggangshi shang de shuangmian yizhe gao he’er” 翻譯與殖民管治：早期香港史上的雙面譯者高和爾（1816-1875） (Translation and Colonial Rule: Daniel Richard Cardwell (1816-1875), the Duplicitous Translator in Early Hong Kong History). *Xiandai zhongwen wenxuebao* 現代中文文學學報 (Journal of Modern Literature in Chinese) 10, no. 2, (2011): 174-194.

———. *Yizhe yu xuezhe: Xianggang yu Daying diguo zhongwen zhishi jiangou* 譯者與學者：香港與大英帝國中文知識建構 (Translators and Scholars: Chinese Knowledge Construction by the British Empire and Hong Kong). Oxford: Oxford University Press, 2017.

The Law Commission, *Family Law Report on Nullity of Marriage*, no. 33 (1970).

Lee, Leo Ou-fan. *Shanghai Modern: The Flowering of a New Urban Culture in China, 1930-1945*. Cambridge: Harvard University Press, 1999.

Legge, James, trans. *The Chinese Classics*. Vol. 1, *Confucian Analects, The Great Learning, and The Doctrine of the Mean.* London: Trübner & Cp., 1861.

———, trans. *The Chinese Classics*. Vol. 3, *The Shoo King.* London: Trübner & Co., 1865.

———, trans. *The Sacred Books of China: The Texts of Confucianism, Part III: The Lî Kî, I-X*. The Sacred Books of the East 27. Edited by F. Max Müller. Oxford: The Clarendon Press, 1885.

———, trans. *The Sacred Books of China: The Texts of Confucianism, Part IV: The Lî Kî, XI-XLVI*. The Sacred Books of the East 28. Edited by F. Max Müller. Oxford: The Clarendon Press, 1885.

Lewis, D. J. "A Requiem for Chinese Customary Law in Hong Kong." *The International and Comparative Law Quarterly* 32, no. 2 (1983): 337-379.

Li, Chao 李超. "Zhongguo guyou minfa ziyuan dui jindai minshi lifa de yingxiang" 中國固有民法資源對近代民事立法的影響 (The Influences of Native Legal Resources on Modern Civil Legislation). In *Zhongguo falü jindaihua lunji* 中國法律近代化論集 (Thesis Collection on Legal Modernization in China), edited by Zhang Sheng 張生, 145-164. Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 2002.

Li, Guanru 李冠儒, "Wanqing shiqi lieqiang zaihua zhiwaifaquan wenti yanjiu"晚晴時期列強在華治外法權問題研究(Study on the Problem of Extraterritoriality in China by Foreign Powers during the Period of Late Qing). Doctoral Thesis, Tsinghua University, 2016.

Li, Guilian 李貴連. *Shenjiaben zhuan* 沈家本傳 (Biography of Shen Jiaben). Beijing: Law Press 法律出版社, 2000.

Li, Liang 李亮. "Zangzu hunyin lishi shanbian ji qi zouxiang zhanwang" 藏族婚姻習慣法歷史嬗變及其走向展望 (History and Prospects of Tibetan Customary Marriage Law). *Guizhou minzu yanjiu* 貴州民族研究(Guizhou Ethnic Studies) 35, no. 10 (2014): 29-32.

Li, Weidong 李衛東. *Minchu minfa zhong de minshi xiguan yu xiguanfa* 民初民法中的民事習慣與習慣法(Customs and Customary Law in Civil Laws of the Early Republican China). Beijing: China Social Sciences Press 中國社會科學出版社, 2005.

Li, Xiandong 李顯東. *Cong daqing lüli dao minguo minfadian de zhuanxing* 從《大

清律例》到《民國民法典》的轉型 (The Transition from Da Qing Lü Li to the Civil Code of the Republic of China). Beijing: Press of People's Public Security University of China 中國人民公安大學出版社，2003.

Li, Xiuqing 李秀清. "Zhongguo Pinglun yu shijiu shiji mo xifang ren yanzhong de zhongguo sifa"中國評論與十九世紀末西方人眼中的中國司法 (*The China Review* and the Administration of Chinese Law in the Eyes of the Westerners in the Late Nineteenth Century). *Zhongwai faxue* 中外法學 (*Peking University Law Journal*) 29, no.1 (2017): 268-279.

———. "Zhongguo Pinglun zhong de zhongguo falü ji qi yanjiu jiazhi" 中國評論中的中國法律及其研究價值 (Chinese Law in The *China Review* and Why We Study It). *Bijiaofa yanjiu* 比較法研究(Journal of Comparative Law), no. 2 (2017): 126-138.

Liang, Linxia. *Delivering Justice in Qing China.* Oxford: Oxford University Press, 2007.

Lin, Duan 林端. *Rujia lunli yu falü wenhua* 儒家倫理與法律文化 (Confucian Ethics and Legal Culture). Beijing: Press of China University of Political Science and Law 中國政法大學出版, 2002.

Lin, Qian 林乾. "Songshi dui fa zhixu de chongji yu qingchao yanzhi songshi lifa" 訟師對法秩序的衝擊與清朝嚴治訟師立法 (The Impact of Song-shi on Legal Order and the Legislations against Song-shi in Qing Dynasty). *Qingshi yanjiu* 清史研究(Studies in Qing History), no. 3 (2005): 1-12.

Liu, Guang'an 劉廣安. *Qingdai minzu lifa yanjiu* 清代民族立法研究 (Legislation Governing the Minorities in the Qing Dynasty). Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 1993.

Liu, Wei 劉薇. "Qingdai hunli zhong de gengtie" 清代婚禮中的庚帖 (Gengtie in the Qing Marriage). *Duhui yizong* 都會遺蹤 (Cultural Heritages of Cities), no. 3

(2013): 12-24.

The London and China Telegraph, "Obituary — Mr. Geo. Jamieson (1843-1920)," January 3, 1921.

Long, George. *Two Course Delivered in Middle Temple Hall*. 1847. Reprint, Philadelphia: Little, 1848.

Lu, Jingyi 盧靜儀. *Qingmo minchu jiachan zhidu de yanbian: Cong fenjia xichan dao yichan jicheng* 清末民初家產制度的演變－從分家析產到遺產繼承 (The Changes of the Institution of Family Property in Late Qing and Early Republican China: From Family Division to Inheritance). Taipei: Angle Publishing 元照出版有限公司, 2012.

Lubbock, John. *The Origin of Civilization and the Primitive Condition of Men*. 1870. Reprint, Cambridge: Cambridge Press, 2014.

Luo, Hui-Min, and Helen Bryant. *British Diplomatic and Consular Establishments in China: 1793-1949*. Vol. 2, *Consular Establishments 1843-1949.* Taipei: SMC Publishing INC., 1988.

M., I. "Chinese Marriage Law." *The China Review* 5, no.1 (1876): 72.

Macfarlane, W. *Sketches in the Foreign Settlements and Native City of Shanghai.* Shanghai: Mercury, 1881.

Maine, Henry. *Ancient Law*. 1861. Reprint, London: J. M. Dent & Sons Ltd, 1917.

———. *Dissertations on Early Law and Custom*. New York: Henry Holt and Company, 1883.

McAleavy, Henry. "Chinese Law in Hong Kong: The Choice of Sources." In *Changing Law in Developing Countries*, edited by James Norman Dalrymple Anderson, 258-269. London: George Allen and Unwin, 1963.

McLennan, Donald, ed. *The Patriarchal Theory: Based on the Papers of the Late John Ferguson McLennan*. London: Macmillan And Co., 1885.

McLennan, John Ferguson. "The Levirate and Polyandry." *The Fortnightly Review* 21 (1877): 694-707.

———. *Primitive Marriage: An Inquiry into the Origin of the Form of Capture in Marriage Ceremonies*. 1865. Reprint, New York: Routledge/Thoemmes Press, 1998.

———. *Studies in Ancient History Comprising a Reprint of Primitive Marriage.* London: Bernard Quaritch, 1876.

———. "Tree and Serpent Worship." *Cornhill Magazine* 19 (1869): 626-640.

McLennan. "The Worship of Animals and Plants, Part I." *The Fortnightly Review* 6 (October 1869): 407-427.

———. "The Worship of Animals and Plants, Part II." *The Fortnightly Review* 6 (November 1869): 562-582.

———. "The Worship of Animals and Plants, Part III." *The Fortnightly Review* 7 (February 1870): 194-216.

Möllendorff, P. G. von. "The Family Law of the Chinese, and Its Comparative Relations with That of Other Nations." *Journal of the North China Branch of the Royal Asiatic Society* 13 (1879): 99-121.

———. "The Family Law of the Chinese." *Journal of The China Branch of the Royal Asiatic Society* 27 (1895): 131-189.

———. *The Family Law of the Chinese.* Shanghai: Kelly & Walsh, Limited, 1896.

Norton-Kyshe, James William. *The History of the Laws and Courts of Hong Kong*. 2 vols. 1898. Reprint, Hong Kong: Vetch and Lee Limited, 1971.

The North-China Herald and Supreme Court & Consular Gazette, "The China Association," January 31, 1896.

The North-China Herald and Supreme Court & Consular Gazette, "The Golden Jubilee Year of Kelly & Walsh, Limited.," July 14, 1924.

The North-China Herald and Supreme Court & Consular Gazette, "Mixed Court," November 13, 1873.

The North-China Herald and Supreme Court & Consular Gazette, "Mixed Court," September 27, 1873.

The North-China Herald and Supreme Court & Consular Gazette, "Passengers," September 20, 1873.

The North-China Herald and Supreme Court & Consular Gazette, "The S. D. C. K.: Annual General Meeting," December 11, 1903.

Ong, S. P. "Jurisdictional Politics in Canton and the First English Translation of the Qing Penal Code." *Journal of the Royal Asiatic Society* 20, no. 2 (2010): 141-165.

P. "Chinese Wills." *The China Review* 4, no. 5 (1876): 331-332.

Pan, Shuren 潘樹仁. *Kongzi jiayu* 孔子家語(Dialogue with Confucius). Hong Kong: Chung Hwa Book Co. 中華書局, 2013.

Parker, E. H. "Comparative Chinese Family Law." *The China Review* 8, no. 2 (1879): 67-107.

———. *A Thousand Years of the Tartars*. New York: Routledge, 1996. First published 1895 by Kelly & Walsh.

Pegg, Leonard. *Family Law in Hong Kong*. 2nd ed. Singapore: Butterworths, 1986.

Perkin, Joan. *Women and Marriage in Nineteenth-Century England.* London: Routledge, 1989.

Plessis, Paul du. *Borkowski's Text Book on Roman Law*. 4th edition. Oxford: Oxford University Press.

Pollock, Frederick. *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England*. 7th ed. London: Stevens and Sons, Limited, 1902.

Pu, Jian 蒲堅. *Zhongguo fazhi shi* 中國法制史 (Chinese Legal History). Beijing:

Guang Ming Daily Publishing House 光明日報出版社, 1987.

Qiu, Pengsheng 邱澎生. "Yi fa wei ming: songshi yu muyou dui mingqing falü zhixu de chongji" 以法為名：訟師與幕友對明清法律秩序的衝擊 (In the Name of the Law: The Impact of Song-shi and Mu-you on Legal Order in Ming and Qing China). *Zhongxi falü chuantong* 中西法律傳統 (Legal Tradition in the West and China), no. 00 (2008): 222-277.

Qiu, Tang 邱唐. "Qi min buhun? Qingdai zuqun tonghun de falü guifan shijian yu yishi" 旗民不婚？－ 清代族群通婚的法律規範、實踐與意識 (No Marriage Between the Manchus and the Hans – The Legal Rules, Practice and Consciousness of Qing Intertribal Marriage). *Qinghua faxue* 清華法學 (Tsinghua University Law Journal), no. 1 (2016): 190-207.

Qu, Wensheng 屈文生, and Wan Li 萬立. "Zhongguo fengjian fadian de yingyi yu yingyi dongji yanjiu" 中國封建法典的英譯與英譯動機研究 (What has Motivated English Translation of the Codes of Pre-modern Chinese Dynasties). *Zhongguo fany*i 中國翻譯(Chinese Translators Journal), no. 1 (2019): 51-59,190.

Rabban, David M. *Law's History: American Legal Thought and the Transatlantic Turn to History*. Cambridge: Cambridge University Press, 2013.

Rawlinson, Frank. "The Social Heart of China." *The Chinese Recorder* 57, no. 7 (1926): 498-513.

Ruskola, Teemu. *Legal Orientalism: China, the United States and Modern Law.* Cambridge and London: Harvard University Press, 2013.

Said, Edward W. *Orientalism*. New York: Pantheon Books, 1978.

Selby, Stephen. "Everything You Wanted to Know about Chinese Customary Law (but were Afraid to Ask)," *Hong Kong Law Journal* 21, no. 1 (1991): 45-77.

Sera-Shriar, Efram. "What is Armchair Anthropology? Observational Practices in 19th-Century British Human Sciences." *History of the Human Sciences* 27, no.2 (2014):

26-40.

Shanley, Mary Lyndon. *Feminism, Marriage, and the Law in Victorian England*, *1850-1895*. Princeton: Princeton University Press, 1989.

Shiga, Shūzō 滋賀秀三. *Zhongguo jiazu fa yuanli* 中國家族法原理 (Principles of Chinese Family Law). Translated by Zhang Jianguo 張建國, and Li Li 李力. Beijing: Law Press 法律出版社, 2002.

Shum, Clement. *General Principles of Hong Kong Law*. 3rd ed. Hong Kong: Addison Wesley Longman China Limited, 1998.

Simpson, A. W. B. "Contract: The Twitching Corpse." Review of *Anson's Law of Contract*, by A. G. Guests; *The Rise and Fall of Freedom of Contract*, by P. S. Atiyah; *The Law of Contract*, by G. H. Treitel. *Oxford Journal of Legal Studies* 1, no. 2 (1981): 265-277.

Smith, Carl T. *A Sense of History: Studies in the Social and Urban History of Hong Kong*. Hong Kong: Hong Kong Educational Publishing Co., 1995.

Spencer, Herbert. *Principles of Sociology.* 1876. Reprint, London & Edinburgh: Williams and Norgate, 1885.

St. André, James. "'But Do They Have a Notion of Justice?' Staunton's 1810 Translation of the Great Qing Code." *The Translator* 10, no. 1 (2004): 1-31.

Staunton, George Thomas. *Memoirs of the Chief Incidents of the Public Life of Sir George Thomas Staunton*. London: L. Booth, 1856.

———. *Ta Tsing Leu Lee; being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China.* 1810. Reprint, Taipei: Ch'eng-wen Publishing Co., 1966.

Stein, Peter G. "Maine and Legal Education." In *The Victorian Achievement of Sir Henry Maine*, edited by Alan Diamond, 195-208. Cambridge: Cambridge University, 1991.

———. *Roman law in European History*. Cambridge: Cambridge University, 1999.

Stone, Olive M. *Family Law*. London and Basingstoke: The MacMillan Press Ltd., 1977.

Su, Yigong 蘇亦工. "Bubian er bian: shi de lin baogao yu xianggang huaren xiguan quanli zhi xingfei"不變而變－史德林報告與香港華人習慣權利之興廢 (Changes and Immutableness: Strickland Report and the Rise and Fall of the Customary Rights of Hong Kong Chinese). *Qinghua faxue* 清華法學 (Tsinghua Law Review) 2, no. 5 (2008): 5-19.

———. "Ling yichong shijiao: Jindai yilai yingmei dui zhongguo falü wenhua chuantong de yanjiu" 另一重視角—近代以來英美對中國法律文化傳統的研究 (How Westerns Looked at the Legal Tradition of China from Another Perspective). *Huan qiu falü Pinglun* 環球法律評論 (Global Law Review), no. 1 (2003): 76-83.

———. *Ming qing lüdian yu tiaoli* 明清律典與條例(Statutes and Sub-statutes in the Ming and Qing Codes). Beijing: Press of China University of Political Science and Law 中國政法大學出版社, 1999.

———. "Xianggang huaren yizhu de faxian ji qi tese" 香港華人遺囑的發現及其特色 (Wills Made by the Chinese in Hong Kong: The Discovery and Their Features). *Zhongguo shehui kexue* 中國社會科學 (Social Sciences in China), no. 4 (2002): 100-113, 206.

———. "Xianggang Zhongguo shi hunyin fazhi de bianqian" 香港中國式婚姻法制的變遷 (The Changes of Traditional Chinese Marriage in Hong Kong). *Bijiaofa yanjiu* 比較法研究 *Journal of Comparative Law*, no. 3 (2002): 3-15.

———. *Zhongfa xiyong: Zhongguo chuantong falü ji xiguan zai xianggang* 中法西用—中國傳統法律及習慣在香港(Chinese Law Applied by Westerners: Traditional Chinese Law and Custom in Hong Kong). Beijing: Social Sciences

Academic Press 社會科學文獻出版社, 2002.

Tan, Carol G. S. “Chinese Wills under the Laws of Hong Kong.” *Hong Kong Law Journal* 29 (1999): 93-122.

———. “How a ‘Lawless’ China Made Modern America: An Epic Told in Orientalism.” Review of *Legal Orientalism: China, the United States and Modern Law*, by Teemu Ruskola. *Harvard Law Review* 128, no. 6 (2015): 1677-1704.

Thomas, Nicholas. *In Oceania: Visions, Artifacts, Histories*. Durham and London: Duke University Press, 1997.

Tian, Tao 田濤, and Zheng Qin 鄭秦. “Dianjiao shuoming” 點教說明(Explanations of Punctuation and Proofreading). In *Daqing lüli* 大清律例 (The Great Qing Code), 1-8. Beijing: The Law Press 法律出版社, 1999.

Timmermans, Glenn. “Sir George Thomas Staunton and the Translation of the Qing Legal Code.” *Chinese Cross Currents* 2, no. 1 (2005): 26-57.

Tu, shi 塗石. “Gudai hunli buhe buyong yue bian” ‘古代婚禮不賀、不用樂’辨 (On No Felicitations and Music in Ancient Chinese Wedding). *Xueshu luntan* 學術論壇(Academic Forum), no. 1 (1986): 85-86.

Turner, Samuel. *An Account of an Embassy to the Court of the Teshoo Lama in Tibet; Containing A Narrative of a Journey Through Bootan, and Part of Tibet*. London: W. Bulmer and Co., 1800.

Tylor, Edward Burnett. *Religion in Primitive Culture*. Vol 2. 1871. Reprint, Gloucester: Peter Smith, 1970.

Valk, Marc van der. *An Outline of Modern Chinese Family Law*. Peking: Henri Vetch, 1939.

Van Dale, Jennifer. “Chinese Custom in the New Territories: Non-indigenous Women’s Right to Inherit Land.” *Hong Kong Student Law Review* 1 (1994): 113-121.

Voget, Fred W. *A History of Ethnology*. New York: Holt, Rinehart and Winston, 1975.

Wakefield, David. *Fenjia: Household Division and Inheritance in Qing and Republican China.* Honolulu: University of Hawai'i Press, 1998.

Wang, Guoqiang 王國強. *Zhongguo pinglun (1872-1901) yu xifang hanxue*《中國評論》（1872-1901）與西方漢學 (The China Review (1872-1901) and Western Sinology). Shanghai：Shanghai Century Publishing Group 上海世紀出版集團, 2010.

Wang, Xin 王欣. "Lun yingguo zaihua zhiwaifaquan de jianli" 論英國在華治外法權的建立 (The Establishment of British Extraterritoriality in China). *Lan tai shijie* 蘭台世界(Lantai World), no. 19 (2014): 99-100.

Wang, Yi 王毅. *Huangjia yazhou wenhui bei zhongguo zhihui yanjiu* 皇家亞洲文會北中國支會研究 (A Study of the North China Branch of the Royal Asiatic Society). Shanghai: Shanghai Bookstore Publishing House 上海書店出版社, 2005.

Watt, Gary *Trusts & Equity*. Oxford: Oxford University Press, 2012.

Wei, Daoming 魏道明. "Zhongguo gudai jicheng zhidu zhiyi" 中國古代遺囑繼承制度質疑 (Did Ancient China had Testamentary Succession as an Institution?). *Lishi yanjiu* 歷史研究 (Historical Research), no. 6 (2000): 156-165, 193.

Wesley-Smith, Peter. *The Sources of Hong Kong Law.* Hong Kong: Hong Kong University Press, 1994.

Williamson, J. Bruce. *The Middle Temple Bench Book: Being A Register of Benchers of the Middle Temple*. 2nd ed. London: Chancery Lane Press, 1937.

Witte, John Jr. *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*. 2nd ed. Louisville: Westminster John Knox Press, 2012.

Wong, Belinda Sheung-yu. "Chinese Customary Law – An examination of Tsos and Family Tongs." *Hong Kong Law Journal* 20, no. 1 (1990): 13-30.

Wong, Man Kong. “Christian Missions, Chinese Culture, and Colonial Administration: A Study of the Activities of James Legge and Ernest John Eitel in Nineteenth Century Hong Kong.” Doctoral Thesis, The Chinese University of Hong Kong, 1996.

——. “Xianggang yu zhongxi wenhua jiaoliu: Ou deli yu zhongguo pinglun” 香港與中西文化交流－歐德理 (E. J. Eitel) 與中國評論 (*China Review*) (Hong Kong and Sino-Western Cultural Interaction: Ernest John Eitel and the *China Review*). In *Gang’ao yu jindai zhongguo xueshu yantaohui lunwenji* 港澳與近代中國學術研討會論文集(*Colloquium Collection on Hong Kong, Macau and Modern China*), edited by Gang’ao yu jindai zhongguo xueshu yantaohui lunwenji bianji weiyuanhui 港澳與近代中國學術研討會論文集編輯委員會 (Council of Colloquium Collection on Hong Kong, Macau and Modern China), 119-147. Taipei: Academia Historica 国史馆，2000.

Wong, Susanna Nga-yin. “The Law of Intestate Succession to Land in the New Territories, Hong Kong – Where ‘East and West Simply Do Not Meet.’” *Hong Kong Student Law Review* 3 (1997): 52-85.

Wu, Kunxiu 吳坤修. *Daqing lüli genyuan* 大清律例根原(Sources of the Great Qing Code). Vol 2. Shanghai: Shanghai Dictionary Press 上海辭書出版社, 2012.

Wu, Qi 吳琦, and Du Weixia 杜維霞. “Songshi yu songgun: mingqing songshi de shehui xingxiang tanxi”訟師與訟棍：明清訟師的社會形象探析 (Song-shi and Litigation Scoundrel: Analysis of The Social Image of Song-shi in Ming and Qing Dynasties). *Xuexi yu tansuo* 學習與探索(Study and Exploration), no. 7 (2013): 145-149.

Wu, Shuling 吳淑玲. “Cong tongxing buhun tan luanlun jinji: shixi zhongguo shehui guanyu luanlun jinji de xiangzhengxing guize” 從“同姓不婚”談亂倫禁忌 —試析中國社會關於亂倫禁忌的象徵性規則 (From the Rule Against Marriage

Between Persons of the Same Surname to Incest Taboo: The Symbolic Rules of Incest Taboo in Chinese Society). Master's Thesis, Sichuan University, 2006.

Xing, Tie 邢鐵. *Jiachan jicheng shi lun* 家產繼承史論 (History of Family Property Inheritance). Kunming 昆明: 雲南大學出版社 Yunnan University Press, 2000.

Xu, Jiali 徐家力, and Wu Yunhao 吳運浩. *Zhongguo lüshi zhidu shi* 中國律師制度史(The History of Chinese Lawyers). Beijing: Press of China University of Political Science and Law 中國政法出版社, 2000.

Xue, Yunsheng 薛允升. *Duli cunyi chongkan ben* 讀例存疑重刊本 (A Typeset Edition of Concentration on Doubtful Matters in the Perusal of the Sub-statutes). Vol 2. Taipei: Cheng Wen Publishing Co., LTD. 成文出版社, 1970.

Yang, Bojun 楊伯峻. *Lunyu yizhu* 論語譯注(Annotations to the Analects). Hong Kong: Chung Hwa Book Co. 中華書局, 2011.

Yang, Hua 楊華. "Yuzi xielao: zhongguo gudai hunli shang" "與子偕老"：中國古代的婚禮（上）>(Grow Old with You: Ancient Chinese Wedding, Part I). *Wuhan wenshi ziliao* 武漢文史資料 (Wuhan Cultural and Historical Data), no. 11 (2017): 50-54.

———. "Yuzi xielao: Zhongguo gudai de hunli xia" "與子偕老"：中國古代的婚禮（下） (Grow Old with You: Ancient Chinese Wedding, Part II). *Wuhan wenshi ziliao* 武漢文史資料 (Wuhan Cultural and Historical Data), no. 12 (2017): 44-50.

Yang, Tianyu 楊天宇, comp. *Liji yizhu* 禮記譯注 (Annotations for the Books of Rites). 2 vols. Shanghai: Shanghai Classics Publishing House 上海古籍出版社, 1997.

Yao, Guangzu 姚光祖. "Qingmo zizhengyuan zhi yanjiu" 清末資政院之研究 (Study on National Assembly in Late Qing). Master's Thesis, National Taiwan University, 1977.

Yao, Yuxiang 姚雨薌, and Hu Yangshan 胡仰山. *Daqing lüli huitong xinzuan* 大清律例會通新纂 (The New Compilation of Da Qing Lü-li). 1873. Reprint, Taipei: Wenhai Press 文海出版社, 1964.

Ye, Xiaoxin 葉孝信. *Zhongguo minfa shi* 中國民法史 (The History of Chinese Civil Law). Shanghai: Shanghai People's Publishing House 上海人民出版社, 1993.

You, Boqing 游博清, and Huang Yinong 黃一農. "Tianchao yu yuanren: Xiao Sidangdong yu zhongying guanxi (1793-1840)" 天朝與遠人—小斯當東與中英關係（1793-1840）(Heavenly Dynasty and Men from Afar: George Thomas Staunton and Anglo-Chinese Relations: 1793-1840). *Zhongyang Yanjiuyuan jindaishi yanjiusuo jikan* 中央研究院近代史研究所集刊 (Bulletin of the Institute of Modern History, Academia Sinica), no. 69 (2010): 1-40.

Z., X. Y. "Chinese Marriages." *The China Review* 6, no.1 (1877): 64-66.

———. "Inheritance and 'Patria Potestas' in China." *The China Review* 5, no.6 (1877): 404-407.

Zhang, Jinfan 張晉藩. *Jianming zhongguo fazhi shi* 簡明中國法制史(A Brief Version of Chinese Legal History). Beijing: Publishing House of People's Public Security University of China 中國公安大學出出版社, 1991.

———. *Qingchao fazhi shi* 清朝法制史(Legal History of the Qing Dynasty). Beijing: Law Press 法律出版社, 1993.

———. *Zhongguo fazhi shi* 中國法制史 (China's Legal History). Beijing: The Commercial Press 商務印書館, 2010.

———. *Zhongguo gudai falü zhidu* 中國古代法律制度 (Ancient Chinese Law). Beijing: Chinese Broadcasting and Television Press, 中國廣播電視出版社, 1992.

Zhang, Sheng 張生. *Zhongguo jindai minfa fadianhua yanjiu* 中國近代民法法典化研究 (A Study on Civil Codification in Modern China). Beijing: Press of China

University of Political Science and Law 中國政法大學, 2004.

Zhang, Xiaoyu 張小雨, and Gao Xiaoqiang 高小強. “Lun hunyi buyong yue” 論“昏禮不用樂”(On ‘No Music in Wedding). *Leshan shifan xueyuan xuebao* 樂山師範學院學報(Journal of Leshan Normal University) 32, no. 11 (2017): 134-140.

Zhang, Zhiren 張智仁. “Shenme shi yizhu? Woguo gudai dui dingli yizhu youhe guiding?” 什麼是遺囑？我國古代対訂立遺囑有何規定？(What is Will? What Regulations were there in Ancient China Concerning Wills?). In *Zhongguo gudai falü sanbai ti* 中國古代法律三百題(Three Hundred Questions on Ancient Chinese Law), edited by Chen Pengsheng 陳鵬生, 401-403. Shanghai: Shanghai Classics Publishing House 上海古籍出版社, 1991.

Zhao, Fen 趙芬. “Lun lingshi caipanquan yu zhiwaifaquan de qubie” 論領事裁判權與治外法權的區別 (The Distinction between Consular Jurisdiction and Extraterritoriality). Master’s Thesis, Soochow University, 2014.

Zhao, Xiaogeng 趙曉耕. “Shixi zhiwaifaquan yu lingshi caipanquan” 試析治外法權與領事裁判權 (An Analysis of Extraterritoriality and Consular Jurisdiction). *Zhengzhou daxue xuebao shehui kexue ban* 鄭州大學學報(哲学社会科学版) (Journal of Zhengzhou University, Philosophy and Social Science Edition) 38, no. 5 (2005): 70-74.

Zhen, Jinzhong 甄進忠. “Zhonggo gudai hunli qianlun” 中國古代婚禮淺論 (On Ancient Chinese Wedding). Zhongzhou daxue xuebao 中州大學學報(Journal of Zhongzhou University) 22, no. 2 (2005): 34-36.

Zheng, Quanhong 鄭全紅. *Minguo shiqi nüzi caichan jichengquan bianqian yanjiu: chuantong xiang xiandai de shanbian* 民國時期女子財產繼承權變遷研究－傳統向現代的嬗變(Changes in Women’s Inheritance Rights in Republicadan China: An Evolution from Tradition to Modernity). Beijing: Law Press，法律出版社,

2013.

Zweigert, Konrad, and Hein Kötz. *Introduction to Comparative Law*. Vol. 1, *The Framework*. 2nd ed. Translated by Tony Weir. Oxford: Clarendon Press, 1987.