

***Is a Paternal Nephew's Right to Inherit His Uncle's Estate Indisputable:  
The Enlightening Case of TSANG Yuet Mui***

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**Abstract**

The English Law has been enforced in Hong Kong since 1842, but some cases involving Chinese traditional practices would be judged on the basis of *Qing Code*. The Hong Kong Chinese followed the traditional convention of succession in the male line. This essay is to discuss a court case which raises questions regarding a paternal nephew's adoption as heir and his succession to estate. The Court of Appeal had previously refused another paternal nephew's request for the right to inherit his uncle's estate. This paper discusses: (1)the specification of the adoption procedure in the *Qing Code* that is obviously not concrete enough and so the court needs reliable evidence and reasonable deduction to determine whether the paternal nephew was adopted; and (2)how the court makes fair and reasonable rulings on the basis of legal provision stipulated in the spirit of the Confucianism centuries earlier.

Keywords: *Qing Code*, English Law, inheritance, paternal nephew

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## 1. Part of the *Qing Code* Still Applicable in Hong Kong

In the Chinese patriarchy, a family without a male successor is a serious problem. The law therefore makes the provisions for handling the issue of appointing a successor. The common practice is to adopt the family head's paternal nephew as the son of the family to continue the lineage. In case the family head does not have any brother, then in the order of proximity to ancestry, he will have to adopt the son of male cousins on the paternal side, or even to the extreme of adopting a son with the same family name. These are stipulated in the *Qing Code*.

HK people follow the Chinese customs. Since the cession of Hong Kong to Britain in 1842, HK people have to comply with the English law, while British government still recognized the legality of the *Qing Code* to a certain extent, and had due respect to Chinese customs. The last part of the *Qing Code* related to marriage, applicable in Hong Kong, was eventually replaced in 1971. Yet some women who taken into families as concubines before 1971, if get involved in any lawsuits in connection with their status, courts will not adjudicate the disputes on the basis of *Hong Kong Ordinances*, but the *Qing Code*.

Moreover, the New Territories was leased to Britain in 1898 for 99 years. The native residents of the New Territories have adhered to the customary rules to settle disputes over the inheritance of land and the inheritance of land and estate is still patrilineal, a tradition by which patrimony is inherited by the male lineage. In 1994 the Legislative Council passed the *New Territories Land (Exemption) Ordinance* which allows the native women of the New Territories to have equal succession right as men. However, for those natives who had been deceased before the ordinance was passed in 1994, the courts should still adjudicate the disputes in accordance with the *Qing Code*.

The rulings of courts exerts great influence on inheritance matters in the New Territories. After 1994, two contradictory verdicts aroused concerns about the possibility of protecting women's right in the modern society by invoking the *Qing Code* which is oriented towards male interests. This is, indeed, a unique phenomenon to Hong Kong.<sup>1</sup>

The two cases mentioned above are: the case of LIU Ying Lan v LIU Tung Yiu and other (hereafter "LIU case"), in which the court ruled that the daughter was entitled to inherit her father's patrimony; and the case of TSANG Yuet Mui v WAN On and other (hereafter "TSANG case"), in which the paternal nephews was entitled to inherit the uncle's patrimony.

## 2. The Daughter to Inherit Patrimony on the Basis of the *Qing Code*

LIU Sau Tseung, the father of the plaintiff LIU Ying Lan, was a native resident in New Territories. He, without any son, had two daughters, Ying Lan and Ying Kwai. One of his brothers had three sons, of whom the eldest was the first defendant LIU Tung Yiu. LIU Sau Tseung and his wife respectively passed away in 1943 and 1987, and left a small piece of land. According to the customs, his two daughters,

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<sup>1</sup> I would like to thank Mr David Tang, Barrister-at-law and counsel of Tsang Yuet Mui, for providing the case and explaining the related legal issues in the case.

respectively married in 1949 and 1958, have no inheritance right. Therefore LIU Tung Yiu applied, to the District Office, for registration as successor to the land on the grounds that he was the eldest paternal nephew, and he should be appointed to continue the succession. LIU Ying Lan appealed and the dispute was adjudicated in accordance with the *Qing Code*. The Court of First Instance ruled against the nephew based on 88(2), *Qing Code*, which states that "in the event of a family becoming extinct for want of legal successors, the daughters shall be entitled to the property".(Jamieson's, p.17) The judge denied LIU Tung Yiu's eligibility for succession to ancestral worship, and then denied his eligibility for succession to property as well. The judge decided that the household had become extinct and therefore the property was turned over to his daughters. The nephew made an appeal, but the three judges of the Court of Appeal ruled unanimously that he was not entitled to succeed LIU Sau Tseung.(SOO(2015))

LIU case is an important precedent in several aspects. First, the difference between succession to ancestral worship and succession to property is clarified anew on the basis of the *Qing Code*. Secondly, although women are not entitled to succeed to ancestral worship, they are entitled to succeed to property, which gives greater scope to the *Qing Code* for protecting women's inheritance right. Thirdly, the paternal nephews can no longer take over their deceased uncles' property easily through such means as transfer of land title and posthumous adoption. The District Offices are thus very cautious in handling application for transfer of land title originally owned by deceased uncles who have no male offspring. Then, the Tsang case in this paper arises.

### **3. The Paternal Nephew to Inherit Patrimony on the Basis of the *Qing Code***

The plaintiff, TSANG Yuet Mui(hereafter "TSANG") was the wife of TANG Yip Sang(hereafter "TANG") and his personal representative, while defendants were WAN On, as the personal representative of the estate of his wife TANG Yung, and TANG Wah Tai. The property in dispute includes 10 lots of rural land in Mui Wo. TANG Yung, CHONG Fu Tai(hereafter "CHONG")'s eldest daughter, already passed away, and her husband WAN On and CHONG 's second daughter, TANG Wah Tai, were both unwilling to attend the hearing.(Judgment in the Tsang case, para.29)

TANG Tin Yau, the husband of CHONG, passed away during the Japanese occupation of Hong Kong(1941-1945). CHONG bought five lots of land in Mui Wo in 1946, and inherited three lots from her late father-in-law and another three lots from her late husband in July 1948. In total CHONG owned 11 lots. On 8 December 1948, CHONG transferred half of the title of 10 lots of land to TANG, her late husband's nephew. Since then 10 lots of land were jointly owned by CHONG and TANG. Lot No 128B in DD1 was the only lot of land not included in the transfer. The two daughters both got married in the 1950s. CHONG passed away in 1969 and Tang in 1997. As the widow of TANG, TSANG inherited the patrimony of TANG in 2007, including half of the land title mentioned above. CHONG's second daughter, TANG Wah Tai, applied for the Letter of Administration regarding her late mother's patrimony to no avail. TSANG also failed to obtain the other half of the land title owned by CHONG because the District Office, adhering to the adjudication of the court in the LIU case in 2003, did not allow TANG to obtain his aunt's land title. The Court ruled that TSANG, the widow of the paternal nephew, had the inheritance right to the aunt's title of the 10 lots of land, and the result was in the paternal nephew's

favour.

TSANG's counsel raised the point that besides being the paternal nephew of TANG Tin Yau and CHONG, TANG was also their adopted son. This status made TANG different from that of LIU Tung Yiu. As the adopted son, then TANG was entitled to succeed to CHONG's estate, and in accordance with the law, TSANG was entitled to take over the estate that TANG had obtained from the his family. Therefore the other half of the land title should belong to TSANG. The problem is that TSANG could not prove that the adoption was a fact because there was neither any witness nor evidence to support this claim.(Judgment, paragraph 26)<sup>2</sup> TSANG claimed that she was not yet married to TANG when TANG was adopted and thus she had no knowledge of it. What TSANG depended on was the fact of the transfer of land title to TANG, and the opinions put forward by the expert witness. The transfer of land title was a crucial factor.

TSANG's counsel also put forward the following arguments to support that TANG had been adopted:

- (1) Tang, throughout his whole life, offered ancestral worship to TANG Tin Yau and performed his duty of grave sweeping.
- (2) TANG and TSANG continued to cultivate CHONG's land after her decease.
- (3) The transfer of land title in 1948 was a halfway succession tallied with the time of the adoption and it was meant to be a "Deed of Gift" out of "love and affection". CHONG intended to complete the formalities of adoption in stages and avoided the total transfer of land title.
- (4) Considering the fact that CHONG already had two daughters and she still gave half of the land title of 10 lots of land to TANG, such an act of giving must have great significances. Professor Baker agreed that was a strong indication of CHONG's intention to complete the adoption step by step. (Judgment, para.30-31.)

As to the implication of the arrangements for the transfer of land title, the judge made no objection. He thought that this was an inference made on the basis of established facts and also pointed out that during the period from CHONG's death(1969) to TSANG's submission of petition(2012), CHONG's daughters did not make any claim. Thus he believed that the arrangement in 1948 was an indication of adoption, and the adoption should be regarded as a justified fact.(Judgment, para.43&45.). Even so, the judge still expressed his reservation. He took a more reliable position: he agreed that even if there was not any arrangement for adoption, TANG, the only paternal nephew, was the most appropriate person to succeed to the family property. Therefore the regulation that 88(2) was not applicable.(Judgment, para.52-54) The judge needs not consider the point that "the daughters shall be entitled to the property". This brings about a result that the paternal nephew succeeded to the estate. As on one hand, the paternal nephew did not have to face the legal challenge from CHONG's daughters. On the other hand, the arrangement of the transfer established the inference that TANG had been adopted as an heir. Although the judge did not entirely accept that TANG was adopted, he did not oppose to this claim. TSANG has got a well-

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<sup>2</sup> Adoptions should be reported to the ancestral temple because getting an heir for a family was a very important event. The contents of the document included not only the name of the adopted heir, but also the rights and duties of the people concerned. See Liang(2006, 2015).

supported inference to win the trust of the court, and the court did not have any rebuttal to it.

#### 4. The Court's Concern about the Evidence of Adoption

According to the *Household Law* of the *Qing Code* regarding the illegal adoption of an heir, 78(1) states the stipulations for adopting an heir when the patriarch is alive; and 78(2) for adoption of an heir by a widow.

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 the 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 further removed may be chosen, and finally the same family name .....(Jamieson, pp.13-14.)

A widow left without a son and not remarrying shall be entitled to her husband's share of the family property, and it shall rest with the elders of the Family to select the proper relative, and appoint him to the succession; but in the event of her remarrying, all the property and her marriage outfit shall remain in the family of her deceased husband. (Jamieson, pp.13-14)

The village representative testified that TANG was the paternal nephew of TANG Tin Yau, thus to adopt TANG was in conformity to 78(1). The crux of the issue was the evidence of adoption, on which the court put much emphasis. In the LIU case, the paternal nephew's claim to succession relied only on his status as the paternal nephew, while his uncle or aunt never did anything to indicate his adoption as their heir. Therefore he failed. However, CHONG's arrangement for the transfer of land title might be interpreted as an arrangement for adoption. The transfer ought to be an act derived from 78(2) and traditional customs. Of the 10 lots of land, the transfer indicated that TANG succeeded to the land handed down from TANG Tin Yau and his father, and also CHONG. This move partially built up the legal basis for TANG to succeed to the family property and, at the same time, maintained the adopter's control over the property.

The adopted person, being the only male member, would usually inherit the estate of the adopting family. The deed of adoption, if any, sometimes provided a list of properties to which the heir would succeed.<sup>3</sup> Some deeds stated that all the estate would be inherited by the adopted heir and some even emphasized, that "the adopted son and should be treated in this way in accordance with rites". The statements help us understand that it was in compliance with rites and custom that the adopted son was given the guarantee of succeeding to the estate in the deed.(Luoyang, p.253) In other words, the transfer of land title can be deemed an important part of the rites related to adoption.

If the adopting person was a widow, then the adopted son was indisputably the only heir of the family. Therefore to let the adopted son inherit the entire estate was a

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<sup>3</sup> A total of 21 deeds of adoption are included in *Luoyang*, spanning from 1760 to 1962. 11 of these stated that the adopted son would obtain the property.

matter of course. In the deed of adoption made by Mrs Cao, nee Ding, it was stated that "the property and implements are to be administered only by the adopted son and *fenxi*(dividing up) is not allowed".(Luoyang, p.254) The widows were concerned about their rights after the handover of the property. Therefore, to divide up the family property or to apportion the earning were restricted. In another deed, Mrs Mao, nee Jiao, also made the stipulation that all property would be administered by the adopted person, and there should be no dispute.(Luoyang, p.255)

Besides, Mrs Mao, nee Ding, committed herself to hand over all the property, while the adopted son Mao Baodan and his son Mao Taisheng acknowledged in another deed that Mrs Mao had the right to supervise and discipline them. Mrs Mao even kept the right to "petition to the officials".

CHONG did not transfer the land title in full, nor did she transfer the title of all her land. She was either still keeping an eye on the adopted son, or she planned to complete the procedure according to TANG's performance. But the verdict did not reveal why CHONG had not made the final transfer. One lot of land was still kept by CHONG, and this was reserved for making provision for her old age. Again, it was a means of self-protection when elders were dividing up family property. Land registration with the District Office was reliable if no clansmen served as witnesses. The arrangements made by CHONG should be regarded as different means to achieve the same result.

## **5. No Prescribed Procedures of Adoption in the *Qing Code***

The expert witness, pointed out that the *Qing Code* did not prescribe the related rules and procedures for adopting an heir, and has no stipulation on how a widow or head of a clan should carry out.(Judgment, para.34(1)&(2)) We could however find some descriptions of such affairs in novels.

Feng Menglong(1574-1646) described the process in which a landowner, Wang, adopted a carpenter's son. Some arrangements and etiquette are noteworthy:

A banquet was arranged in the hall in which was thronged with relatives and friends. Learning that Zhang and his son had arrived, they all came to greet them. Zhang and his son went to the hall and bowed to them all, and were led to the family temple to make an obeisance. Then Esq and Mrs Wang being invited to be seated in the hall, Zhang Tingxiu came forward, prostrating himself four times and knocking his head on the ground twice at each prostration. Subsequently Tingxiu and Mr and Mrs Zhao(Esq Wang's eldest daughter and son-in-law) bowed to each other, and Tingxiu went inside to exchange greetings with Yu Jie (Wang's second daughter). He then finished greeting the male and female relatives one by one, took his seat and drank wine. He was thereafter renamed as Wang Tingxiu. (Feng, p.404)

Relatives and friends attended the banquet especially for the adoption, and the adopted son was introduced to them. Making obeisance to the family temple meant that the son returned home. Then the adopted son performed the etiquette of four times kneeling and eight times kowtowing to the adopting parents, bowed to the eldest sister and brother-in-law on equal terms, greeted the second sister, met the relatives, and was lastly renamed as Wang Tingxiu. All the steps and etiquette were well

organized in the order of importance. Witnesses in the banquet was the evidence of the adoption, and hence the value of the event.

Reference can also be made to a story in *The Scholars* about a lawsuit of adoption. The widow, nee Zhao intended to adopt a 12-year-old boy who was the fifth son of Yan Dawei, the eldest brother of her late husband. However, Yan would like his second son to be adopted. As a result, the widow brought a lawsuit against Yan. Although Yan had connections with local officials, he failed to get his wish fulfilled. The Magistrate ordered that "the issue should be settled by the decision of the clan and relatives", because they had not been consulted, and the widow did not choose the second son of the eldest branch to be the heir. Consequently, the widow invited clansmen and relatives to a feast. The clan head and the village chief, the brothers of the deceased legal wife of Yan Dayu, the widow's brother and nephew participated. But the meeting turned into a blazing quarrel between Yan and the widow. The clan head made a non-committal report to the Magistrate without causing offence to either party in the dispute. The Magistrate then ruled that "it is up to the widow Zhao to choose an older one or an able one to be adopted" (*The Scholars*, Chapter 6, pp.65-68) and allowed the widow Zhao to exercise the right of appointing an heir. This story shows that in addition to the requirement that the adopted person should belong to an appropriate generation of the clan, the consent of relatives and clan members should be obtained, and the widow herself still had the ultimate power of giving or withholding her endorsement. Of course, in such cases as promoting a concubine to the position as legal wife and getting someone adopted as a heir, the role of coordination played by the clan head.(Ju, pp.18-27) and the participation of the family members and relatives would help the adopted heir obtain recognition.

The story of Mr Lu is also related to adoption. Mr Lu, who was a compiler of the Han Lin Academy, had only a daughter. All his relatives came to attend his funeral and they "discuss the adoption of a son from his clan". The importance of the meeting of family members and relatives is obvious.(*The Scholars*, pp.128-129)

Yet humble as the musical instrument mender Ni was, when he got his son adopted by the entertainer Bao, he went through all the formalities and had all the witnesses and deed of adoption as required:

The Pao family invited Mr. Ni and his son to a feast to draw up the contract for the adoption to be witnessed by the left-hand neighbour Mr. Zhang the draper, and the right-hand neighbour Mr Wang the Chandler. When they had all arrived, the contract was drawn up as follows: ...When the document had been signed by Mr Ni and the two witnesses, Pao Wenqing produced twenty taels and gave them to Mr. Ni, then thanked them all.(*The Scholars*, pp.248-249. *The Scholars*(Trans), pp.277-278)

The two families involved in adoption might be of humble origins, and their clans might have only a few members. But at any rate, feast and witnesses and the deed of adoption were all necessary. Regarding those cases where there were no agreements of parents, clan meetings, deeds of adoption and feasts for adoption, there would be a lack of witnesses and evidence to show the existence of adoption or double succession.

Verbal pledges are not to be relied upon in adoption.<sup>4</sup>

The consensus of the family and relatives was reflected in the deed of adoption. The deed as a symbol of solemnity was usually written on a red cloth, which enabled conservation for a longer duration. The deed included the names of contracting person, adopting person and adopted person, date of the deed, the rights and obligations of the parties, and the signatures of witnesses, and middleman. In the deed of adoption from Mrs Mao, nee Jiao, there were up to 14 persons who put down their names and marked their signatures.(Luoyang, p.255) In the TSANG case, as for the direct evidence of Tang's being adopted, nothing of this sort could be found.<sup>5</sup> Adoption was an important event for the clan and many people would have participated, however, perhaps it was so far back in time that they had already passed away. And more crucially, the two daughters were absent in the lawsuit, so the court could not have their testimony.

## 6. The Importance of Expert Witness

The court and parties sometimes have to handle the dispute with recourse to experts' opinions. Professor Baker was frequently invited to be the expert witness in cases involving the *Qing Code* and Chinese traditional customs. He also provided expert evidence in the LIU case and the TSANG case.

Baker emphasizes that the line of succession of a family should not be broken. The branch of TANG Tin Yau would come to an end if TANG did not succeed him. As the Tangs did not have any family elders to handle the adoption of an heir, thus CHONG had to implement all the tasks on her own. Baker agreed that the transfer of land title was a strong indicator that CHONG was taking steps to adopt TANG as the heir.(Judgment, para.32)

Regarding the District Office's query that Tang's adoption was posthumous, the judge again quoted Baker's opinions. 1. The *Qing Code* laid down only the principles for the adoption of an heir. 2. The appointed heir should, ideally, come from the same clan. 3. The only son, the only appointed heir, and the only candidate for posthumous appointment of an heir would all succeed to the property automatically, so Tang as the closest paternal nephew, was not necessary to have any document or discussion. 4. Daughters succession to the property of an extinct household was a deviation from the basic principle of the *Qing Code*.(Judgment, para.34)

These opinions were advantageous to TANG's succession. It should be noted that Baker's opinions were consistent in various cases, which was noted by the judge.(Judgment, para.38) In the Liu case, Baker, as the expert witness of the paternal nephew, showed pointed out that a paternal nephew usually would not succeed to his father and his uncle at the same time, but the paternal nephew was entitled to succeed his uncle because there was not any feasible option in the culture other than the paternal nephew.(Judgment, para.32)

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<sup>4</sup> In the novel, the hero was the first-person narrator, "I". Although the hero agreed to have double succession, it is a mere empty agreement without any document and formality. The matter ended up with nothing definite. See Wu(1978), p.117, pp.167-172.

<sup>5</sup> The conclusion of a contract is usually shouldered by common people. See Shiga, pp.79-80.

The judges of the LIU case ruled against the paternal nephew. The judges emphasized two points: firstly, the paternal nephew should not inherit both his father's property and his uncle's; and secondly, it was impossible for the paternal nephew to get adopted posthumously because it was against the Adoption Ordinance(1972). Therefore, the court did not deny the expert opinion, but the paternal nephew did not satisfy the court's requirement.

The judge also noted Baker's opinions that paternal nephew is the appropriate candidate for succession to his uncle's estate was agreed by both sides in other case.<sup>6</sup> The crucial point in dispute was whether the deceased had adopted the paternal nephew as the heir. Baker insisted that the estate should be handed down to the nephew of the paternal line after the widow's death. The judge agreed but he pointed out that the situation of a case of daughters versus paternal nephews was different from that of a case of a paternal nephew versus the government because the government usually would not forfeit a deceased person's estate on the basis of 88(2). (Judgment, para.51)

Baker's opinions in all these different cases were consistent, and this shows his confidence and professionalism in his research. His interpretations of and explanations for the *Qing Code* command the respect of the court.

## 7. Concluding Remarks

The *New Territories Land (Exemption) Ordinance* (1994) and the adjudication for the LIU case(2003) were originally expected to be a favourable development for the women in the New Territories to inherit their parents' estate, but the adjudication for the TSANG case was advantageous to the paternal nephew.

There were some loopholes in the *Qing Code* which attached great importance to the restoration of the broken line of succession, but some details were overlooked. As a result, the judges had to resort to expert opinions. *Qing Code* emphasized the importance of restoring the broken line, yet it allowed the household to be extinct.<sup>7</sup> This is another option that the judges have to consider.

The precedent cases form an important part of the Common Law. Their judgment made by the court higher in the hierarchy, is extremely valuable for consultation. Judges and lawyers must make full use of the precedent cases. Moreover, evidence and procedures are important. Courts emphasizes evidence and only accept statements based on them. Any disputes, requests and evidence must be presented to courts in accordance with a definite procedure.

The courts in HK will certainly put more emphasis on the idea of the rules of law. A judge will consider whether the case of "restoration" is in compliance with the law, and whether the evidence presented to the court can be accepted.<sup>8</sup> More frequently,

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<sup>6</sup> HCA 1348/2000. The Hon Mr Justice Andrew CHEUNG Kui-nung was also the judge of the first trial in LIU case.

<sup>7</sup> Xue Yunsheng thinks that the adoption of an heir was intended for elites, such as scholars, officials and those in the rank of nobility, and not for common people. See Xue, p.177.

<sup>8</sup> Qing officials consider the factors of affection and reason beyond the realm of law. See Shiga,

to make the court accepts the existence of a relationship between the adopted and the adopting parties is more important than "restoring the broken line of succession". The courts will not be lenient with any party merely because of no heir to restore the broken paternal line. Every case is different. In the TSANG case, the daughters were absent from litigation, then the paternal nephew won. However, it does not mean that a paternal nephew has an indisputable right to succession because the paternal nephew did not convince the judge merely by reason of his status as paternal nephew. Lastly, as law based on Confucianism, *Qing Code* is never an advocate of the gender equality. The cases mentioned in this paper indicated that only when women consciously uphold their right, would the court then have opportunity to consider it. If women do nothing to protect their right, they will lose it.

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