

CHINESE WILLS UNDER THE LAWS OF HONG KONG

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Introduction

While wills have attracted popular research amongst those in search of their family history, as material for academic research they have yet to be fully exploited. As a source of empirical data, the work of Finch et al¹ on inheritance and families in Britain has now placed wills firmly within the scope of socio-legal research. Their work is founded on the value of wills as documentary evidence. According to them, wills repay study because they are simultaneously private and public documents. The private nature of wills stems from the use of the will by the testator to express his personal wishes. Through this, information about the private sphere of the testator's life is revealed. The public nature of wills is derived from the legal process of probate. Having passed through probate, the will is delivered into the public domain so that it is accessible to all. Finch et al also point out that the process of probate, itself concerned with authenticity, provides probated wills with a threshold level of reliability as documents sufficient for the purposes of socio-legal study.

In Hong Kong, although wills have been similarly under-exploited in academic research, one category of wills, those of Chinese testators, has captured academic interest. In the particular circumstances of Hong Kong, the fact that research was not conducted earlier left a gap in the knowledge of the operation of one part of the law's accommodation of Chinese law and custom. Although the law assumed, as long ago as 1856, that the Chinese might make wills and that such wills might be fundamentally different from those which English law would recognise as valid, whether these assumptions were true remained, until more recently, unconfirmed. Those involved in the process of probate would naturally have known, as a matter of experience, whether or not the Chinese left wills but this practical knowledge was not studied or described for the benefit of others. Academic awareness of Chinese wills dates only from the 1970s when a collection of nineteenth-century wills was found during the

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¹ Janet Finch, Jennifer Mason, Judith Masson, Lorraine Wallis, and Lynne Hayes, *Wills, Inheritance, and Families* (Oxford: Oxford University Press, 1996).

demolition of the old Naval Dockyard. The surprisingly large number of wills of Chinese testators found in this collection was studied by the historian Carl Smith and by Dafydd Evans, former Dean of the Faculty of Law, University of Hong Kong. Smith viewed the wills as a source of data on the Chinese in Hong Kong, of wide relevance to 'anthropological, economic, social, legal and religious studies.'² Wills were particularly valuable where other sources of information did not exist or were incomplete. The richness of these Chinese wills was further enhanced by the fact that they were rarely drafted by solicitors and therefore were likely to be informal in style. This richness is brought out in Smith's published work on the subject.³ Evans had initially hoped that by studying the wills of the Chinese, the community's gradual adaptation to the western legal system imposed upon them might be traced. The influx of immigrants to Hong Kong soon made such a task impossible, although the wills of Chinese continued to be a valuable research resource.⁴

This article is in two parts. The first part is a description of and commentary on the form, content, features, and other aspects of Chinese wills admitted to probate this century. This is done to provide continuity with the research of Smith and Evans and a comparison of Chinese wills over the nineteenth and twentieth centuries. This also facilitates the examination of the treatment of Chinese wills under the laws of Hong Kong in the second part.

The material upon which this article is based is derived from Record Series 96 (HKRS 96), held at the Hong Kong Public Records Office. HKRS 96 is a collection of petitions for probate and applications for grants of administration. The collection begins early this century but contains few files from the period before 1946. This, and the fact that my study of the files did not extend further than the end of 1963, explains why much of the information in this paper is from the 1950s and early 1960s.⁵ The HKRS 96 files often contain information relating to the determination, interpretation, and application of law to Chinese wills. This is in contrast to HKRS 144, the collection of probated wills that includes the nineteenth century wills studied by Smith and Evans, which is unaccompanied by other information. Whilst studying HKRS 144 would provide more direct access to a greater number of Chinese wills, the value of HKRS 96 lies in the visibility of the decision-making process and any statement of the principles upon which those decisions were made. The files contain expert evidence on the validity of wills and comments by the officers of the Probate Registry expressing their understandings, beliefs, and doubts about the law. Although the wills themselves were not usually retained in the files,

² 'Hong Kong Chinese Wills 1850-1890' in Carl T Smith, *A Sense of History* (Hong Kong: Hong Kong University Press, 1995), pp 3-37, 37.

³ *Ibid.*

⁴ D M E Evans, "'Fearing Verbal Words": Chinese Testaments in British Hong Kong,' unpublished paper presented to a symposium on Chinese and European concepts of law, Hong Kong 1986.

⁵ This study does not include files after 1963.

English translations were kept. In addition, copies of the wills in Chinese were occasionally found in the files. Subject to checking the Chinese will or the copy thereof, I have used the translations for this article, since the decisions on probate were usually made on the will in its English translation.

As a source of data, wills are not without their limitations. For example, as Finch et al note, they cannot provide reliable information on family size since there is no way of telling which family members the testator has left out. As always, however, the significance of the limitation depends on the use to which the data are put. Within the objectives of this article and its non-statistical approach to the data, the limitations of wills are not material.

Throughout this article I have used the term 'Chinese will' as a reference to any testamentary document left by a Chinese testator which, when presented for probate, raised the question of validity, usually under the special provisions of the law. As will be seen in the second part of this article, the contours of the law under which many of these wills were admitted to probate came to be drawn only through the gradual accumulation of practice in the Probate Registry. I have cited the material from HKRS 96 using the D & S (deposit and serial) number alone. All of the serial numbers mentioned in this paper relate to HKRS 96 Deposit 1.

The wills: characteristics and contents

Length of the wills

Most of the Chinese wills encountered were very brief. One of the briefest said only the following: '(I) am very ill and unable to walk. Chung Ngan is authorised to handle everything after my death and to take over (my) estate.'⁶ The will annexed to a petition for administration in 8053 contained only slightly more lengthy instructions: 'I hereby give the ownership of the property of the 3rd floor in the rear portion of No 24D, Pak Tai Street, Kowloon, Hong Kong to my nephew (two characters illegible) Chan Chi Ming. (This is) delivered for (his) safekeeping as proof.' While most wills were longer than these, only a few were exceptionally lengthy, containing complex and detailed arrangements.

In a small number of cases, the testator left more than one document. For example, in 3239,⁷ the testator executed four separate documents. The first two were executed on 22 February 1944, followed by the third on the 17 June 1945 and the last document on 23 June 1945. The testator used each of the first three documents to distribute a single property. Thus the first gave property at 133 Thompson Road to two named concubines of the testator, the second left 210

⁶ See 8050(1) and (2).

⁷ See also 8666 where the testator left five wills.

Hennessy Road to his daughter-in-law, and the third will gave 183 Johnston Road to two daughters. The fourth covered all movable and immovable property apart from the immovable property mentioned in the first three documents, which the testator gave to his son and another daughter.

Opening lines

Typically, a testator began his will by identifying himself as the maker of the will.⁸ Unless the testator summarised the major events of his life, wills rarely mentioned the testator's occupation. Nor was it common for his age at the time of writing the will to be mentioned.⁹ Occasionally a testator referred to his native origins, as in 18 where the testator described himself as 'a native of Tung Wah Lane of Pak Shui Heung in the County of Toishan in the Province of Kwangtung.'

Reasons for making the will

The will maker having been identified, it was common for the reason for making the will at that particular time to be mentioned. The most common reason was illness and/or advanced age. Although some testators were prepared to be more direct in referring to death, phrases such as '[b]eing advanced in years and frequently ill, I am apprehensive of the unexpected'¹⁰ and 'recovery is difficult'¹¹ were more common. Sometimes, more colourful or figurative language was used, perhaps to avoid direct references to death. One testator described his contemporary situation thus, '[b]eing 73 years old I am like a candle flickering in the wind.'¹² In 7777(1) and (2) the testator cited old age and the fact that he was about to embark on a long journey as reasons for preparing his will. The overriding concern amongst testators was the imminence of death and the desire for their wishes to be recorded as a matter of urgency.¹³ Not all testators died soon after executing wills and there were, of course, some testators who executed wills in circumstances where death was not imminent, such as in 7362, where the testator declared, '[w]hile I am strong and healthy I must provide against any emergency. I make this Will beforehand in case the unexpected may befall me.' Perhaps the very fact that the testator provides some explanation of why the will is made 'before-hand' is an indication that his way of thinking was unorthodox. This testator survived for over twenty years after the execution of the will.¹⁴

⁸ An opening sentence such as the one in 8212 is typical: 'The Maker of this Will is Cheung Man Pan.' For similar examples see 9297, 7872, 7362, 6796, 7057, 5166, 3239, 8212.

⁹ An exception is 10429 – the maker of the will was aged 88 according to the will.

¹⁰ 7057; see also 7872, 9297, 6796, 10429.

¹¹ 8212 and 5166.

¹² 3239.

¹³ 5434, 9868, 10429, 9214, 8050(1) and (2), 8053, 7318, 6051, 6299, 5166.

¹⁴ See also 7057 where the testator, a merchant, was also conscious of making his will 'in advance' to direct his survivors. He died just over a year later.

Closing lines

The wills commonly closed with a simple declaration such as 'These are my directions,'¹⁵ a longer version of which was 'This Will is my decision and direction, which shall not be changed by anybody. This is my Will.'¹⁶

There was a concern to have their directions and decisions recorded so as to furnish evidence proving those same decisions and directions. Phrases such as 'this will is made as proof,'¹⁷ or slightly more sophisticated lines such as 'This will in one document is specially made, to be kept for ever as proof,'¹⁸ or 'Lest oral words should bear no evidence this is written to be kept (as proof).'¹⁹ Some of the wills suggest that this concern arose from a fear that their descendants would argue over their instructions. A Yaumati ferryman precedes the statement of proof with the words, 'As I fear that other relatives of (or) friends may misunderstand (me) and disputes might arise.'²⁰

The emphasis on the will as proof or evidence of the testator's wishes is significant. It indicates that the instructions contained in the will may already have been conveyed orally or made known to the beneficiaries, trustees, and executors concerned. In 9283, for example, the will²¹ itself speaks of an arrangement made in the past, the will being 'specially written to avoid future dispute.'²²

Most wills were signed by the testator. The use of thumbprints was rare, suggesting that most testators were literate.

Writing wills

Some Chinese wills were holographic wills, ie written in the hand of the testator and dated and signed by the testator.²³ Others were written by someone to whom the testator either explained or dictated his wishes, usually either because the testator felt insufficiently literate or was in extremis. The affirmations filed in order to obtain probate tell of how some wills came to be written. In 6299, Melville Edward Ives, a solicitor, affirmed that at about 5:30 pm on 16 December 1956, he received a telephone call from one Tong Man-leong asking him to attend at Queen Mary Hospital to draw up the will of the testator as a matter of urgency. Mr Ives attended the testator together with his partner Peter Mo and a clerk from the firm. The will was typed out in draft form at the hospital on a portable typewriter. In an affirmation filed partly to explain why the will was produced on poor type, it was explained,

¹⁵ 6796, 6999.

¹⁶ 6051. Rather unusually and less formally, one testator ended his will with the words, 'Goodbye to you all, and wishing you well. Last salute from Siu Fung. Night of the 15th of June' (8666).

¹⁷ 9868; see also 6119(1) and (2).

¹⁸ 8212.

¹⁹ 6894.

²⁰ 9868.

²¹ This will was not admitted to probate.

²² See also the terms of the codicil in *Lau Yue-kui v Estate of Lau Leung-chau, decd* [1998] HKLRD 579, 588.

²³ See 7573 for an example of such a will.

That the said Testator although appeared to have all his faculties was nevertheless in a state of exhaustion and furthermore, it was expected that his life would expire at any moment. It was therefore decided as the form of the draft properly set out the Testator's wishes to obtain the signature of the Testator to the draft Will as drawn and not worry the Testator further by re-typing the Will and re-executing the same ...

6 That the said Testator died the same night.

In 4433, the writer of the will, having stated his occupation and that he had been well acquainted with the deceased over a period of fifteen years, affirmed as follows:

- 3 On or about the 8th day of August 1950 I was summoned by the said ... deceased, to her residence at No 100, Queen's Road West, Second floor Victoria aforesaid where the said deceased was lying ill.
- 4 She informed me that she did not feel sufficiently well to draw up her own Will and so requested me to take instructions from her in respect thereof.
- 5 I took her instructions accordingly and after I had done so I reviewed the matter with her. I then prepared the Will in her presence. I read over the Will and explained the contents to the said deceased ...
- 6 She executed the said Will by subscribing her signature thereon in the presence of myself and one Lee Tse Ming. At her request the said Lee Tse Ming and I subscribed in her presence our respective signatures to the said Will ...

The affirmations filed in connection with the grant of probate of the will of one Tong Yin,²⁴ a retired merchant who lived in Causeway Bay, show that his daughter wrote out the will 'in accordance with the oral instruction' of her father at his home. Having written the will 'the contents thereof were read by [her] to the deceased who read and approved the same and thereupon executed the said Will by signing his name ... at the foot.' A witness also signed the will in the presence of the testator.

Wills in English of Chinese testators

Some Chinese testators chose to execute their wills in English. Several observations may be made in relation to these wills. First, a number of the wills were executed by testators whose understanding of English was so limited as to require the will to be interpreted to them before they appended their signatures to the testaments. In 8449, a merchant whose family included three concubines

²⁴ 5092.

executed a will which had been drafted by the firm of C Y Kwan in English after it had been interpreted in Chinese to him. Similarly, in 7370, a widow had her will drawn up by solicitors and interpreted to her before she signed it.²⁵ In 7054, the will, drafted by solicitors, contained no interpretation clause at its end, presumably because the deceased, described as a school teacher, understood English. Second, most of the wills in English were not home-made, holographic ones, but wills drafted by solicitors. In one unusual example of a home-made will written in English,²⁶ the deceased, a woman, wrote out a simple testament in which she gave away her 'earthly possessions' to her four children Arnold, Reffie, Sing, and Blossom. Her earthly possessions included six houses in Shanghai, a flat in Hong Kong, a diamond ring, a jade ring, and a pair of diamond earrings. The jewellery mentioned was left to her daughter Blossom. The will was signed 'mother.'

Third, there was no necessary correlation between the use of English and progressive attitudes of the testator. There are several examples of wills in English where adherence to traditional patterns of distribution can be seen. One example is the will in 6871 which was drafted in English by a solicitor but interpreted in Chinese to the testator prior to execution. The will provided for the division of the estate only upon the death or marriage of all his daughters, whichever was the earlier. The estate was then to be divided between his wife and sons equally. The daughters were to be given dowries only, and a monthly income until their marriage or death.

Fourth, unsurprisingly, a perusal of the occupations of the testators using English shows up no ropemen, laundrymen, or cooks, but grocery merchants, merchants,²⁷ solicitor,²⁸ and school teachers.²⁹

Finally, the fact that the will was in English and drafted with the help of a solicitor did not automatically mean that it was more complex or more sophisticated in the use of trusts etc. Indeed, some wills in English were very brief.³⁰ Nor did the use of solicitors imply forward planning on the part of the testator as some of these wills were deathbed wills.

Life stories

As highlighted by Carl Smith, some testators included a summary of their lives in their wills. The life stories usually spoke of how much they had toiled to build up their estates. The review of the testator's life was done very much as part of a build-up to instructing their descendant or descendants to look after the family wealth. Thus in 6999 a testator whose large estate included several properties and a family home in Honam, described his life as follows:

²⁵ Other examples can be found in 6871 and 3796.

²⁶ 7782(1) and (2).

²⁷ 7611.

²⁸ 6299.

²⁹ 7054.

³⁰ See eg 7611.

Blessed with the virtues of my ancestors I have succeeded in building up the family (estate) with much labour. I remember while I was young I could only manage to keep my body and soul together after having undergone much hardship and faced ... starvation. After studying for a period of 3 years in a school I left and worked as a servant boy to some people. When I was 14 years old I joined the service of the 'John Bird'³¹ Foreign Firm as an employee. At that time my stock of knowledge was very limited and my pay was very low. Though unintelligent I made up the drawback [sic] by working diligently. I led an honest life and lived in a frugal manner. Internally I maintained my family and externally I held social intercourse. I spent several tens of years in building up the estate before I could acquire the present wealth. After having apportioned the estate into certain equal shares as described separately I have reserved the following property acquired by me to form the sacrificial fund of the late ancestor Pui Cheung. Should there leave any balance after applying the annual income derived from the said fund in the form of rents and interests towards the expenses of worshipping ancestors and graves all round the year and toward the payment of taxes, the same shall be divided between the descendants as enumerated hereunder or be accumulated. You must imitate the example of my diligence and should not indulge in laziness or negligence; and must follow the frugal way of mine and should not be haughty and extravagant. You must ... remember the hardships with which I have built up the estate and the difficulties in maintaining the same. You must not entertain any ambitious idea and should appreciate my cherished aim. Be diligent and frugal as I have been and do not neglect anything. Maintain the estate handed down by your ancestors and strengthen the foundation of the same for the benefit of the future age. Be modest and respectful both internally and ... externally and keep on good term [sic] with your neighbours. By so doing you will make your family prosperous and add glories to your ancestors. Endeavour to attain all these which is my earnest hope. These are my directions.

Attitudes and values

As alluded to above, many testators emphasised hard work and diligence as imperatives, sometimes pointing to themselves as good examples. Hard work and living a frugal life were seen as necessary virtues³² if hardship and a disadvantaged position in life were to be overcome. Where the testator

³¹ This is the English transliteration of Chinese characters. It is not thought that a firm called 'John Bird' existed.

³² In 6608 the testator at first directed that the one seventh share of the residue given to his eleventh son be held by the executors until they were satisfied that the son was capable of managing his share of the estate. Later when the testator's displeasure in the son increased, he altered his will to reduce the share by half. This son was described by the expert on Chinese customary law as a 'person of lazy disposition, uninterested in his work, dishonest in word and deed, unable to discriminate between right and wrong and hopeless in the management of financial matters.'

attributes his accumulated wealth to his own sweat and simple lifestyle, the instruction to his survivors to follow in his ways is coupled with the need to maintain, and preferably expand, the family property so that the generation after could be handed an even larger estate. Testators feared the dissipation of family wealth by lazy and extravagant descendants.³³

Family harmony was another value emphasised, particularly when testators thought that their departure as head of the family and the distribution of the property through the will would be accompanied by intra-familial arguments. As 'interlocking branches' and as being 'from the same breath' sons and daughters should live in harmony with one another,³⁴ particularly in carrying out the directions contained in the will. In seeking to ensure harmony, one testator included in her will the provision for the disentitling of any son who challenged her will through legal proceedings.³⁵

Occasionally, testators pleaded with a particular family member to take care of another, more vulnerable member of the family. Thus one testator instructed his wife 'to perform her duty as a mother to the best of her ability and bring up the children' and that she was to 'take more care of the crippled grandchild.'³⁶ In another, the testator was concerned for his concubine, and insisted that his grandchildren must faithfully support her.³⁷

Implicit in a will submitted as evidence of an adoption in 4379 was the high value attached to education. In a will of some length and complexity drafted by solicitors in English, it was stated that, if at any time the number of trustees and executors was reduced to two, the two were to appoint a trustee or trustees from among the testator's offspring but they were to choose 'those who had been educated either in English or Chinese Schools and have passed the Senior Cambridge or its equivalent over those who have not been so educated. Preference shall of course be given to those who have taken degrees at any University either in Europe or Asia.' In the event of a surplus after distribution, the testator directed that such monies were to be invested in landed properties, and the properties put to worshipping the testator, such expenditure to be controlled by two of his offspring. 'They will be elected by my other offspring, the Elder in age and higher in the family tree and *who has a higher educational qualification shall be preferred* [my emphasis] to others.' The testator's interest in education was further evidenced by the various bequests to schools.

³³ A particularly full exposition of these values and attitudes can be found in 7872: 'All you sons and daughters should jointly observe (the will) and shall not dispute and stick to his or her own views. (You) should realize I have experienced difficulties throughout my life and that it is not easy to establish businesses. You must be diligent and careful. Do not be lazy and forget (my instructions) so that (you) may keep your ancestor's property.'

³⁴ 7777(1) and (2).

³⁵ 7370.

³⁶ 8183.

³⁷ 10429.

Some testators provided the means for ancestor worship by setting aside fields, land, and houses.³⁸ In some wills a particular ancestor was mentioned and in others the ancestors generally were mentioned. In 4379, the testator set aside the surplus after distribution for investment in land, the profits from which were to be put to the worship of the testator himself.

Funeral and burial arrangements

Leaving instructions in the will for funeral and burial arrangements was not common but some testators, such as the one in 8375, did leave special instructions for the reservation of \$6,000 for funeral expenses and for paying final medical expenses. He asked that as little as possible be spent on the funeral and burial, and that after cremation his ashes should be thrown into the sea. Further to that, he asked that a tablet of his occupy a permanent seat at a named temple. Any sum remaining was to be spent on the chanting of liturgy. Another testator left instructions to the trustees to apply the proceeds of the sale of property to, inter alia, the funeral expenses of his father, wife, concubine, and mother-in-law.³⁹

In his will, a wealthy testator residing in Kuala Lumpur⁴⁰ asked that, as soon as practicable and within ten years of his death, his trustees obtain permission from the proper authorities to exhume his body and have his remains re-interred permanently in his native village of Taipo. \$20,000 was left for these purposes. \$10,000 was also set aside for his wife's burial expenses.

Instructions on adoption of heirs

Wills were sometimes used by testators to ensure heirs for their sons.⁴¹ Instances of similar concern for married daughters were not encountered. Testators used the will to leave instructions on adoptions either because they had not previously made the necessary arrangements or because the testator's sons were at that time still young.

In 7872 the executors, who were the testator's third, fifth, and ninth sons, were to choose an heir for the fourth son amongst the sons of the testator's second son. This heir was then to receive seventeen parts of the estate. Furthermore, they were to choose for his eighth son a son from the ninth son. This chosen heir was also to get seventeen parts of the estate.

In 9283, the testator explains that, as his fifth son had died, one of the sons of Ma Wai Sheung shall be selected in future to be the heir of the fifth son

³⁸ 7777(1) and (2).

³⁹ See 6364.

⁴⁰ 4379.

⁴¹ See *Cheng Chung-pong v Wong Ching* [1946-72] HKC 544, where Briggs J construed a provision in a will as giving the trustees a power of appointment to appoint from a limited class rather than a power to adopt an heir posthumously. Briggs J remarks that he was not referred to any cases of posthumous adoption through a will. Any such provision in a will would not, in his view, necessarily be against public policy.

'[i]f none can be selected from the sons of Ma Wai Fun, Ma Wai Kui and Ma Wai Chiu respectively according to order.' Although not explicit in the will, these were probably the testator's first four sons. In his rather brief will, this testator, a merchant, mentions having earlier obtained the prior agreement of the executors to act on his wishes in this matter.⁴²

Another example of a posthumous adoption is file 4379,⁴³ where the testator had adopted two sons for his deceased son, but further adoptions were anticipated since his will made reference to 'any other adopted son of Yong Ken Lin (son of the deceased) if any given by each of my daughters Yong Soong Mei, Yong Pat Fah, Yong Ngan Fei and Yong Foo Seong.' The next paragraph makes it clear that the testator saw the possibility of adding up to four adopted sons to his deceased son's line — one from each of the daughters. The point worth observing here is that the adoptees were to come from the daughters of the testator. This is a surprising arrangement, because daughters, once married, are no longer a part of the family, and their children are likewise not members of their mother's natal family. Also interesting is that the testator was interested in adopting more than one son for the deceased son.

There were no cases of daughters being posthumously or otherwise adopted in the files I examined. This was a continuation of the pattern found by Smith. In the 302 wills of the period studied by Smith, there was no incidence of the posthumous adoption of daughters. Although seven adopted daughters were mentioned, this was less than half of the nineteen adopted sons and posthumously adopted sons.⁴⁴

Wills of women

Most of the women testators were widows,⁴⁵ married women⁴⁶ making up a lesser category of testatrices. It is difficult to discern any special features in the circumstances of these women that may have led them to become a part of this minority of testators. Two of them had connections with the Christian faith, which suggests that they were educated women. The will in 9510(1) and (2) was written by Rev Ho Sum-yu and witnessed by the testator's brother, a medical practitioner. The deceased in 5186 had her will witnessed by the Pastor of St Paul's Church and Dr Katie Woo, the principal of St Paul's College. This will was executed in English, and interpreted to the testator by one of the witnesses. It was later the subject of litigation between the Bishop of Victoria,

⁴² Note that this document was later superseded by another properly attested document, and probate was granted on the basis of this will. Thus the validity of this document as a will was never really determined.

⁴³ As evidence of the adoption, a will was filed.

⁴⁴ Twenty if the one ambiguously termed 'foster son' is included.

⁴⁵ 9322, 7370, 5186, 4433, and 3796.

⁴⁶ 8375, 9510(1) and (2), and 5436.

executor and trustee under the will in English, and Ho Wai-ying, the executrix under a second inconsistent will executed in Chinese.⁴⁷

Other testatrices had particular concerns or assets. The widow in 9322 was concerned for her grandson and granddaughter, her two sons having predeceased her. Her grandson being only 17 years old at the time the will was executed, the testator felt there was some uncertainty as to whether he would turn out to be a 'good man.' She thus appointed her late husband's younger brother to become the sole executor and trustee of her will until the grandson reached the age of 30, whereupon the grandson was to be handed the estate. In 5436 the testator owned two houses and some shares in Wah Ying Cheung Company. She wanted the income from these to be used in educating her children. Her estate was to be divided between her husband and her son after the marriage of her daughters.

Distribution and management of the estate

Patterns of distribution are difficult to discern and would require greater statistical research. However, three tentative observations may be made. First, daughters tended to be given maintenance until their marriage and, upon their marriage, a dowry.⁴⁸ They were not often given property or other assets outright. Second, the testator's widow and concubines were often also given maintenance until death or a share of the estate.⁴⁹ In some cases, the testator spelt out in the will that these women would forfeit their portions or living expenses through unchastity or remarriage. In 7454 the share of the wives was to become part of the residue in the event of death or remarriage. In 7512, the one-fifteenth portion of the estate given to each of the concubines was subject to the proviso that their shares were to be forfeited in the event of their remarriage, unchastity, or death before the period of distribution. The shares forfeited would go to their children. One concubine had predeceased the testator, while another remarried after the death of the testator. Remarriage or unchastity after the distribution was not addressed in the will. So long as the concubines had not remarried and remained chaste, they were entitled to maintenance.⁵⁰ In 8989(1) and (2) there was a discussion of the phrase

⁴⁷ *Ho Wai-ying v Bishop of Victoria Hong Kong*, Action No 1 of 1954 (alas, no trace of this judgment has been found). The Chinese will was witnessed by the solicitor Peter Mo, dated 14 July 1950, while the will in English was dated 13 December 1946.

⁴⁸ See 8449. One of the testator's daughters was to be given the net income from a flat until her death. No reasons such as illness or disability appear in the will to indicate why this daughter was singled out for different treatment.

⁴⁹ See 6364 for an example of a concubine (the testator's third concubine) sharing the residue with seven out of eight of the testator's sons; and 9297 — a merchant left two properties in Wanchai to his wife whom he appointed executrix in a very brief will.

⁵⁰ See also 7512, 8950 (the testator's concubine was allowed to live rent free in the 'rear cubicle on the second floor' of a particular building in Kowloon so long as she did not remarry), and 8449 — one concubine was to receive the sum of \$400.00 each month 'so long as she shall not remarry and shall remain chaste.' Another concubine was given the net income of the testator's flat, qualified in the same way.

'remarries losing her chastity' in the translation of a will in Chinese. The court translator explained that this should not be interpreted as two separate conditions, but as one and the same condition which required the wife to remain faithful. Here the kit fat widow had cohabited with someone after the death of the deceased. Counsel gave his view that this disentitled her from her interest under the will.

Third, there are examples of a testator delaying the division and distribution of the estate until later, usually where his children were still young. In one example, the estate was to be divided only after the marriage of all of the testator's sons and daughters.⁵¹ In another, the estate was not to be divided until the testator's mother, wife, and concubine had died and the youngest son or daughter had reached the age of 21. In yet another, the division was to take place when the grandson reached the age of 19.⁵² One testator instructed that the distribution was to take place twenty years after the death of the testator but allowed for an earlier distribution if his wife, son, and concubines were in agreement.⁵³

Among the relatives named as executors or entrusted with the estates and their distribution were the testator's wife,⁵⁴ kit fat wife⁵⁵ where the testator also had concubines, sons,⁵⁶ eldest daughter,⁵⁷ and brother-in-law.⁵⁸ In some instances the person so appointed was given absolute or extensive discretion over the distribution of the estate.⁵⁹ One testator instructed that a family meeting should be held once every year to elect two persons who would have custody and management of the estate pending division.⁶⁰

In summarising this part of this article, the following remarks may be made of the main characteristics of Chinese wills probated in Hong Kong. First, Chinese wills were mostly short, simple documents written either by the testator or someone taking down the words of the testator without the help of a solicitor. Among the wills of Chinese testators, some were executed in English, some, but not all, having been drafted by solicitors. Even when drafted by solicitors, the wills were not necessarily lengthy, nor were the arrangements provided in the will more complex. Wills were usually signed by the testator, and sometimes signed also by a witness, or witnesses. Wills typically began by

⁵¹ 7872.

⁵² 10429.

⁵³ 7512.

⁵⁴ 9297.

⁵⁵ 7454.

⁵⁶ 8212. Two of the four sons were appointed executors over an estate divided between all four sons.

⁵⁷ 10429. This testator was survived by a concubine, a son, a grandson, and several daughters. The eldest daughter was given extensive discretionary powers over the distribution of the estate.

⁵⁸ 8031.

⁵⁹ See 5166 (wife given the discretion as to the division of the estate between his concubines, sons, and daughters). See also 10429.

⁶⁰ 7777(1) and (2). Note that probate was not granted because the will was invalid under s 9 and under Californian law.

identifying the maker of the will and a statement setting out the reason for making the will, which was usually the poor health or the anticipation of death, although not all wills were deathbed wills, even if many were. Some testators included summaries of their lives or some reference as to how they acquired their wealth and position in society. Typically wills closed with words emphasising the writing of the will for the purpose of providing proof of oral words of the testator. Chinese leaving wills came from a variety of occupations and backgrounds and both genders were represented, although women made up a much smaller proportion. Burial and funeral instructions were sometimes part of a will and wills often contained homilies urging family members to live in harmony, respecting each other and maintaining the family wealth. Occasionally instructions for the adoption of heirs, sometimes posthumously for the son of the testator who has predeceased the testator, formed a part of the will. Testators normally maintained traditional notions of kinship by excluding married daughters, providing maintenance for daughters for as long as they remained unmarried as well as a dowry upon their marriage. Widows and concubines who remarried were often excluded, though they were usually given maintenance until their remarriage. The actual division and distribution of the estate were often delayed until all the testator's children reached adulthood. Few testators made bequests to charity.

In examining these features of Chinese wills from the twentieth century, the similarities between these wills and those of the nineteenth century are difficult to miss. The simplicity of the wills, the large proportion of self-written wills or those written by someone to whom the words were dictated, the recitation of the testator's life story or history, the indirect references to death at the beginning of the will, the writing of the will as proof, the fact that some wills were in English and some of these were drafted by solicitors, the fact that women also left wills, the paucity of bequests to charity, and the traditional treatment of women where family property was concerned were all mentioned by either Evans or Smith in their work. It is difficult to see any major shifts between the late nineteenth century and the middle of the twentieth. Perhaps a minor observation may be made. Evans referred to the testator's last words having been recorded in the form of a will during a bedside gathering of his family.⁶¹ Although this may have been true of earlier wills, Smith commented that this was far less frequently seen in the wills executed in Hong Kong.⁶² One might add that this was even less frequently encountered in the wills I examined. If the will was written in anticipation of the death, it is likely that the testator's family would naturally have been gathered at his bedside, but this was not mentioned in the will. This does not, therefore, point conclusively towards any lesser tendency for bedside gatherings.

⁶¹ Evans (note 4 above).

⁶² Smith (note 2 above), p 5.

The law regulating Chinese wills

The principal provisions in Hong Kong law on the formal validity of wills of the period under consideration here were contained in s 9 of the English Wills Act 1837, applicable to Hong Kong as a result of the first Supreme Court Ordinance enacted in 1844. However it was not until 1856 that any express provision on Chinese wills or Chinese testators was introduced. What became s 3 of the Wills Ordinance allowed for wills not valid under s 9 of the Wills Act 1837 to be admitted to probate if they were valid according to 'Chinese laws or usages.' Section 3 was as follows:

Any written will or testamentary writing made or acknowledged by a Chinese testator (whether a native of or domiciled in the Colony or China) shall, if the same is proved to have been made or acknowledged and authenticated according to Chinese laws or usages, so as to be effectual for the transmission of property according to such laws or usages, be deemed and taken to be lawfully made and acknowledged, and to have the same virtue and effect as if the same had been made and acknowledged according to the laws in force in this Colony, notwithstanding certain formalities prescribed by such laws in force in the Colony touching the signing, acknowledgment and attestation of written wills or testamentary writings.⁶³

This section was thought to have been enacted to 'preserve,' for the Chinese people, laws to which they had been accustomed prior to the arrival of the colonial administration.⁶⁴ It received no judicial interpretation through litigation until the case of *Re Tse Lai-chiu, decd*⁶⁵ in 1969, a year before it was replaced by a new section. The conclusions of the Full Court in that case are mentioned below. Without any judicial pronouncements on the section to assist, the Probate Registry had to determine its scope and meaning, independently and with the help of experts, through the accumulation of practice relating to Chinese wills. It is with the interpretation and application of s 3 in the Probate Registry that much of the discussion in this part of the paper is concerned.

⁶³ The legislative history of this provision is rather complex. The original s 1 of the Chinese Wills Validation Ordinance (No 4 of 1856) was not revisited by the primary legislature until 1970 and appeared with minor changes as s 2 of what was renumbered No 1 of 1856 in the Fraser edition of the Laws of Hong Kong (1938). In the Griffin edition of 1950, however, it appeared as s 3 of what was now termed the Wills Ordinance and now given the chapter number 30, but with the addition of the last three lines (from and including 'notwithstanding certain formalities ...'). The section was repealed and replaced in 1970 (see p 119 below). It should be noted that the commissioners charged with preparing regular editions of the ordinances had considerable powers to reorganise the statute book, which explains the confusing changes to the citation of this provision.

⁶⁴ See pp 115-16 below.

⁶⁵ [1960] HKLR 159.

Applicability of s 3

The gradual accumulation of expertise was not without confusion. To begin with, since the section required the testator to be both of Chinese ethnicity and a 'native of or domiciled in the Colony or China,' this involved a deviation from the normal conflicts of law rules in at least two respects: where the will concerns immovables, issues of validity, including capacity, would normally be decided according to the *lex situs*, and in relation to Chinese testators 'domiciled in China,' the normal rule was that the law of the testator's domicile should govern the question of the validity of the will. Both caused some confusion. Among the experts Henry Hu stands out as having clearly understood the irrelevance of the distinction between movable and immovable property, stating the position clearly in an affirmation:

In this Section (3) of the Will[s] Ordinance, no distinction of movable and immovable property was to be made. Generally speaking, *lex situs* is to be applied to the will ... By reading the aforesaid section (3), it is immaterial whether the testator was domiciled in the Colony or whether the property concerned is immovable or movable.⁶⁶

In an application in 1955, the testator had died domiciled in Kwangtung Province, China. Section 3 should have been applied. However, expert opinion on the validity of the will first looked to the laws of the People's Republic, and when finding none, determined the issue of validity in accordance with the Chinese Civil Code.⁶⁷ On the other hand, wills of Chinese testators domiciled neither in the colony nor in China were, correctly, tested for validity under the laws of their domicile.⁶⁸ Two examples suffice. In 7573 expert opinion was filed to say that the will was valid in accordance with Chinese law and custom, but the Deputy Registrar insisted, correctly, that the petitioner's capacity be certified as in accordance with the laws of Macao. In another, 7777(1) and (2), the will of a Chinese testator domiciled in California was also not given the benefit of s 3.⁶⁹

In other respects the contours of s 3 remained unclear until the late 1950s. For one, the concept 'native' appears never to have been explored. The testator's ethnicity tended to be emphasised in the applicability of s 3,⁷⁰ to such

⁶⁶ 7708.

⁶⁷ See also 7877 where Lam Ping-leung affirmed the validity of the will of a Chinese testator domiciled in China applying 'the law of the Republic of China of that time.' Note that the will was later granted probate on the basis of domicile in Hong Kong.

⁶⁸ See another file from 1955, 5241, in which the testator died domiciled in China, but his will had been executed in 1947. Vermier Chiu gave his opinion on some erasures in the will on the basis of the Civil Code.

⁶⁹ See also 8666 in which it was at first unclear whether the testator had been domiciled in Formosa or in China. On the evidence available, probate was eventually granted on the basis of domicile in Hong Kong.

⁷⁰ Expert opinion of Henry Hu was accepted on a number of occasions that, since the testator was Chinese, s 3 should apply. See 7165(1) and (2), 7578, 7708.

an extent that it was thought by some that the will need not have been written in Chinese. As mentioned above, a small minority of Chinese testators executed their wills in English. Section 3 was not helpful, since it was silent on the issue. In 7782(1) and (2), Lam Ping-leung provided in his expert affidavit that a particular will for which a grant was sought was valid in accordance with Chinese law and custom. The Acting Deputy Registrar (J R Oliver), however, took the view that it was a pre-requisite of s 3 that the will be written in Chinese characters. Since the will in this application was not valid under s 9 of the Wills Ordinance, the deceased was treated as having died intestate. This view does not seem to have been challenged and was gradually absorbed into practice so that, by the time the petition in 9415 was filed, at least one expert (Henry Hu) had modified his standard affidavit to include the phrase 'the said will, written in Chinese language' taking into account the view of the Deputy Registrar.

'Chinese laws or usages'

In the majority of applications, 'Chinese laws or usages' was assumed to mean laws or usages of the Qing.⁷¹ Experts such as Vermier Chiu and Henry Hu urged that the phrase, for which they often substituted the more common phrase 'Chinese law and custom,' should be interpreted broadly. This, they argued, was because the Da Qing Lu Li (the Qing Code), with its greater emphasis on penal matters, could not be expected to provide rules on the validity of wills.⁷² Therefore the 'laws, customs and usages prevailing in China'⁷³ and 'custom that has prevailed in China from time immemorial'⁷⁴ should be considered as part and parcel of Qing law. This reference to 'custom prevailing ... from time immemorial' was probably influenced by common law conceptions of custom.

The tacit agreement to broaden the concept of 'Chinese law or usages,' however, did not make the task of ascertaining 'Chinese laws or usages' any easier. None of the experts was able to make other than bald assertions about what Qing law and usages on wills were. As a more tangible source of custom, guidance was sought from the decisions of the Supreme Court of China in the years before the enactment of the Civil Code in 1930. Indeed the body of principles on the validity of Chinese wills which emerged relied heavily on these decisions as authority. The justification given for such reliance was, almost uniformly, that, prior to the Chinese Civil Code, the laws which prevailed and on which the court decisions were based were none other than Qing laws. Pending new Republican laws, Qing laws continued in force. Authority for this could itself be found in the decisions of the period. Thus the

⁷¹ See eg 8935 where in the opinion of Henry Hu it was said 'I take it for granted that the meaning of the words "according to the Chinese laws or usages" in the s 3 of the said Wills Ordinance refers to the laws or usages of the Ching Dynasty.'

⁷² 7708 (Henry Hu).

⁷³ 8375 (Henry Hu).

⁷⁴ 6608 (Vermier Chiu).

expert Henry Hu quoted from the Supreme Court of China in Appeal Case No 304 of the 3rd year of the Chinese Republic:

Before the promulgation of the Code of the Republic, the prevailing Ching law continues to be valid as a matter of course with exception of those parts of law which are inconsistent with the system of the Republic or any written law promulgated later on. About the Ching law now in force, although it is criminal in name, yet there is [sic] many parts concerning the civil and commercial matters. Such a point of view that owing to its names as being a criminal code the Ching law has been abolished is erroneous.⁷⁵

The opinion of the expert Lo Hin-shing explained the position in the following way:

We may recall that the Republic of China was established in 1911 and Book IV (Family) and Book V (Succession) of the Civil Code were not promulgated until the end of 1930, that is the 19th year of the Republic of China. Before promulgation of the Civil Code the First Republic of China appointed its judges from amongst men well trained in Western Jurisprudence and conversant with customs obtaining in China. So without the aid of the Civil Code to start with the High Court Judges had to resort to the use of old customs coupled with the judicious use of the civil portions of the laws and regulations of the Ching Dynasty (1664 to 1911) as the basis for their adjudication.⁷⁶

A few years earlier, it would seem that the relevant article of the Civil Code of Republican China, Art 1190, had already been accepted as giving expression to 'Chinese laws or usages.' Vermier Chiu and other experts repeatedly referred to this article, regarding it as 'but an enactment declaratory of custom that has prevailed in China from time immemorial.'⁷⁷

'Chinese laws or usages' and the requirements of a valid will

In the earlier applications, the grounds for validity were little discussed. The Probate Registry was willing to rely on pronouncements on validity from the experts, whose opinions were confined to brief conclusionary statements that

⁷⁵ 8935.

⁷⁶ 9592.

⁷⁷ See eg 6608 (Vermier Chiu) — in this case the solicitors first filed an opinion by Vermier Chiu which analysed the will in accordance with s 1190 of the Civil Code. When it came to the expert affidavit, Chiu analysed the validity of the will in accordance with Qing law and custom but stated at the very end that the will was also valid under the Civil Code: 7573. This was questioned in 7165(1) and (2) by the Deputy Registrar who doubted whether the Chinese Civil Code 'can be said to be a part of Chinese customary law.'

the will was made, acknowledged, or authenticated according to Chinese laws or usages.⁷⁸ Only in 1957 did the first substantiated expert opinions appear. In 6313, the expert Lam Ping-leung affirmed as follows:

I am of the opinion that the said will was made in accordance with Chinese law and custom and is a valid will. There is [sic] a fair number of authorities to the effect that there is no requirement for any fixed form in executing a will and there is no requirement that the will be witnessed. The essential thing is that the contents of the will must represent the true intention of the testator. There is no difficulty about this in the present case as the entire will was written by the deceased himself.

Fuller affirmations backed by 'authority' followed. In application 7165(1) and (2), the expert, Hu, said that, as the will was made by a Chinese testator, s 3 of the Wills Act 1856 applied and he went on to give the following reasons for the validity of the will:

- (i) In Tsing law there was no definite formality to make and execute a Will. By Appeal Case No 827 of the 4th year of the Chinese Republic which expounded the Tsing law it was ruled:

'In the law now in force there is no requirement for any fixed form in executing a Will.' So a Will may be made in writing or verbally. But whatever form the Will may be the contents therein must represent the true intention of the Testator for such is a requirement for the validity of a Will.

Such ruling was repeatedly affirmed by the Chinese Appeal Court notably Appeal Cases Nos 1724 and 1791 of the 4th year and No 686 of the 6th year of the Chinese Republic.

- (ii) According to Chinese Law and Custom it is obvious that the witnesses who witness the execution of the Will are desirable but are not indispensable. It is desirable because the witnesses can testify for the true intention of the Testator. It is not indispensable because the true intention of the Testator can be established or substantiated by any means other than the witnesses.

This will had been witnessed by two persons but without the usual attesting clause. Neither witness could be traced. The will was probated as a valid Chinese will because of the expert opinion above. As the Deputy Registrar informed Mr Justice Scholes, as no formalities were required 'The fact that the

⁷⁸ See 18, 3796, 3861, and 3385. 4345, 5580, 6051 are similar.

Will was witnessed would not therefore make it any more valid than if it had not been witnessed.⁷⁹

Later files contained expert opinion voicing similar views and quoting the same cases.⁸⁰ The view that there were no requirements of form for Chinese wills began to be echoed in later applications. By this time, the practice of the Probate Registry in relation to Chinese law matters had evolved in such a way that affidavits from experts containing statements on the validity of wills which were not backed by references to cases or statutes were insufficient.⁸¹

By the early 1960s if not earlier, the Probate Registry had become altogether more accustomed to applications involving Chinese wills. In 9305, faced with a will which was signed by the testator in front of one witness, the Deputy Registrar was happy to grant probate without the need for expert evidence, having refreshed his memory on the subject by perusing a previous file. Probate clerks too were able to advise on the validity of Chinese wills and, in some cases, this meant that the applicant was spared the cost of procuring an expert opinion.⁸² That there was no requirement for the Chinese will to have been witnessed nor a requirement that the testator should have written the will himself became part of the knowledge on the law of Chinese wills accumulated through regular practice in the Probate Registry. Where wills were written in the testator's hand but not witnessed, it became standard practice for the Registry to ask for an affirmation from someone familiar with the testator's handwriting. In the case of wills written by someone other than the testator, as mentioned earlier, it became the practice to ask for an affirmation from the writer of the will. In 9415 the Deputy Registrar's communications to solicitors set out the matters which should be covered by such affirmations:

an affirmation of the writer of the will ... stating (if correct) that he wrote it on the Testator's instructions; that after writing it he read it over to the Testator, who then acknowledged it as being written in accordance with such instructions and then signed it; and that the signature appearing thereon is that of the Testator.

⁷⁹ Memorandum dated 14 February 1959.

⁸⁰ Examples include 7385 (P L Lam) and 7578 (Henry Hu).

⁸¹ When, in 7743, the affidavit of Lam Ping-leung stating his opinion on the validity of the will in almost the same terms of that in file 6313 above, the Deputy Registrar (P R Springall) wrote to the solicitors (P C Woo) asking for a supplementary affidavit to be filed: '(a) As Mr Lam says in paragraph 4 of his affidavit that there are many Chinese decisions to the effect that "there is no requirement for any fixed form in executing a Will ..." he should amplify this statement and give details of the "many Chinese decisions." (b) He should also amplify his statement that "the Will must represent the true intention of the testator" and show what this exactly means.' Mr Lam, in his supplementary affidavit, cited Appeal Case No 827 of the 4th year, 1724 of the 4th year and 686 of the 6th year, the same set of cases mentioned by Henry Hu in 7165(1) and (2) mentioned earlier. On (b) he says that 'It is abundantly clear from the above authorities that what is required is sufficient evidence to prove the truth of a will. This may be any kind of evidence, not necessarily a witness who has signed as a witness to the will. As the will in question was written by the deceased himself, this should be sufficient evidence of the truth of the will.'

⁸² 9393. See also 9503.

Whether a will could be valid without the signature or thumbprint of the testator is an issue the Probate Registry does not appear to have had to address. The views of experts in their affirmations were mixed. As seen above, there was consensus that the overriding criterion was the embodiment in the document of the testator's intentions, and it is possible that, given confirmation that the writing in the will was that of the testator or that it was the testator's words which were written down by the writer of the will, such a document could be said to embody the wishes of the testator.

Although, in the expert view of Henry Hu cited above, oral wills were valid, no such wills were submitted to the Probate Registry. Any oral will submitted would very likely have been refused.

In some applications, more than one document was submitted. The approach of the Probate Registry varied from case to case. In one application, four documents of similar format and style, each referring to a single immovable asset, were probated together as the last will of the deceased. Two of the documents were executed on 22 February 1944, while the third and fourth were probated on 17 and 23 June 1945. Authority for treating the four documents as one will was said to come from *Tristram and Coote's Probate Practice*, 18th ed, pp 33, 65, and 478 and *Mortimer on Probate Law and Practice*, 2nd ed, pp 134, 142, and 217. In another case two documents, one in English and the second in Chinese and executed approximately a year apart, were treated as forming the will of the testator, as the second will did not revoke the first and, more importantly, did not contain provisions which were inconsistent with those in the first.⁸³

Where testators altered their wills rather than use a second document, alterations by way of interlineations could be treated as a codicil to the will. In 3406, some interlineations were added at the direction of the testator. There must have been some anxiety that the interlineations would not be valid given that the additions were not made in the presence of the witnesses. Affirmations from the witnesses had stated that the interlineations were made before the will was executed. This issue was clarified in a later application. Here two alterations were made to the will by the testator some nine months after the date of the will without the presence of any witnesses. The testator's intention was to reduce the share of the residue to be given to one of his sons with whom he was displeased. Where the alterations were made, the testator left his chop. In addition, in his own handwriting at the bottom of the will, he wrote the words, '1956, May 1st, altered to be divided into six shares and a half' followed by the testator's signature. Vermier Chiu affirmed the validity of the wills in accordance

⁸³ 7708. Cf 5186 in which the later Chinese will, which contained provisions which were inconsistent with the earlier English will, was interpreted as an implied revocation of the earlier will.

with both Qing law and custom and Art 1190 of the Chinese Civil Code⁸⁴ which he said was merely declaratory of custom from time immemorial. He reasoned that 'since no self-written wills needed to be witnessed as long as they were made in the handwriting of the testator, all alterations thereto need not be made in the presence of witnesses so long as such alterations are made in the handwriting of the testator.'

The Chinese and testamentary freedom

Probate applications do not ordinarily involve listing the next of kin. Therefore if testators were not free to exclude certain members of their family, the Probate Registry was not usually in a position to know if a rightful heir had been excluded. Indeed, by and large the Registry did not seem troubled by the question of whether Chinese testators had absolute testamentary freedom. In a small number of exceptions to this, doubt over whether testamentary freedom was enjoyed by the Chinese was expressed. In one application,⁸⁵ there was an exchange of memos between the Registrar and his deputy regarding the necessity of ascertaining the next of kin of the deceased. The Deputy Registrar wrote that 'It seems that in Chinese customary law a Testator is not free to dispose of his property exactly as he likes. In order to consider the position as a whole in this case it is necessary to know what next of kin survived the Testator.'⁸⁶ In another the Deputy Registrar asked for information on whether the deceased widow had other next of kin apart from a son mentioned in the will, as 'if she did, then it is very doubtful whether, according to Chinese customary law, she had any power to give the whole of the estate to the son named in the will to the exclusion of the other sons and daughters or their issue.' Pages 26 and 27 of *Jamieson*⁸⁷ were cited, together with pages 30 and 31. In some cases, it was obvious that a next of kin of the testator had been excluded in the will but probate was nonetheless granted. In 7165(1) and (2), having found the will to be valid under s 9, the Deputy Registrar suggested that the unmarried daughter could apply for variation of the terms of the will which made no provision for her by applying for administration once probate had been granted, although it was admitted that he did not know of a precedent for this. In an application in 1963,⁸⁸ the Deputy Registrar doubted if the testator could

⁸⁴ In an opinion of Vermier Chiu filed in this application, Art 1190 requires that alterations to self-written wills be made in the handwriting of the testator who must designate the places where such alterations are made and the number of words that have been altered. He need not make the alterations in the presence of witnesses but must affix his signature to the annotation wherein he must designate the places where the alterations are made and the number of words that have been altered. Minor deviations from these principles, such as there were in this case, were, he argued, insufficient to invalidate the alterations.

⁸⁵ 7708.

⁸⁶ The case of *Wong Yu-shi v Wong Ying-kuen (No 1)* [1957] HKLR 420 was cited as authority.

⁸⁷ G Jamieson, *Chinese Family and Commercial Law* (Shanghai: Kelly & Walsh, 1921 (reissued by Vetch & Lee in Hong Kong, 1970)).

⁸⁸ 9868.

validly have barred his son from inheriting his estate 'as according to Chinese custom a father cannot disinherit his son except in extreme circumstances. See Jamieson, pages 26, 27.' The Deputy Registrar nevertheless granted probate on the basis of the small size of the estate.

The extreme circumstances under which a testator could disinherit an heir were never discussed. Although there were cases of an heir being expressly excluded which passed without comment, the granting of probate in these cases is not sufficient to form any conclusions on when it was thought heirs could properly be excluded. In 10238, a testator excluded his obstinate, undutiful, and troublesome eldest son. He appointed his second son as his successor, instructing the eldest son not to interfere with or question the second son. Probate was granted without any investigation into whether the testator was entitled to do this.⁸⁹ The same occurred in an earlier application, where the testator excluded two disobedient sons and a daughter, whom he said were expelled from the family on a date over a year before the will was executed for rebelling against the family. The testator reiterates the permanent severance of their relationship to him in the will.⁹⁰ Neither the exclusion of these survivors nor the failure of the will to mention other sons was raised as an issue before probate was granted.

As mentioned earlier, it was not until 1969 that the courts were faced directly with the question of whether the Chinese in Hong Kong had testamentary freedom in the English law sense. In *Re Tse Lai-chiu, decd*⁹¹ the deceased, who was domiciled in Hong Kong at the time of his death, executed a will in 1958. This will was valid in accordance with English law. The Full Court was asked whether the deceased had testamentary capacity. The members of the Full Court delivered separate judgments, two of the judges dealing at length with a variety of issues, including the juridical basis for Chinese law and custom in Hong Kong. Affidavit evidence of the expert Anthony Dicks was given and arguments made that in Qing law there was no general power of testamentary disposition and that, since intestacy was governed by principles of Chinese law and custom, so too should testate succession be to avoid any illogical distinction where none had existed in Qing law.⁹² Among the arguments urged upon the court by others was that the Wills Act and the Chinese Wills Validation Ordinance referred only to the formal validity of wills and therefore validity of dispositions remained governed by Qing law. It was also suggested that s 3 itself could be interpreted as requiring dispositions by will to be valid according to Chinese law and custom.

⁸⁹ See also 7031 where probate was granted for a will failing to provide for several of the sons.

⁹⁰ 7057.

⁹¹ [1969] HKLR 159.

⁹² *Ibid*, p 166.

Hogan CJ and Mills-Owens J did not accept the argument that s 2 of the Chinese Wills Validation Ordinance 1856, which later became s 3 of the Wills Ordinance, should be read as allowing Chinese wills not complying with English formalities to be probated only when the testator was acting within his limited testamentary freedom or capacity. The argument that the section spoke only of the form of wills and not of testamentary capacity was accepted. However, they rejected the argument that therefore Qing law should govern testamentary capacity. By adopting the Wills Act the legislature had abrogated Qing law on testamentary capacity and introduced English law for all testators. The further introduction of s 2 was to provide a relaxation of the rules on form to accommodate the differences between Chinese wills and others. Testamentary capacity remained governed by English law. In looking at the wording of the section Hogan CJ felt unable to accept that the legislature created or indicated any belief in the general right of testamentary capacity under English law for Chinese testators.⁹³ Mills-Owens J, however, thought that the section implied that Chinese persons had unrestricted powers of disposing property by will.⁹⁴ The alternative footing upon which Chinese testators were held to have full testamentary capacity was that it would cause no injustice or oppression. The third judge, Rigby J, agreed that Chinese testators domiciled in Hong Kong had testamentary capacity but did not state his reasons clearly. The Chief Justice⁹⁵ and Mills-Owens J⁹⁶ were mindful of the fact that Chinese testators in Hong Kong, their solicitors, and the Probate Registry had conducted their affairs on the assumption they had testamentary freedom and held that it was too late to reverse the position.

Prior to this case, the Strickland Committee had, in their report, commented on Chinese wills. They referred to s 2 as validating wills acknowledged and authenticated according to Chinese laws or usages, but only insofar as matters of form are concerned.⁹⁷ They thought that with the possible exception of dispositions of land in the New Territories, in practice, essential validity of dispositions made by will appeared to depend on English law and not upon Chinese law and custom. They further commented that there was some doubt as to 'whether a disinheriting of the sons contrary to Chinese law and custom would be upheld,' a doubt which they said should be removed by a declaration that English law applies.⁹⁸ Moreover they thought that the use of the English rule could survive the test of injustice and oppression.⁹⁹

⁹³ Ibid, p 191 for the Chief Justice's analysis on this point. Note that the inaccurate headnote states that it was held that s 3 implicitly recognises the testamentary power of Chinese testators.

⁹⁴ See analysis of Mills-Owens J, *ibid*, p 198.

⁹⁵ *Ibid*, p 192.

⁹⁶ *Ibid*, p 199.

⁹⁷ Strickland Committee, *Chinese Law and Custom in Hong Kong* (Hong Kong: Government Printer, 1953), para 17 on p 9.

⁹⁸ *Ibid*, para 18.

⁹⁹ *Ibid*, pp 115-16.

More recently, in *Lau Yue-kui v Estate of Lau Leung-chau, decd.*¹⁰⁰ the expert Anthony Dicks again stated his view on the absence of testamentary dispositions in Qing law. Wills were used not to transmit property but to leave moral instructions and precepts for the conduct of family affairs. Where testators made provision for the disposition of property, they normally confined themselves in effect to re-stating the traditional distribution based on division into equal shares among the sons, sometimes also providing for widows, infant sons, and unmarried daughters and for ancestral worship.¹⁰¹ Counsel for the defendants agreed with the point on Qing law but urged upon the court the logic of extending the *Tse* decision to land situated in the New Territories. Cheung J expressed no view on whether Chinese testators had testamentary freedom in relation to such land. As mentioned above, the Strickland Committee expressed some doubt on testamentary freedom to dispose of non-exempt New Territories land. The HKRS 96 files suggest that the Probate Registry did not pause to consider the matter. As with disinheriting rightful heirs, wills may not provide sufficient information, in this case, on the location of immovable property, for the control of disposition of New Territories land. It may be also, again as with the issue of disinheriting heirs, that the practice was to grant probate, leaving it to interested parties to bring an action thereafter. The requirement that the Land Officer register a successor unless a grant of probate is obtained within three months probably meant that in practice succession to land was determined by 'Chinese custom or customary right'¹⁰² whether or not probate would be granted to someone entitled to succeed in accordance with the terms of the will but not under Chinese custom.¹⁰³ Issues raised by the *Lau* judgment may have wider repercussions for Chinese testators, both in relation to land in the New Territories and whether ancestral trusts can be set up by will, but these issues will be left till another occasion.

What, then, are the conclusions to be drawn from the work of the Registry on the law and Chinese wills in Hong Kong? To begin with, as can be expected from the wording of s 3, the scope of the section was only relatively recently understood to include Chinese testators native to Hong Kong and Chinese testators domiciled in China. The fact that the section deviated from well-

¹⁰⁰ [1998] HKLRD 578.

¹⁰¹ I have used the view of the expert as summarised by Cheung J, [1998] HKLRD 578, 592.

¹⁰² See s 17, New Territories Ordinance. This section refers to the registration of the name of the person who is entitled to such land in succession. 'Chinese custom or customary right' is not mentioned, though it appears in s 12 as the law which must (see *Tang Kai-chung v Tang Chik-shing* [1970] HKLR 276) be recognised and enforced in the High Court or the District Court in relation to land in the New Territories. Note that the New Territories Ordinance was amended by the New Territories (Amendment) Ordinance in 1994.

¹⁰³ See further Carol Jones, 'The New Territories Inheritance Law: Colonization and the Elites' in Veronica Pearson and Benjamin Leung (eds), *Women in Hong Kong* (Hong Kong: Oxford University Press, 1995) and Stephen Selby, 'Everything You Wanted to Know about Chinese Customary Law (But Were Afraid To Ask)' (1991) 21 HKLJ 45.

established principles of law, which would have made the domicile of the testator and the distinction between movable and immovable property more relevant, meant that there was some confusion, but the evidence from the later files showed that these had largely been overcome. Second, despite the silence of s 3 on the issue, one principle developed in the Probate Registry was that, for the section to apply, the will had to be at least substantially written in Chinese characters. Third, although the section was enacted with the intention of making allowances for Chinese wills, effectively by subjecting them to less stringent rules on validity, Chinese wills which met the more stringent requirements of form in s 9 of the Wills Act were probated under that section rather than s 3. This was principally because the Registry was aware of the costs involved in using s 3 and often sought to assist the applicant in the avoidance of those extra costs. In the case of wills probated under s 3, apart from instances of very small estates, the procedure was to require an affidavit of an expert confirming the validity of the will under Chinese laws or usages. Indeed, until the staff in the Probate Registry became more confident in their handling of Chinese wills there was almost total reliance on the expert in determining whether a will was valid.

Fourth, as more and more wills were probated under s 3, a collection of principles regarding 'Chinese laws or usages' began to form. It was accepted that the phrase should be interpreted broadly to include non-written forms of law such as custom, evidence of which could be gleaned from the decisions of the Supreme Court after the end of the Qing dynasty but before the adoption of the Civil Code provisions on succession. The extension of sources of 'Chinese laws or usages' to include provisions of the Civil Code was also unchallenged in the Probate Registry. Fifth, on the substantive issue of the requirements for a valid will under Chinese laws or usages, it was accepted that there were no requirements of form for Chinese wills or for alterations made to the will. No witnesses were required for a will to be valid, nor did the will need to have been written by the testator. The central concern of Chinese law and custom was that the will embodied the true intention of the testator. Whether a will did or did not so represent the true intention of the testator was a question of proof, satisfied by a variety of means. The absence of the testator's signature was therefore not fatal. Although some experts were of the opinion that oral wills were valid, there are no traces of petitions for the admission of oral wills. In any case the express reference to writing contained in the section would have made it difficult to hold otherwise even if Chinese laws or usages permitted oral wills. Whether or not several documents could be probated together as the last will of the deceased and whether, where two documents are tendered, the later in time is treated as the codicil to the earlier will were issues which were decided on the basis of laws and principles of general application to wills under s 9. No special rules from Chinese law and custom were identified or applied.

Finally, on the question of testamentary freedom, from time to time doubts were expressed as to the extent to which this existed among the Chinese but, in nearly all other instances, the issue of whether or not a testator was depriving a son or daughter of their rights in succession was not examined.

In the absence of decided cases on s 3, the Probate Registry, in coming into contact with Chinese wills, interpreted the law and created a set of principles or rules, related to the scope, application, and substance of the section. In this, as in other areas of Hong Kong law involving Chinese law and custom, they were assisted regularly by experts. This article has sought to show the development, until the early 1960s, of this body of rules. Whilst not endowed with any formal status of law, these rules represented law administered to those coming into contact with the process of probate. The practice of not restricting Chinese testators to the exercise of testamentary disposition valid under Qing law did, however, acquire the status of law when the majority in the Full Court in the *Tse* case took the view that it was too late in the day to change the position attributed to the Registry, and on which the legal profession had relied. Such readiness to accept long-standing probate practice hints at the influence of practice on the development of the law.

Legislative reform

Section 3 remained in force until supplanted by s 5 of the Wills Ordinance 1970. Section 5(1), which followed very closely English legislation on wills, consisted of various rules on formal validity, to which sub-s (2) was a proviso allowing 'any will of a Chinese testator written wholly or substantially in Chinese and signed by the testator' to be valid although not executed in accordance with the rules set out in s 5(1). When the two sub-sections are compared the following observations may be made. There is convergence on the invalidity of oral wills, the need for the testator to be Chinese, that the will need not have been written by the testator himself, and the absence of an express statement about testamentary capacity. The points of divergence lie in the requirements present only in s 5(2) that the will be wholly or substantially written in Chinese and that the will be signed by the testator. Section 3 mentioned neither. Further, s 5 omitted the reference to validity under Chinese laws or usages present in s 3. One other major difference, although not of any consequence to Chinese testators domiciled in Hong Kong, is that the qualifying condition of 'native of the Colony or domiciled in China' was omitted from the new section, widening substantially the class of Chinese testators to whom the dispensation now applied. It is not clear from the debates in the Legislative Council¹⁰⁴ whether this change in the law was appreciated.

¹⁰⁴ *Hong Kong Hansard* 1969-70, pp 320-2 and 441-4.

Despite these differences, s 5(2) was seen as providing continuity rather than change. Significant change was formal rather than substantive. The explanatory memorandum accompanying the bill referred to the 'long and complex form' of s 3, 'in so far as it refers to domicile, China and Chinese law and custom.'¹⁰⁵ Simplification was therefore the objective of the bill. In particular, inquiring into Chinese law and custom was believed not to have been adhered to strictly by the Registry. Section 5, with its dispensation in sub-clause (2), was therefore seen not as changing the law¹⁰⁶ for Chinese testators so much as 'bringing the law into line with what is an accepted and ... sensible practice.'¹⁰⁷ The Attorney General's comment about non-adherence to the strict requirements of s 3 is not, however, borne out by the study of the probate applications undertaken here. Although ascertaining Chinese law and custom as a source of law and identifying its principles on wills remains to be fully uncovered by scholars, the Registry had its method and practice when it came to these issues. Furthermore, through this both the Registry and legal practitioners acquired and accumulated a kind of doctrine of Chinese law and custom on wills.

This study of course stops some years before 1971 but it is assumed that one practical change consequent upon the omission of Chinese law and custom from s 5 would be that the filing of expert affidavits on Chinese law and custom was unnecessary, thus making the process of obtaining probate much cheaper and perhaps quicker. Assuming this to be the practice of the Registry under s 5, the repeal of s 3 did make a practical difference to those seeking probate of a Chinese will. On the other hand, in terms of the validity of wills, the legislature was probably correct in its assumptions, insofar as the expert opinion in various applications taken as a whole submitted that the main criterion was that the will expressed the true intentions of the testator. This was usually taken to be the case where the will was signed by the testator or written in his own hand. Such wills, valid under s 3, would continue to be valid under s 5. Besides, some of the other changes between the two sub-sections were more apparent than real, due to the practice and understanding which evolved in the Registry. This would be true of the requirement of Chinese writing. However, the enlargement of s 5(2) to include all Chinese testators, if effected by the Registry, did represent change since the distinction between Chinese testators native to the colony or domiciled in China on the one hand, and those who were native or domiciled elsewhere under s 3, was recognised by the Registry.

In 1984 the Chief Justice and Attorney General referred to the Law Reform Commission the question whether, inter alia, the law relating to wills should

¹⁰⁵ Ibid, p 322.

¹⁰⁶ Note, however, the view of Evans, 'The Law of Succession in Hong Kong' (1980) 18 HKLJ 19, 45 that s 5 went much further than s 3.

¹⁰⁷ See speech of the Attorney General: *Hong Kong Hansard* 1969-70, p 321.

be changed having regard to the needs of Chinese testators making wills under s 5(2) of the Wills Ordinance. In making its recommendations in 1986, the general view of the Sub-Committee of s 5(2) was that it was insufficiently stringent. It failed to ensure that Chinese wills are intended to have testamentary effect or are not forgeries. They suggested a new more stringent s 5(2) which would apply to all testators regardless of race. They proposed that, if a document appears to a court to be one which the testator intended to have testamentary effect, then regardless of its compliance with the formal requirements it should be given effect to, subject to the testator having signed, or someone else having signed on the testator's behalf, the written document. In introducing this general power of dispensation, the Sub-Committee parted company with English law deliberately, preferring to move in the direction of freeing the law from 'slavish adherence to the primacy of form' for all testators. The minimal requirements of writing and signature represented necessary checks on a will's authenticity, without which there was a risk of increased litigation. The Sub-Committee's report led to the introduction in 1995 of the Wills (Amendment) Ordinance.¹⁰⁸ The new s 5 requires the following in sub-s (1): (a) the will must be in writing, and signed by the testator, or by some other person in his presence and by his direction; (b) it appears that the testator intended by his signature to give effect to the will; (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (d) each witness either attests and signs the will or acknowledges his signature in the presence of the testator. Subsection (2) then allows documents purporting to be testamentary documents but not executed in accordance with the requirements in sub-s (1) to be deemed to be duly executed if the court is satisfied that there can be no reasonable doubt that the document embodies the testamentary intentions of the deceased person. Whilst following the basic thrust of the s 5 proposed by the Sub-Committee, the amended law does not contain, whether in sub-s (2) or (1), an absolute requirement of the testator's signature.

The abolition of the distinction between Chinese and non-Chinese testators is welcome. It is in keeping with the general movement in the laws of Hong Kong away from pluralism, particularly since, in the case of wills, reference to Chinese law and custom has been abandoned since 1970. As early as 1969, the Attorney General had already expressed the view that the racial distinction should be abolished, especially given the smallness of the non-Chinese population.

The Sub-Committee's concern over the risk of forgery and the risk that non-testamentary documents might be probated is not so easily understood. If these were problems experienced by the Probate Registry, there was nothing to

¹⁰⁸ No 56 of 1995.

indicate this in the Probate Registry files dealing with s 3. Whether problems arose under s 5 is beyond the scope of the study conducted here. Under s 3 the practice of requiring the filing of affidavits of handwriting of the testator or of the writer of the will constituted a procedure which sought to ensure authenticity. A system which could guarantee authenticity is probably impossible to achieve. Besides it is not clear that the new s 5 would be any more capable of guarding against the perceived problem. Moreover, under both s 3 and the earlier s 5, Chinese testators leaving wills drafted in English did not have the benefit of the less stringent provisions for Chinese wills. This group of testators was presumably growing, as English became more widely used and as more testators executed wills with professional assistance. The amendment introduced in 1995 has had the odd effect of reversing this position, as well as making the general dispensing power available to non-Chinese testators.

The assumptions made in these remarks on the possible effects of law reform suggest that there is much scope for further research in this area of the administration of justice in Hong Kong. Beyond these immediate confines, this study of HKRS 96 with its observations on the features of Chinese wills and their treatment under the law prompts further reflection. The shaping of the law over six decades of this century provides the basis for a discussion of a number of theoretical issues on the nature of Chinese law and custom in Hong Kong. It is also pertinent to broader concerns regarding the relationship between law and custom and the particular problems arising from the encounter between the common law and custom. In addition, the gradual process of accretion uncovered in this study, through which the law on Chinese wills gained a relatively settled meaning, is germane to the study of the relationship between practice and the law and how each might influence the other. These and other issues ensure that the study of Chinese law and custom in Hong Kong and elsewhere continues to be relevant to legal scholarship.