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DISCOVERING THE CHINESE COMMON LAW: THE FORMATION OF THE LOAN CONTRACT IN THE QING DYNASTY

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Many principles controlling the modern western civil law, such as consideration, prescription and capacity, have taken shape in history. This paper, from a historical perspective, explores the logic and rationale behind Chinese common law by focusing on the formation of contract in the Qing Dynasty. The first section shows that in the Qing Dynasty, the delivering of the subject matter was a basic requirement to form a loan contract between two parties. However, an agreement for transferring the item in advance worked as a consensual and bilateral contract, and the aggrieved party could ask for compensation or contractual fine or retain the deposit when the other party broke the contract. The second section argues that in the Qing Dynasty, the writing of a loan contract (Shuqi) is not a contract in and of itself, but is only one of the forms of contracts. The writing worked as the primary evidence of the existence of a contract. In the third section, the requirements of consideration and prescription are used to understand the practice of civil trials in the Qing Dynasty. Back then, when the loan contracts provided by two parties entailed some defects, the judges would adjudicate a loan dispute on the basis of consideration, with an assumption that people acted in their own interest and only in this sense were their acts rational. The judges could also identify the right(s) of parties due to the lapse of time. The fourth section argues against the view that equality was not used as a principle to form civil contracts in Chinese history. In Ancient China, there was indeed inequality between officials and laymen and within family or clan. However, in the Qing Dynasty, the different social status of the parties had little to do with the formation of contract. The restrictions for junior individuals (e.g., beiyou) to dispose his family property were actually restrictions on their capability instead of limitations on his capacity to enjoy private right or to have private obligation.
INTRODUCTION

The relationship between debtors and creditors is a kind of contractual relationship from today’s legal perspective. When a judge or lawyer has to decide whether a contract is formed, s/he will check all the requirements for the formation of a contract. Obviously, this line of thought is a product of the invasion of western legal culture. The Qing Dynasty, though not really far away from our era, still falls within the traditional Chinese society model. This article examines how people in the Qing Dynasty thought about the formation of contract, the logic and methodology behind such thought, as well as the relationship between their methodology and the legal theory today.

I. REAL (REALGESCHÄFT) OR CONSENSUAL (CONSENSUALGESCHÄFT) CONTRACT?

WU Jingzi, a novelist during Qianlong period (1736–1795), told an interesting loan story1.

Case 1. An old farmer named HUANG Mengtong complained to the county magistrate: “I came to the county to pay tax last 9th month (in Chinese lunar calendar). For short of money, I asked somebody as a middleman to help me to borrow 20 liang of silver from Mr. YAN (a local evil gentry). I then delivered a debit note to YAN’s house, in which I agreed to pay him an interest at the rate of 3 percent per month. I then met one of my relatives in the street. He kindly lent me several liang of silver with lower interest rate and asked me not to borrow any from Mr. YAN. I therefore returned home with my relative after paying tax. After half a year, I recalled the matter and went to Mr. YAN’s place asking for my debit note back. However, Mr. YAN demanded me to pay him the interests for the months. ‘I had never picked up the principal money,’ I said, ‘Why should I pay you any interest?’ He said that he could have lent the 20 liang of silver to other people to generate interest if I had drawn back my debit note instantly. But now he had to hold the money for me and had lost more than half year’s interest. That was why I should compensate him. I knew it was my fault and I told Mr. YAN through the middleman that I am willing to buy some meat and wine for Mr. YAN to apologize and wish he could give me back the debit note. But Mr. YAN kept refusing my proposals and had some people take my donkey and other personal belongings to his place. More than that, he continued keeping my debit note after all that. I fell it was so unjust; I beg your honor to make a decision in favor of me.’ The magistrate answered ‘it’s so despicable that an official student with honor of the state deceived and cheated people in that way, not to say

1 WU Jingzi, 儒林外史 (The Scholars), People’s Literature Publishing House (Beijing), at 49–50 (1955). I believe this story and the story below had factual background though it was recorded in a fiction.
he has not done anything good to the community.’ The magistrate therefore affirmed the two cases (the other one was against Mr. YAN too).”

Two issues are worth noting here.

1. When YAN demanded HUANG Mengtong to pay him the interest, why did HUANG say, “I had never picked up the principal money, why should I pay you any interest?” The so-called “never picked up the principal money” means the lender had never delivered the object, i.e. the principal in this case, to the borrower. In this regard, the loan contract had not been formed. Therefore, the borrower was not obliged to pay any interest. That is why HUANG felt so unjust. One can deduce from the magistrate’s decision that the loan contract between the parties never existed. More than ten Chinese people have been told of this case, all without legal training, and they unanimously affirmed the magistrate’s decision without any hesitation. It seems the conscious level of fairness and justice of the Chinese people nowadays are more or less the same as the people in Qing dynasty. It seems correct to conclude that, in the traditional Chinese idea, the delivering of the subject matter is a basic requirement for the formation of a loan contract. How will our courts decide on a similar case today? A loan contract in the conventional Western civil law theory is defined as a Realgeschäft. This kind of contract requires one of the parties to deliver the subject matter to the other in order to form a contract. In other words, the loan contract will not be formed until the subject matter is delivered to the other party, even though the parties might have already reached an agreement orally or even in written form. We must obtain the same outcome as in the above case based on this theory. Neither WU Jingzi, the magistrate, nor HUANG had any exposure to Western law education. How come their subjective viewpoint and decision sound similar to that of Western law theory? What is their basis or rationale behind such a decision, and why the decision is so similar to what is covered under Anglo-American law? The novelist did not discuss it. Was it because he despised Mr. YAN’s immoral act or because of the potential idea of universal justice, or both? Rosser H. Brockman, an American scholar who studied Taiwan’s commercial contract law in the late 19th century noted that owing to the inefficiency of the Qing’s legal system, the enforceability of a contract is often preventive rather than remedial.2

It is defined the classification of loan contract as a Realgeschäft has a long history that could be traced back to Roman law. The court decisions in the early period of the Republic of China (1912–1927) and in contemporary Japanese civil code still uphold this kind of application and interpretation.3 Modern lawyers begin to challenge this classification. “The idea of Realgeschäft is short of appropriate foundation,” it is said, and

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3 See Article 587 and Article 593 of Japanese Civil Code (日本民法典), Chinese Translation by CAO Wei, Law Press (Beijing), 1986.
“cannot be established theoretically”; or “it’s unnecessary to make such classification.”

“Many legal systems have been developed from Roman law. Classifying loan contract as Realgeschäft...is only because of history and has nothing to do with necessity, neither theoretically nor practically.” The Swiss Obligation Law and German Civil Code have accepted the classification of loan contract as Consensualgeschäft, but the Japanese Civil Code still upholds the traditional Roman law theory. The above example might help us to understand why the classification was there initially. The old Civil Code (of the Republic of China) took eclecticism on this issue. It is no doubt to say, if a loan contract had been defined as Consensualgeschäft, (i.e. the contract was valid without the delivery of the agreed item), it would be unjust to Huang both in the current perspective and then. There are two main functions for the Civil Code to set up a named or typical contract. Tse-Chien Wang believes one of them is “to protect the interests of one of the parties with mandatory provisions.” I cannot agree with the claim that it is not necessary to take Realgeschäft as a required factor both theoretically and practically: Drawing a lesson from this case, it seems plausible to infer that the purpose of Roman law, which originally made such a classification to the loan contract, was just to protect the benefit of a debtor. The emergence of Realgeschäft attached to a contract, Main said, was “evidently based on ethics,” and was “for the first time when moral consideration became an ingredient in contract law.” Taking into account that traditional Chinese value still has its strong impact today, as well as the current situation that it is so hard to enforce a court decision in civil cases, it seems correct to keep the Realgeschäft as a requirement for loan contract, at least in the predictable future.

2. The loan contract between HUANG and YAN, as stated earlier, was not considered formed without the delivery of money. Why did HUANG admit it was his own fault for not collecting the money and drawing back the memorial when YAN so explained? Why did he also intend to come to YAN’s house with meat and wine as presents? Furthermore, where did this idea of right and wrong come from?

The theory of Realgeschäft, as mentioned above, was criticized by many modern lawyers. This case may serve to illustrate the criticism. What YAN said could be interpreted into modern legal language like this: Huang should compensate YAN’s loss of interest for more than half a year, as HUANG had broken the loan contract and did not inform YAN in time of his intention to cancel the agreement between them. What YAN

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5 Id. CHEN, 民法通义债编总论, at 126.


said was reasonable, although his words may not be true. Money lending and borrowing was very active and frequent during the Qing Dynasty. Many rich people made their living on money lending. Professional associations engaging in money exchange and loan making, which are like modern commercial banks, emerged from certain regions. For instance, “there were stores, locally called fangzhangpu (放账铺), in the counties of northwestern Henan Province whose profession was making loan. Generally, they set the interest rate of their loan below three percent, and were able to collect their principal and interest.” In Chaoyang County, former Rehe province (now Liaoning Province), “there were two kinds of loan in local custom: one was made by merchants; the other was made by rich people.” In Dangtu County, Anhui Province, “some poor people relied on loan as a means of their living.”

According to the author’s statistics on a dairy of a country gentleman (his status was just like YAN) in Wuyuan County, Anhui Province (now in Jiangxi Province), the gentleman had made loan, including lending and borrowing cash and fungible things with or without interest, for 17 times within two months, from the 7th month 5th day to the 9th month 5th day in Kangxi 39th year (1700), with an average of 8.5 times per month. For example, on the 9th month the 20th day of that year: “Uncle Runke borrowed 1.28 liang in silver of 97 percent purity from me and the Society of the Same Age, taking security with a written deed for a piece of land located in Liheqi, which was uncle Zhouchen’s property. He agreed to pay interest at 3 percent per month and the period of the loan shall be one year on the 19th day 11th month, 40th year, he collected the principal and interest totaling 1.67 liang of silver and gave them back the deed.”

Apparently, an honest person would have suffered interest loss had he been in YAN’s situation. It would be unfair if a similar case involves a moneylender of good faith. That was why HUANG admitted “that really was my fault.” A contract had already been formed when HUANG offered to borrow money from YAN through the middleman and YAN accepted it. Both parties were bound by the contract after it was formed, and one party should compensate the other when s/he broke it. Under the custom of the Qing Dynasty, the aggrieved party could ask for compensation or contractual fine or detain the deposit when one party breached her/his promise. According to the custom of Hubei Province: “in Qianjiang County, when one party impaired the contractual right of the other, the latter may demand compensation; in Badong County, in the above situation, the other party may cancel the contract but usually did not seek compensation. In the counties of Zhushan, Qianjiang, Jingshan, and Tongshan, if a party who had paid deposit breached or requested to rescind the contract, then the other party would not be required under the

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9 ZHAN Yuanxian, The Dairy of Weizhai, in 清史资料 (The Material of Qing History), Zhonghua Book Company (Beijing), at 184–274 (1983).
law to return the deposit. In Badong County, if the depositing party had done the same, s/he would usually abandon the whole or part of her/his deposit too.\textsuperscript{10}

In case 1, there were probably two reasons for HUANG to buy YAN the meat and wine. One was to show his apology to YAN; the other was to try to communicate his intention to restore good relations.

There was a custom in the counties of Hunan Province, like Hanshou, Yiyang, Anhua, and Xiangyin, where: “the party at fault should buy a sheep with a person leading it and an earthen jar of wine with two persons carrying it to the house of the right party to show her/his apology in the hope of settling the dispute between them. That was called ‘the propriety of one jin (unit of the Chinese weight) of meat and one jar of wine.’ This custom had been highly respected and observed by people in counties like Hangshou... the propriety would have the same effect as civil mediation.”\textsuperscript{11}

In common law countries, the so called “reasonable expectation” is one of the three fundamental interests protected under contract law.\textsuperscript{12} In brief, reasonable expectation provides a party of a contract with expectation that s/he will benefit from the promise of the other party. For instance, in Case 1, when the agreement between the parties was made, YAN had the expectation of earning three percent interest by lending 20 liang of silver. In common law, the remedial method is to place the aggrieved party in the position where s/he would have been in had the contract been performed; If this principle was to apply, YAN would be entitled to assert his claim against Huang for the interest he should have had. Here, of course, other common law principles such as “duty to mitigate” and “good faith” have not been considered. Under these principles, YAN would have a duty to remind HUANG to pick up the money in due course or he would lend it to somebody else in order to avoid interest loss. YAN could have been compensated for part, but not all, of the damage for he did not perform his duty to mitigate properly. However, YAN’s interest would not be protected under the conventional principle of Realgeschäft in Roman law. This result would be unjust for a party of good faith. This is why the principle of Realgeschäft has been doubted by civil law jurists.

Articles 464, 465 — “loan for use” and Articles 474, 475 — “loan for consumption” in the old Chinese Civil Code seem to be contradictory. For example, art. 474 provided that “a contract of loan for consumption is a contract under which parties agree that one of them shall transfer the ownership of money or other fungible things,” “and the other party shall return items of the same kind, quality, and quantity.” It clearly defined the loan contract as a consensual contract (Consensualgeschäft). However, Article 475 stipulated, “a contract of loan for consumption is effective only on delivery of

\textsuperscript{10} See fn. 8 at 1336.

\textsuperscript{11} Id. at 1364–65.

the money or other fungible items lent.”¹³ Then the loan contract seems to be a Realgeschäft and would not be effective until the item was delivered.

Scholars who tried to resolve the problem argued that “the delivery of item is only a requirement for effectiveness but not one for the formation of a loan contract. Therefore, both the contract of loan for use and the contract of loan for consumption could be formed by agreement. However, it should not become effective but for the delivery of item, and the parties could of course make an agreement in advance (Vorvertrag) to oblige the lender to deliver the item.”¹⁴ This explanation, though seems plausible, is so hard to understand. In the writer’s opinion, a loan contract could be decomposed into two contracts or two groups of juristic actions, which are arranged in chronological order and have causal relationship. The former can be viewed as an agreement for transferring the item. Thus it is a consensual and bilateral contract (Zweiseitiger vertrag) and works as an agreement in advance. The latter virtually is the substantive contract and would not be formed but for the delivery of the item. For this reason, it is identified as Realgeschäft. The debtor, after the delivery, has the obligation to recompense or return the item, but the lender has no reciprocal duty. Consequently, it is called a unilateral contract. The loan contract in Roman law, the author believes, must have referred to the latter. However, for the sake of practicality and convenience, it has absorbed the former as a whole. If this understanding is correct, then YAN could sue for HUANG’s breach of the former contract and recover part of his damage though not all of it. First of all, however, YAN had to be a bona fide party.

Concluding from the above analysis, the ideas of right and wrong naturally developed after a long period of customary practice in the Qing Dynasty. These ideas are in accordance with the values of the west, at least on the point of this case.

II. FORM REQUIREMENTS

The parties’ concern about the presence of the memorial in Case 1 is worth considering. In the Qing Dynasty, the writing of a loan contract is the primary evidence and it plays a crucial role in adjudicating a loan dispute. “Anybody sues for debt recovery must show her/his piao (票) to the court.”¹⁵ “In the case of qianzhai (钱债), quanyue (券约) is the necessary proof.”¹⁶ Such phrases were very commonly invoked when a

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¹³ John WU Ching-hsiung, 袖珍六法全书 (A Handbook of Six Statutes), Huiwentangxinji Publishing House (Shanghai), at 9092 (1936).

¹⁴ See CHEN, fn. 4, 民法通义债编总论, at 124.

¹⁵ SUN Dinglie, 四西斋决事 (Decisions from Xisizhai), vol. 1, at 17 (1904). (The author was appointed as the Prefecture magistrate of Shaoji (Shaoxing Fu), Taiping Fu (currently Dangtu County), and Linghai County, all of the above were in Zhejiang Province) around 1896–1900. The book copied most of his decisions made in these places then).

¹⁶ SHEN Yanqing, 槐卿政迹 (Huaiqing zhengji) vol. 2, at 10 (1862) (The book collected the case decisions which the writer made during 1842–1849 when he was the District magistrate at Xingguo, Anyi, Taihe and Poyang, all in Jiangxi Province).
magistrate decided a loan contract case. Just for this reason, a high proportion of loan contract disputes concerned with written proof, including “trying to recover debt with invalid piao” or with faked or daubed writing of loan contracts.

**Case 2. Basic facts:** The plaintiff ZHAO Xuechun sued the defendant ZHOU Yuru for failing to return debt.

(1) “ZHOU Yuru, who opened a store called ‘Wanyu,’ borrowed 109 yuan, principal and interest included, from Mrs. ZHAO Ji ang (mother of the plaintiff), through ZHAO Yuanhao as a middleman. Mrs. ZHAO owed the store a sum so ZHOU canceled her debt as a way to satisfy the 109 yuan debt, while the remaining was paid through ZHAO Yuanhao. A receipt was written by Mrs. ZHAO as she did not return the piao”; (2) “GUO Shanxi had once borrowed 200 yuan of foreign silver from Mrs. ZHAO Jiang on behalf of HUANG Chanyu, who later satisfied it through GUO. A receipt was issued from Mrs. ZHAO too”; (3) “JIN Changsong, Mrs. Jinyu’s husband, borrowed 62.6 yuan, before his death, from ZHAO Guoming and Mrs. ZHAO Jiang (i.e. the plaintiff’s parents). The debt was gradually amortized while the balance was cleared off with tin goods instead of cash. The data provided by the parties were consistent with the account book records.”

**Facts accepted by the court:** i. “ZHAO Xuechun inappropriately claimed the debt and caused the lawsuit. I, the magistrate of this county, checked the receipt, identified the handwriting on the receipt and affirmed that it was really created by ZHAO Xuechun”; ii. “HAN Fuchun, an employee of Wanyu store, claimed that the foreign silver borrowed by ZHOU Yuru had been satisfied by canceling Mrs. ZHAO’s debt to his store and his returning a sum through ZHAO Yuanhao. When first heard of it, I also guessed ZHAO Yuanhao has embezzled the money and so he should repay. After separately interrogating ZHAO Yuanhao, I found the truth as that Mrs. ZHAO Jiang did not trust the plaintiff and ordered him to live apart from her. She asked ZHAO Yuanhao to deposit the foreign silver in Wanyu store on behalf of her for interest accumulation. However, the plaintiff had stolen the written memorial before the debt was satisfied, consequently, the memorial could not be found and she had to ask the middlemen to write a new receipt which could prove the satisfaction of the debt.”

**Decision:** a. “ZHAO Xuechun was stricken as a punishment for wrongfully instructing CHEN Tingxue to sue for debt recovery”; b. “Mrs. Jinyu had already cleared off the principal debt but did not satisfy the interest according to the account books she submitted. She was ordered to pay 6 yuan of foreign silver within 5 days and wait the plaintiff for collection”; c. …; d. “All jiepiao (借票) Should be destroyed. The receipts reserved for checking could be recollected. The following are returned immediately: 3 volumes of account books of Wanyu store’s, 11 volumes of account books of Mrs. Jinyu’s, 2 volumes of the account books of GUO Shanxi’s and 2 volumes of the account books of HUANG Chanyu. Relevant parties can collect the 5 pieces of pingpiao (凭票) ZHAO Xuechun submitted. Parties involved in this case should take their ganjie (甘结)
separately for finishing the case. It is so decreed.”17

**Case 3.** Facts: Plaintiff WU Zongshan sued the defendant HUANG Hanrong for failing to return debt.

(1) The defendant “opened a tea trading store in the 3rd month last year. Lacking capital, he borrowed 100 yuan of foreign silver from WU Zongshan with ZHOU Dunfu as a middleman. The pingpiao (written ticket as proof) stated that the date fixed on maturity was the 5th day of the 8th month, and the interest was 8.3 yuan of foreign silver. The store soon lost the capital in tea business. When WU Zongshan wanted to collect the debt on the fixed date, HUANG Hanrong denied any wrongdoing by modifying the pingpiao (the Chinese character ‘10’ was added above the character ‘year’ on the pingpiao), and then arguing that the money he borrowed in Guangxu 2nd year had been cleared but the pingpiao was not returned to him. (HUANG) did what against his conscience and wildly repudiated a debt so that WU Zongshan had to sue for recovery.” (2) “According to the statement of WU Zongshan, (HUANG) had borrowed certain amount of tea valued 53 yuan of foreign silver beside the money loan. This could be proved by the account book records.”

The court’s analysis: i. “I, the magistrate of this county, checked the pingpiao and interrogated LOU Liansheng who wrote the pingpiao on behalf of the defendant, as well as somebody else, and found affirmatively that the character ‘10’ was added by HUANG Hanrong with the intention of denying the debt. HUANG was unable to advance any arguments to justify his assertion that the pingpiao was written in Guangxu 2nd year (it was in fact Guangxu 22nd year). How could he discharge his debt in Guangxu 2nd year even if his story was taken? He must pay more interest if the money was really borrowed in Guangxu 2nd year instead of Guangxu 22nd year.” ii. “(I) studied (the case) and interrogated (the defendant) many times. (He) once said he returned the money by himself, and then said he once tried to repay. (The plaintiff) must have returned him the pingpiao had he really satisfied his debt or he should have asked for a receipt (from the plaintiff) had the pingpiao been lost. Who does he try to deceive? iii. “LOU Liansheng said he is 34 years old now and his native place is Cixi (a county in Zhejiang Province). He was only 13 or 14 years old in Guangxu 2nd year. How could he be trusted to write a pingpiao on behalf of somebody else then? No further explanation is needed to respond to his dubious story.”

Decision: a. “(I) order HUANG Hanrong to pay (the plaintiff) 150 yuan of foreign silver. (I) order WU Zongshan to yield the interest and the foreign silver for the tea sale (which the defendant had bought by credit), totaling 9.3 yuan, on the reason of mutual affection. Huang however has to deliver the ordered amount of foreign silver to the court on 12th month 5th and that will be forwarded to WU Zongshan ”; b. “ The account book of

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17 NI Wangzhong, *诸暨谕民纪要* (*The Collection of the Important Instructions to the People in Zhuji County*), vol. 1, at 15 (1987) (This book collected the case decisions made by the author during 1895–1897, when he was appointed the second time as the magistrate of Zhuji County in Zhejiang Province).
WU Zongshan is to be returned. The pingpiao is waiting for destruction. Once WU Zongshan receives the payment (from the defendant), every party involved in this case should take their ganjie separately to finish the case. It is so decreed."18

**Case 4.** Plaintiff: TAO Rong; defendant: LOU Jiakun

**Facts:** “The plaintiff states he holds a qianpiao (ticket for proving debt) which shows your (author’s note: the defendant’s) father had made a loan from him due in 10th month Guangxu 15th year. He claims he did not press for payment after the due date because of your father’s sickness. He postponed in collecting the debt again as your father died one year afterward. According to him, you claimed you had to make funeral arrangement so you could not clear it off. However, it is obvious that the plaintiff’s ticket is fake and he intended to swindle. It is because he said definitely that the date of your father’s death was one year after the due date of the qianpiao (欠票), but your father died in fact on the 24th day January in Guangxu 12th year according to your report for a theft case in February. Additionally, the court found no person called TAO Rong. It actually was a name forged by LU Agui.”

**Decision:** “Such a framed case out of thin air is so much abominable. (LU Agui) has been beaten with bamboo as well as Jiashi (枷示) as punishment. You can go home immediately and live and work in peace.”19

A Chinese scholar regarded “taking written memorial seriously under the traditional Chinese contractual system” as the “wisdom of our ancestors.”20 Both parties’ attitudes towards the memorial in Case 1 perhaps just proceeded from this wisdom. It is not difficult to imagine that Yan’s intention for refusing to return the memorial to HUANG was to try to follow the example of what ZHAO Xuechun did in Case 2 while the purpose of HUANG Mengtong insisting on regaining it was to prevent the same possible result.

*Shuqi* (书契) is not a contract itself but is only one of the forms of contracts. Just as a scholar pointed out:

“Usually, the word ‘contract’ is used to refer to the written memorial (the signed writing) or other utterance that evidences a legally enforceable promise or group of promises. The writing is not the contract; the words that the parties use if they contract orally is not the contract; the conduct or custom of the parties that manifest their legally enforceable agreement is not the contract. All of these manifestations are mere evidence of the contract. Where is the contract? One cannot touch, hear, smell or feel the contract. The evidence of the contract is subject to sensory perception. However, the contract is an abstract legal relationship between the parties thereto. The legal relationship is composed of enforceable rights and correlative enforceable duties.”21

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18 Id. at 43.
19 See SUN, fn. 15.
21 See Murray, fn. 12 at 2–3.
The author is not sure whether our ancestors had realized the abstract nature of the contract. In Chinese language, the term qiyue (契约) is frequently confused with the term Shuqi. That people misunderstand the concept of contract seems quite universal and can be seen both in ancient and present time, inside and outside China. This misunderstanding is perhaps not important for ordinary people, but must be significant to the parties concerned, and especially to the judges who decide on contractual disputes. It can be inferred from the above three cases that the judges (referring to magistrates, similarly hereinafter) and concerned parties did not make such confusion. They paid much attention to the written memorial only because it evidenced the existence of a contract. However, they did not treat the written memorial as contractual relationship itself. Judges did not affirm or deny the existence of a loan contract simply based on a written memorial. In Case 2, Mrs. ZHAO Jiang demanded the Wanyu store to satisfy the debt, and the store did not deny his duty when the former was unable to show the written memorial. In Lantian County, Shaanxi province, it was a custom that written confirmation was not needed after debt collection:

“Merchants and ordinary people that made loans generally required the debtors to give them written memorials, but they rarely returned the memorials to the debtors when the debts were cleared off. They would rather give receipts than return the memorials by inventing the excuse that the memorials had been lost or destroyed if the debtors demanded them.”

It can be seen from the above three cases and other materials that judges not only accepted certain forms of written memorial for a loan but also shouzi (收字), account books, letters, shoutiao (手条) or called shoupiao (手票) and testaments and so on; anything, no matter what sort of forms, simple or detailed, so long as it was a written record, could be used as evidence to prove loan relations.

Was an oral loan contract recognized? The answer should be positive based on theoretical deduction and custom. For instance, in Pianguan County, Shanxi Province, “Most loan relationship did not require contracts, and they would take effect so long as a third party guaranteed the debt. The guarantor subrogated the debtor in case the debtor did not perform her/his obligation.” Here, the phrase “did not require contracts” should be understood as “did not require written form of contracts.” Again, in Gansu Province, “A contract representing the full return of interest and principal was commonly made by utterance, not writing.” However, the court generally declined a contractual lawsuit that was not evidenced in writing due to the difficulty in proof, except when there was other sufficient evidence. For example:

Case 5. “…(He) has no writing memorial to prove that he has deposited (certain amount of) foreign silver for interest accumulation, which his complains has been denied

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22 See fn. 8 at 1399.
23 Id. at 1059, 1428.
(by the defendant). Furthermore, there is no guarantee that his complaint is not fabricated for swindling.”

**Case 6.** “**ZHAO Zixiang** has no written memorial to prove that **WANG** had ever borrowed (money) from him. There seems insufficient evidence when he rests his case only on *jishujingzhe* (计数经折). **WANG Jichuan** is a close relative of **ZHAO**. **ZHAO** is so poor and homeless so he had no choice but to think about becoming a Buddhist in a temple. He is so pitiful. If any temple were to accept him, that would be a good place for him, an old man, to spend his remaining years so as not to be destitute and homeless. How could **WANG Jichuan** and his nephews be so hardhearted towards his situation? **(WANG)** should manage to give him 30 yuan as living expenses and it should not harm their relative affection. **ZHAO Zixiang** is however not allowed to disturb **WANG**. It is so decided.”

**NI Wangzhong**, who was twice appointed as the magistrate of Zhuji County in Zhejiang Province during Guangxu period, once stated this in a decision: “(anybody) lending money naturally should have a *piao* (票), then it will be easy for her/him to collect the debt. Now (you) have no *piao* but only spoken words, how could I rely upon that as proof? This debt is not pursued.”

Brockman pointed out “in common law countries, the Statute of Frauds requires that certain types of contracts be written in order to be valid. Among other reasons, this is intended to ease problems of proof. Several of the phrases in Taiwan contracts were used to show that parties intended the written contract to serve as proof of the agreement. One of the most frequently appearing phrases was *k’uingk’ou wufeng*, literally “empty mouths cannot be depended upon,” indicating that the contract was reduced to writing to avoid the difficulties of proving the existence and the terms of an oral agreement. *Fuchih ts’unchao*, “to hand over as proof” was almost invariably the last phrase in every loan contract and appeared in many sales contracts as well. It indicated that the document itself was proof of the agreement and was transferred to the promisee for one’s use as evidence of the promisor’s obligation.”

The forms of written memorial for the loan contract in China’s mainland have almost no difference from those in Taiwan according to the author’s comparison. The predominant purpose of the requirement for writing is to avoid fraud, both in China’s

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24 See SUN, at 32.
27 See Brockman, fn. 2 at 110.
28 See the written memorials for contracts “Temporary Commission for the Survey of Traditional Customs in Taiwan, Survey 1, Report 3, Supplementary Reference Materials for the Private Law of Taiwan,” Vol. 3, Part 2 and “Temporary Commission for the Survey of Traditional Customs in Taiwan, Survey 1, Report 3, Supplementary Reference Materials for the Private Law of Taiwan for vol. 3.” These books were edited by the colonial government of Taiwan during Japanese occupation before World War II.
mainland and Taiwan.

During the Qing period, the contract forms accepted in custom, though not officially required of uniformity, were largely identical but with minor differences. Regional variations were not significant. The typical loan contract document should indicate the reason for making the loan; the kind or type of the item(s) involved in the loan (if it is money, which kind of money or what level of purity of silver should be specified); duration (or term of time, if no specified duration, the phrase yubian gui huan, literally means “return the money at convenience,” should be added to the document); loan bearing interests should indicate the rate; loan secured by mortgage should describe the mortgage and indicate its location. In the ending part, the formula kongkou wuping fuzhi cunzhao, or kongkou wuping, lici jie yue weiju would inevitably appear. The ending part is important also for recording the names of parties involved and the precise time of the writing. Rigid loan document should be signed and sealed by borrowers, lenders, and middlemen. When there were guarantors and scriveners, their signatures and seals were needed too. For example, the original text of a loan document — jieziyue (借字约) of yihetangji, a store located in Qing County, Hebei Province, which was discovered by Mr. ZHU Wentong in a village called Quanwang Zhuang, Dulin people’s Commune, Cang County, Hebei Province after Liberation, looks like this:

For needing money, Yihetang (seal) is creating a jiezi and asked the help from middlemen, now (we) borrowed and received qingqian (清钱) from Yixinq Tang (a store name), totaling 1,000 diao (unit of money). The interest rate is fixed at three percent and (we will) pay an interest of 30 diao every month. The loan including principal and interest will be repaid within 10 months. 34 mu (亩) of land located in Caojia Fen and 16 mu of land located in Lijia Di will be conveyed to (Yixing Tang) as mortgage in case (we) are unable to return both the principal and interest. Since spoken words cannot be relied on, this loan document has been created as proof.

Middlemen  
LI Yuchun (seal)  
WANG Xiangbo (seal)  
Wanxin Hao (a store) (seal)  
WANG Zhongshan (seal)

Guangxu 14th year, 4th month, 14th day. Yihetangji.

In practice, however, the simple formed loan documents were very popular. In Tianjin, Zhili (now Hebei) Province, it was a custom that obligation contract required

29  The uniformity of contract forms can be traced back to, at least, the Han Dynasty. See Hugh T. Scogin, Jr., Between Heaven and Men: Contract and the State in Han Dynasty China, 63 The Southern California Law Review, 1325–1404 (1990).
30  See fn. 8 at 1399.
31  The original document is collected in the Library of Nankai University, Tianjin. See FENG Erkang, 清 史史料学初稿 (The First Draft of Study on Qing Historical Materials), Nankai University Press (Tianjin), at 276 (1986).
only “last name without first name”: “In remote places far from trading port, (a contract could be valid) without names and signatures of middlemen and guarantors, and the creditors did not have to write their first names if they gave their last names.” In Pingdu County, Shandong Province, it was a custom that “on a written contract or receipt, a signature or stamp was not necessarily presented”; “on the contracts for sale of house or land or contracts for loan, generally people who created the contract only wrote their names without signatures or seals, and the important witness are scriveners; but in places near the county town, there is the principle that a party has to create a written contract by herself or himself; consequently, the four Chinese characters qinbilizi, ‘this writing is created by myself,’ must appear above her/his name.” In Qian County, Shaanxi Province, “a written contract can be valid even without signature or seal while a scrivener does not write her/his name” under the local custom; “a loan-maker need only write a muopiao (墨票), and the middleman and debtor do not sign or seal (on the paper) while the scrivener does not provide her/his name.” Shoutiao or shoupiao circulated in Fujian, Jiangxi, Jiangsu provinces, as well as manyiaozhuan in Henan Province were quite popular and all were simple form of contracts. They would take effect have the debtors signed. For instance, in “Jinjiang County (Fujian Province), people who make loan often create jiezi, locally called shoupiao,…without the names of creditors.” The magistrates not only recognized the contracts in this kind of forms but also ordered the debtors to “write shoutiao” when they instructed judicial enforcement.32

Case 7. “During interrogation, DONG Qizhou confessed that he was the middleman of the written memorial (of the loan contract) formerly created. It does not seem to be true that the total debt is 35 yuan as asserted (by the plaintiff). Therefore, another written memorial for 10 yuan’s debt should be destroyed. The remaining 25 yuan’s debt, of which 10 yuan has allegedly been repaid, is not very clear if we consider the interest as provided (in the contract). Consequently, I persuade and order GAO Handong to reduce the debt to 20 yuan and change the former memorial into a shoutiao with DONG Xueguang as the guarantor. The debt should be satisfied before the end of the 5th month so as to reduce litigation. The ganjie each party has signed should attach to the case files. It is so decided.”33

The above materials indicate that there was no strict form requirement for a loan contract. One rarely sees “certain formalities which were required over and above the mere agreement of the contracting parties,” whether for verbal or written contract.34

The situation in China’s mainland during the Qing period was almost the same as that of 19th century Taiwan. Brockman said: “sale contracts could be oral or written. Little distinction as to enforceability was made between them and, especially among

32 See fn. 8 at 982, 1032, 1411, 1190, 1285, 1269 and ZHAO, fn. 25.
33 See ZHAO, fn. 25, The decisions for GAO Handong.
34 See Maine, fn. 7 at 349–350.
merchants, contracts involving large sums of money, which were often concluded without written documents. There was no Statute of Frauds as in Anglo-American law to require that certain types of contracts be in writing or under seal. Nor were there any specific formalities, as in the civil law system, or rituals as in the so-called stipulation of Roman law where in a ritual recitation the promisee would ask, ‘do you promise so-and-so?’ and the promisor would reply, ‘I promise.’”

In the modern civil codes of such civil law countries as in Germany, Japan, and the old Republic of China, loan contracts are regarded as Formfreies Rechtsgeschäft (contracts without requirement for forms). “It is a general principle,” scholars interpreted, “that there is no form requirement for any type of contracts in modern legislation.” Similarly, §2-201 of the contemporary Uniform Commercial Code has loosened the stringent standards on the form of contract under common law. The only term necessary for an enforceable contract is quantity. The American courts have been applying the Code analogously to other types of contracts, although it is technically applicable only to contracts for the sale of goods. It seems that the contract rules in the Qing Dynasty are consistent with the essence of modern western contract law by placing emphasis on the intention of the parties, not the form of the contract. One prominent difference between the contract law during the “maturity” period and that in ancient time, according to Maine, is that it frees contracts from the trammels of forms and rituals, and stresses on “agreement of the minds.” The author wonders whether this law discovered by Maine could be applied in China.

This article argues that the Qing government did not make harsh requirements on the form of loan contracts not because they had clearly understood the “modern legislation principle,” but because it suited the needs of loan practice in the society. As mentioned earlier, during the Qing Dynasty, the activities of loan making were very frequent and often happened among close relatives and neighbors. Parties usually did not excessively demand the contracts to be in writing, out of the consideration of their friendly relationship. Oral loan contract in a way of the so-called junzi xieding, literally “gentlemen’s agreement,” was nothing new (see Diaries of Weizhai). If the government had imposed too many requirements on the form of loan contracts, most loan relations would not have been protected by the state. Consequently, interested parties would have had no choice but to rely heavily on their own resorts, usually in the form of violence. This circumstance could easily lead to serious consequences, such as local disturbance, which was not desired by the Qing government.

The Supreme People’s Court decided in Opinion No. 21 of 1991 (the 4th Article),
“When examining loan cases, the people’s courts should require plaintiffs to provide loan receipts in writing in accordance with Article 108 of the Civil Procedure Code, or provide necessary factual proof if there is no written receipt (the author’s emphasis). (The courts) should reject the case if the requirement is not met.”

This Opinion itself accords with the essence of the modern contract law. However, many judges have not clearly understood the sentence highlighted; they emphasize written receipts too much. Consequently, a number of unjust decisions have been made. These should have been avoided.

III. CONSIDERATION AND PRESCRIPTION

Brockman has pointed out that the magistrates in civil trials were unlike criminal lawsuits: the former were interested largely in facts but rarely discussed the law. Moreover, they never referred to the Code or precedent. The magistrates’ function was not to create law as Anglo-American judges did, but only to decide if the facts of the case fitted the local custom and to reach a decision accordingly. As seen from the cases cited in this article, the judges concentrated their effort on clarifying the fact of the matter and it proves that Brockman’s conclusion is not wrong. Therefore, it is necessary to discuss the methodology and rationale based on which judges determined the facts and evaluated evidence.

1. How did a judge draw the fact from defective evidence? e.g. pieces of evidence were insufficient, obscure or contradict with each other.

(1) “QIAN Zhangwu claimed that WANG Changtai had borrowed 300 yuan in foreign silver from his father, QIAN Zaocun before the latter’s death, and there was a pingpiao for another 120 yuan. The total debt less 170 yuan which was repaid through WANG Yutang, was not satisfied yet;” (2) “He (QIAN Zhangwu) had already paid 242 yuan in silver as an assigned portion for the dam construction of Mi Lake, although he owned only about 210 mu of hutian (literally Lake field). Unexpectedly, WANG Changtai took it peremptorily as the fund the deceased contributed for the dam construction”; (3) “(I) interrogated WANG Changtai and he claimed that because the dam of Mi Lake collapsed, he and LOU Ehui called the landlords concerned together to discuss this matter and they have reached a resolution unanimously that every landlord should pay 300 wen (unit of value) per mu for uncultivated land and 1200 wen per mu for cultivated land. QIAN Zhangwu owned about 240 mu of hutian but he paid only 2 yuan. Lake dam of about 3,000 zhang (unit of length) and 2 yindong (supposed meaning underdrain) have been constructed with the fund collected (from the landlords) intermittently. However, a yindong for QIAN 16 River and an irrigation channel for Hengjian Lake were suspended because some people took a wait-and-see attitude and

39 See Brockman, fn. 2 at 100–101.
thus there was insufficient fund. The late father of QIAN Zhangwu was originally willing to donate 300 yuan in foreign silver to help the construction. Now the father was dead and his son makes use of this opportunity to sue me inappropriately.”

The Court’s Analysis: i. “It was impossible and unreasonable for QIN Zaocun to donate money to help the irrigation work in Hengjian Lake because his household owned no land there according to my investigation.” ii. “Moreover, I checked the original letter that had been written by QIN Zaocun you (the defendant) submitted (to the court), and I found he intended no more than to ask you to lead the irrigation works and he would pay in advance. WANG Changtai, however, supposed his son did not know the truth and misrepresented his real meaning as making a donation. His (the defendant’s) bad intention is clear. QIAN Zaocun promised to pay in advance, as he thought he could collect the money once the landlords paid. He did not say a word of donation because the landlords should pay for their own benefit. The late QIAN was already kind enough to offer help. How could (you) demand him to donate?” iii. “Furthermore, I checked the account books and found it was recorded that QIAN Zaocun did pay around 200 yuan in foreign silver as the assigned charge for the irrigation work. This record contradicted with what WANG Changtai’s claim that (QIAN) paid only 2 yuan in foreign silver, but proved QIAN Zhangwu’s claim that they had paid 230 yuan in foreign silver. Some items are probably missing from the account book as there is a deficiency of 20 or 30 yuan.”

Decisions: a. (Omitted); b. “WANG Changtai has already repaid QIAN Zhangwu 170 yuan, the remaining balance is 230 yuan in foreign silver. (I) order QIAN Zhangwu to deduct 30 yuan from this as the payment for the construction of yindong. WANG Changtai should satisfy the remaining from the collected money before this 12th month 15th day and QIAN Zhangwu comes to the court for collection”; c. “Two volumes of account books for the collected money are to be returned to LOU Ehui, and he is expected to try his best with the construction job”; d. “WANG Changtai is allowed to take back the account books and the guilüe (supposed meaning: construction plan). Parties involved in this case should take their ganjie separately to finish the case.”

The evidence provided by the parties in this case has some defects. The plaintiff claimed that the contract between his father and the defendant was a loan contract according to the pingpiao, but the defendant alleged that the contract was a grant, submitting the letter as his proof (there were probably other oral promises made by the plaintiff’s father). There is no way to verify the details as the original letter was not shown in the decision. It could be inferred from the case material that there is perhaps an ambiguous expression in the letter that the defendant defined as bangfei (literally contributed fund) while the judge interpreted it as dianfei (payment in advance and should be repaid). The strongest argument supporting the judge’s interpretation is “It was impossible and unreasonable for QIN Zaocun to donate money to help the irrigation

40 See NI, fn. 17 at 62.
works in Hengjian Lake because his household owned no land there according to my investigation.” It is “unreasonable” because he would have no benefit at all if the fund was defined as “bangfei.”

The basic logic according to which this decision was made happens to coincide with that of “consideration” in Anglo-American law. According to the doctrine of consideration, a contract is not valid and enforceable unless there is an exchange of benefits. For example, A promises to pay 200 dollars as an exchange for B’s teaching for four hours per week. To A, the teaching is a benefit he obtains; but to B, this is a detriment he suffers. He cannot do anything else that would have benefited him within these four hours. It will be the same result conversely. If A refuses to pay for the teaching, B can invite the court to enforce the contract. In case A argues that B volunteered to give free teaching, the court may reject the defense for there is no consideration. Consideration is a unique concept in Anglo-American law and is regarded as one of three main requirements for a contract, with offer and acceptance as the other two requirements. Generally, consideration is considered to be the inducement for making a promise, although there are several different definitions. The promisor obtains certain benefit or the promisee incurs some detriment. It appears clear that both this doctrine and the reasoning under which the judge in this case rejected WANG’s defense are based on the same assumption, i.e. people act in their own self-interest and only in this sense, that is, in the pursuit of self-interest, are their acts rational.\footnote{Robin P. Malloy, \textit{Law and Economics}, West Academic Publishing (New York), at 54 (1990).} This is consistent with the assumption of the legalists and Xunzi school of thought under Confucianism in Ancient China, i.e. the human nature is to pursue benefit while avoid detriment. In recent decades, the theory of consideration has been criticized by more and more scholars and was even once regarded as one of symptoms of the death of contract.\footnote{G. Gilmore, \textit{The Death of Contract}, Ohio State University Press (Columbus), (1995).} This article argues that the reason of the death of consideration theory is just because the doctrine represents excessive formalism and dogmatism and goes against its original intention, as well as leads to unjust decisions\footnote{See the case Stilk vs Myrick, id. at 24–30.}. It is said that the theory of consideration has caused much controversy and could form “a thick book”\footnote{See \textit{The Revival of Contract}, in LIANG eds. \textit{Civil and Commercial Law Review}, vol. 3, The Law Press (Beijing), at 210–215 (1995).} if all these comments are collected. The original intention for the creation of consideration is unclear as the author has not mastered enough materials. Consequently, the author dare not reach any conclusion arbitrarily. Consideration was described as “a historical accident.”\footnote{See Murray, fn. 12 at 241.} Inspired by this case, it is suggested that consideration was invented when judges wanted to decide whether the parties declared their true intention and what their true intention was when the evidence was defective (like the situation in this case). Legal philosophers believe the essence of
contract as “the will of human beings.” A contract can be a result of “honesty, fairness and voluntariness on both sides; or they may be the result of economic duress, bad faith and fraud.” Law only protects those in good faith, but never recognizes the binding effects of the promises out of coercion, fraud (untrue declaration of intention), etc. Gilmore said “in any civilized system the same agreements, provided they are entered into voluntarily and in good faith, will be enforced — as of course they should be.”

How can one decide whether it is one’s true intention when it is difficult to obtain proof or when evidence is defective? It seems that in the perspective of Anglo-American law, the only reliable, just, and objective device is to infer from the human nature — pursuing benefit while avoiding detriment. This is why consideration was invented. Under British law, consideration would be applied only in oral contracts but not written contracts. The original purpose of the theory of consideration is kept intact. However, it appears that the classical American theorists of contract made a mountain out of a molehill: The principle was originally applied in deciding what evidence was relied upon, but then the theorists expanded the principle too generally to determine whether a contract is formed. This is probably an alienation of consideration.

2. How did a judge decide if evidence extinguished and the middleman concerned died as the contract was concluded long time ago?

**Case 9.** Facts: Plaintiff: LIU Changmao; defendant: CHEN Jiyun

a. In Jiaqing 8th year (1803), ZHONG Yannan and CHEN Shizuo jointly borrowed 13 thousand wen of qian from LIU Hanxian (LIU Changmao’s uncle); b. In Jiaqing 25th year (1820), the father of LIU Changmao divided the family property with his brothers, and LIU Changmao inherited this obligation right in question.

**The Court’s Analysis:** i. The division of family property has passed 17 years, why has not LIU Hanxian asked for the payment of the debt? ii. “This quan (the certificate for the debt) was equal to an invalidated ticket long time ago if this (obligation right) could not be claimed; if this could be claimed, Hanxian had his own sons and grandsons, why did they not claim themselves? Why did they allot this to Changmao?” iii. “Nobody could seek payment from Yannan as he died long before the division. There is only half of the debt that Shizuo should assume even if he acknowledged this debt. Why did Changmao accept this invalidated ticket of 13 thousand wen without any argument for he was not a child at the time of division?” iv. “It is 35 years from Jiaqing 8th year. I have examined the certificates for the real property of Shizuo, which he bought from Changmao and his cousins on the paternal side during the years. I found the seals on them clear. How could they sell their real property one after another while keeping a debt ticket secretly in the

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46 Luigi Miraglia, *Comparative Legal Philosophy Applied to Legal Institutions* (Chinese version), vol. 3, Commercial Press (Beijing), at 598 (1931).

47 See Gilmore, fn. 42 at 84.

box without suing until 35 years later?” v. All the middlemen recorded on the ticket have died and “cannot bear witness.”

**Decision:** “In the cases of *qianzhai*, *quanyue* is the necessary proof. In this case, however, the *quanyue* LIU Changmao submitted to allege debt against CHEN Jiyun cannot be relied upon.” “Based on the above analysis, it is too hard for me, the magistrate of this county, to order Shizuo to repay. I order to destroy the debt ticket.” 49

**Case 10.** Plaintiff: ZHU Wenjie; defendant: LIN Jianghui

“I interrogated both ZHU and LIN, the two parties in this case; each of them stuck with their own arguments. I, however, examined their debt tickets, 12 pieces in total. I found that nobody concerned survived to provide proof since all the tickets, starting Guangxu 3rd (1877) year through 5th year, were written 20 years ago. ZHU Wenjie filed an action in 20th year for LIN Jianghui refused to acknowledge the debts. He should sue again when he did not recover the money accompanied by the middlemen. He, however, had never sued anymore since then till 23th year. He suddenly complained to the court this 2nd month and the court instructed him to collect the money accompanied by the middlemen again. He should sue the defendant to enforce performance of the obligation instantly after he did not recover again. He, however, did not sue until this 11th month. I investigated the facts concerned and found many unbelievable points in the (plaintiff’s) arguments while the tickets he has presented could not be accepted as reliable proof. I therefore decide that this case is fabricated and should be wound up for settling litigation. It is so decided.” 50

**Case 11.** Plaintiff: CHEN Shaotang; defendant: ZHANG Chaoyuan

“I studied this case again. The handwriting on the receipts for loans submitted by ZHANG Chaoyuan is inconsistent with the previous handwriting of CHEN Shaotang’s father. Furthermore, ZHANG Chaoyuan’s claim that, he had a *shoutiao* for 26 yuan loan made in Tongzhi 1st year (1862) that was left at his place by CHEN Yuelai, CHEN’s grandfather, should be disregarded too. Even if his words are taken, why did he not deduct this amount of debt from the payment of 50 *liang* in Guangxu 15th (1889) year? Why did he not deduct it when he made a new loan (to the plaintiffs)? There are many contradicting points in his argument. It is wrong to intend to defraud (money). Now he (the defendant) is willing to have his land mortgaged, but I still instruct ZHANG Shuzhi and WANG Hanhe to mediate their dispute. It is so decided.” 51

The petitions of the plaintiffs in case 9 and case 10, as well as the petition of the defendant in case 11, were rejected due to the lapse of time. It is thus obvious that time as a legal fact plays some role in identifying the right(s) of parties. In Gansu Province, there was a custom, “(a certificate for debt) would be treated as an invalidated ticket

49 See SHEN, fn. 16.
50 See ZHAO, fn. 25, *The decision for ZHU Wenjie*.
51 Id. *The decision for CHEN Shaotang*. 
after 30 years (without claiming),” i.e. “the obligation right for money debt would be regarded as extinguished provided that (the obligee) has not exercised it for 30 years.”52 However, the grounds the judges relied on to deny the petitions were not only because of time, but mainly because the evidence was insufficient. It can be seen from the decisions that the common grounds of the three cases are: (1) The petitioner’s stories were unreasonable; (2) the parties concerned and middlemen died and could not bear witness; and (3) the obligees have not exercised their rights for a long time. There are provisions of extinctive prescription in the civil codes of most civil law countries. It is said that this rule originated from the decrees of praetors in Ancient Rome; and its purpose was to avoid or ease the difficulty in proof. “Generally speaking, if certain state of fact has continued for a long period,” HU Changqing argued, “then most evidence would have been lost or annihilated. Consequently, holders of rights should lose their rights.” SHI Shangkuan asserts too, “in case somebody is asking for my payment, and s/he allegedly holds a receipt for a loan inherited from her/his ancestors, how can I prove that the debt had been cleared off?” “Therefore, if the right of ownership has continued for a long period or if somebody has not been requested for satisfaction for a long time, then it is better off to recognize this as legitimate legal relationship. To view in another perspective, it is not improper to provide no legal protection to ‘those who sleep on their rights’ as they have not exercised them for a long time, even though they are justifiable owners or justifiable obligees.”53 HU pointed out again that “there are two elements for an extinctive prescription to be tenable.” One needs “the passage of considerable time”; the other needs “(the right holder’s) continuous non-exercise of (her/his) rights.”54 It is thus clear that the ground for establishing the rule of extinctive prescription is quite consistent with the reason the judges applied in the above three cases.

However, there was no strict time restriction for an obligee to act under the Qing law. The common saying “a son is bound to satisfy the liabilities of his father” not only had its profound customary background but was also very popular across both northern and southern China. For instance, in Weinan County, Shaanxi Province: “after the death of the debtor, a creditor can exercise her/his claims to debts of the son or grandson of the deceased. There is no prescription for plea. Therefore, it is called ‘debt of descendant.’”55 The custom cited earlier seems very rare. In ordinary Chinese people’s minds, regardless of whether under the law, cultural conceptions, or general customs, an obligation right would never be extinguished by time. The denying of the claims to

52 See fn. 8 at 1421.
53 HU Changqing, 中国民法总论 (On the General Provisions of Chinese Civil Code), Commercial Press (Hong Kong), at 398–401 (1933); SHI Shangkuan, 民法总则释义 (Interpretation and Definition on the General Provisions of Civil Code), Shanghai Press of Translating & Editing on Jurisprudence (Shanghai), at 438 (1937).
54 Id.
55 See fn. 8 at 1394.
debts in the above three cases that conform to the modern rule of extinctive prescription is for the sake of avoiding unjust results because there are no alternative resorts. This is just like the saying “choose the less harmful one when there are two adversities; choose the more advantaged when there are two benefits.” The Supreme Court Opinion No. 147 of 1914 provided, “there is no rule of prescription to invoke before the promulgation of the Civil Code. No court is allowed to reject the validity of an old contract on the basis of lapse of time.” This decision was reaffirmed by the Supreme Court in Opinion No. 461 of 1916. Judges submitted to people’s custom by making this sort of decisions.  

**Case 12.** Plaintiff: Mrs. LI Da; defendant: DA Caishou  
“I interrogated both parties in this case and obtained their confession. The ticket submitted by Ms. DLI Dai was written in Guangxu *binzi* (2nd year, 1876) year, so more than 20 years have passed. Why has she never asked for payment? Why did she not sue if she once so demanded but got nothing? This is suspicious. DA Caishou said he had already repaid 50 yuan and got a receipt. I examined the receipt and found it is pardonable. Subsequently, (DA) repaid another 20 yuan and Ms. LI has admitted to this. Therefore, it should not be doubted. I order Caishou to write a shoutiao to amortize another 50 yuan to settle the dispute. Each party should take their *ganjie* and attach them to the case file. It is so decreed.”  

**Case 13.** Plaintiff: GU Runzhang; defendant: LI Jingwen  
“The monetary dispute in this case could be traced back to tens of years ago. Since they have *piaojue* (literally ticket certificate), why did they not settle accounts earlier? The ticket provides that the loan would be satisfied right after the flannel store was sold. Why did they not discuss it when the house which the store occupied was sold several years ago? The details are hard to understand. At about the beginning of Guangxu period, GU Runzhang had opened a monetary store (bank) and LI Jingwen had opened a store called Tongxingyu engaged in selling ginseng. Both stores had already closed many years ago. I cannot decide for the plaintiff to recover totally because the ticket is the sort of *xinglongpiao* (兴隆票) and the statements of the parties do not correspond with each other. I interrogated the parties and learned you have been close friends for tens of years. There is no need for you to keep suing each other. It is easy to settle your problem if you look for mediation. It is so decided.”

In Case 12, since the plaintiff had once asked for payment and the defendant had also repaid part of the debt, the judge affirmed the plaintiff’s obligation right, although the loan was made long time ago. This is similar to the modern rule of interruption of the extinctive prescription.

The circumstance in Case 13 is quite similar to that of Case 12. However, the result

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56 ZHOU Dongbai eds. 大理院判例解释民法集解 (A General Interoperation on the Supreme Court Decisions of Civil Law), The World Press of Shanghai (Shangai), Part I, at 65.  
57 See ZHAO, fn. 25, Book 2, The decision for Mrs. LI Da.  
58 Id. Book1, The decision for GU Runzhang.
is a little different because the receipt for the loan was *xinglongpiao*. The so-called *xinglongpiao* was a kind of certificate of a contingent obligation and was a popular custom across Yangtze River. According to an investigation, this custom existed in provinces such as Zhili, Jiangsu, Jiangxi, Hubei and Anhui. In Tianjin, it was called *façaipiao* (发财票): “It was contingent on future. For example, A borrowed one yuan from B and was unable to repay, he then wrote a receipt and delivered it to B, on which he promised to satisfy the debt if he could get rich one day. He would not perform his debt until he could make a fortune. Therefore, this sort of receipt was called *façaipiao* and was frequently used.” In Jiangning County, Jiangsu Province: “When a debtor becomes insolvent but the creditor does not exempt the debt, they reach a compromise that the debtor gives the creditor a receipt which promises s/he would repay the total debt if s/he gets any income or if s/he becomes prosperous (the form of the rest of this receipt was just the same as the general receipt). On the position of the debtor, s/he is quite happy to accept this reconciliation to release her/him from transient embarrassment; while on the position of the creditor, s/he is also eager to get something as a proof to claim her/his right in future for it at least acknowledges her/his conditional obligation right. Therefore, since the Qing Dynasty, this custom has been quite popular in the Jiangning County. Whenever this kind of cases take place, the dispute will be mediated by the relatives or friends of the parties without the need to go to court and the parties will rely on this receipt as a remedy. This kind of receipt has great effect at least within the territory of this county.”

Note that ZHAO Youban, the judge in Case 13, was the magistrate in counties such as Fanshan (in Hubei Province), Shangyuan (merged into Jiangning County after 1911), and Taizhou (near Yangzhou, Jiangsu Province), in this order. In this case, ZHAO did not make his decision directly, but remitted to mediation. It seems he had considered the factor of human feelings and tried to enliven the moral consciousness of the parties, thus conforming to the custom in the Jiangning County. Kitakawa Zentairo, a Japanese scholar said: “The fact is difficult to confirm and the evidence scatters and disappears easily. Therefore, it is better to tentatively recognize the effect of acquisition of right or the effect of extinction of right according to prescription. However, whether the legal effect is accepted is determined by the party of prescription. In other words, even if it matures under prescription, no court is entitled to solely base its decision on the doctrine if the party does not invoke it. It can be said in this way: The party has the option to abstain from applying it when the prescription matures. Thus, the inharmonious relationship between facts and the rule of prescription is mingled with human feelings and leaves open plenty of room where human moral can play a role.”

It is thus obvious that the development of the modern law has never excluded human

59 See fn. 8 at 982, 1089, 1119, 1206 and 1317.

feelings. Oppositely, it should encourage justified social ethics. Just as Kaitakawa Zentairo said, the relation between the fact and the rule of prescription is not quite harmonious. Consequently, there are controversies over the object of negative prescription, and accordingly there are different types of application and interpretation among different countries. In some countries, the obligation right and the right over things except proprietorship could be the objects of negative prescription, such as Japanese Civil Code, and the Draft of Civil Code in the late Qing Dynasty copied it; but in other codes such as the German Civil Code and Swiss Obligation Law, only the right of claim could be the object of negative prescription. In 1914, the government of Northern Warlords drew up a new Draft of Civil Code (historians call it “the Second Draft of Civil Code”) in which the draftsmen chose to accept the latter model and it was followed by the Civil Code of the Republic of China.  

IV. CAPACITY

**Case 14.** Plaintiff: NING Tingshu; defendant: XU Binggong

Decision: “NING Tingshu, a banker, sued for recovery of debt owed by XU Binggong, a magistrate of a prefecture who was formerly responsible for a tax bureau. I ordered him to pay and he paid 100 thousand wen at the court. NING Tingshu, however, kept asking for satisfaction of interest as stipulated, or he would not accept the payment. JIAO, the committee member of the bureau, requested my instruction. I said, litigation about money lending is minor problem, we should therefore only order collection of principal and there is no reason to order recovery of interest. NING should be rebuked and you should tell him that he is not allowed to sue any more if he refuses to accept the held recovery.”

What is interesting in this case is the parties’ different statuses. The magistrate in lower level dare not decide a case presumptuously when an official was accused as a debtor. Consequently, the case was reported to LI Jia, the provincial judicial commissioner of Hunan and the judge of this case. LI affirmed the principal obligation right of the plaintiff but rejected his claim on interest. The right over interest of debt within the legitimate limitation was protected by Great Qing Code at the Article 149 — “Taking interest in violation of the prohibitions.” If the interest rate exceeded the limitation, the surplus would be deducted while the remaining sum would still be protected. For example:

**Case 15.** **Fact:** Plaintiff: HOU Yuansheng; defendant: TIAN Guanyin; the third party:

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61 XIE Zhenmin, 中华民国立法史 (A Legislation History of the Republic of China), Cheng Chung Book (Shanghai), at 904 (1937).

62 LI Jia, Baiyuan suozhi (The Miscellanies of Baiyuan), at 7 (1903) (? supposed publishing year based on the preface of the book).

HOU Yingzu.

Facts: “HOU Yingzu dian (author’s query: Is it equivalent to mortgage? Brockman interpreted it as ‘sale of real property with a retained right of redemption.’64) a certain piece of land to HO Yuansheng for cultivation in Yongzheng 12th year (1734). The straitened circumstance did not improve, then Yingzu borrowed twice or 7 liang of silver in total from TIAN Guanyin in the 8th month of the same year with the same piece of land as security. He was unable to repay both the principal and the interest. Guanyin entered the land to claim his right but was defended by Yuansheng in the 4th month of Qianlong 4th year (1739). Yuansheng was beaten to death.”

Decision: “TIAN Guanyin is sentenced to strangulation after the final review of capital cases according to the provision ‘anyone who, during an affray, strikes and kills another, regardless of whether he has struck with the hand, or the feet, or with another object, or metal knife, will be punished with strangulation after autumn…HOU Yingzu wrote a proof of the security with the land which stipulated that the interest rate was three percent (author’s query: per month?). This written form (therefore) is not regarded as chongdian (author’s query: is it the same as re-mortgage? It should mean selling the same piece of land with retained right of redemption to more than one party at the same time or within the same period), and therefore he should be left alone on this point. However, he should be ordered to repay TIAN Guanyin both principal and interest of a total of 14 liang of silver under the Code. HOU Ziqi is entitled to remain the right of cultivating the land mortgaged to his father, HOU Yuanshen.”65

Note: There are four years and a half from 8th month of Yongzheng 12th year to 4th month of Qianlong 4th year. Therefore, the total interest should have been 11.34 (assumed monthly) and the total debt, including both principal and interest should have been 18.34. However, the Great Qing Code provides that “even though the months and years [of the loan] are many, the [total] interest may not exceed the principal,” “the interest may not exceed three percent per month.” Thus, the maximum that TIAN Guanyin might recover was 14 liang.

It can be seen from this and other cases cited above that there was no legal basis for LI Jia not to protect the plaintiff’s claim for interest. Perhaps, LI’s decision resulted from the relations in official circle and his own future. He opined in another case, in which NING Zengze, an official teacher from LI Ling, did not satisfy the debt owed to WANG Rong, a merchant from Anhui by stating that: “NING is no more than an official teacher. However, the bureaucrats tried to shield him. WANG would have gotten nothing but unjust result had I not been indulged NING a little. Nevertheless, the way as stubborn and honest as that I have persisted has offended many of my fellow officials; and I may not be

64 See Brockman, fn. 2 at 88–89.
65 The First Chinese Historical Archives & The Institute of History of Chinese Academy of Social Science eds. 清代土地占有关系与佃农抗租斗争 (The Relationships of Land Possessions and Tenant Farmer’s Resistance of Rent in the Qing Dynasty), Zhonghua Book Company (Beijing), at 137–138 (1988).
understood by everybody.” It is evident that the disparity in status and positions had produced significant impact on whether a court decision was just or not.

Equality is the basic premise of modern civil law, especially contract law. It is doubtful whether a contract is made out of parties’ own free will without this premise. Professor Jones believes that “there were no citizens” in China,” because “there were no ‘persons’ who, as beings with legal capacity to be bearers of rights, might make declarations of intention, and engage in juristic acts. There was no law of contracts, torts, or unjust enrichment that might constitute a law of obligations and no law of tenure. There was simply a direction to the magistrate to punish those who violated a commandment of the emperor.” “Unless, of course, one regards the emperor as the only ‘person’ whom the law recognizes. He has, however, no duties and every action is unilateral since he can never be obligated to anyone else.”

China, indeed, was a society without equality in history, including the Qing Dynasty. There was inequality between officials and laymen; inequality also existed within Chinese family or clan. Family members would receive different treatment according to their seniority, position, and age in their families or clans. These sorts of inequality, of course, have hindered growth of the contract law in modern sense.

However, it perhaps is an overstatement to say no relative equal positions or relative freedom existed between the parties who were making contracts based on this point. In fact, there has never existed a kind of unlimited freedom of contract and absolute equal subjects, whether it is in ancient or current time, outside or inside China. This article agrees with Professor WANG Tsechien that “contractual justice is an aspect of equality justice…it emphasizes that there must be equality between one party’s performance and the other party’s counter-performance. [However, there is no clear standard of fairness and reasonableness] on whether the performance objectively matches the counter-performance, for example, if [the] counter-performance for [the] labor should be a certain amount of wages, or if the counter-performance for [the sale of] a product should be priced so much. Since there are so many factors to consider, the present (Taiwan) Civil Code has basically chosen a subjective principle of equivalence. That is, the party subjectively wishes to receive a counter-performance in return to her/his own. [Such a counter-performance] is sufficient regardless of whether it is objectively equivalent.”

Case 16. ZHANG Youyun, a juren (successful candidate in the imperial examinations at the provincial level) from Guizhou Province had made several loans sequentially from MA Tingbi, a merchant in Beijing, WU Ningyu and CHE Jitai from Taigu County in Shaanxi Province before and after he took his office as the magistrate of Lingqu County (district) in Shanxi Province. All the loans were usury with unreasonably high interest

66 See LI, fn. 62 at 19.
rate. These creditors came to ZHANG’s home frequently to press for payment of debts. ZHANG found no resolution but to hang himself. The Board of Punishment reported in a zouzhe 奏折 (memorial to the throne) that: “MA Tingbi and WU Ningyu came to press for payment. ZHANG Youyun invited both of them to enter his office and had ZHU Ying, his brother in law negotiated with them. ZHU, on behalf of ZHANG, promised they would pay half of the debt at first to WU Ningyu. However, WU refused to leave his office until they could repay him with silver cash while MA Tingbi insisted on total recovery and kept pressing for payment during the same period. ZHANG Youyun was heavily in debt and depressed so much because he could expect no way to resolve his problem in the near future. His gloomy mode worsened when he saw MA Tingbi and so forth waiting at his office for payment. He felt little relieved though many of his relatives and friends kept consoling him. He hanged himself and died on [Qianlong 47th year (1782)] 12th month, 8th day.”

The parties in this case and case 14 were unequal in their political positions. One of them was an official while the others were laymen. However, this difference in status had no direct impact on their loan relation. The fact that merchants dared to press officials for payments of debts is inconsistent with Professor Jones’s argument; instead, it conforms to the so-called “subjective principle of equivalence” Professor WANG demonstrated.

Case 17. “LUO Zaiyuan is too young to understand and handle this kind of business; his father (LUO) Yongshan is still in custody in Tianchang County (Anhui Province). Thus, (the buyer) should discuss with his father and acquire a writing from him. Only then could the sale of land be legitimate. Furthermore, JIANG Lijiang is a neighbor (of LUO). Why did they only ask the son (LUO Zaiyuan) to write the contract without Lijiang’s presence? There is clear fraud in this transaction for the 15-year-old son is no more than a child. I am also informed that shangqi (or sometimes called shangshouqi, the original contract the current seller bought from the former seller, which prove the legitimacy of the current seller’s title) is still in Yongshan’s hand. This makes this transaction more unreasonable. YANG Jiulin should be detained and interrogated while the money obtained from the sale should be returned without delay. It is so decided.”

Case 18. Facts: Plaintiff: GUO Ruitang; defendant: GUO Xiasong

“Originally in 8th month, Tongzhi 2nd year (1863), GUO Ruitang bought a foundation for three rooms from GUO Xiasong, locally called ‘shangshimu’; and at the same time, he bought the 5th, 6th and 7th rooms on the right side of a house located in the same place, from GUO Xiashan, who is the elder brother of GUO Xiasong. Now he has hired laborers to build a new house. However, GUO Xiasong stops their work and argues with GUO Ruitang. GUO Shidang, a member of their clan, tried to arbitrate the dispute but failed.

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70 See ZHAO, fn. 25, Book 3, The decision for CHEN Delong.
Consequently, they, (just as an old Chinese phrase described) “family members drawing swords on each other,” are suing each other before this court…I interrogated and found) GUO Xiaosong was very young at the beginning of Tongzhi period though his name was listed and signed on the contract of the real property sale. He must have signed on it under the order or coercion of his elder brother although GUO Xiaoshan has not distributed anything to him. Considering the poor circumstance of his household, I order GUO Ruitang to pay 24 yuan in foreign silver to him. GUO Ruitang should pay 14 yuan to GUO Xiaosong in foreign silver because he has already paid 10 yuan through a middleman as an additional price for extinguishing the retained right of redemption. It is also for harmonizing family relationship and helping the poor that I make such a decision. Parties involved in this case should take their ganjie separately for finishing the case. GUO Ruitang should collect his deed, household registration book at the time of paying the decided sum and GUO Zhuandan also collects a zhaogi (supposed meaning: a contract for paying an additional price to extinguish the retained right of redemption). It is so decreed.71

Although the above two cases are not about loan, they serve to illustrate the issue of capacity. Both cases were concerned with whether an infant is capable of entering into a contract. It seems that the judges did not intend to deny such capacity of an infant. However, they doubted whether an infant was capable of judging the effect of his conduct. Apparently, the intention of the judges was to protect their benefits rather than depriving them of their rights because LUO Zaiyuan and GUO Xiaosong were too young to realize the detrimental results their conduct had caused to themselves. This intention is consistent with the purpose of the rule of legal disability (Geschäftsunfähiger) and the rule of limited capacity in modern civil law system as well as the infant rule in the requirement of capacity for a contract in Anglo-American contract law.

The judge in case 17 might have affirmed the enforceability of the signed contract had LUO Yongshan authorized his son to make such transaction or had JIANG Lijiang, the neighbor, been present during the deal. This way of thinking is in accordance with the rationale of the rule of legal representation or legal guardianship. However, the judge did not reject the effectiveness of the transaction in case 18, even though it was very similar to the circumstance in case 17, except that it happened many years before and the plaintiff had occupied the foundation for a long period as well as the elder brother of the defendant was the co-seller of the real property. Kitakawa said: “It will produce too many unstable factors on transaction if the conduct of an infant never takes effect. Therefore, for protecting infants without harming the stability of a transaction, civil law supposes the validity of the conduct of an infant for the moment; however, it is revocable. It will be valid if the conduct is approved by the legal representative.”72 Clearly, it is based on the consideration of transaction safety. The judge in this case did not find any cancellation

71 See NI, fn. 17 at 14.
72 See Kitakawa, fn. 60 at15.
power in the plaintiff. However, he decided that the defendant was entitled to claim certain compensation as a remedy. This was, as this article supposes, a measure that had regard for both sides.

**Case 19.** Facts: Plaintiff: LIU Feipeng; defendant 1: CHEN Changpan, defendant 2: (CHEN) Yifang, defendant 3: (CHEN) Yihua

(1) “CHEN Changpan had ever owed his (the plaintiff’s) grandfather a debt of 100 yuan in foreign silver many years ago. In Daoguang 18th year (1838), (both parties) manifested in an agreement that (the debtor) would pay 20 yuan as an additional interest and clear the debt within 4 years with the deed of his house as a mortgage. Yifang, the son of Changpan managed to raise 100 thousand qian in Chunan (supposedly Hunan Province) and repaid to (LIU) Zhaoshan, the father of (LIU) Feipeng, who was then trading around there and promised to yield the remaining interest at the request of Yifang. Zhaoshan and his elder brother Caimen had already abandoned their claim on the remaining debt and wrote a receipt as a proof. Yifang asked for return of the deed of mortgage after he was back home. Feipeng refused to return the deed as he contended that the payment did not satisfy the total debt. He regards money so important that he pays too little attention to the orders of his father and uncle.”

(2) “CHEN Changpan owns another house, together with Yihua, his nephew, which was inherited from one of their relatives. Yihua has been working at a store owned by LIU Zhaoshan. Yihua once borrowed 10 thousand wen but was unable to repay. Therefore, he sold the house and wrote a memorial as a deed for the co-ownership in Daoguang 2nd year (1822). He had listed the names of Changpan and Yifang on the deed though in fact they neither took part in the transaction nor did they sign the deed. The buyer (LIU Feipeng) only paid half a hundred (author’s query: yuan in silver?) to Yihua; but has not paid the other half to CHEN Changpan. The buyer tried to deduct the remaining debt mentioned above from the sale price of the house while the other party (CHEN Changpan and Yifang) intends to wait for a good bargain and so keeps their co-ownership of the house. Each of them has selfish motives for a long time and tried to cheat or outwit the other. The parties came to sue each other before this court they cannot come to terms.”

**Decisions:** i. “I should order LIU Feipeng to surrender the mortgage deed for the house CHEN Changpan lives in.” ii. “How can a son claim for the remaining debt including both principal and interest after his father promised to yield? The remaining debt, 40 yuan in foreign silver in total, is canceled now.” iii. “The deed for the co-ownership should transfer to LIU Feipeng when he pays 50 liang of silver to CHEN Changpan. LIU is entitled to own the house according to the deed.” iv. “All the other miscellaneous memorials are destroyed for clearing up files.” v. “I feel strongly that the private purchase and the private sale are quite close to a plot of occupying. I tentatively excuse such conducts for they have happened for many years. Each party should take his ganjie separately and wait for the concluding instruction from the prefecture, to whom I will report. Alas! How can the neighbors raise dispute if everybody calmly gets along
with each other? No one should harshly treat their family members if they wish to benefit their descendants for a long term. I hope you do not forget my admonition.”73

There were two groups of thoughts on co-ownership disposition among family members involved in this case. One was that a son refused to accept the right of alteration (Recht auf Rechtänderung) of his father and uncle who modified his grandfather’s obligation right; the other was that a nephew disposed a real property co-owned with his uncle without authorization. The judge affirmed the alteration right in the former group, but confirmed the legal effect of the contract for sale of the house although meanwhile he denounced the lack of morals of the nephew in the latter group.

Professor DAI Yanhui has pointed out: “zunzhang’s right of supervision on family property will be different depending on whether he is a lineal relative or collateral relative. If the head of a family is a lineal ascendant, he has the power to control, instruct, and punish his son or grandson. Consequently, his right of supervision on family property would often confuse with his right to discipline. Furthermore, a lineal descendant is not entitled to challenge how his lineal ascendant uses or disposes his family property. If the head of a family is a collateral ascendant (or senior relative), he cannot dispose the family property at his own will for he has no more than the right of supervision on family property. A junior family member is entitled to sue on the court for correction has the head infringed his benefit.”74 This is why the decisions for the two groups in this case are different.

In the Qing Dynasty, loans and property transactions among family members, who had divided family property and lived apart, had no big difference from that among strangers. It usually had little impact on the formation of contract, regardless of whether the parties involved in the transaction were senior or junior in rank, elder or younger in age. This can be proved by weizhai riji, in which many loan contracts were entered into among family members e.g. the case on 9th month, 28th day, Kangxi 39th year cited above and the real property sale in this case. As for co-owned property of a family, the power to manage it belonged to the head of the family, any beiyou were not entitled to use, avail or dispose it without authorization. However, in reality, many beiyou often secretly disposed their family property. The so-called custom such as xiaomaozhang (literally, debt of mourning hat), mayizhai (debt of gunny clothes), fumo jiaochan (surrender property when his father dies), tingxiang huanzhai (pays his debt when hearing the noise) were quite common in many areas. For instance, in Gongxian County, Henan Province, “under Chinese family tradition, any beiyou was not allowed to use family property without authorization. However, some profligates, more often than not, spent without restraint. They borrowed money secretly or mortgaged lands stealthily. As an exchange, they promised to pay the debt or transfer the ownership of lands after their parents die. This was called xiaomaozhang because they would repay the debt when they wore the mourning hat. Many southern provinces had such customs too, called mayizhai

73 See SHEN fn. 16, vol. 3 at 4.
74 DAI Yanhui, 中国法制史 (Chinese Legal History), San Min Book Store (Taipei), at 215 (1979).
(the due date for performance of obligation was when they were wearing the mourning dress made of gunny cloth).”

It is thus relatively clear that the conducts of beiyou who disposed family property without the permission from the head would be recognized by custom. “Therefore, under the traditional law, the family property should be interpreted as that, was owned jointly by father and sons and meanwhile the co-ownership extended to other lineal descendants,” said DAI Yanhui: “however, it never excluded the co-ownership existing between uncle and nephew or among brothers. The head or other members of a family were not absolutely unable to own their property exclusively from other family members.”

Comparatively speaking, under the Qing private law, the male beiyou had much more rights than those children under the reign of Roman patriarchal system. It seems one would better regard, based on the above facts, the restrictions for beiyou to dispose his family property as restrictions on his capability but not the limitations on his capacity to enjoy private right or capacity to have private obligation. In other words, the purpose of the restrictions was to try to protect rather than inhibit private right through it, more than less, missed its goal.

Right or private right has been regarded as the core and basis of civil law. Therefore, whether an individual person, the bearer of right, has equal capacity as others becomes the foundation of this core. This paper does not propose that there was equality in the Qing society. However, the individuals were relatively equal among each other if one does not take political factors into account and survey the property transaction process in a narrow sense.

**CONCLUSION**

This article has analyzed some of the key elements of the formation of a loan contract and has tried to identify the reason and principle behind each decision and custom by surveying the judicial practice in the Qing Dynasty. The article has identified a number of astonishing similarities on deciding how a loan contract was formed in western and eastern legal systems. More similarities may be found if one studies further on more wide-ranging fields of contractual activities. It might still be thought as preposterous, although this is not the first time that we have such discoveries.

“Law in traditional China was exclusively penal,” from conventional Western perspective: “The so-called legal codes that had developed through centuries were primarily administrative and penal and stressed both morality and harsh punishment. Civil law had a limited and stunted growth.” These are supposed correct conclusions.

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75 See fn. 8 at 1022.
76 See DAI, fn. 73 at 214.
77 Similar discoveries can be seen in the article of Brockman and Scogin, see Brockman, fn. 2 at 29.
It also seems a strained interpretation to persist in considering certain parts of the Great Qing Code, e.g. “laws relating to the Board of Revenue,” as “civil law in reality,” 79 because the provisions in those parts not only attached punishment but also were regarded as criminal law by the people at that time. Those who drew such conclusions depended mainly on their study on traditional Chinese statutory law. In contrast, western scholars who have studied traditional Chinese customary civil law would have different views. It has to be pointed out here that ‘fa’ or ‘falü’ in the modern Chinese language do not correspond completely with the term like ‘law,’ ‘droit’ or ‘recht’ in Western languages. In fact, the term ‘fa’ or ‘falü’ has been legalistic (strongly influenced by the Legalist School) for a long time and its key meaning is penalty. 80 In the ninth chapter of Rulin Waishi, lousangongzi (the third son of Mr. LOU) said, “he did not violate the law but owed some debt,” when Lou talked about YANG Yun, a manager of a salt store who lost 700 liang of silver in business and was detained by his boss in order to press him to repay. 81 In a special news program of CCTV, Jiaodian Fangtan (焦点访谈), on February 13, 1996, a correspondent visited some peasants in Langfang and Dingxing counties, Hebei Province. They had counterfeited and sold Eguotou (二锅头), the brand of a cheap but popular liquor manufactured in Beijing. “Do you know what you have done has violated the law?” A peasant who was found guilty was asked. “No, I don’t.” He replied, “I only know murder and arson violate the law; but I never know this violates the law.” In ordinary Chinese people’s mind, the activities regarded as against the civil law today have never been considered that way, both today and before Western law was imported into China.

Comparatively speaking, the meaning of “law” or similar terms in other Western languages is much broader than its Chinese counterpart — fa or falü. It has been defined in the narrow sense as “rules recognized and acted on by courts of justice” while the general meaning is “the ensemble of precepts, rules or statutes which govern human activity in society, the observance whereof is sanctioned in case of need by social construction, otherwise called public force.” 82 “The word ‘law’ in Western languages has four different meanings, including reason, propriety, (penal) law, and institution, if we define it strictly in Chinese,” said YAN Fu, a famous philosopher in the late Qing Dynasty who first translated “L’Esprit des Lois”

79 This idea was first proposed by the Ministry of Civil Administration at a memorial to the throne during the late Qing dynasty, in which it suggested to draw up a civil code [see ZHU Shoupeng eds. 光绪朝东华录, Zhonghua Book Company (Beijing), at 5682 (1984)]. Since then, many Chinese scholars, who had been educated systemically by modern Western civil law, held this viewpoint. For example, see HU, fn. 53 at 14–15 and SHI, fn. 53 at 41.


81 See WU see fn. 1 at 94.

(The Spirit of Law), the great work of Montesquieu, “the so-called law in the West actually includes the Chinese code of propriety.” The distinction between the Western word “law” and the Chinese character \( fa \) has also been noted by some other Western scholars. “\( Li \) has been translated as ‘propriety’ while \( fa \) has been translated as ‘law,’” “the term \( li \) embraces a far richer meanings than anything encompassed by the pale word ‘propriety.’ On the other hand, western words such as ‘law,’ ‘droit,’ ‘Recht’ are freighted with enormous accumulations of meanings. Finally, the word \( li \) may overlap with some meanings of ‘law,’ and the word \( fa \) can hardly catch all the meanings attributed to the word ‘law.’”

It is not the subject of this article to discuss whether civil law existed in Ancient China. However, this article focuses on explaining the ideas such as abstract justice or right and wrong behind the loan custom and judicial decision in the Qing Dynasty and the principles controlling the modern western law, arguing that there is similarity and mutual applicability. Of course, there is nothing strange that different peoples coincidentally have similar ideas about right and justice at different time. Unfortunately, our ancestors had not sorted out these similar ideas into the rigorous logical codes or properly organized them into the distinct textbook as the forefathers of Europeans did. It is probably just as Dr. Schulz said: “this discernment of kinds was to lead to the discovery of principles governing the kinds.” However, our ascendants were content simply with deciding the cases though the similar principles that were implicit in their decisions. As mentioned above, unlike criminal law suits or their counterparts in Europe, the magistrates in civil trials in the Qing Dynasty had neither to quote the code, nor did they have to invoke precedents as Anglo-American judges did. They even did not need to explain based on what custom they made their decisions. Usually, judges decided the civil cases entirely on the basis of their own sense of what was right without reference to any man-made source, although this sense itself was the production of custom and morality. This seems to corroborate with what Brockman said: “at least a strain of ‘khadi’ justice was present in Chinese jurisprudence.” Nevertheless, this article argues that it does not matter whether a judge’s decision is based on his own sense of what was right or by strict adherence to a comprehensive set of man-made laws. The most important thing is whether there exists a common ground between the two and what legal philosophy the ground is based.

LUO Tong mostly meant the same by arguing: “I have studied law for 30 years. I prefer Anglo-American law because of its flexibility and because it agrees with the spirit of our traditional law from afar.” It is thus clear that we are never short of the ability to

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83 YAN Fu, 法意 (Montesquieu’s the Spirit of Law), The Commercial Press (Beijing), at 3, 7 (1981).
85 See Jones, fn. 66 at 332–333.
86 See Brockman, fn. 2 at 90.
87 LUO Tong, 英吉利法研究 (A Study on English Law), The Commercial Press (Shanghai), at Preface (1934).
discover; what we are short of is to sort out and organize those which we have discovered and observe their authority which they deserve. We never lack our own law; but we do lack our legal science. Just as somebody said, “more than half of the (current) Chinese legal science are translated and transplanted (from the West). The transplantation of natural science into China would have no problem; but plagiarizing legal science will not succeed.” Of course, we could attribute the fault of the previous and current backwardness of our nation to our forefathers; but who can we blame for the possible future backwardness of our nation? Our law and our legal science will eventually be totally imported and never be blended into our blood if we are continuously content with copying and peddling Western legal culture, while reluctant to discover the intrinsic essence of our own.

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