Legal Transplants and Local Custom: The Struggle over Apportioned Liability for the External Debt of Partnerships (Parts I and II)

By Madeleine Zelin
Dean Lung Professor of Chinese Studies
and Professor of History, Columbia University

[Author's note: This paper will likely find its place in section II of a book tentatively entitled *GONGSI--A tale of culture, custom, imperial power and the law in the making of modern China.* Begun as a study of the transplantation of company law in twentieth century China, this book has become an attempt to give context and add nuance to our understanding of the internal factors influencing Chinese responses to external demands for conformity to Western legal practices. As such, it aims to contribute to the literature critiquing legal reform through transplantation. At the same time, it attempts to unpack the interplay of specific state capacities and processes of reform, the pressures exerted by participation in an international business environment, and the embedded practices, both legal and customary, that shaped the "legalization" of business in the early 20th c.]

Introduction to Section II

This section examines one aspect of the introduction of Western business law to China in the first quarter of the twentieth century---the thirty-year debate over the liability of partners for external debt. The context for this debate was the continuous process of civil law codification that began during the last decade of the Qing dynasty [1644-1911] during which time the largely unregulated realm of private transactions in China was reimagined as governed by commercial and civil statute guided by Western example. The debate, which pitted continental and common law principles of unlimited liability against protestations of long-

standing Chinese practices which I will call apportioned liability, was performed within new state and popular institutions as well as mass and specialist print media. The latter, in particular, gave expression to contending views by publishing verbatim new modes of public communication with state agencies, the interpretations and decisions of the new Supreme Court, and a wide range of scholarly, journalistic and lay opinions regarding the changing legal landscape.[1] The intensity of the debate over the issue of partnership liability relied on deeply embedded understandings of how business was done, the place of custom in the ordering of private transactions, the sources of trust, and the appropriate role of the state in regulating business activity and intervening in dispute resolution. An examination of Chinese partnership liability during a period of intense engagement with Western legal norms thus provides a useful point of entry for understanding the embeddedness and historical contingency of legal practices. It underscores the inadequacy of legal transplantation as a means to understand the complex processes by which law enters new terrain. And it allows us to trace the processes by which Western law, itself by no means uniform, participated in the realignment of legal authority in the highly sophisticated, albeit non-Western context that was early twentieth century China.

Part I: Viewing Legal Reform Through the Lens of a Merchant Custom

Background

First, a bit of background. This story begins in the last decades of the last Chinese imperial dynasty and extends into a period of several decades when China was governed by Republican regimes, each committed to legal reform. The dynasty already had a centuries old

[1] Part 3 will examine the public debates in greater detail than is possible here.

written legal code that dealt largely, but not exclusively with what we would call criminal matters and a system of county magistrate's courts that handled both criminal prosecution and private social and economic disputes. Magistrates courts, in conjunction with guilds and other societal institutions, enabled the development of a robust system of private ordering of commercial relationships based on the execution of contractual agreements.[2] And this contract culture would play a big part in the evolution of partnership liability, both as the medium through which shareholding relationships were constituted and as the foundation for the contest that would be waged between custom and law.

Law played a vital role in the fraught relationships between China and the major Western powers and Japan, beginning with the first instantiations of extraterritoriality in the treaties that ended the Opium War and not ending until their final abrogation in 1943, as China was elevated to Ally in the war against Japan. A narrative of Chinese legal insufficiency undergirded much of the diplomacy between China and foreign entities during the period from the 18th c. to the 1940s.[3] China's rapid-fire move to Westernize its legal system must certainly be understood in large part as an effort to recover what was explicitly understood as the challenge extraterritoriality posed to its national sovereignty. Legal reform took place in the context of a legally dominant Western presence. But it was not smooth. Its lumpiness was not simply a product of Chinese legislators and judicial officials who did not understand or who willfully rejected the good law that the West had to offer, though we will see that the process

[2] See Madeleine Zelin, Jonathan K. Ocko, and Robert Gardella, *Contract and Property in Early Modern China* (Stanford, Calif.: Stanford University Press, 2004).

[3] For a discussion of the discourse of Chinese legal insufficiency see Li Chen, *Chinese Law in Imperial Eyes : Sovereignty, Justice, and Transcultural Politics* (New York: Columbia University Press, 2015); Teemu Ruskola, Legal Orientalism: China, the United States, and Modern Law, (Cambridge ; London: Harvard University Press,, 2013), http://www.columbia.edu/cgi-bin/cul/resolve?clio10842376.

of legal reform itself contributed to confusion over key legal concepts. Following the struggle to define partnership liability provides unexpected insights into the authority accorded various sources of law in this period of political and legal transition. It opens to scrutiny the role of courts, the press, Western and Chinese businessmen, societal organizations, legal and other professionals, and of course a changing Chinese state in the contest to define Chinese legal modernity.

What is the Chinese Custom?

On November 18, 1887 the North China Branch of the Royal Asiatic Society initiated a discussion on the issue of Chinese partnership and the liability of individual members for external debt.[4] The discussion began with the reading out of a "proposition" at a meeting of the branch.

> A., B., and C. enter into partnership. A. contributes Tls.[5] 500, B. contributes Tls. 1,000, and C. Tls. 2,000 of capital, which may be regarded as consisting of 7 shares, of which A. holds 1, B. holds 2 and C. holds 4. After a time, the firm fails, with debts to the amount of Tls. 5,000, and at the same time C. absconds.
>
> (a) To what extent and in what proportion will A. and B. according to Chinese mercantile law or custom, be required to make good the debts?
> (b) Supposing C. is a member of a family of ample means, in which he has an undivided share (e.g., is one of three sons, father alive), to what extent can the family property be made available to pay the debts of the firm?

The framing of the question over a decade before the Qing state embarked on its project of commercial law reform, it's recognition that there was in China something akin to mercantile law or custom, it's recognition that liability for debt was constructed in ways that might differ from practices familiar in the West and that family law might have an impact on

[4] "Chinese Partnership: Liability of the Individual Members," *Journal of the North China Branch of the Royal Asiatic Society* 21 (1888): 39-52.
[5] Tls stands for taels, an ounce of silver and the standard denomination for large transactions in Qing China.

that construction, are noteworthy in themselves. The responses of ten individuals, representing a cross-section of prominent Westerners residing in China, as well as two Chinese interlocutors, were reprinted in the Society's journal. Among the respondents were persons familiar to students of China's nineteenth century Western encounter, including C.T. Gardner, a one-time British consul at Amoy, E.H. Parker, a longtime British diplomat and translator of Wei Yuan, Herbert Giles, British consular official and eminent Chinese linguist, and George Jamieson, later noted for his books about Chinese society and business practices. While a couple of the respondents displayed considerable ignorance and disdain for the Chinese, overall they agreed on several points succinctly summarized by an anonymous Chinese official among their number. First, the general custom in China was that A and B would only pay back the creditors in proportion to their respective shares in the firm. C's share would be of no concern to them, although, as his Chinese compatriot stated in his response, they might be asked to deliver up C to the authorities. As for C's family, Chinese law was quite clear. A father had no obligation to pay the debts of a son. And if C and his brothers had already divided their household and set up individual households of their own, the brothers did not bear responsibility for C's debts either.

This attempt by the Royal Society to establish the rules under which Chinese partnerships functioned argued for the deep roots in Chinese business practice of what came to called "apportioning liability according to shares" or *angu fendan*.[6] Once each partner's share

[6] Anecdotal evidence that this custom was followed not simply in the Shanghai environs where foreigners resided is sparse. At the same time, no evidence that contradicts this practice appears in major case collections. For examples from widely dispersed locations see Baxian Archives 6-7-2823., cited in Jing 谢晶 Xie, "设有法律的秩序：晚清巴县工商业合伙研究 Order without Law: A Study of Late Qing Baxian Industry and Commercial Partnerships" (Central Nationalities University, 2012), 18 and as well as other cases on pp.17-21. Early Zigong salt

of the debt was determined and met, his liability ended, regardless of the actions of his fellow partners.[7] While similar to proportional liability[8], *angu fendan* did not require proportional sharing of the obligations of an incapable or absconding partner. And unlike joint and several liability, it did not allow a creditor to seek the entire amount of a debt from any single partner.

Foreign interest in Chinese partnership conventions was a product of the intermingling of Chinese and foreign investment, and the growth of trade and credit obligations among actors subject to widely differing legal systems. It emerged at a time when Western business law was itself in a formative stage. Limited liability was not available to English joint stock companies until 1855, fifteen years after the opening of the first treaty ports in China. And it was not until 1867 that the Hong Kong Company Ordinance allowed common law incorporation in close proximity to China. Within China, the absence of formal law pertaining to partnership or the corporation fostered considerable ambiguity among foreigners regarding the rights and

industry investors do not appear to have anticipated the problem of external debt. However, by the turn of the 20th century they too are contractually provided for equal division of profits and losses. See for example Zigong Archives 5-4-55-109 (1914) and Zigong 7-1-376-35 (1921). The Suzhou archives contains a number of cases in which Chambers of Commerce affirm the contractual obligation to share in profits and losses according to ones share in the firm. See for example 乙 14-34-103-2 (1910) as well as a reference to the pervasiveness of the practice in Ningbo in 乙 14-1-441-15. Qingqi Wang and Li. Qicheng, eds., *Ge Sheng Shen Pan Ting Pan Du [Decisions of the Provincial Courts]* (Beijing: Beijing da xue chu ban she, 2007), 101-03, 105-106 discusses cases Xinmin, Liaoning, and Ningbo.

[7] In the proposition posed by the Royal Society A would have paid 714.285 taels, B would have paid 1,428.571 taels and the creditors would have found themselves with a loss of 2,857.429 taels. Where proportional liability was recognized, A would have paid an additional 952.475 taels for a total of 1666.76 taels and B would have paid an additional 1,904.952 taels for a total of 2053.523 taels. In a proportional regime and a joint and several regime the creditors would receive their full due and the settlement with delinquent members of the partnership would be strictly a matter internal to the partnership.

[8] Proportional liability is more commonly discussed in tort than in corporate law and rarely in relation to partnership debt. Ballantine notes that California law, alone among the United States, had unlimited proportional stockholder liability for corporate debt as late as 1928, elimination of which he included among necessary modernizing reforms Henry Winthrop Ballantine, "Plans for a Modernized Incorporation Law," *California Law Review* 16, no. 5 (1928): 425. Sollars proposes proportional liability as an alternative, not to unlimited liability of members of partnerships, but of the limited liability of corporate shareholders. Gordon G. Sollars, "An Appraisal of Shareholder Proportional Liability," *Journal of Business Ethics* 32, no. 4 (2001).

obligations of parties investing with, and selling and lending to Chinese. It likewise created varying expectations among Chinese who increasingly invested in foreign firms.

Impact of the Company Law

China's hastily drafted first company law had only a modest impact on the structure of new business entities during the period from its promulgation in 1904 to its revision in 1914, two years after the fall of the dynasty. Many of the legal privileges accorded the new business entity called a company were already available to Chinese through customary partnership arrangements.[9] The Company Law itself left vague the distinction between a partnership and a company, first, by making no mention of legal personhood and second, by creating four categories of companies that remained ill-defined but were assigned names that drew on already widely used Chinese terms for jointly invested business.[10]

The new law did introduce two new concepts, registration of a business with the state and limited liability. At the same time, by inscribing the privileges of businesses in law, it put the courts and custom into a new relationship. Prior to 1904 no Chinese law governed the debts of associations of joint owners, with the exception of the debts of households. Article 6 and Article 13 of the new law allowed shareholders in two types of jointly invested business entities to claim limited liability for external claims against the firm by including it in articles of

[9] These included transferability and longevity, though not legal personhood. See Madeleine Zelin, "A Deep History of Chinese Shareholding," *Law and History Review* 37, no. 1 (2019).

[10] The four business forms provided for in the 1904 Company Law, as translated in 1905 by E. T. Williams, the Chinese Secretary to the U.S. Legation in Beijing, drew on common law models: co-partnership [*hezi gongsi*], limited co-partnership [*hezi youxian gongsi*], joint stock company [*gufen gongsi*] and limited joint stock companies [*gufen youxian gongsi*]. The Chinese names of these forms, in brackets here, utilized a common term for combining capital [*hezi*], to which was added the Chinese word for company [*gongsi*] and a Chinese term for shares [*gufen*] to which was also appended the word for company. *Jiu Zhongguo De Gu Fen Zhi : 1868 Nian-1949 Nian*, ([Beijing] :: Zhongguo dang an chu ban she, 1996), 12. E. T. Williams, *Recent Chinese Legislation Relating to Commercial, Railway and Mining Enterprises. With Regulations for Registration of Trade Marks, and for the Registration of Companies* (Shanghai,: Shanghai mercury, 1905), 10.

association and registering with the state according to the terms of the law. As we will see, more problematic for businesses and for the courts was the assertion of a new understanding of the liability of shareholders in firms that did not claim limitation. Article 31 stated that "all joint capital companies [*hezi gongsi*] and joint stock companies that do not distinctly state that they are limited liability companies at the time that they register with the Board of Commerce, using the characters for limited, shall be considered unlimited. If they fail, not only will the assets of the company be sold and applied toward the payment of the debts, but should this be insufficient, the shareholders will be liable for any balance due." Article 32 went on to say that under the conditions described above, the assets of the shareholders could be seized in order to repay the debts. [11]

In order to mediate the interface between new legal concepts and existing practice the state established two new institutions. In 1904 the Qing issued regulations for the establishment of Chambers of Commerce whose members were to be delegates from local guilds and trade associations, and among whose roles would be assisting the courts in the adjudication of commercial disputes. In 1906, as part of a larger project of constitutional reform, the old dynastic Court of Revision [*Dalisi*] was transformed into a new and more powerful Supreme Court (*Daliyuan*). The decision to establish a law school in the imperial capital brought a number of prominent Japanese legal scholars to Beijing, several of whom participated in law revision.[12] At the same time, the central government's commitment to

[11] *Jiu Zhongguo de Gufenzhi*, 10, 15.

[12] Joseph Kai Huan Cheng, "Chinese Law in Transition: The Late Ch'ing Law Reform, 1901-1911" (Ph.D., Brown University, 1976), 142. Among the Japanese scholars were Shida Kōtarō 志田钾太郎, a specialist in commercial law.

replacing the Qing Code with new and separate Civil and Criminal Codes resulted in a massive effort to collect and translate foreign law. Shortly thereafter the Office of Law Revision began sending staff to the provinces to survey popular customs, eventually charging many local governments themselves with collecting information deemed useful for the compilation of the new legal codes.[13]

Not surprisingly, the expansion of law reform generated concern over the compatibility between Western law and Chinese practice.[14] Indeed, from its opening passages the new Civil Code being drafted by the Office of Law Revision acknowledged the potential for tension between law, custom and legal principle, stating in Article 1 of the Book of General Principles that "that which is not stipulated in the Civil Code shall be [adjudicated] according to customary law [*xiguanfa*]. Where there is no customary law, the judge should rely on *tiaoli* 條理," that is , established norms of social intercourse, the authority of which drew on such ancient texts as the Analects.[15] The Draft Civil Code thus made clear the hierarchical relationship intended among law, customary law (itself undefined) and the kind of principles of human behavior and sentiment drawn on by magistrates during the imperial period when few laws applied to civil matters. It also pointedly warned judges against taking the absence of statute as a pretext not

[13] Sheng Zhang, ""'Daqing Minlu Caoan' Zhiyi" [to Make Good Omissions and Deficiencies in the Study of the "Qing Draft Civil Code]," *Faxue yanjiu* 3 (2004): 147. Zhang notes that initially investigators were sent to Zhili, Jiangsu, Anhui, Zhejiang, Hubei and Guangdong.

[14] Among the few surviving memorials expressing such concerns was that of the eminent Qing official Zhang Zhidong. Zhang's worries about the Draft Procedural Law ranged from the inappropriateness of allowing women to serve as witnesses in trials to the problems arising from attaching individual property in a society in which property was jointly held by the household. Joseph Kai Huan Cheng, "Chinese Law in Transition," 173, 183.

[15] The precise wording in the explanation of the reliance on *tiaoli* read as follows: "Consider and come to a judgement based on norms of social intercourse, for example to serve the rulers with loyalty and one's kin with filial piety and all other [norms] that are followed without question 推定社交上必應之處置例如事君以忠事親以孝及一切當然應遵奉者." Liansan Yu, Da Qing Min Lü Cao an 大`清民律草案, (Beijing :: Beijing ai ru sheng shu zi hua ji shu yan jiu zhong xin, 2009), http://www.columbia.edu/cgi-bin/cul/resolve?clio10441871.

to act on civil cases. Nevertheless, formal recognition of custom's juridical role, combined with the uncertain status of laws inherited from the former dynasty and the ambiguous content of many of the articles they contained opened a space for contestation between law and custom that would persist throughout the Republican period.[16]

One of the first arenas in which this contestation emerged was not in the courts of the fading Qing state, but in the colonial domain of British Hong Kong where the vast majority of business people were Chinese. In 1897 Hong Kong's Legislative Council adopted almost verbatim the English Partnership Act of 1890, which among many things confirmed in statute the unlimited liability of partners for external debt.[17] Protests by Chinese merchants ultimately led to the unusual step of promulgating a separate law of partnership for Chinese residents of the colony, the Chinese Partnership Ordinance of 1911. The job of drafting the Chinese law was assigned to C. G. Alabaster, a British barrister who had arrived in Hong Kong two years before. Among the Chinese practices incorporated by Alabaster in the new law was apportioned liability for debt.[18] In considering the significance of this practice, Alabaster anticipated an

[16] The relationship between custom and law was given prominence in the education of potential judges well into the early Republic. For example, the 1922 national preliminary examination for aspiring jurists posed two question, one on national culture and one on law. The question on law gave candidates two choices. The first gave candidates the opportunity to distinguish between civil and criminal law on the matter of handing down a judgement on a matter for which there was no specific article of law. The second called upon the candidates to explain the criteria by which customary law and written law are established and to describe their differences. *Local News* (Suzhou), *Shenbao* 1922, 11, 13.

[17] The contest over this law can be traced back to earlier Chinese discontent with the transplantation of English Bankruptcy Law to Hong Kong in 1864. See Michael Ng, "Dirt of Whitewashing: Re-Conceptualising Debtors' Obligations in Chinese Business by Transplanting Bankruptcy Law to Early British Hong Kong (1860s–1880s)," *Business History* 57, no. 8 (2015).

[18] C. Grenville Alabaster, "Chinese Partnerships in Hong-Kong," *Journal of the Society of Comparative Legislation* 17, no. 1/2 (1917): 26. The one divergence from Chinese practice embodied in the law was the requirement that a partnership and its members register to take advantage of the application of Chinese custom. This was a concession to those seeking to avoid concealment of the real names of partners investing both as individuals and as lineage trusts. Any partnership that did not register was left subject to the 1897 Partnership Ordinance.

argument that would later be made by Chinese defenders against criticism that apportioned liability for debt was harmful to creditors. Pointing out that the creditor was still better off than had he made a loan to an insolvent limited company, Alabaster extolled "the soundness of Chinese commercial customary law that it should provide in this way for the encouragement of trade by lessening the liability of those who embark [*sic*] capital in commercial enterprises."[19]

Criticism of unlimited liability of partnership within China developed slowly, in pace with shifts in the law. As long as most partnerships did not choose to become registered unlimited co-partnerships according to the Company Law, the new forms of liability introduced by that law caused little concern to Chinese businessmen who chose to abide by long-standing practices of apportioned liability. Challenges to customary practices may not have appeared to be a cause for concern. For example, Article 29 of the ill-fated 1906 Bankruptcy Law stated:

> With the exception of Companies having registered limited liability (who shall be dealt with according to Art. 9 of the Company Law), in the case of all Companies of whatever character, if unlimited or having shareholders assuming unlimited liability, should there be any deficiency after liquidation and dividends have been distributed among the creditors of a Company, the [bankruptcy] Trustee shall, in conjunction with the Director or Manager of the Company, reckon the amount of liability which *should be apportioned to each shareholder* and advertise it in the newspapers for their information. On a shareholder discharging the debt apportioned to his share or shares the Trustee shall give him a receipt and report to the Chamber of Commerce, who shall communicate the fact to the local authorities for purposes of record, and the matter shall cease to concern the said shareholder. (italics added)[20]

---

[19] Alabaster, "Chinese Partnership in Hong Kong," 20.

[20] Nieh-yun Chang, *Translation of the Chinese Bankruptcy Code of 1905* (Shanghai: American Presbyterian Mission Press, 1907), 15. The posting of the names and obligations of shareholders in a bankruptcy was just one of the ways in the press became a substitute for administrative supervision of new business practices. Chapter X discusses the early role of the press as the locus for share offerings and the posting of prospectuses in the form of 章程 in the absence of a formal Chinese stock exchange.

Indeed, in a law that dissatisfied so many people in so many ways that it was abrogated the year following its promulgation, the liability of shareholders in partnerships was deemed to follow what was becoming recognized as established business custom.[21]

Merchant Activism and the Legislative Process

The new bankruptcy law was rescinded in 1907 but discussion of commercial law intensified through the end of the dynasty and into the new republic. Scholars have long noted the role that merchants began to play in the process of political reform accompanying the Qing declaration of its commitment to constitutional government. Merchants participated in anti-foreign boycotts, in petition campaigns aimed at hastening the implementation of a constitutional governance structure, and ultimately in the overthrow of the dynasty, through monetary contributions and the organization of merchant militias. So it should not surprise us that members of the business community, assisted by the state's sanction of Chambers of Commerce, began to organize as a critical voice and as positive contributors to the reform process itself.

The outstanding example of merchant legal activism during the first decade of the twentieth century produced a document known as the *Investigation of Commercial Law* [*Shangfa diaocha an*]. In the summer of 1907, the Shanghai Constitutional Preparation Committee in collaboration with the Shanghai General Chamber of Commerce and the Shanghai Association for Business Education initiated a plan that brought together in Shanghai

[21] Thomas Mitrano, "The Chinese Bankruptcy Law of 1906-1907: A Legislative Case History," *Monumenta Serica* 30 (1972) provides a useful discussion of the diverse influences on the law and its ultimate failure to satisfy expectations. China did not implement a lasting Bankruptcy Law until 1935. Xuemei Wang, "Looking at the Social Legal Background of the Late Qing from Merchant Criticism of the Bankruptcy Law" *Journal of Sichuan Normal University (Social Sciences Edition)* 2, no. 143 (2006) argues that the law, though abrogated, continued to influence bankruptcy litigation.

143 attendees drawn from 85 Chambers of Commerce from across China, as well as knowledgeable overseas Chinese. Chambers were tasked with investigating local business practices to ensure their incorporation in a new national commercial law, while a smaller group of participants were charged with translating and scrutinizing foreign laws for the contribution they could make to the project.[22] Summaries of their proceedings were made publicly available in journals like the *Shenbao* and more detailed discussions of the work of the drafters and their intentions appeared in *the Journal of the Constitutional Preparation Committee* and elsewhere.[23]

Taking the lead in drafting a new commercial law were three members of the Constitutional Preparation Committee, Qin Ruijie, Tang Yi'e and Mao Shaochang.[24] In addition to the basic text of their commercial law draft they also produced two companion documents, the *Explanation of the Investigation of Commercial Law* [*Shangfa diaocha liyou shu*] and the *Investigation of Commercial Law Primer* [*Shangfa diaocha jianshuo*]. As in the case of the Qing Commercial Code of 1904, the *Investigation* largely dealt with company law as understood in the Qing Company Law and indeed, could be viewed as a revision intended to better integrate the views of merchants. The *Investigation* had 417 articles, as compared to the 140 in the Qing Commercial Code. While we cannot review all the ways in which these two documents

[22] Xuemei 王雪梅 Wang, "Lun Qingmo De Shangfa Diaocha'an Liyou Shu [论清末的'商法调查案理由书 "on the Late Qing 'Account of the Investigation of Commercial Law'],"*Journal of Sichuan Normal University (Social Sciences Edition)* 32, no. 4 (2005).

[23] See for example, "Reading the 'Account of the Investigation of Commercial Law'(reprinted from Sino-Foreign Daily News), *Journal of the Constitution Preparation Committee*, 2.9 (1909), 17-19 and "A record of the proceedings of the General Meeting of the Constitutional Preparation Committee", *Shenbao*, 1908,12,7. The Journal, like the committee, was an undertaking led by private individuals, not by officials of the Qing state.

[24] All three returned from overseas study in Japan where Qin had graduated from Hosei University, established in 1880 in Japan as a school of law.

differed, it is clear that the *Investigation* was the source of much that was new in the Company Ordinance [*Gongsi* tiaoli] promulgated by the new Republic in 1914. Of significance for our discussion was the introduction of four new categories of company, the first being the unlimited company [*wuxian gongsi*], which replaced the jointly invested company [*hezi gongsi*] of the 1904 Qing company law. With regard to the outside debts of the unlimited company Article 39 stated:

> When the total assets of the company are not sufficient to cover its shortfall, even though the shareholders have not engaged in embezzlement or concealment (of funds) they still must all jointly repay the whole amount.[25]

Unlike the Qing Company Law, which proclaimed in plain language that in the event of failure of a jointly invested company, debts not covered by the assets of the firm would be repaid by the shareholders, this law used a new term, joint and several *liandai.* The editors of the *Explanation* were clearly aware of the novelty of this term and sought to couch its meaning in the language of trust and the goal of expanding China's business investment. They noted that both limited and unlimited companies had advantages and disadvantages. The limited company, in the editor's view, was attractive to investors, but created worries for creditors and was therefore only appropriate where capital was ample and business was stable. In the unlimited company the shareholder's relationship to the debt of the company was that of guarantor. No matter whether their shares were large or small, or how they agreed to distribute losses, "each individual has the responsibility to repay the whole debt and cannot

[25] While I have avoided using Chinese characters in the interest of readability, especially for non-Chinese readers, it is worth noting the full text of this short article here in characters: 公司所有財產，不足抵补其亏欠各款时，股东虽无侵吞隐匿情事，亦应一体**连带**悉数清偿. Jiazhen Zhang et al., *Zhongguo Shangshi Xiguan Yu Shangshi Lifa Liyou Shu* (Beijing:: Zhongguo zhengfa daxue chubanshe, 2003), 139.

limit it to the amount that would be allocated to his shares. If other shareholders delay, he must pay up for them. And in the case of those who do not pay up at all, [the others must] distribute their share [of the debt] amongst themselves. In other words, to gain the trust of creditors they must be linked together and mutually drawn into each other's troubles. This is the meaning of *liandai*."[26]

To members of a Chinese partnership, the notion of joint and several liability was alarming. The distinction between a company and a partnership was imprecise in the minds of merchants accustomed to a world in which the state was minimally involved in the internal or external affairs of business. The frequent use of the term "company" in the naming of Chinese firms in the decades before the promulgation of the first company law further confused the distinction between the entities referred to in the *Investigation* and the partnerships that dominated Chinese commerce. An article by Meng Shaochang, one of the compilers of the *Investigation*, gave voice to the fear that after promulgation of a new law based on its findings, all partnerships would automatically become unlimited companies, with the liabilities that this entailed.[27] Meng's response, that becoming an unlimited company required registration, did not, in itself, allay fears that proposed new regulations were meant to apply to partnerships.

In late 1909, with the work of compilation concluded, the main merchant constituencies that had partnered in the *Investigation* project met to review the section on companies. The main topic of discussion was Article 39.[28] Opening the question was a report by Zhou Jincheng

---

[26] *Ibid, 141-42.*

[27] Meng Shaochang, "Questions and Answers on the *Investigation of Commercial Law* [*Shangfa diaocha'an wenda*]," *Journal of the Constitutional Preparation Committee*, 2.10 (1909).

[28] "Shangfa taolun'an yishilu," *Shenbao* 1909, 12, 21.

on behalf of the Shanghai Chamber of Commerce pointing out the divergence between Article 39 and current custom [*xianzai xiguan*]. The latter, largely referred to in contracts as *angu fendan*, maintained that in the event of failure of jointly invested firms [*hezi yingye*], external debt was apportioned among the shareholders according to the proportion of total shares held by each. Joint responsibility for repayment of the entire debt along the lines described in Article 39, according to this report, would be difficult to carry out.

The contrary view was put forward by citing the compiler Qin Jinhua's explanation that joint and several liability was necessary in order to protect the credit of the company, in order to protect creditors and facilitate "economic circulation." In this view, equal division according to shares was solely an internal matter. Arguing that internally you can have large and small shares, but externally you cannot have light and heavy liabilities, the assembled were reminded of Article 17 of the *Investigation* stipulating that internal relations of a firm were not transferable to the outside. Ironically, given that earlier arguments for the limited liability company had been based in large part on its importance in bringing together capital, the supporters of Article 39 argued that with unlimited joint liability creditors would be more willing to do business with unlimited companies, which in turn would allow unlimited companies to undertake huge projects.

The 1909 debate foreshadowed an ongoing contest between advocates of Western-inflected legal reform over the efficacy of custom over law that continued to have at its center the liabilities of members of shareholding partnerships. However, the discussions recorded in *Shenbao* also call attention to other claims and concerns that would play a role in the emerging contest over business law reform. Among the most important was the role that contract would play in a new world of black letter regulations. Reminding us of the importance of contract in

the culture of private ordering that sustained business self-governance in the late imperial period, one argument against revising Article 39 was that a jointly invested firm could indicate in the contract concluded by its founding members whether it chose to be an unlimited company as described in the Article 39 or follow the custom of apportioning debt equally according to shares. Sidestepping the issue of registration, the author of this proposal assumed registration would be undertaken either way. Others went further, arguing that only those who registered would be bound by the law, while those who did not register need not fear that the law would make existing contracts void.

Another implicit determinant of how one viewed the question of *angu fendan* was the goal of liability regulation itself. Was it to protect the creditor or the shareholder? While in the West legal opinion was clearly on the side of the creditor, we will see that the issue did not unfold as unambiguously in China. Neither did opinions regarding the impact of alternative rules on investment and its possible impact on the overall health of the economy.

Finally, it is worth noting that as early as the debates of 1909 the definition of legal principle [*tiaoli*] was shifting away from the idea that legal decisions for which no statute existed could be derived from ancient texts and Confucian principles of human relationships. As we will see, increasingly, legal principle would reflect the views of a professional elite whose understanding of law was undergirded by Western education, at home or abroad.[29]

[29] Zhiqiang Wang, "Minguo Shiqi De Sifa Yu Minjian Xiguan," *Bijiaofa yanjiu [Research in Comparative Law]* 4 (2000): in passim provides examples of this shift as evidenced in Jiangsu courts. Young argues that *tiaoli* was also understood to mean those principles embodied in the not yet replaced draft civil and commercial codes of the Qing. Mary Buck. Young, "Law and Modern State-Building in Early Republican China: The Supreme Court of Peking (1911-1926)" (Harvard University, 2004), 92.

The question of registration would ultimately be settled by recognition of another Western way of conceptualizing law. Partnership would not be grouped with companies. Meng Shaochang's admonition that only "companies" need register would prove true. This would leave partnerships in a legal limbo until China promulgated a civil law, which, in keeping with the models provided by continental law, would be the locus of regulation for partnerships and other unregistered entities that acquired outside debt.

Adjudication in the Absence of Law

Recognition that imperial law diverged from Western law in form as well as content was an early product of Qing conflict with the West during the last dynastic regime.[30] The project to implement separate Civil and Criminal Codes was a major sign of Qing commitment to legal reform. While compilation of a new Qing Criminal Code proceeded with remarkable speed, jurisdictional disputes, arguments over civil or common law models, and pressures from conservative officials to make the civil law an instrument for the inculcation of traditional values led to lengthy delays in the finalization of a Qing Draft Civil Law.[31] With the fall of the dynasty in 1911 the project of law codification was temporarily halted and courts were left with little guidance in the handling of cases that would ultimately be governed by the Civil Law. Wang Zhiqiang' s analysis of cases brought before the courts in Jiangsu provides evidence that judges in civil cases during this period relied on a variety of sources, including law of the former Qing,

[30] Chen, *Chinese Law in Imperial Eyes*, 98-99, 248.
[31] Zhang, "To Make Good," 142-43.

Supreme Court (*Daliyuan*) decisions and interpretations, and orders issued by the Ministry of Justice (*Sifabu*).[32]

In 1912 the Zhejiang Provincial Office of Ningbo Affairs drafted a recommendation for discussion by the Ministry of Agriculture and Commerce in consultation with the Ministry of Justice that provides a rare look at the way in which the issue of liability for debt in the absence of promulgated law was understood on the ground, among officials at the dawn of the Republic, who dealt daily with business disputes in the most commercially developed regions of China. It begins by noting that among the varied sources of law available to courts of the new Republic, judges hearing cases involving the debts of failed partnerships, at least in this jurisdiction, usually turned to Articles 482 and 483 of the [never-promulgated] *Draft Qing Civil Law*.[33] The Ningbo Office recommendation expressed particular concern over joint and several liability (*liandai zeren*) , which, it noted, was resisted by merchants and was a key source of disputes, appeals, delays and unresolved cases. Their recommendation harkened back to the *General Rules for Traders* [*Shangren tongli*], the companion to the *Company Law* that comprised the 1904 Commercial Law that <u>was</u> promulgated under the Qing.

---

[32] Zhiqiang Wang, "Minguo Shiqi De Sifa," 408-09. To date scholars have been able to study few examples of early Republican commercial litigation. Surviving or accessible collections are few and it has been suggested that many commercial cases were being arbitrated at offices established for this purpose within Chambers of Commerce. As a result, we have only anecdotal evidence of the claims merchants actually made in court and the reactions of the courts thereto. This is mitigated somewhat by an examination of the cases that reached the *Daliyuan*, as we will also see below.

[33] Article 482 "When several debtors bear a divisible obligation to pay or several creditors request payment of a divisible interest, and no special treatment has been expressed, each debtor or each creditor shall share the obligation or the interest in equal proportion," closely tracked the German Civil Code's Article 420. Divisible obligation would later be designated in Chinese with the characters *lianhe zeren*. Article 483 provided for the alternative situation in which several people bear responsibility for a debt and each individually is responsible to pay it back in full. Article 484, labeled such an obligation *liandai zeren* and additional articles broke down in greater detail the circumstances that might face an obligor under this new regime. Unlike Article 482, the introduction of joint and several did not provide a logic for its application or an explanation of how such an obligation might arise.

> We find that the *Shangren* tongli says that when [merchants] invest their capital to do business, first each shareholder signs a contract (*hetong*) and a statement verifying the conclusion of a deed of agreement [*yidan* 議單] that clearly states how many shares each partner has, that if there are profits, they will be equally shared and if there are losses, they will be called upon equally to repay. If they encounter business losses, they fulfill their contract and maintain trust. This is the best way to do things (*weici weizui* 惟此爲最). It has been done this way for hundreds of years without abuses. It really gives each shareholder the rights he should enjoy and gives each the liabilities that he should bear.[34]

The problem of joint and several as understood by the Ningbo Office was one of internal governance. At the time people invested in an enterprise each assumed the other shareholders to be similarly qualified to do so, but unpredictable events could leave those with greater resources to carry the burden of the whole. Joint and several opened the door to evasion and cheap tricks by those who sought to evade liability. Moreover, at a time when the [political] foundations of the country were beginning to stabilize, but the economy was still facing challenges, policy required the protection of business and measures to prevent the withdrawal of investors. It was for this reason that the Ningbo Office urged a return to the practices in place for hundreds of years.

The Ningbo Office was of course not alone in its desire for interdiction of informal reliance on the *Draft Qing Civil Law*. Article 828 in the section specifically devoted to partnerships echoed the wording of Article 482, drawing objections from the Shanghai Chamber of Commerce.[35] The new Beiyang government was itself concerned about the *Draft Qing Civil Law's* acceptance of its German and Japanese models' emphasis on the interests of

---

[34] *Suzhou Archives* 乙 14-1-441-15 (1912)

[35] "Partnership Law in China, The Peril of Allowing Alleged Custom to Over-ride Law: Supreme Court Rulings," *North China Herald*, April 10, 1926. This article cites the March 3, 1914 issue of *Xinwen bao.* Article 828 stipulated that in the event that the assets of a partnership were insufficient to repay its debts, the partners would make up the difference in proportion to the rate at which they apportioned profits and losses. If under these circumstances there are those among the partners who do not have the ability to repay their full share of the obligation, the other partners must equally divide and be responsible for their portion. The explanation simply stated that the establishment of partnership liability in law was in order to prevent detrimental conflicts.

the individual, although the greatest objections in this respect were aimed not at the Book of Obligations, but at the sections of the law dealing with kinship and inheritance. Although initially relying on a clone of the old *Draft Qing Civil Law*, by 1914 the government had formed a new Law Compilation Committee and undertook a new investigation of popular customs that in 1925 produced a new draft civil law, the *Draft Republican Civil Law* [*Minguo minlu caoan*].[36] In the interim the *Daliyuan* attempted to provide guidance on sources of civil law from the dynastic period that did not face opposition from conservative critics. According to 1914 DLY decision no. 304,

> While the Republican Civil Code (*Minfadian* 民法典）has not yet been promulgated, the current law of the former Qing, excluding the parts on punishments (*zhicai* 制裁） [that is, punishments for what would now be considered civil infractions], and those sections that are incompatible with the basic institutions of the state (*guoti* 国体), should continue to be in effect. Although the current Qing law is called the *Penal Law Currently in Use* (*xianxing xinglü* 现行刑律), in addition to penal law, there are still many regulations on civil and commercial matters. Therefore, we must not, because the name is Penal Law, mistakenly consider this law to have already been discarded.[37]

While the Qing Code did contain some regulations useful for the ordering of commerce, it was largely left to the *Daliyuan* to bring clarity to the hybrid legal space in which increasing numbers of Chinese and foreign businessmen operated.

The *Daliyuan* and the elevation of custom

In addition to its legislative efforts, the late Qing reforms bequeathed to the new Republic an unfinished transformation of the court system that for the first time provided Chinese litigants with a formal hierarchy of courts and an appellate framework leading from

[36] Lixin Yang, ed. *Daqing Minlu Caoan Minguo Minlu Caoan* (Jilin: Jillin renmin chubanshe, 2002), 7-8.
[37] Cited in Wang, "Minguo shiqi de sifa," 408. Note the assimilation of the foreign critique of the Qing Code as a penal law.

provincial high courts to the *Daliyuan* in Beijing.[38] The responsibilities of the *Daliyuan* were wide-ranging during a period when new institutions, new procedures and new understandings of the sources of law were being developed. Its role as the interpreter of laws as promulgated was matched in importance by its role as the highest court of appeals, particularly in cases where the law was nonexistent or unclear.[39] In carrying out this role, the court followed the principles established during the last years of the Qing in the Book of General Principles of the *Draft Qing Civil Law*, establishing a hierarchy of legal authority that began with law on the books, looked next to custom and lastly allowed courts to deliberate a case for which neither existed by referring to legal principle, variously understood.[40] At the same time, the court itself provided guidance to judges on ruling according to custom.

> The validity of customs depends on four essentials: 1) it must have been observed by people generally and immemorially 2) It must have been repeatedly observed by people as law 3) the matter it concerns must be one for which there is no express provision and 4) it must not be contrary to public policy or interest.[41]

In the commercial realm Chambers of Commerce were formally charged with the discovery of custom in the service of dispute settlement. In 1913 the Ministries of Justice and of Agriculture and Commerce issued guidelines for the establishment of arbitration offices (*gongduan chu*) in every Chamber of Commerce across China. Later that year supplemental regulations addressed the substance of the dispute resolution process. Of particular interest is

---

[38] See Xiaoqun Xu, *Trial of Modernity : Judicial Reform in Early Twentieth-Century China, 1901-1937* (Stanford, Calif.: Stanford University Press, 2008).

[39] It is in this sense that Mary Buck saw the court as free to find law. Young, "Law and Modern State-Building in Early Republican China, 3. As we will see, however, because its decisions were both inconsistent and therefore difficult to hold to be binding, it may not be appropriate to consider the court to be setting precedent binding on the judiciary as a whole.

[40] 1913 DLY decision no. 64, cited in Buck, 90.

[41] 1913 DLY decision no. 3 translated in F. T. Cheng, *The Chinese Supreme Court Decisions. First Instalment Translation Relating to General Principles of Civil Law and to Commercial Law* (Peking: Supreme Court, 1920), 2.

Article 5 of the General Principles, which stipulated that "the issues deliberated by the Office of Adjudication of Commercial Matters shall be [decided] according to local merchant customs and regulations but may not contradict the compulsory regulations in the laws currently in force (*xianxing gefaling zhi qianzhi guiding*). 現行各法令中之強制規定.[42] Surveys of local customs, first undertaken during the last years of the Qing, continued periodically during the Republican period, often with the cooperation of local Chambers. At the same time, individual lawyers and courts, including the Shanghai Mixed Court and its successor, the Provisional Court of Justice, put questions directly to Chambers of Commerce. In 1933, a volume over 600 pages in length reproduced such queries and the responses provided by the Shanghai Chamber of Commerce on all manner of commercial practices, including the liability of partners for debt.[43]

The *Daliyuan* also provided guidance as to what would be considered prevailing custom in the adjudication of disputes over partnership debt, although as we will see, its ruling were not always consistent. Nor was an effort made to indicate precedence when inconsistencies did occur. Nevertheless, in publicizing its work, the court was aided by a growing number of periodicals dealing with law, both in practice and in theory. Between 1912 and 1927 the Ministry of Justice itself contributed to the dissemination of legal knowledge. The mission of its *Judicial Gazette* [*Sifa gongbao*] was to provide the public with the "facts of the judicial past and promote the judicial future" through the publication of government orders, legislation, decisions, correspondence and documents, and other miscellanea. In 1915 the Gazette

[42] Shanghai shi gongshangye lianhehui 上海市工商业联合会, et al., ed. *Shanghai Zongshang Hui Zuzhi Shi Ziliao Huibian 上海总商会组织史料汇编*, 2 vols. (Shanghai:: Shanghai guji chubanshe. 上海古籍出版社, 2004), 680-81.
[43] Esheng 嚴諤聲 Yan, *Shanghai Shang Shi Guan Li 上海商事惯例* (Shanghai: Xin sheng tong xun she 新聲通訊社, 1933; repr., 2nd).

produced a supplement listing all of the *Daliyuan* precedents issued from September 1912 to December 1914. Of 41 cases under the heading "partnership", 17 dealt predominantly with the allocation of external partnership debt.[44] Where queried by the circumstances of the case, the court affirmed that liability for external debt was shared. The preferred manner of apportionment was held to be according to the standard by which the partnership shared in its own losses,[45] and where this standard had not been agreed upon, according to the standard by which the partnership distributed profits.[46] 1914 DLY decision no. 550 went even further, clarifying the difference between a partnership and a company by stating categorically that in the event that

> the assets of a partnership are insufficient to repay its debts in full, each partner should, within the scope of the obligation he bears for repayments, bear unlimited liability. [The partners] absolutely cannot use the failure of the business as an excuse and only distribute to the creditor from the assets of the partnership, leaving uninvolved the personal assets of the partners themselves.[47]

At the same time, the court noted that if the external obligations of the firm were clearly established, "the partners should apportion the burden according to their shares."

In light of the controversy raised by Article 39 of the Qing Company Law and Articles 482 and 483 of the Qing Draft Civil Law it is noteworthy that the *Daliyuan* also weighed in on the

---

[44] Only the rights and obligations of partners and the impact of withdrawal from the partnership on prior commitments appears to have generated comparable uncertainty.

[45] *Judicial Gazette adhoc supplement* 司法公報臨時增刊, no. 43S, (1915, 10, 30), 54. In addition to decision no. 1240 see in passim decisions for that year 834, 766, 650, 639,636, and 546. Mary Buck Young has determined that partnership debt disputes of all types comprised the largest category of civil cases heard by the Supreme Court. For a lengthy discussion of one such case see Young, *Law and Modern State Building,* 173-192.

[46] Ibid., 56 and 59--1914 DLY decisions no. 819 and no. 222. Decision no. 819 allowed for the possibility that some partners might have contractually been excused from liability for losses. Although not discussed here, Chinese firms had long experience with special provisions for silent partners and for partners whose shares were based on non-monetary investment, such as labor. See Zelin, 21, 23.

[47] Ibid., 57, 1914 DLY decision no. 550.

concept of joint and several liability. Logically, apportionment of the burden according to shares, or according to the method by which a firm apportioned losses (usually the same thing) implied that creditors could not demand payment of the whole debt from one individual partner. However, a number of *Daliyuan* decisions made this explicit. Noting that if a partner had insufficient resources or had absconded without a trace and therefore could not be counted on to pay his share of a debt, 1914 DLY decision no. 895 called for the other partners to pay in his stead. However, in explaining its deliberations, the court noted that it followed its previous ruling, DLY no. 706, holding that "the other shareholders pay on his behalf according to shares, but still cannot be said to have joint and several liability (*liandai zeren*)."[48] Responding to another set of circumstances, the court proclaimed "A creditor cannot go to one partner and, without cause, demand repayment of the whole [debt]." [49] Interest in the issue of partnership debt was sufficient to warrant reprinting of the complete judgment in *Law Weekly* (*Falü zhoubao*).[50] Here the court explained its reasoning as follows:

> The debt in this document cannot be the sole responsibility of the appellee because according to the regulations currently in force regarding civil partnership (*minshi hehuo* 民事合夥), unless there is a special contract and extraordinary circumstances, the principle is that with regard to external obligations, partners only bear a shared obligation 負分擔義務 and do not bear a joint and several obligation 不負連帶責任.[51]

---

[48] Ibid., 55. 1914 DLY decision 895.

[49] Ibid., 57. 1914 DLY decision 536.

[50] Law Weekly was a short-lived journal edited by Ran Xincun 阮性存, one of China's earliest Japan-trained legal scholars and a leading participant in the constitutional reform movement in his native Zhejiang. See his biography in https://baike.baidu.com/item/%E9%98%AE%E6%80%A7%E5%AD%98 [accessed January 23, 2019].

[51] "Representative Judgements: 1915 DLY decision 103: In civil partnerships, except by special agreement and under exceptional circumstances, partners only bear shared responsibility for external obligations," *Falü zhoubao*, 1915 v. 101, 381-382 .

The Return of Law

Merchants tracking the judgments of the *Daliyuan* may have been reassured that customary contract-based methods for dealing with external debt would survive the onslaught of new law, even under the new republican regime. However, among the earliest legislative moves of the new state was the promulgation of a refurbished company law, based in large part on the work of the *Investigation,* concluded during the last years of the Qing. As in the case of the *Investigation,* the new company law had the support of a portion of the business community that saw the limited liability joint stock company as the key to the development of Chinese industry as well as members of a growing community of thought leaders, many returned from education abroad. Generally considered an improvement on the *Qing Company Law* for its elaboration of basic corporate governance issues and its clarification of corporate legal personhood, [52] the 1914 *Company Ordinance* [*Gongsi Tiaoli*] also invited controversy by retaining the maligned language of Article 39, calling for joint and several liability of unlimited companies.

Article 35 of the *Ordinance,* in the section on the unlimited company (*wuxian gongsi*) stated: "When the assets of a company are insufficient to pay its debts, each shareholder should jointly and severally (*liandai* 連帶) take responsibility to repay it in full." Once again, the unsettled relationship between the now renamed "unlimited company" and the partnership was central to the problem created by the new law. Xiang Naiqi, a prominent interpreter of the *Ordinance* saw

[52] Billy K. L. So and Albert S. Lee, "Legalization of Chinese Corporation, 1904-1929: Innovation and Continuity in Rules and Legislation," in *The Treaty Port Economy in Modern China : Empirical Studies of Institutional Change and Economic Performance*, ed. Billy K. L. So and Ramon Myers (Berkeley, CA: Institute of East Asian Studies, 2011), 198-201.

little difference between the *wuxian gongsi* and the unlimited "jointly invested" company (*hezi gongsi*) of the Qing *Company Law*, adding that "if we look at examples in other countries, this kind of company is largely organized by family and friends, liability is unlimited, and they are bound by a common cause" –a classic description of a partnership.[53] Thus it is no surprise that business groups once again raised the alarm against joint and several liability of partnerships despite the *Ordinances* reference to this form of firm organization as a company.

The *Annotation of the Company Ordinance* [*Gongsi tiaoli shiyi*], the quasi-official gloss of the law, did little to clear up confusion. Article 3 of the *Ordinance* improved upon the Qing Company Law by making explicit the legal personhood of the corporation. By stating that " all companies (*gongsi*) are recognized as legal persons" it implied an important distinction that could be made between unlimited companies and partnerships. A similar function was performed by the requirement that all companies register with the relevant local government office and conclude a agreement the law called "articles of association" (*zhangcheng*) [Articles 5 and 9]. However, in its commentary on Article 35, one of the main attributes of a company, legal personhood, is said not to apply to the unlimited company.

> The company is a legal person independent of the shareholders. It would seem that the assets of the company should be applied to their full extent to making good the debts of the company. The personal property of the shareholders should not be dragged in[累及]. But this is only true of a limited company…[54]

The annotation goes on to explain joint and several as follows:

> The two characters 連帶 *liandai* mean what the characters say. The relationship between the shareholders and the company is a kind of secured obligation 保證債務 (*baozheng zhaiwu*) as stated above. And the relationship among shareholders is one of joint and several obligation (連

[53] Naiqi Xiang, "Ping Xinjiu Gongsi Tiaoli," *China Journal (Zhonghua zazhi)* 1, no. 5 (1914): 4.Xiang fits the profile of the *Ordinance's* non-business supporters. Having graduated from Japan's Waseda University (Japan) Xiang wrote this piece in the flagship journal of the Progressive Party ((*Jinbudang*).
[54] Chenghan Yao, *Gongsi Tiaoli Shiyi* (Shanghai: Commercial Press 1914), 46.

> 帶債務). The nature and force (效力 xiaoli) of joint and several obligations is detailed in civil law (*minfa*)[55]

Finally, the official English translation of the *Ordinance* rendered into French the names of the four types of companies provided for in the new law, applying to the *wuxian gongsi* the term Société en Nom Collectif, or in English, the partnership. Adding to the confusion, its translation of Article 35 called not for joint and several, but simply for joint liability, but failed to clarify how the differences between the two might play out in a court of law.[56] Moreover, while unlimited companies were included in the company law, the law left the nature and force of the obligations of the unlimited company to the as yet unpromulgated Civil Code, the regulatory home of those associations that were not a part of company law, such as the partnership.

According to the *Detailed Regulations for Implementation of the Company Ordinance*, the new company law was set to go into effect on September 1, 1914. In March of that year the All-China Federation of Chambers of Commerce held its first national convention in Shanghai. Among the action items coming out of the meeting was a repudiation of the *Ordinance* and a call for public discussion. An internal committee was formed to review the *Ordinance,* evaluating each article "according to the facts and with reference to law" as a prelude to recommendations for revision "in keeping with public opinion." Of greatest concern was joint and several liability.[57] Following their review, the Federation petitioned the Ministry

---

[55] Ibid.

[56] Ministry of Justice of the Republic of China, *Commercial Associations Ordinance of the Chinese Republic* ([Paris: Impr. de Vaugirard, 1914), 2, 9.

[57] Motion: Miscellaneous items: 议案:杂案类:公司条例债务连带条文仍请农商部查照原案速予修正案, Journal of the All-China Federation of Chambers of Commerce, 1916 3.11/12, 110.

of Agriculture and Commerce to change the law, couching their concerns in the language of "commercial war" that had defined China's struggle to stand up to Western and Japanese economic competition since the last decades of the Qing.

> If perfect laws are not devised to hold things together, then there will be no stopping the theft of our wealth. Rich capitalists will consider [investing in business] to be a perilous undertaking. One by one they will stay their feet [and not go forward]. We fear that commerce will never be revived.

It was precisely this struggle, to enable China to successfully engage in "commercial war" and to extricate itself from the shame of extraterritoriality, that had motivated the legal reform movement of the late Qing and had stimulated Chinese fascination with the "company."[58] By the early twentieth century the need for civil law was widely accepted. But for the business community "perfect laws" would accommodate longstanding commercial customs. The response of the Ministry to the Federation was polite, but asserted its sole authority to determine what would and would not be in the new law. The *Ordinance* as promulgated several months later did not make the changes requested.

It is difficult to say how many Chinese partnerships were affected by the *Ordinance.* Disputes between Chinese debtors and creditors were most likely to be resolved in merchant tribunals where compromise solutions were encouraged and customary understandings of the shared liability of partners prevailed. The fact that external partnership debt cases were heard in China's highest appeals court suggests that parties to loans and unfulfilled purchase agreements could assert differing understandings of partnership liability in lower courts. Surveys of customary practice also indicate variations in the way debt was handled, although

[58] See chapter X.

few acknowledge the ability of a creditor to demand payment from one joint or joint and severally liable partner.[59] However, it was in China's centers of foreign trade that both differences over the nature of custom and the tensions generated by the coexistence of customary practice and an imperfectly articulated legal framework were most visible.

By 1918 Japanese businessmen already boasted twenty years of experience operating under a Japanese legal framework transplanted in large part from German civil and commercial law. In Changchun, the hub of Japanese economic expansion in Manchuria, they encountered Chinese firms that by openly soliciting investment in shares, looked like the joint-stock companies that they were familiar with at home. But these Chinese firms did not register with the state. Were these potential business counterparts limited liability companies or were they partnerships? And if the latter, what could one expect in the case of non-payment or debt?[60]

The Japanese consul addressed these questions to the local circuit intendent (*daotai*) and officials in Changchun in charge of foreign affairs. The level of uncertainty among those tasked with dealing with an emerging commercial law framework is clear from the way this simple query was handled. Unable to resolve the issue, they forwarded the inquiry to the local court.

---

[59] For example, the *Minshi xiguan diaocha baogao lu*, a compilation of responses from Chambers of Commerce, magistrates offices and other commercial associations reported on surveys of 11 counties in Hubei province. Some counties reported that the debt of a partner without means was equally apportioned among the remaining partners while in some the remaining partners contributed the outstanding amount according to their shares. In two outliers, partners either helped out with loans or requested that the creditor allow the partner without means to pay in installments. Xiangyang xian Hubei reported that partners bore unlimited liability for debt, but that this was not joint and several. If one partner absconds or has insufficient assets, the others did not bear the liability in his stead. Xucheng Hu, Xinhua Xia, and Jiaofa Li, eds., *Minshi Xiguan Diaocha Baogao Lu* (Beijing: : Zhongguo zheng fa da xue chu ban she, 2000), 633, 55, 69. [fix to 655 and 669].

[60] Common Practice: Civil Affairs: Letter on Shareholders in Partnerships according to custom naturally bear shared unlimited liability [例規：民事：合夥股東依習慣自係分擔無限責任函], *Judicial Gazette (Sifa gongbao)*, 24 (1918):70-71.

The local court felt uneasy answering a question that involved foreign trade and passed it on to the provincial high court. Because it involved interpretation of law, the high court requested a ruling by the *Daliyuan*. In its interpretation no. 823, the highest court in China stated:

> We find that the *Company Ordinance* states that when a company is established, if it does not register with the appropriate government office, it cannot withstand third parties. The situation your letter describes should be considered a partnership. Their shareholders [should] comply with general partnership customs. They have shared 分担, (not joint and several 非连带) unlimited liability. [parenthetical notation in the original].

In foreclosing the joint and several liability of a firm that did not register as an unlimited company, the *Daliyuan* addressed one of the sources of ambiguity arising from the rule of commercial law. But, as we will see, it left unaddressed an equally problematic characteristic of custom as defended by many in the merchant community, the definition of shared liability.

Where foreign and Chinese business converged, the argument over the definition of shared liability and the relative rights of creditors and debtors came to symbolize more than simply a difference in business practice. By the 1920s it became one of many targets in debates over China's fitness as a legally sovereign nation. Since the conclusion of the Opium War, consular jurisdiction over foreigners whose countries were party to "unequal treaties" carried the potential to elevate Western legal principles as a standard for legal interpretation in both Chinese and mixed cases. While in principle Chinese litigants were subject only to the laws of China, in cases involving Chinese and foreign parties, Western legal principles often, though not always, prevailed. While mixed trials could take expectations created by Chinese law and Chinese practice into account, where these were ambiguous the risk that Chinese parties would be subjected to unanticipated judicial findings increased.

By the mid-1920s more than 120 consular and other foreign courts had been established in China.[61] The most closely watched of these courts was the International Mixed Court established in the International Settlement in Shanghai. Following the fall of the Qing the International Mixed Court in Shanghai was reorganized, placing it firmly under the control of the Consular Body of the International Settlement dominated by the US and Great Britain.[62] Hearings of the Mixed Court were presided over by a Chinese magistrate and a foreign assessor, whose mutual agreement was required to render a decision. Neither was required to have legal training, but the presence of Western trained lawyers and Chinese litigants meant that trials could became contests between Chinese and Western legal principles.

Despite its sui generis institutional position, the decisions of the International Mixed Court exerted considerable influence on the way in which the Chinese business community engaged with legal reform. Chinese businessmen found themselves subject to its verdicts in all manner of commercial disputes with foreigners. Even when not party to a dispute, merchants were privy to the court's use of law and lawyers' modes of argument, as Mixed Court cases found their way into the reportage of the foreign expatriate press, leading Chinese language newspapers like *Shenbao* and a growing number of specialized journals devoted to law and commerce. Decisions of the Mixed Court served as catalysts for broader discussions of the Chinese law. And in specific cases, the rulings of the court underscored in the minds of the

[61] Turan. Kayaoglu, *Legal Imperialism : Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge [U.K.] ;: Cambridge University Press, 2010), 151.

[62] A similar arrangement existed in the Shanghai's French concession but its International Mixed Court was presided over by two Chinese judges assisted by three French assessors. Its workload was much smaller and appears to have garnered less hostility than the court of the International Settlement. O. Hudson Manley, "The Rendition of the International Mixed Court at Shanghai," *The American Journal of International Law* 21, no. 3 (1927): 469-70.

business community vulnerabilities inherent, not only in the application of Western law, but in Chinese law as well.

We have already noted the objections to the *Ordinance* in the months before its promulgation in 1914. By 1916 the impact of the *Ordinance* on decisions in the Mixed Court became the object of a second round of protests against joint and several liability. In 1914 five natives of Ningbo and Shaoxing had invested in ten shares, at a cost of 2,000 taels each, to open the Tongyuan native bank (*qianzhuang*) as an . Among its depositors were both Shanghai and Jinshan counties and an unstated number of Chinese and foreigners. Bad management and a tight money market led to the bank's closure within a year of opening and after failing to receive satisfaction otherwise, the bank's foreign creditors brought suit at the Shanghai Mixed Court. Following an audit of the bank's accounts[63] the court ordered the shareholders to fully reimburse the suit's plaintiffs. One of the shareholders, Yu Ziqing, who held three of the ten shares, absconded, whereupon the court ordered the remaining shareholders to make up his share of the debt. Lawyers for the remaining shareholders challenged the decision, arguing that there was no precedent for this action in Chinese commercial custom, but their appeal was rejected.[64]

The details of this case and the response of the merchant community were recorded in an expanded edition of the journal of the All-China Federation of Chambers of Commerce following its second National Congress held in 1916. Asked by the Ningbo and Shaoxing local

[63] The International Mixed Court had established a regular process for dealing with bankruptcy cases, including a special audit department. Thomas B. Stephens, *Order and Discipline in China : The Shanghai Mixed Court, 1911-27* (Seattle :: University of Washington Press, 1992), 109.

[64] "Tongyuanzhuang daobian jinwen" [Recent news on the bankruptcy of the Tongyuan native bank]*, Shenbao,* September 26, 1915. This leading Shanghai newspaper reported on the Tongyuan bankruptcy multiple times during 1915-16.

chambers of commerce to intervene in the case, the Shanghai General Chamber of Commerce petitioned the Federation to again bring the case against the joint and several clauses in the *Ordinance* to the attention of the Ministry. In their minds, the ruling by the Mixed Court, based as it was on a reading of the *Ordinance* that applied joint and several liability of unlimited *companies* to that of contractually binding partnerships underscored the danger of bad law. Of particular interest is their attempt to use the law to position the contest between custom and law. First, they distinguished the entities covered by the *Ordinance,* "companies of each type" (*gezhong gongsi*), from all other organizational forms used by Chinese businessmen. In the case of those firms that are not companies, the argued, the law did not apply. Rather, they held that is was the contract agreed to by the shareholders that determined their internal and external relations.

> There are none that do not have a special agreement announcing that if there is a profit it is divided equally according to shares (*angu junfen*) and if there is a loss it is called up equally according to shares (*angu junzhao*). The characters used (*ziyang*) state that the number of shares will be the standard [for apportioning] gains and losses. This is the case in most provinces and ports.[65]

By focusing on the contract, the Shanghai Chamber shifted the argument from one in which custom served as a placeholder until the state enacted projected law to one in which contractual private ordering occupied a recognized place in a capacious legal framework. Custom was not indeterminate, incoherent and capricious but was itself a mode of ordering with its own standards and expectations. In their view, "law must be grounded in facts." Using a verb most often used to refer to those who were prone to superstition, the Chamber queried

[65] Ibid., 110.

the value of law "if one is biased in favor of law [literally mired in law] and pays no attention to facts."[66]

Part II: The Ming Sung[67] Umbrella Case

The terms of debate over partnership debt during the first decade of the Republic reflected larger inflexion points in the process of state-building. Should all private economic activity be subject to the constraints of written law? What is the relationship between the *Daliyuan*, law and custom? To what extent should "popular opinion" play a role in shaping that law? If a customary realm was to persist, what would its limits be and how would custom be identified? Implicit in the urgency with which the Ningbo and Shaoxing Chambers in Part I sought assistance in Tongyuan native bank case was the fear that, in a period when commercial law was not yet fixed and officials were experimenting with Western models, decisions of the Mixed Court would be given undue weight. It is in this context that the Mixed Court suit to recover the debts owed by the Ming Sung Umbrella Factory captured the attention of both the Chinese and the Anglo-American business community.[68] The arguments put forward by the two parties in the Ming Sung Umbrella Factory case provide a glimpse of Chinese and Western law in direct conversation in early twentieth century China. While both sides were represented

[66] Ibid., 111.

[67] The characters for the company name would be pronounced *minsheng* in Mandarin. However, in all English documentation the firm is referred to as Ming Sung. In translations of the Chinese I will be referring to the firm as Ming Sung to avoid confusion.

[68] Both Anatoly Kotenev, the early twentieth century compiler and critic of Chinese and treaty port legal institutions, and Thomas Stephens, the author of one of the only treatises on the Shanghai Mixed Court have used this case to argue for the failure of the Mixed Court to instill in China a Law Merchant acceptable to both sides, but reflective of Western legal practice. See T.B. Stephens, "The Shanghai Mixed Court and the Ming Sung Umbrella Case 1926," *Australian Journal of Politics & History* 33, no. 2 (1987). We are particularly indebted to Kotenev for his outline of the main events leading up to the retrial of the case in 1926.

by Western lawyers, their modes of argument and mobilization of evidence closely tracked the positions of their clients, not simply with regard to this particular case, but as participants in a larger discourse of law in the semi-colonial context. At the same time, they reveal the extent to which the Chinese side had internalized advocacy on the basis of law and the Western side was willing to animate their argument on the basis of sentiment.

Background: The First Hearing at the Mixed Court

In the summer of 1919 *Shenbao* announced the investment of 20,000 yuan by eight of Shanghai's "giant gentry" in a new factory built to produce Western-style umbrellas. Like many new industries, Ming Sung would rely in part on imported machinery and industrial inputs including US-manufactured steel wire. It would also make use of domestic silk and bamboo. The factory was to employ over 100 workers and anticipated a huge market for their import substituting product.[69] Of particular interest was the designation of the factory as a société anonyme or company limited by shares (*gufen youxian gongsi*). *Shenbao* also reported an elaborate opening ceremony, at which the company's Articles of Association were read aloud and discussed and directors and supervisors were elected by ballot.[70] Ming Sung Umbrella Factory was thus featured publicly enacting a drama of the modern Chinese incorporated industrial company. By mid-1920 it was reported that the firm's business was growing, its initial capital was paid up and at its May shareholders meeting a vote was taken to issue a new block of shares, the old shares to be designated preferred stock and 70,000 yuan in new shares to be common stock.[71]

---

[69] "Ming Sung Umbrella Factory is Formally Established" [民生傘廠正式成立], *Shenbao,* 1919, 8, 19.

[70] "Ming Sung Umbrella Factory Opening Ceremony," *Shenbao*, 1919,11, 3.

[71] "Record of the Ad-hoc Meeting of the Shareholders of the Ming Sung Umbrella Factory," *Shenbao*, 1920, 10, 14.

It is not clear what happened between May and December of 1920. We do know that by the end of 1920 the manager of the Ming Sung Umbrella Factory petitioned to open a bankruptcy hearing at the Mixed Court. At that time the firm declared assets that included equipment, raw materials and finished umbrellas. Their value was insufficient to offset their liabilities, which included rent, electricity, wages, and outstanding payments to foreign importers.[72]

The Mixed Court ruled on two main issues. The first was the status of the firm itself. Ming Sung was found to have completed the steps necessary to register as a limited liability joint-stock company. It filed the required papers, in quadruplicate, with the local magistrate. The magistrate, retaining one copy, forwarded the other three to the offices stipulated in the *Company Ordinance*, including the Ministry of Agriculture and Commerce. However, the process was delayed when the Ministry found that the name chosen by the firm was already in use and it was while a change of name and final approval was pending that the firm declared bankruptcy. The court declared that the firm had not completed the required registration process and was therefore not a limited liability joint-stock company according to Article 6 of the *Ordinance*. [73]

The second issue was how to treat the liability for external debt of the shareholders, now deemed to members of a partnership. The Chinese defendants argued that as partners

---

[72] "Record of Cases Heard Yesterday at the Mixed Court" *Shenbao*, 1920, 12, 10.

[73] Anatol M. Kotenev, *Shanghai, Its Municipality and the Chinese : Being the History of the Shanghai Municipal Council and Its Relations with the Chinese, the Practice of the International Mixed Court, and the Inauguration and Constitution of the Shanghai Provisional Court* (Shanghai: North-China Daily News & Herald, 1927), 223. We are indebted to Kotenev for an outline of the case as it moved through the Mixed Court. It appears that the shareholders, of whom there were over 70, also initiated a suit against the managers of the firm in connection with the failure to achieve limited joint stock status. "公共公廨訊案彙錄 "[Record of Trial hearing in the Mixed Court], *Shenbao,* 1923,4,20.

they were each liable for the outstanding external debt in proportion to their individual stake in the firm, calculated by the number of shares each held. In January 1922 the Mixed Court issued a decision that concurred.

> In the absence of express provisions of law, custom is binding. According to the custom of Shanghai, and there is nothing to be found in any law to the contrary effect, each member of a partnership is, even in respect of third parties, only liable for the debts of the partnership in the proportion which the number of shares held by him bears to the total number of shares of the partnership. We would point out that Art. 35 of the Company Law, quoted by counsel for the Shanghai Import and Export Co. is not to the point, as this law does not deal with unregistered partnerships…..[74]

In so stating, the Mixed Court not only referenced the *Daliyuan*' s 1913 decision no.64 on custom.[75] It also made the precise argument made by the Shanghai Chamber of Commerce in the Tongyuan bank case, that absent registration as an unlimited company, this firm, like the bank, was not subject to Article 35 of the Company Law.

A New Mixed Court Hearing in 1926

Mixed Court decisions were numerous and consequential for both foreigners and Chinese living in the shadow of the treaty ports. They might influence judges in subsequent cases. But they did not constitute a body of judge-made law. With their changing cast of magistrates and assessors it was not uncommon for similar cases to be handled differently. Over the next few years several bankruptcies of Chinese firms with foreign creditors were brought before the court. A. M. Kotenev, considered by many foreigners at the time to be a leading authority on the Mixed Court and the Chinese justice system[76], cites three such

---

[74] Ibid., 223-224.

[75] Translated in F. T. Cheng, *Decisions,* "Civil cases are decided first according to express provisions of law, in the absence of express provisions, then, according to customs, and, in the absence of customs, then according to legal principle."

[76] An article by Kotenev on the Mixed Court introduced Kotenev as the author of *Shanghai: Its Mixed Court and Council*, which has become "a textbook for everyone who comes into contact with Mixed Court practice." "The

liquidations in which the Mixed Court made reference to decisions of the *Daliyuan* supporting full repayment to creditors by the remaining debtors in cases in which one or more partners were in arrears.[77] Regarding the *Daliyuan* decisions themselves, we have already noted the text of 1914 DLY decision no.550 above (p. 23). 1914 DLY decision no. 292 similarly affirmed the duty of partners to make up the amount left unpaid by a genuinely insolvent partner, but added that under no circumstances could a creditor demand the entire debt be repaid by a single partner. "This is what is known as joint liability and absolutely is not joint and several (*liandai*) liability."[78] 1915 DLY decision no. 1543 went the furthest, asserting the priority of creditor rights, stating that "In the case of partnership debt where a partner has absconded or is definitely without means to pay in full, ask the other partners to share the burden in repaying his portion. This is solely for the benefit of the creditor to ensure that the creditor is able to receive full repayment from those partnership who are capable…"[79]

In the Ming Sung Umbrella Factory case the contrary decision, to be guided by custom, left approximately $20,000 of the firms' total debts unrecovered. In one of the subsequent cases cited by Kotenev, a plaintiff, C. C. Barlow and Company, had also been a plaintiff in the case against the Ming Sung Umbrella company. This likely accounts for that company's decision to request that the Mixed Court reassess its decision in the earlier case.

For both sides in the Ming Sung case the coincidental presence in Beijing of the long-awaited Commission on Extraterritoriality in China added gravity to what was one of many

---

Mixed Court in 1925, Its Additional Burden During a Critical Year: Increasing Agitation for Rendition of the Court: What is to Become of it," *North China Herald,* March 17, 1926.

[77] Kotenev, *Shanghai, Its Municipality and the Chinese*, 224. It is not clear whether all three *Daliyuan* decisions were cited for each case.

[78] Zhengzhong Ye, ed. *Hehuo Fali [Partnership Regulations]* (Shanghai: Shanghai Shi shanghui, 1937), 143.

[79] Ibid., 155.

similar cases heard at the Mixed Court in recent years.[80] So great was the interest in this case that rather than report synopses of the Mixed Court sessions, the *North China Herald*, the leading English language journal in China, printed uncommonly lengthy quasi-transcripts of the hearings. Shorter recapitulations appeared in Chinese in *Shenbao* as well. Even before the second hearing began, Kotenev noted the impending meeting of the Commission in the context of pressures being exerted by the Chinese for rendition of the Mixed Court, citing the Ming Sung case and its retrial as a test of the court's viability.[81] In its April 10 installment of the proceedings of the Ming Sung case, the *North China Herald*'s own reporter noted that "the case is expected to have a bearing on the matter of the abolition of extraterritoriality and this was emphasized by Mr. McDonald [counsel for the creditors] in his closing address."[82]

The original Mixed Court case was heard by Magistrate Guan and A.D. Blackburn (British Vice-Consul and senior British Assessor). For the second hearing the British Assessor was replaced by A. J. Martin. The Court's unusual agreement to hear additional arguments in the

---

[80] In 1919 the Chinese delegation to the Paris Peace Conference submitted a document seeking the removal of "a number of hindrances of an international nature" that had retarded China's free development. Arguing that failure to do so would leave incomplete the principles "embodied in President Wilson's Fourteen Points and accepted by all the Allied and Associated Powers" the Chinese delegation made an impassioned plea for, among other things, the end of Spheres of Influence and Consular Jurisdiction. Chinese Delegation, *Questions for Readjustment* [2/14/2019] (Paris: [Impr. de Vaugirard], 1919). While not incorporated in the work of the peace conference, Chinese extraterritoriality was taken up at the 1921 Washington Conference on the Limitation of Armament. It was as a result of resolutions adopted at this conference that a Commission on Extraterritoriality met in Beijing, holding 21 sessions between January and September 1926. Commission on Extraterritoriality in China, "Report of the Commission on Extraterritoriality in China, Being the Report to the Governments of the Commission Appointed in Pursuance to Resolution V of the Conference on the Limitation of Armaments," (Washington: Govt. Print. Off., 1926).

[81] A. M. Kotenev, "The Mixed Court in 1925, Its Additional Burden During a Critical Year: Increased Agitation for Rendition of the Court: What is to Become of It?," *North China Herald*, March 17, 1926. T.B. Stephens, "The Shanghai Mixed Court and the Ming Sung Umbrella Case 1926," *Australian Journal of Politics & History* 33, no. 2 (1987): 80-81 argues that the real contestants in the case were the Chinese guilds and Chambers of Commerce and the foreign consuls.

[82] "PARTNERSHIP LAW IN CHINA: The Peril of Allowing Alleged Custom to Over-ride Law: Supreme Court Rulings," *The North China Herald, April 10,* 1926.

Ming Sung case was narrowly constructed. As stated by the Chinese magistrate appointed to the case "The question to be decided by the Court is whether the solvent shareholders in the defendant factory are only liable for the factory's debts in proportion to the number of shares they hold, or whether they are also, in proportion to their holdings, to bear the liabilities of those shareholders who are without means."[83] In this instance, only three of the 233 shareholders in the firm having appeared in court, the question threatened a considerable burden on the so-called solvent shareholders.

For the defense, A. M. Preston of the law firm Ellis and Hayes focused on the main question, whether or not apportioned liability was a custom applicable to partnership debt. To establish the existence of the custom he called on members of the merchant community and offered corroborating evidence in the form of late nineteenth and early twentieth century publications in which well-known Western experts described Chinese practices. Witnesses all testified to the existence of what at trial was called "liability for partnership losses on a pro rata basis." Among those who testified was Wong Zah-fuh, chairman of the Shandong Guild, who affirmed that the custom in his province was to divide liability according to each partners' shares. In his words, he would always pay the full amount he owed "to save face" but after that "I do not care what happens to the others." The director of the Cotton Yarn Guild confirmed that solvent partners were only liable for partnership losses on a pro-rata basis and were not responsible if a partner absconded. Altogether 17 "Chinese gentlemen," representing "almost

[83] "CHINESE PARTNERSHIP LIABILITY: Mixed Court Magistrate and Assessor Disagree on the Legal Aspect of the Case: Important Point for Foreign Business Community to Consider," *North China Herald*, July 31, 1926.

every trade in the city" provided confirmation that the custom was widely recognized and followed not only in Shanghai.[84]

Preston sought to elevate the significance of the witness's statements by elaborating on the role that guild rules played in the Chinese legal system. Quoting H. B. Morse, recognized by English-speaking expatriates as the leading expert on Chinese guilds, Preston pointed to the power of Chinese guilds to "establish rules and compel obedience to them; they fix prices and enforce adhesion; they settle or modify trade customs and obtain instant acquiescence…,"[85] a jurisdiction that Preston argued, was superior to the *Daliyuan* precisely because the guild was recognized as being "outside the law."[86] Pressing this point, he turned to another highly regarded Western authority, T. R. Jernigan, to further explicate the relationship between China's newly developed institutions of formal civil jurisprudence and the institutions of the guild.

> The rules of the guild are read in the Courts of China as if they were a part of the statutory law of the Empire. With reference to questions before the Court such rules determine the decision of the court as if conclusive on the law relating thereto. Often questions relating to Commerce which come before a court are referred to a guild for settlement and invariably the report of the guild is accepted as final.[87]

Western sources were also mobilized to demonstrate the longevity of the custom of apportioned liability. Most important of these were two sources we have already examined in their historical context. Drawing on the records of the Royal Asiatic society, Preston noted that

---

[84] "CHINESE PARTNER'S LIABILITY: Is an Individual Liable for the Whole Debts of the Partnership or Pro Rata with the Extent of his Shareholding? Interesting Point in Mixed Court," *The North China Herald, Mar* 20, 1926, 538.
[85] Hosea Ballou Morse, *The Gilds of China with an Account of the Gild Merchant or Co-Hong of Canton* (London; New York: Longmans, Green, 1909), 31.
[86] "PARTNERSHIP LAW IN CHINA: The Peril of Allowing Alleged Custom to Over-ride Law: Supreme Court Rulings," *The North China Herald, April 10,* 1926.
[87] Ibid. citing T. R. Jernigan, *China in Law and Commerce* (New York: The Macmillan Company ;, 1905), 219.

as early as the 1880s British China Hands had inquired into the way in which partnership debt was handled. That inquiry, as we saw at the beginning of Part I, was published in the *Journal of the Royal Asiatic Society North China Branch* and concluded that according to Chinese custom, partnership debt was shared in proportion to one's stake in the partnership and did not require individual partners to make up the unpaid share of the debt of delinquent partners.[88] The second source was Hong Kong's *Chinese Partnership Ordinance*, which in 1911 exempted from the jurisdiction of the 1897 *Hong Kong Partnership Ordinance* all Chinese partnerships that registered with the colonial government. The law further created a separate partnership law for Chinese that incorporated the custom of apportioned liability for debt.[89]

The plaintiffs in the case, Barlow and Co., O.H. Blackburn and Frederick Large and Co. were represented by R. G. McDonald of the law firm Teesdale, Newman and McDonald. McDonald put forward three arguments, each of which alone, he claimed, would provide sufficient grounds for reversal of the original Mixed Court finding. As basis for his first argument McDonald cited a number of *Daliyuan* decisions not considered at the original hearing that supported the requirement that solvent partners share in fully repaying partnership debt. Some of the decisions cited, such as 1914 DLY decisions 222 do not appear to

[88] See page 4 above.
[89] See p. 9

do the work that he claimed they did.[90] Others, such as 1914 DLY decisions 550[91] and 292 and 1915 DLY decision 2041 clearly did, although the latter two excluded joint and several liability.[92]

While *Daliyuan* decisions were often referred to as precedents, later conflicts with earlier judgments were not always referenced or explained and might not indicate a change in the *Daliyuan*' s treatment of the same issue in later cases. Both sides in this case could have found examples of *Daliyuan* decisions *to* support their cause. Nevertheless, in arguing that by establishing the rights of creditors to full repayment in cases such as those named above, McDonald maintained that the *Daliyuan* was not simply creating precedent, but was making law, adding somewhat disingenuously that "Your Honours will see that all the Supreme Court [i.e. *Daliyuan*] decisions, without exception, entirely support my contentions. That is the law of China. Nothing could be more unequivocal. Nothing could be clearer." [93]

By claiming that *Daliyuan* decisions had the force of law, the plaintiff's counsel sought to overcome the *Daliyuan*' s own 1913 decision no. 64, that we will recall stated "Civil cases are decided first according to express provisions of law, in the absence of express provisions, then according to customs, and, in the absence of customs, then according to legal principles." If

[90] 1914 DLY decision 222 simply states that if one partner receives a demand from a creditor to pay the entire debt of the partnership he may assert that partners' liability is shared, inform the court of the ability of the other partners to pay in full and the ratio by which the partnership allocates gains and losses, and the court can then "make a decision according to law."

[91] See p. 24.

[92] 1915 DLY decision 2041 states "As for partnership debts, they are first to be repaid by exhausting the assets of the partnership, the insufficient portion should be repaid by the partners according to their shares (*angu fenhuan*). Therefore, a creditor cannot demand repayment of the full amount from one person without first confirming that the other partners do not have the capacity to repay."

[93] "CHINESE PARTNERSHIP LAW: Argument Continued in the Mixed Court as to the Liability of Partners in Unregistered Concerns: Lengthy Exposition of Law by Plaintiff's Counsel." *North China Herald,* March 27, 1926. McDonald also noted the authority of the *Company Ordinance* Article 35, but quickly affirmed its lack of relevance in this case.

Daliyuan decisions were law, then the matter of whether or not apportioned liability was custom would be moot.

McDonald's second line of attack was to controvert the claim that apportioned liability was a custom. The plaintiffs presented only one witness, Tom Griffin, member of a firm of accountants considered to be official accountants to the Mixed Court. Griffin testified that in cases where a partner failed to contribute to the discharge of a debt according to his ownership share the accounting firm would recommend that the Mixed Court ask each partner to be liable for the whole amount of the debt that remains. When asked if he had knowledge of the custom in question in this case, Griffin said no.

Defense witnesses had been unanimous in their corroboration of the custom in question. McDonald sought to undermine their testimony first by demonstrating that merchants viewed themselves to be above the law.[94] He then argued that this custom alleged by the Chinese was nothing more than a loose understanding, an artifact of the Chinese habit of compromise in the case of partnership losses, a practice that worked for the Chinese, in his view, because they had ways to "force recalcitrant partners to pay up their share of losses which are not open to foreigners." Explaining his decision not to seek out Chinese witnesses to rebut those of the defense, McDonald confessed to having no faith that a Chinese person having contrary evidence would present it to the financial detriment of a fellow countryman,

---

[94] As we have seen, Preston's own statements supported this claim, as did witness testimony. For example, to the representative of the Bean and Rice Guild McDonald pointed out that some *Daliyuan* decisions went against custom, eliciting from him the admission that the laws were sometimes contrary to people's ideas. When asked whether he felt he was in a better positon than the Supreme Court to decide [what the law should be] the merchant responded that he did not see himself as an individual to be the final arbiter, but that merchants generally decided as a group what to do." CHINESE PARTNER'S LIABILITY: Is an Individual Liable for the Whole Debts of the Partnership or Pro Rata with the Extent of His Share Holding? Interesting Point in Mixed Court," *The North China Herald* Mar 20, 1926.

implying that Chinese people were both clannish and dishonest. Finally, a handful of Mixed Court cases holding solvent Chinese partners liable for the whole of their foreign debt were offered to demonstrate that apportioned liability was not a custom between Chinese and foreigners.[95]

The third element in the plaintiffs' case rested on legal theory. Maintaining that China had no legal authorities to define what could be considered a custom or a trade usage—this despite the existence of precisely such an authority in DLY 1913 decision no.3, [see p. 22-23]—McDonald turned to what he called the standard work by Lord Halsbury, *The Laws of England*. Here he went in search of "fundamental principles" upon which to judge the validity of a custom or a trade usage, noting that "just as we British in our Courts pay attention to American and other decisions in cases where *fundamental principles* are at stake and where the Law is not clear, so also possibly Chinese courts will consider, at any rate British or American decisions or law as a guide in question of doubt." [italics added]. [96]

Halsbury lists four essential characteristics for a custom to be valid. It must 1) be immemorial, 2) be reasonable, 3) have continued without interruption since its immemorial origins, and must 4) "be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect." McDonald,

---

[95] "CHINESE PARTNERSHIP LAW: Argument continued in the Mixed Court as to the Liability of Partners in Unregistered Concerns; Lengthy Exposition of Law by Plaintiff's Counsel," North *China Herald*, March 27,1926. As noted on p. 37 Mixed Court decisions were case specific and did not necessarily influence judges in other cases. Nevertheless, in his closing arguments the defendant's counsel offered several examples of mixed cases that upheld the custom of apportioned liability and reminded the court that decisions in the cases offered up by McDonald were made subsequent to the initial Ming Sung trial. "PARTNERSHIP LAW IN CHINA: Evidence of Long Ago to Support Recognition of Custom: The Moral Issues" *North China Herald,* April 3, 1926.

[96] CHINESE PARTNER'S LIABILITY: Is an Individual Liable for the Whole Debts of the Partnership or Pro Rata with the Extent of His Share Holding? Interesting Point in Mixed Court," *The North China Herald* Mar 20, 1926.

veering somewhat from Halsbury, arguing that the Chinese custom did not meet the validity test because it could not be shown to have existed from time immemorial, was not confined to a limited liability, was not reasonable, and was not certain.[97] McDonald then challenged the status of apportioned liability as a trade usage, a distinction that was not generally found in Chinese practice. Here, stated as simply as possible, Halsbury finds "that a rule of conduct amounts to a usage, if so generally known in the particular department of business life in which the case occurs, that, unless expressly or impliedly excluded, it must be considered as forming part of the contract." McDonald argued that apportioned liability was not a trade usage on the grounds that it was not notorious, it was not certain, it was not reasonable and it was not legal. Finally, McDonald added that "even if it were held to be a recognized usage," his clients were not bound by it "because they were ignorant of its existence."

McDonald's amplifications on the failure of apportioned liability to meet these criteria were limited. On longevity, he did little more than deny the authority of the printed and oral evidence presented by the defense. It was unreasonable because it was "contrary to the law of other countries [text unclear] and it would and must alter the whole method of dealing between foreigners and Chinese." To be sure, McDonald's argument rested on the difficulty foreigners would face when attempting to collect on a loan to a Chinese partnership if they could not dun a subset of wealthier partners for the full amount. If apportioned liability prevailed, would foreigners have to seek out all the partnership's agreements and have them translated? Could they rely on these being the actual agreements? What would happen if

[97] Earl of Halsbury, ed. *The Laws of England : Being a Complete Statement of the Whole Laws of England*, vol. 10 (London :: Butterworth ;, 1907), 221-22.

those with money still disappeared? While joint and several liability would address some of the concerns and was the only remedy available in this case, McDonald ended with an odd juxtaposition between the murky world of the Chinese partnership and the transparent world of limited liability companies and limited partnerships, whose registration with the state obliterated the uncertainties, dishonesty and forgery facing his clients. Should the Mixed Court legitimize apportioned liability, he argued,

> it would lead to a tremendous contraction of credit and must therefore deal a staggering blow at the business of this port. I submit it is contrary to the law of every foreign country in the world which makes provision for limited companies and limited partnerships.[98]

The remainder of McDonald's argument was devoted to a string of cases that he felt supported his clients' cause. Quoting without citation 1914 DLY decision 292 McDonald subtly shifted the place of custom and the place of legal principle in Chinese jurisprudence.

> Since the Civil Code has not yet been promulgated, there is yet no express provision governing the liability of partners in respect of the debts of the partnership. But *according to the principles of civil law*, every partner is liable to the creditors of the partnership in proportion to the share he holds. If any partner is insolvent, and that is found to be true, the other partners should bear his share of the liability rateably and no creditor may, without just cause, claim payment of the whole of the debt against one of the partners, for this is a joint, and not a several debt. [italics added] [99]

In so doing McDonald posited an alternative route to elevate the authority of *Daliyuan* decisions by associating them with legal principle. And, at a time when China's legal system was under scrutiny for its ability to conform to the self-proclaimed international norms of

---

[98] CHINESE PARTNER'S LIABILITY: Is an Individual Liable for the Whole Debts of the Partnership or Pro Rata with the Extent of His Share Holding? Interesting Point in Mixed Court," *The North China Herald* Mar 20, 1926. Among the ironies of McDonald's argument is the fact that creditors would be fully reimbursed by limited partnership and that British law itself had resisted passage of a limited partnership law until 1907.

[99] CHINESE PARTNERSHIP LAW: Argument continued in the Mixed Court as to the Liability of Partners in Unregistered Concerns; Lengthy Exposition of Law by Plaintiffs' Counsel, *North China Herald*, March 27, 1926.

Western Europe, Britain and the U.S., McDonald sought to discredit Chinese custom for being out of keeping with the universal legal consensus.

Defense arguments cleaved closely to the facts of the case. But in his summation Preston made one reference to the moral implications of the case.[100] The investors in the Ming Sung Umbrella Factory had come together with the intention of incorporating. Fifteen hundred shares were subscribed by 233 shareholders. Unlike infamous cases of Chinese firms tacking the characters for "limited" to their names without registration, Ming Sung complied with the law and was only deprived of limited status by bureaucratic delay. Now, as the issue of liability was being revisited, only three of the shareholders had appeared. Unlike members of an ordinary partnership, these three shareholders had no face to face relationship with the other shareholders, many of whom may held shares under pseudonyms.[101] Was it morally correct to hold them responsible for the default of strangers when this duty was not on the table when they first subscribed to their shares? On the other hand, was it moral to make whole the creditors who, when they entered into this loan agreement, thought they were dealing with a limited company?

As might be expected, the remainder of Preston's summation took aim at both factual and substantive claims made by plaintiff's counsel. The testimony of accountant Griffith was

[100] "PARTNERSHIP LAW IN CHINA: Evidence of Long Ago to Support Recognition of Custom: The Moral Issues" *North China Herald,* April 3, 1926.

[101] It was common for lineage trusts and even firms to invest in other entities under pseudonyms that were sometimes indistinguishable from the names of individuals. The difficulty entailed in identifying such investors was often leveled at Chinese by foreign firms. In my own work on investment at the Zigong saltyard shareholder identity does not appear to have presented a problem for anyone but me. As we have seen, this issue was addressed by in Hong Kong by requiring partnership registration and registration will become one of the alternatives proposed by the Shanghai merchant community in their continued resistance to joint and several liability .

discounted as his service to the Mixed Court had been of short duration. The argument that the creditors had no way of knowing about Chinese practice was challenged by the fact that the comprador of one of the plaintiffs was actually a shareholder in the Ming Sung Umbrella Factory and in a position to enlighten his bosses when he urged them to lend Ming Sung money. Moreover, whether or not McDonald felt the evidence presented in the 1887 discussion of Chinese partnership debt, or the arguments leading to the enactment of the Hong Kong Chinese Partnership Ordinance was sufficient to prove the longevity of the custom, the content of these documents were well known to the foreign community.

Satisfied that the content of the custom itself was established, Preston addressed the two ways in which McDonald had sought to undermine its legal status. The first was to deny that any law existed that could override the custom. Returning to the *Daliyuan*, Preston cited several decisions and interpretations confirming that where there is no express law, custom prevails.[102] Inasmuch as Ming Sung had been judged to be a partnership, the *Company Ordinance* did not apply. There being no law of partnership in the Qing Code, it too did not apply. As for McDonald's argument that *Daliyuan* decisions had the force of law, Preston attempted to kill two birds with one stone. In the "Introduction" to *The Chinese Supreme Court Decisions*, a recent publication that served as a key source of information on the decisions taken by the court since the revolution, Preston found the classic argument for China's reliance of custom and its absence of codified civil law. In the past

> the State took little interest in civil disputes. The people, too, did not like to go to Law. Their disputes were often settled in the Chambers of Commerce or Guilds in the case of city-men.

[102] These included the 1918 interpretation triggered by an inquiry from the Japanese consul in Changchun (see p. 29), 1913 DLY decision 64, DLY 1914 decision 304 (confirming that prior to the promulgation of a Civil Code, those portions of the Qing Code that were not 'repugnant to the existing system of government" would still be in force.

This, Preston ventured, was why the decision was made to deem Supreme Court decisions inferior to custom. Preston acknowledged that many of the principles embodied in Daliyuan decisions bore the traces of Western jurisprudence.[103] But lest the decisions of the Daliyuan be seen as law, Preston reminded his adversary that even the staunchest supporters of the court recognized that the activities of the court were still being evaluated. As the "Introduction" noted, "How far the Supreme Court has exercised this [lawmaking] function in a way worthy of its name will be judged by its work….."[104] More to the point,

> the Supreme Court decisions are no more than legal principles: secondly that legal principles are of inferior value to customs: thirdly that by inviting criticism of its efforts the Supreme Court acknowledges that it may be wrong, and, lastly that the English translation appearing in this and in Mr. Kotenev' s book is not necessarily accurate. Furthermore, it must not be forgotten that the Supreme Court cannot make Law, it can only administer it. The Provisional Constitution of the Republic of China, promulgated on March 11, 1911, states: —Chapter III—National Council 'Art. 1C—The legislative power of the Republic is exercised by the National Council, and it should pass all laws.' This was followed by the Permanent Constitution promulgated on the 10th October 1923, Art. 39—'legislative power of the Republic is exercised by the Parliament and it should pass all laws.'[105]

McDonald's summation added little to his original argument and will not be recapitulated here. Most striking however, was the sense of urgency, almost panic, with which he confronted the consequences of a decision upholding this custom. Sentiment once again seemed to crowd out his more substantive claims. In a China facing a "Bolshevist menace" and military threat[106] McDonald warned the court

> we are faced with a state of chaos that baffles the wildest imagination. We will have reached a stage where reason, sense and law cease to function and where every minute geographical unit,

---

[103] Citing F. T. Cheng, *Chinese Supreme Court Decisions*, iii.

[104] "PARTNERSHIP LAW IN CHINA: Evidence of Long Ago to Support Recognition of Custom: The Moral Issues" *North China Herald,* April 3, 1926.

[105] Ibid.

[106] 1926 marked the beginning of the united front between the Chinese Communists and the Nationalist Party under the leadership of Chiang Kai-shek, whose Northern Expedition was aimed at eliminating competing Chinese warlords and unifying China.

> every little hamlet and every individual is a law unto himself. We have heard the guilds consider themselves superior to anything on earth. Not even bolshevism in its most ambitious mood aspires to anything like this. My friend, with the suavity and the demeanour of an angel has preached the gospel of anarchy in its crudest and most repulsive form.[107]

An Inconclusive Judgment

The parties to the Ming Sung Umbrella Factory debt case had to wait until the end of July to learn how their arguments would be received by the court. Division along party lines, that is, a magistrate siding with the Chinese party and an Assessor siding with the foreigners, was not a foregone conclusion. Had it been, the Mixed Court would have ceased to function long ago. But in this case the decision was split, with the result that the original decision was left to stand.

Magistrate Guan spoke first and on most points concurred with the defendants. Having sat on the original case he knew the case well and arguably wished to defend his earlier position. He vigorously rejected the argument that the decisions of the *Daliyuan* should be recognized as law, affirming that "the decisions of the Supreme Court—not having been passed by the body which can make laws in accordance with the Provisional Constitution or the permanent Constitution—should only be recognized as legal principles and cannot be recognized as laws."[108] He accepted as unimpeachable the oral evidence presented by the Chinese guild representatives on the matter of the custom's existence. He also agreed with the original finding that Ming Sung Umbrella Factory should be treated as a partnership due to incomplete registration. Under these conditions, and in the absence of law, the custom in

[107] "PARTNERSHIP LAW IN CHINA: The Peril of Allowing Alleged Custom to Over-ride Law: Supreme Court Rulings," *North China Herald*, April 10, 1926.
[108] "CHINESE PARTNERSHIP LIABILITY: Mixed Court Magistrate and Assessor Disagree on the Legal Aspect of the Case: Important Point for Foreign Business Community to Consider," *North China Herald*, July 31, 1926.

question should be applied in deciding this case. Having paid their proportionate share of the debt, the three partners appearing in court were not jointly and severally liable for the share of the debt of the remaining partners. Acknowledging that other courts had handed down decisions requiring partners to pay the share of debt owed by insolvent or absconding partners, Guan argued that in those cases either custom had not been raised or evidence for the custom had not been adequately presented. Perhaps to ridicule plaintiffs' counsel, Guan noted that subsequent to the initial Ming Sung case the Mixed Court had repeatedly handed down decisions that followed the custom in this case without negatively affecting China's foreign trade. Once again, he found for the defendants.

The British Assessor, A.J. Martin began his decision with a review of the original case and then moved to review the authority of the *Daliyuan*. While McDonald had relied on no more than an assertion, the July judgment of the British Assessor, A. J. Martin, fleshed out what appears to have been an emerging consensus position within the British legal and diplomatic community on the constitution of Chinese civil law. Two documents were cited that were not included in the plaintiff's arguments. First, Martin recalled that in 1919 and 1920 the *Daliyuan* had compiled a collection of leading cases.[109] At the court's request these were translated into English by F. T. Cheng [Zheng Tianxi 鄭天錫], a British trained lawyer and legal scholar. According to Martin, the leading cases were widely viewed as creating a kind of "common law." To validate this claim Martin first cited a 1923 publication of the Commission on Extraterritoriality containing Chinese Supreme Court decisions. According to Martin, the

[109]This is the same document cited by Preston in his summation, the "Introduction" to which was referenced.

Commission President's preface noted that political conditions in China had slowed the considerable progress that China had made in establishing a body of civil law.

> Nevertheless, there is a body of law which has been steadily growing during the past years, and which may be said to constitute a part of the common Law of the Republic. The Supreme Court functioning from day to day has given a large number of decisions in actual cases brought before it on appeal, covering to a greater or lesser extent large portions of the domain of civil law.[110]

Perhaps betraying a bit of his British training, F. T. Cheng's translator's preface gave even more credence to the plaintiff's contention that decisions of the *Daliyuan* were in effect law.

> As the Supreme Court is the highest tribunal of the land, its decisions may be compared to those of the House of Lords or the Judicial Committee of the Privy Council of England. Moreover, as the Civil Code of China has not yet been promulgated and the civil provisions saved from the Criminal Code of the Tsing Dynasty are too few and too rudimentary to meet the necessities of the time, what is contained in the following pages, so far as they relate to civil matters, is sometimes the only concrete rules by which judges are guided in their decisions, and it is a body of rules in fact repeatedly applied— in other words, *it forms the unwritten law of China in the juridical sense of the term.* [111] [italics added]

In fact, Chinese legal reform had been moving solidly in the direction of emulating not a Common Law system, but one closely modeled on the primacy of statute found in the Civil Law tradition. The format of Cheng's translation of *Daliyuan* decisions itself was designed to give the impression of comprising a legal code, being organized according to the categories of the General Principles section of a Civil Code, and sections of what the translation called the

---

[110] CHINESE PARTNERSHIP LIABILITY: Mixed Court Magistrate and Assessor Disagree on the Legal Aspect of the Case: Important Point for Foreign Business Community to Consider, *North China Herald*, Jul 31, 1926. I have not been able to find the Commission report to which he refers.

[111] F. T. Cheng, *Chinese Supreme Court Decisions*, ii. It should be noted that even within the foreign community there were doubts in this regard, hence McDonald's second line of reasoning. Young, *Law and Modern State Building*, 138-47 provides a useful discussion of whether or not *Daliyuan* decisions were binding. It is worth noting that the final report of the 1926 Commission on Extraterritoriality was inconclusive on the matter of *Daliyuan* decisions' status as law, stating first that it comprised one source of law, judge-made, and then backtracking by stating that is was "difficult to state with accuracy the extent to which they fill the deficiency arising from the absence of a civil code and other statutory civil laws." Commission on Extraterritoriality in China., "Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926," (Washington: Government Printing Office, 1926), 40-42.

Traders Ordinance [the *Shangren* tongli] and *Commercial Associations Ordinance* [what I have been calling the *Company Ordinance* aka *Gongsi tiaoli*].

Martin's decision also addressed the validity of the custom in question, avoiding McDonald's legal universalism by noting that the *Daliyuan*, in 1913 decision no. 3, had established guidelines for judging the validity of a custom, the last being that it not violate public policy or the public interest. Martin then cited 1914 *Daliyuan* decision no. 988, which states that "the custom that a trader's debt is not personal, that is to say, it does not affect his property not engaged in trade is, assuming that it [property] exists, invalid for being against the public interest."[112] While the issue in decision 988 was the ability of a trader to shield all of his personal property from that of his business ventures, Martin saw in it a direct negation of the apportioned liability of partners.

The remainder of Martin's decision was comprised of an extensive review of *Daliyuan* cases that found partners proportionately liable for outstanding debt and directly or indirectly pointed to liability for the share of debt of absconding or insolvent members of the partnership. While several cases noted that partners' liability was not considered to be joint and several, none of the cited cases exempted partners from that portion left unpaid by delinquent partners. Thus, although Martin did not believe there was a custom such as the one claimed by the defendants, he sidestepped the issue by piling up *Daliyuan* decisions that favored creditors

[112] CHINESE PARTNERSHIP LIABILITY: Mixed Court Magistrate and Assessor Disagree on the Legal Aspect of the Case: Important Point for Foreign Business Community to Consider, *North China Herald*, Jul 31, 1926.

and by maintaining the law-creating authority of the court. On this basis he found in favor of the plaintiffs.[113]

Aftermath

Questions like those raised in the Ming Sung Umbrella Factory case appeared in other cases almost as soon as this case was closed. The Western Tavern case is particularly interesting because it closely mirrored and even made reference to the Ming Sung Case. Two previous judgments had been handed down in the Western Tavern Case, each time requiring that partners pay their proportionate share of the debt but not the debt of defaulting partners. In this third hearing, defense counsel argued that the Ming Sung case had conclusively shown the local custom of apportioned liability to exist and that in the absence of a Chinese civil code, "once the custom was established it was dominant and would override Supreme Court decisions which conflicted with it."[114] To the disappointment of the Tavern's only partner with means, the court, presided over by Magistrate Yui and Assessor Bucknell, ruled otherwise. What makes the Western Tavern case so intriguing is what followed the judges' decision. Despite their denial that *Daliyuan* decisions "merely laid down general principles which would be followed where no particular law or valid custom applied" they conceded that in handing down a decision, judges in the Mixed Court were acting only for that particular case and that "in

[113] Cases to the contrary also existed. Young traces a partnership liability case from the county court to the a hearing at the *Daliyuan* where the latter overturned the joint and several liability decided by the Zhejiang High Court and ordered one of two partners to pay the unpaid portion of a debt left by an insolvent partner only in proportion to her share in the firm. Young, 187-89.

[114] "PARTNERSHIP LAW IN CHINA: Another Important Decision: Individual Liability, *"North China Herald*, November 20,1926, 371.

the Mixed Court one court was not bound by the decisions of another, neither was it necessarily bound by precedents although a court might be guided by previous cases."[115]

Read either to say that this court would not be bound by the views of Magistrate Guan in the Ming Sung case, or to say that the decision in this case need not preclude another court from finding that apportioned liability did pertain, the issue of partnership liability, the status of custom and the binding nature of *Daliyuan* decisions were clearly left to vex both merchants and their foreign creditors for another day. What then can we learn from the contest over merchant custom as it played out in the Mixed Court in 1926?

The case mounted by the defense in the Ming Sung case rested on an implicit definition of law that extended beyond the boundaries of law on the books and did not wholly incorporate the idea of binding precedent. This understanding had historical roots but should not be mistaken for a reflexive application of modes of thinking appropriated from the imperial period to a new hybrid legal environment.[116] The fact that imperial law on the books did not deal with most of the issues facing twentieth century business certainly sustained an underlying belief by business people that the rules of the game that applied to them would be shaped by business in practice and with input from those in business. This belief was reinforced by the state's own actions, both the slow pace of civil law legislation[117] and the recognition given to

[115] Ibid.

[116] I will eschew an engagement with the multiple cultural critiques of China's failure to absorb whole cloth a Western legal framework. There are no lack of studies that explain Chinese legal development in the twentieth century on this basis. In addition to the classic works of contemporaries of the actors in this paper, such as Jean Escarra, G. Jamieson, and S. van der Sprenkle, many more recent studies also view Chinese law through the lens of familialism, Confucianism, and so on.

[117] As we have seen, the bankruptcy law was rescinded in 1907. A revised version of the law was drafted in 1915 but courts were not ordered to follow it in bankruptcy cases until 1926. A new bankruptcy law was not enacted by the Nationalist Government until 1935. The much discussed republican civil code was not enacted until 1930-31. To this we could add the slow pace with which new stand-alone courts were established in many parts of China.

merchant knowledge in the process of legal reform[118], as supplements to law in court proceedings and in the workings of Chamber of Commerce Mediation Offices. This understanding formed the grounds for defense counsel Preston's reliance on guild leaders to present evidence and his recourse to texts by Western experts affirming the authority and function of guilds and Chambers of Commerce within the Chinese legal system as constituted during the early Republic. To say that guilds were repositories of knowledge where the law offered no guidance and institutions of enforcement when the state lacked enforcement capacity was an argument that custom was rightly placed after law and before principle as China developed a more robust formal legal system. It was also a key element in the foreign community's challenge to custom, seen as one of many ways in which Chinese guilds impeded the Westernization of Chinese law and business.

The defendants understanding of the role of custom was closely aligned with their understanding of the role of the *Daliyuan*, both of which were influenced by the efforts of the early Republican state to navigate the complicated legal remnants of the late imperial period and the sluggish pace of early Republican legislative efforts. Mary Buck Young provides a striking account of the difficulties facing the *Daliyuan* as the nation's highest court of appeals, as well as the ambiguous nature of its institutional mandate.[119] Among the former was the incompleteness of lawmaking itself, which left the civil code unpromulgated, some Qing law in force, and a variety of local practices vying for recognition by the courts. Article 35 of the Law on the Organization of the Judiciary gave the *Daliyuan* "power to unify the interpretation of law."

[118] For example in the conduct of surveys of merchant practice and the solicitation of reports such as the *Shangfa diaocha liyoushu* and the *Gongsi tiaoli shiyi*

[119] Young, 15-72.

However, as Young points out, its power to unify the interpretation of law was limited by the requirement that a request to this effect be made by another body. At the same time, it had no power to enforce uniformity in the judgements made by provincial high courts.[120] Thus, the defendant's claim that the *Daliyuan* decisions did not have the force of law had both a legal and a logical basis. Moreover, even if *Daliyuan* interpretations were seen as establishing legal principles, we have seen that the Qing Draft Civil Code, which served as the basis for the *Daliyuan*'s own 1913 interpretation, held that *Daliyuan* decisions would not take precedence over custom.

The plaintiff's case rested in large part on the manifest universality of Western law, a claim we have seen supported by privileging Halsbury's definition of custom over that of the *Daliyuan*, and finding China's custom wanting on that and more instrumental bases. Throughout the case China's legal system was juxtaposed with those of the "law of every country in the world." And China's redemption finds itself in those *Daliyuan* decisions that appear to mirror Western law, the product of a continuing struggle to harmonize Chinese and Western legal principles. Indeed, T. B. Stephens provides evidence that Assessor Martin received instructions from the British Consul-General, Sir Sydney Barton, to make universal law central to his ruling on the case. Writing to Martin in December 1925 he said

> I do not think there can be any doubt that solvent Chinese partners are liable for the shares of insolvents—it has always been so in Shanghai as I know from my experience on the Mixed Court. If Kuan [magistrate Guan] refuses to give a decision in accordance with *what may fairly be called a universal law*, make him put it in writing and announce that you can't accept it and will refer it to me and I will refer it to the Commissioner of Foreign Affairs. [italics added][121]

[120] Young, 43-44. Young notes that this power was grant in Article 35 of the Law on the Organization of the Judiciary. We will see that during the debates over joint and several liability the Ministry of Justice referred questions that arose at lower levels to the court on several occasions.
[121] Stephens, "Ming Sung,"81.

It was this tension that prompted the prodigious efforts made by both McDonald and Assessor Martin to demonstrate that *Daliyuan* decisions functioned as law and thereby overcame all claims of authority by Chinese customs. It was also the mindset that allowed for an argument that in the Ming Sung case, Westerners doing business with Chinese could hide behind ignorance of custom, but Chinese should be bound by Western legal principles. That these Western legal principles were by no means universal, that China had favored continental models in reforming its own legal system, and that Western law was itself a product of custom in conversation with changing political, social and economic conditions played no role in the the plaintiffs' case.

By framing their arguments in this way, the plaintiffs' counsel and the British Assessor situated themselves within their own interpretive community, a community that included not just Westerners but members of an emerging cohort of Western trained Chinese lawyers, judges and even accountants. It is no accident that F. T. Cheng, the translator of the Chinese Supreme Court decisions published in 1920 and cited in this case, would begin his preface by stating that as the highest court in the land, the decisions of the *Daliyuan* were analogous to those of the House of Lords or the Judicial Committee of the Privy Council of England, despite its less precedential authority. In 1915 Cheng became the first Chinese person to receive a doctor of law from a British university, and at the time of his translation was a Barrister of the Middle Temple, and a judge of the *Daliyuan*.[122] Cheng notes that

> Those principles of law which are fundamental to the notion of justice have really no nationality. They are merely that *jus gentium* which alone according to Austin belongs to the legitimate

[122] Titles listed on the title page of *The Chinese Supreme Court Decisions.*

> province of jurisprudence, but there must, of course, be someone first to reduce them to a concrete form, just as the law of gravity had to be discovered by Newton.[123]

If the principles of law could be likened to the law of gravity, a natural phenomenon awaiting discovery, then China had no choice but to participate in a universalizing reform. As we will see, this was a viewed shared by many Chinese professionals, and encouraged by similarly confident Western interlocutors whose access to Chinese law was provided by these same few multilingual experts. This confidence may account for the overall framework within which the Ming Sung case was both argued and ultimately decided. On the Chinese side a highly legalistic argument was mounted that insisted on adherence to the order of play set out in the Chinese reform agenda, a gradualist approach that put custom ahead of principles as the legislative process slowly wound its way to the ultimate goal of codified law. On the Western side legal principles became Western legal principles and when embodied in *Daliyuan* decisions, became law. Of course, in the particular case at hand, tangible interests were at stake for the three Ming Sung Umbrella Factory's partners who appeared in court and the creditors who stood to lose money. But reference to universal legal principles and longstanding custom also encoded understandings of how the world of business worked and should work that, on the Chinese side, were defended not in the courtroom but in the realm of politics and public discourse. It is to this realm that we turn in Part III.

[123] F. T. Cheng, *The Chinese Supreme Court Decisions*, iii.

Chen, Li. *Chinese Law in Imperial Eyes : Sovereignty, Justice, and Transcultural Politics*. New York: Columbia University Press, 2015.

Cheng, F. T. *The Chinese Supreme Court Decisions. First Instalment Translation Relating to General Principles of Civil Law and to Commercial Law*. Peking: Supreme Court, 1920.

Cheng, Joseph Kai Huan. "Chinese Law in Transition: The Late Ch'ing Law Reform, 1901-1911." Ph.D., Brown University, 1976.

China, Commission on Extraterritoriality in. "Report of the Commission on Extraterritoriality in China, Being the Report to the Governments of the Commission Appointed in Pursuance to Resolution V of the Conference on the Limitation of Armaments." Washington: Govt. Print. Off., 1926.

China., Commission on Extraterritoriality in. "Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926." Washington: Government Printing Office, 1926.

Delegation, Chinese. *Questions for Readjustment* [in English] [2/14/2019]. Paris: [Impr. de Vaugirard], 1919.

Halsbury, Earl of ed. *The Laws of England : Being a Complete Statement of the Whole Laws of England* Vol. 10. London :: Butterworth ;, 1907.

Hu, Xucheng, Xinhua Xia, and Jiaofa Li, eds. *Minshi Xiguan Diaocha Baogao Lu*. Beijing: : Zhongguo zheng fa da xue chu ban she, 2000.

Jernigan, T. R. *China in Law and Commerce*. New York: The Macmillan Company ;, 1905.

Jiu Zhongguo De Gu Fen Zhi : 1868 Nian-1949 Nian. [Beijing] :: Zhongguo dang an chu ban she, 1996.

Kayaoglu, Turan. *Legal Imperialism : Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. Cambridge [U.K.] ;: Cambridge University Press, 2010.

Kotenev, Anatol M. *Shanghai, Its Municipality and the Chinese : Being the History of the Shanghai Municipal Council and Its Relations with the Chinese, the Practice of the International Mixed Court, and the Inauguration and Constitution of the Shanghai Provisional Court*. Shanghai: North-China Daily News & Herald, 1927.

Manley, O. Hudson. "The Rendition of the International Mixed Court at Shanghai." *The American Journal of International Law* 21, no. 3 (1927): 451-71.

Morse, Hosea Ballou. *The Gilds of China with an Account of the Gild Merchant or Co-Hong of Canton* [in English]. London; New York: Longmans, Green, 1909.

Ruskola, Teemu. *Legal Orientalism: China, the United States, and Modern Law*. Cambridge ; London: Harvard University Press,, 2013. http://www.columbia.edu/cgi-bin/cul/resolve?clio10842376.

So, Billy K. L., and Albert S. Lee. "Legalization of Chinese Corporation, 1904-1929: Innovation and Continuity in Rules and Legislation." In *The Treaty Port Economy in Modern China : Empirical Studies of Institutional Change and Economic Performance*, edited by Billy K. L. So and Ramon Myers, 186-210. Berkeley, CA: Institute of East Asian Studies, 2011.

Stephens, T.B. "The Shanghai Mixed Court and the Ming Sung Umbrella Case 1926." *Australian Journal of Politics & History* 33, no. 2 (1987): 77-89.

Stephens, Thomas B. *Order and Discipline in China : The Shanghai Mixed Court, 1911-27*. Seattle :: University of Washington Press, 1992.

Wang, Xuemei 王雪梅. "Lun Qingmo De Shangfa Diaocha'an Liyou Shu [论清末的'商法调查案理由书 "on the Late Qing 'Account of the Investigation of Commercial Law']."

Journal of Sichuan Normal University (Social Sciences Edition) 32, no. 4 (2005): 77-83.

Wang, Zhiqiang. "Minguo Shiqi De Sifa Yu Minjian Xiguan." *Bijiaofa yanjiu [Research in Comparative Law]* 4 (2000): 407-16.

Williams, E. T. *Recent Chinese Legislation Relating to Commercial, Railway and Mining Enterprises. With Regulations for Registration of Trade Marks, and for the Registration of Companies*. Shanghai,: Shanghai mercury, 1905.

Xiang, Naiqi. "Ping Xinjiu Gongsi Tiaoli." *China Journal (Zhonghua zazhi)* 1, no. 5 (1914).

Xu, Xiaoqun. *Trial of Modernity : Judicial Reform in Early Twentieth-Century China, 1901-1937*. Stanford, Calif.: Stanford University Press, 2008.

Yan, Esheng 嚴諤聲. *Shanghai Shang Shi Guan Li 上海商事慣例*. Shanghai: Xin sheng tong xun she 新聲通訊社, 1933. 2nd.

Yao, Chenghan. *Gongsi Tiaoli Shiyi*. Shanghai: Commercial Press 1914.

Ye, Zhengzhong, ed. *Hehuo Fali [Partnership Regulations]*. Shanghai: Shanghai Shi shanghui, 1937.

Young, Mary Buck. . "Law and Modern State-Building in Early Republican China: The Supreme Court of Peking (1911-1926)." Harvard University, 2004.

Zelin, Madeleine. "A Deep History of Chinese Shareholding." *Law and History Review* 37, no. 1 (2019): 1-27.

Zelin, Madeleine, Jonathan K. Ocko, and Robert Gardella. *Contract and Property in Early Modern China*. Stanford, Calif.: Stanford University Press, 2004.

Zhang, Sheng ""'Daqing Minlu Caoan' Zhiyi" [to Make Good Omissions and Deficiencies in the Study of the "Qing Draft Civil Code]." *Faxue yanjiu* 3 (2004): 140-51.