to transmit his despatches. At forty, enter on high office when strong and capable of good work; at seventy, resign when the natural powers are exhausted. Ts'ai Chung flattered his Prince when in his vigour, and now in the decrepitude of his old age will be more shameless than before. Rebels spring up owing to the exhaustion of the people, consequent on the grain requirement for Yen shan; on the diminution of the stated quantity of salt; and on a constant succession of bad years. The famine, stricken people rise in rebellion. At Shan-Tung are 100,000 under Chang-Hsien 張仙, and 50,000 under Chang-Ti 迪. In Ho-pei are 300,000; and 20 to 30,000 in other places. A woman suddenly develops an elegant moustache 6 to 7 inches long, and is ordered to turn Taoist. A fruit-seller, a man, gives birth to a child!

These portents coincide with the risings of banditti and are shortly to be followed by the Kin invasion. A woman growing a beard or a man bringing forth a child, is each a shocking subversion of the order of nature, and the predominance of the passive, or mean, petty, and selfish element, is an omen of the disasters soon to follow.

(To be continued).

E. L. OXENHAM.

THE LAW OF TESTAMENTARY SUCCESSION AS POPULARLY UNDERSTOOD AND APPLIED IN CHINA.

I do not pretend to possess any knowledge of jurisprudence. Taking up the subject of the Chinese law of testamentary succession, I do so simply as a layman representing the popular view of the question as it would naturally impress itself upon the mind of a student of Chinese sociology, and I publish my effusions in the sincere hope that the crudities which must of necessity mar such a performance in the absence of legal training, will arouse the zeal of some Sinologist who has made a study of archaic law and induce him to expound the whole subject more satisfactorily.

The question what the Chinese law of testamentary disposition of property is, has a very practical bearing on the administration of justice in the Colony of Hongkong. By the law of the Colony any will or testament made by a Chinese resident of Hongkong will have to be interpreted and dealt with, by the Supreme Court of Hongkong, if I am not mistaken, in accordance with the principles of the law of inheritance as understood in China. It is therefore of some importance to arrive at a clear conception of what the Chinese law of inheritance has to say regarding testamentary succession. The Penal Code and the Statutes of the Ta-ts'ing Dynasty do not appear to contain any mention of wills, as legal documents. In this respect the Chinese Code does not stand alone, for legislation regarding wills is generally absent in all archaic systems of law. But there is in the case of Chinese law a special reason why the subject is not specially mentioned. The law of inheritance is based in China on immutable traditional principles the effects of which cannot be set aside by modern legislation regarding private testamentary disposition. In a collection of leading cases translated by Ch. Alabaster (*China Review*, V, p. 193 and 251) examples are given of testamen-

tary dispositions set aside in one case as unjust and upheld in another case on cause shewn, and in the former case the Judge laid down that "the maxim, 'the will of the father should be respected,' was uttered with regard to the succession of a kingdom and cannot be quoted in the matter of family succession."

The principle here laid down is, as I take it, that in the forum of Chinese law a will receives effect only if, or so far as, its provisions are in harmony with the provisions of the statute law and in harmony with the general principles of equity. To all practical intents and purposes a will has, as such, no intrinsically legal effect whatever, but it has within the domestic circle a purely sentimental effect, based on reverence for the person of the testator and subject to the greater reverence due to the law. Consequently the answer to the question, frequently arising in Hongkong, whether any given will made in Hongkong by a Chinese subject has been made according to the law or usage obtaining in China, depends entirely upon a preliminary question, which will be dealt with further on, viz. whether the stipulations of the will are in harmony with the devolution of property as fixed by statute law. If any Chinese resident of Hongkong makes a will, as it may happen sometimes, with the intention of diverting his property from the only lawful course of devolution, his action in making that will is not only not in accordance with the laws of China, but positively criminal.

I will first consider the question how a Chinaman resident in Hongkong could make a will so as to comply with the conditions required for the purpose by Chinese usage. It must be understood that, as Chinese law makes no provision for wills, neither does it determine any special formalities required in making wills. But Chinese custom has fixed the general nature of the formalities required in China in making a lawful will, that is a will which does not attempt to interfere with the course of devolution fixed by the provisions of statute law but confines itself to the arrangement of minor details within the limits of those provisions. The conditions and formalities required by Chinese custom are very simple. A lawful testamentary disposition in the foregoing sense of the word may be made orally *in articulo mortis* in the presence of the senior agnates, or it may be written by the testator's own hand and delivered by him to the senior agnates, or dictated by the testator to any one and in that case avowed by the testator to the senior agnates. In short any formality may be used, provided only that the will be a public document, public within the circle of the kindred interested in the devolution of the property. A will, in the European sense of the term, that is to say a secret testamentary disposition, with the signature of the testator verified by the appended signatures of disinterested strangers, has not yet been countenanced by Chinese custom and is in principle excluded by Chinese law. I have no hesitation in saying that if a Chinaman residing in Hongkong makes a will which is in *any* sense a secret disposition of the property concerned —according to Chinese principles of law it cannot be called *his* property,—then it is not made in accordance with the conditions and formalities required in China. If it is not made secretly, then it has effect in law just so far as it is in harmony with the provisions of statute law, but no farther.

It may be asked, next, whether by the law of China, a testator can disinherit, say, his son or grandson. If the term 'disinherit' means to prevent, by means of testamentary or other disposition, another person from coming, as an heir, into the possession of any property or right which by law or custom would otherwise devolve on that person, we may *a priori* say, there is no room for any such disposition in the Chinese system of inheritance and succession. Chinese law knows no person, no personal rights, no personal

property, but only the family, family rights, family property; and the devolution of such rights (and duties) and of such property is not left to the judgment of any individual, but unalterably fixed by statute law. He who in his life-time has lawful control of property and who practically may consider it and deal with it during his life-time as his own, really has in law only a life interest in that same property, be it inherited or acquired, and consequently he cannot, in law, have any right to dispose of it by testamentary or other disposition otherwise than by expressing as his wish what the statutes have laid down as his law. The moment he closes his eyes, there is his heir and successor standing in all respects in his shoes, and this heir comes in, provided by law for the control of the property and the continuance of the *sacra*, whether the dying man likes it or not, whether he approved or disapproved of it by will or otherwise, nay whether there is a descendant in existence or not. For if there is none, the law provides one. Consequently we may safely *a priori* say that by the law of China no testator can, by testamentary disposition, disinherit his son, and it is not to be wondered at, under such circumstances, if the law makes no reference to the idea of testamentary disinheritance.

But there are positive rules provided by statute law which positively exclude the idea of disinheriting a son by testamentary disposition. One statute (See Appendix, No. 1) says, 'omission to appoint (as heir) the eldest son is visited likewise with the same punishment' (80 blows). From the authoritative comments appended in the Penal Code to the same statute it will be seen that, so far as Chinese law is concerned, the only cause, by which an eldest son in the direct principal line of descent can be ousted from his rights of succession by a grandson in the same line of descent, is death. Chinese law knows no other cause to oust him, certainly not any testamentary disposition. Chinese law plainly states the rule of succession and knows only death as a sufficient cause for deviation from this rule. 'First of all preference is to be given to the eldest son of the principal wife. If a man's eldest son by the principal wife is dead, then he may resort to the second son of the principal wife' (See Appendix, No. 2). Again, 'If the (eldest) son of the principal wife is dead, but has already (left) sons, *then* the eldest grandson of the principal wife receives the preference as a successor' (See Appendix, No. 3).

According to Chinese *custom*, the only way to produce the same effects which disinheriting would produce, is to institute public proceedings against a son and proving him first before the family council and the senior agnates to be an incorrigibly *unfilial* son, and then instituting against him in Court proceedings with a view to have him shut up in prison for life-time or to obtain direct or indirect authority to bury him alive, a proceeding which, to my knowledge, is freely resorted to in South-China.

I have above remarked that, according to the Chinese theory of the law of inheritance, no testator can have property which in a legal sense can be designated as 'his,' so as to imply a right to bequeath it, say, to his grandson instead of his son. As the testator therefore has in law no property to bequeathe, any bequest, arbitrarily made by him *in articulo mortis* or otherwise, is *eo ipso* invalid in law.

But apart from legal theories, the first principles of Chinese sociology abhor any such idea as making the whole or principal portion of any property devolve on any person at the expense and to the exclusion of that person's own father. Suppose a Chinese testator made a will to disinherit his son and to appoint his grandson as his heir, that will, if it had any effect, would place a father in a state of dependence upon his own son (the testator's grandson). Now according to the first principles of both Chinese sociology and Chinese law, the property of the son is the property of the father, and the father can during his

life-time dispose *ad libitum* of his son's property whether inherited or acquired. Consequently, even supposing that a Hongkong Court established, on the basis of a will made as we assume, the grandson's right to the property, and excluded that person's father, the latter would, if the property is situated in China, after all have an unchallenged right to step in and control the property in his own right under Chinese law to the total exclusion of his son who, under any circumstances, could not sue his own father in any Court in China and who would have no means of redress whatsoever.

Moreover, the bequeathing of one's whole property to one's grandson to the exclusion of one's son, is a direct violation of another principle zealously guarded by the Penal Code of China, viz. the principle of following 'the due order of superiors and inferiors' (Appendix, No. 7). The grandson is the inferior of the son. Yet the testator would, in the case we assume, pass over the superior and make the inferior (the grandson) the superior of his own father. There would be therefore not only a violation of the rule that 'the law of the devolution of the succession is to proceed from the nearest of kin to those further removed' (Appendix, No. 6), but a violation of the statute (Appendix, No. 4) which makes disregard of 'the due order of superiors and inferiors' a criminal act. 'A disregard of the due order of superiors and inferiors is a matter of the same degree of criminality as the confusion of surnames' (Appendix, No. 5).

If it is said, that there may be special reasons in some cases to exclude a son from the succession, as a bankrupt or spendthrift, my answer is that, whatever reasons, intents or purposes the testator or any other person connected with the making of a bequest may have, there is in law (Chinese law) no valid cause justifying the exclusion of a son from the succession, provided that the son concerned is the eldest son of the testator's principal wife, which he must be assumed to be if his son, the grandson referred to in our assumed case, is to have any, even prospective, right to the succession. The authoritative comments, published in the official edition of the Penal Code, distinctly lay it down that 'in appointing a son of a principal wife, the question is one of seniority and not one of moral or mental superiority' (Appendix, No. 3). The words 'moral or mental superiority' cover any possible pretext, such as we have assumed above, for excluding an eldest son from the succession.

It may happen in Hongkong sometimes that a testator, knowing or expecting his son to be or to become sooner or later insolvent, makes a will disinheriting his son and devolving the property concerned upon the testator's grandson. At any rate it happens occasionally in Hongkong that the creditors of a Chinese bankrupt, wishing to lay hold of his family property, are confronted with the declaration that the bankrupt has been disinherited under his late father's last will and testament, and that this document has been actually proved in the Probate Court of Hongkong. The question then arises not uncommonly:—Can the official assignee of the estate of the said son pray that probate of the will be revoked?

It is an unassailable maxim in Chinese law that 'the son pays the father's debts' and that the son stands in all respects in the shoes of his father,—when the latter is deceased. If any father has debts which he cannot pay, and if his son has any means to pay them, the latter can be made to pay his father's debts—under Chinese law. And as to revoking probate of the will, I have above sufficiently shewn, I believe, that a document, of the nature of wills occasionally presented in Hongkong to creditors wishing to get hold of the family property of a bankrupt, is not only null and void in Chinese law but an incriminating document, and the very least that, by a stretch of charity, could be said of it is that, from the point of view of Chinese law, the will should not only be revoked, but 'the appointment is to be altered and corrected' (Appendix, No.

1) for 'the son who ought to have been appointed' (Appendix, No. 2) is in our assumed case the bankrupt.

APPENDIX.

As I have cited above detached passages from the Penal Code, and as the construction of the exact meaning of a quotation always requires verification by reference to the context, I append the full context of every passage I cited above.

The subjoined paragraphs have been translated by myself, as literally as I was able to do, from the original of the Penal Code of China. Paragraphs No. 1 and No. 4 will be found correctly, but not literally, translated in *China Review*, Vol. VIII., p. 195. The same two paragraphs will probably also be found translated in Staunton's Edition of a portion of the Penal Code which I have not at hand. But all the remaining paragraphs have, so far as I know, never been translated before.

I only cited Statute Laws (Lü) and none of the Recent Enactments (Li) because I could not find any of the latter to have any bearing on the questions dealt with above.

The numbers which I attach to these paragraphs for convenience of reference are not in the original. Every word, likewise, which in the subjoined translation is placed between brackets is not in the original but suggested by the context or by the *genius linguæ*.

TEXT OF ORIGINAL STATUTE. CHAPTER HEADED 'ILLEGALLY APPOINTING (AS HEIR) A SON OF THE PRINCIPAL WIFE.'

1. Anyone breaking the law in appointing (as heir) a son of the principal wife, (shall receive) 80 strokes; if the said principal wife is over 50 years old and has no son, it is permissible to appoint (as heir) the eldest son of the secondary wife; but *omission to appoint (as heir) the eldest son (is visited) likewise with the same punishment.* In both cases *(the appointment) is to be altered and corrected.*

AUTHORITATIVE PARAPHRASE (APPENDED TO THE FOREGOING STATUTE).

2. It appears, there are already regulations provided in the Laws concerning Rites for the transmission of hereditary official rank, wherefore the foregoing Statute concerning the illegal appointment (as heir) of a son of the principal wife has evidently general reference to officials, scholars, soldiers and common people as a whole. Although scholars and the others have no official rank or duty to transmit (like some officials), yet all have to provide for the succession of heirs and for the continuance of the sacrifices which is viewed as an important duty by the (Laws concerning) Rites. Within the limits of the distinction of sons of principal wife and secondary wife, of seniors and juniors, the appointing of sons (as heirs) must likewise be subject to the same regulation. *First of all preference is to be given to the eldest son of the principal wife. If a man's eldest (son) from the principal wife is dead, then he may resort to the second son of the principal wife.* If the said person's principal wife is over 50 years old and has no son, then it is permissible to appoint (as heir) the eldest son of the secondary wife. If a person sets aside (the son of) the principal wife and appoints (as heir) (the son of) the secondary wife, (or) if he sets aside a senior and appoints (as heir) a junior, there is in either case a breach of the law. In both cases (the punishment is) 80 strokes, and (the appointment) is altered and *the son who ought to have been appointed is appointed.* The distinction of (sons of) principal wife and secondary wife, and the due order of seniors and juniors, are unalterable principles of the Law of Rites.

AUTHORITATIVE COMMENTS.

3. Collected Comments. Anyone appointing a successor must *first of all give the preference to the eldest son of the principal wife* without reference to the question whether he is, compared with the son of a secondary

wife, the latter's senior or junior. In appointing a son (as heir) the question is one of dignity and not one of seniority. In appointing a son of a principal wife *the question is one of seniority and not of moral or mental superiority. If the (eldest) son of the principal wife is dead but has already (left) sons, then the eldest grandson of the principal wife receives the preference as a successor*, and it is not admissible to appoint (as heir) a junior son of the principal wife or a son born of the secondary wife.

ORIGINAL STATUTE.

4. If, in appointing a successor, one belonging to the elder branch (of the clan) is indeed selected, but *the due order of superiors and inferiors is disregarded*, the punishment is likewise as above (60 strokes as in a case of child adoption). The son in question must likewise be re-transferred to his branch (of the family), and, the alteration having been made, the person competent to succeed is appointed.

AUTHORITATIVE PARAPHRASE (OF THE FOREGOING STATUTE).

5. The persons belonging to one and the same branch (of the family) have their due order of superiors and inferiors. A case of disregard of this due order would be, for instance, if a younger brother is made successor of an elder brother, or if a grand-nephew is made successor to a grand-uncle, as this would cause a confusion of the sequence of successive generations. *A disregard of the due order of superiors and inferiors is a matter of the same degree of criminality* as the confusion of the surnames of the branches or of the whole stock (by adoption of strangers). Therefore it is also met with the punishment of 60 strokes (as illicit adoption). The son in question is re-transferred to his branch (of the family), and, the alteration having been made, the person competent to succeed is appointed and the order in the case is thereby restored.

AUTHORITATIVE COMMENTS (ON THE FOREGOING STATUTE AND PARAPHRASE).

6. Collected Comments. *The law of the devolution of the succession is to proceed from the nearest of kin to those farther removed.* When collateral branches are competent to succeed, the question, which of them is entitled to furnish the successor and which is not entitled to furnish the successor, must be decided in accordance with the distinction of elder and younger branches (of the family). A younger branch can be allowed to become extinct (by appointing its last scion as successor in the elder branch) but the elder branch cannot be allowed to become extinct.

NOTE.—As to the meaning of the distinction of 'superiors and inferiors' the following authoritative quotation will illustrate it.

7. Collected Comments. Those of the father class are called superiors, and those of the grand-father class likewise. *Those of the son class are called inferiors and those of the grandson class likewise.* Elder brothers are called seniors, younger brothers are called juniors.

This note will be found among the Authoritative Comments appended to the Chapter called 'Inferiors or juniors appropriating property secretly or arbitrarily.'

E. J. EITEL.