

# 逝者的財產權：兼論台灣的祭祀公業

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「祭祀公業」是以永久祭祀死者為目的，而不得自由處分之獨立財產。這種限定處分的財產權制度在台灣開拓時期相當普遍，一直延續至現在。由於祭祀是家族成員之間的活動，如果能夠經由家庭內部交易達成目的，則沒有必要形成財產權的限制。本文強調台灣開拓時期的社會環境之下，家庭內的跨代交易容易失靈，逝者常常無法從家人得到可靠的祭祀。由於享受祭祀的對象並無行使權利的能力，為了使逝者能夠得到其應得的祭祀，於是透過超出家庭的組織來實現祭祀，並且利用財產權的限制確保祭祀活動所需的經費來源。雖然財產權的限制造成活人在利用財產時遭遇較高的交易成本，但是卻能讓逝者的祭祀得到保障。在這一制度之下，逝者得到部份的財產權。從《台灣司法附錄參考書》裡的祭祀公業契約中，本文的解釋可以得到史料的支持。

關鍵字：財產權、交易成本、祭祀

## 壹、導論

已死去的人是否能有財產權？由於現代社會的產權制度是立基於個人對於產權的行使與保護，所以個人一旦因為死亡而喪失行使權利的能力，其產

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本文曾經在中研院社科所主辦之「法與經濟分析研討會」中發表，作者感謝研討會中，王泰升教授的細心評論，以及簡資修、承立平、邱澎生、陳秋坤諸位教授的意見，本刊的編輯與兩位匿名審稿人在審稿過程中也對本文助益不少，在此一併致謝，文中倘有任何錯誤，皆屬作者個人之責。

收稿日期：89年8月28日；接受刊登日期：90年6月22日

# Property Rights of the Deceased: the Corporate Land for Ancestral Worship in Early Taiwan

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## ABSTRACT

Will people decide to honor the property rights of the deceased? In practice, they did. In Taiwanese history, there existed a system of corporate land for the purpose of ancestral worship (chi-se-kung-yeh). A piece of land was specified as corporate property (kung-yeh) with its rights being entailed solely for ancestral worship (chi-se). This system prevailed in Ch'ing Taiwan and was sustained through the Japanese colonial period. This paper analyzes the particular ownership of land in the light of transaction costs and property rights theories. Because the corporate land system imposed serious constraints on valuable property, it affected land use and resource allocation. Although the entailment of properties resulted in a system different from the private property system, the constraints did ensure the accomplishment of worship activities. In the frontier economy of early Taiwan, the transaction costs among families and kinship members caused failures in intergenerational transactions, so that families might not be relied upon to keep up the tradition of ancestral worship. To ensure the deceased would receive the worship they deserved, the worship activities were organized by a corporate organization with accompanied land property as its binding commitment, which constituted the property rights of the deceased.

Key Words: property rights, transaction costs, ancestral worship.